OPINION NO. 72-006

Syllabus:

1. Where necessary to eliminate the continuing effects of past and present discrimination, the Ohio Civil Rights Commission has the authority under Section 4112.05, Revised Code, to utilize conciliation agreements which require employers to consider potentially qualified minority group applicants whose names are maintained in a separate index before consulting other outside sources for applicants.

2. Utilization of arrest records which did not result in a conviction as a factor in determining whether an applicant is hired is an unlawful discriminatory practice as defined in Sections 4112.02(A) to (F), Revised Code, unless the employer can prove that such practice is a valid predictor of job capability, and the Ohio Civil Rights Commission must prohibit all such discrimination in its conciliation agreements.

3. Where recruitment practices, such as word-of-mouth referrals from present or past employees, nepotism, and reliance upon walk-ins, have an adverse differential effect upon minority group members, their use constitutes an unlawful discriminatory practice as defined in Sections 4112.02(A) to (F), Revised Code, and the Ohio Civil Rights Commission must prohibit all such discrimination in its conciliation agreements.

4. Where requirements of advertising in media serving minority groups and establishing continuing relationships with specified public and nonprofit private employee referral sources serving the minority community are inadequate affirmative remedies to eliminate the continuing effects of past and present discrimination, the Ohio Civil Rights Commission has the legal authority under Section 4112.05, Revised Code, to utilize conciliation agreements which include businesses for profit among such specified referral sources.

To: Hugo A. Sabato, Chairman, Civil Rights Commission, Columbus, Ohio
By: William J. Brown, Attorney General, January 25, 1972

In your letter of April 23, 1971, the Ohio Civil Rights Commission (hereinafter "Commission") requested the formal opinion of the Attorney General regarding the construction of Ohio Laws Against Discrimination, Chapter 4112, Revised Code, as they relate to the Commission's proposed standard form of an employment Conciliation Agreement. Your request raises basic questions concerning the powers of the Commission to effectuate the fundamental State and national policy to secure equal opportunity and eliminate racial discrimination. Consequently your opinion request has received detailed analysis and study.

INTRODUCTION

Under Sections 4112.05(A) and (B), Revised Code, upon receiving a charge of unlawful employment discrimination, and upon investigating and determining that probable cause exists, the Com-

mission must seek to eliminate any such discrimination by informal means of conciliation. Sections 4112.05(A) and (B), supra, provide as follows:

> "(A) The Ohio civil rights commission shall, as provided in this section, prevent any person from engaging in unlawful discriminatory practices, as defined in section 4112.02 of the Revised Code, provided that before instituting the formal hearing authorized by this section it shall attempt, by informal methods of persuasion and conciliation, to induce compliance with Chapter 4112. of the Revised Code.
>
> "(B) Whenever it is charged in writing and under oath by a person referred to as the complainant, that any person, referred to as the respondent, has engaged or is engaging in unlawful discriminatory practices, or upon its own initiative in matters relating to any of the unlawful discriminatory practices enumerated in divisions (A), (B), (C), (D), (E), (F), (I), or (J) of section 4112.02 of the Revised Code, the commission may initiate a preliminary investigation. * * * If it determines after such investigation that it is probable that unlawful discriminatory practices have been or are being engaged in, it shall endeavor to eliminate such practices by informal methods of conference, conciliation, and persuasion. * * * If, after such investigation and conference, the commission is satisfied that any unlawful discriminatory practice of the respondent will be eliminated, it may treat the complaint as conciliated, and entry of such disposition shall be made on the records of the commission. If the commission fails to effect the elimination of such unlawful discriminatory practices and to obtain voluntary compliance with Chapter 4112. of the Revised Code, or if the circumstances warrant, in advance of any such preliminary investigation or endeavors, and if, with respect to an alleged violation of division (H) of section 4112.02 of the Revised Code, the commission finds that the complainant acted with intention of fulfilling any contracts or agreements he was seeking, the commission shall issue and cause to be served upon any person or respondent a complaint stating the charges in that respect and containing a notice of hearing before the commission, a member thereof, or a hearing examiner * * *. (Emphasis added.)

A successful conciliation results in a written agreement which specifies those actions which a respondent must take in order to eliminate the discriminatory practices. The proposed Conciliation Agreement, as therein stated, is designed to effectuate the purposes of the Ohio Laws Against Discrimination and Title VII of the 1964 Federal Civil Rights Act by assuring that an employer's recruitment and hiring practices afford equal employment opportunity to minority group members. Moreover, as you state in your letter, the Commission intends to use this form of Conciliation Agreement:

> "in cases where affirmative action to increase the opportunity of minority groups for employment appears necessary to eliminate the effects of past

discriminatory practices on the part of certain respondents and to assure future compliance with the Ohio Fair Employment Practices Law." (Emphasis added.)

Although the proposed Conciliation Agreement does not define the term "minority", I have assumed that the Commission used this term to include that group, or groups as the case may be, of persons against whom an employer has been or is discriminating based upon race, color, religion, national origin or ancestry.

Pursuant to this Conciliation Agreement, a respondent employer agrees to establish a specified program of affirmative action in his recruitment, testing, and hiring practices. As a part of this affirmative program, a respondent is required to maintain a so-called "Affirmative Action File" consisting of those applications of minority group members who are neither accepted nor rejected by the employer for present job vacancies but who are or may be qualified for future job openings. As future job vacancies occur for which no qualified applicant is then presently available, the employer is required to consider these potentially qualified persons listed in the Affirmative Action File before going to other outside sources for applicants. The decision whether to hire the minority applicants listed in the Affirmative Action File shall be based upon the same validated, job-related qualifications which are applicable to all applicants for employment. A respondent is also required to make periodic compliance reports to the Commission.

With respect to this proposed form of Conciliation Agreement, the Commission is specifically concerned with the following five questions:

1. May the Commission require an employer to maintain the applications of potentially qualified minority group members in an Affirmative Action File when the Commission has determined that such affirmative action is necessary to effectuate the purposes of the Ohio Laws Against Discrimination?

2. Would the use of the Affirmative Action File by an employer in its recruitment constitute an unlawful discriminatory practice against applicants not members of a minority group?

3. May the Commission require an employer in its recruiting and hiring practices to ignore relationships between applicants and members of its present and past work force when persons hired by reason of such relationships would be members of the majority group and such practices would thereby tend to perpetuate an exclusionary pattern of employment?

4. May the Commission prohibit inquiries relating to arrest records in applications for employment in view of the well-proven proposition that minority groups in general have more arrests per capita than majority groups for reasons not related to job qualification or ability?

5. When requiring that employers establish continuing relationships with specified employee referral sources, may the Commission include referral sources which are businesses for profit in such lists?

I. WHEN THE OHIO CIVIL RIGHTS COMMISSION FINDS PROBABLE CAUSE, IT MUST PURSUANT TO SECTION 4112.05, REVISED CODE, REQUIRE IN ITS CONCILIATION AGREEMENTS THAT EMPLOYERS TAKE ALL AFFIRMATIVE ACTIONS WHICH ARE NECESSARY TO ELIMINATE THE CONTINUING EFFECTS OF PAST AND PRESENT UNLAWFUL DISCRIMINATORY EMPLOYMENT PRACTICES.

