North Carolina Central Law Review

Volume 12
Number 1 *Volume 12, Number 1*

Article 3

10-1-1980

The Bottom Line Concept in Equal Employment Opportunity Law

Alfred W. Blumrosen

THE BOTTOM LINE CONCEPT IN EQUAL EMPLOYMENT OPPORTUNITY LAW

ALFRED W. BLUMROSEN*

The prohibition on employment discrimination in Title VII of the Civil Rights Act of 1964[1] produced major social reform in the 1970's. The enforcement of the statute[2] and of Executive Order 11,246, proscribing discrimination by government contractors,[3] virtually eliminated the deliberate and open restriction of job opportunities because of race, national origin, and sex that had been characteristic of the pre-Civil Rights Act era.[4] But Title VII reached far beyond purposeful dis-

* B.A. 1950, J.D. 1953, University of Michigan. Professor of Law, Rutgers—The State University of New Jersey; Of counsel, Kaye, Scholer, Fierman, Hays, & Handler, New York. Chief of Conciliations, United States Equal Employment Opportunity Commission, 1965-67; Consultant, Equal Employment Opportunity Commission, 1977-79, on reorganization, procedures, Uniform Guidelines on Employee Selection Procedures, and Affirmative Action Guidelines; Consultant intermittently since 1967 to the United States Departments of Labor, Justice, Housing & Urban Development, Equal Employment Opportunity Commission, state and local human rights agencies; advisor to private parties in equal employment matters, 1973-77; author, *Black Employment and the Law* (1971), and law review essays; labor arbitrator since 1957; Acting Dean, Rutgers Law School, 1974-75. The views expressed herein are those of the author, and not necessarily those of any government agency.

1. Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1976)). Title VII makes it unlawful for an employer or labor organization, or an employment agency, or a joint labor-management committee controlling apprenticeship or training to engage in discrimination against an individual in employment on the basis of race, color, religion, sex, or national origin. Pub. L. No. 88-352, § 703, 78 Stat. 255 (codified at 42 U.S.C. § 2000e-2 (1976)).

2. Originally the Act applied only to private employers. Title VII is administered primarily by the Equal Employment Opportunity Commission [hereinafter referred to as EEOC], which was given only the power to investigate and conciliate claims of discrimination against private employers in 1964. Pub. L. No. 88-352, § 705, 78 Stat. 258 (1964). It was called a "poor enfeebled thing" by one scholar. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1965). In 1972, Congress authorized EEOC to bring suit in federal court against private parties. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 107 (codified at 42 U.S.C. § 2000e-6(c) (1976)).

Public employers were brought under the Act in 1972. At that time they became subject to investigation and conciliation by EEOC, but only the Attorney General could bring suits in federal court. *Id.* § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-5 (1976)).

3. In addition to the Title VII prohibitions on employment discrimination, employers who are government contractors are prohibited from discriminating and are required to take affirmative action to assure equal employment opportunity under Executive Order 11,246, which is administered by the Department of Labor, Office of Federal Contract Compliance Programs. Exec. Order No. 11,246, 3 C.F.R. § 169 (1974), *reprinted in* 42 U.S.C. § 2000e app., at 1232 (1976).

4. For example, the textile industry was widely noted in the 1960's for exclusion of blacks. In 1967, the EEOC conducted a Textile Employment Forum to present data about hiring practices at textile mills in North and South Carolina. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SECOND ANNUAL REPORT 21-24 (1968). In 1966, textile companies reported a total of

crimination.[5] The 1971 Supreme Court decision in *Griggs v. Duke Power Co.*[6] established the principle that proof of purpose or intent to discriminate is unnecessary to establish a violation of the Act where the business practice has a disparate effect on minorities or women—in that case, an educational standard and passage of a written examination—and is not shown to be job-related.[7]

779,620 employees of whom 61,672 were black (7.9%). EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY REPORT NO. 1: JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY - 1966, pt. 1, A-1 (1968) [hereinafter cited as EEOC REPORT NO. 1]. In 1978, the industry reported a total of 754,296 employees of whom 176,489 were black (23.4%). EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 1 EEOC 1978 REPORT: MINORITIES AND WOMEN IN PRIVATE INDUSTRY I-19 (1980) [hereinafter cited as 1 EEOC 1978 REPORT]. The same sources indicate that the participation of black white collar workers in the textile industry rose from 1.0% in 1966 to 5.5% in 1978. The trucking industry was also the subject of early Title VII enforcement efforts. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). In 1966, 0.8% of the white collar workers in motor freight transportation and storage were black. EEOC REPORT No. 1, *supra* note 4, at A-2. In 1978, 5.5% of the white collar workers in the industry were black. 1 EEOC 1978 REPORT, *supra* note 4, at I-93.

5. Prior to 1965, discrimination was understood as an individual act based on a purpose or motive to subordinate all members of a class, defined by race, color, religion, sex, or national origin. Blacks belong in their place, therefore any black seeking employment will be assigned only to "black" jobs or not hired at all. Women belong "in the home," and will be given "women's work" or nothing. This "evil motive" test of discrimination made proof of violation virtually impossible. A second text of discrimination—equal treatment—was also applied. If similarly situated blacks and whites or men and women applied, and the white or male was preferred by the employer this would be, or be evidence of, discrimination. This test permitted the employer to rely on subordination of minorities or women in other areas of life as a reason for denying them employment opportunities. Under this test, an employer could impose an educational level requirement, although minorities as a class had less education; a test requirement, although minorities fared less well on written tests; a "no arrest" requirement, although minorities in metropolitan areas were more frequently arrested than whites; or a work experience requirement which ignored forms of experience that many women had.

Early in the administration of Title VII, the Equal Employment Opportunity Commission adopted a third test of discrimination, one based on effect rather than the motive of the employer. This was first done in connection with the question of employment tests. The EEOC rules [*sic*] that a test which had an adverse effect on minority employment opportunity was illegal unless justified by business necessity. The "effect test" was thereafter used by the agency and the lower courts to invalidate "word of mouth" recruiting; to set aside departmental or other seniority units; and to upset traditional hiring hall arrangements in the construction industry when they perpetuated racial discrimination. In 1971, the Supreme Court, in the keystone opinion in *Griggs v. Duke Power Co.*, upheld the use of the effect test.

