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In the field of civil rights, there are broad, cumulative remedies available to the aggrieved party. The fabric of these remedies is an amalgam of various and varying statutes, judicial holdings, administrative determinations and arbitral awards. The following article attempts a distillation of current law—much of which is further complicated by conflicting decisions.

I. COVERAGE

The laws covering fair employment practices were enacted to

combat the rising tide of discrimination against minorities and women in industry.

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.[1]

This interpretation of Title VII of the Civil Rights Act of 1964,[2] the most significant of the fair employment legislation, has become a landmark decision applicable to laws subsequently enacted to eliminate invidious discriminatory practices. The effect of Title VII and subsequent statutes and regulations—both federal and state—has been to create a maze of overlapping procedures and remedies. Management is well-advised to consider itself covered by fair employment laws and to review its employment practices in light of the material contained in this article.

Title VII prohibits employment practices based upon race, color, sex, national origin and religion.[3] The statute covers all employees (including executives) of an employer in an "industry affecting commerce" which has 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding year.[4] Originally applicable only to the private sector, Title VII was amended in 1972 to include public employees.[5] Unions and their hiring halls as well as employment agencies are also covered.[6]

"Affecting commerce" is the broadest term used by Congress in its regulation of employment practices. It encompasses a broader reach than the Wage-Hour Law which speaks in terms of employers "engaged in commerce" or "in the production of goods for commerce".[7] Any company that satisfies the standard of 15 employees for 20 payroll weeks should presume that it is covered by Title VII. All individual operations (even if individually incorporated) are

1. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).
2. 42 U.S.C.A. § 2000e *et seq.* (1974).
3. *Id.* § 2000e-2(a) to -2(d).
4. *Id.* § 2000e(b).
5. *Id.* § 2000e(a).
6. *Id.* § 2000e(c)-(e).
7. 29 U.S.C.A. § 206(a) (Cum. Supp. 1975).

covered if they are part of an integrated enterprise which meets the minimum number.[8] However, a company employing fewer than 15 employees, though not covered by Title VII, is still subject to most state or local fair employment laws.[9] Likewise, failure to meet the minimum number of employees does not bar a discrimination claim based upon another federal statute, 42 U.S.C. § 1981.[10]

II. RACE DISCRIMINATION

Title VII prohibits employment discrimination based upon race or color. This prohibition encompasses discrimination not only in hiring but in every condition of employment.[11] Section 703(a) of the statute makes it unlawful for any employer to fail to hire an individual or to discharge an employee because of race or color.[12] Likewise, an employer may not consider an employee's race in determining compensation or any other term, condition, or privilege of employment.[13] Approximately two-thirds of the states have also enacted fair employment practice laws.[14] In addition, the Civil Rights Acts, passed after the Civil War, are of particular signifi-

8. This applies even if one individual operation has fewer than the minimum number of employees. Some of the factors used in determining the degree of integration are the degree of centralized control of personnel policies and labor relations and the degree of interchange of employees. *See* Williams v. New Orleans S.S. Ass'n, 341 F. Supp. 613 (E.D. La. 1972). A Tennessee district court has refused to treat two corporations of a parent-subsidiary relationship as one, and, therefore, the subsidiary was exempt from Title VII coverage. Hassell v. Harmon Foods, Inc., 336 F. Supp. 432 (W.D. Tenn. 1971), *aff'd*, 454 F.2d 199 (6th Cir. 1972). The court observed that the affairs of the two companies were generally handled separately. For example, the parent corporation bore no responsibility for the debts of the subsidiary corporation.

9. *See* note 14 *infra*. For a discussion of state laws on age discrimination see Annot., 29 A.L.R.3d 1407 (1970).

10. The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1970), covers all employees (including executives) of an employer who has 20 or more employees for each working day for 20 or more calendar weeks in either the current or preceding year. *Id.* § 630(b). For a complete discussion of the Act see section IV. *infra*. The Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970), is applicable to all employers regardless of the number of employees.

11. Section 703(a)(2) makes it an unlawful employment practice "to limit, segregate, or classify" employees in a manner which would deprive or tend to deprive an individual of employment opportunities or otherwise affect his employment status because of race. 42 U.S.C.A. § 2000e-2(a)(2) (1974). Similar prohibitions are applicable to labor organizations. *Id.* § 2000e-2(c)(2).

12. *Id.* § 2000e-2(a)(1).

13. *Id.* § 2000e-2(a)(2).

14. For a list of states with fair employment practice laws see Annot., 44 A.L.R.2d 1138 (1955).

cance in the area of racial discrimination. The most significant of these is the Civil Rights Act of 1866,[15] which, *inter alia*, gives "all persons" the same right "to make and enforce contracts . . . as is enjoyed by white citizens." This contractual right has been interpreted to apply to the employment relationship regardless of whether a collective bargaining agreement and/or private contract exists. The courts have generally interpreted the substantive provisions of section 1981 to be similar, if not identical, to the protection of Title VII;[16] yet section 1981 may afford a number of important procedural advantages over a Title VII suit.[17]

In addition to these statutes, Executive Order 11246[18] prohibits discrimination based on race, color, religion, sex or national origin by government contractors and subcontractors. The Secretary of Labor may, in his discretion, grant an exemption where the annual value of the contract is $10,000 or less. The Order specifically requires that an offending contractor take affirmative action to ensure the elimination of any discriminatory practice.[19] The Equal Employment Opportunity Commission (EEOC) and many courts have taken the position that Title VII also requires affirmative action.[20]

There has never been any question that overt racial discrimination by an employer is unlawful. In the past, such patent discrimination was evidenced by a refusal to hire members of minority races

15. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. The modern counterparts of section 1 of the 1866 Act are 42 U.S.C. § 1982 (1970), protecting the right "to inherit, purchase, lease, sell, hold and convey real and personal property" and 42 U.S.C. § 1981 (1970), protecting other enumerated rights including the right "to make and enforce contracts."

16. *See, e.g.*, Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972).

17. For example, a Title VII suit may not be brought in the courts without first having gone through the EEOC procedures, 42 U.S.C.A. § 2000e-5(f)(1) (1974), while a suit under section 1981 may be directly initiated in the courts. Johnson v. Railway Express Agency, 95 S. Ct. 1716 (1975); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Waters v. Wisconsin Steel Wks., 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

18. 3 C.F.R. 169 (1974).

19. *Id.*

20. Section 706(g) of Title VII authorizes the federal courts to enjoin unlawful employment practices and to "order such affirmative action as may be appropriate." 42 U.S.C.A. § 2000e-5(g) (1974).

or to place or promote minority employees outside of the least desirable job levels. But the fair employment law has now evolved in response to more subtle questions of discrimination. It is no longer necessary to show that the employer intended to discriminate. Rather, the law has focused on facially neutral employment policies —neutral in that, on the surface, they appear to be equally applicable to both whites and minorities.

For example, an employer who requires a high school diploma as a prerequisite to employment runs afoul of Title VII.[21] Though an apparently neutral employment policy, the United States Supreme Court unanimously struck it down. The Court found such a policy was unlawful because the high school requirement was not significantly related to the successful performance of the job *and* it disproportionately affected black employees. The Court clearly stated that Title VII was not limited to intended discrimination:

> The objective of Congress in the enactment of Title VII . . . [w]as to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[22]

Since that decision, a number of employment practices, apparently neutral on their face, have been found to unlawfully discriminate on the basis of race.

A. Testing

The Guidelines on Employee Selection Procedures[23] issued by the EEOC define the term "test" to encompass not only the traditional paper-and-pencil test, but any type of job qualification used as a

21. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

22. *Id.* at 429-30.

23. 29 C.F.R. § 1607.1 *et seq.* (1975). The United States Supreme Court stated that a certain amount of deference is to be accorded the EEOC guidelines:

> The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . . Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the Guidelines as expressing the will of Congress. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

basis for any employment decision.[24] Thus, the definition includes any specific requirement concerning personal history, education, work history, biographical information, or interviewer's rating scales which could be used to disqualify an applicant from employment or promotion.[25] The landmark decision in *Griggs v. Duke Power Co.*[26] established that a test or job qualification would be racially discriminatory when applied in a job formerly held by whites only if shown to be not significantly related to successful job performance, while also operating to disqualify Negroes at a substantially higher rate than whites.[27] Even though such a test or job qualification is administered without an intent to discriminate, it remains unlawful if it fails to be job-related and adversely affects minorities.[28] It should be noted that the alleged discriminatee must prove that the test was the basis of his being denied promotion or employment, even though the employer makes no showing that the test was related to the position sought.[29]

Under the EEOC Guidelines[30] a test or job qualification is validated by evidence in the form of statistical data demonstrating that the qualification is predictive of or significantly correlated with important elements of work behavior relevant to the job.[31] In addi-

24. 29 C.F.R. § 1607.2 (1975).

25. *Id.*

26. 401 U.S. 424 (1971).

27. *Id.* at 426.

28. A disproportionate impact is one which could not randomly arise. Statistical differences less dramatic than those involved in *Griggs* may be statistically nonrandom. To determine randomness, statisticians ask whether an observed difference in any given sample is greater than that which would be expected on the basis of mere chance or probability. For example, in Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972), black and Spanish-surnamed candidates for promotion achieved a 31.4% pass rate on the written examination, whereas whites achieved a 44.3% success rate. The court held that such a discrepancy represented a disproportionate impact solely attributable to racial factors. The court strongly relied upon testimony of a mathematician who stated that the probability of the thirteen-point difference being a chance result not related to the factor of race was less than one in one billion. *Id.* at 212.

It has been relatively easy to demonstrate that a job qualification has a disproportionate impact on minorities. As noted by the District of Columbia Circuit:

> In *every one* of the more than twenty reported opinions involving standardized aptitude tests . . . , the final disposition has included a conclusion of racially disproportionate impact. Douglas v. Hampton, 512 F.2d 976, 983 n.52 (D.C. Cir. 1975) (emphasis added).

29. Woods v. North American Rockwell Corp., 480 F.2d 644 (10th Cir. 1973).

30. 29 C.F.R. § 1607.1 *et seq.* (1975).

31. *Id.* § 1607.4.

tion, to be permissible, the person utilizing the test must also show that alternative procedures are unavailable for use.[32] In *Griggs*, the Court held that deference was to be accorded these determinations.[33]

In *Albemarle Paper Co. v. Moody*,[34] two tests given to employees at the company's paper mill were found materially defective under the EEOC's guidelines for determining job-relatedness. In *Albemarle Paper*, the employer had undertaken to validate the job-relatedness of its testing program by hiring a consulting psychologist. He analyzed the correlation between the test scores of employees and an independent ranking of employees by supervisors, finding the test to be predictive of job performance.[35] The Court found, however, that Albemarle had not considered the particular skills needed in the tested job groups. The study dealt only with job-experienced white workers and focused on the jobs near the top of the various lines of progression, while the tests were given to new job applicants, largely inexperienced, and often non-white. In addition, the "standard" against which test scores were compared—subjective supervisorial rankings—was too vague to determine whether the company actually considered job-relatedness.[36] Thus, while the test might be valid for one select group of employees, it would not necessarily measure minimal qualifications of lower level employees.

According to the Supreme Court, a test or job qualification which disproportionately affects minorities is valid only if the standard can be proven to be a reasonable measure of job performance.[37] The more general concept, therefore, is that any employment practice which disproportionately affects minorities is valid only if such practice is necessary to the operation of the employer's business. The courts have, from the employer's vantage point, been very strict in applying this defense of business necessity. For instance, in *United States v. Bethlehem Steel Corp.*,[38] necessity connoted "an

32. *Id.* § 1607.3 .
33. *See* note 23 *supra*.
34. 95 S.Ct. 2362 (1975).
35. *Id.* at 2377.
36. *Id.* at 2379-80.
37. Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971). *See* text accompanying notes 26-28 *supra*.
38. 446 F.2d 652, 662 (2d Cir. 1971).

irresistible demand," meaning that the job requirements were essential to the successful operation of the task. In *Bethlehem Steel*, the employer claimed that alteration of the seniority system to remedy past discrimination would destroy the efficiency and safety of the plant. The company feared that the advantage of rate retention and seniority carry-over, made a part of the court's transfer program, would lead to a wholesale depopulation of several departments, that the injury rate would increase on dangerous, skilled jobs, and that preferential treatment of some employees would result in labor unrest; in short, the increased cost of production caused by this scheme would render the plant uncompetitive. The Second Circuit characterized this argument as substantial, but not persuasive. To qualify under the business necessity defense, the discriminatory practice must do more than merely serve legitimate management functions. Unless this were true, the court reasoned, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. In order to be upheld as a business necessity, the discriminatory practice must be essential to the goals of safety and efficiency of operation without a reasonable alternative that has less discriminatory effects.[39]

Similarly, when the Fourth Circuit ordered the dismantling of a departmental seniority system because it represented a continuing discriminatory barrier to black employees, the court rejected the employer's assertion that the departmental system was a business necessity because employees would perform a job more efficiently if they had prior experience at other jobs within the same department.[40] The Fourth Circuit perhaps took an even stronger position than the Second Circuit in *Bethlehem Steel* by requiring not only a showing of business necessity, but convincing proof that there was no acceptable alternative with a lesser impact on minorities.[41]

In contrast to these rigid definitions, a Missouri district court has upheld, as a business necessity, an employer's practice of refusing to hire job applicants with records of criminal conviction, even

39. *Accord*, United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir.), *cert. denied*, 406 U.S. 906 (1971).

40. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

41. *Id.* at 798.

though this policy had a disparate impact on minorities.[42] The court relied on the testimony of an industrial psychologist which showed at least 50% of those convicted would be convicted again. The court noted that the concerns of the company, *i.e.*, prevention of theft of company property and cargo, refusal to comply with employer's directives, and employment disruption caused by recidivism, were factors relevant to the efficiency and safety of the company's business and, therefore, established that the policies were based upon business necessity.

The Tenth Circuit, in upholding stringent employment qualifications for airline flight officers, enunciated a test which should be a realistic guideline for any industry:

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related.[43]

B. Seniority With Respect to Layoff, Promotion and Transfer

The role of seniority in employment situations is perhaps the most sensitive issue in the administration of fair employment laws, in part because of its potentially direct impact on white male employees. The courts are presented with two conflicting interests, each demanding attention. On the one hand, Title VII demands equal employment opportunity today but on the other counsels that a bona fide seniority system and the expectations for promotion, advancement and job security that it creates are entitled to some deference.[44] The key statutory provision is section 703(h) which provides in part:

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42. Green v. Missouri Pac. R.R., 381 F. Supp. 992 (E.D. Mo. 1974). For a discussion of a related problem involving consultation of arrest records see section II.C. *infra*.

43. Spurlock v. United Airlines, 475 F.2d 216, 219 (10th Cir. 1972).

44. *See, e.g.*, Local 189 v. United States, 416 F.2d 980, 982-83 (5th Cir.), *cert. denied*, 397 U.S. 919 (1969).

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . .[45]

An employer who has engaged in discrimination by segregating departments or job titles on the basis of race or sex can be required to alter its departmental or job seniority[46] procedure to a system of plant or establishment seniority[47] in order that promotions, layoffs, and transfers be governed by the total length of service with the employer. The first case to require this merger was handed down in the Eastern District of Virginia.[48] The court found that prior to 1966, the employer in question had discriminated in hiring by restricting blacks to those departments with the least desirable and lowest paying jobs; after 1966, the employer had remedied this practice and was hiring blacks for all positions. But the impact of prior discrimination continued after 1966. A black employee with ten years of establishment seniority in a lower-paying department who transferred to another previously all-white department would assume an entry level position with less departmental seniority than a white employee with less establishment seniority. The difference in departmental seniority would reflect the period of prior segregation of departments. The court struck down this system and created a new one in which establishment seniority would largely determine transfer and promotion. The court had little difficulty in refusing deference to the existing seniority plan, observing that section 703(h) of Title VII exempts only bona fide seniority systems. The court remarked: "Obviously one characteristic of a bona fide seniority system must be lack of prior discrimination."[49]

The Fifth Circuit, relying upon this decision, has also mandated the replacement of departmental seniority with job seniority.[50] As

45. 42 U.S.C.A. § 2000e-2(h) (1974).

46. Departmental or job seniority establishes that promotions and layoffs are made according to the length of service in a particular department or a particular job.

47. Plant or establishment seniority is determined by length of service with the employer at its plant or establishment.

48. Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

49. *Id.* at 517.

50. Local 189 v. United States, 416 F.2d 980 (5th Cir.), *cert. denied*, 397 U.S. 919 (1969).

with testing requirements,[51] a bona fide seniority system requires more than one facially neutral with "the inevitable effect of tying the system to the *past* . . . ."[52] How much more is required to undo the effects of past discrimination becomes the crucial question. Two competing theories were offered as answers by the court. The "freedom now" theory requires a complete purge of the effects of prior discrimination. Black employees would immediately be given the jobs that, but for discrimination, their greater establishment seniority would entitle them to hold. The Fifth Circuit noted that under this theory, allowing whites with less establishment seniority to continue in their present jobs would constitute a further act of discrimination.[53] The "rightful place" theory entails less drastic effects. It also emphasizes establishment seniority, but only in the future selection for vacant jobs. Looking to the purpose and history of Title VII, the court found a prohibition of future job decisions based upon a system that "locks in" prior segregation. But incumbent employees were not to be bumped out of present positions in order to alleviate past discrimination.[54] To transform a job seniority plan to an establishment or company-wide seniority system does not change the requirement that individuals be qualified for the particular position. The touchstone at all times is business necessity.[55] The effect of most decisions, however, has been that job or department seniority is not essential enough to the safety and efficiency of the employer's operation to allow for its perpetuation of discriminatory effects.

Use of an establishment seniority system appears to remove adequately the effects of prior segregation by jobs or departments. But does Title VII require that an establishment seniority system be altered when a layoff, necessary for economic reasons, disproportionately affects newly-hired minorities? Two circuit courts have recently rejected such a challenge. In *Waters v. Wisconsin Steel Works*,[56] the company had utilized a "last hired, first fired" senior-

51. *See* section II.A. *supra*.
52. 416 F.2d at 988.
53. *Id.*
54. *Id.*
55. *Id.* at 989. *See* text accompanying notes 37-43 *supra*.
56. 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064).

ity system[57] for all employees. Although blacks had been seeking employment as early as 1947, no blacks had been hired prior to 1964. In 1965, severe layoffs occurred, affecting all employees with less than ten years seniority, and as a consequence, every black employee was laid off. The black employees contended that this seniority system perpetuated the effects of past discrimination because blacks were laid off before and recalled after certain whites who had greater establishment seniority. In rejecting this contention and upholding the seniority system, the court distinguished a system of establishment seniority from one which operates by job or department.[58] Under a job or departmental system, *continuing* restrictions on transfer and promotion create unearned or artificial expectations of preference which favor white employees over minority employees having a greater length of service. Establishment seniority on the other hand, merely preserves the earned expectations of long-service employees. Such a system does not of itself perpetuate the effects of past discrimination.[59]

In *Jersey Central Power & Light Co. v. IBEW Local Unions*,[60] the employer, the unions and the EEOC had entered into a written conciliation agreement requiring that affirmative action be taken by the establishment. The company and the unions were to implement a program to increase the proportion of minorities and females in various job titles so that "at the end of five years the proportion of females and minority group employees would approximate the proportion of those groups in the relevant labor market."[61] Six months later, the employer announced that economic considerations compelled a layoff which eventually affected 400 employees. Each of the seven unions with which the employer had collective bargaining agreements required strict adherence by the employer to the seniority provisions of the collective bargaining agreements. The EEOC responded to the company's layoff plans, which would disproportionately affect minorities, by indicating that a layoff governed

57. For a general discussion of this practice see Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975); Note, *The Survival of "Last Hired, First Fired" under Title VII and Section 1981*, 6 LOYOLA U.L.J. 386 (1975).

58. 502 F.2d at 1318.

59. *Id.* at 1320.

60. 508 F.2d 687 (3d Cir. 1975).

61. *Id.* at 704.

by seniority alone would violate the provisions of the conciliation agreement.

The employer sought a declaratory judgment to determine how it should implement the necessary layoff. The Third Circuit, reversing the district court, ruled that strict seniority should be followed. The court observed that the conciliation agreement referred exclusively to the *hiring* of minority employees, and that *once hired* they were intended to be subject to all terms of the collective bargaining agreements, including layoff by seniority.[62] The court further noted that the conciliation agreement required the company to use its "best efforts" to increase the percentage of minority employees; those "best efforts" did not include modification of the seniority system to implement a layoff.[63] The court relied on the legislative history of Title VII to find that employment rights could be effected prospectively only. Section 703(h) required that it have no effect on already established seniority rights.[64]

A contrary view was expressed by the district court in *Watkins v. Steelworkers Local 2369*.[65] In *Watkins*, with the exception of two blacks hired during World War II, only whites were hired until 1965. Beginning in 1971 and continuing through 1974, economic conditions required a substantial cutback in employment which was implemented according to the seniority provisions of the labor contract. Layoffs were so extensive that they reached employees hired as early as 1951. Since recall was in reverse order of layoff, the company was not expected to employ another black for many years.

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62. *Id.* at 702.

63. *Id.* at 703.

64. *Id.* at 707, *quoting* 110 CONG. REC. 7213 (daily ed. April 8, 1964). The interpretive Memorandum of Senators Clark and Case, floor managers for Title VII in the Senate, provided in part:

> Thus, for example, if a business has been discriminating in the past and as a result has an all-white force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged — or indeed, permitted — to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or once Negroes are hired, to give them *special seniority rights at the expense of white workers hired earlier.* 110 CONG. REC. 7213 (daily ed. April 8, 1964) (emphasis added).

The rationale applied in this instance is identical to that applied in Local 189 v. United States, 416 F.2d 980 (5th Cir.), *cert. denied*, 397 U.S. 919 (1969), to decide the question of retroactive seniority regarding promotion. *See* text accompanying notes 357-58 *infra*.

65. 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975).

The district court modified the seniority and layoff provisions to ensure the employment of blacks. The court-ordered modification provided that: (a) without laying off any employees, black employees should be recalled until the racial balance of the work force was equal to that which existed when the last employee was hired; and (b) future layoffs must be allocated so that the ratio of blacks to the total work force remained constant. The modification was reversed by the Fifth Circuit, however.

Applying the rationale of *Griggs*, a layoff system though facially neutral in practice which perpetuates under adverse economic conditions the prior policy of discrimination would appear to run afoul of Title VII.[66] This rationale was qualified by the Fifth Circuit in *Watkins* to make such a layoff system violative of neither section 1981 nor Title VII when certain conditions are met: (1) the present hiring practices are non-discriminatory and have been non-discriminatory for at least ten years; and (2) the system is of long-standing use and adopted without the intent to discriminate. The unqualified approval of an establishment seniority layoff system, as found in the *Jersey Central Power* and *Wisconsin Steel* decisions, appears to misconstrue the decision in *Griggs*.

C. Consultation of Arrest Records

Consulting arrest records as distinguished from records of conviction, is a dramatic example of a neutral, if not advisable, employment policy which nonetheless can reveal a discriminatory employment practice. In *Gregory v. Litton Systems, Inc.*,[67] the parties stipulated that the company's decision not to hire an applicant was predicated upon his statement that he had been arrested fourteen times, without regard to any convictions. The employer's policy of disqualifying persons who had been frequently arrested was neutrally applied, *i.e.*, it was enforced without reference to race, color, religion, sex or national origin. Yet the Ninth Circuit ruled that reliance upon arrest records was discriminatory because arrest records are not an accurate indicator of job performance. Arrests, unlike convictions, do not constitute proof of any wrong-doing. Ac-

66. *See, e.g.*, Delay v. Carling Brewing Co., 10 F.E.P. Cases 164 (N.D. Ga. 1974).
67. 472 F.2d 631 (9th Cir. 1972).

cording to the court, there was no evidence to support the conclusion that individuals who have been arrested on a number of occasions, but never convicted, would perform less efficiently or less honestly than other employees. Since the evidence for the area indicated that blacks were arrested more frequently than whites, such a "neutral" employment policy in fact discriminated against black applicants. Statistics demonstrated that the requirement operated to bar jobs to black applicants in far greater proportion than white applicants. The employer had to show a reasonable business purpose for continuing to ask prospective employees about their arrest records and this was not done.[68]

D. Hiring by "Word-of-Mouth"

If a work force contains virtually no minority groups, it is discriminatory to rely primarily upon existing employees to refer new prospects.[69] Such a policy of hiring is found to perpetuate the existing racial imbalance as much as any seniority system or testing requirement. The courts reason that with a predominately white work force, it is reasonably expected that a system of recruitment by "word-of-mouth" will produce mostly white applicants. Existing white employees would tend to recruit and recommend their own family, friends and neighbors who are likely to be of the same race. Such a recruitment procedure obviously perpetuates the absence of minorities.

E. Subjective Evaluation and Wage Determination by Supervisors

Just as hiring systems dependent upon white employees are viewed with skepticism, so also are promotion systems which make the advancement of blacks dependent upon recommendations from whites. In *Rowe v. General Motors Corp.*,[70] the Fifth Circuit commented that black employees could not reasonably "expect nondiscriminatory action" from such a system. The promotion system in *Rowe* was perhaps an extreme of subjectivity. A recommendation from the foreman was indispensable to promotion. The foremen,

68. *Id.* at 632.
69. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 427 (8th Cir. 1970).
70. 457 F.2d 348 (5th Cir. 1972).

however, were given no written instructions or standards to use. In addition, employees were not notified of the promotion opportunities or the qualifications necessary for the jobs. Statistics revealed that the foreman positions were occupied almost exclusively by whites and that past use of the system caused a great disparity in employment opportunities for blacks.[71] While striking down the policy, the court qualified its decision leaving room for an evaluation process with less subjectivity or more safeguards against discriminatory use.[72]

Likewise, discretionary fixing of wage rates will be closely scrutinized for evidence of discrimination. Such discrimination was found in *United States v. Lee Way Motor Freight, Inc.*,[73] where wage determinations for apprentice mechanics were left to the discretion of the shop superintendent. The system was struck down because its unfettered discretion was a ready vehicle for discriminatory abuse.

