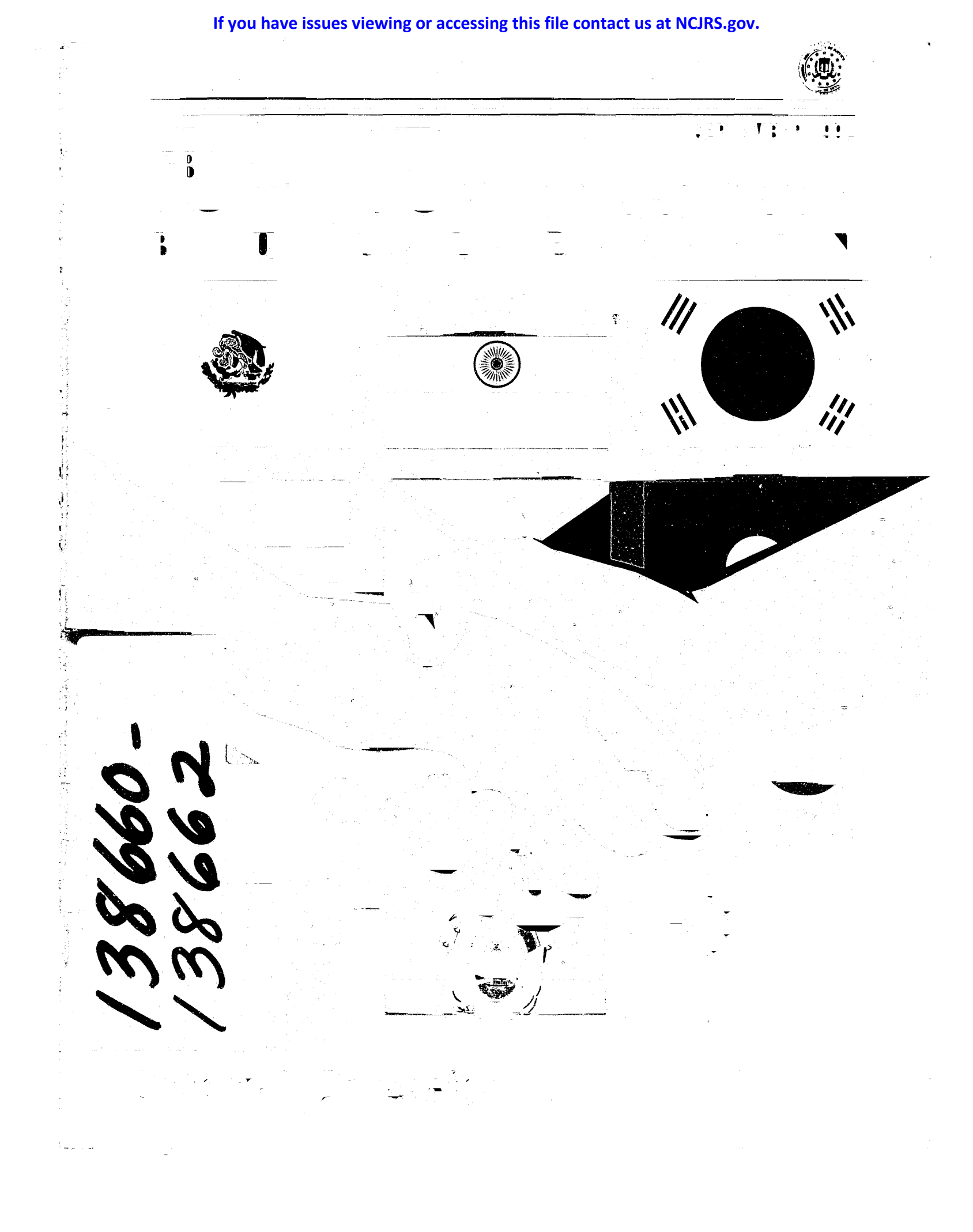

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Features

Focus on Cultural Diversity

Departments

Photo courtesy of Dan Boyd

On the Cover: As the United States becomes an increasingly multicultural society, American law enforcement officers must learn to adapt to a changing world.

