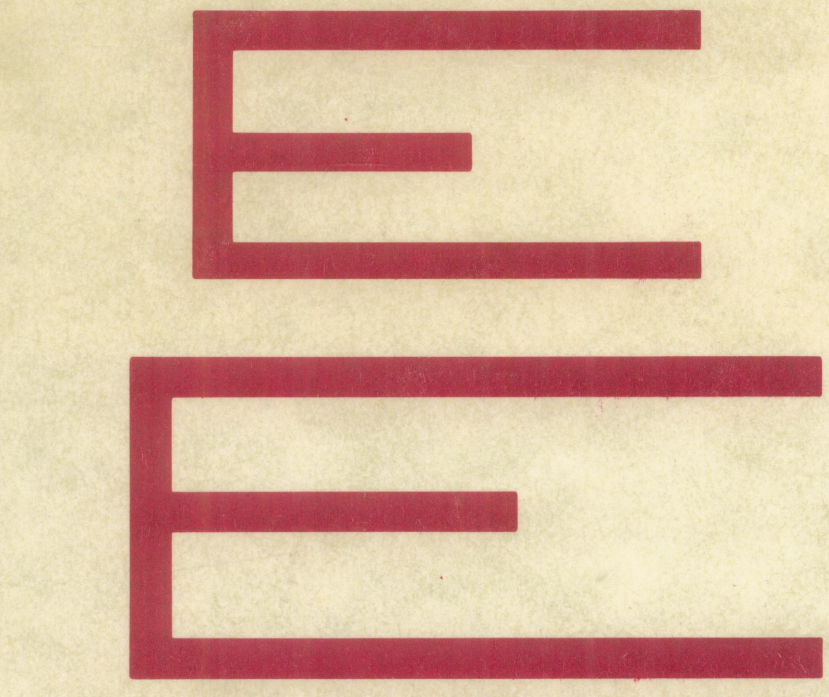

—UPDATE—

EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION IN LABOR-MANAGEMENT RELATIONS; A PRIMER. Update,

February 1978

INSTITUTE OF INDUSTRIAL RELATIONS (Los Angeles).

UNIVERSITY OF CALIFORNIA, LOS ANGELES

(Training manual)

—UPDATE—

EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION IN LABOR-MANAGEMENT RELATIONS: A PRIMER. Update,

~~February 1979~~

by

GERALDINE LESHIN

INSTITUTE OF INDUSTRIAL RELATIONS • UNIVERSITY OF CALIFORNIA • LOS ANGELES

PREFACE

Since the *Primer on Equal Employment Opportunity and Affirmative Action in Labor-Management Relations* was issued in January, 1976, EEO developments affecting the workplace have changed rapidly and dramatically.

This Update is an effort to supplement the original Primer, which is an introduction to the variety of laws and their application, including the principles and prevailing doctrine as of 1976.

But since 1976, the Franks, the Hardisons, the Rawlinsons -- individual employees -- have put EEO doctrine to the test, and in the process the U.S. Supreme Court has turned some principles around, even to the point of rejecting the religious accommodation provisions Congress wrote into Title VII in 1972.

Because of the developments over the past two years, the author felt it necessary to flesh out the Court rulings in greater detail than that provided in the original, introductory publication of 1976.

For those who have the Primer, instructions in this Update will show which pages are to be replaced as well as which pages are to be added. The Update volume is divided into tabs which correspond to the tabs in the Primer. At the front of each Update tab, the reader will find a pink instruction sheet which specifies the changes to be made.

For further information concerning the Primer and the Update, please contact the Publications Center, UCLA Institute of Industrial Relations Los Angeles, Ca. 90024 (Phone: (213) 825-9191).

* * * * *

The author is grateful for the dedicated assistance of Marna McCormick, who stuck with the preparation of the manuscript from the first word of the draft to the final word of the finished volume. And Marna still found time to design the attractive cover.

A special word of thanks goes to the Institute's Publications Center staff: to Faye Hinman, Principal Editor, for her valued suggestions; to Rosalind Schwartz, Senior Editor, for her contribution to content.

Many of the staff members helped to make the task easier: Helen Mills, Lorrie Brunson, Sammye Taylor, Joan Gusten, Sandra Lind have my deep appreciation.

And finally to the Director of the Institute, Professor Frederic Meyers, a warm word of thanks for his patience and understanding.

February, 1978

Geraldine Leshin

1978 UPDATE

INSTRUCTION SHEET

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APPENDICES

Applicable laws, executive orders, guidelines and related materials are found under various Tabs in specially prepared appendices.

INSTRUCTION SHEET

INTRODUCTION: WHAT'S NEW ABOUT DISCRIMINATION?

ADD NEW PAGES 5 and 6

Postscript

1978 UPDATE: WHAT'S NEW ABOUT DISCRIMINATION?

On the opposite page it is stated that "the courts are taking a backward gaze when current practices, neutral on their face and not job-related, perpetuate the effects of past discrimination." This was always interpreted by appellate courts to mean both pre-Act and post-Act violations. No distinctions were made as to when the discrimination took place. The Supreme Court has now made a distinction in Title VII cases.

In its 1977 *Teamsters* seniority decision the "perpetuation of the effects" concept was drastically limited as a means to winning Title VII claims. The definition of what is meant by a PAST act of discrimination is now virtually limited to discrimination occurring since July 2, 1965, the effective date of Title VII. The court left a small crack open in the door for pre-Act victims to squeeze through; i.e., if they can show that a seniority system had its origins in a discriminatory environment (e.g., segregated locals, use of separate company facilities, etc.) and is maintained and operated to continue into the present intentional discrimination. Then a remedy for pre-Act victims may be given. But for all intents and purposes, those who suffered pre-Act discrimination, even though these effects are still present, have little chance for a Title VII remedy.

The year 1977 also saw the Supreme Court underscore the importance of statistical proof and again, as in the seniority cases, give emphasis to post-Act statistical data, especially applicant flow in relation to hiring practices.

And, "what is new about discrimination" is the intrusion of constitutional issues in employment discrimination decisions. This development stems

from inclusion of public employees under antidiscrimination laws. With Title VII coverage has come a greater awareness on the part of public employees of their pre-existing constitutional rights. Thus, the federal government as an employer can be sued under the Fifth Amendment and state and local governments as employers, under the Fourteenth Amendment. Considering, however, the different standards applied in deciding constitutional issues, as opposed to Title VII issues, public employees alleging employment discrimination are not finding the constitutional route an easy one to travel and may find, from their viewpoint, that a Title VII case is easier to prove.

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And finally, what is "new about discrimination" is really old. The long-time and useful tool of conciliation or mediation in resolving collective bargaining deadlocks has now been given special emphasis under the new EEOC procedures. In the area of individual complaints, emphasis is being placed on early settlement through conciliation, with less emphasis on litigation. Litigation efforts, when determined necessary by the EEOC, will focus on systemic discrimination within a company or public agency (pattern or practice cases). And borrowing another procedure from the industrial relations book, the EEOC is again giving consideration to the use of arbitration to settle individual charges of discrimination, a great many of which involve disciplinary actions, including discharges.

These and other developments are covered in the updated sections of this primer.

INSTRUCTION SHEET

TAB A - COLLECTIVE BARGAINING
AND EQUAL EMPLOYMENT OPPORTUNITY

REMOVE OLD PAGES A-19 AND A-20

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In about mid-1974, economic conditions required a substantial employee cutback. The company sought court determination as to whether the contract or conciliation agreement would govern the layoff procedure.

The U.S. District Court of New Jersey issued an order which barred white male employees from bumping less senior minority and female employees if the percentages of women and minorities in the company's workforce fell 15 percent below the goal of the affirmative action program.

The IBEW locals appealed, arguing that preferential layoff rights constituted reverse discrimination.

Following the district court's decree, the company continued to layoff employees in line with the court's decree until the U.S. Court of Appeals, Third Circuit, granted a motion to stay the lower court's order. The company then followed the contract by laying off employees solely by reverse order of seniority.

The appeals court reversed the order of the lower court, stating that the union contract did not conflict with the conciliation agreement which did not contain a procedure for layoffs:

> As such the conciliation agreement sought an increase in the proportion of female and

> minority group workers by "hires" and not by "fires." It is highly significant to us that the conciliation agreement contains no overall layoff procedure or seniority system. Moreover, the express terms of the conciliation agreement do not attempt to affect, nor can we interpret them to affect, the layoff provisions of the collective bargaining agreement.

The court rejected the EEOC position that the company's affirmative action commitment under the conciliation agreement was an implicit modification of the seniority provisions of the contract. The Commission also argued that the objectives of the conciliation agreement would be thwarted if the seniority provisions of the contract prevailed.

(9 FEP Cases 117 (CA 3) 1975)

E. "Constructive" (Retroactive) Seniority: A Proper Remedy.

One of the major seniority cases decided by the Supreme Court was *Franks v. Bowman Transportation Co.* The *Bowman* case centered on the issue of whether applicants denied over-the-road driving jobs because of race, after enactment of Title VII, may be awarded seniority status retroactive to the dates of their employment applications. The Atlanta-based interstate trucking company did not hire blacks as over-the-road drivers at any of its terminals until 1972. The *Bowman* case arose when an employee of Bowman alleged that the company had violated Title VII and the Civil Rights Act of 1866 by engaging in various practices of race

discrimination. It became a class action suit. When the case reached the Supreme Court, the issue decided under Title VII was whether granting retroactive seniority was a permissible remedy under Title VII. /424 U.S. 747; 12 FEP Cases 549, 1976/

In arguments before the Supreme Court, the AFL-CIO and the company made their views known.

Organized Labor Supported Retroactive Seniority

The United Steelworkers of America, the collective bargaining agent at Bowman and a respondent in the case, and the national AFL-CIO filed a brief with the Supreme Court, taking the position that identifiable victims of discrimination are entitled to retroactive seniority to make them whole. This remedy, they argued, is not preferential treatment.

The brief stated that retroactive seniority would give "a proven victim of discrimination his 'rightful place': the place in the seniority system which he would be occupying but for the prior discrimination against him."

The union brief noted that seniority is used as a measure of fringe-benefit entitlement, protection in layoffs, promotional opportunities, and other competitive purposes, and then stated:

> The only way a discriminatee can be made whole is to give him the seniority date he would have had but for the refusal to hire him. That "rightful place" remedy not only effectuates Congress' desire that discriminatees be made whole, it also

> preserves the integrity of seniority systems. Unions and employees have favored seniority as the determinant of employee competition because it furnishes an objective and equitable basis for allocating employment opportunities. But the system remains equitable only if all employees are given their proper seniority measure. Equity does not exist if some employees have had their seniority artificially reduced by the employer's discriminatory behavior. Reflecting this reality, the "rightful place" remedy has long been deemed an implicit part of collectively bargained seniority. When employees are discharged in violation of contract, unions invariably demand that they be reinstated without interruption of seniority, and arbitrators invariably grant that remedy....
>
> In sum, the "rightful place" remedy has always been recognized as an integral component of an equitable seniority system. It must be awarded if employees are to be made whole for the discrimination they have suffered. It is in no sense "preferential." It is, accordingly, wholly consistent with the congressional objectives embodied in Title VII.

Company Position

Bowman Transportation Co. agreed with both the black plaintiffs' and the union's position that a court may order "constructive" seniority as a remedy, but a refusal to do so is not an abuse of a court's discretion.

District Court Decision

The federal district court found that the company had discriminatorily rejected black job applicants for over-the-road (OTR) drivers. The court ordered Bowman to notify the rejected applicants within 30 days that they would be given priority consideration for OTR jobs.

The applicants given this preferred hiring status, when vacancies came up, were: (1) Black employees who had been refused transfer to OTR jobs prior to January 1, 1972.

(2) Nonemployee black applicants who had sought OTR jobs prior to the same date.

The lower court, however, refused to order that these two types of OTR applicants, who might eventually get an OTR job, be granted seniority from the date they would have been hired for that job, but for discrimination. The court also refused back pay awards to those who would be hired as OTR drivers.

Appeals Court Decision

The U.S. Court of Appeals for the Fifth Circuit disagreed with the trial court on the back pay issue and vacated that part of the judgment.

The appellate court met the district court only half way on the seniority issue, holding that

- --those black employees who transferred to OTR positions should be allowed to carry over all accumulated company seniority for all purposes in the OTR department.
- --nonemployee black applicants should not be awarded retroactive seniority upon obtaining an OTR job previously denied to them because of race.

The appeals court said that seniority relief was barred by Section 703 (h) of Title VII, which exempts different conditions of employment if they are the result of a bona fide seniority system.

It was the last aspect of the appellate court's ruling that was considered by the Supreme Court: Can retroactive seniority be granted to non-employee black applicants who, following the district court order, obtained OTR driver jobs?

Supreme Court Decision

Essential to an understanding of the meaning of the *Bowman* decision are the factors discussed below:

(1) Those alleging racial discrimination were pinpointing a discriminatory hiring policy still existing after the effective date of Title VII coverage - July 2, 1965.

(2) While the case was a class action, the Supreme Court recommended retroactive seniority to individual (identifiable) victims of discrimination. Each person in the class must be able to establish he applied for an OTR job and was denied that job because of race. The burden would then shift to the employer to prove denial of an OTR job was based on factors other than race, e.g., lack of qualifications.

(3) Those alleging hiring discrimination for OTR jobs did not seek abolition of the departmental seniority system, but rather that they be given their "rightful place" on the OTR seniority roster as of the time they originally applied for an OTR job.

(4) The Court majority stressed that the hiring practices of the company were racially discriminatory, not the seniority system: "the underlying legal wrong affecting /the class/ is not the operation of a racially discriminatory seniority system but a racially discriminatory hiring system.

Pertinent Findings and Conclusions by Majority

Justice Brennan, writing for the majority, disagreed with the Fifth Circuit Court of Appeals that Section 703(h) of Title VII barred the awarding of seniority relief to the nonemployee black applicants for OTR jobs.

The Meaning and Intent of Title VII Seniority Provisions

Section 703(h) provides in relevant part:

> Notwithstanding any other provision of this title it shall not be an unlawful employment practice...to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system...provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin....(emphasis added)

Thus, Title VII excludes a bona fide or facially neutral seniority system as an "unlawful employment practice," even though it allows for different conditions of employment and differences in benefits between newer and older workers. Title VII seniority provisions, however, are no bar to the award of retroactive seniority relief to persons who suffered discrimination in employment after the effective date of Title VII (July 2, 1965):

> It is apparent that the thrust of the section (703(h)) is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that Section 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved--as in the instant case, a discriminatory refusal to hire. (emphasis added).

In noting that the Bowman hiring system, not the seniority system, was discriminatory the court pointed out that those seeking retroactive seniority "/did/ not ask modification or elimination of the existing seniority system, but only an award of the seniority status they

would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire."

The "Make-Whole" Remedy

The Supreme Court stated that Section 703(h) in no way limits the remedies that a district court can grant under its Title VII authority: Section 706(g) states that upon a finding of employment discrimination the court may order affirmative action such as reinstatement or hiring of employees with or without back pay, or any other equitable relief the court thinks appropriate.

The Court concluded that the remedy provisions are broad; therefore, making a victim of discrimination "whole," through the grant of retroactive seniority, met the purposes of Congress:

> We /repeat/ the observation of earlier decisions that...Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin... and ordained that its policy of outlawing such discrimination should have the "highest priority," ...one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." (emphasis added to quote from Court's decision in *Albemarle Paper Co. v. Moody*, 10 FEP Cases 1181, 1975.)

In supporting the "make whole" remedy in the *Bowman* case, the Supreme Court said that "adequate relief may well be denied /to victims of discrimination/ in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly

be questioned that ordinarily such a relief will be necessary to achieve the 'make whole' purposes of the act."

Importance of Seniority

The significance of retroactive seniority was discussed by the Court within the framework of collectively bargained seniority systems. The Court quoted the observation of UCLA Law Professor Benjamin Aaron: "More than any other provision of the collective /bargaining/ agreement...seniority affects the economic security of the individual employee covered by its terms."("Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 *Harvard Law Review*, 1532, 1535, 1962).

The Court made a distinction between two types of seniority: "competitive"seniority and "noncompetitive" seniority. "Competitive" seniority involves, among other things, the overriding issue of who gets or who keeps an available job. The Supreme Court chose the following observations to illustrate the broad role "competitive" seniority plays under a collective bargaining agreement:

> Included among the benefits, options, and safeguards affected by competitive status seniority, are not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, 'bumping' possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and, in one plant, a preferred place in the punch-out line." Stacy, 28 Vand. L. Rev., at 490 (footnotes ommitted).

This type of seniority is distinguished from "noncompetitive" or "benefit" seniority which deals with an individual worker's rights to pensions, vacation time, and coverage under health and welfare plans, for example. The noncompetitive seniority status of one worker has no direct bearing on the benefits received by another worker.

In assessing the seniority system at *Bowman*, the Court noted:

(1) competitive-type seniority is based on the hire date into a department. Departmental seniority standing determines the order of layoff and recall of employees. Additionally, job assignments for OTR drivers are posted for competitive bidding and seniority is used to determine the highest bidder. Since OTR drivers are paid on a per-mile basis, earnings are to some extent related to seniority;

(2) noncompetitive-type seniority benefits are determined by the hire date into the company. The company date of hire determines the length of an employee's vacation and is a factor in the computation of pension benefits, for example.

The Court concluded:

> Obviously merely to require Bowman to hire /a nonemployee black applicant for an OTR job/ falls short of a "make whole" remedy. A/n/ ...award of the seniority credit he presumptively would have earned but for the wrongful treatment would also seem necessary in the absence of justification for denying that relief. Without an award of seniority dating from the time...he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the district court's order will never obtain his rightful place in the hierarchy of seniority according to which those various benefits are distributed....

Award of Retroactive Seniority upon Individual Proof of Discrimination

The Court responded to the claim that not all members of the class of rejected black applicants were in fact victims of discrimination.

The Court explained that the concern that particular members of the class of blacks were not in fact victims of discrimination only becomes material when individual class members seek positions with Bowman. The Court said that the burden would be on the employer and the unions to prove that each individual who reapplied was not a victim of previous hiring discrimination, since that previous policy of discrimination had been shown. The Court noted that it appeared that only a small number of rejected black applicants desired to reapply for positions with Bowman, but that the number might increase as a result of its decision in the case.

The "Innocent" Worker Argument

The majority rejected the contention that the grant of retroactive seniority would move a new hire ahead of some employees already on the job:

> ...we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."
>
> *United States v. Bethelehem Steel Corp.*, 446 F. 2d 652,663 FEP Cases 589,596 (CA2 1971)

In response to the dissenting opinion that innocent employees would be hurt by the grant of retroactive seniority to victims of racial discrimination, the Court majority made these points--

--there must be a sharing of the burden of past discrimination,

--job expectations arising from a seniority agreement may be modified by laws "furthering a strong public policy interest"--e.g., when a returning veteran is reemployed he enjoys the seniority status he would have acquired but for his absence in the military service,

--the National Labor Relations Board has ordered reinstatement of victims of discrimination, without their loss of seniority.

Directions to District Court

The Court majority acknowledged that Title VII recognizes that the federal district courts make the choice of a remedy upon finding employment discrimination and that "there may be cases calling for one remedy but not another. ..."

In the *Bowman* case, however, the Court made it quite clear that they were in favor of retroactive seniority. The case was sent back to the district court for "further proceedings consistent with this opinion."

Dissenting Opinions

/Chief Justice Burger and Justices Powell and Rehnquist/

Justice Powell, joined by Justice Rehnquist, agreed with the majority that the seniority provision section of Title VII did not bar the award of retroactive seniority. However, Powell argued that it was

wrong for the majority to virtually require that the district court ignore entirely the rights of innocent employees.

He said that there is a difference in granting back pay and benefit-type seniority as opposed to a retroactive grant of competitive-type seniority.

He said that in his view the "controlling distinction between these types of relief is the impact on other workers." He went on to explain that

> ...the granting of backpay and of benefit-type seniority furthers the ...make-whole objectives of the statute without penalizing other workers. But competitive seniority benefits, as the term implies, directly implicate the rights and expectations of perfectly innocent employees. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers.

Chief Justice Burger filed a separate dissent in which he stated that a monetary award or "front" pay to the person suffering discrimination would be a more equitable remedy than an award of "competitive-type seniority relief." He said that "monetary relief... would serve the dual purpose of deterring the wrongdoing employer or union--or both--as well as protecting the rights of innocent employees. ... I cannot join in judicial approval of 'robbing Peter to pay Paul'."

Public Sector Footnote to *Bowman* Decision

Before the *Bowman* decision came down, an appeals court, in deciding

two public sector seniority disputes, perhaps was clairvoyant in deciding those cases in line with the Supreme Court decision in the *Bowman* case:

--The Court of Appeals for the Second Circuit accepted the "rightful place" doctrine in granting retroactive seniority to identifiable victims of employment discrimination. In *Chance v. Board of Examiners*, retroactive seniority was granted to any minority supervisor working for the New York City Board of Education who had failed an examination that had been held to be discriminatory. The court indicated that an individual employee--denied a promotion because of the test that was invalidated as discriminatory--could be awarded constructive (retroactive) seniority. The court approved the education board's offer to grant such employees a fictional date of hire which would be the average appointment date of those who did pass the examination.

(534 F. 2d 993; 11 FEP Cases 1450, 2nd Cir., 1976)

--The second public sector case heard by the same appeals court--*Acha v. Beame*--was a sex discrimination case involving layoffs. Half of all the women police officers who comprised 2.62 percent of all New York City police officers, were laid off at the end of June, 1975. This was in line with the last-hired first laid off concept. The layoff resulted from the city's financial crisis which resulted in the layoff of 4,000 police officers. The women argued that prior discriminatory hiring practices had prevented them from gaining earlier employment with the New York police department; hence they had not been able to acquire sufficient seniority to survive the layoff. The court agreed that retroactive seniority to the date that they would have been hired was an appropriate remedy. Constructive seniority was granted to the limited group of female police officers who had been hired after the police department ceased discriminating based on sex. The appeals court said that it was "...not invalidating or altering portions of the seniority system...we are merely putting plaintiffs in their rightful place in it." The court noted the kind of proof that might be adequate to determine that the laid off female officer had applied for the present job earlier than the time she was finally hired under the subsequent nondiscriminatory hiring policy:

(1) she filed an application; or

(2) wrote a letter of complaint about the discriminatory hiring policy; or

(3) "expressed a desire to enlist" but was "deterred" by the city's known discrimination against women.

(531 F. 2d 648; 12 FEP cases 257 (2nd Cir., 1976)

F. Supreme Court Expands on Bowman Decision

Two questions still remained unanswered following the *Bowman* decision:

(1) Is a victim of pre-Act discrimination entitled to retroactive seniority?

(2) Is a minority nonapplicant also a victim entitled to retroactive seniority?

On a 7 to 2, vote the Supreme Court responded in the *Teamsters* decision.

The answer to the first question: "no"
The answer to the second question: "yes," upon taking on the difficult burden of proving that failure to apply was based on knowledge of employer's discriminatory practices.
/*International Brotherhood of Teamsters v. United States and EEOC; T.I.M.E. - D.C. Inc. v. Same, Nos. 75-636 and 75-672*, May 31, 1977; 14 FEP cases 1514-1543/

Facts and Background

The Justice Department brought a pattern or practice of employment discrimination suit against T.I.M.E. - D.C., a trucking firm operating in 26 states, and the union representing employees of the company--the International Brotherhood of Teamsters. /At the time of the litigation Title VII (Section 707) only permitted the Department of Justice to institute pattern or practice suits. In 1972 this right was extended to the EEOC in private sector litigation. The Attorney General still maintains jurisdiction over such suits in the public sector./

The central claim was that the trucking company had engaged in a pattern or practice of discrimination against hiring minorities--blacks and Spanish-surnamed persons--into the more lucrative line driver jobs (also known as "over-the road" (OTR) drivers who engage in long distance hauling between company terminals).

Further, the company had a "no-transfer" policy between bargaining units. If a city driver wanted to transfer to a line-driver job, he would have to resign and in the process lose his accumulated competitive seniority. Each bargaining unit had its own seniority roster. Only noncompetitive seniority benefits -- i.e., fringe benefits -- were based on company (hire date) seniority.

Thus, transferring to a job in the line driver bargaining unit had the effect of making the man a new hire with very little, if any, competitive seniority protection in the event of a subsequent layoff. This, in effect, "locked" minority members into inferior jobs because even in the event that they were able to get the better paying job as an over-the-road driver, they would be vulnerable without any carry-over competitive seniority.

The company's discriminatory hiring policies existed before and after Title VII became law in July 2, 1965. For example, with but one exception the first black person to be employed on a regular basis as a line driver was hired in 1969. In March 1971 when the government filed its complaint alleging systemwide discrimination, the company had 6,472 employees--of these,5 percent were black and 4 percent Spanish-surnamed. However, of the 1828 line drivers, only 0.4 percent were black and 0.3 percent Spanish-surnamed persons--and all black line drivers had been hired after the litigation had started.

These facts were among the statistical evidence presented by the government as proof of systemic discrimination. Additionally, individual testimony was presented recounting over 40 specific instances of discrimination.

The government asked for a cessation of the discriminatory practices and "make whole" relief for all those alleging discrimination, by allowing them an opportunity to transfer to line-driver jobs with full company seniority (i.e., seniority based on the date of hire) for all purposes.

District Court Decision

The trial court found that the government had shown "by a preponderance of evidence that T.I.M.E.-D.C. ...engaged in a plan and practice of discrimination in violation of Title VII."

The lower court found that the negotiated seniority system also violated Title VII because it "operated to impede the free transfer of minority groups into and within the company." Both the company and union were enjoined from committing further violations of Title VII.

The district court accepted the government's position that the "affected class" of discriminatees included all blacks and Spanish-surnamed incumbent employees who had been hired to fill either city operations or servicemen jobs at every terminal that had a line-driver operation.

This meant that all employees in the "affected class", whether hired before or after the effective date of Title VII, became entitled to preference over all other applicants for vacant line-driver jobs.

However, the district court determined that members of the class had been injured in different degrees; therefore, the court created three subclasses, and ordered seniority remedies accordingly:

Three Subclasses (all incumbent employees)	District Court Ordered:
(1) 30 persons who suffered "severe injury," based on "the most convincing evidence of discrimination and harm."	They be offered chance to fill line-driver jobs with retroactive competitive seniority dating back to July 2, 1965 (Title VII effective date).
(2) 4 persons "very possibly the objects of discrimination" and "were likely harmed," but with no specific evidence of discrimination and injury	They were entitled to fill vacancies in line-driving jobs with retroactive competitive seniority as of January 14, 1971, the date the Government filed its lawsuit.
(3) Over 300 persons in affected class as to whom there was no evidence to show they were "either harmed or not harmed individually."	They were to be considered for line-driver jobs ahead of any applicants from the general public but behind the two other subclasses, but would not receive retroactive seniority. Their competitive seniority as line drivers would begin when they were hired as line drivers.

(The above is illustrative of how complicated remedies can get.)

Further, the district court placed one limitation on its order: the right of any member of a subclass to fill a line-driver vacancy was subject to recall rights of laid-off line drivers. Recall rights under the collective-bargaining agreements extended for three years.

The decision was appealed.

Court of Appeals Decision

The Court of Appeals for the Fifth Circuit agreed with the basic conclusions of the district court that

(1) the company had engaged in a pattern or practice of employment discrimination;

(2) the seniority system violated Title VII as applied to victims of prior discrimination.

However, the appellate court concluded that the trial court's remedy was inadequate. The appellate court decided on a much broader remedy.

The appeals court held that the affected class members--incumbent minority employees--were entitled to bid for future line-driver jobs on the basis of their company seniority. There was no distinction made between minority employees hired either before or after Title VII became law. Further, this company seniority would be carried over into the minority employee's new bargaining unit (line-driver unit) and would in effect be his "retroactive seniority," in the new bargaining unit but with one qualification--retroactive seniority could not be awarded for periods before the date when (1) a line-driving position was vacant and (2) he met (or would have met, given the opportunity) the qualifications to work as a line-driver. For example:

> If a class member began his tenure with the company on January 1, 1966, at which time he was qualified as a line driver and a line-driving vacancy existed, his competitive seniority upon becoming a line driver would date back to January 1, 1966. If he became qualified or if a vacancy opened up only at a later date, then that later date would be used.

This broadly sweeping seniority remedy advocated by the appeals court was topped off with instructions to the district court that class members be allowed to compete for vacancies with laid-off workers on the basis of the class members' retroactive seniority--laid off line drivers would only retain their prior recall rights for "purely temporary" vacancies. The appeals court held that the three-year recall rights in favor of laid-off workers "would unduly impede the eradication of past discrimination."

The company and the union appealed.

Supreme Court Decision

Statistical Proof of Discrimination

The High Court agreed with the two lower courts that the government had proved its case with statistical evidence, buttressed by individual testimony that the company engaged in systemwide discrimination continuing well beyond the effective date of Title VII. The company argued that statistics cannot, in and of themselves, prove the existence of a pattern or practice of discrimination--or even establish a prima facie case of discrimination. The Court responded: "...this was not a case in which the government relied on 'statistics alone.' The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life."

The Court offered two examples of testimony by two minority employees:

> George Taylor, a Negro, worked for the company as a city driver in Los Angeles, beginning late in 1966. In 1968, after hearing that a white city driver had transferred to a line-driver job, he told the terminal manager that he also would like to consider line-driving. The manager replied that there would be "a lot of problems on the road... with different people, Caucasian, et cetera," and stated "I don't feel the company is ready for this right now....Give us a little time. It will come around, you know." Mr. Taylor made similar requests some months later and got similar responses. He was never offered a line-driving job or an application.
>
> Feliberto Trujillo worked as a dockman at the company's Denver terminal. When he applied for a line-driver job in 1967, he was told by a personnel officer that he had one strike against him. He asked what that was and was told: "You're a Chicano, and as far as we know, there isn't a Chicano driver in the system."

And the Court dealt with the importance of statistical proof in employment discrimination cases, as well as noting caution in their use:

> ...our cases make it unmistakably clear that "statistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue. ...We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases.... Statistics are equally competent in proving employment discrimination. We caution only 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....

The company and union argued that statistics which compare the racial composition of the trucking company's work force to the racial composition of the population at large should never be given decisive weight in Title VII cases because the Act prohibits preferential treatment in order to racially balance a work force. /Section 703(j)/

The Court rejected this "reverse discrimination" argument "because the statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced."

Rather, the government offered the statistics on the racial or ethnic imbalance in the company as a "telltale sign of purposeful discrimination," and

> ... absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though Sec. 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population....
>
> Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation.... In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.... (emphasis added)

The Seniority System

Union Position

The union, while acknowledging that the seniority system may in some sense perpetuate the effects of prior discrimination, asserted that the system itself is excluded as an "unlawful employment practice" under Title VII--that Title VII therefore immunizes or protects a seniority system from a Title VII attack. (See p.A-8 for a discussion of the relative scant legislative history on Section 703(h).)

More specifically, the union argued that the central purpose of Section 703(h) is to ensure that perpetuation of pre-Act discrimination is not unlawful. The union states that it would in collective bargaining with the company attempt to seek retroactive seniority for post-Act discriminatees, to the date they would have become line-drivers but for the company's discrimination.

Government Position

The government argued against a distinction being made between pre-Act and post-Act discrimination, responding that a seniority system that perpetuates the effects of prior discrimination--whether pre-or post-Act can never be "bona fide" under Section 703(h).

Supreme Court Position

Majority Opinion

Seven justices of the Court rejected the government's position that a seniority system that has perpetuated prior discrimination is not "bona fide" -- whether that prior discrimination was before or after Title VII, all victims are entitled to relief.

The Court reasoned:

1. Even though a bona fide seniority system perpetuates the effect of prior (both before and after Title VII) discrimination, it is immune from a Title VII attack because of Section 703(h).

2. This immunity is not absolute. A seniority system can be subject to a Title VII action upon proof that it had its genesis in racial discrimination and it was negotiated and maintained with discriminatory intent.

3. (a) A seniority system, without the legal protection afforded by Section 703(h), would appear to fall under the *Griggs* principle--i.e., neutral policies or practices that "are fair in form but discriminatory in operation" are prohibited by Title VII (disparate impact or adverse effects principle). One kind of practice "fair in form, but discriminatory in operation" is one which perpetuates the effects of prior discrimination. As the Court held in the *Griggs* decision: "Under the Act, practices, procedures, or tests neutral in their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

And so the Court noted that:

> Were it not for Section 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale: The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs and other advantages to those employees who have been line-drivers for the longest time. Where because of the employer's prior intentional discrimination, the line-drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passages of the Act. This disproportionate discrimination of advantages does in a very real sense 'operate to freeze' the status quo of prior discriminatory employment practices.