F. Grooming Requirements

The company's rules with respect to grooming must take into account racial differences. In at least one instance, the EEOC has ruled that an employer engaged in an unlawful employment practice by discharging a black employee whose Afro-American hair style did not conform to the company's grooming standards.[74] The Commission stated that the company's grooming policy, that hair be neither bushy nor extend beyond the ears, did not take into account physical and cultural characteristics attributable to race; the application of this policy to all employees adversely affected black employees because of their different hair texture. Moreover, the Commission observed that the wearing of an Afro-American hair style had been appropriated as a cultural symbol of black Americans of both sexes. The evidence indicated that the company did not uniformly apply its grooming policies to all employees. White employees who wore beards in violation of the stated grooming policy had not even been reprimanded.

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71. *Id.* at 358-59.

72. *See also* Newman v. Avco Corp., 7 F.E.P. Cases 385 (M.D. Tenn. 1973), *subsequent order*, 380 F. Supp. 1282 (M.D. Tenn. 1974).

73. 7 F.E.P. Cases 710 (W.D. Okla. 1973).

74. EEOC Decision No. 71-2444, 1971 CCH EEOC Dec. ¶ 716240. *See also* Ramsey v. Hopkins, 320 F. Supp. 477 (N.D. Ala. 1970).

Where a grooming policy has been applied to all employees indiscriminately, no violation has been found. Thus a bus company did not improperly discharge a black male driver for refusing to comply with a regulation requiring drivers to be clean-shaven and prohibiting them from wearing their hair long, since the regulation was invoked against white drivers as well.[75] On the other hand, a school board's regulations restricting the grooming habits of teachers with respect to moustaches, sideburns, and beards was held to "create an arbitrary and capricious classification, devoid of logic and rationality, and plainly offend both substantive due process and equal protection guaranteed by the Fourteenth Amendment."[76] Such grooming regulations are being extensively challenged by whites as well as blacks on grounds apart from Title VII.[77]

G. Presence of an Atmosphere of Racial Hostility

The employer has a duty to maintain a work atmosphere free of racial hostility. In *Anderson v. Methodist Evangelical Hospital, Inc.*,[78] a Kentucky district court awarded back pay and attorneys' fees to a black employee who had been discharged for her "inability to 'get along' with her co-workers." In fact, she had been harassed by a co-worker with racial epithets. The court stated that while no employer is responsible for the personal intent of its employees to resort to racial prejudice, it does have a duty to take appropriate action once overt racial mistreatment is apparent. Appropriate action is not the discharge of the victimized employee.

H. Reverse Discrimination

Reverse discrimination is claimed in the case where whites or males are the victims of preferential treatment programs. In order to establish a cause of action for reverse discrimination, the complainant's allegations must show the same facts for a prima facie case as required of a black,[79] namely that (1) the applicant applied for and was qualified for a job which an employer sought to fill; (2)

75. Brown v. D.C. Transit System, Inc., 10 F.E.P. Cases 841 (D.C. Cir. 1975).

76. Conard v. Goolsby, 350 F. Supp. 713, 718 (N.D. Miss. 1972).

77. *See, e.g.*, Lansdale v. Tyler Jr. College, 470 F.2d 659 (5th Cir. 1972).

78. 4 F.E.P. Cases 33 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972).

79. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *See also* text accompanying note 466 *infra*.

though qualified, the applicant was rejected by reason of his race or sex; and (3) thereafter, the employer continued to seek applicants with the discriminatee's qualifications.[80]

The overwhelming majority of cases hold that white employees may not maintain an action under Title VII based upon a claim of reverse discrimination. "The persons protected under Title VII are those minority group members who have traditionally been the targets of discrimination by labor unions . . . . Surely it cannot be said that Congress, by enacting Title VII, intended to protect those white males who have traditionally dominated the labor unions."[81] The Fifth Circuit, usually the leader in the liberal interpretation of civil rights statutes, found that the "dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee [did] not raise a claim upon which relief may be granted under Title VII," since there was no allegation that the white employees were charged falsely and the case did not involve disciplinary action for offenses not constituting crimes.[82]

III. SEX DISCRIMINATION

The employment practices concerning sex which are prohibited by Title VII parallel those relating to race. Thus section 703(a) of Title VII makes it unlawful for an employer to discriminate on the basis of sex with respect to virtually any condition of employment. Fundamentally, Title VII eliminates employment practices based on stereotyped roles for men and women. Discrimination against women is often based upon nothing more than old, unchallenged rules and customs.[83] An employer cannot lawfully assert that a majority of women are unqualified or uninterested in a particular kind of job, since such an assumption will exclude individual females who are qualified and desire such a position.[84] Furthermore, to protect itself fully, the employer should not merely maintain a neutral

80. *See also* Taterka v. Wisconsin Tel. Co., 10 F.E.P. Cases 966, 967 (E.D. Wis. 1975).

81. Mele v. United States Dep't of Justice, 10 F.E.P. Cases 1000, 1003 (D.N.J. 1975).

82. McDonald v. Santa Fe Trail Transp. Co., 10 F.E.P. Cases 1165, 1166 (5th Cir. 1975) (per curiam).

83. *See* Green v. Waterford Bd. of Educ., 473 F.2d 629, 634 (2d Cir. 1973).

84. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

policy of hiring and promoting qualified women, but should take "affirmative action" to ensure that more women apply for positions and become qualified.[85] Many examples of race discrimination can also manifest themselves in sex-based discrimination. Employment practices such as job qualifications or tests which are not job-related, seniority, hiring by word-of-mouth and subjective evaluation by supervisors are equally unlawful whether the alleged discrimination is by race or sex. This section will, therefore, address itself to special problems of sex discrimination.

A. Bona Fide Occupational Qualification (BFOQ)

No job can ever be categorized as limited by race or color. However, with respect to sex (as well as religion or national origin), Title VII provides that an employer may treat a particular job classification as limited to one sex if sex is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."[86] There are few positions for which sex is genuinely a bona fide occupational qualification, and the EEOC maintains that the exception should be interpreted as narrowly as possible.[87] The bona fide occupational qualification does not permit a refusal to hire an individual based on stereotyped characterizations of the sexes.[88]

1. Advertisements and Job Applications

The Sex Discrimination Guidelines of the EEOC make it a violation of Title VII for a job advertisement to indicate a preference for one sex unless sex is a bona fide occupational qualification for that job.[89] The placement of an advertisement in a column headed "Male" or "Female" is the most prominent example of this illegal preference. While not directly addressing the issue of sex-based advertisements under Title VII, the Supreme Court has upheld the authority of local fair employment agencies to prohibit newspapers from placing advertisements in the male or female columns when

85. For a complete discussion on such self-initiated affirmative action programs see section VII. *infra.*

86. 42 U.S.C.A. § 2000e-2(e)(1) (1974).

87. 29 C.F.R. § 1604.2(a) (1975).

88. The EEOC Guidelines cite as two examples of stereotyped characterizations the belief that women are less capable of aggressive salesmanship and that men are less facile at assembling intricate equipment. *Id.* § 1604.2 (a)(1)(ii).

89. *Id.* § 1604.5.

the jobs do not have bona fide occupational qualifications or exceptions.[90]

Federal courts attach importance to a recent Third Circuit decision dealing with sexual stereotyping in a recruiting brochure.[91] The educational requirements, experience and work were very similar for two different positions, yet the jobs were segregated between males and females with a higher rate paid to the former. In addition to finding statistical evidence of almost complete segregation by sex, the court found that the company's recruitment brochure encouraged such discrimination. The brochure described the female job as "Fit for a Queen" and pictured only women performing the job, while the position effectively reserved to men challenged the applicant with the inquiry, "Are you the right man?"[92] Such sexual specificity invited judicial disapproval.

2. *Special Requirements and Customer Preferences*

The BFOQ exception does not protect an employer who attempts to exclude women from a job "not suited" for them based upon sexual stereotypes. In the leading case, the Fifth Circuit ruled that a job which routinely required the lifting of objects weighing over 30 pounds could not be restricted to men only,[93] despite state laws to the contrary.[94] If a job requires that certain poundage be lifted regularly, an employer can require that applicants for employment be tested to see if they can satisfy this requirement. However, the test must be administered to *both* men and women. The fact that only a small percentage of the women pass the test will not permit the employer to conclude that sex is a bona fide occupational qualification and, therefore, exclude all women. Instead, the employer must offer positions to those women who pass the test or otherwise qualify.[95] Of course, the employer is not required to hire females who

90. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). *See also* Hailes v. United Air Lines, 464 F.2d 1006 (5th Cir. 1972). EEOC Guidelines provide that "[a] pre-employment inquiry may ask 'Male—, Female—'; or 'Mr. Mrs. Miss,' provided that the inquiry is made in good faith for a nondiscriminatory purpose." 29 C.F.R. § 1604.7 (1975).

91. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied,* 95 S. Ct. 2415 (1975).

92. *Id.* at 258.

93. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

94. For a discussion of protective state laws see section III.G. *infra.*

95. *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Ostapowicz v. John-

cannot do the work nor offer unqualified applicants easier jobs.

The burden of proving the applicability of the BFOQ exception rests upon the employer who seeks to assert it.[96] In determining whether an employer has met this burden, the courts and the EEOC generally apply the standard set forth in *Weeks v. Southern Bell Telephone & Telegraph Co.*[97] An employer has the burden of proving reasonable cause to believe, *i.e.*, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. The physical requirements of the job have not always been accepted as sufficient justification for this belief. Where accepted, the employer bears the burden of proving that women are not physically capable of performing the job. In *Rosenfeld v. Southern Pacific Co.*,[98] the court noted that individual capacity, rather than characteristics that might be correlated with a particular sex, must be the basis for the application of this exception.[99]

Since an employment practice based on height or weight is neutral on its face, *i.e.*, not explicitly discriminatory against one sex, it is not specifically prohibited by Title VII. However, if the neutral policy is found to have a "markedly disproportionate impact" on one sex, a prima facie case of sex discrimination can be established.[100] Because minimum height and weight requirements disproportionately affect women,[101] the employer must prove that such a qualification is necessary to the performance of the job.[102] The employer will have great difficulty showing such job-relatedness because even height and weight requirements for police have been found to be discriminatory.[103]

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son Bronze Co., 369 F. Supp. 522 (W.D. Pa. 1973); Taylor v. Goodyear Tire and Rubber Co., 6 F.E.P. Cases 50 (N.D. Ala. 1972); Sontag v. Bronstein, 33 N.Y.2d 197, 306 N.E.2d 405, 351 N.Y.S.2d 389 (1973).

96. Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454 (D.N.J. 1970), *rev'd on other grounds*, 477 F.2d 90 (3d Cir. 1973).

97. 408 F.2d 228 (5th Cir. 1969).

98. 444 F.2d 1219 (9th Cir. 1971).

99. *Id.* at 1224. The court cited as examples the job of wet nurse or dramatic parts where there is a need for genuineness in portraying a character.

100. *Cf.* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

101. *See, e.g.*, Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory under Title VII*, 47 S. CAL. L. REV. 585, 588 n.13 (1974).

102. Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975).

103. *See* Hardy v. Stumpf, 7 F.E.P. Cases 1091 (Cal. App. Ct. 1974). Employers' attempts to justify discrimination against female employees because of other special requirements of

A bona fide occupational qualification *cannot* be based upon preferences of the employer, co-workers, clients, or customers. In *Diaz v. Pan American World Airways, Inc.*,[104] the court found that limiting the position of flight attendant to women, even in response to customer preference, was unlawful. In interpreting section 703(e), which requires that a "bona fide occupational qualification [be] reasonably necessary to the normal operation of that particular business," the court ruled that the word "necessary" requires the application of a business *necessity* test, not a business *convenience* test.[105] Passenger preference for female flight attendants did not meet this standard.

B. Child Care and Marriage

An employment policy which forbids or restricts the employment of married women, but is not applicable to married men, is discriminatory. It is irrelevant that the rule is not directed against all females, but only against married females; such a practice is discriminatory because it treats married females differently from married males.[106] The Supreme Court remanded *Phillips v. Martin Marietta Corp.*[107] to determine whether there had been unlawful sex discrimination where an employer would not accept job applications from women with pre-school-age children. Contrary to the circuit court holding, it was no defense for the employer that 75 to 80 percent of those hired were women, while only 70 to 75 percent of the applicants were women.

An employer may not restrict employment to females who remain unmarried without maintaining a similar restriction for male employees. In *Sprogis v. United Air Lines, Inc.*,[108] the court held that

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the job have been rejected: lifeguard who had to clean the locker rooms and pool area; child-development supervisor of children from broken homes; flight-cabin attendant.

104. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

105. *Id.* at 388. The court stated:

> [D]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.
>
> The primary function of an airline is to transport passengers safely from one point to another . . . . No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another. *Id.*

For a similar view of the business necessity test as applied in the area of race discrimination see text accompanying notes 37-43 *supra*.

106. 29 C.F.R. § 1604.4(a) (1975).

107. 400 U.S. 542 (1971).

108. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

a female plaintiff employed as a stewardess was discriminated against on the basis of sex when she was discharged for violating the airline's policy requiring stewardesses to be unmarried. The EEOC has determined that an employer's rule forbidding or restricting the employment of married women and not of married men is a discrimination based upon sex.[109] The EEOC has also held that an employer's policy of refusing to hire unwed mothers discriminated against females as a class in violation of Title VII.[110] It is likewise unlawful for a company to terminate the employment of the female spouse when two employees marry, but the company may terminate the employment of one of the two employees, leaving the decision to them as to whose employment shall be terminated.[111] In cases where the employee cannot decide, the employee with the greater seniority is retained.

C. Pregnancy

1. Mandatory Maternity Leave Rules

Any policy which requires all pregnant employees to take a leave of absence at a specified time before the delivery date and which limits return until a specified date following childbirth must be reevaluated. The employer cannot impose upon all females a rule which does not take into account the individual differences among women. In *Cleveland Board of Education v. LaFleur,*[112] the Supreme Court sustained a fourteenth amendment due process challenge to the mandatory maternity leaves of two government employers. The employers required pregnant employees to leave their jobs without pay five and four months before the expected birth date. The mandatory leaves were invalidated because of a hostility to "irrebuttable presumptions" which did not reasonably recognize individual differences and characteristics.[113] Applying the same rationale to

109. 29 C.F.R. § 1604.4 (a) (1975).

110. EEOC Decision No. 71-332, 1970 CCH EEOC Dec. ¶ 71-6164, at 4276.

111. EEOC Decision No. 70-453, 1970 CCH EEOC Dec. ¶ 71-6103, at 4153.

112. 414 U.S. 632, 648 (1974).

113. The Court did note that an individualized determination may not be required in those "cases with maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy." *Id.* at 647 n.13.

The courts are currently facing the question of whether mandatory maternity leave policies of public employers violate the equal protection clause. *See* Green v. Waterford Bd. of Educ., 473 F.2d 629, 632-33 (2d Cir. 1973); Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (Powell, J., concurring).

private employers, the EEOC Guidelines state that mandatory pregnancy leaves presumptively violate Title VII.[114] After the employee has given birth and upon submission of a medical certificate from her physician or from the employer's physician, the employer must offer the mother re-employment when there is a vacancy. A rule which did not permit re-employment of any employee until her child had reached the age of three months was held invalid.[115] As with maternity leave, a woman's fitness for re-employment must be determined on an *individual* basis, in the light of her particular medical condition, and not on the basis of an assumption or stereotype.

The pregnant employee is expected to give reasonable notice of her pregnancy, *i.e.*, notice sufficient to permit the employer to maintain business continuity. In *LaFleur,* the Supreme Court indicated approval of a policy which required the employee to give assurances that care of the child would not unduly interfere with her job duties, observing that "[w]hile such a requirement has within it the potential for abuse, there is no evidence on this record that the assurance required here is anything more than that routinely sought by employers for prospective employees— that the worker is willing to devote full attention to job duties."[116]

2. *Pregnancy as Any Other Illness*

The EEOC Sex Discrimination Guidelines state, and several judicial decisions confirm, that pregnancy is to be regarded as any other illness or disability.[117] The Guidelines require that disabilities due to pregnancy, miscarriage, abortion, childbirth, and recovery from

114. 29 C.F.R. § 1604.10(a) (1975).

115. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

116. *Id.* at 650 n.16. Contrary to the prevailing authority, a state agency's employment policy of requiring pregnant female employees to terminate their employment no later than two months before expected delivery was declared valid under the fourteenth amendment. Schattman v. Texas Empl. Comm'n, 459 F.2d 32 (5th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973). To the extent that the two month period cannot be statistically applicable to all women or practically all women, this decision is impliedly overruled by *LaFleur.* In addition, Title VII now covers public employees and the EEOC Guidelines state that both written and unwritten policies which exclude employees because of pregnancy are prima facie violations. 29 C.F.R. § 1604.10(a) (1975).

117. 29 C.F.R. § 1604.10(b) (1975). *See* Gilbert v. General Elec., 519 F.2d 661 (4th Cir. 1975), *cert. granted,* 44 U.S.L.W. 3200 (U.S. Oct. 7, 1975) (Nos. 74-1589, -1590). Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *cert. granted,* 95 S. Ct. 1989 (1975) (No. 74-1245); Communications Workers v. American Tel. & Tel. Co., 10 F.E.P. Cases 435 (2d Cir. 1974).

these conditions be treated as temporary disabilities under any health or temporary disability insurance plan.[118] Similarly, a female may utilize accumulated sick leave for pregnancy-related disabilities. The Guidelines prohibit employment policies which deny employment to an applicant who is pregnant or which automatically require the discharge of a pregnant employee.[119] Additionally, an employer may not discharge an employee who is temporarily disabled because insufficient leave is available if this employment policy disproportionately affects one sex and cannot be justified by business necessity. While this provision was written to encompass both male and female disabilities, it is primarily directed at employment policies which do not permit leave for pregnancy and childbirth.[120]

The Third Circuit has ruled that a private employer's "income protection plan" which provided employees with the payment of income during periods of disability was discriminatory because the plan did not pay any benefits for disability due to or related to pregnancy.[121] The court rejected the argument that pregnancy was in some way distinguishable from other illnesses or disabilities because it involved some element of voluntariness. The court observed that the company's plan covered disabilities resulting from many voluntary and potentially harmful activities such as drinking, smoking and skiing which left pregnancy as the only "voluntary" disability not covered. Furthermore, the court was unwilling to accept completely the argument that pregnancy was voluntary. It observed that no method of contraception was foolproof and that religious convictions also played a role in determining the voluntary nature of a pregnancy. The court afforded considerable deference to the EEOC Guidelines,[122] and was not convinced by company arguments that coverage of pregnancy would greatly increase the costs of the plan to the employer.

The decision was found to be distinguishable from an earlier Supreme Court ruling which upheld California's exclusion of normal

118. 29 C.F.R. § 1604.10(b) (1975).
119. *Id.* § 1604.10(a).
120. *Id.* § 1604.10(c).
121. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975) (No. 74-1245).
122. *See also* note 23 *supra*.

pregnancy from disability coverage for employees of the state.[123] In that case, the Court reasoned that California had a valid reason for excluding pregnancy, namely, the cost of broadening the coverage. Yet since this case was initiated before Title VII was extended to cover public employees, the case was decided solely on constitutional grounds. Subsequently, the Second, Third and Fourth Circuits have refused to be bound by the decision.[124]

D. Pay and Promotions

1. *Equal Pay for Substantially Equivalent Work*

The doctrine of "equal pay for equal work," more accurately stated as equal pay for substantially equivalent skill, effort and responsibility, traces its statutory origins to the Equal Pay Act of 1963.[125] The Act prohibits compensating employees of one sex at a lesser wage rate than that paid to employees of the opposite sex for equivalent work. "Equivalent work" does not mean identical work, but refers to jobs which require equivalent skill, effort, and responsibility and which are performed under similar working conditions.[126] An employer may *not* reduce the wage of any individual in order to achieve wage equality.[127] However, if the employer compensates its employees under a merit system or on a commission basis, and by chance the average earnings of one sex exceed that of the other, the employer is acting lawfully, so long as the method of computation is equally and fairly applied to both sexes.[128]

Employers are held to a high standard under the Equal Pay Act. In *Corning Glass Works v. Brennan,*[129] the Supreme Court ruled that a company violated the Equal Pay Act by paying a higher base wage to male night shift inspectors than to female inspectors performing the same tasks on the day shift, where the higher wage was in

123. Geduldig v. Aiello, 417 U.S. 484 (1974).

124. *See* cases cited note 117 *supra.*

125. 29 U.S.C.A. § 206(d) (1965). The Equal Pay Act is an amendment to the Fair Labor Standards Act (the Wage-Hour Law). In 1972, Congress broadened Equal Pay coverage to such individuals as professional, administrative and executive employees, and outside salesmen who were ordinarily excluded from coverage under the Wage-Hour Law. Title IX of the Education Amendments Act of 1972, 29 U.S.C.A. § 206(b)(1) (Cum. Supp. 1975).

126. Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970). *See also* Wirtz v. Rainbo Baking Co., 303 F. Supp. 1049 (E.D. Ky. 1967).

127. 29 U.S.C.A. § 206(d)(1) (1965).

128. *Id.*

129. 417 U.S. 188 (1974).

addition to a separate night differential paid to all employees for night work.[130] Permitting women to bid for jobs on the night shift as vacancies occurred did not remedy the situation. The only permissible solution was to equalize "the base wages of female day inspectors with the higher rates paid the night inspectors."[131] To justify pay differentials within the meaning of the Equal Pay Act, management must require that the job in each case demand a unique package and ask whether it has artifically created two job titles, one male and one female, compensated at different rates, when in fact the skill, effort, and responsibilities are equivalent for the two jobs. If they are equivalent, the compensation must be equal.

2. *Promotions and Seniority*

The EEOC maintains the position that it is an unlawful employment practice to maintain separate lines of progression based upon sex where this would adversely affect any employee, unless sex is a bona fide occupational qualification for that job.[132] In *LeBlanc v. Southern Bell Telephone & Telegraph Co.*,[133] a federal district court held than an employer discriminated against certain female employees on the basis of sex when, without considering their qualifications, it declined to consider their bids for the job of test deskman. The court was not inclined to accept any justification for such conduct.

"Bumping" of women is discriminatory if male employees with less seniority in jobs which could be adequately performed by women cannot also be bumped by women.[134] In one case, an em-

130. The Court, in ruling that the company had violated the Equal Pay Act, observed:
> The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which [the company] could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work. *Id.* at 205.

131. *Id.* at 206. The importance of this case was accentuated by the Court's explanation of the purpose of distinguishing jobs by skill, effort and responsibility. According to the Court, the congressional intent in using these terms was to adopt the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be valid under the Equal Pay Act.

132. 29 C.F.R. § 1604.3(a) (1975).

133. 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972).

134. Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970) (dictum).

ployer was found to have violated Title VII when it filled a vacancy with a male employee having less seniority than the plaintiff female employee;[135] in *Donner v. Phillips Petroleum Co.*,[136] a female plant clerk was held to have been discriminated against because of her sex when she was discharged in a plant economy move because she possessed no seniority or bidding rights, in an environment where no female in the plant possessed such rights.

E. Fringe Benefits

The EEOC Guidelines define fringe benefits as including "medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave, and other terms, conditions and privileges of employment."[137] The Guidelines provide that an employer *cannot* defend a different level of benefits for one sex on the ground that the cost of such benefits is greater with respect to one sex than the other.[138] This position has been repeatedly supported by the federal courts.[139] An employer may not condition benefits available to employees and their spouses and families on whether the employee is "head of a household" or "principal wage earner" in the family.[140] Such a policy tends to make benefits available only to male employees and their families.

The EEOC Guidelines clearly prohibit different retirement ages for men and women.[141] However, because this issue has received only a limited amount of attention from the courts and inasmuch as many employers are locked into such retirement plans, the law must be considered uncertain at this point. Nonetheless, the trend is definitely toward the abolition of all such retirement distinctions and employers are advised that if a revised retirement plan can be

135. Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd*, 480 F.2d 240 (3d Cir. 1973).

136. 447 F.2d 159 (5th Cir. 1971).

137. 29 C.F.R. § 1604.9(a) (1975).

138. *Id.* § 1604.9(e).

139. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (2d Cir.), *cert. granted*, 95 S. Ct. 2415 (1975) (No. 74-1245); Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3200 (U.S. Oct. 7, 1975) (Nos. 74-1589, -1590).

140. 29 C.F.R. § 1604.9(c) (1975). Likewise, an employer may not offer benefits: (a) to the wives and families of male employees where the same benefits are not made available to the husbands and families of female employees; (b) to the wives of male employees which are not made available to female employees; or (c) to husbands of female employees which are not made available to male employees. *Id.* § 1604.9(d).

