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THE DEVELOPING LAW OF EQUAL EMPLOYMENT OPPORTUNITY AT THE WHITE COLLAR AND PROFESSIONAL LEVEL

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INTRODUCTION

The likely trend in enforcement of equal employment opportunity law in the next decade will be toward increased focus by governmental enforcement agencies and private plaintiffs on perceived problems in the employment of minorities and women in white collar and professional positions. The Office of Federal Contract Compliance Programs' Affirmative Action Guidelines indicate this trend by requiring government contractors to direct "special attention" to the underutilization of women and minorities at the white collar and professional level in their affirmative action goal setting.1


1. The OFCCP Guidelines declare:

Based upon the Government's experience with compliance reviews under the Executive Order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in his analysis and goal setting for minorities and women.


Officials and Managers.—Occupations requiring administrative personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operations. Includes: officials, executives, middle management, plant managers, department managers, and superintendents, salaried supervisors who are members of management, purchasing agents and buyers, and kindred workers.

Professional.—Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background. Includes: ac-
An increased emphasis on white collar and professional level employment practices will pose difficult problems of concept and compliance for employers and the courts. To a large degree, the law of equal employment opportunity has developed in a blue collar context. Case law fashioned to deal with the problems of providing equal employment opportunity for employees who work with their hands rather than with people, paper, or ideas cannot be applied without alteration or adjustment to employment practices at the white collar and professional levels. The problems of selecting and evaluating workers whose success depends upon such intangibles as salesmanship or innovation necessarily are very different from the problems of selecting assembly line workers or craftsmen. They require different procedures and are deserving of a different standard of judicial evaluation.

A review of the case law indicates that, although the courts have not articulated distinct rules or standards for upper level employment, they have not been insensitive to the special problems faced by employers in this area. The courts apparently have taken a sliding scale approach to employment practices; as a court's estimation of countants and auditors, airplane pilots, and navigators, architects, artists, chemists, designers, dietitians, editors, engineers, lawyers, librarians, mathematicians, natural scientists, registered professional nurses, personnel and labor relations workers, physical scientists, physicians, social scientists, teachers, and kindred workers.

Technicians.—Occupations requiring a combination of basic scientific knowledge and manual skill which can be obtained through about 2 years of post high school education, such as is offered in many technical institutes and junior colleges, or through equivalent on-the-job training. Includes: computer programmers and operators, drafters, engineering aides, junior engineers, mathematical aides, licensed, practical or vocational nurses, photographers, radio operators, scientific assistants, surveyors, technical illustrators, technicians (medical, dental, electronic, physical science), and kindred workers.

Sales.—Occupations engaging wholly or primarily in direct selling. Includes: advertising agents and salesworkers, insurance agents and brokers, stock and bond salesworkers, demonstrators, salesworkers and sales clerks and cashier-checkers, and kindred workers.

Office and Clerical.—Includes all clerical-type work regardless of level of difficulty, where the activities are predominantly nonmanual though some manual work not directly involved with altering or transporting the products is included. Includes: bookkeepers, cashiers, collectors (bills and accounts), messengers and office helpers, office machine operators, shipping and receiving clerks, stenographers, typists and secretaries, telegraph and telephone operators, and kindred workers.

1 EMPL. PRAC. GUIDE (CCH) ¶ 1881, at 1459.
of a particular job's mental difficulty, communication and educational requirements, prestige, and social importance increases, the more apt it becomes to require complex, particularized, and convincing evidence before finding that a prima facie or conclusive case of discrimination has been established.

This Article surveys and evaluates the case law that has developed in the white collar and professional areas to determine both the substantive standards and standards of proof that courts have applied to determine the legality of challenged practices. It suggests that the courts have tended to judge employment practices at white collar and professional levels by a standard of procedural fairness.

The Article will analyze the law on white collar employment practices to determine whether white collar employers may base employment decisions on subjective evaluations of candidates and what employment tests properly may be used in this area. The Article then will consider what a plaintiff must show to establish a prima facie case of white collar discrimination. The following specific questions will be examined:

1. What are relevant statistical comparisons?
2. Are statistical showings sufficient without more to establish a prima facie case?
3. Are employment practices judged on a component-by-component basis or by their overall ("bottom line") effect?
4. What non-statistical factors are relevant to a prima facie showing of discrimination?

Finally, the Article addresses the manner in which employers may prevent a court from drawing an inference of discrimination from a statistical showing and the application of the business necessity defense in the white collar context.

**WHITE COLLAR EMPLOYMENT PRACTICES**

**Introduction**

Title VII of the Civil Rights Act of 1964\(^2\) has been interpreted to

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2. 42 U.S.C. § 2000e et seq. (1974). Although this Article deals primarily with cases decided under Title VII, the relevance of these cases to actions brought by the OFCCP under Executive Order 11246 probably can be assumed. Title VII cases are relevant by analogy to enforcement actions under the Executive Order and some courts have held that Title VII is a substantive limitation on the Executive Order. United States v. East Tex. Motor Freight
prohibit three types of race or sex discrimination: 1) disparate treatment; 2) policies or practices that perpetuate in the present the effects of past discrimination; and 3) policies or practices that have a disparate impact on women or minorities and that are not justified by business necessity. Only the first type of discrimination involves an intent to discriminate.

The prohibitions against discrimination contained in Executive Order 11246 and Title VII apply to all employment practices—hiring, promotion, transfer, and discharge. Rather than analyzing the law as to each practice, this Article focuses on the criteria that employers use to make these decisions. This is because the methods that employers use to make their employment decisions tend not to differ according to the type of decision and because the courts appear to have applied the same standards to each type of decision. Basically, employees are judged by two general types of criteria: subjective and objective criteria. Subjective criteria are those that involve an element of judgment or discretion on the part of the evaluator. Objective criteria are standards or requirements that are applied automatically to all employees.

Subjective Criteria in the White Collar Context

Rowe v. General Motors Corp. is the leading decision on subjective employment practices. Rowe took place in a blue collar context and involved a black production worker who alleged that he had been discriminatorily denied promotion to the salaried positions of foreman or clerk. At the time of suit, two methods of promotion existed at the General Motors plant where the plaintiff was em-


3. The continued vitality of this doctrine has been placed in doubt by the Supreme Court's decision in United Airlines v. Evans, 431 U.S. 553 (1977). Several courts have held that individual plaintiffs cannot bring "continued effects" actions when they did not lodge a complaint at the time of the original act of discrimination. Farris v. Board of Educ. of St. Louis, 576 F.2d 765 (8th Cir. 1978); Freude v. Bell Tel. Co., 438 F Supp. 1059 (E.D. Pa. 1977); Dickerson v. United States Steel, 439 F Supp. 55 (E.D. Pa. 1977). See text accompanying notes 302-15 infra.

4. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1 (Student ed. 1976).

5. See note 2 supra.

6. 457 F.2d 348 (5th Cir. 1972).
ployed. A worker's supervisor could nominate him for promotion or the worker could nominate himself. Under the self-nomination procedure, the promotion committee would not act until it had received the recommendation of the worker's immediate supervisor. Thus, under either method, a worker's chance for promotion depended in part on his foreman's subjective evaluation of his ability, merit, and capacity. Until shortly before trial, General Motors did not post notices of vacancies in salaried positions. The plaintiff's statistics showed that the end result of this promotional system was a marked underrepresentation of blacks in salaried jobs.

The United States Court of Appeals for the Fifth Circuit concluded that General Motors' promotional practices violated Title VII in five respects:

(i) The foreman's recommendation is the indispensable single most important factor in the promotion process.
(ii) Foremen are given no written instructions pertaining to the qualifications necessary to promotion.
(iii) Those standards which were determined to be controlling are vague and subjective.
(iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.
(v) There are no safeguards in the procedure designed to avert discriminatory practices.

The Rowe condemnation of subjective, unsafeguarded employment practices has been widely followed in all types of employment cases. Although a court is apt to condemn an employment system at any job level that is deficient in all five Rowe respects, it will condemn subjective white collar employment standards less readily than blue collar standards. In the white collar context, courts are less likely to insist on the elimination of subjectivity than they are to require that the evaluation procedure be fair and safeguarded. One commentator has suggested some reasons for the different judicial approach to white collar jobs:

7. Id. at 353.
8. On the date of trial, out of 702 salaried workers, 27 were black. Of 370 promotions in the two year period between February, 1967 and February, 1969, 26 went to blacks. Prior to 1962, the defendant hired no blacks for its production lines. Id. at 357 n.17.
9. Id. at 358-59.
Judges are far more likely to have personal knowledge of the jobs of plaintiffs in the white collar context, such as airline stewardesses and salesmen, than of the jobs of blue collar plaintiffs. They better appreciate the type of work upper-level plaintiffs perform and recognize the different variables an employer might reasonably consider when searching for personnel to fill these positions. Judges may also feel that employees who have greater contact with outsiders in the course of their work should be subject to some sort of subjective evaluation.10

Whatever the reasons, as the employment level rises, judicial tolerance of subjectivity increases. For example, when evaluating university decisions to award tenure to professors, the courts may recognize explicitly the central importance of subjective practices.11 Conversely, at the low end of the white collar scale, non-specialized clerical jobs, the judicial approach is nearly the same as in the blue collar context.

Outside the special historical context of integration in the South,12 the courts have tended to be sympathetic to the need for

12. Although notable exceptions to judicial tolerance of subjective decision making at higher level white collar jobs exist, these exceptions probably are attributable to their unique historical context: elimination of de jure segregation in the South. United States v. Coffeeville Consol. School Dist., 365 F Supp. 990 (N.D. Miss. 1973), and United States v. Texas Educ. Agency, 459 F.2d 600 (5th Cir. 1972), concern the consequences of the consolidation of previously segregated school districts. In both cases, the schools involved had to cut back on staff after consolidation. In Texas Educ. Agency, 67 members of the faculty were dismissed. Of the 67, 68 were black teachers and 4 were black administrators. Although the decisions were purportedly made as a result of teacher evaluation, the board did not always abide by the results of its own rating system. In Coffeeville, the Board fired 7 black teachers, apparently in an effort to maintain a 50/50 ratio of black to white teachers. Again, the firings were purportedly based on subjective teacher evaluations. Both courts reacted by ordering the schools to apply strictly objective criteria. In Texas Educ. Agency, the Fifth Circuit appended to its opinion a model of an acceptable teacher evaluation form. This form was designed to reflect only length of tenure and educational attainments; no place was provided in the form for any evaluation of teaching ability.

The case of Wade v. Mississippi Coop. Extension Serv., 372 F Supp. 126 (N.D. Miss. 1974), aff'd in part, rev'd in part on other grounds, 528 F.2d 508 (5th Cir. 1976), was brought in the aftermath of integration of the previously segregated service. The MCES is a state service designed to educate and assist farm families. Prior to 1965, MCES maintained two segregated branches, each of which served a clientele of its own race. When the two branches were integrated in 1965, whites were given the top male and female posts in each county. Blacks who had supervisory responsibility over other black professionals prior to 1965 lost all supervisory responsibility. From 1965 to 1970, 87 whites were promoted to the top professional
subjective decision-making for higher levels of white collar employment. When management or professional level plaintiffs have prevailed, they generally have been able to show that the decision-making procedure was unfair.

Female plaintiffs have prevailed when they have demonstrated that the employment process was tainted by a prior determination that women lack supervisory ability or are less acceptable as professional employees than are men. In *Kohn v. Royall, Koegal & Wells*,\(^{13}\)

positions in the various counties; no blacks were promoted to top positions in these years. MCES claimed to base its promotion on "objective" criteria, but the court perceived that these criteria—degree held, length of service, technical knowledge, job performance and concept of job applied for—were not all objective. *Id.* at 133, 142.

Salaries for MCES professional workers were based on the independent evaluations of two supervisors. They used a form which the court described as "a comprehensive one which attempts to measure knowledge and proficiency as well as personal traits such as attitude, personality, temperament and habits." *Id.* at 135. Over the five year period from 1967 to 1971, blacks on an average had received a score 5.72 points below the average white score. The court noted that "[t]he possibility of this difference occurring in a racially unbiased promotion system, is less than 1/10 of 1%." *Id.* As a result of the consistently lower ratings given to black workers, the average black salary was lower than the average salary paid to white workers. The court found that MCES had discriminated against blacks at the time of merger by failing "to adopt and apply reasonable, objective and racially nondiscriminatory criteria in reassigning employees in the merged organization." *Id.* at 140. The court also found that the evaluation forms were discriminatory:

a substantial portion of the evaluation rating relates to such general characteristics as leadership, public acceptance, attitude toward people, appearance and grooming, personal conduct, outlook on life, ethical habits, resourcefulness, capacity for growth, mental alertness, and loyalty to organization [These are traits which are susceptible to partiality and to the personal taste, whim, or fancy of the evaluator.]

*Id.* at 142.

The court did not hold that the use of subjective criteria was per se invalid, but rather, held that the defendant had not validated its evaluation forms and, thus, had failed to rebut the inference of racial discrimination. Nevertheless, citing *Rowe* and *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir. 1972), the court implied that subjective standards could not be used: "the discriminatory effect of MCES's promotion policies having been firmly established, the burden was on the defendants to overcome the presumption by satisfactory proof that their actions were based on nonracial objective promotion standards." 372 F Supp. at 143. The district court ordered MCES to give first priority to blacks for future promotions and prescribed a plan to implement this relief which set forth objective criteria for promotion of professional employees. The objective criteria included academic degree, technological ability, technical knowledge as displayed in in-service training, and length of service. On appeal the circuit court enjoined use of the performance evaluation form until a new form could be developed and validated in accordance with EEOC guidelines and approved by the court. 529 F.2d at 515. The opinions of both the district court and the Fifth Circuit are unclear regarding whether the new performance evaluations could include elements of subjectivity.

a district court certified a female’s class action against a Wall Street law firm. The court commented that:

[t]here is no doubt that hiring a professional requires weighing many subjective factors contributing to the applicant’s qualifications as a whole, above and beyond the more objective academic qualifications. We cannot agree, however, that this fact immunizes discriminatory practices in professional fields from attack on a class basis. Although a law firm is undoubtedly free to make complex, subjective judgments as to how impressive an applicant is, it is not free to inject into the selection process, the a priori assumption that, as a whole, women are less acceptable professionally than men.¹⁴

Thus, the flaw in Royall’s hiring practices was not their nearly complete subjectivity, but rather, that women were evaluated in a biased manner.

The Equal Employment Opportunity Commission has applied a similar standard to the promotion practices of a bank. In EEOC Decision 72-0721,¹⁵ female bank employees charged that they were discriminatorily denied promotions to the position of trust officer. The EEOC found that the defendant bank employed no female trust officers in three of its branches.¹⁶ It compared a sample of five female trust officers with four male trust officers. The EEOC found that the five women had an average length of service of 20.5 years with the bank; the men’s average length of service was only 4.25 years. Moreover, the women were paid an average salary that was $1,100.00 lower then the men’s.¹⁷ Of the 68 people in the training program from January, 1969 to April, 1970, only 1 was female.¹⁸ These figures led the EEOC to conclude that the bank had discriminated against women. It stated that under these circumstances, the bank’s use of “subjective, i.e., non-reviewable selection [sic] criteria”¹⁹ was unlawful.

Despite its broad holding that the use of subjective criteria was unlawful, in reviewing the case of an individual female plaintiff, the Commission’s review was limited to determining whether these cri-

¹⁴. Id. at 521 (citation omitted).
¹⁶. Id. at 4591.
¹⁷. Id.
¹⁸. Id.
¹⁹. Id. at 4592.
criteria had been applied fairly. The bank claimed that the individual charging party had been demoted and transferred out of the trust department because of her poor supervisory ability and customer relations. The Commission investigated these allegations and concluded that the bank had acted "out of a prejudice against the ability of females to supervise other females." It found that the charging party's difficulties in getting along with her subordinates and superiors were due to their resentment of a woman in a position of authority. Finally, because the bank had the burden of showing that it had not engaged in discrimination, the EEOC held that the three anonymous phone calls that the bank claimed to have received did not support the bank's conclusion that the charging party had poor customer relations. Thus, the EEOC implicitly acknowledged that subjective conclusions that a person has poor supervisory ability or customer relations can serve as legitimate, non-discriminatory reasons for demotion and transfer. The thrust of its decision is that such determinations must be made honestly.

