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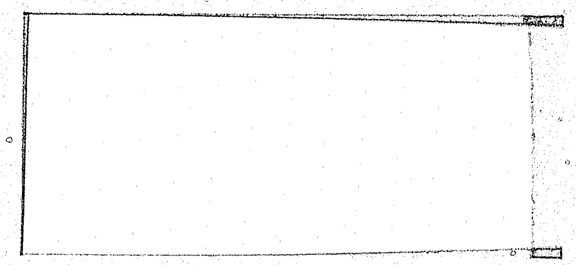

A REVIEW OF COURT DECISIONS AFFECTING AFFIRMATIVE ACTION IN CRIMINAL JUSTICE EMPLOYEMENT

Chris Dunning, Ph.D.

University of Wisconsin-Milwaukee

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Introduction

Judicial decisions resulting from suits brought under provisions of the US Constitution and relevant civil rights statutes promulgated in the last two decades have had a significant impact on the field of personnel administration in the public, as well as the private, sector. The 1972 amendments of Title VII of the Civil Rights Act of 1964 included actions of state and local governments. This has caused public employers to review, and at times defend, their employment practices with respect to the possibility of discrimination against women and minorities. The majority of these challenges were resolved through voluntary compliance pursuant to complaint or judicial activity at the lower court level. New to such review, employers were hard put to drastically revise the manner in which employee and job-related decisions were made, generally examining their procedures in light of a court challenge. This situation has led to patchwork attempts to rectify previous discriminatory actions. The volatile nature of the fair and equal employment issue plus the tendency of organizations to change slowly caused a flurry of judicial activity, as opposed to administrative remedy, in the middle 1970s.

The actions of courts in reviewing and deciding controversies over public employment practices were well-scrutinized by state and local governments as is evidenced by the numerous guides and manuals released during this period. But the diversity of bases of suit and the fact that most cases concluded in narrowly defined decisions caused much uncertainty in the earliest attempts to comply with the dictates of both statute and case law. Compounding the burgeoning activity of the courts was the concurrent promulgation of state statutes defining fair and equal employment practices.

Given the diversity and number of administrative and court challenges to employment practices, it would be impossible to construct an encompassing list

of all activity involving equal employment opportunities. Instead, the approach in this study is to utilize a cross section of civil rights court cases dealing with personnel decisions. This approach provides direction in determining definitive trends in public attitude and public agency compliance toward fair and equal employment. To understand how criminal justice employment may be affected by fair employment laws, an overview of the variety of judicial activity in which litigants claim their rights to be abridged in criminal justice employment will be compared with challenges in other areas of public employment.

The most numerous public employment discrimination suits filed by those seeking to be hired, those presently employed, and labor and fraternal organizations in the interest of their members are directed toward municipal employment in the police field. While these suits tend to be diverse with decisions specific to the individual case, they best exemplify the history of employment discrimination litigation as cases involving police employment span the relatively new history of court consideration of fair employment practices. The proliferation of activity engendered by citizens and their supporters seeking to be hired or promoted in law enforcement services as well as suits sponsored by police officers and police employee groups has reflected the development of employment discrimination law and served to set standards for fair employment practices in other areas of public and private employment.

The Development of Fair Employment Law

Laws affecting fair employment practices have been promulgated over the last 100 years through presidential executive orders, federal legislation, administrative rulings, and state law and practices. Federal employment practices regulation focused as early as 1883 on religious discrimination in

federal employment under the Pendleton Act (Civil Service Act 22 Stat. 403, 1833, 5 USC ch 12, 1958), US Civil Service Commission Rule VIII 1883. In 1940, a presidential rule forbade racial, as well as religious, discrimination in federal employment (Executive Order 8587, 5 Fed Reg 445, 1940). The principle of "equal rights for all" in classified (civil service) federal employment held that "there (shall) be no discrimination against any person, or with respect to the position held by any person, on account of race, creed, or color" (Ramspeck Act, 54 Stat 1211, 1940, Title 1, 5 USC Sec 631a, 1958). Title VII of the Civil Rights Act of 1964 forbade discrimination:

(1) by a respondent such as an employer, employment agency, or labor union,

(2) on the basis of race, color, religion, sex, national origin, or reprisal,

(3) on an issue of employment,

(4) that is causally connected to the basis.

In the Equal Employment Act of 1972, federal legislation specifically prohibited state and local government employers from discriminating on the basis of race, color, religion, sex, or national origin. Title VII of the Civil Rights Act of 1964 extended this coverage to prohibit employment discrimination by "governments, governmental agencies, (or) political subdivisions" [Equal Employment Opportunity Act of 1972, § 701(a)]. Public employers were enjoined from practices which resulted in discrimination in hiring, discharging, compensating employees, or in any other terms or conditions of employment. In addition, public employers were prohibited from segregating, limiting, or classifying employees in any way which discriminatorily deprived them of employment opportunities or other conditions

of employment such as training or job classification which resulted in unfavorable treatment of employees.

Most private employers fell under the prohibitions prescribed in Title VII of the Civil Rights Act of 1964, and under the enforcement arm of the federal government for administrative remedy, the Equal Employment Opportunity Commission (EEOC). However, the EEOC was not given authority to pursue settlement through voluntary compliance for public employees. Instead, after the investigation of a complaint of discrimination involving public employees, the EEOC is directed to seek action through offices of the Department of Justice. Under the Equal Employment Act of 1972 § 706, the EEOC performs the same investigative function for public employers (government, governmental agency, or political subdivision) as it does for private sector employers up to, but not including, the point of litigation. Subsection 706(f)(1) provided that ". . .if the Commission has been unable to secure from the respondent a conciliation acceptable to the Commission; the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent. . ."

In 1972, Congress added Section 717 to Title VII which, in effect, applied the antidiscrimination law of Title VII to the federal government. While state and local government employees were brought under Title VII by changing the definition of employer in § 701(b), federal employees were brought under Title VII by the creation of § 717. Prior to the 1972 amendments, federal employees had recourse against discrimination based on sex, race, color, religion, or national origin through the administrative procedures established under Executive Order 11478 (1969, President Richard Nixon) but did not have access to judicial review. Currently, sole litigation

authority is vested in the Department of Justice with respect to public employees other than the federal government. The present perception is that the EEOC does not have any litigative function in cases involving public employees.

Various federal legislative, administrative, and judicial restraints have been extended to state and local government employers. Included among these restraints are the 1974 amendments to the Fair Labor Standards Act (PL 93-259) which extended federal responsibilities within the Equal Pay Act of 1963, 29 USC 206(d) and the Age Discrimination in Employment Act of 1967, 29 USC 621 et seq ¶ 3235 to state and local government employers.

Generally, two different legal grounds have been used by plaintiffs seeking redress for grievances alleging discrimination in employment. Other than protections for equal employment opportunity that exist in many state laws and federal acts, the most commonly used legal grounds is the "Equal Protection Clause" of the 14th Amendment, US Constitution, in conjunction with Sec 1983 of the Civil Rights Act of 1871 (42 USCA Sec 1893). The second most commonly cited basis for suit is Title VII of the Civil Rights Act of 1964, referred to as the Equal Employment Opportunity Act (42 USCA Secs 20003 et seq). Federal legislative provisions which delineate discrimination in employment practice based on race, color, religion, sex, or national origin include as "unlawful employment practices:" failing or refusing to hire or discharge any individual; discriminating with respect to compensation, terms, conditions, or privileges of employment; and limiting, segregating, or classifying employees in a manner which would deprive employment opportunities and affect employee status.

The purposes or objectives of these provisions are to achieve equality of employment opportunities for all persons, to remove any past discriminatory barriers, and to cause employment to be based only upon applicable job qualifications. Provisions of the Civil Rights Act of 1964 relating to discriminatory employment practices are not exclusive in regulating discriminatory employment practices in the private sector (Hames v. City of Atlanta [1978]), as the court review process includes consideration of the appropriate court order (e.g., consent decree) or administrative procedure (e.g., EEOC hearing or state fair employment practices hearing) indicated by the complaints of the plaintiff.

The inability of the EEOC to effect a settlement or voluntary compliance in public employment cases as prescribed by § 706(f)(1) has resulted in primary resolution through the federal courts. State legislation on fair employment practices tends to be much less comprehensive than the federal mandate (although state laws of New York provided the initial model for Title VII) and may be described as generally weak or limited. The ambiguity, lack of comprehensiveness, and limitation of remedy typical of state law have resulted in federal court action as the most common means of seeking redress for alleged violations of employment rights. The Civil Rights Act of 1964 enlarged the role of the individual in federal court suits, rather than expanding remedies in administrative procedures. This resulted in the explosion of discrimination suits filed in the late 1960s and 70s involving public employment. As informal administrative efforts failed to settle complaints of discrimination against public employers, individuals and groups increasingly sought court intervention and definition. The court in Moore v. City of San Jose (1980) reaffirmed the legislative intent of the Equal

Employment Opportunity Act in interpreting the congressional purpose to supplement existing rights and remedies of public employees.

Identifying Court Action Involving Fair Employment Practices

Complaints involving employment discrimination and fair employment practices could potentially be addressed in state administrative processes, state court, federal EEOC procedure, or federal court. Given the possible options available to the complainant it is unfeasible here to identify all actions alleging discrimination in public employment. Much of the litigation that is resolved in county, state, circuit, or state district courts is not recorded in reporter services or digests. Unless the facts or the decision of the case warrant the attention of interested professionals, the case fails to receive mention in professional newsletters such as the AELE Legal Liability Reporter, Labor Law Journal, or municipal attorneys' magazines. Administrative procedures that are resolved at the state level and, to some extent, at the federal level, may be reported in the Bureau of National Affairs Fair Employment Practices Reporter service or the Commerce Clearinghouse. However, it is difficult, if not impossible to identify or obtain information on all suits filed at the state and lower federal court levels. No compendium exists that would allow examination of all police, public employment, or corrections' cases alleging violations of fair employment practices, and unfortunately, many complaints have been filed and have reached resolution at levels that are unavailable to the researcher through routine methods of examination.

In order to follow the history and developmental philosophy of public policy in the area of fair public employment practices at the state and federal levels, an attempt was made to identify reported court suits alleging

discrimination in the following employment areas. Of interest were suits filed by job-seekers, present employees, local interest groups, and labor and fraternal organizations against law enforcement at the local, county, and state levels. Correctional positions in institutional facilities as well as supervisory positions at county and state levels were also examined as being the focus of civil suits alleging employment discrimination. These occupations were compared against other categories of public employment with specific emphasis on other service-related public occupations.

Police

Court review of employment discrimination, as established by Griggs v. Duke Power Co (1971), signaled the trend toward court intervention in unfair employment practices and resulted in lawsuits in numerous occupational settings alleging discrimination in various areas of employment conditions. Perhaps the best weathervane of legislative, administrative, and judicial philosophy concerning rights to fair employment practices in public employment nas been in the area of public safety. Complaints alleging lack of compliance by governmental employers can be found most readily in one particular public occupation--police officer. Reviews of public employment practices have traditionally focused upon the police as the primary target of evaluation of employer practices and intent.

The practices involving police employment have been questioned for every standard of anti-discrimination stipulated in federal law. In addition to these federal rules, personnel practices regulating employment of police and law enforcement personnel are subject to the constitutional requirements of equal protection and due process. In Washington v. Davis (1976), the court held constitutional standards applied in reviewing these standards to be more rigorous than statutory standards.

