

**1975-1976 Court Case Compendium:  
Legal Standards for Personnel Practices**

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1975-76 COURT CASE COMPENDIUM: LEGAL STANDARDS  
FOR PERSONNEL PRACTICES

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1975-76 COURT CASE COMPENDIUM:  
LEGAL STANDARDS FOR PERSONNEL PRACTICES

ABSTRACT

Prominent or precedent-setting court cases in personnel measurement in 1975-1976 are summarized to provide psychologists and managers with a concise, accurate digest of relevant legal standards as embodied in case law. The technicality of legal language and thinking in judicial decisions is translated into practical terms in the volume. Appendices to the compendium provide an overview of the United States court system, a map of the federal judicial circuits, a topical index, and a brief legal glossary. The volume is loose-leaf to accommodate changes in standards as reflected in court decisions.

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FOR PERSONNEL PRACTICES

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## Introduction

Court cases are time-consuming for the average industrial psychologist to read. Their importance to the psychologist has increased dramatically in recent years and this can be expected to continue. The volume of decisions, compounded by the technicality of legal language, deters most psychologists from reading court cases. This compendium is intended to meet the industrial psychologist's need for relevant, accurate information, presented as concisely as possible. Prominent or precedent-setting court cases relating to personnel measurement during 1975 and 1976 are summarized in this compendium, using accuracy, value to the reader, and objectivity as criteria. Corrections and additions are welcomed in order to achieve these aims. The compendium focuses on those decisions related to public personnel selection cases; other decisions are reviewed if pertinent to major issues affecting public employees or personnel measurement. For the reader's convenience the first sentence of each item will capsule the court decision, this will be followed by a summary of the relevant judicial findings.

The court cases during 1975 and 1976 were notably different from previously issued judicial decisions. Prior to these years, neither attorneys nor judges were familiar with the industrial psychologist's standards, techniques or terminology. A review of the early cases regarding testing revealed that in most instances validation was mentioned only briefly, and then the terminology was often conflicting or misused. In marked contrast are some recent decisions; where, for instance, judges were asked to rule on complicated issues of differential validity.

Judges and attorneys have become more knowledgeable about employment practices, particularly selection, with the increased number of suits in this area. Psychologists' familiarity with legal terminology and requirements has likewise increased. Some knowledge of the rudiments of "employment law", as this specialized field is now termed, has been assumed; however appendices to this compendium also provide an overview of the United States Court System, a map of the appellate courts, and a brief legal glossary. The standard legal method of citation has been modified to better meet the needs of the intended audience. The Harvard Law Review Association's A Uniform System of Citation (1976) should be consulted for accuracy in legal citation. A topical index is provided to assist readers in locating relevant decisions. Several topic headings or subjects may pertain to the case; those which were discussed in more depth in the decision are listed. Various topic headings should be consulted particularly if the subject matter is general.

Changes in professional and legal standards portend further changes in laws and decisions. The dynamic aspects of the law should be remembered; case law may change overnight with one ruling by the Supreme Court. Past precedents cannot always be relied upon to forecast the future. Current information on relevant cases will be maintained; annual updates of the compendium are planned. The length and detail of the summaries vary considerably as does actual litigation. Decisions considered to effect personnel measurement practices are reviewed; a summary of the additional litigation affirming procedural aspects of the case follows the original review of the decision. When a decision has been overturned or vacated by an appellate court, the review is completely revised.

Further information may be obtained by consulting with Dee Ann S. Horstman or reading the text of the relevant decision.

Acha v. Beame  
CA, 2nd Circuit  
February 19, 1976

Granting seniority credit to New York City policewomen who were previously the object of police department discrimination in hiring and who were discharged under the New York law mandating layoffs on the basis of "last hired, first fired" was held not to violate Title VII in February, 1976, by the Second Circuit Court of Appeals in Acha v. Beame. The Second Circuit noted that from 1964 to 1969 only two examinations for the job of policewoman were given while many more were given for patrolman. One result of the past discrimination was that in June, 1975, when New York City laid off 4,000 police officers, 73.5 percent of the females were discharged compared to only 23.9 percent of the males. Noting an earlier, seemingly contrary, ruling in Chance, the court explained that in this case "the decision does not invalidate or alter portions of the seniority system. It merely puts the female police officers in their rightful place in it." Relief was limited to only those females who can show that their lack of seniority was the result of past discrimination.

Acha v. Beame  
CA, 2nd Circuit  
July 16, 1976

A class action on behalf of female police officers was certified by the district court in July, 1976, in continuing action relating to Acha v. Beame. The New York City Police Department was also enjoined from rehiring from a seniority list not reflecting the correct status of those 38 female former officers who scored 87% or higher on a 1969 exam. A preliminary injunction against rehiring any of the former police officers until seniority of all the class members could be determined was denied by the court.



Seniority  
Job-relatedness  
Monetary awards

Albemarle Paper Company v. Moody  
U.S. Supreme Court  
June 25, 1975

This oft-quoted and analyzed decision has had considerable impact on legal and industrial standards. Despite the many references to this decision, the interesting history of the case is usually omitted. The class action originally brought by the present and former employees of the paper company sought relief against "any policy, practice, custom, or usage" which violated Title VII of the Civil Rights Act, as amended in 1972. The broad scope of the complaint was later narrowed to the company's seniority and testing programs. The issue of backpay, which was added later, also became a prime consideration. The district court had found the employment tests to be job-related and denied backpay primarily because the company's seniority system was not in "bad faith". A divided Fourth Circuit reversed the lower court's decision and ruled that the tests were not shown to be job-related and that backpay should have been awarded. The Supreme Court accepted the case for review because of the "evident circuit conflict as to the standards governing awards of backpay and as to this showing required to establish the 'job relatedness' of pre-employment tests"; thus the Supreme Court's decision was intended to establish guidelines. In addition four Justices wrote separate opinions. Marshall and Rehnquist filed concurring opinions and Blackman filed an opinion concurring in the judgment, but not with all that was stated in the opinion. Chief Justice Burger filed an opinion which concurred in part, but dissented in part. Chief Justice Burger did not agree with the Court's review of the plant's testing methods and cautioned against a "slavish adherence to the EEOC Guidelines". The Supreme Court's views at this time are thus more clearly explicated in Albemarle than in most other decisions.

The Supreme Court, noting that the "make whole" purpose of Title VII was evident in the legislative history of the Civil Rights Act, declared that an employer's good intentions, or lack of bad faith, were not sufficient reasons for denying backpay under Title VII. The Court stated "a worker's injury is no less real simply because his employer did not inflict it in 'bad faith'." The broad purposes of Title VII of the 1972 Act were held to give trial courts broad discretion in order "to fashion the most complete relief possible." Backpay awardable under Title VII, the Court stated, was to be denied only for reasons that would not frustrate the purpose of the law.

This was only the second case concerning testing to be heard by the Supreme Court Justices. In Griggs v. Duke Power Company, the first "testing case" to be ruled on by the Supreme Court, it was "unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] ... a manifest relation to the employment in question.'" The Court quickly added that this burden of proof arose only after the complaining individual or class made out a "prima facie case of discrimination - has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly differently from that of the pool of applicants."

The Court, also referencing Griggs on several other matters, declared that in Albemarle its concern was whether or not the company had evidenced its tests to be job-related. The company utilized the Beta examination and alternate forms, A and B, of the Wonderlic Test to test candidates for the various skilled lines of progression.

The Bennett Mechanical Comprehension Test had also been used previously, but was discontinued after several years of use. The Bennett and Beta Tests were "locally validated" before they were introduced, but no documentation of this prior validation attempt was available. The decision affirmed that "job relatedness cannot be proven through vague and unsubstantiated hearsay."

The Wonderlic Test, "chosen in rather casual fashion", was not locally validated prior to the suit due to the expense of the study and the possibility of non-cooperation of employees. Four months prior to the court case the paper hired an industrial psychologist to conduct a concurrent validation study of the company's testing practices. The decision's wording implied criticism of the study for other reasons as well, but the study was specifically cited as "materially defective" for four reasons:

- (1) The study found significant correlations for only three of the eight lines of progression for which it was required. Wonderlic's "equivalent forms" A and B were determined to be relevant for some job groupings, but not for others. The Court, proclaiming the study to show an "odd patchwork of results", declared that a "test may be used in jobs other than those for which it has been professionally validated only if there are 'no significant differences' between the studied and unstudied jobs. 29 CFR § 1607.4(c)(2)." The study was faulted for its failure to analyze the attributes or skills required in the job groupings.
- (2) The Supreme Court was also critical of the study's comparison of test scores with subjective supervisorial rankings where it could not be determined what criteria supervisors were considering. The supervisors had been "asked to rank employees by a 'standard' that was extremely vague and fatally open to divergent interpretations."
- (3) The company's study focused on job groupings near the top of the progression lines; however, the Supreme Court noted that a test, or cut-off score on a test, was not necessarily relevant for entry level positions because it was predictive of success for higher-level positions. "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."
- (4) The fourth fault cited by the Court was apparently the failure of the study to consider differential validation of the lower level positions. The plant's validity study used white, experienced workers when the tests were given to applicants who were mainly younger, inexperienced and nonwhite. Hence the study was considered as not in accordance with the American Psychological Association Standards or the EEOC Guidelines which, while "not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress", were to be accorded "great deference".

The majority decision stated that "the appropriate standard of proof for job relatedness has not been clarified until today." Regrettably the appropriate standards were not delineated and further court cases are still necessary to establish standards.

Veterans' preference  
Sex discrimination  
Public employees

Anthony v. Commonwealth of Massachusetts  
USDC, Massachusetts  
March 29, 1976

The state civil service employment veterans' preference law was declared unconstitutional by a district court as the equal protection rights of women were denied absolutely and permanently.

The veterans' preference law was held by the court to have a discriminatory effect on women who were, for the most part, excluded from participation in the military. Veterans' preference had the rational basis of aiding veterans; however, the means chosen to enforce such preference were held not to be legitimate and rational. The permanent and absolute preference rule was not permissible where alternate means of aiding veterans with less discriminatory impact were available.

Feeney v. Commonwealth of Massachusetts  
U.S. Supreme Court  
November 8, 1976

Later, acting on an appeal filed in August in Anthony v. Commonwealth of Massachusetts, the United States Supreme Court certified to the Supreme Judicial Court of the Commonwealth of Massachusetts, the state supreme court, the following question: Does Massachusetts law authorize the State Attorney General to appeal the district court's judgment to the U.S. Supreme Court without the consent, indeed over the expressed objections, of the State officers against whom the judgment was rendered?

Arnold v. Ballard

CA, 6th Circuit

October 18, 1976

Vacating CA, 6th Circuit June 21, 1976

which affirmed USDC, Ohio 1975

The Sixth Circuit vacated its own decision in light of Washington v. Davis and directed a lower court to reconsider the imposition of a hiring quota on the Akron Police Department. (The previous decision in Arnold v. Ballard had been mentioned by the Supreme Court as one with which the Supreme Court disagreed. See the commentary on Chance v. Board of Examiners.) Previously the appellate court had affirmed the district court's decision establishing a hiring quota for the police department, which had been determined to have a 50 year history of racial discrimination in hiring. Before the Supreme Court decision, the Court of Appeals for the Sixth Circuit had decided the lower court decision instituting a hiring quota was justifiable -- despite the fact that Akron had implemented new testing and recruiting programs prior to the conclusion of the district court litigation. The quota system specified a one to three hiring policy for three years until the number of black employees reached a 17.5 percent level for one year.

Bakke v. Regents of University of California  
Supreme Court, California  
December 14, 1976 appealed to  
U. S. Supreme Court

The Bakke v. Regents of University of California case concerns educational entrance standards, but has importance because of what the U.S. Supreme Court may provide in the way of further guidance as to its views on "reverse discrimination." In Bakke the California Supreme Court held a special admissions program, which was part of a university's affirmative action plan, violated the constitutional rights of nonminority individuals. The special program, which was designed to increase the opportunities for medical education for disadvantaged individuals, resulted in the admission of some minority individuals and the rejection of some nonminority candidates with high qualifications.

The U.S. Supreme Court had stayed implementation of the court decision until the regents decided whether to seek Supreme Court review. The stay order will remain in effect, now that certiorari has been sought, until final disposition of the case. In a later development the University of California on December 15, 1976 sought the Supreme Court's permission to continue the admission program until a decision was issued.

Several aspects of the Bakke case neglected by newspaper articles and other commentary may effect the U.S. Supreme Court's ruling. The California Supreme Court's decision was based in part upon the lack of evidence that the university had discriminated against minorities in the past and thus the preferential admission policy could not be justified as a remedy; in addition the California court said that an educational institution, unlike employers, had other procedures available to integrate the medical school and profession and to provide more doctors willing to serve within minority communities. The procedures noted by the court as less discriminatory were a general enrollment increase and provision of remedial schooling for those students identified as interested in medical school and possessing the requisite talent for success. Some civil rights groups reportedly had opposed the university's appeal because of these aspects of the case, particularly the lack of a history of prior discrimination. A stronger "test case" is favored by these groups. While prediction in the legal realm is always risky, one thing is sure -- this case will continue to receive considerable comment.

Statistical evidence  
Race discrimination  
Promotional criteria  
Hiring criteria

Barnett v. W. T. Grant Company  
CA, 4th Circuit  
June 12, 1975

An earlier decision that statistics alone could not establish race bias was overturned in the case of a Negro trucker suing on behalf of himself and others similarly situated. The statistics made an adequate bias case combined with showings concerning the employer's word of mouth recruiting and other practices on which the appellate court ruled in Barnett v. W. T. Grant. The data, the court stated, "while not overwhelming, seem to us at the least quite suggestive." Noted among the patterns and practices the court found to be persuasive in the ascertainment of racial discrimination was the total absence of black supervisors and the lack of objective criteria for hiring of supervisors. The court cited its agreement with other opinions in holding that "nonobjective hiring standards are always suspect because of their capacity for masking racial basis". Also overturned was a determination limiting the claimant to a challenge of only specific actions of the employer toward him.

Barnett v. International Harvester  
USDC, Tennessee  
January 14, 1976

This is one of the early cases alleging reverse discrimination on the basis that priority consideration given to the top ranked minority applicant as part of a voluntary affirmative action program approved by the OFCCP to correct past discrimination was unconstitutional. Imposition of an affirmative action program involving hiring goals and quotas was held to be lawful if utilized to eliminate effects of past discrimination, particularly if mandated by Congress and adopted in furtherance of executive orders requiring nondiscrimination.

Berry v. City of Omaha  
DC, Douglas County, Nebraska  
November 17, 1975

In Berry v. City of Omaha, the court considered the first legal challenge to the assessment center method. The primary issue was the method's reliability when different assessor "teams" were utilized to evaluate the different candidates for Deputy Police Chief. The brief decision found that the Deputy Police Chief Promotional Examination did not violate the State's laws prohibiting discrimination; further that the defendants "complied with the necessary requirements for conducting and administering an 'assessment center' method of examination of the candidates for the position of Deputy Police Chief." The court also decreed that the examination results did not demonstrate that the ranking of candidates was made in other than a manner that was fair and equitable.

The plaintiffs, while apparently accepting the general validity of the assessment method, alleged the exam was not conducted fairly as the assessors had different standards. The major factors contributing to low reliability were felt to be assessor training and administration of the assessment centers. The Omaha assessment center was judged to have met the requisite standards; however, the case should encourage research relating to the factors affecting the validity and reliability of assessment centers.



Bevans v. Nugent  
USDC, New York  
July 28, 1976

A government employee's claim he was denied promotion due to his age, which was then 37, was denied by a U.S. district court in Bevans v. Nugent. The plaintiff had argued that the 40-64 limitation in the Age Discrimination Act was not applicable to Federal employees; the court's reading of the legislative history determined otherwise. Motions for summary dismissal of constitutional challenges were denied, however, and the decision noted additional information was necessary before ruling in this regard.

Boyd v. Ozark Airlines  
USDC, Missouri  
August 23, 1976

A Federal court in Missouri concluded that an airline's height requirement is both job-related and a business necessity despite its adverse impact. The airline's minimum height requirement, while job-related, was considered "unnecessarily high" and the court ordered it lowered from five feet seven inches to five feet five inches. The design of the airplane's cockpit would not allow shorter individuals to properly see and operate the aircraft controls. The plaintiff had sought empirical validation of the requirement; however, the trial court stated that empirical data to support the validity and relatedness of the requirement was not required in light of the evidence and expert testimony.

Brown v. General Services Administration  
U.S. Supreme Court  
June 1, 1976

Federal employees are required to adhere to Title VII procedures and to exhaust administrative remedies prior to going to court. Section 717 of 1964 Civil Rights Act, as amended in 1972, which proscribes Federal employment discrimination and establishes a judicial and administrative system of enforcement, did not specify whether Title VII procedures were to be the exclusive remedy for discrimination. The Justices' interpretation of legislative history determined that "Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy" and thus created "an exclusive pre-emptive administrative and judicial scheme for redress of federal employment discrimination." The Court also reasoned that a precisely drawn, detailed statute pre-empts more general remedies. Brown, who had not filed within the specified 30 day time limit, thus had his complaint properly dismissed by the district court.