In *Leisner v. New York Telephone Co.*, a court condemned the application of arbitrary or unfair employment standards to women. In *Leisner*, the female plaintiffs alleged that the New York Telephone Company discriminated against women in placement into management positions. The women showed that the defendant's female managers were concentrated in the lowest levels of management and within certain traditionally female jobs, such as chief operator. The company applied both objective and subjective criteria in evaluating its managerial candidates; it considered each candidate's job interest and experience, educational degree, the results of various objective tests designed to test for leadership ability, and performance evaluations done by the candidate's immediate supervisor. Finally, as the company's personnel manager testified: "we stand back and look at the individual as a total individual, and, 'Is this person going to be successful in our business?' becomes our final criterion after we have all of these factors reviewed." The company used a Management Development Program to determine whether employees had the aptitude for upper level management. Although approximately 38% of the company's management level

20. *Id.*
22. *Id.* at 365.
employees were women,\textsuperscript{23} only 6\% of the participants in the Management Development Program were women during the two-year period prior to trial.\textsuperscript{24} Company interviewers had considerable discretion in determining whether applicants had the potential for the development program. That the company considered military but not teaching experience to be indicative of leadership ability also was established.

The United States District Court for the Southern District of New York issued a preliminary injunction against the defendant because it doubted that the company would be able to show that its criteria were valid at the trial for the permanent injunction. The court found that some of the defendant's criteria were arbitrary. For example, the defendant's personnel officer

was asked how he knew that experience as a military officer was more valuable than experience as a teacher. He replied, "I guess I'm paid to make this type of judgment." He testified that no studies or evaluation had been made to validate this judgment.\textsuperscript{25}

The court suspected, moreover, that when the company's criteria were valid, they were applied unfairly to women.\textsuperscript{26} Thus, in \textit{Leisner}, as in \textit{Kohn} and the EEOC decision, subjective criteria were not condemned because they were subjective, but because they were arbitrary or had been applied unfairly.

In \textit{Marquez v. Omaha District Sales Office},\textsuperscript{27} the plaintiff prevailed because he showed that the defendant had not acted in accordance with the defendant's own subjective evaluation of the plaintiff. The plaintiff, Marquez, was a Mexican-American engineer who claimed that he had been discriminatorily denied promotion. The court found that Marquez had been rated as excellent by his superiors and had been eligible for promotion for fifteen years. Marquez never had received a promotion and in 1963 his

\textsuperscript{23} Id. at 363.
\textsuperscript{24} Id. at 364.
\textsuperscript{25} Id. at 369.
\textsuperscript{26} The court observed:
Given the wide discretion that interviewers and supervisors have to measure the "total person" and to waive some criteria if other criteria are satisfied, it is possible that, at least in some cases, the criteria have been applied more stringently with respect to women.
\textit{Id.}
\textsuperscript{27} 440 F.2d 1157 (8th Cir. 1971).
name had been removed from the eligibility list for no apparent reason. Again, in Marquez, subjective evaluation was not the cause of the plaintiff's success; the defendant's unfair application led to the finding of discrimination.

When subjective criteria have been used fairly and in a safeguarded procedure, the courts and the EEOC have expressly approved the use of such criteria. In Thompson v. McDonnell Douglas Corp., the court rejected a black computer operator's claim that he was paid a lower salary than whites and denied entrance into programmer training because of discrimination. The United States District Court for the Eastern District of Missouri held that the defendant's promotion system, which was partially subjective, was not discriminatory because it contained procedural safeguards and had been fairly applied:

[T]he criteria are written, the ratings are discussed with the employee, who may register a complaint with the corporation's equal opportunity officers if he or she thinks the rating unfair, and the ratings are reviewed by at least two other supervisors.

Of greater significance in this case, there has been no showing that defendant discriminated among employees in applying these criteria. On the contrary, defendant has shown that another black operator was promoted to programmer trainee prior to plaintiff's request for transfer, based in part on his outstanding performance ratings.

Thus, the employer rebutted a claim of discrimination by showing the fairness of its employment procedure. The procedure was safeguarded against discrimination by written guidelines, review, and opportunity for appeal. Additionally, the employer produced an

28. The court applied the defendant's own subjective standards to conclude that Marquez had been a victim of discrimination:

The undisputed and documented proof relating to Marquez's outstanding job characteristics, the record of no promotion for Marquez since 1956, the undisputed evidence that several men of equal caliber had received promotions and had been assigned additional job training programs throughout these years, the unexplained removal of Marquez from a promotional status in 1963, the absence of any rational reason for this removal and for his nonpromotion, and the marked absence of minority employees in the district and region, constitute substantial proof of racial discrimination in the instant case.

Id. at 1162.


30. Id. at 982.
individual similar to the plaintiff who had not been discriminated against to dramatize to the court that its procedure was fair.

In Badillo v Dallas County Community Action Committee, Inc.,31 the United States District Court for the Northern District of Texas approved the use of subjective criteria by a screening committee in accordance with the Office of Employment Opportunity guidelines. In Badillo, a class of Mexican-Americans claimed that the Dallas County Community Action Committee ("DAC") discriminated against them in favor of blacks. One of the plaintiffs, Robert Medrano, claimed that he had been discriminatorily denied promotion to the position of Deputy Director of Field Services, the second highest position in the DAC administration. Medrano argued that he was more qualified than the man who had been appointed to the position because of his work experience at DAC, his command of two languages, and his contact with the Dallas poverty community.32 The court considered Medrano's claim to be without merit, largely because of the "objective, reasonable, conscientious job performed by the screening committee."33 The screening committee had selected ten finalists by randomly dividing all applications into five groups. Each committee member selected what he or she considered to be the two outstanding applications in each group. The finalists then were interviewed by the committee and ranked numerically by each member. Eight clearly subjective criteria were used as the basis of ranking:

1. Goals, objectives, priorities
2. Program plans and budgets
3. Organization
4. Leadership ability and potential
5. Administrative capabilities, including depth and length of experience
6. Community support
7. Community change
8. Review and evaluation.34

Because the court was convinced that these criteria were applied

32. Id. at 702.
33. Id.
34. Id.
fairly, it did not find them objectionable on the basis of their subjectivity. Moreover, the court performed its own subjective evaluation of the candidates to determine the fairness of the procedure. It found that the successful candidate’s “appearance at trial assured the Court of his articulateness and leadership abilities. In view of [the successful candidate’s] impressive credentials, the Court finds the screening committee’s decision to be well founded.”35 As in Thompson, the court in Badillo approved the fair use of subjective criteria.

The EEOC also has approved the use of subjective criteria. In Decision 75-225,36 the charging party, a black female social worker, alleged that she was denied promotion on the basis of her sex. The EEOC found that the charging party had been interviewed by three males for the position of correctional manager. The male evaluators testified that they had chosen the male applicant for the job because

while Charging Party did meet its qualification and experience requirements, they were interested in someone who could effectively carry out the functions of the newly created position. Charging Party had strong reservations concerning even the establishment of the position, whereas the male had expressed a very positive attitude about the job.37

In holding this decision to be nondiscriminatory, the EEOC expressly endorsed at least some subjective evaluation:

We do not find it unreasonable for a prudent employer to consider, among other things, a prospective candidate’s enthusiasm and attitude about the job sought and to eliminate from a group of otherwise qualified candidates one or more who, arguably more qualified indicated a genuine lack of interest in the job.38

In the same decision, the EEOC indicated that limits exist to the use of subjective evaluation; the employer could not fire the plaintiff for her “negative and hostile” attitude when this attitude had been displayed by going outside the chain of command to make her EEOC complaint.39 When a subjective decision is made fairly and is not retaliatory, the EEOC decision indicates that it will not be

35. Id.
37. Id. at 4258.
38. Id. (footnote omitted).
39. Id. at 4259.
found objectionable solely because it is subjective. Also worth noting is that the EEOC apparently attached no weight to the fact that this particular subjective evaluation of a female had been made by an all-male panel.

The courts on occasion have deferred to subjective evaluations without even the judicial "second look" taken in Badillo. In Olson v. Philco-Ford,\(^4^0\) for example, the female plaintiff argued that she was more qualified than the male who was selected to be Coordinator of General Education at the defendant's plant. The plaintiff argued that discrimination could be inferred from the lack of posting of notice of the opening, the lack of a formal interview, and the selection of a male by a panel of two males. The Court of Appeals for the Tenth Circuit refused to draw any inference of discrimination because the plaintiff had known of the opening and had been interviewed for it. The court also stated that "[s]tanding alone, selection by two males, one of whom would be her supervisor, will not sustain a reasonable inference of discrimination."\(^4^1\) Finally, the court gave little weight to the plaintiff's subjectivity argument:

> Further argument is that the reasons assigned by the Company for [the male's] selection were subjective and a pretext. These reasons were ability in leadership and public relations and "demonstrated relationship with other staff members." Mrs. Olson's answers are that she was better qualified. This in turn is a subjective conclusion.\(^4^2\)

In Morrow v. Crosby,\(^4^3\) the United States District Court for the Eastern District of Pennsylvania similarly rejected a black plaintiff's contention that he was "overwhelmingly more qualified"\(^4^4\) than two successful white female applicants because "the procedure followed throughout the selection process was fair and reasonably calculated to afford a conscientious consideration of each and every applicant certified as eligible for promotion and was completely untainted by consideration of race or sex."\(^4^5\) Among the criteria for promotion was a personal evaluation by panel members of

\(^{40}\) 531 F.2d 474 (10th Cir. 1976).
\(^{41}\) Id. at 477.
\(^{42}\) Id.
\(^{44}\) Id. at 936.
\(^{45}\) Id. at 937.
the "applicants' inherent abilities and capabilities as displayed at the interviews." In deciding that these evaluations were fair, the court examined the make-up of the two panels involved. Both panels contained two white males, a white female, and a black male. The court was unconvinced that these panels were more likely to choose females than males.

In Levens v. General Services Administration, the United States District Court for the Western District of Missouri approved the use of a one-man screening panel when the evaluator was "neutral and experienced" and used four "customary and acceptable" evaluation factors in making the evaluation. These factors included: "(1) supervisory potential; (2) awards; (3) experience; and (4) job performance." The court made no comment on the obvious subjectivity of at least two of these factors.

Without discussing the merits of the use of subjective criteria, at least some courts tacitly have accepted that the equal opportunity laws do not require employees to promote or retain obnoxious people. In Fogg v. New England Telephone Co., for example, the United States District Court of New Hampshire found that the plaintiff had performed a "valuable public service" by bringing the defendant's discriminatory practices to light. The court, however, gave the plaintiff no relief except attorney's fees and costs because it found that she would not have received a promotion in the absence of sex discrimination. The court found that "what the Company required at this management level was primarily conformity and the ability to get along with other personnel." Fogg did not conform to these standards. To the contrary, she "had a knack for stepping on her supervisors' toes if they got in her way" She was an aggressive, ambitious employee determined to push her way

46. Id.
47. 391 F Supp. 35 (W.D. Mo. 1975).
48. Id. at 36.
49. Id.
50. At the university level, the courts consistently hold that tenure and employment decisions necessarily are based on subjective evaluations. So long as the courts find that these decisions have been fairly made in accordance with reasonable criteria, they will not interfere. See, e.g., Peters v. Middlebury College, 409 F Supp. 857 (D. Vt. 1976); Labat v. Board of Educ. of New York, 401 F Supp. 753 (S.D.N.Y. 1975); Lewis v. Chicago State College, 299 F Supp. 1357 (N.D. Ill. 1969).
52. Id. at 651.
53. Id. at 649.
The court accepted Fogg’s incompatibility with her employer’s bureaucracy as a legitimate reason for denial of promotion. Similarly, in Davis v. Hellmuth, Obata & Kassabaum, Inc., the court concluded that a black interior designer had not been discriminatorily denied promotion when the evidence showed her to be “emotional, antagonistic, demanding, [and] unresponsive.”

This judicial acceptance of subjective evaluations of white collar employees may be limited to levels of employment for which the general public cannot be presumed to be qualified. At lower levels of white collar employment, courts are apt to apply standards similar to those applied to blue collar employment. Smith v. Union Oil Co. may illustrate the judicial approach to such lower level white collar employment.

Smith was a class action brought by blacks and Spanish surname Americans against the retail credit billing center of Union Oil. The named plaintiff alleged that Union Oil discriminated in hiring class members and in promoting class members to managerial and supervisory positions. Promotions at the credit center were based primarily on annual supervisory evaluations. When a vacancy occurred, the personnel department reviewed candidates whom it had identified or who had been recommended for promotion by their supervisors. Employees had an opportunity to express their interest in promotion at the annual review session. The center followed a policy of promotion from within, but did not post vacancies. Based on the plaintiffs’ statistical showing, the court found that:

defendant’s almost exclusively white managerial and supervisory staff controls the promotional process and that subjective evaluations in this context and in conjunction with the policy of “promotions from within” fosters “racial replication” of white employee groups and disparity in promotion.

The court emphasized the defendant’s employment practices in holding that the plaintiffs had shown discrimination. In fact, the court seemed to relegate the plaintiffs’ statistical showing to second

54. Id.
56. Id.
57. 17 FEP Cas. 960 (N.D. Cal. 1977).
58. The personnel department was all white until 1975.
59. Id. at 983.
place in holding that the plaintiffs had established a prima facie case. The court's opinion is worth quoting at length because of this unusual de-emphasis of statistics. The court held that the plaintiffs had established a prima facie case by showing:

(a) Defendant's preference for "word-of-mouth" recruitment and referral hiring.

(b) Defendant's primary reliance, in hiring, placement, and promotion, upon the subjective evaluations of a predominantly white supervisory and personnel staff,

(c) Defendant's lack of bidding for or posting of hiring and promotional opportunities, and defendant's failure to distribute job criteria and qualifications to employees.

(d) Defendant's utilization of subjective or equivocal criteria, virtually without objective, validated tests, for hiring and/or promotion into various positions.

(e) Defendant's occasional utilization of such job criteria with, apparently, greater flexibility for Whites than for minorities (particularly with respect to direct hire into the "credit analyst" position).

(f) Defendant's express policy preference for promotion-from-within based at least in part on in-position seniority (particularly with respect to filling supervisory positions).

The court in Smith did not order specific relief; it instructed the parties to attempt to negotiate a settlement.

Although the court condemned the defendant's use of subjective employment criteria, it accepted the use of such criteria in regard to the promotion of a named plaintiff to the position of credit analyst, a higher level position than clerk. The named plaintiff claimed that she had been discriminatorily denied this promotion. The defendant contended that she had not been promoted because her performance was inadequate; she spent excessive time talking on the telephone and to her fellow employees; she lacked "sufficient industry;" she was reluctant to help in other areas; and she had a poor attitude toward supervision. The court accepted all of these reasons as legitimate grounds for denial of a promotion. Smith thus

60. Id. at 992.
61. Id. at 987.
cannot be read as a complete condemnation of subjectivity at every level of white collar employment. Rather, like many of the other white collar cases, it indicates that at least at higher levels, the real test of the legality of white collar employment practices is whether they are applied fairly.

**Objective Criteria in the White Collar Context**

The leading case on objective employment criteria is the Supreme Court's decision in *Griggs v. Duke Power Co.* In *Griggs*, the Court held that the defendant's use of tests and its imposition of a high school degree requirement were discriminatory even though the employer had not intended to discriminate. The basis of the Court's holding was that the degree requirement and the use of the Wonderlic and Bennet Mechanical Comprehension tests disproportionately disqualified blacks for employment and promotion without being job-related. After *Griggs*, employers cannot use tests or objective requirements to "upgrade" the quality of their workforce unless the tests or requirements are demonstrably related to the job being tested for.

In *Albemarle Paper Co. v. Moody*, the Court expanded on the concept of job-relatedness and endorsed the EEOC's test validation guidelines. The Court agreed with the EEOC that the message of *Griggs* was:

> that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which the candidates are being evaluated."

The Court's favorable recognition of the EEOC's job validation guidelines in *Albemarle* did not end the debate as to how employers are to prove that their tests are job-related. Indeed, in *Washington*
v. Davis, the Court acknowledged that the problem was not likely to be solved easily. In the white collar context, employers have had little difficulty in showing the validity of standardized skills tests. Indeed, one court noted that typing tests, when used to fill secretarial positions, are the classic example of job-related tests. Cases involving such tests usually turn on whether the tests have been fairly administered. In Smith v. St. Louis-San Francisco Railway, for example, the plaintiff, a black female, charged that the defendant had administered the Wonderlic and General Clerical tests in a discriminatory manner. The defendant used both tests as pass-fail measures of applicants for clerical jobs. The tests were administered in local offices and graded in the defendant's personnel office in Springfield, Missouri; the test graders did not know the race of the applicants. The plaintiff took the two tests along with four white applicants in the defendant's Birmingham, Alabama office. She passed the Wonderlic test with the minimum score, but like all four white applicants, she failed the General Clerical test.

The plaintiff claimed that the tests had been administered to her unfairly and that they disproportionately excluded blacks without being job-related. She also claimed that the white male who had given the tests had harrassed her while she took them and had been hostile to her while being unduly helpful and courteous to the whites. From its review of the facts, the court concluded that the tests had been administered fairly.

