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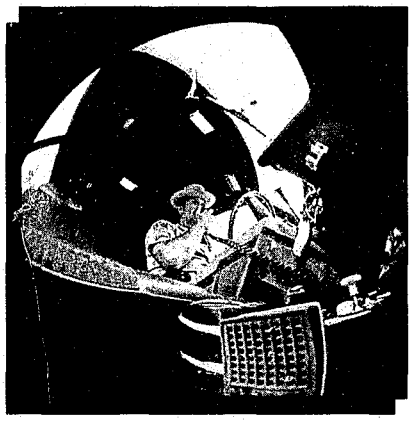
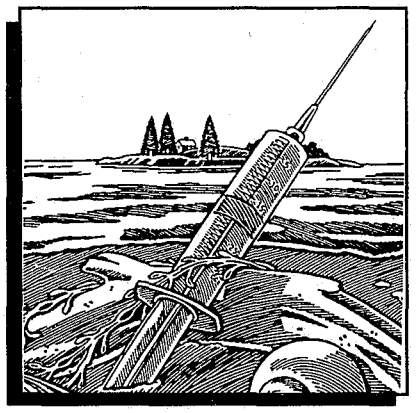
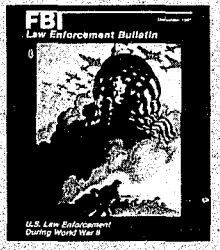


Page 12



Page 14

Departments



Cover: *The Bulletin commemorates the 50th anniversary of the attack on Pearl Harbor with an article describing the changes on American law enforcement brought about by World War II. All posters and photos used with this article were obtained from the National Archives.*

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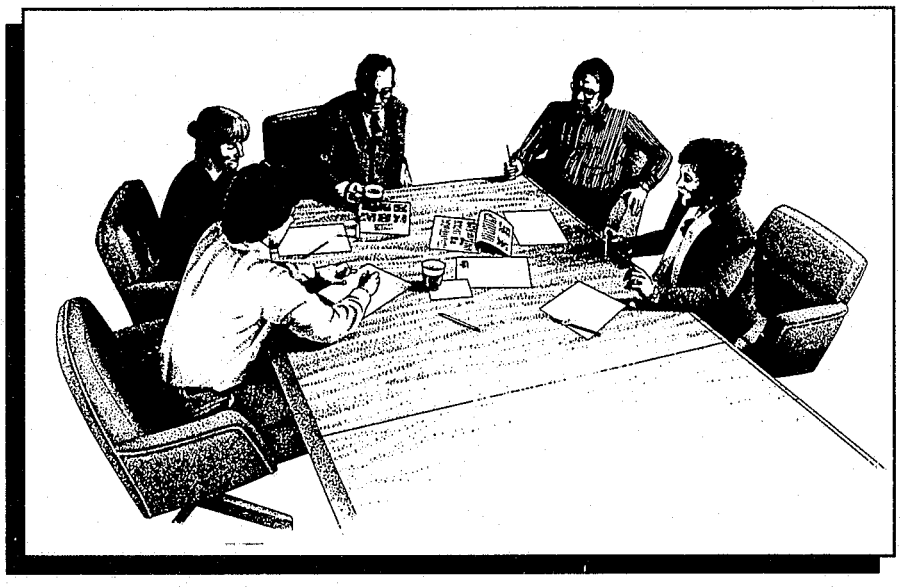
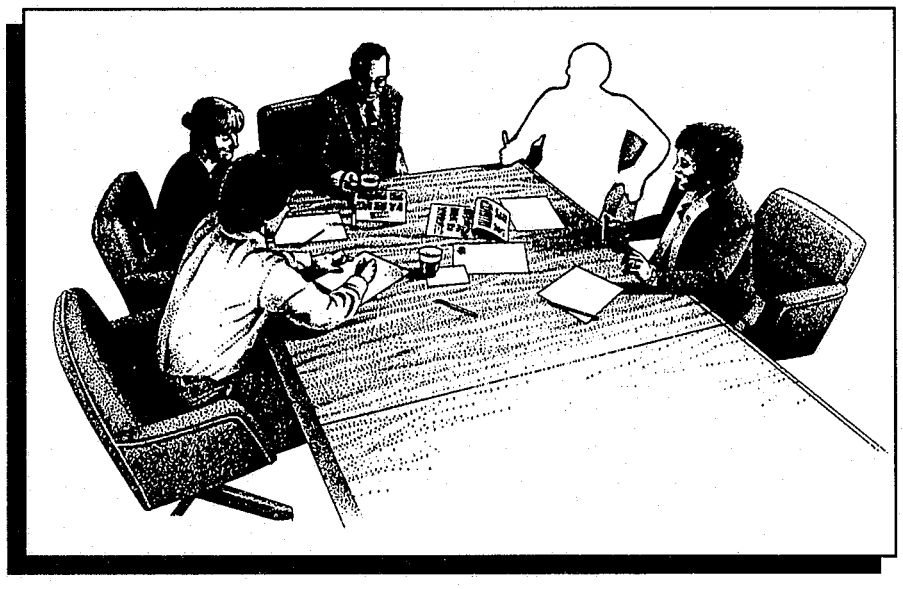
Employment Discrimination

