Washington and Lee Law Review

Volume 38 | Issue 2 Article 13

Spring 3-1-1981

VII. Employment Discrimination

cuit's reasoning is sound as applied to a small, underground mine, such as Sink's, where the operator could refuse inspection.[49] However, in the case of a larger surface mine, the Act's injunction provision might not protect adequately an operator's privacy since an inspector could enter the mine and inspect without challenge.[50]

In upholding warrantless inspections of Sink's mine, the Fourth Circuit issued a broad interpretation of the Mine Safety Act's coverage.[51] The court's ruling makes any coal mining operation, no matter how small, subject to warrantless inspection under section 813.[52] The Fourth Circuit's holding is in accord with decisions of other circuits which consistently have upheld warrantless section 813 inspections of pervasively regulated industries where an overriding federal interest in miner safety exists and where the government abides by the Mine Safety Act's inspection restrictions.[53] One court has held that warrantless section 813 inspections were unconstitutional when applied to a small, family-operated decorative rock operation.[54] The court found that the decorative rock business was not pervasively regulated, and that the operator did not impliedly consent to inspections of his quarry.[55]

JAMES REESE SHOEMAKER

VII. EMPLOYMENT DISCRIMINATION

A. Commencement Requirements for an Equitable Action Under the ADEA

The Age Discrimination in Employment Act (ADEA)[1] prohibits covered employers,[2] labor organizations and employment agencies from discriminating against a person between the ages of forty and seventy

note 11 *supra*. The regulation was a tenuous safeguard, since it was subject to repeal at any time. *See id.*

[49] *See* 614 F.2d at 37; note 37 *supra*.

[50] *See* note 36 *supra*.

[51] *See id. But see* text accompanying notes 42-44 *supra*.

[52] *See* 614 F.2d at 39.

[53] *See* note 28 *supra*.

[54] Marshall v. Wait, No. 78-2345, 160-61 (9th Cir. Sept. 29, 1980). The *Wait* court did not rule that § 813 was unconstitutional on its face, nor did it disagree with the Fourth Circuit's decision in *Sink*. *Id.* at 159-60.

[55] *See* 614 F.2d at 39.

[1] 29 U.S.C. §§ 621-634 (1976 & Supp. 1978).

[2] The Age Discrimination in Employment Act (ADEA) applies to all employers who employ 25 or more employees, including executives and supervisors, for 20 or more weeks in the current or preceding calendar years. 29 U.S.C. § 630(b) (1976).

years on the basis of age.[3] If an employer violates the ADEA, the Equal Employment Opportunity Commission (EEOC)[4] or an aggrieved individual[5] may file an action in federal court for legal and equitable relief.[6]

Section 7(e) of the ADEA establishes the statute of limitations for actions brought under the ADEA.[7] Section 7(e) incorporates section 6 of the Portal-to-Portal Act,[8] which requires that a suit must be commenced within two years after the cause of action accrued, or be forever barred.[9] In the case of willful violations, the limitations period is three years.[10]

---

[3] 29 U.S.C. § 631 (Supp. 1978). The purpose of the ADEA is to alleviate serious economic and psychological suffering of persons within the ages of 40 and 70 caused by unreasonable prejudice and job discrimination. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. __, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214. Courts have held that the ADEA is remedial legislation and should be interpreted liberally to effectuate the congressional purpose of ending age discrimination in employment. *See* Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd*, 434 U.S. 99 (1977); Moses v. Falstaff Brewing Corp., 525 F.2d 92, 94 (8th Cir. 1975).

Where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business, however, an employer's discriminatory actions toward a person bewteen the ages of 40 and 70 may not be unlawful. 29 U.S.C. § 623(f) (1976); *see, e.g.*, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 865 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) (for safety reasons, carrier allowed to impose hiring cutoff at age 35). *See generally* Comment, *Recent Developments in Age Discrimination*, 17 AM. BUS. L.J. 363, 364-65 (1980).

[4] Originally, Congress charged the Secretary of Labor (Secretary) with administering and enforcing the ADEA. 29 U.S.C. § 626(a),(b) (1976). Effective July 1, 1979, however, age discrimination jurisdiction was transferred to the Equal Employment Opportunity Commission (EEOC). Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978).

[5] 29 U.S.C. § 626(c) (1976).

[6] 29 U.S.C. § 626(b) (1976); *see* text accompanying notes 12-15 *infra*.

[7] 29 U.S.C. § 626(e)(1) (Supp. 1978). Congress recognized that only § 6 and § 10 of the Portal-to-Portal Act, 29 U.S.C. §§ 255 & 259 (1976), applied to the ADEA for statute of limitations purposes. 29 U.S.C. § 626(e)(1) (Supp. 1978).

[8] 29 U.S.C. § 255 (1976). For background information regarding the Portal-to-Portal Act, 29 U.S.C. §§ 251-262 (1976), *see* Hodgson v. Katz & Besthoff, #38, Inc., 365 F. Supp. 1193, 1195-96 (W.D. La. 1973).

[9] 29 U.S.C. § 255 (1976). The 1978 amendments to the ADEA provide for the short-term tolling of the statute of limitations. 29 U.S.C. § 626(e)(2) (Supp. 1978). Before the EEOC can bring a suit seeking enforcement, it must attempt to eliminate the discriminatory practices alleged, and to effect voluntary compliance with the ADEA. 29 U.S.C. § 626(b) (1976). Congress determined that the statute of limitations will be tolled while the EEOC attempts to secure the employer's voluntary compliance with the ADEA for a period of up to one year. 29 U.S.C. § 626(e)(2) (Supp. 1978). The tolling of the statute begins when the EEOC states in a letter to the prospective defendant that it is prepared to commence conciliation efforts. *See* H.R. REP. No. 950, 95th Cong., 2d Sess. 13, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS. 504, 534.

[10] 29 U.S.C. § 255 (1976). Recent court decisions have construed virtually every Fair Labor Standards Act (FLSA) violation to be a willful violation subject to the three year statute of limitations. *See* 1 W. & M. CONNOLLY, A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY 241-42 (1979). Courts differ slightly, however, in their interpretation of "willful". *Compare* Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972) (employer's action willful if knows FLSA applies, even if doesn't know actions violate FLSA) *with* Laffey v. Northwest Airlines, Inc., 567 F.2d 429,

To determine when an action commences for statute of limitations purposes under the ADEA, a grievant or the EEOC must refer to the provisions of the Fair Labor Standards Act (FLSA)[11] incorporated into the ADEA. Section 7(b) of the ADEA specifically incorporates sections 16 and 17 of the FLSA into the ADEA.[12] The EEOC may obtain legal relief for a violation of the ADEA in the form of unpaid minimum wages, unpaid overtime wages, and liquidated damages[13] under section 16(c) of the FLSA.[14] Section 17 of the FLSA authorizes the EEOC to seek equita-

---

461-62 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (employer's action willful if aware of appreciable possibility that he may be subject to FLSA's requirements and fails to take steps reasonably calculated to resolve doubt). *See generally* Sheeder, *Procedural Complexity of the Age Discrimination in Employment Act: An Age-Old Problem*, 18 DUQ. L. REV. 241, 244-45 (1980).

[11] 29 U.S.C. §§ 201-219 (1976). The FLSA was designed to prevent the production of goods under conditions detrimental to the maintenance of minimum standards of living necessary for the health and general well-being of individuals. 29 U.S.C. § 202 (1976); *see* United States v. Darby, 312 U.S. 100, 115 (1941).

[12] 29 U.S.C. § 626(b) (1976). Section 7(b) of the ADEA "shall be enforced in accordance with the powers, remedies and procedures provided in Sections 11(b), 16 (except for subsection 16(a) thereof), and 17 of the FLSA." *Id.*

[13] 29 U.S.C. § 216 (1976). Under the FLSA, courts must award liquidated damages automatically upon proof of a violation of § 16, unless the employer is able to show a good faith belief that his acts were not in violation of the FLSA. 29 U.S.C. § 260 (1976); *see* McClanahan v. Mathews, 440 F.2d 320, 322-23 (6th Cir. 1971). Even if the employer is able to show a good faith belief that his acts did not violate the FLSA, courts have the discretion to award liquidated damages up to the amount of unpaid wages due to the employee. *Id. See generally* Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 ARK. L. REV. 328, 347-53 (1975) [hereinafter cited as Richards]. Section 7(b) of the ADEA provides that courts may grant liquidated damages only upon proof of a willful violation in actions brought under the ADEA. 29 U.S.C. § 626(b) (1976). *See generally* Note, *Damage Remedies Under the Age Discrimination in Employment Act*, 43 BROOKLYN L. REV. 47, 71-80 (1976).

[14] 29 U.S.C. § 216(c) (Supp. 1978). As originally enacted, § 16(c) provided that the Wage and Hour Administration could bring an action for back wages upon an employee's request, but only in cases not involving novel questions of law. *See* S. REP. No. 640, 81st Cong., 1st Sess. __, *reprinted in* [1949] U.S. CODE CONG. SERV. 2241, 2272. Congress' amendment to § 17 in 1961 gave the Secretary the right to independently bring an action for injunctive and monetary relief and thereby severely decreased the utility of a § 16(c) action. Hodgson v. Wheaton Glass Co., 446 F.2d 527, 532 (3d Cir. 1971); *see* note 15 *infra*. In 1974, however, Congress amended § 16(c) to authorize the Secretary to bring suit to recover, in addition to unpaid minimum wages or overtime compensation, an equal amount of liquidated damages. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 26, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 77; *see* H.C. REP. No. 93-953, 93d Cong., 2d Sess. 20-21, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2845, 2850. Congress also deleted the requirement that an employee request the Secretary to bring a § 16(c) action and eliminated the provision prohibiting an action involving a novel issue of law. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 26, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 77.

Section 16(b) of the FLSA provides that employees may bring suit for recovery of unpaid wages or overtime compensation plus liquidated damages. 29 U.S.C § 216(b) (Supp. 1978). The right of an employee to bring an action under § 16(b) is terminated when the EEOC files a complaint under § 16(c) or § 17 of the FLSA. *Id.*; *see* S. REP. No. 145, 87th Cong., 1st Sess. __, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 1620, 1658-59.

ble relief in federal district courts to enjoin the employer from withholding back wages and from committing future violations.[15]

Congress has expressly recognized that the EEOC commences a section 16(c) action for legal relief on the date the EEOC files a complaint naming a party plaintiff.[16] If the EEOC does not name the plaintiff on the complaint, section 16(c) states that the EEOC commences the action on the subsequent day on which the EEOC adds the plaintiff's name as a party plaintiff.[17] Unlike section 16, section 17 does not expressly indicate whether the EEOC must name the represented individuals on the complaint before a court will consider a defendant to have formally commenced a suit for equitable relief.[18]

In *EEOC v. Gilbarco, Inc.*,[19] the Fourth Circuit recently considered which formal requirements the EEOC must meet to commence a section 17 action within the statute of limitations.[20] The Fourth Circuit held that the EEOC commences an action for equitable relief under the ADEA when the EEOC files the complaint rather than upon the EEOC's subsequent act of naming the individuals represented in the proceeding.[21]

In *Gilbarco*, the employer terminated the employment of a number of workers between late February and early June of 1973.[22] The Secretary of Labor (Secretary)[23] investigated the employer's action and on February 11, 1976, filed a complaint against the employer to enforce the rights of twenty-five employees that the employer allegedly discriminated against on the basis of their age.[24] The Secretary filed the

---

[15] 29 U.S.C § 217 (Supp. 1978). Congress amended § 17 in 1961, giving the Secretary the right to bring equitable actions to recover unpaid wages and overtime compensation, in addition to injunctive relief. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 12, 75 Stat. 74; *see* Hodgson v. Wheaton Glass Co., 446 F.2d 527, 532 (3d Cir. 1971). Congress gave the Secretary the right to obtain unpaid wages and overtime compensation under a § 17 action, independent of the "employee request" requirement of § 16(c), in order that he might protect not only an employee's private individual rights but also the public interest. *See* S. REP. No. 145, 87th Cong., 1st Sess. __, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 1620, 1658-59. Congress was well aware that, in many instances, employees were reluctant to bring direct wage and hour actions against their employers for fear of subsequent retaliation. *Id.*

[16] 29 U.S.C. § 216(c) (Supp. 1978).

[17] *Id.*

[18] 29 U.S.C. § 217 (1976).

[19] 615 F.2d 985 (4th Cir. 1980).

[20] *Id.* at 987-91.

[21] *Id.* at 987.

[22] *Id.* at 989 n.2; *see* Brief for Appellee at 2, EEOC v. Gilbarco, Inc., 615 F.2d 985 (4th Cir. 1980).

[23] The duty of administering and enforcing the ADEA was not transferred from the Secretary of Labor to the EEOC until July 1, 1979. *See* note 4 *supra.*

[24] 615 F.2d at 988; *see* Brief for Appellee at 2. Of the twenty-five individuals represented, twenty-one were discharged by the employer between February 28, 1973 and June 1, 1973. 615 F.2d at 989 n.2. The employer subsequently rehired one of these individuals but discharged him again on June 24, 1975. Of the remaining four employees, one is still employed, and the others were discharged on July 1, 1973, March 22, 1974, and

complaint within the three-year statute of limitations period for willful violations.[25] The complaint sought both legal and equitable relief[26] but did not specifically identify the individuals whom the Secretary was representing.[27]

On June 30, 1976, the employer moved for dismissal or summary judgment.[28] The employer claimed that the Secretary had failed to commence the action within the statute of limitations.[29] The United States Magistrate[30] filed his findings and recommendations on April 12, 1978, determining that the three-year statute of limitations had expired for twenty-four of the twenty-five individuals.[31] The magistrate reasoned that the Secretary proceeded under both sections 16 and 17 of the FLSA when he brought an action for legal and equitable relief under the ADEA.[32] He indicated that the "plain meaning" of section 7(b) of the ADEA,[33] and the need for the specific individual names during the conciliatory proceedings,[34] required that the Secretary satisfy the re-

---

February 28, 1975. *Id.*; *see* Marshall v. Gilbarco, Inc., 21 Fair Emp. Prac. Cas. 1039, 1044-45 (M.D.N.C. 1978) (list of names and dates of termination).

[25] 615 F.2d at 989. The complaint alleged that the three-year statute of limitations applied because the employer willfully violated the ADEA. *Id.* at 989 n.2. The court will determine the validity of that allegation at trial. *Id.* at 1017 (Murnaghan, J., concurring in part and dissenting in part). The Secretary filed the complaint less than three years after the first alleged violation occurred on February 28, 1973. *Id.* at 989 n.2. Section 16(e)(2) of the ADEA, which provides that the statute of limitations is tolled during conciliation efforts for up to one year, was not yet in effect. *See* note 9 *supra.*

[26] 615 F.2d at 988-89. The Secretary requested injunctive relief under § 17 of the FLSA, including restraint of future violations and the restraint of any withholding of sums due to individuals as a result of past violations. The complaint also sought liquidated damages for the victims of past discrimination, available only under § 16(c) of the FLSA. *Id.*

[27] *Id.* at 989.

[28] *Id.*

[29] *Id.*

[30] A judge may designate a magistrate to conduct hearings and submit findings of fact and recommendations for the disposition of specified motions. 28 U.S.C. § 636(b)(1)(B) (1976).

[31] Marshall v. Gilbarco, Inc., 21 Fair Emp. Prac. Cas. 1039, 1040 (M.D.N.C. 1978). Following the Secretary's answer to defendant's interrogatories, the Magistrate determined that one of the twenty-five individuals had been rehired by the employer on October 4, 1972 (after resigning on November 12, 1971) and was continuously employed by Gilbarco, Inc. since that time. 615 F.2d at 1017.

