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ON-THE-JOB PERFORMANCE EVALUATIONS: AN EMPIRICAL ANALYSIS OF "JUST CAUSE" COROLLARIES AS PREDICTORS OF TITLE VII EMPLOYMENT DISCRIMINATION CASE OUTCOMES

DISSERTATION

Presented in Partial Fulfillment of the Requirements of the
Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

Donald J. Van Meter, B.S., M.L.H.R.

* * * * *

The Ohio State University
1995

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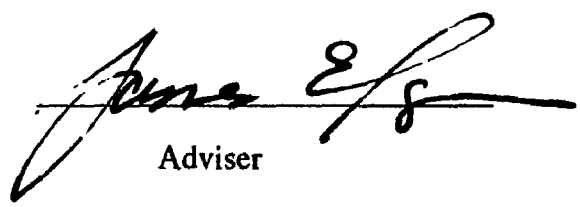

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In memory of my parents, Joseph C. and Esther D. Van Meter, who always encouraged me to get an education because it was the one thing that could never be taken away.

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CHAPTER I

THE PROBLEM

Introduction

During the last decade, a number of writers have reported on changes occurring in America's work force and their impact on human resources management. Usery and Henne (1981/82) list a number of forces that bring about change, including the decline of organized labor, structural shifts in the economy, demographic changes in the composition of the labor force, and improved management techniques to avoid unionism. Changing perceptions of the quality of work life and an increased demand for social justice in the workplace are listed as well. For example, O'Neill (1981/82) reports that in a study of 240,000 management, clerical, and hourly employees in 188 companies, a large number of those surveyed viewed the quality of their companies' work lives as having declined over the years.

Walton (1985) addresses the need to make American workers more productive and competitive. He reports that significant changes have been under way in how organizational and management problems are being addressed in an effort to improve worker performance. He describes those changes as a transformation from the traditional controlled approach of human resources management toward one of gaining greater commitment from employees to the organization's bottom-line productivity.

While Walton cites economic necessity as the driving force behind the need for transformation, he also cites individual leadership emerging from within the ranks of

management and labor alike, philosophical choices in organizational style, and enhanced employee rights as providing fuel for change.

Stepp (1986) too notes that American labor relations, and its effects on the employer-employee relationship, is in a period of great turbulence. He and others (Shepard, Duston, and Russell 1989; Shepard, Heylman, and Duston 1989; Larson and Borowsky 1987; Holloway and Leech 1985; Player 1981) write that employees are seeking an equal voice in important decisions affecting their careers. Employees want and expect to participate in those decisions that affect them (Marshall 1987). Sovereign (1989) confirms the trend and predicts that it will increase during the 1990s and will embrace all aspects of personnel management and, in particular, performance evaluations.

Statement of the Problem

Data from credible performance evaluations can provide valuable information for making and supporting human resources management decisions. Increasingly, having credible performance evaluation systems has become an important legal concern as well (Sovereign 1989).

However, despite a long history of research and development efforts, performance evaluations continue to suffer from serious methodological and human problems that weaken their usefulness and credibility with employers, employees, and courts alike (Pulhamus 1991; Connolly 1989; Henderson 1984; Cascio 1982). Bernardin and Beatty (1984, 13) have found, based on research evidence, that no performance evaluation method has done particularly well in either the legal or employment arena.

While much effort has been devoted to improving the credibility of performance evaluations in all areas, historically the primary focus has been on improving the psychometric properties of rating instruments (e.g., validity, reliability, accuracy, deficiency, and contamination errors) and understanding the nature and characteristics of

the rating processes (e.g., rater errors, cognitive processes of the rater). Heneman (pers. com. 15 November 1991), however, sees the focus on that line of research coming to an end, with many of the problems associated with evaluation practices left unresolved. He and others (e.g., Folger, Konvovsky, and Cropanzano 1992; Murphy and Cleveland 1991; Lawler, Mohrman and Resnick 1984; Keeley 1977) believe the future of evaluation research must lie in exploring the contextual environments and organizational and procedural processes in which evaluation systems must operate if any effective resolutions to the traditional problems associated with them are to be resolved.

Others have advocated eliminating performance evaluations entirely (cf. W. Edward Deming's third deadly disease of management—the evaluation of employee performance—in Walton 1986, 36). While that may at first glance sound like a practical solution, the research does not support it. For example, Jorgensen, Snyder, and Barrett (1988, 5) reviewed more than six hundred federal court cases filed between 1970 and 1986 involving charges of employment discrimination and found that the central overriding theme in all areas of employer and employee defense was the employee's performance. Sovereign (1989, 314) too has recognized the importance of what he calls the "performance defense" and lists having an objective method for measuring performance to be the number one priority for management in the 1990s.

With the increased involvement of courts in all areas of personnel practices, writers have turned their attention to examining court cases and offering advice or designing evaluation systems that address the legal issues surrounding performance evaluations. Typically, this line of research (e.g., Kleiman and Durham 1981; Connolly 1989; Mohrman, Resnick-West, and Lawler 1989) begins with a general discussion of problems associated with traditional performance evaluation systems. It concludes with recommendations for improving evaluation systems to make them more legally defensible,

or it provides a model evaluation system that merges the technical and legal requirements of a performance evaluation system to make it more predictably defensible.

A line of research initiated by Feild and Holley (1982) has applied quantitative analysis to performance evaluation systems in an attempt to identify characteristics that can be used to predict employment discrimination case outcomes. Others (e.g., Miller, Kaspin, and Schuster 1990) have extended this line of empirical research by combining qualitative techniques to identify considerations that serve to explain why predicted performance evaluation characteristics fail to predict case outcomes. Problems with that research exist as well; the results have been mixed. For example, characteristics (e.g., validity) found predictive in traditional cases invoking Title VII, which prohibits discrimination in employment practices based on employee sex, race, religion, national origin, and color, fail to be predictive in age discrimination cases. Beck-Dudley and McEvoy (1991) have concluded after a review of U.S. federal appeals court cases in this area that the courts' continued use of case-by-case analysis has left employers and employees with unworkable and subjective performance evaluation standards. This study sees a different perspective.

The Need for This Study

It appears from reading the technical and legal performance evaluation literature that a "criteria gap" exists between what courts look for in a performance evaluation system and what researchers have been recommending as defensible criteria. Whereas researchers have traditionally concerned themselves with identifying and predicting technical characteristics and standards (e.g., job analysis, validity, reliability), the courts have focused repeatedly on procedural considerations that govern the evaluation system. Factors such as adequate notice of the evaluation standards being given to the employee prior to evaluation, reasonable efforts on the part of management to help the employee improve areas of unsatisfactory performance prior to administering sanctions, and affording the

employee an opportunity to question the evaluation evidence and subsequent ratings appear to be decisive considerations in determining case outcome. Such features appear to be more aligned with the constitutional concept of "due process" and its cousin in arbitral jurisprudence, "just cause."

In conducting the literature search for this study, it appears that procedural research is emerging as a new direction for performance evaluation study. For example, Folger and Greenberg (1985) applied procedural justice concepts developed in law to determine correlates of perceived fairness in performance evaluation processes. Pulhamus (1991) suggested using the "just cause" principles followed in labor relations discipline cases as a method for reducing conflict in the supervisory evaluation process. And Folger, Konovsky, and Cropanzano (1992) argued for a due process metaphor as a solution for many of the problems they see in what they call the "test" and "political" models approach to performance evaluation research and development. However, no study was found that attempted to empirically test the due process or just cause concepts as valid predictors of court case outcomes. Clearly, such research is needed because it appears that the legal defensibility for performance evaluation processes will predominate the interests of researchers and practitioners alike well into the next century.

The Research Question

This study proposes to test empirically the predictability of seven procedural process Corollaries (independent variables) derived from labor-relations principles of just cause as predictors in federal employment Title VII case outcomes (dependent variable) when performance evaluations were central to the factual issues in the case.

The major question proposed for this study is, What is the relationship between seven performance evaluation Corollaries of just cause and case outcome in federal 1964 Civil Rights Act, Title VII employment discrimination litigation when performance

evaluations are central to the factual issues of the case? An ancillary question is, For those variables that fail to predict, what considerations do courts take into account that dictate case outcome?

The null hypothesis is that no relationship exists between Corollaries and case outcomes. The alternate hypothesis is that a relationship exists.

The Significance of This Study

This research is significant for four reasons. First, it contributes to the current trend in performance evaluation research: examination of organizational processes, procedures, and environmental contexts that influence evaluation systems. Current evaluation literature has called for more research in this area, and the seven independent variables that are derived from the concepts of just cause and due process heavily influence the environment within which the employment relationship exists and within which performance evaluations occur.

Second, this research addresses the criteria gap that appears to exist consistently between performance evaluation features considered important by researchers and decisive considerations used by courts to determine employment discrimination case outcomes. Predictive variables in previous studies have focused on identifying performance evaluation characteristics, while courts appear to have concerned themselves with the procedural processes involved in managing the evaluation system. Yet, no research was found in the literature review conducted for this study that empirically tested procedural process factors or, even more specifically, the just cause principles as predictors of case success. This study will contribute to filling in that gap.

Third, previous research in this area has been empirical only in regard to researchers' inductively selecting predictor variables in an attempt to identify predictor

variables (Austin, pers. com. 22 February 1994). This study applies a framework for empirical analysis based on recognized principles of procedural due process and just cause.

Finally, information gained from this study will make a contribution to all stakeholders involved with performance evaluations. Employers can better gauge the defensibility of their evaluation policies and practices, changing them as necessary to avoid the potential of civil litigation. Employees can become more knowledgeable about their procedural rights in evaluation litigation and be better equipped to challenge unjust actions. Those charged with the responsibility for the design, implementation, and use of performance evaluations would have yet another source of information by which to guide their work and improve their recommendations for practitioners and future researchers alike.

Scope and Limitations

This study examines the technical, legal, and labor literature on performance evaluations in order to provide sufficient understanding of the predictor variables tested in this study. The study is limited to the examination of on-the-job performance evaluation systems used for assessing the performances of employees in permanent positions. Not included are systems designed for the primary purpose of supporting initial hiring, or systems designed solely to assess the promotability of job candidates (e.g., knowledge tests, assessment centers). The literature indicates that courts apply different standards to assess the validity of systems depending in large part on the purpose of the system as well as the type of managerial decision made from the information the system is designed to provide (e.g., Nathan and Cascio 1986; Barrett and Kernan 1987, 490; Miller et al. 1990, 563).

An overview of the historical and developmental work that has occurred in performance evaluation systems during the last several decades is presented first. Courts

frequently consider expert opinions and traditional practices when legal issues in new areas of law, such as performance evaluations in civil litigation, are tried. Additionally, this information can provide insight into the environmental contexts in which performance evaluations have been developed—a central concern to this study.

This study focuses only on discrimination cases decided by judges in federal courts under Title VII of the 1964 Civil Rights Act (amended 1991). A 1991 amendment (section 102 (c)) now makes jury trials available in certain situations (Linderman and Kadue 1992, 271). However, this study's interest is only in understanding judicial opinions that create precedents for other courts to follow. Therefore, cases with final outcomes determined by juries were excluded from study.

Numerous others (e.g., Varca and Pattison 1993; Miller, Kaspin, and Schuster 1991; Connolly 1989; Mohrman, Resnick-West, and Lawler 1989; Barrett and Kernan 1987; Bernardin and Beatty 1984; Landy and Farr 1983; Feild and Holley 1982; Shuster and Miller 1980/81; and Latham and Wexley 1981) have reported on specific elements of the 1964 Civil Rights Act and its related amendments; therefore, only a limited presentation of its elements are made here.

This study does not include age discrimination cases under the 1967 Age Discrimination in Employment Act. The reasons for this are twofold. First, whereas age discrimination cases have always provided for jury trials, as stated above juries have only recently been permitted in Title VII cases. Furthermore, evidence exists that courts use different standards in age discrimination cases than are used in Title VII cases to determine the credibility of performance evaluations (Miller, Kaspin, and Schuster 1990, 557).

This study also reviews the labor literature to provide a history and development of the just cause principles in the employer-employee relationship. A comparison will be made between the concepts of just cause and the constitutional principles of due process to demonstrate their similarities and differences. The information is basic to the nature of this

study because the seven principles of just cause that form the basis for the independent variables in this study have their origins in the constitutional concept of due process.

Definition of Terms

A number of the terms used in this study have specific technical and legal meanings. Other terms, such as *performance* or *evaluation* defy simple definitions; and it appears from the literature review that they do not enjoy commonly accepted definitions.

For those terms requiring a legal definition, *Black's law dictionary* (1979, 5th ed.) was used as the primary resource. In those cases where *Black's* did not provide a legal definition, other legal authorities and references were consulted and a definition was selected from among them, or a synthesis of the literature was used to generate a definition for the purposes of this study. For those terms requiring a nonlegal definition and lacking a standard definition, one was generated from a synthesis of the related professional literature.

Adverse Impact

When an improperly validated employer selection policy, practice, or procedure results in a disproportionate number of Title VII protected class employees (commonly accepted as being a number that is less than 80 percent of the highest passing group of selected employees) being rejected.

Business Necessity

A test employed by the courts (primarily in employment discrimination cases) that requires an employment policy or practice to be so necessary to job performance and the goals of the organization that a reasonably available alternative system with lesser discriminatory effects is not available. The United States Supreme Court in *Griggs v.*

Duke Power established precedence for it by requiring that any employment policy that has a discriminatory impact be justified by the employer establishing the relatedness of the policy to job performance (*Griggs v. Duke Power Co.,* 1971).

Due Process

Due process of law implies "the right of a person affected to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law" (*Black's* 1979, 449).

Just Cause

In the *Taracorp Industries* case (1984–85 CCH NLRB ¶ 16, 857, 273 NLRB No. 54, 1984), in a footnote, the National Labor Relations Board defined just cause as encompassing principles such as the law of the shop, fundamental fairness, and related arbitral doctrines (cited in Hogler 1986, 406).

Performance

Those job-related services, products, accomplishments, and employee contracts provided to an employer in an employer-employee relationship. "The fulfillment or accomplishment of a promise, contract, or other obligation according to its terms" (*Black's* 1979, 1024).

Performance Evaluations

Those systematic processes used by organizations to measure and then judge the worth of an employee's job performance in relationship to the needs of the organization. For purposes of this study the terms *employee job performance evaluations, performance evaluations* and *performance appraisals* are used synonymously (see, for example, Stufflebeam 1988, 7; Martin, Bartol, and Levine 1986/87, 370; Cascio 1982, 309; Landy and Trumbo 1980, 113). Note that the thesaurus for Psychological Abstracts recommends that the term *performance evaluation* be used to locate journal articles dealing with the subject of performance appraisals.

CHAPTER II

REVIEW OF THE LITERATURE

Introduction

Contemporary performance evaluation concepts, methods, and practices have evolved over many decades. To synthesize the voluminous literature developed during the last sixty to seventy years, this review reflects, with slight modifications, a categorization scheme developed by R. L. Heneman (with permission, pers. com. 7 January 1992). Heneman divided the literature into the five categories of foundations, performance measures, criterion issues, process, and feedback. For the purposes of this review, the categories are revised into historical foundations, methods and processes, and legal issues and considerations.

The historical foundations section tracks performance evaluation practices from Babylonian times to the present. The reader will observe that performance evaluation practices have been heavily influenced by world and national events during the centuries (e.g., the European agricultural revolution that made possible the American industrial revolution, world wars, trends in the national economy).

Following the historical foundations section, a review is made of the characteristics of the various performance evaluation methods in current use. For the sake of parsimony, methods are grouped into a classification scheme and then compared with a set of criteria suggested by Baily (1983) for the evaluation of performance evaluation methods (i.e.,

"criteria for criteria"). This critique provides, in part, a foundation for understanding the strengths and weaknesses of these various evaluation methods.

The next section provides an overview of Title VII of the 1964 Civil Rights Act and its 1991 amendments. It is important to note that this act does not prescribe, prohibit, or endorse a specific method or approach to performance evaluations or their management. However, it is important to know their various provisions because both recognize performance as an affirmative defense to violations of the acts.

A review is made of major employment discrimination cases where performance evaluations were a factual issue in the court's decision. The information is drawn from reviews presented in the literature as well as from examination of cases. This section includes a presentation of the work that has been done in an effort to predict discrimination case outcomes when performance evaluations were central to the issues of the case, which is the major focus of this study. Information gained also served as a primary source of coding the independent variables used in this study.

Finally, the seven principles of just cause, along with arbitral notes, espoused by arbitrator Carroll Daugherty in *Enterprise Wire Co.* (46 LA 359, 1966) are presented. Their relationship to constitutional principles of due process, and their impact on employer-employee relationships is discussed. Because these principles apply to tests of discipline and discharge processes when enforcement of work rules is judged in a collective bargaining arbitral setting, it was necessary, for the purposes of this study, to restate them in terms relevant to performance evaluation processes. Restatement of these principles to equivalent performance evaluation correlates was, out of necessity, an intuitive process. However, precedence for this process has been established by Folger and Greenberg (1985), who applied procedural justice concepts developed in law to determine correlates of perceived fairness in performance evaluation processes. Additional support for the restatements made in the present study is provided, where possible, from resources cited in

the performance evaluation technical literature. It was the performance evaluation correlates of the just cause principles that provided the seven independent variables for this study.

Historical Foundations of Performance Evaluations

Lopez (1968, 28) tracks elements of performance evaluations from as early as the Chinese Wei Dynasty (221–265 A.D.). Wren (1979) too, in his research on the evolution of management thought, finds evidence of performance evaluation concepts as early as 2123–2081 B.C. in Babylonia.

DeVries et al. (1981) traced the development of historical events and trends in performance evaluation in the twentieth century and report what they believe to be two particularly striking features. First, as new methods of evaluating have emerged, old methods continue to be used. According to the authors, employers apparently do not readily abandon an evaluation practice for newer methods once older methods are established. Wexley and Klimoski (1984, 38) and Locher and Teel (1988), who conducted survey research on the use of various types of appraisal systems, came to a similar conclusion. Locher and Teel (1988, 139) show that rating scales and essays, some of the oldest forms of evaluations, continue to be used along with more modern approaches such as Management by Objectives (MBO) (see table 1).

TABLE 1 USE OF APPRAISAL TECHNIQUES IN SOUTHERN CALIFORNIA

Types of Systems	Small Organizations %	Large Organizations %	Total %
Rating Scale	61.6	50.7	57.1
Essay	19.8	23.3	21.3
MBO	18.6	16.6	18.1
All others	—	9.4	3.5

Note: Survey of 1,459 organizations with 324 respondents.
Source: Adapted from A. H. Locher and K. S. Teel, Assessment: Appraisal trends, *Personnel Journal* (September 1988): 139.

The second observation of DeVries et al. (1981) is that the purpose of performance evaluations has greatly expanded during the last twenty years, which has resulted in performance evaluations being called on to do more than they were originally designed to do or are capable of doing. According to DeVries et al., that has resulted in two types of problems for organizations.

First, because organizations are using evaluation methods that were developed decades ago (the foundations of all systems were developed before the civil rights era; see Zedeck and Cascio 1984), they may no longer be suitable for management's needs. Second, too frequently many of the purposes for which evaluations are being used are not compatible. DeVries et al. (1981) cite evidence that suggests that using evaluations for making salary and promotion decisions as well as for employee counseling and development frequently causes organizational problems (e.g., supervisors may be reluctant to offer constructive criticism about the performance of an employee whom they have just recommended for promotion).

In their study of early performance evaluation history, Wexley and Klimoski (1984, 31) report that during the first half of this century performance evaluation methods reflected the prevailing trends in leadership theories, which had their focus on personality traits and determinants of successful versus unsuccessful leadership. The authors note that traits such as initiative, dependability, and maturity were common items on performance evaluation forms for the evaluation of both managerial and nonmanagerial personnel (1984, 38).

DeVries et al. (1981) categorize the development of performance evaluation history in the twentieth century into three evolutionary eras. The first, or pre-war era, began in the early 1900s and ended just after World War II. The emphasis was on identifying, describing, and rating employee traits and characteristics. The second era began just after World War II and ended just prior to the 1960s civil rights legislation. Attention shifted

from characteristics and traits of the employee to the rating instrument. Researchers hoped to gain better control over rater errors and biases. The third and current era began in the early 1960s concurrent with the passage of employee civil rights and discrimination litigation. During this era, efforts are being made to make performance evaluation more legally defensible. While research continues in traditional areas of performance evaluation interest (i.e., ratee characteristics and traits, psychometric improvement of rating instruments, formats and scales), the focus of research is beginning to shift into such areas as employee behaviors, examination of the total rating process, and the study of the cognitive structures of the rater.

Zedeck and Cascio (1984, 473) reviewed the evaluation research as well. They reported that one area of research that has received considerable attention in recent years has focused on applying social cognition theory (i.e., research that has its emphasis on cognitive structures and processes underlying social judgment and social behavior) to the study of evaluation practice.

According to Zedeck and Cascio (1984, 473), the predominate cognition theory studied in relationship to evaluation practice has been attribution theory, which holds that behavior is not simply judged by its objective components but is interpreted by the observer-rater as well. Examples of that line of research have included such areas as explorations of the rater's locus of control (internal or external), cognitive complexities of the rater, and how information schema are formed (i.e., the study of how cognitive representation of knowledge is formed, which includes recognition, organization, storage, judgment, recall, and information decay).

Heneman (pers. com. 15 November 1991) sees the focus on cognitive research coming to an end, with many of the problems associated with evaluation practices left unresolved. He includes among those calling for an end to the cognitive line of research Kevin Murphy, who for the last decade has been one of its leading proponents. Heneman

and others (e.g., Murphy and Cleveland 1991; Lawler, Mohrman, and Resnick 1984; Keeley 1978) believe the future of evaluation research must lie in exploring the contextual environments in which evaluation systems must operate if any of the traditional problems associated with them are to be resolved.

Review of Performance Evaluation Methods and Processes

The variety of methods that have been developed for the evaluation of work performance is extensive (Guion 1986, 34). A number of reviews devoted to those processes have appeared in the literature over the years (e.g., Wherry 1950; Lopez 1968; Landy and Farr 1980; Baily 1983; Wexley and Klimoski 1984). As a means of efficiently dealing with the extensiveness of the research, reviewers have devised various schemes for categorizing individual methods that describe their common strengths, weaknesses, and attributes (e.g., Lopez 1968; Kujawski and Young 1979; Landy and Farr 1983; Baily 1983). DeVries et al. (1981, 39) reviewed the various classification schemes used by researchers and found no single method compelling for reviewing or reporting on performance evaluation methods. The purpose for the review was central in the selection of the reporting method used.

Baily (1983) provides a classification system and identifies criteria against which the effectiveness of performance evaluation methods may be reported. The criteria (five of which, according to Baily, were taken from the 1979 work of Kane and Lawler) are validity, reliability, freedom from bias, relevance, discriminability, nature and degree of appraiser judgment, and nature of criteria used. Because of the inclusion of criteria by which to assess the strengths and weaknesses of the various performance evaluation methods comprising the method categories, the extensiveness of evidence provided to support conclusions, and the practical concerns for managing the scope of this study,

Baily's scheme was chosen as a guide for summarizing performance evaluation research here.

Closed, Free-Expression Reports

According to Baily, the major characteristic of methods included in this category is that ratings are made against some identified references and the rater's comments are kept confidential from the appraised. Baily lists written essays as being among the major forms included in this category.

The source of problems for methods in this category is related to their subjective nature and the little control they provide over the criteria that raters choose to rate employees. Additionally, the closedness of the system encourages rater bias. Baily cites a number of studies that have shown such characteristics as friendliness towards the ratee, writing capability of the rater, and demographic variants between rater and ratee (e.g., sex, race, and nationality) as influencing ratings. In addition, the rater's ability to observe and rate individual performance with these methods accurately makes it difficult to control the relevancy of the rating criteria to job performance. Overall, Baily finds that these methods are in need of more research and that the research that has been completed provides little support for their use (1983, 9).

