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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: 11 administration, 12 planning, 33 construction, 70 transportation law (01 highway transportation)

Supplement to Labor Standards in Federal-Aid Highway Construction Contracts

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the research. The report was prepared by Ross D. Netherton. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Activities Division (B) of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report supplements and updates a paper in Volume 3, Selected Studies in Highway Law, entitled "Labor Standards in Federal-Aid Highway Construction Contracts," pp. 1295-1330.

This paper will be published in a future addendum to SSHL. Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of

1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two papers that will be published when Volume 5 is issued in a year or so. The text, which totals about 3000 pages, comprises 67 papers 38 of which are published as supplements in SSHL. Copies of SSHL have been sent free of charge, to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of $145.00 per set.

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SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper "Labor Standards in Federal-Aid Highway Construction Contracts" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters

CONVICT LABOR (p. 1296)

Scope of Convict Labor Prohibition (p. 1297)

Use of Convict-Made Materials: Definitions

In 1983 the prohibition against use of convict labor in construction of federal-aid highways was broadened to proscribe the use of "materials produced by convict labor."[1] A year later, in 1984, the prohibition against use of convict labor was modified to permit use of persons under "supervised release programs" as well as those on parole or probation.[2]

Subsequently, in the Surface Transportation Assistance Act of 1987,[3] the restrictions on use of convict labor and convict-made goods were rewritten to permit: (1) use of labor performed by convicts on parole, supervised release, or probation; and (2) use of convict-made materials if they were produced by convicts: (a) who are on parole, supervised release, or probation from a prison, or (b) who are in a qualified prison facility, and the amount produced in that facility for highway construction during any 12-month period does not exceed the amount produced in that facility for that purpose during the year ending July 1, 1987.[4] The term "qualified prison facility" as used in this instance is defined as any prison facility in which convicts produced materials for highway construction on Federal-aid highways during the 12-month period ending July 1, 1987.

"ANTI-KICKBACK" LEGISLATION (p. 1298)

Coverage of the Law (p. 1299)

The Federal Anti-Kickback Act should be understood as part of a multifaceted legislative framework to facilitate enforcement of federally determined wage standards in projects funded or aided by the Federal Government.[5] Its specific purpose is to assure that laborers on federally aided projects receive the full amount of the wages to which they are entitled by law or contract, without being compelled to give back part of their wages to their employer or the contractor. Enactment of this legislation was prompted by instances of flagrant use of threats and coercion or deception to induce laborers to return—or "kick back"—part of their wages to their employer or the contractor on the project.[6] The practice is distinguished from those customarily dealt with as extortion or blackmail under state law because it is restricted to actions arising out of the contract of employment.

Although fact situations in which kickbacks are found or suspected vary widely, the federal law has been construed narrowly in accordance with its stated purpose to "protect labor standards."[7] Thus, where employees of a construction subcontractor returned part of their wages to their employer's representative under threat of dismissal if they did not do so, the act was clearly violated.[8] So, also, where a threat of dismissal was used by a union to enforce collection of its dues and contributions, it was determined to be a form of kickback.[9] On the other hand, contributions or payments taken from employees' pay by an employer by authority of law or under a genuinely voluntary collective bargaining agreement or employment contract are not regarded as kickbacks.[10]

MINIMUM WAGE STANDARDS (p. 1301)

Application of the Davis-Bacon Act to Federal-Aid Highway Projects (p. 1301)

Legislative and Administrative History

Davis-Bacon Act coverage of federal construction projects was extended and clarified by amendments to the law in 1968 and 1983.

The application of the Act to federally aided highway construction was originally limited to projects on the Interstate System. In 1968 this coverage was expanded to include "Federal-aid systems, the primary and secondary, as well as their extensions in urban areas, and the Interstate System, authorized under the highway laws providing for expenditure of Federal funds upon the Federal-aid systems."[11] In 1983, Congress amended the Davis-Bacon Act by removing the limitation of its application to "initial construction" performed on federal-aid highway systems.[12]

In an effort to improve administration of the minimum wage standards, the Office of Management and Budget (OMB), through its Office of Federal Procurement Policy, in August 1978 established an interagency task force representing the Department of Labor and the main federal agencies whose programs involved construction contracting. The Task Force recommended (1) eliminating the "30 percent rule" under which wage rates were determined to be "prevailing" if 30 percent or more of an area's workers in a particular classification were paid that rate; (2) authorizing of "averaging" as a method of computing a wage rate; (3) modifying the classification of the types of construction into four basic categories: residential, building, heavy, and highway; and (4) establishing categories for semi-skilled work in the classification of labor.[13]

In December 1979, proposed new regulations based on these recommendations were published,[14] and final regulations were promulgated to become effective on February 17, 1981.[15] However, the incoming Reagan Administration withdrew them for further study and revision, so that the new final regulations did not become effective until July 27, 1982.[16]

Five of the Secretary's 1982 regulations altering the method of determining prevailing wage rates were challenged in *Building & Construction Trades Department, AFL-CIO v. Donovan.*[17] These were (1)

elimination of the so-called "30 percent rule" by which locally prevailing wage rates could be set at the rate paid to a 30 percent plurality of local workers; (2) authorization for combining data from adjacent rural counties and excluding nearby urban counties when wage data in a particular rural county are insufficient to indicate a prevailing wage; (3) exclusion of wages paid on similar federally funded local projects; (4) expansion of the use of semi-skilled helpers to achieve "prevailing" status for a particular wage rate; and (5) authorization for contractors to submit weekly statements certifying compliance with federal standards instead of submitting actual payroll records for inspection. After reviewing the statutory language and legislative history, the court upheld the validity of these administrative modifications, except with respect to the use of helpers in estimating the prevalence of a wage rate and the use of certification statements instead of reporting actual wage data.

Coverage of the Act

Application of the Davis-Bacon Act standards to second-tier subcontractors was challenged in *O. G. Sansome Co. v. Department of Transportation*[18] as reaching beyond the intended scope of the statute. There, during construction of a segment of the Interstate System under a federal-aid highway project, the prime contractor gave a subcontract for furnishing the subbase materials. But, instead of obtaining the materials from a standard commercial supplier (materialman), the subcontractor arranged to have them hauled from locations adjacent to the construction site and established exclusively to serve that site. This presented a question of whether the truckers who hauled the subbase were sub-subcontractors, and so covered by the federal and state standards, or were employees of a third-party materialman for whom there was an exception in the coverage. The court held that the truckers in question were not employees of a materialman and, therefore, were covered. Noting that the subcontractor had arranged to be supplied from private borrow pits that were established solely for the project, the court stressed that the materialman's exception applied only to suppliers who were "in the business of selling such material to the general public and were not established exclusively to furnish materials for [the project in question]."[19]

Due process and equal protection of the law issues were raised in *Sansome* by the question of whether statutory imposition of mandatory payments in the nature of liquidated damages for failure to comply with minimum wage standards could lawfully be imposed without notice and hearing. The court dismissed these challenges saying:

> When the contractor submits his bid based on the prevailing wage determination and freely enters into a contract for the public work involved, in which contract he stipulates to be subject to the penalty provisions of the prevailing wage law, he cannot be heard to say that he was denied due process of law with respect to the enforcement of the penalty provisions.[20]

Notwithstanding a statement in a public contract that any construction work would not be done by the contractor, but would be done by subcontractors, it was held that Davis-Bacon standards applied to the contractor where it appeared that the contractor's employees did in fact perform construction work on the project.[21]

By an amendment to the Davis-Bacon Act in 1968,[22] its coverage was modified to exempt employees in certified apprenticeship and skill training programs established to promote equal employment opportunity. The implications of this exception were considered in *Suislaw Concrete Construction Co. v. State of Washington, Department of Transportation,*[23] where the contractor argued that the state transportation agency, through the state's prevailing wage law, may not require him to pay wages higher than those required by federal regulations. Arguably, to do so, by requiring application of state wage standards to trainees who were not enrolled in a formal apprenticeship program, would be unconstitutional because the state's prevailing wage law is preempted by the federal law and regulations. The court held, however, that the contractor's evidence of federal intent to occupy the field of minimum wages was not sufficient to allow an inference of preemption. It found no language in the federal law or regulations indicating an intent to preempt, and it declared that the mere volume, complexity, and comprehensive nature of the federal regulations did not support an inference to preempt the state law. Nor did the court find that application of the state's law constituted an obstacle to achievement of the objectives of the federal law under the circumstances present.[24]

Because of the nature of the federal-aid highway program, it is possible for highway construction contracts to provide that wage rates must comply with both the federal standards in the Davis-Bacon Act and standards based on state legislation. It is also possible that the two sets of standards may differ in their legislative language or interpretations so that employers are obliged to pay higher rates under one than under the other. In such instances the courts have taken the position that these minimum wage rates are to be treated as a floor, but not necessarily a ceiling. Thus, in a Kansas case, contract specifications that made both state and federal standards applicable were held to merely create a double floor, with the higher of the two rates prevailing.[25]

Applying this interpretation, Kansas courts also held that a municipality, in advertising for bids on a construction project that did not involve any federal assistance, might voluntarily specify that wage rates for the project must be not less than those prevailing in the project's locality as determined pursuant to the Davis-Bacon Act, despite the fact that such wage rates were higher than rates specified for public construction projects under applicable state law. Voluntary municipal application of federal wage rate determination was permitted so long as it did not result in a conflict between state and federal law, or the state legislation had not preempted municipal options.[26]

