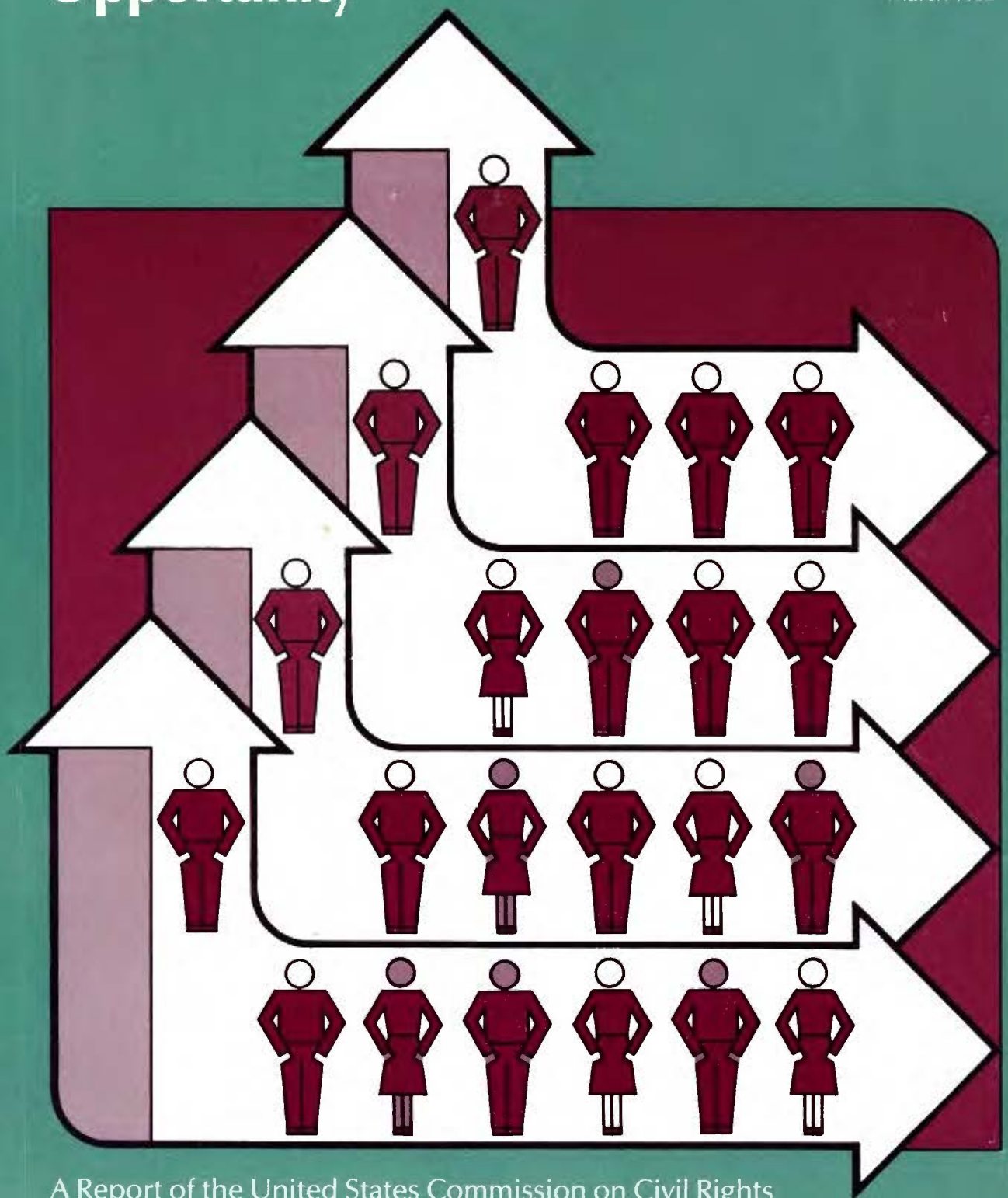
Nonreferral Unions and Equal Employment Opportunity

March 1982



A Report of the United States Commission on Civil Rights

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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LETTER OF TRANSMITTAL

THE U.S. COMMISSION ON CIVIL RIGHTS
Washington, D.C.
March 1982

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Sirs:

The U.S. Commission on Civil Rights presents this report to you pursuant to Public Law 85–315, as amended. This report examines the role of international and local unions in advancing the job status of minorities and women. The findings are based, in part, on a national survey of unions and employers and also on a legal analysis of the duty of unions to represent their members fairly.

We have found that the unions in our survey were either unaware of or did not oppose the use of selection procedures that may have an adverse effect on the job advancement of minorities and women; that women and minorities were severely underrepresented in leadership positions in the surveyed unions; and further, that the surveyed unions have a mixed record in the establishment of programs designed to ensure equal opportunity in the workplace.

The Equal Employment Opportunity Commission (EEOC) has adopted a policy resolution to encourage affirmative action through collective bargaining. When the policy is implemented it will be designed to recognize the good faith efforts of unions with respect to collective bargaining. Although the Commission supports the policy of taking into consideration a union's efforts if they are of a "compelling and aggressive nature," the Commission is concerned that the EEOC policy does not address the issue of the role that unions can play in eradicating discrimination that occurs separately from the collective bargaining agreement. Consequently, we recommend that the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) develop a cooperative mechanism to encourage unions to take action with respect to employer discrimination outside the collective-bargaining agreement.

We also urge that unions intensify their efforts to increase the representation of minorities and women in all levels of union leadership; expand their staffs assigned to their own civil rights and women's rights activities; develop a Title VII compliance program; increase their scrutiny of collective-bargaining agreements for possible denial of equal employment opportunity; initiate collective bargaining to remove from their agreements provisions they believe are discriminatory; be alert to discriminatory practices that are not contained in the bargaining agreement and initiate bargaining to have such practices cease; work with employers to establish voluntary affirmative action plans; and, in the event of employer recalcitrance, be prepared to file charges with the EEOC alleging employer discrimination and charges with the National Labor Relations Board alleging refusal to bargain.

We urge your attention to the information presented here and the use of your good offices in achieving the needed corrective action to facilitate progress toward achieving equal employment opportunity for all in the Nation.
Respectfully,

ARTHUR S. FLEMMING, *Chairman*
MARY F. BERRY, *Vice Chairman*
STEPHEN HORN
MURRAY SALTZMAN
BLANDINA CARDENAS RAMIREZ
JILL S. RUCKELSHAUS

JOHN HOPE III, *Acting Staff Director*

PREFACE

In 1976 the U.S. Commission on Civil Rights published a report that examined the effect of referral unions on the employment opportunities of minorities and women.[1] The Commission found that these unions have considerable influence on employers' hiring decisions in several major industries and that they commonly exercised this influence in a manner that results in discrimination against minorities and women.[2] In 1977 the Commission issued a report on the effect of commonly used layoff procedures on the job security of minorities and women, indicating a need for labor and management to use layoff procedures that do not adversely affect minorities and women.[3]

This study builds upon these previous studies by examining another facet of the job status of minorities and women—the impact of private sector, nonreferral unions on the opportunities of minorities and women for promotion, transfer, and training. Nonreferral unions have no direct influence, and perhaps little or no indirect influence, on hiring.[4] Nonreferral unions, however, can have considerable influence on policies and practices that affect the job advancement of workers already hired. This influence can be exercised through contract negotiations over wages, hours, and other conditions of employment including promotion, transfer, and training practices; union policies toward grievance procedures; and union policies exercised during the day-to-day give-and-take that generally characterizes the union-company relationship. This study examines worksite situations and programs in which unions can play a major role affecting the prospects of minorities and women for job advancement. Particular attention is given to the union role in protecting the rights of bargaining unit members affected by company procedures used to select employees for promotion, transfer, and training. The study focused on those workers whose occupations are classified as production,

[1] *The Challenge Ahead: Equal Opportunity in Referral Unions* defines referral unions as unions that "directly influence entry into a job or trade. . . . By *referring* individuals to employers for hiring and by *selecting* individuals for apprenticeship and membership, many referral unions directly determine the size of the labor force, the qualifications required of workers, and the selection of workers." U.S., Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions*, (1976), p. 15.

[2] Ibid., pp. 15–19, 58–113, 230–36. The Commission found in *The Challenge Ahead* that referral unions in the construction and trucking industries engaged in discriminatory practices that severely restricted the entry of women and minorities into the better paid jobs in those industries. Ibid., pp. 230–36.

[3] U.S., Commission on Civil Rights, *Last Hired, First Fired: Layoffs and Civil Rights* (1977), pp. 62–63.

[4] Leonard A. Rapping, "Union-Induced Racial Entry Barriers," *Journal of Human Resources*, vol. 5 (Fall 1970), pp. 453–54. However, Rapping raises the possibility that the union influence over wage rates may induce employers to intensify already existing exclusionist policies.

maintenance, and service. Certain jobs that were classified as office and clerical were also included.[5]

Since it was not feasible to study all private sector, nonreferral unions, the report focuses on the 12 largest: International Brotherhood of Teamsters (IBT),[6] United Auto Workers (UAW), United Steelworkers (USW), International Association of Machinists (IAM), International Brotherhood of Electrical Workers (IBEW),[7] Retail Clerks International Union (RCIU),[8] Amalgamated Clothing and Textile Workers Union (ACTWU), Communications Workers of America (CWA), Service Employee's International Union (SEIU), Amalgamated Meat Cutters and Butcher Workmen of North America (AMCBW), International Ladies' Garment Workers Union (ILGWU), and Hotel and Restaurant Employees (HRE).[9] In 1978 these unions had about 10.3 million members, almost half of all nonreferral union members in this country.[10]

The report is divided into two sections. Part I examines whether the international unions in the sample and a sample of affiliated local unions have utilized available means to help assure equal employment opportunity for the minority and female employees whom they represent. To permit a conclusion on this issue, part I explores:

- whether the composition of union leadership reflects the presence of minorities and women in work forces represented by unions;
- whether local and international unions scrutinize employer selection procedures to help ensure that they do not have an adverse impact on the job advancement prospects of minorities and women;
- whether the international unions in the study have adopted available means of addressing the issue of equal employment opportunity for minorities and women, including the use of their influence over their own locals' policies toward equal opportunity.

Part II addresses legal issues. The upward mobility of female and minority employees may be impaired by the use of selection factors that have a discriminatory effect, even though the factors may seem neutral on their face. If they have an adverse impact, their use may violate Title VII of the Civil Rights Act of 1964. The first chapter in part II is an analysis of the conditions under which employer use of various selection factors has been found to violate Title VII.

[5] See app. D, footnote 14.

[6] The Teamsters is sometimes considered to be a referral union. EEOC statistics indicate, however, that 89 percent of IBT members are in nonreferral locals. See table D.1 in app. D.

[7] The Electrical Workers (IBEW) is sometimes considered to be a referral union. EEOC statistics indicate, however, that roughly 80 percent of IBEW members are in nonreferral locals. See table D.1 in app. D.

[8] The Retail Clerks and the Meat Cutters merged in June 1979 to form the new United Food and Commercial Workers International Union. Since the field survey (described in chapter 1) conducted by staff of the U.S. Commission on Civil Rights was completed several months before this merger, tables and data analysis are based on information gathered separately from the two internationals before they merged.

[9] The order of these unions is based on size of nonreferral membership in 1974. These membership statistics were the most recent available at the time unions were chosen for inclusion in this study. U.S., Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1975,* Bulletin 1937 (1977), pp. iii, 101. Equal Employment Opportunity Commission, "Total and Minority Group Membership, by Sex, in Referral Unions in the United States, by International Union Grouping, by International Union, 1974" (mimeographed, no date; from the EEOC Local Union EEO–3 Report).

[10] U.S., Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1979,* Bulletin 2079, (1980), table D–1, pp. 91–92.

The promotion, transfer, and training of employees result from negotiated personnel procedures or from unilaterally imposed procedures deemed appropriate by management. Since it is the union's responsibility to protect the rights of the workers in the bargaining unit and to represent them fairly, it is important to determine the extent of liability which unions may bear with respect to the implementation of a selection process for promotion, transfer, and training. Accordingly, the second chapter in part II examines the extent of liability for employment discrimination that unions have been found to have under both Title VII and the National Labor Relations Act.

The Equal Employment Opportunity Commission is undertaking an effort to encourage unions and employers to develop voluntary affirmative action programs through collective bargaining. The third chapter in part II discusses that effort.

The unions studied in this report can have a major impact on the employment opportunities of minority and female members because of the size of the unions and their roles as representatives of their members in bargaining with employers. The ways in which unions exercise their powers and responsibilities are of critical importance to the careers and economic well-being of female and minority union members and in the formulation of public policy.

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Part I

Chapter 1

The Union Role in Job Advancement of Minorities and Women: An Overview

Introduction

The earnings and job status of workers—male and female, minority and nonminority—are strongly influenced by the policies and practices of labor unions. In May 1977 labor unions represented more than 21 million workers, or more than 26 percent of all employees.[1]

The economic status of minorities and women continues to lag behind the status of white men in earnings and occupational prestige.[2] Since unions are obligated to represent fairly the interests of all their members,[3] it is important to know the role that unions play in representing the interests of their minority and female members, not the least of which is the role unions play in helping to expand the opportunities of women and minorities for advancement in their jobs.

This chapter provides an overview of the role nonreferral unions play in the job advancement of minorities and women. The job status of minority and female union members is discussed first, followed by a legal analysis of the obligation placed on unions by Congress and the courts to represent fairly the interests of their minority and female members. The chapter concludes with a description of the survey conducted by the U.S. Commission on Civil Rights to determine the nature of the nonreferral unions' role in the job advancement of minorities and women.

Job Status of Minority and Female Union Members

Of the more than 21 million workers represented by labor organizations in 1977,[4] 6.3 million (29 percent) were women[5] and 4.1 million (19 percent)

[1] U.S., Department of Labor, Bureau of Labor Statistics, *Earnings and Other Characteristics of Organized Workers, May 1977* (1979), p. 1. A small proportion of these workers are represented by employee associations, which share some, but not all, of the characteristics of unions. The *Directory of National Unions and Employee Associations, 1979* reports that labor unions recorded 21.7 million members in 1978, including 1.7 million members employed outside the United States and 2.6 million who were members of employee associations. Union members accounted for 22.2 percent of the labor force in 1978. U.S., Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employees Associations, 1979* (September 1980), pp. 55–56. Unless otherwise stated, figures in the text refer to membership in nonreferral unions and employees represented by those unions.

[2] Among full-time workers, the mean annual earnings in 1978 of white men were $14,627. By contrast, the figures were $6,398 for white women, $9,651 for black men, $6,219 for black women, $10,473 for Hispanic men, and $5,501 for Hispanic women. U.S., Department of Commerce, Bureau of the Census, Current Population Reports, *Consumer Income*, series P–60, no. 123 (June 1980), table 51. See also U.S., Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978), pp. 34–38.

[3] Unions are also obligated to represent fairly the interests of those employees who, though not members of the unions, are represented by them for collective-bargaining purposes. See Duty of Fair Representation, below.

[4] *Earnings of Organized Workers*, p. 6. See note 1. This study was based on the results of the May 1977 Current Population Survey conducted by the Bureau of the Census for the Bureau of Labor Statistics (BLS). Respondents were asked about their membership in or representation by unions or employee associations. Ibid., p. 52. Since most workers who are represented by either unions or employee associations are actually represented by unions, and since the BLS study does not present separate results for unions and employee associations, the term "union" instead of "labor organizations" is used in subsequent references to the survey results.

[5] The *Directory of National Unions and Employee Associations, 1979* reports that women constituted 23.5 percent of total union membership in 1978. Comparable data for minority membership

were minorities.[6] More than 80 percent of the minority and female workers represented by unions were union members.[7]

An assessment of the union role in the job advancement of female and minority workers requires an examination of the current job status of female and minority workers represented by unions. In May 1977 the average weekly earnings of workers represented by unions was $262, and the average weekly earnings of those not represented by unions was $221 (see table 1.1.). The ratio of union workers' to nonunion workers' weekly earnings, as shown in the last column of table 1.1, was 1.19. Hence, union workers, on the average, earned about 19 percent more than nonunion workers. White[8] men, minorities, and women who are represented by unions tend to earn more than their counterparts who are not so represented: the ratios in the last column of the table all exceed 1.0, indicating that for each race-sex group, union workers earn more.

The average earnings of minorities and women compared to white men are higher among unionized than among nonunionized workers. Despite this fact, minorities and women represented by unions earn less than white men represented by unions. In May 1977 the average weekly earnings of white men represented by unions were $288, or $39 a week more than the earnings of minority men so represented; minority women and white women earned still less (see table 1.1). In fact, the average earnings of minority women represented by unions were only 70 percent of the earnings of white men.[9]

One of the reasons for this difference is that minorities and women represented by unions tend to be in less remunerative, lower status occupational categories than white men so represented. Table 1.2 shows the percentages of union workers of different race and sex groups in five major occupational categories,[10] listed in order of remuneration. Of the 10.7 million white men who were represented by unions, 30 percent were craftworkers, the highest paid category. By contrast, 8 percent were in the lowest paid category, service workers. Further, 18 percent of unionized minority males were craftworkers and 14 percent were service workers. Finally, the proportions of minority and female union workers in the two lowest paid categories—clerical workers and service workers—were in every instance higher than the proportions of white male union workers in those categories.

Minorities and women represented by unions also are generally paid less well within a given occupational category compared to white men.[11] For example, white male service workers represented by

are not reported in this publication. Therefore, in most instances reference is made to *Earnings and Other Characteristics of Organized Workers, May 1977,* (1979), the most recent Department of Labor publication that includes data for both women and minorities in unions.

[6] Ibid., pp. 6 and 50. The source publication does not give a complete breakdown by sex of the minority workers. Of the minority workers, 3 million were "black and other"; most "other" workers are Asian and Pacific Island Americans, Alaskan Natives, and American Indians. Hispanic workers represented by unions numbered 1.1 million. The addition of Hispanic and black workers actually leads to a small amount of double counting, since the BLS study notes that Hispanic persons may be white or black; however, the study also notes that about 96 percent of Hispanic workers are classified as white. Ibid., p. 5, note 2.

[7] Of the 3 million black, Asian and Pacific Island American, American Indian, and Alaskan Native workers who were represented by unions, 300,000 were not members. Of the 6.3 million women who were represented by unions, less than 1 million were not members. Ibid., pp. 6 and 12. The source publication does not give a similar breakdown for Hispanic workers. The data for *Earnings of Organized Workers* were from the March 1977 Current Population Survey. Respondents were asked whether they belonged to a union or employee organization. If not, they were asked whether they were covered by one. Ibid., p. 52.

[8] Statistics on white workers published by the Bureau of Labor Statistics in the source tables for table 1.1 include all Anglo workers and also most Hispanic workers. Ibid., p. 5. Whenever possible in this report, Hispanics are included with other minorities. When this is done the term "majority" is used to refer to whites, not of Hispanic origin. In tables 1.1 and 1.2, this was not possible, however.

[9] In comments made on this report in draft, the AFL-CIO noted that "the hiring and initial placement of workers, in this case women and minorities, is the prerogative of management. We certainly do not think it would be fair to leave the impression that unions are responsible for this situation." William E. Pollard, director, department of civil rights, AFL-CIO, Letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Jan. 27, 1981, p. 1 (hereafter cited as Pollard Letter).
The Commission recognizes that the employer and other factors play a role in the widely disparate job status of minorities and women and of white males. The focus of this report, however, is the role unions play in improving employment opportunities for women and minorities

[10] These five occupational categories, and one other, sales workers, are the blue-collar and lower paid white-collar occupational categories covered by this study. The study does not cover professional and technical workers or managers. See app. D. The occupation of salesworker is excluded from table 1.2 because of the small number of union workers in this group—138,000, less than 1 percent of all workers represented by unions. See Bureau of Labor Statistics, *Earnings of Organized Workers,* p. 28.

[11] Within the occupational categories displayed in table 1.2, there are wide variations in the types of jobs included in each category as well as corresponding differences in wage rates that occur regardless of race and sex. Only the broad occupational differences are described by these data. It is notable, however, that the data show fewer unionized minorities and women represented at the higher wage levels than at the lower wage levels.

TABLE 1.1 Average Weekly Earnings of Employed Full-Time Wage and Salary Workers, by Union Representation, Race and Sex, May 1977

	Average weekly earnings (mean)		Earnings ratio
	Represented by unions	Not represented by unions	
Both sexes, all races[a]	$262	$221	1.19[b]
White men	288	273	1.06
Minority[a] men	249	192	1.30
White women	207	160	1.29
Minority[a] women	201	150	1.34

Source: U.S., Department of Labor, Bureau of Labor Statistics, *Earnings and Other Characteristics of Organized Workers, May 1977* (1979), pp. 28–31.

[a] The source publication does not provide separate earnings figures for Hispanic workers. The great majority of Hispanic workers are included as whites. See pp. 50–51 and p. 5, footnote 2 of the source publication. The minority groups included are blacks, Asian and Pacific Island Americans, and American Indians, including Alaskan Natives. The source publication does not provide separate earnings figures for these groups. See p. 1, footnote 1 of the source publication.

[b] Ratio of average weekly earnings of workers represented by unions to earnings of those not so represented.

TABLE 1.2 Percentages of Employed Full-Time Wage and Salary Union Workers, by Race and Sex, in Selected Occupations, and Average Weekly Earnings of These Occupations, May 1977

	OCCUPATIONAL CATEGORIES							
	Craft and kindred workers	Operatives and kindred workers	Nonfarm laborers	Clerical and kindred workers	Service workers	Other workers[a]	Total	
Average weekly earnings (mean) all races, both sexes	$307	$243	$238	$223	$212	$301		
Percentages of workers in each occupation:								Numbers of workers (,000)
All races,[b] both sexes	22%	29%	7%	13%	9%	20%	100%	(16,576)
White men	30	30	8	7	8	17	100	(10,666)
Minority[b] men	18	36	13	9	14	10	100	(1,432)
White women	2	25	2	27	9	35	100	(3,603)
Minority[b] women	1	23	2	29	20	25	100	(875)

Source: U.S., Department of Labor, Bureau of Labor Statistics, *Earnings and Other Characteristics of Organized Workers, May 1977* (1979), pp. 28–31

[a] This category includes data for professional and technical workers, managers, and salesworkers who are not covered by this study. See appendix D.

[b] The source publication does not provide a sex breakdown for the occupations of union-represented Hispanic workers. The great majority of Hispanic workers are included as whites. See p. 50 and p. 5, footnote 2 of the source publication. The minority groups included are blacks, Asian and Pacific Island Americans, and American Indians, including Alaskan Natives. The source publication does not provide separate occupational statistics for these groups. See pp. 28–31 and p. 1, footnote 1 of the source publication.

unions had average weekly earnings of $244 in 1977, while average earnings for minorities and women varied from $157 for minority women to $207 for minority men.[12] Similarly, white male operatives represented by unions had average weekly earnings of $268, while average earnings for minorities and women ranged from $168 for minority women to $237 for minority men.[13]

Unions represent large numbers of minorities and women, yet clearly these workers have lower average earnings, and work in less well-paid occupations than white men. These conclusions hold despite the fact that union workers of all race and sex groups tend to earn more than nonunion workers.

Duty of Fair Representation

Duty of Fair Representation Under the National Labor Relations Act

Section 9 of the National Labor Relations Act[14] (NLRA) establishes a statutory right on the part of labor organizations to represent employees in an appropriate bargaining unit for the purpose of engaging in collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.[15] In accordance with this right, the labor organization has a legal obligation and responsibility to represent all unit members fairly. Unit members who are discriminated against because of race, sex, or national origin, as a result of the labor organization's conduct, may initiate charges against their statutory representative under §301 of the Labor Management Relations Act[16] or §8(b)(1) and (2) of the NLRA[17] and/or §§703 and

[12] *Earnings of Organized Workers*, pp. 29–31.

[13] Ibid.

[14] 29 U.S.C. §§151–169 (1976).

[15] Sec. 9(a) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

[16] 29 U.S.C. §§141–197, sec. 301 permits employees to bring suit against their statutory bargaining representative and employer in a United States District Court. This section is not pertinent to the study.

[17] Sec. 8(b) provides: "It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein: or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

In comments on this report in draft, the Equal Employment Opportunity Commission noted that its Guidelines on Religious Discrimination provide at 29 C.F.R. §1605(2)(d)(2) that:

> [W]hen an employee's religious practices do not permit [an employee to pay his dues or an equivalent sum to a labor organization], the labor organization should accommodate the employee to join the organization. . .by permitting him or her to donate a sum equivalent to dues to a charitable organization.

Preston David, Executive Director, Equal Employment Opportunity Commission, Letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Feb. 6, 1981, p. 1.

704 of the Civil Rights Act of 1964.[18]

The NLRA was promulgated in 1935 to promote industrial stability by recognizing and protecting employees' rights to organize and bargain with their employers.[19] The NLRA created the National Labor Relations Board (NLRB), composed of five board members appointed by the President of the United States.[20] Cases are brought before the NLRB for determination either by the representation procedures under §9 or the unfair labor practice procedures set forth in §10.[21]

When the NLRA was enacted in 1935 there were no provisions that specifically addressed a labor organization's duty of fair representation. Employees discriminated against by their union appeared to have no recourse under the NLRA, and as such, had to file suit with the courts for relief. Thus, the labor organization's duty of fair representation was actually created by the courts. The Supreme Court of the United States in *Steele v. Louisville & Nashville Railroad*[22] placed on the bargaining representative a duty to exercise fairly, without hostile discrimination, the statutory right to represent unit employees.[23]

The NLRB began to apply the Supreme Court's *Steele* findings of a duty of fair representation in its §9 representation proceedings where a challenging union, unit employees, or the employer would raise the issue of the labor organization's discriminatory practices.[24] In cases where the labor organization was found to practice discrimination, the board would deny or rescind the union's certification.[25] This had the effect of preventing the labor organization from acting or continuing to act as the exclusive representative of the unit employees. After the Taft-Hartley Amendments of 1947, which added §8(b), the board decided it would no longer hear union discrimination cases in representation proceedings. Concerned with the adversarial nature of the discrimination issue and with the fact that the precertification hearing on discrimination unreasonably delayed the collective-bargaining process, the NLRB decided that the question of a labor organization's discriminatory practices was more appropriately aired under §10 unfair labor practice procedures.[26]

In the 37 years since the *Steele* decision the board and courts have set forth the union's obligation in representing unit members fairly. Even though the labor organization bargains for the majority, it must still consider the interest of the minority at the negotiating table.[27] However, the union may make contracts that have unfavorable effects on some unit members where the differences are relevant to the

[18] Sec. 703(c) provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. . . .

Sec. 704(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employ, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Sec. 704(b) provides:

> It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

[19] 29 U.S.C. §151 (1976).

[20] *Id.* at §153(a). The board hears charges that employers and unions have committed "unfair labor practices" in violation of §8 of the act; conducts representation elections, so that employees may vote on which union, if any, they wish to represent them in dealings with the employer; interprets the act (subject to review by the Federal courts); and otherwise administers the act. *Id.* at §§157–162.

[21] Employer and union conduct designated as unfair labor practices are set forth in §8. Procedures for litigating unfair labor practices before the NLRB are found under §10.

[22] 323 U.S. 192 (1944).

[23] *Id.* at 202–203.

[24] E.g., Larus & Brother Co., 62 N.L.R.B. 1075 (1945). Hughes Tool Co., 104 N.L.R.B. 318 (1953).

[25] *Id.*

[26] Handy Andy, Inc., 228 N.L.R.B. 447 (1977).

[27] 323 U.S. 192, 200 (1944).

authorized purpose of the agreement (e.g., seniority provisions).[28]

The duty of fair representation not only encompasses the collective-bargaining process but also governs the union's conduct in the administration of the collective-bargaining agreement as well.[29] The union as a participant in implementing the terms of the contract must act "honestly in good faith and without hostility or arbitrary discrimination."[30]

It is possible for a union to violate its duty of fair representation not only by its acts, but also by its omissions. The union's refusal to process minority or women unit members' grievances complaining of discriminatory practices by the employer is violative of the duty.[31] In refusing to process grievances, the union's conduct towards its unit members must not be arbitrary, discriminatory, or in bad faith.[32] And once the grievance process is initiated by the union on behalf of the unit members, the statutory representative may not process the grievance in a perfunctory fashion.[33]

The role of the NLRB in carrying out the national policy against invidious discrimination[34] is helpful in determining the board's jurisdiction in employment discrimination cases. Courts have recognized that Congress has established other governmental agencies with the primary function of preventing invidious discrimination in employment.[35] The primary function of the NLRB is not to eradicate employment discrimination but to maintain industrial stability.[36] Thus, union discrimination cases brought before the NLRB must allege an unfair labor practice violation under §8 of the NLRA.

Union Liability in Representing Minorities and Women Under the Civil Rights Act of 1964

The Civil Rights Act of 1964 includes Title VII, or specifically §703(c), which prohibits discrimination by a labor organization against unit members it represents. Title VII is administered by a five-member Commission, the Equal Employment Opportunity Commission, appointed by the President of the United States[37], for the purpose of preventing "any person from engaging in any unlawful employment practice" set forth in §§703 and 704.[38]

Even though Title VII and the NLRA are coexistent,[39] they are separate and independent statutes. Each has its own distinct procedures, and employment conduct creating liability under one does not necessarily create liability under the other.[40] The aggrieved employee may pursue both statutes' procedures simultaneously, however.[41]

Some courts have held that the union, under §703(c), must take affirmative action in eliminating discrimination against unit employees.[42] The affirmative action requirement means that the union must negotiate actively at the bargaining table for nondiscriminatory treatment of its members. A union failing to take such action may be held responsible for the employer's discriminatory practices.[43]

If the union signs a collective-bargaining contract that includes discriminatory provisions, it matters not that the signing was the result of employer pressure or under protest; the union is still held liable. The union's good faith efforts in and willingness to eliminate the employer's discriminatory practices will be taken into consideration by the courts in assessing backpay awards against the union, however.[44] Moreover, even when a union signs a collective-bargaining contract which is neutral on its face, but has discriminatory effects on minorities or women in its administration, the union is liable.[45] This is so because the bargaining represen-

[28] *Id.* at 203.
[29] Humphrey v. Moore, 375 U.S. 335 (1964).
[30] *Id.* at 350.
[31] Vaca v. Sipes, 386 U.S. 171 (1967).
[32] *Id.* at 190.
[33] *Id.* at 191.
[34] 598 F.2d 136, 146 (D.C.D.C. 1979), *cert. denied,* 99 S.Ct. 2885 (1979).
[35] *Id.*
[36] *Id.;* 29 U.S.C. 151 (1976).
[37] 42 U.S.C. §2000e–4 (1976). The EEOC has the authority to receive charges of discrimination, conduct investigations into these charges, and endeavor to eliminate the alleged unlawful employment practice through conciliation; and to initiate suits in Federal district courts whenever it has reasonable cause to believe that a person or group is engaged in a "pattern or practice" of discrimination. *Id.* at §2000e–4—§2000e–6 and §2000e–12.
[38] 42 U.S.C. §2000e–5.
[39] Local Union No. 12, 368 F.2d 12.
[40] Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975); Guerra v. Manchester Terminal Corporation, 498 F.2d 641 (5th Cir. 1974).
[41] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
[42] Gray v. Greyhound Lines, East, 545 F.2d 169, 174 (D.C. Cir. 1976), Macklin v. Spector Freight System, Inc., 478 F.2d 979 (D.C.D.C. 1973).
[43] 478 F.2d 979 (D.C.D.C. 1973).
[44] Burwell v. Eastern Airlines, 458 F.Supp. 474 (D.C. Va. 1978).
[45] *But see* International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

tative must be held responsible for the natural consequences of its labor negotiations.[46]

The duty placed on unions is a strict one under Title VII, for even if minorities and women do not protest the discriminatory collective-bargaining agreement the union may still be liable.[47] The union's failure to represent employees fairly under the collective-bargaining agreement's grievance and arbitration procedures violates the duty.[48]

Unions may be independent or affiliated with an international labor organization. When the discriminating union is affiliated with an international labor organization, the international may also be held liable for the discriminatory practices of its local. Courts agree that there must be sufficient nexus between the international and the discriminating local's conduct for liability to attach.[49] The extent of the international's involvement in the affairs of the discriminating local may cause different courts to vary the findings of liability, however. Liability of an international has been based on merely providing the local with an advisor and signing the collective-bargaining agreement to the international actually engaging in the negotiation of the collective-bargaining agreement.[50]

The Commission Survey

Since the average job status of women and minorities represented by unions is less than their majority male counterparts, it is vital to determine what unions can do to help improve their position. The job status of minorities and women can be improved through a variety of programs and procedures designed to enhance their advancement opportunities and provide protection from discrimination. Such programs and procedures include, for example, the establishment of labor-management committees to promote equal opportunity at the worksite, special training programs designed to remedy the underrepresentation of women and minorities in skilled occupations, special procedures for use in grievances alleging discrimination, and the inclusion of antidiscrimination clauses in collective-bargaining agreements. While such programs and procedures may be established by employers themselves, unions can take the initiative—and in some instances have done so—to ensure that employers establish such programs and procedures.[51]

Collective bargaining is an important means through which unions can affect the procedures employers use to determine which employees will advance on the job.[52] In interpreting the NLRA's requirement that employers and unions bargain in good faith,[53] the NLRB has divided the subjects of collective bargaining into three categories, mandatory, permissible,[54] and prohibited[55] subjects of bargaining. Mandatory subjects of bargaining are those which must be discussed and on which agreement

[46] Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974).

[47] Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975); Hairston v. McLean Trucking Co., 62 F.R.D. 642, 667 (M.D.N.C. 1974), *vacated on other grounds,* 520 F.2d 266 (4th Cir. 1974).

[48] Macklin v. Spector Freight System, Inc., 478 F.2d 979, 992 (D.C.D.C. 1973).

[49] *See* Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir. 1977) and Kaplan v. International Alliance of Theatrical, Etc., 525 F.2d 1354 (9th Cir. 1975).

[50] *See* Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978); Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir.), *modified on rehearing,* 556 F.2d 758 (5th Cir.), *cert. dismissed,* 434 U.S. 801 (1977); Patterson v. American Tobacco Company, 535 F.2d 257 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976); Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators, 525 F.2d 1354 (9th Cir. 1975).

[51] See ch. 4.

[52] The ability of unions to use collective bargaining to establish procedures they favor is demonstrated by their success in requiring employers to use seniority in their selection procedures. Unions strongly support the seniority system and have succeeded in translating this support into contract language, legally requiring employers to take seniority into consideration in making promotion, transfer, and training decisions (as well as other decisions, including layoffs). Chamberlain and Cullen have described the union role:

> Although seniority was a device rather commonly used even before the spread of labor unions, they have been most responsible for the systematic and widespread adoption of the practice. . . .[W]hat the unions did was to systematize and enforce the procedures under which the older worker's [in terms of service] interests were to be given priority. Neil W. Chamberlain and Donald E. Cullen, *The Labor Sector* (New York: McGraw-Hill, 1971), p. 251.

Neil Chamberlain is on the faculty of Columbia University's Graduate School of Business and Donald Cullen is a faculty member at Cornell University's New York State School of Industrial and Labor Relations. For surveys providing quantitative evidence on the union's success in fostering the use of seniority, see U.S., Department of Labor, Bureau of Labor Statistics, *Seniority in Promotion and Transfer Provisions,* Bulletin 1425-11 (1970), p. 5; BNA, *Employee Promotion and Transfer Policies* (Washington, D.C.: January 1978); and Bureau of Labor Statistics, *Training and Retraining Provisions.* p. 18.

[53] 29 U.S.C. §158(d) (1976).

[54] Permissible subjects of bargaining are those which one party may raise, but which the other party may or may not discuss, at its own discretion. Chamberlain and Cullen, *The Labor Sector,* p. 134.

[55] Prohibited subjects of bargaining are those about which it is illegal to bargain. Chamberlain and Cullen, *The Labor Sector,* p. 135.

must be sought if either party desires to raise the subject. Mandatory subjects are defined as those related to "wages, hours and other terms and conditions of employment."[56] It should be noted that seniority,[57] promotions,[58] transfers,[59] and the elimination of race and sex discrimination[60] have been determined, by the NLRB, to be among the mandatory subjects of bargaining. Hence, if a union requests bargaining on one of these subjects, the company must bargain in good faith on the subject.

Job advancement by means of these personnel procedures typically occurs through the application of one of several formal or informal criteria for choosing among candidates for an opening for a promotion, transfer, or training opportunity. Such criteria include seniority, written tests, interviews, written performance evaluations, and others. Since these criteria, referred to in this report as selection factors, are used to determine selection for promotion, transfer, and training opportunities, their use affects job advancement prospects of women and minorities.

To determine the extent and nature of the union role in advancing the job status of women and minorities, the U.S. Commission on Civil Rights undertook a field survey of local labor unions, international unions, and employers. The survey[61] was designed to obtain information on the union role in influencing programs and procedures that could enhance the employment status of minorities and women represented by nonreferral unions. Secondarily, the survey examined company personnel practices because company officials (1) make the final decisions about promotions, transfers, and training, (2) have more complete information about what employment factors are used in making these decisions, and (3) know whether these factors have been validated.

Commission staff conducted face-to-face interviews with union and company officials between August 1978 and April 1979. Most interviews took place in eight randomly selected metropolitan areas: Chicago; Detroit; Los Angeles; Columbus, Ohio; New Orleans; Atlanta; Tampa-St. Petersburg; and San Antonio.[62]

Three interrelated survey instruments—the International Union, Local Union, and Employer's Interview Schedules—were used to obtain the data. For any one union, information was gathered from international union officials, several local unions associated with the international union, and several employers that had collective-bargaining agreements with these local unions. With this approach, data collected from any one of the three sources helped with the interpretation of data obtained from the other two. By comparing the responses of local union officials and employers, it was possible to identify establishments where local union officials and personnel officers agreed that a particular selection factor was used and to identify establishments where union officials were unaware that certain selection factors were being used.[63]

The international unions chosen for inclusion in the survey were the 12 internationals listed in the preface.[64] In addition, 6 or 7 local unions affiliated with each international were randomly selected for interview, for a total of 77 locals.[65] The random selection of locals was followed by a selection of establishments (a plant, office, store, warehouse, or other similar facility) that employed members of each local. Hence, a group of 77 matched pairs—locals and their collective-bargaining partners—was selected. To permit a comparison of union and

[56] 29 U.S.C. §158(d) (1976).

[57] Longhorn Mach. Works, Inc., 205 N.L.R.B. 685, 84 L.R.R.M. 1307 (1973).

[58] Allan L. Bioff, Laurence J. Cohen, and Kurt L. Hanslowe, eds., *The Developing Labor Law: Cumulative Supplement 1971–75* (BNA Books: Washington, D.C., 1976), p. 232.

[59] Continental Ins. Co. v. NLRB, 495 F.2d 44, 86 L.R.R.M. 2003 (2d Cir. 1974).

[60] Jubilee Mfg. Co., 202 NLRB 272, 82 L.R.R.M. 1482 (1973), *affirmed*, 87 L.R.R.M. 3168 (1974).

[61] The research methods used in the Commission survey are explained in app. D. This appendix examines such topics as the choice of industries and companies for the interviews conducted with the internationals, the weights used in selecting the number of employer respondents for each industry, minimum respondent sizes, methods used in identifying appropriate bargaining partners for each of the 77 locals, and selection of alternate respondents in cases where the primary respondent declined to participate in the survey.

[62] Because of refusals by some respondents in these cities, a few interviews took place in other areas: New York City, Houston, Little Rock, St. Louis, and Fairfield, Ala. Interviews with officials of international unions were held in the cities where the unions have their headquarters.

[63] In those cases in which an employer stated that a practice was used and the union official stated that it was not used (or that he or she did not know if the practice was used), it was assumed that the practice was used, because personnel officials are expected to have more detailed knowledge of their practices than union officials.

[64] The Teamsters did not agree to participate in the survey, however.

[65] Seven locals were interviewed for each of the five largest internationals, ranked by size of nonreferral membership, and six locals for the other internationals.

nonunion employers, representatives at 194 establishments were interviewed, of which 145 were union employers and 49 were nonunion.[66]

Summary

Unions represent a large segment of the work force including substantial numbers of minorities and women, whose average earnings are below those of majority males. Since unions are obliged to represent fairly all persons covered by their collective-bargaining agreements, this report focuses on whether unions are adequately addressing the issue of insuring equal employment opportunity for the minority and female employees whom they represent.

The next chapter examines minorities and women in policymaking positions within the labor movement and analyzes data, mainly from the Commission survey, on the race and sex composition of union membership and of unions' policymaking leadership.

[66] The sample of 194 establishments included establishments in all major industries with at least 10 percent of their total work forces represented by unions. A 3 to 1 ratio of union to nonunion establishments was selected for each industry, so that union-nonunion comparisons in the final sample would reflect differences between unionized and nonunionized employers, rather than differences between industries. To facilitate a comparison of job advancement practices between the South and the non-South, 48 southern establishments were interviewed. This represented an oversampling of the South relative to the South's proportion of all unionized workers. See app. D.

Chapter 2

Minorities and Women in Union Leadership Positions

Background

Historically, minorities and women have not had the opportunity to take leadership roles at the higher levels of the union hierarchy.[1] Concomitantly, many of their employment problems have not been addressed.[2] Although unions have acknowledged the needs of minorities and women (for example, maternity leave,[3] civil rights committees within unions,[4] and equal pay legislation[5]), the unequal status of minorities and women in unions remains.[6]

Over the years, blacks have sought more effective representation by establishing racially separate unions, such as the Brotherhood of Sleeping Car Porters,[7] independent local unions, independent worker federations, and caucuses within established local unions. The Brotherhood of Sleeping Car Porters, however, had great difficulty in achieving recognition by the Pullman Company and acceptance by the American Federation of Labor.[8] Moreover, independent local unions had little effective power, as they had no control over collective bargaining.[9] Caucuses within the unions applied pressure to union leaders, but they were ignored to a great extent.[10]

In the late 19th and early 20th centuries, when many unions were founded, blacks were formally barred from membership.[11] In the 1920s some unions found it advantageous to ease this policy somewhat by establishing black auxiliary locals,[12] or by chartering segregated locals.[13] The practice of maintaining auxiliary or segregated locals continued for several decades, but their numbers diminished significantly in the 1940s.[14] Although segregation in

[1] William B. Gould, *Black Workers in White Unions* (Ithaca, N.Y.: Cornell University, 1977), pp. 363–64; Twentieth Century Fund Task Force on Women and Unemployment, *Exploitation from 9 to 5* (Lexington, Mass.: Lexington Books, 1975), p. 120. William B. Gould is professor of law at Stanford University.

[2] Gould, *Black Workers*, p. 363; Twentieth Century Fund, *Exploitation from 9 to 5*, p. 115; and Philip S. Foner, *Organized Labor and the Black Worker, 1619–1973* (New York: Praeger, 1974), p. 425. Philip S. Foner is a professor of political science at Lincoln University, Pa.

[3] James J. Kenneally, *Women and American Trade Unions* (St. Albans, Vt.: Eden Press, 1978), p. 186.

[4] Ray Marshall, *The Negro Worker* (New York: Random House, 1967), pp. 31–32. Ray Marshall, former Secretary of Labor, is professor of economics at the University of Texas.

[5] Kenneally, *Women and American Trade Unions*, p. 182.

[6] Foner, *Organized Labor*, pp. 425–27; Twentieth Century Fund, *Exploitation from 9 to 5*, pp. 115, 135.

[7] Foner, *Organized Labor*, p. 177.

[8] Ibid., pp. 178, 186.

[9] Martin Estey, *The Unions: Structures, Development, and Management* (New York: Harcourt, Brace, and Jovanovich, 1976), p. 46. Martin Estey has been a faculty member of the Wharton School, University of Pennsylvania.

[10] Gould, *Black Workers*, pp. 397–400.

[11] Ray Marshall, *The Negro and Organized Labor* (New York: John Wiley & Sons, Inc.) 1965, p. 90. See also p. 16.

[12] Marshall notes that auxiliary locals represented the first step beyond total exclusion, but that since they allowed blacks to have little control over their affairs, they were not widely joined. Ibid., pp. 23, 96.

[13] Marshall differentiates segregated locals from auxiliary locals in that the former were "theoretically autonomous" and the latter were extensions of and were controlled by white locals, although he notes that whites often bargained for the segregated locals as well. Ibid., p. 96.

unions decreased after that time, several unions did not drop racial bars until the 1960s.[15]

In the 1950s black union leaders formed the Negro American Labor Council (NALC) to pressure both the AFL–CIO and employers to increase leadership positions for blacks in factories and in unions. They met with considerable resistance, however, and NALC was inherently weak because its leaders lacked independent political power within the unions, since they had to rely upon white union officials to retain their jobs.[16]

In the late 1960s black union members were becoming assertive, and such organizations as the League of Black Revolutionary Workers were being formed.[17] These organizations' activities, primarily on behalf of auto workers, resulted in increased hiring of minority foremen and superintendents in factories and in reduced opposition from union leadership to blacks running for office.[18] Although the Detroit, Michigan, area was the site of much of this activity, it also occurred in New Jersey, California, and Illinois during the same period.[19]

By 1970 black auto workers were becoming increasingly concerned about whether a revolutionary ideology was the best means to achieve their ends.[20] Although these black labor organizations subsequently died out,[21] they nevertheless had the effect of helping to increase the number of black union leaders.[22] One of these new leaders, Nelson Jack Edwards, vice president of the United Auto Workers,[23] was instrumental in forming the Coalition of Black Trade Unionists (CBTU) in 1972.[24] CBTU is composed of black union officials and rank-and-file members from many international unions. A major differentiating characteristic of CBTU and its predecessors is that it sees itself as being neither a "separatist" nor a "civil rights" organization. According to William Lucy, president of CBTU and one of its founding leaders, it works within the trade union movement.[25] The A. Philip Randolph Institute has developed into another civil rights organization composed primarily of black trade unionists. The institute concerns itself with a wide range of economic issues.[26]

Hispanics and women have also formed labor organizations to enhance their relative status in unions. The Labor Council on Latin American Advancement, composed predominantly of Hispanic union members, was founded in November 1973.[27] Since 26 percent of the Hispanic work force are members of unions,[28] one of the council's goals is to encourage unionized Hispanic workers to become more actively involved in union politics.[29]

The Coalition of Labor Union Women (CLUW) was formed in 1974 to help further the cause of women workers.[30] One of its goals is to expand the policymaking role of women in unions.[31] The group has conducted programs to train women in labor leadership in an attempt to make unions more responsive to the needs of their women members.[32]

[14] Derek C. Bok and John T. Dunlop report that in 1939 the AFL ceased chartering segregated unions and they argue that the "tight labor market" during the Second World War increased the pressure on unions to reduce discrimination against blacks. *Labor and the American Community* (New York: Simon and Schuster, 1970), p. 120.

[15] Marshall, *The Negro and Organized Labor*, p. 90.