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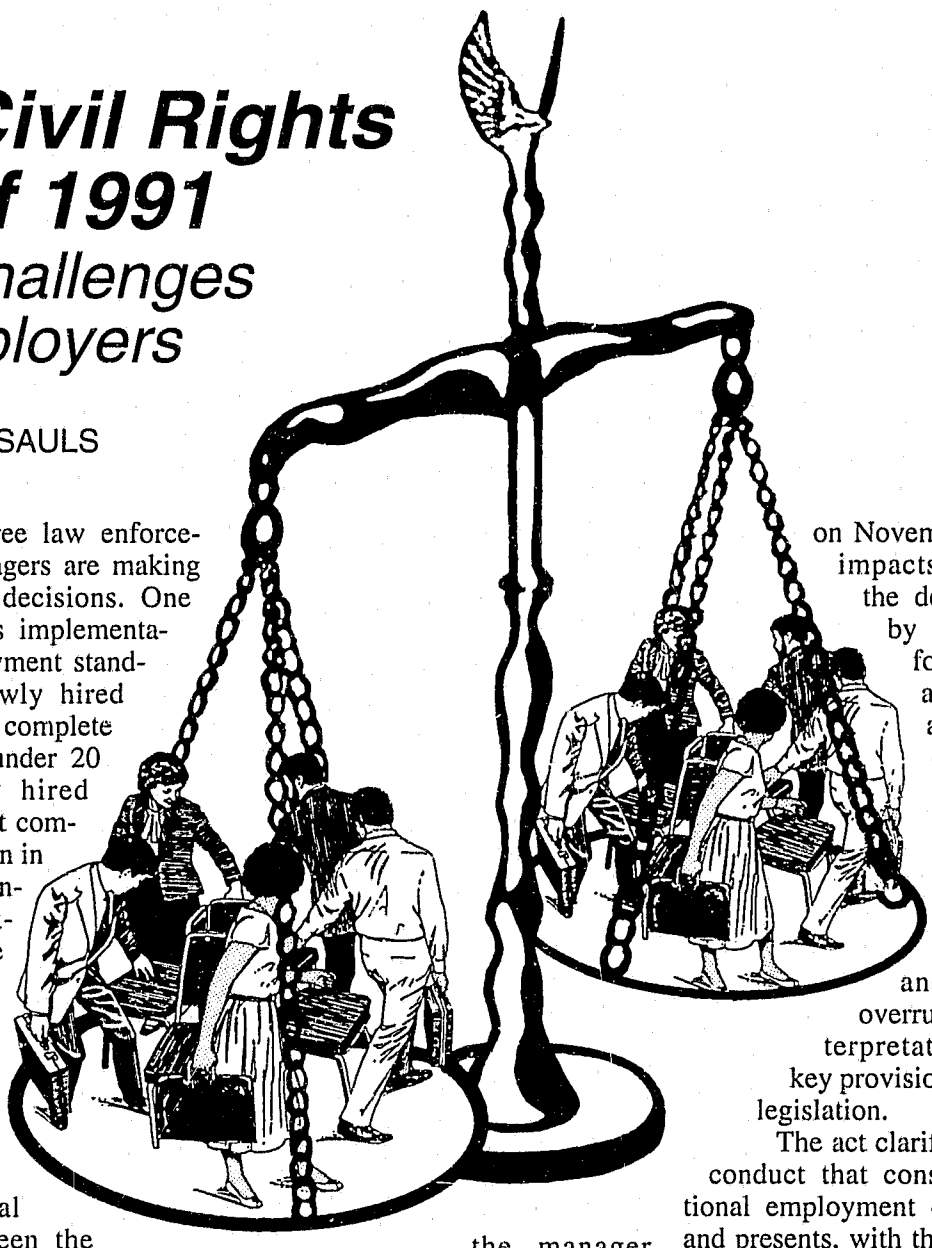
The Civil Rights Act of 1991

New Challenges for Employers

By
JOHN GALES SAULS



Suppose three law enforcement managers are making personnel decisions. One manager approves implementation of an employment standard requiring newly hired female officers to complete a 2-mile run in under 20 minutes. Newly hired male officers must complete the 2-mile run in under 18 1/2 minutes. These maximum times are based on research that indicates an equal quantum of fitness is shown by the different times for males and females because of physical differences between the sexes.

