
Roger Carl Glienke

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol30/iss4/8

This Notes is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.
TITLE VII: NEW RESTRICTIONS ON THE DISPARATE IMPACT PRIMA FACIE CASE—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. GREYHOUND LINES, INC.

Title VII of the Civil Rights Act of 1964 was enacted to provide a remedy for victims of arbitrary employment discrimination due to race, color, religion, sex, or national origin, and to prevent the continuation of such practices. Seventeen years after the enactment of Title VII, however, several issues relating to employment discrimination remain unsettled, and consequently have been the subject of widely differing treatment in the various United States Circuit Courts of Appeals.

In Equal Employment Opportunity Commission v. Greyhound Lines, Inc., the United States Court of Appeals for the Third Circuit ruled that proportionate representation of a minority in an employer's work force prevents a finding under Title VII that a facially neutral hiring or promotion procedure has a disparate impact upon that minority. Additionally, the court held that to establish a prima facie case of racial discrimination under the disparate impact theory, a Title VII plaintiff must show a causal connection between the challenged policy or practice and a racially unequal result. In imposing these standards, the Third Circuit has unnecessarily restricted the disparate impact theory, thereby hampering the effectiveness of litigation based on the theory as an enforcement mechanism under Title VII.

BACKGROUND

The enactment of Title VII of the Civil Rights Act of 1964 resulted from growing congressional awareness that equality of citizenship in such areas as voting, education, and access to public accommodations meant little without

---


4. See notes 35, 134, and accompanying text infra.

5. 635 F.2d 188 (3d Cir. 1980).

6. Id. at 192-93.

7. The term "disparate impact" is used synonymously by the courts with "disparate effect," "discriminatory impact," "discriminatory effect," "disproportionate impact," and "disproportionate effect." These terms refer to a facially neutral policy or requirement that falls more heavily upon a group protected by Title VII than another group. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). To avoid confusion, this Note will use only the term "disparate impact."

8. 635 F.2d 188, 193 (3d Cir. 1980).
a corresponding equality in employment opportunity for individuals. Although lack of equality for blacks as a class was, at the time, a major impetus for the Act's formulation, the focus of Title VII upon individuals, and not classes, is clear both on the face of the statute and in the legislative history.

In recognition of Title VII's emphasis on protecting individuals, the United States Supreme Court has outlined two alternative theories by which an individual may sue an employer for racial discrimination in employment under Title VII. In *McDonnell Douglas Corp. v. Green*, the Court en-

---

9. In reference to Title VII, the House Judiciary Committee Report stated that:

   In other titles of the bill we have endeavored to protect the Negro's right to first-class citizenship. Through voting, education, equal protection of the laws, and free access to places of public accommodations, means have been fashioned to eliminate racial discrimination.

   The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.


   (a) 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; or

   (2) to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex or national origin.

*Id.* (emphasis added).

11. Senators Clark and Case, floor managers of the Act, issued an interpretive memorandum on Title VII which stated that:

   It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question is [sic] each case would be whether that individual was discriminated against.

110 CONG. REC. 7213 (1964) (emphasis added), reprinted in LEGISLATIVE HISTORY, supra note 2, at 3040.

12. 411 U.S. 792 (1973). Green, a black civil rights activist, engaged in disruptive and illegal activity against his former employer to protest that his discharge and the firm's hiring practices were racially motivated. After being refused re-employment, Green sued the corporation, claiming a violation of Title VII. The Supreme Court affirmed the Eighth Circuit's finding that Green had presented a prima facie case of discrimination, but remanded since the court of appeals had erred by holding that the firm's showing that its reason for the refusal to rehire was based on Green's illegal activity did not discharge its burden of proof in rebuttal. The Court additionally outlined one method of presenting a prima facie case under the disparate treatment theory:
dorsed what has since become known as the disparate treatment approach. Under this method, the plaintiff must allege\textsuperscript{13} that the employer treats some people less favorably than others similarly situated in hiring or promotion because of their race, color, religion, sex, or national origin. Proof of a discriminatory motive is critical under this analysis.\textsuperscript{14}

An earlier decision, \textit{Griggs v. Duke Power Co.},\textsuperscript{15} focused on the consequences of employment practices, not simply the motivation of the employer,\textsuperscript{16} and established the disparate impact analysis under Title VII. The \textit{Griggs} Court interpreted the Act to proscribe not only overt, purposeful discriminatory actions,\textsuperscript{17} but also practices which are “fair in form, but

This may be done by showing (i) that [plaintiff] belongs to a racial minority; (ii) that [plaintiff] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [plaintiff’s] qualifications, [plaintiff] was rejected; and (iv) that, after [plaintiff’s] rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.


13. In both disparate treatment and disparate impact cases, plaintiff first bears the burden of presenting a prima facie case of discrimination. This rule was originated by Justice John Marshall Harlan in \textit{Neal v. Delaware}, 103 U.S. 370 (1881). Observing that although blacks constituted one-sixth of the Delaware population, no black had ever served as a juror in that state, Harlan stated:

The showing . . . presented a prima facie case of denial, by the officers charged with selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the state court indulged, that the uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries.

\textit{Id.} at 397. If successful in establishing a prima facie case, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for either the discriminatory treatment or impact. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).


16. \textit{Id.} at 432. In \textit{Griggs}, black employees of the power company challenged the employer’s requirement of either a high school diploma or satisfactory performance on a standardized general intelligence test as a prerequisite to employment or transfer to better jobs. Both requirements operated to disqualify blacks at a substantially higher rate than whites, and neither standard was shown to be significantly related to successful job performance. \textit{Id.} at 425-26. The appellate court held for defendant, stating that in the absence of a discriminatory purpose, use of such requirements was permitted under Title VII. \textit{Griggs} v. Duke Power Co., 420 F.2d 1225, 1235 (4th Cir. 1970). A unanimous Supreme Court reversed, holding that “good 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.” 401 U.S. at 432.

17. The \textit{Griggs} Court interpreted the underlying motivation of Congress in enacting Title VII to be as follows: “What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” \textit{Id.} at 431.
discriminatory in operation.” If the practice operates to exclude a group protected by Title VII, and the employer cannot justify the practice in terms of its relationship to job performance or business necessity, the activity is prohibited. When the employer successfully proves job-relatedness, the plaintiff may then attempt to prove the existence of other selection methods that lack a similar disparate impact and that would also serve the employer's interest in obtaining “efficient and trustworthy workmanship.” Such a showing constitutes evidence that the employer used the practice merely as a pretext for discrimination. Proof of a discriminatory motive is not, however, required under the disparate impact analysis.

