



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

CHAPTER VII

***IDENTIFICATION AND REMEDY OF EMPLOYMENT
DISCRIMINATION***



TABLE OF CONTENTS

7A INTRODUCTION TO CHAPTER VII.....574

7A00 CONTENT574

7A01 PURPOSE574

7A02 APPLICABILITY574

7A03 USE OF TERMS575

7A04 RELATIONSHIP TO SCRR575

7A05 PROCESS.....575

7A06 APPLICABLE LAW576

7B TIMELINESS AND CONTINUING VIOLATION.....576

7B00 TIMELINESS.....576

7B01 CONTINUING VIOLATION576

7C EMPLOYMENT DISCRIMINATION578

7C00 DISCRIMINATION DEFINED578

7C01 PROOFS578

7C02 ADVERSE ACTIONS/RESULTS578

7C03 CAUSAL AGENTS AND THEORIES OF DISCRIMINATION579

7C04 COMPARISON OF THEORIES.....579

7D DISPARATE TREATMENT PROOFS.....580

7D00 DISPARATE TREATMENT DEFINITION.....580

7D01 CLASSIFICATIONS OF DISPARATE TREATMENT.....580

7D02 DIRECT EVIDENCE OF DISPARATE TREATMENT581

7D03 INFERENTIAL DISPARATE TREATMENT581

7D04 COMPARATIVE DISPARATE TREATMENT PROOF.....582

7D05 STATISTICAL DISPARATE TREATMENT585

7D06 USE OF COMPARATIVE AND STATISTICAL PROOFS587

7E DISPARATE IMPACT588

7E00 DISPARATE IMPACT DEFINITION.....588

7E01 ADVERSE IMPACT.....588

7E02 MECHANICS OF PROOF.....589

7E03 POOL OF PERSONS USED IN IMPACT ANALYSIS589

7E04 UNIFORM APPLICATION.....589

7E05 FACIALLY NEUTRAL.....590

7E06 MEASUREMENT OF ADVERSE IMPACT590



**U.S. Department of Labor
Employment Standards Administration
Office of Federal Contract Compliance Programs**

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

7E07	CAUSATION	591
7E08	VALIDATION AND BUSINESS NECESSITY.....	591
7E09	USE OF DISPARATE IMPACT THEORY	592
7E10	DISCRIMINATION BASED ON MANNER OF SPEAKING OR ACCENT RELATED TO NATIONAL ORIGIN.....	592
7F	<u>REMEDIES</u>	593
7F00	INTRODUCTION	593
7F01	DESIGNING THE REMEDY	593
7F02	CORRECTIVE REMEDIES	593
7F03	MAKE WHOLE RELIEF.....	594
7F04	RIGHTFUL PLACE.....	594
7F05	FRONT PAY	594
7F06	RETROACTIVE SENIORITY	595
7F06A	OTHER REMEDIES AFFECTING A UNION AGREEMENT	597
7F07	<u>BACK PAY</u>	598
7F08	TIME LIMITS FOR RELIEF	600
7F09	CALCULATION OF INDIVIDUAL PACK PAY AWARDS.....	601
7F10	REMEDIES IN A PATTERN OR PRACTICE CASE	601
7F11	VICTIM-SPECIFIC REMEDIES.....	602
7F12	FORMULA RELIEF	604
7F13	NOTIFICATION TO CLASS MEMBERS.....	606
7F14	LIABILITY OF A SUCCESSOR EMPLOYER	607
APPENDICES		608
	APPENDIX 7A: INTEREST RATES FOR BACK PAY.....	608
	APPENDIX 7A-1: " <u>MACMILLAN</u> " FACTORS CONCERNING SUCCESSOR EMPLOYER LIABILITY	616
	APPENDIX 7B: IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION INDEX.....	618



7A INTRODUCTION TO CHAPTER VII

7A00 CONTENT

This Chapter contains detailed explanations of the proofs of employment discrimination based on the disparate impact and disparate treatment theories and methods for designing remedies for employment discrimination. It does not cover the investigative steps followed in a compliance review. The process to follow in investigating potential discrimination is set out in Chapter 3 of this Manual and the Standard Compliance Review Report (SCRR) Discrimination Worksheets and instructions that are appended to Chapter 3.

7A01 PURPOSE

The purposes of this Chapter are:

- (a) To state OFCCP policies on proving and remedying employment discrimination; and
- (b) To explain the techniques used to analyze whether employment discrimination exists.

This Chapter is intended to explain the theoretical bases for the procedures set out in Chapter 3 and the SCRR. It focuses on how to determine whether the facts of a case show employment discrimination and explains how to design remedies once employment discrimination has been established.

7A02 APPLICABILITY

This Chapter is primarily applicable to identifying employment discrimination in selections under Executive Order 11246, as amended, as opposed to disability based discrimination under Section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 701), or discrimination against Vietnam era veterans and special disabled veterans under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212). Procedures for investigating employment discrimination under Section 503 and 38 U.S.C. 4212 are covered in Chapters 2, 3, and 6 of this Manual. Appendix A of Chapter 6 contains detailed investigative guidelines on investigating complaints filed by special disabled veterans and individuals with disabilities. A detailed theoretical discussion of proofs used in Section 503



and 38 U.S.C. 4212 cases will be issued as an addition to this Chapter at a future time. Also, this Chapter does not specifically address religious discrimination or accommodation. Guidance on these issues will also be provided in the future. The remedies portion of this Chapter is applicable to all three programs.

7A03 USE OF TERMS

Throughout this Chapter certain shorthand terms are used. The term "prohibited factor" means a factor prohibited by law from being used in making employment decisions. Under Executive Order 11246, as amended, the prohibited factors are race, color, religion, sex, and national origin. Under Section 503 of the Rehabilitation Act of 1973, as amended, the prohibited factor is disability; under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, it is covered veteran's status. However, since this Chapter focuses on Title VII principles, which relate primarily to the prohibited factors specified in the Executive order, one should be careful in applying it to investigations under Section 503 or 38 U.S.C. 4212. For example, there are unique circumstances involved in Section 503 cases, such as determining whether the individual meets the statutory definition of "an individual with a disability" and/or consideration of the contractor's obligation to make reasonable accommodation. Also, the phrase "minorities and women" is used as shorthand for "prohibited factors." The use of shorthand terms is not meant to imply that other groups such as nonminority males are not protected from employment discrimination.

7A04 RELATIONSHIP TO SCRR

During the initial phases of the compliance review, the Compliance Officer (CO) completes Worksheet 17 of the SCRR which is a summary of potential discrimination problems. The potential problems are investigated onsite. The SCRR contains a number of "Potential Discrimination Worksheets." These Worksheets start with refinement of data and proceed through the analytical process. The analytical process consists of two steps. First, the CO must determine whether the particular problem is to be analyzed as an individual case or as a pattern or practice (systemic) case. Next, the CO must determine whether to analyze the problem under the disparate treatment or disparate impact theory, or both. This Chapter discusses these issues, and should be used in conjunction with the SCRR.

7A05 PROCESS

When the CO identifies an instance of potential employment discrimination, he/she conducts an in-depth onsite investigation. If, after analysis of the relevant facts, the CO concludes that there has been



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

employment discrimination, he/she will present these preliminary findings to the contractor. Individual problems of discrimination are presented in a Notice of Violation and pattern or practice problems are presented in a Pre-determination Notice (see Chapters 3, 6, and 8). The contractor then has an opportunity to respond. The CO will investigate the contractor's response and, where it is sufficient, the allegation of discrimination will be dropped. Where the response is insufficient or shown to be a pretext, the CO will offer to conciliate a settlement with the contractor. If settlement cannot be reached, OFCCP may recommend enforcement.

7A06 APPLICABLE LAW

It is OFCCP's policy to interpret the nondiscrimination requirements of Executive Order 11246, as amended, in a manner consistent with Title VII principles.

7B TIMELINESS AND CONTINUING VIOLATION

7B00 TIMELINESS

As a general rule, one seeking to remedy a discriminatory act must assert his/her rights within the time frames established by the statute or other law establishing the rights. Under OFCCP procedures, for an act of discrimination discovered during a compliance review to be a violation of the Executive order, Section 503, or Section 4212, it must have taken place within two years prior to the initiation of the compliance review (Scheduling Letter) unless the violation is part of a continuing violation. Complaints are timely if they are filed within 180 days of the alleged discriminatory act, except for good cause shown, in which case the Deputy Assistant Secretary (DAS) or Regional Director (RD) may waive the filing deadline.

7B01 CONTINUING VIOLATION

The continuing violation concept was developed by the courts to address the fact that some employment practices cannot logically be viewed as discrete incidents, occurring and ending at particular points in time. For example, a policy of paying lower wages to women for the same work for which men receive higher wages is discriminatory, and the violation is repeated each time the women are paid. In evaluating such a violation, courts have considered actionable the entire time period during which it occurred since the effective date of the law. For example, a continuing violation which is grounded in racial



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

discrimination is actionable from the date the continuing practice began or the effective date of Executive Order 11246 (September 1965), whichever is later, provided, of course, the other requirements of coverage are met.

(a) Continuing Violation Theories: The continuing violation theory has been analyzed as encompassing three separate sub-theories:

- (1) A series of related acts (continuing course of conduct);
- (2) Maintenance of a discriminatory policy or system; and
- (3) The present effects of past discrimination.

In recent years, OFCCP has not applied the present effects of past discrimination theory. The case law on the present effects theory is being studied and further guidance will be provided as the issue is clarified.

(b) Application of Continuing Violation Theory: The OFCCP applies the continuing violation theory in compliance reviews and complaint investigations. The theory will be applied in the following situations:

- (1) Series of Individual Discriminatory Acts: A continuing violation may be identified where the discrimination involves a series of closely related acts, the last of which occurred within the 2-year period preceding the initiation of the compliance review (Scheduling Letter) or, in the instance of a complaint investigation, within 180 days from the date the complaint is filed. The acts must be sufficiently related to form a pattern of discrimination.
- (2) Maintenance of a Discriminatory Policy or System: A continuing violation may be found where a contractor maintains a discriminatory policy or practice into the 2-year, or 180-day period. The violation may focus on one particular employment practice, such as promotions or compensation, or it may deal with discrimination across-the-board in areas including initial placement, promotions, transfers, and salary. It is not necessary under this subtheory to show that a discrete act representing the alleged discriminatory policy occurred during the 2-year or 180-day period. It is sufficient to show that the policy or system continued into the period, and that if there had been a personnel action, the policy or system would have been applied in the allegedly discriminatory manner.



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

- (c) Remedies Under a Continuing Violation: Once a continuing violation has been established by showing a series of related acts, one of which occurred within the liability period, or a continuing employment policy that extended into the liability period, all acts that are part of the continuing violation (since the effective date of the law under which relief is sought), whether they occurred within or outside of the 2-year or 180-day period, may be remedied. (See the discussion "Time Limits for Relief" (Section 7F08) for how remedies are developed for a continuing violation.)