While this interpretation follows logically from the premise that the law of the sovereign state should prevail where a construction project

uses only the state's own funds, its applicability is less clear where a project receives federal assistance. Instances in which wage rates set by state law were higher than the rates established under Davis-Bacon Act authority raised the question of whether the Davis-Bacon rate would preempt the higher state rate. As applied to construction that is federally assisted through the Public Housing Act and Indian Housing Act, this question was answered in 1988 by promulgation of rules preempting any wage rate established under state law that exceeded the corresponding wage rate that was determined by federal authority. Bidding documents and contracts awarded for housing construction under those acts must specify that the higher state rates are inapplicable and unenforceable.[27] The rationale of preemption in federally assisted public housing and Indian housing was that additional costs are unnecessarily incurred by applying the higher state wage rates, and that contractors are encouraged to submit higher bids or else offset the higher wage rates by cutting back on the quality of materials and supplies or use of "bargain basement" and untrained workers.[28]

During the rulemaking process of the Department of Housing and Urban Development, the constitutional aspects of its proposed preemption were extensively discussed. Opponents of preemption emphasized that Congress and the Supreme Court had frequently recognized the benefits of permitting states to serve as laboratories of experimentation in legislative and administrative approaches to a wide range of governmental functions, and that there was no inherent or necessary conflict between the purposes of state and federal law in this instance. Rather, the disagreement was over the manner in which the data for determining prevailing wages were identified and compared from one area to another. Notwithstanding these arguments, HUD determined that its preemption was justified and authorized where, as here, a state law, neutral on its face, had an adverse effect on the federal law's objective. In this case, the department found, the effect of state laws that prescribe higher-than-federal wage rates was to "divert funds from construction or maintenance of a greater number of lower income housing units to the payment of higher wages and thus obstruct the federal objective."[29]

At that time (1988) the U.S. Department of Transportation elected not to promulgate similar preemption regulations for federally assisted highway construction. On the premise that prevailing wage laws were enacted for the benefit of workers rather than contractors, the Department of Transportation continued a policy that, where two varying wage rates were established for a highway construction project, the higher rate would be applied.

Determination of Prevailing Wage Rates (p. 1307)

Legal Effects of Wage Rate Determinations and Changes Therein (p. 1309)

"Prevailing wage rate determinations" are of two types. Project wage rate determinations are for particular projects, are typically for short periods of time and specific circumstances, and are communicated directly to the contracting agency that requests them, indicating their effective dates. General wage determinations are applicable to all public construction projects to be performed in a specified geographical area. They are promulgated through public notice in the *Federal Register*, and may be modified in the same way. Contracting agencies are entitled to rely on the latest official communication or published notice of wage rates.

For administrative convenience, modifications published or received by the contracting agency less than 10 days before the opening of bids do not require modification of the project specifications or bid instructions, unless it finds that there is a reasonable time in which to notify the bidders affected by the modification.[30] Thus, where a contracting agency was informally told of an imminent revision of the Secretary's wage rate determination on Friday, but the agency did not attempt to notify bidders prior to the opening of bids on the following Tuesday, the court upheld the agency's decision not to try to notify bidders, and did not require modification of the contract to conform to the subsequent increase in wage rates.[31]

Once awarded with properly certified wage rates, a construction contract covered by Davis-Bacon Act standards need not be modified to require payment of higher wage rates in the event that the Secretary of Labor subsequently determines that wage rate trends require upward revision.[32] Thus, where a contracting agency applied the prevailing wage rates for "highway" and "heavy" work, but the Secretary of Labor subsequently disagreed and determined that the work should have been classified as "building," it was held that the secretarial determination came too late to compel modification of the contract. In order to bring about such a result, a secretarial determination must be officially published or received in writing prior to the contract award. In this instance an advance telephone notification of the classification change was insufficient to cause modification of the bid specifications.[33]

Classification of Laborers and Mechanics (p. 1315)

The reviewability of decisions by the Secretary of Labor relating to classification of work and workers in connection with making an official wage rate determination was questioned in *Commonwealth of Virginia ex rel. Commissioner, Virginia Department of Highways and Transportation v. Marshall.*[34] There the state highway agency applied for a project wage rate determination for construction of a segment of the Interstate System in a metropolitan area where the median strip was designed to accommodate tracks for a rapid transit system in a later phase of construction. The contracting agency classified the project as "highway" construction, but a subsequent ruling by the Department of Labor characterized the work as "heavy construction" because it would ultimately be used as a railroad bed.

On appeal to the Wage Appeals Board, the contracting agency argued that the work then being put under contract applied only to the highway

project, and its eventual extension to become a rapid transit roadbed would not occur until at least a year later, at which time a new project wage rate determination would be requested. When the Wage Appeal Board declared this question moot, appeal was taken to the Circuit Court of Appeal which held that, while the substantive correctness of a wage rate determination was not subject to judicial review, the facts of this case raised a due process issue and a question of whether the statutory directive had been followed. It therefore met the criterion for review.

The additional question of whether the Secretary of Labor's determinations are reviewable under the standards of the Administrative Procedure Act (APA) proved to be more difficult because neither the language nor the history of the Davis-Bacon Act covered the matter of reviewability. The court held, however, that the facts argued by the contracting agency amounted to a challenge of the correctness of the Secretary's procedure and practice and, accordingly, were reviewable under the Administrative Procedure Act.[35]

Finally, addressing the merits of the Secretarial classification of median strip work as "heavy construction," the court rejected the contracting agency's contention that this determination was improperly based on the ultimate use of the facility rather than its physical components. Finding that the secretary's classification was based on reasonable considerations and was consistent with prior practice, the court found no abuse of discretion in the action.[36]

Where construction projects have incorporated training and apprenticeship programs the potential vulnerability of wage rate determinations increases because of the greater care needed in classifying the labor actually used in the work. Thus, where "roofers' helpers" were employed in accordance with the local practice and collective bargaining agreement, but the secretarial wage rate determination did not recognize or provide for this classification in its finding, the roofing subcontractor complained of having to pay "roofers'" wages to employees who were, in fact, helpers. On appeal the classification was upheld because the employees in question were not in an approved training program and their work was performed as a part of the roofing task in the project.[37]

Enforcement of Wage Rate Standards

Where public construction contracts are covered by the Davis-Bacon Act, the enforcement mechanism most frequently used and most clearly contemplated in the statute is for the governmental agency's contracting officer to withhold payment of the contract funds to a contractor who is shown to have not complied with a proper and official wage rate determination. Customarily such action is triggered by a complaint filed with the contracting agency by an aggrieved employee and found to be justified. The duty of monitoring or investigating contractor compliance with wage rate standards is discretionary, both as to whether and when to investigate, and is guided by the basic purpose of the Davis-Bacon Act to protect the employees' interest.[38] Recognizing that to mandate investigation of all projects would be an impossible administrative burden, courts have interpreted the statute as requiring the Department of Labor to make such investigations "as may be necessary to assure compliance with the labor standards clauses of government contracts."[39]

When contract funds are withheld because of failure to comply with federal wage rate standards various secondary questions may arise. One major issue of this sort is whether any private right of action exists for employees who are actually aggrieved by a failure to comply with wage rate standards.

Federal courts have conflicting views on whether such a private right of action is created by the Davis-Bacon Act. In 1977, the U.S. Circuit Court of Appeals for the Seventh Circuit held that implying such a private right of action was necessary to accomplish the purpose of Congress in passing the Davis-Bacon Act.[40] Arguing that the employees of a government contractor are both a specially protected class under the statute and may also be regarded as a third party beneficiary of the construction contract, the court recognized a right of action by employees seeking to recover unpaid back wages.

Three years later, however, in *United States v. Capeletti Brothers, Inc.*, the Fifth Circuit came to the opposite conclusion, declaring that neither the act nor its legislative history contained persuasive evidence of Congressional intent to create or deny private parties a right of action to enforce prevailing wage rates.[41] Indeed, the court found that the duty of enforcement created by the statute was imposed on the Federal Government and contracting agencies to ensure that provisions for payment of prevailing wage rates were included in federally assisted construction contracts. Once this duty was performed by those agencies the legislative intent was satisfied. The benefits of the statute accrued to the specially protected class of laborers and mechanics indirectly and not as a result of any right that could be exercised directly by that class.[42]

In the diversity of views that resulted, the reasoning of the Fifth Circuit has been favored by those District Courts that have considered this question.[43] Denial that the Davis-Bacon Act gives aggrieved employees a private right of action against contractor/employers who do not comply with that statute's minimum wage rates has not, however, affected their right of action against a contractor's payment and materials bond under the Federal Miller Act or the states' "Little Miller Acts."[44]

HOURS AND CONDITIONS OF WORK (p. 1316)

Federal Legislation (p. 1316)

Application to State and Local Government Employees

Congressional enactment of the Fair Labor Standards Act (FLSA) in 1938 established for the first time nationwide standards for minimum wages and maximum hours of work.[45] Originally the Act covered individual employees personally in "industries engaged in commerce or in the production of goods for commerce," and excluded the Federal Government and states and their political subdivisions for its coverage.[46] Beginning in 1961, however, Congress began a series of amendments to

this law that extended its provisions to some types of public employees and, in 1974, revised the legislative definitions of "employees" and of "enterprises engaged in commerce or the production of goods for commerce" to include public agencies.[47] This appeared to remove the exemption that originally applied to the states and their political subdivisions, and to leave only the general exemption for executive, administrative, and professional personnel to be excluded from the Federal minimum wage and maximum hour requirements.

