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Employment Discrimination in Wyoming: A New Legal Frontier

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The law of equal employment opportunity is a rapidly expanding field which is increasingly important to the legal practitioners of Wyoming. In this article, the author makes a comparative analysis of Title VII of the 1964 Civil Rights Act and the Wyoming Fair Employment Practices Act of 1965. Ms. Lawson continues with a discussion of the general body of case law which has developed in the area of employment discrimination and analyzes the principal cases which have been decided in Wyoming. Included for the benefit of attorneys representing Wyoming clients are many practical suggestions useful in advising employers on compliance with the Acts and representing employees in making complaints under the Acts.

EMPLOYMENT DISCRIMINATION IN WYOMING: A NEW LEGAL FRONTIER

*Leslie M. Lawson**

Wyoming is experiencing the "gold rush" of the 1970's as thousands of people move to Wyoming in search of employment now offered by greatly increased development of the state's natural resources. Along with this new workforce come new problems for Wyoming, among which are equal employment problems. Attorneys in Wyoming will be asked more frequently for advice and representation in matters of employment discrimination by individuals as well as employers, employment agencies and labor unions. The attorney who is knowledgeable in this area of law may be able to save the employer thousands of dollars with advice on voluntary compliance or resolve an individual's problem short of costly litigation.

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A number of state and federal laws apply to equal employment matters. The two principal laws with which a Wyoming attorney should be familiar are Title VII of the 1964 Civil Rights Act[1] and the Wyoming Fair Employment Practices Act of 1965 (FEPA).[2] Although an increasing number of complaints and increased enforcement of the laws in Wyoming are recent developments, employers were to have complied long ago and may be liable today for both current and previous non-compliance.

The need for equal employment opportunity is very real. Rising inflation has made it necessary for both spouses to work to afford basic necessities of a family. Racial and ethnic minorities have historically been denied equal employment opportunity, which has in turn deprived them of other necessities such as adequate housing and good educations. The problems of women and minorities are best illustrated by statistics on white and non-white families. In 1973, more than twenty-five percent of all black families and seventeen percent of all families of Spanish origin were below the poverty level, compared with less than seven percent of all white families. About two-thirds of all black children, one-half of all children of Spanish origin and two-fifths of all white children living in poverty were in families headed by women.[3] Federal statistics show, further, that the median income of a white male head of household was $13,253 in 1973, while the median income for a white female head of household was $6,560. The comparable figures for black families were $9,549 and $4,226.[4] The figures illustrate the economic disparities between whites and non-whites and between households headed by males and those headed by females. The combined discrimination against racial minorities and women has made it nearly impossible for a non-white female to support a family.

1. 42 U.S.C. §§ 2000e-2000e-15 (1970), *as amended by* Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-17 (Supp. V 1975).
2. WYO. STAT. §§ 27-257 to -264 (1967 & Supp. 1975).
3. U.S. DEP'T OF LABOR, BULL. NO. 297, HANDBOOK OF WOMEN WORKERS 143 (1975).
4. *Id.* at 142.

EQUAL EMPLOYMENT LAW GENERALLY

A number of laws provide for equal employment opportunity, and as remedies some may be used in combination with one another or alternatively. The Wyoming FEPA prohibits discrimination in employment on the basis of sex, race, creed, color, national origin, or ancestry. It is administered by the Wyoming Fair Employment Commission (FEC) which is a part of the Wyoming Department of Labor and Statistics. Wyoming also has a law which specifically requires the same pay for women as for men employed in the same work by the same employer.[5]

Several federal laws prohibit, either directly or indirectly, discrimination in employment on the basis of race, sex, national origin, color or religion. Title VII, which is enforced by the Equal Employment Opportunity Commission (EEOC), specifically prohibits discrimination on these bases in all phases of employment.

The Equal Pay Act of 1963,[6] which is administered by the U.S. Department of Labor, prohibits sex discrimination in the payment of wages for equal work on jobs performed under similar conditions and requiring equal skill, effort and responsibility.[7]

Any program or activity receiving federal financial assistance cannot exclude any person from participation in or the benefits of the program or activity, or otherwise discriminate on the basis of race, sex, creed, color or national origin, according to Title VI of the Civil Rights Act of 1964.[8] Title IX of that Act[9] prohibits sex discrimination in some private and public schools, which includes discrimination in employment.

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5. WYO. STAT. § 27-210.2 (1967).
6. 29 U.S.C. § 206 (1970), *as amended by* Fair Labor Standards Amendments of 1974, 29 U.S.C. § 206 (Supp. V 1975).
7. *See* EEOC Guidelines on Discrimination Because of Sex, Relationship of Title VII to the Equal Pay Act, 29 C.F.R. § 1604.8 (1975).
8. Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (1970).
9. Education Amendments of 1972, 20 U.S.C. §§ 1681-83 (Supp. V. 1975).

Three post-Civil War civil rights laws have also been held applicable to employment. The Civil Rights Act of 1871[10] has been judicially interpreted to prohibit discrimination on the basis of race, sex, and national origin, resulting from state action, while the Civil Rights Act of 1866[11] has been interpreted to apply only in cases involving race or national origin. A law derived from the Civil Rights Acts of 1871 prohibits conspiracy to interfere with civil rights and this, also, has been used, when appropriate, in employment cases.[12]

Executive orders have been issued to remedy discrimination on the basis of race, sex, national origin, color or religion by the federal government or a contractor with the federal government, and provide for enforcement by the Secretary of Labor. Executive Order No. 11,478 applies to federal employers and requires continuing affirmative action programs in each agency,[13] whereas Title VII provides for affirmative action only as a remedy. Executive Order No. 11,246, as amended in 1967, orders that provisions prohibiting such discrimination by government contractors be included in government contracts.[14]

The equal protection clause of the fourteenth amendment and the equivalent clause of the fifth amendment apply to discrimination resulting from state or federal action. For example, pregnancy leave policies for public school teachers[15] and the treatment of disabilities related to pregnancy under a state social welfare program[16] have been litigated under the equal protection clause.

Employment discrimination cases arising in Wyoming will most often involve the Wyoming FEPA or Title VII, the latter being the most comprehensive and generally applicable of the federal laws. This article is a comparative

10. 42 U.S.C. § 1983 (1970).
11. 42 U.S.C. § 1981 (1970).
12. 42 U.S.C. § 1985 (1970).
13. 3 C.F.R. § 207 (1974).
14. 3 C.F.R. § 169 (1974), *amending* Exec. Order No. 11,375, 3 C.F.R. § 684 (1967).
15. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).
16. Geduldig v. Aeillo, 417 U.S. 484 (1974).

analysis of the two laws designed to illustrate the benefits and burdens of each law, while providing a basic guide to handling cases involving these laws.

COVERAGE OF TITLE VII AND THE WYOMING FEPA

The first problem which arises in an employment discrimination case is the determination of which laws, if any, cover the aggrieved party, the person allegedly discriminating, and the employment practice in question. The nature of the enforcement agency and its powers are important factors to consider in choosing the law which will best serve the interests of the client. The attorney representing an employer, employment agency or labor union should determine, prior to the time a claim of discrimination is filed against his client, which laws affect the client and what action constitutes compliance with these laws. Non-compliance or the failure to demonstrate efforts to comply are generally costly in some form, even though the person claiming discrimination may not ultimately prevail.

Title VII

Title VII prohibits discrimination by employers of fifteen or more employees who are engaged in interstate commerce, employment agencies, labor organiations and joint labor-management apprenticeship committees.[17] The definition of interstate commerce is now so broad that generally the number of employees is the only qualifying factor.[18] Federal employers and federal contractors are also covered.[19] Specifically excluded from coverage are Indian Tribes, *bona fide* private clubs, and religious institutions.[20]

Individuals protected by Title VII may be employees or applicants for employment, union members or applicants for membership, apprentice or apprenticeship applicants.[21] A limited number of individuals are excluded from coverage,

17. 42 U.S.C. §§ 2000e, 2000e-2 (Supp. V 1975).
18. *E.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
19. 42 U.S.C. §§ 2000e-16 to -17 (Supp. V 1975).
20. 42 U.S.C. §§ 2000e(b), 2000e-1 (1970 & Supp. V 1975).
21. 42 U.S.C. § 2000e-2 (1970 & Supp. V 1975).

such as elected officials, their policy-level employees and legal advisers.[22] The United States Supreme Court has recently held that protection from racial discrimination under Title VII applies to whites as well as non-whites, contrary to previous lower court decisions.[23]

In addition to the general prohibition against employment discrimination, Title VII specifically prohibits discharge, classification, failure or refusal to hire or referral for employment based upon discriminatory policies.[24] Job advertisements indicating a preference which discriminates on the basis of race, sex, national origin, color, or creed are prohibited unless the preference is based upon a "bona fide occupational qualification."[25] Unlike other laws, Title VII wisely prohibits retaliation against employees who have filed a charge, opposed an unlawful practice or assisted in the processing of a complaint.[26]

The 1964 Civil Rights Act created the EEOC to investigate and attempt to conciliate charges, and provided that suits for enforcement were to be filed by the United States Attorney General. In 1972 the Act was amended to enable the EEOC to bring civil actions against private employers as part of the enforcement effort.[27] In addition, the 1972 amendment granted the Attorney General authority to bring civil actions against political subdivisions which were included under Title VII by the amendment.[28] Individuals who have filed charges may also bring suit or intervene in suits filed by the EEOC or the Justice Department. The right of an individual to enforce Title VII has been interpreted as separate from the right of the federal agencies.[29]

22. 42 U.S.C. §§ 2000e(f), 2000e-2 (1970 & Supp. V 1975).
23. McDonald v. Santa Fe Transp. Co., 423 U.S. 923 (1976).
24. 42 U.S.C. § 2000e-2 (1970 & Supp. V 1975).
25. 42 U.S.C. § 2000e-3(b) (1970 & Supp. V 1975). Bona fide occupational qualifications are discussed under "Defenses," *infra*.
26. 42 U.S.C. § 2000e-3(a) (Supp. V 1975).
27. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).
28. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).
29. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975); Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir.), *cert. denied*, 411 U.S. 931 (1972); United States v. Operating Engineers Local 3, 4 Fair Empl. Prac. Cas. 1088 (N.D. Cal. 1972); EEOC v. Cleveland Mills Co., 502 F.2d 153 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).

Wyoming FEPA

The Wyoming FEPA prohibits discrimination by the State of Wyoming or any political subdivision or board, commission, department, institution or school district thereof, and every employer of two or more persons.[30] Religious institutions or associations are the only employers specifically exempted from coverage.[31] Individuals specifically protected by the FEPA are employes, applicants for employment, union members and applicants for union membership.[32] No persons are specifically excluded from protection.

The FEPA defines discriminatory or unfair employment practices as refusal to hire, discharge, promotion or demotion, discrimination in matters of compensation by an employer, or discrimination in employment or membership by any person, employment agency, labor organization, or the employees or members thereof, on the basis of race, sex, creed, color, national origin or ancestry.[33] The FEPA does not specify that discriminatory employment advertisements constitute an unlawful employment practice. However, the FEC adopted a resolution which states that the publication of an employment advertisement which expresses or indicates any limitation, preference, specification or discrimination based on race, color, religion, national origin or sex is in violation of the FEPA.[34] An important omission is the failure to prohibit retaliation against employees who have opposed unlawful practices.

The FEC consists of the Commissioner of Labor and Statistics and four other members to be appointed by the Governor with the advice of the Senate for terms of five years, no more than two of which may be from the same political party.[35] The members serve without compensation.[36] The FEC has the power to issue cease-and-desist orders,

30. WYO. STAT. § 27-258(2) (1967).
31. WYO. STAT. § 27-258(2) (1967).
32. WYO. STAT. § 27-261 (1967).
33. WYO. STAT. § 27-261 (1967).
34. Resolution of Fair Employment Practices with Relation to Discriminatory Employment Advertisements, [1976] 3 EMPL. PRAC. GUIDE (CCH) Para. 29,335.
35. WYO. STAT. § 27-259 (Supp. 1975).
36. WYO. STAT. § 27-259 (Supp. 1975).

regulations, and subpoenas, and the duty to investigate and hold hearings on complaints.[37] The FEPA provides for enforcement only by the FEC, as opposed to granting the complainant an independent right to file a suit or otherwise enforce the law.

