

SPECIAL PROBLEMS IN LITIGATING UPPER LEVEL EMPLOYMENT DISCRIMINATION CASES

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I. INTRODUCTION

The success of a corporate enterprise is often determined by the quality of its professional, managerial and supervisory personnel, those occupying the "upper level jobs."¹ That group—necessarily limited in size in most corporations—is usually vested with the policy-forming and decision-making responsibility of the corporation. Upper-level personnel generally are selected in a manner different from that by which lower-level employees are hired and assigned tasks. Historically, employers have enjoyed great freedom in the area of upper-level personnel decisions. Over the past years, however, and as a result of the proliferation of federal² and state³ laws, orders⁴ and regulations,⁵

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1. Upper-level positions include jobs falling within the "Official and Managers" and "Professionals" categories as defined by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs in the EEO-1 forms and regulations. Equal Employment Opportunity Commission ("EEOC") Rules and Regulations, 29 C.F.R. §§ 1601-1601.59 (1977) as amended; Department of Labor Office of Federal Contract Compliance Programs ("OFCC") Rules and Regulations, 41 C.F.R. § 60 (1977) as amended.

"Officials and Managers" are defined as:

Occupations requiring administrative personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operations. Includes: officials, executives, middle management, plant managers, department managers, and superintendents, salaried foremen who are members of management, purchasing agents and buyers, and kindred workers.

"Professionals" are defined as:

Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background. Includes: accountants and auditors, airplane pilots, and navigators, architects, artists, chemists, designers, dietitians, editors, engineers, lawyers, librarians, mathematicians, natural scientists, registered professional nurses, personnel and labor relations workers, physical scientists, physicians, social scientists, teachers, and kindred workers.

2. The most significant statutory provision is Title VII of the Civil Rights Act of 1964, *as amended*, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000(e) (Supp. IV 1974)). Another and often cited provision is the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified in 42 U.S.C. § 1981). *See also* Civil Rights Act of 1968, tit. I, 82 Stat. 73-92 (codified in scattered sections of 231, 18 U.S.C. § 1301, 25 U.S.C. § 1360 nts., 28 U.S.C. § 1973j, § 3533, 42 U.S.C.), providing criminal penalties for interference with an individual's employment rights because of race, color, religion or national origin.

regarding equal employment opportunity, the process of hiring and the manner of dealing with employees has increasingly been the subject of administrative and judicial scrutiny.

For the first several years after the inception of fair employment practice enactments, litigation focused almost exclusively on the lower levels of the employment spectrum: that is, blue collar or non-managerial white collar type jobs. Whatever the reasons for that initial focus, in the coming years the process of filling professional, managerial and executive positions should increasingly be the subject of litigation. There are a number of factors suggesting such a trend.

First, until recently, as the cases in this area attest, discrimination was often the rule for many employers and, indeed, for many industries.⁶ Minorities,⁷ if they were hired at all, were frequently relegated to menial dead-end jobs and rarely received either the training or the experience that could equip them for the more skilled, responsible or remunerative positions. As the obstacles in the lower and middle employment levels fall, however, the pools from which employers select to fill upper-level jobs in the future should contain increasing proportions of minorities.

3. Every state except Alabama, Arkansas, Louisiana, Mississippi and Texas has now adopted some form of statutory prohibition against discrimination in employment. In Delaware, the applicable provisions are found in DEL. CODE ANN. tit. 19, §§710-18 (1974).

4. Exec. Order No. 11,246, 3 C.F.R. 339 (1965) (signed originally by President Johnson September 24, 1965), requires equal employment opportunity and affirmative action by contractors and subcontractors doing business with the federal government. Pursuant to the Order, the Office of Federal Contract Compliance ("OFCC") was established in the Labor Department to carry out the Order's enforcement. President Carter, however, signed on June 30, 1978 Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (1978) the first step in reorganizing the federal equal employment opportunity programs, which provides the EEOC with the authority to coordinate all EEO plans. The President is also scheduled to sign an Executive Order in the fall of 1978 which will consolidate all federal contract compliance responsibility within the Labor Department and eliminating the authority of the 11 federal agencies that currently monitor the EEO programs of companies that do business with the government.

5. See note 1 *supra*.

6. See, for example, the two consent decrees, dated April 15, 1974, in which nine major steel companies and the United Steelworkers agreed to remedy race and sex discrimination in the industry, resolving a suit filed by the Justice Department, on behalf of the Department of Labor, and by the Equal Employment Opportunity Commission. The texts appear at 8 LAB. REL. REP. (BNA) 431:125 (1974). See also the consent order entered into by the American Telephone & Telegraph Company, EEOC and Labor Department on January 18, 1973. 8 LAB. REL. REP. (BNA) 431:73 (1973).

7. For purposes of this article, the term "minorities" includes also women where appropriate. It should also be noted at the outset that in case of upper-level discrimination, minority groups other than those normally associated with discrimination litigation may have an interest. See Anti-Defamation League of B'nai B'rith, *A Study of Jewish Employment Problems in the Big Six Oil Company Headquarters*, 9 RIGHTS 1 (1978). Discrimination may also be against white males. See McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273 (1976). The analyses followed in this paper may also be applied to such "minorities," where appropriate.

Second, upper-level jobs generally require levels of educational attainment infrequently achieved by minorities in the past. Since the late 1960's, however, affirmative action programs to encourage minority enrollment have been initiated in many educational institutions. Consequently, increased minority representation is evident among recent university graduates and, more particularly, in some of the key business-related fields.⁸

Third, employment discrimination litigation is increasing at a staggering rate.⁹ Thus, as equal opportunity is realized in lower-level jobs, and as the plaintiff bar develops greater sophistication, attention will naturally shift to the new frontiers of upper-level discrimination.

Finally, unlike lower-level employment where under-utilization of minorities has decreased, significant disparities of utilization continue at the upper levels of employment. For example, the EEOC's summary of employment statistics for 1975, compiled from employers' ¹⁰ EEO-1 reports,¹¹ indicates:

8. In 1960, for example, blacks constituted approximately six percent of college enrollment; in 1970, black representation was still only seven percent; in 1976, black representation increased to 10.7 percent. *See Statistical Abstract 1977* No. 250 at page 154. There was also a change in the nature of the education. In 1963, for example, approximately 42 percent of the black students were in predominantly black institutions; by 1975, the proportion had decreased to 29.8 percent. For a recent excellent study of the participation of minorities in the professions, including participation in educational programs, in the past, present and with detailed forecasts for the future, *see S. SCHNEIDER, THE AVAILABILITY OF MINORITIES AND WOMEN FOR PROFESSIONAL AND MANAGERIAL POSITIONS 1970-1985 (1977)*. Separate treatment is provided for the professions of engineering, law, accounting, other business related areas, chemistry, physics, medicine and dentistry. The key results of the study indicate that, by 1985, there will be substantial improvement in minority participation in most professional studies, but not all; and that the extent of progress will vary considerably from one profession to another.

9. In 1970 there were a total of 344 equal employment cases filed. In fiscal year 1976, there were 5,321 new such cases filed, including 292 cases filed by the EEOC. *1976 Annual Report of the Director, Administrative Office of the United States Courts*.

10. The EEO-1 reports are required to be filed by every private employer subject to Title VII and having 100 or more employees, and by federal contractors having 50 or more employees and contracts of at least \$50,000. Educational institutions, Indian tribes and tax-exempt private membership clubs were not required to file in 1975, and the cut-off requirements exclude small employers and establishments. For these reasons, the EEO-1 reports are a particularly useful tool in delineating the proportionate representation of minorities for the private industry sector. The reports also constitute the only source of current comprehensive statistical information on the employment of minorities and women in private industry, by occupational categories, for the United States, States, Standard Metropolitan Statistical Areas, counties, cities, and for numerically small minority groups (Asian Americans and American Indians). The compiled reports are broken down by race/ethnic group and sex for 9 occupational categories—Officials and Managers, Professionals, Technicians, Sales Workers, Office and Clerical Workers, Craft Workers, Operatives, Laborers, and Service Workers.

11. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY REPORT—1975, JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY (1977).

<i>Group</i>	<i>Total Employment</i>	<i>Officials and Managers</i>	<i>Professionals</i>
All Employees	100.0	100.0	100.0
Male	62.9	85.8	70.0
Female	37.1	14.2	30.0
White	83.8	94.6	92.5
Minority	16.2	5.4	7.5
Black	10.7	3.0	3.2
Hispanic	4.3	1.6	1.5
Asian American ..	.9	.5	2.6
American Indian .	.3	.3	.2

The above statistics¹² by themselves do not, of course, establish discrimination, but they do suggest subject matters for future litigation.

The legal issues in upper-level discrimination cases should differ in certain important respects from those confronted in lower-level cases. Although the fundamental standards and rules which were developed in lower-level litigation will apply with little or no modification, obviously certain distinctions must be drawn, in order to cope with the specialized problems of discrimination in upper-level positions. This article will not treat the whole area of equal employment opportunity laws as applied to upper-level positions but will address what are perceived to be the more important problems likely to arise.

II. BURDENS OF PROOF IN A CASE OF UPPER-LEVEL EMPLOYMENT DISCRIMINATION

A. *Establishing a Prima Facie Case.* The plaintiff must initially carry the burden of establishing, by a preponderance of the evidence, a prima facie case of unlawful employment discrimination before a court

12. Viewing the Officials and Managers and Professionals categories separately, the percentages appear as follows:

GROUP	PERCENTAGE OF GROUP WITHIN OFFICIALS AND MANAGERS CATEGORY	PERCENTAGE OF GROUP WITHIN PROFESSIONAL CATEGORY
All Employees	10.6	8.1
Male	14.5	9.1
Female	4.0	6.6
White	12.0	9.0
Minority	3.5	3.8
Black	3.0	2.5
Hispanic	3.9	2.9
Asian American	6.4	24.7
American Indian	8.8	4.7

will involve itself in a review of an employment decision. The Supreme Court has, in a recent series of decisions,¹³ provided for an order of proof which alternately shifts the burden of proof from the plaintiff to the defendant and then back to the plaintiff. The extent of that burden, of course, may vary greatly depending upon whether plaintiff sues individually or on behalf of a class alleged discriminatees.

In the individual-plaintiff context, the courts have generally applied the four-step test which the Supreme Court articulated in *McDonnell Douglas Corp. v. Green*.¹⁴

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Of course, there is nothing magical about the elements of proof specified in the *McDonnell Douglas* case. The facts in Title VII cases vary greatly and the proof required in one may not be appropriate in another. The essential inquiry, as the Supreme Court later noted in the *Teamsters* case, is whether an employment decision was made on the basis of an impermissible criterion.

The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act. (Footnote omitted.)¹⁵

13. *Furnco Constr. Corp. v. Waters*, 98 S. Ct. 2943 (1978); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 137 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

14. 411 U.S. at 802.

15. 431 U.S. at 358. See also *Furnco Constr. Corp. v. Waters*, 98 S. Ct. at 2949.

