U.S. Equal Employment Opportunity Commission

CM-604 Theories of Discrimination

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This document addresses the investigation and legal analysis of different types of claims arising under the laws enforced by the Commission.

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Contents

C. Polygraph Examinations
§ 604.7

604.1 Introduction -

This sub-section contains a brief description of each theory of discrimination under Title VII of the Civil Rights Act of 1964, as amended**.[1]** Each of these theories, with the exception of retaliation, is discussed in this section of the Compliance Manual. Retaliation is discussed in § 614 of the Compliance Manual.

Discrimination against the handicapped is mentioned in the discussion of accommodation, primarily to draw a distinction between the accommodation requirement contained in Title VII, and the requirement contained in the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701 - 796.

(a) Disparate Treatment -

Discrimination within the meaning of Title VII of the Civil Rights Act of 1964 can take many forms. It can occur when an employer or other person subject to the Act intentionally excludes individuals from an employment opportunity on the basis of race, color, religion, sex, or national origin. Evidence of exclusion need not be embodied in respondent's employment policies or practices however. Whenever similarly situated individuals of a different race, sex, religion, or national origin group are accorded disparate treatment in the context of a similar employment situation, it is reasonable to infer, absent other evidence, that discrimination has occurred. The presence of a discriminatory motive can be inferred from the fact that there were differences in treatment. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 14 EPD ¶ 7579 (1977).

(b) Adverse Impact -

Discrimination can result from neutral employment policies and practices which are applied evenhandedly to all employees and applicants, but which have the effect of disproportionately excluding women and/or minorities. Dothard v. Rawlinson, 433 U.S. 321, 14 EPD ¶ 7633 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 3 EPD ¶ 8137 (1971). This is the adverse impact theory of discrimination. Once adverse impact is established, the respondent must justify the continued use of the procedure(s) causing the adverse impact as a business necessity.

(c) Perpetuation of Past Discrimination -

The maintenance of a neutral employment policy or practice which perpetuates past discrimination may also violate Title VII. For example, if respondent previously refused to hire Blacks for certain job categories and presently hires most of its employees for those jobs through word-of-mouth recruitment by current employees, the policy may perpetuate the respondent's past discriminatory hiring practices. Commission Decision No. 75-281, CCH Employment Practices Guide ¶ 6455; Commission Decision No. 71-359, CCH EEOC Decisions (1973) ¶ 6172.

(d) Accommodation -

The failure to accommodate an employee's or prospective employee's religious practices, and the failure to accommodate a handicapped employee or prospective employee may be discriminatory.

Section 701(j) of Title VII requires employers and other persons subject to the Act to accommodate the religious practices of its employees and prospective employees unless to do so would create an undue hardship on the conduct of the employer's business.

The Commission enforces the Rehabilitation Act of 1973, as amended, with respect to Federal employment. Federal departments and agencies in the Executive Branch are required to make reasonable accommodation for handicapped individuals unless to do so would create an undue hardship. 29 CFR § 1613.704. This requirement is not identical to the reasonable accommodation requirement contained in Title VII. Discrimination against handicapped individuals is discussed in § ____ of the Compliance Manual.

(e) Retaliation -

Section 704(a) of Title VII prohibits discrimination against individuals because they have filed a Title VII charge, have participated in a Title VII investigation, or have otherwise opposed Title VII discrimination. Commission Decision No. 72-1883, CCH EEOC Decisions (1973) ¶ 6375. Section 704(a) discrimination is discussed in detail in § 614 of the Compliance Manual.

604.2 Introduction to the Theory of Disparate Treatment -

Disparate treatment occurs when an employer treats some individuals less favorably than other similarly situated individuals because of their race, color, religion, sex, or national origin. To prove disparate treatment, the charging party must establish that respondent's actions were based on a discriminatory motive. This does not mean, however, that the charging party must establish that respondent deliberately or willfully discriminated against him/her by submitting proof of respondent's subjective state of mind. The courts and the Commission have recognized that it is difficult and often impossible to obtain direct evidence of discriminatory motive. They have held that discriminatory motive can be inferred from the fact of differences in treatment. Teamsters, supra; Commission Decision No. 71-1683, CCH EEOC Decisions (1973) ¶ 6262. In an adverse impact charge, on the other hand, the EOS is only concerned with whether an employment policy has the effect of disproportionately excluding women and/or minorities. There is no need to establish the presence of a discriminatory motive.

The basis of the disparate treatment theory is differences in treatment between similarly situated individuals. A comparison between similarly situated individuals is comparative evidence. In determining which individuals are similarly situated, the EOS must decide who would reasonably be expected to receive the same treatment in the context of a particular employment decision.

Statistical evidence may also be used to establish disparate treatment. It is important to remember, however, that statistics alone will not prove an individual case of disparate treatment. Bolton v. Murray Envelope Corp., 493 F.2d 191, 7 EPD ¶ 9289 (5th Cir. 1974); Hudson v. International Business Machines, 620 F.2d 351, 22 EPD ¶ 30,827 (2nd Cir. 1980). Statistics revealing the treatment accorded members of charging party's class are important in an individual disparate treatment case because they are evidence of the presence of a discriminatory motive. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 EPD ¶ 8607 (1973).

In a charge alleging a pattern and practice of disparate treatment, statistical evidence is very important**.[2]** For example, statistics may establish that respondent regularly failed to hire Hispanics for professional positions, or that respondent regularly failed to promote Blacks. Individual cases illustrating how the

policy affected particular employees or applicants may be used to buttress a pattern and practice case of disparate treatment.

Whatever type of evidence is used, charging party must establish a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, supra; Furnco Construction Co., v. Waters, 438 U.S. 567, 17 EPD ¶ 8401 (1978). This means that charging party must put forth enough evidence to raise the inference that charging party's allegations are true. The respondent must then be given the opportunity to rebut charging party's prima facie case. This can be done in a number of ways, which are discussed below. Charging party is then given the opportunity to provide evidence that respondent's explanations for its actions are pretextual i.e., an attempt to conceal discrimination. The EOS must also examine respondent's statement and other evidence for pretextuality. When all of the evidence has been obtained and analyzed, the EOS must determine whether it is more reasonable than not to believe that charging party's allegations are true. In making this determination, it is imperative to remember that discrimination need not be the sole motive behind respondent's actions. If the evidence indicates that charging party's race, color, religion, sex, or national origin played any part, consciously or unconsciously, in the challenged employment decision, a violation of Title VII has occurred. See Commission Decision No. 72-0281, CCH EEOC Decision (1973) ¶ 6293; Commission Decision No. 72-0606, CCH EEOC Decision (1973) ¶ 6310.

604.3 Proof of Disparate Treatment -

Charging party must establish a prima facie case of discrimination. It is not the charging party's responsibility to produce sufficient evidence to prove that his/her allegations are true, however. The EOS has the responsibility of seeking evidence from the respondent and the charging party independent of that submitted by the charging party. The types of evidence which can be used to establish a prima facie case of disparate treatment are discussed fully below.

(a) Comparative Evidence -

When similarly situated individuals of different race, sex, religion, or national origin groups are accorded differences in treatment in the context of the same or a similar employment situation, it is reasonable to infer, absent other evidence, that race, sex, religion, or national origin was a factor in the disparate treatment. Commission Decision No. 71-1683, CCH EEOC Decisions (1973) ¶ 6262.

As indicated above, the basis of the disparate treatment theory is differences in the treatment of similarly situated individuals. The concept of "similarly situated" is not one which can be precisely defined, but instead must be fitted to the particular facts of each case. In general, it means that the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment in the context of a particular employment decision.

For example, an employer's collective bargaining agreement may contain a rule that any employee charged with theft of company property is automatically discharged. If a Black employee who is charged with theft of company property is discharged, the discharge is consistent with the rule and the agreement. However, the analysis does not end there. To determine whether there was disparate treatment, the EOS should ascertain whether White employees who have been charged with the same offense are also discharged. If they are merely suspended, disparate treatment has occurred. The key to the analysis is that they are similarly situated employees, yet the employer failed to apply the same criteria for discharge to all of them. They are similarly situated because they are respondent's employees and were charged with the same misconduct. The difference in discipline could be attributable to race, unless respondent produces evidence to the contrary.

It is important to remember that individuals may be similarly situated for one employment decision, but not for another. Two employees who are similarly situated for the purposes of pension benefits may not be similarly situated for the purposes of a particular promotion.

A number of factors go into determining whether individuals are similarly situated. In identifying similarly situated individuals, the EOS must determine which individuals should reasonably receive the same treatment in the context of an employment decision. The identity of these individuals will vary depending on the situation.

(1) Hiring and Promotion - In a hiring or promotion charge, all qualified applicants for a particular job are similarly situated to each other. All applicants who are not qualified are similarly situated. See Commission Decision No. 79-16 (1978), ¶ 6746.

Example - CP, a Hispanic male, applied for a promotion to a foreman position. The announcement of the vacancy stated that all applicants must have a high school diploma, at least three years of successful experience with R as a Lead Man, and the

ability to get along with co-workers. CP had all of the qualifications for the position. He alleges that his non-selection was based on his national origin. In this situation, the EOS would compare the treatment accorded all applicants for the position that CP sought to determine whether R applied the same criteria to all applicants equally. The EOS determined that five men, 1 Hispanic (CP), 1 Black, and 3 Whites applied for the position. One of the applicants was not seriously considered by R because he did not have three years of experience with R as a Lead Man.