[32] 21 Fair Emp. Prac. Cas. at 1041.

[33] Section 7(b) of the ADEA provides that the ADEA "shall be enforced in accordance with the powers, remedies and procedures provided in Sections 11(b), 16 (except for subsection (a) thereof) and 17 of the FLSA." 29 U.S.C § 626(b) (1976). The magistrate found that the directive "shall" and the conjunctive "and" required that the Secretary's action satisfy the requirements of both § 16 and § 17. 21 Fair Emp. Prac. Cas. at 1041.

[34] 21 Fair Emp. Prac. Cas. at 1042. Section 7(b) of the ADEA requires that the Secretary attempt to resolve disputes prior to litigation. 29 U.S.C. § 626(b) (1976); *see* note 9 *supra.* The Secretary must use exhaustive, affirmative action to attempt to achieve conciliation. Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974). The magistrate in *Gilbarco* determined that full disclosure of specific individuals and claims is vitally necessary to the conciliation process. 21 Fair Emp. Prac. Cas. at 1042.

quirements of both sections 16 and 17.[35] Since the Secretary had failed to name the represented individuals in the complaint as required by section 16, the magistrate found that the EEOC had not commenced the action within three years of the alleged violations and therefore the action was barred by the statute of limitations.[36] The district court accepted the magistrate's findings and recommendations and granted the employer's motion for summary judgment.[37]

The Fourth Circuit in *Gilbarco* disagreed fundamentally with the district court and found that sections 16 and 17 of the FLSA are not interdependent.[38] The court noted several basic distinctions between the two sections,[39] including the different commencement requirements.[40] The court determined that an action for equitable relief was not subject to the requirements of section 16.[41] The Fourth Circuit held that the Secretary

---

[35] 21 Fair Emp. Prac. Cas. at 1041.

[36] *Id.* at 1040. The three-year statute of limitations had not expired as to four of the employees when the employer moved for summary judgment on June 30, 1976. *See id.* at 1044-45 (list of employees and termination dates). Thus, the Magistrate determined whether the statute of limitations had expired as of the date of his decision, May 25, 1978, rather than the date on which the employer filed its motion for summary judgment.

[37] *Id.* at 1039.

[38] 615 F.2d at 989.

[39] *Id.* at 989-90 n.3. In addition to its commencement requirement which still applies to § 16(c) actions, § 16(c) of the FLSA contained several restrictions which were deleted in 1974. *Id.; see* note 13 *supra.* The Secretary was required to obtain the written request of employees for a § 16(c) action. *Id.* In addition, the Secretary was forbidden from bringing suit in cases involving unsettled issues of law. *Id.* Courts had held consistently that the § 16 restrictions do not apply to § 17 actions. *See* Hodgson v. Humphries, 454 F.2d 1279, 1284 (10th Cir. 1972) (employee written consent is not a jurisdictional prerequisite for a § 17 action); Hodgson v. Katz & Besthoff, #38, Inc., 365 F. Supp. 1193, 1195 (W.D. La. 1973) (same); Jones v. American Window Cleaning Corp., 210 F. Supp. 921, 923 (E.D. Va. 1962) (same). *See also* Hodgson v. Ewing, 451 F.2d 526, 530 (5th Cir. 1971) (novel question of law provision does not apply to § 17); Hodgson v. Wheaton Glass Co., 446 F.2d 527, 533-34 (3d Cir. 1971) (same). Courts noted the absence of any congressional intent that the requirements of § 16, a closely circumscribed remedy, should be imposed on § 17, a broad remedy with an emphasis on public enforcement. Hodgson v. Wheaton Glass Co., 446 F.2d at 533-34; *accord,* Hodgson v. Ewing, 451 F.2d at 530.

A few courts found that § 16(c) and § 17 are "integrally related elements of a single enforcement scheme," and, therefore, the requirements of § 16(c) apply to § 17. *See* Hodgson v. Union de Permisionarios Circulo Rojo, 331 F. Supp. 1119, 1121 (S.D. Tex. 1971) (novel question of law provision applies to § 17); Hodgson v. American Can Co., 317 F. Supp. 152, 155-56 (W.D. Ark. 1970), *reversed,* 440 F.2d 916, 921 (8th Cir. 1971) (same). The decisions finding an interrelationship between § 16 and § 17 of the FLSA have since been reversed or questioned. *See* Hodgson v. Ewing, 451 F.2d at 530 (questioning the district court's decision in *Union de Permisionarios*).

[40] 615 F.2d at 989-90. Section 16(c) expressly provides that an action commences on the date when the complaint is filed if the employee is specifically named as a party plaintiff in the complaint or, if his name does not appear, on the subsequent date on which his name is added as a party plaintiff. 29 U.S.C. § 216(c) (Supp. 1978). Several courts have held that the Secretary does not have to name the individual claimants in a § 17 complaint to commence the action effectively for statute of limitations purposes. *See* text accompanying note 56 *infra.*

[41] 615 F.2d at 990.

commenced an action for equitable relief under section 17 of the FLSA upon the filing of the complaint even though the names of the employees were not listed on the complaint.[42] The *Gilbarco* court noted that normal discovery procedures could eliminate the employer's uncertainty concerning the identity of the individuals seeking relief.[43]

The Fourth Circuit determined further that Congress incorporated the commencement requirements of section 17 of the FLSA into the ADEA.[44] Following the reasoning of the Supreme Court in *Lorillard v. Pons*,[45] the court found that Congress incorporated fully the remedies, procedures, and judicial interpretations of the FLSA into the ADEA, with the exception of express changes.[46] The court determined that Congress included the uniform judicial recognition that a section 17 complaint need not name the individual claimants to commence an action for statute of limitations purposes.[47] Thus, the Fourth Circuit held that section 7(b) of the ADEA, by incorporating section 17 of the FLSA, provided that the Secretary commences an action for equitable relief for viola-

---

[42] *Id.*

[43] *Id.* Previous cases involving the Equal Pay Act have noted that parties may utilize discovery procedures to determine the names of employees represented when such employees are not specifically named in the complaint. *See* Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 722 (5th Cir. 1970). *Gilbarco* is an example of the suitability of normal discovery procedures for determining the identities of individual claimants. 615 F.2d at 990. In *Gilbarco*, the Secretary filed interrogatories on April 12, 1976, naming twenty-five employees and requesting certain information about the employees from the employer. *Id.* at 1016 (Murnaghan, J., concurring in part and dissenting in part); *see* FED. R. CIV. P. 33(a). On April 26, 1976, the parties stipulated that all parties, including the represented employees, had been correctly identified. 615 F.2d at 1016; *see* FED. R. CIV. P. 29. The employer filed interrogatories requesting the identities of every plaintiff, which the Secretary provided on September 13, 1976. 615 F.2d at 1016.

[44] 615 F.2d at 989.

[45] 434 U.S. 575 (1978). The Supreme Court held in *Lorillard* that prior judicial determination of the right to jury trial under the FLSA meant that Congress, by incorporating the FLSA into the ADEA, intended that the right to jury trial should also exist under the ADEA. *Id.* at 580-83. *See generally* 1979 ANN. SURVEY OF AM. L. 321, 331 (1979).

[46] 615 F.2d at 989. Congress stated that the enforcement provisions of the ADEA bill ultimately enacted follow those of the FLSA. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. 9, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218. Congress considered several alternative proposals for the ADEA's enforcement scheme. The Johnson Administration submitted a bill patterned after § 10(c) & (e) of the National Labor Relations Act, 29 U.S.C. § 160(c),(e) (1976), which would have given the Secretary power to issue cease and desist orders enforceable in the courts of appeals, but would not have granted a private right of action to aggrieved individuals. *See* Lorillard v. Pons, 434 U.S. 575, 578 (1978); S. 830, H.R. 4221, 90th Cong., 1st Sess. 5, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218. Congress also considered a bill which would have adopted the statutory pattern of Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-4, 2000e-5 (1976); *see* 434 U.S. at 578. Senator Javits introduced the proposal that became law, designed to utilize the provisions of the FLSA, and permitting suits by either the Secretary or the injured individual. *See* 113 CONG. REC. 7076, 31254 (1967).

[47] 615 F.2d at 989; *see* Lorillard v. Pons, 434 U.S. 575, 581 (1978).

tions of the ADEA when he files the complaint, regardless of whether the individual claimants are named.[48]

Examining the specific facts in *Gilbarco*, the Fourth Circuit determined initially that a section 17 action for equitable relief commences when the Secretary files the complaint.[49] The Secretary's complaint, however, included a claim for liquidated damages.[50] Liquidated damages are available only under section 16 of the FLSA.[51] Rather than hold that the Secretary's request for liquidated damages imposed the commencement requirements of section 16, the Fourth Circuit denied the liquidated damages claim[52] and concluded that the Secretary brought the action solely under section 17.[53] Since the Secretary complied with section 17 by filing the complaint within three years of the alleged violations of the ADEA, the Fourth Circuit vacated the district court's decision to grant summary judgment to the employer on the section 17 claims.[54]

The *Gilbarco* court is in agreement with established precedent which has recognized that a section 17 action is not governed by the commencement provisions found in section 16(c).[55] Several courts have expressly held that the language of section 17, in contrast to the language of section 16(c), does not require that the Secretary identify the individual claimants to toll the statute of limitations.[56] One court reasoned

---

[48] 615 F.2d at 989.

[49] *Id.*

[50] *Id.* at 990.

[51] 29 U.S.C. § 216 (Supp. 1978); *see* S. REP. No. 145, 87th Cong., 1st Sess. __, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 1620, 1658-59; note 13 *supra.*

[52] 615 F.2d at 991. The Fourth Circuit affirmed the district court's grant of summary judgment for the defendant on the liquidated damages claim. *Id.*

[53] *Id.* at 990-91.

[54] *Id.* at 991.

[55] Judge Murnaghan's admittedly loquacious dissent, *see id.* at 1012, offers a combination of many arguments for the proposition that the requirements of § 16 must be applied to § 17. *See id.* at 991-1018 (Murnaghan, J., concurring in part and dissenting in part). The dissent's main argument is that the two sections are *in pari materia*; i.e., pertain to the same subject matter. *Id.* at 1017. *But see* note 57 *infra.* The dissent asserts that since both § 17 and § 16(b) were amended in the same legislative enactment in 1961, the court should determine the meaning of "commencement" in § 17 of the FLSA by reference to § 16(b). 615 F.2d at 1007-08; *see* CONF. REP. No. 327, 87th Cong., 1st Sess. 19-20, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 1706, 1713-14. In § 16(b), a cause of action is stated "upon the filing of a complaint." 29 U.S.C. § 216(b) (Supp. 1978). Thus, the dissent reasons, the express "commencement of the action" language in § 17 must refer to a point later in time than the filing of a complaint. 615 F.2d at 999 n.23; *see* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 224 (1975) (when different words used in statutory enactments that are *in pari materia*, probability strong that different meanings intended). The commencement of a § 17 action must be, according to the dissent, the time at which the represented employees are identified. 615 F.2d at 1008.

[56] Wirtz v. Harper Buffing Mach. Co., 280 F. Supp. 376, 379-80 (D. Conn. 1968), *aff'd as modified*, 18 Wage and Hour Cas. 894 (2d Cir. 1968); Wirtz v. Novinger's, Inc., 261 F. Supp. 698, 703 (M.D. Pa. 1966); Wirtz v. W.G. Lockhart Constr. Co., 230 F. Supp. 823, 829 (N.D. Ohio 1964); *accord*, Padgett v. Kentucky Util. Co., 83 Lab. Cas. ¶ 33,645 (W.D. Ky. 1978).

that sections 16 and 17 of the ADEA are not *in pari materia*.[57] Section 17 is a broad remedy, designed to provide equitable relief, while section 16 is a narrow legal remedy.[58] The court found that Congress created section 17 for the purpose of avoiding prohibitive restrictions in existing legislation such as section 16(c).[59] In the face of congressional silence, therefore, the "commencement" requirements of section 16(c) should not be imposed on an equitable action under section 17.[60] The court looked to the common law definition of "commencement" and concluded that a section 17 action is commenced upon the filing of a complaint, regardless of whether the individual claimants are named.[61]

Another court analyzed whether section 16(c)'s commencement requirement should be applied to section 17 of the FLSA by referring to section 7 of the Portal-to-Portal Act.[62] Section 7 provides that an action commences on the date when the complaint is filed, except in cases involving collective or class actions.[63] Since section 17 is an action for equitable relief rather than a collective or class action, the court found that the action commenced on the date the complaint was filed.[64] One commentator has noted that an additional reason not to apply section 16(c)'s requirements to section 17 is that section 16(c) states that its requirements apply only to actions brought specifically under the section.[65]

---

[57] Wirtz v. W.G. Lockhart Constr. Co., 230 F. Supp. 823, 828 (N.D. Ohio 1964). Statutes are *in pari materia*—pertain to the same subject matter—when they relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object. *See* 2A J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION 298-99 (C.D. Sands 4th ed. 1973) [hereinafter cited as SUTHERLAND]. Courts dealing with a variety of issues have determined that the provisions of § 16 are not to be read *in pari materia* with the provisions of § 17. *See, e.g.*, Hodgson v. Ewing, 451 F.2d 526, 530 (5th Cir. 1971) (§ 16(c)'s prohibition of suits involving novel questions of law does not apply to § 17); Shultz v. Mistletoe Express Serv., 434 F.2d 1267, 1272 (10th Cir. 1970) (back wages due under § 17 action can be restored without necessity of individual § 16 suits); Hodgson v. Katz & Besthoff, #38, Inc., 365 F. Supp. 1193, 1194 (W.D. La. 1973) (§ 16(c)'s requirement of employee consent does not apply to § 17). The 1961 amendments to the FLSA do not, as the dissent suggests, prove that § 16 and § 17 are *in pari materia*. *See* CONF. REP. No. 327, 87th Cong., 1st Sess. 19-20, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 1706, 1713-14. The amendments contain nothing from which a court could infer that "the broad remedy enacted in § 17 must be read *in pari materia* with the narrow remedy of § 16." Hodgson v. Wheaton Glass Co., 446 F.2d 527, 533-34 (3d Cir. 1971).

[58] Wirtz v. W.G. Lockhart Constr. Co., 230 F. Supp. 823, 828-29 (N.D. Ohio 1964); *see* Hodgson v. Wheaton Glass Co., 446 F.2d 527, 533-34 (3d Cir. 1971); notes 13-14 *supra*. The relief sought under § 17 is no less equitable because compliance with the decree which plaintiff seeks may require the defendant to pay money. Wirtz v. Robert E. Bob Adair, Inc., 224 F. Supp. 750, 756 (W.D. Ark. 1963).

[59] 230 F. Supp. at 829.

[60] *Id.*

[61] *Id.*

[62] Wirtz v. Novinger's, Inc., 261 F. Supp. 698, 700 (M.D. Pa. 1966); Wirtz v. Sterner's Grocery, Inc., 54 Lab. Cas. ¶ 31,874 (M.D. Pa. 1966).

[63] 29 U.S.C. § 256 (1976).

[64] 261 F. Supp. at 702.

[65] *See* Richards, *supra* note 13, at 335; 29 U.S.C. § 216(c) (Supp. 1978).