The constitutionality of these extensions was challenged as being excessively broad interpretations of the federal power to regulate interstate commerce, and violating the tenth amendment's proviso that powers not specifically granted to the national government are retained by the States. The validity of the 1966 amendment (extending coverage to state hospitals, institutions, and schools) was upheld in *Maryland v. Wirtz*,[48] but the issues were reopened following adoption of the 1974 amendments, and led to the U.S. Supreme Court's decision in *National League of Cities v. Usery*[49] holding that both the 1966 and 1974 amendments were unconstitutional to the extent they interfered with the "integral governmental functions" of the States and their political subdivisions.[50]

Recognizing that it had invoked a distinction that would need definition, the court cited the areas of fire prevention, police protection, sanitation, public health, and parks and recreation as illustrative of "integral governmental functions," saying:

> these activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."[51]

In December 1979 the Department of Labor issued a more comprehensive description of traditional and nontraditional functions of state and local governments for purposes of determining the applicability of the FLSA, and listed local mass transit systems among the functions considered to be nontraditional.[52] This administrative determination was challenged by a number of transportation agencies and public mass-transit authorities with mixed results,[53] and in 1984 was brought to the U. S. Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*.[54]

Picking up the pivotal issue left by *National League of Cities* of whether the municipally owned and operated San Antonio mass transit authority was performing an integral and traditional governmental function. the court said:

> Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*.... We relied in large part there [Long Island Railroad] on "*the historical reality*" that the operation of railroads is not among the functions traditionally performed by state and local governments, but we simultaneously disavowed a "static historical view of state functions generally immune from federal regulations." We held that the inquiry into a particular function's "traditional" nature was merely a means of determining whether the federal statute at issue unduly handicaps "basic state prerogatives," but we did not offer an explanation of what makes one state function a "basic prerogative" and another function not basic.[55]

With regard to alternative approaches to the problem raised by *National League of Cities*, the Court discussed and rejected previously used formulas, including a "governmental-proprietary distinction, a purely historical standard, and standards purporting to identify functions that were "uniquely" or "necessary" governmental in their nature. All of these had enjoyed seasons of popularity, but none of them, the Court felt, was likely to yield consistent results or protect the principles of the federal system that were essential. The Court, therefore, returned to what it saw as the central theme of *National League of Cities*, namely, the proposition that the States have a special position in the constitutional system and Congressional activity under the Commerce Clause must defer to that position. The Court concluded that:

> the principal and basic limit on the federal commerce power is that inherent in all Congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.[56]

"In sum," the Court declared, "*National League of Cities* ... tried to repair what did not need repair."[57]

By overruling *National League of Cities*, the Court settled further frontal challenges to application of FLSA wage and hour standards to municipal mass transit authorities, but it left uncertainty regarding its impact on trends in the federal system of government. Both the dissenting members of the Court and commentators in professional legal literature highlighted this facet of the case in their remarks. Justice Powell, writing the principal dissenting opinion, argued that in deciding that the test of state immunity approved in *National League of Cities* was basically unsound and unworkable, the majority ignored long-settled constitutional values and the role of judicial review. Asserting that the courts could fairly and effectively weigh the respective State and Federal interests called for in that decision, Justice Powell defended the balancing test in *National League of Cities* as a better way to ensure that the unique benefits of the federal system are realized.[58]

Professional comments on the implications of the majority opinion also have highlighted its implications for the role of courts and legislatures in further defining the values, functions, and institutions protected by the tenth amendment in the context of the expanding scope of the Commerce Clause.[59]

As speculation over the significance of *Garcia v. San Antonio Metropolitan Transit Authority* began, the Department of Labor moved to

necessarily fluctuated from week to week, but they adjusted to this by negotiating contracts that guaranteed fixed salaries with separate rates for the regular 40-hour week and for the time exceeding 40 hours. In 1942, the U. S. Supreme Court found an "implicit exception" in the original statute for pay plans guaranteeing regular weekly pay rates that protected employees against "short" paychecks in weeks where they worked very few hours.[82] This interpretation was incorporated into the statute in 1949 when Congress enacted a provision for a carefully defined category of guaranteed wage agreements to be exempt from FLSA wage and hour standards.[83] To qualify for this exception pay plans must meet four criteria: (1) the employee's duties must "necessitate irregular hours of work"; (2) the employment must be based on a bona fide individual contract or collective bargaining agreement; (3) the contract must specify a regular pay rate for work up to 40 hours and one and one-half times that rate for work over 40 hours; and (4) the contract must provide a weekly pay guarantee for not more than 60 hours at the specified rates.

Plans purporting to qualify for this exception to FLSA standards are invariably scrutinized carefully for compliance with all of these statutory conditions, and courts have tended to construe the exception narrowly against employers. Accordingly, in *Donovan v. Brown Equipment & Service Tools, Inc.*,[84] when the employer's plan was tested against these criteria it was found not to qualify because the employee's duties did not "necessitate" irregular hours and because the pay rate could not be regarded as a "regular rate."

Determination of Employment Status

Because FLSA standards apply only to "employees" engaged in commerce or production of goods for commerce, the legal status of workers must be verified in enforcement proceedings. Where this occurs it is frequently charged that the person in question is an independent contractor rather than an employee. In such cases the nature of the employment rather than the language used by the parties to describe it is controlling. Thus, despite the fact that welders signed a contract describing them as independent contractors, furnished their own equipment and insurance, billed on their own letterhead, filed their own tax returns, and received higher rates of pay than other welders on the project, it was held that an employer-employee relationship existed.[85]

The holding was explained as follows:

> When there are indicia of the employee's independence of the employer, the determination of employee status is not always an easy one to make and will rest on an analysis of the evidence as a whole as to whether the claimant as a matter of economic reality is dependent for his livelihood upon his relationship with his alleged employer. In this regard, common law concepts of "employee" and "independent contractor" has been specifically rejected by the courts, and five considerations are generally used in gauging the degree of economic dependence of an alleged employee: the skill required; the permanency of the relationship; the employee's investment in facilities; the employer's degree of control; and the degree to which the opportunity for profit or loss is determined by the employer. No one of these tests is controlling. [However, and stated another way, the determinative question is] whether the individual is or is not, as a matter of economic reality, in business for himself.[86]

In this instance, the court determined that despite the various privileges they enjoyed, the welders in question were expected to work regular daily hours, accept work assignments by the defendant/contractor, work under his supervision performing semi-skilled mechanical work. Over a period of several years they worked almost exclusively for the defendant/contractor. These circumstances, the court concluded, made the welders employees rather than independent contractors.

The facts that an individual serves as a supervisor of other employees, enjoys the privilege of choosing his own assignments and work methods, furnishes his own tools, materials and transportation, and hires and discharges others are not sufficient by themselves to make him an independent contractor if "as a matter of economic reality,... [he is] dependent upon the business to which ... [he] renders service."[87] Also, the fact that an individual may not be registered on a labor roster but, rather, may work as a "helper" to one who is registered does not disqualify him as an employee for application of FLSA wage standards. Nor is work performed after an assigned work period considered beyond the coverage of the standards.[88] It is covered by the principle that work not requested but suffered or permitted is compensable since it is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept benefits without compensating the one who provides them.

Record-keeping Requirements

Successful administration and enforcement of federal wage and hour standards depend on the existence of accurate and complete employment records. Pursuant to the Fair Labor Standards Act, the Secretary of Labor has promulgated regulations requiring employers who are covered by the act to maintain for each employee records showing hours worked daily or weekly, time and date when the workweek began, and overtime payments.[89] Failure to comply with these record-keeping requirements does not, however, inevitably prevent recovery of unpaid compensation. Evidence of the basis for a claim may be provided by employees who are able to document the history of their employment through their own records. Where such substitutes are not available, claims can go forward with a lesser degree of proof by the claimant.

In such circumstances courts have held that an employee may meet his burden of proof by showing that he has in fact performed the work for which he was inadequately compensated, and if he produces sufficient evidence to show the extent of that work as a matter of reasonable inference, the burden of proof shifts to the employer to come forward with more precise evidence of the amount of work performed, or evidence to negative the reasonableness of the inference to be drawn from the employee's documentation. If the employer fails to produce such evi-

dence, the court may award the claim even though the result may be only approximate.[90]

Wage Discrimination Based on Sex

The Equal Pay Act, added to the Fair Labor Standards Act in 1963,[91] has been described as an attempt by Congress to create "a broad charter of women's rights in the economic field," seeking to overcome long-held beliefs in women's inferiority and to eliminate the depressing effects of these beliefs on wages and living standards and the economic and social consequences of these effects.[92] The act states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to the employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any factor other than sex.[93]

In efforts to enforce this standard, an issue that is frequently referred to the courts is that of determining what constitutes the "establishment" in which an employee is employed. This question must be answered in the process of comparing wage rates to determine discrimination. Wage analysis may become difficult, however, for a business enterprise that is carried on in more than one location.

