

NOTES

THE ROLE OF STATISTICAL EVIDENCE IN TITLE VII CASES

In two decisions handed down on the same day, the Supreme Court attempted to clarify the requirements for establishing and rebutting a *prima facie* case of employment discrimination under Title VII of the Civil Rights Act of 1964.¹ One case involved objective and facially nondiscriminatory job qualification standards and the other subjective and relatively standardless hiring procedures, and the Court faced problems of proof peculiar to each.² In spite of their differences, however, each case emphasized the importance of the proper use of statistical evidence.

The hiring standards challenged in *Dothard v. Rawlinson*³ were objective and facially neutral. The plaintiff alleged that Alabama's statutory job qualifications, which set minimum height and weight requirements for prison guards, excluded a disproportionate number of women.⁴ The

¹ 42 U.S.C. § 2000c *et seq.* (1970 & Supp. V 1975).

² Employers sued under Title VII generally fall into two categories. The first group consists of those who promulgate objective and inflexible job qualification standards which are alleged to have a discriminatory impact on minority applicants. Examples of such hiring criteria include a requirement of a high school degree or a passing score on a standardized intelligence test. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 427-28 (1971). The second category consists of employers who use subjective and discretionary hiring procedures. These employers pose a difficult problem for the courts, since it is not always possible to determine why a particular applicant, or group of applicants, was not hired or promoted. *See, e.g., International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (racial discrimination in the trucking industry).

The Supreme Court has recognized a dichotomy in Title VII cases which bears some similarity to the distinction between objective and subjective hiring procedures presented here. In a footnote to its decision in *Teamsters*, the Court observed:

"Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment. . . .

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory. . . . Either theory may, of course, be applied to a particular set of facts.

431 U.S. at 335-36 n.15.

Cases involving objective hiring criteria will almost always be tried under what the Court calls a "disparate impact" theory. The plaintiff will allege that facially neutral job qualification standards have a discriminatory impact on a group protected by Title VII. However, when a plaintiff challenges the subjective and discretionary aspect of a hiring procedure, he may employ either theory. Generally, as in *Teamsters*, the plaintiff will allege that the employer is guilty of "disparate treatment" of a protected class. However, the plaintiff may also argue, under a "disparate impact" theory, that the employer's facially neutral, though subjective, hiring procedure operates to exclude members of a protected class disproportionately. If the plaintiff uses this latter theory, he will not be required to prove that the defendant had discriminatory motives or intentions. *See generally* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 92-93 (1972) [hereinafter cited as Blumrosen].

³ 433 U.S. 321 (1977).

⁴ *Id.* at 324.

employment practices challenged in *Hazelwood School District v. United States*⁵ were subjective and not based on readily quantifiable criteria. The Government argued that the Hazelwood School District's highly discretionary procedure for hiring teachers was operated by the defendants to exclude a disproportionate number of black applicants.⁶

Though the Court did not explicitly draw a distinction between Title VII suits involving objective job qualification standards and those dealing with more subjective aspects of a hiring procedure, a comparison of *Dothard* and *Hazelwood* suggests that the requirements for establishing and rebutting a prima facie case can vary significantly, depending on the kind of hiring procedure employed by the defendant. Of particular importance is the Court's discussion of the use of statistics in the two cases. In addition, because *Dothard* and *Hazelwood* represent relatively clear examples of two different types of Title VII cases, they shed considerable light on the Court's view of the options available to the plaintiff and the defendant in Title VII actions generally. The two decisions also highlight some of the difficulties inherent in employment discrimination suits which rely heavily on statistical proof.

This note will discuss the proof requirements of Title VII in light of the Supreme Court decisions in *Dothard* and *Hazelwood*. The facts of each case will be presented, together with separate discussions of the requirements suggested by the Court for establishing and rebutting a prima facie case of employment discrimination in each case. The two decisions will then be compared with a view toward discerning the similarities and differences between cases involving objective job qualification standards and those in which the defendant has employed more subjective hiring procedures.

I. DOTHARD AND OBJECTIVE HIRING CRITERIA

In *Dothard*, the Court was asked to consider a challenge to clearly-defined, objective hiring criteria. The challenged criteria were contained in an Alabama statute which required prison guards to meet certain minimum height and weight requirements. Diana Rawlinson was a college graduate whose major course of study was correctional psychology.⁷ She applied for a job as a prison guard with the Alabama Board of Corrections, but was rejected because she failed to meet the height and weight minima.⁸ She then filed a class action suit in federal district court, alleging that the height and weight standards were violative of Title VII of the Civil Rights Act of 1964.⁹

The plaintiff alleged that Alabama's requirement that prison guards weigh at least 120 pounds and be at least 5 feet 2 inches tall excluded a

⁵ 433 U.S. 299 (1977).

⁶ *Id.* at 306-07 & n.12.

⁷ *Dothard v. Mieth*, 418 F. Supp. 1169, 1177 (M.D. Ala. 1976).

⁸ ALA CODE tit. 55, § 373 (109) (Supp. 1973), provides that all applicants and appointees for prison guard positions be at least 5'2" tall and weigh at least 120 lbs. 418 F. Supp. at 1178. Rawlinson's application was rejected because of her weight. *Id.*

⁹ 418 F. Supp. at 1178-79. The named party was originally Brenda Mieth, Rawlinson's co-plaintiff, who challenged height and weight requirements for the position of Alabama State Trooper as violative of the equal protection clause of the fourteenth amendment. A three-judge district court ruled against Alabama on this constitutional issue. *Id.* at 1172. The state did not appeal. See 433 U.S. at 324 nn.4 & 5.

disproportionate percentage of women. Her prima facie case was founded almost entirely on two types of statistics. Initially, she compared the percentage of women prison guards (12.9%) with the percentage of women in Alabama's total labor force (36.89%), and concluded that women were underrepresented.¹⁰ She then introduced National Census figures which showed that the height and weight minima would exclude 33.29% of the women in the United States between the ages of 18 and 79 while excluding only 1.28% of men between the same ages.¹¹ In response, the defendants challenged the probative value of general census statistics, and they defended the height and weight minima as a job-related "business necessity."¹² A three-judge district court¹³ found for the plaintiff.¹⁴