[16] Gould, *Black Workers*, p. 364.

[17] The Dodge Revolutionary Union Movement (DRUM) was the first of several local worker organizations that demanded major change in their status. Gould, *Black Workers*, p. 388; Foner, *Organized Labor*, pp. 410, 413, 415.

[18] Gould, *Black Workers*, p. 391. See also, Foner, *Organized Labor*, p. 417.

[19] Gould, *Black Workers*, pp. 393–94; Foner, *Organized Labor*, p. 415.

[20] Gould, *Black Workers*, p. 390; Foner, *Organized Labor*, p. 422.

[21] Gould, *Black Workers*, p. 390.

[22] Ibid., p. 391. Foner, *Organized Labor*, p. 417.

[23] Foner, *Organized Labor*, p. 433.

[24] William Lucy, "The Black Partners," *Nation*, vol. 29 (Sept. 7, 1974), pp. 177–78. Lucy is secretary-treasurer of the American Federation of State, County and Municipal Employees.

[25] Gould, *Black Workers*, p. 365.

[26] Norman Hill, president of the A. Philip Randolph Institute (APRI), describes the focus of the Institute as being "issues like national economic policy, trade union rights, the minimum wage, international trade policy, national health insurance, and job training programs." Norman Hill, "A. Philip Randolph Institute" (New York, n.d.), p. 1. In comments on this report in draft, the AFL–CIO noted that "there are 180 APRI chapters around the country composed mostly of black trade unionists working within the labor movement and within their communities for equality and social justice." Pollard Letter, p. 1.

[27] Labor Council for Latin American Advancement, "Declaration of Principles and National By-Laws," art. II, §1, revised Apr. 13–16, 1978.

[28] Alfredo C. Montoya, "Hispanic Workforce: Growth and Inequality," *The AFL–CIO Federationist* (April 1979), p. 10. Statistics published by the U.S. Department of Labor indicate that 29 percent of Hispanic workers are represented by labor unions. U.S., Department of Labor, Bureau of Labor Statistics, *Earnings and Other Characteristics of Organized Workers, May 1977* (1979), p. 2.

[29] Alfredo C. Montoya, director, Labor Council for Latin American Advancement, telephone interview, Sept. 12, 1980.

[30] Kenneally, *Women and American Trade Unions*, pp. 196–97.

[31] "3,000 Delegates at Chicago Meeting Organize a National Coalition of Labor Union Women," *New York Times*, Mar. 25, 1974, p. 27.

[32] Kenneally, *Women and American Trade Unions*, p. 197.

At the 1975 AFL–CIO convention, the delegates resolved to work with CLUW.[33] Further, the Machinists and the Auto Workers began providing financial support for the organization.[34] This marked a change in union policy and the beginning of cooperation in solving women's problems within unions.[35]

This chapter assesses the extent to which women and minorities have been able to translate their growing power in labor unions into union leadership positions. Second, it compares their presence in these positions with their membership in the bargaining units in general. Underlying this analysis is the assumption that with greater representation at high levels of union leadership, women and minorities will have a greater opportunity of having their concerns fully addressed. To serve as a basis for the analysis, the chapter first describes the union leadership hierarchy and which offices are generally designated as the more powerful.

Organizational Structure of Unions

The organizational structure of labor unions provides a wide range of elected or appointed leadership positions. These positions occur at the three major levels in the structure: The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), the international unions, and the local unions.[36]

The AFL–CIO is a federation of international labor unions and independent local unions.[37] It is not directly involved in the collective-bargaining activities of its member unions, but provides support services for the unions (research, legal assistance, mediation of conflicts between unions) and presents "labor's views" on economic and social problems and policies to governmental and nongovernmental bodies.[38] A 35-member executive council governs the AFL–CIO in its daily affairs. Among the duties of the council is suggesting legislation to protect the interests of labor unions and their members.[39]

International unions occupy the principal position in trade union government because of their decisive influence in the collective-bargaining process.[40] The executive board, executive council, or board of directors is the main source of direction and control in international unions.[41] Leadership of the executive board lies with the president, who has administrative control of the key functions of the union.[42] Although the degree of constitutional power exercised by international union presidents at times may be limited,[43] Martin Estey notes that, in general, international union presidents are "likely to wield great de facto power."[44]

Local unions represent workers in a particular company or group of companies in a local area; their organization is similar to the international union. The local union executive board consists primarily of elected executive officers and "additional members elected at large from the membership or from specified constituencies within the local."[45] Some locals prefer to employ a professional business agent to oversee the affairs of the union. The business agent is either elected by the members of the local or appointed by the international or by other union officials.[46]

[33] Ibid., p. 199.

[34] Ibid., p. 200.

[35] In comments on this report in draft, the AFL–CIO noted that at its 13th convention, held in November 1979, it adopted a civil rights resolution "which includes support for APRI, the Labor Council for Latin American Advancement, and the Coalition of Labor Union Women, among others." Pollard Letter, p. 1.

[36] U.S., Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1979* (1980) (hereafter cited as *Directory of National Unions)* reported that the AFL–CIO is composed of 108 independent international unions. Another 66 international unions are unaffiliated with the AFL–CIO. In 1978, 56,389 local unions were affiliated with international unions. Ibid., p. 73. Among the 12 international unions studied in this report, the Teamsters and the Auto Workers are not affiliated with the AFL–CIO.

[37] Martin Estey, *The Unions,* p. 40.

[38] Ibid., pp. 40–41.

[39] *Directory of National Unions,* p. 1.

[40] Section 8(d) of the National Labor Relations Act states: "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. §158(d)(1976).

[41] Estey, *The Unions,* p. 52.

[42] Arthur Sloane and Fred Witney, *Labor Relations* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1967), p. 167. Arthur Sloane is professor of business administration at the University of Delaware and Fred Whitney is professor of economics at Indiana University.

[43] Jack Barbash, *American Unions* (New York: Random House, 1967), pp. 92–93. Jack Barbash is professor of economics and industrial relations at the University of Wisconsin.

[44] Estey, *The Unions,* p. 52.

[45] Barbash, *American Unions,* p. 32.

[46] Reed C. Richardson, *American Labor Unions* (New York: New York State School of Industrial and Labor Relations, Cornell University, 1970), p. 19.

In many unions another unit of organization with its own elected or appointed leadership positions has been created by combining groups of locals into district or area councils commonly called regional bodies. Administration of the regional bodies is carried out by the regional offices, each with a director. In some internationals the regional directors are also vice presidents of the international and are elected at conventions. Each regional office has under its supervision a group of field representatives who are generally appointed by the international.[47]

Minority and Female Representation in Leadership Positions

The AFL–CIO currently has one black and one woman on its 35-member executive council.[48] Frederick O'Neal, president of the Associated Actors and Artistes of America has been a member since 1969 and chairs the council's civil rights committee.[49] Three other blacks have served on the council in previous years. Willard Townsend, then president of the United Transport Service Employees of America, and A. Philip Randolph,[50] then president of the Brotherhood of Sleeping Car Porters, were elected to the executive council in 1955.[51] This was the first executive council of the newly merged AFL–CIO.[52] Townsend served on the council until his death in 1957.[53] C.L. Dellums inherited the presidency of the Sleeping Car Porters from Randolph in 1968;[54] however, Randolph remained on the council as president emeritus of the Sleeping Car Porters until 1974.[55] C.L. Dellums was elected to the executive council to fill the vacancy left when Randolph retired.[56] Dellums left the council in 1979.[57] There have never been any Hispanic, Asian American, or American Indian council members.[58]

Until recently, there were no women on the AFL–CIO executive council. In November 1979 a special 15-member committee was instructed by newly elected president Lane Kirkland to explore ways of increasing the number of minorities and women in leadership positions. At the February 21, 1980, executive council meeting the committee recommended that 2 of 35 council seats be exempt from the tradition that council members be drawn from the general officers of the affiliated unions.[59] On August 21, 1980, Joyce Miller, a vice president of the Textile Workers, was elected to the executive council after the waiver of another longstanding tradition—not having more than one member of any affiliated union on the council.[60] The other exempt seat on the council has yet to be filled, although two other new members were elected to the council at the same time that Joyce Miller was elected.[61]

Women and minorities have endeavored to find ways to increase their representation in leadership positions on the international level, but, according to the Department of Labor's *Directory of National Unions and Employee Associations, 1979,* the number of women in these positions continues to be very small. This publication indicates that of 661 officers of the internationals affiliated with the AFL–CIO, 31 or 4.7 percent of the total were women.[62] No

[47] Derek C. Bok and John T. Dunlop, *Labor and the American Community* (New York: Simon and Schuster, 1970), pp. 150–51.

[48] At the time of publication, the Commission learned that Barbara Hutchinson, director of women's activities, American Federation of Government Employees, had been elected to the council. Hilda Julbe, public relations staff, AFL–CIO, telephone interview, Dec. 7, 1981.

[49] Frederick O'Neal, president, Associated Actors and Artistes of America, telephone interview, Sept. 25, 1980; *Directory of National Unions* (1980), pp. 5–6.

[50] In comments on this report in draft, the AFL–CIO noted that A. Philip Randolph has also served as vice president of the AFL–CIO executive council, and is considered to be "the father of affirmative action." Pollard Letter, p. 1.

[51] Jervis Anderson, *A. Philip Randolph: A Biographical Portrait* (New York: Harcourt, Brace, Jovanovich, 1973), p. 297. The United Transport Service Employees of America merged into the Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees in 1972. U.S., Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1973* (1974), p. 99.

[52] U.S., Department of Labor, Bureau of Labor Statistics, *Brief History of the American Labor Movement* (1976), p. 40.

[53] U.S., Department of Labor, Bureau of Labor Statistics, *Directory of National and International Labor Unions in the United States, 1957* (1958), p. 18.

[54] Anderson, *A. Philip Randolph,* pp. 341–42.

[55] "A. Philip Randolph Retires from Council," *AFL–CIO News,* Aug. 10, 1974, p. 2.

[56] "Dellums, Filbey Elected to Executive Council," *AFL–CIO News,* Aug. 10, 1974, p. 3.

[57] Richard Womack, staff representative, Department of Civil Rights, AFL-CIO, telephone interview, Oct. 15, 1980. Dellums was president emeritus of the Sleeping Car Porters while on the council.

Directory of National Unions (1979), p. 5. The Brotherhood of Sleeping Car Porters merged into the Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees in 1978. Ibid., p. 46.

[58] Womack Interview.

[59] Lane Kirkland, president, AFL–CIO, Transcript of Press Conference, Bal Harbour, Fla., Feb. 21, 1980, p. 1.

[60] "Woman to Join AFL–CIO Council," *The Washington Post,* Aug. 22, 1980, p. E2.

[61] "Three New Vice Presidents Elected by Executive Council," *AFL–CIO News,* Aug. 23, 1980, p. 2.

[62] *Directory of National Unions (1980),* pp. 95–96.

women head any of the AFL–CIO's member international unions.[63] The organization has attempted to improve the representation of women in leadership positions by creating the post "Co-ordinator of Women's Affairs" and by the appointment of a woman to head the AFL–CIO's education department.[64] The Department of Labor does not collect similar data for minorities.[65]

Several studies on the presence of women and minorities in local union leadership positions indicate that they continue to have difficulty getting elected to leadership positions in their unions. Linda LeGrande, in a Department of Labor publication, noted that "although labor unions have had success in recruiting women, they have not made equal progress in electing women as officers or in appointing women to head departments."[66] A 1980 report published by the Coalition of Labor Union Women, *Absent from the Agenda,* reported that "women are underrepresented in unions, and despite improvement, [are] underrepresented in union leadership positions."[67] The Twentieth Century Fund report on women and employment has argued that one of the reasons that women have not had greater representation in leadership positions is that they are perceived as being less competent than men. Its report suggests that men are thought to be "'tougher' at the bargaining table" and that it may be "more 'appropriate' for men to hold positions of authority."[68]

Blacks have found it similarly difficult to get elected to leadership positions. Roger Lamm examined the question of black leadership within San Francisco local unions in 1975, finding that "being black substantially reduces one's chances for gaining union leadership."[69] It was found to be much easier to be elected to a shop steward position if one were black than to be elected to a higher level position.[70] No studies were available on Hispanics or other minorities in leadership positions.

To determine the representation of minorities and women in leadership positions in the unions in the Commission's sample, the race and sex composition of the union's leadership is compared with that of the bargaining units represented by the unions in the survey.[71]

International Union Leadership

According to recently published Department of Labor statistics, for 10 of the 12 international unions covered in this report that provide separate membership figures, 27 percent of a combined total membership of 10,264,000 are women. Women account for at least half of all members in the Garment Workers, Clothing and Textile Workers, Communications Workers, Retail Clerks, and the Service Employees. These 5 unions make up 57 percent (1,556,081) of all female members tabulated for the 10 internationals reporting separate membership figures for women.[72]

Female participation was highest in those unions that traditionally have organized women who work in relatively low-paid occupations and industries, for example, the apparel industry represented by the Garment Workers (80 percent) and the Clothing and Textile Workers (61 percent). Unions that have traditionally represented industries employing large percentages of males, for example, the Auto Workers, Machinists, Meat Cutters, and Teamsters, continue to report high percentages of male membership.[73]

[63] Elyse Glassberg, Naomi Baden, Karen Gerstel, *Absent from the Agenda: A Report on the Role of Women in American Unions* (Coalition of Labor Union Women, Center for Education and Research), September 1980), p. 4.

[64] Ibid.

[65] Eugene Becker, labor economist, Division of Industrial Relations, Bureau of Labor Statistics, U.S. Department of Labor, telephone interview, Feb. 13, 1980 (hereafter cited as Becker Telephone Interview).

[66] Linda H. LeGrande, "Women in Labor Organizations: Their Ranks Are Increasing," *Monthly Labor Review,* vol. 101 (August 1978), p. 12. Linda LeGrande is an economist, formerly in the Division of Industrial Relations, Bureau of Labor Statistics.

[67] *Absent from the Agenda,* p. 6.

[68] Twentieth Century Fund, *Exploitation from 9 to 5,* p. 120.

[69] Roger Lamm, "Black Union Leaders at the Local Level," *Industrial Relations,* vol. 24 (May 1975), p. 231. Roger Lamm is a professor of business administration at the University of California, Berkeley.

[70] Ibid., p. 221.

[71] Estimates of the race and sex composition of the employees selected to be surveyed were obtained from 67 employers and 9 local unions for 76 of the 77 local unions selected for the study. Hence, work force distributions for 67 of the locals do not reflect the total membership of the local but those workers in the local's bargaining unit employed in the particular establishment included in the study. For further information on work forces covered, see app. D. Information on the makeup of the work force for one local was unavailable from either the employer or the union; this local was deleted from the following analysis.

[72] U.S., Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1979* (1980), pp. 93–94.

[73] Becker Telephone Interview.

Since data on the number of minority members in the international unions are not collected by the Department of Labor,[74] Bureau of Labor Statistics data were used to estimate these percentages. The resulting estimates are that black, Asian and Pacific Island American, and American Indian men constitute about 10 percent of the membership of these 12 unions, and women from the same three racial groups make up about 5 percent of their members.[75] Hence, minorities together make up about 15 percent of the members of these unions.

These percentages, however, were not reflected in the proportion of leadership positions held by minority and female union members at either the international or local levels. For 11 of the 12 international unions included in the Commission survey,[76] the distribution of officers and executive board members by race and sex showed that majority males dominated the principal officer positions at the international level. No minorities or women were reported among the 11 international presidents[77] or 7 executive vice presidents[78] included in the survey. Moreover, among these same internationals no women or minorities were represented in the positions of secretary, secretary-treasurer, or treasurer.

Six percent (11) of the 184 vice president[79] positions were held by minority males, 4 percent by black males, and 2 percent by Hispanic males. Women held 7 percent of the international vice president positions, the only officer position at the international level with female representation among 11 international unions. Five percent were held by majority females, 1 percent by black females, and less than 1 percent by Hispanic females. (See table A.1 in appendix A for detail.)

Minorities and women were also underrepresented on the executive boards of the international unions. Minority men held approximately 5 percent (14) of the 294 executive board positions: black men held 4 percent of the executive board positions, and 1 percent of the board members were Hispanic males. Majority women held 4 percent of the board member positions, black women 2 percent, and Hispanic women less than 1 percent. No Asian or Pacific Island Americans or American Indians were reported on the governing bodies of the international unions included in this survey. These percentages for minorities and women in union leadership positions were markedly below the percentages of minorities and women in the membership[80] of these internationals, which is estimated to be 15 percent.

Local Union Leadership

A comparison of the race and sex of local union officers and of the bargaining unit members[81] represented by the locals included in the Commission survey parallels the results shown for the internationals. The percentage of majority males who were local union officers was substantially greater than the percentage of majority males represented in the bargaining units for the local unions surveyed:

[74] Becker Telephone Interview.

[75] The number of black, Asian and Pacific Island American, American Indian, and Alaskan Native men and women in labor organizations is presented in Bureau of Labor Statistics, *Earnings of Organized Workers*, table 5. This table shows the numbers working in specific industries. The statistics in the text were obtained by computing the numbers of workers, by race and sex, in 12 industries covered by this study. (See app. D for a detailed statement of the industries emphasized on the 12 internationals covered by the study.) The great majority of union members in these industries belong to the 12 internationals covered in this study. Some workers in these industries are members of other internationals, while a small percentage of the members of these internationals work in industries not covered by this study.

[76] Representatives of the following international unions were interviewed by Commission staff: United Auto Workers, Mar. 1, 1979; United Steelworkers, Feb. 23, 1979; International Association of Machinists, Mar. 20, 1979; International Brotherhood of Electrical Workers, Mar. 16, 1979; Retail Clerks International Union, Feb. 16, 1979; Amalgamated Clothing and Textile Workers, Mar. 20, 1979; Communications Workers, Apr. 10, 1979; Service Employees International Union, Mar. 15, 1979; Amalgamated Meat Cutters and Butcher Workmen, Mar. 6, 1979; International Ladies Garment Workers, Mar. 22, 1979; Hotel and Restaurant Employees, Mar. 14, 1979. No data are shown for the Teamsters, since that international declined to participate in the survey.

[77] Cleveland Robinson, a founding leader of the Coalition of Black Trade Unionists, is president of the Distributive Workers of America. Cesar Chavez is president and founder of the United Farm Workers of America, AFL–CIO. Neither of these unions was included in the Commission survey. C.L. Dellums, formerly a member of the AFL–CIO executive council, is president emeritus of the Brotherhood of Sleeping Car Porters which merged into the Railway Clerks in 1978.

[78] The seven executive vice presidents were officers of the ACTWU, ILGWU, and CWA, the internationals that make a distinction between the officer positions of vice president and executive president.

[79] Most of the international unions reported more than one vice president.

[80] It is noted above that black, Asian and Pacific Island American, American Indian, and Alaskan Native men constitute about 10 percent of the membership of the 12 international unions.

[81] The term "bargaining unit member" is not synonymous with the term "union member." Bargaining unit members include all persons covered by the collective-bargaining agreement; whereas, union members are those persons who have paid dues to belong to the union. Data on union membership within the bargaining units studied were not available.

TABLE 2.1 Distribution of Local Union Officers by Race, Sex, and Ethnic Group, 1978–79

Office	Total No.	Total %	Majority Male	Majority Female	Black Male	Black Female	Hispanic Male	Hispanic Female	Asian and Pacific Island American Male	Asian and Pacific Island American Female	American Indian and Alaskan Native Male	American Indian and Alaskan Native Female
President	75[a]	100.0	70.7	9.3	10.7	2.7	4.0	1.3	0	0	1.3	0
Vice President	133	100.0	62.4	14.3	8.3	9.0	4.5	1.5	0	0	0	0
Treasurer	20	100.0	70.0	10.0	15.0	5.0	0	0	0	0	0	0
Secretary-Treasurer	36	100.0	63.9	5.6	13.9	11.1	5.6	0	0	0	0	0
Financial Secretary	25	100.0	60.0	24.0	8.0	8.0	0	0	0	0	0	0
Recording Secretary	56	100.0	44.6	21.4	7.1	19.6	7.1	0	0	0	0	0
Guide	15	100.0	73.3	0	20.0	0	6.7	0	0	0	0	0
Guard	16	100.0	56.2	0	43.8	0	0	0	0	0	0	0
Sergeant-at-Arms	15	100.0	40.0	6.7	26.7	6.7	20.0	0	0	0	0	0
Business Agent	14	100.0	50.0	14.3	14.3	0	21.4	0	0	0	0	0
Trustee	112	100.0	56.2	10.7	16.1	9.8	3.6	0.9	0	0.9	0	1.8
Other Officer	61	100.0	62.3	16.4	6.6	8.2	4.9	1.6	0	0	0	0
Total	578	100.0	60.0	12.6	12.3	8.5	5.0	0.9	0	0.2	0.2	0.3

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.
[a] Data covered 76 locals because workforce data was not available for one bargaining unit. In addition, for one local the office of president was not among the local's elected officers.

majority males constituted 43 percent of the bargaining units, but held 60 percent of all officer positions. As figure 2.1 shows, minorities and women were underrepresented in all officer positions for the unions included in the survey when compared to their percentages in the bargaining units represented by these unions (see tables A.2 and A.3 of appendix A for details).

The distribution of minority and female local union officers may be compared to their distribution in the corresponding bargaining units for each union in the survey. As can be seen in figure 2.2, locals affiliated with four of the international unions included in the survey reported having 73 percent or more majority male officers while the locals representing four other international unions indicated majority male officers of more than 50 percent.

In each instance the percentage of majority males who were officers was greater than their corresponding percentage in the bargaining units. For example, the greatest incidence of majority female officers was reported by the locals representing the Garment Workers and the Clothing and Textile Workers. For these unions the percentage of majority female officers closely approximated their percentage within the bargaining units. This, however, was not the case for majority females represented by the Electrical Workers, Retail Clerks, and Communications Workers. In these three unions combined, 18 percent of the local officers were majority females and 42 percent of the bargaining unit members were majority females. (See table A.4 of appendix A for the numbers of local union officers by race, sex, ethnic group, and international union affiliation.)

Table 2.1 lists 12 different officer titles that were identified in the sample, and indicates the percentages of minorities and women in each position. Although there were more majority males in every officer position, relatively high percentages of minorities and women were in some of these positions.

The percentage of majority female officers was highest for the position of financial secretary (24.0 percent). Majority males, however, dominated this position, representing 60.0 percent of the total persons holding the office. About 20 percent of all recording secretaries in the survey were black females, the highest percentage of black women in any officer position. Nevertheless, majority males held 44.6 percent of the recording secretary positions, a higher percentage than any other group. Table 2.1 indicates further that no women were represented in the positions of guide or guard for the local unions surveyed.[82] The incidence of women in the sergeant-at-arms position was noticeably low with only two women holding the position.

The largest percentage of black males in any one officer position was in the position of guard. The greatest concentration of Hispanic males was in the position of business agent, 21.4 percent. Hispanic females, Asian and Pacific Island American males and females, and American Indian and Alaskan Native males and females combined accounted for less than 2 percent of all persons holding office in the local unions surveyed.

For most of the local unions surveyed, all officers were included as members of the executive board while a majority of locals also reported that the executive boards included members selected from the general membership. As figure 2.3 shows, majority males accounted for over half of all executive board members reported by the locals representing the 12 international unions surveyed, as compared with minority males, who constituted less than 20 percent of the 878 executive board members in the survey (see table A.5 of appendix A for detail on specific groups).

Representation of minorities and women among the surveyed locals was even less in the higher echelon positions of president and vice president. Locals representing 6 of the 12 international unions in the survey reported that more than 70 percent of all their president and vice president positions were held by majority males (see figure 2.4 and tables A.2 and A.4 of appendix A). For each of these unions, majority males were substantially overrepresented in these officer positions when compared with their representation in the work force. For example, 32 percent of the work force represented by the Electrical Workers was made up of majority males, yet majority males occupied 86 percent of the presidencies and vice presidencies (see figure 2.4) in the surveyed locals and 74 percent of all officer positions (see figure 2.2). Women made up 52

[82] In most unions it is the duty of the guide to inspect the membership receipts to determine that all persons present at union meetings are entitled to remain in the meeting of the local union. In most unions it is the duty of the guard to take charge of the door at union meetings to ensure that no one enters who is not entitled to do so. See, for example, United Steelworkers of America, *Constitution of International Union, United Steelworkers of America: Manual* (September 1974), art. VIII, secs. 7 and 8.

FIGURE 2.1
Distribution of Local Union Bargaining Unit Members and Local Union Officers by Race and Sex, 1978-79

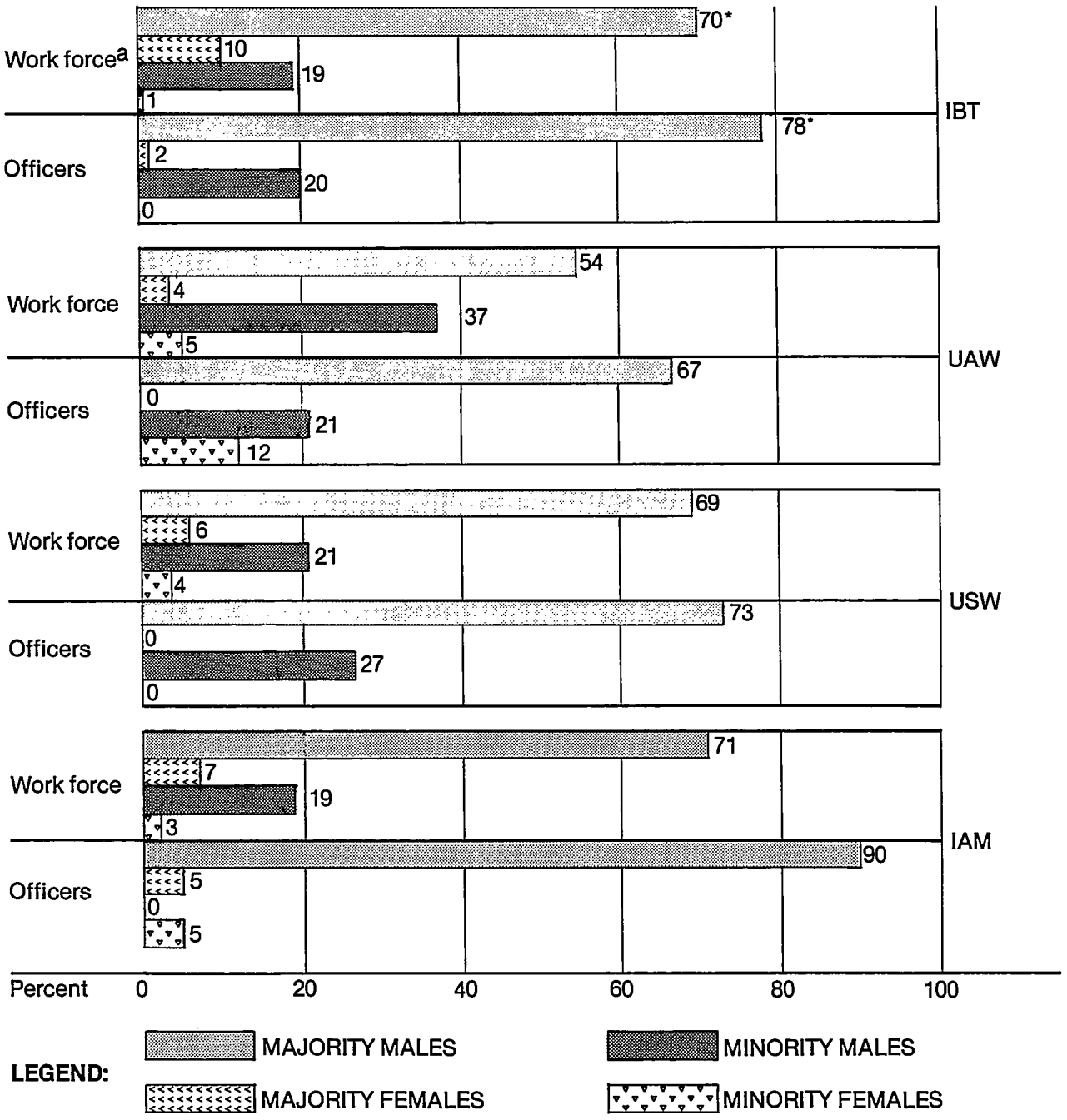
Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979. See table A.2 and table A.3 of appendix A for derivation of figure.

a. Work force is defined as the bargaining units represented by the local unions selected for this survey. A bargaining unit includes all persons covered by a collective bargaining agreement. See appendix D.

* This can be interpreted as follows: 43 percent of the work force in the bargaining units covered by the survey were majority males while 60 percent of the officers representing the members of the bargaining units were majority males.

FIGURE 2.2

Distribution of Local Union Bargaining Unit Members and Local Union Officers by Race, Sex, and International Union Affiliation, 1978-79



* This can be interpreted as follows: 70 percent of the work force represented by the IBT was composed of majority males while 78 percent of the IBT officers in the survey were majority males.

FIGURE 2.2 (Continued)

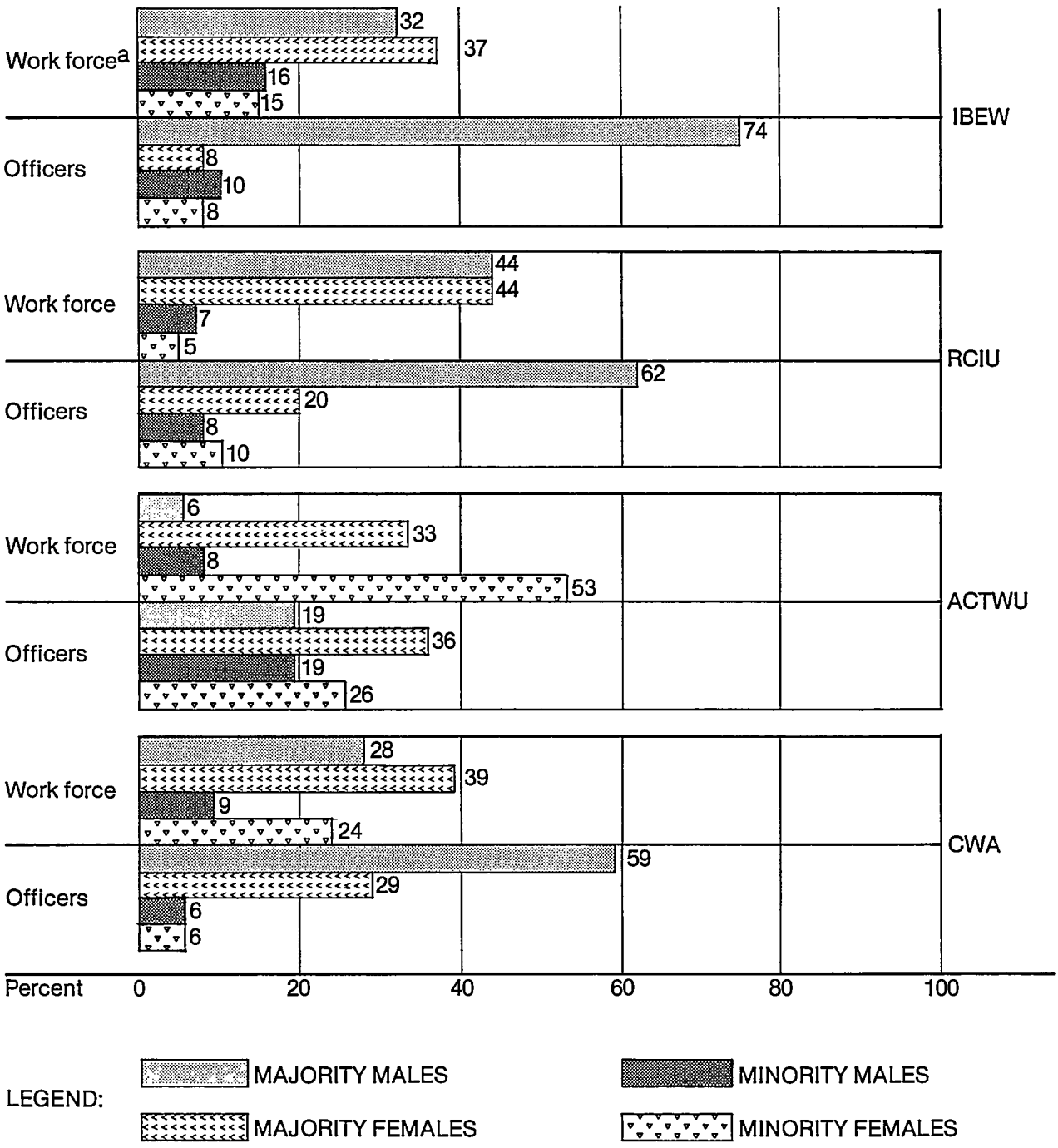
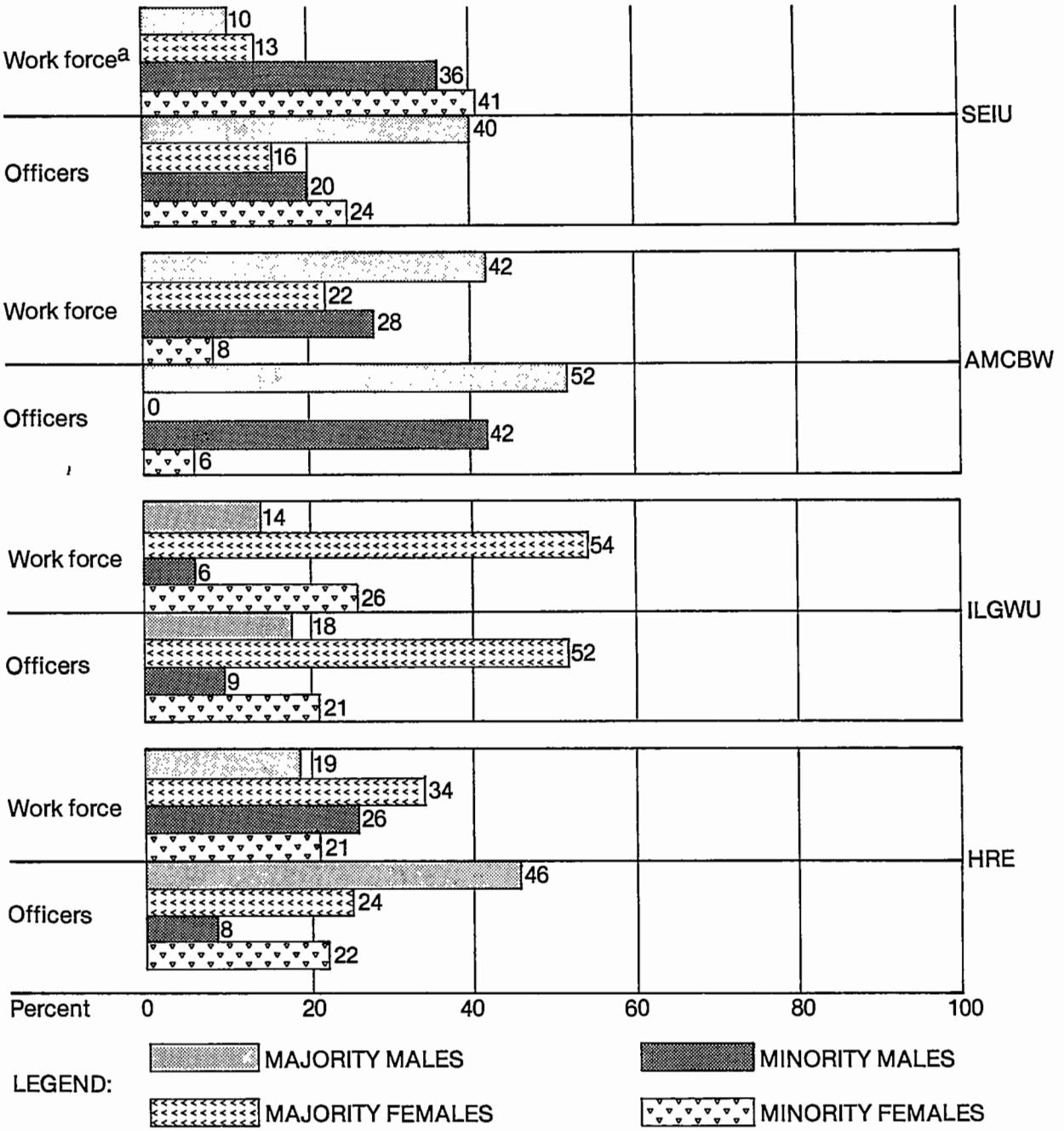


FIGURE 2.2 (Continued)

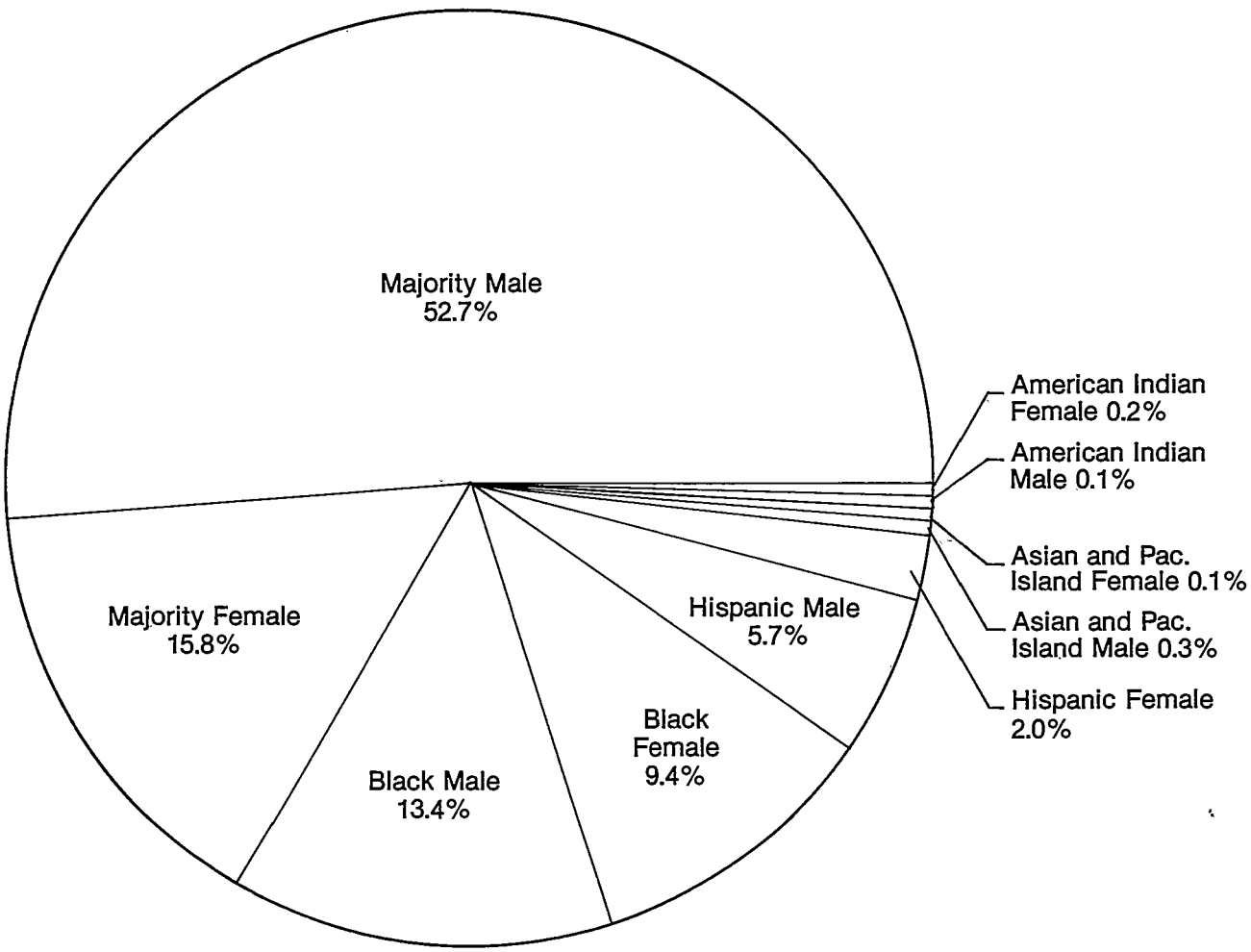


Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979. See table A.2 and table A.4 of appendix A for derivation of figure.

a. Work force is defined as the bargaining units represented by the local unions selected for this survey. A bargaining unit includes all persons covered by a collective bargaining agreement. See appendix D.

FIGURE 2.3

Distribution of Local Union Executive Board Members, by Race, Sex, and Ethnic Group, 1978-79

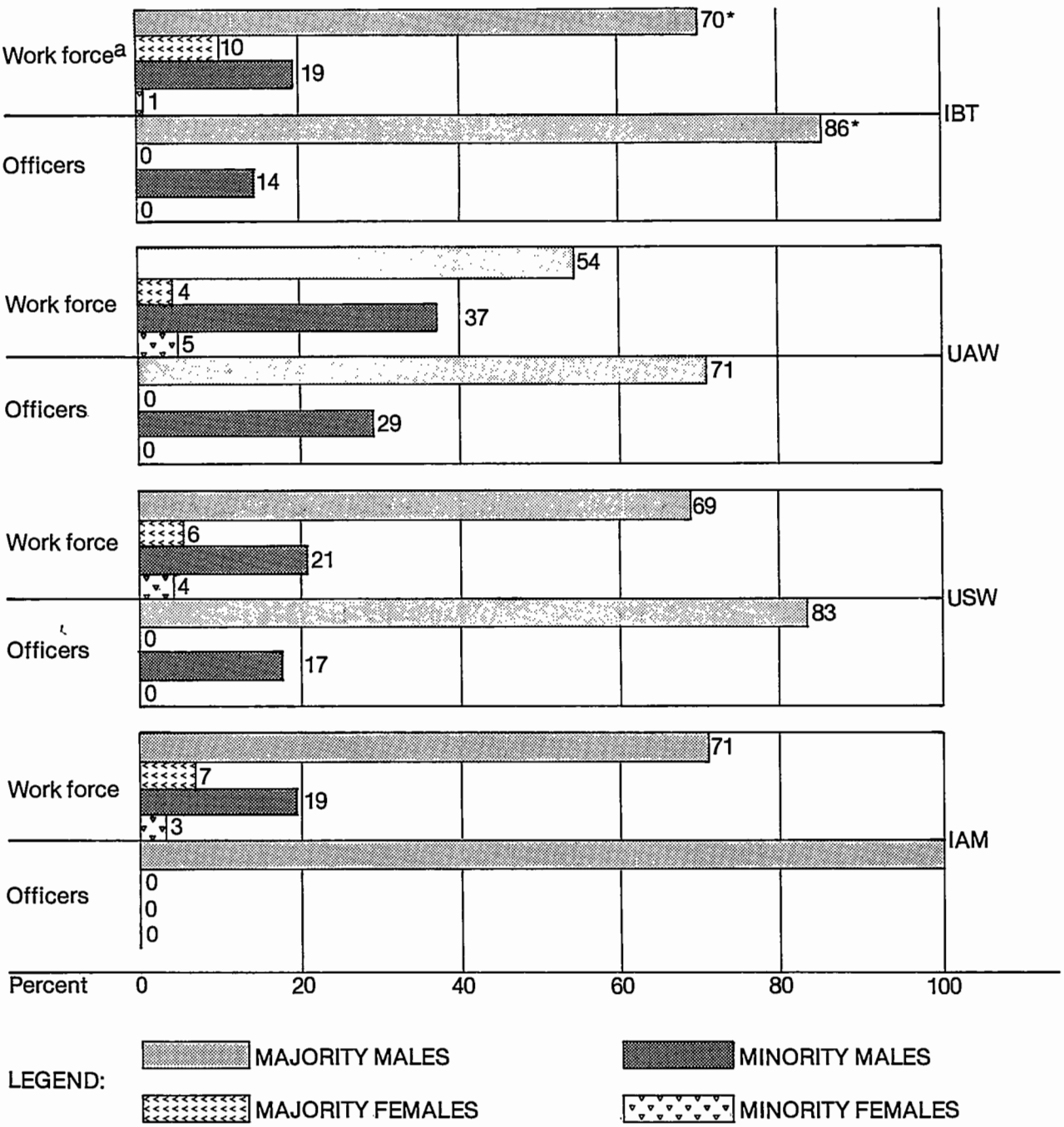


Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979. See table A.5 of appendix A for derivation of figure.

All officers are included as members of the executive board as well as additional rank-and-file members elected to the board.

FIGURE 2.4

Distribution of Local Union Bargaining Unit Members and Local Union Presidents and Vice Presidents, by Race, Sex, and International Union Affiliation, 1978-79



* This can be interpreted as follows: 70 percent of the work force represented by the IBT was composed of majority males while 86 percent of the IBT presidents and vice presidents in the survey for the IBT were majority males.