Blumrosen & Blumrosen, *Layoff or Work-Sharing: The Civil Rights Act of 1964 in the Recession of 1975*, 1 EMPLOYEE RELATIONS L.J. 2, 4-5 (1975).

6. 401 U.S. 424 (1971).

7. "[T]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. "[P]ractices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

"[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in head winds' for minority groups and are unrelated to measuring job capability." *Id.* at 432. "The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the

As a result, many employers began to include minorities and women in jobs that had been the preserve of the white male.[8] Virtually every major employer in the private sector refined and revised employment practices that were once considered a normal part of industrial relations.[9] Both in human terms and in statistical terms, the nation's work force was "more equal" by the end of the decade.[10]

Most impressive were statistics showing that minorities had significantly increased their participation in the job categories of officials and managers, professional and technical workers, and that the proportion

---

consequences of employment practices, not simply the motivation." *Id. See generally* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

The courts have not yet clearly defined in statistical terms what constitutes an adverse effect or impact. Where employment practices are facially neutral, statistics are probative to show a disproportionate effect on a class protected by the statute. The Uniform Guidelines on Employee Selection Procedures - 1978 adopt a "4/5ths" or "eighty per cent" rule as a practical means of determining adverse impact. Uniform Guidelines on Employee Selection Procedures - 1978, 29 C.F.R. § 1607.4 (1978) [hereinafter cited as UGESP - 1978]. *See* text accompanying notes 84-92 *infra* for a discussion of this rule. (In cases of disparate treatment where, unlike disparate "impact" situations, discriminatory motive or intent must be shown, statistics may also be used to make out a prima facie case of discrimination. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 (1977)).

Once a prima facie case of discrimination has been established by the plaintiff, the burden shifts to the employer to show that there is a legitimate, nondiscriminatory reason for an applicant's rejection (individual suit) or for the low number of minorities hired or promoted (pattern or practice suit). Franks v. Bowman Transp. Co., 424 U.S. 747, 772-73 (1976).

8. For examples of increases in black employment, *see* note 4 *supra*. With respect to employment of women in the "executive suite," in 1966, 0.5% of officials and managers in the textile industry were women. EEOC REPORT No. 1, *supra* note 4, at F-4. By 1978, 5,073 of 54,957 textile officials and managers were women (9.2%). 1 EEOC 1978 REPORT, *supra* note 4, at I-19. Other examples of changes in female participation rates as officials and managers include fabricated metal products industry, 0.7% in 1966, and 5.1% in 1978; transportation equipment, 0.5% in 1966, and 3.5% in 1978; and food and kindred products, 0.8% in 1966, and 6.8% in 1978. For 1966 figures, *see* EEOC REPORT NO. 1, *supra* note 4, at F-4, and for 1978 figures, *see* 1 EEOC 1978 REPORT, *supra* note 4, at I-57, -81, -11.

9. The basic employment practice affected by Title VII was the restriction of access to jobs by race or sex. Before Title VII, "black" jobs and "white" jobs, "men's" jobs and "women's" jobs were openly recognized. Some of the other discriminatory employment practices include giving misleading or incomplete information to blacks (*see, e.g.*, United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D.N.C. 1971)); refusing to hire applicants who had arrest records (*see, e.g.*, Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972)); applying a hiring or retention standard to one sex but not to the other (*see, e.g.*, Donohue v. Shoe Corp. of America, 337 F. Supp. 1357 (C.D. Cal. 1972)); and allowing men to work longer hours than women (*see, e.g.*, Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972)). For an extensive discussion of other illegal practices, *see* L. MODJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES §§ 1.11-.17 (1980).

10. For example, from 1954 to 1979, the labor force participation rate of women rose from 33.9% to 46.3%. WOMEN'S BUREAU, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T. OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 1 (1975). For further statistics, *see* R. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 MICH. J. L. REF. 397, 402-10 (1979). New statistical measures have been developed. *See* COMMISSION ON CIVIL RIGHTS, SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN 28-46 (1978).

of minority high school graduates entering college matched that of white youth.[11] Thus, one of the three traditional indicia of discrimination[12]—occupational distribution—showed marked improvement during the decade. The other traditional indicators—relative unemployment rates and family income differences—remained largely unchanged.[13] Therefore, it could be said that the law, through the operation of the *Griggs* principle, opened promotional opportunities to minorities and women in the 1970's. In the eighties, I believe it will shift attention to those practices which contribute to the income and unemployment differentials.[14]

There will be another marked difference between the seventies and the eighties in this field: the emergence of a new legal principle that is contemporaneously thought of as "the bottom line." This principle means that the law will "let alone" those employers whose practices produce an acceptable number of minorities and women in various job categories.[15] The right of an employer to approach "the bottom line"

---

11. For example, in 1966, EEOC found in its national survey that 14,000 black males held positions as officials and managers, while 1,917,000 white males were so employed (total employment reported to EEOC by Title VII employers was 26,000,000). EEOC REPORT NO. 1, *supra* note 4, at 1, 9. In 1978, with a data base of 32,708,421 employees, there were 2,760,584 white male officers and managers and 177,408 black male officers and managers. 1 EEOC 1978 REPORT, *supra* note 4, at 1-1. Thus, the black proportion of the total in this occupation group increased from less than 1% in 1966 to 6% in 1978.

12. These three indicia of discrimination—occupational distribution, relative unemployment rates, and family income differences—have long been used to define the economic consequences of discrimination. Prior to the passage of the Civil Rights Act, blacks were concentrated in the worst paying and least stable job classifications, black unemployment rates were double those of whites, and annual income of blacks was less than 60% that of whites with comparable age, education, and experience. *See* Blumrosen, *Quotas, Common Sense and Law in Labor Relations*, 27 RUTGERS L. REV. 675, 681-82 (1974). *See also* H.R. REP. No. 914, 88th Cong. 2d Sess. 2, *reprinted in* [1964] U.S. Code Cong. & Ad. News 2391; R. Blumrosen, *supra* note 10, at 409.

13. In 1978, the Civil Rights Commission stated that "women and minority males are more likely to be unemployed . . . . With regard to income, minorities and women have less per capita household income; lower earnings; [and] smaller annual increases in earnings with age . . . ." COMMISSION ON CIVIL RIGHTS, SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN 86 (1978). *See* R. Blumrosen, *supra* note 10, at 410.

