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AUTHOR McCarthy, Martha M.
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ABSTRACT

An overview is presented of litigation in which courts have interpreted educational employees' rights to nondiscriminatory treatment and employers' obligations to ensure equal employment opportunities. Because of the range, volume, and complexity of the litigation in this area, the intent is to identify applicable legal principles rather than to present a comprehensive analysis of all recent cases. The first part covers protections against racial discrimination in hiring, promotion, and job assignment based on Title VII of the Civil Rights Act of 1964. Issues arising from affirmative action and reverse discrimination are also discussed. The second part discusses sex discrimination suits pertaining to conditions of employment, pregnancy-related policies, discrepancies in compensation, unequal retirement benefits, and sexual harassment. Remaining sections discuss claims of discrimination based on national origin, religious discrimination, handicap discrimination, and age discrimination. At the conclusion, guidelines for avoiding discrimination suits are provided by means of 10 questions which, if they can be answered affirmatively, will improve a school board's chances of avoiding legal liability in its employment policies and practices. (TE)

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# Discrimination in Employment

Martha M. McCarthy

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Public employment has not been immune to the problem of discrimination against various segments of our citizenry. Indeed, a substantial portion of educational employment litigation pertains to allegations of unlawful discrimination. Decisions regarding hiring, promotion, and a host of other concerns have generated charges that individuals have been discriminated against because of inherent traits rather than because of their qualifications and abilities.

This chapter provides an overview of litigation in which courts have interpreted educational employees' rights to nondiscriminatory treatment and employers' obligations to ensure equal employment opportunities. Specifically, protections against discrimination based on race, sex, national origin, religion, handicaps, and age are covered. Because of the range, volume, and complexity of the litigation in this area, the intent of this chapter is to identify applicable legal principles rather than to present a comprehensive analysis of all recent cases.[1]

## Racial Discrimination

Claims of racial discrimination in educational employment have resulted in numerous lawsuits brought under the equal protection clause of the 14th Amendment and federal civil rights laws. The majority of the cases have involved hiring, promotion, job assignment, and staff reduc-

*Martha M. McCarthy is a professor of education and associate dean of faculties at Indiana University.*

tion practices that allegedly discriminate against minorities.[2] Also, the operation of affirmative action programs has resulted in claims of discrimination against the racial majority or so-called "reverse discrimination."

### Hiring, Promotion, and Job Assignment

Many controversies involving hiring practices in the public sector have focused on prerequisites to employment that eliminate a disproportionate percentage of minorities from the applicant pool. The law is clear that a facially discriminatory racial classification, such as a governmental policy barring minorities from a certain position, violates the equal protection clause of the 14th Amendment unless justified by a compelling governmental interest. However, most allegations of racial discrimination in connection with prerequisites to public employment do not involve overt classifications; rather, they entail claims that facially neutral employment policies adversely affect minority employees. In such suits, aggrieved individuals must prove that they have been victims of purposeful discriminaton to gain relief under the equal protection clause.

Public employers can defend a constitutional charge of discriminatory intent by showing that the prerequisite to employment bears a rational relationship to a legitimate governmental goal. For example, in 1978 the U.S. Supreme Court affirmed a lower court's conclusion that a state's use of the National Teachers Examination for teacher certification and salary purposes satisfied 14th Amendment equal protection guarantees because the test was used for the legitimate purpose of improving the effectiveness of the state's teaching force and was not administered with any intent to discriminate against minority applicants for certification.[3] The trial court was convinced that the test was valid in that it measured knowledge of course content in teacher preparation programs. The court further reasoned that there was sufficient evidence to establish a relationship between the use of the test scores as a factor in determining teachers' placement on the pay scale and valid employment objectives such as encouraging teachers to upgrade their skills.

Because of the difficulty in proving unconstitutional intent, plaintiffs alleging racial discrimination in employment recently have relied primarily on Title VII of the Civil Rights Act of 1964. Title VII prohibits employers with 15 or more employees, employment agencies, and labor organizations from discriminating against employees on the basis of race, color, religion, sex, or national origin and covers hiring, promotion, and compensation practices as well as fringe benefits and other terms and conditions of employment.[4] The law allows employers to impose hiring restrictions based on sex, national origin, or religion (but not on race) if such characteristics are bona fide occupational qualifications.

In challenges to facially neutral policies with a disparate impact on groups protected by Title VII, proof of discriminatory intent is not necessary. After an initial inference of discrimination (prima facie case) is established, the burden shifts to the employer to prove that the policy is justified by a valid job necessity. In a Title VII disparate impact case, a rational or legitimate nondiscriminatory reason for the employment policy is insufficient to rebut an inference of discrimination; the policy must have a manifest relationship to the job. The Supreme Court has ruled that tests used as a prerequisite to employment that disproportionately eliminate minority applicants must be validated as assessing ability to perform the specific jobs for which they are used.[5]

In a significant 1982 decision, the Supreme Court ruled five-to-four that prerequisites to employment or promotion with a disparate adverse impact on minorities violate Title VII even though the "bottom line" of the hiring or promotion process results in an appropriate racial balance. While acknowledging that evidence of a nondiscriminatory work force might in some instances assist an employer in rebutting a constitutional charge of intentional discrimination, the Supreme Court majority reasoned that where "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process," that barrier must be shown to be job-related to satisfy Title VII.[6] The majority declared that Congress did not intend to give employers "license" to discriminate against some employees merely because other members of the employees' group are treated favorably.

However, the employer's burden of establishing a job necessity for policies with a disparate adverse impact is not impossible to satisfy. In 1981 the Fourth Circuit Court of Appeals found no Title VII violation in connection with a school district's use of certification grades based on scores on the National Teachers Examination to determine teachers' salaries.[7] Although the certification grades resulted in the denial of pay raises to a much larger proportion of black than white teachers, the appellate court reasoned that the practice was justified by the job necessity of attracting well-qualified teachers and encouraging self-improvement among low-rated instructional personnel. As discussed previously, this practice had already withstood constitutional challenge because intentional discrimination was not established.

In addition to challenges to facially neutral policies with a disparate *impact* on minorities, some employees have alleged that they have received discriminatory *treatment* because of their race or other protected characteristic in violation of Title VII. Plaintiffs carry a heavier burden of proof in substantiating disparate treatment in contrast to disparate impact under Title VII. In disparate treatment cases, plaintiffs must produce proof of the employer's intent to treat individuals differently

relative to similarly situated members of another race, which is similar to the constitutional standard under the equal protection clause.

To establish a prima facie case of disparate treatment in connection with hiring and promotion practices, the plaintiff must first demonstrate membership in a group protected by Title VII. Then the individual must show that he or she applied for and was qualified to assume the job sought and was rejected despite such qualifications. The individual must also produce evidence that the position remained open after the rejection and that the employer continued to seek applicants with the plaintiff's qualifications.[8] Once a prima facie case is established, the employer can rebut the inference of discrimination by articulating a nondiscriminatory reason for the action. The burden of persuasion remains with the plaintiff to prove by a preponderance of evidence that the legitimate reasons offered are mere pretexts for discrimination.

Courts have accepted employers' asserted nondiscriminatory reasons for denying employment or promotion to minorities and for other differential treatment if the individuals have not been certified or qualified for the positions sought or if the employment decisions have been based on quality of performance or other considerations unrelated to race.[9] However, minority plaintiffs have prevailed with evidence that the avowed nondiscriminatory reason was merely a pretext to mask discriminatory motive. For example, a black employee established a prima facie case of discrimination by establishing that a school district paid him less than his white counterpart for substantially equivalent work. The school district argued that the pay differential was based on nondiscriminatory reasons related to differences in performance and job responsibilities. But the appeals court concluded from the testimony that the differential was based primarily on racial considerations.[10]

Claims of discrimination in hiring and promotion have been particularly troublesome for the judiciary because of the subjective judgments involved. Courts have been reluctant to strip employers of their prerogative to base such decisions on personality and other subjective factors. Employers are not required to accord preference to minorities if nonminority applicants are considered better or merely equally qualified for available positions. The employer has discretion to choose among candidates with similar credentials, provided that the decision is not grounded in discriminatory motives. However, the judiciary also has recognized that "greater possibilities for abuse . . . are inherent in subjective definitions of employment selection and promotion criteria" because of the potential for masking racial discrimination.[11]

Statistical evidence often plays an important role in establishing a prima facie case of racial bias in connection with hiring practices. An inference of disparate treatment can be established by evidence of gross statistical disparities between an employer's work force and the

availability pool or by evidence that minority employees have been confined primarily to a few schools with predominantly minority pupils. In 1982 the Fourth Circuit Court of Appeals ruled that if such a pattern or practice of employment discrimination is established, the burden of proof shifts to school authorities to rebut the discrimination charge.[12] Acknowledging that the plaintiff usually retains the burden of proof in a disparate treatment case, the appeals court reasoned that a finding of either intentional discrimination or a recent pattern of discrimination in a school district warrants placing the burden of persuasion on the employer to justify challenged practices.

