1973

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Using Statistical Evidence to Enforce the Laws Against Discrimination
Kenneth Montlack*

In actions brought under a variety of federal statutes barring racial discrimination, the federal judiciary has increasingly relied upon statistical evidence in determining the existence of unlawful discrimination. This article will seek to identify the nature and extent of such reliance on statistical evidence, discuss the reasons for the increasing use of statistical evidence, analyze the significance of the increase, and explore the potential for using statistical evidence in actions by the Ohio Civil Rights Commission.

The Role of Statistical Evidence in Decisions Rendered Under Title VII of the 1964 Civil Rights Act

Title VII of the 1964 Civil Rights Act\(^1\) prohibits discrimination due to race, color, religion, sex, and national origin by employers, labor organizations, apprenticeship committees and employment agencies. In a variety of decisions rendered under Title VII, the three levels of the federal judiciary have expressly utilized, evaluated and commented upon statistical evidence as a tool in proving unlawful discriminatory practices. These decisions have involved challenged pre-employment requirements,\(^2\) other failures or refusals to hire,\(^3\) no-transfer rules,\(^4\) unlawful seniority systems,\(^5\) closed recruitment systems,\(^6\) lack of upgrading opportunities,\(^7\) and union dis-


I wish to acknowledge my appreciation to the Office of Attorney General for consenting to the use, in portions of this article, of material previously researched in the course of my duties for the Office.


crimination in membership, and referral programs. In most such decisions the federal courts have identified, and declared unlawful, patterns of systemic racial discrimination; that is discrimination wherein apparently neutral criteria have the effect of perpetuating past racial discrimination in the employer's facility and/or in society at large. The courts' willingness to rely on statistics in fair employment cases both results from their more sophisticated approach to the substantive body of civil rights laws and provides an impetus for the continued development of that body of law.

Recognizing the inherent class nature of racial discrimination, numerous federal courts have held that specific instances of disparate racial treatment are not required to prove the existence of acts, practices or patterns which violate Title VII." In United States v. International Brotherhood of Electrical Workers, Local 38, the Sixth Circuit Court of Appeals, reversed the trial court in the Northern District of Ohio, ordering it to retain jurisdiction of the matter, despite a showing that the local union had elected new and enlightened leadership and was taking positive acts to integrate the local. The Sixth Circuit, acknowledged those commendable union actions, taken subsequent to the original district court finding of unlawful discrimination, but also noted evidence showing that only

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12 428 F.2d 144 (6th Cir. 1970).
a small proportion of the union's work referrals were black, as contrasted to the many qualified black tradesmen in the Cleveland area. The court ruled that specific discriminatory acts against individuals were not required as a prerequisite for the trial court's retention of jurisdiction, and that its concern over the continuing low proportion of minority group referrals did not violate the prohibition in Title VII of preferential treatment due to racial imbalances.13

In Jones v. Lee Way Motor Freight14 the evidence revealed that all of the black drivers were confined to lower paying city routes, that 80 percent of the whites were in the better paid "line drivers" (i.e. inter-city drivers) category and that a company "no-transfer" rule was enforced "equally" against the drivers in both categories. The court held that such facts established a prima facie case of unlawful discrimination and reasoned as follows:

True, no specific instances of discrimination have been shown. However, because of the historically all-white make-up of the company's line driver category, it may well be that Negroes simply do not bother to apply.15

In Lea Cone Mills Corp.16 a district court in North Carolina noted that prior to July, 1965, no black females had been employed at the employer's facility, and that only seven black females were so employed between July, 1965 and November, 1966 — along with 22 white females, 53 black males, and 85 white males. The trial court, in finding that the defendant had discriminated against black females, did not require evidence as to the number of black females who had applied for employment.17 The court stated:

While the defendant's Personnel Policy Manual ... directs the selection of applicants for employment without regard to race, statistics, which often tell more than words, effectively refute the claim that the policy was practiced with respect to Negro females. ...18

In this instance, the court assumed that if black females had not, in fact, applied for employment, then the most plausible explanation

13 Id. at 149-51.
14 431 F.2d 249 (10th Cir. 1970).
15 Id. at 245, 247.
17 Id. at 97, 102.
18 Id.
for this was the knowledge by potential applicants that such efforts would be futile. On appeal the Fourth Circuit Court of Appeals affirmed these findings.

In perhaps the most significant decision under Title VII expressly emphasizing statistical evidence in lieu of specific incidents of disparate treatment, the Fifth Circuit Court of Appeals reversed and criticized the lower court ruling in United States v. Jacksonville Terminal Co. The appellate court held that while no precise mathematical formula was applicable in Title VII "pattern and practice" actions, the government was not tied to the "single or isolated incident barrier." Instead, the Court found, as probative, evidence that the defendant failed to promote blacks, while promoting substantial numbers of whites; that, both before and after the effective date of Title VII, defendant's facility contained "black" departments and "white" departments; and that, in a work force with about 50 percent blacks, whites generally held the better jobs. Curiously, the court's opinion first held that the government's statistics did not establish a prima facie case; however, after setting forth those statistics, the court stated that such evidence, absent defendant's explanations in rebuttal, should have been given substantial weight by the trial court, and did indicate that the company equated job classifications with race.