Brunetti v. City of Berkeley  
USDC, California  
October 17, 1975

Preferential treatment of minority fire department personnel was ruled allowable only to correct past or present race bias in Brunetti v. City of Berkeley. Berkeley's affirmative action program could not be sustained as a remedial measure, the court determined, as the City had "never been guilty of discriminatory practices." Promotion of a minority firefighter ranked lower than several white candidates on a written examination, which the parties agreed was a valid, job-related test, was vacated. The City was not required to select employees for promotion mechanically by rankings and could apply any "such non-test factors as prior job performance, supervisory capability, etc. However, defendants may not use racial criteria in selecting a candidate for promotion."

Educational institutions  
Age discrimination  
Sex discrimination  
Admission standards

Cannon v. University of Chicago  
CA, 7th Circuit  
August 27, 1976

The Seventh Circuit Court of Appeals affirmed a trial court's dismissal of age and sex discrimination allegations filed by a rejected medical school applicant against the University of Chicago, Northwestern, and Health, Education and Welfare (HEW). The 39 year-old female was unable to establish a direct relationship between medical school admission and employment; the remoteness of the connection between admission to school and employment contributed to making the Federal Age Discrimination in Employment Act inapplicable.

The plaintiff's sex discrimination charge filed under Title XI was also disallowed. It was noted that while HEW's administrative procedures for remedy in sex discrimination cases were seen by some as "painstakingly slow and ineffective, we fail to see how a private lawsuit by individual parties would facilitate an end to sex discrimination."

Chance v. Board of Examiners  
CA, 2nd Circuit  
January 19, 1976  
On rehearing  
Cert. filed, U. S. Supreme Court

A prior decision in one of the early court cases involving testing, Chance v. Board of Examiners, was modified by the U. S. Court of Appeals, Second Circuit, on rehearing in light of Acha v. Beame and Franks v. Bowman Transportation. Constructive seniority was to be awarded those who took and failed the examinations determined to be discriminatory and those who "have failed to apply for or take the examinations because they reasonably believed the examinations to be discriminatory and unrelated to job performance."

Note: The 1972 decision in Chance was one of the employment cases which the Supreme Court noted had been decided on inappropriate standards; this disagreement was in a footnote in Washington v. Davis. This 1972 Second Circuit opinion, in ruling on allegations of discriminatory selection procedures in violation of the Equal Protection Clause of the Fourteenth Amendment, had utilized (inappropriately most Justices felt) the more stringent Title VII standards in their determination that the competitive examinations were racially discriminatory and not properly validated.

Chandler v. Roudebush  
U.S. Supreme Court  
June 1, 1976

Trial de novo issues were settled in Chandler v. Roudebush, where the U.S. Supreme Court unanimously ruled that Federal employees claiming to be the victims of race and sex discrimination were entitled to a complete new trial in a district court, rather than only a review of the administrative record of the hearings. Chandler had initially filed her complaint of race and sex discrimination after failing to obtain a promotion within the Veterans Administration. Four courts of appeals had previously held that § 717c of Title VII gave Federal employees the right to a complete new trial in the district court: Abrams v. Johnson (CA 6), Caro v. Schultz (CA 7), Hackley v. Roudebush (D. C.), and Sperling v. United States (CA 3). Three other courts of appeals had held that Federal employees, unlike private employees, were generally not entitled to trials de novo, the decisions were Haire v. Calloway (CA 8), Chandler v. Johnson (CA 9) and Salone v. United States (CA 10). The Supreme Court in resolving the conflict noted that legislative history reinforced "the plain meaning of the statute" and Congress' perception of [Federal employees'] lack of access to the courts to raise claims of job discrimination. (See also Brown v. GSA.)

Law enforcement  
Performance evaluation  
Remedial measures/sanctions  
Content validity  
Physical requirements  
Background investigation  
Expert testimony

United States v. City of Chicago (Police Department)  
USDC, Illinois  
January 5, 1976

Quota hiring and economic sanctions were remedies deemed necessary by a United States district court to end racial and sexual bias discerned in hiring and promotions within the Chicago Police Department. U. S. District Court Judge Prentice Marshall ordered the Chicago Police Department to meet a hiring standard of 42% black and Spanish-surnamed males, 16% females and 42% other males. Despite the late Chicago Mayor Daley's protestations that hiring by quota is unAmerican, the City acquiesced to the court's order as all Chicago's revenue-sharing funds, approximately \$95 million, were to be withheld until the Police Department implemented hiring and promotion guidelines to correct racial and sexual imbalance.

The lengthy, complicated litigation was summarized in the trial court's January, 1976, 65 page opinion, which consolidated the numerous related cases and motions for consideration. There was reported to be over 10,000 pages of testimony during the trial, not counting the numerous briefs, depositions, appeals and orders. Illustrative of the complexity of the situation was the Office of Revenue Sharing's position; it was a defendant in several of the individual cases and the plaintiff in others. Judge Marshall noted that part of the delay in reaching the decision was occasioned by the wish to let "the remedy come from the parties rather than the Court". The ruling came, the decision stated, only after the court despaired of the City's producing the promised new, unisex method of selecting police officers. Doubtless "... the arrogant, contumacious refusal by the City defendants to honor their interim hiring agreements and our order approving it..." did not help the City's case.

Discrimination against women was found in the preliminary injunction to the Department's entry, employment, assignments and promotion standards. Judge Marshall declared that the City defendants had not validated or justified the discriminatory treatment and that the defendants' conduct since the injunction had "exacerbated the situation." A previously announced, but not applied, height requirement of 5'4", was not specifically included in the injunctions, but the decision's comments regarding the height standard clearly did not favor it. The height requirement was declared to "fall within the scope of the decree's general prohibition of discrimination against women, absent a persuasive showing of job relatedness which has not been made."

The conclusions expressed in the court's earlier injunction relating to racial discrimination in employment by the Chicago Police Department were reaffirmed. Additional observations were also noted by the court relating to the selection of patrol officers and the promotions to sergeant and lieutenant by the Department. There was no challenge made of the promotions to captain's rank or the selection of command personnel.



Various statistical comparisons were examined to determine whether there was prima facie evidence of discrimination; most notable was the present racial profile of "83% white, 16% black and 1% Hispanic, following a 1970 patrolman examination which black applicants failed at a rate of 77%, Hispanics 70% and whites, 42%, and the 1971 examination which... blacks failed at a rate of 67%, Hispanics 68% and whites 33%." The defendant's argument that other law enforcement agencies used similar entry tests was denied by Judge Marshall, who noted that as time passed those tests were being declared invalid. He acridly added that "while the general practice in a trade or industry may be relevant to prove a standard of care, it has never, to our knowledge, been a defense to a charge of discrimination that everyone does it." Expert testimony was not considered by the court sufficiently convincing to demonstrate the job relatedness of the patrolman's examination.

Defendants neither provided substantial support for the content and use of the Department's background investigations, nor challenged preliminary findings as to the disproportionate racial impact. The decision noted that black candidates were disqualified at a rate 40% greater than white applicants, greater by 2 to 1 by "arrest record" and 3 to 1 by "negative employment record." The precise bases for disqualification were not provided as requested, and "accordingly, the injunction with respect to the use of the results of the background investigations will be made permanent."

The defendants did contest the findings of the preliminary injunction relating to the 1973 sergeant's examination. Adverse impact had been established partially because "the practical success rate of whites versus blacks and Hispanics was 7.07% to 2.23% or 3 to 1." The defense's contention that the burden of proof was not shifted to them under Griggs and Albemarle because this was a promotion test was not legally justified, particularly as the 1968, 1970 and 1971 patrolman examinations had been found to be discriminatory.

Expert testimony was the primary method of defense employed. Dr. Pounian had testified at length during the preliminary injunction hearing as to the content and concurrent validation studies which supported the examination. The ruling stated that "while other experts similarly testified to support of the examination, their testimony was based entirely on Pounian's; they were experts approving an expert." The decision also declared "misgivings as to the substance of the content and concurrent validity studies"; additionally it was "made clear that we had misgivings about the credibility of the testimony given with respect to the studies." The Court found it noteworthy that Dr. Pounian's testimony during the preliminary injunction hearing changed twice while he was on the stand and his counsel had sought to change it a third time after the hearing. "Nothing was done during the trial on the merits to bolster Pounian's credibility or that of his studies."

Dr. Phil Ash testified for the defendants during the trial on the test's merits. Dr. Ash found the sergeant's exam to be content valid because the CSC's job analysis was "thorough and professional. The specification of tasks into six 'exam' categories was correct... match between the content of the job and the content of the test was a close one." Dr. Ash found that the test's content validity met APA standards and EEOC Guidelines. Dr. Ash performed his own concurrent validity study which showed the test to be practically significant. He also found nearly identical regression equations for blacks and whites, "in his opinion,

establishing that the examination was not biased against blacks." Judge Marshall praised Dr. Ash's credentials and knowledge, but on important issues "certain of the opinions which Dr. Ash expressed here were at sharp variance with opinions he had recently expressed in other similar cases." (This conflicting testimony, cross-examination revealed, occurred during earlier testimony for the plaintiffs in Morrow v. Crisler and in Douglas v. Hampton concerning the appropriateness of paper and pencil tests and content validity.)

The efficiency rating procedure used in validating the 1973 sergeant's exam was released from injunction, but the subjectivity of the ratings did "not enhance their value for test validation purposes." The preliminary injunction against utilization of the 1973 sergeants' examination and subsequent roster was thus made permanent.

Clear prima facie evidence of discrimination as a result of the promotion examination for lieutenants was not established. Judge Marshall remarked upon the sharply conflicting testimony for the expert witnesses,

Of course, the experts were called: Dr. Thelma Hunt for the plaintiffs, Dr. Pounian for the City defendants and Dr. John Wick of Northwestern University by stipulation for the McNamara defendants. Dr. Hunt insisted that the 1970 examination had an adverse racial impact; Drs. Pounian and Wick were just as insistent that it did not. Chi Square analyses, which show the probabilities that the pass-fail ratios were the result of chance as opposed to other factors, were computed by Dr. Hunt (1 to 8) and Dr. Pounian (1 to 5). Dr. Wick testified that neither was significant. Dr. Hunt's Chi Square ratio for promotions was 1 to 5; Dr. Pounian's 1 to 2. In Dr. Wick's judgment these computations were conclusive that there was no indication of racial impact.

Despite these differences "the burden of persuasion of discrimination remained with the plaintiffs and they have failed to carry it." The lieutenants' examination was thereby found acceptable.

\* \* \* \* \*

Note: This case was one of the public employment cases with which the Supreme Court disagreed, in a footnote in Washington v. Davis, insofar as these cases held proof of discriminatory purpose unnecessary in establishing an equal protection violation. The various plaintiffs in the Chicago case alleged violations of the First Fifth, Thirteenth, and Fourteenth Amendment rights as well as the Civil Rights Acts of 1866 and 1871, Title VII, and State and Local Fiscal Assistance Act of 1972, and sought relief under those Acts. The charges were considered jointly by the same standard, when apparently they should not have been thus judged.

United States v. City of Chicago (Police Department)  
USDC, Illinois  
September 7, 1976

Subsequent to the previous decision, the 1976 roster for appointment to the Chicago Police Department was approved and the prescribed hiring ratio for the 1976 police class lifted by the Court. The decision casts doubt on the new testing methods, but "the determination of their validity as selection devices must await future assessment of the recruits". Dr. Guion testified "that he does not regard the initial written test as having been sufficiently validated" and recommended a test development program. The decision stated that the court could not approve the selection methodology because the test development program and its results were not known. "But as we perceive our responsibility and the scope of our inquiry in the current posture of the case, we need not approve the methods unless they produce discriminatory results... If they do not, that ends the matter for we do not sit as a super Civil Service Commission."

Thus since the new testing methods produced results sufficiently similar to the prescribed hiring ratios to satisfy the Court, the hiring by quotas was stopped.

\* \* \* \* \*

Note: On January 11, 1977, the Seventh Circuit Court of Appeals affirmed most of the district court's earlier opinions; that portion of the earlier decision concerning the constitutional issue was remanded for further consideration in light of Washington v. Davis.

Seniority  
Content validity  
Statistical evidence  
Transfers and assignments  
Promotional criteria  
Remedial measures/sanctions

United States v. City of Chicago (Fire Department)  
USDC, Illinois  
December 1, 1976

The Chicago Fire Department's promotion, transfer and assignment practices were judged to be nondiscriminatory on December 1, 1976; however, the same day U.S. District Court Judge McMillen also stated he would order the Fire Department to comply with a 1974 consent decree to appoint new firefighters using a 50% minority hiring rule. The plaintiff had alleged discrimination against black and Spanish-surnamed firefighters in violation of the Fourteenth Amendment and Title VII of the 1964 Civil Rights Act. Those issues related to selection were only briefly considered in the decision, since the consent decree was "designed to hasten the racial integration of the force".

Approximately 200 of the City's 4,500 firefighters were black, while about twenty had Spanish surnames. The small number of minorities employed "makes it almost impossible", the judge declared, "to obtain meaningful statistical evidence of discrimination with respect to promotion and transfers". It was further stated that the percentage of minority promotions could be greatly altered "by only a small change in the absolute numbers and are attributable to many factors".

Citing Davis, the decision essentially stated that official misconduct of invidious discrimination was needed to support the claim of a constitutional violation and that the discriminatory intent or purpose of the practices was not shown. Evidence that "Latinos were victims of discrimination... is lacking"; Judge McMillen determined.

The case was primarily concerned with whether the Department's promotional criteria violated Title VII or not. The promotion criteria consisted of written tests (60%), supervisory ratings or "efficiency ratings" (30%), and seniority (10%). The seniority factor was shown to be nonvariable and not considered in the court's ruling.

The "wisdom of the mechanics" behind efficiency ratings was questioned, but the ratings were judged to be an "essential component", not to be abandoned even temporarily. The ratings were criticized for being written in pencil, also for the failure to provide for later inspection, "since this can cause suspicion if not actual chicanery to accommodate the objectives of the higher reviewing officers". Immediately after that comment, however, Judge McMillen stated that no evidence of a practice of rating alterations had been introduced. The efficiency ratings consisted of five criteria: quality of work, quantity of work, dependability, personal relationships, and attendance/promptness. "These criteria are related to all ranks, albeit they could no doubt be expanded and related more specifically to the particular rank being evaluated. Nevertheless, they are not per se discriminatory and yet by their very nature are based on personal observations of the person making the ratings. Hence they tend to be somewhat subjective."

Convincing evidence was not introduced to show that blacks eligible for promotion were given lower ratings by white supervisors; in fact plaintiff's exhibits provided evidence that black officers supervised other blacks. The judge found

inappropriate the reliance upon statistics showing blacks generally received lower ratings than whites without further evidence as to discrimination. "Griggs does not shift the burden to defendants to show that efficiency ratings, as distinguished from written tests which are not job related, must be validated merely because blacks are rated lower than whites." The court stated further that it knew of no way to eliminate the subjective aspect from ratings. The decision held that the plaintiff had failed to show that any efficiency rating or promotion was based on racial discrimination. In addition Judge McMillen commented that he "failed to see how past ratings can be individually 'validated' short of calling each officer to testify". The court concluded, however, that more detailed rating instructions and the addition of other characteristics would be an improvement over the existing procedures. The court decreed that the Department's ratings should be in ink in the future and that the EEOC Guidelines should be followed. Inadequate rating guidelines and incomplete job descriptions were also to be corrected by the Department.

Seventeen written promotional examinations had been developed and given by the Chicago CSC since 1960; however, none of them were considered by the plaintiff's expert witness, Dr. Hunt, to be recognizably racially biased. "No racially objectionable questions were found, and she pointed out no lack of job relatedness." One of the tests (Captain #7371) was found to have had an adverse impact on whites; while nine exams were taken by too few individuals to establish a "statistically valid difference in results". Other exams were either still "posted" or thought too remote in time to be fully considered; only one exam, that for Captain, was given after the EEOC Guidelines were published and Title VII became applicable to the City.

"Although Washington v. Davis did not involve Title VII, the court did state that employment tests can be validated by various different methods." Footnote 13 in Washington was cited, and empirical, content and construct validation techniques defined. Judge McMillen stated, however, that the City had used different validation methods. Test results were first correlated with the pre-existing efficiency ratings; the correlations were "statistically good" for all but four of the tests given since 1960. Dr. Hunt did not attack the validation procedure, the court noted. The drill tests administered after promotions were also correlated with the tests, despite the drill tests' failure to clearly differentiate between an individual's performance and that of the unit under his direction. The Captain's test (#7395) was validated "by comparing the content of the test with the job description"; this wasn't done for the other tests evidently due to the lack of applicable descriptions. Plaintiff's expert did not disparage the thoroughness of the job description or the "content" validation.

