Louisiana Law Review

Volume 34 | Number 3
Employment Discrimination: A Title VII Symposium
Symposium: Louisiana's New Consumer Protection Legislation
Spring 1974

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RACE QUOTAS AS A FORM OF AFFIRMATIVE ACTION

Title VII of the Civil Rights Act of 1964, designed to encourage hiring solely on ability and qualifications, provides that race, religion and national origin are not to be used as a basis for hiring or firing.[1] The Act's principal purpose is to obtain future compliance by eliminating the causes of present discrimination through injunctive relief.[2] However, the court can order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of backpay.[3] This relief can be granted by the court upon its own initiative through its broad equitable power,[4] or upon the request of the Attorney General.[5] Since statistics could be used to establish a prima facie case of

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1. 110 CONG. REC. 6549 (1964)(remarks of Senator Humphrey).

2. *Id.* at 7213 (interpretive memo of Senators Clark and Case).

3. *Id.* at 6549 (remarks of Senator Humphrey).

4. 42 U.S.C. § 2000e-5(g) (Supp. 1972), *amending* 42 U.S.C. § 2000e-5(g) (1970) provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in a unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include *but is not limited to* reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) *or any other equitable relief as the court deems appropriate. Backpay liability shall not accrue from a date more than two years prior to the filing of the charge with the commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce backpay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title." (Emphasis added to 1972 amendments (P.L. 92-261)).

5. 42 U.S.C. § 2000e-6(a) (Supp. 1972), *amending* 42 U.S.C. 2000e-6(a) (1970) provides: "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

Prior to the 1972 amendments suit could be brought only by individuals or by the Attorney General of the United States. The EEOC could not bring suit. Individuals

discrimination, many opponents of the Act felt that the affirmative action provisions could be interpreted as mandating the correction of statistical imbalances through the use of minority preference and race quotas.[6] Sponsors of the Act countered that "quotas are in themselves discriminatory,"[7] and "any deliberate attempt to maintain a racial balance . . . would involve a violation of Title VII."[8] It was maintained that a statistical imbalance would be significant in determining whether the decision to hire was racially motivated, but the relevant inquiry would be whether on a case by case basis discrimination existed.[9] These assurances did not allay the fears of those opposed to the Act who instead pressed for the insertion of section703(j) which provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race . . . or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other

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could bring actions only when the EEOC was unable to resolve the dispute through conciliation. The Attorney General could file in "pattern or practice" suits (§ 707(a)), and intervene in any case which was of general public importance (§ 706(e)). Under the amended Act, the EEOC may bring suit (§ 706(f)(1)); the Attorney General may sue governments; and the EEOC also has the power to bring "pattern or practice" suits. There will be concurrent jurisdiction over pattern or practice suits but on March 23, 1974, the Attorney General's jurisdiction over all Title VII cases ceases, except against governmental agencies (§ 707(e)).

6. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 76 (1965). Senator Lesster Hill remarked "[n]on-discrimination is no longer sufficient, preferential treatment is demanded. It is to preferential treatment as embodied in this bill, that I most vigorously object." 110 CONG. REC. 488 (Jan. 1964).

7. 110 CONG. REC. 6997 (1964) (remarks of Senator Clark, Floor Manager).

8. 110 CONG. REC. 6992 (1964). *See also*, 110 Cong. Rec. 6563 (remarks of Rep. Kuchel). "It (the EEOC) would have no authority to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race . . . had in fact occurred . . . . But the important point . . . is that the court cannot order preferential hiring or promotion consideration for any particular race . . . . Its power is solely limited to ordering an end to discrimination which is in fact occurring . . . . [T]he bill now before us . . . is color blind."