Once unlawful discrimination is established in employment practices, federal courts have broad discretion in ordering equitable relief. In addition to requiring that victims of discrimination be hired, promoted, or reinstated in the next available positions, courts have awarded back pay to the date of the discriminatory act and have granted retroactive seniority under certain conditions to restore such employees to their rightful place.[13] However, bona fide seniority systems that are not negotiated or maintained with discriminatory intent are not vulnerable to attack under Title VII, even though they may perpetuate the effects of past intentional discrimination.[14]

Because legal proceedings in discrimination suits often are quite lengthy, some employers charged with discrimination in hiring have attempted to reduce their potential liability by remedying the alleged discriminatory practice before judicially ordered to do so. In 1982 the Supreme Court ruled that an employer can limit the accrual of back pay liability under Title VII by unconditionally offering the claimant the job previously denied without the promise of retroactive seniority.[15] The Supreme Court majority concluded that without such an opportunity to reduce back pay liability, employers would have no incentive to end discrimination through voluntary efforts when they have been accused of a discriminatory practice. Of course, if the employee ultimately wins a favorable judicial ruling, the court may award full compensation, including retroactive seniority.

### Affirmative Action and Reverse Discrimination

The term "affirmative action" first was used in an Executive Order, issued by President Kennedy in 1961, to refer to a duty placed on employers to take steps to remedy past discrimination. There is some sentiment that without affirmative action plans, including goals to increase the representation of women and minorities in the work force, the effects of prior discriminatory practices cannot be eliminated. However, affirmative action goals are often stated in terms of hiring percentages, which have been criticized as causing "reverse discrimination" or discrimination against the majority. Although affirmative action pro-

grams are directed toward women, the handicapped, and certain categories of veterans as well as toward racial and ethnic minorities, most of the suits challenging such programs have focused on the preferential treatment of racial minorities.

Some courts have upheld the constitutionality of affirmative action plans in connection with a finding of de jure segregation. For example, in 1982 the First Circuit Court of Appeals upheld an affirmative action plan as part of a desegregation order in the Boston school district, and the Supreme Court declined to review the case.[16] Under the plan, minorities must maintain 20% of the teaching positions regardless of their seniority. The court reasoned that without such a plan, the efforts made in remedying intentional discrimination in the school district would be eradicated through layoffs necessitated by declining enrollments.

In contrast, in May 1983 the Sixth Circuit Court of Appeals reversed a federal district court's order that placed race over seniority in recalling teachers who had been released for financial reasons.[17] The appeals court held that the district court erred by imposing a quota of minority teachers (20%) that must be maintained by the Kalamazoo School District. Noting that racial hiring quotas per se are not improper to remedy a violation of students' constitutional rights, the court found that the school district had made a sustained good faith effort to recruit minority teachers to remedy the effects of prior segregation. The court concluded that "the record does not demonstrate that nullification of the seniority and tenure rights of white teachers is necessary to vindicate the students' constitutional rights."[18]

Even more controversial have been efforts to give employment preference to minorities in school systems that are not under court-ordered desegregation mandates. The judiciary has identified factors that should be evaluated in judging the constitutionality of voluntary affirmative action plans. These include the efficacy of alternative remedies, the envisioned duration of the plan, the relationship between the imposed percentage of minorities to be hired and the racial composition of the student population[19] or the relevant work force, and the availability of waiver provisions in the event that the quota is not met. Affirmative action plans that are temporary, do not exclude white employees from consideration for certain positions, and are not designed to maintain a rigid racial balance probably will survive judicial scrutiny, with evidence that such temporary preferential treatment is necessary to remedy the effects of past discriminatory practices.[20]

## Sex Discrimination

Differential treatment of the sexes has a lengthy history, and only within the past few decades has such discrimination been legally

challenged. Traditionally, distinctions based on sex were rationalized by an attitude of "romantic paternalism," which the Supreme Court characterized in 1973 as placing women "not on a pedestal but in a cage."[21] Until the 1970s, unequal treatment of male and female employees was not only prevalent, but also judicially sanctioned.

During the past decade courts have recognized that the 14th Amendment prohibits invidious governmental discrimination based on sex as well as on other inherent traits. Although gender classifications are not considered "suspect" as are those based on race, the judiciary recently has required facially discriminatory sex classifications to be substantially related to important governmental objectives to satisfy equal protection mandates.[22] However, the mere disparate impact of a facially neutral law on men or women is not sufficient to abridge the equal protection clause without proof of unlawful motive, even if the adverse impact of the statute was foreseeable at the time it was enacted.[23]

As with claims of racial discrimination, the difficult burden of establishing unconstitutional motive has caused most plaintiffs in sex bias suits to rely on federal statutory guarantees. Specifically, Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and Title IX of the Education Amendments of 1972 have been the bases for most claims. A range of employment concerns has generated statutory sex bias suits, including conditions of employment, pregnancy-related policies, compensation practices, retirement benefits programs, and sexual harassment.

## Conditions of Employment

Most allegations of sex bias in educational employment have been initiated by female plaintiffs contending that they have been treated unfairly solely because of their sex in violation of Title VII. In these cases plaintiffs often have attempted to establish a prima facie case of sex discrimination by presenting both specific and general statistical data. Specific data relates to the individual's qualifications for the job (or promotion) that was denied allegedly for discriminatory reasons. General data is presented to establish that a prevalent pattern or practice of sex bias exists in the institution. The judiciary has recognized that general statistical data are particularly helpful in the academic context where many hiring and promotion decisions are highly subjective. However, female plaintiffs have not been able to establish a prima facie case of sex discrimination if the labor market data presented do not reflect the number of women actually qualified for the specific job in question. Also, statistical disparity data have been rejected where factors other than sex, which might account for the employment decision, have not been considered.[24]

Educational employers have successfully rebutted a prima facie case of sex discrimination by showing that positions were filled by males who were better qualified than females who were rejected. In 1981 the Supreme Court further declared that employers are not legally obligated under Title VII to give preference to a female applicant when choosing between a male and female with similar qualifications.[25] Also, employers have prevailed by showing that promotion decisions were based on factors unrelated to sex, such as inadequate experience, scholarship, or performance.[26]

Plaintiffs have obtained relief for unlawful sex bias, however, if school authorities have been unable to articulate a nondiscriminatory reason for their actions. Title VII violations have been found with evidence that female applicants were better qualified for specific jobs but were rejected in favor of males because of stereotypic attitudes toward the capabilities of women. Courts similarly have awarded equitable relief where job advertisements have included the notation, "prefer men," or job descriptions have been specifically drafted to exclude qualified women.[27]

Even if the employer does produce a nondiscriminatory reason for the employment decision, the employee still might prove that the nondiscriminatory reason is merely a pretext. For example, in 1979 the First Circuit Court of Appeals ruled that a female university professor established that the legitimate reasons offered for her denial of promotion were a pretext for sex bias.[28] Evidence indicated that the plaintiff had been compared to a "school marm" and in other ways judged on her sex rather than merit. Moreover, the court found that evidence of a general atmosphere of sex bias in the institution, although not proof per se of disparate treatment, could be considered "along with any other evidence bearing on motive" in assessing whether the defendant's reasons were pretexts.

In addition to Title VII's prohibition against sex discrimination in employment, sex bias in federally funded education programs can be challenged under Title IX of the Education Amendments of 1972. While individuals have a private right to bring suit for injunctive relief under Title IX, the Act does not provide for personal remedies such as reinstatement and back pay. Instead, the sanction for a Title IX violation is termination of federal funds to the program where noncompliance is substantiated.

In June 1982 the Supreme Court settled a 10-year-old controversy when it ruled six-to-three that Title IX covers employees as well as students.[29] Acknowledging that the language of the Act does not expressly include employees, the Court majority noted that there is no specific exclusion to that effect in the law's list of exceptions. Also, the majority pointed out that Congress did not pass a resolution opposing the Title

IX employment regulations promulgated by the former Department of Health, Education and Welfare. Furthermore, Congress has rejected several bills that would have amended Title IX specifically to exclude employees. Although the Supreme Court endorsed the employment regulations, it held that Title IX is program specific in that it prohibits sex discrimination in educational programs directly receiving federal aid.

The Department of Education waited to respond to over 200 complaints, pending resolution of the Title IX employment jurisdiction issue. Yet, there is still ambiguity as to the actual reach of the law because the Supreme Court did not define a federally funded educational program. Lower courts recently have rendered conflicting opinions regarding whether "program" should be narrowly or broadly defined.[30] Even if the Supreme Court ultimately should endorse an expansive interpretation of a federally funded program, the prospects for aggrieved employees to gain relief under Title IX are not particularly promising. The Supreme Court recently declined to review two decisions in which the Seventh Circuit Court of Appeals held that proof of discriminatory intent is required to establish a Title IX violation and that individuals cannot seek damages under the law.[31] Although Title IX has served as a catalyst for many schools and colleges to change biased policies, the law has not yet posed a serious threat of sanctions for educational employers whose practices discriminate on the basis of sex.

**Pregnancy-Related Policies**

Law suits alleging discrimination against pregnant employees have been initiated under federal and state constitutional and statutory provisions. Since pregnancy affects only women, disadvantages in employment that accrue because of this condition have generated numerous charges of sex bias. Courts have been called on to address the treatment of pregnancy in disability benefits programs, in connection with leave and seniority policies, and as a basis for dismissing unwed female employees.