The court found that the "defendants' method of correlation, necessarily post-testing due to the date when it became subject to Title VII" fulfilled their obligations under Title VII. The two expert witnesses disagreed with each other on this matter. The judge afforded more weight to Dr. Pounian, the defendant's expert, "despite his personal and official interest" in the case. Pounian was seen by the Court as involved in the practical realities of testing. Pounian, Judge McMillen stated,

Impressed us as a sincere and dedicated public servant, who has made acceptable validation studies on the best records now available, albeit not always in accordance with EEOC guidelines. Plaintiff's witness on the other hand testifies regularly in these cases for the government for pay, and her performance on the witness stand can be expected to lead not only to continued employment as a Federal witness but also to employment as a consultant by the defendant governments. She impressed us as a knowledgeable and doctrinaire partisan rather than as an independent and objective expert.

The Department's practices of transfers and assignments were also reviewed for evidence of discrimination. Transfers, based primarily on seniority within each rank, were determined to be generally readily granted to blacks; plaintiff's evidence of individual cases where transfer requests were not granted did not establish a pattern of discrimination. Assignments to stations were also held to be nondiscriminatory. The court noted the Department's prior policy of segregation was deliberately changed in 1966 and the current request system on the basis of seniority instituted. Involuntary assignments to integrate the stations was not deemed necessary. Voluntary segregation was also expected to continue as firefighters can normally be expected to select stations near their homes.

Promotions based on quotas were not required by the evidence, Judge McMillen determined, although he noted agreement with the goal of achieving a proportionate amount of minority promotions which would be representative of the racial mix of the work force.

This goal must be approached on the basis of merit in a work force which is charged with the responsibility for public safety and protection of property; and it can be achieved through the medium of sound testing and rating procedures, fairly administered.

Hiring criteria  
Promotional criteria  
Law enforcement  
Sample size  
Statistical evidence

Chicano Police Officer's Association v. Stover  
Cert. granted sub nom Stover v. Chicano Police Officer's Association  
U.S. Supreme Court  
June 21, 1976

The petition for a writ of certiorari was granted. The previous judgment was vacated and the case remanded to the Tenth Circuit Court of Appeals for further consideration in light of the ruling in Washington v. Davis. The prior court ruling was not specifically cited by the Supreme Court in the Washington v. Davis footnote as utilizing an improper standard, but it had relied on Chance which was noted as erroneous in Davis.

The Tenth Circuit Court of Appeals, utilizing Title VII standards, held that the New Mexico district court had erred in its consideration of the Chicano Police Association's allegations of discriminatory hiring and promotional procedures by excluding evidence of previously administered examinations, rejecting statistical evidence as insufficient to establish a prima facie case, and finding that the Chicano Police Officer's Association lacked standing to challenge the entry level hiring procedures. The district court decision had considered the previously administered examinations, from 1966 to 1971, to be irrelevant in light of the new, different examination administered in 1973. The Tenth Circuit had reasoned that this was in error as an employer could regularly change exams and "thus insulate unlawful practices from scrutiny." The 2 to 1 pass ratio on the promotional exams was based on a small sample, which undermined its significance--sufficiently for the district court to discount it in combination with a showing that the Spanish-speaking/surname officers might have not adequately prepared for the examinations.

Interestingly, the trial court, although finding in favor of the defendants, made the following unfavorable comments about the promotional examinations: "The heavy reliance placed on the achievement type test seems inequitable and misplaced. It does not go far enough in showing performance, leadership and supervisory ability."

Chmill v. City of Pittsburgh  
Pennsylvania Court of Common Pleas  
June 4, 1976

Plaintiffs in the case sought injunctive relief against Pittsburgh and the City of Pittsburgh Civil Service Commission's preferential minority hiring plan for a city fire department. Approximately 5% of the City's firefighters were black as opposed to 22% of the population in Pittsburgh. The plaintiffs, who ranked in the top 20 of the competitive list for appointment, filed "reverse discrimination charges" as well as a violation of civil service rules when told they would not be certified for positions as firefighter as a result of a temporary quota system to eliminate past bias against blacks. The court held that "federal and state civil rights acts and the federal and state constitutions take precedence over the civil service acts where the potential of discriminatory application is present".

Preferential treatment was ruled to be appropriate under civil rights laws where, as in this instance, the following four conditions were met:

- "(1) to eliminate the effects of past discrimination;
- (2) where no alternative means exist to accomplish the goal of eliminating the vestiges of discrimination;
- (3) the affirmative action program is only temporary in nature and will expire when discrimination ceases and
- (4) the minority given the preference is a qualified applicant for the position."

The court also stated that the realization of increased competition for jobs "has led to cries of (reverse discrimination) in response to affirmative action and for calls to apply color blindness, that in reality may be disguised attempts to keep minorities and women from joining the job market."



Christensen v. State of Iowa  
USDC, Iowa  
August 4, 1976

It was determined that the Supreme Court's decision in National League of Cities v. Usery did not preclude the applicability of the Fair Labor Standards Act's equal pay provisions to state and local governments in a district court decision, Christensen v. State of Iowa. Other initial cases relating to this specific equal pay issue decided similarly, were Usery v. Bettendorf Community School District (USDC, South Dakota) and Usery v. Allegheny County Institution District (Third Circuit Court of Appeals). Readers interested in this topic may obtain further information from legal periodicals. This particular case is noteworthy because it was the first court following the Supreme Court's decision in National League of Cities to consider whether the Fair Labor Standards Act applies to public employees.

Cramer v. Commonwealth University  
USDC, Virginia  
May 28, 1976

A district court in Richmond, Virginia, held that hiring practices giving preferential treatment to female job applicants violate the constitutional guarantees to equal protection contained in Title VII. Dr. Cramer, a white male sociology professor, filed the suit, stating that he was at least as well qualified as two female applicants who were hired to fill positions he had sought. The ruling stated that the university's assertion it was pursuing an affirmative action policy in order to increase the number of women professors did not justify the establishment of an employment quota or goal system based on sex. The decision enjoined the affirmative action plan where it operated to prefer either sex or discriminated against either sex in hiring or promotion practices unless sex was a bona fide occupational qualification. The court interpreted language in prior decisions by the Fourth Circuit to be dicta and therefore not binding on the lower court's verdict. The Fourth Circuit had decreed that Title VII does not forbid preferential hiring as a remedial measure to compensate for past unlawful discrimination. "Whether or not affirmative action is a good policy, the Court holds it to be bad law insofar as it permits or requires sex discrimination in hiring," declared the district court. The decision proclaimed that "the primary-the only-beneficiaries of affirmative action plans and their siblings are the thousands of persons engaged in the civil rights business, bureaucrats, lawyers, lobbyists and politicians."

Douglas v. Hampton  
CA, District of Columbia  
February 27, 1975

The appellate court determined that the district court's earlier decision was erroneous; basically the proir ruling had held that use of construct validity was acceptable without a demonstration that proof of empirical validity is not feasible. The appellate court decision concerned the job-relatedness of the Federal Service Entrance Examination (FSEE), an examination that is no longer used by the Civil Service Commission. Other issues were also ruled on at the time; e. g. affirmation of the lower court's remand of the case to the Commission for reconsideration of the plaintiffs' claims in light of the Civil Service Commission's amended rules allowing administrative consideration of such claims. The injunctive aspect of the case was considered effectively moot.

The test validation issue was addressed by the U. S. Supreme Court in Washington v. Davis. In that ruling the Supreme Court noted its disagreement with the appellate court's ruling in Douglas and other cases. One validation methodology should not be preferable to another, the Court stated in Washington; proponents of a hierarchy of validation techniques state this is true only for cases tried on constitutional discrimination grounds.

Douglas v. Hampton  
USDC, District of Columbia  
January 20, 1976

In a subsequent ruling the FSEE and the Professional and Administrative Career Examination (PACE) were held to be different tests. In addition, the injunction to prohibit further use of the FSEE was moot as its use had been previously discontinued by the Commission. A class action was not appropriate at the time. The court ruled that the case should be remanded to the Commission for an administrative hearing for rapid resolution of differences.

An Appeals Review Board (ARB) decision on May 20, 1976 provided in part that "the issue of the feasibility or infeasibility of empirical validation should and will be determined first." Essentially the ARB decision stated that the administrative hearing should be conducted under Part 300 using the standard that the criterion-related validity strategy is required if it is technically feasible.

Earwood v. Continental Southeastern Lines, Inc.  
CA, 4th Circuit  
August 25, 1976

The Fourth Circuit Court of Appeals determined that sex differentiated grooming standards do not by themselves constitute discrimination under Title VII. The suit was filed by a bus driver taken off several runs until his hair was cut. The driver's hair was described by the trial court as "modishly full". Hair length was held by the appellate court to be a mutable characteristic and thus not a restriction to employment opportunities under Title VII. (The previous rulings of appellate courts and the Supreme Court's ruling in Kelly v. Johnson were probably also major considerations in the court's finding.)

Ellis v. Naval Air Rework Facility  
USDC, California  
June 20, 1975  
September 22, 1975  
November 4, 1975

Federal employees' right to a trial de novo was one of the first questions before the district court in Ellis v. Naval Air Rework Facility. Matters more relevant for psychologists are still in litigation in this complex, consolidated action by Federal employees claiming race, sex, and national origin discrimination in the hiring, promotion, job training and termination practices at a naval base.

Congressional intent and the legislative history leading to the enactment of the 1972 Amendments to the 1964 Civil Rights Act were considered by the court. The court ruled in June, 1975, that in fashioning the 1972 Amendments it was the intent of Congress to provide Federal employees with the same right to an independent trial afforded private employees under the Act. Employees alleging discriminatory practice pursuant to Title VII are entitled to a complete new hearing in Federal court if the administrative record doesn't furnish a good basis for deciding the merits of a discrimination claim.

Judge Orrick, writing for the district court in California, stated "I find that the different standard of proof and the different format for presentation of evidence utilized at the hearings before the CSC and the District court precludes reliance on the administrative record in most instances."

In September, 1975, in the nine consolidated actions Judge Orrick certified as a class "all past, present and future Black, Chicano, Asian and Native American civilian employees of NARF and NAS [Naval Air Rework Facility and Naval Air Station] and all past, present and future Black, Chicano, Asian and Native American applicants for civilian employment at NARF and NAS." The Civil Service Commissioners were also held to be "integrally involved in the challenged employment decisions at the Naval base". The Commissioners were responsible for rules governing the personnel actions within Federal agencies, the court held, and were considered notified of the dissatisfaction of minority workers at the base.

Reconsideration of the case was denied in November, 1975. (Other aspects of the action are still proceeding.)

Remedial measures/sanctions  
Seniority  
Promotional criteria  
Qualifications/criteria  
Sex discrimination  
Affirmative action program

Equal Employment Opportunity Commission v. American Telephone and Telegraph Company  
USDC, Pennsylvania  
August 20, 1976

The preferences accorded women and minorities under the "carry-forward procedure" of an affirmative action plan of American Telephone and Telegraph Company were carefully examined and found not to constitute unlawful discrimination by a Federal court. ("Carry-forward procedure" was the term utilized by the court and involved parties to refer to the continuing provisions to correct deficiencies identified in an interim report of accomplishments under the affirmative action program. These provisions involved specific plans for priority placement of disadvantaged groups.) The initial affirmative action plan, part of the consent decree approved by the court in 1973, provided for transfers and promotions to be made in ways that overrode the terms of collective bargaining contracts and established numerical ratios by which women and minorities were to be provided mobility opportunities.

Labor unions (including the Communication Workers of America, the Alliance of Independent Telephone Unions, and the Telephone Coordinating Council TTC-1 of the International Brotherhood of Electrical Workers) sought to modify the consent decree to prevent its disruptive impact on seniority and other practices. The intervenors essentially argued that the use of quota remedies and the resultant reverse discrimination violate relevant Federal laws and the Constitution of the United States.

While the case's lengthy prior history was only briefly summarized, the parties' claims and rationale are detailed in the decision. The Court's decision in general is that a court-approved affirmative action plan involving an override is permissible; in addition the specifics of the ruling are frequently noteworthy. Seniority and accompanying privileges, while viewed as important, still had not "acquired the status of constitutional rights..."; rather, the court said that seniority should function as only one consideration in deciding between candidates determined to be of equal or approximately equal qualifications. The intervenors' arguments that a court determination of past discrimination against minorities and women was necessary for AT&T to avoid being guilty of reverse discrimination was disallowed by the court. The court explained its ruling and emphasized the general judicial preference for litigation settlement and the expressed Congressional preference for voluntary settlements in Title VII matters. The court rejected the claim that the affirmative action override was a constitutional violation, citing the opinions of four Courts of Appeals. "I decline to hold that the Constitution is a bar in the context of employment discrimination to the application of race-or-sex-conscious remedies based on numerical ratios."

Further, preferential treatment based on race, sex, or national origin had been held not to violate Title VII by the Courts of Appeals in eight circuits, the Court reasoned, citing the relevant case law. "The intervenors cannot cite a single case squarely supporting their argument that the override violated §703(j)". Regarding the recent Supreme Court decision in McDonald, the Court held "while the Supreme Court recently held that racial discrimination in favor of blacks and whites is prohibited by Title VII, the Court specifically declined to consider whether a remedial preference pursuant to an affirmative action program violates Title VII. McDonald v. Santa Fe Trail Transportation Company [citation omitted]."

The decision found the "fundamental error that permeates the intervenors' arguments is their ahistoricity." This lack of perspective, the decision continues, apparently prevents the intervenors from differentiating between practices that would be considered unlawfully discriminatory if standing alone and practices used as in the present case which are in the context of a remedy to past class-based discrimination. Franks v. Bowman and Albemarle v. Moody are interpreted as approving broad remedial powers by the courts in cases of employment discrimination. (However, the Court did specifically decline to intrude "any further into the structure of labor-management relations than is required to effectuate the policies of Title VII" and thus declined to abolish the "best qualified" standard for promotion earlier established in the consent decree). It was stressed that the "carry-forward procedure" was not an initial remedy, but "a remedy for a failure to comply in good faith with an initial court-ordered remedy."

The uniqueness of the case was noted; specifically its national scope, the numerous affected employees, and the comprehensiveness of the relief afforded. "Goals that are appropriate for members of a single police department or fire department or labor union local are not necessarily suited to the work force of one of the largest private employers in the nation, and the converse is also true". Unrealistic exactitude in terms of goals and timetables should not be required, the decision stated, especially if this might frustrate Congressional intent.

Recognizing that "the seniority override is not a painless remedy", the court, citing the Supreme Court's agreement in other cases, held that modification of employees' expectations arising from a seniority system is proper to further a strong public policy interest.

In a footnote, the Court disagreed with another recent decision, McAleer v. American Telephone and Telegraph Co. "With all due respect to Judge Gesell, I believe that case to be wrongly decided. Title VII recognizes a narrow but nevertheless real and complete immunity for employer conduct undertaken in good faith reliance on a written interpretation or opinion of the EEOC. Albemarle Paper Company v. Moody, [citation omitted]." Another most significant footnote said, "in this context, individuals who are not entitled to priority placement, even though they are substantially better qualified than individuals entitled to such placement, may not be placed ahead of the latter."

Hiring criteria  
Monetary awards  
Remedial measures/sanctions

Equal Employment Opportunity Commission v. Datapoint Corporation  
USDC, Texas  
April 23, 1976

Employment practices and tests utilized by the Datapoint Corporation were found to be nondiscriminatory and the defendants were awarded approximately \$80,000 in attorney and outside expert witness fees in Equal Employment Opportunity Commission v. Datapoint Corporation.

It was particularly significant that these costs were to be taxed against the plaintiff Equal Employment Opportunity Commission as well as the private litigant; in addition, the judge directed that further awards were due the defendant, Datapoint Corporation, in the event of appeals.

The court found that "all tests utilized by Datapoint from November 1, 1969 to March 6, 1976 were 'valid' as that term is defined in applicable EEOC regulations." The examinations utilized, the test technician (sic), typing and Purdue Pegboard tests, were apparently determined to be content valid by the court, although the type of validity was not specified in the decision. The tests were professionally developed and not designed or used to discriminate by race. The court approvingly noted Datapoint's affirmative action program. The judicial decision declared that "no employment practice, past or present, in which defendant has engaged has in any way constituted a pretext for employment discrimination made illegal by Title VII."



Equal Employment Opportunity Commission v. National Academy of Sciences  
USDC, District of Columbia  
June 30, 1976

Reference checking of job applicants was determined to be a valid, job-related practice which does not discriminate against black job applicants. The statistical evidence introduced was insufficient to establish a prima facie case of discrimination. However, the National Academy of Sciences presented testimony by Dr. Bartlett and Dr. Goldstein of the University of Maryland to demonstrate the relationships between the Academy's reference checking procedures and turnover on the job. The validation study "established that the reference check had a significant relationship to work behavior and employment termination." The validation study was conducted in accordance with EEOC Guidelines, the court stated, and established that "reference checking is a valid job-related practice for all applicants and the reference checking does not discriminate against black applicants". The Academy further rebutted the charges by evidencing that the Federal government engages in reference checking; indeed these checks are required in many instances. The Civil Service Commission's rules and guidelines relating to reference checking were cited; as well as the Academy's compliance with the relevant standards.