On appeal, the Supreme Court held that the plaintiff had adequately demonstrated the discriminatory impact of the height and weight minima to establish a prima facie violation of Title VII,¹⁵ and that the defendants' attempt to show that the hiring standards were job-related had failed to rebut this prima facie case.¹⁶ Justice Stewart, writing for the majority of the Court, reaffirmed the view first expressed by the Court in *Griggs v. Duke Power Co.*¹⁷ that job qualification standards which disproportionately exclude members of a protected class can violate Title VII whether or not there is any evidence that the defendant intended to discriminate.¹⁸ The Court's opinion focused on whether the national population statistics introduced by the plaintiff sufficiently demonstrated such an impact on female applicants. The defendants had argued that such "generalized national statistics should not suffice to establish a prima facie case," but rather that the plaintiff should have been required to introduce figures regarding "actual applicants for [prison guard] positions."¹⁹

The Court disagreed, Justice Stewart observing that there is "no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants."²⁰ The Court noted that applicant data might not accurately indicate the discriminatory effect of the hiring criteria at issue, since a "potential applicant could easily measure her height and weight and conclude that to make an application would be futile."²¹ Therefore, the Court concluded, the plain-

¹⁰ 418 F. Supp. at 1178-79.

¹¹ *Id.* at 1179.

¹² *Id.* at 1182. See notes and text at notes 35-37 *infra*.

¹³ See note 9 *supra*.

¹⁴ 418 F. Supp. at 1183-84.

¹⁵ 433 U.S. at 332. The plaintiff in *Dothard* had also challenged an Alabama regulation which explicitly excluded women from certain "contact positions" in state maximum security institutions. The Court found that sex was a bona fide occupational qualification for these positions, and therefore rejected the plaintiffs' claim on this issue. *Id.* at 335-37. See Civil Rights Act of 1964, Title VII, § 703 (a), 42 U.S.C. § 2000e-2(e) (1970 & Supp. V 1975). See also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam); *id.* at 542 (Marshall, J., concurring); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969). This issue will not be further discussed in this note.

¹⁶ *Id.* at 331-32.

¹⁷ 401 U.S. 424, 432 (1971).

¹⁸ 433 U.S. at 329.

¹⁹ *Id.* at 330.

²⁰ *Id.*

²¹ *Id.* Justice Stewart also observed that national population statistics were sufficient because, since the case involved physical characteristics, there was "no reason to suppose" that

tiff had introduced enough evidence to warrant an inference of sex discrimination and had established a prima facie violation of Title VII.

The defendants had attempted to rebut the plaintiff's prima facie case by proving that the height and weight requirements had a relationship to strength, "a sufficient but unspecified amount of which is essential to effective job performance" as a prison guard.²² Because the defendants had presented virtually no evidence at trial to support this assertion, the Court affirmed the decision of the trial court that Alabama had failed to prove its hiring criteria were job-related.²³

A. Establishing a Prima Facie Case

The Court in *Dothard*, following other decisions involving objective job qualification standards,²⁴ held that the plaintiff made out a prima facie case by demonstrating that Alabama's hiring standards had a disproportionate and discriminatory impact on a protected class.²⁵ As in *Dothard*, the plaintiff generally carries this burden by using statistics to demonstrate: 1) that the group in question is underrepresented in the defendant's work force; and 2) that this underrepresentation is a result of the defendant's hiring standards.²⁶ In order to establish this latter allegation, the plaintiff introduces statistics which justify a reasonable inference that the defendant's hiring criteria disproportionately exclude actual or potential minority applicants.²⁷ As the Court observed in *Dothard*, a comparison between characteristics of the general population and members of the excluded group may be highly probative in supporting this inference.

B. Rebutting a Prima Facie Case

Once the plaintiff has established a prima facie violation of Title VII, the burden shifts to the defendant to rebut any inferences of discrimination. *Dothard* dealt with two methods of rebuttal: the defendant can introduce evidence which demonstrates that inferences of discrimination based on the statistics offered by the plaintiff are unwarranted,²⁸ or the defendant can establish that its objective hiring criteria are a "business necessity," essential for effective job performance.²⁹

The *Dothard* Court observed that once the plaintiff has established a prima facie case with reference to general statistical proof, the defendant has the burden of coming forward with "countervailing evidence of his own" regarding "fallacies or deficiencies in the data offered by the plaintiff."³⁰ The employer can, for example, attempt to demonstrate that the

analysis of a more narrowly defined population would yield a different result in demonstrating the discriminatory impact of the height and weight minima. *Id.*

²² *Id.* at 331.

²³ *Id.* at 331-32.

²⁴ See, e.g., *Griggs*, 401 U.S. at 436.

²⁵ 433 U.S. at 329-31.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.* at 330.

²⁹ See *id.* (citing *Griggs*, 401 U.S. at 436).

³⁰ *Id.* at 331. See *id.* at 338-39 (Rehnquist, J., concurring in the result and concurring in part). Some of this evidence regarding deficiencies in the plaintiff's statistical proof would not,

plaintiff's statistics are too general to provide even an approximation of the effect of the challenged hiring standards. But whether such an assertion, in and of itself, is sufficient to rebut a *prima facie* case is doubtful where the plaintiff has employed the best statistics available.³¹

The defendant might also introduce evidence regarding actual applicants for the job in question, in an effort to demonstrate that hiring standards which were discriminatory in theory did not actually operate to exclude minority applicants unlawfully.³² If such evidence were available, the defendants in *Dothard* might have introduced statistics showing that a reasonable percentage of women applicants for prison guard positions had been hired, and that the scarcity of women in the defendants' work force was the result of the fact that few had applied for the prison guard job. *Dothard* does not directly discuss the probative value of this kind of evidence when introduced to rebut a *prima facie* case, but the majority opinion does suggest that data regarding actual applicants may be misleading and unreliable. In discussing why the plaintiff will not be required to introduce statistics regarding actual applicants to establish a *prima facie* case, Justice Stewart observed:

The application process might not adequately reflect the actual *potential* applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.³³

Thus if height and weight minima will likely dissuade women from applying for jobs as prison guards, applicant data would appear to have very little probative value whether introduced to establish or to rebut a *prima facie* case of employment discrimination.