The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of

Consistent with that caveat, lower federal courts have since often applied the *McDonnell Douglas* test, with appropriate modifications, in situations which differ markedly on their facts. Indeed, the test has even been applied in the context of promotions to upper-level jobs.¹⁶

In class actions, on the other hand, large numbers of employment decisions are under scrutiny, and comparisons and evaluations on an individual level become prohibitively burdensome, if not outright impossible. The courts have thus willingly relied on statistical evidence, as the best evidence of the cumulative results of such employment decisions, in proof of a prima facie case.¹⁷

The usual thrust of a statistical showing is to demonstrate "disparate treatment," e.g., that an employer's work force as a whole or in a particular category manifests a significant underutilization of a minority group in comparison with such group's current or historical availability. In *Teamsters* the Supreme Court analyzed the showing of a statistical imbalance as follows:

"Disparate treatment" such as is 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 differences in treatment. See, e.g., *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66, 50 L. Ed. 2d 450, 97 S. Ct. 555.¹⁸

Alternatively, statistics may be used to prove a prima facie case on a "disparate impact" theory, that is, proof that a particular employment practice or use of a criterion, while facially neutral and equally and fairly applied, disproportionately affects one group:

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

common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors.

16. See *Olson v. Philco-Ford*, 531 F.2d 474, 477 (10th Cir. 1976); *Smith v. Union Oil Co. of Cal.*, 17 Fair Empl. Prac. Cas. 960, 995 (N.D. Cal. 1977).

17. Reliance on statistical evidence has been most recently approved by the Supreme Court in *International Bhd. of Teamsters v. United States*, 431 U.S. at 339; and *Hazelwood School District v. United States*, 433 U.S. at 310-13.

18. 431 U.S. at 335 n.15.

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. (Citations omitted).¹⁹

Although the Supreme Court distinguished the two theories on the basis that under the disparate treatment theory the plaintiff must demonstrate "discriminatory motive," in practice that distinction becomes illusory, and the Supreme Court has largely ignored it.²⁰ The distinction between the two theories of proof, however, is important for other reasons: most notably, in determining the sufficiency of an employer's defense.

B. Defending the Prima Facie Case. Once a prima facie case is established, the burden²¹ shifts to the employer to show a legitimate,

19. *Id.* The following cases have found criteria having adverse impact to be discriminatory under the "disparate impact" theory: *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (tests and high school diploma requirement); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *Green v. Missouri Pacific Ry. Co.*, 523 F.2d 1290, 1295 (8th Cir. 1975) (disqualification on basis of arrest records).

20. For example, in both the *Teamsters* and *Hazelwood* cases, the Court held that a substantial statistical disparity constitutes or could constitute a prima facie case of discrimination without considering the presence of a discriminatory motive. *Cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977), where the court noted:

We again need not decide whether when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of § 703(a)(1) *Griggs* held that a violation of § 703(a)(2) can be established by proof of a discriminatory effect.

In class actions, however, proof of a statistical imbalance could ordinarily permit an inference of disparate treatment (§ 703(a)(1)), and disparate impact (§ 703(a)(2)). That is, the employer may, for example, use subjective evaluations for selection, and the overall imbalance in the work force can be the result of discriminatory action by the employer or the employer's use of adversely impacting criteria in the evaluation, or a combination of both.

21. *See* note 13 *supra*. There is at least some confusion among the courts whether the burden shifted to the employer is that of persuasion or coming forward with evidence. *EEOC v. E. I. du Pont de Nemours & Co.*, 445 F. Supp. 223, 264 (D. Del. 1978). The First Circuit, for example, in *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 177 (1st Cir. 1978), has stated that the "ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination"; the Fourth Circuit has held in *Roman v. ESB, Inc.*, 550 F.2d 1343, 1350-51 (4th Cir. 1976), that the establishment of a prima facie case places on the employer merely the burden of going forward with rebuttal evidence, but that the risk of non-persuasion may still be on the plaintiff; *see also King v. Yellow Freight Sys.*, 523 F.2d 879 (8th Cir. 1975). The Fifth Circuit, on the other hand, has held that the employer has the burden of persuasion. *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977). A careful reading of the Supreme Court decisions, however, indicates that the burden placed on the employer is that of persuasion. (*See* note 13 *supra*). *See Furnco Constr. Corp.*, 98 S. Ct. at 2950 ("the burden which shifts to the employer is merely that of proving

non-discriminatory reason for its action or otherwise to provide a non-discriminatory explanation for the apparently discriminatory result of its policies.²² The type and extent of the proof which will be required to carry the employer's burden will depend, in part, upon whether the plaintiff's prima facie case was one of disparate impact or disparate treatment. In cases of disparate impact as opposed to disparate treatment,²³ it is not enough for the employer merely to offer a legitimate, non-discriminatory reason for his action. The employer must prove that its business needs actually require it to rely

that he based his employment decision on a legitimate consideration"). This is also the general rule applied by the Supreme Court in non-Title VII discrimination cases, for example, *Washington v. Davis*, 426 U.S. 229, 241 (1976):

With a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result."

Thus, the plaintiff must initially prove a prima facie case by a preponderance of evidence, and the employer must by the same measure prove a legitimate explanation for the apparent discrimination. As a practical matter, it is unusual to find a case where the scales are so evenly balanced that the ultimate result is dictated by how the burden of persuasion is allocated, *EEOC v. E. I. du Pont de Nemours & Co.*, 445 F. Supp. at 233-34, but understanding the underlying requirements makes the discrimination case conceptually easier to litigate and determine.

22. A distinction between a defense to a prima facie case and evidence tending to rebut a prima facie case should be noted. That is, if plaintiff produces statistical evidence showing a significant disparity between the sample of employment decisions and the appropriate pool, but employer proffers contrary statistical data showing that plaintiff's evidence is inaccurate or misleading, and that properly viewed there is no significant statistical disparity, rebuttal to a statistical case obtains, rather than a defense of justification. Since the plaintiff has the burden of showing that there is a sufficient disparity to permit an inference of discrimination, the defendant's evidence can simply negate the inference, rather than defend against it. The court, therefore, before undertaking any review of the defendant's employment practices, must first determine whether considering all the statistical, and perhaps other, evidence, plaintiff, has in fact, established a prima facie case. See *Hazelwood School Dist. v. United States*, 433 U.S. at 312-13; *International Bhd. of Teamsters*, 431 U.S. at 340-41.

23. In a "disparate treatment" case, the employer need only show a legitimate non-discriminatory reason for not selecting the plaintiff or his class. The employer need not show that his "reason" is justified by "business necessity." For example, in *Bracamontes v. Amstar Corp.*, 576 F.2d 61 (5th Cir. 1978), plaintiff's claim that an employer must justify its policy of refusing to rehire certain laid-off employees by a showing of "business necessity" for it was rejected:

Bracamontes and Manale urge that Amstar must show a compelling business necessity to justify its rule. That would be true only if the rule discriminated against their group, either on its face or through a disparate impact. The policy is neutral on its face; plaintiffs never demonstrated that it had a disparate impact on women. The policy is thus immune from attack under Title VII.

Similarly, in *Subia v. Colorado & S. Ry. Co.*, 565 F.2d 659, 662 (10th Cir. 1977), the court rejected the contention that "business necessity" standards applied to a discharge for absence from work.

In *Furnco*, the Supreme Court held that the employer's policy of refusing to hire at the gate could be a nondiscriminatory and legitimate reason for rejecting minorities applying at the gate. In *McDonnell Douglas*, refusal to hire a minority because he had taken part in a stall-in against the employer was held to be proper.

on such factors which have the effect of favoring one group over another:

Where the Title VII claim is that a facially neutral employment practice actually falls more harshly on one racial group, thus having a disparate impact on that group, our cases establish a different way of proving the claim. As set out by the Court in *Griggs v. Duke Power Co.*, supra, to establish a prima facie case on a disparate impact claim, a plaintiff need not show that the employer had a discriminatory intent but need only demonstrate that a particular practice in actuality operates to exclude Negroes.

Once the plaintiff has established the disparate impact of the practice, the burden shifts to the employer to show that the practice has "a manifest relationship to the employment in question." The touchstone is business necessity, and the practice "must be shown to be a necessity to safe and efficient job performance to survive a Title VII challenge." (Citations omitted).²⁴

C. *Pretext.* If the employer succeeds in dispelling the prima facie showing of discrimination, the plaintiff still has the opportunity to show that the employer's defense is a mere pretext for discrimination.²⁵

In "disparate treatment" cases, the proof may consist of a showing that while the employer's asserted basis for unfavorable consideration of the minority applicant might have been legitimate, it was nevertheless a pretext because the employer did not apply it to all applicants equally.²⁶ Statistical evidence also may be offered to prove discriminatory motivation and intent.²⁷ In the "disparate impact" cases, on the other hand, the "pretext" issue will usually be framed in terms of whether the plaintiff can show that there were other alternative selection devices that would have served the employer's legitimate interest

24. *Furnco Constr. Corp. v. Waters*, 98 S. Ct. at 2953. (Marshall, J., concurring and dissenting). See also *Dothard v. Rawlinson*, 433 U.S. at 332 n.14. These cases also clearly require that the burden of showing "disparate impact" is on the plaintiff. Technically, however, the issue may not arise until the defendant has proffered his defense. This should not present any problems in the course of litigation. Under the federal rules of discovery and pretrial conferences, plaintiff will be apprised of the defense long before trial, and the Court is justified in requiring proof of the asserted disparate impact as part of plaintiff's case in chief.

25. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804.

26. *Id.*

27. *Furnco Constr. Corp. v. Waters*, 98 S. Ct. at 2950; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 805 n.19.

in "efficient and trustworthy workmanship"²⁸ and which would not have had the same undesirable exclusionary effect as did the selection procedure which was actually used.

III. SPECIAL PROBLEMS WITH SUBJECTIVE SELECTION CRITERIA FOR UPPER-LEVEL POSITIONS

In an upper-level discrimination case, upon proof prima facie, the defendant employer may frequently be expected to defend statistical disparities in its work force or the rejection of an individual minority applicant on grounds of its subjective evaluation of the applicants. Alternatively, the defendant employer may rely upon its requirement that applicants for the positions in question possess specified higher educational degrees.²⁹ One or both of these two issues will be present in most, if not all, upper-level employment discrimination cases. They are hereafter separately considered.

A. *Use of Subjective Criteria for Selection.* Although past reliance upon subjective criteria for selection is not unique to upper-level positions, employers have apparently encountered greater difficulties in substituting objective criteria for such positions than for lower-level positions. This may be a function of the difference in job duties be-

28. It is clear from these cases that the burden is on the plaintiff to show an alternative selection procedure. See *Dothard v. Rawlinson*, 433 U.S. at 329; *Albemarle Paper Co. v. Moody*, 422 U.S. at 425. The EEOC in its *Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 (1977), had taken a contrary position, defining discrimination as any use of any selection procedure that has an adverse impact unless the employer had validated it and "can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use", *Id.* § 1607.3. The current *Uniform Guidelines on Employer Selection Procedures*, have retreated from that extreme position and now require only that the employer should make an "investigation of suitable alternative selection procedures . . . which have as little adverse impact as possible." 43 Fed. Reg. 38,290 (1978) (to be codified in Equal Employment Opportunity Commission, 29 C.F.R. § 1607; Civil Service Commission, 5 C.F.R. § 300.103(c); Department of Justice, 28 C.F.R. § 50.14; Department of Labor, 41 C.F.R. § 60-3) [hereinafter cited as *Uniform Guidelines*].