COMPLAINT AND CONCILIATION PROCEDURES

Title VII

Condition precedent to the filing of a Title VII suit is the filing of a charge of employment discrimination within specified time periods. A Wyoming resident files with the EEOC District Office in Denver, Colorado, and may do so by mail.[38] A charge is a verified statement by the aggrieved person of those actions he believes constitute employment discrimination against him. The charging party need not offer proof that the alleged actions constitute discrimination to include them in the charge, as the purpose of the charge is merely to trigger an investigation by the EEOC. Charges are to be liberally construed to aid those persons lacking technical skills in pleading and to further the purpose of the law.[39] The charge should, however include all possible issues and bases as the scope of judicial inquiry has been limited to the issues reasonably arising from the charge or the scope of the investigation.[40] When a union contract determines employment practices, the union must be named as a party in both the charge and the subsequent suit. Failure to name the union may result in dismissal of the suit for failure to name an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedure.[41]

Since Wyoming has a fair employment practices agency, the EEOC may not assume jurisdiction over a charge before the expiration of sixty days after proceedings are begun

37. WYO. STAT. § 27-260 (1967).
38. Denver District Office, Equal Employment Opportunity Commission, 1845 Sherman, Denver, Colorado 80203.
39. Sanchez v. Standard Brands, Inc., 531 F2d 455, 462-63 (5th Cir. 1970); Cox v. United States Gypsum Co., 409 F.2d 289, 290 (7th Cir. 1969).
40. Sanchez v. Standard Brands, Inc., *supra* note 39; Arey v. Providence Hosp., 55 F.R.D. 62 (D.D.C. 1972).
41. *E.g.*, Hardy v. Bucyrus-Erie Co., 398 F. Supp. 64 (E.D. Wis. 1975).

under state law, unless the FEC terminates its proceedings earlier.[42] The charge must be filed with the EEOC within thirty days after the state agency terminates its proceedings or three hundred days after the alleged violation occurs, whichever is *earlier*.[43] The charge should be timely filed with the FEC or the federal cause of action may be barred due to the expiration of the three hundred days.[44] However, if the discriminatory act can be considered a continuing act of discrimination, and its continuing nature is alleged in the charge, the time limitations have been held not to be mandatory.[45]

The charge must be served on the respondent within ten days of the filing of the charge.[46] An investigation then takes place; however, Title VII does not provide a specific time in which the investigation must be completed. This failure to require an investigation within a reasonable time is one of the major drawbacks of Title VII.

Following the investigation, the EEOC is required to issue a determination of whether reasonable cause exists to believe the charge is true.[47] Upon a finding of reasonable cause, the EEOC must attempt to conciliate the charge.[48] If the respondent fails or refuses to confer, or if conferences do not result in voluntary compliance with Title VII, the respondent must be notified of the termination of the conciliation efforts.[49]

Wyoming FEPA

The investigation and conciliation procedures under the Wyoming FEPA are very similar to those under Title VII.

42. 42 U.S.C. § 2000e-5(e) (Supp. V 1975).
43. 42 U.S.C. § 2000e-5(e) (Supp. V 1975). In the absence of a state or local agency, the charge must be filed within 180 days after the alleged violation occurs.
44. *See* Dubois v. Packard Bell Corp., 470 F.2d 973 (10th Cir. 1972).
45. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); Cox v. United States Gypsum Co., *supra* note 39; Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970).
46. 42 U.S.C. § 2000e-5(b) (Supp. V 1975).
47. 42 U.S.C. § 2000e-5(b) (Supp. 1975).
48. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975); EEOC v. Container Corp. of America, 352 F. Supp. 262 (M.D Fla. 1972).
49. 29 C.F.R. § 1601.23 (1975); 29 C.F.R. § 1601.25 (1975).

Any person who believes he or she has been aggrieved by a discriminatory or unfair labor practice may initiate state proceedings by filing a complaint wth the FEC.[50] Complaints may be amended or withdrawn at any time before the matter is set for hearing and thereafter at the discretion of the FEC.[51] The FEPA does not specify a time period in which charges must be filed; consequently, a charge could conceivably be filed several years later, after the cause of action under Title VII had expired.

The Rules of Practice and Procedure require that an investigation be made immediately after the filing of a complaint.[52] The FEC practice, however, is to first attempt informal resolution of the matter.[53] A copy of the complaint, along with a questionnaire, is sent to the employer. The employer has fourteen days to respond before an investigator personally contacts the employer to discuss the matter.

If the employer indicates an immediate willingness to settle, a conciliation agreement is signed and the investigation terminates. If the employer fails to cooperate in any manner, a public hearing will immediately be set. In cases where the employer cooperates to the extent of answering the questionnaire, but with no indication of a willingness to settle, an investigation will be made by an FEC investigator. The investigation is to determine whether there is probable cause to believe the complaint and a hearing is warranted.[54] If probable cause is found, the FEC will write an opinion which is sent to the parties before attempts are made to conciliate the matter.[55] Otherwise, the complaint is dismissed for lack of probable cause.[56]

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50. WYO. STAT. § 27-262 (1967); FEC R. PRAC. & P. 4(a)-(f). The complaint must include the name and address of the complainant and the party alleged to have committed the unlawful practice along with a short factual statement regarding the unlawful practice.
51. FEC R. PRAC. & P. 4(g)-(h).
52. FEC R. PRAC. & P. 5(a).
53. Interview with David Garcia, Director, Fair Employment Commission, Barrett Building, Cheyenne, Wyoming (July 30, 1976); FEC Training Manual (unpublished, available from FEC).
54. FEC R. PRAC. & P. 5(a).
55. Interview, *supra* note 53.
56. FEC R. PRAC. & P. 5(b).

Where probable cause has been found, the person who conducted the investigation must endeavor to eliminate the practice by conference, persuasion or conciliation.[57] The practice of the FEC is to consult with the complainant concerning his or her demands, and generally seek all the available remedies for complainant, such as back pay, reinstatement, or promotion.[58] If conciliation efforts are successful, a conciliation agreement is to be signed by the respondent and any one Commissioner, then sent to the complainant.[59] If conciliation efforts are unsuccessful, a hearing is set.

ENFORCEMENT OF THE FEPA AND TITLE VII

The state and federal statutes are similar in terms of coverage and initial procedures. The primary differences are in the method of enforcement following attempts to conciliate, Title VII providing for a trial in the United States District Court and the FEPA providing for administrative hearings before the FEC which has the power to issue cease-and-desist orders. The United States Congress, when Title VII was amended in 1972, considered providing for agency enforcement by cease-and-desist orders but ultimately chose enforcement through federal litigation.[60] In view of the time involved to litigate a Title VII case due to crowded dockets, litigation may not have been the most expedient method to choose.

The following discussion of federal and state hearing procedures illustrates other important differences.

Federal Court Actions Under Title VII

A civil action may be filed in the federal district court by the charging party, the EEOC or the Attorney General. A civil action may be filed by the EEOC against a private employer or by the Attorney General against a political subdivision[61] following completion of the investigation and con-

57. FEC R. PRAC. & P. 5(c).
58. Interview, *supra* note 53.
59. FEC R. PRAC. & P. 5(c).
60. H.R. REP. NO. 238, 92d Cong. 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2167-76.
61. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

ciliation process. The suit will be dismissed if the EEOC has failed to fulfill the statutory prerequisites of giving notice of the charge, conducting an investigation, making a determination of reasonable cause, attempting to conciliate, and giving notice of failure of conciliation.[62] The charging party may not file an action unless the EEOC dismisses the charge or a conciliation agreement has not been entered or suit filed by the government within one hundred eighty days of the filing of the charge. Prior to filing suit, the charging party must obtain a Notice of Right to Sue from the EEOC, this notice being a jurisdictional requirement in private suits.[63] The Notice of Right to Sue may be requested at any time after the expiration of one hundred eighty days; however, the EEOC does not notify the charging party of his right to request the notice until conciliation has failed and the government has decided not to file suit.[64] The EEOC or Attorney General is not bound to complete conciliation efforts or file suit within one hundred eighty days, so this provision provides relief to a charging party who feels the government has been dilatory in handling his case. To avoid dismissal, suit must be filed within ninety days of issuance of the notice.[65]

Exhaustion of remedies, other than filing a charge with a state or local agency, is not required prior to filing suit. The courts have held that Title VII complainants need not exhaust their union contract grievance procedures;[66] however, initiation of grievance procedures tolls the time limits applicable to filing charges with the EEOC.[67] Where a complainant has resorted to the grievance procedure, neither the complainant nor the EEOC is barred from seeking Title VII remedies, as Title VII rights are independent of and supplemental to any other laws and institutions concerning job dis-

62. EEOC v. Western Elec. Co., Inc., 364 F. Supp. 188 (D. Md. 1973); EEOC v. Container Corp. of America, *supra* note 48.
63. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).
64. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975); 29 C.F.R. § 1601.25 (1975).
65. Matyi v. Beer Bottlers Local 1187, 392 F. Supp. 60 (E.D. Mo. 1974). *See also* Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).
66. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).
67. Malone v. North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972); Hutchings v. United States Industries, Inc., 428 F.2d 303 (5th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970).

crimination.[68] The courts have also held acceptance of a state fair employment practices agency settlement will not bar further relief under Title VII.[69]

Intervention.

The charging party has a right of intervention in an action brought by the EEOC or the Attorney General. Title VII also provides for permissive intervention by the EEOC or the Attorney General in an action brought by the charging party.[70] Where the EEOC has filed an action, the charging party has a right to intervene in that action, but may not file a separate action on the same charge.[71] The prevailing view holds, similarly, that after the charging party has filed his own suit, the EEOC may not bring its own suit but rather is limited to intervention in the charging party's suit.[72] The Tenth Circuit recently held that where the EEOC had intervened in a private suit but failed to identify aggrieved parties other than the original plaintiffs, to plead a pattern and practice of discrimination under § 707 of Title VII, or to seek certification of a class for a proceeding under Rule 23 of the Federal Rules of Civil Procedure, the EEOC action would be dismissed for duplicity.[73]

Nature of the Action.

Title VII suits are equitable in nature and as a result the courts have consistently rejected demands for jury trials, whether requested by plaintiff or defendant.[74] These actions in the United States District Courts are trials de novo rather

68. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975).

69. Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972).

70. 42 U.S.C. § 2000e (1970 & Supp. V 1975).

71. Crump v. Wagner Elec. Corp., 369 F. Supp. 637 (E.D. Mo. 1973), in which the Court dismissed the action as being multiplicitous; Cox v. United States Gypsum Co., *supra* note 39.

72. EEOC v. Missouri Pac. R.R. Co., 493 F.2d 71 (8th Cir. 1974).

73. EEOC v. Continental Oil Co., No. 75-1908 (10th Cir. Jan. 21. 1977).

74. Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Piva v. Xerox Corp., 376 F. Supp. 242 (N.D. Cal. 1974).

than proceedings for judicial review of administrative actions.[75]

The judge must assign the case for hearing at the earliest practicable date and expedite the proceedings in every way. If the case is not scheduled for trial within one hundred twenty days after issue is joined, he may appoint a master pursuant to Rule 53 of the Federal Rules of Civil Procedure.[76]

Statute of Limitations.

Two statutes of limitations issues are commonly raised. The state statutes of limitations for wage claims have been applied to Title VII suits, resulting in dismissal, at least to the extent that it is a suit to vindicate private rights as opposed to a governmental action for injunctive relief against unlawful discrimination.[77]

As previously mentioned, Title VII provides that only the EEOC or the Attorney General shall have authority to file suit during the initial one hundred eighty days. In motions to dismiss, defense counsel has argued that this provision constitutes a statute of limitations on actions by the government after the one hundred eighty day period; however, several circuit courts have refused to accept this construction of the statute.[78]

Preliminary Relief.