Contentions asserting that positions of public safety should be held to a different standard than other public occupations have not withstood judicial scrutiny. The courts nave consistently barred discriminatory acts that could not be supported by administrative convenience or "business necessity" (Schaefer v. Tannian [1975]) or the peculiar need for requiring confidentiality of departmental activities as these activities were found to

have a chilling effect on the exercise of protected rights (US v. City of Milwaukee [1975]).

The number of suits directed toward public employment as a police officer has precipitated an intense review of police employment practices by the courts. It is unclear whether the large number of cases filed in this occupation is the result of more numerous acts of discrimination, the attractiveness of the occupation, or the fact that public safety personnel comprise a large snare of public personnel rolls. Complaints have been lodged by those seeking to have current practices and standards reviewed or their condition relieved in every category of alleged discrimination, including some peculiar to the police occupation.

In order to chronicle the history of affirmative action efforts in criminal justice agencies, it is first necessary to map the historical development of public policy concerning equal opportunity to attain public employment, to be considered for duties, assignments, and conditions of employment within the service, and have access to channels and requirements for promotion.

Selection Criteria

The largest concentration of court action in defining employment discrimination policies has been on the most visible of government personnel functions--the selection of new employees. Evidence of discrimination has been relatively easy to document and the available remedies have been within the purview of the court. It is in the selection of new employees that the organization's actions toward minority groups can generally be construed as a reflection of the overall policies and attitudes held toward those groups by the employer. The proliferation of discrimination suits aimed at initial

employment screening criteria has caused employers and the courts to focus upon compliance in this sector.

Initially, courts looked at the motives or intent behind the selection practice in question, attempting to determine whether there was evil intent in the employer's decision to not hire persons because of their race, color, religion, national origin, or sex. When an evil intent was determined, the employment practice was held to be discriminatory and in violation of the law. As evil motive or evil intent was almost impossible to prove, a legal defense evolved which declared "good intent or absence of discriminatory intent."

The court's definition of discrimination evolved later to the complaint of unjust treatment following allegations of denial of equal treatment. The courts did not find employers guilty of discrimination in employment when all job applicants (or employees) were treated equally in matters of hiring and other conditions of employment. As long as employment decisions were based on equal standards for minorities such as Blacks, Hispanics or women and their majority counterparts, no discrimination was found. Investigations of discrimination based on evil intent or denial of equal treatment principles did not take into account effects of the employer's past discriminatory practices; rather, they concentrated on the evaluation of the incident at hand. The requirements of litigation under this standard placed the burden of proof of discrimination solely upon the plaintiff.

In Griggs v. Duke Power Co (1971), the court produced a new standard of evaluating employment discrimination in addressing the concept of adverse impact. While the court agreed that the employer had no evil motives in its employment practices and that the qualification requirements in question had

been administered equally between races, it also noted that the consequences of these employment practices resulted in an adverse impact on Blacks. The employment (and promotional) prerequisite of possession of a high school diploma or passage of general intelligence tests rendered a "markedly disproportionate number of Negroes (at 429) ineligible." The court noted, however, that if an employment practice could be shown to be a "business necessity," it would not be prohibited even though it adversely impacted a protected group. The "business necessity" defense shifted the burden of proof away from the plaintiff (after establishing the adverse impact of the employment practices) to the employer to prove the job-relatedness of that practice. The EEOC guidelines established in light of Griggs v. Duke Power Co listed three methods in which the employer might acceptably validate tests for job-relatedness. It allowed for construct validity or a standard of personal characteristics essential for successful performance on the job such as moral character or psychological stability. Content validity as an allowable method addressed the question as to whether the test measured skills to be used on the job. A study which determined if those performing satisfactorily on a test performed equally as well on the job was allowed as criterion-related validity.

The validation guidelines for job-relatedness established by the EEOC were granted great deference in Albemarle Paper Co v. Moody (1975). The EEOC guidelines required employers to gear tests to job specifications and descriptions and further required validation and periodic checks for validity. The burden for authentication of all tests and standards fell upon the employer, thus disallowing the abrogation of responsibility through a reliance upon "canned" or "store bought" testing instruments.

Public agencies have a responsibility to establish reasonable nondiscriminatory standards under which it will hire people for employment (Fraternal Order of Police v. City of Dayton [1973] and Berks County Prison v. Com, Human Relations Comm [1978]). The courts have reasonably concluded that it is incumbent upon public employees to set, if not a higher standard, at least a higher degree of vigilance in monitoring discriminatory acts and procedures as a matter of public policy. Therefore governments have a greater obligation to set an example by validation of tests. Governments are expected to set an example for the private sector and are exhorted to provide direction in acceptable methods of validation of screening criteria and affirmative action programming. Where possible, the federal courts have usually deferred to the states in the determination of specific fair employment practices.

Most states have enacted various civil rights statutes for the protection of all races, majority and minority, from unfair employment practices. State fair employment statutes do not force employment on the basis of an applicant's membership in a particular minority group. Rather, every person must be given the opportunity to apply for any job not legally exempted by relevant statutes (Berni v. Leonard [1972], and Com, Human Relations Comm v. Beaver Falls City Council [1976]). However, after a proper application is filed, the employer can apply its standards to determine whether a person is qualified for the position sought (McIlvaine v. Pennsylvania State Police [1974]).

Recruiting

The extent of employer recruitment efforts in terms of geographic distribution, method, and impact has been of concern to the court. Given a disparate impact or imbalance in the employer's workforce, it has been found

that discriminatory methods have been used in recruiting efforts. Typically detrimental to the attraction of minorities for application are such practices as word-of-mouth announcements and referrals and active recruitment efforts in predominantly white or male-oriented locations.

Word-of-mouth recruiting by a predominantly white and/or male work force has been the subject of judicial review. Testimony has indicated that employees normally advise people of their own race and of their own sex (generally relatives, friends, and neighbors) of job opportunities at their work place (Parham v. Southwestern Bell Tel Co [1970]). The court in EEOC v. Detroit Edison Co (1975) stated that numerous findings of discrimination against minorities occur from word-of-mouth recruitment conducted by an all-white work force which in effect replicates those racial characteristics (Long v. Sapp [1974]). The combination of a majority white work force and a history of racial discrimination in employment was sufficient to cause the court to reject word-of-mouth recruitment in Neely v. City of Grenada (1977). If the word-of-mouth recruitment effort only notified former employees without taking new applications, the effort operated to the detriment of Black applicants (NAACP v. City of Corinth [1979]). However, challenges to existing minority recruitment efforts must show them to be inadequate and a failure before discrimination can be sustained. On these grounds, the plaintiff in US v. Commonwealth of Virginia (1978) failed to prove that the efforts of a minority trooper canvassing in his police cruiser on a one-to-one basis was an inadequate Black recruitment effort. In Bailey v. DeBard (1975), the court determined that word-of-mouth recruiting improperly excluded Blacks as potential recruits. The reliance upon the image of the department to attract unsolicited applicants into employment pools has been ruled discriminatory.

This is especially true in rural communities where the Black population is predominantly concentrated in urban areas or where this population is outside the communication network conveying positive perceptions of employment conditions and opportunities in the service. As with other employment screening criteria, lack of success in recruiting is not alone indicative of discriminatory practices.

Suits alleging discrimination in recruiting efforts aimed at minority populations have generally named governmental agencies as defendants as have numerous court suits addressing other employment practices. This is probably due to the placement of recruitment and selection responsibilities within a public personnel department. Court actions challenging recruitment procedures address the wider effort by government and do not tend to concentrate solely upon attempts to attract police applicants. However, challenges have been filed against citizenship and residency requirements which seem, on their face, to bar potential minority applicants from certain categories of employment.

The preference for a local resident was held in Snack v. Southworth (1975) to be valid as a job-related criterion where applicants who had served as policemen in the local townships were favored over a Black applicant as the plaintiff failed to show the preference rule had a racially biased impact. The State was also allowed to confine application for police employment to US citizens as the police function was found to bear a rational relationship to citizensnip (Foley v. Connelie [1978]).

Height and Weight Standards

An employment practice based on height or weight is not inherently discriminatory if it does not explicitly discriminate against a specific sex

or ethnic group and is therefore not specifically prohibited by Title VII. However, if the criterion is found to have a disproportionate impact on a minority group, it will be scrutinized to determine its constitutionality. If no formal standard for testing or measurement has been established or utilized, no alleged discriminatory procedure exists to challenge. (Police Conference of New York, Inc v. Municipal Training Council [1979])

Minimum height and weight requirements, employment selection criteria unique to the profession of law enforcement, have been found to have a disparate impact on Asians, women, and Spanish-surnamed applicants. In setting screening criteria for selection to the police department, the governmental entity must demonstrate that requirements which have a substantial disparate impact on minorities have a demonstrated job-relatedness (Castro v. Beecher [1972] and Officers for Justice v. Civil Service Comm of the City and County of San Francisco [1975]). The criterion alone does not become unconstitutional merely because it has a disproportionate impact (Washington v. Davis [1976]). In the absence of business necessity, the public employer must prove that the standard bears a rational relationship to, and is a valid predictor of, successful job performance (League of United Latin American Citizens v. City of Santa Ana [1976], Officers for Justice v. Civil Service Comm of City and County of San Francisco [1975], and Guardians Assn of New York City Police Dept, Inc v. Civil Service Comm of New York City [1977]). Business necessity must be proven beyond the basis of opinion as that of a police chief who testified that he believed taller officers met less physical intimidation (Horace v. City of Pontiac [1980] and Schick v. Bronstein [1978]). In Smith v. Troyan (1975), the court held that there are certain psychological advantages to size and that certain police functions

would be better accomplished by taller officers (Smith v. City of East Cleveland [1975]). The court in Arnold v. Ballard (1975) also upheld the use of height/weight criteria as being properly job-related and not racially biased. Despite the exclusion of certain ethnic groups and females, the Bureau of State Police in Kentucky Comm on Human Rights v. Commonwealth of Kentucky (1979) made a sufficient showing to the court that physical characteristics of size and appearance were necessary qualifications for the safe and efficient performance of the duties of a state trooper. Such a showing was not successfully demonstrated in Blake v. City of Los Angeles (1979) and Brace v. O'Neill (1979) where the defendant failed to show height was a predictor of successful job performance. Under the same requirement for substantiation of job-relatedness, minimum weight requirements were held to be discriminatory by the court in US v. Commonwealth of Virginia (1978). The contention that the exclusion of women from employment as state troopers was intended for their protection and the protection of the public was not sufficient in Mieth v. Dothard (1976) to justify minimum height and weight limitations which the court held had the effect of excluding women. Job performance standards must be bona fide occupational qualifications, measuring necessary and vital tasks in the occupation as well as what they purported to measure.

The Supreme Court in Dothard v. Rawlinson (1977) determined that a plaintiff need only show a significantly discriminatory pattern to shift the burden to the defendant to demonstrate the job relatedness of the aggrieved practice. The failure of the defendant to introduce evidence to rebut a discriminatory pattern caused the court to uphold a statistical prima facie case of discrimination. In that case, the defendant's argument did not support their contention that height and weight were related to strength. The

determination of bona fide occupational qualifications would preclude allegations of discrimination despite the adverse impact of exclusion of protected minority classes.

