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STATISTICAL EVIDENCE IN EMPLOYMENT DISCRIMINATION LITIGATION: SELECTION OF THE AVAILABLE POPULATION, PROBLEMS, AND PROPOSALS

by

William V. Dorsaneo III*

In employment discrimination cases based upon the Civil Rights Act of 1866 and title VII of the Civil Rights Act of 1964, courts generally have

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   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.


2. 42 U.S.C. §§ 2000e to 2000e-17 (1970). Title VII creates a private right of action against employees, employment agencies, and labor organizations when the employment relationship becomes tainted with racial discrimination. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974). The private right of action has been characterized as a method of ensuring that the discriminatee may be made whole by an award of back wages and injunctive relief. Id. at 1367, 1375; accord, Robinson v. Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir. 1971), petition for cert. dismissed, 404 U.S. 1006 (1972); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719-20 (7th Cir. 1969). The language of title VII indicates that an award of back pay is within the sound discretion of the district court. See 42 U.S.C. § 2000e-5(g) (1970). The Supreme Court has recently held that awards of back pay should be refused only if the central statutory purpose of eradicating discrimination and making persons whole for injuries suffered through past discrimination would be frustrated and that the employer's good faith is not a sufficient reason for denying back pay. Albemarle Paper Co. v. Moody, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975).

The discretionary powers of the district court in the area of back pay awards is considered "equitable" rather than "legal" and, therefore, a party may not demand a jury trial in title VII cases under the seventh amendment to the United States Constitution. See Curtiss-Wright Corp. v. Fried, 411 U.S. 189, 197 (1974). Justice Rehnquist's concurring opinion in Albemarle recognizes the legal foundation of title VII actions and indicates that jury
accorded statistical evidence great, if not decisive, weight. The relevance of statistical evidence is premised upon the legal principle that a statistical demonstration of the unequal consequences of a particular employment practice or selection process establishes a prima facie case of discrimination.

Statistical evidence has been utilized to show that a particular standard or qualification for employment or promotion results in selection of applicants for hire or promotion in a percentage or ratio pattern which differs significantly from the minority configuration of the labor pool. Courts have also rendered awards of back pay relatively automatic.

Title VII prohibits discrimination based upon an individual's race, color, religion, sex, or national origin by employers, employment agencies, or labor organizations. The statute permits differences in standards of compensation or terms and conditions of employment based upon a "bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (1970). However, seniority systems have been struck down where their use effectuates the perpetuation of past discrimination. See Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), petition for cert. dismissed, 404 U.S. 1006 (1972). See also United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971), where the court stated: "To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but must 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." Similarly, the statute permits an employer to "act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h) (1970). The use of tests or educational criteria which select applicants for hire or promotion in a racial pattern significantly different from the racial pattern of the labor market places the burden upon the employer to show that the test or other employment criterion is job related and that an alternative device, without similarly undesirable racial effects, could not have been utilized. See Albemarle Paper Co. v. Moody, 95 S. Ct. 2378, 2375-76, 45 L. Ed. 2d 280, 300-02 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

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See also Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974).


4. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (emphasis added), where the Court stated: "... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." See also Watson v. City of Memphis, 373 U.S. 526 (1963). Title VII provides immunity for an employer who engages in conduct "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission." 42 U.S.C. § 2000e-12(b)(1) (1970); see Albemarle Paper Co. v. Moody, 95 S. Ct. 2362, 2365 L. Ed. 2d 280 (1975). However, see Rosenfeld v. Southern Pac. Co., 519 F.2d 527 (9th Cir. 1975), where the court held that good faith reliance is relevant only to liability for back pay and other damages, and does not bar declaratory or injunctive relief or an award of attorney's fees.

acknowledged the relevance of statistical data showing a disparity between the percentages of members of minority groups hired or promoted and the percentages of minority groups in a judicially selected available population.\(^6\) The subtle character of many discrimination producing factors in the employment process requires the courts to place heavy reliance upon statistical evidence.\(^7\)

Despite the importance of statistical evidence, courts have provided only minimal guidance concerning the method and manner of its use. Certainly, a determination of whether minority group members are proportionately represented in an employer's work force or in labor union membership requires an identification of the available population to be used as the base for making comparisons and drawing conclusions. Nonetheless, workable guidelines for selection of an available population from which statistics are to be taken in order to gauge the performance of a defendant charged with unlawful discrimination have not been clearly expressed. Moreover, the permissible extent of a statistical disparity between a defendant's employment pattern and the evidence derived from an analysis of the available population has not been articulated. The premise upon which this Article is based is that courts should utilize precise standards and statistics in selecting the available population to be used as the measuring rod of the defendant's performance in employment discrimination cases. Consequently, this Article explores the current use of statistical evidence and suggests approaches which it is hoped will be of some use in subsequent proceedings.

