Proving and Defending Employment Discrimination Claims

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William L. Corbett*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>218</td>
</tr>
<tr>
<td>II. Disparate Treatment</td>
<td>219</td>
</tr>
<tr>
<td>A. Establishing Plaintiff's Prima Facie Case</td>
<td>220</td>
</tr>
<tr>
<td>1. Refusal to Hire and Discriminatory Denial of Employment Opportunities</td>
<td>221</td>
</tr>
<tr>
<td>2. Discharge and Discipline</td>
<td>227</td>
</tr>
<tr>
<td>B. The Defendant's Burden of Articulating Some Legitimate Non-Discriminatory Reason for the Plaintiff's Rejection</td>
<td>229</td>
</tr>
<tr>
<td>C. The Plaintiff's Establishment of Pretext</td>
<td>231</td>
</tr>
<tr>
<td>D. Proving Causation—The Mixed Motive Case</td>
<td>234</td>
</tr>
<tr>
<td>III. Disparate Impact</td>
<td>237</td>
</tr>
<tr>
<td>A. Plaintiff's Demonstration of Adverse Impact</td>
<td>238</td>
</tr>
<tr>
<td>1. Relevant Statistical Comparisons: Pass/Fail and Population/Work Force</td>
<td>239</td>
</tr>
<tr>
<td>2. The Relevant Statistical Geographical Area</td>
<td>242</td>
</tr>
<tr>
<td>3. The Relevant Statistical Time Period</td>
<td>244</td>
</tr>
<tr>
<td>4. The Relevant Statistical Disparity</td>
<td>245</td>
</tr>
<tr>
<td>5. The Relevant Statistical Sample Size</td>
<td>247</td>
</tr>
<tr>
<td>B. Defendant's Burden of Establishing Job Relatedness</td>
<td>247</td>
</tr>
<tr>
<td>1. Validation Methods</td>
<td>250</td>
</tr>
<tr>
<td>2. Validating Subjective Selection Criteria</td>
<td>256</td>
</tr>
<tr>
<td>3. Bottom Lining</td>
<td>258</td>
</tr>
<tr>
<td>C. Plaintiff's Burden of Establishing a Less Detrimental Alternative</td>
<td>260</td>
</tr>
<tr>
<td>IV. Reasonable Accommodation</td>
<td>262</td>
</tr>
<tr>
<td>A. Religion</td>
<td>262</td>
</tr>
<tr>
<td>B. Handicap</td>
<td>268</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>272</td>
</tr>
</tbody>
</table>

* Professor of Law, University of Montana School of Law. In this, the first of three articles on employment discrimination, Professor Corbett discusses the three leading proofs of discrimination: disparate treatment, disparate impact, and lack of reasonable accommodation. These proof mechanisms apply to a wide range of employment discrimination claims. In later articles, Professor Corbett will discuss protections given specific classes and the procedural steps and practical considerations in the litigation of such cases. This article was supported by the Cowley Endowment. The author appreciates this generous assistance.
I. INTRODUCTION

The claim of unlawful discrimination in the workplace is neither rare nor recent. But, in recent years, more and more people injured by employment decisions now assert their legal rights. Thus, the number of employment disputes has risen sharply. In many of these cases, the employee claims that the employer has violated federal and state statutory protections against discrimination based on race, sex, national origin, religion, handicap, and age.

These forms of discrimination are established by proving a regulated person\(^1\) or entity committed an act subject to protection against a protected class person or persons. An employer who discharges a black employee because of his race falls within this definition. The most difficult part of a plaintiff's case is proving the causal connection between the act subject to protection (i.e. discharge) and plaintiff's protected class status (i.e. race). The statutes designate: (1) those persons and entities whose activities are regulated;\(^2\) (2) the acts subject to protection;\(^3\) and (3) protected class status.\(^4\) Statutory law, however, does not reveal how to prove causal connection. This article explores this issue.

There are three ways to prove causal connection:\(^5\) (1) disparate treatment, (2) disparate impact, and (3) failure to make reasonable accommodation.\(^6\) These mechanisms do not apply to every pro-

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2. See supra note 1.


The Montana Human Rights Act prohibits discrimination in state and local government employment because of an individual's race, creed, religion, color, national origin, age, physical or mental handicap, marital status, or sex. See MONT. CODE ANN. § 49-3-201 (1985).


For the distinction between an unlawful present violation and a permissible discrimination based on present effects of past discrimination, see Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984).

6. While these proof mechanisms were developed under federal law and federal law
EMPLOYMENT DISCRIMINATION

protected class status or every cause of action. But often more than one approach is available, and then a plaintiff may rely on all applicable proofs.\(^7\)

II. Disparate Treatment

The most readily understood proof of discrimination is disparate treatment. Plaintiff alleges simply that members of the protected class are treated less favorably than unprotected class persons: for example, an employer discharges or disciplines a black employee for conduct which would have resulted in no or lesser discipline to a white employee. The difficulty is that the plaintiff must show that the defendant's alleged unlawful employment practices were prompted by an impermissible discriminatory motive.\(^8\) It is the necessity to prove that distinguishes the disparate treatment method of proof from the disparate impact method.

Although the plaintiff must prove discriminatory motive to show disparate treatment, direct evidence of improper motive is not required.\(^9\) Courts have recognized that "direct evidence of discrimination . . . is virtually impossible to produce."\(^10\) Seldom can a plaintiff point to direct evidence of discrimination, such as an employer's statement that he would "prefer a male to a female." Consequently, a plaintiff must frequently rely on circumstantial evidence. The disparate treatment proof mechanism is, in fact, premised on the absence of direct evidence of discrimination. Of course, direct evidence greatly reduces the plaintiff's burden. If di-

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\(^7\) will be relied upon in discussing them, they are applicable to litigation brought under the Montana Human Rights Act. See Martinez v. Yellowstone County Welfare Dep't, Mont. 1981\(^-\), 626 P.2d 242, 246-46 (1981). There the court said:

The provisions of Title 49, Montana Human Rights Act, are closely modeled after Title VII of the Federal Civil Rights Act of 1964 . . . and to a lesser degree after the [federal] Age Discrimination in Employment Act . . . [A] considerable body of law has developed under these federal employment discrimination acts. Due to the parallel structure of the federal laws and the Montana Human Rights Act, this Court has examined the rationale of federal case law.

Thereafter the court recognized the disparate treatment and impact proof methods, and affirmed the application of the disparate treatment method to the case under review.

7. See, e.g., Prewitt v. U.S. Postal Serv., 662 F.2d 292 (5th Cir. 1982) (a handicap discrimination case in which the court discussed how plaintiff could prove discrimination under either reasonable accommodation or disparate impact. Implicit in the discussion was that to the extent there was evidence of purposeful discrimination, the plaintiff could have relied on disparate treatment).

8. Teamsters, 431 U.S. at 335 n.15.


rect evidence is available, the plaintiff need not rely on disparate treatment. Even when direct evidence is present, however, the plaintiff will frequently supplement that evidence with circumstantial evidence, rendering the disparate treatment formula useful.

A plaintiff frequently proves disparate treatment with "comparative" evidence drawn from the contrasting of similarly situated persons. Thus, if persons from one race, sex, or ethnic group receive different treatment from similarly situated persons of another race, sex, or ethnic group and the employer has no adequate non-racial, non-sexual, or non-ethnic explanation for the treatment, then it is reasonable to infer that protected class status was a factor in the disparate treatment. A plaintiff may use statistical evidence to prove disparate comparative treatment.

In *McDonnell Douglas Corp. v. Green*, the United States Supreme Court specified the method of proof for a disparate treatment case based on comparative evidence. The Court established a three-part formula. First, the plaintiff must establish a prima facie case of discrimination. Once a plaintiff establishes a prima facie case, the burden of persuasion shifts to the employer-defendant, who must "articulate some legitimate nondiscriminatory reason for the employee's rejection." If the employer-defendant successfully carries this burden, the plaintiff must then establish that the offered explanation is "pretext."

A. Establishing Plaintiff's Prima Facie Case

The Supreme Court has stated that "[t]he burden of establishing a prima facie case is not onerous . . . ." Such establishment "serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." "[T]he prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." The plaintiff's creation of this presumption, by estab-

12. Lowe v. City of Monrovia, 775 F.2d 998, 1008 (9th Cir. 1985). The use of statistical evidence is discussed infra at part III A and accompanying text.
14. Id. at 802.
15. Id.
16. Id.
17. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
18. Id. at 253-54.
19. Id. at 254.
lishing a prima facie case, is crucial in the successful litigation of an employment discrimination case.

In *McDonnell Douglas*, the Supreme Court stated that a plaintiff may establish a prima facie case by showing:

1. that he belongs to a racial minority;
2. that he applied and was qualified for a job for which the employer was seeking applicants;
3. that, despite his qualifications, he was rejected; and,
4. that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.\(^\text{20}\)

The Court noted that because the "facts necessarily will vary," the four-part test "is not necessarily applicable in every respect to differing factual situations."\(^\text{21}\) Later cases have demonstrated the flexibility of the *McDonnell Douglas* four-part test.

1. **Refusal to Hire and Discriminatory Denial of Employment Opportunities**

The four-part test devised in *McDonnell Douglas*, with some modifications, works well in cases involving either discriminatory hiring or denial of employment opportunities to current employees. The Court has noted the two most common legitimate reasons for rejecting job applicants: (1) an absolute or relative lack of qualifications, and (2) the absence of a vacancy in the job sought.\(^\text{22}\) The *McDonnell Douglas* formula for establishing a prima facie case addresses these legitimate reasons for rejecting an applicant. Satisfaction of the *McDonnell Douglas* formula creates a presumption of discrimination.

The most common reasons for denying a current employee an employment opportunity such as a promotion, pay increase, or favorable transfer are the same for rejecting a job applicant: absolute or relative lack of qualifications or the absence of the alleged employment opportunity. Thus the *McDonnell Douglas* formula provides an appropriate analysis both for job applicants and employees seeking advancement or other internal employment opportunities. An analysis of judicial applications of the *McDonnell Douglas* formula indicates that the formula can be reduced to the following:

1. the employer received an application or the equivalent from a

\(^{20}\) *McDonnell Douglas Corp.*, 411 U.S. at 802.

\(^{21}\) *Id.* at n.13.

\(^{22}\) *Teamsters*, 431 U.S. at 358 n.44.
qualified protected-class person; (2) a job vacancy or employment opportunity existed at the time of the application; and (3) the person was not selected.

a. The Person Belongs to a Racial Minority

The first requirement of the McDonnell Douglas formula — that a person be a member of a "racial minority" — is too narrow. The Court has held that the McDonnell Douglas formula may apply to all protected-class individuals under Title VII.\(^{23}\) The McDonnell Douglas formula has also been applied to non-Title VII protected-class statutes.\(^{24}\)

b. The Person Applied and Was Qualified for the Job for Which the Employer Was Seeking Applicants

This requirement mandates the explanation of three separate elements: an application, from a qualified protected class person, when the employer was seeking applicants.

(i) Job Application

Clearly, discrimination need not be limited to initial hiring.\(^{25}\) Hence, the alleged discriminatory act need not be related solely to hiring. It is clear, too, that an application is not necessary when a potential applicant reasonably believes an application would be futile. For example, the employer may be well known for past discriminatory practices.\(^{26}\) The job notice may exclude a protected-class person, as in "help wanted—female"; the message is that an application by anyone other than a female would be futile.\(^{27}\) Similarly, not all employment opportunities require an application. When an employer promotes, assigns, transfers, awards employment benefits to, or withholds them from existing employees, the employer often bases his decision upon the employee's record rather than upon an application.\(^{28}\) Except when an application would be futile, the protected-class person must apply or satisfy other legitimate requirements for advancement.

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24. See, e.g., Prewitt, 662 F.2d 292.
25. I.e., promotions, transfers and other employee benefits are also covered. See § 703(a)(1) and (2), Civil Rights Act of 1964.
28. However, an employer may require an application, and the employer has no obligation to canvas employees for their preference before filling an opening. Foster v. Arcata Assocs., Inc., 772 F.2d 1453, 1463 (9th Cir. 1985).
(ii) The Applicant Was Qualified

Some courts have required the plaintiff to prove, by showing relative or comparative qualifications, that he was as qualified as the person hired or promoted. Other courts have required the plaintiff to prove only that he met the threshold qualification requirement or had the basic ability to perform, as proof of absolute qualification. This split is caused, in part, by the statement of the Supreme Court that under the McDonnell Douglas standards, the plaintiff proves discrimination by presenting evidence that eliminates "the two most prominent, legitimate reasons on which an employer might rely to reject the job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought."

Courts which require the plaintiff to prove relative or comparative qualifications argue that unless the plaintiff shows that his or her qualifications are commensurate with the qualifications of the successful applicant, the plaintiff has failed to exclude the possibility that the successful applicant had superior qualifications and so failed to establish a prima facie case. Courts that do not require relative or comparative proof argue that the Supreme Court in McDonnell Douglas requires only that the applicant be qualified, and that "qualified" means absolute qualification, not relative or comparative qualifications.

