1985 WL 56631 (D.D.C.)
United States District Court, District of Columbia.

BERGER, ET AL.
v.
IRON WORKERS REINFORCED RODMEN LOCAL 201, ET AL.

No. 75-1743. | Jun. 7, 1985.

Attorneys and Law Firms

John F. Dinelt (Reed Smith Shaw & McClay), Washington, D.C., and Robert B. Wallace, Allen M. Lenchek, and Thomas D. Roberts, Washington, D.C., for plaintiffs.

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Opinion

PENN, District Judge: -

I

***1** 1. This is a civil rights action brought by eight black rodmen on their own behalf and on behalf of a class similarly situated, charging the defendants with employment discrimination in violation of Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (Section 1981) and the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. (Title VII).

2. The five defendants are Iron Workers Reinforced Rodmen Local 201 (Local 201); the International Association of Bridge Structural and Ornamental Iron Workers (International); the Apprenticeship Committee for Iron Workers Reinforced Rodmen, Local 201 (Apprenticeship Committee); the National Iron Workers and Employees Training Program (Training Program); and the Construction Contractors Council (CCC).

3. Jurisdiction is based on 42 U.S.C. § 2000(e)(2) and 28 U.S.C. § 1343.

4. On December 11, 1975, plaintiff Ernest Bellamy filed a timely charge of racial discrimination with the EEOC against defendant Local 201. On November 28, 1975, Mr. Bellamy received a notice of his right to sue.

5. On January 13, 1975, plaintiff Van Edward Lewis filed a timely charge of racial discrimination against defendants Local 201, International, Apprenticeship Committee and Training Program. On October 15, 1975, Mr. Lewis received from the EEOC a notice of his right to sue those defendants.

6. On September 15, 1975, the Lawyers' Committee for Civil Rights Under the Law (Lawyers' Committee), on behalf of numerous black rodmen, including plaintiffs Berger, Jackson, Kirkland, Lewis, Tucker and Bellamy, filed a timely third party charge of racial discrimination against all defendants. In September 1976, the Lawyers' Committee received from the EEOC a notice of its right to sue all defendants.

7. On October 21, 1975, plaintiffs filed this action on their own behalf and on behalf of a class similarly situated alleging violations of Section 1981 and seeking injunctive relief, back pay and attorneys' fees. On November 28, 1975, the Complaint was amended to allege violations of Title VII.

8. The plaintiff class was certified on July 27, 1976. The class is composed of (1) all black persons who have been or might be excluded from membership in Local 201 and/or the International or from participation in the Apprenticeship or Training

Programs by the racially discriminatory practices of the defendants, and (2) all black persons who have been or might be discouraged by the known racially discriminatory practices of the defendants from applying for membership in the International and/or Local 201 and/or from applying for admission to the Apprenticeship Program and/or the Training Program.

9. Motions for summary judgment were filed by defendants International, Apprenticeship Committee and CCC in December 1977. These motions were revised and supplemented by defendants Apprenticeship Committee and CCC in May 1978, and again by CCC in March 1979. Judge Sirica denied the motion of International on May 15, 1979, and of the Apprenticeship Committee on January 30, 1979. This Court denied the motion of CCC on May 4, 1981.

10. On May 5, 1978, defendants Local 201, Apprenticeship Committee, and Training Program filed a consolidated motion to strike the class action allegations or, in the alternative, to limit the class and compel plaintiffs to mail notice with proof of claim form to class members. The motion was denied on May 4, 1981.

A. *PLAINTIFFS AND THE CLASS -*

11. As certified on July 27, 1976, the plaintiff class consists of:
***2** (1) all black persons who have been or might be excluded from membership in Local 201 and/or the International or from participation in the Apprenticeship or Training Programs by the racially discriminatory practices of the defendants, and

(2) all black persons who have been or might be discouraged by the known racially discriminatory practices of the defendants from applying for membership in the International and/or Local 201 and/or from applying for admission to the Apprenticeship and/or the Training Program.

This class is represented in these proceedings by eight black rodmen.

12. Plaintiff Jesse Berger is a 48 year old black citizen of the United States and a resident of the State of Maryland. He has an eighth grade education and has worked as a rodman out of Local 201 since 1968. He became a member of Local 201 in 1976. Between 1968 and February 1976, Mr. Berger worked as a "permit worker" on union jobs to which he was referred by defendant Local 201. During this period, despite his initial lack of experience, he was paid the same wages as those paid to union members (journeyman wage rates). As of June 30, 1975 (the date closest to the date of the Complaint for which data is available), he had worked 11,073 hours on these jobs.

As of October 21, 1975, the date of the Complaint in this action, Mr. Berger had not been given an opportunity to take the journeyman examination, which is a prerequisite to union admission and to top referral status. After numerous fruitless attempts to gain admission to the Training Program, which is administered by defendant Training Program, Berger finally was admitted in September 1974. While in the Training Program, Mr. Berger's salary was not reduced. However, Mr. Berger thought that it was unfair that he had to go through the Training Program and testified that the training sessions consisted mostly of sitting around and talking, not necessarily about rod work. Although he learned nothing new under the instruction of Mr. Malczyk, Mr. Berger entered the Training Program because it was the only way he could become a union member. Only after completing the Training Program in February 1976 was he given an opportunity to take the journeyman examination, which he passed.

Mr. Berger never sought to enter the Apprenticeship Program because he does not have a high school diploma and thus never met the entrance requirements. In addition, his age would have prevented admission to that program since he became 31 years old in 1967.

At a union membership meeting in February of 1981, Mr. Berger heard Mr. Tommy Gilmer, then-business agent of Local 201, say that he was going to make it hard on those who filed this suit.

13. Plaintiff Randolph Jackson is a 45 year old black citizen of the United States and a resident of the State of Maryland. He has a tenth grade education. He is currently a journeyman member of Local 201, although he has not done rod work since June 1976, when he was injured on the job. Mr. Jackson has worked in the rodman trade since 1965. For more than five years, he worked as a journeyman rodman on non-union jobs, rising to the level of foreman. Beginning in 1971, he worked as

a permit worker on union jobs to which he had been referred by defendant Local 201 at journeyman rates. Beginning in 1973, he frequently worked on union jobs to which he was referred by defendant Local 201 as a foreman at wage rates greater than those paid to journeymen. As a foreman, he directed the activities of up to fifteen rodmen, read blueprints, and welded. As of June 30, 1975, he had worked 5,293 hours out of Local 201.

Despite his experience, plaintiff Jackson was required to participate in the Training Program before being given an opportunity to take the journeyman examination. Classes for the Training Program were held twice weekly. Because one of the classes was devoted to welding, and because he was already an accomplished welder, Mr. Jackson was only required to attend one night. The class sessions consisted of Mr. Malczyk talking for about ten minutes, excusing himself, and then returning ten minutes before the scheduled termination. In the interim, trainees conversed among themselves. While in the Training Program, Mr. Jackson worked as a foreman, and never received reduced wages.

Mr. Jackson took the journeyman examination twice, in March and November of 1975. After taking the first examination, he was informed by representatives of Local 201 that he had failed. On December 13, 1975, after the Complaint was filed, Mr. Jackson passed the second examination. There was no difference between the two tests. Upon passing the December 1975 examination, he became a member of Local 201. Nevertheless, because he felt that he was already qualified at the trade, Mr. Jackson thought it was not proper to require him to pass an examination to become a member of the union.

Mr. Jackson does not have a high school diploma and thus never met the entrance requirements of the Apprenticeship Program. In addition, his age would have prevented his admission to the program since he became 31 years old in 1970.

In January of 1975, after charges of discrimination had been filed with the EEOC in this matter, Mr. Jackson was working as a foreman for Wahib Steel at a metro worksite known as “Southwest and D” in the District of Columbia. He was transferred to another Wahib worksite nearby, for what he believed to be a two-day temporary assignment. At the end of the two days, however, he was laid off rather than sent back to Southwest and D. When he was laid off, the superintendent at the worksite told Mr. Jackson that he had orders from Mr. Vermillion to fire him. When Mr. Jackson reported this reason to Mr. Vermillion, Mr. Vermillion denied it. Although he was laid off from Wahib, other rodmen continued to perform rod work at the site.

On March 24, 1975, Mr. Jackson wrote a letter to the International, complaining of his treatment by the Local. Five or six months later, he met with someone from the International who said he would investigate the matter, but he heard no more from the International.

14. Plaintiff Tommy Kirkland is a 44 year old black citizen of the United States and a resident of the District of Columbia. Mr. Kirkland has a sixth grade education and has worked in the rodman trade since 1963. He is now a journeyman member of Local 201. For approximately three years, he worked as a journeyman rodman on non-union jobs. Beginning in 1966, he worked as a non-union permit worker on union jobs to which he was referred by defendant Local 201 at journeyman wage rates, often working as a subforeman or “pusher” on those jobs.

Mr. Kirkland took the journeyman examination on February 20, 1971, during the four-month period (the Open Period) when any rodman with more than two years experience working out of Local 201 was allowed to take the examination. He was informed that he had failed that examination. After that, he was repeatedly refused permission to take any test for union membership without first participating in the two-year Training Program. Notwithstanding the fact that Mr. Kirkland had already worked a total of 13,617 hours out of Local 201 as of June 30, 1975, he sought to enter the Training Program. However, union officials stated that the program was full, and denied his requests to enter that program until September 1977 when he finally joined the program.

The instructor for the Training Program at the time was Mr. Robert Masler. Although Mr. Kirkland spent some seven months, two nights a week in the program, he was taught little that he did not already know, and nothing that assisted him in passing the journeyman examination. Mr. Kirkland did not think it was necessary, given his twelve years of experience at the trade - including experience as a supervisor that he should have to enter the Training Program to qualify for union membership. Mr. Kirkland also believes he has been discriminated against because white union members were allowed to work overtime, while black permit workers were not.

Mr. Kirkland has no high school diploma and thus never met the entrance requirements of the Apprenticeship Program. In addition, his age would have prevented admission to that program since he became 31 years old in 1970.

At the time the Complaint was filed, Mr. Kirkland was working for the M. J. Byorick Co. under the direction of Ray Coda.

About a week after the complaint was filed, Mr. Coda approached Mr. Kirkland and indicated that he knew of the suit. A week following that incident, Mr. Code told Mr. Kirkland that he thought he would have already had permission to fire him. Several weeks later, Mr. Kirkland was laid off, although rodmen from another job were brought in to perform Mr. Kirkland's job.

15. Plaintiff Van Edward Lewis is a 42 year old black citizen of the United States and is a resident of the District of Columbia. He has an eight grade education, and started working as an apprentice rodman, non-union, in 1971. Since 1973 he has worked out of Local 201 as a permit worker on union jobs, accumulating 1,249 hours as of June 30, 1975. Mr. Lewis has not been able to gain membership in defendants International or Local 201. Indeed, he has not ever been given an opportunity to take the journeyman examination. His efforts to obtain admission into both the Apprenticeship and Training Programs were continually thwarted.