Under either method, a Title VII plaintiff must first establish a prima facie case of discrimination before the burden shifts to the employer to justify the discriminatory practice. The elements of the prima facie case, however, differ under the two theories. The disparate treatment analysis requires evidence sufficient to create an inference that an employment decision was based on a discriminatory criterion forbidden by the Act. Under the disparate impact method, a showing that an employment practice has the effect of denying members of a race equal access to employment opportunities is needed. Courts have generally not been overly demanding, however, in the proof required to establish a prima facie case under either theory.


19. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971). Accord, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1372 n.24 (5th Cir. 1974). The defense of business necessity was briefed and argued by both parties in Greyhound, but the issue was never reached by the court of appeals because of its determination that the EEOC had not been successful in presenting a prima facie case of discrimination. For a discussion of job-relatedness and the business necessity defense, see generally 3 Larson, supra note 17, § 78.00; Lopatka, supra note 3, at 82.


23. See note 13 supra.


26. E.g., Jackson v. United States Steel Corp., 624 F.2d 436, 440-41 (3d Cir. 1980) (plaintiff must show he was treated differently from similarly situated individuals of different racial groups); Whack v. Peabody & Wind Eng'r Co., 593 F.2d 190, 193 n.11 (3d Cir. 1979) (sufficient
The Supreme Court has ruled that statistical evidence is appropriate to make this threshold showing, and, consequently, three types of statistical methods have arisen through which Title VII plaintiffs attempt to prove the prima facie case. First, general population pass/fail statistics have been offered to prove that the percentage of blacks in the general population, or relevant geographical area, potentially excluded by the employer’s practice exceeds substantially the comparable percentage of whites potentially excluded. Actual applicant pass/fail statistics, comparing the percentage of actual black applicants who fail a given test or criterion with the percentage of actual white applicants who fail, have also been used. The third method of proof, population/work force statistics, compares the percentage of a minority race in an employer’s work force with the percentage of that to show that plaintiff was a minority worker discharged from job he was qualified for and that less qualified white workers were retained.


29. The origin of this method of statistical proof is found in Griggs v. Duke Power Co., 401 U.S. 424 (1971). There the Court compared the percentage of white male high school graduates to black males who had graduated in its determination that an employer’s high school diploma requirement had a disparate impact on blacks. Id. at 430 n.6. Dothard v. Rawlinson, 433 U.S. 321 (1977), later reaffirmed this method of statistical inference of discrimination by relying on national statistics showing that the employer’s height and weight requirements excluded substantially more females than males from jobs as Alabama prison guards. Id. at 329-30.


31. The origin of this method of statistical proof is also found in Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court there compared the percentage of whites passing a pre-employment standardized aptitude test with the percentage of blacks passing it, and concluded that the test had a discriminatory impact upon blacks. Id. at 430 n. 6.

32. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (aptitude tests); United States v. Commonwealth of Va., 620 F.2d 1018 (4th Cir. 1980) (height and weight requirements, high school diploma, written ability tests); Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975) (height and weight requirements); Coopersmith v. Roudebush, 517 F.2d 818 (D.C. Cir. 1975) (requirement of recent legal experience and completion of test problem for attorney advisor position).

33. This method did not originate with the Griggs decision, but was initially accepted by the lower courts and finally approved by the Supreme Court in International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.30 (1977). Accord, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).
race in the relevant community or labor pool from which the employer hires. 34

The use of these three methods by Title VII plaintiffs has led, especially under the disparate impact analysis, to confusion in the various circuit courts of appeals on several issues, including what type of statistics may be shown by a plaintiff to prove a prima facie case; whether discrimination may be proven without a statistical showing of underrepresentation of a minority in an employer's work force; 35 and what type of causal connection between a challenged policy and a statistically unequal result, if any, must be shown to prove a prima facie case. In Greyhound, the Third Circuit attempted to resolve these three issues.

34. See, e.g., EEOC v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979) (diploma requirement and aptitude test); Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) (hiring procedures and assignment of employees); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975) (promotion and assignment procedures).

35. A split of authority exists in the courts of appeal concerning this issue. Three circuits hold that proportionate representation of a minority in an employer's work force will negate a finding of a discriminatory impact resulting from an employer's practice or requirement on that minority. See EEOC v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979) (statistical disparity between Spanish-surnamed Americans (SSA's) and Anglos in both pass/fail rates on aptitude tests and possession of high school diplomas irrelevant when employer's work force contains equal or larger percentage of SSA's than percentage of SSA's in the surrounding community); Townsend v. Nassau County Medical Center, 558 F.2d 117 (2d Cir. 1977) (general population statistics concerning low percentage of blacks in county with college degrees insufficient to prove disparate impact of employer's degree requirement when no showing made of actual discrimination in terms of actual numbers of blacks employed in medical center's work force), cert. denied, 434 U.S. 1015 (1978); Jarrell v. Eastern Air Lines, 430 F. Supp. 884 (E.D. Va. 1977) (general population statistics insufficient to prove disparate impact on females of Eastern's maximum weight restrictions for flight attendants in light of female dominance in the flight attendant position), aff'd per curiam, 577 F.2d 869 (4th Cir. 1978). See note 134 infra.

Four circuits have ruled that proportionate representation of a minority in the work force does not negate a finding of the discriminatory impact of an employer's policy on that minority. See Waters v. Furnco Constr. Corp., 551 F.2d 1085 (7th Cir. 1977) (greater percentage of blacks in the employer's work force than percentage in the community does not prove that employer's selection procedures are not discriminatory), rev'd and remanded on other grounds, 438 U.S. 567 (1978); Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975) (prima facie case can be established through any of the three statistical methods); Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975) (that percentage of blacks on police force is comparable to percentage of blacks in the community does not negate disparate impact of employment test on blacks as shown by general population or actual applicant statistics; plaintiff need not show both pass/fail and population/work force statistics to present prima facie case), rev'd on other grounds, 426 U.S. 229 (1976); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) (population/work force statistics showing that Goodyear transferred blacks from labor department and hired blacks in a ratio equal to the percentage of black population in the area does not negate the disparate impact of Goodyear's aptitude tests and high school diploma requirement on potential black hires or labor department transferees). See also Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978) (general population statistics alone are sufficient to establish prima facie case and cannot be negated by actual applicant statistics).
THE GREYHOUND DECISION
FACTUAL AND PROCEDURAL BACKGROUND

The Equal Employment Opportunity Commission (EEOC) brought an action in the District Court for the Eastern District of Pennsylvania, under Section 706(f)(1), (3), (g), and 703 of Title VII, against Greyhound Lines, Inc., challenging the legality of Greyhound’s policy that prohibits the wearing of beards by employees holding public contact jobs. The complaint was filed on behalf of Jeffrey B. Ferguson, a twenty-seven year old black male employee at Greyhound’s Philadelphia terminal. Ferguson sought promotion to the public contact job of ticket agent, but was denied the

36. Section 706(f)(1) & (3) provides in part:
   (f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.
   
   (3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice.