141. *Id.* § 1604.9(f).

instituted with minimal cost or dislocation, they should proceed to do so.[142] In *Bartmess v. Drewrys U.S.A., Inc.*,[143] the court observed that a plan which mandated that women retire three years earlier than men was tantamount to a discharge. It was no defense that such a retirement plan was part of the collective bargaining agreement between the employer and the union.[144] Likewise, an employer may not differentiate in retirement benefits on account of sex.[145]

Pension plans present a unique problem because they are linked to actuarial computations which assume that women outlive men. Thus a company plan that makes equal contributions to a pension plan for men and women may nonetheless result in a lower monthly benefit for women, who, under actuarial assumptions, could be receiving monthly benefits for a longer period of time than men. No court has faced this issue, hence the law on this point is in the early stages of evolution. However, management should be aware of the distinct possibility that in the future, the law may mandate the use of premium or rate tables which do not differentiate on the basis of sex, thus requiring both equal contributions and equal periodic benefits.[146]

F. Grooming and Dress Requirements

The question of differential grooming standards has primarily been raised by long-haired male employees and the judicial answers have been diverse. The most persuasive position is that taken by the District of Columbia Circuit, which held that a standard of grooming and dress which requires conformity with the public estimation of "neat and well-groomed" is essential to the operation of many businesses.[147] It is not unreasonable for an employer to expect differ-

142. EEOC decisions have found, as violative of Title VII, plans which assume that married males are the "heads of the household," those under which the availability of coverage differs between the sexes and those under which different options exist for each sex.

143. 444 F.2d 1186, 1189 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). *See also* Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454 (D.N.J. 1970), *rev'd on other grounds*, 477 F.2d 90 (3d Cir. 1973).

144. In a recent case not involving Title VII, the Supreme Court struck down a provision of the social security law which granted different benefits for widowers than for widows. Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975).

145. 29 C.F.R. § 1604.9(f) (1975).

146. *See* Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 Colum. L. Rev. 1203 (1974).

147. Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

ences between men and women in satisfying the one standard of proper grooming. In this case, the employer's grooming code forbidding long hair on male employees whose duties included visiting offices of the employer's customers did not violate Title VII since the image of the employer is created by its employees in dealing with the public on company assignments. The Fifth Circuit has held that a grooming code requiring different hair lengths for male and female job applicants discriminated on the basis of grooming standards, and not on the basis of sex within the meaning of section 703.[148] Such a code was, therefore, beyond the proscription of Title VII. The court felt that the employer's administration of the code was more related to its business standards than to any inequality of employment opportunity.

G. Protective State Laws

Many states have enacted laws which limit the employment of women in certain occupations, *e.g.*, in jobs requiring the lifting of weights in excess of a given amount, working at certain times of night, or for a total number of hours per week.[149] The EEOC, which considers that such "protective legislation" does not take into account the capacities, preferences, and abilities of *individual* females, holds that such laws which conflict with Title VII are superseded by that law and will not be considered either a defense to an otherwise established unlawful employment practice or a basis for the application of the "bona fide occupational qualification" exception.[150]

The courts have upheld the EEOC's position that Title VII supersedes state protective laws. A California district court declared two such "protective" provisions of the California Labor Code, re-

148. Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975).

149. *See, e.g.*, Rule 59 of the Georgia Commission of Labor promulgated pursuant to Ga. Code Ann. § 54-122(d) (1973).

150. 29 C.F.R. § 1604.2(b) (1975). *See* Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972). A number of states require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful practice if: (i) it refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by state law; or (ii) it does not provide the same benefits for male employees. 29 C.F.R. § 1604.2(b)(3).

As to other kinds of sex-oriented state employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of Title VII. *Id.* § 1604.2(b)(4).

quiring certain overtime premium pay to be paid only to women, to be "in conflict with and superseded by Title VII of the Civil Rights Act of 1964."[151] Employers may not rely on state laws purporting to limit the number of hours or time of day that a female employee may work, because such laws must also yield to the conflicting provisions of Title VII.[152]

IV. AGE DISCRIMINATION

The Age Discrimination in Employment Act of 1967[153] prohibits employment discrimination against individuals between the ages of forty and sixty-four inclusive,[154] and is the major federal legislation prohibiting age discrimination. The Act makes it unlawful for an employer to fail or refuse to hire, to discharge, or otherwise to discriminate as to compensation, terms, conditions, or privileges of employment[155] if the employee is within the prescribed age limits. It applies to individuals at every level of employment; protection is not denied because the individual is in (or has applied for) a supervisory, management or executive position. Labor unions[156] and employment agencies[157] are also subject to the Act. The Wage-Hour Administrator, who is charged with enforcement of the Act,[158] takes the position that requests in pre-employment inquiries or on a job application such as "date of birth" or "state age" are permissible provided the information obtained is not used in a discriminatory manner.[159] Approximately two-thirds of the states have laws prohib-

151. Homemakers, Inc. v. Division of Indus. Welfare, 356 F. Supp. 1111, 1113 (N.D. Cal. 1973), *aff'd*, 509 F.2d 20 (9th Cir. 1974).

152. *See* Sontag v. Bronstein, 5 F.E.P. Cases 21 (Sup. Ct., N.Y. County 1972). In Garneau v. Raytheon Co., 323 F. Supp. 391 (D. Mass. 1971), the Massachusetts Commissioner of Labor and Industries was enjoined from taking any steps to enforce a state law which limited the number of hours which females could work, because the state law conflicted with Title VII. The court ruled that female employees of the defendant corporation were entitled to the same overtime opportunities as men.

153. 29 U.S.C. § 621 *et seq.* (1970).

154. *Id.* § 631. In addition to the age requirements, to be covered by the Act an individual must be employed by "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.* § 630(b).

155. *Id.* § 623 (a)(1).

156. *Id.* § 623 (c).

157. *Id.* § 623 (b).

158. For a complete discussion of enforcement of the Act see section IV. C. *infra*.

159. 29 C.F.R. § 860.92(d) (1975). The Administrator advises that the employer should protect itself by including on the application form the following statutory reference: "The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with

iting age discrimination but there is little uniformity.[160] Some statutes follow the Federal Act[161] while others either narrow[162] or expand[163] the protected age groups. Ten states do not define which age groups are to be protected, but include age with other forms of discrimination.[164]

A. Protected Ages

Prohibiting age discrimination between certain ages creates problems regarding discrimination among individuals within the prescribed age group, and protection of persons outside the group. For example, an employer may not limit hirings and promotions to individuals under 35 years of age because the limitation creates a preference which excludes protected as well as unprotected age groups.[165] It would also be unlawful to promote only employees of certain ages within the protected group since this discriminates against other individuals in the protected group.[166] Similarly, an employer may

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respect to individuals who are at least 40 but less than 65 years of age." *Id.* § 860.95(a).

160. *See* Annot., 29 A.L.R.3d 1407 (1970). Virginia does not have an age discrimination in employment law.

161. *See* IND. ANN. STAT. § 40-2318 (1965); NEB. REV. STAT. § 48-1003 (1974). In many cases the state statutes do not precisely define the limits of a particular protected age bracket. For example, does "between 40 and 65" mean 64 inclusive, or 65 inclusive? *See* DEL. CODE ANN. tit. 19, § 710 (1975); GA. CODE ANN. § 54-1102 (1974); KY. REV. STAT. ANN. § 344.040 (Supp. 1974); N.D. CENT. CODE § 34-01-17 (1972); OHIO REV. CODE ANN. § 4101.17 (Anderson 1973); ORE. REV. STAT. § 659.024(1) (1974); WASH. REV. CODE ANN. § 49.44.090 (1962); WIS. STAT. ANN. § 111.32 (5)(b)(1) (1974).

162. *See* IDAHO CODE § 44-1602 (Supp. 1975) ("60 years of age or older"); ILL. REV. STAT. ch. 48, § 881 (Supp. 1975) ("over 45 years of age"); LA. REV. STAT. § 23:893 (1964) ("under fifty years"); MASS. ANN. LAWS ch. 149, § 24A (1965) ("between the ages of forty-five and sixty-five"); PA. STAT. ANN. tit. 43, § 954(h) (1964) ("between the ages of forty and sixty-two inclusive"); R.I. GEN. LAWS ANN. § 28-6-1 (1969) ("attained the age of 45 and not attained the age of sixty-five").

163. *See* COLO. REV. STAT. ANN. § 8-2-116 (1974) ("between the ages of eighteen and sixty years"); CONN. GEN. STAT. ANN. § 31.122(K) (1972) ("between forty and sixty-five, inclusive"); MICH. COMP. LAWS ANN. § 423.303(a) (Supp. 1975) ("between the ages of 18 and 60"); W. VA. CODE ANN. § 5-11-3(q) (Supp. 1975) ("ages forty through sixty-five, both inclusive").

164. *See* ALASKA STAT. § 18.80.220 (1962) ("reasonable demands of the position"); HAWAII REV. STAT. tit. 21, § 378-2(1) (Supp. 1974); IOWA CODE ANN. § 601A.6 (1)(a) (1975); ME. REV. STAT. ANN. tit. 5, § 4572 (1)(A) (Supp. 1974); MD. ANN. CODE art. 49 B, § 19 (a) (Supp. 1975); MONT. REV. CODES ANN. § 64-306(a) (Supp. 1974); N.H. REV. STAT. ANN. § 354-A:1 (Supp. 1975); N.J. STAT. ANN. § 10:5-12(a) (Supp. 1975); N.M. STAT. ANN. § 4-33-7 (A) (1974); N.Y. EXEC. LAW. § 296.1 (a) (McKinney Supp. 1975).

165. 29 C.F.R. § 860.36(c) (1975).

166. *Id.* § 860.91(a); *see* Opinion signed by Wage-Hour Administrator Clarence T. Lundquist, August 7, 1968.

not discriminate between two individuals both of whom are within the protected age group.[167] Instead, the employer must reach a decision by considering the capabilities and experience of the two individuals. Age discrimination between two individuals under protected age limits is not prohibited.[168] Nonetheless, the employer should wherever possible avoid indicating a preference for any age, whatever the age group. Although the federal act does not protect employees outside of a certain range, many state laws do.[169]

Open to challenge is the adoption of 64 as the upper age limit under the Age Discrimination Act. The congressional hearings on the Act[170] are silent on the subject and gerontological research indicates that there is no valid reason to distinguish the class of workers over 65 from those under 65 either on the basis of work ability or contribution to the employer.[171] Older workers are less likely to be involved in work accidents, and although older workers are more susceptible to illness and tend to be disabled longer when injured than younger workers, older workers on the whole are absent from work fewer days.[172]

B. Valid Bases of Age Discrimination

Efforts by employers to evade the provisions of the Age Discrimi-

167. 29 C.F.R. § 860.91(b) (1975).

168. *Id.*

169. See notes 163-64 *supra* and accompanying text.

170. 113 Cong. Rec. 31248, 34738, 35053, 35228 (1967).

171. *See, e.g.*, Confrey & Goldstein, *The Health Status of Aging People*, in Handbook of Social Gerontology 165 (C. Tibbitts ed. 1960).

172. *Id.* at 80. A leading article on the subject offers the following as a list of invalid reasons advanced by an employer for not hiring older employees:

1. Older workers are often afflicted with physical and mental infirmities.
2. Young people must be hired who can be trained, motivated and promoted.
3. Young people are willing to work for less money than older people.
4. Pension, health and life insurance costs increase as the worker ages.
5. Many older workers lack skill, experience or education.
6. According to mortality tables, the older worker will work less time for the firm than a younger worker.
7. Older workers are more costly to train and are less productive.
8. Older workers are less adaptable and more difficult to train than younger workers.
9. Balance in age is needed in every work force. Because seniority clauses in collective bargaining agreements determine retention and promotion, employers need to hire young persons whenever possible.
10. Young executives feel uncomfortable directing older employees.

Kovarsky & Kovarsky, *Economics, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 Vand. L. Rev. 839, 845 (1974).

nation Act are varied, but for the most part unsuccessful unless based upon recognized exceptions to the Act. Those exceptions include: (1) a bona fide occupational qualification;[173] (2) an employment practice based upon reasonable factors other than age;[174] or (3) an employment practice dictated by the terms of a bona fide seniority system or employee benefit plan.[175]

1. Bona Fide Occupational Qualification (BFOQ)

The Wage-Hour Administrator construes narrowly the situations in which an employer can claim age to be a bona fide occupational qualification; as always, the burden of proving the exception is on the employer.[176] The safety and convenience of the public has been used by at least two federal courts to permit maximum cut-off ages for bus drivers.[177] The exception appears applicable whenever there can be shown a relationship between work assignments and the degenerative physical and sensory changes of the aging process which begins late in a person's life.[178] Unless the employer can produce some persuasive statistics showing this relationship, it is risking violation of the Age Discrimination Act if it has a mandatory cutoff age for hiring or promotion. Without a tie to the public safety, the same strict business necessity test, applicable to other forms of discrimination, is applicable under the Act.

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173. 29 U.S.C. § 623(f)(1) (1970).

174. *Id.*

175. *Id.* § 623(f)(2).

176. 29 C.F.R. § 860.102(b) (1975).

177. Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); Hodgson v. Tamiami Trail Tours, 4 F.E.P. Cases 728 (S.D. Fla. 1972). In *Tamiami Trail Tours*, the court ruled that a bus company could refuse to hire drivers over 40 years of age, because age was a bona fide occupational qualification in view of the need for public safety. The court said, "The touchstone for the BFOQ exemption . . . is a finding that age is a *reasonable* requirement, necessitated by normal business operations and having a manifest relationship to the employment in question." *Id.* at 730. In *Greyhound Lines*, a bus company which had a policy of refusing to hire persons 35 years of age or older was required to prove a rational basis for believing that elimination of its maximum hiring age would increase the likelihood of risk of harm to its passengers. Since the company could show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice, the court validated the requirement.

178. Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). In *Greyhound Lines*, the statistical evidence introduced by the company reflected, *inter alia*, that the company's safest driver was an individual with 16-20 years of driving experience and between 50 and 55 years of age. This optimum blend of age and experience could never be attained in hiring an applicant who was over 40 years of age.

2. *Reasonable Factors Other Than Age*

An employer may use a reasonable factor other than age in its hiring and promotion practices. For example, an employer may set physical fitness requirements based on medical examinations related to standards reasonably necessary for the specific job, so long as the tests are uniformly applied to all employees and/or applicants regardless of age.[179] The employer may also evaluate its employees on the basis of educational level or quantity and quality of production,[180] and may use employee tests if all factors have a valid relationship to job requirements and are uniformly applied in good faith to employees of all ages.[181] Unlike other areas of employment discrimination law, such as race or sex, an employer may use a reasonable factor other than age in its employment decisions even though its use has a disproportionately adverse impact on persons within the protected age group. For example, in *Stringfellow v. Monsanto Co.*,[182] the use of eighteen various criteria to make termination decisions was upheld even though only three of the 47 terminated employees were under 40 years of age.[183]

3. *Bona Fide Seniority and Employee Benefit Plans*

A bona fide seniority system must be based upon length of service as the primary criterion for the allocation of available employment opportunities and privileges among younger and older workers. Bona fide seniority systems may be qualified by such factors as merit, capacity, or ability.[184] Since seniority systems ordinarily afford greater rights to those employees with longer service, if a purported seniority system gives lesser rights to those with longer service or treats less favorably those protected by the Age Discrimination Act, it may be held invalid as an attempt to avoid the purposes of the Act.[185] Furthermore, a seniority system that segregates, classifies or otherwise discriminates on the basis of race, color, religion, sex or national origin, will obviously not be regarded as bona fide.[186]

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179. 29 C.F.R. § 860.103(f)(1)(i) (1975).
180. *Id.* § 860.103(f)(2).
181. *Id.* § 860.104(b).
182. 320 F. Supp. 1175 (W.D. Ark. 1970).
183. *Id.* at 1180. *Accord*, Billingsley v. Service Technology Corp., 6 F.E.P. Cases 404 (S.D. Tex. 1973).
184. 29 C.F.R. § 860.105(a) (1975).
185. *Id.* § 860.105(b).
186. *Id.* § 860.105(d).

An employer is not required to provide older workers with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between groups or workers is in accordance with the terms of a bona fide benefit plan. A retirement, pension or insurance plan complies with the Act if the employer expends the same amount of money for an older worker as for a younger one, even if this results in lesser benefits or insurance coverage for the older worker. Benefits may also validly vary within the protected age group if the benefits are based on a formula involving age and length of service.[187]

Early retirement, even involuntary retirement, is valid provided again that it is within the terms of a bona fide plan.[188] But an employer may not utilize a retirement plan to retire prematurely employees who are not participants in the plan.[189] In one case, the employee plan, which was entirely funded from a percentage of company profits, required that all employees retire at age 60.[190] One employee was forced to retire and suit was brought by the Secretary of Labor in his behalf seeking reinstatement and appropriate back pay. The Secretary charged that the company did not have a bona fide plan qualifying for an exemption from the Age Discrimination Act because the Internal Revenue Service defined retirement plans as those in which employer contributions are based upon the anticipated costs of the employee's retirement, and excluded plans in which contributions are based solely upon profits. The Fifth Circuit, however, rejected this argument, observing that retirement under the Age Discrimination Act and the Internal Revenue Code have different purposes; the company's plan satisfied the bona fide test of the Age Discrimination Act by being genuine and authentic in that the plan existed and the employee was actually paid benefits under it.

C. Enforcement and Recordkeeping

Unlike Title VII, which is administered by the EEOC, the Age Discrimination Act is administered and enforced by the Wage-Hour Administration of the Department of Labor. Few cases have been

187. *Id.* § 860.120(a).
188. 29 U.S.C. § 623 (f)(2) (1970).
189. Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225 (D. Minn. 1971).
190. Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974).

brought under the Age Discrimination Act, in part because of the limited number of compliance officers available for enforcement in the Wage-Hour Administration. The Secretary of Labor, through the Wage-Hour Administrator, is empowered to make investigations, issue rules and regulations for administration of the law,[191] and enforce its provisions by legal proceedings when voluntary compliance cannot be obtained.[192] The Secretary or any aggrieved person[193] may bring suit under the Act, and a class action may be brought on behalf of similarly situated employees as provided by section 16(b) of the Fair Labor Standards Act.[194] Suit to enforce the Act must be brought within two years after the violation,[195] or in the case of a willful[196] violation, within three years.

Before initiating court action, the Secretary of Labor must attempt to secure voluntary compliance by informal conciliation, conference, and persuasion.[197] Before an individual institutes court action, he must give the Secretary not less than 60 days notice of his intention to sue.[198] Where a state has its own age discrimination statute, no suit may be initiated under the Federal Act until 60 days after the commencement of proceedings in the appropriate state administrative body, unless the state proceedings were terminated in less than 60 days.[199] Failure to utilize available state administrative proceedings may result in the dismissal of a federal action. The courts, in enforcement actions, are authorized to grant any relief appropriate to carrying out the Act's purposes, including back pay or an order compelling employment, reinstatement or promotion.[200]

Under regulations promulgated under the Act, an employer must keep records indicating name, address, date of birth, occupation, rate of pay and weekly compensation for three years.[201] Other specified records need only be kept for one year.[202] The employer must

191. 29 U.S.C. § 626(b) (1970).
192. *Id.* § 626(b).
193. *Id.* § 626(c).
194. *See* LaChapelle v. Owens-Illinois, Inc., 64 F.R.D. 96 (N.D. Ga. 1974).
195. 29 U.S.C. § 626(e) (1970).
196. "Willful" means intentional; it does not require malice. *See, e.g.,* Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972).
197. 29 U.S.C. § 626(b) (1970).
198. *Id.* § 626(c).
199. *Id.* § 626(d).
200. *Id.* § 626(b).
201. 29 C.F.R. § 850.3(a) (1975).
202. These include any records made in the ordinary course of business in connection with

keep on file employee benefit plans (such as pension and insurance plans) as well as copies of any written seniority and merit systems for the full period during which the plan or system is in effect plus one year.[203] All records must be made available for inspection and transcription by representatives of the Wage-Hour Administration during business hours. In an enforcement action by the Wage-Hour Administrator, the employer may be required to retain records until the action is completed. An employer, for good cause, may petition the Wage-Hour Administrator for permission to maintain records in a manner other than as required.[204]

V. RELIGIOUS DISCRIMINATION

Although given a liberal interpretation by the EEOC, Title VII does not actually define the term "religion."[205] Besides the traditional religions, the EEOC recognizes as "religious" those observances characterized by sincere and meaningful beliefs occupying places in their possessors' lives equivalent to those filled by the traditional God. Not every ideology constitutes a "religion" under Title VII,[206] but the protections against discriminatory practices because of religion have been extended to the nonreligious. An employee who was an atheist was held to have been constructively

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the following:

(1) Job applications, resumes or any other form of employment inquiry, including those pertaining to the failure or refusal to hire any individual.

(2) Promotion, demotion, transfer, selection for training, layoff, recall or discharge.

(3) Job orders submitted to a labor organization or an employment agency.

(4) Test papers completed by applicants and other employment tests considered by the employer.

(5) Results of any physical examination where the examination is used in connection with any personnel action.

(6) Advertisements or notices to the public relating to job openings, promotions, training programs, or opportunities for overtime work. *Id.* § 850.3(b)(1).

Two exceptions exist to the one year requirement. Application forms and other pre-employment records for positions which are, and are known by applicants to be temporary need be kept only 90 days from the date of the personnel action to which they relate. *Id.* § 850.3(b)(3).

203. *Id.* § 850.3(b)(2).

204. *Id.* § 850.11(a).

205. Section 701(j) of Title VII, 42 U.S.C.A. § 2000e(j) (1974), states:

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

206. Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025 (E.D. Va. 1973) (Ku Klux Klan not a religion within the meaning of Title VII).

(hence illegally) discharged when she terminated her job upon being told by her supervisor that she had to attend staff meetings which were begun with a devotional service.[207]

A. Reasonable Accommodations

Section 701(j) of Title VII requires an employer to make "reasonable accommodations" to the religious needs of its employees.[208] Clearly under this provision an employer could no more lawfully limit a job classification to Protestants than it could to whites. EEOC decisions have held that intentional discrimination by an employer against an employee or prospective employee solely because of his religion is per se violative of Title VII. When the issue is one of resultant discrimination, *i.e.*, discrimination resulting from a conflict between a particular tenet of an employee's or prospective employee's religion and a work rule established by an employer, the courts apply the tests described below.[209] One aspect of religious discrimination stands out significantly. Specifically, what should the employer's policy be with respect to employees or applicants who observe Saturday or some other day as the Sabbath or who observe special religious holidays during the year?

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207. Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).

208. 42 U.S.C.A. § 2000e(j) (1974). The Title VII requirement of reasonable accommodation does not violate the Establishment Clause of the first amendment. Cummins v. Parker Seal Co., 10 F.E.P. Cases 974 (6th Cir. 1975). In Hardison v. Trans World Airlines, 375 F. Supp. 877 (W.D. Mo. 1974), the court said:

> The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.
>
> Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602 (1971), and Tilton v. Richardson, 403 U.S. 672 (1971).
>
> We find and conclude, therefore, that the interpretation of Title VII's prohibition of discrimination by reason of religion, as embodied in the E.E.O.C. regulation, 29 C.F.R. § 1605.1(b) does not violate the Establishment Clause of the First Amendment to the Constitution of the United States. 375 F. Supp. at 888.

However, a state governmental practice of closing offices for three hours on Good Friday and paying employees for that time was held to be violative of both the Establishment and Free Exercise Clauses of the first amendment. Mandel v. Hodges, 10 F.E.P. Cases 480 (Cal. Ct. of App. 1975).

209. *See, e.g.*, Dawson v. Mizell, 3 F.E.P. Cases 313, 315 (E.D. Va. 1971).

The EEOC Guidelines provide that the duty to avoid religious discrimination "includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."[210] In *Reid v. Memphis Publishing Co.*,[211] the Sixth Circuit sustained the complaint of an applicant who had been denied employment because, as a Seventh Day Adventist, he was unwilling to work on Saturday. The court, quoting the EEOC Guidelines on religious discrimination, remanded the case to the lower court to determine whether the employer "could 'reasonably accommodate' plaintiff's religious practice 'without undue hardship.' "[212] When the case returned to the district court, that court ruled in favor of the applicant, finding that his employment would not work an "undue hardship" on the employer, despite proof of scheduling problems, an adverse effect on the morale of other employees, and the possible economic burden caused by additional overtime.[213] The court was particularly persuaded by the absence of any prior attempt by the employer to reasonably accommodate the applicant.[214] Similarly, the Fifth Circuit[215] held an employer to the same standard—reasonable accommodation without undue hardship. While no clear definition of reasonable accommodation was offered, the court implied that efforts to transfer to another shift or arrangement for a substitute would have been sufficient. The validity of this rationale has been called into question by the Sixth Circuit in a subsequent review of *Reid v. Memphis Publishing Co.*[216] The circuit court, in reversing the ruling of the district court, challenged both the statutory and legislative justification for the EEOC guideline.

Courts have adopted a case-by-case factual analysis in order to determine whether the "reasonable accommodation" rule has been complied with. An employer must allow some latitude in the employee's work schedule so as to free him for religious observances which his denomination obliges him to honor[217] and must first show

210. 29 C.F.R. § 1605.1(b) (1975).
211. 468 F.2d 346 (6th Cir. 1972).
212. *Id.* at 351.
213. Reid v. Memphis Publishing Co., 369 F. Supp. 684 (W.D. Tenn. 1973).
214. *Id.* at 689.
215. Riley v. Bendix Corp., 464 F.2d 1113, 1115 (5th Cir. 1972).
216. 11 F.E.P. Cases 129 (6th Cir. 1975) (2-1 decision).
217. Shaffield v. Northrop Worldwide Aircraft Services, Inc., 373 F. Supp. 937 (M.D. Ala. 1974).

an attempt at accommodation before claiming undue hardship.[218] On the other hand, an employee seeking special treatment because of his religious beliefs under an employer's work rules must be prepared to make a prima facie showing of the sincerity of his convictions, if their sincerity is challenged.[219]

B. Undue Hardship

The "undue hardship" exception to the "reasonable accommodation" rule has been interpreted by the courts as requiring more than mere inconvenience or even "considerable" inconvenience.[220] In *Reid v. Memphis Publishing Co.*,[221] the necessity of either requiring other employees to work overtime at time and one-half pay or hiring an extra copyreader was found not to be an undue hardship. In *Hardison v. Trans World Airlines*,[222] however, the court ruled that to change work schedules for an employee because of his religious observances when the employee's duties could not be performed by another worker on his shift and a change of shifts would have violated the union's seniority system, was an undue hardship. The court noted that Title VII did not require an employer to impose hardships on the remainder of the employees merely to accommodate the religious beliefs of a few.