9. *Id.*

> training program, in comparison with the total number or percentage of persons of such race . . . or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

The purpose of this section was clearly to prohibit the use of any quota system or plan which used race as a criterion for determining employment. When section 703(a),[10] the general anti-discrimination provision, is read in conjunction with 703(j), this seems to give even greater support to the argument that the Act is "color-blind." It forbids discrimination in employment and this would necessarily include discrimination against whites as well as minority groups.

Apart from section 703(j) the use of quotas raises constitutional questions. When such classifications are used, compelling justification must be demonstrated, since racial classifications are subject to "rigid scrutiny"[11] under the fourteenth amendment. However, such justification has been found in non-Title VII cases.[12] An example is *Norwalk CORE v. Norwalk Redevelopment Agency*,[13] a discriminatory housing case, wherein it was stated:

> What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining a racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.[14]

The courts have *seemingly* accepted the fact that quotas involve some degree of reverse discrimination, but apparently find no constitutional bar since they act in a benign manner to restore equal treatment. One writer[15] has suggested that if quotas were subjected to the

10. The relevant part of section 2000e-2(a) (1964) provides: "It shall be an unlawful employment practice for an employer— (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, color, religion, sex, or national origin; . . . ."

11. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

12. Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970); Norwalk CORE v. Norwalk Redevelop. Agency, 395 F.2d 920, 931 (2d Cir. 1968); Offermann v. Nitkowski, 378 F.2d 22, 24 (2d Cir. 1967).

13. 395 F.2d 920 (2d Cir. 1968).

14. *Id.* at 931-32.

15. Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1971).

"rigid scrutiny" test established in *Loving v. Virginia,*[16] they would probably pass. A racial classification is necessary[17] because it is the only practical way to define a group that has been victimized in the past and the overriding justification that the courts require for racial classifications[18] is met as the benefits being conferred will far outweigh the detriment to the few whites likely to be discriminated against.[19] The United States Supreme Court has affirmed the use of ratios in faculty desegregation cases. In *United States v. Montgomery County Board of Education,*[20] the court approved a district court's order holding that in certain schools the ratio of black to white teachers was to be the same as throughout the system.[21] This was to be accomplished through specific ratios designed to remedy past discriminatory racial assignments.[22] Thus, if quotas are constitutional in this context they should also be constitutional in the employment area.

Resolution of constitutional doubts through the doctrine of benign discrimination does not overcome section 703(j) which despite its clear wording and intent has not resulted in a ban on the use of quotas. The term "race quota" has not been defined by the courts, and until recently[23] there has been a judicial reluctance to use the term. Instead such euphemisms as "hiring ratio" and "goal" have been substituted. A quota is a requirement that an employer hire a certain percentage of minority members either by hiring one black for every white (alternating ratio or referral), or by successively filling positions with minority applicants until a certain number is attained (absolute minority preference). The foundation for the use of quotas was laid in *Louisiana v. United States,*[24] a voting rights case, where

16. 388 U.S. 1, 11 (1967).

17. Racial classifications must be shown to be necessary which includes a demonstration that no acceptable alternative to racial classification exists. *See, e.g.*, Lea v. Cone Mills, 438 F.2d 86 (4th Cir. 1971).

18. Korematsu v. United States, 323 U.S. 214, 216 (1944).

19. Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 99-100 (1971).

20. 395 U.S. 225 (1969).

21. *Id.* at 232.

22. *Id.* at 236.

23. *See* Bridgeport Guardian, Inc. v. Members of Bridgeport Civil Service Commission, 354 F. Supp. 778, 798 (D. Conn. 1973): "Much of the controversy in this area has concerned the difference between quota hiring to remedy past discrimination and some arguably less rigid approach involving affirmative action toward a goal. Ultimately the distinction becomes illusory. As the time nears to reach the goal, a member of the discriminated group must be hired in preference to a majority group person as often as is required to meet the goal. A quota, for all its *unhappy connotations*, is simply a recognition of reality encountered in reaching a goal." (Emphasis added.)

