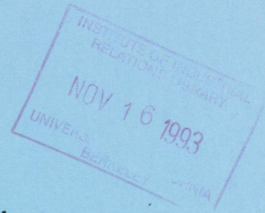


WORKING PAPER SERIES - 259

RESTRICTING OPPORTUNITY AND
ENHANCING OPPORTUNITY:
IMMIGRATION CONTROL AND EEO

Revised Chapter 17 of
Human Resource Management: An Economic Approach

By
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Chapter 17: Restricting Opportunity and Enhancing Opportunity:

Immigration Control and EEO

Some forms of labor market regulation demand that employers not do something, rather than establishing minimum standards for what they must do. Two major federal programs fall primarily into this category. These are immigration control policy and equal employment opportunity (EEO) policy. Immigration controls have a long history in the U.S. However, the contemporary human resource function was not much affected by immigration controls until a significant change in the law was adopted in 1986. Job losses during the recession of the early 1990s, and a fear that immigrants were displacing native workers, intensified discussions of immigration policy. In contrast, although extensive EEO regulation is a comparatively recent phenomena, EEO policy from its inception in the 1960s has had widespread effects on the human resource function.¹

Immigration policy has sought to restrict jobs to native workers and legal residents; EEO has sought to expand opportunities for women and minorities. In that sense, the two policies aim in different directions. But as will be seen below, there are areas in which the two policies come together. And, more generally, both policies illustrate the inevitable linkage between firm-level human resource practices and wider social currents.

I. Immigration Control.

There are many aspect of immigration policy which are not directly related to labor market concerns. Foreign policy questions and humanitarian considerations have always been present. However, the U.S. has historically been a high wage country relative to most of the world, so that its labor market was (and is) an enticement to immigration.

During the second half of the 19th century, and up until World War I, large numbers of immigrants came to the U.S. Annual flows of immigrants sometimes exceeded 1% of the domestic population.² Thereafter, legal immigration was tightly restricted until the 1960s. Thus, much of the concern at that time about immigration was about illegal migrants.

Although statistical estimates of the numbers of illegals are inevitably guestimates, it does appear that legal immigration is significantly larger than illegal. According to one estimate, about 8.4 million migrants entered the U.S. during 1981-89, about 30% illegal and 70% legal. Perhaps 3-4 million illegals were resident in the U.S. prior to the 1986 legislation, about 1-2% of the population.³ In contrast, foreign-born persons in the U.S. constituted about 8% of the U.S. population in the 1990 Census (which undoubtedly undercounted illegals).

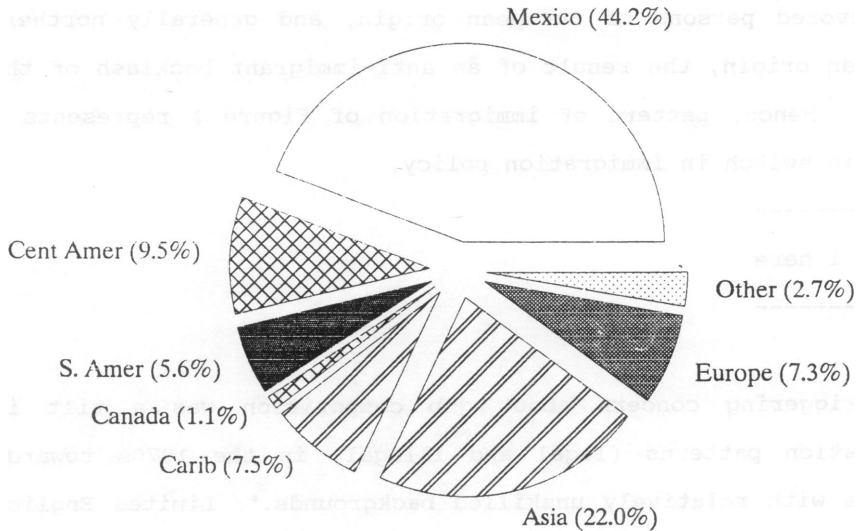
As Figure 1 shows, Mexico is a major source of legal immigration and - as will be noted below - illegal as well. Europe and Canada, sources which provide immigrants most similar to the U.S. in terms of economic status, account for a relatively small fraction of immigrants. Prior to the 1960s, American immigration law favored persons of European origin, and generally northern European origin, the result of an anti-immigrant backlash of the 1920s. Hence, pattern of immigration of Figure 1 represents a dramatic switch in immigration policy.

Figure 1 here

Triggering concern about job competition was a tilt in immigration patterns (legal and illegal) in the 1970s towards persons with relatively unskilled backgrounds.⁴ Limited English language skills (both speaking and reading) also pushed immigrants towards unskilled, low-wage employment. Language problems especially characterize Mexican-origin migrants who can live in ethnic enclaves in several major cities where English need not be spoken for day-to-day activities.⁵ As Figure 2 shows, (legal) immigrants are not spread randomly across the U.S. but rather are concentrated in certain border states (California, Texas, and Florida which "borders" on Cuba) and big cities which have developed enclaves (Chicago, New York). The unskilled end of the labor market where many immigrants find themselves is precisely the

Figure 1

Area of Origin of Legal Immigrants 1990



Note: Year ending September 30.

Source: U.S. Bureau of the Census, Statistical Abstract of the United States: 1992 (Washington: GPO, 1992), p. 12.

immarea.cgm
immig.wk3

sector where employment problems are most intense and where there is concern about labor market prospects of legal residents, especially black and Hispanic.

Figure 2 here

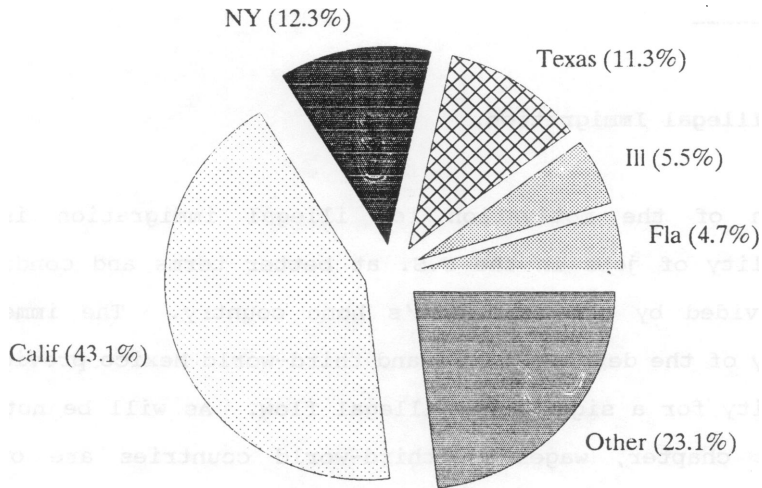
i. Illegal Immigration.

Much of the motivation for illegal immigration is the availability of jobs in the U.S. at better terms and conditions than provided by the immigrant's home country. The immediate proximity of the developed U.S. and third-world Mexico provides an opportunity for a significant illegal flow. As will be noted in the next chapter, wages in third-world countries are only a fraction of U.S. levels.

Of course, there has also been a significant element of politically-motivated immigration, including immigration from Cuba after the establishment of a communist government in that country, and immigration from Southeast Asia after the Vietnam War. Political immigration often means that the new arrival has little or no hope of returning to his/her native country. Thus, there may be added impetus to adapt to the American labor market, via education and training, for such immigrants. In contrast, economically-motivated immigrants have the prospect of returning to

Figure 2

State of Intended Residence, Legal Immigrants 1990



Note: Year ending September 30.

Source: See Figure 1

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their native lands, and thus may simply sell their (often) unskilled labor without feeling the need for upgrading their human capital.⁶

Mexico has been a major source of economic immigrants since the 1970s. In the Mexican case, thanks to peso depreciation and deteriorating internal conditions, the average Mexican wage in manufacturing - translated into U.S. dollars - fell from 23% to 7% of U.S. levels during 1980-87 before rising back to 15% in 1992.⁷ Moreover, high Mexican unemployment means that even jobs paying those spartan wages may not be available domestically to potential young entrants into the Mexican labor force. Thus, it is hardly surprising that a flow of labor is set in motion by this large pay and opportunity differential. Generally, Mexican-origin migrants do advance economically over time and many become permanent residents. However, the immigrant cohort from Mexico in the 1980s tended to have lower education relative to natives raising concerns about the speed of assimilation.⁸

Although lacking the border proximity to the U.S., similar wage motivations have sparked migration from China to the U.S. Incidents of chartering by would-be migrants of dilapidated boats from China arriving along the U.S. coast (or along the Mexican coast for travel by land into the U.S.) attracted public attention. Migrants reportedly paid thousands of dollars for passage,

essentially indenturing themselves to smugglers. In addition, small numbers of illegals enter initially legally as students, visitors, etc., and then overstay their permissible time. Despite these other channels, 93% of aliens expelled in fiscal 1990 were identified as Mexican by the Immigration and Naturalization Service.⁹ Proximity to the border, in short, is a major determinant, given a wage level gap, of illegal entry into the U.S. Where there is no major wage gap, i.e., Canada, relatively little illegal migration occurs.

ii. Impact on the U.S. Workforce.

The impact of immigration, both legal and illegal, has been much debated. In a simple static model of the economy, adding to the supply of labor, while holding other factors constant, will depress real wages. However, dynamic growth models do not necessarily produce such results; the additional labor supply may create sufficient saving to generate the capital needed to hold constant the capital-to-labor ratio. Put another way, other factors are not held constant. Thus, real wages need not fall despite the increase in labor supply. In that respect, a steady increase in the population via immigration is no different from one resulting from native births.

Still more complex models recognize the variegated nature of the U.S. workforce. As with other types of economic change,

immigration can create winners and losers within the existing population. Low-skilled workers, who compete directly with the immigrants, may suffer lower real wages and/or job displacement. Immigrants may cluster in segmented job markets so that the primary direct effect of an increase in their supply is a lowering of their own wages.¹⁰ But more skilled workers may be complements in production to the immigrants. Demand for, and real wages of, the higher skilled group may thus increase.¹¹

To the extent that the presence of low-wage immigrants stimulates the growth of certain labor-intensive industries, e.g., apparel in Los Angeles, there may be indirect impacts on the local economy. Workers employed in the stimulated industry spend their incomes on the products of other local industries. Local suppliers to the stimulated industry may receive more orders.

There is a general consensus in the economic literature that such effects occur.¹² However, precise magnitudes are difficult to estimate and, as is often the case in controversial area, mixed results are found. Studies of cities with large immigrant populations do not necessarily show large wage depressing effects. But, to the extent that worker mobility between cities exists, the impact of immigration on particular cities may be blurred. In the 1980s, the impact of imports on relative wages in particular industries seemed more important than the impact of immigration.¹³

iii. Employer Obligations.

Until 1987, there were no federal sanctions against employers who knowingly hired illegal immigrants. Employers were under no obligation to ascertain the legal status of any workers. The penalty for working illegally - essentially deportation - fell entirely on the employee, not the employer. Indeed, instances have been reported of employers calling for raids on their own premises by the Immigration and Naturalization Service (INS) during union organizing drives among their employees.

The obligation of employers with regard to illegal workers was changed radically by the Immigration Reform and Control Act (IRCA) of 1986. Under this legislation, which began to be enforced in mid 1987, employers are obligated not to employ any illegals who were not on their payrolls when the law was passed. On first impression, the new law might seem to have important effects only in certain low-wage industries (such as agriculture, apparel production, and restaurants) and in certain regions of the country (the Mexican border states of California and Texas).

Despite such impressions, the 1986 law creates obligations for all employers, not just those with prior propensities to hire

Box A

Research on Legal and Illegal Immigrants in the Job Market

Considerable research on the impact of immigrants in the U.S. labor market has been undertaken, in part because of the increased inflow of immigrants (legal and illegal) which developed in the 1970s and 1980s. A summary of such studies by George J. Borjas, himself a noted researcher in the field, noted that:

*Skill levels of immigrants declined relative to the native population since World War II but especially beginning in the 1970s.

*Recent immigrants are unlikely to catch up with natives' earning ability, even as they gain experience in the labor market.

*There are intergenerational effects among immigrants such that their children will also experience reduced earnings ability relative to children of natives.

*Immigrants have only a mild depressing effect on average wages in local labor markets but their effect on wages of unskilled natives may be significant.

*Recent immigrants tend to have a negative fiscal effect because they use welfare programs more than natives or earlier immigrants. The native population, e.g., local employers, those whose skills are complementary to immigrants' skills, experience a gain from the presence of immigrant labor. These magnitudes are very small, however, when placed against overall GDP.

Source: George J. Borjas, "Immigration Research in the 1980s: A Turbulent Decade" in David Lewin, Olivia S. Mitchell, Peter D. Sherer, Research Frontiers in Industrial Relations and Human Resources (Madison, Wisc.: Industrial Relations Research Association, 1992), pp. 417-446.

illegals. Beginning in mid 1987, employers were required to obtain documents from new hires "proving" their legal employment status. Employers also are required to retain these documents for an extended period and to be able to present them to INS agents.

At the least, therefore, even employers in industries with low usage rates of illegals must cope with significant record keeping burdens. The law thus presents human resource professionals with new - if routine - responsibilities. Employers discovered to be employing illegals are subject to an escalating set of fines, with criminal penalties for employers determined to have a pattern or practice of illegal employment. But even where illegals are not found, employers may pay significant fines for paperwork violations.

Box B on employers as IRCA agents here

Box C on Mickey Mouse requirements here

iv. Impact of Immigration Controls.

The impact of the immigration law - if effectively enforced - presumably would be the reverse of those found in the past for immigration. Competing domestic workers and legal immigrants would

Box B

Employers as IRCA Enforcement Agents

A Texas meatpacking firm was found to have violated IRCA when it took only minimal action after that INS informed it that two employees were suspected of being illegal aliens. The INS informed the employer that hiring documents presented by the workers were phony. In response, a company manager asked the workers if their documents were valid and they said they were. The company took no further action. As a result, an administrative law judge ruled that the company had not acted in good faith in complying with IRCA requirements and imposed a fine, a decision ultimately upheld by a federal appeals court.

On the other hand, employers cannot be held responsible for detecting fraudulent documents which are not obviously invalid. In one case, a restaurant accepted a phony Social Security card and hired a worker. A federal appeals court ruled that since the card was not obviously fraudulent, an INS-imposed fine on the employer was improperly imposed.

Source: "Ninth Circuit Upholds DOJ's View Employers Share Duty to Enforce IRCA," Daily Labor Report, February 26, 1991, p. A1; "Failure to Detect Forged Document Held No Violation of Immigration Law," Daily Labor Report, November 7, 1991, p. A3.

Box C

A Mickey Mouse Requirement

Employers can be penalized for failing to comply with IRCA's hiring documentation requirements, even if no illegal aliens are hired. In one noted case, Disneyland in Anaheim, California was fined \$400,000 for paperwork violations although no illegal aliens were found in the park's workforce.

Source: Stuart Silverstein, "7 Years Later, Many Scoff at Immigration Act," Los Angeles Times, August 28, 1993, p. A1.

benefit through higher wages and/or more job opportunities. Workers for whom demand is complementary to immigrant labor may suffer economic losses.

However, there are important qualifications to be made to this prediction. First, only limited resources are applied to enforcement; not every violator can be found. Second, the employer penalties are low for initial offenses, suggesting that some employers will take the risk of being caught hiring illegals. (But see box D). Indeed, survey evidence suggests that in the pre-IRCA period many employers thought (mistakenly) that hiring illegals was against the law, but did so anyway. Third, the documentation that employers are required to obtain from new hires can be forged. It is doubtful that employers will be held accountable for accepting forged documents that look genuine. Because there are penalties in the law for discrimination in complying with the law on the basis of national origin, it is doubtful that employers will want closely to examine documents which are not obviously fraudulent.¹⁴

Box D on pressure for central control here

Box E on too much employer enforcement here

Box D

Pressure for Central Control

The restaurant industry has often been cited as an employer of illegal aliens. Penalties for second offenses are heavier than for first. But in the case of chain restaurants, is each restaurant a separate employer? Or does a first offense at one in the chain subject the others to higher penalties as second offenses if illegal aliens are caught? Despite protests from the National Restaurant Association, a federal appeals court ruled that if the owner of the chain exercises a significant degree of control over hiring, the entire chain must be viewed as a single entity and the responsibility for illegal hiring is at the center.

Source: "10th Circuit Agrees With INS on Corporate Hiring Liability," Daily Labor Report, October 19, 1992, p. AA.

Box E

Too Much Employer Enforcement

In applying for work as a bindery worker, a woman with an Hispanic name (but a native U.S. citizen) presented a valid Texas ID card and a Social Security card as evidence of legal work status. These documents are sufficient under IRCA. However, the employer insisted on a birth certificate, i.e., more documentation than was needed. After an investigation triggered by the woman's complaint, the firm was fined for a pattern and practice of imposing stricter documentary standards than IRCA required.

Source: "Texas Firm to Pay \$12,200 Fine for Document Violations Under IRCA," Daily Labor Report, August 3, 1993, p. D8.