Title VII's prohibition of religious discrimination, like prohibitions of other forms of discrimination, requires more from the employer than uniform application of work rules to all employees. Certain work rules and practices which are facially fair but which, if uniformly enforced, have a discriminatory effect on the religious beliefs of certain employees must be justified by the business necessity test.[223] Employers can be held guilty of religious discrimination when they insist upon conformity to certain standards of dress or appearance without having established that such codes are necessary to the proper conduct of their business.

Flexibility appears to be the controlling factor used to determine

218. Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973).

219. *See* Hansard v. Johns-Manville Prods. Corp., 5 E.P.D. ¶ 8543, at 7560 (E.D. Tex. 1973).

220. Kettell v. Johnson & Johnson, 337 F. Supp. 892 (E.D. Ark. 1972).

221. 369 F. Supp. 684 (W.D. Tenn. 1973) (dictum), *rev'd*, 11 F.E.P. Cases 129 (6th Cir. 1975) (2-1 decision). *See also* United States v. City of Albuquerque, 10 F.E.P. Cases 771 (D.N.M. 1975).

222. 375 F. Supp. 877, 889 (W.D. Mo. 1974).

223. *See, e.g.*, Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Reid v. Menphis Publishing Co., 369 F. Supp. 684 (W.D. Tenn. 1973) (dictum), *rev'd*, 11 F.E.P. Cases 129 (6th Cir. 1975) (2-1 decision).

"business necessity." In *Claybaugh v. Pacific Northwest Bell Telephone Co.*,[224] the court said that as the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation requirement decreases. The balancing of these two concepts constitutes the "business necessity" which will validate an employment practice even though it burdens some employees because of their religious beliefs. But mere speculation that employee discontent will result from making exceptions to uniformly enforced rules does not constitute sufficient justification for failing to make reasonable accommodations. Proof of significant and serious employee discontent is necessary.[225]

VI. OTHER MANIFESTATIONS OF DISCRIMINATION

A. National Origin

Title VII also prohibits discrimination on the basis of national origin.[226] While not infrequently linked to racial discrimination, it is a rarer specimen and the cases are sparse. When it does occur, it is generally commingled with racial discrimination and the interdictions against the latter apply equally. Race and color are treated synonymously by the courts[227] and the EEOC. Title VII, on its face, distinguishes national origin from race and color, stating that national origin, like sex and religion (but unlike race or color), can be a bona fide occupational qualification (BFOQ).[228] Since the passage of Title VII in 1964, the bona fide occupational qualification has

224. 355 F. Supp. 1 (D. Ore. 1973).

225. *See* Reid v. Memphis Publishing Co., 369 F. Supp. 684, 689 (W.D. Tenn. 1973), *rev'd*, 11 F.E.P. Cases 129 (6th Cir. 1975) (2-1 decision). The courts are divided on the question of whether reasonable accommodation requires an employer or union to make exceptions to uniformly enforced work rules contained in a collective bargaining agreement. The courts do agree, however, that uniform requirements to pay union dues under penalty of dismissal are enforceable even when the refusal to pay stems from religious beliefs. *See, e.g.*, Hammond v. United Papermakers Union, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972); Cooper v. General Dynamics, 378 F. Supp. 1258 (N.D. Tex. 1974).

226. According to the Supreme Court the only direct definition given the term "national origin" is a remark made on the floor of the House of Representatives in 1964 by Congressman Roosevelt: "It means the country from which you or your forebearers [sic] came . . . . You may come from Poland, Czechoslovakia, England, France, or any other country." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 89 (1973), *quoting* 110 Cong. Rec. 2549 (1964).

227. Thus the Second Circuit, in upholding numerical goals for nonwhites, observed: "The term 'nonwhite' as so used is defined to mean black and Spanish-surnamed workers." Rios v. Steamfitters Local 638, 501 F.2d 622, 625 (2d Cir. 1974).

228. 42 U.S.C.A. § 2000e - 2(e)(1) (1974).

been narrowly interpreted; there are no reported cases upholding a BFOQ on national origin.

National origin discrimination must be distinguished from discrimination on the basis of citizenship. The former refers to the country of origin and involves citizens of the United States. In *Espinoza v. Farah Manufacturing Co.*,[229] the Supreme Court was faced with circumstances which quite clearly elucidated the distinction. The employer, located in San Antonio, Texas, maintained a policy of hiring only American citizens. This policy resulted in a denial of employment to the plaintiff, a lawfully admitted resident alien and a citizen of Mexico. The Supreme Court upheld the citizens-only limitation relying on the good faith of the employer as evidenced by an undisputed practice of hiring employees of Mexican origin, provided they became American citizens. However, the Fifth Circuit has apparently extended the substantive equivalent of Title VII to aliens by providing a procedural alternative: aliens can sue under section 1981 which grants to all persons within the United States the same right to make a contract, including an employment contract.[230] Absolute prohibitions against the employment of aliens have been found suspect and violative of equal protection guarantees in two recent Supreme Court decisions. In *Sugarman v. Dougall*,[231] the Court invalidated a New York statute which prohibited the employment of aliens in the competitive class of the state civil service. Likewise, in *In re Griffiths*,[232] a Connecticut court rule which denied qualified resident aliens admission to the bar was invalidated. These decisions are applicable only to governmental or "state action" employers and have not as yet been extended to Title VII coverage.

The EEOC Guidelines make discriminatory the use of tests in the English language where English is not the first language of the individual tested and where mastery of the English language is not a requirement of the work to be performed.[233] Furthermore, the Guidelines prohibit denying equal opportunity to individuals who, as a class, fall outside the national norm for height and weight, where such height and weight specifications are not necessary for

229. 414 U.S. 86 (1973).
230. Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974).
231. 413 U.S. 634 (1973).
232. 413 U.S. 717 (1973).
233. 29 C.F.R. § 1606.1(b) (1975).

the performance of the work involved.

B. The Physically Handicapped

The Vocational Rehabilitation Act of 1973[234] contains provisions regarding employment discrimination against the physically handicapped. The Act states that any government contract for property or services in excess of $2,500 shall contain a provision that the employer shall take affirmative action to employ and promote qualified handicapped persons.[235] If a handicapped individual believes that any contracting employer has failed to take appropriate affirmative action, the individual may file a complaint with the Secretary of Labor. The contracting agency shall promptly investigate the complaint.[236] The Secretary of Labor is empowered to take such action as the circumstances warrant including cancellation, suspension and disbarment from future contracts.

C. Vietnam Veterans

The Vietnam Era Veterans Readjustment Act of 1972[237] requires that government contractors take affirmative action to employ and promote qualified veterans, including disabled veterans. The Act would apply to employers who perform any contract for the procurement of personal property and non-personal services (including construction) for the United States.[238] A veteran who believes any contractor has violated the Act may file a complaint with the Veterans Employment Service of the Department of Labor. The Secretary of Labor is empowered to take such action as the circumstances warrant including cancellation, suspension and disbarment from future contracts.[239]

D. Ex-Prisoners

Current judicial and legislative trends are to remove employment restrictions on those with criminal records by requiring employers to consider each applicant on an individual basis and by outlawing

234. 29 U.S.C.A. § 701 *et seq.* (Cum. Supp. 1975).

235. *Id.* § 793(a). Qualified handicapped individuals are defined by the Act. *Id.* § 706 (6).

236. *Id.* § 793(b).

237. 38 U.S.C.A. § 2011 *et seq.* (Cum. Supp. 1975).

238. *Id.* § 2012(a). For the Civil Service Commission's guide for affirmative action plans required by this statute see CCH Employment Practices Guide ¶ 3897.

239. 38 U.S.C.A. § 2012(b) (Cum. Supp. 1975).

the practice of disqualifying applicants solely on the existence of a record. The requirement that job applicants not have criminal records operates to discriminate against minorities, since statistics compiled by the Federal Bureau of Investigation show a disparate percentage of minorities have criminal records. While conviction records may in some instances have a bearing on the suitability of a job applicant, the general rule is that "a conviction of a felony or misdemeanor should not per se constitute an absolute bar to employment."[240] The EEOC takes the view that a discharge or refusal to employ a minority-group person because of a conviction record is unlawful under Title VII unless the particular circumstances of the case, *e.g.*, the time, nature and number of the convictions, indicate that employment of the particular person for a particular job is manifestly inconsistent with the safe and efficient operation of the employer's business.[241] If an employer can show that its policy of denying employment to applicants with criminal convictions is based upon sound business necessity, the policy will be upheld.[242]

The states have recently provided legislative remedies to combat this discrimination. Hawaii has enacted a statute prohibiting discrimination against ex-prisoners in private employment.[243] Connecticut, the District of Columbia, Florida, and Washington have enacted statutes removing mandatory restrictions against ex-prisoners in public employment.[244] In addition, various state and city human rights commissions have enacted guidelines warning employers of the potential discriminatory effects of inquiries concerning job applicants' criminal records.[245]

E. Ex-Addicts

There are no reported cases applying Title VII to job discrimination against ex-addicts. As with criminal convictions, the statistical data indicates that a disproportionate number of heroin addicts

240. Carter v. Gallagher, 452 F.2d 315, 326 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

241. *See, e.g.*, EEOC Decision No. 74-89, 1974 CCH EEOC Dec. ¶ 6418; EEOC Decision No. 73-0257, 1972 CCH EEOC Dec. ¶ 6372; EEOC Decision No. 72-1497, 1973 CCH EEOC Dec. ¶ 6352; EEOC Decision No. 72-1460, 1972 CCH EEOC Dec. ¶ 6341.

242. Green v. Missouri Pac. R.R., 381 F. Supp. 992 (E.D. Mo. 1974).

243. Hawaii Rev. Stat. tit. 21, ch. 378, § 378-2(1) (Supp. 1974).

244. *See* Conn. Gen. Stat. Ann. § 4-610 (Supp. 1975); Fla. Stat. Ann. § 112.011 (Supp. 1974); Offender Employment Rev. 6 (Jan. 1974).

245. For a further discussion see Note, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 Hastings L.J. 1403 (1975).

come from racial and ethnic minority groups. Since an employer's policy of refusing to hire rehabilitated drug addicts merely because of their prior addiction could be established as having a greater effect on minority groups than on whites, it would probably constitute *de facto* discrimination.[246]

VII. AFFIRMATIVE ACTION

To ensure compliance with fair employment law, an employer is urgently advised to design and implement an "affirmative action" program. Such a program is a *positive* policy that goes well beyond merely maintaining "neutral nondiscriminatory" employment practices. For example, an employer may hire applicants solely on their qualifications, without regard to race, color, sex, national origin, or religion. This is a "neutral" policy, but it may be discriminatory if the source of the applicants is by referral from the existing work force.[247] Where, for instance, "word-of-mouth" recruiting effectively excludes minorities, courts have ordered that the employer take the affirmative action of advertising in media which will reach minority group members.[248]

A. LEGAL SOURCES

Section 706(g) of Title VII authorizes the federal courts to enjoin unlawful employment practices and to "order such affirmative action as may be appropriate."[249] Executive Order 11375,[250] covering federal government contractors or subcontractors, has taken an even stronger position.[251] The courts have also required more than

246. This question becomes more complicated in view of the fact that most rehabilitated addicts have conviction records. For a further discussion see Note, *Employment Discrimination Against Rehabilitated Drug Addicts,* 49 N.Y.U. L. REV. 67 (1974); Note, *Heroin, Marijuana and Crime: A Socio-Legal Analysis,* 45 ST. JOHN'S L. REV. 119 (1970).

247. *See* section II. D. *supra.*

248. United States v. Georgia Power Co., 474 F.2d 906, 925-26 (5th Cir. 1973).

249. 42 U.S.C.A. § 2000e-5(g) (1974). For a discussion of the forms that judicially mandated affirmative action may take see section IX.B. *infra.*

250. 3 C.F.R. 321 (1967), *amending* Executive Order 11246 § 202 (i), 3 C.F.R. 339 (1965) (codified at 3 C.F.R. 169 (1974). As the language of the Executive Order implies, age discrimination has generally been excluded from the requirements of affirmative action. Title VII does not mention discrimination based upon age, that being the subject of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1970). The EEOC, charged with enforcement of Title VII only, has not mandated affirmative action regarding age even though it has taken a strong position regarding the factors enumerated in Title VII.

251. Executive Order 11375 provides in part:

> The contractor will take affirmative action to ensure that applicants are employed, and

neutral employment practices. In *Griggs v. Duke Power Co.*,[252] the Supreme Court mandated a change when existing practices and procedures, though neutral on their face and in their intent, operated to freeze the status quo of prior discrimination.

Affirmative action includes any practice or policy which positively seeks to ensure that minorities and women will be hired, trained and promoted in such numbers as will ultimately reflect their general proportion in the available labor market. Affirmative action can be ordered by the courts[253] or may also be part of a consent decree or settlement agreement which settles a lawsuit or a potential suit at an earlier stage. Such an agreement is often reached during the conciliation period required by Title VII after the EEOC has investigated, but before it has brought suit.[254]

But affirmative action is not limited to judicial orders or formal agreements with the EEOC. Many leading companies are instituting, on their own initiative, company-wide affirmative action plans. This section is a set of guidelines which should assist management in developing its own affirmative action program. It is predicated to a considerable degree on the specific recommendations of the EEOC.[255] The most important guideline for an employer is to reduce every detail of the affirmative action program to written form and to maintain a file on the administration of the program. In this manner, if and when Title VII problems arise, the self-initiated program might provide the basis and direction of any judicially-mandated program that may subsequently evolve.

B. Policy Statement

A company executive should issue a statement that equal opportunity is a legal, social, and economic necessity and that affirmative

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that employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. 3 C.F.R. 321 (1967).

252. 401 U.S. 424, 430 (1971).

253. For a discussion of judicially directed affirmative action and other judicially-imposed remedies see section IX. *infra*.

254. For a discussion of the conciliation process see section X.A.3., *infra*.

255. *See* Equal Employment Opportunity Commission, Affirmative Action and Equal Employment (1974). *See also* The Affirmative Action Programs issued by the Office of Federal Contract Compliance (OFCC) 41 C.F.R. § 60-2.1 *et seq.* (1975).

action will be necessary to implement it. The statement should point out that existing neutral employment policies might not be adequate. Instead, the company must set goals just as it does in any other program. Every existing employment practice must be re-evaluated in the light of the affirmative action program. Affirmative action should have a role in recruiting, hiring, promotion, transfer, training, compensation, benefits, layoff, and termination. The statement should further state that executives at all levels share in the responsibility for the success of affirmative action.

Every supervisor and manager should be informed of his or her responsibility under the program. In addition to explaining the legal requirements of affirmative action, many companies have found it useful to institute small informal discussion groups to acquaint managers and supervisors with the problem of discriminatory stereotypes and other barriers to fair employment. The company policy statement and federal equal employment opportunity posters should be placed in prominent areas. Section 711 of Title VII[256] requires every employer to conspicuously post notices, available from the EEOC, which highlight the provisions of Title VII. A second notice summarizing the Age Discrimination Act should also be prominently posted on the employer's premises. Title VII places unions under an obligation to eliminate discriminatory employment practices. If the company has a collective bargaining agreement with a union, the union should be afforded an opportunity to make suggestions for improving the affirmative action program.

C. Survey of Employment

The EEOC suggests that even Form EEO-1 is insufficiently detailed for this self-analysis.[257] Rather, the Commission recommends that jobs be classified as they are actually in use in the company, in collective bargaining agreements, or on payroll records. The wage rate (which is not requested on Form EEO-1) and responsibilities should be listed for each job classification or subclassification. Statistics showing minority and female employment when compiled in this manner better portray the status of the employer with regard to Title VII. These statistics can be used to identify areas of "un-

256. 42 U.S.C.A. § 2000e-10 (1974).

257. For an explanation of Form EEO-1 and a complete discussion of record-keeping requirements see section VIII. *infra.*

derutilization"[258] and "concentration,"[259] either of which indicates a strong probability that discriminatory practices, even if inadvertent, are present in the employment system.

The statistics are useful only when compared to the concentration of available minority and female employees in the relevant labor market. An affirmative action program should contain "an area of reasonable recruitment." Under EEOC Guidelines an employer located in a predominantly white county some 30 miles from an urban area with a substantial minority population should recruit in that urban area.

The Affirmative Action Guidelines[260] issued by the Office of Federal Contract Compliance list several factors to determine whether there is underutilization of minorities and females. The factors include the minority or female population in the labor area surrounding the facility, the percentage of these populations which are unemployed, the size of these populations compared to the total work force in the area, the general skills of these populations, and the degree of training reasonably required and that which the employer could reasonably afford to offer.[261] The controlling factor in such a determination is obviously the relevant labor market which varies in each case. As the guidelines reflect, in evaluating the lower-entry jobs it may include the geographic area from which the employer might reasonably expect to draw applicants while in higher jobs it might include only the existing employees who could be reasonably characterized as promotable.[262]

The survey and analysis will be a starting point for instituting appropriate employment goals. Compensation and benefits, usually the easiest and quickest to change, should be standardized for all employees who perform substantially similar work. A timetable should be established for minority and female representation in each classification which corresponds to the available number of

258. Underutilization implies the employment of fewer minority or female employees in the classification than would be expected by reference to the relevant labor market.

259. Concentration refers to a disproportionately greater percentage of minorities in low-level classifications and an equally disproportionate percentage of white males in high-level classifications.

260. 41 C.F.R. § 60-2 *et seq.* (1975).

261. For other factors relevant in a survey of classifications see 41 C.F.R. § 60-2.11(b) (1975).

262. *See* 41 C.F.R. § 60-2.11(b)(2) (1975).

minority and female employees. The concept of eligibility should be reanalyzed to insure that all prerequisites which may hinder the employment or advancement of minorities and females can be justified as essential to the safe and efficient operation of the employer's business.[263] Federal courts have consistently upheld the legality of goals and timetables, instituted to remedy past discriminatory effects and which do not require that an employer hire or promote any individual who is not qualified for the particular job.[264]

D. Development of Programs of Implementation

The survey and analysis may indicate the underutilization of minorities and females in particular job titles. In that instance, the entire employment process must be reviewed to identify the causes of underutilization. This review invariably reveals that there is more to underutilization than the familiar refrain of unavailable or unqualified candidates.

1. Recruitment

The recruitment procedure for each job category should be carefully reviewed to ascertain whether any artificial discriminatory barriers exist. For example, hiring by "word-of-mouth" should be eliminated[265] since relying upon recommendations of the existing work force tends to perpetuate the composition of the existing force. While it is virtually impossible and not altogether desirable to eliminate subjective factors, every employee involved in recruitment and interviewing should be trained to use objective, job-related standards.[266] All advertising should include the phrase "Equal Opportunity Employer, M/F." Copy of the ads should be carefully reviewed to ensure that no preference for race, sex or age is indicated. Advertisements should be inserted in media which will reach

263. For a discussion of the business necessity exception as it affects racial discrimination, which is equally applicable to other forms of discrimination under Title VII, see text accompanying notes 225-30 *supra*.

264. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974).

265. *See* section II.D. *supra*.

266. An "Applicant Flow Record" should be established for each job applicant. This record should contain the position applied for as well as the race, color, national origin, sex, age, referral source, and date of application. The Applicant Flow Record should indicate whether a job offer was made and if not, why. The person making the employment decision should be identified. These records should be used to assemble quarterly reports of the percentages of minority applicants and total minority hirings by job classification.

women and minorities. If reliance is placed upon an employment agency, a statement in writing should be made to the agency that the company is seeking qualified minorities and women. Recruiting visits to colleges with a large enrollment of minorities should be scheduled. Contacts should be developed with community organizations representing the interests of minorities and women. The Regional EEOC offices can provide a list of existing training programs in the community which may be able to supply qualified applicants.

2. *Job-Related Standards and Qualifications*

The EEOC maintains that any employee-selection procedure which has a statistically adverse effect on minorities and females will be *unlawful* unless (a) it is significantly related to job performance and (b) there is no alternative nondiscriminatory standard.[267] The courts tend to require only the first standard—that the qualification be significantly related to job performance.[268] Employee-selection standards include all written tests as well as any biographical and educational data such as the requirement of a high school diploma.[269]

Each step of the selection process, not only for hiring but also for promotion or transfer, must be reviewed to insure that it either does not hinder the employment or advancement of minorities and women or can be validated as job-related. The EEOC has identified the key steps to be monitored indicating the effect of each activity by race, color, national origin and sex.[270] "Validation" is a technical

267. 29 C.F.R. § 1607.3 (1975).

268. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). *But see* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

269. 29 C.F.R. § 1607.2 (1975). *See also* text accompanying notes 23-25 *supra*.

270. 29 C.F.R. § 1607 (1975). Observe the omission of religion, which is ordinarily not included in affirmative action plans. As noted in the textual discussion on religion, *see* section V. *supra*, the main issue has been the degree of accommodation necessary to an employee's (or applicant's) inability to work on given days. This is not to say that an underrepresentation of particular religious groups in certain industries (for example banks and financial institutions) would not create an affirmative action duty.

Furthermore, employers are generally not considered to be under an affirmative action duty with respect to age. Age discrimination is not under the jurisdiction of either the EEOC (Title VII) or the Office of Federal Contract Compliance (Executive Order 11246), both of which are actively involved with affirmative action. *See* note 250 *supra*. But more fundamentally, age discrimination is more susceptible to eradication by "neutral" policies with respect to all employees and applicants; in the current stage of the evolution of discrimination law, it is not generally considered necessary that employers *actively* recruit, hire, train, and promote older workers.

term for a complex process of demonstrating that a particular test or qualification is sufficiently job-related to make that test valid. Validation is required only where an existing selection procedure disproportionately screens out minorities and females. Once management becomes aware of a disproportionate impact caused by a prerequisite, the validation process should begin. To begin the process each affected job should be analyzed to pinpoint the actual tasks performed, their frequency, and the importance of specific traits or skills used on the job.

Job descriptions and hiring standards should reflect the major functions of a particular job title and should not require higher qualifications than an employee needs to perform the job. The Guidelines of the EEOC state that selection standards should not be geared to future promotion unless there is a high probability that employees will attain a higher level job within a *reasonable* period of time.[271] Furthermore, women and minorities cannot be required to meet any selection standards which were not required in the past for employees now performing these jobs in a satisfactory manner.

Under the EEOC Guidelines, validation is a technical and complex process requiring not only trained industrial psychologists, but a statistically adequate employee sample.[272] If feasible, the Guidelines require *criterion-related validation* to show that those workers who are highly rated under a test or selection standard generally perform successfully on the job, while those who score low usually are not successful on the job. Criterion validation necessitates a large sample of applicants.[273] Content validation evidences that the test is an actual sample of the work to be done, such as typing for a secretarial position, while construct validation refers to whether the test or qualification measures some characteristic necessary to the job. These latter methods are less burdensome and costly, but less reliable in the eyes of the EEOC.

Questions on application forms or pre-employment inquiries concerning race, national origin, and religion should be avoided. Inquiries about sex and age may be made if a statement of non-

271. 29 C.F.R. § 1607.4(c)(1) (1975).

272. *Id.* §§ 1607.4, .5 (1975). For many medium-sized or small companies it is not practicable to obtain the services of trained industrial psychologists to validate job qualifications. Under the circumstances, such employers are taking reasonably protective measures by conducting a written evaluation of job functions and qualifications and heeding those results.

273. *Id.* § 1607.5.

discrimination appears at the bottom of the application form.[274] Inquiry should not be made about arrest records (as distinguished from convictions).[275] Questions about credit information, credit ratings, charge accounts, home or car ownership (unless a car is essential to the job) tend to disproportionately disqualify minorities and may be unlawful unless there is a valid business necessity.[276] Information regarding marital and family status should be used narrowly—as an indicator of an individual's stability. The EEOC believes that any questions on marital or family status are subject to abuse, and that the relevant information on job stability can be more reliably obtained elsewhere.[277] The Commission observes that turnover is more a function of job level than marital status. The employer should eliminate height and weight requirements since they disproportionately screen out women and individuals of Hispanic or Oriental extraction.[278] The prevailing view among courts is to permit employers to refuse to hire males with long hair;[279] however, minorities with "Afro" hairstyles should be considered.[280] The courts state that both men and women are held to the same standard—that of being neat and well-groomed.

3. *Job Mobility—Assignment, Promotion, Transfer and Training*

The basic principles of affirmative action for hiring and recruitment are again applicable; if statistical analysis has indicated areas of underutilization, then artificial barriers must be identified. A formal employee evaluation program based upon objective, measurable factors should be developed. In this manner, minorities and females qualified for promotions will be identified. Job performance and length of service of unpromoted minorities and women can be compared with the qualifications of other employees who have received promotions to measure the effectiveness of the program. If transfers or promotions are made a part of the affirmative action

274. *See id.* § 860.95(a).

275. Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972). *See* section II.C. *supra.*

276. EEOC Decision No. 72-0427, 1971 CCH EEOC Dec. ¶ 6312; 41 C.F.R. § 60-2.24(d)(3) (1975).

277. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT 42 (1974).

278. EEOC Decision No. 71-1418, 1971 CCH EEOC Dec. ¶ 6223.

279. Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975).

280. *See* case cited note 74 *supra.*

program, affected employees should be allowed to retain their seniority and wage rates to encourage utilization of the program.