A second manager is making a promotional decision. Two equally qualified candidates, one white and one black, are competing for promotion to captain. In an effort to increase the number of minorities in the department's leadership ranks, the manager chooses the black candidate.

The third manager hopes to enhance the professionalism of the department. This manager elects to adopt a college degree requirement for newly hired police officers.

The Civil Rights Act of 1991, signed into law by President Bush on November 21, 1991, impacts on each of the decisions made by these law enforcement managers. This act amends prior employment discrimination law, primarily Title VII of the Civil Rights Act of 1964, and effectively overrules judicial interpretation of some key provisions of previous legislation.

The act clarifies the sort of conduct that constitutes intentional employment discrimination and presents, with the provision of new remedies and reallocation of burdens of proof, new challenges to employers who litigate claims of employment discrimination. This article discusses the impact of this legislation on law enforcement employers[1] and suggests steps these employers might take to

ensure compliance with the new provisions.

Consideration of Forbidden Factors

Prior to the 1991 amendments, Title VII made it unlawful for an employer "...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...." Nor could an employer "...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."[2] The U. S. Supreme Court described this prohibition as "...the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[3]

Nonetheless, the precise impact of this announcement was a matter of dispute prior to the 1991 amendment. For example, in *Price Waterhouse* v. *Hopkins*,[4] Hopkins, a former senior manager in the accounting firm, filed suit against Price Waterhouse alleging that it had, in its decision to deny her partnership, discriminated against her on the basis of her sex in violation of Title VII. Evidence presented by Hopkins showed that at the time it declined to make her a partner, Price Waterhouse had 662 partners, 7 of whom were women. Of 88 persons proposed for partnership that year, Hopkins was the sole female.

In the materials considered by Price Waterhouse in the partnership decision were a number of accolades for Hopkins indicating a considerable record of achievement as an employee of the firm. Also present were statements indicating that Hopkins, at times, had difficulty with other staff members and was sometimes abrupt and abrasive in these relations.

Included as well were comments indicative of sexual prejudice. One partner negatively characterized Hopkins as "macho." Another speculated that Hopkins "overcompensated for being a woman." A third suggested that she take "a course in charm school."

Furthermore, the messenger from the decisionmaking board, who told Hopkins that her candidacy had been placed on hold, made suggestions to improve her chances for future favorable consideration. Specifically, she was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[5]

Hopkins also presented expert testimony from a social psychologist. This psychologist noted that based on the facts presented, sex stereotyping likely influenced the partnership process at Price Waterhouse.

In its 1989 decision, the Court held that even if Price Waterhouse improperly considered sex in its partnership decision, the firm could escape a finding of illegal discrimination. The Court stated that to do this, Price Waterhouse needed to show that it *would have* reached the same decision regarding Hopkins absent consideration of her sex.

Under the terms of the 1991 amendment, however, a *violation* is shown when an employee demonstrates that "race, color, religion, sex, or national origin was a motivating factor"[6] in an employment

"The [Civil Rights] Act of 1991...clarifies the sort of conduct that constitutes intentional employment discrimination...."

Special Agent Sauls is a legal instructor at the FBI Academy.

action. This eliminates the previously available defense that the employer *would have* made the same decision absent consideration of the forbidden factors.

As a result, any demonstrated consideration of the forbidden factors, combined with the selection of a person of a different race, sex, color, national origin or religion than that of the complainant, is likely sufficient to constitute proof that consideration of the forbidden criteria was "a motivating factor." The employer that demonstrates the same decision would have been reached anyway does not escape a finding of illegal discrimination; it only limits the range of relief available to the employee.[7]

To escape a finding of discrimination, an employer must assert that although it considered a forbidden factor, this consideration did not motivate the action taken. Although the burden of proof is on the plaintiff on this point, an employer proven to have considered a forbidden factor in an employment action is at a considerable legal disadvantage.

"Affirmative Action" and "BFOQ" Exceptions

The 1991 amendments did not disturb the two exceptions to Title VII's general prohibition of consideration of the forbidden factors in employment actions. These are the "bona fide occupational qualification" (BFOQ) exception, and the "affirmative action" exception. However, the use of these exceptions for law enforcement employers is limited.