The Fourth Circuit relied on *Lorillard v. Pons* to find that the judicial interpretation of section 17 of the FLSA, providing that the action is commenced upon the filing of the complaint, was incorporated into the ADEA when the ADEA was enacted in 1967.[66] Since *Gilbarco* involves a well-established interpretation of the FLSA,[67] the Fourth Circuit is correct in determining that the judicial recognition of the commencement of a Section 17 action upon the filing of the complaint is incorporated into the ADEA.[68]

On the whole, *Gilbarco* represents a logical judicial decision in the midst of a complicated statutory structure. The Fourth Circuit's opinion is consistent with judicial decisions regarding the commencement requirements of section 17 of the FLSA[69] and serves, in addition, to apply that reasoning to the ADEA.

DANA S. CONNELL

---

[66] 615 F.2d at 989.

[67] In the absence of contrary authority, Wirtz v. W.G. Lockhart Constr. Co., 230 F. Supp. 823, 838 (N.D. Ohio 1964), represents solid authority that a § 17 action under the FLSA commences with the filing of the complaint. *See* 615 F.2d at 990. Presumably, Congress incorporated the *Lockhart* court interpretation into the ADEA. *Id.* at 989; *see* Lorillard v. Pons, 434 U.S. 580, 581 (1978); SUTHERLAND, *supra* note 57, at 256-61. Arguably, however, Congress did not incorporate other authorities for that proposition into the ADEA. The court in *Wirtz v. Novinger's*, 261 F. Supp. 698, 700 (M.D. Pa. 1966), based its reasoning on § 7 of the Portal-to-Portal Act. *See* text accompanying notes 62-64 *supra*. Since § 7 was not incorporated into the ADEA, that decision cannot be considered to be incorporated into the ADEA. *See* note 7 *supra*. Other cases, decided after 1967, cannot reasonably be said to have been incorporated into the ADEA upon its enactment that year. *See* Wirtz v. Harper Buffing Mach. Co., 280 F. Supp. 376 (D. Conn. 1968), *aff'd as modified*, 18 Wage and Hour Cas. 894 (2d Cir. 1968). However, Congress' decision not to add a specific commencement requirement to § 17 in its 1974 amendments to the ADEA may indicate a continuing legislative recognition that a § 17 action commences upon the filing of a complaint. *See* Missouri v. Ross, 299 U.S. 72, 75 (1936) (Congress' failure to change federal statue which had been uniformly construed by lower federal courts imports legislative adoption of such construction).

[68] Recent decisions utilize the *Lorillard* methodology. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) (holding that federalism provision of ADEA precluded individual claimants from bringing suit in federal court prior to sixty days after commencement of proceedings with appropriate state agency); Marshall v. Chamberlain Mfg. Corp., 601 F.2d 100 (3d Cir. 1979) (holding that Secretary is not precluded from bringing suit without first deferring to proper state agency for sixty days). *See generally* Note, *The Age Discrimination in Employment Act: Procedural and Substantive Issues in the Aftermath of the 1978 Amendments*, 1979 U. OF ILL. L.F. 665, 677-87.

[69] *See* note 56 *supra*.

B. *Pregnancy Discrimination Under Title VII*

Title VII of the Civil Rights Act of 1964[1] prohibits discrimination in employment on the basis of sex.[2] Because only women can bear children, the broad language of Title VII has forced courts to determine the effect of Title VII on employment practices that distinguish pregnant women from other employees.[3] Application of Title VII prohibitions is particularly difficult when the safe operation of a business depends on a pregnant woman's ability to perform her job. In particular, airline policies that ban pregnant stewardesses from flight duty have required courts to balance workplace safety against employment discrimination.[4]

---

[1] 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978).

[2] *Id.* § 2000e-2. Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. *Id.*; *see, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328-337 (1977) (sex); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88-89 (1973) (national origin); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (race); Redmond v. GAF Corp., 574 F.2d 897, 900 (7th Cir. 1978) (religion). Congress intended Title VII to destroy artificial and arbitrary barriers that measure an employee on the basis of alleged group attributes rather than actual ability. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971); Comment, *Title VII: Sex Discrimination and a New Bona Fide Occupational Qualification—How Bona Fide?*, 30 U. FLA. L. REV. 466, 468 (1978). Title VII applies to public employers, 42 U.S.C. § 2000e(h) (1976), labor organizations, *id.* § 2000e(d), and private employers having fifteen or more employees, *id.* § 2000e(b). To take advantage of the Title VII prohibitions, an aggrieved employee must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged unlawful employment practice. *Id.* § 2000e-5(e); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). If the EEOC finds reasonable cause to believe that discrimination is present, the EEOC will attempt to stop the unlawful practice through informal methods of conference, conciliation, and persuasion. Local 179, United Textile Wkrs. v. Fed. Paper Stock Co., 461 F.2d 849, 850 (8th Cir. 1972). The employee's right to sue under Title VII arises only after the EEOC has issued a notice of the right to sue. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 246 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975). The EEOC must issue a notice of the right to sue if the administrative charge is dismissed, if the EEOC has not filed a civil suit based on the charge within 180 days of the filing of the charge, or if a conciliation agreement has not been reached with the employer within 180 days of the filing of the charge. 42 U.S.C. § 2000e-5(f)(1) (1976). After receiving notice of the right to sue, the employee has ninety days to bring suit on his own behalf in federal district court. *Id.*

[3] *See generally* Davie, *Pregnancy: A Laborious Issue*, 7 HUMAN RIGHTS 36 (Fall 1978) [hereinafter cited as *Laborious Issue*]; Fain, *Pregnancy and Sex Discrimination*, 5 TEX. S. L. REV. 54 (1978) [hereinafter cited as Fain]; Kirp & Robyn, *Pregnancy, Justice, and the Justices*, 57 TEX. L. REV. 947 (1979). The Supreme Court has held that the due process clause of the Fourteenth Amendment prohibits discrimination on the basis of pregnancy. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 650 (1974). *See generally*, Fain, *supra*, at 55-70.

[4] *See, e.g.*, Condit v. United Air Lines, Inc., 558 F.2d 1176, 1176 (4th Cir. 1977) (airline's policy of mandatory maternity leave during entire period of pregnancy held valid), *cert. denied*, 435 U.S. 934 (1978); Air Line Pilots Ass'n. v. Western Air Lines, Inc., 22 EMP. PRAC. DEC. (CCH) ¶ 30,636 at 14,409 (N.D. Cal. 1979) (airline's policy of mandatory maternity leave during entire period of pregnancy held valid); EEOC v. Delta Air Lines, Inc., 441 F. Supp. 626, 628 (S.D. Tex. 1977) (airline's policy of mandatory maternity leave during entire period of pregnancy held valid), *rev'd mem.*, 619 F.2d 81 (5th Cir. 1980); Maclennan v. American Airlines, Inc., 440 F. Supp. 466, 472 (E.D. Va. 1977) (airline's policy of mandatory

In *Burwell v. Eastern Air Lines, Inc.*,[5] an *en banc* panel of the Fourth Circuit recently addressed the pregnancy discrimination issue.

The plaintiffs in *Burwell* contested an Eastern Air Lines (Eastern) rule requiring a stewardess to cease flight duty as soon as she learned of her pregnancy.[6] Eastern allowed pregnant stewardesses to choose between either unpaid maternity leave or transfer to an available ground position.[7] If a stewardess decided to take unpaid maternity leave she would retain her previously accrued seniority when she returned to work.[8] If a pregnant stewardess chose to transfer to a ground position, she would lose all seniority accrued as a flight attendant.[9] Pregnancy was the only disability for which Eastern prescribed loss of seniority upon transfer to a ground position.[10] Arguing that Eastern's employment practices violated Title VII, the plaintiffs requested monetary and injunctive relief.[11]

The district court in *Burwell* held that Eastern could not deprive a stewardess of accrued seniority if she transferred to a ground position for a pregnancy related reason.[12] The lower court also held that, absent complications in the pregnancy,[13] an airline cannot require all stewardesses to stop flying during the first twenty-eight weeks of pregnancy.[14] The district court based the holding on evidence that virtually all stewardesses are able to perform their jobs through the twentieth week of pregnancy.[15] From the twentieth through the twenty-eighth week, the district court found that an individual stewardess can accurately predict whether her pregnancy would cause an incapacitating disability.[16] As a result, the trial court held that Eastern could set a later date for stewardesses to cease flying[17] without compromising passenger

maternity leave held invalid until twenty-sixth week of pregnancy); Harriss v. Pan American World Airways, Inc., 437 F. Supp. 413, 432-35 (N.D. Cal.) (airline's policy of mandatory maternity leave during entire period of pregnancy held valid), *aff'd on rehearing*, 441 F. Supp. 881 (1977); In re National Airlines, Inc., 434 F. Supp. 249, 262-63 (S.D. Fla. 1977) (airline's policy of mandatory maternity leave held invalid until twenty-first week of pregnancy).

[5] 633 F.2d 361 (4th Cir. 1980).

[6] *Id.* at 363.

[7] *Id.*

[8] Burwell v. Eastern Air Lines, Inc., 458 F. Supp. 474, 478 (E.D. Va. 1978), *rev'd*, 633 F.2d 361 (4th Cir. 1980).

[9] 633 F.2d at 363-64.

[10] *Id.* at 363.

[11] 458 F. Supp. at 476.

[12] *Id.* at 495.

[13] The district court mentioned miscarriage and premature delivery as two pregnancy complications that could cause incapacitating disabilities for a pregnant stewardess. *Id.* at 499.

[14] *Id.*

[15] *Id.* at 489.

[16] *Id.* at 498; *see* note 13 *supra*.

[17] The district court found that virtually all stewardesses are unable to perform their job by the twenty-eighth week of pregnancy. *Id.* at 499. Thus, the district court held that an

safety.[18] According to the lower court, the later date would represent a less discriminatory alternative to Eastern's maternity leave policy.[19] To remedy Eastern's discriminatory policy, the district court enjoined the mandatory maternity leave policy and awarded damages for past discrimination.[20] Eastern appealed both the prospective and the retrospective features of the district court ruling to the Fourth Circuit Court of Appeals.[21]

The Fourth Circuit ruling on the district court's *Burwell* decision consisted of four opinions. Judge Sprouse, writing on behalf of himself and another judge,[22] drafted the opinion of the court. Judge Murnaghan, writing for himself and two other judges,[23] and Judge Butzner, writing for himself and three other judges,[24] each filed concurring and dissenting opinions. Judge Widener filed a separate concurring and dissenting opinion[25] to emphasize certain medical evidence contained in the record, but concurred completely in Judge Murnaghan's opinion.

---

airline policy requiring stewardesses to cease flying as of the twenty-eighth week of pregnancy would not violate Title VII. *Id.* The district court relied on the parties to the litigation to develop the exact policy that Eastern should use in the future. *Id.* at 503; *see* note 20 *infra*.

[18] *Id.* at 496.

[19] *Id.* In addition to finding that Eastern should have used a less discriminatory alternative, the district court held that Eastern's mandatory maternity leave policy represented a mere pretext to discriminate against women. *Id.* at 499. The Supreme Court has held that a discriminatory policy which is otherwise justifiable nevertheless may violate Title VII if an employer asserts an alleged justification for its employment policy that is actually a pretext for discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). The district court in *Burwell* found that Eastern's history of discrimination toward female employees coupled with the company's unusually strict policy toward pregnancy indicated that Eastern's safety rationale was a pretext for discrimination. 458 F. Supp. at 501.

[20] 458 F. Supp. at 503. The district court required Eastern to meet with the plaintiffs to devise a mutually satisfactory system for treating pregnancy on the same basis as other disabilities and decide on the amount of damages the court should award the plaintiffs. *Id.* at 503-04. In the interim, the district court allowed Eastern to condition a pregnant stewardess' continued flight prior to the twenty-eighth week on permission from her personal physician. *Id.* at 504. The district court stated that Eastern could require monthly examinations from the thirteenth through the twentieth week of pregnancy, and weekly examinations from the twenty-first through the twenty-eighth week. *Id.* Although Eastern appealed the district court's holding, Eastern subsequently changed its mandatory maternity leave policy to conform to a recent New York Supreme Court decision. 633 F.2d at 376 (Butzner, J., concurring and dissenting). *See* United Air Lines, Inc. v. State Human Rights Appeal Bd., 61 A.D.2d 1010, 402 N.Y.S.2d 630, *appeal denied*, 44 N.Y.2d 648, *cert. denied*, 439 U.S. 982 (1978). Currently, Eastern allows a pregnant stewardess to continue working as long as her doctor or Eastern's medical department certifies that she is able to perform her job. 633 F.2d at 376.

[21] 633 F.2d at 363; Brief of Appellant at 1-2, Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980).

[22] 633 F.2d at 362.

[23] *Id.* at 377 (Murnaghan, J., concurring and dissenting).

[24] *Id.* at 373 (Butzner, J., concurring and dissenting).

[25] *Id.* at 382 (Widener, J., concurring and dissenting).

The nine judges unanimously upheld the district court's decision that a pregnant stewardess should not lose seniority after transferring to a ground position.[26] On the issue of whether Eastern could require stewardesses to cease flying during the entire period of pregnancy, the judges were divided. Six judges, represented by the opinions of Judges Sprouse and Butzner, held that Eastern could not ground a stewardess during the first trimester, or thirteen weeks, of pregnancy.[27] A five judge majority, represented by the opinions of Judges Sprouse and Murnaghan, concluded that Eastern could require stewardesses to cease flying after the first thirteen weeks.[28] All nine judges agreed that Eastern could ground stewardesses after the twenty-eighth week of pregnancy.[29]

In deciding that Eastern could not deprive a stewardess of seniority if she transfers to a ground position because of pregnancy, the circuit court applied the Supreme Court's holding in *Nashville Gas Co. v. Satty*.[30] In *Satty*, the Supreme Court held that an employer's policy of denying accumulated seniority to employees returning from pregnancy leave was a violation of Title VII.[31] Because Eastern's seniority policy was similar to the policy examined in *Satty*,[32] the circuit court applied the *Satty* Court's holding to the *Burwell* facts and found that the Eastern policy violated Title VII.[33] The Fourth Circuit's holding on the accumulated seniority issue is consistent with rulings in other circuits on similar issues.[34]

---

[26] *Id.* at 362.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 434 U.S. 136 (1977).

[31] *Id.* at 139-40. The Court in *Satty* reasoned that an employment policy which denies accrued seniority to women who return to work after childbirth represents a substantial burden that only women are required to carry. *Id.* at 142. Thus, the denial of seniority has a disparate impact on women and violates Title VII. *Id.*; *see* text accompanying notes 35-38 *infra*.

[32] 434 U.S. at 138-139; 633 F.2d at 364.