The Jacksonville Terminal Co. opinion also enunciated a second important principle which complements the use of statistical evidence: that lack of "intent" or presence of "good faith" does not constitute a defense to unlawful discriminatory practices. This principle also merits discussion, here. Prior to the Fifth Circuit opinion in Jacksonville Terminal Co., numerous other federal opinions, expressly relying upon statistical evidence, recognized that specific evidence of unlawful motivation or evil intent was not necessary in proof of Title VII violations.

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19 Id.
20 438 F.2d 86 (4th Cir. 1971), aff'g in part and vacating (trial court's refusal to grant attorney's fees) in part, 301 F.Supp. 97 (M.D.N.C. 1969).
21 451 F.2d 418 (5th Cir. 1971), cert. denied, 466 U.S. 906 (1972).
22 Id. at 441.
23 Id. at 441-42.
24 Id. at 441.
25 Id. at 442.
26 Id. at 442, 443.
The United States Supreme Court enunciated this principal in its landmark Title VII decision, *Griggs v. Duke Power Co.* In the *Griggs* case, the court cited the 1960 census for the state in which the defendant's facility was located, which census indicated that 34 percent of the white males had completed high school as compared to 12 percent of the black males; and that the defendant, against a pre-Act background of disparate treatment of black applicants, began utilizing two unvalidated tests and a high school diploma requirement for employment, at the effective date of Title VII.

The Court held that because (1) such requirements excluded a disproportionate number of minority group applicants and (2) the defendant was unable to show that such criteria were job-related, the defendant-employer had violated the provisions of Title VII. The Court rejected defendant's claim that it did not intend to discriminate, and held that under Title VII,

> ... practices, procedures or tests neutral on their face, and even neutral on terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. ...

Both by its express wording and the inferences which it drew from the presented statistical evidence, the *Griggs* decision reinforced the crucial rule of interpretation in Title VII decisions: procedures, standards or conditions in an employment system which result in an adverse impact upon a protected class are unlawfully discriminatory, unless the employer can establish the business necessity for such procedures. By probing the adverse impact of employment policies, rather than requiring plaintiff to establish (1) overt racial prejudice or (2) disparate treatment as between one identified minority group person and a second majority group person, decisions now tend to focus upon the discriminatory conditions

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29 Id. at 425-31.
30 Id. at 430.
32 For discussion of employers' burden of establishing business necessity under Title VII see United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971); United States v. Jacksonville Terminal Co., 431 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972) necessity, not established; Spurlock v. United Airlines, ___F.2d_____, 5 E.P.D. 7996 (10th Cir. 1972), necessity established.
in our society which, without business justification, have been incorporated into employment systems. This change removes the often impossible burden upon the plaintiff to "prove" evil intent or demonstrate disparate treatment, as against the panoply of possible defenses that the minority group member was less "qualified," as measured by any number of objective or subjective criteria. 33

Thus, in Gregory v. Litten Systems, Inc. 34 a federal district court in California, preceding the Griggs decision by eight months, declared unlawful the defendant-company's practice of requiring applicants to reveal their arrest records. The court noted that statistical evidence established a higher frequency of black arrests as compared to white arrests, and that the company was unable to show a business necessity as justification for the policy. Similarly, in Johnson v. Pike Corporation of America, 35 the same district court held that an employer's discharge of a black employee with several garnishments of his wages under a company rule requiring employees to conduct their personal finances in such a way as to avoid garnishments amounted to unlawful discrimination on account of race, even though the policy was adopted in good faith with no intent to discriminate and was racially neutral on its face and was objectively and fairly applied. While the adverse impact of the company rule is not debated, this case has been criticized as expanding the "business necessity" rule to an unreasonable limit. 36

Title VII decisions relying on statistical evidence invariably look to that data as the basis for broad affirmative relief. 37 Two decisions requiring employers to expend literally millions of dollars to correct unlawful seniority systems typify this trend. Quarles v. Phillip Morris, Inc. 38 was the first such case in which an entire

One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious by methods subtle and elusive — for we deal with an area in which "subtleties of conduct" . . . play no small part.

seniority system was declared unlawful. In Quarles the court reviewed the company's increased proportion of new black employees from 1.9 percent in 1961 to 6.5 percent in 1965, and to approximately 30 percent in 1966 and 1967. The trial court held that the prior discrimination in hiring, reflected by the earlier statistics, combined with a departmental seniority system, had the effect of perpetuating past discrimination by "locking in" newly hired black employees. The court found the entire seniority system unlawful, and ordered that it be modified.

To the same effect in United States v. Bethlehem Steel Corp., the Second Circuit Court of Appeals discounted company protests that the proposed group relief would impair plant safety and efficiency and damage employee morale.

In other cases, courts have required similarly far-reaching changes in union membership, referral procedures and apprenticeship policies, based largely upon statistical evidence presented. It is noteworthy that the courts have generally supported the discovery and investigation efforts required to reach statistical and other evidence beyond those specific facts limited to a named plaintiff's charge. Obviously such support is invaluable to (1) the gathering of statistical data and (2) the designing of appropriate relief. In this regard the Sixth Circuit Court of Appeals, in Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission, ruled that the fullest inquiry into an employer's pattern of action, beyond the complainant's own circumstances, is permissible under Title VII, because racial discrimination is, by definition, a class matter. The Court reasoned as follows:

... evidence concerning employment practices other than those specifically charged by Complainants may be properly considered by the Commission in framing a remedy. Title

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31 Id.
32 Id.
33 United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).
36 418 F.2d 355 (6th Cir. 1969).
37 Id. at 358.
VII of the Civil Rights Act of 1964 should not be construed narrowly, and the Commission may, in the public interest, provide relief which goes beyond the limited interest of the charging party. . . .