Individual Standards Procedures

Individual standards procedures are distinguished by their primary emphasis on individual performance development and their heavy dependence on the ability of the interviewer to identify important organizational and individual employment goals and to conduct effective employee interview and goal setting meetings. Standards may be criteria-referenced as well as norm-referenced. Methods that Baily includes in this category are Drucker's Management by Objectives, McGregor's Management by Integration and Self-

Control, Schleh's Management by Results, Randell's Performance Review, and Cummings and Schwab's Development Action Program.

According to Baily, because of the developmental interest and qualitative nature of methods in this category, the concepts of validity and reliability do not readily apply to them for several reasons. For example, performance criteria are rater and situationally specific; and the effectiveness of these methods depends heavily on the comprehensiveness and quality of the interview process. Additionally, Baily lists the following as reasons why attempts to evaluate the validity and reliability of these methods are meaningless: differential information coverage, differential weighting of information, inaccuracy of elicited information, differential interviewee responses to different interviewers, individual differences in interpretation of traits/events, and the lack of standardization of information (1983, 12).

Comparative Standards Procedures

Methods in this category use norm-referenced standards and are predicated on the assumption that while raters may differ in their abilities to describe or quantify differences among performers, they are capable of making comparative discriminations. Baily includes in this category straight rankings, which require the rater to rank order from the best to next best and so on until all performers are rated; alternate rankings, which require the rater to alternately select between best and worst, next best and next worst, etc., until all performers have been rated; pair comparison, which requires the rater to appraise each performer against every other performer; and forced distributions, which involve rank ordering performers on a select criterion (e.g., merit) and then fitting the rank ordering into a normal distribution function along an interval scale.

According to research reported by Baily (1983, 16), comparative standards procedures have been shown to have a fair degree of face validity and inter- and intra-rater

reliability. Also, because of their intuitively appealing nature, they enjoy a certain amount of face validity and relevancy to job performance. The rating approach is straightforward and requires simple dichotomous decision making by the rater. However, Baily cites several problems associated with comparative standards procedures, including the difficulty of making comparisons among large numbers of employees and the production of ordinal data by most procedures that does not permit the magnitude of differences among rankings to be ascertained.

Landy and Trumbo (1980) find two additional problems associated with comparative standards procedures. Because only comparisons are being made between employees of a specific work group, these methods limit the organization's ability to use rankings for making comparisons across groups or across employee work locations. In addition, because these methods use only a single global performance dimension for rating, it is difficult for administrators to make decisions about the suitability of employees for specific jobs (1980, 122).

Finally, Baily reports that establishing the validation of comparative standards procedures is difficult because methods lack an external criteria against which to establish validity, and the methods depend heavily on the appraiser's ability to define and interpret what constitutes effective performance, thus making their validity highly appraiser-specific (1983, 15).

Absolute Standards Procedures

Methods in this category involve rating employee performance against written standards established for the job. The distinguishing feature of methods included in this category is that they are based on criterion references, as opposed to comparative standards procedures, which are norm-referenced.

Following a classification scheme proposed by Cummings and Schwab, Baily divides absolute standards procedures into two subcategories—qualitative and quantitative types. Qualitative methods require the rater to identify whether some performance characteristic is present in the employee. Quantitative methods require the rater to identify the degree to which a performance characteristic exists within the employee (1983, 17).

Baily includes in the qualitative category the Critical Incident Technique (CIT), weighted checklists, and Forced Choice (FC). In the quantitative category are included conventional rating scales (including traditional and contemporary graphic rating scales), Behavioral Expectation Scales (BES), Behavioral Observation Scales (BOS), and behavioral description inventories.

Baily reports that the reliability of absolute standards procedures has been moderate and geared toward improving various facets of existing methods (1983, 20). Studies have explored such areas as methods used in data collection, ability of raters to observe and interpret behaviors, openness of scoring formats, involvement of ratees and raters in scale development and selection of rating items, effects of rater-ratee interactions on subsequent ratings, and rater motivation.

The major strength of quantitative absolute standards is the relevance of their rating items and performance domains to job performance (Baily 1983, 22). Baily cites a number of studies that support her conclusions. Such attributes as appraiser participation in measure development, scale development, terms couched in assessor's terminology, and the job behavior nature of the methods (e.g., BARS) contribute to their appeal, acceptability, and utility.

The ability of raters to discriminate among performance levels within and between rating scales (that is, discriminability) of specific methods within this category, such as Critical Incident Techniques, Behavioral Anchored Rating Scales, and Forced Choice procedures, is perceived as a strength. However, evidence is presented where

discriminability may be more a function of the rater than the method or instrument (Baily 1983, 23).

The nature and degree of appraiser judgment of the various absolute standards procedures are heavily method-specific. While some methods (e.g., conventional rating scales, weighted checklists) require only that the appraiser make a decision about the ratee's level of performance compared to predefined criteria or standards, other methods involve the appraiser's input into criteria and standard selection (e.g., BARS, BOS, FC). Those methods require that the appraiser possess a variety of complex decision-making and judgment skills. They include observational abilities, perceptual acuity, accuracy of recall, and verbal fluency. Because of the demands the methods place on appraiser judgment, Baily suggests that methods in this category may have different levels of utility for use across appraisal situations (1983, 24).

Performance Tests

Baily divides methods in this category into the two subcategories of work sample tests and situational tests. Methods included in the work sample tests subcategory are usually applicable to semiskilled and skilled jobs and include such items as typing and stenographic tests. Included in the situational tests subcategory are in-basket exercises and leaderless group discussion, which, when combined with similar methods, create assessment centers. Baily notes that neither work sample tests nor situational tests measure actual job performance. She finds that their primary use has been for predictors in employee selection (1983, 25).

According to Baily, the relevance of performance tests must be addressed on two fronts: the relevance of the content of the rating items that compose the test, and the relevance of the criteria selected to evaluate performance on the test (1983, 28). Whereas the inclusion of such rating items as in-basket exercises, answering telephone calls, and

handling interruptions is often found to be highly relevant to actual job performance, it is more difficult to draw firm conclusions as to criteria relevance. Such aspects as job level, assessment purpose, and assessor's characteristics may often require some order in presentation of criteria for the criteria to be relevant; yet criteria must be flexible enough to be situationally specific. Baily concludes that criteria relevance will most likely be a function of the rigor of criterion development (1983, 29).

Performance tests involve a wide range of assessor judgments. Whereas the criteria for work sample tests is usually well defined and leaves little for the appraiser to interpret or judge, situational test methods place a greater demand on the appraiser. As was the case with other performance evaluation considerations, the quality of the appraiser's judgments will depend heavily on such attributes as the appraiser's interviewing skills, perceptual acuity, conception of acceptable performance, and willingness to assess properly.

Direct Indices

Included in this category are objective job behavior outcomes and personnel data. Direct indices are attractive because of their perceived job relatedness (Baily 1983, 30). The most widely used are direct measures of work output—a simple count of what is produced (e.g., indices of sales volume, scrap rates, machine downtime). Personnel data include seniority, incidents of accidents, grievances, and tardiness.

Baily refers to a number of works that have questioned the validity of direct indices as performance measures. The greatest criticisms involve criterion deficiency (i.e., accounting only for a small amount of variance in total performance) and criterion contamination (i.e., criterion variance due to aspects beyond the control of the performer) (1983, 31). An additional criticism leveled at direct indices reflects the belief that many performances, particularly those that are managerial, cannot be measured easily in any direct and timely manner.

Because the measurement procedures involved with direct indices are usually well defined, reliability is a distinct advantage of direct indices compared with subjective methods. However, reliability should not be confused with accuracy, which, according to Baily, involves the representativeness and stability of measures across time.

While freedom from rater bias is considered to be a positive attribute for objective direct indices (i.e., direct counts of worker outputs), that may not be the situation for personnel data direct indices such as salary, rate of advancement, and organizational level, which are often the result of subjective decision making.

The relevance of direct indices is considered to be one of the method's greatest advantages. Due to their nature, direct indices contain certain amounts of face validity. However, Baily cautions that the advantage not be overstated (1983, 32).

Direct indices measures provide interval data, which enhances their discriminability. In addition, direct indices methods minimize the nature and degree of appraiser judgment (Baily 1983, 33). The appraiser's involvement is typically limited to gathering and documenting data within well-defined procedures. Furthermore, direct indices are performance criteria that may be used directly and indirectly to assess performance. Objective methods (e.g., productivity output counts), when used to assess an employee's level of performance, are direct measures of the employee's level of performance. Personnel data (e.g., work unit absenteeism) used to assess the performance of the manager would constitute indirect criteria (Baily 1983, 33).

Regarding the direct relationship of direct indices to organizational goals, Baily notes that they are seen as good criteria for organizational performance. However, she cautions that they have been criticized as inadequate measures of individual performance because they often neglect how and why a performance is effective, they confound performance variables, and they often prove to be criterion deficient (1983, 34).

Legal Issues and Considerations: Employment Discrimination Laws

Employment discrimination laws (e.g., the 1963 Equal Pay Act, Title VII of the 1964 Civil Rights Act, and the 1967 Age Discrimination in Employment Act) have affected employment practices in all areas, including selection, hiring, promotion, evaluation, discipline, and termination (Kujawski and Young 1979; Latham and Wexley 1981; Cathcart and Ashe 1989; Sovereign 1989).

Writers (e.g., Martin, Bartol, and Levine 1986/87, 371; Bernardin and Beatty 1984, 44) advise that performance evaluation practices become important legal issues whenever data obtained from evaluations are used for any type of personnel decision, and they predict that performance evaluation systems will become increasingly involved in contested personnel actions during this decade in all areas of law. The accuracy of this prediction is evidenced in the individual employment rights literature. For example, for the three-year period from September 1986 through January 1990, the Bureau of National Affairs in *Individual employment rights: BNA policy and practices series,* reported only eight cases involving this area of law and performance evaluations. In the subsequent sixteen months from February 1990 through May 1992, fourteen such cases were reported—a 75 percent increase.

The 1964 Civil Rights Act is reviewed in this section and in table 2. Player (1981) and Sovereign (1989) are the primary sources for this review.

TABLE 2 THE 1964 CIVIL RIGHTS ACT—TITLE VII (amended 1991)

Name	Federal Code	Prohibition
1964 Civil Rights Act, Title VII	42 U.S.C.A. § 2000e et seq.	Prohibits job discrimination based on sex, race, national origin, religion, and color for employers (e.g., persons, corporations, unions "affecting commerce" of fifteen or more employees for each working day of twenty or more calendar weeks in the current or previous calendar year). 1972 Amendment extends coverage to governmental agencies. 1978 Amendment (section 701(k)) requires pregnancy to be treated as any other disability or condition for which the employer provides benefits. 1991 Amendment (section 102 (c)) allows for jury trials when compensatory or punitive damages are sought.

Adapted in part from K. L. Sovereign, *Personnel law,* 2d ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1989), 305–306; M. A. Player, *Federal law of employment discrimination,* 2d ed. (St. Paul, Minn.: West, 1981), 82–277 ; Bureau of National Affairs, *Fair employment practices: BNA policy and practices series,* sec. 411 (1986), 1–356; and B. Linderman and D. D. Kadue, *Primer on sexual harassment* (Washington D.C.: The Bureau of National Affairs, 1992).

The 1964 Civil Rights Act—Title VII (amended 1991)

The 1964 Civil Rights Act establishes the legal precedents and parameters under which all discrimination law is based, including the Equal Pay Act, the Age Discrimination Employment Act, and the Americans with Disabilities Act, which address specific forms of discrimination. Described by Sovereign (1989, 29) as the broadest of all antidiscrimination acts, the 1964 Civil Rights Act was passed by Congress on 2 July 1964 and placed in effect one year later. Title VII of the act forbids employment discrimination when such discrimination is based on sex, race, religion, national origin, or color when making personnel-related decisions (Bernardin and Beatty 1984, 44). Since its passage, the 1964

Civil Rights Act has been amended three times: once in 1972 to extend coverage to public employers, again in 1978 to include pregnancy and pregnancy-related disabilities in the definition of the term *sex* (Latham and Wexley 1981, 14–15; Henderson 1984, 335–36; Player 1981, 110–12), and again in 1991 to allow, in part, for jury trials (Linderman and Kadue 1992).

Public and private employers as well as employment agencies and labor unions are affected by Title VII provisions (Bureau of National Affairs 1982, 421:1). With limited exceptions, discrimination is prohibited in hiring, firing, compensation, terms, conditions, or privileges of employment. Exceptions are limited to wages based on merit, seniority, and quantity and quality of production; schools operated by religious institutions; communists; and "bona fide occupational qualifications," which are exceptions based on reasonable necessity to the normal operations of the organization. Bona fide occupational qualification protection does not apply to race or color (Bureau of National Affairs 1980, 421:151).

On 22 August 1978 the EEOC published its current set of enforcement guidelines (codified as 29 CFR Part 1607). The intent of the guidelines was to provide employers with one set of governmental requirements that would enable them to avoid illegal discrimination under the various discrimination laws in their employment testing and other selection processes (Sage et al. 1991, 2; Bureau of National Affairs 1984, 401: 2231). Latham and Wexley (1981, 23) and Sage et al. (1991, 3) report that while the guidelines are not law, the 1971 United States Supreme Court's decision in *Griggs v. Duke Power Company* held them to be the law of the land by explicitly endorsing them as the "expressed will of Congress." Player (1981, 112) cites additional evidence of the acceptance of the guidelines as national policy in a 1975 United States Supreme Court decision in *Albermarle Paper Co. v. Moody.* In that case, the Court gave EEOC guidelines "great deference" as enforcement policy.

According to Player, three methods exist for establishing violations under the 1964 Civil Rights Act. They are individual instances of disparate treatment based on proscribed discrimination; neutral rules that perpetuate past intentional discrimination; and neutral rules not based on business necessity that are shown to have an adverse impact on sex, race, color, national origin, or religion (1982, 150–215). Of these, the first and third methods have the most relevance for performance evaluations, hence only those methods will be discussed here.

Disparate treatment permits the employer to use any legitimate basis as a defense against a claim of unlawful discrimination (e.g., seniority, past work records, breaches of work rules, insubordination, lack of work, disloyalty, poor work performance). While a legitimate basis need not be directly related to actual job performance or a business necessity, poor performance or the expectation of poor performance is frequently cited (Player 1981, 154).

When performance is used as a defense in disparate treatment cases, the employer is obligated to present evidence that others did not have similar work records or the performance expectation is reasonably related to a bona fide employer interest. Poor performance cannot be used as a defense if the plaintiff can show that the employer engaged in such actions as differential handling of poor performers or that the employer manipulated work assignments to cause poor performance (Player 1981, 150–58). In short, the law does not permit the employer to use an otherwise legitimate basis for discrimination as a subterfuge for a discriminatory motive.

According to Player (1981, 153), *McDonnell Douglas Corp. v. Green* (1973) is the leading case courts use to assess an employer's discriminatory motivation in disparate treatment cases. In *McDonnell Douglas Corp.*, the Court established a five-part test to assess the credibility of an employer's motivation in hiring as well as other employment decisions (e.g., discharge). The test elements require plaintiffs to establish *prima facie*

evidence that they were (1) members of a protected class, (2) applicants for positions in which the employer was seeking candidates, (3) qualified to perform the job (i.e., had the basic abilities to do the job), (4) denied the job, and that (5) the employer continued to seek applicants after they were rejected for the job, or the employer stopped seeking applicants because protected classes made applications for the job, or because only minorities applied for the job.

Sovereign (1989, 314) agrees that a legitimate claim of poor performance is nearly an absolute defense against discrimination claims. However, in his research he reports that it seldom works well as a defense because management frequently fails to have a valid system for the measurement of job performance to support the defense. Hence, the credibility of an employer's performance evaluation system becomes central to the employer's defense when claims of poor performance are challenged as a pretext for illegal discrimination.

According to Player (1981, 162–84) the leading case in situations where the employer's rules, neutral on their surface, have in effect a disproportionate (i.e., adverse) impact on protected class members (i.e., disparate impact) is *Griggs v. Duke Power* (1971) which resolved the following issues:

1. The employer need not have a specific motive to discriminate; the act is directed to the effects of an employer's practice, not simply the employer's motivation.
2. Statistical evidence could be used to establish disproportionate impact.
3. Less qualified personnel need not be preferred over better qualified personnel simply because of minority origins. However, when an employer's practice has been shown to have an adverse impact, the employer has a burden of showing the business necessity for the practice.
4. Any test given to assess job performance that results in an adverse impact must be demonstrably a reasonable measure of that job performance.

According to Player, two steps are necessary to apply *Griggs*. First, as is the case in all claims of discrimination, the plaintiff has the initial burden to establish that discrimination occurred and adverse impact resulted from an employment action (e.g., failed to select or promote). Second, once adverse impact is established, the employer must show the business necessity for the action.

The U.S. Supreme Court added a third step to adverse impact claims in the 1975 case of *Albermarle Paper Co. v. Moody*. In that case, the Court determined that a plaintiff can rebut a showing of business necessity if it can be shown that the employer's actions were imposed with a specific discriminatory purpose (Player 1981, 165). As is the case in disparate treatment claims, it is at this step in adverse impact claims that the employer's motives become relevant and suspect. Hence, the greater the subjectivity of a performance evaluation system, particularly for low-skill and task-quantifiable jobs, the more problems the employer can be expected to have in defending the system (Player 1981, 155).

Lee (1989/90, 403) reports that the appropriateness of using disparate impact theory to challenge an employer's subjective employment criteria (e.g., performance evaluations based on personal traits and characteristics) as opposed to objective criteria (e.g., physical requirements, test scores) and their use has been an issue in discrimination litigation almost since the passage of the 1964 Civil Rights Act. She analyzed two U.S. Supreme Court cases that dealt with the issues involved. In its 1987 decision in *Watson v. Fort Worth Bank and Trust* (490 U.S. 642) the Supreme Court made it clear that subjective criteria could be challenged under the disparate impact theory. Before that decision, according to Lee, federal trial and appellate courts were divided on the issue; and several courts held that disparate impact theory could be used only when objective criteria were involved. Two years later in *Antonio v. Wards Cove Packing Company, Inc.* (1989) the issue of whether plaintiffs must identify specific subjective practices in a disparate impact case or whether a cumulative effect approach could be used was addressed. In that case the Court held that

plaintiffs must identify specific employment practices as well as show a causal relationship between the identified practices and the impact (Lee 1989/90, 412).

According to Lee, these cases resolved some validation issues and raised others. In Watson, the court suggested that lower evidentiary standards for employers were possible when defending subjective standards. Lee cites Justice O'Connor (who wrote the opinion for the Court):

> . . . Employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance. (Lee 1989/90, 410)

Lee found this to be contrary to the EEOC *Uniform guidelines on employee selection procedures.*

In *Ward's Cove,* Lee saw the court in its plurality opinion backing away from the business necessity standard that had been established in *Griggs* citing, in part, Justice O'Connor (who again wrote the opinion of the Court):

> The dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . . The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice . . . there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster . . . the employer carries the burden of producing evidence of a business justification for his employment practice. (Lee 1989/90, 413)

In 1991, Congress acted to correct problems it perceived as created by the U.S. Supreme Court's decisions in the *Watson* and *Ward's Cove* cases by passing the 1991 Civil Rights Act. This act amended the 1964 Civil Rights Act, as well as the 1866 Civil Rights Act, the 1976 Attorney's Fee Awards Act, the 1976 Age Discrimination in Employment Act, and the 1990 Americans with Disabilities Act (Linderman and Kadue 1992).

According to Varca and Pattison (1993), the 1991 amendment reestablished that the burden of persuasion in disparate treatment cases rests with the employer once the plaintiff has established a *prima facie* case of discrimination. However, procedures for establishing a *prima facie* case or the employer's defense through the business necessity standard remain unclear, and, according to those authors, will need to be resolved by the courts. A suggestion made to employers by Varca and Pattison is to strengthen their defenses by employing technically sound appraisals, particularly in promotional decisions (p. 252).

Discrimination Laws and Performance Evaluations

Central to issues associated with employment discrimination law and performance evaluation design and practice is whether performance evaluation ratings are considered to be "tests" within the meaning of the EEOC's 1978 *Uniform guidelines on employee selection procedures* (codified as 29 CFR Part 1607, adopted 22 August 1978). A number of writers have taken the position that they are, and therefore performance evaluation must comply with the EEOC's standards for test validation (e.g., Martin, Bartol, and Levine 1987; Nathan and Cascio 1986; Feild and Holley 1982).

Treating performance evaluations as tests, Nathan and Cascio (1986, 1–50) reviewed more than seventy-five court cases involving performance evaluation and compared them against technical and legal standards established for testing. They used the 1985 *Standards for educational and psychological testing* developed by a joint committee representing the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education as their bases for technical standards. For legal standards, they used the EEOC's 1978 *Uniform guidelines on employee selection procedures* (see table 3).

TABLE 3 EMPLOYMENT DISCRIMINATION CASES COMPARED TO TECHNICAL AND LEGAL STANDARDS

1. Job analysis is the first and most important step in performance evaluation development and its subsequent defense, if challenged. Failing to conduct a job analysis, conducting an analysis poorly, and failing to relate the analysis to the assessment items are the leading reasons why courts strike down performance evaluation systems.

   Case Examples:
   - *Albermarle Paper Co. v. Moody* (1975). Validation studies not accepted without a job analysis.
   - *United States v. City of Chicago* (1977). Absent a job analysis, criterion-related validation study was rejected.
   - *Kirkland v. N.Y. Department of Corrections Services* (1974). Absent a job analysis, content validity of a test could not be shown.
   - *Easely v. Anheuser-Busch* (1983). Job analysis must measure relative importance of work behaviors as well as identify them.
   - *Bigby v. City of Chicago* (1984). Documentation of how the job analysis was conducted must be kept available for independent inspection.

2. Rating scales (numerical and behavioral) must be validated. That is, they must be derived from job analysis, must describe the performance dimensions they are rating, have well-defined anchors, have documents to show how they were derived, and be congruent with how the performance data produced by them is to be used. For example, rating scales assessing trait characteristics and used for predicting job success require a construct-validity study; rating scales assessing on-the-job behaviors or the products for job behaviors require content-validity studies.

   Case Examples:
   - *Rowe v. General Motors* (1972). The court found the performance standards to be vague and subjective regarding promotion.
   - *Crawford v. Western Electric Company* (1980). The court found that printed performance review standards reduced rater subjectivity.
   - *Wade v. Mississippi Cooperative Extension Service* (1974). Rating of traits was overly subjective.

3. Performance tests (e.g., job samples, physical fitness testing, established criterion measures) need to conform to all standards established for content validity, as well as ensure test "fidelity." For example, performance tests must contain a representative sample of all important job performances. Test content and testing context need to be as job performance–oriented as practicable. To the extent this is not possible, tests must be supported by other evidence of job validity. Tests designed to measure performance improvement through practice, coaching, familiarization with response modes and instruction need to be shown to do so. Directions for taking the test should be detailed so as to allow the test taker to respond as expected. Expected behavioral responses in behavioral-oriented tests need to be clearly defined. Judgments that enter into the scoring of the test and procedures for training the scorer need to be standardized and well documented.

Table 3 (continued)

Tests need to adhere to ethical and professional standards established for testing, such as "informed consent." That is, test takers are knowledgeable concerning the reasons for the test, the type of test being used, the range of consequences for the intended use of test data and what testing information will be released and to whom.

Case Examples:
- *Dothard v. Rawlinson* (1977). U.S. Supreme Court struck down height and weight standards as not job related and as having severe adverse impact on women.
- *Blake v. City of Los Angeles* (1979). Statistical proof is necessary to show relationship between physical test and job analysis when severe adverse impact is shown.
- *Vanguard Justice Soc. v. Hughes* (1984). Content validity cannot exist for job knowledge tests if items are written in a "haphazard" manner.

4. While not addressed in the *Uniform guidelines* and only indirectly in the *Standards,* courts have strongly supported appraisal interviews as showing that employers were fair in their evaluation process.

Case Examples:
- *Pouncy v. Prudential Insurance Company* (1980). The court endorsed a system where appraisals were subject to employee review and provisions were made for employees to add their comments.
- *Page v. U.S. Industries, Inc.* (1984). Formalized systems that called for second- and third-level supervisory reviews of ratings and allowed employees an opportunity to review and challenge their ratings are supported.