3. (b) But Congress had considered this very effect of many seniority systems and extended "a measure of immunity to them."

Then the Court found:

1. The trucking company's seniority system was bona fide--it applies equally to all races and ethnic groups. To the extent it "locks" employees into non line-driver jobs, it does so for all. Also, placing line-drivers in a separate bargaining unit is in line with the industry practice.

2. The fact it does not extend retroactive seniority to pre-Act discriminatees does not make it unlawful, since Title VII is prospective, not retrospective.

Therefore, the Court ruled:

--Pre-Act Incumbent Employees in the affected class (hired in before July 2, 1965 and were refused line-driver jobs and took city driver or a servicemen's job): Not entitled to retroactive seniority if they transfer to line-driver jobs. (Obviously, if they subsequently (after Title VII) applied and were again refused, they would be treated as a post-Act applicant; absent such a showing, pre-Act incumbents will be treated as non-applicants. (See below)

--Post-Act Incumbent Employees in the affected class (hired in on or after July 2, 1965 and were also refused line-driver jobs): Entitled to retroactive seniority upon transferring to a line-driver's job. But no person may be given retroactive seniority to a date earlier than the effective date of Title VII.

--Nonapplicants in Affected Class (incumbent employees who never applied plus pre-Title VII employees who did and were turned down and did not apply after Title VII): "To conclude that a person's failure to submit an application for a job does not inevitably and forever foreclose his entitlement to seniority relief under Title VII is a far cry, however from holding that nonapplicants are always entitled to such relief. A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices."

Dissenting Opinion

Justices Marshall and Brennan scored the majority decision as one that will have a "devastating impact." They said that the loss of accumulated seniority by pre-Act employees will be too high a price for them to pay, so "they will be locked into their previous positions."

They supported the views of the appellate courts and the EEOC that a seniority system is unlawful if it carries forward into the present past acts of employment bias.

They underscored the point that when Title VII was amended in 1972, Congress made no attempt to overturn the decisions of the appeals courts.

Now Back in Hands of District Court

The Supreme Court ducked the one issue left to be resolved--that of the rights of those qualified individuals in the affected class to fill a line-driver vacancy and the rights of laid-off line-drivers. The Court left it to the district court to "strike the balance."

The district court will have the difficult job of determining who were actual victims on an individual (not a class) basis.

IMPACT OF SENIORITY DECISIONS

While the *Teamsters* case only involved incumbent employees, the Court's holding has an impact well beyond this one case. The seniority decisions have turned around the views of six appellate courts in 30 decisions. In these decisions the appeals courts did not distinguish between pre-Act and post-Act discriminatory practices. Rather, if a seniority system had the effect of continuing in the present discriminatory acts of the past, the courts held the

system to be illegal and ordered appropriate relief which could include carry-over seniority for incumbent employees.

The 1976 *Bowman* decision coupled with the 1977 *Teamsters* ruling has dramatically changed EEO doctrine.

If one were to explain the results in terms of the three theories discussed on page A-12, it can be said that the "rightful place" theory applies to post-Title VII victims of discrimination and the "status quo" theory to pre-Title VII victims.

Finally, it is apparent that the number of individuals who will benefit from a successful class action suit will drop appreciably because of the exclusion of pre-Act victims (who can get relief under extremely limited circumstances) and the requirement now that post-Act victims must prove, as a member of an affected class, that they individually suffered discrimination. Thus, the potential number who will benefit from limited retroactive seniority or other remedies, e.g., back pay, will be noticeably decreased.

The grant of retroactive seniority is described as a "make whole" remedy. Actually, it is a "partially make whole" remedy, however contradictory this phrase may sound. By limiting such a grant of seniority to no earlier than July 2, 1965, means that those employees who have been with a company, say, since 1948, will still lose a substantial amount of accumulated competitive seniority. The desire to transfer into a better paying job may thus be stymied.

The decision also would provide a remedy to someone who has never worked for a company, but who now comes forward to prove that his or her application, say, in 1970, was rejected because of race or sex, or both.

Upon proving discrimination that job applicant could be hired with retroactive seniority and back pay--to the date of his/her application in 1970.

Yet, the incumbent minority employee who was denied, at the time of hire, say, in 1963, the job he sought (line-driver, to use *Teamsters* example) because of racial bias would be denied seniority relief if he now has the opportunity to transfer to the better paying job and never specifically asked for transfer after 1965.

Thus, seniority relief is possible for a post-Act victim never employed to a greater extent than the incumbent employee hired before 1965. In our example, the best that the latter can do is to attempt to prove that his not seeking transfer after 1965 was because the company was still discriminating, he knew it, and such a try on his part would be futile.

Finally, it should be noted that the *Bowman* and *Teamsters* cases dealt only with seniority systems. The Court did not treat the issue of whether no-transfer policies are legal under Title VII.

It would be safe to assume the EEOC will challenge no-transfer policies that adversely affect minorities and women.

Note: See Tab N on Religion for the *Hardison* case in which the Supreme Court upheld the seniority provisions over Title VII's religious accommodation requirements.

A-49--1978

SPECIAL SUPPLEMENT

THE GRIEVANCE-ARBITRATION PROCEDURE

CAN IT WORK

IN

TITLE VII CASES?

Since the *Gardner-Denver* decision (see p. A-2), there has been an ongoing discussion as to whether a negotiated grievance-arbitration procedure lends itself to resolving Title VII grievances.

Whether arbitrators should only interpret the "four corners of the contract" and leave issues of law or public policy for the courts is not a new concern. This question has been discussed and debated over a long period of time by arbitrators themselves and by the industrial relations community using the services of arbitrators.

But the discussion and debate have moved from the general to the specific: Title VII grievances. Can and should arbitrators decide Title VII grievances? Are they competent to do so? How can they decide Title VII grievances if the law is not clear? Do the parties (labor and management who select arbitrators) want them to restrict their decisions to contract language only? What about the desires of the grievant? Does the grievant have faith in the process in discrimination grievances?

These are some of the practical, complicated questions that have surfaced. Additionally, several external factors have generated interest in the possible use of an internal grievance mechanism already structured in order to resolve Title VII grievances, especially in the area of disciplinary actions:

--the backlog of EEOC cases which has frustrated the employer, unions, and the grieving employee. Both employers and unions, often co-defendants in cases, are accustomed in a collective-bargaining environment to attempt to dispose of problems as quickly as possible and look to the grievance-arbitration process to seek relief of such problems.

--a legitimate concern that the person who alleges discrimination should not have to wait several years for a decision--one way or the other.

--concern among some members of the judiciary itself that implementation of equal employment opportunity laws is bogged down in too much litigation. In speaking to the question of whether arbitration is a suitable alternative to litigation, Judge Alvin B. Rubin, of the U.S. Court of Appeals for the Fifth Circuit, has stated: "We have become victims of the myth that access to justice means access to the courts." He said that the time has come to consider other means to resolve employer-employee problems since the federal judiciary is expensive and slow, and is increasingly burdened with an expanding case load. He pointed out that it takes about four years from the time a case is initiated until it is resolved, and this is too long for a worker to exist without a job. "I don't mean to say that the government should abdicate its responsibility or that Title VII should be repealed," but a better way to resolve questions can be found--"mediation and arbitration rather than court action," since arbitration has a greater regard for industrial reality than the courts. (*Daily Labor Report*, BNA, No. 226, p. A-21, Nov. 22, 1977)

These and other considerations have elicited from some quarters the suggestion that insufficient attention is being given to the use of arbitration in handling Title VII grievances--at least certain types not involving unsettled areas on the meaning of the law nor a class of employees, for example.

Yet, such troublesome concerns have not created a consensus regarding the utility of the grievance-arbitration forum as one of the means to resolve Title VII grievances, though it would be a faster process than litigation and less costly. There are countervailing factors, not the least of which is the *Gardner-Denver* decision that an arbitration decision does not prevent an employee from pursuing the EEOC administrative remedy and ultimately court action. Further, the deference the court gives to employment discrimination arbitration is limited. A

court may accord weight to an arbitral award if the following prevail: contract provisions that conform substantially with Title VII; procedural fairness; adequacy of the record with respect to the issues of discrimination; and the special competence of the arbitrator.

Whether arbitration can be adjusted to meet the Supreme Court's requirements has been viewed from different perspectives. Some say a flat "No." Others, "Yes," with certain qualifications.

The legal counsel of the International Woodworkers of America thinks an accommodation can be made, as discussed on pages 4 and 5.

It is not uncommon to find antidiscrimination provisions in collective bargaining agreements which are subject, as are other provisions of the contract, to the negotiated grievance-arbitration procedure. These contracts have the standard "nondiscrimination" provisions. No particular reference is made to Title VII--or other allied laws--or to a special settlement procedure for Title VII grievances. One exception came forth in 1975 when the Amalgamated Clothing & Textile Workers, an AFL-CIO affiliate, negotiated a multi-employer contract which reads:

> The Employer and the Union shall not discriminate nor perpetuate the effects of past discrimination, if any, against any employee or applicants for employment on account of race, color, religion, creed, sex, or national origin. This clause shall be interpreted broadly to be co-extensive with all federal, state or local anti-discrimination laws and where available, judicial interpretations thereof....

> In the event of failure to agree, resolution of the issue shall be referred to final and binding arbitration under the terms of the Agreement. The Arbitrator shall have the power and authority to modify, if necessary, existing seniority, promotion, job bidding and transfer provisions and practices so that each complies with the Equal Rights clause of the Agreement. To the extent permissible, all existing local procedures shall be continued.

Another factor militating against a rush to arbitration is the management view that since the arbitrator's award is not final and binding, there is little incentive for an employer to participate in arbitration. The award is binding on the employer if the employee wins; but if the employee loses, he or she has a second chance to take the case to court. One management attorney said there are other problems in using arbitration in labor discrimination cases:

--Some labor arbitrators consider themselves unqualified to resolve EEO matters and "there is little to commend submission of a dispute to an arbitrator who is uncomfortable in his role of resolving it."

--The task of an arbitrator "is to effectuate the intent of the parties to the agreement, rather than to enforce Title VII."

--Arbitration amounts to fact finding without the procedural and evidentiary rules of the federal courts. In order to offer the parties the same protections, arbitration would have to become more formal, thus becoming more time consuming, complicated and expensive.

--Some cases such as class actions and unsettled areas of the law would be inappropriate for an arbitrator's decision. If the law is in the process of evolution, it should be in the courts rather than in a forum whose authority is circumscribed by a private contract.
(*Daily Labor Report*, No. 226, p. A-21, Nov. 22, 1977)

But not all legal counsel to management share the same opinion. For example, another defense attorney representing management in Title VII litigation holds this view:

> ...It is extremely helpful for an employee to have an internal grievance procedure which is perceived by the employee as an alternative to filing a complaint with a governmental agency. A viable internal grievance procedure exists or operates to relieve the frustration that prompts EEOC charges--very often the employee just wants somebody to complain to. Additionally, it will give the employer opportunity to identify suspect policies and individual misapplications of lawful policies prior to EEOC involvement....
>
> Following the Supreme Court's decision in *Alexander v. Gardner-Denver* much criticism was directed at the use of collective bargaining agreement grievance procedures for resolving Title VII complaints. The disparagement went to the two bites at the apple that the employee was receiving....
>
> Even assuming that the employee may take two bites of the apple, existence of this intermediate procedure is useful for at least two reasons. First, if the employer loses at the grievance-arbitration level, the employee will content himself with the relief afforded by the Arbitrator or Grievance Committee. This relief will ordinarily be addressed to the individual grievant and will spare the employer the potential risks attendant to class action litigation. Alternatively, if the employee loses, the possibility exists that he may be persuaded by a well-reasoned arbitration award that he has received justice and elect not to pursue his claim with the Commission. Even if he does ..., the Arbitrator's decision will be entitled to some weight in court and it is hoped that the Commission will some day develop an administrative deferral policy to arbitration awards that satisfy certain procedural standards.
> ("The Role of a Defense Attorney in Title VII Litigation," address by Harry Risseto, National Conference on Equal Employment Opportunity Law, *Daily Labor Report*, No. 199, p. E-1, Oct. 14, 1975)

Another significant factor that may militate against the successful use of the negotiated grievance-arbitration procedure is the union membership itself. It may happen that the minority and female members are not convinced the internal grievance mechanism will afford a full, neutral airing of their Title VII complaints. Further, what about the union's dilemma in representing, say, a minority female member in a promotion grievance in which she alleges both racial and sexual discrimin-

ation, because a less senior, white male employee, also a union member, got the promotion? In this hypothetical grievance, management argues that the contract provides that promotions be based on ability; if more than one person qualifies seniority will determine the selection; that the white employee had "greater" ability and was the next most senior employee. Hence, the company contends the promotion decision was "job-related" (business necessity defense in Title VII cases).

Let's say the union advocate wins for the grievant in a final and binding arbitration award. The displaced white male employee then decides to file a "reverse discrimination" charge with the EEOC. And, since this is a private sector grievance, he files an unfair labor charge with the National Labor Relations Board, alleging the union breached its duty to fairly represent his interests.

would it even get to the employee if the union thought it would end up at EEOC

Or conversely, let's say the minority female employee loses in arbitration. Then she accuses the union of just "going through the motions," and files a charge with the EEOC against both the employer and union, and also with the NLRB charging the union with a breach of its duty of fair representation and charging the employer with a contract violation.

Despite such day-to-day concerns of labor-management representatives, there are those within and outside the collective bargaining process who see a useful, but defined, role to be played in Title VII complaints through the grievance-arbitration procedure.

A "Two-Track" Approach

(Under a Collective Bargaining Agreement)

Harvard Law School Professor Harry T. Edwards proposes a "two-track" grievance scheme.

He separates grievances into two types:

(1) Those that are filed over "an act that might be seen as a violation of the collective bargaining agreement," as well as a Title VII violation.

(2) Those that involve a "class" of employees; those alleging only a violation of Title VII and not the contract; those charging both the union and employer with discrimination; those seeking changes in contract provisions (reformation of the contract); those claiming inconsistency between the collective bargaining agreement and a court decision or EEOC order; those involving unsettled areas of law (e.g., testing validation).

Type (1) above would be subject to arbitration; type (2) would not since Edwards does not view the arbitrator in the role of a federal judge. Type (2) would be carried along the EEOC and court track.

Type (1) grievances would include, for example, a claim of discharge without "just cause" and also a violation of Title VII, or a claim of improper denial of promotion under the seniority clause of the negotiated agreement and a violation of Title VII.

For those Title VII grievances that are on the arbitration track, Professor Edwards proposes a special procedure in the collective bargaining agreement for handling these grievances.

Among his major points:

(1) Selection of a panel of lawyer-arbitrators competent to decide employment discrimination cases.

(2) Arbitrators would serve on a rotating basis with the union and employer having no power to alter the rotation scheme or to change the panel list of arbitrators during the life of the contract.

(3) The contract should include provisions forbidding discrimination based on race, sex, national origin, etc., with authorization to the arbitration panel to consider applicable legal principles.

(4) The grievant is given the option to use the special arbitration procedure and if the grievant elects to use this special procedure, he/she must agree not to file a charge with the EEOC or the court while arbitration is pending; if the employee does file a charge with the EEOC (or a state agency) or in court, the employer can refuse to arbitrate or can withdraw from arbitration if the employee files during the special arbitration proceeding.

(5) The special arbitration procedure should be "expedited"--all Title VII grievances should be resolved within 60 days after filing of the complaint.

(6) The employee should be given the option to use his/her own counsel in the arbitration hearing.

("Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives," *Labor Law Journal*, p. 265, May 1976)

Another view of the use of arbitration in employment discrimination grievances is held by Professor David E. Feller.

His thesis is that an arbitrator's role in Title VII cases is limited. He views the arbitrator as an assistant adjudicator whose role is diminished because"...recent developments in the law of employment relations have already substantially diminished the role of the collective bargain-

ing agreement /and hence of arbitration/ and that the greatest danger that the system of arbitration faces...is the accelerating trend to remove more and more elements of the employer-employee relationship from the exclusive control of the collective bargaining agreement."

He concludes that"...unless unmistakably directed otherwise by the parties, arbitrators best serve the interest of the parties...if they make it crystal clear that they are interpreting the agreement, not the external law, even where the agreement provisions parallel those of the external law...."
(For a detailed discussion, see "The Impact of External Law upon Labor Arbitration," Reprint No. 406, Institute of Industrial Relations, University of California, Berkeley)

Arbitration Under EEOC Auspices

A staff member of the Equal Employment Opportunity Commission, Herbert Hammerman, has publicly declared his personal view in support of arbitration in Title VII complaints, but under the EEOC umbrella. (The use of arbitration by the EEOC has been advocated by Rutgers Law Professor Alfred Blumrosen, a consultant to the Commission.)

In a speech before a mid-West audience, Hammerman said that the large majority of charges received by the EEOC are individual charges, one charging party and one employer. And the issues involve interpretation of the law as it applies to disputed facts. Large numbers of these cases involve discharge and discipline. "There is nothing more fatal to a

charging party's claim of discriminatory discharge than a long, time-consuming procedure....there needs to be a more timely method of obtaining a decision on the merits of the case.

"This can be done through a special form of Title VII arbitration....the proposal is different in significant ways from traditional labor arbitration....it is not hampered seriously by the Supreme Court decision in *Alexander v. Gardner-Denver*, which ruled out traditional labor arbitration as a substitute for Title VII procedures...."

He went on to point out the elements in his proposal:

1. The parties are the employer and the employee, not the employer and the union. Whether or not he or she is represented by a union, the decision to arbitrate is made by the employee, not the union.

2. The decision to arbitrate is a voluntary agreement freely adopted by both parties, and binding upon both.

3. The arbitration does not receive its sanction from a collective bargaining agreement, if such exists, but is sanctioned as an option by EEOC regulations and procedures.

4. The EEOC would establish appropriate panels of arbitrators with the assistance of arbitration organizations. These arbitrators would be trained in the application of Title VII law and remedies, and selected by a method of rotation.

5. The EEOC would pay the costs of arbitration, since in most cases the charging party cannot.

6. The EEOC would provide representation to the charging party at the arbitration hearing. This is essential to equalize the imbalance in knowledge and ability to pay.

7. The EEOC would study arbitration awards, transcripts, and exhibits to make sure that Title VII is adhered to. However, it would not reconsider arbitral awards on any basis, since that would deprive the arbitration procedure of finality. The parties would have the same rights to contest the awards in court as parties to other forms of arbitration.

8. The EEOC would provide for a verbatim record of the arbitration.

And under his proposal, if the employee knowingly volunteers to use the EEOC arbitration procedure, the charge filed with the EEOC is dropped--i.e., no court suit would ensue. (The Supreme Court decision in *Gardner-Denver* did not rule out arbitration as a final Title VII remedy if the employee knowingly and willingly agrees.)

("Adapting Methods Developed in the Private Sector to Administration of Anti-Discrimination Law," address before American Society for Performance Improvement, Minneapolis, October 5, 1977)

INSTRUCTION SHEET

TAB B--FEDERAL AND CALIFORNIA LEGAL SOURCES PROHIBITING EMPLOYMENT DISCRIMINATION--A SUMMARY

PLACE POSTSCRIPT PAGE AT END OF SECTION B

Tab B

(Place this update at end of Tab B Section)

Postscript

1978 UPDATE: FEDERAL AND CALIFORNIA LEGAL SOURCES PROHIBITING EMPLOYMENT DISCRIMINATION

Page 11 -- Rehabilitation Act of 1973

In addition to Section 503, another section of the Act (Section 504) prohibits discrimination based on handicap by providing that any recipient -- *public or private* -- of HEW funds (except contracts) must take "positive steps" to hire, place and advance *qualified* handicapped persons through "reasonable accommodations" and (2) services, programs and activities of the HEW recipient must be made accessible to the handicapped.

Further, Regulation 504 should be understood by ALL recipients of ANY federal financial assistance. Under Executive Order 11914, Regulation 504 is the model that must be used by ALL federal agencies granting financial assistance.

Regulation 503 may be obtained from the Department of Labor; Regulation 504 from the Department of Health, Education and Welfare. Organizations dealing with other federal agencies that dispense federal funds should write to the given agency for their published rules and regulations dealing with the employment of the handicapped.

Page 17 -- The California FEP Act has been amended to include "marital status" as another basis protected from employment discrimination. It has also been amended to prohibit mandatory retirement practices in the private sector (see Tab E - The California FEP Act for a further discussion).

Summary Chart changes in addition to above: For both the Federal Equal Pay Act and the Age Discrimination in Employment Act, delete language "awaiting Supreme Court decision." (See Tabs C and F for explanation).

INSTRUCTION SHEET

TAB C - EQUAL PAY ACT

ADD NEW PAGES C-14 THROUGH C-26

ADD TO APPENDIX: LESSON OR TRAINING EXERCISE,
PART I and PART II

VII. EPA COVERAGE IN PUBLIC SECTOR -- YES OR NO?

As noted on page C-2 of the primer, employee coverage under the Equal Pay Act (EPA) of 1963 is based on coverage under the Fair Labor Standards Act (FLSA). Hence, an employee covered under the FLSA is automatically covered under the EPA (Section 6 (d) of the federal minimum wage law).

As also noted, the EPA coverage is more extensive than that of the FLSA. While the FLSA exempts professional, executive, administrative, and outside sales persons from the minimum wage and overtime provisions, the EPA covers these four categories.

Until 1966, the FLSA only applied to covered employment in the private sector. In that year, a substantial number of state and local government nonsupervisory employees were brought under coverage--those working in educational institutions, hospitals, nursing homes, and local transit systems. Then, in 1974, coverage was extended to virtually all other nonsupervisory public employees, with special overtime standards for police and fire protection employees, including security personnel in correctional institutions. The 1974 amendments also brought coverage to most federal employees.

The 1966 amendments bringing school, hospital, nursing home and local transit employees under FLSA protection were challenged in court as unconstitutional. The Supreme Court held in *Maryland v. Wirtz* (392 U.S. 183, 18 WH Cases 445, 1968) that Congress had the power, under the

commerce clause of the Constitution, to extend the minimum wage and maximum hours provisions to those specified public agencies and institutions. The unsuccessful challenge was based on the argument that the 1966 amendments constituted an invasion of state sovereignty protected by the Tenth Amendment (States Rights).

Commerce Clause of U.S. Constitution reads:	The Tenth Amendment (part of the Bill of Rights) of the U.S. Constitution reads:
The Congress shall have power ...to regulate commerce with foreign nations, and among the several states, and with Indian tribes;... Article I, Section 8, Clause 3	The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Perhaps the core concern that triggered another constitutional challange, following adoption of the 1974 amendments, was the overtime provisions applicable to safety personnel--police and firefighters. In any event, the second try proved successful for public jurisdictions. In *National League of Cities v. Usery* (96 S. Ct 2465, 22 WH Cases 1064, 1976), by a narrow 5 to 4 margin, the Supreme Court held that FLSA coverage of state and local employees is unconstitutional.

The Court said: "...insofar as the challenged amendments operate to directly displace the states' freedom to structure integral operations in the areas of traditional governmental functions, they are not within

the authority granted Congress by.../the commerce clause of the U.S. Constitution/," (emphasis added) The Court also overruled *Maryland v. Wirtz*, in which the Supreme Court held that the commerce clause gave Congress the power to set minimum wage standards and maximum hours protection for those public employees who were brought under FLSA coverage in 1966.

But the second time around the Court ruled that the commerce clause had to give way to states' rights (sovereignty)--in short, the Tenth Amendment prevailed. Three of the dissenting justices--Brennan, White, and Marshall--strongly disagreed with the majority that Congress did not have the power under the commerce clause to bring public jurisdictions under FLSA coverage. Brennan wrote that it is "surprising that my Brethren should choose this Bicentennial year... to repudiate principles governing judicial interpretations of our Constitution settled since the time of Chief Justice John Marshall, discarding his postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process."

In addition to legal arguments, the Court expressed concern regarding the economic impact of the law. Professor Benjamin Aaron, of the UCLA School of Law, observes that "it is clear" that the Court majority was "greatly impressed by evidence in the record concerning the hardship the FLSA amendments would impose on many states and their political subdivisions. Justice Rehnquist was particularly exercised by the over-

time provisions, which require the states to pay for certain overtime worked instead of compensating for it by granting an equivalent time off.... "Labor Law Decisions of the Supreme Court," Reprint No. 259, UCLA Institute of Industrial Relations, 1976). Because of the *National League of Cities* decision, there were those who felt that both the Equal Pay and Age Discrimination Acts would likewise be found inapplicable to state and local governments. (As noted previously, the EPA is part of the FLSA, and the Age Discrimination Act of 1967 was extended to public employees in 1974 by amendments to the Fair Labor Standards Act.) This view was based on the sweeping language of the opinion which exempted from federal laws all "integral operations" of "traditional" state and local government functions.

However, to date neither five district court rulings nor two appellate court rulings have overturned EPA coverage for public employees. And so far the age discrimination law coverage has also been upheld. (See Tab F for a discussion of the Age Discrimination Act and the court decisions regarding public sector coverage.) The two appellate court rulings are discussed below.

Appellate Court Decisions

1) Court of Appeals, Third Circuit - *Usery v. Allegheny County Institution District* /No. 76-1079, Oct. 28, 1976./

What started out to be an equal pay case developed into a constitutional issue as to whether the Equal Pay Act covered public sector

employees as a result of the Supreme Court ruling in the *National League of Cities* case.

The Secretary of Labor brought suit against the Allegheny County Institution District, operator of the John J. Kane Hospital. The charge against the hospital: violation of the EPA based on paying three female beauticians $165 a month less than the three male barbers. According to the government, the jobs required equal skill, effort, and responsibility, and were performed under similar working conditions. Both the female beauticians and the male barbers provided hair care for geriatric patients (700 male and 1300 female).

The district court ruled that the wage differential did not violate the EPA because the work was not equal, and even if it were the wage differential was based on "a factor other than sex." There was no issue at the lower court level whether the hospital was covered by the Act. However, when this equal pay case reached the appellate court, the issue of EPA Coverage in the Public Sector was brought into the case by the hospital. The *National League of Cities* decision had been handed down from the Supreme Court. The hospital argued, based on that decision, the public sector was not covered under the equal pay law.

The U.S. Court of Appeals, Third Circuit, disagreed with the hospital on both counts, ruling that the Tenth Amendment restriction

on the federal government's powers to regulate minimum wage and overtime pay does not apply to the Equal Pay Act, and that the hospital had violated the EPA in paying the female beauticians less than the male barbers.

THE CONSTITUTIONAL ISSUE OF EPA COVERAGE

The appellate court noted that in the FLSA case the Supreme Court held that Congress had gone beyond the bounds of its authority under the commerce clause in attempting to regulate traditional governmental functions (i.e., wages and hours of work decisions) because the Tenth Amendment limited its commerce clause powers. However, the appellate court also noted that the Supreme Court "expressly disclaimed any intention of ruling upon the constitutionality...of Congressional authority against the states" which is based on Section 5 of the Fourteenth Amendment. Section 5 grants Congress the power to enforce the substantive provisions of the Fourteenth Amendment.

Fourteenth Amendment reads in pertinent part... ...nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the protection of the laws. Section 1-Citizenship	Section 5 -Power of Congress reads: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The appellate court stated that "there is a clear constitutional justification for the Equal Pay Act" since

(1) Congress has power to prohibit sex discrimination in employment because of its authority under Section 5 of the Fourteenth Amendment, and

(2) such power--despite the Tenth Amendment--extends to the state (and hence, its political subdivisions) as an employer.

Buttressing its decision that EPA coverage of the public sector was constitutional, the appeals court noted that the Supreme Court had also handed down a decision that public sector coverage under Title VII was a constitutional exercise of congressional authority under Section 5 of the Fourteenth Amendment. The Appeals Court stated that the Supreme Court "made it perfectly clear (1) that Congress has Section 5 Fourteenth Amendment power to prohibit sex discrimination in employment, and (2) that such power, despite the Tenth Amendment, extends to the state as an employer."

(The appeals court was referring to the Supreme Court's decision in *Fitzpatrick v. Bitzer*, 12 FEP cases, 1586, 1976. For a further discussion of this particular case within a Title VII context, please see Tab D).

Finally, the Third Circuit found no merit in the district court's reasoning regarding the relationship of the Equal Pay Act to the Fair Labor Standards Act by virtue of the EPA being "housed" in the FLSA and enforced by the same federal agency. The appellate court made these points:

(1) The Equal Pay Act is a separate law enacted at a different time and "aimed at a separate problem--discrimination on account of sex in the payment of wages."

(2) Even if the EPA is regarded as a "mere amendment" of the FLSA, it is subject to the latter's severability provision. This provision reads:

> If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby. 29 U.S.C. §219 (1970 ed.)

THE STATUTORY ISSUE OF EQUAL PAY

The findings of facts set forth in the Allegheny case make an excellent tool for classroom use or in a training session for both public and private sector participants. This case provides an understanding of the kinds of considerations that enter into an investigation of an equal pay case. The district court's findings of facts have been reproduced in the appendix of this Tab. This material can readily be reproduced for classroom or training purposes. The students should be asked to determine, based on findings, if they would consider the hospital pay differential a violation of the Equal Pay Act assuming, of course, that the instructor or trainer has already carefully explained the Act's provisions.

Certain points should be made to the student: Both parties agreed that there was a similarity in working conditions, so that aspect of the law was not in contention. Two statutory issues were considered by the district and the appellate court: (1) "equal work" and (2) "factor other than sex."

The district court found no violation of the "equal work" requirement and ruled that the pay differential, even if the work were equal, was based on a "factor other than sex."

The appeals court reversed, (1) finding that the work was equal and (2) rejecting the "factor other than sex" argument of the hospital. The appeals court findings and conclusions are summarized in the appendix. Following the classroom or training session discussion of the facts in the case and the conclusions reached by the students or practitioners, the instructor should then discuss the appeals court findings and conclusions on the issues of "equal work" and "factor other than sex."

See in Appendix following headings:

Part I: Findings of Fact (Class or Training Session Exercise in an Equal Pay Case.)

Part II: Appellate Court Ruling (To be Discussed Following Part I Exercise)

2) Court of Appeals, Fourth Circuit - *Usery v. Charleston County School District* (No. 76-2340, July 25, 1977)

Following the Allegheny decision, a second appellate court dealt with the issue of the applicability of the Equal Pay Act to employees of state and local governments.

The U.S. Court of Appeals, Fourth Circuit, upheld a lower court ruling that the EPA did apply to state and local jurisdictions.

The court's ruling resulted from a Fair Labor Standards Act suit filed in South Carolina by the Secretary of Labor in February 1976. The suit contended that the Charleston County school district and its superintendent had violated the equal pay, minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act and asked that back wages be paid to affected employees.

Based on the June 1976 decision of the U.S. Supreme Court that FLSA coverage could not be enforced against traditional operations of state and local governments, the appeals court dismissed the minimum wage and overtime compensation charges. It did not dismiss the equal pay and related record-keeping allegations.

In upholding the district court, the appeals court found that the equal pay section of the FLSA is an anti-discrimination measure and "as such may be viewed as an exercise of Congress's power to adopt legislation enforcing the Fourteenth Amendment's guarantee of 'equal protection of the law'." Thus, to date two appellate courts have upheld state and local government coverage under the EPA, based on congressional power under the Fourteenth Amendment.

As of this writing, three district court decisions, also upholding EPA coverage, are on appeal in the Sixth, Seventh and Ninth Circuit

In the event that one or more appellate courts differ from the two opinions already handed down, the issue may well find its way to the U.S. Supreme Court which, incidentally, refused to review the first appellate decision, the *Allegheny* case. But in the event that there is unanimity among the appellate courts, the Dallas Independent School District's evangelical zeal was for naught. The DISD hailed the FLSA decision as "the call for a new crusade to wrest the Holy Sepulchre of State's Rights from the Caliphs in Washington under the banner of the Tenth Amendment." /*Government Employee Relations Report*, "State and Local Notes," BNA, January 3, 1977./

A district court didn't buy the Dallas school district's view of the FLSA decision as gospel and ruled the district was covered by the Equal Pay Act. /[6]/ *W.J. Usery et al v. Dallas Independent School District;* USDC NTEX, Case No. Ca. 3-7975-D, Oct. 19, 1976

EEOC LOSES TO DEPARTMENT OF LABOR ON DEFINITION OF EQUAL PAY

As indicated in the section on "The Problem of Multiple Remedies" (Tab I), the Equal Employment Opportunity Commission and the Wage and Hour Division of the Department of Labor have differed on what constitutes equal pay. The difference has involved the critical area of fringe benefits, a substantial monetary consideration in a total pay package.

