

1996-97 ANNUAL SURVEY OF LABOR AND EMPLOYMENT LAW

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LABOR LAW

I. ORGANIZATIONAL AND REPRESENTATIONAL ACTIVITY

A.**National Labor Relations Board's Authority To Award Attorney's Fees Limited: Unbelievable, Inc. v. NLRB*¹

Section 10(c) of the National Labor Relations Act (the "NLRA") provides that the National Labor Relations Board (the "Board") will, upon finding that a respondent has engaged in unfair labor practices, issue an order requiring the respondent to cease and desist such unlawful activities.² Further, the NLRA authorizes the Board "to take such affirmative action including the reinstatement of employees, with or without back pay, as will effectuate the policies of the Act."³ Included among the NLRA's policies is encouraging the practice and procedure of collective bargaining.⁴ Toward that end, the Board's authority to award attorney's fees where the respondent engaged in frivolous litigation remained intact for twenty-five years in the District of Columbia Circuit.⁵ The United States Court of Appeals for the District of Columbia Circuit in *Unbelievable, Inc. v. NLRB* overturned its precedent, deferring instead to the traditional American rule that mandates that each side assume its own litigation expenses, absent a statute clearly indicating Congress's intention to permit an exception.⁶ By withholding the Board's authority to award attorney's fees, the court erodes the Board's ability to deter employers from litigating a frivolous claim and thus uses the Board as a tool to achieve unlawful ends.⁷ Thus, the court's decision eviscerates the Board's ability to encourage the practice and procedure of collective bargaining and thus to effectuate the policy goals of the NLRA.⁸

In 1973, in *Food Store Employees Union Local No. 347 v. NLRB*, the United States Court of Appeals for the District of Columbia Circuit

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¹ 118 F.3d 795, 155 L.R.R.M. (BNA) 2833 (D.C. Cir. 1997).

² 29 U.S.C. § 160(c) (1959).

³ *Id.*

⁴ *Id.* § 151.

⁵ See *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 807, 155 L.R.R.M. (BNA) 2833, 2843 (D.C. Cir. 1997).

⁶ *Id.* at 800, 806, 155 L.R.R.M. (BNA) at 2838, 2843.

⁷ See Risa L. Lieberwitz, *Attorney's Fees, the NLRB, and the Equal Access to Justice Act: From Bad to Worse*, 2 HOFSTRA LAB. L.J. 1, 11-13 (1984).

⁸ See 29 U.S.C. § 151.

held that the Board, which found the employer guilty of unfair labor practices, should have included attorney's fees and litigation expenses in its award of damages to the union because the employer had engaged in a deliberate, sustained pattern of illegal anti-union conduct and had acted in bad faith.⁹ The defendant employer, Heck's Inc. ("Heck's"), discouraged its employees' unionization efforts by engaging in various anti-union practices prohibited by the NLRA.¹⁰ Upon finding Heck's guilty, the Board ordered the employer to bargain in good faith and refrain from interfering with its employees' rights as guaranteed by section 7 of the NLRA, but omitted from its order the reimbursement of litigation expenses.¹¹ The union subsequently appealed the Board's decision to the district court.¹²

The court first noted that the charging party in NLRB proceedings is not required to participate and, thus, to incur litigation expenses when pursuing a complaint.¹³ The court reasoned, however, that employers should be deterred from litigating to delay union recognition and to avoid collective bargaining.¹⁴ Further, the court determined that the Board can only fulfill its legislative purpose of achieving industrial peace through collective bargaining when its docket is uncluttered by frivolous litigation.¹⁵ To this end, the court reasoned that an award of litigation expenses would provide the necessary deterrent.¹⁶ The court thus held that the Board has the power to award attorney's fees to the prevailing party as a part of the damages allowed under the NLRA.¹⁷

In 1975, in *Alyeska Pipeline Service Co. v. Wilderness Society*, the United States Supreme Court held that only Congress, and not the

⁹ 476 F.2d 546, 547-48, 82 L.R.R.M. (BNA) 2955, 2956 (D.C. Cir. 1973), *rev'd on other grounds*, 417 U.S. 1, 8 n.9, 86 L.R.R.M. (BNA) 2209, 2211 n.9 (1974). While *Food Store Employees* was pending before the Supreme Court, however, the District of Columbia Circuit upheld the Board in *Tiidee Products, Inc. & International Union of Electrical, Radio & Machine Workers*, 194 N.L.R.B. 1234, 1236 (1972), reasoning that it was bound by the earlier decision in *Food Store Employees*. See *International Union of Electrical, Radio & Machine Workers v. NLRB*, 502 F.2d 349, 352, 86 L.R.R.M. (BNA) 2093, 2096 (D.C. Cir. 1974). Thus, although *Tiidee Products* is the only lasting precedent in the District of Columbia Circuit, the reasoning upon which it rests is articulated only in *Food Store Employees*. See *Food Store Employees*, 476 F.2d at 547-48, 82 L.R.R.M. (BNA) at 2956; see also *Unbelievable*, 118 F.3d at 801 n.2, 155 L.R.R.M. (BNA) at 2838 n.2.

¹⁰ See *Food Store Employees*, 476 F.2d at 548, 82 L.R.R.M. (BNA) at 2956. Specifically, Heck's had threatened its employees, ascertained the level of union support by publicly polling its employees and refused to bargain despite a majority of votes in favor of the union. See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.* at 550, 82 L.R.R.M. (BNA) at 2958.

¹⁴ See *id.*

¹⁵ See *Food Store Employees*, 476 F.2d at 550, 82 L.R.R.M. (BNA) at 2958.

¹⁶ See *id.* at 550-51, 82 L.R.R.M. (BNA) at 2958.

¹⁷ See *id.*

courts, may create exceptions to the American rule that attorney's fees are not recoverable by the victorious party.¹⁸ In *Alyeska*, petitioners sought to enjoin the Secretary of the Interior from issuing permits granting rights-of-way to Alyeska Pipeline Service Co. ("Alyeska") for construction of an oil pipeline, arguing in part that such a permit would violate the Mineral Leasing Act of 1920 ("Act").¹⁹ Although the United States Court of Appeals for the District of Columbia Circuit enjoined pipeline construction on the basis of the Act, Congress subsequently amended the Act to allow the Secretary of the Interior to grant the requested permits to Alyeska.²⁰ Respondents then sought to recover attorney's fees resulting from the prolonged litigation over the now-moot issue.²¹

The Court first reasoned that authority to determine whether to subvert the American rule rests solely with Congress.²² The Court observed that Congress traditionally assumed responsibility, through fee statutes, for determining whether a victorious party is entitled to an award of attorney's fees.²³ Thus, the Court observed, Congress reserved this right for itself, permitting fee-shifting only in specific and explicit provisions under selected statutes.²⁴ Although courts construed the fee statutes to permit exceptions to the American rule in a very small class of cases, the Court observed that none were germane to this case.²⁵

Finally, the Court addressed the petitioners' argument that a plaintiff bringing an action under a statute that promotes the "private attorney general" concept ought to receive compensation for attorney's fees.²⁶ The Court acknowledged that such a statute may permit

¹⁸ 421 U.S. 240, 270-72, 10 Fair Empl. Prac. Cas. (BNA) 826 (1975). All BNA sources present only highly excerpted versions of this case. For the sake of consistency, I will not include parallel cites for all subsequent notes related to this case.

¹⁹ See *id.* at 242-43.

²⁰ See *id.* at 244.

²¹ See *id.* at 245.

²² See *id.* at 247-50.

²³ See *Alyeska*, 421 U.S. at 247-50. The Court pointed to both the Federal Judiciary Act of 1789, which mandated that federal courts follow the practices of the states in which they were located, and an 1853 Act intended to standardize state practices of fees recoverable from losing parties. See *id.* at 248, 251. Similarly, the Supreme Court has held consistently since 1796 that the judiciary could not create a general rule, independent of any statute, allowing awards of attorney's fees. See *id.* (citing *Aracambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796)).

²⁴ See *id.* at 260.

²⁵ See *id.* at 257-59. For instance, a court may assess attorney's fees for the willful disobedience of a court order or when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. See *id.*

²⁶ See *id.* at 263-64.

the shifting of counsel fees.²⁷ The Court, however, cautioned that the private attorney general concept in a statute, by itself, is not a grant of authority to the judiciary to shift attorney's fees.²⁸ The Court reasoned that courts would encounter difficulty in discriminating between important and unimportant statutes, allowing fee-shifting only in connection with the former, without legislative guidance.²⁹ Thus, in *Alyeska*, the Court held that courts may not shift attorney's fees in the absence of an explicit instruction from Congress.³⁰

In 1982, in *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters & Joiners*, the United States Supreme Court held that courts may not award the attorney's fees incurred by an injured plaintiff during Board proceedings as "damages" under section 303 of the Labor Management Relations Act ("LMRA").³¹ In 1972, Summit Valley Industries, Inc., ("Summit Valley") a manufacturer of prefabricated modular homes, opened a plant in the Butte, Montana area.³² Summit Valley staffed the plant with unskilled workers represented by the Teamsters Union, rather than skilled carpenters represented by Local 112, United Brotherhood of Carpenters & Joiners ("Local 112").³³ Local 112 incorrectly believed that Summit Valley's action violated a valid work-preservation agreement between it and local contractor associations, when in fact the company was not a signatory to the agreement.³⁴ Nevertheless, Local 112 ordered a work stoppage and picketed the company.³⁵ Summit Valley prevailed in actions with the Board against Local 112, alleging illegal picketing and unfair labor practices.³⁶ Summit Valley then filed the present action under section 303 of the LMRA, seeking damages resulting from Local 112's illegal activities, including \$13,604.33 in attorney's fees.³⁷

²⁷ See *id.*

²⁸ See *Alyeska*, 421 U.S. at 263-64.

²⁹ See *id.* Further, the Court observed that courts would also be required to determine whether awards should be discretionary or mandatory and whether awards should be afforded to any prevailing party or only to the prevailing plaintiff. See *id.* at 264.

³⁰ See *id.* at 270-71.

³¹ 456 U.S. 717, 727, 110 L.R.R.M. (BNA) 2441, 2445 (1982); see also 29 U.S.C. § 187(b) (1959).

³² See *Summit Valley*, 456 U.S. at 719, 110 L.R.R.M. (BNA) at 2441.

³³ See *id.*

³⁴ See *id.*, 110 L.R.R.M. (BNA) at 2442.

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *Summit Valley*, 456 U.S. at 721-22, 110 L.R.R.M. (BNA) at 2442. 29 U.S.C. § 158(b) states that:

it shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage any individual employed by any person engaged in

The Court first determined that neither the express language nor the legislative history of section 303 of the LMRA suggests that Congress intended to permit an exception to the American rule.³⁸ Further, the Court reasoned that a narrow interpretation of the term "damages" would suffice to protect employers from the adverse effects of a union's illegal activities, thus satisfying the legislative purpose of the LMRA.³⁹ The Court reasoned that considerations that support the American rule—such as the deterrent effect fee-shifting may have upon poor litigants with meritorious claims—outweigh the need to provide full compensation.⁴⁰

Finally, the Court reasoned that if recovery of attorney's fees were required to compensate fully each successful plaintiff, then each plaintiff who resorts to litigation to enjoin a defendant from engaging in illegal conduct would be entitled to recover the cost of the action in any subsequent action involving the same conduct.⁴¹ The Court determined that an endless stream of litigation would result if successful litigants could recover their attorney's fees in later actions; immediately upon entry of judgment, the plaintiff could start another action to recover his attorney's fees incurred in obtaining the previous judgment.⁴² Thus, in *Summit Valley*, the Court affirmed the supremacy of the American rule in actions brought under the LMRA.⁴³

During the *Survey* year, in *Unbelievable, Inc. v. NLRB*, the United States Court of Appeals for the District of Columbia Circuit held that the NLRB could not require an employer to reimburse litigation costs because the NLRA lacks clear language indicating congressional intent to override the American rule.⁴⁴ In 1988, *Unbelievable, Inc.* ("Unbelievable") purchased the Frontier Hotel & Casino in Las Vegas ("Frontier").⁴⁵ The hotel's employees included members of two unions: the

commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to . . . work on any goods, articles, materials, or to perform any services . . . where the object thereof is forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, unless such employer is failing to conform to an order or certification of the Board . . .

29 U.S.C. § 158(b).

³⁸ See *Summit Valley*, 456 U.S. at 721, 110 L.R.R.M. (BNA) at 2443.

³⁹ See *id.* at 724, 110 L.R.R.M. (BNA) at 2444.

⁴⁰ See *id.* at 725, 110 L.R.R.M. (BNA) at 2444.

⁴¹ See *id.*

⁴² See *id.* at 725-26, 110 L.R.R.M. (BNA) at 2444.

⁴³ See *Summit Valley*, 456 U.S. at 726, 110 L.R.R.M. (BNA) at 2444-45.

⁴⁴ 118 F.3d at 806, 155 L.R.R.M. (BNA) at 2843.

⁴⁵ See *id.* at 796, 155 L.R.R.M. (BNA) at 2834.

International Brotherhood of Teamsters and the International Union of Operating Engineers.⁴⁶ In May 1990, Unbelievable resolved to negotiate new contracts with both unions.⁴⁷ Unbelievable submitted proposed contracts to the two unions with a letter indicating that it would implement the terms of the contract unilaterally if the unions' attorneys did not contact Unbelievable's attorney to arrange negotiations by a fixed date.⁴⁸

Unbelievable negotiated with both unions but failed to reach an agreement with either party, leading to its unilateral implementation of most of the terms in its proposed contract.⁴⁹ Although Unbelievable agreed to certain alterations in contracts with both parties—such as keeping the health insurance plan—the company remained intransigent during the negotiations.⁵⁰ Unbelievable indicated that its management wanted a strike so it could replace the existing employees and eliminate union representation in the workforce.⁵¹ The unions filed a complaint with the Board alleging unfair labor practices.⁵²

In concluding that Unbelievable violated sections 8(a)(1), (3) and (5) of the NLRA, the administrative law judge ("ALJ") found that the company had not bargained in good faith.⁵³ The NLRB adopted the ALJ's findings and legal conclusions and ordered Frontier to pay the

⁴⁶ See *id.* Labor contracts between the unions and Frontier's previous owner expired in 1987, but Unbelievable implemented the terms of the old contract until 1989, when it imposed new contract terms upon the two groups of unionized employees. See *id.*

⁴⁷ See *id.* at 797, 110 L.R.R.M. (BNA) at 2834.

⁴⁸ See *id.*, 110 L.R.R.M. (BNA) at 2835. The proposed contracts would have reduced the wages of some Teamsters from \$11.92 per hour to \$6.50 and would have cut the wages of most employees represented by the Operating Engineers by five percent. See *id.* Both contracts would have eliminated the pension plan, replaced the unions' health plans and imposed restrictions upon employees' receipt of pay for vacations and holidays. See *id.*

⁴⁹ See *Unbelievable*, 118 F.3d at 797, 110 L.R.R.M. (BNA) at 2835.

⁵⁰ See *id.*

⁵¹ See *id.* During Unbelievable's first meeting with the Operating Engineers, the company refused to consider the union's counteroffer, which closely paralleled the standard contract used among area hotels. See *id.* When the union indicated that the company's proposals were unacceptable, Unbelievable's counsel responded that the company would not mind if the proposals led to a strike. See *id.* Negotiations with the Teamsters followed in similar fashion. See *id.*

⁵² See *id.*

⁵³ See *id.* 29 U.S.C. § 158(a) states that:

it shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157 of this title; . . . (3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization; . . . and (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 159 of this title.

29 U.S.C. § 158(a). The ALJ stated that Unbelievable had engaged in "surface bargaining," intentionally seeking to reach an impasse for the purpose of implementing its terms unilaterally

unions' bargaining expenses.⁵⁴ The Board reasoned that where a party to negotiation engages in "aggravated misconduct" that renders the bargaining process wasteful, shifting of negotiation fees is necessary to ensure a return to the economic status quo ante at the bargaining table.⁵⁵ Further, the Board ordered Unbelievable to pay the unions' litigation expenses to restore the charging party fully to its original economic position.⁵⁶ The Board reasoned that its policy mandates that a respondent who raises frivolous defenses must pay for its opponents' litigation expenses.⁵⁷

Unbelievable petitioned the Court of Appeals for review of the NLRB order, and the NLRB cross-appealed for enforcement of its order.⁵⁸ The court sustained the NLRB's conclusions that Unbelievable violated the NLRA, as well as the NLRB's order commanding Unbelievable to compensate the unions for their negotiation expenses.⁵⁹ The court, however, overturned the NLRB order that Unbelievable compensate the unions for their litigation expenses, reasoning that the NLRA does not endow the NLRB with the authority to order a respondent to pay the litigation expenses incurred by a charging party.⁶⁰

The court first reasoned that, in the wake of the Supreme Court's reasoning in *Summit Valley*, the Board could overcome the presumption that the American rule controls only if the NLRA contained express statutory authorization.⁶¹ The court acknowledged that the Supreme Court decision in *Summit Valley* addressed section 303 of the LMRA, and therefore, it did not expressly overrule the District of Columbia Circuit's opinion in *Food Store Employees*, which discussed the remedial authority of the NLRB under the NLRA.⁶² Nevertheless, the court noted that a later Supreme Court decision indicated that lower courts must consider the application of *Summit Valley* for the question of whether the NLRB retains the authority to award attorney's fees.⁶³

and subsequently forcing the unions to strike. See *Unbelievable*, 118 F.3d at 797, 110 L.R.R.M. (BNA) at 2835.

⁵⁴ See *Unbelievable*, 118 F.3d at 798, 110 L.R.R.M. (BNA) at 2836.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.* at 796, 110 L.R.R.M. (BNA) at 2834.

⁵⁹ See *Unbelievable*, 118 F.3d at 799, 110 L.R.R.M. (BNA) at 2837.

⁶⁰ See *id.*

⁶¹ See *id.* at 802, 110 L.R.R.M. (BNA) at 2839.

⁶² See *id.* at 801, 110 L.R.R.M. (BNA) at 2839.

⁶³ See *id.* Specifically, in *J.P. Stevens & Co. v. NLRB*, the Supreme Court vacated a judgment of the Fourth Circuit that followed the District of Columbia Circuit's holding in *Food Store Employees*, remanding the case for reconsideration in light of *Summit Valley*. See *id.* at 801-02, 110

The Court of Appeals for the District of Columbia Circuit next dispensed with petitioner's arguments that *Summit Valley* was distinguishable because section 10(c) of the NLRA, unlike section 303 of the LMRA, contains no limitation on the Board's broad authority to effectuate the policies of the NLRA.⁶⁴ Next, the court observed that congressional silence on the matter of attorney's fees has been interpreted as a sign that the legislature did not intend an exception to the American rule in a particular statute.⁶⁵ The court further reasoned that the requirement of express statutory language to overcome the American rule applies a fortiori to the NLRA because the statute does not require the charging party's participation in the litigation.⁶⁶

The court found that neither the statutory text nor the legislative history of the NLRA provides the clear command of statutory authority necessary to rebut the presumption that the American rule controls.⁶⁷ The court then addressed the Board's argument that it should defer to the Board's interpretation of its own authority under section 10(c) of the statute.⁶⁸ The court noted that it should defer to an agency's interpretation of its own statutory power only if "that interpretation is rational and consistent with the statute."⁶⁹ The court reasoned that it is not rational to interpret silence in section 10(c) on the issue of fee-shifting as support for the remedy when the Supreme Court has stated that an exception to the American rule is permitted only when supported by a clear legislative statement.⁷⁰

L.R.R.M. (BNA) at 2838-39; see also *J.P. Stevens & Co. v. NLRB*, 458 U.S. 1118 (1982), *vacating* 668 F.2d 767 (1982).

⁶⁴ See *Unbelievable*, 118 F.3d at 802, 110 L.R.R.M. (BNA) at 2839. The court stated that it found nothing in the rationale of *Summit Valley* to indicate that the holding did not apply to a statute granting power to an administrative agency. See *id.* The court also cited numerous cases in which the Supreme Court reaffirmed adherence to the American rule to support its ruling that the presumption against fee-shifting applies to the NLRA. See *id.*

⁶⁵ See *id.* at 802-03, 110 L.R.R.M. (BNA) at 2839-40. Since *Summit Valley*, Congress has expressly authorized fee-shifting in numerous statutes, and the Supreme Court has interpreted congressional silence as a sign that the legislature did not sanction a shift in the burden of fees. See *id.*

⁶⁶ See *id.* The court concluded that it would be anomalous for the Supreme Court to hold that a statute requiring an individual to bring an action at his or her own expense cannot be read to authorize an award of attorney's fees without a clear statement of congressional intent, but that a statute allowing a federal agency to pursue a claim on behalf of an individual will be read to permit reimbursing the party's legal fees should the party choose to intervene. See *id.* at 803-04, 110 L.R.R.M. (BNA) at 2840-41.

⁶⁷ See *id.*

⁶⁸ See *id.* at 804, 110 L.R.R.M. (BNA) at 2840-41.

⁶⁹ See *Unbelievable*, 118 F.3d at 804, 110 L.R.R.M. (BNA) at 2841 (citing *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 126 L.R.R.M. (BNA) 3281 (1987)).

⁷⁰ See *id.*

Finally, the court reasoned that the NLRA's broad grant of authority to the NLRB to take appropriate action to effectuate the policies of the Act does not include the power to shift attorney's fees because fee-shifting is not closely related to the NLRB's statutory mission or to its primary area of expertise.⁷¹ The court observed that awarding attorney's fees moves the Board away from its expertise in labor relations and toward "a discretionary power entrusted to a court only when specifically legislated."⁷² Moreover, the court noted that the Board justified awarding attorney's fees as a deterrent to frivolous litigation; this purpose does not further the Board's statutory mission of preventing unfair labor practices because it is not an unfair labor practice to present a frivolous defense.⁷³ Finally, to award attorney's fees as a means of discouraging frivolous litigation is essentially punitive and is beyond the scope of the Board's power.⁷⁴ Thus, in *Unbelievable*, the District of Columbia Circuit held that the NLRB may not award attorney's fees without a clear statutory command that permits an exception to the American rule.⁷⁵

In dissent, Judge Wald contended that *Food Store Employees*, not *Alyeska* and *Summit Valley*, remained the controlling precedent in the District of Columbia Circuit regarding the power of the NLRB to award litigation costs.⁷⁶ Judge Wald maintained that, under *Food Store Employees*, the NLRB is permitted to award attorney's fees to a prevailing party to effectuate the policies of the NLRA.⁷⁷ Thus, Judge Wald contended that the Court of Appeals for the District of Columbia Circuit should affirm the NLRB's award of attorney's fees in *Unbelievable*.⁷⁸

The dissent first argued that *Summit Valley* did not overrule *Food Store Employees*, as the majority held, because it did not address the NLRB's authority under the NLRA to award litigation expenses.⁷⁹ The

⁷¹ See *id.* at 804-05, 110 L.R.R.M. (BNA) at 2841. The court recognized that the Board's remedial power is not limited to the one action enumerated in the statute (reinstatement with or without back pay), but reasoned that it ought to be related to the Board's primary area of expertise and to its statutory purpose. See *id.*

⁷² *Id.*

⁷³ See *id.* at 805, 110 L.R.R.M. (BNA) at 2841.

⁷⁴ See *Unbelievable*, 118 F.3d at 805, 110 L.R.R.M. (BNA) at 2842.

⁷⁵ See *id.* at 806, 110 L.R.R.M. (BNA) at 2843.

⁷⁶ See *id.* at 807, 110 L.R.R.M. (BNA) at 2843 (Wald, J., dissenting).

⁷⁷ See *id.* at 807, 810, 110 L.R.R.M. (BNA) at 2844, 2846 (Wald, J., dissenting).

⁷⁸ See *id.* at 807, 110 L.R.R.M. (BNA) at 2844 (Wald, J., dissenting).

⁷⁹ See *Unbelievable*, 118 F.3d at 808, 110 L.R.R.M. (BNA) at 2844 (Wald, J., dissenting). Judge Wald observed that *Summit Valley* considered the awarding of attorney's fees under section 303 of the LMRA, which contains a far different remedial scheme than that proposed in the NLRA. See *id.* (Wald, J., dissenting). Section 303 contains a damages clause that entitles an employer who has been injured "in his business or property" by a union's unfair labor practice to "recover

dissent argued that *Summit Valley* rests upon factors that are peculiar to section 303 of the LMRA—a fact recognized by the Sixth, Seventh and Ninth Circuits—and, therefore, should not apply to the NLRA.⁸⁰ The dissent also criticized the majority's contention that the NLRB's remedial authority under the NLRA does not include the power to award attorney's fees.⁸¹ Judge Wald observed that section 10(c) is drafted quite broadly, designed to include "all reasonable remedies consistent with the Act's purposes" and opined that reimbursing an injured party for economic harm effected during litigation is within the scope of the NLRA's intention to prevent unfair labor practices.⁸² Thus, the dissent would have affirmed the NLRB's decision to permit an award of attorney's fees as a deterrent to frivolous litigation.⁸³

The court's rejection of the Board's decision in *Unbelievable* will frustrate the Board's ability to promote the process and procedure of collective bargaining, one of the chief policy goals of the NLRA.⁸⁴ By denying the Board's ability to award attorney's fees, the court prevents the Board from seriously deterring employers who use frivolous litigation as a tool against unions.⁸⁵ Thus, employers will be able to delay the processes of the Board itself to postpone union recognition, avoid bargaining with unions and weaken their economic position by purposefully presenting frivolous defenses to union allegations of anti-labor conduct.⁸⁶

The court's decision in *Unbelievable* ignores congressional intent to grant the Board wide discretion in fashioning remedies.⁸⁷ In the Board's 1995 decision to permit the award of attorney's fees, Chairman Gould and members Browning and Truesdale observed that the legislative history of the NLRA indicated an intention to broaden, rather than limit, the remedial authority of the Board.⁸⁸ Specifically, Congress

... the cost of the suit" in addition to the actual damages sustained. *See id.* (Wald, J., dissenting). The Supreme Court's holding in *Summit Valley* found that the term "damages" in this section did not include attorney's fees. *See id.* (Wald, J., dissenting).

⁸⁰ *See id.* (Wald, J., dissenting).

⁸¹ *See id.* at 810, 110 L.R.R.M. (BNA) at 2845-46 (Wald, J., dissenting).

⁸² *See id.* (Wald, J., dissenting). Moreover, she noted that an award of attorney's fees is "no different" from an award of compensation for the costs of bad faith negotiation, which the majority had approved. *See id.*

⁸³ *See id.* at 812, 110 L.R.R.M. (BNA) at 2848 (Wald, J., dissenting).

⁸⁴ *See* 29 U.S.C. § 151 (1959); *see also Unbelievable*, 118 F.3d at 796, 110 L.R.R.M. (BNA) at 2843.

⁸⁵ *See* Lieberwitz, *supra* note 7, at 11-13.

⁸⁶ *See Unbelievable*, 118 F.3d at 808-09, 110 L.R.R.M. (BNA) at 2846 (Wald, J., dissenting).

⁸⁷ *See id.* at 810, 110 L.R.R.M. (BNA) at 2845-46 (Wald, J., dissenting).

⁸⁸ *See Unbelievable, Inc. v. Professional, Clerical & Miscellaneous Employees, Local 995*, 318 N.L.R.B. 857, 862-63, 150 L.R.R.M. (BNA) 1065, 1072-73 (1995).

adopted broad language regarding the scope of the Board's remedial actions in the 1935 Act from Senate Bill 1958, which provided that the Board may issue orders "to take such affirmative action, including restitution, as will effectuate the policies of the act."⁸⁹ In selecting this general language, Congress omitted the mention of such specific remedies in the original proposal, Senate Bill 2926, such as "to take affirmative action, or to pay damages, or to reinstate employees, or to perform other acts to achieve substantial justice."⁹⁰ The Senate Labor Committee reported that it selected the general term "restitution" because "an effort to substitute express language such as reinstatement, back pay, etc., necessarily results in narrowing the definition of restitution, which may include many other forms of action."⁹¹

Historically, the Board has had a recurring problem of formulating effective remedies.⁹² Where an employer refuses to bargain in good faith, for instance, the usual remedy is an order to bargain in good faith.⁹³ A defendant may delay the issuance of the order and its eventual enforcement, however, by choosing to take advantage of its appellate options.⁹⁴ The absence of the power to shift attorney's fees leaves the Board without a substantial deterrent against parties who frivolously litigate, delaying the issuing and enforcing of an order.⁹⁵ During the delay, the effects of the unfair labor practice may thwart the union's efforts to recruit members or may encourage active union members to decertify the union because its bargaining has proven ineffective.⁹⁶ If the Board lacks the independent and flexible authority to fashion creative remedies necessary to carry out the national labor policy, including the power to shift attorney's fees, then an employer may achieve the goals of its unlawful conduct by promoting a frivolous defense and thereby exploiting the delay inherent in the Board's litigation system.⁹⁷

In conclusion, in *Unbelievable*, the United States Court of Appeals for the District of Columbia Circuit reversed twenty-five years of circuit

⁸⁹ *Id.* (citing S. 2926, 73d Cong. (1935), reprinted in 1 LEGISLATIVE HISTORY OF THE NLRA, at 6-7 (1935); S. 1958, 74th Cong., reprinted in 1 LEGISLATIVE HISTORY OF THE NLRA, at 1302 (1935)).

⁹⁰ *Id.*

⁹¹ *Id.* (comparing S. 2926, 73d Cong. and S. 1958, 74th Cong., reprinted in 1 LEGISLATIVE HISTORY OF THE NLRA, at 1360 (1935)).

⁹² See Lieberwitz, *supra* note 7, at 12.

⁹³ See *id.*

⁹⁴ See *id.* at 13.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See Lieberwitz, *supra* note 7, at 13.

precedent in ruling that the Board does not retain the remedial authority under the NLRA to award attorney's fees to the prevailing party when its opponent has engaged in frivolous litigation.⁹⁸ The court extended the holding of *Summit Valley*—which limited exceptions to the American rule to cases where Congress has expressly granted statutory authority to courts to award attorney's fees—to the NLRA.⁹⁹ The court's ruling will erode further the power of the Board to protect unions from unlawful actions by unscrupulous employers and to effectuate the policies of the Act.¹⁰⁰

*B.*City's Actions Must Have "Real Effect" To Be Preempted by NLRA: Alameda Newspapers, Inc. v. City of Oakland*¹

Congress passed the National Labor Relations Act ("NLRA") to guarantee employees the right to organize for the purpose of collective bargaining and to promote peaceful industrial relations.² Sections 7 and 8 of the NLRA encompass a multitude of labor relation activities.³ Congress carefully regulated these activities to prohibit certain forms of economic pressure from being forced on disputing parties.⁴ In addition, to help forge a balance of power between management and labor, Congress intentionally left other activities unregulated and available for parties to use.⁵ When local governments act within the labor arena, however, their conduct may interfere with Congress's integrated scheme of regulation.⁶ Courts have held that those local government actions that have a "real effect" on the disputing parties' federal rights are subject to preemption.⁷ In *Alameda Newspapers, Inc. v. City of Oakland*, the Ninth Circuit addressed uncertainty as to whether the City of Oakland's participation in a boycott constituted municipal regulation subject to NLRA preemption applying this standard.⁸

⁹⁸ See 118 F.3d at 806, 110 L.R.R.M. (BNA) at 2843.

⁹⁹ See *id.* at 801-02, 110 L.R.R.M. (BNA) at 2839.

¹⁰⁰ See *id.* at 806, 110 L.R.R.M. (BNA) at 2843.

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¹ 95 F.3d 1406, 153 L.R.R.M. (BNA) 2257 (9th Cir. 1996).

² See 29 U.S.C. § 151 (1994). This Act is commonly known as the Taft-Hartley Act.

³ See *id.* §§ 157-58.

⁴ See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 146, 92 L.R.R.M. (BNA) 2881, 2886 (1976).

⁵ See *id.*

⁶ See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246, 43 L.R.R.M. (BNA) 2838, 2842 (1959).

⁷ See *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413, 153 L.R.R.M. (BNA) 2257, 2261 (9th Cir. 1996) (citing *Livadas v. Bradshaw*, 512 U.S. 107, 114, 146 L.R.R.M. (BNA) 2513, 2518 (1994)).

⁸ *Id.* at 1409, 1420, 153 L.R.R.M. (BNA) at 2258, 2267.

In 1959, in *San Diego Building Trades Council v. Garmon*, the United States Supreme Court held that federal law preempts state law that purports to regulate activities that the NLRA protects, prohibits or arguably protects or prohibits.⁹ *Garmon* involved a labor dispute in which the employer refused union demands to employ only workers who were union members.¹⁰ The unions picketed the employer's place of business and exerted pressure on customers and suppliers in order to persuade them to stop dealing with the employer.¹¹ In response, the employer initiated a representation proceeding before the National Labor Relations Board ("NLRB").¹² The NLRB's Regional Director, however, "declined jurisdiction presumably because the amount of interstate commerce involved" was not within the scope of the NLRB's jurisdiction.¹³ The employer simultaneously filed suit in California Superior Court for the County of San Diego claiming that the union's actions constituted unfair labor practice.¹⁴ The superior court enjoined the unions from picketing and from applying other pressures to force an agreement.¹⁵ On appeal, the United States Supreme Court remanded the case to the California Supreme Court on the issue of damages.¹⁶ The state court, determining that it had jurisdiction to award damages for injuries caused by the unions' activities, awarded damages in favor of the employer, holding that the unions' activities constituted a tort based on state law.¹⁷

The United States Supreme Court reversed, holding that state jurisdiction must yield to the NLRB where an activity is arguably within the scope of the NLRA, regardless of whether the NLRB assumes jurisdiction.¹⁸ The Court reasoned that allowing states to control activities that are potentially subject to federal regulation could conflict with Congress's integrated scheme of regulation.¹⁹ Thus, the Court concluded that to avoid state government interference with national policy, states must defer to the exclusive jurisdiction of the NLRB if the activity involved is arguably covered by the NLRA.²⁰

⁹ 359 U.S. at 244, 43 L.R.R.M. (BNA) at 2841.

¹⁰ See *id.* at 237, 43 L.R.R.M. (BNA) at 2838.

¹¹ See *id.*, 43 L.R.R.M. (BNA) at 2838-39.

¹² See *id.* at 238, 43 L.R.R.M. (BNA) at 2839.

¹³ *Id.*

¹⁴ See *Garmon*, 359 U.S. at 237, 238, 43 L.R.R.M. (BNA) at 2838, 2839.

¹⁵ See *id.* at 237, 43 L.R.R.M. (BNA) at 2839.

¹⁶ See *id.* at 238-39, 43 L.R.R.M. (BNA) at 2839.

¹⁷ See *id.* at 239, 43 L.R.R.M. (BNA) at 2839.

¹⁸ See *id.* at 245, 43 L.R.R.M. (BNA) at 2842.

¹⁹ See *Garmon*, 359 U.S. at 246, 43 L.R.R.M. (BNA) at 2842.

²⁰ See *id.* at 245, 43 L.R.R.M. (BNA) at 2842.

In 1976, in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, the United States Supreme Court held that states cannot regulate self-help activities that the NLRA leaves unrestricted, such as workers' collective refusal to work overtime.²¹ In *Machinists*, union members refused to work overtime during negotiations for renewal of an expired collective bargaining agreement with their employer.²² The employer filed a complaint with the NLRB and the Wisconsin Employment Relations Commission ("Commission"), charging that the refusal to work overtime constituted an unfair labor practice.²³ The NLRB dismissed the charge because the conduct did not appear to be in violation of the NLRA.²⁴ The Commission, however, concluded that the activity was in violation of state law and entered a cease-and-desist order.²⁵ The Supreme Court reversed, reasoning that Congress intended for some activities to remain unrestricted.²⁶ These activities, the Court reasoned, include the economic weapons (such as refusing to work overtime during negotiations) that Congress left available to the disputing parties.²⁷ The Court reasoned that these activities should be subject only to the free play of economic forces.²⁸ The Court stated that Congress's decision to prohibit certain forms of economic pressure, while leaving others unregulated, represented a congressionally intended balance of power between management and labor.²⁹ Thus, the Court held that certain self-help activities, such as refusing to work overtime, are economic weapons that are integral to national labor law and accordingly, Congress intended such activities to be free from regulation.³⁰

In 1986, in *Golden State Transit Corp. v. City of Los Angeles*, the United States Supreme Court held that federal law preempts a city from imposing a condition on franchise renewal that intrudes on the

²¹ 427 U.S. 132, 133, 136, 92 L.R.R.M. (BNA) 2881, 2881, 2882 (1976). Self-help activities are economic weapons used by parties in a labor dispute to apply pressure on other parties in the dispute. See *id.* at 144, 146, 92 L.R.R.M. (BNA) at 2885, 2886.

²² See *id.* at 134, 92 L.R.R.M. (BNA) at 2881-82.

²³ See *id.* at 135, 92 L.R.R.M. (BNA) at 2882.

²⁴ See *id.*

²⁵ See *id.* at 136, 92 L.R.R.M. (BNA) at 2882. The Wisconsin statute provides, in part: "It shall be an unfair labor practice for an employee individually or in concert with others . . . to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." *Id.* at 136 n.1, 92 L.R.R.M. (BNA) at 2882 n.1 (citing Wis. STAT. § 111.06(2) (1974)).

²⁶ See *Machinists*, 427 U.S. at 136, 141, 92 L.R.R.M. (BNA) at 2882, 2884.

²⁷ See *id.* at 141, 92 L.R.R.M. (BNA) at 2884.

²⁸ See *id.* at 144, 92 L.R.R.M. (BNA) at 2885.

²⁹ See *id.* at 146, 92 L.R.R.M. (BNA) at 2886.

³⁰ See *id.* at 133, 136, 92 L.R.R.M. (BNA) at 2881, 2882.

collective bargaining process.³¹ In *Golden State Transit*, taxicab drivers went on strike while their employer awaited City Council approval of its franchise renewal application.³² The City Council conditioned renewal on the parties settling their labor dispute by a certain date.³³ The franchise expired, however, because the dispute was not settled by the designated date.³⁴ The employer filed suit alleging that the NLRA preempted the City's conditional requirement for franchise renewal.³⁵ The Supreme Court affirmed summary judgment for the employer, reasoning that Congress intended to leave parties free to apply economic pressure as part of the collective bargaining process.³⁶ The Court reasoned that the City thwarted the process by imposing a durational limit on the economic self-help weapon (enduring a strike) available to the employer.³⁷ The Court concluded that the City Council's settlement condition frustrated Congress's decision to allow parties to use self-help economic weapons.³⁸ Therefore, the Court held that the NLRA preempts such municipal restrictions.³⁹

In 1993, in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* ("Boston Harbor"), the United States Supreme Court held that when a state participates in the free market as a proprietor, the NLRA does not preempt the state's actions because they are not regulation within the meaning of the *Garmon* and *Machinists* doctrines.⁴⁰ In *Boston Harbor*, the Massachusetts Water Resources Authority ("MWRA"), an independent government agency, was responsible for the pollution clean-up of Boston Harbor.⁴¹ The MWRA incorporated a pre-hire collective bargaining agreement into their bid solicitation for contractors' work on the project.⁴² An organization representing non-union construction industry employers brought suit against the MWRA, alleging that the NLRA

³¹ 475 U.S. 608, 619, 121 L.R.R.M. (BNA) 3233, 3238 (1986).

³² See *id.* at 610, 121 L.R.R.M. (BNA) at 3234.

³³ See *id.* at 611, 121 L.R.R.M. (BNA) at 3234-35.

³⁴ See *id.*, 121 L.R.R.M. (BNA) at 3235.

³⁵ See *id.*

³⁶ See *Golden State Transit*, 475 U.S. at 615, 121 L.R.R.M. (BNA) at 3236.

³⁷ See *id.*

³⁸ See *id.* at 615-16, 121 L.R.R.M. (BNA) at 3236-37.

³⁹ See *id.*

⁴⁰ 507 U.S. 218, 229-30, 142 L.R.R.M. (BNA) 2649, 2654 (1993).

⁴¹ See *id.* at 221, 142 L.R.R.M. (BNA) at 2650. Following a lawsuit arising out of MWRA's failure to prevent the pollution of Boston Harbor, in alleged violation of the Federal Water Pollution Control Act, the United States District Court for the District of Massachusetts ordered the MWRA to clean-up the Harbor. See *id.*

⁴² *Id.* at 221-22, 142 L.R.R.M. (BNA) at 2651. Bid Specification 13.1 provided, in part: "Each successful bidder and any and all levels of subcontractors, as a condition of being awarded a

preempted the bid specification because it amounted to government regulation.⁴³ The organization sought to enjoin enforcement of the bid specification.⁴⁴ Applying the *Machinists* principle, the United States Court of Appeals for the First Circuit held that the bid specification was preempted because the MWRA was regulating activities that Congress intended to leave unrestricted.⁴⁵ The Supreme Court reversed, however, stating that although the NLRA prevents a state from regulating conduct either subject to NLRB jurisdiction (*Garmon*), or that Congress intended to leave unrestricted (*Machinists*), a state does not regulate simply by acting within one of these protected areas.⁴⁶ The Court recognized that states are typically more powerful than private parties because they can regulate private conduct.⁴⁷ The Court observed, however, that this distinction is far less significant when a state participates as a private consumer, absent an interest in governance.⁴⁸ Thus, the Court held that when a state acts solely as a market participant with no interest in governing, its actions do not constitute regulation.⁴⁹

During the *Survey* year, in *Alameda Newspapers, Inc. v. City of Oakland*, the United States Court of Appeals for the Ninth Circuit held that a city may refuse to patronize an employer during a labor dispute and may even suggest its residents do likewise via legislatively approved resolutions.⁵⁰ The court stated that where municipal government action does not constitute a regulation, it will not infer preemption.⁵¹ The court further stated that such government action must have a "real effect" on labor relations to constitute a regulation subject to NLRA preemption.⁵² The court reasoned that a city's actions are not regulatory where they do not interfere with the self-help economic weapons that Congress intended to leave available to parties involved in a labor dispute.⁵³ The court concluded that the NLRA does not preempt a city

contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement" *Id.* at 222, 142 L.R.R.M. (BNA) at 2651 (citation omitted).

⁴³ See *id.* at 223, 142 L.R.R.M. (BNA) at 2651.

⁴⁴ See *id.*

⁴⁵ See *Boston Harbor*, 507 U.S. at 224, 142 L.R.R.M. (BNA) at 2651-52.

⁴⁶ See *id.* at 226-27, 142 L.R.R.M. (BNA) at 2653.

⁴⁷ See *id.* at 229, 142 L.R.R.M. (BNA) at 2654.

⁴⁸ See *id.*

⁴⁹ See *id.* at 229-30, 142 L.R.R.M. (BNA) at 2654.

⁵⁰ 95 F.3d at 1409, 153 L.R.R.M. (BNA) at 2258.

⁵¹ See *id.* at 1413, 153 L.R.R.M. (BNA) at 2261.

⁵² See *id.*

⁵³ See *id.* at 1418, 153 L.R.R.M. (BNA) at 2265.

from expressing its opinion by way of resolution, participating in a boycott as an ordinary consumer or urging its residents do likewise, because these actions have less than a "real effect" and thus, are not regulation.⁵⁴

The dispute in *Alameda Newspapers* arose after Alameda Newspapers, Inc. ("ANI") purchased the *Oakland Tribune*.⁵⁵ ANI subsequently terminated the Tribune's contracts with several unions, relocated its printing operation out of Oakland and dismissed more than 400 of the Tribune's 600 employees.⁵⁶ In response, the unions launched a boycott of the Tribune newspaper and other ANI publications.⁵⁷ The unions asked the Oakland City Council ("Council") to support the boycott.⁵⁸ The Council replied by passing a written resolution replacing the Tribune as the city paper, endorsing the boycott and urging residents of Oakland to follow suit.⁵⁹ In addition, the Council passed a separate voice resolution directing city officials to discontinue all official advertising in the Tribune and cancel the city's subscriptions to that newspaper.⁶⁰ The Council's directive resulted in a total loss to ANI of thirteen subscriptions and approximately \$40,000 per year in gross advertising revenue.⁶¹

ANI filed an action in United States District Court for the Northern District of California alleging that the two resolutions were preempted by the NLRA under the Supremacy Clause of the United States Constitution.⁶² The district court found in favor of ANI, holding that the resolutions were regulatory and, thus, subject to preemption.⁶³ The

⁵⁴ See *id.* at 1409, 153 L.R.R.M. (BNA) at 2258.

⁵⁵ See 95 F.3d at 1409, 153 L.R.R.M. (BNA) at 2258.

⁵⁶ See *id.* at 1410, 153 L.R.R.M. (BNA) at 2258.

⁵⁷ See *id.* The unions included the Northern California Newspaper Guild, Local 52, Newspaper Guild and other unions comprising the Conference of Newspaper Unions. See *id.* at 1410 n.1, 153 L.R.R.M. (BNA) at 2258 n.1.

⁵⁸ See *id.* at 1410, 153 L.R.R.M. (BNA) at 2258.

⁵⁹ See *id.*, 153 L.R.R.M. (BNA) at 2258-59. The resolution provided, in part:

RESOLVED: That the City of Oakland open up the process to select the official newspaper of the City; and, be it FURTHER RESOLVED: That the Oakland City Council endorse the boycott of the Oakland Tribune and other Alameda Newspaper Group publications; and, be it FURTHER RESOLVED: That the City Council urges all citizens of Oakland to stop purchasing and advertising in the Oakland Tribune and Alameda Newspaper Group publications until the labor dispute is successfully concluded.

Id., 153 L.R.R.M. (BNA) at 2959 (citation omitted).

⁶⁰ See *Alameda Newspapers*, 95 F.3d at 1410, 153 L.R.R.M. (BNA) at 2259.

⁶¹ See *id.*

⁶² See *id.* at 1411, 153 L.R.R.M. (BNA) at 2259. The Supremacy Clause states, in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ." U.S. CONST. art. VI, cl. 2.

⁶³ See *Alameda Newspapers*, 95 F.3d at 1411, 153 L.R.R.M. (BNA) at 2259. The district court

Newspaper Guild, one of the unions participating in the boycott, subsequently filed the appeal.⁶⁴

The United States Court of Appeals for the Ninth Circuit reversed, emphasizing that it was reluctant to infer preemption.⁶⁵ The court stated that congressional intent is the ultimate touchstone of preemption analysis and looked first to congressional intent to guide its analysis.⁶⁶ The court reasoned that a basic assumption of preemption analysis is that Congress did not intend to displace state law.⁶⁷ Thus, absent a clear congressional expression of intent to preempt, the court stated that it would not infer preemption.⁶⁸

In holding that the NLRA did not preempt the Council's resolutions, the court stated that a prerequisite to preemption under either the *Garmon* or *Machinists* preemption principles is a finding that the action in question constituted a regulation, i.e., it must have a "real effect" on federal rights.⁶⁹ The court then focused its analysis on the City's resolutions to determine whether they had such an effect.⁷⁰ The court first examined the written resolution that announced the City's support of the boycott and urged that city residents do likewise.⁷¹ The court observed that the resolution had no binding effect and was only a declaration of principle or conscience.⁷² The court reasoned that the City has a fundamental right as a sovereign government both to endorse the boycott and communicate with its citizens to do the same.⁷³

concluded that the resolutions were an attempt by the City to interfere in the free play of economic forces and, therefore, they were preempted by the NLRA under the *Machinists* doctrine. *See id.* The district court permanently enjoined the City from endorsing the boycott, canceling any subscriptions, replacing the *Tribune* as the newspaper of record for the City or purchasing any print media advertising space or subscriptions for the City in a publication other than the *Tribune* because of the dispute. *See id.* The district court also ordered the City to reinstate any subscriptions that were canceled because of the dispute. *See id.*, 153 L.R.R.M. (BNA) at 2260.

⁶⁴ *See id.*

⁶⁵ *See id.* at 1413, 153 L.R.R.M. (BNA) at 2261. As a preliminary matter, the court denied ANI's claim that it should dismiss the case for lack of jurisdiction because the Guild met the NLRA's Article III actual injury standing requirement. *See id.* at 1412, 153 L.R.R.M. (BNA) at 2260. The court reasoned that the threat of particularized injury from the district court's order was sufficient to satisfy the requirement. *See id.*

⁶⁶ *See id.* at 1413, 153 L.R.R.M. (BNA) at 2261.

⁶⁷ *See id.*

⁶⁸ *See Alameda Newspapers*, 95 F.3d at 1413, 153 L.R.R.M. (BNA) at 2261.

⁶⁹ *See id.*

⁷⁰ *See id.* at 1414, 153 L.R.R.M. (BNA) at 2261.

⁷¹ *See id.*

⁷² *See id.* The court distinguished its decision from *General Electric Co. v. Callahan*, 294 F.2d 60 (1st Cir. 1961), *cert. dismissed*, 369 U.S. 832, which it incorrectly described as a Fifth Circuit case. *See id.*

⁷³ *See Alameda Newspapers*, 95 F.3d at 1414, 153 L.R.R.M. (BNA) at 2261. The court noted

The court further reasoned that because the resolution was purely advisory in nature, it did not curtail ANI's right to freely use all of its economic weapons.⁷⁴

In addition, the court concluded that the second part of the written resolution, in which the City encouraged its citizens to support the boycott, was not regulatory.⁷⁵ The court reasoned that if the City's announcement of support for the boycott did not constitute regulation even though it *implicitly* urged residents to act, then *explicitly* urging residents to act in support of the boycott could likewise be non-regulatory.⁷⁶ The written resolution, the court concluded, was thus merely a non-binding expressive declaration of principle that had no "real effect" on ANI's federal rights.⁷⁷

The court next examined the oral resolution.⁷⁸ The court held that the oral resolution did not constitute regulation because its economic impact on the newspaper was not different from that of an ordinary customer and, thus, it had no "real effect" on ANI.⁷⁹ The court reasoned that the City of Oakland was merely an ordinary customer of the newspaper who did not wield any significant economic power over the *Tribune* through its actions.⁸⁰ Because neither the City's thirteen subscriptions, nor its advertising dollars had a large economic impact on the paper, the court reasoned that the City's conduct was more like a symbolic gesture than a regulatory action.⁸¹ The court concluded that the City's actions did not coerce either party, nor did they curtail the economic self-help weapons available to the parties or otherwise interfere with the bargaining process.⁸²

that local governments have a long tradition of issuing such pronouncements, which are akin to political speech. *See id.*, 153 L.R.R.M. (BNA) at 2261-62. The court reasoned that the principles of federalism and democracy must allow local governments to express their opinions on matters of interest to the local community. *See id.* at 1415, 153 L.R.R.M. (BNA) at 2262-63. The court explained that preempting the City from making such pronouncements would be an extraordinary intrusion into the rights of local governments. *See id.*, 153 L.R.R.M. (BNA) at 2262.

⁷⁴ *See id.*, 153 L.R.R.M. (BNA) at 2263.

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *See Alameda Newspapers*, 95 F.3d at 1415, 153 L.R.R.M. (BNA) at 2262.

⁷⁹ *See id.* at 1415-16, 1417, 153 L.R.R.M. (BNA) at 2263, 2264. The court differentiated situations in which a city is not just one of many customers, but a significant patron of the boycotted business, purchasing an unusually large quantity of a given product. *See id.* Or, where a city could use its powers to tax and spend, exercising the aggregate purchasing power of its citizens and thereby acting differently than the typical consumer. *See id.* The court recognized that under such circumstances, a city's actions could have a substantial impact on the bargaining parties' negotiations, thus interfering with their federal rights under the NLRA. *See id.*

⁸⁰ *See id.* at 1417, 153 L.R.R.M. (BNA) at 2264.

⁸¹ *See id.*

⁸² *See id.* at 1418, 153 L.R.R.M. (BNA) at 2265. The court relied on cases that held preemption

The Ninth Circuit explained that the district court's holding would have required the City to involuntarily patronize a boycotted business, in effect forcing the City to cross picket lines against its wishes.⁸³ The court reasoned that Congress did not intend to limit the freedom of workers to seek support from *all* customers of a boycotted company, including municipalities.⁸⁴ Nor did Congress contemplate limiting the rights of local governments to participate in boycotts where they have no "real effect," an effect that is neither different from that of an ordinary customer nor governmental in nature.⁸⁵ The court reasoned that doing so would compel municipalities to act in a manner that would violate their civic consciences.⁸⁶ Absent a clear congressional expression, the court stated that it would not preempt municipal actions that are not regulatory.⁸⁷

In *Alameda Newspapers*, the Ninth Circuit never explicitly recognized that city governments are fundamentally different than other private third parties concerned with a labor dispute's outcome.⁸⁸ Private actors often participate in a boycott of a manufacturer based on

law was inapplicable to municipal actions that had no significant impact on the parties involved in the labor controversy. *See id.* at 1419, 153 L.R.R.M. (BNA) at 2266. For example, the *Alameda* court relied on *Image Carrier Corp. v. Beame* where the United States Court of Appeals for the Second Circuit held that a New York City policy

permitting only union printers to bid on 'flat-form printing' business was not preempted because . . . the City's flat-form printing needs, as distinguished from either the City's overall printing needs or the total printing work available in and around New York City, are not substantial enough to have even an indirect coercive effect on non-union employees to abandon their [federal] right not to join a union.