24. 380 U.S. 145 (1965).

the Supreme Court upheld a district court's order enjoining the use of a discriminatory qualification test and held that a new citizenship test would have to apply to all registered voters. The Court did not mention quotas specifically but the language employed in upholding the district court's order has been used to give the Act retrospective application in Title VII cases:

> We bear in mind that the court has not merely the power but the duty to render a decree which will *as far as possible* eliminate the discriminatory effects of past as well as bar like discrimination in the future.[25]

The district courts have frequently applied this language to avert the legislative intendment of section 703(j). It has been held that this section cannot be construed as a ban on eliminating the present effects of past discrimination and eliminating future discrimination.[26] Some courts have maintained that section 703(j) was enacted to eliminate preferential treatment *solely* because of a racial imbalance existing at the effective date of the Act.[27] In other words, preferential treatment is not justified merely because of an existing racial imbalance, but when coupled with present discrimination, such treatment is allowable and in many cases required. Other courts held that when 703(j) is read in conjunction with 703(c)[28] and the affirmative relief sections of the Act, preferential treatment is not proscribed and any other interpretation would nullify the purposes of the Act.[29] The purpose of the Act was to eliminate discrimination in employment, and Congress was aware of the effects of past discrimination, but legislative intent was directed at future compliance. Nothing in the Act's history indicates that Congress intended to implement the Act by employing some reverse discrimination against whites. Indeed, the

25. *Id.* at 154. (Emphasis added.) *See also* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). (The court in discussing the enactment of Title VII, held that Congress has "not intended to freeze an entire generation of Negro(es) . . . into discriminatory patterns that existed before the act.")

26. Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1054 (5th Cir. 1969).

27. United States v. Local 38, IBEW, 428 F.2d 144, 149 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970); United States v. Local 638, Enterprise Ass'n., 347 F. Supp. 169 (S.D.N.Y. 1972).

28. 42 U.S.C. § 2000e-2(c) (Supp. 1972), *amending* 42 U.S.C. § 2000e-2(c) (1970), provides that it will be unlawful for any labor organization to discriminate in hiring and in availability of employment opportunities for members and applicants because of race, color, religion, sex, or national origin.

29. United States v. Local 38, IBEW, 428 F.2d 144, 149-50 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970). *See also* United States v. Local 86, Ironworkers Union, 443 F.2d 544, 553-54 (9th Cir. 1971).

opposite is true.[30] The restrictive interpretation given section 703(j) by the courts in order to combat the present effects of past discrimination is, therefore, a liberal one.[31]

Statistics are used to establish a prima facie case of racial discrimination.[32] They are more than just a relevant factor in determining whether there has been discrimination in a particular case. If any employer or union cannot rebut the inference established by a statistical imbalance, he is held to have violated the Act. Quotas are a means of ending the statistical imbalance. Any remedy must end the imbalance or the remedy would itself be discriminatory. Thus, quotas remain in effect only until the past vestiges of discrimination are removed.[33] It would be useful to examine the exact context in which quotas have been granted to see in what direction the courts are moving and some of the problems encountered.

Labor union cases have usually arisen in connection with discriminatory hiring practices in their referral programs. For example, if a union is the exclusive bargaining agent in a particular industry, then it will usually operate a referral system at its office through which it furnishes or approves each worker hired by the contractors in that industry. If all of the union members are white and one of the qualifications a new worker needs before the union will refer him is that he be a relative of a union member, then this would be a discriminatory referral practice. Qualifications for entry into union training programs might also discriminate against minority members in similar ways. The first case in this area was *Local 53, Asbestos Workers v. Volger*.[34] To correct defendant union's discriminatory referral practices, the court affirmed the district court's order admitting the four minority applicants who were discriminated against, referred nine others and ordered alternating black and white referrals until objec-

30. *See* Griggs v. Duke Pow. Co., 401 U.S. 424, 430 (1971)(where the Supreme Court in discussing the act said, "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed.") The legislative intent, *i.e.*, a restrictive reading of section 703(j), was observed and followed in some of the earlier cases arising under the Act. *See, e.g.*, United States v. Local 38, IBEW, 59 CCH Lab. Cas. 9226 (N.D. Ohio 1969), *rev'd*, 428 F.2d 144 (6th Cir. 1970); United States v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968). These cases have not been followed.