In short, the EEOC has maintained that all benefit plans (e.g., pensions, health, income protection plans such as temporary disability insurance) must provide to both genders the same benefits and the cost of doing so is irrelevant. On the other hand, the Wage and Hour Administration has maintained that if the employer contributes the same amount for each employee, then the equal pay test has been met even if the benefits, based on sex, differ; or conversely, if the benefits are equal but the contributions differ, based on sex, that, too, meets the equal pay test.

The Supreme Court has chosen the Dept. of Labor (Wage-Hour Division) interpretation, a less liberal interpretation of equal pay than that held by the Equal Employment Opportunity Commission. (For a detailed discussion of how and why the Supreme Court held that the Dept. of Labor interpretation prevails, see Tab K - Sex Discrimination, for a discussion of the *General Electric* case which involved a temporary disability (income protection) plan that excluded pregnancy-related disabilities. Also see Tab I-The Problem of Multiple Remedies.)

UPDATE - TAB C - APPENDIX

PART I: FINDINGS OF FACTS

Class or Training Session Exercise in an Equal Pay Case

(1) Basic Work:

Women: "The female beauticians are engaged in basic hair care for female patients."

Men: "The barbers are engaged in basic hair care for the male patients."

(2) Hours:

Women: "All beauticians work from 7:30 a.m. to 3:30 p.m. Monday through Friday."

Men: "All the male barbers work from 8:00 a.m. to 4:00 p.m. Monday through Friday."

(3) Place of Work:

Women: "The work of the beauticians is divided between the floors in the women's section of the hospital and the beauty shop."

Men: "Usually in the morning, the barbers work on the floors of the hospital in the men's sections; in the afternoon one barber works in the barber shop while the other two work on the floors of the hospital."

(4) Predominant Activity:

Women: "Between 50% and 75% [of time] is spent in cutting hair . . . ."

Men: "The skills used by the barbers are strictly barbering the hair of all the male patients except four or five. . . . Hair cutting is done on the floors and in the barber shop."

(5) Additional Activities:

Women: "In addition, 25% to 50% of their time is spent in the beauty shop giving permanents, hair sets, straightening and relaxing hair. On occasion they shampoo a patient, and do nail polishing and nail filing when requested. Many of the women patients need to be shaved; the beauticians shave them with an electric razor."

Men: "They do not shave the men as a general rule. The hospital aides shave the men; on occasion the barbers will help out if there is a problem. One half to two hours every two weeks they teach the hospital aides how to shave. . . . They do not shampoo or manicure patients or use chemical lotions."

Both: "Both report scalp diseases to hospital nurses. Both perform their respective skills for bedridden patients and those in geriatric chairs. At the end of each day both clean their tools and do some light cleaning of respective shops."

(6) Patient Responsibilities:

Women: "There are approximately 1300 female patients at the hospital."

. . .

". . . a beautician spends thirty to forty minutes to complete a hair straightening process, and one hour to an hour and fifteen minutes to give a hair set."

". . . The responsibility of the beauticians is to cut the hair and perform additional beauty skills to the female patients who need or request their services."

Men: "There are approximately 700 male patients at the hospital."

". . . barbers on the average spend ten to twenty minutes cutting the hair of a male patient . . . ."

". . . The responsibility of barbers is to cut the hair of over 700 male patients."

(7) Tools:

Women: "The tools used by beauticians are scissors, thinning shears, combs, brushes, various chemical lotions, oils and creams, clippers, bobby pins, clips, irons, rollers, and electric razors. They keep a hair dryer and heater in the beauty shop. The beauticians convey their tools to the floors on a cart."

Men: "The tools used by barbers are scissors, thinning shears, combs, a clipper, a trimming clipper and neck duster. The barbers convey their tools to the floors in a kit."

(8) Effort of Performance:

"Unlike the barbers, the beauticians use several tools in addition to the basic scissors, clippers and combs which use requires more effort of performance."

(Citations to trial transcript deleted).

PART II: APPELLATE COURT RULING IN *USERY v. ALLEGENY COUNTY INSTITUTION DISTRICT*

Following a discussion by participants based on the findings of fact, the instructor or trainer should then discuss the points made by the U.S. Court of Appeals, Third Circuit (Oct. 1976) in finding a violation of the Equal Pay Act (EPA) by John J. Kane Hospital.

A. A summary of the appeals court decision on the "equal work" issue:

(1) The work of barbers and beauticians is equal within the meaning of the EPA. The district court was wrong in finding no violation in view of the basic hours worked, the place of work, predominant activity, additional activities, patient responsibilities, tools and effort. The court quotes from the Department of Labor Regulation:

> Congress did not intend that inconsequential differences in job content would be a valid excuse for payments of a lower wage to an employee of one sex than to an employee of the opposite sex if the two are performing equal work on essentially the same jobs in the same establishment. 29 C.F.R. §800.120 (1974). The statutory test is "equal skill, effort and responsibility." 29 U.S.C. §206 (d) (1).

(2) In the predominant activity--hair care of geriatric patients--beauticians employ skill, effort and responsibility "at least equal to that of barbers. To the extent that the beauticians perform additional duties they are duties involving higher skill and greater effort." Again the court cites the regulation:

> ...where employees of opposite sexes are employed in jobs in which the duties they are required to perform and the working conditions are substantially the same, except than an employee of one sex is required to perform some duty or duties involving a higher skill which

> an employee of the other sex is not required to perform, the fact that the duties are different in this respect is insufficient to remove the jobs from the application of equal pay standard if it also appears that the employer is paying a lower wage rate to the employee performing the additional duties notwithstanding the additional skill which they involve. 29 C.F.R. §800.122 (1974)

(3) The quoted regulation fits the facts in the case. The only difference between the jobs of barber and beautician: in addition to the basic task of hair care, the lower paid beauticians also perform cosmetic and styling tasks requiring greater skill and effort than that expended by the barbers. "The basic job, skill, effort and responsibility appear to be substantially equal."

(4) The appeals court rejected the hospital's argument that educational differences bolstered its contention that the jobs are not substantially equal. While acknowledging that training and education are elements of skill for the purposes of the Act, the court said the evidence tended to show "similarity rather than dissimilarity of skills": both beauticians and barbers must attend 1250 hours of required schooling for at least 9 months; the curricula of the two types of schools overlapped about 75 percent on subject matter. Both beauticians and barbers study haircutting, sanitation, sterilization, use of antiseptic cosmetics and electrical applications. Barbers study honing and strapping, skills which the district court found were little used by the barbers at Kane Hospital. Beauticians study cosmetic skills--permanent waving, rinses, hair tinting, bleaching, wigs and hair pieces, manicuring and make-up, some of which are used at Kane.

The appeals court concluded that for the skills required at the hospital--hair care for geriatric patients--the "educational background...appears to be virtually identical. Probably that identity explains why the district court did not rely on differences in training in reaching the legal conclusion that the work was unequal."

(5) The appeals court stated that on the "equal work" issue the district court had erred: "the facts found by the district court which are amply supported by the evidence will not support its legal conclusion that the work of barbers and beauticians at the hospital was not substantially equal. Rather those facts compel the opposite conclusion."

B. A summary of the appeals court decision on the "factor other than sex" issue:

(1) The district court stated that even if the work were equal, a "factor other than sex" allowed the hospital to pay the female beautician less. /Section 6(d) (1) of the EPA provides for three specific and one general exception to the equal pay requirement: Specific exception: seniority, merit and productivity systems. The general exception: for wages made pursuant to a "differential based on any factor other than sex."/

(2) The district court found that the hospital's pay differential was covered by the general exception, that is, a factor other than sex. The district court said:

> Congress has not provided that when employees of one sex are members of a licensed profession unrestricted as to sex and provide more skill and effort than do employees of the opposite sex who are members of another licensed profession unrestricted as to sex, their common employer must provide equal pay.

The appeals court confessed that it wasn't sure what the district court meant. But if it meant that licensing differences between the barbers and beauticians justified wage discrimination, the appeals court would not agree:

> Once the Secretary /of Labor/ showed that the work was equal the burden shifted to the defendant to show that the differential is justified by a factor other than sex. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974); *Schultz v. Wheaton Glass Co., supra*, 421 F 2d at 267. The record...establishes that the hospital employs no male beauticians and no female barbers. Nothing in the Pennsylvania Barber License Law prevents barbers from cutting women's hair...although the Beauty Culture Act defines beauty culture in terms of women's hair, the Pennsylvania Attorney General has expressed the opinion that persons licensed under that law can work on men's hair. Under Pennsylvania law, persons of either sex may be licensed in either profession, and members of either profession may serve members of either sex...the work performed by the two professions at Kane is substantially similar...we do not regard the mere fact that the two professions are separately licensed as controlling. The distinction amounts, in this case, to a mere difference in nomenclature.

As a matter of federal law, it is job content rather than job classification which controls...Therefore, on the facts in this case we conclude that the mere existence of separate statutory schemes for regulating the two professions is not a..."factor other than sex."...

We conclude that on the facts found by the district court the Secretary has established a violation of the Equal Pay Act and that the defendant has not carried the burden of showing that it falls within one of the exceptions....

INSTRUCTION SHEET

TAB D - TITLE VII

ADD NEW PAGES D-21 THROUGH D-38

IX. REDESIGN OF EEOC FUNCTIONS AND PROCEDURES

To increase the efficiency of the EEOC, agency functions and many of its procedures are being restructured under the guidance of its new chair, Eleanor Holmes Norton. Several of these changes, summarized below, are discussed from the viewpoint of Ms. Norton in testimony before a Congressional committee, in July 1977.

A. Rapid Case Processing System

To prevent and diminish the tremendous backlog of charges accrued by the Commission, an expedited system of handling new complaints has been established while the Commission is attempting to clean up the backlog. Before a claim is accepted there will be more interviewing, analysis of the claim and counseling. This should first allow the EEOC to determine if there actually is a Title VII claim, or if the claimant should be referred elsewhere. This process also permits the Commission to be immediately aware of cases where emergency relief is needed--e.g., temporary restraining orders in situations where an employee is about to be fired, or disciplined, for filing a Title VII charge, or where acts of overt discrimination are continuing. The detailed intake interviewing will also permit the Commission to draft a charge and request information from the respondent based on the specific issues of the case. Respondents will know within 10 days of filing what the precise charges against them are.

Early Resolution

The respondent upon learning of the charges, will have the option of resolving the problem without going further into the process. The Commission is emphasizing settlement of claims in preference to litigation. Early settlement will permit the processing of more claims, and doing it in a more timely fashion. Conciliation will be used at the initial stages.

If a settlement is not reached, the parties will then participate in an informal face-to-face factfinding conference. An EEOC investigator conducts the conference. In addition to the information obtained at the initial interview, the investigator obtains further information from the parties in order to develop a clear picture of the dispute and to have the parties understand each other's position. An attempt to settle is made at the conference or shortly thereafter.

If the parties have not settled, the information gained at the interview and factfinding stages will be used by the EEOC to determine if a violation of Title VII occurred and if the case should be pursued. Should the information obtained not be sufficient, the established techniques of EEOC investigation would be used including field visits and examination of witness and documents. However, this investigation will be more speedy than in the past since substantial information already has been obtained through initial interviews and factfinding.

B. Separation of Individual and Class Actions

Previously much of the EEOC's class action, or systemic discrimination, activity evolved out of the investigation of individual complaints. When investigating an individual complaint, the EEOC felt that the evidence pointed to a pattern of systemic discrimination by the employer. Often the individual complainant was requested to file broad and general allegations of discrimination. Then the Commission could use the individual charge to obtain evidence that the employer was discriminating against groups of employees.

In evaluating that procedure, the EEOC felt it was doing a disservice both to the individual making the complaint and to the public interest objective of attacking systemic discrimination. Because of the time required in investigating and developing a broad case of discrimination and because only in a minority of those cases was cause for a broad suit found, the charging individual did not get timely relief, if any at all. Additionally, this system resulted in a huge backlog of cases. In terms of fighting systemic discrimination, this approach was not efficient since the type of case and the particular employer investigated were controlled by the persons who happened to file individual charges, rather than by EEOC choice based on effectiveness. While the new procedure permits individuals or organizations to petition for an investigation of systemic discrimination, such an investigation will be considered part of a separate procedure; individual charges will not automatically in-

itiate a broad scale pattern and practice investigation of the employer. The investigation of an individual charge will be limited, wherever possible, to the actions alleged by the charging party.

C. The Systemic Discrimination Program

Where systemic discrimination is suspected--e.g., an employer's statistical employment profile shows unusually low proportions of minorities or women compared to similar employers, a Commissioner's charge will be filed. As with individual charges, efforts will be made to settle the systemic cases early in the process--again putting an emphasis on resolution rather than litigation. The systemic program, for the most part, will be developed at the headquarters and carried out in the district offices.

D. Restructuring Internal Relationships

The EEOC plans to phase out regional offices and regional litigation centers. Following the model of the NLRB, field offices will be directly linked to headquarters. In twenty-two full service field offices, investigators will confer with lawyers, thus integrating the functions of investigation, conciliation and litigation. In a given case, such internal conferring will help to decide if there is reasonable cause to litigate. Previously, a finding of reasonable cause for investigation was originally made and if a resolution was not achieved, a separate decision of reasonable cause for litigation had to be made, using dif-

ferent criteria. With the latter determination made at the beginning of a case, the EEOC will have more leverage in its attempt to conciliate.

If conciliation fails, the case may be approved by the EEOC for litigation on the general counsel's recommendation. Factors to be considered: familiarity with the case and where the evidence already gathered, now based on litigation standards, is of the quality necessary for use in developing the case for litigation.

Where evidence of discrimination exists but does not meet the upgraded "reasonable cause" standards, the parties will be given a right-to-sue letter and may litigate on their own.

In addition to the full service field offices, there will be 46 area offices, concerned only with rapid charge processing. In some areas, these smaller offices may have units to handle pattern and practice cases (systemic discrimination cases) initiated by the EEOC against companies within their areas.

These changes were first implemented in three "model offices" (Dallas, Baltimore and Chicago) and are reported to be working well. The entire system should be phased in by September 30, 1978. Along with the innovations described above are the following:

-- Processing backlog cases in a systematic manner by specially assigned staff. The backlog charge processing system will be handled at the full service district offices.

— Working with other federal anti-discrimination enforcement agencies in developing uniform selection guidelines for employers.

— Use of selected agencies or organizations to assist the EEOC in carrying out its mission. Those receiving EEOC grants or contracts will need to match their funded activities to EEOC needs and operations. The EEOC will work with state and local FEP agencies and other federal agencies so that the Commission can make better use of their efforts in case processing. The establishment of a national case processing system, with uniform standards, forms, procedures and reporting systems will aid in this effort.

E. Special Projects: Possible Use of Arbitration

There has been mention of making use of arbitrators trained by/or in conjunction with the EEOC to resolve individual claims of discrimination.

The development of "individual worker-employer arbitration" as an optional mode of settlement would be a part of the responsibility of the EEOC's Office of Special Projects and Programs. Individual worker-employer arbitration (not to be confused with collective bargaining arbitration) will require the identification of arbitrators acceptable to both management and civil rights groups and the Commission. In addition, procedures must be evolved which will insure fairness and competence in the arbitration process. (See Tab A for further discussion of the arbitrator's role in Title VII grievances and the *Gardner-Denver* decision.) At this writing, plans for the use of arbitrators are still under consideration.

X. SUPREME COURT RULES ON PROCEDURAL ISSUES

A. Pursuing Grievance Procedure Does Not "Toll" Time Limitations Under Title VII

The Supreme Court has held that filing a discrimination grievance under a negotiated grievance-arbitration procedure does not "toll" (stop the running of) the legally required time period for filing a claim with the EEOC, At the time the claimant filed with the EEOC, Title VII required a charge to be filed within 90 days after the alleged act of discrimination. The claimant filed a claim 108 days after she was terminated, but only 84 days after completing the grievance procedure. (*Guy v. Robbins & Myers*, 97 S. Ct. 441, 1977)

The Supreme Court drew on its decisions in two other cases. In *Alexander v. Gardner-Denver* (415 US 36, 1974) the Court held that Title VII guaranteed to an individual a statutory right independent of the grievance-arbitration process; that Title VII gives an individual rights that cannot be bargained away.

In *Johnson v. Railway Express* (421 US 454, 1975) the Court again reemphasized the independence of Title VII from other remedies available to an employee and ruled that filing a Title VII charge did not stop the running of the statute of limitations for filing a charge based on the same facts under Section 1981 of the Civil Rights Act of 1866.

Thus pursuing other remedies, such as a grievance procedure, does not toll the time limits for filing under Title VII. Shortly after the charge in this case had been filed with the EEOC, Congress amended the filing period from 90 to 180 days and applied the amendment to cases pending before the Commission at that time. The Court interpreted the provision to include all cases pending, permitting this Title VII action to proceed, since it had been filed within 180 days after the alleged discriminatory act.

B. No Time Limitation on EEOC's Right to Sue

In *Occidental Life Insurance Company of California v. EEOC*, the Supreme Court held there was no limitation on the EEOC's right to file suit under Title VII (No. 97 S. Ct. 2447, 1977).

Section 706(f)(1) of Title VII requires a charging party to wait 180 days after filing the charge with the EEOC before bringing an individual action. The Section does not require the EEOC to file suit within 180 days.

Congressional concern about time limits centered on the initial filing of the charge time with the EEOC and EEOC notification to alleged violators--not the time limitation on EEOC's power to sue. The Court did not feel the lack of time limitations deprived the parties of any fairness. Claimants are given the option of bringing a private suit 180 days after filing with the Commission; defendants are notified within

10 days of the filing of the charges, are kept informed of the progress of the action, including notification of a determination of "reasonable cause" to believe there is a Title VII violation and of the Commission's termination of conciliation efforts. If undue delay would affect an outcome, the federal trial courts have the power to provide relief.

The Court also found that the state statutes of limitations do not apply to EEOC suits. Such statutes were not formulated with consideration of national interest policies, and were felt by the Court to be inconsistent with the Title VII requirement that the EEOC attempt to conciliate discrimination disputes before resorting to litigation.

The Court examined the legislative history of Title VII, including the 1972 amendments which increased the workload of the EEOC by extending its coverage, authorizing it to bring civil action in federal courts, including pattern-and-practice suits. When Congress added to the EEOC workload it was aware of the time problems already facing the EEOC, so the Court concluded that Congress could not have intended the Commission's actions to be limited by varying state statutes of limitations.

C. Timely Filing and the Issue of "Continuing Violation"

In *Evans v. United Airlines*, the Supreme Court considered a Title VII claim of an airline flight attendant who had to resign upon her marriage in 1968, because the airlines did not permit its female flight attendants to be married. Evans did not file a claim at that time nor

was she a party to a Title VII suit in which United's no-marriage rule was declared discriminatory (*Sprogis v. United Airlines* 444 F. 2nd 1194, Ca.7, 1971). Nor was she included under the terms of a 1968 collective bargaining agreement which ended the no-marriage rule and provided for the reinstatement of flight attendants who had been terminated under that rule. (97 S.Ct. 1885, 1977; 14 FEP Cases 1510)

She was rehired in 1972 as a new employee. Under existing company policy, she was not credited with her past seniority. She brought a Title VII suit against United, claiming that the airline continued to discriminate against her by refusing to give her seniority credit which she lost due to United's original discriminatory act. The Court held her claim was not timely filed and hence she had no Title VII claim.

Evans argued that her claim was based on a continuing violation and thus the time constraints for filing a Title VII charge did not apply. She argued that her forced resignation in 1968 was based on a discriminatory policy and the adverse effect of that policy was carried into the present. The seniority system, she charged, perpetuated this post-Title VII discriminatory practice.

The Court agreed that the seniority system had carried forward a prior act of discrimination, but that the company had abandoned the discriminatory no-marriage policy; further, the seniority system itself applied alike to both men and women and hence was a neutral system.

In rejecting the continuing violation argument, the Court ruled that Evans had to file within the 90 days after her resignation (later Title VII was amended to provide for 180 days).

The Court said: "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."

Note: The Evans case dealt with a one-time act, that of discharge, which requires a timely filing. There are no time limitations, however, in pattern or practice suits brought by the EEOC, for example, which attack an ongoing discriminatory policy or practice. Further, an employee may be a class member in a private class action suit even though he or she did not file a complaint.

D. Timely Intervention in Class Action

The United Airlines "no-marriage" rule as a condition of employment was challenged as a violation of Title VII. One stewardess, so affected, brought a class action in 1967 on behalf of herself and all other United stewardesses discharged because of the no-marriage rule.

The district court ruled that only those stewardesses who had filed charges either under Title VII or the company's collective bargaining agreement constituted a class. However, the judge ruled that the number who filed charges did not meet the federal numerical requirement necessary for a "class action" status.

Stewardess McDonald, who had neither filed a grievance nor a claim with the EEOC, attempted to intervene in order to appeal the court's denial of class action status. The trial judge denied her motion to intervene as "untimely." McDonald then appealed denial of her intervention as well as the order denying class action status.

The Supreme Court granted a review on the single issue of whether McDonald's post-judgment application for intervention was untimely. The Court majority held that her motion to intervene was "timely" filed, well within the 30-day period for an appeal to be taken and her motion should have been granted.
[*United Airlines v. McDonald*, U.S. Sup. Ct. No. 76-545, June 20, 1977]

E. Plaintiffs in Class Action Suit Must be "Representative" of Class

The Supreme Court upheld a district court (and overturned the appeals court)in dismissing a class action because the employees who brought the Title VII suit did not properly or fairly represent the "interests" of the class.

Three local drivers sued their employer, a trucking company, on behalf of all Mexican-American and black employees alleging racial and national origin discrimination. They claimed a denial of equal employment opportunities because of a restrictive no-transfer policy between terminals or between city-driving and line-driving positions. They alleged that the seniority system, based on bargaining unit rather than company-wide seniority, helped to perpetuate these discriminatory practices.

They did not make the necessary pretrial motion to have the case certified as a class action. Following the trial, the district court denied class action status since they had not moved for certification and their focus during the trial was on their own individual claims. Significantly, the Court noted that while the plaintiffs sought a merger of the city-driver and line-driver seniority lists, with free transfer between jobs, a substantial majority of the union membership had rejected such a proposal. The trial court also rejected their individual claims.

The court of appeals reversed the district court on the denial of class action status.

The Supreme Court, however, upheld the lower court. The Court focused on the requirements necessary to "fairly and adequately protect the interests of the class," and concluded that the three employees did not meet that requirement because:

(1) the employees' "failure to protect the class interests of class members by moving for certification surely bears strongly on the adequacy of the representation that those class members might expect to receive."

(2) the three employees did not share the same views as those they claimed to represent: "The large majority of the members of /the Local/ at the meeting that rejected the proposal were Mexican-American or Negro city drivers, negating any possibility that the vote was controlled by white persons or line drivers."

(3) a class representative must "possess the same interest and suffer the same injury" as class members.

On this point the Supreme Court noted that the district court had found "abundant evidence" that the three plaintiffs lacked the qualifications

to be hired as line-drivers. "Thus they could have suffered no injury as a result of the discriminatory practices, and they were, therefore simply not eligible to represent a class of persons who did allegedly suffer injury...."

Additionally, the plaintiffs acknowledged they had not been discriminated against when they were initially hired.

The Court concluded:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.
>
> (*East Texas Motor Freight & Rodriguez*, 14 FEP Cases 1505, 1977)

XI. FEDERAL EMPLOYEES' PROCEDURAL RIGHTS

A. Title VII: Exclusive Remedy for Federal Employees

The Supreme Court answered "yes" to the question of whether Title VII is the exclusive legal remedy available to a federal employee complaining of employment discrimination. (*Brown v. General Services Administration*, 96 S. Ct. 1961; 12 FEP Cases 1361, 1976)

Brown, a black employee of the General Services Administration (GSA), filed a complaint with the GSA Equal Opportunity Office after losing two promotions to white employees. The Equal Opportunity Office found no evidence of discrimination, whereupon Brown brought his claim before the complaints examiner of the Civil Service Commission. The examiner found no evidence of discrimination and Brown was informed of his rights either to appeal to the Civil Service Commission's Board of Appeals and Review or to file suit in a federal district court within 30 days.

Forty-two days later Brown filed suit in a district court under several laws, including Title VII and the Civil Rights Act of 1866 (Sec. 1981). The court concluded that Title VII provides the exclusive remedy for federal employee litigation in discrimination suits. Section 717 of Title VII, specifically enacted in 1972 to cover federal employees, permits civil action if no resolution is reached through the administrative process.

Looking at the legislative history of Title VII the Court inferred that Congress intended to create, by Section 717, an exclusive administrative and judicial process for remedying discrimination in federal employment. Among the reasons for this were the problems which might occur in suing an agency of the government under other acts, where complete exhaustion of administrative remedies might be required before a suit could be allowed, or where a court may find it inappropriate, or beyond its jurisdiction to find against, or impose a remedy on, the federal government itself (under the "doctrine of sovereign immunity").

Brown, the complainant, was thus limited to bring suit only under Title VII. Since he filed his suit after the 30-day limit allowed by Section 717, his case was dismissed.

The decision thus means that federal employees are set apart from private sector and state and local government employees who are permitted multiple legal remedies.

B. Federal Employees' Right to Trial "De Novo"

The Supreme Court reviewed the case of *Chandler v. Roudebush*(96 S. Ct. 1949j 12 FEP Cases 1368, 1976) to resolve the differences in appellate court opinions as to whether Section 717 of Title VII entitled federal employees to a trial *de novo*; that is, whether a federal employee, having gone through the administrative process set out in Section 717 and then bringing a timely suit in a federal court, is entitled to a complete new trial on the facts and merits of the case, or if a court review of the administrative proceedings satisfies the law.

In this particular case, federal employee Chandler brought a Title VII complaint against the Veterans Administration alleging her failure to receive a promotion was based on sex and racial discrimination. The hearing examiner upheld her claim of sex discrimination; the agency, however, rejected the hearing examiner's findings. On appeal, the Civil Service Commission Board of Appeals and Review upheld the agency in denying the claim. Within thirty days Chandler brought a suit in federal district court. The district court ruled that a judicial reveiw of the administrative records (rather than a trial) would suffice. The Ninth Circuit Court of Appeals upheld this decision, in line with

decisions of some other circuit courts of appeals. The Supreme Court reversed. Based on an exhaustive review of legislative intent, the Court interpreted the provisions of Section 717 to mean that Congress intended to give federal employees the same right to a trial *de novo* as private sector employees had.

XII. PUBLIC SECTOR: STATE SOVEREIGNTY NO BAR TO BACK PAY AWARDS

Sex discrimination in the area of fringe benefits normally finds women alleging unequal treatment.

However, turnabout is fair play--so male employees of the State of Connecticut filed a Title VII class action suit on behalf of present and retired employees, alleging that the retirement plan discriminated against men. The men prevailed in winning their claim that the retirement plan discriminated against them because of their sex. Both the district and appeals courts agreed with them, but it took some time to settle the issue as to whether they were entitled to retroactive retirement benefits as well as reasonable attorney's fees. Both the district and appeals courts held that recovery of money damages was prohibited by the Eleventh Amendment which limits the power of the federal judiciary in suits filed against the states. The Eleventh Amendment reads:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Connecticut's state sovereignty defense, based on the Eleventh Amendment, was rejected by the Supreme Court. The Court held that Title VII coverage of state and local governments was constitutional and therefore the provisions of Title VII apply, including the right of the federal district courts to award back pay upon a finding of discrimination.

The Supreme Court upheld the validity of Title VII, as it applies to state and local governments, on the basis of Congress' power under Section 5 of the Fourteenth Amendment, granting Congress the power to enforce the substantive provisions of that amendment. The pertinent portions of the Fourteenth Amendment read:

> Section 1. No State...shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. (emphasis added)

The Court concluded that "the Eleventh Amendment, and the principle of state sovereignty which it embodies,...are necessarily limited by the enforcement provisions...of the Fourteenth Amendment." Therefore, Congress can enact legislation such as Title VII which provides for private suits against States or their officials and which also allows for monetary awards as a proper remedy upon a finding of discrimination.

/*Fitzpatrick v. Bitzer*, 12 FEP cases, 1586, 1976./

INSTRUCTION SHEET

TAB E--THE CALIFORNIA FAIR EMPLOYMENT PRACTICE ACT

ADD NEW PAGE E-9

ADD TO APPENDIX: ASSEMBLY BILL 586

Postcript

1978 UPDATE: THE CALIFORNIA FEP ACT

Changes in the FEP law occurred in 1976 and 1977.

The 1976 California legislative session saw the following changes:

1. "marital status" was explicitly included as a basis on which an employer or other designated person may not discriminate,

   a. except for reasonable regulation, for reasons of supervision, safety, security or morale, of spouses working in the same department, division or facility, according to rules and regulations adopted by the Commission, and

   b. except for health plans for employees with dependents. (Section 1420 of the Labor Code).

The 1977 session saw the enactment of AB 586 which amended the FEP Act to prohibit mandatory retirement plans. The new law prohibits private sector employers from requiring mandatory retirement at age 65. This law requires every private sector employer in the state to permit any employee who so desires and can demonstrate ability to do so, to continue his or her employment beyond the normal retirement date. Under the bill, no changes are required in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or for two years after the effective date of the bill, whichever occurs first. (See copy of bill in appendix).

Assembly Bill No. 586

CHAPTER 851

An act to amend Section 1420.1 of, and add Section 1420.15 to, the Labor Code, relating to voluntary retirement.

[Approved by Governor September 16, 1977. Filed with Secretary of State September 16, 1977.]

LEGISLATIVE COUNSEL'S DIGEST

AB 586, Alatorre. Retirement: voluntary retirement.

No provision of existing law prohibits an employer from requiring mandatory retirement at age 65. Existing law prohibits discrimination in employment on the basis of a person's age, but such prohibition is applicable only with regard to persons from 40 to 64 years of age.

This bill would require every employer in this state, except public agencies, to permit any employee who so desires and can demonstrate the ability to do so, to continue his employment beyond the normal retirement date.

The bill would provide that its provisions would not require any changes in any bona fide pension programs or collective-bargaining agreements during the life of the contract, or for two years after the effective date of the bill, whichever occurs first.

The people of the State of California do enact as follows:

SECTION 1. The Legislature of the State of California finds and declares that the use of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement from employment are obsolete and cruel practices. The downward trend toward involuntary retirement at ages from 55 years represents a highly undesirable development in the utilization of California's worker resources. In addition, this practice is now imposing serious stresses on our economy and in particular on pension systems and other income maintenance systems.

SEC. 2. Section 1420.1 of the Labor Code is amended to read:

1420.1. (a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to require any changes in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or

for two years after the effective date of this section, whichever occurs first, nor shall this section preclude such physical and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.

Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, and trade schools shall not, in and of themselves, constitute a violation of this section.

(b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred.

(c) The age limitations of the apprenticeship programs in which the state participates shall not be deemed to violate this section.

SEC. 3. Section 1420.15 is added to the Labor Code, to read:

1420.15. Every employer in this state, except a public agency, shall permit any employee who indicates in writing a desire in a reasonable time and can demonstrate the ability to do so, to continue his employment beyond the normal retirement date contained in any private pension or retirement plan.

Such employment shall continue so long as the employee demonstrates his ability to perform the functions of the job adequately and the employer is satisfied with the quality of work performed.

This section shall not be construed to require any change in funding, benefit levels, or formulas of any existing retirement plan, or to require any employer to increase such employer's payments for the provision of insurance benefits contained in any existing employee benefit or insurance plan, by reason of such employee's continuation of employment beyond the normal retirement date, or to require any changes in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or for two years after the effective date of this section, whichever occurs first.

Any employee indicating such desire and continuing such employment shall give the employer written notice in reasonable time, of intent to retire or terminate when such retirement or termination occurs after the employee's normal retirement date.

INSTRUCTION SHEET

TAB F - AGE DISCRIMINATION IN EMPLOYMENT

REMOVE OLD PAGES F-13 through F-18

ADD NEW PAGES F-13 through F-29

ADD ASSEMBLY BILL 568 TO APPENDIX

applications for employment from bus drivers over the age of 40 (or 35 in the case of Greyhound), and from publishing advertisements stating such restrictions. In the *Greyhound* case the Seventh Circuit Court reversed the district court decision and upheld the company's contention that its maximum age limitations for new drivers is a bona fide occupational qualification. In reaching this decision, the court held that it was sufficient for the company merely to "demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers." (*Hodgson v. Greyhound Lines, Inc.*, 499 F. 2d. 859, 1974. Cert. denied, Jan. 20, 1975)

The *Trailways* case, subsequently decided, also upheld age as a bfoq. (*Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d. 224, CA 5, 1976)

Another decision, however, resulted in a favorable ruling for the plaintiff when the Eighth Circuit Court of Appeals ruled against age as a bfoq for the job of test pilot. The appeals court held that McDonnell Douglas Corp. violated the ADEA when it discharged its chief production test pilot because he was 52 years old.