Alameda Newspapers, 95 F.3d at 1419, 153 L.R.R.M. (BNA) at 2266 (citing *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1202, 97 L.R.R.M. (BNA) 2259, 2262 (2d Cir. 1977)). In addition, the court rejected ANI's reliance on *Golden State Transit*. *See id.* at 1420, 153 L.R.R.M. (BNA) at 2266-67. The court emphasized that in *Golden State Transit*, the City of Los Angeles had life or death power over the taxi company by virtue of its authority to control the renewal of the company's franchise. *See id.*, 153 L.R.R.M. (BNA) at 2267. In contrast, the City of Oakland's support of the boycott in *Alameda Newspapers* merely favored the workers' side during the dispute as an ordinary customer with minuscule economic effect. *See id.* Thus, whereas the City of Los Angeles used its governing power to coerce, the court concluded that the City of Oakland acted without wielding any governmental powers. *See id.*

⁸³ *See Alameda Newspapers*, 95 F.3d at 1416, 153 L.R.R.M. (BNA) at 2263, 2264.

⁸⁴ *See id.*, 153 L.R.R.M. (BNA) at 2263.

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See id.*, 153 L.R.R.M. (BNA) at 2264. As a final matter, the court dismissed ANI's claim that the City had violated 42 U.S.C. § 1983 by depriving ANI of its rights under the First Amendment of the United States Constitution. *See id.* at 1421, 153 L.R.R.M. (BNA) at 2268. The court held that the First Amendment protects newspapers from retaliation by government agencies on account of articles or views that the newspapers have published (or intend to publish), not against retaliation because of the internal policies or business conduct of their owners. *See id.*

⁸⁸ *See Boston Harbor*, 507 U.S. at 229, 142 L.R.R.M. (BNA) at 2654.

a labor policy concern rather than a profit motive.⁸⁹ Under these circumstances, the private actor is attempting to "regulate" the manufacturer's actions through economic pressure.⁹⁰ When a state acts as regulator, however, it performs a role that is characteristically governmental rather than private.⁹¹ As regulators of private conduct, a state is more powerful than private parties.⁹² The court implicitly reasoned, however, that this distinction is less significant when a state acts as a market participant with no interest in governing.⁹³ Therefore, the court rightly ignored the City's unique governing powers because in this case, the City did not use them to influence the outcome; rather, it acted as an ordinary participant.⁹⁴

The court's holding is consistent with Congress's intent to allow disputing parties the ability to apply economic pressure on one another.⁹⁵ The court correctly reasoned that Congress did not entirely bar local governments from acting within the labor arena.⁹⁶ Rather, Congress only barred local governments from acting forcibly to curtail or prohibit parties from applying economic pressure.⁹⁷ Accordingly, when a local government acts as a market participant with no interest in setting policy, its actions are not regulatory in nature; the municipality is free to act within the labor arena without fear of preemption.⁹⁸ In contrast, when a local government uses its power in a coercive manner, it destroys the congressionally designed balance of power and frustrates Congress's decision to leave open parties' options to use economic pressure.⁹⁹ Therefore, *Alameda Newspapers* clarifies one type of municipal action that is not subject to preemption.¹⁰⁰

Although the holding tips the scales in labor's favor, it stops short of altering the balance that Congress intended to create between management and labor.¹⁰¹ The City's actions did not negatively impact the parties' federal rights and, therefore, did not even amount to a

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *Boston Harbor*, 507 U.S. at 229, 142 L.R.R.M. (BNA) at 2654; *Alameda Newspapers*, 95 F.3d at 1417, 153 L.R.R.M. (BNA) at 2264.

⁹⁴ See *Alameda Newspapers*, 95 F.3d at 1417, 153 L.R.R.M. (BNA) at 2264.

⁹⁵ See *id.*

⁹⁶ See *id.*, 153 L.R.R.M. (BNA) at 2265.

⁹⁷ See *id.*

⁹⁸ See *id.*, 153 L.R.R.M. (BNA) at 2264.

⁹⁹ See *Alameda Newspapers*, 95 F.3d at 1418, 153 L.R.R.M. (BNA) at 2265.

¹⁰⁰ See *id.* at 1409, 153 L.R.R.M. (BNA) at 2258.

¹⁰¹ See *id.* at 1416 n.15, 153 L.R.R.M. (BNA) at 2263 n.15.

"thumb on the scale."¹⁰² Because Congress did not explicitly prohibit municipalities from expressions of opinion or ordinary marketplace participation, federal law should not preempt such actions where they do not prohibit the parties from using the self-help weapons available to them.¹⁰³ The court rightly pointed out that the principles of democracy and federalism must militate against preemption, especially in circumstances where a deeply felt local interest is at issue.¹⁰⁴ In this case, the City did not act to control the participants, but only to suggest that its citizens participate in a desired manner.¹⁰⁵ The court correctly protected the City's right to express its interest in local matters where these expressions were not regulatory in nature.¹⁰⁶ Courts should not consider expressions of opinion and/or participation in a boycott as an ordinary customer to be actions that have a real and regulatory effect on disputing parties.¹⁰⁷

Moreover, although Congress sought to preserve the balance of power between the interests of the employer and the employee, true neutrality is not possible in the face of a strike or boycott.¹⁰⁸ All consumers effectively support one side or the other.¹⁰⁹ Purchasing a boycotted product provides economic support to the manufacturer, whereas refusing to do so constitutes withholding such support and benefits the union.¹¹⁰ The district court's injunction would have required the City to take a position that favors the employer.¹¹¹ Therefore, although the Ninth Circuit's holding tips the scales in favor of the union, any action (or lack thereof) by the City would invariably have had a similar effect on the disputing parties.¹¹² In this case, however, the effect was minimal.¹¹³ Thus, because the City's actions were not regulatory, the congressionally intended balance of power remained undisturbed.¹¹⁴

¹⁰² See *id.*

¹⁰³ See *id.* at 1415, 153 L.R.R.M. (BNA) at 2262-63.

¹⁰⁴ See *Alameda Newspapers*, 95 F.3d at 1415, 153 L.R.R.M. (BNA) at 2262-63.

¹⁰⁵ See *id.*, 153 L.R.R.M. (BNA) at 2263.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 1409, 153 L.R.R.M. (BNA) at 2258.

¹⁰⁸ See *id.* at 1416, 153 L.R.R.M. (BNA) at 2263.

¹⁰⁹ See *Alameda Newspapers*, 95 F.3d. at 1416 & n.15, 153 L.R.R.M. (BNA) at 2263 & n.15.

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See *id.* The court reserved judgment on the issue as to whether a municipality may ever be compelled to take a position in a labor dispute by preemption where the city's withholding or furnishing of economic support would have a "real effect" on the parties. See *id.*

¹¹³ See *id.* at 1418, 153 L.R.R.M. (BNA) at 2265.

¹¹⁴ See *Alameda Newspapers*, 95 F.3d at 1418, 153 L.R.R.M. (BNA) at 2265.

In conclusion, in *Alameda Newspapers, Inc. v. City of Oakland*, the United States Court of Appeals for the Ninth Circuit held that a city may refuse to do business with an employer during the course of a labor boycott and may even suggest its residents do likewise.¹¹⁵ Only municipal actions constituting regulation are subject to NLRA preemption.¹¹⁶ The court stated that local government conduct must have a "real effect" on labor relations to constitute regulation.¹¹⁷ Consequently, when a city's actions do not interfere with disputing parties' ability to use self-help economic weapons, these actions will not constitute regulation subject to preemption.¹¹⁸ The court's holding is consistent with congressional intent to allow parties in a labor conflict to apply economic pressure on one another.¹¹⁹ Accordingly, the Ninth Circuit rightly refused to compel the City of Oakland to support the employer in a labor dispute against its civic conscience.¹²⁰

II. FAIR LABOR STANDARDS ACT

A. * "Actual Deductions" Test for Determining Overtime Eligibility: *Auer v. Robbins*¹

Section 207 of the Fair Labor Standards Act of 1938 ("FLSA" or "Act") requires employers to pay employees time and a half for hours worked in excess of forty hours in a week.² Section 213(a)(1) of the Act contains an exemption from this overtime requirement for employees who are employed in a "bona fide executive, administrative, or professional capacity."³ Under regulations promulgated by the Secretary of Labor ("Secretary"), one requirement for exempt status under

¹¹⁵ *Id.* at 1409, 153 L.R.R.M. (BNA) at 2258.

¹¹⁶ *See id.*

¹¹⁷ *See id.* at 1413, 153 L.R.R.M. (BNA) at 2261.

¹¹⁸ *See id.* at 1418, 153 L.R.R.M. (BNA) at 2265.

¹¹⁹ *See Machinists*, 427 U.S. at 141, 92 L.R.R.M. (BNA) at 2884; *Alameda Newspapers*, 95 F.3d at 1413, 153 L.R.R.M. (BNA) at 2261.

¹²⁰ *See Alameda Newspapers*, 95 F.3d at 1409, 153 L.R.R.M. (BNA) at 2258.

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¹ 117 S.Ct. 905, 3 Wage & Hour Cas. 2d (BNA) 1249 (1997).

² *See* 29 U.S.C. § 207(a)(1) (1995). Section 207(a)(1) states, in relevant part: "[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." *Id.*

³ 29 U.S.C. § 213(a)(1) (1995). Section 213(a)(1) states, in relevant part: "(a) The provisions of . . . section 207 of this title shall not apply with respect to—(1) any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor] . . .)." *Id.*

§ 213(a)(1) is that the employee be paid a specified amount on a "salary basis."⁴

Under 29 C.F.R. § 541.118(a) ("§ 541.118(a)"), employees are paid on a salary basis if they receive a predetermined salary which is not "subject to reduction" for variations in the quality or quantity of their work, including disciplinary deductions of less than a week.⁵ The circuits have differed on the question of whether an employee's pay is "subject to" deductions if there is merely a theoretical possibility of such deductions or if actual deductions must be made.⁶ The United States Supreme Court resolved the conflict in *Auer v. Robbins*, holding that employees are not entitled to overtime payment where there is not an actual practice of making deductions and where an employer's

⁴ See 29 C.F.R. §§ 541.1(f), 541.2(c), 541.3(c) (1997). An employee must also satisfy a "duties test" to be exempt from the overtime pay requirements. See, e.g., *Auer*, 117 S.Ct. at 908. To read about the duties involved in the "duties test," see 29 C.F.R. §§ 541.1(a)-(f), 541.2(a)-(e), and 541.3(a)-(e).

⁵ 29 C.F.R. § 541.118(a) (1997). As an exception to this no-deduction rule, the regulation allows employers to impose penalties for infractions of safety rules of major significance without affecting the employee's exempt status. See *id.* § 541.118(a)(5). In addition, deductions may be made from an exempt employee's pay for absences of a day or more for personal reasons other than sickness or accident. See *id.* § 541.118(a)(2). Similarly, deductions may be made for absences of a day or more for sickness or disability if the deduction is made in accordance with a policy of providing compensation for loss of salary occasioned by sickness and disability. See *id.* § 541.118(a)(3). On the other hand, deductions may not be made for absences caused by jury duty, attendance as a witness or temporary military leave. See *id.* § 541.118(a)(4). The employer may, however, deduct any amounts received by an employee for performing those duties. See *id.* If an employer makes an illegal deduction inadvertently or for reasons other than lack of work, § 541.118(a)(6) gives the employer a "window of correction" to rectify the deduction. See *id.* § 541.118(a)(6). Thus, the employee remains exempt if the employer reimburses the employee for the deduction and promises to comply in the future. See *id.* The text of § 541.118(a)(6) provides as follows:

The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

Id.

⁶ See, e.g., *Yourman v. Dinkins*, 84 F.3d 655, 656, 3 Wage & Hour Cas. 2d (BNA) 525, 526 (2d Cir. 1996); *Carpenter v. City of Denver*, 82 F.3d 353, 354, 3 Wage & Hour Cas. 2d (BNA) 362, 362 (10th Cir. 1996); *McDonnell v. City of Omaha*, 999 F.2d 293, 297, 1 Wage & Hour Cas. 2d (BNA) 785, 787-88 (8th Cir. 1993); *Shockey v. City of Newport News*, 887 F.2d 18, 20, 1 Wage & Hour Cas. 2d (BNA) 788, 790 (4th Cir. 1993); *Atlanta Prof'l Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805, 30 Wage & Hour Cas. (BNA) 169, 172 (11th Cir. 1991); *Abshire v. County of Kern*, 908 F.2d 483, 487-88, 29 Wage & Hour Cas. (BNA) 1417, 1420-21 (9th Cir. 1990).

payment policy does not create a significant likelihood of such deductions.⁷ *Auer* limits the number of exempt employees who may claim they are eligible for overtime, protects employers from massive overtime liability and clarifies the meaning of § 541.118(a).⁸

In 1993, in *Kinney v. District of Columbia*, the United States Court of Appeals for the District of Columbia held that District of Columbia ("District") employees were entitled to receive overtime pay because the District's payment policy theoretically subjected the employees to reductions in pay for partial-day absences.⁹ Plaintiffs were firefighters who sued the District for unpaid overtime compensation.¹⁰ Plaintiffs claimed that they were entitled to overtime because the District's pay system subjected them to hourly reductions in pay for partial-day absences.¹¹ The District responded that plaintiffs were exempt from the overtime pay requirement under § 541.118(a) because the mere possibility of deductions was not enough to require the District to pay overtime.¹²

The court concluded that the correct inquiry under § 541.118(a) is whether an employer can theoretically dock an employee's pay, not whether an employer actually has docked the pay.¹³ The court reasoned that the Secretary intended to exempt salaried employees from the overtime pay requirement precisely because they are given discretion in managing their time and activities.¹⁴ The court further reasoned that if employers pay employees under a system that subjects them, even theoretically, to hourly reductions in pay, then those employees lack that discretionary characteristic of salaried, or exempt, employees.¹⁵ Thus, the court held that the District employees were not exempt from receiving overtime pay because the District's payment policy theoretically subjected those employees to reductions in pay for partial-day absences.¹⁶

In 1993, in *McDonnell v. City of Omaha*, the United States Court of Appeals for the Eighth Circuit held that the mere possibility of pay deductions was not sufficient to entitle public employees to overtime pay but that employers must make actual pay deductions to entitle

⁷ 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁸ See *id.*

⁹ 994 F.2d 6, 11, 1 Wage & Hour Cas. 2d (BNA) 697, 700 (D.C. Cir. 1993).

¹⁰ See *id.* at 8, 1 Wage & Hour Cas. 2d (BNA) at 697.

¹¹ See *id.*, 1 Wage & Hour Cas. 2d (BNA) at 697-98.

¹² See *id.* at 8-9, 10-11, 1 Wage & Hour Cas. 2d (BNA) at 697-98, 699.

¹³ See *id.* at 11, 1 Wage & Hour Cas. 2d (BNA) at 699-700.

¹⁴ See *Kinney*, 994 F.2d at 11, 1 Wage & Hour Cas. 2d (BNA) at 700.

¹⁵ See *id.*

¹⁶ See *id.*

employees to overtime pay.¹⁷ Plaintiffs, assistant fire chiefs of the Omaha Fire Division, brought suit against the City of Omaha ("City").¹⁸ The City subjected plaintiffs' pay to reduction for partial-day absences unless they could charge the time to annual or sick leave.¹⁹ The plaintiffs never actually lost pay as a result of the absences of less than a day because they used accumulated leave to cover such absences.²⁰ The City argued that the mere possibility of a pay reduction did not entitle employees to overtime pay and that a deduction of compensatory benefits, such as sick or annual leave time, did not amount to a salary deduction.²¹

The court observed that under the City's policy, a salary reduction would occur only if the plaintiffs had no available paid leave.²² The court reasoned that annual, sick and compensatory leave did not constitute salary and that therefore a reduction in these types of leave was not a reduction in salary.²³ The court further reasoned that § 541.118(a) allowed for the practice of offsetting absences with accumulated leave time without affecting the employee's exempt status.²⁴ Thus, the court held that the mere possibility of pay deductions did not entitle public employees to overtime pay and that employers must make actual pay deductions before employees would be considered "subject to" deductions in salary and thereby entitled to overtime pay.²⁵

In 1993, in *Michigan Ass'n of Governmental Employees v. Michigan Department of Corrections*, the United States Court of Appeals for the Sixth Circuit held that where the employer's payment policy was ambiguous the mere possibility of pay deductions was not sufficient to entitle public employees to overtime pay.²⁶ Correction shift supervisors brought suit against their employer, the Michigan Department of Corrections ("State"), claiming that they were entitled to overtime pay.²⁷ The employees argued that under the employer's sick leave policy, their pay was subject to reduction for absences of less than one day if

¹⁷ 999 F.2d 293, 296, 297, 1 Wage & Hour Cas. 2d (BNA) 785, 787, 788 (8th Cir. 1993).

¹⁸ See *id.* at 294, 1 Wage & Hour Cas. 2d (BNA) at 785. The plaintiffs sought a declaratory judgment entitling them to overtime pay because the City subjected their pay to deductions for partial-day absences. See *id.*

¹⁹ See *id.* at 295, 1 Wage & Hour Cas. 2d (BNA) at 786.

²⁰ See *id.*

²¹ See *id.*

²² See *McDonnell*, 999 F.2d at 297, 1 Wage & Hour Cas. 2d (BNA) at 788.

²³ See *id.* at 298, 1 Wage & Hour Cas. 2d (BNA) at 788.

²⁴ See *id.* at 297, 1 Wage & Hour Cas. 2d (BNA) at 788.

²⁵ See *id.* at 296, 297, 1 Wage & Hour Cas. 2d (BNA) at 787, 788.

²⁶ 992 F.2d 82, 86, 1 Wage & Hour Cas. 2d (BNA) 574, 577, 578 (6th Cir. 1993).

²⁷ See *id.* at 83, 1 Wage & Hour Cas. 2d (BNA) at 575.

employees exhausted their leave credits and compensatory time.²⁸ The State claimed that the policy was meant to cover only absences of eight hours or more and further argued that none of the plaintiffs actually had been denied pay for absences of less than eight hours.²⁹

The court reasoned that the policy's language was more important than the presence of actual deductions.³⁰ First, the court explained, focusing on the policy language was consistent with the actual language of § 541.118(a).³¹ Second, the court observed, the policy would affect employees even if no reductions had occurred yet, because employees would rearrange their schedules and possibly sacrifice non-work activities to comply with the policy language.³² The court acknowledged, however, that the policy's language was ambiguous because it did not state specifically whether employees would receive pay reductions for absences of less than one day.³³

The court then examined the actual implementation of the pay deduction policy to clarify and interpret its meaning.³⁴ The court reasoned that because the State never reduced any plaintiffs' pay for absences of less than one day and because the plaintiffs could not point to any contradictory policy statements or actions, the State's interpretation that the policy applied only to absences of more than one day prevailed.³⁵ Thus, the court held that where the employer's payment policy was ambiguous, the mere possibility of pay deductions did not entitle public employees to overtime pay and the employer must make actual pay deductions to entitle employees to overtime pay.³⁶

During the *Survey* year, in *Auer v. Robbins*, the United States Supreme Court held that public employees were not entitled to receive overtime pay where there was not an "actual practice" of making pay deductions.³⁷ The Court further held that public employees were not

²⁸ See *id.* at 84-85, 1 Wage & Hour Cas. 2d (BNA) at 576.

²⁹ See *id.* at 85, 1 Wage & Hour Cas. 2d (BNA) at 576. Section 541.118(a)(2) explains that deductions may be made when an employee is absent from work for a day or more for personal reasons, other than sickness or accident. See 29 C.F.R. § 541.118(a)(2) (1997). The plaintiffs did not provide evidence that they had in fact suffered pay reductions, nor did they provide support for their belief that the policy applied to absences of less than eight hours. See *Michigan Ass'n of Governmental Workers*, 992 F.2d at 85, 1 Wage & Hour Cas. 2d (BNA) at 576.

³⁰ See *Michigan Ass'n of Governmental Workers*, 992 F.2d at 86, 1 Wage & Hour Cas. 2d (BNA) at 577.

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See *id.*

³⁵ See *Michigan Ass'n of Governmental Workers*, 992 F.2d at 86, 1 Wage & Hour Cas. 2d (BNA) at 577, 578.

³⁶ See *id.*

³⁷ 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

entitled to overtime pay where the employer's payment policy did not create a significant likelihood of such deductions.³⁸ The Court's decision in *Auer* resolves the conflict among the circuits about whether actual deductions must occur to trigger overtime pay requirements or whether the mere theoretical possibility of deductions is sufficient to make employees "subject to" salary reductions, thereby entitling employees to overtime pay.³⁹

In *Auer*, St. Louis police officers brought suit against members of the St. Louis Board of Police Commissioners ("Board").⁴⁰ The plaintiffs claimed that they were entitled to overtime pay because the Board's Police Manual ("Manual") subjected their pay to disciplinary deductions.⁴¹ The Manual nominally covered all department employees, both salaried and non-salaried.⁴² The Board took actual deductions from only one of the plaintiffs on one occasion.⁴³

The Board claimed that it required the ability to use the full range of disciplinary tools, including deductions, to maintain discipline where human lives were at stake on a daily basis.⁴⁴ The Board also argued that as a public sector employer, it had fewer disciplinary alternatives to pay deductions.⁴⁵ The Board contended that, consequently, the § 541.118(a) rule prohibiting pay deductions should not apply to public sector employees.⁴⁶ The Board further argued that the Secretary arbitrarily and capriciously failed to consider adequately whether § 541.118(a) should apply to public employees in violation of the Administrative Procedure Act ("APA").⁴⁷

The Court first addressed the Board's contention that § 541.118(a) should not apply to public sector employees.⁴⁸ The Court noted that the FLSA grants the Secretary broad authority to define the scope of exemption from overtime pay requirements.⁴⁹ The Court further noted that the Secretary had defined the scope in promulgat-

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.* at 908, 3 Wage & Hour Cas. 2d (BNA) at 1251.

⁴¹ See *id.* at 908, 910, 3 Wage & Hour Cas. 2d (BNA) at 1251-52, 1253.

⁴² See *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁴³ See *id.* at 910-11, 3 Wage & Hour Cas. 2d (BNA) at 1253. This officer suffered a one-time deduction for violating the residency requirement. See *id.*

⁴⁴ See *id.* at 909, 910, 3 Wage & Hour Cas. 2d (BNA) at 1252, 1253.

⁴⁵ See *id.* at 909, 3 Wage & Hour Cas. 2d (BNA) at 1252.

⁴⁶ See *id.*

⁴⁷ See 5 U.S.C. § 706(2)(A) (1995); *Auer*, 117 S.Ct. at 910, 3 Wage & Hour Cas. 2d (BNA) at 1253.

⁴⁸ See *Auer*, 117 S.Ct. at 909, 3 Wage & Hour Cas. 2d (BNA) at 1252.

⁴⁹ See 29 U.S.C. § 213(a)(1) (1995); *Auer*, 117 S.Ct. at 909, 3 Wage & Hour Cas. 2d (BNA) at 1252.

ing § 541.118(a).⁵⁰ The Court stated that because Congress did not speak directly on this issue, the Court must sustain the Secretary's approach in § 541.118(a), as long as that approach is reasonable.⁵¹

The Court reasoned that the Secretary's approach in § 541.118(a), which makes no distinction between private and public employers with regard to disciplinary deductions, was reasonable.⁵² The Court reasoned that the differences between private and public employees with respect to discipline are not so significant as to necessitate a large-scale revision of § 541.118(a)'s salary basis test.⁵³ The Court concluded that public employers can use other forms of discipline to enforce work rules, such as placing an officer on restricted duty.⁵⁴ The Court therefore upheld § 541.118(a) as applied to public employees and employers.⁵⁵

The Court then addressed the conflict among the circuits about whether the mere possibility of deductions was sufficient to entitle otherwise exempt employees to overtime pay, or whether actual deductions must occur to entitle those employees to overtime pay.⁵⁶ The Court adopted the Secretary's interpretation of § 541.118(a) as expressed in an amicus brief.⁵⁷ The Secretary argued that, for public employees to be entitled to overtime pay, employers must have an actual practice of making salary deductions.⁵⁸ If employers do not have an actual practice, they must have a clear and particularized policy

⁵⁰ See *Auer*, 117 S.Ct. at 909, 3 Wage & Hour Cas. 2d (BNA) at 1252.

⁵¹ See *id.* (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

⁵² See *id.* The Court also addressed the Board's contention that the Secretary's failure to consider adequately whether the disciplinary deduction rule should apply to public employers was arbitrary and capricious. See *id.* The Court noted the "veritable flood" of litigation against public employers about overtime eligibility since 1985, when the FLSA was extended to cover public employers. See *id.* See, e.g., *Carpenter v. City of Denver*, 82 F.3d 353, 354, 3 Wage & Hour Cas. 2d (BNA) 362, 362-63 (10th Cir. 1996); *Atlanta Prof'l Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805, 30 Wage & Hour Cas. (BNA) 169, 172 (11th Cir. 1991). The Court stated that given the large amount of litigation, the Secretary may need to consider formally whether the rule should apply to public employers. See *Auer*, 117 S.Ct. at 910, 3 Wage & Hour Cas. 2d (BNA) at 1253. The Court concluded, however, that the Board must petition the Department of Labor directly in accordance with APA procedures before seeking redress in the courts. See *id.* Sections 553(e), 555(e), 702 and 706 of the APA describe the procedure for petition to the agency for rulemaking. See 5 U.S.C. §§ 553(e), 555(e), 702, 706 (1995).

⁵³ See *Auer*, 117 S.Ct. at 909, 3 Wage & Hour Cas. 2d (BNA) at 1252.

⁵⁴ See *id.* at 910, 3 Wage & Hour Cas. 2d (BNA) at 1253.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.* at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁵⁸ See *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

which effectively communicates to employees that they will be subject to deductions in specific circumstances, thereby making deductions "significantly likely."⁵⁹ The Court reasoned that this interpretation of § 541.118(a) avoids the problem of massive overtime liability which would occur if a policy is vague or if it nominally applies to a large range of employees.⁶⁰

Applying the Secretary's approach, the Court reasoned that the Board's Manual did not communicate effectively that pay deductions would apply to the plaintiffs.⁶¹ The Court examined the policy, which was contained in the Manual and listed fifty-eight possible rule violations and penalties, including disciplinary deductions.⁶² The Court noted that all St. Louis police department employees—salaried and hourly—were nominally covered by the Manual.⁶³ The Court reasoned that therefore, the penalties and deductions may have referred only to the hourly employees.⁶⁴ Further, the Court explained, because the policy did not specify that the deductions applied solely to salaried employees, the plaintiffs could not infer that the penalties and deductions applied to them.⁶⁵ Furthermore, the Court concluded that the one-time deduction from one plaintiff's pay did not establish a likelihood that other salaried employees would be subject to deductions.⁶⁶

Finally, the Court applied the "window of correction" provision of § 541.118(a)(6) to the one officer's one-time deduction.⁶⁷ The Court reasoned that under § 541.118(a)(6), if deductions are either inadvertent or made for reasons other than lack of work, then employers can retain the exemption so long as they reimburse the employee and promise to comply in the future.⁶⁸ The Court also adopted the Secretary's interpretation of § 541.118(a)(6), as outlined in his amicus brief,

⁵⁹ *See id.*

⁶⁰ *See id.* The Court reasoned that the Secretary's interpretation of 29 C.F.R. § 541.118(a) is controlling unless plainly erroneous or inconsistent with that regulation. *See id.* The Court concluded that the Secretary's interpretation easily met this deferential standard. *See id.* The Court reasoned that the Secretary gave an acceptable and ordinary meaning to the phrase, "which amount is not subject to reduction." *See id.*

⁶¹ *See id.* at 911-12, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁶² *See id.* at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁶³ *See Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁶⁴ *See id.*

⁶⁵ *See id.* at 911-12, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁶⁶ *See id.* at 912, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁶⁷ *See* 29 C.F.R. § 541.118(a)(6) (1997); *Auer*, 117 S.Ct. at 912, 3 Wage & Hour Cas. 2d (BNA) at 1255.

⁶⁸ *See* 29 C.F.R. § 541.118(a)(6); *Auer*, 117 S.Ct. at 912, 3 Wage & Hour Cas. 2d (BNA) at 1255.

which does not require immediate payment.⁶⁹ Thus, the Court held that the plaintiffs were not entitled to overtime pay requirements where there was not an actual practice of making deductions and the payment policy did not create a significant likelihood of such deductions.⁷⁰

Auer clearly resolves the circuit court conflict to the advantage of employers.⁷¹ First, employers now will not be liable for massive amounts of overtime liability because *Auer* limits the number of exempt employees who can claim overtime eligibility under § 541.118(a).⁷² Second, an employee now is exempt unless the policy manual affirmatively communicates through a clear and particularized policy that otherwise exempt employees are subject to disciplinary deductions or that such deductions are significantly likely.⁷³ Thus, employers whose policies do not communicate affirmatively such a message need not change their policies at all because the Court defaulted to a presumption of non-liability for employers.⁷⁴ The Court refused to assign liability to an employer whose policy on deductions could have applied either to hourly employees, exempt employees or both, and instead allowed that policy to stand.⁷⁵ Thus, even if an employer's policy is vague and could apply to either exempt or hourly employees, *Auer* does not require the employer to pay overtime as long as there is not an actual practice of making disciplinary deductions from exempt employees' pay.⁷⁶

Auer provides another advantage for employers because it does not require them to pay overtime even if an illegal deduction occurs

⁶⁹ See 29 C.F.R. § 541.118(a)(6); *Auer*, 117 S.Ct. at 912, 3 Wage & Hour Cas. 2d (BNA) at 1255.

⁷⁰ See *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁷¹ See John D. Canoni, *Supreme Court Revises the Salary Basis Test for Exempt Employees*, 23 EMPLOYEE REL. L.J. 105, 109, 110, 111 (1997). *Auer* arguably applies to both public and private employers. See *id.* at 106. Although the decision interprets 29 C.F.R. § 541.118 in the context of a public employer, the regulation itself applies to both private and public employers. Interview with Thomas Kohler, Professor, Boston College Law School, in Newton, Mass. (Oct. 16, 1997).

⁷² See *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254; Canoni, *supra* note 71, at 105.

⁷³ See *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁷⁴ See *id.*; Canoni, *supra* note 71, at 109.

⁷⁵ See *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁷⁶ See *id.*; Canoni, *supra* note 71, at 109. Employers should, however, clarify their policies to eliminate employee confusion, unnecessary grievances and needless litigation that could arise from that confusion. See *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254. Specifically, employers should change their policy language in handbooks and manuals that discuss discipline and clearly articulate that disciplinary deductions do not apply to exempt employees. See Canoni, *supra* note 71, at 110. One way for employers to accomplish this task is by adding a disclaimer to their manuals, such as, "these disciplinary rules do not apply to exempt employees," "exempt employees, except for safety rules of major significance, are not subject to reductions in pay for

because § 541.118(a)(6) provides a "window of correction."⁷⁷ As *Auer* made clear, if deductions are either inadvertent or made for reasons other than lack of work, then employers can retain the exemption so long as they reimburse the employee and promise to comply in the future.⁷⁸ Furthermore, *Auer*, in adopting the Secretary's interpretation, does not require employers to make the reimbursement within a specific amount of time.⁷⁹

In addition to providing distinct advantages to employers, *Auer* is also very practical.⁸⁰ First, the Court saved millions of tax dollars from being spent on overtime payments by limiting the number of employees who are eligible for overtime pay.⁸¹ Second, the decision will reduce litigation over who is eligible for overtime, which in turn will reduce costs.⁸² Furthermore, *Auer* gives both employers and employees clear instructions about who is exempt.⁸³

From the perspective of exempt employees, *Auer* clearly limits their ability to sue for overtime.⁸⁴ Salaried employees cannot maintain actions for overtime payment if their employer's policy only theoretically subjects them to disciplinary deductions.⁸⁵ Otherwise exempt employees can claim eligibility for overtime only when the employer establishes an actual practice of making deductions or when a clear and particularized policy effectively communicates that deductions are significantly likely.⁸⁶ And even if illegal deductions occur, an employee may not prevail in a lawsuit if the employer reimburses the employee.⁸⁷

suspensions of less than a week" or "exempt employees will be subject to unpaid suspensions only as permitted by the FLSA." *See id.*

⁷⁷ *See* 29 C.F.R. § 541.118(a)(6) (1997); *Auer*, 117 S.Ct. at 912, 3 Wage & Hour Cas. 2d (BNA) at 1255; Canoni, *supra* note 71, at 111.

⁷⁸ *See* 29 C.F.R. § 541.118(a)(6); *Auer*, 117 S.Ct. at 912, 3 Wage & Hour Cas. 2d (BNA) at 1255.

⁷⁹ 117 S.Ct. at 912, 3 Wage & Hour Cas. 2d (BNA) at 1255. The Court is unclear on just how far the "window of correction" of 29 C.F.R. § 541.118(a)(6) extends. *See id.*; Canoni, *supra* note 71, at 111. The Court allowed the St. Louis Police Department to rectify the single officer's deductions by reimbursing him. *See Auer*, 117 S.Ct. at 912, 3 Wage & Hour Cas. 2d (BNA) at 1255. The Court, however, did not explain how many improper deductions an employer could rectify by reimbursement before establishing an "actual practice" of making deductions. *See id.* at 911, 912, 3 Wage & Hour Cas. 2d (BNA) at 1254. Thus, employers might be able to stretch this window to correct a substantial number of deductions. *See* Canoni, *supra* note 71, at 111-12.

⁸⁰ *See generally* 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁸¹ *See* 57 Fed. Reg. 37,666, 37,671, 37,672 (1992); *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254; Canoni, *supra* note 71, at 105.

⁸² *See Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See Auer*, 117 S.Ct. at 912, 3 Wage & Hour Cas. 2d (BNA) at 1255.

Because *Auer* does not require employers to modify their vague overtime policies, employees must continue to live with the uncertainty and confusion those vague policies create.⁸⁸ Employees may be confused by a policy that does not explain clearly when an employee can receive overtime and what kinds of deductions an exempt employee must endure.⁸⁹ Furthermore, if the theoretical possibility of deductions exists in an unclear policy, actual deductions need not occur for employees to be affected by that policy, as the Sixth Circuit pointed out in *Michigan Ass'n of Governmental Employees v. Michigan Department of Corrections*.⁹⁰ Employees who are uninformed of their rights will most likely comply with their employer's disciplinary deduction policy, whether or not that policy legally can apply to those employees.⁹¹

In addition, because employers will owe overtime to fewer exempt employees, those employers might subject their exempt employees to more duties and longer working hours instead of spreading those hours among hourly employees.⁹² Moreover, absent the threat of large overtime liability, employers have less incentive to hire more employees to spread out the hours for all employees.⁹³ Longer hours for exempt employees produce employee stress and fatigue and, in the case of police forces, compromise public safety.⁹⁴

Auer leaves several issues unanswered.⁹⁵ For example, it is unclear how many employees suffering deductions will constitute an "actual

⁸⁸ See *id.* at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁸⁹ See *id.* at 911-12, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁹⁰ 992 F.2d 82, 86, 1 Wage & Hour Cas. 2d (BNA) 574, 577 (6th Cir. 1993).

⁹¹ See *id.*

⁹² See Brief for the AFL-CIO as Amicus Curiae in Support of Petitioners at 5, *Auer* (No. 95-897); Brief for National Association of Police Organizations, Inc., as Amicus Curiae in Support of Petitioners at 3, 10, *Auer* (No. 95-897).

⁹³ See Brief for AFL-CIO at 5, *Auer*; Brief for National Association of Police Organizations at 3, *Auer*.

⁹⁴ See Brief for National Association of Police Organizations at 13, 14, *Auer*. To the extent that unions cover such issues as exempt employees' overtime eligibility, unions should ensure that employees know their rights, especially if employers choose not to rewrite their policies. See generally *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254. Unions should inform employees that disciplinary deductions do not apply to them and that if their employer establishes a practice of making such deductions, they are then entitled to overtime pay. See generally *id.* Furthermore, unions should petition employers to clarify their policies to comply with *Auer*. See generally *id.* In addition, because exempt employees now may be subject to additional hours without overtime compensation, unions should bargain with employers for higher rates of pay and ceilings on hours, as well as encourage legislation aimed at limiting hours for exempt employees. See Brief for AFL-CIO at 5, *Auer*; Brief for National Association of Police Organizations at 3, *Auer*. Public unions, particularly unions of law enforcement personnel, may have additional concerns about excessive work hours due to employee fatigue, stress and public safety. See Brief for AFL-CIO at 5, *Auer*; Brief for National Association of Police Organizations at 3, 13-14, *Auer*.

⁹⁵ See 117 S.Ct. at 911, 912, 3 Wage & Hour Cas. 2d (BNA) at 1254.

practice" of making deductions on the part of the employer.⁹⁶ *Auer*, which involved only one isolated instance of actual deductions, makes clear that just one employee who suffers an improper deduction will not convert an entire class of employees from salaried to hourly status.⁹⁷ In addition, the Secretary's amicus brief explains that an "actual practice" involves more than a few isolated deductions under unusual circumstances and that deductions must occur "with some frequency."⁹⁸ It is not clear, however, exactly how many instances of improper deductions establish an "actual practice" of making deductions.⁹⁹

Similarly, the employee manual in *Auer* did not contain disciplinary rules that constituted a "significant likelihood" of deductions.¹⁰⁰ *Auer* involved a vague employee manual in which the disciplinary deductions could have applied to both salaried and hourly employees.¹⁰¹ But what constitutes a positive example of a policy that makes deductions significantly likely remains an open question.¹⁰² The question also remains whether vague policy language will always presumptively comply with § 541.118(a), just as the Manual's disciplinary deductions presumptively applied to hourly employees alone.¹⁰³

In sum, the Supreme Court held in *Auer* that public employees were not eligible for overtime pay where there was not an "actual practice" of making pay deductions.¹⁰⁴ The Court further held that public employees were not eligible for overtime pay where the employer's payment policy did not create a significant likelihood of such deductions.¹⁰⁵ *Auer* resolves the conflict among the circuit courts as to whether the theoretical possibility of deductions can trigger overtime liability or whether actual deductions must occur.¹⁰⁶

Auer benefits employers because it limits the number of employees who are eligible for overtime payments.¹⁰⁷ *Auer* also helps both employers and employees by clarifying who is eligible for overtime.¹⁰⁸ But

⁹⁶ See *id.* at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁹⁷ See *id.* at 911-12, 3 Wage & Hour Cas. 2d (BNA) at 1254.

⁹⁸ See *id.* at 912, 3 Wage & Hour Cas. 2d (BNA) at 1254; Brief for the United States as Amicus Curiae Supporting Affirmance at 22, *Auer* (No. 95-897).

⁹⁹ See *Auer*, 117 S.Ct. at 911, 912, 3 Wage & Hour Cas. 2d (BNA) at 1254.

¹⁰⁰ See *id.* at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

because the Court approved a vague policy manual, employees might continue to endure confusing disciplinary policies.¹⁰⁹ Thus, employers should change their policy manuals to comply clearly with *Auer*, which both will prevent future lawsuits and give their employees a clear policy of deductions and discipline.¹¹⁰

¹⁰⁹ See *Auer*, 117 S.Ct. at 911, 3 Wage & Hour Cas. 2d (BNA) at 1254.

¹¹⁰ See *id.*

EMPLOYMENT LAW

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. **Employment Relationship Is Touchstone for Defining "Employer" Under Title VII: Walters v. Metropolitan Educational Enterprises*¹

Title VII of the Civil Rights Act of 1964 ("Title VII") was enacted by Congress to provide for equality in employment and to prevent discrimination by an employer on the basis of an individual's race, color, religion, sex or national origin.² Section 2000e of Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"³ A split in the circuit courts occurred over the interpretation of this phrase.⁴ The Supreme Court, in *Walters v. Metropolitan Educational Enterprises*, resolved this circuit split, ruling that the proper test for determining how many employees an employer "has," for purposes of Title VII, is to look not at how many employees an employer is compensating on a given day, but at the number of employees with whom the employer has an employment relationship.⁵ To determine the number of employment relationships an employer has, the Supreme Court adopted the "payroll method," which looks to how many employees are on an employer's payroll in order to calculate the number of existing employment relationships.⁶ The Court's adoption of this method permits the inclusion of part-time employees in determining whether an employer falls within Title VII's coverage.⁷ This decision prevents employers from circumventing Title VII's remedial goals by hiring part-time workers.⁸

In 1983, in *Zimmerman v. North American Signal Co.*, the United States Court of Appeals for the Seventh Circuit held that, for purposes

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¹ 117 S. Ct. 660, 72 Fair Empl. Prac. Cas. (BNA) 1211 (1997).

² See 42 U.S.C. § 2000e-2(a)(1) (1994).

³ See *id.* § 2000e(b).

⁴ See generally *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 32 Fair Empl. Prac. Cas. (BNA) 1511 (1st Cir. 1983) (adopting "payroll method"); *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 31 Fair Empl. Prac. Cas. (BNA) 634 (7th Cir. 1983) (adopting "counting method").

⁵ 117 S. Ct. 660, 664-66, 72 Fair Empl. Prac. Cas. (BNA) 1211, 1213-14 (1997).

⁶ See *id.*

⁷ See *id.*

⁸ See *infra* notes 67-72 and accompanying text.

of determining whether an employer had the requisite number of employees for the requisite number of days under the Age Discrimination in Employment Act ("ADEA"), workers who were paid hourly were not "employees" for days when they were neither working nor on paid leave.⁹ In *Zimmerman*, the plaintiff sued a former employer alleging unlawful age discrimination after he was terminated from his position as vice president.¹⁰ The United States District Court for the Northern District of Illinois dismissed the suit for lack of subject matter jurisdiction after determining that the defendant-employer did not have enough employees to fall within the coverage of the ADEA.¹¹ The plaintiff appealed the district court's ruling, asserting that the method used to calculate the number of employees for each week was incorrect.¹² The plaintiff asserted that the number of employees should be determined by counting the number of employees on the payroll for each work week ("payroll method").¹³ The Seventh Circuit agreed with the district court ruling that the method for determining the number of employees for purposes of the ADEA was to count the number of salaried employees, and to include hourly employees only on days that they actually worked or were on paid leave ("counting method").¹⁴ The court reasoned that since the ADEA provides that an employer must have twenty or more employees "for each working day" of a week before a week can be counted, it would be inconsistent with this language to allow hourly employees who only work certain days each week to be counted as working each working day.¹⁵ The court reasoned that although the ADEA is a remedial statute and was envisioned to allow for a liberal construction of the term "employer," a court's inter-

⁹ 704 F.2d at 353-54, 31 Fair Empl. Prac. Cas. (BNA) at 638. Section 630(b) of the ADEA contains similar language to Title VII § 2000e(b) regarding how to define an employer. See 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b) (1994). The construction in *Zimmerman* of "employer" in the context of the ADEA has been extended to other anti-discrimination legislation including Title VII. See *EEOC v. Metropolitan Educ. Enters.*, 60 F.3d 1225, 1226, 68 Fair Empl. Prac. Cas. (BNA) 499, 499 (7th Cir. 1995).

¹⁰ See 704 F.2d at 350, 31 Fair Empl. Prac. Cas. (BNA) at 635.

¹¹ See *id.*

¹² See *id.* The plaintiff also challenged the number of employees employed by the defendant, alleging that: 1) certain employees were missing from the employment records; 2) certain officers and directors should be counted as employees; and 3) certain persons listed on the defendant's group medical plan should be counted as employees. See *id.*, 31 Fair Empl. Prac. Cas. (BNA) at 636. The Seventh Circuit examined these claims, asserting that even if the plaintiff's assertions were correct, including these groups of employees would not be material to the outcome of the case. See *id.* at 351-52, 31 Fair Empl. Prac. Cas. (BNA) at 636-37.

¹³ See *id.* at 353, 31 Fair Empl. Prac. Cas. (BNA) at 638.

¹⁴ See *id.* at 354, 31 Fair Empl. Prac. Cas. (BNA) at 638.

¹⁵ See *Zimmerman*, 704 F.2d at 353-54, 31 Fair Empl. Prac. Cas. (BNA) at 638.

pretation of "employer" cannot contradict the statutory definition.¹⁶ The court stated that Congress could have exempted smaller employers from the ADEA's coverage by defining the jurisdictional minimum in terms of number of employees on the payroll each week or by any other variation.¹⁷ The Seventh Circuit reasoned that since Congress chose to define the limitation as the number of employees on "each working day," the method of counting the number of employees who are actually present at work on each day was the correct way to determine whether an employer "has" enough employees to fall within the ADEA's coverage.¹⁸

In 1983, in *Thurber v. Jack Reilly's, Inc.*, the United States Court of Appeals for the First Circuit held that regular part-time employees are employees within the meaning of the Title VII provision defining "employer."¹⁹ In *Thurber*, a waitress filed suit against her employer under Title VII alleging that her employer discriminated against her on the basis of sex when the employer refused to train her to be a bartender and then reduced her schedule after she complained.²⁰ The United States District Court for the District of Massachusetts held that it had subject matter jurisdiction, ruling that the number of employees should be determined by examining the payroll, and not by counting the number of employees who report to work on a given day.²¹ The First Circuit, in affirming the district court, reasoned that a congressional majority intended Title VII to be a remedial statute having a broad effect.²² The *Thurber* court rejected the employer's argument that the words "for each working day" in the statute indicated a congressional intent to restrict application of Title VII to employers who had fifteen or more employees actually at work each working day.²³ Instead the court reasoned that, although the "payroll method" of interpreting Title VII might cause a few "Mom and Pop" stores, who employ a large number of part-time employees, to fall within the statute, the only burden on such businesses is that they refrain from discriminating against their employees.²⁴ The *Thurber* court held that

¹⁶ See *id.* at 353, 31 Fair Empl. Prac. Cas. (BNA) at 638.

¹⁷ See *id.* at 354, 31 Fair Empl. Prac. Cas. (BNA) at 639.

¹⁸ See *id.*

¹⁹ 717 F.2d 633, 634-35, 32 Fair Empl. Prac. Cas. (BNA) 1511, 1512-13 (1st Cir. 1983); see also *Vera-Lozano v. International Broad.*, 50 F.3d 67, 69-70, 67 Fair Empl. Prac. Cas. (BNA) 667, 668-69 (1st Cir. 1995) (re-affirming *Thurber*).

²⁰ See 717 F.2d at 633-34, 32 Fair Empl. Prac. Cas. (BNA) at 1511-12.

²¹ See *id.* at 634, 32 Fair Empl. Prac. Cas. (BNA) at 1512.

²² See *id.* at 634-35, 32 Fair Empl. Prac. Cas. (BNA) at 1512.

²³ See *id.* at 634, 32 Fair Empl. Prac. Cas. (BNA) at 1512.

²⁴ See *id.* at 635, 32 Fair Empl. Prac. Cas. (BNA) at 1512-13.

for purposes of Title VII, an employer "has" an employee when there is an employment relationship, not only when that employee is physically present at work.²⁵

In 1992, in *EEOC v. Garden & Associates*, the United States Court of Appeals for the Eighth Circuit held that part-time employees could not be counted towards the number of employees for purposes of the ADEA when they were neither working nor on paid leave for each day of each work week.²⁶ In *Garden & Associates*, the Equal Employment Opportunity Commission ("EEOC") brought suit on behalf of an employee alleging that the employee was wrongfully terminated from her position as a bookkeeper because of her age.²⁷ The United States District Court for the Southern District of Iowa dismissed the suit for lack of subject matter jurisdiction, ruling that the defendant-employer did not have enough employees to be considered an "employer" under the ADEA.²⁸ In affirming the district court's decision, the Eighth Circuit adopted the "counting method," holding that part-time employees who do not work each day of the work week were not "employees" for that week under the ADEA.²⁹

During the *Survey* year, in *Walters v. Metropolitan Educational Enterprises*, the United States Supreme Court resolved the circuit split in favor of the First Circuit's interpretation.³⁰ The Court held that the proper method of determining the number of employees an employer "has" for purposes of Title VII is by examining the number of employees with whom the employer has an employment relationship on the day in question, regardless of whether the employee worked or was compensated on a given day.³¹ The Court determined that although in only nine weeks of 1990 was Metropolitan Educational Enterprises, Inc. ("Metropolitan") actually compensating fifteen or more employees on

²⁵ See 717 F.2d at 634-35, 32 Fair Empl. Prac. Cas. (BNA) at 1512-13.

²⁶ 956 F.2d 842, 843, 58 Fair Empl. Prac. Cas. (BNA) 136, 137 (8th Cir. 1992).

²⁷ See *id.*, 58 Fair Empl. Prac. Cas. (BNA) at 136.

²⁸ See *id.*

²⁹ See *id.*, 58 Fair Empl. Prac. Cas. (BNA) at 137.

³⁰ 117 S. Ct. at 664, 666, 72 Fair Empl. Prac. Cas. (BNA) at 1213, 1215.

³¹ See *id.* The United States District Court for the Northern District of Illinois granted defendant's motion to dismiss on subject matter jurisdiction grounds, ruling that the defendant did not have enough employees to fall within Title VII's definition of "employer." See *id.* at 662-63, 72 Fair Empl. Prac. Cas. (BNA) at 1212. The United States Court of Appeals for the Seventh Circuit affirmed the district court's ruling, reasoning that the proper method for determining the number of employees under Title VII was by counting the number of employees who were either working or on paid leave for each working day. See *id.* at 663-64, 72 Fair Empl. Prac. Cas. (BNA) at 1212-13. The circuit court reasoned that a plain text reading of the phrase "for each working day" within the context of the statute led to a natural interpretation that the phrase looks to the number of employees physically at work on each day of the week. See *EEOC v. Metropolitan*

each working day, it had between fifteen and seventeen employees on its payroll for most of the year.³² The Court reasoned that this gave Metropolitan the requisite minimum number of employees for purposes of Title VII.³³ The difference in the number of employees being compensated and those on the payroll was a result of Metropolitan's employment of two part-time workers who ordinarily skipped one working day each week.³⁴ The Court reasoned that part-time workers should be included because the touchstone for determining how many employees an employer "has" is by looking solely at the number of existing employment relationships.³⁵

In *Walters*, plaintiff Darlene Walters ("Walters") was employed by defendant Metropolitan, a retail distributor of encyclopedias, dictionaries and other educational material.³⁶ In 1990, Walters filed a charge with the EEOC, claiming that Metropolitan (and Metropolitan's President Leonard Bieber ("Bieber")) had discriminated against her on account of her sex when it failed to promote her to the position of credit manager.³⁷ Shortly after filing her grievance with the EEOC, Metropolitan fired her.³⁸ In 1993, the EEOC filed suit against Metropolitan and Bieber, in which Walters intervened, alleging that the firing of Walters constituted unlawful retaliation.³⁹ Metropolitan filed a motion to dismiss for lack of subject matter jurisdiction claiming that it did not fall within the Title VII statutory definition of "employer" because it did not have at least fifteen employees "for each working day in each of twenty weeks within the current or preceding calendar year."⁴⁰

Educ. Enters., 60 F.3d 1225, 1228, 68 Fair Empl. Prac. Cas. (BNA) 499, 500-01 (7th Cir. 1995); see also *Zimmerman*, 704 F.2d at 353-54, 31 Fair Empl. Prac. Cas. (BNA) at 638. To conclude otherwise, the circuit court stated, was to render the words "for each working day" superfluous and "contrary to the explicit definitional restriction chosen by Congress." *Metropolitan*, 60 F.3d at 1227, 68 Fair Empl. Prac. Cas. (BNA) at 500 (quoting *Zimmerman*, 704 F.2d at 353-54, 31 Fair Empl. Prac. Cas. (BNA) at 638).

³² See *Walters*, 117 S. Ct. at 663, 72 Fair Empl. Prac. Cas. (BNA) at 1212. Metropolitan's working days are Monday through Friday and the current and preceding calendar years for purposes of this claim are 1990 and 1989. See *id.* The parties stipulated that in 1989, Metropolitan failed to satisfy the 15 employee minimum. See *id.*

³³ See *id.* at 664-66, 72 Fair Empl. Prac. Cas. (BNA) at 1213-15.