Section 706(g) provides:
   (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an 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 back pay (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.


37. See note 10 supra.


39. Greyhound's policy directive PR-14 provides in part: "Beards, goatees, mutton chops or other facial hair growths of an extreme or bizarre style are neither acceptable nor permissible and are calculated to impair the neat and tidy personal appearance which is critically requisite and, accordingly, may not be worn." Brief for Appellee at 7 n.6., EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980).
position and later "furloughed" because of his failure to comply with the "no beard" requirement.\textsuperscript{40}

Ferguson suffers from a skin condition known as pseudofolliculitis barbae (PFB),\textsuperscript{41} which predominantly affects black males.\textsuperscript{42} The EEOC alleged that, under the Griggs disparate impact analysis, Greyhound’s facially neutral "no beard" policy has a racially discriminatory impact on blacks who suffer from severe PFB. In short, due to the company’s policy, black males who are otherwise qualified are barred from higher paying positions solely because of a condition peculiar to their race.

The district court agreed with the EEOC and held that the plaintiff had established a prima facie case of discrimination.\textsuperscript{43} Additionally, it ruled that Greyhound had not met its burden of proving that the regulation was justified by business necessity,\textsuperscript{44} and therefore the regulation was not suffi-

\textsuperscript{40} 494 F. Supp. at 482. The district court found that Ferguson “was qualified for the position of ticket agent, except for his inability to conform to the grooming regulations.” \textit{Id.} at 484.

\textsuperscript{41} The district court explained in its findings of fact that this condition is caused by sharp tips of recently shaved facial hairs penetrating the skin and causing an inflammatory reaction. \textit{EEOC v. Greyhound Lines, Inc.,} 494 F. Supp. 481, 483 (E.D. Pa. 1979). The disease occurs in persons with curly or kinky hair follicles. After shaving, the curved hair follicles cause the already curly hair to come back into contact with the skin surface, pierce and reenter the skin, thus causing a pseudofollicle. \textit{Id.} The court additionally found that the inflammatory reaction may result in papules, pustules or abscesses. An individual with PFB may induce remission of the disease by growing a beard, and remission in such cases is nearly total and complete. However, an individual can redevelop the disease by resuming shaving. \textit{Id.}

\textsuperscript{42} The court further found that Ferguson had a severe case of PFB and that growing a beard was the only effective remedy because other treatments, such as depilatories, were unsuccessful and even aggravated the condition. \textit{Id.} Ferguson had been examined by three doctors, including Greyhound’s company doctor. All three doctors found that the severity of Ferguson’s condition indicated that it was medically necessary for him to refrain from shaving. \textit{Id.} at 483 n.1.

\textsuperscript{43} The district court concluded that PFB is a disease that primarily affects black males. \textit{EEOC v. Greyhound Lines, Inc.,} 494 F. Supp. 481, 484 (E.D. Pa. 1979). The court also accepted expert testimony presented by the EEOC showing that the incidence of PFB in black males ranges from 45\% to 83\%, with approximately one-half of that number suffering from the severe variety of PFB. \textit{Id.} at 484 n.3. See note 66 infra. Accordingly, the court found that “PFB is an immutable characteristic peculiar to members of the black race.” \textit{Id.} at 484.

\textsuperscript{44} \textit{Id.} at 485.

\textsuperscript{44} \textit{Id.} The district court applied the most often quoted standard for defining the business necessity defense:

The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable or alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

\textit{Robinson v. Lorillard,} 444 F.2d 791, 798 (4th Cir.) (footnotes omitted), \textit{cert. dismissed,} 404 U.S. 1006 (plaintiff was Lorillard), \textit{cert. dismissed,} 404 U.S. 107 (1971) (plaintiff was Tobacco Workers Int’l Union).
ciently compelling to justify its negative racial impact. The court granted judgment for the EEOC, awarded Ferguson back pay, and ordered Greyhound to offer Ferguson employment as a ticket agent. Greyhound appealed both findings of fact and conclusions of law to the Court of Appeals for the Third Circuit.

EXAMINATION AND ANALYSIS OF THE COURT’S DECISION

The sole issue the Third Circuit decided in Greyhound was whether the plaintiff had met the required burden of proving that the defendant’s facially neutral policy had a disparate impact on black workers. In deciding this issue, the court examined two arguments posed by the EEOC.

The EEOC first asserted that due to the overwhelmingly greater prevalence of PFB among blacks than among other racial groups, Greyhound’s “no beard” policy, and its refusal to grant medical exemptions thereto, disproportionately excluded more blacks than whites from public contact positions. The court rejected this argument, relying on statistical evidence.

45. 494 F. Supp. at 485. Contra, Woods v. Safeway Stores, Inc., 420 F. Supp. 35 (E.D. Va. 1976), aff’d, 579 F.2d 43 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979). In Woods, a case which also concerned a plaintiff PFB victim and an employer’s “no beard” requirement, the district court held that defendant Safeway had met its burden, under the Robinson test, of proving business necessity since Safeway was a retail food business and the product sold was intended for consumption. Defendant’s interest in “overall store hygiene and an appearance of cleanliness,” which would affect customer preference, overrode the disparate impact of the “no beard” policy here. 420 F. Supp. at 485.

46. 494 F. Supp. at 485.

47. Id. at 486.

48. EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 189 (3d Cir. 1980). Due to its finding that the plaintiff failed to establish a prima facie case, the court found it unnecessary to meet or resolve the issues of the severity of Ferguson’s disease and the business necessity defense. Id. at 190 nn.1 & 2. The court also stated that it was assuming that a policy against beards could constitute a violation of Title VII, but specifically declared that it was not meeting this issue either. Id. at 190 n.3.


50. The court relied in part upon the following language from Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975):

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets “the burden of showing that any given requirement . . . a manifest relationship to the employment in question.” Id. at 432. This burden arises, of course, only after the complaining party has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.

635 F.2d 188, 191 (3d Cir. 1980) (footnote omitted) (emphasis added).
offered by the defendant which indicated that from 1974 through 1978, the percentage of black male employees holding "no beard" public contact jobs at the Philadelphia terminal had exceeded substantially the comparable percentage of black males in both the labor force and general population in the Philadelphia area. The court also noted that the EEOC had offered no evidence indicating that any other black males at defendant's Philadelphia terminal desired to grow a beard due to PFB affliction.