29. A court will not substantively review a subjective employment process or the college degree requirement until a prima facie case of discrimination is shown. In *General Elec. Co. v. Gilbert*, 429 U.S. 125, 137 n.14 (1976), the Court noted: "In *Griggs*, the burden placed on the employer of showing that any given requirement must have a manifest relationship to the employment in question . . . did not arise until discriminatory effect had been shown. . . ." See also *Hester v. Southern Ry. Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974):

Nonetheless, nonvalidated tests and subjective hiring procedures are not violative of Title VII *per se*. Title VII comes into play only when such practices result in discrimination. At that point, the burden of producing evidence shifts to the employer, who must offer satisfactory justification for his procedures.

tween lower-level and upper-level positions. Usually, lower-level persons are hired to perform some discrete function, but upper-level persons often are hired for their intelligence, initiative, comparability, experience or similar qualities, all of which resist measurement on an objective scale. Consequently, the courts recognize, albeit reluctantly, that reliance upon subjective criteria in such situations is simply unavoidable:

Greater possibilities for abuse, however, are inherent in subjective definitions of employment selection and promotion criteria. Yet they are not to be condemned as unlawful *per se*, for in all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial jobs cannot realistically be made using objective standards alone.³⁰

At the same time, subjective evaluation is, from an equal employment opportunity law viewpoint, the least satisfactory basis for making employment decisions, and courts regard unrestricted subjective evaluation as a ready means for masking unlawful discrimination. Generally recognizing the deficiencies inherent in subjective evaluation, the fifth circuit in the seminal case of *Rowe v. General Motors Corp.*,³¹

30. *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), vacated on other grounds, 423 U.S. 809, reinstated with modification, 526 F.2d 722 (8th Cir. 1975). Numerous other courts have expressly or inferentially held that subjective evaluations are inescapable in the context of upper-level jobs. See, e.g., *EEOC v. E. I. du Pont de Nemours*, 445 F. Supp. 223, 254 (D. Del. 1978) ("It is true that defendant's procedures leave room for the exercise of subjective judgment in the evaluation of potential candidates for both above career level and supervisory jobs but this fact alone does not make them unlawful. Indeed, it would not be feasible to eliminate subjective criteria from the selection process for jobs at these levels."); *Frink v. United States Navy*, 16 Fair Empl. Prac. Cas. 67, 69-70 (E.D. Pa. 1977) ("The position in question [naval architect] is fairly sophisticated and technical, unlike the occupations often encountered in Title VII cases. Consequently, in selecting employees for promotion, subjective and technical factors necessarily must be considered"); *Kohn v. Royall, Koegel & Wells*, 59 F.R.D. 515, 521 (S.D.N.Y. 1973) ("There is no doubt that hiring a professional requires weighing many subjective factors contributing to the applicant's qualifications as a whole, above and beyond the more objective academic qualifications"); *Blizard v. Fielding*, 17 Fair Empl. Prac. Cas. 146 (D. Mass. 1977), remanded, 572 F.2d 13 (1st Cir. 1978) (deputy commissioner); *Frausto v. Legal Aid Society*, 563 F.2d 1324 (9th Cir. 1977) (supervisory attorney); *Newsweek Magazine v. D.C. Comm'n*, 376 A.2d 398 (D.C. App. 1977) (news correspondent); *Adams v. Reed*, 567 F.2d 1283, 1286 n.8 (5th Cir. 1978) (historical archivist); *Hecht v. Cooperative for American Relief Everywhere, Inc.*, 351 F. Supp. 305 (S.D.N.Y. 1972); *Keely v. Westinghouse Elec. Corp.*, 404 F. Supp. 574, 579-80 (E.D. Mo. 1975).

31. 457 F.2d 348, 359 (5th Cir. 1972). Subsequently, numerous courts have in various contexts refused to credit an employer's defense to a prima facie case based on subjective evaluations. For example, *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1385-87 (5th Cir. 1978); *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 662 (5th Cir. 1976); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1192-94 (5th Cir. 1976); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972); *Stewart v. General Motors Corp.*, 542 F.2d 445, 450 (7th Cir. 1976);

rejected an employer's defense to a prima facie case of discriminatory promotions which defense was based upon claims that the decisions were entirely based on the subjective evaluations of blacks by white supervisors:

[P]romotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foremen are a ready mechanism for discrimination against blacks, most of which can be peversely concealed, and, for that matter, not really known to management. We have and others have expressed the skepticism that black persons dependent directly on decisive recommendations from whites can expect nondiscriminatory action.

Courts have resolved this conflict in the past on a case-by-case basis. The issue has not been whether subjective evaluations are proper as an abstract proposition, but, rather, under what circumstances a defense premised upon a subjective evaluation will be credited by the courts.

B. *Applicability of the Uniform Guidelines on Employee Selection Procedures*³² in Determining the Job Relatedness of the Selection Criteria. In reviewing subjective selection processes, the courts have been faced with numerous problems, the first and most important being the determination of standards by which the criteria and procedures of the selection process are to be measured. In this regard, the applicability of the federal guidelines concerning validation of employee selection procedures looms as an important, but yet largely unexplored question. The recently promulgated *Uniform Guidelines* clearly purport to encompass subjective selection procedures,³³ and, as pronouncements of a federal agency, they are entitled to some deference by the courts.³⁴ Given the problems subjective judgments pose in employment discrimination litigation, both the courts and the parties should be aware of these guidelines as possible standards by which the validity of subjective judgments may be measured.

James v. Stockham Valves & Fittings Co., 559 F.2d 310, 345-47 (5th Cir. 1977); Wade v. Mississippi Coop. Extension Serv., 528 F.2d 508, 526 (5th Cir. 1976); Neely v. City of Grenada, 438 F. Supp. 390, 409 (N.D. Miss. 1977); Stallings v. Container Corp., 75 F.R.D. 511, 521 (D. Del. 1977).

32. The *Uniform Guidelines*, 43 Fed. Reg. 38,290 (1978), are very similar to the guidelines previously used by the Civil Service Commission, Department of Justice and Department of Labor. 41 Fed. Reg. 51,734 (1976).

33. See note 38 *infra* and accompanying text.

34. See notes 49-52 *infra* and accompanying text.

The Supreme Court has not yet spoken on this issue, and the lower court decisions are in conflict.³⁵ The vast majority of the federal courts,³⁶ however, have simply ignored the regulations requiring validation efforts and have accepted or rejected subjective criteria or procedures on the basis of each court's own evaluation of the overall fairness to the employees. Nevertheless, given the uncertainty of the decisions, the *Uniform Guidelines* and their applicability in practice will be reviewed here.

Guidelines Requirements. It is apparent, as suggested in the *Rogers*³⁷ case with respect to the 1970 EEOC guidelines, that the *Uniform Guidelines* were intended to apply to subjective employment procedures at all levels of employment. The *Uniform Guidelines* apply to "selection procedures," which is defined to include "any measure, combination of measures, procedure used as a basis for any employment decision."³⁸

The *Uniform Guidelines* initially require that any selection procedure, whether subjective or objective in nature, which adversely impacts upon a protected minority group, must be validated.

The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of Section 6 below are satisfied.³⁹

Validation requires a showing that the particular selection procedure is job related, as demonstrated by means of a criterion, content or construct validity study, which has been performed in a manner consistent with generally accepted professional standards.⁴⁰ The *Uni-*

35. See notes 30 & 31 *supra*.

36. See notes 30 & 31 *supra*.

37. See note 30 *supra*.

38. *Uniform Guidelines*, 43 Fed. Reg. at 38,308. See also *id.* at 38,296 which provides that, "These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision."

39. *Id.* at 38,297. The *Uniform Guidelines* further provide that reference should be made to the "total selection process for a job," to determine whether there is or has been adverse impact, and specify that the enforcement agencies will not take any action based upon adverse impact of any particular component of that process, if no overall adverse impact of the entire selection process is shown. *Id.*

40. The Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education, usually referred to as "APA Standards." *Id.* at 38,298.

form Guidelines, nevertheless, also recognize that such a demonstration is not always achieved:

There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact as set forth below.

* * *

(2) . . . When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate the adverse impact or otherwise justify continued use of the procedure in accordance with Federal law.⁴¹

There are, thus, two bases available for claiming that validation is not required for any given subjective selection procedure. First, as noted earlier, "Federal law" has in the past justified the use of some subjective employment procedures, especially for upper-level jobs, even without a showing that a validation study was attempted.⁴² Unfortunately, the federal agencies have not provided any clarification or further explanation of this exemption, other than to suggest that an employer's "business necessity" or "other justification" may permit continued use of adversely impacting procedures.⁴³ It is also un-

41. *Id.* at 38,299.

42. *See* note 30 *supra*.

43. The Department of Justice issued on January 1, 1977 a memorandum Questions and Answers on the Federal Executive Agency Guidelines on Employee Selection Procedures as interpretation and clarification of the provisions of the Guidelines, which provide:

12. Q. How can users justify continued use in accord with federal law of a procedure which has an adverse impact and which it is not feasible or appropriate to validate?

A. That subject is one to which the Guidelines are not addressed. In *Griggs v. Duke Power Co.*, 401 U.S. 424, the Supreme Court indicated that the burden on the user was a heavy one, but that the selection procedure could be used if there was a 'business necessity' for its continued use. The federal agencies will consider evidence which shows 'business necessity' to justify continued use of a selection procedure. Evidence of any other justification would have to be considered on a case by case basis.

8 LAB. REL. REP. (BNA) 771, 774-75 (1977). *See also* note 32 *supra*. Since the relevant provision of the earlier *Uniform Guidelines* was carried over to the present version *see* 43 Fed. Reg. at 38,299 (1978). It may be inferred that the above interpretation remains current.

clear whether the provision was meant to grant an alternative method of justification⁴⁴ or whether it is available only where validation is impossible.

Second, and more importantly, for most upper-level subjective evaluations, validation may not as a practical matter be "technically feasible." For example, the most commonly used type of validation study is a content validity study. But the *Uniform Guidelines* do not recognize the propriety of content validity studies for typical subjective selection criteria.

[A] content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability.⁴⁵

For upper-level jobs, of course, these and related traits are precisely those which the employer wishes to identify and measure in the selection process.⁴⁶

Criterion-related studies, on the other hand, require detailed data bases, including (a) an adequate sample of participants so that the study will yield findings of statistical significance; (b) a sufficiently representative range of scores; and (c) unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy.⁴⁷ For many upper-level jobs, there will not be an adequate sample available to participate in the study. Moreover, it will frequently be impossible to devise reliable measures of job performance or of employee adequacy for the same reasons it is typically impossible to write a thorough and detailed description of the duties of and requirements for such jobs.

Finally, construct validity studies are new and poorly understood procedures even among industrial psychologists. In addition, they require at a minimum an underlying series of extensive criterion or content validity research studies,⁴⁸ which, as noted, are usually impossible for upper-level jobs.

44. The careful words of limitation ("usually should be followed," "cannot or need not do so") in the *Uniform Guidelines*, 43 Fed. Reg. at 38,299 plainly suggest that the procedure is an alternative method, even if validation can be had.

45. *Uniform Guidelines*, 43 Fed. Reg. at 38,303.

46. See notes 57-68 *infra* and accompanying text.

47. *Uniform Guidelines*, 43 Fed. Reg. at 38,300, 38,304-05.

48. *Id.* at 38,303.

Thus, even if the *Uniform Guidelines* should be applied to subjective selection procedures, their application will, as a practical matter, be severely limited.