Physical requirements  
Age discrimination  
Law enforcement

Figueroa v. Bronstein  
New York State Court of Appeals  
February 12, 1976  
Appeal dismissed, U. S. Supreme Court

The New York State Civil Service Commission's maximum age limitation of 32 for appointment to correctional officer was determined by the New York Court of Appeals to be in accordance with the State's constitution which requires appointments on the basis of merit and fitness. The adoption of age requirements was held not to violate the equal protection clause; however, the ruling noted that the "strict scrutiny test" was not applied. The court recognized the "right of civil service commissions to adopt 'reasonable minimum or maximum age requirements for open competitive examinations for positions such as policemen, firemen, prison guard, or other positions which require extraordinary physical effort, except where age limits are already prescribed by law'". The decision stated that correctional officers occasionally needed the instantaneous availability of "extraordinary physical effort", thus the maximum entry age was reasonable. The assurance of physical fitness upon entry was thus appropriate; in addition it was held "desirable to anticipate continuing qualification for an extended period of service." The age requirement of 32 was ruled "not irrational". It was considered "no infirmity that another age might also have been selected."

The case was appealed to the U. S. Supreme Court sub nom. Figuero v. Director of New York City Department of Personnel.

Fitzpatrick v. Bitzer  
U. S. Supreme Court  
June 27, 1976

This unanimous Supreme Court decision ruled that the Eleventh Amendment sovereign immunity principle did not bar the States' award of attorneys' fees and monetary damages in Title VII cases wherein public employees successfully proved unlawful discrimination. This reversed lower court decisions which had held that present laws prevented, or left to the court's discretion, the award of attorneys' fees or damages to plaintiffs suing public employers under the 1964 Civil Rights Act. (The case has also been interpreted by many lawyers as setting an important Supreme Court precedent of applying Title VII to State and local governments on a constitutional basis.)

Franks v. Bowman Transportation Company  
U. S. Supreme Court  
March 24, 1976

The U. S. Supreme Court ruled in Franks v. Bowman Transportation Company that job applicants who had been discriminatorily denied employment were entitled to retroactive seniority dating from the time of their original application. The Court stated that without the seniority award an individual would "never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed".

The Court emphasized in its decision that the complainants did not ask that the seniority system be modified or eliminated, but only to be awarded the status they would have held but for the unlawful refusal of employment. The Court thus did not address the larger question of the validity of seniority systems. The seniority was not to be denied even if there were no position vacancies; nor because such relief might conflict with other employees' economic interests. The Court stated that it "has long held that employee expectations arising from a seniority system may be modified by statutes furthering a strong public policy interest". The class action, which was alleging racial discrimination by Bowman Transportation as regards their over-the-road (OTR) truck drivers, was not affected by either the hiring of the named representative, Franks or his subsequent dismissal for cause. The Court also ruled that denial of relief to the unnamed class members was not justifiable because those persons had not filed administrative charges under Title VII provisions with EEOC.

The Court declared, however, "we are not to be understood as holding that an award of seniority status is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts."

United States v. Frazer  
USDC, Alabama  
August 20, 1976

The court order decreed that no written tests could be used as ranking devices unless these tests were validated in accordance with EEOC Guidelines. The Federal court decision superseded Alabama's State law requiring vacant state employment positions to be filled by selection from the top three ranking names on the list of those eligible for each position. State or local civil service laws must give way to Federal civil right laws, the decision held, whenever there is a conflict. Appointment from existing eligible lists was later determined to be acceptable on a "pass-fail" or unranked basis. (Validation studies are currently being conducted in accordance with the Court's specifications.)

Frontera v. Sindell  
CA, 6th Circuit  
August 25, 1975

This Sixth Circuit decision ruled that a municipal civil service commission violated neither a civil or constitutional right of Spanish-speaking applicants by administering a carpentry test in English.

If the Civil Service examinations are required to be conducted in Spanish to satisfy a few persons who might want to take them, what about the numerous other nationality groups which inhabit metropolitan Cleveland? These other nationality groups would have just as much right as Frontera to have their examinations conducted in their own languages. The city could not conduct examinations in Spanish and deny other nationalities the same privilege. Denial to any would be invidious discrimination.

In order to accommodate all nationality groups, the city might be compelled to establish a department of languages with a staff of linguists to translate the tests and supervise them. This would, of course, be at the expense of the city which has severe financial problems at the present time and would ultimately be saddled upon the harried taxpayers of Cleveland.

Frontera, who alleged his constitutional rights under the Fourteenth Amendment had been violated, claimed he failed because the test was administered in English rather than Spanish. Earlier he had been advised he could take the test in Spanish, but "due to a lack of both time and a trade dictionary for translating the technical terms in the carpentry test, the Civil Service employee who had been given the assignment of translating the test was unable to do so." The carpenters' examination was comprised of a performance and written section, each worth 50 points; a score of 70 was passing. Frontera scored 36 on the performance and 31.349 on the written sections. The court also apparently considered significant Frontera's failure to ask questions during the exam.

Criterion-related validity  
Differential validity  
Law enforcement  
Performance evaluation  
Documentation  
Sample differences

Gosa v. Phelps  
USDC, Alabama  
June 4, 1976

Use of a test to rank applicants for employment with a city police department was found to have discriminated against blacks in Gosa v. Phelps. The ruling is notable in that it addressed psychological issues to a greater extent than the majority of cases and that it attempted to explain its rationale.

In delving into the questions, the court decreed that the International Personnel Management Association (IPMA) test might in the future be found sufficiently job-related and usable for selection for the Tuscaloosa, Alabama police force "even if blacks fare less well on it than whites." Further, the test could continue to be administered to job applicants with an eye toward, "a predictive validation study with appropriate criterion measures [emphasis in original] when a sufficient number of persons have been employed. Indeed... the defendants are not precluded from using the test to determine relative priority for hiring within minority and non-minority groups... such a use of the test would not discriminate, which is the proscription under Title VII." The Gosa v. Phelps ruling, which is likely to be appealed, also directed that the local Civil Service law "must give way" to Federal law and the remedial measures mandated by Title VII.

The validation evidence presented by the defendants had consisted primarily of a concurrent criterion-related validation study conducted upon the Tuscaloosa police by a Dr. Mickler and two other studies, one by the California Selection Consulting Center (SCC) plus a South Dakota study. The Tuscaloosa study had a correlation of .273,  $p < .05$ . The decision noted the need for practical significance to be demonstrated in addition to statistical significance, particularly with the "relatively low" coefficient correlation. Dissatisfaction was expressly noted with the preparation and evaluation of the performance rating procedures and instruments as well as the lack of sufficient documentation of the validation process, including evidence of a job analysis.

Mainly studied for its findings relating to differential validity, the California SCC study was viewed by the court as ambiguous and unsatisfactory in several respects. The defendants did not consider sample differences between the Alabama personnel and the California sample; these were later found to be significant at  $p < .01$  by Judge Pointer's own independent analysis of the data. Reliance upon the South Dakota study was considered inappropriate as it involved another, earlier form of the IPMA test. The approach to the validation study was criticized as being casual.

Gray v. Greyhound Lines - East  
CA, District of Columbia  
October 13, 1976

A primarily procedural but interesting issue was ruled on recently in Gray v. Greyhound Lines - East. The Court of Appeals for the District of Columbia found that present employees could challenge their employer's hiring practices as causing psychological harm. This reversed the lower court's decision which had held that the Company's present employees were not injured by the hiring practices and thus had no legal standing for challenge. Plaintiff's right to work in an environment free of discrimination was noted by the appellate court decree; thus the potential of psychological harm caused by the Company's hiring practices fell within the provisions of Title VII's protection against discrimination in the "terms, conditions, or privileges of employment". The Company's personnel tests and formal educational requirements were among the practices alleged to be discriminatory and not valid.



Gurmankin v. Costanzo  
USDC, Pennsylvania  
April 2, 1976

Rejecting a blind applicant for a position teaching non-blind students was held to violate the U. S. Constitution and the Rehabilitation Act of 1973 in Gurmankin v. Costanzo. Evidence was introduced showing that the visually handicapped could overcome potential problem areas and be successful instructors of sighted children; in addition blind teachers had been found to be average or above average instructors. Discrimination against handicapped individuals was also noted as beginning to be recognized in legislation and numerous other areas.

The court held that Ms. Gurmankin was not evaluated fairly during the employment interview. The court decision ruled that the school's rejection was based on stereotypes and misconceptions about blind persons rather than on an individual's qualifications for the position.

Haber v. Klassen  
CA, 6th Circuit  
July 15, 1976

A lower court's summary finding that a white Federal employee could not bring suit under Title VII was reversed by the Sixth Circuit Court of Appeals and remanded for consideration in light of the Supreme Court opinion in McDonald v. Santa Fe Trail Transportation.

The white postal worker allegedly denied a position assignment because of his race, in favor of a less qualified black applicant, could thus proceed with his suit under Title VII. Previously Judge Lambros held that white persons should not expect the court to provide relief on the basis of racial discrimination under Title VII but should instead rely upon "other statutes, other Constitutional provisions" in seeking relief.

Hampton v. Mow Sun Wong  
U. S. Supreme Court  
June 1, 1976

The Supreme Court found by a 5 to 4 vote Civil Service Commission regulations excluding resident aliens from most Federal jobs to be unconstitutional. The ruling stressed the absence of a specific law or presidential order giving the Commission the authority to bar aliens from Federal employment and indicated that revised rules if enacted into law might be approved. The direction of President Eisenhower in Executive Order No. 10577 "to establish standards, with respect to citizenship" was not to be interpreted as a citizenship requirement. "Rather it is equally, if not more reasonably susceptible of interpretation as a command to classify positions for which citizenship should be required", the court decreed. Justice Stevens, writing for the court, declared that "the only concern of the Civil Service Commission is the promotion of an efficient federal service". To exclude all non-citizens for administrative convenience was not, however, an acceptable justification for the Civil Service Commission to adopt a policy which indiscriminately deprived others of employment opportunities. (A revised rule has now been adopted.) (Prior to the Supreme Court decision, a New York state citizenship rule for physicians was found unconstitutional in Surmeli v. State of New York, as was a state law giving preference in public works construction projects to citizens and residents of the state in C. D. R. Enterprises, Ltd. v. Board of Education of City of New York. The latter decision has been appealed to the U. S. Supreme Court.)

Interviews  
Performance evaluation  
Differential validity  
Written examinations

Hill v. Western Electric Company  
USDC, Virginia  
April 30, 1976

"Casual and subjective interviews" by all-white, predominantly male interviewers were ruled by a district court to discriminate against black and female job applicants in Hill v. Western Electric Company. Employment tests were also found to be discriminatory, as they had an adverse impact and were not properly validated. The court's objection to the aptitude and mechanical ability tests given installers was "dissatisfaction with the method of measuring job performance." Supervisory evaluations of job performance were found to be imprecise and irregular.

A footnote stated that the difficulty of measuring job performance was "not underestimated or unappreciated by the court." In addition the decision noted it was cognizant of the views that supervisory ratings are frequently more reliable than other measures and the elimination of supervisory ratings would severely damage industrial efficiency. Supervisory ratings per se weren't condemned, only the failure to carefully collect and standardize the ratings. However, appropriate standards were not delineated. Supervisors drawing up promotionary lists "are given no written guidelines for this task and factors employed are necessarily vague and subjective", the judicial opinion stated.

The testimony and evidence regarding differential validity was apparently largely discounted by the court; for example, "whatever the academic view of differential validity, its requirement in these cases seem fairly well established." It was further held that "test fairness and practical significance have not been shown, even using, as urged by the defendant, a definition of fairness in terms of the predicted job performance of an individual."

Western Electric's "last hired, first fired" seniority system was not held to be discriminatory.

Seniority  
Remedial measures/sanctions

Hill v. Western Electric Company  
USDC, Virginia  
October 22, 1976

The October 22 decision decreed that two out of every three persons hired or promoted by the Company's Arlington plant must be black and three of every five persons hired or promoted must be women. Judge Bryan's ruling as to remedial hiring and pay ordered Western Electric to pay those applicants and employees proving employment discrimination the salary of the jobs they would have obtained except for unlawful discrimination from the time sought until they actually got those jobs with the company.

Remedial measures/sanctions  
Firefighters  
Promotional criteria

International Association of Firefighters, Local 134 v. City of Atlanta  
Georgia State Superior Court  
December 2, 1975

An interim preferential promotion plan was barred since it would have resulted in reverse discrimination by requiring promotion of black firefighters to meet a quota of 51 percent minority representation. This would have necessitated filling all 28 supervisory positions in the city fire department with black officers and would have required employment decisions based on race alone, a Georgia court held in Firefighters, Local 134 v. City of Atlanta. The court, in rejecting the EEOC-proposed conciliation agreement, felt the decision would violate the anti-discrimination laws just as much as that which the interim promotion plan was trying to eliminate. The allegation of racial bias, which was to await further trial, was based on the adverse impact of the written test and other aspects of the Atlanta Fire Department's promotion procedure. The preliminary court decision found the promotion test to be job-related, and that even if it wasn't "this Court deplores discrimination in any form. We cannot and must not prefer one group over another." The only priority to be given in promotions, the court stated, was that of qualification. Officers within the fire department had a great responsibility and must be able to make immediate and speedy decisions under stress. "The decision maker must have the background, experience and qualifications to properly save lives and property." (See United States v. Frazer).

Statistical evidence  
Executive appointment  
authority  
Hiring criteria

James v. Wallace  
CA, 5th Circuit  
June 21, 1976

The Fifth Circuit Court of Appeals in James v. Wallace affirmed a lower court decision in favor of Alabama Governor George Wallace, who was charged with systematic discrimination against blacks in his appointments to state boards and commissions.

Plaintiffs had sought to utilize four types of evidence against Governor Wallace: statistical disparities between the percentage of blacks appointed by the Governor and the percentage of blacks in Alabama's population; prior prejudiced statements by the Governor, for example those advocating segregated schools; two specific examples of discriminatory appointments; as well as previous judicial decisions finding discriminatory practices in many Alabama agencies and Wallace's evident refusal to carry out a court order to hire black highway patrol troopers. The plaintiffs also unsuccessfully argued that the current selection system included subjective factors and was not equally open to blacks and whites. Plaintiffs failed to establish a prima facie case through statistics, although court dicta suggested a more appropriate comparison would have succeeded. (The more effective statistical evidence, the decision suggested, would have been that which used the percentage of blacks qualified to serve on the pertinent boards and commissions.)

Further, the court held that "the governor must be accorded the right to implement his policies" unless the policies espoused by his appointees or the governor violate the constitutional rights of individuals. The court declined to express an opinion on the issue of immunity for state executives; rather, "to future courts, faced with more particularized showings of racial discrimination, we leave the difficult legal questions that remain."

Statistical evidence  
Test construction  
Promotional criteria  
Content validity

Jones v. New York City Human Resources Administration  
CA, 2nd Circuit  
January 26, 1976  
Cert. denied, U. S. Supreme Court  
Reh'g denied

Five of nine civil service examinations of the New York City Human Resources Administration (HRA) had been found to be discriminatory against black and Hispanic applicants in a district court opinion but the plaintiffs' request for attorney's fees was denied. The lower court ruling was found to be not clearly erroneous and thus affirmed by the appellate court's decision on the consolidated class action lawsuit.

Incomplete statistical records were held not to be a bar to the plaintiffs' prima facie case of disproportionate impact. The records indicated the race of those taking the promotional exams; however, there was incomplete racial data for the three challenged open competitive examinations. The race of successful applicants or HRA employees was known, but not of unsuccessful applicants. The court decided that "in the absence of any reason to believe otherwise, it seems highly unrealistic to believe that minority applicants would so far out-perform their white counterparts as to wipe out the substantial disparity between the white and minority HRA employees who took the same test, particularly in the light of expert testimony that such a result was unlikely." The appellate court noted that testimony was presented by both sides, but stated it was the trial court's decision as to which testimony was more persuasive.

The trial or district court judge's determination as to the job-relatedness of the tests was based largely on the method of test construction. The defendants tried without success to establish the existence of a "common core of skills" basic to all jobs performed by those in each job title; the district court held these were not established or identified by the HRA job analyses, nor tested for by the civil service examinations utilized. The appellate court decreed that "HRA had made a good faith effort to prepare adequate job analyses and to construct a test which measured qualities demanded by the jobs in question". And the reviewing court repeated its comment in Chance, "While not all of us might have made the same factual finding on the question of job-relatedness as the district judge did, his finding was not clearly wrong". The denial of attorneys' fees was also found to be proper in view of HRA's efforts to comply with constitutional requirements.

Kelly v. Johnson  
U. S. Supreme Court  
April 5, 1976

A Suffolk "county regulation limiting the length of county policemen's hair [was] held not to violate any right guaranteed respondent policeman by the Fourteenth Amendment." The issue was not whether the State could establish a "genuine public interest" for the regulation; rather the issue before the Court was whether the police officer could establish that there was no rational relationship between the regulation and the promotion of public safety. The Supreme Court apparently felt hair regulations were not irrational for police officers finding that similarity of appearance, based on the wish to make police officers readily recognizable to the public and to foster esprit de corps, was a sufficiently rational justification for the rule. The Court thus reversed the Second Circuit's earlier decision in Dwen v. Barry. (Note: The change in case names reflects a procedural rather than substantive change.)