The exclusion of pregnancy-related disabilites from employee disability benefits programs elicited two Supreme Court rulings and stimulated congressional action in the mid-1970s. The Supreme Court ruled that the differential treatment of pregnancy in disability benefits packages does not constitute sex discrimination and thus satisfies both the U.S. Constitution and Title VII.[32] The Court held that the classification involved is based on pregnancy, not on sex, noting that nonpregnant employees contain both men and women. However, in 1978 Congress reacted to the Supreme Court's interpretation of Title VII by amending the law specifically to prohibit employers from excluding

pregnancy benefits in comprehensive medical and disability insurance plans.[33] As of 29 April 1979, all employers with disability programs were required to be in compliance with this provision.

Maternity leave provisions also have been the source of considerable controversy. In 1974 the Supreme Court ruled that a school board policy, requiring teachers to take maternity leave at the beginning of the fifth month of pregnancy and prohibiting them from returning to work until one year after the birth of the child, created an irrebuttable presumption that teaching incompetency accompanies pregnancy and childbirth.[34] The denial of an opportunity for individual teachers to refute such a presumption was found to abridge the due process clause of the 14th Amendment. More recently, the Fifth Circuit Court of Appeals ruled that a school board's maternity leave provisions violated Title VII by vesting discretion in the superintendent to determine when a teacher could return to work from maternity leave, while employees themselves determined when to return to work from sick leave.[35] The board defended its policy as a business necessity, but the court ruled that there were less discriminatory alternatives to attain the district's fiscal objectives.

However, the Ninth Circuit Court of Appeals upheld a mandatory pregnancy leave policy, requiring pregnant employees to go on leave no later than the beginning of the ninth month, as a legitimate business necessity under Title VII.[36] Recognizing the impaired physical condition and abilities of teachers during the ninth month of pregnancy and the need to plan for teachers' absences, the court concluded that mandatory leave was necessary to attain administrative and educational objectives of the district. The court also rejected a 14th Amendment attack on the policy, reasoning that the provision did not impair the equal protection clause and was not irrational or arbitrary in contrast to the fifth-month rule invalidated previously by the Supreme Court. But the appellate court found that the school district's policy denying the use of accumulated sick leave to pregnant teachers created a prima facie case of discrimination. This portion of the ruling was remanded for additional proceedings to ascertain if the school district could demonstrate a business necessity for denying such use of sick leave. Other courts similarly have ruled that differential treatment of pregnancy within sick leave provisions violates Title VII unless justified as a business necessity.[37]

In addition to the use of sick leave for pregnancy-related absences, employees often take unpaid leave if additional time off is needed to recuperate from childbirth or to care for the new infant. The Supreme Court has recognized that the denial of accumulated seniority upon return from such maternity leave violates Title VII.[38] The judiciary also has held that school boards cannot exclude pregnancy leave while including other leaves in computing a teacher's probationary period

toward the award of tenure and cannot otherwise discriminate against employees because of their prior pregnancies in the calculation of seniority.[39]

In some situations a teacher's pregnant status has been the basis for dismissal or nonrenewal. In 1979 the Fourth Circuit Court of Appeals found a Title VII violation where a school district had an unwritten policy that it would not renew the contract of any teacher who could not commit to a full-year's service, and this policy had been applied only to pregnant teachers.[40] Reversing the court below, the appellate court concluded that the pregnant plaintiff, whose contract had not been renewed, established a prima facie case of sex discrimination because of the disparate impact of the board's action on women. The court remanded the case for additional proceedings to ascertain whether the board could justify its practice as a business necessity.

Female employees have also relied on Title VII as well as their constitutional rights to privacy and equal protection of the laws in challenging dismissals which have been based on their unwed parenthood. In 1976 the Supreme Court declined to review a case in which the Fifth Circuit Court of Appeals held that a school board's rule prohibiting the hiring of parents of illegitimate children discriminated against women in violation of the equal protection clause.[41] The appeals court rejected the school district's contention that the policy was rationally related to a legitimate governmental interest. The court did not find that unwed parenthood per se constitutes immorality or that the employment of unwed parents in a school setting contributes to the problem of pregnancies among high school girls.

In 1982 the Fifth Circuit Court of Appeals ruled that if pregnancy out of wedlock is a substantial or motivating reason for a public school teacher's dismissal, the 14th Amendment equal protection clause is violated.[42] The federal district court had upheld a teacher's dismissal, reasoning that immorality based on the teacher's pregnant unwed status was only one of the grounds for the discharge. Because the dismissal was based in part on insubordination for the teacher's failure to adhere to board policy in notifying the superintendent of her pregnancy, the district court concluded that there was a legitimate nondiscriminatory reason that justified the discharge. Rejecting this conclusion, the appellate court recognized that a teacher's right to become pregnant out of wedlock is constitutionally protected and that the teacher carried her initial burden of substantiating that her unwed status was a motivating factor in the dismissal. The appeals court remanded the case for the district court to determine whether the school board could substantiate by a preponderance of evidence that the teacher would have been discharged in the absence of her unwed pregnancy.

## Compensation

A source of considerable legal activity has been the discrepancy between mean wages for male and female workers. The Equal Pay Act of 1963 (EPA) requires equal pay for males and females for substantially equivalent work. Under EPA, employers are allowed to differentiate in compensation based on 1) seniority, 2) merit, 3) productivity, or 4) any other factor not related to sex. Successful plaintiffs can be awarded back pay and an additional equal amount in liquidated damages for willful discrimination. Most EPA cases have not involved school employees because the compensation of teachers and other school personnel is usually governed by salary schedules. However, some pay differentials among male and female public school employees have been challenged under this Act. For example, courts have relied on EPA in striking down a "head of household" supplement for only male teachers and lower compensation for female coaches who perform substantially equivalent duties as male coaches.[43]

To rebut a prima facie case of discrimination under EPA, an employer must do more than articulate a legitimate, nondiscriminatory reason for the action; evidence must be produced to substantiate that one of the four prescribed exceptions applies to the wage differential. In order to establish willful discrimination under the Act, a plaintiff need not prove that the employer had an evil purpose in mind. A discriminatory act is considered willful if the employer acted in bad faith or did not have reasonable grounds to believe that the salary differentials were in compliance with EPA.[44]

Despite the Equal Pay Act and comparable state statutory protections, the gap has widened in recent years between men and women as to their mean salaries. In 1955 working women took home 64 cents for every dollar earned by their male counterparts, but by 1980 female workers earned only 59 cents for every male dollar.[45] This increasing discrepancy is alleged to be caused by the fact that employment is predominantly sex-segregated and "women's jobs" continue to be lower in status and pay than comparable jobs populated primarily by males. Thus women recently have relied on Title VII in alleging sex discrimination because jobs of comparable worth in terms of skills, training, responsibility, and effort are not compensated equally.

The application of Title VII to sex-based discrimination in compensation has been controversial. When Congress added "sex" to the list of characteristics covered by Title VII, this action was accompanied by an amendment (the Bennett Amendment) stipulating that employers could differentiate in compensation under Title VII if the differential was authorized by the Equal Pay Act. Prior to 1981, some courts had rea-

soned that Title VII prohibits sex discrimination in compensation only involving unequal pay for substantially equivalent work, while other courts had interpreted the Bennett Amendment as incorporating EPA's affirmative defenses into Title VII, but not the equal work standard.[46] According to the latter position, Title VII's protection against sex-based discrimination in employment compensation is broader than the Equal Pay Act.

In 1981 the U.S. Supreme Court addressed the issue in *Gunther* v. *County of Washington*. In this five-to-four decision, the Court established the precedent that Title VII's prohibition against sex bias in compensation is not confined by the Equal Pay Act. The Court majority cautioned, however, that it was not substituting a "comparable" work standard for an "equal" work standard. It was simply extending Title VII coverage to claims beyond unequal pay for substantially equivalent work. The Court rejected the restrictive view of Title VII coverage because "a woman who is discriminatorily underpaid could obtain no relief — no matter how egregious the discrimination might be — unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay."[47] The Court noted that an employer's failure to adjust compensation based on the findings of its own job evaluation study can be used to substantiate a Title VII violation.

The concept of comparable worth, which has been called the women's issue of the Eighties, does not seem likely to receive judicial endorsement in the near future, given the massive economic implications. The Equal Employment Opportunity Commission (EEOC) announced in October 1982 that it does not plan to take action on the 226 claims involving comparable worth currently before it because the agency's authority in this area is unclear. However, the Supreme Court's expansive interpretation of Title VII's protection against sex bias in compensation is likely to cause employers to give greater attention to their justification for compensation differentials among jobs requiring comparable training, responsibility, skills, and effort.

### Retirement Benefits

Differential treatment of men and women in retirement benefits programs has created extensive debate. Unlike stereotypic assumptions on which many discriminatory employment policies have been based in the past, the generalization is true that women as a class have a longer life expectancy than men. Because of this fact, employers often have required women to pay more into a retirement program in order to receive the same benefits or have required equal contributions and provided lower benefits to retired women.