Fears that IRCA could become a source of national-origin discrimination have placed employers in a difficult position. Some apparently believe (incorrectly) that the law encourages such discrimination. (See box F). But regardless of belief, discrimination could result in penalties. In any case, reports of such discrimination have given rise to two sorts of proposals. Opponents of tight immigration controls argue that the law should be repealed because of potential discriminatory effects. Others have called for a further tightening of the law by requiring all workers to present a counterfeit-proof, government-issued ID card. Such proposals were rejected when the IRCA was originally passed due to the administrative expense of producing and distributing such cards and concerns about civil liberties.

Box F on inadvertent discrimination here

Since illegal aliens cannot be counted directly, there is no precise way to measure the impact of IRCA on illegal immigration. An early estimate made at the time IRCA was going into effect - and taking account of the limited enforcement resources - suggested that nonfarm illegal employment might be cut by 15-25 percent.¹⁵ But some subsequent evidence suggests the effects may well have been smaller. For example, one study estimated that the number of illegals in the U.S. dropped from 3.1 million in 1986 to 1.9 million in 1988 but that the difference was simply due to the

Box F

Inadvertent Discrimination Due to IRCA

Although it bars hiring of illegal aliens, IRCA requires employers not to discriminate on the basis of citizenship or national origin against legal workers. Because of concerns that employers were engaging in such discrimination due to fear of fines if illegals were hired, the U.S. General Accounting Office sent a survey to employers asking if they were confining employment to citizens or avoiding hiring persons with foreign appearances or accents or temporary work eligibility documents as the result of IRCA. Nineteen percent said they had taken such actions, apparently believing they were complying with the law rather than violating it by doing so. Employers in border areas (Texas, southern California) were especially prone to discriminate illegally.

The GAO study also involved using matched pairs of Hispanic and Anglo "testers" (pretend job applicants). Hispanics, not surprisingly, encountered negative job treatment more frequently than Anglos. It was not clear whether these results were due to IRCA or pre-existing discrimination.

Finally, a survey of 300 job applicants - half with foreign sounding characteristics - in selected cities found that those with such characteristics were more likely to be asked for IRCA-related documentation than others, again suggesting illegal discrimination.

Source: "GAO Finds 'Widespread Pattern of Discrimination,' Prompts Call for Repeal of IRCA Employer Sanctions," Daily Labor Report, March 30, 1990, pp. A9-A12, E1-E32.

amnesty provisions of IRCA which legalized many prior illegals.¹⁶ Another argued that IRCA had simply pushed illegals toward work in which documentation was unlikely to be requested by employers, such as casual day laborer employment and domestic service. A growing market of false documents which illegals could present to employers was also reported.¹⁷

For human resource professionals, the immigration issue bears watching. If Congress becomes dissatisfied with the results of the 1986 controls, it may impose greater sanctions and put more pressure on employers to act as immigration police. On the other hand, if the law proves ineffective but Congress does not react, then the demographics of the workforce will change as a result of immigration flows. Employers - particularly in areas which have historically received large immigration flows - will increasingly need to cope with issues such as bilingualism in the work place and managing workers with diverse cultural backgrounds.

If the immigration controls are strengthened, then certain industries which have relied heavily on low-wage unskilled labor will be adversely affected. They will need to find substitutes for such labor to stay in business. Some may not succeed; others may move abroad to tap the labor supply that once came to the U.S. on its native ground. In some cases, union organizing may be

strengthened, since illegal immigrants were especially hard to unionize before IRCA.¹⁸

As a matter of public policy towards the workplace, IRCA raises some serious questions. Although immigration problems to be concentrated in certain industries and regions, all employers have been enlisted as immigration police. And the requirements imposed on employers are ambiguous and often misunderstood. To make policing easy and effective, the federal government would have to come up with a form of documentation difficult to counterfeit, something it has been unwilling to provide.

Box G on Nannygate here

II. Equal Employment Opportunity.

Equal employment opportunity (EEO) law had its roots in black-white race relations. Although race relations are an ongoing social problem, not just a labor market issue, it is a problem which ultimately had labor market origins. Most American blacks are descended from slaves, involuntary immigrants, brought to this country because wages of free labor were high relative to European levels. High American wages, in turn, provided the economic incentive for slavers to kidnap Africans and sell them to employers as an alternative to hiring free labor.

Box G

Nannygate

In early 1993, President Clinton's first nominee for Attorney General, corporate lawyer Zoe Baird, admitted she and her lawyer husband had hired two illegal aliens - a husband and wife from Peru - as nanny and chauffeur. Her nomination was eventually derailed by the disclosure, which became a furious topic on numerous talk radio shows around the country. Subsequently, other nominees for various federal positions were also rejected as part of "nannygate". The controversy made it apparent that hiring illegal nannies was a widespread practice, even among lawyers who presumably were aware of IRCA. It also led to a period of soul searching by the Washington press corps since many reporters initially regarded the disclosure as a minor matter (presumably because illegal nanny hiring was common among reporters and their friends).

Source: Howard Kurtz, "Talk Radio's Early Word on Zoe Baird: Listeners' 'Nannygate' Reactions Signaled Trouble for Nominee," Washington Post, January 23, 1993, p. B1

On the eve of the Civil War, slaves accounted for over one fifth of the U.S. workforce.¹⁹ In the south, the proportion was much higher. To maintain a slave labor force, an infrastructure of legal and policing mechanisms was required. Since such measures were not applied to free labor, and since such measures violated prevailing norms of treatment which applied to whites, a variety of rationalizations was required to support the institution of slavery. Blacks were viewed as inferior to whites, as preferring menial work, as benefiting from their treatment as slaves, etc. These ideas from the era of slavery formed the basis of modern day racial prejudice.

In the post-Civil War period, competition between freed black labor and white labor played an important part in establishing legal segregation in the south. Notions of appropriate white/black relationships which had arisen under slavery continued as rationales for segregation. Segregation applied to the labor market as well as public facilities such as transportation and schools. Under segregation, formal and informal, blacks were barred from skilled crafts and other forms of employment.

Much of the black workforce remained in southern agriculture until World War I. The ongoing migration of blacks to the north, where voting was permitted and political influence could be wielded, began to shift public policy. Although the armed forces remained segregated by race during World War II, a Presidential

executive order promoted antidiscrimination in federally-funded defense plants. While this measure was not considered especially effective, the post World War II period saw continued change in the legal and political climate. Segregation in public schools and transportation was struck down by a series of Supreme Court decisions.

The Civil Rights Act of 1964 included Title 7 dealing with discrimination in employment was symptomatic of this shift in the legal/political climate. However, racial problems did not disappear from the American scene with this legislation. The 1960s, particularly the latter half of the decade saw a series of race riots in major cities. Such incidents have continued sporadically. The 1980s saw race riots in the Miami area, for example. And the early 1990s saw racial rioting in Los Angeles. These tensions in the larger society are bound to be felt in the workplace where blacks account for about one tenth of total employment.

Racial discrimination against Asians also had labor market roots. In the latter half of the nineteenth century, Asians were viewed by whites, especially in California and the western states, as a competing source of cheap labor. State laws abridged property and other rights of Asian immigrants. At the federal level, the Chinese Exclusion Act of 1882, and subsequent legislation, virtually banned new immigration from China. One byproduct of this

anti-Asian sentiment was the forced removal of residents of Japanese origin from the west coast during World War II.

Significant Asian immigration into the U.S. was not permitted until the 1960s. Since that time, the Asian-origin population of the U.S. has grown rapidly. In 1975, the Asian proportion of the labor force was under 2%. By 1990, it was over 3% and by 2005 the ratio is projected to be over 4%.²⁰ Asians are especially concentrated in certain areas of the country, notably in California where they accounted for about a tenth of the population in 1990, exceeding the black proportion.

Discrimination against Hispanics - like that against Asians - has been linked historically to immigration/labor market concerns. As noted in the previous section, immigration - especially from Mexico - has been more difficult to control because of the physical proximity of the U.S. and Mexico. The grant of American citizenship to Puerto Ricans in 1917 prevented any limits on their immigration into the United States thereafter. Hispanics constituted about 8% of total employment in 1990, a figure expected to rise to over 11% by 2005, roughly the black proportion. Over three fifths of Hispanic employees were Mexican-origin (Chicanos and Chicanas) in 1992; the Puerto Rican share was 9% and the Cuban share was 5%.

Sex discrimination has some labor market origins, but is obviously more heavily connected with social, cultural, and religious attitudes. There are obvious cases in which cheap female labor was seen as a threat to male employment in the past, leading to employer, union, or sometimes legislative policies aimed at discouraging or limiting the workforce participation of women. State "protective" laws aimed at women and children in the 19th and early 20th century put limits on their hours of employment and job assignments.²¹ Generally, the phenomenon of married women working (except on family farms) was seen as a failure of the economic system during that period. Work was for single women awaiting marriage.

i. Initial Federal Regulation in the EEO Area.

Discrimination in the workplace was not attacked in federal legislation in any significant way until the passage of the already-mentioned Civil Rights Act of 1964. Title 7 of the Act forbids discrimination in employment practices on the basis of race, sex, religion, or national origin. Further significant extensions of the law were made in 1972 and 1991.

As in the case of other labor standards, the federal government can place special requirements on its contractors as a condition of doing business with the government. Under Presidential executive order 11246 of 1965, federal contractors

were required to eliminate the kinds of discrimination forbidden by Title 7. In addition, contractors were required to implement "affirmative action" plans, a concept discussed below.

ii. Policy Toward Other Forms of Discrimination.

It is often noted that the issue of sex discrimination, which subsequently became a major concern of EEO policy, was dropped into Title 7 as a political ploy. Southern Congressional representatives added sex discrimination to the bill in the hopes of either making it more controversial and thus killing it, or alternatively, diluting its concentration on the race issue. However, the ultimate inclusion of sex discrimination was not completely out of line with Congressional concerns; Congress had shown prior interest in sex-related issues at the workplace. The Equal Pay Act of 1963, for example, outlawed sex-based wage differentials established by an employer for individuals performing essentially the same jobs.

Box H on glass ceiling here

Viewed with hindsight, the inclusion of sex discrimination in the final version of Title 7 can be seen as the product of rising female participation in the workforce. Once race discrimination in employment was outlawed, sex discrimination would eventually have

Box H

A Glass Ceiling?

Women have entered the workforce in increasing numbers for decades and the proportion of women in nontraditional managerial and professional occupations has definitely increased. But there has also been increasing concern about how much room at the top there is for women to advance. Although 59% of Fortune 1,000 companies were reported to have at least one woman on the Board of Directors in a 1993 study, the proportion of all directors who are women is quite small; women and minorities held 9% of all directorships. Women and minorities are also not well represented in the ranks of top management. These facts have led to charges that there is a "glass ceiling" preventing advancement at the top.

The U.S. Department of Labor released a report in 1991 on the glass ceiling issue, based on in-depth interviews and case studies at nine major firms. Its findings were that if there was not a glass ceiling, there was at least a "plateau" which was difficult to cross. Among the factors uncovered were subjective performance appraisals, heavy reliance on networking to find top job candidates, and failure to impress EEO standards on outside executive recruitment firms.

Source: "Woman, Minorities Gain on Boards, Study Says," Daily Labor Report, March 24, 1993, p. A16; U.S. Department of Labor, A Report on the Glass Ceiling Initiative (Washington: DOL, 1991).

been included in the prohibitions of Title 7 had it not been included in 1964. Although female labor force participation rates were not as high in the 1960s as they were in the 1980s, the trend was upwards. The traditional pattern of female withdrawal from employment upon marriage was breaking down, even then.

Women received the right to vote in 1920 through Constitutional amendment. They have since shown a higher propensity to participate in elections than men, a fact well known to political representatives. Thus, even apart from rising labor force participation of women, this political fact of life would also have eventually produced anti-sex discrimination legislation.

Box I on women and MBAs here

Age discrimination is a more complex issue, since age and seniority are often correlated. Complaints about improper treatment of older employees at the workplace often relate to social norms about management obligations to long-service employees. Under the Age Discrimination Act of 1967 (as subsequently amended), discrimination against person age 40 and older is outlawed and mandatory retirement for most employees is forbidden.

Box J on downsizing, waivers, age here

Box I

Are Women Losing Interest in the MBA?

During the 1980s, articles appeared in the popular press reporting declining MBA enrollments of women, after remarkable growth in the 1970s. Explanations offered included the suggestion that women feared being relegated to a "mommy track" in management or otherwise were concerned about a family-life/business-life conflict and that other career opportunities for women had improved, thus making the MBA relatively less attractive.

However, researchers have found that the proportion of female applicants for the GMAT, the most common exam for entering MBA programs, rose during the 1980s. Although a survey of GMAT applicants revealed some differences in attitudes between males and females regarding work/family issues and money as a motivator, support was not found for attitudinal differences which could account for lower MBA completion rates among women. Indeed, the reports of a decline in female applicants came only from a few "selective" schools; it is possible that the overall MBA graduating pool does not show a decline in the proportion of women.

Source: Terry R. Johnson and Steven D. McLaughlin, "Declining Numbers of Female MBAs" An Analysis from the GMAT Registrant Survey," Selections, vol. 9 (Winter 1993), pp. 22-31.

Box J

Downsizing, Waivers, and Age Discrimination

Even during the employment expansion of the 1980s, some firm found it necessary to "downsize" (reduce staffs) to cut labor costs. The pressure to downsize intensified in the recession of the early 1990s and its aftermath. Many companies, faced with such pressures, opted to offer early retirement incentives for older employees. The ability to do so was enhanced by the stock market run up of the 1980s, which increased the value of pension fund assets, and greater legal restrictions on the use of assets from "overfunded" pension trusts other than for retirement benefits.

In general, pressuring older employees to quit - even in the presence of enhanced pensions - may lead to charges of age discrimination. A study by the U.S. General Accounting Office in the late 1980s found that most Fortune 100 firms did not require employees taking advantage of retirement incentives to sign waivers of their rights to sue, although 28% did. (Such waivers might not prevent a suit if there was evidence that the employee was pressured to sign.) Still, Congress was sufficiently concerned to pass the Older Workers Benefit Protection Act of 1990.

Under the new law, waivers are permitted only if they are written in plain English, make explicit reference to rights under the Age Discrimination in Employment Act, do not waive claims arising from future circumstances, and are exchanged for value beyond what the employee would ordinarily have received. In addition, the employee must be advised to consult an attorney and given a 7-day period in which the agreement can be revoked. Other protective requirements also apply.

Source: U.S. General Accounting Office, Age Discrimination: Use of Waivers by Large Companies Offering Exit Incentives to Employees, GAO/HRD-89-87 (Washington: GAO, 1989); Charles E. Mitchell, "Waiver of Rights Under the Age Discrimination in Employment Act: Implications of the Older Workers Benefit Protection Act of 1990," Labor Law Journal, vol. 43 (November 1992), pp. 735-744.

Box K on protection for young here

Apart from their obligations under Title 7 and Executive Order 11246, federal contractors are forbidden to discriminate against the handicapped pursuant to the Rehabilitation Act of 1973. This prohibition was extended to non-contractors in the Americans with Disabilities Act of 1990. Discrimination by federal contractors is also forbidden against Vietnam War veterans (about 6% of the labor force in 1992) and disabled veterans under the Vietnam Era Veterans Readjustment Act of 1974. As part of their obligations under these various laws and orders, federal contractors are subject to closer scrutiny than other employers. And because of the large volume of federal purchases and funding, most large firms are federal contractors, as are state and federal governments and many private, nonprofit organizations.

State and local governments often adopt EEO policies of their own, both for firms which do business with them, and for other employers. In some cases, these policies may go further than federal requirements, e.g., anti-discrimination restrictions regarding individuals with AIDS which began to be adopted by some jurisdictions in the 1980s. As a result, human resource

Box K

Protection for Young and Old - Or Just Old?

The Age Discrimination in Employment Act refers to protection of employees aged 40 and over. But, the EEOC sometimes seems to apply the Act to cover discrimination on the basis of age against the young. There are phrases in the law such as "because of an individual's age" which might be interpreted to mean any discrimination based on age, whether against young or old. In one court case, young employees did sue on the basis of reverse age discrimination - and lost.

Caterpillar, the agricultural equipment producer, decided to shut two plants and negotiated an early retirement program with its union, the United Auto Workers. The program applied to workers 50 and over. When the plants were closed, a class action was filed on behalf of workers under age 50 (but at least age 40) who otherwise met the program's requirements. Both a federal district court and an appeals court held that the Act did not provide protection against reverse age discrimination. There was nothing to prevent an employer, such as Caterpillar, from offering special retirement benefits to older workers but not younger.

Source: Hamilton v. Caterpillar, Inc. 966 F2d. 1226 (1992).

professionals must be aware of public policies from a variety of sources.

Box L on AIDS here

Box M on protection for the ugly here

Box N on sexual orientation here

iii. Administration and Enforcement.