The EOS should compare the treatment accorded the 3 individuals who met R's minimum qualifications with the treatment accorded CP to determine whether disparate treatment has occurred. If CP had lacked the 3 years of experience, then the treatment accorded CP should be compared with that accorded Whites who did not meet all of the stated minimum requirements. The EOS may have to look at prior applicants and selections to find similarly situated persons.

(2) Discharge - In a discharge case, similarly situated individuals are usually those who have been charged with misconduct identical or similar in kind or magnitude to that which the CP is accused of. See Commission Decision No. 78-02, ¶ 6713. The EOS should identify all those accused of theft of company property, or poor attendance (depending on charging party's allegations), or equally serious misconduct, and determine whether they were all discharged. If charging party and other employees of charging party's Title VII status were discharged more often for misconduct than employees not of charging party's Title VII status who engaged in the same or similar misconduct, it is reasonable to infer that charging party's status was a factor in the discharge. The fact that respondent has not discharged other individuals of charging party's Title VII status does not defeat the charging party's claim of disparate treatment.

(3) Identity of Similarly Situated Individuals Will Vary in Different Employment Situations - As indicated above, individuals similarly situated for one employment decision may not be similarly situated for another. For example, if charging party alleges racial harassment by his/her supervisor, all employees working under charging party's supervisor would be similarly situated with the charging party. On the other hand, if a charge alleges the discriminatory enforcement by respondent management officials of a companywide rule, all employees known by respondent to have violated that rule would normally be similarly situated no matter which supervisory unit they belong to.

Example - CP, an administrative official working for supervisor "Y", alleges that she was denied a promotion and permission to use earned annual leave on the basis of sex. Supervisor "Y" denied CP's request for annual leave. R's personnel manager refused to promote CP. With respect to the promotion, CP met all of the minimum requirements for the position and is similarly situated to all qualified applicants for the position, all of whom happen to be fellow employees of R. All of respondent's employees working in CP's department earn annual leave on the same basis. With respect to her allegation that she was denied permission to use earned annual leave on the basis of sex, CP is similarly situated to all employees working in her department. CP is similarly situated to one group of R's employees for promotion i.e., all qualified applicants, and similarly situated to another for purposes of the denial of annual leave i.e., people working for supervisor "Y".

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NOTE: Directives Transmittal 651 dated 3/28/86 pen and ink change is posted to this page.

(4) Compare as Many Similarly Situated Individuals as Possible - When comparing similarly situated individuals, the EOS should compare as many similarly situated individuals with charging party as possible. A comparison between the charging party and one other similarly situated individual of a different Title VII status might indicate disparate treatment; however, a comparison with other similarly situated individuals might dispel this inference. The following example illustrates this point.

Example - CP, a Black, applied for a position with R. The newspaper advertisement of the position indicated that all applicants must meet several minimum qualifications. CP met all of the minimum qualifications but was not hired. R hired a White female to fill the position. This individual met all but two of the stated minimum qualifications. R established that the individual hired was its employee under a CETA program. Due to a cut-off of funds under that program, her position was being abolished. R did not become aware of the cut-off of funds until after it advertised the vacancy CP sought. Although the individual hired did not meet all of the minimum qualifications, R stated that she had demonstrated her ability to perform the job because she had repeatedly substituted for the individual who previously occupied the position. R alleges that the individual hired was familiar with R's operating procedures, R's other employees, and R's clientele. She was an employee R did not want to lose.

During the course of the investigation, the EOS discovered that several of the other applicants, including four White applicants, exceeded R's minimum requirements but they were also rejected in favor of R's own employee. This comparative evidence supports R's position. If R had merely wanted to fill the position with a White applicant, it probably would have chosen one who met all of the stated qualifications. This evidence may not have been uncovered if the EOS had merely compared the CP with the individual hired to fill the position that CP sought.

(5) Similarly Situated vs. Identically Situated - The term similarly situated does not necessarily mean identically situated. In many instances there will not be any individual who is situated in the same position as the charging party. In those cases, the EOS should look to the most similar situations or to the most similarly situated individuals.

Example - CP, a Hispanic, worked under supervisor Y as a tool and diemaker. During a three-month period he was repeatedly tardy reporting to work for the morning shift. After warning him several times, Y recommended that CP be suspended for a week. R's personnel manager makes the final decision on disciplinary actions and decided to suspend the CP. CP claims that only Hispanics have been disciplined for tardiness. After requesting certain information from the charging party, the respondent, and various witnesses, the EOS learns that none of supervisor Y's other employees had a history of repeated tardiness, and tardiness did not occur frequently at R's facility. The EOS also discovered, however, that absenteeism and petty theft of company property were both widespread and regularly reported to the personnel manager for disciplinary action. The R's records indicated that the personnel manager decided to take disciplinary action against a disproportionate number of Hispanics. There were several cases of repeated absenteeism by White and Black employees, but no disciplinary action was taken.

In this example there are no employees in an identical position with the CP, (an employee of R, working under supervisor Y, with a history of repeated tardiness). CP is similarly situated with other employees outside of Y's supervisory unit who have broken R's rules because R's personnel manager always makes the final decision on whether to take disciplinary action. Because there were few employees guilty of repeated tardiness, it is appropriate to compare CP with employees who have broken other rules set by R.

If the supervisor made the final decision on whether to take disciplinary action, and there were no other employees in Y's unit with a history of repeated tardiness, the

EOS should then determine whether employees in Y's unit were caught violating other company rules and what action supervisor Y took against them. If there are no or very few other employees in Y's unit with a history of repeatedly violating company rules, the actions of other supervisors with respect to disciplinary actions may be considered. The EOS may examine the actions of other supervisors in order to determine whether the action of CP's supervisor was different from actions taken by other supervisors in identical or similar situations. Another situation where the actions of other supervisors may be considered is when R has a history of discriminating against certain groups, or tacitly approves of discrimination by doing nothing to remedy individual cases once it became aware of them. A discriminatory atmosphere probably exists at R's facility. The action taken against CP might only be part of a larger problem which is conducive to action of the type taken against CP. In this instance, the actions of other supervisors may be considered. The basic principle is that the EOS should make the most relevant comparisons that are possible based on the available evidence.

(b) Statistical Evidence -

Statistical evidence can be relevant in proving an individual case of disparate treatment because it is evidence of the presence of a discriminatory motive. See Teamsters, supra. For example, charging party's individual allegation that she was not hired for a secretarial position because of her race, (Black), is buttressed if there is statistical evidence indicating that respondent employs no Black secretaries despite their availability in the SMSA where respondent is located, and in spite of the fact that many have applied for positions with respondent. The statistical data creates an inference that respondent refused to hire Blacks as secretaries and that charging party's rejection was pursuant to this practice. It is evidence of a discriminatory motive. It is important to remember, however, that statistics alone will not normally prove an individual case of disparate treatment. Bolten v. Murray Envelope Co., supra.

In a charge alleging a pattern and practice of disparate treatment, statistical evidence is extremely important. Hazelwood School District v. U.S., 433 U.S. 299, 14 EPD ¶ 7633 (1977). In a pattern and practice case, the charging party must establish that discrimination was the "company's standard operating procedure - the regular rather than the unusual practice." Teamsters, supra at 336, 14 EPD at 4855. Statistical evidence may be used for this purpose. Statistical evidence should be

buttressed wherever possible, by examples of individual instances of disparate treatment.

Whether statistical data is being used to establish a pattern and practice of disparate treatment or as evidence of discriminatory motive in an individual charge, the statistical data must be probative. The Supreme Court has held that a gross disparity between the percentage of minorities in an employer's workforce and their percentage in the relevant labor force may be sufficient to establish a prima facie case of discrimination. Teamsters, supra at n. 20. The composition of the appropriate labor force must be determined on a case by case basis and will vary with the circumstances in each case. When particular skills are required to perform the duties and functions of a position, the basis of comparison should be persons in the labor force in the relevant geographical area who possess the required skills. A comparison to the percentage of the minorities in the general civilian labor force is probative only when the skills involved are possessed by large numbers of individuals in the civilian labor force.

If skills are required to perform a job, but the skills are obtained on the job or through a short apprenticeship, the basis of comparison is also the civilian labor force. Many skilled job categories have an underutilization of minorities and women as a result of past discrimination. For the purposes of formulating affirmative relief, the EOS should not be hemmed in by data reflecting limited availability.

Example - CP, a Black male, applied for a position with R as a truck driver. He was not hired and believes his rejection was because of his race. R has a reputation in CP's community of discriminating in employment against Blacks and other minorities. CP files a charge alleging that R refused to hire him on the basis of race and that R refuses to hire Blacks as a class.

In this charge, the EOS must determine what percentage of R's truck drivers are Black. This percentage should be compared with the percentage of Blacks in the civilian labor force in the general geographical area where R is located. The general geographical area will normally be the SMSA where R is located. If this comparison indicates a significant disparity between the two percentages, a prima facie case of discrimination has been established. In this case, it is appropriate to compare the percentage of Blacks in R's workforce with the percentage in the general area-wide civilian labor force because the job skill involved - the ability to drive a truck - is one that many persons possess or can readily acquire. If the job CP sought had required specific skills (e.g. carpentry), the percentage of Black carpenters in R's workforce

would be compared with the percentage of Black carpenters in the general area surrounding R's facility. The method of identifying the appropriate labor force and the appropriate geographical area surrounding R's facility, as well as the issue of what degree of statistical disparity is significant enough to make out a prima facie case of discrimination are discussed in § 609 of the Compliance Manual.