The elimination of a height requirement and the substitution of a possibly relevant task standard does not negate the department's responsibility to relate the screening criteria to a job-relevant task. In US v. State of New York (1979), the court ruled that the department's requirement that acceptable applicants be able to see over a patrol car while pointing a shotgun was little more than a disguised attempt to unlawfully discriminate against women and Spanish-surnamed applicants through a height requirement.

Testing

The majority of suits filed alleging discrimination in both the public and private sectors dealt with test construction, job relatedness, and validity. As early as 1974, the court required that employers utilize some type of objective job-related criteria for hiring police personnel with tests bearing a demonstrable relationship to successful job performance (NAACP v. Allen [1974]). In Washington v. Davis (1976), the court determined that correlating training program success with screening test scores sensibly measured and met the job-relatedness requirement. The finding in Washington v. Davis, in which the Washington, DC Police Department used a written test developed by the US Civil Service Commission for selection of police officers, was not contrary either to Griggs or Albemarle Paper Co, as successful completion of the training program as a method of validation met both the standards of necessity and job relatedness determined in Griggs and the standards of measurement determined in Albemarle.

The decision in Washington v. Davis set the stage for a plethora of suits alleging discrimination in testing procedure and measurement validity in law enforcement as well as other occupations in both public and private employment. As defined by the EEOC, employment tests included paper-and-pencil tests and performance measures used in the decision to employ independent of considerations of decision weighting, as well as all formal, scored, quantified, or standardized techniques used to assess suitability for employment to a specific function. Following the history of the development of equal employment legislation both at the state and federal levels, as well as the evolution of administrative guidelines, challenges to tests used to determine admissibility in police employment reflect prevailing public policy. Initial challenges as presented in Castro v. Beecher (1972) focused not on the content or construct of the written examination, but upon the impact of the examination statistically on Black applicants. The court held that the pass rate on the test (25 percent Blacks, 10 percent Spanish-surnamed, 65 percent others) showed a prima facie case of racial discrimination--but chose not to invalidate the accomplished procedure.

The development of public policy concerning affirmative action in employment beyond reliance on statistics to indicate adverse impact moved to an emphasis on the validity of the test and its relationship to the job being sought. This accounts for the volume of lawsuits filed on behalf of minorities seeking to be employed as police officers. Successful challenges attacked the premise of job relatedness of the test measure under consideration, the validation procedure used to determine knowledge or skill accomplishment, or the thoroughness of the data presented to support the employer's case.

To the courts, the crux of challenges to the discriminatory impact of screening tests centers upon the purpose of the test (content validity) rather than its effect in screening out a disproportionate number of minority applicants. The decision in Davis prompted controversy as to whether success in training was a proper criterion for determining the relationship of the test to the desired result--success in employment. Davis did not completely do away with the consideration of disparate impact as exemplified by Ensley Branch of the NAACP v. Seibels (1980). The court determined that the Davis rationale could not be extended to the general proposition that any test can be validated by showing a relationship to training without respect to the test's ability to predict job performance. Higher test scores could only be justified if there was evidence to show that those who achieved higher scores did better on the job than those who scored lower which was not supported by the data presented by the defendant in this case.

The burden rests with the employer to present data or evidence to support the validity of a test as a predictor of job performance. Past or present use of a particular test by another agency or government without challenge does not constitute silent acceptance of the instrument itself (US v. City of Chicago [1977]). The courts were not impressed with the level of conscientious effort given by employers to validate tests to job performance if the test continued to result in an adverse impact upon minority applicants. The courts acknowledged the diversity of knowledge and skill demanded by the police profession and recognized that easily measured job skill requirements might not adequately reflect the varied duties performed by the officer. In US v. State of New York (1979), the court noted that screening procedures for the profession of police officer could not be easily

broken down into testable skills. Rather than adjusting the test to better reflect outcomes similar to job demands, the court determined in Guardians Assn of New York City Police Dept v. Civil Service Comm of New York City (1977) that in the absence of research involving job analysis, tests purporting to measure job task could not be viewed as adequate predictors of job performance.

The EEOC and later the courts examined the environment in which tests (whether job-related and validated or not) were administered to applicants for employment to determine whether this environment was indicative of any informal policies of the agency or government to discriminate. Such factors as the physical conditions at the time of the examination, the culture bias of the instrument used, and the arbitrary demarcation of the pass/fail cutoff were cited as conditions under which discrimination might occur. In both Guardians Assn of New York City Police Dept, Inc v. Civil Service Comm of New York City (1977) and Ensley Branch of the NAACP v. Seibels (1980), the plaintiff successfully challenged a test in which the job relatedness was potentially valid but the designation of the cutoff passing score was arbitrary.

The type and frequency of the tests given for preemployment screening have also been at issue (Shield Club v. City of Cleveland [1974]). Scheduling of examinations was at issue in Schaefer v. Tannian (1975) where men were offered the opportunity to take employment application tests weekly but women were only offered a yearly opportunity to test for placement in a women's division or its successor. Explanations of administrative convenience were not found to be sufficient or acceptable justifications for what the court found to be sex discrimination.

The content of the tests used to screen potential applicants for the police position as well as rank officers for promotion must be valid as well as nondiscriminatory. If an employment practice excludes Blacks and it cannot be shown to be job-related, then its use is prohibited (White v. City of Suffolk [1978]). The court found in Shiela Club v. City of Cleveland (1975) that lack of discriminatory intent did not offset the fact of discriminatory impact on Blacks and Hispanics. If few minority applicants achieve passing scores, then the test must be validated. The absence of a substantial relationship between job performance measures and test scores negated the use of multiple choice tests where the items had no impermissible effect on the examination. A few defective individual questions do not negate the validity of an otherwise validated predictive test (Brown v. New Haven Civil Service Board [1979]). Nonvalidated tests were not held to be discriminatory per se or in violation of equal employment opportunities provisions of the law. However, when they resulted in discrimination, the employer was required to provide satisfactory justification (Peltier v. City of Fargo [1975]). Factors such as cultural bias where no active or intentional discrimination existed prompted a finding of de facto discrimination in Commonwealth of Penn v. Sebastian (1972). Apart from discriminatory effect, the predictive validity of successful job performance based on the completion of training was held to be insufficiently job-related in Commonwealth of Penn v. O'Neill (1972).

Selecting out specific job tasks is also subject to scrutiny where the content of the test would have a biased effect on nonwhite applicants. In Bridgeport Guardians, Inc v. Bridgeport Civil Service Comm (1973), the court concluded that use of mug shots of only white persons to test ability to observe facial characteristics for later identification was discriminatory

against nonwhite applicants, as each race can more readily recognize facial features of its own race. Special oral and written communication skills, however, were acceptable (Washington v. Davis [1976]) if the level set for passing was appropriate. In the same category, tests measuring reading, comprehension, memory, note taking, and the use of verbal skills were also held to bear a rational relationship to police tasks in Allen v. City of Mobile (1973). The task must be accurately measured by the test construct. In Guardians Assn of New York City Police Dept, Inc v. Civil Service Comm of New York City (1980) when a pen-and-paper test was used to measure communicative techniques and memory, the test was ruled invalid. A demonstration that the highest scores on the examination would provide an eligibility list of applicants who could best serve as police officers would be sufficient to meet the test. In Craig v. Los Angeles County (1980), the court upheld the validity of a written examination with a correlation coefficient of .60 in relation to academic performance at the police academy. The written examination was held to be non discriminatory against Mexican-American applicants notwithstanding its adverse impact as it was reasonable to expect some minimum job-related standard for employment selection.

The manner in which tests are conducted must also meet acceptable standards of conduct and evaluation. For example, in Shiela Club v. City of Cleveland, the court ordered that use of polygraph examinations to screen applicants must conform to nationally recognized standards, eliminating personnel assessments and/or recommendations by the polygraph operator.

Background Screening

Absent established standards, applicants for the position of police officer cannot be rejected on the basis of ambiguous criteria or arbitrary standards for qualifications of bad character, immoral conduct, and dissolute habits based on information obtained during a background investigation where the standards had a disproportionate impact on Black applicants (US v. City of Chicago [1977] and Baker v. City of St Petersburg [1968]). Subjective hiring procedures have been closely scrutinized by the courts (Woody v. City of West Miami [1979]). Inquiries into education, employment, financial condition, arrests, military service, driving history, and arrest records of members of the applicant's family resulted in a finding of unlawful racial discrimination against Black candidates in US v. City of Chicago (1977). Disproportionate impact on Black applicants was not found in US v. Commonwealth of Virginia (1978), where applicants for the position of state trooper were disqualified on the basis of credit rating, cohabitation practices, venereal disease, prior arrests, convictions, tickets, previous jobs, or illegitimacy. Bankruptcy as a bar to employment was found to hold no racial bias when the standard was applied uniformly to all races (Marshall v. District of Columbia [1975]) and where no bankrupt applicants were accepted.

A hiring policy which excludes Blacks from employment as police officers because they had arrest records was found to be inherently discriminatory in City of Cairo v. Fair Employment Practices Comm (1974) regardless of lack of motive or intent. However, in US v. City of Chicago (1976), the court upheld the city defendant where background investigations were based upon major criminal convictions or proof of criminal conduct. With failure rates of 41 percent for Blacks and Spanish surnamed and 53 percent for white males, no

disproportionate impact was found in this case by the court. Exclusion from employment as a police officer due to felony conviction, being fired for shoplifting, abandoning a position, and pattern of heroin use was not found to be based upon racial considerations in Drayton v. City of St Petersburg (1979). The court suggested in Arnold v. Ballard (1975) that written criteria be developed, defining specific areas of the applicant's background to be evaluated and criteria for exclusion from employment consideration.

Governmental code regulations prohibiting ex-felons from employment as peace officers were found not to discriminate in Hetherington v. Calif State Personnel Board (1978), as these did not violate state equal opportunity laws in non job-related criteria. The courts have gone further to prohibit preemployment inquiries by police employers which specifically discriminate against one of the protected categories that are set forth in statutes prohibiting discrimination in employment (Fahn v. Cowlitz County [1980]). The Equal Employment Opportunity Commission (Decision No. 76-135, Sept. 7, 1976) held that there was reasonable cause to believe that a police department discriminated against a female police patrol applicant on the basis of her sex where a male could not suffer exclusion. The applicant in question had three children, was a new city resident, was formerly a police detective, and was married to a salesman. In another case, sex bias was ruled where the female applicant was an unwed mother, was divorced from a drug addict, and had been a paid informer.