The Supreme Court has not resolved the controversy. The Court had the opportunity to settle the issue in United States Postal Service Board of Governors v. Aikens but chose to avoid it.

The district court in Aikens held that the plaintiff, an applicant for a managerial position, failed to establish a prima facie case because he did not prove that he was as or more qualified than


31. Teamsters, 431 U.S. at 358, n.44 (emphasis added).

32. See supra note 30.

33. See supra note 31.

34. 460 U.S. 711.
those chosen. The Circuit Court of Appeals for the District of Columbia reversed, holding that the plaintiff need show only that he possessed the minimum objective qualifications for the job and any other qualifications that the employer advertised.

The Court of Appeals recognized that low level jobs often require skills or qualifications capable of objective assessment, like typing or minimum years of experience. When this is the case, a plaintiff who meets the objective standards is qualified. Alternatively, when the plaintiff sought a "professional or managerial" position, other subjective qualifications are frequently required. The Appellate Court stated: "Most abilities of a successful manager—especially the ability to assume responsibility for motivating and directing other employees—are intangible, and each application could bring to the position an enormous variety of life experiences that are relevant."

Recognizing the distinction between low level "objective" qualification jobs and jobs that in part require "subjective" qualifications, the Appellate Court stated: "At the prima facie stage . . . plaintiff [subject to subjective job requirements] may be required to go beyond a showing of minimum qualifications to demonstrate that he possesses whatever qualifications or background experiences the employer has indicated are important." Thus if the job required both objective qualifications and the subjective qualification of "leadership," the plaintiff must establish that he met the minimum objective qualifications and possessed leadership characteristics or experiences. Plaintiff need not, however, offer evidence comparing his qualifications to those of the successful applicant.

Aikens presented an excellent opportunity for the Supreme Court to resolve the controversy between absolute and comparative qualifications. Unfortunately, the Court failed to resolve the controversy. While the weight of judicial authority and scholarly comment support the use of absolute qualifications, a definitive answer continues to await Supreme Court resolution.

The difficulty with this approach is that the plaintiff is fre-
quently in a poor position to address relative qualifications until the employer has presented evidence to support his preference of the successful applicant over the plaintiff. Before the plaintiff can address relative qualifications, the employer must offer evidence showing how he evaluated the relative qualifications of the candidates. Only then is the plaintiff in a position to address relative qualifications. Prior to the employer’s assertion, the plaintiff must speculate on the employer’s rationale or be prepared to address every conceivable way the employer could have assessed the successful candidates. This is truly an unacceptable burden.

Arguably, the plaintiff need not address every conceivable method defendant could have used in assessing the candidates. The plaintiff may discover the defendant’s rationale and come to trial prepared to address relative qualifications in the prima facie case. However, several problems persist in requiring the plaintiff to rely on pretrial discovery. First, the defendant has no incentive to cooperate in discovery. While the plaintiff may obtain motions to compel, they only add to the cost of discovery. Even in cases involving a reasonably cooperative defendant, the cost of discovery can be a major obstacle for many plaintiffs. In some instances, if the court requires the plaintiff to prove relative qualification, discovery costs would prohibit the suit.

The defendant can argue that the burden on the plaintiff to engage in discovery is small when compared to the defendant’s burden of presenting an affirmative case when the plaintiff has failed to demonstrate relative qualifications. Certainly, if the court does not require the plaintiff to establish relative qualifications as part of the prima facie case, then the defendant must assume the time and expense of showing a legitimate business reason for the selection. If the court requires the plaintiff to establish relative qualifications, the cost of discovery may be significant, but if the court does not require the plaintiff to assume the expense and inconvenience of establishing relative qualifications, then the defendant will have to present an affirmative case.

Whether the plaintiff must establish relative qualifications as part of the prima facie case will influence the relative burdens of the parties, but placing the initial burden of proof on the plaintiff will significantly undermine his chance to prevail. In every case the plaintiff would have to assume the financial burden and difficulty of discovering exactly how the defendant evaluated candidates’ rel-

42. See Aikens, 642 F.2d at 520-25 (Wilkey, J., dissenting).
ative qualifications. But only in those cases where the plaintiff ultimately did not establish relative qualifications would the defendant be unnecessarily required to offer evidence of business reasons. Even then the law protects the defendant from meritless suits. If the court determines that the plaintiff's suit is "frivolous, unreasonable or groundless," the defendant may recover attorney's fees and the plaintiff's attorney may be held personally liable for such fees.43

A separate "qualifications" issue occasionally arises when the employer rejects a protected-class person without ever considering his absolute or relative qualifications. In such a case the plaintiff may establish a prima facie case without even attempting to establish absolute qualifications.46 For example, when an employer screens out protected-class individuals, such as women or blacks, without considering their qualifications, the court deems the protected-class individuals "qualified" for the purposes of establishing a prima facie case. In one case, the defendant informed a woman who responded by telephone to a job advertisement that the position had been filled.48 Later, her husband telephoned for the same job. The defendant told the husband to submit an application. The employer questioned neither the woman nor her husband about qualifications. The employer rejected the wife because she was a woman, and asked the husband, because he was a man, to submit an application. The Ninth Circuit Court of Appeals stated that, under circumstances "when an employer summarily rejects an applicant without considering his or her qualifications, those qualifications are irrelevant to whether the Title VII plaintiff has raised a prima facie case of disparate treatment."47

(iii) Employer Is Seeking Applicants

A position need not be open at the time the plaintiff applies, nor must the employer be seeking applicants to establish disparate treatment. If the employer accepts applications, and a position opens within a reasonable time period, the employer must consider the applicant.48 If the employer does not want to keep applications

45. See, e.g., Ostroff v. Employment Exchange, 683 F.2d 302, 304 (9th Cir. 1982).
46. Id.
47. Id. (citing EEOC v. Ford Motor Co., 645 F.2d 183, 188 n.3, 198-99 (4th Cir. 1981)).
on file, it should not accept applications until a job opens. If the employer wants to accept applications in anticipation of job openings but does not want to consider "stale" applications once a job opens, he need only inform applicants that their applications will not be considered after a specified period. If the applicant wants to be considered after the prescribed period, he must submit a new application.

c. *The Plaintiff Is Rejected and the Position Remains Open*

Adverse treatment must occur before a plaintiff can claim discrimination. The *McDonnell Douglas* Court stated that after the plaintiff is rejected, the position must remain open while the employer continues to seek applicants. This requirement, however, is simply too restrictive in most situations. Often the plaintiff experiences discrimination when the job opening closes. Hence, the plaintiff's prima facie case may be established upon rejection, regardless of whether the position remains open.

d. *The Generic McDonnell Douglas Formula*

A cause of action alleging discriminatory refusal to hire or denial of employment opportunities may be based on a showing of disparate treatment. A plaintiff can establish disparate treatment by proving (1) that she, a qualified protected-class person, applied for employment; (2) that a job vacancy or employment opportunity existed at the time of the application or while the application was "live;" and (3) that the employer did not select her. If the plaintiff establishes a prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection."

2. *Discharge and Discipline*

In a situation involving discharge or discipline of an employee, the only relevant *McDonnell Douglas* criteria are that a qualified protected-class person was (1) discharged or disciplined, or (2) that his employment was otherwise adversely affected. Of these

49. See *McDonnell Douglas*, 411 U.S. at 802.
50. Holmes v. Bevilacqua, 774 F.2d 636 (4th Cir. 1985); Hagans v. Andrus, 651 F.2d 622 (9th Cir. 1981); King v. New Hampshire Dep't of Resources & Econ. Dev., 562 F.2d 80 (1st Cir. 1977).
51. Circuits are split on whether plaintiff must prove absolute or relative qualification.
52. *McDonnell Douglas Corp.*, 411 U.S. at 802, quoted in *Burdine*, 450 U.S. at 253 see also *Agarwal v. Regents of Univ. of Minnesota*, 40 Fair Empl. Prac. Cas. 937 (8th Cir. 1986) (The fact that the plaintiff held job for fifteen years is not dispositive of qualifications).
criteria, "qualification" is generally the most difficult to establish.

The Seventh Circuit has determined that to demonstrate qualifications, the plaintiff must show that he "met his employer's legitimate expectations." The court observed that the plaintiff may successfully attack the legitimacy of the employer's expectations if they are "unfair or arbitrary." But the court would not review "business decisions" such as "whether the company's methods were sound, or whether its dismissal of . . . [plaintiff] was an error of business judgment."

If the plaintiff cannot demonstrate that he met the employer's legitimate expectations, he fails to establish a prima facie case. For example, suppose that a discharged black plaintiff acknowledges performance failures but asserts that a similarly situated white employee would not have been discharged. The black plaintiff demonstrates he met the employer's "legitimate expectations" by showing that a white employee with such deficiencies would not have been discharged. Thus, the plaintiff establishes that the employer's legitimate expectations for white employees are lower than those for black employees; if the plaintiff were white he would not have been terminated.

The employer's "legitimate expectation" is the minimum performance necessary for an employee to be retained. This level of performance may be objectively measured by comparing the plaintiff's performance deficiencies with those of white employees who have been retained. Similarly, when the employer has previously established certain minimum legitimate expectations, the plaintiff may compare his work performance against these standards.

Frequently, employees cannot discern the employer's absolute minimum legitimate expectations. This is particularly true where there are no objective standards, and the employer relies on obscure subjective considerations. For example, if an employer drops an employee from a training program for performance deficiencies, the employee may show that she was qualified and establish a prima facie case, even if she had more deficiencies than any other trainee, by demonstrating that her performance met or exceeded

53. Huhn v. Koehring Co., 718 F.2d 239, 244 (7th Cir. 1983) (quoting Kephart v. Interstate Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980) (appendix) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)) (emphasis added in Kephart) See also Agarwal v. Regents of Univ. of Minnesota. 40 Fair Empl. Prac. Cas. 937 (8th Cir. 1986) (The fact that the plaintiff held job for fifteen years is not dispositive of qualifications).

the employer's minimum legitimate expectations.\textsuperscript{55}

Beyond making some elementary showing of minimum qualifications, the plaintiff initially may be unable to demonstrate that she met the employer's legitimate expectations. Until the employer asserts those expectations and shows how they were applied, the plaintiff must speculate. The plaintiff generally need not engage in such guesswork.\textsuperscript{56} Thus, the plaintiff's prima facie case may involve nothing more than the establishment of minimum qualifications followed by the defendant's assertion of the minimum legitimate expectations and how they were applied to plaintiff. Ultimately, the plaintiff will have to demonstrate that she met those legitimate expectations. But a requirement that the plaintiff offer proof of meeting the employer's legitimate expectations when those expectations were unknown and highly subjective would place an undue burden on the plaintiff.

B. The Defendant's Burden of Articulating Some Legitimate Non-Discriminatory Reason for the Plaintiff's Rejection

The burden which shifts to the defendant is not a burden of proof. Rather, it is a burden of going forward with the evidence or a burden of production. The burden of proof always remains with the plaintiff.\textsuperscript{57} The plaintiff's establishment of a prima facie case "creates a presumption that the employer discriminated against the employee."\textsuperscript{58} "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter a judgment for the plaintiff because no issue of fact remains in the case."\textsuperscript{59} Thus, once a prima facie case is established, the defendant must state some legitimate, nondiscriminatory reason for the employee's rejection. The defendant's burden is to "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."\textsuperscript{60}

The Supreme Court explained that the defendant must:

set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify judgment for the defendant. If the defendant carries this burden of production, the presumption

\textsuperscript{55} See, e.g., supra notes 35-36 and accompanying text.
\textsuperscript{56} See Kephart, 630 F.2d at 1223 (appendix).
\textsuperscript{57} Burdine, 450 U.S. at 252-53.
\textsuperscript{58} Id. at 254.
\textsuperscript{59} Id. (footnote omitted).
\textsuperscript{60} Id.
raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity . . . [T]he employer need only produce admissable evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. But this does not require defendant to introduce evidence which in the absence of any evidence of pretext, would persuade the trier of fact that the employment action was lawful.

For example, at the conclusion of the plaintiff’s case, the defendant moves to dismiss, alleging that the plaintiff failed to establish a prima facie case and the court denies the motion. If the defendant then responded by offering evidence of the reason for the plaintiff’s rejection, there remains little of the “presumption” of discrimination that arose from the prima facie case.

In Aikens the Supreme Court stated that, once the defendant presents evidence of business reason, “whether the plaintiff really . . . [presented a prima facie case] is no longer relevant,” the “presumption drops from the case,” and “the factual inquiry proceeds to a new level of specificity.” At this point, absent evidence of pretext, the trier of fact “has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff.” “In short, the district court must decide which party’s explanation of the employers’ motivation it believes.”