It is the first reported appeals court decision rejecting a claim that it is unsafe for older pilots to operate high-performance aircraft. The pilot, Phillip Houghton, had been test flying the supersonic F-4 Phantom fighter.

The court said that "medical technology can predict a disabling physical condition in a test pilot with virtually foolproof accuracy." The evidence demonstrates that the safety record of older professional pilots is "much better" than that of younger pilots due to their experiences. (*Houghton v. McDonnell Douglas Corp.*; CA 8, No. 76-1652, April 20, 1977)

In view of the Supreme Court's refusal to review the decision, pilot Houghton will not have to wait to receive his award of six years back pay which accompanies reinstatement.

D. Factors Other Than Age

The ADEA also provides an exception to prohibited discriminatory practices "where the differentiation is based on reasonable factors other than age." These exceptions are to be narrowly construed and the employer, employment agency, or labor organization has the burden of proving the validity of the exemption.

The Interpretive Bulletin in Section 860.103 and 860.104, describes some situations that may be valid as supporting a differentiation based on reasonable factors other than age:

> Physical fitness requirements based upon pre-employment or periodic physical exams relating to reasonable minimum standards for employment. Such standards must be necessary for the specific work to be performed and must be uniformly applied to all applicants for the particular job category, regardless of age. A claim for a differentiation based on physical fitness cannot be based on an employer's assumption that every employee over a certain age in a particular job becomes physically unable to perform the duties of that job.
>
> Evaluation factors such as quantity or quality of production, or educational level, where the factors have a valid relationship to the job requirements and are applied uniformly to all employees, regardless of age.

Although younger persons generally have more "test sophistication" than individuals in the 40-65 age bracket, the use of validated employee tests is not a violation of the Act when such tests are related to the requirements of the job and are administered and evaluated in good faith and without discrimination on the basis of age.

Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's condition as to the number or schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

E. Discharge

Compliance investigations, particularly in large nation-wide corporations, have shown that reductions in force have an adverse impact on the older worker. There have been several significant class-action suits over age-based discriminatory discharges. In a case involving Pan American Airways, which was settled before trial, the compliance investigation disclosed that a disproportionate number of older employees was discharged. Pan American agreed to pay $250,000 in damages to 29 employees. A case involving the Anaconda Aluminum Company also concerning an allegedly discriminatory reduction in force was settled by a consent decree and the payment of back wages to 12 former employees.

As of January 1975, the largest court settlement was the Department of Labor's suit against a Division of Standard Oil of California, Western Operations Inc., which was settled on the basis of offers of reinstatement to 120 former employees, and the payment of $2 million to 160 former employees. The 40 who were not offered reinstatement were those who were 64 years of age and who received instead additional compensation from the date of the judgment to their 65th birthday; those with serious medical problems; and those whose discharges appeared to result from age discrimination, but whose job performance had been deficient.

According to the Secretary of Labor's 1974 annual report on the ADEA, there are also several major suits pending which have not been concluded. The biggest suit was filed by the Department against the Baltimore and Ohio Railroad Company and the Chesapeake and Ohio Railway Company, where the Department is seeking more than $20 million for some 300 present and former railroad employees. This suit seeks the reinstatement of employees who were unfairly discharged or demoted and, also, the abolition of a provision in the company's amended pension plan for mandatory retirement at age 62.

F. Mandatory Retirement

An area of continuing concern is the question of mandatory retirement before age 65. The Department of Labor has generally taken the position that such retirements are unlawful unless the mandatory retirement provision is: (1) contained in a bona fide pension or retirement plan; (2) required by the terms of the plan and is not optional; (3) essential to the plan's economic survival or to some other legitimate purpose - that is, is not in the plan for the sole purpose of moving out older workers, which has now been made unlawful by the ADEA.

The Department of Labor's first test case on mandatory retirement occurred in Brennan v. Taft Broadcasting Co. In this case an employee was forced to retire at age 60. Subsequently, the company advertised the identical job and the former employee applied. The Department argued that the meaning of the provision in the Act that "no employee benefit plan shall excuse the failure to hire any individual" prohibits an employer from rejecting an application for new employment from an employee who was forced to retire if he is the most qualified applicant.

The lawsuit also challenged the validity of the plan since it was not the bona fide type specified in the Act, and because its compulsory retirement provisions had never been communicated to the employees. The district court dismissed the complaint, holding that the plan was bona fide, that the employee was retired pursuant to the plan, and that the company was not legally required to rehire the retired employee. The Department of Labor appealed the decision. In 1974 the Fifth Circuit held that the benefit plan, which makes no reference to mandatory retirement at age 60 and which is financed by profit sharing contributions not geared to the age of participating employees, could be used as a basis for terminating a 60-year-old employee, despite the fact that his job performance had been outstanding. Although the court agreed that the retirement was not required by any cost factor, it held that the Act permits involuntary retirement so long as the retirement provision is part of a bona fide employee benefit plan, and so long as the plan is not a subterfuge to evade the purposes of the Act. Since the plan was in effect before the effective date of the ADEA, the court held that it could not possibly have been a subterfuge. (Brennan v. Taft Broadcasting Co., 500 Fed. 2d. 212, 1974).

Supreme Court Upholds Mandatory Retirement Plans

The issue of mandatory retirement plans--either unilaterally initiated plans by an employer or those negotiated in labor-management agreements--is hotly contested in age discrimination law.

The focus has been on that section of the Age Discrimination in Employment Act of 1967 which states that it shall not be unlawful for an employer to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan that is not a subterfuge to evade the purposes of the age discrimination law (Section 4(f)(2).

When the issue of the legality of a mandatory retirement plan came before the U.S. Supreme Court, it was this "exception" in Section 4(f)(2) that the Court considered in deciding the case.

The effect of the provisions of the Age Discrimination Act which exempt bona fide pension plans is sufficiently similar to the Title VII provisions which exempt bona fide seniority plans, to have predicted the Court's ruling. For in May 1977 the *Teamsters* decision made it clear that a seniority system without intent to discriminate was not unlawful. (See Tab A)

It was not difficult, therefore, to engage in the usually dangerous game of predicting Court decisions to reason that Harris McMann who challenged the Company's mandatory retirement plan would fail.

And he did. In December 1977 the Supreme Court, in a 7-2 decision (same vote breakdown in the *Teamsters* seniority case), held that the forced retirement of McMann at age 60 was not unlawful. The reason: the mandatory retirement age of 60 was established under the terms of a bona fide pension plan which is exempted from the ADEA provisions. The Court turned to Section 4(f)(2) to support its conclusion. Section 4(f)(2)reads in part:

> It shall not be...unlawful for an employer...or labor organization...to observe the terms of...any bona fide employee benefit plan such as retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of the act, except that no such employee benefit plan should excuse the failure to hire any individual;...

Facts and Background

United Airlines had established a retirement plan in 1941. Joining the plan was voluntary on the part of the employees. McMann joined United Airlines in 1944 and continued as an employee until his retirement at age 60 in 1973.

McMann did not join the voluntary retirement plan until 1964. The application form he signed showed the normal retirement age as 60.

He reached his 60th birthday on January 23, 1977, and was retired on February 1, 1977, over his objection. He filed a notice of intent to sue United under the federal Age Discrimination in Employment Act.

Although he had received an opinion from the Department of Labor (whose Wage and Hour Division enforces ADEA) that United's plan was

bona fide and did not appear to be a subterfuge to evade the act, he sued, nevertheless.

Lower Court Decisions

District Court: The district court rejected McMann's claim that he should be reinstated with back pay; McMann appealed the decision.

Appeals Court: In the Court of Appeals for the Fourth Circuit McMann conceded that the plan was bona fide "in the sense that it exists and pays benefits," but McMann, now supported by the Department of Labor in his case, contended that enforcement of the age 60 retirement provision even under a plan instituted in good faith in 1941 was a subterfuge to evade the ADEA. The appeals court agreed, ruling that the pre-age 65 retirement plan falls within the meaning of "subterfuge" unless United could show that "the early retirement provision... has some economic or business purpose other than arbitrary age discrimination." The appellate court remanded the case to the district court to allow United to show an economic or business purpose.

When this decision came down, it ran counter to the decision of *Brennan v. Taft Broadcasting*. It was for this reason that the Supreme Court decided to hear the *McMann* case.

Supreme Court Decision

The Court decision, reversing the appeals court and holding that mandatory

retirement plans per se are not unlawful under the ADEA rested on the majority's interpretation of congressional intent.

Reviewing the legislative history, the Court concluded that Congress did not intend to invalidate retirement plans instituted in good faith before /the Act's/ passage and did not require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-Act plans.

The Court noted that a plan such as United Airlines, instituted 26 years before the Act, could not be interpreted to be a "subterfuge" to evade the purposes of the Act.

Justice Brennan said that the Supreme Court in its first encounter with the ADEA "sharply limits the reach of that important law."

The dissent points to pending congressional legislation when it stated: "The mischief the court fashions today may be short lived. Both the House and Senate have passed amendments to the Act /which/ expressly provide that the involuntary retirement of employees shall not be permitted or required pursuant to any employee benefit plan. Thus, today's decision may have virtually no prospective effect." (*United Airlines, Inc. v. McMann* U.S. Sup. Ct. No. 76-906, Dec. 12, 1977)

Congressional Proposals

The dissent was referring to federal legislation that now awaits a resolution of differences between the Senate and House versions.

Both the Senate and House bills would amend the ADEA to provide that pension plans and seniority systems in the private sector may not be used to force retirement before age 70. If enacted, it would thus overrule the Supreme Court decision, just discussed, by prohibiting involuntary retirement prior to age 70.

The House version would uncap the existing mandatory retirement age of 70 for federal employees. The Senate version does not, but contains other exemptions not in the House bill. Only time will tell the final outcome.

California Laws Prohibiting Mandatory Retirement

In 1977 the State of California enacted into law two bills which provide for voluntary, rather than mandatory, retirement.

One bill, AB 568 deals with the public sector. It applies to most state and public employees, excluding law enforcement and firefighting personnel.

It provides the right of public employees to continue working beyond the mandatory retirement ages prevailing at the time AB568 became law. The school system (excluding higher education) had had a retirement age of 65. Any employee in the system who decides to work beyond 65 will now be able to do so upon certification by his or her employer that the employee is competent to continue in employment. Most other California state and local employees were able to work until age 67, including those in the University and State college systems. The

bill provides them a free choice, subject to certification of competence. Competence will be based on rules and regulations adopted by each respective retirement board or governing body. Employer or member contributions will continue until actual retirement.

See Appendix for a copy of AB568.

The bill dealing with the private sector, AB586, amended the Fair Employment Practice Act. It prohibits private employers from requiring mandatory retirement at age 65.

This law requires every private sector employer in the state to permit any employee who so desires and can demonstrate the ability to do so, to continue his employment beyond the normal retirement date. Under the bill, no changes are required in any "bona fide pension program or collective bargaining agreements during the life of the contract, or for two years after the effective date of the bill, whichever occurs first." (See Tab E-California FEP Act for copy of bill in Appendix)

Mandatory Retirement in Public Sector: Constitutional Issue

The Supreme Court decision in the McMann case, previously discussed, was based on the interpretation of a statute. The Supreme Court decision in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 1976) was based on a constitutional challenge to a Massachusetts law which requires state police officers to retire at age 50.

Robert Murgia, a state trooper, alleged that this compulsory retirement law violated his Fourteenth Amendment rights by denying him "equal protection of the laws."

The State of Massachusetts defended the law on the grounds that it served a necessary public purpose; that the state seeks to protect the public by assuring physical preparedness of its uniformed police; and since physical ability declines with age, requiring retirement at age 50 served that purpose.

The Supreme Court agreed with the State of Massachusetts. The Court said the law did not violate the Equal Protection Clause because the age requirement is a "rational" (reasonable) means to meet the State's objective to protect the public.

V. PROCEDURAL ISSUES AND DEVELOPMENTS

A. Timeliness Requirements of ADEA--Issue Not Resolved

The Supreme Court consideration of the timeliness requirements of the ADEA resulted in a split decision. The Act requires an individual to give the Department of Labor 60 days notice of his or her intent to file an individual suit. This notice must be filed within 180 days of the alleged violation. Where there is a state deferral agency (e.g., state FEP commission) the notice is to be given within 300 days

of the alleged violation or within 30 days after receiving notice of the termination of state proceedings, whichever is earlier.

In the case before the Court, the employee (Dartt) on a lawyer's advice, made a complaint at a local office of the Wage and Hour Division (W & H) nine days after being fired. She alleged age discrimination was the reason for her discharge. The local office investigated and attempted to conciliate for the next several months. Although the employee contacted the W & H office several times, she was not informed of her right to file suit on her own. Many months later, the agency notified her by mail that the completion of the investigation would be delayed, including with this notice an explanatory pamphlet which referred to the employee's right to a private suit if a notice of intent were filed within 180 days of the alleged violation. Dartt immediately contacted a lawyer who mailed a letter of intent. This notice of intent was filed 216 days after her termination. Two months later, Dartt filed suit under the ADEA.

The district court dismissed the complaint, since Dartt did not meet the ADEA's mandatory requirement of filing a timely notice of intent to sue.

The Tenth Circuit Court of Appeals reversed that judgment, holding that the timeliness requirement was similar to a statute of limitations which could be stopped from running for reasons of equity.

The court also found that the oral complaint to the Department of Labor, 9 days after termination, satisfied the purposes of the Act and that the Act is "remedial and humanitarian legislation" that should be "liberally construed." Since several other circuit courts of appeal had insisted on a strict interpretation of the timeliness requirements and dismissed cases similar to Dartt's, the defendant, Shell Oil Company, petitioned the Supreme Court to resolve the issue. The Court's split vote leaves the Tenth Circuit decision in favor of Dartt intact, allowing the case to go back to the district court to be tried on its merits--i.e. the charge of age discrimination.

The interpretation of the timeliness requirements of ADEA remains open. The Supreme Court's action fixes the law only for the states within the Tenth Circuit--Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming--and does not resolve a conflict with rulings of the appeals courts. (*Shell Oil Company v. Dartt;* U.S. Sup. Ct., 76-678, Nov. 29, 1977).

B. Supreme Court to Decide Jury Trial Issue

The Supreme Court will decide if employees suing under the ADEA are entitled to a jury trial. There has been disagreement between circuit courts on this issue.

One circuit court found that age discrimination suits were analogous to Title VII suits which are considered "suits in equity" and are not subject to a trial by jury.

Another circuit court, however, held that a jury trial was permitted. The Supreme Court is left with deciding the appropriate procedure.

A Senate amendment to ADEA includes a provision for trial by jury for plaintiffs seeking damages, a provision not included in the proposed House amendments.

VI. TITLE VII IMPACT ON ADEA

The Fifth Circuit court, in a suit brought by a private individual, has upheld the Department of Labor's position that a prima facie case of age discrimination is established if the criteria set forth in McDonnell Douglas Corp. v. Green, 411 US. 792 (a Title VII case), are met: (1) the aggrieved individual is in the protected age group; (2) he or she was forced to retire (or was discharged, or not hired); (3) he or she was apparently performing satisfactorily (or was apparently qualified for the job), (4) he or she was replaced by a younger person (or the employer continued to look for other applicants). (Wilson v. Sealtest Foods Division of Kraftco Corp. 501 F. 2d. 84 (C.A. 5), 1974).

VII. PUBLIC SECTOR CHALLENGES COVERAGE

Following the Supreme Court decision rejecting the constitutionality of Fair Labor Standards Act (FLSA) coverage of state and local governments, public sector agencies challenged their coverage under the ADEA as they did Equal Pay Act (EPA) coverage. (For a detailed discussion of the FLSA relationship to both the ADEA and EPA, and FLSA Supreme Court decision, see Tab C--Equal Pay Act.)

To date, two district courts have held that public sector coverage under the federal age discrimination law is constitutional.

Assembly Bill No. 568

CHAPTER 852

An act to add Section 23922 to the Education Code, to amend Section 21258.1 of, and to add Sections 20983.5, 20983.6, 31671.03 and 45346 to the Government Code, relating to voluntary retirement, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 16, 1977. Filed with Secretary of State September 16, 1977.]

LEGISLATIVE COUNSEL'S DIGEST

AB 568, Alatorre. Voluntary retirement.

Under existing law, participants in the Public Employees' Retirement System, the State Teachers' Retirement System, retirement systems established pursuant to the County Employees Retirement Law of 1937, and municipal retirement systems are subject to various mandatory retirement provisions.

This bill would permit system participants to continue in employment irrespective of age as regular retirement system members upon certification of the member's competence in employment by the employing department or agency pursuant to rules and regulations adopted by each respective governing board or the State Personnel Board in the case of state employees. The provisions would not be applicable to public law enforcement and firefighting employees.

This bill also provides that no appropriation is made for the reimbursement of any local agency or school district for any costs incurred by it pursuant to the bill because of a specified reason.

The bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. The Legislature of the State of California finds and declares that the use of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement from employment are obsolete and cruel practices. The downward trend toward involuntary retirement at ages from 55 years represents a highly undesirable development in the utilization of California's worker resources. In addition, this practice is now imposing serious stresses on our economy and in particular on pension systems and other income maintenance systems.

SEC. 2. Section 23922 is added to the Education Code, to read:

23922. Notwithstanding any other provision of law, any member who has attained age 65 and desires to continue in employment beyond the age of normal retirement shall have the right to do so upon the certification by his employer pursuant to rules and

regulations adopted by each respective retirement board or governing body that he is competent to do so and the filing of a notice from the member and his employer that the member is continuing in employment. Employer and member contributions shall continue until retirement.

SEC. 3. Section 20983.5 is added to the Government Code, to read:

20983.5. Notwithstanding any provision of law, every state member who has attained age 67, other than a patrol or state safety member, shall have the right to continue in employment upon certification of the member's competence in his position by the department or agency head or other appropriate supervisor pursuant to rules and regulations adopted by the State Personnel Board, the Regents of the University of California, or Trustees of the California State University and Colleges with respect to employees under their respective jurisdictions. In such case, the effective date of retirement shall be delayed until the day following the last day for which salary is payable. The member shall be subject to the same rights and liabilities as all other members and employer and members contributions shall continue until retirement or until death before retirement.

SEC. 4. Section 20983.6 is added to the Government Code, to read:

20983.6. Notwithstanding any other provisions of law, every local member who has attained age 67, other than a local safety member, shall have the right to continue in employment upon certification of the member's competence in the member's position by the department or agency head or other appropriate supervisor pursuant to rules and regulations adopted by each respective governing body. In such case, the effective date of retirement shall be delayed until the day following the last day for which salary is payable. The member shall be subject to the same rights and liabilities as all other members and employer and member contributions shall continue until retirement or until death before retirement.

This section shall not apply to any contracting agency, unless and until the agency elects to be subject to the provisions of this section by amendment to its contract made in the manner prescribed for approval of contracts or, in the case of contracts made after the effective date of this section, by express provision in such contract making the contracting agency subject to the provisions of this section.

SEC. 4.5. Section 21258.1 of the Government Code is amended to read:

21258.1. (a) The retirement allowance referred to in this section excludes that portion of a member's service retirement annuity that was purchased by his accumulated additional contributions.

(b) If a member entitled to credit for prior service retires on or

after July 1, 1971, and after attaining the compulsory age for service retirement applicable to him, or if there is no compulsory age for service retirement applicable to the member and the member attains age 67, or if a member is entitled to be credited with 20 years of continuous state service and retires after attaining age 60, and his retirement allowance is less than one thousand two hundred dollars ($1,200) per year and less than his final compensation, his prior or current service pension, as the case may be, shall be increased so as to cause his total retirement allowance from this system, and from the retiring annuities system of the university, if any, to amount to one thousand two hundred dollars ($1,200) per year, or his final compensation, whichever is less.

If a member to whom this section applies is employed by more than one employer, his aggregate retirement allowances shall be taken into account irrespective of the employer.

SEC. 5. Section 31671.03 is added to the Government Code, to read:

31671.03. Notwithstanding any provision of law, every member other than a safety member may have the right to continue in employment upon certification of the member's competence in his position by the department or agency head or other appropriate supervisor pursuant to rules and regulations adopted by each respective governing body. In such case, the receipt of all retirement benefits shall be delayed until the actual termination of employment. The member shall be subject to the same rights and liabilities as all other members and employer and member contributions, if any, shall continue until retirement.

SEC. 6. Section 45346 is added to the Government Code, to read:

45346. Notwithstanding any provision of law, every member of a city retirement system, other than one whose duties fall within the scope of active law enforcement or active firefighting and prevention service, may have the right to continue in employment upon certification of the member's competence in his position by the department or agency head or other appropriate supervisor pursuant to rules and regulations adopted by each respective governing body. In such case, the receipt of all retirement benefits shall be delayed until the actual termination of employment. The member shall be subject to the same rights and liabilities as all other members and employer and members contributions shall continue until retirement.

SEC. 7. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to that section nor shall there be an appropriation made by this act because the duties, obligations, or responsibilities imposed on local governmental entities or school districts by this act are such that related costs are incurred as part of their normal operating procedures.

SEC. 8. This act is an urgency statute necessary for the

immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order that as many persons as possible may take advantage of the provisions of this bill, the bill must take effect immediately.

INSTRUCTION SHEET

TAB I - MULTIPLE REMEDIES

ADD NEW PAGES I-17 and I-18

Postscript

1978 UPDATE: MULTIPLE REMEDIES

While some multiple remedy problems seem to have resolved themselves, others appear.

Old Problems

The interagency dispute on testing, discussed on page 4, appears to be nearing an end as one set of guidelines has been jointly proposed and should be ready for final adoption sometime in 1978.

The differences existing between the Wage and Hour Division and the EEOC on what constitutes equal pay in the fringe benefit area (pp. 1 through 4) is not permanently settled. Even though the Supreme Court opted for the W & H interpretation, Congress appears to be in the final stages of enacting legislation to overrule the Supreme Court's *Gilbert* decision (see Tab K-Sex Discrimination). If so, the EEOC position will once again prevail. Then the question is: will the W & H Division change its regulations to comply with Congressional intent? Or will Congress have to be more explicit in seeking changes in the Equal Pay Act?

New Problems

New multiple remedy problems have arisen and are of note. The Department of Labor, at least as of this writing, is saying that the seniority de-

cisions of the Supreme Court are based on Title VII, not Executive Order 11246 dealing with government contractors; that the Department's affirmative action regulations permit alterations in a seniority system well beyond a retroactive seniority remedy (e.g., "seniority overrides" forged by the Department under consent decrees).

Or take the position of the Department of Health, Education and Welfare. In the *Gilbert* decision, the Supreme Court held that excluding pregnancy-related disabilities from temporary disability or sick leave plans is not sex discrimination under Title VII. But HEW says the *Gilbert* decision will not apply to Title IX. The HEW regulation provides for coverage of pregnancy-related disabilities under existing temporary disability or sick leave plans.

Latest on One Agency Idea

Perhaps the constant problem of multiple laws and remedies, plus a change in EEOC leadership, has turned the EEOC position around on the one law-one agency idea. Previously the Commission had taken a position against one enforcement agency and a single antidiscrimination in employment law. The new EEOC Chair, Eleanor Holmes Norton, and the White House appear to be moving in the direction of consolidating the EEO effort.

INSTRUCTION SHEET

TAB J TESTING

REMOVE OLD PAGES J-21 and J-22

ADD NEW PAGES J-21 through J-28

asserted that the majority's view is a "step backward that will lead to debasing of our police force." He asserted the test was job-related on its face: "Issuing a badge and gun to a semi-literate cannot transform him into a competent police officer."

On the other hand, the majority held that the statistical evidence showing four times as many blacks as whites had failed the test was sufficient to shift the burden to the city to prove the test was job-related.

The District of Columbia had to establish that there was a direct relationship between performance on Test 21 and performance on the job. Judge Robinson, writing for the majority, distinguished between using the test for job performance and recruit school performance:

> The validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in Recruit School, but there is no evidence to support the proposition that a candidate with an average below 85 is more difficult to train or will not be as good a police officer as a candidate with an average over 85. Moreover, since applicants who scored below 40 on Test 21 have never been admitted to Recruit School, the validity study expressed no conclusion regarding the likely performance in Recruit School of Test 21 failures.

This decision overturned the district court which had concluded Test 21 was non-discriminatory and was reasonably and directly related to the requirements of the police recruit training program. The Court of Appeals remanded the case to the district court for further

proceedings to arrive at a suitable remedy. (*Davis, et al v. Washington,* 512 F 2d 956, D.C. Cir. 1975)

A copy of Test 21 is found in the appendix of this section.

Is it job-related?

Supreme Court Answers Question

The question was answered in the affirmative: Test 21 met the test of job-relatedness, but not under the EEOC definition. And in reaching this decision, another blow was handed to the Equal Employment Opportunity Commission, as a discussion of the *Davis* case, below, will show.

As previously noted, the issue of Test 21 was raised within the context of the Fifth Amendment, applicable to actions of the federal government and its officials. At the time of the filing of the suit in 1970, federal employees were not covered by Title VII (this coverage came in 1972). While the Court reached its decision based on constitutional considerations, it took the occasion to deal with Title VII and the EEOC guidelines on employment selection procedures, including written tests.

Title VII and Fifth Amendment: A Difference

An adverse effect of a selection procedure would be unlawful under Title VII unless the employer could prove (validate) that the selection procedure was job-related.

This Title VII doctrine, however, was irrelevant in the *Washington v. Davis* case, for as a constitutional "equal protection" issue, intent of a public policy (not the effect) became controlling. First, the Supreme Court looked at the purpose of the Test 21: does it have a legitimate public purpose or objective? And, if so, are the means to achieve that objective without discriminatory intent?

In a 7-2 ruling, the Court found Test 21 to meet its constitutional standard; it served a legitimate public purpose without intent to discriminate based on a racial classification.

Since "intent" rather than the "effects" of Test 21 controlled in this case, the Court discounted the significance of the evidence that four times as many black as white applicants failed Test 21. It said that absent any indication that the test was a purposeful device to discriminate against blacks, the fact that the law "bears more heavily on one race than another" does not in itself make it unconstitutional. The Court said:

> ...Test 21, which is administered generally to prospective government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21....

The Constitutionality of Test 21

The Fifth Amendment, under the Due Process Clause, is a bar to invidious discrimination by the federal government itself or those acting in its behalf. The constitutional issue before the Court centered on whether the use of Test 21 invidiously discriminated against blacks and hence denied them due process of law guaranteed by the Fifth Amendment /"No person...shall be denied life, liberty, or property, without due process of law; .../

The Court noted that the Due Process Clause, while not explicitly stating, implies the concept of equal protection. (The Fourteenth Amendment governing state and local government action--and that of their officials--contains an Equal Protection Clause.)

The Court's constitutional treatment of this case rested on the equal protection concept:

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups....But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

The Court thus held that Test 21 was racially neutral and does not deny "any person equal protection of the laws," simply because more black applicants to the police training school fail to qualify than members of other racial or ethnic groups.

Further, in agreeing with the district court and overturning the appeals court decision, the Court said that the Metropolitan Police Department was making "affirmative efforts" to recruit black officers; that the changing racial composition of the recruit classes and the police force in general all counter any claim that the Department discriminated on the basis of race or that a "police officer qualifies on the color of his skin rather than ability."

While relying on a constitutional interpretation to uphold Test 21, it should not be overlooked that the Court nevertheless took the occasion to reject the EEOC guidelines on testing, regarding both the definition of job-relatedness and the requirements for test validation. It did so by ruling that validation against a criterion (standard) of performance in a training program rather than actual job performance is still sufficient to meet the Title VII requirement of job-relatedness. In agreeing with the district court, the Supreme Court said Test 21 was directly related to the requirements of the training program; that the positive relationship between the test and training course performance was sufficient to validate it "wholly aside from its possible relationship to actual performance as a police officer"

And on the complicated issue of validation methods, the Court apparently pulled back from its former position in *Griggs* that the EEOC guidelines on testing and other selection procedures were entitled to "great deference." In footnote 13 of the *Davis* decision the Court said:

"It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance." /*Washington v. Davis*, 96 S. Ct. 2040, 1976/

Davis Decision and Title VII: Its Meaning for Public Sector Management

The *Griggs* decision still is the most widely recognized Supreme Court interpretation of Title VII. As previously discussed, this decision set forth the doctrine of differential (disparate) impact: "not only overt discrimination but also practices...fair in form but discriminatory in operation," are unlawful under Title VII. The touchstone is business necessity--if an employment selection procedure, such as a written test, operates to exclude a protected class, the employer bears the burden of showing the test is job-related (hence business necessity).

It is this disparate impact doctrine, developed under Title VII, that had been applied by a number of courts in cases brought under the Equal Protection Clause of the Fourteenth Amendment. The assumption made by these courts was that it would be unfair to operate with a double standard, based only on the fact that at the time of filing a public employee was not covered by Title VII, but by the time the case was heard at the appeals court level Title VII coverage applied.

However, before *Davis* reached the Supreme Court a new trend in appellate court thinking became noticeable--and it was the new trend in lower court thinking that the Supreme Court supported in its decision; that

is, the appellate courts were saying that the Title VII impact doctrine does not apply in Fourteenth Amendment cases. The Court said in *Davis* it did not apply in Fifth Amendment cases, either. Reason: a constitutional case requires a finding of an intent to discriminate, and hence evidence of disparate impact or an adverse effect resulting from a public employer's practice is not sufficient for a finding of discrimination.

> Footnote: Illustrative of how complicated the whole area of employment selection procedures may become is a case involving the selection of supervisors in the New York City school system. This public sector case, argued on the Fourteenth Amendment and a New York State law, had a seven year litigation history when, in 1977, it was on appeal to the same court for the fourth time. The circuit court judge said: "A child who was in the first grade when this action began is now ready to enter junior high school." /*Chance v. Board of Examiners*, Ca. 2, No. 76-7348, August 11, 1977/

VI. UNIFORM AGENCY GUIDELINES--AFTER 5-YEAR EFFORT

The dispute among federal civil rights enforcement agencies regarding the use of various job validation techniques appears to be nearing its end.

On December 20, 1977, the four enforcement agencies on the Equal Employment Opportunity Coordinating Council--U.S. Civil Service Commission, the Departments of Justice and Labor, and the Equal Employment Opportunity Commission--published their proposed "Uniform Guidelines on Employee Selection Procedures", subject to written comments until March 7, 1978.

In November 1976, these agencies, except the EEOC, adopted guidelines known as the Federal Executive Agency (FEA) Guidelines on Employee Selection Procedures." At that time the EEOC sternly rejected the new proposal.

Thus since November 1976, two different, and in some areas conflicting, sets of guidelines were applicable; for example, a company with a government contract was subject to Executive Order 11246--and hence subject to the FEA guidelines--but also subject to Title VII and the EEOC guidelines!

In issuing the uniform proposed guidelines, the four agencies stated:

> ...The existence of different, and possibly conflicting, interpretations of Federal law in this important subject /is/ intolerable... The draft guidelines are intended to assert a uniform Federal position on this subject and...are also intended to represent professionally acceptable methods of the psychological profession for demonstrating whether a selection procedure validly predicts or measures performance for a particular job... .
>
> They are also intended to be consistent with the decisions of the Supreme Court and authoritative decisions of other appellate courts.
>
> When officially adopted the new guidelines will supersede the two existing and conflicting set of guidelines.

The proposed uniform guidelines permit the use of criterion-related, content validity and construct validity studies.

The guidelines will govern both Title VII and Executive Order 11246. While the Labor Department also enforces the federal age discrimination law and the law prohibiting employment discrimination against the handicapped, these two laws are not included under the draft provisions of the joint guidelines.

For those interested in the full text of the proposed "Uniform Guidelines on Employee Selection Procedures, see the Federal Register of December 20, 1977.

INSTRUCTION SHEET

TAB K--SEX DISCRIMINATION

REMOVE OLD PAGE K-13,K-14

ADD NEW PAGE K-13,K-14

REMOVE OLD PAGES K-17 THROUGH K-23

ADD NEW PAGES K-17 THROUGH K-93

B. Pregnancy-Related Issues

Currently the priority issue in sex discrimination involves the immutable biological characteristic assigned to women: childbearing.