The BFOQ exception allows employers to consider the "...religion, sex, or national origin [of an employee] in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business...."[8] This exception is quite difficult to use in practice.

> ***"...courts require less of a showing of 'business necessity' where public safety hangs in the balance."***

For example, in *International Union, UAW* v. *Johnson Controls*,[9] the employer, a manufacturer of electric storage batteries, sought to limit the exposure to toxic lead of its female employees of childbearing age in order to prevent injury to the unborn. In assessing this intended use of the exception, the Supreme Court ruled that the business of Johnson Controls was the manufacture of batteries, not protection of the unborn, and therefore, protection of the unborn could in no way be necessary to the operation of the business.

The Court noted that "[f]ertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility."[10]

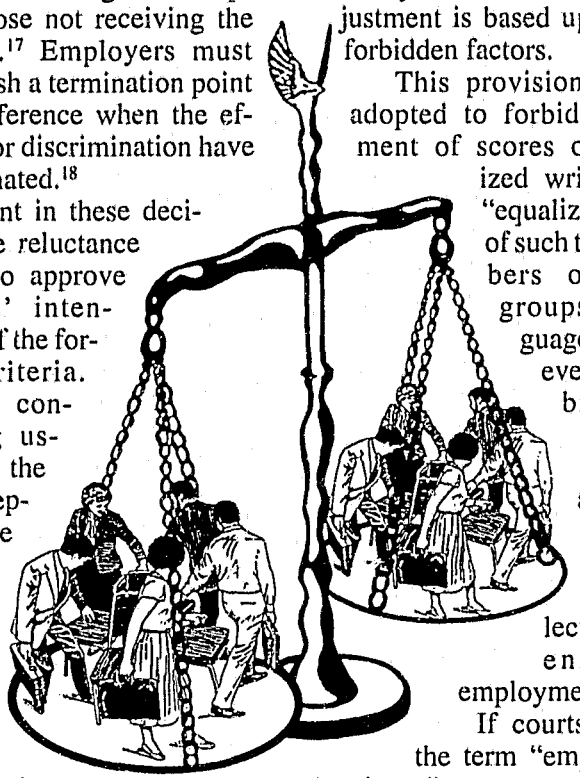
Similarly, in *Fernandez* v. *Wynn Oil Co.*,[11] the employer allegedly denied a female employee an account representative position because in this position she would have to interact with businessmen native to Latin American countries. The employer believed that because of differences in culture, most Latin American businessmen would not accept a woman in the position in question. The court concluded this justification failed to place the employer within the BFOQ exception because "...stereotypic impressions of male and female roles do not qualify gender as a BFOQ. Nor does stereotyped customer preference justify a sexually discriminatory practice."[12]

It is clear that sex, religion, and national origin qualify as BFOQs only where an absence of the requirement would "...destroy the essence of the business or would create serious safety and efficacy problems."[13] It also should be noted that race and color are specifically excluded from the exception and cannot be used lawfully as BFOQs.

A second exception that allows consideration of the forbidden criteria in employment actions is the "affirmative action" exception. Use of this exception is also strictly limited by courts and is permissible only as a necessary remedy for prior discrimination.[14]

An employer that has previously disadvantaged members of a particular race, religion, or sex, or persons of a particular national origin or color may extend preference to the same group in an effort to correct for past discrimination. Great care must be exercised in de-

termining the effects of prior discrimination,[15] and in crafting the preference so that it is not overbroad[16] and does not unnecessarily frustrate the legitimate aspirations of those not receiving the preference.[17] Employers must also establish a termination point for the preference when the effects of prior discrimination have been eliminated.[18]



Apparent in these decisions is the reluctance of courts to approve employers' intentional use of the forbidden criteria. Employers contemplating using either the BFOQ exception or the affirmative action exception should proceed with great caution and deliberation. They should be mindful that the use of the forbidden criteria in employment actions for other reasons is not lawful.

"Norming" of Test Scores Prohibited

A second issue addressed by the 1991 amendment to Title VII is that of adjustment (or "norming") of scores for employment-related tests based on race, color, sex, religion, or national origin in relation to hiring or promotional selection. The 1991 amendment specifically prohibits such adjustment.[19] This provision merely makes explicit what was already implicit, i.e., adjustment of test scores upon which employment actions will be taken is contrary to Title VII where the adjustment is based upon the act's forbidden factors.