The Equal Employment Opportunity Commission (EEOC), established by Title 7, handles complaints pursuant to that title (race, sex, religion, and national origin) plus age discrimination and Equal Pay Act complaints. Compared to other federal agencies, such as the NLRB, the EEOC is not a powerful agency - a characteristic resulting from the political compromises reached to obtain passage of the original Civil Rights Act. It primarily investigates and mediates; most EEO complaints - if they are pursued - are either settled privately or litigated in the courts. On the other hand, the reach of Title 7 is very broad; it covers all but the smallest employers (public and private) plus unions,

Box L

AIDS as a Handicap

The Rehabilitation Act of 1973 applies only to federal agencies and federal contractors (recipients of federal funds), a category which includes most other levels of government. However, protections regarding job discrimination against the handicapped now apply to private employers without federal contracts as well under the Americans with Disabilities Act. Thus, the interpretation of the older Rehabilitation Act are of concern to almost all employers. One of the most difficult areas of application has been employer treatment of individuals who are HIV-positive or have AIDS. Fellow employees, supervisors, and customers may perceive a health risk from persons with AIDS, despite medical evidence to the contrary.

In one case, a teacher of the hearing-impaired in Orange County, California was barred from teaching in the classroom and assigned administrative duties by his school board employer. The teacher had been hospitalized with an AIDS-related bout of pneumonia but was later pronounced fit to return to work by the County's chief medical officer. The teacher applied for a preliminary injunction of the school board's action in a federal district court, but his request was denied. Subsequently, however, an appeals court decision reversed the district court and instructed it to grant the injunction.

There was no doubt that AIDS was a qualified handicap in this case. The appeal court noted that in the view of medical experts, AIDS cannot be transmitted through casual social contact as might occur in a classroom. It rejected contentions that in the future other means of transmission might be discovered. And it rejected the argument that the teacher had suffered no harm since his job reassignment involved no pay cut. The court noted that the teacher enjoyed exercising his skills with students and found the new job, with no student contact, "distasteful." Thus, delaying or denying an injunction could cause him irreparable harm.

Source: Chalk v. Orange County Department of Education, 840 F.2d 701 (1988).

Box M

Protection for the Ugly?

State and local governments may have their own EEO laws which go beyond federal standards under Title 7. The college town of Santa Cruz, California passed an ordinance in 1992 forbidding job bias against ugly people. Initial pressure for the law was sparked by the story of a 300 pound woman who was not hired at a natural foods store. However, the law does not protect people who change their appearance, e.g., bizarre jewelry or hair coloring.

Apart from such local laws, obesity in particular is not generally viewed as a protected handicap unless it is traceable to some disease. Thus, when California courts decided the woman's case under state laws (which predated the Santa Cruz statute), the store was ultimately exonerated.

Source: Richard C. Paddock, "Santa Cruz Grants Anti-Bias Protection to the Ugly," Los Angeles Times, May 25, 1992, p. A3; "California Court Recognizes Limited Right to Sue for Discrimination Based on Obesity," Daily Labor Report, September 8, 1993, pp. A1-A2.

Box N

Discrimination on Grounds of Sexual Orientation?

Federal law, and Title 7 in particular, does not prohibit employment discrimination against homosexuals. Homosexuality is not considered a protected disability. However, some state laws include sexual orientation as a forbidden grounds for employment discrimination. In California, a major retailer, Target Stores, agreed to a settlement of \$2 million in a class action suit based on employment testing. Specifically, plaintiffs charged that Target used intrusive questions in a test for job applicants. The suit was brought by an applicant for a security job position who was asked to respond to statements such as "I am very strongly attracted by members of my own sex" and "I have never indulged in unusual sex practices." Since the settlement was reach out-of-court, however, no precedent was set under California law regarding use of such applicant screening tests.

Source: Stuart Silverstein, "Target to Pay \$2 Million in Testing Case," Los Angeles Times, July 10, 1993, pp. D1-D2.

union hiring halls, employment agencies, and apprenticeship programs.

Employers, unions, and others who are found to have violated EEO requirements can be required to pay damages to victims, to hire or rehire them, to promote them, or to make changes in human resource policies. Where large numbers of individuals are involved in class action suits, awards or settlements may run into the millions of dollars, apart from litigation expenses. The potential costs involved, the bad publicity that can result from EEO litigation, and the possible extensive court involvement in internal firm policy, are sufficient to attract the attention of human resource managers. Indeed, as will be argued below, EEO has had a profound effect on the practice of human resource management, similar to that of the rise of unions as a challenge to management during the 1930s.

Pursuant to amendments to Title 7 enacted in 1972, the EEOC can support suits filed by individuals or, in certain cases, litigate on its own. But the courts have final authority in determining remedies, not the EEOC. In contrast, the NLRB in the labor relations field can issue its own cease and desist orders and fashion its own remedies. The EEOC is also obligated to defer to state and local agencies which have EEO jurisdiction, if such agencies exist and meet designated standards.

The other major federal agency is the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) which monitors federal contractors, pursuant to the various applicable orders and laws. As noted, federal contractors are subject to more detailed scrutiny and requirements than other employers. And it is the OFCCP which carries out this monitoring function. As a practical matter, the OFCCP seems to focus its attention on larger firms within the universe of those doing business with the federal government.²² Failure to meet federal EEO requirements can mean loss of government contracts and debarment from future bidding on contracts.

iv. Impact of EEO Rules on Human Resource Policy.

It is important to stress that "discrimination" in the EEO context is a very broad term. Any action that might be taken with regard to employees could potentially be taken in a discriminatory manner. Thus, charges could be made that the firm has a discriminatory recruitment policy, a discriminatory screening and testing policy, a discriminatory pay policy, a discriminatory benefit plan, a discriminatory employee performance appraisal program, a discriminatory promotion system, and that it discriminates in the manner it provides training, or in the way it conducts layoffs. Thus, the entire array of human resource management policies is subject to EEO review.

Any employee can file EEO charges, as can rejected job applicants or discharged former workers. Although most EEO policy is centered on nonwhites, Hispanics, and women, white males can file suits alleging "reverse discrimination." It is not necessary to prove that a discriminatory intent was involved for a plaintiff to win an EEO case.

Box 0 on protection for atheists here

Of course, a showing of "disparate treatment" of women or minorities, in hiring, promotion, or other employment decisions will demonstrate intentional discrimination. But showing of discriminatory results - intended or not - may be sufficient. A seemingly-neutral human resource policy which has an "disparate impact" on minorities or women, even if not purposefully designed to do so, is regarded as discriminatory. Remedies - when discrimination is found to have occurred - are generally of the "make whole" variety for affected individuals; hiring or reinstatement, back pay, promotion, and credit for lost seniority could be ordered.

Methods of establishing discriminatory impact often involve statistical analysis of firm and local labor market data. But the precise standards vary with court interpretation. A 1989 Supreme Court case made it easier for employers to mount a "business

Box 0

Religious Protection for Atheists?

Most religious discrimination cases involve work times (e.g., requirements to work on Saturdays which affect religious groups which regard Saturdays as the sabbath) and appearance standards (e.g., dress codes that conflict with religious rules such as the wearing of yamulkas by orthodox Jews). However, in some cases, employers have attempted to promote their own religious beliefs among their employees. In one such case, a firm which manufactured mining equipment was owned by born-again Christians who required employees to attend religious services. A machinist, who said he was an atheist, was pressured to attend services and eventually quit and filed a complaint with the EEOC. A subsequent federal district court decision enjoined the firm from holding mandatory religious services. Various appeals by the firm were unsuccessful in establishing that the firm had a religious purpose. Generally, for-profit, commercial firms are not considered to be religious organizations.

Source: EEOC v. Townley Engineering and Manufacturing Co., 675 F. Supp. 566 (1987).

necessity" defense when a disparate impact charge was made, part of a series of decisions generally held to have made EEO litigation more difficult for plaintiffs.²³ Congress, however, reversed this and other decisions as part of the Civil Rights Act of 1991.

Where a human resource practice is demonstrated to have caused a disparate impact, an employer must demonstrate that the practice is job related and consistent with business necessity. If plaintiffs show that an alternative practice would accomplish the same business ends with less of a disparate impact, refusal by the employer to adopt such a practice would be taken as discriminatory. These distinctions and requirements may appear to you to be a lawyer's delight, and indeed they are.

EEO cases can involve multiple interests. The workforce may be divided by EEO charges, with resultant workplace tensions, particularly if the remedy sought by the plaintiff(s) would disadvantage some other employee or employees. Because of the extensiveness of EEO regulation, some examples of its impact on selected human resource functions are provided below.

***Help-Wanted Advertising:** Prior to the enactment of EEO legislation, help-wanted ads sometimes specified the race of the applicants being sought, e.g., "whites only." Newspapers typically divided their ads into separate

sections for men's and for women's jobs. Such blatant practices are extremely rare today. However, consider the implications of an ad seeking "recent college grads" or one requesting the services of a "gal Friday." Might not age or sex discrimination be inferred from these phrases? There are not many recent college grads over age 40. Thus, "recent college grads" may be a code phrase indicating older workers need not apply. And many men might be reluctant to apply for a position as a "gal Friday."

Sound employer policy with regard to job advertising suggests that an human resource specialist sensitive to EEO requirements should screen advertising for hidden messages.

*Screening: Applicants for jobs may be required to take a test of some type. A higher than average failure rate of minorities or women may lead to the test being considered discriminatory unless the test can be "validated." A test can be validated if it can be shown that higher scores predict better job performance.

Proving the connection between scores and performance, particularly in the case of general verbal/math aptitude tests, may be difficult. Statistical

methodology may be required to validate general tests. However, tests which ask for demonstration of a job-specific skill, e.g., typing for a typist, are generally valid.

Apart from tests, employers may require presentation of credentials, such as a high school diploma. Again, it is not always evident that such credentials are predictive of job performance. Is a high school diploma, for example, needed to function as a janitor? However, credentials which are closely related to skills, e.g., a medical degree for a doctor, a driver's license for a trucker, are unlikely to be challenged.

Box P on residence/race here

The interviewing process necessarily involves subjective judgments on the part of the person conducting the interview. A firm in which the interview process results in a disproportionate rejection rate of minorities or women may find its practices challenged by persons not hired. There is an obvious bias in EEO regulation for the application of objective, relevant measures. Subjective judgments and techniques are certainly not forbidden, but their outcomes need to be monitored.

Box P

Residence as a Pretext for Race Discrimination

Municipal governments sometimes require their employees to live with the borders of the city. Such residence requirements are justified on grounds of keeping money within the city or giving employees a greater incentive to perform well by making the recipients of city services themselves. However, de facto racial segregation could mean that a residency requirement has the effect of limiting job opportunities for a particular race.

The Town of Harrison, New Jersey, had a residency requirement for its employees. Harrison had a white population but it adjoined Newark, a city with a substantial black population. Except for a black woman hired in a highly-skilled educational occupation, Harrison had never hired a black employee. Given this history, the Newark branch of the NAACP filed suit against Harrison hiring practices.

A federal district court and an appeals court found that Harrison's residency rule had a disparate impact on black hiring. The Town's argument that the residency rule was a legitimate business justification which outweighed the discriminatory impact was not accepted by the courts. It was ordered to discontinue its policy and engage in an affirmative action effort to make its workforce reflect the local labor pool (including non-residents).

Source: Newark Branch, NAACP v. Township of Harrison, 940 F.2d 792 (1991).

Title 7 includes a very limited possibility of legitimately excluding persons on the basis of sex from particular jobs. It provides for such exclusion only when sex is a "bona fide occupational qualification" (BFOQ) for the job. Occupations such as restroom attendant fall under this exception. However, defenses such as customer preference are not accepted. Thus, airlines - which once barred males from jobs as flight attendants on the grounds that passengers preferred stewardesses to stewards - were not permitted to continue the practice.

Box Q on sex stereotyping here

*Training: Opportunities for training provided by an employer can be a valuable benefit for employees, leading to opportunities to advance within the firm. Employers may be more reluctant to provide training for women than for men, on the assumption that women are less likely to have a long career with the firm during which the training investment can be recouped. On average, women do have a higher propensity to quit than men.²⁴ However, generalizing on the basis of group averages can be seen as discriminatory when applied to individuals. Hence, careful examination must be made of the mechanisms by

Box Q

The Cost of Sex Stereotyping

In 1992, State Farm Insurance Company agreed to pay \$157 million to 814 California women who claimed they had been denied jobs as sales agents. The monetary damages were reported to be the largest EEO settlement in history. Another \$36 million had already been paid in individual awards and settlements arising from the same charges. An earlier federal district court consent decree required that State Farm new hires be 50% female for a 10-year period. In one of the many cases covered by the award, a female employee who wanted to apply for a sales agent job was told by managers that she needed a college degree, although many male agents were not college graduates. Later she was told female agents would not be employed.

Source: Philip Hager, "State Farm to Pay Women \$157 Million for Job Bias," Los Angeles Times, April 29, 1992, pp. A1, A18.

which decisions to train are taken. Monitoring of the outcomes of those mechanisms is also needed.

*Pay Policy: The Equal Pay Act of 1963 requires that separate male and female wage rates not apply to substantially equivalent work.²⁵ Prior to this legislation, different male and female wage rates for the same job were sometimes found in company practices and union contracts. (The female rate was inevitably lower). As in the case of overtly-discriminatory help-wanted advertising, such blatant practices rarely occur today. However, issues can arise over whether two job titles - one containing mostly men and the other mostly women - involve basically the same tasks. If they do, the pay schedule must be the same, regardless of job title. It is function - not title - that matters.

An earlier chapter described the comparable worth issue (sometimes also known as "pay equity").²⁶ In its usual formulation, comparable worth goes beyond equal pay for the same work. It asks that disparate jobs be compared by some uniform standard. The resulting evaluation of "worth" should then be applied to the various jobs. Typically, job evaluation plans, which are designed to make such interoccupational comparisons, are advocated as the tool for determining comparable worth.

As a legal matter, comparable worth has not emerged as an EEO requirement in litigation which has occurred so far. Courts have accepted the outside labor market as a legitimate guide for setting pay. But there have been some private settlements of pay equity cases, mainly in the public sector. Paradoxically, comparable worth claims and pressures are most likely to be raised in the context of government and large private employers who probably pay above average wages.²⁷ Employers may be vulnerable to comparable worth litigation - despite the lack of court recognition of the comparable worth principle - if it can be demonstrated that they deliberately set wages for predominantly female jobs lower than in male jobs merely because women were in those jobs (as opposed to market reasons).²⁸

Box R on comparable worth here

The Canadian province of Ontario passed a law in 1987 requiring employers to apply comparable worth in pay setting through job evaluation. And Australia implemented a version of comparable worth through its compulsory arbitration system in the early 1970s. But a comparable worth law is not in likely in the U.S. Nonetheless, foreign developments may eventually influence American law

Box R

Comparable Worth in the Private Sector

The notion of comparable worth or pay equity has never been adopted by federal courts. It has been applied mainly in the public sector in the U.S., where it has been applied at all. However, there are some exceptions. A 1991 contract between Southern California Gas Company and the Utility Workers Union of America included provisions for comparable worth. Based on a job evaluation survey, particular occupations received adjustments varying from zero to 26%, for an average of 5% overall.

Comparable worth became an issue at the time of the prior contract negotiations when the firm proposed cutting pay of certain clerical workers. An outside consultant was eventually employed to evaluate company job categories and its ratings became the basis of the comparable worth adjustments in 1991. The union campaigned for the comparable worth approach, drawing on support from local feminist groups, prior to negotiations.

Source: Bob Baker, "SoCal Gas Sees the Light: Women's Pay is on a Par With Men," Los Angeles Times, June 13, 1991, pp. D1-D14.

makers and judges. Human resource specialists need to be sensitive to the issue, even though its current legal status is dubious.

*Benefits: The design of benefit plans has been influenced by EEO policy, especially with regard to pregnancy. Until the late 1970s, it was not uncommon for employers to remove benefits for pregnancy from programs such as disability insurance and sick leave. Reversing a Supreme Court decision, Congress made such pregnancy exclusions illegal under Title 7. For example, employers are not required to have disability or sick leave plans. But if they do, pregnancy must be treated the same as other medical conditions.

Retirement and life insurance plans have also been affected by EEO regulation. Female life expectancy is notably longer than male. Based on 1990 data, a white female at birth could expect to live about 79 years, compared with 73 for a white male; the figures for nonwhites were 76 and 68. At age 65, a women could expect to live about 4 years longer than a male.²⁹ The result is that a given amount of life insurance is actuarially cheaper to provide for females than for males. But a defined benefit pension for females is more expensive to fund.³⁰

At one time, some employers adjusted benefits to reflect these sex-based differences or - if they had contributory plans - adjusted the contributions employees were required to make. However, such practices are now viewed as illegal generalizations about the sexes by the U.S. Supreme Court. Employers may not charge different sex-based contribution rates, nor provide unequal monthly pensions or life insurance policies.³¹

Federal contractor obligations with regard to the handicapped have influenced the trend toward establishment of Employee Assistance Programs (EAPs) for alcohol and drug abusers. Although substance abuse and addiction is a handicap, current alcohol or drug abusers whose problem hinders job performance or safety are not protected by the handicapped requirements. However, employers may find it wise to provide an EAP vehicle to permit the affected employee a chance to resolve his/her problem.

