

1987 WL 9919  
United States District Court, S.D. Texas, Houston  
Division.

UNITED STATES of America  
v.  
PASADENA INDEPENDENT SCHOOL  
DISTRICT; Pasadena Board of Education; and  
E.T. Lon Luty, Superintendent.

Civ. A. No. H-83-5107.  
|  
April 18, 1987.

#### ORDER

DeANDA, District Judge.

\*1 On January 12, 1987, the Court commenced the trial of this case with an advisory jury, which returned a verdict on February 10, 1987. The advisory jury found that Defendants had engaged in a pattern or practice of intentional racial discrimination. The Court has reviewed the evidence and the jury's verdict, and enters the following findings of fact and conclusions of law.

By order of this Court, entered October 24, 1984, trial in this case is being held in two stages. Stage I, which has been concluded and for which these findings of fact and conclusions of law are being entered, concerned the issue of Defendants' liability and prospective relief; Stage II will address issues of individual relief.

#### FINDINGS OF FACT

1. Plaintiff in this action is the United States.

2. Defendants are the Pasadena Independent School District, the Pasadena Board of Education, and E.T. Lon Luty, in his official capacity as Superintendent of the School District (hereinafter collectively referred to as "Defendants" or "PISD").

3. PISD was incorporated in 1898. It is an agency organized and existing under the laws of the State of Texas and, pursuant to Texas laws and under the direction of its Board of Education, provides public education to eligible children residing within its boundaries.

4. PISD is located in Harris County, Texas, and includes a part of the City of Houston, the entire City of South Houston, most of the City of Pasadena, and some unincorporated parts of Harris County.

5. The Pasadena Board of Education (hereinafter "Board of Education" or "Board of Trustees") is a school board organized and existing under the laws of Texas. It is the governing board and establishes policies for the operation of PISD.

6. Defendants School District and Board of Education are employers within the meaning of 42 U.S.C. § 2000e(b).

7. Defendant E.T. Lon Luty is superintendent of PISD and is its chief administrative officer.

8. On August 31, 1981, the United States notified PISD that the Department of Justice was initiating an investigation of PISD's employment practices.

9. The City of Pasadena specifically provided for the segregation of the "white race" and "colored race" from 1942 until 1964.

a. The Home Rule Charter 1942 of the City of Pasadena, Article VIII, Section 4, specifically provided for the segregation of races.

b. The City of Pasadena Home Rule Charter of 1964 does not contain any provision relating to the segregation of races.

c. Chapter 103 of the General and Special Laws of the Fortieth Legislature of the State of Texas (Article 1015b, Texas Revised Civil Statutes) which was enacted in 1927, gave cities the power and authority to provide by ordinance for the segregation of negroes and whites. Article 1015b was repealed by Acts 1969, 61st Leg., p.

362, ch. 131, which was effective September 1969.

10. PISD excluded black students from enrollment in its schools until the 1966–67 school year.

a. The 1876 Constitution of the State of Texas Article 7, Section 7, required the segregation of white and black children in separate public schools. That provision was not repealed until August 5, 1969. *Tex.Const.Ann.*, art. 7, § 7 (Vernon’s 1957); Acts 1969, 61st Leg., p. 3230, H.J.R. No. 3.

\*2 b. In 1954, the Supreme Court of the United States declared state laws requiring the segregation of white and black children in separate public schools to be unlawful and in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

c. Until the 1966–67 school year, PISD maintained no educational facilities for black or colored students but offered grades 1–12 only for nonblack students.

11. PISD did not hire black teachers prior to the 1972–73 school year.

a. In addition to being located in Harris County, Texas, PISD is located in the Houston Standard Metropolitan Statistical Area (Houston SMSA) for purposes of the United States Census.

b. The general population census (all persons) for the Houston SMSA was as follows for 1980: total population 2,905,353; black population 528,510; percentage black 18.2.

c. According to the 1980 United States Census information, 21.1% of the elementary and secondary teachers in the Houston SMSA were black.

d. The first black teacher hired by PISD was Clarence Mallet who was hired on October 19, 1972, as a cooperative vocational education teacher and assigned to teach in the Metal Shop at Dobie High School.

12. The race of black applicants is generally known by the staff of the PISD Personnel Department from information requested by the application form and personal observation.

a. The PISD application form has called for the submission of a photograph, if available, and a majority

of applicants continue to submit photographs with their applications.

b. For at least 46 black applicants who made applications for teaching positions with PISD between October 1, 1977 and April 30, 1984, but who did not submit photographs with their application forms, the race of each was determinable from their application forms. The forms revealed either that they had attended colleges or high schools which had historically been attended exclusively by black students or other information from which their race could be surmised, such as membership in a traditionally exclusively black organization. These 46 black applicants, the colleges they attended, and other indications of their race being black, are listed in Appendix A to these Findings.

c. Many applicants personally appear at the PISD Personnel Office to obtain or deliver their application forms.

13. Statistical analyses of data collected by both Plaintiff and Defendants on PISD teacher applicants reveal that PISD has hired statistically fewer black teachers from among all persons applying for positions than would have been expected in the absence of unlawful discrimination.

14. For purposes of this case, the Government retained a labor economist, Dr. Janice Madden, a tenured professor at the University of Pennsylvania. On the basis of her education, professional experience, and background, Dr. Madden qualifies as an expert competent to conduct economic and statistical analyses. The analyses she conducted were based on data collected on persons who applied for teaching positions with PISD from October 1, 1977 through April 30, 1984. Those analyses were of two types:

\*3 a. “Applicant flow” analyses comparing the percentage of black teachers applying to PISD with the percentage of black teachers hired by PISD.

b. “External availability” analyses designed to determine the percentage of black teachers in the teacher labor market from which PISD draws applicants.

15. The data collected and used for the analyses included for each applicant, *inter alia*, that person’s name, address, social security number, race (black, nonblack, or unknown), principal subject area applied for (e.g., Math, Social Studies, etc.), date of application, and whether or not offered a job by PISD. All such data were obtained

from PISD applicant and personnel files with the exception of the race identification of some applicants for whom that information was not in their files in the form of either a photograph or an explicit declaration.

16. If neither a clear photograph nor an explicit declaration as to race existed in an applicant's file, race identification was made from either birth certificates, driver license records, records of the Texas Education Agency in Austin, or correspondence from the applicant. PISD also conducted its own statistical analysis of data on applicants. Although PISD chose not to rely on external

sources of racial information beyond that asserted to be personally known to PISD staff members at the time the application was under consideration, to a considerable extent, the racial identifications made by the Government and PISD are in agreement. The extent of this agreement is as follows for the 5399 applicants included in the Government's analyses:

Gov't ID	PISD Agrees	Disagrees
Nonblack	5000	3952
Black	275	194
Unknown	124	73
Total:	5399	4219

17. The principal causes for the lack of agreement between the data used by the Government and that used by PISD are (1) there are 114 more applicants used in the Government's analyses who were not used by PISD, and (2), due to the Government's utilization of external sources, there are 958 white or nonblack applicants and 80 black applicants in the Government's computation whom PISD treated as "race unknown." There are only 28 applicants used in the Government's analyses for which PISD asserts a race identification which the Government treats as being "race unknown" (25), or has used a contrary identification (3). Plaintiff's Exhibit 105 is a list of the 1180 applicants about whom there is disagreement between the parties as to their races, with indications for

each of the Government's race identifications, its source for that identification, the exhibit number assigned to that source, and the racial identification or lack thereof given the applicant by PISD in its analyses. Both the racial identifications drawn from PISD application files and those determined from external sources are accurate and have been appropriately used by the Government in its economic and statistical studies.

\*4 18. Plaintiff conducted four different "applicant flow" analyses for the purposes of determining whether or not the differences between the actual number of black teachers offered jobs from October 1, 1977 through April 30, 1984, and what would have been statistically expected had race not been a detrimental factor toward blacks

being hired, were differences which might have been expected by chance. The first analysis is straightforward and controls for only two factors: 1) race; and, 2) at least one application was filed. The second analysis controls for an additional factor, "subject area applied for," as determined in most instances by PISD's designation of that subject area in each applicant's file. This was done by creating 23 "pools;" one for each of the 23 teaching areas identified by Plaintiff. The third analysis also controls for three factors; however, in place of "subject area applied for," it controls for the school year for which the application was filed, as determined from the date that PISD stamped the application as received by it. This was accomplished by creating seven "pools," one for each of the seven school years covered by the data. The fourth

analysis controls both for the "subject area applied for" and the "school year of the application," for a total of four factors, necessitating the creation of 161 "pools."

19. The results of each of Plaintiff's applicant flow analyses are stated below in terms of the actual number and percentage of blacks hired, the expected number and percentage of blacks who would have been hired, and the numbers of standard deviations the "actual" is off of the "expected" under each of the analytical approaches pursued.

Analysis Control	Total Hires	Actual Blacks	Expected Blacks	Standard Deviations
None	1440	33(2.3%)	75(5.2%)	7.19
Subject Area	1440	33(2.3%)	74(5.1%)	7.04
School Year	1440	33(2.3%)	70(4.9%)	6.67
Area and Year	1440	33(2.3%)	70(4.9%)	6.45

20. Plaintiff's applicant flow analyses were carried out using appropriate statistical procedures and each establishes that the differences between the actual number of black teachers hired and the number which otherwise would have been expected are statistically significant and would not have been expected to occur by chance. In fact, from the total number of black and nonblack applicants seeking to be hired, the likelihood of only 33 blacks actually being hired would not be expected to occur even once in one billion random drawings.