Remedial measures/sanctions  
Written examinations  
Content validity  
Criterion-related validity

Kirkland v. New York State Department of Correctional Services  
CA, 2nd Circuit  
August 6, 1975

The Second Circuit Court of Appeals in Kirkland v. New York State Department of Correctional Services found the trial court's imposition of a minority hiring quota to be unjustifiable relief. The Second Circuit's previous approval of similar relief was distinguished as being done only when there existed "a clear-cut pattern of long continued and egregious racial discrimination," which it was held was not shown in the Kirkland case.

The Second Circuit declared that "the most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited." Further, "it seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts." Strong disapproval of minority hiring quotas is expressed throughout the decision. The court's concern about "the attack upon the content of civil service examinations" is also readily evident.

Regarding the district court's decision as to the validity of Test 34-944 for promotion to sergeant, the Second Circuit affirmed the order "insofar as it invalidates examination 34-944 and directs the preparation of new non-discriminatory examination procedure" and "requires the new testing procedures to be validated by means of empirical criterion-related validation techniques if feasible." The major part of the text relating to the test's validity, preceding the Second Circuit's disposition, follows:

In Vulcan, we went a step further. We said: "The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics [sic]. Experience teaches that the preferred method of today may be the rejected one of tomorrow. What is required is simply that an examination must be 'shown to bear a demonstrable relationship to successful performance of the jobs for which it was used'." However, since our decision in Vulcan, the Supreme Court in Albemarle Paper Company v. Moody, 43 U.S.L.W. 4880 (June 25, 1975), has strongly endorsed the procedures outlined in the E. E. O. C. Guidelines which provide that evidence of content or construct validity may be appropriate "where criterion-related validity is not feasible." While Albemarle is distinguishable from the instant case in that it is a Title VII action involving a private industrial employer, we think the District Court's similar preference for the E. E. O. C. Guidelines was not clearly erroneous.

We do not construe the order of the District Court as going beyond the provisions of the Guidelines by requiring empirical validation regardless of feasibility. It seems clear that the problems involved in civil service testing are substantially different from those which confront a private employer who tests on a limited and non-competitive basis. These problems will, we are sure, be considered by the District Court should a dispute hereafter arise as to whether appellants' testing procedures have been empirically validated "insofar as feasible."

The Second Circuit's decision apparently departs from an earlier decision regarding the "validation hierarchy approach." The new testing procedures were not to be submitted to plaintiff's expert for review; although the ruling does provide for professional assistance from the plaintiff's expert if the proper steps were taken to insure confidentiality.

Kirkland v. New York State Department of Correctional Services  
USDC, New York  
January 26, 1976

CA, 2nd Circuit  
December 10, 1975  
Cert. denied, U. S. Supreme Court  
Reh'g denied, U.S. Supreme Court

A United States district court held it necessary to rule on the provisional appointment of correctional officers ordered by the earlier appellate court decision in Kirkland. Morale considerations and the possibility of further delay in the development and validation of selection procedures warranted the court to authorize the permanent appointment of officers serving on a provisional basis. The court decision commented on the "murky state of the art of testing and the numerous intangibles which make accurate prediction of time lags difficult, if not impossible."

The month preceding the opinions on the provisional appointments the Court of Appeals for the Second Circuit met to consider rehearing en banc or before all the judges, the decision issued in August, 1975, relating to the Kirkland case. The petition for rehearing before the full court was denied; however, the rationale of the chief judge and two other judges' who disagreed with the decision to deny full court review were stated in interesting dissenting opinions. The dissenting opinions held that a hiring quota is appropriately utilized by a trial court to remedy the discriminatory effect of past practices and that an en banc hearing was needed to explain the previous ruling and thereby maintain uniformity of their decisions.

The U. S. Supreme Court declined review of several procedural issues related to the lower court issues.

Physical requirements  
Educational requirements  
Criterion-related validity  
Firefighters  
Law enforcement  
Performance evaluation

League of United Latin American Citizens v. City of Santa Ana  
USDC, California  
March 12, 1976

Testing and other selection procedures of the Santa Ana police and fire departments were held to unlawfully discriminate against Mexican-Americans in League of United Latin American Citizens v. City of Santa Ana. The court found that a "height requirement constituted a substantial barrier" to the recruitment and employment of Mexican-Americans within the police and fire departments, but was not job-related. The high school education requirement was found to be valid for the police, but not the fire department.

Commenting on the plaintiff League of Latin American Citizens' (LULAC) contention that the defendant's test validation had serious flaws relating to the adequacy of the sample and protection against supervisory bias in the ratings, the court noted the validity study was inappropriate. "This court, therefore, cannot assume that because there is a relationship between test performance and current job performance for persons with job experience that a similar relationship obtains for applicants without job experience." The decision stated that the failure of the study, which was conducted by the Selection Consulting Center, to control for the "crucial variable" of experience "in and of itself undermines the validation claim." The court reasoned that concurrent validation studies were appropriate only if the sample of experienced employees was representative of the minority groups included in the applicant population.

Although the study used a number of techniques to prevent biased supervisory ratings the plan was changed. The court viewed the methodology employed as "the study examined the ratings for bias, found strong evidence of bias, and then proceeded to use the biased results." The court determined that even if adverse impact had not been demonstrated, and the plaintiffs had the burden to evidence the test's lack of validity, the firefighter test would still have been found invalid. The other, older test used by police and fire departments prior to 1973, had not been validated and was also found to be discriminatory. Recruitment policies were also decreed to be discriminatory.

Plaintiffs were adjudged to be entitled to back pay and a preferential hiring order to be decided at a later date.

Longo v. Carlisle DeCoppet Company  
CA, 2nd Circuit  
June 23, 1976

Requiring male employees to wear their hair short without the same requirements for women was held by the U.S. Court of Appeals for the Second Circuit not to violate Title VII in Longo v. Carlisle DeCoppet Company. Four other appellate courts (the D.C., Eighth, Fifth, and Ninth Circuit Courts) ruling on the question had found similarly. (See also the Supreme Court's ruling in Kelly v. Johnson.)

Monetary awards  
Affirmative action program  
Remedial measures/sanctions

McAleer v. American Telephone and Telegraph Company  
USDC, District of Columbia  
June 9, 1976

A district court judge ordered American Telephone and Telegraph to award monetary damages, compensating for his future loss in pay, to a male plaintiff who had claimed that a lesser qualified female obtained a position, which he was seeking, as a result of a court approved affirmative action plan.

Later, Judge Gesell held that the legality of preferences and quotas where there has been no admission or judicial finding of past discrimination was not to be determined in the case. "The Court finds that it need not, and indeed cannot, decide this matter." The district court's finding "does not in any way attack or impugn the judgment in that case"; rather the court sought to determine the rights of nonparties to the Philadelphia suit such as McAleer. The Franks v. Bowman Transportation Company decision was cited as establishing precedent for not promoting McAleer to the specific position in question. AT and T was ordered to "an affirmative award of some damages on a 'rough justice' basis", such damages to "constitute an added cost which the stockholders of AT & T must bear". (Ordinarily those parties complying with the terms of a consent decree are protected from liability, but this protection was held not to be available where the order was occasioned by the wrongful conduct of the company.)

This decision was specifically disagreed with in EEOC v. American Telephone and Telegraph Company. The McAleer case received considerable publicity due to the potential negative consequences for employers utilizing affirmative action plans, but several months later, it remained a unique decision.

McCarthy v. Philadelphia Civil Service Commission  
U. S. Supreme Court  
March 22, 1976

A city residence rule for fire personnel was upheld by the Supreme Court during 1976. The law required employees of the city's fire department to live within the city limits. The city regulation was not violative of the federally protected right of interstate travel. The city's residence regulation did not violate equal protection guarantees; it was viewed by the Justices as a uniformly applied, bona fide continuing residence requirement.

McDonald v. Santa Fe Trail Transportation Company  
U. S. Supreme Court  
June 25, 1976

The U. S. Supreme Court ruled in McDonald v. Santa Fe Trail Transportation Co. that racial discrimination in private industry against whites as well as non-whites is prohibited. The two white petitioners' complaint alleged the violations by the employing transportation company and a representative labor union occurred when they were fired for misappropriating 60 one gallon cans of anti-freeze while a black employee charged with the same offense was retained. Justice Marshall delivered the opinion of the Court which found that Title VII's protection was not limited to members of any particular race. Legislative history, Griggs v. Duke Power, and EEOC were cited as consistently proscribing racial discrimination in private employment against whites upon the same standards as racial discrimination against nonwhites. Responding to the argument that Title VII did not cover discharge for criminal misconduct, the Supreme Court ruled Title VII "prohibits all racial discrimination in employment without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination." The Court, however, declined to consider the lawfulness of preferential treatment accorded to minority groups under an affirmative action program designed to remedy prior discrimination.

Mele v. Equal Employment Opportunity Commission  
CA, 3rd Circuit  
March 17, 1976

The Third Circuit, acting on appeals relating to Mele v. U. S. Department of Justice, affirmed without opinion the earlier decision and dismissed a related appeal. See Mele v. U. S. Department of Justice for explanation of the issues involved in the case. (Differences in names of the decisions here and elsewhere are primarily for procedural reasons; for example, relevant court cases may be consolidated. Changes in the parties involved and standing of a decision are other frequent reasons for name changes. Substantive changes will naturally be noted.)

Affirmative action  
program

Mele v. U. S. Department of Justice  
USDC, New Jersey  
May 7, 1975

The trial court in New Jersey ruled in Mele v. U. S. Department of Justice that a white employee could not expect court relief from the reverse discrimination he alleged he encountered under a Federal agency's affirmative action plan which had prior court approval. A court decree in United States v. United Association of Journeymen provided for a quota and hiring system for the International Brotherhood of Electrical Workers Union (IBEW) "in order to eradicate the effects of past discrimination." The court-approved affirmative action plan had minority and white applicants take the same test, but a dual scoring system required the minority individuals' test results to be separated from the other scores. The 30 highest-scoring minority applicants and the top five white applicants were to be chosen for 35 apprenticeship trainee positions.

Regarding the test used, the trial court found "Despite the fact that an unvalidated test constitutes discrimination per se, it is the holding of this Court that the plaintiff herein, since he is not a member of the class protected by Title VII, may not invoke the protection of the EEOC Guidelines." Preferential treatment was held not unlawful when it resulted from a court-approved plan to remedy discrimination against statutorily protected minority group members.



Mieth v. Dothard  
USDC, Alabama

June 28, 1976

Juris. Noted, U. S. Supreme Court

A U. S. District Court decreed that minimum height and weight requirements for Alabama state trooper and corrections officer positions were sexually discriminatory and a violation of the constitutional guarantee of equal protection (Mieth v. Dothard). The decision also reviews several research projects as well as decisions related to height and weight requirements for law enforcement officers. Washington v. Davis is cited in the court's explication of the proof of discrimination required under Title VII and the test under the Equal Protection Clause of the Constitution; the difference being that under the Equal Protection Clause the test is of intent, not impact. The Mieth v. Dothard decision further cited the Davis case as holding that "only when the plaintiff proves that the discrimination was purposeful has the Constitution been violated." Part of the proof used to establish intent of discrimination involved statements by the Director of the Department of Public Safety that women should not be State Troopers. (The Director's attitude is exemplified by the following: At the end of the interview with Ms. Mieth, which she had sought to determine why she could not be a State Trooper, he said "he would never put a woman on the road because of the dangers involved. Before departing, the Director in a courtly gesture, presented Ms. Mieth with a certificate making her an 'Honorary State Trooper'".)

The U. S. Supreme Court has agreed to consider the State of Alabama's appeal from the decision. The issue of minimum height and weight requirements for prison guards will be argued before the Court.

Miller v. Saxbe  
USDC, District of Columbia  
October 8, 1975

Federal employees were judged to have a right to action against Federal officials on the basis of racial discrimination for which those officials could be held personally liable, despite the plaintiff's failure to pursue their rights for back-pay. Judge Gesell, writing for the court in Miller v. Saxbe stated, "the Court is well aware of the need to avoid a situation that may immobilize officers of the government to a point where necessary action is withheld for fear of personal liability, but surely it is not too much for the federal courts to insist that officers of the Federal Government confine their actions to conduct consistent with elementary constitutional standards, particularly where issues of race are involved." However, the denial of the summary dismissal motion on claims of official immunity does allow charged Federal officials another review of their claims for immunity during the trial.

Law enforcement  
Validation studies  
Title VII standards  
"Unclean hands" defense

United States v. City of Milwaukee  
USDC, Wisconsin  
June 25, 1975  
July 25, 1975

The Milwaukee police department had sought dismissal of race and sex bias charges on the grounds that the department wasn't covered by the 1972 amendments of Title VII and that since the United States allegedly discriminated in its employment, the equitable defense of "unclean hands" was relevant. The defendants in United States v. City of Milwaukee also requested dismissal on the basis that Title VII "is unconstitutionally vague because of a lack of standards." These contentions were all rejected.

The court's review of the legislative history of the 1972 amendments which extended coverage of the 1964 Civil Rights Act led the court to declare "the City of Milwaukee is both a 'person' and an 'employer' within the meaning of Title VII and therefore is subject to its provisions", and that the expanded coverage "is firmly embodied in the principles of the Fourteenth Amendment." The request for dismissal on the "unclean hands" equity principle argued that if the Federal government practices discrimination, the City of Milwaukee should be able to do so also. The court rejected the move and noted that equity principles cannot be used "to frustrate the purpose of its [the U.S.] laws or to thwart public policy."

The defendants claimed the action should be dismissed due to the vagueness of the entire concept of "professional validation" and lack of a standard by which to regulate their conduct. The court ruled that although Title VII contains no validation standards, the EEOC's Guidelines on Employee Selection Procedures "do set out extensive and detailed standards of validation. Although this court recognizes that the Guidelines themselves are very difficult to understand and apply as well as being technical, the difficulty and technicality of the Guidelines does not render them so vague as to constitute a denial of due process under the law."

A month later interim relief was ordered by the court. Pending final determination of sex and race bias claims against the recruiting and hiring practices of the Milwaukee police and fire department, the court ordered that two black applicants be appointed for every three white applicants to police aide and patrol officers. Five female officers were to be hired by October 1 and another five by January 5, 1976. (See City of Milwaukee v. Saxbe.)

Law enforcement  
Firefighters  
Municipality, selection  
for prosecution

City of Milwaukee v. Saxbe  
CA, 7th Circuit  
November 12, 1976

In City of Milwaukee v. Saxbe, the policies of the Attorney General regarding the enforcement of Federal laws barring discrimination were challenged. The Attorney General, it was alleged, used discriminatory practices in choosing to prosecute Milwaukee on a pattern and practice charge of race and sex discrimination within the police and fire departments when other municipalities in the area could have also been so charged. The district court's decision to dismiss the complaint was affirmed by the Seventh Circuit Court of Appeals. The court ruled that as the Attorney General had limited resources it was reasonable to select the largest municipality, particularly one which also had the largest minority population and would thus have a greater impact on minority employment. Standing, jurisdiction and sufficiency of the complaint were the primary issues in the appeal; as these are procedural matters they will not be explicated further here. (See also United States v. City of Milwaukee.)

Statistical evidence  
Sample size  
Promotional criteria

Morita v. Southern California Permente Medical Group  
CA, 9th Circuit  
August 17, 1976  
Cert. denied, U. S. Supreme Court

The promotion of seven whites to one minority worker of Asian extraction was considered to be too small a statistical sampling to establish prima facie evidence of racial discrimination by the Ninth Circuit in Morita v. Southern California Permente Medical Group. The court, citing Harper v. TransWorld Airlines, recognized that the "statistical evidence derived from an extremely small universe, as in the present case, has little predictive value and must be disregarded". Morita, an Asian x-ray technician, claimed racial discrimination when denied a promotion. He conceded he lacked the requisite training to be a Senior x-ray Technician, but contended Permente had a duty to provide this training. The failure to train him for the higher position he sought was determined by the court not to be unlawful bias where co-workers were similarly treated.

Remedial measures/sanctions  
Criterion-related validity  
Educational requirements  
Written examinations  
Law enforcement

Morrow v. Dillard  
USDC, Mississippi  
April 14, 1976

Racial quotas were not imposed in Morrow v. Dillard, but a reporting procedure was ordered to increase the number of minorities in the Mississippi Highway Patrol and the Department of Public Safety (DPS). (The court's earlier finding of discrimination in employment practices had been affirmed by the Fifth Circuit Court in Morrow v. Crisler but the affirmative action relief was considered insufficient to eliminate the effects of prior discrimination and the case had been remanded to the trial court.) The periodic reporting was ordered "to fashion an appropriate decree which will have the certain result of increasing the number of blacks on the Highway Patrol." The court was further ordered to scrutinize the DPS's recruitment procedures and hiring criteria, to "require that hiring criteria, including testing, should be job validated by encompassing criteria predictive of successful job performance", and to order other measures as necessary to recruit black applicants.

Two years of college or its equivalent was held to be a nondiscriminatory requirement for narcotics bureau agents, particularly in light of the "delicate and highly specialized nature of the Bureau's responsibilities." The written entrance examinations, in use for agent selection were also approved, although the decision stated interest in the conduct and outcome of the International Association of Chiefs of Police's (IACP) current validation study. The efforts of the Bureau to attract minority and female candidates were positively commented upon by the court.