14. Neither the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1976)), nor Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1976)), have "been applied to the question of wage rates paid for jobs into which minorities and women have been traditionally segregated." R. Blumrosen, *supra* note 10, at 399.

> Consequently, the major problem confronting women at work and an important problem confronting minorities—the relatively low pay rates for jobs which have been traditionally reserved for women or minorities as compared to rates paid for work traditionally performed by males or whites—has not been addressed at all by federal anti-discrimination laws.

Id. at 400.

During the week of May 3, 1980, the EEOC conducted three days of hearings to investigate the causes of wage gaps between women and men and to decide if this pattern of discrimination can be prosecuted under Title VII.

15. The UGESP - 1978 recognizes that an employee selection procedure which has no adverse impact on protected groups does not violate Title VII or the Executive Order. If "[a] selection rate for any race, sex, or ethnic group . . . is less than four-fifths ((4/5) or (eighty per cent)) of

without risking liability under a "reverse discrimination" claim was upheld in 1979 by the Supreme Court in *United Steelworkers v. Weber*.[16]

Just as the seventies were dominated by the *Griggs* decision, so, I believe, the eighties will be dominated by radiations from the *Weber* decision. That decision protects employer programs which increase the proportion of minorities through race specific action against a claim of reverse discrimination. Just as *Griggs* adopted a principle known as "adverse impact" to help identify discriminatory practices, so the *Weber* case supports another principle, known as the "bottom line," to help improve the employment position of minorities and women. This principle will permit a direct attack on social indicators of job discrimination: the higher unemployment rate, the lower occupational status, and the lower income levels of minorities and women.[17] It will also lead to reduced governmental regulation of employers who apply the principle.[18]

The purpose of this article is to explore the development of the "bottom line" principle and to suggest some of its applications in the 1980's.

THE THEORY OF THE "BOTTOM LINE"

The premise behind the "bottom line" principle is that Congress intended to increase employment opportunities for minorities and women and thereby to improve their economic and social status.[19] The "bottom line" principle protects employers who improve employment opportunities from "direct" discrimination claims by minorities and

---

the rate for the group with the highest rate, [it] will generally be regarded by Federal enforcement agencies as evidence of adverse impact. A greater rate generally will not be regarded as evidence of adverse impact. UGESP - 1978, 29 C.F.R. § 1607.4D (1978). For a discussion of this rule, *see* note 7 *supra* & text accompanying notes 84-92 *infra*.

However, as a matter of prosecutorial discretion, governmental agencies enforcing anti-discrimination laws in the employment field will take into account the "general posture of the [employer] with respect to equal employment opportunity" (*i.e.*, the bottom line). UGESP - 1978, 29 C.F.R. § 1607.4E (1978). Section 4C provides that an employer with an acceptable over-all record for employment of minorities and women will probably be free from government initiation of proceedings under the statute or executive order, notwithstanding that there was an adverse impact found in one component of the selection process. However, an affected individual could still pursue his or her remedies. UGESP - 1978, 29 C.F.R. § 1607.4C (1978).

16. 443 U.S. 193 (1979). *See* text accompanying notes 27-34 *infra* for a discussion of the *Weber* decision.

17. For a complete discussion of how these social indicators can be attacked by the "bottom line" principle, *see* Blumrosen, *supra* note 12.

18. *See* note 15 *supra*.

19. [I]t was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," . . . and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.

United Steelworkers v. Weber, 443 U.S. 193, 203 (1979). *See also*, Dothard v. Rawlinson, 433 U.S. 321, 328 (1977).

women[20] and from "reverse" discrimination claims by white males.[21] This protection may take the form of (a) a complete defense against discrimination claims,[22] (b) a decision by administrative agencies not to proceed against such an employer,[23] (c) a factor to be taken into account in favor of an employer in a discrimination suit against it by a minority or female,[24] or (d) a basis for denying injunctive relief.[25]

Thus, the "bottom line" theory, like *Griggs*, is grounded in the intention of Congress to improve the status of minorities and women in employment. *Griggs* was the stick, threatening an employer with a finding of illegality, an injunction, and financial consequences if his business practices perpetuate the inferior status of minorities and women. "Bottom line" is the carrot, rewarding the employer whose practices "mirror" the congressional purpose. Both the *Griggs* theory and the "bottom line" theory are legal doctrines in the service of the congressional purpose. Just as *Griggs* required a decade of judicial interpretation and adaptation by industry and labor, so, too, the "bottom line" concept will require a decade of implementation and judicial-administrative elaboration.[26]

THE "BOTTOM LINE" IN THE SUPREME COURT

Weber is the most recent case to interpret Title VII in furtherance of the congressional purpose to improve the employment status of minorities and women.[27] In *Weber*, a white employee challenged a training program for skilled jobs which reserved fifty per cent of the places in the program for minorities. This challenge arose in a context where

20. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

21. After the passage of Title VII lent new urgency to compliance with the provisions of Executive Order 11,246, many employers began affirmative action programs to achieve equal employment opportunity. Some of these programs were challenged in "reverse" discrimination suits because they took into account sex, race, or national origin, which are prohibited by Title VII. Pub. L. No. 88-352, § 703, 78 Stat. 255 (codified at 42 U.S.C. § 2000e-2 (1976)). *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979); Contractor's Ass'n v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971); Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972); Hiatt v. City of Berkeley, 10 F.E.P. 251 (Cal. Super. Ct. 1975).

22. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

23. UGESP - 1978, 29 C.F.R. § 1607.4C (1978).

24. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

25. In County of Los Angeles v. Davis, 440 U.S. 625 (1979), an effective affirmative action program was held to moot out a Title VII claim for injunctive relief. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970), also denied injunctive relief against a pattern of discrimination in hiring in light of the recent good hiring record of the employer.

26. Like the "adverse impact" definition of discrimination that is identified with the *Griggs* case, the "bottom line" principle has been applied in several Supreme Court opinions, the most recent being United Steelworkers v. Weber, 443 U.S. 193 (1979). Thus, the "bottom line" concept may ultimately be identified as the "*Weber* principle," just as the "adverse impact" concept is known as the "*Griggs* principle."

27. *See* note 19 *supra*.

virtually all skilled employees were white, and where there were few blacks in the pool of available skilled workers.