FIGURE 2.4 (Continued)

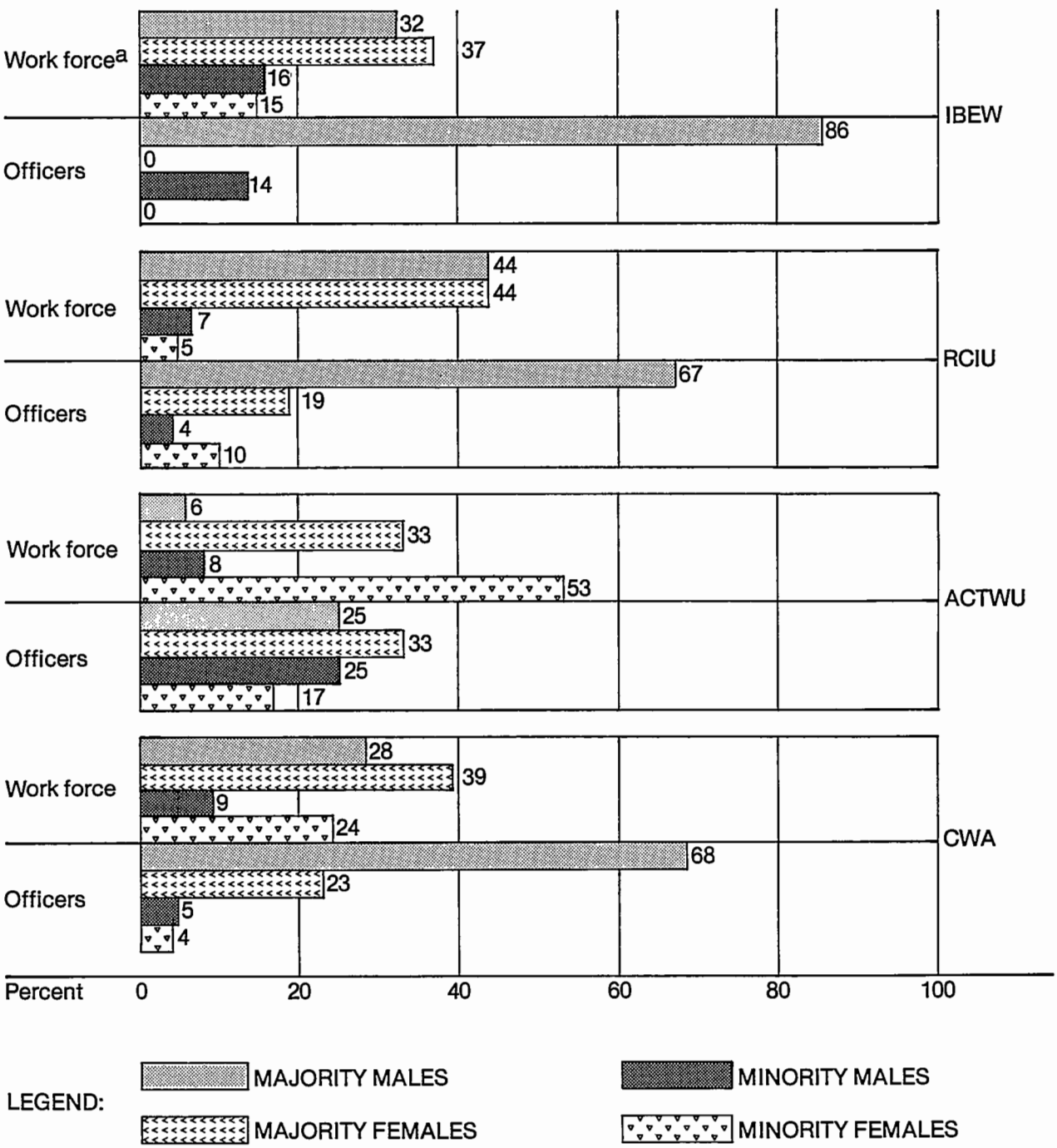
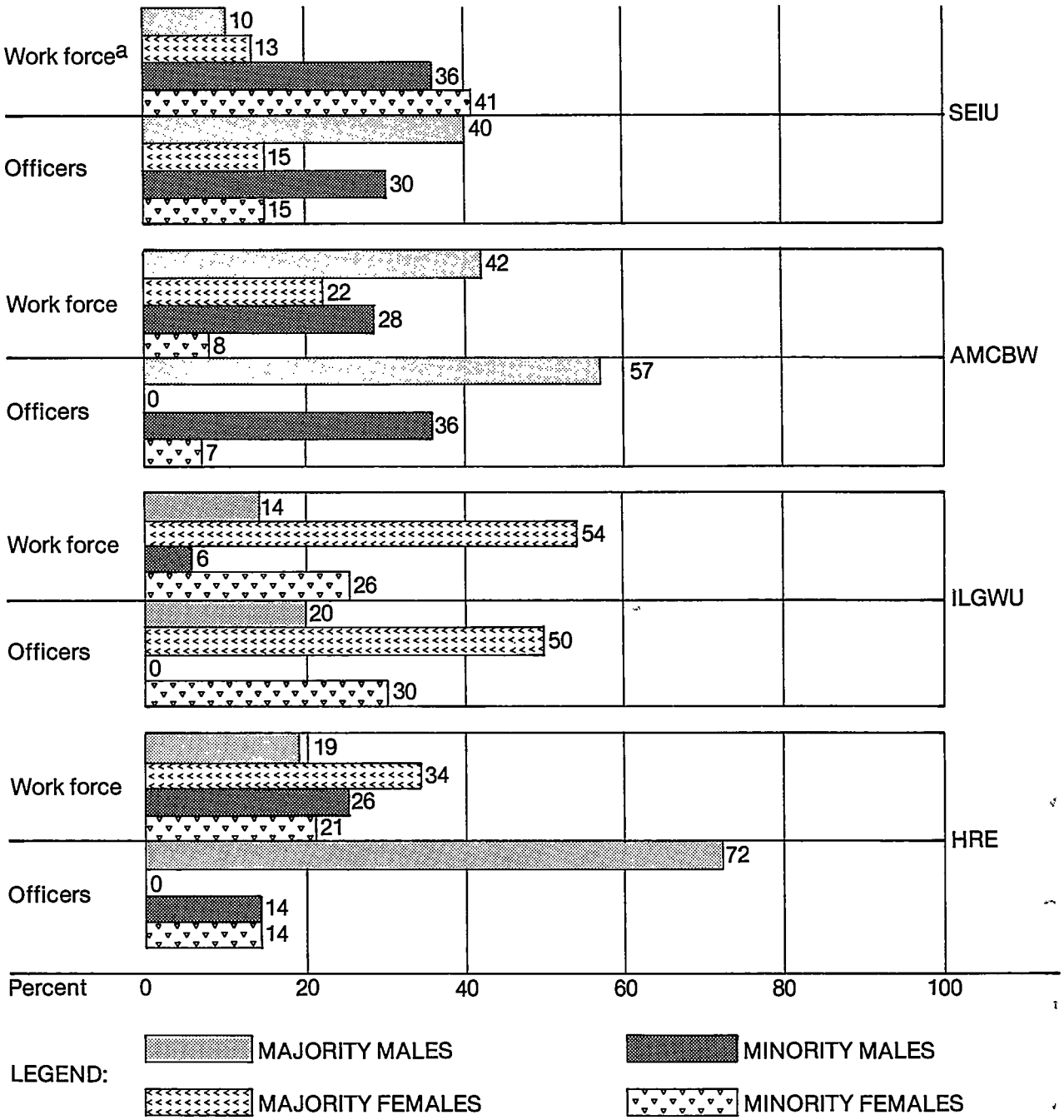


FIGURE 2.4 (Continued)



Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979. See table A.2 and table A.4 of appendix A for derivations of figure.

a. Work force is defined as the bargaining units represented by the local unions selected for this survey. A bargaining unit includes all persons covered by a collective bargaining agreement. See appendix D.

percent of the work force in the sample represented by the Electrical Workers, but held none of the union's top officer positions.

Most of the local unions surveyed demonstrated similar patterns of overrepresentation by majority males in the high level officer positions. For instance, 15 percent of the president and vice president positions reported by the Service Employees locals were held by minority females although minority females accounted for 41 percent of the work force. Moreover, minority males represented 36 percent of the work force reported by the Service Employees locals in the survey, but held 30 percent of the officer positions; in contrast, majority males composed 10 percent of the work force, but held 40 percent of all higher echelon officer positions. Similarly, 63 percent of the total work force in the survey reported by the Communications Workers were females although 27 percent of that union's top level officers were women. In contrast, majority males, who constituted 28 percent of the work force, held 68 percent of the top level officer positions.

Summary

Results of the Commission survey indicate that the composition of union leadership at both the international and local levels did not reflect the makeup of the bargaining units represented by the unions. Although minorities and women constituted large proportions of the bargaining units represented by the unions covered in this study, this was not reflected in the makeup of the leadership of unions. Hence, the survey results show that both women and minorities were severely underrepresented in leadership roles, especially the higher leadership positions of president and vice president. In contrast, majority male officers in the international unions and among the local unions—particularly in the high level officer positions—were generally overrepresented when compared to the proportion of majority males in the bargaining units represented by these unions.

In the past, minorities and women have had little success in effectively challenging the composition of union leadership. The Commission survey documents the continuing need for an extensive effort on the part of the established union leadership to encourage increased participation of minorities and women in the governing hierarchy of both local and international unions. Without increased representation within the union leadership, the problems of women and minorities may be overshadowed by the interests and concerns of the majority. Overt methods of exclusion from the highest levels of union hierarchy have been eliminated. The exclusion effectively continues, however, and women and minorities are still not equitably represented in union leadership positions.

Chapter 3

The Union Role in Promotion, Transfer, and Training

The procedures used to decide which employees will receive opportunities for promotion, transfer, and training directly affect the job advancement of minorities and women. Since unions represent large numbers of minorities and women, who have lower average earnings than white males, it is important to know whether unions have attempted to assure that employer job advancement procedures are fair to the female and minority workers they represent.

Unions can influence company personnel procedures that determine which employees receive: (1) promotions to better jobs, (2) transfers from one job within a company or an establishment to another job that may provide better prospects for future job advancement, and (3) admission to training programs that provide workers with additional skills. The selection factors used to choose among applicants for these opportunities are usually applied, and the successful candidate chosen, by company officials. In unionized establishments, however, the particular selection factors used and the weight of each selection factor in the final decision may be determined jointly by the company and the union through collective bargaining.

Unions have clear legal authority to insist that companies bargain over these selection procedures. The National Labor Relations Board has determined that such procedures are among the mandatory subjects of bargaining: If a union requests bargaining on such procedures, the company must engage in good faith bargaining on the matter.[1] Unions have in fact engaged in bargaining on selection procedures for promotion, transfer, and training. For example, the Commission survey showed that 93 percent of the local unions and 6 (86 percent) of the 7 international unions with a national collective-bargaining agreement operated under contracts requiring the use of seniority for promotion, transfer, and training decisions.[2] The success unions have had in requiring employers to take seniority into account shows that when unions are strongly committed to influencing employers' selection procedures through collective bargaining, they often succeed.

The analysis of the union role in selection procedures that may affect the job status of minorities and women proceeds as follows:

- Commission survey data indicate which selection factors were most widely used, comparing the responses of union and nonunion employers. Since collective-bargaining agreements reflect the priorities and wishes of employers as well as unions, the use of a given selection factor by a unionized employer does not necessarily indicate union support for the selection factor. The re-

[1] Longhorn Mach. Works, Inc., 205 N.L.R.B. 685, 84 L.R.R.M. 1307 (1973).

[2] The seven international unions—the Steelworkers, Auto Workers, Communications Workers, Textile Workers, Garment Workers, Meat Cutters, and Electrical Workers—are those that had a national collective-bargaining agreement at the time of the interview.

sponses of nonunion employers serve as a control group, permitting a more accurate determination of the union influence on the use of particular selection factors.

- Employer validation of these selection factors is presented.
- The role of local unions in the use of these factors is analyzed through the use of Commission survey results.
- Finally, the role of international unions in their collective-bargaining partners' use of these factors is analyzed.

Employer Use of Selection Factors

Employers participating in the Commission survey were asked which of the following criteria they used to select employees for promotion, transfer, and training openings:

- seniority—an employee's length of service in some employment unit, such as a job, department, plant or company;[3]
- written tests—any paper-and-pencil test;
- written performance evaluations—written evaluations of employees' performance, conducted at periodic intervals regardless of whether a change in an employee's status is pending;
- supervisors' recommendations—written or unwritten evaluations provided when an employee is under consideration for a particular promotion, transfer, or training opening;
- interviews—informal or formal meetings to obtain personal information on an employee;
- educational qualifications—minimum educational levels (such as high school graduation or completion of the 10th grade) deemed necessary qualifications for performing certain jobs;
- prior related work experience—experience in a job similar to the job being filled; and
- prior-specialized training—job-related training that a person has had in the past.

In assessing the union role in the use of particular selection factors,[4] it is important to know that the selection factors noted above have adversely affected the job advancement of minorities and women in some job situations. This is not to say the use of these selection factors always has an adverse effect or is illegal. (For an analysis of data on adverse effects and for a discussion of case law regarding their use see part II of this report.)

The results of the Commission survey indicate that seniority was the most widely used selection factor in promotion, transfer, and training decisions. Of the 181[5] establishments in the Commission survey with a promotion system, 94 percent used seniority for promotion decisions[6] (see table 3.1 and table B.1 in appendix B). Ninety-three percent of the 168 establishments with a transfer system used seniority,[7] and 78 percent of the 71 establishments with general training programs did so.

Supervisors' recommendations and interviews were also widely used by the establishments in the Commission survey to select employees for promotion, transfer, and training. Both were used significantly more by nonunionized establishments than by unionized ones in promotion and transfer decisions. Although not as widely used, written performance evaluations and educational qualifications were also used significantly more often by nonunionized establishments for promotion decisions. Written tests were the only promotion selection factor in the Commission survey that unionized establishments used significantly more frequently than nonunionized ones.

Employer Validation of Selection Factors

The Civil Rights Act of 1964 expressly permits employers to use selection factors provided that

[3] Neil W. Chamberlain and Donald E. Cullen, *The Labor Sector* (New York: McGraw-Hill, 1971), pp. 247–49; Lloyd G. Reynolds, *Labor Economics and Labor Relations* (Englewood Cliffs, N.J.: Prentice-Hall, 1978), pp. 470–71.

[4] A search of the literature, including an examination of the results of earlier surveys, indicated that the factors included in the Commission interview schedule are those most commonly used to select employees for training, promotion, and transfer. See, for example, BNA, *Employee Promotion and Transfer Policies* (Washington, D.C., January 1978) and "P-H/ASPA Survey: Employee Testing and Selection Procedures–Where Are They Headed?" *Personnel Management: Policies and Practices* (New Jersey: Prentice-Hall, Inc., 1975)

[5] Field interviews were conducted with 194 employers of which 181 indicated having formal promotion systems, 168 transfer systems, and 71 training systems.

[6] Of the 132 establishments that were unionized, 16 used occupational, job, or shift seniority, 34 used departmental seniority, and 79 used plantwide seniority. Three gave a don't know or other response.

[7] In comments on this report in draft, the Bureau of Labor Statistics noted that in its 1970 report *Seniority in Promotion and Transfer Decisions,* seniority was a factor in 60 percent of all agreements covering 1,000 or more employees and that it played a role in transfer decisions in 25 percent of contracts. Janet L. Norwood, Commissioner, Bureau of Labor Statistics, Letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Feb. 3, 1981, p. 2 (hereafter cited as Norwood Letter).

TABLE 3.1 Percentages of Establishments That Used Particular Selection Factors for Promotion, Transfer, and Training, by Union Status, 1978–79

Percentage of establishments that used factor	Seniority	Written Tests	Written Performance Evaluations	Interviews	Educational Qualifications	Prior Related Work Experience	Supervisors' Recommendations	Prior Specialized Training
For Promotion								
Total	94*	29	45	70	42	88	74	77
Union	95	**35**[a]	**34**	**64**	**34**	85	**66**	76
Nonunion	92	**11**	**77**	**85**	**66**	96	**98**	79
For Transfer								
Total	93	18	41	63	42	80	70	68
Union	95	21	**32**	**56**	36	76	**63**	63
Nonunion	88	10	**71**	**85**	58	90	**93**	85
For training								
Total	78	46	44	72	56	73	65	73
Union	77	52	38	70	55	70	57	73
Nonunion	80	27	67	80	60	87	93	73

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

[a] **Bold type** indicates that the union/nonunion difference is statistically significant at the .05 level. Appendix E indicates which regions, South and/or non-South, were statistically significant. The number of respondents to a question can be found in table B.1, appendix B.

* This can be interpreted as follows: Among establishments with a promotion system, 94 percent used seniority in the promotion decision.

such factors are not "designed, intended or used to discriminate."[8] Federal courts, in interpreting this provision of the act, have found the use of selection factors in employment situations to be discriminatory and illegal if the selection factor has an adverse impact on minority or female job applicants (unless the employer can prove that there is a clear relation between the selection factor and employees' job performance, the use of the factor is necessary for the conduct of business, and there is no less discriminatory alternative).[9] In other words, if the employer can show that an employee's performance on a selection factor is associated with the employee's performance on the job, the employer may use the selection factor even though it may have an adverse effect on an individual or on a specific group of employees.[10] To show an association between employee performance on a selection factor and on the job, a validation study must be performed.

Federal agencies with responsibilities under Title VII of the Civil Rights Act of 1964 and for provisions of other antidiscrimination statutes have issued guidelines defining the types of validation studies that are acceptable under law. The Uniform Guidelines are presently the definitive administrative interpretation of the requirements of Title VII and Executive Order No. 11246 regarding employee selection procedures.[11]

The Uniform Guidelines require that employers using a wide variety of selection procedures, under particular, commonly encountered job situations, conduct validation studies to determine whether the selection procedures are job-related.[12] When employers were queried in the Commission survey as to whether they had validated their use of selection factors for promotion, few indicated that they had done so. Although written tests were the factor that had most frequently been validated by employers, two-thirds of them indicated that they had not validated their use of written tests. The low percentages of establishments performing validation studies indicate that some or all[13] of the establishments that should have validated their selection procedures under Federal guidelines have not done so.

Local Unions' Awareness of and Role in Employer Use of Selection Factors

If these commonly used factors had little or no meaning for promotion, transfer, or training opportunities of women and minorities, the union role in their use would be of little interest. The survey data show, however, that these selection factors are frequently used. Further, the Commission survey data show that many union-represented minorities and women[14] are employed in companies using these selection factors (see table 3.2). Since they can have a negative impact on women's and minorities' job advancement prospects (see part II of this report), and since most employers in the Commission survey had not validated their use, the question arises whether the unions were aware that these factors were being used, whether their contracts required or prohibited the use of any of these factors, or whether they opposed the use of any of these factors.

Local Union Awareness

Officials from the 77 local unions in the Commission survey whose bargaining partners (employers) were also surveyed were asked which selection factors their bargaining partner used to select employees for promotion, transfer, and training. Since employers were also asked which selection factors

[8] 42 U.S.C. §2000e-2(h) (1976).

[9] Violation of Title VII by the illegal use of selection factors has been found in a substantial number of cases. See part II of this report.

[10] Nonetheless, such a selection factor should not be used if another factor, with lesser adverse impact or no adverse impact, is available. See sec. 3-B, "Uniform Guidelines on Employee Selection Procedures" 29 C.F.R. §1607, 3B (1978).

[11] 29 C.F.R. §1607 (1978). See discussion of the Guidelines set forth in part II.

[12] It is not necessary for an employer to validate a selection procedure if the employer has demonstrated that the procedure has no adverse effect on minorities and women. Nor is it necessary for an employer to validate where it is technically not feasible, in other words, where there is an insufficient number of employees in a particular type of job to permit a statistically reliable validation study to be conducted. If a validation study is technically not feasible, the employer should either modify the selection procedure to eliminate the adverse impact or justify its continued use in accord with Federal law. See "Uniform Guidelines on Employee Selection Procedures" 29 C.F.R. §1607, 6B (1978).

[13] It is not possible to determine how many establishments should have validated their selection procedures because it is not necessary for the employer to do so in the instances listed in the preceding note.

[14] The work force statistics as well as the information on the use of each selection factor were supplied by company officials during the Commission survey of establishments. When a company official replied "don't know" either to the question concerning the use of a selection factor or to the question on the race, ethnicity, and sex makeup of the establishment's work force, the establishment was excluded from the calculations displayed in table 3.2.

TABLE 3.2 Percentages of Establishments' Employees that are Minorities or Women Among Establishments Using Particular Selection Factors for Promotion, by Union Status, 1978–79

	Seniority	Written Tests	Written Performance Evaluations	Interviews	Educational Qualifications	Prior Related Work Experience	Supervisors' Recommendations	Prior Specialized Training
For those establishments that used the factor, the percentage of employees who are:								
Minorities								
Union	37*	32	35	39	35	34	42	36
Nonunion	31	22[a]	30	29	30	31	30	30
Women								
Union	24	25	37	25	28	28	26	22
Nonunion	40	28[a]	41	41	39	41	41	38

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

[a] This percentage is based on fewer than 10 cases. See appendix B, for detailed table showing number of cases.

* This can be interpreted as follows: Among the unionized establishments that used seniority for promotion, 37 percent of the employees were minorities.

they used, the Commission was able to match the responses of both collective-bargaining partners and to determine whether local union officials were aware of employers' use of the factors.[15] The data indicate that unions were almost always more aware of employers' use of seniority for promotion, transfer, and training than of any other factor. Ninety-five percent of the local union officials were aware of their bargaining partner's use of seniority for promotion, but one-quarter to one-half of the union officials were not aware that their bargaining partners used any other factors except prior related work experience for promotion decisions (see table 3.3).

For transfer decisions, the differences in union officials' awareness of factors' use was even greater. Ninety-eight percent of the local union officials were aware that their bargaining partners used seniority for transfer decisions, while 21 percent of the union officials were aware of the use of written tests and 30 percent were aware of the use of educational qualifications in transfer decisions. Union officials' awareness varied also by personnel action. For instance, in most cases proportionately fewer of the unions were aware of the establishment's use of interviews for transfer than for promotion or training decisions.

Local Union Role

Local union officials participating in the Commission survey were asked if their collective-bargaining agreements specifically required or prohibited the use of particular selection factors. They were also asked whether their union was opposed to the use of any selection factors even if the contract did not prohibit it.

Data from the Commission survey indicate that unions play an active role in making sure that the contract language specifically requires the employer to take seniority into account for promotion, transfer, and training decisions. None of the locals in the survey reported that the contract prohibited the use of seniority (see table 3.4). Similarly, none reported that their locals opposed the use of seniority for these personnel procedures. Conversely 90 percent or more of the locals reported that their contracts required the use of seniority for each of the three personnel decisions.

None of the union officials stated that their contracts required the use of written tests, written performance evaluations, interviews, educational qualifications, or supervisor's recommendations for promotion decisions. Very few reported that the contracts required the use of any of the factors except seniority for transfer or training decisions. With one exception,[16] union officials indicated that the use of these selection factors for promotion, transfer, and training was not specifically prohibited by the collective-bargaining agreement. Further, very few union officials indicated that their union was opposed to the employer's use of these selection factors, with the exception of written tests. Even in that case, half of the locals did not oppose their use for promotion and two of the three locals whose bargaining partners used them for decisions regarding training did not oppose their use. This lack of union opposition to the use of these selection factors—factors that courts have found can have an adverse impact on minorities and women[17] and have generally not been validated by the unions' bargaining partners—indicates a lack of action on the part of the unions to work to ensure equal employment opportunities for the minorities and women that they represent.[18]

International Unions' Role in the Use of Selection Factors

The Commission posed the same questions that were asked of the local unions to the seven international unions in the Commission survey that had national contracts[19] in the industries chosen for emphasis in this study. These seven were asked

[15] In cases when an employer stated that a factor was used, and the union official indicated that it was not or that he or she did not know whether or not it was used, it was assumed that the factor actually was used; personnel officials are expected to have more detailed knowledge than union officials of the practices they actually use.

[16] One union indicated that the collective-bargaining agreement prohibited the use of written tests for promotion.

[17] See Adverse Impact of Selection Criteria in Promotion, Training, and Transfer Decisions in Part II of this report.

[18] Unions lack of opposition to employers' use of seniority can be best exemplified by union officials' response to a question asked on the Commission survey. When queried, 22 percent of the union officials indicated that seniority provisions in the collective-bargaining agreement had been altered during the past 10 years to expand employment opportunities for minorities and women. This percentage indicates that although there was much publicity and litigation during this 10-year period on the negative effect many seniority systems have on the employment opportunities of minorities and women, the seniority systems used by this group of employers and unions have remained unchanged in most cases.

[19] These contracts were negotiated by the international and

TABLE 3.3 Percentages of Local Unions That Were Aware of Employers' Use of Particular Selection Factors for Promotion, Transfer, and Training, 1978–79

Percentage of unions that were aware of the employer's use of factor	Seniority	Written Tests	Written Performance Evaluations	Interviews	Prior Specialized Training	Prior Related Work Experience	Educational Qualifications	Supervisor's Recommendations
For Promotion	95*	50	71	64	67	85	20	68
For Transfer	98	21	64	37	48	59	30	38
For Training	75	93	17[a]	64	67	58	60	62[a]

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

[a] This percentage is based on fewer than 10 cases. See appendix B.3, appendix B, for detailed table showing number of cases.

* This can be interpreted as follows: 95 percent of the locals were aware of their bargaining partners' use of seniority for promotion decisions.

TABLE 3.4 Percentages of Local Unions That Had Taken a Stand on the use of Particular Selection Factors for Promotion, Transfer, and Training, 1978–79

	Seniority	Written Tests	Written Performance Evaluations	Interviews	Prior Specialized Training	Prior Related Work Experience	Educational Qualifications	Supervisor's Recommendations
For those unions that were aware of the employer's use of factor:								
Percentage of locals that had taken a stand on use of Factor								
For promotion								
Contract Required Use	93*	0	0	0	7	30	0[a]	0
Contract Prohibited Use	0	7	0	0	0	0	0[a]	0
Unions Opposed Use	0	50	33	4	3	2	0[a]	8
For transfer								
Contract Required Use	90	0[a]	0[a]	14[a]	8	21	0[a]	0[a]
Contract Prohibited Use	0	0[a]	0[a]	0[a]	0	0	0[a]	0[a]
Unions Opposed Use	0	67[a]	14[a]	0[a]	0	0	0[a]	0[a]
For training								
Contract Required Use	91	15	0[a]	0[a]	0[a]	0[a]	0[a]	0[a]
Contract Prohibited Use	0	0	0[a]	0[a]	0[a]	0[a]	0[a]	0[a]
Unions Opposed Use	0	23	0[a]	0[a]	0[a]	0[a]	0[a]	20[a]

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

[a] This percentage is based on fewer than 10 cases. See appendix B.4, appendix B, for detailed table showing number of cases.

* This can be interpreted as follows: 93 percent of the locals that were aware of their bargaining partners' use of seniority stated that the collective bargaining agreement required this use.

about one of their major national collective-bargaining contracts.[20] More specifically, the international unions were asked if their bargaining partner used any of the selection factors emphasized in this study.

Results from the Commission survey indicate that six of the seven internationals reported that seniority was used for promotion decisions[21] (see table 3.5). Each of the six internationals indicated that the use of seniority for promotion decisions was required by the contract, and none of the internationals was opposed to its use. Three of six internationals—the United Auto Workers, the International Brotherhood of Electrical Workers, and the Amalgamated Meat Cutters and Butcher Workmen—indicated that written tests were used for promotion decisions. All three stated that they were opposed to the use of written tests for promotion decisions, and one other international, the United Steelworkers of America, reported that the contract specifically prohibited the use of non-job-related written tests for promotion decisions. Four internationals—the Auto Workers, Steelworkers, Electrical Workers, and Garment Workers—reported that prior specialized training and prior related work experience were used for promotion decisions. The Auto Workers, Steelworkers, and Garment Workers reported that supervisors' recommendations were also used for promotion decisions.

None of the internationals stated that written performance evaluations, interviews, prior specialized training, or supervisors' recommendations were specifically prohibited by the contract for promotion decisions. Two internationals, the Meat Cutters and the Auto Workers, were opposed to the use of written performance evaluations, and the companies did not use this selection factor for promotion decisions. Further, the Auto Workers official indicated that the union was opposed to all selection factors for promotion decisions except for seniority.

Two international unions, the Electrical Workers[22] and the Communications Workers of America[23] stated that their bargaining partners did not have a formal transfer system. Of the remaining five unions that reported that their bargaining partners had formal transfer procedures, all reported that seniority was used. Only the Meat Cutters international indicated that its bargaining partner used written tests for transfer decisions and this international was opposed to the use of written tests.

Regarding the use of selection factors for training decisions, most international officials indicated that their bargaining partners did not have formal training programs. The Auto Workers, the Steelworkers, and the Electrical Workers international officials indicated that their bargaining partner had a formal training program.[24] The Steelworkers indicated that their bargaining partner used all of the factors except written tests for training decisions. Of these factors, only seniority was required by the contract and none was opposed by the union. The Electrical Workers reported that seniority, interviews, and prior specialized training were used by their bargaining partner and that the use of seniority was required by the contract. The use of written tests was required by the Auto Workers' contract. As table 3.5 indicates, seniority was almost always used by the unions' bargaining partners for promotion, transfer, and training decisions, and the contracts almost always specifically required its use.[25]

covered more than one establishment located in more than one region of the country. The bargaining partners for those unions interviewed about one of their national contracts were as follows: USWA (U.S. Steel); UAW (Ford Motor Co.); AMCBW (Wilson Food Corporation); IBEW (RCA); ACTWU (The Arrow Co., Cluett Peabody); ILGWU (Jonathan Logan, Inc.); CWA (Chesapeake and Potomac Telephone Co.).

[20] Commission staff conducted face-to-face interviews with international union officials on the following dates: USWA Feb. 23, 1979; UAW Mar. 1, 1979; AMCBW Mar. 6, 1979; IBEW Mar. 16, 1979; ACTWU Mar. 20, 1979; ILGWU Mar. 22, 1979; and CWA Apr. 10, 1979.

[21] The seventh, the Communications Workers of America, indicated that definitive responses to questions on promotion and transfer practices could not be given.

[22] Staff interview, Mar. 16, 1979.

[23] At the time of the interview, the consent decree under which the contract had been developed no longer applied. "Prior to Jan. 19, 1979 the consent decree imposed an elaborate, promotion system. Now that the decree has expired, [we] do not know how the company will do things." Staff interview, Apr. 12, 1979. In comments on this report in draft, BLS noted that "there are explicit provisions for transfers in CWA contracts." Norwood Letter, p. 3.

[24] In comments on this report in draft, the United Automobile Workers noted that its job development and training department provides "preapprenticeship training for minorities and females in many locations to assist in meeting eligibility requirements for entry into the apprenticeship program. Where the above services are not available, it is recommended that similar programs are implemented in cooperation with Project Outreach." Benjamin C. Perkins, director, UAW Fair Practices and Antidiscrimination Department, Letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Jan. 19, 1981, p. 2.

[25] It is far from clear that union officials' commitment to seniority is matched by equal commitment by workers generally or even by union members. One survey of about 3,000 workers inquired whether, in promotions, an opening ought to be offered first to the most senior applicant or to the one who has the "best training and experience for the job." Eight percent of all workers

TABLE 3.5 International Unions' Stands on the Use/Nonuse of Particular Selection Factors, 1978–79

	Seniority	Written Tests	Written Performance Evaluations	Interviews	Prior Specialized Training	Prior Related Work Experience	Educational Qualifications	Supervisor's Recommendations
Internationals' Stands								
For Promotion								
Factor Was Used	6*	3	1	2	4	4	2	3
Contract Required Use	6	0	0	0	0	1	0	0
Contract Prohibited Use	0	1[a]	0	0	0	0	1[b]	0
International Opposed Use	0	3	2[a]	1[a]	0	0	0	0
For transfer								
Factor Was Used	5[c]	1	0	0	1	1	0	1
Contract Required Use	4	0	0	0	0	0	0	0
Contract Prohibited Use	0	0	0	0	0	0	0	0
International Opposed Use	0	1	0	0	0	0	0	0
For training								
Factor Was Used	2[d]	1	1	2	2	1	1	1
Contract Required Use	2	1	0	0	0	1	0	0
Contract Prohibited Use	0	0[b]	0[b]	0	0	0	1[b]	1[b]
International Opposed Use	0	0	0	0	0	0	0	0

Source: Data collected by the U.S. Commission on Civil Rights' survey, February 1979–April 1979. Interviews were conducted with seven internationals, the UAW, the USW, the IBEW, the ACTWU, the CWA, the MCBW, and the ILGWU, that had national contracts in the industries chosen for emphasis in this study.

[a] The company did not use this selection factor.
[b] The USW international indicated that the contract prohibited the use of this factor unless it was job-related.
[c] Two internationals, the IBEW and the CWA, stated that their bargaining partners did not have a formal transfer system.
[d] Four internationals, the ACTWU, the CWA, the AMCBW, and the ILGWU, stated that their bargaining partners did not have a formal training system

* This can be interpreted as follows: Six internationals indicated that their bargaining partners used seniority for promotion decisions. One international, the CWA, could not give a definitive response concerning use of selection factors for promotion (or transfer).

Although the use of written tests, written performance evaluations, and interviews for promotion, transfer, and training decisions can adversely affect employment opportunities of minorities and women, international contracts seldom barred their use. In only a few cases did the internationals oppose the use of any selection factor for employment decisions. The use of written tests for promotion decisions was opposed most often—by three of the six international unions with a national collective bargaining agreement—yet only one contract prohibited their use. These figures were reflected at the local level: half of the local unions surveyed by the Commission opposed the use of written tests for promotion, but only 7 percent of all collective bargaining agreements at the local level prohibited their use.

Summary

Employers in the industries covered by this study used a variety of selection factors to choose employees for promotion, transfer, and training. Seniority, written tests, supervisors' recommendations, and prior related work experience were among the selection factors commonly used by employers in the Commission survey. More unionized than nonunionized employers used seniority and tests. The other factors were used more often by nonunionized employers. Seniority, by far, was the most frequently used selection factor by unionized employers in promotion and transfer decisions. Employers used interviews, prior related work experience, and prior specialized training with nearly as much frequency as seniority in determining whether an employee was qualified to enter a training program. Written tests, educational qualifications, and supervisors' recommendations were other factors used by more than half of employers for training decisions.

Information gathered for this report indicated that seniority, tests, and interviews can have an adverse impact on the job advancement prospects of minorities and/or women. The other factors discussed also can have such an impact in some job situations (see part II of this report). Furthermore, most employers in the Commission survey had not validated their use of these factors to establish their job relatedness. There is, therefore, a strong presumption that many establishments were not fulfilling their obligations under the EEOC's Uniform Guidelines for Employee Selection Procedures. The use of selection factors that do not accurately determine future job performance and that have not been validated in accordance with the Uniform Guidelines violates Title VII of the Civil Rights Act of 1964. Unions are obligated to ensure compliance with the law and to protect their bargaining units from illegal procedures used by employers.

Most local union officials were aware of employers' use of seniority, but a substantial proportion of such officials were unaware of employers' use of the other factors discussed in this chapter for promotion, transfer, and training decisions. These union officials were not sufficiently well-informed to help assure that employers' practices provided equal opportunity to minority and female employees whom they represent.

With rare exceptions, local union officials who were aware of employer use of factors other than written tests for promotion, training, and transfer decisions did not oppose such use. At least half of local officials also did not oppose the use of tests for promotion or training decisions. Almost no collective-bargaining agreements prohibited the use of these selection factors, while the great majority of locals' contracts required the use of seniority. Finally, Commission survey results indicate that substantial numbers of union-represented minorities and women were in bargaining units where these selection factors were used by employers.

International union officials' responses concerning the continued use of seniority paralleled the local union officials' responses. Some of the international unions, however, appeared to oppose the use of written tests, written performance evaluations, and interviews for promotion decisions, yet this opposition had yielded little change in contract language. Thus, the Commission survey results indicate that international unions have not acted systematically and with determination to improve their own or their locals' policies with regard to selection procedures that can adversely affect the women and minorities whom they represent.

These results are especially important when considered in relation to part II of this report. In particular, it is clear that unions have the legal authority under the National Labor Relations Act to bargain over selection procedures; have in fact bargained successfully to require employer use of

generally and 16 percent of union members preferred the seniority rule. Chamberlain and Cullen, *The Labor Sector*, p. 253.

seniority; and have the duty, under the NLRA, to represent fairly the interests of all employees in their bargaining units. It is important to emphasize that many unions do not oppose employer practices that can have an adverse impact on the job advancement prospects of minorities and/or women. Moreover, opposition to the use of potentially discriminatory selection factors has not been incorporated into collective-bargaining agreements to prohibit their use. Hence, unions had not worked to alter employer selection practices that can have an adverse impact on minorities and/or women, despite their authority and their obligation to do so.

Chapter 4

Union Initiatives in Improving Equal Employment Opportunity

Over the past several decades, there has been a tendency toward greater centralization of authority and responsibility in international unions. In a growing number of unions, key negotiations are being conducted by or made subject to review of the international offices.[1] For example, international officers and/or field representatives often sit in on local union negotiations, and international unions are requiring that local union collective-bargaining agreements conform to international standards. Such developments increase the ability of internationals to influence local union bargaining behavior.[2] Myron Roomkin, in an article analyzing union structure, noted that these types of structural changes "have altered the locus of power within unions."[3]

Since international unions have responsibility for overseeing and directing activities of their local union affiliates,[4] do they actively use this authority to work to establish policies in their locals' bargaining units that help ensure equal employment opportunity? Unions that wish to do so must first adopt equal employment opportunity as a policy; second, they must use their authority to make it a reality. The policies adopted by international unions and their influence on local unions to affect directly the employment status of minorities and women are examined in this chapter.

[1] Myron Roomkin, "Union Structure, Internal Control and Strike Activity," *Industrial and Labor Relations Review,* vol. 29 (January 1976), pp. 199–201. Myron Roomkin is a faculty member of the School of Management, Northwestern University.
The powers that international unions have with respect to their local affiliates are considerable. The following discussion of these powers is drawn from Arthur A. Sloane and Fred Witney's description. They include the power to grant or refuse permission to locals to strike and—in the event that a local strikes in defiance of international union instructions—the power to withhold strike benefits and, in extreme cases, to take over the local on a trusteeship basis. Many international unions require that all local collective-bargaining contracts be reviewed by international union officers before they may come into force. Further, international union constitutions contain provisions for the internal operation of their constituent locals, including, in most cases, the dues that locals may charge, the method by which officers are to be elected, and their tenure of office. Sanctions may be placed on local union officers and on locals themselves if these international union standards are violated. Arthur A. Sloane and Fred Witney, *Labor Relations* (Englewood Cliffs, N.J.: Prentice-Hall, 1977), pp. 157–58.

[2] Roomkin, "Union Structure," p. 201.

[3] Ibid., p. 199.

[4] In Myers v. Gilman Paper Corporation, 544 F.2d 837, 850, 851, 860 (5th Cir. 1977), an international union denied that it was liable for perpetuation of discrimination by its local, on the grounds that it was not the local's agent and was not a signatory to the local's collective-bargaining agreement. The U.S. Court of Appeals for the Fifth Circuit held, however, that the international had representatives who knew of the activities of its locals and through whom it could have acted. Moreover, the court found that its constitution gave it sufficient power to effectuate reasonable steps toward compliance. The court held that the international union violated Title VII of the Civil Rights Act of 1964 by its failure to take steps to assure compliance by its local with the requirements of Title VII. (In its decision, the court of appeals affirmed in part, reversed in part, and remanded the case to the district court. 544 F.2d 837 (5th Cir. 1977). The case had involved seniority, and later, after the 1977 Teamsters decision of the Supreme Court of the United States, the fifth circuit again considered the case. It remanded the case to the lower court for a broad consideration of seniority issues. 556 F.2d 758 (5th Cir. 1977) at 760).

Union Policy

Union conventions establish the general framework through which union policy is adopted, typically through formal resolution and approval of committee and officers' reports. Derek C. Bok and John T. Dunlop have described the importance of committees at union conventions. "Many policy issues are worked over in committee [such as]. . .amendments to the constitutions, dues increases, and major new programs. . .along with resolutions relating to collective bargaining goals. . . ."[5] In most unions, committees hold hearings before the convention, where priorities are narrowed and the interaction of interests takes place.

In view of the importance of committees at union conventions, the Commission survey identified which unions made use of convention committees to foster equal employment opportunity for minorities and women. The responses varied among the internationals surveyed.[6] Three of the 11 international unions—Steelworkers, Service Employees, and Meat Cutters—reported that they maintained permanent convention committees that were primarily concerned with minority and women's employment issues.[7] Five of the internationals—Auto Workers, Textile Workers, Communications Workers, Garment Workers, and Hotel and Restaurant Employees—responded that they did not have permanent convention committees specifically formed to handle such issues, but that they normally created temporary committees to deal with civil rights and women's rights issues, usually for the duration of the international convention.[8] Three internationals—the Machinists,[9] Electrical Workers,[10] and Retail Clerks[11]—responded that they had no committees set up for this purpose.

The types of resolutions introduced at conventions provide one indication of the level of union commitment to civil rights and women's rights. International unions were asked if they had adopted official policy statements or resolutions on specific employment issues that affect minority and female employees. Ten of the 11 (the exception was the Communications Workers) reported that their resolutions included the expansion of promotion opportunities for women and minorities. Respondents for eight of the international unions indicated that their convention had taken an official stand that job training programs for minorities and women be established. More than half of the international unions affirmed that they had addressed the issues of establishing child care centers for working parents and providing liberal maternity-related leave provisions for women. Five internationals reported that their convention had adopted resolutions to increase the number of minorities in policymaking positions within the international union and seven internationals reported taking these steps regarding women (see table 4.1).

International Union Implementation of Policy

Staff Services

Most international unions are equipped to conduct research and examine a wide variety of subject areas

[5] Derek C. Bok and John T. Dunlop, *Labor and the American Community* (New York: Simon and Schuster, 1970), p. 74. Derek Bok is president of Harvard University. Former Secretary of Labor John Dunlop is Lamont University professor of business, Harvard Business School and formerly served as chairman of the Pay Advisory Committee to the President of the United States. Roomkin notes that union "conventions permit communication between leaders and members, give members an opportunity to influence policies directly (many of which involve shifts in the locus of power), serve as a court of final appeal against bureaucratic and administrative abuses, and allow members to review the performance of national leaders, since the tenure of leaders is usually coextensive with the interval between conventions." Roomkin, "Union Structure," p. 203. See also Phillip Marcus, "Union Conventions and Executive Boards: A Formal Analysis of Organizational Structure," *American Sociological Review*, vol. 31 (February 1966), pp. 62–63, 65. Philip Marcus formerly taught at the University of Michigan.

[6] Staff interviews: Auto Workers (UAW) Mar. 1, 1979; Steelworkers (USWA) Feb. 23, 1979; Machinists (IAM) Mar. 20, 1979; Electrical Workers (IBEW), Mar. 16, 1979; Retail Clerks (RCIU) Feb. 16, 1979; Clothing and Textile Workers (ACTWU) Mar. 20, 1979; Communications Workers (CWA) Apr. 10, 1979; Service Employees (SEIU) Mar. 15, 1979; Meat Cutters (AMCBW) Mar. 6, 1979; Garment Workers (ILGWU) Mar. 22, 1979; and Hotel and Restaurant Employees (HRE) Mar. 14, 1979.

[7] Staff interviews: Feb. 23, 1979; Mar. 15, 1979; and Mar. 6, 1979.

[8] Staff interviews: Auto Workers (UAW) Mar. 1, 1979; Clothing and Textile Workers (ACTWU) Mar. 20, 1979; Communications Workers (CWA) Apr. 10, 1979; Garment Workers (ILGWU) Mar. 22, 1979; and Hotel and Restaurant Employees (HRE) Mar. 14, 1979. In its comments on this report in draft, the UAW indicated that it has a convention appeals committee "charged with handling appeals during conventions including any discrimination problems subject to review by the subsequent regular constitutional conventions." Perkins Letter, p. 2.

[9] The IAM reported that its conventions occur every 4 years and that it has no permanent convention committees. Although its department of civil rights was mandated at its 1976 convention, IAM does not establish temporary convention committees on civil rights or women's rights. Staff interview, Mar. 20, 1979.

[10] The IBEW said that it had no convention committees to deal with civil and women's rights. Staff interview, Mar. 16, 1979.

[11] The RCIU noted that it had no permanent convention committees of any kind. Staff interview, Feb. 16, 1979.

TABLE 4.1 International Unions' Resolutions, 1979

Resolutions	International Unions with Resolutions										
Expanding opportunities for women	UAW	USW	IAM	IBEW	RCIU	ACTWU	[a]	SEIU	AMCBW	ILGWU	HRE
Expanding opportunities for minorities	UAW	USW	IAM	IBEW	RCIU	ACTWU	[a]	SEIU	AMCBW	ILGWU	HRE
Establishing job training programs for minorities	UAW	USW	IAM	IBEW		ACTWU	[a]	SEIU	AMCBW		HRE
Establishing job training programs for women	UAW	USW	IAM	IBEW	[a]	ACTWU	[a]	SEIU	AMCBW		HRE
Establishing child care centers for working parents	UAW	USW	[a]		RCIU	ACTWU	CWA	SEIU	AMCBW	ILGWU	HRE
Providing liberal maternity-related leave provisions for women	UAW	USW	[a]	IBEW	RCIU	ACTWU	CWA		AMCBW		HRE
Increasing the number of minorities in policymaking positions within the international union	UAW	USW			[a]		CWA		AMCBW		HRE
Increasing the number of women in policymaking positions within the international union	UAW	USW			RCIU	ACTWU	CWA		AMCBW		HRE

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

No data are shown for the Teamsters, since that international declined to participate in the survey.

[a] Respondent responded "don't know" or question was not applicable.

vital to union interests. Sanford Cohen, in his book *Labor in The United States,* lists the professional staff of the United Auto Workers which includes "economists, lawyers, social workers, actuaries, and specialists in metropolitan planning, industrial hygiene, older workers, social security, and radio engineering and broadcasting."[12] Individual departments also handle "the special problems of women members, retired workers, and veterans."[13]

To determine the degree to which internationals in general employ staff at their headquarters to work on civil and women's rights issues, the Commission asked union officials how many persons they assigned major responsibilities in the area of civil and women's rights, for each international union participating in the survey (see table 4.2). Among 9 internationals, 45 employees of 5,669 staff employees (which represents less than 1 percent of the combined staffs of the 9 internationals) were assigned major responsibilities in the area of civil and women's rights. Two of the internationals surveyed, the Garment Workers[14] and the Hotel and Restaurant Workers,[15] indicated that they had no full-time professional staff persons assigned to work primarily in the area of civil and women's rights. Two other international unions, the Electrical Workers and Service Employees, assigned one person major responsibility in this area. The remaining internationals allowed for staffs ranging from 2 to 19 persons.

International union officials were also asked to clarify the nature of the responsibilities of those assigned to work on civil rights and women's rights. Each of the international unions in the survey indicated that the duties and responsibilities of the assignment require not only the development of plans and programs to eradicate discrimination within the union, but also include the implementation of other international union policies regarding civil and women's rights. Other duties included assisting in civil rights grievances and complaints, involvement in litigation and in the negotiation of collective-bargaining agreements, conducting educational programs and providing information in the areas of civil and women's rights, and participating in community activities.[16] Although this list is not exhaustive, it indicates that the responsibilities of staff assigned to work in civil and women's rights are often complex and time-consuming, particularly in view of the small staff size.

International Union Guidance to Locals on Equal Employment Opportunity Issues

International unions furnish both leadership and guidance to their locals and other subordinate bodies on a variety of issues. Most internationals have adopted an organizational structure that allows them the opportunity to monitor closely the activities of their local unions. Sanford Cohen has noted, however, that "no matter how closely the national supervises the local, the business of day-to-day unionism such as contract administration, grievance processing, and looking after spontaneous problems must be handled by the local official."[17] The success of the union as a whole, therefore, depends on the caliber and training of its local officials.[18]

The 11 international unions surveyed in the Commission study were asked if they conducted training programs for the officers of their regional and local union affiliates to assist them in handling issues that relate to their minority and female members. Eight of the internationals—Auto Workers,[19] Service Employees, Meat Cutters, Garment

[12] Sanford Cohen, *Labor in the United States* (Columbus, Ohio: Charles E. Merrill, 1979), p. 111. Sanford Cohen is professor of economics at the University of New Mexico.

[13] Ibid.

[14] Although the ILGWU responded that "no one has exclusive responsibility" for civil and women's rights and that it "has no separate departments" for these areas, the union has "a strong political department" that handles legislation (e.g., ERA), it is "active in educating its members" about civil and women's rights, and it "supports [civil and women's rights] organizations and coalitions both personally and financially." Staff interview, Mar. 22, 1979.