7C EMPLOYMENT DISCRIMINATION

7C00 DISCRIMINATION DEFINED

Discrimination is unfair, but not all unfair treatment is discriminatory. Something more than simple unfairness; i.e., unfairness not based on a prohibited factor, is necessary to constitute illegal discrimination. At its most elementary level, employment discrimination is established by showing a nexus between an adverse action; e.g., a termination, and a prohibited factor. The different theories (or categories) of discrimination are different ways of looking at an adverse action which you have observed and determining whether there is a nexus between that action and some prohibited factor.

7C01 PROOFS

"Proofs" of discrimination are the factual formulations which show that discrimination under a particular theory exists. These formulations tell you the facts you need to know in order to show a nexus between a particular adverse action or result and a particular prohibited factor. Proofs of discrimination can be used during an investigation as a guide for developing facts and at the close of an investigation as a test for determining whether discrimination has been established.

7C02 ADVERSE ACTIONS/RESULTS

The adverse actions or results being examined in a compliance review will generally be indicated by concentrations and underrepresentations of minorities and women and adverse Impact Ratio Analyses (IRAs). (See Section 2O of Chapter 2.)



7C03 CAUSAL AGENTS AND THEORIES OF DISCRIMINATION

There are two primary theories of discrimination--disparate treatment and disparate impact. Disparate treatment occurs when similarly situated people are treated differently because of being minority or female; e.g., having a different attendance rule or set of job qualifications for women than for men. The focus in a disparate treatment case is on the contractor's intent; i.e., did the contractor intend to treat individuals differently because they are a minority or a woman? In contrast, disparate impact focuses on the results of a practice. Disparate impact occurs when a facially neutral employment process/practice has an unjustified exclusionary effect on minorities or women; e.g., where a particular job requirement unjustifiably screens out most women but not most men. Thus, in a disparate impact case, it is the consequences of employment processes/ practices, rather than the intent behind the process or practice, which is of concern.

7C04 COMPARISON OF THEORIES

In the abstract, the disparate treatment and disparate impact theories of discrimination are quite different. For example, as previously mentioned, the focus of a disparate impact case is results. A disparate treatment case involves employment processes/ practices which are differentially applied (intentional discrimination) while a disparate impact case involves those uniformly applied. For the most part the various proofs used to establish each theory are also quite different. However, as discussed later, there is one factual situation where the proof requirements become less distinguish-able: cases involving substantial differences in application of subjective criteria between minorities or women and others. These cases should normally be analyzed under both statistical disparate treatment and disparate impact. The issue of whether the disparate impact theory may be used to analyze subjective criteria was recently settled by the U.S. Supreme Court in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 No. 86-6139, 47 FEP Cases 102, (June 29, 1988). The Court stated, "We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases."

7C05 USE OF THEORIES

- (a) Use of Multiple Theories: All cases may be analyzed under one or more theories of discrimination. Analysis under more than one theory may be desirable during the investigation. If it is not clear at the start of an investigation which theory should be pursued, it may be helpful to attempt to develop facts under two theories to determine which theory is best suited to the facts of the case.



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

- (b) Individual and Class Cases: As a general rule, certain proofs lend themselves to certain kinds of cases.
- (1) Individual cases--those that are based on what happened to an identified individual as opposed to a group of persons--are usually analyzed under a comparative disparate treatment proof (explained below). Disparate impact may be used in individual cases, but it is less common.
 - (2) Class cases--those based upon the effect of the contractor's policies and practices on a group--are most frequently analyzed under the disparate impact or statistical disparate treatment proofs.
- (See Chapter 3 and SCRR instructions on "Individual vs. Pattern or Practice.")
- (c) Objective and Subjective Criteria/Processes: Both disparate impact and disparate treatment proofs may be used to analyze "objective" and "subjective" factors although "objective" factors are usually analyzed first under the impact theory. (See SCRR instruction at Appendix A of Chapter 3 for an explanation of the process for analyzing objective and subjective factors.)

7D DISPARATE TREATMENT PROOFS

7D00 DISPARATE TREATMENT DEFINITION

Disparate treatment exists where the contractor treats similarly situated people differently because of a prohibited factor. (It does not matter whether the treatment is better or worse, only that it is different.) This theory centers on the contractor's intent.

7D01 CLASSIFICATIONS OF DISPARATE TREATMENT

- (a) Two Classifications: Disparate treatment can be classified under two broad headings--Direct Evidence Proof and Inferential Proofs.
- (b) Inferential Proofs: Inferential Proofs can be further broken down into-- Comparative Disparate Treatment Proofs and Statistical Disparate Treatment Proofs.



7D02 DIRECT EVIDENCE OF DISPARATE TREATMENT

- (a) Elements of Direct Evidence Proof: Direct evidence cases are those where the intent to discriminate is obvious on the face of the facts. It is explicit. For ex-ample, a job may be limited to men only. The job description may limit the job to men. In such a case all that is required is the job description and a showing that the sex limitation is implemented. Also, statements by selecting officials may be sufficient to establish a direct evidence case. For example, the official states that he would not hire a Black person. Under these circumstances the CO should provide proof that the statement was made and that the Black person(s) was not hired. Direct evidence could be found where a contractor official tells the CO and the CO records the racial statement in his/her notes; the CO inter-views a witness who heard the official make the statement; the official made a notation on company records; company records of management meeting show that the official made the statement, etc. Other types of direct evidence include racial or sexual slurs by management, evidence of management's stereotyped views of minorities or women, and management's knowledge of and tolerance of sexual harassment. Isolated slurs, by themselves, will not support a violation. However, they may be supportive of other evidence (statistical or comparative) of differential treatment. Also, there could be a violation if there was a pattern of slurs creating a racially (or sexually) hostile environment. Of course, if the direct evidence amounts to an admission of discrimination, a violation is established.
- (b) Contractor Response: Where credible direct evidence of an intention to treat individuals differently because they are minorities or women is discovered, a violation is established. Once direct evidence of intentional discrimination is shown to exist, in order to prevail a contractor must show that the same decision would have been reached absent discrimination or that a sexual (or religious) distinction is justified under the extremely stringent standards of a bona fide occupational qualification. Direct evidence cases may be either individual or class cases.

7D03 INFERENCE OF DISPARATE TREATMENT

- (a) Inference of Intent: The reason for the differential treatment observed by the CO frequently is not evident. It may be a known fact that a minority or woman was not selected for a particular position, but there is no admission or other direct evidence to show intent. In order to establish a case under these circumstances, the CO must construct a proof which will permit one to infer the intent to discriminate.
- (b) Meaning of Intent: As used here, showing "intent" does not mean showing what thought actually went through the contractor's head as she/he made the employment decision in question. What is



required is to produce facts from which one could logically infer that the contractor based his/her decision on a prohibited factor (circumstantial evidence). Since the discriminatory intent is not obvious from the facts, sufficient circumstantial evidence must be produced to make it more likely than not that the contractor's decision was based on a prohibited factor. In other words, sufficient evidence must be produced to infer that the contractor intended to discriminate.

- (c) Basis for the Theory - Similarly Situated Persons: Discriminatory intent can be inferred from the fact that similarly situated minorities and nonminorities (or men and women, etc.) are treated differently in a similar employment situation. The idea in this proof is that if minorities and women and others are truly similarly situated, it is reasonable to expect that they will receive the same treatment during a particular selection decision. If they do not, discriminatory intent can be inferred and the CO should seek the contractor's explanation for the apparent violation. Whether two individuals are "similarly situated" depends upon the selection decision at issue. Persons who are similarly situated are those who possess similar qualifications or have shown similar performance. For example, in a hiring case, all qualified applicants for a particular job are similarly situated to each other, and all those not qualified are similarly situated to each other.
- (d) Comparative and Statistical Evidence: There are two methods used to establish a case of discrimination where intent must be inferred. Disparate treatment may be inferred from comparing individually how similarly situated minorities and women as opposed to others are treated or by comparing differences in their collective treatment, such as a statistical comparison of selection rates for minorities and nonminorities for a particular job. In this Manual, a demonstration of disparate treatment based predominantly on nonstatistical comparisons of individuals will be called a "comparative disparate treatment proof." Similarly, a demonstration of disparate treatment based predominantly on a statistical showing of different treatment based on minority group or female status will be referred to as a "statistical disparate treatment proof." Both of these usages are somewhat arbitrary but basically accurate terminology.

7D04 COMPARATIVE DISPARATE TREATMENT PROOF

- (a) Basis of Proof: As previously mentioned, a comparative disparate treatment proof is a nonstatistical showing that similarly situated minorities or women are treated differently than nonminorities or males in a similar employment situation. If all of the known nondiscriminatory factors used in making the employment decision are accounted for, then differences in treatment between the similarly situated minorities or women and others can be attributed to discrimination. Comparative evidence could include facts from interviews, application forms, personnel records, etc.



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

- (b) Use of Proof: Comparative disparate treatment proofs are normally used in individual, rather than class cases. They can be used when it is not possible to do a statistical disparate treatment analysis due to small sample size, poor data, etc. Note that it is possible for an individual case of discrimination to exist even though the contractor's statistics do not show that a pattern or practice of discrimination exists. The comparative disparate treatment proof is addressed on Worksheet 17-3 of the SCRR.
- (c) Mechanics of Proof: In this proof one compares the qualifications of the person(s) selected to those of the person(s) rejected. The theory is that if differences in qualifications do not account for the employer's actions, then the different treatment may be due to a prohibited factor. The comparison may be on the basis of minimum objective qualifications or relative qualifications.
- (1) Minimum Objective Qualifications: An employment decision may be based solely on a person meeting some minimum objective qualification such as an education level or time in grade. In this situation the employer applies the criteria as a pass/fail screen, rather than to make a comparison. An example would be a career ladder progression where everybody is promoted after one year in grade. In this situation, promotion does not depend upon a comparison with another person. It should be automatic once the minimum requirement is met. If all majority group members with a year in grade are promoted, but a minority with a year in grade is not, a violation has likely occurred. In these situations, an issue of discrimination may be raised merely by showing different treatment of minorities or women as opposed to others who possess similar minimum objective qualifications. If the only obvious difference among similarly situated persons is their minority group status or sex, then any difference in their treatment would appear to be due to such status.
- (2) Relative Qualifications: Decisions based on relative qualifications require a comparison of qualifications to determine which persons have more of what the employer wants. Where a minority or woman who was not selected had equal or better qualifications than a nonminority male who was selected, the CO should seek an explanation. (Qualifications are defined by the contractor, but the CO should be careful to analyze only those qualifications actually used by the contractor, not those he says he uses.) Examples of relative qualifications are: highest typing speed, most relevant education, most relevant experience, etc.
- (3) Multiple Qualifications: Employment decisions may be based upon both minimum objective qualifications and relative qualifications. Contractors will often use minimum



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

qualifications as a pass/fail screen to decide who will be considered a serious candidate for selection. For example, an employer may require that a person possess a certain level of education or experience before being considered for selection. Those who meet the minimum qualifications are then compared to each other, and a decision is made based upon the best qualified. Relative qualifications are normally higher than minimum qualifications and usually are used to select which individual will be chosen from a pool of minimally qualified candidates. To determine whether discrimination is occurring, and, if so, where, it is necessary to examine both components of the decision: application of the minimum qualifications to create a pool of serious candidates and application of the relative qualification used to select from those in the pool.