This conclusion applies to most cases involving objective, facially-neutral job qualification standards. The focus of the statistical analysis must be on the *potential* applicant pool, and not simply on those who actually applied for the job in question. Defendants who wish to rebut a *prima facie* showing of discrimination by introducing statistics regarding actual applicants will, by this reasoning, have little success.³⁴

Because the Court appears reluctant to consider challenges to the use of general population statistics in cases involving objective hiring criteria, defendants will likely attempt to prove that their hiring standards are job-related. The Court has suggested two basic requirements for establishing that facially-neutral, objective standards are job-related. First, the job qualification (*e.g.*, height and weight requirements) must correlate extremely closely with the associated characteristics which are desired (*e.g.*, strength).³⁵ Second, the associated characteristics must be essential, not

strictly speaking, constitute a rebuttal to a *prima facie* case, but rather would represent a challenge to the sufficiency of a *prima facie* case.

³¹ See note 21 *supra*.

³² In his dissenting opinion, Justice White suggests that the plaintiff be required either to show that applicant statistics will not be reliable or to introduce such statistics in order to establish a *prima facie* case. *Id.* at 348-49 (White, J., dissenting). The Court avoids imposing any such requirements on the plaintiff, and implies that it is the defendant's option to introduce such evidence if the plaintiff has not done so. See *id.* at 330-31.

³³ *Id.* at 330 (emphasis added).

³⁴ See Blumrosen, *supra* note 2, at 92.

³⁵ See *Griggs*, 401 U.S. at 430.

merely convenient, for effective job performance.³⁶ Both points must be established in order to rebut a prima facie case of employment discrimination on the grounds that the defendant's hiring standards are a "business necessity." In *Dothard*, the defendants' claim that Alabama's height and weight minima were related to the amount of strength needed to be a prison guard was found unsupported by the evidence.³⁷ Because the defendants failed to establish this correlation adequately, the Court did not consider the merits of their assertion that a minimum level of strength is required in order to be an effective prison guard.

In general, *Dothard* provides little that is new for plaintiffs challenging objective job qualification standards under Title VII. Essentially, the plaintiff must demonstrate that a minority group has been disproportionately excluded from the defendant's work force as a result of the defendant's hiring criteria. After the plaintiff has established a prima facie case, the defendant may attempt to introduce additional statistical evidence to rebut any inference of discrimination, but more likely the defendant will attempt to prove that the hiring standards under challenge are a "business necessity."

II. HAZELWOOD AND SUBJECTIVE HIRING PROCEDURES

Like plaintiffs challenging objective hiring criteria, plaintiffs challenging the subjective and discretionary aspect of a hiring procedure attempt to justify an inference that the defendant has unlawfully discriminated. However, because no objective, clearly defined criteria are at issue, the plaintiff cannot measure the impact of the defendant's hiring standards on minority applicants. Therefore, the plaintiff must rely more heavily on inferences based on statistics demonstrating that a protected class is underrepresented in the defendant's work force.³⁸ Such inferences may not be as strong as those based on the kind of statistical proof offered to challenge objective hiring standards, and therefore the plaintiff generally presents other, nonstatistical evidence of discrimination to buttress a prima facie case. The peculiar nature of this type of statistical proof provides the defendant with additional methods of rebutting the plaintiff's prima facie showing of discrimination. *Hazelwood* represents one of the Supreme Court's most significant efforts to deal with the problems of proof involved in cases of this kind.

Hazelwood involved a suit by the Attorney General of the United States alleging that the Hazelwood School District and various of its officials were engaged in a "pattern or practice" of employment discrimination in violation of Title VII.³⁹ The complaint alleged that the suburban St. Louis

³⁶ See *id.* at 431. See also Blumrosen, *supra* note 2, at 81-84.

³⁷ 433 U.S. at 331.

³⁸ See, e.g., *Hazelwood*, 433 U.S. at 307.

³⁹ 42 U.S.C. § 2000e-6(a) (1970). This statute has since been amended, and authority to bring "pattern or practice" suits against private employers has been transferred to the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-6(c)¹(Supp. V 1975). See *Hazelwood*, 433 U.S. at 301 n.1.

In "pattern or practice" suits, it is the plaintiff's burden to demonstrate that "the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature." *Teamsters*, 431 U.S. at 336 n.16, quoting Senator Humphrey, 110 CONG. REC. 14270 (1964).

school district had deliberately utilized employment procedures which disproportionately excluded black applicants from teaching positions.⁴⁰ Hazelwood's hiring procedure was highly subjective and invested "virtually unlimited discretion" in individual school principals.⁴¹

The Government's prima facie case was based on evidence regarding: 1) Hazelwood's history of racially discriminatory practices; 2) statistical disparities between the percentage of black teachers employed in Hazelwood and the percentage in nearby school districts; 3) the standardless and subjective nature of the hiring procedures; and 4) fifty-five specific allegations of discrimination against individual applicants for teaching positions.⁴² Hazelwood "offered virtually no evidence in response," but denied that the data introduced by the Government established a prima facie violation of Title VII.⁴³ The United States District Court for the Eastern District of Missouri found for the defendants, its decision focusing particularly on the Government's use of statistical proof. The court rejected the proposed statistical comparison between the racial composition of Hazelwood's faculty and the faculties of nearby school districts, and held that the relevant comparison was between the composition of Hazelwood's teaching staff and its student population.⁴⁴ Therefore, figures showing a scarcity of black teachers were found nonprobative because the percentage of black pupils in Hazelwood was equally small.⁴⁵ The court also found that the Government's evidence regarding Hazelwood's subjective hiring procedure and the school district's past practices did not buttress the statistical proof.⁴⁶ In addition, the court held that the Government had failed to meet its burden of proving discrimination in each of the fifty-five individual instances.⁴⁷

The United States Court of Appeals for the Eighth Circuit reversed, rejecting the trial court's treatment of the statistical data.⁴⁸ The court ruled that the proper comparison was not between the percentage of black teachers and black students in Hazelwood, but between black teachers in Hazelwood and black teachers in the relevant labor market area.⁴⁹ Because the Hazelwood School District drew its employees from the entire St. Louis metropolitan area, the court selected that area as the relevant labor market.⁵⁰ The court examined 1970 Census data which showed that blacks comprised 15.4% of the teachers in the St. Louis area, and compared these figures with others showing that fewer than 2% of the teachers in Hazelwood from 1972-1974 were black. This disparity, when "considered in light of Hazelwood's hiring procedures,"⁵¹ and the school district's history of dis-

Issues raised by pattern or practice suits, such as involved in *Hazelwood*, and class action Title VII suits of the kind involved in *Dothard*, are substantially similar with regard to the issues discussed in this note. See *Teamsters*, 431 U.S. at 360.