The written and clerical proficiency examinations utilized in the hiring of non-sworn support personnel were found to be inappropriate. Content validity studies were conducted for the written tests, but were not conducted for the proficiency tests. The job analysis methodology consisted of interviews with one employee from each department followed by a review of the analysis with the departmental supervisor. The ruling criticized the failure to interview minority employees and to determine the skill level required for the various job positions. The court decreed the department's future validation efforts should give great deference to the EEOC's Selection Guidelines. "In particular, wherever possible, the job analysis portion of the study should include (1) interviews with minority employees, and with at least three employees from each position; (2) an analysis of the skill level necessary for each job; and (3) all tests used by the department, including the proficiency tests."

Attorney fees were denied, the court stating that "the defendant's failure to utilize different and more positive recruiting methods and validated tests and other affirmative hiring criteria did not constitute bad faith or wanton or vexatious conduct". That conclusion, the court stated, was supported by the defendant's change to less discriminatory testing procedures, the consent decree, its recruiting measures and other evidence of good faith.

National League of Cities v. Usery  
U. S. Supreme Court  
June 24, 1976

The U. S. Supreme Court held 5 to 4 in National League of Cities v. Usery that Congress lacked the authority under the Commerce Clause to extend coverage of the Fair Labor Standards Act to the States. The decree stressed that Congress couldn't impair the States' "ability to function effectively within a Federal system," to do so would not comport with the Federal system of government established by the Constitution. Extended coverage under the 1974 amendments was also considered to penalize the States for choosing to hire governmental employees on different terms than those Congress desired to impose. The Court's decision recognized that the congressionally imposed displacement of decisions could alter the traditional ability and methods by which local governments are managed.

Justice Rehnquist, writing for the Court, stated that both the minimum and maximum hour provisions of the Fair Labor Standards Act would "impermissibly interfere with the integral governmental functions" of States and their political subdivisions. The Supreme Court ruling on the consolidated appeal of the National League of Cities, the National Governor's Conference, 19 states, and four cities necessitated overruling a prior Supreme Court decision, Maryland v. Wirtz. This decision was viewed as a victory for States' rights; especially in regards to traditional governmental functions such as fire prevention, police protection, sanitation, public health, and parks and recreation.

New York State Division of Human Rights v. Xerox Corporation  
New York Court of Appeals  
June 3, 1976

A company's policy of temporarily suspending employees arrested for serious crimes was determined to be lawful, although statistical evidence established that blacks are more likely to be arrested than whites, as suspension occurred only after review of each individual case. "The essential and distinguishing factor between the case at bar and those above cited [State Division of Human Rights v. Kilian Manufacturing Corporation, Griggs v. Duke Power, Gregory v. Litton and Carter v. Gallagher] is that the arrest here only triggered the invocation of the suspension process; and it was not determinative of its outcome."



Cut-off score  
Licensing examination  
Rational relationship  
Educational requirements

United States v. State of North Carolina  
USDC, North Carolina  
August 27, 1975

Use of the National Teacher Examination (NTE) as a licensing exam for public school teachers in North Carolina was declared unconstitutional in United States v. State of North Carolina as the establishment of the cut-off score was arbitrary and not shown to be a measure of the minimum standard for the teaching profession. The court found that the state had the right to adopt academic requirements and properly validated achievement tests, nor was there anything wrong with the test itself or use of a cut-off score. However, "such cut-off score shall first have been validated with respect to minimum academic knowledge an applicant must possess in order to become a reasonably adequate and competent teacher and that such score be shown to bear a rational relationship to teaching capacity."

It was also noted by the court that the Educational Testing Service (ETS) had consistently opposed the adoption of any cut-off score without validation in relation to the positions in the North Carolina training institutions and the desired job performance in the public schools. Apparently the State had conducted neither reliability or validity studies, but had selected a score calculated to produce a given failure percentage. This was declared unlawful.

The State was held not to have made a "valid determination of the point or dividing line between competency and incompetency". The court decreed that the State could not refuse to license the competent applicant. "In theory, at least, it should be possible for all applicants to pass a given test, i.e., to demonstrate the minimum necessary academic knowledge to enter the profession."

Oburn v. Shapp  
CA, 3rd Circuit  
August 4, 1975

The Third Circuit affirmed a district court opinion's denial of a preliminary injunction sought by plaintiffs alleging that the Pennsylvania State Police were discriminating against them by hiring minority group members using racial quotas excluding the plaintiffs. The court stated that "despite the insistence of the parties that we reach the merits of 'reverse discrimination', a most troublesome subject, we resist the invitation and instead address ourselves to the narrow issue before us: did the district court abuse its discretion in denying a preliminary injunction sought by the plaintiffs."

The eligibility criteria, interim standards under a consent decree entered in Bolden v. Pennsylvania State Police, established a temporary hiring goal of one minority for every two nonminority applicants and changed hiring procedures pending the development of tests validated as being job-related. This hiring ratio was to be followed until 9.2% of the enlisted officers in Pennsylvania State Police are minorities.

The applicants had to meet preliminary requirements and attain a passing score on the written examination. (The Pennsylvania Civil Service Commission administers, grades, and determines the passing score of the written examination.) The applicants were selected in order of exam scores subject to the requirement that "the State Police shall select for further processing as many applicants who passed the examination as are necessary to fill the projected cadet class and meet the minority hiring ratio...." Selected applicants then had to pass a physical examination, and oral interview, and a background investigation. Each eligible applicant (those passing all hurdles) was then ranked according to the "final earned rating", derived from a weighted average of the written exam and oral interview scores; the selection was in accordance with this rank subject to the minimum one-third ratio.

The court found that plaintiffs failed to show they had a substantial likelihood of success on the merits that they would suffer irreparable injury. Cadets hired under the affirmative action plan were competent and their selection did not adversely effect the public interest in law enforcement; furthermore granting of the injunction would adversely effect the cadet class. The court thus affirmed the denial of preliminary relief.

Although the court emphasized it was addressing the issue of whether the trial court had abused its discretion, it did remark that the racial quotas, ordinarily suspect, when utilized as a remedy for prior discrimination had yet to be held unconstitutional. Indeed, the ruling noted some appeals courts had found reversible error when district courts had withheld remedial quota relief where other remedies failed to abolish racial discrimination.

Officers for Justice v. Civil Service Commission of the City and County of  
San Francisco  
USDC, California  
May 2, 1975

A city police department was enjoined from using a 5'6" minimum pre-selection height requirement found to discriminate against Asians, Latins, and females until the requirement was properly validated as job-related. The court noted methodological defects, including a lack of data about officers under 5'7", in the defendant's attempt to establish the validity of the height requirement. Certain aspects of the physical agility test intended to select patrol officers were held to have an adverse impact on females; the portions contributing most to the exclusion of women were the wall and sandbag parts of the test. They were to be temporarily suspended for both males and females so that a specified number of females could be selected for patrol; thereby "providing information that can be used to prove the validity or invalidity of the physical agility test at issue."

The court was unwilling to direct a strict quota hiring of females; however the judge noted that women had been used successfully in patrol in several other cities. The judge therefore chose to frame a remedy which would be a middle course.

The court opinion ruled that the "defendants' burden is particularly heavy here because San Francisco desires to become the only major city in the nation using a ratable physical agility examination to select its patrol officers." The job analysis conducted by Dr. Verducci was considered to have several problems by the court, particularly in view of "the almost total adverse impact against women." The court also noted that there was no evidence that the defendants had sought alternative means of selecting for the desired skills which would have a lesser adverse impact against women.

Patterson v. Newspaper and Mail Deliveries Union  
Cert. denied sub nom Larkin v. Patterson  
U.S. Supreme Court  
June 30, 1976

Less than a week after the McDonald v. Santa Fe Trail Transportation decision, which ruled racial discrimination against whites is prohibited, the U. S. Supreme Court denied review of a race bias suit settlement agreement requiring, among other things, a 25 per cent hiring goal for minority employees. The settlement agreement in Patterson v. Newspaper and Mail Deliveries, adversely effected the rights of white employees; however, the short term advantage to minorities was considered by the Second Circuit Court of Appeals to be proper under the current civil rights laws. The Supreme Court indicated its agreement by denying review of the case. The issue of constructive seniority to minority workers, another part of the agreement terms, was not ruled on by the Supreme Court.

Educational requirements  
Promotional criteria  
Physical requirements  
Seniority

Payne v. Travenol Laboratories  
USDC, Mississippi  
February 19, 1976

Minimum educational requirements for various job levels of a pharmaceutical manufacturer were found to have an adverse impact on blacks, and use of the requirements was enjoined as the defendants could not prove job-relatedness in accordance with the EEOC Guidelines in Payne v. Travenol Laboratories. Certain job assignment practices and the health benefits plan were considered to have an adverse impact on female employees in this district court decision.

Selection requirements held to have an adverse impact and not to be validated in accordance with EEOC Guidelines were the pharmaceutical manufacturer's employment requirements of a tenth grade education, or its General Education (GED) test equivalency, for operative positions; a twelfth grade education or its GED equivalency for office, clerical, technician or supervisory positions; and a college degree as a qualification for systems, traffic or scheduling analyst. Payne's procedures for promotion perpetuate past discrimination, the court stated. "All the criteria used in the promotion process, while racially neutral on their face, suffer from this failing." Length of service as a criterion, it was noted "must have some adverse impact upon blacks...". The management was characterized as well-intentioned, but with employment policies which substantially impeded the entry of blacks into the company's workforce. Payne's job assignment practices were held to have discriminated against females, wherein females were effectively prevented from seeking higher-paying materials handler positions by the strenuous physical requirements of the initial assignments although heavy lifting and physical exertion were not necessary in the majority of the jobs. The company was ordered to try to utilize alternative staffing methods and job restructuring practices to meet Title VII's goals and requirements. The last hired-first fired policy was ordered modified in order that the victims of discrimination would obtain their rightful places within the structure of the seniority system.

Promotional criteria  
Hiring criteria  
Law enforcement  
Job-relatedness  
Remedial measures/sanctions

Reed v. Lucas  
USDC, Michigan  
July 16, 1975

Preliminary relief was granted in Reed v. Lucas to those challenging the hiring and promotional systems of the Wayne County Sheriff's Department in Michigan for using non-validated tests and other criteria which were not shown to be properly validated measures. The court found "the present promotional tests and qualifications in all probability contain some elements which cause them to operate differentially on black and white applicants." The court held that the defendants presented little evidence that either the examinations or qualifications for promotion were job-related. Nevertheless it could not be shown exactly which part of the system caused the disparity in hiring and promotion.

As new tests could not be properly validated and implemented in time for use as part of the preliminary order, the court enjoined all promotions to Detective and Deputy Inspector ranks except as follows:

One out of every two persons promoted to detective and to deputy inspector must be a member of the black race. Within that framework the only modification of the present rules [CSC's] for use of the eligibility lists will be the provision that a black person on the current eligibility list may be appointed to detective or deputy inspector even though there may be a white person higher up the appropriate list at the time of the promotion. Should the percentage of blacks in either rank reach the percentage of the population of Wayne County before resolution of this suit on the merits, then the ratio shall be reduced to one black for every three whites promoted to either rank.

The remedy was occasioned in order to prevent complainants from suffering irreparable harm because of the low turnover within the Department.

Hiring criteria  
Statistical evidence  
Promotional criteria  
Training  
Performance evaluation

Robinson v. Union Carbide Corporation  
CA, 5th Circuit  
September 10, 1976  
Cert. filed, U. S. Supreme Court

An employer's hiring practices were upheld as apparently fair by the Fifth Circuit Court of Appeals based on the statistical showing that the proportion of blacks on the work force was substantially the same as that in the surrounding population. The Fifth Circuit affirmed the lower court's ruling which gave preference to labor force data over applicant flow figures wherein it could be shown that some applicants had filed more than one application.

The litigants' advancement of different methods of analysis of the hiring data proved to be a critical issue in the case. Those alleging discrimination in hiring (the appellants) had compared the percentage of blacks filing applications (50%) to those being hired (26%); however Union Carbide said it was more appropriate to compare its employment record since 1970 of 33% minorities with the composition of the local work force, approximately 26%. The court noted with approval a company witness's comparison of the use of applicant flow data in this instance to "trying to measure jelly fish with a rubber band [because] you don't know where all the applicants come from... [and] how many are duplicated."

The decision found the company's hiring practices to be fair in form, or "reasonably directed to secure the best qualified candidate for the position available", and fair in operation.

The promotional practices, however, were found to be unlawfully discriminatory. Although there was some standardization in the initial aspects of the promotion procedure, the court declared: "The ultimate decision, however, is not based on uniform procedures or objective standards. Instead, the selection of one candidate over another depends on highly subjective criteria which shift in importance from case to case."

Qualification exams used for promotion were held not to be job-related, and the admission standards for the training programs were not shown to be objective and nondiscriminatory. As the training programs were a "springboard to occupational advancement, the admission standards are clearly relevant to an analysis of the plant's promotional practices." The promotional evaluation forms were also found to be subjective with either conscious or unconscious discrimination by the evaluating supervisors possible.

Content validity  
Firefighters  
Remedial measures/sanctions  
Assessment centers  
Written examinations  
Promotional criteria  
Expert testimony

United States v. City of St. Louis  
USDC, Missouri  
June 28, 1976

St. Louis' entry level examination for firefighter was found to have a disparate impact on black applicants and a remedial hiring "goal" was ordered. However, the examination for fire captain, despite an adverse impact, was "properly validated as required by law" a court ruled in United States v. City of St. Louis. The method used to validate the test for fire captain was content validation. Plaintiffs were not able to establish a disparate impact at the higher-level positions of battalion chief, deputy chief and fire chief, although no black had ever held a position above the rank of fire captain.

The court's remedial order decreed that St. Louis should adopt a goal of hiring blacks for at least 50 percent of the entry level vacancies, with only those blacks completing the probationary period counted. "In no case shall defendants be required to displace incumbent employees or to hire unneeded employees or unqualified employees in order to meet the goal." In meeting the goal, certain selection criteria were specified as permissible: city residence, age and physical fitness criteria along with such "written screening devices or alternative systems of testing" as were not a defense for failure to meet the hiring goals. A written examination could be utilized if the parties agreed there was no adverse impact or that it was job-related and validated by a criterion-related study in accordance with Title VII; the court would decide the matter in the event of a dispute.

Also of interest were the comments relating to content validity and approval of the fire captain exam, despite its adverse impact. The defense evidenced that predictive validation was not feasible in the situation primarily due to the small number of promotions per eligibility list, the possibility of collusion among applicants and the "lack of valid criteria for work performance." It was stated that "in order to be valid the content of the examination must match the content of the job." The assessment center approach, gauged at \$500 per candidate, was considered too expensive a process to be utilized in this situation. The court then noted the importance of careful preparation and extensive research. Dr. Lawrence O'Leary, who developed the selection procedures for fire captain and battalion chief, had determined after a fairly thorough job analysis as described in the decision, that the content validation approach was appropriate. Dr. O'Leary determined that skills, abilities and personal characteristics needed for the fire captain's exam could not be properly measured by a paper-and-pencil test, but only the knowledge required for the job. Shorter questions were used since in prior examinations minority candidates had reportedly had some difficulty with longer questions. Supervisory skills, which Dr. O'Leary felt could not be included in the written examination, were tested during the "working test period."



Various criticisms of the process were raised by Dr. Barrett, the plaintiff's expert. The court observed that Dr. Barrett had never performed a content validity study for a fire department nor was he familiar with the job involved. The court's comments regarding Dr. Barrett were caustic; for example: "...his opinions herein are not entitled to credence. His criticism of the examination amounted to no more than nit-picking...his conclusion, that the examination lacked validity, was not supported even by his own testimony. In sum, Dr. Barrett was not an impressive witness herein." Dr. Barrett had been critical of ten of the 125 of the questions; however, he conceded that not every question needed to be content valid for the test itself to be valid. Barrett also conceded there never had been a perfect examination devised.

Seniority  
Law enforcement  
Remedial measures/sanctions  
Transfers and assignments

Schaefer v. Tannian  
USDC, Michigan  
August 27, 1976  
Vacating prior rulings in USDC, Michigan  
after decision in  
CA, 6th Circuit, 1976

The Detroit Police Department was charged in 1973 with sex discrimination in personnel practices relating to recruiting, examining, hiring, promoting and compensating employees and potential employees. In 1974 it was held that the Department had engaged in a broad-based pattern of sex discrimination in hiring and assignment policies. The intensive legal activity in 1975 and 1976 relating to the class action has pertained to remedial relief, seniority issues and various procedural matters. The courts' findings of unlawful discrimination in hiring, assignment and promotion practices resulted in affirmative action relief.

Rulings on the seniority issue were occasioned by Detroit's budgetary deficits necessitating a layoff of over 1,000 police officers. The judge had sought to fashion a compromise on the seniority issue, ensure that fewer senior police officers were laid off, accord an extra measure of relief to victims of past discrimination and also benefit the public by ordering an injunction which decreed that no federally funded employees either male or female should be laid off or demoted. The injunction might have accomplished most of these objectives but not all women officers were hired with federal funds; the parties involved could not agree on the appropriate relief. Retroactive seniority was found to be an appropriate remedy; however, this presented further problems which were decided in August in the most recently reported decision in this continuing litigation.