This provision was likely adopted to forbid the adjustment of scores on standardized written tests to "equalize" the impact of such tests on members of minority groups. The language used, however, has a much broader impact, particularly in the arena of assessment of physical fitness in selection for law enforcement employment.

If courts interpreted the term "employment-related test" to mean a measure of individual performance, then certain assessments of physical characteristics do not fall within the definition. As such, separate scoring scales based upon sex in these assessments would continue to be lawful. Included in this category are such things as height/weight proportionality and body fat assessment. Thus, sex-adjusted height/weight charts that are routinely used for weight control arguably would not violate Title VII's new "norming" prohibition.

More problematic are physical performance tests, such as timed runs and measured calisthenics, that have commonly been "normed" to equalize physiological differences between the sexes. The plain language of the amended statute prohibits this sort of well-intended equalization. Instead, it requires employers to use single physical performance standards for men and women, which may result in a disparate impact based upon sex.

Consequently, use of single physical performance standards for hiring or promotion violates Title VII if the standards have a disparate impact and do not come within the "business necessity" exception that permits standards with disparate impact. The challenges presented in attempting to demonstrate "business necessity" are discussed later in this article.

The amendment, however, does not prohibit all "normed" standards. Many employers have adopted "normed" standards pursuant to the exception to Title VII's prohibition, which allows limited preferential treatment to remedy past discrimination. Such standards continue to be lawful under the amended statute.[20] Section 116 of the Civil Rights Act of 1991 provides that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."

"Normed" standards may also be lawfully used where they are not the basis of hiring or promotion. For example, a police department might adopt a voluntary physical fitness program where the progress of participants is assessed using sex-ad-

justed scores.[21] Since these scores are not used to determine whether someone is hired or promoted, their "norming" is not illegal.

New Remedies for Intentional Discrimination

Before passage of the Civil Rights Act of 1991, Title VII's remedies were limited to employment matters. Its design placed the burden on employers to put the victims of illegal discrimination in the employment position they would have occupied absent the discrimination. Available remedies for victims of illegal discrimination included reinstatement, back pay, and other measures to position employees where they would have been absent the discrimination. Injunctive relief to prevent further discrimination by the employer was also available.

The amended statute retains these remedies and adds limited compensatory (and for defendants who are private employers, punitive) damages to remedy the effects of the emotional distress associated with employment discrimination. These damages are limited to $300,000 per plaintiff for employers with 500 or more employees and lesser amounts for smaller employers.[22] The statute provides a right to have such damages determined by a jury as well.[23]

In addition, Title VII has always provided for payment to the prevailing party of reasonable attorneys' fees. Thus, employers who are sued and fail to prevail are required to pay the litigation expenses of the complainant. The 1991 amendments extended to judges the discretion to include fees for the services of experts within attorneys' fee awards.[24]

This combination of compensatory damages, enhanced provision for payment of the successful plaintiff's litigation expenses, and the right to have the matter decided by a jury increases the uncertainty and potential expense of litigation under Title VII.[25] Consequently, employer policies that seek to avoid such litigation where practicable are even more sensible under the amended statute and should be continued. This includes proactive examination of policies relating to such matters as hiring and promotion for Title VII compliance.

> ***"...law enforcement employers should select physical performance tests that simulate the physical challenges of the job."***

Burden of Proof in Disparate Impact Discrimination

It is critical that employers recognize that unless justified by business necessity, employment practices that operate to the disadvantage of groups of persons based upon race, color, sex, religion, or national origin are unlawful, regardless of the lack of an intent on the part of the employer to illegally discriminate.[26] This holds true even if these employment practices are apparently unbiased on their face.

For example, a written aptitude or achievement test on which a significantly higher percentage of whites achieve passing scores than minorities is a potential instrument of illegal discrimination.[27] So, too, is a subjective promotional process that advances a substantially higher percentage of whites than minorities.[28]

Claims of disparate impact discrimination are proven by statistical comparisons of either actual success rates of one group versus another or by the composition of the employee group in question versus the composition of the relevant qualified labor pool available.[29] The 1991 amendments place the burden of proof on the key defense to claims of disparate impact discrimination, the "business necessity" exception, on employers.