(c) Direct Evidence of Motive -

As indicated above, proof of disparate treatment requires proof that respondent's actions were based on a discriminatory motive. Discriminatory motive can be inferred from the fact that similarly situated individuals of a different Title VII status received different treatment in the context of the same or a similar employment situation. (See § 604.3(a)). However, the EOS should also look for direct evidence of motive. Direct evidence of motive is any statement by an official of respondent that indicates a bias against members of a particular group. In addition, direct evidence is presented by a showing that respondent failed to take appropriate corrective action in situations in which it knew or reasonably should have known that practices and policies or the behavior of its employees were discriminatory. Direct evidence of motive can be in the form of a document, it may be a statement by respondent's official in an interview with the EOS or charging party can testify as to a statement made by respondent, or present other direct evidence of respondent's failure to act. The following examples illustrate the types of direct evidence of motive that the EOS should look for. The EOS should remember that in no instance shall the failure or inability of a charging party to provide direct evidence of motive be construed as a failure to establish a prima facie case of discrimination.

(1) Disparaging References to Charging Party's Title VII Class - CP's supervisor regularly refers to Blacks by using a disparaging term. CP, a Black, alleges in her charge that her supervisor refused to recommend her for a promotion, thereby causing the promotion to be denied. She alleges that her supervisor's refusal to recommend her was based on her race. The supervisor stated that she refused to recommend the CP because CP was not qualified for the promotion; however, the evidence indicates that CP met all of the minimum qualifications. The fact that CP's supervisor regularly refers to Black by using a disparaging term is evidence that her refusal to recommend CP for a promotion was based on a discriminatory motive. Testimony from CP and from other employees working under the same supervisor would be direct evidence of motive. See also, Commission Decision No. 71-357, CCH EEOC Decisions (1973) ¶ 6168.

(2) Stereotyped View of Charging Party's Title VII Class - CP, a female, applied for a position with R as a truck driver. She was denied the position allegedly because R's official believed that CP could not perform the job. CP believes that she was not hired because of her sex. She alleges that throughout her interview, R's official stressed that the position required the lifting of heavy boxes and that women probably couldn't handle this aspect of the job. He refused to allow CP to demonstrate her ability to perform all aspects of the job. During the EOS's interview with R's official, he stated that women couldn't handle this type of work, but he didn't believe this was discrimination. He was merely being practical.

Testimony from the charging party about the supervisor's statements, and the supervisor's statements to the EOS are direct evidence of a discriminatory motive. The fact that R's official did not realize that basing employment decisions on a stereotypical view of women is discriminatory is irrelevant. Commission Decision No. 76-76, CCH Employment Practices Guide ¶ 6655; Commission Decision No. 76-94, CCH Employment Practices Guide ¶ 6671; See also, Commission Decision No.70-727, CCH EEOC Decisions (1973) ¶ 6152; Commission Decision No. 70-47, CCH EEOC Decisions (1973) ¶ 6044.

(3) Certain Characteristics Undesirable When Associated with Members of a Particular Title VII Class - CP, a woman, was employed by R as an assembly line factory worker. She applied for the position of foreman in Department Y. CP met all of R's stated minimum requirements for the job but was not hired. She alleges that R refused to promote her because of her sex. During an interview with the EOS, R's personnel manager stated that the CP was too aggressive and that the employees in Department Y, most of whom are men, would not accept a woman as aggressive as CP supervising them. He stressed that R did employ women in supervisory positions, but he believed that a woman like CP would not be acceptable. The personnel manager's statements are direct evidence of discriminatory motive.

(4) The following examples of direct evidence of motive illustrate situations in which respondent refuses to correct a discriminatory practice which it is or should be aware of.

(i) A sexual harassment situation in which the CP has advised her employer that she is being harassed and the employer fails/refuses to act or effectively acts to penalize her, e.g., by transferring her to another division against her will.

(ii) A situation in which the EEOC or another federal or state agency has conducted a compliance review and has found the employer's compliance status to be deficient, but the employer has failed to take any corrective action.

(d) Which Type of Evidence to Obtain -

In investigating a charge, the EOS should obtain as many types of evidence as possible, particularly if the initial evidence indicates that there is reasonable cause to believe that the charging party's allegations are true. For example, in an individual disparate treatment charge, if comparative evidence raises an inference of disparate treatment based on race, the EOS should still look for any direct evidence of motive and for statistical evidence.

604.4 Analysis of Respondent's Explanation or Justification for its Actions -

In every charge, respondent must be given a full opportunity to respond to the charging party's allegations. The respondent should be asked to provide the reason(s) for the action(s) that charging party is complaining of, and to provide evidence in support of its position. Respondent should also be questioned concerning evidence which appears to indicate disparate treatment.

In a court proceeding respondent only has to articulate a legitimate non-discriminatory reason for its actions. McDonnell Douglas Corp. v. Green, supra; Furnco Construction Corp. v. Waters, supra; Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 18 EPD ¶ 8673 (1978); Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089, 25 EPD ¶ 31,544 (1981). This does not mean that respondent must prove the absence of a discriminatory motive. The burden of proving that a violation of Title VII has occurred always remains with the plaintiff in a court proceeding.

In an investigation of a Title VII charge, the EOS has the responsibility of determining whether there is evidence of the non-discriminatory reason. The EOS should seek corroboration of the alleged legitimate reason from the respondent, and then examine and analyze the respondent's position statement and evidence. A detailed discussion of explanations and justifications commonly raised by respondents follows.

(a) Charging Party's Allegations are Factually Incorrect -

In this situation, the respondent presents evidence which indicates that charging party's allegations are factually incorrect and evidence of what actually occurred. Respondent's version of the facts might dispel any inference of discrimination which had been raised by charging party. It is important to remember that the EOS must attempt to determine whether there is evidence that supports respondent's factual allegations.

(b) Comparison of Similarly Situated Individuals was Not Valid

(1) Individuals Compared are Not Similarly Situated - Respondent could present evidence indicating that the charging party was compared to individuals who were not similarly situated for the purpose of the employment decision that charging party is complaining of.

Example - CP was employed by R as a factory worker. She had been working in that job for ten months when she was laid off. CP alleges that R laid her off on the basis of sex. She identified several male employees who were hired after she was and should have been laid off before she was. R's defense to the charge is that CP is not similarly situated with the male employees who were retained. The individuals that CP cites were all former employees of R who had been laid off and reinstated after she was hired. Because they were only in layoff status, they maintained their seniority when they returned to work. Since they had greater seniority than CP they should not have been laid off prior to CP, as she alleges.

(2) Not all Similarly Situated Individuals were Compared with the Charging Party - The treatment accorded charging party should be compared to as many similarly situated individuals as possible. A comparison with only one other similarly situated individual might indicate that disparate treatment has occurred, but a comparison with all or most similarly situated individuals might dispel this inference. (See the example at § 604.3(a)(4) for an illustration of this point).

(c) Respondent's Actions were Based on an Act of Favoritism -

Title VII only prohibits discrimination based on race, color, religion, sex, or national origin. If in isolated instances a respondent discriminates against the charging party

and other similarly situated individuals in favor of a relative or friend, no violation of Title VII has occurred. In a hiring case, for example, if all applicants including the charging party were rejected and respondent official hired his wife's nephew, the discrimination may not have been on a prohibited basis. If all of the applicants for the position were female or minorities and there is some indication that respondent official hired his wife's nephew to avoid hiring one of the applicants, the EOS should investigate to determine whether respondent's actions were a pretext to hide discrimination. In this case the composition of respondent's workforce and respondent's past hiring practices would be very important pieces of evidence.

If a respondent has a policy of according preferential treatment to relatives of employees and its workforce is predominantly of one race or national origin, the policy will ordinarily have an adverse impact on other races and national origins. See e.g., Commission Decision No. 71-797, CCH EEOC Decisions (1973) ¶ 6181.

(d) Charging Party's Statistical Proof is Not Meaningful -

Statistical proof must always be tailored to the facts of a particular case. Meaningful statistical proof for one charge might not reveal disparate treatment in another. For example, if the EOS obtained statistical data on the percentage of Black teachers in respondent's workforce and compared this with the percentage of Blacks in the local civilian labor force, respondent could argue that these statistics do not raise an inference of disparate treatment because they do not measure the availability of Black teachers in the area. In order to qualify for a teaching position, many schools require that an individual have a college degree and a teaching certificate issued by the state. The percentage of Blacks in the labor force who have these qualifications may be significantly less than the percentage of Blacks in the labor force as a whole. A more meaningful statistical comparison would be between the percentage of Black teachers in respondent's workforce and the percentage of Black teachers in the area.

Example 1 - In a charge alleging a pattern and practice of discrimination against Hispanics in a skilled craft job category, the EOS compared the percentage of Hispanic craftsmen in R's workforce with the percentage in the SMSA where R is located. R is a municipal government which has a residency requirement and alleges that the city not the SMSA, is the relevant labor market area.

Example 2 - Same facts as above except the R's objection is that the disparity is not significant enough to raise an inference of discrimination. The percentage of

Hispanic craftsmen in R's workplace is 3%, but the percentage of Hispanic craftsmen in the city is 5.4%. There is a disparity, but R alleges that it is not statistically significant and therefore no discrimination can be inferred from it.

The issues that respondent raised in these two examples are covered in § 609 of the Compliance Manual.