When a plaintiff introduces direct evidence of discrimination the McDonnell Douglas standard for rebutting a prima facie case does not apply. When the plaintiff establishes his case by direct evidence, the defendant’s burden of rebuttal is much heavier. He must then offer “clear and convincing evidence,” or at least a “preponderance of the evidence.” The McDonnell Douglas proof formula assumes the plaintiff’s reliance on circumstantial evidence. If the plaintiff establishes a case based on circumstantial evidence, the burden of persuasion that shifts to the defendant is light. But if the plaintiff establishes discriminatory intent with direct evi-

61. Id. at 255, 257 (footnotes omitted).
62. Id. at 257 (emphasis in original).
63. 460 U.S. 711; see also supra notes 9 and 30.
64. Aikens, 460 U.S. at 715 (quoting Burdine, 450 U.S. at 255 and n.10).
65. Aikens, 460 U.S. at 715 (quoting Burdine, 450 U.S. at 253).
66. Aikens, 460 U.S. at 716.
67. E.g., Knighton v. Laurens County School Dist. No. 56, 721 F.2d 976, 978 (4th Cir. 1983) (citing cases).
68. Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773 (11th Cir. 1982). See also Thurston, 105 S. Ct. 613; Muntin v. California Parks and Recreation Dep’t, 671 F.2d 360 (9th Cir. 1982).
dence, then the defendant carries the full burden of rebuttal.

C. The Plaintiff's Establishment of Pretext

The plaintiff may respond to the defendant's evidence of business reason by attempting to "demonstrate that the proffered reason is not the true reason for the employment decision . . . . Plaintiff may succeed either directly by persuading the Court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." Often the plaintiff may accomplish this without introducing evidence if, for example, the "plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." A plaintiff who desires evidence of pretext may rely on several alternative methods of proof. The plaintiff may offer (1) direct evidence of discriminatory intent (if such evidence is available); (2) evidence directly contrary to that offered by the defendant; (3) evidence that the defendant has previously relied on inconsistent or shifting reasons; or (4) evidence of dissimilar comparative treatment (the employer's reason is true but has not been applied to nonprotected class individuals).

The plaintiff has many means by which to show pretext. The plaintiff may rely on statistical evidence "to show that a defendant's articulated nondiscriminatory reason or the employment decision in question is pretext." Statistical evidence suggesting past discriminatory conduct can be used by the plaintiff to support inferences of improper motive; for example, that the percentage of protected-class persons employed by the defendant is disproportionate to their number in the work force. Finally, the existence of less discriminatory alternatives in the employment decisions can be used by the plaintiff as some evidence of pretext.

However, merely establishing that the asserted business reason is pretext does not necessarily entitle the plaintiff to judgment. To prevail, the plaintiff must also establish that the employer in-

70. Burdine, 450 U.S. at 255 n.10.
71. See supra notes 11, 67, 68 and accompanying text.
73. See, e.g., Corley v. Jackson Police Dep't, 566 F.2d 994 (5th Cir. 1978).
75. Diaz v. American Tel. & Tel., 752 F.2d 1356, 1363 (9th Cir. 1985), quoted in Lowe v. City of Monrovia, 775 F.2d 998, 1008 (9th Cir. 1986).
tentionally discriminated against the plaintiff. As the Eleventh Circuit Court of Appeals stated in Clark v. Huntsville City Board of Education, "[t]he Court thus must not circumvent the intent requirement of the plaintiff's ultimate burden of persuasion by couching its conclusion in terms of pretext; a simple finding that defendant did not truly rely on its proffered reason, without a further finding that defendant relied instead on race [protected class status] will not suffice to establish Title VII liability." In Clark, the defendant board of education hired a white nonemployee over the plaintiff, a black employee, for a specific job. The plaintiff established a prima facie case of discrimination and the defendant offered evidence that the white nonemployee applicant had superior qualifications. The plaintiff then offered evidence of pretext. It demonstrated that the defendant's policy was to prefer minimally qualified employee applicants for promotion regardless of the relative qualifications. The trial court concluded that the defendant's asserted reason of "qualifications" was pretext and awarded judgment to the plaintiff.

The court of appeals reversed, stating that the district court "labored under a misapprehension of the legal requirements of pretext and intentional discrimination in a Title VII disparate treatment case." The court observed:

The lower court, however, found the defendants did not rely on . . . [the white applicant's] greater qualifications, it found merely that defendant's policies did not allow them to rely on . . . [his] superior qualifications. Instead of simply noting that reliance on . . . [a white applicant's] greater qualifications would be at odds with the defendants' policies and that defendants therefore probably did not rely on those qualifications, the court leapt directly from its interpretation of the policies to a conclusion of intentional discrimination . . . . [The approach of the lower court allowed it] to find initial discrimination by actions inconsistent with a stated policy without a showing that defendants disregarded the policy for discriminatory reasons rather than in a good faith effort to hire the best person available. Even if defendants incorrectly believed that their policy allowed consideration of relative qualification, if they nevertheless based their decision on . . . [the white applicant's] superior qualifications and not on plaintiff's race, they have not violated Title VII.80

78. See id. at 527.
79. Id. at 529.
80. Id. at 528 (citing cases).
Although it may appear to be hair-splitting, the analysis of the appellate court is clearly correct. The trial court must find intentional discrimination. The *McDonnell-Douglas* three-part formula is an excellent vehicle for establishing intent, but it is only a vehicle, and its mechanical application may produce insupportable conclusions.

Some trial courts have been confused, too, by a matter related to establishment of intent: the order of proof. For example, must the plaintiff, when placed on notice of the defendant's nondiscriminatory reason for discharge, present evidence of pretext during his case in chief? One court has held that the plaintiff's failure to do so created the risk that the defendant could successfully file a motion to dismiss. The court found that the defendant, in his opening statement, articulated a legitimate nondiscriminatory reason for the employment action. Because plaintiff was on notice of the allegedly legitimate nondiscriminatory reason prior to and during the presentation of the case in chief, plaintiff should have responded to the alleged reason. Otherwise, he faced a motion to dismiss.

This holding does not comport with Supreme Court requirements. The Supreme Court has stated that the defendant's articulation of a legitimate nondiscriminatory reason requires "producing evidence." The Court further noted that "[a]n articulation not admitted into evidence will not suffice, [t]hus the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." Unless the defendant, prior to or during plaintiff's presentation of the prima facie case, receives leave of court to introduce evidence regarding the alleged reason for the action, the plaintiff will not be subject to a motion to dismiss upon the conclusion of his presentation. There will be no "evidence" of the defendant's alleged nondiscriminatory reason before the court.

Yet, the Supreme Court has also repeatedly said that a plaintiff may anticipate the defendant's business reason in developing evidence of pretext during the presentation of his prima facie case. The court designed the three-part *McDonnell-Douglas* formula to address the intent requirement, not to constrain the timing of the introduction of evidence.

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81. *See* Flowers v. Crouch-Walker Corp. 552 F.2d 1277, 1282 (7th Cir. 1977).

82. *Burdine*, 450 U.S. at 254 n.7.

83. *Id*. at 255 n.9.
D. Proving Causation—The Mixed Motive Case

It has been recognized that in most disparate treatment cases that:

proof proceeds on both sides on the premise that one motive only on the part of the employer—either an illegitimate one (e.g., race) or a legitimate one (e.g., ability to do the job)—has caused the adverse action of which the plaintiff complains. It is this type of case for which . . . McDonnell Douglas . . . is designed. . . . Typically, the plaintiff will contend that one reason—race—was operative, the defendant will contend that another single reason—ability to do the job—motivated it, and the trier of fact will find one reason or the other (but not a combination) to be the true one. In such a case, the issues of motivation and causation are not distinctly separated, nor do they need to be. If the plaintiff shows the defendant's proffered reason to be a pretext for race, the case is over. Liability is established, and reinstatement is ordered (in a discharge case) absent extraordinary circumstances. The very showing that the defendant's asserted reason was a pretext for race is also a demonstration that but for his race plaintiff would have gotten the job.84

In the mixed motive case, the trier of fact accepts the credibility of evidence in supporting the defendant's assertion of a legitimate nondiscriminatory reason, and the plaintiff demonstrates that protected class status had a role in the employment decision. For instance, the plaintiff may not have been the best candidate but race played a role in the selection. Here the court must apply a test that accounts for both reasons and reach a decision as well. Mixed motive cases are not unique to Title VII. Federal courts85 and administrative agencies86 have grappled with mixed motive cases in other contexts.

The Supreme Court has examined actions motivated by both lawful and unlawful considerations in administrative and legislative decision-making. In an equal protection challenge to a municipal zoning plan, the Court adopted the "same-decision" test.87

84. See Bibbs v. Block, 778 F.2d 1318, 1320-21 (8th Cir. 1985).
87. The Supreme Court stated:

Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the
Later, in *Mt. Healthy City School District Board of Education v. Doyle*, the Court used the "same-decision" test for first amendment retaliatory-discharge cases. The Court stated:

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

The test requires that an unlawful consideration be a substantial or motivating factor in the decision. If the defendant demonstrates that he would have reached the same decision even absent the plaintiff's protected status, the defendant prevails.

All circuit courts which have considered the issue have approved the same-decision test in Title VII mixed motive cases. But these courts do not agree regarding all aspects of its application. For example, in *Bibbs v. Block*, a trial court found race to be a "discernable factor" in the selection process, and held that even absent the discrimination, the plaintiff would not have gotten the job. However, the Eighth Circuit determined that:

once the plaintiff has established a violation of Title VII by proving that an unlawful motive played some part in the employment burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.


88. 429 U.S. 274.
89. Id. at 287.
90. Mack v. Cape Elizabeth School Bd., 553 F.2d 720 (1st Cir. 1977); Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983); Dillon v. Coles, 746 F.2d 998 (3d Cir. 1984); Patterson v. Greenwood School Dist. 50, 696 F.2d 293 (4th Cir. 1982); Smallwood v. United Air Lines, Inc., 728 F.2d 614 (4th Cir. 1984); Martinez v. El Paso County, 710 F.2d 1102 (5th Cir. 1983); Jack v. Texaco Research Center, 743 F.2d 1129 (5th Cir. 1984); Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985); Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); Muntin v. State of California Parks & Recreation Dept', 738 F.2d 1054 (9th Cir. 1984); Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985); Toney v. Block, 705 F.2d 1364, 1368-74 (D.C. Cir. 1983) (Tamm. J., concurring and citing earlier cases).
91. 778 F.2d 1318.
decision or decisional process, the plaintiff is entitled to some relief, including, as appropriate, a declaratory judgment, partial attorney's fees, and injunctive relief against future or continued discrimination. However, even after a finding of unlawful discrimination is made, the defendant is allowed a further defense in order to limit the relief. The defendant may avoid an award of reinstatement or promotion and back pay if it can prove by a preponderance of the evidence that the plaintiff would not have been hired or promoted even in the absence of the proven discrimination.

This same decision test will apply only to determine the appropriate remedy and only after plaintiff proves he or she was a victim of unlawful discrimination in some respect.92

The court in Bibbs adopted the test but applied it to the remedy rather than to an initial determination of liability.93 It placed the burden on the defendant to prove by a preponderance of the evidence that the employment decision would have been the same absent the discrimination. Other courts have disagreed regarding whether or not (1) to impose the test at the liability or at the remedy stage,94 (2) to impose the burden on the plaintiff or defendant,95 and (3) to require the burden of proof to be "preponderance of the evidence" or "clear and convincing evidence."96 Given this split among the circuits, the issue appears ripe for Supreme Court

92. Id. at 1323-24 (footnote omitted).
93. The court recognized that in Mt. Healthy the Supreme Court applied the "same-decision" test to the initial determination of liability. In rejecting this approach the Eighth Circuit said:

In the Mt. Healthy group of cases, of course, the Supreme Court's mixed-motives analysis is used to establish the defendant's liability in the first place, not simply to determine the appropriate remedy. If the defendant establishes that it would have made the same decision in the absence of the illegitimate factor, it wins the case, and the complaint is dismissed. Our reading of Title VII is significantly different. In that statute, Congress has made unlawful any kind of racial discrimination, not just discrimination that actually deprives someone of a job. A defendant's showing that the plaintiff would not have gotten the job anyway does not extinguish liability. It simply excludes the remedy of retroactive promotion or reinstatement.
Id. at 1323.
94. The Third Circuit applies the test at the liability stage (see Lewis, 725 F.2d 910) and the remedy stage (see Dillon, 746 F.2d 998; but see Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977)). The Ninth Circuit applies the test at the remedy stage (see Muntin, 738 F.2d 1054).
95. The burden is on the plaintiff: see Mack v. Cape Elizabeth School Bd., 553 F.2d 720 (1st Cir. 1977); Dillon, 746 F.2d 998.

The burden is on the employer, see Smallwood, 728 F.2d 614; Blalock, 775 F.2d 703; Muntin, 738 F.2d 1054; Miles, 750 F.2d 867; Toney, 705 F.2d 1364 (concurring opinion of Judge Tamm).
96. Clear and convincing: see Patterson, 696 F.2d 293; Muntin, 738 F.2d 1054; Milton v. Weinberger, 696 F.2d 94 (D.C. Cir. 1982).

Preponderance of the evidence: see Smallwood, 728 F.2d 614; Miles, 750 F.2d 867.
consideration. In the meantime, mixed motive cases will be a source of continuing conflict.