The EEOC also argued that a prima facie case of disparate impact may be proved without a showing of statistical disparity in the actual number of minority employees in the employer's work force. In support of this contention, the EEOC cited *Furnco Construction Corp. v. Waters*, in which the Supreme Court held that regardless of the present proportional representation of a minority in an employer's work force, an equal employment opportunity must still be given to each member of that racial minority. The

---

51. 635 F.2d at 191-92 n.4. The population/work force statistics revealed that the percentage of black males covered by the appearance code at Greyhound's Philadelphia terminal varied over this time period from 20.5% on March 31, 1974 to 27.5% on December 31, 1977. This was compared with figures of 14.3% black male representation in the total male labor force, and 15.5% black male representation in the total male population within the Philadelphia Standard Metropolitan Statistical Area (SMSA). Brief for Appellant at 5-7 nn.2, 3 & 4, EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980).

52. 635 F.2d at 192. The EEOC contended that this evidence should not be required to establish a prima facie case. The EEOC relied upon the following statement in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), as support for its position:

> There is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants . . . . The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.

*Id.* at 330.

By analogy, the Commission reasoned that, as in *Dothard*, blacks with severe PFB will, through self-selection, not seek promotion or transfer to public contact positions at Greyhound. Therefore, statistics relating to the number of actual applicants for promotion with PFB would not reflect the true impact of the "no beard" rule. Statistics relating to the incidence of PFB in the general population, however, such as those offered by the Commission through its expert witness at trial, would be highly probative of the impact upon potential applicants. See Brief for Appellee at 19, EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980).

The court admitted the validity of this theory. 635 F.2d at 192 n.5. The court rejected its application in the instant case, however, claiming that the EEOC did not present general population statistics to the district court. Therefore, the question of self-selection was not relevant. *Id.*

53. The EEOC argued that Greyhound's policy "is not made lawful merely because Greyhound hires other blacks without PFB. It is the rate of exclusion which is the significant factor." Brief for Appellee at 15-16, EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980).


55. The *Furnco* Court stated that "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Id.* at 579 (emphasis in original). *Accord*, City of Los Angeles v. Manhart, 435 U.S. 702, 708-09 (1978) ("The statute's focus on the individual is unambiguous . . . . Even if the statutory
Greyhound court distinguished Furnco, however, on the basis that it was a disparate treatment case, and thus was inapplicable to cases in which it is alleged that a facially neutral policy has had a disparate impact. The court then announced what it considered a "tautological" rule: "no violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer's work force." In short, the court ruled that it would not consider the alleged disparate impact of Greyhound's "no beard" policy in the absence of a factual showing of discrimination or disparity in the actual number of blacks hired.

Finally, the court noted an additional ground for rejecting the EEOC's case. In the court's view, a Title VII plaintiff must, under the disparate impact analysis, "demonstrate a causal connection between the challenged policy or regulation and a racially unequal result." Thus, in Greyhound, the EEOC did not show that the "no beard" policy had a greater impact on blacks than whites, since it failed to establish that "there is no skin condition or disease affecting white males—other than PFB—that makes shaving difficult or painful and requires them to grow beards." Hence, the court concluded that the EEOC proved only that Ferguson was disadvantaged because he had PFB, not because he was black.

CRITIQUE OF THE COURT'S OPINION

The Greyhound court misapprehended the purpose of Title VII and its focus upon the individual, as well as the mechanics of the prima facie case and methods of statistical proof available to a Title VII plaintiff. Additionally, the court imposed previously unknown burdens upon plaintiffs in proving causation that severely restrict the effectiveness of disparate impact analysis as an enforcement mechanism under Title VII.

language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.

56. 635 F.2d at 192.
57. Id.
58. Id. at 193. The Third Circuit in Greyhound thus aligns itself with the Second, Fourth and Tenth Circuits in holding that proportionate representation of a minority in an employer's work force will negate a finding of a discriminatory impact resulting from an employer's practice or requirement on the minority. See note 35 supra and note 134 infra. The Greyhound majority cited EEOC v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979), as being in particular agreement. Judge Sloviter, however, in her Greyhound dissent, felt that in light of the underlying policies and the focus on the individual embodied in Title VII, as well as the Supreme Court's statements in Furnco and Manhart, the preferable view was that followed by the District of Columbia, Fifth, Seventh, and Eighth Circuits. 635 F.2d at 197-98 (Sloviter, J., dissenting).
59. 635 F.2d at 193.
60. Id. at 194.
61. Id. The Greyhound dissent asserted, however, that there was no need for a Title VII plaintiff to disprove comparable impact on whites from some other cause which would equalize the disparate impact on the minority involved; this, the dissent argued, was unduly burdensome and, additionally, had been required in no previous Title VII cases. 635 F.2d at 199-200 (Sloviter, J., dissenting).
In holding that the EEOC had produced no evidence establishing that the "no beard" policy selects applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants,62 the Greyhound court relied exclusively upon the defendant's favorably balanced population/work force statistics,63 and the EEOC's lack of actual applicant statistics showing that any other black males at the Philadelphia terminal sought to grow beards because of PFB affliction.64 The court, however, totally disregarded the EEOC's general population statistics, which were presented through expert medical testimony and accepted by the trial court. This evidence demonstrated that PFB is an "immutable characteristic, limited with rare exceptions, to members of the black race,"65 and that "one-fourth of all blacks who shave have a sufficiently severe case of PFB to be classified at 'grade II'66 and encounter moderate to serious shaving difficulty."67 Without explanation, the court simply stated that the EEOC did not present "'general population statistics' to the district court."68 This bald statement is difficult to reconcile because the "no beard" policy, when viewed in conjunction with the EEOC's statistics, indicates that those blacks for whom it is medically necessary to grow a beard due to severe PFB will suffer significantly greater exclusion from public contact jobs than will whites, in whom the incidence of the disease is minimal.69