Example 3 - CP, a woman, alleges that R refused to hire her for the position of auto worker, and that R discriminates against women as a class by refusing to hire women as assembly line auto workers. The statistical data compiled by the EOS indicated that women were available for these positions and many had expressed an interest in them, yet the percentage of female assembly line workers is only 2%. R alleges that these statistics are misleading because the EOS failed to consider recent turnover data. Because of poor auto sales, R had recently laid off and fired significant numbers of employees, many of whom were women. The employees had been laid off in accordance with a bona fide seniority system which called for the last hired to be the first laid off or fired. Because women had only recently started working in the auto industry as assembly line workers, they have low seniority and are generally the first fired or laid off.

The turnover information presented by R significantly changes the meaning of the statistical evidence the EOS had gathered. Because a recent turnover, which included large numbers of women, had taken place pursuant to a lawful seniority system, the present underutilization of women cannot be attributed to discrimination. (See § 616, Seniority, for further discussion of bona fide seniority systems and layoff).

(e) Statistical Proof to Rebut an Inference of Discriminatory Motive -

Respondent can submit statistical data showing that the proportion of a race, sex, or ethnic group in its workforce is proportionate to the percentage in the relevant labor pool, to rebut an inference of discriminatory motive in an individual case of disparate treatment. Furnco Construction Corp. v. Waters, supra. These statistics should be considered along with all the other evidence; however, they are not conclusive proof that discrimination has not occurred. There may not be a pattern and practice of discrimination, but an individual case of disparate treatment may have occurred.

Example - In a failure to hire case, CP, a Black man, presents evidence that he applied for and was qualified for job X, but that R hired a White man instead. The evidence presented--that charging party was treated differently from a similarly situated person of a different Title VII status--is sufficient to establish a prima facie violation. In attempting to rebut this showing, R presents evidence that the percentage of Blacks in its workforce is greater than the percentage of Blacks within the SMSA as a whole. This, according to R, rebuts the CP's prima facie showing. While this evidence is relevant, it does not conclusively rebut the prima facie case, since discrimination can occur in an individual case, even if the employer's policies as a whole are non-discriminatory.

(f) Respondent's Actions Taken Pursuant to an Affirmative Action Plan -

If a respondent is implementing a voluntary or mandatory affirmative action plan and the charging party is challenging action taken pursuant to that plan, the respondent may assert the affirmative action plan as a defense to the charge. If respondent does so, the EOS must examine the affirmative action plan to determine whether it is a lawful plan, and then determine whether the respondent's actions were in fact taken pursuant to the affirmative action plan.

The Commission's Affirmative Action Guidelines govern this issue. 29 C.F.R. Part 1608. For detailed instructions on how to analyze an affirmative action plan and determine whether action was lawfully taken pursuant to it, the EOS should refer to § 607 of the Compliance Manual.

(g) Other Members of Charging Party's Title VII Class Not Treated Like Charging Party -

Respondents often attempt to rely on the fact that not all members of a Title VII class have been subjected to unfavorable treatment as a defense to charging party's prima facie case. The issue in a disparate treatment case is whether the individual charging party was treated less favorably than similarly situated persons of a different Title VII status. Respondent cannot sustain its burden with regard to the individual charging party by showing that other individuals of the same Title VII status as charging party have not been treated in the same manner as charging party.

Example 1 - CP, a woman, convened staff meetings during her lunch hour to discuss the status of women at R. She violated no company policies in setting up these meetings or in her outspoken advocacy of women's rights. Indeed, other employees, mostly male, held luncheon staff meetings to discuss the company softball team, the United Way Campaign and other matters.

CP was terminated. The evidence established a prima facie case, since none of the men conducting meetings were terminated. In response, R argues that since none of the other women who had attended the women's meetings were terminated, its actions did not discriminate against CP. This argument will not rebut CP's prima facie case.

Example 2 - CP, a woman, applied for a position with R consulting firm as a management consultant. CP met all of the stated minimum requirements for the position and was one of the applicants chosen for an interview. During the interview, R official asked CP whether she had children. CP responded that she had three children, ages 2, 4, and 6 years old. R official then asked CP whether she was sure she could handle a full-time job, questioned her about her child care arrangements, and reminded her that the available position required a fair amount of traveling. CP was not hired to fill the available position. She files a charge of discrimination alleging that R refused to hire her because of her sex. R's defense to the charge is that it has employed several women as management consultants.

Sex discrimination within the meaning of Title VII need not be based solely on sex. If R bases an employment decision on sex plus another neutral characteristic, a violation of Title VII has occurred. In this case, R may not refuse to hire women with young children but hire men with children of the same age unless it can demonstrate that conflicting family obligations are more relevant to job performance for a woman than for a man. Phillips v. Martin Marietta Corp., 404 U.S. 542, 3 EPD ¶ 8088 (1971); Commission Decision No. 72-0386, CCH EEOC Decisions (1973) ¶ 6295.

(h) Others of a Different Title VII Status Treated Like Charging Party -

A respondent will often assert that evidence showing it treated a minority individual the same as a non-minority individual in a given situation is evidence that charging

party was not discriminated against. Unless the individuals are similarly situated, however, this is not a justification.

Example - R decreased its workforce by laying off 4 persons, 3 of whom were White and 1 of whom was Black. In accordance with a long-standing policy, lay-offs were affected according to seniority.

The Black charging party established a prima facie case by showing that he was laid off and that White employees of equal seniority were not laid off. In response, R asserts that the fact that it also laid off 3 White employees is evidence that charging party's lay-off was not discriminatory.

However, if the three White employees have less seniority than the CP, their lay-off is not relevant to CP's allegation since they were not similarly situated. (This example concerns disparate application of the provisions of a seniority system not the application of a neutral seniority system which has adverse impact.)

(i) Similarly Situated Person Better Qualified Than Charging Party -

In some instances, a respondent will concede that a charging party was qualified for a position in question but argue that it selected another person because the selectee was better qualified. This defense must be examined carefully. Respondent must state precisely the way(s) in which the selectee was more qualified than the charging party. This defense may be a pretext for discrimination.

Example - R developed a management training program into which it placed one employee each quarter. The R's minimum requirements for the position included, among other things, a requirement that the trainee have a degree from an accredited business school (normally a two-year program) or two years of college. CP, a female teller, met the minimum qualifications, having graduated from business school and completed several college courses. The selectee, a male, had a college degree. Because the CP met the minimum qualifications and was not selected, she established a prima facie case of discrimination. R defended its action on the basis that the selectee was better qualified because he had a college degree. In this situation, the EOS should examine all of the circumstances to determine whether R's defense is a pretext for discrimination. For example, the EOS should determine the present number of female management trainees, how many there have been in the past, and the number of management trainees who have college

degrees. Respondent should be asked to explain why a college degree is not a prerequisite for admission to the program, if it renders an applicant more qualified.

604.5 Charging Party's Response to Respondent's Explanation or Justification for its Actions -

After the respondent has submitted its position and evidence in support of that position, the EOS must always give the charging party the opportunity to respond to respondent's case. The charging party may have evidence which contradicts the evidence that respondent has submitted to support its position or be able to identify witnesses who contradict respondent's position. Although the EOS must always solicit a response from the charging party, (s)he must independently examine respondent's evidence to determine whether it is a pretext for discrimination.

604.6 Final Analysis of all the Evidence -

When the EOS feels that all of the evidence on all of the relevant issues has been obtained, (s)he has the responsibility of analyzing the evidence. The ultimate standard is whether it is more likely than not that a violation of Title VII has occurred. This determination must be based on a preponderance of the evidence. The term "preponderance of the evidence" refers to the quality of the evidence, its reliability, and the credibility of witnesses. For example, respondent may submit a great deal of evidence to support its position but may not prevail. The evidence respondent presents will be analyzed according to the preponderance standard. The charging party's evidence is also subject to this standard.

A number of problems can arise in analyzing the evidence. For example, conflicting testimony will often be presented. A determination of who is telling the truth must be based on the credibility of witnesses. The term "credibility of witnesses" refers to how believable a witness is. A determination of which witness is more credible involves the EOS's perception of which witness is more believable.

The first thing the EOS should do when a conflict arises is seek corroborating evidence of each version of the facts. Charging party's co-workers may be able to verify his/her version of an occurrence. Documents and the testimony of other

management officials might verify respondent's version of the facts. If there is no way to corroborate conflicting versions of a factual situation, the EOS must then decide who (s)he believes. The decision can be based on a number of factors. For example, if the EOS has been able to establish that many of the charging party's statements have been false or misleading, the EOS is less likely to believe a statement that (s)he is unable to corroborate. On the other hand, if everything else charging party has stated is true, and there is no other evidence to corroborate respondent official's version of the facts, there is no reason to suspect that charging party is not telling the truth.

Ideally, in this situation, the EOS should try to resolve the charge on other evidence. For example, if charging party has submitted direct evidence of motive in a promotion charge (e.g., a disparaging racial remark by charging party's supervisor), charging party's supervisor denies making the remark, and there are no witnesses to corroborate charging party's allegation or the supervisor's denial, the charge should be resolved by comparative and/or statistical evidence if possible.

(Note: If charging party's co-workers can testify to racially disparaging remarks that the supervisor has made to or about other employees of charging party's Title VII status, charging party's allegation that the supervisor made a racially disparaging remark to him becomes much more credible.)

