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EMPLOYMENT DISCRIMINATION LAW—THE SUPREME COURT LOOKS AT THE "BOTTOM LINE"—Connecticut v. Teal, 457 U.S. 440 (1982)

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EMPLOYMENT DISCRIMINATION LAW—THE SUPREME COURT LOOKS AT THE "BOTTOM LINE"—*Connecticut v. Teal*, 457 U.S. 440 (1982).

I. INTRODUCTION

In December, 1978, 329 employees of the Department of Income Maintenance of the State of Connecticut took an examination for promotion to supervisory status.[1] Shortly after the results of the examination were announced, several black employees who failed the test instituted a suit against the State of Connecticut.[2] The employees alleged that the test barred a disproportionate number of blacks from consideration for promotion in violation of Section 703(a)(2) of Title VII of the Civil Rights Act of 1964.[3] As a result of the alleged disparate impact,[4] the plaintiffs argued that they had established a prima facie case of employment discrimination under Ti-

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1. Connecticut v. Teal, 457 U.S. 440, 443 (1982).

2. *Id.*

3. *Id.* at 444. Section 703(a)(2) of Title VII of the Civil Rights Act of 1964 provides:

> (a) It shall be an unlawful employment practice for an employer—
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> . . .
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e - 2(A)(2) (1976).

4. The Supreme Court has recognized two theories plaintiffs may use to prove discrimination in Title VII cases — disparate impact and disparate treatment. Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). Disparate impact analysis is used to challenge specific employment practices, such as an examination. Although the specific practice may not be discriminatory on its face, disparate impact occurs when the results of such a facially neutral practice fall more harshly on a racial minority or women than on the racial majority or males. Proof of the employer's discriminatory motive is not required. *Id.* Under disparate treatment analysis the employer is accused of treating some people less favorably than others because of their race, color, religion, sex, or national origin. *Id.* Mere proof of adverse impact is not sufficient to establish a prima facie case of disparate treatment. The plaintiff must prove the employer's discriminatory intent. *Id. See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-12 (1976). The disparate impact "rule" essentially states that the plaintiff must show that a facially neutral employment practice has a significant discriminatory impact on the plaintiff's group. If the showing is made, the plaintiff has established a prima facie case of employment discrimination. The burden of proof then shifts and the defendant-employer must demonstrate that the requirement is related to the job. If the requirement is not proven to be job-related, then the defendant-employer will be liable for a violation of

tle VII.[5]

The state responded that it should not be liable for the alleged discrimination because the "bottom line" result of the promotional process was not discriminatory.[6]

The United States Supreme Court, in *Connecticut v. Teal*,[7] held that the state's nondiscriminatory bottom line did not preclude the plaintiffs from establishing a prima facie case nor did it provide the state with a defense.[8]

This casenote will evalute the Supreme Court's decision in *Teal*. It will examine the Court's rationale for focusing on a particular element of an employment selection process,[9] rather than on the final result of that process in a disparate impact case.[10] It will also examine to what extent the Court's decision in *Teal* has further defined the focus of the disparate impact principle.[11] Finally, the note will discuss the further utility of the bottom line defense in light of *Teal*[12] and the applicability of the Uniform Guidelines On Employee Selection Procedures.[13]

II. HISTORY OF *TEAL*

In 1976, Winnie Teal and three other black women employed

Title VII, and vice versa. For a discussion of the source of the disparate impact principle see *infra* text accompanying notes 45-52.

5. Connecticut v. Teal, 457 U.S. 440, 444 (1982).

6. *Id.* The bottom line concept in employment discrimination law has as its primary focus the percentage of minorities or women actually hired rather than any single criterion in the overall hiring process. B. SCHLEI & P. GROSSMAN, *supra* note 4, at 1191. In Connecticut v. Teal, 457 U.S. 440 (1982), the state asserted that there was no disparate impact on blacks because the bottom line percentage of blacks hired exceeded the percentage of whites hired. *Id.* at 444. *See infra* text accompanying notes 25-28.

7. 457 U.S. 440 (1982).

8. *Id.* at 442.

9. Elements of an employment selection process typically include: scored tests, *e.g.*, a passing score on a general intelligence test as a prerequisite for hire; nonscored objective criteria, *e.g.*, a requirement of a high school diploma as a prerequisite for hire; and subjective criteria, *e.g.*, a policy of discharging all employees whose wages are garnished a specific number of times. B. SCHLEI & P. GROSSMAN, *supra* note 4, at 1 n.3.

10. For a discussion of the Court's rationale in *Teal* see *infra* text accompanying notes 95-101.

11. *See infra* text accompanying notes 104-111.

12. *See infra* text accompanying notes 112-116.

13. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1B (1982). These guidelines, designed to assist employers in complying with federal law prohibitions against discriminatory employment practices, are issued jointly by the Equal Employment Opportunity Commission (hereinafter EEOC) and three other government agencies. *Id.* § 1607.1A. *See infra* text accompanying notes 117-130 for a discussion of the applicability of the guidelines to *Teal*.

by the Department of Income Maintenance of the State of Connecticut, were promoted provisionally to the position of Welfare Eligibility Supervisor.[14] All four women served as supervisors for almost two years.[15] In order to attain permanent supervisory status, they were required to participate in a selection process.[16] The first step in that process was successful completion of a written test.[17]

On December 2, 1978, 329 candidates took the test.[18] Forty-eight identified themselves as black; 259 identified themselves as white.[19] When the test results were announced in March, 1979,

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14. 457 U.S. at 443.

15. *Id.*

16. *Id.*

17. *Id.* The written examination was the only formal step in the selection process. The examination generated an eligibility list from which selections were later made. *Id.* *See infra* text accompanying notes 25-26. In selecting persons from the eligiblity list the state considered past work performance, recommendations of the candidates' supervisors, seniority, and an affirmative action program. 457 U.S. at 444. The subjective nature of these considerations prompted the plaintiffs to state: "The present case involves a selection procedure by the petitioners to determine promotional eligibility which procedure consisted of a single component, the test in question." Brief for Respondents at 21, Connecticut v. Teal, 457 U.S. 440 (1982).