Both this and the following Section consider your questions 1. and 2. together. These two questions concern the maintenance and use of the Affirmative Action File which is required by Section III(B) of the proposed Conciliation Agreement, which provides as follows:

> "B. Affirmative Action File
> "1. Applications of members of minority groups which are not accepted or rejected shall be placed in a file, to be known as an Affirmative Action File. This file shall consist of all minority group applicants who are qualified for any position with the Respondent, and those applicants whose qualifications have not been established.
>
> "2. As job vacancies occur for which no qualified applicant is then presently available, the Respondent shall consult the Affirmative Action File to determine if qualified applicants are available from the minority group members listed therein.
>
> "3. Before consulting other sources for applicants, the Respondent will give every consideration to the hiring of applicants from this file.
>
> "4. If, after further review at the time a vacancy is available, the Respondent concludes that the applicant is not qualified and cannot become qualified, he should remove his name from the file and notify him and the appropriate organization and agencies in accordance with paragraph (A)(2) above. If the applicant is still considered qualified, the Respondent shall note on the file the date of each review and the reason for rejection. If the Respondent is of the view that certain steps taken by the applicant could qualify him for employment, it shall so inform the applicant and the referring and sending institution, in writing, maintaining a copy in his file.
>
> "5. The operation of the file shall be reported as provided in Section V infra.
>
> "6. The maintenance and use of the Affirmative Action File does not require exclusion from consideration of other applicants, nor does it imply a quota system for the hiring of any racial or ethnic group."

A. The Elimination of All Discriminatory Employment Practices Is An Unequivocal State and National Policy of Highest Importance.

The national policy against employment discrimination finds expression at the federal level in the comprehensive provisions

of Title VII of the Civil Rights Act of 1964[1] (hereinafter "Title VII"), the provisions of the Civil Rights Act of 1866,[2] and in a long series of Presidential Executive Orders.[3] The current Presidential Executive Order No. 11246[4] not only prohibits discrimination in employment by contractors and subcontractors holding federal contracts and federally-assisted construction contracts but also requires affirmative action by such contractors. Recently, in the so-called "Philadelphia Plan",[5] the federal government has interpreted this obligation of affirmative action to require all bidders on federally involved construction in the Philadelphia area to commit themselves to use every good faith effort to assure a proportion of minority manpower within goal ranges established by the Government.[6] The Philadelphia[7] and other[8] similar affirmative action plans have been upheld against challenges that they impose unlawful racial quotas and otherwise violate Title VII.

In Griggs v. Duke Power Co.,[9] Chief Justice Burger, speaking for a unanimous Court, characterized the goal of this national policy in unequivocal terms: "[T]o achieve equality of employment opportunity and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[10] In enacting Title VII, the Court held that Congress intended to remove any "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."[11] Lower federal courts have also unequivocally expressed this national policy of eliminating discriminatory employment practices.[12]

These goals of our national policy also find expression in Ohio statutes.[13] It is evident from Sections 4112.05(A) and (B), supra, quoted above, that the purpose of Chapter 4112 like that of Title VII is the elimination of unlawful discrimination. In Weiner v. Cuyahoga Community College District,[14] the Ohio Supreme Court noted the similarity of purpose between federal and Ohio laws against employment discrimination, acknowledged the "strong moral commitment of both state and federal governments to fair employment practices * * *",[15] and upheld the requirement of a public body that bidders for public works contracts must give an unqualified commitment to take affirmative action to assure equal employment opportunity during the construction.

B. Included in this State and National Policy is the Requirement of Eliminating the Present and Continuing Effects of Past and Present Discriminatory Practices.

As the Supreme Court stated in Griggs, Congress intended that any "practice, procedures, or tests, neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status-quo of prior discriminatory employment practices."[16]

Section 706(g) of Title VII[17] provides as follows:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment

> practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees with or without back pay * * *." (Emphasis added.)

Federal courts have held that they are under a duty to order "such affirmative action" as is necessary and appropriate to eliminate the continuing present effects of past and present discrimination and to assure the nonexistence of future barriers to full enjoyment of equal employment opportunity.[18] The United States Court of Appeals for the Sixth Circuit recently reversed a district court decision because the trial court had not ordered an effective remedy against apparently neutral practices which perpetuated the effects of a Cleveland craft union's past discriminatory referral and apprentice practices even though the union's new leadership had indicated their willingness now to cease discriminating.[19] Likewise, every United States court of appeals considering the issue has held that Title VII requires the elimination of the present effects of prior discriminatory practices.[20]

Numerous federal court decisions reflect the breadth of affirmative action which has been required to eliminate the continuing effects of past and present discriminatory employment practices, including merger of unions,[21] establishment of new seniority systems,[22] development of new objective criteria for union membership,[23] publication of new nondiscriminatory practices,[24] institution of recruitment practices targeted to minority applicants,[25] retention of existing wage and seniority when transferring to new departments,[26] back pay awards to all members of the class discriminated against,[27] and detailed record keeping and reporting to assure compliance.[28]

Similarily, both the Ohio Supreme Court[29] and federal courts[30] have upheld the imposition of comprehensive requirements of affirmative action on public construction contracts in order to assure equality of employment opportunity.

Of course, as the Court stated in Griggs, the national policy against discrimination:

> "* * * does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[31]

Congress explicitly prohibited so-called reverse discrimination by the anti-preferential treatment provision of Title VII,[32] quoted in the footnote. Congress did not intend that incumbent whites be discharged and their jobs be given to members of minority groups which previously were victims of discrimination.[33] At the same time, Congress did not intend, in the words of Chief Justice Burger, to " 'freeze' the status quo of prior discriminatory practices."[34] The national policy against discrimination does require that future job vacancies be filled on a nondiscriminatory basis.[35] The anti-preferential treatment provision of Title VII does not

prohibit the requirement of all forms of appropriate affirmative relief necessary to eliminate all employment practices (even if neutral on their face) which have the effect of perpetuating prior discrimination.[36]

The Ohio Civil Rights Commission's remedial authority is defined in Section 4112.05(G), Revised Code, which provides as follows:

> "If upon all the reliable probative and substantial evidence the commission determines that the respondent has engaged in, or is engaging in any unlawful discriminatory practice, whether against the complainant or others, the Commission shall state its findings of fact and conclusions of law, and shall issue * * * an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of [Ohio Laws Against Discrimination] * * *, including, but not limited to hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance. * * *" (Emphasis added.)

Thus, the Commission's remedial authority is analogous to that of federal courts under Section 706(g) of Title VII, quoted above. The Ohio Laws Against Discrimination also contain Sections 4112.05(E) and 4112.02(A), supra, which prohibit preferential treatment.

Section 4112.05(E) provides as follows:

> "(E) In any proceeding [pursuant to Section 4112.05], the member, hearing examiner, or commission shall not be bound by the rules of evidence prevailing in the courts of law or equity, but shall, in ascertaining the practices followed by the respondent, take into account all reliable, probative, and substantial evidence, statistical or otherwise, produced at the hearing, which may tend to prove the existence of a predetermined pattern of employment or membership, provided that nothing contained in this section shall be construed to authorize or require any person to observe the proportion which persons of any race, color, religion, national origin, or ancestry bear to the total population or in accordance with any criterion other than the individual qualifications of the applicant."

Section 4112.02(A) provides as follows:

> "[It shall be an unlawful discriminatory practice:] (A) For any employer, because of the race, color, religion, national origin, or ancestry of any person, to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

Because of the similarity between the purposes and language

of Title VII and Chapter 4112, supra, federal decisions interpreting Title VII are useful guides to interpreting analogous provisions in Chapter 4112, supra.[37] Under the reasoning of Griggs and of federal appellate decisions which interpret the effect of similar prohibitions against preferential treatment upon the court's remedial authority, Sections 4112.05(E) and 4112.02(A), supra, do not prohibit the Commission from requiring appropriate affirmative action which is necessary to eliminate continuing effects of past and present discrimination.