Another problem in determining whether there is reasonable cause to believe that a violation of Title VII has occurred arises in analyzing respondent's explanation for its actions. As indicated above, respondent must articulate some legitimate non-discriminatory reason for its actions. The EOS should then seek corroborating evidence of the alleged legitimate reason from respondent. The charging party must then show that respondent's reason for the treatment accorded charging party is a pretext for discrimination. Remember that the EOS must also examine respondent's evidence for pretextuality. This will involve verifying respondent's statements and other evidence and comparing it with evidence that the EOS has received from respondent, the charging party, and other witnesses.

(Note: If a respondent asserts a bona fide occupational qualification (BFOQ) as a defense to a charge, it must prove that sex, religion, or national origin is a BFOQ for the position that charging party sought. See § 625 of the Compliance Manual.)

The EOS must also be concerned with how much credence (s)he should give to each type of evidence. For example, how much weight should the EOS give to statistical

evidence? If statistical data establishes that the percentage of a racial, sexual, or ethnic group in respondent's workforce is proportionate to the percentage in the relevant labor pool, there is no inference of discriminatory motive based on these statistics. See Hazelwood School District v. U.S., supra. In fact, respondent may raise these statistics to rebut an inference of discriminatory motive arising from comparative data. Furnco Construction Corp. v. Waters, supra. In either case, the EOS must remember that the absence of statistical underutilization does not conclusively establish that there has been no discrimination, for an individual act of discrimination may have occurred.

If the statistics indicate that there is underutilization of a race, sex, or ethnic group in respondent's workforce, they raise an inference of discriminatory motive and may be used to support charging party's case, but they too are not conclusive. Statistical evidence is but one type of evidence. Sound comparative evidence and verifiable direct evidence of motive should usually be given more weight in an individual case of disparate treatment. Statistical evidence plays a more important role where a pattern and practice of discrimination is alleged. Whatever type of evidence is used and whatever credence the EOS places on the evidence, the following standard must be applied in determining whether to recommend that the charge be resolved by a cause or no cause letter of determination: is it more likely than not that a violation of Title VII has occurred. In applying this standard, the EOS must bear in mind that only charges which are litigation worthy merit a cause determination. (See § 602 of the Compliance Manual for a discussion of the litigation worthy standard.)

604.7 Adverse Impact -

In 1971 in Griggs v. Duke Power Co., 401 U.S. 424,3 EPD ¶ 8137 (1971), the Supreme Court announced the principle that employment policies and practices which have an adverse impact on minorities and women and are not justified by business necessity constitute illegal discrimination under Title VII. Justifying an employment policy or practice by business necessity involves a showing that the policy or practice is related to performance on the job. This means, for example, showing that a selection procedure has been validated.

In an adverse impact charge, the focus of the inquiry is on the consequences of employment practices rather than the motive. The charging party does not have to prove that respondent's actions were based on a discriminatory motive. (S)he need

only establish that an employment practice, even though applied equally to all applicants or employees, has the effect of excluding or otherwise adversely affecting women and/or minority groups in significant numbers.

(a) Proof of Adverse Impact -

The method of establishing adverse impact is non-CDP pending the issuance of § § 610 and 611 of the Compliance Manual. Generally, if a charging party alleges, for example, that a selection procedure operated to exclude him/her from a given employment opportunity, the EOS must determine whether the use of that selection procedure for the job that charging party sought has an adverse impact on members of charging party's race, sex, or ethnic group. The Uniform Guidelines on Employee Selection Procedures (UGESP) govern this situation. 29 C.F.R. Part 1607. Section 16B of the UGESP define adverse impact "as a substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group." Adverse impact must usually be determined in this situation by comparing the percentage of applicants from charging party's class who were selected with the percentage of applicants selected from the group with the highest selection rate.

(b) Respondent's Options When a Selection Procedure Has Adverse Impact -

If a respondent's total selection process for a job has adverse impact on a particular race, sex or ethnic group, the respondent may modify the component selection procedures so that the adverse impact in the total selection process is eliminated.

If respondent does not eliminate the adverse impact in the total selection process for a job, it must justify the use of the selection procedure causing the adverse impact by showing that it is valid or is otherwise justified by business necessity. In order to establish business necessity, the respondent must show a relationship between the selection procedure and performance on the job. In other words, respondent must show that the selection procedure is job related. In most instances, a respondent can justify the use of a selection procedure which has adverse impact (that is, demonstrate the business necessity of its use) only by showing that the procedure has been validated according to the technical requirements of the UGESP. An EOS is not expected to understand the technical requirements for validity studies under the UGESP; however, a general

understanding of validation is useful. Validation is the process of demonstrating that the use of a selection procedure to measure a job applicant's skills, knowledge, or abilities is related to the applicant's performance on the job. For example, a validation study might show statistically that applicants scoring below 70 on a test are less likely to perform successfully on the job than applicants scoring above 70.

Section 3B of the UGESP requires, as part of any validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedures which have as little adverse impact as possible. If a suitable alternative with substantially equal validity and lesser adverse impact is available, then a procedure having greater adverse impact may not lawfully be used.

Whenever a respondent submits a validity study purporting to justify a selection procedure with adverse impact, the Commission's own psychologists will evaluate the study for compliance with professional standards.

Normally, the method of justifying the use of a selection procedure which has adverse impact is validation. However, the UGESP, Section 6B, recognizes that there may be circumstances in which a respondent could "otherwise justify continued use of the procedure in accord with Federal law". Such justification usually requires a demonstration of "business necessity." A respondent cannot establish a business necessity for a practice or policy having an adverse impact merely by establishing a business purpose for the practice or policy. The respondent must establish that an overriding legitimate business purpose exists which is necessary to the safe and efficient operation of the business. Robinson v. Lorillard, 444 F. 2d 791, 3 EPD ¶ 8267 (4th Cir. 1971). The court stated:

The business purpose must be sufficiently compelling to override any racial or sexual impact, the practice must effectively carry out the business purpose it is alleged to serve, and there must be available no acceptable policies or practices which better accomplish the business purpose or accomplish it with less racial impact.

Robinson, 444 F. 2d at 798; See Commission Decision No. 81-8 (1980).

In United States v. Bethlehem Steel Corp., 446 F. 2d, 3 EPD ¶ 8257 (2nd Cir. 1971), the court stated that the policy or practice must not only foster safety and efficiency of a plant, but also be essential to those goals. If the legitimate ends of safety and

efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.

U.S. v. Bethlehem Steel Corp., 446 F. 2d at 662; See U.S. v. Jacksonville Terminal Co., 451 F. 2d 418, 3 EPD ¶ 8324 (5th Cir. 1971).

(c) Selection Charges Which Should Not be Analyzed Under the Uniform Guidelines on Employee Selection Procedures -0

For a discussion of selection charges which should not be analyzed under the Uniform Guidelines, see § 611 of Volume II of the Compliance Manual.

604.8 Perpetuation of Past Discrimination -

This type of discrimination occurs when the effect of past discrimination is being continued by the present operation of a neutral employment system. Commission Decision No. 72-0265, CCH EEOC Decisions (1973) ¶ 6291; Patterson v. American Tobacco Co., 586 F. 2d 300, 18 EPD ¶ 8691 (4th Cir. 1978). The employment system is neutral if it applies to all applicants or employees and is applied evenhandedly to all.

Example 1 - CP, a Black male, alleges that R refused to hire him for the position of master machinist on the basis of race and that R discriminates against Blacks as a class in hiring for the skilled job categories. R denies the charge and states that it hires without regard to the race of the applicant. An investigation of the charge reveals that R maintained segregated job categories prior to 1965. Blacks and other minorities were assigned only to the Laborer and Janitorial departments. R stopped this policy in July 1965 but continued its word-of-mouth recruitment policy for the skilled job categories. When a vacancy becomes available in the skilled job category, R asks its skilled employees to inform friends and relatives of the vacancy and invite them to apply. Almost all of the positions which became available since 1965 have been filled through word-of-mouth recruitment. R employs no Blacks in any of the skilled job categories. The maintenance of a word-of-mouth recruitment policy by an all-White workforce as the sole basis of informing potential applicants of a vacancy has the foreseeable effect of perpetuating the effects of R's past discriminatory hiring practices. Commission Decision No. 72-0978, CCH EEOC Decisions (1973) ¶ 6345; Commission Decision No. 72-0599 CCH EEOC Decisions (1973) ¶ 6313. See Commission Decision No. 72-2130, CCH EEOC Decisions (1973)

¶ 6371; Commission Decision No. 71-359, CCH EEOC Decisions (1973) ¶ 6172; Commission Decision No. 70-422, CCH EEOC Decisions (1973) ¶ 6127; Ingram v. Madison Square Garden Center, 482 F. Supp. 414, 21 EPD ¶ 30,392 (S.D.N.Y. 1979); Barnett v. W.T. Grant Co., 518 F. 2d 543, 9 EPD ¶ 10,199 (4th Cir. 1975).

Example 2 - CP alleges that R refuses to hire Blacks as summer employees. R contends that it gives preference to applicants who are former summer employees and to children of employees who are students. Prior to 1964, R employed very few Blacks due to discriminatory hiring practices. The policy of giving a preference to the children of employees and to former employees perpetuates R's past discriminatory practices. Commission Decision No. 71-1447, CCH EEOC Decisions (1973) ¶ 6217.