A number of courts in Title VII actions have rejected the plaintiffs' statistical evidence as insufficient to establish a prima facie case of unlawful discrimination, or, having acknowledged that the statistics were sufficient, then determined that the defendant had rebutted those statistics by sustaining their burden of establishing a business necessity. In United States v. National Lead Company, the Eighth Circuit Court of Appeals affirmed the trial court's refusal to issue a preliminary injunction based upon plaintiff's showing that only three of the defendant's 97 foremen were black, that 32 of the black employees were regarded by the company as promotable to the foreman's positions, but that none had been promoted during the prior two years. The appellate court reasoned that the district court's exercise of its discretion in refusing to issue the preliminary injunction was not clearly erroneous and that the plaintiff's facts in support of its motion had been only partially developed.

In Richardson v. Indiana Bell Telephone Co., a federal trial court in Indiana rejected plaintiff's showing that blacks comprised slightly more than 67 percent of the population in the county where the defendant-company was located, while comprising only about one-half that proportion of the company's work force. Looking to evidence of the defendant's minority group recruitment efforts, the court noted that no evidence as to the proportion of blacks among those applying for employment had been introduced. In Terrell v. Feldstein Co. the Fifth Circuit recently affirmed the lower court's refusal to consider proferred statistical evidence, holding that refusal not clearly erroneous because such evidence did not appear relevant to the company's alleged refusal to promote the individual plaintiff. Although the appellate court, in the short per curiam

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46 Id.


50 Id. at 939.


52 Id.

53 F.2d , 5 E.P.D. 8023 (5th Cir. 1972).
opinion, did recognize the probative value of statistics in establishing motive, intent or purpose, the opinion may be quite significant in view of the broad interpretation of Title VII usually extended by the Fifth Circuit panels.

In *Spurlock v. United Airlines, Inc.* the Tenth Circuit Court of Appeals held that plaintiff’s evidence, only 9 of the 5,900 flight officers in defendant’s employ were black, did indeed establish a prima facie case of unlawful discrimination. The court ruled, however, that the airline met its heavy burden by showing that its requirements of 500 hours of flight time and a college degree were job related. This opinion also appears significant in view of the court’s reluctance to nullify the airline’s pre-employment requirements for positions involving great responsibilities to public safety. The *Spurlock* decision may represent a practical limitation in the application of the Griggs “adverse impact-business necessity” doctrines.

The restrained enthusiasm with which some courts greet statistical evidence is reflected in *Mabin v. Lear Siegler, Inc.* Here, the Sixth Circuit Court of Appeals recently affirmed a lower court finding of discrimination based, in part at least, on statistical evidence. The court, while recognizing the value of such evidence, somewhat hedged its bet by reasoning that the statistical information was not the controlling evidence upon which the trial court had relied in reaching its decision.

Such reservations notwithstanding, the clear trend in major Title VII actions has been the acceptance of statistical evidence showing low minority group participation in the employer’s work force as establishing a prima facie case of unlawful discrimination. Prior to the decision in *Griggs v. Duke Power Co.*, the Fifth Circuit Court of Appeals, in *Parham v. Southwestern Bell Telephone Co.*, evaluated employment statistics indicating the low pro-

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54 F.2d ..., 5 E.P.D. 7996 (10th Cir. 1972).
55 Id.
56 457 F.2d 806 (6th Cir. 1972).
57 Id.
60 433 F.2d 421 (8th Cir. 1970).
portion of blacks in each position, each job category, and throughout the defendant's facility; then concluded:

We hold as a matter of law that these statistics, which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the Civil Rights Act of 1964.61

In explaining their reliance on statistical evidence, a number of courts cite the appellate court holding in State of Alabama v. United States,62 that "in the problem of racial discrimination, statistics often tell much and courts listen".63 Thus, in decisions rendered under Title VII of the 1964 Civil Rights Act, the weight accorded to statistical data generally reflects (1) the degree of disparity revealed, (2) the relevance of the statistical data to the issues and (3) the sufficiency of the employer's explanations of such disparities. To this effect the trial court in United States v. Bethlehem Steel Corp.,64 commented upon the possible hazards in evaluating the presented statistical evidence, then concluded:

But the difficulties inherent in the process [of drawing inferences] should not render the use of such statistics improper. Probabilities guide men in their everyday affairs. Evidence of statistical probability may likewise be considered by a finder of fact in determining the questions presented . . . [I]n some cases the statistics might raise such a compelling inference in the absence of any contrary explanation as to make out a prima facie case of discriminatory patterns or practices.65

While greater sophistication in both the presentation and evaluation of statistical evidence can be expected, it is clear that such evidence will continue to occupy center stage in future Title VII litigation.