I. STATISTICAL DATA AND THE PLAINTIFF'S PRIMA FACIE CASE

It has been stated that each claimant seeking relief from discrimination has the burden of showing that his employer intentionally discriminated against him on account of his race, religion, sex, or national origin.\(^8\) In this connection, a claimant must shoulder the initial burden of establishing a prima facie case.\(^9\) Once a prima facie case has been presented, the burden of producing exculpatory evidence is upon the defendant.\(^10\)

A. Individual Claims

The basic method by which an individual claimant may present a prima facie case is by showing that (1) he belongs to an identifiable minority


\(^10\) Id. at 802.
group; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) he was rejected despite his qualifications; and (4) after his rejection the position remained open and the employer continued to seek applicants from persons of the same qualifications. The claimant need not show that the employer had a subjective intent to discriminate. Moreover, an employer's good faith is not a defense to a finding of discrimination or an award of back-pay to the discriminatee. To rebut the claimant's prima facie case the employer must demonstrate the existence of a legitimate non-discriminatory reason for the rejection of the employee. In the foregoing instance, the claimant's prima facie case does not require introduction of statistical evidence. However, statistical evidence may be used by the rejected applicant to show that the employer's asserted legitimate non-discriminatory reason was in fact a cover-up for a racially discriminatory decision.

Where the sought-after position is filled by a competing applicant a more difficult case is presented. The employer may hire the best qualified applicant, and the claimant may demonstrate a prima facie case by showing that he was better qualified. Where the claimant can demonstrate ability equivalent to the person hired, but not superiority, the claimant may introduce statistical evidence that the rejection conforms to a general pattern of discrimination against persons belonging to the claimant's minority group. This evidence will usually take the form of a statistical presentation of the employer's overall minority employment pattern. The purpose of the statistical evidence here will be to show that minority group members are, in fact, not treated equally. The courts reason that a significant unexplained disparity between the percentage of persons in a particular minority group employed or placed in a selected employment category by the employer and the percentage of that minority group in the available population is unlikely to have resulted from a neutral process of selection. In short, although the employer is not required to hire a less qualified minority applicant, he may be precluded from rejecting an equally qualified minority applicant where the claimant can make an unrebutted statistical demonstration that the employer's overall minority employment pattern is discriminatory.

11. Id.
17. United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972). One author has suggested that even the “best qualified” defense will not suffice if the individual claimant is able to demonstrate an overall discriminatory employment pattern. See Blumrosen, Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675, 687-88 (1974). Professor Blumrosen questions the authority of Jacksonville Terminal Co., citing Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973). Nevertheless, it is submitted that the “best qualified” defense is still valid, assuming the qualifications are both necessary and job
B. Individual Claims in the Context of Class Actions

The foregoing analysis presumes that the standards and qualifications for employment selected by the employer are not being questioned. When the applicant for hire or promotion contends that a purported objective qualification is discriminatory in effect, statistical evidence is integral to the claimant's prima facie case. In this context, the individual claim takes on many of the characteristics of a class action. Where the employer requires that all employees fulfill a particular requirement, the discriminatee may contend that the requirement is artificial in the sense that it is not a necessary prerequisite to the tasks the applicant qua employee must perform while functioning as an employee. Where statistical evidence can be marshalled to show that the designated qualification has a more severe impact on minority applicants than non-minority applicants, the individual claimant who is otherwise qualified will present a prima facie case. The employer must then produce evidence that the requirement is job related and necessary or rebut the claimant's statistical evidence by showing that the requirement does not, in fact, have discriminatory consequences. Griggs v. Duke Power Co., a class action case, illustrates the method of showing the discriminatory effect of a particular employment requirement. The employer required a high school diploma and a satisfactory intelligence test score for certain jobs previously limited to white employees. The 1960 census for North Carolina reflected that 34 percent of the white male population completed high school, as compared to only 12 percent of the Black male population. The high school diploma requirement, therefore, altered the racial pattern of the available population in a manner which artificially reduced the percentage of Black males. The employer failed to justify the requirement of a high school diploma as necessary.