\*5 21. Another statistically important conclusion concerning the data is reached from Plaintiff's four applicant flow analyses. The controls for "subject area applied for" and "school year of application" make very little difference in the predicted number of black teachers

hired. Without those two controls the expected number would have been 75, and with both controls it would have been 70. The smallness of this difference indicates that, (1) there were no significant racial differences between blacks and nonblacks in either the subject areas applied for or the timing of their applications which might systematically overstate the percentage of blacks in the applicant pool: and, (2) there is no statistical reason for having to apply such controls in either the applicant flow analyses described above or the labor market analyses conducted by Plaintiff, and discussed hereinafter, using the same basic data.

22. In addition to the four principal applicant flow analyses, Plaintiff conducted a subsidiary analysis or additional check of the reliability of its timing control. In

this analysis, an applicant was only considered to be in competition for a job if he or she had applied between October 1, in a given academic year and the date on which a similarly situated applicant was offered a teaching position. The resulting “expected” percentage of black hires (4.7%) was not significantly different from that projected without this additional check on timing.

23. As mentioned above, PISD also conducted applicant flow analyses. Using the data collected by Defendants and applying their basic analytical processes, with some modifications to embrace both the same applicants and a time span closer to those used by Plaintiff, the actual number of blacks hired remained significantly less than the expected number. Using PISD data, the actual number of blacks hired between January 1, 1978 and May 31, 1984 was 31, while the expected would have been 61, a shortfall of 4.16 standard deviations. When, from the last five years of applicants, those applicants for whom PISD can find no record of having been interviewed are omitted from the analysis, the expected would have been 51 black teachers hired, or 3.03 standard deviations off of the actual 31 hired. Similarly, when applicants from that five-year period for whom PISD can find no record of having been interviewed are omitted from the analysis, the expected would have been 51 black teachers hired, or 3.03 standard deviations off of the actual 31 hired. Similarly, when applicants from that five-year period for whom PISD can find no record that they were either interviewed or had asked to be interviewed are omitted, the expected black hires drops to 48, which still remains 2.68 standard deviations off the 31 actual hires. In statistics, any value beyond 1.96 standard deviations indicates that the difference under study between the “actual” and the “expected” is statistically significant and not ascribable to chance.

\*6 24. The expert hired by Defendants to conduct statistical studies of PISD’s employment problems was Dr. Alan King. Dr. King’s study compared applicants to specific openings and thus depended on a precise breakdown of teaching fields and timing of applications. Dr. King’s study required that an applicant either have requested or received an interview to be considered in the study. By treating those who requested interviews the same as those who were interviewed, Dr. King sought to eliminate any effect that racial bias in granting interviews may have had. Moreover, by requiring an applicant to have requested an interview, Dr. King hoped to conform his model more accurately to the actual PISD application process. However, PISD did not keep accurate records of interview requests, thus many applicants were not counted

in Dr. King’s study that should have been. Furthermore, Dr. King considered written interview requests that accompanied applications or were included in the application packet, specifically in the handwritten letter, as interview requests when PISD did not. In effect, Dr. King’s study transposed many people who did not actually request interviews in place of those who did. This error was significant because as previously stated, Dr. King’s study very precisely considered the timing of applications and the positions for which applications were made. The Court thus finds Dr. King’s study is not credible because it is based on unreliable data.

25. As a prerequisite to being hired by PISD, a teacher applicant must be interviewed by the Assistant Superintendent of Personnel or, for those applying for Special Education, Music, P.E. or Vocational Education positions, by an assistant in Personnel.

a. The granting or denial of an interview is a matter within the sole discretion of PISD.

b. Black applicants have been accorded interviews at a rate less frequent than have white applicants. Data compiled by Defendants show that of 3341 white teachers who applied for hire to PISD between January 1, 1980 and May 31, 1984, 2109, or 63%, were interviewed. In contrast, of the 177 black teachers making application during this same period, only 94, or 53%, were interviewed. This difference in the rate (63% vs. 53%) at which interviews were granted is significant.

According to Defendants’ data covering the same time period, among those applicants who were interviewed at PISD, blacks were less likely to be hired. 726 of the 2109 white applicants who were interviewed, or 34%, were hired. In contrast, only 19 of the 94 black applicants who were interviewed, or 20%, were hired.

c. PISD’s application form and the cover letter accompanying it state that “a personal interview is necessary to complete the application” and that applicants should wait ten days after filing their application forms and “THEN CALL OR WRITE” the School District so it can “make arrangements to talk.” Black and nonblack applicants, however, have been treated differently in the implementation of these procedures and requirements. On several occasions nonblack applicants have been called by PISD and solicited to come in for interviews. Often nonblack applicants were invited to interview even though no vacancies existed at the time they applied on speculation that a vacancy would occur. In contrast, many

black applicants who called to request interviews or to determine whether vacancies existed in the educational fields for which they had applied were denied interviews if no specific position was open.

\*7 d. PISD has no standard procedure for responding to applicants' contacts with its Personnel Office, for recording applicants' requests for interviews or inquiries about vacancies, or for recording its solicitation of applicants.

e. According to Mr. White, applicants who call the personnel office to inquire about vacancies should be invited by his staff to come in for an interview.

f. Applications filed with PISD for teaching positions are treated as active, pending applications from the time they are filed until the following October 1st. After October 1st, an application is ostensibly considered to be no longer active unless the applicant specifically requests that it be continued.

g. Occasionally, nonblack teachers have been solicited to apply to PISD, or have had interviews set up for them at PISD in cooperation with white personnel directors from other nearby school districts, and have subsequently been hired.

26. The Assistant Superintendent of Personnel and his assistant lack uniform objective standards for the selection of teachers.

a. Mr. White has stated that it is the total picture of the individual that counts and that the PISD board policy manual directive states that the PISD is to seek the best qualified person for every job.

b. According to Defendants' counts of PISD data, black applicants to PISD are significantly more likely than white applicants to hold or qualify for a Texas Teaching Certificate.

c. According to Defendants' counts of PISD data, black applicants to PISD were more likely than white applicants to have had at least one year of teaching experience when they applied to PISD for teaching positions.

d. Of the 30 rejected black teacher applicants to PISD who testified, sixteen (16), or more than half of them, held Master's degrees. Twenty-seven (27) were experienced teachers, with seventeen (17) having more than five (5) years experience and, of those, seven (7) had

more than 10 years of experience. All of them either held or qualified at the time of application for a Texas Teaching Certificate in one or more of the teaching areas for which they applied.

27. Teacher applicants to PISD whom the Assistant Superintendent of Personnel or his assistant find satisfactory are not automatically offered jobs. Instead, they are referred to the principals of schools in need of teachers. A principal must also find an applicant satisfactory to him or her before a job offer will be made.

a. All PISD principals are nonblack. PISD never employed a black as a school principal, associate principal or assistant principal during the relevant period of this lawsuit.

28. As part of its case of disparate treatment, the Government presented evidence of individual black applicants who applied for teaching positions at PISD. The Government made a prima facie case of racial discrimination on nearly all of these applicants. PISD in response put Mr. Glen White on the stand to testify as to why each person was not interviewed or hired, or, if he could not recall, why he believed they were not interviewed or hired based on his observations at trial. Often, Mr. White's testimony was completely contradictory of the applicants'. For example, several applicants testified they called for interview appointments, but were told no vacancies existed and no interviews were being conducted. Mr. White, however, testified that had these people asked for interviews they would have been interviewed and they did not get hired because they were not interviewed. However, this testimony was frequently based on assumptions, hearsay, and conclusions without first-hand knowledge. Because written memoranda were sketchy and incomplete, Mr. White had to frequently rely on memory of hundreds of interviews over a period of years. The Court finds the testimony of the individual applicants who personally participated and were directly involved in the specific incidents about which each testified, is of much greater weight than that of Mr. White.

\*8 29. The following qualified black teacher applicants sought initial interviews and were denied interviews and told that no vacancies existed, when, in fact, vacancies in the positions they sought existed or were anticipated and were filled by nonblack applicants who were granted or had been solicited for interviews.

a. *Maurice Black* is a qualified black teacher who applied

to PISD on November 7, 1978 to teach Physical Education (P.E.), and History. A photograph was attached to his application form. After filing his application, he called PISD to request an interview. Mr. Black was told that PISD did not have any openings in P.E. or History at that time and that no openings were anticipated. He was told that there was no need to come in for an interview. PISD hired twelve (12) nonblack History and/or P.E. teachers between November 7, 1978 and September 20, 1979.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for Mr. Black's rejection or for their acceptance over him of each of the twelve nonblack applicants hired for the positions he sought.

b. *Betty Jean Carter* is a qualified black teacher who filed an application with PISD on May 15, 1978 to teach Biology, Chemistry, Physical Science, Life Science, Physiology or Earth Science, grades seven through twelve. She included a photograph with her application. Approximately two weeks after filing her application, she called PISD to request an interview. Ms. Carter was told that there were no vacancies and no interviewing was being done for positions in her areas. Between May 15, 1978 and September 26, 1978, PISD hired five (5) nonblack secondary Science teachers. No black Science teachers were hired by PISD during this time period. PISD denies that Ms. Carter ever applied for a position. The Court, however, finds she did apply and request an interview.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to hire Ms. Carter or for their hiring of each of the five nonblacks in preference to her for the positions she sought.

c. *Minnie Doris Honora Hill* is a qualified black teacher who applied to PISD on April 6, 1981, to teach Special Education or Resource. Her application included a photograph. In March, 1981, Ms. Hill called PISD to schedule an interview with the Director of Special Education. She was not allowed to speak with him, but was told to leave her name and telephone number and that he would return her call. She provided that information but was not thereafter called. A short time later, having not heard from PISD, she called again and was again told to leave her name and number. She never received a call from PISD for an interview. PISD hired thirty-four (34) nonblack Special Education and Resource teachers between April 6, 1981, and October 20, 1981. Mr. White stated he does not believe Ms. Hill ever requested an

interview. The Court, however, finds Ms. Hill did request interviews, as stated above.