A Title VII Primer

By
JOHN GALES SAULS





Suppose three law enforcement managers are making personnel decisions. One approves the implementation of a hiring standard that requires new officers to be able to bench press weight equal to their own. This rule is enacted because the manager sincerely believes that officers must possess physical strength in order to protect themselves and the public. Another manager is deciding which of several captains to assign to a district that has a predominant Hispanic population. An Hispanic officer is chosen based on a belief that the community will be more comfortable with "one of their own" in command of their police officers. The third manager is deciding which officer should be promoted to the rank of captain. A female officer is selected because the department, at present, has no female executives. While these managers may have the best of intentions, each is likely in violation of Federal law.

This article discusses Title VII of the Civil Rights Act of 1964, a Federal statute that prohibits employment discrimination based upon race, sex, color, national origin, or religion.[1] It begins with a discussion of the statute's broad prohibition against considering these forbidden criteria in employment actions and then reviews the remedies the statute provides for victims of illegal employment discrimination. It then addresses two distinct theoretical bases that courts have used to support findings of illegal discrimination under Title VII and notes some narrow exceptions to the statute's prohibition that allow race, sex, color, national ori-

gin, or religion to be considered in employment actions. The article concludes with some suggested strategies that employers may use to avoid violation of the statute.

> ***"...employers who vigilantly seek to prevent Title VII problems are making a sensible investment in the continuing unimpeded function of their businesses."***

Special Agent Sauls is a legal instructor at the FBI Academy.

TITLE VII's PROHIBITIONS

Title VII makes it unlawful for an employer:[2]

> "...(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."[3]

The U.S. Supreme Court has described this prohibition as "...the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[4]

The plain language of Title VII makes it clear that employers take race, color, religion, sex, or national origin into consideration in employment actions at their peril, whether their intentions are noble or ignoble.[5] Consequently, considering only men for a particular position because its physical demands might prove too great for women is no more likely lawful than considering only men because of misogyny.

In the 27 years since Title VII's passage, overt employment discrimination, such as formal employment policies that discriminate based upon race, color, religion, sex, or national origin, have become relatively rare.[6] Claims of employers covertly taking employment actions based upon race, color, religion, sex, or national origin are more frequent.[7]

To evaluate the validity of such claims, courts frequently probe employment decisions that were made behind closed doors, using circumstantial evidence to assess undocumented processes.[8] Tests and other employment selection procedures are also the target of legal challenges, based upon allegations that overtly equal procedures have covert unequal impact.[9] Title VII has also been interpreted to prohibit harassment in the workplace based upon race, color, sex, religion, and national origin.[10]

Title VII allows employers great latitude in making employment decisions, permitting consideration in employment actions any factors other than those prohibited.[11] The statute's existence and enforcement, nonetheless, provide a sound motive for employers exercising careful control over employment decisions to ensure that race, color, religion, sex, and national origin are not factors in the decision-making. Documenting the bases for employment actions is also important for defending employment actions where allegations of illegal discrimination are lodged.