The test itself was developed jointly by the Personnel Department and the Income Maintenance Department of the State of Connecticut. Joint Appendix at A108, Teal v. Connecticut, 645 F.2d 133 (2d Cir. 1981) [hereinafter Joint Appendix]. The test was designed to measure five basic job factors: 1) the objectives of public assistance and departmental structure; 2) the basic principles of training; 3) the principles of supervision; 4) public assistance eligibility requirements; and 5) basic social service unit management techniques. *Id.* at A43. The testing mode chosen to measure these characteristics was a "work sample format", which simulated job conditions in an attempt to assure direct job-relatedness. *Id.* at A105.

The three hour exam placed the candidate in the position of a Welfare Eligibility Supervisor and required each candidate to respond to a series of job-related problem situations. *Id.* at A42. Part one, worth 86 points, was composed of the problem situations themselves and multiple choice questions about them. Part two, worth 14 points, was a rating exercise where the candidate was required to prioritize each of the problem situations presented in Part one, with one being the highest priority and three being the lowest. *Id.* at A97. The priority rating assigned to each item was made in relation to all the other items. The candidates were also required to briefly explain their rating for each item. *Id.*

18. 457 U.S. at 443. Since it was promotional, only those persons already employed by the Department of Income Maintenance were eligible to take the test. This is in accordance with the State of Connecticut's "promote from within" policy. Telephone interview with Patricia Craig, Senior Personnel Analyst, Personnel Division, Department of Administrative Services, State of Connecticut (Jan. 20, 1983).

19. 457 U.S. at 443. The remaining candidates were as follows: Hispanic - 4; Indian - 3; Unidentified - 15. *Id.* at n.4. All 329 candidates taking the examination "were requested to indicate their race and sex in specially designated spaces on their answer sheet. This was done on a purely voluntary basis; candidates were assured that the information was to be used purely for research purposes only and would in no way affect their eligibility or standing." Joint Appendix, *supra* note 17, at A120.

54.17% of the black candidates and 79.54% of the white candidates had passed.[20] The passing rate for blacks was thus approximately 68% of the passing rate for whites.[21] The plaintiffs were among those who failed the exam and were excluded from further consideration for permanent supervisory positions.[22]

In April, 1979, the plaintiffs instituted an action in the United States District Court for the District of Connecticut.[23] They alleged that the defendant violated Title VII by requiring, as an absolute condition for consideration for promotion, that the applicants pass a written test unrelated to the job and that excluded blacks in disproportionate numbers.[24]

Notwithstanding the pending suit, the state continued its promotional process. More than one year after the action was commenced, and approximately one month before trial, the state completed its process and promoted 46 persons to permanent status

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20. 457 U.S. at 443 n.4. *Teal* involved the use of comparative rather than demographic statistics. Comparative statistics, sometimes called applicant flow data, are limited in scope to actual participants in the employment process while demographic statistics look to general population data in the relevant labor market. Note, *Disparate Impact and Disparate Treatment: The Prima Facie Case Under Title VII*, 32 ARK. L. REV. 571, 578 (1978). Here, the plaintiffs are comparing the passing rate for blacks to the passing rate for whites to prove the disparate impact of the test. 457 U.S. at 443 n.4.

21. 457 U.S. at 443. This 68% figure is important to the plaintiffs' task of proving that the written test had a discriminatory impact on blacks in that it offended the Uniform Guidelines on Employee Selection Procedures. The Uniform Guidelines

> are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures.

Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1B (1982). The guidelines are issued jointly by the EEOC, the Civil Service Commission, the Department of Labor, and the Department of Justice. *Id.* § 1607.1A. Section 1607.4D of the Uniform Guidelines states in part:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

Id. § 1607.4D. Thus, because the test in *Teal* resulted in a selection rate for blacks that was only 68% of the rate for whites, there is little doubt that the examination had the disparate impact alleged by the plaintiffs. *See* 457 U.S. at 443 n.4. For a discussion of the weight accorded in *Teal* to § 1607.4C of the Uniform Guidelines, which deals with the bottom line issue, see *infra* text accompanying notes 117-130.

22. 457 U.S. at 443-44.

23. *Id.* at 444.

24. *Id.* *See supra* note 4.

as Welfare Eligibility Supervisors.[25] This group consisted of 11 blacks and 35 whites.[26] Thus, the selection process resulted in the promotion of 22.9% of the black candidates, as compared to 13.5% of the white candidates.[27] The state claimed that because the bottom line result was more favorable to blacks than whites, it should be a complete defense to plaintiffs' claim of disparate impact.[28]

Although the comparative passing rates for the exam indicated a prima facie case of adverse impact upon blacks, the district court entered judgment for the state.[29] The court found that there was no violation of Title VII because the result of the entire process— *i.e.* the bottom line—did not reflect a disparate impact on blacks.[30] Accordingly, the state was not required to show that the test was job-related.[31]

On appeal, the U.S. Court of Appeals for the Second Circuit stated that "the district court erred in ruling that the results of the written exam alone were insufficient to support a prima facie case of disparate impact in violation of Title VII."[32] The Second Circuit proceeded to establish a test:

> [W]here a plaintiff establishes that a component of a selection process produced disparate results *and* constituted a pass-fail barrier beyond which the complaining candidates were not permitted to proceed, a prima facie case of disparate impact is established, notwithstanding that the entire selection procedure did not yield disparate results.[33]

The court of appeals reversed the judgment of the district court and remanded the case for evaluation of the job-relatedness of the test.[34]

Upon appeal by the state, the United States Supreme Court af-

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25. 457 U.S. at 444. The plaintiffs claimed that the timing of the promotions coupled with the fact that they were in favor of black candidates indicated that the defendant made selections in the face of litigation in an effort to avoid liability. Brief for Respondents, *supra* note 17, at 23. The defendant denied this allegation. Reply Brief for Petitioners at 4, Connecticut v. Teal, 457 U.S. 440 (1982). The Supreme Court made no mention of the propriety of the defendant's timing in making the promotions.