Source: Adapted from B. R. Nathan and W. F. Cascio, Technical and legal standards, In R. A. Berk (ed.) *Performance assessment* (Baltimore: Johns Hopkins, 1986), 1–50.

Not all writers agree that the standards set for tests under the *Uniform guidelines on employee selection procedures* apply to performance evaluation. Citing the 1973 case of *Brito v. Zia* as giving rise to the perception that performance evaluations were tests, Barrett and Kernan (1987, 490) believe the court confused the meaning of tests and criteria as they have been traditionally defined in the personnel field. According to those authors, the court was critical of Zia's subjective appraisal process and faulted Zia for not providing empirical evidence of the validity of its performance evaluation "test." The following grasps the essence of Barrett and Kernan's argument:

> A performance appraisal instrument is traditionally considered to be not a test, but a criterion that is correlated with a test. In most organizations, the performance evaluation is the only standard by which an employee's performance can be assessed. Therefore, it is nearly impossible to correlate this standard with any other external measure. (491)

To support their argument, Barrett and Kernan reviewed various commentators who support the test interpretation of *Zia* and point out the practical, psychometric, and legal problems presented by such interpretations. For example, they argue (citing the observations of Cascio and Bernardin 1981) that even if performance evaluation rating instruments could be validated against some other job criterion, nothing would stop the rater from conducting an invalid rating by introducing personal bias during the actual scoring procedures. In short, validating an instrument does not validate the rater.

The authors report that nothing in professional practice or in the 1978 *Uniform guidelines* requires that a content validity test be supported by empirical data. Two legal case citations are provided to support their view: *Contreras v. City of Los Angeles* (1981), and *NEA v. South Carolina* (1982).

A line of research that has begun to emerge in the performance evaluation literature involves predicting the defensibility of employment decisions based on specific performance evaluation attributes.

Predicting Employment Discrimination Case Outcomes

Feild and Holley (1982) applied quantitative analysis to performance evaluation systems in an attempt to identify characteristics that can be used to predict case outcomes. They used multivariate procedures (viz., content analysis, discriminant analysis, and chi square) to examine empirically the effects of thirteen performance evaluation characteristics on sixty-six employment discrimination cases (fifty-five were Title VII cases and eleven were age discrimination cases) for the purpose of predicting case outcomes (1982, 392–

93). One of their stated goals was to shed light on the issue of whether evaluations were tests and therefore fell under the control of the EEOC's *Uniform guidelines* (1982, 402). They reasoned that the standards used by courts for determining the legality of tests (e.g., use of job analysis, validity and reliability of data, and data collection procedures) could be used as predictors in determining performance appraisal case outcomes. However, the authors found only five of the thirteen characteristics to be predictive: type of organization, provision of written instructions, method of evaluation (trait- versus behavior-oriented appraisals), use of job analysis, and review of appraisal results with employees. The authors caution, however, about the generalizability of the findings due to the small number of cases involved and the low to modest relationships (1982, 399).

Werner (1990) replicated and extended Feild and Holley's work by including discrimination cases heard since 1982. His primary goal was to determine whether courts had changed the basis for their decision making since Feild and Holley's work. Werner found that the type of organization, presence of information on appraisal reliability and validity, rater training, purpose and frequency of appraisal, basis for the charge, geographic location, and sex of the evaluator were not predictive of case outcome. The number of evaluators used and their race was marginally predictive; verdicts by circuit were generally not significant; and type of evaluation was only marginally significant, although employers with systems based on behaviors or results fared much better in court. He also noted that outcomes favored employers when the performance evaluation was for purposes other than promotion. He attributed that to the complexity of promotional decisions and their subjective nature and predicted that employers may find it more difficult to defend promotional decisions than decisions in other cases (e.g., discharge, transfer, and merit, which are typically based on objective measures of performance).

Werner reached two conclusions. First, reliability and validity were far less of a concern for judges than they were for researchers; and second, courts place little emphasis

on the *Uniform guidelines* (1990, 19). His finding was similar to what others had observed (e.g., Barrett and Kernan 1986; Lee 1989/90; Beck-Dudley and McEvoy 1991).

Miller, Kaspin, and Schuster (1990, 557) cite evidence that courts use standards to determine the credibility of performance evaluations in age discrimination cases that differ from standards used in Title VII cases. In their investigation, they combined empirical and qualitative techniques (viz., discriminant analysis, chi square, and traditional legal case analysis and content analysis) to investigate the performance features that federal courts considered in deciding fifty-five Age Discrimination in Employment Act cases. They tested eleven predictors, derived in part from the works of Feild and Holley (1982). Their findings were as follows:

1. Organizational factors such as type of organization and geographical location were not related to case outcome.
2. Performance evaluation methods were either not reported in court opinions or were not related to case outcome. They concluded that courts showed greater concern for fairness and objectivity in the system than they did for issues related to validity.
3. Results of the study were contrary to previous research that found that successful employers were those that had job analyses, behavior-oriented items, specific written instructions to raters, and that provided feedback of results to employees.
4. The Equal Employment Opportunity Commission's *Uniform guidelines on employee selection procedures* were not an influential factor in the age discrimination cases under study.
5. The type of personnel action (e.g., promotion) appeared to dictate the nature of proof an employer needed to support a claim of nondiscriminatory action.
6. Formal performance appraisal procedures were not required to mount a successful employer defense. Witness credibility and the amount of documentation of poor

performance such as contemporaneous notes, customer complaints, memos, and evaluation forms were accepted as conclusive evidence.

7. Previous research was supported that employees in older age groups (i.e., sixty-plus years) were more successful than those below that category (the youngest employee to win an age discrimination case was fifty-two years old; 1990, 574).

Lastly, Beck-Dudley and McEvoy (1991) examined forty-six Title VII and Age Discrimination in Employment Act cases since 1980 where performance evaluations were discussed in the court's written opinion. Their interests were in determining just how well management researchers' recommendations for performance evaluation effectiveness were observed by the courts. Their conclusions were that the courts, for the most part, ignored even the most fundamental recommendations made by management researchers (e.g., job analysis, rater training, proof of validity, and reliability), and instead made their decisions on a case-by-case basis (p. 161). However, one factor they find important to the courts was providing an opportunity for the employee to learn of his or her evaluation results and to appeal the evaluation to a third party. It will be shown momentarily that those two elements are critical to the principles of due process as well as to the central focus of this study—just cause.

Overall, the above line of research can be described as having produced mixed and conflicting results. A criteria gap appears to exist between what researchers have used as predictor items and what courts base decisions on when performance evaluations are central to the issues in discrimination cases. Based on these findings, this study will look next at a set of predictor items that researchers have yet to consider in these cases.

Constitutional Due Process and Arbitral Standards of Just Cause

As has been noted by Beck-Dudley and McEvoy (1991, 161) and others reported in this study, courts appear to be concerned more with employee rights than with the psychometric or technical constructs (e.g., validity, reliability, job analysis, rater training) associated with performance evaluation systems when judging employment discrimination cases. This section examines those rights as courts and arbitral tribunals have described them during the last several decades.

The just cause principles are standards used by arbitrators to decide whether management acted correctly in taking disciplinary or termination actions against employees. Although the standards are incorporated into nearly every collective bargaining contract, they lack an explicit definition. Conceptually, their underpinnings can be found in the principles of constitutional due process, criminal and civil law standards of "reasonable person" and "common sense," a mixture of labor administrative and case laws, and arbitrators' case-by-case interpretations of employment contracts (Koven and Smith 1992, 2–12).

Because the origins of just cause are based in such a wide diversity of laws, and because they have developed concomitantly with the labor history of this country, it appears fruitful to consider them as potential predictors of discrimination case outcome when performance evaluations are central to the issues of the case. However, to more fully understand their meaning, constitutional due process will be discussed first.

Constitutional due process protections afforded suspects in criminal proceedings are similar to just cause standards in employee discipline or termination proceedings. Kadish (1964, 125) describes them as peas of the same pod. However, the extent of constitutional protections is held to be out of place by many arbitrators in arbitral proceedings (Koven and Smith 1992, 179–80). Nevertheless, according to those authors, due process carried into the industrial setting as just cause does follow a basic notion of fairness. This notion

includes the employee's right to be informed of management's charges, the right to confront the accusers, the right to answer charges, and the right to be represented. In that sense due process and just cause are not seen as sets of prescribed rules but more so as a balancing of interests.

Hogler (1980, 570) too finds that minimal standards of fairness are firmly embedded in arbitral jurisprudence. Typically this includes rights to notice and explanation of allegations, impartial investigation prior to discipline, the right of employees to present their side, and others. All are elements of due process as well.

Due Process of Law

According to *Black's* (1979, 449) due process of law is defined as " the right of a person affected to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law." Ewing (1989, 5) further defines due process as that which is due in light of contemporary standards of fairness and further asserts that its concepts include procedural as well as substantive considerations (p. 27).

Emanuel (1989, 125–215) provides a history and development of constitutional due process. His work is summarized as follows:

The Bill of Rights is contained in the first ten amendments to the Constitution. The central purpose of the Bill is to restrict the federal government's interference into private affairs. The Fifth Amendment requires that the federal government afford individuals due process when issues involving the deprivation of life, liberty, and property are involved (p. 125).

The Fourteenth Amendment (one of three Civil War amendments aimed primarily at prohibiting discrimination against blacks by states), in its Privileges and Immunities clause (§ 1), was intended to assure "national" citizens that their federal rights would be protected within the states. Additionally, persons residing or within the jurisdiction of a state would be afforded the equal protection of law as well as due process in the deprivation of life, liberty, or property.

Ewing (1983, 93) cites the leading case where constitutional due process standards were applied to the employment relationship setting: *Renny v. Port Huron Hospital* (427 Mich. 415, 198 N.W. 2d (1986)). According to Ewing, the standards are also stated in the Restatement of Judgments, Sec. 83 (2) which lists them as follows: 1) adequate notice, 2) right to present and rebut evidence, 3) the tribunal formulates the rules and questions and facts relevant to those rules, 4) specification of the point at which the tribunal renders its final decision, and 5) other procedures as necessary to ensure a careful determination of the case.

Hogler (1980, 572) points out the close relationship between due process and just cause by citing the arbitrator in *Hygrade Food Products* (69 LA 415, 1977) as stating, "A discharge for just cause cannot be upheld unless the employer provides due process." However, while the constitutional concepts of substantive and procedural due process can be found in the principles of just cause, judicial due process and arbitral just cause have different interests. Whereas judicial due process attempts to balance the interests of society with those of the individual, arbitral just cause is concerned with the individual in the industrial community—a community that is seen as having rights and interests of its own (Edwards 1970, 143). The literature shows that due process varies considerably in the industrial, as opposed to the criminal, setting. Koven and Smith (1992) point to a number of those differences.

One difference Koven and Smith find to be held by a majority of arbitrators is that employees must answer questions presented to them during an investigative interview (p. 186). This is in direct contrast to constitutional protections against self-incrimination. Among the reasons given for that is that the Constitution is designed to protect citizens from the government in criminal actions, which is a situation that does not apply in the industrial setting unless the employer is the government and a criminal action is involved. Koven and Smith include the following other reasons: guilt is not the bottom line, employees have no right to a particular job, management's responsibility to investigate properly would be hampered if it could not compel the employee to testify.

Additionally, in cases of criminal violations, management is not bound by findings in criminal courts. It can impose its own discipline and use its own standards of proof. The criminal and industrial systems of justice are seen as independent. Employees have a procedural right not be convicted of a crime when poor police methods are used, but they do not have a substantive right to prevent the company from knowing and using the facts of the charge and reacting in a reasonable manner (Koven and Smith 1992, 289, citing *Hennis Freight Lines,* 44 LA 711, 714 (arbiter McGury, 1964)).

Koven and Smith find it to be well established that employers are not bound by a court's finding of guilt or innocence. Management's administrative hearings are not double jeopardy or *res judicata* (merits of case cannot be relitigated once a decision has been made), citing *Meyer's Bakery of Blytheville, Inc.,* 70-2 ARB ¶ 8582, 4912 (1970). The basis given for that includes different parties, different standards of proof, different decision makers, and different issues (p. 290). However, not affording an employee the opportunity or a representative a chance to test the accuracy of statements in cross-examination is seen as not providing due process/just cause (p. 301).

Koven and Smith (1992, 333) find that industrial just cause and constitutional due process vary in their application in civil rights cases as well. Affirmative action programs

in Title VII claims conflicting with seniority systems in the industrial arena provide an example. Just cause standards exceed Title VII requirements because they are viewed as protecting all employees from disparate treatment, not just a practical class of people. Also, whereas Title VII law places the burden of proof first on the employee to prove a *prima facie* case of discrimination, in arbitration this falls initially on the employer. It then becomes the union's, or the employee's, burden to show that disparate treatment occurred compared to other employees.

Hogler (1986, 403–11) too points out differences between criminal law and accepted labor practices. In *Taracorp,* a case that involved the appropriate remedy when an employer holds an improper interview (without a union representative), the National Labor Relations Board ruled that when discharge for "cause" existed, but actions taken were in violation of Weingarten protections against self-incrimination, the appropriate remedy for the arbiter was to issue a cease-and-desist order to the company; and it was not necessarily reinstatement of the discharged employee. In labor, as long as "cause" existed for the interview, it may not be held improper. In a criminal due process proceeding, such a conflict would require that the conviction be set aside.

Koven and Smith (1992, 419) view just cause as a contractual creation. Although it can be assumed in the basic employment relationship, the rights are not inherent and can be eliminated through negotiations. According to those authors, it was arbitrator Carroll R. Daugherty in *Enterprise Wire Co.* (46 LA 359, 1966) who reduced the basic elements of just cause to a seven-part test (see table 4). They define Daugherty's work as the most "specifically articulated analysis of the just cause standard as well as an extremely practical approach." Since *Enterprise,* Daugherty's seven tests have been applied in a variety of arbitration cases.

TABLE 4 SEVEN TESTS OF JUST CAUSE

Test Question 1: Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequence of the employee's conduct?

Arbitral Notes:

1. Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

2. There must have been actual oral or written communication of the rules and penalties to the employee.

3. A finding of lack of such communication does not in all cases require a "no" answer to question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

4. Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and some need not have been negotiated with the union.

Test Question 2: Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Arbitral Note:

1. If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

Test Question 3: Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Arbitral Notes:

1. This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

2. The company's investigation must normally be made *before* (italic in original) its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of the positions. In a very real sense the company is obligated to conduct itself like a trial court.

Table 4 (continued)

3. There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

4. The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

Test Question 4: Was the company's investigation conducted fairly and objectively?

Arbitral Notes:

1. At said investigation, the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

2. It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

3. In some disputes between an employee and a management person there are not witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

Test Question 5: At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Arbitral Notes:

1. It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

2. The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

3. "When the testimony of opposing witnesses at the arbitration hearing is irreconcilable in conflict, an arbitrator seldom has any means of resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable ground for believing the evidence presented to him by his own people.

Test Question 6: Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Arbitral Notes:

1. A "no" answer to this question requires a finding of and warrants negation or modification of the discipline imposed.

Table 4 (continued)

2. If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

Test Question 7: Was the degree of discipline administered by the company in a particular case reasonable related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Arbitral Notes:

1. A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a bad record. Reasonable judgment thereon must be used.)

2. An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or last one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

3. Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give a lighter punishment than it gives to others for the same offense; and this does not constitute true discrimination."

4. Suppose that the record of the arbitration hearing establishes firm "yes" answers to all the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's work record has been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends on all the circumstances. But as one of the country's arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator, and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "trial judge," might have imposed a lesser penalty. Actually the arbitrator may be said in an important sense to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bound of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of company unreasonableness.

Note: C. Daugherty articulated the seven tests of just cause in *Enterprise Wire Co.* and *Enterprise Independent Union* (March 28, 1966, 46 LA 359).

Source: A. M. Koven and S. L. Smith, *Just cause: The seven tests,* 2d ed., revised by D. F. Farwell. (Washington, D.C.: Bureau of National Affairs, 1992), 457–61.

It is of interest to notice Daugherty's frequent comparisons in his arbitral notes to the conceptual relationships between his just cause principles and due process as found in criminal courts (e.g., question No. 3, notes 1 and 2; question No. 7, note 4).

Just Cause Principles and Performance Evaluation Corollaries

The pivotal interest here is to determine how well performance evaluation conceptual equivalents to the seven just cause principles predict discrimination case outcome when performance evaluations play an influential role in case outcome. The effort now is to identify, through use of references in the performance technical and legal literature, the corollaries to just cause that will be used as the independent variables for this study.

Each principle of just cause will first be presented. Then select references to the technical and legal evaluation literature that are believed by this author to support the development of an equivalent corollary for performance evaluations will be presented. No attempt has been made to be exhaustive in the presentation of this evidence. Following this, a central theme for the just cause principle will be advocated and a proposed performance evaluation corollary to the just cause principle under examination will be proposed. When appropriate, indicators that point to the presence or absence of the corollary in the evaluation process will be provided. These indicators will help to distinguish the underlying conceptual differences between corollaries, thereby facilitating the coding process.

A. Just Cause Principle One

Principle

Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequence of the employee's conduct?

Discussion

Advance notice of the standards to which employees can expect to be held accountable is the first prerequisite to just cause (Koven and Smith 1992, 27–81). While notice may take several forms (e.g., in writing or implied through customs or practices), few writers in the technical-legal evaluation literature reviewed for this study have failed to emphasize its importance. The following citations illustrate this point:

Nathan and Cascio (1986, 1–8) describe performance evaluations as tests. They further assert that courts look to the *Standards for educational and psychological testing* (prepared jointly by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education 1985) and the *Uniform guidelines on employment selection procedures* (published by the U.S. Equal Employment Opportunity Commission et al. 1978) in defining the legal standards for performance evaluations.

It is at Standard 16.1 of the *Standards for educational and psychological testing* through its requirement of "informed consent" to test takers where Daugherty's first principle of notice is approached in the evaluation environment. Nathan and Cascio state: "Informed consent implies that the test takers . . . are made aware, in language they can understand, of the reasons for testing, the type of tests to be used, the intended use and the range of material consequences of the intended use, and what testing information will be released and to whom" (1986, 85).

Others (e.g., Cascio and Bernardin 1981) have pointed out as well the importance of employees knowing the standards by which their performance will be evaluated. Bernardin and Beatty (1984, 51), citing *Donaldson v. Pillsbury Company* (554 F.2d 885, 8th Cir. 1977), report that the court ruled against the employer because the employee was not shown her job description, which contained in it the standards for behavior to which she would be held accountable.

The central theme of this principle is advance notice of the employer's performance expectations and consequences for violating those expectations. Therefore, the first just cause principle may be restated as the following performance evaluation corollary:

Proposed Corollary One

Advance notice of performance standards and consequences for failing to achieve standards existed.

Indicators of this corollary's presence would include notices given to employees directly or indirectly (e.g., through employee handbooks, customs and practices) the performance standards expected and the consequences for failure. Notice of standards and consequences for failure must both be present to code this corollary as present in the evaluation system.

B. Just Cause Principle Two

Principle

Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Discussion

Establishing the job relatedness of any business practice is central to the defensibility of management decisions in cases where courts have found discrimination to have occurred (see for example *Griggs v. Duke Power,* 1971). Typically, this relationship is shown through a comprehensive job analysis, which Nathan and Cascio (1986, 13) describe as the most critical step in validating any performance evaluation system. Barrett and Kernan (1987, 501) also point out the importance of the job analysis and the business necessity relationship in their list of recommendations for the legal defensibility of an administrative action.

However, in not all cases has research shown business necessity to be a critical determinant of discrimination case outcome. The most important issue for the court to decide is whether discrimination occurred. If so, then was business necessity established through such procedures as job analysis? Kleiman and Durham (1981, 109) point to the courts' perspective of the discrimination–business necessity–job analysis relationship. The authors reviewed twenty-three Title VII cases and found that the courts decided in a majority of cases that as long as adverse impact did not occur, and employers did not intentionally discriminate, business necessity (i.e., concern for validity) was not important in the court's decisions.

While the importance of the business necessity standard appears to be equivocal in discrimination case law, a reasonable relationship between performance standards and administrative action is fundamental in establishing just cause cases (Koven and Smith 1992, 86–158; Redecker 1989, 311). Holloway and Leech (1985, 121) describe the detrimental relationship between performance standards and employee actions as any action the employee may take that tends to injure the employer's business—certainly a statement about job relatedness.

Latham and Wexley (1981) discuss the importance of the relationship between what items are evaluated and what are considered to be the important requirements of the job. They write that the core of the performance evaluation (appraisal) process is the definition of effective employee behavior. *Effective,* for the purposes of validating job tests, means the correlation between the measures on the test and measures of performance on important aspects of the job (p. 3).

In its 1988 publication of the Uniform Guidelines on Employee Selection Procedures, the Equal Employment Opportunities Commission on technical standards for criterion measures in criterion-related validity studies at section 14 (B) 3 states:

> Whatever criteria are used should represent important or critical work behaviors or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular

> employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. (pp. 38300–38301)

The central theme of this just cause principle is the establishment of some reasonable relationship of the rating items in the evaluation process to the nature of the job. Based on the above line of reasoning, the second performance evaluation corollary to just cause is established.

Proposed Corollary Two

A reasonable relationship was established between the rating items and the job.

Indicators of the presence of this corollary would include items related to the effectiveness, efficiency, or safe work performance. Examples include rating items related to production rates, error rates, absenteeism, cooperation with management, or ability to get along with other employees, and the like.

C. Just Cause Principle Three

Principle

Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Discussion

Beck-Dudley and McEvoy (1991, 150) find consensus in the evaluation literature that employees should be made aware of the results of an evaluation and be provided a right to an appeal of any evaluation thought to be improper or unfair. This is aligned with Daugherty's third note about this principle of just cause where he describes the employee's right to a "day in court" in which the employee is made aware of the charge and then given a right to defend the forbidden behavior.

Brown (1982, 394) too pointed out the importance of the employee review and right to comment, with a sign-off to document such review—although not necessarily signifying the employee's agreement with the rating. The employee would retain the right to appeal within a reasonable time.

Faley, Kleiman, and Lengnick-Hall (1984) reviewed 152 court cases to determine standards set by courts for establishing claims of age discrimination. They found that defenses were frequently based on some type of performance evaluations. They report that courts were more frequently concerned with the employer's intent to conduct thorough and genuinely honest evaluations of employees than with the accuracy of the system (e.g., *Mastie v. Great Lakes Steel Co.* 424 F. Supp. 1299 (E.D. Mich. 1976)).

While this principle of just cause and principles four and six appear similar in nature, its central theme has to do with the right of employees to voice or express disagreement with the final rating and seek an appeal. Based on the above, corollary three of this study is proposed.

Proposed Corollary Three

Provisions were provided for in the evaluation process to ensure the employee performed as rated.

Indicators of the presence of this corollary include explicit provisions in the rating process for appeals, notices given to the employee about a right to appeal, opportunities to write disagreements on the evaluation instrument, and opportunities for a re-evaluation to be conducted by another independent authority.

D. Just Cause Principle Four

Principle

Was the company's investigation conducted fairly and objectively?

Discussion

In his second note about this principle, Daugherty emphasizes the importance of other officials being involved in the review and adjudicatory processes of the investigation to ensure fairness and objectivity.

Brown (1982/83, 394) points to the importance of clearly written instructions to performance raters to ensure that ratings are conducted properly. Other suggestions related to this principle were documented performance-rater familiarity with the job being evaluated, evaluation instruments that are easy to understand and use, and central monitoring to ensure that proper procedures were followed.

Nathan and Cascio (1986, 26–27) cite a number of employment discrimination cases involving performance evaluations where courts have focused on fairness and objectivity issues. Specifically, the authors cite the importance courts place on procedures that minimize the likelihood of bias and ensure that fairness and objectivity in the evaluation process occurred. Those procedures have included such practices as having other evaluators involved in the rating process, and requiring that a higher level of management provide a final review.