Many jobs can be performed with relatively minimal, inexpensive training. The EEOC states that management training should be a high priority goal in an affirmative action program, especially in view of the small number of minorities and females in management.[281] To achieve this end, a program for career counseling is helpful to encourage employees to qualify for better jobs, particularly at the management level; but care should be used to insure that the program does not produce results which favor one race or sex over another.[282]

4. Layoff, Recall, Discharge and Discipline

All terminations and disciplinary actions should be monitored. If they disproportionately affect minorities and women, the causes should be identified. If there is not a *compelling* business reason for it, the procedure should be changed. Layoff and recall, even if in accordance with an existing collective bargaining agreement, may not be made along job or departmental lines if this policy in fact disproportionately affects minorities and women or curtails their willingness to be transferred or promoted because of the sacrifice of seniority.[283] In some instances, affirmative action is required even when the layoffs and recalls are made by establishment or employment seniority.[284] Whether unionized or not, the company which is faced with a reduction in force might wish to consider (and negotiate with the union for) a shortened work week or work day to avoid layoffs.

E. Revision of Union Contract

Although every collective bargaining agreement should contain a nondiscrimination clause,[285] an employer may not rely upon a labor contract to justify discriminatory practices. The contract should be

281. Affirmative Action, *supra* note 255, at 51.

282. Hiatt v. City of Berkeley, 10 F.E.P. Cases 251 (Cal. Super. Ct. 1975).

283. *See* section III.D. 2 *supra*.

284. *See* Watkins v. Steelworkers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975). *See also* text accompanying notes 56-66 *supra*.

285. For a discussion of the use of the collective bargaining agreement as a tool of enforcement for Title VII see section XI. H. *infra*.

surveyed as company policies would be. Areas in the contract which are in real or potential conflict with Title VII such as departmental seniority or restrictions on maternity leave and pregnancy should be clearly identified. Management and the union should discuss the changes in the labor contract that must be made to comply with fair employment laws. If a provision of the contract clearly discriminates, and the union is unwilling to rectify it, the employer nevertheless may make the change. To do so is not an unlawful refusal to bargain.[286] If the union is unwilling, and the employer fears a strike or other job action, either the employer or interested employees can file an unfair labor practice charge, or the latter may file a complaint with the EEOC. Moreover, the employer can bring suit in its own name under section 301(a) of the National Labor Relations Act.[287]

VIII. RECORDKEEPING AND ACCESS TO RECORDS

The recordkeeping requirements of Title VII are twofold: (1) employers must preserve all personnel records; (2) employers with 100 or more employees must prepare and retain records necessary to complete the Employer Information Report EEO-1 (Form EEO-1).

A. Preservation of Records

All employers must retain personnel or employment records. These shall include, but not be limited to, application forms and records of hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.[288] No records need be kept which relate to application forms and other pre-employment records of applicants for positions which are of a temporary or seasonal nature and known by the applicants to be such.[289]

These records shall be preserved for six months from the date the record was made or from the date of personnel action, whichever occurred later. In the case of involuntary termination, the personnel records shall be kept for six months from the date of termination.[290]

286. 41 C.F.R. § 60-2.21(a)(6), (7) (1975).

287. 29 U.S.C. § 185(a) (1970); *cf.* Jersey Central Power and Light Co. v. IBEW Local Unions, 508 F.2d 687, 698 n.31 (3d Cir. 1975).

288. 29 C.F.R. § 1602.14(a) (1975).

289. *Id.* § 1602.14(b).

290. *Id.* § 1602.14(a).

Where a charge of discrimination has been filed, a complaint issued, or a judicial action initiated, all personnel records relating to the case shall be preserved until the final disposition of the case.[291]

Although EEOC regulations require that records be preserved for only six months, the Age Discrimination Act[292] and the Fair Labor Standards Act[293] require longer recordkeeping periods. The agencies involved—the EEOC for Title VII and the Wage-Hour Administration for the Age Discrimination and Wage-Hour Act—have not officially reconciled the inconsistencies among the various recordkeeping requirements. To ensure compliance with all recordkeeping requirements, the employer is advised to preserve for three years those records indicating name, address, date of birth, job title, working hours (daily and weekly), rate of pay or basis upon which compensation is paid, total daily or weekly straight-time earnings, total weekly overtime compensation, additions to or deductions from wages paid during the pay period, total wages paid each pay period, date of the payment due and the date when payment was made. Records of hiring, promotion, demotion, transfer, layoff or termination, selection for training, the results of any employment test or physical examination used in connection with any personnel action, and advertisements or notices pertaining to personnel actions should be maintained for one year.

B. Form EEO-1

Form EEO-1 was developed jointly by the EEOC and the Office of Federal Contract Compliance as a single form to satisfy the statistical reporting requirements of both Title VII and Executive Order 11246. Only employers with 100 or more employees must file Form EEO-1;[294] an employer of this size is presumed to be in an industry "affecting commerce" and is, therefore, covered by Title VII.[295] Certain employers having fewer than 100 employees are subject to Title VII and must file Form EEO-1 if "the company is owned by or affiliated with another company; if there is centralized ownership, control, and management, such as central control of

291. *Id.*

292. 29 U.S.C. § 621 *et seq.* (1970). *See* 29 C.F.R. § 850.3 (1975) (three years).

293. 29 U.S.C.A. § 201 *et seq.* (1965). *See* 29 C.F.R. § 516.5 (1975) (certain records to be preserved for three years); *id.* § 516.6 (certain records to be preserved for two years).

294. 29 C.F.R. § 602.7 (1975).

295. 1 CCH Employment Practices Guide ¶ 2173 (1975).

personnel policies and labor relations, that the group legally constitutes a single enterprise; and if the entire enterprise employs a total of 100 or more employees."[296]

Prior instructions to Form EEO-1 required an employer covered by Executive Order 11246 to file the form irrespective of any reporting it had done to comply with state or local fair employment laws. The instructions currently in force[297] are silent on this point. The present instructions are similarly silent on whether an employer covered only by Title VII, and not by Executive Order 1246, must file Form EEO-1. Prior instructions provided that such an employer was relieved of the obligation to file. Due to this silence, it is not certain whether compliance with state recordkeeping requirements is adequate. Precaution would dictate compliance with both since a "fundamental policy of the Equal Employment Opportunity Act is to avoid federal action whenever possible by making the state a partner in the enforcement of Title VII."[298]

Form EEO-1 requires a chart of the number of minority and female employees for certain categories as well as the total number of employees in each job title. Employers may maintain post-employment records as to the identity of employees. However, the EEOC recommends that permanent records of employees' racial or ethnic identities be separately maintained for the purpose of completing Form EEO-1.[299]

C. Confidentiality

Section 709(e) of Title VII makes it unlawful for any officer or employee of the EEOC to make public "in any manner whatever" any information obtained by the Commission.[300] Such proscription exists only until proceedings are commenced by the EEOC against an employer. As a practical matter, the degree of confidentiality is often severely limited. This can be traced to two factors: (1) the

296. *Id.* at 1650-51. In addition, multi-establishment employers must file: (a) a report for each establishment where 25 or more persons are employed; (b) a report covering the principal office or headquarters; and (c) a Consolidated Report listing all establishments employing fewer than 25 employees. 41 C.F.R. § 60-1.7(a)(3) (1975).

297. *See* 1975 Employer Information Report EEO-1, 1 CCH Employment Practices Guide ¶ 2173 (1975).

298. EEOC v. Wah Chang Albany Corp., 499 F.2d 187, 189 (9th Cir. 1974) (per curiam).

299. 29 C.F.R. § 1602.13 (1975).

300. 42 U.S.C.A. § 2000e-8(e) (1974).

potential number of parties in a discrimination suit and (2) the Freedom of Information Act.[301] The Fifth Circuit has ruled that section 709(e) does *not* prohibit the EEOC from divulging such information to the parties involved or to their attorneys.[302] Since it often happens in discrimination suits that the plaintiff or one of the plaintiffs is an organization involved on a full-time basis with discrimination, such information is thereby often publicized.

The Freedom of Information Act, enacted to encourage disclosure of official information obtained by federal agencies, may effectively negate the right to confidentiality. A United States district court, relying on the Freedom of Information Act, has held that section 709(e) of Title VII does not prevent the disclosure of Form EEO-1, filed with the Office of Federal Contract Compliance pursuant to Executive Order 11246, to an organization known as the Council on Economic Priorities.[303] Since section 709(e) is a criminal statute in that it makes disclosure a misdemeanor punishable by fine or imprisonment, the court strictly construed it to refer specifically and solely to the EEOC and not to the Office of Federal Contract Compliance. However, the court did order that the company could introduce evidence demonstrating that certain information in its affirmative action plan submitted to the agency might give its competitors access to inside information and, therefore, all or part of the affirmative action plan could be protected from disclosure.

D. Access to Evidence

Section 706(b) of Title VII provides that charges or information cannot be made public by the EEOC without written consent of the persons concerned.[304] In *Parker v. EEOC*,[305] the plaintiff sought copies of all pre-determination settlement and conciliation agreements made during a particular month by the EEOC, the names of persons who filed discrimination complaints and employers and labor organizations charged with discrimination. Although the documents sought were not specifically exempted from disclosure by Title VII and although the court said that the Freedom of In-

301. 5 U.S.C. § 552 (1970).

302. H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5th Cir.) (en banc), *cert. denied*, 412 U.S. 939 (1973).

303. Sears, Roebuck & Co. v. GSA, 384 F. Supp. 996 (D.D.C.), *stay of order dissolved*, 509 F.2d 527 (D.C. Cir. 1974).

304. 42 U.S.C.A. § 2000e-5(b) (1974).

305. 10 F.E.P. Cases 878 (D.S.C. 1974).

formation Act "represents a strong legislature policy advocating broad disclosure of government records and exemptions under the Act are to be narrowly construed,"[306] the disclosure was prohibited. The court reasoned that both types of agreements are part of "informal endeavors" which fall within Title VII's cloak of confidentiality, since both are negotiated prior to any formal court action and with an eye toward avoiding litigation.

The EEOC has the lawful right of access at reasonable times to examine and copy any evidence or to interrogate any person with respect to unlawful employment practices.[307] Section 710 of Title VII,[308] by reference to section 161 of Title 29,[309] grants the EEOC further authorization to issue subpoenas requiring the attendance and testimony of witnesses or the production of any requested data. The courts appear reluctant to sustain objections to information which the EEOC requests. In *Circle K Corporation, Inc. v. EEOC*,[310] the Commission's request for evidence was upheld over the company's objection that compliance with the request would be unduly burdensome. The relevant factor in the court's decision was not whether production of the requested information would be costly and time-consuming, but whether the information requested was relevant to the EEOC's investigation. However, a demand for access to evidence against an employer that operated seven retail department stores was limited to the store from which the plaintiff was discharged, since each store was a separate hiring unit.[311]

Once a complaint of discrimination has been filed in federal court, the Federal Rules of Civil Procedure are available to both parties. The Federal Rules are liberal in permitting access to records, witnesses, and other relevant information in preparation for trial.[312] The basic test of whether information is subject to this process of discovery is relevance. The information is discoverable if it is admissible or "appears reasonably calculated to lead to the discovery of admissible evidence."[313] Rule 26(c) permits a party or the

306. *Id.* at 880.
307. 29 C.F.R. §§ 1601.14 to .18 (1975).
308. 42 U.S.C.A. § 2000e-9 (1974).
309. 29 U.S.C. § 161 (1970).
310. 501 F.2d 1052 (10th Cir. 1974).
311. Joslin Dry Goods Co. v. EEOC, 483 F.2d 178 (10th Cir. 1973).
312. Discovery is also available before commencement of the suit. FED. R. CIV. P. 27(a).
313. *Id.* 26(b).

person from whom discovery is sought to obtain a protective order from the court to limit or prohibit discovery.[314] Two of the typical grounds for such protective orders are that the discovery requested is not relevant to the case or that the requested information would reveal a trade secret or other confidential information.[315]

In *General Insurance Company of America v. EEOC*,[316] the Ninth Circuit held that the EEOC's demand for access to evidence was too broad to be "relevant or material to the charge[s] under investigation" within the meaning of section 710(a). The demand reached back in time nearly eight years and sought evidence going to forms of discrimination not even charged or alleged. In *Motorola, Inc. v. EEOC*,[317] however, an employer charged with discrimination was ordered to provide the EEOC with: (a) a list of existing job classifications with a staffing breakdown as to minority group composition; (b) a list of new hirings and promotions for two specified years, including the job classification and race or ethnic grouping of each individual; (c) access to any agent or employee for interviews relevant to the Commissioner's charge; and (d) an opportunity to tour and observe the employees at work in all of the employer's facilities in the area.

The parties in a Title VII case may obtain discovery by a variety of methods. Perhaps the most important method is written interrogatories which must be answered "separately and fully in writing under oath."[318] When faced with a substantial list of interrogatories, the employer again has the right to petition for a protective order if the interrogatories are too broad or the preparation of answers requires an unreasonable amount of time and an unreasonable expenditure of money by defendant.[319]

IX. REMEDIES

The key to effective enforcement is effective remedies. Section 706(g) of Title VII[320] authorizes the federal courts to choose from a broad range of remedies if the court determines that the employer

314. *Id.* 26(c).
315. *See, e.g.*, Crockett v. Virginia Folding Box Co., 61 F.R.D. 312 (E.D. Va. 1974).
316. 491 F.2d 133, 136 (9th Cir. 1974).
317. 5 F.E.P. Cases 1379 (D. Ariz. 1973).
318. FED. R. CIV. P. 33(a).
319. Jones v. Holy Cross Hosp. Silver Spring, Inc., 64 F.R.D. 586, 591 (D. Md. 1974).
320. 42 U.S.C.A. § 2000e-5(g) (1974).

has committed or is committing unlawful employment practices. The court's resulting order can be so extensive as to cause considerable expense and change in operating procedures to the employer.[321]

A. Proscribing Retaliation

Section 704(a)[322] protects individuals from reprisals because of opposition to unlawful employment practices. This opposition may manifest itself in several forms: filing of complaints with administrative agencies or courts; disobeying orders; filing grievances; picketing; and encouraging boycotts. In *Pettway v. American Cast Iron Pipe Co.*,[323] a black employee who had filed a complaint against his employer with the EEOC was allegedly suspended for engaging in an altercation with a fellow worker. He was then discharged after alleging that his employer had bribed an EEOC investigator. The employee petitioned for injunctive relief, claiming that his dismissal was in retaliation for his opposition to racial discrimination. In granting the claim, the Fifth Circuit said that the bribery charge was protected, even though it may have contained malicious material.[324] The court further stated that "exceptionally broad protection" was intended for those employees whose actions fell within section 704(a).

In order to establish a prima facie violation of section 704(a), the complainant must establish that: (a) he has opposed employment discrimination *or* has participated in a proceeding in which an employment practice is alleged to be unlawful under Title VII; (b) he has been discriminated against by the respondent; and (c) the discrimination took place because of the complainant's opposition or participation. Intention being the determinative factor, the employee has the burden of proving that he had the intent to "oppose"

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321. *See, e.g.*, Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382 (D.D.C. 1974).

322. 42 U.S.C.A. § 2000e-3(a) (1974).

323. 411 F.2d 998, *petition for rehearing denied*, 415 F.2d 1376 (5th Cir. 1969). *See also* 11 A.L.R. Fed. 302 (1972).

324. The court reached this conclusion in light of the purpose of section 704(a):

> In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action. *Id.* at 1005.

The federal courts possess inherent equitable powers to protect from reprisal litigants whose administrative or judicial actions are pending disposition. *See* Drew v. Liberty Mut. Ins. Co., 480 F.2d 69 (5th Cir. 1973), *cert. denied*, 417 U.S. 935 (1974); Pennsylvania v. Engineers Local 542, 347 F. Supp. 268 (E.D. Pa. 1972).

within the meaning of section 704(a). Threatening to oppose discriminatory acts, either by filing formal complaints or by engaging in forms of concerted activity, may constitute "opposition."[325] In addition, the complainant must show a difference between the treatment given him by his employer before and after his opposition, or a difference between the treatment of himself after his opposition and the treatment of nonopposers and that the employer had received notice of the opposition. Employers commonly defend against charges of retaliation by claiming that they had "independent grounds" for their action.[326]

B. Injunctive Relief Against Discrimination

Section 706(g) of Title VII[327] empowers the courts to enjoin an employer or labor union or employment agency from engaging in any unlawful employment practice.[328] A mere prohibition of future discrimination is not usually sufficient. Employment practices, neutral on their face, become suspect and many times unlawful because of their tendency to lock in the effects of the past. The courts therefore are also empowered to "order such affirmative action as may be appropriate."[329]

Courts have ordered the immediate offer of a position or promotion to an employee who has suffered discrimination. Illustrative of this remedy is a case where an individual was not hired because of a refusal, on religious grounds, to work on Fridays.[330] Pending possible accommodation between the parties, the court directed the individual's immediate employment. In another case involving a far-reaching modification of a discriminatory seniority system, a federal court ordered a company—without laying off any other employees—to recall immediately all black employees laid off under the old seniority plan until the racial percentage of the work force equalled that which existed when the last employee was hired.[331] These cases

325. EEOC Decision No. 71-2338, 1971 CCH EEOC Decisions ¶ 6247.

326. For a further discussion see Spurlock, *Proscribing Retaliation Under Title VII*, 8 Ind. L. Rev. 453 (1975).

327. 42 U.S.C.A. § 2000e-5(g) (1974).

328. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 243-51, *petition for rehearing denied*, 494 F.2d 1296 (5th Cir. 1974).

329. 42 U.S.C.A. § 2000e-5(g) (1974). *See also* section VII. A., *supra*.

330. Roberts v. Hermitage Cotton Mills, 8 F.E.P. Cases 315 (D.S.C. 1973), *aff'd*, 498 F.2d 1397 (4th Cir. 1974).

331. Watkins v. Steelworkers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975).

illustrate that despite expense to the employer, the remedies of Title VII available to individual plaintiffs are to be quickly instituted.

In addition to the immediate hiring or promotion of individual plaintiffs, the courts have usually ordered that numerical goals be established for hiring and promotion "to eradicate the effects of past discriminatory practices."[332] In interpreting either Title VII or Executive Order 11246, eight circuits have upheld such numerical goals.[333] This judicial development is somewhat surprising in view of section 703(j) of Title VII[334] which was originally thought to exclude hiring based upon fixed percentages. Goals may also be linked to a particular hiring ratio. Thus, to remedy discriminatory practices which previously excluded minorities from certain positions, the court in *United States v. N.L. Industries, Inc.*[335] ordered that foremen be selected by merit from a roster of eligible candidates, the roster being open equally to whites and blacks. The court directed that a one-white-to-one-black hiring ratio be utilized until 15 blacks held the foreman position.

Stated simply, "[r]acial quotas, generally, are viewed in our law with suspicion. They tend to freeze official conduct in the future by reference to yesterday's conditions."[336] When a remedy is fashioned on a class quota basis, it leads to insoluble problems and piles discrimination on top of discrimination. For this reason employers should avoid all quota systems for minority and female employees. The courts have gone to great lengths to avoid labeling plans as

332. Rios v. Steamfitters Local 638, 501 F.2d 622, 630 (2d Cir. 1974).

333. Morrow v. Chrisler, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 361 F. Supp. 1293 (D. Mass.), *aff'd*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (*en banc*); United States v. IBEW Local 212, 472 F.2d 634 (6th Cir. 1973); United States v. Lathers Union Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

334. 42 U.S.C.A. § 2000e-2(j) (1974).

335. 479 F.2d 354 (8th Cir. 1973). *See also* United States v. Lee Way Motor Freight, Inc., 7 F.E.P. Cases 710, 749 (W.D. Okla. 1973).

336. Hiatt v. City of Berkeley, 10 F.E.P. Cases 251 (Cal. Super. Ct. 1975). *See also* Lige v. Town of Montclair, 10 F.E.P. Cases 1075, 1077 (N.J. Super. 1975).

"quotas," so that their validity may be upheld.[337] The Second Circuit sustained a trial court's determination that a percentage goal for nonwhites be achieved in three years.[338] The case was remanded, however, to redetermine what figure was appropriate. The lower court had examined the nonwhite percentages in the total population. The court of appeals explained that more relevant was the percentage of nonwhites over 18 years old in the work force. Further, the court expanded the geographic area from which minority group statistics were to be obtained to include the suburbs as well as the city.[339]

The same considerations have been applied when the unlawful act was a failure to promote or transfer. Judicially-mandated transfer systems usually require employers to allow "rate retention" and "seniority carryover" to encourage their full utilization.[340] Otherwise, past discrimination would continue not because of a policy of segregation but because of the economic disincentives to transfer. Other aspects of the employment situation are equally susceptible to change by affirmative action. Courts have ordered employers to institute training programs which qualify minorities for the better jobs,[341] to actively recruit minority applicants,[342] to revise testing and selection procedures that showed a disparate impact on minorities,[343] and to merge existing seniority systems which reflected prior job segregation.[344]

C. Back Pay

The Supreme Court recently stated that back pay should usually be awarded in cases where there is a finding of unlawful discrimination.[345] This expansive view of back pay was explained by the Fifth

337. *See* Firebird Soc. v. Board of Fire Comm'rs, 10 F.E.P. Cases 593, 598 (D. Conn. 1975), in which the court labeled a settlement agreement placing a certain number of blacks on a city fire department's promotion eligibility list as "interim priority relief."

338. Rios v. Steamfitters Local 2369, 501 F.2d 622 (2d Cir. 1974).

339. For the position of the Office of Federal Compliance see text accompanying note 262 *supra.*

340. *See, e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652, 660 (2d Cir. 1971).

341. *See, e.g.*, Frank v. Bowman Transp. Co., 495 F.2d 398 (5th Cir.), *cert. denied*, 95 S. Ct. 625 (1974), *petition for rehearing denied*, 95 S. Ct. 1417 (1975).

342. *See, e.g.*, United States v. Georgia Power Co., 474 F.2d 906, 926 (5th Cir. 1973).

343. *See, e.g.*, Castro v. Beecher, 365 F.Supp. 655, 662 (D. Mass. 1973).

344. *See, e.g.*, Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974). *See also* section II.B. *supra.*

345. Albemarle Paper Co. v. Moody, 95 S.Ct. 2363, 2372 (1975).

Circuit:

> Under Title VII . . . the injured workers must be restored to the economic position in which they would have been *but for* the discrimination—their "rightful place." Because of the compensatory nature of a back pay award and because of the "rightful place" theory, adopted by the courts, and of the strong congressional policy, embodied in Title VII, for remedying employment discrimination, the scope of a court's discretion to deny back pay is narrow.[346]

The courts have been applying the back pay remedy with extraordinary flexibility.[347] It is even possible for an individual who has not formally applied for work to be entitled to back pay. In one case a black employee suffered an injury which prevented him from performing his normal work.[348] The injury was not serious enough to have hindered him in the performance of less strenuous jobs reserved for white workers. Back pay was ordered even though the employee did not apply for any of those jobs. The employee successfully maintained that he knew from years of experience that applying for a less physically demanding job would be fruitless.

Prior cases held that back pay in Title VII class actions could be awarded only to individually named plaintiffs, as opposed to class members generally. Recent cases, on the other hand, have taken the position that an individual plaintiff in a Title VII class action for injunctive relief may properly assert both his own claim for back pay and that of other class members similarly affected by the alleged

346. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252, *petition for rehearing denied*, 494 F.2d 1296 (5th Cir. 1974).

347. Back pay has been awarded when various types of employment practices exist. *See, e.g.*, Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973) (discriminatory termination through retirement); Rock v. Norfolk & West. Ry., 473 F.2d 1344 (4th Cir.), *cert. denied*, 412 U.S. 933 (1973) (discriminatory hiring practices); Danner v. Phillips Petroleum Co., 447 F.2d 159, *rehearing denied*, 450 F.2d 881 (5th Cir. 1971) (discriminatory termination through layoff); Glus v. G.C. Murphy Co., 329 F. Supp. 563 (W.D. Pa. 1971) (on-the-job discrimination with respect to seniority, promotion and transfer rights, allowance of overtime work, and rate of pay); United States v. Lathers Union Local 46, 328 F. Supp. 429 (S.D.N.Y. 1971), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) (discriminatory practices of labor unions); Anderson v. Methodist Evangelical Hosp., Inc., 4 F.E.P. Cases 33 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972) (discriminatory termination through discharge).

As with on-the-job discrimination, this rule is not uniform. *See* United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973). Some courts have refused to award back pay even though a violation of Title VII was found. *See* Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973).

348. Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971).

discriminatory employment practices, regardless of whether such class members have exhausted EEOC remedies.[349] In a class action for back pay claims when the class representative-plaintiff has settled his own claim with the defendant or has not succeeded in establishing his individual right to relief, the class action may nevertheless still be maintained and the class members' back pay claims asserted. Such is the case even though the class representative-plaintiff is not himself eligible for such relief.[350] Recent cases also hold that the federal government, when it brings a civil suit, may seek back pay relief for victims of discriminatory practices; the amount of the award may be determined in the same action that establishes the unlawfulness of the particular practice.[351] The courts usually approve negotiation between the named parties to out-of-court settlements of all back pay claims in a class action despite objections of some members of the class.[352]

Since the object of a back pay award is to effect restitution, such award will not be limited to "straight time pay" but will include overtime and premium pay, and will further take into account raises and promotions which would have been earned. For example, the effect of promotions can be included in the computation of back pay even though precise calculation is impossible. Approximations can be made by averaging the salary history of similarly situated employees[353] and interest may be included at the prevailing legal rate.[354] The usual measure of damages in back pay cases is the amount the claimant would have earned in the absence of unlawful discrimination, reduced by the "[i]nterim earnings or amounts earnable with reasonable diligence."[355] The cases conflict as to whether unemployment compensation received by a claimant should be deducted from his back pay award. Back pay in a Title VII action cannot accumulate more than two years prior to the filing of charges with the

349. For example, in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974), classwide back pay was available upon proper factual proof of an individual's claim, and demonstrated deprivations based on racial discrimination by the employer affecting the aggrieved class.