Deference to the Uniform Guidelines. Further, if the *Uniform Guidelines* were intended to apply to subjective selection procedures, the question remains as to what degree of deference should be shown to their validation requirements. The Supreme Court has several times held that EEOC administrative guidelines interpreting Title VII are entitled to great deference,⁴⁹ and, presumably, the same should hold true for the *Uniform Guidelines*. Yet, as recognized by the Supreme Court, EEOC guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by Congress.⁵⁰ Indeed, in two instances, the Supreme Court has squarely rejected the EEOC's interpretation of the law.⁵¹ And, each time it has been asked to rule on the validity of such an EEOC interpretation, the Court has conducted its own review of the Act and its legislative history.⁵²

There is, in addition, an expressed concern among industrial psychologists as to overly stringent and technical application of such validation requirements:

[The courts] have lost sight of the need to analyze validity studies on a case-by-case basis appropriate to the

49. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976); *cf.*, *Washington v. Davis*, 426 U.S. 229 (1976) (Brennan, J., dissenting). In *Griggs* and *Albemarle Paper Co.*, the Court gave "great deference" to the 1970 EEOC test validation guidelines, the precursor of the somewhat similar *Uniform Guidelines* here in issue. That "deference," however, apparently is not all-encompassing. For example, the 1970 EEOC guidelines had clearly provided that content or construct validation studies were appropriate only where "criterion-related validity is not feasible." 29 C.F.R. §1607.5 (1977). In *Washington v. Davis*, 426 U.S. 229 (1976) however, the Court, without citing the guidelines, expressly rejected any preference for the latter, but held that any of the three studies may be appropriate in a given context.

50. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). The EEOC's authority to issue regulations is carefully limited by statute to "procedural regulations." 42 U.S.C. §2000e-12(a) (1974).

51. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (pregnancy disability); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 380 (1977) (Marshall, J., dissenting) (seniority systems). In *General Elec. Co.* the Court specifically held that Congress did not confer on the EEOC authority to promulgate rules or regulations pursuant to Title VII, 42 U.S.C. §2000(e) (1974) and although the EEOC guidelines are entitled to some consideration in determining legislative intent, the courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law.

52. For example, in the *Griggs* case, before "deferring" to the EEOC Guidelines, the Court noted that "the Act and its legislative history support the Commission's construction." 401 U.S. at 434. See also *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

uniqueness of each study. In the process (the courts) have tended to impose an increasing number of professionally unrealistic and effectively unattainable requirements as the bare minimum acceptable to the courts in establishing whether tests and other selection procedures are demonstrably job-related. Indeed, some of these decisions require such stringent technical compliance as to convert principles drafted and intended as idealistic goals to be striven for, but rarely attained in toto, into successive hurdles which must be surmounted for survival in the crucible of fair employment litigation. The inevitable result is that some significant and worthy validation efforts are being declared legally unacceptable, along with those which have patently earned judicial opprobrium.⁵³

There is, furthermore, at least some reason to believe that the agencies promulgating the *Uniform Guidelines*, especially the EEOC,⁵⁴ intentionally drew the validation requirements in an overly stringent manner so as to discourage any selection procedure which might have an adverse impact on a minority.⁵⁵ The suggestion of the agencies

53. Amicus Curiae Brief of Executive Committee of the Division of Industrial-Organizational Psychology (Division 14), APA at 20, *Washington v. Davis*, 426 U.S. 229 (1976) (copy on file with authors). The APA position is that the "technology of psychological testing and other employee selection procedures remains relatively embryonic," *id.* at 9, and, consistent with APA standards, "psychologists have avoided setting rigid rules and regulations with respect to research on and use of tests and other selection procedures but have sought to establish principles for the guidance of those concerned with their development and use." *Id.* at 12. The introduction to the current *Uniform Guidelines* now recognizes, at least to some extent, that the psychological field is continuing to expand: "Validation has become highly technical and complex, and yet is constantly changing as a set of concepts in industrial psychology." 43 Fed. Reg. at 38,292. The guidelines themselves, however, continue to suggest a rigid formulistic approach.

54. Of particular interest is the view recently expressed by a representative of the Employment Section, Civil Rights Division of Department of Justice in an internal memorandum:

An unstated or covertly stated reason may underlie the apparent EEOC refusal to modify its present guidelines. Under the present EEOC guidelines, few employers are able to show the validity of *any* of their selection procedures, and the risk of their being held unlawful is high. Since not only tests, but all other procedures must be validated, the thrust of the present guidelines is to place almost all test users in a posture of non-compliance; to give great discretion to enforcement personnel to determine who should be prosecuted; and to set aside objective selection procedures in favor of numerical hiring. (Copy on file with the authors.)

The memorandum argued in support of the then-existing Federal Executive Agency Guidelines which served as the apparent basis for the current *Uniform Guidelines*, 43 Fed. Reg. 38,290 (1978). Nevertheless, the coercive factor is still present in the latter guidelines.

55. Aside from the legal issues involved in determining the applicability and availability of the *Uniform Guidelines*, there is also an issue touching the broader policies of equal employment law. The *Uniform Guidelines*, as the predecessor EEOC and Federal Executive Agency guidelines, are stringent in application, and it is both time and resource consuming to perform validation studies. At the same time for upper-level jobs, the courts have permitted employers to defend a prima

has consistently been to "eliminate the adverse impact"⁵⁶ of selection procedures—a commendable goal, but one that does raise a question as to the intent of the Guidelines.

Neither a general statement of the law, nor any general analysis, can finally determine the applicability or availability of the *Uniform Guidelines* to the particular upper-level jobs in question. Yet, the issue exists, and it is not one that can easily be resolved. At least, it should not be ignored. The particular facts in each case should determine whether and to what extent an employer should validate his subjective selection procedures.

C. Objectivity of the Selection Criteria and Process. As noted, the courts have, as a general matter, ignored the predecessors of the current *Uniform Guidelines*, when called upon to evaluate subjective selection procedures. Instead, the courts usually pose two questions. First, they consider whether the criteria upon which candidates are evaluated bear a discernible relationship to the job under consideration. Second, the courts examine whether such criteria are evenly and equally applied to all candidates.

Criteria. The courts have accepted, either expressly or inferentially, the principle that for many upper-level jobs, employers must rely upon some non-objective criteria in evaluating candidates.⁵⁷ Among the subjective factors that have been approved in particular cases involving the selection of supervisors, for example, are: experience, supervisory potential, job performance, willingness to accept responsibility, dependability, and ability to work amicably with fellow employees.⁵⁸ Even the EEOC has been forced to rely upon some of

facie case by unvalidated subjective selection procedures. As a result, there is at least some disincentive to developing tests or other objective criteria that would clearly fall within validation requirements. Frankly, employers may well fear the kind of resolution as faced the employer in the well-publicized recent case of *Association Against Discrimination v. City of Bridgeport*, 17 Fair Empl. Prac. Cas. 1308, 1313 (D. Conn. 1978). The employer spent one and one-half years, 2,745 man-hours and over \$100,000 to develop a proper job-related test, only to have it found invalid and no defense to a prima facie case. Indeed, the invalidity seemed to bolster, rather than negate, the plaintiff's case.

56. Introduction to the *Uniform Guidelines*, 43 Fed. Reg. at 38,291. The suggestion to "eliminate the adverse impact" is thereafter continually noted as an alternative in the Guidelines themselves.

57. See note 30 *supra*.

58. *Nance v. Union Carbide Corp.*, 540 F.2d 718, 727 (4th Cir. 1976) (ability to work amicably with fellow employees); *Roman v. ESB, Inc.*, 550 F.2d 1343, 1354 (4th Cir. 1976) (performance on present job, willingness to accept responsibility, and dependability); *Levens v. General Services Administration*, 391 F. Supp. 35, 36 (W.D. Mo. 1975), *aff'd*, 538 F.2d 332 (8th Cir. 1976) (supervisory potential, experience and job performance); *EEOC v. E. I. du Pont de Nemours & Co.*, 445 F. Supp. 223, 254 (D. Del. 1978) (intelligence, leadership and training talent, a desire to be a supervisor, zeal, initiative and technical ability); *Crocker v. Boeing Co.*, 15 Fair Empl. Prac. Cas. 165, 208 (E.D. Pa. 1977) (experience).

these criteria.⁵⁹

It is difficult, if not impossible, however, to define the criteria properly applicable to upper-level jobs generally, given the variety of requirements and levels of expertise and experience necessary to fill them. The cases provide little general guidance, inasmuch as each upper-level decision appears to have been closely tailored to the particular job in issue.⁶⁰ An exception, perhaps, is in the field of college or university teaching, for which there is already an extensive and gradually expanding case law.⁶¹ Even in this limited area, however, there is judicial dispute as to how closely courts should scrutinize college or university practices, and what factors should properly be considered.⁶²

59. An EEOC Employer Appraisal form, for example, provides for evaluation of the following: extent to which employee understands his field of work; ability to organize work; quality of work he could be expected to produce; quantity of acceptable work he could be expected to produce; how well would he accept supervision and guidance; dependability; resourcefulness; initiative; adaptability to changing situations; receptiveness to suggestions on new ideas; discretion and tact; stability under unusual working conditions; ability to express effectively orally or in writing; personal appearance; personal efforts toward self-development; leadership; acceptance of responsibilities; effective planning and organizing; making sound decisions and exercising good judgment; effective delegation of authority; obtaining cooperation individually or collectively; furnishing adequate instructions and training; keeping oneself improved on matters pertinent to his work; maintaining good employee morale; securing respect and confidence of associates. (Copy on file with authors).

60. For example, in *Nath v. General Elec. Co.*, 438 F. Supp. 213, 220 (E.D. Pa. 1977), a case involving a design engineer, the court held the following factors to be appropriate:

Looking at the criteria themselves, two of the factors—"experience" and "service"—are clearly objective. One of the remaining criteria, "proven ability," specifies the factors which are to be considered in making an evaluation, which are "results, skills, adaptability, length of time on current level of work, versatility, etc." These factors are clearly defined and job-related. The third criteria, "potential for greater contributions and/or responsibilities," while certainly a valid, job-related factor, presents a possible problem in measurement, i.e., how can "potential" be measured. However, the testimony . . . establishes that judgments here were based on past performance; in other words, employees who had demonstrated good skills, adaptability, etc., in the past were presumed to have the potential to do so in the future. Thus, we conclude that the evidence establishes that the criteria used by GE were clear, job-related, and capable of being applied in a non-discriminatory manner.

Some of the above very generalized criteria may be useful tools in evaluating job requirements other than those of design engineer, but it may be questioned whether an evaluation based on such criteria would be a defense in the context of even a design engineer position if the setting was different or where such criteria were differently applied.

61. *Powell v. Syracuse Univ.*, 17 Fair Empl. Prac. Cas. 1316 (2d Cir. 1978); *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir. 1978); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Megill v. Board of Regents of the State of Florida*, 541 F.2d 1073 (5th Cir. 1976); *Stebbins v. Weaver*, 537 F.2d 939 (7th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974).

62. *See, e.g.* the criticism voiced in *Powell v. Syracuse Univ.*, 17 Fair Empl. Prac. Cas. at 1319 and *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d at 176 of the "anti-interventionist policy [that] has rendered colleges and universities virtually immune to charges of employment bias."