\*9 Defendants have failed to articulate any legitimate, nondiscriminatory reason for their treatment of Ms. Hill or for their hiring of each of the thirty-four nonblacks in preference to her for the positions she sought.

d. *Betty Jean Jackson* is a qualified black applicant who applied to PISD on June 29, 1982, to teach Elementary and/or for a coaching position. She attached a photograph to her application form. In her May 10, 1982, letter to Mr. White she expressed an interest in an Elementary teaching position she had learned of through the Placement Service Office at Murray State University. In a letter from PISD postmarked July 26, 1982, Mr. White stated that at the present time there were no openings in her field. He also stated that should an opening occur, PISD would contact her. She was never contacted by PISD regarding any openings. PISD hired eleven (11) nonblack coaches or elementary teachers between June 29, 1982, and August 6, 1982. Mr. White stated that his letter to Ms. Jackson should have included a note that she was welcome to come interview on speculation, but the note was inadvertently omitted. The Court finds, however, that this explanation is not credible.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to hire Ms. Jackson or for their selection of each of the eleven nonblack applicants to whom they offered jobs sought by Ms. Jackson.

e. *Jacosta Conyers Johnson* is a black teacher who applied to PISD on May 5, 1980, to teach Science, Physical Education (P.E.) or Health. Her application included a photograph. Ms. Johnson called PISD from New York before moving to Houston to confirm that her application had been received and to schedule an interview. She was told that not all of her references had been heard from. No interview was scheduled. While still in New York, Ms. Johnson called PISD again and was told to call when she arrived in Houston. In the Summer of 1980, after her arrival in Houston, Ms. Johnson called PISD and spoke with Mr. White, who asked about the amount of her teaching experience and areas of certification, but did not grant her an interview. Mr. White stated he did not interview Ms. Johnson because after speaking with her on the phone he felt that she was not qualified to teach Science and was not interested in coaching a sport, which is required of all intermediate P.E. teachers. The Court finds Ms. Johnson was not

qualified to teach Science. The Court, however, finds she was qualified to teach P.E. and that Mr. White's articulated reason for not interviewing her for a P.E. position was pretextual only.

No black Health, Science or P.E. teachers were hired by PISD during this time period. PISD hired six (6) Health or Physical Education teachers between May 5, 1980, and August 11, 1980.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to hire Ms. Johnson or for their hiring of each of the nonblack applicants hired in preference to her.

\*10 f. *James Martin* is a qualified black teacher who applied to PISD on June 29, 1982, to teach Kindergarten, Elementary or P.E. A photograph accompanied his application form. When he felt that all of his references and transcripts should have been received by PISD, he called to arrange an interview. He was advised that his application was on file and that he needed to speak with a gentleman, whose name he does not recall, and who was not then available, but that PISD would contact him if any vacancies arose in his field. He left his name and telephone number. When he did not hear further from PISD, he called again and spoke to the gentleman whom he had been advised earlier he had to speak with about an interview. He was told by the man that he would be called for an interview when a vacancy occurred in his area. He never heard further from PISD. PISD hired thirty-one (31) nonblack Health, Elementary or P.E. teachers between June 29, 1982 and August 12, 1982. No black Elementary or P.E. teachers were hired by PISD during this time period.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to hire Mr. Martin or for their selecting each of the thirty-one nonblack applicants whom they hired for the positions he had sought.

g. *Naomi Miller McCoy* is a qualified black teacher who applied to PISD on November 1, 1979, to teach Intermediate Social Studies or English. Prior to filing an application, she called PISD and inquired about vacancies. She was told that there were openings and was invited to come in and fill out an application. When she did this, and personally delivered her application, she was told there probably would not be any jobs available in the School District. Approximately a week later, she called PISD and again inquired about vacancies. She was never

granted an interview. PISD hired ten (10) nonblack Intermediate Social Studies or English teachers between November 1, 1979 and August 6, 1980.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to hire Ms. McCoy or for their preference in hiring each of the ten nonblack applicants selected to fill the positions she sought.

h. *Clarence Milliner* is a qualified black teacher who applied to PISD on January 11, 1984, to teach Elementary or Special Education. He submitted a photograph with his application form. Shortly thereafter, Mr. Milliner called PISD to confirm receipt of his application and to learn of any additional steps he needed to take to perfect it. He spoke to Ms. Jones who told him to continue to check with PISD because he would not be interviewed unless there were openings. He called PISD periodically until May, 1984, and then in July, 1984. He was never granted an interview. PISD hired thirty-eight (38) nonblack Elementary or Special Education teachers between January 11, 1984 and July 19, 1984. Mr. White states Mr. Milliner could not be hired because he never completed the application process by requesting an interview. The Court finds, however, Mr. Milliner repeatedly requested an interview.

\*11 Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to interview or hire Mr. Milliner or for the hiring of each of the thirty-eight nonblacks selected for the positions he sought.

i. *Charlotte Poole* is a qualified black teacher who applied to PISD on August 7, 1978, to teach English, Language Arts, Journalism or Reading. Her application included a photograph. When Ms. Poole called PISD to arrange an interview, she was told that no vacancies existed in her areas, but that if something became available she would be called by PISD. Two days later, Ms. Poole called Pasadena High School directly and asked if any vacancies existed for English or Journalism teachers. She was told that such information could not be given out by the school but that she would have to find it out through the main PISD personnel office. Ms. Poole was never contacted by PISD for an interview. PISD hired four (4) nonblack secondary English teachers between August 7, 1978 and September 15, 1979. No black English or Journalism teachers were hired by PISD during this time period.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to hire Ms.



Poole or for having hired each of the four nonblack applicants who were selected for the positions sought by Ms. Poole.

j. *Linda Watson Tillis* is a qualified black teacher who applied to PISD on June 12, 1980, to teach Social Studies. She submitted a photograph with her application form. From mid-June through mid-July, 1980, she contacted PISD about vacancies and was never offered an interview. PISD hired two (2) nonblack Social Studies teachers between June 12, 1980 and October 15, 1980. No black Social Studies teachers were hired by PISD during this time period.

Defendants have not articulated any legitimate nondiscriminatory reason for their failure to hire Ms. Tillis or for their hiring of each of the two nonblack applicants whom they selected for the position she sought.

k. *Marguerite Vanden Wyngaard*, a qualified black teacher, applied to PISD on June 29, 1981, to teach Music. A photograph accompanied her application. She called PISD to verify receipt of her application and was told that it had arrived and that she would be contacted if any vacancies arose. She heard no further from PISD. PISD hired eleven (11) nonblack Music teachers between June 29, 1981 and September 28, 1981. No black Music teachers were hired by PISD during this time period.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their refusal to hire Ms. Vanden Wyngaard or for their having selected each of the eleven nonblacks hired for the positions she sought.

l. *Helen D. Wallace*, a qualified black teacher, applied to PISD on July 21, 1982, to teach Elementary Education. She submitted a photograph to PISD. Two or three weeks after mailing her application, she called PISD to find out if she would be considered for employment. She was advised that PISD had done all of its hiring for the upcoming school year. PISD hired seven (7) nonblack Elementary teachers between July 21, 1982 and August 6, 1982. No black elementary teachers were hired by PISD during this time period. Mr. White stated Ms. Wallace could not be considered for employment because she never requested an interview. Mr. White stated, however, that when applicants inquired about vacancies they were to be invited to come for interviews. The Court thus finds Ms. Wallace did do everything necessary to request an interview.

