
CHAPTER SEVEN
THE REGULATION OF DISCRIMINATION AND AFFIRMATIVE ACTION
IN THE USA

7.1 Anti-Discrimination Legislation in the USA

As can be seen from Chapter Three, from its earliest existence the USA knew slavery. To recap, during the American Revolution, in the 1770's and 1780's, freedom and equality were important issues, and some blacks were freed, but in the South of the US slavery remained. The situation for the slaves improved during the Civil War. In the Northern states slaves were freed. However, in the South the Democrats achieved power and they often reduced the rights given to the blacks to nothing. For example, in order to be able to vote one had to pay poll tax (i.e., own property) and one had to be able to write. These were conditions that blacks often did not meet. In the beginning of the 20th century there was no actual right to vote, schools were segregated and the black schools were of inferior quality and blacks were lynched. Blacks moved from the South to the North, where they ended up in ghettos, and in the North, too, discrimination increased.

In 1909 the NAACP was established in New York. It achieved success in several fields, such as the equal payment of black and white teachers and the admission of black students to white universities.¹ In and after the Second World War several Acts were adopted against discrimination. In 1954 the landmark case of *Brown v Board of Education* of Topeka was decided. The SC decided that segregation at schools should be ended. However, it took ten to twenty years before this aim was achieved.

In fact, at the end of the 1980s there was more segregation in practice in most large cities than in 1968, because whites lived in other areas than blacks and the system of buses which used to transport white and black children to different areas in order to achieve a mixture, was limited. In 1957 a CRA was adopted which dealt with the right to vote, just as a CRA in 1960. Martin Luther King led a strong movement against discrimination and in 1964 Lyndon B Johnson saw to it that a comprehensive CRA was passed in Congress. However, at the end

¹ The SC decision of *Plessy v Ferguson* (1896)163 US 41 L Ed 256, was seen as the end of the “separate but equal” doctrine, which claimed that segregation was all right as long as the facilities provided to students were equal, which was presumed to be the case.

of the 20th century there were still many problems left, among other things in the area of employment. The Equal Employment Opportunity Act was adopted in 1972, and positive action was undertaken. There were many opponents to positive action, though. They claimed that white men were being discriminated against and that merit alone should decide who would get a job. In spite of all the measures, unemployment and poverty grew among the blacks in the 1970's and 1980's. These circumstances led to the passing of anti-discrimination legislation.

7.2 Specific Legislation Prohibiting Unfair Discrimination

Affirmative action in the US is not a legal concept that can be easily articulated by pointing to a single section of the US Code. It is a complicated mixture of case law, statutes and regulations and as such this thesis will explore the US's approach to the constitutionality and interpretations of affirmative action. Therefore the previous chapters and the current one clearly defines the terms and provides an extensive legal foundation to explain the history and current law surrounding affirmative action.

There are various statutes outlawing discrimination in employment in the US. These include but are not limited to Title VII of the CRA of 1964,² the Americans with Disabilities Act³, the Age Discrimination in Employment Act⁴, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.⁵ These statutes explicitly prohibits discrimination in all "terms, conditions, or privileges of employment". The phrase "terms, conditions or privileges of employment" in Title VII is an expansive concept demonstrating an intent by Congress to define discrimination in the broadest possible terms.⁶ Furthermore, Title VII,⁷ the ADA⁸ and the ADEA⁹ states that an employer may not limit, segregate or classify

² 42 USCA §2000e-2(a)(1).

³ 42 USCA §12112(a).

⁴ 29 USCA §623(a)(1).

⁵ 38 USC 4212.

⁶ *Rogers v EEOC* (1971) 454 F.2d 234 (5th Cir.).

⁷ 42 USCA §2000e-2(a)(2).

⁸ 42 USCA §12112(a), (b)(1).

employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect their status as employees.

The Department of Labour's Employment Standards Administration's Office of Federal Contract Compliance Programs (OFCCP) enforces the EO 11246, as amended; Section 503 of the Rehabilitation Act of 1973 , as amended and the affirmative action provisions (Section 4212) of the Vietnam Era Veterans' Readjustment Assistance Act. Taken together, these laws ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, colour, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran.

(7.2.1) The Vietnam-Era Veterans Readjustment Assistance Act

Employees covered under VEVRAA have an obligation to include an equal opportunity clause that covers qualified veterans under the Act.¹⁰

The VEVRAA requires employers with federal contracts or subcontracts of US\$10,000 or more to hire and promote individuals who served in the military during the Vietnam era for 180 or more days. VEVRAA covers the years 1964-1991. Employees who enlist in the United States Armed Forces or who are in the active reserves or National Guard are also afforded job protection under this Act. The law also covers any person discharged or released from active duty because of a service-connected disability or who is entitled to compensation under the laws administered by the Veterans Administration. The Act has also been extended to cover harassment in the workplace on the basis of military status and failure to provide reasonable accommodation.

In addition, employers of fifty or more employees with federal contracts or subcontracts of US\$50 000 or more are required to develop affirmative action programmes for hiring,

⁹ 29 USCA §623(a)(2).
The provision states that it is unlawful for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

¹⁰ 38 USCA §4212(a).

training and promoting veterans who are considered “Special Disabled” or who were on active duty for at least 180 days during the Vietnam War period. Special Disabled Veterans are individuals who were released from active duty due to a service-related disability or who have sustained a service-related disability of at least thirty percent.

VEVRAA requires government contractors and subcontractors to take affirmative action to employ qualified special disabled veterans.¹¹ Part of a contractor's affirmative action obligation is to include in each contract or subcontract, a clause promising not to discriminate against a special disabled veteran or veteran of the Vietnam-era in regard to any position to which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment without discrimination in all employment practices.¹² Much of the affirmative action required here is similar to the affirmative action requirements of the Rehabilitation Act of 1973.¹³

(7.2.2) Americans with Disabilities Act

Title I of the ADA of 1990, which took effect July 26, 1992, prohibits private employers, state and local governments, employment agencies and labour unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment.¹⁴

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.¹⁵ An

¹¹ 38 USCA §4212.

¹² 41 CFR §60-250.5(a)(1).

¹³ 29 USCA §§701 *et seq.*

¹⁴ An individual with a disability is a person who—
(i) Has a physical or mental impairment that substantially limits one or more major life activities;
(ii) has a record of such an impairment; or
(iii) is regarded as having such an impairment.

¹⁵ Reasonable accommodation may include, but is not limited to —
(i) making existing facilities used by employees readily accessible to and usable by persons with disabilities;
(ii) job restructuring, modifying work schedules, reassignment to a vacant position; and

employer is required to make an accommodation to the known disability of a qualified applicant or employee if it would not impose an “undue hardship” on the operation of the employer’s business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer’s size, financial resources and the nature and structure of its operation. An employer is not required to lower quality or production standards to make an accommodation, nor is an employer obligated to provide personal use items such as glasses or hearing aids.

The laws regarding prohibition against the disabled at work is similar to the provisions of the Rehabilitation Act.¹⁶ Under this Act, government contractors are prohibited from discriminating against someone because of their physical or mental disability and are obliged to take affirmative action to employ and advance in employment qualified individuals with disabilities at all levels of employment.¹⁷

(7.2.3) The Age Discrimination In Employment Act

The ADEA was passed when Congress found that, especially in employment, discrimination on the basis of age was is cruel and self-defeating, it destroys the spirit of potential workers, and denies the nation the benefit of potential workers.¹⁸

The ADEA protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA’s protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA. The

(iii) Acquiring or modifying equipment or devices, adjusting modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

¹⁶ 29 USCA §793(a).

¹⁷ 41 CFR §60-741.43.

¹⁸ *Scott v University of Mississippi* (1998) 148 F. 3d 493, 127 Ed. Law Rep. 688 (5th Cir.).

ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labour organisations, as well as to the federal government. The ADEA was enacted to further two goals. Firstly it was enacted to compensate discrimination victims and secondly, to deter employers from practising discrimination.¹⁹

As can be seen, there are various laws prohibiting discrimination in the USA. What can be stated with some certainty from these laws is that discrimination on the basis of race, colour, sex or national origin is prohibited. Apart from VEVRAA the above laws, however do not mandate affirmative action measures for the minority groups. Unlike the South African anti-discrimination legislation, affirmative action is not specifically provided for in the US laws. The most relevant piece of legislation for purposes of this thesis is the CRA of 1964.

(7.2.4) The Civil Rights Act²⁰

The CRA was meant to transform the American society and is therefore considered to be one of the most sweeping civil rights legislation which outlaws segregation in businesses such as theatres, restaurants, and hotels. Due to the CRA, the Jim Crow laws in the South were finally swept away, and it became illegal to compel segregation of the races in schools, housing, or hiring. Such later programmes as affirmative action were made possible by the CRA. At the outset affirmative action was meant to compensate for state sponsored discrimination. Further, it bans discriminatory practices in employment and has ended segregation in public places such as swimming pools, libraries, and public schools.

Looking at the historical background to affirmative action programmes in Chapter Three of this thesis, it was Presidents Kennedy and Johnson who mandated the first use of affirmative action in various executive orders. These EO affirmative action measures mandated that private companies contracting with the federal government take verifiable steps to ensure equal opportunity in hiring and employment for racial and ethnic minorities.

¹⁹ *Long v Sears Roebuck & Co.* (1997) 105 F. 3d 1529 (3d Cir.).

²⁰ The Civil Rights Act of 1964 (The CRA).

In addition, all larger federal contractors must also set affirmative action goals for the company which the company must in good faith attempt to achieve through the use of non-discriminatory means. This is usually achieved by ensuring that the company is not discriminating itself and by reaching a greater pool of potential employees. It is the Labour Department's OFCCP that is the supervisory authority. Essentially this was the beginnings of an anti-discrimination principle as it applied to the government and its various institutions.