- (d) Contractor's Response to a Comparative Disparate Treatment Case: When OFCCP identifies potential discrimination, the contractor is given an opportunity to respond. A case based upon the comparative disparate treatment method will normally be an individual case. The contractor's response usually asserts:
- (1) The alleged discrimination occurred outside the timely period. (See Section 7B on Timeliness and Continuing Violation.)
 - (2) The facts used to identify potential discrimination are in-correct. (For example, the contractor shows factual differences between group members--they were not similarly situated.)
 - (3) The alleged discriminatory actions were based on a "facially neutral" reason; e.g., seniority, job performance, qualifications, etc., not considered by the CO.
 - (4) The contractor may also produce any evidence relevant to intent concerning the disputed action(s); e.g., comparison of workforce statistics to availability, etc.
- (e) Pretext: OFCCP must determine whether the contractor's response is sufficient to rebut discrimination or if it is merely a pretext for discrimination. Pretext means that the reasons offered by the contractor are not true or, even if true, they are not the real or only explanation for the conduct. One common way to show pretext is to demonstrate that the contractor has not applied its alleged nondiscriminatory reason in a uniform manner. For example, where the contractor states that a minority person was not hired because he did not possess a particular qualification, pretext can be demonstrated if the nonminority person selected also lacked the qualification. For a discussion of the ways of showing pretext in an individual disparate treatment case see the SCRR instructions for Worksheet 17-3 of that document.



7D05 STATISTICAL DISPARATE TREATMENT

- (a) **Basis of Proof:** Statistical disparate treatment cases are based on the statistical significance of the difference in treatment of similarly situated minorities/women and others. The difference in treatment may relate to selection rates, promotions, training, and/or other personnel actions. Disparities are usually measured in standard deviations. The landmark statistical disparate treatment cases are Hazelwood School District v. U.S., 433 U.S. 299, 15 FEP Cases 1 (1977) and Teamsters v. U.S., 431 U.S. 324, 14 FEP Cases 1514 (1977). However, see Bazemore v. Friday, 478 U.S. 385, 41 FEP Cases 92 (1986), for more recent developments.
- (b) **Mechanics of Proof:** A statistical analysis generally starts by identifying a pool of similarly qualified and available (similarly situated) minorities/women and others. Since the only significant difference among similarly situated pool members is their minority group status or sex, one would expect that, absent discrimination, the percentage of women or minorities and others selected from the pool would be approximately equal to their representation in that pool. A statistical test is conducted to measure the probability that the representation of women or minorities among those actually selected from the pool of similarly situated candidates occurred by chance. The probability is usually measured in standard deviations. The greater the standard deviation, the less likely the actions being reviewed occurred purely by chance. (See SCRR Worksheets 17-12a and b for instructions on how to calculate the standard deviation.)
- (c) **Relevant Pool:** The first task in a statistical analysis is to identify the relevant pool of similarly situated persons. In a hiring case the relevant pool of similarly situated persons are those who possess the minimum objective qualifications actually used by the contractor (see Section 7D04 (c) above for a discussion of qualifications). In a promotion case, it would be all the persons qualified for promotion. Proof is weakened (or destroyed) to the extent that factors actually applied but not considered in developing the pool account for the differences in treatment. Note: If qualifications do explain difference in selection rates, test the legitimacy of the qualifications under the disparate impact theory (Section 7E below).
- (d) **Level of Disparity:** Normally, two or more standard deviations will raise an inference of discrimination. If the disparity in selection rates for members of a particular minority group or women as opposed to others is two or more standard deviations, it is highly unlikely that the disparity happened by chance. The greater the number of standard deviations, however, the greater the probability that the disparity is due to the use of a prohibited factor in the decision. Statistical evidence of disparities less than two standard deviations will not alone raise an



inference of discrimination, but may raise an inference in conjunction with other evidence of discrimination. Findings of discrimination are based upon consideration of the totality of the evidence; e.g., instances of comparative disparate treatment and direct evidence as well as statistical evidence.

- (e) Supporting Evidence: While courts have held that statistics alone may be sufficient to prove discrimination where disparities are gross; i.e., at least two standard deviations, supporting evidence strengthens statistical cases and should always be sought. One type of supporting evidence is anecdotal evidence. Anecdotal evidence consists of statements from minorities or women who can show that they met all of the contractor's requirements but still did not receive the benefit at issue, and any first hand accounts of discriminatory acts on the part of the contractor that support the statistical inference. Thus, anecdotal evidence is not limited to independent examples of comparative disparate treatment. In addition, direct evidence; e.g., biased statements by the contractor's officials involved in the employment transaction at issue, is obviously highly relevant to intent. Statistical disparate treatment cases also could be supported by evidence that the statistical disparity is "longstanding," that it has existed for some time and is not just a statistical fluke based on the particular time period being examined (see SCRR instructions on supporting evidence).
- (f) Contractor's Response: Once OFCCP has identified potential statistical disparate treatment, the contractor has an opportunity to present its response. (See Chapter 3 for a description of the Predetermination Notice that would be issued at this point.) Common responses to a statistical disparate treatment allegation are:
- (1) Individuals in the pool are not similarly situated.
 - (2) The pool does not represent the feeder group from which the contractor made selections. In other words, the model used by OFCCP does not accurately reflect the contractor's employment process and/or selection criteria.
 - (3) The difference in selection rates from the pool is not statistically significant at the two standard deviations level.
 - (4) The pool is not restricted to the appropriate time period; e.g., it includes selections made outside of the timeliness period.
 - (5) The wrong statistical method was used.



- (g) Pretext: As with the comparative disparate treatment proof, pretext is demonstrated by showing that the reason offered by the contractor to explain the disparity is not true or, even if true, is not the real or only explanation. The CO should evaluate whether any reason offered by the contractor as a response is uniformly applied. Contractor assertions that certain variables not considered by the CO explain away disparities which gave rise to the inference of discrimination are not sufficient to drop the investigation. The contractor must present facts to support the contention that the factor(s) not considered is a major factor which changes the outcome of the statistical analysis. The CO must also determine whether the asserted factor(s) is itself discriminatory. For example, where the contractor asserts that the CO considered the wrong feeder groups for a particular promotion, and that only a few jobs within those groups actually form the promotion pool, the CO must determine whether the contractor relies on those few jobs because people in those jobs possess unique skills, or because nonminorities are concentrated in those jobs. If assistance is needed to assess a contractor's argument about the statistical methodology used, the CO may contact the Division of Policy, Planning, and Review at the OFCCP National Office through regional channels. (See also the discussion of pretext in the SCRR instructions.)

7D06 USE OF COMPARATIVE AND STATISTICAL PROOFS

- (a) Statistical Proofs: Generally, a statistical disparate treatment analysis should be attempted in all cases before resorting to an individual comparative analysis. This is because it is preferable to establish disparate treatment discrimination through a statistical proof rather than an individual proof. Statistical cases are generally easier to construct and identify more potential victims. There are many tests for statistical significance which statisticians use in different circumstances. The SCRR describes one formula for determining statistical significance which will be appropriate for most cases where the numbers are sufficiently large (see SCRR Worksheet 17-12a). One rule of thumb for identifying groups large enough to do this test of statistical significance is if the total group is at least 30 and the number of minorities or women expected to be selected is at least 5. At least 5 minorities or women "expected to be selected" means that if minorities or women were selected from the pool in proportion to their representation in the pool, at least 5 would be selected. Where numbers are not large enough to use the test of statistical significance described in the SCRR, the CO may contact the OFCCP National Office (through regional channels) to discuss methods for analyzing small groups or pursue a comparative disparate treatment proof (see SCRR Worksheets 17-3a and 3b). A sound statistical disparate treatment case allows the investigator to impute to each minority or woman the type of treatment experienced by the entire group of minority or female employees or applicants without having to develop each individual case.



- (b) Comparative Proofs: The comparative disparate treatment proof does not depend upon statistics to infer discrimination. As a result, the comparative disparate treatment proof is used primarily in individual cases and as support in statistical cases (anecdotal evidence), although it may be used for nonstatistical class cases.

7E DISPARATE IMPACT

7E00 DISPARATE IMPACT DEFINITION

Disparate impact is a theory of employment discrimination based on the disproportion-ate effect of a facially neutral criterion/ process. The theory refers to the discriminatory effects of uniformly applied employment criteria/processes that are neutral on their face but which more harshly affect minorities or women and cannot be justified by business necessity or job relatedness. Because the disparate impact analysis addresses the effects of a particular requirement on groups of people, it is generally a statistical proof.

7E01 ADVERSE IMPACT

- (a) Definition: Adverse impact is a substantially different rate of selection in hiring, promotion, transfer, training or in other employment decisions which works to the disadvantage of minorities or women. If such rate is less than 80 percent of the selection rate of the race, sex, or ethnic group with the highest rate of selection, this will generally be regarded as evidence of adverse impact. Adverse impact analyses based on the 80-percent rule may be buttressed by a test of statistical significance. For further discussion, see Section 7E06.
- (b) OFCCP Investigatory Process: In order to clarify the distinction between a prima facie case and a finding, the OFCCP investigatory process set out in chapters 2 and 3 and the SCRR distinguishes adverse impact from disparate impact. Adverse impact is used to refer to the results of the statistical analysis and disparate impact is used to refer to adverse impact that the contractor has not been able to justify on the basis of business necessity or job relatedness. Adverse impact is what the CO alleges in the Predetermination Notice, while disparate impact is what is found when the contractor fails to adequately account for the adverse impact. This distinction in terms is used by OFCCP for purposes of clarity. Neither EEOC nor the courts make such a distinction but use the terms interchangeably.



7E02 MECHANICS OF PROOF

Since disparate impact cases result from the effects of the selection criteria/processes rather than from the contractor's intentional action, there is no need to produce evidence concerning the contractor's intent. However, if evidence of intent to discriminate is discovered in the course of the investigation, a disparate treatment analysis should also be conducted.