Example 3 - R is a referral union. CP alleges that R discriminates against Hispanics by excluding them from membership and by refusing to refer them to high paying positions. The evidence indicates that R refused to admit Hispanics to the union prior to 1965. This charge was filed in 1967. R makes referrals on the basis of priority groups. The group which receives the highest priority consists of members who have worked in R's jurisdiction for 5000 hours over the past eight years or 2,500 hours over the past three years. Since Hispanics have been prevented from acquiring that experience, R's policy of giving priority to members who have the experience perpetuates R's past discriminatory practices. Commission Decision No. 72-0265, CCH EEOC Decisions (1973) ¶ 6291.

Example 4 - CP, a Black male, alleges that R's policy prohibiting transfer between Department A and Department B perpetuates past discrimination. Prior to July 2, 1965, R hired Blacks only in Department A. The employees in Department B were all White. The no transfer policy is not part of a bona fide seniority system. The rule is a separate company policy. Although R's no transfer policy is facially neutral, it perpetuates R's past discriminatory hiring practices, and therefore violates Title VII. U.S. v. Lee Way Motor Freight, Inc., 625 F. 2d 918, 21 EPD ¶ 30, 286 (10th Cir. 1979); Johnson v. Ryder Truck Lines Inc., __ F. Supp.__, 23 EPD ¶ 31,187 (W.D. N.C. 1980); See Parsons v. Kaiser Aluminum and Chemical Corp., 575 F. 2d 1374, 17 EPD ¶ 8427 (5th Cir. 1978); rehearing denied, 583 F. 2d 132, 18 EPD ¶ 8709 (5th Cir. 1978); cert. denied, sub nom. Steelworkers (USA), Local 13000 v. Parsons, 441 U.S. 968, 19 EPD ¶ 9197 (1979).

The perpetuation of past discrimination theory is similar to the adverse impact theory in that neither theory is concerned with the respondent's present

motivation. There is no requirement that the charging party prove the presence of a discriminatory motive. However, past motive may be highly probative, and should be looked for in a perpetuation case (bearing in mind, of course, that direct evidence of past discriminatory motive is not required).

Note: The perpetuation of past discrimination theory of discrimination is not universally recognized by the courts as a basis for relief. The EOS should analyze an alleged act of discrimination to determine whether some other theory of discrimination might also be applicable.

(a) Exception for Bona Fide Seniority Systems Which Perpetuate Past Discrimination -

The Supreme Court's decision in International Brotherhood of Teamsters v. United States, supra. held that bona fide seniority systems are protected by Section 703(h) of Title VII even though they perpetuate discriminatory assignments. For example, when women have been discriminatorily assigned to a low paying unit, the unit seniority system "locks" them into the unit because transfer to a better paying unit cannot occur with seniority carryover and wage protection. The individual seeking to transfer would lose the seniority that she had accumulated in the unit in which she had been discriminatorily assigned. She would be at the bottom of the seniority ladder in her new unit and would therefore be subject to layoff.

The Commission has taken the position that a seniority system is bona fide only if there was no discriminatory intent in the creation or maintenance of the system, and if it was instituted prior to the effective date of Title VII (July 2, 1965). Interpretive Memorandum: International Brotherhood of Teamsters et al v. United States; United Airlines Inc. v. Carolyn J. Evans, (May 1, 1979).

If a seniority system was instituted prior to the effective date of Title VII, and there is no evidence showing discriminatory intent in the creation or maintenance of the system, charges based on perpetuation of past discrimination by the seniority system should be resolved with a no cause Letter of Determination.

Example - CP, a Black female, alleges that R discriminated against her on the basis of race by laying her off pursuant to a seniority system which perpetuates R's past discriminatory hiring practices.

The collective bargaining agreement between R and CP's union requires that the last hired is the first to be laid off. CP alleges that this seniority system perpetuates R's past discriminatory hiring practices.

The seniority system was instituted on June 12, 1963, and there is no evidence indicating that there was discriminatory intent in the creation or the maintenance of the seniority system. The system is bona fide and therefore protected by § 703(h) of Title VII. Commission Decision No. 81-3 (1980).

If there is any evidence that there was discriminatory intent in the creation or maintenance of the seniority system, the EOS should contact Coordination and Guidance Services, Office of Legal Counsel. This issue is non-CDP. See § 616 of the Compliance Manual for more information on this issue.

(b) Proof of Perpetuation of Past Discrimination -

The charging party can establish a prima facie case of discrimination by proving that past discrimination occurred and that it is being continued by the present operation of a neutral employment system. The past discrimination could have occurred before or after the effective date of Title VII. The neutral employment system will generally be a wage, pension, or seniority system, although it can be any policy or practice that operates to freeze the effects of prior discriminatory practices.

In proving a charge alleging perpetuation of past discrimination, the charging party must demonstrate a causal connection between the past discrimination and the current policy's adverse effects. The following example illustrates this theory of discrimination and shows how it differs from the adverse impact theory.

Example - R has two departments, the Oven and the Shop, with entry-level jobs in each department which have no job requirements. Prior to 1960, R assigned all Blacks to the Oven and all Whites to the Shop. From 1960 through 1964, it hired both Blacks and Whites into both the Oven and the Shop. In 1965, R instituted a high school diploma requirement that was applied to anyone who desired to be either hired or transferred into the Shop. Those who were already employed in the Shop, but who did not have a high school diploma were permitted to remain there. The high school diploma requirement is still in effect in 1972 and is challenged by all R's Black employees who are employed in the Oven and lack high school diplomas. "Group A" consists of Blacks hired prior to 1960 who lack a high school diploma, while "Group B" consists of Blacks hired between 1960 and 1964 who lack a

diploma. The effect of the high school diploma requirement is to presently exclude from the Shop all members of Group A, despite the fact that Whites hired prior to 1960 without a high school degree are permitted to remain. Thus, Group A's pre-1960 discriminatory exclusion from the Shop continues to affect them because of the high school diploma requirement. That is, R's present policy "perpetuates R's past discrimination" against Group A. This is true even if in the surrounding community Blacks and Whites graduate from high school with equal frequency. Since there are persons who have worked and who continue to work in the Shop without a high school education, it cannot be concluded that a high school education is "necessary" to the safe and efficient performance of Shop jobs. Under the circumstances, the high school diploma requirement currently discriminates against members of Group A because of their race in violation of Title VII. On the other hand, Blacks in Group B did not suffer discrimination when they were hired, so the high school diploma requirement does not perpetuate past discrimination with respect to them. They could be victims of discrimination under the adverse impact theory of discrimination.

Assume the same facts as above, except that Whites were hired into both departments at all times, while Blacks were hired only into the Oven prior to 1960. Thus, the educational requirement excludes not only members of Group A from transferring to the Shop, but also Whites hired prior to 1960 who were hired into the Oven and who lack a high school degree ("Group C"). This does not change the result, however, because members of Group C had the opportunity to be hired into the Shop prior to 1960, while members of Group A were denied this opportunity because of their race.

(c) Respondent's Justification or Explanation -

If charging party establishes that a neutral employment policy perpetuates past discrimination, respondent must justify the continued use of that policy as a business necessity. (See Sub-section 604.7 of this section and § 611 of the Compliance Manual for a discussion of the business necessity defense).

604.9 Accommodation -

Section 701(j) of Title VII requires an employer or other person subject to Title VII to make reasonable accommodation for the religious practices of employees and

prospective employees unless to do so would create an undue hardship on the conduct of the employer's business.

The Rehabilitation Act of 1973, as amended, requires that all departments and agencies in the Executive Branch of the federal government create an affirmative action plan for the hiring, placement, and advancement of handicapped individuals. 29 U.S.C. § 791. These departments and agencies must also provide reasonable accommodation for handicapped individuals unless to do so would create an undue hardship. 29 CFR § 1613.704.

The duty to accommodate is an affirmative obligation. Employers must accommodate each individual's need for an accommodation. Accommodation is different from other Title VII theories of discrimination because proof of a failure to accommodate does not involve comparisons between the treatment accorded charging party and other similarly situated employees, or a determination of whether neutral employment practices have an adverse impact on the employment opportunities of women and minorities. A prima facie case of discrimination is established if a charging party shows that (s)he informed respondent of the need for an accommodation, and there was a failure to accommodate. Respondent is then given the opportunity to establish that accommodation would have created an undue hardship on the conduct of its business.

(a) Religious -

This issue is non-CDP. Section 701(j) of Title VII requires employers and others subject to the Act to accommodate the religious practices of employees and prospective employees unless to do so would create an undue hardship on the conduct of the employer's business.

The Commission recently issued Guidelines on Discrimination Because of Religion which deal with the issue of religious accommodation. Guidelines on Discrimination Because of Religion, 29 C.F.R. Part 1605. The guidelines provide that an employer or labor organization has a duty to explore all possible methods of reasonable accommodation once an employee or prospective employee expresses a need for an accommodation. Accommodation may be requested, for example, because an employee's or prospective employee's religious practices conflict with his/her work schedule, because an employee's religious practices do not permit him/her to join a labor organization or pay a labor organization a sum equivalent to

dues, or because the employee's religious practices prohibit him/her from wearing a uniform prescribed by the employer.

In TWA v. Hardison, 432 U.S. 63, 14 EPD ¶ 7620 (1977), the United States Supreme Court found that it would be an undue hardship on an employer if it had to bear "more than a de minimis cost" in order to accommodate an employee's religious practices. What constitutes "more than a de minimis cost" must be determined on a case by case basis. The guidelines define the term generally as follows:

In general, the Commission interprets this phrase as it was used in the Hardison decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in Hardison, would constitute undue hardship. However, the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes. 29 C.F.R. ¶ 1605.2 (e)(1).