\*12 Defendants have failed to articulate any legitimate,

nondiscriminatory reason for their refusal to hire Ms. Wallace or for hiring each of the seven nonblack applicants selected to fill Elementary positions in preference to her.

m. *Joyce Marie Brown* is a qualified black teacher who filed an application for an Elementary level teaching position with PISD on May 19, 1982. She provided PISD with a photograph of herself. Before moving to the Houston area from Missouri, Ms. Brown called PISD and spoke to the Assistant Superintendent of Personnel who told her to call PISD when she arrived in Houston and that an interview would be scheduled for her. In June, 1982, when she arrived in Houston, she called PISD to inquire about vacancies and was told that there were no openings in Elementary Education at that time. She called PISD again in July, 1982, and several times in August, 1982. Each time Ms. Brown called she was told that PISD had no openings in Elementary Education. PISD never invited her to come in for an interview. PISD hired thirty-five (35) nonblack Elementary school teachers between May 19, 1982 and August 10, 1982. No black Elementary teachers were hired by PISD during this time period. Mr. White testified Ms. Brown did not complete the application process because she failed to request an interview. As with Ms. Wallace, above, the Court finds, however, that Ms. Brown did properly request an interview.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to hire Ms. Brown or for their selection of each of the thirty-five nonblack applicants hired for the positions sought by her.

n. *Jacqueline G. Tolbert*, a qualified black teacher, applied to PISD on September 25, 1978, to teach Speech, English, Language Arts or Drama. She submitted a photograph with her application. When she called to inquire about vacancies, she spoke to the Assistant Superintendent of Personnel who advised her that there were no openings at the secondary level for English or Speech teachers. PISD hired three (3) nonblack secondary English teachers between September 25, 1978 and February 22, 1979. The evidence showed that because her application was filed so close to the October 1 cut-off, PISD would have considered it active for the next year as well. No black secondary English teachers were hired by PISD during this time period. Mr. White stated that Ms. Tolbert never asked for an interview. The evidence showed, however, that when Ms. Tolbert called she spoke with Mr. White and asked about vacancies. As previously stated, Mr. White established that when someone calls to

inquire as to vacancies they should be asked to come for an interview. The Court thus, finds Ms. Tolbert did properly complete the application process.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to hire Ms. Tolbert or for the selection of each of the three nonblack applicants who were hired for the positions she sought.

\*13 o. *Thelma Jean Johnson* is a qualified black teacher who applied to PISD to teach secondary English or Journalism on June 7, 1983. She included a photograph with her application. Ms. Johnson called PISD at least once a week for the remainder of June, 1983, and was advised each time that there were no vacancies but that if anything opened she would be contacted. She never received an invitation for an interview. PISD hired two (2) nonblack secondary English teachers between June 7, 1983 and August 17, 1983. No black secondary English teachers were hired by PISD during this time period.

Defendants have failed to articulate any legitimate, nondiscriminatory reason for their failure to hire Ms. Johnson or for their selection of each of the two nonblacks hired for the positions sought by her.

p. *Iona Simmons Herron*, a qualified black teacher applicant, applied to PISD for an Elementary teaching position on March 6, 1979. Ms. Herron completed the application and arranged for an interview. When she arrived she was told she did not have an appointment for an interview and to return the next day. When she returned the next day she was told there were no vacancies available. Ms. Herron then left without having an interview. Approximately sixty-three (63) nonblack applicants were hired for positions for which she was eligible and had applied.

Defendants have failed to articulate any legitimate reason for their failure to hire Ms. Herron or for their selection of each of the sixty-three nonblacks hired to fill vacancies sought by her.

q. *Barbara LeBron*, a qualified black teacher, applied to PISD on April 7, 1981, to teach Business or English. Ms. LeBron requested an interview in writing, but received a letter from PISD stating no vacancies were available. In fact, vacancies were available while Ms. LeBron's application was pending and twenty-three (23) nonblacks were hired to fill these vacancies. Mr. White testified that PISD told Ms. LeBron no vacancies were available because she was located in the Virgin Islands and he did

not want her to make a special trip to PISD to interview when he could not guarantee her an opening would be available. However, the evidence showed that with nonblack applicants, PISD would notify them that they could come interview on speculation that an opening might arise, if they so desired. The Court thus finds Mr. White's articulated reason for refusing Ms. LeBron an interview to have been a pretext only.

Defendants have failed to articulate any legitimate reason for their failure to hire Ms. LeBron or for their selection of each of the twenty-three blacks hired in preference to her.

r. *Sheilah Patricia Banks Bowser*, a qualified black teacher, applied to PISD on July 24, 1979, to teach either English or Art. When she thereafter called PISD to request an interview, she was refused and advised either that there were no vacancies or that she would be contacted by PISD if there were vacancies. She was never contacted. PISD hired seven (7) nonblack English or Art teachers between July 24, 1979 and September 19, 1979. Mr. White stated he believes he refused to interview Ms. Bowser because she was under contract for the next school year to another district. The Court finds, however, that this reason was pretextual only as it is common for districts to release a teacher from a contract when the teacher presents a valid reason for such a request.

\*14 Defendants have failed to articulate any legitimate, nondiscriminatory reason for failing to hire Ms. Bowser or for hiring each of the seven nonblack applicants in preference to her.

s. *Phillipa Jean Anderson Palmer* is a qualified black teacher who applied to PISD to teach Elementary Education, on July 2, 1979. Her application form showed she had attended Prairie View A & M and TSU, schools known by PISD's Assistant Superintendent of Personnel to be attended predominantly by blacks. Shortly after filing her application, Ms. Palmer called PISD to request an interview and was told that she would receive a letter informing her of her interview time. She did not receive the promised letter and called PISD again. The second time she called, she was told that the position she had applied for had been filled. PISD hired thirty-five (35) nonblack Elementary teachers between July 2, 1979, the date of Ms. Palmer's application, and September 12, 1980. No black Elementary teachers were hired by PISD during this time period.

Defendants have failed to articulate any legitimate,

nondiscriminatory reason for their failure to hire Ms. Palmer or for the selection of each of the thirty-five nonblacks hired to fill Elementary vacancies sought by Ms. Palmer.

30. In addition to the nineteen black applicants identified above in Finding of Fact No. 29 who were denied interviews and jobs by Defendants, eleven (11) other black applicants applied for positions with PISD for which they were qualified but were not hired. These black applicants were granted interviews and PISD was seeking applicants at the time for the position these black teachers were seeking. Nevertheless, despite the black teachers' qualifications for the position, few were ever referred for interviews with principals, and each position was

thereafter filled by a nonblack.

The following are the eleven additional black applicants rejected for hire while nonblack applicants were hired for vacancies for which the black applicant was qualified. For each of these black applicants, in addition to his or her name, also provided are the date of application, the position sought and the number of nonblacks hired subsequently and during the same hiring season in which the black applicant's application was pending.

Black Applicant		Date Applied	Position(s) Sought	
a)	Linda D. Allen	03/17/82	Elementary;  Kindergarten	56
b)	Betty Armstrong	09/07/83	Elementary;  Social Studies	9
c)	Deborah Drumgoole	10/29/82	Choral Music—  any level	6
d)	Brenda K.W. Fowler	05/21/79	Elementary;  Kindergarten	64
e)	Charlotte R. Frazier	02/11/77	Music	16
f)	Barbara D.H. Jones	03/04/80	Elementary	80
g)	Lorraine Kimbrow	07/30/81	Elementary;	29

			Kindergarten	
h)	Costella Jones-Marquez	05/29/79	Orchestra/Strings	3
i)	Loretta Peoples	05/17/82	Elementary	36
j)	Urita Robertson	04/04/83	Elementary	4
k)	James S. Ross	12/18/82	P.E.; Health	7

Black Applicant Date Applied Position(s) Sought  
 Nonblacks Hired--- -----  
 -----a) Linda D. Allen 03/17/82 Elementary; 56  
 Kindergartenb) Betty Armstrong 09/07/83 Elementary; 9  
 Social Studiesc) Deborah Drumgoole 10/29/82 Choral  
 Music-- 6 any leveld) Brenda K.W. Fowler 05/21/79  
 Elementary; 64 Kindergartenf) Charlotte R. Frazier  
 02/11/77 Music 16f) Barbara D.H. Jones 03/04/80  
 Elementary 80g) Lorraine Kimbrow 07/30/81  
 Elementary; 29 Kindergartenh) Costella Jones-Marquez  
 05/29/79 Orchestra/Strings 3i) Loretta Peoples 05/17/82  
 Elementary 36j) Urita Robertson 04/04/83 Elementary 4k)  
 James S. Ross 12/18/82 P.E.; Health 7

\*15 Defendants have failed to articulate for any of the above-listed black teacher applicants any legitimate, nondiscriminatory reason for their failure to hire those individuals or for their selection of each of the nonblack applicants who were hired for the positions sought by the black applicants while the applications of the latter were active and pending with PISD.

31. *Carl Tompkins*, a qualified black teacher applicant, applied on August 27, 1979, for a vocational teaching job. Mr. Tompkins was interviewed by all PISD personnel involved in the hiring process for the position for which he applied. Mr. Tompkins was not hired and a nonblack was hired for the position.

Defendants, however, have been able to show Mr. Tompkins received full consideration and that the nonblack hired was significantly more qualified for the position. The Court thus finds Mr. Tompkins was not the victim of race discrimination.

32. PISD has refused to enter into a meaningful student teacher arrangement with predominantly black Texas Southern University (TSU), while freely entering into such arrangements with three predominantly white institutions.

a. The principal institutions of higher education offering degrees in education in closest proximity to PISD are TSU, the student body of which is predominantly black, and the University of Houston at University Park and University of Houston at Clear Lake, the student bodies of both are predominantly nonblack.

b. Since 1969, officials and administrators in the School of Education at TSU, responsible for student teacher placements, have regularly contacted officials of PISD and sought to establish an effective student teacher program with PISD. With one exception, explained below, PISD did not accept student teachers from TSU until 1982, and no black TSU student ever student taught in PISD during the relevant time.

c. PISD never entered a student teacher agreement during the relevant time with predominantly black Prairie View A & M University, an institution approximately 45 miles from PISD. No black Prairie View student ever student taught at PISD during the relevant time.

d. The University of Houston at Clear Lake (UHC) began operation in 1974. An official in the School of Education of that University, responsible for student teacher placements, contacted the Assistant Superintendent of

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PISD and requested student teacher placements with PISD for the 1976–77 school year. A program was agreed to, and the relationship has been continued each year since then. UHC students have student taught in PISD every school year since 1976.

e. The one exception to the refusal of PISD to enter into a student teacher program with TSU prior to 1982 occurred during the 1970–71 school year. Dr. Marie Lowery, a white administrator at TSU, contacted PISD and requested that Perry Rearick, a white male student at TSU, be allowed to student teach in PISD that year. The request was granted. Presently, Mr. Rearick is an elementary teacher in PISD.