31. In the course of the debates on amending the Act, Congress gave its approval to this interpretation of section 703(j) and endorsed the affirmative relief granted both under Executive Order 11246 and in the Title VII cases by voting down two amendments to section 703(j) which would have abolished similar relief in the future. *See* 118 CONG. REC. 706 (daily ed. Jan. 28, 1972); *Id.* at 2276 (daily ed. Feb. 22, 1972).

32. Bing v. Roadway Exp., Inc., 444 F.2d 687, 689 (5th Cir. 1971).

33. Swan v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 28, 31-32 (1971).

34. 407 F.2d 1047 (5th Cir. 1969).

tive membership criteria were developed.[35] In *United States v. Ironworker's Local 86*,[36] the union was ordered to offer immediate job referrals to qualified minority applicants who had been discriminated against and to select and indenture sufficient black applicants to meet a judicially imposed ceiling requirement of thirty percent.[37] The Second Circuit in *United States v. Wood, Wire & Metal Lathers, Local 46*,[38] upheld the district court's order creating an office of administrator which would issue work permits on a one-for-one basis with the goal of achieving a racial balance in the work force. In *United States v. Local 212, IBEW*,[39] the court held that the union must participate with the Journeyman's Employment Training Program where blacks were given a preference over whites with equal or greater qualifications and imposed a mandatory black membership quota of eleven percent on the union. Within six years the courts have broadened their scope of relief to include not only quotas, but have achieved specific racial balances,[40] and preferred less qualified blacks.

Cases involving unfair employment in state and local government[41] are now covered by Title VII as well as sections 1981 and 1983

35. *Id.* at 1054. *See* United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D.N.C. 1970) (defendant was ordered to hire six blacks over the road drivers and any new drivers in a one-for-one ratio); United States v. Local 10, Sheetmetal Workers, 3 CCH E.P.D. 8068 (D.N.J. 1970) (temporary apprentices were to be referred on a one-for-one basis).

36. 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971).

37. *See* United States v. Local 357, IBEW, 6 BNA F.E.P. Cas. 388 (D. Nev. 1973) (one-for-three applicants selected by the Apprenticeship Committee were to be minority members until twelve and one-half percent of the designated unit was black); United States v. Local 10, Sheetmetal Workers, 6 BNA F.E.P. Cas. 1036 (N.J. 1973) (apprenticeship committee required to indenture three blacks for every five applicants accepted); Sims v. Local 65, Sheetmetal Workers, 353 F. Supp. 22 (N.D. Ohio 1972)(where a priority pool of qualified minority applicants was ordered with appointments to be made to the training program on a one-for-one basis); Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972) (there an academic pre-apprenticeship training program was ordered for blacks with admission to the apprenticeship program on a one-for-one basis. Blacks who had previously passed the test and not been selected would also be given preference.)

38. 471 F.2d 408 (2d Cir. 1972), *cert. denied*, 93 S. Ct. 2773 (1973).

39. 472 F.2d 634 (6th Cir. 1973).

40. A quota need not necessarily achieve a racial balance which approximates minority representation in a particular job category with its proportion of the population. For example, if there are 535 jobs in a particular department and no minority employees in a city with 6.4 percent minority population, to achieve a racial balance there should be 34 minority workers in the department. But it is within the trial court's discretion to refer only twenty members. *See* note 44 and accompanying text *infra*.