Title VII authorizes the EEOC and the Attorney General to seek preliminary relief where either one has de-

75. *E.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136 (5th Cir. 1971).

76. 42 U.S.C. § 2000e-5(f)(5) (Supp. V 1975).

77. Dickson v. Mortgage & Trust, Inc., [1977] 7 LAB. REL. REP. (14 Fair Empl. Prac. Cas.) 334 (S.D. Tex. 1975); EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975); EEOC v. Griffin Wheel Co., 511 F.2d 456 (5th Cir. 1975).

78. EEOC v. Cleveland Mills Co., *supra* note 29; EEOC v. Louisville & Nashville R.R. Co., 505 F.2d 610 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1974); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975); EEOC v. E. I. DuPont de Nemours & Co., 516 F.2d 1297 (3rd Cir. 1975); EEOC v. Myer Bros. Drug Co., 521 F.2d 1364 (8th Cir. 1975); EEOC v. General Dynamics Corp., 510 F.2d 382 (5th Cir.), *cert. denied*, 423 U.S. 827 (1975).

termined prompt judicial relief is necessary.[79] Although the statutory language does not explicitly authorize private plaintiffs to seek such relief, the Fifth Circuit determined that preliminary relief is similarly available to private plaintiffs during the one hundred eighty day period that the charge must remain before the EEOC.[80] To preserve the status quo and prevent irreparable injury, preliminary relief is proper in employment discrimination cases where the defendant's policies can be shown to be discriminatory and the plaintiff is unemployed or frozen into a low-paying position.[81]

Class Actions.

Title VII places emphasis on protection of individual rights. Since discrimination on the basis of race, color, religion, sex or national origin by definition is class discrimination, the class action suit has been viewed as a logical device for protecting the rights of many individuals at one time.[82]

Whether a suit may be maintained as a class action is determined by Rule 23 of the Federal Rules of Civil Procedure. A single plaintiff who has met the Title VII prerequisites may properly maintain a class action on behalf of all others similarly situated.[83] According to the weight of authority, each putative member need not comply with the requirement that a charge be timely filed.[84] An individual plaintiff's failure to prevail on the merits of his own claim is not a factor to be considered in determining whether the action may be maintained as a class action under Rule 23.[85]

79. 42 U.S.C. § 2000e-5(f)(2) (Supp. V 1975); EEOC v. Midas, Inc., 8 Fair Empl. Prac. Cas. 719 (D.N.M. 1974); Pennsylvania v. Rizzo, [1977] 7 LAB. REL. REP. (13 Fair Empl. Prac. Cas.) 1468 (E.D. Pa. 1974).
80. Drew v. Liberty Mutual Ins. Co., 480 F.2d 69 (5th Cir. 1973); Parks v. Brennan, 389 F. Supp. 790 (N.D. Ga. 1974).
81. *See* United States v. Hayes Int'l Corp., 415 F.2d 1038, 1045 (5th Cir. 1969), in which the Court stated that "irreparable injury should be presumed from the very fact that the statute has been violated."
82. Bowe v. Colgate-Palmolive Co., *supra* note 66; Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).
83. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).
84. Patterson v. Youngstown Sheet & Tube Co., 62 F.R.D. 351 (N.D. Ind. 1974); Bowe v. Colgate-Palmolive Co., *supra* note 66; Oatis v. Crown Zellerbach Corp., *supra* note 82; Hall v. Werthan Bag Corp., *supra* note 82.
85. Franks v. Bowman Transp. Co., 423 U.S. 814 (1976); Huff v. N.D. Cass Co. of Alabama, 485 F.2d 710 (5th Cir. 1973).

As the scope of judicial inquiry has been limited to the scope of the investigation or issues reasonably arising from the charge, the charge should be a complaint of class discrimination in a wide range of employment practices when a class action is contemplated.[86]

Maintaining class actions has been made a costly proposition by more stringent judicial interpretations of the notice requirement under Rule 23 of the Federal Rules of Civil Procedure.[87] The necessity and timing of notice depends on whether the class is certified under Rule 23(b)(2) or Rule 23(b)(3). If the action is brought under Rule 23(b)(3), notice to all class members is necessary, while the judge exercises discretion over the giving of notice in other class actions.[88] Title VII cases are generally brought pursuant to Rule 23(b)(2), which is designed primarily to allow class injunctive relief against discriminatory practices.[89] Notice is not required under Rule 23(b)(2) where solely injunctive relief is sought; however, notice may be required for affected class members in cases seeking back pay relief to allow the individuals to show entitlement.[90] This problem may best be handled by bifurcating the trial and, upon a finding of liability, requiring notice to the affected class prior to trying the damages issue to allow members to prove their damages.[91]

Attorney's Fees and Appointment of Counsel.

The court may, in its discretion, allow the prevailing party, other than the Commission or the United States,

86. *See* Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Jiron v. Sperry Rand Corp., 10 Fair Empl. Prac. Cas. 730 (D. Utah 1975).
87. *E.g.*, Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974).
88. FED. R. CIV. P. 23(c)(2), (d).
89. Notes of Advisory Committee on 1966 Amendment to Rules, 28 U.S.C. app. 7765-66 (1970).
90. Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973). *See generally*, Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781 (1974).
91. United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976) (No. 75-1475); Love v. Pullman, 12 Fair Empl. Prac. Cas. 331 (D. Colo. 1975). *See also* Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615 (E.D. Wis. 1975), requiring the employer to pay notice costs where the plaintiff was indigent and the employer had offered him a substantial settlement, although claiming no unlawful behavior.

reasonable attorney's fees as part of the costs, and the prevailing party may receive costs unless special circumstances would make the award unjust.[92] The Fifth Circuit has established basic guidelines for the computation of attorney's fees.[93] The plaintiff need not seek specific individual relief for attorney's fees to be awarded.[94] The court has determined that the fact that the attorney may be employed or funded by a civil rights organization or tax-exempt foundation, or that the attorney does not exact a fee, should not mitigate the award of costs.[95]

The federal district court is authorized to appoint counsel and to allow commencement of the action without payment of costs if it deems such action just.[96] Court-appointed counsel is faced with a potentially expensive lawsuit, and is not provided with costs for the generally lengthy discovery or awarded attorney's fees unless his or her party prevails. This serves to discourage attorneys from volunteering for appointments as well as from taking a case from a low-income client.

Hearings Pursuant to the Wyoming FEPA

The FEC has promulgated Rules of Practice and Procedure which set forth details relating to FEC hearings.[97] All parties are to be notified of the date, time, and place of a hearing and advised that they may appear with counsel.[98] The complainants and respondents must appear or notify the Commission of good reason for absence, or the Commission will enter a default decree against the absent party.

The hearing is conducted by the Commission with the Commissioner of Labor and Statistics sitting as Chairman.[99]

92. 42 U.S.C. § 2000e-5(k) (Supp. V 1975); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).
93. Johnson v. Georgia Highway Express, Inc., *supra* note 86.
94. Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971).
95. Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Thompson v. Madison County Bd. of Educ., 496 F.2d 682 (5th Cir. 1974).
96. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).
97. The Rules of Practice and Procedure may be obtained from the Secretary of State for the State of Wyoming or found in [1977] 3 EMPL. PRAC. GUIDE (CCH) Para. 29,275 or [1977] 8 LAB. REL. REP. (BNA) 451:1305.
98. FEC R. PRAC. & P. 7(a)(2).
99. FEC R. PRAC. & P. 8(b).

Note here that an apparent conflict of interest arises as the Commissioner has technically been in charge of the prior proceedings and presumably cannot sit as an impartial fact-finder. The Rules attempt to solve the problem by providing that no presiding or deciding officer shall have taken any administrative part in any action prior to or during the hearing, and that the investigator shall not participate in the hearing, except as a witness, or in the deliberations.[100] During the investigative process, an investigator is not to forward information regarding the investigation to any commissioner, and if a commissioner becomes aware of the particulars of any case, that commissioner is not to participate in the hearing.[101] Due to the nature of the administrative and physical proximity of the Commissioner of Labor and Statistics and the investigators of the FEC, the adequacy of this safeguard provision is questionable.

The Rules governing the conduct of hearings present two problems. The complainant has the burden of making a prima facie showing of a discriminatory or unfair employment practice, but the rules do not state what constitutes such a showing, nor do they indicate what constitutes the required rebuttal by the respondent.[102] The testimony in all hearings is to be reported, and the cost of reporting is assessed against the party who does not prevail at the hearing, which may be prohibitive for an individual complainant.[103]

The FEPA does not provide for legal counsel to the FEC, except that advice may be sought from any state agency; an attorney from the Office of the Attorney General generally fulfills this function. Nor does the FEC provide for prosecution by the FEC, at any stage, of the case arising as the result of the complaint. Consequently, in order to proceed beyond the conciliation stage, the complainant must hire

100. FEC R. PRAC. & P. 8(b)(2). In addition, it should be noted that, should the Commissioner in any case have both investigative and adjudicative functions, this dual role has been approved by the Wyoming Supreme Court. First Nat'l Bank of Thermopolis v. Bonham, 559 P.2d 42, 48 (Wyo. 1977) (approving the performance of dual functions by the Wyoming Bank Examiner).
101. FEC Training Manual, *supra* note 53.
102. FEC R. PRAC. & P. 8(i).
103. FEC R. PRAC. & P. 8(o).

counsel or represent himself, whereas, under Title VII, the EEOC or the Attorney General may pursue the charge through the litigation stage seeking relief for the charging party as well as representing governmental interests. Therefore, the complainant whose case goes to a hearing has the expense of attorney's fees and runs the risk of being assessed costs if he or she does not prevail. Fortunately, during 1975 most conciliation efforts were successful and only seven cases, in which conciliation was refused, went to a hearing.[104]

Subpoenas and Discovery.

Parties may apply to the Commission for the issuance of subpoenas requiring the appearance of witnesses or the production of documents or other relevant materials.[105] Such subpoenas are to be enforced by the district court for the county in which the hearing is being held upon application for enforcement by the Commission.[106] Discovery is to be conducted in accordance with the Wyoming Administrative Procedures Act,[107] and discovery may be compelled by the district court in the same manner as subpoenas are enforced.[108]

Pre-Hearing Conference.

An informal pre-hearing conference may be required by the Commission, at which time the parties are to appear before the chairman to discuss simplification of the issues, amendments to pleadings, admissions of fact and documents, and other matters as may aid in disposition of the case.[109] A pre-hearing memorandum reciting actions taken at the conference is prepared by the Commission and controls the case. The Rules appear to preclude participation by the parties in preparation of the memorandum, and allow for modification by the Commission only to prevent manifest injustice.

Final Order and Judicial Review.

If the respondent is found to be engaging in an unfair or discriminatory employment practice, the Commission shall

104. Interview, *supra* note 53.
105. FEC R. PRAC. & P. 9(a)(1).
106. FEC R. PRAC. & P. 9(a)(2).
107. WYO. STAT. § 9-276.25(g)-(h) (Supp. 1975).
108. FEC R. PRAC. & P. 9(b).
109. FEC R. PRAC. & P. 8(j)(2).

enter an order requiring the respondent to cease and desist from the practice. In addition, the respondent may be required to take affirmative action necessary to effectuate the purposes of the Act, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and the posting of notices of making of reports.[110]

Appeals must be made to the district court in the county in which the alleged practice occurred, the county in which the respondent is ordered to cease and desist from a practice or take other affirmative action, or the county in which the respondent resides or transacts business.[111] In certain cases, this provision would provide an opportunity to select a more favorable forum. The Act also provides for permissive intervention by other parties in the proceedings before the district court.[112]

SUBSTANTIVE ISSUES

The relevant body of law for equal opportunity employment cases in Wyoming is almost entirely composed of Title VII decisions, since few cases have been decided by Wyoming courts. Title VII law, however, has been and should be applicable in FEPA decisions for several reasons. Passage of the FEPA one year after the passage of Title VII, similar basic provisions in the laws, and the statutory authority for the FEC to enter into agreements, exchange information and otherwise assist the EEOC[113] indicate that the intent of Title VII and the FEPA is the same. The FEC has contracted with the EEOC to handle complaints in the state office with funding from the EEOC.