During his work out of Local 201, Mr. Lewis encountered a number of situations in which he believes he was discriminated against. He testified that he was informed of the loss of his work at Rebar Construction by pink slips reading "Reduction in Force," although two white permit workers were hired the same day that Mr. Lewis and two other blacks were laid off. Mr. Lewis also testified that discrimination occurred because black workers were given the back breaking work and then laid off, while white men were allowed to complete the less physically demanding work. In December 1974 he filed charges of racial discrimination.

Mr. Lewis was admitted to the Training Program in the summer of 1980, but not without incident. On one occasion, when he went to talk with Mr. Grigsby about filling out an application, he was told there had been a complaint lodged by a foreman about work he had done nine months previously. This incident occurred after he had filed the discrimination charges. After being told repeatedly that there were no openings, and an argument with Mr. Vermillion, Mr. Lewis was finally granted an interview with Mr. Gilmer and Mr. Musgrove in 1980. Mr. Gilmer asked Mr. Lewis if he were willing to drop the charges of discrimination before he was given an application to fill out. Mr. Lewis stated that he was willing to do so and he was ultimately accepted into the Training Program. Mr. Lewis did not drop his charges, however, stating that he had "come too far now" to stop. Mr. Lewis believes he has learned little new other than how to read blueprints in the Training Program, which he has attended for a year.

Mr. Lewis does not have a high school degree and thus never met the entrance requirements of the Apprenticeship Program. In addition, his age would have prevented his admission to that program since he became 31 years old in 1973.

16. Plaintiff Ronald Tucker is a 48 year old black citizen of the United States and a resident of the District of Columbia. He has a tenth grade education and has worked in the rodman trade since 1963. For approximately three years, Mr. Tucker worked as a journeyman rodman on non-union jobs. Since 1966, he has worked as a permit worker on union jobs to which he has been referred by defendant Local 201 at journeyman wage rates. As of June 30, 1975, he had worked 4,357 hours out of Local 201. Mr. Tucker has not been able to gain membership in defendants International, Local 201, or the Training Program. He was scheduled to take an examination for union membership in the Fall of 1970, but was unable to take the examination because he was injured in a construction accident. When he recovered from his injuries approximately six months later, Mr. Vermillion told him that the membership was full and he was refused permission to take an examination for union membership. He has since been repeatedly refused permission to take any examination for union membership.

Mr. Tucker does not have a high school diploma and thus was never able to meet the entrance requirements of the Apprenticeship Program. In addition, his age would have prevented his admission to that program since he became 31 years old in 1968.

17. Plaintiff Ernest Bellamy is a 42 year old black citizen of the United States. A resident of the State of Maryland at the time this Complaint was filed, he has since moved to the State of North Carolina. He has a seventh grade education, and worked as a rodman since 1964, and out of Local 201 from 1968 to 1976. Between September 1968 and October 17, 1975, Mr. Bellamy worked as a permit worker on jobs to which he had been referred by defendant Local 201, accumulating more than seven years experience at journeyman wage rates on union jobs and more than seven months experience as a subforeman or pusher on union jobs. As of June 30, 1975, he had accumulated 11,136 hours of rodman experience out of the Local 201 hiring hall. He last worked out of Local 201 in April of 1976, ceasing work because of an on-the-job injury to his eye.

Mr. Bellamy took the journeyman examination on April 17, 1971, during the "Open Period", when the only prerequisite was two years of experience, and was informed that he had failed. After the end of the Open Period, Mr. Bellamy was required to participate in the Training Program in order to have an opportunity to take the journeyman examination. Despite his great on-the-job experience, Mr. Bellamy had no choice but to participate in the Training Program, which he entered in November

1973.

Mr. Bellamy's instructor in the Training Program was Mr. Joseph Malczyk. Mr. Bellamy, a practicing rodman since 1964, was taught nothing that he did not already know in the Training Program.

On September 30, 1974, Bellamy again took the examination and was told he had failed.

In November of 1974, Mr. Bellamy wrote a letter to defendant International, complaining of Local 201's refusal to admit him to membership. The International subsequently replied, promising an investigation, but Mr. Bellamy heard nothing further from it. He did, however, hear from Mr. Vermillion, who, after "exchanging words" with Mr. Bellamy about the letter, told him that he would never be referred again. Although Mr. Vermillion apparently did not effect his threat, Mr. Bellamy soon found himself working at reduced wages, purportedly in accordance with the rules of the Training Program. This was done in spite of the fact that, during his previous year as a trainee, Mr. Bellamy had received full journeyman wages.

On December 11, 1974, Mr. Bellamy filed a charge of racial discrimination against defendants with the EEOC. After taking another exam, he was finally admitted to Local 201 in September 1975.

Mr. Bellamy does not have a high school diploma and thus never met the entrance requirements for the Apprenticeship Program. In addition, his age would have prevented admission to that program since he became 31 years old in 1973.

18. Plaintiff Garrett Simmons is a 32 year old black citizen of the United States currently residing in the District of Columbia. He has a high school diploma and has worked in the rodman trade since 1971. In 1974-1976, he worked as a permit worker on jobs to which he had been referred by Local 201 at journeyman wage rates. As of June 30, 1977, just prior to becoming a named plaintiff, Mr. Simmons had worked a total of 2,082 hours out of Local 201. He has not been permitted to take the journeyman examination without first participating in the Apprenticeship Program, to which he has been unable to gain admission. He was discouraged from applying for entrance to the Apprenticeship Program because of defendants' discriminatory practices.

19. Willie Lee McMillian is a 31 year old black citizen of the United States currently residing in the District of Columbia. He has a high school diploma and worked non-union as a rodman from 1971 through 1973 in North Carolina. While there he took a journeyman's exam and passed it, but never paid the complete fee to join the union. In 1974, Mr. McMillian moved to Washington, D.C., and began working as a permit worker on union jobs to which he had been referred by defendant Local 201 at journeyman wage rates. As of October 21, 1975, he had worked approximately 2,417 hours out of Local 201.

Mr. McMillian seeks to become a member of the International and of Local 201, but he has not been given an opportunity to take the journeyman examination because he has not participated in the Apprenticeship Program. He was discouraged from applying for entrance to the Apprenticeship Program because of defendants' discriminatory practices.

B. *DEFENDANTS*

20. Defendants are five labor organizations and employer associations that control the unionized portion of the rodmen trade in Washington, D. C. area. In general terms, Local 201 is the certified representative of all rodmen in this area, and negotiates collective bargaining agreements with the CCC regarding terms and conditions of work. The agreements provide that the employers for whom the CCC negotiates will hire only through Local 201. Local 201 in turn operates a "hiring hall" by which rodmen are referred to those employers. Local 201 is a local union of the International. The Apprenticeship Program is a joint Local 201-CCC operation by which potential rodmen under age 31 are prepared for journeyman status.

21. Local 201, an incorporated association of workers primarily engaged in the rodman trade, and the building and construction industry, is a labor organization engaged in an industry affecting commerce, as defined in Title VII, 42 U.S.C. § 2000e(b) (e).[1] The number of members exceeds 15. Local 201 is an affiliate of the International. Local 201 exists, in whole or in part, for the purpose of dealing with rodman contractors in the District of Columbia; in Westmoreland, King George, Stafford, Culpepper, Fauquier, Prince William, Fairfax, Arlington, Loudoun, Clarke, Frederick, Warren, Rappahannock and Spotsylvania Counties and the City of Alexandria, Virginia; and in Saint Marys, Charles, Calvert, Prince Georges, Montgomery, Frederick and Ann Arundel Counties, Maryland (hereinafter sometimes referred to as the Washington Metropolitan Area) concerning grievances, labor disputes, wages, rates of pay, hours of work and other terms and conditions

of employment. Pursuant to a collective bargaining agreement, Local 201 acts as a referral hall for contractors in the Washington Metropolitan Area who are engaged in rod work. As a referral hall, Local 201 is the primary source of rodmen for contractors with whom it has collective bargaining agreements.

22. International, an unincorporated association, is a labor organization with headquarters in the District of Columbia, engaged in an industry affecting commerce, as defined in Title VII, 42 U.S.C. § 2000e(b), (e). The number of its members exceeds 15. Pursuant to its constitution, the International has pervasive authority over the affairs of affiliated local unions. Thus, for example, the International retains authority to suspend or revoke the charters of local unions and to review and approve their by-laws and collective bargaining agreements; establishes membership requirements for them; and requires local unions to seek its permission before striking.

The International has exercised control over the operations of Local 201 which are at issue in this case. It was instrumental in establishing the referral system, the Apprenticeship Program, the Training Program and the testing program for membership. It has also monitored the racial composition of Local 201, supervised the Apprenticeship Program and the Training Program, and participated directly in the collective bargaining process.

23. CCC is an incorporated employer association whose members include contractors and subcontractors engaged in rod work in the Washington Metropolitan Area. CCC is subject to the provisions of Title VII. CCC has represented and continues to represent its members and others in collective bargaining agreement negotiations with Local 201 and, on behalf of its members and others at all relevant times, has been and is a party to collective bargaining agreements with Local 201 concerning the terms and conditions of employment of Local 201's members. Local 201 refers rodmen to employers on whose behalf CCC negotiates and is the primary source of employees for these employers.

24. The Apprenticeship Committee is a joint labor-management committee, as defined in Title VII, 42 U.S.C. § 2000e(b), (d), composed of representatives of Local 201 and of contractors who are parties to a collective bargaining agreement with Local 201. Three representatives are appointed by Local 201, and three by CCC. The Apprenticeship Committee supervises, administers and controls the Apprenticeship Program in the iron work industry within the jurisdiction of Local 201. The Apprenticeship Program is limited in size, and in the number of sessions offered. It is restricted to individuals 30 years of age or younger who possess a high school diploma or its equivalent. Apprentices are paid lower wages than are other non-union individuals who are referred to work from Local 201.

25. The Training is a joint labor management committee as defined in Title VII, 42 U.S.C. 2000e(b), (d), composed of representatives of Local 201 and of contractors who are parties to a collective bargaining agreement with Local 201. Defendant International was instrumental in establishing this program in 1971-72.

C. *MEMBERSHIP REQUIREMENTS, TESTING AND REFERRALS*

26. The rodman trade is a construction trade. It is a less-skilled subset of the general category of "ironworker," and consists primarily of handling and positioning the steel rods used to reinforce structures of various types.

27. A high school diploma is not necessary in order to perform the work of a journeyman rodman.

28. The Constitution of the International establishes the qualifications for membership in Local 201. Article II, Section 2 of the Constitution provides:

> ***8** To be admitted to membership in any local union of the International Association one must be a practical workman versed in the duties of some branch of the trade as set forth in Section I of this Article, of good moral character and competent to demand standard wages.