A showing that a particular practice, policy, or employment standard gives rise to a minority employment pattern which is disproportionate to the percentage of that minority in the labor force is a relatively simple undertaking if the particular practice, policy, or employment standard is identifiable and if population data reveals who is adversely affected by the requirement. The statistics concerning the number of persons by race who have high school diplomas are readily available in United States census data and are computed for delineated geographic areas.

Where the employer has a particular requirement which cannot be directly evaluated for the effect it produces upon minority applicants by reference to

related. Furthermore, Jacksonville Terminal Co. appears to this author to be authoritative, despite Professor Blumrosen's interpretation of Williamson.

19. See Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972): "The only justification for standards and procedures which may, even inadvertently, eliminate or prejudice minority group employees is that such standards arise from a legitimate business necessity." Business necessity means more than serving legitimate management ends. In order for a practice to be a matter of business necessity it must be essential in the fulfillment of those ends, not merely a matter of management convenience. See, e.g., United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).
census data, the analytical problems are exacerbated. An evaluation of the employment tests used by an employer to determine whether they produce discrimination is difficult because the number of persons who have taken the test will usually be small and not necessarily representative of the persons in the relevant labor pool. Boston Chapter, NAACP, Inc. v. Beecher illustrates this problem. The court, in considering the impact of a test used by the Boston fire department, compared the percentage of minority applicants who passed the test with the percentage of non-minority applicants who passed, and concluded that the statistical evidence was inconclusive. However, other statistical evidence indicated that less than one percent of the Boston fire department was Black or Spanish-surnamed and that Boston had a population of at least sixteen percent Black or Spanish-surnamed Americans. The court considered the inconclusive test results in the context of the overall minority employment pattern of defendant and held that plaintiffs had presented a prima facie case. Therefore, the employer had to justify the discrepancy. Defendant attempted to validate its test requirement and failed. Therefore, although the employer is not required to justify the use of practices which cannot be shown to produce discriminatory consequences, the overall employment performance of a defendant may be used to buttress the plaintiff's evidence that a particular practice has discriminatory consequences.

The cases in which a particular policy or practice of an employer has been challenged for the discriminatory effect which it allegedly promotes can best be viewed as cases in which the employer has imposed unnecessary and, therefore, illegitimate discrimination producing limitations upon the selection of the available population.

In summary, to present a prima facie case an individual claimant must prove that he is qualified for the position. In this connection, a claimant may plead and prove that the qualifications selected by an employer result in discriminatory consequences, thereby requiring the employer to justify them as job related and necessary. Statistical evidence will be required to prove that a particular requirement for hiring or promotion results in unequal consequences. Similarly, proof that an employer's announced standards for the promotion, hiring, or rejection of the employee are mere pretexts for discrimination will normally require introduction of statistical data evidencing an employer's general pattern of discrimination. An individual claimant cannot, however, present a prima facie case by statistical evidence alone.

C. Class Actions

An individual claimant may also bring the action as a class action pursuant
to federal rule 23.\textsuperscript{25} The claimant as class representative must establish
that the action meets the requirements of rule 23(a).\textsuperscript{26} However, this rule
is construed liberally in the context of suits based upon title VII\textsuperscript{27} and
section 1981\textsuperscript{28} because suits brought under the employment discrimination
statutes are considered inherent class actions.\textsuperscript{29} Moreover, the failure of the
individual claimant to establish a violation of the equal employment opportu-
nity statutes in connection with his own case does not preclude the courts
from concluding that the defendant discriminates against the class of minori-
ty group members represented by the individual claimant.\textsuperscript{30}

Where a particular employment practice is challenged by the class repre-
sentative as a discrimination producing variable in the employment process,
the method of using statistical evidence to present a prima facie case will not
differ from that used in individual cases where particular practices are
challenged. The class representative will not, however, be required to show
that each class member is otherwise qualified for employment.\textsuperscript{31}

It has recently been held, however, that the plaintiff class may establish a
prima facie case by statistical evidence of the defendant's overall employ-
ment performance and by such statistical evidence alone.\textsuperscript{32} The method of
evaluating an employer's overall employment performance is set forth
succinctly in \textit{Pettway v. American Cast Iron Pipe Co.}.\textsuperscript{33}