The Role of Statistical Evidence In Decisions Rendered Under Other Federal Civil Rights Statutes

In actions commenced under the "Reconstruction" civil rights acts in 42 U.S.C. §§1981, 1982, and 1983 and the Fourteenth Amendment to the United States Constitution, the same trend towards extensive reliance on statistical data is evident. Decisions holding

61 Id. at 426.
62 304 F.2d 583 (5th Cir. 1960), aff'd per curiam, 371 U.S. 37 (1962).
63 Id. at 586.
65 Id. at 992.
that public employers administered discriminatory examinations to applications for positions as policemen, firemen, teachers, and bus drivers, and that public employers discriminated in teacher assignments and discharges, are largely based on statistical evidence. To the same effect are other major decisions identifying unlawful educational systems, unlawful jury selection and school board membership procedures, discriminatory public and low-income housing tenant and site-selection procedures, private housing discrimination, denial of voting rights, withholding of hospital professional privileges and discriminatory allocation of municipal services.

The courts have extensively relied upon statistical data to identify patterns of willful discrimination. While such patterns know no geographical boundaries, the majority of successful challenges to willful discrimination arose in the southern states. In a series of actions challenging school districts accused of applying discriminatory standards for black and white teacher dismissals, following court ordered desegregation of the system, three circuit courts have extensively relied upon statistical data to identify patterns of willful discrimination. While such patterns know no geographical boundaries, the majority of successful challenges to willful discrimination arose in the southern states. In a series of actions challenging school districts accused of applying discriminatory standards for black and white teacher dismissals, following court ordered desegregation of the system, three circuit

50 Jackson v. Whearly School Dist., 430 F.2d 1359 (8th Cir. 1970).
52 Turner v. Foucha, 356 U.S. 346 (1970); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966); Muniz v. Bero, 434 F.2d 697 (5th Cir. 1970); Ford v. White, 430 F.2d 951 (5th Cir. 1970).
courts of appeals have held that those defendant school systems with a long history of segregation, which had dismissed only black teachers after court-ordered desegregation eliminated various teaching positions, were required to present "clear and convincing proof" to justify their actions where the remaining proportion of black faculty to white faculty was significantly less than the proportion of black students to white students.\textsuperscript{79}

\textit{Turner v. Fouche,}\textsuperscript{80} decided by the Supreme Court in 1970, recites statistical data and the rebuttal explanations of such data which are typical of the "prima facie" decisions. In \textit{Turner} the black residents of Taliaferro County Georgia, challenging the methods used to select school board and grand jury members, showed that blacks comprised 60 percent of the county's population, that only 6 of the 23 grand jury members were blacks, and that disproportionate numbers of potential black members were removed from the jury list as being "unintelligent" or "not upright."\textsuperscript{81} The Supreme Court held:

In the absence of a countervailing explanation by the appellees (Taliaferro County, Georgia) we cannot say that the under-representation reflected in these figures is so in-substantial as to warrant no corrective action by a federal court charged with the responsibility of enforcing constitutional guarantees . . . \textsuperscript{82}

The court held that the appellants had demonstrated a sufficient disparity between the percentage of Negro residents in the county as a whole, and of blacks on the newly constituted jury list, which disparity resulted from the highly subjective nature of the selection process.

In \textit{Cyprus v. Newport News General and Nonsectarian Hospital Association,}\textsuperscript{83} the Fourth Circuit Court of Appeals upheld the challenge of black physicians denied hospital privileges. Evidence showed that 70 percent of the white physicians, and no blacks, retained such privileges. The Court found that a prima facie in-

\begin{itemize}
  \item \textsuperscript{79} Jackson \textit{v. Wheatsley School Dist.}, 430 F.2d 1359 (8th Cir. 1970); North Carolina Teachers Ass'n \textit{v. Bd. of Educ.}, 393 F.2d 736, 743 (4th Cir., 1968); Rolfe \textit{v. County Bd. of Educ.}, 391 F.2d 77, 80 (6th Cir. 1968; Moore \textit{v. Bd. of Educ.}, 448 F.2d 709, 711 (8th Cir. 1971).
  \item \textsuperscript{80} 396 U.S. 346 (1970).
  \item \textsuperscript{81} \textit{Id.} at 349-358.
  \item \textsuperscript{82} \textit{Id.} at 359, 360.
  \item \textsuperscript{83} \textit{Id.}
  \item \textsuperscript{84} 375 F.2d 648 (4th Cir. 1967).
\end{itemize}
ference of discrimination had been established and that no further proof of unequal treatment based on race was required, the burden of proof having been "thrown to the party having the power to produce the facts" necessary to refute the inference.5

In Muniz v. Beto,6 the Fifth Circuit Court of Appeals reversed the trial court, which had refused to issue a writ of habeas corpus, upon a showing by the Mexican-American petitioner that approximately 3 percent of the grand jury which had indicted him 28 years previously were Mexican-Americans, as compared to their 15 percent-20 percent representation in the county population. The Muniz decision held that this cited disparity established an unrebutted inference of unconstitutional behavior, and that such statistics "do more than speak for themselves—they cry out 'discrimination' with unmistakable clarity."7

The decisions in the teacher assignment cases, Turner, Cyprus, and Muniz, expressly or implied examined racially motivated practices; however, as court challenges to state and local action "came north" and developed a new emphasis on discrimination as an unjust effect, a new trend in §§1981-1983 decisions paralleled, then incorporated, the Title VII case precedent.