TITLE VII's REMEDIES

Title VII is a remedial statute.[12] Its design places the burden on employers to put the victims of illegal discrimination in the employment position they would have occupied absent the discrimination.[13] The statute has no punitive provisions.

Title VII includes provisions creating the Equal Employment Opportunity Commission (EEOC)

and granting this body significant powers to enforce the statute.[14] Persons who believe that they are victims of illegal employment discrimination may complain to the EEOC. The EEOC investigates such complaints, and through its subpoena powers, compels disclosure of information about the alleged discrimination.[15]

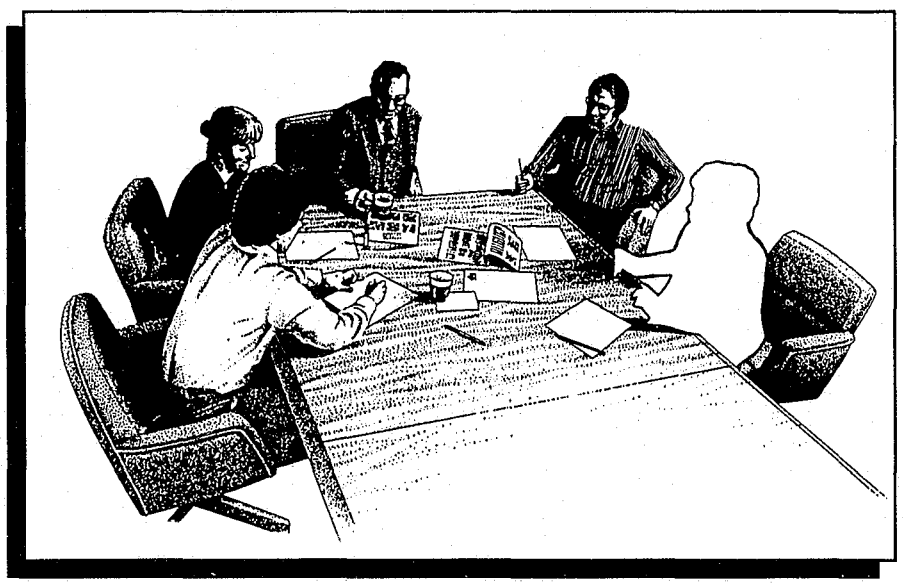
The EEOC has authority under Title VII to negotiate settlements with employers on behalf of complainants. Where such negotiations fail, the EEOC is authorized to file suit to vindicate the claim of the complainant.[16] In such suits, courts may order specific relief for complainants, such as reinstatement, back pay, and other measures, to position employees where they would have been absent the discrimination. Courts may also grant injunctive relief to prevent further discrimination by the employer.[17] A complainant after concluding certain required nonjudicial procedures may also pursue judicial action without the assistance or participation of the EEOC.[18]

Title VII also provides for payment to the prevailing party of reasonable attorneys' fees.[19] Thus, employers who are sued and fail to prevail are required to pay the litigation expenses of the complainant.

The impact of a Title VII action on an employer can be extreme. In *Vulcan Pioneers* v. *N.J. Dept. of Civil Service*,[20] a U.S. District judge ordered that all promotions to the rank of captain cease and that the departments fill their operational needs through the rotation of acting captains.

The imposition of this extreme, temporary remedy in *Vulcan Pioneers* followed a consent decree under which the departments totally revamped their promotional processes, instituting a formal written promotional exam based on a structured job-task analysis.[21] Upon determining that the new promotional process was faulty, the court solicited alternate processes from the litigants, and after rejecting each offered alternative, ordered the promotional process to a halt.

Employers who run afoul of Title VII may find they have lost control of important aspects of their operations. Consequently, employers who vigilantly seek to prevent Title VII problems are making a sensible investment in the continuing unimpeded function of their businesses.



THEORIES UNDERLYING PROOF OF VIOLATIONS

There are two potential paths employers may follow that violate Title VII. Employers may intentionally take employment actions based upon race, color, sex, religion, or national origin. This is known as "disparate treatment" discrimination. Employers may also use employment processes that are equally applied to all groups on their face but operate to the disadvantage of some groups in practice. Such processes are said to have a "disparate impact."