The regulations of the Secretary of Labor state that the "establishment" is a distinct physical place of business rather than the entire business enterprise.[94] As a practical matter this guidance could not be taken literally because in small businesses, where everyone had to perform a variety of different duties, it frequently was impossible to find assignments and conditions of work that were completely identical.[95] In such circumstances, courts tended to approach the objective of equal pay for equal work by emphasizing places of business in which comparable (although not necessarily identical) employment functions were carried on regardless of geographical location.[96]

Applied to state and local governmental agencies, this approach led to comparison of the pay of employees serving in separate and different agencies in *Tomchek-May v. Brown County.*[97] Here the female personnel coordinator of a county mental health center alleged she was the victim of pay inequality when compared with a male counterpart in the county's highway department. Job performance and pay data over several years were compared to make the claimant's case.

This raised the question of whether separate agencies could be regarded as part of a single establishment under the Equal Pay Act. The court held that, notwithstanding the physical separation and differences in the agencies' operations, there was a "countywide integration in an administrative sense." The county administered its personnel management functions in a centralized manner so that the critical factors in the courts' test—wage policy and control, job classification, records and management procedures—were subject to control by a central administration that was countywide. Accordingly, the complainant was held to have met her burden of proof by showing that there was substantial equality of skill, effort, responsibility and working conditions in her work and that of her counterpart in the highway department, and that a differential in wage rates could not be based on any reason except the sex of the employee.

Inequality of pay for substantially equal work may be permitted if it can be based on any of the four exceptions listed in the Equal Pay Act. These permit wage rate differentials that are shown to be based on (1) a seniority system, (2) a merit system, (3) a system in which earnings are based on quantity or quality of work, or (4) any other factor other than sex. The first three exceptions are specific, commonly understood and accepted in practice, and justified as being based on differences in economic benefits to the employer. The fourth exception is a broad "catch-all" category the content of which is left to be determined by the courts.

The legislative history of the Equal Pay Act yields examples of a number of circumstances in which the fairness of wage differentials is generally acknowledged.[98] The difficulty is, however, that it is not clear whether the phrase "factors other than sex" means literally *any* other factor, or factors traditionally used in job evaluation, or something else. Although the history suggests that Congress intended to approach its goal of equal pay for equal work on a broad basis, few courts have addressed this matter directly. One instance in which the scope of this exception was discussed involved employees who were paid by commissions for sales of identical services, and were divided into male and female categories for pay purposes.[99] Commission rates for females were less than for males, and were explained by the employer's desire to equalize the total remuneration of these two groups since his experience showed that it was easier for the female sales staff to sell in the market that it served than it was for the male staff to sell in its market. It was held here that the desire to equalize total remuneration of the two groups, achieved by giving female employees lower commission rates, put those employees in an inferior position without regard to effort or productivity, and so was based on their sex.

Discrimination in employment practices that is not based on a wage rate differential that is allowed by law may be addressed through Title VII of the Civil Rights Act.[100] One form of discrimination frequently complained of is concerned with different treatment of similarly situated employees who are engaged in the same activity. In *Oldfather v. Ohio Department of Transportation*[101] similarly situated employees, one male and one female, were found to be equally involved in the same activity, which resulted in the female being discharged while the male employee retained his position without any punishment.

In determining that discrimination based on sex had occurred in this case, the court heard argument that the employer had tried to avoid discharging the complainant by offering her another position. This required that the substantial equivalence of that position be determined

by reference to compensation, promotion possibilities, job responsibilities, work conditions, status, and practical considerations, such as, for example, commuting time. In this instance the court found that the employer failed to show the substantial equivalence of the position offered.[102]

EQUAL EMPLOYMENT OPPORTUNITY (p. 1321)

Proof of Discrimination

Disparate Treatment and Disparate Impact

The commitment which bidders on federal and federally aided construction contracts make to adopt and comply with an approved affirmative action plan for equal employment opportunity is part of a much larger framework of statute and administrative law that has been developed to implement the Civil Rights Act of 1964.[103] Other papers in this volume discuss the main elements of this framework, how they developed and are related,[104] and how compliance with federal standards by state highway agencies and contractors is enforced.[105] To a considerable extent, however, this framework of precepts and procedures stops short of giving complete and authoritative guidance on the substantive side of the tests for discrimination.

Formulation of criteria for determining when, under varying fact situations, an affirmative action plan acceptably accomplishes the objective of equal employment opportunity, or how well an employer carriers out that plan in his operations, has been attempted in a number of ways. In the years since the Civil Rights Act of 1964 was enacted, compliance criteria have occasionally been derived from legislation,[106] through formulas adopted by voluntary action of contractors and labor unions in collective bargaining,[107] through formulas based on court orders,[108] and by administrative approval of prototype affirmative action plans developed by local governments or other public agencies.[109]

Development of doctrine by these means, however, has taken equal employment opportunity (EEO) programs through a period of uncertainty about what constitutes discrimination and compliance with affirmative action plans, and, in particular, about rights of action created by the Civil Rights Act of 1964. This statute made two distinct practices unlawful. One was intentional discrimination against an employee regarding the compensation, terms, conditions, and privileges of employment; the other was use by an employer of criteria for hiring or promotion that "tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of race, color, religion, sex, or national origin.[110]

To show that an employer practiced discrimination, a complainant had to prove that disparate treatment occurred and was intentional on the part of the employer. But proof of intentional discrimination by direct testimony about an employer's state of mind when making employment decisions has understandably been difficult and infrequently attempted. Therefore, an alternative method of proof has been developed using statistical data and a presumption that people intend the results of their operational decisions and actions.

A prima facie case for intentional discrimination could be established by showing that (1) the employee/complainant belonged to a minority or other protected class of persons; (2) he or she was qualified and applied for a job for which applicants were being sought; (3) despite the applicant's qualifications, the application was rejected; and (4) after this rejection the position remained open and the employer continued to seek and receive applications from people having the complainant's qualifications. The burden of proof then shifts to the employer to provide a legitimate nondiscriminatory reason for the employer's rejection. Following this, the complainant has an opportunity to show why such reasons are pretexts, if he has reason to believe they are not genuine.[111]

In some actions challenging practices that limit, segregate, or classify employees in ways that deprive or tend to deprive individuals of employment or status, however, proof of discriminatory intent on the part of the employer has not been required. This doctrinal development, called the theory of disparate impact, may well be the single most important judicial contribution to Title VII of the Civil Rights Act of 1964, and has, in effect, created a separate right of action for discrimination. Unlike a suit that challenges a particular and intentional discriminatory act, a suit based on disparate impact challenges the process by which the employer makes his employment decisions. A prima facie case for such a complaint is made when it is shown that an employment or promotion practice results in a "disparate impact" on members of a protected minority class, and so becomes a form of discrimination within the purview of the civil rights law.[112]

This concept of disparate impact as a denial of equal employment opportunity was introduced in *Griggs v. Duke Power Co.*,[113] where an employer required satisfactory scores on aptitude tests measuring general intelligence and mechanical ability and a high school diploma as prerequisites for hiring or promotion. There was no evidence that these tests had a racial purpose or discriminatory motive. Yet, the U. S. Supreme Court rejected the employer's practice, and stated:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.... Congress directed the thrust of the [Civil Rights] Act to the *consequences* of employment practices, not simply the motivation.... The Act proscribes not merely 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.[114]

Disparate Impact Analysis

A consensus on rules for applying the concept of disparate impact has been slow in developing for several reasons. First, the concept suffers

from not being able to trace its origin to specific statutory language, as can the concept of disparate treatment. How can a prohibition against neutral practices that have incidental discriminatory effects be derived from a statute that purports to only prohibit intentional discrimination?[115] Moreover, the logic of how employment practices that are neutral in design and operation somehow become discriminatory to all members of a group that is classified by reference to its race, color, sex, religion, or national origin is not clearly apparent. And finally, where are administrators and judges to draw criteria to determine when the disparate impact of a practice or pattern reaches a level that constitutes unacceptable discrimination? Cases are bound to occur where a disparate impact is neither clearly insignificant nor clearly unacceptable. Without touchstones to help determine whether an impact constitutes discrimination (such as the element of intent provides in cases of "disparate treatment"), these situations become the hard cases that make bad law. As a result, courts have scrutinized the analysis of disparate impact evidence to assure it is properly applied and that it is not extended to situations where it may not be appropriate.

In *Griggs* the complainant proved a prima facie case by showing that the employer's standards for hiring and promotion (high school diploma and tests of general intelligence and mechanical ability) resulted in a significantly unbalanced work force adverse to the group (blacks) of which the complainant was a member. He was allowed to do this merely by showing how the employer's pattern of hiring differed from the statistical profile of the national work force. No effort was made to refine this comparison or take the analysis of its details beyond the first threshold, and none was required by the court, which relied on the logic that

> absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population of the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of the work force and of the general population thus may be significant even though [the Civil Rights Act] . . . makes clear that Title VII imposes no requirement that a work force mirror the general population.[116]

When a prima facie case of disparate impact is made, the burden of proof shifts to the employer to show that its standards were justified either by their relation to job performance or business necessity. The court stated in *Griggs* that although testing procedures obviously are useful, "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."[117] Where the employer fails to show this relationship, he fails to rebut the evidence of the disparate impact of his practices.