29. Article XXI, Section 2 of the Constitution provides that "[e]ach local union, except shopmen's local unions, shall have an Examining Committee to examine the qualifications of candidates seeking admission as members."

30. The Collective Bargaining Agreement (Agreement) requires that a journeyman examination be held at least monthly. It provides:

> ***9** The Local Union, through its Examining Board, shall examine all job applicants who have not previously passed an examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers in order to determine whether they are qualified to perform the work of the craft as a mechanic and be eligible for referral. Such examination shall be held at least every month.

31. No examination given by Local 201 has ever been shown to be a valid predictor of job performance, as required by the Equal Employment Opportunity Commission's (EEOC) Guidelines on Employment Testing Procedures, 29 C.F.R. § 1607 (1970).

32. During the period from June 1971 through October 1975, the journeyman examination was given less frequently than once every month.

33. Prior to February 1971, a rodman could qualify to take the examination in one of two ways: (1) by completing the Apprenticeship Program; or (2) by amassing an unspecified amount of experience and requesting the permission of the Executive Committee, which, in its discretion, decided whether or not the rodman could take the examination.

34. From February through June 1971, the Apprenticeship Program remained a way of qualifying for the examination. In addition, the Local allowed any rodman with at least two years of experience working out of Local 201 to take the examination. To this end, officers of Local 201 themselves identified those rodmen with sufficient experience and invited approximately 100 rodmen to be examined. This period has been identified in these proceedings as the "Open Period." The Open Period procedures ended June 12, 1971.

35. Since June 1971, there have been only two ways to qualify for the examination. As before, a man could enter and successfully complete the apprenticeship program. Beginning in September 1972, a man could seek to enter the Training Program, an affirmative action program which was intended to provide training for those over age 31. The age requirement rendered the programs mutually exclusive: a rodman or potential rodman could qualify for one, but not both programs.

36. Since a trainee had to spend a minimum of six months in the Training Program before he could be permitted to take the examination for membership, the earliest a trainee could become a union member was March 1973.

37. In order to enter the apprenticeship program, a man must be between the ages of 18 and 30, possess a high school diploma (or its equivalent), be physically able to perform the work of the trade and submit an application. The application is, in general, submitted to the Local's Apprenticeship Committee or (since 1968) to its Apprentice Coordinator. At all times, the Apprentice Coordinator has been white. Potential applicants who have not possessed the educational requirement have been refused apprenticeship application forms by the Local.

38. Prior to 1973-74, applications to the Apprenticeship Program were accepted on a year-round basis. Since that time, applications have been limited in terms of time - typically to a two-or-three-day period - and in terms of the number that will be accepted. An applicant must demonstrate proof of age and education upon application. If the application is filed, the applicant must secure a physical examination before he is finally accepted.

39. Upon acceptance, the apprentice enters into a contract between himself and the Joint Apprenticeship Committee called an "Indenture Agreement", detailing terms and conditions of employment. This contract is then forwarded to the District of Columbia Apprenticeship Committee, (DCAC) which approves the contract. Upon approval, the apprentice is termed "indentured."

40. The indenture agreement provides for a "probation" period of sixty days, during which either party can cancel without cause. After sixty days, certain grievance procedures become applicable, and the apprentice can only be removed for cause. In addition, at the end of sixty days the apprentice must pay the apprentice initiation fee, one-half of the journeyman fee. Upon payment, the apprentice becomes an apprentice member of Local 201 and the International.

41. Although the Training Program has been in existence since 1972, and although apprentices have always been eligible for "apprentice membership", trainees did not become eligible for this limited form of membership until the Fall of 1979. At that time, the International initiated the category of "trainee members." As in the case of apprentices, trainees can become "trainee members" upon acceptence into the Training Program and payment of one-half of the journeyman initial fee.

42. The Training Program is funded by the Department of Labor (DOL) and is supervised by the National Iron Workers and Employers Training Program (NIETP), a DOL-International corporation. To qualify for entrance, a man has to be at least 31 years old, be physically able to perform the trade and submit the application. There has never been an education prerequisite.

43. The purpose of the Training Program is to assist minorities in becoming journeymen members of Local 201. By its terms, the program is directed toward older, uneducated and employed minorities. An additional qualification for admission which was added by the Training Program was a preference based on years of experience at the trade. In 1977, the cutoff was 12 years of experience.

44. Pursuant to its collective bargaining agreement, Local 201 refers rodmen to jobs in the Washington Metropolitan Area and in other cities and counties within its territorial jurisdiction.

45. Rodmen who are not members of Local 201 (or another local union affiliated with the International) may be referred for work pursuant to the collective bargaining agreement.

46. The Collective Bargaining Agreement between Local 201 and the CCC establishes, *inter alia*, an exclusive hiring hall arrangement.[2] With certain limited exceptions, employers who comprise the CCC agreement to hire only rodmen referred by Local 201, while Local 201 agrees to provide workers upon request. (PX 1, Art. 3, § 2). In other words, Local 201 acts as an employment agency for contractors who need rodmen. To this end, the "Referral Clause" exists in the Agreement.

47. As a "employment agency," the Local is constrained by federal law from granting preference on the basis of union membership. Thus, the Agreement provides that:

> ***11** [t]he Union shall select and refer applicants for employment without discrimination against such applicants by reasons of membership or non-membership in the Union or by reason of race, creed, color or national origin and such selections and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements.

48. Procedurally, rodmen who want to work for CCC employers apply to Local 201 for referral. Referrals are to be made pursuant to Article 3 of the collective bargaining agreement. Section 5 of Article 3 provides:
The Union shall register all applicants for employment on the basis of the Groups listed below. Each applicant shall be registered in the highest Group for which he qualifies.

GROUP A

All applicants for employment who have worked at the trade as a mechanic or apprentice for the past four (4) years; have previously passed a journeyman's examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers qualifying them to work as a mechanic at the trade; have been employed for a period of at least one (1) year during the past four (4) years by Employers (parties to collective bargaining agreements with the Union), and who have actually resided for the past year within the geographical area constituting the normal labor market.

GROUP B

All applicants for employment who have worked at the trade as a mechanic or apprentice for the past four (4) years; and have previously passed a journeyman's examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers qualifying them to work as a mechanic at the trade.

GROUP C

All applicants for employment who have worked at the trade as a mechanic or apprentice for the past two (2) years or more and who have for the past year actually resided within the geographical area constituting the normal construction labor market.

GROUP D

All applicants for employment who have worked at the trade for more than one (1) year.
Section 6 of Article 3 provides:

> The Union shall maintain each of the separate Group lists set forth above which shall list the applicants within each Group in the order of the dates they registered as available for employment.

Section 7 of Article 3 provides:

> Employers shall advise the Union of the number of applicants needed. The Union shall refer applicants to the Employer by first referring applicants in Group A in the order of their places on said list and then referring applicants in the same manner successively from the lists in Group B, then Group C and then Group D. Any applicant who is rejected by the Employer shall be returned to his appropriate place within his Group and shall be referred to another Employer in accordance with the position of his Group and his place within the Group. Upon a registrant being referred for employment and actually employed on a job more than three (3) days, such registrant's name shall be removed from the list until such time as his employment has been terminated, at which time he shall be registered at the bottom of the appropriate list under which he is entitled to be registered. If a registrant, upon being referred in regular order, refuses to accept the referral, such registrant's name shall be placed at the bottom of the appropriate list under which he is entitled to be registered.

49. Local 201 maintains each of the separate Group lists, ranking the applicants within each Group in the order of the dates they registered as available for employment. If two or more members of a Group register on a particular day, they are ranked in order of registration on that day. When contractors actually request rodmen, the Local is to:

> ***12** refer applicants to the Employer by first referring applicants in Group A in the order of their places on said list and then referring applicants in the same manner successively from the lists in Group B, then Group C and then Group D.

50. With the exception of apprentices, this system of referral covers all rodmen who would work for an employer party to the Agreement. Apprentices are referred separately, without specific regard to the referral system, so that there is roughly a five to one journeyman to apprentice ratio. Although never referenced in the Agreement, trainees are similarly referred. Both apprentices and trainees are generally referred before Group D rodmen.

51. With respect to the journeyman examination, passage of which is an element of Group A and Group B status, the Agreement provides as follows:

> The Local Union, through its Examining Board, shall examine all job applicants who have not previously passed an examination conducted by the duly constituted Local Union affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers in order to determine whether they are qualified to perform to work of the craft as a mechanic and be eligible for referral. Such examination shall be held at least every month.

52. In practice, Group A consists of members of Local 201; Group B consist of "Traveling Members", i.e., members of another local union affiliated with defendant International; Group C is not used; and Group D consists of "permit workers" - rodmen who are not affiliated with the International.

53. "Group D" rodmen are required to purchase a permit to use Local 201's referral service. This permit fee (and other assessments) are approximately equal to the dues and their assessments charged to union members.

54. The purpose of the journeyman exam always has been to determine whether a man was considered eligible to join the union. At all times, the question of why a man wanted to be a member of Local 201 has been part of the examination process. The examination itself requires that a man "make application to become a journeyman member of Local Union No. 201." The rule of the Local is that an examinee must tender his union initiation fee - $300 - upon passing the examination.

55. Prior to February 1971, the interview by the Executive Board - which determined whether a non-apprentice would be allowed to take the exam - consisted of question concerning an applicant's motivation for joining the Local, his views on organized labor and his willingness to pay his dues on a timely basis. The very reason for the Open Period was to give permit workers the chance to become members of the union.

56. Theoretically, passage of the journeyman examination plus four years' experience plus, one year working for a CCC contractor plus local residence qualifies rodman for Group A status. However, it is the sole criterion for this preferred classification. In other words, a rodman who passes the examination becomes a Group A rodman. As the record in these proceedings shows, Group A status - union status - is a very valuable characteristic.

57. Simply put, Group A rodmen - union members - work more hours than Group D rodmen - permit workers. More hours means more money. Thus, during the period July 1, 1974 through June 30, 1975, permit workers earned, on the average, $6,600 less than the members of Local 201. Black permit workers who had accumulated at least 2150 hours by June 30, 1975 - experienced rodmen - earned, on the average, almost $4,000 less than the average union member.

58. Defendants' exhibits demonstrate that there is a substantial disparity in the economic opportunities of permit workers and union members. A comparison of the average hours worked by black permit workers and by "working members" (i.e., journeyman and apprentices) produces the following table:

Year	(1) Average Black Permit Worker Hours	(2) Average Working Members' Hours[§]		(1) as a % of (2)
1972	507	286,408/387 =	740	68.5%
1973	1082	619,150/410 =	1510	71.7%
1974	1145	664,964/434 =	1532	74.7%
1975	760	630,775/456 =	1383	55.0%
1976	531	569,283/422 =	1349	39.4%
1977	393	513,038/423 =	1213	32.4%
1978	260	430,515/377 =	1142	22.8%
1979	123	397,437/334 =	1190	10.3%
1980	162	387,119/319 =	1214	13.3%

59. In short, defendants' exhibits demonstrate the substantial economic opportunity represented by access to referral Group A, journeymen status, and membership in Local 201 and the International.