26. 447 U.S. at 444.

27. *Id.*

28. *Id.*

29. *Id.* at 444-45. The opinion of the United States District Court for the District of Connecticut has not been officially reported.

30. *Id.* at 445.

31. *Id. See supra* note 4.

32. Teal v. Connecticut, 645 F.2d 133, 137 (2d Cir. 1981).

33. *Id.* at 135 (emphasis in original).

34. *Id.* at 140.

firmed.[35] The Court held that despite the nondiscriminatory bottom line, plaintiffs' claim of disparate impact established a prima facie case of employment discrimination under Section 703(a)(2) of Title VII.[36] The Court stated that to measure disparate impact "only at the bottom line ignores the fact that Title VII guarantees . . . individual[s] . . . the *opportunity* to compete equally with white workers on the basis of job-related criteria."[37]

The Court also held that the nondiscriminatory bottom line did not provide the state with a defense to plaintiffs' prima facie case. The Court stated: "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group."[38]

The dissenting opinion claimed that there was "no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a *group*."[39]

III. DISCUSSION

The Supreme Court, in determining that the nondiscriminatory bottom line did not preclude the employees from establishing a prima facie case under Section 703(a)(2),[40] expanded the possible situations in which a plaintiff may make a prima facie case of employment discrimination.[41] The Court had indicated previously that policies or practices used to select employees for hire or promotion[42] which resulted in disparate impact on minorities or women were not

35. 457 U.S. at 445. *Teal* was a 5-4 decision. The majority opinion was written by Justice Brennan, joined by Justices White, Marshall, Blackmun, and Stevens. The dissenting opinion was written by Justice Powell, joined by Chief Justice Burger, and Justices Rehnquist, and O'Connor. *Id.* at 456.

36. *Id.* *See supra* note 3.

37. 457 U.S. at 451 (emphasis in original). For a discussion of the majority opinion see *infra* text accompanying notes 72-84.

38. 457 U.S. at 455.

39. *Id.* at 459 (Powell, J., dissenting) (emphasis in original). *See infra* text accompanying notes 85-88.

40. *See supra* note 3.

41. *See Annual Survey of Labor Relations and Employment Discrimination Law*, 23 B.C.L. REV. 81, 275 (1981). Consistent with *Teal*, plaintiffs may establish a prima facie case of employment discrimination based on the disparate impact of a segment of the employment selection process even where the final result of the process reveals that there is no disparate impact on the plaintiff's group, i.e. no disparate impact at the bottom line. This is true, at least, in situations where the segment constitutes a pass-fail barrier beyond which failing candidates are not permitted to proceed. *See infra* text accompanying notes 112-116.

42. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v.

free from judicial scrutiny. Nevertheless, the Court increased that judicial scrutiny by holding that the bottom line result of a selection process was not a defense to a prima facie case under the disparate impact theory,[43] at least where a component of that process constituted a pass-fail barrier to consideration for employment or promotion.[44]

A. *Prior Disparate Impact Cases*

The Supreme Court had decided several cases involving disparate impact prior to its decision in *Teal*. In *Griggs v. Duke Power Co.*,[45] the defendant-employer required a high school education or a passing score on standardized general intelligence tests as a condition to employment in or transfer to jobs at its power plant.[46] The plaintiff-employees claimed that because the requirements barred employment opportunities to a disproportionate number of blacks, they were unlawful under Title VII unless shown to be job-related.[47]

The Court in *Griggs* found that the objective of Congress in enacting Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees"[48] but that "Congress did not intend . . . to guarantee a job to every person regardless of qualifications."[49] From this, the Court concluded that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[50] Although there was no showing of racial purpose or invidious intent on the part of the defendant-employer,[51] the Court held that the job requirements were still invalid because they had a disparate impact on blacks and had not been shown to be related to job performance.[52]

Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see infra* text accompanying notes 45-69.

43. *See supra* note 4.

44. *See infra* text accompanying notes 112-116.

45. 401 U.S. 424 (1971). *Griggs* has been called the most important decision in employment discrimination law. B. SCHLEI & P. GROSSMAN, *supra* note 4, at 5.

46. 401 U.S. at 425-26.

47. *Id.* at 429.

48. *Id.* at 429-30. For a discussion of how the Court in *Teal* uses this objective to shape its decisions see *infra* text accompanying notes 98-100.

49. 401 U.S. at 430.

50. *Id.* at 431.

51. *Id.* at 432.

52. *Id.* at 430-31. Regarding the question of job-relatedness, the Court in *Griggs* stated:

In *Albemarle Paper Co. v. Moody*,[53] the defendant-employer required applicants for employment in skilled jobs to have a high school diploma and to pass two tests.[54] The plaintiff-employees sought permanent injunctive relief against any policy, practice, custom or usage of the defendant-employer that violated Title VII, including its program of employment testing.[55] On the eve of trial the defendant-employer, in response to the *Griggs* decision, did a study of the job-relatedness of its testing program.[56] The study showed that the tests were job-related.[57] Although the district court accepted the study as proof of the job-relatedness of the test,[58] the court of appeals and the Supreme Court did not.[59] For various reasons, the Court held that the district court erred in concluding that the defendant-employer's study had proven the job-relatedness of its testing program.[60]

In *Dothard v. Rawlinson*,[61] the plaintiff claimed that the statutory minimum height and weight requirements for correctional counselors in Alabama prisons were violative of Title VII.[62] The

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> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted . . . without meaningful study of their relationship to job-performance ability. Rather . . . the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.
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> The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.

Id. at 431-32.

53. 422 U.S. 405 (1975).

54. *Id.* at 410. The tests used in *Albemarle* were the Revised Beta Examination and the Wonderlic Personnel Test which, according to the Court, measure nonverbal intelligence and verbal intelligence, respectively. *Id.* at 410-11. These are standardized tests, as opposed to the "in-house" test developed by the State of Connecticut which was taken by the plaintiffs in *Teal*. *See supra* note 17.