The court found the tests to be free from adverse impact and to

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67. In Washington, the Court noted: "It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance." 422 U.S. at 247 n.13.
70. The Wonderlic test is used to assess the general mental ability of industrial workers. It is one of the most extensively used personnel screening devices; considerable normative data on industrial samples have been accumulated through its implementation. A. Anastasi, Psychological Testing 440-41 (4th ed. 1976).
71. 397 F Supp. at 584. The court found that the plaintiff generally believed herself to be a victim of discrimination. Her testimony of harrassment was not supported by the white applicant who testified. Finally, the evidence showed that the defendant's office had an excellent record of recruiting black employees.
be job-related. It concluded that there was no adverse impact because the black failure rate on the tests was only .3% more than the white failure rate.\textsuperscript{72} The court stated that it need not determine the job-relatedness of the Wonderlic test because the plaintiff had passed it. It found the General Clerical test to be valid because it was "related in substantial measure to the successful completion of the clerical training program"\textsuperscript{73} and to job performance. Although the court had not determined the validity of the Wonderlic test, it apparently approved its continued use when it stated that "the evidence clearly and unrebuttably demonstrates the validity of these tests."\textsuperscript{74}

In contrast, in \textit{Hester v. Southern Railway},\textsuperscript{75} the defendant's use of typing tests as part of the defendant's entire hiring process was held to constitute an unlawful employment practice. The defendant's employment process consisted of a battery of tests and a subjective interview. First, it gave applicants a pass-fail SRA (Science Research Associates) typing test. It then gave applicants SRA verbal and non-verbal tests and the J.P Cleaver self-description test. On appeal, the defendant argued that the latter three tests were not used as pass-fail hurdles, but rather as "informational inputs in evaluation of the applicants."\textsuperscript{76} The final step in the defendant's hiring process was an entirely subjective interview with its white male personnel officer. Conceding that the plaintiff's evidence was "weak and in some respects inconclusive,"\textsuperscript{77} the district court nevertheless held that the plaintiff had established that the procedure had a disparate impact on blacks\textsuperscript{78} and enjoined the defen-

\textsuperscript{72} 77.5% of black applicants failed the test whereas 77.2% of white applicants failed. \textit{Id.} at 583.
\textsuperscript{73} \textit{Id.} at 584.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} 349 F Supp. 812 (N.D. Ga. 1972), rev'd in part, vacated in part, 497 F.2d 1374 (5th Cir. 1974).
\textsuperscript{76} 497 F.2d at 1375. It is unclear from the district court's opinion whether the defendant raised this point at trial.
\textsuperscript{77} 349 F Supp. at 817.
\textsuperscript{78} The Fifth Circuit reversed on the ground that the plaintiff's statistical showing did not establish a prima facie case of discrimination. The circuit court held that the plaintiff's contention that 35-40% of the persons responding to the defendant's ads were black whereas the percentage of blacks hired was far smaller was neither probative nor relevant. The court reasoned that a number of applicants may have "deselected" themselves before going through the entire process. Thus, any inference of discrimination was entirely conjectural. 497 F.2d at 1380.
dant’s entire hiring process without attempting to condemn any component. The court did not distinguish between the objective and subjective measures, or between the pass-fail typing test and the "informational inputs."

In a more reasoned opinion, the Eighth Circuit condemned the use of homemade skills tests for clerical workers. In *United States v. N.L. Industries, Inc.*, the district court had held that two of the individual plaintiffs justifiably had been denied clerical employment because they had failed the defendant’s homemade math and dictation tests. The Eighth Circuit held that these tests were an unacceptable employment practice because they were not developed professionally and because they were administered in an unstandardized manner. The math test consisted of four or five problems jotted down on a sheet of yellow paper. The dictation test consisted of five minutes of reading from a foreman’s manual “which the supervisor ‘ordinarily’ dictated at 80 words per minute.” The Eighth Circuit struck down the tests in language which suggests it would have been less critical of standardized tests:

The homemade tests administered by the Company certainly permit vast fluctuation in both their content and administration. It hardly required the expertise of a psychometrist to perceive that the difficulty of the problems or the speed of the dictation are within the complete subjective control of the individual examiner. In addition, National Lead has not shown that the examiner possessed any expertise in testing, that the test was in any way standardized, nor even that the hired applicants performed more satisfactorily than the rejected black applicants.

The Eighth Circuit’s opinion clearly indicates that the defendant’s skills tests are illegal because they are disguised forms of subjective, discriminatory evaluation. This condemnation of unstandardized tests is similar to a Tenth Circuit opinion in which in a blue collar context, that court stated that “[T]itle VII prohibits informal testing procedures which might discriminate against minority groups.”

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79. 479 F.2d 354 (8th Cir. 1973).
80. Id. at 371.
81. Id.
82. Id. at 372.
Predictably, for employers to validate tests which, like the Wonderlic, are not skill tests has been more difficult. In *Young v. Edgcomb Steel Co.*, a black male alleged that he had been discriminatorily denied promotion from shear operator to inside salesman. The defendant used the Wonderlic test as a pass-fail measure of promotional applicants. Persons who passed the Wonderlic then were interviewed. The plaintiff failed the Wonderlic and never was interviewed. Without requiring evidence of the effect of the test on the defendant's workforce, the court concluded that the Wonderlic had a disparate effect on blacks. The basis of the court’s finding was a study performed by the Wonderlic Company independently of the litigation, and the court’s own observation that “the discriminatory impact of the Wonderlic Test has been widely noted particularly in the wake of the Supreme Court decision in *Griggs v. Duke Power Co.*” The plaintiff had contended that the test had been administered in a discriminatory manner, but this proved to be unnecessary to his case. The court found that the Wonderlic had not been shown to be job-related and enjoined the defendant from its further use.

Despite the district court's readiness to condemn the Wonderlic on the most generalized kind of evidence, it apparently was not unsympathetic to the defendant's need to screen candidates for the sales job. The court denied individual relief to the plaintiff, noting that:

> Johnie Young's complaint to the E.E.O.C. shows that he has a limited command of the written English language. It is characterized by frequent misspellings and use of poor grammar and improper punctuation. Such writing would be totally unacceptable in correspondence with customers from inside salesmen on behalf of the defendant corporation. In testifying, Young demonstrated a difficulty in understanding and pronouncing the names of his co-workers. For instance, he repeatedly pronounced the name of Herbert McCorkle as "McCormick." He did this despite having known and dealt with McCorkle for at least six years. This inability to deal with people verbally by perceiving and using their correct names further disqualifies Young as an inside salesman.

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86. *Id.* at 971-72.
On appeal, the Fourth Circuit reversed the denial of individual relief, holding that the court could not devise its own standards for job applicants. Rather, it held that the defendant had to reevaluate Young using "nondiscriminatory, objective, job related standards."cite:87 A company witness had testified that what the company wanted of its inside salesmen were "people who displayed diplomacy, intelligence, patience, initiative, attention to detail, and ability to work under stress."cite:88 The Fourth Circuit did not elucidate how the company was to devise objective standards to find these people.

The judicial recognition that some white collar employees must possess skills which cannot easily be quantified or measured may make validation of tests for higher level employees more difficult. Chance v. Board of Examinerscite:89 involved an equal protection challenge to New York's examination procedure for candidates for supervisory positions in the public schools. These positions included principal, assistant principal, and administrative assistant. Although Griggs did not control this fourteenth amendment suit, the court concluded that the defendant had the burden of showing the tests to be job-related once the plaintiffs had shown a substantial disparate impact. The court confessed that it had doubted initially whether valid examinations could be devised to test supervisory abilitycite:90 Apparently, neither party was willing to argue that New

87. 499 F.2d at 100.
88. Id.
90. The court expressed its doubts as follows:

At the outset of the hearings, being inexperienced in the field of examinations generally, we indicated doubt as to whether examinations could be constructed that would be valid for selection of Principals and other supervisory personnel, since we viewed their duties as being executive and complex in nature, with the success of a Principal in a given school depending not so much on his knowledge of duties and educational content courses given by his subordinates as on such intangible factors as leadership skill, sensitivity to the feelings and attitudes of teachers, parents and children, and ability to articulate, to relate, to organize work, to establish procedures, to promote good community relations, to induce subordinates to accept directions, to work cooperatively, to criticize without creating unnecessary animosity or ill-will, to analyze and evaluate administrative problems, to take decisive action when required, to operate under stress, to initiate and promote new programs, and to instill a feeling of confidence. In short, we questioned whether tests that might be valid for purposes of determining a candidate's knowledge of the duties of a position or of detailed educational information would be valid for purposes of determining his judgment and ability as an executive, particularly since the candidate, being a licensed teacher, has
York should abandon its examination procedures in favor of an entirely subjective selection process. The court concluded that although the exams "may have weaknesses in testing for higher level executive positions" they are "essential tools in selecting supervisory personnel."  

The court found the plaintiff's attacks on the validity of the tests to be confirmed by its own examination of the test questions. Although confessing reluctance to invade the field of educational testing, the court concluded that the defendant's tests did not measure what it perceived to be supervisory qualifications. Rather, the court determined that the questions appear to be aimed at testing the candidate's ability to memorize rather than the qualities normally associated with a school administrator. The ability to memorize and regurgitate laundry lists of bad answers is not, we hope, a true test of a candidate's qualifications for a supervisory position. 

The court was sufficiently convinced that these examinations were not job-related to grant a preliminary injunction against their use. Its ruling was affirmed by the Second Circuit.

The case law reveals a general judicial acceptance of standardized, fairly administered skills tests. The courts are less receptive to tests which attempt to measure other kinds of personal attributes. Young and Chance may represent a general judicial skepticism that objective tests can measure the subjective qualifications which they perceive to be necessary for higher level white collar jobs, or indeed, for any jobs which require dealing with people rather than paper. Thus, whereas an employer who administers typing and clerical tests may have to show only that his procedure was fair, an employer who is attempting to use tests to measure other qualities may have an almost insurmountable burden if his tests are shown to have a disparate effect.

91. Id.
92. Id. at 220.
93. Id. at 221.
94. 458 F.2d 1167 (2d Cir. 1972).
Establishing a Prima Facie Case of Discrimination

Relevant Statistical Comparisons

In its landmark decision in *Griggs v. Duke Power Co.*, the Supreme Court ruled that Title VII prohibits employment practices which have an adverse impact on members of a protected class and which are not justified by business necessity. Statistical comparisons are necessarily the central form of proof in a *Griggs*-type, adverse impact case. In *Teamsters v. United States*, the Court acknowledged the value of statistical proof as an indicator of disparate treatment. The effect of the Court’s acceptance of statistical proof as a central element of discrimination suits has been to give such proof an increasingly common and important role. The Court’s analysis of statistical proof has become more sophisticated since *Griggs*. Nevertheless, the Court has refrained from enunciating specific guidelines for the use of such proof and has left it to lower courts to formulate rules for the use of statistical proof.

The impact of an employer’s practices on a particular race or sex can be determined by using any one of three types of comparisons. First, general population statistics can be used to compare the percentage of protected class members who are adversely affected by an employment practice with the percentages of whites or males who are similarly affected. Second, the percentage of protected class members on an employer’s workforce can be compared to the percentage of class members in the relevant labor market. Third, a court can measure the effect of an employer’s practices by examining its actual effect on the employer’s own workforce or applicant pool. The Supreme Court has endorsed all three modes of comparison.

1. General Population Statistics

The first statistical mode of proof was accepted by the Supreme Court in *Griggs*. The Court held that the defendant’s high school diploma requirement had a disparate impact on blacks. Without discussing the geographical community from which the defendant

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97. Id. at 339-40 n.20.
hired, the Court based its holding on 1960 United States census figures which showed that only 12% of North Carolina black males had high school diplomas whereas 34% of North Carolina white males had such diplomas. The Supreme Court reaffirmed the validity of this type of statistical comparison in Dothard v Rawlinson. In Dothard, the Court found that Alabama's minimum height-weight requirements for its prison guards had a disparate impact on women. The Court justified its reliance on generalized national statistics by noting that there was "no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population." More significantly, the Court in Dothard explained why examination of general population statistics rather than of the actual effect of the defendant's requirements on its applicants was appropriate:

There is no requirement that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.

Thus, Dothard indicates that general population statistics may be appropriate for comparison in certain types of cases.

The Supreme Court's decision this year in New York City Transit Authority v. Beazer, may indicate that the Court is retreating from its endorsement of general population statistics and that it may increasingly require plaintiffs to demonstrate the effect of challenged practices on the employer's actual workforce or applicant pool. Beazer involved a fourteenth amendment challenge by a class of methadone users to the New York City Transit Authority's ("TA") policy against hiring methadone users. The class included all methadone users without regard to race or ethnic origin. The United States District Court for the Southern District of New York held that TA's policy constituted a violation of the due process and

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98. 401 U.S. at 430 n.6.
100. Id. at 330.
101. Id.
equal protection clauses of the fourteenth amendment. 103

Almost a year after its original decision, the district court held that the plaintiffs were entitled to recover attorney’s fees under Title VII 104 because TA’s policy had an adverse impact on blacks and Hispanics. 105 On appeal, the Second Circuit affirmed the district court’s constitutional holding without reaching the statutory issue. 106 The Supreme Court granted certiorari not only because both lower courts had departed from the rule of judicial decision-making that statutory issues be resolved before constitutional issues, but also because of the Court’s concern that the Title VII issues had been wrongly decided. 107 The district court had based its conclusion that TA’s methadone policy had an adverse impact on blacks and Hispanics on statistics which, in its view, showed that: (1) of the employees referred to TA’s medical consultant for suspected violation of the drug policy, 81% were black or Hispanic; and (2) between 62% and 65% of all methadone users in New York City are black or Hispanic. 108

In an opinion by Justice Stevens, the Supreme Court held that either the plaintiffs’ statistics were insufficiently probative to establish a prima facie case or, if they did establish a prima facie case, TA had rebutted the case by showing the business necessity of its policy. The Court placed great emphasis on the need for proof about the actual effect of the defendant’s practices. The opinion is unusual because it did not indicate that the defendant provided statistics about the effects of its policy on its workforce. 109 Rather, in finding the plaintiffs’ showing inadequate, the Court appeared to rely to a great degree on its own doubts and speculations as to whether the plaintiffs’ statistics reflected the actual effect of the employment practice.

The Court held that the figure as to the percentage of blacks and Hispanics referred to the medical consultant for suspected use of drugs was not probative of the alleged Title VII violation because

107. 99 S. Ct. at 1358.
108. Id. at 1362.
109. The defendant did introduce evidence as to the percentage of methadone maintained persons who are employable.
"that statistic tells us nothing about the racial composition of the employees suspected of using methadone."\textsuperscript{110} In footnote, the Court stated that methadone users likely were not included in the group referred to the medical consultant because methadone users do not display physical manifestations of drug abuse.\textsuperscript{111}

The Court also held that the district court erroneously had inferred adverse impact from the statistic that 63-65\% of the methadone-maintained persons in New York City are black or Hispanic. The Court found this statistic to be insufficiently probative because it failed to reveal the effect of the policy on TA's applicant pool:

\begin{quote}
We do not know, however, how many of these persons ever worked or sought to work for TA. This statistic therefore reveals little if anything about the racial composition of the class of TA job applicants and employees receiving methadone treatment. More particularly, it tells us nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance programs for over a year—the only class improperly excluded by TA's policy under the District Court's analysis. The record demonstrates, in fact, that the figure is virtually irrelevant because a substantial portion of the persons included in it are either unqualified for other reasons—such as the illicit use of drugs and alcohol—or have received successful assistance in finding jobs with employers other than TA.\textsuperscript{112}
\end{quote}

The Court's unwillingness to infer adverse impact from general population statistics undercuts its affirmation of the utility of such statistics in \textit{Dothard}. Indeed, in a footnote it acknowledges \textit{Dothard} in so limited a manner as to virtually demolish the opinion:

\begin{quote}
Although "a statistical showing of disproportionate impact need not always be based on an analysis of the characteristics of actual applicants, evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants" undermines the significance of such figures.\textsuperscript{113}
\end{quote}

One of the most intriguing aspects of \textit{Beazer} was the type of "evidence" accepted by the Court as sufficient to show that the

\begin{footnotes}
\item[110] Id. at 1365.
\item[111] Id. at 1365 n.26.
\item[112] Id. at 1365-66.
\item[113] Id. at 1366 n.29 (citation to \textit{Dothard} omitted).
\end{footnotes}
general population statistics might not reflect adequately the pool of qualified job applicants. As far as is reflected in the opinion, the defendant did not produce statistics about its actual applicant pool. Nevertheless, the Court speculated that the plaintiffs' figures that 63-65% of methadone users are black or Hispanic might be inaccurate because they did not include the 14,000 methadone users who were enrolled in private clinics. The Court pointed out that in the unlikely event that all 14,000 of these people were white, the overall percentage of black and Hispanic methadone users would be only 40% compared to the 36.3% of the total population of New York that is black or Hispanic. The Court concluded that the plaintiffs' showing was weak and that, if it did establish a prima facie case, that case had been rebutted by the defendant's showing of business necessity. Thus, the Court hedged on the question of whether the plaintiffs' statistics were adequate to establish a prima facie case.