Bernardin and Beatty (1984, 53) discuss the importance of objectivity in performance evaluation processes to ensure fairness and to ensure that the employee performed as rated in the evaluation system. As one of their recommendations for improving the legal defensibility of evaluations, they list assessing raters to ensure that ratings are being conducted in a valid and objective manner. The authors cite evidence (e.g., *Hodgson v. Sugar Cane Growers Corporation of Florida* 5 EPD, 7812, S.D. Florida, 1973) of how courts look to witness testimony to determine if rater biases influenced rating scores (p. 54).

Kleiman and Durham (1981, 113) discuss the importance of raters who are familiar with the work being evaluated and raters' ability to accurately observe and rate performance to ensure that performance occurred as rated.

Burke, Weitzel, and Weir (1978) cite six characteristics for effective performance evaluations. Their sixth recommendation is related to ensuring objectivity and accuracy in the evaluation rating. They recommend allowing employees an opportunity to voice their opinions in the evaluation. They cite evidence that this practice, when followed, produced more satisfaction with the final ratings (cited in Latham and Wexley 1981, 151).

In a study of three major organizations, Edwards (1983, 22) proposed a model that built in the safeguards to avoid unfairness and bias by including participation in criteria development, self-selection of multiple raters, rater training, and appeal processes. Safeguards against bias and inaccuracy in ratings are legal as well as practical concerns for employers and employees alike.

Folger and Greenberg (1985, 156–62) discuss the importance of fairness in performance evaluation systems as well. They cite much evidence that includes such practices as self-appraisals, input into the evaluation procedures, and interview styles that emphasize a problem-solving orientation.

Nathan and Cascio (1986) cite cases (e.g., *Pouncy v. Prudential Insurance Company*, 1980, and *Page v. U.S. Industries, Inc.*,1984) where courts endorsed systems where appraisals were subject to employee review, provisions were made for employees to add their comments, and appraisals had second- and third-level supervisory reviews.

While this principle is very similar to principle six, which focuses on discrimination, the emphasis here is on procedural safeguards in the evaluation process to ensure rating accuracy. Based on the above, the fourth corollary for this study is proposed.

Proposed Corollary Four

Checks and balances existed in the rating process to ensure that the final rating given was fair and objectively derived.

Indicators of the presence of this corollary include multiple or independent raters, raters trained in how to conduct ratings, established guidelines for conducting ratings, and raters themselves being audited to ensure they conducted ratings properly.

E. Just Cause Principle Five

Principle

At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Discussion

Black's law dictionary (1981) partially defines *substantial evidence* as the appropriate level of evidence to use in an administrative proceeding and regards all evidence as competent regardless of its source and nature and whose value rests on the logical persuasiveness to the reasonable mind as adequate to support a conclusion (p. 1981).

In that the performance evaluation process is neither a judicial-criminal nor civil proceeding (which subscribe to different standards of proof), but an administrative process, it seems reasonable to accept the definition offered by Black as appropriate for assessing the quality of evidence used to support a performance evaluation rating.

Barrett and Kernan (1987, 497–501) point out the importance of having evaluation results documented to enhance credibility with the courts. They found in six out of the ten cases they studied that subjective standards had been applied unevenly, thus causing the case to be lost by the defendant.

Folger and Greenberg (1985) discuss the importance of accurate record-keeping procedures to promote the perception of procedural justice in the use of performance evaluations.

The central theme of the fifth principle is the nature of evidence used to support a performance rating. Therefore, the following performance evaluation corollary for just cause principle five is offered.

Proposed Corollary Five

Performance ratings were supported by some direct evidence of performance.

Indicators of the presence of this corollary include non-contested testimony of employees other than that of the rater, production records, attendance or absentee data, and customer complaints.

F. Just Cause Principle Six

Principle

Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Discussion

Kleiman and Durham (1981, 114) found that courts take two approaches to performance evaluation processes when intentional discrimination is the issue. The first assumes that all but objective systems are discriminatory, and the second is that although a system is subjective it can be defended if it has built-in safeguards against intentional discrimination.

Nathan and Cascio (1986, 15) cite a number of works that have found that when performance evaluation systems are upheld, courts frequently cite the absence of adverse impact and management safeguards that would prevent discrimination from being decisive considerations in the court's decision. The authors found that the performance evaluation interview, when properly conducted, was received by courts as protection against discrimination (p. 27). Feild and Holley (1982, 401) showed statistically that employee

interviews played a predictive role in court decisions as to whether or not the system adequately guarded against discrimination.

Barrett and Kernan (1987, 501) also point to the importance of formal appeal mechanisms and reviews by upper management to prevent the possibilities of discrimination and inconsistent treatment. These researchers found as well that courts frequently looked very favorably on organizations that provided some form of performance counseling or corrective guidance to assist poor performers in improving performance before taking disciplinary or termination actions.

In *Rowe v. General Motors* (1972) the court specifically criticized evaluation systems based on vague and subjective standards. The court found subjective systems that allowed white supervisors to rate black employees highly suspect when resulting in discriminatory treatment of minorities.

The central theme of this just cause principle is management safeguards built into the system to prevent the possibility of illegal discrimination in the rating process. Based on the above, the sixth performance evaluation corollary is stated as follows.

Proposed Corollary Six

Procedural safeguards were built into the rating process to guard against prohibited discrimination in the rating or assignment of performance ratings.

Indicators of the presence of this corollary would include systems based on objective measures of performance, efforts made by the employer to counsel or help the employee improve unsatisfactory performance, raters who have the same demographic variables as the employees they rate, and instances where the records show that employees of different demographic characteristics with similar performances were rated comparatively.

G. Just Cause Principle Seven

Principle

Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Discussion

This principle of just cause focuses on fair treatment in outcome as opposed to fair treatment in process. The following will explain research that has focused on those issues.

Adams's (1963) "equity theory" has been the basis of a line of organizational behavior research that concerns issues of fairness in the process by which decisions are made about the distribution of organizational resources (Thibaut and Walker 1975; Greenberg 1982; Greenberg and Folger 1983; Folger and Greenberg 1985; and Greenberg 1986). The central theme of equity research is that organizational decision-making processes, rewards, and allocation of resources emanating from those decisions should be perceived as fair and commensurate (i.e., equitable) with individual inputs. Inherent in Daugherty's seventh principle of just cause are similar concerns for fairness and equity, thereby making equity research appropriate for development of the seventh corollary for the present study.

Greenberg (1986a, 340) divided equity research into the two categories of distributive justice and procedural justice. Applying equity research to performance evaluations, he defines distributive justice as having to do with the fairness of the evaluations received related to the employee's performance. He defines procedural justice as focusing on the processes involved in the determination of the ratings. For purposes of the current study, the first six corollaries relate to procedural justice and the seventh concerns distributive justice.

Greenberg (1986a) identified seven determinants (procedural and distributive) by which employees judge the fairness of performance evaluations. While finding support for all items studied, he found that the distributive factors (the relationship between performance and rating and the relationships between rating and subsequent administrative actions) were perceived to be just as important as the procedural considerations. He found that employees expect the level of outcome for having performed to be commensurate with the level input to performance, and he cautions researchers and theorists alike not to overlook the importance of distributive considerations in employees' determination of equity in the performance evaluation process (p. 342).

The theme for this just cause principle is equity. It concerns distributive justice issues. Therefore, based on the above discussion, corollary seven is proposed.

Proposed Corollary Seven

Ratings given were commensurate with the performance of the employee.

Indicators of the presence of this corollary include a rating score congruent with the performance evidence provided and ratings that are internally consistent with comparable items on the rating instrument.

CHAPTER III

METHODOLOGY

Introduction

Practical interest in identifying predictors of court case outcomes has existed in a variety of areas since the mid-1950s (Feild and Holley 1982, 393). The primary goal of this study was to identify performance evaluation procedures that could be used to predict Title VII employment discrimination case outcomes. Specifically, the independent variables for study were seven performance evaluation corollaries developed from a study of Arbitrator Carroll Daugherty's seven principles of just cause. Daugherty's principles have been cited and applied by arbitrators in a variety of cases involving due process procedures in discipline and termination cases (Koven et al. 1992, 24). This study extended these principles to performance evaluations. The dependent variable was discrimination case outcome expressed dichotomously as either a win or a loss for the employer.

This study extended earlier research involving performance evaluation and employment discrimination laws conducted by Feild and Holley (1982) and Miller, Kaspin, and Schuster (1990). Their studies focused on identifying evaluation characteristics and factors surrounding evaluation settings (e.g., psychometric properties, methods of evaluation, types of industries, gender of rater and ratee) and applied discriminant analysis to analyze case outcomes. This study, which was exploratory as well as confirmatory in nature, tested corollaries of the just cause principles and applied logistic regression as a statistical technique to analyze the data (see table 5). Normal least-squares regression was

deemed to be inappropriate for this study because of the dichotomous nature of the response variable. Normal least-squares regression assumes a normal distribution of errors, which is not possible with a dichotomous variable (Austin, pers. com. 3 February 1994; Hosmer and Lemeshow, 1989).

Table 5 lists the major research events followed in this study. Steps are discussed in greater detail in "Selection of Discrimination Cases."

TABLE 5 SEQUENTIAL LISTING OF MAJOR RESEARCH STEPS

1. A comprehensive review of the technical, labor relations, and legal literature specific to performance evaluations, due process, just cause, and employment discrimination law was made first.

   The review produced information concerning the current technical and legal status of performance evaluation methods, the nature and scope of research that has been conducted on performance evaluations as they relate to labor relations and discrimination laws, a list of potential discrimination cases for analysis, and a basis for the development of potential performance evaluation corollaries (i.e., independent variables) for this study.

2. A LEXIS-NEXIS computerized legal search was initiated to identify and preliminarily screen additional cases of interest that were not identified through the literature search reported in Chapter II of this study.

   The search was conducted under the direction of a legal research analyst with the College of Law at The Ohio State University. Information gained from this search and the literature review was combined to produce a listing of approximately 947 potential cases for preliminary screening. Screening resulted in a refined list of approximately 205 potential cases for coding.

3. The list of potential corollaries (discussed in Chapter II) was submitted to an independent reviewer with expertise in performance evaluation research and human resources management. The purpose of the review was to assess the closeness and comprehensiveness of the evaluation corollaries to the just cause principles.

4. A draft instrument for coding cases was developed. The instrument was then submitted to three independent reviewers with expertise in instrument design. The purpose of the reviews was to assess the adequacy of the instrument as well as to capture any additional details the reviewers believed would provide additional categories for this study or would be of interest for future research. Their suggestions were incorporated into a final draft instrument.

5. The revised coding instrument containing the proposed corollaries was resubmitted to a panel of two graduate student reviewers, one other independent reviewer familiar with the research, and this author. These reviewers plus the author were assembled to pilot test the coding scheme followed in this study. Each member was given a duplicate set of thirty randomly selected cases drawn from the total number of potential cases. Members were then given a two-hour training course to familiarize themselves with the nature of this study, the corollaries, and the coding procedures. (Appendix A contains a summary of the instructions given to panel members concerning the coding activity.)

Table 5 (continued)

Important goals of the pilot test were to further refine the corollaries if necessary, to identify additional items that would indicate that a case would not be suitable for inclusion in the study, and to consider any additional items that might be of interest to this or future research. Those items were then used to eliminate cases believed not suitable for further consideration. This procedure produced the corollary statements and the coding instrument in their final form (see table 6, column 3, and Appendix A).

6. A second LEXIS-NEXIS computerized search was conducted as a check to capture additional cases that might be relevant based on input gained from the pilot study. This searched produced approximately 371 citations, many of which were duplicates from the original search. Each citation was again screened to determine it relevance to this study, adding an additional 214 cases to the study for a total of 419 potential cases for final coding.

7. Of the 419 remaining cases, a random sample of 223 was selected. The sample size was based on recommendations in the literature (i.e., Austin et al. 1992, 392) of approximately 30 cases for each predictor variable as well as limitations on the time and resources of this researcher. The cases were then read and coded by the author and one independent reviewer. Codings were tested for interrater agreement using Cohen's kappa to correct for chance agreements (see table 8).

8. After correcting for chance agreement, consensus meetings were held among coders to arrive at a final rating for the corollaries. This resulted in an additional 12 cases being dropped from the study because coders were not able to reach consensus on their relevance to the study. For those cases where the status of a particular corollary was uncertain, the corollary in question was rated as being absent (i.e., 0) to be conservative. This step reduced the final number of cases submitted for research to 211 (see Appendix E for a list of these case citations. Appendix B contains a list of the final coding by case identification number).

9. Logistic regression analysis was applied to analyze the relationship between the predictors and binary outcome variable. Cross-tabulation was used to describe distribution of the cases by variables and case outcomes.

10. For those cases where independent variables failed to predict case outcome, court opinions were used to gain insight into the considerations that courts took into account in determining outcomes. This involved the reading of the court's full opinions in those cases involved, any dissenting opinions and any cases referenced. The information found was synthesized into final discussions presented in Chapter V.

Development of Performance Evaluation Corollaries

The independent variables tested in this study were seven corollaries (see table 6) developed as proxies for the seven elements of just cause espoused by Arbitrator Carroll Daugherty (cited in Hill and Sinicropi 1986). Chapter II provides evidence that Daugherty's just cause principles are grounded in constitutional concepts of due process and are well recognized and accepted in arbitral practice as standards for judging the fairness of management procedural processes (e.g., performance evaluations).

In that the just cause principles dominate procedural processes in a labor relations environment, it is argued here that it is appropriate to consider them as the basis for developing the performance evaluation corollaries used in this study.

Because the just cause principles are primarily concerned with discipline and termination issues, it was necessary to examine the labor relations and performance evaluation technical-legal literature to provide a rationale for restating those elements into performance evaluation corollaries. While restatements were intuitive for the most part, precedence for developing corollaries in this manner exists. The most notable work for the purposes of this study was that of Greenberg (1986) whose interest was in translating procedural justice concepts developed in criminal and civil law to issues of performance evaluations.

Further support for the development of the corollaries was outlined in table 2 of this study, which presented the principles of just cause. The principles were followed by specific references to the evaluation technical literature to establish the conceptual relationship between them. They were, in turn, followed with statements of proposed corollaries. To verify the final translation of the corollaries, an independent expert in performance evaluation research and human resources management (Dr. Robert Heneman, Associate Professor, School of Business, The Ohio State University) was consulted. Dr. Heneman was asked to review each corollary to ensure that it captured the

essence of the just cause principle and the related evaluation research. Based on his input, the refined corollaries were field and pilot tested with a random sample of cases, which resulted in their present version.

Selection of Discrimination Cases

Three criteria were used to select cases for this study. First, only Title VII cases where performance evaluations were a central issue in the case were selected. Second, only those cases ruled on by judges in federal courts from 1965 to April 1994 qualified (cases determined by juries were disqualified). The year 1965 is significant because it is the first year of litigation after passage of the 1964 Civil Rights Act. The third criterion was to examine only those cases that reported the court's full written opinion in the case reporter. This criterion was borne of necessity since it would be impractical, if not impossible, to gain access to court opinions not published in the major legal reporters employed in this study.

Preliminary research gained from the literature review indicated that between 120 and 140 relevant cases existed. That number was encouraging because of the need to have enough cases to conduct this study. Heneman (pers. com. 10 September 1992) recommended as a rule of thumb that the number of independent variables in a study of this nature should be a minimum of 20 observations for each independent variable.

In addition to cases identified through the technical literature reviews, legal reporters were used to locate the additional case citations. These reporters included the Bureau of National Affairs' *Fair employment practice series* (FEP), Washington, D.C.; West Publishing Company's *Federal reporting series,* St. Paul, Minnesota; *Commerce clearing house* (CCH), Chicago, Illinois; and a computerized legal search on the LEXIS-NEXIS system, Mead Publishing, Dayton, Ohio.

The combined literature and legal reporting service reviews produced a combined total of 947 potential case citations for study.

Next, it became necessary to examine each case in detail to ensure its relevance to this study and judicial authority. This was accomplished by using the case citation to access the case through the LEXIS-NEXIS computerized legal research system. Along with a number of other search, identification, retrieval, and printing features, full readings of the case are provided as well as the ability to trace the judicial history, verify its relevance and judicial authority or precedence (Cohen 1982). Cases that were found to be not relevant or that no longer carry judicial authority were dropped from further consideration, resulting in a listing of approximately 205 potential cases for analysis.

Thirty randomly selected cases from the 205 potential cases were submitted to a panel of independent reviewers for field testing of the corollaries and coding instrument and for pilot testing of the scoring procedures. An additional task for the panel as they coded the subset of cases was to identify constructs within the cases that would make a case unsuitable for further consideration and to suggest additional items that might be of interest to capture for this study or future research. This effort produced the final refinement of the corollaries and the coding instrument (see table 6 and Appendix A).

A second LEXIS-NEXIS computerized search was conducted to locate additional cases that may have been overlooked in the initial search or that might be added given the input gained from the pilot study. Of particular importance was locating cases since the passage of the 1991 Civil Rights Act. Therefore, this search was conducted for cases heard between December 1991 (the Civil Rights Act was signed into law on 21 November 1991) to March 1994. This search produced an additional 371 potential cases for review, according to procedures above. This resulted in 214 additional cases for analysis producing a total of 419 potential cases for coding.

Of the 419 cases, 223 were drawn at random for in-depth analysis and coding. Sample size was based on the recommendations offered in the literature for logistic regression studies (i.e., approximately 30 cases per independent variable; see Austin et al. 1992, 392). Of these 223 cases, 93 were rejected due to such considerations as the case being time-barred, reversed at a higher level, the court's ruling on other issues, or lack of consensus between coders on the suitability of the case for study. Rejected cases were replaced by random draw from the balance of the 419 cases.

Statistical Procedure

Case data was analyzed using logistic regression procedure (Kennedy 1992, 14). According to Hosmer and Lemeshow (1989, 1), what distinguishes the logistic regression model from traditional linear regression is that the outcome is binary or dichotomous as opposed to being interval and continuous as in the ordinary least squares model. Austin (pers. com. 8 February 1994) recommended as well the use of logistic regression as opposed to ordinary least squares when distribution error of the response variable cannot be assumed to be normal.

The response variable was case outcome. The primary explanatory variables were the seven corollaries described in Chapter II.

The following variables were entered into the analysis in a preliminary step in order to control for possible confounding effects: case type, type of action, and pertinent plaintiff demographic characteristics (e.g., gender, race).

The results of the analysis provided information about the independent and combined effects of the seven corollaries on case outcome over and above those (cross effects) that might be accounted for by case type, type of action, and plaintiff's demographics.

The analysis was conducted using the SAS-JMP computer software statistical package, for SAS, Inc., version three. Partial analysis was run using SPSS/PC+ Advance Statistics™, version five, to confirm findings.

In the Feild and Holley (1982) study, discriminant analysis was used to test whether a set of variables accounted for differences in the plaintiff and defendant groups. In the Miller, Kaspin, and Schuster (1989) study, the interest was in testing whether the group means (verdict for the employee-plaintiff or employer-defendant group) were equal.

The hope for the current study, however, was not so much to describe relationships among groups as it was to gain an idea of the odds of winning a discrimination case given certain predictor variables. This makes the logistic regression approach appealing because it provides log of the odds (Elizabeth Randolph, pers. com. 12 May 1993) that can be useful for accomplishing such objectives.

TABLE 6 PRINCIPLES OF JUST CAUSE, CENTRAL THEME ADVANCED BY THE PRINCIPLE, CODED COROLLARIES, AND MEASUREMENT CODES

Principles of Just Cause	Central Theme Advanced by the Principle	Coded Performance Evaluation Corollaries	Coding	Case Outcome for Employer
1. Employee was forewarned or had foreknowledge of the consequences of conduct.	Advance notice of standards and consequences.	Advance notice of performance standards and consequences for failing to achieve standards existed.	0 = Absent 1 = Present in System, Present in Case 2 = Absent in System, Present in Case	0 = Loss 1 = Win
2. The rule or managerial order was reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee.	Job-relatedness of rating items.	A reasonable relationship was established between the rating items and the job.	0 = Absent 1 = Present in System, Present in Case 2 = Absent in System, Present in Case	0 = Loss 1 = Win
3. Before administering sanction, an effort was made to discover whether the employee did in fact violate or disobey a rule or order of management.	Right to be heard.	Provisions were provided for in the evaluation process to ensure the employee performed as rated.	0 = Absent 1 = Present in System, Present in Case 2 = Absent in System, Present in Case	0 = Loss 1 = Win
4. The investigation was conducted fairly and objectively.	Fairness and objectivity.	Checks and balances existed in the rating process to ensure that the final rating given was fairly and objectively derived.	0 = Absent 1 = Present in System, Present in Case 2 = Absent in System, Present in Case	0 = Loss 1 = Win

Table 6 (continued)

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?	Conformation.	Performance ratings were supported by some direct evidence of performance.	0 = Absent 1 = Present in System, Present in Case 2 = Absent in System, Present in Case	0 = Loss 1 = Win
6. Did the employer apply its rules evenhandedly and without discrimination.	Safeguards against discrimination.	Procedural safeguards were built into the rating process to guard against prohibited discrimination in the assignment of performance ratings.	0 = Absent 1 = Present in System, Present in Case 2 = Absent in System, Present in Case	0 = Loss 1 = Win
7. The degree of discipline administered in a particular case was reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company.	Equity.	Ratings given were commensurate with the performance of the employee.	0 = Absent 1 = Present in System, Present in Case 2 = Absent in System, Present in Case	0 = Loss 1 = Win

Adapted from M. Hill, Jr., and A. V. Sinicropi, *Management rights: A legal and arbitral analysis.* Washington D. C.: Bureau of National Affairs (1986), 98.

CHAPTER IV

DATA ANALYSIS

Two-hundred and twenty-three cases met the initial criteria for analysis. Data were analyzed on a Macintosh Powerbook 180 laptop computer using SAS Institute, Inc.'s, JMP statistical software program, version three. SPSS, Inc.'s SPSS/PC+ Advance Statistics™, version 5 was used to partially confirm findings. The dependent variable (i.e., case outcome) was scaled as nominal-binary, and all 7 independent variables (i.e., corollaries 1–7, were scaled as nominal-continuous. Final agreement on codings was arrived at through consensus meetings between the two coders. This resulted in 12 cases being dropped from consideration because of uncertainty between the coders as to the relevance of the cases to the focus of this study. To remain conservative for those situations where consensus could not be reached on the presence of a particular corollary, the corollary was coded as absent (i.e., 0). Final cases submitted for analysis were 211.

Descriptive Statistics

Data for the following descriptive statistics is found in Appendix C. Table 7 and figure 1 display the distribution of cases by the year of the case.

TABLE 7 DISTRIBUTION OF CASES BY YEAR OF CASE

Year	Cases	Year	Cases
71	1	83	10
72	1	84	8
73	1	85	9
74	2	86	10
75	2	87	15
76	3	88	10
77	11	89	13
78	10	90	15
79	5	91	25
80	14	92	16
81	10	93	11
82	9		

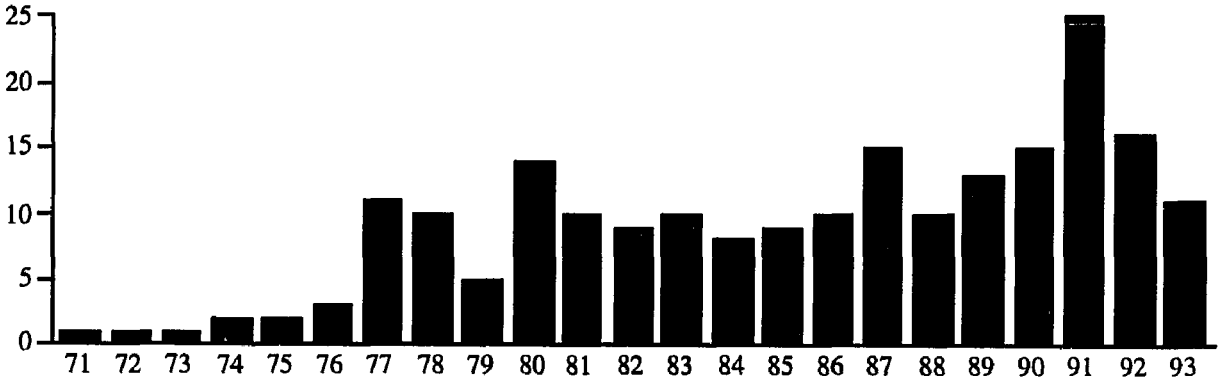

Fig. 1. Number of cases by year. The majority of cases analyzed were between 1983 and 1991, with the largest number of cases (twenty-five) heard in 1991.