55. 422 U.S. at 409.

56. *Id.* at 411. The "study compared the test scores of current employees with supervisorial judgments of their competence in ten job groupings selected from the middle or top of the plant's skilled lines of progression." *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 430.

60. *Id.* at 435-36. One reason given by the Supreme Court was the fact that the "study dealt only with job-experienced, white workers; but the tests themselves are given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite." *Id.* at 435. The Court remanded the case to the district court for a determination of the job-relatedness of the testing program. *Id.* at 436.

61. 433 U.S. 321 (1977). *Dothard* involved sex, rather than racial, discrimination.

62. *Id.* at 324.

plaintiff was refused employment because she failed to meet the minimum 120 pound weight requirement.[63] The Supreme Court stated that "to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern."[64] The plaintiff proved, through demographic statistics,[65] that the height and weight requirements combined would exclude 41.13% of the female population while excluding less than 1% of the male population.[66] The Court found that the height and weight standards had a discriminatory impact on female applicants.[67] The defendant failed to prove that the requirements were job-related,[68] and consequently, the Court held that application of the statutory height and weight standards to plaintiff was in violation of Title VII.[69]

Each of the foregoing cases support the concept, established in *Griggs*, that Title VII forbids the use of any employment requirements or practices which are discriminatory in effect, unless proven to be job-related.[70] These cases, however, did not decide the bottom line issue presented in *Teal*. In each of these cases, disparate impact on minorities or women had been established by the final result of the selection process, rather than one step in the process, as in *Teal*. Nonetheless, the majority in *Teal* used *Griggs* and its progeny as a base from which to expand the possible circumstances under which a plaintiff may make a prima facie showing of employment discrimination.[71]

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63. *Id.* at 323. The minimum height requirement was 5 feet 2 inches. *Id.* at 324.

64. *Id.* at 329.

65. *See supra* note 20.

66. 433 U.S. at 329-30. The plaintiff applied the 5'2" requirement to women in the United States between the ages of 18-79 and found that it would exclude 33.29% of the women, but only 1.28% of the men between the same ages. *Id.* at 329. The 120 pound requirement would exclude 22.29% of the women and 2.35% of the men in the same age group. *Id.*

67. *Id.* at 331.

68. *Id.* at 331-32.

69. *Id.* at 332. Although it held the height and weight standards violative of Title VII, the Court concluded that women may be excluded from the job of "correctional counselor in a 'contact' position in an Alabama male maximum-security penitentiary." *Id.* at 337. The Court reasoned that a woman's contact with male prisoners, 20% of which were sex offenders, would directly hamper her ability to provide security, thereby posing a threat to herself, other security personnel, and control of the facility. *Id.* at 335-37.

70. *See supra* text accompanying notes 45-52.

71. *Annual Survey of Labor Relations and Employment Discrimination Law*, 23 B.C.L. REV. 81, 275 (1981).

B. *The Supreme Court's Opinion in* Teal

It has been said that the "deceptively simple holdings of *Griggs* . . . [have] been broadly applied in many contexts of employment discrimination law."[72] As previously stated, *Griggs* did not decide the bottom line issue presented in *Teal*.[73] *Griggs* held only that discriminatory job requirements that are not shown to be job-related are prohibited under Title VII.[74] Indeed, *Griggs* did not even discuss whether the final result of an employment selection process would preclude a prima facie case of discrimination under the disparate impact theory. The majority in *Teal*, however, ignored lower court decisions on the bottom line issue.[75] By ignoring these lower court cases, the majority avoided the difficult task of distinguishing them from the case before the Court. Instead, the Court used other cases, such as *Griggs* and its progeny, to shape a decision that fulfilled the intent of Congress in enacting Title VII.[76] Thus, because the Court based its decision on *Griggs*, a case that did not even discuss the issue presented in *Teal*, and ignored lower court precedent that dealt with the bottom line issue, it is clear that the Court has applied *Griggs* broadly.

By using a broad application of *Griggs*, the Court in *Teal* was able to eliminate the barrier created by the test, thereby giving plaintiffs an opportunity for the relief they sought.[77] In *Teal*, individual members of a protected group became the victims of the test's disparate impact on minorities. The Court recognized that these individuals were victims even though bottom line statistics showed that there was no discrimination against the protected group as a whole.[78] As

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72. B. SCHLEI & P. GROSSMAN, *supra* note 4, at 10.

73. *See supra* text accompanying notes 70-71.

74. 401 U.S. at 430-32.

75. *See infra* note 87 and accompanying text.

76. For a discussion of the objective of Title VII and its role in *Teal* see *infra* text accompanying notes 98-100.

77. The plaintiffs sought to hold the state liable for a violation of Title VII. *See supra* text accompanying notes 23-24. If, on remand, the state cannot prove that the test is job-related, then it will have violated the requirements of Title VII, as interpreted by *Griggs*. *See supra* text accompanying notes 45-52. If the state can prove that the test is job-related, then it will have fulfilled the requirements of Title VII. Also, even if the state can prove that the test is job-related, plaintiffs may prevail if they show that the state was using the test as a mere pretext for discrimination. *Albemarle Paper Co.*, 422 U.S. at 425; *Dothard*, 433 U.S. at 329.