7E03 POOL OF PERSONS USED IN IMPACT ANALYSIS

The pool of persons used for analysis in an impact proof is different from the pool used in a statistical disparate treatment proof. This is because the question being asked in each analysis is different. The question being asked in a statistical disparate treatment analysis is whether similarly situated; e.g. qualified, people of different minority group status or sex are being treated differently. In a statistical treatment analysis, the pool used for analysis consists of persons who meet the contractor's minimum objective qualifications. For example, if the contractor requires a high school diploma, only persons with high school diplomas are placed in a pool. The question being asked in an impact analysis is whether facially neutral, uniformly applied criteria are causing a disproportionately lower selection of women or minorities. Thus, in an impact analysis it is the effect of the high school diploma requirement in preventing minorities and women from even getting into the pool that is being examined. Therefore, the relevant pool for analysis in the disparate impact test is all applicants. In an impact analysis, look at all applicants to see the proportion that were eliminated from further consideration by the facially neutral criteria/processes.

7E04 UNIFORM APPLICATION

After identifying the criteria/processes that are used in the employment decision being examined (see SCRR Worksheet 17-4 and instructions), the CO must ensure that they are uniformly applied before calculating their impact (SCRR Worksheet 17-5 and instructions). Uniform application means that the contractor applied them to minorities or women and others in the same manner, and that the results of criteria/procedures are likewise used in a uniform manner. If the contractor were to use some criterion/procedure in a nonuniform manner in making a decision, disparate treatment (intentional discrimination) rather than disparate impact may exist. For example, if the contractor required a high school diploma for hire, but applied the rule only to minorities, disparate treatment may exist. If the contractor requires all hires to have a high school diploma and the requirement eliminates substantially



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

more minorities than nonminorities, it has an adverse impact and the contractor must show job relatedness or business necessity. Even if the contractor can show job relatedness or business necessity, a violation may still exist if there is another selection procedure with less adverse impact which would serve the contractor's legitimate interest in efficient and trustworthy workmanship and which is substantially equally valid for a given purpose (41 CFR 60-3B).

7E05 FACIALLY NEUTRAL

A criterion/process is facially neutral if it makes no reference to a prohibited factor. If something is not facially neutral, it explicitly uses a prohibited factor as a selection criterion. For example, a job description which includes sex as a requirement would be a case of direct evidence disparate treatment rather than disparate impact.

7E06 MEASUREMENT OF ADVERSE IMPACT

- (a) 80-Percent Rule: OFCCP has adopted an enforcement rule under which ad-verse impact will not ordinarily be inferred unless the members of a particular minority group or sex are selected at a rate that is less than 80 percent or four-fifths of the rate at which the group with the highest rate is selected (41 CFR 60-3.4D, Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (Questions and Answers) (Nos. 10-27)). When a minority or female selection rate is less than 80 percent of that of White males a test of statistical significance should be conducted. (See SCRR Worksheets 17-6a, 6b, and accompanying instructions.) The 80-percent rule is a general rule, and other factors such as statistical significance, sample size, whether the employer's actions have discouraged applicants, etc., should be analyzed.
- (b) Very Large Samples: Where sample size is very large, determinations of ad-verse impact should be based on tests of practical and statistical significance, rather than the 80 percent rule. This is because when large numbers of selections are made, relatively small differences in selection rates may be both practically and statistically significant (41 CFR 60-3.4D, Questions and Answers Nos. 18, 20, and 22).
- (c) Small Samples: Where the 80-percent rule indicates adverse impact but the analysis is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedures had when used in the same manner in similar circumstances elsewhere may be



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

considered in determining adverse impact. If a lower selection rate continued over a period of time, so as to constitute a pattern, then the lower selection rate would constitute adverse impact (41 CFR 60-3.4D; Questions and Answers Nos. 20, 21, and 23). Where the sample size is small also consider aggregating data in an appropriate fashion or using a statistical test designed for small numbers. Appropriate ways to increase the pool include considering evidence of impact over a longer period of time and/or evidence concerning the impact that the selection procedures had when used in the same manner in similar circumstances elsewhere (41 CFR 60-3.4D, Questions and Answers No. 20). For assistance in determining whether there are tests of statistical significance which may be appropriate for small groups contact through appropriate regional channels the Division of Policy, Planning, and Review in the OFCCP National Office.

7E07 CAUSATION

It must be shown that the criterion/process at issue contributes to the disparity being investigated. An example would be a test that people had to pass in order to be considered for an interview which determined whether they would be hired. If there is a substantial disparity in the passing rates between minorities or women and others and people who failed the test were not considered for the interview, the causal link to the disparity is shown. However, if the test is given but not actually used in the selection process, a causal link with the disparity cannot be established even if minorities or women scored significantly lower on it. (Note: there are statistical tests which may be used to determine whether test results actually influenced selection decisions despite contractor denials.) While the CO must make every possible effort to identify the criterion/process that caused the disparity, there may be times when it will not be possible as when the contractor failed to keep the required records. Under these circumstances it is sufficient to show the bottom line adverse impact since 41 CFR 60-3.4D provides, inter alia, "Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force." (Also, see SCRR Worksheet 17-6a and accompanying instructions.)

7E08 VALIDATION AND BUSINESS NECESSITY

A contractor can justify use of a selection procedure which has adverse impact by showing that the procedure has been validated according to the technical requirements of the Uniform Guidelines on Employee Selection Procedures (41 CFR Part 60-3). Validation is the process of showing job relatedness



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

by showing the relationship between the selection procedure performance and job performance. "Validated in accordance with the Guidelines" means a validation study which complies with all applicable standards of the Guidelines. There are circumstances where a contractor may also justify adverse impact by showing that a selection procedure is required by "business necessity"; i.e., the contractor can show that the selection procedure is job-related and necessary to the safe and efficient operation of its business. Business necessity and validation claims can be rebutted where there are alternatives available that have less adverse impact. See the instructions to Worksheet 17-6b of the SCRR for a detailed discussion of validation and business necessity.

7E09 USE OF DISPARATE IMPACT THEORY

Disparate impact theory may be used to analyze both objective and subjective criteria/ processes. However, as noted above, an impact analysis should be limited to criteria/ processes that are uniformly applied. It is important to ensure that both objective and subjective criteria/procedures are uniformly applied before performing an adverse impact analysis. If they are not uniformly applied, then there is disparate treatment. Chapter 3 and the Potential Discrimination Worksheets of the SCRR (pp. 17-1 through 17-12) discuss in detail the analysis of objective and subjective criteria under the disparate impact theory.

7E10 DISCRIMINATION BASED ON MANNER OF SPEAKING OR ACCENT RELATED TO NATIONAL ORIGIN

- (a) National Origin Discrimination: Section 202 of Executive Order 11246, as amended, prohibits discrimination because of national origin. Similarly Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of national origin. The term "national origin" is not defined in Executive Order 11246 or its implementing regulations. Title VII case law establishes that denial of an employment opportunity because of manner of speaking or accent is unlawful discrimination on the basis of national origin (Carino v. University of Oklahoma Board of Regents, 26 EPD 31,974 (W.D. Okla. 1981), affirmed, 750 F2d 815, 35 EPD ¶34,850 (10 Cir. 1984) and Berke v. Ohio Department of Public Welfare, 628 F2d 980, 24 EPD ¶31,217 (6th Cir. 1980). The Equal Employment Opportunity Commission issued a policy statement (Notice N-915) on August 4, 1986 in accordance with Title VII case law. (See also the EEOC Guidelines on Discrimination Because of National Origin, 29 CFR Part 1606.6.)



- (b) OFCCP Policy: A foreign speaking accent that does not interfere with an employee's or an applicant's ability to perform duties in the work place is not a legitimate justification for an adverse employment decision.

7F REMEDIES

7F00 INTRODUCTION

Remedy represents a separate and distinct phase of the investigation. While the CO should be thinking about remedy throughout the investigation and trying to obtain the information necessary to determine the appropriate remedy, conclusions about the final definition of remedy should be reserved until the CO has sufficient information to make a finding that there has been discrimination. This normally does not occur until the CO has presented the contractor with the preliminary findings, the contractor has submitted its response, and the CO has determined that the contractor's response does not adequately explain the alleged discrimination. The issues raised in the remedy phase of an investigation are very different from those raised during the violation phase. At the point when you begin identifying specific remedies, discrimination has been established. The issues in the remedy phase are what remedies are necessary to:

- (a) Make the discrimination victims whole;
- (b) Stop the violation; and
- (c) Prevent the violation from recurring.

7F01 DESIGNING THE REMEDY

There is much more flexibility in designing remedies than there is in proving an initial violation of discrimination. Remedies are frequently reached through negotiation and compromise. There are, however, general guidelines in designing remedies. The CO should always seek a complete remedy. A complete remedy will correct the cause(s) of the discrimination (corrective remedies) and make the victim(s) of discrimination whole.

7F02 CORRECTIVE REMEDIES



Part of a complete remedy is the corrective remedy. Corrective remedies are those designed to stop the violation and protect against its recurrence. For example, if hiring discrimination is caused by treating applicants differently during a subjective interview, corrective remedies could include stopping the use of the discriminatory interviews, substituting legitimate objective criteria; i.e., objective criteria with no unjustified adverse impact, and establishing a monitoring system to ensure that the criteria are applied in a nondiscriminatory fashion. If discrimination is caused by use of an unvalidated test which has adverse impact, corrective action would include either eliminating the use of the test or continued use of the test in a manner which eliminates its adverse impact; e.g., changing the cut-off score.

7F03 MAKE WHOLE RELIEF

- (a) General Principles: Make whole relief means simply that the victim of discrimination is restored to the position, both economically and in terms of status, that he/she would have occupied had the discrimination never taken place. This usually involves placing the person in his/her rightful place; i.e., the job the person would have occupied with the seniority he/she would have had but for the discrimination. In addition to rightful place, make-whole relief includes all economic benefits the victim would have received had the discrimination not taken place. This would normally include things such as back pay with interest, retirement contributions, vacation credits, sick leave credits, payment for medical expenses that would have been paid by the employer's medical plan, missed training, and any other employment benefits denied the victim.
- (b) Case Law Precedent: In construing what constitutes make whole relief, OFCCP has followed Title VII principles.

7F04 RIGHTFUL PLACE

Make-whole relief includes placing the person in the position he/she would have occupied but for the discrimination. This is the place that the victim would be in at the time the remedy is arrived at if he/she had not been discriminated against. In other words, it is not merely the specific promotion which was denied; e.g., two years ago, but where the person would be today had he/she been promoted two years ago. The victim may have been promoted several steps beyond the original promotion that was denied because of discrimination.

7F05 FRONT PAY



Front pay is appropriate whenever the victim cannot be placed immediately into his/her rightful place. Front pay is the difference between the victim's current pay and the pay associated with his/her rightful place. There are a number of circumstances that may prevent immediate achievement of rightful place, including the absence of a vacancy, training required before assuming the position, need to pass through intermediate jobs for skill acquisition, etc. Where front pay is appropriate, the victim must start receiving the earnings associated with his/her rightful place from the date of settlement until his/ her position pay is equal to the rate it should be in his/her rightful place.