[15] Although the HRE responded that "no one spends full time" on civil and women's rights, it noted that the vice president-at-large helps to "develop policy positions for the general executive boards' decisions and implementation in this area. [HRE] stands with the AFL-CIO on its policies related to minorities and women. If a delegate to a civil rights or women's rights organization needs guidance on how he or she should proceed, [the vice president-at-large gives] the guidance." The HRE added that two local union leaders are active in the Coalition of Labor Union Women and the National Organization for women. Staff interview, Mar. 14, 1979.

[16] Staff interviews February 1979–April 1979.

[17] Cohen, *Labor in the U.S.*, p. 112.

[18] A 1980 study by the Coalition of Labor Union Women notes that "stewards and representatives. . .are often unprepared and untrained to deal effectively with [job discrimination] issues." On the other hand, the report notes that "other unions and associations provide additional education and training for their members, staff and leaders. . . ." *Absent from the Agenda,* p. 16.

Workers,[20] Steelworkers,[21] Communications Workers,[22] Retail Clerks,[23] and Clothing and Textile Workers—responded that they had conducted this special training.[24] The Electrical Workers and the Hotel and Restaurant Employees indicated that the international had conducted no such training,[25] and the respondent for the Machinists stated that the international was undertaking the first training program of this type in April 1979,[26] shortly following the date of the interview with Commission staff. Three regional conferences were subsequently held between October 1979 and February 1980 to inform regional and local staff of the Machinists of civil rights laws and procedures.[27]

All of the international unions included in the survey, with the exception of the Hotel and Restaurant Employees, reported that they conducted similar types of training for their headquarters staff, including field personnel, to assist them in handling issues that relate expressly to minority and female members. Most of the international unions indicated that they conducted these training programs at least once a year.

International Union Review of Negotiated Contracts

International unions have the right to review and approve or reject the contracts that are negotiated by the subordinate bodies. Myron Roomkin, in an article on union structure, has pointed out that in some unions approval of contract demands must have occurred before negotiations begin, but others may be approved after negotiations have been concluded. "Many unions send national representatives to participate in, and sometimes direct, negotiations involving subordinate bodies. Settlements negotiated by subordinate bodies frequently require the approval of the national."[28] Benjamin Wolkinson has noted that "Most internationals have the right to grant and lift charters, regulate the dispensation of strike funds, and approve or reject contracts."[29]

To determine whether international unions review their locals' bargaining activities with respect to equal employment opportunity, international officials were asked to specify the type of contract review process used by their union (see table 4.3). Officials of the 11 international unions included in this report were asked if they reviewed their subordinate bodies' contracts to determine whether any provisions restrict employment opportunities of women and minorities. Six reported that they did not do so on a routine basis. Nevertheless, of these six—the Machinists, [30] the Electrical Workers,[31] the Textile Workers,[32] the Garment Workers,[33] the

[19] The UAW noted that it conducts summer training programs for members of locals. Although most of the program is focused on general union activities, the program contains a civil rights component. Staff interview, Mar. 1, 1979.

[20] The ILGWU indicated that in addition to training it also has classes for members and officers to acquaint them with issues concerning females and minorities. Staff interview, Mar. 22, 1979.

[21] The USW noted that its training program is an "ongoing" process and that each new staff member goes through the program. Staff interview, Feb. 23, 1979.

[22] The CWA said that it started its program 4 or 5 years earlier, but could not identify when the last training program has occurred. Staff interview, Apr. 10, 1979.

[23] The RCIU added that it had a women's conference in 1979 which included assertiveness training. Staff interview, Feb. 16, 1979.

[24] Staff interviews: Mar. 15, 1979; Mar. 6, 1979; Feb. 23, 1979; Apr. 6, 1979; Mar. 20, 1979.

[25] Staff interviews: Mar. 16, 1979, and Mar. 14, 1979.

[26] Staff interview, Mar. 20, 1979.

[27] Commission staff telephone interview, July 10, 1980.

[28] Roomkin, "Union Structure," p. 201.

[29] Benjamin O. Wolkinson, *Blacks, Unions and the EEOC* (Lexington, Mass.: Lexington Books, 1973) p. 114.

[30] The IAM stated that "the national union does not [review contracts], but the committee structure [it was then] setting up on the local and district level will probably get involved in [reviewing contracts.]" Further, IAM stated that it circulated a "model contract to locals as a guide to their contract negotiations." The model contract had been revised over the past years to include sex, age, and handicap in the antidiscrimination clause. The model contract was also to be changed to be in accordance with the law on maternity leave. Staff interview, Mar. 20, 1979.

[31] The IBEW stated that since it did not have a large field staff, contracts were reviewed only to determine if their provisions appeared consistent with the international's policy and Federal law; the union added that it "only looked at contract language on its face." The IBEW noted, however, that it has required its locals to "treat their maternity leave provisions as disability provisions." It reported no other changes in contract provisions with respect to improved employment opportunities for women and minorities. Staff interview, Mar. 16, 1979.

[32] Although the ACTWU reported that it "does not have a policy of reviewing contracts," it noted that it had "a policy of informing all parties of the stance of the union prior to bargaining." Among the areas in which national policy was made known to locals were the following: (1) maternity leave provisions should conform with disability leave provisions, and (2) a uniformly worded antidiscrimination clause was to be adopted "conforming with Federal law and making the wording reflect ACTWU's effort to use its grievance procedure for discrimination rather than go to EEOC." Staff interview, Mar. 20, 1979.

[33] The ILGWU reported that it did not review its local's contracts to determine whether any of their provisions might discriminate against minorities and women nor had it required any of its locals to modify any contract language during the past 10 years for the purpose of expanding employment opportunities for minorities and women. Staff interview, Mar. 22, 1979.

TABLE 4.2 International Unions' Staffing in the Area of Civil and Women's Rights, 1979

Staff Persons	International Unions									
	Total	UAW	USW	IAM	IBEW	RCIU	CWA	AMCBW	ILGWU	HRE
Number of professional and clerical staff persons employed by the international	5669	1600	1520	400	250	400	393	289	677	140
Number of persons assigned major responsibilities in the area of civil or women's rights	45	19	9	3	1	5	3	5	0[a]	0[b]
Percent of staff persons assigned in the area of civil and women's rights	0.8	1.2	0.6	0.8	0.4	1.2	0.8	1.7	0	0

Source: Data collected by the U.S. Commission on Civil Rights' survey, February 1979–April 1979.

No data are shown for the Teamsters, since that international declined to participate in the survey. No data are shown for the Clothing Workers and Service Employees since representatives of these unions replied that they did not know the total number of staff employed by the international. The ACTWU reported having 46 persons assigned major responsibilities for civil and women's rights, while the SEIU reported having one person assigned major responsibilities in the area of women's rights.

[a] The ILGWU reported that no one had exclusive responsibility in the areas of civil or women's rights.

[b] The HRE reported that no one spent full time in the area of civil or women's rights.

TABLE 4.3 International Unions' Review of Local and Regional Bodies' Contracts, as Reported by the Internationals, 1979

Proportion of Contracts Reviewed by International	Total Number of Internationals	International Unions				
All Contracts	4	UAW	USW	RCIU	CWA	
Most contracts	1	SEIU				
About half	0					
Less than half	1	AMCBW				
None	5	IAM	IBEW	ACTWU	ILGWU	HRE

Source: Data collected by the U.S. Commission on Civil Rights' Survey, February 1979–April 1979. No data are shown for the Teamsters since that international declined to participate in the survey.

Hotel and Restaurant Employees,[34] and the Meatcutters[35]—only the Hotel and Restaurant Workers and the Garment Workers did not volunteer that some oversight effort took place.

Routine review of contracts was done by the other five—the Auto Workers,[36] the Steelworkers,[37] the Retail Clerks,[38] the Communications Workers,[39] and the Service Employees[40]—and this review reportedly resulted in the addition, elimination, or modification of provisions whose change was intended to result in improved employment opportunities for minorities and women. Overall, six of the 11 unions interviewed reported having required changes during the past 10 years in the bargaining agreements of their locals that were designed to improve the job status of women and minorities. Nevertheless, none of the locals included in the survey responded that their international unions had ever objected to any contract provisions negotiated by the local on the basis of possible limitation of employment opportunities for minorities and women.[41]

An Information Base for Union Efforts to Obtain Equal Employment Opportunity

Unions that wish to improve the career advancement opportunities of minorities and women, by affecting employer policies and practices, need information on the race, national origin, and sex of members of the bargaining unit and copies of employer affirmative action plans. Further, they need to establish an organizational structure in which equal employment opportunity problems may be systematically discussed and resolved. Labor-management committees and internal local union committees, if they meet regularly and have meaningful agendas, can provide such an organizational setting.[42]

[34] The HRE said, "Our locals are autonomous; we cannot interfere with local bodies' contracts." HRE did, however, report having sent a "circular to its locals interpreting equal pay laws" and informing them that "they would have to comply with this interpretation in their local contracts." Staff interview, Mar. 14, 1979.

[35] Although the AMCBW indicated that it reviewed less than half of its locals' contracts, it reported that "in the very near future a new national policy will be instituted where regional bodies at the district level will have more coordination with the national over the review of contracts." The AMCBW also reported that during the past 10 years it had required its locals to modify their contracts to include the following: (1) merger of male and female seniority lists, (2) addition of a "fair treatment qualification" statement, (3) elimination of wage differentials between men and women for the same job and increased wages in jobs that require greater skill regardless of sex, (4) expanded coverage of options available to women, and (5) added "female" to the antidiscrimination clause. Staff interview, Apr. 6, 1979.

[36] The UAW reported that it reviewed all contracts and that over the past 10 years it had requested its locals "to change provisions that permit employers to fire or reassign women exposed to lead." The UAW further noted that most of its progress made in women's rights and civil rights issues had been done (1) by "persuading" its locals rather than by "requiring" them to do things, (2) by its locals filing grievances, and (3) by the UAW's "lobbying on both the State and Federal level to get laws that require employers to change their practices." Staff interview, Mar. 1, 1979.

[37] The USW noted that "the national actually negotiates almost all of its locals' contracts." The review that takes place is done by "higher level national staff of the work that is done by the national staff assigned to negotiate contracts." The USW reported that over the past 10 years it has required its staff to negotiate language to (1) permit the processing of civil rights grievances at an advanced stage of the grievance procedures to expedite them, (2) move to plantwide seniority with no loss of seniority when promoted or transferred, (3) eliminate the requirement for starting or ending leave at particular stages of maternity, (4) eliminate non-job-related tests and tests with cultural bias, and (5) broaden antidiscrimination clauses to include handicap. Staff interview, Feb. 23, 1979.

[38] The RCIU said that it reviewed all contracts and that over the past 10 years it had "tried to tighten up language regarding seniority's role in promotion so that women would have an equal chance with men." It reported having changed contracts so that "maternity is treated like any other illness and women can now get sick pay (formerly they had to take a formal leave of absence)." Also the Retail Clerks said that it had seen to it that all contracts contain bidding procedures so that "women and minorities who have a lot of seniority can use it and be promoted without the possibility of discrimination." All contracts are now reported to have an equal pay for equal work provision and any contracts that did not have an antidiscrimination clause have had one added. Staff interview, Feb. 16, 1979.

[39] The CWA stated that since all contracts are in the name of the international, they are all reviewed. It added that "maternity leave legislation would automatically result in changes in contract provisions." CWA reported being sure that "advice had been given to locals regarding problems related to testing, but knows of no case where there has been an instruction" to negotiate for validation or elimination. Some CWA contracts had formerly specified that "women be hired at grade 32 and most men at grade 34, which gets higher pay. The national has required changes in this sort of thing in the past 10 years." Finally, CWA has "consulted," but not "instructed," its locals regarding plantwide seniority "to expand promotion opportunities for minorities and women." Staff interview, Apr. 10, 1979.

[40] The SEIU reported that it reviews all major contracts to assure that they comply with Federal and State law. During the past 10 years the international said it had required its locals (1) to eliminate separate seniority lists for women and men, (2) to have maternity leave included as a disability, (3) to include provisions that tests cannot be given, (4) to change disparities in wage rates between men and women, and (5) to alter their antidiscrimination clauses to include sex and age. Staff interview, Mar. 15, 1979.

[41] Staff interviews with local unions, September 1978 through March 1979.

[42] In comments on this report in draft, the UAW noted that it "has a 13-member. . . .Fair Practices and Anti-Discrimination Committee, to assure compliance with the anti-discrimination

The National Labor Relations Board has permitted union requests for racial and sexual workforce demographics from employers if the data can be shown to be necessary for the proper representation of bargaining unit members.[43] The major case addressing this issue is *Westinghouse Electric Corporation v. the International Union of Electrical, Radio and Machine Workers, AFL–CIO,*[44] a case brought under the National Labor Relations Act.[45] In this case, the National Labor Relations Board decided that a union had an unqualified right to receive from the employer race, national origin, and sex data comprising a statistical profile of the union's bargaining unit. The board also stated that under the duty of fair representation a union had a right to request such information.[46]

Dissemination to unions of information concerning employer affirmative action is also encouraged under Federal Government policy regarding nondiscrimination by government contractors.[47] Finally, unions can establish committees to examine employment issues relating to minorities and women.[48]

The Commission surveyed the unions in its sample to determine whether they had taken the initiative to establish ways for helping to improve the career advancement opportunities of the women and minorities they represent and for dealing with related equal employment opportunity matters. Among seven international unions that had a national contract in one of the industries emphasized in the Commission survey, only the Steelworkers knew the race and sex of their bargaining unit members by job, department, or wage level.[49] None of the international unions knew the national origin of the bargaining unit members by job, department, or wage level. Three of the seven international unions stated that their bargaining partners had affirmative action plans,[50] but only the Steelworkers had a copy of the plan.[51]

Two of the seven international unions—the Steelworkers and the Auto Workers—reported that they

policies of the union. . . ." Benjamin C. Perkins, director, UAW Fair Practices and Anti-Discrimination Department, Letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Jan. 19, 1981, p. 2 (hereafter cited as Perkins Letter).

[43] Westinghouse Electric Corp. (East Dayton Tool and Die Co.) 239 N.L.R.B. No. 19 (1978). The U.S. Court of Appeals for the District of Columbia heard oral argument on Westinghouse Electric Corp. v. IUE on May 28, 1980. BNA, *Daily Labor Report,* May 28, 1980, pp. A–7 to A–10.

[44] 1978–79 CCH. N.L.R.B. 15,191 (Oct. 31, 1978), p. 28,434 *appeal docketed,* No. 78–2067 (D.C. Cir. Nov. 1, 1978).

[45] 29 U.S.C. §151 *et seq.* (1976).

[46] 1978–79 CCH. N.L.R.B. 15,191 (Oct. 31, 1978), p. 28,434 *appeal docketed,* no. 78–2067 (D.C. Cir. Nov. 1, 1978).
In Westinghouse Electric Corporation v. the International Union of Electrical, Radio, and Machine Workers, AFL–CIO, *Id.* at 28,434, the union requested demographic (race, sex, and Spanish-surname) data, copies of fair employment complaints and charges, and a copy of the affirmative action plan from Westinghouse. *Id.* at 28,436. The union stated that it needed the statistical information to determine if minorities and women were being treated equitably. *Id.* at 28,438–41. The complaints and charges were needed to ascertain the discrimination concerns of its women and minority bargaining unit members. *Id.* at 28,443–44. The affirmative action plan was needed to determine if provisions in the plan contravened the collective-bargaining agreement. *Id.* at 28,444–45.
When Westinghouse denied the request, the union filed an unfair labor practice charge, alleging that the employer had violated section 8(a)(5) and 8(a)(1) of the National Labor Relations Act. 42 U.S.C. §§8 (a)(5) and 8(a)(1) (1976). The section makes it an unfair labor practice for an employer to deny to unions information which will be relevant in administering and negotiating the collective-bargaining agreement. The administrative law judge in the case decided in favor of the union on each request. Westinghouse Electric Corporation, Case No. 6–CA–7680, (Feb. 17, 1976). The case was then appealed before the National Labor Relations Board. The board ruled that statistical data on the race, national origin, and sex of a union's bargaining unit, like wage data, was presumptively relevant. 1978–79 CCH 15,191 (Oct. 31, 1978), pp. 28,434, 28,439–40, *appeal docketed,* No. 78–2067 (D.C. Cir. Nov. 1, 1978). The relevance of the information does not have to be proved before the union obtains it. Although the board granted the request for statistical data, it only allowed disclosure of the data for bargaining unit members. *Id.* at 28,438–41.
The board granted the union's request for the charges and complaints but did not consider such information to be presumptively relevant. It stated that the union had proved the relevance of the request. The request was only granted for bargaining unit members, and the names of the complainants were deleted. *Id.* at 28,443–44. The union's request for a copy of the affirmative action plan was denied by the board. It stated that the information included in the plan did not appear necessary for the union to administer its contract effectively. *Id.* at 28,444–45. *See also,* Automation and Measurement Division, Bendix Corporation, 242 N.L.R.B. No. 8; Associated General Contractors of California, 242 N.L.R.B. No. 124; and Brazos Electric Power Co-op, 241 N.L.R.B. No. 160.

[47] Executive Order No. 11246, §202, 3 C.F.R. 339 (1965), as amended. Regulations promulgated by the Office of Federal Contract Compliance Programs pursuant to the Executive Order suggest ways for disseminating information on affirmative action plans. 41 C.F.R. §60–2.21 (1979).

[48] *Id.* The formation of permanent labor-management and permanent local union committees in which EEO problems can be discussed and resolved is a first step toward this effort. The regulations state that employers should ". . .[m]eet with union officials to inform them of policy, and request their cooperation." 41 C.F.R. §60–2.21(a)(6)(1979). This language, although it applies directly to referral unions, shows that some cooperation between labor and management was anticipated by the Federal Government.

[49] Staff interview, Feb. 23, 1979.

[50] Staff interviews: Feb. 23, 1979; Mar. 1, 1979; and Mar. 6, 1979.

[51] Staff interview, Feb. 23, 1979.

participated, with employers, in labor-management committees established to discuss employment issues related specifically to minority and female employees. The Steelworkers reported that their committee met at least 11 times during 1978.[52] Its high level of participation may reflect the fact that the Steelworkers are a party to a consent decree to eliminate discrimination within the steel industry and the union.[53]

The low level of international union activity in establishing an information base or an institutional framework for bargaining on equal opportunity issues is reflected in a low level of local union activity (see figure 4.1 and table C.1 in appendix C). Two unions—the Auto Workers and the Communications Workers—had no local unions that reported knowing the race, sex, or national origin of their bargaining unit members. Among locals affiliated with the Hotel and Restaurant Employees, 50 percent reported that they did not know the race, sex, and national origin of the bargaining unit members.

Union-Employer Initiatives in Equal Opportunity

Unions and employers may disagree on the means by which to ensure equal employment opportunity for women and minorities. One approach to reducing this type of union-employer conflict is for both parties to meet to discuss discrimination issues. Labor-management committees and local union committees can facilitate discussions of this type. Commission staff asked local union officials whether they participated in labor-management committees or local union committees to discuss employment issues related to minority and female bargaining unit members. Less than one-quarter of the local unions reported that they participated in a labor-management committee, and most of those belonging to such committees reported meeting less than six times during the past year. Three of the 6 locals meeting at least 11 times in a 1-year period were affiliated with the Steelworkers.

Local unions were also asked if local union committees consisting only of local union members existed to discuss employment issues affecting women and minority bargaining unit members. Less than 30 percent of the local unions reported that they had local union committees to discuss discrimination problems. Special union committees were primarily present in the local unions affiliated with two international unions—the Auto Workers[54] and the Steelworkers.

Although Title VII of the Civil Rights Act of 1964 allows for voluntary efforts to encourage equal employment opportunity,[55] the survey results indicate that some local unions have not taken, for example, the initiative of making themselves aware of the affirmative action programs of employers nor have they provided for regular committees that discuss the concerns of the minorities and females whom they represent. The bargaining partners of 37 percent of the local unions were reported to have affirmative action plans. Thirty-two percent of the local unions whose bargaining partners had affirmative action plans stated that they had a copy of the plan.

A recent Supreme Court of the United States decision has affirmed the right of unions to implement affirmative action programs that improve the employment status of their minority and female members. In 1979 the Supreme Court of the United States, in *United Steelworkers of America v. Weber,*[56] affirmed the legality of a private, voluntary affirmative action plan designed to increase the representation of minorities in traditionally segregated job categories, even where there was no finding that the employer had discriminated against minorities. The new plan permitted the enrollment in a training program of less senior black workers, instead of several more senior white workers, so as to overcome a conspicuous and long-standing underrepresentation of black craft workers in a company's work force.

[52] Ibid.

[53] The Steel Industry Consent Decree required the formation of an audit and review committee to review progress in the implementation of the decree, including the achievement of goals for the improvement of the status of minority and female workers. Representatives of the steel companies and the United Steelworkers were to be members of this committee. Steel Industry Consent Decree No. 1, Apr. 15, 1974. Reprinted in Bureau of National Affairs, *Fair Employment Practice Manual* (Washington, D.C.), 431:141.

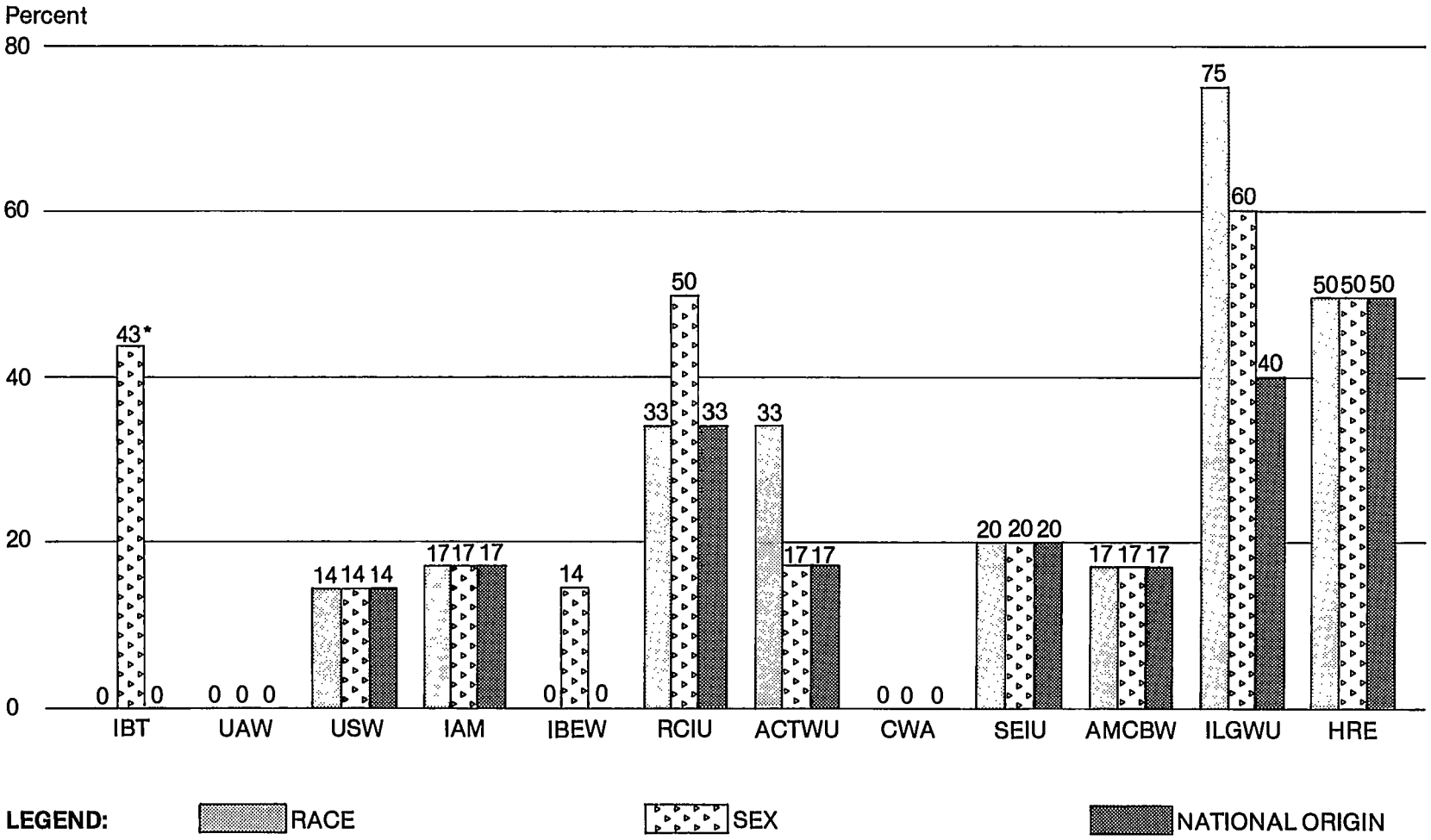
[54] In comments on this report in draft, the Auto Workers added that its contracts provide for "National Equal Application Committees" and that "each plant has a committee in which the function is to explore the cause of equal employment opportunity and make recommendations to the National [Equal Application] Committee." Perkins Letter, p. 3.

[55] United Steelworkers of America v. Weber, 443 U.S. 193, 204–206 (1979).

[56] *Id.* at 197.

FIGURE 4.1

Percentages of Local Unions Which, for the Bargaining Unit, Knew Race, Sex, or National Origin Data, by Job, Department, or Wage Level, by International Union Affiliation, 1978-79



Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979. See table C.1 of appendix C for numbers on which these percentages are based.

* This can be interpreted as follows: 43 percent of the IBT local unions reported knowing the sex of their bargaining units member, but none knew the race or national origin of the bargaining unit members.

In 1974 the Kaiser Aluminum Corporation and the United Steelworkers entered into a national collective-bargaining agreement that was designed, in part, to increase the number of minority workers in the crafts.[57] This agreement established an entrance ratio for the training program of one minority worker to one white worker, to be maintained until the percentage of minority craft workers roughly approximated the percentage of the minority population in the areas surrounding each of several Kaiser plants. Eligibility for training still rested on plant seniority, but to implement the affirmative action goal, it was necessary to establish two seniority lists. For each two training vacancies, one black and one white employee would be selected on the basis of seniority within their respective racial groups.[58]

During 1974, the first year of operation of the Kaiser-USWA affirmative action plan, among 13 craft trainees selected at Kaiser's Gramercy, Louisiana, plant, the most junior black selected had less seniority than several white production workers whose bids were rejected. One of those white workers, Brian Weber, brought suit under Title VII of the Civil Rights Act of 1964.

The Court held that the preferential treatment accorded blacks under the collective-bargaining agreement fell "within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[59]

In declaring the Kaiser-Steelworkers affirmative action plan legal, the Supreme Court of the United States found permissible a plant seniority system that operated to permit a larger proportion of minority enrollees in the training program than would have been admitted under a traditional plant seniority system. The Court stated:

> The purposes of the plan mirror those of the statute [Title VII of the Civil Rights Act of 1964]. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment oppportunities for Negroes in occupations which have been traditionally closed to them."[60]

In this case, a union and its bargaining partner took the initiative to improve equal employment opportunity for minorities in the firm's work force. The Court held that this voluntary plan was legal under Title VII of the Civil Rights Act of 1964.[61] In this case, a union and an employer wanted to correct an inequitable distribution of employment opportunities, and did so.

Summary

Results of the Commission survey demonstrate the need for international unions to expand their efforts to provide equal employment opportunities to minorities and women through the use of contract provisions as well as through other labor-management devices. While some unions have worked hard to enhance equal employment opportunity at the workplace by securing the adoption of specific contract provisions and programs, the majority of unions in the survey have not been as active.

Apart from their own role in bargaining on a national level, international unions have not adopted comprehensive measures for addressing their responsibilities for equal employment opportunity. They have assigned relatively few staff members to civil rights and women's rights activities considering the variety of tasks such staff face. Nine of 11 internationals have assigned less than 1 percent of their staffs to civil rights and women's rights activities.

In addition, international unions are in a position to identify basic union goals through the introduction of convention resolutions, yet results of the Commission survey show that there are key issues significantly affecting the employment status of minorities and women that have not been addressed by all union conventions. For example, 5 of the 11 international unions have not taken the position that they should increase the number of minorities in policymaking positions within the international.

While internationals have the authority to influence their subordinate bodies' policies toward collective bargaining and equal employment opportunity matters, the majority of them have not fully exercised their power to influence those bodies' policies. Six of the 11 internationals reported that they did not routinely review contracts negotiated by their subordinate bodies to determine whether any provisions might restrict opportunities for minorities and women. Since collective bargaining is

[57] *Id.* at 197–198.
[58] *Id.*
[59] *Id.* at 202.
[60] *Id.*
[61] *Id.* at 193.

the core function of all unions, the lack of comprehensive contract review policies places international unions in the potential position of being unaware of problems arising from the denial of equal employment opportunities.

Few international or local unions have obtained basic statistics or other information pertinent to the job status of their minority and female bargaining unit members or have established committees for the examination of equal opportunity issues.

- Among seven international unions that engage in collective bargaining on a national level, only the Steelworkers knew the race and the sex of their bargaining unit members by job, department, or wage level. Less than 20 percent of the local unions knew the race, sex, and national origin of their bargaining unit members by job, department, or wage level.
- Further, three of the seven international unions stated that their bargaining partners had affirmative action plans. The Steelworkers alone had a copy of the plan.
- The bargaining partners of 37 percent of the local unions were reported to have affirmative action plans. Thirty-two percent of the local unions whose bargaining partners had affirmative action plans stated that they had a copy of the plan.
- Less than one-quarter of the local unions reported that they participated in a labor-management committee, and most of those belonging to such committees reported meeting less than six times during the past year.
- Less than 30 percent of the local unions reported that they had local union committees to discuss discrimination problems.

In these critical respects, many international and local unions had not established an institutional or information base for efforts to secure nondiscriminatory employee policies toward their bargaining unit members. Such omissions on the part of the unions indicate that international unions can do much more than they have done to foster equal employment opportunities for the minority and female employees whom they represent.[62]

[62] In its review of this report in draft, the AFL-CIO concluded: We will continue to fight within and outside our trade union movement to eliminate inequality and to speak up, along with organizations like the U.S. Commission on Civil Rights, for justice, for reason, for equal rights and for equal opportunity for all, irrespective of race, color, sex, religion or national origin. Pollard Letter, Jan. 27, 1981, p. 2.

Part II

Chapter 1

Adverse Impact of Selection Criteria in Promotion, Training, and Transfer Decisions

Introduction

Employers utilize various selection criteria in promotion, training, and transfer decisions. Among these criteria are seniority, written tests, written performance evaluations, interviews, and educational qualifications.[1] The use of such criteria may constitute unlawful employment discrimination under Title VII of the Civil Rights Act of 1964,[2] where the selection factor adversely affects a minority group and is not otherwise justified by a legitimate business necessity.

In the following pages, statutes, case law, and administrative regulations governing the use of seniority, written tests, written performance evaluations, interviews, and educational qualifications in employment decisions are discussed. Seniority can be distinguished from other selection criteria in that certain seniority systems which have a discriminatory impact on minority groups are specifically excluded from liability under Title VII. Accordingly, seniority will be treated separately from other selection criteria. Generally, courts have applied the same basic standards in evaluating the legality of tests, performance evaluations, interviews, and educational qualifications. These factors are discussed second.

Seniority

Introduction

Seniority is a widely used method of allocating work related benefits in accordance with the length of a worker's employment, conferring the greater portion of benefits on the more senior employees.[3] Seniority may be computed from the date of an employee's hire with a company or tenure in a particular job category, department, or line of progression. While Title VII of the Civil Rights Act of 1964 promotes equal employment opportunity by prohibiting a broad spectrum of employment practices which discriminate on the basis of race, color, sex, religion, or national origin, "bona fide" seniority systems are specifically excluded from the act's coverage.[4]

Title VII of the Civil Rights Act of 1964 provides, in section 703(h), that it is not unlawful to set different terms and conditions of employment "pursuant to a bona fide seniority or merit sys-

[1] Prior related work experience and prior specialized training are also factors commonly used in employment decisions. The use of these factors will not be discussed in this chapter. For case law analyzing the use of prior related work experience and prior specialized training as employment selection criteria, *see* United States v. City of Philadelphia, 573 F.2d 802 (3d Cir. 1978); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971); United States v. United Association of Journeymen Local 24, 364 F. Supp. 808 (D.N.J. 1973); Local 53 International Association Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Kinsey v. First Regional Securities, 557 F.2d 830 (D.C. Cir. 1977); and Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975).

[2] 42 U.S.C. §§2000e–2000e-15 (1976 and Supp. II 1978).

[3] Stephen Utz, "The New Definition of Seniority System Violations Under Title VII: He Who Seeks Equity. . ." *Texas Law Review,* vol. 56 (1978), p. 301.

[4] Linda C. Baker, "Title VII in the Supreme Court: Equal Employment Opportunity Bows to Seniority Rights," *Utah Law Review,* 1978, p. 249.

tem. . .provided that such differences are not the result of an intention to discriminate. . . ."[5] Under this provision, employers may give employees preference in the matter of pay, promotion, layoff, transfer, and the like, based on length of service.

The courts initially construed section 703(h) narrowly, refusing to uphold seniority systems which effectively locked minority employees into inferior positions.[6] The courts declared that neutral seniority systems which perpetuated the effects of intentional pre-act discrimination could not be "bona fide" and were therefore unlawful under Title VII. In 1977 the Supreme Court of the United States reversed this judicial trend, giving an expansive interpretation to section 703(h).[7] The Court found that Congress' intention in enacting section 703(h) was to protect the seniority rights of incumbent employees, even at the expense of pre-act discriminatees.[8] The Court held that a neutral, legitimate seniority system may be bona fide and does not become unlawful under Title VII simply because it may perpetuate pre-Title VII discrimination.[9] Under the Supreme Court ruling many employers will not be subject to legal compulsion to modify seniority systems which perpetuate pre-act discrimination. A 1979 Supreme Court decision,[10] however, permits employers to engage voluntarily in affirmative action programs which alter established seniority systems in order to rectify minority employment disparities in traditionally segregated job categories. The following pages trace the development of the judicial interpretations of the protection to be accorded seniority systems under 703(h) and the current possibility of private, voluntary affirmative action as a remedy for pre-act discrimination.

Initial Interpretations of 703(h)

Courts initially refused to uphold seniority systems which perpetuated pre-act discrimination on the ground that such systems could not be bona fide. In a representative case, *Local 189, United Papermakers and Paperworkers v. United States,*[11] the court interpreted the act to prohibit future awarding of vacant jobs on the basis of a seniority system that had the effect of locking in prior racial discrimination. The court found that jobs at the Crown Zellerbach paper company were organized hierarchically within lines of progression. Promotions within each line of progression were determined by job seniority. When a vacancy occurred, the employee with the longest tenure in the job slot immediately below the vacancy had priority. Until 1964 the company segregated the lines of progression by race, reserving the more desirable lines for whites. Local 189 of the United Papermakers and Paperworkers, an all-white local, controlled the preferred, higher paying lines. Local 189-A, the black local, had jurisdiction over the lowest paid and least desirable lines of progression. After the effective date of Title VII (July 2, 1965), the company stopped overt segregation of the lines of progression but continued to award promotions on the basis of job seniority. Accordingly, blacks had no seniority in bidding for jobs in the former white lines of progression due to the prior segregation.[12] The court ordered the employer and the union to replace its existing departmental seniority system with plant seniority; that is, total length of service at the plant would be the only type of seniority used in filling vacant jobs. The court found that this would not deprive white employees of seniority accrued before the effective date of the Civil Rights Act, but would simply prevent past discriminatory practices from having future impact on promotions and other benefits.[13] The court stated:

> The defendants assert, paradoxically, that even though the system conditions future employment opportunities upon a previously determined racial status the system itself is racially neutral and not in violation of Title VII. The translation of racial status to job-seniority status cannot obscure the hard, cold fact that Negroes at Crown's mill will lose promotions which, *but for* their race, they would surely have won. . . .It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the *past* is to cut into the employee's *present* right not to be discriminated against on the ground of race.[14]

[5] *See infra* note 37, para. (h).
[6] Baker, "Title VII in the Supreme Court," pp. 251–55.
[7] International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); United Air Lines v. Evans, 431 U.S. 553 (1977).
[8] International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 (1977).
[9] *Id.* at 353–54.
[10] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).
[11] Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).
[12] *Id.* at 984.
[13] *Id.* at 980, 988, 990, 995, and 998.
[14] *Id.* at 988.

The Current Degree of Seniority System Immunity Under Title VII

United States v. Local 189, Papermakers and Paperworkers and a number of similar decisions by other Federal circuit courts were rendered obsolete in 1977 by the Supreme Court of the United States in *International Brotherhood of Teamsters v. United States*.[15] In *Teamsters*, the Court made it clear that a seniority system does not become unlawful simply because it perpetuates pre-act discrimination. The *Teamsters* case arose when city drivers and service workers of T.I.M.E.–D.C. challenged transfer provisions which imposed a penalty in loss of seniority for transferring to more desirable line driver positions.[16] Employees of T.I.M.E.–D.C. were divided into three categories, serviceworker, city driver, and line driver, with promotions based on seniority accrued within each distinct department. Prior to the effective date of Title VII, the higher paying, more desirable line driver positions were reserved for whites. Blacks, Hispanics, and some whites were hired in the lower paying city driver and serviceworker positions. After the enactment of Title VII, city drivers and serviceworkers were allowed to transfer to line driver positions. If a city driver or serviceworker transferred to a line driver position, however, he or she started at the bottom of the seniority ladder for line drivers.

The Supreme Court of the United States found that the seniority system effectively locked minorities into their existing jobs as city drivers or serviceworkers by penalizing transferees through loss of accumulated seniority.[17] The Court held, however, that the seniority system was bona fide and therefore lawful, even though it perpetuated the effects of pre-act discrimination in hiring, promotion, and transfer.[18] In finding that the seniority system was bona fide, the Court focused on five factors: (1) the seniority system was operated to discourage all employees equally from transferring between departments, (the city drivers who were adversely affected by the seniority system included both white and minority workers); (2) the seniority system did not have its genesis in racial discrimination; (3) the seniority system was negotiated and maintained free from any illegal purpose; (4) the placing of serviceworkers, city drivers, and line drivers in distinct bargaining units was rational and in accord with industry practice; and (5) the seniority system was consistent with National Labor Relations Board precedents.[19] The standard elaborated by the Supreme Court of the United States for determining whether a seniority system is bona fide and therefore falls within the immunity of section 703(h) is imprecise. In a notable decision which applied the *Teamsters* standard, a Federal district court found a seniority system which perpetuated pre-act discrimination to be unlawful under Title VII. The court in *Sears v. Atchison, Topeka & Santa Fe Ry. Co.*,[20] held that "the seniority system had its genesis in racial discrimination and was created and maintained with illegal purpose, that it fail[ed] to meet the *Teamsters* test, and that it [was] not bona fide."[21]

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[15] International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[16] *Id.* at 328–29.

[17] *Id.* at 349–50.

[18] *Id.* at 350–55.

[19] *Id.* at 356.

[20] Sears v. Atchison, Topeka & Santa Fe Ry. Co., 454 F. Supp. 158 (D. Kan. 1978).

[21] *Id.* at 180. Black train porters and their certified union representative, the Brotherhood of Sleeping Car Porters, brought a class action suit against the Santa Fe Railway Company and the United Transportation Union (UTU), the certified bargaining representative for brakemen and conductors. *Id.* at 160. The plaintiffs alleged that Santa Fe and UTU (and its predecessors) engaged in the practice of excluding blacks from the craft positions of brakeman, conductor, and supervisory personnel for over 75 years. *Id.* at 161.

At the Santa Fe Company, the seniority system was divided into many regional districts and by crafts within each district. Seniority was not transferable between districts or crafts. Seniority was used to determine rights to advance to more favorable, higher paying crafts and various other employment benefits. *Id.* at 165. The seniority provisions for brakemen and conductors were established under collective-bargaining agreements between the Brotherhood of Railway Trainmen (BRT) and the Order of Railway Conductors and Brakemen (ORCB) within Santa Fe from 1892 to 1969. In 1969 BRT and ORCB merged into UTU which continued collective bargaining on behalf of the brakemen and conductors. *Id.* at 167. The seniority provisions governing the rights of train porters were never incorporated into a written agreement. The court noted that the seniority system at Santa Fe was adopted at a time when segregation in crafts was standard operating procedure at Santa Fe. *Id.* at 180.

Under the seniority system, almost all persons hired as conductors were required to first serve as brakemen. The BRT and ORCB had no black members from 1892 to the 1960s. Moreover, black membership was prohibited in the constitutions of the BRT and ORCB from 1939 to 1960 and 1966, respectively. The court found that the exclusion of blacks from the BRT and ORCB prevented blacks from advancing to positions as brakemen or conductors. *Id.* at 174, 180.

The duties of train porters and brakemen on Santa Fe trains were substantially similar. As a class, train porters were found to be qualified to be brakemen on the basis of past experience. The court found that prior to 1965, blacks were purposefully excluded from the brakeman and conductor crafts by the Santa Fe

In *Teamsters* the Supreme Court made it clear that retroactive seniority is an appropriate remedy for victims of post-act discrimination through seniority systems. However, retroactive seniority can only be granted to victims of post-act discrimination back to the effective date of Title VII because Congress intended Title VII to be prospective.[22] Pre-act discrimination cannot be remedied, since the discrimination was not illegal when it took place.[23]

The Equal Employment Opportunity Commission (EEOC) has issued a legal opinion interpreting the *Teamsters* decision.[24] In this opinion, the EEOC indicates that it will infer a discriminatory intent on the part of the company and/or union in two instances. First, where "unions or units were previously segregated, discriminatory intent in the institution of a unit seniority system will be inferred."[25] The opinion also states: "When a unit seniority system is in effect and the employer or union is made aware that it is locking in minorities or females, discriminatory intent will be inferred if the system is maintained or renegotiated when an alternative system is available."[26] It should be noted that *Teamsters* does not appear to affect seniority systems that currently have discriminatory provisions. Those systems could be unlawful under Title VII if made the subject of a timely charge of discrimination.[27]

Private Affirmative Action Remedies to Post-Act Discrimination

Under the *Teamsters* decision, many employers cannot be legally compelled to alter or modify seniority systems which perpetuate pre-act discrimination. The Supreme Court of the United States, in *United Steelworkers of America v. Weber,*[28] however, approved of private, voluntary affirmative action programs designed to increase the representation of minorities in traditionally segregated job categories, even where the employer has not discriminated against minorities.[29]

In 1974 the Kaiser Aluminum Corporation and the United Steelworkers entered into a national collective-bargaining agreement that was designed, in part, to increase the number of minority workers in the crafts.[30] This agreement established an entrance ratio for the training program of one minority worker to one white worker until the percentage of minority craft workers roughly approximated the percentage of the minority population in the areas surrounding each of several Kaiser plants. Eligibility for training still rested on plant seniority, but to

Company and that the segregation in craft positions was "approved by, acquiesced in, and maintained and demanded by the 'white' unions." *Id.* at 174. The court noted that BRT had worked actively from 1920 to 1960 to secure reductions in the number of train porters in order to increase job opportunities for white brakemen. *Id.* at 167–69. The seniority system was found to have been used to deprive blacks of their train porter positions. *Id.* At 180.

The court held that the use of craft seniority after 1965 perpetuated pre-Title VII discrimination. The court held that the seniority system was not bona fide under the Teamsters decision because it had its genesis in racial discrimination and was created and maintained with illegal purpose. Liability was imposed on Santa Fe and the UTU. *Id.* at 179–80.

[22] International Bhd. of Teamsters v. United States, 431 U.S. 324, 356–57 (1977).

[23] *Id.* at 353. For a comprehensive discussion of remedies available under Title VII, see, Myers, The Scope and Implementation of Retroactive Competitive-Status Seniority Awards Under Title VII, 9 Seton Hall L. Rev. 655 (no. 4, 1978).

[24] EEOC Notice No. N–915, an EEOC Interpretive Memorandum, *reprinted in* the EEOC Compliance Manual, vol. 2 480:0001 (July 14, 1977).

[25] *Id.* at 480:0002.

[26] *Id.*

[27] Rock v. Norfolk and W. Ry. Co., 473 F.2d 1344 (4th Cir. 1973); EEOC v. International Longshoreman's Ass'n, 511 F.2d 273 (5th Cir. 1975); Evans v. United Airlines, 431 U.S. 553 (1977).

[28] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[29] The Supreme Court of the United States has not yet addressed the validity of voluntary affirmative action programs by public employers. Voluntary affirmative action plans by public employers, however, have been upheld in several recent Federal circuit court and State supreme court decisions. In Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *appeal docketed,* No. 79–1080 (S. Ct. Jan. 10, 1980), the court upheld a voluntary affirmative action program instituted by the Detroit Police Department which gives preference to black candidates over whites holding higher positions on promotion rosters. The court found that from 1944 to 1975, blacks were purposefully and consistently discriminated against by the Detroit Police Department in hiring, promotions, and job assignments. *Id.* at 686–92. The court held that under Title VII voluntary affirmative action was permissible to remedy the underrepresentation of black officers on the Detroit police force. The court also held that there was no constitutional prohibition against affirmative action by public employers and discussed the proper scope of inquiry in determining the constitutional sufficiency of public affirmative action programs. *Id.* at 692–97. For other decisions upholding voluntary affirmative action programs by public employers, *see,* Maehren v. City of Seattle, 599 P.2d 1255, 20 FEP Cases 854 (Wash. 1979); Zaslawsky v. Board of Education, Los Angeles Schools, 610 F.2d 661, (9th Cir. 1979); Minnick v. Department of Corrections, 95 Cal. App. 3rd 506, 157 Cal. Reptr. 260, *cert. granted,* 448 U.S. 910 (1980) *cert. dismissed,* 1018 S. Ct. (1981). Some courts have required a finding of past discrimination. Price v. Civil Service Commission of Sacramento County, 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Reptr. 475 (1980), *cert. dismissed,* 101 S. Ct. 57 (1980). Other courts have required some sort of administrative, legislative, or judicial approval of the plan. U.S. v. City of Miami, 614 F.2d 1322 (5th Cir. 1980), *reh'g, en banc granted,* 625 F.2d 1310(5th Cir. 1980).