⁴⁰ *United States v. Hazelwood School Dist.*, 392 F. Supp. 1276, 1278 (E.D. Mo. 1975).

⁴¹ 433 U.S. at 302.

⁴² 392 F. Supp. at 1287.

⁴³ 433 U.S. at 303-04 & n.6.

⁴⁴ 392 F. Supp. at 1287.

⁴⁵ *Id.* at 1287-88.

⁴⁶ *Id.* at 1288.

⁴⁷ *Id.* at 1289-90.

⁴⁸ *United States v. Hazelwood School Dist.*, 534 F.2d 805, 814 (8th Cir. 1976).

⁴⁹ *Id.* at 813.

⁵⁰ *Id.* at 811 n.7.

⁵¹ *Id.* at 813.

criminatorily hiring,⁵² was found sufficient to establish a prima facie case of employment discrimination.⁵³ The court also held that the Government had demonstrated that there was unlawful discrimination in sixteen individual instances, and observed that these "buttress[ed]" the statistical proof.⁵⁴

On certiorari to the Supreme Court, the school district challenged the Government's reliance on "undifferentiated work force statistics" as insufficient to establish a prima facie violation of Title VII.⁵⁵ The defendants challenged this data on two grounds. First, they argued that the Government should have introduced statistics regarding actual applicants for teaching positions, since only such statistics could directly support the inference that Hazelwood's subjective hiring procedure had been operated to discriminate unlawfully. Second, the defendants contended that statistics regarding the entire St. Louis metropolitan area should not be used as a standard of comparison, since that area was too large to warrant any inferences with regard to Hazelwood's hiring policies. To support this latter contention, the defendants asserted that the racially based, affirmative action hiring programs of the city of St. Louis would distort any statistical estimates of the availability of black teachers in the area.

In discussing the sufficiency of the Government's statistical proof, the Supreme Court referred to its recent decision in *International Brotherhood of Teamsters v. United States*,⁵⁶ in which the Court had rejected a challenge to the usefulness of comparisons between general work force and population statistics:

We noted [in *Teamsters*] that statistics can be an important source of proof in employment discrimination cases, since 'absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though . . . Title VII imposes no requirements that a work force mirror the general population.' . . . Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.⁵⁷

According to the Court's reasoning in *Teamsters*, inferences of discrimination may arise when the racial composition of an employer's work force dif-

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 433 U.S. at 306 & n.12.

⁵⁶ 431 U.S. 324 (1977). See notes and text at notes 75-77 *supra*.

⁵⁷ *Hazelwood*, 433 U.S. at 307-08. See *id.* at 308 n.14, where the Court refers to *Castaneda v. Partida*, 430 U.S. 482 (1977), a habeas corpus action alleging unconstitutional discrimination against Mexican-Americans in the selection of a grand jury. The *Hazelwood* Court adopted the method outlined in *Castaneda* for determining the significance of statistical disparities. The Court thus recognized that if a disparity is sufficiently "gross," it can, in and of itself, provide the support for a prima facie case of employment discrimination under Title VII. 433 U.S. at 307-08.

fers significantly from that of the "community from which employees are hired."⁵⁸ In *Hazelwood*, therefore, the Court concluded that the court of appeals was "correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."⁵⁹ Apparently, because this comparison adequately established a prima facie case, the Court did not explicitly impose any requirement that the Government introduce statistics regarding the percentage of actual minority applicants who had been hired by the school district.⁶⁰

Nonetheless, the Supreme Court chose to remand the case to the district court for three reasons. First, the Court stated that further consideration must be given to determining the relevant labor market to which Hazelwood's work force statistics should be compared. Because the district court applied an erroneous standard at the original trial, the Court concluded that the record used by the court of appeals was inadequate to provide the factual basis for defining the relevant labor market. The defendants contended that the city of St. Louis should not be included in the statistical analysis, because that city's affirmative action hiring policies artificially inflated any assessment of the availability of black teachers in the metropolitan area.⁶¹ The Court held that this question should be resolved by the district court, and in general that "a determination of the appropriate comparative figures in this case will depend upon further evaluation by the trial court."⁶² In defining the relevant labor market area, the district court was asked to consider four factors: 1) how long St. Louis' racially based hiring policies have been in effect; 2) whether the city's policies have significantly diverted black teachers from Hazelwood; 3) to what extent black

⁵⁸ 433 U.S. at 307-08 (quoting *Teamsters*, 431 U.S. at 339 n.40).

⁵⁹ *Id.* at 308.

⁶⁰ See notes and text at notes 95-98 *infra*. Though the Court examined recent hiring statistics in an effort to determine Hazelwood's policies since the effective date of the Civil Rights Act, see notes and text at notes 64-67 *infra*, the Court avoided imposing any requirement that the plaintiff introduce applicant statistics in order to establish a prima facie case. This omission is particularly notable in light of the fact that the Court extensively discussed other methods for statistically establishing a prima facie violation of Title VII. The implication must be that applicant data is not generally required to establish a prima facie case.

Of course, the fact that the Court did not require the plaintiff to introduce statistics regarding actual applicants for teaching positions in *Hazelwood* does not mean that in future cases a plaintiff may not introduce such figures to establish a prima facie case. Since cases involving subjective hiring procedures are often concerned with the defendant's "disparate treatment" of actual job applicants, see note 2 *supra*, applicant statistics might be highly probative in this context. See *Kirkland v. State Dept. of Correctional Servs.*, 520 F.2d 420 (2d Cir. 1975), for an example of the use of "applicant flow" statistics to establish a prima facie case.