[33] 633 F.2d at 364. In defense of its seniority policy, Eastern argued that the seniority policy was a bona fide seniority system contained in a collective bargaining agreement and, therefore, was exempt from the prohibitions of Title VII under 42 U.S.C. § 2000e-2(h) (1976). 633 F.2d at 365. Section 2000e-2(h) provides that an employer has not violated Title VII if a discriminatory policy has resulted from a bona fide seniority system. 42 U.S.C. § 2000e-2(h) (1976). The circuit court found that the discriminatory policy had resulted from Eastern's interpretation of the collective bargaining agreement rather than the agreement itself. 633 F.2d at 365. As a result, the appellate court dismissed Eastern's claim. *Id.*

[34] *See, e.g.*, Zichy v. Philadelphia, 590 F.2d 503, 507 (3rd Cir. 1979) (city's refusal to accumulate seniority during employee's maternity absence held to constitute a claim under Title VII); Mitchell v. Mid-Continent Spring Co., 583 F.2d 275, 279-81 (6th Cir. 1978) (employment policy that deprived female employees of accumulated seniority upon transfer to different shift held violative of Title VII), *cert. denied*, 441 U.S. 922 (1979); Eberts v. Westinghouse Elec. Corp., 581 F.2d 357, 361 (3rd Cir. 1978) (employer's denial of seniority to female employees who take pregnancy and maternity leave illegal under Title VII); Roller v. San Mateo, 572 F.2d 1311, 1313 (9th Cir. 1977) (plaintiff's showing that disability due to preg-

Addressing the mandatory maternity leave issue, Judge Sprouse employed the leading case of *Griggs v. Duke Power Co.*.[35] In *Griggs*, the Supreme Court held that an employment practice that is neutral on its face is, nevertheless, discriminatory if the policy has a disparate impact on a protected class.[36] The *Griggs* Court also established an affirmative defense to disparate impact discrimination.[37] Once an employee has proven disparate impact discrimination, the employer may justify the discriminatory policy by showing that it is a business necessity.[38]

Adopting the *Griggs* analysis, Judge Sprouse found that Eastern's mandatory maternity leave policy established a prima facie case of employment discrimination.[39] Judge Sprouse reasoned that although Eastern's maternity leave policy was facially neutral,[40] the policy had a disparate impact on women.[41] In response to Eastern's claim that its employment policies were necessary to insure passenger safety,[42] Judge Sprouse relied on the Fourth Circuit's decision in *Robinson v. Lorillard Corp.*,[43] to evaluate Eastern's claims of business necessity.[44] In *Lorillard*,

---

nancy adversely affects employment opportunities while other disabilities have no similar effect establishes prima facie discrimination).

[35] 401 U.S. 424 (1971).

[36] *Id.* at 431. In *Griggs* a group of black employees challenged an employment practice that required general intelligence tests for certain jobs. *Id.* at 427-28. Evidence showed that white employees generally scored higher on the test than black employees. *Id.* at 430. In finding that the use of the intelligence tests violated Title VII, the court recognized that Congress intended to prohibit both employment policies that expressly discriminate and facially neutral policies that discriminate in effect. *Id.* at 429-30.

[37] *Id.* at 431.

[38] *Id.*; 633 F.2d at 370, 374. The courts have applied the business necessity test in a variety of situations involving sex discrimination. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (necessity of height and weight requirements); Palmer v. General Mills, Inc., 513 F.2d 1040 (6th Cir. 1975) (necessity of discriminatory seniority system); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973) (necessity of haircut rule).

[39] 633 F.2d at 369.

[40] A facially discriminatory policy is characterized as disparate treatment discrimination. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Note, *Title VII and Business Necessity—Individuality or Convenience?*, 22 ARIZ. L. REV. 79, 79 (1980) [hereinafter cited as *Business Necessity*].

[41] 633 F.2d at 369.

[42] Brief of Appellant at 25-33, Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980).

[43] 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

[44] 633 F.2d at 371. Most of the Circuit Courts of Appeals have adopted the *Lorillard* test of business necessity. *E.g.*, Blake v. Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979); Muller v. United States Steel Corp., 509 F.2d 923, 928 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 57 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395 (1977); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); *cf.* Harriss v. Pan American World Airways, Inc., 437 F. Supp. 413, 432 (N.D. Cal.) (first prong of test requires that business interest in challenged policy be necessary to primary purpose of business rather than requiring that business interest outweigh discrimination), *aff'd on rehearing*, 441 F. Supp. 881 (1977). *See*

the Fourth Circuit stated that an employer must meet three tests to establish a business necessity defense.[45] Under *Lorillard*, the employer must show a legitimate business purpose that overrides the discriminatory impact of the challenged policy.[46] The employer also must prove that the disputed policy accomplishes the legitimate business purpose.[47] Finally, *Lorillard* states that the employer must establish that no reasonable less discriminatory alternatives to the policy are available.[48]

Applying the first two factors of the *Lorillard* test, Judge Sprouse found that the Eastern maternity leave policy was a valid method of achieving the legitimate business purpose of maximizing passenger safety.[49] Nevertheless, Judge Sprouse challenged the district court's finding that Eastern could have used an alternative less discriminatory method of insuring passenger safety.[50] Stating that the trial court's finding on the foreseeability of pregnancy complications was clearly erroneous, Judge Sprouse concluded instead that the record contained little evidence to indicate that Eastern could uniformly identify those stewardesses who would experience abnormal health problems due to pregnancy.[51] Judge Sprouse cited the need for probative facts such as the percentage of unhealthy stewardesses who could be identified prior to flight, statistics about pregnant employees in other industries, and evidence that physicians would be willing to accept the responsibility for the safety of airline passengers in evaluating the fitness of a pregnant stewardess.[52] In the absence of these probative facts, Judge Sprouse stated that the court should not be allowed to substitute a judicially created policy for an employer's reasonable but discriminatory policy.[53] Accordingly, Judge Sprouse reversed the trial court's legal conclusion that a reasonable alternative to Eastern's policy exists until a stewardess enters the twenty-eighth week of pregnancy.[54] Judge Sprouse found, however, that the record contained no evidence to sustain Eastern's policy during the first thirteen weeks of pregnancy.[55]

---

generally Business Necessity, supra note 40, at 84-88; Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L. J. 98 (1974).

[45] 444 F.2d at 798.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] 633 F.2d at 371-72.

[50] *See* text accompanying notes 14-16 *supra.*

[51] 633 F.2d at 367.

[52] *Id.* at 367 n.6.

[53] *Id.* at 371, 373.

[54] *Id.* at 372. After reversing the district court's reasonable alternative finding, Judge Sprouse also disagreed with the district court's holding that Eastern's safety rationale was a pretext for discrimination against female flight attendants. *Id.* at 373; *see* note 16 *supra.* Judge Murnaghan also concluded the evidence did not show that Eastern's policy was a pretext. *Id.* at 380-81 (Murnaghan, J., concurring and dissenting). Judge Butzner did not address the pretext issue.

[55] 633 F.2d at 372 (Sprouse, J.). The *Burwell* plaintiffs did not seriously contend that a

Thus, Judge Sprouse's holding would allow Eastern to require stewardesses to cease flying after the thirteenth week of pregnancy.

Although Judge Butzner agreed with Judge Sprouse that the Fourth Circuit's *Lorillard* decision was dispositive of the mandatory maternity leave issue,[56] Judge Butzner disagreed with Judge Sprouse's holding that individual examination of pregnant stewardesses would not isolate those stewardesses who might be unable to perform their jobs.[57] Citing Rule 52 of the Federal Rules of Civil Procedure, Judge Butzner explained that the circuit court could reverse the district court's finding on the foreseeability of incapacitating pregnancy complications only if the finding was clearly erroneous.[58] Judge Butzner referred to medical testimony which supported the conclusion that pregnancy complications are foreseeable.[59] Judge Butzner also cited the current policy of Northwest Airlines allowing a stewardess to fly until the twenty-eighth week of pregnancy if she has received a doctor's permission.[60] Finally, Judge Butzner mentioned Eastern's current policy of allowing a pregnant stewardess to continue flying as long as she has the permission of her doctor or Eastern's medical department.[61] Based on this evidence, Judge Butzner concluded that the trial court's finding of the existence of a reasonable, less discriminatory alternative was not clearly erroneous.[62] As a result, Judge Butzner would have affirmed the lower court's opinion on the mandatory maternity leave issue.[63]

Adopting an approach different from Judges Sprouse and Butzner, Judge Murnaghan recommended complete affirmance of Eastern's requirement that a stewardess cease flying as soon as she learns of her pregnancy.[64] Judge Murnaghan distinguished the *Burwell* case on its facts from other Title VII cases.[65] Because pregnancy was both the reason for and method of Eastern's differentiation between employees,

---

pregnant stewardess should continue to fly after the twenty-eighth week of pregnancy. *Id.* at 371. All the testimony gathered at trial indicated that a stewardess should not remain on flight duty after the twenty-eighth week of pregnancy. *Id.* at 366.

[56] *Id.* at 374 (Butzner, J., concurring and dissenting).

[57] *Id.* at 376.

[58] *Id.* at 374-75.

[59] *Id.* at 375-76.

[60] *Id.* at 375.

[61] *Id.* at 376-77; *see* note 20 *supra*.

[62] 633 F.2d at 377 (Butzner, J., concurring and dissenting).

[63] *Id.* Although he would have affirmed the district court's decision, Judge Butzner would have remanded the case so that the district court could reconsider the relief granted in light of subsequent changes in Eastern's policies. *Id.*; *see* note 20 *supra*.

[64] 633 F.2d at 377 (Murnaghan, J., concurring and dissenting).

[65] *Id.* at 378. In particular, Judge Murnaghan distinguished Eastern's mandatory maternity leave policy from the type of discrimination found in New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (disparate impact race discrimination), Teamsters v. United States, 431 U.S. 324 (1977) (disparate treatment race discrimination), Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (disparate impact race discrimination), and Griggs v. Duke Power Co., 401 U.S. 424 (1971) (disparate impact race discrimination).

Judge Murnaghan suggested that the court should adopt a different analysis than that used in any prior Supreme Court cases in the Title VII area.[66] Judge Murnaghan reasoned that the applicable test in *Burwell* should be whether the airline's statutory duty to maintain the highest possible degree of safety in the operation of passenger airline flights requires the disqualification of pregnant stewardesses from flight duty.[67] Viewing the evidence as indicating that the pregnancy of a stewardess may affect adversely the safety of airline passengers,[68] Judge Murnaghan found that the airline's mandatory maternity leave policy was a valid means of minimizing risk.[69]

The distinction drawn by Judge Murnaghan between Eastern's mandatory maternity leave policy and other discriminatory employment practices is not supported by any analogous Title VII cases.[70] Judge Murnaghan's conclusion that a different legal analysis from other varieties of Title VII cases is required for cases involving discrimination against pregnant women because they are pregnant adds an unneeded dimension to an already complicated field of law. Regardless of the factual setting in which an alleged discriminatory policy is promulgated, courts must determine whether discrimination actually exists and, if so, whether it is justified in the particular business setting.[71] Judges

---

[66] 633 F.2d at 379 (Murnaghan, J., concurring and dissenting).

[67] *Id.* at 379-80. Judge Murnaghan cited § 601(b) of the Federal Aviation Act, 49 U.S.C. § 1421(b) (1976), as the source of an airline's duty to maintain the highest possible degree of safety. *Id.* The Federal Aviation Administration (FAA), which is charged with promulgation of safety standards for the airline industry, does not, however, require mandatory maternity leave for pregnant flight attendants. 458 F. Supp. at 485. In fact, the FAA has expressed disapproval for airline policies that require maternity leave upon knowledge of pregnancy. *Id.* at 500 n.15.

[68] 633 F.2d at 380 (Murnaghan, J., concurring and dissenting). Judge Murnaghan maintained that, because of the likelihood of miscarriage during the first thirteen weeks of pregnancy, a stewardess' pregnancy would compromise passenger safety even during that period. *Id.* In support of this assertion, Judge Murnaghan cited evidence in the record that 10% of all pregnant women miscarry and 90% of all miscarriages occur during the first thirteen weeks of pregnancy. *Id.* at 380 n.8. In a separate opinion, Judge Butzner discounted the possibility of a disabling miscarriage in the first thirteen weeks during a flight on the basis of evidence that certain symptoms precede miscarriage that would warn a stewardess to avoid flying. *Id.* at 376 (Butzner, J., concurring and dissenting). Judge Butzner also cited evidence that pregnant stewardesses in the past regularly had continued flying through the thirteenth week due to Eastern's lax enforcement of its policy. *Id.*

[69] *Id.* at 380 (Murnaghan, J., concurring and dissenting).

[70] Other courts considering the legality of employment policies that distinguish employees on the basis of pregnancy have used the Title VII analysis set out in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and its progeny. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136, 141-146 (1977) (policy of seniority accrual evaluated under *Griggs* analysis); Harper v. Thiokol Chemical Corp., 619 F.2d 489, 491-92 (5th Cir. 1980) (policy of requiring normal menstrual cycle prior to return to work evaluated under *Griggs* analysis); deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 676 (9th Cir. 1978) (mandatory maternity leave policy evaluated under *Griggs* analysis).

[71] *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

Sprouse and Butzner effectively accomplished this objective in the disparate impact setting through use of the *Lorillard* test,[72] notwithstanding their disagreement on the inferences the court should draw from the evidence presented at trial.

While Judges Sprouse and Butzner employed the correct standard for disparate impact discrimination, the court should have considered the 1978 amendments to Title VII.[73] Because the amendments became effective[74] during the period between the decisions of the *Burwell* district and circuit courts, the Fourth Circuit erroneously disregarded the amendments in its review of the trial court's grant of injunctive relief.[75] The 1978 amendments define discrimination on the basis of pregnancy as prima facie discrimination on the basis of sex.[76] Eastern's policy of treat-

---

[72] *See* text accompanying notes 43-63 *supra*.

[73] Pregnancy Discrimination Amendments of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (amending 42 U.S.C. § 2000e (1976)). Congress intended the 1978 amendments to overrule the Supreme Court's interpretation of 42 U.S.C. § 2000e-2 (1976) in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). H. R. REP. No. 948, 95th Cong., 2nd Sess. 2-3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4750-51; S. REP. No. 331, 95th Cong., 1st Sess. 2-3 (1977). In *Gilbert*, the Court ruled that an employee disability plan which discriminated against pregnancy related disabilities did not constitute disparate treatment discrimination under Title VII. 429 U.S. at 136. Although Congress intended to invalidate the Court's *Gilbert* holding, Congress did not limit the language of the amendment to discriminatory disability plans. 42 U.S.C. 2000e(k) (Supp. II 1978). The Senate report on the amendments predicted that the most important effect of the legislation would be the impact on discriminatory policies other than fringe benefit programs. S. REP. No. 331, 95th Cong., 1st Sess. 6 (1977).

[74] The effective date of the 1978 amendments was October 31, 1978, except for fringe benefit programs covered by the legislation. Pregnancy Discrimination Amendments of 1978, Pub. L. No. 95-555, § 2, 92 Stat. 2076 (1978). The amendments became effective for fringe benefit programs on April 29, 1979. *Id.*

[75] Examination of the relief requested by the *Burwell* plaintiffs indicates that the 1978 amendments are applicable to the Fourth Circuit's decision in *Burwell* even though the suit was instituted in 1974. An appellate court should give prospective effect to a statute that supersedes a previously applied statute. Bradley v. Richmond School Bd., 416 U.S. 696, 714-15 (1973); Zichy v. Philadelphia, 590 F.2d 503, 508 (3rd Cir. 1979); Peony Park, Inc. v. O'Malley, 223 F.2d 668, 671 (8th Cir. 1955); 1A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 27.04, at 313 (4th ed. 1972); *see* Condit v. United Air Lines, Inc., No. 79-1200, slip op. at 10-13 (4th Cir. Sept. 10, 1980) (court should not give retroactive effect to 1978 amendments); *cf.* Electrical Workers v. Westinghouse Elec. Co., 20 EMPL. PRAC. DEC. (CCH) ¶ 30,082 n.1 (D. Md. 1979) (1978 amendments not applicable to pre-1978 claims for monetary relief). The plaintiff's request that the *Burwell* court enjoin Eastern's mandatory maternity policy was a request for prospective relief. *See* 458 F. Supp. at 503-04; *cf.* Rondeau v. Mosinee Paper Co., 422 U.S. 49, 61-62 (1975) (injunctive relief designed to deter not to punish); Dombrowski v. Pfister, 380 U.S. 479, 485 (1965) (injunctive relief looks to future conduct); Loya v. Immigration and Nat. Serv., 583 F.2d 1110, 1114 (9th Cir. 1978) (injunctive relief designed to deter future misconduct). Thus, the Fourth Circuit should have evaluated the effect of the 1978 amendments on the propriety of the district court's partial injunction of Eastern's mandatory maternity leave policy.