If Beazer reflects the Court's current thinking on the use of statistics in Title VII cases, it may spell the end of plaintiffs' ability to prove their cases by showing the theoretical impact of an employer's practices on the general population. Beazer may well indicate that, in the future, plaintiffs will be forced to show the actual impact of employment practices on identifiable people. To draw confident conclusions from Beazer, however, would be premature. The Court's ruling as to whether the plaintiffs had made a prima facie case is ambiguous. Beazer is also troubling because it is not a "typical" Title VII case; the Title VII claims were brought only as an afterthought. More importantly, Beazer involved strong considerations of public safety and rather weak showings as to the employability of methadone users. Thus, although Beazer gives defendants ammunition against general population statistics, that Beazer has effectively overruled Dothard cannot yet be concluded.

Whatever the remaining vitality of the Griggs-Dothard method of comparison, the method is of limited utility to plaintiffs, especially at upper levels of employment. First, the method can be useful only

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114. In his dissent, Justice White stated that TA could not complain about "the makeup of the applicant pool since they refused on grounds of irrelevancy to allow discovery of the racial background of the applicants denied employment pursuant to the methadone rule." Id. at 1373.
115. The number of methadone users in New York City totalled 40,000 at the time of trial.
116. Id. at 1366 n.30.
when the challenged practice is a flat employment prerequisite, the
effect of which can be measured through general population statist-
tics. Second, general population statistics are also vulnerable, par-
ticularly after Hazelwood, to defendants' objections that the statist-
tics do not reflect the effect of its requirements on the labor pool
actually available to it. For example, a defendant might argue that
general state-wide statistics as to the percentage of blacks with high
school diplomas do not mirror the percentage of such blacks in the
age group and geographic area from which its applicants come. 117
Finally, the courts may be unwilling to permit use of this analysis
at higher levels of white collar employment.

In Townsend v. Nassau County Medical Center, 118 the Second
Circuit refused to apply a Griggs analysis to a bachelor of science
degree requirement for the job of medical technician in a blood
bank. In Townsend, the plaintiff, a black female, had performed
satisfactorily her duties as a medical technician at the county medi-
cal center for two years before the center imposed the B.S. require-
ment. As an incumbent, Townsend was allowed to attempt to pass
the examination for her position even though she did not hold the
degree. When she failed the examination, she was discharged along
with three white employees. Later, Townsend was rehired into a
lower-paying job classification. She brought suit, arguing that the
college degree requirement had a disparate impact on blacks and
was not job-related. The district court ordered provisional reinsta-
tement of Townsend in the medical technician position and that she
be given the opportunity to retake the examination.

The Second Circuit reversed on the ground that the general popu-
lation statistics presented by Townsend were inadequate to show
that the degree requirement had an adverse impact on blacks. The
court based its holding on two grounds. First, it read Griggs very
narrowly, apparently holding that general population statistics can
be used to show disparate effect only in particularly egregious situa-
tions. Second, the court appeared to accord special status to college
degree requirements. In footnote, the court stated that the relevance
of general population statistics in Griggs had been

117. But see Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1371 (5th Cir. 1974)
(rejecting the defendant's effort to limit the statistical showing to the Houston area on the
basis of the "recognized mobility of today's black labor force.").
118. 558 F.2d 117 (2d Cir. 1977).
not to establish the *prima facie* case of discrimination which had already been made, but to demonstrate that the racially disparate impact on defendant employer's workforce which was *otherwise* established, was due to the challenged job requirement, and not to some other practice of the employer or other cause.\(^{119}\)

The court indicated that general population statistics could not be used in most disparate impact cases. The court distinguished the cases relied on by the plaintiff from the situation before it:

Neither *Griggs* nor *Johnson v. Goodyear Tire & Rubber Co.*, or *United States v. Georgia Power Co.*, relied upon by [Townsend], support the proposition that statistical evidence concerning only the general population is sufficient to demonstrate that a job prerequisite "operates to exclude" minorities. In all of these cases plaintiffs established that virtually no blacks were *in fact* able to satisfy the challenged job qualification and obtain employment with the defendant.\(^{120}\)

Having read *Griggs* so narrowly, the court held that the *Griggs* use of statistics could not be applied appropriately to a challenge to a college degree requirement.

The Second Circuit commented that permitting the plaintiff to establish a *prima facie* case on the basis of general population statistics in this case would put a burden of showing job-relatedness of degree requirements on every employer who imposes such requirements. This, the court was not willing to do:

We do not believe that a statistic relating only to the general population, and not to the employment practices of the particular defendant, should be sufficient to raise such a presumption against a college degree requirement. The requirement of a college degree, particularly in the sciences, seems to be in the modern day of advanced scientific method, a neutral requirement for the protection of the public.\(^{121}\)

The court conceded that degree requirements conceivably could serve as pretexts for discrimination, but declined to put all employers who impose such requirements in the position of bearing the burden of proving them job-related whenever they are challenged on the basis of general population statistics.

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119. *Id.* at 120 n.6.
120. *Id.* at 120 (citations omitted) (emphasis original).
121. *Id.*
2. *Available Workforce Statistics*

The second method of statistical analysis is similar to the first in that it measures the effect of a defendant's practices by looking to general community statistics. Under this second method, the percentage of protected class members in the defendant's workforce is measured against the percentage of protected class members in the available workforce. The Supreme Court explained the rationale for this type of analysis in *Teamsters:*

> [A]bsent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.\(^{122}\)

The difficulty posed by this type of comparison is to determine the size and membership of the relevant labor market.

In *Hazelwood,* the Court made clear that general population statistics do not mirror the actual availability of protected class members when the job in question requires special skills not possessed by the general population. The Court stated that in *Hazelwood,* unlike *Teamsters,* the plaintiff could not establish a prima facie case merely by showing that the percentage of black Hazelwood teachers was lower than the percentage of blacks in the Hazelwood community. The Court explained:

> In *Teamsters,* the comparison between the percentage of Negroes on the employer's work force and the percentage in the general areawide population was highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.\(^{123}\)

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\(^{122}\) 431 U.S. at 340 n.20.

\(^{123}\) 433 U.S. at 308 n.13.
In *Hazelwood*, the defendant’s requirement that its teachers have teaching certificates was not challenged as discriminatory. In other cases in which a court accepts the defendant’s employment prerequisites as valid, a plaintiff will have to base his statistical comparisons on the percentage of qualified protected class members in the relevant labor market.

In the white collar context, whether a court will require a showing based on qualified protected class members will depend on whether it views the defendant’s job qualifications as more analogous to the teaching certificate requirement of *Hazelwood* or the truck-driving ability requirement of *Teamsters*. In *Hester v. Southern Railway*, the Fifth Circuit held that general population statistics were not probative when the job in question, that of data typist, required the ability to type sixty words per minute. Similarly, in *Thompson v. McDonnell Douglas Corp.*, the position in question was that of computer programmer, and the court limited the statistical comparison to minorities possessing the relevant minimal qualifications.

In *Patterson v. American Tobacco Co.*, the Fourth Circuit considered whether a district court had properly imposed a quota for hiring blacks and women into supervisory positions. The circuit court held that imposition of the quota was improper by comparing the defendant’s recent supervisory hiring with the percentage of black and female supervisory personnel in the Richmond Standard Metropolitan Statistical Area (“SMSA”). The court stated that the supervisory statistics “furnish a more realistic measure of the company’s conduct than the gross percentage of blacks and women in the whole workforce, including unskilled labor.” The court did not address the issue of whether use of supervisory statistics might have the effect of locking in discrimination.

When the defendant’s employment prerequisites themselves are challenged as discriminatory and unnecessary, the court will not limit the market comparison to persons possessing those qualifications. In *Spurlock v. United Airlines*, for example, the Tenth Circuit held that the plaintiff had established a prima facie case simply by showing the miniscule number of black flight officers employed...

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124. 497 F.2d 1374 (5th Cir. 1974).
125. 416 F. Supp. 972 (E.D. Mo. 1976), aff’d, 552 F.2d 220 (8th Cir. 1977).
127. Id. at 275.
128. 475 F.2d 216 (10th Cir. 1972).
by United. The court rejected United’s argument that its workforce should be measured against the percentage of qualified blacks in the market because United’s qualifications were challenged as discriminatory. The airline’s argument was weakened because it occasionally had waived at least one of its own requirements and it had trained its own flight officers. This second fact meant that the entry-level qualifications of United’s officers were less critical than they otherwise might have been.

*Smith v. Union Oil Co.* indicates that, at the lower range of white collar employment, the courts are apt to accept general population comparisons. In *Smith*, the defendant argued that its clerical workforce should be measured against the percentage of minority clerical workers in the applicable SMSA who are employed in the fields of “Finance, Insurance & Real Estate” and “Manufacturing—Non-durable goods.” The United States District Court for the Northern District of California rejected this attempt to limit the market, reasoning that the defendant could not limit the comparative market to these particular fields because the defendant was not engaged in manufacturing and because the clerical work in the field of finance was “somewhat more specialized than defendant’s own operations.” The court, however, went further and rejected the defendant’s efforts to limit the relevant market to clerical workers. It advanced two reasons for preferring general population statistics. First, it suggested that clerical skills can be acquired readily by the general population. Second, the court suggested that so limiting the market might tend to freeze the status quo and “to keep employable but unemployed minorities out of the workforce particularly in the case of clerical work where ‘qualifications’ are unlikely to present a significant barrier.” The court in *Smith*’s refusal to accept a narrowing of general population statistics appears to go somewhat beyond the rationale of *Teamsters*. The court’s notion is not just that most members of the population could perform the job, but that Title VII contemplates that employers will reach affirmatively into the general population to teach skills to minority members.

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129. 17 FEP Cas. 960 (N.D. Cal. 1977).
130. Id. at 967.
131. Id.
132. Id.
At upper levels of white collar employment, *Hazelwood* offers employers an excellent chance to limit the size of the market against which their workforce is compared. For example, in *Presseisen v. Swarthmore College*, the plaintiffs challenged on the ground of sex discrimination the college's hiring of senior faculty members. The plaintiffs showed that no woman ever had been appointed at the initial rank of assistant professor or above. The United States District Court for the Eastern District of Pennsylvania held that this did not establish a prima facie case because the plaintiffs had not shown the relevant labor market. Significantly, the court believed that the relevant labor market could be shown by the percentage of female faculty at "other small liberal arts colleges comparable to Swarthmore." With respect to overall faculty hiring, because the plaintiffs could not show that Swarthmore employed fewer women than comparable institutions, the court held that no prima facie case of discrimination had been established. In contrast to *Smith*, the court in *Presseisen* apparently was uninfluenced by fears of freezing the status quo. The *Presseisen* opinion indicates that, when a job requires sufficiently high qualifications, defendants may be able to point to the general absence of protected class members in such positions as indicative of a small relevant labor market.

In addition to recognizing the propriety of limiting the members of the relevant labor market to qualified persons, *Hazelwood* opened the door to a fine-tuned focus on the geographical size of that market. In *Griggs*, the Supreme Court had taken a casual approach to the geographical size of the labor market; the court accepted, apparently without analysis, that state-wide high school diploma figures were relevant to Duke Power Company's hiring practices. This approach to geographic scope may have influenced decisions such as *Johnson v. Goodyear Tire & Rubber Co.* in which the Fifth Circuit rejected the employer's argument that its relevant labor market was blacks between the ages of sixteen and twenty-four who lived in the immediate Houston area. The court rejected age limitations

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134. Id. at 625.
135. Id. at 621.
136. Id. The court regarded Swarthmore's percentage of 19.8% women in 1974-75 compared with a nationwide percentage of 22-24% and of 20% women in 1975-76 with a nationwide percentage of 23-25% as indicative of a lack of discrimination.
137. 491 F.2d 1364 (5th Cir. 1974).
on the ground that accepting such a limit on relevant statistics would contravene the Age Discrimination in Employment Act.\textsuperscript{138} Without indicating the factual basis for its conclusion, the court stated:

Goodyear's geographic and age limitations conveniently ignore the recognized mobility of today's black labor force and the obvious fact that the potential labor pool cannot be limited to one particular age group. A "young" black individual, whether age 25 or 45, is a potential employee in a Goodyear plant. Moreover, a black individual in rural Texas today, may be an active participant in the Houston labor pool tomorrow.\textsuperscript{139}

The Court's opinion in \textit{Hazelwood} should end this conclusory approach to geographical labor markets.

In \textit{Hazelwood}, the Court held that it was important to determine whether the relevant labor market was St. Louis County alone, as argued by the defendant, or the county including the City of St. Louis, as argued by the Government. The Court ordered the district court to determine this issue on remand and suggested a number of factors that would be relevant to its determination:

(i) whether the racially based hiring policies of the St. Louis City School District were in effect as far back as 1970, the year in which the census figures were taken; (ii) to what extent those policies have changed the racial composition of that district's teaching staff from what it would otherwise have been; (iii) to what extent St. Louis' recruitment policies have diverted to the city, teachers who might otherwise have applied to Hazelwood; (iv) to what extent Negro teachers employed by the city would prefer employment in other districts such as Hazelwood; and (v) what the experience in other school districts in St. Louis County indicates about the validity of excluding the City School District from the relevant labor market.\textsuperscript{140}

Noticeably absent from the Court's discussion was recognition of "the recognized mobility of today's black labor market."

\textit{Smith v. Union Oil Co.}\textsuperscript{141} indicates the increased attention which litigants should pay to geography after \textit{Hazelwood}. In \textit{Smith}, the

\begin{footnotesize}
\begin{enumerate}
\item 491 F.2d at 1371 (footnote omitted).
\item 433 U.S. at 312 (footnote omitted).
\item 17 FEP Cas. 960 (N.D. Cal. 1977).
\end{enumerate}
\end{footnotesize}
parties expended considerable effort on suggesting various groups for the court's comparison. The plaintiffs suggested that the relevant geographic market was the entire San Francisco-Oakland SMSA. The plaintiffs also suggested that this comparison be weighted to reflect that the defendant actually hired more applicants from the City of San Francisco, which has a greater percentage of blacks than the SMSA. The defendant argued that, because anyone in the SMSA could work for it, the straight SMSA percentages should be used. The court was able to avoid actually deciding between the two figures because they did not affect its findings. Nevertheless, the court considered the plaintiff's SMSA percentages to be somewhat more persuasive than the defendants'.

In United States v. County of Fairfax, the United States District Court for the Eastern District of Virginia held that comparison to the Washington, D.C. SMSA was inappropriate for judging the hiring policies of the County of Fairfax, Virginia. The court based its determination on practical factors which led it to believe that "[t]he District of Columbia . . . is just not an area from which the defendants can be expected to draw any significant number of their employees." As reasons for this conclusion, the court stated:

The distances involved, the lack of convenient available public transportation and the fact that salaries paid by the County and the other defendant agencies are lower than those paid by District of Columbia employers, most notably the federal government, are factors which dictate this conclusion. The distance and transportation factors also prohibit the Maryland subdivisions [of the SMSA] from being considered noteworthy sources of employment.

3. Applicant Flow and Internal Statistics

The third method of statistical comparison entails examination of the defendant's black/white or male/female hire or promotion ratios. The Fifth Circuit has characterized this as the "most direct route to proof of racial discrimination in hiring." The Supreme

142. Id. at 968.
143. 19 FEP Cas. 753 (E.D. Va. 1979).
144. Id. at 757.
145. Id.
146. Hester v. Southern Ry., 497 F.2d 1374, 1379 (5th Cir. 1974).
Court employed this method in *Albemarle Paper Co. v. Moody* 147 This method has the obvious advantage over the other two of eliminating the theoretical debate over the size of the relevant labor market. Although it entails the fewest complications, the method is not free from difficulty Applicant-hire statistics can minimize or exaggerate the number of protected class members actually affected by an employment practice. The Supreme Court in *Dothard* pointed out the danger of underinclusiveness:

The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory 148

In the new Uniform Guidelines, the Government has noted the problem of exaggeration by stating that defendants can rebut a showing of adverse impact by showing that they have an atypical number of protected class applicants due to their special recruiting efforts. 149

Applicant flow statistics have been criticized as potentially misleading. For example, in *United States v. County of Fairfax*, 150 the court rejected the Attorney General’s attempt to use applicant flow statistics in a pattern or practice suit. The court agreed that use of such statistics was a generally acceptable method, but stated that it had a number of drawbacks:

First, it does not take into account whether an applicant is qualified. Second, it is subject to manipulation by both employer and employee, although there is no evidence of any manipulation in this case. Third, if a particular employer has a reputation for discrimination, this could reduce the number of minority or female applicants. Fourth, it does not take into account applicant training and preference. Fifth, it can penalize an employer who has an aggressive affirmative action program which results in a large number of minority or female applicants some of whom are found not to be qualified. 151

In *County of Fairfax*, the court rejected use of applicant flow statis-

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147. 422 U.S. 405 (1975).
148. 433 U.S. at 330.
150. 19 FEP Cas. 753 (E.D. Va. 1979).
151. Id. at 757.
tics because they were available only for one year, 1978, during which time the county had an aggressive affirmative action program.