Education

The traditionally accepted minimum standard for educational achievement prior to application as a police officer has been graduation from high school or the equivalent (such as a certificate of equivalency or honorable discharge

from a minimum of 3 years military service). This standard was supported with a recommendation of higher educational attainment by the President's Commission on Law Enforcement and Criminal Justice. Despite the statistical disparity between Blacks and Spanish-surnamed persons and white males in achieving the minimum education standards, the court in Castro v. Beecher (1972) found a compelling state interest in professionalizing the police department by setting such a standard. Disparate negative impact was not enough to sustain a finding of discrimination in League of United Latin American Citizens v. City of Santa Ana (1976) where Mexican-Americans disproportionately failed to meet a high school education requirement. The court in Morrow v. Dillard (1976) also held a high school education or its equivalent to bear a demonstrable and significant relationship to the successful performance of the duties of state trooper. In Aquilera v. Cook County Police Merit Board (1979), the use of a high school criterion was considered an unacceptable rebuttal of national origin discrimination, where no evidence of job relatedness or a validation study was introduced. Where its relationship to job performance can be shown, a more stringent standard is allowed. In Jackson v. Curators of University of Missouri (1978), the court upheld a 2-year college education requirement for university security guards as a showing of disproportionate impact was not substantiated. The court contended in US v. City of Buffalo (1978) that the relationship of a high school or equivalency requirement to job performance had been validated by meaningful study. [The court noted in Morrow that affirmative racial hiring was unaffected by the Bakke decision. In order to rebut a claim of reverse discrimination, the defendant (the University of California Regents) would have had to prove that even without a special admissions program the

plaintiff, Bakke, would not have been admitted. (University of California Regents v. Bakke [1978]). Given that, the Supreme Court held that the program allowing special admission of a specified number of students from certain minority groups was unconstitutional and invalid. The court noted, however, that schools were entitled to take race into account as a factor in their admissions programs. An analysis of Title VII in United Steelworkers of America v. Weber (1979) stated that Congress prohibited the requirement of racially preferential integration efforts but would not forbid voluntary efforts.]

Psychological Interviews

The use of the California short-form test of mental maturity was disallowed in League of United Latin American Citizens v. City of Santa Ana (1976) as it was not shown to be sufficiently job related to permit its use in screening applicants for employment as police officers. The court noted that the test in question had a discriminatory impact on Mexican-Americans.

Physical Ability/Agility

Physical agility requirements have posed special problems for women in employment testing, especially when the selection testing procedures emphasize upper body strength. Considerations of endurance, coordination, dexterity, and speed have been accepted as measures of physical fitness in performing the police function. As long as tests measure the criterion referenced to the task to be performed by the officer without undue advantage to one sex or the other, courts have upheld their usage. When applied uniformly, physical fitness and the ability to meet the physical demands of the occupation are generally viewed as suitable screening tests for employment as a police officer. Generally, physical agility and strengtn tests that have a

differential impact on females are not invalid per se as long as they provide a proper means of demonstrating ability to perform tasks ordinarily required of police officers (Hardy v. Stumpf [1978] and Maine Human Rights Comm v. City of Auburn [1979]). However, when there is a substantial disparate impact upon women, the employer must demonstrate job-relatedness (Officers for Justice v. Civil Service Comm of the City and County of San Francisco [1975]). The court has further stated that even if the testing device was job-related, the employer must show that there are no acceptable alternative practices which could accomplish the same purpose with lesser adverse impact. In Officers for Justice v. Civil Service Comm of City and County of San Francisco, the San Francisco Police Department used a rated, rather than a pass/fail physical examination. In rejecting this test, the court determined that job-related skills to be tested should relate to routine patrol work, not just physical skills used in emergency situations. The court suggested that teamwork, intelligence, judgment, patience, and verbal skills were more important than physical skills in emergency situations. Since the test used almost totally excluded females, the exclusion required a very high showing of business necessity despite the substantial efforts of San Francisco to validate the testing procedure.

Job relatedness cannot be intuitively developed independent of objective validation if the physical ability test has a disparate impact on females as found in Harless v. Duck (1980). Job relatedness in itself did not sufficiently demonstrate business necessity in Blake v. City of Los Angeles (1979). Under Title VII, the department was required to demonstrate that physical abilities requirements were necessary for safe and efficient job performance. An example, as found in Castro v. Beecher (1972), was the

100-yard swim test which had a demonstrable relationship to general fitness and certain types of emergency rescue functions even though it disqualified members of some minority groups. The court has challenged the use of physical agility tests that were carelessly administered, not job-related, not designed to have the least adverse impact against women, and in some instances, not applied uniformly to men and women applicants (Officers for Justice v. Civil Service Comm of City and County of San Francisco [1975]). The court in Hardy v. Stumpf (1978) affirmed that a female applicant who was unable to qualify under some less stringent standard subsequently ruled discriminatory could not be required to pass a more stringent test.

Discrimination Based on Sex and/or Race

Once employed or eligible for employment in the police profession, plaintiffs have alleged that the city or police department had acted to prevent their taking a position on the force. In Collins v. City of Los Angeles (1978), the court investigated the possibility of discrimination in the failure decisions of the certifying police academy. The court found no convincing evidence that the police training academy acted to prevent Blacks or females from graduating, effectively blocking them from employment as police officers. The academy sufficiently documented that its standards for successful completion of training could be expected to produce competent police officers.

Pattern and practice allegations of discrimination have been used in place of challenging specific selection criteria (Commonwealth of Penn v. Flaherty [1975]). Where such practices have been found to violate federal civil rights statutes and the 13th and 14th amendments to the Constitution, the courts have acted to impose minimum hiring quotas (Keeves v. Eaves [1976]). The police

department cannot claim that it is legally shielded from providing equal employment opportunity (Berni v. Leonard [1972]), as the courts recognize the protection of the civil rights of employees in the public sector. However, where layoffs were required to accommodate budgetary cutbacks, the court in Acha v. Beame (1978) held that sex discrimination did not exist when women hired last were laid off first, despite the adverse impact upon women.

The physical characteristics unique to females have been addressed by the court. In Roller v. City of San Mateo (1975), the court held that pregnancy was not an allowable criterion for discrimination. If the municipality routinely assigned temporarily disabled officers to "light duty" assignment (and conceivably allowed those temporarily disabled to proceed through the selection process if the test standards were met), then pregnant females must be allowed the same opportunity.

If the female does not perform the same tasks as the contested position description, then there is no basis for discrimination by sex. For example, the court held in Com, Human Relations Comm v. Beaver Falls City Council (1976) that parking meter attendants whose responsibilities included primarily ticketing automobiles parked overtime and occasionally looking for stolen automobiles or helping to transport female prisoners, were not police officers. Since the two positions of police officer and parking meter attendant were not substantially the same, hiring women to the latter position was not in itself discriminatory. An analysis of work effort, skill, and responsibility would have to be addressed before different assignments could be compensated at different scales of pay (Howard v. Ward County [1976]).

The court in Manley v. Mobile County, Ala (1977) found that a sheriff's refusal to hire qualified female applicants was not a bona fide occupational

qualification. The court viewed this refusal as a personal preference defeating the purpose of Title VII of the Civil Rights Act of 1964. The sheriff's practice of ignoring female applicants for positions other than clerical was ruled discriminatory, despite possible job-related considerations of safety due to prisoner contact. Absolute bars to employment based upon policy and past practice are not sufficient without a showing that male gender is a occupational qualification necessary for the position of patrol officer (US v. City of Buffalo [1978], further relief directed in 1979).

The number of occupations or assignments in which a sex-based exception would meet legal tests are few. If the employer can prove that gender exclusion is an authentic and genuine business necessity, the courts will consider it as an occupational qualification. Co-worker preference, cost of installing separate facilities such as locker rooms, and presentations of stereotypic scenarios prophesizing future failure are not sufficient defenses of gender exclusion.

Race as a bona fide occupational qualification has been argued in the courts. Proponents argue that increasing the number of Blacks enforcing, and standing as symbols of, the law and of order maintenance in the community, will improve the efficiency and effectiveness of law enforcement. They suggest that the police department, being the most visible arm of government, should act as a model to assure the Black community that the government will no longer act in a discriminatory manner. However, in Hadnott v. City of Prattville, Ala (1970), the court ruled that there was no evidence that inferior police or fire protection was affected by racial composition of personnel. Race-conscious hiring programs have been challenged by white applicants and those seeking promotion in the service as being a form of

reverse discrimination. The equal protection clause of the 14th Amendment prohibits a state or its governmental subdivisions from distributing government jobs on the basis of race. In addition, Title VII of the Civil Rights Act of 1964 expressly and absolutely prohibits employment decisions based on race.

Race-conscious hiring setting a minimum quota of Blacks to be hired as police officers has been upheld by the courts in numerous cases (Guardians Assn of New York City Police Dept, Inc v. Civil Service Comm of New York City [1980], NAACP v. Allen [1974], Doores v. McNamara [1979], and Commonwealth of Penn v. Sebastian [1973]). The courts have upheld the use of quota programs to eliminate effects of past biases (US v. City of Miami [1980] and US v. City of Alexandria [1980]). The court in Detroit Police Officers' Assn v. Young (1979) stated that a preferential hiring plan which seeks to alleviate an imbalance caused by traditional practices of job discrimination is a reasonable voluntary response.

The courts have been more likely to approve quota systems which are temporary and which do not require the hiring of unqualified applicants. Quotas have not denied availability of police positions to white or male applicants. Usually, the court, through its order or a signed consent decree, has stipulated a number, or percentage, of positions to be filled by minority applicants. In Erie Human Relations Comm v. Tullio (1974), the court ordered the police department to hire Blacks for ten out of the next twenty job openings on the force. The ratio of one Black to two white new employees was found to be proper in Commonwealth of Penn v. O'Neill (1973). A racial hiring quota of two Black applicants for every three white applicants and a separate minimum hiring quota of female officers were determined by the court in US v.

City of Milwaukee (1975). In Shield Club v. City of Cleveland (1972), the court prescribed a hiring quota based on considerations of past discrimination, setting the percentage of minority candidates to be hired as the percentage that would have qualified had the employment examination not been biased. Some courts have opted to define a hiring goal in terms of a loose quota, generally reflecting minority representation in the community. The limits on the permanence of a quota system were addressed in NAACP v. Civil Service Comm of the City and County of San Francisco (1973) in which the court directed that three qualified minority applicants be hired for every two nonminority employees until the total number of minority police officers equaled 30 percent of the department's force. Challenges to reverse discrimination on the basis of unconstitutionality were upheld by the court in Liege v. Town of Montclair (1976) which found that a hiring quota which required employing one qualified Black applicant for each qualified white applicant was discriminatory against other qualified white and nonwhite applicants.

Assertions of diminished competence due to lowered standards were made in Oburn v. Shapp (1975) but such a showing was not supported. To offset possible perceptions of lowered, hence inferior, criteria for employment of minority applicants, some courts directed the establishment of pools of eligible minority employees.

These priority pools allowed departments to meet court mandated affirmative action efforts while, in some cases, disregarding established eligibility rosters generated through invalid means (Castro v. Beecher [1972] and Ensley Branch of the NAACP v. Seibels [1980]). In some cases, the court has instituted hiring freezes on white applicants (Morrow v. Crisler [1974])

or on any new employees beyond those necessary to maintain the current strength of the department (Commonwealth of Penn v. O'Neill [1972]). Issues of public safety and interest caused the court to reject such a request for employment freezes in Washington v. Walker (1976) and Booth v. Prince Georges County, Maryland (1975).