The problem was that the US constitution only applied to government actors and did not directly restrain private sector discrimination. This resulted in various SC decisions whereby the anti-discrimination principle received limited enforcement solely to the public sector. In order to stop discrimination in the private sector the CRA of 1964 was enacted. The CRA made discrimination based on "race, color, religion or national origin" illegal in the public sector.

7.3 Major Features of the CRA

(7.3.1) Title I

Title I of the CRA barred unequal application of voter registration requirements, but did not abolish literacy tests sometimes used to disqualify African Americans and poor white voters.

(7.3.2) Title II

Title II of the CRA outlawed discrimination in hotels, motels, restaurants, theaters, and all other public accommodations engaged in interstate commerce. It however exempted private clubs from discriminating without defining the term "private" club, thereby allowing a loophole, and allowing discrimination to continue.

(7.3.3) Title III

Title III of the CRA encouraged the desegregation of public schools and authorised the US Attorney General to file suits to force desegregation, but did not authorise the use of inter racial buses as a means to overcome segregation based on residence.

(7.3.4) Title VI

Title VI and Title VII are the most important titles with regard to the enforcement of civil rights and the prohibition of unfair discrimination. The CRA explicitly prohibits an employer

from discriminating against any person on the basis of race, colour, religion, sex, or national origin of an individual in programmes and activities receiving federal financial assistance.²¹

Specifically, Title VI provides that —

“[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Title VI was enacted as part of the CRA.²² In calling for its enactment, ex-President JF Kennedy identified “simple justice” as the justification for Title VI —

“Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution, but indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.”²³

The purpose of Title VI is to ensure that public funds are not spent in a way which encourages, subsidises, or results in racial discrimination.²⁴ Title VI bars intentional discrimination.²⁵ However, most funding agencies have regulations implementing Title VI that prohibit practices that have the effect of discrimination on the basis of race, colour, or national origin.²⁶ The SC has held that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.²⁷

²¹ Title VI of the CRA.

²² The CRA Title VI, 42 USC 2000d *et seq.*

²³ See H R Miscellaneous Document (1963) No.124, 88th Congress 1st Session 3 at 12.

²⁴ US Department of Justice Title VI Legal Manual (2001) at 2035-6560 (Title VI Legal Manual).

²⁵ *Alexander v Choate* (1985) 469 US 287 at 293.

²⁶ Title VI of the CRA 42 US §2000d-1.

²⁷ See *Elston v Talladega County Board of Education* (1993) 997 F.2d 1394 (11th Cir.) at 1406.

Thus, Title VI claims may be proven under two primary theories — intentional discrimination or disparate treatment and disparate impact or effects. To assist federal agencies that provide financial assistance and the wide variety of recipients that receive such assistance, the US Department of Justice has published a Title VI Legal Manual.²⁸

Under the first theory of intentional discrimination, the recipient, in violation of the statute, engages in intentional discrimination based on race, colour, or national origin. The analysis of intentional discrimination under Title VI is equivalent to the analysis of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment.²⁹ Under the second theory of disparate impact, a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on individuals of a particular race, colour, or national origin, and such practice lacks a “substantial legitimate justification”.³⁰ Title VI disparate impact claims are analysed using principles similar to those used to analyse Title VII disparate impact claims.³¹ The law and principles regarding disparate impact treatment in the US is similar to the unfair indirect discrimination claims under South African law.

(7.3.4.1) Scope of Coverage

Title VI of the CRA has similar intentions to Title VII but is addressed to institutions and establishments that are in receipt of financial grants or assistance from the federal government rather than to federal contractors.³² While Title VI was not meant to be the primary federal vehicle to prohibit employment discrimination, it does forbid employment discrimination by recipients in certain situations. If a primary objective of the federal

²⁸ The Title VI Legal Manual *op cit* 24 sets out the Title VI legal principles and standards. Most Federal agencies have adopted regulations that prohibit recipients of Federal funds from using criteria or methods of administering their programs that have the effect of subjecting individuals to discrimination based on race, colour, or national origin.

²⁹ *Georgia State Conference of Branches of NAACP v Georgia* (1985) 775 F.2d 1403 (11th Cir.) at 1417.

³⁰ *Larry P v Riles* (1984) 793 F.2d 969 (9th Cir.) at 983.

³¹ *Young by and through Young v Montgomery County (Alaska) Board of Education* (1996) 922 F. Supp. 544 (MD. Ala.) at 549.

³² United States Code of Federal Regulations (US CFR) 1976:42 USC §2000d.

financial assistance to a recipient is to promote employment, then the recipient's employment practices are subject to Title VI.³³

Thus, almost all universities will be in receipt of federal assistance of some kind and will therefore be subject to the same requirements as contractors under Title VII. It is for this reason that the *Bakke* case was decided partly on Title VI grounds and partly under the Equal Protection Clause of the Fourteenth Amendment.

(7.3.5) Title VII

Title VII of the CRA was a hard won victory for civil rights activists and workers in 1964. In securing this Act, they ended the decades of "separate but equal" treatment that had been used as a justification for discrimination against black Americans, and also wrote into law precedents that would affect change in the labour market. The foundation for many of the comprehensive protections against discrimination in today's workplace can be found in Title VII of the CRA.

Voluntary affirmative action became a legitimate tool available to both private and public employers, and there is no absolute prohibition in Title VII,³⁴ 42 USCA §1981,³⁵ or the Constitution³⁶ against the implementation of an affirmative action plan. Title VII of the CRA is the main federal statute prohibiting job discrimination and makes it unlawful for an employer to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his/her compensation, terms, conditions or privileges of employment, because of an individual's race or colour³⁷ religion³⁸, sex or pregnancy³⁹ and

³³ Title VI 42 USC §2000d-3.

³⁴ *United Steelworkers of America v Weber* (1979) 443 US 193 99 S. Ct. 2721, (1979) 61 L. Ed. 2d 480.

³⁵ *Boston Chapter, NAACP v Beecher* (1982) 679 F.2d 965 (1st Cir.) and see the case of *Local Union No. 35 of Intern. Broth. of Elec. Workers v City of Hatford* (1980) 625 F.2d 416 (2d Cir.).

³⁶ *Wygant v Jackson Board of Education* (1986) 476 US 267.

³⁷ §§ 115-123 of the CRA.

³⁸ §§ 124-134 of the CRA.

³⁹ §§ 135-146 of the CRA.

national origin⁴⁰ by employers.⁴¹ This covers hiring, firing, promotions and all workplace conduct.⁴² Title VII prohibits employers from discriminating in any aspect of employment. An employer cannot use discriminatory criteria when he or she hires, fires, transfers, promotes, assigns work, lays-off, advertises for jobs, recruits, trains, provides fringe benefits, compensates, or awards disability leave. To demonstrate discrimination, an employee must establish a connection between the employment condition or decision and a prohibited basis.⁴³

Discrimination can take the form of unlawful employment practices. According to the CRA, it is not an unlawful employment practice to take into account religion, sex or national origin where religion, sex, or national origin is a *bona fide* occupational qualification that is reasonably necessary to the normal operation of a particular business or enterprise. Religion may also be taken into account by schools, colleges, universities, or other educational institutions or institutions of learning, based on a certain religion. It is allowed to use a seniority or merit system and to use tests. The CRA states that nothing shall be interpreted to require a party to grant preferential treatment to any individual or to any group.⁴⁴

(7.3.5.1) Scope of Title VII

The CRA applies to most employers with fifteen or more employees.⁴⁵ Title VII applies to all private employers affecting commerce; state and local governments; and education institutions that employ fifteen or more individuals. It also covers private and public employment agencies⁴⁶ labour organisations⁴⁷ and joint labour management committees

⁴⁰ §§ 147-156 of the CRA.

⁴¹ 42 USCA §2000e-2(a).

⁴² Title VII of the CRA, 42 USC §2000e.

⁴³ Such a connection may be established by pointing to individual instances of different or disparate treatment based on race, colour, religion, sex and national origin, or neutral policies or practices that have a much harsher effect or disparate impact upon a protected class to which the employee belongs.

⁴⁴ See § 2000e-2 of the CRA.

⁴⁵ *Espinoza v Fara Mfg. Co.* (1973) 414 US 86 at 95.

⁴⁶ 42 USCA §2000e-2(b).

⁴⁷ 42 USCA §2000e-2(c).

controlling apprenticeship and training programmes.⁴⁸ Certain entities are not considered “employers” for purposes of Title VII, specifically the US or a corporation owned by the US, an Indian tribe, certain agencies of the District of Columbia and *bona fide* private membership clubs other than labour organisations.⁴⁹ However, most federal employees, but not uniformed members of the armed forces,⁵⁰ are covered by Title VII under another section of the statute.⁵¹

What is important here is that Title VII is the exclusive remedy for discrimination by the federal government on the basis of race, religion, sex or national origin,⁵² unless pre-empted by a later statute.⁵³ Title VII does not apply to discrimination in non-employment matters,⁵⁴ although the courts will look to Title VII principles for guidance in other sorts of discrimination.⁵⁵ Since the statute’s anti-discrimination provisions are limited to employment actions based on race, colour, religion, sex and national origin, it does not extend to discrimination based on other factors like citizenship or alienage,⁵⁶ nepotism,⁵⁷ alcoholism⁵⁸ and effeminacy in men.⁵⁹ Even though cases in some circuits hold that discrimination based

⁴⁸ 42 USCA §2000e-2(d). Part-time and temporary workers are counted for purposes of determining whether an employer has a sufficient number of employees.

⁴⁹ 42 USCA §2000e(b).

⁵⁰ *Randall v US* (1996) 95 F.3d 339 (4th Cir.); *Janniére v US Army* (1999) 34 F. Supp. 2d 850 (ED NY).

⁵¹ 42 USCA §2000e-16(a). In addition, 2 USCA §1302, 1311, enacted in 1995, provides that Title VII is applicable to the legislative branch of the federal government.

⁵² *Briones v Runyon* (1996) 101 F.3d 287 (2d Cir.); *Jackson v Widnall* (1996) 99 F.3d 710 (5th Cir.).