---

62. 635 F.2d at 191.
63. See note 51 infra.
64. 635 F.2d at 192.
66. Plaintiff's expert witness, Dr. A. Melvin Alexander, developed a Zero to IV grade scale of severity of PFB affliction. Grade II, "moderate shaving difficulty," is evidenced by the characteristic ingrown hairs plus 20 or more papules (inflammations) at least 2 millimeters in diameter. Abstinence from shaving is a recommended therapy at the Grade II level. Grade III, "severe," is characterized by multiple pustules and bumps with pus, and Grade IV, "very severe," evidences painful, boil-like abscesses. Brief for Appellee at 5 n.4, EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980).
67. Id. at 5.
68. 635 F.2d at 192 n.5. The apparent reason for this statement by the Greyhound court is that the EEOC did not present additional evidence proving that no other skin condition or disease exists among whites that would counterbalance the disparate impact of the "no beard" policy on those blacks suffering from PFB. See notes 109-23 and accompanying text infra.
69. See, e.g., Woods v. Safeway Stores, Inc., 420 F. Supp. 35 (E.D. Va. 1976), aff'd, 579 F.2d 43 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979). In Woods, plaintiff, a PFB sufferer, sought to prove that Safeway's "no beard" rule had a disparate impact on black males. Significantly, the district court there accepted plaintiff's expert witness testimony, nearly identical to that presented in Greyhound, and concluded that a prima facie case had been established. The court stated:

The evidence satisfies the Court that in its severe form, PFB is peculiar to blacks.

... The evidence adduced in the instant case does establish that the "no beard" policy can act to disqualify an otherwise qualified black from employment solely on the basis of a genetic characteristic peculiar to his race.

420 F. Supp. at 41-42. The court later held, however, that defendant had met its burden of
Since the Supreme Court stated clearly in Dothard v. Rawlinson that actual applicant statistics need not always be the basis of a showing of disparate impact, and the use of general population statistics was expressly approved in both Griggs and Dothard, the Greyhound court's refusal to accept the EEOC's data as prima facie evidence of discrimination clearly contravenes established Supreme Court precedent.

Proportionate Representation of a Minority in the Employer's Work Force and the Prima Facie Case

Even if the Greyhound court had accepted the EEOC's statistics relating to the incidence of PFB in blacks, such statistics would not have been sufficient to establish a prima facie disparate impact case under the court's newly announced "tautological rule," thus shifting the burden to the employer to justify the policy. The court's reasoning that proportionate representation of a minority in the employer's work force negates a finding of the disparate impact of the employer's hiring or promotion requirement, effectively means that a policy that operates to exclude applicants as a result of a race-linked characteristic will not be deemed to have a disparate

---

71. Id. at 330. In Dothard, the Supreme Court rejected the petitioner's argument that generalized national statistics were insufficient to prove the disparate impact on women of petitioner's height and weight requirements for State of Alabama prison guards. See note 52 supra. The requirements excluded 22-33% of all women in the United States between the ages of 18 and 79, but only 1-2% of men of similar ages.
72. See note 29 supra.
73. The Greyhound court stated that "we need not consider the alleged disparate impact of Greyhound's 'no beard' policy because there was no actual discrimination or disparity in its hiring." 635 F.2d at 193.
74. Id. at 192-93.
76. A distinction must be made, however, between violations of grooming regulations because of personal preference, and inability to comply with the regulation because of immutable racially or sexually-linked traits. One court has stated that: "[d]iscrimination based on either immutable sex characteristics or constitutionally protected activities . . . violate[s] [Title VII] because they present obstacles to employment of one sex that cannot be overcome. On the other hand,
impact on individuals of that race if the percentage of that racial minority in the employer's work force equals the percentage of that minority in the general population. Thus, the Greyhound court, by focusing solely on the racial balance of the employer's work force, has defeated the primary purpose of Title VII, the "removal of artificial, arbitrary and unnecessary barriers to employment" and the protection of individuals, rather than classes, in seeking equal employment opportunity. As the Greyhound dissent noted, Title VII creates a right for an individual not to be subjected to employment policies that disqualify members of protected groups at a disproportionate rate. For those minority individuals excluded by the impact of an employer's requirement, it is immaterial that others of that minority have previously obtained an employment opportunity. Thus, Title VII disparate impact analysis should focus upon the impact of the challenged policy on individual minority members, not the existing racial balance of the employer's work force. The underlying rationale for the enactment of Title VII—an equal employment opportunity for all regardless of race—is contravened by the Third Circuit's proportionate representation rule. The rule totally ignores the effect of the employer's policy on those remaining individual minority group members who will be adversely affected in their opportunity for employment or promotion.

discrimination based on personal preference does not necessarily restrict employment opportunities and thus is not forbidden." Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976). See also Garcia v. Gloor, 618 F.2d 264, 269-70 (5th Cir. 1980) (employer's requirement of not speaking Spanish while at work not violative of Title VII since plaintiff employee was bilingual and chose to speak Spanish).


76. 635 F.2d at 196 (Sloviter, J., dissenting).
79. 635 F.2d at 197 (Sloviter, J., dissenting).
80. Id.
81. One commentator, arguing that favorable population/work force figures should not negate the disparate impact of an employment test or requirement under Title VII, stated that:

The reason is that the issue at stake is specifically the discriminatory impact of the test, not the merits of the employer's racial record or efforts in general. This must necessarily be so, because otherwise it would be impossible to relate the remedy to the offense. The remedy asked for may be an injunction against the continued use of the test, in which case the general behavior of the employer is obviously irrelevant, since the test will continue to discriminate in spite of the employer's good intentions. Or the remedy may be individual employment or promotion . . . . If this is to be the remedy, then, of course, the remedy should not be denied this plaintiff because the employer has, in relation to other people, maintained a racially balanced work force.

3 Larson, supra note 18, § 74.42.
82. See notes 9-11 supra.
83. 635 F.2d at 197 (Sloviter, J., dissenting).
The Supreme Court, acknowledging both the focus on the individual evident from the statute's language and the legislative history, has consistently emphasized that the purpose of Title VII is the protection of individuals, not just classes. The *Furnco* Court specifically stated that an equal employment opportunity must be given to each member of a minority group regardless of the existence of proportionate representation of that minority in an employer's work force.\(^84\) The *Greyhound* court's attempt to legitimize its holding by distinguishing *Furnco* as a disparate treatment case, and therefore inapplicable,\(^85\) is feeble. An employer's basic obligation to refrain from discriminating does not change because the discrimination results from a facially neutral policy instead of from intentionally disparate treatment.\(^86\) The disparate treatment and disparate impact analyses are merely alternative methods of proving discrimination under Title VII.\(^87\) A bifurcated approach to the use of population/work force statistics has no basis in logic or the holdings of any Supreme Court decision.\(^88\)

Additionally, the Supreme Court has rejected the *Greyhound* proportionate representation rule in a case which presented a similar factual situation. In *Phillips v. Martin Marietta Corp.*,\(^89\) the defendant's policy of employing men with preschool-age children, but rejecting applications from similarly situated women, was challenged as discriminatory.\(^90\) Although female representation in the employer's work force was five to ten percent greater than the percentage of female applicants,\(^91\) the Court reversed the lower court.
judgments and held that a prima facie case had been established under Title VII. Significantly, the Court did not rely upon the high percentage of females in the work force to negate discrimination, but merely found that these figures tended to show an absence of "bias against women as such." Similarly, in Greyhound, the Commission did not contend that the company engaged in purposeful discrimination. If it had so contended, consideration of the percentage of blacks in the work force would have been appropriate when determining intent. In disparate impact cases, however, there is no intent requirement, thus work force percentages should not, as demonstrated by Phillips, negate a prima facie case of discrimination.