*Job Design: Title 7's ban on religious discrimination and the Americans With Disabilities Act and Rehabilitation Act's requirements for employers regarding the handicapped may influence the way jobs are designed. Employers must make "reasonable accommodation" with regard to job requirements that may conflict with religious beliefs. Issues may involve scheduling of work on the

Sabbath, time off for religious holidays, and dress and appearance standards. However, employers may cite "undue hardship" as a defense against demands for such accommodations.

Federal contractors must also make reasonable accommodation to the physical needs and abilities of the handicapped. Included here may be access arrangements for work stations and restrooms, special equipment, and task reallocation between members of a work group. Substantial costs of making such accommodation may be a defense for not doing so. Generally, however, a wider view of accommodation has been taken regarding handicapped needs as opposed to religious needs.

Box S on limits to accommodation here

Box T on Americans With Disabilities Act here

*Working Conditions and Evaluation: The issue of "sexual harassment" has arisen both in connection with the general tone of work group relations and the process of employee evaluation. Most typically in such cases, male supervisors are accused of harassing female subordinates.

Box S

Limits to Accommodation

Although employers are required to make reasonable accommodations for handicapped workers, there are limits to what may be expected. In one case, a head nurse at a Veteran Administration's hospital suffered from a variety of maladies including depression, anxiety, insomnia, and migraine headaches. On two occasions, she took extended leaves of absence for treatment but her problems returned on resuming work.

The anti-depressant drug she took made it difficult for her to get out of bed in the morning and she was repeatedly late for work. She usually arrived for her 8 AM shift after 10 AM, despite warnings from supervisors. Eventually, she obtained a letter from her physician requesting a later shift, but she refused to allow him to provide medical evidence when the hospital requested it. Instead, she filed a complaint with the EEOC claiming she was denied the later shift because she was black and handicapped.

A second letter from her physician provided more detail and the hospital offered a later shift, but with at a lower level as staff nurse, although at no pay cut. The nurse rejected the offer, viewing it as a demotion, and applied for a disability retirement, which was granted. Nonetheless, the EEO complaint went forward. Ultimately, a federal district judge found that the position of head nurse required a starting shift of 8 AM and that a change of time would be more than the reasonable accommodation standard required. It would impose an undue hardship on the hospital to make the shift time change. An appeals court upheld the lower court's ruling.

Source: Guice-Mills vs. Derwinski, 967 F.2d 794 (1992).

Box T

**Defining Handicapped Under the Americans
with Disabilities Act of 1990**

A protected handicapped person under the Americans with Disabilities Act is someone with a physical or mental impairment that substantially limits one or more major life activities, someone with a prior record of having such an impairment, or someone regarded as having such an impairment.

Although a past drug addiction would be a protected impairment if an employer took negative employment actions based on it (such as a refusal to hire), current drug addiction is not protected and employers may use drug-detection tests in screening job applicants or existing employees.

Refusal to hire people who have a past history of some covered impairment, such as cancer, but who no longer have it could trigger a charge of discrimination.

Unlike other protected groups, there are no hard estimates of the number of persons in the workforce who have a protected handicap or impairment. It might be noted that while Title I of the Act deals with employment issues, there are other titles dealing with such questions as access to public transit.

Source: Americans with Disabilities Act.

The supervisor may hold out the promise of favorable merit reviews or promotions in exchange for sexual favors. Alternatively, threats of making negative evaluations may be used to obtain sexual favors. Since such conduct is aimed only at one sex, it violates EEO regulations, even if the employer has explicit rules against sexual harassment.

Box U on sexual harassment in an auto plant here

Employers may also be held liable for harassment (sexual or racial) of nonsupervisory employees against other nonsupervisors. In effect, the employer is responsible for the climate of working relationships. Indeed, even harassment by outsiders - by customers or by employees of subcontractors who are working on the premises - may lead to employer liability.

Box V on sexual harassment of males here

Because ignorance by the employer of incidents may not be an excuse when harassment occurs, human resource professionals need to establish both systems of monitoring (of supervisors and nonsupervisors), systems of complaint

Box U

Sexual Harassment in an Auto Plant

A female assembly line worker was ordered reinstated by Ford Motor Company and awarded over \$185,000 in back pay on grounds that her complaints of sexual harassment were the cause of her discharge. The woman - the first female employee in her department - repeatedly complained of sexually-offensive remarks to her supervisors. In one incident, she complained that fellow workers had spoken to her about oral sex, only to be told that she should get used to such language in a male-dominated field. In another, the supervisor himself asked if he could watch her undress. In still another, she was denied a bathroom break causing menstrual blood to seep through her clothes.

Eventually, the worker was fired for falsification of her employment application. A federal district judge viewed that action as a pretext under the circumstances. In the judge's view, the firing was retaliation against the employee because of her complaints about sexual harassment.

Source: "Ford Motor Co. Ordered to Reinstate Woman Who Complained of Harassment," Daily Labor Report, August 12, 1991, pp. A2-A3.

Box V

Can Males Be Sexually Harassed?

The vast majority of sexual harassment claims are filed by women against men. But there have been exceptions. Males may sometimes be harassed by gay supervisors, for example. And there have also been such complaints in heterosexual circumstances.

In one case, a court ruled that a male plant manager of a jewelry plating company had sexually harassed two subordinate male manager by forcing them - under threat of job loss - to engage in sexual activity with his female secretary. Although one of the subordinate managers eventually left the firm, his quit was viewed as a "constructive discharge" by the judge and back pay was awarded.

Another case involved a female chief financial officer of a spa manufacturing company who was charged by a male subordinate with forcing him to have sexual relations with him and harassing him verbally. When he later married and returned from his wedding, he was demoted. A jury awarded him over \$1 million in damages (including \$10,000 from the alleged harasser), a verdict which the company said it would appeal.

Source: "Court Upholds Male Workers' Claims of Sexual Harassment at Jewelry Firm," Daily Labor Report, August 16, 1991, pp. A4-A5; John L. Mitchell, "Man Gets \$1-Million Award in Sexual Harassment Case," Los Angeles Times, May 20, 1993, p. A1, and related articles.

(for use by individuals who are harassed), and mechanisms of workplace training and sensitization about the harassment issue. Although explicit anti-harassment policies which are not enforced do not offer legal protection to the employer, it is important nevertheless that anti-harassment policies be formulated. Enforcement systems - with penalties where warranted - work best where explicit rules are in place and where information on the rules has been promulgated.

Box W on the right accent here

v. Affirmative Action and Human Resource Management Policy.

Although this section began by including EEO under the heading of policies which ban certain human resource management practices, some EEO elements require that the employer do something rather than not do something. The "reasonable accommodation" requirements for religious minorities and the handicapped are examples. However, the major example, and the one which has provoked the greatest controversy, is "affirmative action" (AA).

Affirmative action is a requirement for federal contractors. In addition, it is sometimes ordered as a remedy for past discrimination by courts, included in "voluntary" labor-management

The Right Accent

Title 7 forbids employment discrimination on the basis of national origin. But often immigrants arrive in the U.S. have learned, or will learn, English as a second language. Or, even if English is spoken in their country of origin, it may not be spoken with an American accent. As a result, speech with a non-American accent is common among immigrants. In one out-of-court settlement in California, an Asian-Indian credit manager was awarded damages after being discharged because of his accent. According to the EEOC, he had been fired because his accent did not fit the company image, in his employer's opinion. A spokesperson for the EEOC explained that "successful management of diversity in the workplace requires respect and understanding that people with different national or regional backgrounds speak with different accents."

In a Washington State case, a state Supreme Court decision found a Seattle bank guilty of discrimination for failing to promote a teller of Cambodian origin because he did not "speak American." At one point, he was told he would not be promoted unless he persuaded everyone in the local Cambodian community to trade at the bank. The trial court found that the teller's accent did not prevent him from communicating effectively and awarded him substantial damages.

But not all such cases lead to awards for the plaintiff. An Ohio utility hired a Nigerian as a financial and accounting analyst. Frictions with a supervisor arose when the supervisor suggested that the employee try to improve his English. The employee subsequently refused to read his performance evaluation and was fired for insubordination. A federal district court and an appeals court found that there was no proof that the supervisor's comments demonstrated racial or national-origin discrimination.

Source: "EEOC Settles Accent Bias Suit," Daily Labor Report, December 22, 1992, p. A12; "Washington Supreme Court Upholds Finding of Bias Based on Foreign Accent," Daily Labor Report, February 2, 1993, pp. A3-A4; "Supervisor's Comment About Employee's Accent Held No Proof of Racial Bias Under Title VII," Daily Labor Report, February 22, 1991, p. A6.

agreements, company policies, or out-of-court settlements. AA can mean simply reaching out to attract applicant pools of women or minorities where these groups are underrepresented in the employer's workforce. For example, a firm might place help-wanted advertisements in a minority newspaper or open up an employment office in a minority neighborhood.

The controversy over affirmative action comes from its requirement of the establishment of employer "goals and timetables." Such schedules specify numerical objectives of greater minority and female representation within the workforce, or within particular sectors of the workforce (such as skilled crafts or professional occupations). And they include a time frame in which the objectives should be met. The employer may fall short of these goals - such discrepancies are not infrequent - but in such cases reasons for the shortfall may be requested.

Under the Reagan and Bush administrations, affirmative action was criticized as producing reverse discrimination through job quotas and as giving preference on a basis other than merit. However, neither administration ever moved to end the affirmative action requirements which previous Presidents had established, although it has been argued that enforcement was lax.³² While divided by the issue, the Supreme Court has continued to endorse the AA concept within limits.

Essentially, it appears that affirmative action programs will be permitted in situations in which access to new opportunities is involved. Thus, affirmative action in hiring, promotions, or training is accepted as appropriate. In situations where application of affirmative action results in job loss for existing employees, however, it may not be permitted.

Thus, a bona fide union seniority system might include a provision requiring layoffs by reverse order of seniority. An employer which had raised the proportion of minorities or women in the recent past pursuant to an affirmative action program might see its efforts undone if the most junior people were laid off. But it is not free simply to override its contractual seniority system obligations in the name of affirmative action; that would result in tangible job losses for some to benefit others.

Because of the sensitive political nature of affirmative action, it is possible that future Supreme Courts will see the issue quite differently. Generally, employers who have such plans have not been anxious to see substantial changes in the rules, let alone more uncertainty about them. The establishment of numerical standards, and the achievement of those standards, is something that can be "managed" by the firm. An employer that achieves its OFCCP-approved goals under the current system is certain of compliance with federal standards. But a looser, less-defined standard would create a management problem. As a result, political

conservatives who deplore affirmative action find themselves at odds with the management community on this issue.

Box X on affirmative action here

vi. Social Discrimination and Employer Policy.

It is important to distinguish between social discrimination, which affects the characteristics of potential employees, and discrimination within the firm. Social discrimination may manifest itself by making individuals less productive to employers than they otherwise would be. For example, provision of inferior schooling to minority children, leading to less education or lower quality education, might reduce employee value. It has been argued that until the 1970s, increased schooling of blacks was a major contributor to black economic advancement.³³ So might a less stable family background.³⁴ Nondiscriminatory employers would pay less to the affected individuals (or not hire them) because these persons are worth less to the firm.

Social discrimination may also take more subtle forms, such as creating expectations in individuals about sex roles in careers and marriages. These expectations cause the individuals who hold them to invest in different levels of education, to search for particular kinds of jobs, and to follow different patterns of

Box X

Diverse Outcomes of Affirmative Action

The fire department of Columbus, Ohio had an affirmative action plan designed to recruit more women. In the early 1980s, women who took the physical test for firefighter jobs flunked disproportionately. A test which began to be given in 1984 was found by a court to have a disparate impact on women and not to be job related. Eventually, the department agreed to a program under which, for 20 years, an exam would be graded pass/fail and men and women would be hired proportionate to the exam takers. But in 1991, males charged reverse discrimination and demanded that hiring should be based on rankings on the test. A federal appeals court accepted the challenge as valid but ordered the city to consider alternative approaches to selecting applicants.

However, challenges to affirmative action on grounds of reverse discrimination often do not prevail. A food processing firm in Baltimore was found by the EEOC to have violated various EEO laws in 1991. As a result, it installed an affirmative action plan. A promotional opportunity for a mechanic developed and the firm selected a black applicant over a white. The company viewed both applicants as qualified for the job, but saw the white as more qualified based on apprenticeship credentials. After being passed over, the white suited, using a post-Civil War statute to claim reverse discrimination on grounds of race. A federal district court, however, found the affirmative action plan to be valid since it was intended to remedy past discriminatory practices.

Source: "Men Win Reverse Discrimination Suit Against Columbus, Ohio, Fire Department, Daily Labor Report, August 3, 1993, p. D5; "Qualified Applicant Meets Demands of Affirmative Action Plan, Court Rules," Daily Labor Report, April 14, 1993, p. A2.

workforce attachment. The key characteristic of social discrimination is that it changes the "endowments" or job-related characteristics of individuals before they arrive at the employer's door. As a result of their endowment - but not necessarily because of employer prejudice - the individuals experience different treatment in the labor market in terms of success in finding work, attaining occupational status, and wage level. To some extent, affirmative action is aimed at social discrimination.

vii. Employer Discrimination.

However, the roots of EEO policy developed out of concern about employer discrimination. Employer discrimination consists of unequal treatment of individuals, by virtue of race, sex, etc., despite their equal endowments of job-related attributes. In empirical tests of discrimination, which are now often found as part of EEO litigation as well as academic research, a statistical relationship might be developed of the general form:

$$(1) \quad \text{Job Outcome} = f(\text{Job-Related Endowments})$$

where job outcomes might be the probability of hire or the pay level, and job-related endowments might include education, years of experience, or other relevant characteristics. If the function $f()$ differs by race or sex, discrimination might be inferred.

As can be readily seen from equation (1), the concept of discrimination is more easily conceived than measured. The use of statistical evidence in EEO cases has created a growth industry for economic and statistical consultants. Issues arise over the appropriate variables to include, measurement techniques, and biases in particular estimation methods.³⁵ Judges find themselves in the uncomfortable position of weighing probabilities in cases where the precise mechanism of discrimination is not identified.³⁶

One example of the problems raised by statistical interpretation arises in the case of numerical performance appraisals received by employees in the course of their employment. In principle, these ratings are measures of on-the-job output, rather than just background endowments. Thus, a case can be made in including them in any analysis of how individuals are treated on the job. If claims are made that promotional opportunities are being denied to women or minorities, and employer might want to use the appraisal ratings as evidence of nondiscrimination. But if there is prejudice in the rating process, equivalently productive individuals will not receive the same ratings. On the other hand, excluding the ratings will cause omission of actual performance information. Such methodological disputes may end up being decided by judges and juries, who are not always masters of econometric technique.

viii. Economic Models of Discrimination.

An important reason why statistical approaches to employer discrimination produce uncertain results is that discrimination is difficult to fit into a simple economic model. Without a clear model, it is hard to justify a particular tool of measurement. The difficulty arises from the basic question of why employers should discriminate in the first place.

Note first that if only one employer discriminated in a large, classical labor market, there would be no practical effect. An individual employer who did not hire blacks or females for certain jobs would hire whites or males instead. But other (unprejudiced) employers would hire the rejected blacks or females not employed by the prejudiced employer. Thus, the biases of a single employer would result simply in a reshuffle of the race or sex composition of the labor force between firms. But no noticeable impact on wages or anything else would follow from this isolated discrimination.

If all or most firms discriminate, however, then the group against which the discrimination is directed will suffer economic loss. Wages will be lower for the affected workers. In effect, employers require a (negative) compensating pay differential to hire members of the target group. Adding search costs to the model may lead to higher unemployment rates and other real-world symptoms of employer discrimination. But another paradox then enters the picture. With lower wages for otherwise comparable workers, profit

maximizing employers should rush to hire the affected group in place of other workers. Thus, a model of discrimination would seem to imply that firms are not profit maximizing, in violation of the usual classical assumption.

Two basic routes out of this dilemma can be proposed. One is to suggest that employers maximize their "utility," not their profits. Profits are an input into the employer's utility function, but so is the satisfying of prejudice, according to this approach. Hence, widespread employer "tastes" for discrimination are said to explain the phenomenon.³⁷ A second possibility is to find reasons why discriminatory behavior might foster profit maximization, and, hence, be rationale within the classical economic model.

ix. Employer Tastes.

A major problem with the tastes explanation is the separation of ownership and control in the modern firm. Shareholders do not come in contact with the firm's workforce, so it is difficult to understand why they should be concerned with anything but profitability. Of course, salaried managers might have discriminatory tastes. But if these tastes are exercised, a principal/agent problem is created. Management - the agent for the shareholders - is not maximizing profits for its principals.

Rather it is diverting potential profits, by not hiring the cheaper adversely-affected group, to satisfy management's own preferences.

A second conceptual problem is that even if employer preferences in existing firms are dominated by prejudiced tastes - which push the firms away from profit maximization - new (unprejudiced) firms could enter the market and out-earn their older competitors. In particular, it is not clear - within the context of the classical model - why the victims of discrimination do not form their own firms and compete against prejudiced firms. Ultimately, models of discrimination due to employer prejudice must be sustained by background social discrimination which inhibits entrepreneurship and access to capital markets.³⁸

x. Alternative Explanations.