³⁴ See *id.* at 663, 72 Fair Empl. Prac. Cas. (BNA) at 1212.

³⁵ See *id.* at 666, 72 Fair Empl. Prac. Cas. (BNA) at 1215.

³⁶ See *id.* at 662, 72 Fair Empl. Prac. Cas. (BNA) at 1212.

³⁷ See *Walters*, 117 S. Ct. at 662, 72 Fair Empl. Prac. Cas. (BNA) at 1212.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See 42 U.S.C. § 2000e(b); *Walters*, 117 S. Ct. at 662-63, 72 Fair Empl. Prac. Cas. (BNA) at 1212.

Both parties agreed that for determining who was an "employee," all individuals with whom the employer had a relationship fell under the statute.⁴¹ Metropolitan, however, argued that under § 2000e(b) an "employer" only "has" an employee on a given day when the employer is compensating the individual on that day.⁴² Walters, on the other hand, contended that the test for determining how many employees an employer "has" should be no different than the test for determining who qualifies as an "employee."⁴³ The United States Court of Appeals for the Seventh Circuit agreed with Metropolitan, reasoning that the "counting method" was the proper test for determining how many employees an employer "has."⁴⁴

The Supreme Court held that the payroll method represents a fairer reading of the statutory phrase concerning how many employees an employer "has."⁴⁵ The Court reasoned that, in the absence of an indication to the contrary, words in a statute should be given their ordinary and contemporary meaning.⁴⁶ In this case, the ordinary and contemporary meaning of how many employees an employer "has," according to the Court, is the number of employees with whom the employer has an employment relationship.⁴⁷ The Court concluded that to accept the Seventh Circuit's counting method would be contrary to the ordinary and contemporary meaning of how many employees an employer "has."⁴⁸ The Court reasoned that to count only employees who are actually working on a given day would lead to counting even salaried employees only on days they were actually working.⁴⁹ The Court found it unlikely that Congress would have prescribed a system that would essentially require employers to keep daily attendance records of their salaried employees, a task that would be impractical to administer.⁵⁰ Furthermore, the Court reasoned that Metropolitan's proposed test—which asked "[h]ow many employees were you com-

⁴¹ See 42 U.S.C. § 2000e(f); *Walters*, 117 S. Ct. at 663, 72 Fair Empl. Prac. Cas. (BNA) at 1212.

⁴² See 42 U.S.C. § 2000e(b); *Walters*, 117 S. Ct. at 663, 72 Fair Empl. Prac. Cas. (BNA) at 1212; see also *EEOC v. Garden & Assocs.*, 965 F.2d 842, 843, 58 Fair Empl. Prac. Cas. (BNA) 136, 137 (8th Cir. 1992).

⁴³ See *Walters*, 117 S. Ct. at 663, 72 Fair Empl. Prac. Cas. (BNA) at 1212-13. The plaintiff in *Walters* cited cases from the Fifth and First Circuits that adopted the payroll method. See *id.*; *Vera-Lozano*, 50 F.3d at 69-70, 67 Fair Empl. Prac. Cas. (BNA) at 668-69; *Thurber*, 717 F.2d at 634-35, 32 Fair Empl. Prac. Cas. (BNA) at 1512-13; *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979, n.7, 22 Fair Empl. Prac. Cas. (BNA) 319, 323, n.7 (5th Cir. 1980).

⁴⁴ See *Walters*, 117 S. Ct. at 663, 72 Fair Empl. Prac. Cas. (BNA) at 1212-13.

⁴⁵ See *id.* at 664, 72 Fair Empl. Prac. Cas. (BNA) at 1213.

⁴⁶ See *id.* (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993)).

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *Walters*, 117 S. Ct. at 664, 72 Fair Empl. Prac. Cas. (BNA) at 1213.

⁵⁰ See *id.*

pensating on [a given] day?"—simply is not a test that can be derived from any possible reading of the statutory text.⁵¹

The Supreme Court further ruled that the statutory phrase "for each working day" was not rendered superfluous by giving the phrase "has fifteen or more employees" its ordinary meaning.⁵² The Court reasoned that without this further qualification it would be unclear whether an employee who arrives or departs mid-work week would count toward the fifteen-employee minimum for that week.⁵³ The phrase "for each working day" eliminates any ambiguity in this instance for it makes clear that such an employee would not count.⁵⁴ The Court stated that the phenomena of mid-week commencement and termination of employment, which the Seventh Circuit ruled would be rare and thus not a proper justification for the phrase "for each working day," was, in fact, not such a rare occurrence.⁵⁵

As a result, the Court held that the payroll method was the better test for determining the number of employees with whom an employer had a relationship.⁵⁶ The Court reasoned that the payroll method was the simpler method and gave greater consistency to the language of § 2000e(b) of Title VII.⁵⁷ The Supreme Court ruled that on the basis of this method, Metropolitan did have the requisite number of employees for purposes of Title VII.⁵⁸

The Supreme Court in *Walters* correctly resolved the circuit split on this issue by adopting an approach that comports with the legislative intent of Title VII.⁵⁹ Title VII was enacted by Congress to act as a remedial measure to protect employees from discrimination in employment, and the majority in Congress, at the time of enactment, intended to give Title VII broad effect.⁶⁰ Specifically, the congressional record clearly indicates that the definition of "employer" was intended to be

⁵¹ See *id.*

⁵² See *id.*, 72 Fair Empl. Prac. Cas. (BNA) at 1213-14.

⁵³ See *id.*, 72 Fair Empl. Prac. Cas. (BNA) at 1214.

⁵⁴ See *Walters*, 117 S. Ct. at 664-65, 72 Fair Empl. Prac. Cas. (BNA) at 1214. The Court stated that the "mere" elimination of evident ambiguity is ample—indeed, admirable—justification for the inclusion of a statutory phrase” *Id.* at 665, 72 Fair Empl. Prac. Cas. (BNA) at 1214.

⁵⁵ See *id.* In fact, the Court noted that even Metropolitan had 10 mid-week arrivals and departures during 1990. See *id.*

⁵⁶ See *id.* at 665-66, 72 Fair Empl. Prac. Cas. (BNA) at 1214. The Court stated that neither interpretation of the coverage provision is an entirely accurate measure of the size of a business, but that the payroll method was the easiest method to administer and helped eliminate potentially complex and expensive factual inquiries. See *id.* at 665, 72 Fair Empl. Prac. Cas. (BNA) at 1214.

⁵⁷ See *id.* at 665-66, 72 Fair Empl. Prac. Cas. (BNA) at 1214.

⁵⁸ See *id.* at 666, 72 Fair Empl. Prac. Cas. (BNA) at 1215.

⁵⁹ See *supra* notes 42-58 and accompanying text.

⁶⁰ See *Thurber*, 717 F.2d at 634-35, 32 Fair Empl. Prac. Cas. (BNA) at 1512 (citing 110 Cong. Rec. 13,087-93 (1964) (Comments of Senators Morse, Saltonstall and others)).

read broadly.⁶¹ For example, Senator Dirksen, a co-sponsor of Title VII, stated that the definition of "employer" in Title VII was borrowed from the Unemployment Compensation Act,⁶² which states that an employee is to be counted for each day that an employment relationship exists, regardless of whether the employee reports to work each day.⁶³ Furthermore, the EEOC, which acts as the primary agency for implementing Title VII and whose position is entitled to great deference, adopted the payroll method for the ADEA.⁶⁴ The ADEA defines "employer" in the same way that Title VII does.⁶⁵ This resolution creates a sound policy for defining an employer under Title VII, for it prevents complex and expensive factual inquiry and litigation into the number of employees an employer "has."⁶⁶

The *Walters* decision prevents employers from circumventing the reach of the protections afforded employees under Title VII.⁶⁷ Prior to the Court's ruling, employers in the Seventh and Eighth Circuits could avoid liability under Title VII merely by utilizing more part-time employees who could not be included when determining how many employees an employer "has."⁶⁸ The Court's decision in *Walters* serves to extend the protections of Title VII to part-time workers, who are a growing percentage of the work force.⁶⁹

The inclusion, under Title VII, of more "Mom and Pop" businesses, which may employ more part-time employees, imposes on these businesses only the relatively small burden of refraining from discriminating against their employees.⁷⁰ Congressional debate surrounding the enactment of Title VII revealed a concern for the over-regulation of small family and neighborhood businesses.⁷¹ The *Walters* decision, however, continues to shield smaller employers who truly do not have an employment relationship with fifteen or more employees from the scrutiny of Title VII and, thus, is not in conflict with the legislative intent behind Title VII.⁷²

⁶¹ See *id.*

⁶² See *id.* at 634, 32 Fair Empl. Prac. Cas. (BNA) at 1512 (citing 110 CONG. REC. 13,087).

⁶³ See 26 U.S.C. § 3304 (1954).

⁶⁴ See *Walters*, 117 S. Ct. at 663, 72 Fair Empl. Prac. Cas. (BNA) at 1213.

⁶⁵ See *id.*

⁶⁶ See *id.* at 665-66, 72 Fair Empl. Prac. Cas. (BNA) at 1214.

⁶⁷ See *supra* notes 42-58 and accompanying text.

⁶⁸ See *supra* notes 9-18, 26-29 and accompanying text.

⁶⁹ See *supra* notes 42-58 and accompanying text.

⁷⁰ See *Thurber*, 717 F.2d at 635, 32 Fair Empl. Prac. Cas. (BNA) at 1512-13.

⁷¹ See *id.* at 634, 32 Fair Empl. Prac. Cas. (BNA) at 1512.

⁷² See *supra* notes 42-58 and accompanying text; see also *Thurber*, 717 F.2d at 634, 32 Fair Empl. Prac. Cas. (BNA) at 1512.

In sum, the Supreme Court held in *Walters* that the touchstone for determining how many employees an employer "has" for purposes of Title VII is the employment relationship.⁷³ The Court reasoned that the payroll method is the proper method for determining the number of employees with whom an employer has an employment relationship.⁷⁴ The resolution of the circuit split surrounding this issue gives full and contemporary meaning to the words in Title VII's definition of "employer" and is consistent with the legislative intent behind Title VII by protecting a larger portion of the workforce from discrimination in employment.⁷⁵ The *Walters* decision provides for the inclusion of a greater number of businesses by permitting the inclusion of part-time employees in determining whether an employer "has" enough employees to trigger Title VII provisions.⁷⁶ This decision resolves the circuit court split, furthers the broad remedial purpose behind the passage of Title VII, encompasses part-time workers who play a greater role in the workforce and prevents the exploitation of these part-time employees by employers attempting to use them as a tool for circumventing the anti-discriminatory purpose of Title VII.⁷⁷

*B.*Term "Employees" as Used in Anti-Retaliation Provision of Title VII Includes Former Employees: Robinson v. Shell Oil Co.*¹

Title VII of the Civil Rights Act of 1964 ("Title VII") is sweeping, remedial legislation which was enacted to proscribe a vast range of discriminatory conduct and applies to virtually all employers.² The anti-retaliation provision of Title VII ("§ 704(a)") prohibits an employer from discriminating against any employees or applicants for employment who have either availed themselves of Title VII's protection or assisted others in doing so.³ In *Robinson v. Shell Oil Co.*, the Supreme Court held that former employees are included within the

⁷³ See 117 S. Ct. at 664-66, 72 Fair Empl. Prac. Cas. (BNA) at 1213-15.

⁷⁴ See *id.*

⁷⁵ See *supra* notes 42-58 and accompanying text.

⁷⁶ See *supra* notes 42-58 and accompanying text.

⁷⁷ See *supra* notes 42-58 and accompanying text.

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¹ 117 S. Ct. 843, 72 Fair Empl. Prac. Cas. (BNA) 1856 (1997).

² See *Robinson v. Shell Oil Co.*, No. 93-1562, 1995 WL 25831, at *1, 66 Fair Empl. Prac. Cas. (BNA) 1285 (4th Cir. Jan. 18, 1995). Title VII provides in pertinent part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (1982).

³ See 42 U.S.C. § 2000e-3(a).

term "employees" as used in § 704(a), resolving a conflict among the circuits.⁴ As a result, an employer may not retaliate against a former employee who has filed a Title VII claim against it even though the employment relationship has terminated.⁵ The Court found that former employees were included within the term "employees" as used in § 704(a) because to hold otherwise would be inconsistent with the broader context and primary purpose of Title VII and would vitiate the protection provided under § 704(a).⁶

In 1991, in *Reed v. Shepard*, the United States Court of Appeals for the Seventh Circuit held that § 704(a) does not protect former employees from post-employment retaliation.⁷ In *Reed*, an employee claimed that her employer wrongfully discharged her for confronting a superior on matters relating to possible sex discrimination.⁸ The plaintiff alleged further that her employer had subjected her to post-employment retaliation by physically threatening her on a number of occasions after she refused to drop her lawsuit.⁹ The court found that the alleged retaliatory activities, because they were subsequent to and unrelated to the plaintiff's employment, did not constitute adverse employment action within the meaning of Title VII.¹⁰ The court thus held that former employees were not "employees" who are protected under § 704(a).¹¹

In 1992, in *Polsby v. Chase*, the United States Court of Appeals for the Fourth Circuit held that the anti-retaliation provision of Title VII does not protect former employees.¹² *Polsby* involved an employee of the National Institute of Neurological and Communicative Disorders

⁴ See *Robinson*, 117 S. Ct. at 846, 849, 72 Fair Empl. Prac. Cas. (BNA) at 1857, 1860. The Second, Third, Seventh, Ninth, Tenth and Eleventh Circuits held that the term "employees" as used in § 704(a) included former employees while the Fourth Circuit held that the term "employees" as used in § 704(a) did not include former employees. Compare *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200, 202, 64 Fair Empl. Prac. Cas. (BNA) 1414, 1419, 1420 (3rd Cir. 1994) (former employees are "employees" under § 704(a)) with *Robinson v. Shell Oil Co.*, 70 F.3d 325, 332, 69 Fair Empl. Prac. Cas. (BNA) 522, 527 (4th Cir. 1995) (former employees are not "employees" under § 704(a)).

⁵ See *Robinson*, 117 S. Ct. at 848-49, 72 Fair Empl. Prac. Cas. (BNA) at 1859-60.

⁶ See *id.*

⁷ 939 F.2d 484, 492-93, 56 Fair Empl. Prac. Cas. (BNA) 997, 1004-05 (7th Cir. 1991).

⁸ See *id.* at 487-88, 56 Fair Empl. Prac. Cas. (BNA) at 1000.

⁹ See *id.* at 492, 56 Fair Empl. Prac. Cas. (BNA) at 1004. The alleged post-employment retaliation consisted of a grand jury investigation of the plaintiff's alleged illegal jail activities, a mysterious physical attack on her person by a disguised assailant urging her to drop her case against the department, disturbing late-night phone calls threatening her with reprisals for her lawsuit and someone shooting at her car while she was driving. See *id.*

¹⁰ See *id.* at 492-93, 56 Fair Empl. Prac. Cas. (BNA) at 1004.

¹¹ See *id.*

¹² 970 F.2d 1360, 1365, 1367, 59 Fair Empl. Prac. Cas. (BNA) 712, 716, 718 (4th Cir. 1992).

and Stroke ("NINCDS").¹³ The plaintiff claimed that NINCDS did not extend her yearly contract because she consulted an NINCDS administrator, whom she mistakenly thought to be an Equal Employment Opportunity Commission ("EEOC") counselor, concerning numerous alleged acts of sex discrimination.¹⁴ Five months after her termination, and while her claim was still pending, the plaintiff requested a letter from her former employer describing her training so that she could obtain board certification from the American Board of Psychiatry and Neurology.¹⁵ Although NINCDS had informed the plaintiff when she was hired that she would receive residency credit applicable to certification, the letter that NINCDS sent to the American Board of Psychiatry and Neurology reflected a new policy.¹⁶ Without informing the plaintiff, NINCDS stated in its letter that it gave no credit towards residency training.¹⁷ Additionally, the plaintiff claimed that her former employer began to slander her professional competence after she requested the letter.¹⁸

The Fourth Circuit examined the clear language of § 704(a) and concluded that former employees were intentionally omitted from the anti-retaliation protection of Title VII because Congress only included "applicants for employment" along with "employees" in the provision.¹⁹ The court declined to base its decision on policy considerations or to analyze the purpose of the statute, opting instead to interpret the term "employees" according to its ordinary, contemporary and common meaning.²⁰ Furthermore, the court noted that the enumerated unlawful employment practices that Title VII explicitly forbids did not include post-employment discrimination, regardless of its severity.²¹ Thus, the court held that the term "employees" as used in § 704(a) did not include former employees.²²

In 1994, in *Charlton v. Paramus Board of Education*, the United States Court of Appeals for the Third Circuit held that the term "employees," as used in the anti-retaliation provision of Title VII, included former employees.²³ In *Charlton*, the Paramus School District

¹³ See *id.* at 1361-62, 59 Fair Empl. Prac. Cas. (BNA) at 713.

¹⁴ See *id.* at 1362, 59 Fair Empl. Prac. Cas. (BNA) at 713.

¹⁵ See *id.*, 59 Fair Empl. Prac. Cas. (BNA) at 714.

¹⁶ See *id.*

¹⁷ See *Polsby*, 970 F.2d at 1362, 59 Fair Empl. Prac. Cas. (BNA) at 714.

¹⁸ See *id.*

¹⁹ See *id.* at 1365, 59 Fair Empl. Prac. Cas. (BNA) at 716.

²⁰ See *id.*

²¹ See *id.*

²² See *Polsby*, 970 F.2d at 1365, 1367, 59 Fair Empl. Prac. Cas. (BNA) at 716, 718.

²³ 25 F.3d 194, 200, 202, 64 Fair Empl. Prac. Cas. (BNA) 1414, 1419, 1420 (3rd Cir. 1994).

terminated a tenured school teacher after she rebuffed the sexual advances of a superior.²⁴ The plaintiff claimed that, in retaliation for her post-termination pursuit of a Title VII discrimination action, the Paramus School District commenced proceedings to revoke her New Jersey state teaching certificate.²⁵

The court noted that the purpose of the statute was the determining factor in discerning the scope of protection under § 704(a).²⁶ Thus, the court concluded that the term "employees" included former employees when a retaliatory act was in reprisal for a protected act and arose out of, or was related to, the employment relationship.²⁷ The court reasoned that Congress must not have intended Title VII's protection from retaliatory acts to end at the time of termination when the termination itself is the basis of the Title VII claim.²⁸ Thus, the court held that the term "employees," as used in the anti-retaliation provision of Title VII, included former employees.²⁹

In 1996, in *Veprinsky v. Fluor Daniel, Inc.*, the United States Court of Appeals for the Seventh Circuit, clarifying its previous position in *Reed*, held that the term "employees" as used in § 704(a) included former employees when post-termination acts of retaliation adversely affected the plaintiff's employment opportunities or were otherwise related to the former employment relationship.³⁰ In *Veprinsky*, an employee filed a discriminatory discharge claim and subsequently alleged that his former employer retaliated against him in several ways for filing the claim.³¹ The court distinguished *Reed* by emphasizing that it had not intended to exclude completely former employees from pro-

The Second, Ninth and Tenth Circuits have also found that the term "employees" as used in § 704(a) includes former employees. See *O'Brien v. Sky Chef's, Inc.*, 670 F.2d 864, 869, 28 Fair Empl. Prac. Cas. (BNA) 1690, 1694 (9th Cir. 1982); *Patchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055, 18 Fair Empl. Prac. Cas. (BNA) 691, 692, 693 (2nd Cir. 1978); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1166, 16 Fair Empl. Prac. Cas. (BNA) 26, 29 (10th Cir. 1977).

²⁴ See *Charlton*, 25 F.3d at 196, 64 Fair Empl. Prac. Cas. (BNA) at 1415.

²⁵ See *id.*

²⁶ See *id.* at 200, 64 Fair Empl. Prac. Cas. (BNA) at 1418.

²⁷ See *id.*, 64 Fair Empl. Prac. Cas. (BNA) at 1419.

²⁸ See *id.*, 64 Fair Empl. Prac. Cas. (BNA) at 1418.

²⁹ See *Charlton*, 25 F.3d at 200, 202, 64 Fair Empl. Prac. Cas. (BNA) at 1419, 1420.

³⁰ 87 F.3d 882, 895, 71 Fair Empl. Prac. Cas. (BNA) 170, 171, 182 (7th Cir. 1996); see *Reed*, 939 F.2d at 492-93, 56 Fair Empl. Prac. Cas. (BNA) at 1004-05.

³¹ See *Veprinsky*, 87 F.3d at 882, 71 Fair Empl. Prac. Cas. (BNA) at 171. The alleged retaliatory activities included providing false information to Veprinsky's subsequent employer, refusing to consider rehiring him for another position and informing the placement firm with which Veprinsky was working that he had filed the EEOC charge. See *id.* at 883, 71 Fair Empl. Prac. Cas. (BNA) at 172. Furthermore, the defendant's director of human resources arranged for legal representation for an individual that Veprinsky was suing in an unrelated action. See *id.*

tection under the anti-retaliation provision of Title VII.³² Rather, it found that those acts subsequent to and unrelated to the plaintiff's employment fell outside the purview of the statute.³³ The court analyzed the term "employees" in the context of furthering the broad remedial purposes of Title VII instead of relying merely on plain meaning.³⁴ Because discriminatory discharge represents one of the more common forms of unlawful employment actions, the court reasoned that the anti-retaliation provision of Title VII would be considerably less effective if it did not include former employees within its scope.³⁵ The court thus held that § 704(a) included former employees when an employer's post-termination acts of retaliation adversely affected the plaintiff's future employment opportunities or were otherwise related to the employment relationship.³⁶

During the *Survey* year, in *Robinson v. Shell Oil Co.*, the United States Supreme Court held that the term "employees," as used in § 704(a) of Title VII, includes former employees.³⁷ The Court stated that, given that the term "employees" is ambiguous as used in § 704(a), it is more consistent with the broader context of Title VII and the primary purpose of § 704(a) to include former employees within the meaning of the term.³⁸ By holding that the term "employees" as used in § 704(a) includes former employees, the Court resolved the circuit conflict.³⁹

³² See *id.*; *Reed*, 939 F.2d at 492-93, 56 Fair Empl. Prac. Cas. (BNA) at 1004.

³³ See *Veprinsky*, 87 F.3d at 886, 71 Fair Empl. Prac. Cas. (BNA) at 174.

³⁴ See *id.* at 889, 71 Fair Empl. Prac. Cas. (BNA) at 177.

³⁵ See *id.* at 890, 71 Fair Empl. Prac. Cas. (BNA) at 178.

³⁶ See *id.* at 891, 71 Fair Empl. Prac. Cas. (BNA) at 178. A district court in Illinois recently applied this standard in *Murphy v. Village of Hoffman Estates*, 959 F. Supp. 901, 907-08 (N.D. Ill. 1997).

³⁷ 117 S. Ct. 843, 849, 72 Fair Empl. Prac. Cas. (BNA) 1856, 1860 (1997). This decision is in accord with decisions interpreting the anti-retaliation provisions of similar statutes as including former employees in their protection. See *id.* See, e.g., *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088-89, 44 Fair Empl. Prac. Cas. (BNA) 569, 572 (5th Cir. 1987) (holding that the term "employees" in the anti-retaliation provision of the Age Discrimination in Employment Act ("ADEA") includes former employees). Similarly, the *Robinson* decision has influenced lower courts' interpretations of other labor statutes. See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860. See, e.g., *Sada v. Robert F. Kennedy Med. Ctr.*, 65 Cal. Rptr. 2d 112, 126-27 (Dist. Cal. 1997) (anti-retaliation provision of California's Fair Employment and Housing Act covers former applicants); *DeFlavio v. Lord & Taylor, Inc.*, 566 N.W.2d 661, 665, 667 (Mich. App. Ct. 1997) (anti-retaliation provision of Michigan's Civil Rights Act covers former employees); *McKeever v. Ironworker's Dist. Council*, No. Civ. A. 96-5858, 1997 WL 109569, at *2, 73 Fair Empl. Prac. Cas. (BNA) 1000, 1002 (E.D. Pa. Mar. 7, 1997) (anti-retaliation provision of ADEA covers former employees).

³⁸ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860.

³⁹ See *id.* at 846-49, 72 Fair Empl. Prac. Cas. (BNA) at 1857, 1860.

The dispute in *Robinson* developed after the defendant fired the plaintiff.⁴⁰ The plaintiff filed a charge with the EEOC alleging that racial bias motivated his termination.⁴¹ The plaintiff then applied for employment with another company.⁴² While the plaintiff's EEOC charge was pending, his prospective employer contacted the defendant for an employment reference.⁴³ The plaintiff alleged that the defendant, in violation of the anti-retaliation provision of Title VII, had provided his prospective employer with false information and a negative job reference in retaliation for his having filed a discriminatory discharge claim with the EEOC.⁴⁴

The district court, citing *Polsby*, dismissed the complaint holding that the anti-retaliation provision did not apply to former employees.⁴⁵ When the plaintiff appealed, the Fourth Circuit Court of Appeals originally reversed by a divided panel, holding that the term "employees" as used in § 704(a) included former employees.⁴⁶ Concentrating its analysis on Congress's purpose in enacting the sweeping, remedial legislation of Title VII, the court stated that a literal interpretation of the term "employees" would hinder the enforcement mechanism of the statute.⁴⁷ The court concluded that including former employees in the protection of § 704(a) was consistent with Congress's intent to strengthen, not weaken, Title VII by enacting the provision.⁴⁸

The Fourth Circuit granted the defendant's motion for rehearing en banc and vacated the original panel's decision.⁴⁹ On rehearing, the Fourth Circuit affirmed the district court, holding that the term "employees" as used in § 704(a) did not include former employees.⁵⁰ The court found that the statutory language was unambiguous in its use of the term "employees" and stated that nothing in the statute suggested the inclusion of former employees in the term.⁵¹ Furthermore, the court stated that Title VII applies to "adverse employment action,"

⁴⁰ See *id.* at 845, 72 Fair Empl. Prac. Cas. (BNA) at 1857.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *Robinson*, 117 S. Ct. at 845, 72 Fair Empl. Prac. Cas. (BNA) at 1857.

⁴⁴ See *id.*

⁴⁵ See *Robinson*, No. 93-1562, 1995 WL 25831, at *1, 66 Fair Empl. Prac. Cas. (BNA) 1284 (4th Cir. Jan. 18, 1995); *Polsby v. Chase*, 970 F.2d 1360, 1365, 59 Fair Empl. Prac. Cas. (BNA) 712, 716 (4th Cir. 1992).

⁴⁶ See *Robinson*, 1995 WL 25831, at *1, *3, 66 Fair Empl. Prac. Cas. (BNA) 1284, 1285, 1286.

⁴⁷ See *id.* at *2, 66 Fair Empl. Prac. Cas. (BNA) at 1285.

⁴⁸ See *id.*

⁴⁹ See *Robinson*, 70 F.3d at 328, 69 Fair Empl. Prac. Cas. (BNA) at 523.

⁵⁰ See *id.*

⁵¹ See *id.* at 329-30, 69 Fair Empl. Prac. Cas. (BNA) at 525.

necessarily limiting its scope to events that occur within the duration of the employment relationship.⁵² In rejecting the reasoning of the majority of the circuits, the court indicated that broad policy arguments were unpersuasive in this context and inconsistent with the established analytical framework for statutory construction.⁵³

The United States Supreme Court reversed the Fourth Circuit decision, holding that the term "employees" as used in § 704(a) includes former employees.⁵⁴ The Court analyzed the language of the provision itself, the specific context of § 704(a) and the broader context of Title VII, determining that the term "employees" was ambiguous as to whether it included former employees.⁵⁵ The Court resolved the ambiguity in favor of including former employees in light of the broader context of Title VII.⁵⁶

The Court's first step in determining that the term "employees" as used in § 704(a) is ambiguous was to note the absence of a temporal qualifier in the provision.⁵⁷ Section 701(b), for example, clarifies which employers are covered under Title VII; the language contains temporal qualifiers that make plain Congress's intent to have the term "employees" refer to current employees.⁵⁸ Because the language of § 704(a) contains no such temporal qualifier, but rather refers merely to "employees" who have availed themselves of Title VII's protections and does not specify whether the alleged retaliatory action occurred before or after termination, the Court concluded that the term "employees" was ambiguous in this context.⁵⁹ The Court further noted that § 701(f), Title VII's definition section, also lacks any temporal qualifier, defining an "employee" merely as "an individual employed by the employer."⁶⁰ The Court stated that Congress could just as easily have intended the term "employee" to mean one who "was employed" as one who "is employed."⁶¹

⁵² See *id.* at 331, 69 Fair Empl. Prac. Cas. (BNA) at 526.

⁵³ See *id.* at 332, 69 Fair Empl. Prac. Cas. (BNA) at 527.

⁵⁴ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860.

⁵⁵ See *id.* at 846, 72 Fair Empl. Prac. Cas. (BNA) at 1857-59.

⁵⁶ See *id.* at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860.

⁵⁷ See *id.* at 846 n.2, 72 Fair Empl. Prac. Cas. (BNA) at 1858 n.2.

⁵⁸ See 42 U.S.C. § 2000e(b) (1982); *Robinson*, 117 S. Ct. at 846 n.2, 72 Fair Empl. Prac. Cas. (BNA) at 1858 n.2. The relevant provision states that the act applies to any employer "who has fifteen or more employees for each working day;" the use of the present tense clearly evidences Congress's intent to use the term "employees" to mean current employees. 42 U.S.C. § 2000e(b) (emphasis added).

⁵⁹ See *Robinson*, 117 S. Ct. at 846, 72 Fair Empl. Prac. Cas. (BNA) at 1858.

⁶⁰ See 42 U.S.C. § 2000e(f); *Robinson*, 117 S. Ct. at 846-47, 72 Fair Empl. Prac. Cas. (BNA) at 1858.

⁶¹ See *Robinson*, 117 S. Ct. at 847, 72 Fair Empl. Prac. Cas. (BNA) at 1858.

The Court further demonstrated the ambiguity of the term "employees" by pointing out other provisions in Title VII that use the term more inclusively or differently.⁶² In some provisions the term clearly refers only to current employees, but in others, former employees are necessarily included.⁶³ Because the term "employees" has a plain meaning in some contexts, but not in others, the Court concluded that the term is inherently ambiguous and a court must determine the meaning of the term for each individual provision of the statute.⁶⁴

The Court proceeded to resolve the ambiguity inherent in the use of the term "employees" in § 704(a) by finding that the term includes former employees.⁶⁵ The Court analyzed the term "employees" within the broader context of the statute, noting that Congress clearly intended for several provisions of the statute to provide protection to former employees.⁶⁶ Filing a charge alleging discriminatory discharge under § 703(a) is a protected activity under Title VII, an act necessarily performed by a former employee.⁶⁷ Because § 704(a) prohibits retaliation against an employee for a protected activity and because filing a charge alleging discriminatory discharge is a protected activity, the Court concluded that including former employees within the purview of § 704(a) is more consistent with the statute.⁶⁸

The Court also accepted the petitioner's argument that excluding former employees from the definition of "employees" would make § 704(a) considerably less effective.⁶⁹ The Court noted that employees would be less likely to exercise their rights under Title VII if they knew that their employer could retaliate against them in any way as soon as

⁶² See 42 U.S.C. §§ 2000e-5(g)(1), 16(b); *Robinson*, 117 S. Ct. at 847, 72 Fair Empl. Prac. Cas. (BNA) at 1858. Both §§ 706(g) and 717(b) list "reinstatement or hiring of employees" as an affirmative remedial action, necessarily referring to both former and prospective employees when using the term "employees." See 42 U.S.C. §§ 2000e-5(g)(1), 16(b); *Robinson*, 117 S. Ct. at 847, 72 Fair Empl. Prac. Cas. (BNA) at 1858. Similarly, given that discriminatory discharge is a forbidden "personnel action affecting employees" under § 717(a), the "employee" who files the authorized complaint is necessarily a former employee. See 42 U.S.C. §§ 2000e-5(g)(1), 16(b); *Robinson*, 117 S. Ct. at 847, 72 Fair Empl. Prac. Cas. (BNA) at 1858. In contrast, the term "employees," in certain parts of Title VII, clearly refers to current employees. See 42 U.S.C. § 2000e-2(h); *Robinson*, 117 S. Ct. at 847, 72 Fair Empl. Prac. Cas. (BNA) at 1858. Certain sections, for example, address salary and promotions provisions. See *Robinson*, 117 S. Ct. at 847, 72 Fair Empl. Prac. Cas. (BNA) at 1858; 42 U.S.C. § 2000e-2(h).

⁶³ See *Robinson*, 117 S. Ct. at 847, 72 Fair Empl. Prac. Cas. (BNA) at 1858.

⁶⁴ See *id.*, 72 Fair Empl. Prac. Cas. (BNA) at 1859.

⁶⁵ See *id.* at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860.

⁶⁶ See *id.* at 848, 72 Fair Empl. Prac. Cas. (BNA) at 1859.

⁶⁷ See 42 U.S.C. § 2000e-2(a); *Robinson*, 117 S. Ct. at 848, 72 Fair Empl. Prac. Cas. (BNA) at 1859.

⁶⁸ See *Robinson*, 117 S. Ct. at 848, 72 Fair Empl. Prac. Cas. (BNA) at 1859.

⁶⁹ See *id.*

the employment relationship ended.⁷⁰ Conversely, an employer who knew that there would be no punishment for retaliating against a former employee might choose to fire an employee whom it thought might file a Title VII claim against it.⁷¹ Again emphasizing the broader context of Title VII, the Court stated that it would be a disservice to the purpose of the anti-retaliation provision to allow employers to retaliate against an entire class of people who engage in a protected activity, such as those who file discriminatory discharge claims.⁷² Thus, in light of the broader context of Title VII and the specific primary purpose of § 704(a), the Court held that the term "employees" as used in that provision includes former employees.⁷³

Although *Robinson* now secures the protection of Title VII's anti-retaliation provision for former employees, the precise scope of that protection remains undetermined.⁷⁴ The circuit courts that, prior to *Robinson*, had already held that § 704(a) covered former employees, differed in articulating a standard.⁷⁵ The courts must develop a workable standard for assessing which post-termination actions will entitle a former employee to file a retaliation claim.⁷⁶

In *Charlton*, the Third Circuit held that post-termination retaliatory conduct is actionable when it arises out of or is related to the employment relationship.⁷⁷ In *Veprinsky*, the Seventh Circuit used a slightly broader standard.⁷⁸ In that case, the court, clarifying its earlier decision in *Reed*, held that post-termination acts of retaliation that adversely affect the plaintiff's employment opportunities or are otherwise related to employment are cognizable under Title VII.⁷⁹ The *Veprinsky* court declined, however, to overturn *Reed*, implying that physically threatening behavior, even for the purposes of attempting to force a former employee to drop a lawsuit, neither adversely affects

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.* at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860.

⁷³ See *Robinson*, 117 S. Ct. at 848, 849, 72 Fair Empl. Prac. Cas. (BNA) at 1858, 1860.

⁷⁴ See *id.* at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860.

⁷⁵ See, e.g., *Veprinsky v. Fluor Daniel Inc.*, 87 F.3d 882, 886, 71 Fair Empl. Prac. Cas. (BNA) 170, 174 (7th Cir. 1996); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200, 64 Fair Empl. Prac. Cas. (BNA) 1414, 1418-19 (3rd Cir. 1994).

⁷⁶ See, e.g., *Veprinsky*, 87 F.3d at 886, 71 Fair Empl. Prac. Cas. (BNA) at 174; *Charlton*, 25 F.3d at 200, 64 Fair Empl. Prac. Cas. (BNA) at 1418-19.

⁷⁷ See *Charlton*, 25 F.3d at 197, 64 Fair Empl. Prac. Cas. (BNA) at 1416.

⁷⁸ See *Veprinsky*, 87 F.3d at 882, 71 Fair Empl. Prac. Cas. (BNA) at 171.

⁷⁹ See *id.*; *Reed*, 939 F.2d at 492-93, 56 Fair Empl. Prac. Cas. (BNA) at 1004.

the plaintiff's employment opportunities nor is otherwise related to employment.⁸⁰

"Otherwise related to employment," in the *Veprinsky* standard, thus seems not to refer to activities, like physically threatening behavior, which are not ordinarily a natural extension of an employment relationship.⁸¹ In contrast, providing references to a previous employee's prospective employers is a natural extension of an employment relationship and is thus "otherwise related to employment."⁸² The Seventh Circuit has continued to apply the *Veprinsky* standard since the Supreme Court decided *Robinson*.⁸³

As a result of federal courts using slightly different standards for determining which post-termination acts will be actionable retaliatory acts, another split in the circuits could develop as to the required standard for a former employee's § 704(a) claim.⁸⁴ The decision that creates a unified standard is likely to provide a remedy both when the previous employer's retaliatory activity impairs the plaintiff's future employment opportunities and when the retaliatory activity takes the form of an act that is a natural extension of the employment relationship, such as providing a reference for a former employee's prospective employer.⁸⁵ The interesting question is whether a new standard will

⁸⁰ See *Veprinsky*, 87 F.3d at 888, 71 Fair Empl. Prac. Cas. (BNA) at 176; *Reed*, 939 F.2d at 492-93, 56 Fair Empl. Prac. Cas. (BNA) at 1004. In *Reed*, the alleged post-employment retaliation consisted of a grand jury investigation of the plaintiff's alleged illegal jail activities, a mysterious physical attack on her person by a disguised assailant urging her to drop her case against the department, disturbing late-night phone calls threatening her with reprisals for her lawsuit and someone shooting at her car while she was driving. See 939 F.2d at 492, 56 Fair Empl. Prac. Cas. (BNA) at 1004.

⁸¹ See *Veprinsky*, 87 F.3d at 888, 71 Fair Empl. Prac. Cas. (BNA) at 176.

⁸² See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *Veprinsky*, 87 F.3d at 888, 71 Fair Empl. Prac. Cas. (BNA) at 176.

⁸³ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *Veprinsky*, 87 F.3d at 882, 71 Fair Empl. Prac. Cas. (BNA) at 171; *Murphy v. Village of Hoffman Estates*, 959 F. Supp. 901, 907-08 (N.D. Ill. 1997). In *Murphy*, the court held that an employer's disclosure to the plaintiff's former coworkers of confidential information regarding the plaintiff's alcohol and drug treatment adversely affected the plaintiff's employment prospects and thus constituted post-termination retaliation when the former employee was seeking reinstatement. See *Murphy*, 959 F. Supp. at 907-08.

⁸⁴ See, e.g., *Veprinsky*, 87 F.3d at 886, 71 Fair Empl. Prac. Cas. (BNA) at 174; *Charlton*, 25 F.3d at 200, 64 Fair Empl. Prac. Cas. (BNA) at 1419.

⁸⁵ See, e.g., *Robinson*, 117 S. Ct. at 845, 72 Fair Empl. Prac. Cas. (BNA) at 1857. In *Robinson*, the defendant's providing the plaintiff's prospective employer with a false reference both adversely affected the plaintiff's future employment opportunities and was a natural extension of the employment relationship. See *id.* In contrast, the post-employment physical threats by the defendant neither adversely affected the plaintiff's future employment prospects nor was a natural

provide a remedy in a situation like the one in *Reed*.⁸⁶ Physical threats neither impair a former employee's future employment prospects nor are they a natural extension of the employment relationship, but such acts clearly call for a remedy.⁸⁷

Given the uncertainty that the lack of a standard for determining what post-termination acts will be prohibited under § 704(a) creates, employers should be aware of an increased risk of Title VII liability.⁸⁸ Clearly, as discussed above, employers must execute cautiously acts that affect the plaintiff's prospective employment and acts that are considered a natural extension of the employment relationship.⁸⁹ To shield themselves as much as possible from liability, employers' policies should be meticulously evenhanded.⁹⁰ For example, if an employer usually responds to a reference request with a form letter, the employer should be wary of sending a much more detailed letter outlining the faults of a specific former employee who had previously filed a Title VII claim against the employer.⁹¹ Similarly, employers should not mention former employees' Title VII claims.⁹² The negative effect of this necessarily increased awareness is the employer's decreased ability to render honest negative evaluations of employees who happen to have filed a Title VII claim against them, thus impairing future employers' ability to evaluate a prospective employee accurately.⁹³ Employers may also have to be wary of employees who attempt to shield themselves from negative job references by filing a Title VII claim, thus putting the employer in the difficult position of ensuring that any job references given are not seen as retaliatory.⁹⁴

extension of the employment relationship. See *Reed*, 939 F.2d at 492, 56 Fair Empl. Prac. Cas. (BNA) at 1004.

⁸⁶ See *Reed*, 939 F.2d at 492, 56 Fair Empl. Prac. Cas. (BNA) at 1004.

⁸⁷ See *id.*

⁸⁸ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *Veprinsky*, 87 F.3d at 886, 71 Fair Empl. Prac. Cas. (BNA) at 174; *Charlton*, 25 F.3d at 200, 64 Fair Empl. Prac. Cas. (BNA) at 1419.

⁸⁹ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *Veprinsky*, 87 F.3d at 886, 71 Fair Empl. Prac. Cas. (BNA) at 174; *Charlton*, 25 F.3d at 200, 64 Fair Empl. Prac. Cas. (BNA) at 1419.

⁹⁰ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *Veprinsky*, 87 F.3d at 886, 71 Fair Empl. Prac. Cas. (BNA) at 174; *Charlton*, 25 F.3d at 200, 64 Fair Empl. Prac. Cas. (BNA) at 1419.

⁹¹ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *Veprinsky*, 87 F.3d at 886, 71 Fair Empl. Prac. Cas. (BNA) at 174; *Charlton*, 25 F.3d at 200, 64 Fair Empl. Prac. Cas. (BNA) at 1419.

⁹² See *Veprinsky*, 87 F.3d at 883, 886, 71 Fair Empl. Prac. Cas. (BNA) at 172, 174.

⁹³ See *id.*

⁹⁴ See *id.*

Although employers are thus more susceptible to liability after *Robinson*, employees are now enjoying a safer environment for addressing their complaints through the proper channels without as much fear of retaliation.⁹⁵ Employees should be aware, however, that there are still numerous factors that may limit this new found protection. A potential plaintiff should be wary that the mere fact of the *Robinson* decision does not prove that his or her former employer's acts were retaliatory.⁹⁶ The former employer could make proving retaliation very difficult by streamlining the reference process and issuing bland references in retaliation against a once stellar employee. A plaintiff will also need to prove that the alleged retaliatory act bore the necessary connection to the employment relationship.⁹⁷ As discussed above, this nexus might be difficult to prove in situations like *Reed*, where physical threats, because they are not considered a natural extension of the employment relationship, may not bear the necessary relationship to the former employee's future employment prospects.⁹⁸

Just as the Supreme Court's decision in *Robinson* brought the interpretation of § 704(a) into accord with the interpretation of anti-retaliation provisions of similar statutes, the decision will likewise influence the interpretation of protective provisions in other labor statutes.⁹⁹ For example, the *Robinson* decision may influence lower courts'

⁹⁵ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860.

⁹⁶ See *id.*

⁹⁷ See *Veprinsky*, 87 F.3d at 886, 71 Fair Empl. Prac. Cas. (BNA) at 174; *Charlton*, 25 F.3d at 200, 64 Fair Empl. Prac. Cas. (BNA) at 1418-19.

⁹⁸ See *Reed*, 939 F.2d at 492-93, 72 Fair Empl. Prac. Cas. (BNA) at 1004.

⁹⁹ See *Sada v. Robert F. Kennedy Med. Ctr.*, 65 Cal. Rptr. 2d 112, 126 (Dist. Cal. 1997); *Deflaviis v. Lord & Taylor, Inc.*, 566 N.W.2d 661, 664 (Mich. App. Ct. 1997); *McKeever v. Ironworker's Dist. Council*, No. Civ. A. 96-5858, 1997 WL 109569, at *3, *5, 73 Fair Empl. Prac. Cas. (BNA) 1002, 1004 (E.D. Pa. Mar. 7, 1997). In *McKeever*, for example, the court followed the statutory construction in *Robinson* in concluding that retirees are included within the coverage of § 623(a)(1) of the ADEA. See *McKeever*, 1997 WL 109569, at *2-3, *5, 73 Fair Empl. Prac. Cas. (BNA) at 1001-02, 1004. The *McKeever* plaintiffs were union members who were over age 65 and retired when their former employer discontinued their medical benefits on the basis of their age. See *id.* at *1, 73 Fair Empl. Prac. Cas. (BNA) at 1000-01. Like the *Robinson* Court, the *McKeever* court stated that such a finding is more consistent with the broader context that other ADEA sections provide and with the ADEA's general remedial purposes. See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *McKeever*, 1997 WL 109569, at *3, 73 Fair Empl. Prac. Cas. (BNA) at 1002. The court further explained that to find otherwise would potentially undermine the protective purposes of the statute. See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *McKeever*, 1997 WL 109569, at *3, 73 Fair Empl. Prac. Cas. (BNA) at 1002.

Similarly, in *Deflaviis*, a Michigan state court followed exactly the Supreme Court's analysis in *Robinson* when interpreting the anti-retaliation provision of Michigan's Civil Rights Act. See *Deflaviis*, 566 N.W.2d at 664; *Robinson*, 117 S. Ct. at 843, 72 Fair Empl. Prac. Cas. (BNA) at 1856. In that case, the plaintiff alleged that he was denied a prospective employment opportunity when his former employer retaliated against him for a previously filed age discrimination lawsuit by

interpretation of other federal or state statutes.¹⁰⁰ Practitioners should be aware of the potential interpretive ramifications that the Supreme Court's decision in *Robinson* may have on the other state and federal statutes that affect their clients' rights and liabilities.¹⁰¹

In conclusion, the Supreme Court in *Robinson* decided that the term "employees" as used in § 704(a) of Title VII includes former employees.¹⁰² Thus, a former employee who previously filed a Title VII claim against an employer is protected from that employer's retaliation even after the end of the employment relationship.¹⁰³ The Court included former employees within the meaning of the term "employees" as used in § 704(a) because protecting them from post-termination retaliation is consistent with the broader context and primary purposes of Title VII.¹⁰⁴ The courts have yet to develop a workable standard for determining what post-termination employer actions will be actionable.¹⁰⁵ Employers, for their part, may no longer retaliate against former employees who have availed themselves of Title VII's protection and may find themselves streamlining the reference process to avoid increased liability.¹⁰⁶ Employers should be aware of an increased risk of liability and should examine closely their policies regarding post-termination employment activity. Employees can anticipate greater freedom in the ability to redress their grievances, but they should also be aware of a potentially decreased chance of receiving a reference that

providing the prospective employer with a negative reference. See *Deflaviis*, 566 N.W.2d at 663. The court stated that, although it was not bound by federal precedent, the Supreme Court's decision was highly persuasive. See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *Deflaviis*, 566 N.W.2d at 664.

In *Sada*, a California state court relied on *Robinson* in deciding that a "former applicant" was protected under the state's Fair Employment and Housing Act ("FEHA") in light of the primary purpose of anti-retaliation provisions—maintaining unfettered access to the statutory remedial mechanisms. See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *Sada*, 65 Cal. Rptr. 2d at 126. In that case, the defendant fired the plaintiff from her job as an independent contractor after learning of her national origin during an interview for a full-time position. See *Sada*, 65 Cal. Rptr. 2d at 115–16.

¹⁰⁰ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860; *Sada*, 65 Cal. Rptr. 2d at 126; *Deflaviis*, 566 N.W.2d at 665; *McKeever*, 1997 WL 109569, at *3, *5, 73 Fair Empl. Prac. Cas. (BNA) at 1002, 1005.

¹⁰¹ See, e.g., *Sada*, 65 Cal. Rptr. 2d at 126; *Deflaviis*, 566 N.W.2d at 665; *McKeever*, 1997 WL 109569, at *3, *5, 73 Fair Empl. Prac. Cas. (BNA) at 1002, 1005.

¹⁰² See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *Veprinsky v. Fluor Daniel Inc.*, 87 F.3d 882, 886, 71 Fair Empl. Prac. Cas. (BNA) 170, 174 (7th Cir. 1996); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200, 64 Fair Empl. Prac. Cas. (BNA) 1414, 1418–19 (3rd Cir. 1994).

¹⁰⁶ See *Veprinsky*, 87 F.3d at 886, 71 Fair Empl. Prac. Cas. (BNA) at 174; *Charlton*, 25 F.3d at 200, 64 Fair Empl. Prac. Cas. (BNA) at 1418–19.

includes more than purely basic information.¹⁰⁷ Both employers and employees should also be aware of the possible persuasive effects that this decision may have on other courts' interpretation of similar statutes.¹⁰⁸

C. White Males Have Standing To Bring Hostile Environment Claims for Discrimination Directed Towards Black and Female Coworkers: Childress v. City of Richmond*¹

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in employment on the basis of race, color, religion, sex or national origin.² Section 706(b) of Title VII grants individuals a private right of action against their employers.³ This private right of action is designed to assist the Equal Employment Opportunity Commission ("EEOC") in fulfilling Title VII's goal of eradicating unlawful discrimination in the workplace.⁴ An individual must be a "person claiming to be aggrieved" to have standing to file a claim with the EEOC.⁵ Although Title VII does not expressly define "person claiming to be aggrieved," all circuits that have considered this standing requirement have interpreted the language broadly to include people who allege injuries resulting from indirect discrimination.⁶ In 1997, in

¹⁰⁷ See *Robinson*, 117 S. Ct. at 849, 72 Fair Empl. Prac. Cas. (BNA) at 1860.

¹⁰⁸ See, e.g., *Sada*, 65 Cal. Rptr. 2d at 126; *Deflaviis*, 566 N.W.2d at 665; *McKeever*, 1997 WL 109569, at *3, *5, 73 Fair Empl. Prac. Cas. (BNA) at 1002, 1004.

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¹ 120 F.3d 476, 74 Fair Empl. Prac. Cas. (BNA) 749 (4th Cir. 1997).

² Civil Rights Act of 1964 §§ 701 et seq., 703(a), 42 U.S.C. § 2000e et seq., 2000e-2(a) (as amended 1994) [hereinafter Title VII]. The statute provides in pertinent part:

It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate or classify his employees or applicants 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.

Id.

³ Title VII § 706(b). Section 706(b) of Title VII grants "a person claiming to be aggrieved, or by a member of the Commission" the authority to file a complaint with the EEOC alleging a violation of Title VII. *Id.* A "person claiming to be aggrieved" must file a complaint with the EEOC, which in turn determines whether the individual has an injury sufficient to justify an issuance of a right-to-sue letter. *Id.*

⁴ See *EEOC v. Bailey Co.*, 563 F.2d 439, 445, 453, 15 Fair Empl. Prac. Cas. (BNA) 972, 976, 984 (6th Cir. 1977).

⁵ See Title VII § 706(b).

⁶ See *Childress*, 120 F.3d at 481, 74 Fair Empl. Prac. Cas. (BNA) at 753; *EEOC v. Mississippi College*, 626 F.2d 477, 482-83, 23 Fair Empl. Prac. Cas. (BNA) 1501, 1505 (5th Cir. 1980); *Bailey*

Childress v. City of Richmond, the Fourth Circuit helped to solidify the holdings of numerous circuits by interpreting broadly Title VII's standing requirement and holding that Title VII's "person claiming to be aggrieved" allowed a person to sue for indirect discrimination.⁷

In 1972, in *Trafficante v. Metropolitan Life Insurance Co.*, the United States Supreme Court held that a white tenant had standing to sue his landlord under Title VIII of the Civil Rights Act of 1968 ("Title VIII") for discrimination directed towards nonwhite applicants.⁸ In *Trafficante*, a white tenant in an apartment complex alleged that his landlord violated Title VIII by refusing to rent apartments to nonwhite applicants.⁹ The white tenant claimed that the discrimination directed towards minorities caused him to suffer a loss of benefits derived from interracial associations.¹⁰

The Supreme Court reasoned that Title VIII's vague statutory requirement that claims must be brought by a "person aggrieved" evidenced a congressional intent to confer standing broadly under the statute.¹¹ In so construing the language of Title VIII, the Court adopted the Third Circuit's reasoning in a Title VII case, thereby analogizing Title VIII to Title VII.¹² The Court agreed with the Third Circuit's opinion that the use of the language "a person claiming to be aggrieved" evidenced a congressional intent to extend standing to its constitutional limits.¹³ The Court recognized that the language of Title VIII is broad and inclusive and, therefore, reasoned that a loss of

Co., 563 F.2d at 452-54, 15 Fair Empl. Prac. Cas. (BNA) at 983-84; *Waters v. Heublein, Inc.*, 547 F.2d 466, 469, 13 Fair Empl. Prac. Cas. (BNA) 1409, 1411 (9th Cir. 1976). Indirect discrimination is discrimination directed towards one group that indirectly injures a person not a member of that group. See *Waters*, 547 F.2d at 469, 13 Fair Empl. Prac. Cas. (BNA) at 1411.