In a significant 1978 decision, *City of Los Angeles Department of Water* v. *Manhart*, the Supreme Court struck down an employer's plan in which

women made a larger contribution than men to receive comparable benefits upon retirement.[48] The Court rejected the contention that individuals were classified by longevity rather than sex, noting that gender was the only factor considered in predicting life expectancy. The Court found that to treat each individual female, who may or may not fit the generalization, as a class member for retirement benefits constituted sex discrimination in violation of Title VII. The Court, however, specifically limited its ruling to employer-operated pension plans requiring unequal contributions.

However, *Manhart* left unresolved the legality of pension plans that require equal contributions but award unequal benefits for retired men and women. On 6 July 1983 the U.S. Supreme Court settled the issue by invalidating an Arizona retirement program that used sex-segregated actuarial tables in a deferred compensation plan.[49] In *Arizona Governing Committee* v. *Norris* the Court majority agreed with the Ninth Circuit Court of Appeals that the plan violated Title VII because on retirement female employees receive lower monthly annuity payments than male employees contributing the same amount. Rejecting the argument that relief was barred because Title VII cannot be used to regulate the insurance business, the appeals court emphasized that it was not enjoining an insurance company from using sex-segregated annuity tables. Rather, it was barring an employer from contracting with an insurer to offer a fringe benefit which treats individuals differently because of their sex. The Supreme Court affirmed the lower court's order enjoining the state from applying sex-segregated tables to future contributions in calculating benefits. However, the Court held that the ban is not retroactive; contributions made prior to the ruling may be subjected to the sex-segregated tables.

Given the *Norris* ruling, the Teachers Insurance and Annuity Association and the College Retirement Equities Fund (TIAA-CREF) announced plans to convert to unisex tables in calculating retirement benefits on future contributions to the fund.[50] While women's advocacy groups are encouraged by recent developments, there is some disappointment that women nearing retirement will reap little benefit from the *Norris* ruling. Since only prospective relief was ordered, it may be more than forty years before the differential treatment of male and female employees in pension programs is totally eliminated.

**Sexual Harassment**

Charges of sexual harassment have presented particular problems for the judiciary. The term sexual harassment is generally used to refer to "repeated and unwelcomed advances, derogatory statements based on . . . sex, or sexually demeaning gestures or acts."[51] While sexual harassment is not a recent phenomenon, case law in this area is in its infant

stage. Most of the litigation has been brought under Title VII's anti-sex discrimination provisions.

Initially, courts concluded that claims of sexual harassment were beyond the purview of Title VII. However, in the mid-1970s courts began interpreting Title VII as providing a remedy to victims of sexual harassment that results in adverse employment consequences such as termination, demotion, or denial of other benefits. Back pay and accompanying employment benefits have been awarded in several instances where employers have not successfully rebutted charges that an employee has been terminated or otherwise discriminated against because of rejection of sexual advances. Employers also have been found in violation of Title VII if they have failed to investigate employee's complaints of sexual harassment by supervisors, even if the supervisor's acts have violated company policy.[52]

In a significant 1981 case, the Washington, D.C., Circuit Court of Appeals ruled that sexual harassment per se violates Title VII; an employee need not prove that the harassment resulted in penalty or loss of tangible job benefits.[53] The appellate court found that improper sexual behavior toward female employees was a standard operating procedure in the plaintiff's office and that her complaints of harassment were not taken seriously. The court reasoned that proof that the harassing behavior had occurred was sufficient to establish a Title VII violation. This case suggests that the judiciary may become more willing to consider intangible as well as tangible losses in reviewing charges of sexual harassment.

In 1980 the EEOC issued guidelines stipulating that sexual harassment violates Title VII if it is an explicit or implicit term or condition of employment, is used as a basis for employment decisions, or has the "effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[54] Thus the guidelines also indicate that the effect of sexual harassment on working conditions as well as on an employee's status can be considered in Title VII cases. Under the guidelines, employers are responsible for sexual harassment of employees by supervisors, but not for acts among co-workers unless the employer knew or "should have known" of the harassing behavior and failed to take "immediate and appropriate corrective action." Hundreds of sexual harassment charges have been filed with EEOC since the guidelines were adopted, and it seems likely that the number of Title VII lawsuits involving this issue will escalate during the coming decade.

## National Origin Discrimination

Similar to claims of racial bias, allegations of discrimination based on national origin most often have been initiated under the equal protection

clause of the 14th Amendment or Title VII. Facially discriminatory policies generally have not been at issue. Instead, plaintiffs usually have challenged their alleged disparate treatment based on national origin, and thus have carried the burden of proving discriminatory intent. In an illustrative case, the Ninth Circuit Court of Appeals ruled that even if a Mexican-American curriculum supervisor had been able to establish an inference of discrimination, the school board's evidence that the supervisor was not able to work well with other employees was sufficient to satisfy its burden of articulating a legitimate nondiscriminatory reason for nonrenewal of her contract.[55] A Michigan federal district court similarly found that there must be evidence of intentional discriminatory acts to establish a prima facie case of disparate treatment under Title VII; the lack of personnel policies and an affirmative action plan pertaining to the hiring of national origin minorities would not suffice.[56]

Although most suits involving national origin discrimination have involved allegations of disparate treatment, the disparate impact criteria have been applied in some cases. For example, the Tenth Circuit Court of Appeals found that a prima facie case of national origin discrimination was established by evidence that the employer had never promoted a Spanish-American employee coupled with the vague and subjective promotion criteria used.[57] The employer did not rebut the prima facie case with adequate proof of a business necessity for the discriminatory promotion practices. However, the court did not find that the employer deliberately rendered the employee's working conditions so intolerable as to force the claimant to quit his job (constructive discharge). The plaintiff was thus entitled only to the difference between actual pay and the amount he would have made if selected as a foreman during the two-year period before he quit.

While courts have strictly interpreted the procedural requirements for filing a Title VII claim, under certain circumstances a plaintiff might be entitled to an extension of the time limitation for filing a suit. Such an extension was considered appropriate where a foreign-born plaintiff was not aware of the potential discrimination accompanying his discharge until several months later when his "abolished" position was again filled.[58] However, a plaintiff cannot bring a federal discrimination suit regarding an issue that has already been litigated by the state judiciary. In 1982 the Supreme Court ruled that since a state court had found a claim of national origin discrimination meritless under state law, the plaintiff was barred from litigating the same issue under Title VII.[59]

Related to allegations of discrimination based on national origin are challenges to citizenship requirements. In 1978 the Supreme Court rejected a constitutional challenge to a New York education law denying teacher certification to individuals who are eligible for citizenship but

refuse to apply for naturalization. Recognizing that classifications based on citizenship status (unlike those based solely on national origin) are not suspect, the Court applied the rational basis equal protection test. It concluded that the state's interest in attaining its educational goals was rationally related to the citizenship requirement for teacher certification; individuals who do not wish to apply for U.S. citizenship cannot adequately convey appropriate citizenship values to students. The Court declared that certain functions are "so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."[60] However, the Court has invalidated a law stipulating that only U.S. citizens can be hired in any competitive classified civil service positions.[61]

## Religious Discrimination

Individuals enjoy explicit constitutional protection against governmental interference with their religious freedom. The First Amendment to the U.S. Constitution prohibits Congress from enacting a law *respecting the establishment* of religion or interfering with the *free exercise* of religious beliefs. These provisions have been made applicable to state action through the 14th Amendment (see chapter 3).

The Supreme Court has recognized on numerous occasions that while the freedom to believe is absolute, the freedom to act on those beliefs is subject to reasonable governmental regulations. Accordingly, public educators cannot assert a free exercise right to conduct devotional activities in public schools or to proselytize students; the establishment clause prohibits such activities. Similarly, the free exercise clause does not entitle teachers to disregard a portion of the state-prescribed curriculum that conflicts with their religious views.[62]

Although school personnel cannot use the public school classroom as a forum to spread their faith, neither must they relinquish their religious beliefs as a condition of employment. Prerequisites to public employment that entail a profession of religious faith abridge the First Amendment. Also, teachers have a free exercise right to abstain from certain school observances and activities that conflict with their religious beliefs as long as such abstention does not impede the instructional program or the efficient operation of the school. For example, teachers have a First Amendment right to refrain from saluting the American flag and pledging their allegiance, even though they cannot deny students the opportunity to engage in these observances.

Employees are also protected from religious discrimination under Title VII. In the 1972 amendments to Title VII, Congress stipulated that

the protection against religious discrimination includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[64] The EEOC has promulgated guidelines with suggested religious accommodations such as accepting voluntary substitutes and work-shift exchanges, using flexible scheduling, and changing job assignments.

Many controversies have arisen over the degree of religious accommodations in work schedules required under Title VII. Although employers are not required to make costly accommodations, in several cases educational employees have proven that requests for religious absences would not place undue burdens on the public school. For example, in 1981 the Fourth Circuit Court of Appeals affirmed a federal district court's conclusion that the discharge of a teacher's aide for absences to observe the seven-day convocation of the Worldwide Church of God violated Title VII.[65] However, the appellate court disagreed with the district court's holding that the aide was entitled only to back pay from the time of her discharge to the end of her one-year contract. Reasoning that Title VII creates a substantive right to nondiscriminatory treatment, the appeals court held that the plaintiff was entitled to back pay (mitigated by interim earnings) from the time of the discharge until a valid offer of reinstatement was made. The case was remanded with instructions for the district court to provide the school board the opportunity to demonstrate that the aide did not make reasonable efforts to obtain suitable employment to mitigate damages.