41. Vulcan Society v. Civil Serv. Comm'n, 6 BNA F.E.P. Cas. 1045 (2d Cir. 1973) (interim relief on a one-for-three basis ordered where only five percent of the depart-

of the United States Code.[42] The cases brought under the old civil rights acts constitute a body precedent not necessarily binding on Title VII actions, but one which the courts find persuasive.[43] Two problems have arisen in this area: the granting of an absolute minority preference and the use of quotas in filling supervisory positions.

On rehearing in *Carter v. Gallagher,*[44] a 1981 and 1983 action which specifically made reference to Title VII remedies, the Eighth Circuit, sitting en banc, modified its former decision which had refused to grant an absolute minority preference for twenty workers in the Minneapolis fire department; that is, that the next twenty persons hired had to be minority members, in a department that formerly had none. The court reasoned that absolute preference would discriminate against better qualified whites and be violative of the fourteenth amendment.[45] Instead, the court ordered that one out of the three new employees be minority members until twenty were hired and that this did not constitute a quota system since, when the twenty were hired,[46] hiring would be on a color-blind basis.[47] Reverse

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ment were minority members in a city with a thirty-two percent minority population); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (priority pool established with selections to be made on a one-for-one ratio); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972)(one-for-one); Arnold v. Ballard, 6 BNA F.E.P. Cas. 287 (N.D. Ohio 1973)(one-for-one). *See also* Smiley v. City of Montgomery, 350 F. Supp. 455 (M.D. Ala. 1972)(government plan calling for racial balance).

42. Section 2000e(b) of Title 42 was amended by Public Law 92-261, section 2(2), so as to make the term "employer" encompass state and local governments.

43. *See* Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824, 848 (1972). *See also* Smiley v. City of Montgomery, 350 F. Supp. 451, 456 (M.D. Ala. 1972) (where the court held that the Civil Rights Acts and Title VII should be construed together).

44. 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1973). *See* Erie Human Rel. Comm'n v. Tullo, 357 F. Supp. 422 (W.D. Pa. 1973)(where the court ordered a one-for-one ratio until demographic parity was achieved).

45. Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971).

46. *Id.* at 331. The court felt the one-for-one ratios should be limited to cities with a greater minority population than Minneapolis.

47. *Id.* at 330. *But see* Harper v. Kloster, 6 BNA F.E.P. Cas. 880 (4th Cir. 1973). The court's order, inter alia, invalidated a discriminatory entrance and promotion exam and ordered that the predominantly black city residents be given a preference in filling vacancies in the Baltimore Fire Department. The court specifically rejected fixed quotas for various categories of employees for reasons given by the district judge: "As a result of the suspicion with which the law views racial classifications, and the fact that the Supreme Court has yet to address the matter, racial employment quotas may not be valid ingredients in relief . . . . A conclusion of unconstitutionality is not necessary to cause the court to reject a remedy so at odds with the spirit of the Civil Rights Act." The court concluded the discussion, "[n]o sufficient compelling need exists for the imposition of quotas. . . . Because effective relief can be granted without resort to this device, the court will avoid it." Harper v. Mayor and City Council, 359

discrimination was not discussed by the court in this context, but as the minority population of the city was six percent, the decree necessarily involved some discrimination against whites. When the prescribed ratio is greater than the proportion of minority to whites in the population as a whole, the minority group is necessarily preferred.[48] Apparently the majority felt that such preference is not constitutionally objectionable while absolute preference would be. Yet some reverse discrimination is undoubtedly involved in other forms of relief as in the one-for-one referrals.[49] The courts seem to be dealing in degrees of reverse discrimination but have yet to clearly draw the lines between permissible and impermissible preferences.