7F06 RETROACTIVE SENIORITY

- (a) Seniority as an Element of Make-Whole Relief: Seniority is often a critical component of relief. Without seniority an individual who is hired or promoted as a remedy for past discrimination may not have protection against layoff or demotion. If he/she had been hired or promoted at the time the discriminatory act occurred, he/she would have had additional years of seniority and would be less vulnerable to layoff as a result. Therefore, requiring hiring or promotion as a remedy without also requiring an adjustment of seniority does not really make the victim whole. Similarly, in many situations, promotions are awarded in whole or in part based upon the bidder's seniority. Merely placing a victim in the work-force without the seniority to which he/she is entitled will delay his/her attainment of his/her rightful place. Victims must receive all relevant seniority, such as job seniority where relevant in addition to plant seniority.
- (b) Union Involvement: When retroactive seniority is part of the remedy, and seniority is governed by a union agreement, it is very important that the CO make every effort to involve the union in the conciliation discussions on seniority. Although OFCCP generally does not have jurisdiction over unions, if the union consents to retroactive seniority in the conciliation agreement, the agreement will be enforceable. If the union is not involved in the conciliation efforts or does not consent, the seniority relief may not be enforceable. The Title VII court decision in EEOC v. Safeway Stores, 714 F.2d 567 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984), is the only circuit court case which holds that, unless the union is a party to conciliation efforts, a conciliation agreement which provides for retroactive seniority is not enforceable. OFCCP is reviewing on an ongoing basis steps which should be taken to ensure enforceability of its conciliation agreements. For that reason, if the union refuses to participate in the conciliation process or to agree to seniority relief, the CO should seek and may enter into agreements with contractors granting such relief for discriminatees only as described immediately below.
- (c) Union Consent: In W. R. Grace v. Rubber Workers, Local 759, 461 U.S. 757 (1983), the Supreme Court held that an employer who agrees to give retroactive seniority to the individual



victims of its discrimination, and does so, may be sued by the union on behalf of its members who are harmed by having new people come into the workforce with established seniority credits. In other words, if a worker has five years seniority, and is laid off because his/her employer agrees as part of a Conciliation Agreement (CA) to hire a particular person and to credit that person with six years seniority as a remedy for discrimination, that worker can complain to the union that he/she has been harmed, laid off without the union's consent. The union can then sue the employer for violating the collective bargaining agreement (CBA) by unilaterally awarding retroactive seniority to this identified victim. The union can seek damages for the worker to compensate him/her for the time laid off. Because of this threat of suit, contractors are reluctant to agree to retroactive seniority relief without the union's consent.

- (d) Noncompetitive Seniority: Some types of seniority are not used in a competitive situation and no one is harmed when the employer grants retroactive seniority. For example, in the Federal service, after three (3) years of seniority one begins to earn six (6) hours of annual leave per pay period. Seniority for the purpose of benefit accrual or "benefits seniority," as it is sometimes called, is not competitive, even when it is the result of a CBA. In such cases, the contractor should award the victim(s) of discrimination retroactive benefits of seniority. Similarly, seniority may be used for the purpose of determining when someone is eligible to retire. Again, this kind of seniority credit is not competitive and should not pose a problem when identified as a remedy.
- (e) Nonunion Seniority: Some nonunion contractors operate under a system in which seniority is used in both the benefits and competitive context. In other words, even without a union contract, promotions and layoffs are decided on the basis of seniority. Because competitive seniority in this situation is conferred by the employer alone, OFCCP is clearly entitled to obtain retroactive seniority for the victims of discrimination. OFCCP may always seek retroactive seniority where there is no union contract. While the employer may have other reasons for opposing a seniority award in the absence of the union, those reasons do not threaten the enforceability of the Conciliation Agreement.
- (f) Procedures Where Union Involved:
- (1) Union Participates: OFCCP will invite the union to participate in conciliation of a violation which requires a retroactive seniority remedy (see Sections 8B03(c) and 8C). The CO will make every effort to involve the union in the conciliation process and get its consent to the award of retroactive seniority. While OFCCP usually cannot compel the union to participate, if the union does so voluntarily and agrees to the seniority remedy, that remedy may be enforced. Where the union is invited to participate in the conciliation



of seniority issues, its role may be limited to those issues. The contractor may object to having the union present during the discussion of back pay, which may involve disclosure of confidential salary information. There is no basis for requiring the contractor to accept the union's participation in the resolution of such an issue. If the union agrees to the award of retroactive seniority and an authorized representative of the union signs the CA, the nonadmissions clause may be included in the CA.

- (2) Union Refuses to Participate: If the union declines to participate in conciliation, OFCCP should seek to lay the groundwork to defend its insistence upon seniority relief. In other words, OFCCP should not agree to the usual boiler-plate language which says that the contractor does not admit to violating the Executive order (Section 503, 38 U.S.C. 4212). Instead, the CA should recite the factual bases for OFCCP's findings of violation. Under these circumstances:
 - (i) The nonadmissions clause is not included in the CA, and
 - (ii) Paragraph 1 of the General Provisions of the CA will note that the union was invited to participate, but declined to do so or to sign the CA, as applicable (see Sections 8F01(b)(2) and (e)).
- (3) Contractor Refuses to Sign: If a contractor refuses to sign a CA which does not contain the nonadmission language, it should be informed that OFCCP deems this a failure to conciliate, and the case will be referred for enforcement. Some contractors propose a cash buy-out of employee seniority rights. In other words, the contractor offers a lump sum payment to each identified victim of discrimination in exchange for a waiver of his/her entitlement to seniority. Seniority buy-outs are technically possible, but such proposals must be carefully crafted and reviewed very carefully for fairness; many may not be acceptable. Offers of seniority buy-outs must be approved by the National Office of the Solicitor.
- (4) Novel Issue: The refusal of a contractor to provide retroactive seniority relief where it is appropriate has been determined by OFCCP to be a novel issue. Any case which presents such an issue should be referred to the National Office. Enforcement actions in such cases will be referred to the National Office of the Solicitor (NSOL).

7F06A OTHER REMEDIES AFFECTING A UNION AGREEMENT



The procedures described in Section 7F06 immediately above are equally applicable to remedies other than retroactive seniority which require a change in or otherwise affect a union agreement (see Section 8C).

7F07 BACK PAY

- (a) **Back Pay Required:** Back pay is normally part of any make whole remedy. The U.S. Supreme Court stated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975), that "...given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Given this stringent standard, it will be a rare situation where back pay will not be awarded.
- (b) **Elements of Back Pay:** Back pay should reflect total earnings lost by the victim due to the discriminatory act. Many elements of compensation, in addition to salary and straight hourly wages, will normally be included in a back pay award; e.g., raises, bonuses, lost sales commissions, cost-of-living increases, tips, medical and life insurance, pensions, overtime pay, etc.
- (c) **Deductions and Offsets:**
 - (1) **Interim Earnings:** Amounts earned from employment that is in substitution for employment with the contractor are deductible from total back pay. Not all financial compensation received by the victim during the back pay period, however, constitutes "interim earnings." If an employee had both earnings from a full-time job and a part-time job and could have continued in the part-time job even absent the discrimination, the earnings from the part-time job are not deemed interim earnings and are not subtracted from back pay. Further, unemployment and workers' compensation payments do not constitute interim earnings.
 - (2) **Mitigation:** Mitigation refers to the duty of the victim to use reasonable diligence in seeking alternative employment during the back pay period. Back pay awards may be reduced by the amount the victim could have earned with reasonable diligence, less expenses reasonably incurred in looking for alternative employment. Reasonable diligence does not mean that the person had to be successful in obtaining other employment, only that he/she is required to make reasonable effort. The victim is



required only to accept employment that is substantially equivalent to or the same as that sought or held with the employer. The victim is not required to relocate to accept alternative employment.

- (3) **Burden of Proof:** The contractor bears the burden of proving the amount of actual interim earnings or the failure of the victim to take reasonable steps to mitigate back pay loss.
- (d) **Periods of Unavailability:** Periods when the victim would not have been employed even absent discrimination are excluded from back pay awards; e.g., during periods of illness or disability.
- (e) **Interest on Back Pay:**
 - (1) **Purpose and Rate of Interest:** The purpose of payment of interest on back pay awards is to compensate the discriminatee for the loss of the use of his/her money. OFCCP's policy is that interest on back pay be calculated at the same percentage rate as the Internal Revenue Service's underpayment formula. Simple interest is to be calculated from the first date that is covered by the back-pay award.
 - (2) **Rate Adjustments:** The Internal Revenue Service (IRS) may adjust its rate quarterly. The interest rates applicable to various periods are set out in Appendix A of this Chapter.
- (f) **Withholding of Taxes:** Contractors may withhold all applicable Federal, State, and local income and FICA (social security) taxes from payments made in settlement of employment discrimination. Back pay, front pay, and lump-sum payments made in place of lost fringe benefits are considered "wages" subject to such withholding. The contractor must supply the discriminatee with a Form W-2 showing the wage component of the settlement and the amount of taxes withheld. Note, however:
 - (1) **FICA:** FICA requires an employer as well as an employee contribution. The employer's FICA obligation should not be paid out of a settlement unless the settlement has been negotiated to include money for that purpose.
 - (2) **FUTA:** In almost all states, FUTA (unemployment insurance) taxes are an expense paid only by the employer; i.e., there is no matching employee contribution. Thus, when computing back-pay awards, no offset or deduction for FUTA should be taken unless the particular state where the affected party was or would have been employed required



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

employers to withhold FUTA taxes from employees' wages or salaries during the time period for which a back-pay award is being computed.

- (3) Interest: Interest included in a settlement (if separately stated) is not subject to FICA while it is taxable as income to the recipient (just as would be interest on a bank savings account), it is not subject to withholding by the employer. The contractor, however, must supply the discriminatee with a Form 1099 stating the interest component of the settlement.
- (4) Benefits: Since employer contributions to most fringe benefits--such as the employer paid portion of health insurance premiums or pension funds--are not even taxable (whether retroactive or not), they are not subject to withholding.

7F08 TIME LIMITS FOR RELIEF

- (a) Two-Year Limit: Back pay may be obtained for a period beginning two years prior to the date of receipt by the contractor of the Scheduling Letter (or for a complaint, two years before the date it was filed). Where the discriminatory act(s) took place less than two years before the Scheduling Letter or the filing of the complaint, back pay is due from the date of violation forward. Back pay continues from these events until the discriminatory actions are stopped by a CA or other voluntary correction, or until the contractor makes a bona fide offer of the position denied. Total back pay may, therefore, be for more than two years.
- (b) Bona Fide Offer: Under appropriate circumstances, the rejection of a bona fide offer of the position previously denied by the contractor terminates the further accrual of back pay liability. (However, interest continues to accrue until settlement on the back pay losses prior to the bona fide offer.) A bona fide offer does not require the claimant to waive any rights or remedies to which he/she is entitled. For example, the parties may dis-agree on whether retroactive seniority is appropriate, but as long as the contractor offers to place the claimant in the same job (including shift and location) which he/she was denied without requiring that the claimant waive any right to seniority, the offer is bona fide. Under these circumstances, the parties can agree to litigate or arbitrate the seniority issue at a later date. Where the offer is accepted, back pay is still due up to acceptance, and front pay continues to accrue for losses suffered as a result of missed promotional opportunities or increased risk of layoff. Where a bona fide offer is rejected, the discriminatee is not disqualified from receiving back pay; back pay merely cuts off at the date of the offer.