In *Donnell v. General Motors Corp.*, the Eighth Circuit criticized the district court for relying too heavily on such statistics. At issue in *Donnell* was whether GMC's educational requirements for admission to its skilled trades apprentice program had a disparate impact on blacks. The district court analyzed applicant data and concluded that there was no such impact. The Eighth Circuit reversed, stating that:

The District Court failed to consider those applicants rejected for failure to submit a [high school] transcript or for failure to file more than a preliminary application. In this, the District Court gave undue weight to potentially misleading applicant data since the educational requirements will not only cause completed applications to be rejected, but it will also deter the completion of applications.\(^{153}\)

The defendant argued that, because two-thirds of those in its apprenticeship programs were drawn from its current employees, the plaintiff was required to show the educational background of GMC employees in addition to general SMSA statistics. The Eighth Circuit rejected this contention because GMC had exclusive control of this information and had refused to give it to the plaintiffs, apparently on the ground of burdensomeness.\(^{154}\) Thus, in *Donnell*, general population statistics were found better evidence than applicant flow statistics or internal comparisons, both on the grounds of accuracy and ease of access.

Notwithstanding the recognized weaknesses of applicant flow statistics, the courts generally prefer such statistics over general population figures. In *Hill v. Western Electric Co.*, for example, the United States District Court for the Eastern District of Virginia acknowledged the imperfections of applicant flow statistics in footnote:

> [T]he "applicant flow" theory has its imperfections. It penalizes an employer's successful affirmative action efforts. Moreover, it

\(^{152}\) 576 F.2d 1292 (8th Cir. 1978).

\(^{153}\) Id. at 1298.

\(^{154}\) Id. at 1297.

\(^{155}\) 12 FEP Cas. 1175 (E.D. Va. 1976).
theoretically is subject to manipulation. It also would theoretically penalize blacks or females who, because an employer has a reputation for not employing blacks or females, would be discouraged from applying for employment.\textsuperscript{158}

Nevertheless, on the facts before it, the court found applicant flow statistics to be "the appropriate and preferable measure"\textsuperscript{157} for determining whether the employer's practices had a discriminatory effect. The court's preference was based not so much on the strength of applicant flow statistics as on the weakness of general population statistics in this case. First, the court found that the Washington, D.C. SMSA was too large an area to be considered as the area from which the Arlington County, Virginia defendant drew its labor pool. Thus, general population statistics based on the SMSA did not provide accurate information as to persons who actually were available for work with the employer.\textsuperscript{158} Secondly, the court criticized general population statistics for failing to consider existing discrimination.\textsuperscript{159}

In some cases, courts have found that general population data simply are not probative. In Robinson v. City of Dallas,\textsuperscript{160} for example, the plaintiff challenged the City of Dallas' policy of firing city employees who did not pay their "just debts" as being discriminatory against blacks. The plaintiff argued that the poor were less apt to pay their debts than others and that blacks made up a disproportionate percentage of the city's poor. The Fifth Circuit found this theory unpersuasive. It questioned the plaintiff's unsubstantiated notion that the poor are less apt to pay their just debts than others.\textsuperscript{161} More importantly, the court held that the plaintiff's general population statistics were irrelevant to his claim.

If the city of Dallas refused to hire any individual who had ever failed to pay a just debt, statistics concerning the population as a whole would be relevant. But in the present case the employment practice is applied only to employees of the city of Dallas. Thus the question is whether black employees of the city of Dallas fail to pay their just debts more frequently than white

\textsuperscript{156} Id. at 1179 n.4.
\textsuperscript{157} Id. at 1179.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} 514 F.2d 1271 (5th Cir. 1975).
\textsuperscript{161} Id. at 1273.
employees of the city of Dallas. The statistics offered by plaintiff are not helpful in answering this question.\textsuperscript{162}

Thus, in Robinson, the court held that the plaintiff could not prove his case without internal data.

Similarly, in Dickerson \textit{v. United States Steel Corp.},\textsuperscript{163} the plaintiff challenged United State Steel's ("USS") promotion practices for foremen. The plaintiff attempted to show discrimination by comparing the number of black foremen employed by the defendant with the number of blacks in the defendant's workforce. USS argued, not very plausibly, that Hazelwood banned the use of this type of internal data comparison.\textsuperscript{164} The court rejected this interpretation of Hazelwood and noted that general population statistics would be an invalid measure in this case because "foremen are rarely hired off the street."\textsuperscript{165} Comparing the percentage of black foremen on the defendant's workforce to the number of black managers in the SMSA, therefore would "not reflect the available pool for managers."\textsuperscript{166} Thus, in Dickerson, as in Robinson, the court found that general population statistics left unanswered whether the defendant's particular employment practices had a discriminatory effect.

In Dickerson, the plaintiff used another type of internal datum to show that the defendant had engaged in discriminatory placement of blacks. This was a Matched Pair Study of black and white workers that showed a consistent historical placement of blacks in five undesirable types of jobs.\textsuperscript{167} In this study, white workers were matched with black workers hired at about the same time to control for differences in lengths of service. Although the defendant challenged the accuracy of this matching, the court was persuaded that it was accurate.\textsuperscript{168}

In Smith \textit{v. Union Oil Co.}, the court rejected a defendant's attempted use of applicant hire statistics. The defendant argued that

\begin{itemize}
\item \textsuperscript{162} Id. at 1273-74.
\item \textsuperscript{163} 439 F Supp. 55 (E.D. Pa. 1977), rev'd in part on other grounds, 582 F.2d 827 (3d Cir. 1978).
\item \textsuperscript{164} 439 F Supp. at 81.
\item \textsuperscript{165} Id. at 82.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id. at 77.
\item \textsuperscript{168} Id. at 78. In Presseisen, the court suggested that a similar study might have been an effective way to eliminate the bias in the plaintiffs' promotional study. 442 F Supp. at 613.
\end{itemize}
its hiring practices did not have a disparate impact on blacks because it hired the same percentage of blacks as applied to it for employment. The court rejected this argument on the ground that the appropriate comparison was the percentage of black applicants hired compared to the percentage of whites who were hired.\(^{169}\)

**Bare Statistical Proof**

The Supreme Court has held that gross statistical disparities may be sufficient in and of themselves to establish a prima facie case of discrimination.\(^{170}\) The Court, however, has not defined how large the disparity must be before it alone will establish a prima facie case. The leading cases of *Teamsters v. United States*\(^ {171}\) and *Hazelwood School District v. United States*\(^ {172}\) are similar in several respects. Neither *Teamsters* nor *Hazelwood* turned on bare statistical proof. Both were pattern and practice suits in which the Government alleged intentional discrimination. In each case, the Government bolstered its statistical case with individual testimony of specific instances of discrimination. Nevertheless, the defendant company in *Teamsters* argued that statistics alone could not prove conclusively a pattern or practice of discrimination or even shift the burden of

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\(^{169}\) 17 FEP Cas. at 975. Three protected classes were involved in *Smith*: blacks, Spanish-surnamed Americans, and Asians. Through use of a hypothetical, the court showed that the defendant’s applicant-hire ratios were not necessarily probative of lack of discrimination. The court’s hypothetical was as follows:

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<th>APPLICATIONS</th>
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<tr>
<td>Total Applicants</td>
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<th>APPLICANTS HIRED</th>
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<td>Whites</td>
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proof to the employer. In an ambiguous opinion by Justice Stew-
art, the Court affirmed the importance of statistics and apparently
indicated that statistics could establish a prima facie case. The
Court stated that "[w]e have repeatedly approved the use of sta-
tistical proof, where it reached proportions comparable to those
in this case, to establish a prima facie case of racial discrimination
in jury selection cases." The statistical disparities in
Teamsters were large. The proof in Teamsters showed a virtual
exclusion of blacks from the ranks of truck line drivers. Thus,
Teamsters suggests that huge statistical disparities can establish
prima facie cases of discrimination. The Court indicated that it
shares the general judicial preference for proof that is not exclu-
sively numerical by stating that "[t]he individuals who testified
about their personal experiences brought the cold numbers con-
vincingly to life."

In Hazelwood, Justice Stewart confirmed the message of
Teamsters, stating that "[w]here gross statistical disparities can
be shown, they alone may in a proper case constitute prima facie
proof of a pattern of [sic] practice of discrimination." In Hazel-
wood, as in Teamsters, the Government had adduced evidence
of individual instances of discrimination. For the Court to decide
whether the plaintiff's statistical showing was gross enough to
establish a prima facie case therefore was unnecessary Never-
theless, the Court characterized that showing to be substantial
on its face. In Hazelwood, the defendant employed 1.4% and
1.8% black teachers in the 1972-73 and 1973-74 school years,
respectively. It argued that the relevant labor market was 5.7%
black. The Government argued that the relevant market was
15.4% black. The Court found that the disparity was significant

173. 431 U.S. at 339.
174. Id. (citations omitted).
175. Before 1969, the defendant had employed only one black as a line driver. At the time
of trial, 5% of the defendant's workforce was black, but only 0.4% of its line drivers were
black. All of the black line drivers had been hired after commencement of the litigation. 431
U.S. at 337. Two of the three jury selection cases cited by the Court, Norris v. Alabama, 294
U.S. 587 (1935), and Hernandez v. Texas, 347 U.S. 475 (1954), showed complete exclusion
of blacks or Hispanics from jury duty. In Turner v. Fouche, 396 U.S. 346 (1970), the county
was 60% black, but only 37% of the persons on the grand jury list were black. Moreover, of
178 persons excluded from the list of lack of intelligence or "uprightness," 171 were black.
Id. at 358.
176. 431 U.S. at 339.
177. 433 U.S. at 307-08.
178. Id. at 309.
179. Id. at 308-10.
under either theory. Basing its finding of substantiality on a standard deviation analysis of the figures, the Court stated that calculation of standard deviations is ""[a] precise method of measuring the significance of such statistical disparities.""\(^{180}\)

In *Dothard v. Rawlinson*,\(^{181}\) a disparate impact case, the Court again discussed the role of statistics in an opinion by Justice Stewart. The Court stated that ""to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.""\(^{182}\) The Court found that the plaintiff's evidence, which was entirely statistical in nature, showed that the height-weight requirements of the Alabama Board of Corrections had a discriminatory effect on women. The plaintiff showed that these requirements operated to exclude 41.13% of the female population, but less than 1% of the male population,\(^{183}\) but did not bolster this statistical showing with evidence of past discriminatory practices, subjective hiring practices, or any of the other types of evidence that often accompany statistical proof. The defendant attacked the plaintiff's evidence on the ground that she had used the wrong statistics; she had used a general population comparison rather than applicant flow statistics. The Court rejected this attack on the sufficiency of the evidence:

The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns

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180. Id. at 308 n.14. The Court explained the application of this type of analysis as follows: ""[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations,' then the hypothesis that teachers were hired without regard to race would be suspect."" 433 U.S. at 308 n.14, *quoting* Castenada v. Partida, 430 U.S. 482, 497 (1977). In *Hazelwood*, even using the defendant's market figure, the 4% deviation between the percentage of black teachers employed by the defendant and the percentage on the market gave rise to a difference of more than six standard deviations in 1972-73. *Id.*

The new Uniform Guidelines on Employee Selection Procedures set up a four-fifths rule to determine whether a statistical showing amounts to a showing of adverse impact. Under this rule, adverse impact has been shown where the selection rate for the plaintiff's class is less than four-fifths or 80% of the selection rate for the most successful group of applicants. 43 Fed. Reg. 38,297 (1978).


182. *Id.* at 329.

183. *Id.* at 329-30.
fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made.\footnote{184}

Thus, in \textit{Dothard}, statistical proof became conclusive proof of discrimination when the employer failed to convince the Court that the requirements that had a disparate impact were job-related.

Although \textit{Teamsters}, \textit{Hazelwood}, and \textit{Dothard} have clarified the role of statistics, they have left many questions unanswered. The Court deliberately has refrained from articulating inflexible rules as to appropriate types of statistical proof. In \textit{Teamsters}, the Court cautioned that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."\footnote{185}

Although the lower courts are in substantial agreement that statistical proof alone may be sufficient to establish a prima facie case of discrimination,\footnote{186} they have recognized and seem increasingly concerned that incomplete statistical comparisons, comparisons that do not take into account all relevant factors, can be seriously misleading. Consequently, the courts have demanded increasingly sophisticated evidentiary showings as part of the plaintiff's prima facie case. The courts' growing sophistication is particularly apparent in cases involving claimed discrimination at the white collar and professional levels.

The pre-\textit{Hazelwood} cases on statistical disparities predictably reveal less sophisticated statistical analyses than the post-\textit{Hazelwood} cases. \textit{United States v. Hayes International Corp.}\footnote{187} is an example. In \textit{Hayes}, the court found the following evidence sufficient to establish a prima facie case:

\begin{quote}
[A]t the time the suit was brought Hayes employed 918 whites and 6 negroes in office and technical positions. Between that time and October, 1969 an additional 258 whites and 14 negroes were hired in office and technical jobs. Population figures reveal that Birmingham is composed of roughly 30\% negroes.\footnote{188}
\end{quote}
The court found these "lopsided ratios" sufficient to shift the burden of proof despite an absence of evidence as to the percentage of Birmingham blacks qualified for office and technical jobs.\(^{189}\)

The Ninth Circuit was somewhat more cautious in *Kaplan v. International Alliance*.\(^{8}\) The court held that a female still photographer had established a prima facie case of discrimination by a union when she showed that the union roster included no females. The court, however, required some evidence that qualified female still photographers were available, but did not specify what type of showing had been made of the availability of female still photographers.\(^{191}\)

The Fourth Circuit recognized before *Hazelwood* that isolated statistical showings could be misleading. In *Roman v. ESB, Inc.*,\(^{192}\) the plaintiffs alleged discrimination by the defendant in hiring, layoffs, discharges, pay, promotion, and other employment practices. One issue concerned the company's layoff in 1978. Prior to the layoff, 54% of the company's workforce was non-white. Sixty-three percent of the laid-off workers were non-white. After the layoff, 53% of the hourly workforce was non-white. The plaintiffs attempted to show that recalls after the layoff had been discriminatory by focusing on the three-month period immediately after the layoff when 28 employees were hired, only one of whom was black. The court, how-

\(^{189}\) Similarly, in *Senter v. General Motors Corp.*, the court held that the plaintiffs had made out a prima facie case of promotional discrimination by showing that there were few black supervisors compared to the percentage of black hourly workers. This evidence was held to be part of a conclusive showing of discrimination. 532 F.2d 511 (6th Cir.), cert. denied, 429 U.S. 870 (1976).

\(^{190}\) 525 F.2d 1354 (9th Cir. 1975).

\(^{191}\) In requiring evidence that qualified female still photographers were available, the court observed:

> Upon showing wholly disproportionate female membership in a union in comparison to the available female workforce in a demographic area, an inference arises that the sex imbalance results from discrimination, and the burden of going forward and the burden of persuasion is shifted to the accused, for such a showing is sufficient to establish a prima facie case of sex discrimination. Local 659 notes that the absence of variables properly correlating the statistics could undermine the reasonableness of the inference drawn therefrom. However, there was evidence indicating that qualified female still photographers were available in the Los Angeles area, and no individual on the 60 member roster was a female movie still photographer. The basing of its finding of discrimination in part on these statistics was not clearly erroneous.

*Id.* at 1358 (footnotes omitted).

\(^{192}\) 550 F.2d 1343 (4th Cir. 1976).
ever, found that this evidence either was insufficient to establish a prima facie case or had been rebutted. The court cautioned that "isolated bits of statistical information [do not] necessarily make a prima facie case when divorced from other and contrary statistics and from the statistical picture of all the employment at the plant." In finding that a prima facie case had not been made, the court considered the following facts: (a) the layoffs had been made under a bona fide seniority system; (b) the defendant had a non-white employee percentage that exceeded the percentage of the non-white population in the surrounding community; and (c) when hiring both before and after the three month period challenged by the plaintiffs was examined, there was no disparate impact on blacks. The court also was influenced by the lack of evidence showing that qualified blacks were denied promotion or placement.