⁵³ For example the Congressional Accountability Act of 1995, 2 USCA §§ 1301-1438 (legislative branch employees).

⁵⁴ *Callahan v Consolidated Edison Co. New York Inc.* (2002) 187 F. Supp. 2d 132 (SD NY).

⁵⁵ *Franklin v Gwinnett County Public Schools* (1992) 503 US 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208, 72 Ed. Law Rep. 69 (DNH); *Norton v Vartanian* (1983) WL 30392 (D. Mass.).

⁵⁶ *Espinoza v Farah Mfg. Co. Inc.* (1973) 414 US 86.

⁵⁷ *Sogluizzo v Local 817, Intern. Broth. of Teamsters* (1981) 514 F. Supp. 277 (SD NY).

⁵⁸ *King v Seaboard Coastline R. Co.* (1976) 538 F.2d 581 (4th Cir.).

⁵⁹ *Smith v Liberty Mut. Ins. Co.* (1975) 395 F. Supp. 1098 (ND Ga.).

on failure to conform to gender stereotypes, encompassing effeminacy in men and masculinity in women, is a form of sex discrimination prohibited by Title VII,⁶⁰ it has never been held to apply to discrimination based on sexual orientation.⁶¹ In contrast, South African law specifically prohibits discrimination on the basis of sexual orientation.⁶²

Title VII has been supplemented with legislation prohibiting pregnancy, age, and disability discrimination. Currently there is no federal law prohibiting discrimination based on sexual orientation, however Congress continues to consider the Employment Non-Discrimination Act (ENDA) which would prohibit sexual orientation employment discrimination.

Importantly, from a discussion of the sections of the CRA it can be seen that the Act never intended for the use of quotas or reservations, but was only meant to ensure the removal of barriers to equal opportunity. The usage of quotas in admission standards and employment practices came into existence with the subsequent rules and interpretations issued by government agencies charged with the enforcement of the CRA. Employers started then using quotas in order to protect themselves from litigation. It therefore becomes important in the South African context to look at how the courts have interpreted the affirmative action measures as these interpretations assists in how such measures and programmes will be and are being implemented.

(7.3.5.2) Citizenship or Alienage as a Basis of Discrimination

Title VII prohibits discriminatory employment practices based on an individual's association with people of a particular national origin.⁶³ For example, an employee had a right to sue for national origin discrimination under Title VII based on the employee's association with the Hispanic community.⁶⁴

⁶⁰ *Price Waterhouse v Hopkins* ((1989) 104 L. Ed. 2d 268, where an unfeminine women was denied a partnership). *Nicols v Azteca Restaurant Enterprises Inc.* (2001) 256 F.3d 864 (9th Cir.) where an "unmasculine" man was harassed on the job.

⁶¹ *Wrightson v Pizza Hut of America Inc* (1996) 99 F.3d 138 (4th Cir.); *Centola v Potter* (2002) 183 F. Supp. 2d 403 (D. Mass.).

⁶² *Hoffman v South African Airways* (2000) 12 BLLR 1365 (CC).

⁶³ *Garcia v Spun Steak Co.* (1993) 998 F.2d 1480 (9th Cir.).

⁶⁴ *Reiter v Center Consol. School IST. No. 26-JT* (1985) 618 F. Supp. 1458, 28 Ed. Law Rep. 214 (D. Colo.).

Title VII however, does not prohibit discrimination based on citizenship.⁶⁵ For example, an employee of an international employer who alleged that the employee, as an American based employee, was treated differently from employees based in another country, did not have a cause of action under the Statute.⁶⁶ However, an employment action based on citizenship may be national origin discrimination if the employer's intent is to discriminate based on national origin or if there is an adverse effect on a national origin group.⁶⁷

In SA, the courts have stated that foreign citizens are a minority in all countries and have little political power.⁶⁸ They are thus vulnerable to having their interests overlooked and their rights violated. Furthermore, citizenship is a characteristic which is typically beyond the control of the individual.⁶⁹ The differentiation on the basis of citizenship is based on attributes and characteristics which have the potential to impair the fundamental human dignity of non-citizens and amounts, therefore, to discrimination.⁷⁰ Therefore discrimination on the basis of citizenship in SA is prohibited.

In the US, should an individual believe that they have been the victim of discrimination, the EEOC will hear their complaints.⁷¹ Title VII of the CRA also prohibits most employers with twenty-five or more employees from discriminating on the basis of race or colour when hiring or discharging employees. It states that nothing in the law requires "preferential treatment" on the basis of race or colour, but it also allows for "affirmative action" when an employer has intentionally engaged in unlawful employment practices.⁷² Whilst Title VI

⁶⁵ *Espinoza v Farah Mfg. Co. Inc.* (1973) 414 US 86.

⁶⁶ *Fernandes-Middleton v Air India* (1989) 52 Empl. Prac. Dec. 39570 (CCH); (1989) WL 222970 (DDC).

⁶⁷ *Espinoza v Farah Mfg. Co. Inc.* (1973) 414 US 86.

⁶⁸ *Larbi-Odam & Ors v Council for Education* (1997) ICHRL 116 (26 November 1997).

⁶⁹ *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1, 32, 39.

⁷⁰ *Prinsloo v Van der Linde* (1998) 1 LRC 173, 185-6 (SA CC).

⁷¹ The complaint must be filed with the EEOC within 180 days after the alleged occurrence (unless there is a state or local anti-discrimination law with its own procedures). If the EEOC finds that discrimination has occurred, it will attempt to reconcile the parties and, if unsuccessful, may file a federal suit against the employer.

⁷² Section 703 (a) of the CRA states that —
It shall be an unlawful employment practice for an employer —

covers discrimination in federally assisted programmes, Title VII covers employment discrimination.

Unlike the South African anti-discrimination legislation, what can be seen from this discussion of the CRA and especially Title VII is that when one is looking at America's anti-discrimination laws or principles the primary objective of Title VII is a preventive one. It would appear that Title VII aims chiefly not to provide redress but to avoid harm. The purpose of Title VII is advanced when employers are encouraged to adopt anti-discrimination policies and to educate personnel on the prohibitions of Title VII, but it does not specifically provide for affirmative action programmes. Even though employers in the USA are not obligated to enforce affirmative action measures, they must refrain from discriminatory conduct. Where an employer is faced with a situation of being sued for unfair discrimination there are various defences open to him.

7.4 Defence or Exceptions to Prohibitions on Discriminatory Conduct

(7.4.1) Business Necessity

The CRA of 1991 provides for a "business necessity" or "job related" defence to disparate impact claims under Title VII. This Act allows an employer to succeed if it proves "that the challenged practice is job related for the position in question and consistent with business necessity".

Under the Rehabilitation Act⁷³ the business necessity exception will be allowed only if the exceptions are limited to instances in which individual capacity is in some vital respect not feasible to determine and other factors render the disqualification of some actually qualified persons of less importance under public policy than the placement of some under-qualified persons in the occupation or position in question.⁷⁴ One general requirement of the business necessity exception is that a factual basis must exist for believing that generally all or

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex, or national origin.

⁷³ Section 503 of the Rehabilitation Act of 1973.

⁷⁴ *OFCCP v Southern Pacific Transportation Co.* (1982 November, 9) 79-OFC- 10A, ALJ Rec. Dec. and Order at 51.

substantially all members of the discriminated class would be unable to perform the duties.⁷⁵ A requirement of business necessity is that the avoidance of the particular deficiency against which the qualification requirement is aimed must be of extremely high and crucial importance.⁷⁶

However, whilst it may be shown that an employment practice is required by business necessity it may not be used as a defence against a claim of intentional discrimination in Title VII of the CRA disparate impact cases.⁷⁷ If the challenged practice is job related for the position in question and consistent with business necessity then an unlawful employment practice based on disparate impact is not established.⁷⁸ This is unless the complainant makes the demonstration of a reasonable alternative employment practice and the respondent refuses to adopt such alternative employment practice.⁷⁹

So, whilst an employment test must bear a demonstrable relationship to successful performance of the jobs for which it is used,⁸⁰ limiting the number of times an appropriate certification test can be taken may meet the business necessity and job related standards of Title VII.⁸¹

Title VII specifically permits any entity covered by the act to discriminate against individuals on the basis of religion, sex or national origin if based on a *bona fide* occupational qualification (BFOQ),⁸² on the basis of non-fulfilment of national security requirements.⁸³

⁷⁵ *Ibid* at 52.

⁷⁶ *Ibid* at 53.

⁷⁷ 42 USCA §2000e-2(k)(2).

⁷⁸ 42 USCA §2000e-2(k)(1)(A)(I).

⁷⁹ 42 USCA §2000e-2(k)(1)(A)(ii).

⁸⁰ *Tice v Centre Area Transport Authority* (2001) 247 F.3d 506 (3d Cir.); *Bew v City of Chicago* (2001) 252 F.3d 891 (7th Cir.), cert. denied (2001) 122 S. Ct. 545 151 L. Ed. 2d 422 (US).

⁸¹ *Bew v City of Chicago* (2001) 252 F.3d 891 (7th Cir.), cert. denied (2001) 122 S. Ct. 545 151 L. Ed. 2d 422 (US).

⁸² 42 USCA §2000e-2(e).

⁸³ 42 USCA §2000e-2(g).

A requirement that employees speak only English in the workplace is usually prohibited unless the employer can show a business necessity for the rule. If there is a business necessity, the employer needs to let employees know that they can speak only in English and inform them of the consequences of violating the rule. Failure to give notice of an English-only rule can be evidence of discrimination. There should be no prohibition against speaking one's native language when not engaged in the business of the organisation.

Looking at these cases it is evident that even though the CRA allows an employer to triumph if it proves "that the challenged practice is job related for the position in question and consistent with business necessity", the exact outlines of this defence are still unclear, and lower courts have used a number of different standards when evaluating the defence, thereby confusing plaintiffs and defendants alike.