It is now well-settled that the use of sufficiently damning statistical evidence precludes the necessity that plaintiff show specific instances of disparate treatment8 or wrongful intent,9 and that such evidence establishes a prima facie case of unlawful discrimination under §§1981-1983.10 In Hansen v. Hobson,11 District Court Judge J. Skelly Wright stated:

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5 Id. at 655.
6 434 F.2d 697 (5th Cir. 1970).
7 Id. at 700; accord, Labat v. Bennett, 365 F.2d 698, 712 (5th Cir. 1965) granting writ of habeas corpus based on unexplained, "very decided variations in proportions of Negroes and whites on jury lists from racial proportions in the population."
Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and public interest as the perversity of a willful scheme.92

Two years before the Supreme Court decision in Griggs, a federal district court in Massachusetts reviewed data which showed that pre-employment tests administered to applicants for bus driver positions had an adverse impact upon minority group applicants. The court held that the evidence raised an unrebutted inference of "a de facto pattern of classification."93

In seven recent civil rights actions the federal courts, relying upon statistical evidence, have applied the adverse impact rule to non-Title VII actions, with differing results. Because of their great effect upon public employment patterns, and their erosion of case law precedent permitting application of statutory standards to private citizens as against constitutional standards to governmental agencies, these ruling are noteworthy. In Chance v. Board of Examiners,94 the Second Circuit Court of Appeals evaluated data showing that (1) majority group applicants for positions as principal and vice principal in the New York school system were successful in the promotional examinations at a rate of one and one-half to twice that of minority group applicants and (2) only 1.3 percent of the principals in that system were black as compared to 16.7 percent in Detroit and Philadelphia, 8.0 percent in Los Angeles, and 6.9 percent in Chicago. Against defendant's arguments that many non-discriminatory factors could explain such disparity, the court held that the school system had not sustained its burden of proving the validity of those tests.95

In Castro v. Beecher,96 the First Circuit Court of Appeals also compared two sets of statistics showing that (1) 16.3 percent of the Boston population were black, while only 2.3 percent of its police department were black and (2) 65 percent of the whites

(Continued from preceding page)

Carolina Teachers Ass'n. v. Bd. of Educ., 393 F.2d 736, 743 (4th Cir. 1968); Rolfe v. County Bd. of Educ., 391 F.2d 77, 80 (6th Cir. 1968); Moore v. Bd. of Educ., 448 F.2d 709, 711 (8th Cir. 1971); Shield Club of Cleveland ....... F.Supp. ....... 5 E.P.D. ¶8406 (N.D. Ohio 1972).

93 Id. at 497.
95 458 F.2d 1167 (2nd Cir. 1972).
96 Id. at 1176-78.
97 459 F.2d 725 (1st Cir. 1972).
had passed the challenged police entrance examination, while only 25 percent of the blacks were successful. In holding these police examinations to be unlawful, as not rationally related to the positions in question, the court discarded arguments that many whites also suffered from the adverse impact of the examinations. The appellate court held that the low rating achieved in the examination by some majority group persons who were outside of the "mainstream white" educational, social and cultural establishment did not preclude the findings of discrimination. The court reasoned that it is not necessary in such cases to show that blacks and Spanish surnamed Americans have a monopoly on the discriminatory impact shown.\textsuperscript{7} Also significant was the court's ruling that where a racial impact is documented, the public employer must meet the same burden of proof as noted in \textit{Griggs}. It may not rely upon any "reasonable version of the facts" as a constitutional defense, but must come forward with "convincing facts" showing that the challenged job qualifications were job related.\textsuperscript{9} Notwithstanding this broad ruling, the First Circuit expressed its uneasiness with the presentation of combined statistics showing the adverse impact of separate requirements: (1) a high school diploma or its equivalency and (2) an honorable discharge from the military service.\textsuperscript{99}

In a Third Circuit opinion invalidating police entrance examinations,\textsuperscript{100} evidence showing that whites had approximately 1.82 better chance of passing the required written tests as compared to blacks was excepted as probative of unlawful discrimination. However, the district court's preliminary injunction, prescribing a ratio hiring system of one black for each two whites, was vacated due to the appellate court's dissatisfaction with the lack of evidence in the record as to the significance of the various statistical data and examination requirements.\textsuperscript{101}

In \textit{Allen v. City of Mobile},\textsuperscript{102} the Fifth Circuit Court of Appeals recently affirmed the district court finding that the Mobile Police Department was guilty of unlawful discrimination in its policy of racial identification, racially motivated police assignments, and maintenance of an unlawful seniority system. At the same time the

\textsuperscript{7} Id. at 731.

\textsuperscript{9} Id. at 732, 733; Recently cited by the District Court of Northern Ohio in \textit{Shield Club v. City of Cleveland}, ..., F.Supp ..., 5 E.P.D. \$8406 (N.D. Ohio 1972), where Judge Thomas held that the disparity between 26.3 per cent of minority group failures as against 4.5 per cent white failures on the police entrance examination established an unrebutted prima facie case of unlawful discrimination.


\textsuperscript{101} Id.

\textsuperscript{102} 466 F.2d 122 (5th Cir. 1972).
appellate court affirmed the ruling that the police promotional examinations were, in fact, job-related in that they tested the kinds of necessary police knowledge gained through experience on the job. Circuit Judge Goldberg, in a vigorous dissent to this ruling, argued that defendants failed to produce a true validation study sustaining their burden of proof. But, beyond the question of test validation, the dissent noted the grossly disparate promotion rates of black vis à vis white policemen and the many individual acts of intentional discrimination proven during the trial. Looking to decisions in Castro v. Beecher, Chance v. Board of Examiners, and Carter v. Gallagher the judge stated that those courts had placed even more emphasis on bare statistics without a showing of willful acts of discrimination, as proven in Allen. The judge also argued that because the Griggs interpretation of Title VII was directly applicable to §1983 cases, the City of Mobile ought to have been held to a stricter burden of proof, which would require defendants to show a "manifest relationship" between the promotional qualifications and the job duties, rather than merely showing a rational relationship under the Fourteenth Amendment.

