

1995-96 ANNUAL SURVEY OF LABOR AND EMPLOYMENT LAW

LABOR LAW

I. ORGANIZATIONAL AND REPRESENTATIONAL ACTIVITY	303
A. <i>Paid Union Organizers Within the Definition of "Employee":</i> NLRB v. Town & Country Electric, Inc.	303
B. <i>No Exception for Employers with Precontractual Good Faith</i> <i>Doubt in Union Majority Status: Auciello Iron Works, Inc.</i> v. NLRB	315
C. <i>Status of Nurses as "Supervisors" Under the National Labor</i> <i>Relations Act: Nymed, Inc.</i>	323
D. <i>Status of Charge Nurses as "Supervisors" Under the National</i> <i>Labor Relations Act: Providence Hospital & Alaska Nurses</i> <i>Ass'n</i>	335

EMPLOYMENT DISCRIMINATION

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964	347
A. <i>Non-Assistance Provisions of Settlement Agreements Deemed</i> <i>Unenforceable: Equal Employment Opportunity</i> <i>Commission v. Astra USA, Inc.</i>	347
B. <i>Mandatory Arbitration and Statutory Rights Under a Collective</i> <i>Bargaining Agreement: Austin v. Owens-Brockway Glass</i> <i>Container, Inc.</i>	358
C. <i>Two-Pronged Test for Determining the Validity of Affirmative</i> <i>Action Plans Under Title VII: Taxman v. Board of</i> <i>Education</i>	371
II. AGE DISCRIMINATION IN EMPLOYMENT ACT	381
A. <i>Rejecting the Requirement That ADEA Plaintiffs Demonstrate</i> <i>Replacement from Outside Protected Class: O'Connor v.</i> <i>Consolidated Coin Caterers Corp.</i>	381
III. EMPLOYEE RETIREMENT INCOME SECURITY ACT.	392
A. <i>ERISA Section 502(a)(3) Authorizes a Private Cause of Action:</i> <i>Varity Corp. v. Howe.</i>	392

B. <i>No ERISA Violation for Payment of Increased Retirement Benefits in Exchange for Early Retirement and Waiver of Employment Claims: Lockheed Corp. v. Spink</i>	401
IV. REHABILITATION ACT	412
A. <i>Sovereign Immunity Shields Federal Agency Programs from Monetary Damages Claims Under Section 504: Lane v. Pena</i>	412
V. CONSTITUTIONAL DEVELOPMENTS	422
A. <i>Applying First Amendment Principles to Shield Independent Government Contractors from Retaliatory Dismissal: Board of County Commissioners v. Umbehr</i>	422
B. <i>Extension of the Right to Privacy to Medical Prescription Information: Doe v. Southeastern Pennsylvania Transportation Authority</i>	433

LABOR LAW

I. ORGANIZATIONAL AND REPRESENTATIONAL ACTIVITY

A. *Paid Union Organizers Within the Definition of "Employee": NLRB v. Town & Country Electric, Inc.¹

Congress passed the National Labor Relations Act ("NLRA") in 1935, guaranteeing employees the right to organize for the purpose of collective bargaining in order to promote peaceful industrial relations.² The Supreme Court of the United States has included paid union organizers within the definition of "employee" as defined by section 2(3) of the NLRA ("section 2(3)").³ Previously, there had been conflict among the circuits as to whether or not paid union organizers are "employees" under the NLRA.⁴ The Supreme Court granted certiorari to resolve this conflict and held that paid union organizers are "employees" for purposes of the NLRA.⁵ Thus, non-unionized employers may not refuse to hire paid union organizers who are applying for jobs in order to organize the work force.⁶ The Court allowed the National Labor Relations Board ("NLRB") to include paid organizer applicants in the statutory definition of "employee" because protecting union organizers is consistent with the broad language and legislative history

* By Diane E. Gwin, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450, 150 L.R.R.M. (BNA) 2897 (1995).

² See 29 U.S.C. §§ 151-169 (1994).

³ *Town & Country Elec., Inc.*, 116 S. Ct. at 452, 150 L.R.R.M. (BNA) at 2898 (construing 29 U.S.C. § 152(3)). Section 2(3) of the NLRA states:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

29 U.S.C. § 152(3).

⁴ The District of Columbia and Second Circuits held that paid union organizers are "employees," while the Eighth and Fourth Circuits held that they are not. Compare *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 1330-31, 140 L.R.R.M. (BNA) 2745, 2747 (D.C. Cir. 1992) (paid organizers are "employees" under NLRA) and *NLRB v. Henlopen*, 599 F.2d 26, 30, 101 L.R.R.M. (BNA) 2247, 2250 (2d Cir. 1979) (same) with *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 626, 147 L.R.R.M. (BNA) 2133, 2134 (8th Cir. 1994) (paid union organizers are not "employees" under NLRA) and *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 71, 132 L.R.R.M. (BNA) 2377, 2377 (4th Cir. 1989) (same).

⁵ *Town & Country Elec.*, 116 S. Ct. at 452-53, 150 L.R.R.M. (BNA) 2897, 2898 (1995).

⁶ See *id.*

of the statute and effectuates the purposes of the NLRA, namely, protecting both the employees' right to organize and the collective bargaining process.⁷

In 1979, in *H.B. Zachry Co. v. NLRB*, the United States Court of Appeals for the Fourth Circuit held that a paid professional union organizer was not considered an "employee" for purposes of the NLRA.⁸ *H.B. Zachry* involved a journeyman boilermaker welder who, at the time he applied for work with the company, was also a fully paid, professional union organizer.⁹ The company refused to hire the employee because of his union affiliation and also because of his participation in an earlier NLRB proceeding against the company.¹⁰

In construing the plain meaning of the statute, the court reasoned that one cannot be employed by two people at the same time and during the same hours.¹¹ Thus, while the employee worked for Zachry, he was fundamentally an employee of the union and worked for Zachry solely on union orders.¹² The court further reasoned that affording professional organizers the protection of the NLRA would upset the balance Congress had intended between the rights of employees to organize and the rights of employers to prohibit the use of their facilities by outside union organizers.¹³ The court noted that management's right to refuse to hire someone because he or she is employed full-time by another employer is an inherent part of "management prerogative" and should be protected.¹⁴ Thus, the court concluded that a paid professional union organizer was not an "employee" under the NLRA and was not protected from anti-union discrimination.¹⁵

In 1979, in *NLRB v. Henlopen*, the United States Court of Appeals for the Second Circuit held that an employee paid by a union to organize other employees was an "employee" under the NLRA.¹⁶ A paid union organizer alleged that her employer first transferred her to a more difficult job and then fired her because of her union activities.¹⁷ In rejecting the company's argument that the employee was not an "employee" under the NLRA because she was a "paid union infiltrator,"

⁷ See *id.* at 453, 454, 150 L.R.R.M. (BNA) at 2899.

⁸ 886 F.2d at 71, 132 L.R.R.M. (BNA) at 2377.

⁹ *Id.*

¹⁰ See *id.* at 71-72, 132 L.R.R.M. (BNA) at 2378.

¹¹ *Id.* at 73, 132 L.R.R.M. (BNA) at 2379.

¹² See *id.*

¹³ *H.B. Zachry*, 886 F.2d at 74, 132 L.R.R.M. (BNA) at 2380.

¹⁴ *Id.* at 75, 132 L.R.R.M. (BNA) at 2380-81.

¹⁵ *Id.* at 71, 132 L.R.R.M. (BNA) at 2377.

¹⁶ 599 F.2d at 30, 101 L.R.R.M. (BNA) at 2250.

¹⁷ See *id.* at 27, 28, 101 L.R.R.M. (BNA) at 2248.

the court stated only that "[o]n these facts, and on the basis of the Board's decisions, we find that [the employee] was an employee protected by the NLRA."¹⁸ Thus, the Second Circuit summarily concluded that one who is paid by a union to be an organizer is an "employee" under the NLRA.¹⁹

In 1992, in *Willmar Electric Service, Inc. v. NLRB*, the United States Court of Appeals for the District of Columbia Circuit held that a paid union organizer who applies for a job in order to organize the workers, and intends to remain affiliated with the union and possibly return to full-time employment with the union, is an "employee" under section 2(3) of the NLRA.²⁰ In *Willmar*, a field organizer for the International Brotherhood of Electrical Workers applied for a job with Willmar in order to organize the workers.²¹ Willmar refused to hire the employee because of his union affiliation.²² The court first focused on congressional intent and analogized the NLRA to the Labor Management Relations Act ("LMRA"), which indicated that Congress contemplated the possibility that one could be employed by both a union and a company.²³ The court also relied on common-law principles to demonstrate that one can be the servant of two masters, provided that service to one does not lead to abandonment of the duty to the other.²⁴ The court reasoned that if an employee's service to the union does not interfere with service to the employer, then the employee should be afforded the protection of the NLRA.²⁵ The court also rejected Willmar's practical arguments, reasoning that the disloyalty and harm the company feared could just as likely come from a non-union employee as it could from a union employee.²⁶ Thus, in *Willmar*, the court held that a paid union organizer is an "employee" and therefore entitled to the protection of the NLRA.²⁷

¹⁸ *Id.* at 30, 101 L.R.R.M. (BNA) at 2250 (citing *Anthony Forest Prod. Co.*, 231 N.L.R.B. 976 (1977); *Dee Knitting Mills, Inc.*, 214 N.L.R.B. 1041 (1975); *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1970)).

¹⁹ *See Henlopen*, 599 F.2d at 30, 101 L.R.R.M. (BNA) at 2250.

²⁰ 968 F.2d at 1328, 1330-31, 140 L.R.R.M. (BNA) at 2745, 2747.

²¹ *Id.* at 1328, 140 L.R.R.M. (BNA) at 2745-46.

²² *See id.* at 1328, 140 L.R.R.M. (BNA) at 2746.

²³ *See id.* at 1329, 140 L.R.R.M. (BNA) at 2746. Section 302 of the LMRA prohibits payments from another employer to an employee of a union; it excludes from that prohibition, however, payments "to any . . . employee of a labor organization, who is also an employee . . . of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1) (1994).

²⁴ *Willmar Elec. Serv.*, 968 F.2d at 1329-30, 140 L.R.R.M. (BNA) at 2746-47; *see* RESTATEMENT (SECOND) OF AGENCY § 226 (1957).

²⁵ *Willmar Elec. Serv.*, 968 F.2d at 1330, 140 L.R.R.M. (BNA) at 2747.

²⁶ *See id.*

²⁷ *Id.* at 1330-31, 140 L.R.R.M. (BNA) at 2747.

During the *Survey* year, in *NLRB v. Town & Country Electric, Inc.* (*Town & Country*), the United States Supreme Court held that a worker can be a company's "employee" within the meaning of the NLRA even if, at the same time, a union pays the worker to help the union organize the company.²⁸ The Court stated that allowing the NLRB to include paid union organizers within the statutory definition of "employee" was consistent with both the meaning of the term "employee" and the purposes of the NLRA.²⁹ By holding that paid union organizers may be included in the NLRA's definition of "employee," the Court resolved the conflict among the circuit courts.³⁰

The dispute in *Town & Country* arose after the company (*Town & Country*), a non-union electrical contractor, advertised through an employment agency for licensed electricians.³¹ The company refused to interview ten out of the eleven applicants because they were members of the International Brotherhood of Electrical Workers; two of them were also professional union staff.³² The union members filed a complaint with the NLRB, claiming that the company had violated sections 8(a)(1) and 8(a)(3) of the NLRA by refusing to interview or retain them because of their union membership.³³

In deciding that *Town & Country* had committed an unfair labor practice by discriminating against the union members, the NLRB concluded that the eleven applicants were "employees" as defined by section 2(3) of the NLRA.³⁴ The NLRB relied on the broad common and statutory definitions of the word "employee," the statutory exclusions to the definition of "employee" and the legislative history of the NLRA.³⁵ The NLRB also concluded that including paid organizer applicants within the definition of "employee" was consistent with both Supreme Court and NLRB precedent.³⁶ Finally, the NLRB determined that public policy considerations weighed in favor of protecting

²⁸ 116 S. Ct. 450, 452-53, 150 L.R.R.M. (BNA) 2897, 2898 (1995).

²⁹ *Id.* at 453-54, 150 L.R.R.M. (BNA) at 2899. Section 7 of the NLRA grants employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1994).

³⁰ *See Town & Country Elec.*, 116 S. Ct. at 452-53, 150 L.R.R.M. (BNA) at 2898.

³¹ *Id.* at 452, 150 L.R.R.M. (BNA) at 2898.

³² *See id.* The company interviewed one applicant and the employment agency hired him, but the company dismissed him after only a few days of work. *See id.*

³³ *See id.*

³⁴ *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250, 1258, 142 L.R.R.M. (BNA) 1036, 1045 (1992).

³⁵ *Id.* at 1253-54, 142 L.R.R.M. (BNA) at 1040-41.

³⁶ *Id.* at 1254-55, 142 L.R.R.M. (BNA) at 1041-42.

employees' right to organize.³⁷ Thus, the NLRB concluded that the NLRA's definition of "employee" included paid union organizers.³⁸

Town & Country petitioned the Eighth Circuit Court of Appeals for review of the NLRB's decision, and the NLRB cross-petitioned for enforcement of its order.³⁹ The Eighth Circuit refused to enforce the Board's order, following the Fourth Circuit's reasoning in *H.B. Zachry*, and held that the union members were not entitled to protection of the NLRA because they were not employees as defined by section 2(3).⁴⁰ The Eighth Circuit relied on a common-law agency argument that an agent has a duty to act solely for the benefit of his principal in all matters connected with his agency and has a duty not to act on behalf of others whose interests conflict with those of the principal.⁴¹ The Eighth Circuit concluded that, in an employment situation, a union organizer is unable to be loyal to both the union and the employer at the same time and, therefore, a union organizer's dual employment constitutes a conflict of interest.⁴² Thus, the Eighth Circuit held that the union organizers were not "employees" under section 2(3) of the NLRA.⁴³

The United States Supreme Court vacated and remanded the Eighth Circuit decision, holding that paid union organizers are "employees" under section 2(3) of the NLRA.⁴⁴ The Court recognized that Congress created the NLRB to administer the NLRA, and considered the NLRB's understanding of labor relations necessary for proper application and interpretation of the NLRA.⁴⁵ Although the Court acknowledged the deference generally given to the NLRB in interpreting the NLRA, the Court added that the NLRB needed little deference to convince the Court that its interpretation was proper.⁴⁶

In analyzing the NLRB's decision, the Court noted that the NLRB's interpretation of the term "employee" as including paid union organizers was consistent with the broad language contained in the

³⁷ *Id.* at 1256-57, 142 L.R.R.M. (BNA) at 1043-44.

³⁸ *Id.* at 1258, 142 L.R.R.M. (BNA) at 1045.

³⁹ *Town & Country Elec., Inc., v. NLRB*, 34 F.3d 625, 626, 147 L.R.R.M. (BNA) 2133, 2134 (8th Cir. 1994).

⁴⁰ *Id.* at 628-29, 147 L.R.R.M. (BNA) at 2135-36.

⁴¹ *Id.* at 628-29, 147 L.R.R.M. (BNA) at 2136; *see* RESTATEMENT (SECOND) OF AGENCY §§ 387, 394 (1957).

⁴² *Town & Country Elec.*, 34 F.3d at 628-29, 147 L.R.R.M. (BNA) at 2136.

⁴³ *Id.* at 629, 147 L.R.R.M. (BNA) at 2136.

⁴⁴ *Town & Country Elec.*, 116 S. Ct. at 452-53, 150 L.R.R.M. (BNA) at 2898.

⁴⁵ *Id.* at 453, 150 L.R.R.M. (BNA) at 2899.

⁴⁶ *Id.*

NLRA.⁴⁷ While noting that the statutory interpretation is even broader than the dictionary definition, the Court examined the ordinary dictionary definition of "employee" which stated that "[t]he term 'employee' shall include *any* employee."⁴⁸ The Court also noted that although the statute contains several exceptions to the definition of "employee," the union members in this case fell under none of those exceptions.⁴⁹

The Court reasoned that the NLRB's interpretation of the term "employee" was consistent with the purposes of the NLRA, namely, "protecting the right of employees to organize for mutual aid without employer interference," and "encouraging and protecting the collective-bargaining process."⁵⁰ The Court further reasoned that the Board's broad interpretation of the NLRA was consistent with the legislative history of the NLRA.⁵¹ The Court cited several examples of broad congressional definitions and noted that there were few, if any, statements in the legislative history indicating that Congress ever contemplated a narrow definition of the term "employee."⁵²

The Court further concluded that the NLRB's interpretation of the term "employee" is consistent with earlier cases decided by the Court.⁵³ The Court noted, in particular, its decision in *Sure-Tan, Inc. v. NLRB*, in which the Court observed that the "breadth of § 2(3)'s definition is striking: the NLRA squarely applies to 'any employee.'"⁵⁴

⁴⁷ *Id.* The relevant statutory language states that: "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . ." 29 U.S.C. § 152(3) (1994).

⁴⁸ *Town & Country Elec.*, 116 S. Ct. at 453-54, 150 L.R.R.M. (BNA) at 2899 (citing AMERICAN HERITAGE DICTIONARY 604 (3d ed. 1992) (defining "employee" as "any person who works for another in return for financial or other compensation"); BLACK'S LAW DICTIONARY 525 (6th ed. 1990) (defining "employee" as "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed")).

⁴⁹ *Id.* at 454, 150 L.R.R.M. (BNA) at 2899 (construing 29 U.S.C. § 152(3)). The statute states that the term "employee" shall not include agricultural laborers, domestic workers, those employed by a parent or spouse, independent contractors, supervisors and employees subject to the Railway Labor Act. 29 U.S.C. § 152(3).

⁵⁰ *Town & Country Elec.*, 116 S. Ct. at 454, 150 L.R.R.M. (BNA) at 2899.

⁵¹ *Id.*

⁵² *Id.* (noting that "[i]t is fairly easy to find statements to the effect that an 'employee' simply 'means someone who works for another for hire,' H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947), and includes 'every man on a payroll,' 79 Cong. Rec. 9686 (1935) (colloquy between Reps. Taylor and Connery)"); (also citing S. REP. NO. 573, 74th Cong. 6 (1935) (referring to an employee as a "worker"); H.R. REP. NO. 969, 74th Cong. 8 (1935) (same); H.R. REP. NO. 972, 74th Cong. 8 (1935) (same); H.R. REP. NO. 1147, 74th Cong. 10 (1935) (same)).

⁵³ *See id.*

⁵⁴ *Id.* at 454, 150 L.R.R.M. (BNA) at 2899-900 (citing *Sure-Tan v. NLRB*, 467 U.S. 883, 891 (1984)).

The Court then cited several other cases in support of the NLRB's interpretation.⁵⁵

The Court next decided that a provision of the 1947 LMRA allowed it to conclude that Congress may have specifically considered the possibility that an employee of a company may also be employed by a union.⁵⁶ This provision prohibits a company from paying someone who is employed by a union, but exempts from this prohibition wages that are "paid by the company to 'any . . . employee of a labor organization, who is also an employee' of the company."⁵⁷ Thus, the Court concluded that the Board's determination that paid union organizers are "employees" within the NLRA was consistent with this provision of the LMRA.⁵⁸

The Court then dispensed with the common-law agency argument raised by Town & Country.⁵⁹ Town & Country argued that common-law principles, which require that the term "employee" exclude paid union organizers, should govern the determination of whether or not paid union organizers were "employees."⁶⁰ Although the Court accepted Town & Country's argument that common-law principles should govern the determination, the Court concluded that the NLRB's determination was consistent with the common law.⁶¹ Town & Country argued that, based on the *Restatement (Second) of Agency*, one cannot be a paid union organizer and an employee of a company simultaneously.⁶² Town & Country further argued that by serving the union, the organizer acts against the best interests of the company.⁶³

⁵⁵ See *Town & Country Elec.*, 116 S. Ct. at 454, 150 L.R.R.M. (BNA) at 2900 (citing *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189-90 (1981) (certain "confidential employees" fall within the definition of "employees"); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488-90 (1947) (company foremen are "employees"); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131-32 (1944) (independent contractor-like newsboys are "employees"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941) (job applicants are "employees")). *Hearst* and *Packard* were overruled by 29 U.S.C. § 152(3) (1994), which explicitly excluded independent contractors and supervisory employees. See *id.* at 454, 150 L.R.R.M. (BNA) at 2900 (1995).

⁵⁶ *Id.* (construing 29 U.S.C. § 186(c)(1) (1994)).

⁵⁷ 29 U.S.C. § 186(c)(1) (1994); *Town & Country Elec.*, 116 S. Ct. at 454, 150 L.R.R.M. (BNA) at 2900.

⁵⁸ *Town & Country Elec.*, 116 S. Ct. at 454, 150 L.R.R.M. (BNA) at 2900.

⁵⁹ *Id.* at 454-56, 150 L.R.R.M. (BNA) at 2900-01.

⁶⁰ See *id.* at 454-55, 150 L.R.R.M. (BNA) at 2900.

⁶¹ *Id.* at 455, 150 L.R.R.M. (BNA) at 2900-01.

⁶² See *id.* at 455, 150 L.R.R.M. (BNA) at 2900; see also *RESTATEMENT (SECOND) OF AGENCY* § 226 cmt. a, at 499 (1957) (stating that "[g]iving service to two masters at the same time normally involves a breach of duty by the servant to one or both of them . . .").

⁶³ See *Town & Country Elec.*, 116 S. Ct. at 455, 150 L.R.R.M. (BNA) at 2900.

The Court rejected this argument, concluding instead that the *Restatement's* hornbook rule allows the determination that a paid union organizer can be a company employee at the same time.⁶⁴ The hornbook rule states that a "person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve the abandonment of the service to the other."⁶⁵ The Court upheld the Board's determination that serving the union as a paid organizer does not involve the abandonment of service to the employer.⁶⁶ The Court further held that union organization, which Town & Country asserted to be abandonment, is an activity protected by the NLRA.⁶⁷

The Court also rejected the practical arguments raised by Town & Country.⁶⁸ The company argued that including paid union organizers within the definition of "employees" would allow unions to "salt" non-unionized companies with employees who intended to organize the work force.⁶⁹ The company argued that Congress did not intend for the "salts" to be included within the definition of "employees" because they might hurt the company by quitting or engaging in sabotage.⁷⁰ The Court rejected this argument, reasoning that non-union employees could just as easily engage in the same types of harmful behavior as the "salts."⁷¹ The Court reasoned that just because someone might engage in this kind of behavior does not mean that he or she is not an employee.⁷² The Court also noted that the company would have other legal remedies available to it if the "salts" harmed the company.⁷³

Finally, the Court clarified that it was not holding that paid union organizers and employees are identical within the context of every labor issue.⁷⁴ The Court suggested that paid union organizers may not have the same "community of interest" as other employees to justify placing them in the same bargaining unit, although it declined to

⁶⁴ *Id.* at 455-56, 150 L.R.R.M. (BNA) at 2901; see *RESTATEMENT (SECOND) OF AGENCY* § 226, at 498 (1957).

⁶⁵ See *Town & Country Elec.*, 116 S. Ct. at 455-56, 150 L.R.R.M. (BNA) at 2901 (quoting *RESTATEMENT (SECOND) OF AGENCY* § 226, at 498 (1957)).

⁶⁶ *Id.* at 456, 150 L.R.R.M. (BNA) at 2901.

⁶⁷ *Id.*

⁶⁸ See *id.* at 456-57, 150 L.R.R.M. (BNA) at 2901-02.

⁶⁹ See *id.* at 456, 150 L.R.R.M. (BNA) at 2901. "Salting" is the process by which unions authorize their members to apply for jobs with non-unionized companies in order to organize the workers. See *Town & Country Elec.*, 309 N.L.R.B. at 1251, 1252, 142 L.R.R.M. (BNA) at 1038-39, 1040. The work force is thus "salted" with union organizers. See *id.*

⁷⁰ See *Town & Country Elec.*, 116 S. Ct. at 456, 150 L.R.R.M. (BNA) at 2901.

⁷¹ *Id.* at 456, 150 L.R.R.M. (BNA) at 2901-02.

⁷² *Id.* at 456, 150 L.R.R.M. (BNA) at 2902.

⁷³ *Id.* at 457, 150 L.R.R.M. (BNA) at 2902.

⁷⁴ *Id.*

decide whether this was true.⁷⁵ Thus, the Court held only that the NLRB's interpretation of the term "employee" as including paid union organizers was lawful.⁷⁶

The Supreme Court's decision in *Town & Country* provides organized labor with an unprecedented opportunity to expand their efforts to organize non-unionized work forces.⁷⁷ Because union organizers are protected as "employees" under the NLRA, a company can no longer claim that the NLRA does not protect union organizers who are applying for work in order to organize that company's labor.⁷⁸ In response to a continuing decline in union membership, the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) has made union organizing its top priority. The decision in *Town & Country* is likely to facilitate this goal by allowing unions to increase their organization efforts through its paid organizers, now protected as "employees" for purposes of the NLRA.⁷⁹

If the Court had followed the reasoning of the Eighth Circuit in *Town & Country* or the Fourth Circuit in *Zachry* and decided that paid organizer applicants were not included in the statutory definition of "employee," labor unions would be severely limited in their ability to organize non-unionized work places, and non-union employees would have limited opportunities to hear the union message.⁸⁰ The inability of union organizers either to enter the property of a company or to access the workers from within would create a severe encroachment on employees' right to organize as guaranteed by section 7 of the NLRA.⁸¹

⁷⁵ *Town & Country Elec.*, 116 S. Ct. at 457, 150 L.R.R.M. (BNA) at 2902.

⁷⁶ *Id.*

⁷⁷ *See id.* at 452-53, 150 L.R.R.M. (BNA) at 2898.

⁷⁸ *See id.*

⁷⁹ The percentage of the American work force belonging to labor unions has declined steadily, from a high of 35.5% of non-agricultural establishments in 1945 to a near-low of 14.9% in 1995. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NO. 43, EMPLOYMENT AND EARNINGS 210 (bl. 40 (Jan. 1996)); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NO. 2070, HANDBOOK OF LABOR STATISTICS 412 (bl. 165 (1980)). The new president of the AFL-CIO, John Sweeney, was elected in October, 1995, and increased organization was a key component of his election platform. *See Sweeney Announces Sweeping Changes at AFL-CIO, Names Richard Bensinger to Top Organizing Post; Allison Porter to Head Organizing Institute*, AFL-CIO Press Release (Jan. 24, 1996). Sweeney created a new Organizing Department which oversees the Organizing Institute and administers a \$20 million organizing fund. *See id.*

⁸⁰ *See generally* *Town & Country Elec. v. NLRB*, 34 F.3d 625, 147 L.R.R.M. (BNA) 2133; *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 132 L.R.R.M. (BNA) 2377 (4th Cir. 1994). These outcomes would have exacerbated the impact of *Lechmere, Inc. v. NLRB*, an earlier Supreme Court decision which held that employers did not commit an unfair labor practice by excluding non-employee union members from company property. 502 U.S. 527, 541, 139 L.R.R.M. (BNA) 2225, 2231 (1992).

⁸¹ *See* 29 U.S.C. § 157 (1994); *Town & Country Elec.*, 116 S. Ct. at 452-53, 150 L.R.R.M. (BNA) at 2898; *Lechmere*, 502 U.S. at 541, 139 L.R.R.M. (BNA) at 2231.

Thus, the decision of the *Town & Country* Court, following the decisions of the District of Columbia Circuit in *Willmar* and the Second Circuit in *Henlopen*, was necessary in order to preserve employees' section 7 rights.⁸²

Town & Country's extension of the protections of the NLRA to paid union organizers applying for jobs with non-unionized companies prohibits employers from discriminating against union organizers in hiring.⁸³ As a result, it may be much more difficult for employers to oppose union organization and prevent their employees from hearing the union message. It remains to be seen how employers will respond to the *Town & Country* decision, including how their hiring practices will change.

Although *Town & Country* prohibits employers from discriminating against qualified applicants who are also union organizers, this type of discrimination may simply become more subtle and thus harder to detect and prove.⁸⁴ In his concurrence in the NLRB's *Town & Country* decision, Board Member Raudabaugh suggests that employers will be able to continue to fight union organization after this decision through "nondiscriminatory" hiring practices.⁸⁵ Board Member Raudabaugh states that he would not consider it an unfair labor practice for employers to engage in "nondiscriminatory practices" such as refusing to hire temporary employees or employees who are simultaneously employed by another employer.⁸⁶ Thus, according to Board Member Raudabaugh, employers could continue to refuse to hire applicants who are also paid union organizers as long as they are treated like any other "employee" during the hiring process.⁸⁷

Employers could conceivably engage in even more subtle types of discrimination against union organizers as well.⁸⁸ For example, employ-

⁸² See 29 U.S.C. § 157 (1994); see generally *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 140 L.R.R.M. (BNA) 2745 (D.C. Cir. 1992); *NLRB v. Henlopen*, 599 F.2d 26, 101 L.R.R.M. (BNA) 2247 (2d Cir. 1979). For the text of section 7, see *supra* note 29.