The phrase "applicant data" or "applicant flow statistics" as used in this note means a statistical comparison of the number of minority applicants and the number of minority applicants who were hired, *i.e.*, the percentage of actual minority applicants who were hired. This is how the Court appears to use the phrase in *Hazelwood*, 433 U.S. at 308, n.13. An alternative meaning would suggest a comparison between the total number of applicants and the number of minority applicants who were hired. See *id.* at 310, for an example of this type of statistical analysis.

⁶¹ *Hazelwood*, 433 U.S. at 310-11. The issue whether St. Louis should be included in the statistical analysis was highly significant. If the city was considered part of the relevant labor market, then 15.4% of the qualified teachers in the market area were black. If the city was excluded, then only 5.7% were black. *Id.* at 311.

⁶² *Id.* at 310-11.

teachers employed by St. Louis would "prefer employment in other districts;" and 4) how other school districts near St. Louis have handled this problem.⁶³

The second reason for remanding the case was that the court of appeals had erred by "totally disregarding" the possibility that the Government's prima facie showing of discrimination could be rebutted by "statistics dealing with Hazelwood's hiring after it became subject to Title VII."⁶⁴ Justice Stewart, writing for the majority of the Court, observed that discrimination by public employers did not become illegal under Title VII until 1972. Therefore, he concluded, if the defendants could demonstrate that the "claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination,"⁶⁵ the defendants could effectively rebut a prima facie case. There was some evidence in the record that Hazelwood hired a higher percentage of black applicants for teaching positions after 1972.⁶⁶ The district court was instructed to consider these figures, since they might dispel any inference of illegal discrimination based on a statistical analysis of the defendant's work force. The Court observed that if the scarcity of black teachers in Hazelwood was due to pre-1972 hiring, then the school district had not violated Title VII.⁶⁷

The third reason for remanding the case was to permit the district court to consider what percentage of black applicants had actually been hired by Hazelwood. If such figures were available, Justice Stewart noted, they would be "very relevant."⁶⁸ The Court did not impose any requirement that the Government introduce this evidence on remand, nor did the decision describe precisely what the role of these "applicant flow" statistics should be. The Court simply remanded the case for further examination of these issues, and for "an ultimate determination of whether Hazelwood engaged in a pattern or practice of employment discrimination" after the date that Title VII became applicable to public employers.⁶⁹

In *Hazelwood*, the Court attempted to clarify the requirements for establishing and rebutting a prima facie violation of Title VII. The Court recognized that both statistical and nonstatistical proof could be used to establish a prima facie case, but the decision focused on the importance of the proper use of statistical evidence. In particular, the Court outlined some of the factors which should enter into a determination of the relevant labor market to which statistics regarding the racial composition of the defendant's work force should be compared. The Court also considered possible methods of rebutting a prima facie case resting largely on this type of statistical comparison.

⁶³ *Id.*

⁶⁴ *Id.* at 309.

⁶⁵ *Id.* at 310 (quoting *Teamsters*, 431 U.S. at 360).

⁶⁶ *Id.*

⁶⁷ *Id.* at 309.

⁶⁸ *Id.* at 308 n.13.

⁶⁹ *Id.* at 2744. Title VII became applicable to public employers on March 24, 1972.

STATISTICAL EVIDENCE

A. Establishing a *Prima Facie* Case

As in many Title VII suits which allege a "pattern or practice"⁷⁰ of discrimination, the Government in *Hazelwood* relied heavily on statistics demonstrating that the defendants' work force included disproportionately few black employees. The Court observed that what statistics prove "obviously depends upon the figures to which they are compared."⁷¹ The Court in *Hazelwood* determined that statistics regarding the racial composition of the defendants' work force can be highly probative if properly compared to the relevant labor market. The difficult issue was how to define the relevant labor market, both geographically and in terms of estimating the number of people qualified for the job in question.

In many instances, of course, the relevant market area is simply the one "from which the employer draws its employees."⁷² This was the definition employed by the court of appeals in *Hazelwood*. However, the Supreme Court recognized the possibility that certain communities from which the defendant draws its employees may have to be excluded from the relevant labor market, because hiring policies in those areas may distort statistical estimates of the availability of minority employees.⁷³ In *Hazelwood* there was a possibility that work force statistics for the city of St. Louis should not have been included in the relevant labor market, since the city's racially based hiring program may have inflated the court of appeals' evaluation of the presence of black teachers in the area. The *Hazelwood* decision suggests some of the factors which must go into an evaluation of the labor market area when questions of this kind arise. In addition to examining where the defendant's employees presently live, courts must investigate the availability of minority employees currently working for other employers, how nearby communities have handled minority recruitment, and whether racially based hiring policies of other employers have diverted potential minority applicants from the defendant.⁷⁴

If a geographical definition of the relevant labor market is difficult, even more problematic in future cases might be estimating the number of qualified personnel available. Treatment of this issue will vary substantially from case to case. In discussing this problem, the Court referred to its decision in *Teamsters*,⁷⁵ a Title VII suit alleging that a trucking company and a large union were engaged in a pattern or practice of employment discrimination against black and Spanish-surnamed applicants. In that case, the Government relied heavily on a statistical comparison between the racial composition of segments of the defendant's work force and that of the

⁷⁰ See note 39 *supra*.

⁷¹ 433 U.S. at 310. The Court here was specifically addressing the question of post-Act hiring statistics.

⁷² *Id.* at 315 & n.2. (Stevens, J., dissenting) (quoting *Hazelwood*, 534 F.2d at 811 n.7). See notes 57-59 *supra*.

⁷³ *Id.* at 311-12.

⁷⁴ *Id.* The reverse situation may also arise in future cases. If the defendant pursues a racially discriminatory recruitment policy, or if there is a noticeable exclusion of applicants from nearby cities which have a large minority presence, the courts may have to include communities in the relevant labor market area even when the defendant employs few people from these communities. In such instances, courts may have to examine the distance which present employees travel, the relative ease of commuting from nearby areas, and the reasonableness of recruiting applicants from particular communities.