Discrimination could be compatible with profit maximization under certain assumptions. One possibility is that employers are "made" to discriminate by unions. Union discrimination can certainly be documented historically, particularly among skilled crafts.³⁹ Prior to EEO regulation, blacks and Asians were excluded from certain trades; separate male and female job classifications and pay grades were found in some union contracts. And although the most overt forms of discrimination have ended, some of elements of earlier practices linger on. But the union explanation of general discrimination in the labor market founders on three facts.

First, historically, important unions - particularly industrial unions - opposed discriminatory employer practices. The opposition stemmed from radical ideology in some unions, which viewed themselves as uniting the working class. And it also stemmed from the practical need to organize all workers in a firm in order to gain recognition and bargaining power. Second, statistical studies suggest that - at least with regard to blacks - unions in modern times have tended to promote greater equality of wage distribution by pushing up wages in industries in which blacks are concentrated.⁴⁰ Third, most of the workforce is nonunion.⁴¹

The presence of unions may have had effects on employer behavior with regard to hiring, apart from the direct preferences of unions or of their members. Employers in the past found it in their interests to use racial divisions to weaken unions, which might otherwise have had greater bargaining power. In the early part of this century, black workers from the south were sometimes recruited to northern factories as strike breakers. Some of the subsequent tension between white and black labor stemmed from such incidents.

Despite the past history, a union or union-relations story is not a satisfactory explanation of contemporary employer discrimination. Meshing discrimination with profit maximization requires other explanations. One possibility is customer

preference. Firms that are in retail trade might find it profitable to discriminate in hiring if their customers are prejudiced. If, for example, white customers are uncomfortable with black sales clerks or black bank tellers, employers might accommodate to customer preference - as they do in other aspects of marketing. And, indeed, blacks do tend to be underrepresented in sales occupations and retail employment.⁴² Even non-retail firms might find it in their economic interests to adjust to prevailing social prejudices in the communities and neighborhoods in which they operate.

Employee preference might also play a role in determining employer policy. A firm with a significant investment in its existing workforce members is likely to cater to their views. If these views are prejudiced, the firm may want to avoid adverse productivity effects that might be engendered by, say, racial tensions.⁴³

There are many examples of resistance of workers in traditionally white or male occupations to the introduction of blacks, other minorities, or women. The problem is compounded by the team production mode often found in the work setting; all members of the team must cooperate and trust each other. Introduction of persons into the team who are not trusted by the incumbents could lower productivity.⁴⁴

Finally, the notion of statistical discrimination may explain employer discrimination. As noted in an earlier chapter, employers might be unable to measure the productivity of prospective employees. Detecting and removing low productivity workers after hiring can be costly. Thus, firms look for "clues" about future performance before hiring workers (or before promoting workers into new jobs).

Accordingly, if belonging to a particular race/sex group is correlated in the experience of the firm with lower productivity, the firm may follow a strategy of generalizing to all members of that group. Insurance companies find that it pays to generalize about risk in establishing insurance premiums. For example, teenage males as a group have above-average rates of traffic accidents and so all teenage males are charged above-average rates for automobile coverage. It is too costly for the carriers to make individual assessments of each boy's likely risk, and thus rational to generalize. If generalizing about potential employees is cheaper than making detailed individual investigations, employers might also make "actuarial-type" decisions in hiring and promotions.

With statistical discrimination, the accuracy of the generalization may not be the key element in determining its rationality. Suppose there are two groups with identical distributions of productivity, but that there are costs of

determining or predicting the productivity of any individual within the group. Suppose further that employers are more familiar with predictors of productivity in one group compared to the other. They might rationally tilt their hiring and promotion decisions toward the known group in which assessments are less costly.⁴⁵

xi. EEO Costs.

The cost impact on the firm of imposing EEO regulations will vary, depending on the nature of the discrimination process. It might appear that if discrimination is profit-maximizing, as most of the models described above suggested, than removing discrimination would be profit reducing. But that is not necessarily the case.

If, for example, employer discrimination is due to customer preference, and if EEO anti-discrimination provisions are uniformly enforced, no one firm is likely to lose any business by following EEO rules. When all firms are forced simultaneously to end discriminatory practices, prejudiced customers cannot take their trade elsewhere. Short of not consuming at all, they must accept the new situation. In effect, coordinated EEO enforcement acts as a monopsony element in the product market which favors non-discrimination in the labor market.

Suppose alternatively that discrimination is of the statistical type and is due to the fact that employers are less able to determine the future productivity of potential recruits from certain groups. Suppose further that the productivity distributions are the same for all groups. Forced use of the unknown group will, in fact, raise the marginal products of those previously excluded. A net gain in social efficiency could result.⁴⁶

Much depends on the sequence of events. If employee preferences for discrimination were driving employer policy, there may be initial frictions and loss of output during the period of integration. But if a learning process takes place, after which prejudices recede, the employer will have a wider labor market from which to select future employees. EEO policy, enforced over a period of time, could change attitudes, expectations, and labor market institutions. Thus, while discrimination might be rational for unconstrained employers initially, it might be irrational (not profit maximizing) at a later date after EEO policy has been enforced.

Despite the uncertainties involved in modeling discrimination in the workplace, there is a lesson to be drawn for EEO policy. All models ultimately require an interaction of social and employer discrimination. The two types of discrimination may reinforce each

other so that over time, discriminatory policies and attitudes become entrenched.

It is likely, therefore, that discrimination cannot be overcome except by widespread pressure from public policy. Reliance on The Market alone will not by itself change deeply embedded human resource practices. Discriminatory practices can exist comfortably within a market system. An external push may be required to change these practices. But once changed, market forces need not push for the resurrection of past practices.

xii. Labor Market Trends.

Labor market data from the 1970s and 1990s suggest that aggregate indicators were improving for females relative to males, but not blacks versus whites. Figures 3 and 4 show the employment-to-population ratios by race, sex, and Hispanic origin. For all groups, the business cycle impact is clearly evident; employment falls relative to the noninstitutional civilian population during the recessions of the mid 1970s, early 1980s, and early 1990s. It rebounds during recoveries. But apart from these cyclical effects, male employment has been falling relative to female among blacks and whites. White females as a group have made the most dramatic employment gains. If we take the employment-to-population ratio as a measure of integration into the workforce, it appears that white males are most tightly linked to employment followed by Hispanic

males, black males, white females, and then black and Hispanic females.

Figures 3 and 4 here

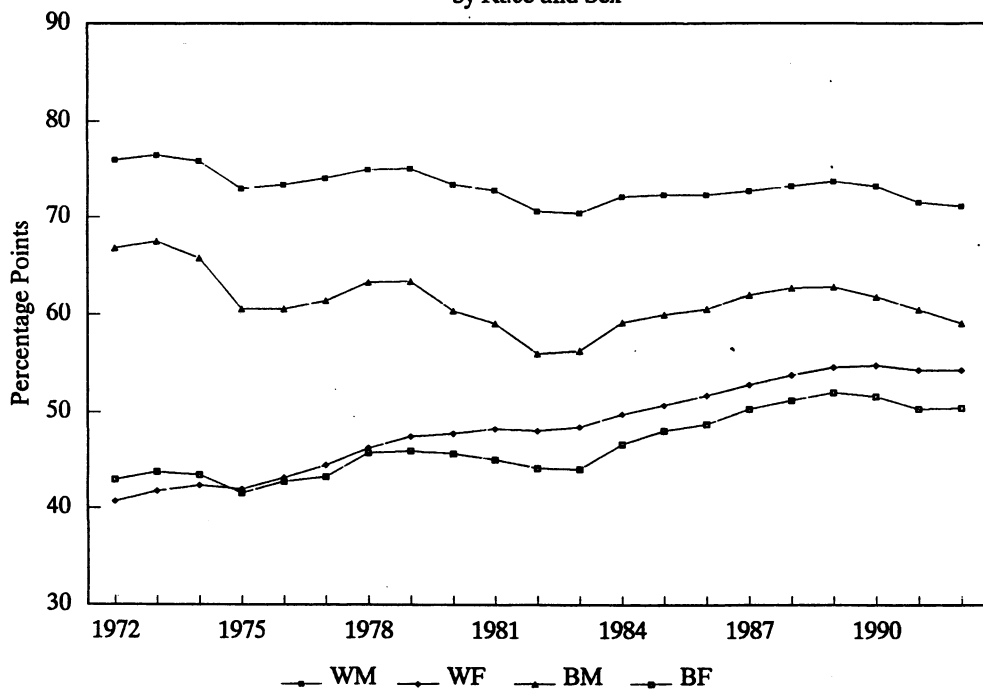
Figures 5 and 6 depict the ratio of black-to-white and Hispanic-to-white unemployment rates. Blacks and Hispanics have a notable disadvantage in the labor market by this index relative to their male and female counterparts. Black female rates have risen relative to white female rates over the period shown while black male rates show little trend. Both vary pro-cyclically because the white unemployment rate changes more dramatically during booms and busts than the black; in effect, there is a block of high black unemployment that does not change much over the cycle.⁴⁷ Generally, black rates of unemployment are double the white rates. Hispanic rates are roughly one and a half to two times as high as white.

Figures 5 and 6 here

As Figure 5 illustrates, female unemployment rates have fallen relative to male rates. This tendency resulted in part because the labor market for males worsened during the 1980s, due to structural shifts in industry employment patterns. Because males are more

Figure 3

Civilian Employment/Population Ratios by Race and Sex



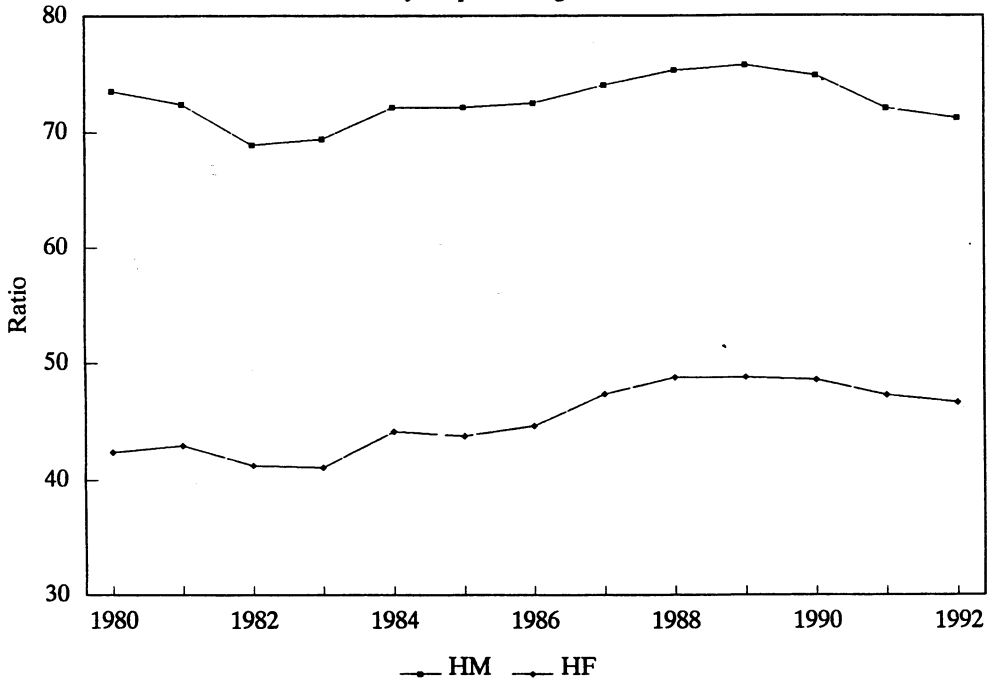
W = white
B = black
M = male
F = female

Source: U.S. Bureau of Labor Statistics

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eeowage.wkl

Figure 4

Civilian Employment/Population Ratios by Hispanic Origin and Sex

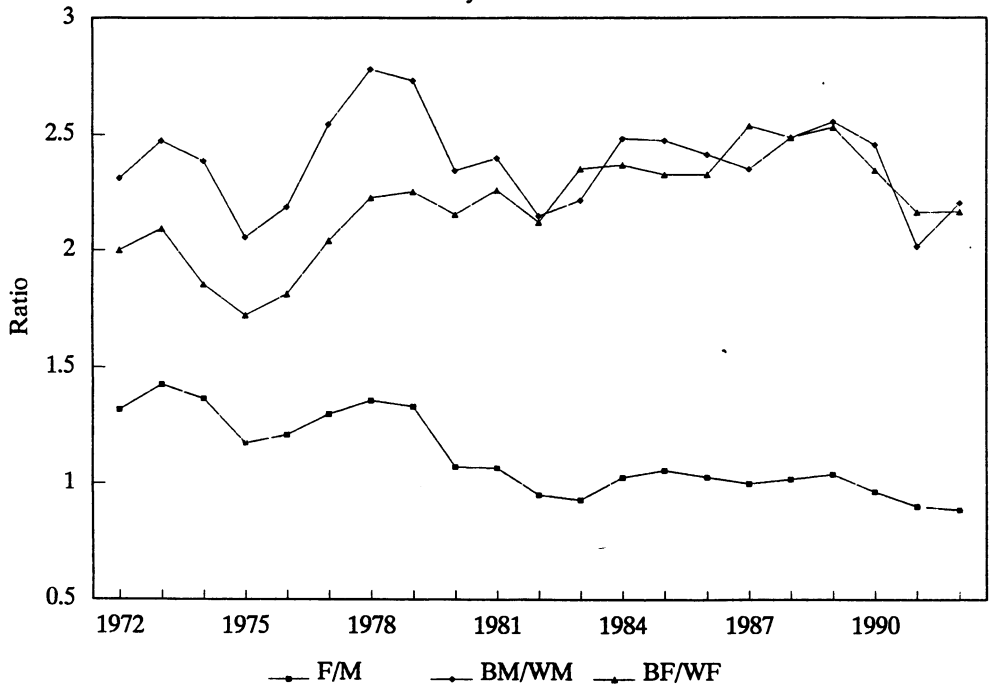


H = Hispanic
M = male
F = female

Source: U.S. Bureau of Labor Statistics

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Figure 5
Ratios of Unemployment Rates
 by Race and Sex



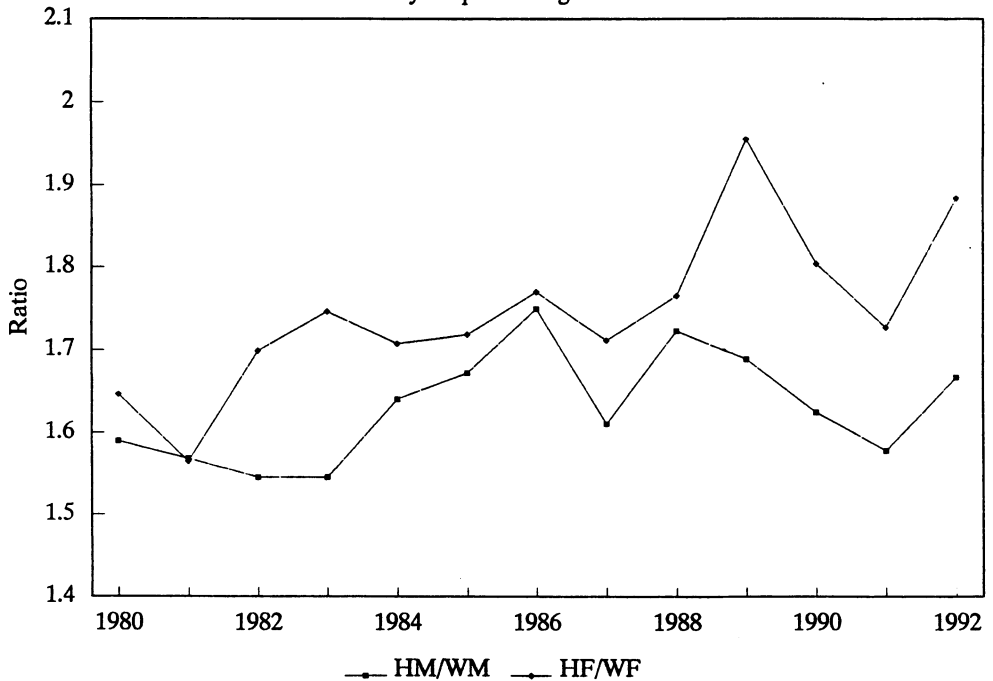
F = female
 M = male
 B = black
 W = white

Source: U.S. Bureau of Labor Statistics

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Figure 6

Ratios of Unemployment Rates by Hispanic Origin and Sex



H = Hispanic
M = male
F = female
W = white

Source: U.S. Bureau of Labor Statistics

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concentrated than females in cyclically-sensitive sectors such as manufacturing, the female-to-male ratio falls during recessions. By the late 1980s and early 1990s, female and male unemployment rates were at roughly comparable levels.