As a consequence, employers should scrutinize their employment standards to detect potential disparate impact. Where a standard with such potential is being used, the employer should assess whether the standard is required by "business necessity." Where it is not, the standard should be eliminated. If the employer retains a standard with potential disparate impact, it should be prepared to prove its necessity.

Establishing "Business Necessity" for Law Enforcement Employment

Establishing business necessity has been described as a "heavy burden"[30] that requires employers to prove that performance at the re-

quired level has a "manifest relationship to the employment in question."[31] Law enforcement employers must be prepared to prove that the level of performance required on a test is *necessary* to perform the duties of the job in question safely and effectively.

In assessing a law enforcement employer's burden, three principles likely come into play. First, courts have recognized that employers making personnel decisions that have an impact on public safety need greater latitude in establishing "business necessity." Consequently, courts require less of a showing of "business necessity" where public safety hangs in the balance. In this regard, the U.S. Court of Appeals for the 10th Circuit stated:

"When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminated against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related."[32]

Thus, law enforcement employers enjoy greater latitude in hiring police officers than clerical employees because police officers play a critical role in preserving public safety. In this regard, one court observed:

"Unlike other work positions this Court or the Supreme Court has considered, the position of officer on the Dallas police force combines aspects of both professionalism and significant public risk and responsibility. We regard this distinction as crucial..."[33]

A second "business necessity" principle is that the greater the disparate impact of a particular standard, the stronger the justification required. For example, a standard that excludes a slightly greater percentage of women than men may be lawful in the absence of any demonstration of "business necessity."[34] However, law enforcement standards that exclude nearly all women, such as a requirement that all officers be at least 6 1/2 feet tall, would require an exhaustive showing of "business necessity" to be lawful under Title VII.[35]

> ***"Use of [the affirmative action] exception is...permissible only as a necessary remedy for prior discrimination."***

A third principle of "business necessity" contrasts standards that can be achieved versus those that are innate. The standards that may be achieved by most are more easily defended than those that focus on characteristics determined by birth or circumstance.

For example, it is much easier to defend a high school diploma requirement than one that requires applicants to be at least 6 feet tall. The high school diploma is accessible to vast multitudes if they put forth the required effort, but 6-foot stature is not a matter of desire, ability, and effort. A person can have little, if any, impact on adult stature.

Physical fitness standards frequently become a "business necessity" legal battleground for law enforcement employers. The fact that law enforcement duties require a certain level of physical fitness is beyond dispute. However, the precise amount required and appropriate means of measurement are markedly more open to dispute. In order to demonstrate successfully the "business necessity" of a physical performance standard, law enforcement employers must be prepared to demonstrate that the quantum of fitness required is necessary for successful performance in the position in question.

Law enforcement employers have failed, at times, to make such a showing successfully. For example, in *Harless* v. *Duck*,[36] the Toledo Police Department used a physical ability test to select patrol officers. In order to pass, applicants needed to complete three parts of the four-part test. The parts included 15 push-ups, 25 sit-ups, 6-foot standing broad jump, and a 25-second obstacle course. After finding that the physical ability test impacted disparately on women, the court noted that the police department showed no justification for the "types of exercises chosen or the passing marks for each exercise."[37]

Especially instructive are the cases in which public safety entities successfully defended physical performance tests shown by plaintiffs to have a disparate impact.[38] It is noteworthy that the physical performance tests used in such cases consisted of performing tasks commonly encountered by individuals engaged in the type of employment in question, rather than abstract measures of particular physical abilities. For example, using a ladder climb or hose carry rather than pushups to assess the physical abilities of those applying to be firefighters would greatly increase the likelihood of successful defense.

Consequently, law enforcement employers should select physical performance tests that simulate the physical challenges of the job. For example, a short, timed run that simulates the type of sprint officers frequently engage in to apprehend suspects might be more easily defended than a timed 2-mile run, because officers would almost never be called upon to run such a distance as a part of their enforcement duties. Similarly, a test of physical strength measured using a machine that simulates the motion and strength required to handcuff a resisting suspect might be more easily defended than push-ups or pull-ups.