The company denied that it had discriminated against blacks, although the reason there were so few black skilled workers was a company policy requiring extensive prior experience as a condition for skilled employment. This requirement may have been illegal under *Griggs*' adverse impact principle,[28] but the issue was not litigated because neither the company, the union, nor the white plaintiff had any interest in establishing discrimination against blacks.[29] Rather, the company defended the training program on the ground that it was entitled to redress traditional exclusion of blacks from opportunities to obtain skill training—a situation termed "societal discrimination."[30] The lower courts held (a) that the program discriminated on its face by reserving positions on the basis of race; (b) that the minorities benefited had not been the victims of discrimination by the employer, and hence the program was not "remedial"; and (c) that correcting "societal discrimination" did not justify a program which otherwise violated the statute.[31]

The Supreme Court reversed. It held that the program did not discriminate despite the fact that race determined eligibility. The Court invoked the principle that statutory language should be interpreted in light of the purpose or "spirit" of the legislation, rather than in a literal sense. The program was held to be consistent with the purpose of the statute, which was to include minorities in jobs from which they had been traditionally excluded.[32] Therefore, the plan did not constitute

---

28. *See* Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting).

29. In his dissent in *Weber v. Kaiser Alum. & Chem. Corp.*, Judge Wisdom pointed out that the broad prohibition against discrimination places the employer and the union on what he accurately described as a "high tightrope without a net beneath them." *Id.* Justice Blackmun agreed: "If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks." United Steelworkers v. Weber, 443 U.S. at 208 (Blackmum, J., concurring). In the district court no party had any incentive to prove that Kaiser had violated the Act. Weber v. Kaiser Alum. & Chem. Corp., 415 F. Supp. 761, 769 (E.D. La. 1976).

30. Appellants urge this court to approve the on-the-job training ratio not to correct past *employment discrimination* . . . but to correct a lack of training blamed on past *societal discrimination*. For surely it is common knowledge that many blacks (and others) have suffered arbitrary discrimination in the society, discrimination still producing effects which they carry with them . . . .

Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 225 (5th Cir. 1977).

31. Weber v. Kaiser Alum. & Chem. Corp., 415 F. Supp. 761, 769-70 (E.D. La. 1976); Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 225-27 (5th Cir. 1977).

32. "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.' 110 Cong. Rec. 6548 (remarks of Sen. Humphrey)." United Steelworkers v. Weber, 443 U.S. at 202.

"The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to 'open employment opportu-

illegal discrimination.

The fact that the individuals who benefited were not the victims of prior discrimination by the employer was not significant in the decision. In fact, the minorities who benefited under the plan probably were also the beneficiaries of an earlier affirmative action hiring program for unskilled workers which the company had instituted as a result of informal governmental pressures.[33] The rejection of a requirement that those benefiting under an affirmative action program be the victims of past employer discrimination left employers free to adopt programs that include minorities and women without admitting past discrimination against them or encountering the risk of a reverse discrimination claim. The opposite result would have severely limited the ability of the employer to take the kind of affirmative action that would enable it to achieve "bottom line" results.[34] *Weber*, however, was only the most recent Supreme Court decision reflecting the "bottom line" philosophy.

In 1974, the Supreme Court decided its first "bottom line" case, a case in which the employer had hired large numbers of minorities in the job for which a minority applicant had applied. In *Espinoza v. Farah Manufacturing Co.*,[35] the plaintiff claimed discrimination on grounds of national origin. She was a Mexican-American resident alien in Texas who had been refused employment because she was not a United States citizen. She claimed that the citizenship requirement discriminated against those born outside the United States. The Court rejected her claim because more than ninety per cent of the employees in the job for which she had applied were American citizens of Mexican-American ancestry. The "bottom line" showed that there was no discrimination against Mexican-Americans.

In 1976, in *Washington v. Davis*,[36] the employer's good overall record of recruiting and hiring minorities led the Supreme Court to relax the standards of the EEOC testing guidelines.[37] *Washington* involved a test for entry into a police training program. While the test apparently measured the abilities necessary for the training program itself, there was no correlation established between success in the training program

---

nities for Negroes in occupations which have been traditionally closed to them.' 110 Cong. Rec. 6548 (remarks of Sen. Humphrey.)" *Id.* at 208.

33. *Id.* at 197-98.

34. "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Id.* at 204.

35. 414 U.S. 86 (1973).

36. 426 U.S. 229 (1976), *discussed in* Blumrosen, *Developments in Equal Employment Opportunity Law, 1976*, 36 FED. B.J. 55, 61-64 (1977).

37. Although decided under the fifth amendment equal protection clause of the United States Constitution, the Court addressed the issues under Title VII.

and success on the job. Therefore, the test did not meet the technical requirements of the EEOC guidelines.[38] Nevertheless, the majority of the Supreme Court upheld the use of the test.

I believe that several factors influenced this decision. First, the department had embarked on a major recruiting program,[39] so that the proportion of blacks who passed the test, while lower than that of whites, nevertheless resulted in admission to the training program of "adequate" numbers of blacks in reference to relevant population figures. All applicants who were admitted to the training program "graduated" and became police officers. Thus, the department was in fact providing substantial minority employment. Second, the test involved reading and writing skills which the Court may have concluded were sufficiently related to police work.[40] Third, the "training program" could be viewed as a "job" in its own right. It lasted sixteen weeks. The "higher level" job which automatically followed was that of police officer. Under EEOC guidelines in effect then and now, there is no obligation to test for a higher level job. Such an obligation would be inconsistent with the purposes of the statute.

In *New York City Transit Authority v. Beazer*,[41] the Court noted that the plaintiff could not have sustained a claim of purposeful discrimination because the Authority employed minorities at a rate double their availability in the labor force.

In *Furnco Construction Corp. v. Waters*,[42] the Court held that the employer's "good record" of hiring minorities could be introduced as evidence of a non-discriminatory motive in a case alleging that individual plaintiffs had been excluded from employment because they were black. *Furnco* is the companion case to *McDonnell Douglas Corp. v. Green*,[43] which held that evidence of a "bad record" in hiring minorities would be evidence against the employer in an individual case.