III. DISPARATE IMPACT

In Griggs v. Duke Power Co.,\textsuperscript{97} the Supreme Court established the disparate impact test for proving employment discrimination. Unlike cases involving disparate treatment, plaintiffs in disparate impact cases need not establish motive. To establish a prima facie case, a plaintiff need merely prove that, in the selection process, the defendant utilized some criteria which disparately impacted a protected class to which the plaintiff belongs. The selection criteria and their application usually appear neutral. But if the criteria have a discriminatory impact, their use may be unlawful regardless of the defendant's motive. The Griggs Court stated that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . ."\textsuperscript{98} "The touchstone is business necessity."\textsuperscript{99}

In Griggs, the employer required that applicants have a high school degree or pass standardized general intelligence tests as a condition of employment. The plaintiffs, a group of black applicants, alleged that this criterion discriminated improperly because more blacks than whites lacked a high school degree or failed the standardized tests, and that an employee needed neither the degree nor a passing score on the test to perform the job. The plaintiffs in Griggs could not establish a disparate treatment prima facie case because they could not prove that they were qualified.\textsuperscript{100} Instead, they alleged that the selection criterion itself discriminated because it had a disparate impact on blacks and was not job-related.

The Supreme Court determined that the selection criterion, while neutral on its face, was unlawful when it had a discriminatory, adverse impact on a protected class and was not "related to job performance."\textsuperscript{101} Had the employer demonstrated job relatedness, the plaintiff might have prevailed by demonstrating that other selection criteria, having less adverse impact, would meet the

\textsuperscript{97} 401 U.S. 424 (1971).
\textsuperscript{98} Id. at 431.
\textsuperscript{99} Id.
\textsuperscript{100} See id. at 434. Because they did not have a high school diploma or passing scores on the tests, they were not "qualified" within the meaning of the disparate treatment formula, i.e. they did not meet the employer's job requirements.
\textsuperscript{101} Id. at 436.
employer's business purpose.102

To prove disparate impact, the plaintiff typically tries first to prove that the selection criteria have an adverse impact on the protected class of which he is a member. If this can be established, the defendant must establish that the selection criteria are job-related. If the defendant establishes job-relatedness, the plaintiff may yet prevail by demonstrating there exist selection criteria that meet the employer's purpose but are less detrimental to the plaintiff's protected class.

In Albemarle Paper Company v. Moody,103 the Supreme Court described this process:

This burden [of establishing the relationship between the selection criteria and the job] arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e. has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that pool of the applicants . . . . [citation omitted]. If any employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship."104

Although the three-part test set forth in Albemarle was applied to scored tests, it clearly applies to other neutral selection criteria as well.105

A. Plaintiff's Demonstration of Adverse Impact

A substantial issue in a disparate impact case is whether plaintiff can establish that selection criteria had an adverse impact on the protected class of which plaintiff is a member. Proof of adverse impact is accomplished by statistically comparing the protected class with the majority class. For example, the Griggs Court determined that 34% of white applicants and 12% of black applicants had high school diplomas, and that 58% of white applicants and 6% of black applicants had passed the prescribed intelligence tests. The plaintiff established a prima facie case based on this statistical disparity.106

Courts have determined that other selection criteria also yield

102. Id. at 428.
103. 422 U.S. 405 (1975).
104. Id. at 425 (quoting McDonnell Douglas, 411 U.S. at 801).
106. Griggs, 401 U.S. at 432.
adverse impact: requiring some minimum height and weight;\textsuperscript{107} requiring certain prior experience;\textsuperscript{108} taking into account only the last ten calendar years of experience;\textsuperscript{109} combining the job of biology teacher with the job of football coach;\textsuperscript{110} taking arrest record into account;\textsuperscript{111} taking garnishment experience into account;\textsuperscript{112} taking into account the number of illegitimate children;\textsuperscript{113} and taking into account the record of criminal convictions.\textsuperscript{114}

1. \textit{Relevant Statistical Comparisons: Pass/Fail and Population/Work Force}

Courts have found two types of statistical comparisons pertinent to a showing of disparate impact. Pass/fail comparisons are the simpler type; population/work force are more complicated.

With pass/fail comparisons, the plaintiff compares the success rate for protected class persons with that of the majority group. In \textit{Griggs}, the Court made the following statistical comparisons:

<table>
<thead>
<tr>
<th>Selection Criteria</th>
<th>Percentage of White Persons Meeting the Selection Requirement</th>
<th>Percentage of Black Persons Meeting the Selection Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>High School Diploma</td>
<td>34%</td>
<td>12%</td>
</tr>
<tr>
<td>Intelligence Test</td>
<td>50%</td>
<td>6%</td>
</tr>
</tbody>
</table>

The plaintiffs established a prima facie case based upon this statistical disparity.

With a population/work force comparison, the plaintiff demonstrates that persons of her protected class are underrepresented in comparison to their availability. For example, a plaintiff may demonstrate that 3\% of an employer's work force are blacks, while blacks make up 10\% of the population. The plaintiff's implication

is that, if the employer had not intentionally refused to hire blacks, then blacks would make up 10% of the work force. In Hazelwood School District v. United States, the Supreme Court relied on such a comparison. The Court compared the percentage of black teachers employed by the defendant school district with the percentage of black teachers in the relevant population. The Court found a disparity and remanded the case to the district court.

The complication in using the population/work force statistical comparison is assuring that the comparisons are appropriate. Such assurance requires a close look at the relevant population. For example, in Hazelwood, one concern involved determining the appropriate population of blacks to compare to a work force group composed of teachers. Because not all blacks in the general population were qualified as teachers and because not all black teachers were interested in working for the Hazelwood school district, the population side of the comparison had to be evaluated carefully to assure that it was an appropriate group to compare to the work force.

At least six potential data sources may help determine the population side of the comparison.

(i) General population data

General population data show the total number of protected-class people in the entire population. The Supreme Court has recognized general population data as appropriate when the required job skills are those that "many persons possess or can fairly readily acquire," and the population workforce disparity is "gross." Thus general population statistics pertain to questions involving entry level positions which do not require skill or prior training or position for which such skills can be readily acquired on the job. But "when special qualifications are required to fill particular jobs, comparisons to the general population . . . may have little probative value." In Hazelwood, the court found that general population data are inappropriate to the issue of hiring teachers.

117. Dothard, 433 U.S. at 330 n.12; see also infra note 149 and accompanying text.
118. EEOC v. United Va. Bank/Seaboard Nat'l, 615 F.2d 147, 154 n.4 (4th Cir. 1980); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1162-63 (9th Cir. 1976); Gibson v. Local 40, Int'l Longshoremen's & Warehousemen's Union, 543 F.2d 1259, 1266 (9th Cir. 1976).
(ii) Labor Market Data

Even when the jobs require no skill or training, general population statistics may be inappropriate because they include children, retired persons not looking for work, military personnel or others who are out of the labor market. So statistics that reflect the protected persons in the labor market more accurately reflect their availability than reliance on general population data.120

(iii) Qualified Labor Market Data

When training or skill is necessary for the position, and the skill or training cannot readily be acquired on the job, a plaintiff should supply qualified labor market data.121 When the plaintiff relies on general population data, the defendant may use the refined qualified labor market data to rebut the plaintiff’s statistics.122

(iv) Qualified and Interested Data

Because all of those people qualified for a given job may not be interested in it, figures for qualified protected-class persons may exaggerate the population. For example, not all qualified people will be interested in the work location, pay, benefits, or other conditions of employment. In such event, the defendant may be successful in demanding that the plaintiff produce more refined statistics.

(v) Actual or Qualified Actual Applicant Flow Data

The question of whether a population group is actually interested in the job may be answered by using actual or qualified actual applicant flow data.123 Actual applicant flow data reflect those persons who applied for a position. Qualified actual applicant flow data reflect those qualified persons who applied for a position. This data is usually very reliable but may be distorted by inadequate, excessive or discriminatory recruiting efforts.124

121. See Hazelwood, 433 U.S. at 308 n.13.
Actual applicant flow data are most frequently used in pass/fail comparisons.125 Here the pass/fail comparisons are made for those individuals who actually applied for the job. When actual applicant flow data are unavailable or unreliable, "potential" applicant flow data may be used. Potential applicant flow data are general population data of a more refined sort that fairly represents the available labor pool for the job.126 The Supreme Court, however, has determined that the assumption that general population figures actually represent potential applicant flow may be inappropriate. This is particularly true in regard to positions for which the general public is not qualified.127

(vi) The Employer's Work Force Data

Non-entry level positions within an organization are frequently filled by promotion. When there is an allegation of discrimination in promotion, the employer's work force is regarded as the population. The comparison is made between the percentage of protected-class persons in the pool from which the promotion could be made and the percentage of protected-class persons promoted.128 The group from which promotions could be made is determined by identifying the work force group that meets eligibility requirements for promotion such as skill, experience, responsibility, and the like.129 A potential problem with relying on work force data occurs where the employer has historically unlawfully discriminated in hiring for or promoting to this work force group.

2. The Relevant Statistical Geographical Area

The relevant statistical geographical area—that geographic area from which applicants would come absent the alleged discrimination—affects the use of population/work force and pass/fail


127. See Beazer, 440 U.S. 568.


This area is used in determining the percentage of the protected-class that comprises the "population" in the population/work force comparison and the potential applicant flow for pass/fail comparisons. For example, when a rural school district hires a custodian, a legitimate expectation exists that the population from which applications or potential applications would come will be limited to a geographic area in and around the school district. That geographic area has its own mix of protected-class individuals and the school district will select an applicant from this population. If there are few protected-class members within the population, it will be more difficult to statistically prove disparate impact. The greater the number of protected-class people within the geographic area, the easier it is to prove impact. The definition of the geographic area significantly affects the statistics.

If the job is low paying, potential applicants will probably come from an area close to the employer. The geographic area for a school custodian will be relatively small. Conversely, if the position is high paying, a successful applicant may relocate some distance. For some positions, relocation may be expected, and interest may be nation-wide. Factors other than initial salary that may influence geographic area are the rate of unemployment or underemployment, the expected salary increase, the availability of public transportation and commuting patterns, the desire to work for a particular employer, the defendant's actual recruiting practices, and the addresses of job applicants, or, in the absence of this information, the addresses of current employees. However, where an employer discriminatorily directs his recruiting efforts at certain geographic areas, the addresses of job applicants and cur-

133. In Hazelwood, 433 U.S. at 312, the court noted that the recruiting effort by competing employers may affect the defendant's ability to recruit.
136. Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir. 1982); Donnell v. General Motors Corp., 576 F.2d 1292, 1296 n.5 (8th Cir. 1978).
rent employees become irrelevant. This type of employer conduct may even be evidence of discrimination.\textsuperscript{137}

3. The Relevant Statistical Time Period

The pass/fail or population/work force statistical comparisons reflect the impact of the defendant's selection procedures over a defined period of time. For example, a plaintiff may compare pass/fail statistics between males and females for the last ten years.\textsuperscript{138} The time period used in the statistical comparison is important in determining the relevance of the statistics. The most significant time period for statistical comparisons is defined by the statute of limitations.\textsuperscript{139} Only during this limited period can the defendant's conduct be determined to be unlawful.\textsuperscript{140} However, statistics

\begin{itemize}
\item \textsuperscript{137} Wheeler v. City of Columbus, Miss., 686 F.2d 1144 (5th Cir. 1982); see also supra note 124 and accompanying text.
\item \textsuperscript{138} Previously, courts relied on statistical comparisons focusing on the impact of the defendant's selection procedure at one point in time. See, e.g., Sethy v. Alameda County Water Dist. 545 F.2d 1157, 1162 (9th Cir. 1976). However, in its 1977 Hazelwood decision, the Supreme Court focused on statistical comparisons over a period of years. Such time frame statistics present a more accurate picture of the impact of the defendant's selection practices on the protected class. See, e.g., EEOC v. Local 14, Int'l Union of Operating Eng'rs, 553 F.2d 251, 254-55 (2d Cir. 1977).
\item \textsuperscript{139} Where there exists no state or local law forbidding discrimination in employment for the reasons specified in Title VII, a charge must be filed with EEOC within 180 days after the alleged unlawful employment practice. See 42 U.S.C. § 706(e).
\item Where there exists a state or local law forbidding discrimination in employment for reasons specified in Title VII (such as the Montana Human Rights Act), or if a charge is filed with the state or local agency within 180 days after the alleged unlawful practice occurred, a charge must be filed with EEOC within 300 days after the alleged practice occurred or within 30 days after receiving notice that the state or local agency has ended its proceedings, whichever occurs first. See 42 U.S.C. § 706(e). The statute of limitations for filing with the Montana Human Rights Act is 180 days. See MONT. CODE ANN. § 49-2-501(2) (1985).
\item The statute of limitations for the Civil Rights Act §§ 1981, 1983, 1985(3) and 1986 is defined by the most analogous state statute of limitations. See, e.g., Movement for Opportunity & Equality v. General Motors Corp., 622 F.2d 1235, 1241-42 (7th Cir. 1980) (quoting Johnson v. Railway Express, Inc., 421 U.S. 454, 462 (1975)).
\item \textsuperscript{140} In United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), the Supreme Court determined that defendants' unlawful conduct occurring outside the statute of limitations was equivalent to such conduct occurring prior to the effective date of Title VII. The Court said:
\begin{quote}
A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.
\end{quote}
\item Moreover, this period may be limited to the period prior to plaintiff's filing of the dis-
outside the time period defined by the statute of limitations but prior to the effective date of the statutory protections may be used as circumstantial evidence of discrimination.141

4. The Relevant Statistical Disparity

If the plaintiff demonstrates a statistical disparity based upon appropriate statistical comparisons for the relevant geographical area and time period, the question becomes whether the statistical disparity is sufficient to establish that the selection criteria have a disparate impact. The answer depends on the amount of statistical disparity; that is, on whether the disparity is statistically significant.