⁸³ See *Town & Country Elec.*, 116 S. Ct. at 452-53, 150 L.R.R.M. (BNA) at 2898.

⁸⁴ See *id.*

⁸⁵ See *Town & Country Elec.*, 309 N.L.R.B. at 1258, 142 L.R.R.M. (BNA) at 1045 (Raudabaugh, Board Member, concurring) (adopting his concurrence in *Sunland Construction Co.*, 309 N.L.R.B. 1224, 1232-33, 142 L.R.R.M. (BNA) 1025, 1035 (1992) (Raudabaugh, Board Member, concurring)).

⁸⁶ *Id.* (Raudabaugh, Board Member, concurring).

⁸⁷ See *id.* (Raudabaugh, Board Member, concurring). At least one NLRB decision since *Town & Country*, however, has held that the "moonlighting" policy advocated by Raudabaugh constituted an unfair labor practice because its intent was to prohibit union organizing. See *Tualatin Elec., Inc.*, 319 N.L.R.B. 1237, 1237, 151 L.R.R.M. (BNA) 1159, 1160 (1995).

⁸⁸ Interview with Thomas C. Kohler, Professor, Boston College Law School, in Newton, Mass. (Oct. 10, 1996).

ers could begin screening applicants for certain personality traits.⁸⁹ Employers could refuse to hire applicants who display too many "leadership" qualities and claim that this disqualification is necessary for them to hire a "compliant" work force when, in reality, they may be trying to eliminate union leadership.⁹⁰ This type of strategy would likely be more difficult for unions to detect and substantiate in order to file an unfair labor charge.⁹¹

If employers' efforts to fight union organization lead them to engage in these more subtle kinds of hiring practices designed to avoid union organization, unions may have a difficult time taking advantage of the protection afforded by the *Town & Country* decision. These discriminatory practices may be difficult to substantiate for the purposes of filing an unfair labor charge or, as Board Member Raudabaugh suggests, may not constitute unfair labor practices at all.⁹² Thus, although *Town & Country* extends the protection of the NLRA to paid organizers, the actual impact of the decision on unions' ability to get their organizers hired remains to be seen and is somewhat dependent on how employers change their hiring practices in response to the decision.

It also remains to be seen how the legislature will respond to the *Town & Country* decision. Members of both the United States House of Representatives and the United States Senate have already introduced the "Truth in Employment Act of 1997," which would amend section 8(a) of the NLRA by permitting an employer to deny employment to "[a]ny person who seeks or has sought employment with the employer in furtherance of the objectives of an organization other than the employer."⁹³ Supporters of the bills believe that forcing employers to hire "salts" places them in a no-win situation.⁹⁴ They assume that once hired, "salts" will disrupt the work place and pursue frivolous

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *Town & Country Elec., Inc.* 309 N.L.R.B. at 1258, 142 L.R.R.M. (BNA) at 1045 (Raudabaugh, Board Member, concurring) (adopting his concurrence in *Sunland Construction Co.*). See *Sunland Construction Co.*, 309 N.L.R.B. at 1232-33, 142 L.R.R.M. (BNA) at 1035 (Raudabaugh, Board Member, concurring).

⁹³ Truth in Employment Act, S. 328, 105th Cong. (1997); Truth in Employment Act, H.R. 758, 105th Cong. (1997) (permits employers to deny employment to "[a]ny person who seeks or has sought employment with the employer in furtherance of other employment or agency status."). The Act was also introduced in the 104th Congress, but had to be reintroduced in the new term. Truth in Employment Act, S. 1925, 104th Cong. (1996); Truth in Employment Act, H.R. 3211, 104th Cong. (1996).

⁹⁴ *Organizing: Fawell's 'Truth in Employment Act' Would Curb Organizing by 'Salts'*, 63 DAILY LAB. REP. (BNA), Apr. 2, 1996, at d6 (quoting Republican Rep. Harris Fawell of Illinois).

unfair labor charges against the employer.⁹⁵ If the employer refuses to hire the "salt," the employer faces a discrimination suit.⁹⁶ The legislators fail to realize, however, that once employed, "salts" are required to perform their jobs, follow the rules of the work place and comply with the same guidelines as other employees in terms of union activities in the work place.⁹⁷ The arguments made in support of this legislation are the same practical arguments that the *Town & Country* Court rejected.⁹⁸ If this legislation is ultimately passed, it will severely limit employees' right to organize in the same way as the *Town & Country* Court would have if it had decided that paid union organizers were not "employees" under the NLRA.⁹⁹

In conclusion, the Supreme Court determined in *Town & Country* that paid union organizers who apply for jobs in non-unionized workplaces for the purpose of organizing the work force are "employees" under section 2(3) of the NLRA and, thus, are afforded the protection of the NLRA.¹⁰⁰ The Court allowed the NLRB to include paid organizer applicants in the statutory definition of "employee" because protecting their right to organize is consistent with the purposes of the NLRA.¹⁰¹ Non-unionized employers may no longer claim that paid union organizers who attempt to organize their labor from within are not "employees" under the NLRA.¹⁰² While the *Town & Country* decision should provide unprecedented opportunity for unions to expand their organizing efforts, it remains to be seen whether employers will try to avoid hiring union organizers in more subtle ways, and if so, whether their new methods for excluding union organizers are detectable and able to be substantiated. It also remains to be seen whether the legislature will respond by amending section 8(a) of the NLRA to allow employers to refuse to hire "salts."

⁹⁵ See *Gorton Introduces Senate Anti-Salting Bill*, 126 DAILY LAB. REP. (BNA), July 1, 1996, at a12; *Organizing: Fawell's 'Truth in Employment Act' Would Curb Organizing by 'Salts'*, *supra* note 94, at d6.

⁹⁶ See *Organizing: Fawell's 'Truth in Employment Act' Would Curb Organizing by 'Salts'*, *supra* note 94, at d6.

⁹⁷ See *Town & Country Elec.*, 116 S. Ct. at 457, 150 L.R.R.M. (BNA) at 2902.

⁹⁸ See *id.* at 456-57, 150 L.R.R.M. (BNA) at 2902.

⁹⁹ See *id.* at 452-53, 150 L.R.R.M. (BNA) at 2898. The bills were introduced in both the House and the Senate on February 13, 1997, but as of this printing no action has been taken on either. See S. 328, 105th Cong. (1997); H.R. 758, 105th Cong. (1997); see generally Cong. Ind. (CCH) 20,001 (105th Cong. Senate 1997-98); Cong. Ind. (CCH) 35,001 (105th Cong. House 1997-98).

¹⁰⁰ *Town & Country Elec.*, 116 S. Ct. at 452-53, 150 L.R.R.M. (BNA) at 2898.

¹⁰¹ See *id.* at 454, 150 L.R.R.M. (BNA) at 2899.

¹⁰² See *id.* at 452-53, 150 L.R.R.M. (BNA) at 2898.

B. **No Exception for Employers with Precontractual Good Faith Doubt in Union Majority Status: Auciello Iron Works, Inc. v. NLRB*¹

Sections 8(a)(1) and (5) of the National Labor Relations Act (the "NLRA") make it an unfair labor practice for employers to restrain employees in the exercise of their rights or to refuse to bargain with employees' chosen representatives.² The objective of the NLRA is to promote industrial peace and stability in collective bargaining.³ Toward that end, the National Labor Relations Board (the "Board") has established conclusive presumptions of union majority status which may be rebuttable at a collective bargaining agreement's expiration if the employer has a good faith doubt in the union's majority support.⁴ The United States Supreme Court in *Auciello Iron Works, Inc. v. NLRB* upheld the Board's refusal to extend the period during which the presumption is rebuttable to a reasonable time after a new contract has been formed.⁵ By clearly defining the time period during which employers may rebut a union's presumption of majority status, the decision in *Auciello* lends certainty to the collective bargaining process and thus will promote industrial peace and stability.⁶

In 1961, in *Garment Workers v. NLRB*, the United States Supreme Court held that an employer committed an unfair labor practice by mistakenly recognizing a union which did not represent a majority of its employees.⁷ In *Garment Workers*, the International Ladies' Garment Workers' Union ("Garment Workers' Union") underwent an organizational drive at Bernhard-Altmann Texas Corporation's San Antonio, Texas, plant when a department of the plant went on strike to protest a wage reduction.⁸ The Garment Workers' Union and the employer

* By Amanda C. Buck, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 116 S. Ct. 1754, 152 L.R.R.M. (BNA) 2385 (1996).

² 29 U.S.C. §§ 158(a)(1), (5) (1994). The NLRA provides in relevant part 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 section 157 of this title; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Id.

³ See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38, 125 L.R.R.M. (BNA) 2441, 2445 (1987).

⁴ See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778, 133 L.R.R.M. (BNA) 3049, 3049-50 (1990); *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 279 n.3, 80 L.R.R.M. (BNA) 2225, 2228 n.3 (1972).

⁵ 116 S. Ct. at 1756, 152 L.R.R.M. (BNA) at 2385.

⁶ See *id.* at 1758, 152 L.R.R.M. (BNA) at 2386-87.

⁷ 366 U.S. 731, 732-33, 48 L.R.R.M. (BNA) 2251, 2251-52 (1961).

⁸ *Id.* at 733, 48 L.R.R.M. (BNA) at 2252.

entered into negotiations, and the employer signed a memorandum recognizing the Garment Workers' Union as the exclusive bargaining representative of its employees.⁹ The Garment Workers' Union claimed that it had received authorization cards from a majority of employees, but neither the employer nor the union checked the accuracy of this assertion.¹⁰ After finding that the employer and the Garment Workers' Union had interfered with the employees' organizational rights, the Board refused to give force to the agreement and ordered the union to stop acting as the employees' representative until a Board-certified election demonstrated its majority status.¹¹ The Supreme Court upheld the Board's finding that the employer's good faith belief in the Garment Workers' Union's majority status was not a defense to unfair labor practice charges, stating that recognizing a union with only minority status was a violation of employee rights and that allowing such a defense would encourage employer carelessness.¹² The Court further reasoned that refusing to create a good faith exception does not place a hardship on employers or unions because it merely requires employers to withhold recognition until a Board-supervised election occurs.¹³ Therefore, the Supreme Court held that an employer who recognizes a union that does not enjoy majority status cannot raise the defense of a good faith belief to unfair labor practice charges.¹⁴

In 1972, in *NLRB v. Burns International Security Services, Inc.*, the United States Supreme Court held that although a successor employer was not bound by its predecessor's collective bargaining,¹⁵ it did have a duty to bargain with a recently certified incumbent union when it hired a majority of its predecessor's employees.¹⁶ In *Burns*, a security business hired the majority of its predecessor's employees, whose union, the United Plant Guard Workers (the "UPG"), had been recently certified.¹⁷ Although the employer was aware of the UPG's status, the employer supplied its new employees with union cards for a competing union, the American Federation of Guards (the "AFG"), telling the employees that they had to belong to the AFG.¹⁸ When the employer refused to recognize the UPG, the union filed unfair labor practice

⁹ See *id.* at 734, 48 L.R.R.M. (BNA) at 2252.

¹⁰ See *id.*

¹¹ See *id.* at 735, 48 L.R.R.M. (BNA) at 2252-53.

¹² *Garment Workers*, 366 U.S. at 738-39, 48 L.R.R.M. (BNA) at 2254.

¹³ *Id.* at 739, 48 L.R.R.M. (BNA) at 2254.

¹⁴ *Id.* at 732-33, 48 L.R.R.M. (BNA) at 2251-52.

¹⁵ 406 U.S. at 281-82, 80 L.R.R.M. (BNA) at 2228-29.

¹⁶ *Id.* at 278-79, 80 L.R.R.M. (BNA) at 2227.

¹⁷ *Id.* at 274-75, 80 L.R.R.M. (BNA) at 2226.

¹⁸ See *id.* at 275, 80 L.R.R.M. (BNA) at 2226. The employer had negotiated collective bargaining agreements with the AFG at other work sites. See *id.*

charges.¹⁹ The Board found that the employer had unlawfully recognized the AFG, refused to recognize the UPG and failed to honor the collective bargaining agreement negotiated by its predecessor.²⁰ The Court upheld the Board's finding that there was a presumption of majority status when a union had recently represented the employees of a predecessor and its members were the majority of a successor's employees.²¹ The Court reasoned that this presumption could not be rebutted in this case because the employer could not have a good faith doubt about the UPG's majority status.²² Thus, the Supreme Court held that a successor employer has a duty to bargain with a recently certified incumbent union when a majority of its employees were previously employed by its predecessor.²³

In 1987, in *Fall River Dyeing & Finishing Corp. v. NLRB*, the United States Supreme Court extended its holding in *Burns* to situations in which the union had not been recently certified, holding that the union's presumption of majority status continued despite a change in ownership, and therefore, the successor employer had a duty to bargain with the union if a majority of its employees worked for the previous employer.²⁴ In *Fall River Dyeing*, the employer bought the assets of its predecessor, conducted a similar operation and hired many of the predecessor's employees.²⁵ When the predecessor's employees became the majority of those employed at Fall River Dyeing, the incumbent union, United Textile Workers of America, Local 292 ("Local 292"), requested recognition and collective bargaining.²⁶ When the employer refused to honor this request, Local 292 filed an unfair labor practice charge with the Board.²⁷ The Board upheld the finding of an Administrative Law Judge ("ALJ") that the employer had committed an unfair labor practice by refusing to bargain with Local 292 once the predecessor's employees comprised the majority of the successor's work force.²⁸ In affirming the Board's decision, the Court extended the holding in *Burns* beyond situations in which the union was recently certified.²⁹ The Court held that a union's rebuttable presumption of majority status continues, regardless of a change in employers, as long

¹⁹ See *id.* at 276, 80 L.R.R.M. (BNA) at 2226.

²⁰ See *Burns*, 406 U.S. at 276, 80 L.R.R.M. (BNA) at 2226.

²¹ *Id.* at 278, 281, 80 L.R.R.M. (BNA) at 2227-28.

²² *Id.* at 278, 80 L.R.R.M. (BNA) at 2227.

²³ *Id.* at 278, 281, 80 L.R.R.M. (BNA) at 2227-28.

²⁴ 482 U.S. at 41, 125 L.R.R.M. (BNA) at 2446-47.

²⁵ *Id.* at 32-33, 125 L.R.R.M. (BNA) at 2443.

²⁶ See *id.* at 31, 33, 125 L.R.R.M. (BNA) at 2442-43.

²⁷ See *id.* at 33-34, 125 L.R.R.M. (BNA) at 2443-44.

²⁸ See *id.* at 34-35, 125 L.R.R.M. (BNA) at 2444.

²⁹ *Fall River Dyeing*, 482 U.S. at 41, 125 L.R.R.M. (BNA) at 2446.

as the new employer is truly a successor and a majority of its employees worked for its predecessor.³⁰ The Court reasoned that an employer who chooses to take advantage of its predecessor's trained work force by operating a similar business and hiring the majority of its employees from that work force has a duty to bargain with the incumbent union.³¹ The Court noted that without such an extension of *Burns*, employers could simply reorganize the business, terminate existing labor contracts and use the ensuing uncertainty to undermine the union.³² Thus, the Supreme Court held that a successor employer must bargain with an incumbent union if a majority of its employees worked for its predecessor, reasoning that a union's presumption of majority status continues despite a change in ownership.³³

In 1990, in *NLRB v. Curtin Matheson Scientific, Inc.*, the United States Supreme Court held that the Board rationally refused to presume that striker replacements oppose the union when determining whether there was an objective basis for an employer's good faith doubt in the union's majority status.³⁴ In *Curtin Matheson*, an employer hired replacement workers after locking out the employees in the bargaining union, Teamsters Local 968, General Drivers, Warehousemen and Helpers ("Local 968").³⁵ When Local 968 ended its strike and offered to accept the contract previously proposed, the employer responded that the offer was no longer available and withdrew recognition of the union.³⁶ The employer justified its refusal to negotiate with Local 968 on its doubt that the union was supported by a majority of the workers.³⁷ In hearing Local 968's unfair labor practice charge, the Board held that the employer did not have a sufficient objective basis to doubt the union's majority support.³⁸ The Supreme Court held that the Board's refusal to presume that striker replacements opposed Local 968 was rational, supporting the Board's recognition that the situations surrounding strikes vary greatly and that the chance that replacement workers do not support the union is not great enough to justify a presumption of opposition to the union.³⁹ The Court further stated that the Board's decision was consistent with the NLRA's policy of

³⁰ *Id.* at 41, 125 L.R.R.M. (BNA) at 2447.

³¹ *Id.* at 41, 125 L.R.R.M. (BNA) at 2446.

³² *Id.* at 40, 125 L.R.R.M. (BNA) at 2446.

³³ *Id.* at 41, 125 L.R.R.M. (BNA) at 2446-47.

³⁴ 494 U.S. at 787-88, 133 L.R.R.M. (BNA) at 3053-54.

³⁵ *Id.* at 782, 133 L.R.R.M. (BNA) at 3051.

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.* at 783, 133 L.R.R.M. (BNA) at 3051.

³⁹ *Curtin Matheson*, 494 U.S. at 793, 133 L.R.R.M. (BNA) at 3056.

industrial peace because it promoted industrial stability.⁴⁰ Therefore, the Supreme Court concluded that the Board was rational in its refusal to presume that striker replacements oppose the union when determining whether an employer had a good faith doubt as to the union's majority status.⁴¹

During the *Survey* year, in *Auciello Iron Works, Inc., v. NLRB*, the United States Supreme Court held that the Board was reasonable in finding that an employer's disavowal of a contract with a certified union because of its good faith doubt in the union's majority status constituted an unfair labor practice.⁴² The Court refused to make an exception to the conclusive presumption of a union's majority status for an employer with precontractual good faith doubt in majority status.⁴³ The Court held that once an employer's offer has been accepted, good faith doubt as to majority status is not a defense to an unfair labor practice charge.⁴⁴

After a union election in 1977, the NLRB certified Shopmen's Local No. 501 (the "Union") as the collective bargaining agent of the employees of Auciello Iron Works ("Auciello") of Hudson, Massachusetts.⁴⁵ Auciello and the Union successfully negotiated collective bargaining agreements until the expiration of one of these agreements on September 25, 1988.⁴⁶ When the employer and the Union did not reach an agreement by October 14, the employees went on strike while negotiations continued.⁴⁷ Auciello presented the Union with a contract proposal on November 17, 1988, and picketing stopped the next day.⁴⁸ According to Auciello, a company with only 23 employees, prior to the Union's acceptance, 9 employees crossed the picket line, 13 resigned from the Union and 16 expressed dissatisfaction with the Union.⁴⁹ Despite its doubt in the Union's majority status, Auciello did not withdraw its outstanding offer.⁵⁰ Instead, based on its doubt that the Union represented a majority of its employees, Auciello disavowed the collective bargaining agreement the day after the Union accepted it and refused to continue negotiating.⁵¹

⁴⁰ *Id.* at 794, 133 L.R.R.M. (BNA) at 3056.

⁴¹ *Id.* at 787-88, 133 L.R.R.M. (BNA) at 3053-54.

⁴² 116 S. Ct. 1754, 1756, 152 L.R.R.M. (BNA) 2385, 2385 (1996).

⁴³ *Id.* at 1761, 152 L.R.R.M. (BNA) at 2389.

⁴⁴ *Id.* at 1758-59, 152 L.R.R.M. (BNA) at 2387.

⁴⁵ *See id.* at 1756, 152 L.R.R.M. (BNA) at 2385-86.

⁴⁶ *See id.* at 1756, 152 L.R.R.M. (BNA) at 2386.

⁴⁷ *See Auciello*, 116 S. Ct. at 1756-57, 152 L.R.R.M. (BNA) at 2386.

⁴⁸ *See id.* at 1757, 152 L.R.R.M. (BNA) at 2386.

⁴⁹ *See id.* at 1756-57, 152 L.R.R.M. (BNA) at 2385-86.

⁵⁰ *See id.* at 1757, 152 L.R.R.M. (BNA) at 2386.

⁵¹ *See id.*

The Board charged Auciello with violating sections 8(a)(1) and (5) of the NLRA.⁵² The Board affirmed an ALJ's ruling that Auciello had violated the NLRA by withdrawing from the contract between the parties, refusing to consider Auciello's defense of a good faith doubt in the Union's majority status.⁵³ When the Board sought enforcement of its order requiring Auciello to honor the contract, the United States Court of Appeals for the First Circuit refused to enforce the order and remanded the case for further discussion of the Board's refusal to consider the defense of good faith doubt in the Union's majority status.⁵⁴ The Board then issued a supplemental opinion supporting its decision, and the First Circuit enforced the order.⁵⁵

The United States Supreme Court granted certiorari, and Justice Souter, writing for a unanimous court, affirmed the First Circuit's decision.⁵⁶ In determining the reasonableness of the Board's decision, the Court stated that the conclusive presumptions regarding majority status articulated in *Burns* and *Fall River Dyeing* were intended to promote the "orderly resolution of disputes between workers and employers."⁵⁷ The Court reasoned that the presumption of majority status allows unions to bargain collectively without facing decertification and prevents employers from attempting to undermine union support during bargaining periods.⁵⁸

The Court rejected the employer's argument that it should extend the exception in *Curtin Matheson*—the presumption of majority status is rebuttable if the employer has a good faith doubt in such status based on a sufficient objective basis—to situations where a contract has already been formed.⁵⁹ The Court stated that the same rationale that prompted the Board to presume majority status required the Board to reject an exception for employers whose doubt in majority status existed before the contract was formed.⁶⁰ The Court reasoned that extending this exception to employers whose good faith doubt in a union's majority status is based on information obtained before contract formation contradicts the very aims of "industrial peace and stability" that the NLRA was enacted to promote.⁶¹ The Court deferred

⁵² See *Auciello*, 116 S. Ct. at 1757, 152 L.R.R.M. (BNA) at 2386.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ *Id.* at 1756–57, 152 L.R.R.M. 2385–86.

⁵⁷ *Auciello*, 116 S. Ct. at 1758, 152 L.R.R.M. (BNA) at 2386–87.

⁵⁸ *Id.* at 1758, 152 L.R.R.M. (BNA) at 2387.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

to the Board's judgment, reasoning that the costs of an exception of the type Auciello sought outweighed any possible benefit because it would give employers too much control over the bargaining process and could be detrimental to the stability sought by the NLRA.⁶²

The Court also rejected the employer's argument that the facts of the case warranted an exception because the employer expressed its doubt about majority status so soon after contract formation.⁶³ The Court stated that the argument for a case-by-case determination of what constitutes a reasonable time in which employers could repudiate a contract did not address the issue of the reasonableness of the Board's decision.⁶⁴ The Court noted that Auciello could have withdrawn its offer and petitioned for an election, withdrawn the offer and refused to negotiate further or withdrawn the offer and investigated while continuing to bargain.⁶⁵ The Court stated that an exception is not needed because employers have ample opportunity to express doubts about a union's majority status before a contract is formed.⁶⁶ Furthermore, the Court concluded that, if the exception were adopted, employers could bargain despite doubts about majority status in order to obtain a satisfactory deal and then challenge the majority status in hopes of getting a more favorable agreement.⁶⁷ The Court upheld the reasonableness of the Board's belief that such challenges after contract formation would not be conducive to the NLRA's goal of stability and industrial peace.⁶⁸ The Court also rejected Auciello's argument that the Board's position undermines the employees' right to have representatives of their choosing conduct their collective bargaining, stating that the Board is justified in being skeptical when an employer presents itself as the champion of its employees' rights.⁶⁹

Finally, the Court rejected Auciello's contention that *Garment Workers* required reversal of the Board's decision.⁷⁰ The Court stated that in contrast to *Garment Workers*, the employees in this case had the opportunity to initiate decertification of the Union but chose not to do so.⁷¹ The Court stated that the two decisions were consistent because both good faith doubt and belief in majority status were insufficient to

⁶² *Auciello*, 116 S. Ct. at 1759, 152 L.R.R.M. (BNA) at 2387.

⁶³ *Id.*

⁶⁴ *Id.* at 1759, 152 L.R.R.M. (BNA) at 2388.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Auciello*, 116 S. Ct. at 1760, 152 L.R.R.M. (BNA) at 2388.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1760, 152 L.R.R.M. (BNA) at 2388-89.

⁷⁰ *Id.* at 1760, 152 L.R.R.M. (BNA) at 2389.

⁷¹ *Id.*

either compel recognition of a union or deny a union's contracting authority.⁷²

The Court's affirmance of the Board's decision in *Auciello* protects the integrity of the collective bargaining process and promotes the NLRA's policy goals of industrial peace and stability.⁷³ The presumptions of majority support ensure industrial peace and stability by allowing unions to concentrate on obtaining a collective bargaining agreement without worrying about their support being undermined.⁷⁴ The Court wisely refused to extend the *Curtin Matheson* exception to a period after a new contract has been formed.⁷⁵ If employers were allowed to first enter into a collective bargaining agreement and then attack the union's majority status in hopes of getting a better deal, industrial stability would suffer greatly because entering into a collective bargaining agreement would no longer be the resolution of the conflict.⁷⁶

The Court's decision in *Auciello* further solidifies the security that unions enjoy without leaving employers who doubt the union's majority status without recourse.⁷⁷ In refusing to extend the good faith exception to the period after contract formation, the Court thus protects the rights of employees by ensuring that the union of their choice will not be undermined, that contracts will be enforced and that their work environment will be peaceful and stable.⁷⁸ In the event that the union is not supported by a majority of employees, however, the Board's decision reserves the employees' right to initiate decertification of the union.⁷⁹ At the same time, the decision gives employers ample opportunity to challenge majority status before contract formation, although the employer in *Auciello* did not avail itself of those opportunities.⁸⁰ In short, the *Auciello* decision prevents the employer from having too much control over the bargaining process, but gives the employer several opportunities to withdraw offers before contract formation.⁸¹

⁷² *Auciello*, 116 S. Ct. at 1760-61, 152 L.R.R.M. (BNA) at 2389.

⁷³ *See id.* at 1758-59, 152 L.R.R.M. (BNA) at 2386-87.

⁷⁴ *See id.* at 1758, 152 L.R.R.M. (BNA) at 2387; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38, 125 L.R.R.M. (BNA) 2441, 2445 (1987).

⁷⁵ *See Auciello*, 116 S. Ct. at 1758-59, 152 L.R.R.M. (BNA) at 2387.

⁷⁶ *See id.* at 1760, 152 L.R.R.M. (BNA) at 2388.

⁷⁷ *See id.* at 1759, 152 L.R.R.M. (BNA) at 2388.

⁷⁸ *See id.* at 1758-60, 152 L.R.R.M. (BNA) at 2387-88.

⁷⁹ *See id.* at 1760, 152 L.R.R.M. (BNA) at 2389.

⁸⁰ *See Auciello*, 116 S. Ct. at 1759, 152 L.R.R.M. (BNA) at 2388.

⁸¹ *See id.* at 1758-59, 152 L.R.R.M. (BNA) at 2387-88.

Furthermore, adopting a bright line test is more conducive to industrial stability than case-by-case determinations of what constitutes a reasonable time after contract formation in which an employer can assert good faith doubt and disavow the contract.⁸² Although adopting a bright line test could be seen as somewhat unfair on the facts of the case as relayed in the petitioner's brief,⁸³ the Court held that the Board was rational in refusing to look at the circumstances on a case-by-case basis.⁸⁴ The Board's decision decisively instructs employers about when a good faith doubt in majority status can be a successful defense to unfair labor practice charges.⁸⁵ Determining reasonableness on a case-by-case basis would not deter employers from obtaining a contract and then questioning its majority status in an attempt to get a better deal.⁸⁶ The certainty accompanying a bright line test will better promote industrial stability.⁸⁷

In conclusion, in *Auciello Iron Works, Inc. v. NLRB*, the Supreme Court established that an employer who disavows a collective bargaining agreement based on a precontractual doubt as to the union's majority status commits an unfair labor practice.⁸⁸ The Court refused to extend the good faith doubt exception articulated in *Curtin Matheson* to the period after contract formation.⁸⁹ The Court established a bright line rule rather than endorsing a determination of the reasonableness of the period of time after contract formation on a case-by-case basis.⁹⁰ The bright line test will promote certainty and industrial stability and protect employees' rights.

C. *Status of Nurses as "Supervisors" Under the National Labor Relations Act: Nymed, Inc.¹

The National Labor Relations Act (the "Act") protects the right of employees to organize collectively by forming and joining labor

⁸² See *id.* at 1759, 152 L.R.R.M. (BNA) at 2388.

⁸³ Brief for the Petitioner at 6-7, *Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754 (1996) (No. 95-688). The employer repudiated the contract the day after the Union, sensing that its support was waning, telegraphed its acceptance to the home of the company's president on Sunday evening before the employer could take action to withdraw the offer on Monday. See *id.*

⁸⁴ See *Auciello*, 116 S. Ct. at 1759, 152 L.R.R.M. (BNA) at 2388.

⁸⁵ See *id.*

⁸⁶ See *id.* at 1758-59, 152 L.R.R.M. (BNA) at 2387.

⁸⁷ See *id.* at 1758-59, 152 L.R.R.M. (BNA) at 2386-88.