(7.4.2) Bona Fide Occupational Qualification

The BFOQ is an affirmative action defence in a disparate treatment case under Title VII and similar to the "inherent requirement of a job" standard in SA.⁸⁴ To establish the defence of BFOQ the defendant has the burden of proving that a definable group or class of employees would be unable to perform the job safely and efficiently or that it was impossible or highly impractical to consider the qualifications of each such employee and that the BFOQ is reasonably necessary to the operation of the business. The employer must therefore be able to show that the qualification at issue is reasonably necessary to the essence of its business.⁸⁵ While the courts are to recognise the BFOQ defence, any race based qualification is clearly precluded.⁸⁶ The law also does not permit religion-based, gender-based or national origin-based differences in pay to those holding the same job.

Sex will not be a BFOQ under Title VII if the exception is being claimed on the basis of a stereotypical characterisation of the sexes.⁸⁷ While this defence is meant to be an extremely

⁸⁴ *Healy v Southwood Psychiatric Hospital* (1996) 78 F.3d (3d Cir.).

⁸⁵ *Gately v Com. of Mass.* (1993) 2 F.3d 1221 (1st Cir.).

⁸⁶ *Ray v University of Arkansas* (1994) 868 F.Supp. 1104, 96 Ed. Law Rep. 119 (ED Ark.).

⁸⁷ *Dothard v Rawlinson* (1977) 433 US 321.

narrow exception to the general prohibition against sex discrimination⁸⁸ the exception is applicable when necessary for the purpose of authenticity or genuineness, such as a situation requiring an actor or actress.⁸⁹

When authenticity or genuineness is not an issue, a sex-based BFOQ will not be recognised merely because of the preferences of co-workers, clients or customers.⁹⁰ However, it has been held that such preferences of customers or clients may constitute legitimate grounds for establishing a sex-based BFOQ when they concerned a customer's or clients personal privacy interests.⁹¹

Title VII's BFOQ exception does not expressly apply to claims of race discrimination. The absence of any mention of race discrimination demonstrates the Congressional intent to exclude race from the scope of the exception.⁹²

In some limited circumstances, Title VII does allow employers to prefer one national origin to another. An employer can do this only when national origin is a BFOQ for the position. A BFOQ means that belonging to a certain national origin is necessary for the job. For example, being Chinese, Hispanic, or having some other national origin might be a *bona fide* occupational qualification for a role in a movie. Circumstances in which preferences for one national origin are allowed are very rare. The employer must be able to demonstrate that the position has special qualifications that only members of one national origin can fulfill.

Like South African law, in the USA, while customer or client preferences cannot normally satisfy the requirements for a sex-based BFOQ, such preferences have been found to

⁸⁸ *Ibid.*

⁸⁹ 29 CFR §1604.2(a)(2).

⁹⁰ *Dothard v Rawlinson* (1977) 433 US 321.

⁹¹ *Fesel v Masonic Home of Delaware Inc.* (1978) 447 F. Supp. 1346 (D. Del.).

⁹² *Miller v Texas State Bd. of Barber Examiners* (1980) 615 F.2d 650 (5th Cir.).

constitute legitimate grounds for establishing a sex-based BFOQ when they concern a customer's or client's personal privacy interests.⁹³

Personal privacy concerns are not a legitimate ground for establishing a sex-based BFOQ unless the employer is informed of them and no reasonable option exists besides total exclusion of one sex from employment.⁹⁴ Thus, for example, a hotel's assertion that clients seeking massage in the hotel spa should be able to choose the sex of their therapist because of privacy concerns did not establish that being a female was a BFOQ of the massage therapist position.⁹⁵

According to the EEOC's Guidelines on Discrimination Because of Sex⁹⁶ the Commission states that the following would not warrant the application of the BFOQ exception —

- (i) The refusal to hire a woman because of her sex based on assumptions on the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
- (ii) The refusal to hire an individual based on stereotyped characterisations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment or that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
- (iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers.⁹⁷

⁹³ *Fesel v Masonic Home of Delaware, Inc.* (1978) 447 F. Supp. 1346 (D. Del.), affirmed (1979) 591 F.2d 1334 (3d Cir.).

⁹⁴ *USEEOC v Sedita* (1991) 755 F. Supp. 808 (ND Ill.).

⁹⁵ *Olsen v Marriot Intern. Inc.* (1999) 75 F. Supp. 2d (D. Ariz.).

⁹⁶ These Guidelines deal with the question of sex as a BFOQ. See 29 CFR §1604.2.

⁹⁷ EEOC's Guidelines on Discrimination Because of Sex 29 CFR §1604. Except as covered by an exception in paragraph 1604.2(a)(2) of the Guide (EEOC Guidelines on Discrimination Because of Sex).

According to the Guidelines, it is also unlawful to classify a job as “male” or “female” or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee.⁹⁸

The Guidelines reiterate that an employer’s rule which forbids or restricts the employment of married women and which is not applicable to married men is discrimination based on sex which is prohibited by Title VII of the CRA.⁹⁹ Likewise the guide prohibits a help-wanted advertisement that indicates a preference, limitation, specification, or discrimination based on sex unless sex is a BFOQ for the job involved.¹⁰⁰ It is also unlawful for an employer to discriminate between men and women with regard to fringe benefits.¹⁰¹ Similarly, a written or unwritten employment policy or practice which excludes as employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII of the CRA.¹⁰²

Employment agencies must also be careful not to discriminate in any way against any individual because of sex.¹⁰³ In looking at whether an employer has discriminated against a person a disparate impact analysis is carried out.

(7.4.3) Affirmative Action

Under the aegis of “affirmative action” employers may engage in disparate treatment in favour of a protected class without violating Title VII or §1981 if such treatment is for the purposes of remedying past discrimination.¹⁰⁴ In some instances, an employer may have an affirmative duty to ameliorate the effects of its past discriminatory practices or reputation for

⁹⁸ *Ibid* at §1604.3.

⁹⁹ *Ibid* at §1604.4.

¹⁰⁰ *Ibid* at §1604.5.

¹⁰¹ EEOC Guidelines on Discrimination Because of Sex *op cit* 97 at §1604.9.

¹⁰² *Ibid* at 1604.10.

¹⁰³ *Ibid* at §1604.6.

¹⁰⁴ *Schurr v Resorts International Hotel Inc.* (1999) 196 F.3d 486 (3d Cir.); *Ferrill v Parker Group Inc.* (1999) 168 F.3d 468 (11th Cir.).

discrimination.¹⁰⁵ For example, it has been held that an employer violated Title VII by failing to take steps to recruit minority employees in a way sufficient to overcome its reputation for discrimination, which it acquired from pre-Title VII discriminatory practices.¹⁰⁶ The standard for evaluating an affirmative action plan as a defence to a claim of job discrimination is the same as the standard for evaluating a voluntary affirmative action plan under Title VII.¹⁰⁷

According to the EEOC, it is Congress' intent that employers undertake affirmative action voluntarily to improve the conditions of minorities and women, and that they should not be exposed for liability for complying with Title VII in this fashion.¹⁰⁸ Thus the setting of goals for minority hiring or promotion can be lawful. However, courts have found that Title VII imposes certain criteria on public and private employers regarding their plans,¹⁰⁹ and the EEOC has promulgated guidelines on affirmative action that provide guidance on how to develop a lawful affirmative action plan under Title VII.¹¹⁰ Also there are both Title VII and constitutional constraints on affirmative action by public employers.¹¹¹

7.5 What is Discriminatory Treatment or Disparate Impact?

Disparate treatment or impact is a legal theory to prove discrimination. Disparate impact is the same as indirect discrimination in South African law. It involves intentional employment discrimination where a protected group is treated less favourably than the other groups. In the US, although it seems that the legal doctrine has been settled by the US SC on disparate impact, the issue still remains of whether an equal protection violation requires purposeful discrimination, or whether it merely requires what is termed "disparate impact". In other

¹⁰⁵ *Association Against Discrimination in Employment Inc. v City of Brodgeport* (1979) 479 F. Supp. 101 (D. Conn.).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Schurr v Resorts International Hotel Inc.* (1999) 196 F.3d 486 (3d Cir.).

¹⁰⁸ 29 CFR §1608.1(a).

¹⁰⁹ §§528 to 543 of the CRA.

¹¹⁰ §§542 *et seq.*

¹¹¹ §§537 *et seq.*

words, does the Equal Protection Clause outlaw public policies that cause racial disparities¹¹² or does it merely outlaw intentional discrimination by public officials?

Disparate treatment is the different treatment of individuals *because of* their membership in one or more protected classes, for e.g., because they are African-American, female, older, disabled or the like. Disparate impact involves a challenge to an employment policy that may be neutral or non-discriminatory on its face but has a disproportionate or disparate impact on a protected class. Here the focus is on the consequences of employment practices, rather than on the employer's motives. Examples include a policy denying employment to all persons with arrest records, which may have a disparate impact on minorities because historically they have been arrested more often than Caucasians. A policy requiring specific education levels (for e.g., a high school degree), without showing that the requirement is necessary for a particular job, also may have a disparate impact on minorities because they generally have lower educational levels. A height or weight requirement may discriminate against women, Asian or Hispanic applicants, who are generally of smaller stature than Caucasian or African-American males.

The disparate impact theory may also be used to attack the effects of subjective decision making, without having to prove discriminatory intent. Plaintiffs ordinarily must identify a particular test or practice and prove that the practice caused a disparate impact. The employer may prove, as a defence, that the practice is job related, in that it is necessary to the safe and efficient conduct of the employer's business. The plaintiff may then seek to prove that alternatives with less impact on minorities were available to the employer.

In the context of Title VII of the CRA, which forbids job discrimination on the basis of race, national origin, sex or religion, the SC has answered in the *Griggs* case that (1) if an employer's policy has disparate racial consequences, and (2) if the employer can't give a reasonable justification for such a policy on grounds of "business necessity", then the employer's policy violates Title VII. Therefore, an employment practice, facially neutral, which operates to exclude protected individuals, must be shown to be job-related.