Coordination and Guidance Services, Office of Legal Counsel should be contacted for guidance whenever this issue arises.

(b) Accommodation of Handicapped Individuals -

The Rehabilitation Act of 1973, as amended, governs the employment practices of all federal agencies and departments in the Executive Branch, all federal contractors, and all recipients of Federal financial assistance with respect to handicapped employees or prospective employees. (Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796). The Equal Employment Opportunity Commission only enforces the Act with respect to Federal employment.

All federal departments and agencies in the Executive Branch must make reasonable accommodation for handicapped individuals, unless to do so would create an undue hardship. 29 C.F.R. § 1613.704. A reasonable accommodation may include making facilities readily available and usable by handicapped employees, job restructuring, and acquisition or modification of equipment or devices. The

requirement to reasonably accommodate handicapped individuals is not synonymous with the requirement contained in Title VII.

The Rehabilitation Act of 1973, Section 501 as amended, requires all Federal departments and agencies in the Executive Branch of government to initiate affirmative action programs which encourage the hiring, placement, and advancement of handicapped individuals.

The term "handicapped individual" has been liberally defined by the Act. It includes any person who has a physical or mental impairment which substantially limits one or more major life activities. A handicapped individual may include a person having a record of impairment, or one who is regarded as having such an impairment. With respect to employment under federal contracts and employment under federal grants and programs, alcohol or drug abusers are not considered "handicapped individuals" to the extent that the "current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." Rehabilitation Act of 1973, as amended, § 706. Federal employees who abuse alcohol or drugs are considered handicapped individuals within the meaning of the Act.

Since the 1978 amendment to the Act, Federal employees and applicants for Federal employment can file charges of employment discrimination under the procedures for filing charges under Title VII of the Civil Rights Act of 1964. See, 29 C.F.R. §§ 1613.708 - 1613.710. For a detailed discussion of how to investigate charges of discrimination filed under the Rehabilitation Act of 1973, as amended, see § _____ of the Compliance Manual.

604.10 Statutory Defenses -

Title VII contains several defenses which respondent may raise to defend a charge of discrimination. These statutory defenses are discussed in this sub-section.

(a) Religious Educational Institutions -

Section 703(e)(2) contains an exception for religious educational institutions. It provides that:

It shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion.

This exception only applies to religious discrimination. A religious educational institution may not discriminate against applicants or employees on the basis of race, color, sex, or national origin.

There is some overlap between this exception and the exemption contained in § 702 of Title VII because the 702 exemption also exempts a religious educational institution from the prohibition against religious discrimination. (See, § 605 of Volume II of the Compliance Manual for a discussion of the 702 exemption.)

If a respondent claims that the Commission has no jurisdiction over it because it is a religious educational institution, the following inquiries should be addressed to the respondent.

(1) Submit information indicating whether respondent is owned, supported, controlled, or managed by a particular religion or religious corporation. The statement should include the following information:

(i) For the last 5 years, identify the percentage of respondent's annual monetary contributions which came from a religious corporation, association, or society. Identify the religious corporation, association, or society.

(ii) Was respondent founded by a particular religious group or religious corporation, association, or society?

(iii) Is respondent affiliated with a particular religious group, church, corporation, association, or society? If so, submit a statement identifying the affiliation.

(iv) Does respondent require that all nominees to the Board of Trustees or similar body be of a particular religious faith? If so, identify that faith.

(v) Does respondent require that its faculty members be of a particular religious faith? If so, identify the religious faith. If not, what percentage of respondent's faculty members are of the religious faith that respondent is affiliated with?

(2) Submit a statement indicating whether the curriculum that respondent offers is directed toward the propagation of a particular religion. The following information should be included in your submission.

(i) Respondent's course offerings for the past 3 years. Include a description of the content of those courses directed toward the propagation of a religion.

(ii) Identify the percentage of respondent's faculty members who are priests, nuns, ministers, rabbis, or lay ministers of the church, temple or other religious entity with which respondent is affiliated.

Example - CP applied for a position as an instructor with respondent university. R did not hire CP but instead hired an instructor of the Catholic faith. CP is Jewish and files a charge of religious discrimination. R alleges that Title VII does not apply to its hiring decision because it is exempt under § 703(e)(2) of the Act. The EOS submitted a request for information to R and learned that respondent was founded by the Catholic Church and receives 40 percent of its annual operating budget from the church. The EOS also learned that all of the members of the Board of Trustees are of the Catholic faith, and that respondent makes a deliberate effort to maintain a majority of Catholic faculty members. Ten percent of the faculty members are Catholic priests and 45 percent of the faculty members are of the Catholic faith. Respondent offers a wide variety of courses in various religions and requires all undergraduate students to take 3 religion courses.

Based on this information, respondent is entitled to the exemption contained in § 703(e)(2). See Commission Decision No. 75-186, CCH Employment Practices Guide ¶ 6553. Respondent clearly is supported, controlled, and managed by the Catholic Church. Its curriculum is not directed toward the furtherance of the Catholic religion, but this criterion need not be met if respondent is supported, controlled, or managed by the Catholic Church.

(b) Membership in the Communist Party -

Section 703(f) of Title VII provides that any action or measure taken by an employer or other person subject to the Act against members of the Communist Party of the

United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950, is not an unlawful employment practice under Title VII.

If respondent raises this statutory defense, the EOS should verify that the charging party is in fact a member of one of the organizations. If so, Title VII does not prohibit an employer from discriminating against him/her on that basis, however, an employer cannot discriminate against an individual who is a member of one of the organizations indicated above on the basis of race, color, religion, sex, or national origin.

Example - CP is a member of the Communist Party. She was employed by R as a secretary. CP applied for a promotion to the position of Executive Secretary. She was not promoted and believes that her non-selection was on the basis of her national origin, Hispanic. CP files a charge of discrimination and R raises § 703(f) as a defense. R states that CP joined the Communist Party several months after she started working for R, but R only recently learned of it. After talking with the CP and several witnesses, the EOS is convinced that CP is a member of the Communist Party, and that R was aware of her membership. The EOS also believes that the CP was not promoted because of her membership in the Communist Party.

CP was not promoted because she is a member of the Communist Party, therefore the failure to promote was not an unlawful employment practice under Title VII.

(c) Bona Fide Occupational Qualification (BFOQ) -

Section 703(e)(1) of Title VII contains an exception to the prohibition against discrimination on the basis of sex, religion, and national origin when sex, religion, or national origin, is a BFOQ for a particular job. There is no BFOQ for race or color. This exception has been narrowly construed. Dothard v. Rawlinson, supra. Application of the exception generally has been limited to those situations where only individuals of one sex, religion, or national origin can perform the duties and functions of the job in question. Sex, religion, or national origin must be an actual qualification for performing the job. The respondent must raise this defense. If it does, it is required to prove that sex, religion, or national origin is a BFOQ for the position denied to the charging party. Customer preferences and stereotypic notions concerning the physical or mental capabilities of a particular sex, religion, or national origin do not warrant the application of this exception. Each individual

is entitled to be judged on his/her capabilities. Where sex is necessary for authenticity (e.g., an actor or actress) sex is a BFOQ. Guidelines on Discrimination Because of Sex, 29 C.F R. § 1604.2(a)(2).

In analyzing a BFOQ defense to a charge, it is important to distinguish between BFOQ and business necessity. Both BFOQ and business necessity are defenses based on business needs which a respondent may raise to a charge of discrimination. The primary difference is that the BFOQ statutory exception allows an employer to deliberately discriminate on the basis of religion, sex, or national origin where sex, religion, or national origin is a BFOQ for the position in question. The employer has the burden of establishing that only individuals of one sex, national origin, or religion can perform the duties of the job involved in a safe and efficient manner. Weeks v. Southern Bell Tel. and Tel. Co., 408 F.2d 228, 1 EPD ¶ 9970 (1969). The respondent must show that the "essence of the business operation would be undermined by not hiring members of one sex exclusively. "Diaz v. Pan American Airlines, 442 F.2d 385, 388, 3 EPD ¶ 8166 at 6522 (1971).

The business necessity defense may be raised where a neutral employment criterion applied to all employees or applicants, has the effect of discriminating on the basis of race, color, religion, sex or national origin. (See § 625 of the Compliance Manual for a complete discussion of the BFOQ defense).

(d) Employment of Indians on or Near an Indian Reservation -

Section 703(i) of Title VII allows businesses on or near an Indian reservation to maintain and publicize a hiring preference in favor of Indians living on or near the reservation. In order for this exemption to apply to an employer's hiring practices, the employer located on or near a reservation must publicly announce that it has a policy of preferring to hire Indians on or near a reservation. Commission Decision No. 74-26, CCH Employment Practices Guide ¶ 6398. If a respondent asserts this exception as a defense to a charge, the following information should be requested.

(1) Submit proof that respondent publicly announced its policy of preferring to hire Indians, (e.g., job advertisements and announcements, posters respondent regularly displays in its place of business).

(2) Identify the individual hired for the position that charging party sought and indicate whether that individual is an Indian living on or near a reservation. (Provide his/her name and address.)