[30] United Steelworkers of America v. Weber, 443 U.S. 193, 197–98 (1979).

implement the affirmative action goal, it was necessary to establish two seniority lists. For each two training vacancies, one black and one white employee would be selected on the basis of seniority within their respective racial groups.[31]

During 1974, the first year of operation of the Kaiser-USWA affirmative action plan, among 13 craft trainees selected at Kaiser's Gramercy, La. plant, the most junior black selected had less seniority than several white production workers whose bids were rejected. One of those white workers, Brian Weber, brought a suit under Title VII of the Civil Rights Act of 1964.[32]

The Supreme Court of the United States held that the preferential treatment accorded to blacks under the collective-bargaining agreement fell "within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[33]

In declaring the Kaiser-Steelworkers affirmative action plan legal, the Court clearly permitted the operation of a plant seniority system in such a way as to permit a much larger proportion of minority enrollees in the training program than would have been admitted under a traditional plant seniority system. The Court stated that:

> The purposes of the plan mirror those of the statute [Title VII of the Civil Rights Act of 1964]. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."[34]

The Court did not delineate a precise formula for determining whether a private, voluntary affirmative action program falls within the discretion accorded private employers under Title VII. Guidance as to the legality of affirmative action programs can be found, however, in the three factors relied upon by the Court in determining the Steelworkers' plan to be lawful:

(1) "The plan does not require the discharge of white workers and their replacement with new black hires;"

(2) "Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white;"

(3) "Moreover, the plan is a temporary measure; it is not intended to maintain racial imbalance but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force."[35]

Conclusion

Under *Teamsters,* a seniority system which perpetuates pre-Title VII discrimination may be bona fide and therefore lawful. Those who cannot succeed on a claim of employment discrimination because the discriminatory conduct occurred prior to the effective date of the Civil Rights Act of 1964, will be most affected by this decision. Post-act seniority practices which unjustifiably discriminate against minorities and women are clearly prohibited under Title VII. While a victim of pre-act discrimination may be barred from recovery under *Teamsters,* employers may voluntarily undertake to increase minority representation in traditionally segregated job categories. As the Court noted in *Steelworkers,* one of the purposes of Title VII is to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[36]

Written Tests, Written Performance Evaluations, Interviews, and Educational Qualifications

Introduction

Title VII prohibits the use of selection factors which have an adverse and unjustified impact on protected classes on account of race, color, religion, sex, or national origin.[37] The use of written tests,

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[31] *Id.*
[32] *Id.* at 199.
[33] *Id.* at 209.
[34] *Id.* at 208.
[35] *Id.* at 208–09.
[36] Albemarle Paper Co. v. Moody 422 U.S. 405 (1975), *quoted with approval in,* United Steelworkers of America v. Weber, 443 U.S. 193, 204 (1979).
[37] 42 U.S.C. §2000e–2 (1976 and Supp. II 1978) in pertinent part provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

performance evaluations, interviews, and educational qualifications in employment decisions, that have adverse effects upon a protected class and which for various reasons do not accurately predict likely future job performance, has been found to violate Title VII.[38]

Where a Title VII plaintiff establishes that a selection criterion adversely affects his or her employment opportunity because of race or some

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to 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, nor shall it be an unlawful employment practice for an employer to give and 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. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

[38] Employment discrimination plantiffs have alternatively sought relief under the Civil Rights Act of 1866, 42 U.S.C. §1981 (1976) and the Civil Rights Act of 1871, 42 U.S.C. §1983 (1976). While the majority of employment discrimination claims have been brought under Title VII of the Civil Rights Act of 1964, many of the principles established in these cases have been held to apply with equal weight to 42 U.S.C. §§1981 and 1983. For a general discussion of the role of 42 U.S.C. §§1981 and 1983 in employment discrimination claims, see Barbara Lindemann Schlei and Paul Grossman, *Employment Discrimination Law, 1979 Supplement* (Washington, D.C.: Bureau of National Affairs, Inc., 1979), pp. 138–40.

other impermissible classification,[39] the burden shifts to the employer to demonstrate a valid business need for following an employment practice with a discriminatory impact. In the landmark case *Griggs v. Duke Power Co.*,[40] the Supreme Court of the United States made it clear that the employer has the burden of showing that any job requirement has a manifest relationship to the job in question where the requirement tends to reduce job opportunities because of race. The Court asserted that the "touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[41] Under *Griggs*, facially neutral employment practices as well as those which are overtly discriminatory will not survive Title VII scrutiny: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[42] The Supreme Court of the United States also held that a finding of discriminatory intent on the part of the employer is not required in establishing a valid claim under Title VII:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. . . .Congress directed the thrust of the Act to the *consequences* of employment practices not simply the motivation.[43]

The Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor, the U.S. Department of Justice, and the U.S. Office of Personnel Management have jointly promulgated Uniform Guidelines on Employee Selection Procedures which detail permissible uses of various selection criteria. The Uniform Guidelines also specify the conditions in which employers are required to conduct validation studies to demonstrate that employment selection criteria are predictive of essential job performance characteristics.[44] Under the Guidelines, employment practices which have an adverse impact because of race, color, national origin, religion, or sex are impermissible unless shown by professionally accepted methods to

[39] Demonstration of an adverse impact resulting from the disputed employment practice is the key element in the Title VII prima facie case and it can be demonstrated in various ways. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the court asserted that the employer's burden of demonstrating a manifest relationship between an employment requirement and the employment in question arises after the plaintiff "has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* at 425. In Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), a statistical disparity in the number of whites versus blacks who were promoted was sufficient to place the burden of showing a business necessity for the promotion practices on the employer. Employment positions at the defendant corporation were divided into two classes, production line positions paid at hourly rates and salaried positions. Between 1963 and 1969, the approximate percentage of nonwhite hourly workers ranged from 11 to 15 percent. The court focused on the fact that the proportions of black hourly workers promoted to salaried positions, from 1963 to 1967 and again from 1967 to 1969, were substantially below 10 percent. *Id.* at 357. The court asserted that "figures of this kind, while not necessarily satisfying the whole case, have critical, if not decisive, significance—certainly, at least in putting on the employer the operational burden of demonstrating why, on acceptable reasons, the apparent disparity is not the real one." *Id.* at 358. In Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976), "blacks received less than half the number of promotions to salaried positions they should have received had they been promoted at the same rate as white hourly employees." *Id.* at 1191. In Watkins blacks constituted 30 percent of the labor pool from which employees were promoted to supervisory positions between 1965 and 1972. However, blacks constituted only 8.6 percent of all promoted supervisors during the 7 year period. *Id.* at 1190. In Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973), management utilized performance evaluations to achieve a reduction in the work force. The impact of the performance evaluation was to reduce the Hispanic proportion of machine shop workers from 40 to 22 percent and to reduce the Hispanic proportion of iron works shop workers from 56 to 45 percent. The court found sufficient disparate impact resulting from the performance evaluation to satisfy Title VII requirements. *Id.* at 1206. In U.S. v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1976), *aff'd in part, rev'd in part on other grounds*, 549 F.2d 415 (7th Cir. 1977), the court relied on a comparison of the number of blacks and Hispanics hired and promoted with the percentage of blacks and Hispanics in the surrounding population. U.S. v. City of Chicago, 411 F. Supp. 218, 233–34 (N.D. Ill. 1976) at 233–34. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court of the United States relied on disparate rejection rates of blacks versus whites in hiring and job transfer in finding that Title VII requirements for a prima facie case were satisfied. *Id.* at 425–26. In Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 440–41 (5th Cir. 1974), job categories were segregated according to race with higher paying jobs reserved for whites. The great majority of blacks who were promoted were elevated to jobs traditionally held by blacks. Further, there was a constant disparity in the pay of whites and blacks from 1965 to the trial date. These factors were sufficient to satisfy disparate impact requirements of the plaintiff's Title VII action.

[40] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[41] *Id.* at 431. Similarly, in Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), the court stated that the "*only* justification for standards and procedures which may, even inadvertently, eliminate or prejudice minority group employees is that such standards or procedures arise from a non-discriminatory legitimate business necessity." *Id.* at 354.

[42] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[43] *Id.* at 432.

[44] 29 C.F.R. §1607 (1980).

be predictive of or significantly correlated with important elements of job performance.[45]

The Guidelines recognize the use of criterion-related, content, and construct validation study methods.[46] To conduct a criterion-related validity study, the achievement of a prospective candidate for hire or advancement on a test or other selection device is weighed against a measure of job performance chosen for the study. For example, a criterion-related validity study might compare candidates' scores on a test used for hire against performance evaluations received by incumbent employees who received similar scores on the entrance test.[47] Content validity exists where the selection criterion measures specific skills or knowledge necessary to perform a job. An example of a content valid test is a typing test given to prospective typists.[48] Construct validity is present where the selection criterion measures a character trait such as intelligence or learning ability and that trait can be shown to have a manifest relationship to the job. A construct validity study might be used to show the necessity for a college degree requirement for hire as a commercial airline pilot.[49]

In *Griggs v. Duke Power Co,* the Supreme Court of the United States addressed the role of EEOC guidelines in determining the legality of disputed selection criteria under Title VII. The Court asserted that EEOC guidelines are to be accorded great deference by the courts:

> The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting §703(h) to permit only the use of job related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. See, e.g. United States v. City of Chicago, 400 U.S. 8 (1970); Udall v. Tallman, 380 U.S. 1 (1965); Power Reactor Co. V. Electricians, 367 U.S. 396 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.[50]

In *Albemarle Paper Co. v. Moody,*[51] the Supreme Court of the United States struck down a validation procedure which failed to meet EEOC standards. Following the mandate of the Court, numerous courts have explicitly accorded EEOC guidelines determinative weight in evaluating the legality of various employment selection factors and validation procedures.[52] The vast majority of courts, although not explicitly relying on EEOC guidelines, have rendered decisions consonant with the principles established in them.[53] EEOC guidelines assume a

[45] *Id.* at §1607.3A. The 1978 Guidelines adopt an 80 percent approach; the government will normally not prosecute if the rate by which minorities pass a given test or advance on the basis of a selection criterion is at least 80 percent of the relevant comparison group rate. *Id.* at §1607.4D.

[46] The Guidelines provide that "[e]vidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated." *Id.* at §1607.5B.

[47] A criterion-related validation study is "called a 'predictive' study if the sample group take the test before they have performed the job in which their performance is used for comparison to test scores. It is a 'concurrent' study if the test is given to incumbent employees, regardless of whether they were selected to fill the job by the test or other means, whose current performance on the performance measure chosen for the study is then compared with their test scores." Schlei and Grossman, *Employment Discrimination Law,* pp. 66–67.

[48] *Id.* at 67.

[49] *See generally* Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972).

[50] Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).

[51] Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

[52] For cases according determinative weight to EEOC Guidelines in evaluating the validity of educational qualifications, see Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) ["Once it has been established that a diploma barrier has an adverse consequence on potential black employees, the failure of the employer to validate his educational prerequisite compels the conclusion that it is invalid."] *Id.* at 1371; Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).
For cases according determinative weight to EEOC Guidelines in determining the legality of performance evaluations see, Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976); Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973); United States v. City of Chicago, 411 F. Supp 218 (N.D. Ill. 1976), *aff'd in part,rev'd in part on other grounds,* 549 F.2d 415 (7th Cir. 1977).
For cases according determinative weight to EEOC Guidelines in evaluating the use of written tests see, EEOC v. Local 638, 401 F. Supp. 467 (S.D.N.Y. 1975), *modified,* 532 F.2d 821 (2d Cir. 1976), *aff'd,* 565 F.2d 31 (2d Cir. 1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Hicks v. Crown Zellerbach, 319 F. Supp. 314 (E.D. La. 1970), *modified.,* 321 F. Supp. 1241 (E.D. La. 1971). For a case giving determinative weight to EEOC Guidelines in analyzing the use of employment interviews see, Leisner v. N.Y. Telephone Co., 358 F. Supp. 359 (S.D.N.Y. 1973).

[53] Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437 (5th Cir. 1974); Brown v. Gaston City Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d

prominent role in setting legal bounds for the use of selection criteria and validation studies and should be given careful consideration by employers.[54]

Where an employer is successful in demonstrating the job relatedness of a selection factor, he or she has satisfied the initial burden of justifying the adverse impact of the employment practice. The employer, however, will still be held in violation of Title VII where the plaintiff can demonstrate that there are alternative practices available to the employer which would have a lesser adverse impact. In fact, the Uniform Guidelines put the burden on the employer, by requiring it to investigate alternatives as part of its validity study.[55] In such circumstances the use of the discriminatory selection factor has been held to be a mere "pretext for discrimination."[56]

It should be noted that Title VII does not require that employers hire unqualified persons to fill vacancies.[57] Selection criteria may not be designed in such a way, however, as to exclude otherwise qualified minorities and women from employment consideration. In *Griggs v. Duke Power Co.,* the Supreme Court of the United States stated:

> Congress did not intend Title VII, however, to guarantee a job to every person regardless of his qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[58]

The following sections will discuss cases where the use of tests, performance evaluations, interviews, and educational qualifications as selection criteria have been found to be unlawful.

Written Tests

Private employers began to use written employment tests after the First World War, but it was not until after the Second World War that the use of such tests became widespread. In the decade between 1947 and 1957, the use of tests by all American companies was reported to have increased from 57 percent to 80 percent.[59] The 1960s also witnessed an increase in the use of employment tests. One study showed that 84 percent of firms used personnel tests in 1963, as opposed to only 64 percent in 1958.[60] There is some evidence that the use of written tests has declined since 1971, the year of the *Griggs v. Duke Power Co.*[61] decision of the Supreme Court of the United States, but they are still widely used.[62]

The use of tests in employment decisions has been found by the courts to be invalid under Title VII when no manifest relation exists between test scores and job performance and where the tests have a

348 (5th Cir. 1972); Sawyer v. Russo 19 FEP Cases 44 (D.D.C. 1979); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977).

[54] In United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), the court stated that:

> We do not read *Griggs* as requiring compliance by every employer with each technical form of validation procedure set out in 29 C.F.R., Part 1607. Nevertheless, these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability. Their guidance value is such that we hold they should be followed absent a showing that some cogent reason exists for noncompliance. *Id.* at 913.

[55] 29 C.F.R. §1607.3B (1980).

[56] When the employer meets the burden of demonstrating business necessity for the practice, the plaintiff may show that there are alternative employment practices available to the employer which have a less disparate impact. As the court commented in Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976), "It is clear that business necessity is limited to those cases where an employer has no other choice." *Id.* at 1181. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) the Supreme Court of the United States asserted:

> If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient, and trustworthy workmanship". . .such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. *Id.* at 425.

See also, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801, 804 (1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971); and United States v. City of Philadelphia, 573 F.2d 802 (3d Cir. 1978).

[57] United States v. Local 189, United Papermakers and Paperworkers; 416 F.2d 980, 988 (5th Cir. 1969).

[58] Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

[59] W.D. Scott, R.C. Clothier, and W.R. Spriegel, *Personnel Management* (New York: McGraw-Hill, 1961), p. 566.

[60] "Survey of Hiring Procedures, 1958–1963," Psychological Services Inc., 1800 Wilshire Blvd., Los Angeles, Calif., (unpublished), p. 2.

[61] Griggs v. Duke Power Co. 401 U.S. 424 (1971).

[62] Donald J. Peterson, "The Impact of Duke Power on Testing," *Personnel,* vol. 51 (March-April 1974), pp. 30–37. *See also, Employee Testing and Selection Procedures–Where Are They Headed?* Prentice-Hall, American Society for Personnel Administration Survey 656 (Prentice-Hall, 1975).

disparate impact on minority job applicants. In the case of *EEOC v. Local 638,*[63] applicants for admission to Local 28's apprenticeship program were required to take an entrance examination. This exam consisted of five areas: mental alertness, mechanical reasoning, space relations, mathematical computations, and concepts. The plaintiffs alleged that the exam discriminated against nonwhites and introduced statistics showing that 13.43 percent of the white applicants were successful while only 8.79 percent of the nonwhites were successful. The court found that a prima facie case of discrimination had been established and held that the defendant failed to show sufficient job relatedness of the testing requirement despite the fact that the defendant had conducted three validation studies.

The court evaluated these validation studies in accordance with standards set by EEOC guidelines. The court found that the validation efforts did not satisfy EEOC requirements and that results from the studies were "spotty and largely equivocal."[64]

The court also noted that there was evidence that persons who scored poorly on the apprenticeship admission test could perform successfully as apprentices and journeymen. The court concluded that the defendants failed to demonstrate that "the disproportionate impact was simply the result of a proper test demonstrating less ability of blacks and Hispanics to perform the job satisfactorily."[65] The union was ordered to achieve within 6 years a combined union and apprenticeship nonwhite membership percentage equal to the nonwhite percentage of the relevant labor force within its jurisdiction, 29 percent.[66]

In *EEOC v. International Union of Operating Engineers,*[67] the court found that the union's requirement of passing a test at the training school was discriminatory against nonwhites:

> A test which is required of some, not of all; which relates to only a small portion of the relevant skills despite the applicant's knowledge of many others; which has no standards for measuring success; which is given by different people applying different rules; and the passing of which does not guarantee prompt union membership, is an obstruction of equal employment opportunities without any relationship to business necessity. . . .[Moreover,] absence of *any* validation effort simply confirms the conclusion that this test procedure has no business necessity.[68]

In *Albemarle Paper Co. v. Moody,*[69] the company was divided into several functional departments, each containing one or more distinct lines of progression. Certain lines of progression were more skilled and higher paid than others. Prior to the effective date of Title VII these higher paid lines were expressly reserved for white workers. With the enactment of the Civil Rights Act of 1964, the company discontinued overt segregation in the lines of progression. Black workers were allowed to transfer to skilled lines if they could pass the Beta and Wonderlic appitude tests, but few succeeded in doing so.[70]

The company hired an expert in industrial psychology who conducted a concurrent validation study, attempting to justify the testing program. The Supreme Court of the United States held that Albemarle had failed to sustain its burden of proving the job relatedness of the aptitude tests. The Court reached this conclusion after comparing the company's validation study to the criteria set forth in the EEOC Guidelines. The company's validation study was found defective on the following points:

> (1) no job analysis was done to determine salient features of the job; (2) the criteria used were subjective, supervisory rankings based on vague standards; (3) there was no differential validity study done, nor was one shown to be infeasible; and (4) the validity study dealt only with job experienced whites in a concurrent study.[71]

In *Hicks v. Crown Zellerbach,*[72] employees seeking transfer to other departments were required to obtain specified minimum scores on certain standardized tests. The plaintiffs showed that the tests disqualified a disproportionate percentage of blacks. The court found the testing program unlawful because it had not been validated. In upholding the validation study requirement the court asserted that the Guidelines required professional validation studies. Also, it pointed out that the Guidelines were

[63] EEOC v. Local 638, 401 F. Supp. 467 (S.D.N.Y. 1975), *mod.*, 532 F.2d 821 (2d Cir. 1976), *aff'd*, 565 F.2d 31 (2d Cir. 1977).
[64] *Id.* at 480.
[65] *Id.* at 481, *quoting from* Vulcan Society v. Civil Service Commission, 490 F.2d 387, 392 (2d. Cir. 1973).
[66] *Id.* at 489.
[67] EEOC v. International Union of Operating Engineers, 415 F. Supp 1155 (S.D.N.Y. 1976), *mod.*, 553 F.2d 251 (2d Cir. 1977).
[68] *Id.* at 1173.
[69] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
[70] *Id.* at 427–29.
[71] Bonnie Sandman and Faith Urban, "Employment Testing and The Law," *Labor Law Journal,* vol. 27 (1976), p. 43.
[72] Hicks v. Crown Zellerbach, 319 F. Supp. 314 (E.D. La. 1970), *mod.*, 321 F. Supp. 1241 (E.D. La. 1971).

"entitled to great deference, particularly on a matter, such as use of employment tests, which involves great professional expertise."[73]

Performance Evaluations

Performance evaluations are utilized to a great extent by business organizations. Since performance appraisals usually involve the judgment of one person about another, there is great opportunity for ratings to be subjective and impressionistic.[74] Perhaps the major deficiency of performance evaluations is the "lack of reliability in the observation of behavior."[75] "Rating errors" can occur whenever one individual observes and rates another; hence, there are "severe difficulties" in obtaining accurate ratings of job performance.[76]

The susceptibility of performance evaluations to the subjective judgments of evaluators means that they are usually unreliable tools for assessing the work performance of employees. The race, ethnicity, and sex of both the person being rated and the person doing the rating have an influence on the evaluation.[77] A study by W. Clay Hamner and three of his colleagues indicated that sex-race stereotypes influence performance ratings even when objective elements are included in the rating procedure.[78] This same study found a "serious problem of racial bias" in performance evaluations, and concluded that they can work especially unfairly against blacks.[79]

White employees have obtained higher supervisory ratings on overall job performance than blacks, according to other studies.[80] And in researching performance ratings in a training program, it was found that "an employer's perception of a black supervisor's social behavior [rather than task-related behavior] tended to be the most important influence in evaluating a black supervisor."[81] On the other hand, N. Rotter and G.S. Rotter found that white raters generally gave higher ratings to black than to white workers when performance was poor, but found no difference in ratings given to black and white workers when performance was good.[82]

Discrimination may also be present when the supervisor is male and the employee is female. Male administrators have been found to discriminate against women in evaluations for promotions and to give the poorest evaluations to women who apply for managerial positions.[83]

The use of inaccurate performance evaluations in promotion, transfer, and training decisions have resulted in numerous Title VII employment discrimination actions. In *Brito v. Zia Co.*[84] an employee performance evaluation utilized in a work force reduction had a disparate impact on Hispanic employees. The employer's performance appraisal was based primarily on subjective observations of three evaluators, two of whom did not observe the workers on a daily basis. The Court of Appeals for

[73] *Id.* at 319.

[74] Harry Levinson, "Appraisal of What Performance?," *Harvard Business Review,* vol. 54 (July-August 1976), pp. 30–31.

[75] Gary P. Latham, Kenneth N. Wexley, and Elliott D. Pursell, "Training Managers to Minimize Rating Errors in the Observation of Behavior," *Journal of Applied Psychology,* vol. 60, no. 5 (1975), p. 550.

[76] Walter C. Borman, "Exploring Upper Limits of Reliability and Validation in Job Performance Rating," *Journal of Applied Psychology,* vol. 63, no. 2 (1978), p. 135.

[77] Ronald L. Flaugher, Joel T. Campbell, and Lewis W. Pike, *Prediction of Job Performance for Negro and White Medical Technicians,* (Princeton, N.J.: Educational Testing Service), 1969, pp. 6–7; William J. Bigoness, "Effect of Applicant's Sex, Race and Performance on Employers' Performance Ratings: Some Additional Findings," *Journal of Applied Psychology,* vol. 61, no. 1 (1976), pp. 80–84.

[78] Clay Hamner et al., "Race and Sex as Determinants of Ratings by Potential Employers in a Simulated Work-Sampling Task," *Journal of Applied Psychology,* vol. 59, no. 6 (1974), pp. 705–11.

[79] Ibid., p. 709.

[80] James L. Farr, Brian S. O'Leary, and C.J. Bartlett, "Ethnic Group Membership as a Moderator of the Prediction of Job Performance," *Personnel Psychology,* vol. 24 (1971) pp. 609–36; Jeffrey H. Greenhaus and James F. Gavin, "The Relationship Between Expectancies and Job Behavior for White and Black Employees," *Personnel Psychology,* vol. 25 (1972), pp. 449–55.

[81] Richard W. Beatty, "Blacks as Supervisors: A Study of Training, Job Performance, and Employers' Expectations," *Academy of Management Journal,* vol. 16, no. 2 (1973) p. 202. Social behavior included acceptance by others, personal example set for others, self-confidence. Employers subjectively measured social behaviors such as acceptance by others, personal example set for others, self-confidence, friendliness, and personal interest in others, and openmindedness to others' suggestions and opinions.

[82] N. Rotter and G.S. Rotter, "Race, Work Performance, and Merit Ratings: An Experimental Evaluation," (paper presented at the convention of the Eastern Psychological Association, Philadelphia, April 1969) as discussed in Alan R. Bass and John N. Turner, "Ethnic Group Differences in Relationships Among Criteria of Job Performance," *Journal of Applied Psychology,* vol. 57, no. 2 (1973), p. 108.

[83] B. Rosen and T.H. Jerdee, "The Influence of Sex-Role Stereotypes on Evaluations of Male and Female Supervisory Behavior," *Journal of Applied Psychology,* vol. 57 (1973) 44–54; B. Rosen and T.H. Jerdee, "Effect of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions," *Journal of Applied Psychology,* vol. 59 (1974), pp. 511–12.

[84] Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973). The Commission survey distinguished between written performance evaluations and supervisors' recommendations, as noted in ch. 3, part I. Court decisons have not made such a distinction, treating the two types of criteria as if they were the same, or quite similar.

the Tenth Circuit upheld an injunction against Zia on two grounds:

(1) The test was not administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores. . .as required by [EEOC guidelines] §1607.5 (2) for the minimum requirements for validation[85] and

(2) The Zia Company failed to. . .introduce evidence of the validity of its employee performance evaluation test consisting of empirical data demonstrating that the test was significantly correlated with important elements of work behavior relevant to the job for which the appellants were being evaluated.[86]

In *Rowe v. General Motors Corp.*,[87] the fifth circuit found the defendant corporation's promotion system to violate Title VII in several respects:

(i) The foreman's recommendation [was] the indispensable single most important factor in the promotion process.

(ii) Foremen [were] given no written instructions pertaining to the qualifications necessary for promotions. (They [were] given nothing in writing telling them what to look for in making their recommendations.)

(iii) Those standards which were determined to be controlling [were] vague and subjective.

(iv) Hourly employees [were] not notified of promotion opportunities nor [were] they notified of the qualifications necessary to get jobs.

(v) There [were] no safeguards in the procedure designed to avert discriminatory practices.[88]

The court noted that subjective performance evaluations may foster discrimination against minorities:

Promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management.[89]

In *Watkins v. Scott Paper Co.*,[90] an appellate court found Scott Paper Company's promotion procedure violative of Title VII where: (1) low level supervisors were crucial in the promotion process as they provided a list of people who they believed should be promoted to supervisors; (2) there were no adequate safeguards against racial bias of low level supervisors; (3) the first line supervisors had no written criteria for evaluating employees; (4) some of the company's promotion criteria were clearly subjective; and (5) it was unclear whether hourly employees were informed of vacancies for supervisory positions.[91]

Courts have found performance evaluations to violate Title VII where an employer discriminatorily fails to train adequately a minority employee for a job.[92] In addition, performance evaluations have been found unlawful where an employer manipulates a job assignment in order deliberately to give a minority employee a poor work record and thereby justify an unfavorable employment action.[93] The utilization of performance evaluations under such circumstances constitutes a mere pretext for discrimination.

Various courts have also found the use of performance appraisals in validation studies designed to validate the use of written tests to be violative of Title VII. The EEOC guidelines allow the use of supervisory ratings in the validation of employment tests. Due to the subjective nature of supervisory evaluations, however, EEOC guidelines require supervisory ratings to meet established criteria before they may be utilized in validation studies.

In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group.[94]

In *Albemarle Paper Co. v. Moody*,[95] the Supreme Court of the United States struck down a validity study which relied on supervisory evaluations where the supervisory ratings did not meet EEOC standards. The validity study compared the test scores of each employee with an independent rating of the

[85] *Id.* at 1206. The 1978 Uniform Guidelines on Employee Selection Procedures supersede prior employee selection guidelines. These guidelines provide that "[v]alidity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions." 29 C.F.R. —1607.5E (1979).

[86] Brito v. Zia Co., 478 F.2d 1200, 1205 (10th Cir. 1973).

[87] Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

[88] *Id.* at 358–59.

[89] *Id.* at 359.

[90] Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976).

[91] *Id.* at 1193.

[92] *See,* Annot. 32 A.L.R. Fed. 7, 23 (1977).

[93] *Id.* at 22.

[94] 29 C.F.R. 1607.14B(2) (1980).

[95] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

employee relative to a coworker made by two of the employee's supervisors.

The Court found the supervisory evaluations standard to be "extremely vague and fatally open to divergent interpretations."[96] The Court asserted that there was "no way to determine whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact."[97]

In *Watkins v. Scott Paper Company,*[98] the defendant attempted to validate the use of a battery of tests by comparison of the test scores with supervisory evaluations. Supervisors, in comparing employees, were asked to rate which employee was "better."[99] No formal evaluation criteria were entered into the record. The court stated that, as in *Moody,* the vagueness of the evaluation criteria made it impossible to determine whether "any of the supervisors actually applied a focused and stable body of criteria of any kind."[100] The appellate court held that the "absence of evidence of the criteria actually employed by the rating supervisors is a fatal flaw in [the] study."[101]

In *U.S. v. City of Chicago,*[102] the court found the practical success rate of whites versus blacks and Hispanics on an examination required for promotion from patrolman to police sergeant to be 3 to 1. The police department conducted a validation study on the test procedure by comparing test scores with efficiency ratings. Efficiency ratings were used as measures of job performance. Under the efficiency ratings patrolmen were rated 1–100 in five categories: quantity of work, quality of work, personal relations, dependability, and attendance/promptness.

The court held that the validity study did not meet the minimum requirements of validation set forth in the EEOC guidelines because the efficiency ratings had not been validated as accurate reflections of job performance. The court cited three factors in support of its conclusion: (1) efficiency ratings were highly subjective and subject to the bias of the raters; (2) department policy of favoring an average rating score of 85 could cause raters to manipulate the calculations to arrive at the given average; and (3) persons of higher authority were authorized to change ratings for patrolmen whose performance was not directly known to them.[103]

Interviews

The employment interview is generally a subjective selection device which often does not accurately measure likely future job performance.[104] A number of studies conclude that interviewers' judgments of interviewees are influenced by race and sex stereotypes and that the interview process tends to result in discrimination against women and minorities. A study conducted by Robert L. Dipboye and others concluded that judgments by interviewers are often based on superficial characteristics that are unrelated to job success. These characteristics include race and sex, as well as physical attractiveness and manner of dress.[105] A number of studies indicate that "interviewers seem to have a common 'ideal' applicant against which interviewees are evaluated."[106] The Dipboye study, based on a survey of recruiters at a university placement center, found that "for male Caucasian interviewers, that ideal has often been 'young,' 'white' and 'male,' particularly when the job sought is a traditionally male occupation."[107]

When interviewers perceive a similarity between applicants and themselves, according to a number of

[96] *Id.* at 433.
[97] *Id.*
[98] Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976).
[99] *Id.* at 1189.
[100] *Id.*
[101] *Id.* at 1190.
[102] United States v. City of Chicago, 385 F.Supp. 543 (N.D. Ill. 1974), 411 F. Supp. 218 (N.D. Ill. 1976), *aff'd in part, rev'd in part on other grounds,* 549 F.2d 415 (7th Cir. 1977).
[103] 385 F.Supp. 543, 560.
[104] Studies showing low correlation between interview and job performance include: Donald P. Schwab, "Why Interview? A Critique," *Personnel Journal,* vol. 48 (Feb. 1969), pp. 126–29; Neal Schmitt, "Social and Situational Determinants of Interview Decisions: Implications for the Employment Interview," *Personnel Psychology,* vol. 29, no. 1, pp. 79–101; Robert L. Dipboye, Richard D. Arvey, and David E. Terpstra, "Equal Employment and the Interview," *Personnel Journal,* Oct. 1976, pp. 520–25; and Neal Schmitt and Bryan W. Coyle "Applicant Decisions in the Employment Interview," *Journal of Applied Psychology,* vol. 61 (1976), pp. 184–92.
[105] Dipboye, Arvey, and Terpstra, "Equal Employment and the Interview," p. 521.
[106] Schmitt, "Social and Situational Determinants" p. 90. Schmitt's statement is based on an analysis of eight studies published between 1959 and 1974.
[107] Dipboye, Arvey, and Terpstra, "Equal Employment and the Interview," p. 520.

studies, they are likely to give higher ratings to the applicants.[108] In a study of 103 interviewers in a realistic employment situation, A. Keenan concluded that interviewers tended to give high ratings to candidates they liked.[109] Given the undoubtedly high proportion of white male interviewers in job situations, the conclusion that interviewers give higher ratings to applicants they perceive as similar to themselves has unfortunate implications for job advancement prospects of minorities and women.

A study by James Ledvinka reported that, in exit interviews, black interviewers obtained more complete responses than white interviewers when dealing with black interviewees.[110] This result is consistent with other studies concerning the effect of perceived similarity on interview results. The result does not bode well for black interviewees in the typical job situation, however, since they would most frequently be interviewed by whites.

Sex-role stereotyping adversely affects the opportunities of women being interviewed for nontraditional jobs. Benson Rosen and Thomas H. Jerdee investigated the influence of sex-role stereotypes on the personnel decisions of 95 bank supervisors and found that male administrators tend to discriminate against females in important decisions involving promotion, development, and supervision.[111] In a study of job recruiters at two university placement centers, S.L. Cohen and K.A. Bunker found that significantly more women were recommended for an editorial assistant position, while significantly more men were recommended for a personnel technician job. Both males and females were more likely to be recommended for traditionally role-congruent jobs, although other qualifications were constant.[112]

These studies show that—through sex-role stereotyping, the tendency of interviewers to give high ratings to candidates similar to themselves, and other intrusions of sex and race into the interview process—the use of interviews tends to affect minorities and women adversely.

In recent years considerable concern has been generated over the legality of using interview results that have an adverse effect on women and minorities for employment decisions. The employment interview has qualified as legally suspect in a variety of court cases. In general, however, such cases have not dealt exclusively with interviews, but with several subjective selection practices including interviews. When such cases do arise the rationale followed by the courts is generally similar to that employed by the fifth circuit in *Rowe v. General Motors Corp.*[113]

In *Leisner v. N.Y. Telephone Co.*,[114] women employees brought a class action against the New York Telephone Company for discrimination against women in management positions in its traffic department. The traffic department provides operator services and administers the equipment by which telephone calls are routed.[115] In order to place persons in management positions within the traffic department, employment interviewers assessed the supervisory potential of each individual. The court found that the interviewers had wide discretion in determining the weight to be accorded to applicants' skills and in generally assessing supervisory potential.[116] The court found that women constituted 38 percent of all management level employees throughout the company and that this figure reflected the percentage of women in the relevant labor force.[117] In the traffic department, however, women occupied over 97 percent of the lowest level salary

[108] Schmitt, "Social and Situational Determinants," p. 91. Schmitt is discussing, at this point, nine studies published between 1970 and 1975.

[109] A. Keenan, "Some Relationships Between Interviewers' Personal Feelings About Candidates and Their General Evaluation of Them," *Journal of Occupational Psychology,* vol. 50 (1977), pp. 281–82.

[110] James Ledvinka, "Race of Employment Interviewer and Reasons Given by Job Seekers for Leaving Their Jobs," *Journal of Applied Psychology,* vol. 58, no. 3 (1973), pp. 362–64.

[111] Benson Rosen and Thomas H. Jerdee, "Influence of Sex Role Stereotypes on Personnel Decisions," *Journal of Applied Psychology,*vol. 59, no. 1 (1974), pp. 9–14.

[112] Stephen L. Cohen and Kerry A. Bunker, "Subtle Effects of Sex Role Stereotypes on Recruiters' Hiring Decisions, *Journal of Applied Psychology,* vol. 60 (1975), pp. 566–72.

[113] See discussion of Rowe v. General Motors Corp., *supra* note 41.

[114] Leisner v. N.Y. Telephone Co., 358 F. Supp. 359 (S.D.N.Y. 1973), *enforcing,* 398 F. Supp. 1140 (S.D.N.Y. 1974), *aff'd,* 562 F.2d 38 (2d Cir. 1977).

[115] 358 F. Supp. 359, 363 (S.D.N.Y. 1973).

[116] The general personnel supervisor for the defendant testified that in the interviewing process, "we stand back and look at the individual as a total individual, and, 'Is this person going to be successful in our business?' becomes our final criterion after we have all of these factors reviewed." *Id.* at 365. The interviewers generally accorded great weight to military experience whereas teaching was not considered valuable supervisory experience. *Id.* at 369.

[117] *Id.* at 363.

positions and only 21 percent of the highest positions.[118] The court also found substantial disparities in the allocation of job classifications within grade levels.[119] No validation studies were conducted by the company to determine whether its highly discretionary interviewing process accurately predicted future job performance.[120] The court enjoined the company from utilizing any selection criteria in its traffic department which were not validated in accord with EEOC guidelines and held that the class members were entitled to relief.[121]

Generally, the courts will favor employers who have developed guidelines outlining factors an interviewer should take into account.[122] For instance, in *Badillo v. Dallas County Community Action Committee,*[123] a nonprofit organization interviewed 10 persons seeking the position of deputy director. The interviewing committee had developed a questionnaire according to the Office of Economic Opportunity Guideline 6901–1, "Guide to Selecting the CAA Executive Director," for the selection procedure to be used in filling the vacancy. The interviewers were to formulate a standard set of questions in order to determine the qualifications of the applicants with regard to: leadership ability and potential; administrative capabilities, including depth and length of experience; and other related criteria.[124] Ginensky and Rogoff, researchers in the field of employment discrimination, noted: "Although the committee's judgment of an applicant's qualifications clearly was determined subjectively the court was impressed by the selection procedure" and ruled for the defendant.[125]

Educational Qualifications

The use of educational qualifications in hire, promotion, and transfer decisions by employers is widespread. A 1975 Prentice-Hall survey on employee selection procedures investigated the weight accorded to educational qualifications by employers in employment decisions.[126] The survey revealed that a substantial percentage of the survey respondents attributed importance to educational background in their selection processes. Of the 2,500 respondent companies, 1.4 percent rated educational qualifications as the most important employment criteria; 10.6 percent rated education as second in importance; 32 percent third in importance; and 40.5 percent rated educational qualifications as fourth in importance.[127]

The use of educational criteria in employment decisions can adversely affect minority classes due to differing levels of educational attainment between minority and majority workers. In *Social Indicators of Equality for Minorities and Women,* the United States Commission on Civil Rights explored the variations in educational attainment among blacks, Mexican Americans, Puerto Ricans, and whites.[128] The study reports that substantially more white men and women have achieved high school educations than have blacks, Mexican Americans, and Puerto Ricans. The study also reveals that while the differentials in high school educational attainment decreased between 1960 and 1976, the educational disparities remain substantial.[129] The Commission also found that there is a greater disparity between minorities and whites in college completions than in high school completions. Further, the percentage gap between white male college completion rates and those for black males and females, Mexican American and Puerto Rican males and females and white females is increasing.[130] Under Title VII, the use of educational qualifications which disparately affect protected classes are void unless shown to be justified by legitimate business necessity.

In *Griggs v. Duke Power Co.,*[131] the Supreme Court of the United States found a high school diploma requirement for hire or transfer to be unlawful under Title VII, where the diploma requirement rendered ineligible a markedly disproportionate number of blacks and was not shown to be job related.

[118] *Id.*
[119] *Id.* at 363–64.
[120] *Id.* at 368–69.
[121] *Id.* at 370.
[122] Amy B. Ginensky and Andrew R. Rogoff, "Subjective Employment Criteria and the Future of Title VII in Professional Jobs, *Journal of Urban Law,* vol. 54 (1976), p. 188.
[123] Badillo v. Dallas County Community Action Committee, 394 F. Supp. 694 (N.D. Tex. 1975).
[124] *Id.* at 702.
[125] Ginensky and Rogoff, "Subjective Employment Criteria," p. 188.
[126] *Employee Testing and Selection Procedures–Where Are They Headed?,* Prentice-Hall, American Society for Personnel Administration Survey (Prentice-Hall, 1975).
[127] Ibid., p. 653.
[128] U.S., Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978).
[129] Ibid.; p. 12.
[130] Ibid.
[131] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

In 1955 Duke Power Company instituted a high school diploma requirement for assignment to any of its departments other than its labor department.[132] Blacks were hired only for the labor department, where the highest paying jobs paid less than the lowest paying jobs in the four operating departments reserved for whites. In 1965 the company abandoned its policy of restricting blacks to the labor department. However, at the same time, the company required a high school diploma for transfer from the labor department to any other department.

In finding that the diploma requirement disqualified a disproportionate number of black job applicants, the Court relied on 1960 census statistics which showed that 34 percent of white males in North Carolina had completed high school while only 12 percent of the black males had done so.[133] The Court noted:

> Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v. United States,* 395 U.S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race.[134]

The Court found that Duke Power's diploma requirement was not justified by business necessity. White employees hired prior to the imposition of the diploma requirement continued to perform satisfactorily and achieve promotions in the higher paying departments despite their lack of high school education. Further, the diploma requirement was found to have been adopted without meaningful study of its relationship to job performance, but rather to improve generally the overall quality of the work force.[135]

In *Watkins v. Scott Paper Co.,*[136] the court found grade school and high school educational requirements for transfer within the company, which had a disparate impact on blacks, to violate Title VII. The fifth circuit did not find Scott's justification for its transfer requirements to be compelling. The court held that a diploma requirement, predicated on the assumption that high school graduates will be able to learn and to be productive in industry because they were able to achieve in school will not survive Title VII scrutiny. The court stated that, "even if graduation conclusively shows some achievement, there is no necessary correlation between that achievement and job performance."[137]

The court concluded that the grade school and high school educational transfer requirements were violative of Title VII because they had a disparate impact on blacks and were not justified by business necessity. The court noted that there were non-high school graduates in the various lines of progression at Scott Paper who were performing adequately. The court also found that the educational requirements were not validated as predictive of or correlated with significant elements of job performance as required by EEOC guidelines.[138]

The appellate court further stated that it was not necessary that non-high school graduates be demonstrably equal in performance to high school graduates:

> [E]ven assuming that non-high school graduates do not perform *as well as* high school graduates, the question should be whether non-high school graduates perform *adequately.* For only if the diplomaless individual is not adequate to a job may his exclusion from that job be deemed a business necessity.[139]

In *United States v. Georgia Power Co.,*[140] the court disallowed a requirement that employees in certain job categories who wish to transfer into other job categories with the same company have a high school diploma. The court held the company's justification for its diploma requirement insufficient to satisfy the business necessity requirements established in *Griggs v. Duke Power Co.:*

> At best, the only justification for this requirement is the obvious eventual need for above-average ability to read and comprehend the increasingly technical maintenance manuals, the training bulletins, operating instructions,

[132] The Duke Power Company plant was divided into five operating departments: (1) labor; (2) coal handling; (3) operation; (4) maintenance; and (5) laboratory and test. *Id.* at 427.

[133] *Id.* at 430, n.6.

[134] *Id.* at 430.

[135] Similarly, in Roman v. Reynolds Metals Co., 368 F. Supp. 47 (S.D. Tex. 1973), the defendant instituted a high school education requirement for hire into the company. The Reynolds Company contended that its educational requirement was justified by business necessity because it "upgraded the overall quality of the company's workforce and facilitated advancement and progression within the plant." *Id.* at 50. The court found the company's reasoning was not sufficient to establish a bona fide business necessity for the discriminatory educational requirement.

[136] Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976).

[137] *Id.* at 1182.

[138] *Id.* at 1179–82.

[139] *Id.* at 1180.

[140] United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

forms and the like demanded by the sophisticated industry. . . .In such a context, the high school education requirement cannot be said to be reasonably related to job performance. This is not to say that such requirements are not desirable. . .it simply means that the "diploma test" cannot be used to measure the qualities. Many high school courses needed for a diploma (history, literature, physical education, etc.) are not necessary for these abilities. A new reading and comprehension test. . .might legitimately be used for this job need.[141]

The court also noted that many of the highest ranking company personnel could not meet the high school diploma requirement, including 47 out of 100 foremen, supervisors, and chief division operators in the Atlanta and Macon operating division.[142] The court concluded that Georgia Power failed to demonstrate a manifest relationship between the educational qualification and job performance.

In *Padilla v. Stringer,*[143] the court invalidated a high school education requirement for the position of zookeeper II instituted by the Albuquerque Rio Grande Zoo in 1972. The court found the diploma requirement summarily disqualified a disproportionate number of Hispanic Americans. In support, the court cited Department of Commerce statistics revealing that 46 percent of Spanish surnamed males over 25 had completed high school as opposed to 67.4 percent of white males in Bernalillo County.

The court found the principal requirements of the zookeeper II position to be:

a love for animals, a willingness to learn more about the animals one is assigned to care for, communicative skills so that one can relate to the public, ability to read regulations and write animal reports, and good physical condition.[144]

The court asserted that a person of normal intelligence could perform these duties. Further, "[w]hile some education might be necessary for some of the requirements, the evidence in the case [did] not establish that a high school diploma [was] related or necessary to these job requirements."[145] The court also noted that there were several employees and volunteers at the zoo who had not finished high school who had successfully performed the tasks of zookeeper. The court enjoined the continued use of the diploma requirement on the ground that it disparately impacted on Hispanic Americans and was not justified by business necessity.

In *Payne v. Travenol Laboratories, Inc.,*[146] the court invalidated a college degree requirement where the defendant corporation could not establish a business necessity for the criterion. Travenol Laboratories imposed a college degree requirement for the positions of traffic analyst, systems analyst, and scheduling analyst. The court found the college degree criterion to have a disparate impact on blacks in Mississippi.

Information available to the court showed that in Bolivar County in 1970, 14.7 percent of white males over 25 and 12.5 percent of white females over 25 had college degrees. This was true for 3.2 percent of black males over 25 and 3.3 percent of black females over 25. In the State of Mississippi 10 percent of all whites over 25 had college degrees, but 3.7 percent of all blacks had graduated from college.[147]

Travenol asserted that the college education requirement was necessitated by the "professional demands" of the position. The court found that Travenol failed to validate its educational requirements pursuant to EEOC guidelines or otherwise establish a business necessity for its requirement. The court struck down the requirement as unlawful under Title VII.[148]

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[141] *Id.* at 918, quoting the district court with approval. The diploma requirement applied only to employees who wished to transfer from three previously all-black categories (janitor, porter, and maid). The requirement also applied originally to new hires, but its use was suspended, after which time new employees had to agree not to progress in the company without satisfying the requirement. *Id.* at 911.

[142] *Id.* at 918–19.

[143] Padilla v. Stringer, 395 F. Supp 495 (D.N.M. 1974).

[144] *Id.* at 505.

[145] *Id.*

[146] Payne v. Travenol Laboratories, Inc. 416 F. Supp. 248 (N.D. Miss. 1976), *aff'd in part, rev'd in part, vacated in part,* 565 F.2d 895 (5th Cir. 1978).

[147] 416 F. Supp. at 259–60.

[148] It is entirely consistent with these court decisions that educational qualifications have been upheld in various cases where jobs required a high degree of skill and the risks of hiring an unqualified applicant were great. In these cases the employers were able to establish a manifest relationship between the educational qualification and job performance. Where a valid business necessity for an educational qualification is established, the courts will uphold the requirement despite any disparate impact on minority groups. See Spurlock v. United Airlines, Inc. 475 F.2d 216 (10th Cir. 1972) (college degree requirement for pilots); League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976), *modified in pt.,* 13 FEP Cases 1019 (C.D. Cal. 1976) (high school education requirement for police officers); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972)(high school education or 3 year military service requirement for police officers); Rice v. City of St. Louis, 464 F. Supp. 138 (E.D. Mo. 1978)(college degree requirement for public health program representative); Jackson v. Curators of University of Missouri, 456 F. Supp. 879 (E.D. Mo. 1978) (requirement of 2

Summary

Title VII of the Civil Rights Act of 1964 was designed to promote equal employment opportunity by prohibiting employment practices which have an adverse and unjustified affect on a protected class on account of race, color, religion, sex, or national origin. The use of written tests, performance evaluations, interviews, and educational qualifications as selection criteria in employment decisions, which for various reasons do not accurately predict job performance, has been found to be unlawful under Title VII. The Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures assume a prominent role in determining the permissible uses of selection criteria and validation studies.

years of college for campus security guard); Townsend v. Nassau County Medical Center, 558 F.2d 117 (2d Cir. 1977)(college degree requirement for blood bank technician).