Promotions

Subjective measures of testing and ranking are more likely to be found in procedures that select employees for promotion than in any other area of employment practice. Legitimate business necessity again supports the only justification for standards or procedures which operate to deny minorities and women promotional opportunities. The Supreme Court in Griggs v. Duke Power Co (1971) looked at three factors in determining that promotional standards and procedures in question were nondiscriminatory: (1) the relationship of promotional standards to job performance, (2) promotional standards' disparate impact on Blacks, and (3) the organization's longstanding practices of alleged discrimination. A history of whites-only promotion or disparate placement preventing nonwhite individuals' movement up the career ladder has been viewed by the court as indicative of discrimination. In addition to statistics, the court must also examine patterns, practices, and policies before reaching a finding of discrimination. Nonobjective standards have been suspect by the courts because of their capacity for masking bias. The court assumes that the decision to promote or upgrade an employee will be based upon the needs of the organization and the worker's qualifications, not on the worker's race, color, sex, religion, national origin, or age. Yet voluntary affirmative action programs that promote minority officers were found to be proper in Baker v. City of Detroit (1979). The court determined that where an equal number of

Blacks and white officers were promoted, white officers were not denied equal opportunity!

Failure to promote is not sufficient proof of bias. In Vanguard Justice Society, Inc v. Hughes (1979), the court upheld such standards as work experience and the amount and type of education attained by the employee as legitimate qualification standards. An added perspective to business necessity was found in US v. City of Chicago; Robinson v. Conlisk; Comacho v. Conlisk; Robinson v. Simon (1976), where a discriminatory effect resulted from promotional policies which did not have a valid connection with operational efficiency.

Allegations of discrimination in promotion through the police ranks have focused upon subjective ranking procedures such as written examinations and oral boards as well as upon seemingly arbitrary designations of seniority and time-in-grade requirements. The retroactive award of seniority to those affected employees who were denied employment because of illegal discrimination was affirmed in Franks v. Bowman Transportation Co, Inc (1976), where the court determined that the "make-whole" objectives of Title VII would support such relief. Relying on Franks v. Bowman, the court argued the same rationale of retroactive seniority in Teamsters v. US (1977). It remanded the case to the District Court to decide which employees were actual victims of discrimination and, to determine relief, directed the lower court to recreate the conditions and relationships which would have existed had there been no discrimination.

One common requirement for eligibility to take the sergeant's examination is a minimum of 5 years of service at the patrol officer rank (City of Schenectady v. State Div of Human Rights [1975]). That requirement was rejected in Afro American Patrolmen's League v. Duck (1974) where the 5-year

rule plus additional credit proportionate to longevity on the force amounted to racial imbalance. The statistics presented by the defendant showed racial imbalance and were not justified by business necessity or compelling governmental interests. The court upheld the 5-year rule as reasonable but held that the use of longevity credits was unjustifiable. A similar 4-year requirement was shown to be unnecessary in US v. San Diego County (1979). The court in Allen v. City of Mobile (1972), considering that Blacks had not been on the city's force long enough to earn seniority points, found the seniority system was discriminatory against Blacks on the basis of fair access. This rationale was supported in Acha v. Beame (1976) where the court ruled that considerations of fairness in seniority dictated that females who had lost employment seniority due to discrimination should receive credit from the time they would have been appointed instead of from the date of their appointment (in this case, for determination of layoff). A bona fide seniority system which perpetuated prior discrimination was not construed as continuing discrimination as long as no other employment practices were illegally discriminating (Guardians Assn of New York City Police Dept, Inc v. Civil Service Comm of New York City [1979]). However, even bona fide seniority criteria may be overlooked when there are sufficient compelling reasons to justify other considerations such as race to achieve the goal of diversity (St Louis Police Officers' Assn v. McNeal [1979]). Reduction of seniority requirements as a departmental remedy is also invalid if unsupported by evidence of job-relatedness. The court in Afro American Patrolmen's League v. Duck (1974) rejected attempts to rectify seniority considerations by reducing seniority requirements for promotion above sergeant from 5 to 2 years, and 1 year for sergeant. Yet, in McCosh v. City of Grand Forks (1980), the court

found that 1 year of patrol experience as a prerequisite for promotion to sergeant was necessary for safe and efficient job performance.

A requirement similar to seniority is the time-in-grade minimum for promotion eligibility. Minority employees are placed at a disadvantage in seniority systems such as that presented in Allen v. City of Mobile (1972) in which promotion depended on total years in grade rather than years of service in the department. The difference between seniority and time-in-grade was addressed in Shield Club v. City of Cleveland (1974) where considerations of disproportionate impact on race negated the practice of awarding ten seniority points for 4 years of service in spite of the possible job relevance of time-in-grade requirements.

Consideration of past work performance would seem to be a legitimate basis for promotion. However, the manner in which the employer conducts the performance appraisal and the extent of documentation of objective standards have been addressed by the court. Rating procedures used by police departments may be a possible vehicle for discrimination if the rating supervisor cannot justify the rating given to an officer (Allen v. City of Mobile [1972]). While the court did not find that regular monthly ratings were discriminatory, they held that special promotional service ratings for which no justification was required and in which ratings were given after written examination scores were known, could be imbued with subjective prejudices.

Subjectivity alone is not indicative of discrimination if disparate impact is not shown. In US v. City of Chicago; Robinson v. Conlisk; Comacho v. Conlisk; Robinson v. Simon (1976), the court found only a one-point difference in ratings between Black and white patrol officers. A demotion of

a female officer based on allegations of preferential treatment was found to be an obvious act of sex discrimination in Shortt v. Arlington County, Va (1978).

The written examination for promotion must meet the same standards of job-relatedness, criterion reference, and validity as those given for entry into the police department (Norwalk Guardian Assn v. Beres [1980]). When the validity of the test as a predictor of job performance has not been proven, then disparate impact may be considered by the court. The process of validation would require the analysis of individual questions on the promotional examination to determine if particular items resulted in racial differences in test scores (Commonwealth of Penn v. O'Neill [1979]). The municipality in US v. San Diego County (1979) failed to demonstrate a correlation between job function and the weight that function or task was given on the promotional examination. In this case, the test had an adverse impact on Blacks and Mexican-Americans. In Allen v. City of Mobile (1972), the job-relatedness of verbal skills, memory, language, reading, and comprenension as necessary accomplishments for the rank of sergeant was successfully presented. Also supported was a test designed to select candidates for promotion to the rank of detective, where the test construction attempted to address setting a standard above the average score of a national sampling of patrol officers. The decision in Bridgeport Guardians v. Briogeport Police Dept (1977) allowed the city to determine the minimum qualification as a score seven points above the national average.

The manner in which a written test for promotion is conducted must also meet criteria for fair access. The court allowed the administration of a makeup promotional examination to a male lieutenant despite allegations of

discrimination against females similarly situated, as allowance of the test was not based upon sex discrimination (Menshaw v. Police Dept, City of New York [1980]).

Corrections

Correctional agencies have not been the focus of employment discrimination suits to the same extent as other public safety and justice agencies even though they are equally subject to state and federal statutory restrictions and constitutional requirements. For police and fire positions, the most numerous type of suit has centered around selection criteria involving unvalidated hiring testing criteria. These have given greatest consideration to alleged race discrimination. However, such suits in the correctional area have generally centered around differing employment conditions involving male and female employees. As with law enforcement, the courts have approved voluntary quota and affirmative action programs designed to improve minority and female personnel statistics in corrections (Minnick v. California Dept of Corrections [1979]).

Wage Differential

The most common claims in corrections allege discrimination in pay scales. Onondaga County v. New York State Div of Human Rights (1974), the court held that matrons performing similar duties as jailers were entitled to be upgraded in pay to the grade step equal to that of their male counterparts. Coverage under the Equal Pay Act of 1963, 29 USC 206 (d) was extended to state and local government employers in that same year through amendment to the Fair Labor Standard Act, and has been used as the basis for the majority of suits of this type. While matrons may perform tasks in addition to those performed by male jailers, the fact that they perform the same duties (booking, showing, and supervising prisoners) would require that they receive comparable compensation.

In Janich v. Sheriff of Yellowstone County (1977), matrons performed more bookkeeping duties than male jailers because of a higher number of male prisoners, yet their common duties were the same. The court acknowledged the difference in time spent in direct prisoner contact, but did not find the male jailers' responsibilities so substantially different as to justify a higher salary. In US v. City of Milwaukee (1977), the court found that a male head jailer's added responsibilities were insubstantial and did not justify higher pay, especially when matrons were prevented from attaining that position. As with Janich, the court held that a greater volume of male rather than female prisoners was an irrelevant issue to an equal pay suit as a specified volume of work to be performed was not a pre-condition to jail employment. The court based its decision on tasks actually performed in employment, noting that the possession of a skill not necessary for adequate job performance could not be considered in determining equality of skills. Where different employment duties were required of male correctional officers such as field and patrol work, no sex discrimination resulted from differing pay scales (Ruffin v. Los Angeles County [1979]).

Job Assignment

A closer parallel to the history of court suits found in police and fire employment is discrimination in job assignment. In Strain v. Philpott (1971), the court held that assigning a public employee to a particular position was allowable based on the individual worker's qualifications to perform the job. Such an exception was allowed in City of Philadelphia v. Penn Human Relations Comm (1973) where city juvenile authority supervisors shared housing, monitored showers, and conducted body searches of wards of the same sex. The intimacy required by the job task was not considered an issue, however, in

Tracy v. Oklahoma Dept of Corrections (1974) where the exclusion of a female probation and parole officer from a male eligibility list for male clients was ruled unlawful sex discrimination. The privacy of male clients was not found to be abridged by female supervision.

Sex-designated institutional settings such as all-male prisons do not automatically require segregation of personnel by sex to ensure privacy. However, in Carey v. New York State Human Rights Appeal Board (1978), the court found that gender was a proper qualification for a position in a facility housing females. Women were upheld in alleging discrimination in applying for the position of cook in a male institution in State Div of Human Rights on Complaint of Cox v. New York State Dept of Correctional Services (1978). The court stated that women were allowed to assume the risk of possible job dangers such as sexual attack. In Reynolds v. Wise (1974), the court also held that barring a female from a prison correctional position that involved supervision of male inmates was unlawful sex discrimination. The prisoner's right to privacy was considered in relation to employment rights in Blake v. Los Angeles (1979) and Forts v. Ward (1980), but the court concluded that accommodations could be made to ensure privacy (such as a screen around toilets) without resorting to exclusion of the opposite sex from guard duty. The level of intimacy required in performing job duties which cannot be accomplished adequately without invasion of privacy, such as frisking prisoners, has been held to be an appropriate situation in which gender may be a bona fide occupational qualification (Sterling v. Cupp [1980]).

Segregation of females from male correctional institutions has been argued on grounds of personal safety in institutions where violence is common, inmates have personal contact with guards, and a substantial portion of the

inmates were sex offenders (Dothard v. Rawlinson [1977]). Compromising and hazardous situations (where females were exempted from certain job duties, in effect changing their job classification) were sufficient to rule male sex as a bona fide occupational qualification at a men's reformatory in Iowa Dept of Social Services v. Iowa Merit Employment Dept (1977). Yet, in Gunther v. Iowa State Men's Reformatory (1980), the court held that there was no evidence that women could not perform safely and efficiently as correction officers with proper training; moreover, women could be assigned to nonprivacy areas.