In 1980 a New Jersey federal district court also concluded that religious absences were a "substantial motivating factor" in the dismissal of a teacher in violation of Title VII.[66] Finding that the absences created no hardship for the school or students, the court ordered the teacher's reinstatement with back pay. But the court denied the teacher's request for compensatory and punitive damages. The court was not persuaded that the teacher suffered mental and emotional distress or that the superintendent and board acted with a malicious and wanton disregard for his constitutional rights.

In addition to federal requirements, most states also have constitutional or statutory provisions protecting individuals from religious discrimination. Interpreting such a provision, the California Supreme Court ordered reinstatement of a teacher who had been terminated for unauthorized absences for religious reasons.[67] The court held that the teacher was entitled to unpaid leave for religious observances since no evidence was presented that the teacher's absences had a detrimental effect on the educational program. However, a Colorado appeals court upheld the dismissal of a tenured teacher for similar unauthorized

religious absences, reasoning that his teaching duties had been neglected.[68] The court ruled that the termination was justified and did not violate Colorado's antidiscrimination law because testimony indicated that the teacher's four unauthorized absences had interfered with the academic progress of his students and disrupted the management of the school.

While public school boards generally attempt to accommodate reasonable absences for religious reasons, paid leave need not be provided for this purpose. Indeed, paid leave tied specifically to religious observances implicates the establishment clause. For example, in a New Jersey case, teachers were allowed to use personal leave days for religious as well as other purposes, but the teachers association sought specific paid leave for religious observances.[69] The state supreme court ruled that the establishment clause prohibits the school board from granting such religious leave, and therefore negotiations over this item would be unconstitutional. The court reasoned that if specific leave were designated for religious reasons, the nonreligious employee could never enjoy the proposed benefit.

From litigation to date it appears that school authorities are expected to make reasonable accommodations to enable employees to practice their faith as long as the accommodations do not create substantial hardships for the school, significantly impede students' academic progress, or serve to advance religion. However, courts have recognized that the establishment clause precludes school boards from conferring special benefits on employees for religious reasons such as paid leave available only for sectarian observances. Also, a minimal impairment of employee's free exercise rights may be required in public school settings to protect vulnerable children from religious inculcation.

## Discrimination Based on Handicaps

Individuals are protected from discrimination based on handicapping conditions by the equal protection clause and various federal and state civil rights laws. The most extensive legal protections against employment discrimination in this regard are contained in Section 504 of the Rehabilitation Act of 1973; thus, most recent litigation involving claims of employment bias against the handicapped have been initiated under this law. Section 504 provides in part that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[70]

The U.S. Supreme Court delivered its first opinion interpreting Sec-

tion 504 in 1979. In this case a licensed practical nurse brought suit after she was denied admission to a college program to train registered nurses. Her application was rejected because of her serious hearing deficiency, which the college asserted would prohibit her from participating in all aspects of the program and would pose a danger to her future work with patients. The Supreme Court concluded that Section 504 does not compel an institution to ignore the disabilities of an individual or substantially to modify its program to enable a handicapped person to participate. Instead, Section 504 prohibits institutions from barring an otherwise qualified handicapped person "who is able to meet all of a program's requirements in spite of his handicap."[71]

In employment cases, courts have reiterated that Section 504 requires reasonable accommodations only for handicapped persons who are otherwise qualified. For example, a blind California teacher was unsuccessful in challenging the school board's failure to appoint him to an administrative position because the board produced evidence that the plaintiff did not possess the requisite administrative skills or leadership experience for an administrative job.[72] The court rejected both equal protection and Section 504 claims, finding that the individual was not otherwise qualified for an administrative position and that there was a rational basis for the board's decision. The court also rejected the assertion that the board's action violated due process guarantees by creating an irrebuttable presumption that blind persons were unqualified to serve as administrators; the board did not impose a blanket ban on hiring blind employees in leadership roles. Moreover, the court reasoned that it was permissible for the committee to inquire as to how the teacher would cope with his blindness in fulfilling administrative job responsibilities.

However, handicapped individuals have successfully challenged employment decisions with evidence that they are qualified for the job and have been discriminated against solely because of their handicaps. For example, the Third Circuit Court of Appeals held that a blind teacher was entitled to back pay and retroactive seniority from the time she would have been hired, absent the school district's unlawful policy barring disabled persons from taking an examination that was a prerequisite to employment.[73] Since the suit was initiated before the effective date of Section 504, it was resolved on federal constitutional grounds. The appeals court concluded that the school district had violated due process guarantees by creating an irrebuttable presumption that blindness per se was evidence of incompetence. But the court denied the teacher's request for tenure to be granted, reasoning that the award of tenure should be based on the school district's assessment of the teacher's performance. More recently, a federal district court ruled that a school district's pre-employment inquiries about an applicant's prior mental problems were impermissible under Section 504 because the questions

were not related to his present fitness for the position of teacher's aide.[74]

Courts will review employment decisions carefully to ensure that handicapped persons are not discriminated against solely because of their disabilities. A handicapped person is considered qualified if capable of performing the job with reasonable accommodations that do not present an undue business hardship. In evaluating the hardship imposed, courts consider the extent of the necessary accommodation and its expense. Employers are not required to make substantial adjustments in working conditions to accommodate handicapped individuals or to hire disabled persons who are not qualified for the job.[75]

## Age Discrimination

Age is distinct among attributes discussed in this chapter in that all individuals are subject to the aging process. Because of medical progress in prolonging life coupled with the post-World War II decline in birthrates, the mean age of the American population has steadily climbed in recent years. This phenomenon has been accompanied by increasing public concern for the problems associated with aging and by legislative enactments prohibiting age-based discrimination. Similar to allegations of race and sex bias, claims of employment discrimination on the basis of age have been initiated under both the equal protection clause and federal and state statutory protections.

While the U.S. Supreme Court has not addressed an age discrimination suit involving public school personnel, it has reviewed a constitutional challenge to a Massachusetts law requiring the retirement of uniformed police officers at age 50.[76] Noting that age is not a suspect class and public employment is not a fundamental right, the Court reasoned that the retirement policy need only be rationally related to a legitimate state objective to satisfy equal protection mandates. The Court found that the retirement of police officers at an early age has a rational relationship to the objective of protecting the public by ensuring a physically competent police force.

In the school context, the Second Circuit Court of Appeals upheld a New York statute mandating teacher retirement at age 70 as having a rational basis.[77] The court noted that teachers are under physical demands and further reasoned that the retirement statute advances the legitimate objectives of 1) allowing younger individuals and minorities to be hired, 2) bringing fresh ideas into the classrooms, and 3) facilitating the administration of pension plans by predictable retirement dates. Also, the Third Circuit Court of Appeals found that a teacher's 14th Amendment rights were not violated by requiring her to retire at age 65 because all persons similarly situated were treated the same under the law.[78]

However, the Seventh Circuit Court of Appeals departed from the prevailing view in using the equal protection clause to strike down a school board's policy mandating retirement for public school teachers at age 65.[79] The court concluded that the mandatory retirement provision was not rationally related to the objective of eliminating unfit teachers. According to the court, competence should be judged on an individual basis, and a teacher's fitness to teach should not be assessed solely on age.

Although legislative enactments that classify individuals on the basis of age can satisfy equal protection guarantees if rationally related to a legitimate governmental objective, in recent years plaintiffs have not had to rely on constitutional protections in challenging age-based employment discrimination. In 1967 Congress enacted the Age Discrimination in Employment Act (ADEA), which prohibits employers, employment agencies, and labor unions from discriminating against employees on the basis of age in hiring, promotion, and compensation. The Act was intended to eliminate arbitrary, irrational age barriers to employment so that employment opportunities can be based on merit and ability. The protected category of employees includes persons age 40 to 70. The upper limit was extended from 65 to 70 in an amendment to ADEA in 1978, but there is no upper limitation for federal employees.[80] Remedies for violations of ADEA include 1) injunctive relief, 2) offer of employment or reinstatement, 3) back pay, and 4) liquidated damages where it is established that age discrimination was unlawfully motivated. Successful plaintiffs can also be awarded attorneys' fees.

Age classifications can be justified under ADEA if age is a bona fide occupational qualification (BFOQ) necessary to the normal operation of a particular business: "An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, but to avoid any penalty."[81] Schools boards have successfully substantiated an age BFOQ for certain roles such as bus drivers. Because establishment of a BFOQ is an affirmative defense (in contrast to rebuttal of a prima facie case), the burden is on the employer to produce appropriate evidence.