The courts have based a finding of adverse impact on data showing the
percentage . . . hired as compared to the percentage . . . in the avail-
able population. The statistical disparity is held to create a prima facie
showing of discriminatory impact and thus invokes the requirement that

\begin{small}
\begin{itemize}
  \item 25. Fed. R. Civ. P. 23(a) sets forth the prerequisites to a class action:
           One or more members of a class may sue or be sued as representative
           parties on behalf of all only if (1) the class is so numerous that joinder
           of all members is impracticable, (2) there are questions of law or fact
           common to the class, (3) its claims or defenses of the representative par-
           ticipants are typical of the claims or defenses of the class, and (4) the repre-
           sentative parties will fairly and adequately represent the class.
  \item 26. Rossin v. Southern Union Gas Co., 472 F.2d 707, 712 (10th Cir. 1973);
           Johnson v. Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969).
           United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); Oates v. Crown Zellerbach Corp.,
           398 F.2d 496, 499 (5th Cir. 1968).
  \item 30. See, e.g., Parham v. Southwestern Tel. Co., 433 F.2d 421, 428 (8th Cir. 1970).
  \item 31. Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 55 (5th Cir. 1974).
  \item 32. Id. at 53. The plaintiffs stipulated that the defendant's driver hiring practices
           were not discriminatory; therefore, no particular practice or policy was brought into
           question. This was despite the fact that the defendant-employer had imposed an
           experience requirement which effectively foreclosed minority group members from
           becoming road drivers. Irrespective of the stipulation, it is clear from the opinion that
           the court considered the experience requirement discriminatory. See Bing v. Roadway
           Express, Inc., 485 F.2d 441 (5th Cir. 1973) (past intentional discrimination constitutes
           another factor which supports the conclusion that statistical evidence is probative);
           United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972) (defendant's use of
           referral service for new employees in an inconsistent manner disadvantaging minorities
           held to support inference of discrimination); Robinson v. Lorillard Corp., 444 F.2d 791 (4th
           Cir. 1971) (departmental seniority system embodied in collective bargaining agreement
           held a practice having discriminatory effect). With respect to seniority systems, see
  \item 33. 494 F.2d 211 (5th Cir. 1974).
\end{itemize}
\end{small}
the job relatedness of the overall selection process be established . . . . 34

An analysis of the racial configuration of the employer's work force is required where the Pettway standard is implemented. The method has frequently been used by the courts. 35

If the class representative shifts the burden of persuasion to the defendant by showing a statistical disparity between the minority configuration of the employer's labor force and the available population, the defendant will be required to identify the non-discriminatory cause or causes of the disparity to rebut the prima facie case. Thus, the importance of formulating precise standards for the selection of the available population is increased in the class action context.

II. SELECTION OF THE AVAILABLE POPULATION

Analysis of the case law reflects that only minimal consideration has been given to the selection of the available population. The courts, in a number of cases, have given little clue as to the population to be utilized. 36 In at least one case the appellate court was compelled to take judicial notice of the percentage of the particular racial minority in the available population, as there apparently was no evidence in the trial record on the matter. 37

A. Geographic Limitations

The cases may be classified on the basis of the geographic boundaries selected in defining the available population. In many cases it has been assumed that the geographic boundaries of the available population are congruent with the particular metropolitan city in which the employer's business is located. 38 Courts have also utilized the geographic boundary of the county in which the enterprise is situated. 39 Other cases have utilized the geographic boundary of the state 40 or region 41 where the enterprise or labor organization is located. Nevertheless, the courts have provided very little guidance with respect to the proper method of selecting the available population, even on a geographic basis.

34. Id. at 225 n.34.
36. See Rowe v. General Motors Corp., 457 F.2d 348, 357 (5th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791, 795-96 (4th Cir. 1971).
There have, however, been a few cases in which the selection of a particular geographic area has been disputed. In Johnson v. Goodyear Tire & Rubber Co. the defendant asserted that the available population should be limited to "those blacks living in the immediate Houston area." The court held that the geographic limitation suggested by the defendant ignored "the recognized mobility of today's black labor force." In another case the Ninth Circuit precluded the defendant from arguing on appeal that the city of Seattle did not constitute the entire relevant geographic area because the employer made no objection to its use at the time of trial.