78. 457 U.S. at 456. Some observers would disagree with the Court's view that, although statistics show that the protected group as a whole might not have been discriminated against, there was discrimination against individual members of the protected group who did not meet the specific criterion that had the disparate impact. These observers state:

previously noted, the primary focus of the bottom line approach is on the percentage of minorities or women who are actually hired rather than on a single criterion in the overall hiring process.[79] The Court, however, declined to adopt the bottom line approach because the concept: (1) ignored the Title VII guarantee of equal employment opportunity to all individuals;[80] and (2) would allow employers to discriminate against some individuals merely because they favorably treated other members of the employees' group.[81]

Although the Court did not adopt the bottom line approach in *Teal*, it did employ disparate impact analysis.[82] According to some commentators, the proper focus of disparate impact analysis is on the treatment of the class as a whole.[83] Upon examination of its prior disparate impact cases, including *Griggs*, *Albemarle*, and *Dothard*, the Supreme Court in *Teal* stated:

> In considering claims of disparate impact under § 703(a)(2) this

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> This contention would seem to have no merit . . . since it fails to perceive the fundamental nature of the disparate impact theory of discrimination. An individual member of a class achieves an individual right to relief not on the basis of disparate treatment directed against that individual, but simply because the individual realizes an incidental benefit from class-wide discrimination proved by a disparate impact against the class. Unlike the disparate treatment theory of discrimination, which focuses on individual rights, the disparate impact theory of discrimination focuses solely on the treatment of the class of a whole. If there is no disparate impact as to the class, there are no individuals to realize incidental benefits from such disparate impact.

B. SCHLEI & P. GROSSMAN, *supra* note 4, at 1192. The dissenting Justices in *Teal* would agree with Schlei and Grossman's discussion of the bottom line concept in disparate impact cases. *See infra* note 85 and accompanying text.

79. *See supra* note 6.

80. 457 U.S. at 453.

81. *Id.* at 455. The Court also rejected an argument based on another section of Title VII. The United States Department of Justice, in an *amicus curiae* brief, sought to support the district court's judgment that the plaintiffs had not established a prima facie case of employment discrimination by relying on Section 703(h) of Title VII. *Id.* at 451-52. Section 703(h) provides in part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h) (1976). The government argued that the test administered by the state was not "used to discriminate" because it did not actually deprive disproportionate numbers of blacks of promotions. 457 U.S. at 452. The Court, however, stated that the government's reliance on Section 703(h) was "misplaced" in that Congress, in enacting that section, "intended only to make clear that tests that were *job related* would be permissible despite their disparate impact." *Id.* (emphasis in original).

82. *See supra* note 4.

83. B. SCHLEI & P. GROSSMAN, *supra* note 4, at 1192.

> Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed on the overall number of minority or female applicants actually hired or promoted.[84]

Simply stated, the Court believed that its prior disparate impact cases focused on the specific employment requirement, rather than on the total selection process, in order to determine if there was an adverse impact on minorities or women.

In contrast, the dissenting opinion stated that the Court's "disparate impact cases consistently have considered whether the result of an employer's *total selection process* has an adverse impact upon the protected group."[85] It is clear that Justice Powell's dissenting opinion took a fundamentally different view of the Court's previous disparate impact decisions. Indeed, stating that those cases were of questionable relevance to the issue presented in *Teal*, Justice Powell suggested[86] that the Court follow lower court decisions[87] on the bot-

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84. 457 U.S. at 450 (emphasis in original).

85. *Id.* at 458 (Powell, J., dissenting) (emphasis in original). The dissent also stated that in *Griggs* and its progeny the Court "considered, not whether the claimant as an individual had been classified in a manner impermissible under § 703(a)(2), but whether an employer's procedures have had an adverse impact on the protected *group* to which the individual belongs." *Id.* at 459. (Powell, J., dissenting) (emphasis in original). In addition to its disagreement with the majority view of the Court's prior disparate impact decisions, the dissenting opinion also asserted that the plaintiffs sought to combine the disparate impact and disparate treatment theories by proving a violation of Title VII by reference to group figures and then denying the defendant the opportunity to rebut the evidence by introducing similar figures. *Id.* at 459-60.

86. 457 U.S. at 460 n.5.

87. *Id. See, e.g.*, Brown v. New Haven Civil Service Board, 474 F. Supp. 1256 (D. Conn. 1979). *Brown*, decided in the same district court as *Teal*, although by a different judge, involved a claim of racial discrimination in hiring for the New Haven Police Department due to a written exam's disproportionate impact on blacks. The selection process included a written exam and an agility test which were scored separately and then combined to determine whether the applicant passed or failed. The plaintiffs failed to get past the written exam/agility test stage of the selection process. The court recognized that the exam "was a pass-fail hurdle that could prevent an applicant from entering the pool from which hiring decisions were made . . . ." *Id.* at 1262. Nonetheless, as in *Teal*, the district court adopted the bottom line approach and held that the plaintiffs had not made a prima facie case of employment discrimination. *Id. See also* EEOC v. Greyhound Lines, 635 F.2d 188 (3d Cir. 1980) (EEOC brought suit on behalf of employee denied public-contact job because he wore a beard due to skin disorder unique to blacks; EEOC claimed employer's no-beard policy had disparate impact on blacks; court adopted the bottom line approach and held that it need not consider the alleged disparate impact because there was no actual discrimination in hiring); EEOC v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979) (employment requirements eliminated a disproportionate number of Spanish-surnamed Americans (SSA's); actual percentage of SSA's hired, however, compared favorably with the percentage of Anglos hired; court stated

tom line issue. A majority of those lower court decisions hold that "the selection process as a whole, rather than any segment of it, should be examined for disproportionate impact on a Title VII case."[88]

Despite the existence of the lower court opinions, a slim majority of the Court opted to focus on the source of the disparate impact rather than on the bottom line.[89] Thus, as a result of *Teal*, the disparate impact principle may be applied in situations where a particular component of an employment selection process has a discriminatory impact on a protected group but the overall process does not.[90]

C. *Analysis*

Application of the bottom line approach in a factual setting such as *Teal* would result in a finding of no violation of Title VII. This follows from the fact that there would be no discrimination as a result of the final hiring or promotion decision. Likewise, an application of the dissenting opinion's view of the disparate impact principle[91] would result in a finding of no violation of Title VII because there would be no disparate impact on the protected group as a