- (c) Continuing Violation: Where a continuing violation is found (see section 7B01 above), remedies, except for back pay, are to be provided for the entire period of the violation but not earlier than the effective date of the authority violated (Executive Order 11246, Section 503, or 38 U.S.C. 4212). Individuals affected by a continuing violation may recover back pay for those effects of the violation which occur within the period beginning two years prior to the scheduling notice even where the specific act affecting them occurred outside the two-year period. The effective dates of the laws administered by OFCCP are:
- (1) Executive Order 11246 - October 24, 1965;
 - (2) Executive Order 11375 (adds sex as a prohibited factor) – October 14, 1968;
 - (3) Section 503 of the Rehabilitation Act - September 26, 1973; and
 - (4) Vietnam Era Veterans' Readjustment Assistance Act (38 U.S.C. 4212) - December 3, 1974.

7F09 CALCULATION OF INDIVIDUAL BACK PAY AWARDS

The amount of back pay to be awarded to a victim is determined by calculating as well as possible the pay the victim would have received absent the discrimination. The most common way to reconstruct pay is to identify a nonminority or male (preferably a nonminority male) (or an individual without a disability in a Section 503 case) comparator who was hired, promoted, etc., at about the same time the victim of the discrimination should have been hired, promoted, etc. The comparator's pay history is then traced. The differential between the pay received by the victim and that by the comparator within the appropriate time frame would constitute the back pay due the victim. If there are gaps in the comparator's employment during the back pay period; e.g., the comparator quits, has a lengthy illness, etc., a reasonable estimate of the amount of wages the comparator would have made absent the break in service should be made.

7F10 REMEDIES IN A PATTERN OR PRACTICE CASE

There are two models used to remedy pattern or practice problems:

- (a) Victim-specific or individual remedies; and
- (b) Formula relief.



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

The initial step in fashioning pattern or practice relief is to determine which remedy model to use (see SCRR Worksheet 17-11). The models are different approaches to relief. The elements of the two approaches should not be interchanged when providing relief; e.g., if a victim-specific approach is adopted, the total amount of back pay is not based on a formula and if a formula approach is adopted potential victims are not excluded from the class because they have not been shown to be actual victims. The decision about which model to apply is made by OFCCP, not the contractor.

7F11 VICTIM-SPECIFIC REMEDIES

- (a) Preferred Approach: The victim-specific model, which provides make-whole relief for identified victims of the discrimination, is the primary one for remedy in a pattern or practice case which focuses on individual victims. It is the preferred approach in this type of case and should be used whenever feasible. It is particularly useful when the number in the class is small, when the time period is short, or when the effect of the discrimination is straightforward.
- (b) Remedy Phases: There are two stages to the remedy phase:
 - (1) Identifying the specific class members entitled to relief; and
 - (2) Determining the exact remedy to which each victim is entitled.
- (c) Identifying Victims: The first step in the process is to identify potential victims of the discriminatory policy or practice. In other words, the CO must define the group or class of individuals for whom he/she is seeking relief. These could include for example: all Blacks who failed an unvalidated pass-fail test; all Hispanics who were eligible for supervisory positions, but were not promoted; or all women who were denied reinstatement following maternity leave. At the liability phase, the CO will most likely have defined this class on the basis of the violations identified. In other words, once the time period of the violation and the nature of the violation are established, and the minorities and/or women who were adversely affected are set forth, the minorities and/or women who are presumptively entitled to a remedy are for all intents and purposes defined. In defining the group at this point, the CO should refer only to what he/she has determined to be the minimum objective qualifications actually imposed. The CO should not evaluate comparative ("relative") qualifications at this stage. At this stage the "class" consists of all who met the minimum objective qualifications.
- (d) Contractor's Response:



- (1) Contractor's Burden: The CO must inform the contractor of the names of the class members for whom relief is sought. All members of the class are presumed to be victims of discrimination and, thus, each member is entitled to relief unless the contractor shows that he/she is not. To show that an individual is not a victim the employer must prove that there is a nondiscriminatory explanation for its treatment of the individual. This is a heavy burden. Once it has been established that a class member was an actual victim of discrimination, the contractor may produce evidence about the amount of make-whole relief to which the victim is entitled.
- (2) Level of Proof Required: Proof means more than just suggesting or offering some evidence of a nondiscriminatory reason. It means demonstrating convincingly that it is more probable than not that the nondiscriminatory reason was the only reason for its less favorable treatment of the alleged victim.
- (3) Common Contractor Responses: Some reasons which contractors commonly advance as nondiscriminatory include:
 - (i) The individual(s) in question was not qualified under standards actually applied. (These may or may not be the same as stated standards.)
 - (ii) A better-qualified candidate was selected.
 - (iii) There was no vacancy within the time period that the application was active.
 - (iv) There is something in the candidate's background that caused rejection; e.g., a poor work record.
- (e) Evaluation of Contractor's Response: Once the contractor has been given the opportunity to prove that each identified victim is not entitled to relief, the CO must weigh the proof. The contractor must convincingly demonstrate that a given person would have been treated in exactly the same manner even in the absence of discrimination. Each person the contractor cannot eliminate from the class by this method is considered to be an actual, identified victim of the discrimination and entitled to full relief.
- (f) Identification of Vacancies: Where the CO is proceeding on a victim specific basis, he/she should consider all vacancies or job opportunities denied the victims (not merely some portion of them). In other words, once a pattern of discrimination with regard to a particular type of



employment action has been established, each relevant employment decision made by the contractor during the actionable period is presumed to have been discriminatory.

- (g) Shortfall: Some contractors have argued that COs should limit their consideration of the denied opportunities to those vacancies which constituted a "short-fall." When a contractor talks about shortfall vacancies, it refers to the difference between the number of opportunities which were actually awarded to minorities and women, versus the number of opportunities which one would have expected them to get based on a their percentage in the relevant pool. For example, suppose a contractor has filled 100 vacancies. The applicant pool for those vacancies consisted of 100 Whites and 100 Blacks. However, the employer hired only 10 Blacks and 90 Whites. The CO has now found a violation and informs the contractor that the class for whom relief is being sought consists of the 90 Black rejected applicants. The contractor might contend that, if it had hired 50 Blacks, OFCCP would have found no violation. Therefore, under the shortfall vacancy argument, OFCCP may only seek relief for 40 of the 90 rejected applicants--the difference between the 10 the contractor actually hired and the 50 it would have been expected to hire absent discrimination. Under the victim-specific model, OFCCP rejects this argument. Once discrimination has been established, all 90 of the rejected Black applicants are presumed victims.
- (h) Use of Shortfall in a Formula Model: The shortfall concept can be helpful when the CO is proceeding under the formula model and the loss suffered by a class must be determined. However, it is not appropriate to use the shortfall concept to reduce the number of the class members entitled to relief (see section 7F12 below).
- (i) Individual Remedies: The make-whole relief must then be determined for each individual who has not been eliminated from the class by the contractor's proof that he/she was not the victim of discrimination. The precise remedy should be tailored to the situation of each victim. The CO should be sure to consider all the different types of harm that the victim has suffered. For example, the passage of time since the violation may mean that victims are less interested in reinstatement or hiring because they have built new careers. On the other hand, where very little time has passed since the violation occurred, and monetary damages are small, reinstatement or preferential hiring may be the most important remedy.

7F12 FORMULA RELIEF

- (a) When Used: Individualized relief must be sought whenever it is feasible to identify individual victims of discrimination and to calculate their losses. However, formula relief should be pursued wherever it is impossible or impractical to determine individual relief; that is, where the number



of persons actually victimized by discrimination is so large that case-by-case determinations would be unduly burdensome, and/or where reconstruction of the employment decision that would have been made absent discrimination involves mere speculation, as where there are no lines of progression. Sometimes the CO knows the identity of the victims, but it is so difficult to trace their losses that they can only be estimated. Perhaps the most common situation where the CO may wish to resort to a formula to determine relief is where the number of class members exceeds the number of vacancies.

- (b) Definition: Formula relief is a mechanism by which the compensation for the damage suffered by a particular class is determined and then financial compensation is divided (not necessarily pro rata) among all the members of that class. Under a formula it is possible that some individuals will receive less than their total losses and some will receive more. Thus, what is done is approximating losses in a situation in which it is unrealistic to attempt to compute individual losses with precision.
- (c) Measuring Losses: Once the CO has decided to go forward with formula relief rather than victim-specific relief, he/she can begin the next step of the remedy phase. This includes an attempt to measure the loss which the class has suffered.
- (1) Shortfall Method: Where the formula method was selected because the number of class members exceeds the total number of opportunities, a "shortfall vacancies" approach may be considered for computing the amount of back pay for the class. As an example, assume a situation where there are 50 Black and 50 White applicants, all of whom possess the required qualifications, seeking 20 jobs. Nineteen Whites were hired. The difference between the actual number of Blacks hired (1) and the expected number of Black hires (10) represents the shortfall (9). Shortfall vacancies do not limit the number of individuals entitled to relief. Instead, the amount of money attributable to those vacancies is distributed to the whole class. In this example, the CO would compute the earnings attributable to the nine shortfall positions for the entire period, and distribute these to the 49 qualified Black applicants who were not selected. Shortfall vacancies do not represent a cap on OFCCP's entitlement to relief. They are a compromise figure utilized as part of an approximation of class wide loss.
- (2) Averaging Method: Not all formulas require the CO to look at shortfalls. There are other reasons to use a formula other than the fact that there are more victims than vacancies. For example, suppose there is a case in which the major claim is that the men and women who were hired were placed in sex segregated departments. In such a situation, the CO may want to compare the average salary earned by men with a given level of seniority, to



the average salary earned by women with the same seniority. The difference in average salary defines the measure of back pay to be awarded to each woman in that seniority group. The formula devised should be designed to address the particular violation found.