To be statistically significant, the disparity must not be the result of chance. There are a number of recognized tests for determining statistical significance.142 The three most widely used are: (1) the 0.05 level of statistical significance; (2) the Hazlewood two or three standard deviations test; and (3) the four-fifths or 80% rule.

A 0.05 level of statistical significance means that there is no more than a 5% possibility that chance is the cause of the disparity.143 There is, in other words, a 95% assurance that discrimina-

141. In Hazlewood, the Court excluded statistics for the period prior to the effective date of Title VII. Hazlewood, 433 U.S. at 309-10 and n.15. See also Patterson, 634 F.2d at 752 and n.11 (pre-Act discrimination relevant only to establish employment practices continued after the statutory protections were established).

Statistical evidence from the effective date until the commencement of the relevant statute of limitations period may be used as circumstantial evidence. See Hazlewood, 433 U.S. at 309 n.15; see also Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1017-18 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981).

142. In addition to the three tests discussed above, courts may rely upon 3.67% or 1 in 27 under the chi-square test (see Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 649 and n.92 (D.C. Cir. 1978) (en banc) (Robinson J., dissenting); the test of proportions (see Markey, 439 F. Supp. at 233 and n.59), or the Kolmogorov-Smirnov test (see Mistretta v. Sandia Corp., 15 Fair Empl. Prac. Cas. (BNA) 1690, 1705 (D.N.M. 1977), aff'd sub nom. EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980)). See D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION, chs. 9 and 9A (1980 & Supp.).

143. See Contreras v. City of Los Angeles, 656 F.2d 1267, 1272 n.3 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); see also D. BALDUS & J. COLE, supra note 142, § 9.221 at
tion is the cause. This test, frequently used by statisticians in many analyses, has been accepted by the courts.144

The two to three standard deviations test has also been applied by the Supreme Court and lower courts in employment discrimination cases.145 Two standard deviations are approximately equivalent to the 0.05 level of statistical significance. Three standard deviations are approximately equivalent to the 0.01 level of statistical significance, meaning that the chance of disparity is 1%.146 The Equal Opportunity Employment Commission Uniform Guidelines on Employee Selection Procedures provide a simple “rule of thumb” procedure for determining significance. Under this procedure, a plaintiff proves adverse impact if the selection rate for the protected group is less than four-fifths, or 80%, of the selection rate for the majority group.147 For example, suppose that 110 individuals—10 black and 100 white—applied for a particular position. Suppose further that the employer accepted 3 black and 50 white applicants. The selection procedure would have a disparate impact on blacks because the rate of acceptance was only 3/5 of the acceptance rate for whites.

<table>
<thead>
<tr>
<th></th>
<th>Black</th>
<th>White</th>
</tr>
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<tbody>
<tr>
<td>No. of Applicants</td>
<td>10</td>
<td>100</td>
</tr>
<tr>
<td>No. accepted</td>
<td>3</td>
<td>50</td>
</tr>
<tr>
<td>% rate of acceptance</td>
<td>30%</td>
<td>50%</td>
</tr>
</tbody>
</table>

If the employer had accepted four black applicants then there would not have been an adverse impact because the selection rate for blacks would have been 4/5, or 80% of that of whites. The test is easy to apply, but it has been criticized as being too simplistic and unreliable.148

308 n.36.


145. Hazlewood, 433 U.S. at 309-11 and nn.14 and 17 (1977); Hameed, 637 F.2d at 514; Gay, 694 F.2d at 551; Rivera v. City of Wichita Falls, 665 F.2d 531, 544-45 (5th Cir. 1982); American Nat'l Bank, 652 F.2d at 1191-92.


When the statistical disparity is characterized as "gross" or "substantial," courts have found discrimination without relying on statistical tests of significance. In recent years, however, courts have required more sophisticated statistical methods and insisted on proof of statistical significance. In cases where the statistical disparity was not significant, courts relied on other evidence to supplement the statistics.

5. The Relevant Statistical Sample Size

In addition to disparity, the size of the sample from which the plaintiff draws the statistics is fundamental to statistical reliability. A small sample will "detract from the value of such evidence." Courts have refused to rely on the statistics when the sample size is too small to provide reliable statistical conclusions. Certain statistical methods are more reliable than others for dealing with a small sample. When no reliable statistical conclusion is possible, the statistics, coupled with other evidence, may nevertheless give rise to an inference of discrimination. Finally, if the brevity of the statistical time period limits sample size, statistical evidence drawn from outside the critical time period may provide circumstantial evidence sufficient to establish impact.

B. Defendant's Burden of Establishing Job-Relatedness

Once the plaintiff establishes disparate impact, the defendant
must demonstrate that the selection criteria are significantly related to successful job performance or otherwise constitute business necessity. The defendant rebuts the impact of the selection criteria by offering evidence that the criteria are job-related. For example, the requirement of a high school education may have a disparate impact on blacks. If the defendant who hires a police officer requires applicants to have a high school education, the issue will be whether a high school diploma is sufficiently job-related.

One of the first questions is the degree of job-relatedness required to meet the Griggs standard that the criteria “must be related to successful job performance or otherwise constitute business necessity.” The Supreme Court has yet to specify what constitutes compliance with this standard. Lower courts have not agreed on what constitutes compliance, either. They have characterized the defendant’s evidentiary burden by using the terms “business purpose,” “business necessity,” and “job relatedness.” Even cases within the same circuit have produced conflicting standards.

Requiring the defendant to prove that the selection criteria are “necessary” is a higher standard than requiring that the criteria be “job-related.” The Ninth Circuit Court of Appeals determined that the defendant’s burden of proof is to demonstrate that the selection criteria are “predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which the candidates are being evaluated.” This standard requires more than merely showing that the selection criteria are “job-related” but less than demonstrating the criteria to be “necessary” to the enterprise. After reviewing the legislative history and Supreme Court pronouncements, the Ninth Circuit found unsupportable the requirement that a defendant establish the selection criteria to be necessary. The court recalled the Supreme Court’s holding in Dothard vs. Rawlinson, which stated that “a discretionary employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.” The court determined that the Su-

158. Contreras, 656 F.2d at 1267.
159. Id. at 1054 (quoting Moody, 422 U.S. at 431 (citing 29 C.F.R. § 1607.4(c)), cited in Craig v. County of Los Angeles, 626 F.2d 659, 662 (9th Cir. 1980), cert. denied, 450 U.S. 919 (1981)).
160. Contreras, 656 F.2d at 1277-80.
161. Id. at 1280.
162. Id. at 331-32 n.14.
The Supreme Court did not require a showing of necessity. The circuit court concluded that, while a showing of job necessity is not mandated, the defendant must demonstrate something more than mere job-relatedness. This compromise standard requires that the challenged criteria be predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job. Defendant must, therefore, demonstrate a significant correlation between the job criteria and important elements of the job. A showing that the relative criteria are related or tangential to elements of the job or that there exists some correlation between the criteria and job performance is not satisfactory.

It is difficult to demonstrate job-relatedness. Historically, employers have relied upon selection criteria that may or may not be job-related. To the extent that these criteria have an adverse impact on a protected class, the employer must be prepared to prove job-relatedness. As the Supreme Court held in Griggs, the employer must "measure people for the job rather than people in the abstract." Such measurement requires a direct link between selection criteria and job performance.

The EEOC Uniform Guidelines on Employee Selection Procedure provide that it is unlawful to use any selection criteria having an adverse impact unless it has been validated in accordance with the Uniform Guidelines or, in very limited circumstances, it has been demonstrated validation cannot or need not be performed. The Court of Appeals for the Ninth Circuit has recognized that while the uniform guidelines "are not mandatory, they are entitled to great deference . . . and an employer who disregards them must articulate some cogent reason for doing so and generally bears a heavier burden than the usual burden of proving job-relatedness." The Ninth Circuit, relying on the Uniform Guidelines, provided a three-step procedure for validation:

The employer must first specify the particular trait or characteristic which the selection device is being used to identify or measure. The employer then must demonstrate that the particular trait or characteristic is an important element of work behavior. Finally, the employer must demonstrate by "professionally ac-

ceptable methods" that the selection device is "predictive of or significantly correlated" with the element of work behavior identified in the second step.167

1. **Validation Methods**

The Uniform Guidelines provide three validation methods: content validation, criterion-related validation and construct validation.

a. **Content Validation**

Of the three methods, content validation is the most easily used. This method applies when the test is almost identical to the activities required on the job. In content validation, the employer identifies critical or important aspects of the actual job and tests the applicant to determine his or her overall proficiency. The Uniform Guidelines provide:

[T]o be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level of complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behavior, the stronger is the basis for showing contact validity. As the content of the selection procedure less resembled a work behavior, or the setting and manner of the administration of the selection procedure less resembled the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid and the greater the need for other evidence of validity.168

If an employer seeks a secretary, and a job analysis reveals typing to be a critical or important aspect of the job, the employer could validate the typing requirement by administering a typing test. The typing test should resemble the actual work required as closely as possible.

b. **Criterion Validation**

Unlike content validation, the criterion validation method

167. Craig, 626 F.2d at 662 (quoting Moody, 422 U.S. at 431).
measures identified aspects of job performance: for example, reading and writing, apart from a setting similar to the actual job. The employer must demonstrate a positive relationship between test scores and job performance. When the employer uses the test to predict job training performance, the test may under some circumstances be validated against success in the training program.\(^{169}\)

The employer need not test for all the criteria in a given job, but the courts will closely review the employer's choice of job criteria to assure that those selected for testing are not discriminatory.\(^{170}\)

The Uniform Guidelines provide two criterion validation procedures, concurrent and predictive.

169. In Washington v. Davis, 426 U.S. 229 (1976), a police department relied on a written test that had a disparate impact on blacks to select recruits for its training program. It was clear some minimum level of skill was necessary to successfully complete the training program. The Supreme Court held that a positive correlation between the test scores and the training program performance was sufficient to validate the test regardless of "whether the training program itself is sufficiently related to actual performance of the police officer's task." Id. at 252.

While Davis was not a Title VII case, the principle of test validation against training programs was thereafter accepted in the Title VII context. United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977) (three judge panel), aff'd without opinion, 434 U.S. 1026 (1978).

Despite the broad language of Davis, the lower courts have limited it to its facts. See Guardians Ass'n of New York City Police Dep't v. Civil Service Comm'n, 633 F.2d 232 (2d Cir. 1980), cert. denied 463 U.S. 1228 (1983); Ensley Branch of the NAACP v. Seibels, 616 F.2d 812 (5th Cir.), cert. denied 449 U.S. 1061 (1980); Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), cert. denied, 450 U.S. 919 (1981).

The Court of Appeals for the Second Circuit has said that the Supreme Court in Davis held that "entry-level tests were justified by the need to weed out those who lacked minimal skills necessary to successful completion of the training program." Guardians Ass'n, 633 F.2d at 247. Where the test does more than screen the minimally qualified from training it must be validated against actual job performance. Id.

Where an employer utilized a test, validated only against the training program, to screen other than the minimally qualified, lower courts have not sustained validation. For example, in Seibels, the employer required police officers and firefighters to take and pass a test. Candidates that passed the test were placed on a list in order of their score, highest to lowest. As job openings occurred candidates from the top of the list were certified to the department for final selection. After selection the candidate was required to complete a training program before being placed on duty.

The test had an adverse impact on blacks. The county argued, based on Davis, that the test was lawful because of a positive correlation between the test scores and training program performance. See Seibels, 616 F.2d at 819.

The Court of Appeals for the Fifth Circuit held the test were discriminatory. The court distinguished Davis on the basis that the test was used to determine the minimum competence to compete in the training program whereas here test scores were used to determine ultimate selection.

170. For example, testing firefighters solely for strength and endurance [which will favor males]. See also Craig, 626 F.2d at 688 (minimum height required by sheriff's department); Beecher, 371 F. Supp. 507 (D. Mass. 1974), aff'd, 504 F.2d 1017, cert. denied, 421 U.S. 910 (1975) (firefighters' written test not job-related).
(i) Concurrent

The concurrent method evaluates the criteria-related performance of current employees. The employees are tested, and the test results are compared to their evaluated performance. If the test is predictive, employees who are evaluated as poor will perform poorly on the test, and highly evaluated employees will perform well on the test. While this method of validation is relatively simple to administer, the courts have noted several problems with its application. In Albemarle Paper Co. v. Moody, the Supreme Court struck down the employer’s use of general ability tests administered to applicants for skilled jobs, holding that the test had an adverse impact on blacks despite the fact that the validation study was conducted by an industrial psychologist.