60. In addition to preferred referrals, only members of Local 201 and the International have the ability, when local employment is low, to work as traveling members in other locals' jurisdictions. Under the referral system, these workers also

have preference over permit workers. As construction employment in the Washington area dropped during the latter part of the 1970's, this right of travel itself represented an important economic opportunity. A relatively large number of the members of Local 201 have chosen this option in recent years.

61. Thus, the evidence presented in this case shows that journeyman members of Local 201 earned more money when employment was high, and had the right to travel to other areas as a member when employment began to decline.

E. *STATISTICAL DISPARITIES*

62. From the creation of Local 201 until January 1971, blacks were almost totally excluded from membership in the Union. Between 1949 and 1965, only two blacks were admitted to Local 201, and one entered by tranferring his membership to Local 201 from another local union.

63. As the year 1967 began, there were approximately four black members and 200 white members. Four years later, on the eve of the Open Period, there were sixteen black and 260 white members.

64. The reason why blacks were not getting into Local 201, is that one gets into the union by passing the journeyman examination and defendants have erected various barriers to that examination which have worked to exclude a disproportionate number of blacks.

65. The effect of the barriers to the journeyman examination may be properly measured by a disparate impact analysis. Such an analysis generally compares the racial composition of applicants for a position with that of those actually selected to determine whether the selection process is biased. With respect to the journeyman examination, one should compare "likely examinees" with actual examinees to determine the racial impact, if any, of the barriers to the examination. The barriers and the racial composition of the actual examinees are well-known. There is, however, some complexity in identifying "likely examinees."

66. In the simplest situation, one would identify likely examinees by identifying actual applicants for the exam.[3] However, defendants have never employed a formal application process for the examination. Professor Sheldon Haber, plaintiffs' expert in, *inter alia*, labor economics and employment solved the "likely examinee" problem with his concept of the "experienced pool."

67. Professor Haber testified that, in order to evaluate the racial impact of the procedures for selecting examinees, it was necessary to determine who were candidates for selection to take the exam. He also recognized that this examination purported to be a practical test of competency, requiring some experience at the trade. Given these guides, the Open Period standards of two years' experience became a natural starting point for the applicant pool proxy, which Professor Haber termed the "experienced pool".

> ***14** In defining the experience pool from which selections to the journeyman exam could be made, it was assumed that two years of experience was a level sufficient to take the exam, and from that point on that was the initial basis that we used in defining the experienced pool.

Professor Haber found corroboration for this standard in Mr. Grigsby's statement that the two-year Open Period standard was set "to try to conform with the period of time for the apprenticeship program," which Mr. Grigsby identified as being two years in length.

68. The mere determination to use a two-year standard to identify potential examinees did not, however, fully solve the problem. Professor Haber had only the union's records to rely on, and the records that indicated experience - i.e., the records of the Local's Pension Fund (pension records) - showed such experience only in terms of hours worked, not years. What he did, therefore was look at those rodmen who had been selected for the examination because they had at least two years' experience - i.e., those individuals who took the exam during the Open Period. By identifying those individuals, he used the pension records to determine how many hours they had worked prior to taking the examination in order to establish an "analytical counterpart ... to what two years experience meant."

69. Professor Haber, using the pension records, looked at the hours worked of those non-apprentices examined during the

period February 1 through May 31, 1971.[4] In order to approximate the two-year standard more closely, he looked only at those Open Period examinees who had worked in both 1969 and 1970. He then computed the hours that these individuals worked over those two years, and obtained three two-year averages: a white average, a black average and a "white plus black" average. Professor Haber found that the white average was 2150 hours and that the black average was 2825 hours. In order to be "conservative" - i.e., to exclude as few whites as possible while still maintaining a defensible standard - Professor Haber chose the white average, 2150 hours, as the operational equivalent of two years' experience at the trade. This 2150-hour standard therefore represented the average number of hours worked during the previous two years by white rodmen who had worked in both those years and who were selected to take the examination on the basis of two years' experience at the trade.

70. Professor Haber thus had arrived at an analytical counterpart to two years' experience - 2150 accumulated hours - as a basis for his identification of "likely examinees" in a disparate impact analysis of the racial effect of the Union's barriers to the examination. He then added one more qualification: any rodman who had actually been examined - regardless of hours - was, logically enough, taken to be a "likely examinee." Professor Haber referred to these "likely examinees" as the "experienced pool." Thus, the "experienced pool," for a given time period, consisted of those rodmen who: - had accumulated 2150 hours before the end of the period, or actually examined during the period; and - at some time during the period were not members of Local 201 (i.e., were examined, if at all, on or after the first day of the given period).

71. Professor Haber's analysis demonstrated that, at least since 1967 and continuing through the date of the filing of the complaint in this matter, every procedural barrier to the examination erected by the defendants - with the dramatic exception of the Open Period - has prevented a disproportionate number of blacks from taken the examination. Professor Gastwirth, plaintiffs' expert in statistical analysis, demonstrated that these disparities were, without exception, statistically significant. In addition, during *all* periods - including the Open Period - Professors Haber and Gastwirth demonstrated that the procedural barriers barred or delayed the entry of a statistically significant proportion of blacks to membership in the Local and International, and thus to Group A referral status.

72. As discussed above, prior to February 1, 1971, there were two ways to qualify to take the journeyman examination: the Apprenticeship Program and the "Execution Board Procedure." During the period January 1, 1967, to January 31, 1971, 55.8 percent (63 of 113) of the experienced whites were examined, while only 15.9 percent of the experienced blacks were tested.[5]

73. Professor Gastwirth testified to the statistical significance of this disparity. He assumed that experienced blacks and whites in fact had equal access to the examination during this period, i.e., that the 55.8/15.9 percent disparity was not indicative of the true "long run" access of blacks and whites. Working on this assumption, and applying the statistical test for the difference between two proportions, Professor Gastwirth found that the probability of such a gross disparity occurring due to chance was less than one in a million. Statistically, this probability translates to a significance level of .000001, based on a difference of 5.62 standard deviations.

74. The level of statistical significance observed during this period exceeds the .05 (1.96 standard deviations) generally required in disparate impact cases.

75. During the period February 1, 1971 through June 12, 1971, there were two ways to qualify to take the journeyman examination: the Apprentice Program and the "Open Period" procedure. Unlike the procedures extant in any other period, those in effect during this time resulted in nearly identical rates of access to the examination by experienced black and white rodmen.

76. During this period, blacks were still unable to attain union membership representative members. Ordinarily, very few examinees fail to pass the exam. However, during the single period when blacks were allowed equal access, blacks failed at twice the rate of whites. Specifically, 70.6 percent (24 of 34) of the white examinees, but only 35.3 percent (12 of 34) of the black examinees passed.[6]

77. The probability that the difference in pass rates from February 1, 1971, through June 12, 1971, would arise if chance were the cause is less than 1 in 40 (significance level .024), the difference being 2.25 standard deviations.

78. Plaintiffs have demonstrated that the examination administered between February 1, 1971, and June 12, 1971, prevented a significantly higher percentage of blacks than whites from attaining union membership and from entering Referral Group A. The use of such a test *prima facie* violates Title VII.

79. From June 12, 1971, through October 21, 1972, 33.3% (24 of 72) of the "experienced" whites, but only 9.2% (7 or 72) of

the "experienced" blacks, were selected to take the examination. The probability that this disparity would arise due to chance is less than one in 1,000, the difference being 3.4 standard deviations.

80. Similarly, the percentage of experienced blacks selected to take the exam during the three years prior to the filing of this lawsuit was substantially lower than the analogous percentage for experienced whites. From October 22, 1972, through October 21, 1975, 33.6% (49 of 146) of the experienced whites, but only 16.9% (21 of 124) of the experienced blacks took the journeyman examination.[7] The probability that the disparity in the percentages of whites and blacks selected to take the exams would arise by chance is about three in 1,000 corresponding to 2.96 standard deviations.

81. Since the differences between the percentages of experienced whites and the percentages of experienced blacks examined from June 13, 1971, to October 21, 1972 and from October 22, 1972 to October 21, 1975 far surpass the five percent significance level, plaintiffs have demonstrated that the most recent requirements for qualifying to take the journeyman examination *prima facie* violate both Title VII and § 1981.

82. As a result of the above percentages, for each time period analyzed, the percentage of black experienced workers gaining admission to Local 201 and the International has been substantially less than the percentage of white experienced workers attaining such membership. These disparities are demonstrated as follows:

Period	Exp'd	New Members	Access Rate	Exp'd Pool	New Members	Access Rate
1-1-67 to 1-31-71	113	60	53.1%	88	12	13.6%
2-1-71 to 5-31-71	68	20	29.4[1]	12	15.6%	
6-1-71 to 10-21-72	72	24	33.3%	76	7	9.2%
10-22-72 to 10-21-75	146	49	33.6%	124	19	15.3%

***17** The disparities for each period are statistically significant at the five percent level: for the period January 1, 1967, through January 31, 1971, the probability that the difference would arise by chance is less than one in one million (5.76 standard deviations); for the second period, the probability is about one in forty (2.23 standard deviations); for the third period, the probability is approximately one in 1,000 (3.25 standard deviations); for the fourth time period, the probability is also about one in 1,000 (3.3 standard deviations). Thus, plaintiffs have demonstrated that, since 1967, all of the rules used by the defendants for selecting examinees have discriminatorily prevented blacks from gaining membership in Local 201 and the International and from qualifying for Referral Group A. Such a showing is sufficient to establish a *prima facie* case that defendants have violated both Title VII and § 1981.

83. In order to rebut plaintiffs' *prima facie* showing, defendants must do more than just point out potential sources of error. Rather, defendants must demonstrate that the claimed error is systematic, that it actually biased the results, and that the bias was sufficiently extensive that it would affect the validity of plaintiffs' demonstration of discrimination. Defendants failed to satisfy their burden of demonstrating that the claimed errors would affect the finding of discrimination. Defendant have thus failed to rebut plaintiffs' *prima facie* showing of discrimination.

84. Defendants have maintained a predominantly white membership by limiting the number of rodmen admitted to the union. During fiscal year 1975 Local 201 referred 394 journeymen members and 456 non-union permit workers for work as rodmen. In spite of the large number of permit workers in the trade, and even though the "experienced" non-union pool included 281 rodmen, only 76 apprentices and trainees were selected to take the journeyman examination during the three years prior to the filing of this lawsuit.

85. Since the end of the Open Period, rodmen under the age of 31 have been unable to qualify to take the journeyman examination unless and until they complete the Apprenticeship Program. Admission into this program is conditioned on several factors. Since 1950, applicants have been required to have high school diplomas.