⁸⁸ *Id.* at 1756, 152 L.R.R.M. (BNA) at 2385.

⁸⁹ *Auciello*, 116 S. Ct. at 1758-59, 152 L.R.R.M. (BNA) at 2387.

⁹⁰ *Id.* at 1759, 152 L.R.R.M. (BNA) at 2388.

* By Peter R. MacLeod, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 320 N.L.R.B. 806, 151 L.R.R.M. (BNA) 1198 (1996).

unions.² Originally, the Act protected all employees, but in 1947, it was amended by Congress to exclude "supervisors."³ Section 2(11) of the Act defines "supervisor" to include any individual who uses independent judgment to carry out any one of twelve listed supervisory activities in the interests of the employer.⁴ If individuals are "supervisors" within the meaning of the Act, employers are not compelled to recognize their right to organize.⁵ Conversely, section 2(12) of the Act specifically protects the bargaining rights of "professional" employees, who are defined as employees whose work involves the use of consistent judgment.⁶ Thus, the definitions of "supervisor" and "professional" both concern an employee's use of judgment.⁷ The courts and the National Labor Relations Board (the "Board") have noted that differentiating between the two can be difficult.⁸ In *Nymed, Inc.*, the Board set out guidelines for deciding whether a nurse is a supervisor under the Act.⁹

In 1993, in *Northcrest Nursing Home*, the Board applied the so-called patient care analysis, holding that licensed practice nurses ("LPNs") at Northcrest Nursing Home were not supervisors under the Act because they exercised their judgment in the interests of the

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

³ *Id.* § 152(3).

⁴ *Id.* § 152(11). Section 2(11) defines a supervisor as:

[A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id.

⁵ *See id.* § 164(a).

⁶ *Id.* § 152(12). Section 2(12) defines a professional employee as:

[A]ny employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent use of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

Id.

⁷ 29 U.S.C. §§ 152(11), 152(12)(a).

⁸ *See, e.g.,* N.L.R.B. v. Health Care & Retirement Corp., 511 U.S. 571, 581, 146 L.R.R.M. (BNA) 2321, 2325 (1994); *Providence Hosp.*, 320 N.L.R.B. 717, 728, 151 L.R.R.M. (BNA) 1172, 1190 (1996).

⁹ 320 N.L.R.B. at 809, 151 L.R.R.M. (BNA) at 1198, 1202-03.

patient, rather than in the interests of the employer.¹⁰ In *Northcrest*, the LPNs all worked as charge nurses for part of their shift.¹¹ As charge nurses, their duties included checking on patients, giving reports on patients to nurses' aides and administering medication.¹² Charge nurses directed aides, assigned them to shifts if they were short-handed and wrote reports on aides who violated the employer's policies.¹³

In reasoning that the LPNs working as charge nurses were not supervisors under the Act, the Board concentrated on their role in assigning, directing, disciplining and evaluating the nurses' aides.¹⁴ Following its well-established precedents, the Board examined whether the LPNs' exercise of these indicia was an exercise of professional judgment incidental to patient care or an exercise of supervisory authority in the interest of the employer.¹⁵ The Board determined that the LPNs exercised these indicia as an extension of their role as professionals providing care to the patients; therefore, they were protected as professional employees.¹⁶ Thus, the Board held that because the LPNs exercised their professional judgment in the interests of the patient rather than the employer, the nurses were not supervisors under the Act.¹⁷

In 1994, in *NLRB v. Health Care & Retirement Corp.*, the United States Supreme Court rejected the patient care analysis employed in *Northcrest* and held that four LPNs were supervisors within the meaning of section 2(11).¹⁸ In *Health Care & Retirement Corp.*, the Board's counsel issued a complaint on behalf of four LPNs who had recently been disciplined, claiming that they were protected by the Act as employees.¹⁹ The LPNs' duties included assigning work, monitoring and evaluating the nurses' aides and ensuring that adequate staffing levels existed.²⁰ These tasks were similar to those that the nurses in *Northcrest* carried out and the Board applied the same analysis as it had in *Northcrest*, holding that the LPNs were professional employees protected by the Act rather than unprotected supervisors.²¹

¹⁰ 313 N.L.R.B. 491, 493, 145 L.R.R.M. (BNA) 1213, 1216 (1993).

¹¹ *Id.* at 500-02, 145 L.R.R.M. (BNA) at 1225.

¹² *See id.* at 501-02, 145 L.R.R.M. (BNA) at 1227.

¹³ *See id.* at 502, 145 L.R.R.M. (BNA) at 1227.

¹⁴ *Id.* at 502-09, 145 L.R.R.M. (BNA) at 1227-33.

¹⁵ *Northcrest Nursing Home*, 313 N.L.R.B. at 493, 145 L.R.R.M. (BNA) at 1218.

¹⁶ *Id.* at 505, 145 L.R.R.M. (BNA) at 1229.

¹⁷ *Id.* at 509, 145 L.R.R.M. (BNA) at 1233.

¹⁸ 511 U.S. at 584, 146 L.R.R.M. (BNA) at 2327.

¹⁹ *Id.* at 574, 146 L.R.R.M. (BNA) at 2323.

²⁰ *See id.* at 575, 146 L.R.R.M. (BNA) at 2323.

²¹ *Id.*; *see* 313 N.L.R.B. at 500-03, 145 L.R.R.M. (BNA) at 1226-29.

In rejecting the Board's reasoning, the Court stated that there was no sound reason for the Board to employ the patient care analysis, which created an industry-specific false dichotomy between the interests of the employer and those of the patient.²² The Court reasoned that this was a false dichotomy because the care of the patient was the business of the employer.²³ Although rejecting the Board's non-statutory grounds for applying this distinction, the Court stated that it was the proper function of the Board to examine the nurses' positions and to determine whether or not the nurses were supervisors.²⁴ The Court further stated that the Board could distinguish between nurses whose authority encompassed front-line management prerogatives and thus were supervisors, and nurses whose authority arose from professional knowledge.²⁵ After rejecting the argument that there was a difference between the interests of the employer and those of the patient, the Court held that the nurses were supervisors.²⁶

In 1996, in *Providence Hospital*, the Board interpreted the Supreme Court's decision in *Health Care & Retirement Corp.* for the first time, holding that nurses working at a hospital were not supervisors within the meaning of the Act because they did not exercise independent judgment in assigning and responsibly directing employees.²⁷ The nurses in *Providence Hospital* worked as charge nurses, home health assistants and on-call leaders.²⁸ The charge nurses were regular registered nurses ("RNs") the majority of the time and only assumed the extra responsibilities of charge nurses when supervisor RNs were absent.²⁹ The home health team leaders coordinated the RN home health teams and the on-call leaders made assignments only when an assigned worker was absent.³⁰

Heeding the Supreme Court's directive in *Health Care & Retirement Corp.*, the Board concentrated on the question of whether the nurses used independent judgment in assigning and responsibly directing employees so as to render them supervisors.³¹ The Board reasoned

²² *Health Care & Retirement Corp.*, 511 U.S. at 577, 146 L.R.R.M. (BNA) at 2324.

²³ *Id.*

²⁴ *Id.* at 582-83, 146 L.R.R.M. (BNA) at 2326.

²⁵ *Id.* The Court indicated that a proper analysis may include an examination of whether the nurses' actions were routine or required independent judgment. *Id.*

²⁶ *Id.* at 584, 146 L.R.R.M. (BNA) at 2327.

²⁷ 320 N.L.R.B. at 717, 151 L.R.R.M. (BNA) at 1180.

²⁸ *Id.*

²⁹ See *id.* at 730, 151 L.R.R.M. (BNA) at 1192.

³⁰ See *id.* at 733, 734, 151 L.R.R.M. (BNA) at 1194, 1195.

³¹ *Id.* at 717, 151 L.R.R.M. (BNA) at 1180. The Board mentioned a number of guiding principles to use to decide whether a person is a "supervisor" under the Act. *Id.* at 729, 151

that the routine, clerical nature of the assignments showed that the nurses did not use independent judgment and thus were not supervisors.³² In addition, the Board construed the meaning of "responsibly to direct" narrowly, reasoning that Congress intended for the Act to protect those workers who directed others as a function of their professional knowledge or experience.³³ The Board emphasized that any judgment used by the nurses arose from their position as professional employees, rather than from a shared power with management.³⁴ Thus, the Board held that the nurses were not supervisors under the Act.³⁵

During the *Survey* year, in *Nymed, Inc.*, the Board held that forty-five LPNs were not supervisors within the meaning of the Act because they did not have the authority to assign, responsibly direct, discipline, evaluate or transfer other employees, or effectively to recommend such action.³⁶ The forty-five LPNs in *Nymed, Inc.* were employed at Ten Broeck Commons, a nursing home which provided services to about 240 residents.³⁷ The Board examined each of the supervisory indicia and held that the LPNs did not exercise any of the indicia in such a way as to render them supervisors.³⁸

The nursing department consisted of the director of nursing (the "DON"), the assistant director of nursing, staff development personnel, RNs, LPNs and certified nursing assistants ("assistants").³⁹ During the day, the full nursing department was present, but during the night, there were fewer staff members present.⁴⁰ The patients in the facility were divided into four or five "runs," or groups of patients, depending on the number of assistants.⁴¹ The LPNs assigned each assistant to a run on a monthly basis.⁴² The RNs or LPNs were responsible for filling out a long-term care plan when a new resident first

L.R.R.M. (BNA) at 1191. These included factors such as the length of time during which the person was "supervising," the skill levels of those whom the person was directing and the routine nature of the tasks. *See id.*

³² *Providence Hosp.*, 320 N.L.R.B. at 731-735, 151 L.R.R.M. (BNA) at 1193-96.

³³ *Id.* at 728, 151 L.R.R.M. (BNA) at 1189-90. The Board indicated in dicta that the meaning of the word "responsibly" was also ambiguous but that the proper procedure was to first examine whether the nurses employed independent judgment. *Id.* Because the Board decided that they did not in this situation, the Board did not need to discuss the meaning of "responsibly." *See id.*

³⁴ *Id.* at 733, 151 L.R.R.M. (BNA) at 1194.

³⁵ *Id.* at 736, 151 L.R.R.M. (BNA) at 1196.

³⁶ 320 N.L.R.B. 806, 806, 151 L.R.R.M. (BNA) 1198, 1200 (1996).

³⁷ *Id.*

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See id.* at 807, 151 L.R.R.M. (BNA) at 1200.

⁴¹ *See Nymed, Inc.*, 320 N.L.R.B. at 807, 151 L.R.R.M. (BNA) at 1201.

⁴² *See id.*

arrived.⁴³ The plan, called the Aidex, detailed the resident's daily requirements and was changed as necessary.⁴⁴ The LPNs checked the Aidex to ensure that the assistants were completing each task properly.⁴⁵ LPNs issued oral warnings to the assistants for initial infractions, followed by written reports if the conduct continued.⁴⁶ The nursing supervisor read these reports and then talked with the people involved and the assistant director of nursing before deciding whether to take any action.⁴⁷ LPNs were also responsible for filling out a portion of the assistants' evaluation forms, which were reviewed by the DON and others who then decided what action to take.⁴⁸ Both the LPNs and the RNs occasionally recommended the transfer of certain assistants to different shifts or units because they were not working well in their present placement.⁴⁹ The DON, however, made the final decision either to transfer the assistants or give them further training.⁵⁰ In addition to these tasks, the LPNs performed duties as treatment nurses or medication nurses.⁵¹

The United Industry Workers Local 424 (the "Local") petitioned to represent the LPNs, and a hearing was held before a hearing officer of the Board.⁵² The hearing officer concluded that the LPNs were not supervisors and thus allowed the Local's petition.⁵³ The employer sought review of the decision and the case was transferred to the Board.⁵⁴ The Board found that the hearing officer's rulings were free from prejudicial error and affirmed.⁵⁵

The Board focused its discussion on five of the twelve indicia of supervisory status set out in section 2(11), namely whether the individuals in question had the authority to assign, responsibly direct, discipline, evaluate or transfer other employees.⁵⁶ The Board first inquired whether the LPNs exercised one of these criteria or had the

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.* at 808, 151 L.R.R.M. (BNA) at 1201. They also assigned extra duties to the assistants on a rotational basis. See *id.*

⁴⁶ See *Nymed, Inc.*, 320 N.L.R.B. at 808, 151 L.R.R.M. (BNA) at 1202.

⁴⁷ See *id.* at 808-09, 151 L.R.R.M. (BNA) at 1202.

⁴⁸ See *id.* at 809, 151 L.R.R.M. (BNA) at 1202.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *Nymed, Inc.*, 320 N.L.R.B. at 807, 151 L.R.R.M. (BNA) at 1201.

⁵² See *id.* at 806, 151 L.R.R.M. (BNA) at 1198.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ *Id.* at 806, 151 L.R.R.M. (BNA) at 1200.

⁵⁶ *Nymed, Inc.*, 320 N.L.R.B. at 809, 151 L.R.R.M. (BNA) at 1202-03.

authority to recommend such action effectively.⁵⁷ The Board then examined whether the exercise of authority required the use of independent judgment so as to render the LPNs supervisors under the Act.⁵⁸

The Board first examined the statutory indicia of assignment and responsible direction.⁵⁹ The Board determined that although the LPNs did assign assistants, they did not exercise independent judgment in doing so.⁶⁰ The Board used the test established by the Supreme Court in *Health Care & Retirement Corp.* to determine whether the LPNs exercised independent judgment or whether their authority was merely routine and clerical in nature.⁶¹ Specifically, the Board noted that (i) there were established procedures for dealing with assigning runs and substituting assistants; (ii) because all the assistants had the same skills, there was little choice involved in deciding the assignments; and (iii) the extra duties, lunch breaks and runs were routinely rotated among the assistants.⁶² The Board reasoned that the LPNs did not exercise independent judgment, and thus they were not statutory supervisors.⁶³

The Board then determined that the LPNs did not exercise independent judgment in responsibly directing the work of the assistants.⁶⁴ The Board distinguished between writing a long-term care plan (the Aidex) and directing employees to carry out the tasks within it.⁶⁵ The Board reasoned that while designing the Aidex required judgment, that judgment was based upon the LPNs' technical expertise; i.e., it was a function of their position as professional or technical employees.⁶⁶ The Board further reasoned that the daily routines of the assistants were governed by the Aidex, and thus the LPNs did not use independent judgment in directing the assistants.⁶⁷ Any judgment that the LPNs employed while directing the assistants drew on the greater skill and experience of the LPNs and, thus, was not supervisory.⁶⁸ Furthermore, the Board recognized that the LPNs had many other

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 809, 151 L.R.R.M. (BNA) at 1203.

⁶⁰ *Id.* at 810, 151 L.R.R.M. (BNA) at 1203.

⁶¹ *Nymed, Inc.*, 320 N.L.R.B. at 810, 151 L.R.R.M. (BNA) at 1203.

⁶² *Id.* at 810-11, 151 L.R.R.M. (BNA) at 1204.

⁶³ *Id.* at 810-11, 151 L.R.R.M. (BNA) at 1203.

⁶⁴ *Id.* at 811, 151 L.R.R.M. (BNA) at 1204.

⁶⁵ *Id.*

⁶⁶ See *Nymed, Inc.*, 320 N.L.R.B. at 811, 811 n.10, 151 L.R.R.M. (BNA) at 1204, 1204 n.10.

⁶⁷ *Id.* at 811, 151 L.R.R.M. (BNA) at 1204.

⁶⁸ *Id.*

responsibilities that did not involve the assistants, and thus the LPNs only incidentally directed the other employees in narrowly circumscribed circumstances, in a similar manner to leadmen.⁶⁹

In addition, the Board looked at the LPNs' involvement in disciplining the assistants and decided that this responsibility did not render the LPNs supervisors within the meaning of section 2(11).⁷⁰ The Board concluded that an LPN's responsibility was merely to report incidents and had no effect on the status of the assistants.⁷¹ Furthermore, the Board noted that any report made by the LPNs was reviewed and independently investigated by the DON prior to any action.⁷² In deciding what action to take the DON did not rely solely on the written report of the LPN, but used other documentary evidence as well.⁷³ Thus, the Board concluded that the LPNs' role in discipline did not render them supervisors under the Act.⁷⁴

The Board next examined the LPNs' role in evaluating the assistants.⁷⁵ The Board decided that the LPNs were not involved in evaluation so as to make them supervisors under the Act.⁷⁶ The Board reasoned that the record showed that the LPNs' evaluations did not directly result in personnel changes, and that any personnel changes which affected the assistants was not based solely on the LPNs' written evaluation.⁷⁷

Finally, the Board examined the role of the LPNs in transferring the assistants.⁷⁸ The Board decided that the LPNs' involvement in transferring the assistants was not sufficient to make them supervisors.⁷⁹ The Board acknowledged that LPNs had made recommendations to the DON that assistants be transferred, but the effectiveness

⁶⁹ *Id.* at 812, 151 L.R.R.M. (BNA) at 1205. "Leadmen" were common at the time the Act was first written, and thus are mentioned in the legislative history of the Act. *See id.* at 815, 151 L.R.R.M. (BNA) at 1208. Leadmen are highly skilled employees whose primary function is participation in the production of goods, usually in a factory situation. *See id.* They incidentally direct the movements and operations of less skilled, subordinate employees. *See id.*

⁷⁰ *Id.* at 812, 151 L.R.R.M. (BNA) at 1205.

⁷¹ *Nymed, Inc.*, 320 N.L.R.B. at 812, 151 L.R.R.M. (BNA) at 1205. The Board cited to *Passavant Health Center*, 284 N.L.R.B. 887, 889, 125 L.R.R.M. (BNA) 1274, 1276 (1987), in which the Board decided that the nurses' reportorial role in discipline, where a supervisor independently evaluated the report, was too minor a role to be considered supervisory. *See id.*

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.* at 813, 151 L.R.R.M. (BNA) at 1206.

⁷⁵ *Id.*

⁷⁶ *Nymed, Inc.*, 320 N.L.R.B. at 813, 151 L.R.R.M. (BNA) at 1206.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

of those recommendations was not established.⁸⁰ The Board noted that there was no evidence that showed that any transfers of assistants were based solely on the LPNs' recommendations and that the DON took other factors into consideration in making such decisions.⁸¹ Thus, the Board held that LPNs were not supervisors under the Act.⁸²

Board Member Cohen filed a dissenting opinion stating that the LPNs were supervisors under the Act.⁸³ He contended that the Board had reached the conclusion that the nurses were not supervisors by stretching the language of section 2(11).⁸⁴ He concluded that in this situation, the nurses employed five of the indicia in 2(11) in such a way as to make them supervisors.⁸⁵

Board Member Cohen looked first at the assignment of work, in particular the assignment of runs.⁸⁶ He concluded that the LPNs effectively controlled the number and the identities of the patients assigned to each assistant.⁸⁷ Because this involved considering the personality and capabilities of the assistant, he reasoned, independent judgment was necessary.⁸⁸ Secondly, Board Member Cohen examined the LPNs' role in directing the assistants.⁸⁹ Concentrating on the LPNs' responsibility for monitoring and directing the assistants in carrying out the tasks in the Aidex, he rejected the majority's reasoning that the LPNs were not supervisors because their actions were based on greater skill and experience in the nature of professional or technical employees.⁹⁰ He reasoned that it was exactly the use of individual thought processes, rather than acting on the order of an outside force or person, which differentiated a supervisor from an employee.⁹¹ Finally, Board Member

⁸⁰ *Id.*

⁸¹ *Nymed, Inc.*, 320 N.L.R.B. at 813, 151 L.R.R.M. (BNA) at 1206.

⁸² *Id.*

⁸³ *Id.* at 814, 151 L.R.R.M. (BNA) at 1207 (Cohen, Board Member, dissenting). Board Member Cohen stated that the decision of the Supreme Court in *Health Care & Retirement Corp.* required the Board to determine whether the LPNs exercised, or had the power to exercise, one of the 12 powers in 2(11), and then to determine whether the nurses employed independent judgment in using the power. *See id.* (Cohen, Board Member, dissenting).

⁸⁴ *Id.* (Cohen, Board Member, dissenting).

⁸⁵ *Id.* (Cohen, Board Member, dissenting).

⁸⁶ *Nymed, Inc.*, 320 N.L.R.B. at 814, 151 L.R.R.M. (BNA) at 1207 (Cohen, Board Member, dissenting).

⁸⁷ *Id.* (Cohen, Board Member, dissenting).

⁸⁸ *Id.* at 815, 151 L.R.R.M. (BNA) at 1207 (Cohen, Board Member, dissenting). In deciding that the assignment of extra duties also rendered the LPNs supervisors, Board Member Cohen found it unimportant that the assignments were of a short duration and changed often. *See id.* (Cohen, Board Member, dissenting).

⁸⁹ *Id.* at 815, 151 L.R.R.M. (BNA) at 1207-08 (Cohen, Board Member, dissenting).

⁹⁰ *Id.* at 815, 151 L.R.R.M. (BNA) at 1208 (Cohen, Board Member, dissenting).

⁹¹ *Nymed, Inc.*, 320 N.L.R.B. at 815, 151 L.R.R.M. (BNA) at 1208 (Cohen, Board Member, dissenting).

Cohen stated that the LPNs played an effective role in disciplining, evaluating and recommending transfers for assistants.⁹² He argued that the DON relied upon the LPNs' reports in disciplining assistants and thus the LPNs' recommendations were indeed effective.⁹³ He observed that the LPNs' evaluations could affect the assistants' positions.⁹⁴ Lastly, concerning transfer recommendations, Board Member Cohen noted that about six assistants were transferred after LPNs had made such recommendations and hence the recommendations were effective.⁹⁵ Thus, Board Member Cohen concluded that the LPNs were supervisors under the Act.⁹⁶

Nymed, Inc. is important because the Board purported to enunciate the guidelines by which it will analyze future health care supervisor cases.⁹⁷ These guidelines, however, are so vague and imprecise that they are of little use to the health care industry, and will undoubtedly create more litigation. More importantly, the guidelines are seriously flawed as they are contrary to the Board's precedent and Congress's intent in enacting section 2(11).⁹⁸ Finally, these guidelines will rapidly become obsolete as the health industry evolves and gives more power to front-line employees.⁹⁹

First, the guidelines are vague and imprecise, particularly where the Board addresses the LPNs' use of independent judgment in directing the assistants.¹⁰⁰ As Board Member Cohen argued in his dissent, it is clear that in this situation the LPNs relied on their own judgment in designing a care plan and directing its implementation.¹⁰¹ The Board has left no clear line between independent and professional judg-

⁹² *Id.* at 815-16, 151 L.R.R.M. (BNA) at 1208 (Cohen, Board Member, dissenting).

⁹³ *Id.* (Cohen, Board Member, dissenting).

⁹⁴ *Id.* at 816, 151 L.R.R.M. (BNA) at 1208 (Cohen, Board Member, dissenting).

⁹⁵ *Id.* (Cohen, Board Member, dissenting).

⁹⁶ *Nymed, Inc.*, 320 N.L.R.B. at 816, 151 L.R.R.M. (BNA) at 1208 (Cohen, Board Member, dissenting).

⁹⁷ See *id.* at 809, 151 L.R.R.M. (BNA) at 1202-03. In an address to Western Reserve University on April 22, 1996, Chairman Gould stated that the Board's decision in these two cases provides considerable guidance, but that the Board had been unable to fashion a generalized rule. See William B. Gould, *In the Wake of the Blizzard of '96 and the Government Shutdowns: Part II of the Clinton Board's Decision*, DAILY LAB. REP. (BNA), Apr. 22, 1996, at d29.

⁹⁸ See *Northrest Nursing Home*, 313 N.L.R.B. 491, 504, 145 L.R.R.M. (BNA) 1213, 1229 (1993); 93 CONG. REC. 4715 (1947), reprinted in 2 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1303 (1985) [hereinafter NLRB LEGISLATIVE HISTORY].

⁹⁹ See *NLRB Review of Supervisory Status May Extend Beyond Health Care*, DAILY LAB. REP. (BNA), Oct. 31, 1996, at d3. The American Hospital Association contended in oral argument that the industry is in the throes of a revolution and is changing how it delivers care. See *id.*

¹⁰⁰ See *Nymed, Inc.*, 320 N.L.R.B. at 811-12, 151 L.R.R.M. (BNA) at 1204-05.

¹⁰¹ See *id.* at 815, 151 L.R.R.M. (BNA) at 1207-08 (Cohen, Board Member, dissenting). The Board stated that this was not supervisory because other staff members looked at the plan. *Id.*

ment.¹⁰² What is clear is that the Board will minimize any independent judgment that employees use in order to find them protected under the Act.

Furthermore, the Board had earlier decided in *Northcrest* that LPNs in a very similar position to those in this case had used independent judgment in directing other employees.¹⁰³ In *Northcrest*, the nurses in question had similar responsibilities to those in *Nymed, Inc.*, except that the *Northcrest* nurses did not write a long-term care plan.¹⁰⁴ The Board stated that the evidence showed that the nurses in *Northcrest* used their own independent judgment in directing the tasks.¹⁰⁵ The Board, however, was able to use the patient care analysis to protect the nurses in *Northcrest*, an analysis since discredited by the Supreme Court.¹⁰⁶ As this analysis is no longer viable, the Board should follow its own precedent and find that the nurses in *Nymed, Inc.* also use independent judgment and, therefore, are supervisors.¹⁰⁷

Moreover, the Board is ignoring Congress's intent in enacting section 2(11) by deciding that these LPNs do not use independent judgment in responsibly directing the assistants.¹⁰⁸ As Board Member Cohen argued persuasively in his dissent, the situation of the nurses is exactly that described by Senator Flanders when he proposed "responsibly direct" as an addition to the supervisory definition.¹⁰⁹ Senator Flanders explained that he wanted to include those who determine, under general orders, what job shall be undertaken next and who shall do it.¹¹⁰ The LPNs in *Nymed, Inc.* were under general orders concerning

at 811-12, 151 L.R.R.M. (BNA) at 1204-05 (Cohen, Board Member, dissenting). This line of reasoning, however, is flawed as it assumes that the LPNs did not use their independent judgment in designing the plan. Merely because the LPNs' work is reviewed by superiors does not render them non-supervisory.

¹⁰² See *id.* at 811-12, 151 L.R.R.M. (BNA) at 1204-05.

¹⁰³ See 313 N.L.R.B. at 492, 145 L.R.R.M. (BNA) at 1217. As discussed above, the Board held that they were still not nurses by using the patient care analysis. See *id.* at 509, 145 L.R.R.M. (BNA) at 1233; see *supra* notes 10-17 and accompanying text.

¹⁰⁴ Compare *Northcrest Nursing Home*, 313 N.L.R.B. at 502-03, 145 L.R.R.M. (BNA) at 1228 with *Nymed, Inc.*, 320 N.L.R.B. at 808, 151 L.R.R.M. (BNA) at 1200-01.

¹⁰⁵ *Northcrest Nursing Home*, 313 N.L.R.B. at 504-05, 145 L.R.R.M. (BNA) at 1229-30.

¹⁰⁶ See *id.*; see also *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 577, 145 L.R.R.M. (BNA) 2321, 2324 (1994).

¹⁰⁷ See *Northcrest Nursing Home*, 313 N.L.R.B. at 504-05, 145 L.R.R.M. (BNA) at 1229-30. The Supreme Court test mandates the Board to determine if the role of the nurses encompasses front-line prerogatives. See *Health Care & Retirement Corp.*, 511 U.S. at 583, 146 L.R.R.M. (BNA) at 2326.

¹⁰⁸ See 2 NLRB LEGISLATIVE HISTORY, *supra* note 98, at 1303.

¹⁰⁹ See *Nymed, Inc.*, 320 N.L.R.B. at 815, 151 L.R.R.M. (BNA) at 1208 (Cohen, Board Member, dissenting).

¹¹⁰ See 2 NLRB LEGISLATIVE HISTORY, *supra* note 98, at 1303.

patient care and they were responsible for applying this general plan and directing others in executing it.¹¹¹ As this is exactly the situation that Senator Flanders envisioned, the Board should have applied the statute as Congress intended and found these LPNs to be supervisors.¹¹²

Finally, as the American Hospital Association stated in its position statement, the health care service industry is rapidly changing.¹¹³ Nurses now are vested with much more power than their predecessors and are more accountable for what occurs in the health care facility.¹¹⁴ The Board has left itself with no effective way of dealing with the evolving nature of health services. The Supreme Court has stated that Congress intended for the Act to accommodate a pyramidal hierarchy of management, as was common at the time it was written.¹¹⁵ The new type of management, with decentralized power structures and front-line management empowerment, may make the Act itself obsolete in its present form. The Board has taken the short-term attitude of trying to mold the Act to fit its own view, which will become increasingly difficult. A bolder position would have been for the Board to apply the statute as it was written and intended, and find that the LPNs were supervisors. Although this result would have been unpalatable to many, it might have forced Congress to re-examine the Act. The Board's quick fix method of ignoring the reality of the situations it examines will do more harm in the long run, as it will increase litigation and breed uncertainty in the industry.¹¹⁶

In summary, the Board in *Nymed, Inc.* held that LPNs were not supervisors under the Act.¹¹⁷ It examined various supervisory indicia and decided that the LPNs either did not exercise them or did not use independent judgment in doing so.¹¹⁸ The Board did not set out a definite rule to be followed in deciding such cases in the future but, rather, gave a set of guidelines to be followed in examining the facts of each case.¹¹⁹ These guidelines, however, are unclear and the Board

¹¹¹ See *Nymed, Inc.*, 320 N.L.R.B. at 808, 151 L.R.R.M. (BNA) at 1200-01.