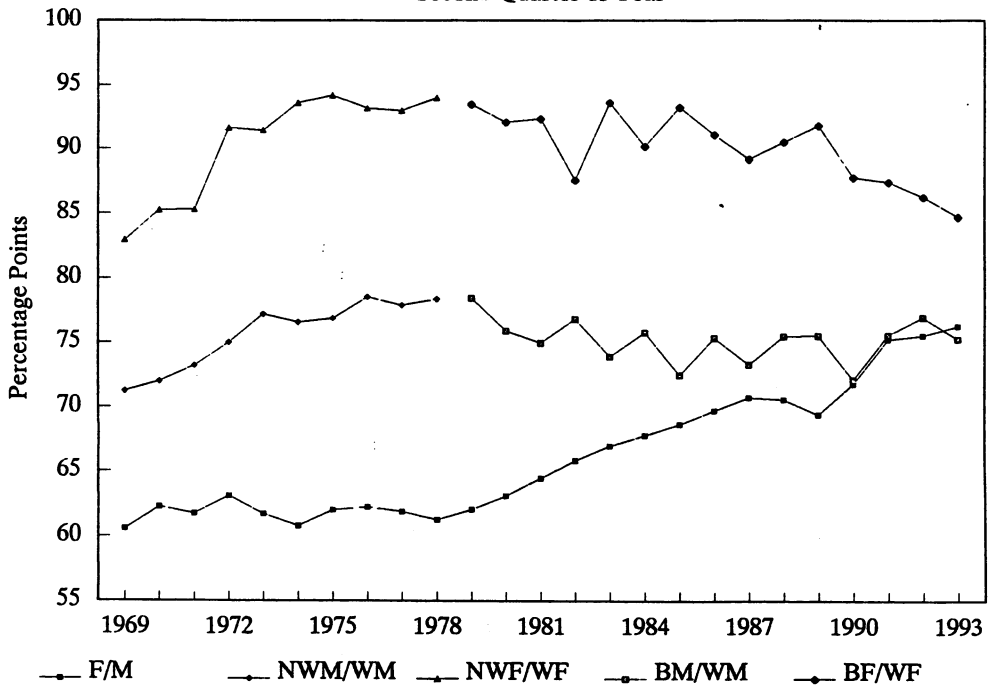
While employment and unemployment data measure gross success in job finding, earnings data provide information on the quality of work, once it is found. Earnings data will reflect a mix of influences such as occupation, industry, firm size, and unionization. In general, an improvement in the pay ratio of blacks to whites, or females to males, represents an improvement in the employment situation for those blacks or females who find jobs.

Figures 7 and 8 show the median black-to-white earnings ratios for full-time males and females during the 1970s, 1980s, and early 1990s.⁴⁸ Some improvement occurred for both groups in the earlier years, but there is a slight deterioration for black males and females. For males, this deterioration has been attributed to such factors as deunionization, changing employment composition of the workforce, and slippage in the relative level of the minimum wage.⁴⁹

Figures 7 and 8 here

Figure 7

Usual Weekly Earnings Ratios: Second Quarter of Year



F = female
M = male
NW = nonwhite
B = black
W = white

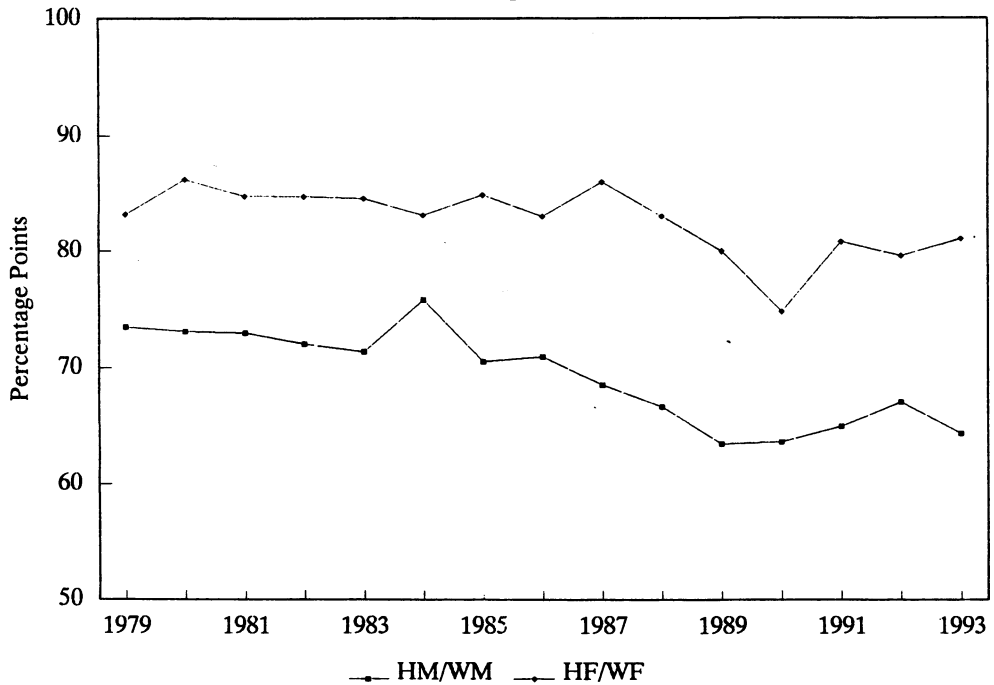
Source: U.S. Bureau of Labor Statistics

earnrat.pic
eowage.wkl

Figure 8

Usual Weekly Earnings Ratios:

Second Quarter of Year



H = Hispanic
M = male
F = female
W = white

U.S. Bureau of Labor Statistics

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eeowage.wkl

Just as comparative unemployment rates indicated some decline in the labor market status of Hispanic females, so, too, do relative pay rates. In contrast, the female-to-male earnings ratio (Figure 7) began to rise in the late 1970s, roughly the period when agitation over the comparable worth issue began to swell.⁵⁰ Although private employers are unlikely to be found guilty of pay discrimination in an EEO suit - since courts have not accepted the comparable worth doctrine - they may nevertheless have adjusted their pay schedules. Some public jurisdictions explicitly raised female pay relative to male on a comparable worth rationale.⁵¹

There have been concerns that women will disproportionately enter the contingent labor force, and thus be subject to lower pay and few benefits.⁵² There is no precise definition or measurement of the contingent labor force; part-time workers are the closest approximation available. Since the data of Figure 7 are confined to full-time workers, it might be the case that the trend shown hides developments among part-timers (who are disproportionately female). However, during the 1979-93 period, when the female-to-male earnings ratio was rising for full-timers, it also rose for part-timers. Moreover, employment trends are not moving in line with the contingent prediction; full-time female employment rose faster than part time and the reverse was true for males.⁵³

Obviously, many forces - especially the tightness or slackness of the labor market and changes in industrial structure - influenced the aggregate data just reviewed. For example, it has been argued that the rising female/male earnings ratio in the 1980s was more the result of a deteriorating job market for males, rather than an improved one for females.⁵⁴ Moreover, a substantial fraction of the female/male and black/white discrepancies in labor market treatment results from different job-related endowments rather than from employment discrimination.⁵⁵ Nevertheless, there is room for optimism concerning future female employment developments. Employment is growing and relative pay is improving for women.⁵⁶

One factor stressed by many economists is job-market experience. Generally, this factor augurs well for female/male wage comparisons in the future, since women have been gaining in labor market experience. With rising participation rates, women will be using that experience more fully in the labor market.⁵⁷ During the 1970s, young women showed a dramatic increase in expectations that they would be working later in life.⁵⁸ On the other hand, falling workforce participation among black males is an omen of future difficulties.

xiii. Effects of EEO Policy.

Although there were broad social and economic trends which seemed more favorable to females than to black males in the 1970s and 1980s, it is still important to ask whether EEO policy had a noticeable impact in making the labor market different from what it otherwise would have been. In fact, research studies suggest that EEO and affirmative action have had an effect and in the expected direction.⁵⁹ Yet the timing of the impact of EEO policy does not necessarily correlate with the intensity of enforcement nor with the administrative efficiency of the enforcement agencies.

Significant improvements for black workers, for example, seemed to come in the late 1960s, shortly after EEO policy went into effect. The lesson appears to be that EEO policy has worked as much or more by focusing the attention of management on race/sex problems as it has by implementation of any particular policy or procedure.⁶⁰ As already noted, this pattern may be reflected in the upward drift of the female/male pay ratio after the comparable worth issue surfaced. Although the comparable worth doctrine did not receive court endorsement, the focus on the issue may have convinced human resource specialists to address the question before it became a problem for their employers.⁶¹ So court decisions and particular public policies may not coincide with economic trends which are nonetheless influenced by the general aura of EEO.

xiv. EEO and the Status of Human Resource Management.

EEO policy, like other federal regulatory programs adopted in the 1960s and 1970s, put added stress on the human resource management function within firms. When regulatory policies are created, firms must adjust by hiring experts to keep up with the new requirements. In that respect, all of the regulatory programs discussed in this chapter and the preceding one have raised the status of the human resource function, the human resource department, and human resource professionals within the firm.

But EEO is something special. It is not just a creator of a demand for experts. Its impact can be compared with the effect of the rise of unionization in the 1930s and later, since EEO touched all elements of human resource management practice within firms. Moreover, it pushed internal firm policy toward formalization and central control or monitoring.

When a firm is challenged in court, or by a regulatory agency, with regard to an EEO matter, the firm will generally be better off showing that it follows centralized, controlled, and objective human resource policies. In the case of hiring, for example, a firm which leaves such decisions entirely in the hands of line managers runs a risk. Line managers are under pressure to meet production targets; they may well hire through informal networks of friends or through referrals by current employees. Such hiring procedures will not generally be neutral with regard to race and

sex; they will bias the applicant pool towards people similar to those already in the firm's employ.

Similarly, firms who leave it to line managers to discharge unsatisfactory employees may create problems for themselves. Detailed documentation on the reasons for discharges may not be kept by line managers, whose main goal is to rid themselves of a troublemaker. Without such documentation, however, charges that disciplinary actions were really taken for discriminatory reasons will be hard to refute.

The fact that EEO policy pushes the firm toward centralized and formalized human resource management policies does not mean that all firms adopt such management styles. There are obvious advantages in decentralization and in leaving decisions with line managers, who are close to the production scene, and who have an incentive to meet firm production goals. As with everything else in economic life, EEO pressures create a tradeoff for the firm. Different firms select different points along the tradeoff spectrum.

Even decentralized styles of management, however, can be influenced by EEO objectives. Line managers can be trained to recognize the potential costs which incorrect decisions on their part can inflict on the firm. The reward and penalty system can be designed to reflect the firm's EEO, as well as production,

objectives. In such situations, human resource specialists operate as trainers, monitors, and evaluators of line decisions; they do not make such decisions themselves.

III. The Public Policy Environment.

Some readers at this point must wonder whether the list of regulatory programs which affect the human resource management function has been exhausted in the last chapter and this one. Complex as the programs discussed so far seem, they are but a sampling of the public policies which affect the employment relationship. For example, there are specialized programs which affect fringe benefits. An earlier chapter mentioned the influence of the tax code on the kinds of benefits offered. These incentives reflect a Congressional desire to foster a private system of health and welfare programs run by employers. And there are other programs as well aimed at regulating employee benefits.

Because of federal concerns about retiree security, firms that offer pension plans and similar arrangements are subject to the Employee Retirement Income Security Act of 1974 (ERISA). Those with defined benefit pensions must insure their plans against bankruptcy with the federal Pension Benefit Guarantee Corporation (PBGC). And they must meet various standards of funding and vesting.

Federal policy is concerned about unemployment, particularly high youth unemployment and unemployment among welfare recipients. As a result it has fostered various programs aimed at subsidizing employers who hire targeted groups, through tax credits and other means. State and local governments have related programs.

As these examples illustrate, the list of public policies which affect the workplace is long. Where a government interest is felt, a labor market solution is often sought. Some resulting programs impose mandatory burdens on firms; others provide financial inducements to modify human resource management practices that would otherwise be followed.

Thus, if future predictions about public policies which will affect human resource are to be made, it is necessary to consider likely future public concerns. The aging of the population, which will occur over the next few decades, will place added stress on income security. Income security and job security are closely related. As a result, proposals for restricting employer freedom to layoff and discharge employees are surfacing. The requirements enacted in 1988 that employers provide 60 days notice of plant closings and mass layoffs are symptomatic of this movement.

The growing proportion of women in the workforce will continue to raise issues concerning comparable worth, pregnancy leaves, sexual harassment, and similar matters. One of the first actions

of the Clinton administration was to sign into law legislation creating mandatory family leaves. Changes in industrial structure, and the resulting job displacement, have renewed public interest in job training and vocational education. The degree to which the regular educational system prepares students for the transition to the workforce will also be a key concern.

Forward-looking human resource specialists attempt to monitor those social trends which can lead eventually to pressures on internal firm policy. But futurology is risky. The overused term "flexibility" best describes the posture human resource specialists should take with regard to future developments. An ability to quantify the effects of potential programs, and alert top management to their internal consequences is important. Also very important is an ability to see the potential conflicts between proposed management strategies and the requirements of public policy.

Where the firm has severe problems with regulatory proposals or actual programs, it may have recourse. The firm can find outlets for expression of its needs through trade associations and business groups. Forecasting future public policies with confidence may not be possible. But firm survival may rest on with coping with those policies, and even influencing them.

EXERCISE FOR THE STUDENT

In 1992, women constituted 46% of total civilian employment. Yet only 8.5% of employed engineers were women. While there is underrepresentation of women in other scientific and mathematical fields, it is nowhere near the level of engineering. For example, about a third of mathematical and computer analysts and about a fourth of natural scientists are women.¹ Suppose you were an human resource executive in an industry such as aerospace which is a heavy user of engineering personnel and is a major supplier to the federal government. Your record regarding the hiring of women into engineering pursuant to your affirmative action plan is being questioned by officials of the OFCCP. What steps might you take to increase female representation in your engineering ranks? Consider such aspects of your human resource management procedures as recruitment, screening, training, and retention. What costs might you encounter in implementing policies in these areas? What other human resource problems might arise?

KEY QUESTIONS AND PHRASES

1. In what way do immigration controls affect employers who have not had a history of employing aliens - legal or illegal?
2. Will native labor necessarily benefit from a tightening of immigration restrictions?
3. What distinction would you make between affirmative action and anti-discrimination policy?
4. How have EEO requirements affected human resource management functions related to the hiring of new employees?
5. How might the preferences of nonsupervisory employees lead to discriminatory practices by management in the absence of EEO constraints? What about customer preferences?
6. How do restrictions on age discrimination interact with concerns about job security?

Phrases:

Age Discrimination in Employment Act, Americans with Disabilities Act, bona fide occupational qualification, comparable worth, disparate impact, disparate treatment, EEOC, Equal Pay Act, health care cost containment, Immigration Reform and Control Act, OFCCP, pay equity, reasonable accommodation to religious practice,

¹Employment and Earnings, vol. 40 (January 1992), p. 195.

reasonable accommodation to the handicapped, seniority vs. affirmative action, sexual harassment, statistical discrimination, Title 7 of the Civil Rights Act, validation

FOOTNOTES

1. As will be noted below in the text, EEO policy can in principle be traced back to World War II. However, its impact was extremely limited until a legislative break through in the 1960s occurred, as part of the civil rights movement of the period.
2. U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970 (Washington: GPO, 1975), Part 1, pp. 8, 105-106.
3. George J. Borjas, "Immigration Research in the 1980s: A Turbulent Decade" in David Lewin, Olivia S. Mitchell, and Peter D. Sherer, eds., Research Frontiers in Industrial Relations and Human Resources (Madison, Wisc.: IRRA, 1992), p. 421.
4. Barry R. Chiswick, "Is the New Immigration Less Skilled Than the Old?," Journal of Labor Economics, vol. 4 (April 1986), pp. 168-192.
5. Sherrie A. Kossoudji, "English Language Ability and the Labor Market Opportunities of Hispanic and East Asian Immigrant Men," Journal of Labor Economics, vol. 6 (April 1988), pp. 205-228; Barry R. Chiswick, "Speaking, Reading, and Earnings among Low Skilled Immigrants," Journal of Labor Economics, vol. 9 (April 1991), pp. 149-170.
6. George J. Borjas, "The Earnings of Male Hispanic Immigrants in the United States," Industrial and Labor Relations Review, vol. 35 (April 1982), pp. 343-353.
7. These data, and other related international wage statistics, are discussed more fully in the next chapter.
8. Georges Vernez and David Ronfeldt, "The Current Situation in Mexican Immigration," Science, vol. 251 (March 8, 1991), pp. 1189-1193.
9. U.S. Immigration and Naturalization Service, Statistical Yearbook: 1990 (Washington: INS, 1991), p. 167.
10. George J. Borjas, "Immigrants, Minorities, and Labor Market Competition," Industrial and Labor Relations Review, vol. 40 (April 1987), pp. 382-392.
11. There are special provisions of immigration law permitting employers to import skilled immigrant workers when there is a shortage of the needed skill in the U.S. Legislation passed in 1990 ordered the U.S. Department of Labor to come up with a method of designating such skill shortages, a task which has proven to be difficult empirically.