[76] 42 U.S.C. § 2000e(k) (Supp. II 1978); *see* Somers v. Aldine Indep. School Dist., 464 F. Supp. 900 (S.D. Tex. 1979) (school's mandatory maternity leave policy violated Title VII in view of Pregnancy Discrimination Amendments of 1978), *aff'd per curiam*, 620 F.2d 298 (5th Cir. 1980). *See generally* Blackmun, *The Pregnancy Discrimination Act*, 16 GA. S. B. J. 43

ing pregnant flight attendants differently from non-pregnant flight attendants was, therefore, a facially discriminatory policy by statutory definition.[77] The appropriate affirmative defense[78] for a facially

---

(1979) [hereinafter cited as Blackmun]; Note, *Employment Discrimination—"Sex Discrimination" Under Title VII Includes Differential Treatment of Pregnancy Related Disabilities*, 45 MO. L. REV. 145 (1980) [hereinafter cited as *Employment Discrimination*]. The House Report on the 1978 amendments stated that the bill would make any distinctions based on pregnancy a per se violation of Title VII. H. R. REP. NO. 948, 95th Cong., 2nd Sess. 3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4751; *see Employment Discrimination, supra*, at 145-46. By making pregnancy discrimination a per se violation of Title VII, Congress expressly intended to avoid the difficulties associated with disparate impact analysis. H. R. REP. NO. 948, 95th Cong., 2nd Sess. 3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4751, *see Laborious Issue, supra* note 3, at 38-39 (Congress considered and rejected *Gilbert* impact analysis).

[77] *See* note 76 *supra*.

[78] The legislative history of the Pregnancy Discrimination Amendments indicates that even if Eastern's mandatory maternity leave policy violates § 2000e(k), Eastern could attempt to prove a legal justification for the discriminatory policy. In addition to equating pregnancy discrimination with sex discrimination, the amendments also state that employers must treat pregnant employees the same as other employees who are similar in ability or inability to work. 42 U.S.C. § 2000e(k) (Supp. II 1978); *see* text accompanying note 76 *supra*. The language of the amendments, however, does not indicate whether the requirement of equal treatment pre-empts the legal justifications for unequal treatment provided elsewhere in Title VII. *See, e.g.*, note 33 *supra* (bona fide seniority system exempt from Title VII); text accompanying note 80 *infra* (BFOQ defense applicable to disparate treatment). The legislative history to the amendments, however, states that, other than including the special biological conditions of women within the scope of sex discrimination, the amendments do not change the application of Title VII in any other way. S. REP. NO. 331, 85th Cong., 1st Sess. 3-4 (1977). Thus, Congress intended to allow employers to justify pregnancy-related discriminatory employment practices on the same grounds as other types of sex discrimination. Although the requirement of equal treatment contained in the amendments to Title VII does not appear to pre-empt the application of previously established affirmative defenses, the language of the amendments implies another affirmative defense that applies only to pregnancy-related discrimination. By requiring employers to treat pregnant women the same as similarly disabled employees, Congress implied that employers could single out pregnancy as a possible disability so long as pregnancy-related disabilities are treated the same as other disabilities. *See* H. R. REP. NO. 948, 95th Cong., 2nd Sess. 4, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4752 (statement in House report that amendments only require equal treatment). To treat pregnant employees the same as similar non-pregnant employees, the amendments require that an employer use the same methods of determining ability or inability to work for all possible disabled employees. H.R. REP. NO. 948, 95th Cong., 2nd Sess. 5, *reprinted in* [1978] U.S. CODE CONG., & AD. NEWS 4749, 4753; S. REP. NO. 331, 95th Cong., 1st Sess. 4 (1977); 29 C.F.R. § 1604.10(b) (1979); Questions and Answers on the Pregnancy Disability Act, *id.* § 1604.10 app. Answer 6.

Viewing the *Burwell* decision in light of the 1978 amendments, Eastern would have difficulty showing that pregnant flight attendants are treated the same as other employees. At the time of the *Burwell* trial, Eastern had no specific guidelines for determining the ability of non-pregnant flight attendants to perform their duties. 458 F. Supp. at 495. Evidence in the record revealed, however, that Eastern allowed certain diabetic and epileptic flight attendants to continue flying on an individual basis under the supervision of the Eastern medical department. 633 F.2d at 376 (Butzner, J., concurring and dissenting); Brief of Appellee at 54, Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980). Expert [illegible] also indicated that the chances of incapacity are greater with the diabetic and

discriminatory practice[79] is the bona fide occupational qualification (BFOQ) defense rather than the business necessity defense.[80] Thus, the circuit court should have examined the prospective portion of the district court's holding under a BFOQ analysis rather than a business necessity analysis.[81] Because the BFOQ and business necessity defenses embody different elements,[82] the application of the BFOQ defense by the

---

epileptic flight attendant than with flight attendants in the second trimester of pregnancy. 633 F.2d at 376. In order to accord the same treatment to pregnant stewardesses and other possibly disabled flight attendants, Eastern should determine each pregnant stewardess' ability or inability to continue flying by individual medical examination.

[79] *See* note 40 *supra.*

[80] Burwell v. Eastern Air Lines, Inc., 633 F.2d at 370 (Sprouse, J.); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 292-93 (1976). Title VII expressly provides for a BFOQ defense. 42 U.S.C. § 2000e-2(e) (1976). The BFOQ defense has two components. First, the employer must show that the discriminatory policy furthers the essence of the business. Second, the employer must show that substantially all members of the aggrieved class are unable to perform satisfactorily the duties of the job involved or that dealing with the members of the class individually is impractical. Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235-36 (5th Cir. 1976). The two-pronged approach to the BFOQ defense originated in two Fifth Circuit cases involving sex discrimination. In Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 229 (5th Cir. 1969), the Fifth Circuit invalidated a facially disciminatory hiring policy because the defendant company could not show that substantially all women were unable to perform the job satisfactorily. *Id.* at 235. In Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), the Fifth Circuit again invalidated a facially discriminatory hiring policy on the ground that the sex of the job applicant was not an essential quality required for adequate performance of the particular job. *Id.* at 388. The Supreme Court cited the *Weeks* and *Diaz* standards with approval in Dothard v. Rawlinson, 433 U.S. 321, 333 (1977). *See* note 81 *infra. See generally* Note, Dothard v. Rawlinson: *Misapplication of the Bona Fide Occupational Qualification Defense*, 22 ST. LOUIS U.L.J. 197 (1978). The cases that have dealt with the BFOQ defense clearly indicate that the burden of proving a BFOQ rests on the employer. Arritt v. Grisell, 567 F.2d at 1271; In re Nat. Airlines, 434 F. Supp. 249, 262 (S.D. Fla. 1977).

[81] Burwell v. Eastern Air Lines, Inc., 633 F.2d at 370; *see* note 80 *supra.* Eastern argued both a business necessity and a BFOQ defense in its brief. Brief of Appellant at 25-43, Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980). The Supreme Court has recognized implicitly that different defenses apply to different types of discrimination. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the court dealt with two employment policies of the Alabama penitentiary system. The plaintiffs in *Dothard* challenged a statute that required all applicants for law enforcement jobs to meet minimum height and weight requirements and an administrative regulation that forbade the hiring of women for certain jobs in maximum security prisons. *Id.* at 323-25. The Court viewed the minimum height and weight requirements as having a disparate impact on women. *Id.* at 330-31; *see* text accompanying notes 37-38 *supra.* The Court found that the prison system's total exclusion of women from certain jobs was discriminatory treatment. 433 U.S. at 332-33. To determine whether the prison system was justified in maintaining either of the policies, the Court examined the former policy in light of the business necessity defense and the latter policy in light of the BFOQ defense. *Id.* at 329, 334. *But see* DeLaurier v. San Diego United School Dist., 588 F.2d 674, 678 (9th Cir. 1978) (court recognized business necessity defense as justification for prima facie discrmination); *Business Necessity, supra* note 40, at 80 (BFOQ and business necessity defenses are interchangeable).

[82] *See* text accompanying notes 44-48 and note 80 *supra.*

Fourth Circuit may have necessitated a different result in *Burwell*.[83]

The applicability of the Fourth Circuit's *Burwell* decision to subsequent Title VII cases is limited. In the future, the 1978 amendments to Title VII[84] and the concurrent application of the BFOQ defense[85] will require courts to apply different legal standards to pregnancy discrimination cases.[86] Nevertheless, because the tests for the BFOQ and business necessity affirmative defenses involve similar considerations pertaining to a stewardess' ability to perform her duties,[87] the *Burwell* decision provides valuable insight into judicial resolution of challenges to mandatory maternity leave policies. The factual disagreement between Judges Sprouse and Butzner[88] concerning the foreseeability of incapacitating pregnancy complications illustrates the reluctance of the judiciary to fully extend anti-discrimination policies into an area where the effect of judicial intervention on the public's safety is uncertain. Inevitably, this reluctance will play a similar role in the application of the BFOQ defense to airline pregnancy discrimination cases.

ROBERT M. COUCH

---

[83] In *Burwell*, Judge Sprouse stated that Eastern probably would not be successful in pursuing a BFOQ defense as justification for the mandatory maternity leave policy prior to the third trimester of pregnancy. 633 F.2d at 370 n.15. At trial, Eastern argued both BFOQ and business necessity as defense for the maternity leave policy. Brief of Appellees at 38, Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980). The district court considered Eastern's BFOQ defense and found that non-pregnancy is not a bona fide occupational qualification for a stewardess position. Burwell v. Eastern Air Lines, Inc., 458 F. Supp. 474, 497 (E.D. Va. 1978); *Cf.* In re Consol. Pretrial Proceedings in Airline Cases, 582 F.2d 1142, 1145-46 (7th Cir. 1978) (airline's BFOQ defense insufficient to justify no-motherhood rule for flight attendants).

[84] *See* note 76 *supra*.

[85] *See* text accompanying 76-80 *supra*.

[86] *See* note 78 and text accompanying note 81 *supra*.

[87] If applied to the *Burwell* facts, both the business necessity and BFOQ defenses would have evaluated the ability of pregnant stewardesses to perform their jobs. As illustrated in Judge Sprouse's opinion, the crucial factor in the application of the *Lorillard* test for a business necessity was whether a less discriminatory method existed for determining the ability of pregnant stewardesses to perform in emergency situations than to set an arbitrary date for them to cease flying. *See* text accompanying notes 49-53 *supra*. Likewise, the second component of the test for a BFOQ examines whether substantially all members of the aggrieved class can perform the essential duties of the particular job. *See* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236-38 (5th Cir. 1976) (age requirement for bus drivers to insure safety of passengers examined under BFOQ analysis); 458 F. Supp. at 497-99; note 80 *supra*.

[88] *See* text accompanying notes 49-72 *supra*.

C. *Standards of Proof in Title VII Litigation*

Title VII of the Civil Rights Act of 1964[1] (Title VII) prohibits discrimination on the basis of race, color, religion, sex, or national origin in both public[2] and private employment.[3] Title VII bars employment practices that are overtly discriminatory,[4] as well as employer policies that are facially neutral yet discriminatory in effect.[5] Title VII plaintiffs may establish a prima facie case[6] of employment discrimina-

---

[1] 42 U.S.C. § 2000e (1976 & Supp. III 1979).

[2] *Id.* § 2000e(h).

[3] *Id.* § 2000e(b). To proceed under Title VII a plaintiff must file an administrative claim of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory action for evaluation and attempted conciliation by the EEOC. *Id.* § 2000e-5(e); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). Thereafter, the plaintiff may not sue under Title VII unless the EEOC notifies him of a right to sue. *See* Local 179, United Textile Wkrs. v. Federal Paper Stock Co., 461 F.2d 849, 851 (8th Cir. 1972). As a result of its own investigation, the EEOC may issue notice of the right to sue after dismissing the administrative charge, terminating conciliation discussions with the defendant, or failing to bring suit within 180 days of the filing of the charge. 42 U.S.C. § 2000e-5(f)(1) (1976). Upon receipt of notice of the right to sue, the plaintiff has 90 days within which to bring suit in federal district court. *Id. See generally* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

Plaintiffs may also seek redress for racial discrimination in public and private employment under 42 U.S.C. § 1981 (1976). *See* Long v. Ford Motor Co., 352 F. Supp. 135, 140 (E.D. Mich. 1972), *modified on other grounds*, 496 F.2d 500 (6th Cir. 1974). Section 1981 grants equal rights with regard to making and enforcing contracts. Plaintiffs claiming under § 1981, or under both § 1981 and Title VII, can avoid the delay-ridden EEOC administrative procedures. *See* 42 U.S.C. § 2000e-5(f)(1) (1976); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

[4] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); note 7 *infra*.

[5] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); note 8 *infra*.

[6] To establish a prima facie case of disparate treatment, the plaintiff must show that he was a member of a racial minority, that he sought a promotion offered by his employer to a position for which he was qualified, that his employer rejected him despite his qualifications, and that after his rejection the position remained available to others with comparable qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see* note 7 *infra*. The Court in *McDonnell Douglas* noted that because facts will vary in Title VII cases, the prima facie proof requirement also will vary in differing factual situations. *Id.* at 802 n.13. After the plaintiff makes out a prima facie case, the burden shifts to the employer to articulate legitimate, nondiscriminatory reasons for his actions. *Id.* at 802; *see* note 7 *infra*.

To establish a prima facie case of disparate impact, *see* note 8 *infra*, the plaintiff must demonstrate that an employment practice effectively denies equal employment opportunities to members of a protected class. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). The disparate impact test is not applicable to an individual instance of discrimination even though the discrimination may be directly traceable to a particular employment practice. *See* Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd on other grounds*, 600 F.2d 211 (9th Cir. 1979). To make a valid disparate impact claim, the plaintiff must establish a practice of discrimination by the employer. *See* 401 U.S. at 430-32; Wright v. National Archives and Records Serv., 609 F.2d 702, 711-12 (4th Cir. 1979). A prima facie

tion by showing that the employer's actions either result in disparate treatment[7] of an individual or have a disparate impact[8] on a class of in-

---

case of discrimination is rebuttable by the defendant's showing that the allegedly discriminatory employment practices arise out of business necessity. 401 U.S. at 431; *see* note 8 *infra*.

[7] Disparate treatment is a theory of discrimination for which the United States Supreme Court promulgated a tripartite proof standard in *McDonnell Douglas Corp. v. Green*. 411 U.S. 792 (1973). In contrast to the disparate impact theory, *see* note 8 *infra*, a plaintiff using the disparate treatment theory ultimately must prove discriminatory intent on the part of the employer. *See* Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The plaintiff's initial burden, however, is not hard to meet. The plaintiff can establish a prima facie case of disparate treatment without evidence of discriminatory intent. *See* 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 50.10 (1980). After the plaintiff makes out a prima facie case, the burden shifts to the employer to articulate legitimate, non-discriminatory reasons for its action. 411 U.S. at 802.