As an illustration of the importance and the difficulty of formulating precise standards for the selection of the geographic boundaries of the available population, the 1970 Census of Population and Housing indicates that Blacks comprise 15.9 percent of the Dallas, Texas, Standard Metropolitan Statistical Area (SMSA); 16.6 percent of the total population of Dallas County, Texas; and 24.9 percent of the total population of the city of Dallas. Moreover, the Dallas, Texas, SMSA contains several metropolitan areas and incorporated subdivisions, each having a relatively small percentage of Blacks in comparison to the percentage of Blacks who reside in the city of Dallas. The Dallas, Texas, SMSA is further divided into census tracts of unequal geographic size and population. A review of the census tracts reveals that some have almost no Black residents, while other tracts have a Black population which approaches 100 percent.

The labor force of a particular employer having a facility located in the Dallas, Texas, SMSA may be drawn entirely from persons residing in the SMSA or a particular geographic segment of the SMSA. Evidence of the composition of an employer's work force may reflect no significant difference between the percentage of persons hired or promoted and the percentage of such persons in the Dallas, Texas, SMSA; however, a significant difference may exist between the percentage of persons hired and promoted and the percentage of persons residing in the city of Dallas. The case law provides no ready answer to this dilemma.

Despite the inherent difficulty in establishing standards for selecting the available population on a geographic basis, the uncertainty of the mobility theory espoused by the Fifth Circuit in Johnson provides no guidance for courts or litigants in subsequent proceedings, and, therefore, has little to recommend it.

Any standard formulated for the geographic selection of the available population should be identifiable by persons charged with the responsibility of compliance with the equal opportunity laws. The standard should also be sufficiently flexible to permit the promotion of equal employment opportuni-

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42. 491 F.2d 1364 (5th Cir. 1974).
43. Id. at 1371.
44. Id.
46. U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION AND HOUSING: 1970 CENSUS TRACTS, FINAL REPORT PHC (1)-52, Dallas, Texas, SMSA.
47. Id. at P-1.
48. Id.
through the eradication of discriminatory employment practices. Voluntaryism must be encouraged if the objective of integrating the American labor force is to be achieved. In selecting the geographic area to be used in defining the available population, the initial focus should be upon the employment characteristics of the particular employer under consideration. Relevant considerations include the general nature of the business enterprise, the type of position offered potential employees, the distance potential employees will be required to travel to fulfill their employment obligations, the geographic location of the employer's facility or facilities, and the number of employees used in the defendant's business.

Of these factors, the distance which an employee is willing to travel in order to seek employment is probably the most significant factor in determining the geographic extent of the area selected. Analysis of a particular employer's actual work force should provide reliable evidence of the distance that potential workers will be willing to travel in order to secure and hold a position with the employer.

In the absence of a showing that a particular employer, employment agency, or labor organization imposes restrictions upon the geographic distance which an employee may travel to seek employment, a determination of the size and shape of the geographic area constituting the available labor market may be accomplished by ascertaining the area from which the current employees or labor union members are drawn. This process will involve, as a first step, the ascertainment of the maximum area required to account for at least 80% of the employer's actual work force. Second, location of the particular facility in the actual geographic area should be determined. From this information, a hypothetical geographic area should be constructed by enclosing all census tracts which are of equal distance from the employer's facility as the census tracts comprising the actual geographic area. Third, the hypothetical geographic area should be superimposed upon the actual geographic area to determine the extent to which the two areas are congruent. Fourth, if the actual geographic area and the hypothetical geographic areas are not congruent, a comparison of the racial configuration of the hypothetical geographic area with the racial configuration of the actual geographic area should be made. If a disparity exists, it will result from the addition to the actual geographic area of a census tract containing a different percentage of minority group members than the actual census tracts in the geographic area. Assuming potential minority employees are willing to travel as far as non-minority employees to secure employment, the party arguing for the use of the actual geographic area should be required to explain why the actual geographic area differs from the hypothetical one. Fifth, if the hypothetical geographic area and the actual geographic area are congruent, but the employer has an estab-

49. The selection of an 80% figure is based upon a conclusion that certain employees probably behave uncharacteristically in terms of the distance they are willing to commute. It is asserted that the natural labor market will be identified with sufficient accuracy by excluding 20% of the labor force which reside farthest from the defendant's facility.
lished policy of restricting minority hiring to a particular geographic region immediately adjacent to his facility, the employer should be required to demonstrate that the residence requirement is job related and necessary to the promotion of legitimate business needs. In other words, where it can be shown that the employer has artificially limited the labor force from which he selects applicants on a geographic basis, the discrimination producing limitation should be justified as a matter of business necessity. Otherwise, if a party contends that a different geographic area should be utilized, that party should have the burden of demonstrating objective reasons why the area is inappropriate for consideration as the employer’s natural geographic region.