In Albemarle Paper, the supervisors were told to evaluate the current employees. A general ability test was given to employees, and their test results were compared to their supervisors’ ranking to determine if there was a correlation. The trial court concluded that the employer had sustained its burden of proof because there was a positive correlation for two of the ten job classifications. The court of appeals determined that the validation study failed to demonstrate job-relatedness.

The Supreme Court affirmed. The Court concluded that the validation study was “materially defective in several respects.” First, the validation study was not validated for all the skilled lines of progression for which it was used. Recognizing that the tests had been validated for some skilled jobs, the Court, relying on the EEOC Uniform Guidelines, cautioned that “[a] test may be used in any job other than that for which it has been professionally validated only if there are ‘no significant differences’ between the studied and the non-studied jobs.” The employer failed to establish that there were no significant differences between the skilled jobs for which the test had been validated and those other jobs for which it was also used.

The Court also noted that the validation study was flawed because of the subjective nature of the supervisors’ evaluations of the current employees. The “supervisors were asked to rank employees by a ‘standard’ that was excessively vague and totally open to divergent interpretations.” The Court said “[t]here is, in short,
simply no way to determine whether the criteria actually considered were sufficiently related to the company's legitimate interests in job-specific ability to justify a testing system with a racially discriminatory impact."\(^{175}\)

The Court found that the employer's validation study was limited, in most cases, to jobs near the top of the various lines of progression. Quoting from the Uniform Guidelines, the Court noted:

If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for jobs at or near the entry level.\(^{176}\)

The Court then determined:

The fact that the best of those employees working near the top of a line of progression score well on a test does not necessarily mean that that test, or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers entering lower level jobs. In drawing any such conclusion, detailed consideration must be given to the normal speed of promotion, to the efficacy of on-the-job training in the scheme of promotion, and to the possible use of testing as a promotion device, rather than as a screen for entry into low level jobs. The district court made no findings on these issues. The issues take on special importance in a case, such as this one, where incumbent employees are permitted to work at even high level jobs without passing the company's test battery.\(^{177}\)

Finally, the Court determined that the employee or "validation study dealt only with job-experienced white workers, but the tests themselves are given to new job applicants, who are younger, largely inexperienced and in many instances non-white."\(^{178}\) "The EEOC Guidelines . . . provide that '[d]ata must be generated and results separately reported for minority and non-minority groups whenever technically feasible.'\(^{179}\) The Court noted that it may not have been technically feasible to include the black employees.

\(^{175}\) Id. (emphasis in original).
\(^{176}\) Id. at 434 (quoting 29 C.F.R. § 1607.4(c)(1) (1974)).
\(^{177}\) 422 U.S. at 434 (citing 29 C.F.R. § 1607.11 (1974)).
\(^{178}\) 422 U.S. at 435.
\(^{179}\) Id. (quoting 29 C.F.R. § 1607.5(b)(5) (1974)).
within the validation group. Quoting from the Uniform Guidelines, the Court said:

If it is not technically feasible to include minority employees in the validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.\(^\text{180}\)

(ii) Predictive

After applicants have been selected and the applicants have been on the job for a reasonable period, their performance is evaluated. If there is a positive correlation between the test scores and their job performance evaluations, the test is predictive. Because the predictive procedure focuses on an applicant pool ostensibly more free of protected class discrimination than the existing work force, and because it eliminates the potentially prejudicial aspects of experience, it may be favored over the concurrent procedure.\(^\text{181}\) The concurrent procedure, however, is generally acceptable.\(^\text{182}\)

In large part, the significance of *Albemarle Paper* is its heavy reliance on the Uniform Guidelines regarding the employer's need to validate. Even when the employer's validation method is appropriate, the issue turns on the degree of correlation between the selection criteria and job performance. The Guidelines provide that "there is no minimum correlation coefficient applicable to all employment situations."\(^\text{183}\) The American Psychological Association has suggested a "very rough guide" to interpretation of correlation coefficients:

[A] correlation between a single employment test and a measure of job performance of approximately .20 is often high enough to be useful and such correlations rarely exceed .50. . . . A correlation of .40 is ordinarily considered very good, and most personnel research workers are usually pleased with a correlation of .30.\(^\text{184}\)

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180. 422 U.S. at 435 (quoting 29 C.F.R. § 1607.5(b)(1) (1974)).
182. See, e.g., City of Chicago, 549 F.2d 415; Dickerson v. U.S. Steel Corp., 472 F. Supp. 1304 (E.D. Pa. 1978), vacated and remanded on other grounds sub nom. Worthy v. United States Steel Corp., 616 F.2d 698 (3d Cir. 1980) (the current procedure acceptable except where test "puts a premium on experience").
Some courts have also adopted a "rule of thumb" standard. As a practical matter, however, the degree of correlation depends on the facts of the case. The greater the adverse impact, the stronger the required correlation and demonstration of the importance of the criterion for successful job performance. When an employer uses the test only to screen out grossly unqualified applicants, a lower correlation may be acceptable. The higher the human and economic risk of failure on the job, the lower the necessary correlation. Courts freely invoke this latter principle in cases involving airline pilots and bus drivers entrusted with the safety of human life.

Not only must there be a proper correlation between the selection criteria and job performance, but the correlation must also be statistically significant. As previously discussed, this assures that the statistical correlation actually measures what it purports to and does not represent pure chance.

Requiring the validation of selection criteria frequently confronts the employer with an extensive, time-consuming process which, even when conducted by qualified personnel, may be vulnerable to attack. If an employer chooses not to validate the selection criteria on his or her own work force and instead relies on criteria validated elsewhere, the validation is subject to attack. To defend the validation, the employer must demonstrate that his work force is substantially identical to that which was previously validated.

Many employers, particularly small ones, are unable to validate selection criteria on their own work force because they do not have sufficient employee turnover to support acceptable validation. There is a relationship between sample size and level of

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188. See 29 C.F.R. § 1607.75 (C) (1985).
190. See supra part III A 4 and accompanying text.
192. The general rule is that the relationship must be significant to the 0.05 level of significance, no more than five chances in a hundred of the relationship having occurred by chance. 29 C.F.R. § 1607(B)(2) (1985).
193. See Kim v. Commandant, 772 F.2d 521 (9th Cir. 1985).
statistical significance.\textsuperscript{194} As sample size decreases, the minimum correlation between selection criteria and performance accuracy to obtain a .05 level of statistical significance increases. A low level of employee turnover requires that the correlation between selection criteria and job performance be particularly strong.

As a consequence, small employers may be financially and statistically precluded from validating criteria on their own work force, and adoption of selection criteria from another employer is risky. The small employer is presented with a difficult situation in attempting to defend using the criterion method.

c. Construct Validation

Construct validation supports tests measuring psychological constructs such as intelligence, anxiety, ability to work in certain environments, comprehension, and motivation. Construct validation begins with a job analysis to identify the applicable constructs. This process must be performed by professionals qualified to identify such constructs.\textsuperscript{195} The second step requires that professionals identify a selection procedure to reliably measure the construct. Although psychologists have long used tests for most standard constructs, very little case law dealing with construct validation exists. Litigants rarely challenge the results, partly because the method is not widely used and validation of the tests is well documented in the professional literature. There are, in any event, practical advantages to using construct validation. Because construct validation is documented outside the job, the test may be used with small sample sizes and narrow ranges of scores. As with criteria validation, however, the plaintiff may challenge the relevance of the construct to actual job performance and question whether the test actually measures the construct.

2. Validating Subjective Selection Criteria

The analysis in this article has assumed that the defendant used some objective criteria in the selection process. These criteria may include scored tests such as those for intelligence, achievement, reading, writing, mathematical ability, or psychological make-up, and non-scored objective criteria such as educational achievement, strength, and agility. But the defendant may also rely on subjective criteria, such as judgment of an applicant's maturity, self-reliance, ability to get along, and ability as a team.

\textsuperscript{194} See supra notes 152 to 156 and accompanying text.

player.

The Uniform Guidelines\textsuperscript{196} apply to any selection procedure used as a basis for making employment decisions.\textsuperscript{197} Thus, they apply to both objective and subjective selection standards. The courts have had little difficulty applying the disparate impact analysis to scored tests and non-scored objective criteria. A defendant's use of subjective selection criteria, however, has caused the courts some difficulty. Defendant's use of subjective criteria is not unlawful per se,\textsuperscript{198} and courts have recognized that selection criteria for some jobs, particularly supervisory and managerial ones, cannot be solely objective.\textsuperscript{199} On the other hand, the use of subjective criteria may create\textsuperscript{200} or strengthen an inference of discrimination.\textsuperscript{201} Some courts, including the Ninth Circuit Court, have refused to apply the disparate impact model when the defendant has relied on subjective selection criteria.\textsuperscript{202} These courts have restricted the disparate impact model to objective, seemingly neutral criteria such as height and weight, scored tests, and education. However, because the selection criteria for most supervisory and professional jobs are in part subjective and discretionary, a court's refusal to apply the disparate impact proof model to subjective and discretionary selection criteria eliminates this method of analysis for a significant category of jobs. Some courts apply both the disparate treatment and the disparate impact model to subjective selection criteria\textsuperscript{203} and a multi-component selection process that includes both objective and subjective criteria.\textsuperscript{204}

Courts that have refused to apply the disparate impact method to subjective and discretionary selection criteria have

\begin{itemize}
  \item \textsuperscript{196} See supra text accompanying notes 97-98.
  \item \textsuperscript{197} 29 C.F.R. § 1607.2(C) (1985) (emphasis added).
  \item \textsuperscript{198} E.g., Hung Ping Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982); Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir.), vacated and remanded on another issue, 423 U.S. 809 (1975).
  \item \textsuperscript{199} See Rogers, 510 F.2d at 1345.
  \item \textsuperscript{200} E.g., Burrus v. United Tel. Co., 683 F.2d 339, 342 (10th Cir.), cert. denied, 459 U.S. 1071 (1982).
  \item \textsuperscript{201} See O'Brien, 670 F.2d at 867.
  \item \textsuperscript{202} Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982); Vuyanich, 723 F.2d at 1202; Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 763 (5th Cir.), cert. denied, 464 U.S. 991 (1983); Hill v. K-Mart Corp., 699 F.2d 776, 779 (5th Cir. 1983); Talley v. U.S. Postal Serv., 720 F.2d 505, 507 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985); Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1132-33 (9th Cir. 1985); Mortensen v. Callaway, 672 F.2d 822, 824 (10th Cir. 1982).
  \item \textsuperscript{203} Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982).
\end{itemize}
made an unnecessarily narrow reading of the *Griggs* case. As the Eleventh Circuit Court stated:

In *Griggs*, the Court indicated that Title VII requires "the removal of artificial, arbitrary and unnecessary barriers to employment" which "operate as built-in headwinds for minority groups and are unrelated to measuring job capability." . . . The Court in *Griggs* did not differentiate objective from subjective barriers and, in fact, the Court made frequent references to "practices" and "procedures," terms that clearly encompass more than isolated, objective components of the overall process.\(^{205}\)

The Circuit Court went on to say:

Exclusion of such subjective practices from the reach of the disparate impact model of analysis is likely to encourage employers to use subjective, rather than objective, selection criteria. Rather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews or review panel decisions. It could not have been the intent of Congress to provide employers with an incentive to use such devices rather than validated objective criteria.

Similarly, limiting the disparate impact model to situations in which a single component of the process results in an adverse impact ignores the situation in which an adverse impact is caused by the interaction of two or more components. This problem was recognized in the recent Eighth Circuit decision in *Gilbert v. City of Little Rock, Ark.*\(^{206}\) The court reversed the district court's finding of no discrimination under a disparate impact theory because "the district court neglected to adequately consider the interrelationship of the component factors and, more specifically, whether the oral interview and performance appraisal factors . . . had a disparate impact . . . ."\(^{207}\)

Whether or not the analysis of the Eleventh Circuit Court will prevail must await a decision by the Supreme Court. In the interim, Montana Title VII plaintiffs must rely on disparate treatment in attacking subjective selection standards.

3. **Bottom Lining**

Because employers need some selection criteria, and because it is difficult to validate these criteria, many employers continue to rely on unvalidated criteria. Such employers may attempt to avoid

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disparate impact suits by assuring, through affirmative action, that their work force statistically reflects the protected-class population. The employer merely selects a sufficient number of protected class persons to correct any statistical imbalance. Assuring that sufficient protected class persons survive the selection process regardless of the fact that aspects of the process may have a disparate impact on protected class members is referred to as "bottom lining;" in other words, despite the alleged disparate impact of the selection process, the bottom line results in a statistically fair representation of protected class persons. The theory is that if the plaintiff cannot demonstrate that the bottom line of the selection process shows an under-representation of his protected class, then the selection process has no disparate impact.

For a number of years defendants successfully defended against disparate impact charges by bottom lining. However, in Connecticut v. Teal,\(^\text{208}\) the Supreme Court ruled that bottom lining was not a defense when presented in one form of a multi-component process.