350. *See, e.g.*, Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

351. *See, e.g.*, United States v. AMBAC Indus., Inc., 3 E.P.D. ¶ 8210 (D. Mass. 1971).

352. Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799 (3d Cir.), *cert. denied*, 419 U.S. 900 (1974).

353. Hodgson v. Cook, 20 Wage & Hour Cas. 941 (C.D. Cal. 1972).

354. Peters v. Missouri Pac. R.R., 3 F.E.P. Cases 792 (E.D. Texas 1971), *aff'd*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973).

355. 42 U.S.C.A. § 2000e-5(g) (1974).

EEOC.[356] While an individual is awarded back pay from the date he should have been hired or promoted, most courts have refused to award retroactive seniority from that date.[357] The Sixth Circuit recently observed, however, that nothing in Title VII prohibits such an award.[358] In remanding a case to the trial court, the appellate court also observed that merely because back pay is appropriate does not justify retroactive seniority. The lower court, in dealing with seniority, must consider the interests of other workers and not just the interests of the employer.

Various defenses have been asserted against back pay awards, the major one being that the defendant did not "intentionally" violate the statute. This defense is based upon the language of section 706(g), which authorizes an award of back pay "if the court finds that the respondent has intentionally engaged in or is intentionally engaging in" an unlawful employment practice.[359] The courts generally have refused to consider the lack of intent to discriminate as a valid defense.[360] Good-faith reliance on state "protective" statutes, such as those which limit women's hours or lifting requirements, is usually upheld as a valid defense.[361] Under section 713(b) of Title VII,[362] reliance on EEOC written interpretations or opinions is a valid defense against the award of back pay, but the document relied upon must strictly conform to the EEOC regulations under that section.[363]

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356. *Id. See also* EEOC v. Detroit Edison Co., 10 F.E.P. Cases 239, 249 (6th Cir. 1975). In an action brought to recover back wages under the Equal Pay Act, 29 U.S.C.A. § 206(d) (1965), the same time period applies unless the violation is willful in which case the period is three years. "Willful" means intentional and the courts have found such violations are easily discoverable. *See* note 196 *supra*. A back pay award under 42 U.S.C. § 1981 is not restricted by the limitation in Title VII. Johnson v. Railway Express Agency, Inc., 95 S. Ct. 176 (1975).

357. *See, e.g.*, United States v. Detroit Edison Co., 10 F.E.P. Cases 239 (6th Cir. 1975); Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), *cert. granted*, 95 S. Ct. 1421 (1975).

358. Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975).

359. 42 U.S.C.A. § 2000e-5(g) (1974).

360. In the Civil Rights Act of 1964, the term "intentional" means that defendants intended to do what they did, not that there was a willful and deliberate intention to violate the law. Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056, 1065 (D. Ore. 1974). *See also* Norman v. Missouri Pac. R.R., 497 F.2d 594 (8th Cir. 1974), *cert. denied*, 95 S.Ct. 826 (1975).

361. Garneau v. Raytheon Co., 341 F. Supp. 336 (D. Mass. 1972).

362. 42 U.S.C.A. § 2000e-12(b) (1974).

363. *See, e.g.*, Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

The present good-faith efforts of a defendant to eliminate past discriminatory employment practices have generally not been recognized as a defense against award of back pay in a Title VII action.[364] Even the unsettled state of the law as to back pay awards to discriminatees under Title VII is generally not a valid defense against an award of back pay.[365] Failure of the plaintiff to make a timely request for back pay has previously been asserted successfully as a defense against court consideration of back pay awards under Title VII, but recent authority holds that such a failure should not prejudice the right to recover back pay.[366] In arbitration proceedings under a collective bargaining agreement, a final decision adverse to a back pay claimant does not preclude that claimant from asserting his right to relief from allegedly discriminatory employment practices in judicial proceedings under Title VII.[367]

A claimant for back pay under Title VII must establish that he has suffered actual monetary damage as a result of the discriminatory employment practice in question, and this requirement applies to each member of a class.[368] However, the courts refuse to consider the difficulty of determining eligibility for, or amounts of, individual back pay awards as a defense against an award of back pay once unlawful discrimination under Title VII has been established.[369]

The Sixth Circuit has refused to award punitive damages against

364. *See* Albemarle Paper Co. v. Moody, 95 S.Ct. 2362, 2374 (1975). The Court noted, "[u]nder Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor." Thus the Court held that "given a finding of a violation of Title VII, back pay should be denied only for reasons that would not frustrate the central purposes of Title VII—of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."

365. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

366. *See, e.g.*, United States v. Hayes Int'l Corp., 456 F.2d 112, 121 (5th Cir. 1972).

367. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), in which back pay claims were not barred by an adverse arbitration decision because in arbitration an employee seeks to vindicate his rights under a collective bargaining agreement, while under Title VII he asserts independent statutory rights accorded by Congress.

368. *See* United States v. Lathers Union Local 46, 328 F. Supp. 429 (S.D.N.Y. 1971), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

369. *See, e.g.*, Mill Workers Local 186 v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284 (N.D. Ind. 1969). Other defenses to back pay awards have been rejected. *See* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (finding by EEOC of "no reasonable cause" at administrative level); King v. Laborers Local 818, 443 F.2d 273 (6th Cir. 1971) (discrimination not the sole cause of the act for which recovery was sought); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971) (failure of claimant to demand reinstatement).

the employer.[370] Referring to section 706(g) of Title VII which confers upon the federal courts broad remedial powers, the Sixth Circuit ruled that no authority had been found in section 706(g) for the award of punitive damages. "We know of no authority which holds that the awarding of punitive damages is equitable relief."[371] At the district court level, a majority of courts have followed this reasoning and have also denied punitive damages.[372]

D. Attorneys' Fees and Court Costs

Attorneys' fees have been awarded under section 706(k) of Title VII[373] to the prevailing party, other than the EEOC or the United States, as part of the costs of the action. Such awards are not infrequent; paying for plaintiff's attorneys' fees, according to the courts, encourages the bringing of suits which discriminatees would otherwise be unable to afford.[374] While a rare occurrence, section 706(k) also authorizes a court to award attorneys' fees to employers when bringing suit against the EEOC.[375]

Although statutory language plainly states that the allowance of attorneys' fees is discretionary with the court, a prevailing plaintiff is usually entitled to the award while a prevailing defendant in private suits generally is not.[376] However, the rule is different when

370. EEOC v. Detroit Edison Co., 10 F.E.P. Cases 239 (6th Cir. 1975).

371. *Id.* at 244.

372. *See* Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973), *appeal dismissed*, 497 F.2d 180, *subsequent order*, 503 F.2d 1131 (9th Cir. 1974); Howard v. Mercantile Commerce Trust Co., 10 F.E.P. Cases 158 (E.D. Mo. 1974). *But see* Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974); Waters v. Heublein, Inc., 8 F.E.P. Cases 908 (N.D. Cal. 1974). The *Waters* case relied upon the award of punitive damages by the lower court in *Detroit Edison*, which was reversed by the Sixth Circuit.

373. 42 U.S.C.A. § 2000e-5(k) (1974).

374. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The court gave an exhaustive explanation of the guidelines to be used in determining the appropriate compensation. *Id.* at 717-19.

375. Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974).

376. This rule has *not* been altered despite a variety of possibly mitigating factors. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971) (defendant presents meritorious defenses); Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971) (suit instituted as "test case"); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 430 (8th Cir. 1970) (suit instituted as class action); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 611 (E.D. La. 1971), *aff'd per curiam*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1973) (defendant acted in good faith reliance on state statute); Clark v. American Marine Corp., 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971) (per curiam) (prevailing party had no obligation to pay a fee to his attorney).

the suit is instituted by the federal government. Section 706(k) specifically provides that the United States may be liable for attorneys' fees as part of the costs awarded the prevailing party in a Title VII action.[377]

The determination of the amount of the attorney's fee is generally held to be within the discretion of the court,[378] which often defers determination of the award until the parties have failed to agree on the amount.[379] In fixing the amount of the award, the courts generally consider the factors which the American Bar Association's Code of Professional Responsibility lists as proper in fixing the amount of an attorney's fee.[380] Such fees may be awarded even when an employee fails to prove that the employer violated Title VII, as long as the evidence was sufficient to justify the employee's claim.[381] In addition to reasonable attorneys' fees, the costs of services rendered during the course of the proceeding are also recoverable. Such costs include fees for the prosecution of the original trial and appeal on the merits, and fees for defending (but not for challenging on appeal) the amount of such fee.[382]

E. Actions Against Labor Unions

Where unions discriminate against an employee, they are denied the right to represent all employees in the unit.[383] The duty of the union includes a statutory obligation to serve the interests of *all*

377. United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

378. Culpepper v. Reynolds Metals Co., 442 F.2d 1078 (5th Cir. 1971).

379. Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

380. *See, e.g.*, Clark v. American Marine Corp., 320 F. Supp. 709 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971) (per curiam).

381. Thomas v. J. C. Penney Co., 10 F.E.P. Cases 319 (E.D. Tex. 1975).

382. A district court in Texas, in addition to $47,500 in attorneys' fees awarded $3,000 to an expert witness as well as an unspecified sum for "[s]uch other and further costs which are ordinarily taxable in litigation of this nature." Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974).

383. Were we, as an arm of the Federal Government, to confer the benefits of a certification upon a labor organization which is shown to be engaging in a pattern and practice of invidious discrimination, the power of the Federal Government would surely appear to be sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment. Moreover, such action on our part would clearly be anomalous in view of the Federal Government's express policy against such discrimination and the many laws which prohibit it. Bekins Moving & Storage Co., 1974 CCH NLRB Dec. ¶ 26,575. *See also* Hughes Tool Co., 1964 CCH NLRB Dec. ¶ 13,250.

members without hostility or discrimination toward any.[384] A union cannot act in a discriminatory manner in referring applicants for employment nor can it act to prevent racial minorities or women from qualifying for union membership.[385] The Third Circuit has stressed the fact that a union will not always have to press an employee's complaint through every stage of the grievance procedure, but can exercise a certain degree of discretionary power to settle or even to abandon a grievance.[386] This is true even if it can later be demonstrated that the employee's claim was meritorious. But the exercise of such discretion cannot be affected by considerations of race, sex or other factors susceptible of discriminatory abuse.

In fashioning a remedy against a labor union which maintained, within one bargaining unit, two separate locals segregated solely on the basis of sex, the NLRB and a federal district court have reached the same result but with different remedies. In one case,[387] the Board found that the segregation constituted an unfair labor practice and ordered merger of the two locals and institution of a single grievance procedure. In the district court case,[388] it was found that the segregation constituted a per se violation of Title VII and payment of monetary damages was ordered. The difference in remedies is due to the statutory provision in the National Labor Relations Act (NLRA) that limits the power of the Board to grant broad affirmative or compensatory relief.[389] On the other hand, Title VII[390] gives the courts the power to fashion remedies that directly serve anti-discrimination policies. This difference of available remedies is important since the Board and the courts have concurrent jurisdiction over complaints alleging discrimination by unions. While the NLRB has the power to grant monetary damages in certain circumstances, the Supreme Court has held that such relief must be remedial or

384. Vaca v. Sipes, 386 U.S. 171, 177 (1967).

385. Pacific Maritime Ass'n, 1974 CCH NLRB Dec. ¶ 26,301. *See also* Miranda Fuel Co., 1966 CCH NLRB Dec. ¶ 11,848, *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

386. Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970).

387. Owens-Illinois Inc., 1974 CCH NLRB Dec. ¶ 26,539, *enforcement granted*, 520 F.2d 693 (6th Cir. 1975).

388. Evans v. Sheraton Park Hotel, 5 F.E.P. Cases 393 (D.D.C. 1972), *remanded on other grounds*, 503 F.2d 177 (D.C. Cir. 1974).

389. 29 U.S.C. § 160(c) (1970).

390. 42 U.S.C.A. § 2000e-5(g) (1974).

compensatory, and not punitive.[391] As a result, the NLRB will only award damages when there is specific evidence of economic injury. The NLRB has two other remedies available: decertification of the bargaining representative and removal of the contract bar thereby exposing the union to the drives of rival unions. Neither of these, however, is effective against a well-established incumbent union that can prevail in an election and then continue its discriminatory practices.

Contrasted with the narrow affirmative relief powers of the NLRB are the broad powers of federal courts in Title VII suits. When ordering merger of separate lines of progression as a remedy, the courts have devised supplementary orders to protect minority rights. For example, one court's order to establish a single line of progression included specific guarantees of minority participation in the new union.[392] In *Thornton v. East Texas Motor Freight, Inc.*,[393] qualified black city drivers who were not transferred to over-the-road positions because of racial discrimination were relieved of payment of all union dues for a period equivalent to the length of time that they had affirmatively sought such transfer.

Labor unions commit unlawful employment practices in violation of section 703(c) of Title VII[394] by negotiating collective bargaining agreements which contain provisions discriminating against employees because of their sex.[395] In such situations governed by collective bargaining agreements, a union as well as an employer is re-

391. UAW v. Russell, 356 U.S. 634 (1958).

392. Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536, *subsequent order*, 319 F. Supp. 314 (1970), *re-aff'd in part*, 321 F. Supp. 1241 (E.D. La. 1971). For a further discussion of this topic see Comment, *Remedies for Labor Union Sex Discrimination*, 63 GEO. L.J. 939 (1975).

393. 7 F.E.P. Cases 1239 (W.D. Tenn. 1972).

394. 42 U.S.C.A. § 2000e-2(c) (1974).

395. A district court held that local and international unions which established seniority and compensation plans limiting promotions and pay because of sex violated section 703(c). *See* Glus v. G.C. Murphy Co., 329 F. Supp. 563 (W.D. Pa. 1971). Retirement plans, adopted pursuant to collective bargaining agreements, which treat men and women differently with respect to retirement age are also violations. *See* Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). Labor organizations are also deemed to have violated Title VII by failing or refusing to represent fairly or process the grievances of female employees because of their sex. *See* Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970). However, labor organizations do not violate Title VII by failure to protest discriminatory state laws. *See* Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd*, 444 F.2d 1219 (9th Cir. 1971).

sponsible when, for example, the seniority system created by its contract perpetuates the effects of past discrimination.[396]

X. PROCEDURE

A. Prerequisites to Bringing a Suit

In pursuing the right of redress for discriminatory practices, several avenues are open to the plaintiff. Under Title VII, however, the statutory scheme requires that certain prerequisites be met prior to the institution of a civil action in federal court.[397]

1. Initial Filing with State Fair Employment Agency

If the state or locality has a law prohibiting the challenged unlawful employment practice, the EEOC will not consider a Title VII charge unless it has initially been filed with the state or local agency.[398] Upon the expiration of sixty days following the date of filing with that agency, the aggrieved party may file with the EEOC. The passage of sixty days is the only condition to filing; it is unnecessary that the state agency complete its action. However, the party alleging discrimination need not wait the full 60 days if proceedings before the state agency are terminated in less than 60 days by, *e.g.*, the refusal to issue a complaint.[399] The EEOC has officially designated over 50 state and local agencies as "Section 706 Agencies" to which it will defer.[400]

On the other hand, the Supreme Court has sanctioned a procedure which effectively obviates the need to resort to the state agency. In *Love v. Pullman Co.*,[401] the Court upheld the EEOC's practice of accepting a charge simultaneously filed with the state agency, that was investigated after the expiration of sixty days without requiring that a new charge be filed. This case does not necessarily imply that an individual or class of individuals claiming discrim-

396. United States v. Time-DC, Inc., 11 F.E.P. Cases 66, 78 (5th Cir. 1975). *See also* Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 61-62 (5th Cir. 1974).

397. For a complete discussion of the nonapplicability of these Title VII prerequisites to section 1981 suits see Comment, *Title VII and 42 U.S.C. § 1981: Two Independent Solutions*, 10 U. Rich. L. Rev. 339 (1975).

398. 42 U.S.C.A. § 2000e-5(c)(1974). Virginia has no such state equal employment law.

399. *Id.* § 2000e-5(d). For a new state or local law, the 60 day period is enlarged to 120 days during the first year after its effective date. *Id.*

400. 29 C.F.R. § 1601.12(m) (1975).

401. 404 U.S. 522 (1972).

ination can bypass the state agency by filing with the EEOC following the expiration of the state filing period. The Tenth Circuit has held to the contrary. In *Dubois v. Packard Bell Corp.*,[402] the New Mexico state law had required that a charge be filed with the New Mexico Human Rights Commission within ninety days of the occurrence of the alleged unlawful employment practice.[403] The employee failed to file with the state agency, but 144 days after resigning from her job with the employer, she filed a charge with the EEOC. The court ruled that the charge must be dismissed as being untimely filed, since the employee did not afford "the state commission a bona fide opportunity to act upon the claims."[404]

The charge must be filed with the EEOC within 180 days after the occurrence of the alleged unlawful employment practice. This period is extended or tolled when the aggrieved employee actively pursues his other remedies. If, as is required in states and localities with their own fair employment commissions, a charge has been filed with the state or local commission, then the 180 day period for filing with the EEOC is extended to either (a) 300 days after occurrence of the alleged unlawful employment practice, or (b) 30 days after receiving notice that the state or local agency has terminated the proceedings under the state or local law, whichever is earlier.[405] The Eighth Circuit has held that an individual who files a charge with the state fair employment agency within 180 days of the alleged discriminatory act may take advantage of the 300 day period, even if the state limitations period is less than 180 days.[406] A timely state filing is not required to obtain the benefit of the extended filing period with the EEOC. Likewise, where filing a charge with the EEOC has been delayed because of recourse to the grievance machinery of a collective bargaining agreement, the charge will not be dismissed as untimely. The EEOC's statute of limitations is tolled "while an employee in good faith pursues his contractual grievance remedies in a constructive effort to obtain a private settlement."[407]

402. 470 F.2d 973 (10th Cir. 1972).

403. *See* N.M. STAT. ANN. § 4-33-9A (Supp. 1971).

404. 470 F.2d at 975.

405. 42 U.S.C.A. § 2000e-5(e) (1974).

406. Olson v. Rembrandt Printing Co., 10 F.E.P. Cases 27, 29 (8th Cir. 1975).

407. Malone v. North Am. Rockwell Corp., 457 F.2d 779, 781 (9th Cir. 1972) (per curiam). *See also* Sanchez v. Trans World Airlines, Inc., 499 F.2d 1107 (10th Cir. 1974).

2. Procedural Timetable for Processing a Charge

Title VII provides that the employer, once the charge has been filed with the EEOC, must be notified within ten days that the charge has been filed.[408] But due to the heavy backlog of cases at the EEOC, courts have excused delays of as long as one year in giving notice that a charge has been filed. One court justified the delay by explaining that giving the employer notice only when the EEOC is ready actually to proceed with the case will minimize employer reprisals.[409]

The EEOC must investigate to determine whether there is reasonable cause to believe that an unfair employment practice has been committed.[410] In determining whether reasonable cause exists, the Commission is required to "accord substantial weight" to final findings and orders issued by state or local authorities and is under a duty to make its determination on reasonable cause as promptly as possible and, if practicable, within 120 days of the filing of the complaint.[411] If the EEOC finds that there is reasonable cause to believe that the unfair employment practice exists, "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."[412] Having obtained no conciliation agreement from the employer within 30 days, it may sue in federal district court.[413] However, if no reasonable cause exists and the charge is dismissed, then the Commission must so notify the aggrieved employee and give him notice of his right to bring a civil action.[414] An employee may pursue his remedy under section 706(e) through the federal courts, even though the EEOC has found no reasonable cause to believe that the employee's allegations of discrimination are true.[415]

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408. 42 U.S.C.A. § 2000e-5(b) (1974).

409. Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972). *See also* EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1329 (D. Del. 1974).

410. 42 U.S.C.A. § 2000e-5(b) (1974).

411. *Id.*

412. *Id.*

413. *Id.* § 2000e-5(f)(1)(3). The Commission may still decline suit because of its case load or some other reason.

414. *Id.* § 2000e-5(f)(1). The EEOC has 180 days in which to sue. The notification is by a notice-of-right-to-sue letter and the aggrieved party then has ninety days in which to sue.

415. Fakete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970). This is true even in a class action suit. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

Should the EEOC decide to sue, the suit is not limited to the practices complained of in the charge. In *EEOC v. Raymond Metal Products Co.*,[416] an employee charged that in a recall from a layoff he was discriminated against because of his Greek national origin. After investigation, the EEOC found reasonable cause to believe not only that national origin discrimination existed, but also that the employer discriminated on the grounds of race and sex. Upholding the broadening of the investigation, the federal court ruled that the scope of the complaint filed in court to commence the judicial proceedings is defined by the scope of the EEOC's investigation; it is not limited to the subject matter of the original charge filed with the EEOC.[417]

3. *Conciliation Proceedings by EEOC*

Some cases have held that an aggrieved party must first give the EEOC the opportunity to conciliate the alleged unlawful employment practice before he may bring a civil action under Title VII.[418] An actual attempt at conciliation by the EEOC, however, is not a jurisdictional prerequisite to the maintenance of a civil action by an aggrieved party,[419] though it is a condition precedent which the EEOC usually satisfies before it can bring suit against an employer or union.[420]

4. *Exhaustion and Election of Remedies Under Title VII*

Title VII does not expressly provide that it is the exclusive remedy for racial discrimination in employment. Therefore, the courts have had to decide whether the failure of a plaintiff to exhaust his remedies under Title VII will bar his right to bring suit under section 1981. The courts were divided prior to the Supreme Court's decision in *Johnson v. Railway Express Agency, Inc.*[421] Some held exhaustion of Title VII procedures was not a jurisdictional prerequisite to the maintenance of a section 1981 action, reasoning that Title VII was

416. 385 F. Supp. 907 (D. Md. 1974).

417. *Id.* at 915.

418. *See, e.g.*, Mickel v. South Carolina State Empl. Serv., 377 F.2d 239 (4th Cir.), *cert. denied*, 389 U.S. 877 (1967).

419. *See, e.g.*, Johnson v. Seaboard Air Line R. Co., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

420. EEOC v. Container Corp., 352 F. Supp. 262 (M.D. Fla. 1972).

421. 421 U.S. 454 (1975).

not intended to be an exclusive remedy for employment discrimination and did not repeal, amend nor pre-empt section 1981.[422] Others, while not directly confronted with the problem, reached the same result by holding that a plaintiff who was barred from Title VII action by a jurisdictional defect could still rely upon section 1981.[423]

The rationale of courts holding the conflicting view was that national policy reflected in Title VII was to encourage resort to the EEOC for nonjudicial resolution of complaints, even during the pendency of a section 1981 action. The plaintiff should be able to bypass Title VII only when resort thereto would be ineffective.[424] The Supreme Court apparently resolved this conflict in holding that the remedies under Title VII and section 1981 are "separate, distinct and independent" although directed toward the same objectives.[425]

Although Title VII does not impose a jurisdictional barrier to a section 1981 suit, the availability of EEOC conciliation is still a factor that may be considered by the court when exercising its discretion in granting equitable relief.[426] Parties are not barred from Title VII proceedings by an election of remedies either. An aggrieved employee may seek more than one remedy, as long as he does not recover twice for the same injury.[427] A Title VII action in a federal

422. *See, e.g.*, Hill v. American Airlines, Inc., 479 F.2d 1057 (5th Cir. 1973), which is representative of these cases holding that section 1981 is a completely independent remedy.

423. Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

424. *See, e.g.*, Taylor v. Safeway Stores, Inc., 333 F. Supp. 83 (1971), *subsequent order*, 365 F. Supp. 468 (D. Colo. 1973).

425. 421 U.S. at 461.

426. *See, e.g.*, Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971). Several reasons are cited on behalf of the proposition that administrative remedies should be exhausted. One reason parallels the federalism theory, in that federal courts do not wish state remedies bypassed. It is thought that the administrative procedure is efficient in disposing of many cases the courts would otherwise hear. Another reason is that state agencies generally act more quickly than the courts and have an expertise from dealing with cases of the same type. There is a well-recognized exception to the requirement that state administrative remedies be exhausted, primarily, that exhaustion is not necessary if the remedy is inadequate or would prove ineffective.

There are also reasons for not requiring exhaustion. Many Title VII cases contain constitutional issues, and no state agency has more expertise in this area than the federal courts. Efficiency, so the argument runs, should not be of primary importance where constitutional issues are involved. Supporting this view is the fact that compliance with state protective laws is not a valid defense in Title VII cases, so that state agencies should not prevail over the federal courts. For a further discussion see Note, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565 (1975).

427. *See, e.g.*, Oubichon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973).

district court is not foreclosed where a complaint is first submitted to final arbitration under a collective bargaining agreement. The plaintiff meets the prerequisite of a Title VII action when he "(1) [has] filed timely a charge of employment discrimination with the EEOC and (2) received and acted upon the commission's statutory notice of the right to sue."[428]

5. Pattern or Practice Suits

Sections 707(a) and (c) of Title VII[429] authorize the EEOC to bring suit, without waiting for a prior charge to be filed, against an employer that the Commission has reasonable cause to believe is engaging in a "pattern or practice" of discriminatory employment practices. Section 707(a) provides that the district court can grant a permanent or temporary injunction against the practice. Furthermore, back pay may be ordered to remedy the pattern of discrimination.[430] A pattern and practice of discrimination is established when it can be shown that: (a) virtually all-white unions and apprenticeship committees have a discriminatory reputation in the Negro community; (b) they have historically not had Negro members or participants in work referral and apprenticeship training; and (c) there are a significant number of Negroes qualified for membership, work referral and apprenticeship training.[431]

6. Duplicitous Suits

For the first eight years of its existence, the EEOC had great difficulty in administering Title VII. In 1972, the EEOC was granted the power to enforce the Act by enabling it to bring suit against private employers charged with discrimination. Not only could the EEOC attack violations of the Act, but it could also, through the threat of court action, encourage employers to participate seriously in conciliation efforts expected to lead to increased voluntary compliance with the Act.