86. As a result of this discriminatory entrance requirement, the percentage of blacks in the apprenticeship program has been

disproportionately low. According to census data for 1970, 13.8% of the white males in the Washington SMSA had not graduated from high school. By comparison, three times as many blacks - 38.3% - had not completed four years of high school. For the years 1976 through 1979, a similar disparity appears in the male population aged 20 to 29 in the Washington SMSA. (6.8% of whites, but 25.7% of blacks, failed to complete high school).[8]

87. The individuals actually admitted to the apprenticeship program were disproportionately white. From 1970 to 1979, 82 minorities and 245 whites participated in the Apprenticeship Program. Thus, the minority participation rate was 25.1%.

88. In order to determine whether this rate is disproportionately low, it is necessary to determine the black availability rate, i.e., the black percentage of the individuals who would have become apprentices in the absence of any policies that discouraged them from doing so. Because interested persons who did not have high school diplomas were not even given applications, complete applicant information was not available. As a result, plaintiffs could not determine the black availability rate on the basis of actual applicant date, but instead had to turn to other sources to estimate the racial composition that one would expect to find among persons seeking to enter the apprenticeship program. Plaintiffs presented two such estimates: one based on the individuals first appearing at the union hall during fiscal years 1973, 1974 and 1975 - the "new entrant model" - and another based on census data - the "commuter model".

89. The "new entrant model" is an estimate of the black availability rate for the apprenticeship program based on the racial composition of the individuals who first entered the trade from July 1, 1973, through June 30, 1975. The figure gives a good indication of the racial composition of the part of the labor force that would be interested in entering a relatively lowskilled trade such as the rod trade. Moreover, this figure is based on actual data, and is therefore somewhat more reliable than estimates based on figures that encompass a population as large as that of the Washington SMSA. Using this analysis, Professor Haber determined that there were 199 black and 242 white "new entrants", and thus blacks constituted 45.1% of the "new entrants" during the period studied.

90. The "commuter model", the second estimate of black availability for the apprenticeship program, is based on a model Professors Haber and Gastwirth described in their article, "Defining the Labor Market for Equal Employment Standards" (*Monthly Labor Review,* March 1976). The premises of the model is that, in estimating the percentage of an employer's labor pool that is expected to be black, the data should be refined to reflect the commuting patterns of workers.

91. In making this computation, Professor Haber began by identifying the sector of the population that he felt would be interested in seeking employment in a blue collar construction occupation such as the rodman trade. He selected the male population with twelve years of education or less, because census data indicate that few people with more education would be likely to enter such a trade.

92. Because census data for the 18 to 30 year old population with twelve years of eduction or less was not broken down by area of residence (i.e., District of Columbia versus the suburbs), Professor Haber was forced to use the population 25 years of age or older with twelve years of education or less as a proxy for the younger age group. He then refined these figures, following the model presented in his article, to reflect the commuting patterns of these workers. He determined that, of the males 25 years of age or older with twelve years of education or less who work in the District of Columbia, 48.3 percent were black. Professor Haber further determined that, of those individuals who worked in the suburbs, 21.5 percent were black. Professor Haber then further refined these figures to reflect the actual locations of rodmen jobs during fiscal years 1973, 1974 and 1975. These computations resulted in an estimate of the black availability rate for the apprenticeship program of 42.2%.

93. Thus, plaintiffs have introduced two estimates of the expected rate of participation of black workers in the apprenticeship program. One figure, based on the "new entrants" into the trade during fiscal years 1973, 1974 and 1975, was 45.1%. The other standard, based on census data and the commuting model of Professors Haber and Gastwirth, resulted in a standard of 42.2%.

94. Blacks constituted only 25.1% of the apprentices from 1970 through 1979. The differences between the expected rates of black participation and the actual rate are statistically significant - the 42.2% standard is significant at 6.27 standard deviations, the 45.1% figure is significant at 7.28 standard deviations.

95. Thus plaintiffs have established a *prima facie* case that the high school diploma requirement has unlawfully discriminated against blacks on the basis of race.

96. Defendants have presented a number of challenges to the "new entrant" standard advanced by the plaintiffs. In order to rebut plaintiffs' showing, defendants must demonstrate that the alleged error is systematic, that it actually biased the results,

and that such bias is sufficiently extensive to affect the validity of plaintiffs' showing of discrimination.

97. Defendants have failed to demonstrate that the various claimed errors in the computation of the "new entrant" standard would affect the results in a systematic and biased fashion sufficient to call into question the finding of discrimination. They have therefore failed to satisfy their burden of rebutting plaintiffs' *prima facie* showing that the high school diploma requirement discriminated against blacks.

98. Plaintiffs introduced a second estimate of the black availability rate for the apprentice program based on census data and the commuter model of Professors Gastwirth and Haber. Although this figure was based on sources of information totally different than those underlying the "new entrant" standard, it resulted in a criterion that was only slightly different than the "new entrant" figure. This figure therefore corroborates the validity and reliability of the 45.1% standard. As the previous section demonstrated, defendants failed to rebut plaintiffs' *prima facie* case that the 45.1% standard proves that the high school diploma requirement violated the civil rights of qualified blacks.

99. Defendants have introduced no evidence of errors or inaccuracies in the commuter model standard sufficiently systematic, biased or extensive to question the validity of the showing of discrimination.

100. Defendants have failed to rebut plaintiffs' *prima facie* showing that the high school diploma requirement discriminated against blacks on the basis of race. This requirement therefore violates both Title VII and section 1981.

101. Before June 1971, a disproportionate number of blacks of all ages were generally unable to gain admission to the union either because they were denied the opportunity to take the journeyman examination or because they failed the test. As a result of this discrimination, the pool of older "experienced" non-union rodmen during the three years prior to the filing of this action was predominantly and disproportionately black: while whites constituted 72.1% of the "experienced" non-union rodmen under the age of 31, blacks comprised 72.8~~f the "experienced" non-union workers age 31 or over.~~

102. After June, 1971, this predominantly black group of rodmen was confronted with yet another barrier to entering the union: the requirement that workers 31 years of age or older complete a two-year training program in order to qualify for the opportunity to take the journeyman examination. Plaintiffs Berger, Bellamy, Jackson, and Kirkland encountered this barrier and eventually entered the training program in order to gain access to the exam. Plaintiff Kirkland was unable to gain admission to this program until September 1977 - after working 12 years out of Local 201. Plaintiff Tucker has never been able to gain admission to the program.

103. The required completion of the training program is an illegal detour that has barred certain of the plaintiffs and the members of their class from becoming members of Local 201.

104. The journeyman exam prerequisite of completion of the training program, which was established in June, 1971, similarly exacts an additional penalty from "experienced" black rodmen who had been denied union membership prior to June, 1971. These workers were confronted with a reduction in wages, and, in addition, were required to participate in an unnecessary program that worked to delay their access to the journeyman examination for: (a) the period between June, 1971 and the date of admission to the program. By requiring black rodmen with thousands of hours of experience to enter and complete this program as a prerequisite to taking the journeyman examination, defendants perpetuated the denial of equal employment opportunities to these experienced black rodmen. This unlawful practice forced these workers to participate in a training program in order to take the union admission examination.

105. The costs of participation in the training program in fact deterred a number of experienced black rodmen 31 years of age or older from participating in the program. Only 17.3% of the "experienced" black workers 31 years of age or older participated in the training program during the three years prior to the filing of this lawsuit. Those who did not - approximately five out of six - had no route to journeyman membership. These figures show that the required participation in the training program in order to take the journeyman examination is another discriminatory impediment faced by experienced black rodmen seeking journeyman membership in Local 201 and the International.

106. Even for those black rodmen who chose to enter the training program, this route to the journeyman examination was a far less effective means of gaining an opportunity to take the journeyman examination than was the Apprenticeship Program - a program which they were foreclosed from entering by the high school diploma requirement and the maximum age rule. From 1970 through 1979, 52.9% of the individuals entering the apprenticeship program successfully completed the program. By comparison, the completion rate for the training program during the years 1972 through 1980 was 38.5%. The differences in these completion rates are statistically significant.[9]

107. A comparison of the racial compositions of the Apprenticeship Program and the Training Program further illustrates the discriminate effects of defendants' current prerequisites for taking the journeyman examination. As Rodmen Exhibit 69 shows, 20.8% of the apprentice completions since 1970 have been minorities, while 85.5% of the training program completions have been minorities. The disproportionately low rate of black participation in the apprenticeship program - the more effective route into the union - further substantiates plaintiffs' *prima facie* showing.

108. In short, defendants have created two racially distinct "tracks" leading to the Journeyman examination: a predominantly white apprenticeship "track" and a predominantly black trainee "track". The training program "track" has been a significantly less effective means of qualifying to take the examination. Thus, the bifurcation of the pool of experienced workers according to age, and the creation of two parallel "preexamination" programs, has *prima facie* discriminated against black rodmen, and has unlawfully denied them journeyman membership in the union and placement in the top referral group under the collective bargaining agreement between the union and the CCC. This disparity violates both Title VII and § 1981.

109. As a result of these various practices that discriminated against black rodmen, these workers have consistently received, on the average, significantly fewer hours of work than have white rodmen. This disparity is made clear from an analysis of the figures presented in Rodmen Exhibit 62. These figures produce the following comparison of the average hours of black and white rodmen for the period 1970 through 1980:

Comparison of Average Annual Hours Worked by Black and White Rodmen

Year	Average Hours - - Blacks*	Average House - - Whites**	(1) As a Percentage of (2)+
1970	1370.7	1477.4	92.8%
1971	1288.1	1480.5	87.0%
1972	571.2	707.9	80.7%
1973	1103.7	1355.1	81.4%
1974	1108.5	1335.6	83.0%
1975	981.1	1166.2	84.1%
1976	928.6	1208.6	76.8%
1977	902.5	116.6	80.8%
1978	834.0	1128.5	75.7%
1979	1035.0	1194.4	86.7%
198	746.2	1139.5	68.5%

$$\text{Average white hours} = \frac{\text{total hours-minority hours}}{\text{total workers-minority workers}}$$

***22** As this table demonstrates, in every year from 1970 through 1980, blacks received substantially fewer hours of referrals than did white rodmen. This table further demonstrates that, as compared with whites, blacks actually fared slightly worse during the latter portion of the 1970's than they did during the first few years of that decade. Finally, this table demonstrates that whites were still receiving a disproportionate number of hours seventeen years after the passage of Title VII. These figures, which are wholly based on defendant's statistics, provide further and graphic evidence that defendants' continued discriminatory practices have deprived these workers of substantial economic opportunity in violation of Title VII and Section 1981.

RETALIATORY CONDUCT BY DEFENDANTS

110. Defendants or other agents took retaliatory actions against certain of the named plaintiffs following their filing of charges with the EEOC or their participation in this suit.

111. Plaintiff Randolph Jackson was laid off in January 1975, after charges of discrimination had been filed with the EEOC, and was told by the superintendent of the job site that he had orders from Mr. Vermillion to fire him.