The substantive provisions of ADEA are almost identical to those of Title VII of the Civil Rights Act of 1964, and the judicial criteria developed in Title VII cases are often applied to evaluate age-discrimination charges under ADEA. Most courts, including several federal appellate courts, have required a showing of discriminatory intent in ADEA cases, thus adopting the disparate treatment standard of review. Employers have been able to rebut a prima facie case of disparate treatment based on age by articulating nondiscriminatory reasons for dismissals, such as excessive tardiness, poor performance, or inability to relate to a supervisor.[82]

However, in 1980 the Second Circuit Court of Appeals ruled that plaintiffs could establish a violation of ADEA, regardless of motive, by

establishing that employment practices have a disparate impact on older employees.[83] In this case the defendant school board adopted a cost-cutting policy of preferentially hiring teachers with fewer than five years of experience. Evidence substantiated that over 92% of the state's teachers over 40 years of age had at least five years of experience, whereas only 62% of teachers under 40 had this much experience. The court concluded that the policy with a disparate impact on teachers over 40 had to be justified as a job necessity to satisfy ADEA. A Missouri federal district court applied similar logic in evaluating a prima facie case of age discrimination in connection with a university's policy reserving a certain portion of faculty slots for nontenured professors.[84] The court rejected the economic rationale offered in defense of this practice as an insufficient business necessity to justify the adverse impact of the policy on older professors.

The U.S. Department of Labor and several courts have interpreted ADEA as prohibiting age discrimination among employees *within* the protected age group. In other words, an employer cannot discriminate against employees who are 60 years old by preferring those who are 45. For example, the First Circuit Court of Appeals ruled that an employee need not show that he was replaced by a younger person outside the protected age group to establish a prima facie case of discrimination under ADEA.[85]

The award of specified damages has been ordered where willful employment discrimination based on age has been proven. Conflicting opinions have been rendered regarding whether employers can assert a good faith defense to avoid liquidated damages.[86] Courts also have differed as to whether victims of willful violations of ADEA are entitled to compensatory damages in addition to other types of relief. While several federal district courts have allowed such damages to be assessed against employers, two federal circuit courts of appeal have disallowed damages for pain, suffering, and emotional distress.[87] Courts in general have not allowed punitive damages, reasoning that Congress preferred liquidated damages in lieu of a punitive award.

Several states have enacted antidiscrimination statutes that provide greater protections to employees than afforded by ADEA. For example, the Montana Human Rights Act has been interpreted as prohibiting employment decisions based on age unless age is directly related to job performance.[88] This Act was held to prevail over a school board's mandatory retirement policy in the absence of evidence that the policy was necessitated by the nature of the job. The Nevada Supreme Court similarly ruled that a state university could not make hiring and retention decisions on the basis of age because of the state statute requiring all personnel actions taken by state, county, or municipal departments, agencies, boards, or appointing officers to be based solely on merit and

fitness.[89] Also, the Iowa Supreme Court struck down a school board's attempt to dismiss a teacher who had attained age 65 and refused to retire in compliance with the school board's policy. The court reasoned that "age has nothing to do with fault" and, therefore, the discharge was not based on good cause.[90]

With the "graying" of the American citizenry, lobbying efforts to secure additional protections and benefits for older employees seem destined to continue. And it seems likely that courts increasingly will be called upon to assess claims of age discrimination under state and federal laws.

## Conclusion

Social scientists, legal scholars, public policymakers, and the American citizenry agree that employment discrimination is a serious problem in this nation, and educational institutions have not escaped the negative consequences. In spite of general consensus that the elimination of employment discrimination will benefit individuals and our society, finding acceptable means to attain this goal has been extremely problematic. Delineating the types of prohibited discrimination and devising remedies to compensate victims of employment discrimination have proven to be awesome tasks.[51] All three branches of government have been involved in efforts to clarify the individual's protections against discrimination in the work force and employers' obligations to eliminate biased practices. Yet, despite numerous legislative acts and an escalating body of complex judicial rulings, many questions pertaining to discrimination in employment remain unanswered.

Even though the law governing employment discrimination is still evolving, there are certain principles that public employers can use to guide their daily actions. For example, hiring policies that facially discriminate on the basis of sex, national origin, age, or religion should be used *only* if justified as essential for the particular jobs, and facially discriminatory classifications based on race should never be imposed. Prerequisites to employment that disproportionately discriminate against certain classes of employees should not be used unless such prerequisites are valid measures of ability to perform the job. Promotion, compensation, and job-assignment decisions should be based on objective assessments of employees' qualifications, performance, length of service, etc., and not on employees' class membership, beliefs, or other attributes unrelated to the job. If an employer cannot justify an employment decision on legitimate nondiscriminatory grounds, equitable relief should be provided to restore the employee who has been the victim of discrimination to his or her rightful place.

However, employers do not have to hire, promote, or give other

special benefits to unqualified individuals merely because of their membership in a protected group. Indeed, it is a disservice to hire an unqualified black or female or to place a handicapped person in a role that cannot be performed adequately because of a disability. Such action is the antithesis of fundamental fairness, perpetuates erroneous stereotypes when the unqualified individuals ultimately fail, and may subject the employer to a "reverse" discrimination suit.

Some of the most troublesome issues arise in situations where employees are currently at a disadvantage because of prior discrimination. Mere membership in a class that has been historically discriminated against should not catapult an individual into a preferred position; but without some special consideration, the lingering effects of past discrimination may never be eradicated. Employers are faced with the difficult task of ensuring that victims of past employment bias are "made whole," while at the same time protecting legitimate business interests and safeguarding the rights of the majority to equitable treatment. Temporary preferential treatment of racial and ethnic minorities, women, and the handicapped in hiring and personnel reduction practices may be necessary in some situations to compensate for past discriminatory acts.

Educational employers would be wise to ask themselves the following questions in making employment decisions:

1. Are hiring restrictions based on sex, national origin, age, or religion bona fide occupational qualifications?
2. Are prerequisites to employment valid indicators of success in the specific jobs for which they are used?
3. Is there a legitimate business necessity for policies that adversely affect certain classes of employees?
4. Are questions used in job interviews directly related to the candidate's ability to perform the job?
5. Are hiring, promotion, compensation, and job-assignment decisions based on considerations that relate to qualifications, merit, and performance, rather than stereotypic assumptions?
6. Is pregnancy treated like any other temporary disability in terms of sick leave, seniority, and disability benefits?
7. Have reasonable accommodations been made to enable qualified handicapped employees to perform adequately?
8. Have reasonable accommodations been made to the religious beliefs of employees?
9. Have precautions been taken to ensure that current practices do not perpetuate the effects of past discrimination?
10. Are employment policies and internal grievance procedures well publicized to all employees?

If the above questions can be answered affirmatively, school districts and

school officials are likely to avoid legal liability when particular employment practices are challenged. Moreover, by taking steps to reduce employment discrimination, the public's interest in ensuring a competent educational work force will be advanced.

## Footnotes

1. This chapter is condensed in part from a monograph, Martha McCarthy, *Discrimination in Public Employment: The Evolving Law* (Topeka, Kans.: National Organization on Legal Problems of Education, 1983).
2. Allegations of discriminatory treatment in connection with staff reduction practices are addressed in chapter 8.
3. National Educ. Ass'n v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd* 434 U.S. 1026 (1978). Prior to 1976, several federal appellate courts had found a constitutional violation in public school districts' use of tests as a prerequisite to employment if the tests had a disparate impact on minorities and had not been validated as predicting success in the particular jobs for which they were used. *See* Walston v. County School Bd. of Nansemond Cty., Virginia, 492 F.2d 919 (4th Cir. 1974); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972). However, in *Washington* v. *Davis*, 426 U.S. 229 (1976), the Supreme Court announced that plaintiffs must prove discriminatory intent to establish that facially neutral prerequisites to employment violate the equal protection clause. *See also* Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).
4. 42 U.S.C. § 2000e *et seq.*
5. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Guidelines of the Equal Employment Opportunity Commission stipulate that a selection rate for any group protected by Title VII that is less than 80 percent of the highest group's rate generally will be regarded as evidence of adverse impact.
6. Connecticut v. Teal, 102 S. Ct. 2525, 2530 (1982), citing 645 F.2d 138 (2d Cir. 1981).
7. Newman v. Crews, 651 F.2d 222 (4th Cir. 1981).
8. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).
9. *See, e.g.*, Lewis v. Central Piedmont Community College, 689 F.2d 1207 (4th Cir. 1982) (white applicant was better qualified than black applicant who was rejected); Johnson v. Michigan State University, 547 F. Supp. 429 (W.D. Mich. 1982) (denial of promotion and tenure to minority professor was based on poor performance); Lee v. Ozark City Bd. of Educ., 517 F. Supp. 686 (M.D. Ala. 1981) (nonrenewal of minority coach's contract was justified by legitimate objectives of athletic program); Adams v. Gaudet, 515 F. Supp. 1086 (W.D. La. 1981) (rejection of minority applicant was justified by reliance on employment criteria established by state department of education); Fusi v. West Allis Pub. Schools, 514 F. Supp. 627 (E.D. Wis. 1981) (minority teacher lacked proper certification).