Differences between allegations of "disparate treatment" and "disparate impact" are more than semantic. The means typically used to prove the violations differ. More significantly, the exceptions to Title VII allowing the use of the forbidden criteria under certain circumstances differ depending on whether a proposed employment action will result in disparate treatment or will have a disparate impact.

Disparate Treatment Discrimination

Allegations of disparate treatment involve claimed intentional use by an employer in employment actions of the forbidden criteria. For example, in *Price Waterhouse* v. *Hopkins*,[22] Hopkins claimed that she had been denied promotion to partner because she was a female. The decision to deny Hopkins partnership was made by a committee behind closed doors, and Hopkins had no access to the committee's deliberations.

In her attempt to demonstrate illegal sex discrimination, Hopkins used written materials considered by the committee, as well as circumstantial proof. The fact that at the time of Hopkins' action, Price Waterhouse had only 7 female partners among 662 in the firm clearly concerned the court that heard her case. The fact that when her partnership consideration was placed on hold, she was instructed that her chances for favorable consideration would improve were she to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry"[23] was also a factor in the court's determination that her sex had impermissibly been considered.

Consequently, Price Waterhouse was required, if they were to escape a finding of illegal discrimination, to show that they would have made the same decision (denying partnership), even if the impermissible matters had not been considered.[24] Such proof, especially where a personnel decision was a close one, is difficult to assemble. Success might require proving that every person selected for partnership that year was more qualified than Hopkins.

Reported decisions demonstrate that consideration of the forbidden criteria in employment actions for apparently good reasons is no more lawful than their use based upon malice. Employment actions based upon race, color, sex, national origin, or religion are only lawful if authorized under one of the narrow exceptions to Title VII's ban on disparate treatment.

> ***"...Title VII makes it clear that employers take race, color, religion, sex, or national origin into consideration in employment actions at their peril, whether their intentions are noble or ignoble."***

Exceptions: Lawful Disparate Treatment

There are two exceptions to Title VII's prohibition of disparate treatment—the bona fide occupational qualification (BFOQ) exception[25] and the affirmation action exception.[26] Both allow employment actions based upon consideration of some or all of the otherwise forbidden criteria, but both are very strictly interpreted and may be used by employers only where absolutely necessary.

The BFOQ exception

The BFOQ exception allows employers to consider the "...religion, sex, or national origin [of an employee] in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business...."[27] This exception is quite difficult to use in practice.

In *International Union, UAW* v. *Johnson Controls*,[28] for example, the employer, a manufacturer of electric storage batteries, sought to limit the exposure to toxic lead of its female employees who were able to bear children in order to prevent injury to the unborn. In assessing this intended use of the exception, the Court ruled that manufacture of batteries was the business of Johnson Controls, not protection of the unborn, and therefore, the protection of the unborn could be in no way necessary to the operation of the business. The Court noted that "[f]ertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility."[29]

Similarly, in *Fernandez* v. *Wynn Oil Co.*,[30] the employer was alleged to have denied a female

employee an account representative position because in the position she would have to interact with businessmen native to Latin American countries. The employer believed that because of the Latin American culture, the businessmen would not accept a woman in the position in question. This justification also failed to place the employer within an exception. In Fernandez, the court stated: "...stereotypic impressions of male and female roles do not qualify gender as a BFOQ. Nor does stereotyped customer preference justify a sexually discriminatory practice."[31]

It is clear that sex, religion, and national origin qualify as BFOQs only where an absence of the requirement would "...destroy the essence of the business or would create serious safety and efficacy problems."[32] It also should be noted that race and color are specifically excluded from the exception and cannot be used lawfully as BFOQs.[33]

The affirmative action exception

A second exception that allows consideration of the forbidden criteria in employment actions is the "affirmative action" exception. Use of this exception is also strictly limited by courts. It has been held permissible only as a necessary remedy for prior discrimination.[34]

Employers who have previously disadvantaged members of a particular race, religion, or sex, or persons of a particular national origin or color may extend preference to the same group in an effort to correct for past discrimination. Great care must be exercised in determining the effects of prior discrimination,[35] crafting the preference so that it is not overbroad[36] and does not unnecessarily frustrate the legitimate aspirations of those not receiving the preference.[37] Employers must also establish a termination point for the preference when the effects of prior discrimination have been eliminated.[38]

An example of a voluntary affirmative action program is found in *Johnson* v. *Transportation Agency, Santa Clara County*.[39] In *Johnson*, the Transportation Agency determined that it had denied women certain promotional opportunities in the past in some of its job categories. It established a component of preference for women in the promotional process for those job categories that allowed the consideration of the sex of an applicant at the stage where selections were being made among candidates that had been determined highly qualified for promotion.