Since Hazelwood, the courts more frequently have insisted on rigorous showings of the relevant comparative market, especially when discrimination is claimed to exist at higher levels of employment. In EEOC v. E.I. du Pont de Nemours & Co., the Government argued that its statistics showing a higher percentage of blacks than whites assigned to lower level jobs established a prima facie case of placement discrimination. The court, however, disagreed on the rationale that without more, such statistics do not establish a disparate impact; if, for example, the percentage of blacks in higher skilled jobs reflected the percentage of qualified blacks in the labor force, then "the more reasonable inference would be that substantially more blacks than whites were willing to take the service worker jobs."

The court in du Pont also recognized that the statistical disparities may be indicative of pre-Title VII practices rather than actionable discrimination. Du Pont had begun the post-Title VII period with a highly segregated work force. The court recognized that present showings of statistical disparities might reflect this pre-Act dis-

193. Id. at 1351.
194. Id. at 1352-53. The court also noted that "the absence of other evidence of discrimination should be considered in determining whether a prima facie case is made, just as the presence of other evidence of discrimination should be considered in arriving at the same conclusion." Id.
195. Id.
196. Id. at 1353.
198. Id. at 240 (citation omitted).
crimination rather than actionable post-Act practices and found that this phenomenon of "lag time" was particularly relevant to evaluation of data on promotions above the "career" level:

Candidates for above career level and supervisory positions come largely from the ranks of those having substantial experience in career level jobs. Accordingly, it is to be expected that racially neutral promotion procedures would not significantly increase black representation in these higher positions until sometime after significant black participation at the career job level is reached.200

Du Pont thus held that statistically significant disparities are not probative of discrimination unless they are placed in the context of showing that members of the protected class in fact are available and qualified for the positions from which they allegedly are excluded.201

In Pack v. ERDA, an individual plaintiff claimed that she was denied promotional opportunities by the Atomic Energy Commission because of her sex and attempted to establish a prima facie case with statistics showing that women were underrepresented in upper civil service grades. The Ninth Circuit, however, was unimpressed; because the plaintiff failed to show the relevant labor market, the court refused to infer that ERDA was discriminating against females.203

199. Id. at 234.
200. Id. at 235.
201. Cf. Swint v. Pullman-Standard, 15 FEP Cas. 144 (N.D. Ala. 1977), in which the court recognized the phenomenon of lag time, but described it as an element in rebutting a prima facie showing:

[T]he law recognizes the reality of the situation; namely, that departments are not reshuffled anew each year but are, rather, the result of past assignments as well as new ones. Hence, as noted in Teamsters, [su] an employer can overcome the prima facie effect of such statistics by showing that 'the claimed discriminatory pattern is a product of pre-Act [assignments] rather than unlawful post-Act discrimination.'

Id. at 147-48 (footnote omitted).
202. 566 F.2d 1111 (9th Cir. 1977).
203. The court observed that, although "98% of the employees at grades GS-11 and above were males, whereas 95% of the lower-grade professionals were female [n]o evidence whatsoever was introduced to demonstrate that the lower-grade professional women were qualified to occupy the higher positions or that there elsewhere existed a pool of qualified women applicants." Id. at 1113.

Similarly, in EEOC v. Chesapeake & Ohio Ry., the Fourth Circuit held that "[i]n the
In *Lee v. City of Richmond*, the district court held that a prima facie case of hiring and promotional discrimination could be established only by showing that equally qualified persons were treated differently on the basis of race:

Since the plaintiffs produced no information on the number of blacks available in Richmond with the requisite skills for the higher paying jobs or who had actually applied for the higher paying jobs, it is difficult to understand how plaintiffs' expert arrived at what the expected black representations in those higher paying jobs should be. *Likewise, a discrepancy between black and white average advancement in grade is not significant unless it reflects the fact that the blacks in the same position as whites and with the same qualifications have been passed over in favor of whites.*

Finally, the court held that a showing that few blacks held jobs in the higher pay grades proved nothing in the absence of some showing of the number of blacks in the Richmond job market with the requisite job skills.

The courts have been unreceptive to efforts to establish prima facie cases on the bare comparison of the defendant's workforce to the Standard Metropolitan Statistical Area. In *McAdory v. Scientific Research Instruments, Inc.*, the plaintiff claimed that she had not been hired because of her race and introduced evidence showing that the defendant employed a lesser percentage of blacks than the Baltimore SMSA. The court held this to be insufficient to establish a prima facie case because:

plaintiff makes no effort to show the percentage of black electrical engineers, black Ph.D.'s, black draftsmen, black electrical technicians or black secretaries in Baltimore, or to show the number of blacks that have applied with the defendant and have been rejected in each job classification. At this juncture it is not necessary to determine the quantum of statistical evidence necessary to successfully shift the burden, for it is sufficient to hold that

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absence of data concerning the number of qualified black persons in the labor pool, the commission's evidence is insufficient to establish a prima facie case of racial discrimination against black employees as a class." 577 F.2d 229, 233 (4th Cir. 1978) (citations omitted).


205. Id. at 769 (emphasis added).

206. Id. at 770.

mere citation of a general population figure without adequate correlation will not suffice.\textsuperscript{208}

The courts also have rejected statistical showings as support for a prima facie case even when some effort has been made to show the relevant labor market. In \textit{Opara v. Modern Manufacturers, Co.},\textsuperscript{209} an individual plaintiff claimed that the defendant's refusal to transfer her from her position as a tableworker to one as a sewer was discriminatory. She claimed that sewers made more money than tableworkers and that the company was confining blacks to the lower paying positions. Statistical evidence was introduced showing that the company employed fewer black sewers than were available in the relevant labor market. The United States District Court for the District of Maryland found this evidence insufficient to establish a prima facie case because no evidence was introduced that other employees, black or white, were transferred from one job to another.\textsuperscript{210}

In \textit{EEOC v. Union Planters National Bank},\textsuperscript{211} the United States District Court for the Western District of Tennessee rejected the EEOC's effort to show hiring, promotion, and wage discrimination by a bank against blacks and females. The agency attempted to establish a prima facie case through workforce comparisons. When the agency produced actual persons who claimed discrimination, the court was willing to give weight to rather sketchy statistical showings. For example, two blacks claimed they had been discriminatorily denied employment as management trainees. The court found their claim and a weak statistical showing "barely sufficient"

\begin{itemize}
\item \textsuperscript{209} 434 F Supp. 1040 (D. Md. 1977).
\item \textsuperscript{210} Id. at 1044. The court concluded:
\begin{quote}
Although the court is aware from the evidence introduced by the plaintiff that there is a higher percentage of blacks hired as tableworkers than hired as sewers and that a greater percentage of black sewers live in the community than were employed at Modern, the court cannot conclude from this statistic that this disparity is due to racial discrimination. The statistics do not indicate to this court that Modern systematically excluded blacks from its sewer positions. In fact, numerically there are more black sewers than black tableworkers. There was no evidence introduced at trial to indicate that sewer positions were reserved for white employees and that blacks who applied for positions as a sewer were turned down for that position and were hired only as tableworkers.
\end{quote}
\item \textsuperscript{211} No. 73-132 (W. D. Tenn. May 30, 1979).
\end{itemize}
to establish a prima facie case with regard to this claim.\textsuperscript{212} The court, however, was unpersuaded that the EEOC had made out a prima facie case with its statistical evidence on hiring and promotion. It commented that, without evidence as to the availability of qualified applicants, proof that a certain percentage of blacks or females were hired or promoted provided no valid basis for statistical comparison.\textsuperscript{213} The court also found that the agency's failure to interpret properly information from the bank's computerized personnel system rendered its studies non-probative.

The EEOC offered a Dr. Henderson as an expert witness on hiring. The court found his testimony utterly unpersuasive in part because he

made no analysis of the job openings, grades or descriptions at Union Planters, the skills required for employment, the relationship of jobs to salary grade or the availability of blacks and females with requisite skills for employment. Furthermore, while Dr. Henderson attempted to analyze hiring into initial salary grade, he was unable to utilize the term "initial salary grade" as used on the computer printout.\textsuperscript{214}

The court likewise found that Dr. Henderson's analysis of job placement was unpersuasive because it was based insufficiently upon "accurate information or demonstrably sound statistical methods under the circumstances stated."\textsuperscript{215} Similarly, with regard to the claim of sex discrimination in higher job grades, the court determined that the statistical evidence did not show satisfactorily the number of qualified persons who sought new positions or promotions, the ratio or rejections by race or sex, or the particular persons who claimed such discrimination. Thus "it could . . . as easily [have been] presumed that there [sic] were more whites and males with college degrees (and/or graduate) and/or with college experience seeking employment and advancement than there were comparable blacks or females at Union Planters Bank."\textsuperscript{216} Finally, the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{212} Id., slip op. at 7.
\item \textsuperscript{213} Id., slip op. at 9.
\item \textsuperscript{214} Id., slip op. at 12.
\item \textsuperscript{215} Id., slip op. at 12-13. Dr. Henderson compared black males with high school education or less to white males with a high school education or less over a three year period, even though "three times as many black males gave no education information as did those black or white males which indicated they were high school graduates." Id.
\item \textsuperscript{216} Id., slip op. at 14.
\end{itemize}
\end{footnotesize}
court found the plaintiff's showing that white males on the average earned more than blacks or females to support an inference of discrimination. 217 Union Planters supports the conclusion that statistical showings do not establish prima facie cases unless they are complete enough to indicate that qualified members of protected classes have been denied employment or treated differently on the basis of race or sex than persons with the same qualifications.

Like the Supreme Court, the lower courts have expressed a decided preference for statistical proof that is bolstered by other types of evidence. Indeed, before 1977, the Fourth Circuit had insisted on such bolstering. In Logan v. General Fireproofing Co., 218 the Fourth Circuit held that statistics showing a small number of black employees on the defendant's workforce relative to the percentage of blacks in the community were insufficient to establish a prima facie case. The court held that the plaintiff needed to produce evidence "that would identify any Negro who had been specifically denied employment because of his or her race or color." 219 The court acknowledged the value of statistics, but cautioned that "statistics must not be accepted uncritically, without careful consideration of all relevant factors. Especially where such statistics are 'based on community racial proportions,' which is the situation in this case, they are 'ambiguous' and 'ought to be listened to with a critical ear.'" 220 This cautious approach to statistics taken in Logan is still reflected in judicial evaluation of statistical proof.

In Scott v. University of Delaware, 221 for example, the United States District Court for the District of Delaware was influenced by the plaintiff's failure to produce individual testimony of discrimination. The court stated that "[w]hile I realize that a plaintiff in a disparate impact case is entitled to rely solely on statistics, the absence of any identified victim is nevertheless significant." 222 Although the plaintiff's evidence did show underutilization of blacks on the University of Delaware faculty, the court concluded that the
cause for this underutilization was a black preference for other institutions rather than discriminatory hiring practices by the University. 223

Once the burden of proof has shifted to the defendant, the risk of non-persuasion remains. Perhaps as a result of this, the courts appear to be in general agreement that statistical proof alone cannot conclusively establish discrimination. 224 The Supreme Court suggested this in Teamsters when it cautioned that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." 225

Scott v. University of Delaware 226 contains the most explicit recognition that a statistical disparity may show that something in a hiring process is race-related without necessarily showing that the "something" is discrimination. The plaintiff in Scott showed that only 1.46% of the University's faculty was black but that the available pool of black faculty was 2.55%. Thus, the observed value of black faculty was 1.97% standard deviations below the expected value. Although the court found this level of disparity sufficient to establish a prima facie case, 227 in view of all of the evidence, it held that a conclusive showing of discrimination had not been made. 228

223. Id.
224. The Eighth Circuit has stated that statistical proof can be conclusive evidence in class actions. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir. 1973). In both of these cases, however, the plaintiffs had produced evidence other than statistics.
225. 431 U.S. at 340 (footnote omitted). At least one Justice has concluded that bare statistical proof cannot be conclusive. In United Steelworkers v. Weber, 99 S. Ct. 2721 (1979), Justice Blackmun stated in his concurring opinion that: "[W]hile under Title VII, a mere disparity may provide the basis for a prima facie case against an employer, it would not conclusively prove a violation of the Act." Id. at 2733 (citations omitted). The case law in the lower federal courts generally supports Justice Blackmun's statement.
228. In support of this determination, the court noted:

In summary, the limited applicant flow data and hiring flow data available do not support the inference of disparate impact on blacks. On the other hand, the static work force data cited by Dr. Siskin and the applicant supplemental form data do provide some support for Dr. Siskin's opinion that "there is something in the process of selecting new full time faculty which relates to race." Even if this hypothesis be accepted, however, one must further ask what it is in the process which is related to race. There are three possibilities. First, it could
The employer was able to rebut a prima facie showing of discrimination by producing evidence of its efforts to recruit black faculty members.\textsuperscript{229}

In \textit{Swint v. Pullman-Standard},\textsuperscript{230} the plaintiffs made out a prima facie case of discriminatory job assignments by comparing the racial composition of various departments with each other and with general census figures. The company, however, was able to rebut the prima facie case by showing that the racial composition of its departments resulted from pre-Act practices:

\begin{quote}
[A]n employer can overcome the \textit{prima facie} effect of such statistics by showing that "the claimed discriminatory pattern is a product of pre-Act [assignments] rather than unlawful post-Act discrimination." Here, the evidence shows that the somewhat disparate composition of the departments in the post-1966 period were attributable to the assignments made prior to Title VII.

Indeed, these very exhibits reflect that the extent of departmental variations from the overall work force composition was being reduced each succeeding year during the critical time period.\textsuperscript{231}
\end{quote}

The company rebutted the plaintiff's prima facie showing by introducing statistics regarding its post-Act practices and evidence of its efforts to integrate its department.


A split of authority exists among the courts as to whether the

\begin{quote}
be that the University's methods of recruitment, i.e., the dissemination of information about faculty vacancies, result in a low level of black exposure. Second, it could be that the decision-makers choose non-black candidates from the applicant pool at a rate disproportionate to their numbers. Finally, it could be that black academic candidates are able to choose among a number of employment opportunities and that a lower proportion of qualified blacks than qualified whites views the University of Delaware as a desirable place to be a faculty member. To the extent that a factor related to race does play a role in the selection of full time faculty at the University, the most reasonable reconciliation of all of the evidence, statistical and non-statistical, is that the third hypothesis is the correct one.
\end{quote}

455 F Supp. at 1128-29.


230. 16 FEP Cas. 144 (N.D. Ala. 1977).

231. Id. at 147-48 (citations omitted).
of employment practices is to be measured by their bottom line effect or on a component-by-component basis. In *EEOC v. Navajo Refining Co.*, the Tenth Circuit held that the bottom line approach is the correct one. The court reversed an injunction against the use of a high school diploma requirement and a passing grade on an employment test as employment prerequisites, and observed that:

> [t]here is disparity between SSA's [Spanish surnamed Americans] and Anglos in these counties as to numbers who have a high school education or the GED equivalent, and with respect to the pass rate on the tests before the racial factor adjustment is made. But we do not get to that point unless there is discrimination in fact in actual numbers hired.\(^{233}\)

The court held that Navajo was free to use its requirements provided that they did not result in a disparity in the actual numbers hired.

The Sixth Circuit also has adopted a bottom line approach. In *Smith v. Troyan*,\(^{234}\) the City of East Cleveland used an entrance "examination" consisting of several steps to choose police officers. Among these steps were the Army General Classification Test ("AGCT") and a statutory veterans preference. Whites passed the AGCT at a significantly higher rate than blacks, but the veterans preference favored blacks because of their disproportionately high representation among veterans. In effect, these two requirements cancelled each other so that the total hiring process did not favor whites or blacks. The district court held that, regardless of the overall results of the hiring process, the disproportionately high black failure rate on the AGCT established a prima facie case of discrimination.\(^{235}\) The Sixth Circuit reversed. It characterized the AGCT and the veterans preference as a "subtest" of the overall entrance examination and held:

> [t]hat blacks fare less well than whites on the AGCT, a "subtest" in the process of hiring East Cleveland police officers,
is insufficient in itself to require defendants to justify the AGCT as being job-related. Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a "subtest" of the "subtest." The Sixth and the Tenth Circuits are the only circuits that have addressed squarely whether the bottom line approach is the correct one. Their reasoning, however, is at odds with the approach taken by the Fifth and Eighth Circuits.