¹¹² See 2 NLRB LEGISLATIVE HISTORY, *supra* note 98, at 1303.

¹¹³ See Position Statement on behalf of Amicus Curiae American Hospital Association at 1, *Nymed, Inc.*, 320 N.L.R.B. 806, 151 L.R.R.M. (BNA) 1198 (Feb. 2, 1996) (No. 3-RC-10166).

¹¹⁴ See *id.* at 809.

¹¹⁵ *NLRB v. Yeshiva University*, 444 U.S. 672, 680, 103 L.R.R.M. (BNA) 2526, 2530 (1980).

¹¹⁶ See 10 LAB. REL. WEEK 157 (Feb. 19, 1996). At the moment, however, both unions and management state that they are happy with the *Nymed* decision. See *id.* The unions were pleased because the decision recognized professional judgment, and management was pleased because the decisions would be made on a case by case basis. See *id.*

¹¹⁷ 320 N.L.R.B. at 813, 151 L.R.R.M. (BNA) at 1206.

¹¹⁸ *Id.*

¹¹⁹ See *id.* at 809, 151 L.R.R.M. (BNA) at 1202-03.

ignored important precedent in establishing them.¹²⁰ Furthermore, the Board has ignored important changes that are taking place in the health care industry.¹²¹ Thus, this decision may lead to increased litigation and less certainty for the industry.

D. **Status of Charge Nurses as "Supervisors" Under the National Labor Relations Act: Providence Hospital & Alaska Nurses Ass'n*¹

The purpose of the National Labor Relations Act (the "Act") is to protect employees from unfair labor practices by enabling employees to organize into collective bargaining units.² Congress amended the Act in 1947 so that supervisors were no longer employees for purposes of the Act's protections.³ Section 2(11) of the Act defines supervisor as one who performs one of twelve listed functions in the interest of the employer and acts with independent judgment.⁴ Congress intended to exclude supervisors from the protections of the Act so as to maintain a balance between employers and unions and to prevent conflicts of interest on the part of the supervisors.⁵

Section 2(12) of the Act, however, expressly includes professionals in the definition of employees who are protected under the Act.⁶ Because of this explicit inclusion, the National Labor Relations Board (the "Board") and the courts have had a difficult time formulating a standard that excludes employees who perform supervisory functions, while not excluding employees who perform these functions in the

¹²⁰ See *id.* at 815, 151 L.R.R.M. (BNA) at 1207-08; *Northcrest Nursing Home*, 313 N.L.R.B. at 504, 145 L.R.R.M. (BNA) at 1229.

¹²¹ See *NLRB Review of Supervisory Status May Extend Beyond Health Care*, DAILY LAB. REP. (BNA), October 31, 1994, at d3.

* By Colleen A. Manning, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 320 N.L.R.B. 717, 151 L.R.R.M. (BNA) 1177 (1996).

² See 29 U.S.C. § 151 (1996).

³ See *id.* § 152(11) (1996). This section is more commonly referred to as "section 2(11)." See, e.g., *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 578, 146 L.R.R.M. (BNA) 2321, 2324 (1994).

⁴ 29 U.S.C. § 152(11). Section 2(11) provides:

The term supervisor means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id.

⁵ See, e.g., *Health Care*, 511 U.S. at 572, 146 L.R.R.M. (BNA) at 2321; *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 281, 85 L.R.R.M. (BNA) 2945, 2950 (1974).

⁶ 29 U.S.C. § 152(12) (1996). This section is more commonly referred to as "section 2(12)." See *Health Care*, 511 U.S. at 585, 146 L.R.R.M. (BNA) at 2327 (Ginsburg, J., dissenting).

capacity of a professional.⁷ One specific area that has stirred controversy and confusion is the health care industry.⁸ The issue in the instant case is whether a charge nurse who performs certain supervisory functions does so strictly as a supervisor, thereby warranting exclusion from the Act's protections, or as a professional, thereby warranting inclusion.⁹

In 1949, in *Ohio Power Co. v. NLRB*, the United States Court of Appeals for the Sixth Circuit held that any employee who responsibly directs other employees is a supervisor as defined in section 2(11) and thus, is not entitled to the Act's protections.¹⁰ In *Ohio Power*, the employer refused to bargain with a bargaining unit because the unit included control operators, whom the employer argued were supervisors, and according to the Act, employers are not required to bargain with units containing supervisors.¹¹ The control operators' duties included directing the activities of both assistant control operators and auxiliary equipment operators, but the control operators had no authority to hire, discharge or discipline employees.¹² The Sixth Circuit decided in the employer's favor, stating that, even though the control operators did not exercise any of the specific powers set forth in the statute, they nevertheless engaged in supervisory activities.¹³ The court defined the statutory term "responsible" as being accountable for the completion of certain duties.¹⁴ The court further stated that responsibility included judgment, skill, ability, capacity and integrity, and can be implied by the existence of power.¹⁵ Using this definition, the court held that because the control operators in Ohio Power Company had the duty to responsibly direct a particular unit and the employees under them, they were supervisors as defined by section 2(11).¹⁶

In 1974, in *NLRB v. Bell Aerospace Co.*, the United States Supreme Court held that Congress intended to exclude from the protections of

⁷ See, e.g., *Health Care*, 511 U.S. at 573-78, 146 L.R.R.M. (BNA) at 2322-27; *Bell Aerospace*, 416 U.S. at 274-89, 85 L.R.R.M. (BNA) at 2947-53.

⁸ See *Health Care*, 511 U.S. at 574, 146 L.R.R.M. (BNA) at 2322.

⁹ See *Providence Hosp.*, 320 N.L.R.B. at 717, 115 L.R.R.M. (BNA) at 1180.

¹⁰ 176 F.2d 385, 387, 24 L.R.R.M. (BNA) 2350, 2352 (6th Cir. 1949).

¹¹ *Id.* at 385, 24 L.R.R.M. (BNA) at 2351.

¹² See *id.* at 386, 24 L.R.R.M. (BNA) at 2351.

¹³ *Id.* at 387, 24 L.R.R.M. (BNA) at 2352 (quoting Sen. Flanders' statements made on Senate floor when he proposed phrase "responsibly to direct" for inclusion in statute).

¹⁴ *Id.*

¹⁵ See *Ohio Power*, 176 F.2d at 387, 24 L.R.R.M. (BNA) at 2352.

¹⁶ *Id.* The court also rejected the Board's reliance on legislative history, stating that where, as here, the wording of a statute is clear, there is no need to examine the legislative history to interpret its meaning. *Id.*

the Act all employees properly classified as "managerial," not just those in positions susceptible to conflicts of interest in labor relations.¹⁷ In *Bell Aerospace*, twenty-five buyers in the purchasing and procurement department at Bell Aerospace's plant petitioned the Board for a representation election to determine whether a particular union could be certified as their bargaining representative.¹⁸ The buyers served as team chairpersons and had full discretion in selecting prospective vendors, drafting invitations to bid, evaluating submitted bids, negotiating prices and terms and preparing purchase orders.¹⁹

In reaching its decision, the Supreme Court first determined what Congress intended when it used the phrase "managerial employees" in section 2(11).²⁰ The Court relied on various factors which pointed unmistakably to the conclusion that managerial employees are not covered by the Act.²¹ First, the Court stated that nowhere in the Boards early decisions, nor in the decisions following the passage of the 1947 version of the Act, did the Board include managerial employees in the Act's protections.²² The Court further stated that Congress's intent to exclude managerial employees because of their close relationship with the employer was clear from both the House and Senate Reports which voiced serious concerns about conflicts of interest.²³ In addition, the Court noted that the courts of appeals had consistently approved the Board's exclusion of managerial employees and had specifically disapproved of the Board's departure from this position.²⁴ The Court did not allow the Board to read a more restrictive meaning of "managerial employees" into the Act.²⁵ Thus, although the Court did not actually decide whether the buyers were managerial employees, it held that the Board's construction of the phrase was too narrow and that all employees properly classified as managerial, not just those in positions susceptible to conflicts of interest in labor relations, were excluded from the protections of the Act.²⁶

In 1989, in *Children's Habilitation Center, Inc. v. NLRB*, the United States Court of Appeals for the Seventh Circuit held that although charge nurses at residential facilities performed certain supervisory

¹⁷ 416 U.S. at 269, 85 L.R.R.M. (BNA) at 2945.

¹⁸ *Id.* at 269, 85 L.R.R.M. (BNA) at 2945-46.

¹⁹ *See id.* at 270, 85 L.R.R.M. (BNA) at 2946.

²⁰ *See id.* at 275, 85 L.R.R.M. (BNA) at 2948.

²¹ *Id.* at 289, 85 L.R.R.M. (BNA) at 2953.

²² *Bell Aerospace*, 416 U.S. at 276, 285, 85 L.R.R.M. (BNA) at 2948, 2952.

²³ *Id.* at 281, 85 L.R.R.M. (BNA) at 2950.

²⁴ *Id.* at 288-89, 85 L.R.R.M. (BNA) at 2952-53.

²⁵ *See id.* at 289, 85 L.R.R.M. (BNA) at 2953.

²⁶ *Id.* at 289-90, 85 L.R.R.M. (BNA) at 2953.

functions, they were not supervisors as defined in section 2(11).²⁷ In *Children's Habilitation Center*, five charge nurses in dispute had limited authority to discipline, but there was no evidence that they had the authority to discharge or suspend.²⁸ Even when the charge nurse was the only person in a position of authority on a night shift, the official supervisor was only a phone call away, thus limiting the nurses' authority.²⁹

The court acknowledged that there are legitimate policy considerations for the exclusion of supervisors, such as maintaining a reasonable balance of power between employer and union, but stated that those policy reasons were not necessarily compromised by including these charge nurses in the protections of the Act.³⁰ After determining that the statutory indicia listed in section 2(11) were present, the court further considered the ratio of supervisory to non-supervisory employees, as well as the disciplinary authority of the alleged supervisors.³¹ As to the performance of duties that appeared to be supervisory in character, the court concluded that the charge nurses were merely acting in accordance with their professional training.³² Although the Seventh Circuit recognized that the charge nurses performed certain supervisory functions, such as initialing time cards, it ultimately held that those duties were too routine to classify the charge nurses as supervisors and, thus, declined to place the charge nurses under the Act's protections.³³

In 1993, in *Northcrest Nursing Home*, the Board held that charge nurses are supervisors only when they exercise supervisory authority in the interest of their employer, not when they exercise professional judgment incidental to patient care.³⁴ In *Northcrest*, charge nurses performed various activities such as handing out assignments and prepar-

²⁷ 887 F.2d 130, 134, 132 L.R.R.M. (BNA) 2780, 2783 (7th Cir. 1989).

²⁸ *Id.* at 133, 132 L.R.R.M. (BNA) at 2782.

²⁹ *See id.* at 133, 132 L.R.R.M. (BNA) at 2783.

³⁰ *Id.* at 131-32, 132 L.R.R.M. (BNA) at 2781.

³¹ *Id.* at 132, 132 L.R.R.M. (BNA) at 2782. At this facility there were five charge nurses per 55 employees, and the court stated that looking at the ratio alone did not warrant a holding that the Board erred in excluding charge nurses. *Id.* at 132-33, 132 L.R.R.M. (BNA) at 2782. Likewise, the evidence showed that the charge nurses' responsibility for discipline was not so great as to make serious problems of divided loyalties inevitable. *See id.*

³² *Children's Habilitation*, 887 F.2d at 134, 132 L.R.R.M. (BNA) at 2783. The court stated that "Supervision exercised in accordance with professional rather than business norms is not supervision within the meaning of the supervisor provision, for no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the company's profit-maximizing objections." *Id.*

³³ *See id.*

³⁴ 313 N.L.R.B. 491, 504-05, 145 L.R.R.M. (BNA) 1214, 1229 (1993).

ing shift reports, suggesting that the nurses sometimes used independent judgment in the assignment and direction of aides.³⁵ The Board first determined that the charge nurses possessed at least one of the twelve statutory indicia of supervisory authority.³⁶ Having found that the nurses performed at least one of the listed supervisory functions, the Board then addressed the question of whether the nurses exercised this function using their independent judgment in the interest of their employer.³⁷ To assist in making that determination, the Board invoked the "patient care" analysis as an aid to determine supervisory status, which ensures that nurses will not be excluded from the Act's protections simply because of their professional responsibility.³⁸ The Board found that although the nurses exercised independent judgment, the nurses used their judgment as an extension of their professional judgment and not in the interest of their employer.³⁹ The Board acknowledged that the charge nurses performed certain non-professional supervisory functions in the interest of the employer, but stated that because they were exercised in a routine or clerical manner, those functions were not indicative of supervisory authority.⁴⁰

Only two months after the *Northcrest* decision, in 1994, in *NLRB v. Health Care & Retirement Corp.*, the United States Supreme Court rejected *Northcrest's* patient care analysis standard and stated that the Board created a false dichotomy—between acts taken in connection with patient care and acts taken in the interest of the employer—and that such a standard was inconsistent with the Act and the Court's precedents.⁴¹ *Health Care & Retirement Corp.* arose out of an allegation that the employer committed unfair labor practices in disciplining four licensed practical nurses ("LPNs").⁴² The nurses performed functions

³⁵ *Id.* at 501-03, 145 L.R.R.M. (BNA) at 1226-28.

³⁶ *Id.* at 504, 145 L.R.R.M. (BNA) at 1229.

³⁷ *Id.* at 504-05, 145 L.R.R.M. (BNA) at 1229.

³⁸ *See id.* at 493, 505, 145 L.R.R.M. (BNA) at 1218, 1229.

³⁹ *Northcrest*, 313 N.L.R.B. at 505, 145 L.R.R.M. (BNA) at 1229.

⁴⁰ *Id.* at 505, 145 L.R.R.M. (BNA) at 1230. The Board also discussed other indicators of supervisory authority and referred to such indicators as "secondary indicia." *Id.* at 498, 145 L.R.R.M. (BNA) at 1224. Two examples of "secondary indicia" are the ratio of supervisors to non-supervisors and whether an employee is the highest person in charge in a given shift. *See id.* The circuit courts are in disagreement about the weight of these two factors. *See id.* at 499, 145 L.R.R.M. (BNA) at 1224-25. The Fourth, Sixth, and Seventh Circuits place considerable weight on them, and the Seventh Circuit has called the ratio a "guiding light." *See id.* (quoting *Children's Habilitation*, 887 F.2d at 132, 132 L.R.R.M. (BNA) at 2782).

⁴¹ *Health Care*, 511 U.S. at 576-77, 146 L.R.R.M. (BNA) at 2323-24.

⁴² *Id.* at 574-75, 146 L.R.R.M. (BNA) at 2323.

such as ensuring adequate staffing, monitoring aides' work and disciplining aides.⁴³

The Supreme Court ultimately rejected the patient care analysis, stating that it was inconsistent with the Act and the Court's precedents; however, the Court declined to determine the status of the disputed employees.⁴⁴ The Court stated that a nursing home's business is patient care and, therefore, nurses attend to the needs of patients in the employer's interest.⁴⁵ The Court noted that any act performed within the scope of employment or for the employer's authorized business would be in the interest of the employer under an ordinary meaning of the phrase, and that there is no indication that Congress intended a different construction of the phrase.⁴⁶ The Court acknowledged that the Board was troubled because of the inherent ambiguities in the language of section 2(11) and that the patient care analysis assists the Board in resolving these cases; the Court stated, however, that an ambiguity in one portion of a statute does not give the Board license to distort other provisions of the statute.⁴⁷ Thus, the Supreme Court rejected the patient care analysis and held that this test for determining the supervisory status of nurses was inconsistent with the Act and subsequent case precedent.⁴⁸

During the *Survey* year, in *Providence Hospital & Alaska Nurses Ass'n*, the Board concluded that the charge nurses in dispute did not exercise independent judgment in the performance of their duties as required to warrant exclusion from the protections of the Act.⁴⁹ *Providence Hospital* addressed the impact of the Supreme Court's rejection of the patient care analysis, and in compliance with that decision, the Board returned to the traditional analysis for determining supervisory status in the health care industry.⁵⁰ In *Providence Hospital*, certain reg-

⁴³ See *id.*

⁴⁴ *Id.* at 578-80, 146 L.R.R.M. (BNA) at 2323-25. In her dissent, Justice Ginsburg feared that the ramifications of this decision could be far-reaching and could have the effect of excluding all professional employees from protections of the Act. *Id.* at 597-98, 146 L.R.R.M. (BNA) at 2332 (Ginsburg, J., dissenting).

⁴⁵ *Id.* at 577-78, 146 L.R.R.M. (BNA) at 2324.

⁴⁶ *Health Care*, 511 U.S. at 578, 146 L.R.R.M. (BNA) at 2324.

⁴⁷ *Id.* at 579-80, 146 L.R.R.M. (BNA) at 2324-25.

⁴⁸ *Id.* at 584, 146 L.R.R.M. (BNA) at 2326.

⁴⁹ 320 N.L.R.B. 717, 717, 151 L.R.R.M. (BNA) 1177, 1180 (1996). Despite the Board's decision to certify the nurses' union as the exclusive collective-bargaining unit, the employer continued to refuse to bargain with them, arguing that the inclusion of the supervisory and managerial employees tainted the election. *Providence Hosp. & Alaska Nurses Ass'n*, 321 N.L.R.B. No. 100 1, 1 (July 10, 1996). On a motion for summary judgment, the Board ordered the employer to cease and desist from refusing to bargain. See *id.*

⁵⁰ 320 N.L.R.B. at 726, 151 L.R.R.M. (BNA) at 1188.

istered nurses ("RNs") petitioned to determine whether they could be included in a bargaining unit and thus be eligible to vote in the election.⁵¹ The issue in this case was the status of RNs who occasionally worked as charge nurses.⁵² No disputed RN served as a permanent charge nurse, thus the question before the Board was whether their duties while serving as charge nurses were sufficient to classify them as supervisors.⁵³

The employer alleged that the charge nurses performed two separate functions listed in the Act—assigning and responsibly directing.⁵⁴ As far as the RNs' assigning duties, the charge nurses had no authority in making the monthly schedules, but in unusual situations, they sometimes needed to make staffing changes during their shift.⁵⁵ There was no evidence that the charge nurses could require an employee to work.⁵⁶ With respect to responsibly directing the nurses, charge nurses coordinated patient care within their respective areas and prepared end-of-shift reports.⁵⁷ A charge nurse could intervene in disputes between staff members or discuss problems with them, but there was no indication that charge nurses formally counseled the staff members.⁵⁸

In beginning its analysis, the Board stated that if an employee performed any of the twelve statutory indicia, the Board would next determine if the employee satisfied the other requirements.⁵⁹ The Board noted that when Congress enacted section 2(11), it intended to distinguish between true supervisors who perform genuine management duties and straw bosses, leadmen and set-up men who are protected by the Act even though they perform minor supervisory duties.⁶⁰ The employer in this case argued that the RN charge nurses used independent judgment to responsibly direct and assign employees, and thus, the Board should classify them as supervisors under section 2(11) and exclude them from the Act's protections.⁶¹

⁵¹ *Id.* at 717–18, 151 L.R.R.M. (BNA) at 1180.

⁵² *See id.* The Board also addressed the supervisory status of various home health care leaders and other similar nursing positions. *See id.*

⁵³ *See id.* at 718, 151 L.R.R.M. (BNA) at 1180.

⁵⁴ *See id.* at 725, 151 L.R.R.M. (BNA) at 1187.

⁵⁵ *See Providence Hosp.*, 320 N.L.R.B. at 727, 151 L.R.R.M. (BNA) at 1189.

⁵⁶ *See id.* at 732, 151 L.R.R.M. (BNA) at 1193.

⁵⁷ *See id.*

⁵⁸ *See id.* at 719, 151 L.R.R.M. (BNA) at 1182.

⁵⁹ *Id.* at 725, 151 L.R.R.M. (BNA) at 1187.

⁶⁰ *Providence Hosp.*, 320 N.L.R.B. at 725, 151 L.R.R.M. (BNA) at 1187 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–81, 85 L.R.R.M. (BNA) 2945, 2950 (1974) (quoting S. Rep. No. 105, at 4 (1947))).

⁶¹ *See id.* As for the term "assignment," the Board held that whatever authority the RN charge

The Board first determined whether the RN charge nurses did in fact have the authority to responsibly direct other employees.⁶² The Board noted that they must first determine whether the exercise of any statutory indicia was of a merely routine or clerical nature or whether it required the use of independent judgment on the part of the employee in dispute.⁶³ The Board noted the difficulty of this analysis when the employee's authority arises from his or her professional knowledge versus when the authority arises from actual supervisory functions.⁶⁴

The Board then acknowledged that since the decision in *Ohio Power*, many courts had attempted to set parameters on the "responsibly to direct" indicia.⁶⁵ For example, the Board noted that the Sixth Circuit in *Ohio Power* coined a test which provided that for an employee to qualify as a supervisor, the employee needed to be answerable for the discharge of a duty or obligation.⁶⁶ The Board chose to use the traditional approach—examining whether the employee exercised independent judgment—in determining whether or not an employee responsibly directed.⁶⁷

The Board noted a distinction between supervisors who share management's power and non-supervisory employees whose direction of other employees stems from their professional judgment and skill.⁶⁸ Applying the general standards and guiding principles utilized in its traditional analysis of statutory supervisory functions, the Board held that the evidence did not establish that charge nurses' assignments were anything more than routine clerical tasks.⁶⁹ With respect to the statutory indicia "responsibly to direct," the Board acknowledged that the charge nurses have responsibilities as team leaders, but nevertheless affirmed the Regional Director's decision that their direction of employees was merely routine or clerical and did not require the use of independent judgment within the meaning of section 2(11).⁷⁰ The RN charge nurses did not satisfy either of the two alleged supervisory indicia; thus, the Board held that the charge nurses were not supervi-

nurses had to assign other staff members was not authority that required the use of independent judgment. *Id.* at 727, 151 L.R.R.M. (BNA) at 1189.

⁶² *Id.* at 727, 151 L.R.R.M. (BNA) at 1189.

⁶³ *Id.* at 728, 151 L.R.R.M. (BNA) at 1189.

⁶⁴ *Id.* at 728, 151 L.R.R.M. (BNA) at 1190.

⁶⁵ See *Providence Hosp.*, 320 N.L.R.B. at 728, 151 L.R.R.M. (BNA) at 1190.

⁶⁶ See *id.* at 728, 151 L.R.R.M. (BNA) at 1189 (quoting *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387, 24 L.R.R.M. (BNA) 2350, 2352 (6th Cir. 1949)).

⁶⁷ *Id.* at 729, 151 L.R.R.M. (BNA) at 1190.

⁶⁸ *Id.* at 729, 151 L.R.R.M. (BNA) at 1191.

⁶⁹ *Id.* at 731, 151 L.R.R.M. (BNA) at 1193.

⁷⁰ *Providence Hosp.*, 320 N.L.R.B. at 733, 151 L.R.R.M. (BNA) at 1194.

sors within the meaning of the Act and should therefore be included in the petitioned-for unit and eligible to vote in the election.⁷¹

In his dissenting opinion, Board Member Cohen rejected the majority's contention that the individuals who performed the two functions of a supervisor, assigning employees and responsibly directing employees, were not supervisors because they did not use independent judgment in performing these functions.⁷² To reach this conclusion, Board Member Cohen relied on legislative history, stating that the language "responsibly to direct" was added to section 2(11) in order to distinguish between straw bosses, leadmen, set-up men and other minor supervisory employees.⁷³ Aside from the differences in statutory interpretation, the dissent also disagreed with the majority's determination that the RN charge nurses exercised only routine functions in assigning employees.⁷⁴ Board Member Cohen argued that the charge nurses, and the other positions analyzed in this decision, used their independent judgment in performing the two supervisory functions and therefore were not entitled to the protections of the Act.⁷⁵

In determining the supervisory status of employees in the health care field, the Board abandoned its patient care analysis, which some may consider "pro-employee" because it categorically denied supervisory status to anyone who performed functions in the interest of the patient, for the traditional analysis, which requires a fact-specific inquiry thereby opening the door to more "pro-employer" results.⁷⁶ Although the traditional approach has the potential effect of making outcomes uncertain and encouraging litigation, the Supreme Court was correct when it rejected the patient care analysis, and contrary to what people feared, the Court's rejection did not result in a "pro-employer" analysis.⁷⁷ Rather, the traditional fact-specific approach is a

⁷¹ *Id.* The Board continued to apply the same standards and guiding principles with respect to "assignment" and "direction" to other employees and concluded that they did not exercise their duties pursuant to independent judgment but, rather, in a routine and clerical manner. *Id.* at 733-36, 151 L.R.R.M. (BNA) at 1194-96.

⁷² *Id.* at 736, 151 L.R.R.M. (BNA) at 1197 (Cohen, Board Member, dissenting).

⁷³ *Id.* (Cohen, Board Member, dissenting).

⁷⁴ *See id.* at 737, 151 L.R.R.M. (BNA) at 1197 (Cohen, Board Member, dissenting). Board Member Cohen argued that the RN charge nurses used subjective judgment in assigning the employees and such subjective judgment required the use of independent analysis and decision making. *Id.* (Cohen, Board Member, dissenting).

⁷⁵ *Providence Hosp.*, 320 N.L.R.B. at 737-38, 151 L.R.R.M. (BNA) at 1198 (Cohen, Board Member, dissenting).

⁷⁶ *See id.* at 726-27, 151 L.R.R.M. (BNA) at 1188.

⁷⁷ *See NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 576-78, 146 L.R.R.M. (BNA) 2321, 2323-24 (1994).

better test because it is consistent with Congress's intent and adequately serves the purposes of both section 2(11) and 2(12).⁷⁸

Since the Sixth Circuit's decision in *Ohio Power*, the Board and the courts have attempted to develop a standard that will solve the problem of improperly excluding those who perform supervisory functions in their capacity as professionals while properly excluding those who are truly supervisors and not merely straw bosses.⁷⁹ The Board's early decisions merely excluded any employee in a managerial capacity without much inquiry into the specifics of the employee's duties and professional capacity.⁸⁰ Believing that this type of analysis excluded too many employees from the protections of the Act, the Board began to use the patient care analysis, which restricted the definition of supervisor.⁸¹ The Supreme Court rejected that analysis because patient care is the business of a nursing home; thus, distinguishing between acts done in the interest of the patient and acts done in the interest of the employer was a distinction without a difference.⁸² The Supreme Court held that the Board should use the same traditional analysis used in other industries, i.e., a determination that one of the twelve statutory indicia of a supervisor is present and that the employee performs those functions in the interest of the employer with independent judgment.⁸³

One reason the Board adopted the patient care analysis was to avoid the problem of having to distinguish between supervisors and professionals.⁸⁴ Since the Court rejected the analysis, the Board is once again faced with the difficulty of explaining the difference between the exercise of professional responsibility and the exercise of statutory supervisory authority.⁸⁵ In addition to the difficulty the Board may have in making these determinations using the traditional analysis, their decisions also have the potential of being inconsistent because they will be decided on a case by case basis.⁸⁶ Therefore, how the particular charge nurses' duties are categorized may significantly influence the outcome. Now, the Board merely looks to see if the disputed employee

⁷⁸ See e.g., *Providence Hosp.*, 320 N.L.R.B. at 725-27, 151 L.R.R.M. (BNA) at 1186-88.

⁷⁹ See, e.g., *Health Care*, 511 U.S. at 582-84, 146 L.R.R.M. (BNA) at 2326-27; *Bell Aerospace*, 416 U.S. at 289, 85 L.R.R.M. (BNA) at 2945; *Northcrest Nursing Home*, 313 N.L.R.B. 491, 493, 145 L.R.R.M. (BNA) 1214, 1218-19 (1993).

⁸⁰ See *Bell Aerospace*, 416 U.S. at 289, 85 L.R.R.M. (BNA) at 2953; *Ohio Power*, 176 F.2d at 387, 24 L.R.R.M. (BNA) at 2352.

⁸¹ See *Northcrest*, 313 N.L.R.B. at 493, 145 L.R.R.M. (BNA) at 1219.

⁸² See *Health Care*, 511 U.S. at 577-78, 146 L.R.R.M. (BNA) at 2324.

⁸³ See *id.* at 583-84, 146 L.R.R.M. (BNA) at 2326.

⁸⁴ See *Providence Hosp.*, 320 N.L.R.B. at 726-27, 151 L.R.R.M. (BNA) at 1187-88.

⁸⁵ See *id.* at 727, 151 L.R.R.M. (BNA) at 1188.

⁸⁶ See *id.*

performs one of the twelve listed functions and, if so, asks whether the function was performed in the interest of the employer and with independent judgment.⁸⁷ Those terms may be analyzed differently depending on how the Board wishes to come out in a particular case.