¹¹² For example, a public school examination that more white students than black students pass.

In the years since *Griggs*, courts have defined “business necessity” as requiring the employer to prove that whatever is causing the racial disparity, be it a test, an educational requirement or a hiring practice, has a demonstrable factual relationship to making the company more profitable.

In most other situations, however, the Court’s focus is on discriminatory intent. This was made clear in the seminal case of *Arlington Heights v Metropolitan Housing Corp.*¹¹³ In that case, the plaintiff, a housing developer, sued a Chicago suburb that had refused to re-zone a plot of land in order to allow low-income, racially integrated housing to be built. There was no clear evidence of racially discriminatory intent on the part of Arlington Heights’s planning commission, in their refusal to grant a re-zoning.

The result, however, was racially disparate, since the refusal prevented more African-Americans and Hispanics than whites from moving in. Justice Lewis Powell, writing for the Court, stated that “proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Disparate impact merely has an evidentiary value; absent a “stark” pattern, said the Court, “impact is not determinative”.¹¹⁴

The SC first described the disparate impact theory in 1971 in the *Griggs* case where it held that —

“Title VII proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in headwinds’ for minority groups and are unrelated to measuring job capability.”¹¹⁵

In 1989, the SC reduced the defendant’s burden of proving business necessity to a burden of producing evidence of business justification in the *Wards Cove* case.¹¹⁶ The CRA of 1991

¹¹³ *Arlington Heights v Metropolitan Housing Corp* (1977) 429 US 252.

¹¹⁴ See also *Washington v Davis* (1976) 426 US 229.

¹¹⁵ *Griggs v Duke Power Company* (1971) 401 US 424 at 431-2.

¹¹⁶ *Wards Cove Packing Co. v Antonio* (1989) 490 US 642 at 657.

overturned that portion of the *Wards Cove* decision. Examples of practices that may be subject to a disparate impact challenge include written tests, height and weight requirements, educational requirements, and subjective procedures, such as interviews.

The purpose of the CRA outlawing both disparate treatment and disparate impact is to remove artificial, arbitrary, and unnecessary barriers to employment which operate invidiously to discriminate on the basis of protected classifications.

(7.5.1) Allocation of proof

The burden of proof in a disparate treatment case was set out in the US SC case of *McDonnell Douglas Corp. v Green*¹¹⁷ and later clarified by the Court in *Texas Dept. of Community Affairs v Burdine*.¹¹⁸ In a hiring case, for example, the complaining party must first establish a *prima facie* case by showing that the complaining party —

- (i) belongs to a protected group;
- (ii) applied and was qualified for a job for which the employer was seeking applicants;
- (iii) was rejected, despite being qualified; and
- (iv) after rejection, the position remained open and the employer continued to seek applicants from persons having qualifications similar to the complaining party.

Once a plaintiff does this, the employer must explain the non-discriminatory reasons for its actions. After the employer has articulated some legitimate non-discriminatory reason for the individual's rejection, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were merely a pretext and that intentional discrimination was a substantially motivating factor in the employer's decision making.

The US SC resolved a conflict among the lower courts regarding this three step process in *St. Mary's Honor Center v Hicks*.¹¹⁹ The Court reaffirmed the notion that the burden of proof remains at all times on the plaintiff and that the burden of production, which falls temporarily

¹¹⁷ *McDonnell Douglas Corp. v Green* (1973) 411 US 792.

¹¹⁸ *Texas Dept. of Community Affairs v Burdine* (1981) 450 US 428.

¹¹⁹ *St. Mary's Honor Center v Hicks* (1993) 509 US 502.

on the defendant when it offers a non-discriminatory explanation for its action, is a much lighter burden. Thus, the plaintiff does not prove intentional discrimination merely by showing that the employer's explanation is not credible. Even if a plaintiff does not believe the employer's explanation for its actions, the plaintiff must still prove that the employer did in fact intentionally discriminate.

Where discrimination is only one of a number of reasons for the employer's action (a so called "mixed motive" case)¹²⁰ the plaintiff need only establish that the discriminatory reason was "a motivating factor". Under federal law, the employer can avoid liability for damages (but not attorneys' fees or other relief) if it can show that the result in such mixed motive cases would have been the same even in the absence of discrimination.

Therefore, the following steps have been articulated by the courts regarding proof of discrimination —

(a) *Prima facie case*

The plaintiff must prove, generally through statistical comparisons, that the challenged practice or selection device has a substantial adverse impact on a protected group.¹²¹ The defendant can criticise the statistical analysis or offer different statistics.

(b) *Business necessity*

If the plaintiff establishes disparate impact, the employer must prove that the challenged practice is "job-related for the position in question and consistent with business necessity".¹²²

(c) *Alternative practice with lesser impact*

Even if the employer proves business necessity, the plaintiff may still prevail by showing that the employer has refused to adopt an alternative employment practice which would satisfy the employer's legitimate interests without having a disparate impact on a protected class.¹²³

¹²⁰ Where a plaintiff proves that an impermissible factor played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken into account the impermissible factor. The plaintiff does not have to show that the impermissible factor was the sole, or motivating factor, only that it was a factor considered.

¹²¹ See 42 USC §§ 2000e-2(k)(1)(A)(I).

¹²² 42 USC §§ 2000e-2(k)(1)(A)(I).

This three-step order of proof has been applied to cases involving issues other than hiring, such as discharge and failure to promote and to cases brought under other federal and state statutes, including Washington’s Law Against Discrimination.

7.6 Title VII Violations

(7.6.1) Sexual Harassment Discrimination

The whole of 29 CFR §1604.11 is dedicated to sexual harassment, which is a violation of 29 CFR §703 of Title VII of the CRA. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature, when —

“.....submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; or, submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or, such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

Title VII also makes it unlawful for employers to discriminate against an employee or applicant on the basis of his/her religion, in hiring and firing. There are however, notable exceptions. Certain religious corporations, associations, educational institutions and societies are allowed to give preferential treatment in employment to individuals of that religion with respect to work connected with the carrying out of the entity’s activities. This exception does not apply to terms and conditions of employment for individuals already employed and not engaged in the carrying out of the entity’s purpose. Title VII does not prohibit religious expression in the workplace but does prohibit harassment on the basis of religion such as coercion for participation or non-participation in religious activities. The repeated use of religious slurs can constitute a hostile environment. Also under Title VII, employers are required to make reasonable accommodation to the religious practices of its employees.

The first successful “quid pro quo” sexual harassment case was in 1976 in *Williams v Saxbe*.¹²⁴ The court found that sexual harassment created “an artificial barrier to employment that was placed before one gender and not the other, even though both genders were similarly

¹²³ 42 USC §§ 2000e-2(k)(1)(A)(ii).

¹²⁴ *Williams v Saxbe* (1976) 413 F. Supp. 654 (DD Cir.).

situated”. Here the court found that this amounted to sex discrimination. In *Barnes v Costle*¹²⁵ the court held that sexual harassment was “an exaction which the supervisor would not have sought from any male”. Soon thereafter, in *Bundy v Jackson* the court went further by recognising that Title VII extends to “less tangible benefits such as a work environment free of psychological harm flowing from discrimination”.¹²⁶

In *Harris v Forklift Systems Inc.*, the court found that an abusive work environment was not restricted to the complainant suffering either economic or tangible discrimination but extended to psychological harm and stated that “the workplace is permeated with discriminatory behaviour that is sufficiently severe or pervasive to create a discriminatory hostile or abusive working environment”.¹²⁷ It also applied the reasonable person test to determine what was hostile or abusive in which the victim subjectively perceived it to be abusive. Here one sees that what took twenty years of litigation to recognise the different forms of sexual harassment is now encapsulated in the South African Code on Handling of Sexual Harassment claims.

There has however been a backlash to the development of the law in the States and in 1998 in *Oncale v Sundowner Offshore Services Inc.*, the court directed that lower courts should “not examine routine interactions among men and women in the workplace and” not to mistake ordinary socialising in the workplace — such as male-on-male horseplay or inter-sexual flirtation — for discriminatory “conditions of employment”.¹²⁸ The court also stated that —

“We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotation. The critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”

¹²⁵ *Barnes v Costle* (1977) 561 F. 2d 983 (DC Cir.)

¹²⁶ *Bundy v Jackson* (1981) 205 US App. 444 (DC).

¹²⁷ *Harris v Forklift Systems Inc.* (1993) 510 US 17.

¹²⁸ *Oncale v Sundowner Offshore Services Inc.* (1998) 523 US 75.

(7.6.2) Race and Colour Discrimination

Discrimination on the basis of race and colour is specifically prohibited in the CRA. In trying to define race, it is helpful to refer to the definition cited by the EEOC in its publication on Race and Color Discrimination —

“.....a local geographic or global human population distinguished by genetically transmitted physical characteristics (or) ...any group of people united or classified together on the basis of common history, nationality, or geographical distribution.”

While there is no accepted definition of the term “colour”, as used in Title VII, colour has frequently been viewed as synonymous with race or a subclass within a race. It is sometimes assumed that race discrimination is the product of contemptible racist attitudes. However, individuals who harbour no ill will toward members of another racial group can still fall prey to racial stereotypes or assumptions and, as a result, rely upon race when making employment decisions. Adverse employment decisions made on the basis of race usually fall into the category of discriminatory practices.

Discrimination on the basis of race and colour can also occur as a result of one’s association with members of a particular racial group even though the victim is not a part of that group. Employers are prohibited from discriminating against an individual as a result of —

- (i) marriage to or association with members of a racial group;
- (ii) membership in an organisation designed to protect the interests of a racial group;
- (iii) attendance at schools or religious organisations normally associated with a particular racial group; and
- (iv) association of last name or spouse’s last name with a racial group.