Figure 2 describes the cases by court type.

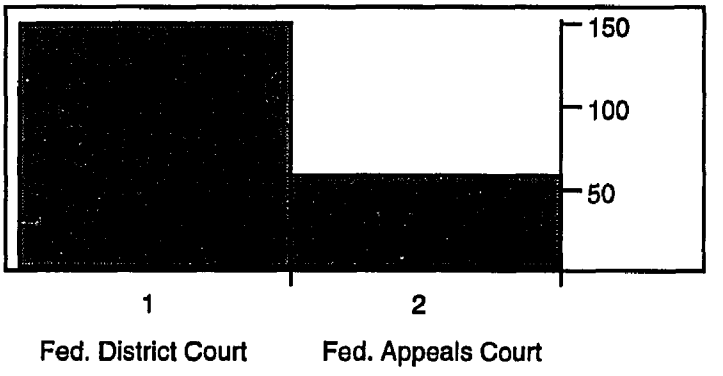

Fig. 2. Cases by court type

Level	Count	Percentage
1	151	0.715
2	60	0.284
Total	211	

It is shown that of the 211 cases studied, 151 (or 71.5 percent) were tried in a U.S. Federal District court (coded as 1), 60 (or 28.4 percent) were tried in a U.S. Federal Appeals court, and no cases were heard in the U.S. Supreme Court.

Figure 3 shows the trial type either as a case involving summary judgment for the employer or a full trial.

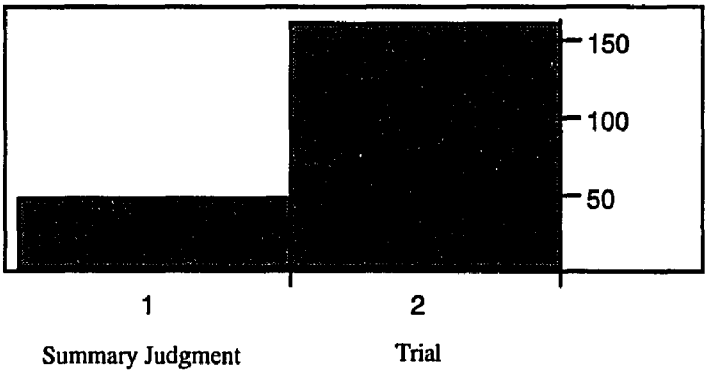

Fig. 3. Cases by trial type

Level	Count	Percentage
1	50	0.23697
2	161	0.76303
Total	211	

Of the 211 cases, 50, or 23.7 percent, were cases involving a summary judgment, coded as 1 (i.e., the court for one reason or another dismissed the case in favor of the employer or remanded the case for trial ruling against the employer's request for summary judgment); and 161, or 76.3 percent, went to trial, coded as 2. All cases remanded for trial on summary judgment were checked to determine if they went to trial. If so, that case was coded. It was assumed that cases that did not reappear in subsequent legal searches were either dropped by the plaintiff or were settled out of court.

Figure 4 shows the case outcome.

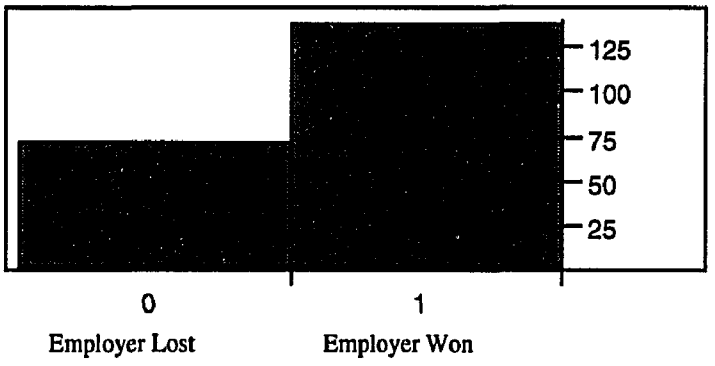

Fig. 4. Case outcome

Level	Count	Percentage
0	73	0.34597
1	138	0.65403
Total	211	

It can be seen that the employer lost, coded as 0, 73 cases (34.6 percent) either in summary judgment or at trial. Correspondingly, 138 (65.4 percent) of the cases were won (coded as 1) by the employer.

Figure 5 shows the basis of the case. The following coding was used:

1 = race
2 = sex
3 = national origin
4 = religion
5 = color
6 = mixed basis

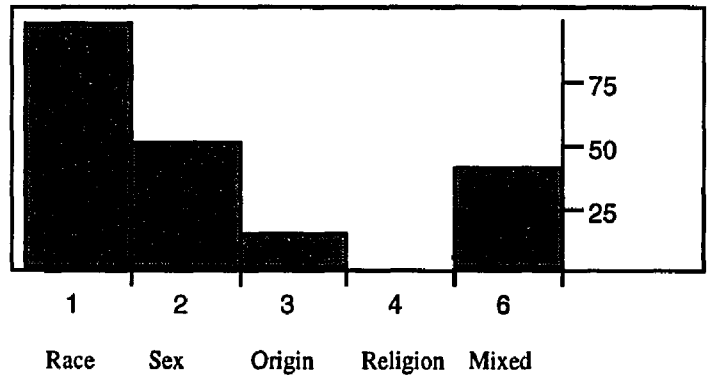

Fig. 5. Case basis

Level	Count	Percentage
1	99	0.46919
2	52	0.24645
3	16	0.07583
4	2	0.00948
6	42	0.19905
Total	211	

Figure 5 shows that the vast majority of the cases (99, or 46.9 percent) were based on a charge of racial discrimination. This is followed by sex discrimination (52, or 24.6 percent), mixed basis (42, or 19.9 percent), national origin (16, or 7.6 percent), and religion (2, or .9 percent). No cases were based on color, which may be because neither courts or plaintiffs view color to be a separate class of discrimination from race.

Discrimination type is displayed in figure 6.

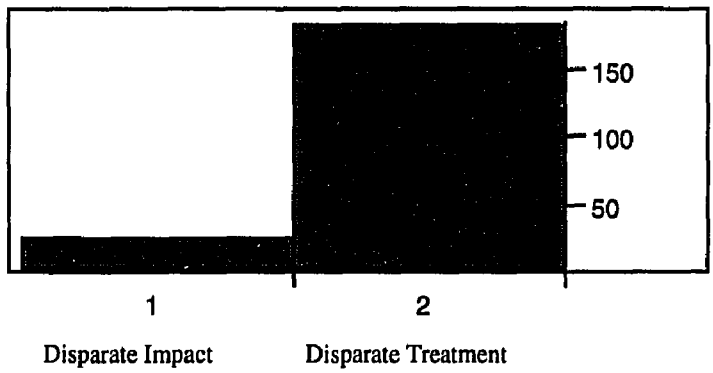

Fig. 6. Discrimination type

Level	Count	Percentage
1	28	0.13270
2	183	0.86730
Total	211	

Cases were classified as being primarily disparate impact, coded as 1, or disparate treatment, coded as 2. In a few cases, both types of discrimination were involved. However, a careful reading of the case made it possible to distinguish the primary issue and to code the case accordingly. It is shown in figure 4 that the majority of cases 183 (86.7 percent) involved a claim of disparate treatment, and 28 (13.3 percent) involved disparate impact.

The employer's action that precipitated the case was classified into the following six categories:

1 = discharge
2 = failure to promote
3 = demotion
4 = evaluation
5 = mixed actions
6 = other

As the data in figure 7 show, employee discharge was the most frequent employer action (75 cases, or 35.5 percent). This was followed by a failure to promote (65 cases, or 30.8 percent). Interestingly, only 6 cases (2.8 percent) were based solely on the

employer's being charged with giving a poor performance evaluation. Perhaps this was because receiving a poor performance evaluation does not have nearly the impact on an employee's employment status as does a discharge, failure to be promoted, or other actions.

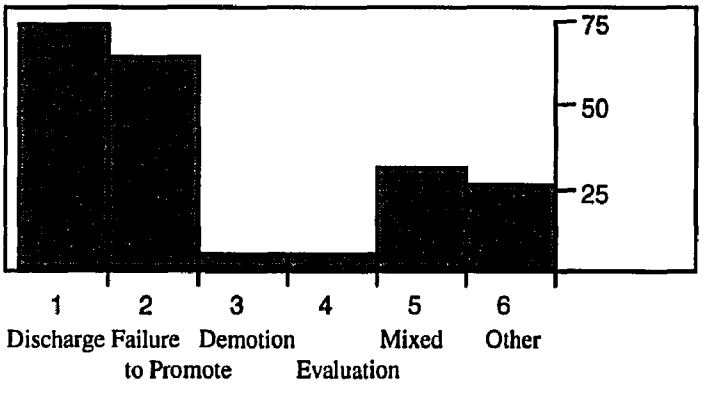

Fig. 7. Employer action

Level	Count	Percentage
1	75	0.35545
2	65	0.30806
3	6	0.02844
4	6	0.02844
5	32	0.15166
6	27	0.12796
Total	211	

Figure 8 reports the distribution of employee gender involved in the 211 cases. Cases were about evenly split between genders with 94 (44.6 percent) being males (coded as 0) and 97 (46 percent) being females (coded as 1). Twenty cases (9 percent) involved defendants of mixed gender (coded as 2).

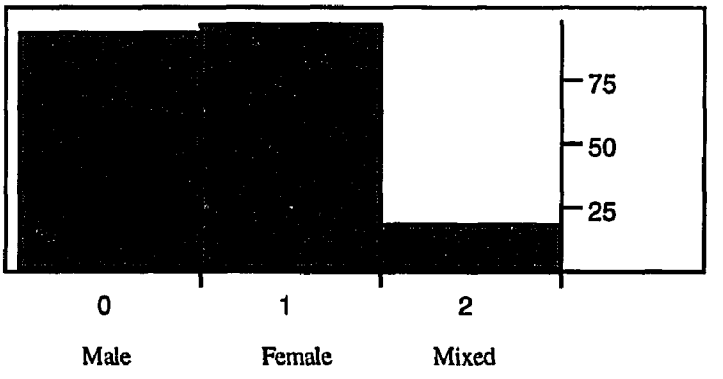

Fig. 8. Employee gender

Level	Count	Percentage
0	94	0.44550
1	97	0.45972
2	20	0.09479
Total	211	

The final category to be reported is the type of job involved in the cases. Categories were divided as follows:

1 = Blue collar/clerical
2 = White collar/managerial
3 = Academic
4 = Government (except academic)
5 = Other

Figure 9 shows that the vast majority of job types were blue collar/clerical (80, or 37.9 percent), followed by government (61, or 28.9 percent), and white collar/managerial at 54 cases (25.6 percent).

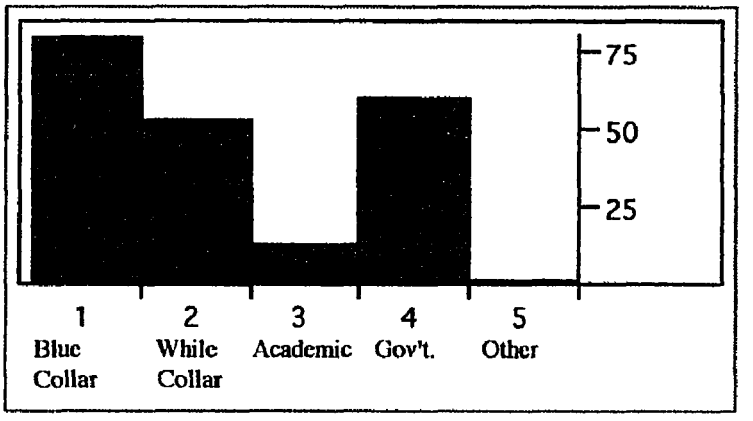

Fig. 9. Job type

Level	Count	Percentage
1	80	0.37915
2	54	0.25592
3	14	0.06635
4	61	0.28910
5	2	0.00948
Total	211	

Table 10 reports the frequency of corollaries by coding level.

TABLE 8 FREQUENCY OF COROLLARIES BY CODING LEVEL

Level	C1	C2	C3	C4	C5	C6	C7
0	142	37	139	85	70	64	101
1	60	157	63	89	119	94	54
2	9	17	9	37	22	53	56

Interrater Agreement

Tinsley and Weiss (1975, 373) state that nominal-scaled data permit only an analysis of interrater agreement. They explain that the concept of "proportionality of ratings," which is central to interrater reliability, is absent when rating categories do not differ quantitatively. In effect, this means that disagreements between raters on nominal data do not differ in their severity (361). Agreement either exists or it does not. Therefore, interrater reliability of the independent variables was not practical for this study and was not conducted.

Interrater agreement tests the extent to which the two coders in this study made the same judgments about the presence or absence of the independent variables in the 211 cases investigated (Tinsley and Weiss 1975, 359). Cohen's kappa (equation 1) is the recommended statistic for assessing interrater agreement when it can be assumed that variables are nominal, cases are independent, cases are rated independently by the same coders, and categories are independent, mutually exclusive, and exhaustive (Tinsley and Weiss 1975, 371–73; Zegers 1991, 321–33). Fleiss (1971) advises further that kappa is restricted to cases were there are only two raters and the same two raters rated the same subjects. This describes the coding situation followed in the present study.

EQUATION 1 COHEN'S KAPPA

$k = Po - Pe/1-Pe$, where

Po = the proportion of ratings agreed upon by the two coders

Pe = the proportion of ratings agreed upon as expected by chance

Agreement Defined

Agreement, for the purposes of this study, was defined as identical ratings between the two coders. Rating codes were:

O = the corollary was judged to be not present either in the employer's evaluation system or in the court's written opinion

1 = the corollary was judged to be present in both the employer's evaluation system and was discussed in the court's written opinion

2 = the corollary was judged to be absent in the employer's evaluation system but its absence was discussed in the court's written opinion

It seemed reasonable to assume that if a corollary was considered by the court to be important in rendering its decision on case outcome, it would be discussed in the written opinion. In short, the judge would not bother to discuss issues not deemed relevant to the case. This assumption precluded the need for making an unwarranted assumption that when the corollary was present in the evaluation system, it was not considered important by the court, thus eliminating the need for an additional rating category.

The rationale for adopting the above definition of *agreement* stems from the small range of the rating scale (i.e., 0–2) and the nature of the dependent and independent variables. Employers either won or lost their cases and corollaries were either present or absent in their cases. Table 9 reports the kappa coefficients calculated for the seven independent variables.

TABLE 9 KAPPA COEFFICIENTS AND SUPPORTING DATA

Corollaries	C1	C2	C3	C4	C5	C6	C7
Total Cases Studied	211	211	211	211	211	211	211
Total Agreements Between Raters =	173	168	177	152	140	154	150
Proportion of Agreements Observed (Po) =	0.82	0.79	0.83	0.72	0.66	0.73	0.71
Proportion of Agreement Expected by Chance	0.56	0.55	0.55	0.38	0.42	0.35	0.39
(Pe) =	0	6	5	9	5	4	1
Kappa (k) =	0.59	0.54	0.63	0.54	0.41	0.58	0.52

While interrater agreement has been discussed frequently in the literature (e.g., Zegers 1991; Tinsley and Weiss 1975; Pedhazur and Schmelkin 1991; Fleiss 1971; Flack Afifi, and Lachenbruch 1988; Cohen 1960), little was found in the way of standards for judging the adequacy of kappas. Wilkinson (1989) offered the opinion that kappas greater than .80 suggest strong agreement, those between .40–.79 should be considered to range from fair to good, and those less than .40 should be considered to be poor. Using somewhat different terminology, Landis and Koch (1977, 165) support those ranges as well.

Pedhazur and Schmelkin (1991, 109) offer additional advice from analogous situations involving reliability standards. They suggest that the most important considerations have to do with the types of decisions to be made on the basis of the ratings and the consequences related to those decisions.

The case here involves employers' incorporating the seven corollaries of just cause into their evaluation systems. The consequences for failing to do so could affect employers' odds of winning a Title VII discrimination case if the case is based on the employers' performance evaluation practices. These are important decisions with serious consequences indeed, thus making it desirable to have as high agreements as practicable. This issue is discussed again momentarily, but first an explanation of the kappa coefficients is offered.

The coefficients in table 9 are interpreted as follows. For any randomly selected case coded by a similarly trained set of coders who are chosen at random, the coders would be expected to reach agreement (minus the percent of agreement expected by chance) on the status of corollary 1 approximately 59 percent of the time, 54 percent on corollary 2, 64 percent on corollary 3, 54 percent on corollary 4, 42 percent on corollary 5, 58 percent on

corollary 6, and 53 percent on corollary 7 (interpreted and modified from Fleiss 1971, 379).

Based on the literature cited and the nature of this study, the kappas reported in table 9 were considered to be adequate. As previously mentioned, after independently coding the cases, consensus meetings were held between the two coders to resolve differences in codings to arrive at a final rating. The alternative was to attempt to find other persons and train them to code in hopes of arriving at higher agreements. This was not deemed to be feasible given the constraints on resources available for this study.

Correlational Analysis

Following the assignment of final ratings, correlational analysis using Pearson's product-moment was calculated to check for colinearity between independent variables (see table 10). Correlations ranged from a low of .0155 between corollaries five and six to a high of .3034 between corollaries four and six, which indicated that colinearity was not a problem.

TABLE 10 COLINEARITY OF INDEPENDENT VARIABLES

Var.	C1	C2	C3	C4	C5	C6	C7
C1	1.0000	0.1419	0.2081	-0.0724	0.2269	0.0121	0.0365
C2	0.1419	1.0000	0.1123	0.0322	0.1608	0.1664	0.0540
C3	0.2081	0.1123	1.0000	0.0740	-0.0212	0.0475	-0.0172
C4	-0.0724	0.0322	0.0740	1.0000	-0.0413	0.3034	0.1232
C5	0.2269	0.1608	-0.0212	-0.0413	1.0000	-0.0155	0.1533
C6	0.0121	0.1664	0.0475	0.3034	-0.0155	1.0000	0.1500
C7	0.0365	0.0540	-0.0172	0.1232	0.1533	0.1500	1.0000

Because of the low correlations, scatter plots were produced to check for linearity. Figure 10 indicates that the ellipses generally flow from flat to upward-right diagonals, indicating that no relationship or a slight linear relationship existed in general.

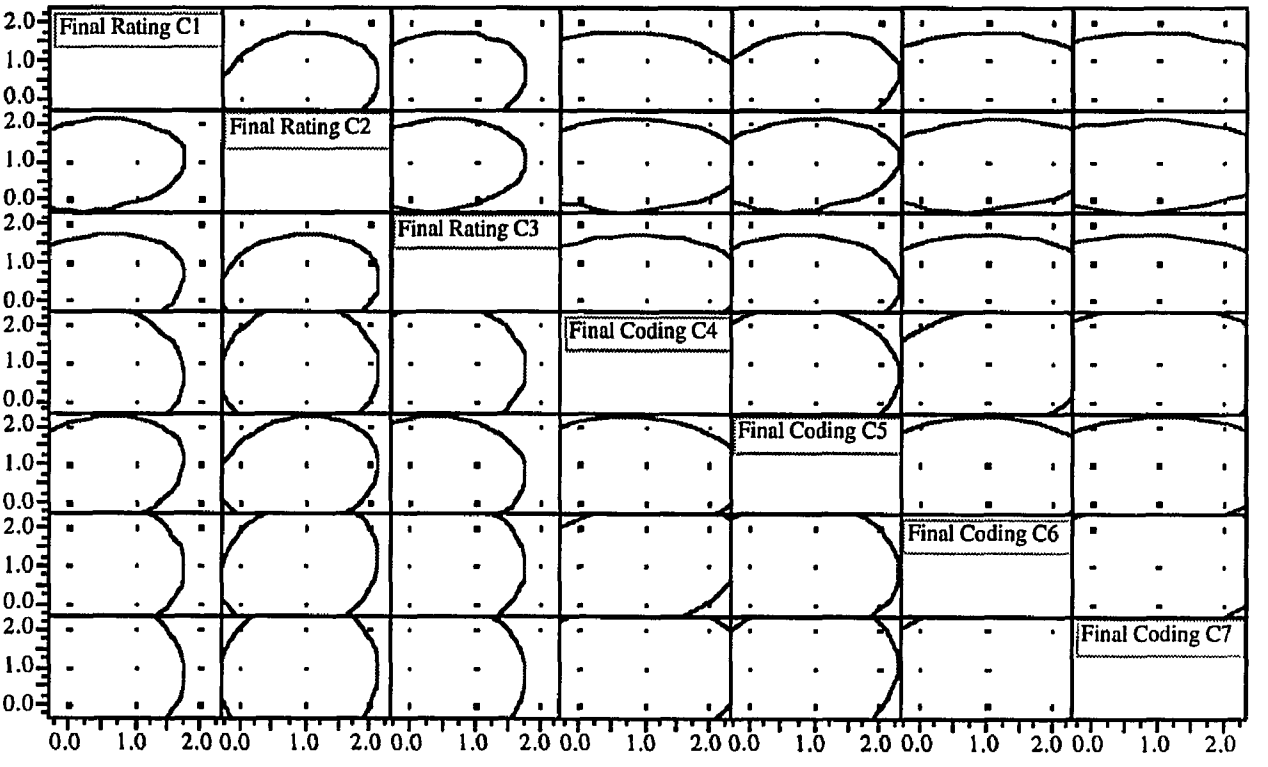

Fig. 10. Scatter plot of correlations for the seven corollaries

Logistic Regression

Logistic regression is the standard method used for regression analysis of dichotomous data and is particularly appropriate when the goal is to predict whether an event will or will not occur (Hosmer and Lemeshow 1989 and Norusis 1992.)

The logistic regression function for the SAS-JMP statistical program produced a fit for a categorical-binary dependent variable (i.e., case outcome) to a linear model of the seven categorical independent variables. The equation model was

$$\frac{e^{(B0 + B1C1 + B2C2 ... + B7C7)}}{1 + e^{(B0 + B1C1 + B2C2 ... + B7C7)}}$$

where e = the base of the natural logarithms (approximately 2.718); B_0 = the constant intercept; $B_1, B_2, B_3 \ldots B_7$ are the coefficients estimated from the data; $C_1, C_2, C_3 \ldots C_7$ = the corollaries serving as independent variables.

The program tests the following models:

- Whole-Model testing to determine if chosen regressors included in a model are better than a model containing the intercepts only
- Lack of Fitness testing to determine if a saturated model (i.e., a parameter for each unique combination of regressor values) would be better than the chosen regressor model
- Effects testing to determine if a chosen model was better than some other model without a given effect

Case Outcome and the Seven Corollaries

Table 11 below lists the data produced for a test of all seven regressor corollaries on the dependent variable, case outcome.

TABLE 11 WHOLE-MODEL TEST FOR SEVEN REGRESSOR COROLLARIES

Source	DF	-Log Likelihood	ChiSquare	Prob>ChiSq
Model	14	73.63449	147.269	0.000000
Error	196	62.44303		
C Total	210	136.07752		

RSquare (U)	0.5411
Observations (or Sum Wgts)	211

Whole-Model Test

The SAS-JMP Whole-Model Test lists three sources of variations (i.e., labeled the C Total, the Error, and the Model in table 11 above). Additionally, the degrees of freedom for each source, their negative Log Likelihoods (corresponds to the sum of squares), the chi-square statistic for the model variation (corresponds to the F-test), the RSquare (U), which represents a ratio of the model to the C total negative Log Likelihood values, and the number of cases analyzed are given. The negative Log Likelihood value for a model that would include only the intercept coefficients was 136.07752 (see C total line, above). The estimated intercept is reported in table 12 below.