**\*16** f. Prior to and since 1973, PISD has had student teacher relationships each school year with the University of Houston at University Park (UHUP) and Sam Houston State University (SHS) in Huntsville.

g. The numbers of student teachers accepted by PISD in each of the following school years from UHUP, UHC, SHS and TSU were:

School Yr.	UHUP	UHC	SHS	TSU
1973–74 .....	103	0	51	0
1974–75 .....	116	0	51	0
1975–76 .....	107	0	38	0
1976–77 .....	106	15	29	0
1977–78 .....	111	31	24	0
1978–79 .....	70	18	20	0
1979–80 .....	37	16	20	0
1980–81 .....	55	18	24	0
1981–82 .....	50	15	20	0
1982–83 .....	38	9	22	1
1983–84 .....	36	25	1	0

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1984-85 ..... 34 20 19 2

No black TSU student has ever student taught in PISD during the relevant time.

33. Student teaching experience in PISD provides an applicant who performs successfully and subsequently applies to PISD for permanent employment as a teacher with an “inside track” towards such employment. By the same token, however, student teachers who do not perform well have their chances for future employment with PISD diminished.

a. Student teaching experience with PISD is of benefit to both PISD and the student with respect to future employment of the student as a regular teacher. It provides PISD with the opportunity to observe the student’s classroom abilities and it provides the student with the opportunity to experience the educational philosophies and policies of PISD in practice.

b. By failing to establish meaningful student teaching relationships with predominantly black TSU, PISD has severely limited the number of blacks who gain the

“inside track” to employment that student teaching affords.

34. Black teachers approved for hire by the PISD Board of Trustees have been disproportionately approved for hire only as Special Education teachers. Due to federal legislation requiring more emphasis on Special Education, the demand for Special Education teachers has taxed the supply to a point that over the last decade PISD has not been able to afford to discriminate against black applicants for these positions to the extent it has in other areas.

a. The number of teachers approved for hire by the PISD Board of Trustees, and the number and percentage who were black, for the calendar years 1976 through 1984 are set forth below. Also set forth in this table are the number and percentage of the blacks who were approved each year as Special Education teachers.

Year	Total Approved	Black Approved	% Black Approved	Black Sp.Ed.	% Black Spec.Ed.
1976	270	6	2.2	3	50.0
1977	260	2	0.8		0.0
1978	294	9	3.1	3	33.3
1979	296	3	1.0	0	0.0
1980	297	2	0.6	2	100.0
1981	386	9	2.3	7	77.7

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1982	277	7	2.5	3	42.8
1983	108	1	0.9	0	0
Sub Totals:.....			2,188	39	1.8 18 46.2

\*17 b. At the time this suit was filed in 1983, PISD had 30 black teachers of whom 16 had been hired as Special Education teachers.

35. Between October 1, 1977 and April 30, 1984, black teacher applicants constituted only 5.2% (275 of 5275 racially identified applicants) of all initial applications made to PISD. This rate of application by blacks is considerably lower than what would be expected in the labor market from which PISD draws its teachers, absent any unlawful discrimination. By any measure or estimate, black teachers constitute a significant portion of PISD's normal labor market.

36. As indicated earlier, the 1980 census revealed that blacks constitute 21.1% of the teachers in the Houston SMSA. However, data collected for the Government's statistical studies revealed that while PISD obtained a majority of its applicants from the immediate Houston area, it also drew teacher applicants from numerous locations outside either Harris County or the Houston SMSA. Because some of these other areas had lower percentages of black teachers residing within them, PISD's true "labor market" from which it obtained its teachers would have a black teacher population lower than the 21.1% of the Houston SMSA. It was to better determine this true labor market that Plaintiff undertook its labor market or external availability analyses mentioned earlier (*supra*, ¶ 14(b)).

37. The first labor market analysis undertaken by Plaintiff used a "weighted applicant model." The theory underlying this model is that the recent historic share of applicants coming from different areas indicates the willingness of teachers who live in those areas to either commute to PISD or to move there in order to obtain employment as teachers for PISD. The areas considered

in the model as being potential sources of teacher applicants were 135 ZIP codes in Harris County, the 253 remaining counties of Texas, and the 49 states and District of Columbia outside of Texas. The first step in the analysis was to identify, from the seven years of PISD teacher applicant data, those areas from which applicants had applied as revealed by their addresses at the time they filed their applications. Next, for each area identified, the percentage, if any, of all applicants coming from that area was determined. This provided the "weights" for the model. These "weights" were then combined with the racial compositions of teachers in the various areas as determined from the U.S. census. Finally, the percentage of black teachers for each area is summed to produce an estimate of the black percentage of the PISD teacher labor market.

38. Plaintiff's "weighted applicant model" analysis estimated that the PISD labor market for teachers was 10.9% black. The Court thus finds the portion of PISD's labor market that is black is not less than 10.9 percent.

39. The "weighted applicant model" approach to determining the racial composition of PISD's labor market is a very conservative one and has a number of built-in problems which underestimate what the true black percentage of the PISD teacher labor market should be absent any unlawful discrimination against blacks. To the extent that PISD has engaged in recruitment and employment practices which discourage or otherwise depress the rates at which black applicants apply, the effect on the model is to underestimate the black representation in the PISD labor market. For example, the populations of many ZIP codes in Harris County are exclusively or predominantly white and others are overwhelmingly black. Since the "weighted applicant model" assigns a weight to each ZIP code based on the

historic rate at which applicants have applied from it, the effect of PISD's failure to enter into student-teacher contracts with predominantly black TSU, while entering such contracts with the predominantly white Universities of Houston, is to depress the rate of applications from the ZIP codes in which TSU students live and to elevate those in which white students live. These in turn depress the "expected" rates of applications from black areas. The effect of PISD's sporadic "word-of-mouth" recruitment is the same. Likewise, to the extent that PISD's refusal to grant black applicants' requests for interviews, or to participate in teacher recruitment programs attended by blacks, may become common knowledge or contribute to a reputation as not desiring black applicants, the black percentage estimate for PISD's labor market is further reduced. Thus, the portion of PISD's labor market that is black is actually somewhat higher than 10.9 percent.

\*18 40. To overcome the sensitivity of the weighted applicant model to the combined effects of racially defined residential patterns and discriminatory recruitment and hiring practices which have "chilled" the black applicant rate to PISD, the Government conducted another labor market analysis using a "gravity model" approach. This approach is a commonly used one in the social sciences to estimate the behavior and movement of people, goods, and services. It is an appropriate one for application to the seven years of data collected concerning PISD teacher applicants, even though it cannot serve to totally eliminate all effects of discriminatory practices since the data used is in part the results of those practices.

41. The "gravity model," unlike the "weighted applicant model," assumes that two geographic areas that have the same size teacher populations and are the same distance from PISD will contribute equally to PISD's labor market. To determine the amount of each area's expected contribution, the historic data concerning PISD applicants is subjected to a multiple regression which assigns "weights" based on the two principal factors of distance from PISD and teacher population size. For Harris County, where the areas are the ZIP codes, a third factor is also included designed to compensate for any effect that the Houston Independent School District may have in siphoning away applicants from PISD. To obtain appropriate weights which take into account those areas that have historically not produced applicants to PISD, the professionally recognized "Tobit" procedure can be applied.

42. Plaintiff's gravity model analyses produce estimates of the percentage of black teachers in the PISD labor

market that range from 12.8% when a simple "least squares" statistical procedure is applied which does not use the distances and populations of areas from which no applicants in the collected data came (including black areas of Houston in which black teachers reside), to 14.9% when the "Tobit" statistical procedure is used.

43. The range of 12.8% and 14.9% produced by the Government's gravity model analyses as estimates of the percentage of teachers in the PISD labor market who are black are reasonable ones. The real percentage of that market that is black, as previously stated, is not less than 10.9%, but as shown by Plaintiff's gravity models, is likely as high as 12.8 to 14.9 percent.

44. The size of the difference between the actual rate of black teacher applicants and the percentage of the teacher labor market which is black raises the inference that that difference is the result of discrimination based on race. The inference, is supported by the employment practices discussed above which discriminate against or otherwise have an adverse impact upon black teacher applicants. To the extent that they are known, or suspected, in fact or as a matter of reputation, the natural consequence is that potential black applicants are discouraged from making application to PISD. Furthermore, the explanations offered by PISD for the discrepancy between the PISD black applicant rate and the availability of black applicants are not credible. Specifically, PISD asserts that few blacks live in or around PISD and the commuting distance between PISD and areas where black teachers live discourages them from seeking employment with PISD. In fact, the commuting distance from many black areas to PISD is insignificant, and commuting distance does not account for the lack of black applicants. PISD also asserts many blacks are discouraged from applying to PISD by the City of Pasadena's reputation as a white "redneck" or racist community. Indeed, a study by Dr. Aaron of TSU showed that many blacks perceive Pasadena as racist and hence PISD, and do not apply to PISD for that reason. PISD argues, however, that it cannot be held accountable for the Pasadena community's reputation. The Court, however, finds that the chilling effect of the Pasadena community's reputation on black applicants is not sufficient to account for the statistical discrepancy. The only credible explanation for the discrepancy is the chilling effect PISD's actions have had on black applicants.