In the tortuous course of the Carter v. Gallagher decisions the courts wrestled with the nature of both the adverse impact shown and the defendant's burden of proof required in actions challenging the constitutionality of statutes. In the initial district court decision, the court, citing sets of statistical evidence showing adverse impact, declared as unlawful (1) defendant's use of arrest and conviction records on the basis that such standards were not reasonably related to the performance of the firemen's job duties and that defendant had established no "compelling state interest" in such requirements; (2) the prerequisite high school education or its equivalent, on the same basis; (3) the five years' residency requirement as a condition to allowing the veterans' preference on

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103 459 F.2d 725 (1st Cir. 1972); 458 F.2d 1167 (2d Cir. 1972); ... F.Supp...., 3 E.P.D. ¶8205 (D. Minn. 1971).

104 Id.; Judge Goldberg's dissent contains the following comments which, if expanded by the courts could further increase the burden of defendants in establishing business necessity.

So-called 'objective' tests were once hailed as the definite answer to 'subjective,' often discriminatory, hiring or promotion procedures. But it has been increasingly clear as analysis becomes more sophisticated that there can be other, much more subtle, forms of discrimination lurking in 'objective' testing. It is now recognized that a test can be impeccably 'objective' in the manner in which the questions are asked, the test administered and the answers graded, and still be grossly 'subjective' in the educational or social milieu in which the test is set.

civil service tests, such requirement having a discriminatory effect on black veterans, shown to move more often; and (4) placing an upper age limit of 30 in the Civil Service Commission plan, on the basis that this requirement also adversely affected minority group persons subject to past discrimination by defendants. A three-judge panel declined to issue an injunction restraining the exercise of the Minnesota statute reciting the residency requirement for veterans preference, and referred the matter to a one-judge district court.

That court declared the statute to be unconstitutional. Citing Shapiro v. Thompson, the decision held that the city had failed to sustain its burden of showing a compelling government interest (emphasis by court). The district court rejected defendant's argument that a showing of "rational relationship" constituted their burden of proof. Again citing Shapiro the court declared that where fundamental personal rights are involved, the rational relationship test is not appropriate. Finally, the Eighth Circuit Court of Appeals in Carter v. Gallagher affirmed the initial trial court ruling on a variety of pre-employment requirements. The appellate court noted that none of the 535 fire fighters in Minneapolis were black, Indian or Mexican-American; that blacks constitute 6.44 percent of the Minneapolis population; that no substantial evidence to rebut the inference of racial discrimination had been produced; that a finding of willful or intentional discrimination under §§1981 and 1983 was not necessary under the applicable Grigg standards; and that the testing requirements of the city were similarly discriminatory. On the basis of these facts the court, on rehearing, issued a broad injunction which included suspension of "otherwise valid" state requirements and a plan for ratio hiring of minority group persons.

In Kennedy Park Homes Association v. City of Lackawana, New York, a Second Circuit Opinion and Garrett v. City of Hamtramck a Michigan federal district court ruling, both actions under Title VIII of the 1968 Civil Rights Act (Federal Fair Housing Act), the courts noted statistical data showing that urban renewal projects

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107 Id.
110 Id. at 629-30.
111 452 F.2d 315 (8th Cir. 1971).
112 4 E.P.D. ¶7616 (8th Cir. 1972).
113 436 F.2d 108 (2d Cir. 1970).
had caused the concentration of blacks in one predominantly black ward (Kennedy) and the displacement of blacks to surrounding communities (Garrett). Both courts also noted the role of private housing discrimination in victimizing the affected blacks. The courts’ injunctive relief in both cases reflects the trend in housing actions, also, prohibiting public agencies from adopting a passive stance in the face of private discrimination which their policies may perpetuate.

These seven cases reveal that courts are becoming sensitive to two major issues: (1) the relation of Title VII standards to non-Title VII civil rights actions; and (2) the growing sophistication, in non-Title VII actions, also, of the analysis given to plaintiffs’ statistical evidence.

Using Statistical Evidence Under Ohio’s Laws Against Discrimination

It is essential that Ohio’s Laws Against Discrimination (Ohio Revised Code, Chapter 4112) be enforced with the same vigor as the federal civil rights acts. All of the “high impact” federal decisions, considered together, affect only a small proportion of the protected class under those acts. Although the Equal Employment Opportunity Commission is currently preparing to meet its new litigation responsibilities under Title VII as amended, Ohio cannot expect that the federal agency will be capable of fully resolving the systemic discriminatory patterns in Ohio. William H. Brown, III, Chairman of the EEOC, recently reported that the estimated incoming charges of discrimination to the EEOC would surpass 45,000 during the present fiscal year and could reach 55,000 by next year.

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115 This trend can be expected to continue, with the 1972 amendments to Title VII of the 1964 Civil Rights Act, which eliminates the exemption of state and local political subdivisions from coverage. See former §701(a), (b), 42 U.S.C. §2000e (1970), as amended, 42 U.S.C.A. (Supp. 1973).