Two issues are involved:

(1) Paid pregnancy or maternity benefits under a sick leave, disability insurance or income protection plan.

(2) Maternity leave policy.

1. Pregnancy (Maternity) Benefits Under Plans Providing Temporary Disability Benefits

The California Disability Insurance Law

A major challenge to the exclusion of pregnancy benefits arose in California. In a case which reached the U.S. Supreme Court, the plaintiff alleged that the provisions of the California Unemployment Disability Insurance law deny to pregnant women equal protection guaranteed by the Fourteenth Amendment.

Background

California is among five states which have enacted an unemployment disability compensation program. It applies to private sector employees only. (Public sector employees in California have temporary disability income through sick leave accrual.)

The state's unemployment disability insurance (UDI) is meant to compensate, in part, for the wage loss sustained by individuals unemployed because of sickness or injury (non-job related and hence not under workers' compensation).

The UDI fund is financed by workers through a one percent tax on wages up to a specified amount. Weekly benefits can be collected up to a maximum of 26 weeks. The weekly benefit amount is determined by earnings, with the maximum and minimum weekly payment set by law.

The Court issue was raised by the denial of UDI for disability caused by normal pregnancy. There was a time when complications and illnesses caused by pregnancy were not covered, which automatically had eliminated any and all conditions related to pregnancy.

However, in a case brought against the state insurance program in the California Court of Appeals, California was forced to amend the law to include complications of pregnancy and abnormal births. The California Court of Appeals thus construed the law to preclude payment of benefits for disability accompanying normal pregnancy.

Section 2626 was later amended, and a new 2626.2 was added, in order to reflect this interpretation. The two sections now provide as follows:

> 2626 'Disability' or 'disabled' includes both mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.
>
> "2626.2 Benefits relating to pregnancy shall be paid under this part only in accordance with the following:
>
> "(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including, but not limited to: puerperal infection, eclampsia, caersarian section delivery, ectopic pregnancy, and toxemia.

> Despite the Act's broad goals and scope of coverage, compensation is denied for disabilities suffered in connection with a "normal" pregnancy -- disabilities suffered only by women . . . . Disabilities caused by pregnancy, however, like other physically disabling conditions covered by the Act, require medical care, often include hospitalization, anesthesia and surgical procedures, and may involve genuine risk to life. Moreover, the economic effects caused by pregnancy related disabilities are functionally indistinguishable from the effects caused by any other disability: wages are lost due to a physical inability to work and medical expenses are incurred for the delivery of the child and for post-partum care . . . singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcission, hemophilia and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.

California Legislature Repeals *Geduldig*

Spurred by the Supreme Court decision, women's organizations and civil rights advocates focused their efforts to enact AB 3881 (Fazio-Sacramento), an AFL-CIO sponsored bill. Enacted into law in 1976, the measure extended benefit coverage under the State disability insurance program to include normal pregnancies. Disabilities caused by abnormal pregnancies were already covered. Normal pregnancy coverage is for a total of 6 weeks--3 weeks prior to childbirth and 3 weeks following delivery.

To finance the added coverage, the maximum taxable wage base was raised from $9,000 to $11,400. The one-percent tax on covered employees' weekly earnings was not changed.

With passage of this measure, California joined Hawaii, New Jersey and Rhode Island in providing such benefits. The California unemployment disability insurance law covers workers in the private sector; public employees and domestic workers are excluded.

Liberty Mutual Sets Stage for Supreme Court Ruling

The Supreme Court was to consider the *Liberty Mutual* case involving an income protection plan. The Court denied a hearing on a technicality. However, *Liberty Mutual* joined the issues and arguments considered in the *Gilbert* case which was heard by the Court.

The *Liberty Mutual* plan provides for continuation of a percentage of income when an employee is temporarily ill, but excludes illness incurred during pregnancy or time off for childbirth. Employees contribute to the funding of the plan. After an ill employee is away from work 8 days, under a doctor's care, the employee receives a percentage of his or her salary up to a specified maximum period.

The EEOC Guidelines on Sex Discrimination require that pregnancy-related disabilities be treated like any other temporary disability:

Section 1604.10 Employment policies relating to pregnancy and childbirth:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The U.S. Court of Appeals, Third Circuit, agreed with the EEOC interpretation, as did the district court.

To be considered by the U.S. Supreme Court were the company's arguments and the Appellate Court's findings and conclusions:

Liberty Mutual Arguments	Court of Appeals, Third Circuit Findings and Conclusions
1. On EEOC Guidelines: EEOC had changed its position and it was only in 1972 that it revised its Guidelines to reflect its change. Guidelines do not reflect Congressional intent.	1. Rejected by court. Said Guidelines did not violate Congressional intent.
2. Even EEOC Guidelines do not require company to include pregnancy benefits in income protection plan. Company relied on decision in Geduldig v. Aiello; i.e., this case disposes of issue.	2. Rejected by Court. Said there are several distinctions: (a) Geduldig involved question of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. This case involves question of discrimination in violation of a statute, Title VII. Hence case is one of statutory interpretation rather than a constitutional analysis. (b) California law excludes only normal pregnancy and delivery disabilities, but Liberty Mutual excludes all pregnancy-related disabilities.

3. **Pregnancy is voluntary. Illnesses are not. Hence pregnancy can be excluded from income protection plan.**	3. Rejected by court. (a) "Voluntariness is no basis to justify disparate treatment of pregnancy." People participate in a great many activities involving a recognized risk. Most undertake these activities with full knowledge of potential harm: smoking, drinking, intoxicating beverages, skiing, handball and tennis -- all types of activities in which one could sustain harm. Liberty Mutual includes such activities under its income protection plan. (b) Even if "we were to accept argument of voluntariness," some voluntary disabilities are covered while one voluntary disability which is "peculiar to women" is not covered. (c) Further, pregnancy itself may not be voluntary -- religious convictions and methods of contraception "may play a part in determining the voluntary nature of a pregnancy. There is no 100% sure method of contraception short of surgery, and for health reasons many women cannot use the pill."
4. **Plan covers those disabilities arising from sickness. Pregnancy is not a sickness and hence properly excluded from the plan.**	4. Rejected by Court. Pregnancy should be treated as any other temporary disability. Purpose of plan is to alleviate economic burdens caused by loss of income and medical expenses. A women disabled by pregnancy also suffers economic loss and incurs medical expense, plus hospital expense that another person may not have.

5. Plan does not violate Title VII because of company's legitimate interest in maintaining financial integrity of plan.	5. Rejected by Court. Company offered no statistical information to conclude increased cost for pregnancy benefits would be "devastating." Cost, as per Guidelines, is no defense under Title VII in this particular issue.

2. Maternity Leave

Maternity leave was the second issue in the Liberty Mutual case.

Before September 1970, female employees who became pregnant were terminated after the eighth month, with no re-employment rights. Subsequently the policy was modified to allow a pregnant woman to work as long as her physician certifies her ability to work. Further, if she had worked for Liberty Mutual for one year, the employee could take a maternity leave of absence for six months from the time the leave started, or three months from the date of delivery, whichever came first.

The employee was required to return to work by or within the time limit or lose her job.

This time limitation was applied only to maternity leaves, not to any other leave of absence for other temporary disabilities. In effect, this means that a person suffering disability other than pregnancy would return to work after recovery; however, a woman with

a pregnancy-related disability would be required to return to work within the specified time limit or be fired.

The appellate court, as it did in its analysis of paid pregnancy benefits, allowed "great deference to the EEOC Guidelines." The Guidelines concerning the maternity leave issue are in pertinent part as follows:

> Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. (1604.10 /6/)
>
> Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity. (1604.10 /c/)

The appellate court held that Liberty Mutual's maternity leave violated Title VII and that "We are not requiring appellant /Liberty Mutual/ to give to women any more than it already gives to men. Since appellant provides leaves for all temporary disabilities, it must also provide leaves for pregnancy on the same basis."

The Gilbert Case

When the Supreme Court remanded the *Liberty Mutual* case to the district court on a procedural issue, the allied case, *Gilbert v. General Electric* (Nos. 74 - 1589 and 74-1590, Dec. 7, 1976; 13 FEP cases 1), became the focal point to determine if a temporary disability insurance plan (income protection plan) discriminated against women because of the denial of disability payments for pregnancy-related disabilities. (The essential difference between *Liberty Mutual* and *Gilbert* is that the former involved an additional issue related to maternity leave, discussed on the previous page.)

The *Gilbert* decision of the Court of Appeals of the Fourth Circuit paralled the appellate decision in *Liberty Mutual*: That is, excluding pregnancy from the General Electric temporary disability plan was sex discrimination. When the U.S. Supreme Court reversed the Appeals Court on a 6-3 vote, it overturned 6 appellate court and 18 federal district court decisions.

Background and Bargaining History

General Electric (GE) is part of the electrical equipment manufacturing industry which employs more than one million women, a number unmatched by any other durable goods manufacturing industry. About 40 percent of workers in the electrical equipment manufacturing industry are females and about 40 percent of the IUE's (International Union of Electrical Workers) membership is female. /The IUE brought the class action suit./

Bargaining between GE and IUE involved the issue of pregnancy long before Title VII was enacted--demands for disability benefits for pregnancy-related disabilities were made by the IUE since the parties met across the table for the first time in 1950.

Following passage of Title VII, GE agreed during the 1966 negotiations to include pregnancy benefits under its hospital and medical plan, with maternity to be covered like any disability. GE pays the full hospital and medical costs of all deliveries of babies of female employees as well as the wives of male employees. However, GE refused to include pregnancy coverage under its temporary disability benefit plan which provides a degree of income protection for workers off the job for nonoccupational illness or injury (Workers' Compensation covers job-related illness or injuries).

> (Source of background and bargaining history information is based on testimony of IUE President David Fitzmaurice before the Senate Human Resources Subcommittee on Labor, Daily Labor Report, No. 82, April 27, 1977, p. F-1, BNA)

It was GE's bargaining table refusal to cover pregnancy-related disabilities the same as other medical disabilities that precipitated the *Gilbert* case.

Features of the Plan

The plan provides a weekly benefit amount equal to 60 percent of an employee's straight time earnings, up to a maximum of $150.

Benefit payments start on the eighth day of a nonoccupational disability unless hospitalization occurs earlier; in that event, coverage starts on the day of hospitalization.

The weekly payment of 60 percent of the employee's straight time earnings is made for a maximum of 26 weeks (in effect, the plan is a weekly wage replacement).

The facts as they relate to pregnant workers:

(1) (a) While still working, if a disability occurs as a result of pregnancy--such as swollen ankles--and requires time away from work beyond eight days, the pregnant employee would receive no benefits under the plan.

(b) If a male employee or a nonpregnant female employee incurs the same disability--swollen ankles--which also requires time away from work, the plan would make payments after the 8th day of the disability. In the event of a total disability which requires the nonpregnant employee to cease working altogether, the benefits would continue up to the maximum time provided by the plan--26 weeks.

(2) (a) A nonpregnant employee who takes a personal leave, goes on layoff, or is on strike and then becomes ill or is injured is assured 31 days of coverage.

(b) A pregnant employee who takes a leave to await childbirth does not have the 31-day protection even for a disability not related to her pregnancy. The court record provides an actual case: Emma Furch took a pregnancy leave on April 7, 1972. On April 21 she was hospitalized with a nonpregnancy related pulmonary embolism. Since personal leave provided for 31 days of coverage for a nonpregnancy disability, she filed for disability benefits solely for the period of absence due to the pulmonary embolism. The claim was rejected "since such benefits have been discontinued in accordance with the provisions of the General Electric Insurance Plan." The plan cuts off coverage when a pregnant employee leaves work for childbirth.

Title VII Suit Filed

Martha Gilbert and other similarly affected female hourly production and maintenance employees at GE's Salem, Va. plant and the IUE asked the federal district court (after processing charges through the required EEOC administrative procedures) to order GE to include pregnancy disabilities in the company plan. Damages were also sought.

District Court Decision

The federal district court determined that excluding pregnancy disabilities from the GE plan was sex discrimination because it violated Section 703(a)(1) of Title VII which provides that it is an unlawful employment practice

> "...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

The court made these findings:

(1) Normal pregnancy, while not necessarily a "disease" or "accident" was disabling for a period of 6 to 8 weeks.

(2) Statistical findings

  (a) About 10 percent of pregnancies terminate in miscarriage which is disabling.

  (b) About 10 percent of pregnancies are complicated by deseases which may lead to additional disabilities (5 percent of pregnancies are complicated by diseases also found in nonpregnant persons, but which may have been stimulated by pregnancy. Five percent of pregnancies are complicated by pregnancy-related diseases).

(3) Inclusion of pregnancy-related disabilities under the company plan would "increase G.E.'s /disability benefits plan/ costs by an amount which, though larger, is at this time undeterminable."

There was no finding that the value of coverage was equal between men and women and if it were, this would not justify the exclusion of pregnancy related disabilities:

> /I/f Title VII intends to sexually equalize employment opportunity, there must be this one exception to the cost differential defense.

The district court, in finding sex discrimination in the operation of the temporary disability benefit plan, ordered GE to discontinue the pregnancy exclusion and provided for the future award of monetary relief to individual members of the affected class.

The company appealed the decision to the Court of Appeals for the Fourth Circuit. The court, by a 2-1 vote, upheld the district court.

Supreme Court Decision

On Pearl Harbor Day, December 7, 1976, the Supreme Court handed down its decision that the GE plan did not discriminate against women and hence was not a Title VII violation.

The reasoning of the Court's majority was akin to that in the *Geduldig* decision, previously discussed (page K-15). The majority did not agree with the appellate decision that the reasoning in a Fourteenth Amendment case (*Geduldig*) was not applicable under a Title VII case (*Gilbert*).

How and why the majority reached this conclusion will, of course, be of interest to Constitutional scholars and lawyers. For purposes of this primer it will not be pursued here.

Following are the major points made by the majority and the counter-points made by the three dissenting Justices (Brennan, Marshall, and Stevens).

IS GE PLAN DISCRIMINATORY?

Majority Opinion

The answer: "no." The reasons for this conclusion were based on these considerations:

1. Exclusion of pregnancy benefits is not based on gender. Both men and women are covered for like risks--the only risk excluded is related to pregnancy, but women as a class are covered equally with men for all other risks. No insurance plan has to be all inclusive. The Court said:

> The Plan, in effect...is nothing more than an insurance package, which covers some risks, but excludes others.... The "package" going to relevant identifiable groups we are presently concerned with--General Electric's male and female employees--covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "/t/here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Geduldig, 417 U.S., at 496-497, 8 FEP Cases, at 102. As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme

> simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive."...

(Note: Footnote 17 of the majority opinion makes the point that if the employer were to remove this fringe benefit and instead increased wages by an amount equal to the cost of the insurance, there would be no gender-based discrimination--even though a female employee who wished to purchase disability insurance covering all risks would have to pay more than a male employee because of the "extra" disability due to pregnancy. The Court chided the thinking of those who acknowledged that "GE had no obligation to establish any fringe benefit program"... while illogically, according to the Court, suggesting that the GE plan violates Title VII because "a female must spend her own money to buy a personal disability policy covering pregnancy...to be fully insured... where as a male without extra expenditure is fully insured by GE... /Brief for Martha Gilbert/)

2. Exclusion of pregnancy benefits would be unlawful under Title VII if the exclusion were a "pretext designed to effect an invidious discrimination against the members of one sex or the other." The Court said there was no such intent or subterfuge in the GE plan because both sexes are covered equally for all diseases and disabilities, except pregnancy which is "significantly different from the typical covered disease or disability." And: "The District Court found that it is not a 'disease' at all, and is often a voluntarily undertaken and desired condition...."

Dissenting Opinions

The three dissenting justices answered the question "Is the GE plan discriminatory?" in the affirmative. Interestingly, Justice Stevens,

one of those dissenting, had been opposed by women's organizations when he was nominated for appointment to the Court.

Justice Brennan, joined by Justice Marshall, noted that

> the characterization of pregnancy as "voluntary" is not a persuasive factor, for as the Court of Appeals correctly noted, "other than for childbirth disability, /General Electric/ has never construed its plan as eliminating *all* so-called 'voluntary' disabilities," including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight and elective cosmetic surgery....Similarly, the label "disease" rather than "disability" cannot be deemed determinative since General Electric's pregnancy disqualification also excludes **the 10% of pregnancies that end in debilitating miscarriages...** the 10% of cases where pregnancies are complicated by "disease" in the intuitive sense of the word...and cases where women recovering from childbirth are striken by severe diseases unrelated to pregnancy....

The two Justices disagreed with the majority opinion that pregnancy is the only sex-specific exclusion: "The court's analysis proves to be simplistic and misleading...the plan also insures risks such as prostatectomies, vasectomies and circumcisions that are specific to the reproductive system of men for which there exist no female counterparts covered by the plan."

Justices Brennan and Marshall likewise rejected the majority conclusion that GE's plan was not a subterfuge to discriminate against women. They argued that this conclusion did not square with the employment history of GE. They found a "discriminatory attitude" in the history of GE's employment practices and evidence that the exclusion of pregnancy benefits came from a policy that intentionally downgraded the role of women in the workforce.

Justice Stevens, in a separate dissent, said that he held the pregnancy exclusion illegal because it places the risk of absence due to pregnancy in a class by itself, and such a rule, by definition, discriminates on account of sex.

WHAT ABOUT THE "GRIGGS" PRINCIPLE?

The Supreme Court in its 1971 landmark decision--*Griggs v. Duke Power Co.* (See Tab J for a discussion of this case)--ruled that a neutral policy or practice which has a discriminatory "effect" on a protected class under Title VII, is, on its face, an illegal employment practice--unless the policy or practice can be justified as a "business necessity". (This is the disparate impact theory). The majority and minority opinions on the "effects" test (*Griggs* principle) should be read with this background in mind.

Majority Opinion

The conclusion was that those alleging sex discrimination did not prove that the GE plan had "gender-based effects" because the plaintiff's did not show that women employees as a class received less aggregate financial protection than men.

Judge Rehnquist--writing for the majority--tended to water down or qualify the *Griggs* principle when he said that "a prima facie violation of Title VII can be established in *some circumstances* upon proof"

of a discriminatory effect and only *"assuming* that it is not necessary in this case to prove intent to establish a prima facie violation...." The *Griggs* decision had clearly stated that motive--good or bad intent --was not controlling when a policy or practice has a discriminatory impact or effect.

Rehnquist's statement prompted one of the majority--Justice Blackmun--to write: "I do not join any inference or suggestion...that effect may never be a controlling factor in a Title VII case, or that *Griggs v. Duke Power Co.* ...is no longer good law."

Dissenting Opinions

Justices Brennan and Marshall note that the G.E. income protection plan has 3 sets of effects:

(1) Covers all disabilities mutually afflicting both sexes.

(2) Covers all disabilities that are male-specific.

(3) Covers all female-specific disabilities, except for the most prevalent, pregnancy.

They state that the majority focuses on issue (1) and overlooks effects (2) and (3), which results in an adverse impact on women.

Justice Stevens concludes that in certain situations there might be a defense to justify this adverse impact, but GE did not establish any justification.

WHY DID THE COURT REJECT EEOC GUIDELINES?

Majority Opinion

The Court majority did not defer to the EEOC guideline dealing with "Employment policies relating to pregnancy and childbirth." Section 1604.10 (b) reads in relevant part:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are... temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment...payment under any health or temporary disability insurance or sick leave plan...shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

An additional EEOC guideline provision is pertinent to an understanding of the impact of the Court's rejection of the EEOC position. The provision sets forth:

> It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other. (Section 1604.9 (e) - Fringe Benefits)

The majority made these points in rejecting the EEOC position:

(1) The EEOC has not been consistent.

In 1966, in an Opinion Letter, the General Counsel of EEOC wrote:

> You have requested our opinion whether the exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.
>
> In a recent opinion letter regarding pregnancy we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury

> with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, it is our opinion that...a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII...

In another Opinion Letter issued a few weeks later, the EEOC's position was that "an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discrimination."

Then, in 1972, the EEOC issued its sex discrimination guidelines which provided just the opposite interpretation. (See the sex discrimination guidelines in appendix in this Tab.)

The majority stated that the guidelines do not have the force of law--this was never granted under Title VII--but are entitled to consideration in determining legislative intent if they meet certain standards. The Court held that the EEOC guidelines failed to meet the standards expected of interpretative rulings. The majority said that the most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines is found in another case in which the Supreme Court said:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute

> a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.
>
> /*Skidmore v. Swift & Co.* 323 U.S. 134, 140, 4WH cases 866 (1944)/

Based on this standard, the court concluded that the 1972 EEOC guideline did not fare well. The 1972 guideline was not a "contemporaneous interpretation of Title VII" since it was issued eight years after the passage of Title VII and "more importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." (This was in reference to the 1966 Opinion Letters).

(2) EEOC Guideline Subject to Equal Pay Act Interpretation

The EEOC guideline interpretation of what constitutes "equal pay" (total compensation--wages and fringe benefits) conflicts with the Equal Pay Act (EPA) as interpreted by the Department of Labor's Wage and Hour Division (W&H) which enforces the EPA. (Additionally, the EEOC guideline states that the Commission "will not be bound" by W & H interpretations--Section 16040.8(c).

In 1964 when Title VII was being considered and debated, it was amended in the Senate to include reference to the Equal Pay Act. The following was added to Section 703 (h) of Title VII:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex

> in determining the amount of the wages or compensation paid or to be paid to employees...if such differentiation is authorized by the provisions of.../the Equal Pay Act/.

Senator Humphrey, the floor manager of the bill, explained that the purpose of this amendment, offered by Senator Bennett, was to make it "unmistakably clear" that "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law." (110 Cong. Record, 13663-13664, 1964).

The Supreme Court majority concluded that because of this amendment, W & H interpretations of equal pay cover Title VII as well.

The Court then set forth the W & H interpretation applicable to Title VII:

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees. 29 CFR § 800.116(d) (1975).

Thus, the W & H interpretation to which the court majority deferred, provides that if either benefits are equal (though contributions may differ) or if contributions are equal (though benefits may differ) the equal pay standard has been met and there is no sex discrimination.

This, of course, runs counter to the EEOC position that the equal pay standard requires equal benefits, that costs (contributions) are irrelevant.

Dissenting Opinions

Justice Brennan, with whom Justice Marshall joined, disagreed with the rejection of the EEOC position:

> ...while some seven years had elapsed prior to the issuance of the 1972 guideline, and earlier opinion letters had refused to impose liability on employers during this period of deliberation, no one can or does deny that the final EEOC determination followed thorough and well-informed consideration. Indeed, realistically viewed, this extended evaluation of an admittedly complex problem and an unwillingness to impose additional, potentially premature costs on employers during the decision-making stages ought to be perceived as a practice to be commended. It is bitter irony that the care that preceded promulgation of the 1972 guideline is today condemned by the Court as tardy indecisiveness, its unwillingness irresponsibly to challenge employers' practices during the formative period is labelled as evidence of inconsistency, and this indecisiveness and inconsistency are bootstrapped into reasons for denying the Commission's interpretation its due deference.
>
> For me, the 1972 regulation represents a particularly conscientious and reasonable product of EEOC deliberations and, therefore, merits our "great deference." Certainly, I can find no basis for concluding that the regulation is out of step with congressional intent...On the contrary, prior to 1972, Congress enacted just such a pregnancy-inclusive rule to govern the distribution of benefits for"sickness" under the Railroad Unemployment Insurance Act...Furthermore, shortly following the announcement of the EEOC's rule, Congress approved and the President signed an essentially identical promulgation by the Department of Health, Education, and Welfare under Title IX of the Education Amendments of 1972...Moreover, federal workers subject to the jurisdiction of the Civil Service Commission now are eligible for maternity and pregnancy coverage under their sick leave program....

WHAT IS DEFINITION OF "SEX DISCRIMINATION?"

Majority Opinion

When Title VII was enacted, the majority reasoned, the concept of "discrimination" was well-known because of court interpretations of discrimination based on the Fourteenth Amendment of the Constitution; therefore, when Congress makes it unlawful for an employer to "discriminate...on the basis of...sex," without further explaining its meaning, then the meaning of sex discrimination should be what the Court has "traditionally meant" it to be under the Fourteenth Amendment. /By way of an historic note: on balance women have not fared well under the sex discrimination definition in Fourteenth Amendment cases/ One of the cases decided under the Fourteenth Amendment was *Geduldig*, in which the California law excluding normal pregnancies from the unemployment disability insurance program was held to be constitutional because exclusion was not, per se, sex-based. (See page K-15 for discussion of Geduldig)

Dissenting Opinion (Justice Stevens)

Taking issue with the majority, Justice Stevens notes that the word "discriminate" does not appear in the Equal Protection Clause of the Fourteenth Amendment. The word does appear in a number of federal laws "but has by no means been given a uniform interpretation."

Congress, he argued, could not have considered the Supreme Court's analysis of sex discrimination under the Equal Protection Clause because--

(1) it was seven years after Title VII that the Court even intimated that the concept of sex discrimination might have some relationship to equal protection analysis. /See *Reed v. Reed*, 404 U.S. 71, 1971/

(2) Congress could not have relied on *Geduldig* which was decided in 1974. Title VII was enacted in 1964. He said: "The constitutional holding in *Geduldig...*, does not control the question of statutory interpretation presented by this case." (emphasis added)

EEOC RESPONSE: ISSUES NEW PROCEDURES

Following the General Electric decision, the Equal Employment Opportunity Commission issued Notice 915 (12/30/76) which sets forth the procedures to be followed by the EEOC in processing *"Gilbert* allegations." *Gilbert* allegations are defined as those which allege "discrimination because pregnancy or maternity claims are treated differently by a respondent from other claims under temporary disability or health benefit programs." The procedural changes became effective January 3, 1977.

The new procedures provide that persons who make *Gilbert* allegations (new complaints) are to be advised that there is no relief under Title VII and will be given "no reasonable cause-to-sue"letter after charges are formally filed. Such a letter does not preclude a person from taking the issue to court within 90 days of the receipt of the EEOC letter. Charges pending with the EEOC will be handled the same way.

When a charge involves other issues in addition to *Gilbert* allegations, the other issues will not be dropped, only the *Gilbert* allegations.

Additionally, when a conciliation agreement has already been reached--prior to the *Gilbert* decision--requiring that pregnancy or maternity claims be treated in the same manner as other claims under benefit programs, the EEOC will continue to monitor that agreement: *"General Electric Co. v. Gilbert* does not make such agreements unlawful."

Finally, the EEOC still holds the following actions to be unlawful under Title VII because they have a disproportionate impact on women and are therefore gender-based or are by their terms gender-based:

a. refusals to hire, train, assign or promote pregnant women

b. refusals to hire, train, assign or promote married women

c. refusals to hire, train, assign or promote women of childbearing age

d. mandatory maternity leaves for predetermined time periods

e. dismissals of pregnant women

f. denials of reemployment rights to women on leave for pregnancy-related reasons

g. denials of unemployment benefits to pregnant women

h. denials of seniority or longevity credit to women on leave for pregnancy-related reasons

i. denials of accrued leave to pregnant women who have worked less than a stated time period

j. payment of lower periodic amounts to retired women according to sex-segregated actuarial tables

k. denials of disability or medical benefits for disabilities which are unrelated to pregnancy or childbirth, whether or not they occur during a pregnancy, childbirth, or recovery from childbirth.

Following the *Gilbert* decision, the EEOC position on item (e) above--i.e., it is an illegal employment practice to dismiss women because of pregnancy--found support in the U.S. Court of Appeals for the Sixth Circuit--and not only for pregnancy but for pregnancy out of wedlock.

The case arose when Rose Jacobs, an executive secretary to the senior vice president of the Sweets Company, an employer of about 60 persons, became pregnant in 1972, two years after she started to work for the company. She was not married; typically, the news traveled through the office faster than sound.

Her boss called her into his office--closed the door, of course--and told her he had heard from other workers about her condition. Jacobs confirmed she was pregnant. Her boss said he would not tolerate it nor would the company president. He gave her a two weeks' notice of discharge; however, he offered to furnish a "more than good" recommendation if she needed it in her job hunting.

Jacobs contacted the EEOC. She was advised that it would be illegal for the company to fire her because of pregnancy and the EEOC official advised her to get the facts in writing. So she

contacted her boss, requesting that he write a letter of recommendation, stating she was fired for being pregnant, not for her work performance. Further, she requested that he sign a statement that the company was required to dismiss her because of being pregnant and unwed "in order to avoid embarrassment to the company and to yourself" and that the company intended to give her a letter of recommendation. He refused to comply and contacted the company's attorney.

Two days later Jacobs' boss contacted her, telling her she should clean out her desk and turn in her office keys since she was being transferred to a clerical job in the purchasing department. Shortly thereafter, Jacobs quit, filed sex discrimination charges with the EEOC, and later filed a class action suit.

The company's defense in the district court centered on these claims: (1) the transfer was temporary in order to fulfill an overload requirement in the purchasing department; (2) the job was not a demotion; (3) there was no reduction in pay nor a change in hours. The company also maintained that its policy on pregnancy was to allow an employee to continue to work as long as she was physically able to do so as long as the work did not jeopardize her health. This testimony conflicted with the statements in the company's personnel manual which provided for termination of employment of pregnant employees at the end of six months of pregnancy.

The district court found in Jacob's favor. The remedy was $7,500 in back pay and an award of $3,500 in attorneys' fees.

The company appealed. The Sixth Circuit sustained the lower court and included an additional $1,000 in attorney's fees to cover the cost of defending against the company's appeal.

The appeals court rejected the argument of the company that the pregnant employee must prove that if she had been a "male expectant parent" she would have been treated differently by the company. Judge Miller, writing for a unanimous court, declared: "The sophistry of this argument is that it equates pregnancy with the condition of 'expectant parent' in a male."

The appeals court ruled that the *Gilbert* case had no bearing on the exclusion of pregnancy from protection against "invidious employment termination." (The reader will recall that the *Gilbert* decision did not deal with discharge, rather with an income protection (disability insurance) plan.)

The Sixth Circuit likewise rejected the company's contention that its action was based on an abhorrence of premarital sex rather than an intent to discriminate against pregnant women. The court said:

> Sweets Co. next argues that Jacobs has not shown that she would have received different treatment had her premarital sexual activity not resulted in pregnancy and that the EEOC's guideline applicable to pregnancy is unconstitutional because it is "an attempt to control the moral policies of a private company with respect to the premarital sexual behavior of

> individuals of both sexes." However, the district court found that Jacobs' employment was terminated because she was pregnant and unmarried--not because of her premarital sexual activity. Apart from the EEOC's guideline, which, in the absence of showing that it conflicts with the letter or spirit of the Act (not shown here), is entitled at least to some weight, the district court's finding establishes a prima facie case of discrimination....Sweets Co.'s argument that the "unmarried" portion of the finding renders Jacobs' pregnancy different for the purposes of Title VII is supported only by its citation to *Wardlow v. Austin School District* (not officially reported), the facts of which are substantially different. 10 F.E.P. Cases 892 (W.D. Tex. 1975). The argument impliedly suggests that this court permit "artificial, arbitrary, and unnecessary barriers to employment" (condemned in *Griggs v. Duke Power Co.*,...) in the case of unwed pregnancy, while declaring such barriers unlawful in the case of wed pregnancy. However, there is no evidence that such classification has any rational relationship to the normal operation of Sweets Co.'s business....
>
> /*Jacobs v. The Martin Sweets Co.*, CA6, No. 75-2406-07, Feb. 11, 1977/

Congressional Response: Proposed Amendment to Title VII

In response to the *Gilbert* decision, Senators Harrison Williams (New Jersey) and Augustus Hawkins (Calif.) introduced legislation intended to reverse the *Gilbert* decision.

The identical measures (S. 995 and H.R. 5055) would amend Title VII by adding a new subsection to Section 701-Definitions.

Subsection 701 presently defines the terms "persons" - "employer"--"employment agency"--"labor organization"--"employee"--"commerce"----"industry affecting commerce"--"state"--"religion".

By adding a new subsection (k), Congress would be responding to the Supreme Court that Title VII does not define sex discrimination.

The proposed amendment would also overturn the *Gilbert* decision. As introduced, the amendment reads:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 703(h) of this title shall be interpreted to permit otherwise.

The thrust of the amendment is to include <u>all</u> fringe benefit plans, not just the type of disability insurance plan contested in *Gilbert*. Section 703(h) refers to bona fide merit or seniority systems which are exempted as illegal employment practices under Title VII.