⁷ See 120 F.3d at 481, 74 Fair Empl. Prac. Cas. (BNA) at 753.

⁸ See 409 U.S. 205, 207, 209 (1972). The district court dismissed the claims, holding that the tenant lacked standing to sue because he was not within a class towards which the discrimination was directed. See *id.* at 208. In affirming the district court's ruling, the United States Court of Appeals for the Third Circuit interpreted Title VIII narrowly on the issue of standing, explaining that only people who are the direct objects of discriminatory practices can bring claims. See *id.*

⁹ See *id.* at 207-08.

¹⁰ See *id.* at 208, 209-10. In particular, the white tenant alleged that he lost both social advantages gained from living in an integrated community and business privileges derived from associating with minority groups and suffered embarrassment and financial damages from being labeled as a resident of a "white ghetto." See *id.* at 208.

¹¹ See *id.* at 209.

¹² See *id.* (citing *Hackett v. McGuire Bros.*, 445 F.2d 442, 3 Fair Empl. Prac. Cas. (BNA) 648 (3d Cir. 1971)). In *Hackett*, the court held that by using the broad phrase "a person claiming to be aggrieved" under Title VII, Congress intended to define standing to its constitutional limits. See 445 F.2d at 446, 3 Fair Empl. Prac. Cas. (BNA) at 649.

¹³ See *Trafficante*, 409 U.S. at 209 (citing *Hackett*, 445 F.2d at 446, 3 Fair Empl. Prac. Cas. (BNA) at 650).

benefits derived from interracial associations was a sufficient injury to place a white tenant within the meaning of a "person aggrieved" as defined by Title VIII.¹⁴ Thus, the Supreme Court held that the white tenant had standing to bring suit against his landlord for discrimination directed towards nonwhite applicants.¹⁵

In 1976, in *Waters v. Heublein, Inc.*, the United States Court of Appeals for the Ninth Circuit held that a white female had standing to sue her employer under Title VII for discrimination directed towards racial and ethnic minorities.¹⁶ In *Waters*, a white female employee filed suit against her employer for failing to provide women and minorities the same job and salary opportunities as white males.¹⁷ Specifically, she claimed that she had been performing the same job as male employees, but was receiving lower pay.¹⁸ Moreover, she alleged that, in general, women and minorities were placed in low-status positions and received lower pay than white males.¹⁹

The Ninth Circuit found the case indistinguishable from *Trafficante*, reasoning that because Title VIII and Title VII have similar statutory language, purposes and structure, they are subject to the same interpretation.²⁰ Moreover, the Ninth Circuit noted the Supreme Court's comparison of Title VIII to Title VII in *Trafficante* and explained that the court here was merely applying the same analogy.²¹ In addition, the Ninth Circuit reasoned that interracial harmony is just as important in the workplace as it is at home.²² Consequently, the court explained that the benefits derived from interracial associations are as great, if not greater, at work than at home, emphasizing that in today's mobile society people are more likely to know their coworkers than their neighbors.²³ Hence, the Ninth Circuit concluded that the injury alleged by the plaintiff—a loss of benefits derived from interracial associations—qualified her as a "person claiming to be aggrieved"

¹⁴ See *id.* at 209–10.

¹⁵ See *id.* at 212.

¹⁶ 547 F.2d 466, 467, 470, 13 Fair Empl. Prac. Cas. (BNA) 1409, 1410, 1412 (9th Cir. 1976).

¹⁷ See *id.* at 467, 13 Fair Empl. Prac. Cas. (BNA) at 1410. The district court dismissed the claims of discrimination directed towards minorities, holding that the petitioner lacked standing to sue for discrimination directed towards groups of which she was not a member. See *id.*, 13 Fair Empl. Prac. Cas. (BNA) at 1409–10.

¹⁸ See *id.*, 13 Fair Empl. Prac. Cas. (BNA) at 1410.

¹⁹ See *id.*

²⁰ See *id.* at 469, 13 Fair Empl. Prac. Cas. (BNA) at 1411 (citing *Trafficante*, 409 U.S. 205).

²¹ See *Waters*, 547 F.2d at 469–70, 13 Fair Empl. Prac. Cas. (BNA) at 1411–12 (citing *Trafficante*, 409 U.S. 207).

²² See *id.* at 469, 13 Fair Empl. Prac. Cas. (BNA) at 1411.

²³ See *id.*

under Title VII.²⁴ Thus, the Ninth Circuit held that a white female employee had standing to sue her employer under Title VII for discrimination directed towards racial and ethnic minorities.²⁵

Likewise, in 1980, in *EEOC v. Mississippi College*, the United States Court of Appeals for the Fifth Circuit held that Title VII permits a white female employee to bring suit against her employer for discrimination directed towards minorities.²⁶ In *Mississippi College*, a white female employee filed suit against her employer claiming violations of Title VII resulting from the employer's failure to consider her for a vacant full-time position as an assistant professor in the psychology department.²⁷ She later amended her complaint to include allegations that the employer violated Title VII by discriminating against women with respect to promotions, recruitment, pay and job classifications and by failing to recruit and hire both male and female minorities.²⁸

The Fifth Circuit implicitly reasoned that although the claimant was not the direct object of the discrimination directed towards minorities, it nevertheless affected her.²⁹ Relying on *Trafficante*, the court reasoned that by allowing claims to be brought by a "person claiming to be aggrieved," Congress intended to confer standing broadly.³⁰ Moreover, the Fifth Circuit noted the Supreme Court's acceptance of a loss of important benefits derived from interracial associations as a cognizable injury under Title VIII, as well as other circuits' recognition

²⁴ See *id.* at 469-70, 13 Fair Empl. Prac. Cas. (BNA) at 1411-12.

²⁵ See *id.* at 470, 13 Fair Empl. Prac. Cas. (BNA) at 1412. Similarly, in 1977, in *EEOC v. Bailey Co.*, the United States Court of Appeals for the Sixth Circuit held that a white female employee had standing to sue her employer under Title VII for discrimination directed towards females and blacks. 563 F.2d 439, 454, 15 Fair Empl. Prac. Cas. (BNA) 972, 985 (6th Cir. 1977). The Sixth Circuit reasoned that *Trafficante* compelled the court's conclusion that the white female had standing to sue her employer for discrimination directed towards blacks. See *id.* at 452, 453, 15 Fair Empl. Prac. Cas. (BNA) at 983 (citing *Trafficante*, 409 U.S. at 209-10). The Sixth Circuit explained that the Supreme Court's analogy of Title VIII to Title VII coupled with its adoption of the Third Circuit's broad interpretation of standing reveals the Supreme Court's opinion that Title VII and Title VIII are subject to the same interpretation. See *id.* Moreover, because the Supreme Court in *Trafficante* recognized the loss of important interracial benefits as a cognizable injury under Title VIII, the Sixth Circuit determined that it was compelled to recognize the same injury under Title VII. See *id.* Thus, the Sixth Circuit held that a white employee had standing to sue her employer under Title VII for discrimination directed towards blacks. See *id.* at 454, 15 Fair Empl. Prac. Cas. (BNA) at 985.

²⁶ 626 F.2d 477, 483, 23 Fair Empl. Prac. Cas. (BNA) 1501, 1505 (5th Cir. 1980).

²⁷ See *id.* at 479, 23 Fair Empl. Prac. Cas. (BNA) at 1502.

²⁸ See *id.* at 479-80, 23 Fair Empl. Prac. Cas. (BNA) at 1502. The district court dismissed the claim, holding that the plaintiff lacked standing to sue for discrimination that was directed towards a class to which she did not belong. See *id.* at 481, 23 Fair Empl. Prac. Cas. (BNA) at 1503.

²⁹ See *id.* at 482, 23 Fair Empl. Prac. Cas. (BNA) at 1504.

³⁰ See *id.*, 23 Fair Empl. Prac. Cas. (BNA) at 1505 (citing *Trafficante*, 409 U.S. 205).

of the same injury under Title VII and thus, the Fifth Circuit likewise recognized such an injury.³¹ Furthermore, the Fifth Circuit implicitly extended this reasoning to include a right to work in an environment that is free from unlawful discrimination.³² Accordingly, the court reasoned that an employer's discriminatory practices can create a work environment permeated with discrimination and, therefore, a white employee properly may allege an injury—a loss of important benefits derived from interracial associations—to qualify her as a “person claiming to be aggrieved” under Title VII.³³ Hence, the court held that the white female had standing to sue her former employer under Title VII for discrimination directed towards minorities.³⁴

During the *Survey* year, in *Childress v. City of Richmond*, the United States Court of Appeals for the Fourth Circuit held that white males had standing under Title VII to sue their employer for indirect discrimination.³⁵ Specifically, in *Childress*, the court held that seven white male police officers had standing under Title VII to bring hostile environment claims against their supervisor for discrimination directed towards black and female coworkers.³⁶ In doing so, the Fourth Circuit helped to solidify the holdings of numerous circuits by interpreting broadly Title VII's standing requirement and holding that Title VII's “person claiming to be aggrieved” language allows a person to sue for indirect discrimination.³⁷

In *Childress*, seven white male police officers alleged that their supervisor, a white male, had made numerous disparaging comments about black and female officers over a two-month period.³⁸ The white male officers explained that these comments were made in the presence of both the black and white female and male officers, as well as in the sole presence of the white male officers.³⁹ They claimed that these disparaging remarks created a hostile working environment.⁴⁰ Further, they asserted that the hostile working environment resulted in a loss of “teamwork” among the officers of different races and sexes.⁴¹ They alleged that such a loss of “teamwork” might lead officers

³¹ See *Mississippi College*, 626 F.2d at 482, 23 Fair Empl. Prac. Cas. (BNA) at 1505.

³² See *id.* at 483, 23 Fair Empl. Prac. Cas. (BNA) at 1505 (citing *Trafficante*, 409 U.S. 205).

³³ See *id.* at 482, 483, 23 Fair Empl. Prac. Cas. (BNA) at 1505.

³⁴ See *id.* at 483, 23 Fair Empl. Prac. Cas. (BNA) at 1505.

³⁵ 120 F.3d 476, 481, 74 Fair Empl. Prac. Cas. (BNA) 749, 753 (4th Cir. 1997).

³⁶ See *id.*

³⁷ See *id.* at 480–81, 74 Fair Empl. Prac. Cas. (BNA) at 753.

³⁸ See *id.* at 478, 74 Fair Empl. Prac. Cas. (BNA) at 751.

³⁹ See *id.*

⁴⁰ See *Childress*, 120 F.3d at 478, 74 Fair Empl. Prac. Cas. (BNA) at 751.

⁴¹ See *id.*

of one segment of the police force to become hesitant in assisting officers of another group while on duty.⁴²

In overturning the district court's dismissal of the plaintiffs' hostile environment claims, the Fourth Circuit explicitly rejected the lower court's reasoning that discrimination against one group actually favors another group.⁴³ Recognizing Congress's grant of a private right of action to "a person claiming to be aggrieved" under Title VII, the Fourth Circuit began its analysis by determining whether the white male officers were "person[s] claiming to be aggrieved" within the scope of Title VII.⁴⁴ The court first considered Supreme Court precedent and particularly its holding in *Trafficante*, a Title VIII case.⁴⁵ The Fourth Circuit reasoned that because Title VIII and Title VII have similar language, purposes and structure, the statutes are subject to the same analysis.⁴⁶ Thus, the Fourth Circuit reasoned that Congress intended to confer standing broadly through Title VII's "person claiming to be aggrieved" language, applying the same reasoning as the Supreme Court when construing Title VIII's "person aggrieved" language.⁴⁷ Moreover, the Fourth Circuit explained that the Supreme Court had already implicitly applied such a broad construction to Title VII's "person claiming to be aggrieved" language by its analogy of Title VIII to Title VII in *Trafficante* and its adoption of the Third Circuit's broad interpretation of Title VII's standing requirement.⁴⁸

Next, the Fourth Circuit noted that every other circuit that has addressed the issue of standing under Title VII has adopted the *Trafficante* Court's broad construction of the phrase "person aggrieved" and has held that white persons have standing to sue for indirect discrimination.⁴⁹ In addition, the Fourth Circuit explained that Con-

⁴² See *id.*

⁴³ See *id.* at 480, 74 Fair Empl. Prac. Cas. (BNA) at 752. The district court dismissed the claims, holding that the plaintiffs lacked standing to sue because the alleged discrimination was directed at black and female officers, not at the white male officers. See *id.* at 478-79, 74 Fair Empl. Prac. Cas. (BNA) at 751. The court reasoned that discrimination against one group is discrimination favoring another group and, therefore, the plaintiffs had no cognizable injury. See *id.* at 479, 74 Fair Empl. Prac. Cas. (BNA) at 752. The court further reasoned that the plaintiffs could not recover for violations of other people's rights. See *id.*

⁴⁴ See *id.* at 480, 74 Fair Empl. Prac. Cas. (BNA) at 752.

⁴⁵ See *Childress*, 120 F.3d at 480-81, 74 Fair Empl. Prac. Cas. (BNA) at 752-53 (citing *Trafficante*, 409 U.S. 205).

⁴⁶ See *id.* at 480, 74 Fair Empl. Prac. Cas. (BNA) at 752.

⁴⁷ See *id.* at 480-81, 74 Fair Empl. Prac. Cas. (BNA) at 753 (citing *Trafficante*, 409 U.S. 205).

⁴⁸ See *id.*

⁴⁹ See *id.* at 481, 74 Fair Empl. Prac. Cas. (BNA) at 753 (citing *EEOC v. Mississippi College*, 626 F.2d 477, 481-83, 23 Fair Empl. Prac. Cas. (BNA) 1501, 1504-05 (5th Cir. 1980)); *EEOC v. Bailey Co.*, 563 F.2d 439, 452-54, 15 Fair Empl. Prac. Cas. (BNA) 972, 983-85 (6th Cir. 1977); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469-70, 13 Fair Empl. Prac. Cas. (BNA) 1409, 1411-12 (9th Cir. 1976).

gress's failure to overrule any of these cases when it passed the Civil Rights Act of 1991 evidenced its acceptance of the circuits' interpretation of Title VII.⁵⁰ Thus, the Fourth Circuit concluded that the white male officers had standing to bring hostile environment claims against their supervisor under Title VII for discrimination directed towards black and female officers.⁵¹

The Fourth Circuit's holding in *Childress* has four crucial implications.⁵² First, the Fourth Circuit's broad construction of Title VII's standing requirement is in accord with the holdings of all the circuits that have addressed this issue and thereby helps provide certainty and predictability by clarifying the meaning of Title VII's standing requirement.⁵³ The solidification of the circuits' interpretation of Title VII's "person claiming to be aggrieved" language will help employers, employees, the EEOC and the judicial system by avoiding unnecessary litigation. Because employers will know they may be held liable for indirect discrimination, they should be less likely to engage in unlawful discriminatory practices.⁵⁴ In addition, such clarity will assist employees who are contemplating filing a Title VII claim with the EEOC better determine if they have standing to do so.⁵⁵ Thus, the certainty and predictability will lead to greater efficiency and will assist the EEOC in satisfying Title VII's goal of eradicating unlawful discrimination.⁵⁶

Second, the Fourth Circuit's holding will further aid the EEOC in fulfilling Title VII's goal of eliminating unlawful discrimination in the workplace.⁵⁷ By allowing both direct and indirect victims of discrimination to file claims with the EEOC, the court is increasing the possibility that discrimination will be reported.⁵⁸ Thus, the Fourth Circuit's recognition of standing for indirect discrimination likely will increase the

⁵⁰ See *Childress*, 120 F.3d at 481, 74 Fair Empl. Prac. Cas. (BNA) at 753. The court noted that Congress made extensive revisions to Title VII in the Civil Rights Act of 1991. See *id.* (citing Pub. L. No. 102-66, Title I, 105 Stat. 1074-76 (1991)). Moreover, the court cited *Cannon v. University of Chicago*, which explained that "it is realistic to presume that Congress was thoroughly familiar with these unusually important precedent [sic] from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." *Id.* (citing *Cannon*, 441 U.S. 677, 699 (1979)).

⁵¹ See *id.*

⁵² See *infra* notes 53-79 and accompanying text.

⁵³ See, e.g., *Mississippi College*, 626 F.2d at 481, 483, 23 Fair Empl. Prac. Cas. (BNA) at 1505; *Bailey Co.*, 563 F.2d at 452, 454, 15 Fair Empl. Prac. Cas. (BNA) at 985; *Waters*, 547 F.2d at 469-70, 13 Fair Empl. Prac. Cas. (BNA) at 1411, 1412.

⁵⁴ See *infra* notes 69-71 and accompanying text.

⁵⁵ See *Bailey Co.*, 563 F.2d at 444-45, 15 Fair Empl. Prac. Cas. (BNA) at 976.

⁵⁶ See *id.* at 453, 15 Fair Empl. Prac. Cas. (BNA) at 984.

⁵⁷ See *id.*

⁵⁸ See *Childress*, 120 F.3d at 481, 74 Fair Empl. Prac. Cas. (BNA) at 753; *Bailey Co.*, 563 F.2d at 444-45, 15 Fair Empl. Prac. Cas. (BNA) at 976.

number of incidents of discrimination that are brought to the EEOC's attention.⁵⁹

Although some might argue that the Fourth Circuit's recognition of standing for indirect discrimination will lead to a flood of frivolous cases, courts have not considered this to be a valid concern.⁶⁰ Every circuit that has addressed the issue has recognized standing for indirect discrimination.⁶¹ The theoretical possibility of opening the proverbial floodgates has not been cause for concern in any of these circuits.⁶² Moreover, this holding, like those of other circuits, is limited to the issue of standing.⁶³ An individual filing a claim with the EEOC still must prove a valid injury.⁶⁴ The requirement of proof of an actual injury will weed out most frivolous claims.⁶⁵ In addition, upon the filing of a claim, the EEOC must attempt to resolve the matter through informal methods before it may grant an individual a right-to-sue letter.⁶⁶ Hence, the EEOC remains a filtering device for non-legitimate claims.⁶⁷ In sum, while the number of lawsuits will not rise necessarily, the amount of

⁵⁹ See *Childress*, 120 F.3d at 481, 74 Fair Empl. Prac. Cas. (BNA) at 453.

⁶⁰ See, e.g., *EEOC v. Mississippi College*, 626 F.2d 477, 481-83, 23 Fair Empl. Prac. Cas. (BNA) 1501, 1504-05 (5th Cir. 1980) (silent on floodgate argument); *Bailey Co.*, 563 F.2d at 452-53, 15 Fair Empl. Prac. Cas. (BNA) at 983-84 (same); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469-70, 13 Fair Empl. Prac. Cas. (BNA) 1409, 1411-12 (9th Cir. 1976) (same).

⁶¹ See, e.g., *Mississippi College*, 626 F.2d at 483, 23 Fair Empl. Prac. Cas. (BNA) at 1505; *Bailey Co.*, 563 F.2d at 454, 15 Fair Empl. Prac. Cas. (BNA) at 985; *Waters*, 547 F.2d at 470, 13 Fair Empl. Prac. Cas. (BNA) at 1412.

⁶² See, e.g., *Mississippi College*, 626 F.2d at 481-83, 23 Fair Empl. Prac. Cas. (BNA) at 1504-05 (silent on floodgate argument); *Bailey Co.*, 563 F.2d at 452-53, 15 Fair Empl. Prac. Cas. (BNA) at 983-84 (same); *Waters*, 547 F.2d at 469-70, 13 Fair Empl. Prac. Cas. (BNA) at 1411-12 (same).

⁶³ See *Childress*, 120 F.3d at 481 n.8, 74 Fair Empl. Prac. Cas. (BNA) at 753 n.8; *Mississippi College*, 626 F.2d at 483, 23 Fair Empl. Prac. Cas. (BNA) at 1505; *Bailey Co.*, 563 F.2d at 454, 15 Fair Empl. Prac. Cas. (BNA) at 985; *Waters*, 547 F.2d at 470, 13 Fair Empl. Prac. Cas. (BNA) at 1412.

⁶⁴ See, e.g., *Childress*, 120 F.3d at 481 n.8, 74 Fair Empl. Prac. Cas. (BNA) at 753 n.8; *Waters*, 547 F.2d at 470, 13 Fair Empl. Prac. Cas. (BNA) at 1412.

⁶⁵ See, e.g., *Childress*, 120 F.3d at 481 n.8, 74 Fair Empl. Prac. Cas. (BNA) at 753 n.8; *Waters*, 547 F.2d at 470, 13 Fair Empl. Prac. Cas. (BNA) at 1412.

⁶⁶ See 42 U.S.C. § 2000e-5(b) (1994); *Bailey Co.*, 563 F.2d at 445, 15 Fair Empl. Prac. Cas. (BNA) at 976 (citing § 706(b) of Title VII which sets forth that the EEOC "shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion").

⁶⁷ See *Bailey Co.*, 563 F.2d at 445, 15 Fair Empl. Prac. Cas. (BNA) at 976. Though some might contend that the EEOC might be overburdened by claims, this result also has not been realized. See, e.g., *Mississippi College*, 626 F.2d at 481-83, 23 Fair Empl. Prac. Cas. (BNA) at 1504-05 (silent on floodgate argument); *Bailey Co.*, 563 F.2d at 452-53, 15 Fair Empl. Prac. Cas. (BNA) at 983-84 (same); *Waters*, 547 F.2d at 469-70, 13 Fair Empl. Prac. Cas. (BNA) at 1411-12 (same). Again, no circuit that has recognized standing for indirect discrimination has found the need to address

reported discriminatory practices probably will increase, thereby bringing a greater number of Title VII violations to the EEOC's attention.⁶⁸

Third, the Fourth Circuit's recognition of a person's standing to sue for indirect discrimination should help deter employers from utilizing discriminatory practices.⁶⁹ The knowledge that employees might have standing to sue as a result of indirect (and not just direct) discrimination may further discourage employers from engaging in discriminatory practices in the workplace. For example, knowing that white employees may sue for indirect discrimination, the supervisor in the *Childress* case might have refrained from making racially and sexually disparaging comments to the white officers both within and outside the presence of black and female officers.⁷⁰ Thus, the court's recognition of standing for indirect discrimination will help further Title VII's goal of eradicating discrimination in the workplace.⁷¹

Finally, the Fourth Circuit's holding acknowledges that discrimination is harmful to everyone within our society, not only to a particular segment.⁷² All circuits that have addressed the issue of standing under Title VII have acknowledged that discrimination may lead to a loss of important benefits derived from interracial associations.⁷³ In the employment area, discrimination hinders productivity because it leads to a loss of qualified employees and thereby results in the employment of less capable people.⁷⁴ Further, discrimination may create intra-office

this argument. See, e.g., *Mississippi College*, 626 F.2d at 481-83, 23 Fair Empl. Prac. Cas. (BNA) at 1504-05 (silent on floodgate argument); *Bailey Co.*, 563 F.2d at 452-53, 15 Fair Empl. Prac. Cas. (BNA) at 983-84 (same); *Waters*, 547 F.2d at 469-70, 13 Fair Empl. Prac. Cas. (BNA) at 1411-12 (same).

⁶⁸ See *Bailey Co.*, 563 F.2d at 444-45, 15 Fair Empl. Prac. Cas. (BNA) at 976.

⁶⁹ See *Childress*, 120 F.3d at 481, 74 Fair Empl. Prac. Cas. (BNA) at 753 (holding that white males may sue for discrimination directed towards blacks and females).

⁷⁰ See *id.* at 478-79, 74 Fair Empl. Prac. Cas. (BNA) at 750-51.

⁷¹ See *Bailey Co.*, 563 F.2d at 453, 15 Fair Empl. Prac. Cas. (BNA) at 984.

⁷² See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972); *Childress*, 120 F.3d at 453, 74 Fair Empl. Prac. Cas. (BNA) at 781. In support of Title VIII, which has the same policy goals as Title VII, Senator Javits explained that the unlawful discrimination clearly affects the "whole community." See *Trafficante*, 409 U.S. at 211.

⁷³ See, e.g., *EEOC v. Mississippi College*, 626 F.2d 477, 482, 23 Fair Empl. Prac. Cas. (BNA) at 1501, 1505 (5th Cir. 1980) (discrimination results in deprivation of benefits derived from interracial associations); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469, 13 Fair Empl. Prac. Cas. (BNA) 1409, 1411 (9th Cir. 1976) (benefits include personal and business contacts); cf. *Trafficante*, 409 U.S. at 208 (Title VIII case describing benefits from interracial contact as including social and business advantages).

⁷⁴ See Paula B. Stolker, *Weigh My Job Performance, Not My Body: Extending Title VII to Weight-Based Discrimination*, N.Y.L. SCH. J. HUM. RTS. 223, 228 (Fall, 1992); see also *Bailey Co.*, 563 F.2d at 442, 15 Fair Empl. Prac. Cas. (BNA) at 973 (appellant explained that employer's discriminatory practices resulted in less educated and experienced men being placed in higher-status positions).

tensions, which cause employees to be less productive.⁷⁵ In the aggregate, such discriminatory practices lead to a reduced level of productivity, and thereby harm the overall economic well-being of society.⁷⁶ Hence, the courts have recognized that an important benefit of eradicating discrimination in the workplace is interracial and inter-gender harmony.⁷⁷ Because all people, regardless of their race or sex, have an interest in such harmony, discrimination that creates interracial or inter-gender discord injures everyone.⁷⁸ Thus, the Fourth Circuit's recognition of a person's standing to sue for indirect discrimination acknowledges that the efforts to eradicate discrimination are community-wide endeavors and not merely battles to be fought by specific groups within our society.⁷⁹

In sum, in *Childress v. City of Richmond*, the Fourth Circuit held that white male police officers had standing under Title VII to sue their supervisors for discrimination directed towards black and female co-workers.⁸⁰ In so doing, the Fourth Circuit acknowledged that an individual does not have to be the direct target of unlawful discrimination to suffer a cognizable injury.⁸¹ By recognizing that the white male police officers have standing to sue their supervisors for indirect discrimination, the Fourth Circuit has taken a step forward in the effort to eradicate unlawful discrimination in the workplace.⁸² The Fourth Circuit has acknowledged the universally harmful nature of such discrimination and has sent a message to employers, employees and society that the endeavor to eradicate employment discrimination requires the joint efforts of everyone within the workplace.⁸³

⁷⁵ See *Childress*, 120 F.3d at 478-79, 74 Fair Empl. Prac. Cas. (BNA) at 751. For example, in *Childress*, the white male officers claimed that the discrimination created tensions between the different groups within the force and resulted in a loss of "teamwork." See *id.* at 478, 74 Fair Empl. Prac. Cas. (BNA) at 751. They further claimed that this loss of teamwork could cause some officers to hesitate when called to assist another officer while on duty. See *id.*

⁷⁶ See Stalker, *supra* note 74, at 228; see also *Childress*, 120 F.3d at 478-79, 74 Fair Empl. Prac. Cas. (BNA) at 751; *Bailey Co.*, 563 F.2d at 442, 15 Fair Empl. Prac. Cas. (BNA) at 973.

⁷⁷ See, e.g., *Waters*, 547 F.2d at 469, 13 Fair Empl. Prac. Cas. (BNA) at 1411.

⁷⁸ See, e.g., *Childress*, 120 F.3d at 480-81, 74 Fair Empl. Prac. Cas. (BNA) at 753; *Waters*, 547 F.2d at 469, 13 Fair Empl. Prac. Cas. (BNA) at 1411; cf. *Trafficante*, 409 U.S. at 211 (Title VIII case).

⁷⁹ See, e.g., *Childress*, 120 F.3d at 480-81, 74 Fair Empl. Prac. Cas. (BNA) at 753; *Waters*, 547 F.2d at 469, 13 Fair Empl. Prac. Cas. (BNA) at 1411; cf. *Trafficante*, 409 U.S. at 211 (Title VIII case).

⁸⁰ 120 F.3d at 481, 74 Fair Empl. Prac. Cas. (BNA) at 753.

⁸¹ See *id.* at 480-81, 74 Fair Empl. Prac. Cas. (BNA) at 752-53.

⁸² See *supra* notes 53-79 and accompanying text.

⁸³ See *supra* notes 72-79 and accompanying text.

II. AMERICANS WITH DISABILITIES ACT

*A.*Employees Not Bound by Agreements To Arbitrate ADA Claims Unless They Knowingly Waive Their Judicial Remedies: Nelson v. Cyprus Bagdad Copper Corp.*¹

In 1925, Congress enacted the Federal Arbitration Act ("FAA") to reverse judicial hostility to arbitration agreements and to place arbitration agreements on an equal footing with other contracts.² The FAA allows federal district courts to stay proceedings when a claim can be referred to arbitration and to compel arbitration when one party has not complied with an arbitration agreement.³ Even when the FAA is not invoked, the United States Supreme Court has established a federal policy favoring arbitration of employment disputes.⁴

Congress enacted Title VII of the Civil Rights Act of 1964 ("Title VII") to ensure equality of employment opportunities and protection from discrimination.⁵ In 1990, Congress enacted the Equal Opportunities for Disabled Act, popularly referred to as the Americans with Disabilities Act of 1990 ("ADA"), to extend legal protection from discrimination to disabled employees.⁶ The powers, remedies and procedures available under the ADA mirror those available under Title VII.⁷ Title VII provides for consideration of employment discrimination claims in several forums, including arbitration and the courts, and also provides that submission to one forum does not preclude subsequent submission to another.⁸ The Supreme Court has interpreted Title VII and the ADA as manifesting Congress's intent to make its policy against

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¹ 119 F.3d 756, 6 A.D. Cases (BNA) 1714 (9th Cir. 1997).

² See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 55 Fair Empl. Prac. Cas. (BNA) 1116, 1119 (1991); see also 9 U.S.C. § 2 (1994).

³ 9 U.S.C. §§ 3-4.

⁴ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 46 n.6, 7 Fair Empl. Prac. Cas. (BNA) 81, 85 n.6 (1974).

⁵ See *id.* at 44, 7 Fair Empl. Prac. Cas. (BNA) at 84. Title VII provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex or national origin . . ." 42 U.S.C. § 2000e-2(a)(1) (1994).

⁶ See 42 U.S.C. § 12101(a)(4). The ADA provides in pertinent part: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a).

⁷ See *id.* § 12117(a).

⁸ See *Alexander*, 415 U.S. at 47-48, 7 Fair Empl. Prac. Cas. (BNA) at 85 (citing 42 U.S.C. § 2000e-5(b), (c), (f) (Supp. II 1972)).

discrimination a top priority.⁹ When faced with determining whether to compel arbitration of a particular Title VII or ADA claim, courts must consider the federal policies of opposing discrimination and favoring arbitration.¹⁰ By requiring employers to prove that employees knowingly agreed to arbitrate their claims, the Ninth Circuit in *Nelson v. Cyprus Bagdad Copper Corp.* continues to give the federal policy against discrimination the highest possible priority.¹¹

In 1974, in *Alexander v. Gardner-Denver Co.*, the United States Supreme Court held that an employee's Title VII claim was not precluded even though the same complaint was filed under a collective bargaining agreement and resolved by an arbitrator.¹² In *Alexander*, an employee alleged that a company discharged him because of his race in violation of Title VII.¹³ The district court dismissed the case because an arbitrator had previously adjudicated the discrimination claim in the employer's favor, and the United States Court of Appeals for the Tenth Circuit affirmed per curiam.¹⁴ In determining whether the employee's claim was precluded, the Supreme Court examined the legislative history of Title VII and concluded that Title VII was designed to supplement, rather than replace, other employment discrimination laws.¹⁵ The Court reasoned that it is not inconsistent to enforce both contractual and statutory rights in their respective forums.¹⁶ Furthermore, the Court rejected the argument that the employee waived his Title VII cause of action, explaining that a union may not waive an employee's Title VII rights because Title VII concerns individual, rather than collective, rights.¹⁷ The Court added that submitting a grievance to arbitration did not constitute a waiver because resorting to the arbitral forum is the exercise of an independent contractual right.¹⁸ Thus, the Court held that an arbitrator's resolution of a complaint filed under a collective bargaining agreement did not preclude the employee's subsequent Title VII claim.¹⁹

⁹ See *id.* at 47, 7 Fair Empl. Prac. Cas. (BNA) at 85.

¹⁰ See *id.* at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90.

¹¹ 119 F.3d 756, 762, 6 A.D. Cases (BNA) 1714, 1718 (9th Cir. 1997).

¹² 415 U.S. at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90.

¹³ See *id.* at 39, 42, 7 Fair Empl. Prac. Cas. (BNA) at 82, 83.

¹⁴ See *id.* at 42-43, 7 Fair Empl. Prac. Cas. (BNA) at 83-84. Though the arbiter found for the employer, the arbiter did not specifically refer to the employee's racial discrimination claim. See *id.* at 42, 7 Fair Empl. Prac. Cas. (BNA) at 83.

¹⁵ See *id.* at 48-49, 7 Fair Empl. Prac. Cas. (BNA) at 85-86.

¹⁶ See *id.* at 50, 7 Fair Empl. Prac. Cas. (BNA) at 86.

¹⁷ See *Alexander*, 415 U.S. at 51, 7 Fair Empl. Prac. Cas. (BNA) at 86-87.

¹⁸ See *id.* at 52, 7 Fair Empl. Prac. Cas. (BNA) at 87.

¹⁹ See *id.* at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90.

In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, the United States Supreme Court held that an arbitration agreement could subject an employee's claims under the Age Discrimination in Employment Act ("ADEA") to compulsory arbitration.²⁰ In *Gilmer*, an employee alleged that his employer discharged him because of his age in violation of the ADEA.²¹ In response, the employer filed a motion to compel arbitration.²² The Court stated that unless Congress specifically intended to preclude the waiver of judicial remedies for the statutory rights in question, courts should hold the employee to his bargain to arbitrate the statutory claim.²³ The Court noted that the party seeking to avoid arbitration bears the burden of showing that Congress intended to preclude a waiver.²⁴ The Court determined that the employee did not meet this burden.²⁵ The Court rejected the argument that compulsory arbitration is improper because it deprives claimants of the judicial forum provided by the ADEA.²⁶ The Court also rejected the argument that an employee's rights are less protected by the arbitral process than by the judicial forum.²⁷ The Court distinguished *Alexander*, where the employee had exercised his contractual right pursuant to a collective bargaining agreement, because the employee in *Gilmer* agreed individually to arbitrate all of his claims.²⁸ Thus, the Court held that the employee's ADEA claim could be subject to compulsory arbitration because the employee failed to show that Congress intended to preclude arbitration of such claims.²⁹

In 1992, in *Mago v. Shearson Lehman Hutton, Inc.*, the United States Court of Appeals for the Ninth Circuit held that an employee failed to show that Congress intended to preclude arbitration of Title VII claims.³⁰ In *Mago*, an employee alleged that her employer sexually harassed her and discriminated against her because of her sex in violation of Title VII.³¹ In response, the employer moved to compel

²⁰ 500 U.S. 20, 23, 55 Fair Empl. Prac. Cas. (BNA) 1116, 1118 (1991).

²¹ See *id.* at 23-24, 55 Fair Empl. Prac. Cas. (BNA) at 1119.

²² See *id.* at 24, 55 Fair Empl. Prac. Cas. (BNA) at 1119. The employee had submitted a securities registration form, which contained a mandatory arbitration clause, to the New York Stock Exchange. See *id.* at 23, 55 Fair Empl. Prac. Cas. (BNA) at 1118.

²³ See *id.* at 26, 55 Fair Empl. Prac. Cas. (BNA) at 1120.

²⁴ See *id.*

²⁵ See *Gilmer*, 500 U.S. at 35, 55 Fair Empl. Prac. Cas. (BNA) at 1123.

²⁶ See *id.* at 29, 55 Fair Empl. Prac. Cas. (BNA) at 1121.

²⁷ See *id.* at 30, 55 Fair Empl. Prac. Cas. (BNA) at 1121.

²⁸ See *id.* at 35, 55 Fair Empl. Prac. Cas. (BNA) at 1123.

²⁹ See *id.* at 23, 55 Fair Empl. Prac. Cas. (BNA) at 1118.

³⁰ 956 F.2d 932, 935, 58 Fair Empl. Prac. Cas. (BNA) 178, 180 (9th Cir. 1992).

³¹ See *id.* at 934, 58 Fair Empl. Prac. Cas. (BNA) at 179.

arbitration pursuant to her employment agreement.³² The Ninth Circuit determined that the ADEA and Title VII have similar aims and provisions.³³ The Ninth Circuit also noted that, similar to *Gilmer*, the parties agreed upon a privately negotiated commercial arbitration agreement.³⁴ The court then applied the reasoning of *Gilmer* and concluded that the employee failed to show that Congress intended to preclude arbitration of Title VII claims.³⁵ Thus, the Ninth Circuit held that the arbitration agreement compelled the employee to arbitrate her Title VII claims.³⁶

In 1994, in *Prudential Insurance Co. of America v. Lai*, the United States Court of Appeals for the Ninth Circuit held that a Title VII plaintiff may only be compelled to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration.³⁷ In *Lai*, employees signed registration forms that included an agreement to arbitrate any disputes.³⁸ The employees later sued their immediate supervisor and the employer, alleging that their supervisor raped, harassed and sexually abused them.³⁹ In response, the employer moved to compel arbitration.⁴⁰ The Ninth Circuit distinguished *Alexander* and *Gilmer* because the issue was not whether employees could agree to arbitrate statutory employment claims, but whether these particular employees had agreed to arbitrate such claims.⁴¹ The court then examined congressional intent with respect to the employee's ability to waive his or her Title VII rights.⁴² Recognizing Title VII's crucial purpose of preventing employment discrimination, the court concluded that Congress intended at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived statutory rights.⁴³ In applying the knowing agreement standard, the Ninth Circuit determined that the employees

³² See *id.*

³³ See *id.* at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180.

³⁴ See *id.*

³⁵ See *Mago*, 956 F.2d at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180.

³⁶ See *id.*

³⁷ 42 F.3d 1299, 1305, 66 Fair Empl. Prac. Cas. (BNA) 933, 937 (9th Cir. 1994).

³⁸ See *id.* at 1301, 66 Fair Empl. Prac. Cas. (BNA) at 934. The forms provided that the employees submit their claims to arbitration pursuant to the requirements of any organizations to which the employees later registered. See *id.* The employees subsequently registered with the National Association of Securities Dealers, which required that any disputes with its members' businesses be arbitrated. See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.* at 1303, 66 Fair Empl. Prac. Cas. (BNA) at 935.

⁴² See *Lai*, 42 F.3d at 1304-05, 66 Fair Empl. Prac. Cas. (BNA) at 936-37.

⁴³ See *id.* at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

could not have understood that by signing the registration forms they had agreed to arbitrate sexual discrimination claims.⁴⁴ Thus, the court held that the employees were not bound by an agreement to arbitrate their Title VII claims because they did not knowingly contract to forego their statutory remedies.⁴⁵

During the *Survey* year, in *Nelson v. Cyprus Bagdad Copper Corp.*, the United States Court of Appeals for the Ninth Circuit held that an employee was not bound by an agreement to arbitrate contained in the Employee Handbook ("Handbook") because the employee did not knowingly contract to forego his statutory remedies provided by the ADA.⁴⁶ In *Nelson*, an employee alleged that his employer violated the ADA by terminating him because he was unable to work shifts that caused him medical difficulty.⁴⁷ The employer had previously issued the Handbook, which contained a grievance resolution procedure.⁴⁸ Nelson signed an acknowledgment that he received the Handbook, that he agreed to read and understand its contents and that he would contact his supervisor if he had any questions.⁴⁹ The employee initiated the formal grievance process, but then refused to continue the process and was advised by counsel to file suit.⁵⁰ The district court granted summary judgment to the employer, reasoning that the arbitration clause contained in the Handbook was enforceable and that the employee knowingly and voluntarily agreed to waive his rights to a judicial forum.⁵¹

The Ninth Circuit first noted that prior to *Gilmer*, federal anti-discrimination laws had been interpreted to prohibit any waiver, even a knowing waiver, of statutory remedies in favor of arbitration.⁵² The

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718. In dissent, Circuit Judge Rymer argued that the majority should have followed the district court by evaluating the validity of the waiver under Arizona contract law, which recognizes that an employee handbook may be incorporated into an employment contract. See *id.* at 764, 6 A.D. Cases (BNA) at 1720 (Rymer, J., dissenting). Thus, because Nelson did not argue that the district court's conclusion was erroneous under Arizona law, the dissent would have held that the case was not ripe for appeal. See *id.* (Rymer, J., dissenting).

⁴⁷ See *id.* at 758-59, 6 A.D. Cases (BNA) at 1715-16. The employer required Nelson to work rotating twelve hour shifts despite previously experienced medical difficulties in working such shifts. See *id.* at 758, 6 A.D. Cases (BNA) at 1715.

⁴⁸ See *id.* The formal grievance resolution procedure contained in the Handbook provided four steps culminating in an appeal to an arbitrator. See *id.* at 758-59, 6 A.D. Cases (BNA) at 1715-16.

⁴⁹ See *id.* at 758, 6 A.D. Cases (BNA) at 1715.

⁵⁰ See *id.* at 759, 6 A.D. Cases (BNA) at 1716.

⁵¹ See *Nelson*, 119 F.3d at 759, 6 A.D. Cases (BNA) at 1716.

⁵² See *id.* at 760, 6 A.D. Cases (BNA) at 1716.

Ninth Circuit recognized that the Supreme Court in *Gilmer* held that individuals can contractually agree to arbitrate employment disputes and thereby waive their statutory rights.⁵³ Cognizant of the federal policy favoring arbitration, the Ninth Circuit then examined congressional intent with respect to waiving statutory rights under the ADA.⁵⁴ The Ninth Circuit noted that the legislative history of the ADA mirrored that of Title VII.⁵⁵ Extending its holding in *Lai*, the court concluded that the ADA, like Title VII, requires a knowing agreement.⁵⁶

In applying the knowing agreement standard, the court first explained that the signed acknowledgment form did not suffice as a valid waiver.⁵⁷ The court noted that the employee agreed only to "read and understand" the Handbook rather than be bound by its provisions.⁵⁸ The court emphasized that nothing in the form notified the employee that he was agreeing to waive any rights or remedies afforded him by anti-discrimination statutes.⁵⁹ Additionally, the court determined that the employee's continued employment subsequent to receiving the Handbook did not amount to the type of knowing agreement contemplated by *Lai*.⁶⁰ The court noted that nothing in the form or the Handbook itself put the employee on notice that he was somehow agreeing to waive his statutory rights by continuing to perform his work.⁶¹ The court added that the employer must explicitly present to the employee any bargain to waive the right to a judicial forum for ADA claims and the employee must explicitly agree to waive the specific right in question.⁶² Thus, the Ninth Circuit held that the employee was not bound by an agreement to arbitrate contained in the Handbook because the employee did not knowingly contract to forego his statutory remedies provided by the ADA.⁶³

Provided with inadequate guidance from the Supreme Court in determining whether employees have contractually waived their statutory rights, courts have struggled to balance the federal policy favoring arbitration and the federal policy against discrimination.⁶⁴ In determin-

⁵³ See *id.*

⁵⁴ See *id.*, 6 A.D. Cases (BNA) at 1716-17.

⁵⁵ See *id.* at 761 n.9, 6 A.D. Cases (BNA) at 1717 n.9.

⁵⁶ See *Nelson*, 119 F.3d at 761, 6 A.D. Cases (BNA) at 1717.

⁵⁷ See *id.* at 761, 6 A.D. Cases (BNA) at 1718.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.* at 762, 6 A.D. Cases (BNA) at 1718.

⁶¹ See *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See, e.g., *Gilmer*, 500 U.S. at 23, 55 Fair Empl. Prac. Cas. (BNA) at 1118; *Alexander*, 415

ing that an arbitrator's resolution of a complaint filed under a collective bargaining agreement did not preclude the employee's subsequent Title VII claim, the United States Supreme Court, in *Alexander*, elevated the federal policy against discrimination above the federal policy favoring arbitration.⁶⁵ Only seventeen years later, however, the United States Supreme Court reversed field in *Gilmer* and elevated the federal policy favoring arbitration above the federal policy against discrimination in determining that an employee's ADEA claim could be subject to compulsory arbitration.⁶⁶ The Court distinguished the individual agreement to arbitrate in *Gilmer* from the collective bargaining agreement to arbitrate in *Alexander*.⁶⁷ The Court noted that in the collective bargaining context, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.⁶⁸ Thus, because the employee in *Gilmer* had individually agreed to arbitrate his ADEA claim, concerns regarding collective representation were inapplicable.⁶⁹ Although the Supreme Court concluded that an individual agreement to arbitrate can be enforced, the Court was silent as to what kind of agreement suffices to waive the judicial remedy.⁷⁰

Without any guidance, the Ninth Circuit has set its own course.⁷¹ After accepting the reasoning of *Gilmer* in *Mago* that employees can contractually waive their statutory rights, the Ninth Circuit then focused on what type of agreement is necessary to waive the judicial remedy.⁷² In *Lai*, the Ninth Circuit held that employees may only be compelled to forego their statutory remedies and arbitrate their Title VII claims if they have knowingly agreed to submit such disputes to arbitration.⁷³ In *Nelson*, the Ninth Circuit extended the holding in *Lai* to ADA claims when it determined that employers could not compel the arbitration of employees' ADA claims where the employees did not

U.S. at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90; *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718; *Lai*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

⁶⁵ See 415 U.S. at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90.

⁶⁶ See 500 U.S. at 23, 55 Fair Empl. Prac. Cas. (BNA) at 1118.

⁶⁷ See *id.* at 35, 55 Fair Empl. Prac. Cas. (BNA) at 1123.

⁶⁸ See *id.* at 34, 55 Fair Empl. Prac. Cas. (BNA) at 1123.

⁶⁹ See *id.* at 35, 55 Fair Empl. Prac. Cas. (BNA) at 1123.

⁷⁰ See *id.*

⁷¹ See *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718; *Lai*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

⁷² See *Gilmer*, 500 U.S. at 23, 55 Fair Empl. Prac. Cas. (BNA) at 1118; *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718; *Lai*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937; *Mago*, 956 F.2d at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180.

⁷³ See 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

knowingly contract to forego their statutory remedies.⁷⁴ Though the Ninth Circuit accepts that arbitration may be compelled, the court insulates employees from unknowingly agreeing to arbitrate statutory discrimination claims.⁷⁵ By requiring employers to prove that employees knowingly agreed to arbitrate their claims, the Ninth Circuit continues to give the federal policy against discrimination the highest possible priority.⁷⁶

More specifically, employers will find it more difficult to compel employees to arbitrate their statutory claims through employee handbooks in light of the *Nelson* decision.⁷⁷ With respect to what constitutes a knowing waiver, the Ninth Circuit appears to require that the employee fully understand the consequences of signing an arbitration clause.⁷⁸ Thus, an acknowledgment form indicating the receipt of a handbook that contains an arbitration clause should notify the employee that by signing the form the employee additionally agrees to waive rights and remedies afforded him or her by civil rights statutes.⁷⁹ Additionally, the acknowledgment form should notify the employee that by continuing to perform his or her duties the employer will presume that the employee has agreed to waive his or her statutory rights.⁸⁰ Hence, an employer must be forthright in presenting the arbitration clause to the employee, and the employee must have the opportunity to agree knowingly to waive his or her rights.⁸¹

Because employers will have to prove a knowing waiver to compel arbitration, the Ninth Circuit will protect employees from unknowing agreements to arbitrate.⁸² As *Lai* and *Nelson* have demonstrated, the Ninth Circuit has effectively shielded employees from employers who are seeking to avoid the judicial forum, even in the aftermath of *Gilmer*.⁸³ As a result, employees are more likely to present their statutory claims in federal court as opposed to arbitration.⁸⁴ Consequently,

⁷⁴ See *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718.

⁷⁵ See *id.*; *Lai*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937; *Mago*, 956 F.2d at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180.

⁷⁶ See *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718.

⁷⁷ See *id.*

⁷⁸ See *id.* at 761-62, 6 A.D. Cases (BNA) at 1718.

⁷⁹ See *id.* at 761, 6 A.D. Cases (BNA) at 1718.

⁸⁰ See *id.* at 762, 6 A.D. Cases (BNA) at 1718. The court explained that "the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question." *Id.*

⁸¹ See *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718.

⁸² See *id.*; *Lai*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

⁸³ See *Gilmer*, 500 U.S. at 23, 55 Fair Empl. Prac. Cas. (BNA) at 1118; *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718; *Lai*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

⁸⁴ See *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718; *Lai*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

the federal court system will suffer from further over-burdening because the federal courts will have to hear harassment and discrimination suits that otherwise would have been submitted to an arbitrator. Additionally, employers expecting to save considerable costs by arbitrating these claims will be forced to expend substantial resources preparing for trial as opposed to the more economical arbitral forum.

In summary, the Ninth Circuit in *Nelson* held that ADA plaintiffs may be compelled to arbitrate their claims only if they knowingly waive their judicial remedy.⁸⁵ Although it applied the *Gilmer* holding in *Mago*, the Ninth Circuit continues to give the highest possible priority to the federal policy against discrimination by requiring a knowing waiver of statutory rights.⁸⁶ In particular, the *Nelson* decision may prevent many employers from enforcing arbitration clauses contained in employee handbooks against employees claiming discrimination.⁸⁷ As a result, the court system will likely suffer further over-burdening, and employers will be forced to expend substantial resources defending discrimination suits in the judicial forum. Nevertheless, employers are not completely foreclosed from compelling arbitration of ADA and other statutory claims.⁸⁸ Employers may still compel arbitration where they can prove that the employee made a knowing waiver of judicial remedies.⁸⁹

III. EMPLOYEE RETIREMENT INCOME SECURITY ACT

A. **Non-Vested Employee Benefits Protected Under Section 510 of ERISA: Inter-Modal Rail Employees Ass'n v. Atchinson, Topeka & Sante Fe Railway Co.*¹

In 1974, Congress passed the Employee Retirement Income Security Act ("ERISA") to protect the rights of employees, retirees and their beneficiaries to employee benefit plans through a uniform body of federal law.² During the *Survey* year, in *Inter-Modal Rail Employees Ass'n*

⁸⁵ See 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718.

⁸⁶ See *Gilmer*, 500 U.S. at 23, 55 Fair Empl. Prac. Cas. (BNA) at 1118; *Nelson*, 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718; *Lai*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937; *Mago*, 956 F.2d at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180.

⁸⁷ See 119 F.3d at 762, 6 A.D. Cases (BNA) at 1718.

⁸⁸ See *id.*

⁸⁹ See *id.*

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¹ 117 S. Ct. 1513, 20 Employee Benefits Cas. (BNA) 2825 (1997).

² See 29 U.S.C. §§ 1001-1461 (1974); see also Henry H. Rossbacher et al., *ERISA's Dark Side:*

v. Atchinson, Topeka & Sante Fe Railway Co. ("Inter-Modal Rail I"), the Supreme Court of the United States held that section 510 of ERISA prohibits employer interference with an employee's right to both vested and non-vested benefits.³ Previously, a conflict existed among the circuits as to whether section 510 of ERISA protected non-vested welfare benefits.⁴ The Supreme Court granted certiorari to resolve the conflict and held that section 510 applies to both vested and non-vested benefits.⁵ The Court's decision in *Inter-Modal Rail II* has significant implications for both employees and employers because the Court failed to define the exact scope of section 510 and declined to delineate the point at which an employer's fundamental business decisions begin to run afoul of section 510.⁶ With these issues left unsettled, employees and employers must continue to be wary of the protection offered by and the difficulties in complying with section 510 of ERISA.⁷

In 1993, in *Seaman v. Arvida Realty Sales*, the United States Court of Appeals for the Eleventh Circuit held that section 510 of ERISA

Retiree Health Benefits, False Employer Promises and the Protective Judiciary, 9 DEPAUL BUS. L.J. 305, 305 (1997).

³ See 117 S. Ct. 1513, 1515, 20 Employee Benefits Cas. (BNA) 2825, 2827 (1997) [hereinafter *Inter-Modal Rail II*]. Section 510, which forbids employer interference with employee rights under an existing benefit plan, states in relevant part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with any right to which such participant may become entitled under the plan

29 U.S.C. § 1140 (originally enacted as Pub. L. No. 93-406, Title I, § 510, 88 Stat. 895 (1974) and commonly cited as § 510 of ERISA). Vested benefits, such as pension benefits, are non-forfeitable. See Rossbacher et al., *supra* note 2, at 305. Non-vested benefits, such as health and disability benefits, are subject to unilateral changes by management. See *Court Leaves Outsourcing, Benefits Issues Unsettled*, 155 Lab. Rel. Rep. (BNA) 315, 315 (July 7, 1997) [hereinafter *Outsourcing*].