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that Congress directed the thrust of the Civil Rights Act to the consequences of employment practices and held that the employer was free to use the requirements if the result was not discrimination in fact); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978) (black fire fighters challenged disparate impact of written promotional exam; court considered the entire selection process, not just one segment; looking at the bottom line, the court held that there was no adverse impact on blacks); Rule v. Ironworkers Local 396, 568 F.2d 558 (8th Cir. 1977) (aptitude test in an employment selection process had disparate racial impact; court viewed selection process as a whole and held that plaintiffs did not establish a prima facie case); Lee v. City of Richmond, 456 F. Supp. 756 (E.D. Va. 1978) (employment test had an adverse impact on blacks; court stated that the crucial fact in determining disparate impact is the rate at which blacks are ultimately chosen for the position rather than their test scores in the selection process). *But see* Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952 (D.C. 1980) (certain requirements for entrance into union training program had disparate impact on blacks; defendant asserted a bottom line defense but court stated that the bottom line defense was flawed); League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976) (tests for positions as policemen and fire fighters had a disparate impact on Mexican-Americans; defendant argued for a bottom line approach; court held that the plaintiffs' showing of disparate impact constituted a prima facie case of discrimination).

88. Brown v. New Haven Civil Service Board, 474 F. Supp. 1256, 1261 (D. Conn. 1979).

89. 457 U.S. at 450.

90. For a discussion of the significance of *Teal* in the development of the disparate impact principle see *infra* text accompanying notes 104-111.

91. 457 U.S. at 458 (Powell, J., dissenting). Justice Powell's dissenting opinion maintained that when a court is applying the disparate impact principle it should examine the final result of an employment selection process, i.e. the bottom line, for discrimination in a Title VII case. *Id.*

whole.[92] The Court in *Teal*, however, refused to apply the bottom line approach[93] and nonetheless found a violation of Title VII. Its finding was based on two factors: the Court's reading of its previous disparate impact cases and the objective of Title VII.[94]

Based upon the Court's reading of its previous cases, including *Griggs*, *Albemarle*, and *Dothard*,[95] the Court determined that appropriate focus of disparate impact analysis was on the specific requirement within the employment selection process, rather than on the entire process.[96] Specifically, the Court determined that disparate impact analysis properly focused on employment and promotion requirements that create a discriminatory bar to opportunities.[97]

The objective of Title VII was the second factor in the Court's decision.[98] Citing to language in *Griggs*, the Court stated that the objective of Section 703(a)(2) is "to achieve equality of employment *opportunities* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[99] Faced with the fact that the bottom line approach would thwart that objective,[100] the Court chose to render a decision consistent with the objective of Title VII. The Court preserved the plaintiffs' right to equal employment opportunity under Title VII by invalidating the discriminatory test barrier despite the nondiscriminatory bottom line. As a result of its focus on a particular compo-

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92. Under both the bottom line approach and the dissenting opinion's view of the focus of the disparate impact principle there is no violation of Title VII because there is no disparate impact at the bottom line. This argument is based on statistics which show that 22.9% of the black candidates and 13.5% of the white candidates were promoted despite the fact that 54.17% of the black candidates and 79.54% of the white candidates passed the exam. *See supra* text accompanying notes 18-28.

93. 457 U.S. at 453.

94. *Id.* at 446-51; *see infra* text accompanying note 99.

95. 457 U.S. at 446-47, 450-51.

96. *Id.* at 450.

97. *Id.*

98. *Id.* at 448.

99. *Id.* (emphasis in original) (quoting Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

100. The bottom line approach requires that the final result of the employment selection process, rather than any segment of it, be examined for discrimination in a disparate impact case. *See supra* note 6. The objective of Section 703(a)(2) is to remove discriminatory barriers which prevent equal employment opportunity. *See supra* text accompanying note 99. Those persons failing to get past the discriminatory barrier created by the test in *Teal* will not be afforded equal employment opportunity under the bottom line approach because that concept is concerned only with the final result of the selection process, which in *Teal* was not discriminatory. Thus, because of its focus on the final result of the selection process, application of the bottom line approach in a factual setting such as *Teal* would thwart the objective of Section 703(a)(2).

nent of a selection process, rather than on the overall process, the Court was able to fulfill the objective of Title VII.

A common thread running through both the Court's discussion of its previous disparate impact cases and its discussion of the objective of Title VII is the great emphasis placed on affording individuals equal employment opportunity. Throughout its opinion, the Court stressed constantly the importance of eliminating barriers that would deprive individual minorities of "the *opportunity* to compete equally with white workers on the basis of job-related criteria."[101] It is clear that "opportunity" was the key focus of the Court's decision in *Teal*.

The conclusion reached by the Court in *Teal* was necessary to continue the progress made in employment discrimination law since enactment of the Civil Rights Act of 1964.[102] Any decision to the contrary would have been a serious setback for those concerned with affording equal employment opportunity to all individuals. Had the bottom line concept been adopted, the plaintiffs, as individuals, would have been denied an equal employment opportunity since they had been permanently barred from consideration for promotion by the disparate impact of the test. Such a denial of equal employment opportunity would have been inconsistent with the stated objective of Title VII.[103]

Along with fulfilling the goal of Title VII, the Court further defined the focus of the disparate impact principle.[104] In *Teal*, the

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101. 457 U.S. at 451 (emphasis in original).

102. *See generally* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225 (1976). The author of the foregoing article served as counsel for the plaintiffs in *Griggs*, *Albemarle*, and other employment discrimination cases. Belton writes:

> The relatively short history of enforcement under the Act has spawned three generations of issues. The first generation embraced procedural problems . . . . The second generation of issues included the definition of an unlawful employment practice and the type and quantum of proof necessary to establish a claim under the Act. In the third generation of issues the courts face the problems of formulating appropriate and effective remedies.
>
> Individual and class actions were filed under Title VII as early as October, 1965. Despite some earlier adverse decisions by the district courts, it became clear after several years of litigation that in light of the broad wording of the Act and the receptivity of the courts persons victimized by employment discrimination would have some measure of success . . . . Ten years of vigorous, aggressive, and protracted litigation . . . have demonstrated that Title VII can be a powerful agent to redress employment discrimination.

Id. at 228-30 (footnotes omitted).

103. *See supra* text accompanying note 99.