Congressional and business opponents such as the NAM and insurance companies argue, among other things, that the amendment is written too broadly and could result in a tremendous litigation load. They point out that passage of the amendment would mean a return to the EEOC guidelines which define fringe benefits as "medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leaves; and other terms, conditions and privileges of employment." /Section 1604.9 of the EEOC Guidelines on Sex Discrimination. See Appendix in the Tab for the full text of the Guidelines/.

Equally vocal in support are AFL-CIO unions and women's civil rights organizations. The bottom line of the debate, all other considerations aside, is the matter of cost. The union arguments vs. the management arguments typify a collective bargaining debate on fringe benefit

coverage. Both sides have their figures to support their position. Congressional testimony is replete with economic data, interpretation, and rebuttal.

As this is being written, the Senate has already passed S.995 by a wide margin of 75-11. The House of Representatives has yet to vote. If the measure passes both houses, presidential approval should be forthcoming since administration spokespersons from the Departments of Labor and Justice have testified in support, as well as the EEOC.

Gilbert Decision: A Pyrrhic Victory for Management?

The *Gilbert* decision does not legally "settle" the issue of temporary disability or sick pay plans nor assure that the employer is off the liability "hook" where such plans exist.

Even assuming that the Congress fails to enact legislation establishing a national policy to overrule the Supreme Court's *Gilbert* decision, and even assuming that unions are not able to incorporate provisions in their contracts to counter the decision, employers should be alerted to the possibility that they are not legally home free on the disability or sick pay issue as it involves pregnancies.

Some examples will serve to support this observation:

--the International Union of Electrical Workers (IUE), is seeking to circumvent the *Gilbert* decision by applying state laws in those states that require private employers to pay income maintenance benefits to women disabled by pregnancy. In the meantime an

employer in one of those states--Montana--has challenged the law. The Mountain Bell Telephone Company is challenging in court the state's Maternity Leave Act which requires all employers to provide pregnancy benefits to workers. Mountain Bell argues that federal law, especially the Employee Retirement Income Security Act, pre-empts the state law. (Daily Labor Report, No. 51, 3/15/77, p. A-11).

--In testimony before the Senate Human Resources Subcommittee on Labor, the Director of the Women's Bureau of Department of Labor reported that "Most states have civil rights laws comparable to Title VII, and many of their administrative agencies have adopted sex discrimination guidelines similar to.../the EEOC Guidelines/ struck down in *Gilbert*. The Wisconsin Supreme Court unanimously upheld the policy position some months ago and the highest court of New York--only days after *Gilbert* was delivered--ruled that employers subject to that state's human rights law must give equal treatment for disabilities caused by pregnancy. In several other states and the District of Columbia the civil rights agencies are not pursuaded that *Gilbert* effects (sic) guidelines issued pursuant to their respective laws..." (Daily Labor Report, No. 81, 4/26/77, p. D-2, BNA).

And there are further questions yet to be answered in this legal quagmire--for example, Title IX of the 1972 Education Amendments Act prohibits discrimination based on sex by educational agencies and institutions receiving federal financial assistance. The enforcement agency, the Department of Health, Education and Welfare (HEW), announced after the *Gilbert* decision that HEW would continue to enforce Title IX regulations regarding pregnancy--i.e., pregnancy-related illness or disability must be covered in disability or health plans. Does a Supreme Court's finding of Congressional intent under Title VII also apply to Title IX, likewise passed by Congress to deal with sex discrimination? And how will the Department of Labor (DOL) deal with similar plans for contractors under Executive Order 11246?

If DOL insists on the inclusion of pregnancy, will the courts rule that a presidential order cannot override congressional intent as found by the Supreme Court in *Gilbert?*

These questions will become academic, of course, if Congress enacts the proposed legislation discussed above.

The Case of Pregnant Teachers: Maternity Leave and Return Rules

The Supreme Court dealt with the issues of rules governing mandatory (compulsory) leave for pregnant teachers as well as setting the specific time frame for a female teacher's return to the classroom. (Cleveland Board of Education v. La Fleur and its companion, Cohen v. Chesterfield County School Board, 414 U.S. 632, 1974)

The facts in the two cases are:

(1) La Fleur - The Cleveland Board of Education required pregnant teachers to take an unpaid maternity leave beginning five months before the expected birth of the child. Application for leave had to be made no less than two weeks before the date of departure. The Board also had a return-to-work policy: the teacher could not return until the beginning of the next regular school term following the date when the child reached three months of age. In any case, re-employment was not guaranteed; she was simply given priority in a job assignment for which she qualified. Failure to abide by the regulations was grounds for discharge.

The plaintiffs were two teachers who were forced to take maternity leave before the end of the school year. They brought suit under the Civil Rights Act of 1871 (Section 1983), enacted to enforce the Fourteenth Amendment. (At the time of the suit, Title VII did not cover state and local agencies and educational institutions; they came under coverage in 1972.) Their suit attacking the constitutionality of the maternity leave regulations was rejected by a federal district court. The Court of Appeals for the Sixth Circuit reversed, by a divided vote, finding that the Cleveland School Board's regulations violated the Equal Protection Clause of the Fourteenth Amendment. (465 F. 2d 1184 (6th Cir. 1972))

(2) Cohen - The Chesterfield County School Board's regulations required that pregnant teachers leave work at least four months before the expected birth of the child. It was required that a notice in writing be given to the School Board at least six months before the expected birth. Further, in order to be re-employed, the teacher was required to have a written notice from her doctor that she was physically fit to return to work, and she could assure that care of her child would cause only minimal interference with her job requirements. Under these conditions, re-employment was guaranteed no later than the first day of the school year following the date eligibility was established.

The plaintiff, compelled to leave her job during the school year, also sued under the Civil Rights Act of 1871.

The federal district court held that the school board regulations violated the Equal Protection Clause. The case was appealed to the Fourth Circuit. By a divided vote, the Court of Appeals reversed the lower court, upholding the constitutionality of the regulations.

Thus two different appellate decisions came before the Supreme Court for decision.

Justice Stewart, writing for a bare majority, declared that the mandatory rules of both school boards violated the Due Process Clause of the Fourteenth Amendment.

The majority opinion recognized ". . . that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."

The majority opinion held that while the regulations were designed to maintain continuity of classroom instruction and to insure that physically unfit teachers be removed, there was no rational link between the purposes of the regulations and the means used to achieve them.

Justice Stewart said that the rules were too broad, containing "an irrebuttable presumption of physical incompetency," and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary."

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C. Supreme Court Rules on Weight and Height as a BFOQ

The issue of weight and height as a bfoq and its effect on women came to the Supreme Court's attention in the case of *Dothard v. Rawlinson* /No. 76-422, June 29, 1977/

Facts in Case

Dianne Rawlinson, a 22-year-old college graduate, applied for employment with the Alabama Board of Corrections as a prison guard, called in Alabama a "correctional counselor." While her major course of study had been correctional psychology, she was refused employment because she failed by five pounds to meet the minimum 120-pound weight standard required by an Alabama law. This same law also required a minimum height of 5 feet, 2 inches.

Rawlinson filed a Title VII charge with the EEOC. She received a "right to sue" letter from the Commission and filed a complaint in the district court on behalf of herself and other similarly situated women, challenging the statutory height and weight minima, alleging violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment.

The case was considered by a three-judge court. While the case was pending, another issue entered the picture: the Alabama Board of Corrections adopted a regulation (Regulation 204) in which gender is the basis for assigning correctional counselors for "contact positions" in maximum security prisons.

"Contact positions" are those requiring physical proximity to inmates. Thus, the regulation established gender as a bfoq for contact positions in maximum security institutions. Alabama's prisons are segregated on the basis of sex, like most such institutions in the United States. Four of Alabama's maximum security prisons are male populated; one, female populated.

Rawlinson amended her class action complaint by challenging the regulation as also violating Title VII and the Fourteenth Amendment.

Rawlinson won at the federal district court level in her challenge against both the state law and the regulation. The State of Alabama appealed to the U. S, Supreme Court. /For procedural reasons, only Title VII - not the Fourteenth Amendment - was considered by the High Court/.

The Supreme Court in an 8-1 decision upheld the lower court ruling that the Alabama law setting minimum weight and height requirements (it also set maximum) violated Title VII because of its discriminatory impact ("effect") on female applicants. In short, the Court did not accept the statutory weight/height restrictions as bfoqs and rejected the state's contention that the statutory weight/height requirements were job-related.

However, on the gender-based regulation the High Court disagreed by a 6-2 vote with the federal district court. It held that being a man

was a bona fide occupational qualification for the "contact" positions in the all-male maximum security prisons and hence legal under Title VII which permits exceptions based on bfoqs.

Findings and Conclusions on the Alabama Law

The Supreme Court considered the "impact" or "effect" the Alabama law had on female applicants by turning to statistical evidence which showed:

- --Women aged 14 and over comprise 52.75 percent of the Alabama population and 36.89 percent of its total labor force, but they hold only 12.9 percent of its correctional counselor positions.
- --The effect of the minimum height (5'2") standard would exclude 33.29 percent of the women in the United States between ages 18-79, but only 1.28 percent of the men between the same ages.
- --The effect of the minimum weight (120 lbs.) standard would exclude nationally 22.29 percent of the women, but only 2.35 percent of the men in the 18-79 age group.
- --When combined, the height and weight restrictions would exclude 41.13 percent of the female population while excluding less than one percent of the male population.

The State of Alabama argued against the use of national statistics to establish a disproportionate impact or adverse effect on women in order to establish a prima facie case of discrimination. The State claimed that the plaintiff had failed to present comparative statistics concerning actual applicants for correctional counselor positions in Alabama. The Supreme Court rejected the State's argument:

> 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 might itself

> 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...A potential applicant could easily measure her height and weight and conclude that to make an application would be futile. Moreover, reliance on general population demographic data was not misplaced where 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.

And the Court also commented:

> If the employer discerns 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.

In accepting the plaintiffs' statistical analysis, the Supreme Court concluded that the statutory height and weight requirements had a "discriminatory impact on women applicants." And once it is shown that the employment standard has a discriminatory effect, the employer must meet "the burden of showing that any given requirement /has/ ... a manifest relation to the employment in question." /The Court was quoting from its decision in *Griggs v. Duke Power Co.* discussed under Tab J - Testing/ Alabama contended that it had met this burden by showing that the weight and height standards were job-related; that the weight/height requirements related to strength which is essential to effective job performance as a correctional counselor. But the Supreme Court noted that no evidence was presented to correlate the height and weight requirements with the required amount of strength thought essential to safe and efficient job performance.

Therefore the Supreme Court found the State of Alabama weight and height law in violation of Title VII: Even though neutral on its face, it adversely affected women (covert discrimination), and the public employer had failed to show that the requirements were job-related.

Findings and Conclusions on Regulation 204

Regulation 204 was not viewed by the Court as neutral on its face. The Regulation "explicitly discriminates against women on the basis of their sex " (overt discrimination). In a footnote the Court states:

> By its terms Regulation 204 applies to contact positions in both male and female institutions. ... The District Court found, however, that "Regulation 204 is the administrative means by which the /Board of Corrections'/ policy of not hiring women as correctional counselors in contact positions in all-male penitentiaries has been implemented." The regulation excludes women from consideration for approximately 75% of the available correctional counselor jobs in the Alabama prison system.

Although the Court recognized the Regulation as overt discrimination, it nevertheless found that it escaped a Title VII violation by virtue of being a bfoq exception. Section 703(e) of Title VII permits sex-based discrimination "in those circumstances where...sex...is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise".

The district court had rejected the public employer's bfoq defense, relying on the virtually consistent view of federal courts that Section 703(e) provides for extremely narrow exceptions to the general rule requiring equality of employment opportunity--an equality which

cannot be achieved on the basis of stereotyping either sex. The district court held, in effect, that Regulation 204 was based on stereotypical assumptions.

In overturning the lower court the Supreme Court said that while it was persuaded that the bfoq is "meant to be an extremely narrow exception," the facts in the case make the gender criteria of Regulation 204 a bfoq exception. The facts: Alabama prisons were characterized by rampant violence and by a jungle atmosphere. Prison officials had made no attempts to either classify or segregate inmates according to the nature of their crimes or their level of dangerousness.

The Court concluded that to employ women as counselors in "contact" positions would thus create risks of sexual assaults, a risk attributable, according to the Court, to "womanhood". The majority said:

> The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women. In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians.

Justices Brennan and Marshall, while concurring in the decision reached on the weight and height law, disagreed with the majority decision upholding a bfoq exception under Regulation 204:

> It is simply irrelevant here that a guard's occupation is dangerous and that some women might be unable to protect themselves adequately. Those themes permeate the testimony of the state officials below, but as the Court holds, "the argument that a particular job is too dangerous for women" is refuted by the "purpose of Title VII to allow the individual woman to make that choice for herself." ... Some women, like some men, undoubtedly are not qualified and do not wish to serve as prison guards, but that does not justify the exclusion of all women from this employment opportunity. Thus, "/i/n the usual case," ... the Court's interpretation of the bfoq exception would mandate hiring qualified women for guard jobs in maximum security institutions. The highly successful experiences of other States allowing such job opportunities, see Briefs *amicus curiae* of the States of California and Washington, confirm that absolute disqualification of women is not, in the words of Title VII, "reasonably necessary to the normal operation" of a maximum security prison.

The dissent expressed concern that the Court majority had determined a bfoq issue without regard to the environment in which the exception was granted; that is, they did not concern themselves with the "barbaric and inhumane" conditions which state officials conceded violated the Eighth Amendment of the Constitution /The Eighth Amendment deals with bails, fines and punishments, stating: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The justices were referring to the underlined provisions./

Justice Marshall, joined by Justice Brennan, wrote:

> What would otherwise be considered unlawful discrimination against women is justified by the Court, however, on the basis of the "barbaric and inhumane" conditions in Alabama prisons, conditions so bad that state officials have conceded that they violate the Constitution. See *James v. Wallace*, 406 F.Supp. 318, 329, 331 (MD Ala. 1976). To me, this analysis sounds distressingly like saying two wrongs make a right. It is refuted by the plain words of Sec. 706(e). The statute requires that a bfoq be "reasonably necessary to the normal operation of that particular business or enterprise." But no governmental "business" may operate "normally" in violation of the Constitution. Every action of Government is constrained by constitutional limitations. While those limits may be violated more frequently than we would wish, no one disputes that the "normal operation" of all government functions takes place within them. A prison system operating in blatant violation of the Eighth Amendment is an exception that should be remedied with all possible speed. . . . In the meantime, the existence of such violations should not be legitimatized by calling them "normal." Nor should the Court accept them as justifying conduct that would otherwise violate a statute intended to remedy age-old discrimination.

Decision Does Not End Weight/Height Issue

The issue of weight and height as bfoq requirements is not over in sex discrimination cases--or, for that matter, in racial or national origin cases where physical attributes are related to ethnicity.

Justice Rehnquist who agreed that the Alabama law setting weight and height requirements resulted in sex discrimination nevertheless noted that the Supreme Court's agreement with the lower court is "essentially dictated by the peculiarly limited factual and legal justifications offered by the State of Alabama." He said he did not believe--nor did he read the Court's opinion as holding--that all or even many of the height and weight requirements imposed by states for many law enforcement agency jobs are voided by this decision.

He went on to suggest that if Alabama would have urged that a job-related qualification for prison guards is the appearance of strength and that the weight and height requirements were related to this qualification, then a different result may have been reached.

That this case must be considered according to the facts at hand is also based on the failure of the State of Alabama to rebut the use of national statistics in establishing a prima facie case of sex discrimination. As Rutgers Law Professor Alfred Blumrosen states:

> Nationwide statistics were held proper since they seemed relevant. The employer's attack on statistics was purely negative. The message to employers defending against a statistical prima facie case is "you can't fight something with nothing." Negativism alone will not defeat a statistical case which seems rational on its face. /Paper presented Nov. 17, 1977 at Amer. Bar Assn. National Institute Conference on EEO Law, New Orleans_7.

D. Title VII Challenge to Public Pension Plan

Among the sex discrimination cases involving retirement benefits in the public sector is the Title VII class action against the Los Angeles City Department of Water and Power: *Manhart v. City of Los Angeles*. It was brought in 1975 by employee Manhart, other female employees, retirees, and the International Brotherhood of Electrical Workers, Local 18.

The Department of Water and Power operates under a retirement benefit plan that provides equal benefits for similarly situated men and women. But the women must contribute about 15 percent more of their salaries in order to obtain equal retirement benefits with men. The Department matches the contributions.

The Department claimed the higher contribution by female employees was required because women live longer than men; hence, they will receive the same monthly benefits as men for a longer period of time. Thus, women, as a group, must contribute more.

The female employees and retirees argued the EEOC position:

(1) Benefits must be equal;

(2) Costs (contributions) to the employer are irrelevant;

(3) The effect of making women pay more out of their salaries is the same as if they were to receive lower benefits, for if they did not contribute about 15 percent more, they would receive lower benefits.

District Court Decision

The lower court held that the retirement plan violates Title VII. The relevant provision of Title VII reads in part:

> It shall be an unlawful employment practice for an employer... to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of ... sex. (Section 703 (a) (1))

In upholding the female employees and retirees, the district court ordered the Department (1) to discontinue the higher contribution requirement; (2) to refund the excess contributions collected on and after April 5, 1972 plus interest at 7%; (3) payment of reasonable attorneys' fees to the plaintiffs' lawyers.

The Department appealed the judgment.

Appeals Court Decision

In an unanimous ruling, the 3-judge panel of the U.S. Court of Appeals for the Ninth Circuit upheld the decision of the trial court. The appellate court disagreed with the Department's argument that the higher contribution was necessary because women "on the average" live about five years longer than men; i.e., the plan's different treatment of women was based on longevity, not on sex, and hence was not invidious sex discrimination prohibited by Title VII.

The first of its kind on the federal appeals court level, the ruling upheld the district court because the retirement policy discriminated against <u>individual</u> women:

> Not all women live longer than all men, yet each individual woman is required to contribute more, not because she as an individual will live longer, but because the members of her sexual group, on the average, live longer.

Relating the Department's policy to Title VII requirements, the appellate court said:

> It is undisputed that the overriding purpose of Title VII is to require employers to treat each employee (or prospective employee) as an individual, and to make job-related decisions...on the basis of relevant individual characteristics, so that the employee's membership in a...sexual group is irrelevant to the decisions.

Thus the court said that the claim that women "on the average" live longer than men "is just the kind of abstract generalization... which Title VII was designed to abolish."

Longevity Defense

In rejecting the Department's longevity argument, the court noted:

(1) not all women live longer than men;

(2) the Department did not consider other longevity factors such as smoking, drinking, weight, prior medical history, or family longevity history when determinig pension contribution levels, but instead makes an actuarial classification "based wholly on sex."

> We emphasize that our holding rests on the clear policy behind Title VII of requiring that each employee be treated as an individual. Setting retirement contribution rates solely on the basis of sex is a failure to treat each employee as an individual; it treats each employee only as a member of one sex. We do not pass judgment on the legality of a plan which determines contribution rates based on a significant number of actuarially determined characteristics, one of which is sex. Our holding is limited to the proposition that when sex is singled out as the only, or as a predominant, factor, the employee is being treated in the manner which Title VII forbids. (emphasis added)

The BFOQ Defense

Further, the court rejected the Department's defense that Title VII allows exceptions based on a bona fide occupational qualification where "...sex...is a [bfoq] reasonably necessary to the normal operation of that particular business or enterprise." The court pointed to the distinction between a business necessity test and a business convenience test. Thus a bfoq--permitting discrimination based on sex--is valid only when the essence of the business operation would be undermined. It said:

> Discriminating against women in setting the amount of retirement contributions in no way affects the ability of the Department to provide water and power to the citizens of Los Angeles. Even if it could be said that the relevant business function here involved is that of providing employees with a stable and secure pension program there is no showing that sexual discrimination is necessary to protect the essence of that function. Actuarial distinctions arguably enhance the ability of the employer and the pension administrators to predict costs and benefits more accurately, but it cannot be said that providing a financially sound pension plan requires an actuarial classification based wholly on sex. This is especially true when distinctions based on many other longevity factors... are not used in determining contribution levels. Thus, we find that the BFOQ exception does not permit the sexual classification challenged in this case.

Equal Pay Defense

The unanimous judgment likewise rejected the Department's defense that the interpretation by the Wage and Hour (W&H) Administrator, Department of Labor, satisfies the equal pay concept since the benefits are equal and differences in contributions are permitted. (This was the W & H interpretation accepted by the Supreme Court in the *Gilbert* case in which the Court turned down the more liberal EEOC interpretation. (See p.K-23 for discussion of *Gilbert* decision.)

The appeals court held among other things, that the W & H regulation and the EEOC guidelines "do not squarely cover the present case" because neither of the regulations "deal directly with our case of an employer requiring greater pension plan contributions from women employees when the plan is funded and administered by the employer and its employees." (emphasis added)

/ *Manhart v. City of Los Angeles*, Ninth Circuit Court of Appeals, Nos. 75-2729, 75-2807, 75-2095; *GERR*, No. 687, Section F, Dec.13, 1976./

Ninth Circuit Rejects Rehearing

Following the Supreme Court decision in *Gilbert v. General Electric Co.*, the Department of Water & Power asked for a rehearing before the full appeals court, rather than the 3-judge panel that originally heard the appeal.

The request was rejected by the panel on a 2-1 vote.

Supreme Court Review Pending

The Supreme Court has agreed to hear the case. It will be interesting to see how much weight the High Court gives to the Ninth Circuit's observation that neither the Wage & Hour regulation of the Department of Labor nor the EEOC guidelines apply to the pension dispute. Undoubtedly the *Gilbert* decision will be a significant point of departure in the reasoning of the nine Justices. If the Congress enacts a pending amendment to Title VII the issue before the Court will have no meaning--as the Court would say, it is "moot." The purpose of the amendment is to assure equal treatment in all fringe benefit areas. It would thus overturn the *Gilbert* decision.

E. Veterans' Preference - An Ongoing Issue

Among the controversial sex discrimination issues is the use of veterans' preference points in public employment. Jurisdictions using the point system add a specified number of points to a veteran's test score. For example, say a disabled veteran is allowed 10 points. If he receives a test score of 80, his final score would be 90. He would then be ranked after all those--veteran and nonveteran--who received scores of 91, and before those eligibles who received less than 90. Under this system a specified number of points can also be given to veterans without disabilities.

Women and organizations primarily concerned with equal opportunity for female applicants and employees point to the adverse effect of this policy on women getting jobs--particularly the higher paying jobs--or achieving promotions within a public agency or jurisdiction.

Women's organizations, realizing the public policy purpose to reward veterans for service to their country and to ease their military-to-civilian life adjustment, are seeking a more limited application of a veterans' preference policy. For example, the nearly 2,000 delegates to the first National Women's Conference in Houston, Texas (Nov., 1977) approved an amendment to the Federal Veterans Preference Act limiting its use to a one-time only basis for initial employment within three years after discharge. This is line with the suggestion by the General Accounting Office that if Congress wishes to lessen the conflict between veterans' preference and equal employment opportunity goals for women,

it could limit the preference to a one-time use and impose a time limit on the use of preference points.

(1977 GOA report to the President and Congress, entitled "Conflicting Congressional Policies: Veterans' Preference and Appointment vs. Equal Employment Opportunity" (B-167015).)

Such an effort to limit the use of veterans' preference points failed in the California Legislature. In 1977, a bill was introduced (SB 847-DUNLAP) cosponsored by the State Personnel Board and the California Commission on the Status of Women. The bill received the support of the California Department of Veteran Affairs and of the Governor. It was described as "a moderate compromise" which would have given veterans, after discharge, eight years to use veterans' preference points for entry-level positions in state government. According to the California Commission on the Status of Women, "the bill would not have limited preference for disabled veterans nor would it have affected retired veterans. It would not have affected other state and federal benefits now available to veterans." ('California Women," a bulletin published by CCSW, July 1977). The proposal was defeated in the Senate by a vote of 13-24.

The Case of Absolute Preference (a Constitutional Issue).

In addition to a point preference law there is another type of law which grants veterans an absolute preference.(Forty-seven states have some form of a veterans' preference law; the four without such laws are Arkansas, Mississippi, New Mexico and South Carolina.) The absolute

preference policy of Massachusetts was challenged as unconstitutional in 1976 by a female state employee. She had scored third on a civil service test, but was placed fourteenth on the eligibility list after eleven male veterans--all with lower scores--were put ahead of her. She alleged that the absolute preference law violated the Equal Protection Clause of the Fourteenth Amendment because of its adverse effect on women.

Under the absolute preference law veterans receiving passing grades are ranked ahead of all nonveteran eligibles (hence male and female alike). The ranking formula works this way:

(1) disabled veterans in order of their scores
(2) other veterans in order of their scores
(3) Widows and widowed mothers of veterans in order of their scores
(4) all other eligibles in order of their scores

Only 2 percent of women in the Commonwealth of Masschusetts could claim veterans preference. Of 50 sample eligible lists reviewed by the U.S. district court, 38 percent of the men and only 0.6 percent of the women were preference eligibles. Additionally, on each of the 50 sample lists one or more females were ranked behind male veterans with lower test scores.

The lower court found that although women comprise 43 percent of all civil service appointees in a 10-year period examined, they were clustered in the lower grades, and hence lower-paying jobs, for which men traditionally do not apply.

It was the judgment of the court that the absolute veterans'

preference was the reason that few, if any, females have been considered for the higher paying civil service positions in that state.

Two members of a 3-judge panel held the law unconstitutional:*/

> Facially, the Veterans' Preference is open to both men and women. But to say that it provides an equal opportunity to both men and women to achieve a preference would be to ignore reality.

The point was made that the combination of federal military enlistment regulations and the absolute preference law resulted in a "one-two" punch that kept 98 percent of the state's women from obtaining good civil service jobs.

The majority opinion also noted that veterans' preference provides a selection procedure which "has caused disastrous negative consequences for the employment opportunities of women, a clearly identifiable segment of the Commonwealth's population entitled to fair and equal protection of the law."

However, the majority opinion did not reject all forms of veterans' hiring preference:

> Despite its troublesome impact on the women of this Commonwealth, the operation of the Massachusetts Veterans' Preference might escape constitutional rejection if it were the only means by which the state could implement a program of veterans' assistance in the area of public employment. But the fact is that there are alternatives ... for example, a point system could be established ... a time limit for exercising the preference could also be established....

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* A constitutional challenge requires a 3-judge panel. The case was heard by two U.S. District Court judges and a Circuit Court judge. /*Anthony v. Commonwealth*, USDC Mass., 1976, 12 FEP Cases 915/ Any appeal for review goes to the Supreme Court.

The dissenting district judge in the Massachusetts case did not think the veterans' absolute preference law denied women equal protection; he felt the law should be upheld. Among his considerations:

> the Supreme Court...has defined discrimination as dissimilar treatment of men and women who are similarly situated...it is obvious that the division between veterans and nonveterans is not drawn along sex lines and does not provide for dissimilar treatment for similarly situated men and women... The Statute was not passed to disqualify women from civil service appointments... If there exists the almost inseparable barrier to women attaining higher level civil service jobs...it is a circumstance that nonveteran women share with a large number of nonveteran men. This circumstance presents an even less compelling claim for sex discrimination than Geduldig v. Aiello... where only women were in the group burdened by the classification. (See p. K-15 for discussion of *Geduldig.*)

Supreme Court Upholds Absolute Preference

When the *Anthony* case reached the High Court it set aside the district court ruling which had invalidated the Massachusetts law. The Supreme Court sent the case back to the lower court to reconsider its decision. The reason the Supreme Court directed reconsideration was based on its 1976 decision that on a constitutional issue discriminatory intent must be proved to find a law or government conduct in violation of the Constitution (The Supreme Court was referring to its decision in *Washington v. Davis*. See Tab J-Testing, for discussion of the case.)

Title VII and Veterans' Preference (a Statutory Issue)

In the *Anthony* case discussed above, the dissenting judge took note of the fact that Title VII exempted a veterans' preference system from the category of an illegal employment practice. He said:

> ...Congress has taken an active role in defining the applicability of the Fourteenth Amendment to gender discrimination in the employment context through Title VII....Congress, however, has specifically chosen to protect veterans preference legislation from challenge under Title VII...the judgment of a coequal branch of government which has specifically addressed the issue accommodating equal employment rights with veterans preference legislation is not without significance in evaluating the question presented in this case.

Section 712 of Title VII provides:

> Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

Supporters of the Equal Rights Amendment (ERA) offer the veterans' preference issue, within the context of equal opportunity for women in public employment, as another reason for adoption of ERA. In the report of the National Commission on the Observance of International Women's Year, a list of reasons is set forth as to why ERA is needed. Among the reasons: "To insure equal opportunity, privileges, and benefits in all aspects of government employment, <u>including admission to the military services and military training schools</u>." (emphasis added)

> ("To Form a More Perfect Union... Justice for American Women," June 1970, p. 375.)

This recommendation implicitly supports veterans' preference by urging that women have the opportunity to benefit similarly through service in the military.

F. Sexual Preference/Sexual Change

1. As A Title VII Issue

When Congress enacted Title VII of the Civil Rights Act of 1964, the term "sex" applied to gender: male or female. Nothing in the legislative history of Title VII leads to the conclusion that Congress intended --much less gave it a thought--that the definition of sex should include "sexual preference" (homosexuality) or "transsexualism" (change of sex through a surgical procedure).

In a decision issued on September 24, 1974, the Equal Employment Opportunity Commission found no violation of Title VII when a board of education discharged a teacher because of a sex change:

> ...although the operation...was a sex reassignment, we find nothing in the legislative history of Title VII to indicate that such claims were intended to be covered by Title VII. Absent evidence of a Congressional intent to the contrary, we interpret the phrase "discrimination because of sex," in accordance with its plain meaning, to connote discrimination because of gender.* We therefore are compelled to conclude that charging party's termination based in part upon having undergone a sex reassignment operation does not constitute discrimination because of sex.

/EEOC Decision No. 75-030 12 FEP Cases 1355/

*In footnote 11 of the decision the EEOC stated:

"Thus the first definition of 'sex' in Webster's Seventh New Collegiate Dictionary states: 'Either of two divisions of organisms distinguished respectively as male or female.'"

Homosexuals

Notwithstanding the 1974 EEOC decision that Title VII does not cover transsexualism--and by inference homosexuality, based on Webster's definition--a homosexual case did arise under Title VII following that decision.

Barbara Schlei and Paul Grossman write in their authoritative reference work, *Employment Discrimination Law* (BNA, 1976) that "the first court opinion of which we are aware dealing with the applicability of Title VII to adverse actions taken against persons because of sexual preference is *Smith v. Liberty Mutual Insurance Co.*" /p. 368; case citation: 395 F. Supp. 1098, 11 FEP 741, N.D.Ga.1975/

In that case the court found that the employer had not engaged in an illegal employment practice by refusing to hire an effeminate male: "/w/hether or not Congress should,by law, forbid discrimination based on 'affectional or sexual preference' of an applicant, it is clear that the Congress has not done so."

Schlei and Grossman observe that "there was no indication...that the plaintiff, although effeminate, was a homosexual, but the logic would seem applicable." /p.368/

Transsexuals

The 1974 EEOC decision, referred to above, dealt specifically with the issue of transsexualism and its exclusion under Title VII coverage. Yet, pursuit of the issue through the courts was evident when, in 1975, two decisions came down. Both held that adverse employment action against persons who have undergone sex-change surgery--or intend to do so--does not violate Title VII:

--The plaintiff was admittedly discharged as a hemodialysis technician because she intended to undergo sex conversion surgery. The Medical Center said her change of sex would have a potentially adverse effect on patients and on the employees who cared for the patients treated at the dialysis unit. The U.S. district court, Northern California, dismissed the case holding that Title VII does not cover transsexuals, homosexuals or bisexuals. /*Voyles v. Ralph K. Davies Medical Center*, 403F. Supp. 456, N.D. Cal., 1975/

--A New Jersey elementary school music teacher claimed a Title VII violation when she was fired from her job after undergoing a sex change operation. The teacher, formerly known as Paul Grossman, was fired in 1971 after 14 years as a teacher. Grossman, married with three daughters, underwent the operation in March of 1971 and planned to return to school that fall as a woman.

The school board said that because of her new sex, Grossman's classroom presence had the potential of being psychologically harmful to the students.

Grossman argued that her firing violated the sex discrimination provisions of Title VII, maintaining that transsexuals are psychologically women from birth who are trapped in a man's body.