"Unrealistic exactitude" in determining seniority status was held to be beyond the court's realm and could not be required. It was decreed that the retroactive seniority should be based on the date of application with the Department, as adjusted by an average quarterly processing time for males (which was shorter than for females). In these instances the Department had the burden of proving that members of the class weren't entitled to relief. Where individuals claimed the Police Department's discriminatory reputation had prevented them from applying, the court stated that class members had the burden of showing that discrimination dated back beyond the date of application and the establishment of the date in each circumstance.

Law enforcement  
Job-relatedness  
Rational relationship

Shack v. Southworth  
CA, 6th Circuit  
July 28, 1975

Preference given to local police officers in selecting applicants to fill deputy sheriff positions is not racial bias where the requirement is job-related. The U. S. Court of Appeals ruling upheld a district court's rejection of a bias claim by an unsuccessful black applicant. The existence of a rational relationship between the preference rule and successful job performance was considered by the court sufficient to justify the rule when it wasn't shown to have a racially disproportionate impact.

Singer v. U. S. Civil Service Commission  
U. S. Supreme Court  
January 10, 1977

The Supreme Court vacated the Ninth Circuit's earlier decision that EEOC properly discharged an employee whose open flaunting of his homosexual lifestyle brought discredit to the agency. The Ninth Circuit Court is to reconsider its decision that Singer's conduct hindered the agency's efficiency by lessening public confidence in the agency's fitness to conduct public business. The Justices remanded the decision for consideration under new CSC policies stating that individuals cannot be found unsuitable for employment merely because they are homosexuals. Singer, a probationary employee, had been informed in 1972 by the CSC that he was disqualified due to his "immoral and notoriously disgraceful conduct" and that his agency had been directed to separate him from its service. CSC's amended regulations and guidelines relating to homosexuals do not allow conduct detrimental to the organization. Singer had been found by the lower court to have "advocated homosexuality... (sought) television, newspaper and magazine publicity", attempted to marry another man, and to have displayed homosexual advertisements on his car windows.

Law enforcement  
Physical requirements  
Rational relationship  
Written examinations

Smith v. Troyan  
CA, 6th Circuit  
Cert. denied, U. S. Supreme Court  
June 14, 1976

The Supreme Court declined review of the Sixth Circuit's decision in Smith v. Troyan, which found that height requirements for police officers were constitutional. A 5'5", 136 pound black woman who was rejected as a police applicant in East Cleveland, Ohio, had filed the class action charging that women were discriminated against by a city requirement that police be at least 5'8"; weight at least 150 pounds. The height requirement screened out 95 percent of the women but only 45 percent of the men. The weight requirement screened out another four percent of otherwise eligible women.

The U. S. District Court for Northern Ohio had previously determined that both requirements discriminated against women. The City appealed, maintaining that both requirements must be sustained if they bear a rational relationship to a legitimate state objective.

The Sixth Circuit accepted the rational support standard, but concluded that only the height requirement is valid. The court accepted the City's view that "taller police officers have a psychological advantage in effecting arrests and giving emergency aid. Weight in itself, however, is a poor predictor of fitness, the court finds." Writing for the court, Judge Pick found the weight requirement neither rationally related to physical strength nor to any psychological advantage. The court noted that other tests to determine a police applicant's strength were used.

At the district court level evidence establishing the Army General Classification Test's (AGCT) discriminatory impact on blacks taking the test was found. Evidence presented in Smith v. East Cleveland revealed that 22% of the blacks taking the AGCT in 1973 received a raw score over a 100, while 71% of the whites made similar scores. The discriminatory impact of the AGCT as evidenced by the disparity in test performance was lent further weight as only 12% of the Department's officers were black in a city with a population 60% black. The City's argument centered on their positive affirmative action efforts and the high number of blacks hired since 1968; however the City said in their defense that the City's Civil Service Commission had been unable to obtain another examination which did not also have a discriminatory effect. The district court's finding that the plaintiffs had made an initial showing of discrimination noted most of the black applicants had been hired since 1968 because of the preference given veterans. The City was unable to demonstrate that the AGCT was valid further the district court rejected the City's contention that law enforcement applicants must be screened on the basis of such "vague traits (of) general intelligence, language skills and ability to reason" as measured by the AGCT. The court expressed doubt as to whether a job-related, nondiscriminatory written examination had ever been developed for police applicants.

The U. S. Court of Appeals for the Sixth Circuit on the question of the discriminatory impact of the AGCT held that the "plaintiff failed to demonstrate prima facie that the test is unlawfully discriminatory" and did not reach the question as to whether or not the AGCT was job-related. The court held that the disproportionate impact of intelligence tests in the hiring rather than in the test results themselves was the reason for invalidating general ability or intelligence exams. The appellate court reasoned that a showing that blacks did not fare as well as whites taking the AGCT, a "subtest" in the hiring process, was not sufficient to require the defendants to prove the AGCT's validity. "Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a 'subtest' of the 'subtest'."

Promotional criteria  
Educational requirements  
Seniority  
Title VII standards

Swint v. Pullman-Standard  
CA, 5th Circuit  
August 30, 1976

The Fifth Circuit Court of Appeals held that Title VII plaintiffs need not prove economic harm as a part of their prima facie case; accordingly a lower court ruling which had upheld a departmental seniority system was reversed. The decision stated that the statutory prohibitions of Title VII are "explicitly broader than economic harm." The lack of established selection criteria for supervisory personnel was also criticized; the appointment system was held to be totally subjective. The district court's earlier decision had found "that a greater number of blacks than whites were functionally illiterate and, therefore, were less likely candidates for promotion." The district court's ruling was also based on evidence that 30 blacks and 17 whites had turned down promotional offers since the mid-sixties and that there was a recent increase in the number of black supervisors. The appellate court reversed the district court's conclusion that discrimination was not proven. The educational requirement wasn't to be considered as a defense unless it was job-related; the district court was instructed to "balance the recent promotion statistics and black turn-downs against the overall statistics presented by the plaintiffs."

The court's comment prior to ruling on the appropriate relief is noteworthy:

If ever there was a time of facile Title VII litigation, it surely ended with the demise of intentional violations of equal employment opportunity. Today's parade of Title VII cases present more and more subtle manifestations of discrimination. Proof of invidious practices becomes more difficult as the ability to separate the real violation from the unfounded suspicion grows harder. This is especially so since many employers and unions, including Pullman-Standard and Steelworkers, have made substantial good faith efforts toward eliminating racial distinctions for the work force.

Classification  
Monetary awards  
Federal employment

United States v. Testan  
U. S. Supreme Court  
March 2, 1976

In a suit for reclassification of Federal civil service positions and back pay the Supreme Court has ruled in United States v. Testan that Federal trial attorneys underpaid due to misclassification are not entitled to sue in the U. S. Court of Claims for back pay. Several prior decisions were affected by the Supreme Court ruling; specifically disproved were those where the Court of Claims had awarded back pay (on the basis of racial discrimination) to Federal employees: Chambers v. United States, Allison v. United States, and Pettit v. United States.



Townsend v. Nassau County Medical Center  
USDC, New York  
December 8, 1975

Demotion of an incumbent black blood technologist because she lacked a college degree, an eligibility requirement imposed several years after her employment, was held to be unlawful discrimination as the degree requirement had an adverse impact on blacks without a showing of job-relatedness. The court briefly discussed criterion, content, and construct validation in relation to the degree requirements in the decision in Townsend v. Nassau County Medical Center. The opinion stated that criterion-related validation was the preferred method, and that under the EEOC Guidelines content and construct should be used only upon a showing that criterion-related validation was not feasible.

The court decision stated that a degree or its equivalent could guarantee that "new applicants possess the skills and learning needed for successful training... [however] under Title VII an inherently discriminatory safeguard cannot be applied woodenly to deny job status to a current employee who has achieved all applicable learning and skills through practical experience." The court declined to rule on the validity of the degree except in the special instance before it. The court was careful to emphasize the difference between current practitioners' rights (those individuals who had started their careers when degrees weren't required) and those of future applicants.

Firefighters  
Job-relatedness  
Physical requirements  
Race discrimination

Van Davis v. County of Los Angeles  
CA, 9th Circuit  
October 20, 1976

The Ninth Circuit determined that Los Angeles County unlawfully discriminated against Mexican-American applicants for firefighter by a 5'7" height requirement and by an "admittedly biased" verbal aptitude examination administered in 1969 in Van Davis v. County of Los Angeles. The appellate court, noting that eight circuit courts had found quota relief appropriate to eradicate the effects of past discrimination, directed the lower court to reconsider its ordered affirmative relief in light of the higher court's finding of a discriminatory, invalid height requirement. Previously, the district court had approved the height requirement, apparently on the basis of testimony by the 5'8" Fire Chief that individuals shorter than 5'7" would have difficulty performing some of the duties. Thus the quota relief, which was ordered by the district court to correct the discriminatory effect of the written test, did not properly consider the height factor. The appellate court ordered the reconsideration of the previously imposed quota presumably to effect one more favorable to Mexican-Americans.

The height requirement had excluded 45% of otherwise eligible Mexican-American applicants; the court noted that "no scientifically approved test has been utilized to determine whether the height requirement is in fact job related." The Fire Chief had testified that "a smaller man might have difficulty working with taller men in removing long ladders and other equipment, and might have a slower reaction time in climbing on and off equipment." The Chief also testified that in the past firefighters under 5'7" had been able to perform their duties without problems caused by their height.

At the time of trial there was a minority population of about 28% in Los Angeles County, but only 3% of the firefighters were black or Mexican-American. The dissent stated that the use of written tests as ranking devices was planned and a new selection procedure utilizing a whole list/random selection methodology was designed to eliminate cultural bias. An injunction was filed requiring that oral interviews be made on merit and the examination process was halted for two years, until it became necessary to fill the vacant positions.

Law enforcement  
Criterion-related validity  
Due process  
Written examinations  
Training  
Job-relatedness

Washington v. Davis  
U. S. Supreme Court  
June 7, 1976

The Supreme Court upheld as constitutional the District of Columbia Police Department's use of the CSC-developed Test 21 to select police officers. Washington v. Davis was the third case relating to testing to be heard by the Supreme Court and the first case on public employment testing. Even more importantly, it was the first case in which the employee's testing practices were approved by the high court. The Court's dicta, its statements or expressed opinions in addition to its actual ruling or findings of fact, have considerable import for personnel measurement practices and related litigation. A particularly noteworthy statement was footnote thirteen, "It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance." (This footnote and other comments or omissions, as with differential validity, have had implications for the Federal Executive Agency Guidelines for Employee Selection and lower court decisions.)

The petition of certiorari did not request reversal on grounds that the Court of Appeals had erroneously applied the legal standards applicable to Title VII cases, but only that there was a misapplication of those standards. However, the Supreme Court rule providing that the Justices "may notice a plain error not presented" was invoked and the case was decided on constitutional grounds, the Due Process Clause of the Fifth Amendment. (The case had not been amended in 1972 to qualify under Title VII as the plaintiffs did not want to go through the administrative hearing procedures necessary to qualify under Title VII.)

Justice White, writing for the Court, stated that the test is apparently neutral and rationally serves a purpose the government is constitutionally empowered to pursue. The Court held that a law is not unconstitutional solely because it has a racially disproportionate impact. The test thus met the due process standards; additionally Justice White commented that the test would satisfy statutory standards too. Ensuing case law has considered the case mainly to be decided on constitutional grounds, but Justice White's statement provides support otherwise.

The decision needs to be carefully read as it would be easy to misconstrue the Court's meaning; for example, the Court implies at some points that Test 21 was upheld without any documentation, however, the Court notes Test 21 "was supported by a validation study as well as by other evidence of record." In this regard, Futransky's empirical validity study differentiated this court case from Griggs and Albermarle which lacked a similarly adequate study. The Court's acceptance and regard for the Commission's testing procedures may also be observed in the decision. The majority Court opinion also found that a criterion-related validity study may properly use training academy success as a criterion.

Receiving considerable attention, plus the censure of three Justices, was the majority's "laundry list" of cases resting on the belief that proof of discriminatory racial purpose is not necessary to find an equal protection violation, a belief the Supreme Court did not share. The list included public employment cases such as Douglas v. Hampton, United States v. City of Chicago, Bridgeport Guardians, Chance, Castro, as well as public housing and zoning cases. Two cases before the Court were also listed, one on which the Court had already agreed to give a full hearing and one, Tyler v. Vickery, which still had a petition for certiorari pending.

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**CONTINUED**

**1 OF 2**

## APPENDIX A

### Topical Index

This index of major topics in the reviewed court cases is, of course, not exhaustive but merely provided to assist readers in locating those cases of most interest to them.

The index will be updated periodically to reflect psychological and judicial attention to various subjects.

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## APPENDIX B

### An Overview of the Court System

The United States system of courts, which Peter Rodino has called "the most comprehensive in the world", is comprised of two general types of judicial systems. The judicial systems are briefly described to aid the reader in understanding the various stages in litigation. Diagrams and tables are also provided to explain the basics of the complicated judicial system, e. g. Figure 1 depicts the framework of the United States legal system. A more comprehensive overview of the entire legal system is available in various law books. Cohen's *Legal research in a nutshell* (1971) provides a concise, informative description of the legal literature as well as its reliability, prominence, and relationship to the legal system.

Litigation is essentially aimed at resolving conflicts in interpretation and application of legislation.

One set or type of system is the State and local courts established under State governmental authority within each State. There is no standard pattern of court organization; the organization varies from State to State and even among counties within the same State. Basically, however, there are three levels of jurisdiction into which state court systems are organized: limited or special, general, and appellate. Within each level courts may hear a variety of cases or they may be authorized to hear only specialized types of cases. In 24 States intermediate appellate courts and "courts of last resort" have been established. The "court of last resort", which is usually the State Supreme Court, hears those cases involving issues concerning the State, plus appeals from the courts of original jurisdiction and intermediate appellate courts. (These "courts of last resort" in the Eastern states have frequently ruled on cases involving employment issues.) The term "courts of last resort" is a misnomer when the question involves the Federal constitution or laws, as the highest Court in the land, the United States Supreme Court, is the essential part of the other type of judicial system in the United States--the United States Court system.

The United States Court system is set up under the authority of the Constitution, which states that the judicial power of the U. S. is to be "vested in one Supreme Court, and such inferior courts as the Congress may ordain and establish". Although rarely done, Congress thus has the power to abolish or establish the United States Courts, with the exception of the Supreme Court.

These courts are not authorized to decide every case, but only those specified by the Constitution and the enacted laws of Congress. Indeed, the majority of legal matters are handled in the State courts. The United States courts, with a few exceptions handle cases:

- involving the State or where the State courts might be suspected of partiality, for example, in controversies between citizens of different States;
- where the U. S. Government itself or one of its officers is suing someone, or is being sued by another party;
- where State courts are inappropriate, for example, suits involving foreign nations, their representatives or citizens;
- involving the Constitution and Congressional laws.

Thus United States, or federal, courts frequently decide cases involving personnel management and measurement matters of import to psychologists.

Each State or territory has at least one United States District Court and many States have two or three such courts; the number of judges per district varies considerably more, from one to 27 per district. The vast majority of the cases handled by these district courts are civil. Every district court has procedures whereby poor defendants in criminal cases may obtain lawyers at no cost; lawyers are also available in some instances to those involved in civil cases. Some courts have established specific "offices" or funds to handle cases affecting the public interest; this is becoming more noticeable in the employment area. District courts also have various administrative and support personnel, a U. S. Marshal's office, U. S. attorney's office and court clerk's office.

The Federal court system also consists of a system of Judicial Councils and Conferences for self-government purposes. Recommendations for improvement of the judiciary system are submitted to Congress by the Judicial Conference of the United States. As noted earlier, among other things, the National Judicial Conference recently recommended a 25 per cent increase in Federal district judgeships above the present 400 authorized. Efforts to alleviate the congested court dockets may result in some reorganization of the court system, but the basic framework is anticipated to remain the same. In addition to the actual courts, there is an Administrative Office of the United States courts to perform the requisite administrative duties of the Judicial Branch, conduct studies and compile statistics for the Judicial Conference, various groups, and occasionally Congressional committees.

Preliminary requirements to court action depend primarily upon the Federal statute(s) under which one files, although the strictness of the particular court may also play a part. These procedural requirements will not be covered in this compendium. In addition to a lack of constancy and uniformity, it should be noted that the preliminary requirements to court action differ somewhat for local, State, and Federal employees who wish to claim discrimination in employment. The courts are not in agreement on all the prerequisites, but the U. S. Supreme Court has settled a few disputes. Essentially, in Chandler v. Roudebush the Supreme Court stated that Federal employees alleging race and sex discrimination are entitled to a complete new trial in district court, rather than only a review of the administrative hearing record; however, Brown v. General Services Administration confirmed that Federal employees are required to exhaust their administrative remedies prior to going to court.