104. The Supreme Court in *Griggs* established the disparate impact principle: that Title VII forbids the use of any employment requirements or practices that are discriminatory in effect, unless proven to be job-related. 401 U.S. at 431; *see supra* text accompa-

Court used the disparate impact principle to provide individuals with equal employment opportunity.[105] In theory, the disparate impact principle had been concerned only with possible discriminatory treatment of protected groups as a whole.[106] Individuals achieved a right to relief under the theory only by realizing an incidental benefit from class-wide discrimination that had been proven by a disparate impact against the group.[107] The dissenting opinion in *Teal* argued that it was improper, under the disparate impact principle, to give the individual plaintiffs relief when statistics showed that there was no disparate impact at the bottom line.[108] The majority, however, decided that the proper focus of the disparate impact principle was on the particular segment of the employment selection process that created the discrimination, rather than the final result of that process.[109] By focusing on the test for promotion, rather than on the bottom line, the Court in *Teal* found that there was discrimination because of the test's disparate impact on blacks.[110] As a result of that focus, the individual plaintiffs received an incidental benefit from the discrimination. The incidental benefit was the Court's determination that they had established a prima facie case of employment

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nying notes 45-52. In *Albemarle* the Court set forth what an employer must show to prove that a requirement or practice is job-related. 422 U.S. at 435-36; *see supra* text accompanying notes 53-60. In *Dothard* the Court determined what types of statistics may be used to prove disparate impact. 433 U.S. at 331-32; *see supra* text accompanying notes 61-69. In *Teal*, the Court continued the evolution of the disparate impact principle as represented by these prior cases. The Court further defined the disparate impact principle by holding that it should focus on the discriminatory segment of the employment selection process rather than on the nondiscriminatory final result of that process. *See* 457 U.S. at 450.

105. Although the Court held that plaintiffs had established a prima facie case of employment discrimination, the defendant may rebut that case on remand by proving that the test is job-related. *See supra* note 4.

106. B. SCHLEI & P. GROSSMAN, *supra* note 4, at 1192. This is the main point of disagreement between the majority and dissenting opinions in *Teal*. The majority believed that the disparate impact principle had traditionally focused on the discriminatory element of an employment selection process, rather than on the total selection process. 457 U.S. at 450. The dissent believed that the total selection process should be examined for disparate impact, rather than the specific element within that process. *Id.* at 458 (Powell, J., dissenting).

107. B. SCHLEI & P. GROSSMAN, *supra* note 4, at 1192.

108. 457 U.S. at 459 (Powell, J., dissenting). In this context the "relief" was a finding that the plaintiffs had established a prima facie case of employment discrimination under Section 703(a)(2), not that the defendant was liable for a violation of that section. The defendant may avoid a finding of liability on remand by proving that the test is job-related. *See supra* note 4.

109. 457 U.S. at 450.

110. *Id.* at 448; *see supra* text accompanying notes 77-78.

discrimination under Section 703(a)(2).[111] Therefore, by determining that the principle should concentrate on the discriminatory segment of the employment selection process rather than on the final result of that process, the Court has further defined the focus of the disparate impact principle.

D. *Further Utility of the Bottom Line Defense*

An important aspect of *Teal* was the fact that the written test constituted a pass-fail barrier beyond which failing candidates could not proceed.[112] It is arguable that had the plaintiffs been allowed to participate in the entire selection process, the bottom line defense may have been acceptable to the Court. In such a situation, the test alone would not have been the sole determinative under which applicants would be considered for promotion. Consequently, the Court would be more inclined to examine the overall results of the selection process for disparate impact.[113]

It is not clear, however, whether the Court would accept this argument. As previously stated, *Teal* placed great weight on the importance of eliminating barriers that would deprive individual minorities the opportunity to compete equally with white workers on the basis of job-related criteria.[114] Even if the plaintiffs were given a chance to participate in the entire selection process, the disparate im-

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111. *Id.* at 451.

112. *Id.* at 443-44.

113. This argument may be implied from the Second Circuit's statement:

> Viewing the overall results of a selection process ordinarily is a prudent course to pursue, since it places the burden upon the defendant to demonstrate job-relatedness only in situations in which courts can determine with some degree of certainty that a selection device has discriminatorily denied an employment opportunity to members of a protected class. Where all the candidates participate in the entire selection process, and the overall results reveal no significant disparity of impact, scrutinizing individual questions or individual sub-tests would, indeed, "conflict[] with the dictates of common sense."

Teal v. Connecticut, 645 F.2d at 138 (footnote omitted) (quoting Kirkland v. New York State Dep't of Correctional Services, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823)). The Second Circuit discussed *Kirkland* and Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934. In both these cases the respective courts adopted the bottom line approach. The Second Circuit, however, properly distinguished its holding in *Teal* from *Kirkland* and *Smith*. In both *Kirkland* and *Smith*, the passing score on employment tests was cumulative and all of the candidates were "subjected to the complete selection process, which, when viewed as a whole, did not produce unlawful disparate results." 645 F.2d at 137-38. The test in *Teal* constituted a pass-fail barrier. Thus, *Kirkland* and *Smith* are strong support for the Second Circuit's "implied" argument that the bottom line defense may be acceptable if the plaintiffs are allowed to participate in the entire selection process.

114. 457 U.S. at 451.

pact of the test would still be present, thereby effectively reducing the individual candidate's chances for promotion. Thus, because of the Court's overriding concern with any factor that might affect equal job opportunities for individuals,[115] the bottom line defense may be of little help to defendants in future Title VII cases.[116]

IV. APPLICABILITY OF THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

In an effort to persuade the Court to adopt the bottom line approach, the state suggested that the Uniform Guidelines On Employee Selection Procedures[117] be applied.[118] Section 1607.4C of the Uniform Guidelines states in part: "If . . . the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not . . . take enforcement action based upon adverse impact of any component of that process . . . ."[119] Simply stated, the agencies will usually initiate enforcement action only where an employer violates the 80% rule set forth in Section 1607.4D of the Uniform Guidelines.[120]

The Supreme Court has stated that the administrative interpretation of the Civil Rights Act by the enforcing agency is entitled to great deference.[121] The Court declined to defer to the guidelines in

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115. *Id.*

116. It must be remembered, however, that *Teal* was a slim 5-4 decision. There were very strong arguments both for and against adoption of the bottom line approach. Given a slight change in Court personnel, the bottom line defense may be adopted and the *Teal* decision limited to its facts alone.