In a multi-component process, an employer may reject an applicant in two ways: (1) once an applicant fails one aspect of the process, thereafter the employer does not consider him; or (2) even if an applicant fails one aspect, she continues to compete, and the employer only makes a selection after all the results from all the selection criteria are in. In the second form, failure in one selection criteria does not eliminate the candidate, and that failure can be counter-balanced by successes on other criteria.

The Supreme Court in Teal\(^\text{209}\) held that where an employer dropped from the selection process a plaintiff who had failed one criterion, the criterion had a disparate impact on plaintiff's protected class. The fact that the bottom line of the selection process showed no statistical disparity for plaintiff's protected class was not a defense. A five-to-four majority focused on the impact of the criterion on the individual plaintiff, not on the impact on the protected class. The dissenters, on the other hand, focused on the protected class, arguing that under the disparate impact method of proof, the plaintiff established an inference of discrimination by demonstrating that the selection process resulted in disparate impact on the protected class. If the plaintiff had not focused on the protected class but rather on individual treatment, the disparate treatment method of proof would have been appropriate; but, the

\(^{208}\) 457 U.S. 440; see also supra note 105 and accompanying text.

\(^{209}\) 457 U.S. at 454-56.
dissenters argued, plaintiff "cannot have it both ways." They said:

Having undertaken to prove discrimination by reference to one set of group figures (used at a preliminary point in the selection process), the plaintiff then claims that non-discrimination cannot be proved by viewing the impact of the entire process on the group as a whole. The fallacy of this reasoning—accepted by the Court—is transparent. It is to confuse the individualistic aim of Title VII with the methods of proof by which Title VII rights may be vindicated. The respondent, as an individual, is entitled to the full personal protection of Title VII. But, having undertaken to prove a violation of his rights by reference to group figures, respondent cannot deny petitioner the opportunity to rebut his evidence by introducing figures of the same kind. Having pleaded a disparate impact case, the plaintiff cannot deny the defendant the opportunity to show/prove that there was no disparate impact.211

The rationale of the majority opinion appears to apply only where failure of one component of the multi-component selection process presents a barrier to further consideration.212 In like manner, when failure is not an absolute barrier but has a major negative impact on the ultimate decision, bottom lining would be insufficient evidence.213

C. Plaintiff's Burden of Establishing A Less Detrimental Alternative

The Court in Albemarle Paper found that where an employer meets his burden of establishing job relatedness, "it remains open to the complaining party to show that other tests or selection devices without a similarly undesirable racial effect, would also serve the employers' legitimate interest in efficient and trustworthy workmanship."214 Despite what appears to be a clear assertion that a plaintiff has the burden of establishing a less detrimental alternative, some lower courts have required the defendant to demonstrate, as part of job-relatedness, the absence of a less detrimental

210. Id. at 459 (Powell, J., dissenting).
211. Id. at 459-60 (Powell, J., dissenting).
alternative to the selection criteria relied upon.215 The burden these courts place on the employer in rebutting the plaintiffs' *prima facie* case is "business necessity."216 They reason that if the selection criteria must be "necessary," by implication there may not be other selection criteria that could accomplish the asserted business purpose with less adverse impact.217 Thus the employer must demonstrate that there is no less detrimental alternative to the selection criteria; he must prove a negative: that a less detrimental alternative does not exist. This allocation of burden does not conform with the Supreme Court pronouncements.

The Uniform Guidelines provide that an employer, as part of the validation study, should include "an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible . . . ."218 The Guidelines also provide that "[w]here two or more procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact."219 While the Guidelines place the burden on the employer to seek less detrimental selection criteria, some authorities claim this burden of investigation is inconsistent with *Albermarle*.220 This conclusion appears well founded. Because the Uniform Guidelines apply to almost all selection criteria and require the employer to validate, they would, in effect, require the employer to search for and validate less detrimental alternatives. The Uniform Guidelines would then give the plaintiff the burden of proving a less detrimental alternative but would require the defendant to investigate and compile the less detrimental alternative evidence on which plaintiff will rely. In effect, the burden of producing the evidence is on the defendant. A plaintiff may merely inquire through discovery and present at trial what the defendant has been required to produce and supply. It is indeed questionable

215. *E.g.*, Kirby v. Colony Furniture Co., 613 F.2d 696, 703-04 (8th Cir. 1980); Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 244 n.87 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979) (citing cases). See also EEOC Uniform Selection Guidelines 29 C.F.R. § 1607.

216. *E.g.*, Kirby, 613 F.2d at 703-04 (emphasis added).

217. *See, e.g.*, Contreras, 656 F.2d at 1287 (Tang, J., concurring in part and dissenting in part).

218. 29 C.F.R. § 1607.3(B) (1985).

219. *Id*.

220. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 95 (2d ed. 1983); *see also* Contreras, 656 F.2d at 1279.
whether this is the result the Supreme Court intended in assigning plaintiff the burden of persuasion on the issue of a less detrimental alternative.

IV. REASONABLE ACCOMMODATION

The third proof mechanism, reasonable accommodation, specifically pertains to two protected classes: religion and handicap. While disparate treatment and disparate impact also apply to these two protected classes, plaintiffs asserting religion or handicap-based discrimination most frequently rely upon reasonable accommodation as the proof mechanism of choice.

A specific overview of these two protected classes is necessary to understand this form of affirmative action. Unlike disparate treatment and disparate impact, reasonable accommodation requires the defendant to take affirmative action to accommodate the plaintiff's religious or handicap protected class status.

A. Religion

Title VII makes it unlawful for a regulated person to discriminate against a protected-class person because of his religious beliefs and practices. Initially, no statutory provision required accommodation. Despite this lack of statutory authority, the 1966 EEOC Religious Discrimination Guidelines prohibited discrimination on the basis of religion and required that employers affirmatively "accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." This Guideline eliminated employment practices, many neutral on their face, which interfered with the exercise of religious practices.

The Guidelines, amended in 1967, now require the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's

221. See infra note 233; see also 42 U.S.C. 2000e(j) (1985).
224. E.g., Sabbath work, religious clothing or appearance, and religious observances.
business." This standard required the employer to prove that the accommodation would cause an "undue hardship."

The Court of Appeals for the Sixth Circuit struck down this Guideline and determined that EEOC lacked the statutory authority to require an employer to make an accommodation. It found that, even if there were a statutory basis, the requirement violated the establishment clause of the United States Constitution. An equally divided Supreme Court affirmed this decision without producing an opinion. Congress subsequently responded by inserting in Title VII the affirmative duty "to reasonably accommodate . . . an employee's or perspective employee's religious observances or practices without undue hardship on the conduct of the employer's business." While the Supreme Court has not spoken on the constitutional issue, lower courts have held the provision constitutional. Even though the reasonable accommodation provision purportedly applies only to employers, the lower courts have held that unions are under a statutory duty to accommodate as well.

To establish a prima facie case, a plaintiff must prove (1) that the mandated employment practices are contrary to his religious faith; (2) that plaintiff informed the defendant of this fact; and

225. 29 C.F.R. § 1605.1(b) (1980).
226. 29 C.F.R. § 1605.1(c) (1980).
228. See Dewey, 429 F.2d at 334-35.
230. While the Montana Human Rights Act does not specifically provide for reasonable accommodation it has been so construed. See supra note 222.

Plaintiff need only prove (1) that his belief is "religious" in his own scheme of things, and (2) that it is sincerely held. In Welsh, moral or ethical beliefs which occupy the role of religion in an individual's life were considered as a religion. Political or social ideologies
that the defendant took some adverse employment action be-
cause of plaintiff's continued religious practice, observances, or be-
liefs. 234 Once the prima facie case is established, the defendant
must show that he or she made a good faith effort to accommodate
the plaintiff's religious practices. 235 The plaintiff need not have
suggested methods of accommodation 236 and if a defendant's ef-
forts at accommodation were unsuccessful, the defendant must
demonstrate that he could not accommodate the plaintiff without
undue hardship. 237 While the defendant must search for methods
to accommodate the plaintiff, he or she need not attempt every
conceivable method of accommodation to establish undue hard-
ship. 238 The employer must, however, at least seriously consider
the accommodation and determine that the accommodation would
cause undue hardship. 239

The EEOC Guidelines require that "where there is more than
one means of accommodation which would not cause undue hard-
ship, the employer or labor organization must offer the alternative
which least disadvantages the individual with respect to his or her
employment opportunities." 240 This does not require the employer
to give priority to plaintiff's preferred method of accommodation.
It only requires that the method chosen have the least adverse im-
pact on the plaintiff's employment opportunities, "such as com-
pensation, terms, conditions, or privileges of employment." 241

have been determined to be outside the limits of Title VII. Bellamy v. Mason's Stores, Inc.,

234. Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979); see also An-
derson, 589 F.2d at 401.

235. See Anderson, 589 F.2d at 401.

236. Id.

237. Id; see also Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1978).

238. See Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir.
1976). For example, in one case, the plaintiff, a job applicant, demanded that the employer
guarantee that she would never have to work on her Saturday Sabbath. The employer, a
bank, normally closed on Saturday and Sunday, rejected the proposal and refused to hire
the plaintiff. In a split decision the Fourth Circuit held that plaintiff's demand never to be
required Saturday work could not be "reasonably" accommodated, and any such accommo-
dation would certainly cause undue hardship. However, more recently, another federal court
held that an employer may not reject an applicant for making a Saturday work exclusion
demand without first determining that accommodation could not be made without undue
hardship. Jordan v. North Carolina Nat'l Bank, 565 F.2d 72 (4th Cir. 1977); see also United
States v. City of Albuquerque, 545 F.2d 110 (10th Cir. 1976), cert. denied, 433 U.S. 909

239. See McGinnis v. U.S. Postal Serv., 512 F. Supp. 517 (N.D. Cal. 1980) (The plain-
tiff, a postal service window clerk refused to distribute draft registration materials. The
court determined the employer made no good faith effort to accommodate where other win-
dow clerks were willing to distribute the materials for her.).


241. Id.
One court determined that "[w]here the employer and the employee each propose a method of reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." Yet, another court determined that while "Title VII requires accommodation . . . [i]t does not require employers to accommodate to religious practices of an employee in exactly the way an employee would like to be accommodated . . . . Nor does Title VII require employers to accommodate an employee's religious practices in a way that spares the employee any cost whatsoever."

Often the most critical issues involve the extent to which the defendant must accommodate the plaintiff's religious practices and the point at which the accommodation causes undue hardship. The Supreme Court addressed this issue in *TransWorld Airlines, Inc. v. Hardison*, where it determined that an employer need not bear more than a de minimis cost in making accommodation. While the Court did not raise the issue of the constitutional establishment clause, the underlying tone of the opinion was that, had Congress required the employer to shoulder more than a de minimis cost, the burden would have been unconstitutional.

In *Hardison*, employee Hardison's religion prohibited him from working Saturdays and certain religious holidays. Because the job classification required someone to work Saturdays and Hardison was second from the bottom in seniority, TransWorld assigned Saturday work to him. When TWA was confronted with the conflict between Saturday work and Hardison's religion, it asked the union to permit a change in Hardison's work assignment that would not require Saturday work. The union refused, because the proposed shift of assignment violated the collective bargaining agreement's seniority provision.

TWA considered other alternatives for accommodation, such as assigning Hardinson a four-day work week and having another employee perform Hardison's Saturday work or arranging a swap between another employee and Hardison. Ultimately, it rejected


243. Pinsker v. Joint Dist. No. 28J, 735 F.2d 388, 390-91 (10th Cir. 1984) (The employee sought additional religious days off with pay. The employer allowed the plaintiff the time off but without pay.).

244. 432 U.S. 63 (1977).

245. The rationale for this conclusion is that the establishment clause prohibits the government from establishing religion. A statutory requirement that employers must accommodate religious practices, under penalty of law constitutes the establishment of religion.
these alternatives. The first would have required a Saturday-working employee or supervisor to neglect his or her primary duties in order to perform Hardison's work. The second would have required paying premium wages. Shifting another employee or supervisor to work Saturday or paying premium wages would have resulted in either lower efficiency or higher costs. The Court concluded that either would have resulted in more than a \textit{de minimis} cost and would have created an undue hardship for TWA.

The Court also concluded that the duty to accommodate does not require an employer to take steps inconsistent with an otherwise valid collective bargaining agreement. The Court noted that section 703(h) of Title VII affords special treatment to seniority systems. To require a senior employee to work Saturday would deprive him of his contractual preference. The Court concluded:

Title VII does not contemplate such unequal treatment. ... It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preferences to some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others and we conclude that Title VII does not require an employer to go that far.\textsuperscript{246}

Lower courts have determined that when an employer makes no effort to accommodate,\textsuperscript{247} or when the accommodation could be made without disruption,\textsuperscript{248} the employer will be required to accommodate. After Hardison, EEOC amended its Guidelines. The EEOC took a broad reading of reasonable accommodation. While recognizing the \textit{de minimis} cost concept of undue hardship, EEOC determined that the reasonable accommodation cost on the employer is relative. "[D]ue regard [will be] given to identifiable cost in relation to the size and operating cost of the employer and the number of individuals who will in fact need a particular accommodation."\textsuperscript{249} The Guidelines state that:

\begin{quote}
regular payment of premium wages to substitutes ... constitute undue hardship. Infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accom-
\end{quote}

\textsuperscript{246} Hardison, 432 U.S. at 81.
\textsuperscript{248} See McGinnis, 512 F. Supp. 517 (other employees and the union who would bear the burden of accommodation support the plaintiff's proposed accommodation).
\textsuperscript{249} 29 C.F.R. § 1605.2(e)(1) (1985).
modation. However, administrative costs, "e.g., costs involved in rearranging schedules and recording substitutions for payroll purposes," necessary for an accommodation will not constitute more than a de minimis cost. 250

250. Id. Title VII includes two exemptions applicable to religious discrimination. Section 702 provides:

This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with carrying on by such corporation, association, educational institution, or society of its activities.