12. For reviews of these issues, see Michael J. Greenwood and John M. McDowell, "The Factor Market Consequences of U.S. Immigration," Journal of Economic Literature, vol. 24 (December 1986), pp. 1738-1772; U.S. President, Economic Report of the President, February 1986, op. cit., chapter 7; Clark W. Reynolds and Robert K. McCleery, "The Political Economy of Immigration Law: Impact of Simpson-Rodino on the United States and Mexico," Journal of Economic Perspectives, vol. 2 (Summer 1988), pp. 117-131, especially p. 125; Barry R. Chiswick, Illegal Aliens: Their Employment and Employers (Kalamazoo, Mich.: Upjohn Institute, 1988).

13. Kristin R. Butcher and David Card, "Immigration and Wages: Evidence from the 1980s," working paper no. 281, Industrial Relations Section, Princeton University, February 1991; John M. Abowd and Richard B. Freeman, "The Internationalization of the U.S. Labor Market," working paper no. 3321, National Bureau of Economic Research, April 1990.

14. Barry R. Chiswick, "Illegal Immigration and Immigration Control," Journal of Economic Perspectives, vol. 2 (Summer 1988), pp. 101-115, especially pp. 111-113.

15. John K. Hill and James E. Pearce, "Enforcing Sanctions Against Employers of Illegal Aliens," Economic Review, Federal Reserve Bank of Dallas (May 1987), pp. 1-15. The law provides for importation of foreign workers in agriculture under certain conditions. A special "adverse effect wage rate" is established by the U.S. Department of Labor -- in effect a minimum wage for farmers -- for employers of immigrant labor under this program to avert a depression of domestic wages by the immigrants.

16. Karen A. Woodrow and Jeffrey S. Passel, "Post-IRCA Undocumented Immigration to the United States: An Assessment Based on the June 1988 CPS" in Frank D. Bean, Barry Edmonston, and Jeffrey S. Passel, eds., Undocumented Migration to the United States: IRCA and the Experience of the 1980s (Washington: Urban Institute Press, 1990), p. 51.

17. Wayne A. Cornelius, "Los Migrantes de la Crisis: The Changing Profile of Mexican Labor Migration to California in the 1980s," working paper, Center for U.S.-Mexican Studies, University of California, San Diego, 1988.

18. Prior to IRCA, union officials complained that employers threatened with unionization would call for INS raids of their own premises to remove union activists. But with IRCA's employer penalties, employers would be unlikely to use such a tactic.

19. U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Part 1 (Washington: GPO, 1975), p. 139.

20. U.S. Bureau of Labor Statistics, Outlook 1990-2005, bulletin 2402 (Washington: GPO, 1992), p. 31.

21. Women and children were often grouped together in the mind of legislators of the period. State protective laws which vary by sex were struck down as being in conflict with the federal EEO legislation to be discussed below.

22. Jonathan S. Leonard, "Affirmative Action as Earnings Redistribution: The Targeting of Compliance Reviews," Journal of Labor Economics, vol. 3 (July 1985), pp. 363-384.

23. Ward's Cove Packing Co. v. Atonio, 49 FEP Cases 1519 (1989).

24. For example, a study comparing newly-hired men and women found that while time on the job reduced the likelihood of quitting for men, the quit probability rose with time for women. See Mark E. Meitzen, "Differences in Male and Female Job-Quitting Behavior," Journal of Labor Economics, vol. 4 (April 1986), pp. 151-167.

25. Differences between males and females on the same job which result from merit awards, progression plans, and piece rates are not forbidden.

26. See also Henry J. Aaron and Cameran M. Lougy, The Comparable Worth Controversy (Washington: Brookings Institution, 1986).

27. Robert S. Smith, "Comparable Worth: Limited Coverage and the Exacerbation of Inequality," Industrial and Labor Relations Review, vol. 41 (January 1988), pp. 227-250.

28. In the cases of firms which have been in business for long periods of time, there may be a history of pay differentials which - if unearthed - could be taken as evidence of pay discrimination. For example, there may be memos written years ago which justify low female pay rates for certain jobs on the grounds that women don't "need" as much money as men.

29. U.S. Bureau of the Census, Statistical Abstract of the United States: 1992 (Washington: GPO, 1992), pp. 76-77.

30. The pension cost differential is cushioned by the inclusion of survivor's benefits. A short-lived male employee is likely to be married to a younger, long-lived female. The extra costs for her tend to offset the lower costs for him. Similarly, a long-lived female employee is likely to have an older, short-lived husband.

31. Estimates of the differential costs the unisex benefit decisions have made for the pay of men and women have not been made. There are many complicating factors including the dependent issue cited in the previous footnote. In addition, with regard to pensions, women - although more expensive if they reach retirement

age - have shorter average job tenures than men. So they are less likely to vest their pension benefits and are likely to have shorter service periods, if they do vest. It is interesting to note that blacks have shorter life expectancies than whites, but employers did not make racial adjustments in their benefit plans to reflect this difference.

32. In principle, Presidents Reagan and Bush could have revoked earlier executive orders and ended the affirmative action requirement for federal contractors. For evidence of reduced enforcement, see Jonathan S. Leonard, "Women and Affirmative Action," Journal of Economic Perspectives, vol. 3 (Winter 1989), pp. 61-75.

33. In the early 1950s, at around the time of the Supreme Court's school desegregation decision, instructional expenditures per pupil in southern white schools was about two thirds higher than in black schools. See Finis Welch, "Black-White Differences in Returns to Schooling," American Economic Review, vol. 63 (December 1973), pp. 893-907, especially p. 900. Evidence of more recent black disadvantage due to background characteristics can be found in June O'Neill, "The Role of Human Capital in Earnings Differences Between Black and White Men," Journal of Economic Perspectives, vol. 4 (Fall 1990), pp. 25-45. See also James P. Smith and Finis R. Welch, "Black Economic Progress After Myrdal," Journal of Economic Literature, vol. 27 (June 1989), pp. 519-564.

34. There has been concern about the growth of single-parent families especially among blacks. On average, income levels for children in such families are likely to be lower and various disadvantages in the labor market for such children when they grow up may ensue. See David T. Ellwood and Jonathan Crane, "Family Change Among Black Americans: What Do We Know?," Journal of Economic Literature, vol. 4 (Fall 1990), pp. 65-84.

35. See, for example, the symposium on the subject of statistical tests for employment discrimination (part of a volume devoted to "Statistical Inference in Litigation") appearing in Law and Contemporary Problems, vol. 46 (Autumn 1983), pp. 171-267; Masanori Hashimoto and Levis Kochin, "A Bias in the Statistical Estimation of the Effects of Discrimination," Economic Inquiry, vol. 18 (July 1980), pp. 478-486; Walter Fogel, "Class Pay Discrimination and Multiple Regression Proofs," Nebraska Law Review, vol. 65 (2:1986), pp. 289-329; Joseph L. Gastwirth, "Statistical Methods for Analyzing Claims of Employment Discrimination," Industrial and Labor Relations Review, vol. 38 (October 1984), pp. 75-86.

36. The statistical techniques usually involve identifying a difference in job-related outcomes for one group relative to another. But the source of the difference in outcomes may not be known. All that may be said is that the chance that the difference in outcomes is caused by random processes is very small. Orley

Ashenfelter and Ronald Oaxaca, "The Economics of Discrimination: Economists Enter the Courtroom," American Economic Review, vol. 77 (May 1987), pp. 321-325.

37. An early statement of this approach can be found in Gary S. Becker, The Economics of Discrimination, 2nd edition (Chicago: University of Chicago Press, 1971 [1957]), pp. 16-17.

38. It might be noted that international trade theory - some of which is described in the next chapter - suggests that even barriers to factor acquisition (such as limits in obtaining capital) would not necessarily prevent real wages from being equal in an economy composed of, say, all-male and all-female firms. If female firms in the aggregate had lower capital-to-labor ratios than the aggregate of male firms, they would specialize in labor intensive goods, exporting them to the male economy in exchange for capital intensive goods. Under certain assumptions, the capital-to-labor ratios at the firm level would equalize within the two sectors, thus equalizing productivity and real wages.

39. A criticism of unions with regard to treatment of blacks, with historical references, can be found in Herbert Hill, "The AFL-CIO and the Black Worker: Twenty-Five Years After the Merger," Journal of Intergroup Relations, vol. 10 (Spring 1982), pp. 5-78.

40. Orley C. Ashenfelter, "Racial Discrimination and Trade Unionism," Journal of Political Economy, vol. 80, part 1 (May-June 1972), pp. 435-64; Orley C. Ashenfelter and Lamond I. Goodwin, "Some Evidence on the Effect of Unionism on the Average Wage of Black Workers Relative to White Workers, 1900-67" in Gerald G. Somers, ed., Proceedings of the Twenty-Fourth Annual Winter Meeting, Industrial Relations Research Association, December 27-28, 1971 (Madison, Wisc.: IRRA, 1972), pp. 217-224.

41. A comparison of union and nonunion plants in California suggested that unions did not hinder employment opportunities of women and minorities. See Jonathan S. Leonard, "The Effects of Unions on the Employment of Blacks, Hispanics, and Women," Industrial and Labor Relations Review, vol. 39 (October 1985), pp. 115-132.

42. One study finds that black professional basketball players earn less than equivalently-talented whites, and connects this discrepancy to white fan (customer) preferences. Attendance at games (and therefore team profitability) rises if white players are substituted for blacks. See Lawrence M. Kahn and Peter D. Sherer, "Racial Differences in Professional Basketball Players' Compensation," Journal of Labor Economics, vol. 6 (January 1988), pp. 40-61.

43. It has been argued, for example, that once it becomes obvious that female-dominated jobs are lower paid, males will have an incentive to act as "gatekeepers," resisting the entrance of women into "their" occupations. In addition, socialization might keep women from applying for better-paying male jobs, even if wage premiums could be obtained. See Myra H. Strober and Carolyn L. Arnold, "The Dynamics of Occupational Segregation among Bank Tellers" in Clair Brown and Joseph A. Pechman, eds., Gender in the Workplace (Washington: Brookings Institution, 1987), pp. 107-148, especially pp. 110-119. The authors note parallels between how real estate markets are able to maintain separate neighborhoods for whites and blacks, even without legal support for doing so. If everyone knows where they "belong," and if there is a sense that hostility might ensue if unwritten borders are crossed, the separate neighborhoods can maintain themselves, even if land prices and rents differ between them.

44. Ouchi notes that the highly successful American "theory Z" firms he identified had top management teams composed of "unremittingly white, male, middle class" membership and the firms tend to be racist and sexist. He found even greater racism and sexism among successful Japanese firms. These characteristics are attributed to the high degree of trust among managers on which the firms rely. See William G. Ouchi, Theory Z: How American Business Can Meet the Japanese Challenge (New York: Avon Books, 1982), pp. 77-79.

45. Shelly J. Lundberg and Richard Startz, "Private Discrimination and Social Intervention in Competitive Labor Markets," American Economic Review, vol. 73 (June 1983), pp. 340-347.

46. ibid.

47. Nonetheless, black economic status is improved by economic boom conditions in absolute terms. See Richard E. Freeman, "Employment and Earnings of Disadvantaged Young Men in a Labor Shortage Economy," working paper no. 3444, National Bureau of Economic Research, September 1990.

48. Available data provide nonwhite (rather than black) earnings information until the late 1970s, and black data thereafter. Nonwhites are roughly 90% black.

49. John Bound and Richard B. Freeman, "What Went Wrong? The Erosion of Relative Earnings and Employment Among Young Black Men in the 1980s," working paper no. 3778, National Bureau of Economic Research, July 1991.

50. Thus, one of the first statements of comparable worth as a legal issue appeared in early 1979. See Ruth G. Blumrosen, "Wage Discrimination, Job Segregation, and Title VII of the Civil Rights

Act of 1964," University of Michigan Journal of Law Reform, vol. 12 (Spring 1979), pp. 399-502.

51. See Morley Gunderson, "Male-Female Wage Differentials and Policy Responses," Journal of Economic Literature, vol. 27 (March 1989), pp. 46-72.

52. Susan Christopherson, "Labor Flexibility: Implications for Women Workers" in Rosalind M. Schwartz, ed., Women at Work (Los Angeles: UCLA Institute of Industrial Relations, 1988), pp. 3-24.

53. Female and male part timers are very different in age profile. However, the gross ratio of part-time female-to-male usual weekly earnings stood at about 1.08 in 1979-II and 1.13 in 1992-II. Source: U.S. Bureau of Labor Statistics, press release USDL 93-278, July 21, 1993, and earlier releases.

54. Lester C. Thurow, "The New American Family," Technology Review, vol. 90 (August/September 1987), pp. 26-27.

55. Randall K. Filer, "Male-Female Wage Differences: The Importance of Compensating Differentials," Industrial and Labor Relations Review, vol. 38 (April 1985), pp. 426-437.

56. It is tempting to argue that female workforce participation is increasing because of the growing attractiveness of female pay. However, the fact that the pay ratio did not rise much in the 1970s, when female workforce participation surged, is reason for skepticism of this explanation. It has been argued that the lesser certainty of male pay, as the male labor market deteriorated, drove wives to seek work. See Francine Blau and Adam J. Grossberg, "Wage and Employment Uncertainty and the Labor Force Participation Decisions of Married Women," working paper no. 3081, National Bureau of Economic Research, August 1989.

57. One study argued that female job experience rose over a long period, but - paradoxically - not for working women. That is, the gains were among women who were not working, but had worked in the past. As participation rates rise, however, the probability increases that nonworking women convert to working status. See James P. Smith and Michael P. Ward, Women's Wages and Work in the Twentieth Century (Santa Monica, Calif.: Rand Corp., 1984). See also June O'Neill, "The Trend in the Male-Female Wage Gap in the United States," Journal of Labor Economics, vol. 3, Part 2 (January 1985), pp. S91-S116.

58. U.S. President, Economic Report of the President, January 1987 (Washington: GPO, 1987), pp. 215-216.

59. John H. Donohue III and James Heckman, "Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic

Status of Blacks," Journal of Economic Literature, vol. 29 (December 1991), pp. 1603-1643.

60. Jonathan S. Leonard, "Employment and Occupational Advance under Affirmative Action," Review of Economics and Statistics, vol. 66 (August 1984), pp. 377-385; Jonathan S. Leonard, "What Promises are Worth: The Impact of Affirmative Action Goals," Journal of Human Resources, vol. 20 (Winter 1985), pp. 3-20; Jonathan S. Leonard, "The Impact of Affirmative Action on Employment," Journal of Labor Economics, vol. 4 (October 1984), pp. 439-463; Jonathan S. Leonard, "The Effectiveness of Equal Employment Law and Affirmative Action Regulation" in Ronald G. Ehrenberg, ed., Research in Labor Economics, vol. 8, Part B (Greenwich, Conn.: JAI Press, 1986), pp. 319-350; Paul Osterman, "Affirmative Action and Opportunity: A Study of Female Quit Rates," Review of Economics and Statistics, vol. 64 (November 1982), pp. 604-12; Orley Ashenfelter and James Heckman, "Measuring the Effect of an Antidiscrimination Program" in Orley Ashenfelter and James Blum, eds., Evaluating the Labor-Market Effects of Social Programs (Princeton, N.J.: Industrial Relations Section, Dept. of Economics, Princeton University, 1976), pp. 46-84; Richard B. Freeman, "Changes in the Labor Market for Black Americans: 1948-72," Brookings Papers on Economic Activity (1:1973), pp. 67-120.

61. Aaron Bernstein, "Comparable Worth: It's Already Happening," Business Week, April 28, 1986, pp. 52, 56.

Appendix

Sex Stereotyping at an Accounting Firm

A major U.S. Supreme Court case in 1989 was Price Waterhouse vs. Ann B. Hopkins (109 S.Ct. 1775). In this case, a woman who had failed to be promoted to a partner position sued her employer on the grounds that sex stereotyping was the cause of the negative decision. The original district court decision ruled in favor of the plaintiff, although it did not award her a partnership on grounds that she had quit rather than been discharged after failing to make partner. When the case reached the Supreme Court, it ruled (by split vote) that an employer had the burden of proof to show that even if it did engage in sex discrimination, it would have denied partnership anyway, absent the discrimination. The burden was to be based on a preponderance of the evidence, a less strict standard than the district court and appeals court had required. When the case was finally heard again in district court - following the Supreme Court's new guidelines - the court ruled that the employer had not met its burden of proof and ordered partnership to be granted.

In the Civil Rights Act of 1991, Congress overrode the Price Waterhouse decision and made any intentional discrimination unlawful, even if the same action would have occurred absent the discrimination.

Below we present edited excerpts from the original district court decision. Based on the excerpt, consider the following questions:

- 1) Was sex stereotyping a major element in the decision not to grant partnership to Ann B. Hopkins?
- 2) Should employers be permitted to maintain any separate standards of conduct for male and female employees?
- 3) Are there special complications involved in court-ordered promotions to partners? Or should such promotions be considered essentially the same as promotions from one "ordinary" employee position to another ordinary position?