Application Standards

Discrimination in application, screening, and testing in corrections also seems to be predominately a sex-based, as opposed to racial, issue in corrections. Unlawful considerations of gender in Kennedy v. Godwin (1977) were reconsidered in Kennedy v. R. M. Landon (1979) where the court found insufficient evidence to conclude that an employment selection board allowed a female job applicant's gender to influence their rating for the position of assistant superintendent. As with police, suits attacking height/weight standards in corrections have been successful in showing disproportionate impact with failure to show job-relatedness of standard (Mieth v. Dothard [1976], Dothard v. Rawlinson [1977], and Blake v. Los Angeles [1979]). Written and oral examinations were not sex-biased in Bannerman v. Dept of Youth Authority (1977) as there was no significant difference in pass rate, hence disparate impact, between males and females. More women than men were successful in achieving passing scores on the written exam. Subjective scoring of interviews for employment selection must also conform to standards of job relatedness (Williams v. City and County of San Francisco [1979]).

Race as an issue involving discrimination was addressed in Kirkland v. New York State Dept of Correctional Services (1977) in which the Court imposed a limited quota allowing special consideration for officers who had been serving on provisional status. Race was not, however, a motivation for discrimination when a Black prison guard was terminated after being given the option to resign for failure to pass a polygraph test to determine whether he had taken money from an inmate. In Davis v. City of Houston (1979), a Black officer was given the same option as a white guard in an identical situation.

Public Employment

While the majority of public employment suits alleging discrimination in employment practices have centered on the police occupation, litigants have sought redress for racial and sexual discrimination in other public job classifications. Notably, in City of Los Angeles, Dept of Water and Power v. Manhart (1978), the court addressed employers' myths and habitual assumptions about a woman's inability to perform certain types of work. As in the private sector, the courts disallowed employment decisions predicated on stereotyped impressions independent of valid examinations of job requirements, the validity of screening, testing, or disparate impact. While finding it reasonable to take into account an individual's physical capabilities in determining ability to perform a certain kind of work (Mims v. Board of Education of City of Chicago [1975]), the court has also held that physical and written requirements must be proven to be job-related.

Fire Services

Many of the suits addressing discrimination in the police service are coupled to challenges to fire fighter selection. Of the various other public employment job categories, the position of fire fighter most closely parallels that of police officer. While court cases focusing on the fire service have not been as numerous as in law enforcement, the allegations and challenges to employment practices have been predominantly identical. One unique aspect of the fire service that has no parallel to law enforcement is the quartering requirement necessitated by scheduling of duty. The court has not accepted defenses of unavailability of facilities or costs of provision of sex-segregated locker and sleeping rooms as being sufficient to excuse the service from employing females. The court has required that public employers maintain control over and eliminate employment practices such as "supper clubs" which exclude Black fire fighters from membership (Firefighters Institute for Racial Equality v. City of St Louis [1977]).

Defendants have been more successful in supporting screening tests that measure physical agility skills, strength, and stamina. Strict adherence to traditional standards in public employment has historically confounded legal challenges to testing criteria. In addition, lack of knowledge of the unique requirements necessary to work in specific public employment classifications hinders the argument for minimum employment standards. For example, in Pina v. City of East Providence (1980), the court maintained that the skill of firefighting was one that the general population might possess.

An encompassing case that addresses many of the same concerns as found in the police service was Harper v. Mayor and City Council of Baltimore (1973), in which the court addressed a variety of alleged discriminatory employment

practices. The court in Harper determined that the city permitted collusion between the fire commissioners and the Civil Service Commission which resulted in the exclusion of Blacks from the fire service before 1953. The court found evidence of discrimination and segregation of Black fire department employees throughout the 1950s . As the result of past discriminatory practices, the court would not tolerate promotional criteria that tended to perpetuate those conditions. Time-in-grade requirements for promotion to officer positions in the city fire department had the effect of extending prior racial discrimination so that business necessity would have had to be demonstrated for its use to be sustained.

In Harper, the court also addressed issues of the validity of employment screening tests, noting that an empirical validation study consisting of the statistical analysis of the correlation between fire fighter test scores and scores at the end of 6 months' fire school was not sufficient. Non job-related criteria such as penmanship were rejected by the court as were efforts to increase the number of Blacks in the fire department through easy and superfluous tests which bore no connection to the fire fighter task.

Using a failure rate on pen-and-paper tests that resulted in a disproportionate impact was held to be indicative of discrimination in EEOC decision No. 74-25, Sept. 10, 1973, where the failure rate of Blacks was 42 percent as compared to 29 percent for white applicants for the position of fire fighter (Boston Chapter NAACP, Inc v. Beecher [1974]). When a written examination was properly demonstrated as job-related (Vulcan Society of New York City Fire Dept, Inc v. Civil Service Comm of City of New York [1974]), then a pretesting for predictive or concurrent validation was not required. The examination must meet persuasive standards for evaluating claims of

job-relatedness, such as being necessary for successful job performance (Arnold v. Ballard [1975] and US v. City of St Louis [1977]). The content of the written examination must be validated (Firefighters Institute for Racial Equality v. City of St Louis [1977] and Davis v. Los Angeles County [1977]). No applicant may be excluded from the position of fire fighter by an employment test that goes beyond the actual requirements of the job and adversely affects those applicants that do not possess the background (e.g., cultural bias) or education (e.g., vocabulary level) necessary to pass an overdemanding test. Moreover, it is up to the employer to demonstrate that the test and its subsequent failure rate are not discriminatory, and that the level of difficulty of the test bears a relationship to job-relatedness and is therefore necessary to indicate job performance. When such a determination can be made through the use of a written examination, then its use is appropriate (Western Addition Community Organization v. Alioto [1973]). The court does not require that different standards of attainment be met by minorities and white applicants (Western Addition Community Organization v. Alioto [1972]) or that the less qualified be given preference for employment as fire fighters due to their racial or sexual status. However, minorities cannot be held to a more stringent standard because of their race (Dawson v. Pastrick [1976]).

Plaintiffs may challenge individual test questions as being discriminatory against Blacks (Fowler v. Schwarzwalder [1972]). The validation process cannot be the result of a perfunctory analysis of the fire fighters job nor may it use as a base the scores of volunteer fire fighters with an arbitrary designation of a passing score (Assn Against Discrimination in Employment, Inc v. City of Bridgeport [1978]). However, abandonment of a

test is not an admission of discrimination in selecting fire fighters nor does it render moot the question of the validity of the test used in prior employment screening (Dozier v. Chupka [1975]).

Challenges to other employment screening standards appear less frequently for fire fighters than for law enforcement officers in reporter services. Ancillary hiring criteria which have been challenged include minimum education, background screening, and safety standards. In Dozier v. Chupka [1975] and League of United Latin American Citizens v. City of Santa Ana [1976] [joined with police]), the issue of minimum educational requirements such as a high school diploma or its equivalent was challenged. The subjective nature of background screening standards was addressed in Drayton v. City of St Petersburg (1979) where the court rejected the argument that recent marijuana usage was an acceptable barrier to employment as a fire fighter. In Carter v. Gallagher (1971), however, the court allowed officials to give fair consideration to felony and misdemeanor convictions in selecting fire service applications. Concern for the safety of fellow fire fighters and the public would suggest that a review of convictions that are numerous or aggrieved would be a legitimate consideration for employment.

Access to notice of job availability must be equal. As in the police service, the court in Assn Against Discrimination in Employment, Inc v. City of Bridgeport (1979) rejected word-of-mouth recruitment efforts, which possibly excluded Blacks from applying for the position.

Disparate impact cases for the fire service also reflect the police experience. Municipal fire departments are subjected to the same standard for determining bias and complainants may attempt to prove alleged bias (Commonwealth of Pennsylvania v. Rizzo [1979]). The employer may rebut

discriminatory inferences drawn from their practices by using evidence that they had no discriminatory purpose (Friend v. Leidinger [1978] and Friend v. City of Richmond [1978]). Bias may be demonstrated by showing statistical deviation between minority representation in the fire department and in the general population. Apparent racial discrimination was cited by the court in Commonwealth of Penn v. Glickman (1974) using data that represented a municipal population that was 20 percent Black and a fire department that was only 3-4 percent Black (also cited Boston Chapter NAACP, Inc v. Beecher [1974]).

Promotion

Considerations of discrimination in promotion practices differ slightly from those at the entrance level. As an example, where consideration of individual test questions on the fire fighter entrance exam was allowed in Fowler, the court in Friend v. Leidinger (1978) held that the entire selection procedure should be considered. Concern for job-relatedness and weighting by frequency and importance to job task for promotion were also considered in Firefighters Institute for Racial Equality v. City of St Louis, Mo (1979). In that case, the court found that the promotional test appropriately measured and weighed knowledge, skills, and abilities required to successfully perform on the job. A later challenge to a promotional examination used in St Louis (Firefighters Institute for Racial Equality v. City of St Louis, Mo [1980]) led the court to determine that neither the city's good intentions nor the amount expended in developing a valid test was a determination of content validity.

Conclusion

On the basis of this review of court cases and EEOC decisions, it is apparent that the majority of suits alleging discrimination in public employment practices involve issues of law enforcement employment. The most prevalent result of these suits is the issuance of a court order directing defendants, found to be illegally limiting employment and promotional opportunities to members of protected groups, to revise examinations of employment practices and, in some cases, engage in affirmative action recruiting. In many instances in which resolution occurs at the lower court level through mediation and consent agreement, the courts have specified the percentage or number of minority employees to be hired or promoted. Aside from eliminating or revising various tests, physical ability, screening, and educational requirements that adversely affect the selection of certain groups of applicants, the courts have in some instances enjoined public employers to meet quota designations.

The use of the courts to obtain clarification of employment regulations and law and relief from unequal employment practices can best be characterized by the legal history of affirmative action in law enforcement. The levels of activity in other areas of public employment have not been as numerous or diverse as those in policing. Law enforcement has experienced consistent judicial scrutiny due to the interest of those seeking to enter or be promoted into the profession, as well as public attention due to its unique position as a visible reflection of community mores and values. The extent to which professional and community-based interest groups have participated in the litigative process seems to exemplify the unique position of the police in our society. The definition of police employment and the practices and procedures

leading to that employment are of concern not only to potential police members but to the community-at-large which benefits from that service.

Other areas of public employment do not reflect as active or as consistent a pattern of court challenge as do the police. Corrections and fire employees, and even less frequently, other public employees, have not enjoyed the attention and commitment to action as have police employees, particularly in the areas of selection and promotion. Law enforcement employment may be recognized as reflecting current judicial philosophy on more diverse issues surrounding selection, promotion, and job practices, than any other occupation, public or private.

More than any other area of public or private employment, the law enforcement occupation most closely mirrors judicial activity alleging discrimination in the hiring and promotion of personnel. Rather than addressing unique situations and circumstances in the profession, court challenges to the conditions of employment in policing reflect the major issues found in most occupations. Law enforcement employment practices have frequently been challenged on issues of disparate or adverse impact, job-relatedness, business necessity, bona fide occupational qualification, validity, and non-discriminatory implementation of hiring and promotional practices. As most private employment complaints are heard administratively, direction from the courts is likely to be reflected in the public sector. The police occupation may be perceived as a weathervane for judicial interpretation of equal employment legislation.