## Special Courts

The U. S. Court of Claims has been called the "keeper of the nation's conscience" as it hears claims by an individual or corporation against the United States involving sums of money (in those cases where Congress has waived sovereign immunity). The Court of Claims has nation-wide jurisdiction, with its final judgments subject to review by the Supreme Court.

The U. S. Court of Customs and Patent Appeals hears appeals from the Customs Court, the Tariff Commission and the Patent Office. The Customs Court decides disputes concerning the classification and valuation of imported merchandise. The U. S. Tax Court hears cases regarding an individual or corporation's payment of federal income, gift or estate taxes. Strictly speaking, the Tax Court is not part of the Federal judicial system established under Article III of the Constitution, but is a special court established under Article I by Congress; nonetheless it is a court with decisions appealable to the United States courts of appeals with the possibility of further review by the Supreme Court.

## Circuit Courts of Appeals

Each circuit court of appeal, except the individual District of Columbia Circuit Court, includes three or more States. The map at Figure 2 indicates the specific boundaries of each court's jurisdiction. The amount of court case activity varies from circuit to circuit, and the number of judges per circuit varies from three to 15 accordingly. The States and number of authorized judgeships in each U. S. Court of Appeal are listed in Table 1. The majority of court cases involving personnel issues have arisen in the District of Columbia, Second, Fifth and Ninth Circuit Courts of Appeals; however significant cases have occurred in every circuit. The appellate courts also review a variety of district court cases, tax court decisions, and decisions of various Federal administrative agencies.

A bill is being considered by Congress to increase the number of federal judgeships and otherwise alleviate heavy caseloads. A total of 146 judgeships would be created under the current bill; 35 for the circuit courts and 111 for the district courts (three of these would be temporary). The bill also proposes that Texas and Louisiana (now in the Fifth Circuit Court of Appeals) be in a new Eleventh Circuit Court. The bill recommends the next U. S. Judicial Conference consider whether the Ninth Circuit should be divided or if the appointment of additional judges eased the overload sufficiently.

## District Courts

The United States courts where cases are initially decided are the district courts. The U. S. district courts with federal jurisdiction established under the Constitution are those in the 50 states, the District of Columbia, and the Commonwealth Government of Puerto Rico. Those district courts in the Canal Zone, Guam and the Virgin Islands may decide all types of cases and may even have some nonjudicial duties; these territorial courts are sometimes referred to as legislative courts since they were authorized by legislation rather than the Constitution.

## Administrative Complaint Process

The details of the administrative complaint process are too technical for the purpose of this overview. The following general review pertains to the equal employment opportunity administrative complaint process and not to all grievance procedures. (The Civil Service regulations, the Federal Personnel Manual and Supplements, as well as an expert attorney, should be consulted to ensure accuracy, currency, and relevancy in this area.) The Federal Employee Appeals Authority (FEAA) and the Appeals Review board (ARB) have jurisdiction over cases or complaints filed under the laws, Executive orders, rules and regulations administered by the Civil Service Commission. A grievance procedure has been established to resolve the complaint at the informal level. There are various types of appeals; these are described more completely in the recently issued Federal Employee Appeals Authority Appeals Procedures (U. S. Civil Service Commission, 1977). The major type of appeal is adverse action; appeals of performance ratings are increasing markedly, but the biggest increase has been with regard to equal employment opportunity. The Federal Personnel Manual and Civil Service Regulations are being revised. The personnel psychologist is most likely to need be aware of the following types of appeals procedures and CSC Regulations: Employment practices-Part 300; equal employment practices-Part 713; performance ratings-Part 430 and Part 771 for agency grievance systems.

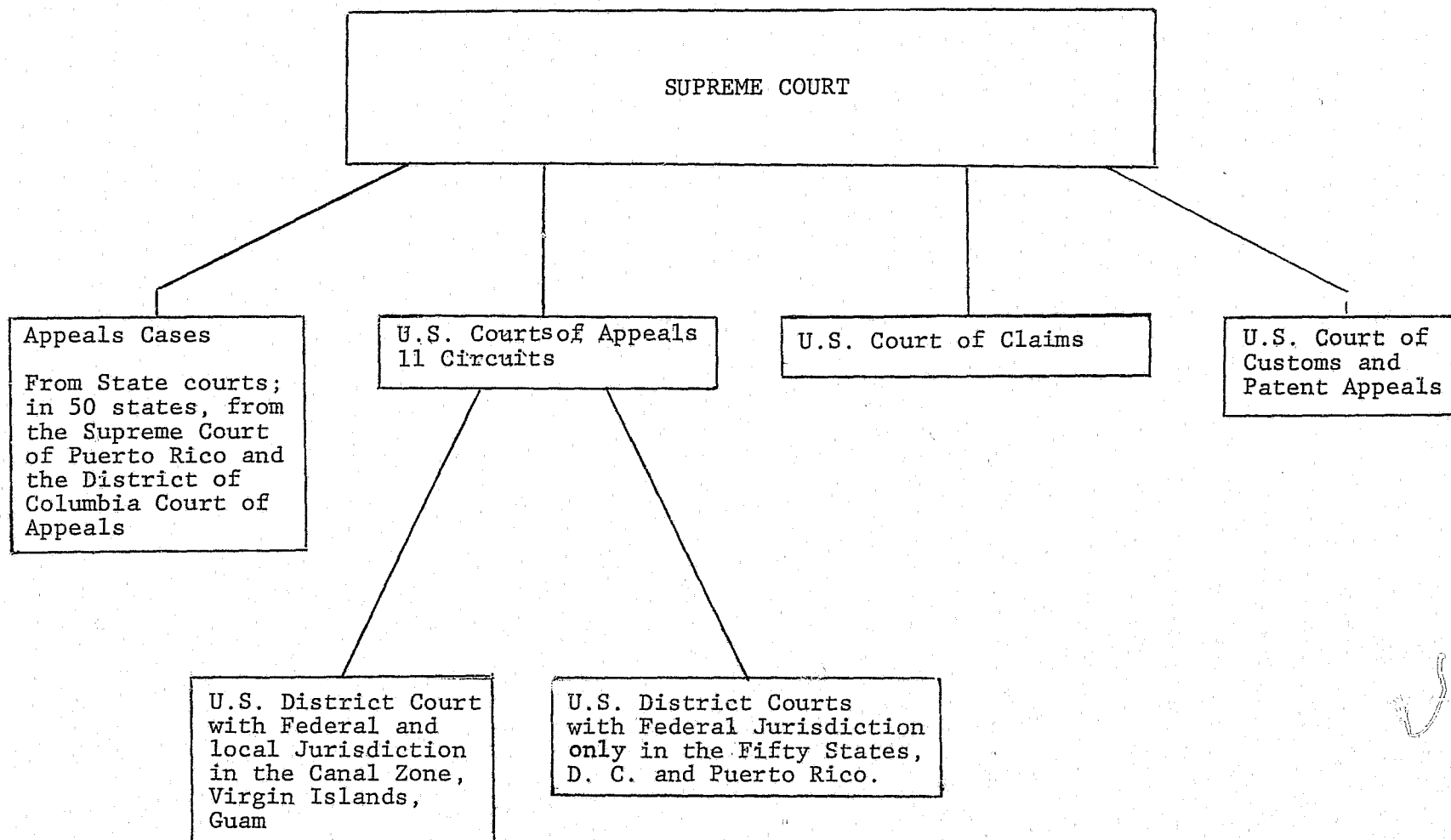
The rudiments of the equal employment opportunity administrative (EEO) complaint process are counseling, investigation, the hearing and final agency decision which is appealable to the CSC Appeals Review Board. The employee or applicant may then file a civil action in district court if the agency's decision is not satisfactory to her or him, or if final action by the agency has not been taken within 180 days from the time of filing. Also should a decision of the Appeals Review Board not be issued within 180 days after filing of the appeal, the individual may then file a civil action. Specific time limits normally are established for each of these steps. Throughout the EEO complaint process the individual may be represented by a lawyer or other individual of her or his choice.

The procedure on appeal to the Appeals and Review Board consists of a review of the file and other relevant written material. The Appeals Review Board reviews the complaint file and pertinent material; the Board may remand the matter to the agency for further investigation or rehearing or designate other individuals to conduct additional investigations. The Board does not conduct hearings. A written, final decision is issued by the Board. The complainant is also given notice of the right to file a civil action in court if dissatisfied with the decision.

The Civil Service Commission itself may reopen and reconsider any previous decision should new, relevant material be discovered; should evidence establish a misapplication of law or policy in the prior decision; should the earlier decision establish a precedent or a new unreviewed policy, or should it appear the prior decision was otherwise exceptional. The procedures slightly differ but a person or organization who has not been the subject of discrimination may also file a complaint with an agency alleging employment discrimination. The procedural prerequisites of these third party complaints will not be covered in the compendium as these comprise only a small per cent of the filed complaints.

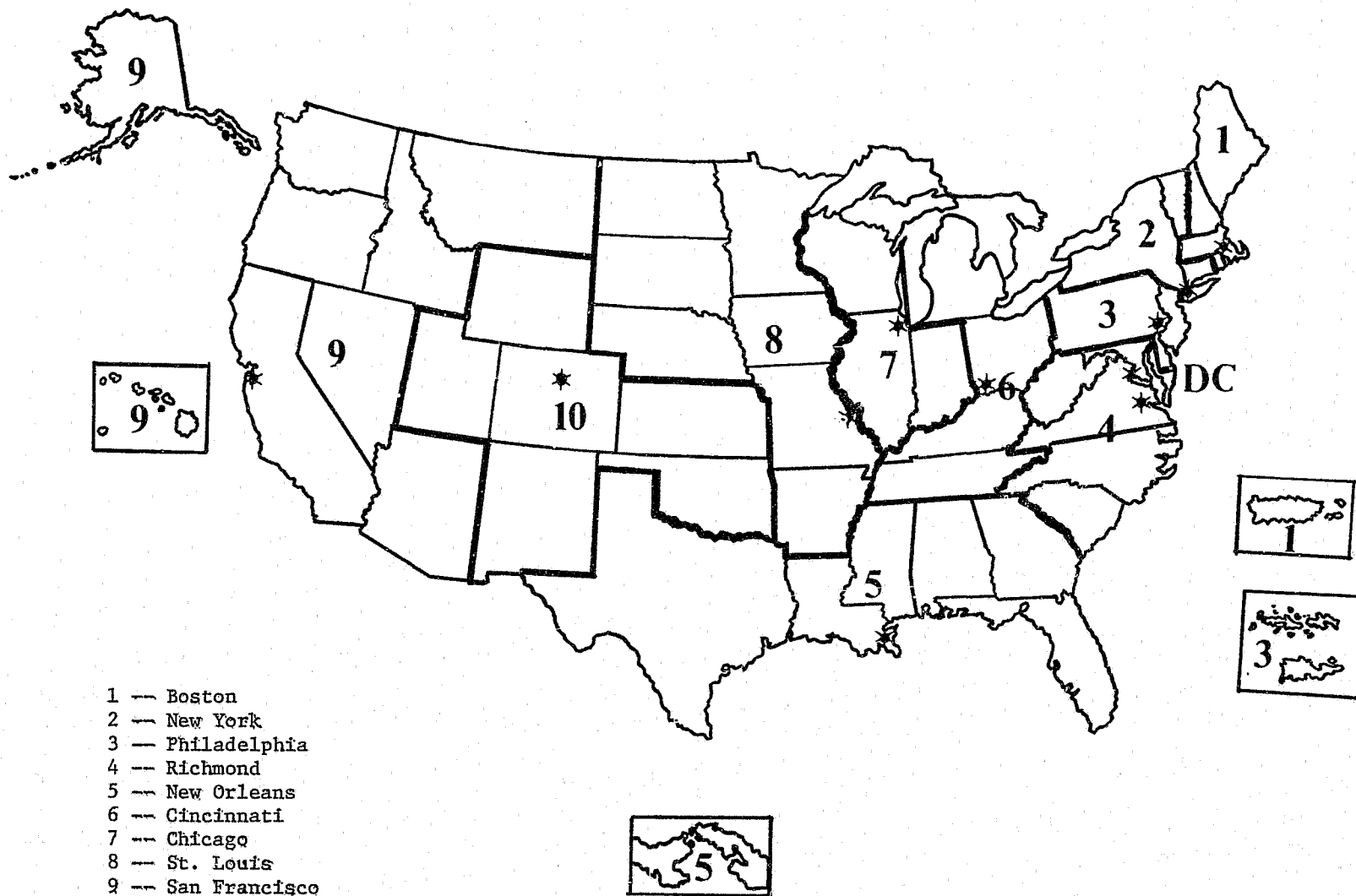
Table 1  
United States Courts of Appeals

<u>Court of Appeals</u>	<u>Jurisdiction</u>	<u>Number of Authorized Judgeships</u>
First Circuit	Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico	3
Second Circuit	Connecticut, New York, and Vermont	9
Third Circuit	Delaware, New Jersey, Pennsylvania, and Virgin Islands	9
Fourth Circuit	Maryland, North Carolina, South Carolina, Virginia, West Virginia	7
Fifth Circuit	Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, and Canal Zone	15
Sixth Circuit	Kentucky, Michigan, Ohio, and Tennessee	9
Seventh Circuit	Illinois, Indiana, and Wisconsin	8
Eighth Circuit	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota	8
Ninth Circuit	Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam	13
Tenth Circuit	Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming	7
District of Columbia	District of Columbia	9



The United States Courts System  
Figure 1





- 1 -- Boston
- 2 -- New York
- 3 -- Philadelphia
- 4 -- Richmond
- 5 -- New Orleans
- 6 -- Cincinnati
- 7 -- Chicago
- 8 -- St. Louis
- 9 -- San Francisco
- 10 -- Denver
- DC -- District of Columbia

Map of the Federal Judicial Circuits  
Figure 2

## APPENDIX C

### Legal Terminology\*

- Affidavit** - A written or printed declaration or statement of facts made voluntarily and sworn to before a judge or someone legally authorized to administer an oath. May refer also to depositions.
- Affiant** - (See deponent)
- Amicus curiae** - Latin, a friend of the court. An individual or organization not directly involved as a party in a suit, but who may introduce evidence to inform the court on a specific matter or to protect personal interests.
- Arguenda** - An observation made by a judge as an illustration.
- Brief** - An attorney's written documentation containing the points of law she or he relied upon; frequently refers to the written document containing the counsel's argument. (These are usually far from brief documents.)
- Certiorari** - Latin, to be made certain. A legal proceeding by which a court reviews the decision of a lower court. Frequently abbreviated as cert.
- De Facto** - In deed. An action or state of affairs which must be accepted for all practical purposes, but is illegal.
- De Jure** - Legitimate, lawful.
- Demur** - To take an exception to the sufficiency in point of law of a pending or alleged state of facts.
- Deponent** - A person who makes a written statement under oath. "Affiant" is a similar term used to refer to one making an affidavit. "Witness" is a more general, inclusive term.
- Deposition** - The written testimony of a witness given under oath prior to trial; generally used when it would be difficult for a witness to provide information at the trial itself.
- Dictum** - Generally used as a shortened version of obiter dictum. It is an observation or remark made by a judge in an opinion which is suggested by the subject of the case, but not necessarily a deliberate determination of the law.
- En banc** - French, in the bench. Usually refers to the presence, or an opinion, of the full court, rather than to that of an individual judge or tribunal who might be legally authorized to render decisions.

\*More precise definitions may be found in Black, H. C. Black's law dictionary. St. Paul: West, 1968. This supplement is provided as an aid to psychologists unfamiliar with legal terminology.

Enjoin - To require a person by a writ of injunction to perform or to desist performance of some act.

Ex rel - Procedural phrase generally meaning on the relation of, for the use of, or on behalf of; the term is used in court case citations.

In jure - In law, according to law.

In re - Another procedural phrase meaning in the affair, or in the matter of.

Inter alia - Latin, among other things. Old term frequently used to avoid the recitation of statutes or repetition.

Interlocutory - Provisional or temporary. An interlocutory decree is a preliminary one to settle certain matters prior to issuance of the final judgment.

Interrogatory - A formal or written set of questions which must be answered by law, frequently used in conjunction with the deposition procedure.

In toto - In the whole, completely.

Joinder - Joining or coupling together, concurrence. Uniting with another person or organization in a legal proceeding.

Laches - Failure to act at the proper time, particularly when the delay will prevent the parties from bringing a legal proceeding.

Mandamus - Latin, we command. A writ from a superior court which directs performance of a specified duty.

Per curiam - Latin, by the court. Used in reports to distinguish an opinion of the whole court as opposed to that written by one judge, may also refer to an opinion written by the chief justice.

Prima facie - Immediately plain or clear, at first appearance. Prima facie evidence is that which is sufficient to establish a fact unless rebutted.

Res judicata - A case that has been decided or adjudicated. (For example the 1968 case is res judicata.)

Stipulation - An agreement by opposing counsel, particularly a written agreement or contract, concerning business before the court: Such identification of matters not in dispute is often used as a time-saving process.

Sub nom. - Latin, short for sub nomine. Under the name of, under the title of.

Trial de novo - A new trial conducted as if no trial or administrative proceeding had been previously conducted. (See Chandler v. Johnson.)

Trial court - Frequently used to refer to the court in which the case originated; usually is synonymous with district court.



**END**