In subsequent cases, as the courts returned to the problem of developing a doctrine for applying the disparate impact theory, the relevancy of the employer's standards to job performance and business necessity continued to be a pivotal issue. Accordingly, establishment of minimum height and weight standards for hiring was successfully challenged because of their tendency to exclude a disproportionate number of women.[118] Failure to show relevance to job performance also led to rejection of employment standards that excluded applicants who were taking certain medications,[119] or had poor credit, or had records of previous arrests.[120] In contrast, where police recruits were required to pass a written test, verbal and writing skills, it was held that the tests were "validated" by their relation to the skills needed to master the curriculum of the police training academy.[121]

Collateral assistance in defending employers' practices in this case was derived from evidence that the employer had an effective program for recruiting minority applicants and that the pattern of its work force, although containing disparities, contained a substantial percentage of the potentially eligible applicants in the total work force. Early cases in which a prima facie case of disparate impact could be shown by citing national demographic data were replaced by insistence that complainants sharpen the focus of the objectionable impact on the precise part of the total labor pool to which the complainant belonged. So, in *Hazelwood School District v. United States,*[122] where a pattern or practice of discrimination in teacher employment was charged, the disparate impact model used by the complainant was rejected because an irrelevant labor market was used in making the statistical comparisons upon which the disparate impact relied. Also, the court noted that such statistical comparisons should consider the time dimension, and that in this case rebuttal of the inference of discriminatory treatment was supported by the employer's shift in hiring practices after enactment of civil rights legislation.[123]

Tighter discipline also was applied to analysis of disparate impacts by insistence that causal connections be shown between specific practices or procedures and adverse impacts on specific protected groups. This is illustrated in *Pouncy v. Prudential Insurance Company of America,*[124] where the complainant charged that a disparate impact had resulted from employer's practices of not posting notices of job vacancies, of using a "level system" that kept black employees in low skill jobs longer than white employees, and the use of subjective criteria in evaluating employees. The court ruled that the complainant failed to make a prima facie case. Not only did the complainant fail to show that the challenged practices singled out the black minority for adverse impact, but complainant's challenge was issued to the employer's entire process of promotions. The court explained:

> Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy. . . . We do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices, for to do so "would allow the disparate impact of one element to require validation of other elements having no adverse effects." . . . None of the three Prudential "employment practices" singled out by the appellant . . . are akin to the "facially neutral employment practices" the disparate impact model was designed to

> test.... [Plaintiff] has not shown, nor can he show, that independent of other factors the employment practices he challenges have caused the racial imbalance in Prudential's work force.[125]

The charge in *Pouncy* that, among other things, the employer based promotion and assignment decisions on subjective criteria—specifically, the judgment of supervisory personnel—opened up an aspect of disparate impact analysis for which no doctrine had been adopted. By denying the complainant's claim the court appeared to say that disparate impact theory could be applied only where it is possible to show the causal impact of a specific employment practice by external statistical means and trace that impact to a particular protected group of which the complainant is a member. So-called "objective standards" fitted this approach nicely, since they were applied uniformly and directly and were relatively easy to isolate for collection and study. In contrast, standards that were subjective, calling for judgment by a supervisor or interviewer, were not easy to isolate, measure, or interpret by statistics. Nor were empirical data on the record of discretionary hiring or promotion decisions always a reliable basis for references explaining that record.[126]

Predictably, therefore, the ruling in *Pouncy* increased disagreement among the federal circuits over the handling of disparate impact claims that challenged subjective employment criteria. Between 1981 and 1988 the Sixth, Seventh, Ninth, Eleventh and D. C. Circuits issued decisions allowing such actions;[127] the Fourth Circuit decided against allowing such actions;[128] and the Fifth, Eighth, and Tenth Circuits had internally conflicting decisions.[129]

In 1988 the United States Supreme Court addressed this issue in *Watson v. Fort Worth Bank and Trust,*[130] where a black employee was repeatedly passed over for promotion in favor of white employees. The employer had no precise or formal selection criteria for promoting to supervisory positions, but relied on the subjective judgment of white supervisors who were acquainted with the candidates and their jobs. The court allowed the complainant's case to go forward on a disparate impact theory, declaring that in principle that theory was just as applicable to subjective employment criteria as to standardized objective tests, and if its application was limited only to the latter situations, employers might be tempted to thwart challenges to their employment practices by mixing subjective and objective standards, or find ways to introduce quotas or preferential treatment.

At the same time, the court acknowledged the need to keep disparate impact analysis "within its proper bounds," and explained how the evidentiary standards that it felt its previous decisions had mandated would be adequate safeguards for this purpose. First, a prima facie case must go beyond showing a statistical disparity in the work force; it must identify the specific practice that is challenged, and then prove it is the cause of the discriminatory result that is alleged. Also, in this process, the complainant's proof is subject to impeachment for technical flaws and disparagement of its probative weight. In his turn, the employer may defend by showing the "job-relatedness" or "business necessity" of his practice by drawing from the full range of considerations that serve his legitimate business goals. The employer is not required to introduce formal "validation studies" showing that particular criteria and test results will assure actual on-the-job performance. And, ultimately, the court emphasized, the burden of proving that discrimination against a protected group was caused by a specific employment practice remains with the complainant at all times.[131]

The decision in *Watson* took the form of three opinions, in which all the justices concurred that employment practices using the unchecked discretion of supervisors were subject to the disparate impact theory of *Griggs v. Duke Power Company,* but there were strongly differing views on the adequacy of the analytical rules that should be laid down to deal with the variety of subjective selection processes that might arise. Dissenting opinions also voiced misgivings over the way that the burden of proof was left by the court. Far from settling the doctrine on proof of disparate impact, therefore, the court appeared to postpone a final resolution of the problems of proof and the burden of proof until another opportunity.

On the matter of designing analytical tools for the theory of disparate impact, notice should be given to the contribution of the administrative agencies involved with the Civil Rights Act. In this regard the chief contributor has been the Equal Employment Opportunity Commission, and its chief contribution is its Uniform Guidelines for Employee Selection Procedures.[132] From this is derived the "Four-Fifths Rule" for determining the acceptability of employment tests. By this rule, a test is "validated" if the pass rate for protected employee group is equal to four-fifths of the pass rate of the most successful group. Useful as this may be as an administrative criterion, it is vulnerable where applicants cannot be identified with specific labor markets or where data bases are too small to be statistically significant.[133] Recognition that numerous exceptions must be allowed for when using the EEOC Uniform Guidelines led the United States Supreme Court in *Connecticut v. Teal*[134] to reject their use in judicial evaluation of disparate impact claims. Other attempts to formulate rules for disparate impact analysis have also revealed limitations and have led the Supreme Court to observe that "it appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance."[135]

Disparate Impact and Affirmative Action

The basic purpose of affirmative action plans is to correct imbalances in the patterns of employment resulting from previous disparate treatment of individuals or disparate impact on minority elements of the work force. Since these plans call for preferential treatment of minority groups, the question arises as to how they can be squared with the provisions of the Civil Rights Act that prohibit discrimination in employment practice and assure all persons the full and equal benefits of the law. Ultimately, of course, this becomes a constitutional question of how far legislative and administrative action can require preferential

treatment in the labor market in order to redress the effects of discriminatory practices by employers in the past.

This issue, focused in a claim of reverse discrimination, was presented in *United Steelworkers of America, AFL-CIO-CLC v. Weber,*[136] where enforcement of a voluntary collective bargaining agreement to allocate in-plant training positions in favor of black minority trainees was challenged by a white employee. The United States Supreme Court held that Title VII of the Civil Rights Act does not prevent private employers and unions from negotiating and adopting affirmative action plans aimed at eliminating the imbalance of minority representation in particular categories of the work force, provided certain limitations are recognized. Although it did not define in detail the line between permissible and impermissible affirmative action, the court cited four aspects of the plan in question that placed it on the permissible side. The plan (1) was designed to open employment opportunities for blacks in occupations that had been traditionally closed to them by long-standing patterns of racial discrimination, (2) did not unnecessarily restrict the interests of white employees, or (3) create an absolute bar to the advancement of white employees, and (4) was a temporary measure "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."[137]

Federal courts interpreted *Weber* as approving the use of private-sector agreements as a means of addressing directly the difficult problem of changing long-held societal attitudes and hierarchies, and also of removing lingering uneasiness about a possible inconsistency in the Civil Rights Act. In principle, this result was generally approved with the observation that "to open the door for such plans under Title VII[138] and close it under Section 1981[139] would make little sense . . . [and] bar a remedy Congress left within the discretion of private employers when it passed Title VII."[140] Also, without difficulty, the courts held that states and their agencies were able to utilize affirmative action plans in the same way to remedy disparities in employment opportunity.[141]

In applying the limits that *Weber* imposed on preferential treatment of minority members, the requirement that the affirmative action plan be temporary in character and duration received further attention. Whereas *Weber* involved a special training program aimed at bringing minority representation up to a stated percentage, and *LaRiviere* also had a target percentage goal suggested by a previous feasibility study—both of which constituted reasonably explicit deadlines for ending preferential treatment—other affirmative action situations inevitably arose in which the end was not in sight. This point was made in *Johnson v. Transportation Agency of Santa Clara County,*[142] where a male applicant for assignment to a higher grade position was passed over in favor of a less qualified female applicant pursuant to the agency's affirmative action plan. The temporary character of the plan was challenged because it did not state a termination date or other formula for ending preferential treatment to female applicants. The Ninth Circuit Court of Appeals approved the plan, however, stating that *Weber* did not establish a rigid criterion for testing the validity of affirmative action plans, and must be read in light of the remedial purpose of the Civil Rights Act. In the Transportation Agency's plan the preferential treatment would end when its remedial function was served and its long-ranged goal of equitable representation attained. "Attainment" rather than "maintenance" was the touchstone for such situations, and since the evidence showed that the agency had 237 male employees to one female in the group of positions under consideration, the affirmative action plan's goal clearly was not yet attained.