⁷⁵ 431 U.S. 324 (1977).

general population in the area. As the Court noted in *Hazelwood*, this comparison was "highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire."⁷⁶ But the Court recognized that when "special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."⁷⁷

In *Hazelwood* the Government compared the racial composition of the school district's teaching staff with the staffs of nearby communities. This comparison, therefore, included only employed, and presumably qualified, teachers rather than general population statistics. But if a future case involved a challenge to the hiring policies of an entire industry, or if there were strong reasons for believing that particular professions had pursued racially exclusive policies across the board, estimates of the composition of the qualified labor force based on the percentage of minorities hired by nearby employers might be highly unreliable. In such instances, the courts might have to examine relatively general population statistics even with regard to positions requiring special qualifications, and nonstatistical evidence of discrimination might take on special significance.

In spite of these difficulties with the concept of the "relevant labor market," the decision in *Hazelwood* essentially reconfirms the importance of statistical proof in employment discrimination suits, and the "liberal substantive standards for establishing a Title VII violation."⁷⁸ The Court recognizes that general work force and population figures can provide substantial, and sometimes even exclusive,⁷⁹ support for a prima facie case of employment discrimination. This result is particularly justifiable when the defendant has used a subjective hiring procedure, because if a prima facie case cannot be founded largely on statistics it will often be impossible for the plaintiff to determine how the defendant came to his hiring decisions. As one commentator has noted:

Frequently, the 'real grounds' for finding liability are adduced from evidence given by the employer's own witnesses. . . . The plaintiff may guess at what the defendant did wrong and attack these actions as discriminatory. His proof consists of statistics showing a failure to hire or promote minority persons plus identification of the acts and practices by defendant that may have produced the statistics. Full disclosure of the operations of defendant may be forthcoming only during defendant's testimony, and consequently this evidence will become available only if the court requires defendant to present this proof; otherwise, defendant will prevail on a motion for a directed verdict after plaintiff has finished presenting his case. If the entire picture is presented before the court, however, the operative factors that produced the prima facie discrimination statistics may be identified and the defendant's claims of justification with respect to each element in

⁷⁶ 433 U.S. at 308 n.13.

⁷⁷ *Id.*

⁷⁸ *Id.* at 313 (Brennan, J., concurring).

⁷⁹ See note 57 *supra*.

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the situation evaluated. The use of statistics may thus be well suited to securing a full judicial scrutiny of defendant's employment practices—a scrutiny necessary if Title VII is to be effective.⁸⁰

By this reasoning, the defendant should be required to come forward and explain or defend his hiring decisions after the plaintiff has established that there is a significant scarcity of minority employees in the defendant's work force. Otherwise, employers who make hiring decisions in a subjective manner will often be able to sidestep the commands of Title VII.⁸¹

The *Hazelwood* decision was concerned primarily with the use of statistical evidence. However, as is often the case when a subjective procedure is at issue, the plaintiff also introduced three types of nonstatistical proof: 1) Hazelwood's history of discrimination; 2) individual instances of alleged discrimination; and 3) the highly subjective nature of the school district's hiring procedures. Each of these types of evidence is discussed below.

Although Title VII did not apply to public employers before 1972, the Court in *Hazelwood* recognized that evidence of past discriminatory practices can "in some circumstances support the inference that such discrimination continued."⁸² Justice Stewart noted that such an inference is particularly warranted where "relevant aspects of the decisionmaking process ha[ve] undergone little change."⁸³ Thus, if the defendant employs the same hiring procedure as before the effective date of the Civil Rights Act, proof of previous racially exclusive policies can support the plaintiff's prima facie case.

In addition to presenting evidence of past discrimination, the *Hazelwood* plaintiff introduced evidence showing that individual qualified black applicants had been inexplicably rejected by the defendants. The court of appeals found that sixteen such individual cases of discrimination "buttress[ed]" the plaintiff's statistical proof.⁸⁴ The Supreme Court did not discuss what standards are to be applied to individual allegations of discrimination when a defendant is charged with a pattern or practice of discrimination in violation of Title VII. Previously, the Court has held that to make out a prima facie case in pattern or practice suits the Government is not required to prove that "each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy."⁸⁵ However, if the Government attempts to support statistical proof of a pattern of discrimination with particular allegations, the Court has implied in recent cases that the most effective way to do this is to establish a prima facie violation of Title VII in each individual instance.⁸⁶ The standard for doing so was set

⁸⁰ Blumrosen, *supra* note 2, at 91. Although a liberal application of discovery techniques might assist in this area, see FED. R. CIV. P. 26-37, a full explanation of the defendant's practices will likely be forthcoming only at trial.

⁸¹ Cf. *Teamsters*, 431 U.S. at 339-40 n.20 (statistical disparities are often the "telltale sign of purposeful discrimination").

⁸² *Hazelwood*, 433 U.S. at 309 n.15.

⁸³ *Id.* at 309-10 n.15.

⁸⁴ 534 F.2d at 813. Evidence regarding individual instances of discrimination would be particularly probative where the plaintiff alleges that the defendant has been guilty of "disparate treatment" of a protected class of applicants. See note 2 *supra*.

⁸⁵ *Teamsters*, 431 U.S. at 360.

⁸⁶ See *Hazelwood*, 433 U.S. at 305, n.9 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). See also *Teamsters*, 431 U.S. at 339.

forth in *McDonnell Douglas Corp. v. Green*.⁸⁷ Under the *McDonnell Douglas* standard the plaintiff must show that a qualified applicant who was a member of a protected class had unsuccessfully attempted to get a job for which there was a vacancy, and for which the employer continued thereafter to seek applicants with similar qualifications.⁸⁸ Although *McDonnell Douglas* provided only the requirements for establishing a prima facie case of employment discrimination in an individual, non-class action suit, the Court in *Hazelwood* seemed to look to these standards in attempting to determine if individual allegations of discrimination "buttress" statistical proof of a pattern or practice of discrimination.⁸⁹

The plaintiff in *Hazelwood* also challenged the highly subjective nature of the school district's hiring procedures. The court of appeals found these procedures particularly susceptible to discrimination.⁹⁰ The Supreme Court did not address the question whether employment practices which vest a great deal of discretion in those who make the hiring decision are especially vulnerable to abuses leading to Title VII violations. It has been argued that the existence of a highly subjective hiring procedure should subject a defendant to particularly exacting scrutiny.⁹¹ If the Supreme Court accepts this view, then much of the "fine tuning" of statistical proof will not be required to establish a prima facie case when the defendant has utilized a subjective hiring procedure. For the present, it is not certain whether the Court believes that the fact that the defendant has employed a highly discretionary hiring process, in and of itself, can lend support to the plaintiff's prima facie showing of discrimination. Given the relatively limited statistical evidence available to plaintiffs in cases involving subjective hiring procedures, and the fact that the defendant's vague hiring standards often can be fully understood only by the defendant, the Court should impose on the plaintiff in such instances a somewhat lighter burden with respect to establishing a prima facie case.