117. *See supra* note 21.

118. 457 U.S. at 453 n.12.

119. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4C (1982).

120. *Id.* § 1607.4D.

121. *Griggs*, 401 U.S. at 433-34. There are actually four "enforcing agencies" with respect to the Uniform Guidelines. *See supra* note 21. For the purpose of this note the most important of these agencies is the EEOC. At its creation in 1964 the EEOC could not prosecute alleged discriminators; its functions were limited to investigation of complaints, determination of "reasonable cause" to believe discrimination existed, and conciliation. Blumrosen, *The Bottom Line In Equal Employment Guidelines: Administering A Polycentric Problem*, 33AD. L. REV. 323, 324 (1981). In 1972, however, Congress authorized the EEOC to sue private employers if conciliation failed. Equal Employment Opportunity Act of 1972, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-5 (1976 & Supp. V 1981)). The Uniform Guidelines are generally viewed as the EEOC's interpretation of Title VII. As will be seen, however, this is not the view of the guidelines taken in *Teal*. *See infra* text accompanying notes 122-130.

this case,[122] however, because it adhered to the view that the enforcing agencies were "treating the 'bottom line' issue as a matter of prosecutorial discretion rather than as an interpretation of the statute."[123]

Also, in what has been called an "English translation,"[124] the enforcing agencies published an overview of the Uniform Guidelines.[125] In this overview, the agencies stated that the guidelines "do not address the underlying question of law,"[126] and that an individual who is the victim of a discriminatory component in an otherwise nondiscriminatory selection process "retains the right to proceed through the appropriate agencies, and into Federal court."[127]

In summation, the section of the Uniform Guidelines dealing with the bottom line issue[128] is not an interpretation of Section 703(a)(2). Instead, it is an administrative "tool" used by the Equal Employment Opportunity Commission and the other enforcing agencies to determine whether to initiate enforcement action against employers who discriminate.[129] The Court, therefore, declined the state's suggestion to apply the guidelines in *Teal*.[130]

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122. 457 U.S. at 453 n.12. *But see* Brown v. New Haven Civil Service Board, 474 F. Supp. 1256 (D. Conn. 1979).

> The E.E.O.C. and other federal enforcement agencies have also adopted a "bottom line" approach in deciding when to bring action against employers. This policy controls the exercise of prosecutorial discretion; but in allocating resources of government agencies, it also indicates a threshold of administrative concern about different hiring practices. At least in the absence of discriminatory intent, the threshold of judicial inquiry should be set at the same level.

Id. at 1263 n.10.

123. Blumrosen, *supra* note 121, at 331. In this article, Professor Blumrosen, counsel to the chair of the EEOC, has reported a personal account of the development of the Uniform Guidelines. He writes:

> There was serious objection to the "bottom line" concept in the EEOC General Counsel's Office . . . . I believed we could avoid internal conflict by treating the "bottom line" issue as a matter of prosecutorial discretion rather than as an interpretation of the statute. This approach would lead government agencies to concentrate on cases where there was overall adverse impact.

Id.

124. *Id.* at 336.

125. *See* 43 Fed. Reg. 38,290 (1978).

126. *Id.* at 38,291. The "underlying question of law" refers to whether the bottom line defense will be upheld as legally valid.

127. *Id.*

128. *See supra* text accompanying note 119.

129. *See supra* text accompanying notes 119-120.

130. 457 U.S. at 453 n. 13.

V. CONCLUSION

The plaintiffs in *Teal* claimed that the written test given to employees seeking promotion to Welfare Eligibility Supervisors had a disparate impact on minorities. The Supreme Court held that this disparate impact established a prima facie case of employment discrimination under Section 703(a)(2) of Title VII despite the defendant's nondiscriminatory bottom line defense. The Court based its holding on two factors: the Court's reading of its previous disparate impact decisions and the objective of Title VII.[131] As a result of *Teal*, plaintiff-employees may establish a prima facie case of employment discrimination based solely on the disparate impact of one segment of the employment selection process even if the statistics reveal that there is no disparate impact on the plaintiffs' group at the bottom line.

The *Teal* decision has continued the evolution of the disparate impact principle.[132] The Court decided that the proper focus of the disparate impact principle was on the particular segment of the employment selection process that created the discrimination, rather than on the final result of that process.[133] In so finding, the Court further has defined the focus of the disparate impact principle.[134]

Despite the existence of many lower court decisions that hold to the contrary,[135] the Court also held that an employer's nondiscriminatory bottom line is no defense to an employee's prima facie case of disparate impact. Throughout its opinion, the Court placed great emphasis on affording individuals equal employment opportunity. As a result of this emphasis on "opportunity", the bottom line defense may be little help to employers in future Title VII cases and will be no help when the employment requirement involved constitutes a pass-fail barrier beyond which failing candidates are not permitted to proceed.[136]

Finally, the Court rejected the defendant's suggestion that the Uniform Guidelines On Employee Selection Procedures be followed in this case.[137] The Uniform Guidelines advocate a bottom line approach, but only as a matter of prosecutorial discretion. Thus, be-

131. *See supra* text accompanying notes 94-100.
132. *See supra* note 104 and accompanying text.
133. *See supra* text accompanying notes 95-97.
134. *See supra* text accompanying notes 104-111.
135. *See supra* note 87.
136. *See supra* text accompanying notes 112-116.
137. *See supra* text accompanying notes 117-130.

cause the guidelines are not an interpretation of Section 703(a)(2), the Court declined to follow them in *Teal*.

James P. Rock