When originally enacted the exemption was limited solely to "religious" activities. However, thereafter Congress removed the "religious" restriction on activities. Thus, on its face the provision exempts from religious discrimination all activities of religious institutions. However, such a construction has serious constitutional problems. In King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974), the Court of Appeals for the District of Columbia stated that to exempt religious institutions from religious discrimination on all of their activities, no matter how secular, would run afoul of the Establishment Clause. See also Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983). Alternatively, where the activities are legitimately religious in nature, courts have upheld the exemption. Feldstein, (Christian Science Monitor as a religious activity of the Christian Science Church); Larsen v. Kirkham, 499 F. Supp. 960 (D. Utah 1980) (a church sponsored school under Section 703(e)). It is clear the Section 702 exemption applies only in favor of discrimination based on religion. Thus, while a religious institution may require its employees to belong to a certain religion, it cannot discriminate against other protected classes. EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

Accordingly, a religious institution may not generally discriminate in employment against a woman merely because she is a woman. However, if the religious institution is able to establish that its religious doctrine mandates discrimination against women, the discrimination is lawful. To hold otherwise would run afoul of the Free Exercise Clause of the First Amendment. Pacific Press Publishing Ass'n, 676 F.2d at 1279. While Title VII may prohibit religious institutions from discriminating against non-religion protected class statuses, the Free Exercise Clause prohibits such discrimination if the religious institution demonstrates discrimination is part of church doctrine.

Section 703(e)(2) provides:

[Notwithstanding any other provision of this subchapter] . . . it shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.


Like Section 702, this provision is limited to the employment of persons engaged in nonsecular religious activities or the teaching of religious doctrine, beliefs, or practices. Thus, a religious affiliated school could not require all custodians to be members of the faith. Similarly, a church owned and operated college cannot require all faculty members to be members of the particular religious faith where the faculty members do not attend to the religious needs of the faithful or instruct students in the whole of religious of doctrine. One court concluded that while the faculty of a church college is expected to serve as exemplars
B. Handicap

The federal law prohibiting employment discrimination against the handicapped requires special attention, because being handicapped is not a Title VII protected-class status. The federal employment law addressing discrimination against the handicapped is primarily addressed by the Rehabilitation Act of 1973, the Vietnam Era Veterans Adjustment Assistance Act, and the State and Local Fiscal Assistance Act of 1972 as amended. These acts provide a much narrower base of federal protection than Title VII.

In contrast, the Montana Human Rights Act provides the handicapped with the same protection accorded other protected classes; consequently, employment discrimination against the handicapped within Montana will most often be litigated under the Montana Human Rights Act. The Montana Human Rights Commission has adopted the proof mechanism developed by federal authorities interpreting federal protections. Thus the procedure described below will be used for both federal and Montana protections.

Title V of the Rehabilitation Act of 1973, as amended, is the operative federal provision prohibiting employment discrimination against the handicapped. The provision regulates the conduct of

of practicing Christians, this does not serve to make the terms and conditions of their employment matters of church administration, and thus purely of ecclesiastical concern. See Mississippi College, 626 F.2d 477. See also MONT. ADMIN. R. 24.9.1404 (1983).

255. The Rehabilitation Act defines a handicapped person as:

[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse would constitute a direct threat to property or the safety of others. 29 U.S.C.A. § 706(7)(B).

The regulations further amplify this definition. A major definitional problem is whether the physical or mental impairment "substantially limits one or more of such person's major life activities" (emphasis added). Major life activities are defined in the EEOC regulations as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1613.702(c) (1985) (emphasis added). The Section 503 OFCCP regulations define major life activities "to include commu-
three categories of employers: the federal government, federal contractors, and recipients of federal funds. Non-governmental contractor private sector employers are exempt. This limited coverage in part distinguishes federal protections for handicapped people from other federally-protected classes and the Montana Human Rights Act.

Section 501 of the Rehabilitation Act requires the federal government to take affirmative action in "hiring, placement and advancement of handicapped individuals." This section is enforced by EEOC regulations which prohibit the federal government from discriminating against qualified handicapped persons in employment and require the federal government to take affirmative action in the hiring, placement and advancement of qualified

cation, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc. . . . [p]rimary attention is given to those life activities that affect employability." Appendix A (emphasis added).

Accordingly, if a person's physical or mental impairment substantially impacts his/her ability to work he/she is considered handicapped. The question becomes when does an impairment substantially impact a person's ability to work. See Jasany v. U.S. Postal Serv., 755 F.2d 1244 (6th Cir. 1985).

Plaintiff Jasany, a postal employee, suffered from a medical ailment commonly known as crossed eyes. The primary function of his job was operation of a mail sorting machine. The operation of the machine resulted in eye strain and he refused to operate the sorter. The court of appeals said the analysis of a handicapped case involves three elements: (1) "impairment," (2) "substantial limitation of a major life activity" and (3) "qualified person." Here the court focused on the first two elements.

The court concluded because plaintiff's "condition had never had any effect whatsoever on any of his activities, including his past work history and ability to carry out other duties at the post office apart from operation of the [mail sorting machine]" he was not handicapped. Id. at 1250. Relying on a frequently cited lower court decision, E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980), the court said, "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not substantially limiting within the meaning of the statute." Jasany, 755 F.2d at 1248. Quoting another case the court said, "one particular job for one particular employer cannot be a 'major life activity.'" Id. (quoting Salt Lake City Corp. v. Confer, 674 F.2d 632, 636-37 (Utah 1983) (interpreting identical language in a state statute) (emphasis in original)). See also Tudyman v. United Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (rejected flight attendant applicant who exceeded maximum weight because of voluntary body building is not handicapped where he has no physical impairment and is not substantially limited in any major life activity). Thus, where the impairment limits only a narrow ban of employment activities the person may not be considered handicapped. Again, relying on Black, in Jasany the court suggested that the "factors relevant to determining whether an impairment substantially limited an individual's employment (include) . . . the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training." Jasany, 755 F.2d at 1249 (citing Black, 497 F. Supp. at 1100-01).


257. The Rehabilitation Act provides that the procedures and remedies of Title VII are applicable to Section 501 violations. See § 505(a)(1), 29 U.S.C. § 794a(1) (1982).
Section 503 of the Act requires federal contractors with contracts in excess of $2,500 to "take affirmative action to employ and advance qualified handicapped individuals . . . . " The Department of Labor Office of Federal Contract Compliance (OFCCP) enforces the requirement. OFCCP regulations provide that a specified affirmative action clause must be included in each contract over $2,500. The affirmative action provision, in part, prohibits the contractor from discriminating against any qualified handicapped applicant or employee and requires him to take affirmative action "in all employment practices".

Section 504 of the Act prohibits recipients of federal funds, federal executive agencies, and the United States Postal Service from discriminating against any "qualified handicapped individual." The federal agency that provides the federal assistance

259. Under Section 503 an aggrieved handicapped applicant or employee may file a complaint with OFCCP. 41 C.F.R. § 60-741.26(a) (1985). Where OFCCP, either through complaint, investigation, or compliance review determines a violation, it attempts to secure compliance. 41 C.F.R. §§ 60-741.28 and 60-741.29 (1985). While this remedy may fulfill the federal purpose of preventing handicapped discrimination, it does not necessarily remedy the injury the handicapped person suffered. Moreover, the handicapped person cannot sue to recover for his/her personal injuries. A majority of the circuit courts have held Congress did not accord the handicapped plaintiff a private cause of action under Section 503. See, e.g., Beam v. Sun Shipbuilding & Dry Dock Co., 679 F.2d 1077 (3d Cir. 1982); Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981); Davis v. United Air Lines, Inc., 662 F.2d 120 (2d Cir. 1981); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979).
262. The remedies for a violation of section 504 include an administrative termination of federal funds and a private cause of action.

Section 505 of the Vocational Rehabilitation Act of 1973 provides that "remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of federal assistance or federal providers of such assistance under section 504 of this act; the Title VI remedy is a suspension of federal funds." Health and Human Services Title VI regulations (45 C.F.R. §§ 80.6 -80.10 (1980) and 45 C.F.R. § 80 (1980)) are applicable to Section 504, 45 C.F.R. § 84.61 (1980).

An aggrieved party may also bring a private cause of action. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984); see also Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (plaintiff need not exhaust administrative remedies prior to commencing the private cause of action). Regarding the private cause of action, the courts are split on whether plaintiff is entitled to damages or merely equitable relief (including backpay). See Darrone, 465 U.S. at 626. Compare Miener v. Missouri, 673 F.2d 969 (8th Cir.) cert. denied, 459 U.S. 909 (1982) (damages are available) with Ruth Ann M. v. Alvin Independent School Dist., 532 F. Supp. 460 (S.D. Tex. 1982) (limited to equitable relief). It has been determined that private actions can be maintained against recipients even though the aid received is not for the primary purpose of promoting employment. See Darrone, 465 U.S. at 631-37.
enforces section 504.\textsuperscript{263}

Section 501, applicable to the federal government, and Section 503, applicable to federal contractors, require non-discrimination and affirmative action. The Supreme Court has recognized that the affirmative language of Sections 501 and 503 requires the defendant to make reasonable accommodation up to the point of undue hardship.\textsuperscript{264} Alternatively section 504, applicable to recipients of federal funds, merely requires nondiscrimination. However, the Court determined that, while Section 504 imposes no affirmative duty, in some instances the failure of a Section 504 defendant to accommodate may indicate discrimination. The Court said that a defendant's:

> insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances may also enable attainment of these goals without imposing undue financial and administrative burdens upon a state. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility . . . . \textsuperscript{265}

If a handicapped plaintiff attempts to establish a disparate treatment or disparate impact \emph{prima facie} case, the plaintiff must establish he is currently \emph{qualified} to perform the essentials of the job. Under the reasonable accommodation standard, the plaintiff need not demonstrate that he is currently qualified to perform the job. He need only establish that, except for the handicap, he is qualified to perform the essential functions of the job and, with reasonable employer accommodation for the handicap, could perform the job. The plaintiff must demonstrate that the job requirements present a barrier which could be overcome with reasonable employer accommodation.

\textsuperscript{263} The Attorney General is responsible for coordination of enforcement by executive agencies of section 504. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).


If plaintiff establishes at least an apparent showing or plausible reason to believe that job performance is attainable with the employer's reasonable accommodation, the burden of persuasion shifts to the defendant. The defendant must then demonstrate that an accommodation is unreasonable or would cause undue hardship.266

V. CONCLUSION

An understanding of the three proofs of discrimination, disparate treatment, disparate impact, and reasonable accommodation is necessary as a foundation for evaluating an employment discrimination claim. They define and focus the inquiry and establish a method of analysis.

The next step in the evaluation requires an understanding of the protections accorded each protected class status. The final step concerns the procedural steps and practical considerations in resolving such claims. The second and third will be the concern of future articles.

266. A frequently cited case, borrowing heavily from Title VII procedures, outlined the method for establishing reasonable accommodation/surmountable barrier.

(1) . . . The disabled claimant, may establish a prima facie case of unlawful discrimination by proving that: (a) except for his physical handicap he is qualified to fill the position; (b) he has a handicap which prevents him from meeting the physical criteria for employment . . . . To sustain this prima facie case, there should also be a facial showing or at least plausible reasons to believe that the handicap can be accommodated . . . .

(2) Once the prima facie case of handicap discrimination is established, the burden of persuasion shifts to the . . . employer . . . [t]he . . . employer must then be prepared to make further showing that accommodation cannot reasonably be made that would enable the handicapped applicant to perform the essentials of the job adequately and safely; in this regard the . . . [employer] must "demonstrate that the accommodation would impose an undue hardship on the operation of its program . . . .

(3) . . . [t]he burden of persuasion and proving inability to accommodate always remains on the employer; however, once the employer presents credible evidence that reasonable accommodation is not possible or practicable, the plaintiff must bear the burden of coming forward with evidence that suggests that accommodation may in fact be reasonably made.

Prewitt, 662 F.2d at 309-10.

Much of the litigation has centered on whether the accommodation causes an undue hardship. See Southeastern Community College, 442 U.S. 397 (The accommodation would force the employer to utilize other employees to perform the plaintiff's duties. Treatment of this significant issue will be addressed in a subsequent article.)