If the defendant employer successfully rebuts the prima facie case, the plaintiff has an opportunity to show that the defendant's allegedly nondiscriminatory reasons are only a "pretext" shielding discriminatory intent. *Id.* at 804. *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978). Once the plaintiff brings the defendant's motivation into issue, the plaintiff bears the burden of persuasion with regard to the defendant's intentional discrimination. *See* Board of Trustees v. Sweeney, 439 U.S. 24, 27 (1978) (Stevens, J., dissenting).

[8] Disparate impact is a theory of discrimination promulgated by the United States Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 431-33 (1971). Congress was aware that employment discrimination is an institutionalized class problem and therefore is more likely to be a systematic condition resulting from widespread practices than from isolated events. *See* S. REP. No. 92-415, 92d Cong., 1st Sess. 5; S. REP. No. 91-1137, 91st Cong., 2d Sess. 4. Prior to *Griggs*, Title VII plaintiffs faced the formidable task of proving discriminatory intent. *See* Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 79-80 (1973). The disparate impact test, however, has enabled courts to recognize Title VII violations that were formerly unprovable. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328-31 (1977) (disparate impact of minimum height and weight requirements); Johnson v. Pike Corp. of Am., 332 F. Supp. 490, 494 (C.D. Cal. 1971) (disparate impact of employee discharge for wage garnishment).

To prove discriminatory employment practices under the *Griggs* test, a plaintiff must establish that a facially neutral employment policy or practice disproportionately burdens the claimant's protected group. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 74.10 (1980). Without identifying any particular policy or practice, a plaintiff may establish a prima facie case of disparate impact with statistical proof of gross underrepresentation of a protected group in a particular group of employees or job classification. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977). Usually, however, the proof of a disparate impact claim entails a three-step analysis. *See* 433 U.S. at 329.

If the plaintiff establishes a prima facie case of disparate impact discrimination, the defending employer may rebut the plaintiff's prima facie case by showing that the allegedly discriminatory employment practices are related to job performance. *See* 433 U.S. at 329; 401 U.S. at 431. The Fourth Circuit considers employment practices to be "job related" if the employer demonstrates that the practice effectuates the safe and efficient operation of the business. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). The employer may rebut the plaintiff's prima facie case by demonstrating that the business purpose advanced is compelling enough to override any racial impact and that there are no less discriminatory practices available to accomplish the stated purpose. *Id.*

dividuals.[9] In *Wright v. National Archives and Records Service*,[10] the Fourth Circuit reviewed the standards of proof applicable to a Title VII claim based on the disparate treatment and disparate impact theories of discrimination in the context of an affirmative action training program.

The plaintiff in *Wright* was a black civil service employee of the National Archives and Records Service (Service), a component of the General Services Administration.[11] Wright participated in the Archives Specialists Training Program, a program that the Service instituted in 1968 to qualify employees for promotion to managerial roles in the Service.[12] Initially, the Service accepted applications for the program only from employees who were college graduates and who had passed the Federal Service Entrance Examination.[13] In 1969, however, as part of an Equal Employment Opportunity Affirmative Action Program, Service administrators relaxed entrance requirements in order actively to recruit black Service employees into the program.[14] Plaintiff Wright was one of the recruits.[15] At the conclusion of the two year training program, Wright's supervisors did not promote him.[16] Wright refused the supervisors' offer of a special training extension and brought a Title VII racial discrimination suit.[17] In his complaint, Wright alleged that the operation

---

Nevertheless, the plaintiff may ultimately establish liability by proposing alternative methods by which the defendant could advance its legitimate business interests without disproportionately affecting the plaintiff's protected class. 433 U.S. at 329; 422 U.S. at 425.

[9] Groups traditionally "protected" by Title VII include racial, religious, and ethnic minorities as well as women. *See* 42 U.S.C. § 2000e-2(a)-(c) (1976). Although in *McDonnell Douglas* the Supreme Court recognized that the prima facie test for disparate treatment is flexible, 411 U.S. 792, 802 n.13 (1973), the classic formulation of the prima facie test includes minority status as one of its elements. *Id.* at 802. Title VII, however, applies to all employees, including white males. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279-80 (1976). Absent compelling evidence to the contrary, Title VII assumes that white males, females, and minorities qualify equally for all jobs. *See* Copus, *The Numbers Game Is The Only Game In Town*, 20 How. L.J. 374, 383 (1977).

[10] 609 F.2d 702 (4th Cir. 1979).

[11] *Id.* at 705; Brief for Appellee at 4, Wright v. National Archives & Records Serv., 609 F.2d 702 (4th Cir. 1979).

[12] 609 F.2d at 706.

[13] *Id.*

[14] *Id.*; *see* note 35 *infra*.

[15] 609 F.2d at 706.

[16] *Id.*

[17] *Id.* at 709-10. The Fourth Circuit noted that Wright had alleged both the disparate impact and the disparate treatment theories of discrimination. *Id.* at 710-11; *see* notes 7 & 8 *supra*. The district court employed a disparate treatment analysis of the evidence in Wright's case. 609 F.2d at 710. The Fourth Circuit, however, interpreted the district court's opinion as also having applied the disparate impact test. *Id.* at 710-11. The Fourth Circuit concluded that the appropriate method of adjudicating a combined impact and treatment claim is to treat the theories as alternative grounds for Title VII relief. *Id.*; *see* Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The Fourth Circuit noted that the evolving

of the program had a disparate impact on his class and the subsequent failure to promote him constituted disparate treatment of him as an individual.[18]

The Fourth Circuit first addressed Wright's disparate impact claim.[19] Wright alleged that a disproportionate number of black trainees had failed to complete the course successfully because the supervisors provided blacks with inferior training.[20] Considering Wright's claim, the court emphasized that the Service's allegedly discriminatory personnel actions affected only four persons, three blacks and one white.[21] The court noted that of these three minority members, only Wright claimed to have suffered legally cognizable harm.[22] The court held that the challenged employment practice did not have a disparate impact because

---

state of discrimination law during the extended litigation of Wright's case may have caused confusion as to applicable discrimination theories. 609 F.2d at 711 n.5 (Wright entered the training program in April of 1970. The United States Supreme Court decided Griggs v. Duke Power Co., 401 U.S. 424 (1971), in 1971 and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), in 1973).

In addition to his disparate treatment and disparate impact claims, Wright also alleged violations of 42 U.S.C. § 1981 (1976) and the fifth amendment. 609 F.2d at 705 n.1. *See generally* note 6 *supra*. Wright did not, however, allege that the district court had erred in denying these claims. The Fourth Circuit therefore did not address the § 1981 and fifth amendment issues on appeal. *Id.*

[18] 609 F.2d at 711. The district court noted that the Service's management was committed to remedying racial discrimination. Wright v. National Archives & Records Serv., 388 F. Supp. 1205, 1212-13 (D. Md. 1975). Title VII does not require a trial de novo from EEOC rulings and limits review by courts to the administrative record. *Id.* at 1207; 42 U.S.C. § 2000e-16 (1976). The district court affirmed the EEOC's denial of Wright's discrimination claims and granted the Service's motion for summary judgment. 388 F. Supp. at 1213. On Wright's first appeal, the Fourth Circuit vacated the district court judgment and remanded the case for a new trial. 609 F.2d at 706 n.2. On remand the district court reviewed the evidence and concluded as a matter of law that the Service had not discriminated against Wright. Wright v. National Archives & Records Serv., [1977] 21 Fair Empl. Prac. Cas. 4, 5 (D.Md. 1977). The district court held that the Service had demonstrated that Wright lacked the skills necessary for promotion and had advanced legitimate, non-discriminatory reasons for not promoting him. *See* 609 F.2d at 716-17. Wright appealed to the Fourth Circuit a second time alleging racially discriminatory personnel actions. Prior to filing a panel opinion, the Fourth Circuit ordered rehearing en banc. *Id.* at 706 n.3. On rehearing, the Fourth Circuit affirmed the district court's holding that Wright had failed to establish a Title VII violation. *Id.* at 718.

[19] 609 F.2d at 711; *see* note 8 *supra*. The Fourth Circuit noted that judicial economy favors consideration of the disparate impact theory prior to the disparate treatment theory in cases where the plaintiff advances both theories. 609 F.2d at 711 n.7. After establishment of a prima facie case, both the plaintiff's and the court's tasks are easier under the impact theory than under the treatment theory. *Id.*; *see* notes 7 & 8 *supra*.

[20] 609 F.2d at 712.

[21] *Id.* Absent a statute expressly conferring standing, a plaintiff must suffer actual or threatened injury as a result of the alleged unlawful conduct in order to have standing to allege discriminatory employer activity under Title VII. Davis v. County of Los Angeles, 566 F.2d 1334, 1338 (9th Cir. 1977).

[22] 609 F.2d at 712; *see* note 8 *supra*.

the affected minority group was so small in number and only one member of the group had claimed that the program had a discriminatory impact.[23]

The Fourth Circuit noted that if Wright were allowed to recover under the disparate impact theory, courts and future plaintiffs might interpret such a holding to support a prima facie case of disparate impact whenever a single white male employee received an employment benefit that a comparable member of a protected group[24] did not receive.[25] The Fourth Circuit concluded that recognition of a disparate impact claim on the facts of *Wright* would constitute an unregulated extension of the disparate impact doctrine and would undercut the purposes of Title VII.[26]

The court next considered Wright's second theory of Title VII discrimination, disparate treatment.[27] In contrast to the disparate impact theory,[28] the disparate treatment theory requires the plaintiff to prove discriminatory motive on the part of the employer.[29] On appeal, Wright conceded that he did not qualify for promotion and based his discrimination claim on the differences between the training that he had received and the training that the supervisors had provided for the white trainee in his program.[30] Wright alleged that the supervisors intentionally had given him inferior training because he was black.[31] Wright claimed, therefore, that the inferior training was the effective cause of his lack of qualification for promotion.[32]

The court reasoned that even if Wright could establish a prima facie case, Wright would be unable to overcome the Service's defense.[33] In a Title VII disparate treatment claim, if the defendant employer can demonstrate that his actions were legitimately nondiscriminatory,[34] the

---

[23] *Id.*

[24] *See* note 9 *supra.*

[25] 609 F.2d at 713 n.11.

[26] *Id.* at 713; *see* text accompanying notes 1-5 *supra.*

[27] 609 F.2d at 713. The Fourth Circuit noted in *Wright* that *McDonnell Douglas* provided the basic framework for analysis of the plaintiff's disparate treatment claim. 609 F.2d at 713; *see* notes 6 & 7 *supra.*

[28] *See* note 8 *supra.*

[29] Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); note 7 *supra.*

[30] 609 F.2d at 715.

[31] *Id.*

[32] *Id.* The Fourth Circuit questioned whether the evidence established a prima facie case with regard to Wright's allegedly inferior training opportunities. *Id.* Although the *McDonnell Douglas* test is adaptable to claims of unequal training opportunities, *see* Long v. Ford Motor Co., 496 F.2d 500, 505 n.11 (6th Cir. 1974), the Fourth Circuit had difficulty strictly applying *McDonnell Douglas* in *Wright* because the training program involved only a small number of persons and was intended to qualify participants for managerial positions. 609 F.2d at 715; *see* note 6 *supra.*

[33] 609 F.2d at 716.

[34] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see* note 7 *supra.*

burden shifts back to the plaintiff employee to demonstrate that the employer's justification is a mere pretext for discriminatory policies or practices.[35] The court acknowledged the Service's justification for its actions, including testimony by the single white employee that he sought out supervisory assistance while the black trainees did not.[36] The court also noted that the Service had a practice of delegating assignments and opportunities according to the trainees' abilities.[37] Wright argued that the Service's reasons were pretextual because they did not reflect goals specifically maximizing Wright's opportunities in relation to those of the white employee.[38]

The Fourth Circuit rejected Wright's pretext argument. The court stressed that although Title VII prohibits discriminatory practices, Title VII does not require an employer to adopt special hiring procedures to maximize the hiring of minority employees.[39] Applying this analysis to the training program, the Fourth Circuit held that Title VII did not obligate the Service to favor Wright without consideration of other factors such as the white trainee's qualifications.[40] The Fourth Circuit therefore concluded that to hold that Wright had established a disparate treatment claim would be inconsistent with the standard of proof that Congress intended for Title VII cases.[41] The court noted that the heavier burden on the employer, which Wright had urged, would induce employers to undertake only the most unobtrusive and limited affirmative efforts to better employment opportunities for minority employees.[42]

The Fourth Circuit's decision in *Wright* is consistent with recent United States Supreme Court decisions that make it more difficult for a plaintiff to establish a prima facie case in employment discrimination cases.[43] The Supreme Court severely limited the effectiveness of a plaintiff's constitutional discrimination claim in *Washington v. Davis* by re-

---

[35] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); *see* note 7 *supra.*

[36] 609 F.2d at 715-16.

[37] *Id.* The Service was responsive to black participants' needs and concerns with regard to the training program in *Wright. Id.* at 716. To encourage initial admission of blacks to the program, the Service lowered entrance requirements and continued actively to recruit blacks to the exclusion of whites. *Id.* at 706, 716; *see* text accompanying notes 13 & 14 *supra.* The Service removed one of the program supervisors when black trainees objected to her attitude. 609 F.2d at 707. When the black trainees complained of seating patterns, the Service changed them. *Id.* at 706-07. Following the black trainees' objection to the white trainee's assignment to the Special Projects Staff, the Service assigned black trainees to the Staff. *Id.* at 708.

[38] 609 F.2d at 717.

[39] *Id.*; *see* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978).

[40] 609 F.2d at 717.

[41] *Id.* at 717-18.

[42] *Id.* at 718.

[43] *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 278-80 (1979); New York City Transit Auth. v. Beazer, 440 U.S. 568, 582-87 (1979); Washington v. Davis, 426 U.S. 229, 244-45 (1976);

quiring proof of discriminatory intent.[44] Formerly, plaintiffs could establish a prima facie case of unconstitutional discrimination merely by showing that an employer's actions had a disproportionate impact on a protected class of employees.[45] In *Personnel Administrator v. Feeney*,[46] the Supreme Court held that a plaintiff could not establish intent by demonstrating that the defendant could foresee the discriminatory impact of a facially neutral policy.[47] And in a substantial departure from precedent, the Supreme Court in *New York City Transit Authority v. Beazer*[48] rejected the plaintiff's use of general population statistics to establish a prima facie case of disparate impact.[49] Without discussion of prior Supreme Court decisions allowing the use of general population statistics,[50] the *Beazer* Court stated that plaintiffs must provide

---

text accompanying notes 42-49 *infra*. *See generally* Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979). *See also* note 6 *supra*.

[44] 426 U.S. 229, 244-45 (1976).

[45] *Id.* at 244. In *Washington*, two blacks made an unsuccessful constitutional challenge to the District of Columbia Police Department's recruiting procedures. *Id.* at 232-33. Plaintiffs based their claim on the due process clause of the fifth amendment. *Id.* At the time plaintiffs filed their complaint, Title VII did not apply to federal employees. *See* the 1972 Amendments to the Civil Rights Act of 1964, Pub. L. No. 92-261, §§ 2(1) & (2) (codified at 42 U.S.C. §§ 2000e(a) & (b) (1976). The plaintiffs did not claim intentional discrimination. 426 U.S. at 235. The plaintiffs alleged only that testing procedures were unrelated to job performance and had a discriminatory impact on black appllicants. Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972), *rev'd*, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976). In holding that proof of disparate impact was insufficient to show unconstitutional racial discrimination, the Supreme Court held that plaintiffs must show discriminatory intent to establish a prima facie case. 426 U.S. at 238-39, 242, 245-48.