Other than *Espinoza*, *Furnco* is the clearest "bottom line" case to reach the Supreme Court. *Furnco* involved a deliberate affirmative action hiring program under which the employer sought to and did employ a specific proportion of black workers exceeding the proportion of blacks available in the labor market with the necessary skills. This affirmative action plan had been developed after the employer had experience in prior Title VII litigation. The employer's business consisted

38. The UGESP - 1978 sets out acceptable types of validity studies. UGESP - 1978, 29 C.F.R. § 1607.5 (1978).
39. 426 U.S. at 246.
40. *Id.* at 252.
41. 440 U.S. 568 n.25 (1979).
42. 438 U.S. 567 (1978).
43. 411 U.S. 792 (1973). *See* Blumrosen, *Strangers No More: All Workers are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUSTRIAL REL. L.J. 519 (1978).

of re-bricking blast furnaces on contract from steel manufacturers in the Chicago-Gary area. When it obtained a contract, it designated a permanent employee as supervisor of the job. That employee would then hire individual workers for the project from among those workers known to him to be experienced and competent, or recommended to him as such. The supervisors were white; the persons they hired also tended to be white. Alone, this practice would constitute a discriminatory hiring system.[44] However, the employer's affirmative action hiring program directed that a specific proportion of those hired should be black. These persons were identified by other company personnel. As a result, Furnco employed black bricklayers in excess of three times their participation rate in the available labor force.

Three qualified black bricklayers applied "at the gate" for employment on the project. They were rejected on the ground that no one was hired at the gate, but only through the process described above. They brought a Title VII action. The district court found for the employer on the ground of "business necessity"[45]—that the special skills involved in the job in question justified the employer in pre-screening employees and refusing to hire anyone at the plant gate. The court of appeals[46] reversed on the ground that Title VII precluded an employer from refusing to consider qualified black applicants. The court of appeals, however, did not find any other specific aspect of the employer's practice to be discriminatory. The Supreme Court reversed. It rejected the contention that an employer must always consider qualified black applicants regardless of the surrounding circumstances. Rather, it noted that there was no "adverse effect" of the employer hiring practices on the minorities as a group because the affirmative action program had resulted in hiring of minorities at a rate substantially above their availability in the labor pool. This meant that the two hiring practices taken together—the supervisors' method of selecting employees plus the affirmative action program—did not violate Title VII under the "adverse effect" principle of *Griggs*.

On this point Justice Marshall dissented.[47] He wished to leave open the question of whether the affirmative action hiring program eliminated the discriminatory taint of what he considered the "primary hiring practice" of employment of whites based on past associations with the white supervisor. The majority opinion, however, foreclosed that issue, and thus implicitly adopted the "bottom line" thesis: the law will look to the overall results of an employer's hiring program, and if they

44. *Cf.* Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).
45. Waters v. Furnco Constr. Co., 13 F.E.P. 1020, 1024 (1975).
46. 551 F.2d 1085 (7th Cir. 1977).
47. 438 U.S. at 583-84 (Marshall, J., dissenting).

are not illegal, will not inquire into the operation of component parts of the process.

Concluding that there had been no "adverse impact" found, the majority then chastised the court of appeals for imposing a remedy without finding a violation of the statute: "[C]ourts may not impose such a remedy [to consider and hire more qualified minorities] on an employer at least until a violation of Title VII has been proved, and here none has been . . . ."[48]

The Court did, however, remand to permit consideration of whether there had been deliberate purposeful discrimination against any of the individual applicants. In connection with this remand, the Court directed that the employer be permitted to introduce the results of its affirmative action hiring program in order to rebut any inference of purposeful discrimination.

> [T]he employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided.[49]

Furnco thus illustrates two aspects of the "bottom line" concept. The results of affirmative action preclude a finding that the hiring practice has an adverse effect under the *Griggs* principle. Those same results may show that an employer has not rejected the particular applicants because of their race. If an employer is hiring other minorities at the time it rejects a particular minority, it seems unlikely that the rejection was based on race. In such circumstances, in the absence of other evidence of purposeful discrimination on the part of the employer, it is difficult to see how individual plaintiffs could prevail. The deliberate inclusion of minorities through an affirmative action program will make it difficult for a trier of fact to believe that other minorities were rejected on racial grounds.[50]

Thus, in cases based on the "adverse effect" theory, such as *Espinoza*, as well as cases based on the "intent" theory of discrimination, such as *Furnco*, a good record of minority or female employment may defeat liability altogether, or become a factor in the court's net judgment as to whether there was discrimination. The lower courts are also applying the "bottom line" concept.[51]

---

48. *Id.* at 578.
49. *Id.* at 580.
50. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 584 n.25 (1979).
51. Rice v. City of St. Louis, 607 F.2d 791 (8th Cir. 1979); Blizard v. Frechette, 601 F.2d 1217 (1st Cir. 1979); EEOC v. Navajo Refining Co., 593 F.2d 988 (9th Cir. 1979); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Hernandez v. Phelps Dodge Refining Co., 572 F.2d 1132 (5th Cir. 1978); Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256 (D. Conn. 1979); Hameed v. International Ass'n of

THE BOTTOM LINE IN THE ADMINISTRATIVE AGENCIES

In 1966, the EEOC issued a set of "guidelines" expressing its interpretation of Title VII requirements regarding testing which adversely affects minority employment opportunity. The underlying theory of the guidelines was that unless the tests had been validated—that is, unless there was a demonstrated relationship between success on the test and success in job performance—the tests were not "professionally developed" as the term was used in Title VII. The guidelines were relatively simple. Thereafter, EEOC and the Department of Labor, Office of Federal Contract Compliance issued more extensive guidelines on the subject.[52] In 1971, the Supreme Court upheld the basic EEOC interpretation of Title VII in the *Griggs* case.[53]

In 1972, various federal agencies set out to harmonize technical differences between the EEOC, the Labor Department, and the Civil Service Commission. After a four year gestation period, the result was a governmental nightmare.[54] Three agencies—Justice, Labor, and Civil Service—issued new guidelines called the Federal Executive Agency Guidelines (hereinafter referred to as FEA).[55] EEOC republished its 1970 guidelines, which differed in certain respects from the FEA, including the approach to the "bottom line" issue.[56] The FEA guidelines adopted an approach that examined the end result of an employer's hiring or promotion process to determine if there was adverse impact. If there was no adverse impact, normally there would be no enforcement action, even if one component of the process, such as a test, did have adverse impact. The EEOC guidelines were interpreted informally as taking the opposite view. If any component of a selection process had adverse impact, it had to be validated, regardless of whether the remainder of the process cancelled out the adverse effect of the component. The differences between the agencies can be illustrated by a simple example:

	APPLICANTS	PASSED TEST	PASSED INTERVIEW	HIRED
White	50	30	20	6
Black	50	10	7	6

Bridge, Structural & Ornamental Iron Workers, Local Union No. 396, 24 F.E.P. 352 (8th Cir. 1980); Abercrombie v. Bi-Lo Corp., 21 F.E.P. 1252 (D.S.C. 1979); EEOC v. Greyhound Lines, 24 F.E.P. 7 (3rd Cir. 1980).