The basic tenet of equal employment opportunity is that each applicant for employment and each employee is to be treated as an individual, not cast in a role based on his or her race, color, national origin, religion or sex. One's opportunity should be based on individual qualifications or lack thereof,

110. WYO. STAT. § 27-262 (1967).
111. WYO. STAT. § 27-263 (1967).
112. WYO. STAT. § 27-263 (1967).
113. WYO. STAT. § 27-260(7) (1967).

and lack of qualifications is a defense to the failure to hire, promote or continue the employment of a member of a protected group. Opposition to equal employment laws results primarily from the failure to understand that the laws do not require employment of unqualified persons, but rather an opportunity for all persons to fairly demonstrate their qualifications and compete for a job.

Several important principles of equal employment law were established by the United States Supreme Court in *Griggs v. Duke Power Co.*[114] In terms of proving discrimination, the most important ruling in the case is that intent to discriminate is irrelevant to determining whether an employer has violated Title VII, as Congress directed the thrust of the Act to the consequences of employment practices, not the motivation. Therefore, the employer need only have intended the use of any employment practices which have a discriminatory effect. According to *Griggs*, a practice which screens out a disproportionately higher percentage of a protected group of persons is prohibited unless it is related to job performance and required by business necessity.[115]

The EEOC has issued guidelines interpreting Title VII by more specifically delineating practices which constitute discrimination.[116] *Griggs* held these guidelines are entitled to great deference and shall be treated as expressing the will of Congress.

Recruitment

Probably the most common method of recruitment for employers and employment agencies is help-wanted advertisements in various publications. In any form of advertisement, a preference, limitation or discrimination on a prohibited basis is an initial and illegal bar to employment.[117] The rule

114. 401 U.S. 424 (1971).
115. *See* discussion of business necssity as defense, *infra*.
116. Sex Discrimination Guidelines, 29 C.F.R. §§ 1604.1 to .10 (1975); Religious Discrimination Guidelines, 29 C.F.R. § 1605.1 (1975); National Origin Discrimination Guidelines, 29 C.F.R. § 1606.1 (1975); Testing and Selecting Employees Guidelines, 29 C.F.R. §§ 1607.1-.14 (1975).
117. 42 U.S.C. § 2000e-3(b) (Supp. V 1975); Resolution of FEC with Relation to Discriminatory Employment Advertisements, [1977] 3 EMPL. PRAC. GUIDE (CCH) Para. 29,335.

is absolute in terms of race or color, and qualified as to sex, national origin and religion to allow discrimination only where the discriminating characteristic is a bona fide occupational qualification.[118] Therefore, placing advertisements in segregated columns of newspapers is a violation of Title VII by the recruiting party, not the newspaper, and the publisher should be instructed on such publication.[119]

Word of mouth recruiting may serve to perpetuate effects of past discriminatory practices because it relies on current employees who may not include members of protected groups due to prior screening practices. For example, word of mouth recruitment in an all male or white department results in males or whites being most often contacted and thereby illegally perpetuates past discrimination.[120] Notices of vacancies should be posted and other measures taken to insure that employees in prviously segregated departments and job classifications are aware of new job opportunities to avoid illegally perpetuated discrimination within a company.[121]

Another pitfall for employers can be the use of referrals where the referral source is practicing discrimination, such as an employment agency which will refer only one sex for a particular kind of job or a union with racially biased admission policies. Relying on such referrals may also result in the unlawful perpetuation of past discrimination.[122]

Screening and Evaluating Methods

When a job opening occurs, employers generally consider a number of applicants or employees for the position.

118. 42 U.S.C. § 2000e-3(b) (Supp. V 1975). *See* discussion of bona fide occupational qualification as a defense, *infra*.

119. Brush v. S.F. Newspaper Printing Co., 469 F.2d 89 (9th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

120. United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); NAACP v. Beecher, 371 F. Supp. 507 (D. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Rock v. Norfolk & Western R.R. Co., 473 F.2d 1344 (4th Cir. 1973), *cert. denied*, 412 U.S. 862 (1973).

121. Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 862 (1972).

122. EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *petition for cert. filed*, 45 U.S.L.W. 3047 (U.S. Sept. 12, 1975) (No. 75-393); Parham v. Southwestern Bell Tel. Co., *supra* note 83.

Methods have been devised to evaluate and screen those being considered in the process of making a hiring or promotion decision. Some of these practices screen out persons directly or indirectly on the basis of their race, sex, national origin, color or religion and violate Title VII and the FEPA. Practices are not unlawful, however, if they are reasonably related to successful job performance, required by business necessity, and applied in a consistent manner to all applicants. The employer must also show that no suitable alternative is available.[123]

Whether or not an applicant is hired or an employee is promoted into a job should depend on an objective appraisal of the person's qualifications in relationship to the job description and the qualifications necessary to successful job performance. All employment and personnel policies should be written an objective to provide both guidelines to personnel responsible for carrying them out and a safeguard against an exercise of personal bias. The policy on interviewing applicants for employment should not allow personnel to make subjective evaluations of applicants, and a lack of formal objective guidelines on hiring has supported a finding of discrimination.[124] Proof that more weight was given to subjective evaluations of interest, attitude and personality than objective criteria, that formal objective guidelines were not provided for job interviews and that exclusively non-minority personnel were employed to interview minority applicants has been found to be discriminatory.[125]

Records of all applications and data relating thereto must be kept for six months from the date the record is made or an employment decision is made, whichever is later.[126] If records are destroyed during the six-month period, the EEOC will consider aggrieved applicants to be qualified.[127]

123. EEOC Testing and Selecting Employees Guidelines, 29 C.F.R. § 1607.3 (1975).
124. Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); United States v. Lee Way Motor Freight Inc., 7 Fair Empl. Prac. Cas. 710 (D. Okla. 1973).
125. Reed v. Arlington Hotel Co., 276 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); Brown v. Gaston County Dyeing Machine Co., *supra* note 121.
126. EEOC Reporting and Record Keeping, 29 C.F.R. § 1602.14 (1975).
127. EEOC Decision, No. 71-1477 (March 19, 1971); EEOC Decision, No. 70-92 (August 19, 1969).

A popular screening device is pre-hire inquires, which may be made verbally or on a written application form. Inquiries related to race, sex, national origin, color or religion are not violations of Title VII *per se*. The employer must have a lawful explanation, however, or the fact that the inquiry was made may constitute evidence of discrimination which carries significant weight in the EEOC's decision as to whether or not Title VII has been violated.[128] These inquiries seldom relate to the applicant's abilities or qualifications, but they may be necessary to meet reporting requirements on applicants and employees of protected groups by local, state or federal government. In this instance the inquiry would serve a lawful purpose and would not constitute discrimination.[129] As a practical matter, the precaution of explaining the necessity of the inquiry to the applicant or employee may be necessary. Also, employers and employment agencies should carefully select application forms, as many of the older purchased forms often contain unlawful questions. New forms are now on the market that set apart any questions which may be unlawful if the employer cannot justify their use, and the applicant is instructed to answer only those questions in that group which the employer has indicated are necessary questions for the particular job. The FEC has written information on employment application forms which may lead to discrimination, listing common questions and an explanation of how these questions may discriminate.[130]

Inquiries or coding of applications as to the race or national origin of an individual coupled with a low representation of that minority group in the workforce, union membership or referral lists support a finding of discrimination.[131] Coding on applications has sometimes been difficult to detect without very thorough investigation.

128. EEOC Release, *re* Pre-Hire Inquiries (January 13, 1966, *as amended* May 27, 1968).

129. *Id.*

130. WYOMING FAIR EMPLOYMENT COMMISSION, EMPLOYMENT APPLICATION FORMS WHICH MAY LEAD TO DISCRIMINATION (1976).

131. Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973), *aff'd sub. nom.* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *petition for cert. filed*, 45 U.S.L.W. 3047 (U.S. Sept. 12, 1975) (No. 75-393).

Pre-hiring inquiries and qualifications standards related to the marital or parental status of the applicant cannot be applied only to women. Questions regarding marital status may be asked in good faith and for a non-discriminatory purpose.[132] An employer cannot utilize a rule regarding marital status which is not applied equally to both sexes, resulting in the restriction of employment of one sex.[133] The airlines previously would not employ married women as stewardesses while no men were similarly prohibited; however, the courts held the policy was not justified by a bona fide occupational qualification.[134] Pre-hiring inquiries and restrictions on employment related to pre-school children must also be applied to men as well as women.[135] Any pre-hire inquiry which expresses, directly or indirectly, any limitation, specification or discrimination as to sex is unlawful unless based upon a bona fide occupational qualification.[136] Any employment practice or policy which excludes women from employment for pregnancy is a prima facie violation of Title VII under the EEOC guidelines.[137]

Employee selection criteria which exclude applicants on the basis of sex are unlawful unless the employer can demonstrate sex is a "bona fide occupational qualification" reasonably necessary to the normal operation of the business.[138] The EEOC has issued guidelines on sex discrimination under Title VII which state that this exception should be narrowly interpreted.[139] These guidelines provide that a refusal to consider an individual for a particular job on the basis of sex-related characteristics and stereotypes, or the preference of co-workers, clients or customers is not justified.[140] A shining example of this practice is the airlines' employment of stewardesses and not stewards, which also points out that sex discrimination is not synonymous with discrimination

132. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.7 (1975).
133. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.4(a) (1975).
134. Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).
135. Phillips v. Martin Marietta Co., 400 U.S. 542 (1971).
136. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.7 (1975).
137. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.10(a) (1975).
138. 42 U.S.C. § 2000e-2(e) (Supp. V 1975).
139. EEOC Sex Discrimination Guidelines, 29 C.F.R. §§ 1604.1-.10 (1975).
140. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.2(a) (1975).

against women.[141] The rule that preferences of customers and co-workers is not a valid reason for refusing to consider an individual is also true in cases involving race, national origin, color and religion.[142]

The findings of fact in the FEC decision in *Pfister v. Niobrara County*,[143] show a blatant example of this type of sex discrimination by a sheriff who refused to consider a female applicant for a position as deputy sheriff. He conceded her qualifications but stated he could not forward her application to the county commissioners for consideration because he believed the county commissioners would not consider hiring a female. At the FEC hearing the Sheriff testified that he did not hire Carmen Pfister because he had a two-man department with no job opening for a matron or a secretary, the people in the county have disapproved, and he did not think it would be right to pick up someone else's wife in the middle of the night to patrol "out in the boondocks." These statements indicate the exclusion of an applicant on the basis of sex, sex-related characteristics and stereotypes, or the preference of those receiving services, each of which is specifically prohibited by Title VII and has been held discriminatory by the FEC. The reviewing district court found sex discrimination but reversed for lack of jurisdiction.[144]

An employer may refuse to hire a male with long hair on the basis of an appearance code designed to maintain a certain image. Hairstyles are not immutable characteristics like race or sex.[145] Whether or not an appearance code which fails to accommodate an applicant or employee's observance of religious rules is discriminatory has yet to be decided on the merits by the courts, but the EEOC has decided this constitutes discrimination.[146]

141. Diaz v. Pan American Airways, Inc., 442 F.2d 385 (5th Cir. 1971).
142. Anderson v. Methodist-Evangelical Hosp., Inc., 4 Fair Empl. Prac. Cas. 33 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972).
143. No. 30-1974 (FEC April, 1975).
144. Pfister v. Niobrara County, No. 12-169 (Wyo. Dist. Ct., 6th Dist., Oct. 28, 1975), *aff'd*, 557 P.2d 735 (Wyo. 1976).
145. Baker v. California Land Title Co., 349 F. Supp. 235 (C.D. Cal. 1972), *aff'd*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975).
146. EEOC Decision, No. 71-779 (Dec. 21, 1970); EEOC Decision, No. 71-2620 (June 25, 1971). *See also* EEOC v. Rollins, Inc., 8 Empl. Prac. Cas. 492 (N.D. Ga. 1974).