The district court dismissed the complaint, stating that Title VII focuses on discrimination because of the *status* of sex or because of sexual stereotyping, not because of *change* of sex. /*Grossman v. Bernards Township Board of Education* D.N.J., 1975, 11 FEP Cases 1196/

On appeal to the Third Circuit, she again failed. The appellate court ruled she had no right to reemployment and that Congress did not intend to include transsexuals within the scope of Title VII protection.

Grossman sought a Supreme Court review. The Court refused to review the case. /No. 76-313/

In 1977, a third case was added to the litany of consistent decisions dealing with transsexuals and Title VII:

--The case involved a person who was born male and who underwent a sex conversion through surgery. On her first day of employment as a waitress at the drug store, "Shawn" was fired when it was discovered that "she" was born male. She charged that her firing stemmed from a report by a customer who had known her as "Michael."

Shawn asked the Court to declare that employment discrimination against transsexuals violates her rights under Title VII.

The district court judge concluded that the discharge was not sex discrimination under Title VII and said that a reading of Title VII to cover "Shawn's" complaint would be "impermissibly contrived and inconsistent with the plain meaning of the words." /*Powell v. Read's, Inc.*; USDC MD., No. Y-77-624, August 30, 1977/

2. As A Constitutional Issue In Public Sector Homosexuals

While private sector employers find Title VII concerns vanish, absent any legislative change, the public sector employer--also covered under Title VII--faces constitutional challenges by those claiming discrimination based on sexual preference or gender change.

The federal government as an employer faces a challenge under the due process provisions of the Fifth Amendment. State and local agencies face similar challenges based on the Equal Protection Clause of the Fourteenth Amendment. At times the free speech protection of the First Amendment comes into play.

Federal and state courts generally have held that an employee may not be discharged based solely on his or her status as a homosexual. Other factors would have to be present to show that homosexuality has a relationship to job performance; for instance--the inability of a homosexual to obtain a security clearance makes that person unable to perform a given job, or the person flaunts his or her homosexuality, including homosexual advances on the job or engages in notorious conduct.

The federal courts have found that a public employer has engaged in an unconstitutional act in firing an employee just for being a homosexual, without showing that his or her homosexuality has a relationship to job performance. The leading case to make this point involved a federal employee who was discharged after being arrested for his off-duty homosexual advances. He was seen making a pick-up in the early A.M. Police followed him home, questioned him and the employee admitted to prior homosexual encounters.

In a 2 to 1 decision, the Court of Appeals, District of Columbia, ruled that the discharge was unconstitutional because the government had not offered evidence that there was a reasonable connection between his homosexuality and job performance.

/*Norton v. Macy*, 417 F.2d 1101, D.C. Cir. 9 FEP Cases 1382/

The court stated that immoral or indecent acts could be cause for dismissal "only if all immoral or indecent acts of an employee have some accountable deleterious effect on the efficiency of the service..."

It said:

> A reviewing court must at least be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service. Once the connection is established, then it is for the agency and the Commission to decide whether it outweighs the loss to the service of a particular competent employee.
>
> In the instant case appellee has shown us no such specific connection. Indeed, on the record appellant is at most an extremely infrequent offender, who neither openly flaunts nor carelessly displays his unorthodox sexual conduct in public. Thus, even the potential for the embarrassment the agency fears is minimal. We think the unparticularized and unsubstantiated conclusion that such possible embarrassment threatens the quality of the agency's performance is an arbitrary ground for dismissal.

Other court decisions which followed this 1969 decision also dealt with the issue of unfitness of homosexuals for given public jobs. However, the most exhaustive decision--including a review of numerous court rulings--is *Singer v. U.S. Civil Service Commission* /530 F. 2nd 247, 9th Cir. 1976, 12 FEP Cases 20<u>8</u>7

Singer was an out front homosexual who seemingly enjoyed publicity. He made TV, newspaper and magazine coverage when he attempted to have a homosexual marriage ceremony. He was discharged from his job with the Seattle office of EEOC, following such actions as sending a letter to the U.S. Civil Service Commission about a planned symposium on employment discrimination, writing in part: "I work for the EEOC, and am openly gay...."

The U.S. Court of Appeals in the Ninth District (San Francisco) upheld a lower court's decision that the public flaunting and advocacy of homosexuality was a valid reason for discharge.

Singer argued that he was denied freedom of expression in violation of the First Amendment.

In turn, the U.S. Civil Service Commission argued that the publicity which linked the employee with the agency could cause "possible embarrasment to, and loss of public confidence in the agency and the Federal Civil Service."

The court reasoned that the interest of the government in promoting effeciency of public service outweighed the individual's exercise of his First Amendment rights.

In upholding his discharge the court said:

> We conclude from a review of the record in its entirety that appellant's employment was not terminated because of his status as a homosexual or because of any private acts of sexual preference. The statements of the Commission's investigation division, hearing examiner, and Board of Appeals make it clear that the discharge was the result of appellant's "openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities," while identifying himself as a member of a federal agency. The Commission found that these activities were such that "general public knowledge thereof reflects discredit upon the Federal Government as his employer, impeding the efficiency of the service by lessening public confidence in the fitness of the Government to conduct the public business with which it was entrusted.

And on the First Amendment claim, the court reviewed two cases involving the issue of homosexuals and their First Amendment rights. It rejected those cases as supportive of Singer's claim of denial of free speech:

> Neither /case/ involved the open and public flaunting or advocacy of homosexual conduct... the /U.S. Civil Service/ Commission could properly conclude that under the facts of this case, the interest of the Government as an employer "in promoting the efficiency of the public service" outweighed the interest of its employee in exercising his First Amendment Rights through publicly flaunting and broadcasting his homosexual activities.

Note: One of the two cited cases to which Singer referred was *Acanfora v. Board of Education of Montgomery County* (491 F. 2d 498; 9 FEP Cases 1287, 4 Cir., 1974). In this case the school board had transferred Acanfora to a non-teaching job upon learning he was a homosexual. The board's action was upheld on the ground that Acanfora had deliberately withheld from his application information relating to his homosexuality. However, the appellate court ruled that his public statements on homosexuality were protected by the First Amendment: The court said:

> At the invitation of the Public Broadcasting System, Acanfora appeared with his parents on a program designed to help parents and homosexual children cope with the problem that confront them. Acanfora also consented to other television, radio and press interviews. The transcripts of the television programs which the district court found to be typical of all the interviews, disclose that he spoke about the difficulties homosexuals encounter, and, while he did not advocate homosexuality, he sought community acceptance. He also stressed that he had not, and would not, discuss his sexuality with the students.
>
> In short, the record discloses that press, radio, and television commentators considered homosexuality in general, and Acanfora's plight in particular, to be a matter of public interest about which reasonable people could differ, and Acanfora responded to their inquiries in a rational manner. <u>There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said. We hold, therefore, that Acanfora's public statements were protected by the First Amendment and that they do not justify the action taken by the school system</u> .... (emphasis added)

In summary, *Norton* and *Singer*, considered the leading cases, held that homosexuality per se is not sufficient for a public employer's

action of discharge. Such adverse action must be based on a showing that the homosexual status of the employee negatively affects his or her own ability to perform the job and affects the agency through loss of public confidence and trust.

However clear this abstract doctrine may be, it does not mean that each and every member of a court agrees on when the link between homosexual status and an adverse effect on the public agency has been forged. Clearly, whether a homosexual adversly affects a public agency's operations is not always easy to establish.

There likely will be continued disagreement, as illustrated by the latest decision to come down from the Supreme Court of the State of Washington/*Gaylord v. Tacoma School District* No. 10, et al.; Case No. 44078, Jan. 20, 1977/.

In a 6-2 decision, the majority took the view that when a high school teacher admitted to being a homosexual, the school board was justified in firing him, that homosexuality connotes illegal as well as immoral acts. (A provision of the school code provides for the discharge of teachers for "immorality," a definition also subject to varying personal perceptions of "right" and "wrong.")

The six State Supreme Court justices upholding the discharge stated that once the plaintiff's homosexual status became publicly known, it would and did impair his efficiency.

One of the dissenting justices noted that the teacher, who has been employed at the Wilson High School in Tacoma for over 12 years, had an outstanding teaching record: "/T/he fact of ... homosexuality

per se does not preclude competence." Further, the mere "status" of homosexuality is an insufficient basis for firing the teacher. The dissenting justice pointed to the trial court record in which there was no allegation or evidence that the teacher had ever committed any overt acts of homosexuality.

The case was generated by a former high school student who informed the school's vice principal that he thought the teacher was a homosexual. In turn, the vice principal went to the teacher's home to present him with a written copy of the student's statement. The teacher admitted he was a homosexual and tried to have the vice principal drop the matter.

A short time later the school board notified him that there was "probable cause" for his discharge because of his status as a publicly known homosexual. Following a hearing, the board discharged him under the school code provision requiring the discharge of teachers for "immorality."

When the case went to the superior court, the discharge was upheld on two counts: (1) homosexual conduct was immoral; (2) public knowledge of his homosexuality adversely affected the teacher's performance.

Initially the State Supreme Court reversed the lower court and remanded the case for further consideration. The trial court reconsidered the case, issued new findings and conclusions, and again upheld the teacher's discharge. The teacher again appealed. This second time around the State Supreme Court upheld the lower court.

The majority opinion of the State Supreme Court held that a teacher's efficiency is determined by the relationship with students, their parents, the school administration, and other teachers. Therefore, the majority concluded, a failure to discharge him after his homosexuality became known would result in "fear, confusion, suspicion, parental concern, and pressure on the administration by students, parents, and other teachers."

On the morality issue, the court quotes testimony by a psychiatrist who said: "I would say in our present culture and certainly in the last few hundred years in Western Europe and in America this /homosexuality/ has been a frightening idea." On the other had, the two justices who disagreed with the majority emphasized that the teacher carefully kept his private life separate from his teaching duties and that he made no sexual advances toward his students or colleagues. They described as conjecture the majority's conclusion that the teacher's classroom effectiveness would be impaired: "Historically, the private lives of teachers have been controlled by the school districts in many ways. There was a time when a teacher could be fired for a marriage, a divorce, or for the use of liquor or tobacco." And while the practice of firing teachers for such reasons has ceased, "there are undoubtedly those who could speculate that any of these practices would have a detrimental effect on a teacher's classroom efficiency as well as cause adverse community reaction. /We/ find such speculation to be an unacceptable method for justifying the dismissal of a teacher who has a flawless record of excellence in his classroom performance."

The U.S. Supreme Court refused to hear the case. This, in effect, means that public agencies in the State of Washington will be guided by the state's high court ruling. This ruling, however, still leaves open to interpretation what is and what is not detrimental, as regards sexual preference, to the functioning of a public agency.

3. As a California FEP Act Issue

If Title VII doesn't cover homosexuals, what about California's Fair Employment Practice Act?

In 1977 the FEP Act was put to the test in the case of *Gay Law Students Association, et. al. v. The Pacific Telephone and Telegraph Company, FEPC of California, et. al.* (Court of Appeal, State of Calif., First Appellate District, 1 Civil 38615, Jan. 4, 1977.)

The four plaintiffs sought to prevent the Pacific Telephone and Telegraph Co. (PT&T) from discriminating against persons because of their sexual orientation and to obtain a ruling that employment discrimination on the basis of sexual orientation be declared illegal under the state FEP Act. The suit also sought a court order commanding the FEP Commission (FEPC) to assume jurisdiction over their claims of employment discrimination against PT&T.

Joining the four plaintiffs in the case were the Gay Law Students Association--a group of students at Hastings College of Law and Boalt Hall, University of California, Berkeley,--and the Society for Individual Rights--a California corporation organized to promote equal treatment for homosexuals in all areas, including employment and government services.

The plaintiffs lost their case and appealed to the California Court of Appeal, First District.

The two questions considered by the state appellate court were:

(1) Does the FEP Act prohibit all discrimination on any basis, other than a bona fide occupational qualification (bfoq)?

(2) Is employment bias against homosexuals discrimination based on sex?

QUESTION I: DOES FEP ACT COVER HOMOSEXUALS?

PT&T agreed that even if the allegations were true, employment discrimination based on sexual preference is not prohibited under California law. The plaintiffs on the other hand, had argued that the FEP Act prohibits all employment discrimination on any basis other than a bona fide occupational qualification. The thrust of their argument was that while the Act specifically enumerates those bases for discrimination (i.e., race, religious creed, sex, national origin, physical handicap, etc.), such an enumeration is merely illustrative rather than restrictive.

To support this argument, the plaintiffs turned to another California law, the Unruh Civil Rights Act which forbids discrimination in providing "accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." They argued that the Unruh Civil Rights Act has been interpreted by the courts to outlaw all forms of arbitrary discrimination, not merely those enumerated in the Act. (In re Cox, 3 Cal. 3d 205, 1970)

The State appeals court turned to the legislative history and intent of the FEP Act and concluded that the California Legislature did not intend

to outlaw all employment discrimination:

> ... The Act declares the Legislature's purpose as safeguarding the right of all persons to seek, obtain and hold employment without discrimination as to specifically enumerated bases. ... Repeatedly, throughout the Act, the Legislature has specifically listed those bases of discrimination in employment which it considers to be unlawful as contrary to the public policy of this state. ... Not once does the Act make a declaration indicating that its purpose is broader than to protect those classes of persons which are specifically enumerated. ... Discrimination "unless based upon a bona fide job qualification" is made an unlawful practice only where it is done because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition or sex. ... Thus, the language of the statute on its face provides no support whatever for the position that every form of job discrimination, other than on the basis of bona fide job qualifications, is prohibited. If such were the case, the Legislature could have easily said so and saved itself a substantial amount of superfluous verbiage.

The appeals court, in rejecting the analogy between the FEP Act and the Unruh Civil Rights Act, stated in part:

> ... in In re Cox, ... the court made it clear that the Unruh Act was an articulation of a long-standing common law doctrine regarding business establishments which serve the public: "The common law attached to these enterprises 'certain obligations, including ... the duty to serve all customers on reasonable terms without discrimination and the duty to provide the kind of product or service reasonably to be expected from their economic role.'" ...
>
> But whereas the Unruh Act was a development or expression of the common law doctrine, the Fair Employment Practice Act was a direct encroachment into common law principles regarding employer's rights. The common law, strongly rooted in notions of "freedom to contract," provided generally that "(i)t is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor." ... Courts were firm in the belief that "an employer's right to employ and discharge whom he pleases, in the absence of any statutory or contractual provision is unquestioned." ...

> Undoubtedly then, the Legislature's enactment of the F.E.P. Act broke new ground in the field of employment practices, creating certain limitations of an employer's right to hire, retain or discharge his employees....

The appellate court further said that if there were any doubt about legislative intent, that doubt was dispelled in 1975 when the Legislature rejected a bill to amend the FEP Act to include "sexual orientation" as another enumerated basis of prohibited employment discrimination.

ISSUE II: IS EMPLOYMENT BIAS AGAINST HOMOSEXUALS DISCRIMINATION BASED ON "SEX"?

The appeals court rejected the argument that statistics show that male homosexuals "significantly" outnumber female homosexuals, and hence that a discriminatory policy has a "disparate effect" against men. The court said that the preference of PT&T for heterosexual employees has not had the effect of discriminating against the male gender. No statistics were presented regarding male versus female employees, and hence there was no showing of disproportionate impact based on sex.

The second aspect of this sex discrimination argument: Discrimination on the basis of homosexuality is "sex" discrimination in the literal sense of the word. The court referred to federal cases which "already made it clear that employment discrimination on the basis of sexual preference is not 'sex' discrimination under Title VII...."

In responding to the charge that when the FEPC refused jurisdiction, it denied homosexuals the "fundamental right" to work--and hence their

constitutional protections of due process and equal protection of the law, the court said:

(1) The right to work is not a "fundamental right." The "right to work" as expressed by the California courts is the "right to pursue a lawful occupation" free from arbitrary state interference. The FEPC has remained neutral.

(2) FEPC is not the exclusive forum available to the plaintiffs to secure relief from homosexual discrimination, as was claimed. Therefore, denial of access to the FEPC machinery is not a denial of due process. Further, the Commission has no power to handle homosexual claims: "... it would be absurd" to require "the FEPC to perform investigations and provide hearings on the basis of complaints that say nothing ."

The homosexual issue does provide an explicit example of the following observation:

> THE GROUNDS UPON WHICH DISCRIMINATION IS PROHIBITED
>
> The theory of fair employment practices legislation is that an employer is free to discriminate in hiring, promotion and other employment connected practices on any grounds he pleases except those grounds specifically barred by the act. The precise grounds specified in this type of statute must, therefore, be examined with some care.
>
> --Professor Arthur Bonfield, "The Substance of American Fair Employment Practices Legislation," 61 Northwestern Law Review 907, 912-18.

This explains, of course, the reason that given organizations are pushing for legislative protections. While no state has yet passed a law, the Wall Street Journal reported that "about 15 municipalities ... have passed" measures to prohibit discrimination in employment, housing, etc. (Jan. 17, 1977).

G. The Case of Maternity Leave, Sick Pay and Seniority

The Nashville Gas Co. had a policy which required pregnant women to take formal leaves of absence--of an indeterminate length--without sick pay. Further, the maternity leave policy triggered what, in effect, was a discharge, for upon taking maternity leave the employee automatically lost all accumulated job seniority. There was no promise of a job until she was able to return from maternity leave. If available, she would be given a temporary job when she was ready to return to work. But, while in the temporary job she could well lose a chance to fill a vacancy in a permanent position since she was at the bottom of the seniority list, other employees could outbid her, even those hired after she had gone on leave. Or, assuming that when she is ready to return to work a permanent position for which she qualifies is available, her lack of seniority, again, would deny her the job unless no one else bid for it. If and when the employee acquired a permanent position, she regained previously accumulated (noncompetitive) seniority for purposes of pension, vacation, and the like. But she did not regain her competitive seniority for the purposes of bidding on future job openings.

The sick leave-seniority policy for pregnant women differed from the sick leave-seniority policy for other employees--male and female--who had to take a leave for a nonoccupational illness or injury. They retained their accumulated seniority while on sick leave.

Seniority was forfeited by men and women who took leaves for any other reason, including pregnancy.

It was this policy that Nashville Gas Co. employee Nora Satty attacked under Title VII.

In 1972 she went on maternity leave without sick pay. During her three-month absence, Satty's clerical job had been eliminated by the installation of a computer. She was rehired in a temporary job at an entry-level salary which was some $10 less per week than her former weekly wage of $130.80. Because she was stripped of her competitive seniority she was not able, on three occasions, to bid successfully for permanent positions. She was discharged one month after her return to the company when her temporary job ended.

Supreme Court Decision

Both the district court and the Sixth Circuit Court of Appeals held that the sick pay and seniority policies violated Title VII. The Supreme Court, however, found denial of sick pay lawful, but the denial of accumulated seniority unlawful.

The Sick Pay Issue

The Court readily disposed of this issue by remanding it to the district court to be reviewed in light of the *Gilbert v. General Electric* decision. Justice Rehnquist, who wrote the majority opinion, said that Nashville's policy of not awarding sick-leave pay to pregnant employees

is "legally indistinguishable from the disability insurance program upheld in *Gilbert*." As the reader will recall, the Court ruled that excluding pregnancy-related disabilities from the General Electric income protection plan was not, on its face, a violation of Title VII. However, he pointed out that Satty could still win her case if she could show evidence under the second *Gilbert* test that the exclusion of pregnancy is "a pretext designed to effect an invidious discrimination against the member of one sex or the other."

Therefore, the Court held that it was necessary to send the case back to the district court as the "trier of fact" to determine whether Nashville's sick-leave pay plan was a "pretext" to discriminate.

(Note: A companion case involving the issue of sick pay for California teachers was also remanded to the lower court in light of *Gilbert* and for "consideration of possible mootness" since a California state law covering certificated employees provides, among other things, pregnancy coverage under disability or sick leave plans. The California suit was filed by a kindergarten teacher who had requested that she be allowed to work up to her expected delivery date and to use sick leave pay for her period of disability. She was denied the use of sick leave pay. Both the lower court and the Ninth Circuit Court of Appeals ruled in her favor. The California law that may have resolved the issue in the teacher's favor became effective Jan. 1, 1976 (AB 1060 by Berman, Chap. 914/1975). Currently pending in the California legislature is another Berman bill that would extend the same protection to all employees.)

Seniority Issue

The High Court in a unanimous decision on the seniority issue concluded that the policy of denying accumulated seniority to female employees returning from pregnancy leave violates Title VII, which declares it to be an unlawful employment practice for the employer to:

> limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's... sex.... (emphasis added)
>
> /Section 703(a)(2)/

Based on this provision the Court held that depriving employees returning from pregnancy leave of their accumulated seniority denies them employment opportunities and adversely affects their status as employees:

> ...It is apparent...that /Nashville's/ policy denied /Satty/ specific employment opportunities...Even if she had ultimately been able to regain a permanent position...she would have felt the effects of a lower seniority level, with its attendant relegation to less desirable and lower paying jobs, for the remainder of her career with /the company/.

Benefits and Burdens

The Court noted that in denying sick pay benefits to pregnant women the company was denying them a benefit that "men cannot and do not receive." But in denying pregnant women their accumulated seniority, the company "has imposed on women a substantial burden that men need not suffer."

The majority therefore held that Title VII does not "permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role."

What the Decision Tells Labor-Management Practitioners

In summary, the Court's decision, based on Title VII, said:

(1) Sick leave plans (or temporary disability insurance plans as in the *Gilbert* case) which deny benefits to pregnant women are not, on their face, sex discrimination under Title VII

UNLESS

it can be shown that such an exclusion is intentional sex discrimination, i.e., is a "pretext" to discriminate;

(2) denial of sick leave or disability benefits because of pregnancy does not affect a woman's employment opportunities upon returning to work or adversely affect her job status.

BUT

(3) a pregnancy-related policy that adversely affects a returning employee by limiting her job opportunities or affects her job status is sex discrimination in violation of Title VII. A company cannot successfully defend a policy -- such as denial of accumulated seniority -- based on the argument that it is permissible because it flows from the original decision to treat pregnancy differently for purposes of leave policies and benefit payments. For the formerly and temporarily pregnant employee is permanently disadvantaged as compared to the rest of the work force -- and since pregnant employees are all female, the policy has an obvious discriminatory effect.

INSTRUCTION SHEET

TAB L--RACIAL DISCRIMINATION

ADD NEW PAGES L-7 THROUGH L-26

VII. DO CIVIL RIGHTS LAWS PROTECT WHITE EMPLOYEES?

During the 1976-77 term, the U.S. Supreme Court responded to the two questions:

(1) Are white employees guaranteed the same protection as are black employees under Title VII and the Civil Rights Act of 1866?

(2) Can a union be sued under Title VII for failure to fairly represent white employees alleging racial discrimination?

The Court answers "yes" to both questions in *McDonald v. Santa Fe Trail Transportation Co.* (No. 75-260, June 25, 1976; 12 FEP cases 1577).

This case, brought by two white employees, was the result of a 1970 discharge action by the Santa Fe Trail Transportation Co. The suit was brought against the union--Teamsters Local 988--as well as against the company.

The two white male employees (McDonald and Laird) were fired for allegedly stealing cargo while the black employee (Jackson), also charged with the same offense, was not fired. They were charged with taking 60 one-gallon cans of antifreeze.

McDonald filed a grievance with Local 988, but received no relief through the grievance process. Subsequently, the two discharged employees filed Title VII complaints with the EEOC, charging that Santa Fe had discriminated on the basis of their race in firing

them and not the black employee also; and that the Teamsters local had discriminated against McDonald on the basis of his race in failing properly to represent his interest in the grievance.

The EEOC did not resolve the matter, so the Commission notified the two fired employees (July 1971) of their right to sue in court within 30 days. They sued under Title VII and under the Civil Rights Act of 1866 (Section 1981).

Almost three years later--June 1974--the district court dismissed both their Title VII and Section 1981 claims. The court, subsequently backed by the Court of Appeals for the Fifth Circuit, said that a worker who was guilty of criminal misconduct and was fired for that reason couldn't use Title VII to claim discrimination; the court ruled that the 1866 law was intended to protect the rights of newly freed blacks and did not confer legal rights on white persons.

The U.S. Supreme Court reversed the lower courts' decisions.

Supreme Court Findings and Conclusions

Title VII Coverage

Title VII prohibits discharge of "any individual" because of "such individual's race" (Section 703 (a) (1)). The Court said that Title VII protection is not limited to any particular race:

> ...although we were not there confronted with racial discrimination against whites, we described the Act in *Griggs v. Duke Power Co.* ... as prohibiting "[d]iscriminatory preference for *any* [racial] group, *minority or majority.*" (Court supplied emphasis)

However, in another case the Court said that one of the requirements for establishing a prima facie case of racial discrimination is to be a member of a *racial minority. (McDonnell Douglas Corp. v. Green;* see p.L-1)In explaining that there was no conflict between *Griggs* and *McDonnell Douglas,* the Court said that in the latter decision "we particularly noted this specification...of the prima facie proof required...is not necessarily applicable in every respect to differing factual situations"; that the requirement of belonging to a racial minority demonstrates "how the racial character of the discrimination could be established in the most common sort of case and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination."

In the *Santa Fe* case the Court gave the EEOC position "great deference" because of the Commission's *consistency* in interpreting Title VII as prohibiting racial discrimination against whites on the same terms as racial discrimination against non-whites. The EEOC position, the Court said "is in accord with uncontradicted legislative history." Title VII was intended to "cover all white men and women and all Americans " (110 Cong. Record 2579--remarks of Representative Celler, 1969), and creates an "obligation not to discriminate against whites" (id., at 7218--memorandum of Senator Clark).

The Court concluded:

> We therefore hold...that Title VII prohibits racial discrimination against the white petitioners /McDonald & Laird/... upon the same standards as would be applicable were they negroes and Jackson white.

Company's Position Rejected

Based on the foregoing analysis of Title VII coverage, the Court rejected the argument of the Company that since the two men were fired for a criminal offense, they should not be protected by Title VII:

> While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be "applied alike to members of all races" and Title VII is violated if...it was not.

This point was underscored again when the majority held:

> The Act prohibits *all* racial discrimination in employment, without exception for any group of particular employees, and while criminal or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination. (Court supplied emphasis).

In short, what the unanimous decision held was that an otherwise legal firing could be found discriminatory if race determined who was fired. The Court did not express an opinion on the merits of the discharge or the truth of the allegations. That is left to the district court to which the Supreme Court remanded the case.

Union Position Also Rejected

The claim against the union was that it had shirked its duty properly to represent McDonald who had filed a grievance. The complaint against the union was that it had "acquiesced and/or joined in" Santa Fe's alleged racially based discharge decisions.

The union argued that in settling differences with the employer compromises may be necessary; consequently, the compromise resulted in the retention of one employee. Since the union was responding to the realities of compromise, it argued that it should not be liable under Title VII. The Supreme Court did not agree, stating:

> We reject the argument. The same reasons which prohibit an employer from discriminating on the basis of race. . . apply equally to the Union; and whatever factors the mechanism of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them.

The claim against the union was also sent back to the district court to be considered in light of the ruling concerning the applicability of Title VII.

Coverage of Civil Rights Act of 1866

Section 1981 of the Civil Rights Act of 1866 provides that "/a/11 persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens."

While the Court was unanimous in its decision that Title VII protection applies to all races, the Court split on whether Section 1981 of the Civil Rights Act of 1866 applied equally to whites and blacks. Justices White and Rehnquist dissented.

In previous decisions the Supreme Court had ruled that Section 1981 covers the *private* sector as well as the public sector in employment discrimination. Those rulings related to cases in which discrimination against blacks was the issue. Thus in the instant case the Court was to determine if Section 1981 also prohibits racial discrimination in private employment against whites. The Court was faced with the fact that lower federal courts had divided on the applicability of Section 1981 to racial discrimination against white persons.

In the *Santa Fe* case, both the district and appellate courts failed to elaborate on the reasons for not applying Section 1981 to racial discrimination against white persons. However, the company and the union suggested two reasons to support the lower courts:

(1) the phrase "as is enjoyed by white citizens" clearly limits itself to protection of nonwhites against racial discrimination.

(2) such an interpretation is consistent with the legislative history of the law. They asserted that the 1866 law was to assure specified civil rights (e.g., to make contracts, to sue, etc.) for former black slaves freed by the Thirteenth Amendment.

The Court did not find these arguments "persuasive." Rather, the majority was persuaded by an examination of the language and extensive review of the history of Section 1981 that the 1866 statute applies to racial discrimination in private employment against white persons.

In looking at the Congressional debate, the Court concluded that "...the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as nonwhites. The point was most directly focused on in the closing debate in the Senate... in /Senator Trumbull's/ response to the argument of Senator Davis of Kentucky that by providing for the punishment of racial discrimination in its enforcement section..., the bill extended to Negroes a protection never afforded whites." The Court quotes Senator Trumbull:

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous

> and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all citizens of the country, *a bill that protects a white man just as much as a black man?* With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it and when *the very object of the bill is to break down all discrimination between black men and white men?"* Cong. Globe p. 599 (emphasis supplied).

After passage of the bill, following agreement by the Senate to accept the House amendments, President Andrew Johnson vetoed the measure. In his veto message, President Johnson recognized that the bill attempted to fix "a perfect equality of the white and black races." (*Cong. Globe,* p. 1679). The veto was overriden by the Thirty-ninth Congress.

The Court majority concluded that the district court, backed by the appeals court ruling, erred in dismissing the union members' claims under Section 1981;the judgment of the Court of Appeals for the Fifth Circuit was reversed.

The case was sent back to the lower court to be reconsidered on the basis of the Supreme Court's decision concerning both Title VII and Section 1981 of the Civil Rights Act of 1866.

VIII. RACIAL DISCRIMINATION AND STATISTICS

One of the continuing and complex issues in EEO cases is the use of statistics to establish a prima facie case of discrimination. Courts also use labor statistics to fashion a remedy if discrimination is found.

For those interested in a critical analysis of how the courts have used statistics, see "The Use of Labor Statistics and Analysis in Title VII Cases: Rios, Chicago and Beyond," by Dr. Marc Rosenblum, in Industrial Relations Law Journal, Vol. 1, No. 4, Winter 1977 . (Published by School of Law, University of California, Berkeley)

During its 1976-77 term, the Supreme Court handed down two racial discrimination decisions dealing with the issue of statistical proof in establishing whether there was reasonable cause to conclude the specified employment practice resulted in discrimination against black employees. The burden then shifted to the employer to disprove otherwise.

In the *Teamster* decision (see Tab A for full discussion of the case as it relates to the issue of retroactive seniority), the Court described the role of statistics in Title VII pattern or practice suits. In *Teamsters*, the Court said that when the government brings a pattern or practice suit it has the burden "to establish by a preponderance of the evidence that racial discrimination was the /employer's/ standard operating procedure--the regular rather than the unusual practice," and that statistics, the Court said, can be an important source of proof in employment discrimination cases because

> absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. 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 Sec. 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population. (emphasis added)
>
> /Note: Section 703(j) prohibits preferential treatment in attempting to balance a work force./

Comparing the composition of an employer's work force with the general population may be significant depending on the given facts in a case. Comparing an occupation within an employer's work force with the same occupation in a relevant labor market area is also considered proper by the Supreme Court (*Hazelwood School District v. U.S.*, No. 76-255, June 27, 1977; 15 FEP Cases 1.)

The *Hazelwood* case was initiated by the U.S. Department of Justice, alleging the Hazelwood School District had used racial discrimination in its hiring practices. The government cited an historic "pattern or practice" of discrimination against black applicants for teaching positions. The government offered what it considered sufficient statistical proof to establish a prima facie case of racial discrimination in

the district's hiring practices. Included in the government's case were 55 individual claims by black applicants who were rejected for employment between 1970 and 1973, alleging that whites got the teaching jobs who were not as well qualified or were no better qualified. The government sought back pay for those victims of past discrimination.

Background and Facts

The Hazelwood School District, covering 78 square miles in the northern part of St. Louis County, Missouri, was formed from 13 rural school districts through annexations. Before the Supreme Court's 1954 ruling against segregated schools, the Missouri State constitution required racially segregated schools. But since no blacks had lived in the Hazelwood School district before 1954, the district did not have any black students or black teachers. And before 1954, Hazelwood's application forms required designation of race; these forms were used as late as the 1962-63 school year.

The hiring procedures of the Hazelwood School District were not structured; each school principal was given virtually free choice in the selection process (applicants were sent from the central personnel office). The only general requirement was to hire the "most competent" person and "personality, disposition, appearance, poise, voice, articulation, and ability to deal with people" counted heavily.

