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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

DEC 20 1982

OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO:

Mr. Michael Uhlmann
Assistant Director for Legal Policy
Office of Policy Development
Old Executive Office Building
Washington, D. C. 20500

Dear Mike:

Enclosed, as discussed this morning, is a copy of a memorandum to me dated June 17, 1982, regarding the "effects test" under the Fair Housing Act. I don't regard this as a final product but it is a useful review, particularly in the description of specific cases in the Appendix. It also covers, for comparative purposes, Voting Rights Act and constitutional voting practices cases through Mobile v. Burdine but not including Rodgers v. Lodge.

The memorandum is particularly useful in its comparison of different types of housing cases to the "disparate treatment" and "disparate impact" cases under Title VIII. The single-victim basic Fair Housing case, which the enforcement reforms we would propose are designed for, is a "disparate treatment" case. In that context, the prima facie case analysis established by McDonnell Douglas has been carried into Title VIII cases (see page 10 of the memorandum) in a manner which works quite well and, as far as I can see, is not objected to by anyone. It is in the "disparate imapct" area, generally involving exclusion of low-income housing projects, that greater resistance arises and the law is less clear.

An important but hardly conclusive recent case, noted in the memo (page 13) but not in the Appendix, is Angell v. Manchester, where the District Court refused to find that a community's withdrawal from our block grant program would have a discriminatory effect. Other recent "land-use", "disparate impact" cases in which liability has been held, all on the basis of adequate evidence of intentional discrimination, are Smith v. Town of Clarkton, 682 F. 2d 1055 (4th Cir. 1982) (town withdrawal from multimunicipality low-income housing authority) (but Court agrees with Arlington Heights II analysis); United States v. City of Birmingham, 538 F. Supp. 819 (E.D. Mich. 1982) (city interference with low-income housing project, including placing referendum on ballot); Atkins v. Robinson, 545 F. Supp. 852 (E.D. Va. 1982) (county board veto of low-income project).

Also enclosed is a copy of the latest version we saw of a proposed (never introduced) "compromise" Bill by Senator Dole. This proposal was drafted before his Voting Rights Act amendment, and we don't know if Dole's staff has made (or would make) subsequent changes. The relevant amendment is Section 814, beginning on page 12. Note, however, the explanation on page 2, referring

This is precisely the burden of persuasion that the Supreme Court said was too much in a Title VII "disparate treatment" context in the Burdine case (memorandum, page 5). Instead, it is only a burden of coming forward with an explanation that rebuts the prima facie case and raises "the factual inquiry . . . to a new level of specificity." I don't know whether this difference was intentional on the part of Dole's staff or whether they simply hadn't caught up with Burdine (decided in March 1981). However, as you can see, the burden on defendants imposed by Burdine is a rather light one and, possibly, could be resisted by civil rights advocates.

Sincerely yours,

John J. Knapp
General Counsel

Enclosures

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

June 17, 1982

OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO:

MEMORANDUM FOR: John J. Knapp, General Counsel, G

Harry Carey

FROM: Charles N. Farbstein, Assistant General Counsel
Equal Opportunity Division, GRE

SUBJECT: Analysis of Effects Test Under Title VIII of the Civil Rights Act of 1968

This memorandum analyzes the nature and impact of the case law relating to the effects test under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. (the Fair Housing Act). Generally, the effects test may be defined as any method of analysis which stresses the discriminatory effect of a policy or practice in order to establish a violation of Title VIII. In order to assess the nature, present impact and probable future impact of the Title VIII effects test this memorandum discusses the Title VIII effects test cases and analogous cases interpreting Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §2000e et seq. The memorandum also discusses, by way of contrast, the standard applicable to claims brought under the Equal Protection Clause of the 14th Amendment to the Constitution and the type of effects test associated with the Voting Rights Act.

I. THE CONSTITUTIONAL STANDARD

It is often stated that a discriminatory purpose must be shown in order to invalidate a law or practice under the Equal Protection Clause of the 14th Amendment to the Constitution. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

In Washington v. Davis, black police officers and black applicants alleged, among other things, that the District of Columbia Police Department's requirement that recruits pass a test on verbal ability, vocabulary, reading and comprehension bore no relationship to job performance and had a highly discriminatory impact in screening out blacks. Plaintiffs moved for partial summary judgment on this issue seeking a declaration that the test in question is unlawfully discriminatory in violation of the equal protection component of the due process clause of the Fifth Amendment. The District Court sustained the test but the Court of Appeals found it to be unlawful.

The Supreme Court, in reversing the Court of Appeals, noted at the outset that the Due Process Clause of the Fifth Amendment contains an equal protection component applicable to the Federal government akin to the Equal Protection Clause of the 14th Amendment which applies to the States. 426 U.S. at 229 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)). The Court went on to state that a law or other official act is not unconstitutional solely because it has a racially disproportionate impact; a purpose to discriminate must be present. 426 U.S. at 239. However, the Court made it clear that although deference will be given to a law which is neutral on its face and serves a legitimate governmental purpose, "invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S. at 242. All of this led Justice Stevens to observe in a concurring opinion that there is not always a bright line between discriminatory purpose and discriminatory impact because when the disparate impact is dramatic "it really does not matter whether the standard is phrased in terms of purpose or effect." 426 U.S. at 254. Justice Stevens also noted that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." 426 U.S. at 253 (emphasis added). Thus, although the constitutional standard is stricter than the statutorily based standard, clearly it is not a "pure intent" standard.

In Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), the Court was presented with a challenge to the constitutionality of the Massachusetts veterans' preference statute on the ground that it discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court sustained the preference concluding that the plaintiff "simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex." 442 U.S. at 281. Although the Court in Feeney stated that the "Fourteenth Amendment guarantees equal laws, not equal results," 442 U.S. at 273, it also indicated that even with the stricter constitutional standard, motivation is not always relevant. For example, "a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." Personnel Administrator v. Feeney, 442 U.S. at 272 (emphasis added) (citing Brown v. Board of Education, 347 U.S. 483 (1954) and McLaughlin v. Florida, 379 U.S. 184 (1964)). In addition, a law or practice that is "ostensibly neutral but is an obvious pretext for racial discrimination" is also unconstitutional. Id. (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886), and Guinn v. United States, 238 U.S. 347 (1915)).

More recently, in City of Mobile v. Bolden, 446 U.S. 55 (1980), plaintiffs brought a class action on behalf of all black citizens of Mobile alleging that the City's practice of electing City Commissioners at large unfairly diluted the strength of blacks in violation of §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, the Fourteenth Amendment and the Fifteenth Amendment. The District Court found that there had been a constitutional violation and the Fifth Circuit of the Court of Appeals affirmed.

The Supreme Court reversed holding that there was not sufficient evidence from which an intent to discriminate on the part of the City could be inferred. The Court, citing Feeney, explained that in order to establish an intent to discriminate more is required than evidence that the policy or practice in question would have as a foreseeable consequence a disproportionate impact on blacks. Rather, there must be a finding that the particular course of action was taken at least in part because of its adverse effects upon an identifiable group. 446 U.S. at 71, n. 17. Thus, although the Court recognizes that a discriminatory purpose may be inferred "from the totality of the relevant facts," it will not allow such an inference to be lightly drawn by the lower courts.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., (hereafter referred to as Title VII), bans employment discrimination. Both Title VII and Title VIII prohibit discrimination "because of" race, color, religion, sex or national origin. The Supreme Court has recognized two types of discimination claims under Title VII. These are claims of "disparate treatment" and claims that stress "disparate impact." The principal difference between the two theories is that proof of discriminatory motive is essential under a disparate treatment theory but has not been required under a disparate impact theory.