Although any generalization in this area may be premature, the trend of the cases, not stated in so many words, appears to be toward sanctioning a greater degree of subjectivity in selection criteria where the responsibilities and need for expertise in a job are similarly greater.⁶³ And, in the final analysis, the best statement of the law on subjective criteria in upper-level jobs is perhaps that found in *Nath v. General Electric Co.*:⁶⁴

Plaintiff relies heavily on the contention that the criteria used by GE were subjective. Although it is true that the use of subjective criteria may open the door to more subtle types of discrimination, the use of subjective criteria is not per se a violation of Title VII. In all fairness to GE, no one would seriously contend that an evaluation of the relative ability of design engineers could be made solely on the basis of completely objective criteria, such as years of service with GE and educational level. An evaluation of technical ability is necessarily based on factors that are not purely objective.

Nevertheless, use of subjective criteria is open to attack where the criteria are vague and unrelated to the qualities necessary for successful on-the-job performance. A distinction must be made between such vague, subjective criteria, and criteria which, although subjective, are job-related, clearly defined in terms of the competences to be measured, and capable of being applied in a non-discriminatory manner.

The case law indicates that the reluctant acceptance of the use of subjective criteria carries with it an insistence that objective criteria be substituted to the extent possible.⁶⁵

Procedure. In the past, upper-level employment discrimination cases have rarely turned on the procedure employed in the selection

63. Compare *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d at 176 n.14 ("Judicial tolerance of subjective criteria seems to increase with the complexity of the job involved").

64. 438 F. Supp. at 220.

65. There are steps which can be taken toward minimizing the subjectivity of the criteria and the selection process. They range from conducting a careful analysis of the requirement of a particular job, a job analysis, to providing for a review function in the selection process. Other articles discussed guidelines to be followed in modifying a selection process to comply more fully with the concept of equal employment opportunity. See Stacy, *Subjective Criteria in Employment Decisions under Title VII*, 10 GA. L. REV. 737 (1976); Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 J. URB. L. 165 (1976); Note, *Title VII and Employment Discrimination in Upper-Level Jobs*, 73 CALIF. L. REV. 1614, 1630 (1973); Holley & Field, *The Law and Performance Evaluation in Education: A Review of Court Cases and Implications For Use*, 5 J. L. EDUC. 427, 447 (1977).

process. Nevertheless, the legal issue is the same as in the lower-level employment cases—whether the selection has been made in a fair and impartial manner.⁶⁶

There is no single manner of conducting such evaluations that is guaranteed to satisfy a reviewing court. Certain procedures, nevertheless, have become widely recognized, and the fact of their absence may severely undercut the employer's defense. For example, in *Watkins v. Scott Paper Co.*,⁶⁷ the court suggested the following procedures to be considered by an employer in revamping its subjective process for selecting supervisors.

(1) formulating guidelines that explain the manner in which job-related objective criteria, such as absenteeism and number of reprimands, are evaluated, (2) formulating guidelines that explain the relative importance of subjective criteria found to be job-related, (3) formulating guidelines with respect to the experience generally necessary in each line of progression (and, with respect to the affected class, minimum residency periods, if possible), (4) requiring posting of supervisor vacancies and formal bidding, (5) devising a procedure by which Scott can recognize situations where first line supervisors' recommendations might be affected by racial bias. . . .

It could be that some or most of these procedures would be impracticable in the context of a given upper-level job. Yet, it is clear that to the extent such procedures can be utilized the risks of discriminatory action inherent in using subjective criteria and procedures are reduced.⁶⁸

IV. COLLEGE DEGREE FACTOR

A. *Application of the Griggs Standard.* Following the Supreme Court's pronouncement in *Griggs v. Duke Power Co.*,⁶⁹ courts have consistently condemned as discriminatory the requirement of a high school diploma for a job absent proof that such a requirement is dictated by business necessity.⁷⁰ The Court's reasoning in the *Griggs*

66. See generally *Holley & Field*, *supra* note 65.

67. 530 F.2d at 1194.

68. *EEOC v. E. I. du Pont de Nemours and Co.*, 445 F. Supp. at 254. ("It is feasible to reduce the risk of disparate impact inherent in subjective criteria by the institution of procedures and standards which control and review the exercise of subjective judgment").

69. 401 U.S. 424 (1977).

70. The only job for which the high school education requirement has been consistently sustained is that of police officer. *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *League of United Latin Am. Citizens v. City of Santa Ana*, 410 F. Supp. 873, 901 (C.D. Cal. 1976); *Arnold v. Ballard*, 390 F. Supp. 723 (N.D. Ohio 1975).

case was straightforward: a high school diploma requirement will exclude from employment a significantly greater percentage of blacks than whites, and, under the "disparate impact" principle, in order to use it, the employer must demonstrate that the requirement bears some manifest relationship to the requirements of the job.⁷¹

Of course, a high school diploma alone is rarely a requirement for hire or promotion to an upper-level job. Employers are more likely to require a college level or higher degree for these jobs—an even more stringent requirement. Applying the *Griggs* rationale to a requirement of a college degree, it is clear that in most situations the college requirement will again exclude from employment a significantly greater percentage of blacks and other non-whites than whites, as well as a greater percentage of females than males. For example, as of 1977, available evidence shows as follows:

*Percent Population Completing
4 Years or More of College
as of March, 1977*⁷²

	<i>Age 25 and Over</i>	<i>Ages 25-29</i>
All races:	15.4%	24%
White:	16.1%	25.3%
Black and other Races: ..	9.7%	15.5%

71. With the exception of the police cases, *see* note 70 *supra*, the principle that it is discriminatory to require a high school diploma is followed consistently by the courts. Nevertheless, it does seem that decisions may be focused on the wrong statistics. Most employment selections, as a practical matter, are made from the 20 to 34 age group. Looking at the current statistics in that age group, one finds a significantly different pattern than that reviewed in the *Griggs* case:

<i>As of March, 1977; 25-29 Age Group</i>	<i>Completed 4 or More Years of High School</i>	<i>Median School Years Completed</i>	<i>Percentage Comparison With Whites</i>
Whites	86.8%	12.9%	
Blacks and Other Races	76.0%	12.6%	.875
 <i>As of March, 1976; 25-34 Age Group</i>			
Whites	84.0%		.85
Blacks	71.6%		.85
Hispanics	54.5%		.65

National Center for Educational Statistics, Digest of Education Statistics 1977-78, Table 11, at 14 (1978) [hereinafter Digest of Educational Statistics] and 1977 Statistical Abstract, Table 219, at 137 (1978). The above statistics are national and will vary in the various relevant market areas. In some areas, however, the adverse impact of the high school requirement will be less than the *Uniform Guidelines* "rule of thumb" test of four-fifths ($\frac{4}{5}$) (or 80%) standard for a showing of adverse impact. 43 Fed. Reg. at 38,297.

72. *Digest of Educational Statistics, supra* note 71, at 14. The 'adverse impact' of a college degree requirement would thus be a selection rate of blacks and other

Thus, given the plainly disproportionate impact, the first leg in the *Griggs* test, it follows that any employer who required a college diploma should be prepared to justify it as a business necessity.

B. *The Cases.* There are only a handful of cases that have to date considered the requirement of a college degree for a particular job, and none provides any detailed guidelines for future reference. For example, in *Payne v. Travenel*,⁷³ the fifth circuit affirmed a lower court's determination that an employer's requirement of a college degree for candidates for positions as scheduling, systems and traffic analysts was discriminatory as to blacks because it impacted adversely upon them as a group and because the employer failed to offer "concrete evidence as to the need for the continued use of this qualification." Indeed, the employer did not even specify any particular discipline or major area of study that it required of such college graduates.

Two other lower courts, in *Fisher v. Proctor & Gamble Manufacturing Co.*,⁷⁴ and *United States v. Lee Way Motor Freight, Inc.*,⁷⁵ have reached the same conclusion, although neither court analyzed the issue in any greater detail. It is not clear, for instance, whether the defendant employers in the two cases had attempted to offer any justification for their college degree requirements. In the *Fisher* case the court found that the employer had discriminated against blacks by its policy of recruiting only recent college graduates with engineering or technical degrees for management and supervisory positions in its industrial plant. Similarly, the *Lee Way Motor Freight* court held that Title VII was violated, absent a showing of business necessity, by a requirement that blacks, as a condition of being accepted into the company's management training program, possess a college degree, once it was shown that such an educational requirement tended to result in a disproportionate rejection or disqualification of otherwise qualified black applicants.

Other cases make it clear that college degree requirements can be justified. For example, in *Townsend v. Nassau County Medical Center*,⁷⁶ the defendant employer had imposed a bachelor of science degree

racers at 60% that of whites in the '25 and over' category, and 61.3% that of whites in the 25-29 age category. These figures exceed the "rule of thumb" test, *see* note 71 *supra*.

73. 565 F.2d 895, 899 (5th Cir. 1978).

74. 14 E.P.D. 5265 (N.D. Tex. 1977).

75. 15 E.P.D. 6380 (D.C. Okla. 1972).

76. 11 E.P.D. 7564 (E.D.N.Y. 1975), *rev'd*, 558 F.2d 117 (2d Cir.), *cert. denied*, 434 U.S. 1015 (1977).

requirement for continued employment in, as well as for future hiring into, the position of laboratory technologist, but also provided that all incumbent employees could qualify by passing an examination in lieu of a degree. The plaintiff, a black employee who did not have the necessary degree, failed the examination and was thereafter discharged. The lower court, confronted with the classic *Griggs* situation, ordered the plaintiff reinstated finding that the academic prerequisite was discriminatory: *i.e.*, the requirement excluded from employment a higher proportion of blacks than whites, and the employer had not shown that the degree was job related. In so ruling, however, the court refused to make any determination of the validity of the college degree requirement as generally applied and only held that it could not be required in the instant case. The second circuit, recognizing that a *prima facie* case might be made by means of evidence that an employment qualification has a substantially exclusionary effect on minority applicants, reversed because the statistical evidence related only to the general population and did not indicate the availability, by race, of persons in the relevant market area holding a B.S. degree.⁷⁷ The language of the decision, however, strongly suggests that the second circuit believed the college degree requirement to be justified.

In the university teaching cases, which are tangentially relevant, degree requirements appear to be well established. A direct challenge to the requirement of a Ph.D. degree was made in the recent District of Delaware opinion in *Scott v. University of Delaware*.⁷⁸ Plaintiff, as well as the EEOC, which appeared as *amicus curiae*, argued that a

77. There are several sources for educational data. However, due to the lack of a complete survey in this field and the difficulties encountered with methodological differences, there is very little useful data on the percentage of minorities having degrees or attending college, in any discipline. The most comprehensive and detailed data are those which are collected and tabulated by the National Center for Educational Statistics (NCES). The Office of Civil Rights (OCR) attempts to collect data by biennial enrollment surveys of four-year institutions. The Bureau of Labor Statistics and the Bureau of the Census also collect data but it is very limited in scope and detail. Educational data are also collected and tabulated by private organizations, but these data tend to focus on certain educational levels or specific areas of study. The Academy of Sciences, for example, has the most complete data on degrees awarded at a doctorate level, but little information concerning the lower degrees. In discrimination litigation, this lack of data creates evidentiary problems. In the *Townsend* case, for example, there were no generally available statistics that could have shown the number or percentage distribution among the races of B.S. degrees generally or in any given discipline.