52. For discussion of the 1966 and 1970 EEOC testing guidelines, *see* Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-36 (1975). Guidelines discussed in *Moody* are found in 29 C.F.R. § 1607 (1974).

53. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

54. *See generally*, Rubin, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. UNIV. L. REV. 605, 608-10 (1979).

55. 41 Fed. Reg. 51,734, 51,735 (Dept. of Justice), 51,744 (Dept. of Labor), 51,752 (Civil Service Comm'n) (1976).

56. Guidelines on Employee Selection Procedures, 41 Fed. Reg. 51,984 (1976) (codified in 29 C.F.R. § 1607).

Under the approach of the EEOC guidelines, the test resulted in an adverse effect on minorities because it screened out a higher proportion (80%) of them, than of whites (40%). Therefore, it would have to be validated. Under the FEA guidelines approach, the test would not have to be validated because there was no overall adverse impact. The same proportion of minority applicants were hired (12%) as were whites (12%).

The nightmare of government inconsistency proved short-lived. In 1978, disputes between the agencies were resolved in the Uniform Guidelines on Employee Selection Procedures-1978 (hereinafter referred to as UGESP).[57] UGESP adopted the "bottom line" philosophy of the FEA guidelines as a matter of prosecutorial and administrative discretion.[58] Thus, on the "bottom line" issue, the regulatory agencies reached the same result as the Supreme Court had reached in *Furnco*, albeit as a matter of the exercise of discretion,[59] rather than as an interpretation of the statute.

UGESP invites an employer to eliminate the adverse impact of a selection procedure rather than to validate it.[60] Sections 3,[61] 4,[62] and 6[63] of the Guidelines make clear that if an employer eliminates the adverse effect of employment practices for a job by placing minorities and women in it at a rate close to the rate at which white males are placed, it need not validate the selection procedure. The employer who takes that action will probably not be prosecuted by the government under Title VII or the Executive Order prohibiting discrimination by government contractors.[64]

Another consideration makes the "bottom line" approach attractive, if not essential, to employers in connection with the review of their selection procedures under Title VII. It has been my experience that

57. 29 C.F.R. § 1607 (1978).

58. *See* text accompanying note 56 *supra*.

59. 29 C.F.R. § 1607.4C (1978).

60. Absent adverse impact, there is no Title VII violation under the *Griggs* principle. *See* EEOC v. Greyhound Lines, 24 F.E.P. 7 (3rd Cir. 1980).

61. Under 29 C.F.R. § 1607.3, EEOC determines that a procedure having adverse impact constitutes discrimination unless justified by a business necessity.

62. Under 29 C.F.R. § 1607.4A and 29 C.F.R. § 1607.4B, the EEOC requires keeping records that would disclose adverse impact. Records must be kept on sex, race, and ethnic groups. 29 C.F.R. § 1607.4C explains that although individual components of the selection procedure show adverse impact, only if the *total* selection process results in adverse impact will validation be required. 29 C.F.R. § 1607.4D adopts the "four-fifths" or "eighty per cent" rule. *See* note 7 *supra*.

63. 29 C.F.R. § 1607.6 describes how alternative selection procedures can be used to eliminate adverse impact or how an employer can use an affirmative action program to eliminate adverse impact rather than validate under the UGESP - 1978.

64. UGESP - 1978, 29 C.F.R. § 1607.4C (1978).

most selection and promotion decisions, particularly for jobs which involve the exercise of some discretion, involve an irreducable component of subjective judgment. Yet, the reliance on subjective judgments may include components of conscious or unconscious discrimination.[65] Where subjective judgments have adverse impact, the system which relies on them is presumptively illegal. In such cases, the courts will require the employer to establish "objective standards" in order to reduce the scope for discrimination.[66] This requirement not only eliminates possible discrimination, it also reduces the scope for the legitimate exercise of subjective judgments. Virtually the only way an employer can retain the flexibility to make subjective judgments is by meeting the "bottom line" standards. In this way, the employer will avoid scrutiny of its practices under the strict standards of Title VII. This is a powerful incentive to the employer to meet the bottom line standard and to retain its freedom of decisionmaking.

If the employer chooses to validate its procedures rather than to achieve "bottom line" results, the UGESP contains detailed rules concerning validation.[67] The existence of this combination of professional standards and legal requirements for violation of selection prodcedures[68] poses practical problems that may lead an employer to conclude that it is easier to "switch than fight" to preserve selection procedures that may have adverse effects.

In addition to the UGESP, the EEOC has adopted guidelines intended to protect employers who take affirmative action from liability for "reverse" discrimination claims.[69] These guidelines antedated the decision in *Weber*,[70] and provide an additional element of protection, and hence incentive, to an employer who wishes to increase its minority and female employment.

These guidelines differ in one important aspect from all previous EEOC guidelines. All previous guidelines represented EEOC's interpretation of the statute, and as such were entitled to "deference" by the courts. The courts remained free to disagree with EEOC guidelines, and, on occasion, did so.[71] Thus, reliance on EEOC guidelines was a speculative venture. The EEOC affirmative action guidelines have re-

65. *See, e.g.*, Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

66. *Id.*

67. The UGESP - 1978 requirements are highly technical and complex. *See* UGESP - 1978, 29 C.F.R. § 1607.5B-.5C (1978).

68. UGESP - 1978, 29 C.F.R. § 1607.5C (1978).

69. Affirmative Action Appropriate Under Title VII of The Civil Rights Act of 1964, *as amended*, 29 C.F.R. § 1608 (1979).

70. United Steelworkers v. Weber, 443 U.S. 193 (1979), applies where there are traditionally segregated jobs. The EEOC Guidelines apply in situations where traditional segregation is not present. *See* 29 C.F.R. § 1608.4 (1979).

71. *See, e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

duced or eliminated that risk. While they constitute the EEOC's interpretation of the statute, they go further and invoke the "save harmless" provision of Title VII, section 713(b).[72] Under this section, which has never been invoked by the EEOC in a general way, employers and others who act in "good faith, in reliance upon and in conformity with" the guidelines, cannot be found in violation of Title VII, even if the EEOC interpretation is later rejected by the courts.