Physical requirements such as height and weight or strength standards have particular disparate impact on men and women and certain minorities, particularly Spanish-surnamed Americans. The National Origin Discrimination Guidelines cite as an example of discrimination denial of equal opportunity to persons who as a class of persons fall outside the national norms for height and weight where such height and weight specifications are not necessary for the performance of the work involved.[147] Again, these standards must be applied uniformly, be reasonably related to job performance and justified by business necessity.[148] Some of the standards held unlawful have been maximum body weight standards applied to female flight attendants but not male flight attendants,[149] limits on the amount of weight females can lift as opposed to individual testing of all employees,[150] jobs characterized as strenuous or heavy being limited to males based on assumptions about the abilities of females.[151]

A very high percentage of racial and ethnic minorities are arrested but not necessarily convicted.[152] Therefore, hiring standards based on arrest records will generally screen out a higher number of minorities and constitute discrimination absent the required showing.[153] Records of convictions are more often found to have bearing on successful job performance, but nonetheless the employer cannot make a sweeping rejection of applicants with criminal convictions. The

147. EEOC National Origin Discrimination Guidelines, 29 C.F.R. § 1606.1 (1975).

148. Weeks v. Southern Bell Tel. & Tel. Co., 277 F. Supp. 117 (S.D. Ga. 1967), *rev'd on other grounds*, 408 F.2d 228 (5th Cir. 1969); Meadows v. Ford Motor Co., 62 F.R.D. 98 (W.D. Ky. 1974). *But see* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

149. Laffey v. Northwest Airlines, Inc., [1976] 7 LAB. REL. REP. (13 Empl. Prac. Cas.) 1068 (D.C. Cir. 1976); Gerdom v. Continental Airlines, Inc., 8 Fair Empl. Prac. Cas. 1235 (C.D. Cal. 1974), *injunction denied*, [1976] 7 LAB. REL. REP. (13 Fair Empl. Prac. Cas.) 1205 (C.D. Cal. 1976).

150. Bowe v. Colgate-Palmolive Co., *supra* note 66; Long v. Sapp, 502 F.2d 34 (5th Cir. 1974). *But see* Gudbrandson v. Genuine Parts Co., 297 F. Supp. 134 (D. Minn. 1968).

151. Weeks v. Southern Bell Tel. & Tel. Co., *supra* note 148; Taylor v. Goodyear Tire and Rubber Co., 6 Fair Empl. Prac. Cas. 50 (N.D. Ala. 1972).

152. Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972).

153. *Id.*; Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). *See* City of Cairo v. Illinois FEPC, 21 Ill. App. 3d 358, 315 N.E.2d 344 (1974).

employer must be able to demonstrate the necessity of a standard related to convictions.[154]

Members of minority groups have not only had less opportunity for employment; they have also had less opportunity for education and training. Consequently, education and training standards may screen out a disproportionate number of minorities and may not be required arbitrarily. For example, in *United States v. Georgia Power Co.*,[155] high school diplomas were required by the defendant for entry level jobs such as laborer, screening out a high number of blacks, without a demonstration that high school diplomas were required by business necessity and related to job performance.[156] The same demonstration is necessary to justify other education and training requirements.[157] Where such demonstration has been made no discrimination has been found.[158]

Written performance tests are one means of measuring a person's qualifications.[159] In *Griggs*, the United States Supreme Court stated that a test must measure the person for the job, not the person in the abstract.[160] Professionally developed ability tests which are not designed, intended or used to discriminate are specifically authorized by the EEOC guidelines on testing.[161] Many tests, however, do exclude minority group members at a higher rate because they test more than job-related qualities, such as certain cultural values or assumptions which racial or ethnic minorities do

154. Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971), *aff'd* 468 F.2d 951 (5th Cir. 1972); Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975).
155. *Supra* note 120.
156. Statistics cited in the case showed in the 25 to 44 age group in the South, 64.7% of white males, 35% of black males, 63% of white females, and 34.7% of black females have completed high school. *Id.* at 918.
157. Griggs v. Duke Power Co., *supra* note 114; United States v. Georgia Power Co., *supra* note 120; Harkless v. Sweeny Ind. School Dist., 388 F. Supp. 738 (S.D. Tex. 1975); Roman v. Reynolds Metals Co., 368 F. Supp. 47 (S.D. Tex. 1973).
158. Spurlock v. United Airlines, Inc., 330 F. Supp. 228 (D. Colo. 1971), *aff'd*, 475 F.2d 216 (10th Cir. 1972); McGaffney v. Southwest Mississippi Gen. Hosp., 5 Fair Empl. Prac. Cas. 1312 (D. Miss. 1973), *aff'd*, 6 Fair Empl. Prac. Cas. 1123 (5th Cir. 1973); Cooper v. Allen, 493 F.2d 765 (5th Cir. 1974); Stone v. E.D.S. Federal Corp., 351 Supp. 340 (N.D. Cal. 1972).
159. EEOC Testing and Selecting Employees Guidelines, 29 C.F.R. § 1607.2 (1975).
160. Griggs v. Duke Power Co., *supra* note 114.
161. *Id.*; Albemarle Paper Co. v. Moody 442 U.S. 407 (1975).

not relate to in the same manner as white persons. These tests, like other screening devices, are unlawful if they operate to exclude a protected group and cannot be shown to be related to job performance.[162]

A prima facie case of discriminatory testing is ordinarily made by a showing that the test has an adverse impact on a protected group, which the defendant may rebut by proving the test has been professionally validated as a predictor of job performance.[163] As a general rule, evidence that minority group test-takers failed a particular written examination at a significantly higher rate than white test-takers establishes adverse impact. The numbers must be statistically significant, which one case defines as a relationship sufficiently high to have a probability of not more than one in two of having occurred by chance.[164] If the statistics are not sufficiently reliable, the courts may also consider census statistics which show a disparity between the minorities in the employer's workforce and in the general labor force of the community and indicate that minorities are being screened out disproportionately.

Rebuttal evidence that the test has been validated by one of several methods can then be presented. Criterion-related or empirical validation, the preferred method, demonstrates that the test has been validated with one or more exterior variables or criteria, such as work proficiency data, supervisory ratings or regularity of attendance at work.[165] Evidence of content or construct validity may be appropriate where criterion-related validity is not feasible.[166] This involves identifying skills and knowledge needed to perform a job in an independent job analysis and then determining if the test being

162. Albemarle Paper Co. v. Moody, *supra* note 161.

163. Davis v. Washington, 423 U.S. 820 (1976); NAACP v. Beecher, *supra* note 120; United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

164. Kinsey v. Legg, Mason & Co., Inc., 62 F.R.D. 462 (D.D.C. 1974).

165. EEOC Testing and Selecting Employees Guidelines, 29 C.F.R. § 1607.5 (1975); Vulcan Soc'y v. Civil Serv. Comm'n, 360 F. Supp. 1265 (S.D.N.Y. 1973), *aff'd*, 490 F.2d 387 (2d Cir. 1973).

166. EEOC Testing and Selecting Employees Guidelines, 29 C.F.R. § 1607.5 (1975).

used tests for the skills and knowledge needed for the job.[167] Other methods, such as differential validation, which requires separate collection of data for both men and non-minority groups, may also be used. The EEOC guidelines should be followed in every instance as they are to be given great deference by the courts, and a use of a test will generally be enjoined unless it is validated in accordance with the guidelines.[168] If no showing of test validity is made, use of the test has been held unlawful.[169] Where evidence of validity is offered, the legal issue becomes the sufficiency of the validation study as proof that the test predicts job performance. In many instances, courts have found the evidence of validity insufficient and the test therefore unlawful.[170]

Job Classification and Assignment

The days of open and notorious segregation of black and brown employees from white employees in both jobs and facilities are gone, but less obvious employment practices and policies still result in segregation. An imbalance in the distribution of women and racial and ethnic minorities within an employer's workforce is generally indicative of discriminatory policies and practices relating to job classification and assignment.[171] For example, racial and ethnic minorities have been assigned to entry-level jobs, such as janitor or laborer, regardless of qualifications.[172] Many trucking companies have historically maintained segregated job classifications by refusing to assign female or minority employees to over-the-road driver positions.[173]

167. Kirkland v. New York State Dept. of Correctional Serv., 374 F. Supp. 1361 (S.D.N.Y. 1974), *rev'd on other grounds*, 520 F.2d 420 (2d Cir. 1975).
168. Griggs v. Duke Power Co., *supra* note 114; Albemarle Paper Co. v. Moody, *supra* note 161.
169. United tSates v. Jacksonville Terminal Co., *supra* note 163.
170. *E.g.*, NAACP v. Beecher, *supra* note 120; Western Addition Community Organization v. Alioto, 360 F. Supp. 733 (N.D. Cal. 1973); Bridgeport Guardians v. Bridgeport Civil Serv. Comm'n, 354 F. Supp. 778 (D. Conn. 1973); United States v. Georgia Power Co., *supra* note 120; Albemarle Paper Co. v. Moody, *supra* note 161.
171. Stamps v. Detroit Edison Co., *supra* note 131; Bush v. Lone Star Steel Co., 373 F. Supp. 526 (E.D. Tex. 1974).
172. United States v. Inspiration Consol. Copper Co., 6 Fair Empl. Prac. Cas. 939 (D. Ariz. 1973); Roman v. ESB, Inc., 7 Fair Empl. Prac. Cas. 1063 (D.S.C. 1973).
173. *E.g.*, Franks v. Bowman Transp. Co., *supra* note 85; United States v. Lee Way Motor Freight, Inc., *supra* note 124.

Allegations are often made in Title VII cases that an employer has discriminated by assigning a protected group only to lower paying, less desirable jobs which have fewer opportunities for advancement.[174] One of the most common forms of segregated job classifications is the all-white male managerial and supervisory classifications, generally resulting from a failure to hire or promote women and minorities to these positions of authority and responsibility.[175] Classifying certain jobs as male or female, whether explicitly in a policy or implicitly by a practice, is both common and unlawful.[176] This job assignment problem may result from subjective assessments by supervisors who have not been provided with or instructed to follow written, objective selection and assignment criteria.[177]

An employee who is assigned to a part-time, temporary or probationary position has all the same protections as full-time, permanent employees in terms of equal employment opportunity. The probationary employee is generally the most vulnerable to any form of bias held by a supervisor and feels less able to protect him or herself due to uncertainty about his or her job performance and inability to join a union during this period. An employee may be terminated during the probationary period for reasons such as poor job performance[178] or work force reduction,[179] unless the employees of one race, sex, national origin, color or religion are being treated in a different manner than other probationary employees. Such unlawful bias has been found where blacks were more frequently disciplined and discharged during this period than whites, and only whites were granted extended

174. *See* cases cited in note 172, *supra*.

175. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Bush v. Lone Star Steel Co., *supra* note 171; Russell v. American Tobacco Co., 374 F. Supp. 286 (M.D.N.C. 1973), *modified*, 528 F.2d 357 (4th Cir. 1975). *But see* Roman v. ESB, Inc., *supra* note 172.

176. Peterson v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972); Weeks v. Southern Bell Tel. & Tel. Co., *supra* note 148; Nance v. Union Carbide Corp., 397 F. Supp. 436 (W.D.N.C. 1975).

177. Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522 (W.D. Pa. 1973); Pettway v. American Cast Iron Pipe Co., *supra* note 175; Bush v. Lone Star Steel Co., *supra* note 171.