Having satisfied itself that the affirmative action plan met the criteria of the *Weber* formula, the court addressed the question of how the employer's reliance on an affirmative action plan to rebut the charge of discrimination affected the allocation of procedural burdens. For the employer to rebut the complainant's prima facie case, the court stated, he must first show that he acted pursuant to an affirmative action plan, and produce "some evidence" that the plan responded to a demonstrable imbalance in his work force, and was intended to correct it. Finally, he must also produce "some evidence" that the affirmative action plan is reasonably related to its corrective purpose. Once this is done, the rebuttal is complete, unless the complainant shows that the plan is defective on grounds of administrative procedure.

This holding did not rest easily with part of the court whose dissent argued that *Weber* was being construed too broadly, as it appeared to approve any plan that did not admit to being permanent. Nor did it go as far as needed in defining the burdens of proof and rebuttal where the challenged employment practice was based on a voluntary affirmative action plan. Certiorari was issued to bring these and other issues to the United States Supreme Court in 1988.

On review,[143] the Supreme Court approved the transportation agency's plan, specifically holding that affirmative action plans do not need to be created to redress documented previous instances of employment discrimination, but rather may be used to correct "conspicuous imbalance in traditionally segregated job categories." Also, it found the plan did not unnecessarily restrict the rights of male employees or create absolute bars to their advancement. But the court acknowledged that it did not attempt to establish outer limits of voluntary programs undertaken to benefit disadvantaged groups, or to fully define the responsibilities of employee and employer to prove and rebut the charge of reverse discrimination. As a result, a strongly phrased dissent by three justices warned of the danger that approval of affirmative action plans not structured to correct prior histories of specific discrimination could easily encourage the imposition of governmentally determined "proper proportions" of minorities in particular job categories.

Perhaps in order to provide another opportunity to settle these differences, the U.S. Supreme Court promptly agreed to hear *City of Richmond v. J.A. Croson Company.*[144] Here the city, in 1983, adopted a Minority Business Utilization Plan, requiring prime contractors on municipal construction projects to subcontract at least 30 percent of the dollar amount of their contracts to MBEs. Waivers were authorized where contractors showed that this requirement could not be achieved,

despite all feasible attempts to do so, and that "sufficient, relevant, qualified Minority Business Enterprizes . . . are unavailable or unwilling to participate" to meet the 30 percent goal.[145] The city advertised a construction contract on which J.A. Croson Company was the only bidder. The issue of constitutionality was joined when Croson's request for waiver of the set-aside was denied and the city rebid the contract. As this matter came up to the Court for decision in March 1989, the record and arguments focused on the extent to which state and local governments could legislatively redress the effects of past discrimination by requiring affirmative action from public contractors.

Croson argued that the Court's decision in *Wygant v. Jackson Board of Education*[146] limits this power to eradicating the effects of the contracting agency's own prior discrimination. The City of Richmond countered with the argument that its situation was governed by *Fullilove v. Klutznick*,[147] which recognized broad discretion for municipalities to define the specific prior discrimination and disparate impacts that they chose to attack. Still troubled by this problem, however, and unable to resolve it on principles, the Court again relied on problems of proof to dispose of the case, finding that the city's affirmative action plan lacked sufficient proof of discrimination.

In this respect the city offered a record that was vulnerable for resting on a finding that less than one percent of construction contract awards went to minority prime contractors, despite the fact that 50 percent of the city's population was black and that there was very low MBE membership in local contractors' associations. Also, the city did not answer counter assertions that all minorities who were willing to work were actually being hired and this labor pool was not sufficient to satisfy a 30 percent set-aside requirement. Accordingly, the Court found that too much about the nature and extent of the discrimination which the city's plan attacked was speculative, and that neither the necessity for introducing a policy of racial bias into the award of public construction contracts nor the selection of a 30 percent set-aside to remedy past discrimination was justified on the record.

While it thus struck down the city's Minority Business Utilization Plan, the court in *Croson* denied that it rolled back the local government's authority to adopt racially biased action plans that it had approved in *Fullilove*. Rather, it explained, in *Fullilove* it had approved Congressional authorization of set-asides in federally funded construction projects to eradicate discriminatory practices in construction projects throughout the nation; but its approval had been tempered by explicitly recognizing that the extent of the problem varied in different market areas and so might be subject to waiver. In the use of set-asides for minority contractors, therefore, state and local agencies had to establish the presence of discrimination by their own specific findings or the determination of other competent, relevant, and persuasive evidence.

This conclusion may well follow from the premise that affirmative action plans are "remedial" in their nature, and are subject to "heightened scrutiny,"[148] but it left undetermined whether an agency's affirmative action plan had to be tailored to deal only with the discriminatory aspects of its own current practices.[149] The Croson Company argued that the permissible limits of affirmative action were indeed that narrow, since that was the fact situation in *Wygant v. Jackson Board of Education*.[150] But the Court did not read *Wygant* as requiring affirmative action plans to be so restricted. It was unrealistic to believe that opening up the city's bidding procedure to minority businesses would help them much if other social and economic institutions of the community continued to restrict them in acquiring the means to compete effectively in the bidding. Therefore, the court declared, if the city "could show it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."[151]

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[1] Pub. L. No. 97-424, § 148, 96 Stat. 2131 (Jan. 6, 1983).

[2] Pub. L. No. 98-473, § 226, 98 Stat. 2030 (Oct. 12, 1984).

[3] Pub. L. No. 100-17, § 112, 101 Stat. 148 (Apr. 2, 1987).

[4] For the legislative history of this amendment, see: 133 Cong. Rec. (daily ed. Jan. 6, 1987), H31; H.Rep. 100-17, Conf. Rep., Surface Transportation Assistance Act of 1987, p. 137. Prior to the 1987 amendment, the use of materials produced by convict labor in Federal-aid highway construction was authorized in the Department of Justice Appropriation Acts in 1985 and 1986. Pub. L. No. 99-180, tit. II, § 202, 99 Stat. 1146 (Dec. 13, 1985); Pub. L. No. 99-591, tit. II, § 202, 100 Stat. 3341-3351 (Oct. 30, 1986); Pub. L. No. 100-202, tit. II, § 202, 101 Stat. 1329 (Dec. 22, 1987).

[5] United States v. Carbone, 327 U.S. 633 (1946); United States v. Laudani, 320 U.S. 543 (1944); Slater v. United States, 562 F.2d 58 (1st Cir. 1946).

[6] Slater v. United States, 562 F.2d 58, 60 (1st Cir. 1946).

[7] Ibid. at 61.

[8] United States v. Laudani, 320 U.S. 543 (1944).

[9] United States v. Alsup 219 F.2d 72 (5th Cir. 1955). Compare with activity determined to be legitimate and lawful union actions in United States v. Carbone, 327 U.S. 633 (1946).

[10] United States v. Carbone, 327 U.S. 633 (1946).

[11] Act of Aug. 23, 1968, Pub. L. No. 90-495, 82 Stat. 821. *See also*, 1968 U.S. Code Cong. & Admin. News 3482.

[12] Act of Jan. 6, 1983, Pub. L. No. 97-424, 96 Stat. 2131. *See* H.R. Rep. 97-555, — Cong., — Sess., May 17, 1982; H.Conf. Rep. 97-987, — Cong., — Sess., Dec. 21, 1982, 139.

[13] Warner, "Congressional and Administrative Efforts to Modify or Eliminate the Davis-Bacon Act," 10 W.State U. L.Rev. 1 (1982).

[14] 44 Fed. Reg. 77026-77032, 77080-77091 (1979).

[15] 46 Fed. Reg. 4390-4409 (1981).

[16] Revised draft regulations published Aug. 14, 1981 for comment. 46 Fed. Reg. 23658-23679 (1982). Final regulations published May 28, 1982. 47 Fed. Reg. 23644-23656, 23768-23769 (1982).

[17] 712 F.2d 611 (D.C. Cir. 1982).

[18] 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (1976).

[19] 127 Cal.Rptr. at 803-804, relying on H.B. Zachry Co. v. United States, 344 F.2d 352 (Ct.Cl. 1965).

[20] 127 Cal.Rptr. at 812.