> **"It is advantageous for employers to assess their employment practices for potential legal problems."**

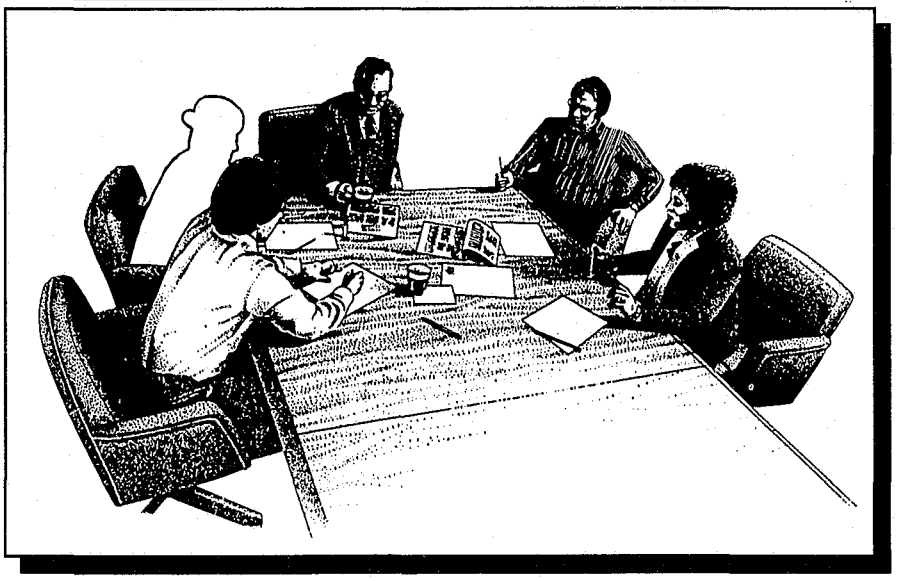
In *Johnson*, a male employee, who was passed over for a promotion awarded to a woman, asserted that he had been a victim of illegal sex discrimination.[40] After a careful assessment of the Transportation Agency's preferential treatment scheme, the Court concluded that the limited consideration of sex in the employment action was lawful, since it fit within the affirmative action exception.[41]

The reluctance of courts to approve the intentional use by employers of the forbidden criteria is apparent in these decisions. Employers contemplating such use based upon the BFOQ exception or the affirmative action exception should proceed with great caution and deliberation. Employers considering the use of the forbidden criteria for other reasons are cautioned that no other exceptions exist that allow intentional use of the forbidden criteria.

Disparate Impact Discrimination

Employers may also be held to have engaged in illegal employment discrimination where they use employment practices that although apparently unbiased on their face, operate to the disadvantage of groups of persons based upon race, color, sex, religion, or national origin.[42] This is true, even where no intent on the part of the employer to discriminate illegally is shown.[43] This "disparate impact" theory of Title VII liability is based upon a judicial recognition that uniform standards have potentially unequal impact.[44] It is also based on judicial recognition that the use of subjective employment standards may shield discriminatory intention from judicial scrutiny.[45]

For example, a written aptitude or achievement test on which



a significantly higher percentage of whites achieve passing scores than minorities is a potential instrument of illegal discrimination.[46] So too is a subjective promotional process that advances a substantially higher percentage of whites than minorities.[47]

Such cases are proven by statistical comparisons of either actual success rates of one group versus another,[48] by the composition of the employee group in question versus the composition of the relevant qualified labor pool available,[49] by testimony of discriminatory words or actions on the part of the employer, or by a combination of these means. It is advantageous for employers to assess their employment practices for potential legal problems. Such self-examination allows corrective measures to be made to the employment practices before an employer is accused of illegal discrimination.