The wax and wane of court challenges in policing closely follows interpretations of employment practices in all areas of employment. Activity at the federal court of appeals level followed the 1972 landmark decision in

Griggs v. Duke Power Co and did not dissipate over the decade that followed. Indeed, requests for judicial intervention in alleged discrimination were numerous after 1972 (see Figure 1) and led to a number of Supreme Court decisions involving law enforcement personnel practices in the mid-1970s. Judicial interpretation spawned increased activity in the latter part of the decade, a pattern not repeated in other areas of public employment (see Figure 2). Challenges to law enforcement selection, hiring, and promotion have apparently acted to define fair employment practices in other public occupations. While significantly represented in comparison to other public occupation employees, firefighters and correctional officers' employment practices are less frequently addressed. Despite the number and diversity of occupations in the public sector, they have not been well-represented. In all other areas of public employment, court challenges have been sporadic and have not appeared to be the consistent target of scrutiny as has been the case in law enforcement.

The brief history of affirmative action litigation in the law enforcement area despite its short time span has seen substantial changes in the judicial philosophy regarding these issues. It is noteworthy to indicate that the combination of the Griggs v. Duke Power Co case in 1971 and the 1972 amendments to the Civil Rights Act of 1964, particularly Title VII, has the effect of increasing the number of cases and making possible the testing of affirmative action issues with regard to law enforcement. Indeed, as indicated in the accompanying figures, these two actions in 1971 and 1972 may be seen as opening the gates for the initiation of such suits which then reached a peak in the period around 1977. It is also important to note the particular factors in the amendments to the Civil Rights Act, which as

indicated earlier, led to the use of the courts rather than the Equal Employment Opportunity Commission. This has had an effect of creating a record of these decisions which is publicly accessible and has allowed the development of a body of case law and a series of precedents which can guide employers in other areas.

Across this time span, the courts have moved in a fashion which increasingly places a burden of proof upon the public agency to demonstrate that its hiring and employment practices are consistent with affirmative action guidelines. This can be seen in the initial shift from the need to prove "intent" to discriminate, to a lesser standard of demonstrating "disparate or adverse impact." The courts however haved moved away from any position that a showing of disparate impact in and of itself is sufficient to prove discrimination. The concept of disparate impact has instead triggered a need for an affirmative showing on the part of the public employer of the relationship of the employment practice to the actual employment duties. Thus, the courts have required: the stringent validation of entry exams, the showing that other types of entry or promotional criteria are indeed "job related," and the showing that particular occupational qualifications (e.g., educational attainment) are indeed bona fide occupational qualifications.

In short then, the courts have engaged in the balancing of two competing positions with regard to alleged job discrimination. The first is the degree of adverse or disparate impact. The second is the degree of business necessity. Courts appear to have engaged in a balancing of these two, that is to say, they have required that a high degree of disparate impact be balanced off by a high degree of business necessity before they will permit the activity to continue. Correspondingly, the courts have apparently held a

somewhat lower standard for the showing of business necessity when the adverse or disparate impact is of a smaller nature. Although such an interpretation appears initially to be a rational balancing of competing public interests, it is likely to produce continuing litigation in the area of discrimination in employment practices. Since such a balancing act is by definition somewhat vague and unclear, from the perspective of the public employer, it is not certain what level of business necessity might be sufficient to warrant some amount of disparate or adverse impact upon some protected population. It is thus a reasonable prediction to believe that litigation in this area will continue in the foreseeable future.

A review of court decisions regarding employment practices in criminal justice as well as court-directed affirmative action efforts reveals a significant number of court cases focusing upon the law enforcement profession disproportionate to other categories of public and private employment. It is conceivable that the police profession might hold a unique attraction to minority members seeking employment which could account for the activity in this area. Such factors as rate of pay, educational standards, and occupational tasks might draw greater numbers of job seekers to policing. The proliferation of employment discrimination suits could also be the result of pervasive patterns of discrimination nationwide in the police service against Blacks, females, Asians, Mexican-Americans, and persons under a certain height. While the reason behind the large number of police court cases may be uncertain, it is certain that the desire for employment as a police officer has caused aggrieved parties to use the courts to seek relief. Individuals or groups may pursue court action based on the high level of judicial review of specific law enforcement employment practices and decisions from other

jurisdictions. Clearly, police cases parallel all facets of employment discrimination challenges and persist over the span of affirmative action history. They reflect and frequently set directions for litigation, resolution, and eradication of discrimination in employment. It is obvious that, for whatever reason the police occupation is selected as a target of suit, law enforcement as a public employment profession has contributed significantly in the writing of case law in fair employment practices.

The occupational grouping receiving challenges most similar to those in law enforcement are the fire services (Figure 3). While nowhere near as active, the majority of court activity occurred at the federal level after 1976. Since police services are the consistent object of judicial scrutiny, they may be seen as the example for interpretation of public personnel practices on issues of fair employment practices and discrimination. The consistency of challenges to law enforcement practices over the years as well as the relevance of the issues to which the court addressed itself closely reflects the judicial history of equal employment.

US Supreme Court Cases

Federal Circuit Court of Appeals Police

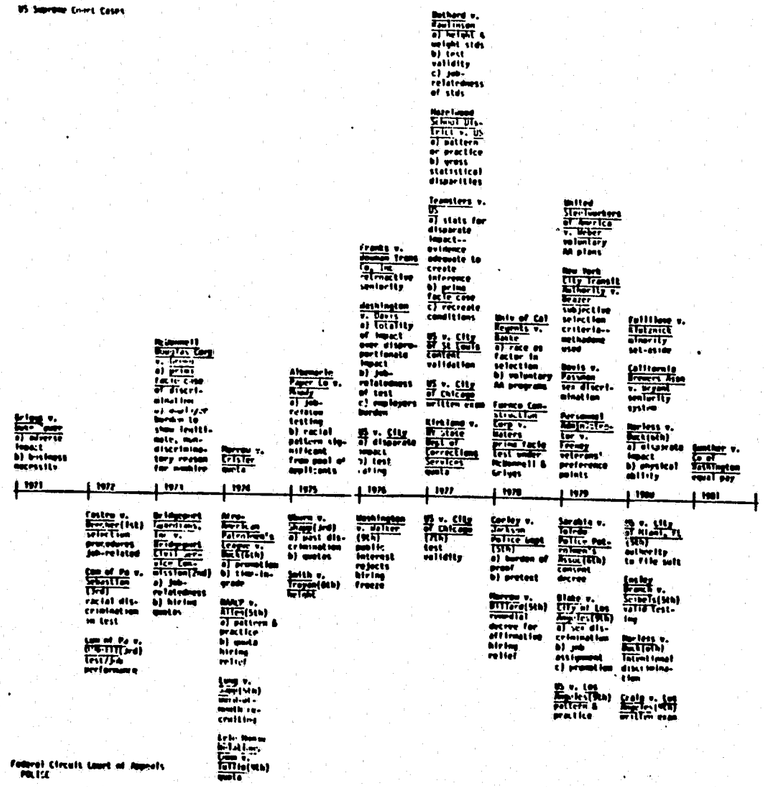
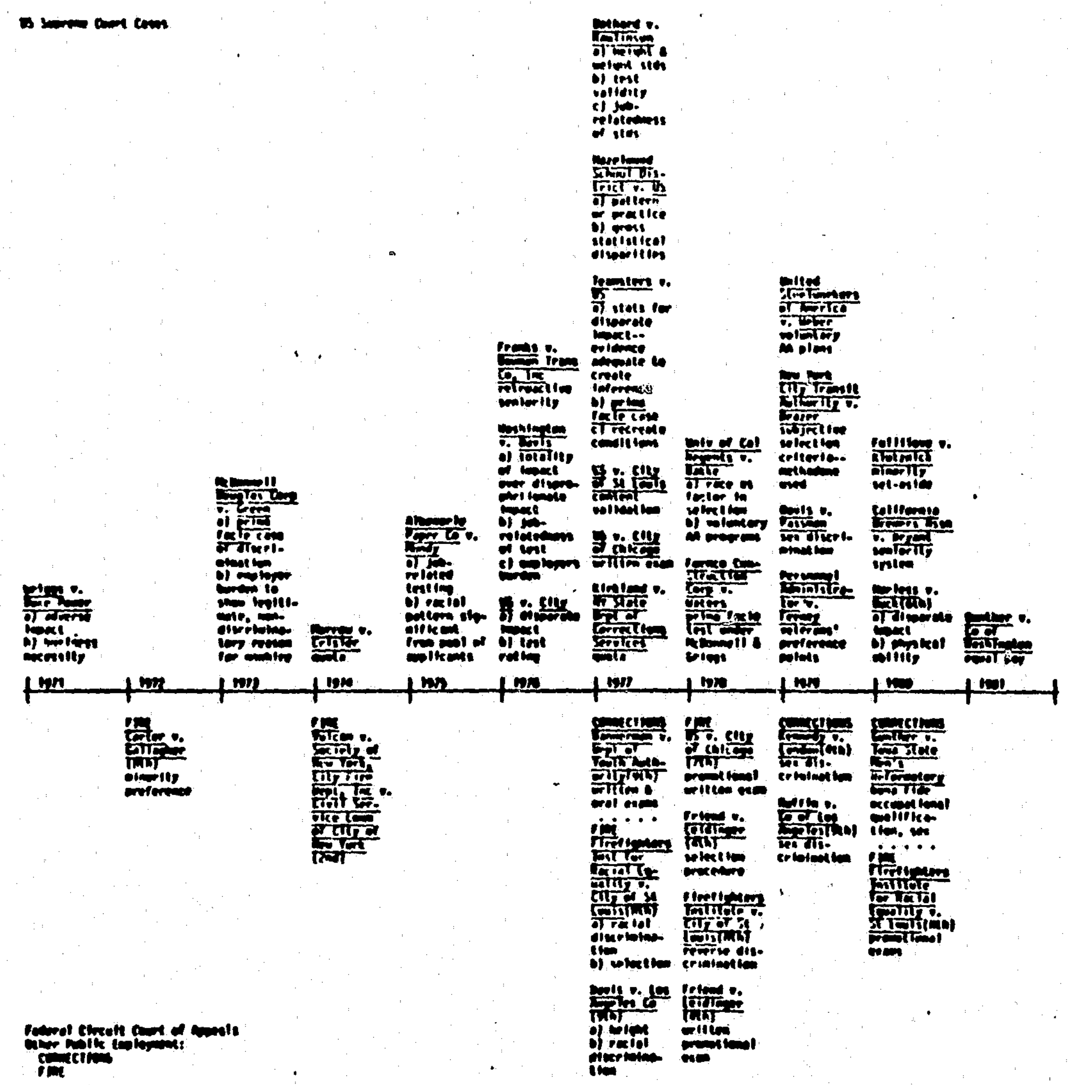