The proposed five-point formula has several advantages. It will cause litigants and courts to consider an employer’s overall employment conduct in the context of the actual geographic labor market served. The proposed formula recognizes that all employers do not draw employees from the entire population of a state or region. Because the test is based on existing practices and is not impossible to administer, it permits an employer to know what is expected of him on a performance basis.

This proposal does have limitations. It assumes that non-minority persons are willing to travel as far for employment as minority applicants, when, in fact, minority applicants may, as a matter of necessity, be willing to travel greater distances. The proposed formula may call for the inclusion of “lily white” census tracts having inhabitants who are not interested in the employer’s job-offerings, thereby diluting the minority percentage of the available population. A census tract by census tract consideration of the labor force will, however, cause litigants and courts to focus upon the composition of the employer’s particular labor force. The proposed formula is certainly no panacea for the myriad of problems in this area; nevertheless, it is substantially less haphazard than current practices, and offers employers better notice than other proposals, while, at the same time, facilitating ease of administration.

B. Age and Sex Limitations

Virtually no attention has been given to the use of other criteria for defining the available population. In Johnson v. Goodyear Tire & Rubber Co., the employer contended that the age group 16 to 24 years should have been utilized in determining the racial configuration of the available population. The court rejected this suggestion. Presumably, limitations based on sex would have also been rejected.

50. Thus the test will be consistent with the result reached in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974).
51. For another suggested formula see Blumrosen, supra note 17, at 689-90. Professor Blumrosen advocates a “catch up” formula which would require employers to increase minority employment in order to achieve existing utilization rates.
52. 491 F.2d 1364 (5th Cir. 1974).
53. “[T]he potential labor force cannot be limited to one particular age group.” Id. at 1371. The court cited the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1970), in support of its conclusion.
In Rios v. Enterprise Ass'n Steamfitters Local 638, however, the Second Circuit took a more plausible position than the view expressed in Johnson. Analyzing the 30 percent remedial goal selected by the trial court, the Second Circuit noted that the membership of the labor organization was not drawn from the entire population. The court indicated that the statistics showed that "19.79% of the total work force over 16 years of age in the area over which the Union has jurisdiction consisted of black and Puerto Rican males." The Second Circuit recognized that under the provisions of the Age Discrimination in Employment Act not all discrimination based on age is unlawful. Moreover, premised upon the concept that "the court should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck . . . between the elimination of discriminatory effects, which is permissible, and the impermissible involvement of the court in unjustifiable 'reverse racial discrimination,'" the approach taken in Rios is extremely persuasive. The Second Circuit also rejected the mobility concept, espoused in Johnson, and characterized it as an unlawful attempt to maintain a future non-white percentage.

It is sensible for courts to consider that age and sex related restrictions inherent in the type of position offered may affect the definition of the available population. For example, census data reflects that the total male labor force, 16 years of age and older, residing in Dallas County, Texas, is 353,984, while the total Black male labor force, 16 years of age and older residing in Dallas County, Texas, is 46,532. Consequently, Black males comprise only 13 percent of the available male labor force, 16 years of age and older, in Dallas County, Texas. A persuasive argument for the use of the 13 percent figure as the measuring standard, rather than the 16.6 percent figure derived from overall population statistics, can be made. All age limitations will not run afoul of the Age Discrimination in Employment Act. Moreover, the employer may be able to justify exclusion of one sex from the available population by showing that all persons of that sex are simply voluntarily not in the market for valid reasons.