In the early 1960s the school district had to recruit new teachers. Members of the district staff visited Missouri colleges and universities and those in bordering states--all of which were predominantly white. Hazelwood did not seriously recruit at either of the two four-year colleges in the State that were predominantly black. One was never visited, although it was located nearby in St. Louis; the second was briefly visited on one occasion, but no potential applicant was interviewed. When in the early 1970s the supply of teachers exceeded demand, Hazelwood stopped its recruiting efforts.

Hazelwood hired its first black teacher in 1969. The number of employed black teachers gradually increased in successive years:

School Year	Black Faculty	Out of Total Faculty of
1970-71	6 (less than 1%)	957
1972-73	16 (1.4%)	1107
1973-74	22 (1.8%)	1231

In March 1972, Title VII coverage was extended to the public sector. The hiring pattern for the two-year period, 1972-74,showed that 15 out of a total of 405 new teachers were black (3.7%):

School Year	Blacks Hired	Out of Total New Hires
1972-73	10 (3.5%)	282
1973-74	5 (4.1%)	123
	15 (3.7%)	405

The 1970 Census showed that of the 19,000 teachers employed in the St. Louis area, 15.4% were black, compared to less than 2% in Hazelwood. The St. Louis area includes the County of St. Louis (in which the Hazelwood School District is located) and the City of St. Louis (which is not in, but is surrounded by, the County).

This St. Louis area was the relevant labor market used by the federal government in its suit against the school district. In turn, the school district argued against inclusion of the City of St. Louis since the city was attempting to maintain a 50% black teaching staff which, the district claimed, "distorted" the statistical comparison. (By excluding the city's school district, the 1970 Census figure would show 5.7% of the teachers in the county were black, compared to less than 2% in Hazelwood.

District Court Rules for School District

The district court ruled that the federal government had failed to establish a pattern or practice of discrimination. It rejected the argument and evidence that the district had a history of racial discrimination because (1) a dual school system had never existed, and (2) the statistics showing that a relatively small number of blacks were employed as teachers did not prove discrimination because the number of black pupils was also small (about 2%). And the court saw nothing wrong with the recruitment or hiring procedures.

Appeals Court Rules for Government

On appeal, the Eighth Circuit Court of Appeals disagreed with the lower court and ruled in favor of the government. The court ordered the school district to cease its discriminatory practices, to place 16 rejected black applicants on a "preferred hiring list," and directed it to award back pay to two of the rejected black applicants and to determine whether another fourteen were entitled to back pay (55 had claimed discrimination).

The appeals court, in a divided vote, said comparison of the number of black teachers to the number of black students was irrelevant. The proper comparison should have been made between black teachers in Hazelwood and black teachers in the "relevant labor market area": St. Louis County and St. Louis City, (15.4% were black teachers).

In the 1972-73 and 1973-74 school years, less than 2% of Hazelwood's teachers were black. The court said that this statistical difference between Hazelwood and the St.Louis area, especially when viewed against the hiring procedures, constituted a prima facie case of a pattern or practice of racial discrimination.

In accepting the government-selected geographic area for comparison, Justice Clark noted that one-third of the teachers hired by Hazelwood lived in the City of St. Louis at the time of hire. Therefore, it was appropriate to include the city as part of the relevant labor market:

> We accept the Government's contention that St. Louis City and County is the relevant labor market area...The relevant labor market area is that area from which the employer draws its employees...Of the 176 teachers hired by Hazelwood between October, 1972, and September, 1973, approximately 80 percent resided in St. Louis City and County at the time of their initial employment. Approximately one-third...hired during this period resided in the City of St. Louis...and 40 percent resided in areas of St. Louis County other than the Hazelwood District.

Further, the appeals court said that a "telling statistic" was that after Title VII applied to the school district (1972), only 3.4% of the new teachers were black.

Also given weight was the fact that Hazelwood had not employed black teachers until 1969; that both before and after Title VII coverage Hazelwood "used a standardless and largely subjective hiring procedure." The Hazelwood School District appealed to the Supreme Court.

Supreme Court Decision

As a result of the Supreme Court decision, the *Hazelwood* case went back to the district court. The sole dissent was by Justice Stevens, who felt the school district had had a chance to make its case initially at the district court level and had failed to do so. He said that the appeals court had correctly appraised the record before it, and, therefore, "at some point litigation must come to an end."

The Hazelwood School District was given another chance statistically to refute the government's charge that it had an historic pattern of racial discrimination in hiring teachers.

District Court Erred...But so did Appeals Court

The High Court said that the district court was "legally" wrong in basing a comparison on the number of Hazelwood's black teachers with the number of black students in the district; that the appeals court used the proper basis of comparison, namely, between Hazelwood's black teaching staff and the employed teacher population in the relevant labor market.

However, the Court held that the appeals court made a mistake in accepting the government's statistical evidence as conclusively showing that a "pattern or practice" of racial discrimination existed in Hazelwood's hiring practices, because

(1) the determination of the geographic area to be used in a comparison is a fact-finding function of the district court. The appeals court should have returned the case to the lower court for a determination of the proper labor market to be used for the comparison;

(2) in accepting the government's statistics as proof of a prima facie case of discrimination, the appeals court did not consider the hiring practices after the school district came under Title VII coverage (March 2, 1972):

> A public employer who from that date forward made all its employment decisions in a wholly non-discriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes. For this reason, the Court cautioned in the *Teamsters* opinion that once a prima facie case has been established by statistical work force disparities, the employer must be given an opportunity to show "that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination.

The Supreme Court did not close the door on the use of pre-Title VII evidence as proof of discrimination:

> 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 to the decision making process had undergone little change...and, of course, a public employer even before extension of Title VII...was subject to the command of the Fourteenth Amendent not to engage in purposeful racial discrimination. (footnote 15 of the decision)

(3) The appeals court did not consider "applicant flow" data. While the majority touched briefly on this point, Justice White suggested that the government should be required to use "applicant flow" statistics to demonstrate a prima facie case of employment discrimination. He voiced reservations about allowing the government to prove a case of discrimination by relying on comparative work force data. (See p. L-24)

Supreme Court Issues Guidelines

The Court highlighted the importance of the contested labor market area, especially in the issue of post-Title VII hiring:

> What the hiring figures prove obviously depends upon the figures to which they are compared. The Court of Appeals accepted the Government's argument that the relevant comparison was to the labor market area of St. Louis County and St. Louis City, in which, according to the 1970 census, 15.4% of all teachers were Negro...that comparison was vigorously disputed by /Hazelwood/...because the City of St. Louis has made special attempts to maintain a 50% Negro teaching staff, inclusion of that school district in the relevant market area distorts the comparison. Were that argument accepted, the percentage of Negro teachers in the relevant labor market area (St. Louis County alone) as shown in the 1970 census would be 5.7% rather than 15.4%.
>
> The difference between these figures may well be important; the disparity between 3.7% (the percentage of Negro teachers hired by Hazelwood in 1972-1973 and 1973-1974) and 5.7% may be sufficiently small to weaken the Government's other proof, while the disparity between 3.7% and 15.4% may be sufficiently large to reinforce it....

EXPLANATION OF APPLICANT FLOW STANDARD

An "applicant flow" standard focuses on the disparity (difference) between the proportion of minority applicants and those hired. This bypasses the use of labor force and labor market data. The basic assumption of the standard: all applicants are equally qualified. Thus: Let's say the Hazelwood School District has to hire 100 teachers and 200 apply. The following breakdown shows the number of teachers who applied, the number who were hired, and the number selected by race:

	TOTAL	(1) WHITE	(2) MINORITY
Applicants	200	100	100
Hired	100	50	50

Same proportion hired in relation to applications

Based on the selection of an equal number of white and minority applicants, there would be no charge of discrimination.

- - -

If the following results occur, then this could trigger a claim of racial discrimination and the burden would fall to the Hazelwood School District to prove that those rejected were not qualified and hence racially based reasons did not guide the selection:

	TOTAL	(1) WHITE	(2) MINORITY
Applicants	200	100	100
Hired	100	75	25

This difference could trigger Title VII case.

Therefore, in remanding the case to the district court, the Supreme Court set forth suggestions or guidelines that the trial court should consider:

(1) whether the racially based hiring policies of the St. Louis City School District were in effect as far back as 1970, the year of the census figures;

(2) to what extent the city's policies have changed the racial composition of the school district's teaching staff from what it would otherwise be;

(3) to what extent St. Louis' recruitment policies have diverted to the city teachers who might otherwise have applied to Hazelwood;

(4) to what extent black teachers employed by the City of St. Louis would prefer employment in the other districts such as Hazelwood; and

(5) what the experience in other county school districts indicates about the validity of excluding the city school district from the relevant labor market.

The complex problem is back in the lap of the judge at the trial court level. Whatever his decision may be, other courts will be looking to the Supreme Court's suggestions in the *Hazelwood* case, as well as the Court's comments in the *Teamsters* case about the important role of statistics in pattern or practice discrimination suits.

It is safe to say that statistical validity in proving or disproving racial (or indeed sexual) discrimination in class action suits is and will remain a lively, contested issue in EEO developments. Judges, no less than many labor-management relations practitioners, affirmative action

officers and attorneys have been thrown into the often unfamiliar world of statistical language--"multiple regressions," "multiple linear regression," "analysis of variance," etc.

As someone once wrote--"Every successful use of technical information by the law has had to travel the path from strangeness to indispensability."

INSTRUCTION SHEET

TAB M - NATIONAL ORIGIN

ADD NEW PAGES M-3 THROUGH M-7

IV. ALIENS COVERED UNDER CIVIL RIGHTS ACT OF 1866

While the Supreme Court decision in *Espinoza* held that "nothing in /Title VII/ makes it illegal to discriminate on the basis of citizenship or alienage," the same holding does not apply under the Civil Rights Act of 1866 (Section 1981), according to the Fifth Circuit Court of Appeals. /*Guerra v. Manchester Terminal Corp.*, 498 F. 2d 641; 8 FEP cases 433 (5th Cir. 1974.)/

The *Guerra* decision was occasioned by a suit filed by Guerra, a Mexican citizen lawfully residing in Houston, Texas as a registered alien. While working for the Manchester Terminal Corporation (Terminal) his family remained in Mexico.

At the time the lawsuit arose, the union representing the workers at the Terminal--Local 158, International Longshoremen's Association--limited its membership to United States citizens and those declaring their intent to become citizens.

Guerra was not a member, though most of the Local's members were Mexican-American or Mexican Nationals.

As a result of 1965 contract negotiations, Terminal agreed to hire its employees through the union hiring hall and to give preference to U.S. citizens. Other aspects of the agreement dealing with job assignments and job locations adversely affected Guerra and other Mexican Nationals.

He charged that various policies and practices discriminated against him and other Mexican Nationals on the basis of national origin, in violation of Title VII and the Civil Rights Act of 1866 (Section 1981).

The appeals court found that there was discrimination against him, and that this discrimination was not based on national origin, but on his alienage--i.e., his status as a noncitizen. He therefore was not entitled to relief under Title VII based on the *Espinoza* ruling.

However, the appeals court said that discrimination based on his status as an alien was protected by the Civil Rights Act of 1866, Section 1981. The court pointed to Supreme Court decisions, including a 1971 High Court ruling in which it was noted that "The protection of /Section 1981/ has been held to extend to aliens as well as to citizens." /*Graham v. Richardson*, 403 U.S. 365/. The appeals court further said it is well established that the 1866 law applies to private companies as well as to public agencies.

It has been noted that *Guerra*, "if good law," has filled the gap in national origin discrimination when alienage was excluded from coverage under Title VII. However, Section 1981 does not entitle plaintiffs to attorney's fees if they should win, and they may have problems with state statutes of limitations which usually govern in Section 1981 cases. On the other hand, monetary awards under Section 1981 are not limited as they are under Title VII. (For Section 1981 provisions and further discussion, see Tab L - Racial Discrimination).

V. ALIENS IN FEDERAL EMPLOYMENT

The Supreme Court split sharply on the constitutionality of a U.S. Civil Service Commission regulation which barred all persons except American

IV. REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

The initial paragraph of the first page of this section, written in early 1976, contains the following statement: "Comparatively little attention has been given to the dilemma created by the employee whose religious beliefs forbid him or her to work on given days."

Now, two years later, 1978, it is necessary to qualify that statement, for in 1977 the U.S. Supreme Court handed down a critical decision. The Court held that employers are not required to violate the negotiated seniority rights of other employees in order to accommodate the religious needs of an individual, and that anything more than a minimal cost to the employer constitutes an "undue hardship." While the ruling is a major legal defeat for those whose religion requires observance of a Saturday Sabbath and certain holy days, the reasoning could also apply to Sunday observers who are ordered to work on those days. (*Trans World Airlines v. Hardison*, Nos. 75-1126 and 75-1385, June 16, 1977)

Joining TWA in the Supreme Court appeal was the International Association of Machinists and Aerospace Workers (IAM, AFL-CIO). The 7-2 opinion said, in effect, that if Congress wanted to bend seniority rules and the rights of other employees, then it would have to legislate that intent. Justice White, writing for the majority, stated:

The four justices who dissented argued that simply because the rule was adopted by the Civil Service Commission rather than directly by Congress does not justify the "back door" attack on its legitimacy. They also reasoned that the decision to exclude aliens from employment is political in nature and not subject to interference by the courts.

The suit was filed by five lawfully admitted resident aliens who were born in China--one held a job with the post office loading and unloading mail until it was learned he was not a citizen. A second plaintiff was refused employment as a janitor with the General Services Administration; the others tried to get clerical jobs.

Shortly after the *Hampton* decision, President Ford issued Executive Order 11935 (September 2, 1976), requiring citizenship for admission to federal competitive examinations and for appointment to civil service. Exception may be made for temporary appointments or where necessary to promote the efficiency of the service. In the communication issued with the Order, the President noted the *Hampton* decision. He stated that he felt it was in the national interest to maintain the existing civil service policy until an appropriate determination could be made as to whether the national interest would be served by employing aliens in the competitive service. Pointing out that the primary responsibility for admission and regulation of aliens lay with Congress, he urged Congress to address this issue promptly.

In explaining his decision, President Ford pointed out that the existing statutes discriminate between citizens and categories of

aliens in a manner which affects their rights. Additionally he noted that legislation was before the Congress which would more broadly prohibit the federal employment of aliens than did his Order.

VI. ALIENS IN STATE EMPLOYMENT

State laws that prohibit the hiring of resident aliens have consistently been struck down. They have been declared unconstitutional under the Equal Protection Clause of the Fourteenth Amendment: "No State shall... deny to any person... the equal protection of the laws." (emphasis added)

Examples of State laws found unconstitutional:

--a New Jersey law prohibiting the hiring of aliens in public works

--a New York law barring aliens from civil service jobs

--a California Labor Code provision making it illegal for contractors knowingly to hire an alien on public works projects.

INSTRUCTION SHEET

TAB N--RELIGION

ADD NEW PAGES N-5 THROUGH PAGES N-23

IV. REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

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Joining TWA in the Supreme Court appeal was the International Association of Machinists and Aerospace Workers (IAM, AFL-CIO). The 7-2 opinion said, in effect, that if Congress wanted to bend seniority rules and the rights of other employees, then it would have to legislate that intent. Justice White, writing for the majority, stated:

> In the absence of clear statutory language or legislative history to the contrary, we will not readily construe /Title VII/ to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

The Court's decision counters the Wolkinson conclusion on page N-4 that "it is...possible that as employees recognize the futility of arbitration in religious discrimination cases, they are increasingly turning to the EEOC for relief." For the *Hardison* decision is an obvious defeat of the EEOC position on religious accommodation.

While the Supreme Court reached its decision in *Hardison* according to legal reasoning, the decision, in the final analysis, does not differ from the prevailing arbitral view that exempting an employee from uniform work rules for religious reasons violates the nondiscrimination provisions of a contract and, hence, such exemptions are themselves discriminatory since they result in preferential treatment.

Developments Prior to *TWA v. Hardison*

As originally enacted in 1964, Title VII prohibited religious discrimination without explaining what that meant.

In 1967, the Equal Employment Opportunity Commission issued amended guidelines requiring an employer "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship in the conduct of the employer's business...." (emphasis added. (Section 1605.1 (b).)

One of the issues that surfaced following the promulgation of the 1967 guidelines was the discontent or complaints of other employees who had to fill in for the absent Saturday Sabbatarian. Were such complaints an "undue hardship" on the employer? It was the position of the EEOC that complaints or grumblings of fellow employees, in and of themselves, did not contitute undue hardship in the conduct of the employer's business. However, the EEOC felt it was possible that employee morale problems could become sufficiently acute to constitute an undue hardship for the employer. The EEOC, in interpreting its guideline provisions, noted the possibility of undue hardship when the employer would make a persuasive showing that employee discontent would produce "chaotic personnel problems." /EEOC Decision, No. 71-463, Nov. 13, 1970/

Response to Supreme Court Deadlock (*Dewey v. Reynolds Metal Co.*)

In 1972 Title VII was amended to incorporate the reasonable accommodation-undue hardship provisions of the EEOC guidelines.

The reasonable accommodation amendment was a response to the uncertainty created by a tie vote of the U.S. Supreme Court (Justice Harlan not voting) in the case of *Dewey v. Reynolds Metal Co.* /402 U.S. 689, 1971/

... About Dewey

Plaintiff Dewey, after his employer had instituted a seven-day workweek, refused because of his religious beliefs to work on Sundays. He also refused to seek a replacement.

The district court found in favor of Dewey, but the Sixth Circuit Court of Appeals reversed the decision, holding that the employer had met his duty in trying to accommodate. Also, the court gave weight to the arbitration decision, according to which Dewey lost.

But the court went further: it stated that the EEOC had not been given statutory (Title VII) authority to require an employer to accommodate, and if there were such statutory authority, it "would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment."

Since the Supreme Court did not decide the issue, the Congress amended Title VII.

Title VII provisions are broader than the EEOC guideline language, which extends to "all aspects of religious observance and practice, as well as belief."

EEOC Guideline Section 1605.1(b) reads in part:	Title VII, Section 701 (j) reads in part:
...the duty not to discriminate on religious grounds, ...includes an obligation on the part of the employer to make reasonable accommodation to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business....	The term "religion" includes all apects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business....

This broader language in the law itself--i.e., inclusion of "all aspects of religious observance and practice, as well as belief"--has been used by employees to object on religious grounds to

--making particular products; e.g., a religious pacifist's refusal to make ammunition

--shaving

--joining a union or paying agency fees under a union security provision in a negotiated labor-management agreement.

Second Supreme Court Deadlock (*Cummins v. Parker Seal Co.*)

Five years after deadlocking in *Dewey*, the Supreme Court found itself repeating the performance.In 1976 the Court, by a 4 to 4 vote, with Justice Stevens not participating, affirmed a decision of the U.S. Court of Appeals for the Sixth Circuit that the Kentucky-based Parker Seal Company was guilty of religious discrimination when it discharged Paul Cummins, a supervisor who belonged to the World Wide Church of God. /*Cummins v. Parker Seal Co.*, No. 75-478, Nov. 2, 1976; 13 FEP Cases 1178/. The basis of the discharge was Cummins' inability to work on Saturdays, his Sabbath.

Appeals Court Decision

The 2-1 decision held that Title VII and the EEOC Guidelines on religious discrimination were constitutional.

Two issues were raised in this case:

(1) A Title VII Issue: Did the employer attempt to reasonably accommodate without suffering an undue hardship?

(2) A Constitutional Issue: Did Title VII and the EEOC guidelines violate the First Amendment of the U.S. Constitution guaranteeing both freedom of religion and separation of Church and State?

Title VII: Accommodation Issue

The appeals court overturned the district court ruling that the Parker Seal Co. did attempt to accommodate Cummins, and that any further accommodation would have created an undue hardship on the employer's business; hence the Company was justified in discharging him. /516f. 2d 544, 10 FEP Cases 974 6th Cir. 1975/

In overturning the decision, the court noted that the trial court did not spell out what "undue hardship" would have resulted. Nor did the lower court explain "why an accommodation that was reasonable for over a year (from July 1970 when Cummins joined the World Wide Church of God until his discharge) suddenly became unreasonable in September 1971." It was the conclusion of the appeals court, based on the factual record, that the major reason for Cummins' discharge was the resentment of his fellow supervisors who had to work on Saturdays while Cummins was not forced to do so. The appeals court said:

> ...The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business.... It is conceivable that employee morale problems could become so acute that they would constitute an undue hardship. The EEOC...has noted /such a possibility/...however /Parker Seal/ has shown no such dire effect upon the operation of its business.

The appeals court suggested that the company could have alleviated some of the dissension by actively pursuing a means to accommodate Cummins. For example, the company could have required him to work longer hours on weekdays or on Sundays; or reduce his salary based on a shorter workweek; or to "have taken pains" to make sure that Cummins substitute for other supervisors on an equitable basis, rather than assuming that the co-workers would make such demands on him.

The majority thus concluded the company had violated Title VII.

Constitutional (First) Amendment Issue

The majority reached the conclusion that Title VII and the EEOC guideline provisions did not violate the First Amendment, rejecting the company's contention that both Title VII and the guidelines were laws "respecting an establishment of religion" and therefore invalid under the First Amendment.

The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

The "no law respecting an establishment of religion" language is known as The Establishment Clause. The "free exercise /of religion/" language is known as the Free Exercise Clause.

Among the constitutionally based arguments made by Parker Seal was the contention that under the accommodation rule, an employer may be required to excuse an employee from Saturday work to attend church, but an atheistic employee wishing to go fishing on Saturdays enjoys no similar right under Title VII. Consequently, the Company argued, the rule constitutes a governmentally mandated preference for religion that is impermissible under the First Amendment.

In deciding that both the law and the EEOC guideline provisions were constitutional, the appeals court majority used three standards set down by the Supreme Court to determine if a law can pass constitutional muster. A law

(1) "must reflect a clearly secular legislative purpose,"

(2) "must have a primary effect that neither advances nor inhibits religion," and

(3) "must avoid excessive government entanglement with religion."

/*Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973/

While two members of the appeals court felt that Title VII and the EEOC guidelines satisfied these tests, Judge Celebrezze strongly dissented.

He stressed that government "neutrality is the heart of the religion clauses of the First Amendment," and that this First Amendment stands as "a wall of separation between church and State." He said that Title VII

and the EEOC requirements "breached the wall":

> /Both/ grant preferences to employees by reason of their religion, forcing modifications in seniority systems, overtime scheduling, and other forms of employee organization.... Exemption from uniform work rules for religious reasons has been recognized as an unfair and undue preference under collective bargaining agreements....

Based on his analysis of the three constitutional standards, he concluded that the "religious accommodation rule violates the First Amendment" but noted:

> Striking down the religious accommodation rule would not change the law requiring employers to disregard religion in employment decisions. Discrimination based on religion is illegal. If a Saturday Sabbath observer can show that an employer discharged him for refusing to work on Saturdays although similarly situated employees were not required to work on Saturdays or were exempted from Sunday work, he could maintain that the actual reason for his discharge was religious discrimination, not his refusal to work on Saturdays....

Judge Learned Hand, eminent in the annals of jurisprudence, offered his view of the First Amendment:

> The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens*, no matter what economic loss his change of domicil

> entailed. We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.
>
> Source: *Cotten v. Baltimore & O.R.R.*, 205 F. 2d58, 61 (2d cir. 1953)

Trans World Airlines v. Hardison: Supreme Court Rules Third Time Around

In 1976 the Supreme Court on a 7-2 vote finally ruled on the religious accommodation issue. (97 S. Ct. 2264 (1977))

This case involved a collective bargaining agreement. The union, the International Association of Machinists, AFL-CIO, was concerned that the accommodation issue threatened seniority-based job bidding, promotions, transfers, shift preference, overtime work preferences, etc. Consequently the union joined the company in arguing against Hardison and the EEOC position.

Again, as in most religious discrimination cases, the issue that generated the litigation involved work schedule changes to accommodate an employee's religious belief and practice.

The Supreme Court decision, for all practical purposes, has made meaningless the reasonable accommodation requirements of Title VII.

The decision is a legal deliverance for those hoping for the ruling handed down; for others it represents a legal Armageddon.

The Court majority--7 out of 9 Justices--concluded that

> (1) seniority provisions prevail over accommodating to a person's religious observances and practices; and in accommodating
>
> (2) more than minimal cost to the employer is an "undue hardship."

Facts and Background

Trans World Airlines (TWA) operates an airplane maintenance and overhaul base in Kansas City, Missouri. In 1967 Larry Hardison was hired to work as a clerk in the Stores Department, which operates 24 hours per day, 365 days per year. Whenever an employee's job in the Stores Department is not filled, another employee must be shifted from another department, or a supervisor must fill in.

TWA had a collective bargaining agreement with the International Association of Machinists (IAM), an AFL-CIO affiliate. The seniority system, based on job classification and departmental seniority, provides that the most senior employees have, among other things, first choice for job and shift assignments.

The negotiated agreement provides in pertinent part:

> The principle of seniority shall apply... in all reductions or increases in force, preference of shift assignments, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers... seniority shall apply in selection of shifts and days off within a classification within a department.

In 1968 Hardison began to study the religion of the World Wide Church of God. One of the tenets of this religion is that one must observe the Sabbath by not working from sunset on Friday until sunset on Saturday. Additionally, work is prohibited on certain holidays.

Hardison spoke to his manager in the Stores Department of his religious conviction and of the need not to work on Saturday, his Sabbath. Because Hardison had sufficient seniority, there was no problem in accommodating to his need to be off on Saturdays; he transferred to the 11 p.m.-7 a.m. shift.

However, when he transferred to another job in another building, the problem of his religious practice surfaced again. The two buildings had separate seniority lists; so while Hardison had enough seniority in the first building, in which he formerly worked, to shift his hours of work to observe his Sabbath, in the second building he was second from the bottom on the seniority list. There was factual disagreement in the case as to whether Hardison could have returned to his former building with his seniority intact. In any event, the rules prohibited a transfer for a given number of months.

He was asked to work Saturdays when a fellow employee was on vacation. TWA agreed to permit the union to seek a change of work assignment, but the union was unwilling to violate the seniority provisions to satisfy Hardison who had insufficient seniority to bid for a shift having Saturdays off.

TWA rejected a proposal that Hardison be allowed to work only four days a week, maintaining that his job was essential to the operation.

No accommodation was reached, and Hardison was fired for refusing to work on Saturdays. He filed a complaint with the EEOC and moved

into the federal district court, asking for injunctive relief against TWA and the union, claiming his discharge constituted religious discrimination in violation of Title VII.

The district court ruled in favor of both TWA and the union, holding that the union's duty to accommodate Hardison's religious beliefs did not require it to ignore the seniority system and that TWA had met its "reasonable accommodation" obligations.

The Court of Appeals for the Eighth Circuit agreed with the lower court in its ruling in behalf of the union. It disagreed, however, with the trial court's ruling in favor of TWA, holding that the company had not made a sufficient effort to meet its obligation to accommodate the discharged employee's religious needs.

Both TWA and IAM petitioned the Supreme Court for a review, which was granted.

Supreme Court Decision

Majority Opinion

The Supreme Court disagreed with the appeals court that TWA could have met its obligations by one of the following alternatives:

(1) Permitting Hardison to work a four-day week by having a supervisor or another worker work his fifth day, or

(2) Filling Hardison's Saturday shift from a work pool of at least 200 workers competent to do the job and paying the worker the premium overtime rate, or

(3) Arranging a "swap" between Hardison and another employee either for another shift or for the Sabbath days.

Court's Concept of "Undue Hardship"

In the opinion of the High Court, any one of these alternatives would have resulted in an "undue hardship" to TWA:

Alternative 1: (4-day week)	would have "caused other shop functions to suffer" hence there would be a loss of efficiency;
Alternative 2: (premium pay for overtime	would have meant additional costs to TWA and any expenditure above a minimal cost is an undue hardship. There is the likelihood that a company as large as TWA may have many employees whose religion, like Hardison's, prohibited them from working either on Saturdays or Sundays.
Alternative 3: (swapping shift for Sabbath days)	would have required a breach of the seniority provisions of the contract and hence would have violated rights of other employees.

Reasonable Accommodation vs. Seniority

It was the judgment of the seven Supreme Court Justices that the seniority system itself represented a significant accommodation to both the religious and secular needs of all TWA employees. Both the union and TWA had agreed to the seniority system; since the union had been unwilling to make an exception for Hardison over the objections of more-senior employees, TWA could not have made the swap unilaterally because that would have been a breach of the contract. The Court said:

> ...TWA cannot be faulted for having failed itself to work out a shift or job swap for Hardison...the union was unwilling to entertain a variance /of the seniority provisions/ over the objections of men senior to Hardison; and for TWA to have arranged unilaterally for a swap would have amounted to a breach of the collective-bargaining agreement.

EEOC Position on Seniority Rejected

EEOC took the position that the Title VII requirement to accommodate

religious needs took precedence over the TWA-IAM contract and thus over the seniority rights of TWA's other employees. The Court, in rejecting the EEOC argument, explained:

> We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate /Title VII/, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement.

Then the Court continued:

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with...the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances....

Seniority Rights of Other Employees

The Court balanced the rights of more-senior employees to Hardison's, concluding that if TWA had "circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shif preference so that Hardison could be given his. The senior employee would...have been deprived of his contractual rights under the collective-bargaining agreement."

The Court stated that since it was essential to TWA's business to require weekend work from at least a few employees, though most preferred those days off, allocating the burdens of weekend work was a matter for collective bargaining. In turn, the parties in negotiating the agreement had two choices:

(1) adopt a neutral system such as seniority, a lottery, or rotating shifts or

(2) allocate days off in accordance with the religious needs of the employees.

Consequently to accommodate Hardison choice (2) would have to be negotiated. Such a decision would have assured all employees of having those days off when needed to follow their religious dictates. But, the Court said, this approach would have been at the expense of others "who had strong, but perhaps nonreligious reasons for not working on weekends."

Since there were no volunteers to relieve Hardison on Saturdays, TWA would have to deprive another employee of shift preference, at least in part because he did not follow a religion that observed the Saturday Sabbath. The Court ruled:

> Title VII does not contemplate such unequal treatment... discrimination is proscribed when it is directed against majorities as well as minorities.... It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contracted rights in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

And, finally, the Court pointed to the provision of Title VII which protects neutral or bona fide seniority systems (Section 703 (h)). Referring to the seniority decisions in *Bowman* and *Teamsters* (see Tab A for a full discussion of these cases), the Court stated:

> ... absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.
>
> There has been no suggestion of discriminatory intent in this case.

Vigorous Dissent

Justice Marshall, writing also for Justice Brennan, claimed that the majority decision "deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices."

And he charged:

> The Court holds, in essence, that although the EEOC regulation and /Title VII/ state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and /Title VII/ don't really mean what they say.... As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.

Further:

> ...as a matter of law /the/ result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard Congressional choices that a majority of this Court thinks unwise....

In response to the majority's conclusion that any of the proposed accommodations to Hardison's religious observances would require "unequal treatment," the dissent responded:

> That is quite true. But if accommodation can be rejected simply because it involves preferential treatment, then the /EEOC/ regulation and the statute, while brimming with "sound and fury," ultimately "signify nothing."

The Supreme Court decision skirted the constitutional challenge to the religious accommodation provisions of both Title VII and the EEOC guidelines. Both TWA and the union had asked for a First Amendment review.

The Court briefly stated that since they agreed with both the company and union that "their conduct was not a violation of Title VII, we need not reach the other questions presented." (emphasis added)

ONE PERSON'S ASSESSMENT OF HARDISON DECISION

Kenneth T. Lopatka, of the University of Illinois College of Law, assesses the Supreme Court's ruling in the Hardison case as follows

> One of the most surprising decisions...was the High Court's holding in *Trans World Airlines v. Hardison*. In this decision the Court avoided the question whether the definition of religious discrimination in Section 701 (j) /of Title VII/ was consistent with the First Amendment's establishment clause....The avoidance...was not a mere temporary, artful dodging. To put it bluntly, the Court tore the guts out of Section 701 (j).

He made this observation regarding the Court's comment that Title VII runs in favor of majorities as well as minorities: "The analogy to the plight of whites or males who are disadvantaged by quotas, imposed in favor of blacks or women, is difficult to resist. Unless

Hardison is limited by the fact that the Court was apparently straining hard to avoid a possible First Amendment infirmity, it does not bode well for the proponents of racial or gender quotas."

Lopatka notes that in the *Hardison* case, as in other decisions made during its 1976 term, the "Court was approaching the important Title VII issues with great independence and little heed to lower court consensus, much less EEOC interpretation... . The Court's unanticipated emasculation of Section 701 (j) overturned every appellate interpretation of the section and, needless to say, repudiated the EEOC position."