Using quotas in supervisory positions is another problem area presented in these cases. The Third Circuit in *Pennsylvania v. O'Neill*[50] upheld a one-for-three ratio for entry level positions in the Philadelphia police department, but a similar quota for supervisory positions was not enforced seemingly due only to the fact that the promotion test was not proven discriminatory. The court did not draw any distinction between the two types of quotas. The court found that a promotion test was not discriminatory in *Allen v. City of Mobile.*[51] The dissent, however, urged that not only was the test discriminatory,[52] but also that promotions during the interim period (while a valid test was being drafted) should be made on a percentage basis in order to eliminate past discrimination, with the precise for-

F. Supp. 1187, 1214 (D.C. Md. 1973). Morrow v. Crisler, 5 BNA F.E.P. Cas. 934 (5th Cir. 1973). In this case the majority specifically refused to meet the question of whether "minority preference" or "quota hiring" should have been granted. The court did not discuss the constitutionality of such relief but held that it deserved "serious consideration." The court upheld the district court's order enjoining the discrimination in the Mississippi Highway Safety Patrol. Only two of its 27 bureaus had any black employees and no black employees were being hired. The district court's order enjoined discrimination in processing applications; forbade giving preference to relatives of employees; and forbade using recruiting films showing only whites in responsible positions. The department was affirmatively ordered to recruit blacks and to keep records of all hirings for a three to five year period. It is clear that under similar circumstances quotas have been ordered both in the Fifth Circuit, *Local 53, Asbestos Workers v. Volger*, 407 F.2d 1047 (5th Cir. 1969) and in other circuits. *See* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971). This decision seems to cast serious doubt on the future use of quotas in the Fifth Circuit, leaving it completely within the trial court's discretion, which order will not be disturbed unless clearly inadequate on its face or once put into operation, it is not sufficient to end the discrimination.

48. *See* the excellent discussion in Note, 56 MINN. L. REV. 842, 855 (1972).

49. *Id.*

50. 473 F.2d 1029 (3d Cir. 1973).

51. 466 F.2d 122 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).

52. *Id.* at 129.

mula being left to the district judge.[53] Again no distinction was drawn between quotas in supervisory positions and entry level quotas.

The Second Circuit has distinguished the two types of quotas in *Bridgeport Guardians, Inc., v. Members of the Bridgeport Civil Service Commission.*[54] The district court's order creating a minority pool of qualified applicants to fill vacancies in the rank of patrolman on a quota basis was upheld. The court held that the district court abused its discretion in finding that the promotion test was discriminatory and also held that the imposition of quotas on ranks above patrolman would discriminate against whites who had embarked on a police career with expectation of advancement and would only exacerbate rather than decrease racial discrimination.[55] Similarly, in *Chance v. Board of Examiners,*[56] the use of discriminatory promotion tests was enjoined and the New York School Board was allowed to fill vacancies in supervisory positions without regard to race. A minority quota was rejected in these positions because of the district court's reasoning that the Constitution did not require quotas in supervisory positions, and that there was a need for having the best possible people in these positions.[57] It was noted that only a minority of the population has the requisite qualifications for the jobs, and that a valid exam should indicate these people irrespective of race.[58] Quotas in entry level positions can be justified on the ground that they allow the minority applicant a chance to get a job, and he can then prove himself as any other worker. The applicant passed over for the entry level position need not necessarily know the minority worker who was preferred over him. The applicant passed over still has a good chance of obtaining the job because the minority applicants are preferred on an alternating basis, and usually there are more entry level positions available than supervisory positions. The minority member will be entering the work force in an equal position and if there is resentment on the part of his fellow employees, it need not be personal resentment as they were not themselves deprived of a position in order to hire the minority applicant. At the supervisory level the problems escalate. The non-minority applicant will probably know who was promoted over him because both will probably still be with the employer. Even where the minority applicant has superior qualifications, if he was

53. *Id.* at 130.

54. 5 BNA F.E.P. Cas. 1344 (2d Cir. 1973).

55. *Id.* at 1350. As an alternative approach the court suggested that time in grade and seniority requirements for promotions might be decreased.

56. 458 F.2d 1167 (2d Cir. 1972).

57. *Id.* at 1179.