TABLE 12 ESTIMATED INTERCEPT FOR THE MODEL

Term	Estimate	Std Error	ChiSquare	Prob>ChiSq
Intercept	-0.6367942	0.1447239	19.36	0.0000

The negative Log Likelihood for all seven variables (reported in the error line of table 10) included in the whole model was 62.44303. The difference between these two negative Log Likelihoods, shown to be 73.63449 in the model line, represents the significance of all seven regressors as a whole to the fit.

The Likelihood Ratio chi-square of 147.269 tested the hypothesis that all coefficients in the model were zero. This was found by taking twice the difference in the Log Likelihoods between the model containing the seven regressors and the reduced model containing only the intercepts.

RSquare U, sometimes called the uncertainty coefficient, represents the ratio between the negative Log Likelihood for a model with only intercepts and the negative Log Likelihood for the model containing the seven regressors. This statistic was 0.5411 and represents the proportion of uncertainty attributed to the fit.

Lack of Fit (Goodness of Fit)

Lack of Fit tested whether or not the model containing the seven corollaries as regressors was sufficiently specified. Table 12 reports a chi-square of 77.52739 (significant at the .927252 level) for the probability that a Log Likelihood constructed from every combination of the regressor values in the model would be significantly better than the specified model fit. It was therefore concluded that the model tested presented the better fit.

TABLE 13 LACK OF FIT (GOODNESS OF FIT)

Source	**DF**	**-LogLikelihood**	**ChiSquare**
Lack of Fit	97	38.763696	77.52739
Pure Error	99	23.679331	**Prob>ChiSq**
Total Error	196	62.443026	0.927252

Effect Test

The SAS-JMP program uses the Wald Chi-Square as a one-step linear approximation to the Likelihood Ratio test for effect, a method for determining if the difference in a model with and without an effect is significant. Table 14 below displays the results of this test. It can be seen that only the effects of corollary numbers six (chi-square 12.559532) and seven (chi-square 9.643133) were significant (.0019 and .0081, respectively).

TABLE 14 EFFECTS OF SEVEN COROLLARIES AND THEIR SIGNIFICANCE

Source	Nparm	DF	Wald ChiSquare	Prob>ChiSq
Final Code C1	2	2	1.973827	0.3727
Final Code C2	2	2	0.190234	0.9093
Final Code C3	2	2	2.951639	0.2286
Final Code C4	2	2	0.045202	0.9777
Final Code C5	2	2	0.124677	0.9396
Final Code C6	2	2	12.559532	0.0019
Final Code C7	2	2	9.643133	0.0081

Effect Likelihood-Ratio Tests

The Effect Likelihood-Ratio (table 15) tests the full model against the null hypothesis of no effect and is calculated as twice the Log Likelihood of the full model and is constrained by the hypothesis. Again, as in the Wald test, only corollaries six and seven proved to be significant.

TABLE 15 EFFECT LIKELIHOOD

Source	Nparm	DF	L-R ChiSquare	Prob>ChiSq
Final Code C1	2	2	2.043541	0.3600
Final Code C2	2	2	0.191054	0.9089
Final Code C3	2	2	3.114509	0.2107
Final Code C4	2	2	0.045111	0.9777
Final Code C5	2	2	0.127521	0.9382
Final Code C6	2	2	14.901655	0.0006
Final Code C7	2	2	34.042001	0.0000

To summarize the analysis up to this point, statistical tests have indicated that a model containing the seven corollaries as regressor variables is a better fit than a model with only intercepts or a more complex model (i.e., containing cross products of the seven corollary regressors). Of the seven corollaries, only six and seven made a significant contribution. Next, a model containing only corollaries six and seven was run.

Case Outcome for Corollaries Six and Seven

Table 16 displays the Whole-Model test for corollaries six and seven only. It was calculated to show that the removal of the first five corollaries had little effect on improvement of the model (see table 11 for a comparison).

TABLE 16 WHOLE-MODEL TEST

Source	**DF**	**-LogLikelihood**	**ChiSquare**	**Prob>ChiSq**
Model	4	70.05201	140.104	0.000000
Error	206	66.02551		
C Total	210	136.07752		

RSquare (U)	0.5148
Observations (or Sum Wgts)	211

Table 17 suggests that a model, absent combinations of corollaries six and seven, is sufficiently specified.

TABLE 17 LACK OF FIT (GOODNESS OF FIT)

Source	**DF**	**-LogLikelihood**	**ChiSquare**
Lack of Fit	3	3.465284	6.930568
Pure Error	203	62.560229	**Prob>ChiSq**
Total Error	206	66.025513	0.074144

Table 18 provides data that suggest that the difference between the model with corollaries six and/or seven and a model with only the intercept would be significant.

TABLE 18 EFFECT TEST

Source	Nparm	DF	Wald ChiSquare	Prob>ChiSq
Final Code C6	2	2	32.742053	0.0000
Final Code C7	2	2	14.859956	0.0006

Table 19 shows the results of testing the model against the null hypothesis of no effect. It is shown that both corollaries six and seven are significantly predictive.

TABLE 19 EFFECT OF LIKELIHOOD-RATIO TESTS

Source	Nparm	DF	L-R ChiSquare	Prob>ChiSq
Final Code C6	2	2	42.679398	0.0000
Final Code C7	2	2	38.649886	0.0000

Summary

In summary, based on the findings of this study the following can be stated. In a study of 211 federal Title VII discrimination cases with performance evaluations as the central focus, 2 of the 7 corollaries (numbers 6 and 7) derived from the just cause principles developed in labor arbitration were shown to be significantly predictive of case outcome.

CHAPTER V

CONCLUSIONS

Part one of the research question asked in this study was, What is the relationship between seven performance evaluation Corollaries of just cause and case outcome in federal 1964 Civil Rights Act Title VII employment discrimination litigation when performance evaluations are central to the factual issues of the case? The second part of the question was, For those variables that fail to predict, what considerations do courts take into account that dictate case outcome?

Findings

Evidence presented in Chapter IV suggests that only two of the seven corollaries tested (numbers six and seven, see table 20) were significantly predictive of increasing the odds of an employer winning a discrimination case when these corollaries were present in the employer's evaluation procedures.

TABLE 20 COROLLARIES SIX AND SEVEN

Corollary Six	Procedural safeguards were built into the rating process to guard against prohibited discrimination in the rating or assignment of performance ratings.
Corollary Seven	Ratings given were commensurate with the performance of the employee.

These findings were somewhat surprising given the emphasis that has been placed on the concepts of fundamental fairness and just cause in the literature. While corollary six

did show support for the position that some writers (e.g., Lee 1989/90, and Miller et al. 1990) have taken (i.e., courts are interested only in whether discrimination occurred), the significance of corollary seven and the discussion of the cases that follows suggests that the issues involved are much more complex. The following cases have been selected from this study to provide some insight into possible reasons why the other corollaries failed to be predictive.

Many of the cases in this analysis involved multiple issues and claims (e.g., Title VII, age discrimination, retaliation claims) with performance evaluations playing a central role in the cases. In some cases, the Title VII claim was dismissed on administrative grounds but decided on other grounds. *Littmer v. Firestone Tire and Rubber Company* (D.C. SDNY, 709 F. Supp. 461) 49 FEP 879 presents a case in point. In this case, performance evaluations were central to the case; but due to filing errors, the court dismissed the Title VII claim. It then relied heavily on the performance evaluation evidence to uphold, in part, for the employer on the age discrimination claim, but then ruled for the employee on retaliation claims. Cases of this nature were retained because they satisfied the original selection criteria for inclusion in the study.

It appeared that the primary focus for the courts was to determine whether the evidence presented by the employee was sufficiently persuasive that unlawful discrimination occurred. The courts seldom discussed the quality of the evaluation system directly in arriving at their decisions. Instead, procedural rules for presenting evidence and the nature of the evidence in relation to the employer's actions served as the primary means for judging whether the parties' evidence was judged to be credible.

In employment discrimination cases, it is the employee's responsibility to go forward with the burden of persuading the court that discrimination occurred (the leading cases this area are *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 1973, and the *Texas Department of Community Affairs v. Burden*, 450 U.S. 248, 101 S.Ct. 1089,

1981). Cases were frequently won by the employer because the inference of nondiscrimination by the employer could not be overcome by the employee. *Agarwal v. McKee and Company,* D.C. ND Calif., 1977, 19 FEP 503 is another example. Here a disparate impact claim was won by the employer because the employee could not rebut that the employer's stated reasons for failing to promote minorities were not for reasons other than discrimination. This was true even though the court agreed that the employer's practices resulted in discriminatory impact on the minorities involved in the case in eight different areas of the employer's employment practices.

An excellent example for understanding how the courts view their role in discrimination cases was found in *Barnes v. Yellow Freight Systems, Inc.,* C.A. 5, 1985. 778 F.2d 1096, 39 FEP 1050. Here the employee (i.e., Barnes) lost but then won on appeal. Nevertheless, the appeals court held that it was the employee's burden to prove that he or she was qualified for the job if the employer believed the employee was not qualified, and it was not the job of the court to determine whether the employer discriminated against Barnes by deciding he was not qualified for the job. Rather, its job was to determine whether the employer's actions against Barnes were harsher than those against whites. Apparently, this court believed it was the relative degree of discrimination that was important, not discrimination per se.

Numerous cases provided guidelines by which courts determined whether an employer's evaluation system was credible (e.g., *Johnson v. Olin Corporation* , 484 F. Supp. 577, S.D. Tex. 1980, 22 FEP 176; *Lamb v. Dole*, D.C. D.C., 1989 U.S. Dist. LEXIS 9885; *Brito v. Zia Company,* 478 F.2d. 1200, 10th Cir., 1973; *Rowe v. General Motors Corporation*, 457 F.2d 348, 5th Circuit, 1972; *Lewis v. National Labor Relations Board*, C.A. 5, 1985, 750 F.2d 1266; *Goodman v. Schlesinger*, C.A. 4, 1978, 18 FEP 191; *Ray v. First National Bank of Chicago*, 1991 U.S. Dist. LEXIS 13114; 56 FEP 501,

1991; *Wade v. Mississippi Cooperative Extension Service*, D.C. 372 F. Supp. 126, 1974, 7 FEP 282, 12: 1031, 1038; C.A. 5, 1976, 12 FEP 1041).

Collectively, these courts found systems that were highly suspect of discrimination if they were not shown to be job valid, were subjective, allowed supervisors to act out their prejudices, rated minorities solely by non-minorities, had ratings that were not supported by objective data, had no safeguards built into the system, allowed reviews by someone other than employees' supervisors, did not permit employee challenges, or did not train or provide supervisors with written instructions. Ironically, those same elements were used in this study to indicate the presence or absence of the first five corollaries that were subsequently found to be nonpredictive. It appears that while courts provide criteria for judging the credibility of an employer's defense, these criteria serve a limited role.

As long as the employee is not able to establish that a prima facie case of discrimination occurred, courts are less concerned about the qualitative features of the evaluation system in and of themselves. An interesting case that pointed this out was *Robles v. Panama Canal Commission*, D.C. D.C., 1991 U.S. Dist. LEXIS 12042. In this case, the court found that even though the agency did not follow all of its evaluation procedures that were mandated by federal regulations, it did properly follow procedures established for removing a poor performing employee, which were not based on its evaluation procedures. Consequently, the court found the evaluation procedures to be irrelevant in the case. Apparently, as another court has expressed (*Foster v. MCI Telecommunications Corp.*, 555 F. Supp. 330, D. C. Colo. 1983; aff'd 773 F.2d 116, 10th Cir. 1985, 30 FEP 1493), it is the totality of the evidence, which includes evaluations as well as supervisors' actions and general attitude in race relations, that justifies inferences of discrimination. This may also serve to explain, in part, the criteria gap that this study suggested existed between what courts look for in the way of evaluation systems and what experts are recommending. Courts appear to concern themselves only with the ability of an

evaluation system to either support or rebut an inference of discrimination. The intrinsic values of the system's features themselves appear to play a very minor role.

Even though the evaluation system may be judged credible by the courts, its use may not be (e.g., *Loiseau v. Department of Human Resources of the State of Oregon,* D.C. Ore., 1983. 567 F. Supp. 711, and 39 FEP 232, 39 FEP 289). In *Mitchell v. M. D. Anderson Hospital,* C.A. 5, 1982, 29 FEP 263, a prima facie case was established by the employee by showing she received her first unfavorable evaluation one month after she applied for the position of assistant chief therapist the first time, that she was placed on probation two days after she sought the position a second time, and that she was discharged approximately six months later. In *Nord v. U. S. Steel Corp.*, 758 F.2d 1462, C.A. 11, 1985, the employee had a good performance evaluation record until she requested a promotion. After the request, her evaluations became negative, which led to her termination.

Evidence of this nature appears to be particularly persuasive to the courts when an adverse employment action is taken that is contrary to the employee's having a history of receiving good performance evaluations (e.g., *Marquez v. Omaha District Sales Office, Ford Division of the Ford Motor Co.*, 440 F.2d 1157, 1971). In *Cline v. General Electric Capital Auto Lease, Inc.*, 757 F. Supp. 923; 1991 U.S. Dist. LEXIS 1082, 1991 (a case involving disparate treatment surrounding cruel and sexual harassment by a supervisor in which her performance subsequently deteriorated) she was able to show through her performance evaluations that prior to these actions she had been considered a good employee by her employer. The court used the employer's use of objective measures, supervisory reviews, and an open door policy where employees could discuss performance-related problems with management as evidence against it by finding that the employee's previous ratings were more credible then the employer's reason for its actions.

A similar situation involving a failure to promote was presented in *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, D.C. EPa., 1990, 54 FEP 808. Favorable evaluations given by partners who worked more closely with her were given more credibility over those of senior partners who voted against her promotion, and who were presumably less knowledgeable about her performance. The court found this system of review more credible than the employer's review board.

It appears that a few reasons can be advanced for those corollaries that failed to be predictive of case outcome in this study. First, cases coming before the court often involved multiple and conflicting issues. While performance evaluations may have played a central role in a case, it was not uncommon for the case to be resolved on other issues at trial. This served to weaken the potential relationship between the predictors and the case outcome.

Next, expressing the dependent variables as binary case outcome and expressing as a win or loss by the employer may have been too simplistic given the various reasons why courts rule in a particular fashion. Perhaps classifying the dependent variable into sufficient categories that capture the uniqueness of the various outcomes would reduce the predictive error.

Necessarily, case coding was largely a subjective process that at times presented its own considerations. Coding became particularly problematic when the court gave recognition to a corollary in one part of the case report, such as the Finding of Facts, but failed to comment on its importance in another part, such as the Conclusions of Law (*Thomas v. Parker*, D.C. D.C., 1979, 19 FEP 49; *Yartzoff v. Thomas*; 809 F.2d 1371; 1987 U.S. App. LEXIS 1826; 42 FEP1660, 1987). In these situations, final coding was achieved either through consensus meetings between coders or the case was rejected from further analysis. When the court differed in the Conclusions of Law from its discussion in

Facts of the Case, its position as presented in the Conclusions of Law was followed for coding.

Conclusions

Based on the results of this study, structuring procedural safeguards into an evaluation system to avoid discrimination and ensuring that ratings given accurately reflect the performance of the employee (i.e., corollaries six and seven) appear to offer sound advice for employers concerned about the legal requirements of their evaluation systems. However, in this author's opinion, the other five corollaries have important value from a human resources management perspective.

Independently and collectively these corollaries can provide the safeguards that courts, and all stakeholders, need to ensure that discrimination does not occur and employees in fact receive the ratings they have earned. For example, corollary one (i.e., advance notice of standards and consequences) provides a means by which it can be determined if what was actually evaluated was in fact what was intended to be evaluated. Furthermore, it seems reasonable to assume that employees who know what is expected of them, before evaluation, will be better performers.

Corollary two (i.e., job-relatedness of rating items) promotes business necessity, a concept that is at the heart of all discrimination laws. Additionally, one has to seriously question the wisdom or utility of evaluation items that do not target performances that are not related to the needs of the jobs in the organization.

Corollary three (i.e., opportunity to defend) is so fundamental to the concept of due process in the American justice system that it touches nearly every person's life in one way or another. It would be a rare employee today indeed who has not come to expect such considerations in all contacts including those made with their employers.

Corollary four (i.e., checks and balances) too has come to be the expected way of interacting with systems. Performance evaluations are a part of the larger system of human

resources management and one has to wonder what system can operate efficiently, effectively, or fairly without some method of checks and balances to keep it on track and under control.

Corollary five (i.e., auxiliary evidence) supports corollary seven directly (i.e., ensuring the ratings given are commensurate with performance) as well as provides a means for auditing the evaluation system to ensure that it is operating fairly and objectively. It is this author's opinion that it is the lack of objective evidence in traditional evaluation systems that has done much to foster the distrust, if not contempt, many employees and employers alike have for evaluation systems.

A subtle insight suggests itself in the reading of the hundreds of technical and legal articles and discrimination cases that comprise this study. That is while the current interests of courts are on the procedural issues brought before them, employees are seeking from these very courts some sense of fundamental fairness (i.e., a concept related more closely to substantive due process) in the way employers treat them. However to date, it does not appear that courts have the necessary authority, precedence, procedures, or perhaps interest to resolve many of the wrongs employees perceive are occurring to them in the work place. However, history has repeatedly shown that substantive issues are the genesis of laws that create procedural due process rights to correct social injustices. Employers who fail to recognize this reality will forfeit their authority to the courts to determine the standards by which performance in their organizations will be evaluated.

It appears to this author that employers still have a window of time in which to affirmatively address problems that have been associated with performance evaluations for decades. The cases studied here have shown that employers are still winning the majority of actions brought against them as long as some credible evidence of non-discrimination exists. However, that window is closing. And, if the past thirty-plus years of civil rights legislation and litigation is any indicator of the quality of social justice that can be expected

for the future when the government becomes involved in the process, the lost will be deleterious to employers, employees, and society alike.

Suggestions for Further Research

The following suggestions are offered to aid others contemplating research of this nature.

This author's lack of any formal education in the nuances of the law and conducting legal research proved to be a major challenge. What was learned was, for the most part, self-taught during the study. This involved becoming familiar with the special language of law, how to do legal research and use complex computer legal search services, and verifying the authority of cases. Fortunately, legal research assistants at the university law library where this work was conducted were available and provided their assistance. It is highly recommended that others who would undertake a study of this nature either receive training in the fundamentals of law as well as modern computer search strategies and available reporting services or, as a minimum, enlist the assistance of a third- or fourth-year law student who is available throughout the course of the study to guide the research and provide answers to technical-legal questions that frequently arise. This may not make the law simpler to deal with, given the complexity with which law is applied and the diversity by which cases are reported, but it will help one understand it more effectively and efficiently.

Maintaining a chronological log of important events as the study unfolded proved to be extremely helpful, particularly in generating insights and formulating thoughts leading to the final corollary statements. As cases were resolved in the courts, the log served as a ready reference for moving the study forward, in an iterative fashion.

The value of using a computerized database for identifying, storing, cross-referencing, and reporting data cannot be overemphasized. Without it, this author would

have been hopelessly lost in a morass of clippings, short abstracts, and notes written on index cards. A flat-file database served the purpose very well (i.e., FileMaker Pro, version 2.0, by the Claris Corporation), although a relational database (such as Fox Pro) is recommended for its cross-referencing, one-time updating features, and sorting capabilities. A copy of the index card used for data storage is in Appendix D.

The importance of an effective and efficient coding strategy cannot be overemphasized as well. Fortunately, this author had the opportunity to be coached by persons within the university community who possessed both technical and practical experience in coding works of this nature (e.g., Dr. Robert Heneman, Dr. James Austin, Dr. Elizabeth Randoph, and doctoral student cohorts).

A resource that is recommended for its in-depth treatment of coding issues as well as its discussion of practical consideration is that by Stock (1994). As Stock suggests in his writing, and as this experience has shown, coding is necessarily an iterative process between training, coding, and revision of the coding instrument. In fact, this author now questions whether one can consider coders completely trained at any step of the coding process. Several hundred cases had to be read first before enough confidence was felt that coders could be provided with sufficient instructions for coding. Even then gaps existed in the understanding and meaning of the corollaries. Such gaps required frequent checking to assure that agreement between coders was being reached; examples of the corollaries were adjusted accordingly.

Earlier it was stated that this study was significant and was needed for four reasons. By examining organizational contexts and processes that combined to influence evaluation systems, it intended to add to the current direction being called for in the literature for evaluation research (e.g., Folger, Konvovsky, and Cropanzano 1992; Murphy and Cleveland 1991; Lawler, Mohrman and Resnick 1984; Keeley 1977). It addressed the criteria gap that appeared to exist in the literature between what researchers and courts find

decisive in employment discrimination cases when performance evaluations are involved. It applied a framework for empirical analysis of performance evaluation systems based on recognized principles of procedural due process and just cause. Finally, the information gained from the study was intended to make a contribution to all stakeholders affected by performance evaluation systems.

While the null hypothesis of no significance could not be rejected for five of the seven corollaries tested, a significant relationship was indicated for two of them, thus making this study useful for its stated purposes. Empirical support for some of the procedural justice and related just cause works originated by others (e.g., Greenberg 1982; Greenberg and Folger 1983; Folger and Greenberg 1985; and Greenberg 1986, 1985; Pulhamus 1991; Folger, Konovsky, and Cropanzano 1992) may prove helpful in advancing this line of research.

However, the sentiments expressed by Lee (1989/90) and others (e.g., Miller et al. 1990) appear to have a dull ring of truth. As suggested earlier, courts appear to be less concerned about employers' being fair in their employment decisions than they are of discrimination. To the courts, fairness is only an indicator of nondiscrimination. This was the common thread that ran through nearly all of the cases reviewed in this study. For example, in *Smith v. Monsonito Chemical Co.*, 770 F.2d 719, 723 n. 3, 8th Cir. 1985, the court stated that the employer may develop arbitrary, ridiculous, and irrational rules but must apply them evenhandedly. This appeared to be the sentiment expressed by many courts.

Two final suggestions for future research are offered. First, more needs to be known about corollary development. The method followed here was largely intuitive and subjective based on some precedents found in the literature (i.e., Folger and Greenberg 1985). Perhaps applying the techniques and principles of qualitative research originating in

the works of Glaser and Strauss (1967; see also Strauss and Corbin 1990) may prove helpful for doing this.

Secondly, knowing more about what makes managerial decisions based on performance evaluation legally defensible is important. Practical experience has shown this author that the law does not make a good model for managing because it deals too specifically and narrowly with only those issues brought before it. The concern about insulating managerial actions from civil suits is well taken but is, in this author's opinion, overdone. Numerous cases in this study pointed out that courts do not want to be in the business of telling employers how to conduct their business. Employers can have any evaluation system they chose, at least as far as discrimination law is concerned, as long as they can overcome a prima facie challenge of illegal discrimination and carry the burden of producing evidence of reasons other than discrimination for their actions (see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668,1973; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 U.S. 240, 101 St. Ct. 1089, 67 L.Ed. 2d 207, 1981).

It may also be fruitful to explore features that lead employees to believe that their performance evaluation system is procedurally fair. While fairness is of lesser concern for the courts, the line of research originating with Thibaut and Walker (1975) that focuses on procedural justice suggests that it should be an important concern for employers. Procedural justice research indicates that employees who believe they have been treated fairly in the procedural processes followed by employers in arriving at a managerial decision are less apt to challenge the decision (see, for example, Greenberg 1986a). Perhaps if employers knew more about what employees considered to be fair evaluation procedures and acted in a procedurally just manner, employees would sue less. This is something that would certainly be beneficial to courts, employers, employees, and society alike.

APPENDIX A

CODING INSTRUCTIONS, VARIABLES, AND INSTRUMENT

Instructions for Coding Corollaries

You are being asked to participate in a research study. The purpose of the study is to assess the comprehensiveness and appropriateness of a coding instrument. This instrument will be used in a logistic regression analysis of federal level Title VII discrimination cases.