Chapter 2

The Union's Duty of Fair Representation and Nondiscrimination

Introduction

This chapter presents a legal analysis of the obligation placed on international and local unions by Congress and the courts to represent fairly the interests of their minority and female members. The development of the duty of fair representation under the National Labor Relations Act is examined first. The duty of nondiscrimination by unions under Title VII of the Civil Rights Act of 1964 is discussed second, followed by an analysis of the liability of the international union for discriminatory provisions contained in collective-bargaining agreements.

The Union's Duty of Fair Representation Under the National Labor Relations Act

The doctrine of fair representation imposes upon labor organizations the duty to represent fairly all members of a bargaining unit. The duty of fair representation is a judicial invention. The National Labor Relations Act[1] (NLRA) does not specifically include provisions addressed to the requirement that labor organizations represent all bargaining unit members fairly. The doctrine originated in the Supreme Court decision in *Steele v. Louisville & Nashville Railroad*[2] which arose under the Railway Labor Act[3] (RLA). The union initiated amendments to the collective-bargaining agreement that had the ultimate effect of reassigning black firemen to more arduous, longer, and less remunerative work while filling the vacant black firemen positions with white workers of less seniority. In *Steele,* the Court likened the power of the statutory representative to that of a "legislature. . .subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and. . .(was) under an affirmative constitutional duty equally to protect those rights."[4] Then, relying on the Federal statute (RLA), the Court imposed on the "bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[5] *Steele* expressly recognized that the duty imposed did not bar representatives in all cases from making contracts that have unfavorable effects on some unit employees when based upon "differences relevant to the authorized purposes of the contract. . .such as seniority. . . ."[6]

In *Wallace Corp. v. National Labor Relations Board,*[7] a case decided on the same day as *Steele,* the Supreme Court of the United States applied the duty of fair representation doctrine to a union that negotiated a closed shop contract[8] with the employer and then denied union membership to rival union employees causing their discharge. The employer, the board (NLRB) found, had established and maintained the incumbent union and had knowledge that the incumbent union intended to use the

[1] 29 U.S.C. §§151–169 (1974).
[2] 323 U.S. 192 (1944).
[3] 45 U.S.C. §§151–188 (1976).
[4] 323 U.S. 192, 198 (1944).
[5] *Id.* at 202–03.
[6] *Id.* at 203.
[7] 323 U.S. 248 (1944).
[8] Closed shops were not illegal under the NLRA at the time *Wallace* was decided.

contract to oust the rival union employees from their jobs. Without citing the *Steele* case, the Court, approving the board's order,[9] for the first time applied the duty of fair representation to a labor organization under the NLRA:

> The duties of a bargaining agent selected under the terms of the act extend beyond the mere representation of interests of its own group members. By selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interest fairly and impartially.[10]

Wallace not only extended the concept of fair representation to labor organizations subject to the NLRA, but it expanded the duty beyond the prohibition of racial discrimination.

A year after *Steele* and *Wallace,* the issue of fair representation was faced for the first time in a representation proceeding. The board announced in *Larus & Brother Co.*[11] that as a remedial action it would rescind certification of a union that discriminated in its duty to represent all unit members fairly.[12] The board limited this drastic relief to the unfair representation of unit members, allowing unions to continue to base eligibility of union membership on race.[13]

It was not until *Ford Motor Co. v. Huffman*[14] that the Supreme Court of the United States specifically applied *Steele* in setting the standard of fair representation to unions certified under the NLRA. In *Huffman,* the union negotiated a collective-bargaining contract which allowed new employees seniority credit for time spent in the military service. This lowered the seniority rating of employees who had been employed longer, but did not have as much credit for military service. The Court perceived that even with this developing duty concept, labor organizations must have the power to balance the myriad interests of the bargaining unit. The Court opined that a "wide range of reasonableness must be allowed a statutory bargaining representative. . ., subject always to complete good faith and honesty of purpose"[15] and that "[v]ariations acceptable in the discretion of bargaining representatives. . .may include differences based upon. . .seniority."[16] The Court concluded that seniority was "within the reasonable bounds of relevancy."[17]

Humphrey v. Moore[18] brought before the Supreme Court of the United States, for the first time, the union's duty in administration of the collective-bargaining agreement. Employees of one company were absorbed by another company through an agreement made by a joint employer-union committee to integrate the two seniority lists of the companies. The collective-bargaining agreement provided for integration of the seniority list upon "some rational basis."[19] The same union represented employees of both companies. The company being absorbed was older; therefore, its employees had greater seniority and displaced employees of the acquiring company. The State court granted the acquiring company's employees an injunction against the implementation of the committee's decision. The Supreme Court of the United States reversed the judgment of the State court finding that the union acted "honestly, in good faith and without hostility or arbitrary discrimination"[20] and had not exceeded its power under the contract.

Independent Metal Workers Union Local[21] (Hughes Tool II) saw the NLRB aggressively attacking segregated unions once found legal in *Atlanta Oak Flooring Co.*[22] and *Larus & Brother Co.*[23] The board held that it could not "validly render aid under Section 9 of the NLRA to a labor organization

[9] The NLRB found that the employer had committed a §§8(3) violation by enforcing the closed shop agreement which resulted in the discriminatory discharge of rival union employees.
[10] 323 U.S. 248, 255 (1944).
[11] 62 N.L.R.B. 1075 (1945). A rival union asked the board to revoke the certification of a whites only union where black workers had to form their own separate local.
[12] The board in *Hughes Tool Co.* (Hughes Tool I), 104 N.L.R.B. 318 (1953), reaffirmed its remedial action of revocation of a discriminating union's certification because this was the board's only weapon for a representation violation.
[13] 62 N.L.R.B. 1075 (1945).
[14] 345 U.S. 330 (1953).
[15] *Id.* at 338.
[16] *Id.* at 338–39.
[17] *Id.* at 342.
[18] 375 U.S. 335 (1964).
[19] *Id.* at 347.
[20] *Id.* at 350.
[21] 147 N.L.R.B. 1573 (1964). The all-white union refused membership to black unit members who then formed their own local. The collective-bargaining contract allocated certain jobs to white employees and other jobs to black employees. The contract was amended to create new apprenticeships which were barred to black workers. A black employee applied for the program and was rejected. The black employee then requested grievance representation by the white union. Receiving no reply, the employee filed unfair labor practice charges against the union seeking to rescind its certification.
[22] 62 N.L.R.B. 973 (1945).
[23] 62 N.L.R.B. 1075 (1945).

which discriminates racially when acting as a statutory bargaining representative"[24] and rescinded the certification of the all-white union.

The Hughes Tool II decision was issued on July 1, 1964, and on July 2, 1964, Congress passed the Civil Rights Act of 1964.[25] Title VII of that act, dealing with employment discrimination, became effective July 2, 1965. The fifth circuit, in *Local Union No. 12, United Rubber Workers v. NLRB*[26] addressed the issue of "overlapping remedies" caused by the NLRA and the Civil Rights Act of 1964 in employee discrimination cases. Referring to 110 Cong. Rec. 13, 171 (1964) the court said:

> Legislative history and specific provisions of the Act itself make it apparent that Congress did not intend to establish the enforcement provisions of Title VII as the exclusive remedy in this area. . . .[T]he Senate [specifically] rejected a proposed amendment which would have had the effect of rendering the remedial provisions of Title VII exclusive with regard to all claims arising under it.[27]

The court concluded that employees who suffer discrimination by their unions would be at liberty to seek redress under the enforcement provision of Title VII, or to assert unfair labor practice charges before the board.[28] The court raised, but left undecided, the issue of whether the board should assert jurisdiction over claims of employer discrimination covered by Title VII, which might also involve an unfair labor practice.[29]

Vaca v. Sipes[30] was a watershed in the development of the law governing the duty of fair representation by labor organizations. The dispute in *Vaca* was precipitated when the employer refused to permit employee Owens to resume his job after an extended sick leave period because of high blood pressure. Even though Owens' family physician certified him fit to resume his heavy work in the packing plant, the company's physician disagreed. Owens was permanently discharged on the grounds of poor health. Owens sought the union's help to secure reinstatement. The union diligently processed Owens' grievance to the fourth step of the grievance procedure. Prior to the union's deciding to take the grievance to arbitration, the union at its own expense, sent Owens to another doctor for additional evidence on Owens' fitness for work. The result of this examination did not support Owens' position. The union then refused to submit Owens' grievance to arbitration. Owens filed suit in State court against the union claiming his discharge violated the collective-bargaining agreement and that the union had "arbitrarily, capriciously and without just or reasonable reason or cause" refused to take his grievance to arbitration.[31]

The union claimed that (1) the gravamen of Owens' complaint was an unfair labor practice and therefore within the exclusive jurisdiction of the NLRB and (2) the State court applied a duty standard inconsistent with Federal law. In answer to the union's first contention, the Supreme Court of the United States alluded to the appropriateness of the NLRB's "tardy assumption" of unfair labor practice jurisdiction[32] for breaches of the duty of fair representation and in the same breath made clear that such assumption did not "oust the courts of their traditional jurisdiction to curb arbitrary conduct by. . .employee's statutory representatives"[33] and that §301 of the Labor Management Relations Act accorded concurrent jurisdiction to State and Federal courts to hear breach of contract cases involving duty of fair representation.

The Court, agreeing that the State court applied an incorrect duty standard, set forth the standard upon which a union's conduct will be judged:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. . . .Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to

[24] 147 N.L.R.B. at 1573 (1964).

[25] 42 U.S.C. §2000e–§2000e–15 (1976 and Supp. II 1978).

[26] 368 F.2d 12 (5th Cir. 1966). The union refused to process grievances of black unit members concerning segregated plant facilities and maintenance of separate seniority rolls where blacks with greater seniority had no rights over whites with less seniority.

[27] *Id.* at 24, note 24.

[28] It should be noted that an employee may pursue remedies under the NLRA and TItle VII simultaneously. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[29] *Id.*, note 25.

[30] 386 U.S. 171 (1967). A more recent case affirming the union's duty in grievance and arbitration matters is *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

[31] 386 U.S. 171, 173 (1967).

[32] The NLRB was given unfair labor practice jurisdiction over union activities by the Labor Management Relations Act, 29 U.S.C. §§141–197. Even though §8(b) of the NLRA was enacted in 1947, the NLRB did not, until 1962, interpret a breach of a union's duty of fair representation as an unfair labor practice. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2nd Cir. 1963).

[33] 386 U.S. 171, 183 (1967).

have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.[34]

Vaca standards make clear that a prerequisite for an employee to resort to the courts in a §301 duty suit is the exhaustion of the exclusive contractual grievance and arbitration procedures. Where the employer repudiates the contractual procedures or the union having the sole power to invoke the grievance procedure refuses, however, the employee may avoid the contractual process and seek judicial relief.

After *Vaca,* the exponents of the requirement of the duty of fair representation took on a new face. *NLRB v. Mansion House Center Management Corp.*[35] saw the employer defending a §8(a)(5) unfair labor practice charge for refusing to bargain on the ground that the union practiced racial discrimination in its membership. On appeal, the court vacated the board's order requiring the recognition of the union and ordering the employer to bargain. The court opined that "any recognition or enforcement of illegal racial policies by a federal agency is proscribed by the Due Process Clause of the Fifth Amendment."[36] And accordingly, when "a governmental agency recognizes. . .a [discriminating] union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices."[37]

The *Mansion House* case blurred the line in discrimination cases as to where the NLRA ends and Title VII begins. The eighth circuit's decision dealt with the two acts as if they were interchangeable in discussing evidentiary requirements and availability of defenses. The eighth circuit ruling is in limbo because it appears that no other circuit has adopted the *Mansion House* decision, the board has avoided applying the rulings, and the Supreme Court of the United States has not yet addressed the issues raised in *Mansion House.*

In *Bekins Moving and Storage Co.,*[38] as in *Mansion House,* the employer alleged discriminatory practices by the union. Specifically the employer in *Bekins* argued that the union should be disqualified from seeking an election under §9(c) of the NLRA because it engaged in invidious discrimination on the basis of sex and also against Spanish-speaking and Spanish-surnamed individuals. In answer to the employer's objection to the union's certification, the board thought it appropriate to consider the merits of the objection prior to issuance of a board certification. The board reasoned that certification of a discriminating union violates the due process clause of the fifth amendment of the Constitution. Further, if the board certified a union shown to be engaging in a pattern or practice of invidious discrimination, the board would "appear to be sanctioning, and indeed furthering the continued practice of such discrimination."[39] The board concluded that a precertification inquiry was not only appropriate but constitutionally required.

Bell & Howell Co.[40] was the first decision the board issued modifying the principles outlined in *Bekins.* The board refused to entertain Bell & Howell's allegations of sex discrimination practiced by the union. Member Kennedy, concurring, sided with members Fanning and Pannello, who had dissented in *Bekins;* this created a board rule that denied precertification inquiry into allegations of union sex discrimination. Member Kennedy declined to extend precertification inquiry into allegations of sex discrimination because he did not perceive sex as being an inherently suspect classification. Moreover, member Kennedy was of the opinion that the board lacked sufficient expertise to deal with issues concerning sex discrimination and therefore, should only concern itself with the more serious forms of unlawful discrimination. In "pre-certification representation proceedings, the board should only view allegations of discrimination which involve classifications determined by the Supreme Court to be inherently suspect, that is, race, alienage, or national origin."[41]

The life span of *Bekins* was 3 years, being overruled by *Handy Andy, Inc.*[42] In *Handy Andy,* the employer filed objections with the board, after the union won the election, contending that certification should be denied because of the union's discriminatory practices in excluding persons from membership based on race and national origin.[43]

[34] *Id.* at 190–91.
[35] 473 F.2d 471 (8th Cir. 1973).
[36] *Id.* at 473.
[37] *Id.*
[38] [1974] 211 N.L.R.B. (CCH) para. 26,575.
[39] *Id.* at 34,450–51.
[40] [1974] 213 N.L.R.B. (CCH) para. 15,008.
[41] *Id.* at 25,064.
[42] [1977] 228 N.L.R.B. (CCH) para. 17,938.
[43] *Id.* at 29,764–65.

The board in *Handy Andy* decided that allegations of invidious discrimination practiced by a union could no longer be considered in representation proceedings as set forth in *Bekins.*[44] The board reasoned that the fifth amendment of the Constitution did not require precertification consideration of allegations of invidious discrimination practiced by a labor organization because certification did not establish a sufficiently close nexus between governmental action and actual discrimination by a private party. The board was of the opinion that once the labor organization was selected by ballot, the board, in light of §9 of the NLRA, lacked power to withhold certification.[45] The board concluded that allegations of invidious discrimination would now be considered:

> . . .in the context of unfair labor practice proceedings. Such a proceeding. . .continues to be the appropriate vehicle for resolving such issues and for devising the appropriate remedies for unlawful discrimination including revocation of certification. This route recognizes the substantive and procedural differences between representation and unfair labor practice proceedings and affords the charged party the full panoply of due process of law without at the same time denying or delaying the employees' right to the services of their designated bargaining agent.[46]

In light of the *Handy Andy* ruling, the board decided on its own to reconsider its decision in *Bell & Howell.* The board issued a supplemental[47] decision on June 24, 1977, applying the new principles set out in *Handy Andy* which had the effect of sustaining the board's prior ruling finding a §8(a)(5) violation and ordering the employer to bargain.[48]

The U.S. Court of Appeals for the District of Columbia,[49] on reviewing the board's *Bell & Howell* decision, addressed Bell & Howell's challenge to the board's application of the *Handy Andy* principle in the instant case. Specifically, Bell & Howell argued that "the vital national commitment to eradicate employment discrimination [justified] denying certification to [the union]."[50] Bell & Howell's contention provided the court with the opportunity to harmonize the role of the board in promoting this national policy with that of other agencies created for the primary purpose of implementing the policy. The court reasoned that the board's "responsibility to carry out the national policy against invidious discrimination must be determined in light of the purposes underlying the creation of the agency. The primary purpose of the NLRA was not, and is not, the eradication of discrimination in employment."[51] For the board to adhere to the *Bekins'* principle[52] would entail:

> . . .the Board. . .investigating allegations of past union discrimination that occurred outside the unit for which the union seeks certification [that] would unnecessarily duplicate the functions of the [Equal Employment Opportunity Commission]. The broader scope of the EEOC's investigative and remedial authority, its expertise in detecting subtle and complex forms of discrimination, and its single-purpose anti-discrimination mission combine to make EEOC a preferable vehicle for eliminating union discrimination.[53]

The court, in relying on *Burton v. Wilmington Parking Authority,*[54] clearly rejected the eighth circuit's ruling of a fifth amendment violation by certification of a discriminatory union and instead, stated an opposing ruling—that the effect of the union's certification was to "[place] an affirmative obligation on the [union] not to discriminate."[55]

Union Liability in Representing Minorities and Women Under Title VII of the Civil Rights Act of 1964

After the Civil Rights Act of 1964 was enacted, Federal courts determined at a very early stage in employer-union invidious discrimination cases initiated under §8 of the NLRA that the two acts were coexistent.[56] Courts cautioned, however, that even though jurisdiction of the NLRA and Title VII overlapped, they are separate and independent statutes, each having its own distinct procedures;

[44] *Id.* at 29,772.
[45] *Id.* at 29,765.
[46] *Id.*
[47] [1977] 230 N.L.R.B. (CCH).
[48] In order to obtain judicial review, Bell & Howell refused to bargain with the union.
[49] 598 F.2d 136 (D.C. Cir. 1979), cert. denied, 99 S. Ct. 2885 (1979).
[50] *Id.* at 146.
[51] *Id.*, note 29.
[52] Denial of certification to a union practicing invidious discrimination.
[53] 598 F.2d 136, 147–48.
[54] 365 U.S. 715 (1961).
[55] 598 F.2d 136, 149.
[56] Local Union No. 12, United Rubber Workers v. NLRB, 368 F.2d 12, 24 (5th Cir. 1966).

employment conduct creating liability under one may not create liability under the other.[57] Moreover, the complaining employee is not required to exhaust remedies under the NLRA prior to bringing suit under the Civil Rights Act of 1964. The aggrieved may seek relief simultaneously under both statutes.[58]

Under section 703(c) of the Civil Rights Act, a union is liable for committing acts of discrimination against unit members it represents as their exclusive bargaining representative, or against applicants seeking employment in the unit it represents, or against employees whose employment opportunities are affected by the conduct of the union.[59] Not only may the union be held liable under Title VII for its own acts of discrimination, but it may also be held jointly liable for discriminatory conduct engaged in by the employer.[60] A union is also liable under §704(d) of Title VII, which prohibits discrimination in admission to or employment in, any program established to provide apprenticeship or other training.[61]

In *Gray v. Greyhound Lines, East*[62] black bus drivers brought an action against the employer bus company and union for racial discrimination with respect to the company's hiring practices. The union argued to the District Court for the District of Columbia that it was entitled to judgment because it had no responsibility for hiring policies and no duty toward those who might be harmed (job applicants) by such policies. The district court dismissed the action for lack of standing, and the Court of Appeals for the District of Columbia reversed. In addressing the union's contention, the appeals court said, "it is clear that in some circumstances a union may be held responsible for an employer's discriminatory practices if it has not taken affirmative action against those practices."[63]

In implementing the court's mandate to take affirmative action in eliminating discrimination against employees, the union, as bargaining representative, is expected to negotiate actively for nondiscriminatory treatment in aid of its members. The union that takes a passive role at the negotiating table in light of the employer's discriminatory practices may be held in violation of the act.[64]

In *Burwell v. Eastern Airlines*[65] female flight attendants filed suit against the airline and union alleging the employer engaged in sex discrimination in its employment practices governing pregnant flight atendants by placing them on a 6-month time limit on guaranteed reinstatement following childbirth, requiring pregnant flight attendants to cease flight duty immediately upon learning of the pregnancy, and stripping them of accumulated inflight seniority when transferred to ground positions.

The discriminatory employment policies were unilaterally imposed for a number of years by Eastern over the union's protest and included in the collective-bargaining agreement. The union was more than willing, and in good faith, tried, to eliminate the illegal practice, but Eastern insisted on the discriminatory policy and refused to alter it. Nevertheless, the court found that the union, as a signatory to numerous collective-bargaining agreements containing sexually discriminatory maternity leave policies, was guilty of engaging in unlawful employment practices. The court said:

> The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interest of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable.[66]

However, the court, weighing the union's good faith efforts and willingness to eliminate the discriminatory practices against Eastern's hardline unalterable approach, assessed backpay awards[67] solely against Eastern.[68]

In *Burwell* the employment policy contained in the collective-bargaining contract was discriminatory

[57] Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975); Guerra v. Manchester Terminal Corporation, 498 F.2d 641 (5th Cir. 1974).

[58] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[59] 42 U.S.C. §2000e–§2000e–15 (1976 and Supp. II 1978). Section 703(c) is also applicable to union discrimination against persons it employs. However, only the above areas of violations are pertinent to the study.

[60] *Id.*

[61] *Id.*

[62] 545 F.2d 169 (D.C. Cir. 1976).

[63] *Id.* at 174, note 15.

[64] Macklin v. Spector Freight System, Inc., 478 F.2d 979 (D.C.D.C. 1973).

[65] 458 F. Supp. 474 (E.D. Va. 1978).

[66] *Id.* at 502, *quoting with approval,* Russell v. American Tobacco Co., 528 F.2d 357, 365–66 (4th Cir. 1975) & Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

[67] 42 U.S.C. §2000e–5(g) authorizes back pay awards.

[68] 458 F. Supp. 474,.503.

on its face. But in *Johnson v. Goodyear Tire & Rubber Co.*[69] the court was concerned with the discriminatory effect of innocuous language in a collective-bargaining agreement. After suit was initiated by blacks because the company's departmental seniority system was included in their collective-bargaining contract and perpetuated previous discrimination,[70] the union sought and obtained a preliminary injunction against the employer, who attempted to change the seniority system. Backpay was assessed against the union from the date the preliminary injunction was granted to the court's decree, modifying the departmental seniority system. The union contended backpay should not be imposed against it because as a craft union it had a right to bargain for departmental seniority and being signatory to a discriminatory contract was insufficient to impose liability. In holding the union liable the court said:

> The union must have known precisely what effect the incorporation of the departmental seniority provisions in the collective bargaining agreements would have on labor department employees. Common sense demands that a union be held to the natural consequences of its labors in negotiating a collective bargaining agreement.[71]

And even where minority employees do not protest the discriminatory collective-bargaining agreement the union is still held liable:

> . . .Congress [did not] absolve a union whose disadvantaged members acquiesced in the unfair conditions of employment, and there are sound reasons why courts should not engraft this exemption on the Act. Unions have long been required to negotiate for all their members without discrimination because of race and they cannot bargain away the right to fair employment assured by Title VII. [Citations omitted] Moreover, because of "the realities of entrenched employment discrimination," a worker need not complain, other than to the EEOC, as a prerequisite to judicial relief. . . .[72]

Also, the failure of a union to represent unit employees in a nondiscriminatory manner in the collective-bargaining, grievance, and arbitration procedures constitutes a violation of Title VII. Although the employee is encouraged to exhaust intraunion grievance machinery before initiating Title VII procedures, there is no requirement to do so.[73] Moreover, careful attention should be paid to the time limits for filing a change under Title VII which are 180 days (300 days in States with local fair employment practices agencies.[74]

Liability of the International

Courts will hold the international labor organization liable for discriminatory conduct of its local when there is a sufficient connection between the labor organization and the discriminatory practice. The fifth circuit, in *Myers v. Gilman Paper Co.*,[75] found sufficient connection where the international had developed a close relationship with its locals under which the international provided the locals with a bargaining advisor and required locals to submit contracts to it for approval.

In *Kaplan v. International Alliance of Theatrical, Etc.*,[76] International Alliance (International) was the exclusive bargaining representative for all affiliates, including Local 659. International would negotiate a basic agreement with the Association of Motion Picture and Television Producers and then negotiate a separate agreement on behalf of, and together with, each of its local affiliates. Local 659's agreement established an industry experience roster (the roster) maintained by the producers and used to classify employees to seniority and priority in employment opportunity. Union membership is not required for eligibility, but an individual must become a union member after placement on the roster. Employers must give preference in hiring to roster individuals. Local 659's membership totalled

[69] 491 F.2d 1364, 1381 (5th Cir. 1974).

[70] Prior to International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), courts declared that seniority systems which were facially neutral but had the effect of perpetuating past discrimination by locking black employees into the lowest positions on the job scale violated Title VII of the Civil Rights Act of 1964. The Supreme Court of the United States, in International Brotherhood of Teamsters, held that a seniority system, despite its perpetuation of past discrimination, may be immune from a Title VII violation where the seniority system is facially neutral and was not designed or maintained with the intent to discriminate. See app. B for a discussion of the evolution of the immunity of seniority systems under Title VII.

[71] 491 F.2d 1364, 1381 (5th Cir. 1974).

[72] 528 F.2d 357, 365–66. The collective-bargaining agreement restricted transfers between one plant of the employer with a predominantly black work force and employer's second plant made up of a predominantly white work force. The union contended it should not be held liable because black employees did not protest racial discrimination as a grievance and were among unit members unanimously ratifying the collective-bargaining agreement.

[73] Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252, 261–62 (N.D. Ind. 1977) *Aff'd.* 15 FEP Cases 822 (1977); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973).

[74] 42 U.S.C. §2000e–§2000e–15 (1976 and Supp. II 1978), §706(e)(c).

[75] 544 F.2d 837, 851 (5th Cir. 1977).

[76] Kaplan v. International Alliance, 525 F.2d 1354 (9th Cir. 1975).

1,445, 8 of whom were female and 6 of those were not included on the roster.

A white female still photographer requested union membership in Local 659. She was informed that the "duty roster" was full and new applications were not being accepted. The photographer testified that though qualified, numerous employers would not hire her because she was nonunion. She brought suit against the International and Local 659.

The ninth circuit, finding the International played a significant role in the negotiations of and was signatory to Local 659's collective-bargaining agreement and that International's constitution empowered it to revoke the charter of a local affiliate which unlawfully discriminates, held:

> . . .the policies embodied by Title VII demand that an international union closely scrutinize the practice of its affiliates to reveal discriminatory acts or consequences. . . .The failure of an international union to act when aware of discrimination resulting from a collective bargaining agreement has been held to constitute a violation of Title VII. [Citations omitted][77]

Conclusion

The responsibility placed on unions under Title VII and the NLRA for elimination of discrimination in the workplace is a firm one. Unions are prohibited from engaging in arbitrary, discriminatory, or bad faith conduct toward any member of their bargaining unit.[78] Not only is discriminatory union conduct prohibited, but unions also have an affirmative duty to eliminate employer discriminatory practices at the bargaining table.[79] Union passivity or acquiescence which allows discrimination against bargaining unit members will result in joint liability for the union and the discriminatory employer.[80] In some instances, however, where courts have found insufficient connection between the union and the discriminatory conduct, union liability has been excused.[81]

[77] *Id.* at 1360.

[78] Vaca v. Sipes, 386 U.S. 171, 190–91 (1967).

[79] Macklin v. Spector Freight System, Inc. 478 F.2d 979 (D.C.D.C. 1973).

[80] *Id.*

[81] Thornton v. East Texas Motor Freight, 497 F.2d 416 (4th Cir. 1974); Meyers v. Gilman Paper Co., 544 F.2d 837 (5th Cir. 1977).

Chapter 3

The Role of the Equal Employment Opportunity Commission in Encouraging Voluntary Affirmative Action Through Collective Bargaining

The elimination of discrimination and the adoption of voluntary affirmative action programs in a context in which both employer and union play a role ideally requires their agreement at the collective-bargaining table on the best means of achieving these ends. In an effort to provide incentives for employers and unions to work together to adopt voluntarily measures ending discrimination and instituting affirmative action programs,[1] the Equal Employment Opportunity Commission (EEOC) is undertaking steps to encourage employers and unions to use the collective-bargaining process for this purpose. This chapter discusses EEOC's rationale for undertaking these steps, describes the developing policy and its anticipated implementation, and assesses the policy in terms of its likely impact.

Background

The EEOC initiated its policy of encouraging voluntary affirmative action through collective bargaining, largely because of the EEOC's increasing awareness of "the need for a strategy that could respond appropriately to the dynamics of the collective bargaining relationship."[2] In addition, the policy was promoted in 1974 by the Union of Electrical, Radio and Machine Workers (IUE).[3] In June 1972 its international convention had unanimously adopted a "National IUE Program that will be implemented from top to bottom," requiring all of its locals to review "contracts and practices in their plants to determine" whether race and/or sex discrimination existed, and "to take corrective action, including proposals for nondiscriminatory job posting and bidding procedures."[4]

In March 1973 the locals were provided with a check list of various manifestations of race discrimi-

[1] On Jan. 19, 1979, the EEOC issued Affirmative Action Guidelines encouraging voluntary affirmative action and clarifying the kinds of voluntary actions appropriate under Title VII of the Civil Rights Act of 1964. 29 CFR §§ 1608.1–1608.12 (1979). The guidelines are applicable to those instances in which affirmative action plans have been (or are being) developed and describe the kinds of actions that may be taken consistent with Title VII. 29 CFR §1608.1(d) (1979). With respect to labor organizations, the guidelines state that they as well as employers "may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices." 29 CFR §1608.3(a) (1979). The guidelines indicate that affirmative action is encouraged "through collective bargaining where a labor organization represents employees." 29 CFR §1608.3(c)(4) (1979). The policy resolution encouraging voluntary affirmative action is a separate undertaking.

[2] Paula J. Huessy, special assistant to former Commissioner Daniel E. Leach, then Vice Chairman, U.S. Equal Employment Opportunity Commission, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, June 25, 1981, p. 2 (hereafter cited as Huessy Letter).

[3] Paul Jennings, president, IUE, "EEOC Could Improve Administration of Title VII by Encouraging Affirmative Role of Unions in Correcting Discriminatory Practices by Employers," Nov. 8, 1974 (hereafter cited as "IUE Statement to EEOC").

[4] Paul Jennings, president, IUE, "Memorandum to all IUE Local Unions," Mar. 16, 1973, at 1 (hereafter cited as "IUE Memorandum to its Locals").

nation[5] and of sex discrimination,[6] and were instructed to "examine [their] contracts for any provisions which have a discriminatory purpose or effect. . .[and] examine practices within the plant to see whether there are any which discriminate against females or minorities,. . ."[7]

In those instances in which the IUE determined that discrimination existed it "requested bargaining with the employer either at the end of the contract or midterm in the agreement."[8] If the employer refused to bargain, the IUE filed charges with the NLRB alleging refusal to bargain in good faith, a violation of section 8(a)(5) of the National Labor Relations Act. It also filed charges with the EEOC alleging violation of Title VII of the Civil Rights Act of 1964.[9] At the time of its 1974 statement to the EEOC, the IUE had filed charges with EEOC against each General Electric and each Westinghouse establishment with which it maintained collective-bargaining agreements, alleging discrimination in hiring, wage rates, promotion and training policies, and job segregation. These charges, according to the IUE, covered 170 separate establishments.[10]

The IUE's experiences in another instance made it concerned that its affirmative efforts perhaps had been unwise. In 1969 the IUE determined that the Sperry Rand pension plan violated Title VII, and it undertook efforts to correct the plan by collective bargaining. Because these efforts were unsuccessful, the IUE filed charges with the EEOC in February 1970 and filed suit in Federal district court in November 1970. Perhaps as a result of publicity related to the suit, several employees filed charges against the IUE in 1972, 1973, and 1974. When its collective-bargaining agreement ran out in 1973, IUE refused to sign a new one because it did not wish to be a party to an agreement containing what it viewed as an illegal provision regarding early retirement for females but not for males.[11]

The EEOC found reasonable cause to believe that IUE had discriminated on the basis of sex for having participated in the earlier agreement, even though the IUE had refused to sign the subsequent agree-

[5] The IUE check list for race discrimination is as follows:

1. Are most of the dirty or menial jobs held by minorities [blacks and Hispanics] with very few or no minorities in clean or skilled or semi-skilled jobs?
2. Are certain jobs or departments occupied exclusively or almost exclusively by minorities, while others are occupied exclusively or almost exclusively by white employees?
3. Are minorities hired in at lower rates of pay than for whites?
4. Is the average rate of pay for minorities less than for whites?
5. Is there a departmental seniority system which operates to keep minorities in certain departments?
6. Are minorities denied the same promotion rights as whites?
7. Does the employer require that an applicant for employment pass I.Q. tests or other tests unrelated to the specific job to be filled?
8. Are there jobs for which the employer refuses to hire minorities?
9. Are there segregated facilities?
10. Are there any minority supervisors?
11. Are there any minority clerical employees?
12. Are there any minority craftsmen?

If answer to any of questions 1-9 is "yes" the employer has probably discriminated. If answer to any of questions 10-12 is "no" the employer has probably discriminated. IUE Memorandum to its Locals.

[6] *Id.* The IUE check list for sex discrimination is as follows:

1. Are female janitors paid less than male janitors?
2. Are female inspectors paid less than male inspectors doing substantially equal work and having substantially the same skills, training, and responsibility?
3. Are jobs classified as light or heavy, with light jobs paid less and assigned to females?
4. Are females paid less for substantially the same work as males?
5. Are certain classifications, jobs, or departments all or nearly all male, all or nearly all female?
6. Is the average rate of pay for females less than for males?
7. Are females denied the same promotion rights as males? Is there a failure to promote females to "male" jobs?
8. Does the pension plan pay different benefits or contain different eligibility provisions for each sex or in any way refer to sex?
9. Are women required to go on maternity leave even though they want to work?
10. Are women refused the right to return to their jobs with no loss of seniority following childbirth?
11. Are sickness and accident benefits denied or limited to women who are disabled by childbirth or suffer complications arising from pregnancy?
12. Are pregnant employees denied the same medical and hospitalization benefits given other employees or wives of male employees?
13. Is the hiring-in rate different for women and men?
14. If the hiring-in rate is the same, state:
    (a) approximate number employed at hiring-in rate:
    XX (men); XX (women).
    (b) approximate number employed in bargaining unit above the hiring-in rate:
    XX (men); XX (women).

If answer to any of questions 1–12 is "yes" the employer has probably discriminated. If the percentage of women at the hiring-in level is greater than that of women above the hiring-in level, the employer has probably discriminated.

[7] IUE Memorandum to its Locals, at 2.

[8] IUE Statement to EEOC, at 3.

[9] *Id.*

[10] *Id.* at 3–4.

[11] *Id.* at 16–17.

ment. In its subsequent statement to the EEOC, the IUE wondered what it could have done to show good faith: since the company was unwilling to change the pension plan, the IUE felt that the only alternatives open to it—besides filing charges and refusing to sign the discriminatory agreement—would have been to ask the company not to offer a pension plan to its employees or to have gone on strike.[12] Moreover, since the IUE had already filed suit in Federal district court and had "spent many thousands of dollars pursuing that suit," it pronounced itself

> puzzled as to what its course of action with respect to other employers shall be. Can [IUE] afford to ferret out discriminatory practices and bring them before the EEOC. . .if the result is going to be a liability on the IUE which very likely would never have come to light if the IUE had not made a successful effort to hunt up all discriminatory practices and bring them to EEOC's attention where the IUE was unsuccessful in its efforts to persuade the employer to correct the practices?[13]

In its statement before the EEOC, the IUE called for "a firm understanding between EEOC and the unions on a program which the unions can follow without thereby subjecting themselves to reasonable cause findings by the EEOC."[14] The IUE was concerned that without such an understanding it would not be in the union's interest to "ferret out" illegal provisions and practices.[15]

The Developing Policy

In May 1978, at the request of former Commissioner Daniel E. Leach, then Vice Chairman,[16] the EEOC adopted a resolution to form an internal task force to develop policy proposals that would "promote Title VII objectives within the context of collective bargaining."[17] The task force was composed primarily of staff members from EEOC's offices of General Counsel, Policy Implementation, and Field Services as well as staff representatives of the offices of Commissioners Daniel E. Leach and J. Clay Smith.[18] The work of the task force was guided primarily by Commissioner Leach "who had a keen interest in and understanding of the problems involved."[19]

The task force held a series of meetings with representatives of employer groups[20] and unions,[21] meeting separately, to learn what the employers' and unions' previous efforts had been with respect to Title VII issues, to learn what difficulties they had in eliminating discrimination and in implementing voluntary affirmative action plans, and to elicit recommendations from them for EEOC to consider in developing a policy encouraging voluntary affirmative action.[22] One of the major questions raised in these sessions was "whether an effective Title VII program can operate without recourse to charges and lawsuits."[23] In answer to this question, the unions provided examples of Title VII issues that they had resolved with management through collective bargaining, such as "initial job classification and assignment, pregnancy disability, seniority, minimum height requirements, job segregation, training, hiring practices, and sexually discriminatory wage rates."[24]

Specifically with respect to the use of selection factors for promotions, transfer, and training, it was noted that many unions have traditionally sought to widen seniority from departmental to plantwide seniority and to expand posting and bidding procedures so that all employees are eligible for promo-

[12] *Id.* at 17.
[13] *Id.* at 17–18.
[14] *Id.* at 18.
[15] *Id.* at 16.
[16] Huessy Letter, p. 2.
[17] U.S., Equal Employment Opportunity Commission, "Background Paper and Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining," 65 DLR D–1 (Apr. 2, 1980) (hereafter referred to as EEOC Background Paper and Resolution).
[18] Paula Huessy, special assistant to former Commissioner Daniel E. Leach, then Vice Chairman, U.S. Equal Employment Opportunity Commission, staff interview, Feb. 27, 1981 (hereafter cited as Huessy Interview).
[19] Huessy Letter.
[20] Employer groups included representatives of the Chamber of Commerce; the National Association of Manufacturers; the Business Round Table; Organization, Resources, Counselors, Inc.; and individual companies such as Safeway Stores, Inc. "Collective Bargaining Project: Report on Meetings, Observations," Memorandum to former Commissioner Daniel E. Leach from Marvin Rogoff, Task Force member and former EEOC employee, p. 1 (hereafter cited as Rogoff Memorandum).
[21] Unions were invited to participate based on their having "demonstrated some initiative in voluntary Title VII compliance. Others were added for the sake of balance." Of the 21 unions that were invited, the following unions participated: The Woodworkers, Retail Clerks (which later merged with the Amalgamated Meat Cutters and Butcher Workmen to form the United Food and Commercial Workers International Union), the Carpenters, the International Union of Electrical, Radio and Machine Workers, the Graphic Artists, and the Amalgamated Clothing and Textile Workers. The Coalition of Black Trade Unionists attended the second session. *Id.* at 1–2.
[22] *Id.* at 2.
[23] *Id.*
[24] *Id.* at 3.

tion without undergoing loss of seniority. In addition, unions have "expressed skepticism concerning formal educational requirements and written examinations for hiring and promotion; in general they prefer on-the-job demonstrations of ability."[25]

A memorandum summarizing the task force's meetings and its tentative conclusions was submitted in 1979 to then Vice Chairman Daniel E. Leach by Marvin Rogoff, a task force member. Although the Rogoff memorandum noted that "many union representatives" at the task force meetings thought that the Supreme Court's endorsement in *Weber*,[26] of the union-management training program voluntarily developed by the United Steelworkers of America and Kaiser, would "open the door for increased Title VII activity of this sort,"[27] the memorandum concluded that the "EEOC should not expect a stampede of unions and employers seeking to uncover and eliminate all employment discrimination."[28] Nevertheless, the Rogoff memorandum noted that several union representatives indicated an interest in the EEOC's developing a mechanism that would identify and note their efforts.[29]

The Rogoff memorandum was primarily concerned with the need to implement, in EEOC's procedures and processes, a mechanism for taking into account the good faith efforts of unions. It concluded that should the Commission adopt procedures to encourage employers and unions to include Title VII objectives in their collective bargaining, certain principles should be recognized, among them that the Office of General Counsel should incorporate into its litigation strategy recognition of "the good faith efforts" of either the union or employer prior to bringing suit.[30]

It was noted that the concept of good faith is difficult to specify and apply uniformly. It was recommended that it be applied on a case-by-case basis.[31] The Rogoff memorandum recommended, however, that EEOC lawyers and investigators consider the following activities when attempting to identify good faith on the part of unions:

(1) Proposal to employer that an illegal practice or contract provision be changed, with a suggested legal substitute;

(2) Union request to employer to provide detailed information as to racial, ethnic and sexual make-up of the workforce, in new hires, promotions, etc., and the subsequent use of that information to help correct the effects of discrimination in the workplace;

(3) Signing a contract under protest;

(4) Record of regular or special processes for handling discrimination grievances on behalf of individual victims;

(5) Filing an EEOC charge;

(6) Existence of a Title VII compliance program and active implementation;

(7) Strike over issues that include Title VII matters;

(8) Convention-mandated Title VII contract provisions.[32]

Regardless of the culpability of unions for acquiescence in employer discrimination, employers are bound by Title VII of the Civil Rights Act of 1964 not to discriminate when making employment decisions. In general, the employer is solely responsible for discrimination that occurs in the hiring and initial placement of new employees, since unions have not usually been given a role in hiring decisions. Once employees are hired, however, employers and unions share responsibility for employment decisions regarding their training, promotion, and transfer.

Employers as well as unions are, therefore, required to bargain in good faith to eliminate discrimination and to ensure that the collective-bargaining agreement does not contain discriminatory provisions. The EEOC task force is considering the following activities for determining good faith on the part of employers in attempting to exclude discriminatory provisions from collective-bargaining agreements:

(1) Developing a voluntary affirmative action program or taking other actions to end discrimination;

(2) Refusing to sign a collective-bargaining agreement that contained discriminatory provisions demanded by a union;

(3) Resisting discriminatory demands in face of a strike;

[25] *Id.* at 6.
[26] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).
[27] Rogoff Memorandum, p. 6.
[28] *Id.* at 7.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 5.
[32] No examples of employer good faith appeared in the Rogoff memorandum. *Id.* at 5–6.

(4) Filing charges of discrimination against a union.[33]

While the policy of encouraging voluntary affirmative action through collective bargaining was being developed, the EEOC found support[34] in the Supreme Court of the United States' 1979 opinion in *United Steelworkers of America, AFL–CIO v. Weber.*[35] In *Weber* the Court approved the use of collective bargaining for the purpose of developing and implementing voluntary affirmative action programs even when the employer has not illegally discriminated against minorities.[36] The EEOC also found support[37] in the 1978 decisions of the National Labor Relations Board in *Westinghouse*[38] and in *East Dayton Tool and Dye Company*[39] in which the Board held that an employer must provide EEO data at the union's request if the union is to use the information in administering or negotiating the collective-bargaining agreement.

On April 1, 1980, at the urging of Vice Chairman Leach,[40] the EEOC adopted a policy resolution to encourage voluntary affirmative action in collective bargaining.[41] In the background paper accompanying the resolution, the EEOC noted that cases may arise in which only one of the parties is "a willing advocate to such undertakings" and that in such instances, "it becomes imperative for government to find a means of assisting unions and management despite the resistance they may encounter from their collective bargaining partner."[42] Moreover, the EEOC's background paper concluded, since case law supports voluntary efforts, it is incumbent upon the EEOC to "do whatever it can to make it within the self interest of unions and management to take voluntary action."[43]

To carry out this policy the EEOC stated that its "processes and procedures [would] recognize the 'good faith' efforts of unions and/or employers towards eliminating discrimination, *particularly* where either party has to act alone and without the cooperation of the other."[44]

Implementation

Upon adoption of its resolution to encourage voluntary affirmative action through the collective-bargaining process, the EEOC increased the size of its task force to develop appropriate implementing manuals to be used in charge processing and in the litigation review process.[45] Accordingly, key figures in the offices of Policy Implementation, Field Services, and General Counsel were assigned to participate in drawing up the implementing materials and to identify criteria that could be used for determining good faith on the part of unions or

[33] Vella Fink, Assistant General Counsel, Appellate Division, U.S. Equal Employment Opportunity Commission and Task Force member, staff interview, Mar. 2, 1981 (hereafter cited as Fink Interview).

[34] EEOC Background Paper and Resolution, p. D–1.

[35] 443 U.S. 193 (1979).

[36] *Id.* at 208–09. See ch. 2 in this part for a detailed discussion of the Court's holding in *Weber.*

[37] EEOC Background Paper and Resolution, p. D–1.

[38] Westinghouse Electric Corp. v. International Union of Electrical, Radio and Machine Workers, AFL–CIO, 1978–79 N.L.R.B. Dec. (CCH) para. 15,191 (Oct. 31, 1978) *appeal docketed,* No. 78–2067 (D.C. Cir. Nov. 1, 1978). For a detailed discussion of this case see ch. 4 in part I of this report.

[39] East Dayton Tool and Dye Company, 239 N.L.R.B. No. 20, (1978).

[40] Huessy Letter.

[41] The policy resolution is as follows:

> Whereas, the Equal Employment Opportunity Commission has a responsibility to encourage voluntary endeavors to eliminate discriminatory employment practices,
>
> Be it resolved that, in order to encourage such voluntary endeavors by unions and employers, the Commission hereby consolidates and adopts the following policy:
>
> 1. Through its administrative processes, the Commission shall recognize the "good faith" efforts of unions and employers to eliminate discriminatory employment practices, whether undertaken in cooperation with each other or unilaterally; "good faith" must be of a compelling and aggressive nature evaluated on a case by case basis;
>
> 2. When, engaged in investigation, conciliation, and enforcement, the Commission shall exercise its discretion in recognition of union or employer voluntary affirmative action that meets appropriate standards;
>
> 3. In order to implement, this policy, the Offices of Field Services, Policy Implementation and the General Counsel shall develop, amend, and modify written instruction to the field staff that clearly reflects this policy with the understanding that criteria necessary to establish the standard of "good faith" as expressed above, shall be approved only by the Commission and,
>
> 4. The Office of the General Counsel, when engaged in enforcement activity and in exercising the Commission's discretionary enforcement authority, shall consider and evaluate voluntary affirmative action endeavors of potential union and/or employer respondents in accordance with paragraph 3 above.

EEOC Background Paper and Resolution, p. D–2.

[42] *Id.* at D–1.

[43] *Id.*

[44] *Id.*

[45] The background paper and policy statement foresaw that the new policy would be implemented both in charge processing and in litigation. In noting that it had not previously made clear to its field staff the role of unions with respect to Title VII, the EEOC indicated that an investigative manual, a compliance manual, and "Field Notes" were being developed which, taken together, would serve to establish a "cumulative policy" regarding "union (or employer) efforts and resources in pursuing Title VII claims." *Id.* p. D–2.

employers. These materials had not been completed at the time that this report went to press, but several members of the task force and other EEOC employees agreed to discuss the developments underway.