10. Pittman v. Hattiesburg Municipal Separate School Dist., 644 F.2d 1071 (5th Cir. 1981).
11. Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir. 1975). *See also* Royal v. Missouri Highway and Transportation Comm'n, 655 F.2d 159, 164 (8th Cir. 1981); Barnett v. W. T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975).
12. Evans v. Harnett, 684 F.2d 304 (4th Cir. 1982); *see also* Williams v. Colorado Springs School Dist. #11, 641 F.2d 835 (10th Cir. 1981). While the judiciary often relies on statistical evidence in assessing discrimination charges, the Supreme Court has cautioned that courts should move with circumspection in evaluating statistics because their usefulness is contingent on each individual set of circumstances. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977); Castaneda v. Partida, 430 U.S. 482 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).
13. *See, e.g.*, Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Local 189 United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).
14. *See* American Tobacco Co. v. Patterson, 102 S. Ct. 1534 (1982); Pullman-Standard, Inc. v. Swint, 102 S. Ct. 1781 (1982). Although Title VII has been the most popular statutory basis for employment discrimination suits, some suits have been initiated under Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance, 42 U.S.C. § 2000d. In a significant 1983 decision, the severely splintered Supreme Court ruled that evidence of discriminatory intent is not necessary to establish a Title VI violation. The majority interpreted Title VI regulations as prohibiting practices with a discriminatory impact. However, a different majority of the justices concluded that in the absence of proof of discriminatory motive, prevailing plaintiffs in Title VI disparate impact suits are entitled only to injunctive, prospective relief and not to compensatory relief such as an award of constructive seniority. Guardians Ass'n v. Civil Service Comm'n of the City of New York, 51 U.S.L.W. 5105 (July 1, 1983).
15. Ford Motor Co. v. Equal Employment Opportunity Comm'n, 456 U.S. 923 (1982). This case involved alleged sex discrimination under Title VII, but the principle announced by the Court is equally applicable to allegations of racial discrimination in hiring practices.
16. Boston Teachers' Union v. Boston School Comm., 671 F.2d 23 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 62 (1982). *See also* Boston Chapter of NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), *vacated and remanded*, 51 U.S.L.W. 4566 (May 17, 1983).
17. Oliver v. Kalamazoo Bd. of Educ., 498 F. Supp. 732 (W.D. Mich. 1980), *vacated and remanded*, 706 F.2d 757 (6th Cir. 1983).
18. *Id.* at 764. *See also* Kromnick v. School Dist. of Philadelphia, 555 F. Supp. 249 (E.D. Pa. 1982).
19. *See* Zaslawsky v. Board of Educ. of Los Angeles, 610 F.2d 661 (9th Cir. 1979); Wygant v. Jackson Bd. of Educ., 456 F. Supp. 1196 (E.D. Mich. 1982).

20. *See* Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981); Caulfield v. Board of Educ. of the City of New York, 583 F.2d 605 (2d Cir. 1978).
21. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).
22. *See, e.g.*, Mississippi University for Women v. Hogan, 102 S. Ct. 3331 (1982); Craig v. Boren, 429 U.S. 190 (1976). Employers can facially discriminate on the basis of sex under Title VII if gender is a bona fide occupational qualification (BFOQ) necessary to the normal operation of the business. While this type of overt discrimination is not usually an issue in school cases, the BFOQ exception to Title VII has generated litigation in other contexts. *See* Martha McCarthy, "Recent Developments in Sex Discrimination Litigation," in *School Law Update — 1977*, ed. M.A. McGhehey (Topeka, Kans.: National Organization on Legal Problems of Education, 1978), pp. 53-56.
23. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).
24. *See* Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), *rehearing*, 662 F.2d 1156 (5th Cir. 1981), *vacated and remanded*, 103 S. Ct. 34 (1982), *vacated and remanded in part*, 695 F.2d 134 (5th Cir. 1983).
25. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).
26. *See, e.g.*, Patterson v. Greenwood School Dist. 50, 696 F.2d 293 (4th Cir. 1982); Cummings v. School Dist. of City of Lincoln, 638 F.2d 1168 (8th Cir. 1981); Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist., 706 F.2d 813 (8th Cir. 1983).
27. *See, e.g.*, Coble v. Hot Springs School Dist. No. 6, 882 F.2d 721 (8th Cir. 1982); Rodriguez v. Board of Educ. of Eastchester Union Free School Dist., 620 F.2d 362 (2d Cir. 1980); Tyler v. Board of Educ. of New Castle Cty., 519 F. Supp. 834 (D. Del. 1981); Schoneberg v. Grundy Cty. Special Educ. Cooperative, 385 N.E.2d 351 (Ill. App. 1979).
28. Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980). *But see* Canham v. Oberlin College, 666 F.2d 1057 (6th Cir. 1981), in which the appellate court held that a college's asserted nondiscriminatory reasons for denying a permanent position to a male in favor of a female were not pretexts for sex bias. The college produced sufficient evidence that the decision was based on the male candidate's inadequate performance during a trial period.
29. North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912 (1982). Title IX, 20 U.S.C. § 1681(a), provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." For a discussion of lower court litigation pertaining to this employment issue, *see* Martha McCarthy, "Title IX: A Decade Later," *Journal of Educational Equity and Leadership* 2 (1982): 215.
30. *See* Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983); Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982); Haffer v. Temple University, 688 F.2d 14 (3d Cir. 1982); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1976 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981); Bennett v. West Texas State University, 525 F. Supp. 77 (N.D. Tex. 1981).

31. Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982) (no damages remedy); Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 454 U.S. 1128 (1981) (proof of intentional discrimination required.)
32. Geduldig v. Aiello, 417 U.S. 484 (1974) (no constitutional violation); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (no Title VII violation).
33. Pregnancy Disability Act, 42 U.S.C.A. 2000e(k) (1978). A current controversy involves the application of this law to spouses of male employees. The Supreme Court recently affirmed a decision in which the Fourth Circuit Court of Appeals ruled that a health plan covering pregnancy for employees, but limiting spouses' coverage for pregnancy, violates Title VII by discriminating against married male employees, *Newport News Shipbuilding and Dry Dock Co.* v. *Equal Employment Opportunity Comm'n*, 667 F.2d 448 (4th Cir. 1982), *aff'd* 51 U.S.L.W. 4837 (June 20, 1983).
34. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); *see also* Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980).
35. Clanton v. Orleans Parish School Bd., 649 F.2d 1084 (5th Cir. 1981).
36. deLaurier v. San Diego Unified School Dist., 588 F.2d 674 (9th Cir. 1978). During the course of the litigation, California law was amended to prohibit both the ninth-month mandatory leave and the denial of sick leave for pregnancy-related absences.
37. *See* Thompson v. Board of Educ., 526 F. Supp. 1035 (W.D. Mich. 1981); Strong v. Demopolis City Bd. of Educ., 515 F. Supp. 730 (S.D. Ala. 1981).
38. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). However, pregnancy leave is not entitled to preferred treatment. In 1982 a Massachusetts appeals court upheld a collective bargaining agreement that disallowed seniority credit for medical disability leave including pregnancy leave, *Burton* v. *School Comm.*, 432 N.E.2d 725 (Mass. App. 1982).
39. *See* Board of Educ. of Farmingdale Union Free Pub. School Dist. v. New York State Division of Human Rights, 451 N.Y.S.2d 700 (1982); Schwabenbauer v. Board of Educ., 498 F. Supp. 119 (W.D.N.Y. 1980). *But see* White v. Columbus Bd. of Educ., 441 N.E.2d 303 (Ohio App. 1982), in which an Ohio appeals court found that a Title VII suit was not timely filed in connection with denial of a teacher's seniority for a prior year in which she did not teach the required 120 days because of a mandatory maternity leave.
40. Mitchell v. Board of Trustees of Pickens Cty. School Dist., 599 F.2d 583 (4th Cir. 1979).
41. Andrews v. Drew Municipal Separate School Dist., 507 F.2d 611 (5th Cir. 1975), *cert. denied*, 425 U.S. 559 (1976). *See also* Martin Sweets Co. v. Jacobs, 550 F.2d 364 (6th Cir. 1977), *cert. denied*, 431 U.S. 917 (1977).
42. Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982). The court cited *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977), in which the Supreme Court recognized that if a protected right is a substantial reason for a dismissal action, the school board must establish that it would have reached the same decision in the absence of the protected conduct.