A. The Title VII "Disparate Treatment" Theory

The Supreme Court has described the disparate treatment theory of discrimination as the most easily understood type of discrimination. "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situtations be inferred from the mere fact of differences in treatment." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, n. 15.

The Supreme Court first dealt with the order and allocation of proof in a Title VII disparate treatment case in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff-employee in McDonnell Douglas alleged that he was denied employment because of his involvement in civil rights activities and because of his race and color. 411 U.S. at 801. The Supreme Court held that:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open

> and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802 (footnote omitted).

The burden then shifts to the defendant-employer to articulate some legitimate nondiscriminatory reason for the employee's rejection. 411 U.S. at 802. If the defendant meets the burden the plaintiff must then be afforded "a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." 411 U.S. at 805. The Court indicated that one of the ways of showing pretext is to introduce statistical evidence indicating that defendant as a matter of practice discriminates in employment. 411 U.S. at 805. If the court finds defendant's reasons to be pretextual the plaintiff prevails. In the absence of such a finding the defendant prevails. 411 U.S. at 807.

In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Court had occasion to consider in greater detail the role of statistics in proving discrimination under the "disparate treatment" theory of discrimination. The United States charged an employer with engaging in a pattern and practice of employment discrimination. Since the key issue in the case was the seniority system established by collective-bargaining agreements between the employer and the International Brotherhood of Teamsters (union) the union was joined as a defendant. 431 U.S. at 324 - 25.

The government introduced statistical evidence indicating that the vast majority of the company's employees were white, even in geographic areas where there was a substantial black population. 431 U.S. at 337. The company contended, among other things, that statistics can never in and of themselves establish a prima facie case shifting to the employer the burden of rebutting the inference caused by the figures. 431 U.S. at 339. Although the Court noted that the government did not rely only on statistical evidence of discrimination the Court made it clear that statistical analyses play an important role in cases in which the existence of discrimination is a disputed issue. "Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." 431 U.S. at 340, n. 20 (emphasis added).

In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), the Court explained the limited impact of a prima facie showing under McDonnell Douglas. This decision is of particular interest in light of the importance the Court in Teamsters attributed to statistical evidence in establishing a prima facie case of discrimination. Justice Rehnquist speaking for the Court held it improper to equate a prima facie showing of discrimination (established with or without statistical evidence) with an ultimate factual finding of discrimination. 438 U. S. at 576. "Rather, [the McDonnell Douglas prima facie case] is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." 438 U.S. at 580. As a result of this understanding of the prima facie showing the Court held that the defendant employer "must be allowed some latitude to introduce evidence which bears on his motive." 438 U.S. at 580. This evidence may include statistical evidence of a racially balanced workforce.

Thus, in Furnco the Court admonished the lower courts not to expand the impact of a prima facie showing of discrimination. Moreover, the Court made it clear that just as employees may take advantage of unfavorable general workforce statistics to show pretext, employers may take advantage of favorable general workforce statistics to rebut a prima facie case.

In Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978), the Court again indicated the limited impact of a McDonnell Douglas prima facie case. The Court of Appeals for the First Circuit indicated that the defendant, once a prima facie case was established, had the burden of proving the absence of discriminatory motive. The Supreme Court reversed, stating that the burden placed on the defendant after plaintiff has established a prima facie case of discrimination is merely to articulate a legitimate, nondiscriminatory reason for the challenged action. 439 U.S. at 24. The Court further explained that "[w]hile words such as 'articulate,' 'show,' and 'prove,' may have more or less similar meanings depending upon the context on which they are used, we think that there is a significant distinction between merely 'articula[ting] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive'." 439 U.S. at 25. Therefore, in Keene as in Furnco the Court delimited the impact of a prima facie showing of discrimination.

In its most recent disparate treatment decision, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court further defined the burden that shifts to the defendant once plaintiff has established a prima facie case. The specific issue presented in Burdine was "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." 450 U.S. at 247. The Court held that this would be too onerous a burden to place on the defendant. "When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." 450 U.S. at 260. That is, "the employers need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." 450 U.S. at 257. In order to meet this burden the defendant need not actually persuade the trier of fact that the employment action was lawful. Id. If the defendant "meets the burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." 450 U.S. at 255 (footnote omitted). Plaintiff at this point has "the opportunity to demonstrate that the proferred reason is not the true reason for the employment decision." 450 U.S. at 256. Thus, under a disparate treatment theory, plaintiff may succeed "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256 (citation omitted). Although the burden of production shifts during the trial (once after plaintiff establishes a prima facie case and again if defendant rebuts the prima facie case) the plaintiff at all times retains the burden of persuasion. Id.

The Supreme Court in McDonnell Douglas created a theory of discrimination that was susceptible to widely varying interpretations, and in fact some lower courts went so far as to equate the establishment of the prima facie case with discrimination. However, the Supreme Court did not long tolerate such varied interpretations.

B. The Title VII "Disparate Impact" Theory

The second theory for establishing a violation of Title VII stresses the "disparate impact" of a particular policy or practice. Violations found under this paradigm involve "employment practices that are facially neutral in treatment of different groups but . . . in fact fall more harshly on one group than another and cannot be justified by business necessity." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336, n. 15. This theory was first articulated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

In Griggs the Court struck down Duke Power's policy of requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to certain jobs. Although the policy was neutral on its face in that it applied to both whites and blacks alike it operated to disqualify blacks at a substantially higher rate than whites. However, the Court noted other facts that were equally important to its decision. First, "the job in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." 401 U.S. at 426. Indeed, the high school requirement was not instituted until Duke Power abandoned its overt policy of restricting blacks to the lowest paying jobs. 401 U.S. at 424. Second, the high school and test requirement was not shown to be significantly related to successful job performance. The evidence showed that "employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used." 401 U.S. at 431-32 (footnote omitted). The District Court found that since Duke Power's policy of overt discrimination had ceased prior to the effective date of Title VII there was no violation. The Court of Appeals affirmed, concluding that a subjective test of the employer's intent should govern and in this case, applying that subjective standard, there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. 401 U.S. at 428. The Supreme Court reversed, holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If the employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431. This is the case without regard to the employer's intent; "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to job capability." 401 U.S. at 432. Indeed, the Court found a violation notwithstanding evidence of the employer's lack of discriminatory intent. The Court concluded that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432 (emphasis in original).

In Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court explored the question of what showing an employer must make to satisfy the burden of establishing "a manifest relationship between a given requirement and the employment in question." The plaintiff in Albemarle, a certified class of present and former black employees of a paper mill, challenged, among other things, Albemarle's requirement that applicants for employment for skilled positions have a high school diploma and pass two intelligence tests. The diploma and test requirement was instituted by the company in the 1950s, well before the effective date of Title VII. In 1964 the company discontinued overt segregation and permitted black workers to transfer to the skilled line if they could pass the test, but few succeeded in doing so. 422 U.S. at 429. The Supreme Court, adopting guidelines of the Equal Employment Opportunity Commission (EEOC), held that tests that have a disparate impact "are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs in which candidates are being evaluated." 422 U.S. at 431 (citation to EEOC guidelines omitted). The Supreme Court, agreeing with the Fourth Circuit, concluded that the District Court "erred in concluding that Albermarle had proved the job relatedness of its testing program . . ." 422 U.S. at 435-36. In addition, the Court held that even if an employer shows its tests to be "job related" the plaintiff still must have an opportunity to show that other tests or selection devices, without a similarly undesirable racial effect, would serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " 422 U.S. at 25, quoting McDonnell Douglas v. Green, supra, 411 U.S. at 801. Thus, even if an employer shows that its test is job related, the test is still unlawful if plaintiff can show that there is a way of achieving the same result with less of a discriminatory impact.

More recently, the Supreme Court upheld the decision of a three-judge court declaring unlawful, under the disparate impact theory of discrimination, a minimum height and weight requirement for Alabama prison guards. Dothard v. Rawlinson, 433 U.S. 321 (1977). Specifically, an Alabama statute required that prison guards weigh at least 120 pounds and be at least 5 feet 2 inches tall. After plaintiff was rejected because of her weight she brought a class action alleging that the requirements discriminate against women. The claim did not involve an assertion of purposeful discriminatory motive. 433 U.S. at 328. The Supreme Court upheld the District Court's finding that the statutory height and weight standards had a discriminatory impact on women applicants. 433 U.S. at 331. The District Court reached this conclusion because "[w]hen the height and weight restrictions are combined, Alabama's statutory standards would exclude 41.13% of the female population while excluding less than 10% of the male population." 433 at 329 - 30 (footnote omitted). Thus, plaintiff had made out a prima facie case of sex discrimination.

In order to rebut this prima facie case of discrimination defendants argued that these height and weight requirements had a relationship to strength, a quality essential to effective job performance as a prison guard. The Supreme Court rejected this argument stating that if the defendants really need to measure strength, "their purpose could be achieved by adopting and validating a test for applicants that measures strength directly." 433 U.S. at 332 (footnote omitted). In Dothard a violation of Title VII was found both without a claim of discriminatory intent and without any evidence from which it would be reasonable to infer an intent to discriminate.

C. Relationship Between "Treatment" and "Impact" Approaches

The Supreme Court has not recently decided a Title VII disparate impact case. However, in Texas Department of Community Affairs v. Burdine, supra, the Court did appear to indicate a unanimous resolve to limit the burden imposed upon the defendant by the establishment of a Title VII prima facie case. Although Burdine is a Title VII disparate treatment case it is possible that this trend will ultimately carry over to Title VII disparate impact cases as well and result in tightening up the proof required of a plaintiff in demonstrating a discriminatory effect. One circuit has already held that Burdine affects the allocation of proof in a disparate impact case under Title VII. Croker v. Boeing Co., 662 F.2d 975 (3rd Cir. 1981). The Third Circuit held that "[a]s with claims of discriminatory intent, the burden of persuasion remains at all times with the plaintiff." Id. at 991, Cf. NAACP v. Medical Center, Inc., 657 F.2d 1322, 1333-37 (3rd Cir. 1981) (holding that under Title VI of the Civil Rights Act of 1964 the burden of persuasion remains at all times with the plaintiff). However, a Fifth Circuit case decided on the same day as Croker held to the contrary. Johnson v. Uncle Ben's, Inc., 657 F.2d 750 (5th Cir. 1981).

The Supreme Court in Burdine overruled the Fifth Circuit's interpretation that the defendant in a Title VII disparate treatment case "bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action and that the defendant also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff." Burdine, supra, 450 U.S. at 252 (emphasis added). However, the Fifth Circuit continues to place a similar burden on the employer in Title VII disparate impact cases. Specifically, the Fifth Circuit, relying on language from Dothard, supra, emphasizes the word "proves" in the statement "[i]f the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices . . . would also 'serve the employer's legitimate interest . . . .'" Johnson v. Uncle Ben's Inc., 657 F.2d 750, 753 (5th Cir. 1981), quoting Dothard, supra. See also James v. Stockman Valves & Fittings Co., 559 F.2d 310, 330 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Rowe v. General Motors Corp., 457 F.2d 348, 354-55 (5th Cir. 1972).

This language from Dothard is interpreted by the Fifth Circuit as placing the burden of persuasion on a Title VII defendant. Following Burdine the Supreme Court remanded, for further consideration in light of Burdine, the Fifth Circuit's most recent pronouncement that the defendant in a Title VII disparate impact case bears the burden of persuasion once a prima facie case is established. Uncle Ben's Inc. v. Johnson, 101 S. Ct. 1967 (1981) remanding 628 F.2d 419 (5th Cir. 1980). The Fifth Circuit, with one judge of the three judge panel dissenting, affirmed its earlier decision and held that "[w]hile Burdine . . . affects the burdens of the parties in Title VII disparate treatment cases, it does not address Title VII disparate impact cases." Johnson v. Uncle Ben's Inc., 657 F.2d 750, 752 (footnote omitted). Indeed, the Fifth Circuit opinion asserted "[t]hat the burden upon the defendant in rebutting a prima facie case should vary in the two branches of Title VII law . . . [because] [k]nowledge of legitimate business reason is uniquely available to the employer who is accordingly bound to persuade the Court of its existence by a preponderance of the evidence." Id. at 753 (emphasis added).

The dissenting judge argued that the Supreme Court remanded in light of Burdine because it did not wish a distinction to be made between the allocation of burdens in Title VII disparate treatment cases and Title VII disparate impact cases and concluded that "the burden of proof in all cases of disparate treatment and disparate impact remains with the plaintiff and . . . only the burden of production shifts to the employer." Id. at 754 (emphasis added).

Thus, there is a conflict between the Third and Fifth Circuits in this case. The defendant in Uncle Ben's is currently seeking Supreme Court review on this issue.

III. TITLE VIII EFFECTS TEST

Title VIII, like Title VII, prohibits discrimination "because of" race, color, religion, sex or national origin. In addition, as with Title VII, the courts have recognized two ways of establishing a violation of Title VIII.

The most obvious and common way of establishing a violation of Title VIII is by showing that the defendant intended to discriminate. This theory of discrimination is closely analogous to the Title VII "disparate treatment" theory. For example, in Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2nd Cir.

1979), a black research physicist employed by IBM who was rejected by the screening committee of a New York City cooperative brought suit under Title VIII alleging that he was rejected because of his race. The Second Circuit, by analogy to McDonnell Douglas v. Green, supra, held that in order to establish a prima facie case a plaintiff who alleges a discriminatory denial of housing must show:

(1) that he is black;

(2) that he applied for and was qualified to rent or purchase the housing; and

(3) that he was rejected; and

(4) that the housing opportunity remained available.