116 Address by John J. Ross, Esq. of Hogan and Hartson, Washington, D.C., to the Dallas, Texas, session of the Practicing Law Institute of Equal Employment Opportunities Compliance, February 15-16, 1973, echoed the exasperation felt by many attorneys representing employers, relative to the courts’ acceptance of unrefined statistical data, which Mr. Ross believes to be often unreliable measures of compliance with the law. He also noted, as unreliable, statistics seeking to identify Spanish-Surnamed Americans’ participation in employers’ work forces.

The Sixth Circuit Court of Appeals seems to share these views: see Mabin v. Lear Siegler, Inc. 457 F.2d 806 (6th Cir. 1972), and an earlier decision in Lewis v. Grand Rapids, 222 F.Supp. 349 (W.D. Mich. 1963), where the court reversed the trial court ruling that the disproportionately low number of liquor licenses granted to blacks, relative to their representation in the population, raised an inference of unconstitutional discrimination by the licensing authority.

117 See former §706(f) (1) of the CIVIL RIGHTS ACT of 1964, as amended, 42 U.S.C. §2000e-5 (Supp. 1973), authorizing EEOC to bring actions in federal district court following unsuccessful conciliation efforts; see also former §707(c) of the ACT, 42 U.S.C. §2000e-6 (b), terminating the U.S. Attorney General’s role in Title VII litigation two years after the effective date of the Act, as amended.

118 E.P.D. LAB. L. REP. No. 26 (February 8, 1973).
Thus, it is apparent that no state should assume that its responsibilities to eliminate unlawful discrimination will be, or can be, performed by the federal government.\textsuperscript{119} We may also conclude from Chairman Brown's report that the great majority of charging parties under Title VII ought not to rely on EEOC's resources in seeking judicial relief. It is a fact of life that at present most attorneys, who are necessary prerequisites to a successful action, are either unprepared or reluctant to litigate such cases. Notwithstanding a disappointing history of anti-discrimination enforcement on state and local levels generally,\textsuperscript{120} there is now reason to hope that Ohio will implement the mandates of the Ohio Constitution\textsuperscript{121} and the General Assembly\textsuperscript{122} to meet the standards of law enforcement recognized by the courts of our country.

Ohio's laws against discrimination prohibit discrimination based on race, color, religion, national origin and ancestry in employment, public accommodations, and housing.\textsuperscript{123} Upon receipt of a charge of discrimination, and in employment cases, upon the initiation of the Ohio Civil Rights Commission, that agency undertakes a preliminary investigation to determine whether it is probable that unlawful discrimination has occurred. If such investigation reveals that the respondent (the party charged) has caused or permitted any unlawful discriminatory practices, the Ohio Civil Rights Commission shall attempt to eliminate those practices by informal means of conference, conciliation and persuasion. When unsuccessful, the commission issues a formal complaint and notice of administrative hearing. That hearing is a complete adjudicatory proceeding before a hearing examiner appointed by the agency. Based on the record at hearing, including testimony, documentary evidence, written and oral argument, and the hearing examiner's advisory report, the commission issues its order. That order either (1) dismisses the complaint where it has failed to sustain the burden of proving unlawful discrimination, or (2) upholds the complaint and provides appro-
The final orders of the commission are subject to judicial review, based upon a test of reliable, probative and substantial evidence on the record of the administrative hearing. All parties have the right of further appeal.

Under this procedure the Ohio Civil Rights Commission is uniquely equipped to investigate and litigate class-action issues, and to provide relief which extends beyond "settlement" of an individual complainant's grievance to (1) eradication of the underlying unlawful conditions giving rise to the charge, as well as (2) the requirement of such further affirmative action as will effectuate the purposes of Ohio's Laws Against Discrimination. The substantive provisions of Chapter 4112 of the Ohio Revised Code are remarkably similar in phraseology, scope and purpose to Title VII of the 1964 Civil Rights Act, as amended (employment) and to Title VIII of the 1968 Civil Rights Act (housing). This identity of purpose between the Ohio and Federal Civil Rights Act was recognized by the Ohio Supreme Court in Weiner v. Cuyahoga Community College District, where the court noted the "strong moral commitment" of both divisions of government to equal opportunity.

These facts, together with the mandate of the General Assembly that all provisions of Chapter 4112 are to be construed liberally for the accomplishment of the chapter's purposes, authorize, indeed obligate, Ohio's agencies to utilize decisions interpreting the federal acts in administrative and judicial actions under Chapter 4112.