To invoke the affirmative action guidelines, an employer needs to conduct an analysis of his employment practices[73] that may suggest actual or potential "adverse effect," the present effects of prior discriminatory practices, or a pool of available workers which was limited as a result of prior discriminatory practices. The employer need not admit prior discrimination.[74] After such an analysis, the employer may adopt a reasonable affirmative action program, including "goals and timetables"[75] without risking "reverse discrimination" liability. The guidelines cover areas of affirmative action that go beyond the *Weber* decision's emphasis on including minorities in "traditionally segregated jobs."[76] Thus, they contribute to the freedom of the employer to achieve an acceptable "bottom line" while retaining a substantial degree of flexibility in decisionmaking.

The most recent development in this area is a resolution of April 1, 1980, by the EEOC, adopting a new approach to employers and unions who address problems of discrimination through the collective bargaining process.[77] EEOC has indicated that it will take the "good faith" of the employer or union into account in "investigation, conciliation and enforcement" activities. The resolution suggests a case-by-case evaluation of the action of each party in collective bargaining to determine whether it did "enough" in the bargaining process to achieve essen-

---

72. In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect . . . .

Civil Rights Act of 1964, Pub. L. 88-352, § 713(b), 78 Stat. 265 (codified at 42 U.S.C. § 2000e-12(b) (1976)).

73. "An affirmative action plan . . . shall contain three elements: a reasonable self analysis, a reasonable basis for concluding action is appropriate, and reasonable action." 29 C.F.R. § 1608.4 (1979). "The objective of a self-analysis is to determine whether the employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment . . . or leave uncorrected the effects of prior discrimination. . . ." *Id.* § 1608.4A.

74. "It is not necessary that the self analysis establish a violation of Title VII" before a plan can be put into effect. *Id.* § 1608.4B.

75. *Id.* § 1608.4C.

76. *Id.* § 1608.3A-.3C.

77. [1980] 103 Lab. Rel. Rep. (BNA) 304.

tially "bottom line" results, or whether it was a recalcitrant party seeking to maintain discriminatory practices.

Some Specific Aspects of the "Bottom Line" Approach

Thus, both the Supreme Court and the federal agencies have moved toward the concept that the purpose of the law can be directly served by employer race and sex specific action to increase minority and female employment. In such actions, percentages, numbers, goals, and timetables may be used.[78] It is implicit in this analysis that the persons benefited by such programs need not themselves have been "identifiable victims" of discrimination, so long as they are members of the groups which have been discriminated against. The *Weber* decision makes this point in its rejection of the court of appeals' analysis. That court would have permitted affirmative action only to the extent that it provided redress for victims of prior discrimination.[79] But this was not the situation in *Weber*. In fact, the unskilled black workers who benefited from the affirmative action training program may have been beneficiaries of an earlier affirmative action hiring program designed to increase the number of unskilled black workers.[80] If so, they were twice blessed by affirmative action. This fact did not deter the Supreme Court from upholding the training program. Thus, *Weber* overcomes a major barrier to the "voluntary" use of "quota remedies." The imposition of such remedies by courts and agencies can be expected in the future with greater frequency where the employer has not adopted and implemented a "bottom line" philosophy.

One issue that must be resolved in applying the "bottom line" approach is "how much is enough." How do we know if the "bottom line" has been satisfied? As a general principle, the bottom line for a job category should be set at that point which, if implemented generally, will have a significant effect on the three indices of employment discrimination: unemployment rates, occupational distribution, and income ratios. It must be achievable; hence, availability of candidates is a necessary consideration.

Hazelwood School District v. United States[81] suggests that the appropriate standard is the distribution of opportunities which would occur in the long run absent discrimination. This distribution would include minorities and women throughout the relevant labor force in rough approximation to their proportions in the population. This, however, is

78. 29 C.F.R. § 1608.4C (1978).

79. Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 224 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979).

80. *See* text accompanying note 33 *supra*.

81. 433 U.S. 299, 305 (1977).

not to be understood as a rule requiring proportional representation in each employment situation.[82] Rather, it is a general standard by which we may determine when society has "done enough" in the field of employment opportunity. The application of this standard to specific cases will require a high degree of sensitivity centered around two fairly simple points.

First, in the absence of a showing of discriminatory purpose, Title VII comes into play only when there is "adverse impact." This is the lesson of *Furnco*.[83] Absent such impact, the courts should not meddle in employer hiring practices under Title VII. Second, adverse impact is a *legal*, not a statistical, concept.[84] The UGESP uses a "rule of thumb" to identify adverse impact, which involves finding that the rates of hire or promotion of minorities are less than eighty per cent of that of non-minorities.[85] Thus, in the illustration used above, the test did have adverse impact, while the interview did not.

This "rule of thumb" is an understandable and relatively simple method of identifying when the statutory obligations attach. It uses facts that are easily ascertainable and are understandable to those who must administer and review such programs. The argument that the standard should be "statistical significance" rather than the "eighty per cent rule of thumb" not only would require all employers to acquire statistical competence, but—more fundamentally—it misconceives the function of the principle of adverse impact. Adverse impact is a legal concept which has been defined by the Supreme Court in cases from *Griggs*[86] to *Beazer*.[87]

Statistical significance is not necessary to establish adverse impact. Adverse impact can be identified by a simple inspection of the differences in the number of males compared to females or the number of blacks compared to whites. Rather, evidence of statistical significance may be used defensively to show that factors other than race or sex were responsible for the adverse impact.[88] If statistical significance were required to prove adverse impact, a plaintiff would have to exclude all reasons other than race or sex as a part of the prima facie case. This would destroy the legal function of the adverse impact principle, which is to require the defendant to explain or to justify apparent restrictions on minority or female opportunity. The "eighty per cent

82. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977).

83. Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978). *See* text accompanying notes 42-51 *supra*.

84. *See* discussion note 7 *supra*.

85. *Id.*

86. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

87. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

88. *See* Finklestein, *Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 CAL. L. REV. 737 (1980).

rule" of the UGESP is a practical device used to identify situations where an explanation should be produced by an employer.