Thus, the Third Circuit's "tautological rule" is in conflict with both the reasoning and holdings of the Supreme Court, as well as the underlying rationale of Title VII. For these reasons, proportionate representation of a minority in the employer's work force should not operate to negate a prima facie disparate impact case. Although a split of authority exists in the various circuit courts of appeal on this issue, the approach taken by the District of Columbia, Fifth, Seventh, and Eighth Circuits, holding that proportionate representation does not negate a finding of disparate impact, is preferable to the rule adopted in Greyhound.

Causation and the Prima Facie Case

Additionally, the Greyhound court ruled that to establish a prima facie disparate impact case a Title VII plaintiff must demonstrate a "causal con-

92. Id. at 544.
93. Id. at 543.
94. 635 F.2d at 191.
95. See note 88 and accompanying text supra. The Supreme Court in Furuco held that this evidence was worthy of some consideration in determining intent under disparate treatment analysis, but alone could not show conclusively that an employer's actions were not discriminatorily motivated.
96. See also Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). In Espinoza, the petitioners, Mexican aliens, argued that the respondent's policy against hiring noncitizens violated Title VII's prohibition against discrimination on the basis of national origin. Although the Court relied on population/work force statistics to show that discrimination against noncitizens generally had not prevented persons of Mexican origin from obtaining employment at defendant's San Antonio plant, the Court stressed that population/work force statistics are not an automatic "defense" to a charge of discrimination under disparate impact analysis. The Court reasoned:

There is no indication in the record that Farah's policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin. It is conceded that Farah accepts employees of Mexican origin, provided the individual concerned has become an American citizen. Indeed, the District Court found that persons of Mexican ancestry make up more than 96% of the employees at the company's San Antonio division . . . . While statistics such as these do not automatically shield an employer from a charge of unlawful discrimination, the plain fact of the matter is that Farah does not discriminate against persons of Mexican national origin. . . . If Plaintiff was denied employment, not because of the country of her origin, but because she had not yet achieved United States citizenship.

97. See note 35 and accompanying text supra and note 134 infra.
Tion between the challenged policy or regulation and a racially unequal result." This is a judicial creation which is bereft of any supporting authority. The reason for this lack of precedent is clear: although the rule is apparently reasonable on its face, it imposes an almost insurmountable burden of proof on the plaintiff.99

Traditionally, a Title VII complainant carries a relatively light burden of proof in establishing his or her prima facie case. A mere inference of discrimination,100 or a showing that a policy denies members of a race equal access to employment opportunities101 is sufficient.102 The burden then shifts to the defendant to justify the questioned practice.103 As the Greyhound dissent pointed out, however, the court's new causation rule may be interpreted to necessitate a showing that either the minority percentage in the employer's work force would have been higher but for the discriminatory practice, or that the particular plaintiff would have been hired but for the discriminatory requirement.104

In the former situation, a plaintiff could use only actual applicant statistics as proof of causation, since only actual minority applicants could possibly have increased the minority percentage in the employer's work force upon being hired. This requirement of actual applicant statistics to prove causation, however, specifically contradicts the Supreme Court holding in Dohard v. Rawlinson105 that this type of statistic need not be used to establish a prima facie case.106 Additionally, a shift in the traditional bur-

98. 635 F.2d at 193.
99. Id. at 198 (Sloviter, J., dissenting). Courts in general, and the Third Circuit in particular, have not placed such great burdens upon Title VII plaintiffs in proving a prima facie case of discrimination. See, e.g., Jackson v. United States Steel Corp., 624 F.2d 436, 440-41 (3d Cir. 1980) ("the Third Circuit has not been overly demanding in the proof required for a prima facie case.") (quoting Whack v. Peabody & Wind Eng'r Co., 595 F.2d 190, 193 n.11 (3d Cir. 1979)).
100. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (inference arises when plaintiff shows that his rejection did not result from lack of qualifications or lack of job opening); Jackson v. United States Steel Corp., 624 F.2d 436, 440 (1980) (inference arises when plaintiff offers sufficient evidence to show employer's action was based on impermissible reasons).
102. The underlying rationale of Title VII and the economic interest in promoting equal opportunity in employment would seem to preclude the imposition of great burdens on Title VII plaintiffs in establishing a prima facie case. Additionally, employers have a variety of defenses at their disposal to rebut the prima facie case, including the defenses of business necessity, job-relatedness, and the bona fide occupational qualification. For a discussion of this last defense, see Larson, supra note 18, § 13.00. See also notes 44-45 supra.
104. 635 F.2d at 198 (Sloviter, J., dissenting).
106. Id. at 330. See note 52 supra.
dens of proof will occur. An employer’s defense that a low percentage of minorities in the work force is due to an insufficient number of minority applicants will become a requirement that a plaintiff prove in his or her prima facie case that there are actual minority applicants who were disqualified.\textsuperscript{107} The latter alternative of requiring a Title VII plaintiff to prove that he or she would have been hired but for the challenged policy also poses an unreasonable burden, and has not previously been required in Title VII litigation.\textsuperscript{108}

Applying this causation rule, the Third Circuit held that the EEOC had failed in its prima facie proof because evidence was not introduced proving that no skin condition or disease, other than PFB, affects white males with comparable incidence and severity to prevent them from shaving and consequently obeying the “no beard” directive.\textsuperscript{109} The Supreme Court, however, ruled in \textit{Dothard} that a Title VII plaintiff need not exhaust every possible source of evidence if the proof offered demonstrates an employment requirement’s discriminatory impact.\textsuperscript{110} For this reason alone, plaintiff’s trial evidence, demonstrating the high incidence and severity of PFB in blacks, the resulting inability to shave, and the nearly total absence of PFB in whites,\textsuperscript{111} was sufficient to demonstrate causation.