⁴ The Sixth, Seventh and Eleventh Circuits held that § 510 of ERISA prohibits employer interference with an employee's right to both vested and non-vested benefits while the Ninth Circuit held that § 510 of ERISA prohibits employer interference with an employee's right to vested benefits only. Compare *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) (holding that § 510 of ERISA prohibits employer interference with both vested and non-vested benefits), and *Heath v. Varsity Corp.*, 71 F.3d 256, 258, 19 Employee Benefits Cas. (BNA) 2209, 2210 (7th Cir. 1995) (same), and *Seaman v. Arvida Realty Sales*, 985 F.2d 543, 546, 16 Employee Benefits Cas. (BNA) 1689, 1691 (11th Cir. 1993) (same), with *Inter-Modal Rail Employees Ass'n v. Atchinson, Topeka & Sante Fe Ry. Co.*, 80 F.3d 348, 351 (9th Cir. 1996) [hereinafter *Inter-Modal Rail I*] (holding that § 510 of ERISA prohibits employer interference with vested employee benefits only). Thus, the decision of the Ninth Circuit in *Inter-Modal Rail I* created the conflict among the circuit courts. See 80 F.3d at 351.

⁵ See *Inter-Modal Rail II*, 117 S. Ct. at 1515, 20 Employee Benefits Cas. (BNA) at 2827.

⁶ See *id.* at 1516-17, 20 Employee Benefits Cas. (BNA) at 2828; see also *Outsourcing*, *supra* note 3, at 314.

⁷ See *Inter-Modal Rail II*, 117 S. Ct. at 1516-17, 20 Employee Benefits Cas. (BNA) at 2828; see also *Outsourcing*, *supra* note 3, at 314.

prohibits employer interference with an employee's right to both vested and non-vested benefits.⁸ *Seaman* involved a real estate salesperson entitled to health insurance coverage and participation in a 401(k) pension plan pursuant to her employment contract.⁹ Her employer, Arvida, notified her that her employment contract would be terminated so that Arvida could eliminate the costs of providing health insurance and contributing to the 401(k) plan.¹⁰ Arvida offered the employee an independent contractor position which did not provide health or pension benefits.¹¹ When the employee refused to sign the new contract, Arvida terminated her.¹² The employee then sued Arvida, alleging that her discharge resulted from her refusal to accept a change in status from an employee to an independent contractor and a concomitant loss of non-vested health benefits in violation of section 510 of ERISA.¹³

The *Seaman* court first focused on the purpose of the statute, reasoning that section 510 was intended to prohibit interference with an employee's exercise of protected rights and with the attainment of future rights.¹⁴ The court reasoned that Congress did not intend to leave employees unprotected after only some of their rights were vested.¹⁵ Further, the court noted that the plain language of section 510 states that employers may not interfere with "the attainment of *any right* to which [a] participant *may become entitled*."¹⁶ Thus, the court reasoned that the validity of a section 510 claim does not hinge upon whether the benefits involved are vested or non-vested and held that section 510 prohibits employer interference with employees' rights to additional non-vested benefits.¹⁷

In 1995, in *Heath v. Varsity Corp.*, the United States Court of Appeals for the Seventh Circuit held that section 510 of ERISA prohibits employer interference with an employee's right to both vested and non-vested benefits.¹⁸ *Heath* involved an employee terminated shortly before he became eligible for early retirement.¹⁹ The discharge did not

⁸ 985 F.2d at 546, 16 Employee Benefits Cas. (BNA) at 1691.

⁹ See *id.* at 544, 16 Employee Benefits Cas. (BNA) at 1689.

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *Seaman*, 985 F.2d at 544, 16 Employee Benefits Cas. (BNA) at 1689.

¹⁴ See *id.* at 545, 16 Employee Benefits Cas. (BNA) at 1690.

¹⁵ See *id.*, 16 Employee Benefits Cas. (BNA) at 1691.

¹⁶ *Id.* at 545-46, 16 Employee Benefits Cas. (BNA) at 1691 (construing 29 U.S.C. § 1140 (1974)) (emphasis added).

¹⁷ See *id.* at 546, 16 Employee Benefits Cas. (BNA) at 1691.

¹⁸ 71 F.3d 256, 258, 19 Employee Benefits Cas. (BNA) 2209, 2210 (7th Cir. 1995).

¹⁹ See *id.* at 257, 19 Employee Benefits Cas. (BNA) at 2209.

affect the employee's pension, which was long vested under the terms of the employer's plan, but it did prevent him from becoming eligible for additional non-vested benefits.²⁰

The court first construed the statutory language of section 510, forbidding employer action "for the purpose of interfering with the attainment of any right to which [a] participant may become entitled under the plan."²¹ The court noted that "plan" as defined in ERISA includes both pension and welfare plans.²² In addition, the court recognized that these types of plans include both vested and non-vested benefits.²³ Thus, the court concluded that section 510 protects both types of benefits.²⁴

The court acknowledged that ERISA does contain an apparent contradiction: although an employer is free to modify or abolish a benefit plan by following appropriate amendment procedures, an employer cannot interfere with an employee's right to benefits under an existing plan.²⁵ The court explained this apparent contradiction as simply a reflection of the compromise reached between competing interests when ERISA was adopted.²⁶ The court concluded that an employer may modify or abolish a plan by following appropriate amendment procedures but may not wrongfully interfere with vested or non-vested benefits that existing plans provide.²⁷ Thus, the court held that section 510 applies not only to vested benefits but also to non-vested benefits.²⁸

In 1996, in *Shahid v. Ford Motor Co.*, the United States Court of Appeals for the Sixth Circuit held that section 510 of ERISA prohibits employer interference with an employee's right to both vested and non-vested benefits.²⁹ *Shahid* involved an employee who alleged that her employer, Ford Motor Company ("Ford"), terminated her to deprive her of all non-vested benefits for which she would qualify under Ford's Voluntary Termination Plan ("VTP").³⁰ Ford argued that the

²⁰ See *id.*

²¹ *Id.* at 258, 19 Employee Benefits Cas. (BNA) at 2210.

²² See *id.*

²³ See *Heath*, 71 F.3d at 258, 19 Employee Benefits Cas. (BNA) at 2210.

²⁴ See *id.*

²⁵ See *id.* at 2210-11.

²⁶ See *id.* at 2211. The court explained that during ERISA's legislative debates, employers secured the right to modify plans, while employees secured the right to qualify for benefits under existing plans. See *id.*

²⁷ See *id.*

²⁸ See *Heath*, 71 F.3d at 258, 19 Employee Benefits Cas. (BNA) at 2210.

²⁹ 76 F.3d at 1411.

³⁰ See *id.* at 1408; see also *Revocation of Severance Offer and Termination of Employee Did Not*

employee had no entitlement to the benefits because Ford had no obligation to offer the VTP and could terminate the plan at any time.³¹

Rejecting this argument, the court stated that the plain language of section 510 contradicted Ford's narrow view of the statute.³² The court further noted that ERISA expressly exempts employee welfare benefit plans like the VTP from the sections concerned with vesting and accrual of benefits.³³ Moreover, the court reasoned that the plain language of the statute does not limit its application to vested benefits.³⁴ Thus, the court concluded that section 510 of ERISA protects non-vested benefits, like those offered by the VTP, as well as vested benefits.³⁵

During the *Survey* year, in *Inter-Modal Rail II*, the United States Supreme Court held that section 510 of ERISA prohibits employer interference with an employee's right to both vested and non-vested benefits.³⁶ In *Inter-Modal Rail I*, the United States Court of Appeals for the Ninth Circuit held, in contrast to all the other circuits which ruled on the issue, that section 510 of ERISA did not protect non-vested employee benefits.³⁷ The Supreme Court's holding in *Inter-Modal Rail II* resolved the conflict among the circuit courts surrounding this issue.³⁸

The dispute in *Inter-Modal Rail II* arose when the Sante Fe Terminal Services, Inc. ("SFTS"), a wholly owned subsidiary of The Atchinson

Violate ERISA Where Employee Engaged in Misconduct, [New Developments] Pens. Plan Guide (CCH) ¶ 23,918O, at 25,265-16 (Apr. 29, 1996). Before the employee formally requested that Ford allow her to participate in the VTP, Ford terminated her for allegedly accepting and coercing kickbacks in exchange for referrals of Ford business to a travel company. See *Shahid*, 76 F.3d at 1408; see also *Revocation of Severance Offer and Termination of Employee Did Not Violate ERISA Where Employee Engaged in Misconduct*, *supra*, at 25,265-16.

³¹ See *Shahid*, 76 F.3d at 1411. Although the court noted that Ford's argument was sensible in that an employer should not be penalized for offering gratuitous benefits, the court reasoned that § 510 was designed to protect employees' expectations in benefit plans and thus held the employer to its promises. See *id.* at 1412.

³² See *id.* at 1411.

³³ See *id.* at 1412 (construing 29 U.S.C. § 1051(1) (originally enacted as Pub. L. No. 93-406, Title I, § 201(1), 88 Stat. 852 (1974) and commonly cited as § 201(1) of ERISA). Section 201(1) of ERISA expressly states that an employee welfare benefit plan, which includes non-vested benefits, is exempt from the vesting requirements of other benefits covered by ERISA. See 29 U.S.C. § 1051(1). Thus, § 201(1) indicates that ERISA's protection is not limited to vested benefits but extends to non-vested benefits as well. See *id.*

³⁴ See *Shahid*, 76 F.3d at 1412.

³⁵ See *id.* at 1411.

³⁶ 117 S. Ct. at 1515, 20 Employee Benefits Cas. (BNA) at 2827.

³⁷ See 80 F.3d 349, 351 (9th Cir. 1996); see also *Action Barred Because ERISA Does Not Cover Suits For Benefits Recovery Under Railroad Retirement Act*, [New Developments] Pens. Plan Guide (CCH) ¶ 23,918X, at 25,265-21 (May 13, 1996) [hereinafter *Action Barred*].

³⁸ See *supra* note 4.

son, Topeka and Sante Fe Railway Co. ("ATSF"), terminated a group of employees for declining to continue employment under a new employer who would substantially reduce both the group's vested and non-vested benefits.³⁹ SFTS transferred cargo between railcars and trucks at ATSF's Hobart Yard in Los Angeles, California and provided its employees with pension, health and welfare benefits through employee benefit plans subject to ERISA's comprehensive regulations.⁴⁰

In January 1990, ATSF entered into a formal service agreement with SFTS.⁴¹ The newly-formed agreement stated that SFTS would continue to do the same work it had done without a contract for the previous fifteen years at the Hobart Yard.⁴² Seven weeks later, ATSF exercised its right to terminate the newly-formed agreement and opened up the Hobart Yard work for competitive bidding.⁴³ ATSF terminated SFTS employees who declined to continue employment with the successful bidder, In-Terminal Services ("ITS").⁴⁴ Employees who continued their employment with ITS lost their Railroad Retirement Act benefits and suffered a substantial reduction in their pension, health and welfare benefits.⁴⁵

The terminated employees sued SFTS, ATSF and ITS in federal district court, alleging that the respondents violated section 510 of ERISA by terminating them for the purpose of interfering with their attainment of both vested and non-vested rights under the benefit plans adopted by ATSF.⁴⁶ The petitioners contended that the substitution of ITS for SFTS forced them to accept significantly reduced benefits, thus interfering with the attainment of their rights in violation of section 510 of ERISA.⁴⁷ The district court granted the respondents' motion to dismiss these section 510 claims.⁴⁸

In *Inter-Modal Rail I*, the Court of Appeals for the Ninth Circuit affirmed in part and reversed in part.⁴⁹ The court reinstated the petitioners' claim under section 510 for interference with their pension benefits but affirmed the dismissal of their claim for interference with

³⁹ See 117 S. Ct. at 1514-15, 20 Employee Benefits Cas. (BNA) at 2826.

⁴⁰ See *id.* at 1514, 20 Employee Benefits Cas. (BNA) at 2825-26.

⁴¹ See *id.*, 20 Employee Benefits Cas. (BNA) at 2826.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *Inter-Modal Rail II*, 117 S. Ct. at 1514, 20 Employee Benefits Cas. (BNA) at 2826.

⁴⁵ See *id.* at 1514-15, 20 Employee Benefits Cas. (BNA) at 2826.

⁴⁶ See *id.* at 1515, 20 Employee Benefits Cas. (BNA) at 2826.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See 80 F.3d at 353; *Action Barred*, [New Developments] Pens. Plan Guide (CCH) at 25,265-

their welfare benefits.⁵⁰ The court reasoned that the existence of a present right is a prerequisite to section 510 relief, and although the employees did have a present right to vested pension benefits, the employees had no present right to future, anticipated, non-vested welfare benefits.⁵¹ Thus, the court held that the petitioners did not state a cause of action for interference with non-vested welfare benefits.⁵²

In *Inter-Modal Rail II*, the Supreme Court vacated and remanded the Ninth Circuit decision, holding that section 510 bars employer interference with an employee's right to both vested and non-vested benefits.⁵³ The Court reasoned that the Ninth Circuit's decision contradicted the plain language of section 510.⁵⁴ In construing the plain language of the statute, the Court noted that ERISA defines "plan" to include both an employee welfare benefit plan and an employee pension plan.⁵⁵ Because "plan" includes employee welfare benefit plans and because employee welfare plans offer benefits that do not vest, Congress's use of the word "plan" in section 510 "all but forecloses the argument that section 510's interference clause applies only to 'vested' rights."⁵⁶ The Court reasoned that if Congress had intended to confine section 510's protection to vested rights, it could easily have substituted the term "pension plan" for "plan" or the term "nonforfeitable right" for "any right."⁵⁷ Thus, the Court concluded that section 510 draws no distinction between vested and non-vested rights.⁵⁸

The Court also noted that an employer's right to unilaterally amend or eliminate its welfare benefit plan does not justify a departure from the plain language of section 510.⁵⁹ The Court explained that the flexibility an employer enjoys to amend or abolish its welfare plan is counterbalanced by section 510, which prohibits blatant employer interference for the purpose of circumventing the provision of promised benefits.⁶⁰ Thus, the Court concluded that the power to amend or abolish a welfare plan does not include the power to interfere with an

⁵⁰ See 80 F.3d at 351.

⁵¹ See *id.*

⁵² See *id.*

⁵³ 117 S. Ct. at 1517, 20 Employee Benefits Cas. (BNA) at 2828.

⁵⁴ See *id.* at 1515, 20 Employee Benefits Cas. (BNA) at 2827.

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ See *id.*

⁵⁸ See *Inter-Modal Rail II*, 117 S. Ct. at 1515, 20 Employee Benefits Cas. (BNA) at 2827.

⁵⁹ See *id.* at 1516, 20 Employee Benefits Cas. (BNA) at 2827.

⁶⁰ See *id.*

employee's right to vested and non-vested benefits under an existing plan.⁶¹

In addition, the Court noted that in certain situations, section 510 does not prohibit employer actions that affect an employee's attainment of vested or non-vested benefits so long as the employer acts without the purpose of interfering with these benefits.⁶² The Court stated that "when an employer acts without this purpose, as could be the case when making fundamental business decisions, such actions are not barred by section 510."⁶³ Thus, the Court concluded that section 510 of ERISA prohibits blatant employer interference with an employee's right to both vested and non-vested benefits.⁶⁴

Several significant issues underlie the Supreme Court's ruling in *Inter-Modal Rail II*. First, the decision has a number of important implications for employees. On its face, *Inter-Modal Rail II* appears to grant broad protection to employees by prohibiting employer interference with both their vested and non-vested rights under existing benefit plans.⁶⁵ It is possible, however, to conceive of certain kinds of employee benefits included in an employee benefit plan that will fall outside the scope of section 510.⁶⁶ Although by definition all employee benefits are characterized as either vested or non-vested, some benefits, such as completely discretionary employer contributions to a simplified employee pension plan, are so speculative and discretionary that they might fall outside the scope of section 510.⁶⁷ In situations involving these types of benefits, where the attainment of the benefit is thoroughly contingent on an employer's discretion and entirely within an employer's control, the benefit is probably too speculative to support a section 510 claim.⁶⁸ Thus, employees should be aware that even though the Court interpreted section 510 of ERISA broadly, the possibility remains that some extremely speculative and discretionary employee benefits are not protected under section 510 of ERISA.⁶⁹

⁶¹ See *id.*, 20 Employee Benefits Cas. (BNA) at 2827-28.

⁶² See *id.*, 20 Employee Benefits Cas. (BNA) at 2828.

⁶³ *Inter-Modal Rail II*, 117 S. Ct. at 1516, 20 Employee Benefits Cas. (BNA) at 2828.

⁶⁴ See *id.*

⁶⁵ See *id.* at 1515-16, 20 Employee Benefits Cas. (BNA) at 2827; see also *Outsourcing*, *supra* note 3, at 315.

⁶⁶ See, e.g., *Garrat v. Walker*, 121 F.3d 565, 570, 21 Employee Benefits Cas. (BNA) 1444, 1448 (10th Cir. 1997) (holding that completely discretionary employer contributions to a simplified employee pension plan were so speculative and discretionary that they fell outside the scope of § 510).

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

Furthermore, employees should note that the decision in *Inter-Modal Rail II* might not extend blanket protection to traditional kinds of non-vested employee benefits under section 510 of ERISA.⁷⁰ It is possible to argue in a technical sense that section 510 of ERISA, when applied to non-vested benefits, only protects an employee's right to cross the "threshold of eligibility."⁷¹ In other words, one can argue that the plain language of section 510 simply means that an employee who is eligible to receive non-vested benefits has already attained his or her rights under the plan simply by becoming eligible to receive them.⁷² Thus, any subsequent actions taken by an employer cannot, by definition, interfere with the attainment of an employee's rights under the plan.⁷³

This argument hinges on a technical and narrow reading of the word "attainment" in section 510 of ERISA. Although the argument might seem tenuous, the Supreme Court acknowledged the argument in *Inter-Modal Rail II* and suggested that the Ninth Circuit consider it on remand.⁷⁴ Thus, employees should remain wary of the scope of section 510 of ERISA.⁷⁵ Although on its face *Inter-Modal Rail II* appears to clearly settle the issue, the possibility remains that if courts accept this technical argument, non-vested employee benefits are not protected under section 510 of ERISA.⁷⁶

The decision in *Inter-Modal Rail II* also has significant implications for employers and the attorneys who advise them. In its opinion, the Court noted that an employer has the right to interfere with an employee benefit plan when making "fundamental business decisions," but failed to explain what might constitute a "fundamental business decision."⁷⁷ For example, it is unclear whether an employer's decision to subcontract would qualify as a "fundamental business decision" in situations where the employer is only partly motivated by a desire to reduce employee benefits.⁷⁸ The decision to subcontract is almost always driven by considerations of the cost of employee benefits.⁷⁹ Thus, the Court's decision in *Inter-Modal Rail II* will have a significant

⁷⁰ See 117 S. Ct. at 1516-17, 20 Employee Benefits Cas. (BNA) at 2828.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See 117 S. Ct. at 1516-17, 20 Employee Benefits Cas. (BNA) at 2828.

⁷⁶ See *id.*

⁷⁷ See *id.*; see also *Outsourcing*, *supra* note 3, at 315.

⁷⁸ See *Inter-Modal II*, 117 S. Ct. at 1516, 20 Employee Benefits Cas. (BNA) at 2828.

⁷⁹ See *Outsourcing*, *supra* note 3, at 315.

impact on the way employers attempt to reduce the cost of employee benefits.⁸⁰

Inter-Modal Rail II involved an employer making a contracting decision based solely on its blatant desire to reduce benefit costs.⁸¹ Most employer decisions, however, are more complex and the motivations behind these decisions are not so obvious.⁸² The Supreme Court's ruling in *Inter-Modal Rail II* does not address the more common situation in which an employer makes a subcontracting decision based partly on business considerations and partly on benefit considerations.⁸³ Thus, the Court failed to provide any guidance on what constitutes acceptable employer interference with an employee benefit plan when it is part of a "fundamental business decision" to subcontract.⁸⁴

Furthermore, because subcontracting offers many advantages to employers, more cases involving this issue are likely to surface as employers continue to choose subcontracting as an attractive business option.⁸⁵ The advantages of subcontracting include the flexibility to employ only when necessary, the ability to acquire expertise and skills in particular business areas and the ability to shop around for the best fit for an employer's needs.⁸⁶ Subcontracting also allows employers to reduce other labor costs such as training, wages and recruiting expenses.⁸⁷ Thus, the decision in *Inter-Modal Rail II* creates a dilemma for employers: although employers may choose to subcontract because of the many business advantages it offers, employers face potential liability under section 510 of ERISA for the concomitant loss of employee benefits.⁸⁸ This dilemma will inevitably create substantial litigation as the courts attempt to draw a line between an acceptable fundamental business decision which permissibly infringes on employee benefits and a decision which violates section 510 of ERISA.⁸⁹

Because the decision in *Inter-Modal Rail II* failed to explain how much of a role cutting employee benefits can play in business decisions, it will be difficult for employers to discern whether an employ-

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See generally *Inter-Modal Rail II*, 117 S. Ct. 1513, 20 Employee Benefits Cas. (BNA) 2825. See also *Outsourcing*, *supra* note 3, at 316.

⁸³ See *Outsourcing*, *supra* note 3, at 315.

⁸⁴ See *Inter-Modal Rail II*, 117 S. Ct. at 1516, 20 Employee Benefits Cas. (BNA) at 2828.

⁸⁵ See *id.*; see also *Outsourcing*, *supra* note 3, at 315, 316.

⁸⁶ See *Outsourcing*, *supra* note 3, at 316.

⁸⁷ See *id.*

⁸⁸ See *id.* at 315, 316.

⁸⁹ See *id.*

ment decision violates section 510 of ERISA.⁹⁰ Yet, *Inter-Modal Rail II* is clear on one point: to avoid running afoul of ERISA, employers must have a fundamental business reason other than wanting to cut benefit costs when taking an action that infringes on existing employee benefit plans.⁹¹ For example, if an employer chooses to subcontract in order to make fundamental changes in the way it does business, then that decision should not violate section 510 of ERISA.⁹² If business considerations are only part of an employer's reasoning, however, and benefit costs are also a factor, an employer may confront problems with ERISA compliance.⁹³ If cutting benefit costs is the sole factor in an employer's decision to subcontract, the employer's decision is a clear violation of section 510 of ERISA.⁹⁴ To remain safely in compliance with section 510 of ERISA, employers who want to reduce their benefit costs may opt to adjust their employee benefit plans instead of subcontracting or terminating employees.⁹⁵ Indeed, the Supreme Court explicitly held in *Inter-Modal Rail II* that adjusting employment benefit plans is an acceptable way to curtail employee benefits under ERISA.⁹⁶

In conclusion, the Supreme Court held in *Inter-Modal Rail II* that section 510 of ERISA prohibits employer interference with an employee's right to both vested and non-vested benefits.⁹⁷ The Court based its decision on the plain language of section 510.⁹⁸ The decision in *Inter-Modal Rail II* is likely to have a significant impact on both employees and employers as the courts proceed to define the exact scope of section 510 and to delineate what constitutes a "fundamental business decision" that permissibly affects employee benefits.⁹⁹ Most importantly, *Inter-Modal Rail II* instructs employers that to remain in compliance with section 510 of ERISA, employers should refrain from

⁹⁰ See *id.* at 316.

⁹¹ See generally *Inter-Modal Rail II*, 117 S. Ct. 1513, 20 Employee Benefits Cas. (BNA) 2825. See also *Outsourcing*, *supra* note 3, at 315, 316.

⁹² See *Inter-Modal Rail II*, 117 S. Ct. at 1516, 20 Employee Benefits Cas. (BNA) at 2828; see also *Outsourcing*, *supra* note 3, at 316.

⁹³ See *Outsourcing*, *supra* note 3, at 316.

⁹⁴ See *Inter-Modal Rail II*, 117 S. Ct. at 1516, 20 Employee Benefits Cas. (BNA) at 2827; see also *Outsourcing*, *supra* note 3, at 316.

⁹⁵ See *Inter-Modal Rail II*, 117 S. Ct. at 1516, 20 Employee Benefits Cas. (BNA) at 2827; see also *Outsourcing*, *supra* note 3, at 316.

⁹⁶ See *Inter-Modal Rail II*, 117 S. Ct. at 1516, 20 Employee Benefits Cas. (BNA) at 2827; see also *Outsourcing*, *supra* note 3, at 316.

⁹⁷ See 117 S. Ct. at 1516-17, 20 Employee Benefits Cas. (BNA) at 2828; see also *Outsourcing*, *supra* note 3, at 314.

⁹⁸ See *Inter-Modal Rail II*, 117 S. Ct. at 1515, 20 Employee Benefits Cas. (BNA) at 2827.

⁹⁹ See *id.*

subcontracting or terminating employees for the sole purpose of reducing benefit costs.¹⁰⁰

IV. FEDERAL TORT CLAIMS ACT

*A.*Negligent Hiring, Supervision and Training—The Scope of the Assault and Battery Exception: Senger v. United States*¹

Congress passed the Federal Tort Claims Act ("FTCA") in 1948, waiving sovereign immunity in cases involving the negligent or wrongful acts of governmental employees acting within the scope of their employment.² Section 2680(h) of the FTCA ("§ 2680(h)"), however, bars government liability in "[a]ny claim arising out of assault [or] battery," as well as for other specified intentional torts.³ Recently, the task of defining the jurisdictional boundary of the Act has proven problematic in situations where an assault or battery has occurred largely due to government personnel's negligent hiring, supervision or training.⁴ The Supreme Court's reluctance to define the scope of the FTCA in such cases has prompted disagreement among the circuits as to whether the government is liable where its own negligent hiring, supervision or training is the proximate cause of the alleged harm.⁵ Relying on statutory language and relevant legislative history, a majority of circuits have interpreted the phrase "arising out of" broadly, and in so doing, presently exclude claims alleging negligent hiring, supervision and training against the government.⁶ Contrary to these decisions, the Ninth Circuit, in *Senger v. United States*, recently reaffirmed its minority position, allowing claimants to assert such claims.⁷ In so

¹⁰⁰ See *id.* at 1516, 20 Employee Benefits Cas. (BNA) at 2827; see also *Outsourcing*, *supra* note 3, at 316.

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¹ 103 F.3d 1437, 12 Indiv. Empl. Rights Cas. (BNA) 598 (9th Cir. 1996).

² See 28 U.S.C. § 1346(b) (1994).

³ See *id.* § 2680(h).

⁴ See *Guccione v. United States*, 847 F.2d 1031, 1033 (2nd Cir. 1988).

⁵ See *Sheridan v. United States*, 487 U.S. 392, 404 n.8 (1988) (expressly declining to consider whether negligent hiring, negligent supervision or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a government employee).

⁶ See *Thigpen v. United States*, 800 F.2d 393, 395-96 (4th Cir. 1987); *Hoot v. United States*, 790 F.2d 836, 838 (10th Cir. 1986); *Satterfield v. United States*, 788 F.2d 395, 399 (6th Cir. 1986); *Garcia v. United States*, 776 F.2d 116, 117-18 (5th Cir. 1985).

⁷ See, e.g., *Senger v. United States*, 103 F.2d 1437, 12 Indiv. Empl. Rights Cas. (BNA) 598 (9th Cir. 1996); *Morrill v. United States*, 821 F.2d 1426 (9th Cir. 1987); *Kearney v. United States*, 815 F.2d 535 (9th Cir. 1987); *Bennett v. United States*, 803 F.2d 1502 (9th Cir. 1986).

doing, the Ninth Circuit has reasoned that principles of tort liability demand a result contrary to the plain language of the statute.⁸

In 1985, in *United States v. Shearer*, the United States Supreme Court held that the federal government could not be held liable under the FTCA for negligent retention or supervision of a serviceman who murdered another serviceman while away from the military base.⁹ In *Shearer*, the mother of an army private who was kidnapped and murdered by a fellow serviceman sued the government under the FTCA, claiming that the Army's negligence caused her son's death.¹⁰ Chief Justice Burger, in a plurality opinion joined by three other Justices, concluded that the express "arising out of" language of § 2680(h) indicated a legislative intent to bar claims for supervisory negligence where there would have been no claim without an assault and battery.¹¹

In reaching its conclusion, the plurality considered the language of the statute as well as the tort principles underlying the FTCA.¹² The plurality reviewed the legislative history of § 2680(h) and noted that Congress did not distinguish between "negligent supervision" claims and respondeat superior claims for determining whether sovereign immunity had been waived in a given situation.¹³ This history, coupled with the statute's language "arising out of assault or battery," prompted the plurality to read § 2680(h) broadly enough to encompass claims like respondent's that sound in negligence but stem from a battery committed by a government employee.¹⁴

⁸ See *Senger*, 103 F.2d at 1437, 12 Indiv. Empl. Rights Cas. (BNA) at 598; *Morrill*, 821 F.2d at 1426; *Kearney*, 815 F.2d at 535; *Bennett*, 803 F.2d at 1502.

⁹ 473 U.S. 52, 59 (1985).

¹⁰ See *id.* at 53-54. Defendant in *Shearer* was convicted of murder in a New Mexico court and had also been convicted by a German court of manslaughter in 1977 while assigned to an Army base in Germany. See *id.*

¹¹ See *id.* at 53, 55-56, 59-60. Four Justices concurred on the alternative basis that the plaintiff's claim was, in any event, barred under the *Feres* doctrine. See *id.* at 57, 59-60. *Feres* involved a wrongful death action brought by the executrix of the estate of a soldier killed in a fire while asleep in his barracks. See *Feres v. United States*, 340 U.S. 135, 136-37 (1950). In *Shearer*, Chief Justice Burger, writing for a total of eight Justices, noted, *inter alia*, (1) the special relationship of the soldier to his superiors, (2) the effects of the maintenance of suits under the Act on discipline and (3) the extreme consequences that might be realized if such suits were allowed for negligent orders given or negligent acts committed in the course of military duty. See 473 U.S. at 57. Justice Powell did not participate in the decision. See *id.* at 59.

¹² See *Shearer*, 473 U.S. at 55.

¹³ See *id.* at 55-56.

¹⁴ See *id.* (emphasis in original). Despite different rationales, eight Justices ultimately concluded that a serviceman could not recover under the FTCA for the government's negligent failure to prevent another serviceman's assault and battery. See *id.*

In 1986, in *Thigpen v. United States*, the United States Court of Appeals for the Fourth Circuit held that § 2680(h) bars all negligent supervision claims that depend upon the existence of an assault or battery by a governmental employee.¹⁵ In *Thigpen*, two minors, aged fourteen and twelve, were admitted to the United States Naval Hospital in Beaufort, South Carolina.¹⁶ During the course of their respective treatments, a corpsman responsible for monitoring their vital signs sexually assaulted the two minors.¹⁷ Pursuant to the FTCA, plaintiffs filed a civil suit against the government after learning that the corpsman in question had pled guilty to a Texas charge of indecency with a child before he entered the Navy.¹⁸ In affirming the dismissal of plaintiffs' claims of negligence against the physicians, hospital staff and supervisory Naval personnel, the court held that § 2680(h) barred claims where an assault or battery constituted an integral part of plaintiff's action, irrespective of prior governmental negligence.¹⁹

In reaching its conclusion, the court found the *Shearer* decision particularly persuasive despite its plurality status.²⁰ Additionally, the court noted that the plain language of § 2680(h) makes no special allowances for claims alleging breach of independent governmental duties.²¹ Allowing such claims, the court reasoned, would invite plaintiffs to disguise assault or battery claims amidst allegations of breach of government's supervisory duties.²² Were that to occur, the court feared that the congressional mandate embodied by the FTCA would be circumvented.²³ On these grounds, the court held that § 2680(h) bars claims that allege negligent supervision but depend upon the existence of an assault or battery by a government employee.²⁴

¹⁵ 800 F.2d 393, 395 (4th Cir. 1986). *Thigpen* is representative of cases wherein various circuits have adopted the *Shearer* plurality's reading of the "assault and battery" exception. See, e.g., *Franklin v. United States*, 992 F.2d 1492, 1495, 1498 (10th Cir. 1993) (barring claim of negligence against United States in case of medical battery in Veterans Affairs hospital because claim was contingent on employment relationship); *Guccione v. United States*, 847 F.2d 1031, 1034, 1036-37 (2d Cir. 1988) (barring claim that United States was negligent in failing to supervise undercover agent under intentional tort exception because claim was not "entirely independent" of the employment relationship).

¹⁶ See 800 F.2d at 393.

¹⁷ See *id.* at 393-94. The corpsman was convicted of one count of contributing to the delinquency of a fourteen-year-old child and two counts of committing a lewd act upon a twelve-year-old child. See *id.* (citing *State v. Rodriguez*, 302 S.E.2d 666 (S.C. 1983)).

¹⁸ See *Thigpen*, 800 F.2d at 394.

¹⁹ See *id.* at 394-95.

²⁰ See *id.* at 395.

²¹ See *id.* at 395-96.

²² See *id.* at 396.

²³ See *Thigpen*, 800 F.2d at 396.

²⁴ See *id.* at 395. In a lengthy concurrence, Judge Murnaghan agreed with the majority's decision on the grounds of the *Feres* doctrine. See *id.* at 398 (Murnaghan, J., concurring).

In 1986, in *Bennett v. United States*, the United States Court of Appeals for the Ninth Circuit held that the "assault and battery" exception to FTCA liability did not insulate the government from liability for negligent hiring and retention of a particular teacher.²⁵ In *Bennett*, parents brought an action for damages on behalf of their children who were kidnapped, assaulted and raped by a teacher at a Bureau of Indian Affairs boarding school ("BIA school").²⁶ The BIA school conducted no investigation before giving the teacher a position, although he admitted on his employment application that he had been arrested and charged with violating Oklahoma "Outrage to Public Decency" statutes.²⁷ Such an investigation would have revealed that the teacher had been charged with acts of child molestation similar to those he committed at the BIA school.²⁸ Reversing the district court's ruling, the Ninth Circuit concluded that § 2680(h) did not insulate the government from liability where the government was negligent in hiring and continuing to employ the teacher.²⁹

In reaching its conclusion, the *Bennett* court made three significant determinations.³⁰ First, despite its factual similarity, the *Shearer* decision was not controlling in light of its four-justice plurality status.³¹ Second, Ninth Circuit precedent establishes that where the government had notice and could have prevented a crime by the exercise of due care by its employees, the government is liable for its own negligence.³² Third, to remain consistent with the purpose of the FTCA—to provide a forum for the resolution of claims against the federal government for injury caused by the government's negligence—§ 2680(h)'s waiver of sovereign immunity should be read broadly.³³ On the basis of these considerations, the *Bennett* court concluded that the provision which retains sovereign immunity for claims "arising out of

Contrary to the majority, however, he argued that a claim does not "arise out of" an assault or battery where it is based directly on the breach of a clear and recognizable affirmative duty, owed by the United States to the plaintiff, to protect the plaintiff from harmful conduct of others. *See id.* at 400-01 (Murnaghan, J., concurring).

²⁵ 803 F.2d 1502, 1503 (9th Cir. 1986).

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See id.* at 1503, 1505.

³⁰ *See Bennett*, 803 F.2d at 1503-04.

³¹ *See id.* at 1503.

³² *See id.* Noting that the government has accepted liability for negligent management resulting in assaults and batteries by inmates and patients under governmental supervision, the court failed to discern any principled reason to permit recovery when the government has been negligent in supervising non-employees, but to deny recovery when the government has been negligent in supervising an employee. *See id.* at 1503-04.

³³ *See id.* at 1504.

assault [or] battery" does not insulate the government from liability with respect to a claim alleging negligent hiring.³⁴

In 1987, in *Kearney v. United States*, the United States Court of Appeals for the Ninth Circuit held that the government cannot invoke § 2680(h) immunity where a claimant's injury arises out of a battery by a government employee and the government's own negligence is the alleged proximate cause of that injury.³⁵ In *Kearney*, a husband sought recovery against the government under the FTCA for the wrongful death of his wife at the hands of an Army Private who was a prisoner in the government's custody following his arrest for the rape of another enlisted servicewoman.³⁶ In reaching its conclusion, the court reasoned that § 2680(h) shields the government solely from respondeat superior liability by employees, but does not extend to the consequences of the government's own negligence.³⁷ In addition, the court found no principled reason for retaining immunity for those batteries committed by governmental employees, while waiving immunity for those batteries committed by non-employees under governmental control (i.e., prisoners and patients).³⁸ On these grounds, the *Kearney* court held that the "assault and battery" exception does not preclude government liability for assaults and batteries that result from the negligent supervision of its employees.³⁹

In 1988, in *Sheridan v. United States*, the United States Supreme Court held that the negligence of government employees who allow a foreseeable assault and battery to occur may subject the government to FTCA liability.⁴⁰ In *Sheridan*, three naval corpsmen found a fellow serviceman lying face down in a drunken stupor on the floor of Bethesda Naval Hospital.⁴¹ While the corpsmen attempted to take him to the emergency room, he broke away, revealing the barrel of a rifle in his possession.⁴² Thereafter, the corpsmen fled, without subduing the serviceman or alerting the appropriate authorities that he was

³⁴ See *id.*

³⁵ 815 F.2d 535, 538 (9th Cir. 1987).

³⁶ See *id.* at 535.

³⁷ See *id.* at 537.

³⁸ See *id.*

³⁹ See *id.* at 538; see also *Morrill v. United States*, 821 F.2d 1426, 1426 (9th Cir. 1987) (holding that the "assault and battery" exception in § 2680(h) did not preclude U.S. government liability where the Navy hired a go-go dancer to perform in a club for enlisted men, and because the Navy failed to provide adequate supervision, the dancer was assaulted and raped by an enlisted man in the women's restroom).

⁴⁰ 487 U.S. 392, 401 (1988).

⁴¹ See *id.* at 395.

⁴² See *id.*

heavily intoxicated and brandishing a weapon.⁴³ Later that evening, the serviceman fired several rifle shots into petitioners' automobile injuring one of the petitioners and damaging their car.⁴⁴ Proceeding under the FTCA, petitioners alleged that their injuries were caused by the government's negligence in allowing the serviceman to leave his workplace, Bethesda Naval Hospital, intoxicated and with a loaded rifle in his possession.⁴⁵

The majority began its analysis with the "settled and undisputed" principle that, in at least some situations, direct causation of an injury by an assault or battery will not preclude liability against the government for negligently allowing the assault to occur.⁴⁶ The Court then emphasized the corpsmen's assumption of duties vis-a-vis the assailant entirely independent of their status as governmental employees.⁴⁷ Specifically, the corpsmen, by voluntarily undertaking to provide care to a person who was visibly drunk and armed, assumed responsibility to perform their good Samaritan task in a careful manner.⁴⁸ Noting that the breach of this duty, separate and distinct from any supervisory obligation, would have provided a basis for liability if the assailant had been an unemployed civilian patient or a visitor in the hospital, the Court concluded that § 2680(h) did not bar plaintiff's claim.⁴⁹ In so doing, the Court established that FTCA claims may be based on a breach of duty, so long as the duty is wholly unrelated to the government's employment relationship with the assailant.⁵⁰ In a footnote, however, the Court declined to consider whether breach of governmental duties pertaining to negligent hiring, supervision or training may ever provide the basis for liability under the FTCA.⁵¹

Justice Kennedy issued a concurring opinion wherein he concluded that where plaintiff's tort claim is based on the mere fact of government employment (i.e., a respondeat superior claim) or on employment-related activities between the assailant and the government (i.e., a negligent hiring, supervision or training claim), § 2680(h)'s

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *Sheridan*, 487 U.S. at 394-95.

⁴⁶ See *id.* at 399 n.4; see also *United States v. Muniz*, 374 U.S. 150, 158 (1963). In *Muniz*, prisoners beat plaintiff with chairs and sticks until he was unconscious. See 374 U.S. at 152. He alleged that prison officials negligently failed to provide enough guards to prevent the assaults leading to his injuries. See *id.* The Court allowed claimant to assert his claim. See *id.* at 150.

⁴⁷ See *Sheridan*, 487 U.S. at 401-02.

⁴⁸ See *id.*

⁴⁹ See *id.* at 401-03.

⁵⁰ See *id.* at 401.

⁵¹ See *id.* at 402 n.8.

exception applies and the United States is immune from prosecution.⁵² Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented on the basis of statutory interpretation and the legislative history of § 2680(h).⁵³ In the dissenters' opinion, "arising out of" suggests a sweeping exception intended to preclude liability in any case in which the battery is "essential to the claim."⁵⁴ In conclusion, the dissent commended the majority for refusing to adopt a position which would hold the government liable for negligently supervising a government employee who commits an assault and battery within the scope of his employment.⁵⁵

During the *Survey* year, in *Senger v. United States*, the Ninth Circuit held that the "assault and battery" exception to the FTCA does not immunize the government from liability for negligently hiring and supervising a government employee who commits an assault or battery.⁵⁶ In February 1991, Kerry Senger, a tow truck driver, responded to a request from the Postal Service to move an illegally parked vehicle from the parking lot of the main post office in Portland, Oregon.⁵⁷ Upon learning that his vehicle was being towed, Ervin Lee Brown, a postal employee with a history of violent behavior, ran out of the post office building to the tow truck, grabbed Senger by the neck and threatened to kill him if he did not put the car down.⁵⁸ Brown and Senger were separated shortly thereafter by the Postal Service's security guard.⁵⁹ In addition to the criminal charges filed against Brown, Senger sued the United States for lost wages, medical expenses and non-economic damages stemming from the altercation.⁶⁰ Proceeding under the FTCA, Senger advanced the following three arguments: (1) the

⁵² See *Sheridan*, 487 U.S. at 406-08 (Kennedy, J., concurring).

⁵³ See *id.* at 408-11 (O'Connor, J., dissenting).

⁵⁴ See *id.* at 408-09 (O'Connor, J., dissenting).

⁵⁵ See *id.* at 411 (O'Connor, J., dissenting). Referring explicitly to the majority's consideration in footnote 8, the dissent added, "I trust that the courts will preserve at least this core of the assault and battery exception." *Id.*

⁵⁶ 103 F.3d at 1442, 12 Indiv. Empl. Rights Cas. (BNA) at 601-02. In addition to its analysis of 28 U.S.C. § 2680(h), the court also considered the duty that a possessor of land has, under Oregon law, to warn business invitees of the intentional acts of third parties. See *id.* at 1443, 12 Indiv. Empl. Rights Cas. (BNA) at 602. Justice Wallace issued a separate opinion wherein he concurred with the majority's interpretation of the FTCA, but dissented as to its state law analysis. See *id.* at 1443-44, 12 Indiv. Empl. Rights Cas. (BNA) at 602-04 (Wallace, J., concurring and dissenting).

⁵⁷ See *id.* at 1439, 12 Indiv. Empl. Rights Cas. (BNA) at 599.

⁵⁸ See *id.* Plaintiff's affidavits (which the government did not contest) suggest that Brown had a history of violent behavior. See *id.* at 1440, 12 Indiv. Empl. Rights Cas. (BNA) at 600.

⁵⁹ See *id.* at 1439, 12 Indiv. Empl. Rights Cas. (BNA) at 599.

⁶⁰ See *id.* Brown, initially charged with assault and menacing, was later convicted of menacing. See *id.* As a result, he was suspended from work for 82 days. See *id.*

Postal Service negligently employed and retained an employee whose dangerous disposition posed a risk to others; (2) the Postal Service negligently supervised the assailant, thus rendering futile any attempt to thwart the assault before it occurred; and (3) the Postal Service negligently failed to warn Senger, a business invitee, of Brown's dangerous propensities.⁶¹

At the outset, the *Senger* court noted that the Ninth Circuit, unlike other circuits, had not adopted the position of the *Shearer* plurality.⁶² Although the court conceded that its reasoning was contrary to that of most circuits, it noted that its position was tacitly permitted given the Supreme Court's failure definitively to resolve the issue in *Sheridan*.⁶³ The court proceeded to cite a line of Ninth Circuit cases involving negligent hiring and supervision on the part of the government that hold that the "assault and battery" exception does not preclude liability under the FTCA.⁶⁴

These cases, the court reasoned, were particularly significant because they distinguished between negligence based entirely on a theory of respondeat superior on the one hand and independent negligent acts or omissions by the government that are proximate causes of the harm on the other.⁶⁵ Having articulated this distinction, the court reasoned that the FTCA barred solely those claims grounded in the former theory of liability.⁶⁶ Accordingly, because Senger's claim was grounded in the government's negligent hiring and supervision of its employee, the court held that the assault and battery exception to the FTCA did not immunize the government from liability.⁶⁷

In *Senger*, the Ninth Circuit declined the opportunity to align itself with a majority of circuits regarding the scope of § 2680(h), and in so doing, has threatened to undermine public policy central to the

⁶¹ See *id.* The district court dismissed the first two claims for lack of subject matter jurisdiction pursuant to the "assault and battery" exception to the FTCA. See *id.* Finding that Brown's attack on Senger was unforeseeable as a matter of law, the district court granted summary judgment in favor of the United States on the negligent failure to warn claim. See *id.* at 1438, 12 Indiv. Empl. Rights Cas. (BNA) at 599. Thereafter, Senger appealed both the dismissal of the first two claims and the grant of summary judgment on the third claim. See *id.*

⁶² See *Senger*, 103 F.3d at 1441, 12 Indiv. Empl. Rights Cas. at 601. But see *Franklin v. United States*, 992 F.2d 1492, 1498 (10th Cir. 1993); *Guccione v. United States*, 847 F.2d 1031, 1034 (2d Cir. 1988).

⁶³ See *Senger*, 103 F.3d at 1441-42, 12 Indiv. Empl. Rights Cas. (BNA) at 601.

⁶⁴ See *id.* at 1441, 12 Indiv. Empl. Rights Cas. (BNA) at 601. The court relied most heavily on *Morrill v. United States*, 821 F.2d 1426 (9th Cir. 1987); *Kearney*, 815 F.2d at 535; and *Bennett*, 803 F.2d at 1502. See *id.* at 1439, 12 Indiv. Empl. Rights Cas. (BNA) at 599.

⁶⁵ See *Senger*, 103 F.3d at 1441, 12 Indiv. Empl. Rights Cas. (BNA) at 601.

⁶⁶ See *id.*

⁶⁷ See *id.* at 1442-43, 12 Indiv. Empl. Rights Cas. (BNA) at 602.

FTCA.⁶⁸ The opinion's fatal flaw, and the one that has relegated *Senger* to a minority position, is its failure to rectify its conclusion in light of the FTCA's language and legislative history.⁶⁹ Because the court's conclusion runs afoul of established tenets of statutory construction, it invites criticism and, quite possibly, reversal.⁷⁰

The decision in *Senger* is at least tacitly authorized by the Supreme Court, given the Court's unwillingness definitively to establish the scope of § 2680(h).⁷¹ Indeed, the Court, in *Sheridan*, explicitly declined to rule on the issue of FTCA liability for negligent hiring, supervision and training.⁷² Both the concurrence and dissent in *Sheridan* make clear, however, that at least four current members of the Court are steadfastly opposed to the minority rule as articulated in *Senger*.⁷³ Justice O'Connor's dissent, joined by the Chief Justice and Justice Scalia, adamantly rejected a claim of negligent supervision stemming from a government employee's assault or battery while acting in the scope of employment.⁷⁴ In addition, Justice Kennedy concluded his concurrence with a warning to future courts that a claim for negligent hiring would fall within the scope of § 2680(h)'s exception, thereby immunizing the government from liability.⁷⁵ Thus, should the Court endeavor to resolve the present inconsistency among the circuits, it appears that it would repudiate the minority rule embodied by *Senger*.⁷⁶

Predispositions aside, the Court's decision to recognize negligent supervision, hiring or training claims as viable under § 2680(h) would hinge largely on the focus of their analytical inquiry.⁷⁷ Should the Court's reasoning weigh statutory construction and legislative history more heavily than tort principles, the minority position reflected in *Senger* would be nearly impossible to defend.⁷⁸ On the other hand, should the Justices look beyond congressional intent and examine the

⁶⁸ See *id.* at 1441-42, 12 Indiv. Empl. Rights Cas. (BNA) at 601-02.

⁶⁹ See *Sheridan*, 487 U.S. at 408-10 (O'Connor, J., dissenting); *Shearer*, 473 U.S. at 55-57; *Senger*, 103 F.3d at 1438-43, 12 Indiv. Empl. Rights Cas. (BNA) at 598-602; *Thigpen*, 800 F.2d at 396.

⁷⁰ See *Sheridan*, 487 U.S. at 409-11 (O'Connor, J., dissenting); *Thigpen*, 800 F.2d at 394.

⁷¹ See *Sheridan*, 487 U.S. at 402 n.8; *Senger*, 103 F.3d at 1442, 12 Indiv. Empl. Rights Cas. (BNA) at 601.

⁷² See 487 U.S. at 402 n.8.

⁷³ See *id.* at 408 (Kennedy, J., concurring), 411 (O'Connor, J., dissenting).

⁷⁴ See *id.* at 408-11 (O'Connor, J., dissenting).

⁷⁵ See *id.* at 408 (Kennedy, J., concurring).

⁷⁶ See *id.* (Kennedy, J., concurring), 411 (O'Connor, J., dissenting). Compare *Senger*, 103 F.3d at 1442-43, 12 Indiv. Empl. Rights Cas. (BNA) at 602, with *Thigpen*, 800 F.2d at 395-96, and *Hoot v. United States*, 790 F.2d 836, 838 (10th Cir. 1986).

⁷⁷ See *supra* notes 62-70 and accompanying text.

⁷⁸ See *Shearer*, 473 U.S. at 55-57; *Thigpen*, 800 F.2d at 394.

solid tort law foundation upon which *Senger* relies, the Ninth Circuit's narrow reading of § 2680(h) would likely prevail.⁷⁹

The court's narrow interpretation of § 2680(h) in *Senger* belies both the legislative history and prior constructions of parallel exceptions to the FTCA.⁸⁰ Indeed, instead of merely barring claims "for" assault or battery, Congress used the more sweeping language "arising out of" to indicate that § 2680(h) did not distinguish between claims sounding in negligence and those sounding in respondeat superior.⁸¹ Accordingly, the express language of the statute suggests that a claimant's negligent hiring and supervision claims would be barred.⁸²

Furthermore, the legislative history of § 2680(h), albeit limited, is wholly incompatible with the *Senger* court's interpretation.⁸³ Rather than distinguishing among theories of liability, it appears Congress intended § 2680(h) to bar claims arising out of a certain type of factual situation—namely deliberate attacks by government employees.⁸⁴ Congress reiterated its intent in 1974 when it amended § 2680(h) to waive sovereign immunity for claims arising out of the intentional torts of law enforcement officers.⁸⁵ In addition, the Supreme Court's interpretation of § 2680 provisions regarding intentional torts other than assault and battery also supports the finding that government liability under the FTCA did not turn on the adequacy of supervision or warnings.⁸⁶ Lastly, the *Senger* court's reasoning implicitly rejects the established notion that all waivers of sovereign immunity be strictly construed in favor of the sovereign.⁸⁷

⁷⁹ See *Sheridan*, 487 U.S. at 401–02; *Senger*, 103 F.3d at 1441, 12 Indiv. Empl. Rights Cas. (BNA) at 601; *Bennett*, 803 F.2d at 1505.

⁸⁰ See *Sheridan*, 487 U.S. at 409 (O'Connor, J., dissenting); *Senger*, 103 F.3d at 1441–42, 12 Indiv. Empl. Rights Cas. (BNA) at 600–01.

⁸¹ See *Shearer*, 473 U.S. at 55.

⁸² See *id.*

⁸³ See *id.* at 55–57; *Senger*, 103 F.3d at 1441–42, 12 Indiv. Empl. Rights Cas. (BNA) at 600–01.

⁸⁴ See *Shearer*, 473 U.S. at 55. Congress advised the Department of Justice that the exception would apply "where some agent of the Government gets in a fight with some fellow . . . [a]nd socks him." See *id.* (quoting *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary*, 77th Cong., 2d Sess. 33 (1942)).

⁸⁵ See *id.* at 56. The premise of the legislation was that 28 U.S.C. § 2680(h), unamended, "protect[ed] the Federal Government from liability when its agents commit[ted] intentional torts such as assault and battery." See *id.* (quoting S. REP. NO. 93–588, at 3 (1973), reprinted in 1973 U.S.C.C.A.N. 2789, 2791). This remains true even though Congress had reason to believe that "several incidents" of "no-knock raids" by federal narcotics agents were the result of inadequate supervision. See S. REP. NO. 93–588, at 2.

⁸⁶ See *Shearer*, 473 U.S. at 56.