The "eighty per cent rule" requires a comparison between two situations: "before" and "after." Thus, it will work to compare applicants with "hires," or those employed with those promoted. However, it will not work in connection with recruiting of employees because the size of the pool of available persons generally is not known. This uncertainty leads to interminable conflicts about the size of the pool of "available" persons. If the pool is defined in a limited way, then the pool may "dry up." If it is defined as the labor force as a whole,[89] then the employer's obligation may become more extensive than can be achieved.

It is my view that the determination of availability should not be so refined as to cause the pool of candidates to disappear, but neither should it impose an impossible burden on the employer. These objectives can be met by utilizing the categories of employment which the federal government has developed and administered for more than fifteen years.[90] By now, virtually all jobs have been slotted into one of the ten occupational categories on which all employers of one hundred or more employees are required to report annually to the EEOC.[91] Availability should be based on the existing utilization rates of other employers in the same general job category. For example, if all employers in a given area employ minorities in a certain job category at a level of thirty per cent, as revealed by EEOC data, such information would establish the existence of a qualified labor pool in the area. This approach will provide a ready answer to questions of availability, which, when coupled with the operation of the "eighty per cent rule," will assure that only the employer with serious underutilization will be targeted under Title VII. EEOC data of the type described can be made readily available without identifying individual employers.[92] This would eliminate the technical advantages which wealthy employers may obtain through the use of high caliber specialists, and would reduce the cost of administering the programs to the government.

Once adverse effect has been established, a remedy using specific goals and timetables is now appropriate,[93] reserving specific proportions of positions to minorities or women. This remedy may remain in effect until the employer has reached the level of participation expected

89. In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), general population statistics were held determinative of whether enough minorities had been hired as truck drivers. However, in Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), the Court looked to a more limited pool of teachers where specialized skills were required.

90. *See* EEOC REPORT NO. 1, *supra* note 4, at xv.

91. *See* 1 EEOC 1978 REPORT, *supra* note 4, at I-686.

92. *Id.* at IX.

93. 29 C.F.R. § 1608.4C (1978). The discussion in text assumes that the employer has no other defenses.

of an employer who has made a positive contribution to equal employment opportunity—so that the employer's minority and female participation rates would be *above* the average.[94] Under this approach, the employer who "comes close" to meeting the "bottom line" standard would be "let alone," while the employer who did not, would feel the full burden of the law until it had made this positive contribution to equal employment opportunity.

The bottom line concept must be applied separately to each job group. Otherwise, the purpose of the statute could be defeated by placing many minorities and women in jobs which had been traditionally reserved to them.[95]

Once a goal has been established, the courts now seem more willing to reserve specific percentages of the job vacancies for minorities or women until the goal has been reached, following the formula adopted in the *Weber* case.[96]

The present Office of Federal Contract Compliance Programs' (hereinafter referred to as OFCCP) approach to the "bottom line" is more mechanical than that suggested here or that applied under Title VII. Under the statute, as interpreted, a "gross disparity" between employment and availability establishes a prima facie case of discrimination in recruitment and hiring.[97] Remedial action in such a case may include goals aimed at achieving a level of employment based on availability.[98] Under the OFCCP approach, an employer missing the availability goal by one person must adopt a goal of increasing its minority or female employment by one.[99] Thus, there exists a difference in the underlying approaches of Title VII and the Executive Order program, in that the Executive Order program would require "affirmative action" of contractors in situations where the Title VII approach would leave the employer alone because its employment pattern did not rise to the level of a "gross" disparity.

While the OFCCP Compliance Manual suggests that an employer must not only set goals if it is short of the availability level by one person, but also must come within ninety-five per cent of meeting its goals,[100] we can hope that the Order will not be enforced in a mechanical fashion. In terms of allocation of scarce enforcement resources and

94. This "average" could be established through a consideration of relevant EEOC statistics.

95. This view is adopted in 29 C.F.R. § 1608.4C (1978). *See* note 9 *supra*. This view is also implicit in Furnco Const. Corp. v. Waters, 438 U.S. 568 (1978).

96. *See* text accompanying notes 27-34 *supra*.

97. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

98. *Id.*; Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979).

99. 41 C.F.R. § 60-2.12(*l*) (1979), *as interpreted in* OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, COMPLIANCE MANUAL § 2.190.1 (1979).

100. *Id.*

of avoidance of complex legal problems of the relation between Title VII and the Executive Order, it makes more sense for the Department of Labor to focus its enforcement efforts in situations where it can establish a violation of *both* Title VII and the Order, rather than addressing the "marginal" case under the Executive Order.

CONCLUSION

The "bottom line" principle will be a central legal and industrial relations issue of the 1980's. It is an important tool in implementing the anti-discrimination law because it suggests that the allocation of jobs on the basis of race or sex under the threat of government supervision need not continue into the indefinite future. Once the bottom line is "satisfied," employers should be free to operate personnel systems on principles which do not take into account race or sex. This does not mean that the employer may return to its traditional patterns of restriction or exclusion of minorities or women. In order to satisfy the "bottom line" standard, the employer will have brought minorities and women into its employment in significant numbers. Their presence will provide assurance that the employment system will thereafter operate to include those who have previously been excluded without the need for formal quotas, either voluntarily adopted or governmentally imposed.

Recruitment practices such as "word of mouth" notification of vacancies from incumbent employees to their friends, which excluded minorities when the work force was all or largely white, will include them as minorities make up an increasing part of the work force.[101] Thus, the bottom line principle envisions a time when race or sex conscious programs can be reduced or eliminated because the industrial relations system operates autonomously in a fair way.[102] It may enable our society to implement the underlying principles of Title VII without creating a system which permanently allocates employment on the basis of race or sex.

---

101. In discussing this approach in an article concerning the duty of fair recruitment, I hypothesized that minority employment would reach a "take off point" where special programs would no longer be necessary. *See* A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 218-70 (1971).

102. The Supreme Court in *Weber* laid a foundation for discontinuing such programs after an appropriate level of minority participation had been established by distinguishing between programs which "eliminate" racial imbalance and those which "maintain" racial balance. The Court suggested that a program of the latter type might not be protected under Title VII. United Steelworkers v. Weber, 443 U.S. 193, 208 (1979). The temporary nature of the set aside of 10% of certain federal construction contract funds for minority contractors was a factor contributing to the holding in Fullilove v. Klutznick, 100 S. Ct. 2758, 2779 (1980), that the program was constitutional.