112. Plaintiff Tommy Kirkland's supervisor, Ray Coda, indicated his knowledge of Kirkland's participation in the lawsuit. A week later, Mr. Coda told Mr. Kirkland that he thought he would have permission to fire him, and several weeks later Mr. Kirkland was indeed laid off, although other rodmen were brought in to perform his job.

113. Plaintiff Jesse Berger heard Tommy Gilmer, then business agent for Local 201, state at a union membership meeting in February 1981 that he was going to make it hard on those who filed this suit.

114. Plaintiff Van Edward Lewis was told by Mr. Gilmer that he would not provide him with an application for the training program until he agreed to drop the discrimination charges. After indicating his willingness to do so, Mr. Lewis was given an application, although he did not drop his charges.

115. Plaintiff Ernest Bellamy, before becoming a party to this action, wrote a letter to defendant International in November, 1974, complaining of Local 201 membership practices. Mr. Bellamy testified that he later "exchanged words" with Mr. Vermillion about the letter, and that Mr. Vermillion stated that Bellamy would never be referred again. Although Mr. Vermillion did not effect this threat, Mr. Bellamy soon found himself working at reduced wages, purportedly in accordance with the rules of the training program, despite the fact that Mr. Bellamy had received full journeyman wages in previous years in the training program.

F. *THE ROLE OF THE INTERNATIONAL*

116. An examination of the Constitution of the International establishes the pervasive authority of the International over the affairs of its affiliated local unions such as Local 201. Indeed, the Constitution grants the International the power to control virtually all aspects of the structure and operation of its local unions. In a word, the Constitution identifies and treats affiliated local unions as "subordinate" bodies.

117. Local unions become affiliated with the International through a charter issued by the International and the International retains the authority to suspend or revoke the charter or to place local unions under "direct International supervision" for conduct detrimental to the International's interests. The International Constitution contains a provision entitled "Constitution Governing All Local Unions" (Art. XXVI). That provision contains more than 15 pages of detailed instructions, ranging from the specification of the officers which local unions must have, and their duties, to directions regarding the order of business and rules of conduct to be followed at meetings of the local unions. Not only has the International written and maintained the Constitution of its locals within its own Constitution, but also local unions must submit their By-laws to the International for approval, and such By-laws do not become effective until approval of the International is received. (Art. XXI § 4.)

118. The Constitution of the International also establishes the membership requirements for all local unions, requiring, *inter alia,* that "[t]o be admitted to membership in any local union of the International Association one must be a practical workman versed in the duties of some branch of the trade ... of good moral character and competent to demand standard wages." (Art. II, § 2.) If local unions fail "to enforce this section to the letter ... all benefits of such Local and its members will be suspended for thirty days" and, if such failure persists, the local's charter will be forfeited. (Art. II, § 4.) The Constitution prescribes the procedures by which rodmen can become local, and at the same time International, union members.[10] Each local union is required to have "an Examining Committee to examine the qualifications of candidates seeking admission as members of a local union of this body." (Art. XXI, § 2.) The Constitution further prescribes the membership of the Examining Committee, the frequency of its meetings and other details regarding its operation. (Art. XXVI, § 8.) The International must approve the membership of applicants and reviews the reasons for rejection of any applicant. (Art. XXI § 2.) It may also expel members. (Art. II, § 5.)

119. The International receives a portion of the initiation fee for new members and has the authority to change the amount of the fee. (Art. XIX, §§ 1-2a.) The International issues membership cards and receives monthly dues from all members. (Const., Art. XIX, §§ 5-8; Art. XVI.)

120. The International Constitution sets forth detailed requirements for operation of apprenticeship programs by local unions. Local unions are required, *inter alia,* to establish such programs in conformity with "Standards of Apprenticeship" adopted by the International. (Art. XXIII, §§ 1-2.) The Constitution further prescribes the requirements for entry into the Apprenticeship Program. (Art. XXIII, § 3.)

121. The International also was instrumental in establishing the National Ironworkers Employment Training Program, pursuant to a government contract. This program was allegedly designed to increase minority participation in the iron work trade. Mr. Lyons testified that the International decided against the alternative of increasing minority participation in the Apprenticeship program and opted for a separate training program in order to avoid "diluting" the Apprenticeship Program and thereby developing "a bunch of second-class ironworkers." Local training programs are supervised by the National program whose president, William Hardesty, is also the International's Director of Apprenticeship and Training.

122. The Constitution grants the International's General President, the General Executive Board and the General Executive Council broad powers to effectuate International control over local union affairs.

123. The General President has the duty to "organize or cause to be organized, local unions". (Const., Art. IX, § 7.) The Constitution further provides that the General President:

> ***24** ... shall, whenever in his judgment subordinate bodies or the members thereof are working against the best interests of the International Association, have power to order said body to disband or cease such practices under penalty of revocation of charter.

"[W]ith the approval of the General Executive Board," the General President has "full power to effect settlement of any strike." (Id., § 14). Moreover, he (Id., § 18)

> ... shall have authority to investigate, personally, through the General Auditor and/or International representative, the affairs of local unions and the administrations of all General and Local Officers; and all books, records, accounts, securities and property in the custody of any such officer or Local Union shall be made available for examination by the General President, the General Auditor, or other persons selected by the General President for the purpose. For the purpose of carrying on such investigations, as well as for other purposes within the purview of his general supervisory powers, the General President may employ and designate certified public accountants to make examinations and audits.

Finally, the General President has the power (Id., § 10)

> ... to decide all points of law and to suspend any subordinate body for violation of the Constitution and laws.

124. The General Executive Board, composed of the General President, the General Secretary and one other officer, has authority "to fix by general orders from time to time the system of bookkeeping and accounting to be employed by local unions" (Art. XII, § 10) and to "provide rules and regulations governing all local unions in the employment of our members or work for interstate employers," (Id., § 11). More significantly, Article XII, Section 7, provides:

> The General Executive Board shall have the power to place any local union or other subordinate body of the Association under direct International supervision whenever in its judgment such action is necessary for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or duties of a bargaining agent, restoring democratic procedures, *or otherwise carrying out the legitimate interests of the International Association.* (Emphasis supplied.)

125. The General Executive Council, composed of the General President, the general Secretary, the General Treasurer and the nine General Vice Presidents of the International, rules on appeals from the General Executive Board. (Art. XIII, § 6). With specific reference to the Council's authority over local unions Article XIII, Section 5 provides:

> ***25** The General Executive Council shall formulate such organizing plans or policies as they may consider in the best interest of the International Association and when such plans or policies have been adopted by the General Executive Council it shall be mandatory that such plans or policies be observed by all Local Unions and the failure or refusal of any Local Union to co-operate with the International Association in such efforts shall be sufficient cause for the revocation of the charter of such Local Union, and the General Executive Council may, should it be deemed best, establish another charter in that territory.

126. The International also controls the collective bargaining process of its local unions. The Constitution prescribes in mandatory language the steps in that process, including submission to be International, upon request, of the local union's initial bargaining proposal, and requires local unions to obtain approval of the General Executive Board before commencing negotiations and finalizing collective bargaining agreements. (Art. XXI, § 29.) The Constitution provides that the International "will aid and assist its local unions and chartered bodies in drafting and negotiating suitable and workable agreements and working rules." (Id.) Following negotiations (id., ¶A).

> ... [t]he final draft of all new agreements and/or the final draft of all amendments to existing agreements shall be submitted to and approved by the General Executive Board before same is signed by the officers of the local union, and any such agreements or amendments which have not been approved by the General Executive Board shall have no binding force or validity.

The International retains power to enforce these provisions and, once an agreement is entered, the International enforces compliance with its provisions. (Art. XXI, § 29, ¶A.)

> Outside Local Unions which fail or refuse to comply with the provisions of this paragraph or Paragraph C of this Section or that violate an agreement after approval of same by the General Executive Board will be subject to the forfeit of their charter, and the officers or members of Outside Local Unions violating the provisions contained in this paragraph or Paragraph C of this Section shall be subject to charges and, after trial, such penalty as the General Executive Board may deem proper.

Significantly, "[l]ocal Unions are not granted the power, and are forbidden, to call any strike involving the work of any fair contractor, or cause *any* stoppage of work, without first securing the sanction and approval of the General President." (Id., § 28, emphasis in original.)

128. The facts regarding the International's responsibility for discriminatory action by Local 201 are not limited to the

numerous provisions of the International's Constitution which confirm the International's authority to control virtually every aspect of Local 201's structure and operations. The International has, in fact, exercised its authority to direct Local 201 action with respect to the central issues in this lawsuit, including the admission of rodmen to membership.

129. Plaintiffs have been deprived of or delayed in obtaining union membership because of their race. One principal means of preventing or inhibiting blacks from attaining union membership has been the manner in which the test or membership has been administered.

130. On at least two occasions, the International has intervened to prescribe the test which Local 201 should employ. In 1967, International representatives visited Local 201, evidently to deal with questions of admissions to membership and racial discrimination. Mr. Hardesty reported to Mr. Lyons regarding that meeting. He stated:

> ***26** As has been our practice in the past with other Local Unions, we presented Local 201 with form letters, and seven (7) written examinations and discussed at length the reasons why they should adopt a standard procedure for the acceptance of non-members, as well as why non-members should be accepted. Numberous questions were asked concerning the execution of Federal Reporting Forms EEO-2 and EEO-3 which were answered to the satisfaction of all present.

131. Representatives of the International visited Local 201 again in January 1971 and met with its Executive Board. The minutes indicate that "the Executive Board was instructed ... as per General President John H. Lyons' instructions to notify all men working on permit, by registered mail, to appear before the Examining Board to be given the test. We were instructed to examine thirty applicants per month until all have been examined. Any man that passed the test and pays the initiation fee is to be taken in the Union as a member."

132. The apparent reason for the International's intervention was to attempt to prevent "future litigation, such as occurred in Local 1, Chicago, Illinois, in Local 426, Detroit, Michigan, in Local 86, Seattle, Washington, and in other locals throughout the country." The International representative followed up the meeting with Local 201 with a form report to Mr. Lyons indicating that he had "no reason to believe that the instructions left will not be followed." The International representative also sent Local 201's Business Agent a detailed letter after the meeting listing certain "suggestions" and numerous "instructions" regarding Local 201's referral practices, testing procedures and treatment of "non-members".

133. There is no doubt that Local 201 carried out its instructions. The Business Agent in 1971, Ronald Vermillion, explained what transpired in his deposition:
Q. You stated that the International prepared the written questions [for the admission test]. Is that what your testimony was?

A. That's right.

Q. How do you know that the International prepared the written questions?

A. Well, to the best of my knowledge, December of '70 or January of '71 two general organizers from the International appeared at our executive board meeting, informed us that they were going all over the country and informing locals to give all these people working on a permit a test to become members of the association. It was a very lengthy meeting and a lot of discussion. We were told, more or less, that we do it or the International would do it and we wouldn't get any of the initiation fee, so to keep our own autonomy and to get $15,000 or $20,000 whatever it would be from initiation fees, we decided to concur with them.