54. 501 F.2d 622 (2d Cir. 1974).
56. 501 F.2d at 633. The court stated that it was permissible to exclude women because they never sought to become steamfitters. Males under 18 years of age were customarily excluded from the union and the apprenticeship programs as a result of their age.
57. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1970), generally prohibits employment discrimination by an employer, employment agency, or labor organization against individuals who are at least 40 years of age but less than 65 years of age unless age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age. Id. §§ 623, 631.
58. 501 F.2d at 633.
59. Id.
61. Id. at P-145.
62. See notes 46-49 supra and accompanying text.
64. See note 56 supra. Women present special problems in the area of employment discrimination. While it is apparent that all women are not in the market for certain positions for which they may be physically qualified, population data is of little utility in
C. Other Limiting Factors

Courts and litigants may properly make use of other factors in identifying the available population. While this technique has not been used with frequency, *Badillo v. Dallas County Community Action Committee, Inc.*,65 is illustrative. The case involved a class action brought in behalf of Spanish-surnamed Americans against a non-profit corporation implementing the Economic Opportunity Act of 196466 programs in Dallas County, Texas.

The plaintiffs contended that the employment pattern of the defendant-employer should be considered in the context of available population data showing that for every Spanish-surnamed American in Dallas there are 2.5 Blacks. The court concluded, however, that:

By using percentages and ratios of Black and Mexican-Americans living at or below the 'poverty level indexes' established by the Federal Inter-Agency Committee, we arrive at a far different and more meaningful conclusion . . . . The ratio of poverty level Blacks to Mexican-Americans—46.8%/9% = 5 to 1—contrasts quite significantly to the 2.5 to 1 result achieved by the plaintiffs' overly broad 'total population' ratio analysis.67

The court based its use of the poverty factor on the fact that legitimate aims and functions of the defendant-employer included the employment of poor persons.68 The conclusion of the court is sound. Moreover, this type of analysis can be used when an employer offers only low salaried positions on the theory that currently employed persons making a higher salary are not properly includible within the available population. Census data contains much information which can be useful in the process of identifying the available population. Persons are counted not only by race, age, and sex, but by occupational and industrial classifications. These factors should be considered when selecting the available population.

An attempt to formulate workable guidelines for selection of the available population is overdue. The tentative analysis of the actual labor pool made by the Second Circuit court in *Rios*69 should serve as a starting point for future employment discrimination cases. There is no reason why the parameters of the available population should be mysterious or why the maximum level of precision permitted by available population data should not be the judicial goal.

III. Significant Statistical Disparity

After the available population has been selected, the courts must determine whether the difference (statistical disparity) between the percentage of deciding questions of the type resolved in *Rios*. For a different treatment of gender related qualifications see Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975).


67. 394 F. Supp. at 708.

68. Id. The case also illustrates how the use of a ratio analysis can be misleading where more than one minority group is in the available labor market.

69. 501 F.2d 622 (2d Cir. 1974); see notes 54-59 supra and accompanying text.
the minority group employed and the percentage of the minority group in the available population is significant. While it may be questioned why any statistical disparity should be permitted, the disinclination of the courts in Justice Frankfurter's words to "turn matters that are inherently incommensurable into mere matters of arithmetic" is understandable.

However, courts have had an unfortunate tendency to use general terms in characterizing the extent of the statistical disparity. In United States v. Hayes International Corp., the Fifth Circuit selected the entire population of Birmingham, Alabama, as the available population. The court found that population figures revealed that roughly 30 percent of the population of Birmingham, Alabama, was Black, and that at the time the suit was instituted the defendant employed 918 whites and 6 Blacks in office and technical positions, and further, that between the date of suit and October 1969 (the last date for which the record revealed information) an additional 285 whites and 14 Blacks were hired in office and technical jobs. The court concluded that the "lopsided ratios" presented a prima facie case. In Castro v. Beecher the court found that an employer having a work force containing only 3.6 percent Blacks, in the context of an available population 16.3 percent Black, established a prima facie case. Moreover, cases indicate that where the defendant employs an extremely small number of minority employees in the context of an available population containing a significant percentage of minority group members a prima facie case is established. Thus, the focus of decisions has not been upon the question of the permissible extent of the disparity.

The courts have made no distinction between the statistical or arithmetical analysis utilized in cases where a particular practice or policy has been challenged as discriminatory and cases in which the overall selection process utilized by the employer has been attacked as discriminatory in effect. For example, in United States v. Georgia Power Co., another case in which the employer's requirement that employees have a high school diploma was challenged, the Fifth Circuit concluded that the requirement "screens out blacks at a considerably higher rate than whites, because in the 25-44 age group in the South, 64.7% of white males, 35% of black males, 63% of white females, and 34.7% of black females have completed high school."