The research question asked in the study is whether or not case outcome (a binary dependent variable) can be predicted by the presence or absence of seven independent variables. Predictor variables are corollaries written to modify the seven principles of just cause found in labor arbitration misconduct cases in order to make them appropriate for performance evaluation study.

You are being asked to analyze the written opinions of the justices in a random sampling of thirty cases. These cases were randomly selected from a larger sample of cases to be analyzed in the study.

The major purposes of your work are to:

1. Determine if the seven corollaries as appearing on the coding instrument are adequately written such that their presence or absence in the case may be inferred from a reading of the cases. If so, please code the corollaries accordingly. If not, please provide a suggestion for a rewriting of the corollary.

2. Code the other case items (e.g., type of case, gender, court level). Please offer any suggestions you may have for including additional considerations that may be of interest for this or future research.

Three others and I will be working on this effort. It is important that work be done independently. If you have questions concerning clarification of these instructions or other related details, please contact me directly.

Once all have had an opportunity to complete coding, we will meet as a group and review our work.

My sincerest thanks to you,

TABLE 21 CODING VARIABLES

Variable	Name	Code/Values	Column Heading
1	Case Identification Number	1-211	Case No.
2	Case Year	65-93	Case Year
3	Coder Identification	1-2	Coder ID
4	Case Citation		Cite
5	Court Type	1 = US District 2 = US Appeals 3 = US Supreme	Court Type
6	Trial Type	1= Summary Judgment 2= Trial	Trial Type
7	Case Outcome	0 = Employer Lost 1 = Employer Won	Case Outcome
8	Discrimination Type	1 = Race 2 = Sex 3 = National Origin 4 = Religion 5 = Color 6= Mixed Basis	Discrim. Type
9	Case Basis	1 = Adverse Impact 2 = Disparate Treatment	Case Basis
10	Employer Action	1 = Discharge 2 = Failure to Promote 3 = Demotion 4 = Evaluation 5 = Mixed Actions 6 = Other Category	 Failure to Promote Demotion Evaluation Mixed Actions Other Category
11	Employee Gender	0 = Male 1 = Female	Employee Gender
12	Job Type	1 = Blue collar/clerical 2 = White collar/managerial 3 = Academic 4 = Government (except academic) 5 = Other	Job Type
13	Notice and Forewarning	0 = Absent 1 = Present in System and Case Record 2 = Absent in System, Present in Case	Final Coding C1
14	Business Relationship	0 = Absent 1 = Present 2 = Absent in System, Present in Case	Final Coding C2

Table 21 (continued)

15	Opportunity for Defense	0 = Absent 1 = Present 2 = Absent in System, Present in Case	Final Coding C3
16	Checks and Balances	0 = Absent 1 = Present 2 = Absent in System, Present in Case	Final Coding C4
17	Auxiliary Evidence	0 = Absent 1 = Present 2 = Absent in System, Present in Case	Final Coding C5
18	Protection Against Discrimination	0 = Absent 1 = Present 2 = Absent in System, Present in Case	Final Coding C6
19	Rating Commensurate With Performance	0 = Absent 1 = Present 2 = Absent in System, Present in Case	Final Coding C7

CASE CODING INSTRUMENT

Case No. [ ] Case Year [ ] Coder ID [ ]

Cite: [ ]

Court Type [ ] U.S. District = 1 U.S. Appeals = 2 U.S. Sup. Ct = 3

Trial Type [ ] Summary Judgment = 1 Trial = 2 Case Outcome [ ] Employer Win = 1; Loss = 0

Case Basis [ ] Race = 1 Sex = 2 Nat' Origin = 3 Religion = 4 Color = 5 Mixed = 6

Discrimination Type [ ] Disparate Impact = 1 Disparate Treatment = 2

Employer Action [ ] Discharge =1 Failure to prom. = 2 Demotion = 3 Eval. = 4 Mixed = 5 Other = 6

Employee's Gender [ ] 1 = Female 0 = Male Mixed = 2

Job Type [ ] Blue-collar/Clerical = 1; White-collar/Managerial = 2; Academic = 3; Gov. = 4; Other = 5

Corollaries ABSENT = 0 PRESENT = 1 UNCERTAIN = 2

1. Advance notice of performance standards and consequences for failing to achieve standards existed. [ ]
Indicators of this corollary's presence would include notices given to employees directly or indirectly (e.g., through employee handbooks, customs and practices) the performance standards expected and the consequences for failure. Notice of standards and consequences for failure must both be present to code this corollary positive.

2. A reasonable relationship was established between the rating items and the job. [ ]
Indicators of the presence of this corollary would include factors related to the effectiveness, efficiency, or safe work performance. Examples would include such things as rating items related to production rates, error rates, absenteeism, cooperation with management, or ability to get along with other employees and the like.

3. An effort was made to determine if the employee did in fact perform as rated. [ ]
Indicators of the presence of this corollary would include such things as explicit provisions in the rating process for appeals, notices given to the employee as to a right to appeal, opportunities to write disagreements on the evaluation instrument, and opportunities for a re-evaluation to be conducted by another independant authority.

4. Checks and balances existed in the rating process to ensure that the final rating given was fairly and objectively derived. [ ]
Indicators of the presence of this corollary would include such things as the use of multiple or independant raters, raters were trained in how to conduct ratings, guidelines were established for conducting ratings, raters themselves were audited to ensure they were conducting ratings properly, or raters had an opportunity to observe the performance being rated.

5. Performance ratings were supported by some auxiliary evidence of performance. [ ]
Indicators of the presence of this corollary would include such things as non-contested testimony of employees other than that of the rater, production records, attendance or absentee data, and customer complaints.

6. Procedural safeguards were built into the rating process to guard against prohibited discrimination in the assignment of performance ratings. [ ]
Indicators of the presence of this corollary would include systems based on objective measures of performance, efforts made by the employer to counsel or help the employee improve unsatisfactory performance, raters who are of the same demographic variables as the employee they rate, and instances where the records show that employees of different demographic characteristics with similar performances were rated comparatively.

7. The employer's actions based on the performance rating were commensurate with the performance rating. [ ]
Indicaters would be rating score given is congruent with the performance evidence provided, or ratings are internally consistent with comparable items on the rating instrument.

APPENDIX B

LIST OF CASES CODED BY COROLLARIES

Case No.	Final Coding C1	Final Coding C2	Final Coding C3	Final Coding C4	Final Coding C5	Final Coding C6	Final Coding C7
1	1	1	0	0	1	0	0
2	0	1	0	1	0	1	0
3	2	0	2	1	0	1	2
4	2	1	0	0	2	0	1
5	1	1	0	1	1	1	1
6	2	1	0	0	1	0	1
7	2	1	0	1	1	1	2
8	0	1	0	1	1	2	0
9	0	1	0	0	1	0	1
10	1	1	0	1	1	1	1
11	1	1	0	0	1	1	0
12	0	1	1	1	1	1	0
13	0	1	0	2	0	2	0
14	1	1	1	1	1	1	1
15	1	1	1	1	0	0	0
16	0	1	1	0	1	1	0
17	0	1	0	1	1	0	0
18	0	1	0	0	1	0	2
19	0	2	0	0	2	2	2
20	1	1	0	0	1	2	2
21	0	1	1	1	1	1	1
22	1	1	1	0	1	1	0
23	0	1	0	0	1	0	1
24	1	1	0	2	1	1	0
25	0	1	0	2	0	0	0
26	1	1	1	0	1	1	1
27	1	1	0	0	0	0	1
28	0	1	1	1	0	1	1
29	0	2	2	2	0	2	2
30	0	1	1	0	1	1	1
31	0	1	0	0	0	0	2
32	0	1	0	1	0	0	0
33	1	1	0	0	1	1	0
34	0	1	1	1	1	1	0
35	0	1	1	1	1	1	1
36	0	2	0	2	2	2	0
37	0	1	0	2	1	2	2
38	0	0	0	0	1	0	0
39	0	1	0	0	0	0	1
40	0	0	0	1	0	0	0
41	0	1	1	1	1	0	0
42	0	1	0	0	0	1	1
43	0	1	0	0	0	2	2
44	0	1	0	2	0	2	2
45	0	1	0	0	0	1	0
46	0	1	1	1	1	1	0

Appendix B (continued)

Case No.	Final Coding C1	Final Coding C2	Final Coding C3	Final Coding C4	Final Coding C5	Final Coding C6	Final Coding C7
47	0	1	0	1	1	0	0
48	0	1	0	2	2	2	2
50	1	1	1	1	1	1	1
51	0	1	0	0	1	0	0
52	0	2	2	2	2	2	2
53	0	1	0	1	1	0	2
54	0	1	0	0	0	0	0
55	0	0	0	1	0	0	0
56	0	1	1	1	1	1	0
57	0	1	0	1	0	1	0
58	0	1	0	1	1	1	2
59	0	0	0	2	2	0	0
60	1	1	0	1	1	0	1
61	0	1	1	1	1	1	0
62	0	1	0	1	0	0	1
63	1	1	1	0	1	1	2
64	0	1	0	1	0	1	0
65	0	2	2	2	0	2	2
66	0	0	1	0	1	0	0
67	0	1	0	1	0	2	0
68	0	1	0	0	1	0	2
69	0	0	0	2	2	2	2
70	1	1	0	1	1	1	1
71	0	1	0	1	0	0	2
72	0	1	0	1	1	0	2
73	1	1	0	1	1	1	1
74	0	1	0	1	1	1	1
75	1	1	0	0	1	1	1
76	0	1	0	1	1	1	1
77	0	1	1	0	0	0	1
78	0	2	0	2	0	2	0
79	0	1	0	0	1	1	0
80	2	1	2	1	2	2	2
81	1	1	0	0	1	1	0
82	0	1	0	1	1	2	2
83	1	1	1	1	1	1	0
84	1	1	1	1	1	1	1
85	1	1	0	0	1	1	0
86	0	1	0	0	0	2	2
87	0	0	0	2	2	0	2
88	0	1	0	1	1	2	0
89	0	2	0	0	1	2	0
90	0	0	0	0	1	1	1
91	0	1	0	2	0	2	2
92	0	0	0	0	2	2	2
93	0	1	0	1	1	1	1

Appendix B (continued)

Case No.	Final Coding C1	Final Coding C2	Final Coding C3	Final Coding C4	Final Coding C5	Final Coding C6	Final Coding C7
94	1	1	1	1	1	0	1
95	0	1	0	0	1	1	1
96	0	1	1	1	1	1	0
97	0	0	0	2	0	2	0
98	0	1	0	0	0	0	2
99	0	1	1	1	1	1	0
100	0	1	0	1	1	1	2
101	0	0	0	0	2	0	2
102	0	1	1	0	1	1	0
103	1	0	1	2	1	1	0
104	1	1	0	0	1	1	0
105	1	0	1	0	1	1	0
106	0	1	1	1	0	1	0
107	0	1	0	2	2	2	2
108	0	1	0	0	0	1	1
109	0	1	1	1	0	0	1
110	0	1	0	0	1	0	2
111	0	1	1	1	1	1	0
112	1	1	0	0	1	1	0
113	1	1	1	0	1	1	1
114	2	2	0	2	2	2	2
115	2	1	1	0	1	1	0
116	1	1	0	1	1	1	1
117	0	0	1	2	0	2	2
118	0	1	0	1	1	0	2
119	1	1	1	0	0	1	0
120	0	1	0	1	1	0	0
121	0	1	0	0	1	0	1
122	0	1	0	0	1	1	0
123	0	1	0	0	0	0	2
124	0	0	0	2	2	2	2
125	0	1	0	0	1	0	0
126	0	1	0	1	2	2	2
127	0	1	1	0	0	0	0
128	1	1	0	1	1	1	1
129	0	1	0	0	2	2	2
130	1	1	0	1	1	1	1
131	0	0	0	2	0	2	2
132	0	0	0	2	0	2	2
133	0	0	1	1	0	1	0
134	0	0	0	0	1	1	0
135	1	1	0	0	1	1	0
136	0	1	0	1	0	1	0
137	0	0	0	0	0	2	0
138	0	0	0	2	0	2	0

Appendix B (continued)

Case No.	Final Coding C1	Final Coding C2	Final Coding C3	Final Coding C4	Final Coding C5	Final Coding C6	Final Coding C7
139	0	0	0	0	0	2	2
140	0	0	1	0	0	0	0
141	0	1	0	0	2	0	2
142	0	1	0	0	2	0	2
143	0	0	1	1	0	0	0
144	1	1	0	1	1	0	0
145	0	1	0	1	1	1	0
146	0	0	0	2	0	2	2
147	1	1	1	0	1	1	0
148	0	0	0	0	0	2	0
149	0	1	0	2	0	0	0
150	1	1	0	1	1	1	1
151	0	1	1	1	1	1	0
152	0	1	0	1	1	0	0
153	0	0	1	1	0	1	0
154	1	1	1	1	1	1	0
155	0	0	0	2	0	0	2
156	0	1	0	2	0	2	0
157	1	1	1	1	1	1	0
158	0	1	0	1	1	0	1
159	1	1	1	1	1	1	1
160	0	1	0	0	1	0	2
161	0	0	0	0	0	2	0
162	1	0	1	1	0	0	0
163	0	1	1	0	1	1	0
164	0	2	0	2	2	2	0
165	0	0	0	2	0	2	2
166	0	1	0	0	0	1	0
167	0	1	0	1	1	0	1
168	0	0	0	2	0	2	0
169	0	1	0	0	1	0	1
170	0	0	1	1	1	0	0
171	1	1	0	1	1	1	1
172	0	1	1	1	0	0	0
173	1	1	0	0	1	1	0
174	1	1	1	1	0	1	0
175	1	1	1	0	1	1	1
176	1	1	0	0	1	1	1
177	0	1	1	0	1	1	0
178	0	2	2	0	2	2	0
179	1	1	1	0	1	2	2
180	1	1	0	1	1	1	1
181	1	1	1	1	1	1	1
182	1	1	0	0	1	1	1
183	1	1	1	1	1	1	1
184	2	2	2	2	2	2	2

Appendix B (continued)

Case No.	Final Coding C1	Final Coding C2	Final Coding C3	Final Coding C4	Final Coding C5	Final Coding C6	Final Coding C7
185	2	2	2	2	0	2	2
186	0	2	0	2	0	2	0
187	0	0	2	0	0	0	0
188	1	1	0	1	1	1	0
189	0	1	1	1	0	0	2
190	0	1	0	2	2	0	0
191	1	1	0	0	1	0	0
192	0	1	0	0	0	2	2
193	1	1	0	1	1	1	0
194	0	2	1	0	0	2	2
195	1	1	0	0	1	1	0
196	0	1	0	1	1	1	0
197	0	1	1	2	0	2	2
198	0	1	0	0	1	0	0
199	0	2	0	1	0	2	0
200	0	0	0	0	0	2	0
201	0	2	0	0	0	2	0
202	1	1	0	1	1	1	1
203	0	2	0	2	0	2	0
204	1	1	1	1	1	0	1
205	0	1	1	1	1	0	2
206	0	1	1	1	1	1	1
207	0	1	1	0	1	0	1
208	1	1	0	1	1	1	2
209	1	1	1	1	1	1	1
210	1	1	1	1	1	1	0
211	0	0	0	0	1	1	0

APPENDIX C

LIST OF CASES CODED BY CHARACTERISTICS

Case No.	Case Year	Court Type	Trial Type	Case Outcome	Case Basis	Disc. Type	Employer Action	Employee Gender	Job Type
1	89	1	1	1	6	2	3	1	1
2	77	1	2	1	1	1	2	2	1
3	85	1	2	0	1	2	1	1	1
4	88	1	1	1	6	2	1	1	2
5	91	1	1	1	1	2	1	0	2
6	90	1	1	1	3	2	1	0	2
7	85	2	1	0	1	2	1	1	1
8	81	2	2	1	2	2	2	1	1
9	81	1	1	1	1	2	1	0	1
10	85	1	1	1	1	2	5	0	1
11	91	1	2	1	1	2	1	0	4
12	87	1	2	1	2	2	6	1	2
13	87	1	2	0	1	1	2	2	4
14	77	1	1	1	1	2	1	0	4
15	90	2	2	1	1	2	1	0	2
16	92	1	1	1	6	2	1	1	3
17	90	1	2	1	2	2	1	1	2
18	93	1	2	0	1	2	1	1	1
19	73	2	2	0	6	2	6	0	1
20	88	1	2	1	2	2	6	1	4
21	80	1	2	1	1	2	1	0	1
22	81	1	2	1	1	2	1	0	2
23	82	2	2	1	2	2	2	1	2
24	82	1	2	1	1	2	2	0	2
25	90	2	2	0	1	2	1	1	1
26	83	1	2	1	6	2	2	1	1
27	92	1	2	1	6	2	1	1	3
28	91	2	2	1	6	2	1	1	2
29	80	1	2	0	1	1	2	2	4
30	91	1	1	1	6	2	1	0	4
31	91	1	1	1	2	2	2	1	1
32	91	1	2	0	2	2	1	1	2
33	92	1	1	1	1	2	1	1	1
34	87	2	2	1	1	2	4	1	4
35	92	1	2	1	2	2	6	1	2
36	84	2	1	0	1	1	2	2	1
37	74	1	2	0	1	2	1	0	1
38	90	1	1	0	2	2	1	1	2
39	90	1	2	1	2	2	1	1	2
40	89	1	1	1	6	2	3	1	2
41	80	1	2	1	6	2	2	0	4
42	90	1	1	1	1	2	5	0	1
43	87	1	2	0	2	2	1	1	4
44	93	1	1	0	1	1	5	1	1
45	93	1	1	1	2	2	1	1	2
46	84	1	2	1	1	2	2	0	2

Appendix C (continued)

Case No.	Case Year	Court Type	Trial Type	Case Outcome	Case Basis	Disc. Type	Employer Action	Employee Gender	Job Type
47	84	1	2	1	1	2	5	0	2
48	90	1	2	0	2	2	1	1	1
49	91	1	1	1	1	2	6	0	1
50	88	1	2	1	1	2	1	0	5
51	83	1	1	0	1	1	1	0	5
52	91	2	1	1	1	2	1	0	3
53	83	1	2	0	6	2	2	1	4
54	77	2	2	1	1	2	4	0	4
55	82	1	2	1	1	2	2	0	2
56	77	1	2	1	1	2	2	0	4
57	86	1	2	1	1	2	2	0	4
58	91	1	2	1	1	2	1	1	2
59	89	1	1	0	1	2	5	1	4
60	91	1	2	1	2	2	1	1	3
61	91	1	2	1	3	2	2	0	4
62	90	1	2	1	1	2	2	0	4
63	84	1	2	1	1	2	2	1	1
64	79	1	2	1	1	2	1	1	3
65	83	1	2	0	1	1	2	0	1
66	78	2	2	1	6	2	2	2	4
67	93	1	1	0	3	2	1	2	2
68	80	1	2	0	2	2	1	1	2
69	82	1	2	0	2	2	5	1	1
70	91	1	2	1	1	2	3	1	1
71	88	2	2	0	1	2	2	0	2
72	91	1	1	0	6	2	6	0	3
73	80	1	2	1	3	2	1	0	1
74	87	1	2	1	1	2	6	2	4
75	81	2	2	1	1	2	1	2	2
76	89	1	2	1	1	2	2	0	4
77	91	1	2	1	2	2	2	1	1
78	83	1	2	0	6	1	6	1	4
79	92	2	1	1	1	2	4	1	2
80	81	1	2	0	1	2	1	0	2
81	87	1	2	1	2	2	1	1	1
82	87	2	2	1	2	2	2	1	2
83	83	1	2	1	6	2	2	0	3
84	86	2	2	1	6	2	3	1	4
85	83	1	2	1	6	2	1	0	2
86	90	2	2	0	1	2	5	0	1
87	92	2	2	0	6	2	3	0	4
88	77	1	2	0	1	1	5	0	1
89	86	1	2	0	1	2	1	1	1
90	80	1	2	1	6	2	2	1	2
91	77	2	2	0	1	1	5	0	1

Appendix C (continued)

Case No.	Case Year	Court Type	Trial Type	Case Outcome	Case Basis	Disc. Type	Employer Action	Employee Gender	Job Type
92	88	2	2	0	3	2	2	0	4
93	92	1	2	1	6	2	2	1	4
94	89	1	1	1	6	2	5	0	4
95	93	1	1	1	1	2	1	0	2
96	86	1	2	1	1	1	2	0	4
97	80	1	2	0	1	2	1	1	1
98	91	1	2	0	1	2	5	0	2
99	86	1	2	0	2	2	6	0	4
100	78	1	2	0	1	2	2	0	4
101	85	2	2	0	1	2	1	0	1
102	82	2	2	1	1	2	1	0	1
103	89	1	2	1	1	2	6	0	2
104	87	2	2	1	1	2	1	0	4
105	93	1	2	1	3	2	1	0	4
106	80	2	2	1	6	1	2	2	4
107	78	1	2	0	2	2	5	1	2
108	87	1	2	1	2	2	1	1	4
109	89	1	2	1	1	2	2	0	4
110	83	2	2	1	1	2	2	0	4
111	85	2	2	1	1	1	2	0	4
112	89	1	1	0	4	2	1	0	2
113	86	1	2	1	1	2	1	1	2
114	83	1	2	0	1	2	2	0	4
115	93	1	1	1	1	2	6	1	1
116	93	1	1	1	6	2	1	0	2
117	87	1	2	0	2	2	5	1	1
118	71	2	2	0	3	2	2	0	1
119	79	2	2	1	6	2	5	1	3
120	92	1	2	1	2	2	2	1	4
121	85	2	2	1	6	2	2	1	4
122	80	1	2	1	1	2	1	0	1
123	92	1	1	1	2	2	5	1	1
124	85	2	2	0	1	2	6	1	1
125	91	1	1	1	2	2	2	1	2
126	86	2	2	0	2	2	4	1	1
127	86	2	2	1	1	1	2	2	4
128	88	1	2	1	2	2	2	1	3
129	82	2	2	0	1	2	5	1	2
130	79	1	2	1	3	2	1	0	1
131	87	1	2	1	2	2	2	1	2
132	82	1	1	0	2	2	2	1	1
133	78	1	2	1	6	1	6	2	1
134	91	1	2	1	2	2	2	1	2
135	91	1	2	1	1	2	3	0	1
136	77	1	2	1	3	2	6	0	2
137	88	1	2	0	6	2	6	0	4

Appendix C (continued)

Case No.	Case Year	Court Type	Trial Type	Case Outcome	Case Basis	Disc. Type	Employer Action	Employee Gender	Job Type
138	85	2	2	0	2	2	5	1	1
139	90	2	2	0	2	1	1	1	2
140	86	1	1	1	3	2	2	0	4
141	79	1	1	0	2	2	6	1	1
142	84	2	2	1	1	2	5	0	1
143	85	1	2	1	2	1	5	1	4
144	89	2	2	0	6	2	5	1	4
145	88	1	1	1	6	2	5	1	1
146	88	1	2	0	6	1	6	2	4
147	88	1	1	1	2	2	2	0	2
148	74	2	2	0	1	1	2	2	1
149	87	1	1	1	6	2	2	0	4
150	84	1	2	1	6	2	2	1	2
151	80	1	2	1	1	2	5	2	1
152	78	2	2	1	6	2	1	1	3
153	91	2	1	1	2	2	1	1	1
154	84	1	2	1	6	2	5	1	2
155	87	2	2	1	1	2	1	1	1
156	75	2	2	0	1	1	6	2	1
157	81	1	2	1	1	2	1	0	1
158	89	2	2	1	2	2	2	1	4
159	92	1	2	1	3	2	5	0	1
160	90	1	2	0	3	2	2	0	4
161	77	2	2	0	1	1	2	2	1
162	91	1	1	1	3	2	1	0	4
163	92	1	2	1	1	2	1	1	2
164	82	2	2	0	1	2	6	0	1
165	72	2	2	0	1	1	6	0	1
166	91	1	2	1	2	2	5	1	1
167	92	1	2	1	3	2	6	0	4
168	77	1	2	1	2	2	2	1	1
169	92	1	2	1	2	2	2	1	4
170	84	1	2	1	6	2	2	1	4
171	93	1	2	1	6	2	1	0	2
172	93	2	2	1	4	2	1	0	1
173	93	1	1	0	1	2	1	0	2
174	81	1	2	1	1	2	1	0	1
175	91	1	1	1	1	2	1	1	1
176	90	1	2	1	2	2	1	1	2
177	91	1	1	1	1	2	6	1	1
178	81	2	2	0	1	2	2	0	4
179	77	1	2	0	1	1	2	2	1
180	86	1	2	1	6	2	1	1	1
181	80	1	2	1	2	2	2	0	2
182	77	1	2	1	6	2	1	0	1
183	78	2	2	1	1	2	5	0	4

Appendix C (continued)

Case No.	Case Year	Court Type	Trial Type	Case Outcome	Case Basis	Disc. Type	Employer Action	Employee Gender	Job Type
184	78	1	2	0	2	1	5	1	1
185	80	1	2	0	2	2	2	1	1
186	92	1	2	0	6	1	5	2	1
187	82	2	2	0	6	2	4	0	4
188	81	1	2	1	1	2	1	0	1
189	78	2	2	0	2	2	2	1	3
190	78	1	2	1	2	2	6	1	1
191	80	2	2	1	6	2	1	1	4
192	79	1	2	0	1	2	6	0	4
193	76	1	2	1	1	2	2	0	1
194	80	2	2	0	1	1	6	0	4
195	87	1	2	1	1	2	6	1	1
196	89	1	1	1	2	2	1	1	3
197	90	1	2	0	1	2	4	1	4
198	87	2	2	1	3	2	5	0	4
199	76	2	2	1	1	1	5	2	4
200	90	1	1	0	2	2	6	1	1
201	75	2	2	0	1	2	1	0	4
202	91	1	2	1	1	2	2	0	2
203	76	2	2	0	1	1	2	2	1
204	78	2	2	1	6	2	5	0	3
205	92	1	2	0	2	2	5	1	3
206	89	1	1	1	2	2	1	0	1
207	89	1	1	1	2	2	1	1	2
208	92	1	1	0	1	2	1	1	1
209	91	1	1	1	3	2	1	0	2
210	81	1	1	1	1	2	2	0	2
211	83	2	2	1	1	2	2	1	1

APPENDIX D

MODEL OF INDEX CARD USED FOR CASE SEARCH AND RETRIEVAL

Comments

Case Number	
Case Cite	
Case Year	
Date Entered	
Case Outcome	
Key Words	
Abstract	
Follow-up Needed	
Copy on File	
Case Shepardized	
Case AutoCited	
Employer Action	
Case Basis	
Case Type	
Employee Gender	
Job Type	
Employer Action	
Implications for Study	

APPENDIX E

TITLE VII 1964 CIVIL RIGHTS ACT CASES INCLUDED IN THE FINAL CODING

Addoo v. Blue Cross/Blue Shield, 1989 U.S. Dist. LEXIS 3865; 50 Empl. Prac. Dec. (CCH)P39,115 (D.C. SDNY, 1989).