Thus, under both Title VII and Chapter 4112, although majority group members may not be displaced from their present positions by the victims of past discrimination, the future awarding of vacant jobs and future operation of other employment practices (such as seniority and job referral systems) must be on nondiscriminatory basis that do not perpetuate the effects of past and present discrimination.

C. Eliminating Employment Discrimination and Securing Voluntary Compliance Through Informal Conciliation Is An Integral Part of This State and National Policy to Achieve Equal Employment Opportunity.

Title VII requires that before a person may institute a judicial action he must first file a complaint with the Equal Employment Opportunity Commission (EEOC) so that upon a finding of reasonable cause, the EEOC has the opportunity to eliminate the alleged discrimination through informal means of conference, conciliation and persuasion.[38] In analyzing the policies behind Title VII, federal courts have discussed the congressional preference for conciliation and private settlements as a means of obtaining compliance with the national policy of equal employment opportunity.[39] To eliminate discriminatory employment practices through informal conciliation, the EEOC enters into written agreements with employers which require those affirmative actions necessary to eliminate the continuing effects of prior discriminatory practices and to assure continued compliance.[40]

Analogously, Sections 4112.05(A) and (B), Revised Code, quoted in the Introduction above, require that before the Ohio Civil Rights Commission may conduct an adjudicatory hearing it must first attempt to eliminate the discriminatory practices and obtain voluntary compliance with Ohio Laws Against Discrimination by informal means of persuasion, conciliation and conference. Like the EEOC, the Commission also enters into written conciliation agreements with employers which specify those actions an employer must take to eliminate the continuing effects of prior discrimination.[41]

D. Upon Finding Probable Cause, The Commission Must Require That an Employer Take Those Actions Necessary to Eliminate The Discrimination and Its Continuing Effects.

When the Commission has found probable cause, Sections 4112.05(A) and (B), supra, require it to eliminate all such unlawful discriminatory practices and to obtain compliance with Chapter 4112. As discussed in Subsection B above, this legal obligation to eliminate discrimination includes eliminating those practices (even if apparently neutral) which perpetuate the effects of past and present unlawful discrimination. To fulfill these statutory responsibilities, the Commission must

determine what actions are necessary and appropriate to eliminate the discrimination and its continuing effects.

Pursuant to Sections 4112.05(A) and (B), supra, the Commission must first seek to eliminate discriminatory practices by the informal method of conciliation. At this conciliation stage, the Commission is legally obligated to determine what remedial actions the employer must take to eliminate the discrimination. Because the objectives of these conciliation endeavors is to eliminate the discrimination, the Commission is legally authorized to propose and ratify only those conciliation agreements which include such necessary remedial actions. If the Commission is able to obtain necessary remedial actions through the informal methods of conciliation, it has fulfilled its statutory responsibilities and the matter is conciliated. If, however, the Commission is unable to obtain such actions and therefore is unable to eliminate the discrimination, it is required by the unambiguous language of Section 4112.05(B), supra, to issue its complaint and seek these necessary remedial actions through the formal method of a public hearing.

Accordingly, if the Commission, during conciliation endeavors, fails or refuses to demand those necessary remedial actions and/or ratifies or accepts a conciliation agreement which requires less than these necessary actions, it would violate its indisputable statutory obligation.

Not only would such failure or refusal of the Commission violate its obligation under Ohio statutes, but it may also violate its constitutional obligations under the Fourteenth Amendment. The State of Ohio and its agencies, such as the Commission, are under a Constitutional duty not to encourage or authorize private racial discrimination.[42] In the face of the undisputable national policy to eliminate discrimination, failure or refusal of the Commission to identify and demand those actions necessary to eliminate discrimination may constitute state encouragement of such unlawful discrimination.[43]

If the Commission fails or refuses to eliminate unlawful discrimination, such action might be interpreted by private employers as a manifestation of governmental approval and might therefore encourage continued or increased private discrimination. Moreover, if the Commission fails or refuses to demand necessary affirmative relief when legally authorized to do so, it would allow residual discrimination to continue. As the Supreme Court has stated in Burton v. Wilmington Parking Authority:[44] "[N]o State may effectively abdicate its [Fourteenth Amendment] responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."[45]

E. Where Necessary to Eliminate the Continuing Effects of Prior Discrimination, Chapter 4112 Authorizes the Commission to Require Employers to Maintain and Use an Affirmative Action File.

In its questions 1. and 2., the Commission asks whether any provisions of Chapter 4112, supra, prohibit it from requiring in its conciliation agreements that employers maintain and use the Affirmative Action File where necessary to eliminate discrimination and its continuing effects. As discussed in Subsection (D) above, the Commission legally may propose and accept only those conciliation agreements which eliminate all discrimination. To fulfill this legal obligation, the Commission must require in its

conciliation agreements those remedial actions which are necessary and appropriate to eliminate discrimination.

It has been nevertheless suggested that the Commission cannot require the maintenance of such a separate index of minority group applicants because this would violate Section 4112.02(E), supra, which provides as follows:

> "[It shall be an unlawful discriminatory practice] * * * for any employer, employment agency, or labor organization prior to employment or admission to membership to: (1) Elicit or attempt to elicit any information concerning the race, color, religion, national origin, or ancestry of an applicant for employment or membership; (2) Make or keep a record of race, color, religion, national origin, or ancestry of any applicant for employment or membership."

It has also been suggested that the Commission cannot require employers to use the Affirmative Action File as their initial source of recruiting applicants because this would constitute preferential treatment or discrimination against nonminority group applicants in violation of Sections 4112.05(E) and 4112.02(A), supra, quoted in Subsection B above.

When these provisions are properly interpreted to effectuate the purposes of Chapter 4112, supra, they do not prohibit the Commission from requiring the Affirmative Action File to eliminate the continuing effects of prior and present discrimination. To the contrary, where necessary and appropriate to eliminate discrimination, Chapter 4112 requires the Commission to include the Affirmative Action File in its conciliation agreements.

Requiring employers to maintain records which indicate race of applicants is necessary to effectuate the purposes of Chapter 4112, supra. In order to determine whether an employer has ceased discriminatory recruiting, testing, or hiring practices and is complying with an affirmative program necessary to eliminate the effects of such discrimination, the Commission must analyze the treatment accorded minority and majority group applicants. To achieve these objectives of Chapter 4112, the Commission has determined that record keeping by race is necessary. To achieve the objectives of the national policy, federal courts have likewise routinely required record keeping by race. Federal courts have ordered discriminatory employers and unions to maintain detailed records indicating an applicant's race, the disposition of his or her application for a new job, union membership, apprentice program, or promotion, and the reasons for such disposition.[46]

The requirement of the Commission's proposed Conciliation Agreement that an employer maintain records of the race of applicants would not violate the purposes of Section 4112.02(E), supra, quoted above. The evident purpose of this prohibition against keeping records of race of applicants is to prevent an employer from utilizing knowledge as to the racial identity of applicants in a discriminatory manner. The recruitment and hiring practices of employers subject to such a Conciliation Agreement would be periodically reviewed by the Commission. Thus, uthe employer subject to such Conciliation Agreement would be unable to utilize information as to the racial identity of applicants for unlawful discriminatory purposes. Moreover, the maintenance of such records by an employer pursuant to the terms of a conciliation agreement

would not constitute a violation of Section 4112.02(E), supra, so long as such information is not used to discriminate against any person.