⁸⁷ See *Senger*, 103 F.3d at 1441–42, 12 Indiv. Empl. Rights Cas. (BNA) at 600–01; *Thigpen*, 800 F.2d at 394. On the topic of sovereign immunity, see *Garcia v. United States*, 776 F.2d 116, 118

The significance of the *Senger* opinion's construction becomes apparent when one considers the practical repercussions of its decision that may cumulatively undermine the purpose of the FTCA.⁸⁸ If plaintiffs, like *Senger*, are permitted to recover against the government for negligent activity that precedes the immediate cause of harm (i.e., assault or battery), claimants will invariably avoid the § 2680(h) exception.⁸⁹ Indeed, one can imagine few instances where an assault could not possibly have been prevented by some act or omission on the part of the government.⁹⁰ Accordingly, where the fact pattern of a claim is one of assault and battery, a plaintiff could circumvent the § 2680(h) bar simply by pleading negligence or breach of duty on the part of the government.⁹¹ Despite the magnitude of these practical ramifications, *Senger* fails to address these matters.⁹²

Such a result would practically nullify Congress's intent in enacting the FTCA.⁹³ Rather than shielding the government from liability—the essential purpose of § 2680—the minority rule subjects the federal government to innumerable claims alleging negligent hiring, supervision and training.⁹⁴ Holdings, such as the *Senger* decision, have taken affirmative steps towards rendering the federal treasury the ultimate deep pocket for every plaintiff injured in an altercation with a federal employee.⁹⁵ Courts that weigh policy considerations, legislative intent and statutory construction heavily have refused to adopt the minority rule as embodied by *Senger*.⁹⁶ As a result, most circuits and at least four Justices of the Supreme Court, hold that the drafters of the FTCA intended to bar recovery in situations, such as *Senger*, where claimant's injuries were the immediate result of an assault or battery, irrespective of any prior negligence on behalf of the government.⁹⁷

Despite these formidable criticisms, the rationale of the *Senger* court rests on a sound application of tort principles.⁹⁸ Indeed, under

(5th Cir. 1985), and *Radin v. United States*, 699 F.2d 681, 685, 112 L.R.R.M. (BNA) 2560, 2563 (4th Cir. 1983).

⁸⁸ See *Thigpen*, 800 F.2d at 396.

⁸⁹ See *id.* at 394.

⁹⁰ See *id.* at 395.

⁹¹ See *id.* at 396.

⁹² See *Senger*, 103 F.3d at 1441-42, 12 Indiv. Empl. Rights Cas. (BNA) at 600-01.

⁹³ See *Sheridan*, 487 U.S. at 411 (O'Connor, J., dissenting); *Thigpen*, 800 F.2d at 395.

⁹⁴ See *Kearney*, 815 F.2d at 536-37 (citing *Jablonski ex rel. Pahls v. United States*, 712 F.2d 391, 395 (9th Cir. 1983) (discussing policy underlying § 2680(h))).

⁹⁵ See *id.* at 536.

⁹⁶ See *Sheridan*, 487 U.S. at 408-11 (O'Connor, J., dissenting); *Thigpen*, 800 F.2d at 395-96.

⁹⁷ See *supra* notes 71-96 and accompanying text.

⁹⁸ See 103 F.3d at 1441-42, 12 Indiv. Empl. Rights Cas. (BNA) at 601; *Thigpen*, 800 F.2d at 398-99 (Murnaghan, J., concurring).

certain circumstances, the government may assume an affirmative duty to protect a plaintiff from the violent conduct of others upon entering into a "special relationship" with a given plaintiff.⁹⁹ Such a "special relationship" exists, for example, between a hospital and its patient, as in *Thigpen*; a school and its pupils, as in *Bennett*; or a property owner and a business invitee, as is the case in *Senger*.¹⁰⁰ Although the scope of the government's duty is determined by the factual circumstances and the appropriate application of state law, the presence of at least some affirmative duty in that context is undeniable.¹⁰¹ Accordingly, an actual assault or battery need not be alleged to find a breach of a defendant's affirmative duty.¹⁰²

In *Senger*, therefore, the government technically breached its duty towards plaintiff, a business invitee, by subjecting him to the danger that an employee (i.e., Brown) potentially presented.¹⁰³ In failing either to warn plaintiff of this risk or to take affirmative steps to control its employee's conduct, the government breached its affirmative duty to the plaintiff.¹⁰⁴ It follows that the actual nature of the harm, be it assault, battery or otherwise, is irrelevant for purposes of establishing prima facie tort liability.¹⁰⁵ In other words, courts ought to consider the nature of the harm solely to evaluate the severity of the plaintiff's injuries rather than to determine whether such a claim exists.¹⁰⁶ A finding of government liability, therefore, would not hinge on two purely fortuitous events—that an assault or battery occurred and that the assailant was on the federal payroll.¹⁰⁷

In summary, the Ninth Circuit in *Senger* reaffirmed the minority position that the assault and battery exception does not immunize the government for negligent hiring, supervision or training of an employee.¹⁰⁸ In reaching its conclusion, the court ignored important principles of statutory construction and disregarded the policy matters that underlie the FTCA.¹⁰⁹ As a result of this oversight, most circuits and at

⁹⁹ See *Thigpen*, 800 F.2d at 399 (Murnaghan, J., concurring); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 315, 383 (5th ed. 1984).

¹⁰⁰ See *Thigpen*, 800 F.2d at 399 (Murnaghan, J., concurring); W. PAGE KEETON ET AL., *supra* note 99, at 315, 383.

¹⁰¹ See *Thigpen*, 800 F.2d at 399 (Murnaghan, J., concurring).

¹⁰² See *id.* at 399 n.10.

¹⁰³ See 103 F.3d at 1442-43, 12 Indiv. Empl. Rights Cas. (BNA) at 602.

¹⁰⁴ See *id.*; *Thigpen*, 800 F.2d at 399 n.10 (Murnaghan, J., concurring).

¹⁰⁵ See *Thigpen*, 800 F.2d at 399 n.10 (Murnaghan, J., concurring).

¹⁰⁶ See *id.* (Murnaghan, J., concurring).

¹⁰⁷ See *supra* notes 98-106 and accompanying text.

¹⁰⁸ See *supra* notes 56-67 and accompanying text.

¹⁰⁹ See *supra* notes 68-97 and accompanying text.

least four current members of the Supreme Court look unfavorably upon holdings such as *Senger*.¹¹⁰ Nonetheless, the Ninth Circuit's commitment to the minority rule, as articulated in *Senger*, finds support in well-established doctrines of tort liability.¹¹¹ Thus, depending upon one's approach, *Senger* is either a misguided refutation of congressional intent or a sound application of tort principles.¹¹²

V. CONSTITUTIONAL DEVELOPMENTS

A. *Summary Suspension of Public Employee Without Pay Does Not Violate Due Process*: *Gilbert v. Homar*¹

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution prohibit state action that deprives a person of life, liberty or property without due process of law.² In a series of landmark decisions during the early 1970s, the United States Supreme Court held that this constitutional guarantee of due process applies to legitimate claims of entitlement to public benefits, including a tenured public employee's interest in continued employment, and prohibits the government from terminating such benefits without first providing the interest-holder adequate notice and an opportunity to be heard.³ A public employee who is summarily deprived of a qualifying property interest in continued employment thus may challenge the termination procedures on the grounds that

¹¹⁰ See *supra* notes 77-79 and accompanying text.

¹¹¹ See *supra* notes 98-107 and accompanying text.

¹¹² See *supra* notes 67-107 and accompanying text.

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¹ 117 S.Ct. 1807, 12 Indiv. Empl. Rights Cas. (BNA) 1473 (1997).

² U.S. CONST. amend. V, XIV § 1. The Fifth Amendment states, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. The Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

³ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-78, 1 Indiv. Empl. Rights Cas. (BNA) 23, 27-28 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599-602, 1 Indiv. Empl. Rights Cas. (BNA) 33, 35-36 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970). The Court first extended due process protection to government benefits awarded by statutory "entitlement" in *Goldberg v. Kelly*, a case widely regarded as the inauguration of a "due process revolution" in the Court's constitutional jurisprudence. 397 U.S. at 261-63; ERNEST GELLHORN & RONALD M. LEVIN, *ADMINISTRATIVE LAW AND PROCESS* 192-96 (4th ed. 1997). In *Goldberg*, the Court held that because eligibility for public assistance benefits is a matter of statutory definition, recipients have an interest in continued benefits that rises to the level of a constitutionally protected "property" right, and therefore state action that deprives the recipient of such benefits must satisfy the Due Process Clause of the Constitution. See 397 U.S. at 261-63, 262 n.8.

they violate the Due Process Clause.⁴ In adjudicating procedural due process public employment claims, the Court has historically adopted a case-by-case balancing approach, determining what process the employee is due by weighing the competing private and public interests at stake as well as the risk of an erroneous deprivation of a property interest in continued employment.⁵ In *Gilbert v. Homar*, the Court reaffirmed the ad hoc nature of procedural due process adjudication and held that the Due Process Clause does not require a state employer to provide notice and a hearing before suspending a public employee without pay.⁶

In 1972, in *Board of Regents of State Colleges v. Roth*, the United States Supreme Court held that a government employee may enjoy a constitutionally protected property interest in continued employment that the state cannot take away without first providing due process of law in the form of notice and an opportunity to be heard.⁷ In *Roth*, an untenured state university professor whose one-year contract was not renewed sued a university, claiming it had violated his Fourteenth Amendment right to procedural due process by failing both to notify him of the reasons for his non-retention and to provide him an opportunity to challenge the decision.⁸ The Court reasoned that when a government employee establishes—whether on the basis of a formal contract, reasonable reliance on the employer's representations or statutory protection against at-will dismissal—a "legitimate claim of entitlement" to continued employment, the employee has a property right at state law that merits protection under the Due Process Clause of the Fifth or Fourteenth Amendment.⁹ The Court thus held that when a public employee enjoys a vested property interest in continued government employment, state action that deprives the employee of this property interest must satisfy due process by providing, at a minimum, notice of the reasons for termination and "some kind of hearing" at which to challenge it.¹⁰

⁴ See *Roth*, 408 U.S. at 576-77, 1 Indiv. Empl. Rights Cas. (BNA) at 27.

⁵ See Richard J. Pierce, *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1981 (1996).

⁶ 117 S.Ct. at 1811-13, 12 Indiv. Empl. Rights Cas. (BNA) at 1475-77.

⁷ 408 U.S. at 576-77, 1 Indiv. Empl. Rights Cas. (BNA) at 27.

⁸ See *id.* at 566-69, 1 Indiv. Empl. Rights Cas. (BNA) at 23-24.

⁹ See *id.* at 576-77, 1 Indiv. Empl. Rights Cas. (BNA) at 27. The Court in *Roth* concluded, however, that the plaintiff's interest in continued employment at the state institution did not constitute such a protected property right, because his expectation of re-employment was merely unilateral or subjective, unsupported by any mutual agreement with his employer or any existing rules of state law. See *id.* at 578, 1 Indiv. Empl. Rights Cas. (BNA) at 28.

¹⁰ See *id.* at 569-70, 1 Indiv. Empl. Rights Cas. (BNA) at 25, 27.

In 1979, in *Barry v. Barchi*, the United States Supreme Court clarified the procedural safeguards the Constitution affords to property interests in public benefits, holding that the Due Process Clause does not require a state agency to hold a hearing before suspending a property interest in a government benefit, so long as there is a prompt post-suspension hearing to permit the deprived party to petition for reinstatement.¹¹ In *Barchi*, a state horse-racing licensing board temporarily suspended the license of the plaintiff, a trainer whose horse tested positive for drugs in a routine post-race urinalysis.¹² Under the board's disciplinary procedures, license suspension was a summary adjudication that did not permit the licensee to be heard.¹³ The plaintiff challenged the suspension procedures, arguing that the lack of pre-suspension and prompt post-suspension hearings deprived him of a property interest in his license in violation of his Fourteenth Amendment right to due process.¹⁴

The Court rejected the plaintiff's argument regarding a pre-suspension hearing, reasoning that the state's important interest in maintaining the integrity of the horse-racing industry and protecting the public from harm outweighed the licensee's interest in avoiding suspension, and that the drug testing procedures, which were conducted by experts, minimized the risk of an erroneous deprivation of the licensee's interest.¹⁵ The Court further reasoned, however, that the harm to a licensee resulting from summary suspension necessitated a prompt post-suspension hearing to determine whether there was probable cause to validate the charges and to determine whether the statutory conditions justifying license suspension were satisfied.¹⁶ The Court thus held that it is not a violation of constitutional due process to suspend an individual's enjoyment of a property right in a public benefit without a prior hearing, provided that a prompt post-suspension hearing follows as a check against erroneous deprivation.¹⁷

In 1985, in *Cleveland Board of Education v. Loudermill*, the United States Supreme Court determined the minimum due process to which a government employee is entitled prior to termination, holding that

¹¹ 443 U.S. 55, 63-64 (1979).

¹² See *id.* at 59.

¹³ See *id.* at 60-61. Although the board was required to hold a post-suspension hearing to evaluate the grounds for a suspension, it could take up to 30 days to issue its final ruling, during which time the suspension would remain in effect. See *id.* at 61.

¹⁴ See *id.*

¹⁵ See *id.* at 64-65.

¹⁶ See *Barchi*, 443 U.S. at 66.

¹⁷ See *id.* at 63-64.

a tenured public employee must receive notice of the grounds for discharge and an opportunity to respond in person or in writing prior to dismissal.¹⁸ In *Loudermill*, a municipal school board fired the plaintiff, a school security guard, when it discovered that he had failed to disclose a prior felony conviction on his employment application.¹⁹ The plaintiff challenged the termination procedures, arguing that the lack of a pre-dismissal hearing deprived him of his property interest in continued employment without due process.²⁰ The Court reasoned that in deciding whether termination of a public employee complied with due process, it had to balance three factors: (1) the private interest affected by the dismissal, (2) the risk of erroneous termination and (3) the governmental interest served by both the summary termination of an unsatisfactory employee and the avoidance of additional procedural burdens.²¹ Applying this test to the plaintiff's dismissal, the Court determined that the severity of depriving an employee of his means of livelihood, coupled with the risk of an erroneous termination when many factual issues were in dispute, outweighed the government's interest in summarily discharging a convicted felon from a position of public trust.²² The Court therefore concluded that a public employee is constitutionally entitled to a pre-termination hearing to determine whether there is probable cause to believe that the charges against the employee are true and sufficient to warrant dismissal.²³ The Court held that due process is satisfied when the state provides a discharged employee notice of the reasons for dismissal and an opportunity to respond in person or in writing prior to termination.²⁴

In 1988, in *Federal Deposit Insurance Corp. v. Mallen*, the United States Supreme Court held that a government interest of sufficient importance to justify summary suspension of a constitutionally pro-

¹⁸ 470 U.S. 532, 545-46, 1 Indiv. Empl. Rights Cas. (BNA) 424, 429-30 (1985).

¹⁹ See *id.* at 535-36, 1 Indiv. Empl. Rights Cas. (BNA) at 425-26.

²⁰ See *id.* at 536, 1 Indiv. Empl. Rights Cas. (BNA) at 426.

²¹ See *id.* at 542-44, 1 Indiv. Empl. Rights Cas. (BNA) at 428-29 (citing *Mathews*, 424 U.S. at 335).

²² See *id.* at 544-45, 1 Indiv. Empl. Rights Cas. (BNA) at 429. In reaching this conclusion, the Court reasoned that a government employer shares the employee's interest in avoiding an erroneous termination, because it is preferable to keep a trained employee on the job pending a hearing on the charges against the employee, and because the government has an interest in keeping its citizens gainfully employed rather than forcing them, perhaps erroneously, onto the welfare rolls. See *id.*

²³ See *Loudermill*, 470 U.S. at 545-46, 1 Indiv. Empl. Rights Cas. (BNA) at 430.

²⁴ See *id.* (citing *Arnett v. Kennedy*, 416 U.S. 134, 170-71 (1974) (Powell, J., concurring) (public employee with protected property interest in continued employment, who was terminated after receiving written notice of the reasons and an opportunity to respond in person or in writing, received all the process he was due)).

ected property interest, coupled with factors minimizing the risk of an erroneous deprivation, may also justify a significant postponement of a post-deprivation hearing.²⁵ In *Mallen*, the Federal Deposit Insurance Corporation ("FDIC"), acting pursuant to congressional statute, summarily suspended the plaintiff, the president of a federally insured bank, after he was indicted by a grand jury for allegedly violating federal banking law.²⁶ The plaintiff argued that the statute's authorization of a ninety-day delay before the FDIC was required to hold a post-suspension hearing deprived him of his property interest in continued employment in violation of due process.²⁷ The Court, relying on *Barchi*, stated that in limited cases requiring prompt action, an important government interest, coupled with substantial assurance that a suspension is not baseless, may justify postponing an opportunity to be heard until after an initial deprivation of a property interest in employment.²⁸ Turning to assess the length of the post-suspension hearing delay, the Court similarly reasoned that the important government interest in protecting depositors and maintaining public confidence in the bank outweighed the private harm suffered by the suspended employee during the interim hearing delay.²⁹ The Court further reasoned that the employee's *ex parte* indictment by a grand jury minimized the risk that his suspension was baseless or mistaken.³⁰ The Court therefore held that an important government interest, coupled with factors minimizing the risk of an erroneous deprivation, may justify a lengthy postponement of a post-suspension hearing and a continued deprivation of a constitutionally protected property interest.³¹

During the *Survey* year, in *Gilbert v. Homar*, the United States Supreme Court held that a state employee suspended without pay was not entitled to notice and a pre-suspension hearing under the Due Process Clause of the Fourteenth Amendment.³² In *Gilbert*, the Court clarified dicta in *Loudermill* concerning the due process rights of sus-

²⁵ 486 U.S. 230, 240-42 (1988).

²⁶ See *id.* at 236-37. The FDIC acted pursuant to 12 U.S.C. § 1818(g)(1), which provides that when an officer of a federally insured bank is charged or indicted by a United States Attorney with a crime involving dishonesty or breach of trust punishable by imprisonment, the appropriate banking agency may suspend the officer if it finds that continued service or participation may threaten the interests of depositors or public confidence in the bank. See *id.* at 238.

²⁷ See *id.* at 239-40.

²⁸ See *id.* at 240-41 (citing *Barchi*, 443 U.S. at 64-66).

²⁹ See *id.* at 241-43.

³⁰ See *Mallen*, 486 U.S. at 244-45.

³¹ See *id.* at 245.

³² 117 S.Ct. 1807, 1810, 1813, 12 Indiv. Empl. Rights Cas. (BNA) 1473, 1474, 1476-77 (1997).

pendent employees, as well as its general approach to due process claims involving property interests in public employment.³³ *Gilbert* establishes that when a public employee's property interest in continued employment is adversely affected by state action, there is no absolute due process right to notice and a hearing, but rather the procedural safeguards of the Due Process Clause will be determined by a case-by-case weighing of the competing private and public interests at stake.³⁴

In *Gilbert*, the plaintiff, Richard J. Homar, was suspended without pay from his job as a police officer at East Stroudsburg State University ("ESU"), a Pennsylvania State institution.³⁵ ESU suspended Homar after Pennsylvania state police had arrested him in a drug raid and charged him with possession of marijuana with intent to deliver and felony criminal conspiracy to violate the controlled substance law.³⁶ The state police informed ESU of Homar's arrest, and ESU's director of human resources immediately suspended Homar without pay pending an investigation into the criminal charges.³⁷ Although the state police dropped the charges against Homar six days later, his suspension remained in effect while ESU conducted its own investigation.³⁸

Three weeks after his suspension, the director met with Homar to hear his side of the story.³⁹ One week later, the director demoted Homar to the position of groundskeeper and awarded him backpay at a reduced rate for the period of his suspension, explaining that the demotion was based on admissions Homar had allegedly made to the state police about his personal drug use and his association with known drug dealers.⁴⁰ The next day, ESU President James Gilbert met with Homar and afforded him an opportunity to respond to this alleged confession.⁴¹ Following Homar's response, Gilbert sustained his demotion.⁴²

³³ See *id.* at 1811-14, 12 Indiv. Empl. Rights Cas. (BNA) at 1475-77.

³⁴ See *id.* at 1811-12, 12 Indiv. Empl. Rights Cas. (BNA) at 1475-76.

³⁵ See *id.* at 1810, 12 Indiv. Empl. Rights Cas. (BNA) at 1474.

³⁶ See *id.*

³⁷ See *Gilbert*, 117 S.Ct. at 1810, 12 Indiv. Empl. Rights Cas. (BNA) at 1474. The director suspended Homar pursuant to an executive order of the governor of Pennsylvania that authorized summary suspension without pay of any state employee charged with a felony. See *id.* at 1813, 12 Indiv. Empl. Rights Cas. (BNA) at 1477.

³⁸ See *id.* at 1810, 12 Indiv. Empl. Rights Cas. (BNA) at 1474.

³⁹ See *id.* The director told Homar only that the state police had provided information about him that was "very serious in nature"; he did not reveal that he had received a report of a confession Homar allegedly had given to the state police on the day of his arrest, and thus did not afford Homar an opportunity to respond to these alleged statements. See *id.*

⁴⁰ See *id.* at 1810-11, 12 Indiv. Empl. Rights Cas. (BNA) at 1474-75.

⁴¹ See *id.* at 1811, 12 Indiv. Empl. Rights Cas. (BNA) at 1474-75.

⁴² See *Gilbert*, 117 S.Ct. at 1811, 12 Indiv. Empl. Rights Cas. (BNA) at 1475.

Homar filed suit under 42 U.S.C. § 1983 against Gilbert and other members of the ESU administration, alleging that their failure to provide him notice and a hearing prior to suspending him without pay violated his Fourteenth Amendment right to due process.⁴³ After the district court granted summary judgment for defendants, the United States Court of Appeals for the Third Circuit reversed, holding it unconstitutional to suspend without pay a tenured government employee without providing pre-suspension notice and an opportunity to be heard.⁴⁴ The Third Circuit based its holding on its reading of dicta in *Loudermill*, where the United States Supreme Court stated that a government employer who perceives a hazard in keeping an employee on the job can satisfy constitutional due process by suspending the employee with pay as an alternative to dismissal without a hearing.⁴⁵ The Court concluded that the Third Circuit had misread *Loudermill* and reversed.⁴⁶

The Court rejected as "indefensible" the Third Circuit's conclusion that the *Loudermill* dicta strongly suggested an absolute due process rule that a tenured public employee could not be suspended without pay in the absence of prior notice and a hearing.⁴⁷ Although the Court acknowledged *Loudermill's* claim that suspension with pay satisfies due process, it denied that this claim entails the corollary that suspension with pay is the *only* alternative to summary termination consistent with an employee's due process rights.⁴⁸ Moreover, the Court reasoned, the absolute rule enunciated by the Third Circuit is inconsistent with the balancing approach the Court historically has adopted in its procedural due process precedents.⁴⁹ Due process adjudication,

⁴³ See *id.*

⁴⁴ See *Homar v. Gilbert*, 89 F.3d 1009, 1015-16, 12 Indiv. Empl. Rights Cas. (BNA) 1368, 1372-73 (3d Cir. 1996).

⁴⁵ See *id.*

⁴⁶ See *Gilbert*, 117 S.Ct. at 1811-12, 12 Indiv. Empl. Rights Cas. (BNA) at 1475-76.

⁴⁷ See *id.* The Court first addressed the threshold question of whether suspension of a tenured public employee without pay infringed a constitutionally protected property interest, thereby necessitating a due process inquiry. See *id.* at 1811, 12 Indiv. Empl. Rights Cas. (BNA) at 1475. Whereas the Court had held in *Roth* that procedural due process is required before a tenured government employee may be terminated, the Court observed that it had never had the opportunity to decide whether the Due Process Clause applies when the discipline imposed on a public employee falls short of termination. See *id.* Because the point had not been contested by the petitioners, however, the Court assumed, without deciding the matter, that Homar's suspension without pay infringed a protected property interest and proceeded to inquire what process was due under the Fourteenth Amendment. See *id.*

⁴⁸ See *id.* at 1812, 12 Indiv. Empl. Rights Cas. (BNA) at 1476.

⁴⁹ See *id.*, 12 Indiv. Empl. Rights Cas. (BNA) at 1475-76 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

the Court concluded, rejects sweeping categorical rules, favoring instead an ad hoc approach to determining the procedural safeguards that each particular situation demands.⁵⁰

To determine whether Homar's suspension without pay satisfied due process, the Court balanced the three factors it had articulated in *Loudermill*.⁵¹ In weighing the severity of the harm suffered by Homar, the Court reasoned that it had to consider both the duration and finality of his deprivation.⁵² Because Homar faced temporary suspension without pay rather than termination, the Court concluded that his loss was relatively insubstantial, so long as he received a sufficiently prompt post-suspension hearing.⁵³ On the other side, the Court reasoned, ESU had a significant interest in immediately suspending an employee who occupied a position of public trust and high visibility and who faced felony charges.⁵⁴ The Court rejected Homar's argument that ESU's interest would be served just as well by suspending him with pay, insisting that the Constitution does not require the government to give an employee charged with a felony a paid leave at taxpayer's expense or to bear the additional expense of hiring a replacement while still paying the suspended employee.⁵⁵ Thus, the Court concluded that ESU's significant interest in preserving public confidence in its police force outweighed Homar's interest in avoiding suspension without pay.⁵⁶

The Court then evaluated the risk of an erroneous deprivation of Homar's property interest under the summary suspension procedure and the likely value of additional procedural safeguards, noting that this was the most important factor in resolving the case.⁵⁷ The Court reasoned that, as with a pre-termination hearing, the purpose of a pre-suspension hearing is to determine whether there are reasonable

⁵⁰ See *id.*, 12 Indiv. Empl. Rights Cas. (BNA) at 1476. The Court noted that it has frequently recognized that when pre-deprivation due process is impractical or when an important government interest justifies immediate suspension of a protected property interest, a prompt post-deprivation hearing can satisfy the requirements of the Due Process Clause. See *id.* (citing *Mallen*, 486 U.S. at 240; *Barchi*, 443 U.S. at 64-65).

⁵¹ See *Gilbert*, 117 S.Ct. at 1812, 12 Indiv. Empl. Rights Cas. (BNA) at 1476; *supra* note 21 and accompanying text.

⁵² See *Gilbert*, 117 S.Ct. at 1813, 12 Indiv. Empl. Rights Cas. (BNA) at 1476.

⁵³ See *id.*

⁵⁴ See *id.* A state university's interest in maintaining public confidence in its police force, the Court reasoned, is at least as significant as the government's interest in preserving the integrity of the sport of horse racing was in *Barchi*. See *id.*, 12 Indiv. Empl. Rights Cas. (BNA) at 1476-77 (citing *Barchi*, 443 U.S. at 69).

⁵⁵ See *id.*, 12 Indiv. Empl. Rights Cas. (BNA) at 1476.

⁵⁶ See *Gilbert*, 117 S.Ct. at 1813, 12 Indiv. Empl. Rights Cas. (BNA) at 1476-77.

⁵⁷ See *id.*, 12 Indiv. Empl. Rights Cas. (BNA) at 1477.

grounds to believe that the charges against the employee are true and justify the proposed action.⁵⁸ The Court further reasoned that, as with the grand jury indictment of the bank official in *Mallen*, Homar's arrest on felony charges by the state police provided "reason enough" for the director to believe that suspension without pay was justified.⁵⁹ Because an independent third party had already determined that there was probable cause to believe that Homar had committed a serious crime, the Court concluded, there was no need for the director to provide Homar a pre-suspension hearing to protect against erroneous deprivation.⁶⁰ The Court thus held that the Due Process Clause of the Fourteenth Amendment does not require the state to provide notice and a hearing before suspending an employee without pay.⁶¹

Finally, the Court stated that whether Homar had in fact received a sufficiently prompt post-suspension hearing was a "separate question" not presently before it.⁶² The Court noted that ESU did not provide Homar a post-suspension hearing until eighteen days after the state police had dropped the criminal charges against him.⁶³ The Court further observed that once the charges had been dropped, the risk of an erroneous deprivation increased substantially, at which point there likely would have been some value in holding a prompt hearing.⁶⁴ The Court, however, declined to decide whether the post-suspension hearing delay had violated Homar's right to due process and remanded the issue to the Third Circuit for further proceedings.⁶⁵

The Court's decision in *Gilbert* is consistent with its prior decisions on summary suspensions of protected property interests in public benefits and does not signal any reversal of recent due process juris-

⁵⁸ See *id.* (citing *Loudermill*, 470 U.S. at 545-46, 1 Indiv. Empl. Rights Cas. (BNA) at 430).

⁵⁹ See *id.* at 1813-14, 12 Indiv. Empl. Rights Cas. (BNA) at 1477 (citing *Mallen*, 486 U.S. at 240-41).

⁶⁰ See *id.* at 1814, 12 Indiv. Empl. Rights Cas. (BNA) at 1477.

⁶¹ See *Gilbert*, 117 S.Ct. at 1810, 1813, 12 Indiv. Empl. Rights Cas. (BNA) at 1474, 1476-77. The Court rejected Homar's contention that, assuming the director had discretion not to suspend him, he was entitled to an opportunity to be heard and to persuade the director of his innocence. See *id.* at 1814, 12 Indiv. Empl. Rights Cas. (BNA) at 1477. The Court reasoned that, unlike a termination, where the employee's only meaningful opportunity to invoke the employer's discretion is prior to the dismissal, a suspension is temporary and affords the employee ample opportunity to be heard later. See *id.* The Court further reasoned that a short delay in obtaining a hearing actually benefits the suspended employee because it permits the employer to obtain more accurate information about the employee's alleged offense and ensures that a decision about continued suspension is not made in excessive haste. See *id.*

⁶² See *id.*, 12 Indiv. Empl. Rights Cas. (BNA) at 1477-78.

⁶³ See *id.*, 12 Indiv. Empl. Rights Cas. (BNA) at 1477.

⁶⁴ See *id.*, 12 Indiv. Empl. Rights Cas. (BNA) at 1478 (citing *Mallen*, 486 U.S. at 243).

⁶⁵ See *id.* at 1814-15, 12 Indiv. Empl. Rights Cas. (BNA) at 1478.

prudence. In *Barchi* and *Mallen*, for example, the Court held that temporary deprivation, without prior notice or hearing, of a property right in a public benefit did not violate the Due Process Clause.⁶⁶ In each case, the state summarily suspended enjoyment of an employment-related property interest after the interest-holder had allegedly broken the law.⁶⁷ In concluding that the deprivation satisfied due process, the Court in each case emphasized three points: the state had a substantial interest in maintaining the integrity of a public institution by promptly removing an alleged lawbreaker from a position of public trust, the suspended employee suffered a relatively slight harm from a temporary deprivation of a property interest, and an *ex parte* finding of the interest-holder's probable wrongdoing minimized the risk of an erroneous deprivation.⁶⁸ Given the similarity of the plaintiff's situation in *Gilbert* to the facts of these prior cases, the Court's express reliance on these precedents to uphold the summary suspension without pay of a state university police officer facing felony charges is a fairly predictable outcome.⁶⁹

Similarly, the Court's refusal in *Gilbert* to acknowledge an absolute rule mandating that a public employee is entitled to notice and a hearing prior to suspension without pay is consistent with its longstanding case-by-case balancing approach to due process claims involving deprivations of property interests in public benefits.⁷⁰ The Court's application of the balancing test in *Gilbert*, however, particularly its weighing of the harm Homar suffered as a result of his deprivation, appears strained, yielding the following contradiction in its reasoning:

⁶⁶ See *Mallen*, 486 U.S. at 240-41; *Barchi*, 443 U.S. at 63-64.

⁶⁷ See *Mallen*, 486 U.S. at 236-37; *Barchi*, 443 U.S. at 59.

⁶⁸ See *supra* notes 14, 27-28 and accompanying text. As the Court noted in *Gilbert*, the *Mallen* opinion does not expressly state whether the bank president was suspended with or without pay. See *Gilbert*, 117 S.Ct. at 1812 n.1, 12 Indiv. Empl. Rights Cas. (BNA) at 1476, n.1. The Court observed, however, that the plaintiff in *Mallen* protested the "denial of an income stream" during the period of his suspension, thus warranting the inference that his suspension was without pay. See *id.*

⁶⁹ See *Homar*, 89 F.3d at 1023, 12 Indiv. Empl. Rights Cas. (BNA) at 1378-79 (Alito, J., dissenting).

⁷⁰ See *supra* notes 10-30 and accompanying text. The Third Circuit's reading notwithstanding, *Loudermill* was no exception to this ad hoc model of due process adjudication, for there the Court relied on a three-factor balancing test to determine the procedural protections to which the discharged plaintiff was due. See 470 U.S. at 542-45, 1 Indiv. Empl. Rights Cas. (BNA) at 428-29. The Third Circuit's contention that the dictum in *Loudermill* "strongly suggested" an absolute rule of due process that contradicts the balancing approach the Court expressly adopted in that case is thus a strained reading of precedent at best. See *Homar*, 89 F.3d at 1015-16, 12 Indiv. Empl. Rights Cas. (BNA) at 1372-73. Indeed, the *Loudermill* dictum is construed better not as a normative statement of a due process rule, but rather as a descriptive statement of how a government employer might avoid a constitutional challenge to disciplinary action altogether.

the plaintiff's loss was relatively insubstantial because his suspension was brief and he received a sufficiently prompt post-suspension hearing, yet the postponement of the plaintiff's post-suspension hearing still may have been sufficiently lengthy to constitute a due process violation.

On the one hand, the ostensible brevity of Homar's suspension without pay figured prominently in the Court's assessment of the severity of his injury: the temporary nature of a suspension (in contrast to the finality of termination), coupled with its short duration when there is a "sufficiently prompt post-suspension hearing," meant that Homar's property interest in continued receipt of a paycheck was not severely infringed.⁷¹ Homar's due process challenge thus failed because the Court concluded that the brief duration of his property deprivation made his loss "relatively insubstantial" in comparison with the state's "significant interest" in preserving the integrity of law enforcement.⁷² On the other hand, thus having attributed a near dispositive importance to the brevity of Homar's period of suspension, the Court remanded the issue of the constitutional adequacy of the post-suspension procedures, observing that whether Homar in fact had received a sufficiently prompt post-suspension hearing was a "separate question" that it would not consider in the first instance.⁷³ The Court even went so far as to suggest that, because the risk of erroneous deprivation increased substantially after the state police dropped the criminal charges against Homar, ESU's failure to provide Homar a post-suspension hearing for another sixteen days may have constituted a due process violation.⁷⁴ Thus, on the Court's reasoning, the duration of Homar's suspension was *both* sufficiently brief to render his suspension consistent with due process *and* sufficiently lengthy to constitute a potential due process violation.

For if the employer suspends an employee *with* pay, there is no deprivation of a property interest, and thus no grounds for implicating the Due Process Clause. *See id.* at 1024, 12 Indiv. Empl. Rights Cas. (BNA) at 1379 (Alito, J., dissenting).

⁷¹ *See Gilbert*, 117 S.Ct. at 1813, 12 Indiv. Empl. Rights Cas. (BNA) at 1476 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (when weighing the private harm caused by deprivation, court must consider the importance of the private interest affected, as well as the length and finality of the deprivation)). The Court also reasoned that the "short delay" in holding a post-suspension hearing actually served to minimize the likelihood of an erroneous deprivation of Homar's property interest by affording state officials an opportunity to obtain more accurate information about the alleged wrongdoing that prompted the disciplinary action. *See id.* at 1814, 12 Indiv. Empl. Rights Cas. (BNA) at 1477.

⁷² *See id.* at 1813, 12 Indiv. Empl. Rights Cas. (BNA) at 1476.

⁷³ *See id.* at 1814-15, 12 Indiv. Empl. Rights Cas. (BNA) at 1478.

⁷⁴ *See id.*, 12 Indiv. Empl. Rights Cas. (BNA) at 1478.

Perhaps the clearest practice implication of the Court's strained reasoning on this point is that a due process challenge to a disciplinary suspension without pay should encompass both pre-suspension and post-suspension procedures, thereby forcing the court to address directly the constitutional adequacy of the postponement, if any, of the employee's post-suspension opportunity to be heard. A court might conclude that such a post-suspension hearing delay, even though lengthy, nevertheless is justifiable under the substantial governmental interest rationale of *Mallen*.⁷⁵ Yet this strategy at least would have the effect of limiting the court's freedom to construe a significant postponement as a "short delay" that resulted in a "relatively insubstantial" deprivation of a property interest.

Gilbert is likely to fuel speculation that the current Supreme Court is aiming to complete a due process "counterrevolution" that has been underway for the past twenty years.⁷⁶ Following landmark decisions in the early 1970s that extended due process protection to a host of property interests in public benefits, including tenured government employment, the Court, some argue, gradually has retreated from these early progressive gains, undertaking to lower the procedural barriers the Constitution erects against state deprivations of such novel, state-created property interests.⁷⁷ The due process balancing test may be the primary engine of this movement to restrict constitutional hearing rights.⁷⁸ For, as *Gilbert* illustrates, this balancing approach enables the Court to invoke the public or governmental interest in summary deprivation as an effective counter-weight to the claimant's interest in continued receipt of a valuable entitlement, and thus to uphold deprivation procedures that might be deemed constitutionally inadequate if the severity of the claimant's harm were the sole consideration.⁷⁹ Recent academic commentary predicted that the Supreme Court, having relied on a balancing test to limit the due process

⁷⁵ See 486 U.S. at 241-44.

⁷⁶ See Pierce, *supra* note 5, at 1973. Among the scholars who have asserted the Supreme Court's repudiation of the "due process revolution" of the early 1970s is Yale law professor Charles Reich. See Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 731-33 (1990). Reich's earlier writings on the importance of private "entitlements" to public benefits as a source of wealth in contemporary American society figured prominently in the Court's original recognition of constitutionally protected property interests in public benefits. See *Goldberg*, 397 U.S. at 262 n.8 (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965); *The New Property*, 73 YALE L.J. 733, 733 (1964)).

⁷⁷ See Pierce, *supra* note 5, at 1973; Reich, *Beyond the New Property*, *supra* note 76, at 731-32.

⁷⁸ See Pierce, *supra* note 5, at 1981; Reich, *Beyond the New Property*, *supra* note 76, at 731-32.

⁷⁹ See 117 S.Ct. at 1813, 12 Indiv. Empl. Rights Cas. (BNA) at 1476-77.

protection afforded recipients of various public benefits, would look next to constrain the due process rights of public employees who claim a constitutionally-protected property interest in continued employment.⁸⁰ *Gilbert* could be the opening salvo in this latest due process counter-offensive, signaling the Court's intention to limit the capacity of public employees to challenge dismissal, suspension or other disciplinary action on constitutional grounds.

In summary, in *Gilbert v. Homar* the Court held that the Due Process Clause does not require a government employer to provide notice and a hearing before suspending a public employee without pay.⁸¹ *Gilbert* establishes that to determine the procedural due process rights of suspended government workers, courts must weigh the public interest served by summary suspension against the severity of the employee's resulting injury and the risk of an erroneous deprivation of a vested property right in continued public employment.⁸² The Court's reliance on a balancing test in *Gilbert* is consistent with its recent decisions on due process claims involving terminations and suspensions of government benefits, and perhaps signals the beginning of a movement to restrict the due process hearing rights of public employees.⁸³

*B.*California Proposition 209 Does Not Impose Unconstitutional Burdens: Coalition for Economic Equity v. Wilson*¹

Proposition 209, the California Civil Rights Initiative, provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."² In *Coalition for Economic Equity v. Wilson*, a three-judge panel for the Ninth Circuit recently upheld the validity of Proposition 209 in the face of constitutional and Title VII of the Civil Rights Act of 1964 ("Title VII") challenges.³ The

⁸⁰ See Pierce, *supra* note 5, at 1992-95.

⁸¹ See 117 S.Ct. at 1810, 1813, 12 Indiv. Empl. Rights Cas. (BNA) at 1474, 1477.

⁸² See *id.* at 1812, 12 Indiv. Empl. Rights Cas. (BNA) at 1476.

⁸³ See *supra* notes 49, 67-70, 77-81 and accompanying text.

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¹ 110 F.3d 1431, 1446, 1448, 73 Fair Empl. Prac. Cas. (BNA) 821, 833, 834 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

² CAL. CONST. art. I, § 31(a). Proposition 209 became an operative provision of the California Constitution after voter approval on November 6, 1996. See *id.*

³ 110 F.3d 1431, 1446, 1448, 73 Fair Empl. Prac. Cas. (BNA) 821, 833, 834 (9th Cir.), *cert.*

court found that Proposition 209 was not invalid on its face and that it did not isolate minorities or women for specific political burdens.⁴

The adoption of Proposition 209 in California abolished affirmative action by law, at least in government employment, contracting and education.⁵ Although Proposition 209 presently applies only to government entities, it could eventually threaten private affirmative action programs as well.⁶ The Supreme Court recently denied certiorari of *Wilson*, effectively upholding the validity of Proposition 209, yet leaving unanswered questions as to the status of affirmative action.⁷ Over the past few years, courts in various jurisdictions have been asked to consider the legitimacy of various preferential treatment programs.⁸ Recent judicial activity in the area of affirmative action signals a movement toward limiting, or perhaps even eliminating, preferential treatment in both the public and private arenas.⁹

In 1995, in *Adarand Constructors v. Pena*, the United States Supreme Court held that federal and state racial classifications must be narrowly tailored and must serve a compelling state interest.¹⁰ Plaintiffs, Adarand Constructors ("Adarand"), lost out on a subcontracting bid to a government contract because Adarand was not certified as a small business controlled by "socially and economically disadvantaged

denied, 118 S. Ct. 397 (1997); see also Ed Mendel, *Prop. 209 Becomes State Law; Agencies That Don't Comply with Ban on Preferences Targeted*, SAN DIEGO UNION-TRIBUNE, Aug. 29, 1997, at A1.

⁴ See *Wilson*, 110 F.3d at 1440, 1446, 73 Fair Empl. Prac. Cas. (BNA) at 827-28, 832-33.

⁵ See CAL. CONST. art. I, § 31(a).

⁶ See *Employment Discrimination—Race: Supreme Court Ruling Could Render Moot Debate Over Affirmative Action*, ABA Told, U.S.L.W., Aug. 12, 1997, available in WESTLAW, BNA-USLW database, 66 USLW 2093.

⁷ See 118 S. Ct. 397, 397 (1997); see also Richard Carelli, *Prop. 209 Survives Justices' Scrutiny*, BOSTON GLOBE, Nov. 4, 1997, at A1. California cases subsequent to *Wilson*, such as *Monterey Mechanical Co. v. Wilson*, attempted to evade the uncertainty of *Wilson* and implement the goals of the California Civil Rights Initiative. See No. 96-16729, 1997 WL 538757, at *1 (9th Cir. Sept. 3, 1997); see also Dave Leshner, *Appeals Court Voids State Contracting Law Business: End to Goal of Hiring Firms Owned by Women or Minorities Could Have the Effect of Prop. 209, But Faster*, LOS ANGELES TIMES, Sept. 5, 1997, at A1.

⁸ See *Taxman v. Piscataway Township Bd. of Ed.*, 91 F.3d 1547, 1550, 71 Fair Empl. Prac. Cas. (BNA) 848, 850 (3d Cir. 1996), cert. dismissed, 118 S. Ct. 595 (1997); *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). In *Hopwood* and *Taxman*, the Fifth and Ninth Circuits were faced with issues similar to those in *Wilson*. See *Taxman*, 91 F.3d at 1550, 71 Fair Empl. Prac. Cas. (BNA) at 850; *Hopwood*, 78 F.3d at 934. In both of these cases the court came down on the side of limiting affirmative action programs. See *Taxman*, 91 F.3d at 1565, 71 Fair Empl. Prac. Cas. (BNA) at 862; *Hopwood*, 78 F.3d at 962.

⁹ See *Adarand Constructors v. Pena*, 515 U.S. 200, 235-39, 67 Fair Empl. Prac. Cas. (BNA) 1831, 1843-44 (1995); *Taxman*, 91 F.3d at 1565, 71 Fair Empl. Prac. Cas. (BNA) at 862; *Hopwood*, 78 F.3d at 962; see also *Employment Discrimination—Race: Supreme Court Ruling Could Render Moot Debate Over Affirmative Action*, ABA Told, *supra* note 6.

¹⁰ 515 U.S. at 235-39, 67 Fair Empl. Prac. Cas. (BNA) at 1843-44.

individuals," as set out in a federal statute.¹¹ Adarand contested the statute, claiming that it discriminated on the basis of race in violation of the Equal Protection Clause of the United States Constitution.¹² Both the United States District Court for the District of Colorado and the Court of Appeals for the Tenth Circuit rejected Adarand's claim, applying a standard of lenient scrutiny.¹³ The Supreme Court then granted certiorari.¹⁴

The Supreme Court concluded in *Adarand* that equal protection under the Constitution should be equivalent to that afforded by the states through the Fourteenth Amendment and thus, should face the same degree of scrutiny.¹⁵ The Court stated that because the Constitution prohibits unequal treatment at the state level, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."¹⁶ The Court then addressed racial classifications, noting that because they are potentially harmful at all levels of

¹¹ See 15 U.S.C. § 637(d)(3)(A) (1994); *Adarand*, 515 U.S. at 205, 67 Fair Empl. Prac. Cas. (BNA) at 1831. The dispute involved a construction project where Mountain Gravel & Construction Company held the prime contract, funded by the United States Department of Transportation. See *Adarand*, 515 U.S. at 205, 67 Fair Empl. Prac. Cas. (BNA) at 1831. The prime contract's terms provided that Mountain Gravel would receive additional compensation if it hired a subcontractor certified as a small business controlled by "socially and economically disadvantaged individuals." See *id.* Both Adarand and Gonzales submitted bids, with Adarand's bid being the lowest. See *id.* Gonzales, a minority-owned company, was awarded the contract. See *id.* Mountain Gravel's Chief Estimator submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid had it not been for the additional payment it received by hiring Gonzales instead. See *id.*

¹² See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *Adarand*, 515 U.S. at 204-06, 67 Fair Empl. Prac. Cas. (BNA) at 1830-31. The Fifth Amendment states, in relevant part: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. The Fourteenth Amendment states, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process, nor deny to any person within its jurisdiction the equal protection of the laws . . .

U.S. CONST. amend. XIV, § 1. Federal law required the statute in dispute to be included in most federal agency contracts. See 15 U.S.C. § 637(d)(3)(A); *Adarand*, 515 U.S. at 205, 67 Fair Empl. Prac. Cas. (BNA) at 1831. The statute required, in pertinent part: "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. § 637(d)(3)(C)(ii).

¹³ See *Adarand*, 515 U.S. at 210, 67 Fair Empl. Prac. Cas. (BNA) at 1832-33.

¹⁴ See *id.*, 67 Fair Empl. Prac. Cas. (BNA) at 1833.

¹⁵ See U.S. CONST. amend. XIV, § 1; 515 U.S. at 215-16, 235, 67 Fair Empl. Prac. Cas. (BNA) at 1835, 1843.

¹⁶ *Adarand*, 515 U.S. at 215, 67 Fair Empl. Prac. Cas. (BNA) at 1839 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954)).

government, it is especially important that the justifications for any classifications be clearly identified and unequivocally legitimate.¹⁷ The Court thus imposed a standard of strict scrutiny on any federal racial classification, requiring the governmental actor to narrowly tailor its legislation to further a compelling state interest.¹⁸ Having significantly altered the analysis in instances of government discrimination, the Supreme Court remanded *Adarand* to the lower court for further consideration.¹⁹

In 1982, in *Washington v. Seattle School District No. 1*, the Supreme Court of the United States held that a state initiative prohibiting integrative school busing violated the Equal Protection Clause of the Fourteenth Amendment on the grounds that it established an impermissible racial classification.²⁰ In 1978, the Seattle School District adopted the "Seattle Plan" to desegregate its schools.²¹ The plan required mandatory busing.²² Shortly thereafter, opponents of the Seattle Plan introduced a ballot initiative, Initiative 350, which prohibited school boards from requiring any student to attend a school other than the one geographically nearest or next-to-nearest his or her home.²³ The initiative contained various exceptions, however, allowing the school boards to assign students away from their neighborhood schools for practically all purposes other than integration.²⁴ A majority of voters approved the initiative, sparking a lawsuit.²⁵ Plaintiffs, the Seattle, Tacoma and Pasco school districts, challenged the initiative on the grounds that it established an impermissible racial classification because it disallowed busing for racial reasons but permitted it for all other reasons.²⁶

The *Seattle* Court, reasoning that the Fourteenth Amendment equates all individuals, found that Initiative 350 unequally reordered the political process, resulting in a unique and substantial burden on

¹⁷ See *id.* at 236, 67 Fair Empl. Prac. Cas. (BNA) at 1843.

¹⁸ See *id.* at 235, 67 Fair Empl. Prac. Cas. (BNA) at 1843.

¹⁹ See *id.* at 237-39, 67 Fair Empl. Prac. Cas. (BNA) at 1844.

²⁰ 458 U.S. 457, 470, 479, 486 (1982); see U.S. CONST. amend. XIV, § 1; WASH. REV. CODE § 28A.26.010 (repealed by Laws 1991, ch. 116, § 26).

²¹ See *Seattle*, 458 U.S. at 461.

²² See *id.*

²³ See WASH. REV. CODE § 28A.26.010; *Seattle*, 458 U.S. at 462. This Note uses the gender specific pronoun "he" and its derivatives to represent individuals of both genders.

²⁴ See WASH. REV. CODE § 28A.26.010; *Seattle*, 458 U.S. at 462. For example, a student could be assigned beyond his neighborhood school if he required special education, care or guidance or if the local school was unfit or inadequate because of overcrowding. See *Seattle*, 458 U.S. at 462.

²⁵ See *Seattle*, 458 U.S. at 463-64.

²⁶ See WASH. REV. CODE § 28A.26.010; *Seattle*, 458 U.S. at 464-65. The United States and several community organizations intervened in support of the District. See *Seattle*, 458 U.S. at 464.

racial minorities.²⁷ The Constitution guarantees individuals the ability to petition all levels of government and seek equality at all stages of bureaucracy.²⁸ The Court explained that the initiative drew distinctions between those problems that involve racial matters and those that did not and reasoned that such differentiation impedes the path of minorities seeking protection against unequal treatment.²⁹ Further, the initiative restructured Washington's political process by removing the authority of local school boards to enact programs to desegregate schools and placing this power at the hands of a different governmental body—the state-wide electorate.³⁰ The Court concluded that the political restructuring created a racial classification in violation of the Equal Protection Clause of the Fourteenth Amendment.³¹

In 1982, in *Crawford v. Board of Education*, the United States Supreme Court held that Proposition 1, an amendment to the California State Constitution, did not violate the Fourteenth Amendment's guarantee of equal protection.³² Proposition 1 prohibited state courts

²⁷ See U.S. CONST. amend. XIV, § 1; WASH. REV. CODE § 28A.26.010; *Seattle*, 458 U.S. at 467–70.

²⁸ See U.S. CONST. amend. XIV, § 1; *Seattle*, 458 U.S. at 468.

²⁹ See *Seattle*, 458 U.S. at 468, 480.

³⁰ See *id.* at 466.

³¹ See U.S. CONST. amend. XIV, § 1; *Seattle*, 458 U.S. at 486–87; see also *Hunter v. Erickson*, 393 U.S. 385, 391 (1969). The *Seattle* Court relied on the reasoning from *Hunter* in reaching its decision. See *Hunter*, 393 U.S. at 391. In *Hunter*, the United States Supreme Court struck down an amendment to the Charter of the City of Akron, holding that the amendment constituted a material and odious denial of equal protection of the laws. See *id.* at 393. The amendment in question, section 137 of the Akron City Charter, required that any ordinance (including any currently in effect) dealing with racial, religious or ancestral discrimination in housing be approved by a majority of the voters of Akron. See *id.* at 387. Prior to the amendment's enactment, any ordinance became effective 30 days subsequent to approval by the City Council. See *id.* at 390. The *Hunter* Court stated that not only did section 137 suspend operation of the existing 1964 ordinance, but it also required voter approval before any future ordinance relating to racial, religious or ancestral discrimination could take effect. See *id.* at 389–90. The amendment disadvantaged those who would benefit from such laws and placed a special burden on minorities seeking their protection. See *id.* The Court reasoned that this constituted an explicit racial classification because it treated ethnic housing matters differently from other racial and housing concerns. See *id.* at 390, 392. The Court held that the amendment was therefore subject to the most rigid scrutiny, which was an early form of strict scrutiny. See *id.* Compare *Hunter*, 393 U.S. at 392, with *Adarand*, 515 U.S. at 227. The Court found that the City's justification was not compelling and held that section 137 was discriminatory towards minorities and amounted to a denial of equal protection. See *Hunter*, 393 U.S. at 392–93.