78. No. 74-58, slip op. 61-71 (D. Del. August 18, 1978). See also *Keyes v. Lenoir Rhyne College*, 15 Fair Empl. Prac. Cas. 914,923 (W.D.N.C. 1976), *aff'd*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977):

The policy requiring a doctorate degree for a faculty member of a college to advance beyond the rank of Assistant Professor is not prohibited by the statute. This is not the type of testing condemned by the Supreme Court in *Griggs v. Duke Power Company*, 401 U.S. 424. The Ph.D. degree is a

Ph.D. requirement for promotion had an adverse impact on blacks, and that the University had failed to show any justification for that requirement. The Court found adverse impact, but rejected the latter claim:

While the evidence on the question of justification is surprisingly sparse, it is fair to say that the record offers two rationales for the Ph.D. or its equivalent requirement. The first and foremost of these rationales is that the experience, knowledge and skills acquired in obtaining a Ph.D. are reasonably related to the ability to do research, think creatively, and add to the existing fund of knowledge through publication and other communication in one's chosen field. This scholarship function is crucial to the University, it is said, because a true university . . . [is] concerned with the discovery or creation of knowledge as well as its transmission through teaching and service Moreover, involvement in the business of creating knowledge is viewed not only as valuable in itself but also as a means of keeping a faculty member's teaching alive and current.

The second rationale is that the Ph.D. experience or its equivalent is reasonably related to an ability to teach graduate students, it being desirable for those teaching to have more extensive academic training than those being taught.⁷⁹

The most useful analysis of a college degree requirement, to date, appears in *Spurlock v. United Airlines, Inc.*⁸⁰ In that case, the tenth circuit held that an employer had met its burden of showing that its requirement of a college degree was sufficiently job related to make it a lawful pre-employment standard for the position of an airline pilot. The airline showed that its flight officers went through a rigorous training course upon being hired, were thereafter required to attend intensive refresher courses at six-month intervals, and that possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information given in the atmosphere of a classroom or training program.

The evidence showed that United flight officers go through a rigorous training course upon being hired and then are required to attend intensive refresher courses at six-month

credential which presumably is evidence of certain skills and knowledge from which one might predict job performance and is an educational credential which is almost universally required for higher ranks in most colleges.

79. *Id.* at 65-66.

80. 475 F.2d 216 (10th Cir. 1973).

intervals to insure that all flight officers remain at peak performance ability. United officials testified that the possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information given in the atmosphere of a classroom or training program. Thus, a person with a college degree, particularly one in the "hard" sciences, is more able to cope with the initial training program and the unending series of refresher courses than a person without a college degree. We think United met the burden of showing that its requirement of a college degree was sufficiently job-related to make it a lawful pre-employment standard.⁸¹

The tenth circuit also noted a justification which will have frequent application in the context of upper-level jobs, holding that the amount of justification needed to justify a college degree requirement should depend upon the consequences, in terms of human life or economic cost, if an unqualified person were selected for the job:

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 discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate 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. Cf. 29 C.F.R. § 1607, 5(c)(2)(iii). The job of airline flight officer is clearly such a job. United's flight officers pilot aircraft worth as much as \$20 million and transport as many as 300 passengers per flight. The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job.⁸²

81. *Id.* at 219.

82. *Id.* at 219. In other instances, the courts have noted that a college degree was a requirement for a job but did not address its exclusionary impact or legality. *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 347 (5th Cir. 1977) (college-degree requirement for management training program noted, but discrimination found only because of failure to recruit at predominantly black institutions); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1190 n.42 (5th Cir. 1976) (no discrimination in college degree requirement for maintenance supervisor position where plaintiff did not challenge practice); *Wade v. Mississippi Coop. Extension Service*, 528 F.2d 508, 517 (5th Cir. 1976) (academic degrees are appropriate factors for consideration in

C. *Validation Pursuant to the Uniform Guidelines.* The current *Uniform Guidelines*,⁸³ as did the earlier EEOC regulations, clearly demand that all educational requirements for employment must be validated if an adverse impact is shown.⁸⁴ The cases have, however, virtually ignored those regulations and, as in the case of subjective evaluation procedures, have rendered judgments on other grounds.⁸⁵ There is, moreover, at least some evidence that the EEOC itself is unsure whether and under what circumstances such validation is necessary.⁸⁶ In all events, it is clear that any effort to validate a college degree requirement would be subject to many of the same problems

promotions and salary awards in the professional staff of employer); *Equal Employment Opportunity Comm'n v. Georgia-Pacific Corp.*, 450 F. Supp. 1227, 1237 (N.D. Miss. 1977) (professional foresters "of necessity" have college degrees in forestry); *Downey v. A.H. Selo Corp.*, 402 F. Supp. 1368, 1375 (N.D. Tex. 1975) (college degree requirement for salespersons, but no adverse impact on plaintiff); *Thompson v. McDonnell Douglas Corp.*, 416 F. Supp. 972, 983 (E.D. Mo. 1976), *aff'd*, 552 F.2d 220 (8th Cir. 1977) (college degree requirement for computer programmer legitimate business necessity and plaintiff met qualification); *Detroit Police Officers v. Young*, 16 Fair Empl. Prac. Cas. 1005, 1012-13 (E.D. Mich. 1978) (college credit for police promotions).

83. See note 28 *supra*.

84. The *Uniform Guidelines* define a Selection Procedure as including "educational requirements." 43 Fed. Reg. at 38,308.

85. See notes 73-82 and accompanying text. Cf., *Lerner, Washington v. Davis: Quantity, Quality and Equality In Employment Testing*, 1976 Sup. Cr. Rev. 263, 304, 306 (1977), suggesting that validation of academic prerequisites need never be required:

Demonstration of the scientific validity of academic requirements for most professional jobs has never been required and is not likely to be in the foreseeable future. Technical difficulties aside, it would require too massive an upheaval in the life of the nation and too extreme a disappointment of expectations built up over long periods of time by great numbers of students, teachers, and professionals in a multitude of fields, quite apart from any presumed effects on the level of competence of members of various professions.

Thus, setting impossible standards for the validation of test requirements in all situations, and no standards at all for the validation of advanced degree educational requirements, results in the destruction of opportunities for objective merit selection and advancement for those with less formal education while preserving such opportunities intact for those with more formal education. (Footnotes omitted.)

86. See, e.g., *Scott v. University of Delaware*, No. 74-58, slip op. at 67n.** (D. Del. August 16, 1978):

Plaintiff does argue that relief should be awarded because the University has not "validated" the Ph.D. or equivalent requirement in accordance with 29 C.F.R. § 1607.1, *et seq.* The EEOC initially suggested at oral argument that such formal validation is not necessary in this context, but ultimately declined to take a position on the issue. While these regulations can be read to apply to a Ph.D. or equivalent requirement, the Supreme Court has interpreted them in a manner inconsistent with plaintiff's contention, *Griggs v. Duke Power Co.*, *supra*, at 433 n.8, and courts considering challenges to objective educational job criteria have generally not required validation in the manner there required. E.g., *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50 (8th Cir. 1977); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976).

and limitations encountered in attempting to validate subjective criteria and evaluation procedures.

*D. Approach to an Employer's College Degree Requirement*⁸⁷

Careful analysis of the college degree requirement will indicate that the issues are somewhat different from an employer-imposed high school requirement. A high school education generally imparts no particular skill to the student but, rather, provides a basic package of broad educational experiences.⁸⁸ For this reason it will usually be impossible to justify the requirement of a high school diploma as a prerequisite to employment.⁸⁹

A college education, on the other hand, usually entails the achievement of some level of competence in a given academic discipline or area of major study.⁹⁰ It is also apparent that there are jobs for which a person without formal education is ordinarily unqualified, as, for example, law, medicine, nuclear technology, etc. As recognized in the *Spurlock* and *Townsend* cases,⁹¹ moreover, where an employee will be responsible for duties that entail substantial economic or human risk, the employer's decision to insist upon a college degree from a job applicant will not lightly be disturbed.

On the other hand, employers may require a college degree not because of any particular knowledge or skill required for the job, but because the employer desires, as did the employer in *Griggs*, to "improve the overall quality of the work force."⁹² Congress noted in the enactment of the 1972 amendments to Title VII, that "artificial selection and promotion requirements that place a premium on 'paper' credentials" are of questionable value.⁹³ A common example would perhaps be an employer, as in *Payne v. Travenal*,⁹⁴ who simply requires a college degree, but not in any particular field or major, for a job that can easily be performed by a non-degreed individual.

87. In some employment decisions, the requirement of a college degree may not fall within the employer's discretion, as for instance where state licensing or certification (medicine, law and teaching) is required. Often, the predicate for such licensing or certification is, in turn, a certain educational degree. The legality and effect of such certification requirements are not treated here.

88. Some high schools teach particular skills or trades, such as those needed to be a secretary or a mechanic. Yet, a high school diploma, earned concurrently with such skills, does not necessarily verify any particular competence level.

89. *But see* the police officer cases at note 70 *supra*.

90. There remains, of course, continued dispute in the academia as to the proper role of the college education, pitting the "generalists" against the "specialists" and "technocrats." At least for the present, however, colleges to a large extent continue to provide specialized education.

91. *See* notes 76 & 80 *supra* and accompanying text.

92. *Griggs v. Duke Power Co.*, 401 U.S. at 431.

93. H.R. REP. NO. 238, 92D CONG., 1ST SESS. 24 (1971).

94. *See* note 73 *supra* and accompanying text.

Between these extremes lie the many jobs for which a college degree would be helpful but not necessarily essential for all applicants. *Fisher v. Proctor & Gamble Manufacturing Co.*⁹⁵ typifies this situation. The employer in that case filled its management and supervisory positions by promoting non-degreed existing employees and by hiring applicants from the outside who had degrees in technical fields. The court, without any detailed analysis, simply held the requirement of a college degree for hire from the outside to be discriminatory as to blacks.⁹⁶ Unfortunately, the court made no attempt to analyze the particular jobs involved or their relationship to the degree requirement. It may be assumed, however, that the basis for the court's conclusion was the fact that the employer did not require a degree of those who were promoted from within.⁹⁷ Yet, careful analysis might have shown that the requirement was sufficiently job related. For example, in a typical industrial plant, staffing supervisory and management positions only from within inevitably tends to limit the employer's capacity to adjust to continuing technical advancements or to develop new and better methods of production.

The initial step in any case where a college degree requirement adversely impacts on a minority group is to compare the needs of the particular job with the particular expertise or knowledge required to perform it. The comparison should control the court's scrutiny of the criterion, and the quantum of proof required to be shown by the employer to justify its use. If the particular job requires only a level of learning which is possessed by the general population or which can be reasonably taught on the job, and if the employer has no obvious business need for any skill indicated by a college degree, the requirement should be sustained only upon a showing of manifest job relatedness upon the now familiar standards (for example, a validation study showing the criterion's predictive capability).

If, on the other hand, the job (whether on its face or upon proof at trial) requires technical knowledge or other learning which is not commonly found in the general labor force and cannot easily be taught, and if the particular degree required would normally be an indication that the applicant has the required learning or knowledge, the degree requirement should be held presumptively valid. The court in such event should not require of the employer more extensive or elaborate proof of the job-relatedness of the criterion. And where, perhaps, the showing is inconclusive, but the economic or human risk is sub-

95. 14 E.P.D. 7662 (N.D. Tex. 1977).

96. *Id.* at 5270.