This new civil enforcement power has been given different interpretations by the courts. The most serious threat appears in

428. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

429. 42 U.S.C.A. § 2000e-6(a),(c) (1974).

430. United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). *See also* United States v. Lee Way Motor Freight, Inc., 5 F.E.P. Cases 492 (W.D. Okla. 1972).

431. United States v. IBEW Local 357, 356 F. Supp. 104 (D. Nev. 1972). Similar considerations apply in other areas of discrimination as well.

EEOC v. Missouri Pacific Railroad Co.,[432] which barred the EEOC from suing employers against whom a private party has already initiated a court action, when both suits are based upon the same charge of employment discrimination. Once the charging party has filed suit, the 1972 amendments accord the EEOC authority to seek only permissive intervention. Because the EEOC has an enormous backlog of charges pending before it, the charging party will almost always be able to bring an action before the EEOC has completed its administrative process. The practical significance of this new ban on "duplicitous suits" is that Congress' grant of civil enforcement power is effectively nullified except when the charging party is either unable or unwilling to bring suit himself.

One of the most basic administrative procedures under Title VII is that an aggrieved party may not begin by filing suit himself, but must first file a timely charge of employment discrimination with the EEOC, and receive permission from the EEOC in the form of a notice of right to sue in order to initiate a separate private Title VII action.[433] The right to sue letter can be requested, however, after 180 days from the date the charge is filed. This leaves the EEOC to attempt to secure intervention. While an aggrieved party has an absolute right to intervene in a suit brought by the EEOC,[434] the EEOC is given the right to seek only permissive intervention upon its certification that the private suit is of general public importance.[435] Without this right, the EEOC would be completely precluded from participating in cases brought before it had investigated and found reasonable cause, or had completed conciliation efforts. In *EEOC v. Louisville & Nashville Railroad Co.*,[436] the Fifth Circuit noted that large groups of employees would be bound by judgments entered in class actions brought by private parties. Therefore, the EEOC's right to intervene could forestall an inadequately litigated private case from binding a whole class of potential claimants, while its right to sue alone could not.[437]

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432. 493 F.2d 71 (8th Cir. 1974).

433. 42 U.S.C.A. § 2000e-5(f) (1974).

434. *See* EEOC v. Painters Local 857, 384 F. Supp. 1264 (D.S.D. 1974).

435. *See* section X.C.2. *infra*.

436. 505 F.2d 610 (5th Cir. 1974).

437. For a further discussion see Reiter, *The Equal Employment Opportunity Commission and "Duplicitous Suits": An Examination of EEOC v. Missouri Pacific Railroad Co.*, 49 N.Y.U.L. REV. 1130 (1974).

B. Parties to the Suit

1. *Aggrieved Employees or Applicants*

Any individual employee or applicant who believes himself aggrieved by an improper employment practice may sue.[438] Discriminatees can sue their employer under Title VII even though charges were filed by a union in their behalf.[439] Since the "aggrieved parties" were the discriminatees, and not the union, the joinder of the union is deemed unnecessary. A party not named in an EEOC charge but subsequently joined as a defendant in a civil suit may not be held liable under Title VII.[440]

2. *Class Action*

A class action,[441] a significant legal weapon available to employees, is a suit brought on behalf of a large number of individuals or employees all of whom are alleging that they have been subject to the same acts of discrimination. Typically, a class action initially is brought by a few individuals and is then broadened into a class action when it becomes apparent that there are numerous potential claims outstanding. The goal of the class action device is to facilitate the handling of an otherwise complex, protracted and repetitive series of cases.

In order to maintain a class action, the four prerequisites set out in Rule 23(a) of the Federal Rules of Civil Procedure must be satisfied.[442] These requirements are characterized as numerosity, commonality, typicality and representativity. A recent case[443] exemplifies how courts determine whether the four prerequisites are satisfied. As to numerosity, the court observed that the potential class

438. 42 U.S.C.A. § 2000e-5(f)(1) (1974).

439. Atkinson v. Owens-Illinois Glass Co., 10 F.E.P. Cases 710, 712 (N.D. Ga. 1975).

440. Bush v. Lone Star Steel Co., 373 F. Supp. 526, 537 (E.D. Tex. 1974).

441. *See generally* Fed. R. Civ. P. 23.

442. The four prerequisites are:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

In addition to these prerequisites, a class action is improper unless at least one of the three subsections in Rule 23(b) can be satisfied.

443. Ellison v. Rock Hill Printing Co., 8 F.E.P. Cases 383 (D.S.C. 1974).

could be as large as 3,000 employees which clearly made joinder impossible. The requirement of commonality was met since the suit was an "across the board" attack on employment practices, the allegation of racial discrimination constituting a common question of fact to be resolved. Typicality meant that individual claims which are not considered would be similar to those with which the court and parties were concerned. The court noted that depositions from the thirteen named plaintiffs challenged many aspects of the company's employment practices. Therefore, even though the class of employees which the thirteen named plaintiffs claimed to represent could be as large as 3,000 individuals, the hypothetical claims of other unnamed aggrieved individuals would be covered by the allegations made by the named plaintiffs. Representativity required that the class plaintiffs fairly and adequately protect the interests of the class. This means that there must be no possibility of class members whose interests are antagonistic to the plaintiff. In order to ensure fair representation, the court determined that six subclasses were necessary. The six subclasses were constituted on the basis of the union involved, which department the employees worked in, whether the individuals were applicants or employees rejected for promotion, who was employed as of July 2, 1965 (the effective date of the Act), who was a union member from that date, and who was employed or refused employment after that date.[444]

The Fifth Circuit, in *Oatis v. Crown Zellerbach Corp.*,[445] recognized that the class action device is particularly adaptable to situations involving discrimination in employment. The named plaintiff in such an action functions as a private attorney general by permitting a privately instituted suit to further the public interest of eliminating employment discrimination. The courts are taking an expansive view of the class that a plaintiff might properly represent.[446] A plaintiff need not assert a claim factually identical with those of the class members that he purports to represent. As stated in *Oatis*, class membership is extended to all parties who "assert the same or some of the issues" asserted by the representative in the charge filed with the EEOC.[447] It is also unnecessary for each member of

444. *Id.* at 384-85.

445. 398 F.2d 496 (5th Cir. 1968).

446. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (1969), *rehearing on other grounds*, 488 F.2d 714 (5th Cir. 1974) (discharged).

447. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

the class to file a charge with the EEOC. The only charge required is that filed by a named plaintiff with the EEOC and only that charge must comply with the time limits delineated in the Act. One of the few remaining restrictions on representation is that the representative must not be remote in time to the proposed members of the class.[448]

The Fifth Circuit adheres to a broad rule that allows the court to look beyond the individual claims whenever the requested relief is applicable to a class and to determine whether the suit involves an overall attack on prohibited discrimination.[449] This is true even when the complaint is phrased in individual terms. This view, however, is not universally accepted.[450] The petition generally must comply with certain formalities in order to be the proper vehicle for obtaining class-wide relief. In *Danner v. Phillips Petroleum Co.*,[451] the court said that if a class action is to be maintained, it must be identified as such and must lay the predicate for class relief. Neither the factual circumstances relevant to the class nor the members of the class, however, need be expressed.[452]

In enacting the 1972 amendments, Congress expressed the view that there was no intention to alter the use of class actions in Title VII cases as a means of securing more than individual relief.[453] If the disposition of the class action benefits all employees, not all of them need be members of the class. But if the plaintiff attacks policies of the company in which other employees have an interest, he may be required to join as defendants those employees whose interests may be adversely affected by the court's determination.[454] Injunctive relief is not proper when the employer has totally and unconditionally terminated the prior discriminatory policy.[455] An injunction may be issued, however, even if the company has ceased its discriminatory policies, if the court is of the opinion that the wrong will be

448. Burney v. North Am. Rockwell Corp., 302 F. Supp. 86 (C.D. Cal. 1969).

449. Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).

450. *See* White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971).

451. 447 F.2d 159 (5th Cir. 1971).

452. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (1969), *rehearing on other grounds*, 488 F.2d 714 (5th Cir. 1974) (discharged).

453. For the legislative history of the 1972 Amendments see U.S. CODE CONG. & AD. NEWS 2137 (1972).

454. English v. Seaboard Coast Line R.R., 465 F.2d 43 (5th Cir. 1972).

455. Baham v. Southern Bell Tel. & Tel. Co., 55 F.R.D. 478 (W.D. La. 1972).

repeated.[456] In addition to injunctive relief, the relief granted to the class may include reinstatement and damages in the form of back pay.[457] In *Robinson v. Lorillard Corp.*,[458] the plaintiff was held not to have waived any remedy to which he may have been entitled merely by a failure to request it at the commencement of the lawsuit; instead he had the option for additional relief as long as it was requested before a decision was rendered. The courts are divided on the question of whether a class action may be maintained where the class representative requests no injunctive relief.

The fact that the plaintiff might lose on the merits does not bar him from maintaining a class action under Rule 23.[459] The courts generally construe Rule 23 liberally in favor of class actions, some going so far as to hold maintainable a racial discrimination suit against a defendant class.[460]

Rule 23(c) requires the court to determine by order as soon as practicable after the commencement of an action whether it may be maintained as a class action.[461] As to whether adverse class action determinations may be immediately appealed under 28 U.S.C. § 1291, two theories are advanced: (1) appealability is required for final resolution of certain important rights separable from rights asserted in the main action (the "collateral order" doctrine); or (2) appealability is required because such determinations, if unreviewed, would render the continuation of the lawsuit impracticable (the "death knell" doctrine). The "collateral order" doctrine was stated in *Cohen v. Beneficial Industrial Loan Corp.*,[462] where the Supreme Court said that 28 U.S.C. §§ 1291-92 do not disallow an appeal from a decision which finally determines claims of right separable from, and collateral to, rights asserted in the action. Such is the case where the rights involved are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The "death knell" doctrine was developed in *Eisen v. Carlisle &*

456. Coleman v. Humphreys County Memorial Hosp., 55 F.R.D. 507 (N.D. Miss. 1972).

457. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

458. 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

459. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (1969), *rehearing on other grounds*, 488 F.2d 714 (5th Cir. 1974) (discharged).

460. *See, e.g.*, United States v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969).

461. FED. R. CIV. P. 23(c).

462. 337 U.S. 541 (1949).

Jacquelin,[463] wherein the court held that review should be allowed where a district court order dismissing a class action would, if not reviewed, be the death knell of the action, in that it would for all practical purposes terminate the litigation. It is generally held that this doctrine should not be liberally applied.[464]

The tentative settlement class is an alternative procedure to the class action; the main difference is timing. In an ordinary class action, the class must be formed and certified by the court before the suit may proceed. The tentative settlement class is constituted without judicial supervision at the time the parties negotiate a settlement. If the parties can reach agreement, the court is asked to approve the entire package—both the settlement and the composition of the class—as is required by law.[465]

C. Proving the Case

The complainant in a Title VII trial must carry the initial burden of establishing a prima facie case of racial discrimination. This may be done by showing: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[466] Once a prima facie case of discrimination is made out, the burden falls upon the employer to prove that the employment practice in question is not discriminatory. The difficulty employers confront in defending such suits can be traced in part to the ease with which a prima facie case of discrimination can be made, and the inapplicability of intent to a subsequent finding of liability.

In satisfying the prima facie test, the "qualification" standard can be difficult for the plaintiff to prove. In reality, this becomes the company's responsibility. Once any test or job qualification is shown to disproportionately affect women or minorities, it becomes

463. 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

464. *See* Korn v. Franchard Corp., 443 F.2d 1301 (1971), *rev'd on other grounds*, 456 F.2d 1206 (2d Cir. 1972). For a summary of the development of the two doctrines see Williams v. Mumford, 511 F.2d 363 (D.C. Cir. 1975).

465. *See generally* Note, *The Tentative Settlement Class and Class Action Suits under Title VII of the Civil Rights Act*, 72 Mich. L. Rev. 1462 (1974).

466. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

the employer's burden to show that such qualification is job-related.[467] Thus, more than one court has held that a complaint of discrimination need not allege the plaintiff actually applied for and was rejected for a job; it is sufficient to allege that the practices of the defendant employer were so discriminatory that a potential applicant could reasonably believe that even applying for the job was futile.[468] In class action suits, the prima facie showing of discrimination may be satisfied by statistics showing the underrepresentation of minorities or females.[469] Thus, such a showing is made if minorities or females are employed only in lower classifications,[470] or if minorities or females are employed in significantly lower numbers than their representation in the community.[471]

1. Discovery

Courts are liberal in allowing discovery—to the point that it will be granted if it is arguably within the scope of the plaintiff's complaint. Construing the decision of the Fifth Circuit in *Burns v. Thiokol Chemical Corp.*,[472] a district court stated:

> Past history as revealed by statistical or other empirical evidence is relevant to a Title VII action, even if only individual relief is sought . . . . despite the problem of compiling, assimilating and synthesizing voluminous employment records into cogent, responsive answers to interrogatories, employers should not be permitted to avoid responding to such interrogatories because they invoke this burden.[473]

Brennan v. Midwestern United Life Ins. Co.[474] was the first case to hold that absent, but identifiable, members of the representative

467. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

468. McDonald v. General Mills, Inc., 387 F. Supp. 24 (E.D. Cal. 1974); Hailes v. United Air Lines, 464 F.2d 1006 (5th Cir. 1972).

469. *See, e.g.*, Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

470. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

471. Newman v. Avco Corp., 7 F.E.P. Cases 385 (1973), *subsequent order sub nom.* Alexander v. Avco Corp., 380 F. Supp. 1282 (M.D. Tenn. 1974).

472. 483 F.2d 300, *rehearing denied*, 485 F.2d 687 (5th Cir. 1973).

473. Foster v. Boise-Cascade, Inc., 10 F.E.P. Cases 1287, 1289 (S.D. Tex. 1975). An employer may not defer answering interrogatories on the question of whether a class action can be maintained until the federal district court has determined whether the action may proceed as a class action, since the interrogatories will aid the court in its determination as to the maintenance of such action. Dickerson v. United States Steel Corp., 7 F.E.P. Cases 1318 (E.D. Pa. 1974).

474. 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

plaintiff's class, who had received notice of the pendency of the suit but had neither elected to be excluded nor entered an appearance, were required to submit to discovery by the defendant. In *Brennan*, the court said that in addition to a party's exclusion from the class as a sanction for his refusal to make discovery, a court may also impose the more severe sanction of dismissing with prejudice the claims of that party.[475] On the other hand, some cases have denied a defendant's motion seeking discovery from absent plaintiffs of the class. In *Fischer v. Wolfinbarger*,[476] the court stated that the reason for Rule 23 would fail if members of a class were treated in all respects as if they were parties plaintiff.

An employer being sued under section 1981 and Title VII will not be compelled to identify sources of information relied upon in answering interrogatories propounded by the plaintiff.[477] In addition a protective order limiting the EEOC's discovery may be granted to an employer being sued by the EEOC under Title VII. In one case, however, the court denied a protective order, agreeing with the plaintiff who contended that expert testimony concerning tests used by the defendant would not otherwise be available through the use of independent experts.[478]

2. *Intervention*

Section 705(e)(5) of Title VII[479] confers upon the EEOC power "to intervene in a civil action brought by an aggrieved party against a respondent other than a government, governmental agency or political subdivision." On the strength of this provision, the courts will allow the EEOC to intervene in employees' actions against employers and unions, since the disposition of the case may be materially aided by the EEOC's expertise in the field.[480] Whether an application to intervene is brought pursuant to Federal Rule 24(a) (intervention as of right) or 24(b) (intervention by permission), it must be timely filed. In *EEOC v. United Air Lines*,[481] it was held that permissive intervention may be refused for lack of timeliness when

475. *Id.* at 1003.
476. 15 FED. RULES SERV. 2D 905 (W.D. Ky. 1971).
477. Winfrey v. General Motors Corp., 7 F.E.P. Cases 215 (N.D. Ga. 1973).
478. Crockett v. Virginia Folding Box Co., 61 F.R.D. 312 (E.D. Va. 1974).
479. 42 U.S.C.A. § 2000e-4(g)(6) (1974).
480. *See* Marshall v. Electric Hose & Rubber Co., 10 F.E.P. Cases 1070 (D. Del. 1974).
481. 10 F.E.P. Cases 909 (7th Cir. 1975).

discovery had been ordered closed at the time the motion to intervene was filed.

Section 706(e)(1)[482] gives an aggrieved employee an absolute right to intervene in a civil action brought by the EEOC. Again, such intervention must be timely. In *Nevilles v. EEOC*,[483] the court held that a motion to intervene made more than two months after the entry of a consent decree was not timely made. Among the factors the judge should take into consideration on the question of timeliness are "how far the proceedings have gone when the movant seeks to intervene . . . ; prejudice which resultant delay might cause to other parties . . . ; and the reason for the delay. . . ."[484]

In addition, for intervention under Rule 24(a)(2), applicants must show a protected interest relating to the subject matter of the litigation and that their ability to assert their claims would be impaired by the denial of intervention.[485] Intervention will only be allowed when the party seeking to intervene is likely to contribute to the question of the rights of the individuals to employment.[486] Under Rule 24(b), intervention will only be permitted if the adjudication of the rights of the parties will not be unduly delayed or prejudiced. Intervention has been denied where the motion to intervene was filed six weeks prior to the date set for trial and the complaint in the action was filed three years before.[487]

3. Joinder

If an action against a union as well as against management is brought, failure to name the union in the charges filed with the EEOC entitles the union to summary judgment under Rule 19 of the Federal Rules of Civil Procedure. Absent this necessary party, when the suit involves some aspect of the collective bargaining agreement, the employee may not seek injunctive relief against the employer.[488] The principle of law as set forth in *LeBeau v. Libby-Owens-Ford Co.*[489] was based on Rule 19, which requires two sep-

482. 42 U.S.C.A. § 2000e-5(f)(1) (1974).
483. 511 F.2d 303 (8th Cir. 1975).
484. NAACP v. New York, 413 U.S. 345, 366 (1973).
485. *See* Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).
486. Smiley v. City of Montgomery, 350 F. Supp. 451 (M.D. Ala. 1972).
487. Gerstle v. Continental Airlines, Inc., 466 F.2d 1374 (10th Cir. 1972).
488. Johnson v. Thomson Brush Moore, Inc., 7 F.E.P. Cases 921 (N.D. Ohio 1974).
489. 484 F.2d 798, 800 (7th Cir. 1973).

arate but interrelated inquiries: (1) whether the absent party is a person "to be joined if feasible;" (2) if not feasible, whether the court in equity and good conscience should allow the action to proceed or treat the absent party as indispensable. The desirability of joining a party depends on whether complete relief can be granted in his absence, and whether his interests will be prejudiced or those already parties will be subjected to a substantial risk of incurring inconsistent obligations. Where joinder is desirable but not feasible, the Rule provides great flexibility for determining whether the suit should be dismissed, or the relief shaped to avoid such prejudice. A successor employer, not properly joined in court proceedings, may, nevertheless, be held liable if certain conditions are met.[490]

4. Venue

Congress intended "to limit venue to the judicial districts concerned with the alleged discrimination . . . ."[491] As stated in *Ashworth v. Eastern Airlines, Inc.*,[492] "Title VII actions are governed by a 'special' venue provision,"[493] which represents a conscious attempt by Congress to put to one side the usual balance of convenience test as it may pertain to transfers among divisions within a district.[494] The statute provides that an action brought in the United States District Court may be instituted in the judicial district where the alleged unlawful employment practice was committed, where

490. The Sixth Circuit has stated these conditions:

> (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same product. EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974).

491. Stebbins v. State Farm Mut. Auto Ins. Co., 413 F.2d 1100, 1102 (D.C. Cir.) (per curiam), *cert. denied*, 396 U.S. 895 (1969).

492. 10 F.E.P. Cases 670 (E.D. Va. 1974).

493. 42 U.S.C.A. § 2000e-5(f)(3) (1974).

494. 10 F.E.P. Cases, 670, 671 (E.D. Va. 1974). The court went on to say:

> To facilitate the redress of Civil Rights deprivations, Congress favored Title VII plaintiffs with a wide and unfettered discretion in choosing a forum within a district in order to 'afford them greater convenience' and enable them 'to avoid potential local economic and political pressures.' A Title VII plaintiff may bring his or her suit in any division of any district where the cause of action arose and that decision must not only be given great weight, it must be left undisturbed. This special venue statute may, indeed, encourage forum shopping, but that is apparently what Congress intended. *Id.*

the employment records relevant to such practice are maintained, where the aggrieved person would have worked but for the alleged unlawful employment practice, and if the respondent is not found within any such district, where the respondent has his principal office.[495]

5. *Res Judicata and Collateral Estoppel*

Whether a prior judgment will bar a subsequent action under the doctrine of res judicata is determined by certain criteria. As set forth by the Fifth Circuit a plea of res judicata requires that the prior judgment be rendered by a court of competent jurisdiction; that there was a final judgment on the merits; that the parties, or those in privity with them, were identical in both suits; and that the same cause of action was involved in both suits. These elements being established, the judgment or decree upon the merits in the earlier case is an absolute bar to the subsequent action or suit, not only in respect of every matter which was actually offered and received to sustain the requested relief but also as to every ground of recovery which might have been presented.[496] An employer who has been charged by an individual in an unsuccessful Title VII action cannot then be sued by the EEOC on the same charge. However, the EEOC may sue the employer to bring an end to discriminatory practices discovered during its investigation of the previous charge.[497]

Collateral estoppel prevents issues that have been litigated in a prior action from being brought again in a new action.[498] The court's judgment acts as an estoppel, limiting any future actions between the parties to matters not covered in the first action. For the doctrine to be invoked, the issue raised must be identical to that involved in the prior action, the issue must have been actually litigated in the prior action, and the determination in the prior action must have been necessary and essential to the resulting judgment.[499]

6. *Jury Trial*

An overwhelming majority of courts have denied the right to jury

495. Ford v. Valmac Indus., Inc., 494 F.2d 330, 331 (10th Cir. 1974).

496. Stevenson v. International Paper Co., 10 F.E.P. Cases 1386, 1389 (5th Cir. 1975).

497. EEOC v. Hutting Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975).

498. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

499. James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-59 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971).

trial in Title VII actions.[500] The most common rationale has been that the available remedies are equitable and, therefore, place the action beyond the reach of the seventh amendment.[501] Title VII contains no express provision regarding the right to a jury trial for alleged civil violations of the Act,[502] but does provide for a jury in criminal contempt cases.[503] The language of section 706(g)—that "the court" is empowered to "enjoin the respondent" and order appropriate "affirmative action"—sustains the conclusion that Congress did not intend to provide for jury trials in Title VII civil cases. Also, the legislative history suggests that section 706(g) was modeled after section 10(c) of the National Labor Relations Act, which Congress knew did not provide the right to a jury trial.[504]

7. Adjustment of Disputes

Conforming to the policy of encouraging settlements in Title VII actions, the Second Circuit has said that the scope of review on appeal of a settlement is limited to determining whether the federal district court in approving the settlement abused its discretion.[505] The appellate courts usually find such not to be the case.[506] Similar deference is usually accorded consent decrees.[507] The Third Circuit found no abuse of discretion when the lower court approved a settlement granting a plaintiff a "very small percentage of claimed back pay." The appellate court noted that an evaluation of the probable outcome of the litigation must be balanced against the probable costs, in both time and money, of continued litigation.[508] This was so even though the plaintiffs appeared to have a prima facie case of discrimination.

Before the EEOC can bring judicial action, notice must be served

500. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (1969), *rehearing on other grounds*, 488 F.2d 714 (5th Cir. 1974) (discharged).

501. *See, e.g.*, United States v. United States Steel Corp., 371 F. Supp. 1045 (N.D. Ala. 1973).

502. 42 U.S.C.A. § 2000e-5(g) (1974).

503. *Id.* § 2000h. *See, e.g.*, Ponce v. City of Tulane, 7 F.E.P. Cases 113 (Cal. Super. 1973).

504. For a further discussion see Comment, *Jury Trial in Employment Discrimination Cases—Constitutionally Mandated?*, 53 TEXAS L. REV. 483 (1975).

505. Patterson v. Newspaper Deliverers' Union, 10 F.E.P. Cases 349 (2d Cir. 1975).

506. *See, e.g.*, Chance v. Board of Educ., 496 F.2d 820 (2d Cir. 1974).

507. *See, e.g.*, Sagers v. Yellow Freight Sys., Inc., 388 F. Supp. 528 (N.D. Ga. 1974).

508. Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.), *cert. denied*, 419 U.S. 900 (1974).

on the offending employer and the EEOC must investigate the charge.[509] It is the duty of the EEOC to inform the employer that charges may be settled through conciliation, and to make an effort to achieve such conciliation. If the employer ignores the opportunity to conciliate, or does not negotiate in good faith, the EEOC may end its attempt to settle the case by these means. Notice of the termination of the conciliation efforts must be given to the employer, who may then decide to reopen negotiations. In *EEOC v. Firestone Tire & Rubber Co.*,[510] the court placed an affirmative duty upon the EEOC at least to bring to the attention of the employer/respondent named in the charge that an opportunity exists for resolution of the charge by conciliation and to invite the employer/respondent to participate in procedures designed to lead to conciliation. Letters notifying the parties of the Commission's effort to conciliate must be sent "*before or concomitant with the beginning of efforts to conciliate.*"[511]

A consent decree is the contract of the parties entered upon the record with approval and sanction of a court of competent jurisdiction. Such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake; in order to vacate such a judgment, an independent action must be instituted. The courts recognize that consent decrees by which the litigants agree to resolve the dispute over discrimination may be vulnerable on various grounds, including:

> [A]lleged illegality, . . . venue deprival; lack of advance notice; enforcement by violators; insufficiency of relief; direct interference

509. 42 U.S.C.A. § 2000e-5(b) (1974).