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124 OHIO REV. CODE §4112.05 (b) (Page 1972).
125 OHIO REV. CODE §4112.06 (Page 1972).
127 See OHIO REV. CODE §4112.04 (B) (3) (Page 1972) granting full investigatory subpoena, and interrogatory powers consistent with the rules of discovery applicable to civil actions in common pleas courts (Ohio R. Civ. P. 26 sets forth broad discovery authority consistent with its federal counterpart); see also OHIO REV. CODE §4112.05 (E) (Page 1972) providing that reliable, probative and substantial evidence — rather than the rules of evidence applicable in courts of law or equity — shall be considered in Commission hearings to determine the existence of unlawful discrimination, and Rule 5.01 of the Commission's Rules and Regulations directing that the Commission determine during investigation whether it is probable that any unlawful practices have occurred (Emphasis added).
128 See OHIO REV. CODE §4112.05 (G) (Page 1972) authorizing such relief where the Commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, whether against the complainant or others. See n. 129, infra, regarding standards of relief in employment cases.
130 OHIO REV. CODE §4112.08 (Page 1972).
131 Liberally construing a statute the courts (1) resolve all reasonable doubts regarding its application to the particular case in the affirmative, Dennis v. Smith, 125 Ohio St. 120, 124-125, 180 N.E. 638, 640 (1932); (2) adopt the most comprehensive meaning of the terms used in the statute to accomplish its aims, Schaefer v. Bernhardt, 76 Ohio St. 443, 448-449, 81 N.E. 640, 641 (1970); (3) avoid any interpretation to narrow or technical as to defeat the rights granted by the statute, 50 OHIO JUR. 2d Statutes, §278 at 263-64.
Of course, the use of statistical evidence in the proceedings of the Ohio Civil Rights Commission is expressly recognized under Ohio Revised Code §4112.05(E).

Notwithstanding the great potential in Chapter 4112 for effective law enforcement, the best that can be said of Ohio's efforts during the ten years following the enactment of this chapter in 1959, is that the State, recording few significant judicial decisions, at least avoided establishing "bad law" in this field. The winds of change have not neglected Ohio, however. The present Attorney General has increased his staff of attorneys representing the Ohio Civil Rights Commission from one part-time counsel to nine full-time Assistant Attorneys General; created a separate Civil Rights Division to litigate under Chapter 4112; accepted new responsibilities in equal employment opportunity enforcement under an increased grant from the EEOC; and has expressly recommended to its client agency, the Ohio Civil Rights Commission, that it provide full and effective relief pursuant to federal standards in its proceedings.132 By the same token the Ohio Civil Rights Commission, with a newly appointed commissioner and chairman, has accepted the challenge of aggressive law enforcement.

One result of these changes is the agencies' effective use of statistical evidence in Chapter 4112 actions. In the Greater Cleveland area, such evidence was used at hearings relative to alleged real estate company practices of steering black home seekers into already integrated sections of some suburbs, while steering whites away from those sections.133 Based, in part, upon statistical evidence which may reflect the operation of an unlawful seniority system, the Ohio Civil Rights Commission is currently investigating the employment practices of a large steel company.134 A hearing is now scheduled against a public employer, based upon the commission's complaint reciting the concentration of black employees in its Solid Waste

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1962) and (4) consider the statutory objectives, legislative history, laws upon the same or similar subject, the consequences of a particular construction, and the administrative construction of the statute, Crow v. DeLuca, 29 Ohio St.2d 53, 58. 278 N.E.2d 352, 356 (1972); OHIO REV. CODE §1.49 (Page 1972); Miller Properties, Inc., v. Ohio Civil Rights Comm'n. ...... Ohio App.2d ......, E.O.H. 115, 020 (Franklin County St. of App. 1972).

132 See OHIO ATTN. GEN. OP. 72-006, recommending that Ohio Civil Rights Commission, where appropriate, require (1) use of separate index of minority group applicants as employment source, before consulting other sources where necessary to eliminate continuing effects of past and present discrimination; (2) prohibition of arrest record inquiries; (3) prohibition of recruitment practices which adversely effect minority group persons; (4) use of private advertising sources designed to reach predominantly minority group persons as a remedy for the continuing effects of past and present discrimination.


Department, as garbage collectors, and virtual absence of blacks in the other classified and non-classified positions, and the alleged unlawful operation of a closed recruiting system and residency requirement to perpetuate the segregated work force.\textsuperscript{135} The commission recently issued an order against the Youngstown Hospital Association based on evidence adduced at the administrative hearing which showed that respondent had utilized an invalid test for its operating room technicians. The result had been a disproportionate failure rate for the tested black technicians, most of whom had performed their operating room duties for years.\textsuperscript{136}

Because such actions are recent, no judicial decisions in the State courts have treated the commission's use of statistical evidence. The Ohio Supreme Court has already extended "due deference" to the legal interpretations of the Equal Employment Opportunity Commission;\textsuperscript{137} it would be a bitter irony for Ohio's anti-discrimination agencies, were the courts to lend a deaf ear to their efforts. By the same token, it is incumbent on the Ohio Civil Rights Commission and the Ohio Attorney General to continue to develop and apply statistical evidence in a sophisticated manner, as part of an effective law enforcement program. When Ohio courts recognize that "evil intent" and specific acts of disparate treatment are not the sole indicia of unlawful discrimination — when those courts rely on appropriate statistical evidence to raise the inference of discrimination — then, the respondents and potential respondents in Ohio will act to change the conditions which bar minority groups from full participation in American society.

\textsuperscript{135} In the Matter of The City of Euclid, O.C.R.C. Complaint No. 315, heard on February 28, March 1-3 and March 5, 1973 before Hearing Examiner Hyman Cohen, Esq.; Hearing Examiner's Report pending.

\textsuperscript{136} In the Matter of Youngstown Hospital Association, Inc., d.b.a. Northside Hospital, O.C.R.C. Complaint No. 211.

\textsuperscript{137} Jones Metals Prod. Co. v. Walker, 29 Ohio St. 2d 173, 181 (1972), declaring Ohio's female "protective laws" invalid:

Courts, when interpreting statutes are required to give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which agency Congress has delegated the responsibility of implementing the Congressional command.