Employers also may not discriminate on the basis of a characteristic that affects one racial group. For example, sickle-cell anaemia predominately affects blacks, so a policy that excludes individuals with sickle-cell anaemia must be job related and consistent with business necessity. Further, a preference in employment for one racial group over another is not legal in American law.

(7.6.3) National Origin Discrimination

Although it is known as “a nation of immigrants”, the US officially practiced national origin discrimination in the form of legislation such as the Chinese Exclusion Act of 1881, and immigration quotas enacted in the 1920's. Employers adopted policies discouraging the appointment of applicants based on their country of origin.

Title VII and State laws now prohibit employers from discriminating against an individual on the basis of his or her national origin. This means that, except in limited circumstances, an employer cannot discriminate against an individual based on where their ancestors were born, or based on their physical, cultural or linguistic characteristics.

This type of discrimination can also occur as a result of one's association with members of a particular national origin even though the victim is not a part of that group. Employers are prohibited from discriminating against an individual as a result of —

- (i) marriage to or association with members of a national origin group;
- (ii) membership in an organisation designed to protect the interests of a national origin group;
- (iii) attendance at schools or religious organisations normally associated with a particular national origin group; and
- (iv) association of last name or spouse's last name with a national origin group.

Other evidence of discrimination includes requirements that employees either not be foreign trained or only be foreign trained and requirements that employees be fluent in English. Height and weight requirements can also be evidence that an employer discriminates against a specific national origin. While an employer who has one of these requirements won't automatically be liable for discrimination, courts will scrutinise such requirements to make sure they don't have an illegal purpose. For example, a requirement that employees speak fluent English might be illegal unless it is a *bona fide* job requirement that they frequently have to talk on the phone with clients.

Like the position in SA, it is illegal for an employer in the US to take an adverse action against an employee in retaliation for engaging in a protected activity such as filing a discrimination claim, or participating in a complaint process.

(7.6.4) Other Anti-Discrimination Provisions

The CRA of 1964 is by no means the first law designed to help eliminate past and present discrimination. The Thirteenth Amendment to the US Constitution made slavery illegal; the Fourteenth Amendment guaranteed equal protection under the law; the Fifteenth Amendment forbids racial discrimination in access to voting. The 1866 CRA guaranteed “every citizen the same right to make and enforce contracts ... as enjoyed by white citizens”.

Further, EO 8802, signed by President Franklin D Roosevelt in 1941, outlawed segregationist hiring policies in defence-related Federal contracts, and the 1954 SC decision of *Brown v Board of Education* ended the practice of “separate but equal” with regards to education. In 1965, President Lyndon Johnson signed EO11246 requiring “...that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin”, specifically in Federal contracts. In 1967, President Johnson expanded the EO to include affirmative action requirements to benefit women.

It should however be noted that it is Title VII of the CRA of 1964 that provides the foundation for the comprehensive protections against discrimination that the American society enjoys in today’s workplace. As noted earlier, as early as the post Civil War period, the US congress passed legislation prohibiting race discrimination in the making and enforcing of contracts. Other federal laws prohibit discrimination on the basis of age, disability, and medical condition. The California Fair Employment and Housing Act¹²⁹ also prohibits discrimination on the basis of race, colour, religion, sex, or national origin as well as age, disability, medical condition, and sexual orientation. The Santa Barbara County Code¹³⁰ also affords these same protections to its employees and to those doing business with the County.

What follows is a discussion of the requirements of EO 11264 and the regulations of the OFCCP which were promulgated for the purpose of ensuring compliance with and enforcing

¹²⁹ The Mission of the Department of Fair Employment and Housing is to protect the people of California from unlawful discrimination in employment, housing and public accommodations, and from the perpetration of acts of hate violence.

¹³⁰ This document is current through Ordinance 4524.

the EO. The ensuing discussion does not detail every aspect of the EO or implementing regulations but only the similarities between SA and the USA legislation.

7.7 Executive Order 11246; Title VII and the EEA Compared

If one had to look at EO 11246,¹³¹ it is similar to the goals of Title VII. Both aim to “improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace”.¹³² The key difference is that whilst EO 11246 is a regulatory provision it does not have the firm statutory basis of Title VII.¹³³

The basic requirements of the EO is that federal contractors having contracts or subcontracts with the government in excess of US\$10 000, must comply with the non-discrimination requirements of the EO, i.e., to refrain from discriminating against any employee or job applicant on the grounds of race, colour, religion, sex and national origin. Secondly, contractors or subcontractors with a contract of US\$50 000 or more and having fifty or more employees must desist from discrimination.¹³⁴ They must further comply with the following requirements.

Like SA, employers must prepare an annual written affirmative action programme to ensure non-discrimination, to monitor the workforce composition and in the event of the under-utilisation of minorities or women, prepare a plan to correct any imbalances. This includes the setting of goals and timetables. The employers are further required to state that they are equal opportunity employers in all job advertisements. They are also required to file regular compliance reports with the OFCCP.¹³⁵

¹³¹ As amended by EO 11325.

¹³² US CFR 1985: Chapter XIV 1608.1.

¹³³ Organisation Resource Counsellors Inc. (1984) at 7 (ORC).

¹³⁴ US CFR 1989: Chapter 60 (Otherwise known as Revised Order No. 4).

¹³⁵ The OFCCP is a part of the Employment Standards Administration which itself is a directorate of the Department of Labour.

Section 60-1.40 of the OFCCP regulations sets forth the requirements of a written affirmative action compliance programme which a contractor and subcontractor must comply with.¹³⁶ Further, the required components of an affirmative action programme for contractors with fifty employees or more and a federal contract of US\$50 000 or more is laid down in the Revised Order No.4.¹³⁷

Like SA, a workforce analysis must be conducted. Most of the guidelines that regulate the drawing up of an employment equity plan in the US is similar to the regulations that can be found in the EEA of SA.¹³⁸ The difference is that whilst these regulations have constitutional backing in SA they do not in the USA. This is important as the next part of this thesis will show how interpretation by the judges can impede affirmative action programmes. In the US, contractors are required to take steps to reduce such deficit, if there is found to be an under-utilisation of minorities in any given job category. In SA, this is commonly known as an under-representation. The first step is to set goals for the proportion of each job category that should be held by minority employees. Like SA, these goals are set by the contractor, but unlike SA, takes place on an annual basis.¹³⁹

Numerical goals are not required. Unlike SA where numeric goals are set for each designated groups, in the US there will not normally be separate goals for, for example, Hispanics, Asian-Americans, Blacks etc. The OFCCP may, however, in exceptional circumstances require goals to be set in respect of a particular group if it finds that the groups are substantially under-utilised in comparison with other groups.¹⁴⁰

Like SA, goals are to be realistic in the sense of being “attainable” in the context of the under-representation analysis and by “putting forth every good faith effort”.¹⁴¹ Importantly, the regulations proscribe the idea of using quotas —

¹³⁶ 41 CFR §60-1.40; 41 CFR §60-2.1(a).

¹³⁷ US CFR 1985: Part 60.2.

¹³⁸ Look at the US CFR 1989: 41 CFR 60-2.11(b)(1)(I)-(vii).

¹³⁹ Bear in mind that in SA employment equity plans are drawn up for a five year period.

¹⁴⁰ US CFR 1989: 41 CFR 60-2.12(1).

¹⁴¹ US CFR 1989: 41CFR 60-2.12(e).

“.....goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.....”¹⁴²

The US CFR lists various affirmative action steps that may be taken to advance equal employment. As the substance of the list does not differ in any marked degree from the sorts of actions that are promoted in SA as affirmative action, these steps will not be discussed here.¹⁴³ Such actions are part of a broader strategy — the overall affirmative action programme and not merely affirmative action. In SA these measures would be called measures designed to achieve employment equity and not merely affirmative action.¹⁴⁴

A contractor in violation of EO 11246 may have its contracts cancelled, terminated, or suspended in whole or in part, and the contractor may be debarred, i.e., declared ineligible for future government contracts. However, a contractor cannot be debarred without being afforded the opportunity for a full evidentiary hearing. Debarments may be for an indefinite term or for a fixed term. When an indefinite term debarment is imposed, the contractor may be reinstated as soon as it has demonstrated that the violations have been remedied. A fixed-term debarment establishes a trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that are in compliance with the EO.

If a matter is not resolved through conciliation, OFCCP may refer the matter to the Office of the Solicitor of Labor, which is authorised to institute administrative enforcement proceedings. After a full evidentiary hearing, a Department of Labor Administrative Law Judges issues recommended findings of fact, conclusions of law, and a recommended order. On the basis of the entire record, the Secretary of Labor issues a final Administrative Order. Cases also may be referred to the Department of Justice for judicial enforcement of EO 11246, primarily when use of the sanctions authorised by the Order is impracticable, such as a case involving a sole source supplier.

¹⁴² US CFR 1989: 41CFR 60-2.12(e).

¹⁴³ See Chapter Six — Provisions Regulating Affirmative Action in SA.

¹⁴⁴ See Chapter Five in Part II.

(7.7.1) Policies and Practices

The OFCCP's primary responsibility is to implement and enforce an EO and several statutes banning discrimination and establishing affirmative action requirements for federal contractors and subcontractors. While these policies have roots in the 1940's, the seminal requirements are contained in EO 11246, signed by President Johnson, and in regulations promulgated pursuant to that order in 1970 under President Nixon, which introduced the concept of goals and timetables. Specifically, OFCCP may require goals for hiring and promoting women and minorities as part of the affirmative action programme which contractors are required to develop and/or implement. However, race- or gender-based hiring and promotion are not required, and quotas are prohibited.

The OFCCP regulations expressly prohibit discrimination and the use of goals as quotas.¹⁴⁵ The numerical goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. Numerical benchmarks are established based on the availability of qualified applicants in the job market or qualified candidates in the employer's work force. The regulations specifically prohibit quotas and preferential hiring and promotions under the guise of affirmative action numerical goals. Numerical goals do not and are not intended to create quotas for specific groups, nor are they designed to achieve proportional representation or equal results.