178. Rice v. Gates Rubber Co., 521 F.2d 782 (6th Cir. 1975).

179. United States v. Hayes Int'l Corp., 295 F. Supp. 803 (N.D. Ala. 1970), *rev'd on other grounds*, 456 F.2d 112 (5th Cir. 1972).

probationary periods as opposed to termination.[180] A protected group cannot initially be given a longer period of probation with more conditions than other employees,[181] or treated differently with respect to any other terms and conditions of employment.[182]

The Wyoming FEC in *Kaufholz v. Cheyenne Fire Department*,[183] found sex discrimination essentially based on a difference in the treatment of a female firefighter and male firefighters during the six-month probationary period. Vicki Kaufholz was the first and only woman employed as a firefighter in Cheyenne, Wyoming, receiving a job after attaining the highest score on a written examination. The media were allowed to photograph and question her continuously throughout her employment. After she was hired, a strength and agility test was instituted, which she passed, and a program of calisthenic exercises was implemented only for the period of her employment. The FEC also found the Department made no distinction between her training and testing, and trained her for a pumper truck but assigned her to a ladder truck which had different equipment. She also was not issued proper equipment and clothing. Without forewarning, she was told of recorded deficiencies in her work and her probationary period was terminated five and one-half months after she had begun. The FEC seems to imply, although it did not specifically state, that its finding of sex discrimination is based on a finding that some of these employment practices were a reaction to the employment of a female and sex stereotypes, while other practices were not similarly applied to male firefighters during their period of probation.

Promotions, Seniority and Layoffs

An employee's future and security in his or her job are very important. All too often members of protected groups have found themselves without a future or security regard-

180. EEOC Decision, No. 71-797 (Dec. 21, 1970).
181. Laffey v. Northwest Airlines, Inc., *supra* note 149.
182. *E.g.*, Lowry v. Whitaker Cable Corp., 348 F. Supp. 202 (W.D. Mo. 1972), *aff'd*, 472 F.2d 1210 (8th Cir. 1973).
183. No. 18-1975 (FEC April 13, 1976).

less of their qualifications or performance. Decisions on promotions, like decisions on hiring and job assignment, should be made on the basis of qualifications for the job, not on the basis of race, color, national origin, sex or religion. Nevertheless, the low percentages of women and minorities in the higher-paying, more responsible job categories into which employees can be promoted indicates these factors are determinative in many promotional decisions.[184] However, the courts have refused to find discrimination in cases where the employer has proven other candidates for promotion were better qualified than the plaintiff.[185] The showing of qualifications must be based on objective evaluations of the employee's qualifications in relation to a job related criteria, or it will not be sufficient to prove the failure to promote was not discriminatory.[186] As in hiring decisions, the use of predominantly or all-white or all-male personnel to make promotional decisions affecting racial and ethnic minorities and women has been held to result in discriminatory practices.[187] If tests are used, the testing standards relative to hiring also apply to promotions.[188]

A seniority system is generally based on the length of time spent in a job, department or company and is used to determine the competing rights of workers, such as rights to promotion and transfer. Seniority is generally used by employers for two separate functions: benefit-type seniority measures the benefits such as pensions and vacation time, and competitive-type seniority gives the employee with the longer time on the job an advantage over a newer employee in competition for promotions, transfers and recalls, as well as protection from layoffs. A seniority system can have a discriminatory effect when, due to prior exclusion from cer-

184. Stamps v. Detroit Edison Co., *supra* note 131; EEOC Decision, No. 71-562 (Dec. 4, 1970).

185. Baxter v. Savannah Sugar Ref. Corp., 350 F. Supp. 139 (S.D. Ga. 1972), *aff'd*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033 (1974); Smith v. South Central Bell Tel. Co., 7 Fair Empl. Prac. Cas. 609 (M.D. Tenn. 1974), *aff'd* 518 F.2d 68 (6th Cir. 1975).

186. Rowe v. General Motors Corp., *supra* note 124; Newman v. AVCO Corp., 313 F. Supp. 1069 (M.D. Tenn. 1973). *But see* Privette v. Union Carbide Corp., 395 F. Supp. 372 (W.D.N.C. 1975).

187. Baxter v. Savannah Sugar Ref. Corp., *supra* note 185; United States v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973).

188. *See* discussion of testing as a screening and evaluating device, *supra*.

tain jobs, progression lines or departments, the members of a minority group have been prevented from acquiring seniority relevant to those jobs, progression lines or departments. The ramifications range from loss of benefits to more exposure to layoffs for the employee who is transferred or promoted after desegregation, giving present effect to the results of prior discrimination.[189] Notwithstanding an express exemption of a "bona fide seniority or merit system" from the prohibitions of Title VII,[190] the courts have generally held seniority systems to be unlawful to the extent that they perpetuate the effects of past discrimination, unless a system is shown to be required as a matter of business necessity.

Job or departmental seniority in a previously segregated business perpetuates the effects of past discrimination and has been the subject of frequent litigation. Even though a plant may no longer be segregated, all minority and female employees allowed into previously white or male jobs or departments will have less seniority in that job or department, and therefore cannot compete with or receive the same benefits as the whites or males even though they may have more plant seniority. In this situation the courts have required the use of plant seniority,[191] unless a valid experience requirement is a prerequisite to promotion or transfer into the job or department, in which case the courts have granted as relief job or departmental seniority from the date the employee was hired or acquired the necessary experience, whichever is later.[192] In class actions, relief in the form of seniority is limited to those persons who can prove they were in fact victims of the discrimination.[193] Employees entitled

189. Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).
190. 42 U.S.C. § 2000e-2(h) (1970).
191. EEOC v. Detroit Edison Co., *supra* note 122; United States v. Georgia Power Co., *supra* note 120; United States v. N.L. Industries, *supra* note 187; United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., *supra* note 75; Local 189, United Paperworkers & Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).
192. Franks v. Bowman Transp. Co., *supra* note 85; Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974), *cert. granted*, 44 U.S.L.W. 3670 (U.S. May 24, 1976) (No. 75-718).
193. Franks v. Bowman Transp. Co., *supra* note 85; Patterson v. American Brands, Inc., 12 Fair Empl. Prac. Cas. 314 (4th Cir. 1976).

to promotions or transfers on the basis of plant-wide or retroactive seniority may not bump junior employees out of their present jobs; rather the new seniority should be asserted only with respect to new job openings.[194]

In some operations the lines of progression from one job to another were segregated, which meant the employees performed the same work in separate departments. The courts have ordered that when departments were desegregated, the seniority lists had to be merged.[195]

In other instances, the minority and female workers have progressed in a restricted progression of jobs to a job which pays less than the upper levels of jobs from which they have been restricted and more than the entry level of those jobs. This required cut in pay deters employees from entering the desegregated jobs as it means a loss of pay until they can progress to the upper levels, and thereby perpetuates the discrimination. The remedy devised for this type of discrimination is "red circling" of wage rates which permits the transferring employee to receive his or her current wage rate until the employee attains a level in the new line of progression with a higher wage rate.[196]

Traditionally, seniority systems have dictated that the last employee in is the first employee out when layoffs or other workforce reduction measures are necessary. The obvious problem in the discrimination context is that many of the newer employees in a job, department or plant are members of protected groups who have been employed, promoted or transferred in recent years as a result of equal employment requirements imposed on employers. While there is some conflict in the decided cases, the dominant view at the present time is that Title VII does not prohibit seniority-based layoffs in a context of past hiring discrimination, at least where the laid-off employees had not been personally

194. Franks v. Bowman Transp. Co., *supra* note 85.

195. Rock v. Norfolk & Western R.R. Co., *supra* note 120; United States v. N.L. Industries, *supra* note 187.

196. Hicks v. Crown Zellerbach Corp., 321 F. Supp. 1241 (E.D. La. 1971); Robinson v. Lorillard Corp., *supra* note 75.

discriminated against.[197] However, layoffs on the basis of departmental seniority have been held unlawful where blacks who had been excluded from transferring into certain departments were laid off while whites in the formerly white departments, who had less plantwide seniority, were not affected.[198]

Where an employer has imposed mandatory leave for maternity but not for any other non-work-related disability, it has been held unlawful to fail to credit female employees returning from maternity leave with previously accumulated seniority for purposes of bidding on job openings.[199]

Terms and Conditions

A myriad of employment practices constitutes what may be generally referred to as the terms and conditions of employment. Generally, any rules or regulations must apply and all rights and benefits be conferred to all employees equally, regardless of race, national origin, color, sex or religion. The interests of the employer and the employees must be balanced, the touchstone being business necessity.[200] For example, employers maintaining facilities segregated on the basis of race or national origin have been held to be discriminating and ordered to discontinue the practice.[201] Vacation time, sick leave, and holidays may be conditioned on a factor such as length of service for the employer, but may not be applied in a different manner to one group than another on an unlawful basis.[202]

An interesting issue concerns an employer's obligation to accommodate an employee's religious needs, particularly

197. Watkins v. Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 96 S. Ct. 2214 (1976).
198. Cox v. Allied Chemical Corp., 382 F. Supp. 309 (M.D. La. 1974).
199. Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), *aff'g* 384 F. Supp. 765 (M.D. Tenn. 1974), *cert. denied*, 45 U.S.L.W. 3508 (U.S. Jan. 25, 1977) (No. 75-536).
200. Griggs v. Duke Power Co., *supra* note 114.
201. Buckner v. Goodyear Tire and Rubber Co., 476 F.2d 1287 (5th Cir. 1973); United States v. Jacksonville Terminal Co., *supra* note 163.
202. Rice v. Litton Systems, Inc., 8 Fair Empl. Prac. Cas. 763 (D.D.C. 1974), *aff'd*, 530 F.2d 1094 (D.C. Cir. 1976); EEOC Decision, No. 72-0324 (Aug. 18, 1971).

as related to time off for religious observances. The employer must make reasonable accommodations for sincerely asserted religious beliefs of employees, the defense for a failure to do so being a demonstration of undue hardship.[203] Title VII defines religion as all aspects of religious observance and practice, as well as belief, unless the employer meets the burden of proving undue hardship which would have the effect of excepting such practices from protection.[204] The issue has generally been whether the rearranging of work schedules would constitute hardship.[205] In determining what constitutes undue hardship, the courts have emphasized the undue aspect and held that a showing of inconvenience or necessity to pay overtime or mild and infrequent complaints from co-workers is insufficient.[206] This issue of accommodation is currently before the United States Supreme Court in several cases.[207] The Title VII requirement that employers reasonably accommodate religious practices was recently declared a violation of the establishment clause of the United States Constitution, a federal district court finding the government had not maintained the requisite neutrality on the religious question.[208]

One Wyoming FEC decision, *Banyai v. Salt Creek Freightways*,[209] deals with religious discrimination arising from termination of an employee for taking an unapproved leave of absence to attend a religious convocation. She requested a leave of absence without pay in the proper manner and received an unqualified refusal. The FEC held the complainant has the burden of demonstrating authentic or valid religious conviction. This showing shifts the burden to the

203. EEOC Guidelines on Religious Discrimination, 29 C.F.R. § 1605.1 (1975); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) (upholding the guidelines).

204. 42 U.S.C. § 2000e(j) (Supp. V 1975).

205. Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972), *cert. denied*, 45 U.S.L.W. 3364 (U.S. Nov. 16, 1976) (No. 75-1105); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd*, 424 U.S. 942 (1976).

206. Shaffield v. Northrop Worldwide Aircraft Serv., Inc., 373 F. Supp. 937 (M.D. Ala. 1974); Kettell v. Johnson & Johnson, 337 F. Supp. 892, 895 (E.D. Ark. 1972); Hardison v. Trans World Airlines Inc., 527 F.2d 33 (8th Cir. 1975); *cert. granted*, 45 U.S.L.W. 3363 (U.S. Nov. 16, 1976) (No. 76-1126); Cummins v. Parker Seal Co., *supra* note 205.