The \textit{Greyhound} court also mischaracterized the cause of Ferguson’s inability to comply with the challenged policy. It is true, as the court pointed out,\textsuperscript{112} that the impact of a requirement on the majority race must be

\textsuperscript{107} 635 F.2d at 199 (Sloviter, J., dissenting). The court’s causation requirement, together with the necessity of showing disparate impact in numbers in the employer’s work force, means that to prove a prima facie case: 1) population/work force statistics are required to prove disparate impact in numbers on the work force, and 2) actual applicant pass/fail statistics are required to prove causation between the challenged policy and the unequal result in the work force as shown by the population/work force statistics. This enormous burden conflicts with Griggs original statement, and the \textit{Dothard} reaffirmance, that general population pass/fail statistics are sufficient to prove a prima facie case of disparate impact. See \textit{Dothard} v. Rawlinson, 433 U.S. 321, 330 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971).

\textsuperscript{108} 635 F.2d at 198 (Sloviter, J., dissenting). The \textit{Greyhound} dissent pointed out that in disparate treatment cases one need only show the four factors outlined in \textit{McDonnell} to prove a prima facie case. \textit{Id.} citing \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792, 802 (1975). See note 12 supra. The Supreme Court has indicated that \textit{McDonnell} is neither an inflexible formulation, nor the only means of proving a prima facie case, since the facts will vary in each situation. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977). Nonetheless, the Court has never imposed a stricter causation requirement for disparate treatment cases than that found in \textit{McDonnell}. Thus, there would appear to be no reason to do so in disparate impact cases since disparate impact and treatment are but alternative methods of proving discrimination. See \textit{Wright v. National Archives & Records Serv.}, 609 F.2d 702, 711 (4th Cir. 1979).

\textsuperscript{109} 635 F.2d at 194.

\textsuperscript{110} The Court stated that “[t]he plaintiffs . . . are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement’s grossly discriminatory impact.” \textit{Dothard} v. Rawlinson, 433 U.S. 321, 331 (1977).

\textsuperscript{111} See notes 41-42, 66-68, and accompanying text supra.

\textsuperscript{112} 635 F.2d at 194.
compared with its impact on the minority alleging discrimination.\footnote{113} Here, the requirement is the “no beard” rule. The impact of this requirement arises, however, not merely because PFB is a disease, but because PFB is an immutable, race-linked disease affecting black males.\footnote{114} Thus, the EEOC did not prove merely that Ferguson was disadvantaged because he had PFB, as the court contended,\footnote{115} but it showed that he was disadvantaged precisely because he was black. Thus, the statistical evidence indicated that for all practical purposes, “PFB” equaled “black.”\footnote{116}

Consequently, for other skin diseases to offset the disparate impact of the “no beard” rule on blacks with PFB, it would be necessary for these hypothetical diseases to be linked specifically to race as an immutable racial characteristic of whites. Although Title VII protects victims of racial discrimination, rather than disease discrimination,\footnote{117} it would be the defendant’s burden, according to Dothard,\footnote{118} to prove a similar incidence and severity in whites to avoid a finding of discrimination.\footnote{119} Thus, an employer should be required to adduce statistics demonstrating the comparable impact of the hypothetical disease on whites that equalizes the impact of the “no beard” rule on the protected class.\footnote{119}

No previous Title VII cases, however, including those concerning immutable racial characteristics,\footnote{120} have required a plaintiff to “disprove the exis-

\footnotesize{\begin{itemize}
\item[113.] See also Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971); Green v. Missouri Pac. R.R., 523 F.2d 1290, 1295 (8th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1372 n.22 (5th Cir. 1974).
\item[114.] See note 75 supra.
\item[115.] 635 F.2d at 194.
\item[116.] See notes 41-42, 66-68, and accompanying text supra.
\item[117.] It would be necessary that the effects of this hypothetical disease be comparable to PFB’s effects on blacks; 45% to 83% of white males would have to be affected, and 25% of whites must suffer from it severely enough to preclude shaving. Appellant’s Petition for Rehearing at 11, EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980).
\item[118.] As the Dothard Court stated, “If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.” Dothard v. Rawlinson, 433 U.S. 321, 331 (1977). Greyhound introduced no evidence suggesting that hypothetical skin diseases comparable to PFB and affecting white males actually exist. Appellant’s Petition for Rehearing at 12, EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980).
\item[119.] When immutable, race-linked characteristics are at issue, the preferable view would be to grant a medical exemption from the requirement to members of the afflicted race. Engaging in a “comparative impact” analysis is improper when immutable racial characteristics are concerned since Title VII has been construed to protect all races. See, e.g., McDonald v. Santa Fe Trail Transp., 427 U.S. 273, 280 (1976); Hicks v. ABT Assoc., Inc., 572 F.2d 960, 967 (3d Cir. 1978); Detroit Police Officers Ass’n v. Young, 446 F. Supp. 979, 1003 (E.D. Mich. 1978). Further, it is erroneous to argue that one race’s comparably severe disease nullifies the other’s impact, thus removing the question from the ambit of Title VII protection. This would be so only if the diseases were not linked to race; indeed, if race were not involved, Title VII would be totally inapplicable. When each condition is race-linked, however, Title VII’s focus upon the individual indicates that protection should be afforded to members of both races afflicted by their respective race-linked diseases.


tence of a comparable impact on whites from *some other cause* which might equalize the adverse impact on the protected class." 121 The Greyhound court's demand for this proof is based on an overly rigid approach to causation that severely conflicts with the settled practice in Title VII litigation of not imposing overly demanding proof requirements to establish a prima facie case. 122 Thus, the EEOC's proof that PFB predominantly affects blacks was sufficient to create an inference that the "no beard" policy predominantly affects blacks. 123 The additional showing required by the Third Circuit only presents a needless obstacle to plaintiffs in establishing their prima facie case in a Title VII action.

**IMPACT OF THE COURT'S DECISION**

The Greyhound decision will greatly hinder disparate impact litigation as a method of effectuating Title VII's goal of equal employment opportunity for all regardless of race. Contrary to Title VII policy, the Third Circuit's new rules significantly increase the burden of proof required to establish a prima facie case under this analysis. 124 Further, the Third Circuit's proportionate representation rule reduces the number of statistical methods available to prove a prima facie case in Title VII litigation. Contrary to Griggs and Dothard, 125 only population/work force statistics may now be used to

---

121. 635 F.2d at 199-200 (Sloviter, J., dissenting) (emphasis in the original). See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) ("[A]ny Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.").