Charge Processing

The initial procedure that EEOC undertakes with respect to enforcing Title VII of the Civil Rights Act of 1964 is known as charge processing. When a complaint is filed with the EEOC, it must charge that employment discrimination has occurred on the basis of race, color, religion, sex, or national origin.[46] An individual employee may file a charge alleging individual harm and/or harm to a class of individuals; or a third party, such as a labor organization, may file a charge on behalf of an employee or group of employees.[47] If the EEOC staff finds reasonable cause to believe that discrimination has occurred, a cause determination is made and the charging and respondent parties are invited to appear for conciliation proceedings. In the event that conciliation is unsuccessful, the EEOC may determine that the issues involved warrant its filing suit against the respondent party. If the EEOC does not file suit, the individual complainant may do so.[48]

Charge processing takes place at the EEOC's 67 field offices. In those cases that raise novel or complex issues, however, the headquarters staff prepares a Commission decision which is submitted to the Commissioners for their approval.[49]

One of the changes the new policy anticipates is that EEOC's compliance manual and its "Field Notes"[50] will be revised to provide explicit instructions and standards to guide the field staff in implementing the new policy.[51] Currently, Field Notes 904–15 state that a labor union may file a charge as an aggrieved party or may file on behalf of its members,[52] but the task force plans to provide instructions on what kinds of efforts may possibly be considered as being of "good faith" when the union is a respondent as opposed to an aggrieved party. The instructions will also deal with employers' good faith efforts and are to be used throughout the charge processing prodecure.[53]

Litigation Review Process

The Civil Rights Act of 1972,[54] an amendment to the Civil Rights Act of 1964, empowered the EEOC to file suit against respondent employers and/or respondent unions. If the EEOC's efforts at conciliation fail, the case is forwarded to the Regional Attorney for litigation review. Subsequently, the case may be forwarded to the Office of General Counsel at headquarters for submission to the Commissioners for further consideration and possible approval.[55]

The new policy is intended to serve as a mechanism not only to assist the EEOC in identifying appropriate cases for litigation, but also to encourage unions and employers to undertake voluntary affirmative action.[56] In adopting this policy, the EEOC drew support[57] from *Social Services Union, Local 535 v. County of Santa Clara,*[58] in which the Ninth Circuit Court of Appeals held that even though the union had signed a collective-bargaining agreement containing discriminatory provisions, it could serve as class representative of its members in Title VII litigation challenging the provisions because of its initiatives prior to filing suit. The court held that the union's "vigorous efforts to correct

[46] Title VII forbids an employer from discriminating against a person or a group by refusing to hire or by discharging, and with respect to rates of compensation, and terms, conditions, and privileges of employment. For a detailed discussion of EEOC's compliance process, see U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. V, To Eliminate Employment Discrimination,* July 1975, pp. 510–60, (hereafter cited as *To Eliminate Employment Discrimination).*

[47] According to the background paper accompanying the EEOC's policy resolution, EEOC staff have at times failed to appreciate a union's legal status as a charging party and have, for example, "'requested' that unions withdraw as charging parties or have refused to accept their charges. . . ." EEOC Background Paper and Resolution, p. D–2.

[48] EEOC strategies for exercising its "prosecutorial discretion" are discussed in the section on the litigation review process.

[49] Howard Kallem, staff attorney, Office of Policy Implementation, U.S. Equal Employment Opportunity Commission, staff interview, Feb. 25, 1981.

[50] Whereas compliance manuals set policy and must be approved by the Commissioners, "Field Notes" are a vehicle for interpreting existing EEOC policy. Field notes are approved by the Office for General Counsel for legal sufficiency. Huessy Interview.

[51] The EEOC background paper states: "Standards should be developed by which the field, starting from intake and throughout charge processing, can better recognize the appropriate role for a union, whether as a charging party or respondent in the Commission process." EEOC Background Paper and Resolution, p. D–2.

[52] U.S., Equal Employment Opportunity Commission, Field Notes 904–15, "Labor Unions," Sept. 26, 1979, pp. 1–5.

[53] Merle Morrow, task force member and supervisory attorney, Office of Policy Implementation, staff interview, Mar. 2, 1981 (hereafter cited as Morrow Interview).

[54] Civil Rights Act of 1972, 42 U.S.C. 2000e–5(f)(2) (1978).

[55] For a detailed discussion of the litigation review process see *To Eliminate Employment Discrimination,* pp. 537–43.

[56] EEOC Background Paper and Resolution, p. D–1.

[57] *Id.*

[58] 609 F.2d 944, 948 (9th Cir. 1979).

discrimination" would serve as protection from liability for backpay awards should the suit succeed.[59]

To implement the new policy at the litigation review process level, a subtask force is investigating the substantive issue of what constitutes good faith,[60] by reviewing case law under Title VII, the NLRA, and the Fair Labor Standards Act (FLSA), with particular attention being given to cases in which unions were allowed to bring suit and when they were allowed to act as class representatives.[61] The subtask force is also reviewing the criteria listed in the Rogoff memorandum.[62] Deliberations have not progressed to the point that a policy has been developed that specifies how "good faith" is to be determined, but it was noted that "good faith" would probably have to be manifested independent from the collective-bargaining table, because "it is difficult for EEOC to look at the history of a collective bargaining agreement. That would require a factual determination that is difficult to make without a judicatory proceeding."[63] It was also noted that for an effort to constitute "good faith," a certain degree of "vigor" must have been shown.[64]

Good Faith as a Standard for Nonliability

The policy statement notes and the EEOC staff have reiterated that "good faith" is to be decided on a case-by-case basis. It was repeatedly noted, for example, that the facts of each case will differ and that no one set of standards specifying what constitutes "good faith" would be generally applicable.[65] Nevertheless, points made in the EEOC background paper and policy statement, combined with interviews with EEOC staff, indicate some general lines that a "good faith" standard is likely to take:

1. Because it is intended to encourage union-employer cooperation, it will apply primarily to discriminatory provisions of collective bargaining agreements or to efforts made in connection with the collective bargaining process.[66]

2. A union that has signed a collective bargaining agreement containing discriminatory provisions must have shown vigorous efforts against the provisions separate from any efforts it may have made at the bargaining table with respect to the provisions.[67]

3. Filing a charge against an employer for implementing a discriminatory provision in a collective bargaining agreement is not in itself likely to be considered as constituting "good faith."[68]

The good faith standard would be utilized in the context of the EEOC's administrative and prosecutorial discretionary powers. Thus, although a union may be liable for acts which may include cooperating with an employer's discriminatory policies, the EEOC would take into account the union's good faith efforts in attempting to remove discriminatory provisions from collective-bargaining agreements when deciding whether to pursue conciliation and which parties to sue.[69] Regardless of EEOC's position, an individual would not be precluded from filing suit against a union that had signed a collective-bargaining agreement with discriminatory provisions. The good faith standard would be applied primarily in those instances in which a union had signed a collective-bargaining agreement with discriminatory provisions. Thus, it would provide an incentive to unions to work actively with employers to remove the provisions and, if unsuccessful, to seek other ways to have the resulting discrimination eradicated. If a union's efforts were deemed sufficiently vigorous, the EEOC could elect not to sue the union.[70]

[59] *Id. See also* Burwell v. Eastern Airlines, 458 F. Supp. 474, 503 (E.D. Va. 1978).
[60] Fink Interview.
[61] *Id. See also* Social Services Union, Local 535 v. County of Santa Clara, 21 FEP 684 (1979).
[62] Fink Interview.
[63] *Id.*
[64] *Id.*
[65] Huessy Interview, Feb. 27, 1981; Morrow Interview and Fink Interview, Mar. 2, 1981.
[66] EEOC Background paper and Policy Statement, pp. D-1 and D-2.
[67] Huessy Interview, Morrow Interview, and Fink Interview.
[68] Huessy Interview and Morrow Interview.
[69] EEOC Background Paper and Resolution, pp. D-1, D-2.
[70] Another problem of liability for employment discrimination potentially confronted by unions involves employer efforts to sue the union for "contribution" to judicially imposed backpay orders against the employer.
A right of contribution is generally recognized when two or more persons are responsible to the same plaintiff-victim for the same injury and the plaintiff-victim has sued only one wrongdoer who is liable for the entire amount of court awarded damages. Recognition of the right allows the wrongdoer to bring a subsequent suit against the other wrongdoers in order to recover the amount paid which exceeds his share of the common damaging conduct. The policy underlying this remedy deters all wrongdoers by increasing the likelihood that all will share responsibility for their participation in the injurious conduct.
The Supreme Court, *Northwest Airlines v. Transport Workers Union,* 49 U.S.L.W. 4383 (1981) has removed this problem of employer lawsuits for contribution from unions in a recent decision. *Northwest Airlines* presented the question of whether an

EEOC's policy concerning the good faith standard does not appear designed to extend to employer discrimination not the result of a collective-bargaining agreement. A union is required when bargaining with an employer to represent the employees in the bargaining unit in a manner that is not "arbitrary, discriminatory or in bad faith."[71] Courts are split, however, on the issue of when this duty requires a union to resort to the bargaining table to eliminate employer discrimination. Some courts have held that a union's Title VII obligation not to discriminate against the employees it represents is "broader than simply refusing to sign overtly discriminatory agreements."[72] Moreover, even when a union has not violated its duty of fair representation, its acquiescence or "passivity at the negotiating table" can nevertheless make it liable for costs and attorneys' fees, because in acquiescing, it "shares a part of the blame in discriminating. . .[A union that knows] of the companies' actions. . .encourage[s] such by its own inaction."[73] Other courts, however, have held that failure to protect employees from discriminatory employers' policies is insufficient to establish liability.[74]

Whether a union should be held liable for employment practices not contained in a collective-bargaining agreement is arguable.[75] Unions do have a clear obligation, however, to represent fairly all bargaining unit members. The Supreme Court of the United States defined the standard of fair representation under the National Labor Relations Act as not "arbitrary, discriminatory, or in bad faith" regarding one or more of its members.[76] If a union does not initiate bargaining to correct a discriminatory practice by an employer, it can be held to violate its duty of fair representation. The degree of liability depends on a number of factors, including whether the union knew or should have known that the practice was taking place and that it was discriminatory.[77]

Under the law two separate statutes apply in determining union liability in the face of employer discrimination, whether or not the employer's practice is contained in a collective-bargaining agreement. Much of the confusion in the case law in this area is the result of judicial attempts to reconcile the different policies underlying these two bodies of law.[78] For example, an employment practice that disadvantages members of one race or sex may

employer held liable to its female employees for backpay because collectively bargained wage differentials were found violative of the Equal Pay Act, 29 U.S.C. §206 (1963), and Title VII, 42 U.S.C. §2000e-2 (1964), had a Federal statutory or common law right to contribution from the unions who allegedly bore partial responsibility for the violations. Without discussing the issue of union responsibility for discriminatory collective-bargaining provisions, the Court saw its task only as one of statutory construction and held that neither the EPA nor Title VII created in favor of employers a right to contribution from the unions. Moreover, the Court found that the statutes had been enacted not for the benefit of the class of which the employers were members but that the legislation was directed against employers. The Court also rejected the argument that such a right had been created by the Federal courts in their development of Federal common law.

[71] Vaca v. Sipes, 386 U.S. 171 (1967).

[72] Macklin v. Spector Freight Systems, Inc. 478 F.2d 979, 989 (1973).

[73] Hairston v. McLean Trucking Co., 62 F.R.D. 642, 667, note 10, 673 (1974). *See also* Dickerson v. United States Steel Corp., 439 F. Supp. 55, 80 (1977); EEOC v. Detroit Edison, 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds,* 431 U.S. 951 (1977); United States v. City of Buffalo, 457 F. Supp. 612, 639 (W.D.N.Y. 1978).

[74] Williams v. General Foods Corp. 492 F.2d 399, 405 (7th Cir. 1974). *See also* Atkinson v. Owens-Illinois Glass Co. 10 F.E.P. 710, 716-17 (N.D. Ga. 1975).

[75] Union Liability for Employer Discrimination, 93 Harv. L. Rev. 702, 724 (1980). This article argues that a union can be held liable under Title VII for not initiating bargaining to incorporate a provision prohibiting the discriminatory practice if its passivity violated its duty of fair representation under the National Labor Relations Act; that is, the passivity was arbitrary, discriminatory, or resulted from bad faith. The analysis recommends adoption by the courts of a two-step process to (1) determine the "type of contract provision that the union allegedly had a duty to negotiate"; and (2) determine "whether the union's decision not to negotiate for that provision was properly motivated (free of bad faith and discriminatory purpose) and rationally based (not arbitrary." *Id.* at 711. The analysis then argues that in making a determination in the second step, courts should take into consideration whether the discriminatory practice had been the subject of complaints or, if not, whether the union was aware of the discrimination and of reasons why employees may have remained silent about it. *Id.* at 717. Specifically, the analysis suggests that hostile union attitudes or language barriers are good reasons why aggrieved employees might not have gone to the union. *Id.*

[76] Vaca v. Sipes, 386 U.S. 171, at 190 (1967).

[77] The *Harvard Law Review* article cited in note 75 discusses four cases in which the issue of union liability arises. The first case is the strongest argument for imposing liability; the last is the weakest: (1) The union has failed to negotiate for a contractual prohibition of a discriminatory practice that employees have complained about. (2) Employees have complained about discrimination that is forbidden by an arbitrable term of the collective-bargaining agreement and the union has been unresponsive. (3) The union has failed to bargain over discrimination that has not been the subject of complaints and that is not forbidden by the present contract. (4) The employer's contract has forbidden discriminatory practices and there have been no complaints. 93 Harv. L. Rev. at 717-18. For a detailed analysis of union liability under Title VII and the NLRA, see generally, Union Liability for Employer Discrimination, 93 Harv. L. Rev. at 702-24. *See also* "Union Liability Under Title VII for Employer Discrimination," *68 Geo. L. J.* 959, 966-67 (1980) (hereafter cited as "Union Liability").

[78] Both Title VII and the NLRA prohibit discriminatory conduct. The language of Title VII, §703(c)(3) parallels that of §8(b)(2) of the NLRA in that they both prohibit unions from

violate Title VII even if there is no discriminatory intent on the part of the employer or union because Title VII cases focus on the effect or result of a party's action.[79] The National Labor Relations Act, unlike Title VII, is a congressional attempt to regulate the process of labor-management relations rather than the result of that process.[80] Consequently, a court confronted with the issue of whether a union has breached its duty of fair representation is concerned with the decisionmaking process underlying the action or inaction giving rise to the grievance. Under the duty of fair representation standard, a union would be liable only if its decision not to represent a member was discriminatory, arbitrary, or in bad faith.[81] A court, in determining liability under labor law, therefore, looks not to the result of the union's bargaining but to its good faith efforts.

The judicial response to these two different statutory approaches to the issue of union liability in the face of employer discrimination has varied. Some courts have applied a strict Title VII standard.[82] Under a Title VII standard, unions are always found liable for employer discriminatory actions that are contained within the collective-bargaining agreement. For discriminatory practices outside the collective-bargaining agreement, the imposition of Title VII liability has posed a problem for courts. This problem is often the result of an inability to find a sufficient link between the discriminatory action of the employer and the union. Thus, in determining union liability for employer discrimination outside the bargaining agreement, some courts have applied a duty of fair representation standard. The application of this standard requires, first, a finding of a "duty to bargain" before liability can be imposed for failure to represent union members fairly. If a "duty to bargain" cannot be shown, unions may be absolved of liability for mere passivity in the face of employer discriminatory practices outside the collective-bargaining agreement.[83]

In addition, some courts have applied both statutes by incorporating the elements of the duty of fair representation into the Title VII standard for union liability.[84] This approach has worked well in cases involving employer discriminatory practices both inside and outside the collective-bargaining agreement.

This latter approach will be most effective for deterring union passivity in the face of employer discriminatory practices both inside and outside the collective-bargaining agreement because it is an approach that recognizes the interplay between the NLRA and Title VII. Taken separately, Title VII and the duty of fair representation encourage unions to self-examine and evaluate an employer's discriminatory practices outside the collective-bargaining agreement,[85] but the interplay between the NLRA duty to protect the best interest of its members and the Title VII policy of eliminating discrimination with a minimal resort to lawsuits creates an affirmative union duty to combat discriminatory practices by an employer.[86]

The EEOC and the NLRB have not developed a mechanism to coordinate charge processing and to determine when union inaction in the face of discriminatory employer conduct may violate the law. Since there has also been no definitive ruling by the Supreme Court on the issue, there is no uniform nationwide standard for determining the extent of union liability for employer discrimination.

In part I of this report it was shown that substantial percentages of unions in the Commission's sample were unaware of employer use of

". . .causing or attempting to cause an employer to discriminate against an employee. . ." (42 U.S.C. §2000e-2(c)(3) (1976) and 29 U.S.C. §158(b)(2) (1976). Although the language of §703(c)(3) parallels that of §8(b)(2) of the NLRA, the two statutes differ in the way in which they attempt to regulate the conduct of labor and management. The difference in these approaches has caused courts to differ as to when and how these statutes should be applied to questions of union liability for employer discrimination.

[79] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[80] "Union Liability" at 960.

[81] Vaca v. Sipes, 386 U.S. 171 (1967).

[82] Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364, 1381 (5th Cir. 1974).

[83] "Union Liability" at 967. *See also* Williams v. General Foods Corp., 472 F.2d 399 (7th Cir. 1974).

[84] Macklin v. Spector Freight Sys. Inc., 478 F.2d 979, 989 (D.C. Cir. 1973); Gray v. Greyhound Lines East, 545 F.2d 169 (D.C. Cir. 1976); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975). When the union attempts to eliminate discriminatory practices within the collective-bargaining agreement and is unsuccessful because of an uncooperative employer, a court will consider a union's good faith efforts to eliminate the discrimination in determining the degree of union liability, i.e., the amount of money the union will be required to pay for signing an agreement containing discriminatory practices.

[85] It should be noted that courts have found that Title VII requires, rather than encourages, unions to eliminate discriminatory practices contained in the collective-bargaining agreement. See note 83, supra and related discussion.

[86] Gray v. Greyhound, supra; EEOC v. Detroit Edison, supra, and Macklin v. Spector Freight Sys. Inc., supra.

various selection factors used in promotion, transfer, and training decisions,[87] many of which have been shown to have an adverse effort on employment opportunities for minorities and women. In those instances in which the union representatives were aware of the use of these factors, substantial proportions were not opposed to their use[88] and almost none of the collective-bargaining agreements prohibited their use.[89] With the exception of seniority (which was required as a selection factor in at least 90 percent of the collective-bargaining agreements for promotion, transfer, and training decisions), most of the collective-bargaining agreements were relatively silent with respect to the use of other selection factors.[90] Nevertheless, these factors were being used by employers[91] whose firms employed substantial numbers of women and minorities,[92] whose employment status may be adversely affected by their use.[93]

Unless a union is considered ultimately liable for failing to protect employees from discriminatory treatment by employers that is not a result of a collective-bargaining agreement, it would be in the union's interest not to be aware, for example, of employer use of selection factors that can have an adverse effect on employees in its bargaining unit. In such a situation, the union would apparently have no incentive to initiate bargaining on the point.

The impetus for the EEOC policy to encourage unions and employers to use the collective-bargaining process arose because the EEOC was interested in developing a mechanism to encourage affirmative action through the collective-bargaining process. Specifically, the EEOC was concerned that a union's efforts to redress employment discrimination resulting from its having participated earlier in a discriminatory collective-bargaining agreement could be taken into consideration during charge processing and litigation review. The EEOC's efforts were supported by the IUE, which had argued that without such a policy, there would be no incentive for unions (1) to review their collective-bargaining agreements for possible discriminatory provisions, (2) to initiate bargaining to eliminate the provisions, or (3) if unsuccessful, to undertake any of the other steps itemized by IUE such as filing charges with the NLRB alleging failure to bargain and filing charges with the EEOC alleging discrimination.[94]

Although the EEOC policy setting forth the "good faith" standard is designed to remedy this situation, it does not appear to address what may be a more common situation—employer discrimination that is not the result of the collective-bargaining process. If unions are *not* considered liable either under Title VII of the Civil Rights Act of 1964 or under the National Labor Relations Act for their inaction in the face of employer discrimination, then it appears unlikely that they will have sufficient incentive to take affirmative steps to try to end it. If unions do not hold some degree of responsibility to attempt to protect the members of their bargaining units from employer discrimination, then there is little incentive to adopt the kind of Title VII compliance program undertaken by the IUE.

Summary

The EEOC is developing a policy to encourage voluntary affirmative action in collective bargaining. The basic policy was approved on April 1, 1980, and, at the time this report went to press, was being implemented. It is based on the fact that unions are liable for collective-bargaining agreements they sign and that they are therefore liable for discriminatory practices taken by employers that are required by the agreement. The policy is intended to recognize

[87] For example, 50 percent of the unions in the Commission's sample were unaware that written tests were used for promotion decisions, 79 percent were unaware that they were used for transfer decisions, but 7 percent were unaware that they were used for training decisions. See table 3.3 in ch. 3 of part I of this report.

[88] For example, 50 percent of those that were aware of the use of written tests were not opposed to their use for promotion decisions, 33 percent were not opposed to their use for transfer decisions, and 77 percent were not opposed to their use for training decisions. See table 3.4 in ch. 3 of part I of this report.

[89] For example, the use of written tests for promotion decisions was prohibited in 7 percent of the contracts of those unions aware of their use, and their use for transfer and training decisions was prohibited in none of them. *Id.*

[90] For example, the use of written tests for promotion and transfer decisions was required in none of the contracts in the sample of union representatives who were aware of their use, and their use for training decisions was required in 15 percent of the contracts. *Id.*

[91] For example, 35 percent of the unionized establishments in the Commission's sample used written tests for promotion decisions, 21 percent used them for transfer decisions, and 52 percent used them for training decisions. See table 3.1 in ch. 3 of part I.

[92] For example, 32 percent of the employees at the unionized establishments in the Commission's sample that use written tests for promotion were minorities and 25 percent were women. See table 3.2 in ch. 3 of part 1.

[93] See ch. 1 of this part of the report for a legal analysis of the adverse effects of various selection factors.

[94] See background section above.

"good faith" efforts of unions and employers to eliminate employment discrimination and to undertake voluntary affirmative action.

A review of the background paper that accompanied the policy statement and interviews with EEOC employees serving on a task force that is developing the implementing documents suggests that the EEOC policy will be applied chiefly to collective-bargaining agreements or to efforts one of the parties had made with respect to a collective-bargaining agreement. The EEOC would use its administrative and prosecutorial discretion in determining on a case-by-case basis whether the efforts that were made were done in "good faith." Although unions are considered liable for the discriminatory effects of provisions of collective-bargaining agreements that are implemented by employers, case law is unresolved regarding the extent of union liability in those instances in which they opposed the discriminatory provisions. Case law is also unresolved regarding whether a union is liable for its passivity if it does not take steps to negotiate with management to eliminate discriminatory practices about which the collective-bargaining agreement is silent.

The Commission's survey of 77 local and 11 international unions reported in part I of this report indicates that union unawareness is widespread regarding employer use of various selection factors that can have an adverse effort on the employment status of women and minorities. Moreover, a large number of the collective-bargaining agreements for the establishments where many of these factors are used were silent regarding them; the contracts neither required their use nor prohibited it.

If the union currently bears no liability for the resulting discrimination, no incentive exists for it to initiate collective-bargaining negotiations to prohibit their use. Indeed, a disincentive may exist, in that to obtain the elimination of discriminatory practices a union might have to bargain away other provisions already fought for and won. The EEOC's policy of encouraging good faith efforts to correct a bargaining agreement previously participated in by the union addresses one aspect of the efforts a union might take in behalf of the employees it represents. Equally important is a mechanism to encourage unions to examine employer practices that appear to violate Title VII and the NLRA and to initiate negotiations to prohibit them. Without this two-fold approach the burden of eliminating such discrimination rests ultimately on the employee who, upon alerting the union to the alleged discrimination and not receiving satisfaction, must then carry the process forward by charging the employer with discrimination and the union with failure to fulfill its duty of fair representation.

Findings

Part I

1. Of more than 21 million workers represented by labor organizations in 1977, 29 percent were women and 19 percent were minorities. Minority and female workers represented by unions had lower average earnings and worked in less well-paid occupations than white[1] men. These conclusions hold despite the fact that union-represented workers of all races and both sexes had higher average earnings than their nonunion counterparts.

2. Commission survey results show that as of April 1979 the composition of union leadership at both the international and local levels of most unions did not reflect the makeup of the work forces represented by the unions.

- Minority men held 5 percent of the executive board positions in 11 international unions, minority women 2 percent, and majority[2] women 4 percent. All of these figures are markedly lower than the proportions of these groups in the bargaining units represented by these unions.
- Majority men constituted 43 percent of the work forces represented by local unions in the Commission survey, but they held 60 percent of the officers' positions.
- The preponderance of majority men is especially great in the highest levels of leadership: all presidents and executive vice presidents of 11 international unions and 71 percent of the presidents of local unions participating in the Commission survey were majority men.

3. Under the National Labor Relations Act unions have authority to bargain over selection procedures used to choose employees for promotion, transfer, and training openings. When unions are strongly committed to influencing employer selection procedures they can often succeed. Commission survey results show that unions have translated their support for the use of seniority in selection procedures into contract language, legally requiring employers to consider employees' seniority in their selection decisions.

4. Employers commonly use selection factors such as seniority, written tests, interviews, written performance evaluations, prior related work experience, supervisors' recommendations, prior specialized training, and educational qualifications in their promotion, transfer, and training decisions.

5. Most of the establishments that participated in the Commission survey had not validated their use of

[1] Statistics on white workers, as reported by the Bureau of Labor Statistics in the statistical tables on which this finding is based, include all Anglo workers and most Hispanic workers. See ch. 1, note 8. Wherever possible, in this report, Hispanics are included with other minorities.

[2] The term "majority" is equivalent to the term "white, not of Hispanic origin."

these selection factors in accordance with Uniform Guidelines on Employee Selection Procedures.[3]

- Validation studies had been conducted by one-third of the employers using written tests for promotions and by less than 5 percent of those employers using the other selection factors.

6. Commission survey results indicated that local union officials were not aware of many of the selection procedures employers used, nor did they oppose their use.[4]

- Almost all of the local union officials were aware of employers' use of seniority, but substantial proportions were unaware of employers' use of tests, educational qualifications, and interviews for promotion, transfer, and training.[5]
- More than 95 percent of local union officials who were aware of employer use of seniority, interviews, prior specialized training, prior related work experience, and educational qualifications in job advancement procedures did not oppose such use.[6] Substantial proportions of local officials also did not oppose the use of the other selection factors.
- With the exception of seniority, almost no collective-bargaining agreements required or prohibited the use of these selection factors.[7]
- Substantial numbers of minorities and women were in bargaining units where these selection factors were used in personnel decisions.

7. Most international unions participating in the Commission survey reported that their contracts required the use of seniority for some job advancement procedures. None of the internationals interviewed on this subject reported that they opposed the use of seniority for any job advancement procedure.[8]

8. Some international unions stated that they opposed the use of tests, performance evaluations, and interviews for job advancement procedures. This opposition, however, had not resulted in appropriate changes in contract language, employer practices, or local union officials' acceptance or opposition to the use of these practices.[9]

9. Apart from their own role in bargaining on a national level, international unions have not adopted all feasible means of addressing responsibilities for equal employment opportunity.

- Six of the 11 international unions reported that they assigned less than 1 percent of their staff to civil rights and women's rights activities.[10]
- Four of the 11 internationals had not passed a convention resolution to increase the number of minorities or women in policymaking positions within the international.

10. International unions have failed to exercise their authority to ensure that their locals follow equal opportunity policies.[11] Six of 11 internationals participating in the Commission survey reported that they did not routinely review their subordinate bodies' contracts to determine whether any provisions restrict opportunities for women and minorities.

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[3] Under the Federal Government's Uniform Guidelines on Employee Selection Procedures, employers should, under commonly encountered job situations, conduct a validation study to determine whether a selection factor is job related, and if the selection procedure has an adverse impact on the job advancement of minorities or women. The Guidelines do not require that certain seniority systems be validated. See sec. 1-C, Uniform Guidelines on Employee Selection Procedures (1978); 43 Fed. Reg. 38296-97 (Aug. 25, 1978). Although the Uniform Guidelines do not require that validation studies be conducted under all circumstances, the circumstances under which they are to be conducted are commonly encountered and, therefore, the majority of employers who participated in the Commission survey may not have been fulfilling their obligations under the Uniform Guidelines.

[4] See part II of this report and findings below regarding the adverse impact these selection factors can have on promotion opportunities for minorities and women.

[5] For example, 21 percent of the local union officials whose bargaining partners had stated that they used the selection factor were aware of the use of tests for transfer, 37 percent were aware of the use of interviews for transfer, and 30 percent were aware of the use of educational qualifications for transfer.

[6] No local union officials opposed the use of seniority or educational qualifications for promotion, transfer, and training.

[7] More than 90 percent of local contracts required the use of seniority for promotion or training decisions.

[8] Seven of the 11 internationals participating in the survey had national contracts in industries emphasized in this study. Six of the seven reported that their contracts required the use of seniority for promotion. The seventh international, the Communication Workers, indicated that the union was not certain as to the promotion and transfer procedures being used by the employer at the time of the Commission interview. Smaller numbers of unions reported that their contracts required the use of seniority for transfer and training decisions. No international opposed the use of seniority for promotion, transfer, or training.

[9] With the exception of the Steelworkers, the use of these three selection criteria was not prohibited in any national contract. In some cases the employer used these selection criteria despite the international union's stated opposition to such use. Further, since many local officials reported that their local unions did not oppose the use of these three factors, either international opposition to their use had not been communicated to local officials, or, if communicated, had not been accepted.

[10] Two of the nine internationals, the Ladies' Garment Workers and the Hotel and Restaurant Employees, had no full-time staff assigned to women's rights or civil rights activities.

[11] International unions have the authority to influence their local's and other subdordinate bodies' policies toward collective bargaining and equal opportunity issues. Most international unions' constitutions give the international clear authority to influence their locals' activities.

11. Eight of 11 international unions participating in the Commission survey have taken official stands in favor of establishing job training programs, but they had not implemented such programs at the time of the survey.

- Three international unions stated that regular training programs were available to bargaining unit members. None of the three reported the availability of special training programs for training semiskilled and unskilled workers, to prepare them for admission into more advanced training programs.
- Thirty-three percent of the local unions surveyed stated that regular training programs were available to bargaining unit members. Special training programs were available to less than one-third of these bargaining units.

12. Few international unions have obtained basic statistics on the job status of their minority and female bargaining unit members, obtained copies of their bargaining partners' affirmative action plans, or established committees for the examination of equal opportunity issues.

- Among seven international unions that engage in collective bargaining on a national level, only the Steelworkers[12] knew the race and the sex of their bargaining unit members by job, department, or wage level.[13]
- Three of the seven international unions stated that their bargaining partners had affirmative action plans, but the Steelworkers were the only international with a copy of the plan. Employers who bargained with 37 percent of the local unions were reported, by the unions, to have such plans. Thirty-two percent of those locals whose bargaining partners had such a plan stated that they had a copy of it.
- Two of seven international unions and less than one-quarter of the locals reported belonging to a labor-management committee established to discuss employment issues related specifically to minority and female workers. Six locals reported that such committees met at least 11 times in a 1-year period.
- Less than 30 percent of the locals reported that they had local union committees established to discuss employment issues related to minority and female members. Special union committees were primarily found in the local unions affiliated with two internationals, the Auto Workers and the Steelworkers.

Part II

1. The selection factors listed above in part I can have an adverse impact on the job advancement prospects of women and/or minorities.[14]

2. Selection factors that have an adverse impact on the employment status of minorities and/or women must be validated and must have a legitimate business purpose or their use must be discontinued.[15]

3. A union has a duty under the National Labor Relations Act to represent its members fairly and its conduct must not be "arbitrary, discriminatory or in bad faith. . ."[16]

4. A union "may be held responsible for an employer's discriminatory practices if it has not taken affirmative action against those practices."[17]

5. A union is expected to negotiate actively for nondiscriminatory treatment on behalf of its members.[18]

6. A union may be found liable for acceding to a discriminatory contract provision, but its good faith in the face of an employer's intransigent position may be taken into consideration in assessing backpay damages.[19]

7. A union may be assessed back pay, however, when it signs a collective-bargaining agreement containing discriminatory departmental seniority provisions.[20]

8. A union has been held liable for a discriminatory provision in a collective-bargaining agreement even in those instances in which the employee does not protest directly to the union but files a Title VII complaint instead.[21]

[12] The Steelworkers' possession of this information and a copy of an affirmative action plan may reflect the fact that the Steelworkers are a party in a consent decree to eliminate discrimination within the steel industry and the union.

[13] Fourteen percent of the Steelworkers local unions knew the race, sex, and national origin of their bargaining unit members by job, department, or wage level.

[14] See part II of this report for an examination of the adverse impact of these factors on minorities and women.

[15] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[16] Vaca v. Sipes, 386 U.S. 171, 190 (1967).

[17] Gray v. Greyhound Lines, East, 545 F.2d 169, 174, note 15 (D.C. Cir. 1976).

[18] Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C.D.C. 1973).

[19] Burwell v. Eastern Airlines, 458 F. Supp. 474, 503 (E.D. Va. 1978).

[20] Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381 (5th Cir. 1974).

[21] Russell v. America Tobacco Co., 528 F.2d 357, 365–66 (4th Cir. 1975).

9. The international union will be held liable for the discriminatory conduct of its local when there is a sufficient connection between the international and the discriminatory practice.[22]

10. The Equal Employment Opportunity Commission (EEOC) is developing a policy to encourage employers and unions to use the collective-bargaining process to eliminate discriminatory policies and practices and to institute voluntary affirmative action programs.[23]

11. The EEOC intends to encourage unions and employers to use the collective-bargaining process to eliminate discrimination and to take affirmative action by taking into consideration their good faith efforts to eliminate discriminatory provisions in collective-bargaining agreements during the charging process and in litigation review.[24]

12. "Good faith" will be decided on a case-by-case basis, but the EEOC expects a union or an employer to have displayed a vigorous effort to eliminate a discriminatory provision of a collective-bargaining agreement.[25]

13. The EEOC has not developed a policy for confronting the issue of union inaction in the face of employer discrimination outside the context of a collective-bargaining agreement.

14. In view of unsettled case law regarding union inaction in the face of employer discrimination not the result of a collective-bargaining agreement,[26] the EEOC's policy of taking into consideration "good faith efforts" is unlikely to be an incentive for a union to initiate collective bargaining to eliminate discrimination not currently resulting from a provision in a collective-bargaining agreement.

15. The EEOC and the NLRB have not developed a mechanism for encouraging unions to take action with respect to employer discrimination outside the context of a collective-bargaining agreement.

[22] Myers v. Gilman Paper Co., 544 F.2d 837, 851 (5th Cir. 1977).
[23] U.S., Equal Employment Opportunity Commission, "Background Paper and Policy Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining," 65 DLR D-1 (Apr. 2, 1980).
[24] *Id.* at D-2.
[25] *Id.*
[26] See chs. 2 and 3 in part II of this report.

Recommendations

I. To the U.S. Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) has authority under Title VII of the Civil Rights Act of 1964 to issue guidelines designed to implement Title VII.[1] Pursuant to this authority, the EEOC has issued "Uniform Guidelines on Employee Selection Procedures" to provide direction to employers on the permissible and impermissible uses of employee selection criteria.[2] EEOC Guidelines assume a prominent role in setting the legal bounds for the use of selection criteria and validation studies. The Guidelines have generally been accorded great deference by the courts in evaluating the conduct of employers and unions under Title VII.[3] Present EEOC guidelines do not specify the extent or nature of international and local union responsibility for discriminatory selection procedures used by employers with whom the unions have collective-bargaining agreements.

The EEOC has also issued "Affirmative Action Guidelines" describing the kinds of actions that employers and unions may take in implementing voluntary affirmative action programs.[4] The guidelines indicate that affirmative action is encouraged in the collective-bargaining process,[5] but they do not apply to the elimination of discrimination by a means other than an affirmative action plan.[6]

Finally, the EEOC has adopted a policy resolution that is specifically designed to encourage voluntary affirmative action in collective bargaining.[7] In implementing the policy the EEOC has indicated that, in making probable cause determinations of discrimination with respect to unions or employers, it will take into consideration the good faith efforts of unions and employers to undertake to eliminate discriminatory provisions in collective-bargaining agreements.[8]

In general, the Commission supports these policies and procedures, and makes the following specific recommendations to advance the goals of equal employment opportunity and affirmative action.

1. In investigating charges of discrimination, in assessing damages (e.g., backpay), and in making decisions regarding litigation, the EEOC should take into account union efforts of a "compelling and aggressive nature"[9] to eliminate discriminatory provisions from collective-bargaining agreements. These efforts should include at least the following:

a. The union should be able to demonstrate that it has an ongoing Title VII compliance program by which it systematically reviews (1) the collective-bargaining agreement for discriminatory pro-

[1] 42 U.S.C. §2000e–12 (1976).
[2] 29 C.F.R. §1607 (1979).
[3] *See* ch. 1 in part II of this report.
[4] 29 C.F.R. §1608 (1979).
[5] *Id.* at §1608.3(c)(4) (1979).
[6] *Id.* at §1608.11(b) (1979).
[7] U.S., Equal Employment Opportunity Commission, "Background Paper and Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining," 65 DLR D–1 (Apr. 2, 1980).
[8] *Id.* at D–2.
[9] *Id.*

visions, (2) employer practices for possible discriminatory effects, and (3) the patterns of selection of employees for promotion, transfer, and training by race and sex.

b. The union should have initiated bargaining to have discriminatory provisions removed from the agreement and, if the employer has refused to bargain, the union should have filed unfair labor practice charges with the NLRB and discrimination charges with the EEOC.

2. The EEOC should develop, jointly with the National Labor Relations Board, a cooperative mechanism to encourage unions to take action with respect to employer discrimination outside the collective-bargaining agreement.

The EEOC's reliance on good faith efforts of unions to initiate collective bargaining to eliminate employer discrimination may not be an incentive for them to do so if unions are not considered liable for employer discrimination that occurs outside the context of a collective-bargaining agreement.[10] Although the extent to which a union can be held liable for employer discrimination that is not the result of a collective-bargaining agreement has not been settled in the courts, the EEOC and the NLRB could provide leadership in this area by issuing a joint memorandum indicating when acquiescence in such instances is in their view a violation of Title VII and/or the National Labor Relations Act. By applying standards regarding unions' good faith efforts and their duty of fair representation, the EEOC and the NLRB could encourage unions to initiate collective bargaining to eliminate discriminatory employer practices that are not the result of a collective-bargaining agreement. The joint memorandum should also detail the responsibilities of the respective agencies, as well as what constitutes violations of Title VII or the NLRA. Furthermore, the joint memorandum should indicate procedures for handling charges, for example, reciprocal agreements on referrals of charges to the appropriate agency, and procedures for resolving disagreements as to agency jurisdiction. The memorandum should also provide guidance to unions on the actions they should take to eliminate discriminatory practices that adversely affect the minority and female employees they represent.

[10] *See* footnotes 71–77 and related text in ch. 3, part II of this report.

II. To Labor Unions

This study has provided detailed information concerning the responsibility of unions to represent bargaining unit employees in a nondiscriminatory manner. Some unions have accepted their responsibilities under Title VII of the Civil Rights Act of 1964 in working with employers to eliminate discriminatory provisions of collective-bargaining agreements and to institute voluntary affirmative action to provide minorities and women greater access to training, transfer, and promotion opportunities. Major deficiencies in international and local unions' equal opportunity policies and activities remain, however. Most of the internationals surveyed have failed to exercise their authority over locals to ensure that they follow equal opportunity policies. More rapid progress toward equality for minorities and women in the workplace will occur if the major union policymaking bodies—the AFL–CIO as well as the international unions—fully exercise their authority in an effort to achieve such equality. Accordingly, the Commission makes the following recommendations to local and international unions:

1. Establish procedures to increase the representation of minorities and women in union leadership positions.

The acquiescence of some local and international unions in employer practices which can adversely affect minorities and women may be due largely to the disproportionately small representation of these two groups among union officials. The operations of international unions and their local affiliates are generally directed by a president and an elected executive board. The board and particularly the president exert a great deal of influence over the policies of the union and the issues on which the union attempts to bargain. Without greater representation of minorities and women at the highest levels of union leadership, race, national origin, and sex discrimination by an employer may continue largely unchallenged.

2. Establish a Title VII compliance program.

The program should be designed to uncover discriminatory provisions in the collective-bargaining agreement, discriminatory practices not covered by the agreement, and patterns of selection for promotions, transfer, and training that vary by race, national origin, and sex. Collective-bargaining agreements should be specifically reviewed for provisions

requiring the use of selection procedures that can adversely affect employment opportunities for women and minorities.

3. Initiate collective bargaining to remove from their agreements provisions they believe to be discriminatory.

4. Be alert to discriminatory practices used in the selection of employees for promotion, transfer, and training and initiate collective bargaining to have such practices cease.

5. If the employer refuses to bargain, be prepared to file unfair labor practice charges with the National Labor Relations Board and discrimination charges with the Equal Employment Opportunity Commission.

6. Work with employers to establish and implement voluntary affirmative action plans and seek to include such plans in collective-bargaining agreements.

Unions should recognize their joint responsibility with employers in attempting to eliminate discrimination through voluntary affirmative action. The Supreme Court has approved the use of affirmative action under Title VII, even without a finding of specific acts of discrimination.[11] Unions and employers should establish affirmative action plans for training, transfer, and promotion.

[11] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

TABLE A.1 Percentages of International Union Officers and Executive Board Members by Race, Sex, and Ethnic Group, 1979

Office	Total		Majority		Black		Hispanic		Asian and Pacific Island American		American Indian and Alaskan Native	
	No.	%	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
President	11	100.0	100.0	0	0	0	0	0	0	0	0	0
Executive Vice Pres.	7	100.0	100.0	0	0	0	0	0	0	0	0	0
Vice Pres.	184	100.0	87.0	5.4	4.3	1.1	1.6	0.5	0	0	0	0
Secretary	2	100.0	100.0	0	0	0	0	0	0	0	0	0
Secretary-Treasurer	9	100.0	100.0	0	0	0	0	0	0	0	0	0
Treasurer	2	100.0	100.0	0	0	0	0	0	0	0	0	0
National Director	6	100.0	83.3	0	0	0	16.7	0	0	0	0	0
Regional or District Dir.	43	100.0	97.6	0	2.3	0	0	0	0	0	0	0
Total Officers	264	100.0	90.2	3.8	3.4	0.8	1.5	0.4	0	0	0	0
Executive Board[a]	294	100.0	88.8	4.4	3.7	1.7	1.0	0.3	0	0	0	0

Source: Data collected by the U.S. Commission on Civil Rights' survey, February 1978–April 1979.
[a] Executive board members are not always officers.

Detail may not sum due to rounding.
Detailed information was unavailable for the Teamsters. Hence these statistics relate only to 11 of the 12 internationals surveyed.

TABLE A.2 Percentages of Employees In Local Union Bargaining Units by Race, Sex, Ethnic Group, and International Union Affiliation, 1978–79

	Total		Majority		Black		Hispanic		Asian and Pacific Island American		American Indian and Alaskan Native	
	No.	%	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
IBT(7)	1,713	100.0	70.4	10.1	16.0	0.6	2.5	0.0	0.2	0.0	0.1	0.0
UAW(7)	28,410[a]	100.0	54.5	4.2	33.0	4.5	0.7	0.0	0.2	0.0	0.0	0.0
USW(6)	20,250	100.0	68.9	6.2	17.2	3.5	3.8	0.1	0.1	0.0	0.1	0.0
IAM(7)	6,212	100.0	71.5	6.5	14.6	2.4	4.6	0.2	0.1	0.0	0.0	0.0
IBEW(7)	7,921[a]	100.0	32.4	37.5	4.7	3.7	4.5	4.6	1.7	1.0	1.0	0.1
RCIU(6)	32,773	100.0	44.1	44.0	5.6	4.0	1.2	1.1	0.0	0.0	0.0	0.0
ACTWU(6)	8,210	100.0	5.6	33.4	5.9	20.3	2.4	31.9	0.1	0.4	0.0	0.0
CWA(6)	6,828	100.0	28.0	39.1	7.8	21.0	1.1	2.4	0.2	0.2	0.0	0.1
SEIU(6)	901	100.0	10.0	13.3	32.1	37.4	3.3	3.9	0.0	0.0	0.0	0.0
AMCBW(6)	3,754	100.0	42.5	21.5	4.9	1.6	19.4	5.8	2.6	0.8	0.6	0.2
ILGWU(6)	883	100.0	14.5	54.0	0.7	16.0	4.9	9.7	0.0	0.2	0.0	0.0
HRE(6)	26,661	100.0	19.0	34.4	7.8	6.8	14.1	6.0	4.1	7.8	0.0	0.0
Total	144,516[b]		42.5	25.2	13.7	6.4	4.8	3.8	1.0	1.5	0.1	0.0[c]

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

Detail may not sum to total due to rounding.

[a] For the UAW and the IBEW, the horizontal details do not sum to the totals since two local union estimates are based on employer data where white males and white females were reported individually but a single total was reported for all minority males and females. These aggregate totals were not spread across racial minority groups but were included in the union total.

[b] Estimates of the race sex makeup of the employees selected to be surveyed were obtained from 67 employers and 9 local unions for 76 of the 77 local unions selected for the study. Hence, for 67 of the locals included in this table, the percentages do not reflect the total membership of a local but only those workers in the locals' bargaining unit employed in the particular establishment included in the study. The data collected from the nine local unions reflect total union membership in the local. Information for one local was unavailable either from the employer or the union.

[c] American Indian women constitute less than 0.05 percent of the total number of persons represented.