97. *Id.* at 5267.

stantial, a showing of some nexus will rebut the prima facie case. In such cases, the "manifest relationship" to the job in issue or "business necessity" therefore may be assumed, even without formal validation or other proof of the degree's predictive capability.⁹⁸

To be sure, as the *Griggs* case noted, degrees themselves are only evidence and not determinants of ability:

History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.⁹⁹

However, it would seem counterproductive to require an employer to evaluate each individual applicant on his knowledge and experience, with the expectation of finding the one person that can perform a job without "the conventional badges of accomplishment."¹⁰⁰ Notably,

98. Ironically, these instances may be precisely where the exclusionary effect of the college degree is the greatest. For example, blacks constituted approximately 9% of all college enrollment in 1974, yet they constituted only 3.14% of enrollments in engineering schools and received only 1.92% of the B.S. degrees. Similarly, women constituted 45% of all college enrollment, yet they constituted only 4.89% of enrollments in engineering schools and received only 2.3% of the B.S. degrees. At the same time, in 1975-76 women received 73% of the degrees in education, 61% in the fine and applied arts, and 76.3% in foreign languages.

99. *Griggs v. Duke Power Co.*, 401 U.S. at 433.

100. The Department of Labor does collect some statistics on level of educational attainment found in various job categories. The job categories, however, are necessarily general and, therefore, somewhat overinclusive. That is, the "professional" job category is lapped together with "technical and kindred workers," which includes embalmers, kindergarten teachers, writers, musicians, laboratory workers, etc., as well as professionals as that term is more commonly understood. The category "Managers and Administrators (except Farm)" includes a number of different occupations, including funeral directors, local government administrators, meat inspectors, restaurant and bar managers, etc., as well as highest-echelon private and governmental officers. Nevertheless, the Department statistics are instructive of the percentage of college graduates that are in the upper-level job categories:

Percentage distribution by four or more years of college:

	<i>White/Male</i>	<i>White/Female</i>	<i>Black/Male</i>
Professional, Technical and Kindred Workers	66.7%	61.6%	65.0%
Managers and Administration (except Farm)	31.0%	19.8%	34.9%
	<i>Black/Female</i>	<i>Median School Years Completed</i>	
Professional, Technical and Kindred Workers	57.8%	16.5 years	
Managers and Administration (except Farm)	—	13.2 years	

BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, EDUCATIONAL ATTAINMENT OF WORKERS, SPECIAL LABOR FORCE REP. NO. 193, 1976 reprinted in DIGEST OF EDUCATIONAL STATISTICS 175, table 164.

an employer is not required to individually evaluate the ability of an applicant who has failed a validated and job-related test.

The most difficult case will be where there is no substantial economic or human risk involved, and where the college degree would be some indication that an applicant possessed learning generally helpful to the employer, but where such learning is not essential. The tension here between the societal interests for continued industrial growth and the employer's proper demand for efficiency, and the need to obviate exclusionary practices, is most pronounced.¹⁰¹ The issue is whether in such cases the showing of job-relatedness should be a sufficient defense where there is no "manifest relationship" or "business necessity." To permit mere "job-relatedness" to suffice may perpetuate a discriminatory work force, yet to impose a "business necessity" requirement may severely debilitate an employer's competitive capability and growth. In this sense, the college requirement is neither an "artificial, arbitrary, and unnecessary barrier to employment,"¹⁰² nor can one always show its "demonstrable relationship to job performance."¹⁰³

In such instances, the proper resolution is to accept the employer's long-term need for some college-indicated learning as itself a "business necessity." The question (to be resolved on a case-by-case basis) is what portion of (or what particular jobs) in issue should be reserved for college-degreed applicants, and what portion should be opened to all applicants. The resolution of each case may yield artificial distinctions, but, in the absence of better-suited alternatives, such may be the only fair one.

In summary, if the degree requirement impacts adversely upon a particular minority group and it cannot be justified on any basis other than employer whim, it should be stricken. On the other hand, certain jobs should properly carry the presumption of validity. And, in the gray area in between lie the difficult choices and determinations requiring careful and circumspect review of the job and the college degree.

101. The Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. at 801 noted:

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

102. *Griggs v. Duke Power Co.*, 401 U.S. at 431.

103. *Id.*

V. LITIGATION THE UPPER-LEVEL DISCRIMINATION CASE

A. *Individual Actions.* The *McDonnell Douglas*¹⁰⁴ test arose in the context of a lower-level, as opposed to an upper-level, job and it works quite well in that specific context. When an attempt is made to apply it to the process of filling upper-level jobs, however, the *McDonnell Douglas* test works in such a way that that plaintiff may have a relatively easy task in proving he or she was presumptively qualified for the position in question, and, on the other hand, the defendant may have a similarly easy task in defeating the prima facie case by asserting the superior qualifications of another applicant.

This result stems from two differences between lower- and upper-level jobs and from the way in which employers fill them.

The criteria for filling lower-level jobs are more likely than in the case of upper-level jobs to be objective in nature and thus it is a relatively simple matter to determine if a particular applicant was qualified. In the area of upper-level positions, however, the predominant criteria are subjective, and the application of the *McDonnell Douglas* test becomes much more difficult. As noted previously, the criteria for such jobs tend to be numerous, as well as subjective, in nature. This may be true to the point that writing job descriptions for such positions, except in a very general way, is not even attempted. Hence, the courts have not required a showing by plaintiff of superiority, but only minimal competence to meet the *McDonnell Douglas* competency standard.¹⁰⁵

On the other hand, it is not always discriminatory to hire a more or equally qualified non-minority applicant. And, the employer need only show a legitimate non-discriminatory reason for the selection in order to successfully defend any prima facie case. But, because the final employment determination is again often based on subjective evaluations, the employer will usually be able to proffer acceptable

104. See notes 13-16 *supra* and accompanying text.

105. See *Powell v. Syracuse Univ.*, 17 Fair Empl. Prac. Cas. 1316, 1320 (2d Cir. 1978):

[P]roof of competence sufficient to make out a prima facie case of discrimination was never intended to encompass proof of superiority or flawless performance. If an employer is dissatisfied with the performance of an employee, he can properly raise the issue in rebuttal of the plaintiff's showing. In the context of this case, Ms. Powell has demonstrated that she possesses the basic skills necessary for the performance of her job, and has thereby made out a prima facie showing of competence.

Judge Campbell in *Blizard v. Fielding*, 17 Fair Empl. Prac. Cas. 149, 151 (1st Cir. 1978) (dissenting), indeed, suggested that in upper-level jobs, it may be wiser to simply presume that a prima facie case was made out. *But cf.* *Olson v. Philco-Ford*, 531 F.2d 474, 478 (10th Cir. 1976) (holding that to show a prima facie case, plaintiff must show something more than that a qualified male was chosen over a qualified female).

justification for the decision—e.g., particular education, employment experience or expertise that the employer concluded was especially relevant for the particular position. Where objective standards are absent and cannot be established, the court may feel bound by the employer's decision as to the particular requirement for a position, and especially where the court lacks sufficient expertise to itself make any intelligent evaluation of the contentions.¹⁰⁶

Moreover, because employers tend to have more lower-level positions and because the success of the entire corporate enterprise is not likely to rise and fall strictly on the basis of individual performance at that level, employers are not usually inclined to an extensive search in an effort to find the most qualified. At the upper levels, however, there tend to be a limited number of such jobs and the quality of performance in such positions is more closely linked to the success of the entire enterprise. (At least the salary structure is usually premised upon that assumption.) Thus, in filling such positions the employer is more inclined to search a group of qualified applicants, and courts will more readily accept the need for selecting the "best," rather than any qualified, applicant.

In any event, the result is that a legitimate non-discriminatory reason for non-selection of a minority can more readily be adduced to defeat a prima facie case in the upper-level case.

As recognized in the *McDonnell Douglas*¹⁰⁷ and *Furnco*¹⁰⁸ decisions, however, proof of a legitimate business justification, such as the superior qualifications of another applicant, does not end the Title VII inquiry, and this remains particularly true in upper-level employment discrimination cases where the legitimate justification defense may easily be abused. The plaintiff must be given an opportunity to introduce evidence that the proffered justification is merely a "pre-text" for discrimination. And, because of the difficulty in resolving a

106. The Supreme Court explained in *Furnco Constr. Corp. v. Waters*, 98 S. Ct. 2943, 2950 (1978) that the burden which shifts to the employer is "merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race," and, that courts cannot require employers to adopt an employment procedure that maximizes hiring of minority employees. Consequently, an employer retains wide discretion in determining the criteria upon which any employment decision will be made, and so long as that criteria is legitimate, it will be credited by the courts in rebutting the prima facie case. Yet, if "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it" in the context of a suit by bricklayers, much less compelling is any restructuring of employment criteria for upper-level jobs. See also *Powell v. Syracuse Univ.*, 17 Fair Empl. Prac. Cas. at 1321. ("But the law does not require, in the first instance, that employment be rational, wise, or well-considered—only that it be nondiscriminatory.")

107. 411 U.S. 792, 796 (1973).

108. 98 S. Ct. 2943 (1978).

case on the prima facie or rebuttal level, the pretext issue is increasingly becoming the focal point of upper-level discrimination cases.

Unfortunately, there are few cases where "pretext" has, in fact, been established, and, therefore, little authority to guide future litigation. It would seem, however, that a plaintiff has essentially three methods of proceeding. First, it may be shown that the employer failed to follow his own established procedure in applying the selection criteria. Second, if sufficient, usable data are available, the easiest way of proving pretext is probably by analyzing and comparing a group of employment decisions in the same job or type of job. Proof that non-minorities were exempted from requirements imposed on the minority candidate, or that there is a general trend of accepting less-qualified non-minorities in the same or similar jobs, may be conclusive evidence of pretext. Third, as the *Furnco* case firmly established, statistical evidence may be introduced to support other evidence of a discriminatory intent in the application of selection requirements. Given the current statistical underutilization of minorities, such evidence would usually support a plaintiff's case. Statistical disparity, however, in itself is not proof of pretext.

The record of individual upper-level court decisions, especially university teaching cases, is disheartening from a plaintiff's perspective. Unlike the lower-level and supervisory cases, the employers usually are successful. Moreover, because upper-level jobs are often few in number, many of such cases will only be litigated at this level rather than as class actions. The employer's success may mean that there is little discrimination in upper-level jobs, but, it may indicate the need to develop newer and better litigation methods to uncover subtle discrimination from apparently innocuous procedures. Every case, however, will have to be tried on its own.

B. Class Actions and Statistical Evidence. As noted previously, the prima facie case in class actions is invariably made by means of statistics, and this method has consistently been approved by the Supreme Court. There is no reason why such a method would not also be applicable in upper-level employment discrimination cases.

The leading case discussing problems of statistical proof in the context of a class action is the *Hazelwood* case,¹⁰⁹ an action by the United States alleging a "pattern or practice" of employment discrimination in the hiring of public school teachers. In that case, the Supreme Court once again confirmed that proof of a substantial statistical disparity by itself may carry the plaintiff's burden of proof. How-

109. 433 U.S. 299.

ever, the Supreme Court also noted a general limitation on the probative value of statistics that is particularly relevant in considering statistical proof in an upper-level employment context. Specifically, where "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."¹¹⁰ That is, where, as for most upper-level jobs, special skills are required, the only relevant evidence is that which compares the employer's work force with the available pool of those possessing the required skills.