43. *See, e.g.*, Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721 (8th Cir. 1982); Marshall v. A & M Consol. School Dist., 605 F.2d 186 (5th Cir. 1979); Brennan v. Woodbridge School Dist., 74 LC 33, 121 (D. Del. 1974). Although courts have considered statistical evidence regarding wage disparities, such evidence has been rejected if all factors that might influence compensation differentials (e.g., education, experience) have not been considered.
44. *See* Melanson v. Rantoul, 536 F. Supp. 271 (D.R.I. 1982). Most cases under EPA have been initiated by females, but male plaintiffs in the Colleges of Agriculture and Home Economics at the University of Nebraska were successful in challenging pay differentials under the Act, *Board of Regents of the University of Nebraska* v. *Dawes*, 522 F.2d 380 (8th Cir. 1975).
45. *See* "Comparability: An Issue for the '80s," *California Women* (January, 1981), publication of the California Commission on the Status of Women, Sacramento, California; *see* Ruth Blumrosen, "Wage Discrimination, Job Segregation, and Women Workers," *Employee Relations Law Journal* (1980): 77, 79.
46. *See, e.g.*, International Union of Electrical, Radio, and Machine Workers, AFL-CIO-CLC v. Westinghouse Electric Corp., 631 F.2d 1094 (3d Cir. 1980); Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979); Molthan v. Liberty Mutual Insurance Co., 449 F. Supp. 397 (W.D. Pa. 1978); Wetzel v. Liberty Mutual Insurance Co., 442 F. Supp. 448 (E.D. Pa. 1977).
47. Gunther v. County of Washington, 452 U.S. 161, 178 (1981).
48. 435 U.S. 702 (1978).
49. Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *aff'd in part, rev'd in part* 51 U.S.L.W. 5243 (July 6, 1983).
50. Prior to the *Norris* decision, federal appellate courts had rendered conflicting opinions on the legality of TIAA-CREF's use of sex-segregated tables in calculating retirement benefits. *See* TIAA-CREF v. Spirt, 691 F.2d 1054 (2d Cir. 1982); Peters v. Wayne State University, 691 F.2d 235 (6th Cir. 1982).
51. Dayle Nolan, "Sexual Harassment in Public and Private Employment," *Education Law Reporter* 3 (1982): 227.
52. *See, e.g.*, Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979); Tomkins v. Public Service Electric and Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978); Munford v. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977).
53. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). However, some courts since this decision have continued to require evidence of adverse employment consequences resulting from the harassment. *See, e.g.*, Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981); Meyers v. I.T.T. Diversified Credit Corp., 527 F. Supp. 1064 (D. Mo. 1981).
54. 29 CFR § 1604.11(a)(1980). The Department of Education's Office for Civil Rights also is authorized to investigate complaints of sexual harassment in federally funded educational programs under Title IX of the Education Amendments of 1972. *See* Lee Berthel, "Sexual Harassment in Education

Institutions," *Capital University Law Review* 10 (1981): 585-90.

55. Correa v. Nampa School Dist. No. 131, 645 F.2d 814 (9th Cir. 1981); *see also* Panlilio v. Dallas Indep. School Dist., 643 F.2d 315 (5th Cir. 1981).
56. Skelnar v. Central Bd. of Educ., 497 F. Supp. 1154 (E.D. Mich. 1980).
57. Muller v. United States Steel Co., 500 F.2d 923 (10th Cir. 1975).
58. Baruah v. Young, 536 F. Supp. 356 (D. Md. 1982).
59. Kremer v. Chemical Construction Corp., 102 S. Ct. 1883 (1982). Also, in 1982 the Supreme Court dealt with the issue of class certification in connection with an allegation of national origin discrimination. The Court held that the respondent must do more than prove the validity of his own claim to bridge the gap between his charge of discrimination in the denial of promotion and the existence of a class of persons who have suffered similar injury in connection with hiring practices, *General Telephone Co. of the Southwest* v. *Falcon*, 102 S. Ct. 2364 (1982).
60. Ambach v. Norwick, 441 U.S. 68, 73-74 (1979).
61. Sugarman v. Dougall, 413 U.S. 634 (1973).
62. *See* Palmer v. Board of Educ. of the City of Chicago, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).
63. *See* Russo v. Central School Dist. No. 1, 469 F.2d 623 (2d Cir. 1972); Opinions of the Justices to the Governor, 363 N.E.2d 251 (Mass. 1977); Hanover v. Northrup, 325 F. Supp. 170 (D. Conn. 1970).
64. 42 U.S.C. § 2000e(j)(1976).
65. Edwards v. School Bd. of Norton, Virginia, 483 F. Supp. 620 (W.D. Va. 1980), *vacated and remanded*, 658 F.2d 951 (4th Cir. 1981). In 1977 the Supreme Court recognized that Title VII does not require employers to bear more than minimal costs in accommodating the religious beliefs of employees, *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977).
66. Niederhuber v. Camden Cty. Vocational and Technical School Dist. Bd. of Educ., 495 F. Supp. 273 (D.N.J. 1980).
67. Rankins v. Commission on Professional Competence, 593 P.2d 852 (Cal. 1979), *appeal dismissed*, 444 U.S. 986 (1979).
68. School Dist. #11, Joint Counties of Archuleta and LaPlata v. Umberfield, 512 P.2d 1166 (Colo. App. 1973).
69. Hunterdon Central High School Bd. of Educ. v. Hunterdon Central High School Teachers Ass'n, 416 A.2d 980 (N.J. Super. 1980).
70. 29 U.S.C. § 794 (1976).
71. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).
72. Upshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979); *see also* Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979), *cert. denied*, 444 U.S. 927 (1979); Sabol v. Board of Educ. of Twp. of Willingboro Cty., 510 F. Supp. 892 (D.N.J. 1981).
73. Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd* 556 F.2d 184 (3d Cir. 1977), *aff'd in part, vacated and remanded in part*, 626 F. 2d 1115 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).
74. Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D.N.Y. 1981). Several courts have ordered the reinstatement of handicapped school bus drivers based on evidence that the individuals can perform the job without unreasonable accommodations. *See* Coleman v. Casey Cty. Bd. of Educ.,

510 F. Supp. 301 (W.D. Ky. 1980); State Division of Human Rights v. Averill Park Central School Dist., 388 N.E.2d 729 (N.Y. 1979); Commonwealth of Pennsylvania Dept. of Transportation v. Byrd, 399 A.2d 425 (Pa. Commw. 1979).

75. In several recent cases courts have ruled that Section 504, like Title IX, prohibits discrimination based on handicaps only in programs that benefit directly from federal aid. *See, e.g.*, Doyle v. University of Alabama in Birmingham, 680 F.2d 1323 (11th Cir. 1982); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Pittsburgh Fed'n of Teachers, Local 400 v. Langer, 546 F. Supp. 434 (W.D. Pa. 1982). However, the Pennsylvania federal district court observed that a board of education might be subject to a Section 504 suit where federal funds are not directly implicated if the board's federal financial assistance is so substantial "that the entire operation of the school system may be treated as a 'program' for the purpose of Section 504," 546 F. Supp. at 437.
76. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). The Court subsequently applied similar reasoning in ruling that mandatory retirement at age 60 in the United States Foreign Service is rationally related to the legitimate objective of conducting foreign relations with a competent and physically fit staff, *Vance* v. *Bradley*, 440 U.S. 93 (1979).
77. Palmer v. Ticcione, 576 F.2d 459 (2d Cir. 1978).
78. Kuhar v. Greensburg-Salem School Dist., 616 F.2d 676 (3d Cir. 1980).
79. Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977), *cert. denied*, 440 U.S. 945 (1979).
80. 29 U.S.C. § 621. The amendment extending the upper age limit to 70 allowed colleges and universities to compel tenured faculty members to retire at age 65 until 1 July 1982. In March 1983 the U.S. Supreme Court ruled that the application of ADEA to state and local government employees does not impinge on an attribute of state sovereignity essential for carrying out traditional governmental functions in violation of the 10th Amendment, *Equal Employment Opportunity Comm'n* v. *Wyoming*, 514 F. Supp. 595 (D. Wyo. 1982), *rev'd* 103 S. Ct. 1054 (1983).
81. Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 591 (5th Cir. 1978). Individuals have a private right to bring suit under ADEA, but available state administrative remedies must first be pursued, although not exhausted. For a discussion of procedural requirements under ADEA, *see* Baruah v. Young, 536 F. Supp. 356 (D. Md. 1982); Sanders v. Duke University, 538 F. Supp. 1143 (M.D.N.C. 1982).
82. *See, e.g.*, Schwager v. Sun Oil Co., 591 F.2d 58 (10th Cir. 1979) (poor performance); Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977) (poor performance); Kerwood v. Mortgage Bankers Ass'n, 494 F. Supp. 1298 (D.D.C. 1980) (inability to relate to supervisor); Brennan v. Reynolds and Co., 367 F. Supp. 440 (N.D. Ill. 1973) (excessive tardiness).
83. Geller v. Mackham, 635 F.2d 1027, 1032 (2d Cir. 1980).
84. Leftwich v. Harris-Stowe State College, 540 F. Supp. 37 (E.D. Mo. 1982).
85. Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); *see also* Polstorff v. Fletcher, 452 F. Supp. 17 (N.D. Ala. 1978); 29 C.F.R. § 860.91(a).
86. *Compare* Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla.

1976); *with* Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979).

87. Federal district courts allowing compensatory damages include Buckholz v. Symons Manufacturing Co., 445 F. Supp. 706 (E.D. Wis. 1978); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952 (N.D. Ill. 1977). Damages for pain, suffering, and emotional distress have been disallowed in Rogers v. Exxon Research and Engineering Co., 550 F.2d 834 (3d Cir. 1977); Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977).
88. Dolan v. School Dist. No. 10, 636 P.2d 825 (Mont. 1981).
89. Board of Regents of the University of Nevada System v. Oakley, 637 P.2d 1199 (Nev. 1981).
90. Johnston v. Marion Indep. School Dist., 275 N.W.2d 215, 216 (Iowa 1979). *See also* Selland v. Fargo Pub. School Dist. No. 1, 302 N.W.2d 391 (N.D. 1981).
91. In addition to specific remedies included in various civil rights laws, such as reinstatement and back pay, victims of public employment discrimination often have attempted to secure compensatory and punitive damages under 42 U.S.C. § 1983. For a discussion of judicial interpretations of this provision, *see* McCarthy, *Discrimination in Employment: The Evolving Law*, pp. 57-59.