[21] Coutu v. Universities Research Ass'n, Inc., 595 F.2d 396 (7th Cir. 1979).

[22] Act of Aug. 23, 1968, Pub. L. No. 90-495, 82 Stat. 821, 23 U.S.C. 113(c).

[23] 784 F.2d 952 (9th Cir. 1986).

[24] 784 F.2d 957-958.

[25] Ritchie Paving Inc. v. Kansas Department of Transportation, 232 Kan. 346, 654 P.2d 440 (1982), applying Kan. Stat. § 44-201 (1982).

[26] For municipal contracts, see: R.D. Anderson Constr. Co., Inc. v. City of Topeka, 228 Kan. 73, 612 P.2d 595 (1980); Woodside Village v. Secretary of Labor, 611 F.2d 312 (9th Cir. 1980). *See also*, Fasse v. Lower Heating & Air Conditioning, Inc.,

241 Kan. 387, 736 P.2d 930 (1987), approving suit for additional compensation by contractor's employee as third party beneficiary of Davis-Bacon wage determination.

[27] 53 F.R. 30206, 30211 (1988), "Preemption of Certain State-Determined Prevailing Wage Rates Applicable to Public Housing Projects," amending portions of 24 C.F.R. Pts. 905, 941, 965, and 968, Aug. 10, 1988.

[28] THIEBOLT, PREVAILING WAGE LEGISLATION (U. Pa. Labor Relations and Public Policy Series, No. 27, 137 (1986).

[29] 53 F.R. 30211, Aug. 10, 1988, citing Felder v. Casey, 56 U.S.L.W. 4689 (1988); Lawrence County v. Lead-Deadwood School Dist., No. 40-1, 469 U.S. 256 (1985). On preemption criteria, see also: Gould, *Davis-Bacon Act: The Economics of Prevailing Wage Laws*, Am. Enterprise Inst., 1971, 27–29; 2 CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS, § 12:27 (1988).

[30] 29 C.F.R. 1.7(b)(2)(1981). *See* International Union of Operating Engineers, Local 627 v. Arthurs, 355 F.Supp. 7 (D.W.D. Okla. 1972), where prior to requesting a wage rate determination, the contracting agency for construction of a dam advertised for bids using highway construction rates, and thereafter refused to modify bid specifications when the Secretary of Labor issued a different wage rate 8 days prior to bid opening. Held that the contracting agency acted arbitrarily and capriciously since the revised rates could have been given to bidders prior to the opening.

[31] Operating Engineers Local Union No. 3 v. Hurley, 546 F.Supp. 387 (D. Utah 1982).

[32] Twin Falls Constr. Co. v. Operating Engineers Local 370, 95 Ida. 370, 509 P.2d 788 (1973).

[33] North George Bldg. & Constr. Trades Council v. Goldschmidt, 621 F.2d 697 (5th Cir. 1980).

[34] 599 F.2d 588 (4th Cir. 1979).

[35] 599 F.2d at 592.

[36] Distinguishing *Tennessee Road Builders Ass'n v. Marshall*, 446 F.Supp. 399 (D.M.D.Tenn. 1977), where inland levee and local highway construction were held to be "highway work."

[37] Clevenger Roofing & Sheet Metal Co. v. United States, 8 Cl.Ct. 346 (1985), holding also that a subcontractor was not entitled to recover on breach of contract theory for procedural irregularities in wage rage classification.

[38] Unity Bank & Trust Co. v. United States, 756 F.2d 870 (Fed. Cir. 1985), holding that the Federal Government does not owe assignee of a contract any duty to investigate the contractor's compliance with wage rate standards.

[39] 756 F.2d at 873. Similarly, where the decision is made to investigate the extent of a contractor's liability under the Davis-Bacon Act and the parties entitled to such funds, commencement of bankruptcy proceedings by the contractor does not stay the action of the Secretary of Labor to obtain compliance with minimum wage standards. *In re* Quinta Contractors, Inc., Bankruptcy, 34 B.R. 129 (Pa. 1983), citing 11 U.S.C. 326(b)(4) (1988) and declaring that the language and history of the Davis-Bacon Act show that it was not enacted for the benefit of contractors, but rather to protect employees from substandard earnings by fixing a floor under wages on government projects.

[40] McDaniel v. Univ. of Chicago, 548 F.2d 689 (7th Cir. 1977), suit against a government research contractor to enforce contract provisions for payment of prevailing wage rates.

[41] United States v. Capeletti Bros., Inc., 621 F.2d 1309 (5th Cir. 1980).

[42] 621 F.2d at 1314.

[43] Mosley v. Starr Elec. Co., 542 F.Supp. 1032 (D.E.D. Tenn. 1981); Weber v. Heat Control Co., 579 F.Supp. 346 (D.N.J. 1982).

[44] United States for the use of Motta v. Able Bituminous Contractors, Inc., 640 F.Supp. 69 (D.Mass. 1986), holding that *Capeletti* did not bar the action since the claimant based his claim on the Miller Act rather than the Davis-Bacon Act.

[45] 29 U.S.C. §§ 201–209 (1988).

[46] 29 U.S.C. § 203(d).

[47] 29 U.S.C. §§ 203(d), (s), (x), (1988). *See, generally*, 1961 U.S. CODE CONG. & ADMIN. NEWS 1620; 1974 U.S. CODE CONG. & ADMIN. NEWS 2811.

[48] 392 U.S. 183 (1968).

[49] 426 U.S. 833 (1976).

[50] 426 U.S. at 851.

[51] Ibid.

[52] 29 C.F.R. 775.3.

[53] Enrique Molina-Estrada v. Puerto Rico Highway Authority, 680 F.2d 841 (1st Cir. 1982), holding that "irregular employees" of the Commonwealth of Puerto Rico working on highway construction and "upkeep" were engaged in a traditional and integral governmental function to which minimum wage provisions of FLSA did not apply; Dove v. Chattanooga Area Transp. Auth., 539 F.Supp. 36 (D.E.D. Tenn. 1981), holding that a municipally owned and operated metropolitan transit system performed an integral governmental function and was exempt from application of the FLSA; United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), holding that a state-owned and operated commuter railroad serving metropolitan New York City was not a traditional governmental function; Alewine v. City Council of Augusta, Georgia, 699 F.2d 1060 (11th Cir. 1983), holding that historically mass-transit has not been considered an integral governmental function.

[54] 469 U.S. 528 (1985).

[55] 469 U.S. at 539–540.

[56] 469 U.S. at 555.

[57] 469 U.S. at 557.

[58] 469 U.S. at 558–546.

[59] Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Skover, *"Phoenix Rising" and Federalism Analysis*, 13 HASTINGS CONST. L.Q. 271 (1986); Comment, *Breakdown of the Political Safeguards of Federalism*, 3 J.L.POL. 749 (1987); Comment, *Garcia v. San Antonio Metropolitan Transit Authority and the Manifest Destiny of Congressional Power*, 8 HARV. J.L. & PUB. POL'Y 745 (1985); Comment, *Garcia v. San Antonio Metropolitan Transit Authority: Dismantling a Nation of Many Sovereign States*, 37 MERCER L. REV. 523 (1985); Comment, *Garcia v. San Antonio Metropolitan Transit Authority: Is the Political Process a Sufficient Safeguard for State Autonomy?*, 13 W. STATE U. L. REV. 261 (1985).

[60] Pub. L. No. 99-150, Nov. 13, 1985, 99 Stat. 787. *See, generally*, 1985 U.S. CODE CONGR. & ADMIN. NEWS 651.

[61] Brock v. Kentucky Ridge Mining Co., Inc., 635 F.Supp. 444 (D.Ky. W.D. 1985).

[62] 29 U.S.C. 203(1).

[63] *See also*, Donovan v. Kentwood Development Co., Inc., 549 F.Supp. 480 (D.M.D. 1982), where delivery under a "mutual ownership contract" was held not to make goods eligible for exemption from FLSA standards.

[64] 463 F.Supp. 1329 (D. M.D. Fla. 1978).

[65] 463 F.Supp. at 1346.

[66] Although several courts had previously held that construction of new highways was not covered by FLSA standards, this proposition was rejected by the U.S. Supreme Court in Mitchell v. C. W. Vollmer & Co., Inc., 349 U.S.427 (1955).

[67] This distinction is reflected in the administrative interpretation given to the law by the Department of Labor, which has stated that "construction of other streets, which are not part of a public road building program and are constructed on private property as part of a new residential development, will not be considered covered until further clarification from the courts." 20 C.F.R. 776.29(f)(3) (1987).

[68] Marshall v. Whitehead, 463 F.Supp. 1329 (D.C. Fla. 1978).

[69] 603 F.2d 1122 (5th Cir. 1979).

[70] 653 F.Supp. 1159 (D. S.D. Ohio 1986).

[71] 653 F.Supp. at 1164.

[72] 706 F.2d 1178 (11th Cir. 1983), *cert. denied*, 564 U.S. 1021.

[73] 706 F.2d at 1181.

[74] 566 F.Supp. 1016 (D.E.D. Ar. 1983).

[75] 750 F.2d 47 (8th Cir. 1984).

[76] *Re:* Department of Agriculture Meat Inspectors, 60 COMP. GEN. 811 (1981).