610 F.2d at 1038. If plaintiff succeeds in establishing a prima facie case the burden then "shifts to the defendant to come forward with evidence to show that his actions were not motivated by considerations of race. If the defendant does not present such evidence, the plaintiff will be entitled to relief." 610 F.2d at 1039. Although courts in considering Title VIII "disparate treatment" cases do not always follow Title VII case law as closely as the Second Circuit did in Robinson, the focus of the inquiry in such cases is on the intent of the defendant. E.g. Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973); Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973) (if racial discrimination was part of the determination not rent, Title VIII was violated); U.S. v. Real Estate Development Corp., 347 F.Supp. 776 (N.D. Miss. 1972).

In United States v. City of Birmingham, Michigan, No. 80-70991 (S.D. Mich., May 27, 1982), the Department of Justice filed suit alleging that the City of Birmingham engaged in a policy and practice that prevented the development in the City of a racially integrated housing project. Although the court did consider a limited amount of statistical data, the focus of the suit and the court's inquiry was on the existence of racially discriminatory intent in the City's actions rather than on an analysis of the effects of the actions. Specifically, the court found that because racial considerations were a motivating factor among a significant percentage of those who were responsible for the City's conduct the City had acted with an intent to discriminate.

Title VIII not only prohibits a refusal to sell or rent a dwelling because of race, color, religion, sex or national origin but also makes it unlawful "to otherwise make unavailable or deny a dwelling." 42 U.S.C. §3604(a). Almost since the inception of efforts to enforce Title VIII the "otherwise make unavailable" language has been cited as indicating that Congress intended Title VIII to be as broad as it could be in precluding practices which had the effect of discriminating. Early in the enforcement of Title VIII the Department of

Justice brought suit against a muncipality alleging, among other things, that one of the city's zoning ordinances violated Title VIII because it had a racially discriminatory effect. The Eighth Circuit found that the ordinance had a racially discriminatory effect and therefore violated Title VIII. United States v. City of Black Jack, 508 F.2d 1179 (1974), cert. denied, 422 U.S. 1042 (1975). This method of establishing a violation of Title VIII is frequently referred to as the "effects test." The Title VIII effects test is analogous to the Title VII "disparate impact" theory of discrimination. Indeed, courts when faced with a Title VIII effects test issue often look to the Title VII case law for guidance. However, the Title VIII case law is not nearly as well developed as the case law under Title VII. The Supreme Court and several circuits of the U.S. Court of Appeals have yet to rule on whether there is an effects test under Title VIII. In addition, those circuits which have adopted a Title VIII effects test differ as to its precise articulation.

This section discusses the basis for a Title VIII effects test and its application to cases involving discriminatory housing practices. In addition, an appendix to this memorandum analyzes in detail significant Title VIII cases in which the effects test has been adopted and utilized as well as those cases which have been cited for the proposition that intent to discriminate must be shown in order to establish a violation of Title VIII.

In the leading effects test litigation under Title VIII plaintiffs sought to compel the Village of Arlington Heights, Illinois to rezone their property in order to permit the construction of housing to be built with federal financial assistance under section 236 of the National Housing Act, 12 U.S.C. §1715z-1. Specifically, plaintiffs alleged that the Village's refusal to rezone was racially discriminatory and violated their rights under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §§1981-83, and Title VIII. The Seventh Circuit let stand the district court's finding that plaintiffs had not proven discriminatory intent but rejected the district court's finding that the Village had violated the Equal Protection Clause of the Fourteenth Amendment. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 517 F.2d 409, 412-15 (7th Cir. 1974). The Supreme Court reversed, 429 U.S. 252 (1977), holding that discriminatory intent is required to establish a violation of the Equal Protection Clause of the Fourteenth Amendment. However, the Supreme Court remanded the case to the Seventh Circuit to determine whether plaintiffs' showing of discriminatory effect was sufficient to establish a violation under Title VIII.

On remand, Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) (hereinafter Arlington Heights II), the Seventh Circuit took into account the similarity of Title VIII to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., which bans employment discrimination, and noted the distinction the Supreme Court made between the standard of proof applicable under the Equal Protection Clause on the one hand and under Title VII on the other. Washington v. Davis, 426 U.S. 229 (1976). The Supreme Court held in Washington v. Davis that intent is required for equal protection cases but reaffirmed its holding in Griggs v. Duke Power Co., 401 U.S. 424 (1971), that a violation of Title VII may be established without a showing of discriminatory intent. The Seventh Circuit, after examining the history and purpose of the Fair Housing Act, drew the same distinction in the context of Title VIII and held that a violation of the Fair Housing Act can be established by a showing of discriminatory effect without a showing of discriminatory intent. Five other circuits of the Court of Appeals have held that a violation of Title VIII may be established without a showing of discriminatory intent. Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2d Cir. 1979); United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978); Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); United States v. Youritan Construction Co., 370 F.Supp. 643 (N.D. Cal. 1973), aff'd in part, 509 F.2d 623 (9th Cir. 1975).

In only two of these cases, Arlington Heights II and Rizzo, was it essential to find discriminatory effect in order to establish a Title VIII violation since the evidence was insufficient for a finding of discriminatory intent. In the other five cases, Robinson v. 12 Lofts Realty, United States v. Mitchell, Smith v. Anchor Bldg. Corp., United States v. City of Black Jack and United States v. Youritan, it seems probable that even if intent to discriminate were essential to establish a violation of Title VIII a violation would have been found. Although the decisions in each of these cases clearly embrace the effects test they differ as to the analysis that should be made of evidence justifying the actions complained of once a finding of discriminatory effect has been made. The differing approaches used are explained in the appendix to this memorandum.

Although no circuit court has explicitly rejected the effects test in a case involving the sale, rental or financing of housing or the provision of services and facilities in connection therewith, the Sixth Circuit has indicated that intent to discriminate must be shown in order to invalidate a zoning ordinance. Skillken v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068 (1977), aff'd on remand sub nom, Skilken v. City of Toledo, 58 F.2d 351 (6th Cir. 1977), cert. denied, 434 U.S. 985 (1977). Skillken has been interpreted to mean that the Sixth Circuit has rejected the effects test. Senate Committee on the Judiciary, Report Together with Minority and Additional Views on the Fair Housing Amendments Act of 1980, S. Rep. No. 96-919, 96th Cong. 2d Sess., 63-64 (1980) (Minority views). The Sixth Circuit recently affirmed a District Court decision finding a violation of Title VIII based on findings of both racially discriminatory intent and effect. United States v. City of Parma, Ohio, 661 F.2d 562 (6th Cir. 1981), affirming United States v. City of Parma, Ohio, 494 F.Supp. 1049 (N.D. Ohio 1980). However, the Sixth Circuit did not adopt the effects test; it merely concluded that there was sufficient evidence to support the District Court's finding of discriminatory intent. The Court also noted that the holding in Skillken was not based on a construction of Title VIII. "In fact the Fair

Housing Act is not mentioned in any of the dispositive language of the opinion." 661 F.2d at 574. Thus, the Sixth Circuit has neither adopted nor rejected the effects test.