***27** We didn't have much choice in the matter, being as they were the International we concurred or they would have done it themselves.

Q. In other words, they would have given people tests and admitted them to the International?

A. Yes; and kept the initiation fee themselves.

Q. They would send these men to you to be referred out to work as members of the International?

A. They would just let them in the Local as members.

Q. They would put them in Local 201?

A. Yes.

The active role played by the International in establishing the tests and other requirements relating to union membership, which was confirmed in the testimony at trial of its General President, John Lyons belies any suggestions that the International lacked or did not exercise authority with respect to the racially discriminatory admission policies of Local 201.

134. The International has also exercised significant control over the Apprenticeship and Training Programs. One must be a member of the Apprenticeship or the Training Program in order to become a union member. The International prescribes the structure and operation of both programs. It can impose requirements on these programs to ensure that they are not used, as they have been in this case, to perpetuate racial discrimination. In particular, Mr. Lyons, himself, played the crucial role in dictating the high school graduation requirement for the Apprenticeship Program.

135. The International also was instrumental in establishing the referral system employed by Local 201 and other local unions. Mr. Grigsby acknowledged that the referral system was established because "it was felt by the International that some kind of a, some kind of system, that some kind of documented system had to be used."

136. The International has not, moreover, been unaware of the racial imbalance in Local 201 and claims of racial discrimination. In 1974, Mr. Hardesty wrote local unions, including Local 201, stating that "[o]nce again, it is necessary for me to seek your assistance and cooperation in providing me with accurate information concerning the make-up of your Local Union." He enclosed a chart on which local unions furnished statistics regarding their racial compilation. Local 201 reported that less than ten percent of its members were black.

137. A number of black iron workers have complained to the International regarding discrimination by Local 201. In each instance, the International conducted an investigation of the complaints. Thus, the International has acknowledged that it has the responsibility to deal with racial discrimination against black iron workers who seek membership in or referral from Local 201. Indeed, General President Lyons has explained that he had appointed Mr. Hardesty to be his "man on racial discrimination," "assigned to be the coordinator of every matter relating to racial or discriminatory practices of the local unions." Thus, "the instructions were that whenever a local union gets into any problem relating to equal-employment the question goes from the local union directly to International headquarters to be handled by Mr. Hardesty."

138. The International, in addition, has exercised the control contemplated by its Constitution with respect to collective bargaining and strikes by Local 201. In 1973, for example, the International refused to grant Local 201 permission to strike and directed it to discontinue an unauthorized work stoppage. In 1974, the International assumed control of collective bargaining negotiations and, ultimately, the General Secretary of the International executed the agreement on behalf of Local 201. After considerable correspondence with Local 201, the International refused permission to strike in 1975. According to Michael Byorick, who has been chairman of the negotiating committee for the Construction Contractors Council, on behalf of employers, the International has intervened to conclude negotiations with respect to the last three collective bargaining agreements. He testified:
***28** Q. You reached impasse on the last three agreements in your negotiations between CCC and the Local and it was necessary for International to come in; is that your testimony?

A. Right.

Mr. Byorick explained that in negotiating the collective bargaining agreement in effect in 1977, a representative from the International, Robert Cooney, "sat together" with representatives of Local 201 and then CCC and "we settled the contract."[11]

139. The International has, in short, exercised exactly the kind of pervasive control over the affairs of Local 201 which the Constitution authorizes and contemplates.[12] The fact that this control has extended to the very matters at issue in this litigation emphasizes the inappropriateness of the suggestion that the International has no authority over or responsibility for the activities of Local 201.

140. The CCC is the agent of employers in the rodman trade in collective bargaining and other dealings with Local 201. In its answer, the CCC admitted that it "has represented and continues to represent its members in collective bargaining agreement negotiations with Local 201, and, on behalf of its members, is a party to a presently effective collective bargaining agreement

with Local 201."[13] Under the collective bargaining agreement negotiated and entered into by the CCC, members of the CCC obtain their rodman employees through Local 201's referral system. Thus, the CCC controls access to employment on unionized rodman jobs.

141. The CCC appoints trustees to the Training Program, the Apprenticeship Committee. Local 201 appoints an equal number of representatives. Prospective members of Local 201 and the International must serve as a trainee or an apprentice in order to obtain union membership. Thus, the Training Program and the Apprenticeship Program control access to union membership. The trustees have general supervisory responsibility for the operations of the Training Program and the Apprenticeship Program, including the duty to ensure adequate participation by minorities, particularly in the Training Program.

142. The CCC knew or should have known of the discriminatory impact of the referral system, which has been part of collective bargaining agreements since 1959, and of the other racial discrimination which has occurred. CCC's participation in the Training Program and the Apprenticeship Program is sufficient itself to justify the finding that the CCC knew or should have known of the racial discrimination. Moreover, there are other grounds on which to infer that the CCC knew, when it negotiated collective bargaining agreements with Local 201, that the referral clause had the effect of implementing and perpetuating racial discrimination.

143. The CCC's 1971 Steering Committee file, complied to assist in negotiations with various locals, including Local 201, contained a memorandum suggesting that the referral system employed by a sister ironwork union. ????? [Ed. note: - The question marks were in the copy received from court.] Minutes of the bargaining strategy meeting indicated that the CCC concluded that the referral clause of the collective bargaining agreement needed to be completely revised. In fact, a revision to the collective bargaining agreement, which completely deleted the referral clause, was prepared and submitted to Local 201. However, Local 201 rejected the proposed revision, and the CCC agreed to a collective bargaining agreement which contained the referral clause.

144. On these facts, it is proper to infer that, in the 1971 bargaining, the CCC: (1) was aware that the referral clause had a discriminatory impact; (2) took notice of such discrimination in its collective bargaining; (3) ultimately agreed to retention of the clause; and (4) thus, knowingly participated in continuation of racial discrimination.

145. CCC considered itself to have a responsibility to ensure that it was not a party to a collective bargaining agreement which permitted or perpetuated racial discrimination.

II

1. Local 201 is a union and a labor organization engaged in an industry affecting commerce, as defined in Title VII, 42 U.S.C. § 2000e(b), (e), and is a person within the meaning of 42 U.S.C. § 1981.

2. International is a labor organization with headquarters in the District of Columbia, engaged in an industry affecting commerce, as defined in Title VII, 42 U.S.C. § 2000(b), (e), and is a person within the meaning of 42 U.S.C. § 1981.

3. CCC is an incorporated employer association whose members are contractors and subcontractors engaged in bridge, structural and ornamental iron work in the Washington Metropolitan Area. CCC is subject to the provisions of Title VII, 42 U.S.C. § 2000e et seq., and is a person within the meaning of 42 U.S.C. § 1981.

4. Apprenticeship Committee is a joint labor-management committee as defined in Title VII, 42 U.S.C. § 2000e(b), (d), and is a person within the meaning of 42 U.S.C. § 1981.

5. Training Program is a joint labormanagement committee as defined in Title VII, 42 U.S.C. § 2000e(b), (d), and is a person within the meaning of 42 U.S.C. § 1981.

6. This action has been brought pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. This Court has jurisdiction pursuant to 42 U.S.C. § 2000e(2) and 28 U.S.C. § 1343. Venue is proper pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 2000e(f)(3). Plaintiffs have exhausted their administrative remedies.

7. The named plaintiffs represent a class, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, composed of: (1) all black persons who have been or might be excluded from membership in Local 201 and/or the International or from participation in the Apprenticeship or Training Program by the racially discriminatory practices of the defendants; and (2) all black persons who have been or might be discouraged by the known racially discriminatory practices of the defendants from applying for membership in the International and/or Local 201 and/or applying for admission to the Apprenticeship and/or Training Programs.

8. Title VII forbids employers, labor organizations, and apprenticeship and other training programs from using race, color or national origin as factors in employment or employment-related decisions. Title VII provides in relevant part, 42 U.S.C. § 2000e-2:
***30** (a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applications for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin ...

(c) It shall be an unlawful employment practice for a labor organization

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section....

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or otherwise training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training, 42 U.S.C. § 1981.

9. Section 1981 forbids discrimination on the basis of race, and provides a federal remedy against such discrimination in private employment. Section 1981 provides, 42 U.S.C. § 1981:

> ***31** All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

10. In demonstrating a violation of Title VII, plaintiffs bear the burden of establishing a *prima facie* case. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 5 FEP Cases 965 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-31, 3 FEP Cases 175 (1971). Once a *prima facie* case has been established, the burden of persuasion shifts to defendants to attack directly plaintiffs' presentation, see, e.g., Davis v. Califano, 613 F.2d 957, 962, 21 FEP Cases 272 (D.C. Cir. 1979), and/or to prove that the employment decision in question was based on a legitimate, nondiscriminatory consideration, see, e.g., Dothard v. Rawlinson, 433 U.S. 321, 329, 15 FEP Cases 10 (1975).

11. Generally, there are two types of Title VII cases: those involving the "disparate treatment" of individuals and those involving "disparate impact" on classes of people. International Brotherhood of Teamsters v. United States, 431 U.S. 324,

335 n. 15, 14 FEP Cases 1514 (1977).

12. Claims of disparate impact

> involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity [citation omitted] Proof of discriminatory motive ... is not required under a disparate impact theory.

Teamsters, supra 431 U.S. at 355 n. 15. The *prima facie* case under a disparate impact theory rests on evidence that facially neutral criteria select "applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 10 FEP Cases 1181 (1975).

13. Racial discrimination may be proven by the use of statistics which demonstrate a disparate impact on blacks. Griggs v. Duke Power Co., 401 U.S. 424, 3 FEP Cases 175 (1971); Reynolds v. Sheet Metal Workers Local 102, 498 F.Supp. 952, 966-67, 24 FEP Cases 648 (D. D.C. 1980) 702 F.2d 221, 25 FEP Cases 837 (D.C. Cir. 1981).

14. A disparate impact analysis measures the effects on protected groups of a practice or barrier which stands between potential and selected employees. Griggs v. Duke Power Co., 401 U.S. 424, 429-31, 3 FEP Cases 175 (1971). Plaintiffs have employed disparate impact analyses extensively in these proceedings, submitting evidence which compares similarly situated blacks and whites with respect to employment opportunities, such as access of experienced rodmen to the journeyman examination and thus to union membership and preferred referral status, access to the Apprenticeship Program, and hours worked. This evidence demonstrated that whites fare proportionately better than blacks in employment opportunities controlled by defendants. Plaintiffs also calculated the probability that the black/white disparties were due to chance. The calculations indicated that there were disparities that were statistically significant at the .05 level or at lower levels. See Hameed v. Ironworkers, Local 396, 637 F.2d 506, 514, 24 FEP Cases 352 (8th Cir. 1980); Reynolds v. Sheet Metal Workers Local 102, supra, 498 F.Supp. at 966.