\*19 45. PISD has refused invitations from predominantly black TSU to visit its School of Education in conjunction with other school districts to provide prospective



graduates with information about PISD and its teacher employment opportunities. Invitations to attend predominantly black Prairie View A & M University's Education Job Fair have also been ignored. In contrast, PISD has accepted invitations from time to time to participate in similar "teacher career days" at the predominantly white University of Houston at Clear Lake. In 1984, when PISD did not attend the fall or spring "career day" at Clear Lake, it authorized Clear Lake to post notices stating the following:

"Pasadena ISD will not be participating in the Fall Semester Teacher Career Day, but they are interested in hiring you to teach. If you wish to be considered for a teaching position with Pasadena ISD, please contact the district Personnel Office."

46. PISD has never solicited applicants through the TSU School of Education for specific positions. In contrast, PISD has advised Clear Lake officials of vacancies in teaching positions.

47. In addition to its contacts with University of Houston at Clear Lake, PISD has also notified the predominantly nonblack University of Houston at University Park of teaching vacancies. The only time PISD may have contacted a predominantly black university would have been in about 1980 when it may have contacted Prairie View A & M, in addition to predominantly white Texas A & M and Sam Houston University, "looking for an agriculture teacher."

48. Beyond its contact with predominantly white universities described above, and special recruitment efforts undertaken from the mid-1960s through the mid-1970s to obtain bilingual teachers, PISD has not undertaken any significant efforts to recruit teachers or otherwise to make known the availability of teaching positions. PISD has relied sporadically upon "word-of-mouth" recruitment and its location in the Houston area to attract applicants. In large part, this "word-of-mouth" recruitment takes place through the friends and relatives of its existing teachers and administrators, less than 2.0% of whom have been black at any time since the first black teacher was hired in 1972.

a. The PISD's newsletter, the "Golden Rod", is distributed to all employees of the PISD. Occasionally, the "Golden Rod" has published notices like the one that appeared in the March 4, 1981, issue:

The district anticipates vacancies in most teaching fields

for next school year. Employees having friends or relatives who are good teachers and would be interested in teaching in Pasadena next year may call the Personnel Office (944-7411, ext. 242) for application materials to be sent. If you wish, Personnel will include a note to them giving your name as the person making the referral.

b. In a letter dated November 30, 1978, to the Office of Civil Rights of the (then) Department of Health, Education and Welfare, Mr. White described the PISD's recruitment practices. According to that letter, when the School District "need(s) a teacher with a specified teaching field," it "let(s) current employees know of this need and through their contacts in professional associations, their neighborhood or graduate school, they let this need be known." PISD's expectation is that "by making (PISD) a good working place with the highest salary that economic conditions will permit and the best benefits available, the teachers themselves would be the best source of recruiting other teachers."

\*20 c. The "word-of-mouth" recruiting method, however, is used only sporadically and is not a primary method of recruitment.

49. PISD has not recruited a sufficient number of teachers to fill its vacancy needs in all teaching areas, the Special Education area in particular.

50. Some black teachers in the Houston area are reluctant to apply to PISD because they have heard that blacks are not welcome in Pasadena. PISD's own study of the attitudes of black teachers in the Houston area towards PISD revealed that 87.4% of those in the sample "had heard that the community of Pasadena was a racist community," and 73.6% "had heard that the Pasadena Independent School District was racist." See Report of Dr. Aaron.

51. The Government also asserts that PISD gives preference in hiring to applicants with "insider contacts." Any preference in hiring given applicants who have had previous contact with PISD, "insider contacts," would tend to favor nonblack applicants over black applicants. The Government defines applicants with "insider contacts" as those applicants with any one or more of the following three characteristics: 1) prior attendance at a PISD school; 2) listed an employee of PISD as a reference; and, 3) student taught in PISD. PISD has denied that it accords any such preference, and thus PISD has offered no evidence to demonstrate that any such preference is grounded in a legitimate business necessity

or otherwise is predictive of which applicants will most likely be successful teachers. They deny they follow such an employment practice and, accordingly, offer no defense of it.

52. The Court finds that the “insider contacts” are simply attributes which gave PISD more information about particular applicants or gave PISD greater confidence in the sources of information about particular applicants. Thus, an “insider contact” could help or hurt a particular applicant depending on what the information revealed. Furthermore, the evidence showed that PISD’s employment practices were in many ways irregular and the Court finds that in respect to the alleged “insider contacts,” PISD did not adhere to any specific, regular policy or practice of giving preference to those with “insider contacts.”

53. The evidence did show that on occasion a more qualified black applicant was rejected in favor of a less qualified nonblack applicant who fell within the “insider contacts” group. The Court, however, believes such evidence is most appropriately analyzed as evidence of intentional racial discrimination.

#### CONCLUSIONS OF LAW

1. This action was properly brought by the Attorney General on behalf of the United States on August 19, 1983, to enforce Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000(e), et seq.). The action alleged that PISD has pursued and continues to pursue a pattern or practice of unlawful discrimination against blacks in the recruitment and hiring of teachers thereby depriving them of equal employment opportunities in violation of Title VII.

\*21 2. The Court has jurisdiction of the subject matter and the parties in this action pursuant to 28 U.S.C. § 1345 and 42 U.S.C. § 2000(e)–6(b). *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir.1984).

3. Venue is properly laid in this District. *United States v. H.K. Porter Company*, 296 F.Supp. 40, 53 (N.D.Ala.1968). All proper, necessary and appropriate parties have been made parties hereto. F.R.Civ.P. 19.

4. A pattern or practice suit of the nature of the present action is properly tried in two stages. *Teamsters v. United States*, 431 U.S. 324 (1977). By order of this Court entered October 24, 1984, trial of this case is being held in two stages. Stage I, which will be completed upon the effective date of these findings of fact and conclusions of law, concerned the issues of Defendants’ liability and prospective injunctive relief. Stage II, which will follow, will address issues of individual relief for those persons who have been victims of PISD’s unlawful employment practices.

5. Evidence of PISD’s operation until 1966 of a *de jure* segregated school system whereunder black students were not admitted to PISD schools, as well as evidence that no black was employed as a teacher by PISD prior to 1972, and that from then through 1977, only 1% of the teachers hired was black, is admissible. *Hazelwood School District v. United States*, 433 U.S. 299, 309–10 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 540 & n. 25 (5th Cir.1980), *cert. denied*, 449 U.S. 1115 (1981); *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1385 (5th Cir.1978), *cert. denied*, 441 U.S. 968 (1979). The Court, however, finds this evidence to be of minimal probative force as it is relatively remote in time. The Court limited the time frame in issue to the period of 1977–1984, the prejudicial nature of evidence outside of that time frame outweighs its probative force. F.R.Evid. 401.

6. Section 706(g)’s restriction, that “Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission,” on its face applies only to limit the amount of an individual back pay recovery following Stage II proceedings. It has no applicability to, and places no limitation on, the admissibility of evidence during the Stage I trial of a pattern or practice case. “Title VII is silent as to limitation periods. (By) Section 706(g) ..., Congress simply meant to provide a maximum period during which an employer might be liable for back pay ...” *EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 458 (5th Cir.1975). *See also Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).

7. Whether in a Title VII pattern or practice suit brought by the Attorney General, where there is no requirement of a charge being filed with the Equal Employment Opportunity Commission, the two-year back pay limitation of Section 706(g) is tolled by the Government placing PISD on notice that it was undertaking an investigation of its employment practices under Title VII

is a matter for Stage II consideration and shall not be resolved now. However, to the extent it is relevant for Stage I, the notice was provided to PISD by letter dated August 31, 1981. Two years prior to that date was August 31, 1979. *See generally, United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 934 (10th Cir.1979); *EEOC v. United Air Lines, Inc.*, 12 FEP Cases 1592 (N.D.Ill.1975), *aff'd. and modified on other grounds*, 560 F.2d 224 (7th Cir.1977), *cert. denied*, 434 U.S. 1063 (1978).

**\*22** 8. State statutes of limitation have no applicability to suits brought by the federal government to enforce the federal sovereign's rights. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977); *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Georgia Power*, 474 F.2d 906, 923 (5th Cir.1973); *EEOC v. Griffin Wheel Co.*, 511 F.2d at 458.

9. The Government alleges that PISD has engaged in a pattern or practice of disparate treatment in the recruitment and hiring of blacks. Disparate treatment is the easiest type of racial discrimination to understand. It simply means that the employer intentionally treated a person less favorably than others due to his or her race. A pattern or practice of disparate treatment is established when the plaintiff shows it is the employer's regular business practice to treat members of one racial group less favorably than others on the basis of their race. As the Supreme Court wrote in *Teamsters*:

The ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were "racially premised." [citations omitted]. As the plaintiff, the Government bore the initial burden of making out a prima facie case of discrimination. [citations omitted]. And, because it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice.