It has also been contended that the Second and Fourth Circuits have rejected the effects test. See Boyd v. Lefrak Organization, 509 F.2d 918 (2d Cir. 1974), cert. denied, 423 U.S. 896 (1975); Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1974). However, the Second Circuit in its decision in Robinson v. 12 Lofts Realty, supra, which expressly adopted the effects test, indicated that the Robinson decision was not inconsistent with its holding in Boyd v. Lefrak Organization. In Robinson the court described its decision in Boyd as declining to "impose an affirmative duty on the private landlord to accept low income tenants absent evidence that his motivation is racial rather than economic in origin. [Boyd] 509 F.2d at 1113." 610 F.2d at 1037-38, n. 10. In Madison v. Jeffers, the Fourth Circuit upheld the district court's conclusion that the defendant's refusal to sell property for tax reasons in this case was legitimate and that in the absence of evidence to indicate racial bias no violation of Title VIII has been established. The fact that the court took into consideration evidence relevant to lack of intent to discriminate does not indicate that the Fourth Circuit considered a finding of intent to discriminate essential to establishing a violation of Title VIII.

Recently, a Federal District Court rejected a challenge relying on the Title VIII effects test to a municipality's decision to withdraw from HUD's Community Development Block Grant (CDBG) program. Angell v. Town of Manchester, PHEOH ¶15,398 (D. Conn. 1981). The citizens of Manchester, Connecticut in a referendum voted by more than a two-to-one margin to withdraw from the program. Plaintiffs, seeking to represent a class of low and moderate income citizens of Manchester, brought suit to enjoin implementation of the referendum ordinance. Plaintiffs contended, among other things, that the referendum ordinance violated Title VIII because it had the effect of discouraging the development of low income housing in Manchester. The district court (which is part of the Second Circuit), after carefully considering the Title VIII case law, with emphasis on the decisions of the Second Circuit (Boyd v. Lefrak, supra, and Robinson v. 12 Lofts Realty, supra), held that a prima facie violation of Title VIII may be established by proof that the defendants' acts had a racially discriminatory effect. However, after examining the four "critical factors" described in Arlington Heights II, supra, the court concluded that the town's withdrawal from the CDBG program did not have a segregative effect on Manchester. Specifically, the court noted that plaintiffs had not proved that the withdrawal resulted in any adverse effect on the construction of subsidized housing. For example, the court found that the fact that Manchester would not have a Housing Assistance Plan (HAP), which accompanies a town's CDBG application, does not mean that there would be less low income housing in Manchester. The court also found that the loss of a Fair Housing Officer (due to the loss of CDBG funds) did not have a segregative effect on Manchester. In short, the court declined to find a segregative effect simply because the town withdrew from the CDBG program. Rather, in the absence of hard evidence of discriminatory effect the court entered judgment for the defendants.

As noted at the outset of this section, courts have looked to Title VII case law to help resolve questions regarding the basis for and the nature of the Title VIII effects test. See, Robinson v. 12 Lofts Realty; Arlington Heights II; Resident Advisory Board v. Rizzo; Smith v. Anchor Bldg. Corp.; United States v. City of Black Jack, supra. As a result, there are similarities between the Title VIII effects test and the Title VII "disparate impact" theory of discrimination. For example, in Rizzo, supra, the Third Circuit expressly looked to Title VII and Griggs v. Duke Power Co., supra, for guidance in determining the correct standard for rebuttal of a prima facie case. 564 F.2d at 148. Under the effects test articulated in Rizzo, once plaintiff establishes a prima facie case of discrimination the burden shifts to the defendant to establish a justification for the acts resulting in discriminatory effect and to show that no alternative course of action could be adopted that would enable the interest to be served with less discriminatory impact. If the defendant meets this burden, the burden once again shifts to the plaintiff to demonstrate that other practices are available. Id. at 149, n. 37. The effects test articulated by the Eighth Circuit in Black Jack, supra, also involves burden shifting similar to that found in Title VII disparate impact cases. In Arlington Heights II the Seventh Circuit relied heavily on Title VII in deciding that a violation of Title VIII could be established without a showing of discriminatory intent and then set forth four "critical factors" for determining whether there has been a violation of Title VIII. These four "critical factors" have less of a similarity to the test under Title VII than do the tests described in Black Jack and Rizzo.

There is no pattern to show that the application of the Title VIII effects test in the various circuits of the Court of Appeals has evolved in a way which reflects changes over time in the Supreme Court's articulation of the effects test in Title VII disparate impact cases or of the allocation of the burdens in Title VII disparate treatment cases.

IV. STATUTORY EFFECTS STANDARD

The Voting Rights Act passed in 1965 and amended in 1970 and 1975 (codified at 42 U.S.C. §§1971 to 1973bb-4 (1981)) is the only civil rights statute that contains an explicit effects standard. Section 5 of the Act establishes a preclearance requirement that a state or political subdivision of a state, covered by section 4 of the Act, prior to effectuating "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in effect on November 1, 1964, obtain a determination from either the Attorney General of the United States or the United States District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. §1973c (1981). Thus, a finding of either discriminatory purpose or effect is sufficient to deny a proposed voting change submitted by a state or political subdivision.

The effects standard under Section 5 differs from the effects tests under Title VII and Title VIII in two very significant respects. First, the Section 5 test may be characterized as a "substantive" standard in that the denial or abridgement of the right to vote is a violation regardless of any justification the state may be able to advance for the enactment of the voting qualification or prerequisite. Under either the Title VII or the Title VIII effects test the defendant is accorded the opportunity to justify its practice by showing business necessity (see, e.g., cases cited under II.B., supra) or, in the case of a governmental entity, the defendant's interest in taking the action complained of (Arlington Heights II, 558 F.2d at 1290; Resident Advisory Board v. Rizzo, 564 F.2d at 149 ("a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact")). Second, the burden under Section 5 is on the state or subdivision to seek federal approval and to demonstrate that the change does not have a racially discriminatory effect. (The constitutionality of Section 5 was upheld in South Carolina v. Katzenbach, 383 U.S. 301, 355 (1966), which specifically affirmed the power of Congress to place "the burden of proof on the areas seeking relief.") Furthermore, under the Voting Rights effect test the burden does not shift; if the state or local government does not establish that the proposed change does not have a discriminatory effect then the change is denied.*

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*While the burden of an affirmative demonstration of the absence of a racially discriminatory effect clearly falls upon the political authorities making the change, the standards of proof demanded for section 5 clearance were not delineated in the legislation. However, the Supreme Court in Beer v. United States, 425 U.S. 130 (1976) rejected the proposition that members of a minority group have a right to be represented in proportion to their number in the general population. The case involved a New Orleans reapportionment scheme under which black voting strength would be increased from a population majority in one of five districts to population majorities in two districts and a voting majority in another. The District of Columbia district court had denied preclearance on the ground that the plan failed to give blacks their proportional voting strength. After a brief review of the legislative history and the facts, the Supreme Court announced its major holding in the case, the "nonretrogression" rule:

> [T]he purpose of 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. 425 U.S. at 141. Applying the rule to the facts at hand the Court found that the New Orleans plan did not have a discriminatory effect since the position of racial minorities was enhanced.

Another aspect of the Voting Rights Act that is significant relates to Section 2, which provides that

> [n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . . (emphasis added).