15. Because plaintiffs have established a *prima facie* case of employment discrimination, defendants' burden is to rebut this showing by adequate proof that plaintiffs' statistical case is "accurate or insignificant," Davis v. Califano, 613 F.2d 957, 962, 21 FEP Cases 272 (D.C. Cir. 1979), or by showing that the demonstrated disparate impact resulted from the use of legitimate criteria which are justified by business necessity. Dothard v. Rawlinson, 433 U.S. 321, 329, 15 FEP Cases 10 (1975); Griggs v. Duke Power Co., 401 U.S. at 431.

16. Defendants have offered no business justification for their conduct. Therefore, in order to rebut plaintiffs' *prima facie* case, defendants must demonstrate that the claimed inaccuracies or errors in the data are systematic rather than random, that they actually bias the results, and that the bias was sufficiently extensive that it would affect the validity of plaintiffs' demonstration of disparate impact. Defendants failed both to satisfy their burden of demonstrating that the claimed errors would affect the finding of discrimination, and to show that *any* of the supposed inaccuracies introduced any systematic error whatsoever. Defendants have thus failed in their attempt to undermine plaintiffs' *prima facie* showing of discrimination.

17. Claims of disparate treatment require a showing that individuals were treated less favorably than others because of their race, color, religion, sex or national origin. International Brotherhood of Teamsters v. United States, supra, 431 U.S. at 335 n. 15; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973). Plaintiffs must show discriminatory motive in addition to difference in treatment to establish a *prima facie* case. In cases involving allegations of class-wide differences in treatment, the disparities themselves - if great enough - can suffice to establish both the fact of disparate treatment and the racial animus. See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 307-08, 15 FEP Cases 1 (1977); Teamsters, supra, 431 U.S. at 338.

18. Once plaintiffs have established a *prima facie* case of disparate treatment, defendants have the burden of showing that there was some permissible, business reason for the disparate treatment. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 17 FEP Cases 1062 (1978); McDonnell Douglas Corp. v. Green, supra.

19. Plaintiffs have established a *prima facie* case of disparate treatment, based upon their statistical showing of discrimination and individual instances of discrimination, including refusal to admit the named plaintiffs to the Apprenticeship and Training Programs or otherwise delaying their opportunity to become union members, discriminating against them in job referrals, lay offs and opportunities for overtime and acts of retaliation against them. Defendants have offered no business justification for these acts.

20. A violation of section 1981 generally is proven by the same evidence required to prove a violation of Title VII. Proof of a violation of section 1981, like proof of a violation of Title VII because of disparate treatment, requires proof of discriminatory motive, which can be demonstrated by use of statistical evidence.

21. The evidence presented demonstrates persistent, pervasive and intentional discrimination against black rodmen. This discrimination includes the following:
***33** a. administering the membership policies of Local 201 such that the number of black members was significantly lower than the percentage of members who would be expected to be black in the absence of racial discrimination;

b. denial to blacks qualified to be journeyman members of Local 201 and the International of the opportunity to take the examination which would qualify them for journeyman membership and thus to preferred status for referral to work under the Collective Bargaining Agreement between the union and the CCC;

c. requiring qualified blacks to complete an Apprenticeship Program or a Training Program as a prerequisite to taking the examination;

d. using an unvalidated examination for journeyman membership;

e. imposing the requirement of a high school diploma or its equivalent for entrance to the Apprenticeship Program, thus eliminating a disproportionate number of blacks from the opportunity to enter that program;

f. delaying admission to union membership of blacks until they had worked significantly more hours in the rodman trade than whites who gained admission;

g. operating a Training Program for the purpose of delaying or denying blacks the opportunity to become union members;

h. operating the referral system in such a manner that blacks worked significantly fewer hours than whites;

i. giving preference to white union members with respect to overtime opportunities, layoffs and nature of work; and

j. engaging in acts of retaliation against blacks who attempted to exercise their civil rights.

These actions are all in violation of Title VII and Section 1981.

22. Defendants' discriminatory actions against plaintiffs and the class are continuing violations of Title VII and section 1981.

23. Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), prohibits retaliatory conduct by employers and others in response to protected civil rights activities. Section 704(a) provides in relevant part:

> It shall be an unlawful employment practice for ... [a] joint labor-management committee controlling apprenticeship or other training or retraining, including on-the job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

24. To establish a *prima facie* case of retaliation, plaintiffs must show: (a) that they protested practices contrary to Title VII, thus engaging in "protected conduct" pursuant to Title VII; (b) that plaintiffs were subject to adverse action from the employer or labor organization either contemporaneous with, or after, their opposition or participation; and (c) that the adverse action is linked to the protected conduct.

25. Once plaintiffs establish their *prima facie* case, the burden of proof shifts defendants to demonstrate a legitimate, nondiscriminatory explanation for their conduct. If this can be shown, then plaintiffs must establish that defendants' non-discriminatory reason is in fact a pretext. See McDonnell-Douglas Corp. v. Green, supra.

26. Plaintiffs have claimed that the retaliatory actions occurred in response to their filing charges with the EEOC, their participation as plaintiffs in this suit, and the writing of letters of protest to the International. All of these actions constitute "protected conduct" pursuant to § 704(a).

27. Plaintiffs Jackson and Kirkland testified that they were involuntarily laid off, plaintiff Lewis testified that he was not admitted to the Training Program until he agreed to drop his charges, and plaintiffs Berger, Bellamy, and Lewis described veiled threats and harassment on the part of defendants. The actions of defendants complained of are classic examples of "retaliation" condemned under section 704(a). The failure of a union to refer members for work because of their protected activities, resulting in reduced earnings for those parties, is plainly prohibited.

28. There is overwhelming evidence that defendants and their agents knew of plaintiffs' participation in this suit or in otherwise protected conduct.

29. Defendants have attempted to rebut portions of plaintiffs' *prima facie* case by proffering other reasons for their conduct. While they do not dispute that various plaintiffs were laid off or not referred, they do dispute the reasons for the lay-offs. However, the showing of other sufficient justification for defendants' conduct does not defeat plaintiffs' claim of retaliation. Rather, the issue then becomes whether this proffered justification is being used as a "pretext" for a action taken for motives prohibited by Title VII. It is sufficient that plaintiffs show that retaliation played *any* part in the conduct complained of.

30. Defendant International is liable for the discriminatory acts of Local 201 by virtue of its total control and domination of Local 201, and its active participation in and approval of the procedures used by Local 201. The evidence demonstrates that the International knew of the discriminatory conduct and its effect, and permitted the continuance of this conduct on the part of Local 201. Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975).

32. Defendant CCC has discriminated against plaintiffs and their class by virtue of its appointment of trustees to the Joint Apprenticeship Committee and the Training Program, and its negotiation and active participation in the parties' collective bargaining agreement. The evidence demonstrates that the CCC knew, or plainly should have known, that the activities in which it or its agents were engaged fostered continuous and pervasive discrimination against members of the plaintiff class.

33. Plaintiffs and the members of their class are suffering irreparable harm.

34. Plaintiffs are entitled to declaratory and injunctive relief against all defendants, as prayed for in their complaint, and are directed to submit a proposed order to institute such relief.

35. Plaintiffs are also entitled to back pay, in an amount to be determined at a hearing for damages.

36. As the "prevailing party" pursuant to Title VII plaintiffs are also entitled to their costs and attorneys' fees, in an amount to be determined at the hearing for damages.

Parallel Citations

42 Fair Empl.Prac.Cas. (BNA) 1161

Footnotes

§ The averages in this column were derived by dividing "total hours" by "total members."

* These figures are derived by dividing the total hours worked by blacks by the total number of black workers. See Rodmen Exhibit 62, columns 4 and 7.

** These figures are derived by dividing the total hours worked by whites by the total number of white workers. The total white hours were computed by subtracting the total hours for all minorities from the total hours for all workers. The total number of white workers equals total workers minus minority workers. See Rodmen Exhibit 62, columns 5 and 6. Thus, the formula for computing the average white hours is as follows:

+ This figure is computed by dividing the average hours of blacks by the average hours of whites, and then multiplying by 100.

[1] Defendant Local 201 and the other defendants are also "persons" under 42 U.S.C. § 1981, whom plaintiffs allege have interfered with their rights and the rights of class members to make and enforce contracts.

[2] The Agreement provides that an employer may directly employ a minimum number of "key" employees (superintendent, general foreman, foreman), as well as former employees who have been employees during the previous year. (1974 Agreement). The latter provision is generally referred to as the "recall" provision. In addition, in certain emergent situations, the employer may hire directly.

[3] See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 308 n. 13, 15 FEP Cases 1 (1977); Reynolds v. Sheet Metal Worker Local 102, 498 F.Supp. 952, 965, 24 FEP Cases 648 (D. D.C. 1980), aff'd, 702 F.2d 221, 25 FEP Cases 837, No. 80-1378 (D.C. Cir., March 31, 1981).

[4] The period February 1, 1971 through May 31, 1971 was chosen on the basis of Mr. Grigsby's description of the period, as well as the fact that no non-apprentices or non-trainees were examined after May 31, 1971. In fact, three rodmen were invited to take - but did not take - the exam under the Open Period rules on June 12, 1971, a fact not known to Professor Haber prior to the trial of this matter. This minor discrepancy does not affect the analysis of the practices of the conclusion of racial discrimination.

[5] Among the experienced blacks not examined during this period were plaintiffs Berger, Kirkland, Bellamy and Tucker.

[6] Among the experienced blacks who did not pass this exam were plaintiffs Kirkland and Bellamy.

[7] Among the experienced blacks not given the opportunity to take the examination during this period were plaintiffs Kirkland, Tucker, Berger, Bellamy, and Jackson.

[8] Plaintiffs Bellamy, Lewis, Kirkland and Tucker were working out of Local 201 at a time when they were under 31 years of age, and none had a high school diploma.

[9] If one introduces a two-year lag into these figures, as suggested by defendants' expert, the apprenticeship program completion rate is slightly higher, 53.8%.

[10] A rodman becomes a member of the International by becoming a member of a local union. It is not possible to be a member of the International without becoming a member of a local union. Thus, the membership and admissions policies of Local 201 are in fact the membership and admissions policies of the International.

[11] Mr. Byorick also testified that the International was sometimes called by employers to settle disputes between them and Local 201 with respect to particular jobs.

[12] The records of the International also indicate that it has exercised the kind of day-to-day control over Local 201's affairs which is contemplated by the International's Constitution. It has approved By-Laws. It has also ruled on such matters of detail as the imposition of an assessment of $15 per member and increases to the expense account of the Business Agent.

[13] The CCC first negotiated a collective bargaining agreement with Local 201 in 1949. Employers who were not members of the CCC also could, and did, become signatories to the collective bargaining agreements negotiated by the CCC. Recently, the CCC has altered its method of operations so that, presently, members or non-members who wish the CCC to negotiate with Local 201 for them must give specific authorization.