510. 366 F. Supp. 273, 276 (D. Md. 1973).

511. *Id.* at 278 (emphasis in original). A typical letter inviting a party to enter into conciliation discussions with the EEOC was set forth in EEOC v. Lithographers Local 2P, 10 F.E.P. Cases 1080, 1080-81 (D. Md. 1975):

> The Commission hereby invites your participation in conciliation discussions pursuant to section 706(b) of the Act as amended . . . . Your failure to notify the Commission within seven (7) days of receipt of this letter of your intent to so participate will indicate that you do not wish to engage in conciliation discussions. In that event, the matter will be referred to the Commission's general counsel for appropriate action.

The purpose of this letter, said the court

> is to insure that the central role of conciliation in the Congressionally adopted scheme of Title VII is fulfilled. Where, however, the defendant had received notice on two prior occasions that failure of conciliation would bring suit and, on those two prior occasions the defendant had not responded on the first occasion but did respond on the second and attended a meeting which was unproductive, the requirements discussed in Firestone [366 F. Supp. 273 (1973)] have been fully vindicated. *Id.* at 1081.

> with rights of individuals to file, maintain or pursue individual remedies; and a renunciation of statutory responsibility by executive agencies.[512]

Therefore, the courts unquestionably reserve "jurisdiction of [the] cause for the purpose of issuing subsequent orders, consistent with the principles of due process, as necessary to further the purposes and objectives of these decrees."[513]

XI. ENFORCING AGENCIES

A. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) is an autonomous federal agency created by Title VII and charged with the compliance and enforcement of Title VII.[514] The five member Commission sits in Washington, but there are seven Regional Offices situated throughout the country. Each EEOC Regional Office includes within its jurisdiction two to six district offices.

Application of the Equal Employment Opportunity Act in the enforcement of Title VII is difficult because of the Act's intricate substantive and procedural requirements[515] and the Supreme Court's admonition that its provisions not be interpreted too literally or technically.[516] Under Title VII, when charges are filed with the EEOC, the alleged discriminating employer or union is notified of the charges. The EEOC investigates the charges which, if unsupported by the investigation, are dropped and the parties notified. If the charges are supported by the investigation, the EEOC notifies the alleged discriminator and attempts to seek a settlement correcting the unlawful practices through the informal methods of conference, conciliation, and persuasion. The EEOC usually does not maintain a Title VII action against an employer and/or union until it has attempted and failed at a conciliation effort to reach an agreement.[517] If a conciliation agreement has not been reached within 30 days, the EEOC may bring suit or may notify a charging party that

512. United States v. Allegheny-Ludlum Indus., Inc., 63 F.R.D. 15 (N.D. Ala. 1974).
513. *Id.* at 6.
514. 42 U.S.C.A. § 2000e-4(a)-(g) (1974).
515. EEOC v. Wah Chang Albany Corp., 499 F.2d 187, 189 (9th Cir. 1974) (per curiam).
516. Love v. Pullman, 404 U.S. 522 (1972).
517. For a further discussion see section X.A.2. *supra*.

an agreement has not been reached within 180 days after the charge was filed. Although the charging party is then authorized to bring a private suit, the EEOC may also sue. Once a charge has been filed with the EEOC, the Commission has authority at reasonable times to examine any witness or copy any evidence, as well as the power to subpoena witnesses and documents.[518]

The EEOC may not maintain a Title VII action against an employer where the individual alleging discrimination has filed his own action and the subject matter of both actions is identical.[519] The 1972 amendments to Title VII give the Commission the power to sue in federal court on behalf of an individual or a class of individuals.[520] This added authority does not, however, shift the emphasis from conciliation as the preferred method for correcting discrimination in employment.[521] The Commission has no direct power to issue any orders, such as a cease and desist order, requiring that an employer refrain from an unlawful employment practice.

B. The Office of Federal Contract Compliance and the General Services Administration

The Office of Federal Contract Compliance (OFCC) is under the Department of Labor and is responsible for insuring compliance with Executive Order 11246,[522] which prohibits discrimination by government contractors. The Order covers all government contractors, but exemptions are permitted at the discretion of the OFCC.[523] It is not necessary that there be any formal contract,[524] and every company contracting with the government should consider itself

518. 42 U.S.C.A. §§ 2000e-8(a),-9 (1974). The EEOC is entitled to enforcement of a subpoena duces tecum only insofar as it seeks evidence relating to a charge of discrimination which was timely filed. EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1968).

519. EEOC v. United States Pipe & Foundry Co., 8 F.E.P. Cases 335 (E.D. Tenn. 1974). *See* section X.A.6. *supra.*

520. 42 U.S.C.A. § 2000e-5(f)(1) (1974).

521. EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1357 (6th Cir. 1975).

522. 3 C.F.R. 169 (1974).

523. The Secretary of Labor may exempt contracts "involving less than specified amounts of money or specified numbers of workers," and companies whose amount of business with the federal government is $10,000 or less. 41 C.F.R. § 60-1.5(a) (1975). An exemption once granted can be withdrawn when "such action is necessary or appropriate to achieve the purposes of the order." *Id.* § 60-1.5(d).

524. *See* United States v. New Orleans Public Serv., Inc., 8 F.E.P. Cases 1089 (E.D. La. 1974).

covered by the Executive Order.[525]

It is not the intent of Executive Order 11246 to enforce compliance by litigation. The responsibility for direct compliance has been delegated by the OFCC to over a dozen federal agencies which seek to obtain voluntary compliance by "conference, conciliation, mediation, or persuasion."[526] The General Services Administration (GSA) is the compliance agency with which industry must deal. Under OFCC regulations,[527] the GSA may require the annual submission by March 31 of Form EEO-1 from any employer, the value of whose contract is at least $50,000 and who has 50 or more employees.[528] This form requires the listing of the number of minority and female employees in each job category.[529] The GSA is authorized to require a company which is bidding or negotiating for a service contract to state in the bid or in writing whether it has developed and has on file at each of its establishments an affirmative action program.[530] It may also undertake a compliance review to determine if the contractor maintains nondiscriminatory hiring and employment prac-

525. The following "equal opportunity clause" must be placed in every contract:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment; upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments [under the Order]. Exec. Order 11246 § 202, 3 C.F.R. 170 (1974).

526. *Id.* § 205, 3 C.F.R. at 172.

527. 41 C.F.R. § 60-1.7(a)(1) (1975).

528. The OFCC requires such an employer to develop a written affirmative compliance program. 41 C.F.R. § 60-1.40 (1975). For a discussion of such self-initiated affirmative action programs see section VII *supra*.

529. *See* section VIII *supra*.

530. 41 C.F.R. § 60-1.7(b)(1) (1975).

tices and is taking appropriate affirmative action. The review is a comprehensive analysis and evaluation of every aspect of employment policy.[531] The GSA has the right, upon reasonable notice, to enter into the employer's property for the examination of the employer's facilities and to examine and copy books, records, accounting and other relevant material for the purpose of ascertaining compliance with Executive Order 11246.[532]

If voluntary compliance cannot be satisfactorily secured, the contracts may be terminated or suspended,[533] and the violating contractor can be barred from receiving any federal contracts in the future.[534] The OFCC and its enforcing agencies such as the GSA do *not* have the power to sue in court for enforcement of Executive Order 11246. The enforcing agency can only recommend to the EEOC that appropriate proceedings, including litigation, be instituted under Title VII.[535]

C. The Wage-Hour Administration

The primary function of the Wage-Hour Administration is to secure enforcement of the Fair Labor Standards Act (the Wage-Hour Law)[536] which sets the minimum wage and requires the payment of time and one-half the regular rate of pay for overtime after 40 hours of work in any pay period. The Wage-Hour Administration becomes part of the discrimination enforcement mechanism in two areas—age discrimination and equal pay. In enforcing both the Equal Pay Act and the Age Discrimination Act, the Wage-Hour Administration has authority similar to that of the EEOC. It has broad power to inspect records and to subpoena witnesses and documents.[537] The Wage-Hour Administration, suing in the name of the Secretary of Labor, can obtain an injunction against violation of

531. *Id.* § 60-1.20(a).

532. *Id.* § 60-1.43. Federal regulations provide that "where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the [Executive Order], it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must indicate the precise action to be taken and dates for completion." *Id.* § 61-1.20(b).

533. Exec. Order 11246 § 209(a)(5), 3 C.F.R. 174 (1974).

534. *Id.* § 209(a)(6).

535. *Id.* § 209(a)(3).

536. 29 U.S.C.A. § 206 *et seq.* (Cum. Supp. 1975).

537. *See, e.g.*, 29 U.S.C.A. § 216(b) (Cum. Supp. 1975).

either act.[538] Under both acts, an individual may sue on his own behalf.[539]

D. State Fair Employment Agencies

The large majority of states and several localities have their own fair employment practice laws.[540] When an allegedly unlawful employment practice occurs in a state which has a state law prohibiting the practice, the charge must initially be filed with the state agency. The intent is to encourage resort to state and local fair employment remedies. It is not necessary that the case be pursued to a conclusion in the state agency; once 60 days have elapsed after the filing of the charge with the state agency, the EEOC will take jurisdiction if the charge is then filed with it.[541] The EEOC has officially designated over 50 state or local agencies to which it will defer.[542]

Federal law does not limit the protection available under state laws if a particular provision of a state law provides broader protection to employees.[543] For example, many state age discrimination laws are not limited to protecting a particular age bracket but afford coverage to any qualified person denied an employment opportunity because of age.[544] Furthermore, state fair employment laws typically cover all the employees of an employer of any size.[545] Title VII is limited to employers with at least 15 or more employees on the payroll for 20 or more weeks of the year.[546] State agencies have fairly complemented the EEOC. This is illustrated by a Connecticut case in which the state supreme court invalidated a sex classification in employment advertising as a per se violation of state law.[547] In so holding, the court reflected the "strong authorities in the interpretation of federal legislation and that of other states."[548]

538. *Id.*
539. *Id.* §§ 626(b) (1975), 216(b) (Supp. 1975).
540. *See* Annot., 44 A.L.R.2d. 1138 (1955).
541. *See* 42 U.S.C.A. § 2000e-5(d) (1974).
542. For a list of these agencies see 29 C.F.R. § 1601.12(m) (1975).
543. *See* 42 U.S.C.A. § 2000e-7 (1974).
544. *See* note 164 *supra*.
545. *See* note 14 *supra* and accompanying text.
546. 42 U.S.C.A. § 2000e-(b) (1974).
547. Evening Sentinel v. NOW, 10 F.E.P. Cases 1043 (Conn. Sup. Ct. 1975).
548. *Id.* at 1046-47.

E. The Courts—Federal and State

While state courts may occasionally be called upon to review the final determination of a state fair employment agency, the tribunal most widely concerned with enforcement of fair employment legislation is the federal district court. It may hear a case de novo, examine every aspect of the alleged discriminatory practices, hear evidence and expert testimony on the many-faceted issues raised under Title VII, offer settlement agreements and actually prescribe the corrective course of conduct to be pursued by the discriminating employer. It may also rule out litigation where conciliation has not preceded it, issue consent decrees and approve settlement agreements. Federal Rule of Civil Procedure 23(e) vests the court with the responsibility for determining whether a settlement was legitimately arrived at and if it is "fair, adequate, and reasonable."[549]

The federal district court has the power to hear the dispute once efforts at conference, conciliation and persuasion have failed, and to review determinations of an agency. In addition, it has broad powers to fashion an appropriate remedy once the violation of a right is shown.[550] The court's discretion in this area will not be disturbed on appeal unless abuse is shown.[551] The court can and must render decisions which will eliminate future instances of discrimination and make amends for present effects of past discrimination.[552] Because the trial court hears all of the evidence and sees the witnesses, it is best able to adjudge appropriate relief.[553] Review of a federal district court's decision approving an agreement that settled a Title VII action is limited to a determination of whether the court abused its discretion. Settlements which will significantly contribute to the achievement of statutory goals are encouraged, and the district court's concept of fairness will be accepted by the appellate tribunal where there is evidence that equitable consideration was extended to all parties.[554]

549. Percodani v. Riker-Maxson Corp., 50 F.R.D. 473, 477 (S.D.N.Y. 1970). "If the proposed settlement fails this test, disapproval will automatically follow despite unanimity of consent." Myers v. Gilman Paper Corp., 10 F.E.P. Cases 211, 212 (S.D. Ga. 1974).

550. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

551. Franks v. Bowman Transp. Co., 495 F.2d 398, 414 (5th Cir. 1974), *cert. granted*, 95 S. Ct. 1421 (1975).

552. *See, e.g.*, United States v. Lee Way Motor Freight, Inc., 7 F.E.P. Cases 710, 749 (W.D. Okla. 1973).

553. Naraine v. Western Elec. Co., 507 F.2d 590, 594 (8th Cir. 1974) (per curiam).

554. *See* Patterson v. Newspaper Deliverers' Union, 10 F.E.P. Cases 349 (2d Cir. 1975).

F. THE ADMINISTRATOR

Deciding the case is merely the first step in a Title VII suit—drafting a decree that ensures an effective and prompt end to discrimination is the most important and most difficult part of the case. A simple injunction prohibiting discrimination is insufficient; defendants are required to take affirmative action to remedy the effects of their past discriminatory conduct.

Under sections 706(g) and 707(a) of Title VII,[555] the courts have wide discretion to grant affirmative remedies to the extent that goals have been imposed upon defendants. Realizing that it is difficult to supervise the enforcement of injunctions, some courts have appointed advisory committees or administrators to supervise various aspects of their operation. The basic function of these court-appointed officials is threefold: (a) to provide information and assistance to minority workers which will enable them to take advantage of the full benefits of the court order;[556] (b) to deal with the daily problems which arise under the decree, thereby preventing major conflicts between the parties;[557] and (c) to provide the court with neutral expertise which can be utilized in recommending changes in employment practices designed to effectuate the purposes of the decree.[558]

The earliest use of an administrator in a Title VII context occurred in *United States v. Lathers Union Local 46*,[559] where the settlement agreement provided for the appointment by the court of "an impartial person . . . to implement the provisions of this Agreement and to supervise its performance." The district court indicated that it conceived of the administrator as a quasi-administrative body. In a circuit court case,[560] the defendant unions and apprenticeship committees were ordered to make specific changes in their membership application procedures, the hiring hall

555. 42 U.S.C.A. §§ 2000e-5(g), -6(a) (1974).

556. *See, e.g.*, United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

557. *See* United States v. Lathers Union, Local 46, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

558. *See* Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

559. 2 E.P.D. ¶ 10226, at 879 (S.D.N.Y. 1970).

560. United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

system, and the apprenticeship training programs. To effectuate the plan the court established an "Advisory Committee" of nine members—two from labor, two from the contractors, two from the black and one from another minority community, and one each from state and local governments. The Committee was given responsibility for conciliation, consultation and cooperation with the parties. In *United States v. United States Steel Corp.*,[561] a district court created an "Implementation Committee" to ensure the dissemination of information and explanations concerning the rights and procedures provided for in its decree. In order to ensure fairness in a union's admissions procedures, another district court's decree[562] provided for an impartial examining board, consisting of three persons—one each from the faculty of Columbia University's Engineering School, the faculty of Stevens Institute, and an aptitude testing service—to validate and administer a job-related test to applicants for union membership.

Court-appointed administrators function as quasi-administrative agencies because, in addition to their role as troubleshooters, they have power to investigate, criticize, recommend and develop practical solutions to unforeseen problems arising under a decree. Experience with the use of judicially-appointed administrators indicates that they can perform a very useful role in supervising and enforcing civil rights decrees.[563] At the present time, the amount of authority which can be delegated to an administrator is not entirely clear, but it is recognized that the administrator's findings are entitled to great weight.

G. The National Labor Relations Board

The National Labor Relations Act (NLRA)[564] as enforced by the National Labor Relations Board (NLRB), as well as by the federal courts, prohibits employment discrimination. Most of the prohibitions against discrimination under the Act are directed against unions. If in the course of an election to determine whether a union is to be the exclusive bargaining representative of employees, either

561. 371 F. Supp. 1045 (N.D. Ala. 1973).

562. United States v. Local 638, Enterprise Ass'n, 347 F. Supp. 169 (S.D.N.Y. 1972).

563. *See* J. Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 Cornell L. Rev. 53 (1974).

564. 29 U.S.C. § 151 *et seq.* (1970).

union or management makes flagrant appeals to racial prejudice, there is adequate justification for the NLRB setting the election aside.[565] The NLRB has ruled that it will not certify a union as exclusive bargaining agent (even though the union has won a representational election) where such union engages in discrimination based upon race or national origin.[566] The employer may object on grounds of discrimination to the certification of a union within five days after the tally of ballots is issued in a representational election.[567]

Management should be aware of the NLRB policy not to certify a union which discriminates. Yet as a practical matter, this policy may mean little to a company which has just lost a representational election. The indications are that the NLRB is extremely reluctant to utilize this tool; the Board requires far stronger evidence than is necessary for a finding of discrimination in the federal courts under Title VII. Also, a company may find it impractical to tell a union which has just received a majority of votes in a representational election that it is contesting the validity of the election because the union engages in unlawful discrimination. The NLRA places the union under a "duty of fair representation" to all unit employees.[568] Under this doctrine, the union would violate the Act by, for example, refusing to process the grievances of female or minority employees.[569]

The District of Columbia Circuit has taken the position that employer discrimination, by its very nature, always constitutes an unfair labor practice because it "sets up an unjustified clash of interests between groups of workers."[570] The NLRB takes a less adamant position.[571] According to the Board there must be actual evidence,

565. Sewell Mfg. Co., 1962 CCH NLRB Dec. ¶ 11,504.

566. Bell and Howell Co., 1974-75 CCH NLRB Dec. ¶ 15,008; Bekins Moving & Storage Co., 1974 CCH NLRB Dec. ¶ 26,575.

567. Grants Furniture Plaza, 1974-75 CCH NLRB Dec. ¶ 15,010.

568. Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. Louisville & Nash. R.R., 323 U.S. 192 (1944).

569. Bell and Howell Co., 1974-75 CCH NLRB Dec. ¶ 15,008.

570. Food Workers v. NLRB, 416 F.2d 1126, 1135 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

571. Jubilee Mfg. Co., 1973 CCH NLRB Dec. ¶ 25,127.

rather than speculation, of the connection between the discriminatory conduct and the interference with or restraint of employees' rights to organize and to bargain collectively.

Initially an aggrieved party—a union, an employer, or an individual employee—files a charge with the Board. The NLRB will investigate, and if it finds reasonable cause to believe that such charge is true, will issue a complaint followed by a hearing conducted before an Administrative Law Judge. The Administrative Law Judge's determination is subject to review by the NLRB and the United States Court of Appeals.[572]

The NLRA[573] also provides that for the purposes of all hearings and investigations, the Board shall at reasonable times have access to the appropriate premises to question witnesses or copy any evidence. The NLRB can compel the attendance of witnesses or the production of evidence by issuing subpoenas upon the request of either party. If it is determined that an unfair labor practice has been committed, the employer or the union or both may be ordered to cease and desist from the practice. Both the Board and the Administrative Law Judge have the authority to order that an individual or group of individuals be reinstated with back pay plus interest for the loss of income due to the discrimination, less any amounts earned in the interim. Still unanswered is whether an employer's discrimination based on race, color, religion, sex, or national origin independently constitutes an unfair labor practice under the NLRA and is, therefore, within the jurisdiction of the NLRB. The District of Columbia Court of Appeals answered this question in the affirmative,[574] while the NLRB answered it in the negative.[575] Legislative history indicates that Congress, recognizing the difference between

572. 29 U.S.C. § 161 (1970).

573. *Id.*

574. Food Workers v. NLRB, 416 F.2d 1126, 1135 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

575. Jubilee Mfg. Co., 1973 CCH NLRB Dec. ¶ 25,127. In a concurring opinion in a Board case, member Kennedy analyzed the Supreme Court's first discussion of the duty of fair representation as found in Steele v. Louisville & Nash. R.R., 323 U.S. 192 (1944). In that decision, the Court clearly indicated that the origin of the duty of fair representation was statutory rather than constitutional. The Court noted that a statutorily certified or recognized labor organization was vested with exclusive authority to represent union employees. In view of this statutory grant of exclusive authority, the Court determined, there arose a corresponding duty to fairly and impartially represent each employee in the unit. *See* Bekins Moving & Storage Co., 1974 CCH NLRB Dec. ¶ 26,575. *See also* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

Title VII and the NLRA, intended to permit concurrent jurisdiction over employment discrimination cases under the two statutes.[576]

H. ARBITRATION

The unionized company should continue to remind the union of its obligation to eradicate discrimination. In the collective bargaining negotiations, some time should be spent by the parties agreeing that the elimination of discrimination is a mutual responsibility of the employer and the union. Assuming that the labor agreement contains a grievance and arbitration clause, the individual who believes himself the victim of discrimination may file a grievance and pursue the matter through to arbitration. Resorting to arbitration is considerably less time-consuming than initiating the Title VII machinery. Furthermore, and of great significance, the Supreme Court has held that Title VII is an independent remedy; even if the employee has lost his case in arbitration, he may commence a Title VII action with the EEOC and the court.[577]

In hearing a claim of discrimination, the arbitrator will take into account the applicable fair employment law as it has evolved under Title VII. In many respects, because the grievance and arbitration procedure is less formal than litigation and less of an adversary procedure, it is thought that an expeditious resolution of a discrimination problem may be more satisfactory at this level. However, the grievance and arbitration procedure may not afford a realistic remedy where discrimination is alleged against an employer on behalf of a broad class of individuals, rather than of one or two individuals.

Employees who have a claim of racial discrimination which the union is willing to pursue under the grievance and arbitration procedure of the labor contract may not use the picket line to protest the employer's discriminatory practices. In one such case, where two employees picketed with handbills accusing the employer of being "racist pigs" and running a "colonial plantation," the United States Supreme Court upheld the discharge of these employees.[578]

576. See Note, *Employer Discrimination: How Far Does NLRB Jurisdiction Reach?*, 59 CORNELL L. REV. 1078 (1974).

577. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

578. Emporium Capwell Co. v. Western Addition Comm. Org., 420 U.S. 50 (1975).

Although arbitration is desirable at first glance, it is an extremely limited method of enforcement against discrimination for various reasons. First, the union must agree to proceed, or may, because of its responsibility to represent its members properly, deem itself impelled to proceed under penalty of an action by the individual union member.[579] Since arbitration is generally available only at the request of either management or the union, it has not been a popular device for enforcement of civil rights claims initiated by individual employees. Second, the entire arbitration system has been the object of severe criticism because of inherent problems including lack of experienced arbitrators, the fear of bias, the inability to appeal awards, and the skepticism that surrounds the choice of arbitrators. The arbitrators themselves are subject to question—whether they are liberal or conservative, whether they will predicate the award upon the merits or upon an interest in future appointments,[580] and in general whether they lack dedication since their conduct is amenable to no tribunal. While arbitration can and does save time and expense, these factors have lessened its popularity in the area of civil rights.

The courts have used several rationales when declining to defer to arbitration awards in Title VII actions: the task of the arbitrator is to effectuate the intent of the parties while the task of the courts is to effectuate the purposes of legislation; the specialized competence of the arbitrator pertains primarily to the law of the shop while that of the courts pertains to the law of the land; and the arbitral and judicial fact-finding processes are different. The Supreme Court, refusing to defer to arbitration, made clear that while it has upheld and continues to uphold the arbitration system, Title VII strongly suggests that one does not forego a private cause of action by first resorting to arbitration.[581]

Even though an aggrieved employee has initiated a grievance procedure because of her charge of alleged sex discrimination and an impartial arbitrator after a full and fair hearing denied her allegations, the Ninth Circuit granted the plaintiff a full trial upon the

579. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

580. "The tendency of arbitrators to favor industrial needs over civil rights advancement is largely the result of personal motivations and pressures." Kovarsky, *Civil Rights and Arbitration*, 1974 WASH. U.L.Q. 59 (1974).

581. Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974).

issues raised by the complaint.[582] While arbitrators' awards are not binding in court since the issue stems from a separate cause of action, they are admissible as evidence[583] and may have a persuasive effect upon the outcome of the judicial proceeding. This fact has engendered suggestions that a more satisfactory arbitration procedure be implemented.

XII. Conclusion

Title VII is the most comprehensive anti-discrimination legislation enacted to date. Not only does it ban discrimination in hiring, job mobility and discipline, whether for sex, color, religion or national origin, it also prescribes remedial action which may be taken by a number of tribunals of concurrent jurisdiction. In its all-encompassing scope it need defer to no agency, state or arbitrator, and by its fiat, federal courts are commanded to fashion remedies to correct past, and avoid future discriminatory practices. Its failure to cover age discrimination is corrected by an additional law so that no gap is left in the fabric of applicable legislation. As a safety valve, employers should resolve doubts with a cautious eye, casting no reliance on traditional defenses of good faith.

Title VII is not without its defects. The current legislative structure provides overlapping jurisdiction which results in conflicting opinions and administrative delays. As in the case of most social legislation, ideological considerations seem to prevail over the pragmatic. But as the law matures and its application is viewed in proper perspective, a delicate balancing of interests becomes more evident. Equalization of employment opportunity is slowly but surely becoming the accepted practice.

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582. Oubichon v. North American Rockwell Corp., 482 F.2d 569 (9th Cir. 1973).

583. *See* Oppenheim, *Gateway and Alexander—Whither Arbitration*, 48 Tul. L. Rev. 973 (1974).