Agarwal v. McKee & Company, 19 Fair Empl. Prac. Cas. (BNA) 503; 16 Empl. Prac. Dec. (CCH) P8301 (D.C. NDCalif., 1977).

Anderson v. Group Hospitalization (D.C. D.C. 1985); 621 F. Supp. 943.

Arehart v. Western Airlines, Inc., 1988 U.S. Dist. LEXIS 10161; 47 Fair Empl. Prac. Cas.(BNA) 251; 46 Empl. Prac. Dec. (CCH) P38,079 (D.C.Calif., 1988).

Ausbrooks v. Secretary, U.S. Department of Health and Human Services (D.C. D.C., 1991); 1991 U.S. Dist. LEXIS 15637.

Baltazar v. Cecil County Bd. of Education, 1990 U.S. Dist. LEXIS 6288; 52 Fair Empl. Prac. Cas. (BNA) 1877; (D.C. Md., 1990).

Barnes v. Yellow Freight Systems, Inc., 778 F.2d 1096; 39 Fair Empl. Prac. Cas. (BNA) 1050; 39 Empl. Prac. Dec. (CCH) P35,894 (C.A. 5, 1985).

Bauer v. Bailar, 647 F.2d 1037; 25 Fair Empl. Prac. Cas. (BNA) 963; 26 Empl. Prac. Dec. (CCH) P31,799 (10th Cir. 1981).

Bennett v. Eggers, 26 Fair Empl. Prac. Cas. (BNA) 1408; (D.N.J. 1981).

Berry v. E. I. DuPont De Nemours and Company (D.C. Delaware, 1985) 625 F. Supp. 1364; 39 Fair Empl. Prac. Cas. (BNA) 1295.

Betters v. Stickney, (D.C. D.C., 1991) 1991 U.S. Dist. LEXIS 15655.

Biscaha v. Federal Bureau of Investigation, (D.C. D. C.) 1987 U.S. Dist. LEXIS 15222; 44 Empl. Prac. Dec. (CCH) P37, 420.

Black Law Enforcement Officers Association v. Akron, City of; (C.A. 6, 1987); 824 F.2d 475; 1987 U.S. App. LEXIS 9832; 44 Fair Empl.Prac. Cas. (BNA) 1477; 44 Empl. Prac. Dec. (CCH) P37,411.

Boykins v. Grable, Department of the Navy et al., (D.C. Va. 1977) 15 Empl. Prac. Dec. (CCH) P7928.

Boze v. Branstetter, (C.A. 5, 1990); 912 F.2d 801; 1990 U.S. App. LEXIS 16782; 53 Fair Empl.Prac.Cas. (BNA) 1630; 54 Empl. Prac. Dec. (CCH) P40,259.

Bradley v. Spartan Food Systems Inc., (D.C. SAla., 1990); 1990 U.S. Dist. LEXIS 6258; 54 Fair Empl. Prac. Cas. (BNA) 1202.

Brady v. DiBiaggio; 794 F. Supp. 663; 1992 U.S. Dist. LEXIS 7859; May 6, 1992, Filed.

Briscoe v. Fred's Dollar Store, 822 F. Supp. 1353; 1993 U.S. Dist. LEXIS 7831; 64 Fair Empl. Prac. Cas. (BNA) 1155; 64 Empl. Prac. Dec. (CCH) P43, 020 (June 9, 1993, Filed).

Brito v. Zia Company, 478 F.2d 1200; 5 Fair Empl. Prac. Cas. (BNA) 1207; 5 Empl.Prac. Dec. (CCH) P8626, (10th Cir. 1973).

Broderick v. United States Securities and Exchange Commission, (D.C. D.C.) 685 F. Supp. 1269; 1988 U.S. Dist. LEXIS 4474; 46 Fair Empl. Prac. Cas. (BNA) 1272; 46 Empl. Prac. Dec. (CCH) P37,963; 16 Media L. Rep. 1927.

Brown v. Delta Air Lines, Inc., (D.C. Tex., 1980); 522 F. Supp. 1218; 30 Fair Empl. Prac. Cas. (BNA) 38; 25 Empl. Prac. Dec. (CCH) P31,528, see also 30 FEP 36.

Buchanan v. American Petroleum Institute, (D.D.C. 1981); 26 Fair Empl. Prac. Cas. (BNA) 466; 27 Empl. Prac. Dec. (CCH) P32,188.

Burrus v. United Telephone, 683 F.2d 339; 29 Fair Empl. Prac. Cas. (BNA) 663; 29 Empl.Prac. Dec. (CCH) P32,932.

Carter v. Lockheed-Georgia, (USDC, N. District, GA.) 35 Fair Empl. Prac. Cas. (BNA) 1201; 31 Empl. Prac. Dec.(CCH) P33,354.

Carter v. South Central Bell (C.A. 5, 1990); 912 F.2d 832; 1990 U.S. App. LEXIS 17038; 54 Fair Empl.Prac. Cas. (BNA) 1110; 54 Empl. Prac. Dec. (CCH) P40,272.

Casas v. First American Bank, (DDC 1983); 31 Fair Empl. Prac. Cas. (BNA) 1479.

Cassells v. University Hospital at Stony Brook, 1992 U.S. Dist. LEXIS 5942; (April 23, 1992, Filed).

Charles v. Allstate Insurance Company; 932 F.2d 1265; 1991 U.S. App. LEXIS 9830; 55 Fair Empl. Prac. Cas. (BNA) 1516; 56 Empl. Prac. Dec. (CCH) P40,757; (May 15, 1991, Filed).

Chisholm v. The United States Postal Service et al. (D.C. WDN.C., Charlotte Division,1980); 516 F. Supp. 810; 25 Fair Empl. Prac. Cas. (BNA) 1778; 24 Empl. Prac. Dec. (CCH) P31,326.

Chojar v. Levitt; 773 F. Supp. 645; 1991 U.S. Dist. LEXIS 13321; (September 26, 1991).

Churchill v. International Business Machines Inc., National Service Division (D.C. DNJ); 759 F. Supp. 1089; 1991 U.S. Dist. LEXIS 3643; 19 Fed. R.Serv. 3d (Callaghan) 197; 55 Fair Empl. Prac. Cas. (BNA)1004; 118 Lab. Cas. (CCH) P35,462; 56 Empl. Prac. Dec.(CCH) P40,687; 30 Wage & Hour Cas. (BNA) 673.

Cline v. General Electric Capital Auto Lease, Inc.; 757 F. Supp. 923; 1991 U.S. Dist. LEXIS 1082; 55 FairEmpl. Prac. Cas. (BNA) 498; 56 Empl. Prac. Dec. (CCH)P40,739; 6 BNA IER CAS 624, (February 2, 1991).

Collier v. Farmers Insurance Co., 1992 U.S. Dist. LEXIS 16577; (September 10, 1992, Filed)

Collins v. Illinois, (C.A. 7, 1987); 830 F.2d 692; 1987 U.S. App. LEXIS 13017; 44 Fair Empl. Prac. Cas. (BNA) 1549; 44 Empl. Prac. Dec. (CCH) P37,432.

Cosgrove v. Sears Roebuck & Co., 1992 U.S. Dist. LEXIS 185; 58 Empl. Prac. Dec. (CCH)P41,281. (January 10, 1992, Filed).

Crawford v. Western Electric Company, 745 F.2d 1373; 36 Fair Empl. Prac. Cas. (BNA) 1753; 35 Empl. Prac. Dec. (CCH) P34,908 (11th Cir. 1984).

Culp v. General American Transportation Corp., (D.C. Ohio, 1974); 8 Fair Empl. Prac. Cas. (BNA) 460; 8 Empl. Prac. Dec.(CCH) P9523 8 FEP 460.

Curtiss v. Key Bank of Western New York (D.C. WDNY,1990); 1990 U.S. Dist. LEXIS 16150; 53 Fair Empl. Prac. Cas. (BNA) 1576.

Daughhetee v. Amax Coal Co., Div. of Amax Inc., (D.C. Ind., 1990); 761 F. Supp. 622; 1990 U.S. Dist. LEXIS 19120; 56 Fair Empl. Prac. Cas. (BNA) 1880; 61 Empl. Prac. Dec. (CCH)P42,148.

Davis v. AT&T Information Systems, (D.C. WLa., 1989); 1989 U.S. Dist. LEXIS 17517; 56 Fair Empl. Prac. Cas.(BNA) 520.

Davis v. Bolger, (D.C. D.C., 1980); 496 F. Supp. 559; 23 Fair Empl. Prac. Cas. (BNA) 1159; 23 Empl. Prac. Dec. (CCH) P31,151.

Dean v. Taco Tico Inc., (D.C. Kan., 1990); 1990 U.S. Dist. LEXIS 6824; 55 Fair Empl. Prac. Cas. (BNA) 547; 57 Empl. Prac. Dec. (CCH) P40,991.

Delgado v. Lehman, (D.C., Va., 1987); 665 F. Supp. 460; 1987 U.S. Dist. LEXIS 7180; 43 Fair Empl. Prac. Cas. (BNA) 593; 44 Empl. Prac. Dec. (CCH) P37, 517.

Dicker v. Allstate Life Insurance Co., (U.S.D.C., 1993); 1993 U.S. Dist. LEXIS 2758; 61 Empl. Prac. Dec. (CCH)P42, 211.

Douglas v. PHH Fleet America Co., (August 27, 1993, Decided); 832 F. Supp. 1002; 1993 U.S. Dist. LEXIS 13571; 62 Fair Empl. Prac. Cas. (BNA) 1615.

EEOC v. IBM Corp., (D.C. Md., 1984); 583 F. Supp. 875; 34 Fair Empl. Prac. Cas. (BNA) 766; 34 Fair Empl. Prac. Cas. (BNA) 766; (see also 34 FEP 765).

Elam v. C & P Telephone Co., (D.C. D.C., 1984); 609 F. Supp. 938; 38 Fair Empl. Prac. Cas. (BNA) 969.

Ezold v. Wolf, Block, Schorr & Solis-Cohen, (D.C. EPa., 1990); 751 F. Supp. 1175; 1990 U.S. Dist. LEXIS 15974; 54 Fair Empl. Prac. Cas. (BNA) 808; 55 Empl. Prac. Dec. (CCH) P40,497; 111 A.L.R. Fed. 691.

Fears v. J. C. Penny Co.; 1991 U.S. Dist. LEXIS 9112; 56 Fair Empl. Prac. Cas. (BNA)1101; June 4, 1991, Filed.

Floyd v. Kellogg Sales Company (D.C. Minnesota, Third Division,1987); 1987 U.S. Dist. LEXIS 14243.

Foster v. Arkansas, Univ. of, (C.A. 8, 1991); 938 F.2d 111; 1991 U.S. App. LEXIS 13936; 56 Fair Empl.Prac. Cas. (BNA) 512; 56 Empl. Prac. Dec. (CCH) P40,862.

Foster v. MCI Telecommunications Corp.,(D. C. Colo. 1983); 555 F. Supp. 330; 30 Fair Empl. Prac. Cas. (BNA) 1493; 31 Empl. Prac. Dec. (CCH) P33,592; aff'd 773 F.2d 116 (10th Cir. 1985).

Freeman v. Drew Lewis et al., (D.C. D.C., 1983). 36 Fair Empl. Prac. Cas. (BNA) 677; 31 Empl. Prac. Dec. (CCH) P33,615.

Friend v. Leidinger, (C.A. 4, 1978); 446 F. Supp. 361; 18 Fair Empl. Prac. Cas. (BNA) 1030; 17 Empl. Prac. Dec. (CCH) P8392. (18 FEP 1052)

Fridge v. Staats et al., (D.C. D.C., 1982); 30 Fair Empl. Prac. Cas. (BNA) 216.

Frink v. United States Navy, (D.C. Pa, 1977); 16 Fair Empl. Prac. Cas. (BNA) 67.

Fudd v. Treasury Dept., (D.C. D.C., 1986); 690 F. Supp. 1; 46 Fair Empl. Prac. Cas. (BNA) 62; 49 Empl. Prac. Dec. (CCH) P38,790.

Galatas v. Shell Oil Co., 1991 U.S. Dist. LEXIS 6584; (May 16, 1991, Filed).
Garrett v. Hodel, (U.S.D.C., 1989); 717 F. Supp. 4; 1989 U.S. Dist. LEXIS 9275; 50 Fair Empl. Prac. Cas. (BNA) 784.

Garvey v. Dickinson College; 775 F. Supp. 788; 1991 U.S. Dist. LEXIS 14882; 64 Fair Empl. Prac. Cas. (BNA) 160; 61 Empl. Prac. Dec. (CCH)P42,173. (August 23, 1991).

Garza v. City of Inglewood, 761 F. Supp. 1475; 1991 U.S. Dist. Lexis 5461; 60 Empl.Prac. Dec. (CCH) P41,977; 91 Daily Journal DAR 4836, (April 12, 1991, Filed).

Gautier v. Watkins, Secretary, U.S. Department of Energy (D.C. D.C., 1990); 747 F. Supp. 82; 1990 U.S. Dist. LEXIS 12951; 57 Fair Empl. Prac. Cas. (BNA) 1122.

Geer v. General Motors Corp., (D.C. NDGeorgia, 1984); 588 F.Supp. 1067; 45 Fair Empl. Prac. Cas. 4.

Gidion v. Hospital for Joint Diseases, (S.D.N.Y. 1979); 20 Fair Empl. Prac. Cas. (BNA) 923; 20 Empl. Prac. Dec.(CCH) P30,153.

Goldman v. Marsh, (D.C. EArk., 1983); 54 Fair Empl. Prac. Cas. (BNA) 1689; 31 Empl. Prac. Dec.(CCH) P33,605.

Goodman v. Schlesinger, (C.A. 4, 1978); 584 F.2d 1325; 26 Fed. R. Serv. 2d (Callaghan) 322; 18 Fair Empl. Prac. Cas. (BNA) 191; 18 Empl. Prac. Dec. (CCH) P8659.

Goyette v. DCA Advertising Inc., 828 F. Supp. 227; 1993 U.S. Dist. LEXIS 10491; 62 Empl.Prac. Dec. (CCH) P42,629, (August 2, 1993, Filed).

Grindstaff v. Burger King, Inc., (D.C. Tenn., 1980); 494 F. Supp. 622; 23 Fair Empl. Prac. Cas. (BNA) 1486.

Grove v. Frostburg National Bank, (D. Md. 1982); 549 F. Supp. 922; 26 Wage & Hour Cas. (BNA) 316; 31 Fair Empl. Prac. Cas. (BNA) 1675; 96 Lab. Cas. (CCH) P34,327; 31 Empl. Prac. Dec. (CCH) P33,606.

Guilford v. Beech Aircraft Co., 1991 U.S. Dist. LEXIS 15988; 62 Fair Empl. Prac. Cas. (BNA) 1141; (October 25, 1991, Filed).

Gunby v. Pennsylvania Electric Co., (C.A. 3, 1988), (see also 40 FEP 346); 840 F.2d 1108; 1988 U.S. App. LEXIS 1697; 45 Fair Empl. Prac. Cas. (BNA) 1818; 45 Empl. Prac. Dec. (CCH) P37,785.

Guntur v. Union College (D.C. NNY, 1991); 1991 U.S. Dist. LEXIS 18261; 57 Fair Empl. Prac. Cas.(BNA) 925.

Gupta v. International Business Machines Corp., (D.C. Md., 1980); 23 Fair Empl. Prac. Cas. (BNA) 857; 23 Empl. Prac. Dec.(CCH) P30,936.

Harris et al. v. Marsh (D.C. E.D.N.C., Fayetteville Division); 679 F. Supp. 1204; 1987 U.S. Dist. LEXIS 12850.

Harris v. Group Health Association, Inc.,(D.C. Cir. 1981); 662 F.2d 869; 26 Fair Empl. Prac. Cas. (BNA) 969; 26 Empl.Prac. Dec. (CCH) P32,065; 213 U.S. App. D.C. 313.

Harris v. Lyng (D.C. D.C.,1989); 717 F.Supp. 870; 1989 U.S. Dist. LEXIS 8345; 50 Fair Empl. Prac. Cas. (BNA) 506; 53 Empl. Prac. Dec. (CCH) P39,957.

Harris v. Neff (D.C. Kan., 1991); 1991 U.S. Dist. LEXIS 3816; 55 Fair Empl. Prac. Cas. (BNA) 1019; 6 BNA IER CAS 615.

Harrison v. Lewis (D.C. D.C.,1983); 559 F. Supp. 943; 40 Fair Empl. Prac. Cas. (BNA) 181.

Harriston v. Chicago Tribune Co., (C.A. 7, 1993); 992 F.2d 697; 61 EPD P42,221; 1993 U.S. App. LEXIS 9960; 63 Fair Empl.Prac. Cas. (BNA) 319; 61 Empl. Prac. Dec. (CCH) P42,221; 25 Fed. R. Serv. 3d (Callaghan) 1018.

Hatton v. Ford Motor Co., (D.C. Mich., 1981); 508 F. Supp. 620; 25 Fair Empl. Prac. Cas. (BNA) 314; 26 Empl. Prac. Dec. (CCH) P32,038.

Hollis v. Fleetguard, Inc., (D.C. Middle District of Tenn., NE Division); 668 F. Supp. 631; 1987 U.S. Dist. LEXIS 8141; 44 Fair Empl. Prac. Cas. (BNA) 1527; 44 Empl. Prac. Dec. (CCH) P37,545.

Hopkins v. Price Waterhouse, 825 F.2d 458; 1987 U.S. App. LEXIS 10343; 44 Fair Empl.Prac. Cas. (BNA) 825; 43 Empl. Prac. Dec. (CCH) P37,230;263 U.S. App. D.C. 3211987.

Hou v. Pennsylvania, (D.C. Pa., 1983); 573 F. Supp. 1539; 33 Fair Empl. Prac. Cas. (BNA) 513

Howard v. Marsh, Jr., Secretary of the Army (D.C. EDMissouri, Eastern Division, 1985); 616 F. Supp. 1116; 37 Empl. Prac. Dec. (CCH) P35,489 rev. and rem. 1986

Howard v. Miller Brewing Co., (N.D.N.Y. 1983). 31 Fair Empl. Prac. Cas. (BNA) 850.

Ingram v. Missouri Pacific Railraod Co., (C.A. 8, 1990); 897 F.2d 1450; 1990 U.S. App. LEXIS 3575; 52 Fair Empl.Prac. Cas. (BNA) 571; 53 Empl. Prac. Dec. (CCH) P39,750.

Hughes v. Derwinski, 967 F.2d 1168; 1992 U.S. App. LEXIS 16081; 59 Fair Empl.Prac. Cas. (BNA) 641; 59 Empl. Prac. Dec. (CCH) P41,659.

Ivey v. Western Electric Co., (D.C. Ga., 1977) see also 20 FEP 618; 23 Fair Empl. Prac. Cas. (BNA) 1012; 16 Empl. Prac. Dec.(CCH) P8297.

Jackson v. Ebasco Services Incorporated, (D.C. SDNY, 1986); 634 F. Supp. 1565; 40 FEP 1606.

Jackson v. Gulf Oil Corporation, Civil Action; 23 empl. Prac.Dec. P.30, 953;1980.

James v. Stockham Valves and Fittings Co., 559 F.2d 310(1977).15 Fair Empl. Prac. Cas. (BNA) 827; 15 Empl.Prac. Dec. (CCH) P7842.

Jaurequi v. City of Glendale (C.A. 9, 1988); 852 F.2d 1128; 1988 U.S. App. LEXIS 9989; 47 Fair Empl.Prac. Cas. (BNA) 1860; 47 Empl. Prac. Dec. (CCH) P38,169.

Jennings v. Cheney, Secretary of Defense; 1992 U.S. Dist. LEXIS 1796; Entered February 11, 1992.

Johnson v. Bowen, Secretary of Health and Human Services (D.C. NDIll., E.D., 1989) 1989 U.S. Dist. LEXIS 702.

Johnson v. Digital Equipment Co.; 836 F. Supp. 14; 1993 U.S. Dist. LEXIS 15504; 63 Fair Empl. Prac. Cas. (BNA) 651.

Johnson v. Garrett; 1991 U.S. Dist. LEXIS 8185; March 6, 1991.

Johnson v. Olin Corporation 484 F. Supp. 577 (S.D. Tex. 1980). 22 Fair Empl. Prac. Cas. (BNA) 176.

Jolly v. Northern Telecom, Inc.,766 F. Supp. 480; 1991 U.S. Dist. LEXIS 8963; June 24, 1991, Decided.

Jones v. Lyng, Secretary of Agriculture (D.C. D.C.,1986); 669 F. Supp. 1108; 42 Fair Empl. Prac. Cas. (BNA) 587.

Jones v. Middendorf, II, Secretary of the Navy (D.C. EDOklahoma, 454 F. Supp. 1276, 1978).18 Empl. Prac. Dec. (CCH) P8719; 31 Fair Empl. Prac. Cas. 1004.

Jones v. Western Geophysical Co., (C.A. 5, 1985) see also 29 FEP 914, 1117. 37 Fair Empl. Prac. Cas. (BNA) 1734; 761 F.2d 1158; 37 Empl. Prac. Dec. (CCH) P35,372.

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