B. *Rebutting a Prima Facie Case*

After the plaintiff has established a prima facie case, the defendant must be given an opportunity for a rebuttal. Under the standard established in *Griggs*, the defendant may rebut a prima facie case of employment discrimination if he can demonstrate that the criteria used were necessary for selecting employees capable of performing the job.⁹² This defense may also be available in cases involving subjective hiring procedures if the defendant can come forward with legitimate, business related reasons why particular applicants were not hired. However, mere assertions that the employer attempted to hire the "best qualified applicants" will not be of

⁸⁷ 411 U.S. 792, 802 (1973).

⁸⁸ *Teamsters*, 431 U.S. at 357-58.

⁸⁹ See note 39 *supra*.

⁹⁰ 534 F.2d at 813. For a discussion of the problems involved with subjective hiring procedures, see *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

⁹¹ See *Saracini v. Missouri Pac. R.R.*, 431 F.Supp. 389, 393 (E.D. Ark. 1977), where the district court stated that "[i]t is well settled that 'subjective standards' applied to the evaluation of employees, whether for hiring or promotion, are subjected to close scrutiny by the Courts." *Id.* (citing, among others, the circuit court decision in *Hazelwood*).

⁹² See notes and text at notes 35-37 *supra*.

value, nor will lists of vague discretionary principles which were allegedly employed.⁹³ Because the defendants in *Hazelwood* used such vague and subjective hiring standards, the defendant apparently could not effectively rely on the "business necessity" defense.

It is more likely that employers with subjective hiring procedures will present statistics of their own to rebut the plaintiff's prima facie case. Because the plaintiff in such cases has generally relied heavily on a statistical analysis of the racial composition of the defendant's work force, the defendant can come forward with a variety of explanations or justifications which deny the probative value of the plaintiff's statistics. *Hazelwood* discusses two such defenses: 1) the defendant can attempt to show that the scarcity of minority employees is a result of hiring which took place before the effective date of Title VII; or 2) the defendant can introduce statistics regarding actual applicants for the position in question in an effort to demonstrate that no discrimination has occurred. These two methods of rebutting a prima facie case overlap somewhat, since the defendant may use recent applicant data to prove that there has been no post-Act discriminatory hiring. Each of these defenses may also be more problematic than the *Hazelwood* opinion suggests.

Hazelwood was remanded to the trial court in part because there was some evidence in the record that the defendants had changed their policies since 1972, the date Title VII became applicable to public employers, and had hired a higher percentage of minority applicants in the ensuing years. The Court gave the school district an opportunity to demonstrate that the statistical disparity between the racial composition of its teaching staff and the teaching staffs of schools in the relevant labor market was a result of pre-Act hiring.⁹⁴

⁹³ See *Teamsters*, 431 U.S. at 342-43 n.24 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

⁹⁴ 433 U.S. at 309-10. The *Hazelwood* Court relied heavily on the reasoning of the *Teamsters* decision in recognizing that only post-Act discrimination is unlawful under Title VII. *Id.* (quoting *Teamsters*, 431 U.S. at 360). *Teamsters* involved an allegation of purposeful discrimination by a private employer, whereas *Hazelwood* concerned purposeful discrimination by a public employer. Because the fourteenth amendment does not apply to private employers, pre-Act discrimination by them was not illegal under the Constitution nor under Title VII. However, prior to 1972, when Title VII was extended to cover public employers, purposeful job discrimination by state-run agencies was illegal under the fourteenth amendment. See *Washington v. Davis*, 426 U.S. 229 (1976). Although the *Hazelwood* Court noted in passing that public employers were subject to the "command of the fourteenth amendment not to engage in purposeful racial discrimination" even "before the extension of Title VII," 433 U.S. at 310 n.15, the Court's treatment of pre-Act hiring policies did not discuss the possibility that the school district was engaged in unconstitutional discrimination prior to 1972. Instead, the *Hazelwood* decision implies that a public employer can defend itself against a Title VII suit on the grounds that the scarcity of minority employees on its work force is due to previous unconstitutional hiring practices.

Although the plaintiff in *Hazelwood* did allege a constitutional violation, *Brief for the United States* at 2, the Court was not called upon to confront this problem, because the focus of the case was on Title VII violations and not on the fourteenth amendment, and the court of appeals had restricted itself to findings under the statute. In addition, the standards for establishing discrimination differ substantially under Title VII and the fourteenth amendment, and the *Hazelwood* plaintiff may not have assumed the greater burden of proof imposed under the latter. See *Washington v. Davis*, 426 U.S. 229, 238-48 (1977). If a future plaintiff were to combine a Title VII claim with a claim under the fourteenth amendment, and if the plaintiff were able to establish a history of pre-Act constitutional violations as a part of his case, the defendant might not be able to rebut inferences of discrimination merely by demonstrating that the

The Court also remanded the case so that the district court could examine whether reliable "applicant flow" statistics were available. Most of the Court's discussion of the usefulness of statistics regarding actual applicants for Hazelwood's teaching positions is found in footnotes to the decision.⁹⁵ These footnotes are somewhat cryptic in their discussion of applicant data. The Court notes that "applicant flow" statistics might be "very relevant,"⁹⁶ but the decision does not make clear whether such data should be introduced to establish or to rebut a *prima facie* case. Because the decision avoids imposing any requirement that the plaintiff introduce this evidence as a part of a *prima facie* case, the implication, supported by the concurring and dissenting opinions, seems to be that applicant data will often be introduced as a rebuttal to the plaintiff's case.⁹⁷ Since Title VII suits involving subjective hiring procedures are generally concerned with the defendant's treatment of actual job applicants,⁹⁸ such statistics can be highly useful in this context. However, an analysis of applicant statistics might be of somewhat less value than the Court suggests. In particular, the assumption that the employer had no role in determining the composition of the applicant pool is often unwarranted. Although the defendant has no objective job qualification standards which would deter potential minority applicants, past discriminatory practices may have discouraged members of minority groups from applying for jobs with the defendant. As a result, the racial composition of the applicant pool can be at least partially the product of the defendant's past discriminatory behavior.