*Teamsters*, 431 U.S. at 335–36.

10. The Government, however, is not required to prove that racial discrimination was the sole motive for PISD's acts. Rarely, can it be said that a governing body, like a school district, has made a decision motivated solely by a single concern. A policy of racial discrimination is

impermissible even as a secondary motive for action and cannot be justified by the good intentions with which other laudable goals are pursued. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–66 (1976); *Washington v. Davis*, 426 U.S. 229 (1976).

11. The Government sought to prove disparate treatment by means of statistical evidence, individual case histories, PISD's student teacher programs, PISD's recruiting practices, PISD's reputation, and specific racist acts or comments by PISD administrators.

12. First, the Court feels compelled to dispose of the issues of reputation and racist acts and comments. The Government presented evidence of very few specific racist acts or comments by PISD administrators. Generally, the black applicants, both successful and unsuccessful, stated PISD administrators and personnel were courteous and pleasant to black applicants and supportive of those hired. Very few witnesses testified as to specific racist comments by Mr. White and the personnel office staff. The Court finds this testimony was neither very credible nor illuminating, and is of no probative force. The incident involving the assistant principal who wore a Ku Klux Klan robe to school for history day was an example of a tasteless act by a minor PISD administrator. The circumstances surrounding this incident show, however, that while it was a tasteless act, it was not a *racist* act, and the Court finds this evidence is of no probative value in deciding the issues in this case. Finally, although the Court endeavored to keep general reputation evidence out of this case, some such evidence did get into the case; specifically, Dr. Aaron's report of the perceptions of blacks of PISD. The Court finds the evidence of reputation in Dr. Aaron's study is of some small probative value, however, the Court finds any other evidence of reputation that found its way into the case to be of no probative value.

**\*23** 13. Statistics may be used in a Title VII pattern or practice case to raise an inference that disparate treatment has occurred. "[I]t is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative" of the relevant labor market, *Teamsters*, 431 U.S. at 340, n. 20, and "[w]here gross disparities can be shown, they alone may in a proper case constitute a prima facie proof of a pattern of discrimination." *Hazelwood*, 433 U.S. at 307–8. Generally, a statistical disparity which is more than two or three standard deviations ... undercut[s] the hypothesis that [the challenged employment] decisions were being

made randomly with respect to race,” and thus warrants an inference of discrimination. *Id.*, at 311 n. 17; *Harrell v. Northern Electric Co.*, 672 F.2d 444, 447 (5th Cir.1982), *cert. denied*, 4598 U.S. 1037 (1982).

The “no-significant-disparity” result “ordinarily to be expected” means the result which a random selection would be expected to produce where race plays no role in the selection process. It is the result expected from a blindfolded drawing where race is *not* known. Accordingly, Plaintiff has no burden of demonstrating that Defendants knew the race of each applicant before it is entitled to make a statistical showing raising an inference that race played an unlawful role in that selection process.

14. To establish the race of the applicants for employment, external sources of race identification, such as the birth certificates and driver license records of applicants, may be resorted to and those items of evidence are admissible under the government records exception to the hearsay rule. *Guardians Ass’n v. Civil Service Commission*, 463 U.S. 582, 586 n. 7 (1983), *affirming*, “*Guardians III*,” 633 F.2d 232, 239 (2d Cir.1980); Rule 44, F.R.Civ.P.; F.R.Evid. 803, 902.

15. The statistical showing that from among all applicants making an initial application to PISD between October 1, 1977 and April 30, 1984, the actual number of black teachers hired was 33 while the number to be expected was from 70 to 75, depending upon the factors controlled in the analyses, and that these differences were from 7.19 to 6.45 standard deviations in magnitude, are *prima facie* proof of unlawful discrimination in hiring based on race. *Hazelwood*, *supra*; *Teamsters*, *supra*.

16. Likewise, the statistical showing that black teachers constituted only 5.2% of PISD’s applicant pool (275 of the 5,275 racially identified applicants between October 1, 1977 and April 30, 1984), while an uninfected labor market for PISD would constitute not less than 10.9% black applicants (weighted applicant model), to as high as 14.9% black applicants (gravity model), and that the differences between the actual rate of black applicants and any of the estimated rates were statistically significant, are *prima facie* proof of unlawful discrimination in recruitment. *Hazelwood*, *supra*; *Teamsters*, *supra*; *Casteneda v. Pickard*, 648 F.2d 989, 1003 (5th Cir.1981), *appeal after remand*, 781 F.2d 456 (5th Cir.1986).

\*24 17. When there has been a showing of discriminatory recruiting and a history of discriminatory hiring practices,

applicant flow data does not constitute an accurate picture of the employer’s relevant labor market. Discriminatory hiring and recruiting practices skew the ethnic composition of the applicant pool. *Casteneda*, 648 F.2d at 1003; *Kilgo v. Bowman Transportation, Inc.*, 789 F.2d 859, 868–69 (11th Cir.1986); *Wheeler v. City of Columbus*, 686 F.2d 1144, 1152 (5th Cir.1982). Minorities may be deterred from applying by the manner in which a discriminatory employer “publicizes vacancies, his recruitment techniques, his responses to causal or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.” *Teamsters*, 431 U.S. at 365.

18. When there has been a history of discriminatory recruiting practices, the “weighted applicant model” estimate of PISD’s relevant labor market is too conservative because it builds in the effects of PISD’s prior discriminatory employment practices. *Markey v. Tenneco Oil Co.*, 635 F.2d 497, 500–01 (5th Cir.1981), *appeal after remand*, 707 F.2d 172 (5th Cir.1983); *see Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir.1982); *Mister v. Illinois Central Gulf Railroad Co.*, 639 F.Supp. 1560, 1577–78 (S.D.Ill.1986); *EEOC v. Chicago Miniature Lamp Works*, 622 F.Supp. at 1308–09.

19. Once Plaintiff establishes a *prima facie* case of a pattern or practice of employment discrimination, the “burden then shifts to the employer” to show that the “Government’s proof is either inaccurate or insignificant,” *Teamsters*, 431 U.S. at 360, or to “provide a nondiscriminatory explanation for the apparently discriminatory result.” *Id.* at 361 n. 46.

20. PISD’s burden on rebuttal cannot be met by “general assertions of good faith or of hiring only the best applicants.” *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1393 (5th Cir.1983) *cert. denied*, 465 U.S. 1006 (1984); *accord*, *Teamsters*, 431 U.S. at 342–43 n. 24. PISD’s use of subjective standards to choose among applicants creates a ready mechanism for discriminating against blacks, particularly since none of the personnel decision-makers at PISD is black. *Boykin*, 706 F.2d at 1390; *Harrell*, 672 F.2d at 448; *Rowe v. General Motors Corp.*, 457 F.2d 348, 358–59 (5th Cir.1972).

21. The Government contends that since PISD is a school district having a “relatively recent history of discrimination,” its burden on rebuttal may be met only with “clear and convincing evidence ...” *Casteneda*, 648 F.2d at 994; *Price v. Denison Independent School*

*District*, 694 F.2d 334, 375 (5th Cir.1982). This standard, however, is most properly applied to events during and after a transition period from a dual to a unitary school system when the effects of past discrimination continue to linger in the district. PISD has operated a unitary system since 1966 and the relevant period of this lawsuit is 1977–1984, long after PISD schools were desegregated, and five years after the first black teacher was hired. The Court thus shall not apply the “clear and convincing” standard on rebuttal as the Government has failed to show that continuing effects of past discrimination continue to haunt PISD. The Court, rather, shall at all times keep the ultimate burden of proof on the Government. *Castaneda v. Pickard*, 781 F.2d, 456, 459–63 (5th Cir.1986).

\*25 22. For PISD to establish that Plaintiff’s statistical proof is flawed, it “must do more than raise theoretical objections to the data or statistical approach taken; instead, the defendant should demonstrate how the errors affect the results, ... particularly in cases where the plaintiff has demonstrated gross disparities in employer practices ...” *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654 (5th Cir.1983) *cert. denied*, 466 U.S. 927 (1984). Generally, statistical proof cannot be rebutted by disaggregating the data to cause the statistical tests to become less probative. *Id.*; see *Wheeler*, 686 F.2d at 1151–52.

23. When Plaintiff uses a multiple regression analysis, “it is clear that a regression analysis that includes less than ‘all measurable variables’ may serve to prove a plaintiff’s case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.” *Bazemore v. Friday*, 106 S.Ct. 3000, 3009 (1986). Unless a showing is made that blacks and nonblacks differ systematically with regard to some relevant characteristic, a regression analysis that ignores that characteristic does not lose its probative force. See *id.* at 3009–10.

24. In an *individual* case of disparate treatment, a plaintiff makes out a prima facie case 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 the complainant’s qualifications.

*McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). *Accord*, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

25. The plaintiff in a Title VII pattern or practice action need not present its case within the *McDonnell Douglas/Burdine* evidentiary framework. *Payne v. Travenol Laboratories*, 673 F.2d 798 (5th Cir.1984). However, nothing precludes it from shouldering this additional burden and to the extent that it does so successfully, the more substantial the conclusion that the defendant has engaged in a pattern and practice of unlawful discrimination on the basis of race. Although the Plaintiff’s statistical proof shows a gross disparity in PISD’s treatment of blacks and nonblacks, the Plaintiff, though not required to, may buttress its statistical proof with individual instances of discrimination and by showing opportunities to discriminate that exist in PISD’s subjective decision-making process. *Id.* at 817.