207. Reid v. Memphis Publishing Co., *supra* note 205; Hardison v. Trans World Airlines, Inc., *supra* note 206.

208. Yott v. North American Rockwell Corp., 45 U.S.L.W. 2367 (C.D. Cal. Jan. 10, 1977).

209. No. 47-1974 (FEC July 11, 1975).

respondent to prove efforts were made to reasonably accommodate the complainant's religious practices without incurring undue hardship in the conduct of the respondent's business or that any further accommodation would have created such hardship. In this case, the Respondent was found to have admitted that allowing the complainant three days leave would not have incurred undue hardship. The Respondent was ordered to cease and desist from discriminatory employment practices on the basis of creed, to post notices relative to equal employment opportunity, to file reports on any additional action taken, and to pay $1,800.40 in backpay. The FEC clearly applied principles of law developed under Title VII in this decision. Following an appeal to the district court and remand to the FEC, the agency again found discrimination and awarded the complainant $3,798.15.[210]

The most important contemporary issues in sex discrimination concern fringe benefits such as medical insurance, life insurance, and retirement plans, which must be provided equally to employees of both sexes.[211] An employer's conditioning of fringe benefits on principal wage-earner status is a prima facie violation of Title VII since such benefits "tend to be available only to male employees and their families."[212] An employer cannot make benefits available to the wives of of male employees which are not made available to female employees.[213] The fact that the cost of such benefits is greater with respect to one sex than the other is not a defense according to the EEOC guidelines.[214]

The EEOC guidelines state that pregnancy-related disabilities must be treated like any other temporary disability for all job-related purposes, including providing sick leave, sick pay, medical and health insurance, and disability income protection plan.[215] The United States Supreme Court deci-

210. *Id.* (FEC March 28, 1977), *on remand from* No. 41-126 (Wyo. Dist. Ct., 7th Dist., Nov. 12, 1976).
211. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.9 (1975).
212. 29 C.F.R. § 1604.9(c) (1975); Chastang v. Flynn and Emrich Co., 365 F. Supp. 957 (D. Md. 1973); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973).
213. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.9(d) (1975).
214. 29 C.F.R. § 1604.9(d) (1975); Taylor v. Goodyear Tire & Rubber Co., *supra* note 150.
215. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.10(b) (1975).

sion in *General Electric Co. v. Gilbert*[216] struck a serious blow to this guideline. The Court found exclusion of pregnancy-related disabilities from an employee disability benefit plan does not constitute sex discrimination, following the rationale of *Geduldig v. Aiello*[217] which held a similar exclusion from a state disability benefit program did not violate the Equal Protecton Clause of the Fourteenth Amendment.

Termination of any employee for a temporary disability is unlawful if it has a disparate impact on employees of one sex and is not justified by business necessity.[218] Cases challenging the guideline as to the treatment of pregnancy-related absences, the ability of a pregnant employee to continue working, and the denial of seniority benefits to employees on pregnancy leave are now pending before the United States Supreme Court.[219] Mandatory pregnancy leave policies established by school boards fixing times for the leave of absence to commence have been held arbitrary and not justified by a legitimate state interest in cases brought under the fourteenth amendment to the United States Constitution.[220] Two states' unemployment compensation laws which imposed special restrictions on women workers unemployed due to pregnancy and childbirth have recently been declared unconstitutional.[221]

EVIDENCE OF DISCRIMINATION

The initial burden of proof rests on the plaintiff to establish a right to prevail in the action. A prima facie case of employment discrimination may be established by several means, depending on the nature of the suit. Proof of discrimination is seldom direct and a plaintiff does not always have to show specific instances of discrimination to prevail. One of the most common methods of proving the discriminatory

216. 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976) (Nos. 74-1589 & 74-1590).
217. 417 U.S. 484 (1974).
218. EEOC Sex Discrimination Guidelines, 29 C.F.R. § 1604.10(c) (1975).
219. Richmond United School Dist. v. Berg, 528 F.2d 1208 (9th Cir. 1975), *cert. granted*, 45 U.S.L.W. 3508 (U.S. Jan. 25, 1977) (No. 75-1069).
220. Cleveland Bd. of Educ. v. LaFleur, *supra* note 15.
221. Turner v. Dep't of Employment Security, 423 U.S. 44 (1975); Sylvara v. Industrial Comm'n of Colo., ___ Colo. ___, 550 P.2d 868 (1976).

impact of an employment practice is a showing of statistical disparity between the racial and ethnic composition of the community population or labor force and the composition of the employer's workforce drawn from the community. This showing has been held sufficient to create a prima facie case in Title VII cases.[222] The validity of the statistics may be questioned to reduce the probative thrust of the data.[223] Absent a strong statistical showing, evidence of practices which discriminate must be included.[224]

The United States Supreme Court in *McDonnell-Douglas Corp. v. Green*[225] set forth the proof necessary to establish a prima facie case in a single-plaintiff action. The plaintiff may show (i) that he belongs to a protected minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications. The Court noted that the facts will necessarily vary in Title VII cases, and this specification of proof is not necessarily applicable to differing fact situations.[226]

In cases concerning discriminatory promotion policies, the Tenth Circuit has recently held that upon the plaintiff's showing of his general qualifications for the job, the defendant's failure to promote a protected group into the job over a lengthy period of time, and utilization of a subjective promotion policy, the plaintiff is entitled to an inference of discrimination which shifts the burden to the defendant to show business necessity for the failure to promote.[227]

222. United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir. 1973); Parham v. Southwestern Bell Tel. Co., *supra* note 83; Chance v. Bd. of Examiners, 458 F.2d 1167 (2d Cir. 1972).
223. Taylor v. Safeway Stores, Inc., 365 F. Supp. 468 (D. Colo. 1973), *rev'd on other grounds*, 524 F.2d 263 (10th Cir. 1975); Chicano Police Officers' Ass'n v. Stover, 526 F.2d 431 (10th Cir. 1975).
224. Waters v. Wisconsin Steelworks of Int'l Harvester Co., *supra* note 197; Bridgeport Guardians v. Bridgeport Civil Serv. Comm'n, *supra* note 170.
225. *Supra* note 63.
226. *See also* King v. Yellow Freight System, Inc., 523 F.2d 879 (8th Cir. 1975); Gates v. Georgia-Pacific Corp., 492 F.2d 292 (9th Cir. 1974).
227. Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975); Rich v. Martin Marietta Corp., *supra* note 90.

The plaintiff is required to prove his or her case by a preponderance of the evidence.[228] The whole of the evidence is considered; therefore incidents which, when viewed separately may not show bias, may show a pattern of discrimination when considered together.[229]

The Wyoming Supreme Court, in *Shenafield v. Sheridan County School District No. 1*,[230] has indicated that the burden on the plaintiff may be very heavy, for the court will give deference to the employer's freedom of choice where the existence of discrimination is difficult to ascertain. Mary Shenafield applied for a teaching position with the defendant, having seen an advertisement for a job teaching English, Spanish and drama. She had a degree in English and was certified to teach English and speech. When she applied, the principal told her a male was preferred because there were few men on the faculty. The male who was later hired for the position was described as having good recommendations but no experience other than student teaching. The plaintiff filed a complaint with the FEC and at the ensuing hearing the testimony of the school board was that she was not hired because she would have to commute, the position now involved coaching sports, she required a higher salary due to her qualifications, the principal found her "pushy and demanding" and thought she would not stay long because he believed she had made several moves due to her husband's employment. These factors had not been discussed previously with the plaintiff to allow her a chance to respond. The Supreme Court affirmed the district court's reversal of the FEC finding of sex discrimination for lack of substantial supporting evidence of discrimination. The court stated the FEC had erroneously assumed that an employer must pick the candidate with the most qualifications and experience. The employer was held to have a freedom of choice of selection of employees in light of its own special problems and the fact that the job advertisement did not state coaching was involved did not mean the employer lost its discretion in hiring.

228. Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir 1975); Frockt v. Olin Corp., 344 F. Supp. 369 (D. Ind 1972).
229. Lowry v. Whitaker Cable Corp., *supra* note 182.
230. 544 P.2d 870 (Wyo. 1976).

The case is interesting as it represents one of the most difficult types of discrimination for a plaintiff to prove, and the court fails to deal with the preference for one sex over the other. The court did not discuss the preference for a male either as lawful affirmative action or unlawful bias. Nor did it discuss the addition of coaching duties as an afterthought which may have been used to justify hiring a male, or the assumption that she could not coach or another person on the faculty could not assist in the coaching duties. The statements of the school board seem to indicate that a stereotype of women dictates how they are to be evaluated. The real question the case raises is whether the court will continue to disregard indications of discrimination and place the emphasis on the employer's freedom of choice.

DEFENSES

Business Necessity

The primary defense in Title VII cases is the doctrine of business necessity which originated in *Griggs*. Under this doctrine the employer has the burden of establishing that the practices in question are necessary to the business even though they may have a discriminatory effect. Strict standards have been applied to a showing of business necessity, and mere proof that the practices serve legitimate management functions is insufficient. The test is whether the employment practice is essential to the safe and efficient operation of the business and acceptable policies and alternatives are not available.[231] For example, in sex discrimination cases, to meet the business necessity test, the employer would have to show the essence of the business would be undermined by not treating applicants and employees differently on the basis of sex.[232]

Bona Fide Occupational Qualification

Title VII provides that religious, sex or national origin discrimination may be justified where "religion, sex or na-

231. United States v. Bethlehem Steel Corp., *supra* note 191.
232. Diaz v. Pan American Airways, Inc., *supra* note 141.

tional origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular enterprise."[233] The regulations further state that sex will be considered a bona fide occupational qualification only where necessary for authenticity or genuineness.[234] This defense has most often been asserted in cases of sex discrimination and with little success. The standard which is generally applicable and which must be met in order to establish a valid bona fide occupational qualification is whether all or substantially all women do not have the capability of doing the job.[235] An individual standard which requires that each individual be given reasonable opportunity to demonstrate his or her abilities was applied in *Bowe v. Colgate-Palmolive Co.*,[236] which found failure to place women in certain jobs on the basis of a weight lifting restriction of 35 pounds for women to be unlawful.[237]

Reliance on State Protective Legislation

One source of differential treatment of men and women in employment is state labor laws. Although the state laws may have been intended as protective legislation for women, those that exclude women from certain types of employment are preempted by Title VII and are not considered a defense.[238] The courts have nevertheless exercised their discretion to refuse backpay awards in some Title VII cases where the employer has shown reliance in good faith on state protective laws.[239] Opinions vary on whether the provisions of state laws which require certain differential benefits for women must be extended to men, or whether the statute is invalid and benefits do not have to be provided to men or women.[240] The EEOC regulations advocate extension of bene-

233. 42 U.S.C. § 2000e-2(e) (1970)
234. 29 C.F.R. § 1604.2 (1975).
235. Weeks v. Southern Bell Tel. & Tel. Co., *supra* note 148.
236. *Supra* note 66.
237. *See* Rosenfeld v. Southern Pac. Ry. Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *rev'd on other grounds*, 444 F.2d 1219 (9th Cir. 1971).
238. 20 C.F.R. § 1604.2 (1975); General Elec. Co. v. Hughes, 454 F.2d 730 (6th Cir. 1972); Rosenfeld v. Southern Pac Ry. Co., *supra* note 237; Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969).
239. *E.g.*, Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974); LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1972).
240. *See, e.g.*, Potlatch Forests, Inc. v. Hays, 318 F. Supp. 1368 (E.D. Ark. 1970); Homemakers, Inc. of Los Angeles v. Division of Indus. Welfare, 356 F. Supp. 1111 (N.D. Cal. 1973).

fits to men except where the employer can prove that business necessity prevents such an extension, in which case the benefits should not be extended to either men or women.[241]

The first case decided under the FEPA, *Longacre v. State*,[242] dealt specifically with a state protective law. Longacre was charged with a violation of a statute which prohibited employing women as bartenders.[243] The defenses raised were that the law was unconstitutional and had been repealed by the passage of the FEPA. The Wyoming Supreme Court found the two statutes so repugnant they could not stand together and the earlier restrictive statute therefore implicitly repealed, never reaching the constitutional issue.