In Johnson v. Goodyear Tire & Rubber Co., the Fifth Circuit rejected Goodyear's attempt to show that its transfer policies did not have an adverse effect on blacks. The plaintiff showed that over 49% of blacks failed Goodyear's written tests which had been a prerequisite to transfer out of the labor department until 1971, whereas only 15% of whites failed the tests. Goodyear produced statistics showing that it transferred black employees and hired blacks from the Houston area in a ratio equivalent to the total black population in that area. The court treated this proof as irrelevant to its finding of discrimination because it showed only "that Goodyear has attempted by other practices to remove the taint of the tests' consequences. The fact still remains that for those potential black hirees and black labor department transferors, these unvalidated [sic] testing devices have a substantial invidious effect." Although the court did not explain fully the logic that led to its holding, the result of Johnson seems to be that if a single element of an employer's practices is discriminatory, the employer cannot escape liability even if other elements of the practice have a counterbalancing effect.

The Eighth Circuit implicitly has reached the same result. In Green v. Missouri Pacific Railroad, the court held that the Pacific Railroad's policy of not hiring any person convicted of a criminal offense had a racially discriminatory effect and instructed the district court to enjoin this practice. The court did not discuss the overall effect of the railroad's hiring process. Chief Justice Gibson's

236. 520 F.2d at 496.
237. 491 F.2d 1364 (5th Cir. 1974).
238. Id. at 1372.
239. Id. at 1373.
240. 523 F.2d 1290 (8th Cir. 1975).
separate opinion, however, indicates that 29% of the defendant's employees apparently were black, even though blacks comprised only 16.4% of the relevant labor market. 241 Because the majority did not find these statistics even worthy of discussion, the conclusion can be drawn that, like the Fifth Circuit, the Eighth Circuit adheres to a component-by-component analysis.

The United States District Court for the Central District of California has attacked directly the Sixth Circuit's reasoning in Smith. In League of United Latin American Citizens v. City of Santa Ana, 242 involving police and firefighter employment, the defendants argued that "if they [could] establish overall acceptance rates which do not reveal a disproportionate impact on minority groups, then a disproportionate impact on a particular test [would] not constitute the kind of adverse impact necessary for a prima facie case." 243 The court distinguished Smith on the ground that the written tests used by the City of Santa Ana were not "subtests," but rather "pass-fail hurdles;" applicants who failed these tests were denied jobs without any opportunity to counteract their low scores by achieving higher scores in other areas of the testing process. 244 The court reasoned that a favorable overall acceptance rate does not indicate a lack of discrimination; the Civil Rights Act protects individuals, and the discriminatory impact on an individual is not lessened merely because an employer has favorable minority acceptance rates. 245 Finally, the court attacked the "subtest" doctrine itself as being of "dubious utility:"

Of course, employers should not be compelled to justify each and every question on a written test. But if a procedure forms a substantial part of an employee's [sic] selection process, and if that procedure operates adversely against minority groups, employers should not be relieved of the burden of defending that procedure merely because it did not constitute the entirety of the hiring process. 246

The basis of the court's holding was that, whatever the overall effect of an employer's practices, if individual components exclude indi-

241. Id. at 1300.
243. Id. at 894.
244. Id.
245. Id. at 896.
246. Id.
vidual members of minority groups because of each individual's minority status, an employer may be found to have discriminated. Although the courts disagree on whether to take a bottom line approach, that courts will not take this approach when plaintiffs produce testimony of individuals who have been excluded by the challenged element of the employment process probably should be assumed. The new Uniform Guidelines on Employee Selection Procedures represent a compromise among government agencies on whether to use the bottom line or component-by-component approach. Prior to the adoption of the Uniform Guidelines, the Departments of Labor and Justice and the Civil Service Commission had adopted a bottom line approach, whereas the EEOC had insisted that each component of an employment practice had to be examined individually. The new Uniform Guidelines do not purport to resolve the legal question of which approach is the correct one. Rather, they adopt the bottom line approach as a matter of administrative and prosecutorial discretion. Individual components of the employment system usually will not have to be validated unless the overall result of the process is an adverse impact on a protected group. The government agencies reserve the right to intervene in some cases involving no overall adverse impact. The Guidelines list two types of situations in which the Government may intervene on the basis of a single component:

1. where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices,
2. where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job-related in the same or similar circumstances.

The regulations indicate that this is not meant to be an exhaustive list of the types of situations in which the Government will intervene in the absence of an overall adverse impact. The examples, however,
indicate that the Government rarely will intervene in situations involving no overall adverse impact. Intervention probably should not be expected unless some factor such as prior discrimination or a clearly illegal practice makes the use of a single component particularly egregious even in the absence of overall adverse impact.

**Non-Statistical Factors Relevant to a Prima Facie Showing of Discrimination**

Because the courts seldom find statistical evidence, except when it indicates a gross disparity, to be sufficient to establish a prima facie case, plaintiffs seldom rely solely on statistical evidence. Rather, they bring their statistical evidence to life with individual testimony, with showings that the employer's practices are apt to serve as a ready mechanism of discrimination, or with showings that the employer has engaged in discrimination in the past. Each type of evidence bolsters the inference of discrimination that is drawn from the plaintiff's statistical showing.

1. **Individual Testimony**

Individual testimony can be the strongest additional proof. In *Presseisen*, the court discussed the relation of individual evidence to statistical proof in a class action. The defendant argued that the plaintiff's individual testimony was deficient because it did not conform to the *McDonnell Douglas* formula for establishing a prima facie case. The court rejected this argument on two grounds. First, it declined to read *McDonnell Douglas* as establishing an inflexible rule of proof. Second, the court held that the strength of individual testimony could vary widely according to the strength of the statistical showing. The court in *Presseisen* thus determined that when the statistical evidence is strong enough to create a prima facie case of discrimination, individuals need only testify that they were denied employment or promotion and the court will infer discrimination.


252. In *McDonnell Douglas*, the Supreme Court held that a plaintiff could establish a prima facie case of discrimination by showing: 1) that he belongs to a protected class; 2) that he was qualified and applied for a job for which the employer was seeking applications; 3) that he was rejected despite his qualifications; and 4) the position remained open after his rejection and the employer continued to seek applications from persons of the complainant's qualifications. 411 U.S. 792, 802 (1973).
When the statistical evidence is weaker, however, the burden on the individual class members is much the same as under *McDonnell Douglas* and will differ according to the content of their testimony.\(^{253}\)

In *Wade v. Mississippi Cooperative Extension Service*,\(^{254}\) individual testimony served not so much to bolster the inferences drawn from the statistical evidence as to quiet the court's doubts about the propriety of the plaintiff's statistical methodology. The plaintiff sought to prove, primarily by the method of multi-variate regression analysis,\(^{255}\) that the defendant's evaluation procedure resulted in lower average salaries for blacks. The defendant argued that regression analysis was "inappropriate for use in a social service setting."\(^{256}\) The Fifth Circuit focused on the individual testimony as a way to avoid determining the probativeness of the statistical analysis:

Although multi-variate regression analysis is indeed a sophisticated and difficult method of proof in an employment discrimination case, there was additional evidence of specific instances of black and white workers with essentially similar experience and qualifications receiving disparate salaries. Thus, we find that while in some instances the statistical facts spoke for themselves, as in the absence of promotions of black professional workers, in other cases, there was evidence beyond the statistical facts and

\(^{253}\) Thus, if a female faculty member were to testify that she overheard a conversation between the President and the Provost wherein the President of the College told the Provost to make sure that no women are promoted above the rank of Assistant Professor, then such testimony obviously would not have to meet a *McDonnell-Douglas* type formula. However, if a female faculty member were to testify, as many did in this case, that, by reason of their own personal experience at Swarthmore, they were victims of alleged discrimination, then they would have to show more than the mere fact that they were not hired, promoted, renewed, tenured, etc. They must also demonstrate that the alleged discrimination did not result from the most common legitimate non-sexist reason on which Swarthmore might deny a female faculty member a promotion, renewal and tenure—an absolute or relative lack of qualification—and in the case of hiring, an absence of a vacancy.

442 F. Supp. 593, 601 (citation omitted).

254. 528 F.2d 508 (5th Cir. 1976).

255. Multi-variate regression analysis is a complex statistical method in which information from different tests or evaluation procedures is combined to yield one overall score. This score is intended to predict an individual's ability or achievement potential in a given area or occupation. A. ANASTASI, supra note 70, at 180-81.

256. 528 F.2d at 517.
analysis that would support an inference of discrimination as in the case of salaries.257

In Presseisen, the court viewed individual testimony as a way for plaintiffs to bolster the inferences drawn from their statistical showing. In Wade, evidence that worked independently of the statistical showing enabled the court to infer discrimination without relying on a form of statistical analysis with which it was uncomfortable.

2. Potentially Discriminatory Employment Practices

The courts have recognized since Rowe v. General Motors Corp., that, although certain types of employment practices are not per se violations of equal opportunity law, they can serve as "ready mechanism[s] for discrimination."258 The type of practices condemned in Rowe were invalid because they vested uncontrolled discretion in supervisory personnel. A showing that an employer's personnel practices leave such uncontrolled discretion in supervisors can bolster a statistical showing by making it much more difficult for an employer to convince the court that any statistical disparity is not the result of discrimination. In United States v. N.L. Industries, Inc.,259 the plaintiff showed that only three of the defendant's one hundred foremen were black. The Fifth Circuit held that these numbers gave rise to a strong inference of discrimination. This inference became conclusive when the plaintiff also showed that foremen were chosen on the basis of subjective recommendations by incumbent foremen260 and that the defendant had a history of discrimination. In Parson v. Kaiser Aluminum & Chemical Corp.,261 the plaintiff bolstered a strong statistical showing of discrimination in several ways. The court found the statistical showing to be strong enough that it could have established a prima facie case by itself. The plaintiff produced other evidence as well, however, leading the court to state that:

[w]e conclude that the plaintiff's evidence of racial disparities in promotions to foreman [sic] after 1965, the exclusion of blacks from such positions prior to 1965, subjectively based promotion

257. Id. (footnote omitted).
258. 457 F.2d 348, 359 (5th Cir. 1972).
259. 479 F.2d 354 (8th Cir. 1973).
260. Id. at 368.
261. 575 F.2d 1374 (5th Cir. 1978).
decisions by white supervisors after 1965, and the testimony by individual class members of discrimination they suffered, make a \textit{prima facie} case of [discrimination].\textsuperscript{262}

In these Fifth Circuit opinions, subjective employment practices constituted an additional element that reinforced the statistical showing.

In \textit{Smith v. Union Oil Co.},\textsuperscript{263} the court treated statistical evidence as bolstering a showing of discrimination made by demonstrating the defendant's subjective employment practices. The court recognized that subjective employment practices violate the law only if they are shown to have a discriminatory effect. Nevertheless, the court expected to find such an effect and viewed statistics as a way to confirm rather than to trigger its suspicions.\textsuperscript{264} \textit{Smith} indicates the judicial hostility toward employment practices that vest a great deal of discretion in evaluators. The plaintiff's showing that Union Oil used highly subjective employment practices prepared the court to draw an inference of discrimination from the statistical showing.

In \textit{Brown v. Gaston County Dyeing Machine Co.},\textsuperscript{265} the Fourth Circuit held that the defendant could not refute the inference of discrimination drawn from the plaintiff's statistics because it had no objective standards for placement and promotion. The plaintiff's statistics showed that blacks were largely relegated to lower paying jobs. The Fourth Circuit thus concluded that discrimination had been conclusively shown.\textsuperscript{266} The court in \textit{Brown} apparently foreclosed the notion that in this instance the defendant could have shown non-discriminatory subjective practices. The combined effect of the plaintiff's statistical showing and the defendant's subjective practices thus was to create an irrefutable case of discrimination.

Similarly, in \textit{Leisner v. New York Telephone Co.},\textsuperscript{267} the district court issued a preliminary injunction against the defendant's allegedly discriminatory hiring and promotion policies because it doubted that the defendant would be able to rebut the inference drawn from the plaintiffs' statistical evidence at trial. In \textit{Leisner},

\begin{thebibliography}{9}
\bibitem{} \textsuperscript{262} \textit{Id.} at 1387.
\bibitem{} \textsuperscript{263} 17 FEP Cas. 960 (N.D. Cal. 1977).
\bibitem{} \textsuperscript{264} \textit{Id.} at 963.
\bibitem{} \textsuperscript{265} 457 F.2d 1377 (4th Cir. 1972).
\bibitem{} \textsuperscript{266} \textit{Id.} at 1382-83.
\bibitem{} \textsuperscript{267} 358 F Supp. 359 (S.D.N.Y. 1973).
\end{thebibliography}
the plaintiffs supported an allegation of sex discrimination in hiring and promoting women into management level positions with a showing that women were concentrated at lower level management positions. The court concluded that the defendant probably would have been unable to rebut the inference of discrimination because its hiring criteria had not been validated and, more significantly, because its supervisors had wide discretion in applying the hiring criteria.268

3. History of Past Discrimination

Evidence that a defendant has engaged in discrimination in the past bolsters a statistical showing by giving the courts a context in which to interpret the plaintiff's statistics. In Hazelwood, the Court affirmed the use of evidence of past discrimination as an interpretative aid: "Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decisionmaking process had undergone little change."269

In both Parson and N.L. Industries, the Fifth Circuit used evidence of past discrimination in the manner suggested by the Court. In N.L. Industries, the Fifth Circuit stated:

The evidence before us presents statistics reflecting great disparity in the employment of blacks as compared to whites as clerks, typists and technicians. The Company apparently maintained a white-only policy in these departments prior to the effective date of the Civil Rights Act. We think the statistics, when considered in the light of the Company's past discriminatory policies and its failure to fully ameliorate those policies, established an inference of discrimination which the Company had failed to rebut by its assertion of nondiscriminatory hiring policies.270

268. Id. at 369. In addition to showing that the defendant has vested unguarded discretion in their evaluators, a showing that the defendant uses non-validated objective tests will bolster a plaintiff's statistical evidence. See, e.g., Watkins v. Scott Paper Co., 530 F.2d 1159, 1185 (5th Cir.), cert. denied, 429 U.S. 861 (1976) (noting that the Wonderlic test "has been shown to be discriminatory in impact in a number of other Title VII cases."); United States v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973); Young v. Edgcomb Steel Co., 363 F Supp. 961 (M.D.N.C. 1973).
270. 479 F.2d at 370.
In *Parson*, the defendant’s discrimination before 1965 helped the court conclude that the plaintiff had established a prima facie case of discrimination.\(^2\)

Thus, three types of evidence—individual testimony, showings of potentially discriminatory employment practices, and showings of a history of past discrimination—help bolster statistical evidence of discrimination. The first type of evidence can provide the strongest help because it can virtually provide the plaintiff with "smoking gun" proof. At its weakest, it still helps to bring the cold numbers to life for the court. Potentially discriminatory employment practices also may count heavily against employers because courts are highly suspicious of unguarded employment practices and may expect them to result in discrimination. A showing of a past history of discrimination provides less direct help; it merely leads a court to conclude that the defendant is predisposed to discrimination. Unless the defendant can show that he has reformed, however, the court may find that his past history of discrimination significantly strengthens a statistical inference of discrimination.

**Defending Discrimination Suits**

**Burden of Proof**

In *McDonnell Douglas Corp. v. Green*,\(^2\) the Supreme Court articulated a formula for allocating the burden of proof in private, non-class action employment discrimination suits. The Court recognized that the plaintiff has the initial burden of establishing a prima facie case of discrimination.\(^2\) It held that this initial burden could be met by a plaintiff's 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 applications from persons of complainant's qualifications.\(^2\) Once the plaintiff has established this prima facie case, the burden

\(^{271}\) 575 F.2d at 1387.

\(^{272}\) 411 U.S. 792 (1973).

\(^{273}\) Id. at 802.

\(^{274}\) Id.
of proof shifts to the defendant. At this point, the employer can escape liability by articulating "some legitimate, nondiscriminatory reason for the employee's rejection." The Court in *McDonnell Douglas* acknowledged that an applicant's illegal actions against the defendant would constitute such a legitimate nondiscriminatory reason for rejection. Once the defendant has given a nondiscriminatory reason for rejection of the plaintiff, the burden of proof shifts back to the plaintiff. At this point, the plaintiff can keep his case alive by attempting to prove that the defendant's "stated reason for [his] rejection was in fact [a] pretext" for discrimination. One way for the plaintiff to show this would be to prove that the defendant did not apply its policy equally to protected and non-protected class members.

In *Teamsters v. United States*, the Court cautioned that *McDonnell Douglas* had not created an "inflexible formulation" for the order and allocation of the burden of proof in employment discrimination cases. Although the *McDonnell Douglas* formula cannot be regarded as definitive, it has been very influential in all types of employment discrimination litigation. Recently, the Court gave further guidance on the allocation of the burden of proof in discrimination suits.