122. See notes 99-102 and accompanying text supra.

123. As the EEOC argued:

[A] showing that 25% of blacks failed an employment test would not be sufficient to establish that the test had a disparate impact without evidence as to the failure rate among whites. This is so, however, because there is a real possibility that 25% of whites may have failed a given test. To mechanically impose the same proof requirement on the Commission in this case where the possibility of comparable disqualification rates among whites is virtually nonexistent serves no useful purpose . . . . [A] plaintiff need not disprove every logical possibility which would explain its statistics in non-discriminatory terms, as long as the plaintiff has convincingly demonstrated a significant disparity.


124. See notes 99-102 and accompanying text supra.

125. See notes 29 & 52 and accompanying text supra.
establish a prima facie case under the disparate impact theory and, consequently, population/work force statistics may now nullify a showing of disparate impact made through the use of general population or actual applicant statistics. By utilizing a statistical method formerly used only in establishing a prima facie case as a method of rebutting one, an invidious quota defense arises for an employer. The percentage of a given minority in the general population will now be the ultimate limit to which an employer is required to extend employment opportunities.

The Greyhound causation rule also restricts the statistical methods available to Title VII plaintiffs by necessitating the use of actual applicant statistics to prove a connection between the challenged policy and the requisite unequal result in the work force. Thus, the Third Circuit contradicted the Supreme Court’s statements in Griggs and Dothard that general population statistics alone are sufficient, and actual applicant or population/work force statistics need not be shown. Additionally, the causation rule brings about an enormous shift in the burdens of proof previously recognized under Title VII. A plaintiff must now prove that but for the challenged policy, the minority work force population would have been greater. Thus, the Greyhound rule converts an employer’s defense of insufficient numbers of minority applicants into an additional burden on the plaintiff to prove the proportion and number of actual minority applicants that were rejected. This new requirement, when combined with the court’s additional demand that a plaintiff disprove the existence of comparable impact upon whites from all other causes that might somehow equalize the impact of the policy on the minority, creates an insurmountable burden of proof never yet imposed upon plaintiffs in Title VII disparate impact litigation. The practical effect of this enormous burden will be to reduce the initiation of disparate

126. 635 F.2d at 193. See also notes 73 & 107 supra.
127. 635 F.2d at 196-97 (Sloviter, J., dissenting). Title VII does not require a work force to be racially balanced as long as any imbalance is not due to discriminatory employment practices. See Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) (employer not required to adopt policies to maximize the number of minorities in his work force); Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 891, modified in part, 13 Fair Empl. Prac. Cas. 1019 (C.D. Cal. 1976) (employer not required to hire minorities in proportion to their representation in the population); Western Addition Community Org. v. Alioto, 360 F. Supp. 733, 739 (N.D. Cal. 1973) (same). However, no authority exists for the proposition that an employer need not offer employment to blacks because of an already racially balanced work force. See, e.g., Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978); Vaughn v. Westinghouse Elec. Corp., 471 F. Supp. 281, 285 (E.D. Ark. 1979). The Vaughn court stated that: "[P]erhaps the employer believes that harmony in its work force can best be preserved by not allowing the number of black employees to exceed by much their proportion in the general population. . . . This motivation is forbidden by law."
128. See note 107 and accompanying text supra.
129. See notes 29 & 52 and accompanying text supra.
130. See note 118 and accompanying text supra.
131. 635 F.2d at 194.
132. See notes 99-102 and accompanying text supra.
impact litigation due to the difficulty of proving the prima facie case. Consequently, Title VII's goal of equal employment opportunity for all individuals regardless of race will be severely frustrated.\(^{133}\)

**Conclusion**

By limiting the methods of statistical proof available to plaintiffs, and imposing previously unnecessary causation elements upon them in proving a prima facie case based on the disparate impact theory, the United States Court of Appeals for the Third Circuit has drastically reduced the effectiveness of this analysis as a method of enforcement under Title VII. The court has effectively closed the doors to minority individuals who seek an equal employment opportunity merely because other members of that minority have already passed through those doors. While paying "lip service" to the spirit of Title VII and to the clear indications of the Supreme Court in Furnco, the court has created a precedent with disturbing implications. The "quota defense," in conjunction with the unwarranted causational obstacles hereby established, will impede further progress in achieving the societal goal of equality of employment opportunity. Since the approaches taken by the several circuit courts of appeals in deciding the questions presented in Greyhound differ significantly, and the answers to them are of such potential importance for so many minority individuals, ultimate resolution by the United States Supreme Court is desirable and, indeed, urgently needed.\(^{134}\)

Roger Carl Glienke

133. See notes 9-11 and accompanying text supra.

134. As this Note went to press, it appeared that the Supreme Court would soon be deciding the issue of whether proportionate representation of a minority in an employer's work force negates a finding of the disparate impact of an employer's hiring or promotion requirement on that minority.

In Teal v. Connecticut, 645 F.2d 133 (2d Cir.), cert. granted, 102 S.Ct. 89 (1981), four black state employees brought suit under Title VII alleging that a written examination, on which a passing score was a prerequisite to further consideration in the state's promotion process, had a disparate impact on members of their race. The passing rate on the examination for black candidates was approximately 68% that of the passing rate for white candidates. *Id.* at 136. The actual promotion rate of blacks, however, was 170% that of the actual promotion rate of whites. This was due in part to an affirmative action program used by the state in its promotion program. The trial court concluded that the results of the entire selection process, which included other factors such as past work performance, recommendations by supervisors, and seniority, was the proper basis for determining whether a prima facie case had been proved. Accordingly, the trial court dismissed the plaintiff's action for failure to prove a prima facie case because the results of the entire selection procedure were actually more favorable to black candidates than white candidates. *Id.* at 137.

The Court of Appeals for the Second Circuit reversed the trial court's decision. The appellate court ruled that "where a plaintiff establishes that a component of a selection process produced disparate results and constituted a pass-fail barrier beyond which the complaining candidates were not permitted to proceed, a prima facie case of disparate impact is established, notwithstanding that the entire selection procedure did not yield disparate results." *Id.* at 135. The court further stated that "Title VII cannot be interpreted to permit obvious denial of employment
opportunities to candidates that is solely attributable to non-job-related characteristics they possess that are incident to their race." *Id.* at 135.

Thus, the Second Circuit implicitly overrules its decision in *Townsend v. Nassau County Medical Center*, 558 F.2d 177 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978), and aligns itself with those circuits which hold that a prima facie case of disparate impact may be proved without a statistical showing of underrepresentation of a minority in hiring or promotion in an employer's work force. See note 35 *supra*. Since this view comports with the focus upon the individual found in both Title VII and the Supreme Court's holdings in *Furnco* and *Manhart*, the Supreme Court should affirm the judgment of the Second Circuit and bring final resolution to this question.