To conclude that the prohibition of Section 4112.02(E), supra, prevents the Commission from requiring in its Conciliation Agreement that employers maintain such records would not only ignore the purpose of these provisions but would also be inconsistent with the mandate of the General Assembly in Section 4112.08, supra, that the remedial authority of the Commission "shall be construed liberally for the accomplishment of the purposes thereof and any law inconsistent with any provision hereof shall not apply." This is an explicit statement by the General Assembly that the Ohio Laws Against Discrimination--like other remedial laws--shall be construed so as to achieve their evident purposes--the elimination of unlawful discrimination.[47] The Commission is explicitly authorized in Section 4112.05(G), supra, quoted above, to require compliance reports in its orders following public hearing. Like federal courts and other state antidiscrimination agencies,[48] the Commission has determined that it is necessary to require employers to maintain records of the racial identity of applicants in order to assure compliance with Ohio Laws Against Discrimination and performance of the affirmative action necessary to eliminate discrimination.

To interpret Section 4112.02(E), supra, as preventing the Commission from requiring racial record keeping would produce the absurd result of preventing the Commission from using a remedial device it has determined to be necessary to eliminate discrimination. The Ohio Supreme Court has held that statutes should be construed to avoid unreasonable or absurd consequences.[49] The absurd result of interpreting the Commission's remedial power to exclude a form of necessary compliance reports is not required by the clear language of Chapter 4112 and must therefore be avoided.

As discussed in Subsection B and D above, requiring appropriate forms of affirmative action is legally required where necessary to achieve the objectives of the State and national policy to eliminate discrimination. There are numerous federal decisions which require employers to take specified affirmative actions to recruit and hire qualified members of minority groups and thereby eliminate the continuing underutilization of minority group members which results from prior discriminatory practices.[50] Because discriminatory practices violate the rights of a class of (minority group) persons,[51] the remedy to eliminate the effects of this prior discrimination must require the employer to provide opportunities to those in the class against whom he has discriminated.[52] The employer cannot, however, provide opportunities for those individuals who over the years were denied notice and opportunity for employment because these persons cannot be identified. Therefore, the remedy must benefit other members of the class against which the prior discrimination was directed.

I have already highlighted generally in Subsection B above the scope of affirmative relief which federal courts, under a remedial obligation analogous to that of the Commission, have determined is necessary to eliminate the continuing effects of prior discrimination. Several of these orders by federal courts are similar to the Commission's proposed Conciliation Agreement which requires an employer to use an Affirmative Action File as

discussed therein. One federal court decree even required an employer, inter alia, to: (a) advise minority recruitment sources of future job vacancies prior to recruitment from other sources; (b) have the personnel director or his representative interview each black applicant and inform them of all current job vacancies without regard to stated qualifications or interest; and (c) state in writing why black applicants are deemed unqualified.[53]

There are numerous federal decisions ordering relief which goes beyond the requirements of the Affirmative Action File. For example, one all-white construction union was required to admit automatically into membership any person meeting court defined qualifications and to make referrals for work in a ratio one black for each white.[54] Another federal appellate court affirmed an order which required construction unions to admit into membership blacks who met court defined qualifications, authorized contractors to hire blacks without regard to referral priority or work experience, and required apprenticeship committees to indenture at least 30 percent Negroes in each class of apprentices.[55]

The Commission's proposed Conciliation Agreement itself is patterned after a form of model conciliation agreement drafted by the EEOC,[56] the federal agency responsible for investigating and conciliating charges of discrimination under Title VII. As the Supreme Court has noted, the policies of the EEOC, "the enforcing agency [,are] entitled to great deference."[57] Analogous to the Commission's responsibilities under Chapter 4112,. the EEOC is responsible to "obtain voluntary compliance" with Title VII.[58] Where necessary and appropriate to assure compliance, the EEOC requires in its conciliation agreements both affirmative action and compliance reports.[59]

For these reasons, I conclude that the use of an Affirmative Action File is a permissible form of affirmative action and the Commission has both the legal authority and obligation to require in its conciliation agreements that employers adopt such an affirmative action program where necessary to eliminate the continuing effects of past and present discriminatory practices. Moreover, as discussed in Subsection B above, the use of an Affirmative Action File would not constitute an unlawful quota or preferential treatment in violation of Sections 4112.02(A) and 4112.04(E), Revised Code.

II. INTERPRETING PROVISIONS OF CHAPTER 4112, REVISED CODE, TO PROHIBIT THE COMMISSION FROM REQUIRING RESPONDENTS TO MAINTAIN AND USE AN AFFIRMATIVE ACTION FILE WOULD RAISE SERIOUS QUESTIONS UNDER THE SUPREMACY CLAUSE AS TO THE VALIDITY OF SUCH PROVISIONS.

As discussed in Section I, when properly interpreted to effectuate its purposes, Chapter 4112, supra, requires the Commission to utilize the Affirmative Action File where necessary and appropriate to eliminate the continuing effects of prior discrimination. Nevertheless, assume arguendo that Section 4112.02(E), supra quoted in Section I(E) above, were interpreted as prohibiting the Commission from requiring by conciliation agreement that employers maintain records indicating the race of applicants and that Sections 4112.05(E) and 4112.02(A), supra, quoted in Section I(B) above, prohibit the Commission

from requiring employers to utilize the Affirmative Action File as provided therein.

In light of the purposes of Title VII, the reasoning of federal court decisions, and the guidelines of the EEOC, discussed in Section I above, I conclude that the maintenance and use of the Affirmative Action File would effectuate the strong national policy to assure nondiscrimination. Insofar as the provisions of Chapter 4112, Revised Code--especially Sections 4112.02(A) and (E) and 4112.05(E)--prohibit the maintenance and use of the Affirmative Action File, said provisions would thereby frustrate the objectives and achievement of the national policy to eliminate discrimination.

Accordingly, there is a serious question under the Supremacy Clause of the Constitution of the United States whether such provisions are invalid and void.[60] As the Supreme Court recently stated in Perez v. Campbell:[61] "Any state legislation which frustrates the full effectiveness of Federal law is rendered invalid by the Supremacy Clause."[62] In Perez, the Court reaffirmed its statement in Hines v. Davidowitz[63] that the test of the validity of a state statute under the Supremacy Clause is whether the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[64]

The EEOC itself has considered whether the Ohio Civil Rights Commission is prohibited by any provision of Chapter 4112, supra, from requiring in its conciliation agreements that employers maintain and use the Affirmative Action File. The General Counsel of the EEOC has concluded that the use of the Affirmative Action File does not constitute an illegal preference[65] and is not barred by the prohibition of Section 4112.02(E), supra, against record keeping by race. Indeed, he was of the opinion that this latter provision was invalidated because it frustrates national policy.[66]

It has been suggested that not withstanding the general principle of federal supremacy, Congress may specifically provide that federal law yield to state law in case of conflict and that Congress has done so in this instance in Section 708 of Title VII,[67] quoted in the footnote. Read literally, Section 708 might be interpreted to mean that Congress intended Title VII to yield to any conflicting state law except where the state law required or permitted an unlawful employment practice as defined in Title VII. Section 708, however, is not to be read as preserving state laws which are inconsistent with any of the purposes or provisions of Title VII. A reading of Section 708 to preserve all state laws not in conflict with Sections 703 and 704[68] (which define unlawful discriminatory practices) regardless of whether such state laws are inconsistent with the purposes and other provisions of Title VII would lead to absurd results. For example, a state could not only pass a law forbidding the posting of the EEOC notices as required by Section 711[69] or prohibiting the maintenance of records required under Section 709(c)[70] but could also pass a law interferring with the EEOC's authority to conduct investigations pursuant to Sections 709(a)[71] and 710.[72] Moreover, the legislative history indicates that Section 708 was intended by Congress as an anti-preemption provision to preserve state fair employment practice laws even though the federal government had entered the field, rather than as a section abolishing the supremacy of the provisions and policy of Title

VII in the face of state law which is inconsistent with or frustrates the full accomplishment of Title VII.[73]

In sum, Section 708 of Title VII does not preserve provisions of state law which "frustrate"[74] the "accomplishment and execution of the full purposes and objectives"[75] of the national policy against discrimination.