Although criticism of such a seemingly arbitrary factual determination is surely justified, a more categorical test, such as the patient care analysis, also deserves the same degree of criticism. The patient care analysis is potentially imperfect in that it wholly ignores the fact that hospitals are businesses and the patients are essentially customers.⁸⁸ The patient care analysis assisted the Board in keeping professionals included under the Act's protection, but it ignored Congress's intention to expressly exclude supervisors.⁸⁹

The fear after *Health Care & Retirement* was that all professionals would be excluded from the Act because the term "supervisor" would be read too broadly.⁹⁰ The decision in *Providence Hospital* proves that fear to be unfounded where, even without the "pro-employee" patient care analysis, the Board still found in favor of the charge nurses.⁹¹ In *Providence Hospital*, the Board examined the facts and determined that the RN charge nurses did not satisfy any of the statutory indicia of a supervisor.⁹² Because the traditional analysis is primarily a factual analysis, outcomes may be hard to predict.

While a case by case analysis may be a practitioner's nightmare, it is the most fair and statutorily consistent way to determine these cases. If necessary, the Board could implement specific guiding principles to assist employers and employees.⁹³ A case by case analysis based entirely on the specific facts of each case serves both the purposes of section 2(11), which excludes supervisors, and section 2(12), which specifically includes professionals, provided that the Board's decisions are relatively consistent and not arbitrary manipulations of facts.⁹⁴

In conclusion, the Board in *Providence Hospital* invoked its traditional analysis to determine whether RN charge nurses were supervi-

⁸⁷ See *id.*

⁸⁸ See *Health Care*, 511 U.S. at 577-78, 146 L.R.R.M. (BNA) at 2324.

⁸⁹ See *id.*

⁹⁰ See *id.* at 585-86, 146 L.R.R.M. (BNA) at 2327 (Ginsburg, J., dissenting).

⁹¹ See 320 N.L.R.B. at 733, 151 L.R.R.M. (BNA) at 1194.

⁹² See *id.*

⁹³ For example, the Board could use the secondary indicia articulated in *Children's Habilitation* and therefore, in making determinations, the Board would need to examine the ratio of supervisory employees to non-supervisory employees as well as to examine who has the disciplinary authority in a given shift. See *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 132, 132 L.R.R.M. (BNA) 2780, 2782 (7th Cir. 1989).

⁹⁴ See, e.g., *Providence Hosp.*, 320 N.L.R.B. at 725-27, 151 L.R.R.M. (BNA) at 1186-88.

sors for purposes of inclusion in the Act's protections.⁹⁵ This type of analysis requires a factual determination of whether the disputed employee performs at least one of the twelve statutory indicia listed in section 2(11) of the Act, and whether the employee performs his or her duties in the interest of the employer using independent judgment.⁹⁶ Although some may consider the traditional approach too ad hoc, potentially producing inconsistent results, the approach is probably the most fair and consistent with the statute. Requiring the Board to look carefully at the particular duties of a health care worker will help to ensure that the decisions will be consistent with Congress's intention of excluding only those employees who are too closely related to the employer, so as to create a conflict of interest, without unfairly excluding professionals who do not create such a concern.⁹⁷

⁹⁵ *Id.* at 727, 151 L.R.R.M. (BNA) at 1188.

⁹⁶ *Id.*

⁹⁷ See, e.g., *Health Care*, 511 U.S. at 577-78, 146 L.R.R.M. at 2324; *Providence Hosp.*, 320 N.L.R.B. at 725-27, 151 L.R.R.M. (BNA) at 1186-88.

EMPLOYMENT DISCRIMINATION

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. **Non-Assistance Provisions of Settlement Agreements Deemed Unenforceable: Equal Employment Opportunity Commission v. Astra USA, Inc.*¹

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against employees on the basis of race, color, religion, sex or national origin.² The statute charges the Equal Employment Opportunity Commission ("EEOC") with investigating allegations of discrimination and enforcing Title VII.³ Although the EEOC's authority is predicated upon the filing of a charge, the EEOC does not merely act on behalf of private citizens; it also acts to vindicate the public interest in preventing discrimination in the workplace.⁴ At the same time, other public policy interests strongly favor private settlement of employment discrimination disputes and allow employees to release employers of liability from past unlawful practices or actions.⁵ Yet, private settlement can interfere with the EEOC's ability to enforce anti-discrimination laws by preventing disclosure of discriminatory practices to the EEOC.⁶ After weighing these divergent public interest and policy goals, the United States Court of Appeals for the First Circuit has ruled that employers may not enforce settlement agreements that prevent employees from communicating with the EEOC or cooperating with an EEOC investigation.⁷ The court reserved its opinion, however, on the question of whether or not non-filing agreements are unenforceable as a matter of public policy.⁸

* By Andrew J. Simons, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 94 F.3d 738, 71 Fair Empl. Prac. Cas. (BNA) 1267 (1st Cir. 1996).

² 42 U.S.C. § 2000e-2 (1988). Title VII states, in relevant 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

Id. § 2000e-2(a)(1).

³ *Id.* § 2000e-5.

⁴ See *Astra*, 94 F.3d at 744, 746, 71 Fair Empl. Prac. Cas. (BNA) at 1271, 1272-73.

⁵ See, e.g., *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 846-47, 853, 11 Fair Empl. Prac. Cas. (BNA) 167, 182-83, 187 (5th Cir. 1975).

⁶ See, e.g., *Astra*, 94 F.3d at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁷ *Id.* at 744-45, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁸ *Id.* at 746 n.7, 71 Fair Empl. Prac. Cas. (BNA) at 1273 n.7.

In 1975, in *United States v. Allegheny-Ludlum Industries, Inc.*, the United States Court of Appeals for the Fifth Circuit held that settlement agreements releasing employers from Title VII claims arising from antecedent discriminatory events are valid.⁹ In *Allegheny-Ludlum*, the EEOC and the Secretary of Labor brought an action against nine steel companies alleging widespread hiring and job assignment discrimination based upon race, sex and national origin.¹⁰ The parties negotiated consent agreements which included provisions for restitutional back pay.¹¹ To receive such back pay, however, employees were required to execute a comprehensive release of all Title VII and related claims.¹² The court reasoned that an employee's informed and voluntary release of a disputed employment discrimination claim in return for valuable consideration does not violate public policy.¹³ The court also recognized that public policy strongly favors the settlement of employment discrimination claims.¹⁴ The court further reasoned that such disputes would not be resolved without litigation unless defendants could obtain binding, negotiated settlements.¹⁵ Additionally, the court reasoned that the release only applied to claims arising from discriminatory practices that were causally rooted in acts or practices that antedated the execution of the release agreements.¹⁶ Thus, the Ninth Circuit held that settlement agreements releasing employers from Title VII claims arising from antecedent discriminatory events are valid.¹⁷

In 1986, in *Rogers v. General Electric Co.*, the United States Court of Appeals for the Fifth Circuit held that employees could waive non-prospective Title VII claims.¹⁸ In *Rogers*, the plaintiff filed a sex discrimination charge with the EEOC five weeks after executing a release of

⁹ 517 F.2d at 853, 11 Fair Empl. Prac. Cas. (BNA) at 187.

¹⁰ *Id.* at 834, 11 Fair Empl. Prac. Cas. (BNA) at 171-72.

¹¹ *See id.* at 851-52, 11 Fair Empl. Prac. Cas. (BNA) at 186.

¹² *See id.* at 852, 11 Fair Empl. Prac. Cas. (BNA) at 186-87.

¹³ *Id.* at 860, 11 Fair Empl. Prac. Cas. (BNA) at 193.

¹⁴ *Allegheny-Ludlum*, 517 F.2d at 846-48, 11 Fair Empl. Prac. Cas. (BNA) at 182-83.

¹⁵ *Id.* at 858-59, 11 Fair Empl. Prac. Cas. (BNA) at 191-92. The court noted that it could not "conceive of how any employment discrimination dispute could ever be resolved outside . . . the courtroom, if defendants were forbidden to obtain binding negotiated settlements." *Id.*

¹⁶ *See id.* at 853, 11 Fair Empl. Prac. Cas. (BNA) at 187. The court noted, however, that the release provisions would be unlawful if they applied to prospective rights. *Id.* at 856, 11 Fair Empl. Prac. Cas. (BNA) at 190.

¹⁷ *Id.* at 853, 11 Fair Empl. Prac. Cas. (BNA) at 187.

¹⁸ 781 F.2d 452, 456, 39 Fair Empl. Prac. Cas. (BNA) 1581, 1583 (5th Cir. 1986). Non-prospective Title VII claims are those claims arising from discriminatory practices which antedate the execution of the release. *See id.* at 454, 39 Fair Empl. Prac. Cas. (BNA) at 1582. In dicta, the court noted that waivers of prospective or future discrimination claims would be invalid. *Id.*

all Title VII charges against the company.¹⁹ The EEOC, relying upon the release, dismissed the plaintiff's claim.²⁰ The plaintiff then filed suit.²¹ In affirming summary judgment against the plaintiff, the Fifth Circuit noted that a general release of Title VII claims does not violate public policy, provided that the release does not waive prospective claims and is entered into both knowingly and voluntarily.²² Moreover, the court reasoned that the release waived only those Title VII claims arising "on or before" the effective date of the release.²³ The court further reasoned that the plaintiff had knowingly and voluntarily waived her rights arising under Title VII.²⁴ Thus, the Fifth Circuit held that employees may enter into settlement agreements which waive non-prospective Title VII claims against their employers.²⁵

In 1987, in *Equal Employment Opportunity Commission v. Goodyear Aerospace Co.*, the United States Court of Appeals for the Ninth Circuit held that the EEOC has a right of action independent of an employee's private action rights.²⁶ In *Goodyear*, an employee filed a race discrimination charge with the EEOC alleging a failure to promote her in retaliation for filing a previous charge with the EEOC and seeking restitutional back pay.²⁷ The EEOC filed suit after the company rejected the EEOC's offered consent decree.²⁸ In the interim, however, the employee entered into a settlement agreement with the company.²⁹ Subsequently, the district court granted summary judgment for the company on grounds of mootness.³⁰ The Ninth Circuit remanded the case.³¹ The court reasoned that by seeking injunctive relief the EEOC acts in the public interest.³² The court further reasoned that the EEOC's interest in determining the legality of specific conduct and in

¹⁹ *Id.* at 454, 39 Fair Empl. Prac. Cas. (BNA) at 1582.

²⁰ *See id.*

²¹ *See id.*

²² *Id.*

²³ *Rogers*, 781 F.2d at 455, 39 Fair Empl. Prac. Cas. (BNA) at 1583. The court also noted that an otherwise valid release that waives prospective Title VII rights would be invalid as violative of public policy. *Id.* at 454, 39 Fair Empl. Prac. Cas. (BNA) at 1582.

²⁴ *Id.* at 455-56, 39 Fair Empl. Prac. Cas. (BNA) at 1583.

²⁵ *Id.*

²⁶ 813 F.2d 1539, 1542, 43 Fair Empl. Prac. Cas. (BNA) 875, 877 (9th Cir. 1987).

²⁷ *Id.* at 1541, 43 Fair Empl. Prac. Cas. (BNA) at 877.

²⁸ *See id.*

²⁹ *See id.* at 1541-42, 43 Fair Empl. Prac. Cas. (BNA) at 877.

³⁰ *See id.* at 1542, 43 Fair Empl. Prac. Cas. (BNA) at 877.

³¹ *Goodyear*, 813 F.2d at 1545, 43 Fair Empl. Prac. Cas. (BNA) at 879. The court determined that the EEOC would be entitled to an injunction if it can prove Goodyear's liability for discrimination and retaliation and if Goodyear fails to prove that the violation will not likely recur. *Id.*

³² *Id.* at 1543, 43 Fair Empl. Prac. Cas. (BNA) at 878.

detrerring future violations is distinct from the employee's interest in a personal remedy.³³ The court concluded that although the settlement agreement mooted the issue of back pay, it did not moot the EEOC's right of action to seek injunctive relief to protect employees as a class and to deter future discrimination or retaliation.³⁴ Thus, the Ninth Circuit held that the EEOC has a right of action that is independent from an employee's private action rights.³⁵

In 1987, in *Equal Employment Opportunity Commission v. Cosmair, Inc., L'Oreal Hair Care Division*, the United States Court of Appeals for the Fifth Circuit held that a waiver of the right to file a charge with the EEOC violates public policy.³⁶ In *Cosmair*, a fifty-three-year-old employee entered into an agreement with Cosmair, waiving any claims against Cosmair arising from his eighteen years of employment in return for severance benefits.³⁷ Cosmair stopped paying the severance benefits, however, after the employee filed a charge with the EEOC; Cosmair claimed that the employee breached the release agreement by filing the charge.³⁸ The EEOC subsequently sought a preliminary injunction requiring Cosmair to pay the employee's severance benefits and preventing Cosmair from retaliating against other employees who file charges with the EEOC or assist the EEOC in its investigation.³⁹ In granting the injunction, the Fifth Circuit reasoned that enforcing waivers of the right to file charges could impede EEOC enforcement of civil rights laws because the EEOC depends on the filing of charges to notify it of possible discrimination.⁴⁰ The court further reasoned that an EEOC investigation not only serves the individual who filed the charge but also vindicates the public interest in preventing discrimination in the workplace.⁴¹ Moreover, the court reasoned that the public interest in EEOC enforcement of anti-discrimination laws outweighs the public policy interest in encouraging private dispute resolution.⁴² The court concluded that an employer and employee cannot agree to deny the EEOC the information it needs to advance the public inter-

³³ *Id.* at 1542, 43 Fair Empl. Prac. Cas. (BNA) at 877.

³⁴ *Id.* at 1543, 43 Fair Empl. Prac. Cas. (BNA) at 878.

³⁵ *Id.* at 1542, 43 Fair Empl. Prac. Cas. (BNA) at 877.

³⁶ 821 F.2d 1085, 1090, 44 Fair Empl. Prac. Cas. (BNA) 569, 573 (5th Cir. 1987).

³⁷ *Id.* at 1087, 44 Fair Empl. Prac. Cas. (BNA) at 570-71.

³⁸ *See id.* at 1087, 44 Fair Empl. Prac. Cas. (BNA) at 571.

³⁹ *See id.* at 1087-88, 44 Fair Empl. Prac. Cas. (BNA) at 571.

⁴⁰ *Id.* at 1090, 44 Fair Empl. Prac. Cas. (BNA) at 573.

⁴¹ *Cosmair*, 821 F.2d at 1090, 44 Fair Empl. Prac. Cas. (BNA) at 573.

⁴² *Id.*

est.⁴³ Thus, the Fifth Circuit held that a waiver of the right to file a charge is unenforceable because it violates public policy.⁴⁴

In 1996, in *Equal Employment Opportunity Commission v. Astra USA, Inc.*, the United States Court of Appeals for the First Circuit held that non-assistance agreements violate public policy.⁴⁵ In so doing, the court upheld an injunction preventing Astra from entering into or enforcing non-assistance agreements.⁴⁶ The First Circuit also held, however, that the district court erred in granting an injunction preventing Astra from enforcing the non-filing agreements.⁴⁷ More importantly, the court explicitly reserved judgment as to the validity of non-filing agreements, holding only that the EEOC made no showing that it would be irreparably harmed in the absence of an injunction preventing Astra from enforcing the non-filing agreements.⁴⁸

In *Astra*, the EEOC sought to enjoin Astra from entering into or enforcing non-assistance and non-filing provisions included in settlement agreements regarding sexual harassment charges brought against Astra.⁴⁹ The EEOC first learned of the provisions when a former employee who had entered into such an agreement told an EEOC investigator that she had relevant information but could not disclose it because of a confidential settlement agreement she entered into with Astra.⁵⁰ In addition, of the ninety Astra employees that the EEOC contacted and asked for information, only twenty-six responded.⁵¹

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See 94 F.3d 738, 745, 71 Fair Empl. Prac. Cas. (BNA) 1267, 1271 (1st Cir. 1996). Additionally, in deciding an issue of first impression, the court held that the EEOC must meet a traditional four-part test, including a showing of irreparable harm, to obtain injunctive relief. *Id.* at 743, 71 Fair Empl. Prac. Cas. (BNA) at 1270.

⁴⁶ *Id.* at 747, 71 Fair Empl. Prac. Cas. (BNA) at 1274. The details of various non-assistance agreements vary but all contain versions of the following provisions: 1) the settling employee agrees not to assist others who file charges with the EEOC; and 2) the settling employee agrees to a confidentiality regime under which she is barred from discussing the incidents that gave rise to her claim and from disclosing the terms of her settlement. See *id.* at 741, 71 Fair Empl. Prac. Cas. (BNA) at 1269. Although the non-assistance provisions have two aspects—barring assistance to both the EEOC and fellow employees—the EEOC only challenged the aspect that purports to prevent settling employees from communicating with the EEOC. See *id.* at 741 n.2, 71 Fair Empl. Prac. Cas. (BNA) at 1269 n.2. Consequently, the court abstained from addressing the aspect purporting to limit assistance to fellow employees. See *id.*

⁴⁷ *Id.* at 746, 71 Fair Empl. Prac. Cas. (BNA) at 1273. The non-filing agreements prevented settlers from filing new charges with the EEOC. See *id.* at 745–46, 71 Fair Empl. Prac. Cas. (BNA) at 1272.

⁴⁸ See *id.* at 746 & n.7, 71 Fair Empl. Prac. Cas. (BNA) at 1272 & n.7.

⁴⁹ *Id.* at 740–41, 71 Fair Empl. Prac. Cas. (BNA) at 1268.

⁵⁰ See *Astra*, 94 F.3d at 741, 71 Fair Empl. Prac. Cas. (BNA) at 1268.

⁵¹ See *id.*

Upon Astra's refusal to rescind the non-assistance and non-filing agreements, the EEOC sought preliminary injunctive relief pursuant to 42 U.S.C. § 2000e-5(f) (2) to prevent Astra from enforcing the agreements.⁵² The trial court granted the request for a preliminary injunction without holding an evidentiary hearing and enjoined Astra "from entering into or enforcing provisions of any Settlement Agreements which prohibit current or former employees from filing charges with the EEOC and/or assisting the Commission in its investigation of any charges."⁵³

On appeal, the First Circuit applied a traditional four-part test to both the non-assistance and non-filing provisions to determine if the district court made an error of law or abused its discretion in granting the EEOC's request for a preliminary injunction.⁵⁴ First, the court considered the non-assistance agreements in light of Astra's argument that the district court issued the injunction without a satisfactory showing of irreparable harm.⁵⁵ In so doing, the First Circuit implicitly reasoned that if the non-assistance agreements violate public policy, then the likelihood of success on the merits is great and a lesser showing of irreparable harm will suffice to obtain a preliminary injunction.⁵⁶ Accordingly, the court addressed whether or not the non-assistance agreements violated public policy before reaching the issue of irreparable harm.⁵⁷

In considering whether the non-assistance agreements violated public policy, the First Circuit weighed the impact that non-assistance provisions would have on the enforcement of Title VII against the impact that prohibiting such agreements would have on the willingness of the parties to enter into settlement agreements.⁵⁸ The court concluded that the non-assistance agreements severely curtailed the EEOC's ability to enforce Title VII by impeding the EEOC's ability to

⁵² See *id.* at 742, 71 Fair Empl. Prac. Cas. (BNA) at 1269.

⁵³ See *id.* (quoting *EEOC v. Astra U.S.A., Inc.*, 929 F. Supp. 512, 521, 71 Fair Empl. Prac. Cas. (BNA) 1259, 1267 (D. Mass. 1996)).

⁵⁴ *Id.* at 742-43, 71 Fair Empl. Prac. Cas. (BNA) at 1269-70. The traditional four-part test for issuing injunctive relief requires the moving party to show: 1) a substantial likelihood of success on the merits; 2) a significant risk of irreparable harm if the injunction is withheld; 3) a favorable balance of hardships; and 4) that granting the injunction will not negatively affect the public interest. See *id.* at 742, 71 Fair Empl. Prac. Cas. (BNA) at 1269.

⁵⁵ *Astra*, 94 F.3d at 742, 71 Fair Empl. Prac. Cas. (BNA) at 1269.

⁵⁶ See *id.* at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271. The court recognized an interplay between the first and second elements of the four-part test: if the likelihood of success on the merits is great, a less compelling showing of irreparable harm will suffice. *Id.* at 743-44, 71 Fair Empl. Prac. Cas. (BNA) at 1270-71.

⁵⁷ See *id.* at 743-44, 71 Fair Empl. Prac. Cas. (BNA) at 1270-71.

⁵⁸ *Id.* at 744-45, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

investigate charges of discrimination.⁵⁹ In addition, the court reasoned that the EEOC acts not only on behalf of private parties, but also on behalf of the public by preventing discrimination in the workplace.⁶⁰ Because an employee's right to communicate with the EEOC must be preserved to safeguard the public interest, the court reasoned that an employer cannot purchase an employee's right to speak freely to the EEOC, nor can an employee sell his or her right to speak freely to the EEOC.⁶¹ Thus, the First Circuit held that any agreement that materially interferes with communication between an employee and the EEOC harms the public interest.⁶²

The First Circuit completed the balancing test by acknowledging that the strong public policy in favor of encouraging voluntary settlement of employment discrimination claims supported enforcement of non-assistance agreements.⁶³ The court ultimately concluded, however, that an injunction preventing the enforcement of non-assistance agreements would not create a significant disincentive to settlement.⁶⁴ The court reasoned that granting the injunction in this case would not promote further litigation between Astra and the settling employees or disturb the finality of their settlements.⁶⁵ Thus, after weighing the significant public interest in maintaining open channels of communication between employees and the EEOC against the minimal adverse impact that encouraging communication would have on settlement, the First Circuit held that non-assistance agreements violate public policy.⁶⁶

By so holding, the First Circuit determined that, in this case, a lesser showing of irreparable harm would suffice to obtain a preliminary injunction.⁶⁷ The court rejected Astra's contention that no evidence of irreparable harm existed because the EEOC could obtain all the information it needed through its power to subpoena Astra employees.⁶⁸ Relying on the affidavit of an EEOC investigator and its own

⁵⁹ *Id.* at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁶⁰ *Astra*, 94 F.3d at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁶¹ *Id.* at 744 n.5, 71 Fair Empl. Prac. Cas. (BNA) at 1271 n.5. Employees may, however, waive their right to recover damages in either their own lawsuits or in lawsuits brought by the EEOC. *See id.*

⁶² *Id.* at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Astra*, 94 F.3d at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁶⁶ *Id.* at 744-45, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁶⁷ *Id.* at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁶⁸ *Id.* at 745, 71 Fair Empl. Prac. Cas. (BNA) at 1271-72. The court explicitly rejected any construct which would limit an employee's freedom to speak at will to the EEOC. *Id.* at 745, 71

conclusion that the non-assistance agreements' chilling effect impeded the EEOC's ability to investigate charges of discrimination and enforce anti-discrimination laws, the First Circuit agreed with the district court that the risk of irreparable harm warranted a preliminary injunction.⁶⁹ Thus, the First Circuit upheld the injunction barring the enforcement of the non-assistance agreements.⁷⁰ In addition, the court held that the injunction effectively precluded Astra from enforcing the confidentiality provisions and preventing employees from divulging any relevant information to the EEOC.⁷¹

After finding that an injunction was warranted with respect to the non-assistance agreements, the First Circuit held that the injunction against enforcement of the non-filing agreements was not warranted.⁷² The court determined that the EEOC did not show that it would be irreparably harmed in the absence of injunctive relief.⁷³ The court reasoned that once a charge is brought it serves as a "jurisdictional springboard," enabling the EEOC to investigate both the specific acts of alleged discrimination as well as the circumstances surrounding the complaint.⁷⁴ Because in this case the EEOC was actively investigating three separate charges against Astra, two of which alleged class-wide sexual harassment in the workplace, the court reasoned that the EEOC already had the authority to investigate Astra to the fullest extent possible.⁷⁵ Consequently, the non-filing agreements did not impair the EEOC's ability to investigate Astra.⁷⁶ In addition, the injunction preventing Astra from enforcing the non-assistance or confidentiality agreements ensured that all Astra employees could cooperate freely with the investigation.⁷⁷ Thus, the First Circuit held that the district court erred in enjoining the enforcement of the non-filing agreements because the EEOC did not make a showing of irreparable harm.⁷⁸

The First Circuit's holding in *Astra* is significant for three reasons. First, the court's holding that non-assistance agreements are void as against public policy has practical ramifications: it changes the calculus

Fair Empl. Prac. Cas. (BNA) at 1272. The court also dismissed Astra's claim that the settlement agreements do not actually bar communication with the EEOC. *Id.*

⁶⁹ *Id.* at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1272.

⁷⁰ *Astra*, 94 F.3d at 747, 71 Fair Empl. Prac. Cas. (BNA) at 1274.

⁷¹ *Id.* at 745 n.6, 71 Fair Empl. Prac. Cas. (BNA) at 1272 n.6.

⁷² *Id.* at 746, 71 Fair Empl. Prac. Cas. (BNA) at 1273.

⁷³ *Id.* at 746, 71 Fair Empl. Prac. Cas. (BNA) at 1272.

⁷⁴ *Id.* at 746, 71 Fair Empl. Prac. Cas. (BNA) at 1273.

⁷⁵ *Astra*, 94 F.3d at 746, 71 Fair Empl. Prac. Cas. (BNA) at 1273.

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *Id.*

of settlement negotiations for employers.⁷⁹ Second, it will force employers to examine the language of their standard settlement and release agreements to ensure that they conform with the court's holding. Third, the court questioned the validity of non-filing agreements, although it declined to squarely decide the issue, which may further affect future settlement negotiations because employers can no longer assume non-filing provisions are enforceable.⁸⁰

Although it reached an equitable result in holding that non-assistance agreements are void as against public policy, the court did not adequately balance the competing public policies.⁸¹ The court failed to sufficiently weigh the impact that prohibiting non-assistance agreements would have on the strong public policy of encouraging settlement in employment discrimination cases.⁸² Specifically, the court failed to consider the detrimental effect that prohibiting non-assistance provisions will have on future negotiations between employers and employees.⁸³

By holding that non-assistance agreements are unenforceable, the court changed the cost-benefit analysis for employers in reaching a settlement, making settlement less likely. A settlement agreement without a non-assistance provision is not worth as much to an employer as a settlement agreement which includes provisions that effectively silence claimants. Employers are now less able to prevent the EEOC from gathering information and investigating allegations of discrimination against them.

In its analysis, the court only considered the effect of prohibiting non-assistance agreements with respect to settlements already reached.⁸⁴ While the injunction against *Astra* will not promote further litigation because the employees have already settled, *Astra* would not necessarily have agreed to compensate settlers with cash payments between \$20,000 and \$100,000 without the non-assistance agreements and confidentiality provisions.⁸⁵ Consequently, if employers are unwilling to pay as much for a settlement without the non-assistance provisions, the bargaining range within which a settlement can be reached is reduced.⁸⁶ This limitation, in turn, may actually discourage settle-

⁷⁹ See *id.* at 744-45, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁸⁰ See *Astra*, 94 F.3d at 746 n.7, 71 Fair Empl. Prac. Cas. (BNA) at 1273 n.7.

⁸¹ See *id.* at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ *Id.*

⁸⁵ See *Astra*, 929 F. Supp. at 515, 71 Fair Empl. Prac. Cas. (BNA) at 1261.

⁸⁶ Employees will still want to be compensated in full for the alleged violation of their rights.

ment and create more litigation, thereby undermining the public policy of encouraging settlement.⁸⁷

On the other hand, the effect of prohibiting non-assistance agreements on settlement negotiations may be negligible because the alternative to settlement—litigation—is still too costly. Employers will be forced to accept less favorable settlement terms for their money and consequently will be less able to thwart an EEOC investigation.⁸⁸ Thus, prohibiting non-assistance agreements may in fact raise the overall cost of discrimination for the employer, thereby further deterring discrimination in the workplace. Regardless of the ultimate result, the court correctly determined that the legitimate policy of encouraging settlement does not trump the public interest in ensuring a discrimination-free workplace.⁸⁹

In practical terms employers should examine the language of their standard settlement and release agreements. Employers should avoid language that expressly prohibits employees from either cooperating with an EEOC investigation or communicating with the EEOC regarding alleged incidents giving rise to the agreement.⁹⁰ Furthermore, waivers should be prefaced with a phrase such as "to the extent permitted by law."

In addition, the court reserved judgment as to the validity of non-filing agreements, further obscuring the cost-benefit analysis for employers.⁹¹ By leaving the question open after admitting that it is a "close" question, the court suggested that it may determine in the future that non-filing agreements violate public policy and are not

Employers will presumably be unwilling to pay as much to settle the dispute because they cannot foreclose the possibility of paying additional costs as a result of an EEOC investigation.

⁸⁷ See, *supra*, note 86 and accompanying text. Previously, for example, if an employee's settlement range was \$20,000–\$40,000 and the employer's range, with the agreements, was \$10,000–\$30,000, the bargaining range was \$20,000–\$30,000. Without the agreements, however, the employee's settlement range presumably has not changed but the employer may now only be willing to settle for \$10,000, precluding settlement.