In City of Mobile v. Bolden, 446 U.S. 55 (1980), the Supreme Court rejected the argument that it was sufficient for plaintiffs bringing suit under Section 2 to show that a state or local law had a discriminatory effect. The Court held that plaintiffs must prove purposeful discrimination under either the Fourteenth or Fifteenth Amendment. This ruling prompted the inclusion by the House of Representatives in H.R. 3112, passed by the House on October 5, 1981, and by the Senate in S. 1992 of an amendment to Section 2 of the Voting Rights Act of 1965 which would strike out the quoted language underlined above and insert in lieu thereof "in a manner which results in a denial or abridgement of."** (emphasis added) Thus, under the amended language, plaintiffs in voting right suits brought under Section 2 could establish a violation of this section by proving that actions by a state or local governments had resulted in voting discrimination regardless of the jurisdiction's intent. If enacted, the Section 2 effects standard would be a "substantive" standard similar to the one in Section 5.

V. CONCLUSION

The effects tests applied by the Supreme Court in Title VII disparate impact cases and by Courts of Appeal in Title VIII cases are fundamentally different from the rigorous substantive effects standard prescribed by Section 5 of the Voting Rights Act and the proposed amendment to Section 2. On the other hand, as the analysis indicates, the so-called "pure intent" standard of the Constitution, although differently articulated, does not necessarily result in a fundamentally different approach than that followed in applying an effects test under Title VII or Title VIII. Further, in Title VII cases analyzing the question of "disparate treatment" it appears the Supreme Court has been carefully circumscribing the burden on defendants. It is possible, although there are indications to the contrary at least in one circuit, that this evolution will carry over to Title VII "disparate impact" cases as well. Since the Title VIII effects test is closely analogous to the test in Title VII disparate impact cases, a lessening of the defense burden in the latter should result in a similar limitation in Title VIII cases.

**H.R. 3112 and S. 1992 would further amend Section 2 by indicating that a right to proportional representation is not created. In addition, S. 1992 would delineate the legal standard to be applied under the "results" test.

The analysis of Title VIII effects test cases indicates that in only two of the circuit court effects test cases was it essential to find discriminatory effect in order to establish a Title VIII violation. In all of the other Court of Appeals cases decided under the effects test it appears that it would have been possible to make a finding of discriminatory intent based on the evidence presented at trial.

APPENDIX

SIGNIFICANT TITLE VIII EFFECTS TEST CASES

In litigation involving the Village of Arlington Heights, Illinois plaintiffs sought to compel the Village to rezone their property in order to permit the construction of housing to be built with federal financial assistance under section 236 of the National Housing Act, 12 U.S.C. §1715z-1. Specifically, plaintiffs alleged that the Village's refusal to rezone was racially discriminatory and violated their rights under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §§1981-83, and Title VIII. The Seventh Circuit let stand the district court's finding that plaintiffs had not proven discriminatory intent but rejected the district court's finding that the zoning decision did not have a discriminatory effect and concluded that the Village had violated the Equal Protection Clause of the Fourteenth Amendment. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 517 F.2d 409, 412-15 (7th Cir. 1974). The Supreme Court reversed, 429 U.S. 252 (1977), holding that discriminatory intent is required to establish a violation under the Equal Protection Clause of the Fourteenth Amendment. However, the Supreme Court remanded the case to the Seventh Circuit to determine whether plaintiffs' showing of discriminatory effect was sufficient to establish a violation under Title VIII.

On remand, Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) (hereinafter "Arlington Heights II"), the Seventh Circuit first reaffirmed its earlier holding that the Village's refusal to rezone had a discriminatory effect. The court had two bases for finding a discriminatory effect. First, since a greater number of blacks than whites in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing, the Village's refusal to rezone to permit the construction of the project had a greater impact on blacks than on whites. In addition, the court noted that Arlington Heights was almost totally white and that the project plaintiffs intended to build would be racially integrated. The court therefore concluded that "preventing the project from being built had the effect of perpetuating segregation in Arlington Heights." 558 F.2d at 1288.

Having found a discriminatory effect the court went on to ask whether such a finding "without a concomitant finding that the action was taken with discriminatory intent, is ever enough to support the conclusion that the action violated [Title VIII];

and, if so, under what factual circumstances will it be enough?" 558 F.2d at 1288.

Taking into account the similarity of Title VIII to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e _et seq._, which bans employment discrimination, the Seventh Circuit noted the distinction the Supreme Court made between the standard of proof applicable under the Equal Protection Clause on the one hand and under Title VII on the other. _Washington_ v. _Davis_, 426 U.S. 229 (1976). The Supreme Court held in _Washington_ v. _Davis_ that intent is required for equal protection cases but reaffirmed its holding in _Griggs_ v. _Duke Power Co._, 401 U.S. 424 (1971), that a violation of Title VII may be established without a showing of discriminatory intent. The Seventh Circuit, after examining the history and purpose of the Fair Housing Act drew the same distinction in the context of Title VIII and held that a violation of the Fair Housing Act can be established by a showing of discriminatory effect without proof of discriminatory intent.

The court then set forth four "critical factors" for determining "under what circumstances conduct that produces a discriminatory impact but which was taken without discriminatory intent will violate [Title VIII]." 558 F.2d at 1290. The four "critical factors" are as follows:

> (1) The strength of plaintiff's showing of discriminatory effect;
>
> (2) Evidence of intent, though not enough to satisfy the constitutional standard;*
>
> (3) Defendant's interest in taking the action complained of;
>
> (4) Whether the plaintiff seeks to compel the defendant to provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

_Id_.

After setting forth these four "critical factors" the court remanded the case to the district court with instructions to

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*The court concluded that this factor is the least important of the four. 558 F.2d at 1292.

determine whether there was land other than plaintiff's property which was both properly zoned and suitable for low-cost housing and in the event that there was no such land to find that the Village's refusal to rezone constituted a violation of Title VIII. 558 F.2d at 1294. The parties, on remand, entered into a consent decree which was approved by the district court, 469 F.Supp 836 (D. Ill. 1979). The district court's approval of the consent decree was subsequently upheld by the Seventh Circuit. 616 F.2d 1006 (7th Cir. 1980). In upholding the district court's approval of the consent decree the court described Arlington Heights II as holding that the Village "has a standing obligation under the Fair Housing Act to refrain from perpetuation of zoning practices that effectively foreclose construction of low cost housing . . . ." Id. at 1008.

Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d. Cir. 1977), cert. denied, 435 U.S. 908 (1978), decided shortly after Arlington Heights II, involved a challenge to the termination of the Whitman Park Townhouse Project in Philadelphia. Although the district court found that two of the defendants, the Philadelphia Housing Authority (PHA) and the Redevelopment Authority of Philadelphia (RDA) had not acted with discriminatory intent it found that the actions of these agencies with regard to the Whitman Park Project had a discriminatory effect and constituted a violation of Title VIII. The Third Circuit joined the Seventh Circuit in concluding that "in Title VIII cases, by analogy to Title VII cases, unrebutted proof of discriminatory effect alone . . ." may constitute a violation of the Fair Housing Act. 564 F.2d at 146. The court went on to recognize that the actions of RDA and PHA in terminating the Whitman Park Project "was felt primarily by blacks, who make up a substantial proportion of those who would be eligible to reside there." Id. at 149. In addition, the court noted that urban renewal clearance resulted in the removal of blacks from the Whitman project area, an area in which, before urban renewal, 45% of the families were black. Id. For these reasons the Third Circuit concluded that the actions of the PHA and RDA had a racially discriminatory effect.