[46] 442 U.S. 256 (1979).

[47] *Id.* at 278-79. In *Feeney*, the plaintiff challenged the constitutionality of a Massachusetts statute giving veterans preferential treatment in all state civil service appointments, claiming that the statute had a disparate impact on women. *Id.* at 259. The plaintiff further contended that because the preferential treatment was foreseeable, the discriminatory results were intentional. *Id.* at 278-79. The United States Supreme Court held, however, that the state legislature's awareness that the statute could result in an adverse impact on women did not indicate that adverse impact was the purpose of the statute. *Id.*

[48] 440 U.S. 568 (1979).

[49] *Id.* at 584-87.

[50] The Court in *Beazer* held that statistical evidence may establish a prima facie violation of Title VII. *Id.* at 584-87. Statistics are not, however, irrefutable, and the plaintiffs' statistics in *Beazer* failed to prove a Title VII violation. *Id.* The Court rejected one set of statistics as too general since they failed to show the percentage of employees actually dismissed as a result of a Transit Authority drug policy. *Id.* at 585. The Court considered a second set of statistics to be overly inclusive because the statistics included individuals outside the relevant class of applicants and employees receiving methadone treatment. *Id.* at 585-86. The *Beazer* Court did not, however, attempt to distinguish either Griggs v. Duke Power Co., 401 U.S. 424 (1971), or Dothard v. Rawlinson, 433 U.S. 321 (1977), from *Beazer*'s shift in method of statistical analysis in disparate impact cases.

The Court in *Griggs* used general population statistics to compare the percentage of blacks and whites who failed to satisfy an employer's facially neutral high school diploma re-

statistical evidence demonstrating the degree of impact on individual applicants.[51]

In *Wright*, the Fourth Circuit recognized that Title VII is not a catchall for employment grievances. Although Title VII prohibits an employer from making employment decisions on a discriminatory basis, Title VII does not impose a duty on the employer to take affirmative action to increase the number of minority employees.[52] The court noted that Title VII guarantees all employees the right to expect their employer to treat them without regard to race, color, religion, sex, or national origin.[53] The court, therefore, was sensitive to Wright's discrimination claims and acknowledged that the Service's treatment of Wright may have been improvident.[54] Affirmative action training programs involve risks for both employers and employees, however, and the court realistically refused to acknowledge mere improvidence, and even insensitivity, as violations of Title VII.[55]

To recognize an employer's improvidence as a Title VII violation would ultimately impair affirmative action programs by imposing such high risks on employers that they would make only limited affirmative action efforts.[56] In setting a high standard for a plaintiff who is challenging a program set up for his own benefit, the Fourth Circuit in *Wright* recognized the need to allow employers flexibility in their special training programs and the need to encourage affirmative action programs.

A. KIRKLAND MOLLOY

D. Statistical Evidence in Title VII Litigation

The purpose of Title VII of the Civil Rights Act of 1964[1] (Title VII) is to promote equal employment opportunities by removing artificial bar-

---

quirement to prove a prima facie case of disparate impact. 401 U.S. at 430 n.6. In *Dothard*, Title VII plaintiffs offered statistical evidence of the relative capacities of men and women to satisfy a statutorily-imposed height and weight requirement. 433 U.S. at 329-30. The *Dothard* Court rejected the defendants' assertion that the plaintiffs' statistics did not concern actual job applicants by stating that a statistical showing of disparate impact need not necessarily be based on an analysis of characteristics of actual applicants. *Id.* at 330.

[51] 440 U.S. at 585-87.

[52] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978); text accompanying notes 37-40 *supra*.

[53] 42 U.S.C. § 2000e-2 (1976); *see* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir. 1971).

[54] 609 F.2d at 718.

[55] *Id.*

[56] *Id.*; *see* text accompanying notes 24-26 & 37-40 *supra*.

---

[1] 42 U.S.C. § 2000e (1976 & Supp. III 1979).

riers that have favored one group of employees over another.[2] Title VII proscribes intentionally discriminatory acts[3] as well as facially neutral policies that adversely affect a protected group.[4] Plaintiffs may establish Title VII employment discrimination claims under either a disparate treatment theory outlined by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*,[5] or a disparate impact theory as set out by the Court in *Griggs v. Duke Power Co.*[6] To establish disparate

---

[2] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). Sections 703(a)(1) and (2) of Title VII prohibit discrimination on the basis of race, color, religion, sex, or national origin in both public and private employment. 42 U.S.C. §§ 2000e-2(a)(1) and (2) (1976). Under § 701(b) Title VII only applies to employers who are engaged in industry affecting commerce and who employ at least fifteen employees. 42 U.S.C. § 2000e(b) (1976).

To proceed under Title VII, a private plaintiff must file an administrative claim of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory event for evaluation and attempted conciliation by the EEOC. 42 U.S.C. § 2000e-5(e) (1976); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). Thereafter, the plaintiff may not sue under Title VII unless the EEOC notifies him of a right to sue. *See* Local 179, United Textile Wkrs. v. Federal Paper Stock Co., 461 F.2d 849, 851 (8th Cir. 1972). As a result of its own investigation, the EEOC may issue notice of the right to sue after dismissing the administrative charge, terminating conciliation discussions with the defendant, or failing to bring suit within 180 days of the filing of the charge. 42 U.S.C. § 2000e-5(f)(1) (1976). Upon receipt of notice of the right to sue, the plaintiff has 90 days within which to bring suit in federal district court. *Id.; see* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 862-64 (1972).

Plaintiffs may also seek redress for racial discrimination in public and private employment under 42 U.S.C. § 1981 (1976). *See* Long v. Ford Motor Co., 352 F. Supp. 135, 140 (E.D. Mich. 1972), *modified on other grounds*, 496 F.2d 500 (6th Cir. 1974). Section 1981 confers on all persons within the United States equal rights to make and enforce contracts. Plaintiffs claiming under § 1981, or both § 1981 and Title VII, may avoid the delay-ridden EEOC administrative procedures. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

[3] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); note 5 *infra*.

[4] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); note 6 *infra*. Groups traditionally "protected" by Title VII include racial, religious, and ethnic minorities as well as women. *See* 42 U.S.C. § 2000e-2 (1976). Although in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court recognized that the prima facie test for disparate treatment is flexible, *id.* at 802 n.13, the classic formulation of the prima facie test includes minority status as one of its elements. *Id.* at 802. Title VII, however, applies to all employees, including white males. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976). Absent compelling evidence to the contrary, Title VII assumes that all individuals qualify equally for all jobs. *See* Copus, *The Numbers Game Is The Only Game In Town*, 20 How. L.J. 374, 383 (1977) [hereinafter cited as Copus].

[5] 411 U.S. 792 (1973). Disparate treatment is a theory of discrimination for which the United States Supreme Court promulgated a tripartite proof standard in *McDonnell Douglas Corp. v. Green. Id.* at 802-04; *see* note 7 *infra*. In contrast to the disparate impact theory, *see* note 6 *infra*, a plaintiff using the disparate treatment theory must prove discriminatory intent on the part of the employer. *See* Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The disparate treatment plaintiff, however, can establish a prima facie case without showing discriminatory intent. *See* 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 50.10 (1980).

[6] 401 U.S. 424 (1971). Disparate impact is a theory of discrimination promulated by the United States Supreme Court in *Griggs v. Duke Power Co. Id.* at 431-33; *see* note 8 *infra*.

treatment, a plaintiff must prove discriminatory intent on the part of the employer.[7] To establish disparate impact, a plaintiff must show that an employer has engaged in practices that have a disproportionate impact on a protected group and are not justified by business necessity.[8]

Congress was aware that employment discrimination is an institutionalized class problem and is therefore more likely to result from widespread practices than from isolated events or intentional wrongs. *See* S. REP. No. 92-415, 92d Cong., 1st Sess. 5; S. REP. No. 91-1137, 91st Cong., 2d Sess. 4. Prior to *Griggs*, Title VII plaintiffs faced the formidable task of proving discriminatory intent. *See* Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co., *and The Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 70 (1972). The disparate impact test, however, has enabled courts to recognize Title VII violations which were formerly unprovable. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328-31 (1977) (disparate impact of minimum height and weight requirements); Johnson v. Pike Corp. of Am., 332 F. Supp. 490, 494 (C.D. Cal. 1971) (disparate impact of employee discharge for wage garnishment).

[7] To establish a prima facie case of disparate treatment under *McDonnell Douglas*, the plaintiff must show that he was a member of a racial minority, that he sought a promotion offered by his employer to a position for which he was qualified, that his employer rejected him despite his qualifications, and that after his rejection the position remained available to others with comparable qualifications. 411 U.S. at 802. The *McDonnell Douglas* Court noted that the prima facie proof requirement will vary according to differing fact patterns in Title VII cases. *Id.* at 802 n.13. After the plaintiff makes out a prima facie case, the burden shifts to the employer to rebut the prima facie case by articulating legitimate, nondiscriminatory reasons for its action. *Id.* at 802. If the defendant employer is successful, the plaintiff has an opportunity to show that the defendant's allegedly nondiscriminatory reasons are only a "pretext" shielding actual discriminatory intent. *Id.* at 804. *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978). Once the plaintiff brings the defendant's motivation into issue, the plaintiff has the burden of persuasion with regard to the defendant's intentional discrimination. *See* Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (per curiam).

[8] To prove discriminatory employment practices under the *Griggs* test, a plaintiff must establish that a facially neutral employment policy or practice disproportionately burdens the claimant's protected group. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 74.10 (1980). Without identifying any particular policy or practice, a plaintiff may establish a prima facie case of disparate impact on the basis of statistical evidence that a protected group is grossly underrepresented in a particular group of employees or in a specific job classification. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977). Usually, proof of a disparate impact claim entails a three-step analysis. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

To establish a prima facie case of disparate impact discrimination, a plaintiff first must demonstrate that an employment practice effectively denies equal employment opportunities to members of a protected class. *Id.*; Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). The disparate impact test is not applicable to an individual instance of discrimination even though the discrimination may be directly traceable to a particular employment practice. *See* Miller v. Bank of Am., 418 F. Supp. 233, 234-35 (N.D. Cal. 1976), *rev'd on other grounds*, 600 F.2d 211 (9th Cir. 1979). To make a valid disparate impact claim, a plaintiff must establish a pattern or practice of discrimination by the employer. *See* 401 U.S. at 430-32; Wright v. National Archives and Records Serv., 609 F.2d 702, 711-12 (4th Cir. 1979).

The plaintiff's prima facie case of discrimination is rebuttable by the defendant's showing that the allegedly discriminatory employment practices are job related. *See* 433 U.S. at 329; 401 U.S. at 431. The Fourth Circuit considers an employment practice to be "job related" if the employer demonstrates that the practice effectuates efficient operation of

Disparate impact claims generally do not require the plaintiff to prove specific discriminatory intent.[9]

Private actions as well as Equal Employment Opportunity Commission (EEOC) pattern and practice[10] suits often stem from widespread institutionalized discrimination.[11] Since institutionalized practices account for most discrimination, statistics are an essential form of evidence in proving discrimination.[12] The United States Supreme Court has approved the use of statistical evidence in both disparate treatment[13] and

---

the business. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971). The employer may rebut the plaintiff's prima facie showing by demonstrating that the business purpose overrides any racial impact and that there are no less discriminatory practices available to accomplish the stated purpose. *Id.*

Nevertheless, the plaintiff may ultimately establish liability by demonstrating alternative methods by which the defendant could advance its legitimate business interests without disproportionately affecting the plaintiff's protected class. *See* 433 U.S. at 329; 422 U.S. at 425.

[9] *See* note 6 *supra.*

[10] The federal government is the plaintiff in a pattern or practice suit. *See* Teamsters v. United States, 431 U.S. 324, 360 (1977); 42 U.S.C. §§ 2000e-6(a) and (c) (1976). The Government's initial burden in a pattern and practice suit is to demonstrate that an employer has unlawfully discriminated as a regular practice or policy. 431 U.S. at 360. The Government's burden at the liability stage is merely to establish a prima facie case that a discriminatory policy existed. *Id.*; *see* note 8 *supra.*

The employer has the burden to defeat the Government's prima facie showing of a discriminatory pattern or practice. *Id.*; *see* notes 5 & 6 *supra.* Should the employer fail to rebut the inference of discrimination arising from the Government's prima facie case, a court's finding of a discriminatory pattern or practice justifies an award of relief to the plaintiff. 431 U.S. at 361. The question of individual relief does not arise until the remedial stage of the trial. *Id.* Individual discriminatees may then rely on the inference that the employer made employment decisions, during the effective time of the discriminatory policy, in pursuit of that policy. *Id.* at 362.

[11] *See* Copus, *supra* note 4, at 376.

[12] *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 306-09 (1977) (use of statistics to find a pattern or practice of employment discrimination); Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) (use of statistics an important source of proof of employment discrimination); Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962) (with regard to institutionalized discrimination, "statistics often tell much, and courts listen"); Copus, *supra* note 4, at 378-82.

Title VII statistical comparisons under both the disparate impact and disparate treatment theories are either comparative or demographic. *See* Note, *Disparate Impact and Disparate Treatment: The Prima Facie Case Under Title VII*, 32 ARK. L. REV. 571, 578 (1978). "Applicant flow data" are comparative statistics that refer to actual participants in the employment process. *Id.* Demographic statistics refer to more general population data in the relevant labor force. *Id.* Comparative statistics may sway courts on the disparate impact and disparate treatment issues because an employer cannot manipulate these statistics. *See* Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 469 (1973). *See also* EEOC v. Local 14, Int'l Union of Operating Eng'rs, 553 F.2d 251, 254-55 (2d Cir. 1977) (manipulation of statistics to prove impact or non-impact).

[13] *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). *See also* Furnco Const. Corp. v. Waters, 438 U.S. 567, 579-80 (1978); note 28 *infra.*

disparate impact cases.[14] In *United States v. County of Fairfax, Virginia*[15] and *Equal Employment Opportunity Commission v. United Virginia Bank/Seaboard National*,[16] the Fourth Circuit reviewed the role of statistical evidence in a plaintiff's case under Title VII. In *Fairfax* the court outlined the role of statistics in establishing a plaintiff's prima facie case of disparate treatment, and in *United Virginia* the court determined what type of statistical evidence is probative in disparate impact cases.

In *Fairfax*, the United States advanced both disparate impact[17] and disparate treatment arguments alleging that the County of Fairfax, Virginia had discriminated against blacks and women in recruitment, hiring, assignments, and promotions.[18] To establish a prima facie case of disparate treatment, the United States offered statistics to show that the number of blacks and women employed by the county was disproportionately low compared to the number of blacks and women in the available labor market.[19] The United States presented statistical data for the Washington, D.C. Standard Metropolitan Statistical Area (SMSA) proving significant disparities on the basis of 1970 census and 1974 Department of Labor information.[20] In addition, the United States produced applicant flow data showing the race and sex of all applicants for county employment and compared that data to the composition of the county's work force.[21]

In response to the disparate treatment claim, the county offered a statistical analysis as well as proof of its 1978 affirmative action plan.[22]

---

[14] *See* Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977).

[15] 629 F.2d 932 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3493 (U.S. Jan. 12, 1981).

[16] 615 F.2d 147 (4th Cir. 1980).

[17] The United States produced evidence at trial that the county's practice of using unvalidated tests to screen applicants had a disparate impact on blacks and women. 629 F.2d at 936-37. The district court did not, however, consider the disparate impact issue. *Id.* In view of the many unresolved factual aspects of the disparate impact case, the Fourth Circuit vacated the district court judgment and remanded for further proceedings. *Id.* at 943.