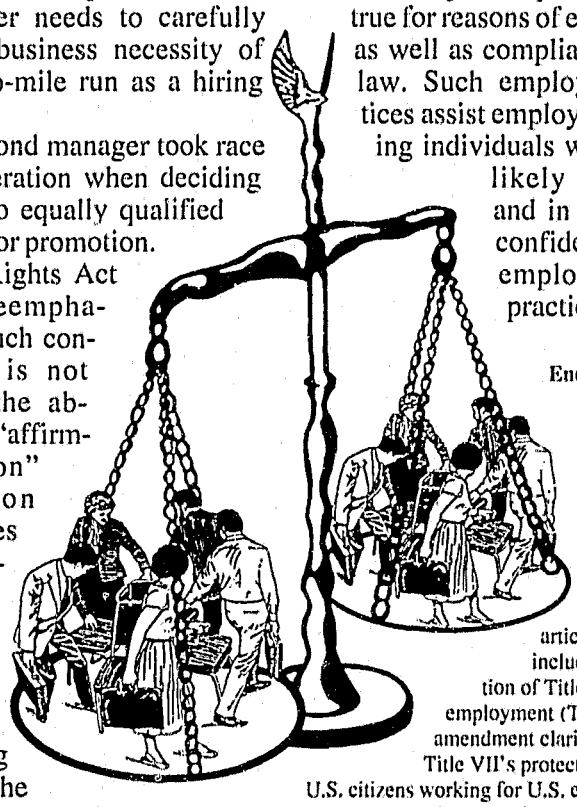
Summary

At the beginning of this article, three examples were set forth. In the first example, the manager sought to implement a sex-equalized physical performance test as part of the department's hiring process. Such a provision violates the 1991 Civil Rights Act prohibition of "norming" employment standards. Because a unisex standard for a timed 2-mile run could possibly have a disparate impact on women, this manager needs to carefully assess the business necessity of a timed two-mile run as a hiring standard.

The second manager took race into consideration when deciding between two equally qualified candidates for promotion. The Civil Rights Act of 1991 reemphasized that such consideration is not lawful in the absence of an "affirmative action" justification that satisfies that exception's strict requirements.

The third manager, hoping to enhance the professionalism of the department, adopted a college degree requirement for newly hired police officers. Because statistics indicate such a standard impacts disparately on certain minorities, this manager should carefully assess the business necessity of this new employment standard. A demonstrated need for well-educated, professional officers has been held to be a sufficient justification to require at least a certain number of college credits.[39]

Employers will likely benefit from assessing all of their employment practices in light of Title VII. In doing so, they should seek practices that evaluate, in a fair and uniform way, knowledge, skills, and abilities necessary for the performance of the job in question. This is true for reasons of effectiveness, as well as compliance with the law. Such employment practices assist employers in selecting individuals who are most likely to succeed and in assuring the confidence of their employees in the practices used.✦



Endnotes

[1] Due to limitations of space, certain provisions of the Civil Rights Act of 1991 are not discussed in the body of this article. These include: 1) Application of Title VII to overseas employment (The 1991 amendment clarifies the fact that Title VII's protections extend to U.S. citizens working for U.S. employers in overseas operations. 42 U.S.C. 2000e(f)(1991), 42 U.S.C. 2000e-1(B)(b)(1991).); 2) filing time for suits against the U.S. Government (The 1991 amendment extends the filing time, from 30 to 90 days, for court actions under Title VII where the U.S. Government is the defendant. 42 U.S.C. 2000e-16(c)(1991).); 3) limitation on collateral attack on consent decrees (The 1991 amendment contains a provision making it futile for employees to attack collaterately consent decrees and judgments of which the employees had actual notice and an opportunity to present objections, or whose interests were adequately represented by others who challenged the decree on the same legal grounds and similar facts. 42 U.S.C. 2000e-2(n)(1)(A) *et seq.* (1991).

The 1991 amendment also revitalized section 1981 of the Civil Rights Act of 1866 (42 U.S.C. 1981) by clearly extending rights protected under that statute to discrimination

that occurs after the formation of an employment relationship. Previously, the statute had been interpreted to apply only to the formation of the employment relationship. The amendment also extends the protection of this statute to victims of nongovernmental discrimination.