[77] 29 C.F.R. 790.8(a) (1987).

[78] Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984), noting also that the pre-shift review of logs could be done during the employee's regular shift, and the time actually spent in activity benefitting the employer after early arrival was so small as to suggest application of the De Minimis Doctrine.

[79] Price v. Tampa Electric Co., 806 F.2d 1551 (11th Cir. 1987).

[80] *See*, California Ass'n of Highway Patrolmen v. California Department of Personnel Administration, 185 Cal.App.3d 352, 229 Cal.Rptr. 729 (1986); Phillips v. Lake County, 721 P.2d 326 (Mont. 1986); Prendergast v. City of Tempe, 143 Ariz. 14, 691 P.2d 726 (1984); Hill v. United States, 751 F.2d 810 (6th Cir. 1984), *cert. denied*, 474 U.S. 817; Brock v. El Paso Natural Gas Co., 826 F.2d 369 (5th Cir. 1987).

[81] Secretary of Labor v. E. R. Field, Inc. 495 F.2d 749 (1st Cir. 1974).

[82] Walling v. A. H. Belo Corp., 316 U.S. 624 (1942), giving rise to the popular prac-

tice of calling such agreements "Belo Plans."

[83] 29 U.S.C. 207(f).

[84] 666 F.2d 148 (5th Cir. 1982).

[85] Robicheaux v. Radcliff Material, Inc. 697 F.2d 662 (6th Cir. 1983).

[86] 697 F.2d at 666.

[87] Castillo v. Givens, 704 F.2d 181, 189 (5th Cir. 1983), cert. *denied*, 464 U.S. 850 (1983). *See also*, Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984), *reh. denied*, 760 F.2d 126 (6th Cir. 1985); Donovan v. Tehco, Inc., 642 F.2d 141 (5th Cir. 1981).

[88] Mendoz v. Brady, 618 F.Supp. 579 (D.W.D. Mich. 1985).

[89] 29 C.F.R. 211(c) (1988); 29 C.F.R. 516.2 (1988).

[90] Marshall v. R&M Erectors, Inc. 429 F.Supp. 771 (D.Del. 1977).

[91] 29 U.S.C. 206(d)(1) (1988).

[92] Shultz v. American Can Co.-Dixie Products, 424 F.2d 356, 360 (8th Cir. 1970).

[93] 29 U.S.C. 206(d)(1) (1988).

[94] 29 C.F.R. 800.18 (1988).

[95] Jacobson v. Pitman-Moore, Inc., 573 F.Supp. 565 (D.Minn. 1983), *aff'd* 786 F.2d 1172 (8th Cir. 1983).

[96] Brownlee v. Gay and Taylor, Inc., 642 F.Supp. 347 (D.Kan. 1986).

[97] 581 F.Supp. 1163 (D.Wis. 1984).

[98] *E.g.*, time of day worked, hours of work, handling heavy or cumbersome objects, differences in experience or training, desire to keep skilled labor available for future use, need to fill particular type of skilled position. H.REP. 309, 88th Cong., 1st Sess.; STAFF OF HOUSE COMM. ON EDUCATION AND LABOR, LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963, 88th Cong., 1st Sess. (1963).

[99] Bence v. Detroit Health Corp., 712 F.2d 1024 (6th Cir. 1983).

[100] 42 U.S.C. 2000e, *et seq.* (1987).

[101] 653 F.Supp. 1167 (D. S.D. Ohio 1986).

[102] 653 F.Supp. at 1179. *See also*, McKee v. Bi-State Development Authy., 801 F.2d 1014 (8th Cir. 1986); Beall v. Curtis, 603 F.Supp. 1563 (D.Ga. 1985).

[103] 42 U.S.C. §§ 2000e–17 (1988).

[104] Finch, "Minority and Disadvantaged Business Enterprise Requirements in Public Contracting," *Selected Studies in Highway Law*, Vol. 3, pp. 1582-N1 to 1582-N62.

[105] Federal Highway Administration regulations outlining the responsibilities of state highway agencies and contractors in developing and implementing equal employment opportunity policies and goals are set forth in Executive Order 11246, 23 C.F.R. ch. 1, pt. 230, subparts A through D (1988), and FHWA *Federal-Aid Highway Program Manual*, Vol. 6, ch.4, sec. 1.

[106] Fullilove v. Klutznick, 448 U.S. 448 (1980), applying § 103(f)(2) of the Public Works Employment Act of 1977, 91 Stat. 116, 42 U.S.C. 6705(f)(2), requiring assurance that at least 10 percent of each grant for local public works projects is spent for minority business enterprises.

[107] United Steelworkers of America v. Weber, 443 U.S. 193 (1979), where employer set aside 50 percent of its craft training positions for minority employees.

[108] Firefighters Local Union v. Stotts, 467 U.S. 561 (1984), where a consent decree approved by the court regulated the employer's hiring and promotion practices relating to minority employees.

[109] E.g., FHWA *Federal-Aid Highway Program Manual*, Vol.6, ch.4, sec. 1, para. 7, "Implementation of Special Requirements for On-The-Job-Training," and para. 9, "Special Contract Requirements for 'Hometown' or 'Imposed' Plan Areas."

[110] 42 U.S.C. 2000e–2(a).

[111] McDonell Douglas Corp. v. Green, 411 U.S. 792, 802–804 (1973).

[112] Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[113] 401 U.S. 424 (1971).

[114] 401 U.S. at 428–429, 431–432.

[115] Rutherglen, "Disparate Impact Under Title VII: An Objection Theory of Discrimination," 73 VA. L. REV. 1297, 1299 (1987).

[116] Int'l Bhd. of Teamsters v. United States, 431 U.S. at 340, n.20.

[117] 401 U.S. at 431.

[118] Dothard v. Rawlinson, 433 U.S. 321 (1977), where minimum height and weight standards were established for all positions as prison guards, and general restrictions were applied to positions requiring close physical proximity to inmates. Held that employer failed to show how these standards related to job performance of a "correctional counselor" position for which a female applicant was rejected.

[119] New York City Transit Authy. v. Beazer, 440 U.S. 568 (1979).

[120] Larson, EMPLOYMENT DISCRIMINATION § 73.00 (1981).

[121] Washington v. Davis, 426 U.S. 229 (1976).

[122] 433 U.S. 299 (1977).

[123] 433 U.S. at 306–331.

[124] 668 F.2d 795 (5th Cir. 1982).

[125] 668 F.2d at 801.

[126] Comment, *Disparate Impact and Subjective Employment Criteria*, 54 U.CHI.L.REV. 957 (1987).

[127] Rowe v. Cleveland Pneumatic Tire Co., 690 F.2d 88 (6th Cir. 1982); Regner v. City of Chicago, 789 F.2d 534 (7th Cir. 1986); Stewart v. Gen. Motors Co., 542 F.2d 445 (7th Cir. 1977); Atonio v. Ward's Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984).

[128] EEOC v. Fed. Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983).

[129] Permitting action: Page v. U.S. Indus., Inc., 726 F.2d 1038 (5th Cir. 1984); Pittway v. Am. Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986); Lasso v. Woodmen of the World Life Ins. Co., 741 F.2d 1241 (10th Cir. 1975). Denying action: Vuyanich v. Republic Nat. Bank of Dallas, 723 F.2d 1195 (5th Cir. 1984); Cunningham v. Housing Authy of City of Opelousas, 764 F.2d 1097 (5th Cir. 1985); Talley v. U. S. Postal Service, 720 F.2d 505 (8th Cir. 1983); Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982). *See also*, Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984), permitting disparate impact theory but holding that it was rebutted.

[130] 487 U.S. ___, 101 L.Ed.2d. 827 (1988).

[131] 487 U.S. at ___, 101 L.Ed.2d. at 845–848.

[132] 29 C.F.R. pt. 1607 (1975).

[133] Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA.L.REV. 1297, 1323 (1987); Kaye, *The Numbers Game: Statistical Inferences in Discrimination Cases*, 80 MICH. L.REV. 833, 836–842 (1982).

[134] 457 U.S. 440 (1982).

[135] Washington v. Davis, 426 U.S. at 247, n.13, citing professional standards developed by the American Psychological Association for educational and psychological testing. See also comments in Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975), discussing Uniform Guidelines.

[136] 443 U.S. 193 (1979).

[137] 443 U.S. at 208.

[138] 42 U.S.C. 2000e–2(a).

[139] 42 U.S.C. 1981.

[140] Seator v. Novack Inv. Co., 657 F.2d 962 (8th Cir. 1981).

[141] LaRiviere v. EEOC, 682 F.2d 1275 (9th Cir. 1982), preferential recruiting of female applicants for California Highway Patrol.

[142] 748 F.2d 1308 (9th Cir. 1984).

[143] 480 U.S. ___, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1988).

[144] ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

[145] 102 L.Ed.2d at 872.

[146] 476 U.S. 267 (1986).

[147] 448 U.S. 448 (1980).

[148] 102 L.Ed.2d at 885.

[149] 102 L.Ed.2d at 889–890.

[150] 476 U.S. 267 (1986).

[151] 102 L.Ed.2d at 881.

APPLICATIONS

The foregoing research should prove helpful to highway and legal counsel and state highway and transportation employees in estimating and administering federal-aid highway contracts.