Edited Excerpt from Ann B. Hopkins v. Price Waterhouse

U.S. District Court for the District of Columbia
618 F. Supp. 1109 (1985)

Ann B. Hopkins was proposed for partnership in Price Waterhouse, a nationwide professional partnership, but was held

for further consideration at the next annual partnership selection.¹ The following year the partners in the unit where she worked decided not to propose her a second time. Hopkins then resigned and filed this suit alleging sex discrimination in violation of Title VII of the Civil Rights Act. She asked to be made a partner and to be awarded back pay and other monetary relief.

Background.

Price Waterhouse is a partnership that specializes in providing auditing, tax and management consulting services primarily to private corporations and government agencies. At the time this action was filed, Price Waterhouse had 662 partners operating in 90 offices scattered across the nation. Its partners are certified public accountants and other specialists. Despite its size and geographic dispersal, Price Waterhouse has consistently sought to maintain the traditional characteristics of a professional partnership both in its management and partnership selection practices.

Partners manage the firm through a Senior Partner and Policy Board elected by all the partners. New partners are regularly selected from the ranks of the partnership's senior managers through an elaborate recommendation and review process that culminates in a partnership-wide vote in which the successful candidates are approved. There is no limitation on the number of partners who may be selected in any one year.

The admissions process takes place annually and begins when the partners of each local office may propose that one or more senior managers from their office be considered as partnership candidates. Partners in the local offices draft written recommendations based on a detailed consideration of the candidates' qualifications. These proposals are distributed to all of the firm's 662 partners and each partner is invited to submit evaluation forms on any candidate about whom the partner may have information.

Partners who have significant and recent contact with the candidate submit "long-form" evaluations and partners who only have a limited basis upon which to evaluate the candidate submit "short form" evaluations. These forms ask the partners to rank the candidates relative to other recent partnership candidates in 48 different categories ranging from practice development and technical expertise to interpersonal skills and participation in civic activities. The numerical rankings in this exhaustive list

¹ Caution: The text in this appendix has been edited from the original federal district court decision to improve readability for a nontechnical audience and to eliminate technical legal language. Words and tenses have been changed and footnotes have been eliminated or incorporated into the main text. Readers interested in a complete and accurate transcript should consult the original decision by Judge Gerhart A. Gesell.

of relevant, neutral criteria is supplemented by asking the partners to indicate whether they believe the candidate should be admitted to the partnership, denied partnership or held for further consideration and asking them to provide a short comment explaining their assessment.

The Admissions Committee reviews each candidate's personnel file and members of the Committee make visits to some local offices to interview partners who have commented in order to determine more precisely the basis for their views on the candidates. It then prepares a summary of the evaluations and other information and makes its recommendations to the Policy Board. If the recommendation is to "hold" a candidate for reconsideration in a later year or a "no" recommendation denying admission, the Committee prepares a short written statement summarizing its reasons. The Policy Board reviews the recommendations of the Admissions Committee and votes to include a candidate on the partnership ballot, to "hold" the candidate, or to deny partnership.

While the Admissions Committee's recommendations focuses primarily on the qualifications of the individual candidate, the Policy Board may occasionally interject business considerations and decide to recommend a candidate because of the firm's need for a particular type of partner or a particular skill. The candidates recommended by the Policy Board are submitted to the entire partnership for election, and candidates who are not included on the ballot are informed of the Board's reasons for rejecting their candidacy. Candidates who have been held may be reproposeed in later years and the review process begins again.

In 1982, Ann B. Hopkins was proposed for partnership by her office, the Office of Government Services (OGS), which specializes in designing and implementing consulting and management projects for government agencies. She was the only woman among the 88 candidates for partnership that year. All of the partners in OGS at that time were men. Indeed, as of July, 1984 only seven of the 662 partners at Price Waterhouse were women.

Hopkins had a successful career as a senior manager in OGS and had played a significant role in developing business for the firm. She played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State. Afterwards, she helped prepare a proposal and manage a project for a computerized system to handle the State Department's real property worldwide and successfully managed the preparation of a competitive proposal for a computer system to track loans of the Farmers' Home Administration. She had no difficulty dealing with clients and her clients appear to have been very pleased with her work. None of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership.

The partners in the OGS office fully endorsed her proposal for partnership. She was generally viewed as a highly competent

project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked. The comments submitted to the Admissions Committee, however, indicated that Hopkins had problems with her "interpersonal skills;" specifically, she had trouble in dealing with staff members. Eight of the thirty-two partners who submitted evaluations recommended that she be denied admission, three favored holding her for reconsideration, and eight indicated that they had insufficient basis for an opinion.

Supporters and opponents of her candidacy indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff. For example, she sometimes used profanity and appeared to be insensitive to others. These negative comments and the significant number of "no" votes, most of which were by partners filing short forms because of their limited contact with the Hopkins, were determinative in the Admission Committee's decision to recommend "that she should be HELD at least a year to afford time to demonstrate that she has the personal and leadership qualities required of a partner." After a full discussion the Policy Board adopted this recommendation.

Upon learning that her candidacy had been put on hold, Hopkins, at the urging of the Senior Partner, underwent a Quality Control Review in order to improve her chances of making partner the next year. Several partners indicated that they planned to give Hopkins opportunities to demonstrate her abilities and receive more exposure. However, these partners never followed through on their plans and the favorable results of the Quality Control Review came too late because just four months after the Policy Board's recommendation the partners in OGS decided not to repropose Hopkins for partnership. By that time, two partners in the OGS office strongly opposed her candidacy. Without strong support within that office, it was felt that her candidacy could not possibly be successful.

After the decision not to repropose, Hopkins was advised that it was very unlikely that she would be admitted to partnership. Rather than waiting to try again or accepting an offer to remain as a senior manager, she resigned from Price Waterhouse in January, 1984. After pursuing the appropriate administrative remedies she brought this action.

Hopkins advanced three arguments for maintaining that the decision was discriminatory:

- (1) The criticism of her interpersonal skills were fabricated;
- (2) Even if the firm believed her interpersonal skills were deficient, Price Waterhouse has routinely admitted male candidates with interpersonal skills problems if they had strong qualifications in other areas and would have admitted her if she had not been a woman;
- (3) The criticisms of her interpersonal skills were a product

of sexual stereotyping by male partners and the firm's partnership selection process improperly gave full weight to these these discriminatory evaluations.

Price Waterhouse denied these allegations and claimed that Hopkins was properly denied partnership because the firm, for legitimate business reasons, sought to avoid having abrasive partners who might jeopardize morale and be incapable of successfully supervising staff as they move among different locations in response to work demands.

Analysis: Were the Criticisms Fabricated?

The interpersonal skills of prospective partners was properly an important part of Price Waterhouse's written partnership evaluation criteria. Inability to get along with staff or peers is a legitimate, nondiscriminatory reason for refusing to admit a candidate to partnership. It is clear that the complaints about Hopkins' interpersonal skills were not fabricated as a pretext for discrimination. Even Hopkins admitted that she is a "hard-driving" manager who pushes her staff and occasionally uses profanity.

Contemporaneous records of counseling sessions and evaluations conducted well before Hopkins was proposed for partnership indicate that partners found her too assertive, overly critical of others, impatient with her staff, and counselled her to soften her image. At the time, Hopkins indicated that she agreed with many of these criticisms. Even partners who strongly supported her partnership candidacy acknowledged these deficiencies, although in more muted tones, when emphasizing the high quality of her work and her value to the firm. Staff members who testified on Hopkins' behalf indicated that she was an effective manager but her hard-driving style might be regarded as "controversial" and it required "diplomacy, patience and guts" to work with her.

Hopkins also alleged that the two OGS partners who blocked reproposing her after the Policy Board held her candidacy for reconsideration falsified their reasons to hide their discriminatory motives. There is not sufficient proof to support this allegation. One partner recommended that she be put on hold when she was first proposed and apparently opposed reproposal because he found her disagreeable to work with and had reservations about her technical skills and dedication to the firm. Although there is some suggestion that this partner may have held a personal grudge against Hopkins, there is no proof that his position was animated by animosity toward her sex.

The second partner supported Hopkins when she was first proposed, but changed his position after receiving additional criticism of her management style from staff members, having several conversations with her, and reflecting on his previous experience with her work. His decision to oppose Hopkins' candidacy put him in the uncomfortable position of being in direct conflict with the head partner in the office, who was one of her

biggest boosters. Although Hopkins disputes his version of the events that led him to change his vote, the Court found him to be a credible witness and accepts his account of these events.

While offers from several partners to arrange assignments which might have improved her chances for partnership never materialized and no one made any effort to check on Hopkins' current relationship with staff members after she was placed on hold, the evidence before the Court indicates that this was due to the timing of the partnership evaluation process rather than any discriminatory motives. Only a few months separated the announcement that Hopkins had been placed on hold and the vote not to repropose her so the firm had little opportunity to change Hopkins' assignment or do a thorough investigation into her subsequent relationships with staff. The decision not to repropose her was due to the unexpected position taken by the two partners discussed above and she did not prove that their actions were discriminatory.

Analysis: Would She Have Been Made a Partner if She Were a Man?

Hopkins alleged that even if there were problems with her interpersonal skills she was so highly qualified in every other respect that the firm would have made her a partner if it had not discriminated against her because of her sex. She claimed that the Policy Board invariably admitted men who have interpersonal skills problems and that comparing her "superb" record with that of these men showed that she was a victim of classic disparate treatment. Price Waterhouse did not concede that interpersonal skills were Hopkins' sole deficiency, but it admitted they were the principle and determinative reason for the firm's decision. Nonetheless, Price Waterhouse claimed that the male candidates that Hopkins pointed to were not comparable and did not indicate disparate treatment.

Fortunately the Court does not have to engage in the difficult task of second-guessing the Policy Board's balancing of professional skills of candidates from different years in order to resolve this allegation. The contemporaneous records generated by the partnership selection procedure demonstrate that Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between Hopkins and the male partners with whom she compared herself. From past partnership admissions records Hopkins identified two male candidates who were criticized for their interpersonal skills because they were perceived as being aggressive, overbearing, abrasive or crude, but were recommended by the Policy Board and elected partner.

Price Waterhouse pointed out that in both cases the Policy Board expressed substantial reservations about the candidates' interpersonal skills but ultimately made a "business decision" to admit the candidates because they had skills which the firm had a specific, special need and the firm feared that their talents might be lost if they were put on hold. In one case the Policy Board

rejected a "hold" recommendation by the Admissions Committee because of business considerations. Also, these candidates received fewer evaluations from partners recommending that they be denied partnership and the negative comments on these candidates were less intense than those directed at Hopkins.

The Court finds that the firm's emphasis on negative comments did not, by itself, result in any discriminatory disparate treatment. Hopkins attempted to show that the small number of women partners at Price Waterhouse indicates discrimination but her proof lacked sufficient data on the number of qualified women available for partnership and failed to take into account that the present pool of partners have been selected over a long span of years during which the pool of available qualified women has changed. Women have only recently entered the accounting and related fields in large numbers and there is evidence that many potential women partners were hired away from Price Waterhouse by clients and rival accounting firms. Although women partnership candidates have been elected to partnership at a slightly lower rate than men (60% versus 68%), the difference is not statistically significant.

Analysis: Was Sex Stereotyping Involved in Selection Process?

Hopkins' final argument was that the male partners who criticized her interpersonal skills applied a double standard. She claimed that she was not evaluated as a manager, but as a woman manager, based on a sexual stereotype that prompts males to regard assertive behavior in women as being more offensive and intolerable than comparable behavior in men because some men do not regard it as appropriate "feminine" behavior. And she claimed that this type of sexual stereotyping was reflected in comments about her aggressiveness and profanity. Thus, she was being evaluated as a woman and not simply as a partnership candidate.

One commentator said "she may have overcompensated for being a woman." Another suggested that she needed to take a "course at charm school." Supporters indicated that her critics judged her harshly due to her sex. One acknowledged "Ann has a clearly different personality," but "[m]any male partners are worse than Anne (language and tough personality)," and people were only focusing on her profanity "because its a lady using foul language." Another conceded that she initially came across as "macho" but said, "if you get around the personality thing she's at the top of the list or way above average." Another defended her by saying, "she had matured from a tough-talking, somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate."

When Hopkins consulted with the head partner at OGS, who was her strongest supporter and responsible for telling her what problems the Policy Board had identified with her candidacy, she was advised to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear

jewelry. Some comments on other women partnership candidates in prior years support the inference that the partnership evaluation process at Price Waterhouse was affected by sexual stereotyping. Candidates were viewed favorably if partners believed they maintained their femininity while becoming effective professional managers.

To be identified as a "women's liber"² was regarded as negative comment. Nothing was done to discourage sexually biased evaluations. One partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers - yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations. Besides Hopkins, the Admissions Committee rejected at least two other women candidates because partners believed that they were curt, brusque and abrasive, acted like "Ma Barker" or tried to be "one of the boys."

Comments suggesting that sex stereotypes may have influenced the partners' evaluations of interpersonal skills were not frequent, but they appear as part of the regular fodder of the partnership evaluations. The Court finds that while stereotyping played an undefined role in blocking Hopkins' admission to the partnership in this instance, it was unconscious on the part of the partners who submitted comments. Business women who earn a place at the highest ranks of their profession by combining ability with a strong persistent effort to succeed frequently sense antagonism from some male colleagues whose contact with the working female as an equal has been limited. However, it is impossible to accept the view that Congress intended to have courts police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex.

But Hopkins argued one step further, stressing that the Price Waterhouse partnership evaluation system permitted negative comments tainted by stereotyping to defeat her candidacy, despite clear indications that the evaluations were tainted by discriminatory stereotyping. All the evaluators were men. The Policy Board gave great weight to the negative views of individuals who had very little contact with Hopkins. Several of the negative comments allude to Hopkins' sex and many might be attributed to sex stereotyping. Despite the fact that the comments on women candidates often suggested that the male evaluators may have been influenced by a sex bias, the Policy Board never addressed the problem. The firm never took any steps in its partnership policy statement or in the evaluation forms submitted to partners to articulate a policy against discrimination or to discourage sexual bias.

Although the stereotyping by individual partners may have been

² Editorial note: Women's "liberation" was a popular term used in the 1960s, 1970s, and early 1980s for "feminism."

unconscious on their part, the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole. There is no direct evidence of any determined purpose to maliciously discriminate against women but Hopkins appears to have been a victim of "omissive and subtle" discrimination created by a system that made evaluations based on "outmoded attitudes" determinative. The evidence indicates that Price Waterhouse should have been aware that women being evaluated by male partners might well be victims of discriminatory stereotypes. Yet the firm made no efforts to make partners sensitive to the dangers, to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes.

The Court is aware that this case involves applying Title VII to a professional partnership. However, while partnerships must be given freedom to evaluate the qualifications of employees who seek to become partners, they are not free to inject stereotyped assumptions about women into the selection process. Neither a partnership nor any other employer can remain indifferent to indications that its evaluation system is subject to sex bias, as Price Waterhouse did in Hopkins' case. Price Waterhouse's failure to take the steps necessary to alert partners to the possibility that their judgments may be biased, to discourage stereotyping, and to investigate and discard, where appropriate, comments that suggest a double standard constitutes a violation of Title VII in this instance.

Price Waterhouse had every reason and legal right to come down hard on abrasive conduct in men or women seeking partnership. But discriminatory stereotyping of females was permitted to play a part. Comments influenced by sex stereotypes were made by partners; the firm's evaluation process gave substantial weight to these comments; and the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. While these three factors might have been innocent alone, they combined to produce discrimination in the case of Ann B. Hopkins. The Court finds that the Policy Board's decision not to admit Hopkins to partnership was tainted by discriminatory evaluations that were the direct result of its failure to address the evident problem of sexual stereotyping in partners' evaluations.

Remedy.

Because Hopkins had considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations. Even Hopkins' supporters viewed her style as somewhat offensive and detrimental to her effectiveness as a manager. However, once a plaintiff proves that sex discrimination played a role in an employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination. Price Waterhouse

has not done so. Where sex discrimination is present, even if a promotion decision is a mixture of legitimate and discriminatory considerations, uncertainties must be resolved against the employer so that the remedial purposes of Title VII will not be thwarted by saddling an individual subject to discrimination with an impossible burden of proof.

However, Hopkins must carry the burden of proof on another issue. She has the burden of proving that she was constructively discharged. If Hopkins resigned voluntarily, and not because Price Waterhouse made working conditions intolerable and drove her to quit, she is not entitled to an order that she be made a partner. Hopkins did not show any history of discrimination, humiliation or other aggravating factors that would have compelled her to resign. Aside from Price Waterhouse's denial of partnership, Hopkins' experience at the firm appears to have been quite normal and amicable. Price Waterhouse offered to retain her as an employee and some partners even encouraged her to take this option rather than resign when it appeared unlikely that she would become a partner. Hopkins' failure to show a constructive discharge requires the Court to deny Hopkins' request for an order directing Price Waterhouse to make her a partner.'

' Editorial note: In the original district court decision, although a partnership was not granted, certain minor monetary damages and attorney's fees were awarded to Ms. Hopkins.