Example - R is a factory located 60 miles from an Indian reservation in the state of Montana. It regularly displays posters in its facility indicating that it has a policy of preferring to hire Indians from the nearby reservation to fill available positions. R advertised a supervisory vacancy and indicated in the advertisement that Indian applicants are preferred. CP, a White, saw the advertisement but applied for the position. R hired an Indian who lived 52 miles from its facility but 8 miles from the Indian reservation. CP files a charge of discrimination with the Commission. His attorney alleges that R is not entitled to the exemption contained in § 703(i) of Title VII because the R is not located near an Indian reservation.

The phrase "near a reservation" cannot be precisely defined. At a minimum it encompasses all of the area a person could reasonably be expected to travel from the reservation or a nearby community in one working day to and from work. In this case, R is located 60 miles from the reservation. Whether this is "near" the reservation as previously defined will depend on a number of factors. For example, in certain states, it is not uncommon for individuals to travel several miles to and from work each day. This is probably particularly true for Indians living on Indian reservations because reservations tend to be located in isolated geographical areas away from major population centers. The nearest employer, not located on the reservation, might be 60 miles from the reservation, and an individual could reasonably be expected to travel from the reservation to that employer to work. Additionally, the use of public transportation and the automobile have made it much more likely that individuals will travel 120 miles to and from work each day.

In Montana, it is not uncommon to travel long distances to and from work. One could reasonably be expected to travel 120 miles to and from work therefore the R is entitled to the 703(i) exemption.

The determination of whether an employer is located near a reservation must be made on a case by case basis. In large part, common sense will determine whether this criterion has been met. This determination can be made by the EOS in consultation with his/her supervisor. If assistance is needed, contact Coordination and Guidance Services, Office of Legal Counsel, for additional guidance. For further discussion of this exception, see also Morton v. Mancari, 417 U.S. 535, 7 EPD ¶ 9431 (1974); Wardle v. Ute Indian Tribe, 623 F. 2d 670, 23 EPD ¶ 31,035 (10th Cir. 1980); Livingston v. Ewing, 601 F. 2d 1110, 20 EPD ¶ 30,002 (10th Cir. 1979).

(e) Veteran Preference -

Federal, state, or local laws that confer special rights or privileges on veterans with respect to hiring are not affected by Title VII. Section 712 of Title VII. Commission Decision No. 74-64, CCH Employment Practices Guide ¶ 6419. If respondent is subject to a law of this type and alleges that a veteran was hired pursuant to the law, the EOS must ask respondent to identify the law. The EOS should then obtain a copy of the law and determine whether the individual hired was hired pursuant to the law. The EOS can make this determination in consultation with his/her supervisor. If assistance is needed contact Coordination and Guidance Services, Office of Legal Counsel (Inserted by pen and ink authority in Directives Transmittal 517 dated 4/20/83).

Example - CP, a female, went to the state employment service to obtain information on employment opportunities in City Y and to be referred to prospective employers if positions for which he qualified were available. CP is a machinist and saw a request by a local employer for two experienced machinists. When CP inquired about the positions, the employment specialist asked CP whether she was a veteran.

When CP replied that she was not, the specialist indicated that he could not consider referring CP for the job. The specialist explained that state law requires that R give preferential treatment to veterans in referring applicants for employment. The employer had asked for only five well qualified applicants. Of the group of individuals that the specialist had interviewed for the two positions, 15 were veterans. The specialist stated that he would choose five applicants from that group.

Title VII does not interfere with the operation of the state veterans preference law, regardless of any discriminatory effect it might have.

If the respondent grants a preference to veterans, but this preference is not required by a local, state, or Federal law, the issue is non-CDP, and you should contact Coordination and Guidance Services, Office of Legal Counsel (Inserted by pen and ink authority in Directives Transmittal 517 dated 4/20/83).

(f) National Security -

Section 703(g) of Title VII allows an employer or other person subject to the Act to refuse to hire or discharge an individual if that action is in the interest of national security. The following two conditions must be met:

(1) Occupancy of the position or access to the premises involved must be subject to a national security requirement under a security program imposed by statute or Presidential order; and

(2) The person involved does not meet or has ceased to meet the requirement.

If a respondent asserts this exception to the provisions of Title VII as a defense to the charge, respondent should be asked to identify the statute or Presidential order which imposes a national security requirement, and the manner in which the CP does not meet or has ceased to meet that requirement. After obtaining this information, contact Coordination and Guidance Services, Office of Legal Counsel (Inserted by pen and ink authority in Directives Transmittal 517 dated 4/20/83). This issue is non-CDP.

(g) Reliance on a Commission Interpretation or Opinion (Section 713(b)(1) of Title VII) -

Section 713(b)(1) of Title VII provides that:

In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission.

Section 1601.33 of the Commission's Procedural Regulations sets out the only types of documents that can be relied on as a written interpretation or opinion or the Commission.

Section 1601.33 Issuance of Interpretation of Opinion -

Only the following may be relied upon as a "written interpretation or opinion of the Commission" within the meaning of § 713 of Title VII:

(a) A letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission, or

(b) Matter published and specifically designated as such in the Federal Register, including the Commission's Guidelines on Affirmation Action, or

(c) A Commission determination of no reasonable cause issued under the circumstances described in § 1608.10 (a) or (b) of the Commission's Guidelines on Affirmative Action 29 C.F.R. Part 1608, when such determination contains a statement that it is a "written interpretation or opinion of the Commission." 29 C.F.R. § 1601.33.

If a respondent presents any document which is specifically designated as a written interpretation and opinion of the Commission or alleges that a document is a written interpretation and opinion, the EOS or his/her supervisor must contact Coordination and Guidance Services, Office of Legal Counsel for guidance.

[RESCINDED]

[RESCINDED]

POLYGRAPH EXAMINATIONS

In a charge or complaint challenging a respondent's use of a polygraph examination, the standard Title VII and ADEA theories will apply. The Commission is not aware of any conclusive evidence that there are significant differences in performance on polygraph exams based on race, sex, national origin, or age. See, e.g., Commission Decision No. 76-12, CCH EEOC Decisions (1983) ¶ 6607 (national origin Hispanic). Accordingly, unless the particular respondent's use of an exam indicates otherwise, such charges and complaints should generally be analyzed under the disparate treatment theory. Brown v. State of Tennessee, 693 F.2d 600, 30 EPD ¶ 33,155 (6th Cir. 1982) (no evidence of disparate treatment in denial of promotion to male who refused to take polygraph test where female who also refused to take polygraph was disciplined); Ramirez v. City of Omaha, 678 F.2d 751, 29 EPD ¶ 36,698 (8th Cir. 1981) (use of admissions made during polygraph examination as a factor in an employment decision held nondiscriminatory in an impact case); United States v. City of Miami, 614 F.2d 1322, 1346, 22 EPD ¶ 30,822 (5th Cir. 1980) (consent decree upheld which allowed polygraph use for applicants

to positions of trust when only job-related questions are posed and when polygraph results may not be the sole qualifying factor), other holdings modified en banc, 644 F.2d 435, 27 EPD ¶ 32,328 (1981); Johnson v. Georgia Highway Express, Inc., 5 EPD ¶ 18,444 (N.D. Ga. 1972) (polygraph use is a permissible testing device for discipline in a disparate treatment action). The Commission will apply these theories whenever faced with an allegation that an employer's use of such a test in making employment decisions is discriminatory.

Example 1 - A large quantity of money was missing from one of the cash registers at R's department store. R required three of its five cashiers to take polygraph tests about the theft. The three individuals refused to take the test and were fired; all were Black. The two cashiers not asked to take the test were not fired; both were White. Absent some legitimate, nondiscriminatory reason for requiring Blacks but not Whites to submit to a polygraph exam, the Commission will conclude that R's actions were disparate treatment based on race and a violation of Title VII.

Example 2 - R requires all applicants to submit to polygraph exams. The EOS discovers that, while Hispanics are asked questions about drug-related and other arrests or convictions, non-Hispanics are not. Again, absent some legitimate, nondiscriminatory reason for this difference in treatment, the Commission will issue a cause determination.

Commission decisions on the use of polygraph exams include Commission Decision No. 76-65, CCH EEOC Decisions (1983) ¶ 6649 (charging party not hired because he failed exam required of all applicants: ". . . no evidence that [polygraph exam] has a disproportionate adverse impact upon Black applicants for employment at respondent's facility. Moreover, . . . no evidence that respondent would have retained applicants of other races who failed the . . . test under similar circumstances."); Commission Decision No. 75-061, CCH EEOC Decisions (1983) ¶ 6519 (same as to employees after a theft); Commission Decision No. 7612, CCH EEOC Decisions (1983) ¶ 6607 (respondent able to provide legitimate nondiscriminatory reason for why Hispanic charging party was only one asked to take test; also, non-Hispanic employees required to take tests on other occasions and also discharged for failure).

[1] If respondent's conduct is not unlawful under one of the theories of discrimination discussed in this section, the EOS may inform the charging party that respondent's actions may be subject to challenge under Executive Order 11246, or under one of the old Civil Rights statutes (42 U.S.C. §§ 1981, 1983, 1985). The EOS may advise the charging party to consult a private attorney, however, (s)he should not give his/her opinion of whether the respondent's actions were in fact in violation of another statute.

[2] A pattern and practice of disparate treatment may also be established through the testimony of the charging party and other employees, and/or established through formal or informal policies of the respondent. Sporadic or isolated instances of discrimination will not establish a pattern and practice of disparate treatment, however, International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 14 EPD ¶ 7579 (1977).