58. *Id.*

appointed under a quota system, the implication would always be that the choice was made strictly on a racial basis. Thus, the minority supervisor might be the target of resentment on the part of those working for him. When minority employees are suing for equal access to supervisory positions, this usually presupposes their presence in the entry level positions in some number, and hence discrimination may be absent on that level. But if discrimination should exist on both levels, as in *Bridgeport*, the court might order quotas in the entry level to achieve demographic parity if the situation is serious enough to warrant such relief. The court should eliminate the cause of the discrimination in the supervisory level, and rely on the inevitable psychological pressure generated by this order and the provisions of the Act to achieve minority representation in these positions. The employer could draw from the entry level positions to fill vacancies in the supervisory positions. The imposition of quotas here might reach the point of diminishing returns. The *Bridgeport-Chance* approach will eventually eliminate the present effects of past discrimination in a less objectionable fashion and is, therefore, preferable.

Cases arising under Executive Order 11246[59] have also upheld minority employment quotas. Section 202 of the Order requires that the contractors and subcontractors on federal work projects not discriminate in hiring and also calls for "affirmative action" to insure non-discrimination.[60] The validity of the Order was upheld in *Contractor's Association of Eastern Pennsylvania v. Schultz*,[61] in which the Philadelphia Plan, calling for contractors in that area to make good faith efforts to meet minority employment "goals" ranging from nineteen to twenty-six percent in six trades where the percentage of black workers was one percent and the black population of the city was thirty percent, was approved. The Plan was to eliminate the present effects of past discrimination, and the court assumed, that the paucity of blacks in the work force was due to the exclusionary practices of the unions as there were available black workers.[62] Due process was not violated as there would be no adverse effect on white workers because the labor market was transitory and workers were usually in short supply.[63] The court also seemed influenced by the fact that all the Plan called for was good faith efforts to

59. 3 C.F.R. § 402 (1970).

60. The Order applies to government construction contracts and government supply contracts.

61. 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

62. *Id.* at 176.

63. *Id.*

meet the "flexible goals," as opposed to "fixed quotas." The Plan involved some reverse discrimination. If an employer was faced with an equally qualified black and a white, and he needs to show good faith efforts to employ blacks in order to keep his contract,[64] the psychological pressure could likely operate in favor of the black, since there is no better evidence of a good faith effort than the actual presence of blacks in the work force.[65] The Order was held not inconsistant with Title VII as Title VII is also color conscious.[66] Section 703(j) was held to be a limitation on Title VII only.[67] The court held that the fifth amendment did not bar the Plan as the federal government has a cost and performance interest in remedying the absence of blacks in these trades and that the President has the power to effectuate this interest through the Executive Order.[68] Other courts have used similar reasoning in upholding like plans.[69]

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64. Section 202(6) provides that the contract may be cancelled for noncompliance. The contractor may also be declared ineligible for future government contracts.

65. *See* Note, 45 NOTRE DAME LAWYER 678, 692 (1970).

66. 442 F.2d at 173.

67. *Id.* at 172.

68. *Id.* at 177.

69. Associated Gen. Cont. v. Altshuler, 6 BNA F.E.P. Cas. 1013 (1st Cir. 1973). The court upheld the constitutionality of a Massachusetts plan calling for an employer to take "every possible measure" to fill minority goals of twenty percent on a federally financed construction project. The plan goes further than did the Philadelphia Plan as it required more than good faith efforts. The court upheld the Plan against an attack that it violated the equal protection clause as there was a compelling need to remedy a glaring imbalance in the number of blacks involved in the building trades industry as opposed to the number available and found that quotas were related to this desired end as they were not unrealistically set. Southern Ill. Build. Ass'n v. Oglive, 471 F.2d 680 (7th Cir. 1972); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970); Weiner v. Cuyahoga Comm. College Dist., 249 N.E.2d 907 (Ohio), *cert. denied*, 396 U.S. 1004 (1969).