- (3) Computing Earnings: Because the formula approach represents a compromise, it is extremely important to account fully for all the earnings attributable to a particular vacancy in computing losses such as: interest, interim raises, promotion potential (i.e., the earnings associated with all of the promotions the person would have received had they not been discriminated against in the first place), overtime, and shift differential. Identifying a certain number of vacancies is not the same as identifying specific vacancies within a job group. Therefore, the overtime calculation, for example, should reflect average overtime worked by a person in the job. Similarly, promotions should be based on average time to promotions. The CO should not be limited only to individual vacancies where the incumbent declined overtime or did not qualify for promotion.
- (4) Distribution of Remedy: When using the formula approach, the remedy agreed upon is shared by all members of the class. The amount of money which represents the group's lost wages is divided among the members of the class either on a pro rata basis or some other equitable basis. The CO may decide on a method of distribution based upon the facts of the case. For example, where the CO has identified an incumbent class which was denied promotions or assigned to lower paying jobs, the contractor controlled their interim earnings. In that situation, a distribution based upon the number of months in the employer's workforce might be most appropriate. With a rejected applicant class, the CO might decide that a simple per capita distribution makes more sense.
- (5) Nonmonetary Relief: In addition to the monetary relief provided for class members, the CO should also consider requiring nonmonetary remedies such as: preferential hiring, promotion goals, red circling, special training programs, and EEO counseling for supervisors. With formula relief, it is difficult to provide for reinstatement or retroactive promotion because, by using the formula, you have not tied any individual to any particular opportunity. However, the CO may create a preferential hiring or promotion list consisting of the members of the class and from which the contractor must make all or a proportion of selections; e.g., one minority for each nonminority selected, to fill vacancies until it has achieved a nondiscriminatory distribution in its workforce.

7F13 NOTIFICATION TO CLASS MEMBERS



U.S. Department of Labor

Employment Standards Administration

Office of Federal Contract Compliance Programs

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

The CA or other settlement document must guarantee that all class members are aware of their rights under the agreement and specify the procedures through which those rights will be effected, including counseling where appropriate. Normally, the contractor will be required to notify all class members of their rights. That notice must include the terms and conditions under which an employment offer is tendered, including the specific amount of back pay and the retroactive seniority as well as all other appropriate benefits.

7F14 LIABILITY OF A SUCCESSOR EMPLOYER

- (a) In determining whether a successor employer is liable for the discriminatory acts of its predecessor, OFCCP follows Title VII case law. The Federal courts have held that such liability must be judged on a case-by-case basis considering the "Macmillan" factors (EEOC v. Macmillan Bloedel Containers, Inc., 8 FEP Cases 897 (6th Cir. 1974)).
- (b) Requests for a determination of successor liability should be directed to the NO Division of Policy, Planning, and Review and should include responses (with supporting documentation) to the "Macmillan" factors described in Appendix A-1 to this Chapter.



APPENDICES

(Revised June 1998)

APPENDIX 7A: INTEREST RATES FOR BACK PAY

OFCCP's policy is that simple interest on back pay is calculated at the same percentage rate as the IRS' underpayment formula on interest--from the first date that is covered by the back-pay award.

Interest rates for back-pay calculations based on IRS calculations since 1983 are as follows:

TIME PERIOD	(A) ANNUAL	(Q) QUARTERLY (A/4)
January 1, 1983 - June 30, 1983	16.00%	4.00%
July 1, 1983 - December 31, 1984	11.00%	2.75%
January 1, 1985 - June 30, 1985	13.00%	3.25%
July 1, 1985 - December 31, 1985	11.00%	2.75%
January 1, 1986 - June 30, 1986	10.00%	2.50%
July 1, 1986 - September 30, 1987	9.00%	2.25%
October 1, 1987 - December 31, 1987	10.00%	2.50%
January 1, 1988 - March 31, 1988	11.00%	2.75%
April 1, 1988 - September 30, 1988	10.00%	2.50%
October 1, 1988 - March 31, 1989	11.00%	2.75%
April 1, 1989 - September 30, 1989	12.00%	3.00%
October 1, 1989 - March 31, 1991	11.00%	2.75%
April 1, 1991 - December 31, 1991	10.00%	2.50%



**U.S. Department of Labor
 Employment Standards Administration
 Office of Federal Contract Compliance Programs**

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

TIME PERIOD	(A) ANNUAL	(Q) QUARTERLY (A/4)
January 1, 1992 - March 31, 1992	9.00%	2.25%
April 1, 1992 - September 30, 1992	8.00%	2.00%
October 1, 1992 - June 30, 1994	7.00%	1.75%
July 1, 1994 - September 30, 1994	8.00%	2.00%
October 1, 1994 - March 31, 1995	9.00%	2.25%
April 1, 1995 - June 30, 1995	10.00%	2.50%
July 1, 1995 - March 31, 1996	9.00%	2.25%
April 1, 1996 - June 30, 1996	8.00%	2.00%
July 1, 1996 - March 30, 1998	9.00%	2.25%
April 1, 1998 - Present ¹	8.00%	2.00%

Updates on IRS underpayment rates are available from the IRS at (800) 829-1040.

METHOD OF CALCULATING SIMPLE INTEREST ON BACK PAY

In a compound interest calculation, used in Executive order and Section 503 cases, the interest due on back pay (or any other debt) for one-time period is included in the money on which interest is figured for the next-time period; i.e., you pay “interest on your interest.” In a simple interest calculation, on the other hand, used in 38 U.S.C. 4212 cases, the interest due on back pay (or any other debt) for one-time period is not included in the money on which interest is figured for the next-time period; i.e., you don’t pay “interest on your interest.”

Title 41 CFR 60-1.26(a)(2) requires that interest on back pay be compounded quarterly in Executive order cases. Similarly, 41 CFR 60-741.65(a)(1) requires that interest on back pay be compounded quarterly in Section 503 cases. Therefore, in determining the amount of back pay due in Executive order and Section

¹ To at least the date of this revision (June 1998).



**U.S. Department of Labor
 Employment Standards Administration
 Office of Federal Contract Compliance Programs Federal Contract Compliance Manual (FCCM)
 CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION**

503 cases, first determine the amount of back pay due for each quarter. Then use column Q above to find the inter-est rate applicable to each quarter. For example, if the back-pay period were 12/4/97 through 5/25/98 and \$12,000 back pay were due, distribute back pay by quarter as follows:

YEAR	QUARTER	BACK PAY DUE FOR QUARTER	IRS QUARTERLY INTEREST RATE
1997	10/1-12/31	\$2,000.00	2.25%
1998	1/1-3/31	\$6,000.00	2.25%
1998	4/1-6/30	\$4,000.00	2.00%

Quarterly compound interest is applied to the average amount of back pay due during each quarter. This average is the total amount of back pay plus interest due at the beginning of each quarter, plus half the amount of back pay due for the quarter itself. The following worksheet displays the result for the above example:

WORKSHEET FOR CALCULATING <u>COMPOUND</u> INTEREST ON BACK PAY²						
Year	Quarter	BACK PAY		INTEREST		
		(a) Back Pay Due at <u>Beg. of Qtr.</u> (last Qtr's a + b + e)	(b) Back Pay Due for <u>Quarter</u>	(c) Average Back Pay Due for <u>Quarter</u> ([a + (b/2)])	(d) IRS Quarterly <u>Rate</u>	(e) Interest Due <u>for Quarter</u> (c x d)
1997	1/1-3/31 4/1-6/30 7/1-9/30 10/1-12/31		\$2,000.00	\$1,000.00	2.25%	\$22.50
1998	1/1-3/31 4/1-6/30 7/1-9/30 10/1-12/31	\$2,022.50 \$8,137.01	\$6,000 \$4,000	\$ 5,022.50 \$10,137.01	2.25% 2.00%	\$114.51 \$202.74
		a + b for last Quarter			e for last quarter	
TOTAL DUE						

² The back pay due at any given time includes accrued interest.



U.S. Department of Labor
Employment Standards Administration
Office of Federal Contract Compliance Programs **Federal Contract Compliance Manual (FCCM)**
CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

		\$12,137.01		\$202.74
			\$12,339.75	

Title 41 CFR 60-250 still requires that simple interest be paid on back pay in 38 U.S.C. 4212 cases. Simple interest is figured on a quarterly basis. Therefore, in calculating simple interest first determine the amount of back pay due for each quarter. Then use column Q above to find the interest rate applicable to each quarter. For example, if the back-pay period is 12/4/97 through 5/25/98 and \$12,000 in back pay is due, distribute back pay by quarter as follows:

YEAR	QUARTER	BACK PAY DUE FOR QUARTER	IRS QUARTERLY INTEREST RATE
1997	10/1-12/31	\$2,000.00	2.25%
1998	1/1-3/31	\$6,000.00	2.25%
1998	4/1-6/30	\$4,000.00	2.00%

Quarterly simple interest is also applied to the average amount of back pay due during each quarter. This average is the total amount of back pay due at the beginning of each quarter, plus half the amount of back pay due for the quarter itself. The following worksheet displays the result for the above example:

WORKSHEET FOR CALCULATING <u>SIMPLE</u> INTEREST ON BACK PAY						
Year	Quarter	BACK PAY		INTEREST		
		(a) Back Pay Due at <u>Beq. of Qtr.</u> (last Qtr's a + b)	(b) Back Pay Due for <u>Quarter</u>	(c) Average Back Pay Due for <u>Quarter</u> ([a + (b/2)])	(d) IRS Quarterly <u>Rate</u>	(e) Interest Due <u>for Quarter</u> (c x d)
1997	1/1-3/31 4/1-6/30 7/1-9/30 10/1-12/31		\$2,000.00	\$1,000.00	2.25%	\$22.50



U.S. Department of Labor
Employment Standards Administration
Office of Federal Contract Compliance Programs **Federal Contract Compliance Manual (FCCM)**
CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

1998	1/1-3/31	\$2,000	\$6,000	\$ 5,000	2.25%	\$112.50
	4/1-6/30	\$8,000	\$4,000	\$10,000	2.00%	\$200.00
	7/1-9/30					
	10/1-12/31					
		a + b for last Quarter			add all e's	
		\$12,000.00		TOTAL DUE	\$335.00	
				\$12,335.00		

Note that partial quarters (here, 12/4/97 - 12/31/97 and 4/1/98 - 5/25/98) are calculated the same way as full quarters (here, 1/1/98 - 3/31/98). This is true for calculation of simple AND compound interest.

The worksheet for calculation of quarterly compound interest is provided on page 7A-3. For longer time periods, copies of either worksheet can be used, depending on which type of interest applies.³ Alternatively, computerized versions of both worksheets (with interest rates pre-entered) are being forwarded to ROs for distribution to DOs and AOs.

WORKSHEET FOR CALCULATING QUARTERLY COMPOUND INTEREST ON BACK PAY						
Year	Quarter	BACK PAY		INTEREST		
		(a) Back Pay Due at <u>Beg. of Qtr.</u> (last Qtr's a + b + e)	(b) Back Pay Due for <u>Quarter</u>	(c) Average Back Pay Due for <u>Quarter</u> ([a + (b/2)])	(d) IRS Quarterly <u>Rate</u>	(e) Interest Due for <u>Quarter</u> (c x d)
	1/1-3/31					
	4/1-6/30					
	7/1-9/30					

³ For longer time periods, on each page carry forward the total back pay from the bottom block labeled "a + b + e for last Qtr" into the first column "(a)" on next page.