A contractor's failure to attain its goals is not, in and of itself, a violation of the EO; failure to make good faith efforts is. The OFCCP undertakes compliance reviews for certain contractors flagged by a computer program as having below average participation rates for minorities or women. The OFCCP also conducts reviews of contractors selected randomly and identified through complaints.¹⁴⁶

As an incentive the OFCCP gives Exemplary Voluntary Efforts and Opportunity 2000 awards to those companies who demonstrate significant achievement in equal opportunity and affirmative action. A contractor in violation of EO 11246 may have its contracts

¹⁴⁵ 15 USC §637 (a)(1) and (4).

¹⁴⁶ Roughly eighty percent of reviews are "triggered by" computer-based selection system.

terminated or suspended, or be debarred. Such administrative actions are rare, and there is ample due process accorded to the contractor before hand. In addition to enforcing the government's affirmative action requirements, the OFCCP performs a related but distinct function: enforcement of the anti-discrimination provisions of EO 11246 (based on the principles of Title VII of the CRA).

The regulations implementing the EO establish different affirmative action provision for non-construction, i.e., service and supply contractors and for construction contractors.

7.8 Executive Order Affirmative Action Requirements

(7.8.1) For Supply and Service Contractors

Non-construction (service and supply) contractors with fifty or more employees and government contracts of US\$50 000 or more are required, under EO 11246, to develop and implement a written affirmative action programme for each establishment. The regulations define an affirmative action programme as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The affirmative action programme is developed by the contractor (with technical assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The affirmative action programme is kept on file and carried out by the contractor and it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.

The affirmative action programme identifies those areas, if any, in the contractor's workforce that reflect utilisation of women and minorities. The regulations¹⁴⁷ define under-utilisation as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. When determining the availability of women and minorities, contractors consider, among other factors, the presence of minorities and women having the requisite skills in an area in which the contractor can reasonably recruit.

Based on the utilisation analysis under EO 11246 and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilisation. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to

¹⁴⁷ At 41 CFR 60-2.11 (b).

increase the pool of qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

(7.8.2) For Construction Contractors

The OFCCP has established a distinct approach to affirmative action for the construction industry due to the temporary nature of the construction workforce. In contrast to the service and supply affirmative action programme, the OFCCP, rather than the contractor, establishes goals and specifies affirmative action which must be undertaken by Federal and federally assisted construction contractors. The OFCCP issued specific national goals for women. The female goal of 6.9 percent was extended indefinitely in 1980 and remains in effect today. Construction contractors are not required to develop written affirmative action programmes. The regulations enumerate the good faith steps construction contractors must take in order to increase the utilisation of minorities and women in the skilled trades.

Under the EO programme, affirmative action in employment is intended to —

- (i) promote inclusion of under-represented minorities and women, in recognition that the lingering effects of past discrimination and exclusionary practices have denied opportunities to qualified people;
- (ii) prevent future discrimination by encouraging employers to be inclusive in their hiring and promotion practices;
- (iii) provide a practical means, through use of flexible goals and timetables, for employers to gauge their progress. This mirrors the universal conclusion that successful organisations pursue their objectives by adopting measurable goals, and plans to achieve them.

The experiential literature indicates that affirmative action generally, and specifically the OFCCP EO programme, does create equal employment opportunities.¹⁴⁸

7.9 The EEOC's Affirmative Action Guidelines

In January 1979, the EEOC published its affirmative action guidelines.¹⁴⁹ These are regulations which constitute the EEOC's written interpretation and opinion of Title VII and

¹⁴⁸ Leonard Jonathan The Impact of Affirmative Action on Employment (1984) Journal of Labor Economics V(2) 439-463.

the issue of affirmative action.¹⁵⁰ The EEOC’s Guidelines on Affirmative Action are considered a “written interpretation or opinion” of the agency, and employers who have taken actions in implementing voluntary affirmative action plan in good faith conformity with and in reliance on those guidelines can, under appropriate circumstances, invoke this defence.¹⁵¹

The following chapter will also look briefly, at the major provisions of these regulations.

7.10 The EEOC’s Guidelines under Title VII of the CRA¹⁵²

Among other things, 29 CFR §1608.1 underlines the principles of —

- (i) non-discrimination in employment because of sex;
- (ii) that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation; and,
- (iii) voluntary action and litigation are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII.

The guidelines further defines the circumstances under which voluntary affirmative action is appropriate.¹⁵³ The following criteria must be taken into consideration —

- (a) Adverse effect — Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, Title VII proscribes practices which “tend to deprive” persons of equal employment opportunities. Employers, labour organisations and other

¹⁴⁹ Title VII of the CRA of 1968 established the EEOC to enforce and administer the provisions of that statute.

¹⁵⁰ Title 29 Labor Chapter XIX Equal Employment Opportunity Commission EEOC Affirmative Action Guidelines 29 CFR § 1608.2 (EEOC Affirmative Action Guidelines).

¹⁵¹ 29 CFR §§ 1608.1(d) — 1608(2).

¹⁵² Title 29 Labor Chapter XIX Equal Employment Opportunity Commission Part 1608 — Affirmative Action Appropriate under Title VII of the Civil Rights Act of 1964, as amended 29 CFR §1608.1.

¹⁵³ EEOC Affirmative Action Guidelines *op cit* 150 at 29 CFR §1608.3.

persons subject to Title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

- (b) Effects of prior discriminatory practices — Employers, labour organisations, or other persons subject to Title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labour force.
- (c) Limited labour pool — Due to the historic restrictions by employers, labour organisations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labour organisations, and other persons subject to Title VII may, and are encouraged to take, affirmative action in such circumstances, including, but not limited to, the following —
 - (i) training plans and programmes, including on-the-job training, which emphasise providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;
 - (ii) extensive and focussed recruiting activity;
 - (iii) elimination of the adverse impact caused by non-validated selection criteria; and
 - (iv) modification through collective bargaining where a labour organisation represents employees, or unilaterally where one does not, of promotion and layoff procedures.

The Guidelines also deal with the establishment of affirmative action plans.¹⁵⁴ Notably, these plans must contain three elements:

- (a) A reasonable self analysis;
- (b) A reasonable basis for concluding that affirmative action is appropriate; and

¹⁵⁴ *Ibid* at 29 CFR §1608.4.

- (c) A reasonable action.

These EEOC's guidelines are similar to the guidelines already discussed above. However, the difference is that the EEOC's guidelines provides that an affirmative action plan shall contain the three elements listed above.¹⁵⁵

A reasonable self analysis is similar to the tests of direct or indirect discrimination that needs to be carried out in identifying barriers in the South African workplace.¹⁵⁶ If the reasonable self-analysis reveals a problem area in employment practices, the guidelines state that a "reasonable basis for concluding that action is appropriate" exists. Similar to the direct discrimination analysis of SA, this reasonable basis will exist "without any admissions or formal finding that the person has violated Title VII and without regard to whether there exists an arguable defence to a Title VII action".¹⁵⁷

Under the guidelines, action taken pursuant to an affirmative action plan must also be reasonably related to problems disclosed by the self-analysis. If an affirmative action plan is challenged as a violation of Title VII or is asserted as a defence to a charge of discrimination, the foregoing standards will govern the EEOC's investigation as to whether or not the self-analysis and the plans are in writing. The EEOC guidelines recommend such analysis and plans to be in writing.¹⁵⁸

The EEOC's Guidelines are clear in that it views voluntary affirmative action as conduct which "must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII".¹⁵⁹ Such affirmative action cannot be measured by the standard of "whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation".¹⁶⁰

¹⁵⁵ *Ibid* at §1608.4.

¹⁵⁶ *Ibid* at §1608.4(b).

¹⁵⁷ *Ibid* at §1608.4(b).

¹⁵⁸ *Ibid* at §1608.4(b)(2).

¹⁵⁹ *Ibid* at §1608.1(e).

¹⁶⁰ *Ibid*.

Rather the EEOC envisions that entities subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of Title VII.¹⁶¹

Employers can establish this affirmative action defence to a Title VII violation if the affirmative action plan and the self-analysis on which it is based¹⁶² are written and dated.¹⁶³ If a defence of a Title VII charge is based on an unwritten affirmative action plan, the EEOC will investigate the charge, and consider the lack of a written and dated plan and self-analysis to make it more difficult for the employer to prove the defence.¹⁶⁴ A written plan therefore assists in the employer in his defence.

(7.10.1) Circumstances Calling for Affirmative Action

According to the EEOC's Guidelines, voluntary affirmative action measures are appropriate where existing or contemplated employment practices have had an adverse impact on those protected by Title VII. Employers, labour organisations, or other persons subject to Title VII may also take affirmative action to correct the effects of prior discriminatory practices.¹⁶⁵ The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labour force. These employers may also take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices. The Guidelines provide that the discriminatory effects could be initially identified by a comparison between the workforce and an appropriate segment of the labour force.¹⁶⁶

Finally, the Guidelines state that affirmative action can be taken where there is an "artificially limited" labour pool due to historic restrictions by employers.¹⁶⁷ In this circumstance, the

¹⁶¹ *Ibid.*

¹⁶² §§ 542 of the CRA *et seq.*

¹⁶³ 29 CFR § 1608.4(d)(1).

¹⁶⁴ 29 CFR § 1608.4(d)(2).

¹⁶⁵ EEOC Affirmative Action Guidelines *op cit* 150 at §1608.3.

¹⁶⁶ *Ibid* at §1608.3(b).

¹⁶⁷ *Ibid* at §1608.3(c).