Figure 1

Figure 2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b) employer burden to show legitimate, nondiscriminatory reason for not hiring
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a) job-related testing
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Washington v. Davis
a) totality of impact over disproportionate impact
b) job-relatedness of test
c) employers burden
US v. City
a) disparate impact
b) test rating
Dothard v. Rawlinson
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New York City Transit Authority v. Beazer
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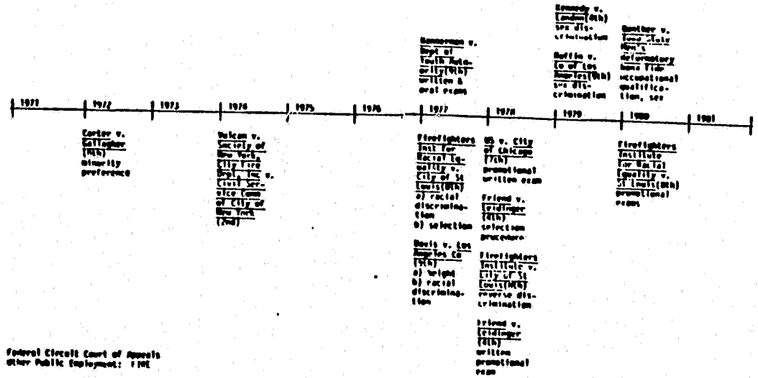
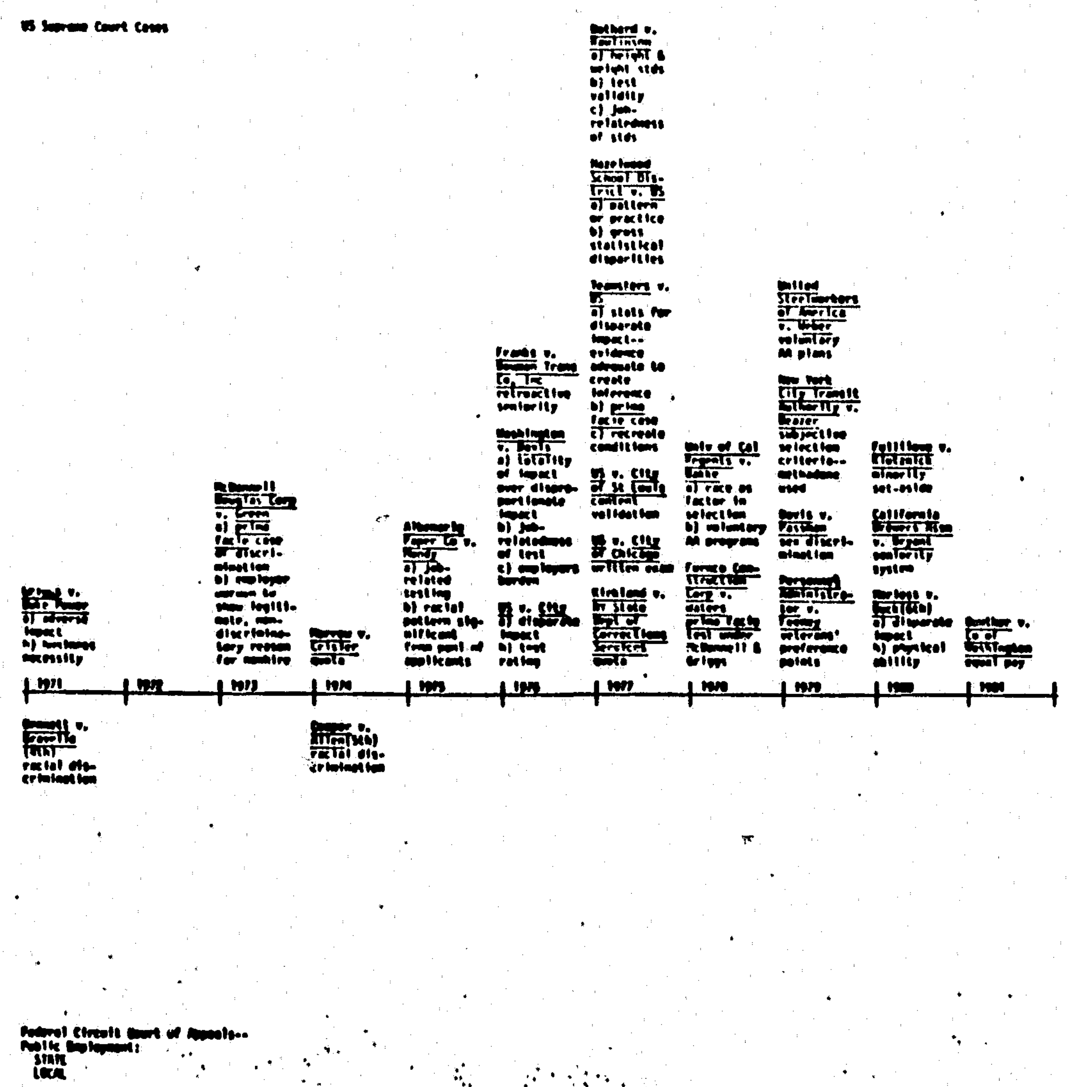
Federal Circuit Court of Appeals
Other Public Employment: CORRECTIONS

Figure 3



Federal Circuit Court of Appeals
Other Public Employment: FIRE

Figure 4



US Supreme Court Cases
Griggs v. Duke Power
a) adverse impact
b) business necessity
McDonnell Douglas Corp v. Green
a) prima facie case of discrimination
b) employer burden to show legitimate, non-discriminatory reason for nonhire
Morrow v. Crisler quota
Albemarle Paper Co v. Moody
a) job-related testing
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racial discrimination
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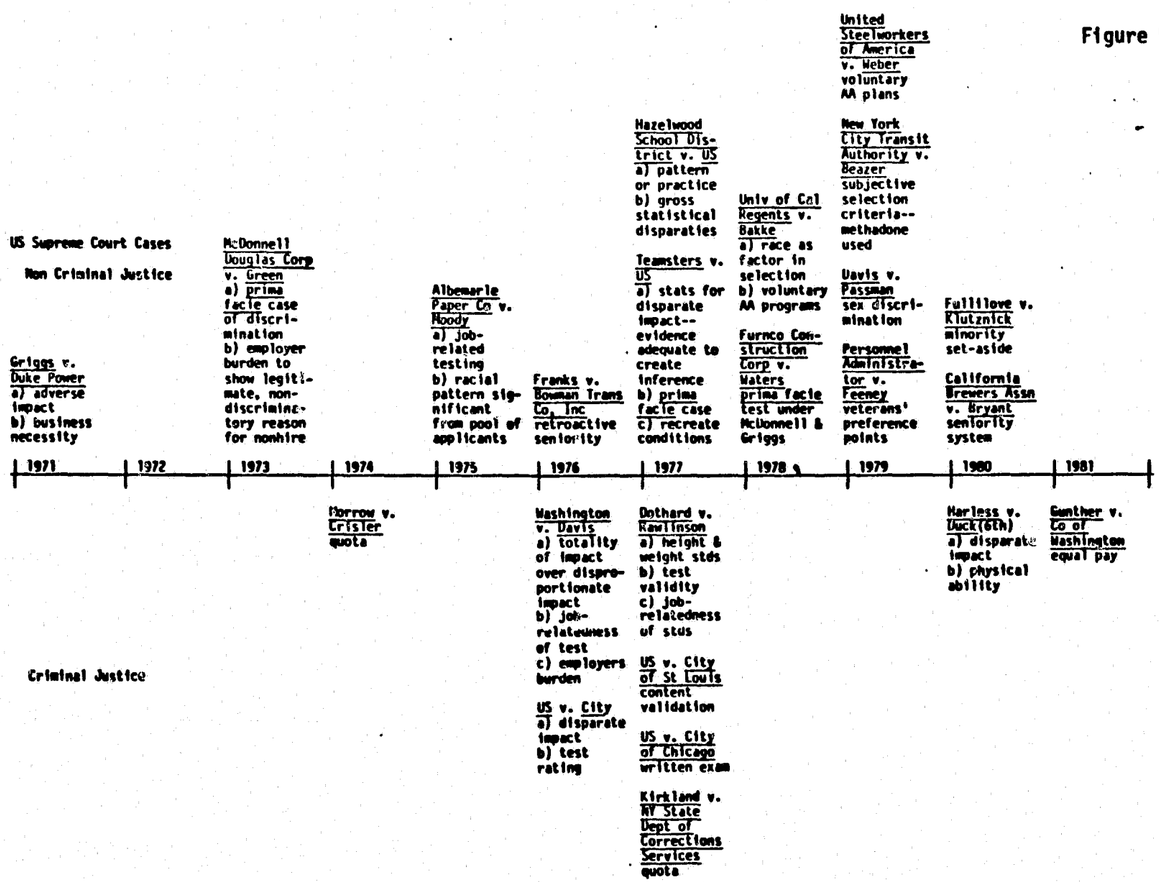
Figure 5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McDonnell Douglas Corp v. Green a) prima facie case of discrimination b) employer burden to show legitimate, nondiscriminatory reason for nonhire
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US v. City of Chicago written exam
Kirkland v. NY State Dept of Corrections Services quota
Harless v. Duck(6th) a) disparate impact b) physical ability
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Figure 6

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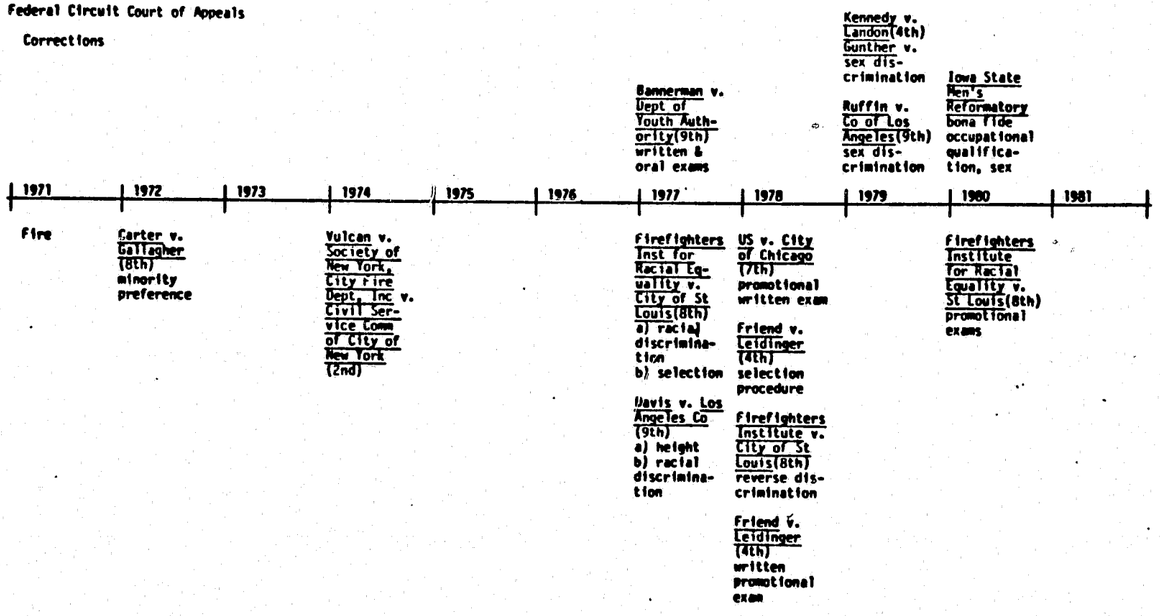
Fire		Carter v. Gallagher (8th) minority preference		Vulcan v. Society of New York, City Fire Dept, Inc v. Civil Service Comm of City of New York (2nd)			Firefighters Inst for Racial Equality v. City of St Louis(8th) a) racial discrimination b) selection Davis v. Los Angeles Co (9th) a) height b) racial discrimination	US v. City of Chicago (7th) promotional written exam Friend v. Leidinger (4th) selection procedure Firefighters Institute v. City of St Louis(8th) reverse discrimination Friend v. Leidinger (4th) written promotional exam		Firefighters Institute for Racial Equality v. St Louis(8th) promotional exams	

Figure 7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