⁸⁸ Nevertheless, employers may decide to include the non-assistance and confidentiality provisions in the hopes that settlers will abide by them even though the provisions are unenforceable.

⁸⁹ See *Astra*, 94 F.3d at 744–45, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁹⁰ See *id.*

⁹¹ See *id.* at 746 n.7, 71 Fair Empl. Prac. Cas. (BNA) at 1273 n.7. The court acknowledged, without deciding, the competing public policy considerations for and against non-filing agreements: that a charge is sometimes a prerequisite to an EEOC action in the public interest but that private settlement will be hindered by employers seeking finality if they cannot keep employees who settle from filing charges. See *id.* In so doing, the court erased any presumption that non-filing agreements are enforceable. See *id.*

enforceable.⁹² Consequently, in the wake of *Astra*, employers can no longer rely on non-filing agreements being enforced by courts.⁹³

Moreover, it is unlikely that the court will find that non-filing agreements are enforceable.⁹⁴ The same reasoning that tipped the balance in favor of abrogating non-assistance agreements will probably be applicable to non-filing agreements.⁹⁵ An employee's right to file charges must be protected to safeguard the public interest in ensuring a discrimination-free workplace.⁹⁶ Although the court recognized that prohibiting non-filing agreements would adversely impact the policy of encouraging settlement, an effective non-filing agreement could completely obstruct the EEOC's ability to investigate discriminatory practices.⁹⁷ Given the *Astra* court's extreme deference to the EEOC's need to investigate charges of discrimination without any impediments, the court will likely prevent an employer from enforcing an agreement that effectively bars the EEOC from enforcing anti-discrimination laws.⁹⁸ Thus, any waiver of a right to file charges with the EEOC that is worth enforcing will, in all likelihood, be held to violate public policy.⁹⁹ Consequently, in light of the fact that non-assistance agreements are no longer enforceable and that the enforceability of non-

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *Astra*, 94 F.3d at 746 n.7, 71 Fair Empl. Prac. Cas. (BNA) at 1273 n.7. In *Equal Employment Opportunity Commission v. Cosmair, Inc., L'Oreal Hair Care Division*, the Fifth Circuit held that non-filing agreements were void as against public policy. See 821 F.2d 1085, 1090, 44 Fair Empl. Prac. Cas. (BNA) 659, 573 (5th Cir. 1987). The First Circuit implicitly endorsed the reasoning of the *Cosmair* court by adopting its reasoning with respect to the non-assistance agreements. See *Astra*, 94 F.3d at 744-45, 71 Fair Empl. Cas. (BNA) at 1271-72.

⁹⁵ See *Astra*, 94 F.3d at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

⁹⁶ See *id.*; *Cosmair*, 821 F.2d at 1090, 44 Fair Empl. Prac. Cas. (BNA) at 573. The right to file a charge is separate and distinct from the right to recover damages, which may be bargained away. *Astra*, 94 F.3d at 744 n.5, 71 Fair Empl. Prac. Cas. (BNA) at 1271 n.5.

⁹⁷ See *Astra*, 94 F.3d at 746 n.7, 71 Fair Empl. Prac. Cas. (BNA) at 1273 n.7. The EEOC's authority is predicated upon a charge being filed; absent a charge, the EEOC is powerless to investigate discrimination in the workplace. See *id.* at 746, 71 Fair Empl. Prac. Cas. (BNA) at 1272-73.

⁹⁸ See *id.* at 744, 71 Fair Empl. Prac. Cas. (BNA) at 1271. Moreover, as the value of a non-filing agreement increases, the likelihood that the agreement offends public policy increases proportionately. For example, if an employer is being investigated by the EEOC, as *Astra* was, the value of further non-filing agreements is minimal and the agreement would be enforceable as it was in *Astra*. See *id.* at 746-47, 71 Fair Empl. Prac. Cas. (BNA) at 1273. If a company is not being investigated, however, the value of the non-filing agreement increases significantly because it will prevent the EEOC from investigating the company. See *id.* at 746-47, 71 Fair Empl. Prac. Cas. (BNA) at 1272-73. Under the reasoning of *Astra*, such interference with the EEOC's ability to enforce anti-discrimination laws will most likely be found to violate public policy. See *id.* at 744-45, 71 Fair Empl. Prac. Cas. (BNA) at 1271-72.

⁹⁹ See *id.* at 744-45, 71 Fair Empl. Prac. Cas. (BNA) at 1271; *Cosmair*, 821 F.2d at 1090, 44 Fair Empl. Prac. Cas. (BNA) at 573.

filing provisions remains an open question, employers must reconsider settlement strategies as well as the overall cost of discrimination.

In summary, the United States Court of Appeals for the First Circuit in *Equal Employment Opportunity Commission v. Astra USA, Inc.* held that non-assistance agreements are unenforceable because they violate public policy.¹⁰⁰ Although the court declined to decide if non-filing agreements also violate public policy, the court questioned their validity.¹⁰¹ Moreover, the reasoning of the court indicates that if a non-filing agreement interferes with the EEOC's ability to investigate violations of Title VII, it too will be unenforceable.¹⁰² Thus, the First Circuit has further discouraged discrimination in the workplace by facilitating the EEOC's ability to investigate charges and limiting an employer's ability to suppress the disclosure of discriminatory practices.

B. **Mandatory Arbitration and Statutory Rights Under
a Collective Bargaining Agreement: Austin v.
Owens-Brockway Glass Container, Inc.*¹

Congress enacted Title VII of the Civil Rights Act of 1964 ("Title VII") to ensure equality of employment opportunities and protection from discrimination.² In 1990, Congress, responding to the lack of legal recourse for individuals who experience discrimination specifically on the basis of disabilities, enacted the Equal Opportunities for Disabled Act, popularly referred to as the Americans with Disabilities Act of 1990 ("ADA").³ The powers, remedies and procedures available under the ADA are identical to those available under Title VII.⁴ The procedures under Title VII include a provision for consideration of

¹⁰⁰ *Astra*, 94 F.3d at 744-45, 71 Fair Empl. Prac. Cas. (BNA) at 1271. Furthermore, the court held that the injunction against the non-assistance agreements prevented Astra from enforcing the confidentiality agreements. *See id.* at 745 n.6, 71 Fair Empl. Prac. Cas. (BNA) at 1272 n.6.

¹⁰¹ *See id.* at 746 n.7, 71 Fair Empl. Prac. Cas. (BNA) at 1273 n.7.

¹⁰² *See id.* at 744-45, 71 Fair Empl. Prac. Cas. (BNA) at 1271.

* By Katherine L. Kettler, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 78 F.3d 875, 5 A.D. Cases. (BNA) 488 (4th Cir. 1996).

² *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 7 Fair Empl. Prac. Cas. (BNA) 81, 84 (1974). 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) (1988).

³ 42 U.S.C. § 12101(a)(4) (1990). Specifically, the ADA provides: "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).

⁴ *See id.* § 12117(a). The statute provides in pertinent part: "The powers, remedies and

employment-discrimination claims in several forums, including arbitration and the courts, and a provision that submission to one forum does not preclude subsequent submission to another.⁵ The United States Supreme Court has interpreted Title VII and the ADA as manifesting Congress's intent to make its policy against discrimination of the highest priority.⁶

In 1925, Congress enacted the Federal Arbitration Act ("FAA"), which 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.⁷ Even when the FAA is not applied, the Supreme Court has established a federal policy favoring arbitration of labor disputes arising under Collective Bargaining Agreements ("CBAs").⁸ When faced with a determination of whether to compel arbitration of a particular Title VII or ADA claim, courts must consider the federal policies of opposing discrimination and favoring arbitration.⁹

In 1974, in *Alexander v. Gardner-Denver Co.*, the United States Supreme Court held that an arbitrator's resolution of a grievance filed under an existing CBA, that an employee was dismissed without just cause, did not dispose of that employee's subsequent Title VII claim based on the same factual occurrence.¹⁰ In *Alexander*, where a CBA was in force between the company and the employee's union, an employee filed a statutory claim alleging that his employer fired him because of

procedures set forth in sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9) shall be the powers, remedies and procedures this title provides to the Commission" *Id.*

⁵ 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) (1988)).

⁶ See *id.* at 47, 7 Fair Empl. Prac. Cas. (BNA) at 85.

⁷ 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. §§ 3-4 (1994). The FAA provides in pertinent part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994).

⁸ See *Alexander*, 415 U.S. at 46 n.6, 7 Fair Empl. Prac. Cas. (BNA) at 85 n.6. The Court cited the *Steelworkers Trilogy* to support the proposition that federal policy favors arbitration in labor disputes. *Id.* (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)); see also *Austin*, 78 F.3d at 879, 5 A.D. Cases (BNA) at 491 (relying on well-recognized policy of federal labor law favoring arbitration of labor disputes).

⁹ See *Alexander*, 415 U.S. at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90; see also *Austin*, 78 F.3d at 887, 5 A.D. Cases (BNA) at 496-97 (Hall, J., dissenting).

¹⁰ 415 U.S. at 50, 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 86, 89-90.

his race in violation of Title VII.¹¹ The employee's union filed a contractual grievance alleging dismissal without just cause prior to the employee's filing of his Title VII claim.¹² An arbitrator found for the employer in the grievance action.¹³ The district court then held that because the employee's union had already submitted his claim to the arbitration process, the arbitral decision precluded him from bringing subsequent Title VII claims.¹⁴ The United States Court of Appeals for the Tenth Circuit affirmed *per curiam*.¹⁵

On appeal, the Supreme Court interpreted the legislative history and procedures of Title VII as indicative of Congress's intent that Title VII supplement, not replace, other legal safeguards relating to employment discrimination.¹⁶ The Court stated that no inconsistency would result from enforcing both contractual and statutory rights in their respectively appropriate forums.¹⁷ Additionally, the Court dismissed the argument that the employee waived his statutory cause of action under Title VII, asserting that a union may not waive an employee's Title VII rights prospectively because Title VII concerns individual, rather than collective, rights.¹⁸ Submission of a grievance to arbitration did not constitute a waiver, the Court determined, because resorting to the arbitral forum is an existing contractual right and no additional concession may be exacted as the price for enforcing that right.¹⁹ The Court held, accordingly, that the arbitrator's resolution of the union's contractual grievance did not dispose of the employee's statutory right to pursue the Title VII claim in court.²⁰

In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, the United States Supreme Court held that an employee's claims under the Age Discrimination in Employment Act of 1967 ("ADEA") could be subject to compulsory arbitration, and finally adjudicated, by virtue of an arbitration agreement associated with the employee's terms of employment.²¹ In *Gilmer*, an employee filed a claim alleging that his employer fired him because of his age in violation of the ADEA.²² In response,

¹¹ *Id.* at 43, 7 Fair Empl. Prac. Cas. (BNA) at 83.

¹² *See id.* at 39, 7 Fair Empl. Prac. Cas. (BNA) at 82.

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

¹⁴ *See id.*

¹⁵ *See Alexander*, 415 U.S. at 42, 7 Fair Empl. Prac. Cas. (BNA) at 83.

¹⁶ *Id.* at 48-49, 7 Fair Empl. Prac. Cas. (BNA) at 85-86.

¹⁷ *Id.* at 49-51, 7 Fair Empl. Prac. Cas. (BNA) at 86.

¹⁸ *Id.* at 51, 7 Fair Empl. Prac. Cas. (BNA) at 86-87.

¹⁹ *Id.* at 52, 7 Fair Empl. Prac. Cas. (BNA) at 87.

²⁰ *Alexander*, 415 U.S. at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90.

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

²² *Id.* at 23-24, 55 Fair Empl. Prac. Cas. (BNA) at 1119.

the employer filed a motion to compel arbitration of the ADEA claim pursuant to the arbitration clause in the employee's securities registration form for the New York Stock Exchange.²³ The Court stated that statutory claims may be subject to a compulsory arbitration agreement, enforceable pursuant to the FAA, unless Congress intended to preclude a waiver of judicial remedies for the statutory rights in question.²⁴ The Court placed the burden on the employee to show Congress's intention to preclude such a waiver.²⁵ The Court reasoned that the employee did not meet his burden.²⁶ The Court stated further that parties retain the same substantive rights afforded by the statute by agreeing to an arbitral, rather than a judicial, forum.²⁷ Moreover, the Court rejected the assertion that various aspects of the arbitration process weaken the protections afforded in the substantive law.²⁸ Finally, the Court distinguished *Alexander* on the grounds that the employee in that case agreed only to arbitrate contractual rights under a CBA whereas the employee in *Gilmer* agreed to arbitrate statutory rights under the security registration form.²⁹ The Court therefore held the ADEA claim subject to final resolution through compulsory arbitration in accordance with the arbitration agreement because the employee failed to show that Congress intended to preclude arbitration of ADEA claims.³⁰

In 1991, in *Willis v. Dean Witter Reynolds, Inc.*, the United States Court of Appeals for the Sixth Circuit followed the reasoning used by the Supreme Court in *Gilmer* and held that an employee's Title VII claims were subject to her agreement to arbitrate.³¹ In *Willis*, the employee executed a securities registration form which provided that any disputes would be resolved through arbitration.³² In addition to claims of state anti-discrimination and contract law violations, the employee in *Willis* alleged sexual harassment and sexual discrimination under Title VII.³³ Her employer moved to compel arbitration based upon the

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

²⁴ *Id.* at 26, 55 Fair Empl. Prac. Cas. (BNA) at 1120.

²⁵ *Id.* The Court stated that if Congress intended to preclude arbitration, this intent would be discoverable in the text of the ADEA, its legislative history or there would be an "inherent conflict" between arbitration and the underlying principles of the ADEA. *Id.*

²⁶ *Gilmer*, 500 U.S. at 26-33, 55 Fair Empl. Prac. Cas. (BNA) at 1120-23.

²⁷ *Id.* at 26, 55 Fair Empl. Prac. Cas. (BNA) at 1120.

²⁸ *Id.* at 30-31, 55 Fair Empl. Prac. Cas. (BNA) at 1121-22.

²⁹ *Id.* at 34, 55 Fair Empl. Prac. Cas. (BNA) at 1123 (citing *Alexander*, 415 U.S. at 49-50, 7 Fair Empl. Prac. Cas. (BNA) at 86).

³⁰ *Id.* at 35, 55 Fair Empl. Prac. Cas. (BNA) at 1123.

³¹ See 948 F.2d 305, 312, 57 Fair Empl. Prac. Cas. (BNA) 386, 392 (6th Cir. 1991).

³² *Id.* at 306, 57 Fair Empl. Prac. Cas. (BNA) at 387.

³³ *Id.*

terms of a securities registration form executed by the employee.³⁴ The Sixth Circuit analogized Title VII to the ADEA and applied the *Gilmer* analysis.³⁵ The Sixth Circuit rejected the argument that Title VII precludes an arbitral forum from adjudicating these claims even if the parties contractually agree to submit all statutory claims to arbitration.³⁶ The court therefore held enforceable the arbitration clause of the securities registration form, compelling the employee to arbitrate her Title VII action for sex discrimination.³⁷

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.³⁸ In *Mago*, an employee alleged sexual harassment and gender discrimination in her Title VII action.³⁹ The employer moved to stay the proceedings and compel arbitration under the terms of the employee's private employment application.⁴⁰ The Ninth Circuit found that Title VII and the ADEA have similar aims and provisions.⁴¹ The court then applied the *Gilmer* reasoning and concluded that because the employee did not meet her burden of proving that Congress intended to preclude arbitration of Title VII claims, the arbitration agreement was enforceable.⁴² The court thus held that the arbitration clause of the employment application was enforceable and forced the employee to arbitrate her Title VII claims.⁴³

During the *Survey* year, in *Austin v. Owens-Brockway Glass Container, Inc.*, the United States Court of Appeals for the Fourth Circuit held enforceable a CBA's arbitration provisions which precluded the employee from suing her employer prior to submitting any ADA or Title VII claims to the arbitration process.⁴⁴ In *Austin*, the employee sued Owens-Brockway Glass Container, Inc. ("Owens-Brockway"), alleging violations of Title VII and the ADA when the employer dismissed her rather than re-assign her to a light-work detail, as recommended by her doctor, or to another position, as it did her male co-worker.⁴⁵

³⁴ See *id.*

³⁵ See *id.* at 307, 57 Fair Empl. Prac. Cas. (BNA) at 387-88.

³⁶ *Willis*, 948 F.2d at 309-10, 57 Fair Empl. Prac. Cas. (BNA) at 389-90.

³⁷ *Id.* at 306, 310, 57 Fair Empl. Prac. Cas. (BNA) at 387, 390.

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

³⁹ *Id.* at 934, 58 Fair Empl. Prac. Cas. (BNA) at 179.

⁴⁰ See *id.*

⁴¹ See *id.* at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180;

⁴² *Id.*

⁴³ *Mago*, 956 F.2d at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180.

⁴⁴ 78 F.3d, 875, 877, 885-86, 5 A.D. Cases (BNA) 488, 489, 496 (4th Cir. 1996).

⁴⁵ *Id.* at 877-78, 5 A.D. Cases (BNA) at 489.

Owens-Brockway filed a motion to dismiss, arguing that the court lacked jurisdiction.⁴⁶ Relying on the reasoning applied by the Supreme Court in *Gilmer* and distinguishing the holding of *Alexander*, the Fourth Circuit found the voluntary CBA provisions, which specifically listed gender and disability discrimination as claims subject to arbitration, consistent with the text, legislative history and purposes of Title VII and the ADA.⁴⁷ The Fourth Circuit therefore enforced the provisions because the employee failed to meet her burden in establishing that Congress intended to preclude arbitration of claims under Title VII and the ADA.⁴⁸ The Fourth Circuit consequently upheld the district court's order to dismiss the claims because the employee failed to submit them to the arbitration process prior to filing a suit.⁴⁹

In *Austin*, the terms of the plaintiff's employment were governed by a CBA negotiated by her union.⁵⁰ The employee worked for Owens-Brockway as an equipment cleaner/oiler-greaser until she became disabled in a work-related injury.⁵¹ Her doctor certified her for light-duty work but, rather than provide her with an appropriate work assignment, Owens-Brockway placed her on medical leave, providing her with worker's compensation benefits.⁵² While the employee was on leave, Owens-Brockway eliminated the cleaner/oiler-greaser job classification.⁵³ Owens-Brockway subsequently dismissed the employee, while re-assigning a male employee who had worked with her to another position in the plant.⁵⁴

The employee filed suit, alleging that Owens-Brockway violated the ADA and Title VII by refusing to offer her light-duty work and terminating her employment while simply re-assigning her male co-worker.⁵⁵ Owens-Brockway filed a motion to dismiss, arguing that the employee's failure to file her claims under the CBA's mandatory grievance-arbitration procedure precluded her from pursuing them in court.⁵⁶ Owens-Brockway offered affidavits in support of its motion; as

⁴⁶ See *id.* at 878, 5 A.D. Cases (BNA) at 489. The employer argued that the claims were subject to mandatory arbitration based on the terms of the CBA. See *id.*

⁴⁷ *Id.* at 880-82, 885-86, 5 A.D. Cases (BNA) at 492-93, 496.

⁴⁸ *Id.* at 882, 886, 5 A.D. Cases (BNA) at 493, 496.

⁴⁹ *Austin*, 78 F.3d at 885-86, 5 A.D. Cases (BNA) at 496.

⁵⁰ *Id.* at 878, 5 A.D. Cases (BNA) at 489-90.

⁵¹ See *id.* at 877, 5 A.D. Cases (BNA) at 489.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *Austin*, 78 F.3d at 877-78, 5 A.D. Cases (BNA) at 489.

⁵⁵ See *id.*

⁵⁶ See *id.* at 878, 5 A.D. Cases (BNA) at 489. Owens-Brockway also filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the employee had failed to file her claim with

a result, the district court treated it as a summary judgment motion.⁵⁷ The district court granted the motion for summary judgment, holding that, under *Gilmer*, the employee could not sue Owens-Brockway before submitting her claims to the mandatory arbitration process.⁵⁸

Relying on the Supreme Court's analysis in *Gilmer*, the Fourth Circuit considered the enforceability of the CBA provisions requiring arbitration of statutory claims.⁵⁹ The court began by emphasizing its reliance on the "well recognized policy of federal law favoring arbitration of labor disputes."⁶⁰ The court then examined the text of the CBA and noted that the language specifically provided that claims of gender and disability discrimination are subject to the grievance procedure.⁶¹ Based on this language, the court concluded that the employee con-

the Equal Employment Opportunity Commission ("EEOC") and had not obtained a right to sue letter, both prerequisites to filing ADA and Title VII claims. *See id.*

⁵⁷ *See id.* at 878, 5 A.D. Cases (BNA) at 489-90.

⁵⁸ *See id.* at 878, 5 A.D. Cases (BNA) at 490. The court found that a significant factual dispute existed regarding the employee's actions with the EEOC and thus declined to grant summary judgment based on her failure to file her claim or obtain a right to sue letter. *See id.* The court concluded, however, that because both motions essentially challenged the court's jurisdiction over the case, it only had to decide one of them in favor of Owens-Brockway in order to dismiss the claims. *See id.* at 878 n.1, 5 A.D. Cases (BNA) at 490 n.1.

⁵⁹ *See Austin*, 78 F.3d at 879, 5 A.D. Cases (BNA) at 491. Before the Fourth Circuit discussed the enforceability of the arbitration agreement, it addressed whether the employee had standing under the CBA to arbitrate her dispute and whether arbitration under this agreement was permissive or obligatory. *Id.* at 878-79, 5 A.D. Cases (BNA) at 490-91. The court first concluded that the CBA was in effect at the time of the alleged discrimination, thereby granting the employee standing to assert her rights under this contract. *See id.* at 878-79, 5 A.D. Cases (BNA) at 490. In the alternative, the court stated, even if the plaintiff was a terminated employee, she could have asserted any rights she had under the CBA even after the CBA's termination. *See id.* at 878, 5 A.D. Cases (BNA) at 490; *see also id.* at 878-79, 5 A.D. Cases (BNA) at 490 (citing *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 255, 294 L.R.R.M. (BNA) 2753, 2757 (1977)). The court then interpreted the language of the agreement to suggest that the arbitration provision in the CBA was obligatory and not permissive. *Id.* at 879, 5 A.D. Cases (BNA) at 490-91. The employee argued that the phrase "may be referred to arbitration" makes arbitration permissive, but the court, following the construction of a similar phrase in an Eighth Circuit decision, opined that the purpose of the word "may" only gave an aggrieved party the choice between arbitration or abandonment of the claim. *Id.* at 879, 5 A.D. Cases (BNA) at 490 (citing *Bonnot v. Congress of Indep. Unions Local 14*, 331 F.2d 355, 359 (8th Cir. 1964)).

⁶⁰ *Id.* at 879, 5 A.D. Cases (BNA) at 491 (citing *Adkins v. Times-World Corp.*, 771 F.2d 829, 831, 120 L.R.R.M. (BNA) 2216, 2217 (4th Cir. 1985)). The court relied on the *Steelworkers Trilogy* for further support of this policy favoring arbitration in labor disputes. *Id.* The court also stated that it was not relying on the FAA applied in *Gilmer* because, in the Fourth Circuit, the FAA is not applicable to labor disputes arising from a CBA. *Id.* (citing *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067, 144 L.R.R.M. (BNA) 2817, 2819-20 (4th Cir. 1993)).

⁶¹ *Id.* at 879-80, 5 A.D. Cases (BNA) at 491. Pertinent sections of the CBA included:
Article 38 — Fair Employment Practice and Equal Opportunities

1. The Company and the Union will comply with all laws preventing discrimination against any employee because of . . . sex, . . . handicap . . .

tractually agreed to submit her discrimination claims to the grievance procedure.⁶² The court rejected the notion that arbitration is an inappropriate forum for resolution of statutory rights, the Supreme Court's principal concern in *Alexander*.⁶³ Rather, the court recognized the reasoning in *Gilmer* that the arbitration of statutory claims does not constitute relinquishment of any rights under the statutes.⁶⁴ Arbitration, the court stated, simply provides another equally appropriate forum in which to resolve disputes.⁶⁵ The court, therefore, decided to enforce the agreement against the contracting party, unless Congress intended to preclude arbitration for ADA and Title VII claims.⁶⁶

The Fourth Circuit first examined the text of the ADA and Title VII, concluding that Congress expressed a preference for arbitration.⁶⁷ The Fourth Circuit then surveyed the legislative history of both acts and determined that Congress generally supported voluntary agreements to arbitrate statutory claims.⁶⁸ Finally, guided by the reasoning applied in the *Gilmer* Court's examination of the ADEA, the Fourth Circuit identified no inherent conflict between arbitration and the underlying purposes of the ADA or Title VII.⁶⁹

2. This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act

3. Any disputes under this Article as with all other Articles of this Contract shall be subject to the grievance procedure.

Id.

⁶² *Id.* at 880, 5 A.D. Cases (BNA) at 491.

⁶³ *Id.* (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56, 7 Fair Empl. Prac. Cas. (BNA) 81, 89 (1974)).

⁶⁴ *Austin*, 78 F.3d at 880, 5 A.D. Cases (BNA) at 491.

⁶⁵ *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 55 Fair Empl. Prac. Cas. (BNA) 1116, 1121 (1991)).

⁶⁶ *Id.* at 880-81, 5 A.D. Cases (BNA) at 492.

⁶⁷ See *id.* The Civil Rights Act of 1991, amending Title VII, provides: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Act or provisions of Federal law amended by this title." Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991).

The ADA states identical language: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this Act." 42 U.S.C. § 12212 (1990).

⁶⁸ See *Austin*, 78 F.3d at 881-82, 5 A.D. Cases (BNA) at 492-93. The court acknowledged that the legislative history was less clear regarding Congress's intent as there were some reports that included language like "permissible when voluntary." *Id.* at 881, 5 A.D. Cases (BNA) at 492. To mitigate this, the court relied on *Davis v. Lukhard*, which supports the Fourth Circuit principle that, even if the provisions of the legislative history are contrary to the statute, the statute must prevail. *Id.* at 882, 5 A.D. Cases (BNA) at 493 (citing *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir. 1986)).

⁶⁹ *Id.* at 882, 5 A.D. Cases (BNA) at 493 (citing *Gilmer*, 500 U.S. at 28, 55 Fair Empl. Prac. Cas. (BNA) at 1120 (which held that an arbitral forum will allow the statute to continue to serve both its remedial and deterrent functions)).

To support its decision to enforce the mandatory arbitration agreement, the Fourth Circuit relied on other circuit court decisions that enforced arbitration agreements based on the reasoning in *Gilmer*.⁷⁰ The Fourth Circuit stated that although these cases did not involve CBAs, the employees in these cases had made agreements to arbitrate employment disputes.⁷¹ The court decided that as long as an agreement is voluntary, it is valid and should be enforced.⁷² Finally, the Fourth Circuit noted that the Supreme Court, as well as the circuit's own case law, required that an employee follow the grievance procedure established by the CBA before filing suit in federal court.⁷³

In summary, the Fourth Circuit upheld the CBA mandatory arbitration provisions as enforceable.⁷⁴ The court acknowledged that the CBA provisions encompassed the types of claims the employee raised and concluded that the text, legislative history and purpose of Title VII and the ADA were consistent with the voluntary agreement.⁷⁵ Concluding that Congress did not intend to preclude arbitration of claims under Title VII and the ADA, the Fourth Circuit upheld the district court's decision to dismiss the claims.⁷⁶

In dissent, Judge Hall argued that *Alexander*, rather than *Gilmer*, continues to govern in the context of CBAs.⁷⁷ Judge Hall maintained that, under *Alexander*, an employee is not limited to arbitration but could pursue a contractual remedy, a statutory remedy or both.⁷⁸ Judge

⁷⁰ See *id.* at 882-85, 5 A.D. Cases (BNA) at 493-95 (citing, inter alia, *Benefits Communication Corp. v. Klieforth*, 642 A.2d 1299, 1304-05, 65 Fair Empl. Prac. Cas. (BNA) 122, 126-27 (D.C. 1994) (enforcing anticipatory agreement in securities registration application to arbitrate employment disputes); *Bender v. A/G Edwards & Sons, Inc.*, 971 F.2d 698, 699-701, 59 Fair Empl. Prac. Cas. (BNA) 1231, 1231-33 (11th Cir. 1992) (holding that plaintiff's Title VII claim was subject to compulsory arbitration agreement in securities regulations form under FAA); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 306, 57 Fair Empl. Prac. Cas. (BNA) 386, 389 (6th Cir. 1991); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 933-35, 58 Fair Empl. Prac. Cas. (BNA) 178, 178-80 (9th Cir. 1991)).

⁷¹ *Id.* at 885, 5 A.D. Cases (BNA) at 495. In four of the five cases the agreement was based on securities regulation forms and in one case it was based on an employment application. See *id.*

⁷² See *id.*

⁷³ *Austin*, 78 F.3d at 885, 5 A.D. Cases (BNA) at 495-96 (citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965); *Adkins v. Times-World Corp.*, 771 F.2d 829, 832, 120 L.R.R.M. (BNA) 2216, 2219 (4th Cir. 1985)).