Guidelines encourage affirmative action, including training plans, recruitment programmes, the elimination of adverse impact caused by invalidated selection criteria and the modification of layoff procedures.¹⁶⁸

Further, the EEOC stated that it would apply the following standards in considering the reasonableness of an affirmative action plan —

“The plan should be tailored to solve the problems identified in the self-analysis and to ensure fair employment practices in the future. Provisions of a plan which are race-sex-, or national origin-conscious should be maintained only as long as necessary to achieve those goals.¹⁶⁹ Goals and timetables should be reasonably related to the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of ‘basically qualified or qualifiable applicants,’ and the number of employment opportunities expected to be available.”¹⁷⁰

Bearing in mind that these are merely guidelines that a court must take into account when interpreting the constitutionality or otherwise of a particular affirmative action programme, what then would be the effect of such guidelines on the courts decision.

(7.10.2) Reliance on the Guidelines as a Defence to a Title VII Charge

Section 713(b) of Title VII¹⁷¹ provides that no person subject to Title VII shall be subject to any liability for an unlawful employment practice “if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission.....”.¹⁷² To obtain this protection in affirmative action matters, the EEOC Guidelines provide that such protection will be accorded “only if the self-analysis and affirmative action plan are dated and in writing.....”.¹⁷³

¹⁶⁸ Turner R The Past and Future of Affirmative Action (1990) at 110 (Turner).

¹⁶⁹ EEOC Affirmative Action Guidelines *op cit* 150 at §1608.4(c)(2)(1).

¹⁷⁰ *Ibid* at §1608.4(c)(ii).

¹⁷¹ 42 USC § 2000e-12.

¹⁷² *Ibid*.

¹⁷³ EEOC Affirmative Action Guidelines *op cit* 150 at §1608.4(d)(1).

Therefore, if, during the investigation of a charge of discrimination filed with the EEOC, a respondent asserts that the action complained of was taken pursuant to an in accordance with a plan or programme of the type described in these Guidelines, the EEOC will determine whether the assertion is true, and if so, whether such a plan or programme conforms to the requirements of these guidelines. If the EEOC so finds, it will issue a determination of no reasonable cause and, where appropriate, will state that the determination constitutes a written interpretation or opinion of the EEOC under section 713(b)(1).

This interpretation may be relied upon by the respondent and asserted as a defence in the event that new charges involving similar facts and circumstances are thereafter filed against the respondent, which are based on actions taken pursuant to the affirmative action plan or programme. If the EEOC does not so find, it will proceed with the investigation in the usual manner.

This part of the chapter points out the role played by the EEOC in employment matters. Charges of discrimination in employment relating to the constitutionality of an employers affirmative action plan will be analysed by the EEOC pursuant to its guidelines. Importantly, the Courts may however decline to defer to the Guidelines and the requirements set forth therein.¹⁷⁴

7.11 Analysis of the Anti-Discriminatory Provisions in SA and the USA

In most jurisdictions, the classification of the dispute as either direct or indirect discrimination is of vital importance because of the different standards of justification applied, depending on the manner in which the dispute is framed.¹⁷⁵ In South African law the precise classification of the dispute as either direct or indirect discrimination is unimportant as far as justification is concerned. In terms of the EEA, the same defences or justification grounds are available to an employer irrespective of the form the discrimination takes.¹⁷⁶ If one looks at the case law in SA and in terms of the Constitution, once unfair discrimination is

¹⁷⁴ Turner *op cit* 168 at 113.

¹⁷⁵ Chaskalson M (ed) Constitutional law of South Africa (1999) at ch 14.

¹⁷⁶ Dupper Ockert Justifying unfair discrimination: the development of a 'general fairness defence' in South African (labour) law (2001) *Acta Juridica* 147 at 149.

presumed or established¹⁷⁷ the respondent either bears the onus of proving that the discrimination was fair or has to justify it in terms of the limitations clause.¹⁷⁸ No distinction is made between direct and indirect discrimination in this regard.

In the UK for example, justification for direct discrimination is linked to the genuine occupational qualification, while a more lenient “general justification” is available in cases of indirect discrimination. Similarly, in the USA, the BFOQ defence is available in cases of direct discrimination, while a relatively more lenient “business necessity” defence is available in cases of indirect discrimination. The South African courts will often consider foreign developments in its attempt to give content to the EEA. The fact that the South African EEA does not provide different defences in cases of direct and indirect discrimination in this regard stems from the notion that equally undesirable societal costs result from both direct and indirect discrimination.¹⁷⁹

In the USA however, the notion of equal treatment underpins direct discrimination or disparate treatment¹⁸⁰ provisions, and is based on the principle that like persons should be treated alike. Indirect discrimination or disparate impact,¹⁸¹ on the other hand recognises that equal treatment might produce unequal results if the relevant subjects are socially unequal to begin with.¹⁸² The legal recognition of disparate impact as a form of discrimination stems from the SC decisions in *Griggs v Duke Power*. Indirect discrimination in SA is the same as disparate impact in the USA.

The prohibition against both direct and indirect discrimination in SA was intended to cover all forms of discrimination on the listed or analogous grounds. By outlawing both forms of discrimination the South African government is spreading the net of unfair discrimination

¹⁷⁷ This depends on whether discrimination is on a listed or unlisted ground.

¹⁷⁸ See the case of *Harksen v Lane No & Others* (1997) 11 BCLR 1489 (CC).

¹⁷⁹ Friedman The Burger Court and the *prima facie* case in employment discrimination litigation — A Critique *Cornwell Law Review* (1979) V(1) at 22.

¹⁸⁰ Title VII of the CRA of 1964 (1977) 431 US 324 at 335.

¹⁸¹ See the case of *Griggs v Duke Power Company* (1971) 401 US 424 .

¹⁸² Fredman Sandra *Women and the Law* (1997) at 284.

very wide. This stops any arguments about whether or not affirmative action is unfair discrimination. Thus any law which has an unfair discriminatory impact may amount to prohibited discrimination even if the law is neutral on its face. The applicant therefore, does not have to overcome, the often insurmountable burden, of proving that the law was enacted with the intent of unfairly discriminating on one of the listed or analogous grounds.

Further, unlike the enforcement power of the South African legislation on employment equity, the US SC has consistently held that guidelines such as the EEOC's Guidelines on affirmative action are not controlling on the courts, but do "constitute a body of experience and informed judgment to which courts and litigants may properly resort to guidance".¹⁸³

The importance of these guidelines is that these regulations will govern in administrative investigations which can result in federal lawsuits by the EEOC on behalf of the individuals claiming that an affirmative action plan violates Title VII.¹⁸⁴ Looking at the provisions regarding discrimination and affirmative action, although US law does not explicitly provide for affirmative action, it does however, expressly outlaw discrimination.

It may be noted that today the Equal Protection Clause as well as the CRA has come to be viewed as mandating affirmative action programmes using racial classifications.¹⁸⁵ However, those affected by affirmative action programmes have begun to fashion the weapon of Equal Protection Clause as a shield for the argument that race cannot be a factor in affirmative action programmes. The opponents of these programmes call such measures discrimination in reverse and consequently amounts to unfair discrimination.

SA has various anti-discrimination legislations in place for example the EEA and the LRA. Most significantly, affirmative action is mandated by the Constitution of SA. As opposed to SA, affirmative action in the US has no constitutional basis. The importance of having such a constitutional basis for affirmative action will not only provide a legal and authoritative background for affirmative action programmes but also assists employers with the

¹⁸³ *General Electric Co. v Gilbert* (1976) 429 US 125 at 141-42 and *Griggs v Duke Power* (1971) 401 US 424.

¹⁸⁴ *Turner op cit* 168 at 114.

¹⁸⁵ Singh Parmanand (Dr) Equality, Reservations and Discrimination in India (1985).

interpretation of such programmes. Further, such interpretations will assist in deciding whether or not a programme is constitutionally valid or if it will pass constitutional muster.

In the US, affirmative action only applies at transition points; times when individuals are changing their employment or enrolment. Thus, any probable advantage or disadvantage is predominately conferred upon adults who change jobs for better prospects or do so in the pursuit of educational opportunities. In SA affirmative action measures are a much broader concept and apply throughout a person's employment in a particular workforce.

Significantly, even though there are numerous federal provisions and statutes regarding anti-discrimination in the USA, none of these provisions actually sanction affirmative action programmes. The EEOC guidelines for affirmative action measures are just that, guidelines. EO 11246, although specifically providing for affirmative action does not make such measures mandatory.

Importantly and as mentioned earlier, the key difference between EO 11246 and Title VII is that whilst EO 11246 is a regulatory provision it does not have the firm statutory basis of Title VII.¹⁸⁶ SA on the other hand does not only constitutionally provide for affirmative action programmes but has other legislation specifically providing for same. Obviously, constitutionally mandated principles or provisions will be harder to ignore in court rulings and will set the stage for more affirmative action programmes.

A comparison between the US and SA regarding both countries courts approaches to affirmative action measures is important as it will assist SA to learn from experiences in the USA.

The next part of this dissertation will discuss how Title VII, in combination with related executive orders and key administrative and court decisions, has set the stage for either a stronger or weaker affirmative action measures.¹⁸⁷ Apart from the Civil Rights Acts that

¹⁸⁶ ORC *op cit* 133.

¹⁸⁷ Drake A and Holsworth R Affirmative Action and the Stalled Quest for Black Progress (1996).

were passed, other equal protection laws that were promulgated to make discrimination illegal included the 1965 Voting Rights Act adopted after Congress had found that racial discrimination in voting was an “insidious and pervasive evil”.¹⁸⁸ In addition to its employment provisions the Civil Rights Act banned discrimination in for example public accommodations, public conveyances, theatres and restaurants and it authorised the government to withhold federal funds from schools that had not yet desegregated.¹⁸⁹

The most important sections relating to discrimination in employment and the courts interpretations thereof will be discussed in greater detail in the next part to the thesis and will then look at how the goals of affirmative action has been interpreted and impeded due to the fact that it has no statutory backing in the US.

¹⁸⁸ Sykes Marguita *The Origins of Affirmative Action* (1995).

¹⁸⁹ *Brown v Board of Education* (1954) 347 US 483.