Having determined that the actions of the PHA and RDA had a racially discriminatory effect and that such a showing establishes a Title VIII prima facie case the court went on to consider "under what circumstances a Title VIII defendant can justify the discriminatory effect which results from its challenged action." Id. at 148 (footnote omitted). The court did not utilize the Seventh Circuit's "critical factors" but noted "parenthetically" that if it had it would still have found that the PHA and RDA violated Title VIII. Id. at n. 32.

In determining the standard for rebuttal of a prima facie case the Third Circuit again looked to Title VII; specifically, the "business necessity" test utilized in Title VII employment discrimination cases, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Recognizing the vast differences between employment and housing discrimination cases the court indicated that Title VIII rebuttal criteria must evolve on a case by case basis. The court did, however, provide some guidance:

> a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.37

* * *

> 37 If the defendant does introduce evidence that no such alternative course of action can be adopted, the burden will once again shift to the plaintiff to demonstrate that other practices are available. Id. at 149.

In the event that a prima facie case is not rebutted, a violation of Title VIII is established. Id.*

Since there was no finding that PHA and RDA acted with discriminatory intent it would not have been possible to find that the PHA and RDA violated Title VIII without an effects test. In addition, t.. Third Circuit has adopted a strong effects test. Once a prima facie case is established the defendant must come forward with more than just a legitimate, bona fide interest which is served by the action or actions complained of but must also show that there is not another course of action available that would serve the interest with a less discriminatory impact.

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*The Supreme Court recently reaffirmed that in an employment discrimination suit brought under Title VII once plaintiff has established a prima facie case of discriminatory treatment a presumption is created that the defendant has violated Title VII. The burden then shifts to the defendant to rebut the presumption by producing evidence that the employment action was taken for a legitimate, nondiscriminatory reason. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and plaintiff then has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Although Burdine is a Title VII disparate treatment case rather than a discriminatory impact case, it does appear to indicate a unanimous resolve by the Supreme Court to limit the significance of the establishment of a prima facie case under Title VII. It is reasonable to expect this view will prevail in Title VIII cases as well, and to the extent it does there should be less concern about a Title VIII effects test imposing an undue burden on defendants. Of course, the Supreme Court has not yet ruled on whether there is an effects test under Title VIII.

In United States v. City of Black Jack, 508 F.2d 1179 (1974), cert. denied, 422 U.S. 1042 (1975), the Eighth Circuit held that a zoning ordinance prohibiting the construction of any new multiple-family dwelling within the city had a discriminatory effect and constituted a violation of Title VIII. The court found that in order to establish "a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect." Id. at 1184 (citations omitted). Since "[t]here was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white" the court found that the Department of Justice had established a d'scriminatory effect, id. at 1186, and that the burden shifted to he City to demonstrate "that a compelling governmental interest was furthered by that ordinance." Id. The court therefore used the "compelling interest" analysis used in cases involving alleged violations of the Constitution. See e.g., Shapiro v. Thompson, 394 U.S. 618, 637 (1969). (The Third Circuit in Rizzo, supra, expressly declined to apply the Black Jack "compelling interest" analysis to Title VIII, noting that this analysis is not part of the Title VII doctrine and that such a "heavy burden should be reserved not for Title VIII defendants, but for those who seek to justify denials of equal protection by purposeful discrimination." 564 F.2d at 148.)

The court in Black Jack found that the City did not have a compelling governmental interest and held that the ordinance violated Title VIII. 508 F.2d at 1187-8. Notwithstanding the Justice Department's contention that the ordinance was enacted with discriminatory intent and the uncontradicted evidence that race played a significant role both in the desire to incorporate and the decision to rezone, the court declined to base its "conclusion that the Black Jack ordinance violate[d] Title VIII on a finding that there was improper purpose." Id. at 1185, n. 3.

United States v. Youritan Construction Co., 370 F.Supp. 643 (N.D. Cal. 1973), aff'd in part, 509 F.2d 623 (9th Cir. 1975), involved an apartment owner who as a matter of practice required credit checks of blacks but not whites and steered prospective black tenants to certain buildings by telling them that no apartments were available in the buildings occupied by whites. The Justice Department filed a civil action alleging that this conduct constituted a pattern or practice of resistance to the full enjoyment of the rights granted by Title VIII. 42 U.S.C. 3613(a).

The court found that "practices which have the effect of denying dwellings on prohibited grounds are . . . unlawful." 370 F.Supp at 648 (citations omitted). The court further noted that statistical evidence may be used to establish a prima facie case and that once a prima facie case is established the burden shifts to "the defendant to come forward with evidence to the contrary." Id. at 649 (citations omitted). The court concluded that Title VIII had been violated but did not provide specific guidance as to how a defendant can rebut a prima facie case of discrimination under Title VIII. Although the court based its judgment on the effect of defendants' actions there was ample evidence of discriminatory intent. For example, the court found that the resident manager of the apartment complex gave discriminatory instructions to rental agents working under her supervision. Id. at 646. In addition, the court found that the statistical evidence created an inference that arbitrary procedural roadblocks were placed in the path of black rental applicants "because of race, and not neutral thoughtlessness." Id. at 650. Thus, although the district court utilized an effects test analysis and such use was upheld by the Ninth Circuit it seems reasonably clear that there was sufficient evidence of discriminatory intent to establish a violation of Title VIII even without the effects test.

United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978), like Youritan, supra, involved a case brought by the Attorney General involving steering practices. The district court found that defendants had steered blacks to a particular section of an apartment complex. Specifically, the black tenants were very heavily clustered in four of the apartment complex's eighteen buildings. The Fifth Circuit found this statistical evidence to be highly probative of a violation of Title VIII. The Court of Appeals went on to note, citing Arlington Heights II, that "a significant discriminatory effect flowing from rental decisions is sufficient to demonstrate a violation of the Fair Housing Act." Id. at 791. Mitchell, like Youritan, supra, is a case in which an effects test analysis was adopted and utilized where intentional discrimination could have been found. The statistical evidence in Mitchell and Youritan could have been used to infer intentional discrimination. For example, in Mitchell it was found that 95% of all blacks living in the complex lived in four of the complex's eighteen buildings and that 53% of all black tenants were located in one of these four buildings.

Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976), involved a landlord who repeatedly told a qualified black applicant that no apartments were available while informing white applicants that apartments were in fact available. The court citing Black Jack, supra, noted that "[e]ffect not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme," 536 F.2d at 233, and found that "where a black rental applicant meets the objective requirements of a landlord, and the rental would likely have been consummated were he or she a white applicant, a prima facie inference of discrimination arises as a matter of law. If the inference is not satisfactorily explained away, discrimination is established." Id. (citation omitted). The court found that defendant had not rebutted the prima facie case and reversed the district court's judgment that there was no discrimination. Although an effects test analysis was used there was sufficient evidence to find intent to discriminate. Thus, the result could easily have been the same even without the effects test.

In Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979), plaintiff, a black research physicist employed by IBM, entered into a contract to purchase a cooperative apartment in Manhattan. The contract made the sale conditional on the seller's obtaining the consent of the corporation. After the proposed sale to plaintiff was discussed at a shareholders' meeting the shareholders voted to establish a screening committee and later increased the percentage needed for approval from 51% to 66 2/3%. The shareholders then disapproved the sale to plaintiff and plaintiff brought suit alleging, among other things, a violation of Title VIII. The district court entered judgment for the defendant and the Second Circuit reversed. After considering Arlington Heights II and other cases in the area the Second Circuit adopted the effects test and, by an analogy to the employment discrimination area, set forth the following elements which a plaintiff who alleges a discriminatory denial of housing must show:

> (1) that he is black;
> (2) that he applied for and was qualified to rent or purchase the housing; and
> (3) that he was rejected; and
> (4) that the housing opportunity remained available.

Id. at 1038 (citation omitted). The Second Circuit then went on to state that once a prima facie case is established the "burden shifts to the defendant to come forward with evidence to show that his actions were not motivated by considerations of race." Id. at 1039 (citing Rizzo, supra and Smith v. Anchor Bldg. Corp., supra). The court found that the burden was not satisfied in this case.* The court also noted, however, that "[e]ven if a

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*Since the Second Circuit's decision in Robinson a case decided in the Eastern District of New York, Dreher v. Rana Management, Inc., 493 F.Supp. 930 (E.D. N.Y. 1980), held that even if plaintiffs had established a prima facie case by showing a discriminatory effect the prima facie case was successfully rebutted by defendant. Rana Management had entered into a lease agreement with Hofstra University to provide housing for Hofstra's students. Since the population of the apartments prior to the agreement was at least 90% black and the University students who would occupy the units under the lease agreement would be 90% white plaintiffs contended that a discriminatory effect had been proven. Assuming this to be the case the court found that the economic justifications presented by defendants were sufficient to rebut a prima facie case of discrimination. These economic justifications included Hoftsra's obligation under the lease to pay fair market rental for the entire building whether or not all the apartments were occupied. This case is (Continued) motivation test were applied [plaintiff] would be found to have established his prima facie case, for the nature and timing of the corporation's actions with respect to [plaintiff's] application readily permits an inference of racially discriminatory motivation." Id. at 1038.

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particularly interesting because it demonstrates that even in a situation where statistics show an extreme adverse disparate effect on minorities a defendant can prevail by presenting a genuine economic justification.

Skillken v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), involved a challenge to the City's refusal to rezone an area in an expensive residential area to permit low cost public housing units. The district court held for the plaintiff and ordered the City Council to rezone the area by passing a spot zoning ordinance. The Sixth Circuit reversed, finding that the district court erred in finding discrimination. The court noted that it did not regard the City Council's refusal to rezone "as obstructing the rights of minorities to housing, upon which an inference of discrimination 'in effect' may be drawn . . . ." Id. at 881. More generally, the Sixth Circuit stated that:

> The time has not yet arrived for the courts to strike down state zoning laws which are neutral on their face and valid when passed in order to permit the construction at public expense of large numbers of low cost public housing units in a neighborhood where they do not belong, and where the property owners, relying on the zoning laws, have spent large sums of money to build fine homes for the enjoyment of their families. Id.

On certiorari to the Supreme Court the case was remanded in light of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and Hills v. Gautreaux, 425 U.S. 284 (1976). On remand the Sixth Circuit considered the Supreme Court's opinion in Arlington Heights and concluded that had the Supreme Court opinion been available to the court it would have been cited as "the principal authority in support of [its] decision." Skilken v. City of Toledo, 558 F.2d 350, 351 (6th Cir. 1977). Although the Sixth Circuit did not explicitly reject the effects test its opinions in Skillken strongly indicate that, at least in the context of exclusionary zoning cases, intent to discriminate must be shown in order to establish a discriminatory housing practice.

In United States v. City of Parma, Ohio, 661 F.2d 562 (6th Cir. 1981), the Attorney General sought to enjoin Parma from violating the Fair Housing Act. Specifically, the government challenged "(1) Parma's refusal to enact a fair housing resolution welcoming 'all persons of goodwill'; (2) Parma's general opposition to all forms of public and low-income housing; (3) Parma's denial of building permits for a privately-sponsored low-income housing development--Parmatown Woods; (4) Parma's enactment of four land use ordinances which impose height, parking and voter approval limitations on housing developments; and (5) Parma's refusal to submit an adequate housing assistance plan in connection with its application for Community Development Block Grant Funds." 661 F.2d at 566. After considering the evidence, the district court concluded that Parma violated the Fair Housing Act. In the opinion on appeal, the Sixth Circuit stated that the district court's findings "are based on both a standard of racially discriminatory intent and a standard of racially discriminatory effect." 661 F.2d at 568. In affirming the district court's decision, the Sixth Circuit distinguished Skillken, supra, holding that on the record presented the district court did not err in finding discriminatory intent and a pattern and practice of resistance to the full enjoyment of rights granted by the Fair Housing Act. The Court noted that the holding in Skillken was not based on a construction of Title VIII. "In fact the Fair Housing Act is not mentioned in any of the dispositive language of the opinion." 661 F.2d at 574. Thus, the Sixth Circuit has neither adopted nor rejected the effects test.

In Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1974), plaintiffs claimed that defendant refused to sell land to them because they were black. The district court found that defendant took the land off the market for income tax purposes and not race. The Fourth Circuit affirmed noting that the record clearly showed that defendant consistently stated that he would not sell for tax reasons and there was little or no evidence to indicate racial bias. One judge dissented because he did not believe that the defendant had established with objective facts a business or other rational purpose for withdrawing the property from the market.

Boyd v. The Lefrak Organization, 509 F.2d 1110 (2d Cir. 1974), was an action brought by black recipients of public assistance in New York City whose applications to rent defendant's apartments were rejected because of their income. Specifically, plaintiffs contended that defendant's rule that an applicant have a weekly net income of 90% of the monthly rental of the apartment applied for ("the 90% rule") or, alternatively, obtain a cosigner, violated the Fair Housing Act. Plaintiffs argued that the 90% rule excluded almost all public assistance recipients, that a majority of these recipients were black or Hispanic and that therefore the use of the 90% rule was racially discriminatory. The district court held for plaintiff but the Second Circuit reversed noting that there had been no finding of racially-motivated discrimination. The court rejected plaintiffs' contention that in a Title VIII case, as in employment discrimination cases under Title VII, defendant must demonstrate a business necessity for practices such as the 90% rule. Judge Mansfield dissented noting that where a formula such as the 90% rule "has the effect of excluding a disproportionately high percentage of a minority group, the landlord should in fairness be prepared to demonstrate the business necessity of his facially neutral rule." Id. at 1116. Although based on Boyd alone it would appear that the Second Circuit has rejected the effects test, in Robinson v. 12 Lofts Realty, 610 F.2d 1032 (1979), the Second Circuit expressly adopted the effects test and explained that the conclusion in Boyd "after a full trial that the plaintiffs have failed to show racial motivation does not imply that proof of motivation was required in order for the plaintiffs to establish a prima facie case." Id. at 1037, n. 10.