⁷⁴ *Id.* at 885-86, 5 A.D. Cases (BNA) at 496.

⁷⁵ *Id.*

⁷⁶ *Id.* at 886, 5 A.D. Cases (BNA) at 496. The court remanded the case so the district court could amend its order dismissing the case without prejudice to the merits of the claim, thereby enabling the employee to pursue her claims in arbitration. See *id.*

⁷⁷ *Id.* at 887, 5 A.D. Cases (BNA) at 497 (Hall, J., dissenting).

⁷⁸ *Austin*, 78 F.3d at 887, 5 A.D. Cases (BNA) at 497 (Hall, J., dissenting).

Hall therefore contended that the court should reverse the district court's decision, requiring that the claims be considered *de novo*.⁷⁹

Judge Hall emphasized that in *Alexander* the Court distinguished between an employee's individual statutory rights and any contractual rights the employee may have under a CBA.⁸⁰ Judge Hall contended that the very fact that the cases cited by the majority did not involve CBAs distinguished this case from the others.⁸¹ The dissent reasoned that, unlike situations in which an individual employee agrees in a securities regulation form or an employment application to waive his or her own rights regarding statutory claims, the present case involved a labor union's decision to prospectively waive a member's individual right to choose a judicial forum for his or her statutory claims.⁸² Judge Hall distinguished the power of a union to waive the statutory rights of a collective of employees from the power of an individual to waive his or her own Title VII and ADA claims.⁸³ The individual statutory claims, Judge Hall asserted, do not concern the majoritarian process and the union's waiver of these rights defeats the congressional purpose behind Title VII and the ADA.⁸⁴

Judge Hall contended that a CBA provision in which a union purports to waive an employee's right to pursue Title VII and ADA claims in court is clearly unenforceable under *Alexander*.⁸⁵ Judge Hall stated further that *Alexander* remains precedent in cases involving CBAs in several federal courts, and that the majority's holding creates a split among the circuits.⁸⁶ The dissent therefore concluded that the employee should be permitted to pursue her Title VII and ADA claims

⁷⁹ *Id.* (Hall, J., dissenting).

⁸⁰ *Id.* at 886, 5 A.D. Cases (BNA) at 496-97 (Hall, J., dissenting) (citing *Alexander* in which unanimous Supreme Court held that person may sue under Title VII notwithstanding that he has submitted his claims to arbitration under CBA and lost).

⁸¹ *Id.* at 886, 5 A.D. Cases (BNA) at 496 (Hall, J., dissenting).

⁸² *Id.* (Hall, J., dissenting).

⁸³ *Austin*, 78 F.3d at 886, 5 A.D. Cases (BNA) at 496 (Hall, J., dissenting).

⁸⁴ *Id.* at 886-87, 5 A.D. Cases (BNA) at 496 (Hall, J., dissenting).

⁸⁵ *Id.* at 887, 5 A.D. Cases (BNA) at 497 (Hall, J., dissenting). He reasoned that allowing an employee to pursue arbitration for contractual claims and litigation for statutory claims would most effectively accommodate both the federal policy of favoring arbitration and the federal policy against discriminatory employment practices. *Id.* at 887, 5 A.D. Cases (BNA) at 496-97 (Hall, J., dissenting).

⁸⁶ *Id.* at 887, 5 A.D. Cases (BNA) at 497 (Hall, J., dissenting). The dissent illustrated that the Court in *Gilmer* distinguished its holding from the principles established in *Alexander* and did not in fact overrule it. *See id.* Justice Hall highlighted the language in *Gilmer* acknowledging that a CBA was not at issue and that, therefore, the issue of tension between collective representation and individual statutory rights was not present. *See id.* (citing *Tran v. Tran*, 54 F.3d 115, 116-118, 149 L.R.R.M. (BNA) 2350, 2351-52 (2d Cir. 1995) (holding that former employee was not required to seek arbitration before presenting merits of his Fair Labor Standards Act claims)).

in court independent from the requirement to arbitrate any contractual claims she may raise.⁸⁷

Although the Supreme Court in *Gilmer* distinguished a mandatory arbitration clause in a securities registration form from one found in a CBA, the Fourth Circuit in *Austin* appears to extend the application of the *Gilmer* rationale to the latter situation.⁸⁸ In its analysis, the court in *Austin* refrained from considering the possible differences among securities registration forms, private employment applications and CBAs.⁸⁹ Rather, the Fourth Circuit held that as long as the agreement to arbitrate statutory rights is voluntary, it is valid and the parties should be bound to it.⁹⁰ Furthermore, the only attention given by the majority to the *Alexander* decision was to refute its position that arbitration is not an appropriate forum for the resolution of Title VII statutory rights.⁹¹ Using this analysis, the *Austin* court appears to essentially disregarded the Supreme Court's conclusion in *Alexander* that unions do not have the power to waive prospectively an individual's statutory rights under Title VII.⁹² The dissent alone raises the issue of whether there remains a distinct analysis, generated by *Alexander*, that requires different treatment of statutory rights encompassed in a CBA or whether the courts should more broadly apply the holdings and policies of *Gilmer*.⁹³

The dissent criticized the majority for not recognizing that, because *Austin* involves an arbitration provision in a CBA, the court should apply the reasoning of *Alexander* rather than that of *Gilmer*.⁹⁴ The dissent supported this position by citing federal case law that

⁸⁷ *Id.* (Hall, J., dissenting).

⁸⁸ See *Austin*, 78 F.3d at 885-86, 5 A.D. Cases (BNA) at 495-96; see also *Gilmer*, 500 U.S. at 35, 55 Fair Empl. Prac. Cas. (BNA) at 1123. In *Gilmer*, the Supreme Court listed several important distinctions between that case and *Alexander*, including that the arbitration in *Alexander* occurred in the context of a CBA and that there was concern about tension between collective representation and individual statutory rights. See *Gilmer*, 500 U.S. at 35, 55 Fair Empl. Prac. Cas. (BNA) at 1123.

⁸⁹ See *Austin*, 78 F.3d at 885, 5 A.D. Cases (BNA) at 495. The court in *Austin* noted that in each of the cases it cited, including this case, the employee who brought the discrimination claims had made an agreement to arbitrate employment disputes. *Id.*

⁹⁰ See *id.*

⁹¹ See *id.* at 880, 5 A.D. Cases (BNA) at 491. The court's only other reference to *Alexander* occurred when it justified its reasoning that the legislative history generally supports arbitration of the statutory claims. See *id.* at 882, 5 A.D. Cases (BNA) at 493.

⁹² See *Alexander*, 415 U.S. at 51-52, 7 Fair Empl. Prac. Cas. (BNA) at 86-87.

⁹³ See *Austin*, 78 F.3d at 880, 5 A.D. Cases (BNA) at 491; see also *id.* at 885-87, 5 A.D. Cases (BNA) at 496-97 (Hall, J., dissenting) (stating that *Alexander* court determined that employee's statutory rights were independent of the contractual rights found under CBA and that both rights should be permitted to be enforced in their respectively appropriate forums).

⁹⁴ See *id.* at 886-87, 5 A.D. Cases (BNA) at 496-97 (Hall, J., dissenting).

recognized that *Alexander*, rather than *Gilmer*, continues to govern arbitration provisions in CBAs.⁹⁵ The dissent concluded that as a result of the majority's position, there may now be a split in the circuits regarding compulsory arbitration of statutory rights pursuant to an agreement in a CBA.⁹⁶

In general, courts appear to rely consistently on the federal policy, established by cases such as the *Steelworker Trilogy* and the FAA, supporting the enforcement of arbitration agreements.⁹⁷ Furthermore, in *Willis* and *Mago*, courts held employees bound to securities regulations forms and employment applications that require arbitration of employment discrimination claims if they are entered into voluntarily.⁹⁸ The *Austin* dissent nevertheless raises the issue of whether the distinctions between an employee's ability to have access to the courts under a CBA, compared to either an individual employment application or securities form, remain significant enough to keep the analysis of *Alexander* alive in light of the court's broad interpretation of

⁹⁵ See *id.* at 887, 5 A.D. Cases (BNA) at 497 (Hall, J., dissenting) (citing *Tran v. Tran*, 54 F.3d 115, 117, 118 (2d Cir. 1995) where the court recognized that *Alexander*, rather than *Gilmer*, governs in the context of collective bargaining agreements).

⁹⁶ See *id.* (Hall, J., dissenting) (stating that, because *Tran* was decided by Second Circuit, majority's holding created split among circuits); see also *Pryner v. Tractor Supply Co., Inc.*, DAILY LAB. REP. (BNA), Mar. 25, 1997, at d22. In *Pryner*, the United States Court of Appeals for the Seventh Circuit faced a similar issue; whether a CBA can compel an employee to arbitrate a Title VII or ADA claim. See DAILY LAB. REP. (BNA), Mar. 25, 1997, at d22. Unlike the Fourth Circuit in *Austin*, the Seventh Circuit held that, though an individual employee had the right to consent to arbitrate his or her federal anti-discrimination claims, the union cannot give this consent for the employee by signing a CBA that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration process. Compare *id.*, with *Austin*, 78 F.3d at 886, 5 A.D. Cases (BNA) at 496. By affirming the lower court's denial of the employer's motion to stay the suit pending arbitration, the court rejected the employer's argument that there was no conflict of interest between the employer and employee in completing arbitration. *Pryner*, DAILY LAB. REP. (BNA), Mar. 25, 1997, at d22. Because the union controls whether arbitration is invoked, the court refused to leave the enforcement of the individual employee's statutory rights exclusively to the union's discretion. See *id.* The court also recognized the split in the circuits regarding this issue and questioned whether, in light of the *Gilmer* decision, the Supreme Court may need to determine whether *Alexander* still compelled a decision in favor of the employee. *Id.*

⁹⁷ See *Austin*, 78 F.3d at 879-81, 5 A.D. Cases (BNA) at 491-92; see also *id.* at 887, 5 A.D. Cases (BNA) at 496-97 (Hall, J., dissenting); *Mago*, 956 F.2d at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180.

⁹⁸ See *Austin*, 78 F.3d at 884-85, 5 A.D. Cases (BNA) at 495 (citing *Willis*, 948 F.2d at 312, 57 Fair Empl. Prac. Cas. (BNA) at 392; *Mago*, 956 F.2d at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180); see also *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1305, 66 Fair Empl. Prac. Cas. (BNA) 933, 936 (9th Cir. 1994). In *Prudential*, two women employees sued for violation of Title VII. See 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 936. Although they had signed a securities form which included a provision to compel arbitration, the court held that the agreement did not bind the employees because they did not knowingly agree and therefore had not entered into the agreement voluntarily. *Id.*

Gilmer.⁹⁹ Consequently, as the dissent in *Austin* suggests, the issue of whether the federal policy that supports the protection of individual employees from discrimination will continue to be equated with an individual's access to the federal court, must be examined.¹⁰⁰ The majority in *Austin* extended the reasoning in *Gilmer* to apply to statutory claims under a CBA, raised prior to arbitration.¹⁰¹ The question remains whether the plaintiff could still bring her claims to court after completing arbitration, similar to *Alexander*, or whether, as in *Gilmer*, arbitration would be her final adjudicatory process.¹⁰² If other circuit courts follow the approach taken by the majority in *Austin*, and it is interpreted to further diminish the difference between CBAs and other employment agreements, the Supreme Court may need to step in to clarify its position regarding the *Alexander* and *Gilmer* analyses.

In summary, the Fourth Circuit in *Austin* held enforceable a voluntary agreement within a CBA to arbitrate ADA and Title VII statutory claims and that, therefore, an employee cannot sue her employer in federal court before pursuing arbitration of her discrimination claims.¹⁰³ The court applied the rationale used by the Supreme Court in *Gilmer* which provides that once parties have contracted to arbitrate a statutory matter, the parties should be held to that agreement, unless Congress intended to preclude arbitration.¹⁰⁴ This decision appears to de-emphasize the distinction, explicated by *Gilmer*, between agreements to arbitrate statutory rights under a CBA and other employment agreements.¹⁰⁵ Based on the competing federal policies to protect individual employees from discrimination and to encourage arbitration of employment disputes, the Supreme Court may need to intervene to clarify the remaining significance, if any, of the *Alexander* case in light of the lower courts' expanded interpretation of *Gilmer*.

⁹⁹ See *Austin*, 78 F.3d at 886-87, 5 A.D. Cases (BNA) at 496-97 (Hall, J., dissenting); see also *Pryner*, DAILY LAB. REP. (BNA), Mar. 25, 1997, at d22.

¹⁰⁰ See *Austin*, 78 F.3d at 887, 5 A.D. Cases (BNA) at 496-97 (Hall, J., dissenting); see also *Gilmer*, 500 U.S. at 26, 55 Fair Empl. Prac. Cas. (BNA) at 1120 (stating that rights are not relinquished by requiring employee to use arbitration in place of courts).

¹⁰¹ See *Austin*, 78 F.3d at 885, 5 A.D. Cases (BNA) at 495 (finding that employee cannot sue employer without first going through grievance procedure).

¹⁰² Compare *Alexander*, 415 U.S. at 59, 7 Fair Empl. Prac. Cas. (BNA) at 90 (holding that employee can pursue fully both his remedy under grievance-arbitration clause of CBA and his cause under Title VII) with *Gilmer*, 500 U.S. at 23, 55 Fair Empl. Prac. Cas. (BNA) at 1118 (holding that employee can be held to compulsory arbitration pursuant to arbitration agreement in securities registration application).

¹⁰³ *Austin*, 78 F.3d at 885-86, 5 A.D. Cases (BNA) at 496.

¹⁰⁴ See *id.* at 880-81, 5 A.D. Cases (BNA) at 492.

¹⁰⁵ See *id.* at 885, 5 A.D. Cases (BNA) at 495; *id.* at 887, 5 A.D. Cases (BNA) at 497 (Hall, J., dissenting).

C. **Two-Pronged Test for Determining the Validity of Affirmative Action Plans Under Title VII: Taxman v. Board of Education*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 In creating the prohibition against racial discrimination in Title VII, Congress opened employment opportunities in areas which traditionally had been closed to minority employees.³ The United States Supreme Court has found that voluntary affirmative action plans that take race into consideration do not necessarily violate Title VII's prohibition against racial discrimination.⁴ In determining whether the application of an affirmative action plan violates Title VII, the Court has considered whether the purpose of the plan mirrors the purpose of Title VII and whether the plan unnecessarily trammels the rights of nonminority employees.⁵

In 1976, in *McDonald v. Santa Fe Trail Transportation Co.*, the United States Supreme Court held that Title VII prohibits discrimination against white employees to the same extent that it prohibits discrimination against black employees.⁶ In *McDonald*, a transportation company discharged two white employees for misappropriating cargo but did not discharge a black employee who was charged with the same offense.⁷ The white employees claimed that the employer had discriminated on the basis of race in violation of Title VII.⁸ The Court reasoned that Title VII's provision prohibiting the discharge of any individual because of his or her race was not limited to any particular race and

* By Amy B. Rensko, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 91 F.3d 1547, 71 Fair Empl. Prac. Cas. (BNA) 848 (3d Cir. 1996).

² 42 U.S.C. § 2000e-2(a) (1994). The statute states in relevant 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 See *United Steelworkers v. Weber*, 443 U.S. 193, 202–03, 20 Fair Empl. Prac. Cas. (BNA) 1, 5–6 (1979).

⁴ *Id.* at 207–08, 20 Fair Empl. Prac. Cas. (BNA) at 7.

⁵ See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 627–30, 43 Fair Empl. Prac. Cas. (BNA) 411, 416–18 (1987); *Weber*, 443 U.S. at 208, 20 Fair Empl. Prac. Cas. (BNA) at 7.

⁶ 427 U.S. 273, 280, 12 Fair Empl. Prac. Cas. (BNA) 1577, 1580 (1976).

⁷ *Id.* at 276, 12 Fair Empl. Prac. Cas. (BNA) at 1578.

⁸ See *id.*

therefore applied to white employees.⁹ The Court determined that although an employer may discharge employees for crimes or other misconduct, an employer violates Title VII if it retains an employee of one race while discharging employees of another race when all have committed the same offense.¹⁰ The Court in *McDonald* thus held that under Title VII an employer may not use race as a factor when deciding whether to discharge employees for misconduct, and that this prohibition against racial discrimination applies equally to employees of all races.¹¹

In 1979, in *United Steelworkers v. Weber*, the United States Supreme Court held that an affirmative action plan, which reserved for black employees fifty percent of the openings in an in-house training program, did not violate Title VII because the purpose of the plan mirrored the purpose of the statute and the plan did not unnecessarily trammel the interests of the white employees.¹² In *Weber*, a white employee, whose employer denied him admission to an in-house craft training program while admitting less senior black employees, challenged the legality under Title VII of an affirmative action plan that reserved fifty percent of the program openings for black employees.¹³ The employer designed the affirmative action plan to eliminate racial imbalances in the craft-work forces of defendant's plant by setting goals for black workers and establishing an in-house craft training program to assist in meeting the goals.¹⁴

Responding to the argument that Title VII prohibited all race-conscious affirmative action plans, the Court examined Title VII's legislative history and concluded that Congress did not intend to prohibit entirely voluntary affirmative action efforts as a means of opening employment opportunities to black workers in occupations that traditionally have been closed to them.¹⁵ In addition, the Court examined the language and legislative history of section 2000e-

⁹ *Id.* at 278-80, 12 Fair Empl. Prac. Cas. (BNA) at 1579-80.

¹⁰ *Id.* at 283-84, 12 Fair Empl. Prac. Cas. (BNA) at 1581. In addition, the Court concluded that, under Title VII, a union may not use the race of employees whom it represents as a factor when negotiating with an employer for retention of employees. *Id.* at 284-85, 12 Fair Empl. Prac. Cas. (BNA) at 1581.

¹¹ *McDonald*, 427 U.S. at 283-84, 12 Fair Empl. Prac. Cas. (BNA) at 1581.

¹² 443 U.S. at 208-09, 20 Fair Empl. Prac. Cas. (BNA) at 7-8.

¹³ *Id.* at 198-99, 20 Fair Empl. Prac. Cas. (BNA) at 3-4.

¹⁴ *See id.* at 197-98, 20 Fair Empl. Prac. Cas. (BNA) at 3. As a result of a history of excluding black workers from craft unions, black employees constituted only 1.83% of craft-workers at the plant prior to the affirmative action plan even though the entire workforce was approximately 39% black. *See id.* at 198-99, 20 Fair Empl. Prac. Cas. (BNA) at 3-4.

¹⁵ *Id.* at 201-04, 20 Fair Empl. Prac. Cas. (BNA) at 5-6.

2(j)¹⁶ of Title VII and concluded that although Title VII does not require affirmative efforts to correct racial imbalances, it does not prohibit the use of all voluntary affirmative actions to correct racial imbalances.¹⁷ The Court reasoned that because the affirmative action plan and Title VII were both designed to end patterns of racial segregation and to open employment for blacks in areas that traditionally have been closed to them, the plan mirrored the purposes of Title VII.¹⁸ The Court also reasoned that because the affirmative action plan did not require that the employer discharge white employees for replacement with black employees, did not create an absolute bar to the advancement of white employees and was a temporary measure for the purposes of eliminating a manifest racial imbalance as opposed to maintaining racial balance, the plan did not unnecessarily trammel the interests of white employees.¹⁹ The Court thus held that the voluntary affirmative action plan was permissible under Title VII because the plan mirrored the purposes of the statute and did not unnecessarily trammel the interests of white employees.²⁰

In 1987, in *Johnson v. Transportation Agency*, the United States Supreme Court applied its reasoning from *Weber* and held that where an employer considered the sex of its employees as one factor when deciding which employee to promote, the employer's actions were permissible because the promotion decision was made pursuant to a voluntary affirmative action plan that conformed to Title VII.²¹ A male employee, who had applied for promotion to road dispatcher but was rejected in favor of a female applicant, alleged that his employer

¹⁶ See 42 U.S.C. § 2000e-2(j) (1994). Section 2000e-2(j) of Title VII provides:

Nothing contained in the subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to the subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Id.

¹⁷ *Weber*, 443 U.S. at 204-06, 20 Fair Empl. Prac. Cas. (BNA) at 5-6.

¹⁸ *Id.* at 208, 20 Fair Empl. Prac. Cas. (BNA) at 7.

¹⁹ *Id.*

²⁰ *Id.* at 208-09, 20 Fair Empl. Prac. Cas. (BNA) at 7-8.

²¹ 480 U.S. at 641-42, 43 Fair Empl. Prac. Cas. (BNA) at 422.

denied his promotion on the basis of sex in violation of Title VII.²² The employer included sex as a factor in the promotion decision to increase the number of women in traditionally segregated job classifications and promoted the qualified female applicant.²³

Applying the *Weber* analysis, the Court first examined whether consideration of sex was "justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'"²⁴ The Court reasoned that it was not unreasonable to take the sex of the applicant into consideration given the obvious imbalance in the job classification and the goal of eliminating those imbalances.²⁵ The Court reasoned that the application of the affirmative action plan satisfied the first part of the *Weber* analysis.²⁶

Applying the second prong of the *Weber* analysis, the Court next considered whether the affirmative action plan unnecessarily trampled the rights of the male employees.²⁷ The Court reasoned that the employer did not unnecessarily trammel the rights of the male employees because 1) the plan did not set aside positions for women but merely considered sex as one factor in the decision; 2) the plaintiff had no absolute entitlement to the position and was competing with the other qualified applicants; and 3) the plan was intended to attain, rather than maintain, a balanced workforce.²⁸ The Court thus held in *Johnson* that the consideration of sex as one factor in a promotion decision made pursuant to an affirmative action plan that met the *Weber* requirements was permissible under Title VII.²⁹

During the *Survey* year, in *Taxman v. Board of Education*, the United States Court of Appeals for the Third Circuit en banc held that a decision to lay off one of two equally qualified teachers was a violation of Title VII because race was considered as a factor and the decision was based on a non-remedial affirmative action plan.³⁰ The Third Circuit reasoned that because the sole purpose of the school board's affirmative action plan was to obtain an educational benefit from the

²² See *id.* at 623-25, 43 Fair Empl. Prac. Cas. (BNA) at 415-16.

²³ See *id.*

²⁴ *Id.* at 630, 43 Fair Empl. Prac. Cas. (BNA) at 418.

²⁵ *Id.* at 637, 43 Fair Empl. Prac. Cas. (BNA) at 420-21.

²⁶ *Johnson*, 480 U.S. at 637, 43 Fair Empl. Prac. Cas. (BNA) at 420-21.

²⁷ *Id.* at 637-38, 43 Fair Empl. Prac. Cas. (BNA) at 421.

²⁸ *Id.* at 637-39, 43 Fair Empl. Prac. Cas. (BNA) at 421.

²⁹ *Id.* at 641-42, 43 Fair Empl. Prac. Cas. (BNA) at 422.

³⁰ 91 F.3d 1547, 1550, 71 Fair Empl. Prac. Cas. (BNA) 848, 850 (3d Cir. 1996). The Third Circuit also held that *Taxman* was entitled to summary judgment based on her New Jersey Law Against Discrimination claim because the legal analysis was essentially the same as for the Title VII claim. *Id.* at 1565, 71 Fair Empl. Prac. Cas. (BNA) at 862. Although the Third Circuit awarded

presence of a racially diverse faculty, the plan did not attempt to remedy a manifest imbalance in the racial composition of the faculty.³¹ The court further reasoned that because the plan lacked goals and standards, did not exist for the purpose of attaining a racial balance, and imposed a substantial and costly burden on particular individuals, the plan unnecessarily trammelled nonminority interests.³² The Third Circuit thus held that the layoff decision made in accordance with the affirmative action plan violated Title VII because the plan failed to satisfy either prong of the *Weber* test.³³

The Board of Education of the Township of Piscataway, New Jersey ("Board") developed and adopted an affirmative action plan that applied to all employment decisions including layoffs.³⁴ The stated purpose of the plan was to provide for equal educational and employment opportunities and to attract minority personnel who would be considered along with other qualified candidates.³⁵ The affirmative action plan would take effect when candidates appeared to have equal qualifications.³⁶ The plan did not have a remedial purpose and, at all relevant times, African-American teachers were not underrepresented on the faculty.³⁷

In 1989, the Board needed to layoff one of two teachers, Sharon Taxman or Debra Williams, who were equally junior members of Piscataway High School's Business Department.³⁸ Both were judged to have equal ability and qualifications; however, Taxman was white and Williams was African-American.³⁹ In previous layoff decisions where employees were of equal seniority and possessed equal qualifications, the Board had randomly selected which employee to layoff.⁴⁰ In this case, the Board decided to invoke the affirmative action plan and chose to layoff Taxman and to retain Williams.⁴¹ The Board's President ex-

Taxman 100% backpay damages, the Third Circuit refused to award Taxman punitive damages because there was no evidence that the Board acted willfully, wantonly or outrageously. *Id.* at 1565-67, 71 Fair Empl. Prac. Cas. (BNA) at 862-64.

³¹ See *id.* at 1563, 71 Fair Empl. Prac. Cas. (BNA) at 861.

³² *Id.* at 1564, 71 Fair Empl. Prac. Cas. (BNA) at 861-62.

³³ *Id.* at 1563-65, 71 Fair Empl. Prac. Cas. (BNA) at 861-62.

³⁴ See *id.* at 1550, 71 Fair Empl. Prac. Cas. (BNA) at 850.

³⁵ See *Taxman*, 91 F.3d at 1550, 71 Fair Empl. Prac. Cas. (BNA) at 850.

³⁶ See *id.*

³⁷ See *id.* at 1550, 71 Fair Empl. Prac. Cas. (BNA) at 850-51. The percentage of black employees in the relevant job category was greater than the percentage of black workers in the available workforce. See *id.* at 1551, 71 Fair Empl. Prac. Cas. (BNA) at 851.

³⁸ See *id.* at 1551, 71 Fair Empl. Prac. Cas. (BNA) at 851.

³⁹ See *id.* Williams was also the only African-American member of the Business Department. See *id.*

⁴⁰ See *Taxman*, 91 F.3d at 1551, 71 Fair Empl. Prac. Cas. (BNA) at 851.

⁴¹ See *id.*

plained that the application of the plan intended to create a culturally diverse faculty that would provide an educational advantage to the student population.⁴²

After Taxman filed a charge of employment discrimination with the Equal Employment Opportunity Commission, the United States filed suit against the Board in the United States District Court for the District of New Jersey alleging racial discrimination under Title VII, and Taxman intervened.⁴³ The district court granted partial summary judgment to the United States and Taxman on the issue of liability for racial discrimination, and a trial proceeded to determine damages.⁴⁴ The Board appealed to the Third Circuit, contending that summary judgment as to liability was granted in error.⁴⁵

The Third Circuit noted that not all voluntary race-conscious affirmative action plans violate Title VII's prohibition against racial discrimination and that the analytic framework established in *Weber* and refined in *Johnson* must be applied to determine the validity of the plan.⁴⁶ The Third Circuit first examined the first prong of the *Weber* test to decide whether the Board's purpose of promoting racial diversity mirrored the purposes of Title VII.⁴⁷ The Third Circuit reasoned that the plan did not further Title VII's goals of ending discrimination in employment and remedying underrepresentation of minorities due to discrimination.⁴⁸

The Third Circuit reasoned that applying the affirmative action plan for the purpose of obtaining educational benefit from a racially diverse faculty did not mirror the goals of Title VII because the plan was not adopted to remedy past discrimination or a manifest racial imbalance in employment.⁴⁹ The Board argued that the purpose of promoting racial diversity was included in Title VII when it was amended in 1972 to include private and public academic institutions, and that Fourteenth Amendment case law supported the validity of using the plan to achieve racial diversity.⁵⁰ In examining the legislative history of the 1972 amendment to Title VII, the Third Circuit noted that Con-

⁴² See *id.* at 1551-52, 71 Fair Empl. Prac. Cas. (BNA) at 851-52.

⁴³ See *id.* at 1552, 71 Fair Empl. Prac. Cas. (BNA) at 852. The statute of limitations had run for a 42 U.S.C. § 1983 claim. See *id.* at 1552 n.5, 71 Fair Empl. Prac. Cas. (BNA) at 852 n.5. The plaintiff, therefore, did not include a Fourteenth Amendment Equal Protection claim. See *id.*

⁴⁴ See *id.* at 1552, 71 Fair Empl. Prac. Cas. (BNA) at 852.

⁴⁵ See *Taxman*, 91 F.3d at 1552, 71 Fair Empl. Prac. Cas. (BNA) at 852.

⁴⁶ *Id.* at 1553, 1556, 71 Fair Empl. Prac. Cas. (BNA) at 853, 855.

⁴⁷ *Id.* at 1556-57, 71 Fair Empl. Prac. Cas. (BNA) at 855-56.

⁴⁸ *Id.* at 1563, 71 Fair Empl. Prac. Cas. (BNA) at 861.