In *Furnco Construction Corp. v. Waters*, the three individual plaintiffs, black bricklayers, established the *McDonnell Douglas* formula of prima facie discrimination by showing that they were qualified bricklayers, that the defendant had been hiring bricklayers but had rejected the plaintiffs despite their qualifications, and that the defendant had continued to seek applications from similarly qualified bricklayers after rejecting the plaintiffs. The defendant attempted to rebut this prima facie showing by arguing that the reason for its hiring policies had been business necessity. The employer had been hiring bricklayers to reline a furnace in a steel mill. The job necessitated shutting down the furnace and therefore

275. *Id.*
276. *Id.* at 803.
277. *Id.* at 804.
279. *Id.* at 358.
had to be performed expertly and within strict time limits. Consequently, the defendant's foreman had hired only bricklayers whom he knew to be skilled, or who had been recommended to him.\textsuperscript{282} The overall result of this process was not discriminatory; a higher percentage of black bricklayers had worked on the job than the percentage of blacks in the relevant SMSA. Nevertheless, the Seventh Circuit held that the employer had not rebutted effectively the plaintiff's prima facie case because it could have devised a hiring policy that would have served its needs and enabled it to consider more minority applications. The Supreme Court reversed, holding that:

when the prima facie case is understood in the light of the opinion in \textit{McDonnell Douglas}, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal \textit{and} allow him to consider the \textit{most} employment applications.\textsuperscript{283}

\textit{Furnco} makes clear that, at least in suits in which the plaintiff is not able to show an overall discriminatory effect, an employer will be able to escape liability if his policies serve legitimate ends, even though better policies for the purposes of affirmative action could have been devised.

In November, 1978, the Court granted certiorari in the case of \textit{Board of Trustees of Keene State College v. Sweeney}.\textsuperscript{284} In granting certiorari, the Court reaffirmed that under \textit{McDonnell Douglas} and \textit{Furnco}, an employer need not prove the absence of a discriminatory motive in order to rebut a prima facie case. He meets his burden when he articulates "some legitimate, nondiscriminatory reason for the employee's rejection."\textsuperscript{285}

\textit{Preventing a Court From Drawing an Inference of Discrimination From a Statistical Showing}

As has been shown, plaintiffs can establish prima facie cases of

\begin{itemize}
\item \textsuperscript{282} Id. at 570.
\item \textsuperscript{283} Id. at 577.
\item \textsuperscript{284} 99 S. Ct. 295 (1978).
\item \textsuperscript{285} Id., quoting \textit{Furnco}.
\end{itemize}
discrimination through the use of statistics. When the thrust of the plaintiff's case is that the employer's practices have a disparate effect on a protected class and he is able to present prima facie proof of this effect with statistics, the employer's burden of proof in rebuttal is much more difficult to meet than in the McDonnell Douglas situation. Therefore, a defendant's first line of defense in a discrimination suit must be to discredit the plaintiff's statistical showing to prevent the court from finding that a prima facie case has been made.

Fortunately for employers, the difficulties inherent in constituting statistical analyses afford ample ground for attacks on plaintiff's statistical showings. Hazelwood opened the door to sophisticated attack on the labor market selected by plaintiffs for the purposes of comparison. Pressesen illustrated the vulnerability of complex statistical analyses, such as regression analysis, to attacks by defense experts.

Hazelwood was a double boon to defendants. First, it recognized that relevant labor markets have precise geographical limits. After Hazelwood, suburban employers can be expected to argue, as did the defendants in Hazelwood, that their markets do not include the more heavily black and Hispanic cities. City employers, on the other hand, will argue that their hiring area includes the suburbs, thus lessening the minority percentage in the relevant labor market. The highly complex instructions handed down by the Court to guide determination of the relevant geographic market make it unlikely that courts will be able to resolve the issue with any degree of certainty. Presumably, because plaintiffs have the burden of proof, the increased complexity of establishing the relevant labor market should work against them.

The Court in Hazelwood's recognition that the relevant labor pool may consist only of qualified workers is a second boon to defendants and one that is especially helpful for higher level white collar employers. As illustrated by Pressesen, courts may be led to glean the size of the relevant labor pool from the number of protected class members employed in similar occupations. The better able an employer is to demonstrate that his work is specialized and requires

287. See, e.g., Smith v. Union Oil, 17 FEP Cas. 960 (N.D. Cal. 1977).
288. See text accompanying note 60 supra.
skills not found in the general population, the better able he will be to limit the size of the relevant labor market.\footnote{See, e.g., Hester v. Southern Ry., 497 F.2d 1374 (5th Cir. 1974) (relevant labor market is persons who can type 60 words per minute); Pressesisen v. Swarthmore College, 442 F Supp. 593 (E.D. Pa. 1977) (relevant labor market is female faculty employed at comparable colleges); Davis v. Hellmuth, Obata & Kassabaum, Inc., 416 F Supp. 997 (E.D. Mo. 1976) (relevant market is persons interested in schools of architecture). See also Smith v. Union Oil Co., 17 FEP Cas. 960 (N.D. Cal. 1977) (accepting that clerical workers in the field of finance perform specialized work).}

Pressesisen indicates the success that defense experts may have at rebutting statistical showings. Indeed, in Pressesisen, the parties were each so successful at undermining the opponent’s statistical showing that the court commented:

It seems to the Court that each side has done a superior job in challenging the other’s regression analysis, but only a mediocre job in supporting their own. In essence, they have destroyed each other and the Court is, in effect, left with nothing.\footnote{Id. at 619.}

In Pressesisen, Swarthmore College convinced the court that the plaintiff’s salary regression analysis was unreliable since it did not include such factors as scholarship, teaching ability, publications, some assessment of teaching ability, quality of degree, career interruptions, career continuity, quality of publications, administrative responsibility and some measure of committee work.\footnote{Id. at 616.}

These missing factors are in large degree subjective. Clearly, it will be difficult, if not impossible, for a plaintiff to formulate a reliable regression analysis when the court believes that the analysis must reflect ability and quality of work. The plaintiffs refuted the College’s own regression analysis by arguing that the inflation figure used by the defendant was susceptible to bias.\footnote{Id. at 618.} The court concluded that, like the plaintiffs, the defendants had failed to include all the relevant variables in the analysis.

Another serious flaw in the plaintiff’s salary analysis in Pressesisen was the exclusion of rank as a variable. The plaintiffs had excluded rank on the ground that including it would conceal “the fact that women at Swarthmore College took longer on the average to reach rank on the ground that including it would conceal “the fact that women at Swarthmore College took longer on the average to reach
a given rank than did men.” The defendants showed that when rank was included, no significant disparity existed in the average salaries of men and women. Whether the exclusion of rank was proper turned on whether the plaintiffs had proven that women were discriminated against in promotion rate. The court had found the plaintiffs’ promotional studies to be unreliable because they excluded the variables of prior experience, division, and publications. Therefore, because the plaintiffs had failed to make out a prima facie case of discrimination in promotion, the exclusion of rank as a variable in the salary analysis was held to be improper.

A third flaw in the salary analysis was that the plaintiffs’ analysis had aggregated junior and senior appointments. The College argued successfully that faculty at junior and senior levels were drawn from separate labor pools and that a study that failed to distinguish between the two pools would be biased. One of the defendants’ experts testified that:

[i]f, for example, it is the case that the pool from which senior appointments are drawn is predominantly male and the pool from which junior appointments are drawn is mixed, the result of aggregation will be to mix the effect of seniority with the effect of sex and make it impossible properly to sort out what policies may be due to seniority and what policies may be due to sex.

In addition to the debates generated over inclusion of variables and treatment of levels of appointments, the parties were unable to resolve to the court’s satisfaction the problems of how to deal with inactive members of the faculty and the varying career and salary slopes within different divisions. The defendants argued successfully that one variable which the plaintiffs had treated as an independent variable or baseline characteristic, years since highest degree, was in fact a dependent variable, one that could change during employment. Treatment of a dependent variable as an independent variable also biased the defendants’ study.

293. Id. at 615.
294. Id. at 614.
295. Id.
296. Id. at 615.
297. Id. at 616.
298. Id. at 609.
net effect of expert criticism on both sides was to discredit all the statistical studies. Because the burden of proof was on the plaintiffs, this resulted in victory for the defendants.

Employers also can attack statistical analyses by arguing that the universe of affected employees is too small to give rise to a valid statistical showing. This defense was successful in Harper v. Trans World Airlines and in Cedeck v. Hamiltonian Federal Savings & Loan Ass'n. Large employers might be able to use this defense if they can convince the court to examine their hiring practices on a department-by-department basis.

**Defenses to Statistical Showings**

If the defendant is unable to discredit the plaintiff's statistical analysis, the defendant must fall back on his second line of defense; he must attempt to rebut the inference of discrimination that the court will draw from the statistics. A defense that any statistical disparities are not due to present employment practices is one way that the defendant can attempt to rebut an inference of discrimination.

The strength and scope of a no-present-violation defense is uncertain. The lower courts had developed a theory of Title VII liability under which an employer was liable if his present neutral employment practices perpetuated in the present the effect of past discrimination. This theory was used mainly against facially neutral seniority systems. Under this theory, an employer could not escape liability merely by saying that it had ceased its discriminatory practices after the passage of Title VII or that any complaints of discrimination were time-barred.

The Supreme Court's decision in United Airlines v. Evans casts doubt on the continued viability of this theory of liability for the locked-in effects of past discrimination. In Evans, a female plaintiff

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300. 525 F.2d 409 (8th Cir. 1975) (statistics based on five married couples have little predictive value and must be disregarded).
301. 414 F Supp. 495 (E.D. Mo. 1976) (statistics based on 55 employees must be disregarded).
alleged that United's seniority system gave present effect to a past act of discrimination. Specifically, she argued that she had been discriminatorily forced to resign in 1968 when she got married. When the plaintiff was rehired in 1972, she was given no credit for her past services and, as a result, was junior to males who had been hired after 1968. The Court rejected the plaintiff's argument that United's seniority system was not bona fide because it gave present effect to the plaintiff's discriminatory discharge. The Court also cast doubt on whether employers could be held liable for past acts of discrimination if those acts were not the subject of timely complaints:

Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d) [of Title VII]. A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences. 304

Relying on Evans, employers can argue that their hiring practices must be judged as of "right now," that is, within the 180-day period for filing Title VII complaints. 305 Whatever their practices were before that period, they are entitled to treat them as legal so long as no complaint was made.

The major problem with this argument is that it is unclear from the Evans opinion whether the Court's holding is limited to seniority systems, which are given special protection under Title VII. 306 Authority exists that Evans should not be read as so limited. In Farris v. Board of Education of St. Louis, 307 the Eighth Circuit applied Evans to a salary claim. Because of pregnancy, the plaintiff had been compelled to take a leave of absence from her high school teaching position in 1970. As a result, she did not receive her annual

304. Id. at 558.
306. See id. at § 2000e-2(h).
307. 576 F.2d 765 (8th Cir. 1978).
incremental pay raise for that year. Each year thereafter she was one step lower on the salary schedule than she would have been but for the mandatory pregnancy leave. The Eighth Circuit held that because Title VII did not apply to schools in 1970 and because the plaintiff had not filed a charge, the school board could treat its original act as lawful. Because incremental increases are not currently dependent on sex, the court held that the school board was not guilty of any present violation of the Act. 308

The District Court for the Eastern District of Pennsylvania has ruled twice that Evans is not limited to seniority cases. In Freude v. Bell Telephone Co., 309 the court stated that "[i]t is plain that the basic holding of Evans is that a current nondiscriminatory policy will not revive a time-barred act of discrimination even though such policy gives present effect to a past act of discrimination." 310

In Dickerson v. United States Steel, 311 the court stated that Evans was based on two independent grounds:

[T]hat the statute of limitations is an absolute bar and that it cannot be circumvented by lock-in. A second and independent holding said that such a past event may not serve as a basis for a present challenge to a neutral seniority system. 312

These decisions thus open the door to the possibility that an employer's liability may be cut off even for practices followed after the applicable date of Title VII or Executive Order 11246, 313 so long as his present practices are nondiscriminatory.

The Tenth Circuit, however, recently rejected this theory. In United States v. Lee Way Motor Freight, Inc., 314 the court held that a no-transfer rule locked in past discrimination and therefore was unlawful. The court stated:

In Griggs, the Court was concerned with the present consequences and practices which perpetuate the effects of the past discriminatory act, not the past act itself. There is not the slight-

308. Id. at 768.
310. Id. at 1061.
312. 439 F Supp. at 70.
313. See note 2 supra.
est indication in Evans that the Supreme Court intended to overrule or disassociate itself from the decision in Griggs. Evans and also Teamsters merely explained the exception to Griggs which was provided in § 703 for bona fide seniority systems.

Inasmuch then as the no-transfer rule does not constitute a bona fide seniority system, the rule in Griggs is still viable.\(^{315}\)

In view of the ambiguity of Evans, it is likely that not all circuits will find the Tenth Circuit's reasoning persuasive.\(^{316}\)

When an employer's practices have been shown to have a present disparate effect, he can attempt to justify those practices under the business necessity doctrine. The most widely followed formulation of that doctrine was enunciated by the Fourth Circuit in Robinson v. Lorillard Corp.\(^{317}\)

The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.\(^{318}\)

The three-pronged test found in the Robinson formulation has made

\(^{315}\) Id., slip op. at 13.

\(^{316}\) The Second Circuit in EEOC v. Local 14, Int'l Union of Operating Engineers suggested a public policy argument for limiting an employer's liability. 553 F.2d 251 (2d Cir. 1977). In Local 14, one of the defendant unions had discriminated before the effective date of Title VII. Since that date, however, it had admitted a percentage of minority members greater than or equal to the minority percentage in the relevant labor market, had hired minority officers, and had participated in affirmative action programs. In reversing a trial court holding that the union was guilty of discrimination, the Second Circuit stated:

It does not further the purposes of Title VII to find liability in a union which has seemingly complied with the Act's provisions since its enactment in 1965.

We must carefully balance the need for effective enforcement of the Act against overzealous enforcement which can only lead to resentment and a resistance to change.

Id. at 255 (citation omitted). This expressed reluctance to penalize defendants who currently are in compliance with Title VII can furnish additional fuel to employers who wish to argue that Evans makes past practices irrelevant to present findings of discrimination.

\(^{317}\) 444 F.2d 791 (4th Cir. 1971).

\(^{318}\) Id. at 798 (footnotes omitted).
the business necessity defense a very narrow one in the blue collar context. There have not been many cases where the defense has been used in a white collar context.

White collar employers would have little difficulty demonstrating that it is a business necessity that their secretaries know how to type and that their accountants know how to add. When employment requirements bear a more tenuous relationship to ability to perform a job, the courts have been tolerant of such requirements when public safety depends to some extent on the quality of the defendant's employees, as with pilots or policemen.

To predict how employers will fare with a business necessity defense in the white collar context is difficult. On the one hand, courts recognize the necessity that some white collar employees possess certain subjective qualifications. On the other hand, the court probably will not view customer preference as a business necessity. Furthermore, the element of public safety that has been most important in blue collar business necessity cases is largely absent in the white collar context.

Finally, even if the courts recognize certain subjective qualities as being necessary for the performance of a white collar job, employers likely will be unable to meet the third prong of the Robinson test, the lack of acceptable alternative methods of picking such employees with a lesser disparate effect than their current practice. A high probability exists that the courts will find liability if they believe the selection or promotion process could have been better safeguarded to avoid potential discrimination. Thus, although in some ways, courts are more sensitive to the business needs of white collar employers than to those of blue collar employers, the business necessity defense may be of little help to employers whose practices are shown to have a discriminatory impact.

322. See, e.g., Wade v. Mississippi Coop. Extension Serv., 528 F.2d 508 (5th Cir. 1976).
Conclusion

This Article has examined a broad range of problems of substance and of evidence in equal opportunity law at the white collar and professional levels. This review reveals that, although the Title VII mandate applies with full force to every level of employment, the courts have recognized that the problems of devising non-discriminatory employment practices differ in subtle and obvious ways among different types of employment. Yet, for the most part, this recognition has been implicit, rather than explicit. As a result, white collar and professional employers have received little guidance as to how they may devise lawful practices suited to their needs to employ persons whose relative qualifications must be judged subjectively. It is hoped that the predicted increase in volume of litigation challenging white collar and professional employers will result in the development of a jurisprudence which explicitly recognizes that subjective employment practices are not inherently suspect under Title VII or any other equal opportunity law so long as necessary subjective determinations are made in the context of a fair, safeguarded procedure.