Lawful Disparate Impact: The Business Necessity Exception

Employment practices having a disparate impact may be lawful where they "...serve, in a significant way, the legitimate employment goals of the employer."[50] Such practices will be lawful where no readily available equally effective alternative practice exists that has a significantly lesser or no disparate impact.[51]

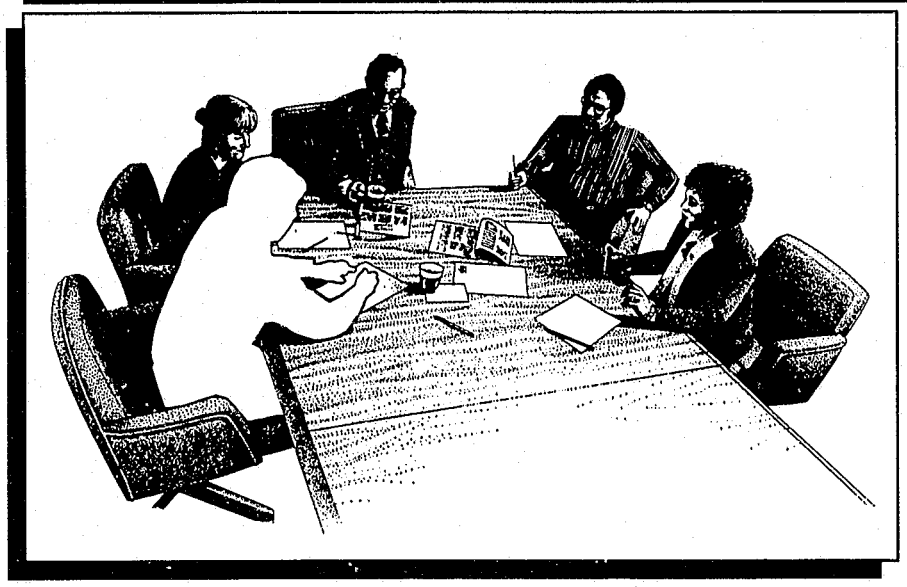
There are numerous necessary job standards that have potential disparate impact. For example, police officers might be required to demonstrate the ability to speak and write the English language. Such a requirement might significantly disadvantage groups of certain national origins whose primary language is other than English. An employer using such a standard would need to be prepared to show that the test was used fairly and uniformly assessed the skill in question, that the skill level tested is indeed necessary for successful performance of the job in question, and that alternative methods, such as educational programs to teach new officers English skills, are not practicable.[52]

SUMMARY

At the beginning of this article, three examples were set forth. In the first example, a police manager had instituted an employment requirement that all police officers be able to bench press a weight equal to their own. This requirement on its face treats all persons equally, but because of the lower degree of upper body strength possessed on average by women, the requirement would have a disparate impact on females. Consequently, the manager would be required, if challenged, to demonstrate business necessity, i.e., that police officers need to be able to bench press their own weight in order to perform their jobs effectively. It is unlikely that this could be shown.

In the second example, a police manager selected an Hispanic officer to command a predominately Hispanic precinct. This is disparate treatment and may only be justified by the establishment of a BFOQ. It is unlikely that the manager can establish that only an Hispanic captain can effectively command the precinct. This manager may wish to focus on Spanish language skills rather than national origin in making a selection. A requirement that the precinct commander speak Spanish might have a disparate impact, but could likely be supported by "business necessity."

The third manager chose a female for promotion because no females have achieved executive status in the department previously. This also is disparate treatment. Consequently, the manager must be



prepared to show that the selection falls within the bounds of the "affirmative action" exception. An assessment much more detailed than the one made to justify the selection is required.

Employers may benefit from assessing all of their employment practices in light of Title VII. In doing so, they should seek practices that evaluate in a fair and uniform way knowledge, skills, and abilities necessary for the performance of the job in question. This is true for reasons of effectiveness, as well as compliance with the law. Such employment practices assist employers in selecting individuals who are most likely to succeed and in assuring the confidence of their employees in the practices used.