**U.S. Department of Labor
 Employment Standards Administration
 Office of Federal Contract Compliance Programs**

**Federal Contract Compliance Manual (FCCM)
 CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION**

	10/1-12/31					
	1/1-3/31					
	4/1-6/31					
	7/1-9/30					
	10/1-12/31					
	1/1-3/31					
	4/1-6/31					
	7/1-9/30					
	10/1-12/31					
	1/1-3/31					
	4/1-6/30					
	7/1-9/30					
	10/1-12/31					
		a + b for last Quarter		e for last Quarter		
		TOTAL DUE				

WORKSHEET FOR CALCULATING <u>SIMPLE</u> INTEREST ON BACK PAY			
		BACK PAY	INTEREST
Year	Quarter		
<i>November 25, 1998</i>			



**U.S. Department of Labor
 Employment Standards Administration
 Office of Federal Contract Compliance Programs**

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

		(a) Back Pay Due at <u>Beg. of Qtr.</u> (last Qtr's a + b)	(b) Back Pay Due for <u>Quarter</u>	(c) Average Back Pay Due for <u>Quarter</u> ([a + (b/2)])	(d) IRS Quarterly <u>Rate</u>	(e) Interest Due for <u>Quarter</u> (c x d)
	1/1-3/31					
	4/1-6/30					
	7/1-9/30					
	10/1-12/31					
	1/1-3/31					
	4/1-6/31					
	7/1-9/30					
	10/1-12/31					
	1/1-3/31					
	4/1-6/31					
	7/1-9/30					
	10/1-12/31					
	1/1-3/31					
	4/1-6/30					
	7/1-9/30					
	10/1-12/31					

		a + b for last Quarter		add all e's	
			TOTAL DUE		



**U.S. Department of Labor
Employment Standards Administration
Office of Federal Contract Compliance Programs**

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

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PAGE VII - 615



APPENDIX 7A-1: "MACMILLAN" FACTORS CONCERNING SUCCESSOR EMPLOYER LIABILITY

(Reference Section 7F14)

Requests for a determination of successor liability should include responses to the factors listed below. Responses should cite the source of the information and, where the source is written material, a copy of the relevant page(s) should be attached. Information on these factors may be obtained from a number of sources including Standard and Poor's and other corporate guides, trade magazines, annual reports, collective bargaining agreements, and the business section of local newspapers.

1. WHETHER THE SUCCESSOR COMPANY HAD NOTICE OF THE CHARGE

The date the alleged discriminatory act occurred, the date the complaint was filed, and the dates concerning the transfer (announcement date, effective date of merger, acquisition, etc.).

2. THE ABILITY OF THE PREDECESSOR TO PROVIDE RELIEF

Whether the predecessor continues to operate and the extent and location of its new operations, whether the predecessor maintained any of its assets (what percentage and type), whether the transfer resulted from a bankruptcy action, whether the predecessor could provide seniority, reinstatement, hiring, back pay, etc.

3. WHETHER THERE HAS BEEN A SUBSTANTIAL CONTINUITY OF BUSINESS OPERATIONS

The percentage of operating assets that were transferred to the successor, the status of the predecessor's patents, trademarks and operating name, whether there are corporate officers and members of the board of directors who are common to both the predecessor and the successor, etc.

4. WHETHER THE SUCCESSOR USES THE SAME PLANT

5. WHETHER THE SUCCESSOR USES THE SAME OR SUBSTANTIALLY THE SAME WORK FORCE



6. WHETHER THE SUCCESSOR USES THE SAME OR SUBSTANTIALLY THE SAME SUPERVISORY PERSONNEL

7. WHETHER THE SAME JOBS EXIST UNDER SUBSTANTIALLY THE SAME WORKING CONDITIONS

Whether the organization of the departments, sections, etc., remain substantially the same, the percentage of old jobs maintained, whether personnel practices are substantially the same, and the status of any collective bargaining agreements, etc.

8. WHETHER THE SUCCESSOR USES THE SAME MACHINERY, EQUIPMENT, AND METHODS OF PRODUCTION

9. WHETHER THE SUCCESSOR PRODUCES THE SAME PRODUCT



**APPENDIX 7B: IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION
INDEX**

Adverse Impact7-15 to 7-16,, 7-17 to 7-19, 7-21
Albemarle Paper Co. v. Moody 7-25

Back Pay 7-21, 7-25 to 7-27, 7-31, 7-32, 7-33, 7A-1
Back Pay, Interest on 7-26, 7A-1
Bazemore v. Friday 7-12
Berke v. Ohio Department of Public Welfare 7-19
Burden of Proof 7-26
Burden, Contractor's 7-29

Carino v. University of Oklahoma Board of Regents 7-19
Civil Rights Act of 1964, Title VII 7-3, 7-19, 7-20, 7-21, 7-22
Comparative Proof of Disparate Treatment 7-6, 7-7, 7-9 to 7-11, 7-13, 7-14, 7-15
Conciliation Discussions, Union Involvement in 7-22 to 7-23
Continuing Violation 7-3 to 7-4, 7-27
Contractor's Burden 7-29

Direct Evidence Proof of Disparate Treatment 7-7 to 7-8, 7-13, 7-17
Disparate Impact Theory of Discrimination 7-1, 7-2, 7-5, 7-6, 7-15 to 7-20
Disparate Treatment, Comparative Proof of 7-6, 7-7, 7-9 to 7-11, 7-13, 7-14, 7-15
Disparate Treatment Theory of Discrimination 7-2, 7-6, 7-7, 7-9
Division of Policy, Planning, and Review 7-14, 7-18

EEOC v. Safeway Stores 7-22
EEOC Guidelines on Discrimination Because of
National Origin, 29 CFR Part 1606.6 (b) 7-19 to 7-20
80-Percent Rule 7-17 to 7-18
Employee Selection Procedures, Uniform Guidelines on 7-17, 7-19
Employment Criteria, Uniform Application of 7-6, 7-11, 7-14, 7-15, 7-16 to 7-17, 7-19
Employment Discrimination Defined 7-5
Executive Order 11246 7-1, 7-2, 7-3, 7-19, 7-27
Executive Order 11375 7-27

Facially Neutral 7-5, 7-11, 7-15, 7-16, 7-17



U.S. Department of Labor
Employment Standards Administration
Office of Federal Contract Compliance Programs **Federal Contract Compliance Manual (FCCM)**
CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

Formula Relief 7-28 to 7-33
41 CFR Part 60-3 7-17, 7-18
Friday, Bazemore v. 7-12
Front Pay 7-21

Grace, W. R., v. Rubber Workers, Local 759 7-22
Hazelwood School District v. U.S. 7-12

Impact Ratio Analysis (IRA) 7-5
Inferential Proof of Disparate Treatment 7-7, 7-8
Intent to Discriminate (Disparate Treatment) 7-5, 7-7, 7-8, 7-9, 7-11, 7-13
Interest on Back Pay 7-21, 7-26, 7A-1

Large Samples 7-17

Make-Whole Relief..... 7-20, 7-21, 7-22, 7-25, 7-26, 7-28, 7-29, 7-30
Manner of Speaking (Accent), Discrimination Based on 7-19 to 7-20
Minimum Objective Qualifications 7-10, 7-12, 7-16, 7-28 to 7-29
Mitigation..... 7-25
Moody, Albemarle Paper Co. v. 7-25

Noncompetitive Seniority 7-23
Nonmonetary Relief..... 7-33
Nonunion Employer..... 7-23
Notification to Class Members 7-33

Ohio Department of Public Welfare, Berke v. 7-19

Pattern or Practice Case, Remedies in 7-28
Policy, Planning, and Review, Division of 7-14, 7-18
Potential Discrimination 7-1, 7-2, 7-11, 7-19
Potential Statistical Disparate Treatment 7-13
Potential Victims..... 7-14, 7-28
Predetermination Notice 7-2, 7-13, 7-16
Prohibited Factors 7-2, 7-5, 7-7, 7-8, 7-9, 7-13, 7-17
Proofs of Discrimination..... 7-5

Qualifications, Minimum Objective 7-9, 7-10, 7-12, 7-16, 7-28 to 7-29
Qualifications, Relative..... 7-9, 7-10, 7-11, 7-27



**U.S. Department of Labor
Employment Standards Administration
Office of Federal Contract Compliance Programs**

Federal Contract Compliance Manual (FCCM)

CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

Rehabilitation Act of 1973, Section 503	7-1, 7-2, 7-3, 7-24, 7-27
Relative Qualifications.....	7-9, 7-10, 7-11, 7-29
Relief, Time Limit for.....	7-26 to 7-27
Remedies.....	7-20 to 7-33
Remedies for Continuing Violation.....	7-27
Retroactive Seniority	7-22 to 7-24
Rightful Place	7-21, 7-22
<u>Rubber Workers, Local 759, W. R. Grace v.</u>	7-22
<u>Safeway Stores, EEOC v.</u>	7-22



U.S. Department of Labor
Employment Standards Administration
Office of Federal Contract Compliance Programs **Federal Contract Compliance Manual (FCCM)**
CHAPTER VII - IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION

Scheduling Letter 7-3, 7-4, 7-26
Section 503 of the Rehabilitation Act of 1973.....7-1, 7-2, 7-3, 7-24, 7-27
Seniority, Noncompetitive 7-23
Seniority, Retroactive 7-22 to 7-24
Shortfall Vacancies 7-30 to 7-32
Similarly Situated as Component of Statistical Disparate
 Treatment Proof..... 7-12
Standard Compliance Review Report 7-1, 7-2, 7-6, 7-9, 7-11, 7-12, 7-13, 7-14,
 7-15, 7-16, 7-17, 7-18, 7-19, 7-28
Statistical Proof of Disparate Treatment 7-9, 7-12 to 7-15
Statistical Significance 7-12, 7-13, 7-14, 7-17, 7-18

38 USC 4212 (Vietnam Era Veterans' Readjustment
 Assistance Act of 1974) 7-1, 7-2, 7-3, 7-24, 7-27
Teamsters v. U.S. 7-12
Time Limit for Relief..... 7-26 to 7-27
Title VII, Civil Rights Act of 1964..... 7-2, 7-3, 7-19, 7-20, 7-21, 7-22

U.S., Hazlewood School District v. 7-12
U.S., Teamsters v. 7-12
Uniform Application of Employment Criteria..... 7-6, 7-11, 7-14, 7-15, 7-16 to 7-17, 7-19
Uniform Guidelines on Employee Selection Procedures..... 7-17, 7-18, 7-19
Union Involvement in Conciliation Discussions 7-22 to 7-24
University of Oklahoma Board of Regents, Carino v. 7-19

Victim-Specific Remedies 7-28
Vietnam Era Veterans' Readjustment Assistance
 Act of 1974 (38 USC 4212) 7-1, 7-2, 7-3, 7-24, 7-27

W. R. Grace v. Rubber Workers, Local 759 7-22