The Ohio Supreme Court has directed that, where reasonably possible, a statute should be given a construction which will avoid raising a serious question as to its constitutionality.[76] As discussed in this Section, an interpretation of Sections 4112.02(A) and (E) and 4112.05(E) which would prohibit the Commission from requiring in its conciliation agreements that employers maintain and use the Affirmative Action File where necessary to eliminate effects of prior discrimination would raise serious questions under the Supremacy Clause as to the validity of such provisions. Accordingly, where such provisions reasonably permit they must be interpreted so as to avoid such serious constitutional questions.

As discussed in Section II above, such constitutionally questionable interpretations are neither required by the clear language of said Sections nor by the purposes of Chapter 4112.

III. ANY EMPLOYMENT PRACTICE WHICH HAS ADVERSE DIFFERENTIAL EFFECT UPON MINORITY GROUP MEMBERS AND WHICH THE EMPLOYER CANNOT JUSTIFY BY BUSINESS NECESSITY IS AN UNLAWFUL DISCRIMINATORY PRACTICE.

In this Section, I consider your questions 3. and 4. together.

A. The Griggs Test of What Practices Constitute Unlawful Discrimination.

Because Title VII and Chapter 4112 have many similar purposes and utilize similar statutory language to define unlawful discriminatory employment practices, the Supreme Court's decision in Griggs v. Duke Power Co.[77] on what constitutes a discriminatory employment practice under Title VII provides guidance in interpreting analogous provisions of Chapter 4112.[78]

The goal of the national policy as expressed by Congress in Title VII is to eliminate all "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[79] By Title VII, Congress has prohibited "not only overt discrimination but also practices fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[80] Moreover, discriminatory motive or intent is not required since Congress has directed this national policy against the "consequences of employment practices, not simply the motivation."[81] Once an employment practice is shown to have a differential adverse impact upon minority group members, the burden of proof is on the employer "of showing that any given [employment] requirement must have a manifest relationship to the employment in question."[82]

Thus, as Griggs conclusively establishes there are conceptually two types of unlawful discrimination: (1) disparate treat-

ment which consists of treating minority group members unequally or differently than majority group members; and (2) disparate effect which consists of any employment practice which (a) has an adverse consequence upon minority group members compared with majority group members and (b) the employer cannot prove has a demonstratable relationship to successful job performance (the so-called "business necessity" test or justification).[83] In Griggs v. Duke Power Co., the employer failed to prove that employment requirements of a high school diploma and passing two paper-pencil intelligence tests were manifestly related to measuring job capability, i.e. valid predictions of job performance.

B. Use of Arrest Records Not Resulting in Conviction as a Factor in Decision to Hire is an Unlawful Discriminatory Practice Unless the Employer Can Prove Such Records Are Valid Predictors of Satisfactory Job Performance.

Section IV of the Commission's proposed Conciliation Agreement is entitled "Qualifications for Employment" and Subsection (C) provides as follows:

> "Respondent's application for employment shall discontinue requiring the following information: 'Have you ever been arrested other than for Minor Traffic Violations?' other than that such applicants may be queried as to whether they have been convicted for a felony."

This provision is designed to stop a respondent from seeking information from applicants concerning their prior arrests which did not result in a felony conviction. I infer from this provision and am informed that the Commission intends that the respondent should also cease utilizing as a factor in determining any condition of employment, including hiring, promotion and termination, any record of arrest which did not result in a felony conviction.

Under the rationale of Griggs, at least two federal courts have held that utilization of records of arrests which did not result in a conviction as a factor in a hiring decision is an unlawful discriminatory practice because such a practice has a differential effect upon minority group applicants and is not justified by business necessity.[84] One federal appellate court affirmed a lower court prohibiting a municipal civil service commission from inquiring into arrest records of applicants for positions in the fire department and further ordered that conviction of a felony or misdemeanor should not per se constitute an absolute bar to employment.[85] Another federal court prohibited a large industrial employer from utilizing records of arrest not leading to conviction as a factor in any employment decision, including hiring.[86]

Thus, based upon the Griggs test and the reasoning of these federal decisions, I conclude that utilization of records of arrest which did not result in a conviction as a factor in the hiring decision is an unlawful discriminatory practice unless the employer can demonstrate that for a specific position such arrest records are valid predictors of job performance.

At present, utilization by an employer of a record of an applicant's conviction (including misdemeanor) in hiring decision

has not been held to be an unlawful discriminatory practice. In absence of such authority, I believe it is unwarranted for the Commission in Section IV(C) of its Conciliation Agreement to restrict an employer's permitted inquiry and consideration to solely felony convictions. Accordingly, I conclude an employer may inquire and use misdemeanor convictions in his employment decisions as well as felony convictions unless the Commission establishes that consideration of misdemeanor convictions has an adverse differential effect upon minority groups not justified by business necessity. Hence, Section IV(C) should be modified to permit consideration of misdemeanor convictions.

C. Use of Recruitment Practices Which Have the Effect of Denying Minority Group Members Equal Employment Opportunity Are Unlawful Discriminatory Practices.

Where the Commission determines an employer's recruiting practices have an adverse differential effect upon minority group members, it has proposed Section III of the Conciliation Agreement entitled "Hiring Process", and Subsections D and E thereof provide as follows:

> "D. Respondent shall hire its summer and other temporary employees on the same basis as herein provided for other new hires. Respondent shall not consider relationship of the applicant to any present or past company employee as a criterion for summer employment to the detriment of those applicants not so advantaged.
>
> "E. Respondent shall not consider the fact that any applicant may be related to, a friend of, or a neighbor of any present or past company employee, as a criterion for the hiring or rejection of such applicant."

The prohibitions of Section 4112.02(A) to (F), Revised Code, against discrimination in employment must mean that a potential employee cannot have a lower chance of being hired due to his race, color, religion, national origin, or ancestry. It is immaterial whether the lower chance results from the hiring standards or tests applied, from discriminatory recruitment, or from a decision to do "walk-in" hiring and rely on the recruiting services of employees.[87] Accordingly, under the Griggs test, the use of recruiting practices which have an adverse consequence upon minority applicants and are not justified by business necessity constitutes unlawful discrimination.

Such discriminatory recruiting practices include recommendation and referral by present and past employees of a predominately white workforce ("word-of-mouth" recruitment),[88] acceptance of and reliance upon walk-in applicants,[89] preference for friends, relatives or neighbors of present workforce (nepotism),[90] and advertisement of vacancies in media and soliciting from referral sources which reach a disproportionately smaller number of minority group persons.[91]

Accordingly, use of recruiting practices such as those described in Section III(D) and (E) of the proposed Conciliation Agreement which would perpetuate an exclusionary pattern of hiring or would have an adverse differential effect upon minority group persons are unlawful discriminatory practices.

IV. WHERE NECESSARY TO ELIMINATE THE CONTINUING EFFECTS OF PRIOR DISCRIMINATION, THE COMMISSION IS AUTHORIZED TO REQUIRE EMPLOYERS TO ESTABLISH CONTINUING RELATIONSHIPS WITH REFERRAL SOURCES WHICH INCLUDE BUSINESSES FOR PROFIT.

The proposed Conciliation Agreement requires the employer to establish continuing relationships with specified organizations which have as an object the improvement of employment opportunities for minority group persons. This continuing relationship is defined as notification of expected vacancies in the coming calendar quarter and of unexpected vacancies.