LEB

Footnotes

[1]42 U.S.C. secs. 2000e-2000e-17 (1972).

[2]"Employer" is defined in 42 U.S.C. sec. 2000e as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person...." "Person" is defined in sec. 2000e as "...one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code, or receivers." "Industry affecting commerce" is defined to include "...any governmental industry, business, or activity." Title VII is made applicable to the Federal Government in 42 U.S.C. sec. 2000e-16.

[3]42 U.S.C. sec. 2000e-2(a).

[4]*Price Waterhouse* v. *Hopkins*, 109 S.Ct. 1775, 1784 (1989).

[5]*See International Union, UAW* v. *Johnson Controls*, 111 S.Ct. 1196 (1991).

[6]*See, e.g., Griggs* v. *Duke Power, Co.*, 401 U.S. 424, 427 (1971).

[7]*See, e.g., Watson* v. *Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988).

[8]*Id. See also Price Waterhouse* v. *Hopkins, supra* note 4.

[9] *Supra* note 6.

[10]*See, e.g., Henson* v. *City of Dundee*, 682 F.2d 897 (11th Cir. 1982). For an excellent discussion of sexual harassment employment discrimination, *see* Higginbotham, "Sexual Harassment in the Police Station," *FBI Law Enforcement Bulletin*, vol. 57, No. 9, September 1988, pp. 22-29.

[11]*Supra* note 4.

[12]Available remedies are stated at 42 U.S.C. sec. 2000e-5(g).

[13]*Id.*

[14]42 U.S.C. sec. 2000e-4.

[15]The EEOC's subpoena power is broadly interpreted. *See University of Pennsylvania* v. *EEOC*, 110 S.Ct. 577 (1990).

[16]42 U.S.C. sec. 2000e-5(f). Suits against governmental agencies must be filed by the U.S. Department of Justice.

[17]*Supra* note 12.

[18]*Supra* note 15.

[19]42 U.S.C. sec. 2000e-5(k).

[20]832 F.2d 811 (3d Cir. 1987).

[21]*Id.* at 814-15.

[22]*Supra* note 4.

[23]*Id.* at 1782.

[24]*Id.* at 1787-88.

[25]This exception is set forth in the statute. 42 U.S.C. sec. 2000e-2(e).

[26]This exception was created through court decision. *See, e.g., Johnson* v. *Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987).

[27]*Supra* note 25.

[28]*Supra* note 5.

[29]*Supra* note 5, at 1207.

[30]653 F.2d 1273 (9th Cir. 1981).

[31]*Id.* at 1276-77.

[32]*Id.*

[33]*Supra* note 28.

[34]*See Johnson* v. *Transportation Agency, Santa Clara County, supra* note 26.

[35]*See Hammon* v. *Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 2023 (1988).

[36]*Cf. City of Richmond* v. *J.A. Croson, Co.*, 109 S.Ct. 706 (1989).

[37]*See Steelworkers* v. *Weber*, 443 U.S. 193 (1979). EEOC guidelines for voluntary affirmative action are found at 29 CFR 1608.3(b) et seq.

[38]*Supra* note 35.

[39]*Supra* note 26.

[40]Title VII protects members of majority groups from employment discrimination based on race, color, sex, religion, and national origin. *McDonald* v. *Sante Fe Trail Transfer Co.*, 427 U.S. 273 (1976).

[41]*Supra* note 26, at 1457.

[42]*Griggs* v. *Duke Power Co.*, *supra* note 6.

[43]*Id.*

[44]*Id.*

[45]*Watson* v. *Fort Worth Bank and Trust, supra* note 7.

[46]*Supra* note 42.

[47]*Supra* note 45.

[48]*Id.*

[49]*See Wards Cove Packing Co.* v. *Atonio*, 109 S.Ct. 2115 (1989).

[50]*Id.* at 2125-26.

[51]*Id.* at 2126-27.

[52]For a detailed discussion of potential disparate impact problems in establishment of health and fitness standards for law enforcement officers, *see* Schofield, "Establishing Health and Fitness Standards: Legal Considerations," *FBI Law Enforcement Bulletin*, vol. 58, No. 6, June 1989, pp. 25-31.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.