Although the cases reflect that a showing of a gross statistical disparity is sufficient, the permissible limits remain undefined.

71. 456 F.2d 112 (5th Cir. 1972).
72. Id. at 120.
73. 459 F.2d 725 (1st Cir. 1972).
75. 474 F.2d 906 (5th Cir. 1973).
76. Id. at 918. The court also stated that the EEOC guidelines which require a 95% level of confidence to validate an employment test which also was under attack "must be read as setting a desirable goal and not a prerequisite." Id. at 915. See EEOC's Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.5(c)(1) (1974).
Theoretically, when courts examine a particular practice, standard, or policy which has been challenged as a discrimination producing variable in the employment process, the permissible extent of the disparity should be small. The fact that an employment practice has a relatively small impact upon the racial pattern of the work force is irrelevant if it does not arise from legitimate business necessity. Thus, the practice or policy, if unjustifiable as a business necessity, should be eradicated. While mathematical exactitude should not be required, the permissible extent of the statistical disparity should be small where individual practices or policies are examined.

IV. REMEDIAL DECREES

The courts have broad, equitable power in formulating remedial decrees in employment discrimination cases. Federal district courts may establish goals for the purpose of remedying the effects of past discriminatory conduct. Affirmative relief in numerical terms has been ordered by the courts. However, formulation of remedial decrees involves the same difficulties as selection of the available population and the determination of whether a statistical disparity of significant proportions exists. The use of numerical standards (e.g., quotas) raises various problems, both constitutional and statutory.

If an employer determines that his employment process has operated in a discriminatory manner and, therefore, voluntarily decides to institute an affirmative action program to remedy the effects of past discriminatory practices, the employer takes the risk that his affirmative action plan may itself be discriminatory in effect. The problem of reverse discrimination is confronted. Moreover, where the available population from which the
employer draws his labor force contains more than one minority group, the difficulty of formulating remedial decrees and taking voluntary affirmative action will be further compounded. For example, if an employer finds that two distinct minority groups are statistically under-represented in his work force, can the affirmative action plan for remedial decree produce a remedy which achieves an appropriate goal for one minority group at a different pace than for the other minority group? Similarly, if the statistical disparity for one minority group is more disproportionate than for the other, should the employer be required to address the more serious problem first?

A hypothetical employer who will have 100 job openings in the next hiring period may have a labor force comprised of 1,000 employees of which 85 percent are white, 7 percent are Black, and 8 percent are Spanish-surnamed, as compared to an available population with a white population of 74 percent, a Black population of 16 percent, and a Spanish-surnamed population of 10 percent. May the employer remedy the discriminatory impact upon the Black population before disposing of the statistical disparity between the number of Spanish-surnamed Americans in the employment force and the percentage of the Spanish-surnamed Americans in the available population? It could be argued that the remedial action should be directed toward resolving the more severe problem first. However, if relatively few or no Spanish-surnamed Americans are employed during the hiring period in which 100 new employees are hired, a rejected Spanish-surnamed American may contend that he was rejected on racial grounds despite his qualifications for the position. He is not likely to be satisfied with the explanation that the employer is focusing upon the Black problem first. However, the defendant should not be penalized for taking affirmative action. In fact, the legal system should facilitate attempts on the part of individual employers to integrate the labor force. Therefore, action which promotes integration in a statistically demonstrable manner should not be subject to legal attack.

V. CONCLUSION

The haphazard manner in which the courts have considered the selection of the available population cries to be rectified. The difficulties inherent in formulating precise standards and methods for the selection of an available population makes it all the more necessary for courts to focus attention on the problem. Voluntary compliance can hardly be expected from employers, labor organizations, or employment agencies as long as the standard by which conduct is measured remains vague and ambiguous. The proposed formula set forth herein may provide guidance with respect to selection of the available population in future employment discrimination litigation. The courts should also formulate reasonable rules of thumb for determining the permissible extent of a statistical disparity between the percentage of minori-

84. See notes 49-51 supra and accompanying text.
ty group persons employed and the percentage of minority group persons in the available population. Where particular practices or policies have been identified as discrimination producing factors in the employment process only a de minimis deviation should be permitted. The time for the formulation of precise standards to be utilized in employment discrimination cases is overdue. The task is essential to fulfilling the statutory goal of providing equal employment opportunity to all persons regardless of their race, sex, creed, or national origin.