The express purpose of establishing such continuing relationships with minority group referral sources is to give notice of employment opportunities to minority persons and thereby increase the number of minority applicants.

Analogous to this affirmative action requirement of the Commission's Conciliation Proposal, federal courts[93] have ordered unions which had not previously advertised to advertise in specified newspapers and other profit-making media serving the black community in order to make known employment opportunities to minority group members. Moreover, federal courts have ordered discriminatory unions[94] and employers[95] to establish continuing relationships with public and nonprofit private employee referral organizations.

As discussed above, the Commission possesses a wide scope of legal authority to fashion affirmative remedies to effectuate the purposes of Chapter 4112. In those cases in which the Commission determines that requirements of advertising in media serving minority groups and of establishing continuing relationships with public and nonprofit private employee referral sources (e.g. Bureau of Employment Services, Urban League, NAACP and community action organizations) are insufficient, and therefore inadequate, remedial devices, then the Commission may require additional affirmative actions to overcome the continuing effects of prior discrimination in recruiting and hiring. Where necessary to achieve equal employment opportunity, these additional requirements may include the addition of businesses for profit to the list of referral sources with which the employer must establish continuing relationships. Because such a requirement is susceptible to abuse (such as the profit making source failing to provide services commensurate with their fee), the Commission should exercise reasonable caution in choosing which profit-making sources will be included and in reviewing the adequacy of the performance of such sources during the term of the conciliation agreement.

CONCLUSION

In specific answer to your questions it is my opinion, and you are so advised, that:

1. Where necessary to eliminate the continuing effects of past and present discrimination, the Ohio Civil Rights Commission has the authority under Section 4112.05, Revised Code, to utilize conciliation agreements which require employers to consider potentially qualified minority group applicants whose names are maintained in a separate index before consulting other outside sources for applicants.

2. Utilization of arrest records which did not result in

a conviction as a factor in determining whether an applicant is hired is an unlawful discriminatory practice as defined in Sections 4112.02(A) to (F), Revised Code, unless the employer can prove that such practice is a valid predictor of job capability, and the Ohio Civil Rights Commission must prohibit all such discrimination in its conciliation agreements.

3. Where recruitment practices, such as word-of-mouth referrals from present or past employees, nepotism, and reliance upon walk-ins, have an adverse differential effect upon minority group members, their use constitutes an unlawful discriminatory practice as defined in Sections 4112.02(A) to (F), Revised Code, and the Ohio Civil Rights Commission must prohibit all such discrimination in its conciliation agreements.

4. Where requirements of advertising in media serving minority groups and establishing continuing relationships with specified public and nonprofit private employee referral sources serving the minority community are inadequate affirmative remedies to eliminate the continuing effects of past and present discrimination, the Ohio Civil Rights Commission has the legal authority under Section 4112.05, Revised Code, to utilize conciliation agreements which include businesses for profit among such specified referral sources.

FOOTNOTES

1 42 U.S.C. Secs. 2000e to 20002-15 (Supp. IV, 1966).

2 42 U.S.C. Sec. 1981 (1964), which has been interpreted as prohibiting private racial discrimination in employment. E.g., Young v. International Tel. & Tel. Co., 438 F.2d 757 (3rd Cir. 1971); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970); Saunders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970) (reh. denied).

3 See, e.g., Developments in the Law--Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1275-91 (1971).

4 3 C.F.R. 427 (1971) (as amended).

5 2 CCH EMPL. PRAC. GUIDE, Pars. 16,175 and 16,176. See also "Washington Plan", 41 C.F.R. Sec. 60-5 (1971); "San Francisco Plan", 36 C.F.R. 10868-74 (1971).

6 See generally Nash, Affirmative Action Under Executive Order 11,246, 46 N.Y.U. L. REV. 225 (1971); Note, The Philadelphia Plan, 6 COLUM. J.L. & P. SOC. PROB. 187 (1970).

7 Contractors' Ass'n v. Shultz, 442 F.2d 159 (3rd Cir.), cert. denied, 40 U.S.L.W. 3165 (1971); 42 Op. Att'y Gen. No. 37 (1969).

8 Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970) (upholding State of New Jersey's Newark Plan); Southern Ill. Builders' Ass'n v. Ogilvie, 3 CCH EMPL. PRAC. DEC. Par. 8259 (S.D. Ill. 1971) (upholding State of Illinois' Ogilvie Plan). See Weiner v. Cuyahoga Comm. Coll. Dist., 15 Ohio Misc. 289, 238 N.E.2d 839 (Cuy. Co. C.P. 1968), aff'd 19 Ohio St.2d 35, 249

N.E.2d 907 (1969), cert. denied, 396 U.S. 1004 (1970) (upholding the "Cleveland Plan" which is decribed in Jones, The Buga boo of Employment Quotas, 1970 WISC. L. REV. 341, 346-58 (1970)).

9 401 U.S. 424 (1971).

10 Id. at 429-30.

11 Id. at 431.

12 "Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society. . . . Title VII . . . provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination." Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970). Accord, e.g., Fekete v. U.S. Steel Corp., 424 F.2d 331, 336 (3rd Cir. 1970).

13 Ohio Rev. Code, Secs. 4112.02(A) to (E) and 153.581 to 153.60.

14 Supra note 8.

15 Id. at 39, N.E.2d at 910.

16 Supra note 9 at 430.

17 42 U.S.C. Sec. 2000e-5(g).

18 E.g., United States v. Carpenters Local 169, 4 CCH EMPL. PRAC. DEC. Par. 7610 at 5398 (7th Cir. 1972); Long v. Georgia Kraft Co., 4 CCH EMPL. PRAC. DEC. Par. 7556 at 5223-150 (5th Cir. 1971), rev'g 328 F.Supp. 681 (N.D.Ga. 1970). United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970); United States v. Hayes Int'l Corp., 415 F.2d 1038, 1045 (5th Cir. 1969). See, e.g., Louisiana v. United States, 380 U.S. 145, 154 (1965); Potts v. Flax, 313 F.2d 284, 289 (5th Cir. 1963); Clemons v. Board of Educ., 228 F.2d 853, 859 (6th Cir.) (concurring opinion, Stewart J.), cert. denied, 350 U.S. 1006 (1956).

19 United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir), cert. denied, 400 U.S. 943 (1970). See Long v. Georgia Kraft Co., supra note 18.

20 E.g., United States v. Bethlehem Steel Corp., 3 CCH EMPL. PRAC. DEC. Par. 8257 (2nd Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 91 Sup. Ct. 972 (1971); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970), aff'g 301 F.Supp. 906 (E.D.La. 1969); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

21 E.g., United States v. Jacksonville Terminal Co., 3 CCH EMPL. PRAC. DEC., Par. 8324 at 6993-149 to 150 (5th Cir. 1971); Local 189, Papermakers v. United States, supra note 20.

22 E.g., id.; United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 40 U.S.L.W. 3264 (1971), aff'g 315 F.Supp. 1202 (W.D. Wash. 1970); United States v. Bethlehem Steel Corp., supra note 20; Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969), aff'g. 294 F. Supp. 368 (E.D.La. 1968), order following affirmance, 62 CCH Lab. Cas. Par. 9411 (1970). See generally Cooper and Sobol, Senority and Testimony

Under Fair Employment Laws: General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598 (1969); Note, Senority Discrimination and the Incumbent Negro, 80 HARV. L. REV. 1260 (1967).

23 E.g., United States v. Ironworkers Local 86, supra note 22; United States v. Sheet Metal Workers Local 36, supra note 20.