³² 458 U.S. 527, 542 (1982); see U.S. CONST. amend. XIV, § 1; CAL. CONST. art. I, § 7(a) (1983). The proposition provided, in relevant part:

A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil

from ordering mandatory pupil reassignments or transportation, except to remedy violations of the Equal Protection Clause of the Fourteenth Amendment.³³ Minority students alleged that the proposition created a racial classification and imposed a burden on minorities seeking to exercise specific state-created rights.³⁴ They argued that the Amendment limited the power of state courts to enforce state-created rights to desegregate schools, although other state-created rights could be addressed by the state courts without limitation.³⁵ The Supreme Court, distinguishing between state action that discriminates on the basis of race and action that addresses race-related matters, reasoned that Proposition 1 did not operate to embody a racial classification.³⁶ The Court implied that a mere repeal or modification of desegregation laws does not burden minority rights to the extent of being a violation of the Equal Protection Clause.³⁷ Finally, the Court discounted the petitioners' argument that Proposition 1 was enacted with discriminatory intent, pointing out that the purposes of the initiative were clear in the text and that the state electorate, which is composed of all races, approved the initiative.³⁸ Finding that Proposition 1 was not discriminatory on its face and that the state did not intend it to apply in a discriminatory fashion, the Supreme Court held that the proposition was not in violation of the Equal Protection Clause of the Fourteenth Amendment.³⁹

In 1996, in *Romer v. Evans*, the Supreme Court of the United States held that Amendment 2 of Colorado's Constitution, a provision which permitted discrimination based on sexual orientation, violated the Equal Protection Clause.⁴⁰ Prior to the enactment of Amendment 2, Colorado law included ordinances affording protection to persons

transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation . . . of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution

CAL. CONST. art. I, § 7(a).

³³ See *Crawford*, 458 U.S. at 532.

³⁴ See *id.* at 536.

³⁵ See *id.*

³⁶ See *id.* at 537-38.

³⁷ See U.S. CONST. amend. XIV, § 1; *Crawford*, 458 U.S. at 539.

³⁸ See *Crawford*, 458 U.S. at 543-45.

³⁹ See U.S. CONST. amend. XIV, § 1; CAL. CONST. art. I, § 7(a); *Crawford*, 458 U.S. at 542, 545.

⁴⁰ 116 S. Ct. 1620, 1629, 70 Fair Empl. Prac. Cas. (BNA) 1180, 1187 (1992); see U.S. CONST. amend. XIV, § 1; COLO. CONST. art. II, § 30b.

discriminated against because of their sexual orientation.⁴¹ Amendment 2 rescinded these provisions and further prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians."⁴² Plaintiffs, who included aggrieved homosexuals and municipalities, contended that the amendment subjected homosexuals to immediate and substantial risk of discrimination based on their sexual orientation.⁴³

In *Romer*, the Court reasoned that the amendment isolated homosexuals from protection against discrimination afforded others and offered no means to reinstate those policies or laws.⁴⁴ The Court noted that the amendment denied homosexuals the usual political safeguards, which they could employ only by enlisting the citizenry of Colorado to pass laws or amend the state constitution.⁴⁵ The Supreme Court found Amendment 2 bore no rational relationship to a legitimate governmental interest.⁴⁶ The Supreme Court thus held that Colorado Amendment 2 was in violation of the equal protection principles of the Fourteenth Amendment.⁴⁷

During the *Survey* year, in *Coalition for Economic Equity v. Wilson*, a unanimous three-judge panel of the Court of Appeals for the Ninth Circuit upheld the constitutionality of Proposition 209, a California voter initiative, which provides in relevant part that, "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."⁴⁸ The Ninth Circuit reasoned that because a denial of equal protection requires, at the least, a classification that treats individuals unequally, Proposition 209, a state law that prohibits classifications based on race or gender, did not violate the Equal Protection Clause of the Fourteenth Amendment.⁴⁹ The court found that the

⁴¹ See *Romer*, 116 S. Ct. at 1623, 70 Fair Empl. Prac. Cas. (BNA) at 1183.

⁴² COLO. CONST. art. II, § 30b; see *Romer*, 116 S. Ct. at 1623, 70 Fair Empl. Prac. Cas. (BNA) at 1183.

⁴³ See *Romer*, 116 S. Ct. at 1624, 70 Fair Empl. Prac. Cas. (BNA) at 1183.

⁴⁴ See *id.* at 1625, 70 Fair Empl. Prac. Cas. (BNA) at 1184.

⁴⁵ See *id.* at 1627, 70 Fair Empl. Prac. Cas. (BNA) at 1185-86.

⁴⁶ See *id.* at 1628-29, 70 Fair Empl. Prac. Cas. (BNA) at 1187.

⁴⁷ See U.S. CONST. amend. XIV, § 1; *Romer*, 116 S. Ct. at 1629, 70 Fair Empl. Prac. Cas. (BNA) at 1187.

⁴⁸ CAL. CONST. art. I, § 31(a); *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834.

⁴⁹ See U.S. CONST. amend. XIV, § 1; *Wilson*, 110 F.3d at 1445-46, 73 Fair Empl. Prac. Cas. (BNA) at 831-33.

initiative was constitutional on its face and did not reorder the political process to burden women or minorities.⁵⁰ The court also held that Title VII of the Civil Rights Act of 1964 did not preempt Proposition 209.⁵¹

One day following the adoption of Proposition 209, several individuals and groups, calling themselves the Coalition for Economic Equity ("Coalition" or "plaintiffs"), claiming to represent the interests of minorities and women, filed a complaint in the Northern District of California against several officials and political subdivisions of the State of California.⁵² The Coalition brought suit under 42 U.S.C. § 1983, alleging that Proposition 209 denied both women and racial minorities equal protection of the laws.⁵³ It further alleged that Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972 preempted the Proposition.⁵⁴ The Coali-

⁵⁰ See *Wilson*, 110 F.3d at 1440, 1446, 73 Fair Empl. Prac. Cas. (BNA) at 827-28, 832-33.

⁵¹ See 42 U.S.C. § 2000e-2 (1994); *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834. Title VII of the Civil Rights Act of 1964 states, in pertinent part:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as employee, because of such individual's race, color, religion, sex, or national origin

42 U.S.C. § 2000e-2.

⁵² See *Wilson*, 110 F.3d at 1435, 73 Fair Empl. Prac. Cas. (BNA) at 823. The Coalition included civil rights organizations in California and across the country, such as the NAACP, the California Labor Federation and the Women Construction Business Owners and Executives. See *id.* at 1431, 73 Fair Empl. Prac. Cas. (BNA) at 822. Defendants included Pete Wilson, Governor of California; Daniel Lundgren, Attorney General for the State of California; Joanne Corday Kozberg, Secretary of State and Consumer Services Agency; and James Gomez, Director, Department of Corrections. See *id.*

⁵³ See 42 U.S.C. § 1983 (1979); *Wilson*, 110 F.3d at 1435, 73 Fair Empl. Prac. Cas. (BNA) at 823. The statute states, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983.

⁵⁴ See *infra* note 51; see also 20 U.S.C. § 1681(a) (1994); 42 U.S.C. § 2000-d; 42 U.S.C. § 2000e-2; *Wilson*, 110 F.3d at 1435, 73 Fair Empl. Prac. Cas. (BNA) at 823. Title VI of the Civil Rights Act of 1964 states, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000-d. Title IX of the Educational Amendments of 1972 provides, in relevant part, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied

tion challenged Proposition 209 only to the extent that it prohibited governmental agencies from offering preferential treatment to women and minorities.⁵⁵ With its complaint, the Coalition filed an application for a temporary restraining order and a preliminary injunction, which the district court granted.⁵⁶ A defendant/intervenor, Californians Against Discrimination and Preference, together with the state, then applied to the district court for a stay of the preliminary injunction pending appeal.⁵⁷ The Ninth Circuit, instead of addressing the stay, reached the merits of the case and handed down a decision.⁵⁸

In reviewing the district court's issuance of a temporary restraining order and preliminary injunction, the Ninth Circuit used "conventional" equal protection analysis to determine whether Proposition 209 was invalid on its face.⁵⁹ Reasoning from *Adarand*, the court stated that the first step in deciding whether a law violates the Equal Protection Clause is to identify the classification it draws.⁶⁰ Finding that Proposition 209 actually *prohibited* the state from classifying individuals by race or gender, the court held that as a matter of law, Proposition 209 did not violate the Constitution on its face.⁶¹

Next, the court turned to the constitutionality of Proposition 209 as a matter of "political structure," addressing the Coalition's argument that the initiative imposed an unequal burden on women and minorities by denying them the right to seek preferential treatment from the lowest levels of government.⁶² Distinguishing *Seattle*, the Ninth Circuit held that Proposition 209 did not reallocate political authority in a discriminatory manner, stating that the initiative instead addressed

the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a).

⁵⁵ See *Wilson*, 110 F.3d at 1435, 73 Fair Empl. Prac. Cas. (BNA) at 824. The Coalition sought as relief a permanent injunction enjoining the state from implementing and enforcing Proposition 209 and a declaratory judgment that the proposition was unconstitutional. See *id.*, 73 Fair Empl. Prac. Cas. (BNA) at 823.

⁵⁶ See *id.*

⁵⁷ See *id.* at 1436, 73 Fair Empl. Prac. Cas. (BNA) at 824.

⁵⁸ See *id.* Before reaching the merits of the case, the court analyzed whether this conflict was necessary following *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1072 (1997). See *Wilson*, 110 F.3d at 1436-37, 73 Fair Empl. Prac. Cas. (BNA) at 825. In *Arizonans*, the Supreme Court warned against "premature adjudication of constitutional questions . . . when a federal court is asked to invalidate a State's law." See 117 S. Ct. at 1074. The Ninth Circuit found, based upon the district court's findings and the factual basis of the case, that the conflict really was necessary. See *Wilson*, 110 F.3d at 1438, 73 Fair Empl. Prac. Cas. (BNA) at 826.

⁵⁹ See *Wilson*, 110 F.3d at 1439-40, 73 Fair Empl. Prac. Cas. (BNA) at 826-28.

⁶⁰ See *id.* at 1440, 73 Fair Empl. Prac. Cas. (BNA) at 827; see also *Adarand*, 515 U.S. at 214, 67 Fair Empl. Prac. Cas. (BNA) at 1834.

⁶¹ See *Wilson*, 110 F.3d at 1440, 73 Fair Empl. Prac. Cas. (BNA) at 827-28.

⁶² See *id.*, 73 Fair Empl. Prac. Cas. (BNA) at 828.

race and gender-related matters in a neutral fashion.⁶³ The court reasoned that even though Proposition 209 restructured the political process in that laws on preferential treatment must be addressed by state amendment, Proposition 209 must burden an individual's right to equal treatment to be held invalid under the Fourteenth Amendment.⁶⁴ Proposition 209, the court explained, not only failed to burden the right to equal treatment, but also created an impediment to receiving preferential treatment, a burden the Constitution itself imposes.⁶⁵

Comparing this case to *Crawford*, the court implied that Proposition 209 involved the repeal of race-related legislation and policies not required by the Constitution in the first place.⁶⁶ The court reasoned that this type of action did not offend the Equal Protection Clause because the removal of antidiscrimination laws has never been viewed as creating an apparently invalid racial classification.⁶⁷ *Seattle* and *Romer*, on the other hand, both involved situations where the state was singling out race and gender preferences for unique political burdens.⁶⁸ In each of these cases, the court stated, the majority was placing political obstructions in the path of minorities aiming to acquire protection against unequal treatment.⁶⁹ In *Wilson*, the court reasoned it was irrational to apply "political structure" equal protection principles where the group claiming to face those obstacles constituted a majority of the electorate, implying that it was nonsensical to believe a majority would vote to impose burdens upon itself.⁷⁰

Finally, the Ninth Circuit addressed the issue of whether Proposition 209 was invalid under the Supremacy Clause because Title VII of the Civil Rights Act of 1964 preempted it.⁷¹ Acknowledging that federal

⁶³ See *id.* at 1444, 73 Fair Empl. Prac. Cas. (BNA) at 830-31; see also *Seattle*, 458 U.S. at 479-80; *Hunter v. Erickson*, 393 U.S. 985, 391 (1969).

⁶⁴ See U.S. CONST. amend. XIV, § 1; *Wilson*, 110 F.3d at 1445, 73 Fair Empl. Prac. Cas. (BNA) at 832.

⁶⁵ See U.S. CONST. amend. XIV, § 1; *Wilson*, 110 F.3d at 1445, 73 Fair Empl. Prac. Cas. (BNA) at 832.

⁶⁶ See U.S. CONST. amend. XIV, § 1; *Wilson*, 110 F.3d at 1443, 73 Fair Empl. Prac. Cas. (BNA) at 830; see also *Crawford*, 458 U.S. at 538.

⁶⁷ See *Wilson*, 110 F.3d at 1443, 73 Fair Empl. Prac. Cas. (BNA) at 830.

⁶⁸ See *id.* at 1441, 73 Fair Empl. Prac. Cas. (BNA) at 829; see also *Romer*, 116 S. Ct. at 1620; *Seattle*, 458 U.S. at 467.

⁶⁹ See *Wilson*, 110 F.3d at 1441, 73 Fair Empl. Prac. Cas. (BNA) at 829; see also *Romer*, 116 S. Ct. at 1620; *Seattle*, 458 U.S. at 467.

⁷⁰ See 110 F.3d at 1441, 73 Fair Empl. Prac. Cas. (BNA) at 829.

⁷¹ See 42 U.S.C. § 2000c-2; *Wilson*, 110 F.3d at 1446-48, 73 Fair Empl. Prac. Cas. (BNA) at 833-34. The district court found that neither Title VI of the Civil Rights Act of 1964 nor Title IX of the Education Amendments of 1972 preempted Proposition 209 under the Supremacy Clause. See 20 U.S.C. § 1681(a); 42 U.S.C. § 2000d; *Wilson*, 110 F.3d at 1446, 73 Fair Empl. Prac. Cas. (BNA) at 833. Plaintiffs did not contend otherwise on appeal and therefore the Ninth Circuit

law may preempt state law to the extent that state law stands as an impediment to the goals and objectives of Congress, the court pointed to sections 708 and 1104 of the Civil Rights Act of 1964 as controlling in this situation.⁷² Both of those provisions, the court noted, specify that state action is preempted only if the law at issue actually conflicts with federal law.⁷³ Finding that Proposition 209 was in no way inconsistent with the 1964 Civil Rights Act, the court held that Title VII did not preempt Proposition 209.⁷⁴

Subsequent to the three-judge panel outcome in *Wilson*, the Coalition appealed to the full United States Court of Appeals for the Ninth Circuit, which refused to overturn the panel's decision.⁷⁵ The Coalition then petitioned the Supreme Court for review of *Wilson*, which was recently rejected.⁷⁶ The Court's decision to deny certiorari effectively validates the enforceability of Proposition 209, while at the same time leaving many unanswered questions as to affirmative action programs.⁷⁷

In cases subsequent to *Wilson*, interested parties attempted to address some of those unresolved issues.⁷⁸ The decision in *Monterey Mechanical Co. v. Wilson* began to implement the goals of Proposition 209 while the measure's future was still uncertain.⁷⁹ *Monterey Mechani-*

only addressed the issue of Title VII of the Civil Rights Act of 1964. See *Wilson*, 110 F.3d at 1446, 73 Fair Empl. Prac. Cas. (BNA) at 833.

⁷² See 42 U.S.C. § 2000e-7; 42 U.S.C. § 2000h-4; *Wilson*, 110 F.3d at 1447, 73 Fair Empl. Prac. Cas. (BNA) at 833-34. Section 708 of the Civil Rights Act of 1964 provides that:

Nothing in this subchapter shall be deemed to exempt or relieve any person from liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7. Section 1104 of the Civil Rights Act of 1964 provides that:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4.

⁷³ See 42 U.S.C. § 2000e-7; 42 U.S.C. § 2000h-4; *Wilson*, 110 F.3d at 1447, 73 Fair Empl. Prac. Cas. (BNA) at 833.

⁷⁴ See 42 U.S.C. § 2000e-2; *Wilson*, 110 F.3d at 1447-48, 73 Fair Empl. Prac. Cas. (BNA) at 833-34.

⁷⁵ See *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719, 71 Empl. Prac. Dec. ¶ 44,935 (9th Cir.), *cert denied*, 118 S. Ct. 397 (1997) [hereinafter *Wilson II*].

⁷⁶ See 118 S. Ct. at 397.

⁷⁷ See *id.*; see also Richard Carelli, *Prop. 209 Survives Justices' Scrutiny*, BOSTON GLOBE, Nov. 4, 1997, at A1.

⁷⁸ See *Monterey Mechanical v. Wilson*, No. 96-16729, 1997 WL 538757, at *1 (9th Cir. Sept. 3, 1997).

⁷⁹ See *id.* at *1, *14; see also Leshner, *supra* note 7, at A1.

cal stemmed from the issue of a contractor whose low bid on a state university construction project was rejected because he had not actively sought to share the job with minority and female subcontractors, as encouraged by the California Public Contract Code.⁸⁰ The same three-judge panel that decided *Wilson* found the contracting law unconstitutional, reasoning that it violated the Equal Protection Clause.⁸¹ Although this ruling impacts only state government contracts, it is conceivable that this action will spur other challenges to similar provisions in local government laws across California and within other states under the Ninth Circuit's jurisdiction.⁸²

California was the first state to abolish affirmative action by law, but the concept is not likely to remain isolated on the west coast.⁸³ Two recent cases, *Hopwood v. Texas* and *Taxman v. Piscataway Township Board of Education*, signify a nearing end to public affirmative action programs within the Fifth and Third Circuits.⁸⁴ On the legislative front, more than two dozen states are moving to follow California's example

⁸⁰ See CAL. PUB. CONT. CODE §§ 10115(c), 10115.2 (1988); *Monterey Mechanical*, 1997 WL 538757, at *1-2. The statute in question of the California Public Contract Code requires that bidders on public works projects put forth effort to share 15% of their contract dollar value with minority-owned businesses, 5% with female-owned companies and 3% with disabled veteran subcontractors. CAL. PUB. CONT. CODE § 10115(c).

⁸¹ See U.S. CONST. amend. XIV, § 1; *Monterey Mechanical*, 1997 WL 538757, at *1, *14; *Wilson*, 110 F.3d at 1434, 73 Fair Empl. Prac. Cas. (BNA) at 823.

⁸² See *Monterey Mechanical*, 1997 WL 538757, at *14; see also *Leshner*, *supra* note 7.

⁸³ See *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834; *Taxman v. Piscataway Township Bd. of Ed.*, 91 F.3d 1547, 1550, 1567, 71 Fair Empl. Prac. Cas. (BNA) 848, 850, 864 (3d Cir. 1996), *cert. dismissed*, 118 S. Ct. 595 (1997); *Hopwood v. Texas*, 78 F.3d 932, 934, 962 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

⁸⁴ See *Taxman*, 91 F.3d at 1550, 1567, 71 Fair Empl. Prac. Cas. (BNA) at 850, 864; *Hopwood*, 78 F.3d at 934, 962. In *Hopwood*, the Fifth Circuit declared a University of Texas School of Law program designed to produce a diverse student body unconstitutional on the grounds that it deprived whites of equal protection. See 78 F.3d at 934-35, 957, 962. Holding the law school to strict scrutiny, the court found that the school had not presented a compelling justification for their admissions practices. See *id.* at 934, 940. The court further stated that recent Supreme Court decisions indicated that diversity interests will not satisfy strict scrutiny. See *id.* at 944. The Supreme Court denied certiorari of the *Hopwood* case, solidifying it as law in the three states under the Fifth Circuit. See *Hopwood v. Texas*, 116 S. Ct. 2581, 2581 (1996) [hereinafter *Hopwood II*]. In *Taxman*, the Third Circuit found in favor of a white school teacher fired due to reductions in teaching positions. See 91 F.3d at 1550-52, 1567, 71 Fair Empl. Prac. Cas. (BNA) at 850-51, 864. The school retained a minority teacher with identical seniority and evaluations instead of the white teacher, pursuant to a school board policy of promoting diversity in its teaching staff. See *id.* at 1551-52, 71 Fair Empl. Prac. Cas. (BNA) at 851-52. *Taxman* was scheduled to be heard by the Supreme Court this session, but recently settled out of court. See *Piscataway Township Bd. of Educ. v. Taxman*, 118 S. Ct. 595, 595 (1997) [hereinafter *Taxman II*]. The settlement of \$433,500 was funded in large part by the Black Leadership Forum, which feared an adverse ruling to affirmative action was likely if the case reached the Supreme Court. See Jan Crawford Greenburg, *Civil Rights Groups Pay Teacher to Avoid Court; Coalition Feared Adverse Ruling By High Court Would Damage Affirmative Action*, CHI. TRIB., Nov. 22, 1997, at A:1.

of Proposition 209, and a federal bill is in the works as well.⁸⁵ The pending legislation and recent court decisions affect only state and federal government action but suggest that affirmative action programs are on shaky ground in the private sector as well.⁸⁶

In California, implementing Proposition 209 has not been easy.⁸⁷ Certain cities and counties throughout the state refused to comply with the measure's requirements until an appeal was heard.⁸⁸ In response, California Governor Pete Wilson called upon the state legislature to repeal or amend some thirty state statutes identified as violating Proposition 209 by granting race or gender preferences.⁸⁹ If state and local legislatures fail to comply, each statute potentially in violation of Proposition 209 must be declared unconstitutional by a court to be invalidated.⁹⁰ Wilson has already challenged five such statutes in cases which are presently pending in Sacramento Superior Court.⁹¹

The continuing debate over the enforceability of Proposition 209 exemplifies the conflicting objectives that will be played out as measures like Proposition 209 surface across the nation.⁹² Proponents of Proposition 209 are apt to use the momentum from the *Wilson*, *Hopwood* and *Taxman* decisions to expand anti-affirmative action measures throughout the United States.⁹³ *Wilson* and related cases are significant in that they are signaling an emerging change in attitudes towards preferential treatment programs.⁹⁴ The final outcome of *Taxman* suggests that parties on both sides of the affirmative action battle recog-

⁸⁵ See H.R. 1909, 105th Cong. (1997); S. 950, 105th Cong. (1997); James J. Kilpatrick, *Another Blow to Racial Preferences*, SAN DIEGO UNION-TRIB., Sept. 4, 1997, at B8:1. House Bill No. 1909 and its Senate counterpart, Senate Bill No. 950, would prohibit preferences based on race or gender in federal government hiring and contracting. See H.R. 1909, 105th Cong.; S. 950, 105th Cong.

⁸⁶ See H.R. 1909, 105th Cong.; S. 950, 105th Cong.; see also Kilpatrick, *supra* note 85. Kilpatrick noted that the "whole wobbly structure of preferential treatment now approaches collapse." *Id.*

⁸⁷ See Ed Mendel, *Prop. 209 Becomes State Law; Agencies That Don't Comply with Ban on Preferences Targeted*, SAN DIEGO UNION-TRIB., Aug. 29, 1997, at A1. Mendel, referring to comments by Ward Connerly, noted that "some local governments are bent on 'sabotage' and do not intend to comply with the new law." *Id.* Ward Connerly led the campaign for Proposition 209. See *id.*

⁸⁸ See *id.*

⁸⁹ See Dave Leshner, *Wilson Urges Legislature to Act on Prop. 209*, LOS ANGELES TIMES, Sept. 10, 1997, at A1.

⁹⁰ See Mendel, *supra* note 87.

⁹¹ See Leshner, *supra* note 89.

⁹² See *Wilson*, 110 F.3d at 1434, 1448, 73 Fair Empl. Prac. Cas. (BNA) at 823, 834; see also Kilpatrick, *supra* note 85.

⁹³ See *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834; *Taxman*, 91 F.3d at 1550, 1567, 71 Fair Empl. Prac. Cas. (BNA) at 850, 864; *Hopwood*, 78 F.3d at 934, 962.

⁹⁴ See *Adarand*, 515 U.S. at 237-39, 67 Fair Empl. Prac. Cas. (BNA) at 1843-44; *Crawford*, 458 U.S. at 542-45; *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834; see also Mendel, *supra* note 87.

nize that such programs are losing footing in the public sector.⁹⁵ The effect is also certain to be felt in the private sector as well, stimulating lawsuits aimed at non-governmental affirmative action programs.⁹⁶ Whatever an employer's outlook on affirmative action in the workplace, he or she should be aware that preferential treatment could likely be challenged as unconstitutional in the near future.⁹⁷

In conclusion, the Ninth Circuit in *Wilson* upheld the validity of a state constitutional amendment eliminating racial and gender preferences in public employment, education and contracting.⁹⁸ The court reasoned that Proposition 209 was not unconstitutional on its face nor did it create discriminatory barriers to the political process.⁹⁹ The court also found that Proposition 209 was not in violation of Title VII, as Title VII did not preempt the initiative.¹⁰⁰ *Wilson* was denied certiorari by the Supreme Court, thereby solidifying Proposition 209 as law in California.¹⁰¹ Practitioners should be on notice that a significant change in the legality of affirmative action programs is in progress.¹⁰² Employers may soon be unable to use race and gender as criteria for hiring and other workplace decisions.¹⁰³ Although *Wilson* did not set national precedent, the Supreme Court is certain to rule on the issue of affirmative action before long.¹⁰⁴ The settlement in *Taxman*, cases like *Wilson* and *Hopwood* and the conservative nature of the Court towards preferential treatment programs suggest that such a case could likely result in a fatal blow to affirmative action, stifling preferential treatment programs across the nation.¹⁰⁵

⁹⁵ See Greenburg, *supra* note 84.

⁹⁶ See *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834; *Taxman*, 91 F.3d at 1550, 71 Fair Empl. Prac. Cas. (BNA) at 850; *Hopwood*, 78 F.3d at 934, 962; see also *Employment Discrimination—Race: Supreme Court Ruling Could Render Moot Debate Over Affirmative Action*, ABA Told, *supra* note 6.

⁹⁷ See *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834; *Taxman*, 91 F.3d at 1550, 1567, 71 Fair Empl. Prac. Cas. (BNA) at 850, 864; *Hopwood*, 78 F.3d at 934, 962.

⁹⁸ See CAL. CONST. art. I, § 31(a); *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834.

⁹⁹ See CAL. CONST. art. I, § 31(a); *Wilson*, 110 F.3d at 1440, 1446, 73 Fair Empl. Prac. Cas. (BNA) at 827–28, 832–33.

¹⁰⁰ See 42 U.S.C. § 2000c-2; CAL. CONST. art. I, § 31(a); *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834.

¹⁰¹ See 118 S. Ct. at 397.

¹⁰² See *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834; *Taxman*, 91 F.3d at 1550, 1567, 71 Fair Empl. Prac. Cas. (BNA) at 850, 864; *Hopwood*, 78 F.3d at 934, 962.

¹⁰³ See *Wilson*, 110 F.3d at 1448, 73 Fair Empl. Prac. Cas. (BNA) at 834; *Taxman*, 91 F.3d at 1550, 1567, 71 Fair Empl. Prac. Cas. (BNA) at 850, 864; *Hopwood*, 78 F.3d at 934, 962.

¹⁰⁴ See David G. Savage, *New Legal Test of Affirmative Action Arrives*, LOS ANGELES TIMES, Nov. 26, 1997, at A:1.

¹⁰⁵ See *Adarand*, 515 U.S. at 237–39, 67 Fair Empl. Prac. Cas. (BNA) at 1843–44; *Wilson*, 110

VI. MASSACHUSETTS DEVELOPMENTS

*A.*Public Policy Exception to At-Will Employment Rule Extended to Internal Complaints About Criminal Violations: Smith v. Mitre Corp. and Shea v. Emmanuel College*¹

In Massachusetts, employment contracts are deemed to be at-will unless there is a contractual provision stating otherwise.² An employee at-will may be terminated at any time and for any reason or for no reason at all.³ Massachusetts courts recognize an exception to this general rule when an employee is terminated contrary to a well-defined public policy.⁴ Recent decisions have expanded the traditionally narrow public policy exception to protect employees terminated for complaining internally about criminal matters.⁵

In 1989, in *Smith-Pfeffer v. Fernald State School*, the Supreme Judicial Court of Massachusetts held that the public policy exception to the at-will employment rule does not include employees terminated without just cause simply because they perform appropriate, socially desirable duties.⁶ In *Smith-Pfeffer*, an at-will employee of a state school for the mentally retarded brought an action against the school's superintendent after he allegedly fired her for criticizing his administrative abilities and reorganization plan.⁷ The plaintiff claimed that the discharge violated public policy because her job was socially important.⁸ The court reversed a jury verdict in favor of the plaintiff, reasoning that to extend the public policy exception in the plaintiff's case would convert the general rule that an at-will employee can be terminated at any time for any reason or for no reason at all into a rule that requires

F.3d at 1148, 73 Fair Empl. Prac. Cas. (BNA) at 850; *Hopwood*, 78 F.3d at 934, 962; see also Greenburg, *supra* note 84.

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¹ *Smith*, 949 F. Supp. 943, 66 Empl. Prac. Dec. (CCH) ¶ 44,506, 87,838 (D. Mass. 1997); *Shea*, 682 N.E.2d 1348, 13 Indiv. Empl. Rights Cas. (BNA) 308 (Mass. 1997).

² See Richard L. Alfred & Ben T. Clements, *The Public Policy Exception to the At-Will Employment Rule*, 78 MASS. L. REV. 88, 88 (1993).

³ See, e.g., *Smith*, 949 F. Supp. at 948, 66 Empl. Prac. Dec. (CCH) ¶ 87,838.

⁴ See *id.* Another exception to the at-will rule is discharge resulting from an employer's overreaching for its own financial advantage. See John Allen Doran & David L. Abney, *An Overview of Massachusetts Law on Wrongful Termination of At-Will Employment*, 77 MASS. L. REV. 83, 85 (1992). This occurs when the employer discharges an employee and retains benefits, commissions or other income that the employee has already earned. See *id.*

⁵ See *Smith*, 949 F. Supp. at 951-52, 66 Empl. Prac. Dec. (CCH) ¶ 87,841; *Shea*, 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁶ 533 N.E.2d 1368, 1371, 4 Indiv. Empl. Rights Cas. (BNA) 289, 291 (Mass. 1989).

⁷ See *id.* at 1370, 4 Indiv. Empl. Rights Cas. (BNA) at 291.

⁸ See *id.* at 1371, 4 Indiv. Empl. Rights Cas. (BNA) at 291.

just cause to terminate.⁹ The court noted that the public policy exception is available when an at-will employee is terminated for asserting a legally guaranteed right (e.g., filing a workers' compensation claim), for doing what the law requires (e.g., serving on a jury) or for refusing to do what the law forbids (e.g., committing perjury).¹⁰ The court noted, however, that employers have an interest in running their businesses as they see fit and that the public has an interest in discouraging dissatisfied employees from filing frivolous lawsuits.¹¹ Therefore, the court reasoned that the administration and organization of the school was a matter of opinion and internal policy and could not be the basis of a public policy exception to the at-will rule.¹² The court further reasoned that even employees in socially important occupations may not seek legal redress for termination stemming from disagreement with their employer's policy decisions.¹³ Thus, the court held that the public policy exception should not extend to employees terminated without just cause simply because they perform socially desirable acts.¹⁴

In 1991, in *Flesner v. Technical Communications Corp.*, the Supreme Judicial Court of Massachusetts held that an employee who cooperates with a government investigation, even if not legally required to do so, is protected by the public policy exception to the general at-will rule.¹⁵ In *Flesner*, an employee claimed that he was constructively discharged in retaliation for cooperating with a United States Customs Service investigation of his employer.¹⁶ The court noted that the public policy of the Commonwealth encourages cooperation with ongoing criminal investigations.¹⁷ The court reasoned that allowing an employer to terminate an employee for such cooperation would seriously impair the government's ability to conduct investigations.¹⁸ Thus, the court found

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *Smith-Pfeffer*, 533 N.E.2d at 1371, 4 Indiv. Empl. Rights Cas. (BNA) at 291.

¹² See *id.* at 1371-72, 4 Indiv. Empl. Rights Cas. (BNA) at 291.

¹³ See *id.* at 1372, 4 Indiv. Empl. Rights Cas. (BNA) at 291.

¹⁴ See *id.* The court also noted that the question of whether there is a public policy violation is a question of law for the judge. See *id.*, 4 Indiv. Empl. Rights Cas. (BNA) at 292.

¹⁵ 575 N.E.2d 1107, 1111, 6 Indiv. Empl. Rights Cas. (BNA) 1530, 1533 (Mass. 1991).

¹⁶ See *id.* at 1109, 6 Indiv. Empl. Rights Cas. (BNA) at 1531. Customs officials detained the employee after he attempted to take his employer's merchandise out of the country without the requisite export license. See *id.* The employer had assured the employee that no license was necessary. See *id.* at 1108, 6 Indiv. Empl. Rights Cas. (BNA) at 1531. The customs officials told the employee that they would handcuff and arrest him if he did not cooperate. See *id.* at 1109, 6 Indiv. Empl. Rights Cas. (BNA) at 1531.

¹⁷ See *id.* at 1110, 6 Indiv. Empl. Rights Cas. (BNA) at 1533. The court cited state statutes that grant immunity to witnesses and reimburse them for their travel costs. See *id.*

¹⁸ See *id.* at 1111, 6 Indiv. Empl. Rights Cas. (BNA) at 1533.

that the three bases for the public policy exception outlined in *Smith-Pfeffer* should be expanded in certain circumstances to include employees terminated for performing important public deeds, even though the deeds may not be legally required.¹⁹ Accordingly, the court held that the employee's cooperation with the governmental investigation was an important public deed which justified an exception to the general at-will rule.²⁰

In 1994, in *King v. Driscoll*, the Supreme Judicial Court of Massachusetts held that firing an employee in retaliation for exercising his statutory right to file a shareholder's derivative suit did not justify an exception to the general at-will rule.²¹ In *King*, the employer, a closely held corporation, fired the employee, a vice president and shareholder of the corporation, after his concern over the buy back of a retiring executive's stock motivated him to participate in a shareholder's derivative suit.²² The court reasoned that the mere existence of a statute relating to derivative suits did not by itself pronounce a public policy that would give rise to an exception to the at-will rule.²³ The court noted that the administration of the stock buy back program was an internal company matter.²⁴ Therefore, the court reasoned that the effect on the public due to the administration of the program was too remote to justify an exception to the at-will rule.²⁵ Thus, the court held that the public policy exception did not prevent the employer from firing the employee for participating in the derivative suit.²⁶

In 1994, in *Hutson v. Analytic Sciences Corp.*, the United States District Court for the District of Massachusetts held that a Massachusetts court would recognize a cause of action for wrongful discharge based on public policy for an employee terminated for complaining internally about fraudulent claims and practices that violated federal law.²⁷ In *Hutson*, a defense contractor allegedly terminated an em-

¹⁹ See *id.*; *supra* note 10 and accompanying text. The court noted that whistleblowing may fall into this category. See *Flesner*, 575 N.E.2d at 1111 n.3, 6 Indiv. Empl. Rights Cas. (BNA) at 1533 n.3.

²⁰ See *Flesner*, 575 N.E.2d at 1111, 6 Indiv. Empl. Rights Cas. (BNA) at 1533.

²¹ 638 N.E.2d 488, 492-93, 130 Lab. Cas. (CCH) ¶ 57,895, 86,360 (Mass. 1994).

²² See *id.* at 490-91, 130 Lab. Cas. (CCH) ¶¶ 86,358-59.

²³ See *id.* at 493-94, 130 Lab. Cas. (CCH) ¶ 86,361.

²⁴ See *id.* at 492, 130 Lab. Cas. (CCH) ¶ 86,360.

²⁵ See *id.* at 493, 130 Lab. Cas. (CCH) ¶ 86,361.

²⁶ See *King*, 638 N.E.2d at 492-93, 130 Lab. Cas. (CCH) ¶ 86,360.

²⁷ 860 F. Supp. 6, 12-13, 129 Lab. Cas. (CCH) ¶ 57,770, 85,793 (D. Mass. 1994). The court's decision in *Hutson* to extend protection to employees who complain internally is consistent with other jurisdictions. For example, in 1982, in *Petrik v. Monarch Printing Corp.*, the Appellate Court of Illinois held that an employee stated a complaint for wrongful discharge in violation of public policy even though he never complained outside the organization. 444 N.E.2d 588, 592-93, 115

ployee who complained internally about the company's failure to comply with the terms of one of its contracts to develop technology.²⁸ The court first concluded that a Massachusetts court would consider federal law a source of well-defined public policy sufficient to support an exception to the at-will rule.²⁹ The court then reasoned that nearly identical federal and state statutes exist prohibiting fraud against the government.³⁰ The court considered both statutes and concluded that, by criminalizing fraud against the government, the statutes expressed a similar public policy against such conduct.³¹ Thus, citing the Supreme Judicial Court's reasoning in *Flesner*, the district court held that a Massachusetts court would recognize internal whistleblowing on fraud against the federal government as an important public deed justifying an exception to the general at-will rule.³²

During the *Survey* year, in *Smith v. Mitre Corp.*, the United States District Court for the District of Massachusetts affirmed its analysis in *Hutson*, and held that whistleblowing on fraud and false claims by a government contractor is sufficiently important to state a claim for wrongful termination in violation of public policy.³³ The employee in *Smith* claimed that she was discharged for informing her employer of fraud and the misuse of funds derived from government contracts.³⁴ The court concluded that the Supreme Judicial Court of Massachusetts would apply the public policy exception to protect an employee terminated for complaining internally about fraud and false claims by a government contractor.³⁵

L.R.R.M. (BNA) 4520, 4523-24 (Ill. App. Ct. 1982). The court reasoned that the employee's complaint was not merely an internal dispute between an employee and his employer and that a public policy favoring enforcement of the criminal code supported the employee's conduct. *See id.*

²⁸ *See Hutson*, 860 F. Supp. at 10, 129 Lab. Cas. (CCH) ¶ 85,791.

²⁹ *See id.* In support of its conclusion, the court cited case law from other jurisdictions and noted the lack of contrary authority. *See id.*

³⁰ *See id.* at 10-11, 129 Lab. Cas. (CCH) ¶ 85,792.

³¹ *See id.* at 11, 129 Lab. Cas. (CCH) ¶ 85,792.

³² *See id.* at 10, 11, 129 Lab. Cas. (CCH) ¶¶ 85,791, 85,792. This decision is consistent with *Tighe v. Career Systems Development Corp.*, 915 F. Supp. 476, 485, 131 Lab. Cas. ¶ 58,099, 87,265 (D. Mass. 1996). In *Tighe*, the court concluded that federal statutes encouraging persons to report fraud formed the basis of a public policy exception to the general at-will rule. *See id.* The court in *Hutson* also held that a Massachusetts court would recognize a cause of action for wrongful discharge in violation of public policy for the plaintiff's claims that he was terminated for revealing alleged violations of government procurement laws and laws protecting information related to national defense. *See Hutson*, 860 F. Supp. at 11-13, 129 Lab. Cas. (CCH) ¶¶ 85,792-93.

³³ 949 F. Supp. 943, 951-52, 66 Empl. Prac. Dec. (CCH) ¶ 44,506, 87,841 (D. Mass. 1997).

³⁴ *See id.* at 948, 66 Empl. Prac. Dec. (CCH) ¶ 87,838.

³⁵ *See id.* at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,839.

In *Smith*, the plaintiff, Patricia G. Smith ("Smith"), was an employee of the defendant, Mitre Corporation ("Mitre"), a nonprofit corporation and government contractor funded mainly through government grants.³⁶ Smith conducted internal audits.³⁷ She also served as company ombudsperson for complaints about the misuse of government funds and as compliance officer for their proper use.³⁸ Smith investigated and complained to Mitre executives about several instances of fraud and false statements by Mitre employees and management in connection with Mitre's spending of money derived from government contracts.³⁹ She insisted that Mitre comply with the federal law prohibiting such activities.⁴⁰

Smith alleged that Mitre responded to her complaints by taking adverse employment actions against her.⁴¹ She contended that Mitre demoted her, and that her superiors denied her sufficient work and falsely characterized her work performance.⁴² Although Mitre claimed that Smith was to be terminated as part of a "lay-off action," she alleged that Mitre terminated her in retaliation for making internal complaints, or for being a potential "whistleblower."⁴³

The court concluded that the Supreme Judicial Court would consider whistleblowing an activity worth protecting by the public policy exception to the at-will rule.⁴⁴ The court reasoned that the Supreme Judicial Court would rely on its conclusion in *Flesner* that, in certain circumstances, the public policy exception should extend to important public deeds, even though the deeds are not legally required.⁴⁵ The

³⁶ See *id.* at 948, 951 n.3, 66 Empl. Prac. Dec. (CCH) ¶¶ 87,838, 87,840 n.3.

³⁷ See *id.* at 952, 66 Empl. Prac. Dec. (CCH) ¶ 87,841.

³⁸ See *Smith*, 949 F. Supp. at 952, 66 Empl. Prac. Dec. (CCH) ¶ 87,841.

³⁹ See *id.* at 948, 952, 66 Empl. Prac. Dec. (CCH) ¶¶ 87,838, 87,841.

⁴⁰ See *id.* at 949-50, 66 Empl. Prac. Dec. (CCH) ¶ 87,839.

⁴¹ See *id.* at 952, 66 Empl. Prac. Dec. (CCH) ¶ 87,842.

⁴² See *id.*

⁴³ See *Smith*, 949 F. Supp. at 945, 950, 66 Empl. Prac. Dec. (CCH) ¶¶ 87,835, 87,839. Smith's claim for wrongful termination in violation of public policy was one of three new claims she sought to add to her original complaint. See *id.* at 945, 66 Empl. Prac. Dec. (CCH) ¶ 87,835. The other proposed amendments were a claim for termination in retaliation for her filing a discrimination claim under Massachusetts law and a claim for termination in retaliation for her filing a claim under federal law. See *id.* In her original complaint, Smith claimed Mitre demoted her and otherwise discriminated against her because of her age and gender. See *id.* The court allowed all three amendments. See *id.* at 953, 66 Empl. Prac. Dec. (CCH) ¶ 87,842. The court concluded that prejudice from delay in trial and reopening of discovery was insufficient to deny the motion. See *id.* With respect to the retaliation claims, the court noted that, under Massachusetts law, Smith would not be required to exhaust the administrative remedies before bringing a claim arising out of an earlier filed charge. See *id.* at 948, 66 Empl. Prac. Dec. (CCH) ¶ 87,838.

⁴⁴ See *id.* at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,839.

⁴⁵ See *id.*

court observed that, in *Flesner*, the Supreme Judicial Court noted that whistleblowing may fall into the category of important public deeds worthy of such protection.⁴⁶

The court also concluded that, in a case like *Smith*, an employee would not be required to complain outside the organization to be protected under the public policy exception for whistleblowers.⁴⁷ Citing the *Flesner* court, the court held that an employee need not complain outside the company, provided that the employee can establish that he or she was terminated for making internal complaints about the alleged fraud and false claims.⁴⁸ The court also cited *Hutson*, where it also appeared that the employee did not complain outside the organization and still was protected by the public policy exception.⁴⁹ Thus, the court held that some whistleblowers, even those who only complain internally, can qualify for the public policy exception.⁵⁰

The court found that the whistleblower in *Smith* fell within the exception.⁵¹ The court noted the Supreme Judicial Court's concern in *King*, that the public policy exception be limited to cases of sufficient social import to prevent the general rule from being converted into a rule requiring just cause to terminate an employee at-will.⁵² The court observed, however, that Mitre is a corporation funded mainly through taxpayer dollars, and thus, *Smith* could be distinguished from *King*, where the Supreme Judicial Court found the public effect of a private corporation's stock buy back program too remote to justify the exception.⁵³ Furthermore, the court noted that Mitre's government contracts subjected the company to claims under the federal Fraud and False Claims Act.⁵⁴ Finally, the court reasoned that the situation was factually very similar to *Hutson*, where the court found that whistleblowing on fraud in federal government contracts deserved the protection of the public policy exception.⁵⁵ Thus, the court held that the public policy

⁴⁶ See *id.*

⁴⁷ See *id.* at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,840.

⁴⁸ See *Smith*, 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,840.

⁴⁹ See *id.* at 951, 66 Empl. Prac. Dec. (CCH) ¶ 87,840.

⁵⁰ See *id.* at 951-52, 66 Empl. Prac. Dec. (CCH) ¶ 87,841.

⁵¹ See *id.*

⁵² See *id.* at 949, 951, 66 Empl. Prac. Dec. (CCH) ¶¶ 87,839, 87,840.

⁵³ See *Smith*, 949 F. Supp. at 951 n.3, 66 Empl. Prac. Dec. (CCH) ¶ 87,840 n.3.

⁵⁴ See *id.*

⁵⁵ See *id.* at 951, 66 Empl. Prac. Dec. (CCH) ¶ 87,841; see also *Hutson v. Analytic Sciences Corp.*, 860 F. Supp. 6, 11, 129 Lab. Cas. (CCH) ¶ 57,770, 85,792 (D. Mass. 1994). The court also cited its holding in *Tighe* to support its conclusion. See *Smith*, 949 F. Supp. at 951, 66 Empl. Prac. Dec. (CCH) ¶ 87,841; see also *Tighe v. Career Sys. Dev. Corp.*, 915 F. Supp. 476, 485, 131 Lab. Cas. ¶ 58,099, 87,265 (D. Mass. 1996) (federal statutes encouraging persons to report fraud formed the basis of a public policy exception to the general at-will rule).

exception should protect an employee terminated for complaining internally about fraud and false claims by a government contractor.⁵⁶

Subsequently, in 1997, in *Shea v. Emmanuel College*, the Supreme Judicial Court of Massachusetts adopted the district court's reasoning in *Smith*, and held that an employee discharged for reporting criminal activity to her employer is protected by the public policy exception.⁵⁷ In *Shea*, the employer, a private college, allegedly discharged the employee for reporting to the college's administration the apparent theft of funds from the office in which she worked.⁵⁸ The Supreme Judicial Court stated that the district court in *Smith* correctly decided that the public policy exception does not require employees to complain about alleged criminal violations outside their employer's organization.⁵⁹ The court reasoned that it would be illogical to protect employees who report criminal conduct to public authorities but deny protection to employees who report such conduct to their superiors.⁶⁰ Therefore, the court extended the public policy exception to employees who complain internally about criminal conduct.⁶¹

Smith and *Shea* are significant because they open the door for more wrongful discharge claims based on public policy in Massachusetts.⁶² By holding that an internal complaint may be sufficient to justify protection under the public policy exception, the courts did not require an employee to contact public authorities to be protected.⁶³ Thus, the courts lowered the threshold for bringing a wrongful discharge claim based on a violation of public policy.⁶⁴

Extending protection to employees who complain internally about criminal violations continues the trend in Massachusetts courts to broaden the public policy exception.⁶⁵ Although the court in *Smith-Pfeffer* expressed concern about converting the general at-will rule into a rule requiring just cause to terminate, subsequent decisions expanded the breadth of the public policy exception.⁶⁶ Beginning with

⁵⁶ See *Smith*, 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,839.

⁵⁷ 682 N.E.2d 1348, 1350, 13 Indiv. Empl. Rights Cas. (BNA) 308, 309 (Mass. 1997).

⁵⁸ See *id.* at 1349, 13 Indiv. Empl. Rights Cas. (BNA) at 308-09.

⁵⁹ See *id.* at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *Smith*, 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,840; *Shea*, 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁶³ See *Smith*, 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,840; *Shea*, 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁶⁴ See *Smith*, 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) at ¶ 87,840; *Shea*, 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁶⁵ See *Smith*, 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,840.

⁶⁶ See *Smith-Pfeffer*, 533 N.E.2d at 1371, 4 Indiv. Empl. Rights Cas. (BNA) at 291; see also *Flesner*, 575 N.E.2d at 1111, 6 Indiv. Empl. Rights Cas. (BNA) at 1533.

Flesner, the court recognized protection for cooperating with a criminal investigation, even though such cooperation may not be required legally.⁶⁷ Then, in *Smith*, the district court held that internal complaints can justify protection under the public policy exception when they constitute whistleblowing on fraud against the federal government.⁶⁸ The Supreme Judicial Court's adoption of *Smith* in *Shea* confirmed that Massachusetts courts will protect employees who complain, either internally or externally, about criminal violations.⁶⁹

Extending protection to employees who complain internally about criminal violations supports the public policy against criminal activity and thus serves the purpose of the public policy exception.⁷⁰ *Smith* and *Shea* will encourage more employees to report criminal activity because they will no longer be forced to expose their employers to, and involve themselves in, criminal investigations before being eligible for protection.⁷¹ Furthermore, these decisions fill a logical gap in the public policy exception.⁷² Prior to *Smith* and *Shea*, there was no explicit protection for an employee fired after making an internal complaint about criminal activity but before reporting the activity to the authorities.⁷³ Now, as the court discussed in *Shea*, the public policy exception protects employees fired for bringing criminal activity to the attention of their employers.⁷⁴

Any broadening of the public policy exception to the at-will rule, however, necessarily limits an employer's discretion in making firing decisions and exposes an employer to additional liability.⁷⁵ As the court noted in *Smith-Pfeffer*, employers have an interest in running their businesses as they see fit, and the public has an interest in discouraging dissatisfied employees from filing frivolous lawsuits.⁷⁶ Thus, the courts should limit protection for internal complaints to those about suspected criminal conduct.⁷⁷ Complaints about noncriminal conduct do not have sufficient public effect to justify interfering with an employer's management of its business.⁷⁸ Extending protection to internal

⁶⁷ See 575 N.E.2d at 1111, 6 Indiv. Empl. Rights Cas. (BNA) at 1533.

⁶⁸ See 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,840.

⁶⁹ See *Shea*, 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁷⁰ See *Hutson*, 860 F. Supp. at 11, 129 Lab. Cas. (CCH) ¶ 85,792.

⁷¹ See *Smith*, 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,840; *Shea*, 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁷² See *Shea*, 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁷³ See *Smith*, 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,840; *Shea*, 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁷⁴ See 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁷⁵ See *Smith-Pfeffer*, 533 N.E.2d at 1371, 4 Indiv. Empl. Rights Cas. (BNA) at 291.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *King*, 638 N.E.2d at 493, 130 Lab. Cas. (CCH) ¶ 86,361.

complaints about noncriminal matters would convert the general at-will rule into a rule that requires just cause to terminate, a result the Supreme Judicial Court of Massachusetts disapproved of in *Smith-Pfeffer*.⁷⁹

Furthermore, the courts should only extend protection to employees whose internal complaints about suspected criminal conduct are made in good faith.⁸⁰ Because allegations of criminal wrongdoing can seriously harm an employer's reputation and business operations, an employer should not be forced to tolerate an employee who makes baseless accusations against it.⁸¹ Thus, the public policy exception should be limited to employees who make good faith complaints based on actual knowledge.⁸²

In summary, *Smith* and *Shea* expanded logically the protection for employees cooperating with criminal investigations to include employees who complain internally about criminal violations.⁸³ By doing so, the courts simultaneously broadened the traditionally narrow public policy exception and diminished the discretion an employer enjoys under the at-will rule.⁸⁴ These decisions were a needed clarification of the public policy exception with respect to complaints about violations of criminal law. The courts should be mindful, however, that further expansion of the public policy exception could threaten the policy supporting an employer's discretion that underlies the at-will rule.

*B.*Same-Gender Sexual Harassment Actionable in Massachusetts Even if Harasser Not Homosexual: Melnychenko v. 84 Lumber Co.*¹

The Massachusetts anti-discrimination statute, chapter 151B of the General Laws ("chapter 151B"), bars discrimination by an employer because of an employee's sex and also expressly defines and prohibits workplace sexual harassment.² Title VII of the Civil Rights Act of 1964

⁷⁹ See 533 N.E.2d at 1371, 4 Indiv. Empl. Rights Cas. (BNA) at 291.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *Smith*, 949 F. Supp. at 950, 66 Empl. Prac. Dec. (CCH) ¶ 87,840; *Shea*, 682 N.E.2d at 1350, 13 Indiv. Empl. Rights Cas. (BNA) at 309.

⁸⁴ See *Smith-Pfeffer*, 533 N.E.2d at 1371, 4 Indiv. Empl. Rights Cas. (BNA) at 291.

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¹ *Melnychenko v. 84 Lumber Co.*, 676 N.E.2d 45, 73 Fair Empl. Prac. Cas. (BNA) 179 (Mass. 1997).