The 1991 amendment also extends the time during which an employee may challenge discriminatory seniority systems. The statute of limitations will now run from the latter of the time of adoption of the system, the time the employee becomes subject to the system, or the time when the employee is actually injured by the system. 42 U.S.C. 2000e-5(e) (1991).

[2] 42 U.S.C. 2000e-2(a)(1991).

[3] *Price Waterhouse* v. *Hopkins*, 109 S.Ct. 1775, 1784 (1989).

[4] *Id.*

[5] *Id.* at 1782.

[6] 42 U.S.C. 2000e-2(m) (1991).

[7] 42 U.S.C. 2000e-5(g)(B)(1991)(only declaratory relief, injunctive relief, and attorney fees and costs are available in this circumstance).

[8] 42 U.S.C. 2000e-2(e)(1991).

[9] 111 S.Ct. 1196 (1991).

[10] *Id.* at 1207.

[11] 653 F.2d 1273 (9th Cir. 1981).

[12] 653 F.2d at 1276-77.

[13] *Id.*

[14] *See Johnson* v. *Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987).

[15] *See Hammon* v. *Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 2023 (1988).

[16] *Cf. City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706 (1989).

[17] *See Steelworkers* v. *Weber*, 443 U.S. 193 (1979). EEOC guidelines for voluntary affirmative action are found at 29 CFR 1608.3(b) *et seq.*

[18] *See Hammon* v. *Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 2023 (1988).

[19] 42 U.S.C. 2000e-2(l)(1991).

[20] *See Johnson* v. *Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987).

[21] For an excellent discussion of the legal issues associated with such programs, see Schofield, "Establishing Health and Fitness Standards: Legal Considerations," *FBI Law Enforcement Bulletin*, June 1989, 25-31.

[22] 42 U.S.C. 1981a(b)(3)(1991).

[23] 42 U.S.C. 1981a(c)(1991).

[24] 42 U.S.C. 2000e-5(k)(1991).

[25] A contested issue under the amended statute is whether its provisions should be given retroactive effect, particularly the compensatory damages provisions. There is no language in the amendment that gives its new remedies retroactive effect. The issue has been twice decided at the Circuit Court of Appeals level, both courts holding that retroactive application is not appropriate. *Vogel* v. *Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Fray* v. *Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992).

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

[27] *Id.*

[28] *See Watson* v. *Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988).

[29] *Id. See also, Wards Cove Packing Co.* v. *Atonio*, 109 S.Ct. 2115 (1989).

[30] *See Chambers* v. *Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

[31] *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977).

[32] *Spurlock* v. *United Airlines*, 475 F.2d 216, 219 (10th Cir. 1972) (approving requirement of 500 hours of previous pilot experience and a college degree for airline pilot trainees).

[33] *Davis* v. *City of Dallas*, 777 F.2d 205, 211 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1985) (approving requirement of at least 45 college credits with at least a "C" average, no recent marijuana use, and no recent hazardous driving convictions for consideration in hiring police officers).

[34] In general, so long as the "pass rate" for the disadvantaged group is at least 80% of that of the comparison group, the disparity is not considered legally significant. See EEOC "Uniform Guidelines on Employee Selection Procedures," 29 CFR 1607.4(D)(1988).

[35] *See Zamlen* v. *City of Cleveland*, 906 F.2d 209 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 1388.

[36] 619 F.2d 611 (6th Cir. 1980).

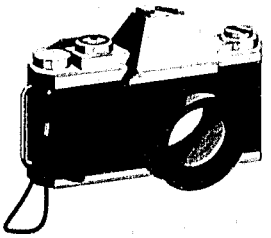
[37] *Id.* at 616.

[38] *See Evans* v. *City of Evanston*, 881 F.2d 382 (7th Cir. 1989); *Zamlen* v. *City of Cleveland*, 906 F.2d 209 (6th Cir. 1990); *United States* v. *Wichita Falls*, 704 F.Supp 709 (N.D. Tex. 1988).

[39] *Davis* v. *City of Dallas*, 777 F.2d 205 (5th Cir. 1985).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Wanted: Photographs



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