24 E.g., id.; Carter v. Gallagher 3 CCH EMPL. PRAC. DEC. Par. 8335 at 6993-206 (8th Cir. 1971), modified on other grounds, 4 CCH EMPL. PRAC. DEC. Par. 7616 (reh. en banc 1972); United States v. Plumbers Local 73, 314 F. Supp. 160 (S.D.Ind. 1969).

25 E.g., Carter v. Gallagher, supra note 24; Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Ironworkers Local 67 v. Hart, 4 CCH EMPL. PRAC. DEC. Par. 7565 at 5259, 5264 (Iowa Sup. Ct. 1971) (aff'g order of Iowa Civil Rts. Comm'n.).

26 E.g., United States v. Bethlehem Steel Corp., supra note 20.

27 E.g., Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

28 E.g., United States v. West Peachtree Tenth Corp., 437 F.2d 221, 230-31 (5th Cir. 1971) (reh. denied) (housing discrimination under Title VIII of Fair Housing Act of 1968, 42 U.S.C. Sec. 3601 et seq. (Supp. IV, 1968)); United States v. Dillon Supply Co., 3 CCH EMPL. PRAC. DEC. Par. 8306 (E.D.N.C. 1971); United States v. Roadway Express, Inc., 63 CCH Lab. Cas. Par. 9516 (N.D. Ohio 1970); Ironworkers Local 67 v. Hart, supra note 25; Williams v. Joyce, 91 Adv. 1481, 479 P.2d 513, 524-26 (Ore. App. 1971).

29 Weiner v. Cuyahoga Comm. Coll. Dist., supra note 8.

30 See notes 7 and 8 supra.

31 Supra note 9 at 431.

32 42 U.S.C. Sec. 2000e-2(J), which provides: "(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

33 See, e.g., Local 189, Papermakers v. United States, supra note 20, at 988-89; Cooper and Sobol, supra note 22, at 1602-29; Note, Senority Discrimination and the Incumbent Negro, supra note 22, at 1268-75.

34 Supra note 9 at 430.

35 See authorities cited in note 33 supra and United States v. Bethlehem Steel Corp., supra note 20 at 6849.

36 E.g., United States v. Ironworkers Local 36, supra note 22 at 6718-19; United States v. Electrical Workers Local 38, supra note 19, at 149-51; United States v. Sheet Metal Workers Local 36, supra note 20 at 140; Local 53, Asbestos Workers v. Vogler, supra note 22, at 1053-54.

37 See, e.g., Cincinnati Traction Co. v. Public Util. Comm'n., 113 Ohio St. 618, 631, 150 N.E. 81, 85 (1925); Royal Idem. Co. v. Day & Maddock Co., 114 Ohio St. 58, 150 N.E. 426 (1926); Wonderly v. Tax Comm'n., 112 Ohio St. 233, 147 N.E. 509 (1925). See generally 50 O. JUR.2d "Statutes", Secs. 267, 216-21 (1961).

38 42 U.S.C. Sec. 2000e-5(a).

39 See, e.g., Parham v. Southwestern Bell Tele. Co., supra note 25; Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) (reh. denied); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

40 29 C.F.R. Sec. 1601.22 (1971). Examples of such conciliation agreements with Arthur D. Little, Inc. and Atlantic Steel Co. are found at BNA FAIR EMPL. PRAC. MANUAL 431.55 and 431.60c.

41 Ohio Rev. Code, Secs. 4112.05(A) and (B); Commission Rules & Regs. CR-Secs. 1.14 and 5.06 (as amended, eff. Oct. 28, 1971), CCH EMPL. PRAC. REP. Par. 5199 (hereinafter "Commission Rules").

42 Palmer v. Thompson, 403 U.S. 217, 223-24 (1971), referring to Reitman v. Mulkey, 387 U.S. 369 (1967) (equal protection clause prohibits state action which has effect of encouraging private discrimination).

43 See id. Cf. Jenkins v. United Gas Corp., supra note 39 at 34; State v. Bergeron, _____ Minn. _____, 187 N.W. 680, 683 (1971).

44 365 U.S. 715 (1961).

45 Id. at 725; See Ethridge v. Rhodes, 268 F. Supp. 83, 87 (S.D. Ohio 1967).

46 See, e.g., Local 189, Papermakers v. United States, supra note 20; Dobbins v. Local 212 Electrical Workers, 292 F. Supp. 413, 461 (S.D.Ohio 1968); United States v. Medical Soc. of S.C., 298 F. Supp. 145, 158 (D.S.C. 1969); United States v. Plumbers Local 73, supra note 29 at 165.

47 E.g., Ironworkers Local 67 v. Hart, supra note 25 at 5263; Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969); Williams v. Joyce, supra note 28; Burke v. Rosenthal, 27 Conn. Supp. 141, 145, 232 A.2d 508, 511 (1967). See, e.g. Curry v. Lybarger, 133 Ohio St. 55, 60, 11 N.E.2d 873, 875 (1937); Dennis v. Smith, 125 Ohio St. 120, 124-25, 180 N.E. 638, 639 (1932). See generally 3 Sutherland, Statutory Construction, Sec. 6604, at 282-89 (3rd ed.); 50 O. JUR.2d "Statutes" Secs. 247-252 (1961).

48 See note 46, supra; Ironworkers Local 67 v. Hart, supra note 25.

49 Canton v. Imperial Bowling Lanes, 16 Ohio St.2d 47, 242 N.E.2d

566 (1968) (Syllabus #4). See generally, 50 O.JUR.2d "Statutes" Sec. 238 (1961).

50 See, e.g., authorities cited in note 25, supra. See generally Blumrosen, Duty of Fair Recruitment Under Civil Rights Act of 1964, 22 RUTGERS L. REV. 465 (1968).

51 Racial discrimination by its nature is discrimination against a class of persons because of a group characteristic, such as, race. See, e.g., Parham v. Southwestern Bell Tele. Co., supra note 25 at 425; Bowe v. Colgate-Palmolive Co., supra note 27 at 719; Jenkins v. United Gas Corp., supra note 39; Jackson v. Concord Co. 54 N.J. 113, 253 A. 2d 793 (1969). The chief motive behind the adoption of the Federal Civil Rights Act of 1964 was the desire to benefit the economic and social condition of black Americans as a group by eliminating discriminatory barriers. See Developments In Law, supra note 3 at 1113-14.

52 See United States v. Bethlehem Steel Corp., supra note 20 at 6849; Blumrosen, note 50 supra at 489-91.

53 United States v. Dillon Supply Co., supra note 28. Cf. United States v. Roadway Express Inc., supra note 28.

54 Local 53, Asbestos Workers v. Vogler, supra note 22. See Carter v. Gallagher, supra note 24 at 4 CCH EMPL. PRAC. DEC. Par 7616 (racial ratio of 30% minority hires imposed); Smith v. Concordia Parish Sch. Bd., 3 CCH EMPL. PRAC. DEC. Par. 8266 (5th Cir. 1971) (racial ratio imposed to govern personnel decisions); Strain v. Philpott, 4 CCH EMPL. PRAC. DEC. Par. 7562 M.D.Ala. 1971) (state agency required to hire Negroes to fill 50 percent of vacancies); Southern Ill. Builders Ass'n v. Ogilvie, supra note 8 (mandatory percentages of minority workforce on public construction).