26. Here, the prima facie case of disparate treatment in hiring established by Plaintiff’s statistical showing is substantiated and fortified by direct evidence of discrimination. That evidence included the experiences of thirty (30) qualified black teacher applicants who made application to PISD when PISD was seeking applicants for the positions the black teacher sought, but who despite their qualifications were not hired while nonblack applicants were being hired in considerable numbers. Nineteen of these black applicants were not even accorded interviews even though PISD was hiring nonblacks to fill positions for which the black applicants had applied. In each instance PISD knew the race of the black applicants, and in each instance PISD has failed to offer a legitimate, nonpretextual, nondiscriminatory reason for its failure to hire these applicants or for its selection of the numerous nonblack applicants who were hired in their place. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802; *Texas Dept. of Community Affairs v. Burdine*, *supra*.

\*26 27. PISD’s refusal to enter into an effective program for the placement in its schools of black TSU student teachers, while maintaining such programs serving nonblack students with UHUP and SHS, and developing a new program with UHC upon the founding of the latter institution, constitutes further evidence of intentional discrimination based on race.

28. PISD’s refusal to participate in TSU’s “teachers fair” or to utilize TSU’s placement office by advising it of vacancies while periodically attending the “career day”

held at UHC and periodically providing UHC and UHUP placement offices with information on vacancies and, occasionally soliciting those offices for applicants to fill specific vacancies, constitutes evidence of intentional race discrimination.

29. The Government also showed that blacks who were hired were assigned to Special Education in disproportionate numbers. The Court has found that PISD hired blacks in Special Education because the shortage of Special Education teachers did not allow them to discriminate. The Court is of the opinion that this is further circumstantial evidence showing that in the absence of intentional discrimination PISD's hiring of black teachers would have been more reflective of its labor market.

30. Based on the foregoing, the Court concludes that from October 1, 1977 to May 31, 1984, PISD engaged in a pattern or practice of intentional racial discrimination by treating black teacher applicants less favorably than nonblack teacher applicants. The Government thus prevails on its theory of disparate treatment.

31. The Government also alleged racial discrimination against PISD based on a disparate impact theory. The plaintiff makes out a case of disparate impact when it establishes that the defendant engaged in a facially neutral employment practice which eliminates from favorable employment consideration, or otherwise adversely affects, disproportionately more black applicants than nonblack applicants. Upon making such a case, the burden then shifts to the defendants to demonstrate that the practice in question serves a legitimate "business necessity." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Teamsters*, 431 U.S. at 335, n. 15 (1977); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800 (5th Cir.1982).

32. The Government asserts that PISD has adopted an employment practice of giving preference in hiring to people with "insider contacts." Persons with "insider contacts" are defined by the Government as persons who have one or more of three attributes: (1) attendance at PISD schools; (2) a PISD employee as a reference; or (3) student taught in PISD.

The Government contends that preference in hiring on these bases disproportionately favors nonblacks and adversely affects blacks because very few blacks have had prior contacts with predominantly nonblack PISD. PISD denies that it has adopted an "insider contacts" preference as an employment practice.

33. The Government further alleges that PISD has adopted an employment practice of recruiting only at the University of Houston at Clear Lake and the University of Houston at University Park, and by "word-of-mouth" through its current employees. These facially neutral recruiting practices allegedly disparately impact on blacks because these academic institutions are predominately white, as are PISD's employees. PISD denies it does any substantial recruiting and maintains that its recruiting efforts are at best sporadic.

\*27 34. The Government could not show, however, that PISD's "insider contacts" preference was a regularly observed hiring practice. The evidence showed that if a student teacher performed well his or her chances for a job with the district were markedly enhanced, while if he or she performed poorly, the opposite was true. This situation is a normal consequence of any internship relationship. Furthermore, PISD's reliance on PISD references presents a similar situation: If a reliable PISD employee can vouch for an applicant it means more to the district than a reference from a stranger. Finally, many of the applicants who had attended PISD schools were local people who were more likely to pursue their applications and have personal contacts with PISD personnel. These "insider contacts" were not shown to have been regularly adhered to hiring criteria, rather they are attributes which would tend to give an employer more information about an applicant than normally available or give an employer more confidence in the sources of information, thus giving a talented applicant an edge, but by the same token eliminating less talented people. The Government did show that at times a less qualified "insider" who was nonblack was hired over a more qualified black. The Court, however, believes such individual cases were illustrative of disparate treatment—intentional race discrimination—and not illustrative of how a facially neutral employment practice disparately impacts on blacks. In short, the Court does not find the alleged "insider contacts" preference amounted to a regular, specific employment practice of PISD. *See Pouncy*, 668 F.2d at 800.<sup>1</sup>

35. The Court has found that PISD's practice of recruiting at the University of Houston at University Park and the University of Houston at Clear Lake Campuses while refusing to recruit at TSU is evidence of intentional discrimination. The Court also finds that "word-of-mouth" recruiting, to the extent it occurs, is further evidence of intentional discrimination as PISD's staff is nearly all nonblack. The evidence at trial showed,

however, that PISD was not consistent in its personnel practices. PISD did recruit at the two University of Houston campuses, but only on a sporadic basis. PISD did from time to time advertise teacher positions by “word-of-mouth,” but again it had no regular practice in this respect. Rather, PISD, as it appears with other area school districts, did little recruiting. The Court finally notes that although only about two percent of the PISD teaching force is black, blacks make up about 5.2 percent of the applicant flow, thus the number of black applicants far exceeds the number which might be expected in a “word-of-mouth” recruiting system. *See Markey*, 707 F.2d at 175. The Court has found that PISD’s recruiting and hiring history does show intentional race discrimination against blacks, but the Court does not find that PISD established any regular, specific recruiting practices that caused a disparate impact on black applicants. *See Pouncy*, 668 F.2d at 800.

\*28 36. To the extent any of the foregoing conclusions of law incorporate factual findings, the Court adopts them as such. To the extent any of the foregoing factual findings incorporate conclusions of law, the Court adopts them as such.

The Court shall by separate instrument enter an injunction barring PISD from intentionally discriminating against blacks and ordering remedial measures to correct the effects of past discrimination. The Court, however, shall defer the effective date of this Order and the injunctive decree to allow the parties to file motions to modify its findings of fact and conclusions of law as well as the injunctive decree, if appropriate, by April 27, 1987, and

responses to any such motions by May 8, 1987. This Order and the injunctive decree shall not be effective until May 16, 1987, and the Court reserves the right to withdraw or modify this Order and the injunctive decree until that time. The Court shall hold a conference in this case to discuss Stage II proceedings and all other pending matters on May 15, 1987, at 9:00 a.m.

APPENDIX TO FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

INDICATIONS OF RACE FOUND IN FILES OF  
BLACK APPLICANTS LISTED IN DEFENDANTS’  
DATA BASE AS RACE UNKNOWN

TABULAR OR GRAPHIC MATERIAL SET AT THIS  
POINT IS NOT DISPLAYABLE

All Citations

Not Reported in F.Supp., 1987 WL 9919, 43 Fair  
Empl.Prac.Cas. (BNA) 1319, 55 USLW 2655

Footnotes

<sup>1</sup> In order to establish a claim of racial discrimination under this theory, disparate impact, a plaintiff need only show that a facially neutral employment practice produces a significantly adverse impact on one race. *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977). The employer’s intent to discriminate against a class of employees is not at issue. (footnote omitted) When coupled with an identifiable employment practice, neutral in form but discriminatory in operation, statistics that show a significant disparity in an employer’s work force raise “an inference that employment decisions are tainted by intrusion of illegitimate concerns.” *Rivera v. City of Wichita Falls*, 665 F.2d 531, 535 (5th Cir.1982). A prima facie case is shown by identification of a neutral employment practice coupled with proof of its discriminatory impact on the employer’s work force. *Johnson v. Uncle Ben’s, Inc.*, 657 F.2d 750, 753 (5th Cir.1981).

The discriminatory impact model of proof in an employment discrimination case is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company’s employment practices. Nor may just any employment practice be challenged under this model simply because an uneven racial balance exists in an employer’s work force. As originally conceived in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91

S.Ct. 849, 28 L.Ed.2d 158, an action in which a group of black employees challenged their employer's requirement of a high school diploma and a satisfactory score on two aptitude tests for positions in several departments of a power generating facility, the disparate impact theory applied to an "overt, clearly identified nondiscretionary selection criteri [on] that [was] applied at a single point in a selection process." D. Baldus & J. Cole, Statistical Proof of Discrimination § 1.23, at 12 (1981 Supp.). Although some courts have used the disparate impact model of proof to challenge multiple employment practices simultaneously, *see id.*, this is an incorrect use of the model. The disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the work force. Thus, a disparate impact analysis may be used to challenge aptitude and intelligence tests, *see Griggs*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, educational requirements, *see id.*, height and weight requirements, *see Dothard*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786, an employer's refusal to employ persons who use methadone, *see New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979), who have a poor credit rating, *see* 3 A. Larson & L. Larson, Employment Discrimination § 73.00 (1981 & 1981 Supp.), or who have a record of arrests, *see id.*, so long as a resulting disparate impact may be shown.

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