This issue was discussed by the *Teamsters* Court in the context of possible relief for non-applicants after a violation of Title VII had been established. The Court observed:

The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. . . . [A discriminatory message can be communicated] by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial and ethnic composition of that part of his workforce from which he has discriminatorily excluded members of minority groups.⁹⁹

scarcity of minorities on his work force is a result of pre-1972 hiring. In general, the relationship between Title VII and the fourteenth amendment in this context will require further treatment by the courts.

For an excellent survey of recent Supreme Court decisions and a fruitful discussion of the developing concept of "purposeful" discrimination under the fourteenth amendment, see Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause*: Washington v. Davis, Arlington Heights, Mt. Healthy and Williamsburgh, 12 HARV. C.R.-C.L. L. REV. 725 (1977).

⁹⁵ 433 U.S. at 308-16 nn.13, 16 & 21.

⁹⁶ *Id.* at 308 n.13.

⁹⁷ See *id.* at 347-48 (White, J., concurring); *id.* at 313 (Brennan, J., concurring).

⁹⁸ Plaintiffs challenging the subjective aspect of a hiring procedure generally proceed under a "disparate treatment" theory. See note 2 *supra*.

⁹⁹ 431 U.S. at 365.

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In light of this reasoning in *Teamsters*, which also involved a subjective hiring procedure, the Court's suggestions in *Hazelwood* regarding the usefulness of applicant statistics should be narrowly interpreted. When an employer has a history of discriminatory recruitment and hiring, a statistical analysis of the applicant pool may not effectively rebut inferences of discrimination based on work force statistics. At the very least, the plaintiff should be permitted to demonstrate that applicant data is not reliable because members of minority groups were dissuaded from applying for the job in question due to the defendant's past discriminatory practices. For example, the defendants in *Hazelwood* had recruited teachers only at colleges attended primarily by white students, and had ignored two teachers' colleges with a predominately black enrollment.¹⁰⁰ This practice might have discouraged potential black applicants, or, in a subtler way, might have established patterns of hiring which encouraged students at certain colleges to apply for teaching positions in Hazelwood while discouraging others. In light of this fact, the Court's suggestion that statistics regarding black applicants would be of substantial value must be read with caution.

The decision in *Hazelwood* highlights several of the peculiar problems of cases involving highly subjective hiring procedures. Because the plaintiff must rely heavily on inferences based on the scarcity of minority employees in the defendant's work force, greater care must be taken in determining the "relevant labor market" to be used in a comparison with work force statistics. In addition, the plaintiff often must introduce nonstatistical evidence of discrimination to buttress the statistical proof. Since no clearly defined hiring criteria are at issue, the plaintiff generally is unable to introduce additional statistics which establish the connection between the defendant's hiring practices and the scarcity of minority employees in the defendant's work force. As a result, the defendant can effectively rebut a prima facie case by introducing statistics of its own which explain why minority groups are underrepresented.

III. COMPARISON OF *HAZELWOOD* AND *DOTHARD*

The Supreme Court decisions in *Dothard* and *Hazelwood* were handed down on the same day, were drafted by the same Justice, and arose under the same statute. It is understandable, then, that the two cases are similar in many respects. In both decisions the Court emphasized that the initial burden on the plaintiff in a Title VII suit is to justify an inference that the defendant has been guilty of unlawful discrimination. In both cases, the Court permitted relatively general statistical comparisons to help establish a prima facie case of employment discrimination. In both decisions, after a prima facie violation had been demonstrated, the burden shifted to the employer to rebut the inference that his hiring practices were illegally discriminatory.

A comparison of *Dothard* and *Hazelwood* also suggests substantial differences between the Court's treatment of cases involving objective job qualification standards and those dealing with subjective hiring procedures. Although plaintiffs challenging objective criteria generally attempt to demonstrate a scarcity of minority employees in the defendant's work force, the

¹⁰⁰ 433 U.S. at 303 & n.4.

emphasis of the plaintiff's prima facie case must be on the impact of the challenged job qualification standard on the pool of potential applicants. The plaintiff's burden is to demonstrate that minority applicants have been disproportionately screened out by the defendant's hiring standards. Since objective criteria are clearly defined, a statistical analysis of the impact of the challenged job qualification standard on the general population can be highly probative. To rebut a prima facie case of employment discrimination, the defendant may challenge the reliability of the statistics offered, but usually must attempt to establish that the job qualification standards are necessary for effective job performance.

On the other hand, plaintiffs who challenge the subjective and discretionary aspect of a hiring procedure must rely more heavily on inferences of discrimination based on the scarcity of minority employees on the defendant's work force. A significant disparity¹⁰¹ between the racial composition of the defendant's work force and that of the relevant labor market can constitute much, or even all, of the foundation for a prima facie case. The plaintiff can support this statistical proof by introducing other evidence of, for example, the employer's history of discrimination, individual allegations of Title VII violations, or possibly the suspect nature of the hiring procedure itself. The plaintiff's heavy reliance on work force statistics permits the defendant to rebut a prima facie case by introducing figures of his own to demonstrate that no post-Act discrimination has occurred, or to introduce data showing that an adequate percentage of actual minority applicants have been hired. However, the value of this latter method of proof remains in doubt.¹⁰²

CONCLUSION

The Supreme Court decisions in *Dothard* and *Hazelwood* underline the importance of statistical proof in establishing a prima facie violation of Title VII. Though the two decisions raise some unresolved questions, the Court's recognition that Title VII plaintiffs must often rely heavily on statistical evidence represents a significant step toward bringing the proof requirements of Title VII in line with its ultimate purpose: "to achieve equality of employment opportunities."¹⁰³

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¹⁰¹ See note 57 *supra*.

¹⁰² See notes and text at notes 95-100 *supra*.

¹⁰³ *Griggs*, 401 U.S. at 429.