55 United States v. Ironworkers Local 86, supra note 36, 315 F. Supp. at 1239 et seq.

56 See generally Blumrosen, supra note 50 at 488-89. Under the terms of an antidiscrimination enforcement grant from the EEOC, the Commission is required, where necessary and appropriate, to use a specified form of conciliation agreement. See EEOC Contract #70-36, Section I(A)(4)(b) (extended by letter agreement of June 30, 1971) and Memorandum of Peter Robertson to Agencies with EEOC Contracts, Nov. 10, 1969 (on file in Office of the Ohio Attorney General). The Commission's proposed form of Conciliation Agreement herein discussed is patterned after this EEOC model.

57 Griggs v. Duke Power Co., supra note 9 at 434.

58 42 U.S.C. Sec. 2000e-5(e).

59 See authorities cited in note 40, supra, and Blumrosen, supra note 50, at 488-89.

60 See Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239 (1967).

61 Perez v. Campbell, 402 U.S. 637 (1971).

62 Id. at 652 (emphasis added).

63 312 U.S. 52 (1941).

64 Id. at 67. See, e.g., Nash v. Florida Indus. Comm'n., supra note 60; Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963); Colorado Anti-Discrimination Comm'n. v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963) (dictum); Free v. Bland, 369 U.S. 663, 666 (1962); Hill v. Florida, 325 U.S. 538, 542-543 (1945); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942).

65 Memorandum of Russell Specter, Acting General Counsel, EEOC, to Peter C. Robertson, Director of State and Community Affairs, EEOC, Sept. 30, 1969, referring to Memorandum of Philip Sklover and Lawrence J. Gartner, Office of General Counsel, EEOC, Sept. 15, 1969 (on file in Office of Ohio Attorney General).

66 Id. at 4: "[T]he effectiveness of conciliation and agreements based on conciliation would be hindered, if not destroyed, if the Ohio State law barred a defendant from keeping records based on race. Such a result from the enforcement of a state law would render it invalid because it is in conflict with Federal policy."

The EEOC has also determined that maintaining records of the racial identity of applicants, as required by the Affirmative Action File, does not violate Title VII. EEOC, "Pre-employment Inquiry Statement", May 27, 1968. BNA FAIR EMPL. PRAC. MAN. 401:61.

67 42 U.S.C. Sec. 2000e-7, which provides: "Nothing in . . . [Title VII] shall . . . relieve any person from any liability, [or] duty, . . . provided by any . . . law of any State . . ., other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under . . . [Title VII]."

68 42 U.S.C. Secs. 2000e-2 and 2000e-3.

69 42 U.S.C. Sec. 2000e-10.

70 Id. Sec. 2000e-8(c).

71 Id. Sec. 2000e-8(a).

72 Id. Sec. 2000e-9.

73 The House Education and Labor Committee in reporting H.R. 10144, the precursor to Title VII, referred to a provision identical to Section 708 as "an anti-preemption provision". H.R. Rep. 1370, 87th Cong. 2d Sess. 14. The term "preemption" is commonly used to refer to conflicts between state and federal law arising from the expressed or implied intent of Congress that the federal legislation should be exclusive of all other law in that area. See Campbell v. Hussey, 368 U.S. 297, 300 (1961); Swift & Co. v. Wickham, 382 U.S. 111, 115, 120, 123 (1965). Futhermore, the legislative debate on Section 708 indicates Congress intended it as an anti-preemption provision. See 110 CONG. REC. 7205, 7216-18, 7243 and 7386.

74 Perez v. Campbell, supra note 61, at 652.

75 Hines v. Davidowitz, supra note 63, at 67.

76 Transportation Brotherhood v. Public Util. Comm'n., 177 Ohio St.

101, 202 N.E.2d 699 (1964) (Syllabus #2). See Generally 10 O.JUR. 2d "Constitutional Law", Secs. 162-66 (1964).

77 Supra note 9.

78 See note 37, supra.

79 Griggs v. Duke Power Co., supra.note 9 at 853.

80 Id.; Carter v. Gallagher, supra note 24.

81 Id. at 854 (emphasis by Court). The requirement of 42 U.S.C. Sec. 2000e-5(g) that the discrimination be "intentional" is satisfied if the employer meant to do what he did, i.e. his employment practice was not accidental. E.g., Robinson v. Lorillard Corp., supra note 27; United States v. Jacksonville Terminal Co., supra note 37 at 6993-138 to 139.

82 Id. Accord Colbert v. H-K Corp., 3 CCH EMPL. PRAC. DEC. Par. 8248 (5th Cir. 1971).

83 For post-Griggs analysis of what circumstances constitute business necessity and therefore permit the continuation of employment practices which have an adverse effect upon minorities see Robinson v. Lorillard Corp., supra note 27; United States v. Bethlehem Steel Corp., supra note 20; United States v. Jacksonville Terminal Co., supra note 21 at 6993-142 to 148; Johnson v. Pike Corp. of Amer., 4 CCH EMPL. PRAC. DEC. Par. 7517 (C.D.Calif. 1971) (discharge of minority employee discriminatory notwithstanding expense or inconvenience to employer of several garnishments).

84 E.g., Carter v. Gallagher, supra note 24; Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D.Calif. 1970); EEOC Decision 71-797, Dec. 21, 1970, CCH EMPL. PRAC. GUIDE Par. 6181. See generally 6 HARV. CIVIL RTS.-CIVIL LIB. L. REV. 165 (1970).

85 Carter v. Gallagher, supra note 24 at 6993-206.

86 Gregory v. Litton Systems, Inc., supra note 84 (applicant for sheet metal mechanic position).

87 See generally Blumrosen supra note 50; Development in the Law, supra note 3 at 1152-55.

88 Parham v. Southwestern Bell Tele. Co., supra note 36 at 423, 424, 426-27; Clark v. American Marine Corp., 304 F. Supp. 603, 606 (E.D.La. 1969); EEOC Decisions of April 16, 1969, CCH EMPL. PRAC. GUIDE Par. 6006, of Sept. 16, 1969, id. at Par. 6070, and of April 29, 1971, id. at Par. 6274. See United States v. Ironworkers Local 86, supra note 36, 315 F. Supp. at 1216, 1225, 1235; 41 C.F.R. Sec. 5-12.805-51(b)(5) (1970).

89 Parham v. Southwestern Bell Tele. Co., supra note 36 at 423, 424, 426-27. See 41 C.F.R. Sec. 5-12.805-51(b)(5) (1970).

90 Local 53, Asbestos Workers v. Vogler, supra note 22; United States v. Plumbers Local 73, supra note 24; Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969); United States v. Medical Soc. of S.C., supra note 46. See United States v. Carpenters Local 169, supra note 18; United States v. Electrical Workers Local 36, supra note 19 at 150 (dicta).

91 See United States v. Sheet Metal Workers Local 86, supra note 36, 315 F. Supp. at 1220, 1231, 1235; United States v. Sheet Metal Workers Local 36, supra note 20 at 137-40; United States v. Electrical Workers Local 36, supra note 19 at 150-51 (by implication).

92 E.g., United States v. Ironworkers Local 86, supra note 36, 315 F. Supp. at 1238 and 1246; Local 53, Asbestos Workers Vogler, supra note 22, 62 CCH Lab. Cas. at 6616. Cf. United States v. Electrical Workers Local 36, supra note 19 at 150-51.

93 See, e.g., United States v. Ironworkers Local 86, supra note 36, 315 F. Supp. at 1238 and 1245-46; Local 53, Asbestos Workers v. Vogler, supra note 22, 62 CCH Lab. Cas. at 6612 and 6616. Cf. United States v. Electrical Workers Local 36, supra note 19 at 150-51; United States v. Sheet Metal Workers Local 36, supra note 20 at 137-40.

94 E.g., United States v. Dillon Supply Co., supra note 28; United States v. Roadway Express Co., supra note 28. See Carter v. Gallagher, supra note 24 at 6993-200.