A recent decision by the Albany County District Court reaches a different conclusion than the EEOC on the extension of benefits provided to women by protective legislation. In *Asamera Oil, Inc. v. Wyoming Department of Labor and Statistics*,[244] two male employees filed complaints that the company was not paying them the same overtime as that required for females under the Wyoming statutes requiring overtime pay for women. The Wyoming Commissioner of Labor had determined that the benefits of the statute should be extended to men and failure to do so constituted sex discrimination. The district court disagreed, finding the statute rendered void and unenforceable by both the FEPA and Title VII. The Court also emphasized that the Commissioner had far exceeded his delegated powers by attempting to create a general right to premium overtime which the legislature did not intend to create.

The Wyoming Constitution provision that boys under fourteen years of age and girls or women are not to be employed in or about, coal, iron, or other dangerous mines, unless they are doing clerical work, is another example of a conflict with the prohibitions of the FEPA and Title VII.[245]

241. 29 C.F.R. § 1604. 2(b)(3), (4) (1975).
242. 448 P.2d 832 (Wyo. 1968).
243. WYO. STAT. § 12-20 (Supp. 1975).
244. No. 16,665 (Wyo. Dist. Ct., 2d Dist., Aug. 19, 1976)
245. WYO. CONST. art. 9, § 3.

With increased mining activity being carried on in Wyoming, the issue could eventually be raised. The conflict may soon be resolved, however, by repeal of the constitutional provision, the 1977 Wyoming Legislature having recently passed a joint house resolution to place the issue of repeal before the voters.[245a]

REMEDIES

Back Pay

Title VII authorizes an award of back pay where the Court finds such relief to be appropriate.[246] Back pay is an integral part of the statutory equitable remedy and is therefore determined by the court, not a jury.[247] Since the broad purpose of Title VII is to eliminate discrimination and make persons whole for injuries resulting from discrimination, back pay may be denied only for reasons that would not frustrate the statutory purposes.[248] A claim for back pay can be raised as late as the post-trial stage of litigation due to objectives of Title VII and the nature of the remedy.[249] However, a substantial unwarranted delay in making the claim may be reason to deny the award.[250]

Back pay may be awarded in class actions.[251] Only one plaintiff need file a charge, as the back pay award to other members of the class is not predicated on their fulfillment of the Title VII procedural requirements for filing a suit.[252]

Title VII limits recovery of back pay to a date of no earlier than two years prior to the filing of a charge of discrimination with the EEOC.[253] In computing the back pay

245a. Enrolled Joint Resolution No. 2 (H. of Rep.), 44th Wyo. State Legislature (1977).
246. 42 U.S.C. § 2000e-5(g) (1970).
247. *E.g.*, Johnson v. Georgia Highway Express, *supra* note 86.
248. Albemarle Paper Co. v. Moody, *supra* note 161; Robinson v. Lorillard Corp., *supra* note 75.
249. Robinson v. Lorillard Corp., *supra* note 75; United States v. Hayes Int'l Corp., *supra* note 179.
250. Albemarle Paper Co. v. Moody, *supra* note 161.
251. Rich v. Martin Marietta Corp., *supra* note 90.
252. Albemarle Paper Co. v. Moody, *supra* note 161; Bowe v. Colgate Palmolive Co., *supra* note 66.
253. 42 U.S.C. § 2000e-5(g) (1970).

award, courts subtract interim earnings or amounts which could have been earned with reasonable diligence by those discriminated against from the total allowable award, as back pay awards are limited to losses actually suffered.[254] In order to compensate for the total loss, future loss of earnings resulting from the discriminatory practices may also be included.[255] The difficulty of computing back pay and the unmanageability of awarding it is not a defense, and the court may consider appointing a master to handle the back pay award.[256]

The FEPA specifically authorizes the FEC to reinstate or upgrade employees, with or without back pay.[257] Back pay has been awarded by the FEC in at least three cases.[258] The district court in reviewing one of the cases noted that the FEC had exceeded its authority in awarding back pay, before reversing the entire decision for lack of jurisdiction.[259] The court did not state the reasons for finding that the FEC exceeded its authority in awarding back pay, but it might be speculated that the case involved failure to hire rather than reinstatement or upgrading, and the court narrowly interpreted the remedies provision. The cases indicate the back pay, when awarded, is computed in the same manner as in Title VII cases. The FEPA, however, does not contain a limit on the amount of time prior to filing the charge which can be considered. The FEC denied backpay in the *Kaufholz* case without giving reasons for the denial.[260]

Injunctive Relief

Injunctive relief enjoining the discriminatory practices of the defendant is the most common form of relief sought in

254. Jurinok v. Wiegand Co., 477 F.2d 1038 (3rd Cir. 1973), *aff'g* 331 F. Supp. 1184 (W.D. Pa. 1971); McLaughlin v. Mercury Freight Lines, Inc., 472 F.2d 1406 (5th Cir. 1973), *aff'g* 5 Fair Empl. Prac .Cas. 769 (S.D. Ala. 1972); Lea v. Cone Mills Corp., *supra* note 94.
255. Johnson v. Ryder Truck Lines, Inc., 12 Fair Empl. Prac. Cas. 895 (W.D.N.C. 1975).
256. United States v. United States Steel Corp., *supra* note 91.
257. WYO. STAT. § 27-262(7) (1967).
258. Banyai v. Salt Creek Freightways, *supra* note 209; Pfister v. Niobrara County, *supra* note 143; Shanafield v. Sheridan County School Dist. No. 1, *supra* note 230.
259. Pfister v. Niobrara County, *supra* note 143.
260. Kaufholz v. Cheyenne Fire Dep't., *supra* note 183.

Title VII cases. Preliminary relief, as previously discussed, may be sought where prompt judicial action is necessary to carry out the purposes of the Act.

Perhaps one of the greatest drawbacks of the FEPA is the failure to provide for preliminary injunctive relief. The FEPA does, however, provide for injunctive relief in the form of cease-and-desist orders upon a finding of discrimination.

Affirmative Relief

The most controversial and yet most effective forms of relief are the affirmative hiring ratios and minority preferences ordered by the courts to remedy the effects of past discrimination. Although Title VII counsels against preferential treatment,[261] this provision has consistently been interpreted not to preclude this affirmative relief.[262]

Affirmative relief is discretionary in nature; however, the affirmative relief ordered under Title VII has been extensive. Upon finding of past discrimination, the courts have ordered affirmative relief such as union job referrals or employee hiring on an alternate black-white, one-for-one basis.[263] Courts may refuse to grant such relief where the showing of past discrimination is insubstantial.

Affirmative action is specifically provided for in the FEPA and has been ordered by the FEC in some cases.[264] This affirmative action has included requiring the posting of notices,[265] reporting,[266] reinstatement and provision of

261. 42 U.S.C. § 2000e-2(j) (1970); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971).
262. United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970); Local 189, United Paperworkers & Papermakers v. United States, *supra* note 191.
263. *E.g.*, Local 53, Int'l Ass'n of Heat & Frost Workers v. Vogler 407 F.2d 1047 (5th Cir. 1969); United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970). Cases illustrating other examples of affirmative relief are: United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Southern Illinois Builders' Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972).
264. Banyai v. Salt Creek Freightways, *supra* note 209.
265. *Id.*
266. Kaufholz v. Cheyenne Fire Dep't, *supra* note 183.

proper training and equipment, as well as separate sleeping quarters and bathrooms for women and men.[267] The FEC has issued Affirmative Action Program Guidelines to assist employers concerned with eliminating the effects of discrimination in designing affirmative action programs and establishing goals and timetables.

Whether the affirmative action is taken pursuant to a court order, an executive order, or the concern of employers that charges of discrimination will be filed against them, the action may result in charges of "reverse discrimination" or discrimination against whites.[268] Where the charge resulted from preferential hiring quotas designed to remedy past exclusion of protected groups, the courts have found the affirmative action necessary to eradicate discrimination.[269] This does not mean, however, that an absolute preference be given to minorities, particularly when they are not qualified for the job. Affirmative action should mean instead that when applicants for employment or candidates for promotion are equally qualified, a preference should be given to a member of a group previously excluded by discriminatory practices as is necessary to achieve a reasonable ratio of males , females, minorities and non-minorities in the workforce.[270] The use of quotas has been limited in several cases to those situations where (1) there has been a clear cut pattern of long continued and egregious discrimination, and (2) the effect of reverse discrimination is not felt by or concentrated on an identifiable group of non-minorities.[271]

Other Types of Relief

As a general rule, punitive and compensatory damages are not awardable under Title VII. Title VII provides for awards of equitable relief which the court may deem appropriate, but the majority of the courts have held that punitive

267. *Id.*
268. McDonald v. Santa Fe Transp. Co., *supra* note 23.
269. Rios v. Enterprise Ass'n Steamfitters Local 638, *supra* note 261; United States v. Ironworkers Local 86, *supra* note 261.
270. United States v. N.L. Industries, Inc., *supra* note 187; Carter v. Gallagher, *supra* note 153.
271. EEOC v. Local 638, Sheet Metal Workers, 532 F.2d 821 (2d Cir. 1976); Kirkland v. N.Y. State Dep't of Correctional Serv., *supra* note 167.

damages were not intended to be a part of such relief.[272] Compensatory damages have also been found beyond the scope of the intended relief, although some courts have found such awards compensation for tangible economic losses.[273]

The FEPA does not provide for punitive and compensatory damages and no decisions have dealt with the issue.

CONCLUSION

Equal employment law in Wyoming is a new frontier, yet to be explored as so few cases have been brought in Wyoming. An excellent opportunity exists to shape this new body of law to both protect the individual from discrimination and take into account the management problems of the employer.

A number of statutory changes should be made to provide a better basis from which to work. The FEPA should be amended to include a prohibition against retaliation by an employer against any person who has asserted rights under the law. The threat of losing one's job or getting unfavorable references is very real and prevents aggrieved persons from seeking relief. A statute of limitations on the filing of complaints with the FEC is critical. Currently a person could complain of an incident which occurred four or five years ago, for example, and the necessary investigation would be very limited because records had been destroyed and witnesses could not be located. A burden is also placed on the employer to produce relevant documents that may be stored away to construct a possible defense. A provision for the award of attorney's fees should also be added to the FEPA; otherwise a plaintiff without sufficient funds to hire an attorney has no real means of enforcing his rights under the FEPA beyond filing a charge. Also, under existing law, an

272. EEOC v. Detroit Edison Co., *supra* note 122; Jiron v. Sperry Rand Corp., *supra* note 86; Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973). *But see* Dessenberg v. American Metal Forming Co., 8 Fair Empl. Prac. Cas. 290 (D.C. Ohio 1973).

273. Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974); Tooles v. Kellogg, 336 F. Supp. 14 (D. Nebr. 1972); Jiron v. Sperry Rand Corp., *supra* note 86; Waters v. Heublin, Inc., 8 Fair Empl. Prac. Cas. 908 (N.D. Cal. 1974).

employer who prevails cannot be compensated for the expense incurred to hire an attorney to defend against a baseless complaint.

The failure of the Wyoming legislature to repeal or extend to men the benefits of protective labor legislation expressly applicable only to women leaves the employer in a confusing position. Until such action is taken, the employer is subject to conflicting legislation, and compliance with the state law is not a defense to Title VII claims.

The advice an attorney provides the employer is an important factor in making the laws more beneficial. A negative attitude toward government regulation of free enterprise, particularly with regard to employment, is prevalent. A negative attitude cannot negate the laws, however, and the situation will be improved only by increasing awareness by employers of the requirements of the laws. They must realize these laws do not require hiring of unqualified persons. Moreover, the laws do not require retention of employees who are not satisfactorily performing their job because the are of a racial or ethnic minority or female. Failure to terminate such employees often builds the very kind of prejudice the laws are designed to eradicate and subjects the employer to charges of reverse discrimination. The FEC and the EEOC both provide materials and training on equal employment law and should be consulted for assistance in bringing an employer's employment practices into compliance.

The real question at this point is what the courts in Wyoming, both state and federal, will do to shape the law. Uncertainty is increased by recent indications of the Wyoming Supreme Court that types of discrimination which are difficult to prove may be disregarded. Until further decisions develop the trend of Wyoming law, the general case law based on Title VII is the only comprehensive source of equal employment law in Wyoming.