² MASS. GEN. LAWS ch. 151B, §§ 1(18), 4(1), 4(16A) (1996). Chapter 151B provides in part: "It shall be an unlawful practice: 1. For an employer, by himself or his agent, because of the . . . sex . . . of any individual to . . . discriminate against such individual in compensation or in terms, conditions or privileges of employment . . ." *Id.* § 4(1). Chapter 151B further provides:

("Title VII" or "Act") similarly prohibits unlawful discriminatory employment practices, including discrimination because of an employee's sex, and the United States Supreme Court has made clear that a victim of sexual harassment may state a claim for a violation of the Act.³ In *Melnychenko v. 84 Lumber Co.*, the Supreme Judicial Court of Massachusetts held that sexual harassment prohibited under chapter 151B may include same-sex sexual harassment, even where the harasser is not homosexual.⁴ The court held that any verbal or physical conduct of a sexual nature that interferes unreasonably with an employee's work performance by creating a humiliating or sexually offensive work environment can be sexual harassment under chapter 151B.⁵ The federal circuits are split on the question of whether, and on what basis, sexual harassment claims may be raised under Title VII when the harasser and victim are both of the same sex.⁶ The United States Supreme Court has not yet spoken on the issue of whether Title VII covers same-sex sexual harassment claims but has granted certiorari on a leading case whose outcome depends on resolution of this question.⁷

The term "sexual harassment" shall mean sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination on the basis of sex shall include, but not be limited to, sexual harassment.

Id. § 1(18). Chapter 151B also provides: "It shall be an unlawful practice . . . [f]or an employer, personally or through its agents, to sexually harass any employee." *Id.* § 4(16A).

³ Civil Rights Act of 1964 § 701 (Title VII), 42 U.S.C. § 2000e-2(a)(1) (1994); see *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66, 67, 40 Fair Empl. Prac. Cas. (BNA) 1822, 1827 (1986); see also *Meritor*, 477 U.S. at 74, 40 Fair Empl. Prac. Cas. (BNA) at 1830 (Marshall, J., concurring). Title VII provides, in part: "It shall be an unlawful employment practice for an employer — (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(a)(1).

⁴ 676 N.E.2d 45, 48, 73 Fair Empl. Prac. Cas. (BNA) 179, 182 (Mass. 1997).

⁵ See *id.*

⁶ Compare *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141, 72 Fair Empl. Prac. Cas. (BNA) 186, 189 (4th Cir. 1996) (same-sex sexual harassment claim may be actionable under Title VII where harasser is homosexual), and *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378, 71 Fair Empl. Prac. Cas. (BNA) 551, 556 (8th Cir. 1996) (implying same-sex sexual harassment claim may be actionable under Title VII), with *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120, 70 Fair Empl. Prac. Cas. (BNA) 1303, 1305 (5th Cir. 1996) (same-sex sexual harassment not actionable under Title VII), *cert. granted*, 117 S. Ct. 2430 (1997).

⁷ See *Quick*, 90 F.3d at 1376 n.4, 71 Fair Empl. Prac. Cas. (BNA) at 554 n.4; *Oncale*, 83 F.3d at 120, 70 Fair Empl. Prac. Cas. (BNA) at 1305; see also Elizabeth Williams, *Same-Sex Sexual Harassment Under Title VII* (42 USCS §§ 2000e et seq.) of *Civil Rights Act*, 135 A.L.R. FED. 307,

In 1986, in *Meritor Savings Bank, FSB v. Vinson*, the United States Supreme Court held that sex discrimination in the form of sexual harassment creating a hostile or abusive work environment may violate Title VII.⁸ The female plaintiff in *Meritor* claimed that her male supervisor made repeated demands on her for sexual favors, to which she agreed for fear of losing her job, leading to sexual intercourse between them forty to fifty times over the course of four years.⁹ The plaintiff also alleged that her supervisor fondled her in front of other employees, exposed himself to her and forcibly raped her on several occasions.¹⁰

The Court rejected a narrow definition of sexual harassment as violating Title VII only when the harassment involves economic discrimination or loss.¹¹ The Court first reasoned that the expansive language of Title VII barring sex discrimination with respect to "terms, conditions, or privileges" of employment indicated a congressional intent to strike at all forms of disparate treatment of men and women, not just economic discrimination.¹² Moreover, the Court reasoned that the administrative interpretation of Title VII by the enforcing agency, the Federal Equal Employment Opportunity Commission ("EEOC"), constituted a body of informed judgment to which courts could turn for guidance.¹³ The EEOC Guidelines on Discrimination Because of Sex prohibit sexual harassment as a form of sex discrimination barred under Title VII.¹⁴

307 (1996) (federal courts sharply divided on applicability of Title VII to same-sex sexual harassment).

The related, but different, issue of whether Title VII bars discrimination based on sexual orientation does not bear directly on the *Melnichenko* decision, and so is not addressed here. See 676 N.E.2d at 46, 73 Fair Empl. Prac. Cas. (BNA) at 180. See generally *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 592, 74 Fair Empl. Prac. Cas. (BNA) 625, 650 (7th Cir. 1997) (courts widely agreed that discrimination based on sexual orientation is beyond purview of Title VII); *Wrightson*, 99 F.3d at 143, 72 Fair Empl. Prac. Cas. (BNA) at 190 (Title VII does not afford cause of action for discrimination based on sexual orientation). Under Massachusetts law, that issue has already been resolved by legislative action; the Massachusetts anti-discrimination statute explicitly bars discrimination on the basis of sexual orientation, provided that orientation does not involve minor children as the sex object. See MASS. GEN. LAWS ch. 151B § 4(1).

⁸ 477 U.S. at 66, 67, 40 Fair Empl. Prac. Cas. (BNA) at 1827; see also *id.* at 74, 40 Fair Empl. Prac. Cas. (BNA) at 1830 (Marshall, J., concurring).

⁹ See *Meritor*, 477 U.S. at 60, 40 Fair Empl. Prac. Cas. (BNA) at 1824.

¹⁰ See *id.*

¹¹ See *id.* at 64, 40 Fair Empl. Prac. Cas. (BNA) at 1826.

¹² See *id.* The *Meritor* court noted that the prohibition against sex discrimination was added to Title VII at the last minute and there is consequently little legislative history to guide us in interpreting the statute's prohibition against discrimination based on sex. See *id.* at 63-64, 40 Fair Empl. Prac. Cas. (BNA) at 1825-26.

¹³ See *id.* at 65, 40 Fair Empl. Prac. Cas. (BNA) at 1826.

¹⁴ See *Meritor*, 477 U.S. at 65, 40 Fair Empl. Prac. Cas. (BNA) at 1826 (quoting Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1985) ("EEOC Guidelines")). The EEOC

The Court also analogized from earlier cases involving racial, religious or ethnic discrimination, in which courts had found violations of Title VII where the working environment was so heavily polluted with discrimination it destroyed the emotional and psychological stability of minority group workers.¹⁵ The Court reasoned that Title VII likewise should prohibit a hostile environment created by discriminatory sexual harassment.¹⁶ Thus, based on the broad language of the statute, the administrative interpretation of the statute by the EEOC and analogies to the discrimination in racially hostile environments, the Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex, in the form of sexual harassment, has created a hostile or abusive work environment.¹⁷

In 1987, in *College-Town, Division of Interco, Inc. v. Massachusetts Commission Against Discrimination*, the Supreme Judicial Court of Massachusetts, addressing the question for the first time, similarly held that sexual harassment may constitute discrimination in violation of chapter 151B of the Massachusetts General Laws.¹⁸ The court also reasserted its earlier holding that interpretation of chapter 151B was not bound by federal decisions concerning Title VII.¹⁹ The male supervisor in *College-Town* was accused of repeatedly making sexually offensive comments to the female plaintiff he supervised, as well as touching and sexually propositioning her.²⁰

The court reasoned that chapter 151B, section 4(1) sought to remove unnecessary barriers to full participation in the workplace by prohibiting discrimination on the basis of gender in the terms, conditions or privileges of employment.²¹ The court concluded that a work

Guidelines define sexual harassment to include "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* The EEOC Guidelines further provide that such sexual misconduct constitutes sexual harassment, whether or not it is linked to an economic *quid pro quo*, if the conduct has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." *Id.* at 65, 40 Fair Empl. Prac. Cas. (BNA) at 1826 (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

¹⁵ See *id.* at 66, 40 Fair Empl. Prac. Cas. (BNA) at 1826-27.

¹⁶ See *id.* at 66, 40 Fair Empl. Prac. Cas. (BNA) at 1827.

¹⁷ See *id.*

¹⁸ 508 N.E.2d 587, 590, 46 Fair Empl. Prac. Cas. (BNA) 1406, 1409 (Mass. 1987). The court's reasoning did not employ subsection 16A of chapter 151B, section 4, the subsection that explicitly bars sexual harassment of an employee. See *id.* at 590-91, 46 Fair Empl. Prac. Cas. (BNA) at 1409. The Massachusetts Legislature did not approve the subsection until six days after *College-Town* was argued. See MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1996) (Historical and Statutory Notes).

¹⁹ See *College-Town*, 508 N.E.2d at 591, 46 Fair Empl. Prac. Cas. (BNA) at 1410; see also *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 N.E.2d 1192, 1198, 20 Fair Empl. Prac. Cas. (BNA) 1804, 1807, 1808 (Mass. 1978).

²⁰ See 508 N.E.2d at 589, 591, 46 Fair Empl. Prac. Cas. (BNA) at 1407, 1409.

²¹ See *id.* at 591, 46 Fair Empl. Prac. Cas. (BNA) at 1409.

environment pervaded by harassment or abuse, with its consequent intimidation, humiliation and stigmatization, creates such barriers to the full participation of an individual in the workplace.²² The court also concluded that the supervisor's harassing conduct was sufficiently pervasive to alter the conditions of the plaintiff's employment and created a barrier "based solely on gender."²³ Although the court held that federal decisions concerning Title VII were not binding on its interpretation of chapter 151B, it did note that its decision was in accord with *Meritor*.²⁴ Based on the intent of the Massachusetts statute and supported by persuasive federal precedent, the court held that sexual harassment could constitute discrimination based on sex in violation of chapter 151B.²⁵

In 1996, in *Oncale v. Sundowner Offshore Services, Inc.*, the United States Court of Appeals for the Fifth Circuit held that same-sex sexual harassment claims are not actionable under Title VII.²⁶ The male plaintiff, an employee on an offshore rig, claimed that two male coworkers restrained him while his male supervisor touched the plaintiff with his genitals and that the supervisor and one of the coworkers threatened him with homosexual rape.²⁷ The plaintiff also claimed that in Sundowner's shower facility the supervisor forcibly sodomized him with a bar of soap while a coworker restrained him.²⁸

The court noted the plaintiff's arguments that Title VII's prohibition against sex discrimination and the Supreme Court's sexual harassment decisions, including *Meritor*, were formulated in gender-neutral terms.²⁹ The court reasoned, however, that it was bound by Fifth

²² See *id.*

²³ See *id.*

²⁴ See *id.* at 590 n.3, 46 Fair Empl. Prac. Cas. (BNA) at 1409 n.3.

²⁵ See *College-Town*, 508 N.E.2d at 590, 46 Fair Empl. Prac. Cas. (BNA) at 1409. In 1995, in *Smith v. Brimfield Precision, Inc.*, the Massachusetts Commission Against Discrimination ("MCAD"), addressing same-sex sexual harassment for the first time, held that a plaintiff may make a claim of same-gender harassment under chapter 151B. 17 MDLR 1089, 1095, 1096 (1995). The male plaintiff in *Smith* alleged that hostile work environment sexual harassment by a male coworker forced the plaintiff to quit his job. See *id.* at 1090, 1093.

The MCAD rejected the argument that same-sex sexual harassment is not actionable, reasoning that such an approach would lead to an unduly restrictive application of chapter 151B. See *id.* at 1095, 1096. Moreover, the MCAD noted that the Massachusetts statute defined and prohibited workplace sexual harassment without reference to gender and that this prohibition was in addition to the prohibitions of sex discrimination in the statute. See *id.* at 1096; see also MASS. GEN. LAWS ch. 151B, §§ 1(18), 4(1), 4(16A).

²⁶ 83 F.3d 118, 120, 70 Fair Empl. Prac. Cas. (BNA) 1303, 1305 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997).

²⁷ See *id.* at 118, 70 Fair Empl. Prac. Cas. (BNA) at 1304.

²⁸ See *id.* at 118-19, 70 Fair Empl. Prac. Cas. (BNA) at 1304.

²⁹ See *id.* at 119, 70 Fair Empl. Prac. Cas. (BNA) at 1304.

Circuit precedent which barred same-sex harassment claims under Title VII.³⁰ The court reiterated the reasoning of an earlier Fifth Circuit decision that Title VII addresses gender discrimination and that, consequently, harassment by a male supervisor against a male subordinate does not state a claim under Title VII, even if the harassment has sexual overtones.³¹ The *Oncale* court thus held that Title VII does not recognize same-sex sexual harassment claims.³²

³⁰ See *id.* The court referred to the Fifth Circuit precedent in *Garcia v. Elf Atochem North America*. See *id.*; see also *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52, 66 Fair Empl. Prac. Cas. (BNA) 1700, 1704 (5th Cir. 1994). In *Garcia*, a male employee brought a Title VII claim of sexual harassment by a male supervisor for repeated incidents where the supervisor allegedly grabbed the plaintiff's crotch. See 28 F.3d at 448, 66 Fair Empl. Prac. Cas. (BNA) at 1701. The *Oncale* court noted that the *Garcia* decision left the Fifth Circuit with interpretive problems because the *Garcia* court found an independent basis to affirm the grant of summary judgment for each defendant. See 83 F.3d at 120, 70 Fair Empl. Prac. Cas. (BNA) at 1305. Thus, some district courts in the circuit treated the *Garcia* court's pronouncement on same-sex harassment as dictum. See *id.* The *Oncale* court settled the issue for the Fifth Circuit, holding that *Garcia's* bar on same-sex sexual harassment claims under Title VII was binding precedent. See *id.*; see also *Garcia*, 28 F.3d at 451-52, 66 Fair Empl. Prac. Cas. (BNA) at 1704.

³¹ See 83 F.3d at 120, 70 Fair Empl. Prac. Cas. (BNA) at 1305; see also *Garcia*, 28 F.3d at 451-52, 66 Fair Empl. Prac. Cas. (BNA) at 1704.

³² See *Oncale*, 83 F.3d at 120, 70 Fair Empl. Prac. Cas. (BNA) at 1305. By contrast, in *Quick v. Donaldson Co.*, the United States Court of Appeals for the Eighth Circuit held that protection under Title VII extends to all employees and prohibits disparate treatment based on a person's sex. 90 F.3d 1372, 1378, 71 Fair Empl. Prac. Cas. (BNA) 551, 556 (8th Cir. 1996). By allowing the plaintiff's complaint to go forward, the court implied that Title VII does not preclude a same-sex sexual harassment claim. See *id.*; *Melnychenko*, 676 N.E.2d at 47 n.5, 73 Fair Empl. Prac. Cas. (BNA) at 181 n.5. The male plaintiff alleged that other male employees sexually harassed him at work in at least 100 incidents of "bagging," the practice of reaching for, hitting or squeezing another man's testicles. See *Quick*, 90 F.3d at 1374, 71 Fair Empl. Prac. Cas. (BNA) at 552. The plaintiff also alleged that his fellow employees harassed him verbally and made false accusations that he was homosexual. See *id.*

The court reasoned that Title VII protects both men and women because Congress did not limit protection only to women or minorities in the language of the statute. See *id.* at 1377, 71 Fair Empl. Prac. Cas. (BNA) at 555. The court cited the *Meritor* decision's admonition that neither a man nor a woman should be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to work. See *id.* The court also relied on the EEOC Guidelines under which unwelcome sexual harassment can include verbal or physical conduct of a sexual nature. See *id.*

The court concluded that the lower court erred in finding that "bagging" aimed at the plaintiff's sexual organs, taunts alleging his homosexuality and other challenged conduct were not of a sexual nature. See *id.* at 1378, 1379, 71 Fair Empl. Prac. Cas. (BNA) at 556. The court noted, however, that harassment need not even be explicitly sexual in nature to violate Title VII because Congress intended to define discrimination in the broadest possible terms and so did not enumerate specific discriminatory practices. See *id.* at 1377, 71 Fair Empl. Prac. Cas. (BNA) at 555. The court reasoned that the proper inquiry for determining whether discrimination was based on sex was whether members of one sex were exposed to disadvantageous working conditions to which members of the other sex were not exposed. See *id.* at 1379, 71 Fair Empl. Prac. Cas. (BNA) at 556. The court decided that a fact-finder could reasonably conclude that the

In 1996, in *Wrightson v. Pizza Hut of America, Inc.*, the United States Court of Appeals for the Fourth Circuit took a position different from the Fifth Circuit, holding that a plaintiff may state a claim under Title VII for same-sex hostile work environment sexual harassment if the harasser is homosexual.³³ The plaintiff, a heterosexual male, alleged that his openly homosexual male supervisor and five homosexual male co-employees harassed him on a daily basis, making sexual propositions and engaging in sexually provocative contact with the plaintiff's head, shoulders and buttocks.³⁴ The court reasoned that Title VII does not require that the perpetrator of sexual harassment be a different sex than the target of the harassment.³⁵ The court reasoned that the statute instead broadly prohibits employers, whether male or female, from discriminating on the basis of sex against individual employees, whether male or female.³⁶

The court further reasoned that a male employer who discriminates only against his male employees and not against his female employees would be discriminating "because of" the employee's sex no less than a male employer who discriminates only against women.³⁷ Thus, the court saw no logical connection between Title VII's require-

treatment of men at Donaldson was worse than the treatment of women because the record only revealed incidents of bagging male employees. *See id.*

³³ 99 F.3d 138, 141, 72 Fair Empl. Prac. Cas. (BNA) 186, 189 (4th Cir. 1996). The Fourth Circuit had earlier taken the position, in *McWilliams v. Fairfax County Board of Supervisors*, that a plaintiff has no cause of action for hostile work environment sexual harassment under Title VII when both the perpetrator and the victim of the harassment are heterosexuals of the same sex. 72 F.3d 1191, 1195, 69 Fair Empl. Prac. Cas. (BNA) 1082, 1085 (4th Cir. 1996). Acknowledging that it faced a particularly egregious example of male on male harassment involving physical assault, genital contact and requests for sex, the *McWilliams* court offered the following reasoning for its refusal to find a claim under Title VII:

[T]o interpret Title VII to reach that conduct when only heterosexual males are involved as harasser and victim would be to extend this vital statute's protections beyond intentional discrimination "because of" the offended worker's "sex" to unmanageably broad protection of the sensibilities of workers simply "in matters of sex." . . . There perhaps "ought to be a law against" such puerile and repulsive workplace behavior even when it involves only heterosexual workers of the same sex, . . . but we conclude that Title VII is not that law.

Id. at 1196, 69 Fair Empl. Prac. Cas. (BNA) at 1085-86.

The *McWilliams* court expressly reserved judgment concerning the possibility of same-sex sexual harassment where the perpetrator was homosexual. *See id.* at 1195 n.4, 69 Fair Empl. Prac. Cas. (BNA) at 1085 n.4; *see also Wrightson*, 99 F.3d at 141, 72 Fair Empl. Prac. Cas. (BNA) at 189.

³⁴ *See Wrightson*, 99 F.3d at 139, 140, 72 Fair Empl. Prac. Cas. (BNA) at 186, 187. The contact included the supervisor rubbing his genital area against the plaintiff's buttocks and pulling out the plaintiff's pants in order to look down into them. *See id.* at 140, 72 Fair Empl. Prac. Cas. (BNA) at 187.

³⁵ *See id.* at 142, 72 Fair Empl. Prac. Cas. (BNA) at 189.

³⁶ *See id.*

³⁷ *See id.*

ment that the discrimination be "because of" the employee's sex and a requirement that a harasser and victim be of different sexes.³⁸ The court also noted that the EEOC's Compliance Manual addressed these very circumstances.³⁹ The manual concluded that a male supervisor who makes unwelcome sexual advances toward a male employee because the employee is male, but does not make similar advances towards females, may be sexually harassing the employee because the disparate treatment is based on the male employee's sex.⁴⁰ Thus, the court held that a plaintiff may state a Title VII claim for same-sex hostile work environment sexual harassment if the harasser is homosexual.⁴¹

During the *Survey* year, in *Melnychenko v. 84 Lumber Co.*, the Supreme Judicial Court of Massachusetts held that sexual harassment prohibited under chapter 151B may include same-sex sexual harassment, even where the harasser is not homosexual.⁴² The court held that any verbal or physical conduct of a sexual nature that interferes unreasonably with an employee's work performance by creating a humiliating or sexually offensive work environment can be sexual harassment under chapter 151B.⁴³ In this case, the male plaintiffs, employees of 84 Lumber Company, complained of sexual harassment by another male employee of the company.⁴⁴ The harasser had grabbed the plaintiffs by their genitals, fondled their buttocks, squeezed their chests and touched them "everywhere."⁴⁵ He also exposed himself to two of the plaintiffs and asked them for oral sex.⁴⁶ Another male employee also joined in the harassment, forcing one plaintiff's head down towards the penis of the other harasser who had exposed himself.⁴⁷

The plaintiffs sued in Massachusetts Superior Court alleging sexual harassment in violation of chapter 151B.⁴⁸ The trial judge found

³⁸ *See id.*

³⁹ *See Wrightson*, 99 F.3d at 143, 72 Fair Empl. Prac. Cas. (BNA) at 190 (citing EEOC Compl. Man. (CCH) § 615.2(b)(3) (1987)).

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² 676 N.E.2d 45, 48, 73 Fair Empl. Prac. Cas. (BNA) 179, 182 (Mass. 1997).

⁴³ *See id.*

⁴⁴ *See id.* at 46 & n.4, 73 Fair Empl. Prac. Cas. (BNA) at 181 & n.4.

⁴⁵ *See id.*

⁴⁶ *See id.* One harasser told the plaintiff that if the plaintiff did not perform oral sex on him, the plaintiff could start looking for other work. *See id.* The harasser also told store employees that he had been having sex with two of the plaintiffs and announced over the store's public address system that one of the plaintiffs had given him oral sex. *See id.*

⁴⁷ *See Melnychenko*, 676 N.E.2d at 46 n.4, 73 Fair Empl. Prac. Cas. (BNA) at 181 n.4.

⁴⁸ *See id.* at 46, 73 Fair Empl. Prac. Cas. (BNA) at 180.

that one harasser had engaged in conduct of a sexual nature and that this conduct was unwelcome.⁴⁹ The judge ruled that this harasser's "revolting and positively outrageous" behavior had the purpose or effect of unreasonably interfering with the plaintiffs' work performance by creating an intimidating, hostile and sexually offensive work environment and found for the plaintiffs on the sexual harassment complaint.⁵⁰ On its own motion, the Supreme Judicial Court took the appeal directly and affirmed the Superior Court's verdict on the sexual harassment claim.⁵¹

Because chapter 151B included sexual harassment within discrimination on the basis of sex and explicitly barred such harassment, the Supreme Judicial Court reasoned that sexual harassment was by legislative definition a form of prohibited sex discrimination.⁵² Thus, the court determined that gender discrimination was not an essential element of a sexual harassment claim in Massachusetts.⁵³ Moreover, the court noted that chapter 151B defined prohibited sexual harassment to include conduct of a sexual nature that interferes unreasonably with an employee's work performance by creating a humiliating or sexually offensive work environment.⁵⁴

The employer asserted that sexual harassment is only actionable as a form of sex discrimination.⁵⁵ Therefore, the employer argued that when same-sex harassment does not involve homosexual advances, the harassment does not constitute gender discrimination and so does not violate chapter 151B.⁵⁶ The court noted, however, that these arguments relied heavily on federal case law under Title VII and observed that the federal courts were not in accord on the issue of same-sex harassment.⁵⁷ The court stated that substantial Massachusetts precedent, including *College-Town*, established that the court could make its own

⁴⁹ See *id.* The trial court found that the harasser's actions were not romantic overtures to the plaintiffs, nor were they inspired by sexual desire. See *id.* at 46 n.4, 73 Fair Empl. Prac. Cas. (BNA) at 181 n.4. Rather, his actions were intended simply as horseplay on some occasions, and on others, were motivated by malevolence and spite and intended to degrade and humiliate, according to the trial court. See *id.*

⁵⁰ See *id.*

⁵¹ See *id.* at 46 & n.3, 51, 73 Fair Empl. Prac. Cas. (BNA) at 180 & n.3, 185.

⁵² See *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.

⁵³ See *id.*

⁵⁴ See *id.*; see also MASS. GEN. LAWS ch. 151B, §§ 1(18), 4(16A) (1996).

⁵⁵ See *Melnychenko*, 676 N.E.2d at 47, 73 Fair Empl. Prac. Cas. (BNA) at 181.

⁵⁶ See *id.*

⁵⁷ See *id.* The court gave several examples of this split in the federal circuits: the *Quick* court's implication in the Eighth Circuit that same-sex sexual harassment may be actionable under Title VII without regard to the sexual orientation of the harasser; the assumption by the First Circuit in *Morgan v. Massachusetts General Hospital*, 901 F.2d 186, 192, 53 Fair Empl. Prac. Cas. (BNA)

independent conclusions about the interpretation of chapter 151B.⁵⁸ The court reasoned that an independent assessment was particularly appropriate here because the language of the Massachusetts statute differed significantly from Title VII.⁵⁹

The court particularly relied on the Massachusetts statute's express definition and prohibition of sexual harassment.⁶⁰ Thus, the court held that sexual harassment prohibited under chapter 151B may include same-sex sexual harassment, even where the harasser is not homosexual.⁶¹ The court held that any verbal or physical conduct of a sexual nature that interfered unreasonably with an employee's work performance by creating a humiliating or sexually offensive work environment can be sexual harassment under chapter 151B.⁶²

Justice O'Connor, in a dissent joined by Justice Lynch, argued that the plaintiffs did not prove that they were sexually harassed *because of* their gender.⁶³ Thus, the plaintiffs did not establish the *discriminatory* sexual harassment the dissent believed necessary for a violation of chapter 151B.⁶⁴ The dissent reasoned that the legislative history of chapter 151B established the elimination of discrimination in the workplace as the Legislature's single concern in enacting the statute.⁶⁵

The dissent argued that the legislative history also makes clear that chapter 151B is an anti-discrimination statute patterned after Title VII as construed by the EEOC Guidelines on Discrimination Because of Sex.⁶⁶ Justice O'Connor noted that these EEOC Guidelines provide: "Harassment on the basis of sex is a violation . . . of Title VII."⁶⁷ The

1780, 1785 (1st Cir. 1990), that same-sex sexual harassment was actionable; the *Oncale* court's holding in the Fifth Circuit that same-sex sexual harassment is not actionable; and the *Wrightson* court's holding in the Fourth Circuit that same-sex sexual harassment may be actionable where the harasser is homosexual. See *Melnychenko*, 676 N.E.2d at 47-48 n.5, 73 Fair Empl. Prac. Cas. (BNA) at 181-82 n.5.

⁵⁸ See *Melnychenko* 676 N.E.2d at 47-48, 73 Fair Empl. Prac. Cas. (BNA) at 181-82.

⁵⁹ See *id.* at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182. The court observed that there is no federal statutory language paralleling chapter 151B's explicit definition and prohibition of sexual harassment. See *id.* Compare the federal and state statutory language, *supra* notes 2 and 3.

⁶⁰ See *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.* at 51, 73 Fair Empl. Prac. Cas. (BNA) at 185 (O'Connor, J., dissenting).

⁶⁴ See *id.*

⁶⁵ See *Melnychenko*, 676 N.E.2d at 51, 73 Fair Empl. Prac. Cas. (BNA) at 185 (O'Connor, J., dissenting).

⁶⁶ See *id.* at 51-52, 73 Fair Empl. Prac. Cas. (BNA) at 185 (O'Connor, J., dissenting); see also Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1996).

⁶⁷ See 676 N.E.2d at 52, 73 Fair Empl. Prac. Cas. (BNA) at 185 (O'Connor, J., dissenting) (quoting 29 C.F.R. § 1604.11(a)). Justice O'Connor observed that in *Meritor* the U.S. Supreme Court endorsed the EEOC Guidelines as a proper interpretation of Title VII, commenting that

dissent reasoned that the Massachusetts Legislature would have been very explicit, which it was not, if it intended a different meaning of the term than the EEOC's.⁶⁸ The dissent thus objected to the court's interpretation that the Legislature defined both nondiscriminatory and discriminatory sexual harassment as discrimination on the basis of sex.⁶⁹ Rather, the dissent concluded, a valid claim for sexual harassment under chapter 151B requires *discriminatory* sexual harassment, that is, harassment that occurred because of the victim's sex.⁷⁰

In Massachusetts workplaces, following the Supreme Judicial Court's decision in *Melnychenko*, harassment of a sexual nature that interferes unreasonably with an employee's work by creating a humiliating or sexually offensive work environment is prohibited, even where the harassed may not be the victim of sex discrimination.⁷¹ Thus, the pivotal factors in such a claim appear to be the sexual nature of the

"when a supervisor harasses a subordinate *because of the subordinate's sex*, that supervisor 'discriminate[s]' on the basis of sex." *Id.* (quoting *Meritor*, 477 U.S. at 64 (emphasis added by J. O'Connor)). The dissent noted that the Supreme Judicial Court has recognized that the definition of sexual harassment adopted under chapter 151B, section 1(18), is the same definition as that in the EEOC Guidelines. *See id.* at 52, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting). The EEOC Guidelines read, in part:

Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment . . . or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1996).

Compare the wording of these EEOC Guidelines to the very similar wording of chapter 151B, section 1(18), *supra* note 2.

⁶⁸ *See Melnychenko*, 676 N.E.2d at 52-53, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting).

⁶⁹ *See id.* at 53, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting); *see also id.* at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182 (discrimination not an essential element of a sexual harassment claim). Justice O'Connor suggested that the phrase "other verbal or physical conduct of a sexual nature" in the statutory definition of sexual harassment should be construed as a reference to discriminatory actions taken because of the victim's sex. *See id.* at 53, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting); text of chapter 151B § 1(18), *supra* note 2. The dissent argued that this interpretation would make the statute consistent both internally and with the federal law on which it was patterned. *See Melnychenko*, 676 N.E.2d at 53, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting). The dissent concluded that such an interpretation would necessitate a different result in this case because the plaintiffs did not prove they were sexually harassed because of their gender. *See id.* at 51, 53, 73 Fair Empl. Prac. Cas. (BNA) at 185, 186 (O'Connor, J., dissenting).

⁷⁰ *See Melnychenko*, 676 N.E.2d at 51, 73 Fair Empl. Prac. Cas. (BNA) at 185 (O'Connor, J., dissenting).

⁷¹ *See id.* at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182; *id.* at 53, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting).

harassment and its impact on the work environment of the victim rather than the sex or sexual orientation of the victim or harasser, or any discrimination by the harasser.⁷² In the past, some employers may have dismissed same-sex sexual banter, insults and innuendo and even genital contact as mere horseplay, raising no serious sexual harassment liability concerns for the employer.⁷³ Massachusetts employers now will have to treat such conduct as posing liability risks under chapter 151B.⁷⁴ Massachusetts employers will need to redraft company policies, retrain employees and develop effective responses to all employee harassment complaints of a sexual nature to reduce liability exposure for sexual harassment claims in light of the *Melnychenko* decision.⁷⁵ Conduct that would have raised a red flag for Massachusetts employers if it occurred between a male and female at the workplace now should raise the same warning flag if it occurs between members of the same sex.⁷⁶

Employee plaintiffs in Massachusetts now have an additional cause of action where harassment of a sexual nature by same-sex supervisors or fellow employees creates a humiliating or sexually offensive environment.⁷⁷ Prior to *Melnychenko*, sexually offensive same-sex physical contact or verbal harassment in the workplace might have only justified tort claims like assault, battery or intentional infliction of emotional distress against possibly penurious supervisors or fellow workers.⁷⁸ Now, in Massachusetts, such sexually offensive conduct may justify a sexual harassment complaint against the employing company, deepening the pool of possible defendants and causes of action.⁷⁹

⁷² See *id.* at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182; *id.* at 53, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting).

⁷³ See generally *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1198, 1199, 69 Fair Empl. Prac. Cas. (BNA) 1082, 1088, 1089 (4th Cir. 1996) (Michael, J., dissenting) (discussing cases that distinguished horseplay from sexually hostile acts or sexual assaults); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 448, 66 Fair Empl. Prac. Cas. (BNA) 1700, 1701 (5th Cir. 1994) (management viewed conduct complained of as horseplay and not sexually motivated); *Melnychenko*, 676 N.E.2d at 46 n.4, 73 Fair Empl. Prac. Cas. (BNA) at 181 n.4 (harasser's actions sometimes intended simply as horseplay).

⁷⁴ See *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.

⁷⁵ See *id.* See generally *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377, 71 Fair Empl. Prac. Cas. (BNA) 551, 555 (8th Cir. 1996) (claim may be based in part on employer's failure to take proper remedial action despite knowledge of harassment).

⁷⁶ See *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.

⁷⁷ See *id.*

⁷⁸ See generally *Wrightson*, 99 F.3d at 144, 72 Fair Empl. Prac. Cas. (BNA) at 191 (Murnaghan, J., dissenting).

⁷⁹ See *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.

The *Melnychenko* decision is based on a straightforward reading of the language of chapter 151B: "It shall be an unlawful practice . . . [f]or an employer, personally or through its agents, to sexually harass any employee."⁸⁰ Nowhere does the language of chapter 151B expressly limit the prohibitions to harassment between a man and a woman.⁸¹ Moreover, chapter 151B's expansive definition of sexual harassment includes any verbal or physical conduct of a sexual nature when it unreasonably interferes with an individual's work by creating an intimidating, hostile, humiliating or sexually offensive work environment.⁸² The statute also provides that such harassment is included within discrimination on the basis of sex.⁸³ Thus, the *Melnychenko* court's application of chapter 151B to same-sex sexual harassment appears squarely based on the terms of the statute, even where the sexual harassment is not manifestly directed against an individual because of his or her sex.⁸⁴

Though the *Melnychenko* decision is authoritative precedent only in Massachusetts, it adds to the growing persuasive precedent in favor of recognizing a cause of action for same-sex sexual harassment nationwide.⁸⁵ The persuasiveness of this particular precedent may be limited, however, because the *Melnychenko* decision relied heavily on explicit

⁸⁰ MASS. GEN. LAWS ch. 151B, § 4(16A) (1996).

⁸¹ See *id.* §§ 1(1), 1(5), 1(6), 1(18), 4(1), 4(16A); see also *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182 ("nowhere is discrimination because of a victim's sex made an essential element of a sexual harassment claim in Massachusetts").

⁸² See MASS. GEN. LAWS ch. 151B, § 1(18).

⁸³ See *id.*

⁸⁴ See *id.* §§ 1(18), 4(16A); *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182. The dissent in *Melnychenko* highlights the inconsistency between the majority's expansive reading of actionable sexual harassment to include *nondiscriminatory* acts and the historical focus of chapter 151B, and Title VII, on *discriminatory* acts taken because of the victim's sex. See *Melnychenko*, 676 N.E.2d at 53, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting). The dissent particularly notes the disconcerting effect of prohibiting *nondiscriminatory* sexual harassment by interpreting it as discrimination under the provisions of § 1(18). See ch. 151B, § 1(18); *Melnychenko*, 676 N.E.2d at 53, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting). But it would be more disconcerting to ignore the plain meaning of section 4(16A)'s unqualified prohibition of sexual harassment. See ch. 151B, § 4(16A). In reading the definition of sexual harassment in section 1(18), it would likewise be disconcerting to "construe" narrowly the phrase "conduct of a sexual nature," as the dissent does, to mean action taken because of the victim's sex. See *id.* § 1(18); *Melnychenko*, 676 N.E.2d at 53, 73 Fair Empl. Prac. Cas. (BNA) at 186 (O'Connor, J., dissenting).

⁸⁵ See, e.g., *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 566, 74 Fair Empl. Prac. Cas. (BNA) 625, 628 (7th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141, 72 Fair Empl. Prac. Cas. (BNA) 186, 189 (4th Cir. 1996); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192, 193, 53 Fair Empl. Prac. Cas. (BNA) 1780, 1785, 1786 (1st Cir. 1990). For example, the First Circuit has assumed that same-sex sexual harassment is actionable. See *Morgan*, 901 F.2d at 192, 193, 53 Fair Empl. Prac. Cas. (BNA) at 1785, 1786. The Fourth Circuit has allowed a same-sex

statutory language in the Massachusetts anti-discrimination law expressly prohibiting sexual harassment and defining it as sex discrimination per se.⁸⁶ This language vitiated the strongest argument against certain same-sex sexual harassment claims—that such harassment is not actionable under anti-discrimination laws absent a showing that the victim was being harassed *because of* his or her sex.⁸⁷ Similar language prohibiting sexual harassment and defining it as sex discrimination per se does not appear in the federal anti-discrimination statute, and thus the case for wide-ranging same-sex sexual harassment claims is more difficult to make under Title VII.⁸⁸

Although the dissent argued that the *Melnychenko* decision is a departure from the anti-discrimination purposes of statutes based on Title VII, the decision is in line with the underlying policy rationales for the federal statute.⁸⁹ With the admission that Title VII protects men as well as women and addresses noneconomic as well as economic barriers to equal participation in the workplace, the statute has become a broad shield protecting all employees from certain forms of unacceptable workplace conduct.⁹⁰ Courts have repeatedly stressed the re-

sexual harassment claim where the harasser was homosexual. See *Wrightson*, 99 F.3d at 141, 72 Fair Empl. Prac. Cas. (BNA) at 189. The Sixth Circuit held that same-sex sexual harassment may be actionable where the harasser acts because of homosexual attraction. See *Yeary v. Goodwill Industr.-Knoxville, Inc.*, 107 F.3d 443, 448, 73 Fair Empl. Prac. Cas. (BNA) 146, 150 (6th Cir. 1997). The Seventh Circuit held that same-sex sexual harassment may be actionable even where the harassers were not homosexual. See *Doe by Doe*, 119 F.3d at 566, 74 Fair Empl. Prac. Cas. (BNA) at 628. The Eighth Circuit implied that same-sex sexual harassment may be actionable by allowing such a claim to proceed. See *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378, 71 Fair Empl. Prac. Cas. (BNA) 551, 556 (8th Cir. 1996); see also *Melnychenko*, 676 N.E.2d at 47 n.5, 73 Fair Empl. Prac. Cas. (BNA) at 181 n.5. The Ninth Circuit noted that a viable claim of sexual harassment might be possible by both a male and female employee against a male supervisor. See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464, 65 Fair Empl. Prac. Cas. (BNA) 58, 62 (9th Cir. 1994). The Eleventh Circuit held that a claim of same-sex sexual harassment is actionable where the harassing supervisor was a homosexual who solicited sexual favors and conditioned work benefits or detriment on receiving such favors. See *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1510, 73 Fair Empl. Prac. Cas. (BNA) 1519, 1525 (11th Cir. 1997). At the federal appellate level only the Fifth Circuit has held that, no matter what the circumstances are, a man harassed by another man has no claim under Title VII. See *Oncala v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120, 70 Fair Empl. Prac. Cas. (BNA) 1303, 1305 (5th Cir. 1996); see also *Doe by Doe*, 119 F.3d at 571, 74 Fair Empl. Prac. Cas. (BNA) at 632 (only appellate court to so hold is the Fifth Circuit).

⁸⁶ See *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.

⁸⁷ See generally *McWilliams*, 72 F.3d at 1195, 69 Fair Empl. Prac. Cas. (BNA) at 1085; *Melnychenko*, 676 N.E.2d at 51, 73 Fair Empl. Prac. Cas. (BNA) at 185 (O'Connor, J., dissenting).

⁸⁸ See *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.

⁸⁹ See *id.* at 52, 53, 73 Fair Empl. Prac. Cas. (BNA) at 185, 186 (O'Connor, J., dissenting); *infra* notes 90–92 and accompanying text.

⁹⁰ See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 67, 40 Fair Empl. Prac. Cas. (BNA) 1822, 1826, 1827 (1986).

removal of artificial, arbitrary and unnecessary barriers to the full participation of individuals in the workplace as a policy rationale for anti-discrimination statutes.⁹¹ Severe or pervasive sexual harassment, even where it does not appear to be because of the victim's sex, creates such a barrier to workplace participation.⁹² As one court observed in the face of despicable forms of same-sex harassment, there "ought to be a law . . ."⁹³ Title VII already may be that law, waiting only to be interpreted broadly enough to give relief to men and women driven unnecessarily and arbitrarily from the workplace by conduct of a sexual nature that creates an abusive, intimidating or hostile environment.⁹⁴

At present, the case for a claim of same-sex sexual harassment under Title VII is most readily made where it can be shown that the victim was discriminated against because of his or her sex, that is, where there was *discriminatory* same-sex sexual harassment.⁹⁵ The plain language of the statute, the relevant Supreme Court and administrative interpretations and the plurality of federal circuit decisions all suggest that Title VII is offended where a person harasses employees of the same sex because of their sex.⁹⁶ The case for an actionable claim of

⁹¹ See, e.g., *id.* at 67, 40 Fair Empl. Prac. Cas. (BNA) at 1827; *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination*, 508 N.E.2d 587, 590, 46 Fair Empl. Prac. Cas. (BNA) 1406, 1409 (Mass. 1987).

⁹² See generally *Meritor*, 477 U.S. at 67, 40 Fair Empl. Prac. Cas. (BNA) at 1827; *College-Town*, 508 N.E.2d at 591, 46 Fair Empl. Prac. Cas. (BNA) at 1409.

⁹³ *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196, 69 Fair Empl. Prac. Cas. (BNA) 1082, 1086 (4th Cir. 1996).

⁹⁴ See generally *Meritor*, 477 U.S. at 65-66, 40 Fair Empl. Prac. Cas. (BNA) at 1826-27; *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 593, 74 Fair Empl. Prac. Cas. (BNA) 625, 650-51 (7th Cir. 1997); *McWilliams*, 72 F.3d at 1198, 69 Fair Empl. Prac. Cas. (BNA) at 1088 (Michael, J., dissenting).

⁹⁵ See *Yeary v. Goodwill Industr.-Knoxville, Inc.*, 107 F.3d 443, 448, 73 Fair Empl. Prac. Cas. (BNA) 146, 150 (6th Cir. 1997). Title VII does not confine itself to discrimination occurring between the sexes but instead makes it unlawful for any employer to discriminate against "any individual . . . because of such individual's . . . sex." Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000c-2(a)(1) (1994); see *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1505, 73 Fair Empl. Prac. Cas. (BNA) 1519, 1520 (11th Cir. 1997) ("There is simply no suggestion in these statutory terms that the cause of action is limited to opposite gender contexts."). In interpreting Title VII in *Meritor*, the Supreme Court also did not limit harassment claims to those between sexes but instead indicated that when a supervisor sexually harasses a subordinate "because of the subordinate's sex," that supervisor has discriminated on the basis of sex. See 477 U.S. at 64, 40 Fair Empl. Prac. Cas. (BNA) at 1826. Significantly, the administrative agency charged with enforcing the statute, the EEOC, has interpreted Title VII to prohibit same-sex harassment if that harassment is based on the victim's sex. See EEOC Compl. Man. (CCH) § 615.2(b)(3) (1987), cited in *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143, 72 Fair Empl. Prac. Cas. (BNA) 186, 190 (4th Cir. 1996). Furthermore, many of the federal circuits that have addressed the issue have likewise held that Title VII protects against discriminatory same-sex sexual harassment. See *supra* note 85.

⁹⁶ See *supra* note 95.

same-sex sexual harassment under Title VII may be weakest, however, when there is no showing that an employee was victimized because of his or her sex, that is, where the same-sex sexual harassment appears to be *nondiscriminatory*.⁹⁷ For example, courts may have more difficulty applying Title VII to same-sex sexual harassment where both parties are heterosexual or where the harasser victimizes both men and women equally.⁹⁸ Ultimately, however, situations such as those where men and women are equally harassed by a single harasser may provide further impetus for Title VII jurisprudence to consolidate around the approach of the *Melnychenko* court, allowing a claim for same-sex sexual harassment even absent a showing of sex discrimination by the harasser.⁹⁹ It would undermine Title VII's intent to strike at the entire spectrum of disparate treatment of men and women in the workplace to deny a claim for same-sex harassment because the victim is a man if the same harassing conduct would be actionable if the victim were a woman.¹⁰⁰

⁹⁷ See *McWilliams*, 72 F.3d at 1196, 69 Fair Empl. Prac. Cas. (BNA) at 1085-86; see also *Melnychenko*, 676 N.E.2d at 51, 52, 73 Fair Empl. Prac. Cas. (BNA) at 185 (O'Connor, J., dissenting).

⁹⁸ See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120, 70 Fair Empl. Prac. Cas. (BNA) 1303, 1305 (5th Cir. 1996); *McWilliams*, 72 F.3d at 1195, 69 Fair Empl. Prac. Cas. (BNA) at 1085; cf. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1379, 71 Fair Empl. Prac. Cas. (BNA) 551, 556 (8th Cir. 1996) (male-on-male sexual harassment claim allowed to go forward where fact-finder reasonably could conclude treatment of men was worse than treatment of women).

⁹⁹ See generally *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 566, 568, 74 Fair Empl. Prac. Cas. (BNA) 625, 628, 630 (7th Cir. 1997); *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182. Such a claim presumably still would require that the sexual harassment meet the thresholds of pervasiveness or severity set out in *Meritor*. See 477 U.S. at 67, 40 Fair Empl. Prac. Cas. (BNA) at 1827.

¹⁰⁰ See generally *Doe by Doe*, 119 F.3d at 568, 74 Fair Empl. Prac. Cas. (BNA) at 630 (if plaintiff were a woman, no court would have difficulty construing such abuse as sexual harassment). Paradoxically, a seminal federal case opposing the acceptance of same-sex harassment claims, *Goluszek v. H.P. Smith*, also recognized the inherent sex discrimination in employers reacting differently to female complaints of harassment than to similar male complaints. 697 F. Supp. 1452, 1456, 48 Fair Empl. Prac. Cas. 317, 320 (N.D. Ill. 1988); see also *Williams*, *supra* note 7, at 322 (providing that *Goluszek* is the seminal case ruling same-sex harassment not actionable under Title VII). When an employer reacts promptly to stop harassment when a female complains, while doing nothing to stop similar harassment when a male complains, the harassment of the man may continue because of his sex. See *Goluszek*, 697 F. Supp. at 1456, 48 Fair Empl. Prac. Cas. (BNA) at 320. *Goluszek* side-stepped this problem by arguing Title VII was meant to protect discrete and vulnerable groups at the workplace, and thus does not offer protection, for example, to a man in a male-dominated workplace. See *id.* Other tribunals have criticized this interpretation as unsupported by the plain language of Title VII, the legislative history of Title VII or the relevant court decisions, or as simply illogical. See *Fredette*, 112 F.3d at 1509, 73 Fair Empl. Prac. Cas. (BNA) at 1524; *Smith v. Brinfield Precision, Inc.*, 17 MDLR 1089, 1095 (1995); see also *Williams*, *supra* note 7, at 325.

Moreover, to require a plaintiff making a same-sex harassment claim to show the harasser is homosexual, as the *Wrightson* court suggests, may raise difficult problems of proof.¹⁰¹ Notably, the courts have not made the sexual orientation of the harasser an issue when harassment occurred between a man and a woman, focusing instead on the sexual nature of the conduct, its unwelcome aspect, its severity or pervasiveness and its impact on the work environment of the plaintiff.¹⁰² The presumption that sexual harassment between the sexes is sexually motivated, while same-sex harassment is not, is an increasingly dubious presumption in the modern workplace where employees have different sexual orientations and where these orientations may be openly expressed in some cases and repressed, denied or consciously hidden in others.¹⁰³

If courts accept the convincing logic of the *Wrightson* decision, that same-sex sexual harassment by a homosexual is actionable, the practical and legal difficulties of scrutinizing the sexual orientation of harassers will probably necessitate further judicial evolution towards *Melnychenko's* even more expansive reading of prohibited sexual harassment.¹⁰⁴ The *Melnychenko* approach avoids a problematic focus on the sexual orientation of the parties and instead appropriately concentrates on the sexual nature of the harassing conduct and its effect on the plaintiff's work environment.¹⁰⁵ The *Melnychenko* approach thus has the advantage of giving a brighter line of guidance to courts, employers and employees because what is impermissible does not vary based on the sexual orientation of the harasser.¹⁰⁶ There is some statutory leeway for such a broad interpretation of prohibited sexual harassment, because the full meaning of the phrase "because of sex" was not legislatively defined under Title VII.¹⁰⁷ By presuming in *all* cases of harass-

¹⁰¹ See *Doe by Doe*, 119 F.3d at 589, 74 Fair Empl. Prac. Cas. (BNA) at 647; *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141, 72 Fair Empl. Prac. Cas. (BNA) 186, 189 (4th Cir. 1996); *McWilliams*, 72 F.3d at 1198, 69 Fair Empl. Prac. Cas. (BNA) at 1088 (Michael, J., dissenting).

¹⁰² See *Meritor*, 477 U.S. at 66, 67, 40 Fair Empl. Prac. Cas. (BNA) at 1827; *Doe by Doe*, 119 F.3d at 588, 590, 74 Fair Empl. Prac. Cas. (BNA) at 646, 648; *Quick*, 90 F.3d at 1377, 71 Fair Empl. Prac. Cas. (BNA) at 555.

¹⁰³ See generally *Doe by Doe*, 119 F.3d at 588, 589, 74 Fair Empl. Prac. Cas. (BNA) at 646, 647; *McWilliams*, 72 F.3d at 1198, 69 Fair Empl. Prac. Cas. (BNA) at 1088 (Michael, J., dissenting).

¹⁰⁴ See *Doe by Doe*, 119 F.3d at 589, 74 Fair Empl. Prac. Cas. (BNA) at 647; *Wrightson*, 99 F.3d at 141, 72 Fair Empl. Prac. Cas. (BNA) at 189; *McWilliams*, 72 F.3d at 1198, 69 Fair Empl. Prac. Cas. (BNA) at 1088 (Michael, J., dissenting).

¹⁰⁵ See 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.

¹⁰⁶ See *id.*

¹⁰⁷ See Civil Rights Act of 1964 § 701 (Title VII), 42 U.S.C. § 2000e (1994); *Quick*, 90 F.3d at 1378, 71 Fair Empl. Prac. Cas. (BNA) at 555; see also *Meritor*, 477 U.S. at 64, 40 Fair Empl. Prac. Cas. (BNA) at 1825-26.

ment, not just those between men and women, that whenever a person sexually harasses another employee the motivation is implicitly "because of" the victim's sex, Title VII could be fully utilized to prohibit the creation of hostile work environments due to sexual harassment.¹⁰⁸

In conclusion, the Supreme Judicial Court of Massachusetts determined in *Melnychenko* that sexual harassment prohibited under chapter 151B may include same-sex sexual harassment, even where the harasser is not homosexual.¹⁰⁹ The court held that any verbal or physical conduct of a sexual nature that interferes unreasonably with an employee's work performance by creating a humiliating or sexually offensive work environment can be sexual harassment under chapter 151B.¹¹⁰ In Massachusetts, at least, whether workplace behavior is barred as sexual harassment depends on the sexual nature of the conduct and its effect on the work environment of the plaintiff and not on the sex, sexual orientation or explicitly discriminatory acts of the parties.¹¹¹ This expansive conception of sexual harassment is well grounded in the language of chapter 151B and advances the fundamental policy goal of eliminating unnecessary and arbitrary barriers to the participation of individuals in the workplace.¹¹² Pathbreaking decisions like *Melnychenko* help create a persuasive basis for widening Title VII jurisprudence to include claims for discriminatory same-sex sexual harassment and eventually may set the stage for a federal prohibition on all forms of hostile work environment sexual harassment.¹¹³

¹⁰⁸ See generally *Doe by Doe*, 119 F.3d at 593, 74 Fair Empl. Prac. Cas. (BNA) at 650-51; *McWilliams*, 72 F.3d at 1198, 69 Fair Empl. Prac. Cas. (BNA) at 1088 (Michael, J., dissenting).

¹⁰⁹ See 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See *Meritor*, 477 U.S. at 67, 40 Fair Empl. Prac. Cas. (BNA) at 1827; *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182; *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination*, 508 N.E.2d 587, 591, 46 Fair Empl. Prac. Cas. (BNA) 1406, 1409 (Mass. 1987).

¹¹³ See *Melnychenko*, 676 N.E.2d at 48, 73 Fair Empl. Prac. Cas. (BNA) at 182.