TABLE A.3 Numbers and Percentages of Local Union Officers and Executive Board Members, by Race, Sex, and Ethnic Group, 1978–79

OFFICERS	Majority				Black				Hispanic				Asian and Pacific Island American				American Indian and Alaskan Native				Total	
	Male		Female		Male		Female		Male		Female		Male		Female		Male		Female			
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
President	53	70.7	7	9.3	8	10.7	2	2.7	3	4.0	1	1.3	0	0	0	0	1	1.3	0	0	75	100.0
Vice president	83	62.4	19	14.3	11	8.3	12	9.0	6	4.5	2	1.5	0	0	0	0	0	0	0	0	133	100.0
Treasurer	14	70.0	2	10.0	3	15.0	1	5.0	0	0	0	0	0	0	0	0	0	0	0	0	20	100.0
Secretary-Treasurer	23	63.9	2	5.6	5	13.9	4	11.1	2	5.6	0	0	0	0	0	0	0	0	0	0	36	100.0
Financial Secretary	15	60.0	6	24.0	2	8.0	2	8.0	0	0	0	0	0	0	0	0	0	0	0	0	25	100.0
Recording Secretary	25	44.6	12	21.4	4	7.1	11	19.6	4	7.1	0	0	0	0	0	0	0	0	0	0	56	100.0
Guide	11	73.3	0	0	3	20.0	0	0	1	6.7	0	0	0	0	0	0	0	0	0	0	15	100.0
Guard	9	56.2	0	0	7	43.8	0	0	0	0	0	0	0	0	0	0	0	0	0	0	16	100.0
Sergeant-at-arms	6	40.0	1	6.7	4	26.7	1	6.7	3	20.0	0	0	0	0	0	0	0	0	0	0	15	100.0
Business agent	7	50.0	2	14.3	2	14.3	0	0	3	21.4	0	0	0	0	0	0	0	0	0	0	14	100.0
Trustee	63	56.2	12	10.7	18	16.1	11	9.8	4	3.6	1	0.9	0	0	1	.9	0	0	2	1.8	112	100.0
Other Officer	38	62.3	10	16.4	4	6.6	5	8.2	3	4.9	1	1.6	0	0	0	0	0	0	0	0	61	100.0
Total	347	60.0	73	12.6	71	12.3	49	8.5	29	5.0	5	0.9	0	0	1	0.2	1	0.2	2	0.3	578	100.0
Executive Board	463	52.7	139	15.8	118	13.4	83	9.4	50	5.7	18	2.1	3	.3	1	0.1	1	0.1	2	0.2	878	100.0

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

TABLE A.4 Numbers of Local Union Officers, by Race, Sex, Ethnic Group, and International Union Affiliation, 1978–79

OFFICER	Total number of persons holding office	IBT	UAW	USW	IAM	IBEW	RCIU	ACTWU	CWA	SEIU	AMCBW	ILGWU	HRE
President	75[a]	7	7	6	7	7	6	6	6	6	6	5	6
Majority male	53	6	4	5	7	6	6	2	5	4	3	1	4
Black male	8	0	3	1	0	0	0	1	0	2	0	0	1
Hispanic male	3	1	0	0	0	0	0	0	0	0	2	0	0
As./Pac. Is. Amer. male	0	0	0	0	0	0	0	0	0	0	0	0	0
Am. Ind./Ak. Nat. male	1	0	0	0	0	1	0	0	0	0	0	0	0
Majority female	7	0	0	0	0	0	0	3	1	0	0	3	0
Black female	2	0	0	0	0	0	0	0	0	0	0	1	1
Hispanic female	1	0	0	0	0	0	0	0	0	0	1	0	0
As./Pac. Is.Amer. female	0	0	0	0	0	0	0	0	0	0	0	0	0
Am.Ind./Ak. Nat. female	0	0	0	0	0	0	0	0	0	0	0	0	0
Vice President	133	7	7	6	7	7	42	6	16	14	8	5	8
Majority male	83	6	6	5	7	6	26	1	10	4	5	1	6
Black male	11	1	1	1	0	0	2	1	0	4	1	0	0
Hispanic male	6	0	0	0	0	1	0	1	1	0	2	0	1
Majority female	19	0	0	0	0	0	9	1	4	3	0	2	0
Black female	12	0	0	0	0	0	4	2	0	3	0	2	1
Hispanic female	2	0	0	0	0	0	1	0	1	0	0	0	0
Treasurer	20	0	3	4	2	7	0	0	2	1	0	1	0
Majority male	14	0	2	2	2	6	0	0	1	1	0	0	0
Black male	3	0	1	2	0	0	0	0	0	0	0	0	0
Majority female	2	0	0	0	0	0	0	0	1	0	0	1	0
Black female	1	0	0	0	0	1	0	0	0	0	0	0	0

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.
[a] For one local, the office of president was not among the local's elected officers.

TABLE A.4 (CONTINUED)

OFFICER	Total number of persons holding office	IBT	UAW	USW	IAM	IBEW	RCIU	ACTWU	CWA	SEIU	AMCBW	ILGWU	HRE
Secretary-Treasurer	36	7	0	0	3	0	6	2	4	5	5	0	4
Majority male	23	6	0	0	3	0	3	0	2	2	3	0	4
Black male	5	1	0	0	0	0	2	0	0	2	0	0	0
Hispanic male	2	0	0	0	0	0	0	0	0	0	2	0	0
Majority female	2	0	0	0	0	0	1	0	1	0	0	0	0
Black female	4	0	0	0	0	0	0	2	1	1	0	0	0
Financial Sec.	25	0	7	5	4	4	0	2	0	0	0	3	0
Majority male	15	0	5	4	3	3	0	0	0	0	0	0	0
Black male	2	0	1	1	0	0	0	0	0	0	0	0	0
Majority female	6	0	0	0	1	0	0	2	0	0	0	3	0
Black female	2	0	1	0	0	1	0	0	0	0	0	0	0
Recording Sec.	56	7	7	6	7	7	2	4	0	3	5	5	3
Majority male	25	6	4	4	7	2	0	0	0	0	2	0	0
Black male	4	0	0	1	0	1	0	0	0	1	1	0	0
Hispanic male	4	1	0	1	0	0	0	0	0	0	2	0	0
Majority female	12	0	0	0	0	3	1	1	0	1	0	3	3
Black female	11	0	3	0	0	1	1	3	0	1	0	2	0
Guide	15	0	5	7	0	0	0	0	0	0	3	0	0
Majority male	11	0	4	6	0	0	0	0	0	0	1	0	0
Black male	3	0	1	1	0	0	0	0	0	0	1	0	0
Hispanic male	1	0	0	0	0	0	0	0	0	0	1	0	0
Guard	16	0	0	11	0	0	0	0	0	0	4	0	1
Majority male	9	0	0	5	0	0	0	0	0	0	3	0	1
Black male	7	0	0	6	0	0	0	0	0	0	1	0	0

TABLE A.4 (CONTINUED)

OFFICER	Total number of persons holding office	IBT	UAW	USW	IAM	IBEW	RCIU	ACTWU	CWA	SEIU	AMCBW	ILGWU	HRE
Sergeant-at-arms	15	0	6	0	0	0	0	4	0	0	4	1	0
Majority male	6	0	4	0	0	0	0	1	0	0	1	0	0
Black male	4	0	2	0	0	0	0	2	0	0	0	0	0
Hispanic male	3	0	0	0	0	0	0	0	0	0	3	0	0
Majority female	1	0	0	0	0	0	0	0	0	0	0	1	0
Black female	1	0	0	0	0	0	0	1	0	0	0	0	0
Bus. Agent	14	0	0	0	0	4	0	1	0	0	2	5	2
Majority male	7	0	0	0	0	3	0	1	0	0	0	3	0
Black male	2	0	0	0	0	0	0	0	0	0	1	1	0
Hispanic male	3	0	0	0	0	1	0	0	0	0	1	1	0
Majority female	2	0	0	0	0	0	0	0	0	0	0	0	2
Trustee	112	21	18	18	17	0	0	3	0	10	16	0	9
Majority male	63	14	9	13	14	0	0	0	0	2	9	0	2
Black male	18	4	5	4	1	0	0	0	0	0	4	0	0
Hispanic male	4	2	0	1	0	0	0	0	0	0	1	0	0
As./Pac. Is. Amer. male	0	0	0	0	0	0	0	0	0	0	0	0	0
Am. Ind./Ak. Nat. male	0	0	0	0	0	0	0	0	0	0	0	0	0
Majority female	12	1	0	0	2	0	0	3	0	3	0	0	3
Black female	11	0	4	0	0	0	0	0	0	4	0	0	3
Hispanic female	1	0	0	0	0	0	0	0	0	0	0	0	1
As./Pac. Is.Amer. female	1	0	0	0	0	0	0	0	0	1	0	0	0
Am.Ind./Ak. Nat. female	2	0	0	0	0	0	0	0	0	0	2	0	0

TABLE A.4 (CONTINUED)

OFFICER	Total number of persons holding office	IBT	UAW	USW	IAM	IBEW	RCIU	ACTWU	CWA	SEIU	AMCBW	ILGWU	HRE
Other Officer	61	0	6	8	10	3	4	3	4	6	1	8	8
Majority male	38	0	6	8	8	3	2	1	1	5	1	1	2
Black male	4	0	0	0	1	0	1	1	1	0	0	0	0
Hispanic male	3	0	0	0	1	0	0	0	0	0	0	1	1
Majority female	10	0	0	0	0	0	1	1	2	0	0	4	2
Black female	5	0	0	0	0	0	0	0	0	1	0	2	2
Hispanic female	1	0	0	0	0	0	0	0	0	0	0	0	1
Total	578	49	66	71	57	39	60	31	32	45	54	33	41

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.
[a] For one local, the office of president was not among the local's elected officers.

TABLE A.5 Numbers of Executive Board Members, by Race, Sex, Ethnic Group, and International Union Affiliation, 1978–79

Office	Total number of persons	IBT	UAW	USW	IAM	IBEW	RCIU	ACTWU	CWA	SEIU	AMCBW	ILGWU	HRE
Executive Board													
Majority male	463	38	68	50	56	36	47	13	41	39	34	14	27
Black male	118	6	31	19	4	5	8	8	0	23	11	1	2
Hispanic male	50	4	0	5	3	3	0	9	1	3	14	3	5
As./Pac. Is. Amer. male	3	0	1	0	0	0	0	0	0	1	0	0	1
Am. Ind./Ak. Nat. male	1	0	0	0	0	0	1	0	0	0	0	0	0
Majority female	139	1	2	0	2	10	23	16	24	19	2	27	13
Black female	83	0	10	0	0	3	7	17	6	16	3	13	8
Hispanic female	18	0	0	0	0	1	1	1	3	2	1	5	4
As./Pac. Is. Amer. female	1	0	0	0	0	0	0	0	0	1	0	0	0
Am. Ind./Ak. Nat. female	2	0	0	0	0	1	0	0	0	0	1	0	0
Total	878	49	112	74	65	59	87	64	75	104	66	63	60

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

Appendix B
Detailed Tables for Chapter 3 of Part I

TABLE B.1 Number of Cases for Table 3.1, Use of Factors

	Seniority	Written Tests	Written Performance Evaluations	Interviews	Educational Qualifications	Prior Related Work Experience	Supervisor's Recommendations	Prior Specialized Training
Use of Factors								
For Promotion								
Total	181	181	181	181	181	181	181	181
Union	134	134	134	134	134	134	134	134
Nonunion	47	47	47	47	47	47	47	47
For Transfer								
Total	168	167[a]	168	167[a]	168	168	168	167[a]
Union	127	126	127	126	127	127	127	126
Nonunion	41	41	41	41	41	41	41	41
For Training								
Total	71	71	71	71	71	71	71	71
Union	56	56	56	56	56	56	56	56
Nonunion	15	15	15	15	15	15	15	15

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

[a] Employers who did not know whether factor was used were excluded from the tabulation.

TABLE B.2 Number of Cases for Table 3.2, Minority and Female Representation

	Seniority		Written Tests		Written Performance Evaluations		Interviews	
	Union	Nonunion	Union	Nonunion	Union	Nonunion	Union	Nonunion
For those establishments that use the factor								
The percentage of employees who are:								
Minorities	114	42	42	5	39	35	74	40
Women	114	42	42	5	39	35	75	40
For those establishments that consider the factor the first or second most important:								
The percentage of employees who are:								
Minorities	81	17	3	0	15	11	6	9
Women	81	17	3	0	15	11	6	9

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

TABLE B.3 Number of Cases for Table 3.3, Union Awareness

	Seniority	Written Tests	Written Performance Evaluations	Interviews	Prior Specialized Training	Prior Related Work Experience	Educational Qualifications	Supervisor's Recommendations
Union Awareness								
For Promotion	57	28	17	39	45	54	20	38
For Transfer	40	14	11	19	27	32	10	21
For Training	16	14	6	14	12	12	10	8

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

TABLE B.4 Number of Cases for Table 3.4, Union Stand

	Seniority	Written Tests	Written Performance Evaluations	Interviews	Prior Specialized Training	Prior Related Work Experience	Educational Qualifications	Supervisor's Recommendatons
Union Stand								
For Promotion	54	14	12	25	30	46	4	26
For Transfer	39	3	7	7	13	19	3	8
For Training	11	13	1	9	8	7	6	5

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

TABLE B.5 Detailed Information for Table 3.4, Union Stand

Union Stand	Seniority		Written Tests		Written Performance Evaluations		Interviews	
	Establishments in Non-South	Establishments in South	Establishments in Non-South	Establishments in South	Establishments in Non-South	Establishments in South	Establishments in Non-South	Establishments in South
FOR PROMOTION								
Contract Required Use	92% of 36	94% of 18	0% of 10	0% of 4	0% of 9	0% of 3	0% of 18	0% of 7
Contract Prohibited Use	0% of 36	0% of 18	0% of 10	25% of 4	0% of 9	0% of 3	0% of 18	0% of 7
Unions Opposed Use	0% of 36	0% of 18	40% of 10	75% of 4	11% of 9	100% of 3	0% of 18	14% of 7
FOR TRANSFER								
Contract Required Use	85% of 26	100% of 13	0% of 2	0% of 1	0% of 5	0% of 2	0% of 5	50% of 2
Contract Prohibited Use	0% of 26	0% of 13	0% of 2	0% of 1	0% of 5	0% of 2	0% of 5	0% of 2
Unions Opposed Use	0% of 26	0% of 13	50% of 2	100% of 1	20% of 5	0% of 2	0% of 5	0% of 1
FOR TRAINING								
Contract Required Use	88% of 8	100% of 3	20% of 10	0% of 3	a	0% of 1	0% of 5	0% of 4
Contract Prohibited Use	0% of 8	0% of 3	0% of 10	0% of 3	a	0% of 1	0% of 5	0% of 4
Unions Opposed Use	0% of 8	0% of 3	10% of 10	67% of 3	a	0% of 1	0% of 5	0% of 4

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

a. No establishments fell in this category.

Appendix C
Detailed Tables for Chapter 4 of Part I

TABLE C.1 Local Unions Which, for the Bargaining Unit, Knew Race, Sex, or National Origin Data, by Job, Department, or Wage Level, by International Union Affiliation, 1978–79

	Race		Sex		National Origin		Total Response
	Number	%	Number	%	Number	%	
IBT	0		3*	42.8*	0		7
UAW	0		0		0		7
USW	1	14.3	1	14.3	1	14.3	7
IAM	1	16.7	1	16.7	1	16.7	6
IBEW	0		1	14.3	0		7
RCIU	2	33.3	3	50.0	2	33.3	6
ACTWU	2	33.3	1	16.7	1	16.7	6
CWA	0		0		0		6
SEIU	1	20.0	1	20.0	1	20.0	5
AMCBW	1	16.7	1	16.7	1	16.7	6
ILGWU	3[a]	75.0	3[a]	60.0	2	40.0	5
HRE	3	50.0	3	50.0	3	50.0	6
All Unions	14 (of 73)	19.2	18 (of 74)	24.3	12 (of 74)	16.2	74[b]

Source: Data collected by the U.S. Commission on Civil Rights' survey, August 1978–April 1979.

[a] Because there are 4 instead of 5 responses for ILGWU local unions for the race question, the percentages are different for the "Race" and "Sex" categories.

[b] Three local unions did not respond to any of the questions on race, sex, and national origin data or gave a "don't know" or "not applicable" response.

* These figures may be read as follows: 3 of 7 IBT local unions, or 42.8 percent, knew the sex breakdown for the bargaining unit, by job, department, or wage level.

Appendix D

Methodology of the Commission Survey

The Commission survey covered international unions, local unions, and employers at the establishment level.[1] A survey instrument was developed for each of these three types of organizations. The three survey instruments—the International Union, Local Union, and Employers' Interview Schedules[2]—provided interrelated information on union policies toward equal opportunity programs and promotion, transfer, and training procedures. That is, for any one union, information was gathered from international union officials, officials of several local unions associated with the international union, and several employers with collective-bargaining agreements with these specific local unions.

Selection of International Unions

The overriding objective of the Commission study was to examine those policies of private sector, nonreferral unions that affect the job advancement opportunities of women and minorities. In keeping with this objective, the survey excluded unions with more than 30 percent of their members in referral locals, public employee unions, and professional associations. Further, the survey was confined to the 12 largest private sector nonreferral unions, ranked by size of nonreferral membership.

Table D.1 shows the calculations made to select the 12 unions. The table shows that of the 15 largest private sector unions, the referral membership of 3 unions exceeded 30 percent of their total membership: the Carpenters, the Laborers, and the Operating Engineers. The 12 remaining unions, which were all selected for the survey, had about 10,351,000 members in 1974, about 48 percent of all union members, excluding members of professional associations and public employee unions.[3] The 12 largest nonreferral international unions were selected (as opposed, for example, to a random sample of international unions of all sizes) primarily because these unions represent such a large proportion of all union members.[4]

[1] An establishment is an economic unit, generally at a single physical location, where business is conducted or where services or industrial operations are performed. Examples of establishments are plants, stores, hotels, movie theaters, banks, sales offices, warehouses, and central administrative offices. U.S., Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual 1972* (no date), p. 10.

[2] The interview schedules were pretested in the Washington, D.C., vicinity. Copies may be requested from the Office of Program and Policy Review, U.S. Commission on Civil Rights, Washington, D.C. 20425.

[3] The use of 1974 statistics was necessary because these were the latest figures available when the selection was made in 1977. For sources, see table D.1.

[4] In comments on this report in draft, the BLS noted that about "200 other union and employee associations, most of which are nonreferral in whole or part, representing 14.6 million members,. . .were not surveyed. As a result, we do not know the statistical validity of the results that can be achieved, and we do not believe that clear judgments can be reached from the survey data." Janet L. Norwood, Commissioner, Bureau of Labor Statistics, Letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Feb. 3, 1981, p. 1.
This report is not intended to cover all union members or all workers represented by unions. Instead, it emphasizes employees in production, maintenance, and service jobs and, depending on job classifications, some employees in office and clerical positions

Selection of Industry

For each of the 12 selected international unions, an industry was chosen as the subject of survey interviews. In most cases, the largest industry (in terms of numbers of union members employed) for each international union was chosen, to allow the results of the survey to relate to a large subgroup rather than a small subgroup of the international's members. The largest industry was chosen unless (1) insignificant numbers of minorities and women were employed in the industry, (2) the industry was not relatively well-defined, or (3) the work processes in the industry were not relatively homogeneous.

The following is a description of the industries selected for inclusion in this study for each of the 12 internationals. Most industries were defined by use of the Standard Industrial Classification (SIC) code.[5]

1. *Teamsters*—The "industry" covered in the examination of the Teamsters consisted of two components: first, all workers covered by Teamsters' collective-bargaining agreements in Standard Industrial Classification (SIC) 42, Motor Freight Transportation and Warehousing, and, second, all motor vehicle drivers covered by Teamsters' collective-bargaining agreements in all other SIC groups. SIC groups, other than SIC 42, that have large numbers of drivers include SIC 16, 17, 20, 50, 53, and 54.

2. *Auto Workers*—The selected industry in this case consisted of SIC 3711, Motor Vehicles and Passenger Car Bodies, and SIC 3713, Truck and Bus Bodies, but was confined to the four domestic car manufacturers, General Motors, Ford, Chrysler, and American Motors. These SIC categories included manufacture of automobiles, trucks, taxicabs, buses and other commercial vehicles, but excluded agricultural equipment.

3. *Steelworkers*—The industry in the case of the Steelworkers was the steel producing and fabricating plants and facilities covered by the contracts between the Steelworkers and each of the 10 major producers. Iron ore mining and refining operations were excluded.

4. *Machinists*—The industry in this case was SIC 35, Machinery, except Electrical.

5. *Electrical Workers*—The industry in this case was SIC 36, Electrical Machinery, Equipment, and Supplies.

6. *Retail Clerks*—The industry in this case was supermarket food stores, regardless of whether the supermarkets were chain stores or independent supermarkets.

7. *Clothing and Textile Workers*—In this case, the industry consisted of SIC 2321, Men's and Boys' Shirts; SIC 2327, Men's and Boys' Trousers; SIC 2328, Men's and Boys' Work Clothing including nontailored trousers; and SIC 2311, Men's, Youths', and Boys' Suits, Coats, and Overcoats.

8. *Communications Workers*—The industry studied in connection with the Communications Workers was Bell System telephone carriers where the specific companies had contracts with the Communications Workers. This included AT&T's Long Lines and General Departments, but excluded Western Electric. It also excluded independent (non-Bell) telephone carriers.

9. *Service Employees*—The industry in this case was SIC 734, Services to Dwellings and Other Buildings. In this industry, workers represented by the Service Employees are employed by companies that contract to perform services, predominantly cleaning services, for owners and lessors of buildings.

10. *Meat Cutters*—In this instance, all of SIC 2011, Meat Packing Plants, and SIC 2013, Sausages and Other Prepared Meat Products were included, as well as SIC 5411, Grocery Stores.

11. *Ladies' Garment Workers*—In this case, the industry was SIC 2335, Women's and Misses' Dresses, and SIC 2377, Women's and Misses' Coats and Suits.

12. *Hotel and Restaurant Employees*—In this case the industry was SIC 7011, Hotels, Motels, and Tourist Courts. Restaurants and drinking places were included only if operated by hotels, motels, and tourist courts.

Among the 12 international unions selected for the survey, 8 were themselves parties to national contracts with employers in the selected industry. The four that had no such contract were the Hotel and

(see footnote 14 below). Many employee associations and several unions do not represent such employees. The National Education Association, for example, represents 1.7 million members. The various Federal, State, and county employee unions represent an additional 2 million members. All told these unions represent 4.5 million members. U.S., Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1979,* (1980), table D.1, p. 91. As noted elsewhere in the report, this study was intended to cover the largest unions representing production, maintenance, and service employees, and secondarily, office and clerical employees.

[5] For a description of the SIC codes, see Office of Management and Budget, *Standard Industrial Classification Manual 1972,* pp. 9–13.

Restaurant Employees, the Service Employees, the Machinists, and the Retail Clerks. One of the eight international unions with such a national contract, the Teamsters, declined to participate in the Commission survey. The survey interviews with the remaining seven international unions all included sections devoted to the international's national contract with a specific major company in the selected industry and to the job advancement practices used by the company. These seven international unions and the companies were:

1. Auto Workers (UAW) and the Ford Motor Company.
2. Steelworkers (USW) and the United States Steel Corporation.
3. Electrical Workers (IBEW) and the RCA Corporation.
4. Meat Cutters (AMCBW) and the Wilson Foods Corporation.
5. Clothing and Textile Workers (ACTWU) and Cluett-Peabody and Company, Inc.
6. Communications Workers (CWA) and the Chesapeake and Potomac Telephone Company.
7. Ladies' Garment Workers (ILGWU) and Jonathan Logan, Inc.[6]

Interviews were held with a total of 11 international unions. In addition to the seven internationals just listed, interviews were also held with the four internationals that had no national contract in the selected industry. All 11 international unions were asked about the size of their union membership; the race, sex, and ethnicity of international union officials; and the international's civil rights and women's rights programs. All 11 interviews were held at the unions' headquarters in Washington, D.C., New York City, Pittsburgh, Detroit, Chicago, and Cincinnati. The interviews were held with one or more (usually two or more) high-ranking officials designated by the presidents of the international unions.

Selection of Cities

Random sampling was used to select the metropolitan areas in which the interviews with local unions and establishment-level employers took place. The metropolitan areas were randomly selected from SMSAs (Standard Metropolitan Statistical Areas) or SCSAs (Standard Consolidated Statistical Areas) of a million or more.

Metropolitan areas were selected separately for the South and non-South. A number of studies of wage differentials show greater racial differentials in the South than in the rest of the country. Further, unions are weaker in the South than elsewhere. Hence, it appeared useful to choose a portion of the union sample from the South and a portion from the non-South.

Based on Census Bureau statistics, four southern SMSAs or SCSAs and four nonsouthern SMSAs or SCSAs[7] were chosen from those of a million or more.[8] A weighted selection procedure was used, so that those metropolitan areas with a proportionately greater population had a greater chance of selection.[9] The metropolitan areas randomly selected for the non-South[10] were the Chicago-Gary, Ill.-Ind.

[6] The numbers of workers in the bargaining units covered by the national contracts were as follows: Ford Motor Company: 197,000; U.S. Steel Corporation: 125,000; RCA Corporation: 22,000; Wilson Foods Corporation: 7,300; Cluett-Peabody and Co.: 4,500; Chesapeake and Potomac Telephone Co.: over 20,000; Jonathan Logan, Inc.: 7,500. Hence the total number of workers covered by the seven interviews was over 383,300. These figures were obtained by Commission staff in interviews with officials of the international unions on Mar. 1, 1979 (UAW); Feb. 23, 1979 (USWA); Mar. 16, 1979 (IBEW); Mar. 6, 1979 (AMCBW); Mar. 20, 1979 (ACTWU); Apr. 10, 1979 (CWA); Mar. 22, 1979 (ILGWU). In six of the seven cases, these employment figures relate only to the production, maintenance, and service workers in the bargaining units. In the seventh case, the Communications Workers, they relate only to the office and clerical workers. The Communications Workers official stated that he did not know the number of office and clerical workers in the bargaining unit, but indicated that it was over 20,000.

[7] The South, as defined by the Bureau of the Census, contains slightly under one-third of the total population; according to a 1975 estimate, the population of the South was 68.1 million and the country as a whole was 213.1 million. U.S., Department of Commerce, Bureau of the Census, *Estimates of the Population of Counties and Metropolitan Areas: July 1, 1974 and 1975,* Series P–25. No. 709 (September 1977), p. 3. (In the following, SCSAs will generally be referred to as SMSAs, except in contexts where the distinction is pertinent).

[8] Such SMSAs had a 1975 estimated population of 98.5 million, which may be compared to a population of 156.1 million for all SMSAs and 213.1 million for the Nation as a whole. U.S., Bureau of the Census, *Estimates of the Population, 1974 and 1975,* pp. 3, 29, 30, and 34. (The 98.5 million figure was calculated on the basis of SCSAs, where an SCSA has been defined for a given area.) The restriction of the sample to such large cities was based on considerations of minimizing travel and other costs. (San Antonio, Texas, and Rochester, N.Y., with populations of between 950,000 and 1 million were considered, through rounding, to have populations of 1 million.)

[9] This procedure gave the New York SCSA, which is 17.7 times as large as the Rochester, N.Y. SMSA, 17.7 times the probability of being selected as Rochester.

[10] Baltimore and Washington, D.C. were classified as nonsouthern metropolitan areas, despite the fact they are classified as southern by the Bureau of the Census. Commission staff believed that they were more characteristic of nonsouthern than southern

SCSA; the Detroit-Ann Arbor, Mich. SCSA, the Columbus, Ohio SMSA, and the Los Angeles-Long Beach-Anaheim, Calif. SCSA. The metropolitan areas chosen in the South were the Tampa-St. Petersburg, Fla., SMSA,; the San Antonio, Texas, SMSA; the New Orleans, La., SMSA; and the Atlanta, Ga., SMSA.

After field trips began, some local unions and employers declined to participate in the survey. Hence it was necessary to choose additional metropolitan areas, based on knowledge that eligible locals or companies would be found in these areas.[11]

Selection of Local Unions

The local union interview schedule was administered to 77 local unions. For each of the five largest international unions (Teamsters, Auto Workers, Steelworkers, Electrical Workers (IBEW), and Machinists—see table D.1) seven local unions were surveyed. For each of the remaining internationals, six locals were surveyed. For all 12 internationals, 2 of the locals were in the South and the remaining 4 (or 5) in the non-South.

The selection procedure was as follows. After selection of the metropolitan areas, preliminary lists of local unions were assembled for each area. Lists of locals for each area were manually compiled from a U.S. Department of Labor publication, *Register of Reporting Labor Organizations 1977.*[12] After compilation of the needed 24 lists (12 internationals on both the South and the non-South) the locals on each list were ranked randomly.

The 24 lists of locals were then examined to determine which locals were eligible for interview. To be eligible, a local had to fulfill the following criteria: (1) it had a contract in the specific industry selected for the international with which it was affiliated; (2) it (a) had at least 200 members or (b) represented at least 200 workers. If two locals, affiliated with the same international union and located in the same SMSA, both represented workers employed by a particular company in the SMSA—and if neither local represented any employee at any other company in the chosen industry—only one would be eligible for interview. One of the two was selected randomly.[13]

Selection of Matching Establishments For Locals

The Commission survey design required that for each local in the survey, an establishment with a collective-bargaining agreement with that local must also be in the survey. Such "matching" establishments were to be interviewed using the Employers' Interview Schedule. Hence it was necessary to identify an eligible establishment for each selected local.[14] It was also decided to eliminate very small establishments from consideration.

The interviews with employers focused on a particular establishment to determine the actual personnel practices followed, as opposed to intended company policy.[15] In the case of interviews with

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cities. The total population of southern SMSAs and SCSAs above 1 million was 12.6 million in 1975 after the elimination of Washington, D.C., and Baltimore.

Two limiting conditions were applied in executing these procedures, for southern as well as nonsouthern SMSAs. First, no two SMSAs were to be in the same State. Second, no SMSAs with a minority population less than 7 percent of the total population were chosen. The first condition avoided excessive geographic concentration. The second condition avoided undertaking field trips in areas where some observers might believe that equal employment opportunity for minorities would not be an important issue.

[11] These cities were New York City; Houston, Tex; Little Rock, Ark.; St. Louis, Mo.; and Fairfield, Ala. While these metropolitan areas were not randomly selected, the local unions and employers interviewed in these areas were randomly selected from lists of locals and companies compiled by Commission staff. Only 13 of 77 locals and 13 of 194 employers in the final sample were located in areas other than the 8 initially selected areas. (The necessity to interview in Houston required abandoning the requirement that no more than one metropolitan area be selected from one State; San Antonio had been randomly selected as one of the original eight SMSAs.)

[12] This publication lists locals by State and, within States, by international union affiliation. Hence the lists could be compiled only by determining whether the town or city of a particular local union was located in a county which was part of one of the selected metropolitan areas.

[13] Eligibility was determined by checking a file of collective-bargaining agreements maintained by the Bureau of Labor Statistics ("B.L.S. contract file") containing relevant information for dozens of locals for each international. Commission staff also examined official forms submitted by unions to the U.S. Department of Labor (LM-2 forms), union newsletters, union convention proceedings, publications of the Bureau of National Affairs (BNA) and contract files maintained by the BNA. When necessary, out-of-town sources were explored, primarily through telephoning.

[14] The BLS contract file was very useful in this regard. In some instances, it was necessary also to contact employers or employers' associations and/or to use directories of employers to obtain the necessary information.

[15] The Commission survey's interview schedules contain separate sections for the job advancement procedures used for production, maintenance, and service employees (PMS), and for office and clerical employees (O&C). For each interview, only one of these two occupational groups was coded and analyzed, depending on which occupational group was predominant in a given industry. Production, maintenance and service employees includes craft and kindred workers, operatives and kindred workers, nonfarm

matched employers, not only were questions asked about the personnel at a particular establishment, questions were also asked specifically about those employees represented by the selected local union.

For the local, the company as a whole—though limited to establishments within the SMSA if the company had establishments outside the SMSA—was the subject of the survey interview.

Selection of Unmatched Establishments

In addition to the 77 establishments that were matched with locals, an additional 123 establishments were selected for interviews with the Employers' Interview Schedule, for a total of 200 employer interviews. These additional establishments were selected for two reasons: (1) to provide information for industries other than the 12 industries represented by the 77 matched employers and (2) to provide a control group of nonunionized employers, to permit comparisons between unionized and nonunionized employers.

The sampling plan was as follows: (1) 25 percent of the interviews were to be with employers without unionized employees, (i.e., 50 of the 200 respondents selected were nonunionized employers), and (2) 25 percent of the interviews were to be with employers in the South, so that 50 southern interviews were to be obtained. This represented an oversampling of the South relative to the proportion of all unionized wage and salary workers estimated to be in the South (about one-sixth).[16] The oversampling was necessary in order to have enough cases to make union–nonunion comparisons within the South. The survey plan called for a total of 200 respondents, 150 in the non-South and 50 in the South. In the non-South 112 of the respondents were to be unionized and the other 38 were to be nonunionized. Of the 50 respondents in the South, 38 were to be unionized and the other 12 nonunionized. Owing partly to the difficulty of finding eligible respondents and partly to respondent refusals to participate in the survey, 194 employer interviews rather than 200 were conducted. Four interviews in the non-South and two in the South were not obtained. Of the 194 employer interviews, 77 were matched with local unions and 117 were unmatched.

The 117 unmatched employers were selected from those industries that met the following criteria:

1. Industries with at least 10 percent of their employees unionized. The following industry groups were eliminated because less than 10 percent of their wage and salary workers were unionized:[17] SIC 011–097, Agriculture, Forestry, and Fishing; SIC 581, Eating and Drinking Places (Retail Trade); SIC 601–679, Finance, Insurance and Real Estate; and SIC 881, Private Household Services.
2. Industries that were within the intended scope of the study, i.e., industries that were largely in the private sector and employed predominantly nonprofessional staff. The following industry groups were eliminated because they were government-related, or because the industry was predominantly made up of professionals: SIC 431, U.S. Postal Service; SIC 800–805, 807–809, Health Services, mostly involving professionals; SIC 811–869, Various Services, mostly involving professionals; SIC 891–899, Miscellaneous Services, mostly involving professionals; and SIC 911–972, Public Administration.
3. Industries where unionized employees were represented primarily by nonreferral unions. Only the construction industry (SIC 152–179) was eliminated by this criterion.

The industries which met these criteria and which were, therefore, included in the Commission survey were mining; manufacturing; transportation, communication, and electrical, gas, and sanitary services; wholesale and retail trade; and a substantial portion of the service industry.

The number of establishments included in the survey for each industry was dependent on the number of unionized employees in each industry. In other words, the proportion of all establishment interviews in a given industry in a given region (non-South or South) was made equal to the proportion of

laborers, and most service workers. Office and clerical employees includes clerical and kindred workers and sales clerks. Professional workers and managers were not covered by the survey.

[16] Estimated on the basis of data presented in U.S., Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, vol. 23 (July 1976), pp. 78–87 (May 1975 data) and in three unpublished tables provided by the Bureau of Labor Statistics, "Number of Wage and Salary Workers in Labor Unions, by Industry, Sex, and Race, May 1975," "Percent of Wage and Salary Workers in Labor Unions, by Industry, Sex, and Race, May 1975," and "Labor Union Membership Rates, by Region, Industry and Race, May 1975." The estimate relates only to the industries included in the Commission survey.

[17] Statistics on union membership were obtained from an unpublished table provided by the Bureau of Labor Statistics: "Percent of Wage and Salary Workers in Labor Unions, by Industry, Sex, and Race, May 1975." One group of industries, business and repair services (SIC 731–799) was included in the list of eligible industries even though only 9.5 percent of the employees were unionized, because the matched employer interviews selected for Service Employees locals were in this group.

all unionized workers, in all industries included in the survey, employed in that industry.[18] In each industry, South and non-South, one-fourth of all interviews was set aside for nounionized employers. In this way, a similar industrial distribution was obtained for union and nonunion interviews.

The unmatched establishments were randomly selected from EEO–1 data tapes, produced by the EEOC from reports submitted by establishments.[19] Lists of establishments were produced from these tapes, by computer, for each industry in each region.[20] The computer program randomly assigned a rank to each eligible establishment.[21]

These lists could not be used immediately, since the EEO–1 tapes do not indicate the union/nonunion status of establishments. Commission staff had to determine the union status of each establishment, beginning with the establishments randomly ranked highest on each list, until the required number of unionized and nonunionized establishments had been identified and selected.[22]

[18] The main focus of the study was employer and union practices that affect unionized employees in the selected industries, not on practices which occur in these industries as a whole. Hence it was desirable to obtain as much information as possible on the practices reported for those industries that employed many unionized workers. It was not an objective of the study to describe practices affecting nonunionized employees in these industries. The nonunion establishments were included strictly as a control group. In the non-South, the number of required interviews in each industry was computed for each of 26 industries, mostly two-digit SIC industries. In the South, only five broadly defined industries were used. The five southern industry groups included all of the 26 detailed industry groups used in the nonsouthern calculations.

[19] The 1976 EEO–1 tapes were used. The EEO–1 tapes include information on establishments' numbers of employees, SIC codes and SMSAs.

[20] Hence, 31 lists were produced: 26 for the non-South and 5 for the South. An establishment was included in a list only if it met all of the following criteria: 1. It must have been located in one of the SMSAs or SCSAs selected for the survey. 2. The EEO–1 form must have been either: a) a single-establishment employer report or b) an individual establishment report of a multiestablishment employer. Consolidated reports, headquarters unit reports, and special reports were not eligible. 3. The establishment must have had at least 200 employees. This restriction was designed to ensure that selected establishments had enough employees to have specific promotion, training, and transfer practices. (Nonetheless, a few establishments interviewed had fewer than 200 employees because the EEO–1 data, in these cases, proved to be outdated or inaccurate.)

[21] The chance of selection of a given establishment was weighted by the establishment's number of employees. Hence larger establishments had a greater chance than smaller ones of being ranked first on a list.

[22] While the BLS contract files and other information were used to some degree, the union status of an individual establishment was most often determined by a telephone call to the establishment to determine whether it was the one selected from the EEO–1 tape and whether any of the establishments' employees were represented under a union contract.

The lists of establishments were also screened to ensure that no more than one establishment of one company was selected in a given SMSA (e.g., no more than one Montgomery Ward's store in a given SMSA), that any establishment already selected as a matched establishment was not selected again as an unmatched establishment, and that the establishment's complement of blue-collar or hourly-paid white collar employees was sizable and that the sum of both types of employees constituted at least 25 percent of the establishment's work force.

In addition to the requisite number of unionized and nonunionized establishments for each industry and region, alternate establishments were also selected. The procedures used to select alternate respondents were identical to those used for primary respondents.

TABLE D.1 Nonreferral Membership of 15 Largest Private Sector Unions, 1974

Union	Membership	Referral Membership	Difference: Total Membership Minus Referral Membership	Percent in Referral Units
1. Teamsters	1,973,000	221,049	1,751,951	11.2
2. Auto Workers	1,545,000	0	1,545,000	0
3. Steelworkers	1,300,000	0	1,300,000	0
4. Electrical Workers (IBEW)	991,000	186,475	804,525	18.8
5. Machinists	943,000	15,417	927,583	1.6
6. Carpenters	820,000	288,225	531,775	35.1
7. Retail Clerks	651,000	56,580	594,420	8.6
8. Laborers	650,000	240,170	409,830	36.9
9. Service Employees	550,000	65,968	484,032	12.0
10. Meat Cutters	525,000	82,042	442,958	15.6
11. Clothing and Textile Workers	517,000	9,170	507,830	1.8
12. Communications Workers	499,000	0	499,000	0
13. Hotel and Restaurant Employees	452,000	114,548	337,452	25.3
14. Operating Engineers	415,000	136,368	278,632	32.9
15. Ladies' Garment Workers	405,000	40,829	364,171	10.1

Sources: U.S., Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1975* Bulletin 1937 (1977), pp. iii, 101. Equal Employment Opportunity Commission, "Total and Minority Group Membership, by Sex, in Referral Unions in the United States, by International Union Grouping, by International Union, 1974" (mimeographed, no date; from the EEOC Local Union EEO-3 Report).

Note: Total union membership in 1974 was 21,643,000. Total membership of all unions in table, excluding Carpenters, Laborers, and Operating Engineers, was 10,351,000, or 47.8 percent of total union membership. Total *nonreferral* membership of all unions in the table (excluding the Carpenters, Laborers and Operating Engineers) was 9,558,928 or 44.2 percent of total union membership.

Appendix E

Differences Between Unionized and Nonunionized Employers

Unionized and nonunionized establishments were included in the Commission survey to permit a comparison of procedures used by the two types of employers. The first table of chapter 3 shows differences between selection procedures used by unionized and nonunionized employers in the sample of 194 establishments included in the Commission survey. Chi-square[1] was used to determine whether these differences were statistically significant; the level of probability was set at 1 chance in 20, or P = .05.

Results of Chi-Square Tests: Unweighted Data

The results of the Chi-square tests are presented in table E.1 which shows the results regarding the association between the union-nonunion status of establishments and their use of particular selection factors. The calculations for the value of Chi-square were made on unweighted data, that is, on the raw data as computed directly from the interview schedules.

The Chi-square tests reported here indicate that the union-nonunion status of establishments does make a difference in the job advancement procedures used. Unionized establishments in the non-South as a whole made greater use of written tests for promotion decisions than nonunionized establishments. Nonunionized establishments made significantly greater use than unionized establishments of written performance evaluations, interviews, and supervisors' recommendations for both promotion and transfer and greater use of education qualifications for promotion.

Results of Chi-square Tests: Weighted Data

The Commission survey of establishments was designed to obtain extensive data on unionized establishments. Therefore, heavily unionized industries were oversampled compared to lightly unionized industries.[2] Further, in each industry, three-fourths of the establishments selected for interview were unionized, which amounted to an oversampling. Weights for the various industries and for unionized and nonunionized establishments within each industry were calculated to reflect the relative sizes of the different industries, and of unionized establishments within each industry[3] in the non-South and South. Chi-square tests were performed

[1] For a description of the Chi-square statistic and its uses, see William L. Hays, *Statistics for the Social Sciences* (New York: Holt, Rinehart and Winston, 1973), ch. 17.

[2] In app. D, it is noted that the proportion of all establishment interviews in a given industry was made equal to the proportion of all unionized workers employed in that industry. Hence, industries with a larger proportion of unionized workers than of all workers (unionized plus nonunionized) were oversampled.

[3] The weights for the relative sizes of industries were derived from establishment information on the EEOC's EEO-1 tapes. For comments on these tapes see app. D. For each industry in the survey, the number of establishments with over 200 employees was computed for the four selected nonsouthern metropolitan areas combined and also for the four southern metropolitan areas combined. The industry weights used in the weighting procedures were simply the proportions of such establishments, within

for the weighted data. The results indicate that all of the union-nonunion differences in the use of factors that were significant at the .05 level for the unweighted data (table E.1) were also significant for the weighted data.[4]

each industry and within each region, to the total of such establishments for each region.

[4] In addition, some union-nonunion differences that are not significant for the unweighted data for the non-South are significant for the weighted data for the non-South, namely the use of written performance evaluations for training decisions, educational qualifications for transfer decisions, prior related work experience for promotion, transfer, and training decisions, and supervisors' recommendations for training decisions.

TABLE E.1 Union/Nonunion Status of Establishments and Percentage of Establishments Using Particular Selection Factors, by Region, 1978–79

Use of Factor	Seniority: Establishments in Non-South	Seniority: Establishments in South	Written Tests: Establishments in Non-South	Written Tests: Establishments in South	Written Performance Evaluations: Establishments in Non-South	Written Performance Evaluations: Establishments in South	Interviews: Establishments in Non-South	Interviews: Establishments in South	Prior Specialized Training: Establishments in Non-South	Prior Specialized Training: Establishments in South
For Promotion										
Total	95% of 137	91% of 44	27% of 137	34% of 44	46% of 137	41% of 44	71% of 137	66% of 44	77% of 137	75% of 44
Union	96% of 101	91% of 33	**33%**[a] of 101	42% of 33	**35%** of 101	30% of 33	**65%** of 101	61% of 33	78% of 101	70% of 33
Nonunion	92% of 36	91% of 11	**11%** of 36	9% of 11	**78%** of 36	73% of 11	**86%** of 36	82% of 11	70% of 36	91% of 11
For Transfer										
Total	92% of 128	95% of 40	15% of 127	28% of 40	41% of 128	42% of 40	65% of 127	55% of 40	69% of 127	65% of 40
Union	94% of 95	97% of 32	17% of 94	31% of 32	**31%** of 95	34% of 32	**57%** of 94	50% of 32	64% of 94	59% of 32
Nonunion	88% of 33	88% of 8	9% of 33	12% of 8	**70%** of 33	75% of 8	**88%** of 33	75% of 8	85% of 33	88% of 8
For Training										
Total	80% of 59	67% of 12	46% of 59	50% of 12	41% of 59	58% of 12	71% of 59	75% of 12	73% of 59	75% of 12
Union	78% of 46	70% of 10	50% of 46	60% of 10	35% of 46	50% of 10	67% of 46	80% of 10	72% of 46	80% of 10
Nonunion	85% of 13	50% of 2	31% of 13	0% of 2	62% of 13	100% of 2	85% of 13	50% of 2	77% of 13	50% of 2

Use of Factor	Educational Qualifications: Establishments in Non-South	Educational Qualifications: Establishments in South	Prior Related Work Experience: Establishments in Non-South	Prior Related Work Experience: Establishments in South	Supervisors' Recommendations: Establishments in Non-South	Supervisors' Recommendations: Establishments in South	Age Qualifications: Establishments in Non-South	Age Qualifications: Establishments in South	Union Recommendations[b]: Establishments in Non-South	Union Recommendations[b]: Establishments in South
For Promotion										
Total	39% of 137	52% of 44	86% of 137	93% of 44	72% of 137	82% of 44	7% of 137	2% of 44	9% of 137	9% of 44
Union	**32%** of 101	42% of 33	83% of 101	91% of 33	**62%** of 101	76% of 33	6% of 101	3% of 33	13% of 101	12% of 33
Nonunion	**61%** of 36	82% of 11	94% of 36	100% of 11	**97%** of 36	100% of 11	8% of 36	0% of 11	0% of 36	0% of 11
For Transfer										
Total	40% of 128	48% of 40	80% of 128	78% of 40	70% of 128	70% of 40	6% of 128	5% of 40	12% of 128	10% of 40
Union	35% of 95	41% of 32	78% of 95	72% of 32	**63%** of 95	62% of 32	6% of 95	6% of 32	17% of 95	12% of 32
Nonunion	54% of 33	75% of 8	88% of 33	100% of 8	**91%** of 33	100% of 8	6% of 33	0% of 8	0% of 33	0% of 8
For Training										
Total	56% of 59	58% of 12	71% of 59	83% of 12	63% of 59	75% of 12	14% of 57	17% of 12	14% of 59	17% of 12
Union	52% of 46	70% of 10	65% of 46	90% of 10	54% of 46	70% of 10	14% of 44	20% of 10	17% of 46	20% of 10
Nonunion	69% of 13	0% of 2	92% of 13	50% of 2	92% of 13	100% of 2	15% of 13	0% of 2	0% of 13	0% of 2

Source: Data collected by the U.S, Commission on Civil Rights' survey, August 1978–April 1979.

a. **Bold** type indicates that the union/nonunion difference is statistically significant at the .05 level.

b. Tests of significance not calculated. Nonunionized establishments could not possibly use union recommendations as a selection factor, so union/nonunion differences reflect definitional differences.

This table provides a detailed breakdown for information presented in table 3.1 in Chapter 3.

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