Selecting a proper statistical standard against which to judge an employer's selection record for any level of job under the *Hazelwood* rule requires a two-step, labor-market analysis. First, the relevant geographic labor-market area must be selected. Second, the availability of qualified persons within the selected geographic area must be determined. In the case of lower-level jobs, courts¹¹¹ have usually selected the Standard Metropolitan Statistical Area ("SMSA"), or the city or county within which the employer operates as the relevant geographic area.¹¹² Upper-level jobs on the other hand, generally require a broader geographic labor market area, and defining such an area will require reference to factors usually insignificant in lower-level cases, such as areas of recruitment.¹¹³ Indeed, in the case of some upper-level jobs, the labor market may be national in scope.¹¹⁴ It is also apparent that this choice of the geographic bounds of the labor

110. *Id.* at 308 n.13.

111. *See, e.g.*, *Thompson v. McDonnell Douglas Corp.*, 416 F. Supp. 972, 980 (E.D. Mo. 1976), *aff'd.*, 552 F.2d 220 (8th Cir. 1977); *Louis v. Pennsylvania Indus. Dev. Auth.*, 371 F. Supp. 877 (E.D. Pa. 1974), *aff'd.*, 505 F.2d 730 (3rd Cir. 1974), *cert. denied*, 420 U.S. 993 (1975); *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *EEOC v. E. I. du Pont de Nemours & Co.*, 445 F. Supp. 223, 236-38 (D. Del. 1978); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1298 (5th Cir. 1978).

112. SMSA's are established by the Office of Management and Budget, with the assistance of the Bureau of the Census, as reflections of established areas of social and economic integration primarily on the basis of existing commuting patterns. *United States v. Connecticut National Bank*, 418 U.S. 656, 670 (1974).

113. *See* BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, *JOBSEEKING METHODS USED BY AMERICAN WORKERS*, BULLETIN 1886, at 15 (1975):

Among both men and women, much larger proportions of jobseekers who obtained jobs as professional workers or as managers traveled over 100 miles from home to look for work. Recruitment and job search in these two occupational groups are much more likely than in other occupations to be on a regional or national basis.

and, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *A Guide for Employers*, 1 AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT 25 (1974) [hereinafter cited as *Guidebook*].

114. *Guidebook*, *supra* note 113, at 25.

market may often be critical in determining whether a prima facie case has been established by way of statistical comparison.¹¹⁵

The second step in the labor market analysis is to determine the availability of qualified persons within the selected geographic area. The degree of difficulty in this second step depends upon how specific are the criteria for the job in question and thus how easy it is to specify what type of person, in terms of experience or education, is qualified to fill it. Published census data showing availability of persons trained or experienced in hundreds of specific job categories are readily available for various geographic areas ranging from the entire nation down to states, counties, SMSA's, cities and even census tracts.

If a geographic area for which such data are readily available has been chosen as the labor market area, then this second step of the analysis can be quite easy. This is especially true when the analysis of availability is being made for a distinct profession such as chemist, engineer, physician, etc. On the other hand, many upper-level positions simply do not fall into separate pigeon holes, and thus statistics showing the availability of persons to fill such positions may be difficult to obtain. For example, one would expect some "fungibility" among the various types of administrators included in the census category "Managers and Administrators." The level of that fungibility so far as a particular new job opening is concerned, however, is not an easy thing to calculate. Thus, to the extent that census-type or other data are important to the inquiry, the parties and the court may have to accept the fact that they are at best dealing with estimates.

Aside from these more basic difficulties, there is the oft-present problem of small numbers of persons and decisions involved, and, thus the difficulty in amassing hard statistical proof.¹¹⁶ Courts are reluctant to place much reliance upon statistics when a change of only one or two employment decisions would drastically alter the significance of the statistical showing.¹¹⁷ When the statistical samples are small in size, it is almost impossible to obtain "statistically significant" results. At the upper levels of employment this difficulty be-

115. For example, the 1970 census data shows that in the category "Professional, Technical and Kindred Workers," black representation was as follows: National—5.4%; Wilmington SMSA—4.8%; Philadelphia SMSA (immediately adjacent to Wilmington)—8.2%. In the category "Managers and Administrators": National—2.7%; Wilmington SMSA—2.8%; Philadelphia SMSA—5.1%. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE YEARBOOK 1970.

116. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977).

117. *See, e.g., EEOC v. C&O Ry. Co.*, 17 Fair Empl. Prac. Cas. 815, 818 (4th Cir. 1978), where there were 51 upper-level positions, only one of which was held by a black. All but seven of the positions, however, were filled before Title VII, and of the seven, one was held by the sole black. Thus, 14% of the available vacancies were filled by blacks, and no prima facie case was established.

comes particularly acute when dealing with particular professions where minority availability is minimal. For example, in the university teaching cases, the available pool of Ph.D.'s has been calculated at between only 1% and 2% black; the pool of those holding Master's degrees in the relevant disciplines is only approximately 4% black. Similarly, in private industry, minority participation in upper-level positions varies, but is generally very low—for example, the engineering profession has 1.6% female, 1.2% black and 1.6% hispanic participations.¹¹⁸ Moreover, given current minority college enrollment in such disciplines, no significant change may be expected in the near future.

Another statistical problem which may be expected to recur in the context of upper-level employment discrimination cases involves the collection and use of "applicant flow" data, which the Supreme Court in the *Hazelwood* case stated should be preferred over cumulative or static employment data.¹¹⁹ Again, the problem stems in part from the fact that in the context of upper-level employment the number of positions is limited. If the inquiry is then restricted to actual "applicant flow" in the period following the effective date of Title VII or is further restricted to only those employment decisions made by the employer within the period for which the statute of limitations as to money liability has not run, then the lack of data problem discussed above becomes further pronounced. Other problems will also arise. In the context of upper-level jobs where objective qualification standards are not available, it may not be easy to identify those who were or should have been considered for particular openings. And, the applicant flow may be very easily distorted by apparently qualified applicants who in fact are not. Unlike the lower-level jobs or where objective selection criteria are available, the probative value, if any, of such applicant flow statistics may be questionable.

118. See also BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, CURRENT POPULATION REPORTS, Series P-23, No. 53 (1974).

	<i>Computer Specialists</i>	<i>Mathematical Specialists</i>	<i>Life Scientists</i>	<i>Physical Scientists</i>
Female	12.2%	14.5%	13.2%	7.5%
Black	1.5	3.7	1.6	1.8
Oriental	1.3	2.6	2.3	3.2
Other Races	.7	.6	.6	.9
	<i>Environmental Scientists</i>	<i>Psychologists</i>	<i>Sociologists</i>	
Female	3.0%	28.1%	21.0%	
Black	.2	1.8	1.4	
Oriental	1.4	.3	1.8	
Other Races	.3	.3	.3	

119. 433 U.S. at 308.

Finally, there may be a serious problem in determining which jobs are sufficiently similar to each other in terms of duties and level of responsibility to justify grouping them together for purposes of making statistical compilations and comparisons. Indeed, should he so wish, the employer has the ability to assign seemingly different job titles for essentially similar jobs.¹²⁰ Alternatively, jobs with very different responsibilities, levels of pay and future potential for promotion can be made to seem equivalent in title.¹²¹ This can also have the effect of limiting the size of the pool of jobs to be considered unless the plaintiff is attentive to this possibility.

The above are certainly not the only difficulties that differentiate the upper-level statistical case from most others, but they are probably the most common ones that will be found. To state the difficulties of using small numbers and examining discrete job positions is, however, to state the consequence. Many, if not most, upper-level jobs will probably be tried as individual, and not class, actions. If it is possible to proceed on a class basis, however, both the parties and the court must carefully appraise statistical evidence in light of the various limitations inherent in upper-level jobs.

C. Subjective Evaluations and College Degree Requirements.

Assuming a prima facie case is established, and the employer defends on one of the above grounds, the initial issue may be validation under the *Uniform Guidelines*. A few authoritative decisions in the

120. An interesting example of an apparent such case in the television broadcasting industry was presented in a report found in *Hearings on S. 60 Before the Subcomm. on Communications of the Committee on Commerce, Science and Transportation, 95TH CONG., 1ST SESS. 454 (1977)*.

For example, the data suggests that women in clerical posts are being given paper promotions with impressive titles that licensees can report to the FCC. The proportion of women employees in full-time office and clerical jobs has purportedly dropped 22 percent since 1971, from 77 percent to 55 percent of all full-time women employees. In the same period, the percentage of women in the upper level management, professionals, technical and sales jobs is reported to have increased from 19 percent to 42 percent of all women employees.

The suspicion that much of this improvement in the status of women is fictitious arises from the fact that between 1971 and 1976, the number of office and clerical worker positions, reported dropped by 755. In the same period 1,251 new positions were reportedly established for officials and managers. It seems improbable that this greatly increased corps of management personnel can function with reduced clerical support.

In the lower level full-time job categories in which racial minority employees are most often found, craftsmen dropped from 2,420 to 1,190 and operatives from 1,377 to 535. The combined labor and service categories dropped from 865 to 668 jobs.

In contrast, the upper level positions increased markedly. There were 2,758 new professionals posts reported, 1,756 new technicians and 357 new sales workers.

121. *Id.*

future may, of course, settle the issue, but it is impossible to predict any decision. It may be supposed, however, that since the courts in the past have exhibited great reluctance in applying validation techniques to these areas, that no marked change will occur. Nevertheless, there may be particular upper-level jobs for which the selection criteria should be required to be validated pursuant to the *Uniform Guidelines*. But even if full-blown validation efforts are unnecessary, technically impossible or prohibitively costly, courts should nevertheless inquire as to whether the employer has made a good faith effort to determine objective standards and to reduce reliance upon criteria and procedures which are known to have high adverse impact. In such event, the *Uniform Guidelines* do suggest some of the factors that should be properly considered.

One area of litigation yet largely unexplored is that of objective selection for upper-level jobs. Even though the courts have accepted the inevitability of utilizing subjective factors, and, perhaps, conventional wisdom may lead to that conclusion, this is not to say that some objective standards of measurement in upper-level jobs cannot be stated. The answer may well be that a system based on subjective judgments is not feasible, but this need not be assumed. Certainly, so long as the subjective process has an adverse impact, plaintiff has the option of proving that an alternative selection procedure exists which would serve the employer equally well with a lesser adverse impact.

In all events, litigation involving subjective processes and college degree requirements will require a detailed analysis of the particular job by both parties. Unlike lower-level jobs, proper analysis cannot be had by a "two-word job description."¹²² Indeed, expert testimony describing particular jobs and their requirements may be necessary.¹²³ The proof, thereafter, will have to be geared accordingly.

CONCLUSION

Upper-level or limited-entry positions have unique characteristics that may make resolution of discrimination actions more difficult, especially since statistical evidence may be unavailable or inconclusive

122. Cf. Judge Godbald's suggestion in *Smith v. Olin Chemical Corp.*, 15 Fair Empl. Prac. Cas. 290, 297 (5th Cir. 1977) (*en banc*) (dissenting) that the majority determined a necessary job qualification for a laborer based upon a two-word job description.

123. See *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 174 (1st Cir. 1978), a university teaching case, where experts in the areas of education and sex discrimination were called to testify.

and because decision making is necessarily based on subjective rather than objective judgments. The courts should find that broad general rules developed in lower-level Title VII litigation are not always applicable. Application of established Title VII principles is, nevertheless, proper, if the unique aspects of upper-level litigation are understood.