[18] *Id.* at 936-37.

[19] *Id.* A prima facie case of disparate treatment would shift the burden to the county to rebut the Government's inference of intentional racial and sexual employment discrimination practices. *Id.*; *see* note 5 *supra*.

[20] 629 F.2d at 936-37. The county's work force was 7.5% black and 26.4% female and the SMSA labor pool, as measured by the 1970 census, was 24% black and 40.4% female. *Id.* at 937.

[21] *Id.* Experts testified that, for numerous job classifications, the percentages of blacks and women hired in 1978 were significantly lower than the percentages of blacks and women in the 1978 applicant pool. *Id.* The Government demonstrated that blacks and women were concentrated in lower-paying and less desirable job classifications including service, maintenance, office, and clerical positions. *Id.* The Government also showed isolated instances of actual race and sex discrimination by certain county departments. *Id.*

[22] *Id.* at 937. Unfortunately, the county had destroyed pre-1978 applications for the affirmative action program and could not verify the effectiveness of its 1978 affirmative action plan in comparison to pre-1978 recruitment efforts. *Id.* at 937-38.

The county based the percentage of available blacks and women in the geographic vicinity on a zip code analysis of job applicants in 1978.[23] The district court rejected the United States' statistical data and evaluated the discrimination claim on the basis on the county's zip code analysis.[24] Although the zip code analysis revealed that the county had discriminated against blacks in 1976 and 1977, the district court concluded that the county's affirmative action program precluded the necessity for equitable relief to correct racial discrimination.[25] The district court, however, enjoined future sex discrimination as a result of discrimination by the county against women in one job category.[26] Both the United States and the county appealed from the district court judgment.[27]

On appeal, the Fourth Circuit addressed the issue whether the United States' or the county's statistical evidence was more probative on the disparate treatment discrimination claim.[28] The Fourth Circuit

---

[23] *Id.* at 937. On the basis of the zip codes of 1978 job applicants, the county determined the percentage of applicants from six selected geographical areas including Northern Virginia, the District of Columbia, suburban Maryland, the Mid-Atlantic States, New York/Pennsylvania/Delaware, and the remainder of the United States. *Id.* Using 1970 census figures, the county determined by race and sex the number of employed and experienced unemployed persons from each of the six geographic areas and then computed the percentages of available blacks and women in each employment category for each area. *Id.* Comparison of actual hires from 1974-78 to the available labor market showed significant disparities with respect to blacks in only two job categories and with respect to women in only one job category. *Id.*

[24] *Id.* at 937-38.

[25] *Id.* at 938.

[26] *Id.*

[27] *Id.* at 936.

[28] *Id.* at 936-37. Although statistics may be used in disparate treatment cases, *see* note 13 *supra*, the proper role of statistical evidence in disparate treatment claims is unclear. At least one circuit has rejected a plaintiff's use of statistical evidence alone to establish a prima facie case of disparate treatment. *See* Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412 (8th Cir. 1975) (statistical evidence not determinative of employer's reasons for actions against individual employee). Other circuits have accepted statistical evidence of individual employment discrimination that was supported by other evidence indicating discrimination. *See* Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Mach. Operators, 525 F.2d 1354, 1358 (9th Cir. 1975) (in addition to evidence of specific discriminatory acts, plaintiff produced evidence of qualified females in the area); Muller v. United States Steel Corp., 509 F.2d 923, 928 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975) (selection standards for promotion were vague and subjective). The Court of Appeals for the District of Columbia has held that statistical evidence alone established a prima facie case of discrimination. *See* Davis v. Califano, 613 F.2d 957, 963 (D.C. Cir. 1979). A problem with the *Davis* decision, however, is the D.C. Circuit's analytical shift from disparate treatment analysis to disparate impact analysis. *See id.* at 962-63.

Although the circuits are divided with regard to the use of statistics for establishing a prima facie case in an individual action, the United States Supreme Court's decision in Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), indicates that a plaintiff cannot rely on statistics alone. *Id.* at 579-80. In *Furnco*, the Court held that the statistical evidence was insufficient to demonstrate conclusively that the employer's actions were discriminatorily motivated. *Id.* The *Furnco* Court indicated, however, that the lower court could consider the racial mix of the work force in trying to evaluate the employer's motivation. *Id.*

rejected the county's zip code data.[29] Although the Fourth Circuit also rejected the United States' SMSA statistics,[30] the court held that the United States' applicant flow data was probative on the issue of discrimination.[31] The Fourth Circuit reasoned that the applicant flow data provided the most accurate estimation of the county's labor market because the flow data reflected the actual participants in the county's employment process.[32] The Fourth Circuit indicated that the county's analysis of the available labor market was incomplete and misleading.[33] The county had understated the available number of minority members by including only employed and experienced unemployed blacks and women in its statistics.[34] The court noted that the distortion was especially significant since many of the county's entry level jobs required no prior experience.[35]

The Fourth Circuit's conclusion that the United States' applicant flow data provided the appropriate measure of Fairfax County's 1974-78 labor market is consistent with recent United States Supreme Court decisions.[36] The Supreme Court has indicated that general population statistics may not be probative on the issue of an employer's discrimina-

---

In *Fairfax*, the Fourth Circuit accepted statistical evidence of a substantial racial and sexual imbalance in the county's work force as a sign of purposeful discrimination. 629 F.2d at 938. Although the court noted that disparate treatment requires proof of discriminatory intent, *see* note 5 *supra*, the court held that statistics alone could establish a prima facie case without specific proof of overt discrimination. *Id.* The Fourth Circuit previously has held statistical data sufficient to demonstrate intentional discrimination. *See* Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975). Nevertheless, the *Fairfax* court emphasized the need to examine patterns, practices, and general employment policies in addition to statistics. *Id.*

[29] 629 F.2d at 941.

[30] *See* text accompanying note 20 *supra*. The Fourth Circuit rejected the SMSA statistics because the differences in wage rates and geographical distance between the county and District of Columbia were sufficient to create two separate and distinct labor markets. 629 F.2d at 939-40. The Government therefore could not properly rely on the substantial black population in the District of Columbia to raise the percentage of blacks in the SMSA statistics. *Id.*

[31] *Id.* at 941.

[32] *Id.* at 940. The Fourth Circuit noted that applicant data is generally highly probative evidence of an employer's labor market. *Id.*; *see* Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977).

[33] 629 F.2d at 941.

[34] *Id.*

[35] *Id.*

[36] *See, e.g.*, New York City Transit Auth. v. Beazer, 400 U.S. 568, 584 (1979) (statistical showing inadequate to demonstrate that Transit Authority's regulation prohibiting narcotics use by employees was effectively racially discriminatory); Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977) (proper statistical comparison was between racial composition of school teaching staff and racial composition of the qualified public school teacher population in the relevant labor market). *See generally* Hay, *The Use of Statistics to Disprove Employment Discrimination*, 29 LAB. L.J. 430 (1978) [hereinafter cited as Hay].

tory hiring and promotion practices for skilled positions.[37] Since Congress intended Title VII to insure fair treatment of all employees, and not to redistribute jobs, a plaintiff's statistics should include only those individuals who are qualified for the disputed positions.[38] Statistics based on a qualified labor market are a more accurate indication of employment discrimination than mere general population statistical disparities that are not the result of discrimination.[39]

Fairfax demonstrates that in disparate treatment cases, statistical evidence is less probative because the plaintiff must show that the employer acted with discriminatory intent.[40] In disparate impact cases, however, statistical evidence is highly probative because the plaintiff must show only the actual discriminatory consequences of an employment practice.[41] In *Equal Employment Opportunity Commission v. United Virginia Bank/Seaboard National*, the Fourth Circuit refined the standards for determining when statistical evidence is probative in disparate impact cases. In *United Virginia*, the EEOC brought a pattern and practice suit[42] against United Virginia Bank/Seaboard National (UVB) alleging discriminatory hiring procedures against black applicants.[43]

The EEOC proffered a statistical comparison of black employees at UVB with blacks in the local labor force to substantiate the disparate impact claim.[44] On remand from the Fourth Circuit for more detailed find-

---

[37] The Supreme Court has required that labor market statistics include only those individuals who are qualified to fill the disputed positions. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977) (reliance on "qualified labor market" concept). *See also* Hay, *supra* note 36, at 436.

[38] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978) (Title VII does not impose duty to maximize minority hiring); Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977) (Title VII does not require racially balanced work force); Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971) (since race, religion, national origin, and sex are irrelevant, Congress made job qualifications controlling factor).

[39] *See* Hay, *supra* note 36, at 440.

[40] *See* W. CONNOLLY & D. PETERSON, USE OF STATISTICS IN EQUAL EMPLOYMENT OPPORTUNITY LITIGATION 16-17 (1980).

[41] *Id.* at 17; *see* note 6 *supra.*

[42] *See* note 4 *supra.*

[43] 615 F.2d at 148-49. The EEOC's suit included a claim that UVB had discriminated against black applicants by requiring a high school education and a preemployment credit check. *Id.* at 149. On remand from the Fourth Circuit for more detailed findings of fact, the district court held that the EEOC had failed to establish either that UVB had a minimal high school education requirement or that such a requirement had a disparate impact on blacks. EEOC v. United Va. Bank/Seaboard Nat'l, [1977] 21 FAIR EMPL. PRAC. (BNA) 1392, 1402. The court further held that the fiduciary nature of the banking business would permit credit checks of prospective employees as a legitimate business device so long as UVB conducted checks regardless of race. *Id.* at 1402-03. The EEOC did not appeal from the district court's holdings on the high school education and credit check requirements. 615 F.2d at 149.

[44] 615 F.2d at 149.

ings of fact, the district court held that the EEOC's statistical evidence established a prima facie case of discrimination by UVB against blacks.[45] The district court concluded, however, that UVB had not discriminated against any employee or in any employment practice and also commended UVB's affirmative action program.[46] The court held that UVB had rebutted the presumption of racial discrimination raised by the EEOC statistics.[47]

On appeal, the Fourth Circuit affirmed on different grounds.[48] The Fourth Circuit held that the EEOC's statistical comparisons failed to establish a prima facie case of hiring discrimination.[49] The Fourth Circuit reasoned that the EEOC's statistical evidence was not probative because the figures did not exclude pre-Title VII hires[50] and because the figures represented the total number of blacks in the population area rather than the number of blacks in the work force qualified to work for UVB.[51] In addition, the court held that the EEOC's statistics represented an insufficient statistical sample because the statistical comparisons were based on insufficient samples.[52]

United Virginia is consistent with a recent United States Supreme Court decision that increased the standard for the admission of statistical proof in a Title VII disparate impact case.[53] The Supreme Court

---

[45] 21 FAIR EMPL. PRAC. at 1395.

[46] *Id.* at 1404.

[47] *Id.* at 1402-03.

[48] 615 F.2d at 148-53, 154 n.3.

[49] *Id.* at 156.

[50] *Id.* at 150. The *United Virginia* court held that the EEOC's failure to exclude employees hired prior to the effective date of Title VII (July 2, 1965) from the statistical evidence improperly weighted the figures against UVB because the statistics included white employees hired prior to Title VII. *Id.* The Supreme Court has held that an employee who has made wholly non-discriminatory employment decisions does not violate Title VII by having intentionally excluded blacks from an all-white work force prior to the enactment of Title VII. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 309 (1976).

[51] 615 F.2d at 154. The Fourth Circuit noted that a statistical comparison between the UVB work force and the qualified regional work force would be probative evidence on the issue of employment discrimination by UVB. *Id.* at 149.

[52] *Id.* at 153; *see* Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) (statistical comparisons from insufficient samples improper).

[53] *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 582-87 (1979). The *Beazer* Court held that statistical evidence may establish a prima facie violation of Title VII. *Id.* at 584. Statistics are not, however, irrefutable, and the plaintiffs' general population statistics in *Beazer* failed to prove a Title VII violation. *Id.* The Court rejected one set of statistics for failing to describe employees actually dismissed as a result of the Transit Authority's drug policy. *Id.* at 585. The Court held a second set of statistics to be overinclusive for including more than just the relevant class of applicants and employees receiving methadone treatment. *Id.* at 585-86.

The *Beazer* Court did not distinguish either Griggs v. Duke Power Co., 401 U.S. 424 (1971), or Dothard v. Rawlinson, 433 U.S. 321 (1977), from its shift in statistical evidence analysis in disparate impact cases. The *Griggs* plaintiffs used general population statistics to compare the percentage of blacks and whites who failed to satisfy an employer's facially

held that plaintiffs cannot establish a prima facie case of disparate impact on the basis of general population statistics.[54] Instead, the Court held that a plaintiff must produce applicant flow data to demonstrate the policy's impact on actual applicants.[55]

The *United Virginia* court's refusal to hold that the EEOC had established a prima facie case of employment discrimination is also consistent with prior Fourth Circuit decisions in the area of employment discrimination[56] as well as the purpose of Title VII.[57] In *United Virginia*, all blacks in the local labor force were not qualified for all of the bank's available jobs.[58] The Fourth Circuit stressed that the EEOC had not produced any evidence regarding the relative numbers of blacks and whites qualified for the jobs at UVB.[59] Nor had the EEOC produced evidence, out of thousands of employee records, of a single applicant qualified for a managerial position who was denied employment.[60] Congress did not intend Title VII to guarantee every person a job irrespective of the individual's qualifications or to require an employer to hire an applicant solely because the applicant is a member of a minority group.[61] In Title VII Congress sought to eliminate discriminatory preferences for any group, minority or majority, by removing artificial, arbitrary, and unnecessary barriers to employment.[62] The *United Virginia* decision is consistent with the congressional objectives.

Fairfax and *United Virginia* exemplify the growing role of statisical evidence in Title VII litigation. In both *Fairfax* and *United Virginia*, the Fourth Circuit emphasized that applicant flow data was the most ac-

---

neutral high school diploma requirement to prove a prima facie case of disparate impact. 401 U.S. at 430 n.6. In *Dothard*, the Title VII plaintiffs offered statistical evidence of the relative capacities of men and women to satisfy a statutorily-imposed height and weight requirement. 433 U.S. at 329-30. The *Dothard* Court rejected the defendants' assertion that the plaintiffs' statistics did not concern actual job applicants by noting that a statistical showing of disparate impact need not be based on an analysis of characteristics of actual applicants. *Id.*

[54] *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 585 (1979); note 53 *supra.*

[55] 440 U.S. at 585-86.

[56] The Fourth Circuit has emphasized the necessity for statistical evidence designed to show disparities to adapt fairly to actual labor pools and work categories. *See, e.g.*, Stastny v. Southern Bell Tel. & Tel. Co., No. 78-1361, slip op. at 17 (4th Cir. July 28, 1980); EEOC v. Radiator Specialty Co., 610 F.2d 178, 185 (4th Cir. 1979); Roman v. ESB, Inc., 550 F.2d 1343, 1349-50 (4th Cir. 1976).

[57] *See* text accompanying notes 61-62 *infra.*

[58] 615 F.2d at 149, 154.

[59] *Id.* at 154.

[60] *Id.*

[61] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

[62] *Id.* Since the purpose of Title VII was to insure that men and women be employed strictly on the basis of their qualifications, Congress considered making an employer's use of race as a criterion for employment of applicants an illegal practice. *See* 110 CONG. REC. 13088 (1964) (remarks of Sen. Humphrey). *See also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-79 (1975).