⁴⁹ *Id.*

⁵⁰ See *Taxman*, 91 F.3d at 1558-59, 71 Fair Empl. Prac. Cas. (BNA) at 857-58.

gress did not include the promotion of racial diversity in schools as a purpose of the amendment but merely intended to extend existing Title VII coverage to schools.⁵¹ The court also rejected the Board's argument that racial diversity as an affirmative action goal, which the Board argued had been accepted in equal protection case law, also applied to Title VII.⁵² The Third Circuit instead concluded that Title VII's prohibitions on employers did not extend as far as the Constitution.⁵³ The Board's argument was not valid, the court reasoned, because the argument was based on a misinterpretation of United States Supreme Court case law.⁵⁴ The Third Circuit concluded that the *Johnson* Court had not held that an affirmative action purpose that satisfies the Constitution must also satisfy Title VII.⁵⁵ The Third Circuit further reasoned that even if equal protection standards could be imported into a Title VII analysis, the case law did not support the promotion of racial diversity as a goal.⁵⁶ The Third Circuit therefore concluded that the affirmative action plan failed the first prong of the *Weber* test because a non-remedial purpose, such as the promotion of racial diversity for educational benefit, did not mirror the purposes of Title VII.⁵⁷

The Third Circuit next applied the reasoning of *Weber* and *Johnson* to examine whether the application of the affirmative action plan unnecessarily trammelled nonminority interests.⁵⁸ The Third Circuit concluded that the Board's plan did not set standards by which to evaluate progress toward achieving the plan's purpose or to assure that the Board did not apply the plan contrary to its purpose.⁵⁹ The Third Circuit also concluded that the plan was not a temporary measure to attain a racial balance; rather, the plan maintained an existing racial balance in the school's faculty.⁶⁰ Finally, the Third Circuit reasoned that the harm imposed on Taxman by the loss of her job was too substantial and costly to justify the application of the plan in this instance because Taxman, a tenured employee, bore the entire burden of the plan's application.⁶¹ Because the plan did not contain goals and standards,

⁵¹ See *id.* at 1558-59, 71 Fair Empl. Prac. Cas. (BNA) at 857.

⁵² *Id.* at 1559-60, 71 Fair Empl. Prac. Cas. (BNA) at 858.

⁵³ See *id.* at 1560, 71 Fair Empl. Prac. Cas. (BNA) at 858.

⁵⁴ *Id.* at 1559-62, 71 Fair Empl. Prac. Cas. (BNA) at 857-60.

⁵⁵ *Taxman*, 91 F.3d at 1559-60, 71 Fair Empl. Prac. Cas. (BNA) at 858.

⁵⁶ *Id.* at 1560, 71 Fair Empl. Prac. Cas. (BNA) at 858.

⁵⁷ *Id.* at 1563, 71 Fair Empl. Prac. Cas. (BNA) at 861.

⁵⁸ *Id.* at 1564, 71 Fair Empl. Prac. Cas. (BNA) at 861.

⁵⁹ *Id.*

⁶⁰ *Taxman*, 91 F.3d at 1564, 71 Fair Empl. Prac. Cas. (BNA) at 861-62.

⁶¹ *Id.* at 1564, 71 Fair Empl. Prac. Cas. (BNA) at 862.

sought to maintain racial diversity and imposed substantial harm and severe costs on Taxman, the Third Circuit reasoned that Taxman's interests were unnecessarily trammelled under the second prong of the *Weber* test.⁶² Because the Third Circuit concluded that neither prong of the *Weber* test was satisfied, the court held that the Board's plan and the application of the plan to the Taxman layoff decision violated Title VII.⁶³

Chief Judge Sloviter's dissent, however, stated that the significance of *Weber* and *Johnson* was not the purported establishment of a test, but was that the United States Supreme Court upheld affirmative action plans that deviated from the literal interpretation of Title VII.⁶⁴ Chief Judge Sloviter reasoned that although the Court in *Weber* and *Johnson* upheld plans that sought to remedy racial imbalances, it did not follow that affirmative action plans that pursued other purposes, such as racial diversity, could not comply with Title VII.⁶⁵ Chief Judge Sloviter emphasized that the Court did not intend for the standards it applied in *Weber* and *Johnson* to uphold affirmative action plans to be used to establish boundaries between permissible and impermissible plans.⁶⁶

Chief Judge Sloviter criticized the majority for elevating the language of *Weber* that the plan "mirror the purposes of Title VII" to a litmus test contrary to the intentions of the *Weber* Court.⁶⁷ Chief Judge Sloviter stated that the Court in *Weber* did not intend to create a test where an affirmative action plan is valid only if Title VII's text or legislative history matches the articulated purposes of the plan.⁶⁸ Rather, Chief Judge Sloviter reasoned that creating a racially diverse faculty is consistent with the goals of Title VII because Congress intended Title VII to be forward-looking legislation with the broad goal of eliminating the causes of discrimination.⁶⁹ Chief Judge Sloviter further found that the Supreme Court, in other contexts, had recognized racial diversity in the classroom as important to eliminating attitudes that can lead to

⁶² *Id.* at 1564-65, 71 Fair Empl. Prac. Cas. (BNA) at 861-62.

⁶³ *Id.* at 1550, 71 Fair Empl. Prac. Cas. (BNA) at 850.

⁶⁴ *Id.* at 1570, 71 Fair Empl. Prac. Cas. (BNA) at 866 (Sloviter, C.J., dissenting). In addition to Chief Judge Sloviter, Judges Scirica, Lewis and McKee wrote separate dissenting opinions. *See id.* at 1576-79, 71 Fair Empl. Prac. Cas. (BNA) at 872-74 (Sloviter, C.J., dissenting) (Scirica, J., dissenting) (Lewis, J., dissenting) (McKee, J., dissenting).

⁶⁵ *Taxman*, 91 F.3d at 1570, 71 Fair Empl. Prac. Cas. (BNA) at 866-67 (Sloviter, C.J., dissenting).

⁶⁶ *Id.* at 1570, 71 Fair Empl. Prac. Cas. (BNA) at 867 (Sloviter, C.J., dissenting).

⁶⁷ *Id.* at 1571, 71 Fair Empl. Prac. Cas. (BNA) at 867 (Sloviter, C.J., dissenting).

⁶⁸ *Id.* (Sloviter, C.J., dissenting).

⁶⁹ *Id.* at 1571, 71 Fair Empl. Prac. Cas. (BNA) at 867-68 (Sloviter, C.J., dissenting).

future discrimination.⁷⁰ Chief Judge Sloviter therefore reasoned that obtaining educational benefits from a racially diverse faculty was consistent with the goals of Title VII and disagreed with the majority's reasoning that affirmative action plans cannot take race into consideration other than in remedying past discrimination.⁷¹

Contrary to the majority, Chief Judge Sloviter concluded that applying the affirmative action plan to the layoff decision was not overly intrusive of Taxman's rights.⁷² Because Taxman would have had a fifty percent chance of being laid off had the Board not invoked the plan, Chief Judge Sloviter reasoned that Taxman did not have a "legitimate and firmly rooted expectation" that she would not be laid off.⁷³ Chief Judge Sloviter also criticized the majority's narrow reading of *Weber* and *Johnson* in finding that a plan must be explicitly temporary to be valid because, to Chief Judge Sloviter, the significant consideration is the impact on other employees and not whether the plan is in effect for a specified number of years.⁷⁴ Chief Judge Sloviter further reasoned that the plan's impact on nonminorities was minimal because it was discretionary and had been applied only once during twenty years.⁷⁵ Because Chief Judge Sloviter could not conclude that faculty diversity was an impermissible purpose of the plan and did not conclude that the Board's decision under the plan was overly intrusive of Taxman's rights, she would have reversed the grant of summary judgment for Taxman and directed the lower court to grant summary judgment to the Board.⁷⁶

The Third Circuit in *Taxman* elevated the analyses in *Weber* and *Johnson* to the level of a two-pronged test.⁷⁷ The two requirements are that an affirmative action plan 1) mirror the purposes of Title VII and 2) not unnecessarily trammel nonminority interests.⁷⁸ Although *Johnson* applied the analysis from *Weber* to determine that an affirmative action plan was valid under Title VII, the Court in *Johnson* did not

⁷⁰ *Taxman*, 91 F.3d at 1571-72, 71 Fair Empl. Prac. Cas. (BNA) at 867-68 (Sloviter, C.J., dissenting).

⁷¹ *Id.* at 1572, 1574, 71 Fair Empl. Prac. Cas. (BNA) at 868, 870 (Sloviter, C.J., dissenting).

⁷² *Id.* at 1576, 71 Fair Empl. Prac. Cas. (BNA) at 871 (Sloviter, C.J., dissenting).

⁷³ *Id.* at 1574, 71 Fair Empl. Prac. Cas. (BNA) at 870 (Sloviter, C.J., dissenting).

⁷⁴ *Id.* at 1575, 71 Fair Empl. Prac. Cas. (BNA) at 871 (Sloviter, C.J., dissenting). Sloviter pointed out that the plan at issue in *Johnson* contained no end date and that the Court in *Johnson* indicated that only particularly burdensome plans need be explicitly temporary. *Id.* at 1575, 71 Fair Empl. Prac. Cas. (BNA) at 870.

⁷⁵ *Taxman*, 91 F.3d at 1575, 71 Fair Empl. Prac. Cas. (BNA) at 871 (Sloviter, C.J., dissenting).

⁷⁶ *Id.* at 1576, 71 Fair Empl. Prac. Cas. (BNA) at 871 (Sloviter, C.J., dissenting).

⁷⁷ *See id.* at 1563-65, 71 Fair Empl. Prac. Cas. (BNA) at 861.

⁷⁸ *See id.*

explicitly establish the *Weber* factors as a legal test or create outer boundaries for permissible affirmative action plans.⁷⁹

Taxman is significant because it rejects the possibility that a purpose other than the remedy of past discrimination or a manifest racial imbalance in traditionally segregated job categories could be consistent with the purposes of Title VII.⁸⁰ The Third Circuit narrowly approached the decision of whether the plan was consistent with the purposes of Title VII by examining only whether a plan with a goal of promoting faculty diversity for education's sake had a remedial purpose.⁸¹ The Third Circuit stated that the primary goals of Title VII were to end discrimination and to remedy minority underrepresentation caused by discrimination.⁸² In her dissent, however, Chief Judge Sloviter concluded that an affirmative action plan with a forward-looking purpose could mirror the purposes of Title VII.⁸³ The presence of a diverse faculty could result in the development of student attitudes that could help end future discrimination in employment in a broader context than Piscataway High School.⁸⁴

The Third Circuit chose the safer route, however, by refusing to recognize any opening left by the Supreme Court to find additional reasons in Title VII to take race into account when making employment decisions and by elevating the language of *Weber* and *Johnson* to the level of a test.⁸⁵ The *Johnson* Court framed its inquiry such that it examined only whether the plan met the goal of remedying a manifest racial imbalance in order to satisfy the first requirement of the *Weber* analysis.⁸⁶ Because the *Johnson* Court only looked at a remedial affirmative action program, *Johnson* does not provide support for the conclusion that a non-remedial goal of an affirmative action plan can mirror the purposes of Title VII.⁸⁷ Nor, however, does *Johnson* support the conclusion that goals other than the goal of remedying a manifest racial imbalance do not mirror the purposes of Title VII.⁸⁸ In *Taxman*, the Third Circuit chose not to expand the Supreme Court's analysis of

⁷⁹ *Johnson v. Transportation Agency*, 480 U.S. 616, 642, 43 Fair Empl. Prac. Cas. (BNA) 411, 422-23 (1987) (Stevens, J., concurring); see *Taxman*, 91 F.3d at 1570, 71 Fair Empl. Prac. Cas. (BNA) at 866-67 (Sloviter, C.J., dissenting).

⁸⁰ See 91 F.3d at 1563, 71 Fair Empl. Prac. Cas. (BNA) at 861.

⁸¹ See *id.* at 1557-58, 71 Fair Empl. Prac. Cas. (BNA) at 856-57.

⁸² *Id.* at 1557, 71 Fair Empl. Prac. Cas. (BNA) at 856.

⁸³ *Id.* at 1571, 71 Fair Empl. Prac. Cas. (BNA) at 867 (Sloviter, C.J., dissenting).

⁸⁴ See *id.* at 1571-72, 71 Fair Empl. Prac. Cas. (BNA) at 867-68 (Sloviter, C.J., dissenting).

⁸⁵ See *Taxman*, 91 F.3d at 1563-65, 71 Fair Empl. Prac. Cas. (BNA) at 861-62.

⁸⁶ See 480 U.S. at 631-37, 43 Fair Empl. Prac. Cas. (BNA) at 418-21.

⁸⁷ See *id.*

⁸⁸ See *id.*

which goals mirror the purposes of Title VII and, instead, chose to limit valid affirmative action plans to those adopted by employers to remedy past discrimination or to correct a manifest imbalance in the employment of minorities.⁸⁹

In sum, *Taxman v. Board of Education* established that an affirmative action plan must have a goal that mirrors the purposes of Title VII and must not unnecessarily trammel the interests of nonminorities to be valid under Title VII.⁹⁰ The Third Circuit clearly established the analysis introduced in *Weber* as refined by *Johnson* as a two-pronged test for determining whether an affirmative action plan is valid under Title VII.⁹¹ In addition, *Taxman* is significant because it rejected the possibility that a non-remedial goal of an affirmative action plan, such as obtaining educational benefit from a diverse faculty, can be consistent with the purposes of Title VII.⁹² In recognizing only remedial measures, the Third Circuit has therefore forbidden the application of affirmative action plans that take forward-looking approaches to ending discrimination in employment.⁹³

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. **Rejecting the Requirement That ADEA Plaintiffs Demonstrate Replacement from Outside Protected Class: O'Connor v. Consolidated Coin Caterers Corp.*¹

The Age Discrimination in Employment Act ("ADEA") protects workers aged forty and older from discrimination on the basis of age.² Plaintiffs under the ADEA can prove age discrimination under ordinary principles of proof, by establishing by a preponderance of the evidence that age was the determining factor in the adverse employment decision, or under the *McDonnell Douglas* burden shifting scheme of proof.³ The various circuits have generally agreed that an ADEA plaintiff must establish, as part of her prima facie case under *McDonnell*

⁸⁹ See *Taxman*, 91 F.3d at 1563, 71 Fair Empl. Prac. Cas. (BNA) at 861.

⁹⁰ *Id.* at 1556, 1564, 71 Fair Empl. Prac. Cas. (BNA) at 855, 861.

⁹¹ See *id.* at 1563, 71 Fair Empl. Prac. Cas. (BNA) at 861.

⁹² See *id.*

⁹³ See *id.* at 1563, 1567, 71 Fair Empl. Prac. Cas. (BNA) at 861, 864.

* By Stephen E. Gruendel, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 116 S. Ct. 1307, 70 Fair Empl. Prac. Cas. (BNA) 486 (1996).

² 29 U.S.C. §§ 623(a)(1), 631(a) (1994).

³ See *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 545, 67 Fair Empl. Prac. Cas. (BNA) 1859, 1862 (4th Cir. 1995), *rev'd*, 116 S. Ct. 1307, 70 Fair Empl. Prac. Cas. (BNA) 486 (1996); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 153, 64 Fair Empl. Prac. Cas.

Douglas, that she was in the protected class of individuals forty and older; that she was qualified for the position, and that she suffered an adverse employment action.⁴ The circuits have split, however, on the question of whether an age discrimination plaintiff must demonstrate that the employer replaced her with someone outside the protected class.⁵ The Supreme Court resolved the circuit split in *O'Connor v. Consolidated Coin Caterers Corp.*, holding that an ADEA plaintiff is not required to demonstrate that her replacement ("the replacement") was someone outside the protected class.⁶ Rejecting that requirement, the Court suggested the alternative requirement that the replacement be substantially younger than the plaintiff.⁷

In 1988, in *Freeman v. Package Machinery Co.*, the United States Court of Appeals for the First Circuit held that a plaintiff does not have to show that his employer replaced him with a younger person, or with someone outside the protected age group, to establish a prima facie case under the ADEA.⁸ The plaintiff in *Freeman* had worked for his employer for more than twenty-five years until the company discharged him in 1980.⁹ The company replaced the sixty-year-old plaintiff with a forty-eight-year-old man and the plaintiff brought suit for age discrimination under the ADEA, prevailing at trial.¹⁰

(BNA) 1645, 1646 (7th Cir. 1994). Under *McDonnell Douglas*, the plaintiff bears the initial burden of proving by a preponderance of the evidence a prima facie case of illegal discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 5 Fair Empl. Prac. Cas. (BNA) 965, 969 (1973); see *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 25 Fair Empl. Prac. Cas. (BNA) 113, 115 (1981). Establishing a prima facie case creates a presumption of unlawful discrimination, and the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." See *Burdine*, 450 U.S. at 253, 254, 25 Fair Empl. Prac. Cas. (BNA) at 115, 116 (quoting *McDonnell Douglas*, 411 U.S. at 802, 5 Fair Empl. Prac. Cas. (BNA) at 969). If the plaintiff meets her initial burden and the defendant remains silent, the court must enter judgment for the plaintiff. See *Burdine*, 450 U.S. at 253, 25 Fair Empl. Prac. Cas. (BNA) at 116.

⁴ See, e.g., *O'Connor*, 56 F.3d at 546, 67 Fair Empl. Prac. Cas. (BNA) at 1862 (requiring plaintiff to prove: (1) he was in protected age group; (2) he was discharged or demoted; and (3) at time of discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations); *Rinehart v. City of Independence*, 35 F.3d 1263, 1264, 65 Fair Empl. Prac. Cas. (BNA) 1548, 1551 (8th Cir. 1994) (requiring plaintiff to show: (1) he was within protected age group; (2) he was performing his job at a level that met his employer's legitimate expectations; and (3) he was discharged); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379, 63 Fair Empl. Prac. Cas. (BNA) 262, 264 (6th Cir. 1993) (requiring plaintiff to demonstrate that (1) she was a member of protected class; (2) that she was subjected to adverse employment action; and (3) that she was qualified for particular position).

⁵ See *infra* notes 8-56 and accompanying text.

⁶ See 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489.

⁷ See *id.*

⁸ 865 F.2d 1331, 1335, 49 Fair Empl. Prac. Cas. (BNA) 1139, 1142 (1st Cir. 1988).

⁹ *Id.* at 1334, 49 Fair Empl. Prac. Cas. (BNA) at 1141.

¹⁰ See *id.* at 1333, 1334, 49 Fair Empl. Prac. Cas. (BNA) at 1140, 1141.

On appeal, the First Circuit affirmed, holding inter alia that the plaintiff had established a prima facie case under the ADEA even though the employer replaced him with someone from within the protected age group.¹¹ In addition, the court stated that a plaintiff could conceivably prevail even without demonstrating that the employer replaced her with someone younger.¹² Although recognizing that a plaintiff might not ultimately prevail in an ADEA suit where the defendant did not replace the plaintiff with a younger individual, the court expressly disclaimed any such requirement as part of a prima facie case.¹³ The court thus concluded that a plaintiff does not have to show replacement either by a younger person or by someone outside the protected age group as part of a prima facie case under the ADEA.¹⁴

In 1994, in *Kralman v. Illinois Department of Veterans' Affairs*, the United States Court of Appeals for the Seventh Circuit held that the fact that an employee's replacement was also a member of the protected class did not preclude a showing of age discrimination under the ADEA.¹⁵ In *Kralman*, the Department of Veterans' Affairs ("the Department") employed the plaintiff as a Veterans' Service Officer for eight years until it closed the office due to lack of funding.¹⁶ The Department reopened the office two years later but selected a forty-six-year-old woman for the position rather than reinstating the seventy-one-year-old plaintiff.¹⁷ When the plaintiff brought suit under the ADEA, the district court granted summary judgment for the defendant, stating that the plaintiff could not establish a prima facie case because the Department had ultimately hired a person who was also in the protected age class.¹⁸

¹¹ *Id.* at 1335 & n.2, 49 Fair Empl. Prac. Cas. (BNA) at 1142 & n.2. The court examined the holding in *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013, 20 Fair Empl. Prac. Cas. (BNA) 29, 36 (1st Cir. 1979), which rejected the requirement of replacement by a member outside the protected class, and conflicting dictum from *Dea v. Look*, 810 F.2d 12, 14 n.1, 42 Fair Empl. Prac. Cas. (BNA) 1399, 1400 n.1 (1st Cir. 1987). *Id.* The court determined that the *Dea* dictum rested on a misreading of *Loeb*. *Id.*

¹² *Id.* at 1335, 49 Fair Empl. Prac. Cas. (BNA) at 1142. In *Loeb*, the court explained that replacement by someone older would not suggest age discrimination but would not disprove it conclusively. 600 F.2d at 1013 n.9, 20 Fair Empl. Prac. Cas. (BNA) at 36 n.9. The older replacement could have been hired, for example, to ward off a threatened discrimination suit. *Id.*

¹³ *Freeman*, 865 F.2d at 1335, 49 Fair Empl. Prac. Cas. (BNA) at 1142.

¹⁴ *Id.*

¹⁵ 23 F.3d at 155, 64 Fair Empl. Prac. Cas. (BNA) at 1648.

¹⁶ *Id.* at 152, 64 Fair Empl. Prac. Cas. (BNA) at 1645.

¹⁷ *Id.* at 152, 64 Fair Empl. Prac. Cas. (BNA) at 1646.

¹⁸ *See id.* The district court based this decision on three recent cases in the Seventh Circuit, *Oxman v. WLS-TV*, 846 F.2d 448, 455, 46 Fair Empl. Prac. Cas. (BNA) 1392, 1397 (7th Cir. 1988), *Konowitz v. Schnadig Corp.*, 965 F.2d 230, 232, 61 Fair Empl. Prac. Cas. (BNA) 1291, 1293 (7th Cir. 1992), and *Crady v. Liberty National Bank & Trust Co.*, 993 F.2d 132, 134-35, 61 Fair Empl.

The Seventh Circuit disagreed, explaining that it is considered "hornbook law" that an ADEA action can be based on discrimination between older and younger members of the protected class.¹⁹ The court reasoned that an "overwhelming majority" of other circuits have recognized that age discrimination can occur even if the employer ultimately hires another individual in the protected class.²⁰ In addition, the court noted that an Equal Employment Opportunity Commission ("EEOC") regulation stated that "it is unlawful . . . for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over."²¹ Although recognizing that some circumstances may exist where the age differential between the plaintiff and the favored employee is not sufficient to create a reasonable inference of age discrimination, the court reasoned that the seventy-one-year-old plaintiff in *Kralman* was of an entirely different generation than the forty-six-year-old woman who the defendant ultimately hired for the position.²² The Seventh Circuit thus reversed the lower court on this point, concluding that an ADEA plaintiff could prevail even where the plaintiff's replacement was also a member of the protected class.²³

Similarly, in 1994, in *Rinehart v. City of Independence*, the United States Court of Appeals for the Eighth Circuit held that a plaintiff may prevail in an age discrimination action even when replaced by an individual within the protected class.²⁴ In *Rinehart*, the sixty-seven-year-

Prac. Cas. (BNA) 1193, 1194 (7th Cir. 1993). See *id.* at 154, 64 Fair Empl. Prac. Cas. (BNA) at 1647. The district court reasoned that these cases demonstrated a Seventh Circuit "trend" requiring a plaintiff to show that persons outside the protected class were treated more favorably to establish a prima facie case of age discrimination. See *id.*

¹⁹ *Id.* at 155, 64 Fair Empl. Prac. Cas. (BNA) at 1648. The *Kralman* court found the district court's reliance on *Oxman*, *Konowitz* and *Crady* understandable but not persuasive for two reasons. *Id.* at 154, 64 Fair Empl. Prac. Cas. (BNA) at 1647; see *supra* note 17. First, the court noted that none of the cases dealt with an analogous fact situation where both the plaintiff and his or her replacement were in the protected class. *Kralman*, 23 F.3d at 154, 64 Fair Empl. Prac. Cas. (BNA) at 1647. Second, and more significantly, the court reasoned that the opinions merely suggested one way of establishing a prima facie case of age discrimination, rather than foreclosing other ways to do so. See *id.* at 154, 64 Fair Empl. Prac. Cas. (BNA) at 1647-48.

²⁰ *Kralman*, 23 F.3d at 155, 64 Fair Empl. Prac. Cas. (BNA) at 1648.

²¹ *Id.* (quoting 29 C.F.R. § 1625.2(a) (1991)). The court cited three Seventh Circuit decisions, *Mayall v. Peabody Coal Co.*, 7 F.3d 570, 572 (7th Cir. 1993), *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1411 n.4, 36 Fair Empl. Prac. Cas. (BNA) 913, 919 n.4 (7th Cir. 1984) and *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1228, 59 Fair Empl. Prac. Cas. (BNA) 504, 505 (7th Cir. 1992), where the court had relied on the regulation and had explained that "an employer is not insulated from liability for age discrimination when he chooses among people in the protected class." *Id.*

²² *Id.* at 155-56, 64 Fair Empl. Prac. Cas. (BNA) at 1648-49.

²³ *Id.* at 155, 64 Fair Empl. Prac. Cas. (BNA) at 1648.

²⁴ 35 F.3d at 1266, 65 Fair Empl. Prac. Cas. (BNA) at 1551.

old plaintiff had been employed as the city's chief of police for twelve years before being fired.²⁵ When a forty-eight-year-old woman replaced him, he sued under the ADEA.²⁶ The district court granted summary judgment for the city because the plaintiff could not demonstrate that the defendant replaced him with someone outside the protected class or that age constituted a factor in the termination decision.²⁷

On appeal, the Eighth Circuit explained that a plaintiff need only demonstrate replacement by a younger person—rather than someone outside the protected age group—to make out a prima facie case of age discrimination.²⁸ Although recognizing that replacement by a person outside the protected class may be probative of the ultimate issue of intent to discriminate, the court concluded that such evidence is not a per se requirement for a plaintiff to prevail.²⁹ In addition, the court recognized the substantial similarity between the prima facie case requirements under Title VII and those under the ADEA.³⁰ Reasoning that, under Eighth Circuit precedent, Title VII does not require proof that a person outside the protected class replaced the plaintiff, the court concluded that the ADEA should not require such proof either.³¹ The court therefore held that a plaintiff need not demonstrate replacement by someone outside the protected class to prevail under the ADEA.³²

In contrast, in 1993, in *LaPointe v. United Automotive Local 600*, the United States Court of Appeals for the Sixth Circuit held that an ADEA plaintiff whose replacement was within the protected age group of forty years and over could not establish a prima facie case of age discrimination.³³ In *LaPointe*, the fifty-one-year-old plaintiff served as a health and safety representative for the defendant, United Autoworkers Local 600.³⁴ The plaintiff argued that he quit this position after becoming the target of ridicule and harassment.³⁵ When the union ultimately filled his position eighteen months later with a forty-four-year-old, the plaintiff alleged that the union had constructively discharged him because of his age and brought an ADEA ac-

²⁵ *Id.* at 1264, 65 Fair Empl. Prac. Cas. (BNA) at 1549.

²⁶ *See id.* at 1264, 1265, 65 Fair Empl. Prac. Cas. (BNA) at 1549, 1550.

²⁷ *See id.* at 1265, 65 Fair Empl. Prac. Cas. (BNA) at 1550.

²⁸ *Id.*

²⁹ *Rinehart*, 35 F.3d at 1266, 65 Fair Empl. Prac. Cas. (BNA) at 1551.

³⁰ *Id.*

³¹ *Id.* at 1266, 65 Fair Empl. Prac. Cas. (BNA) at 1550–51.

³² *Id.* at 1266, 65 Fair Empl. Prac. Cas. (BNA) at 1551.

³³ *See* 8 F.3d at 379, 63 Fair Empl. Prac. Cas. (BNA) at 264.

³⁴ *Id.* at 377, 63 Fair Empl. Prac. Cas. (BNA) at 263.

³⁵ *See id.*

tion.³⁶ The district court granted summary judgment against the plaintiff, in part because he could not establish that he was replaced by an individual outside the protected class.³⁷

The Sixth Circuit agreed with the district court and held that the plaintiff could not prevail in this case because his replacement came from within the protected class.³⁸ While noting that several other jurisdictions do not require plaintiffs to show replacement by someone outside the protected class, the court adhered to Sixth Circuit precedent under which a plaintiff must demonstrate that the replacement was outside the protected class.³⁹ In addition, the court cited Sixth Circuit authority that held that a plaintiff under Title VII must show that he was replaced by a person outside the protected class.⁴⁰ Without further analysis, the Sixth Circuit reaffirmed its precedent, concluding that an ADEA plaintiff must demonstrate replacement by someone outside the protected class to prevail in a claim of age discrimination.⁴¹

During the *Survey* year, in *O'Connor v. Consolidated Coin Caterers Corp.*, the United States Supreme Court resolved the circuit split, holding that an ADEA plaintiff need not demonstrate replacement by a person outside the protected class.⁴² In *O'Connor*, the defendant replaced the fifty-six-year-old plaintiff with a forty-year-old employee when it restructured its operations.⁴³ The district court granted summary judgment against the plaintiff because his replacement came from within the protected class.⁴⁴ Concluding that the ADEA prohibits

³⁶ See *id.* at 377-78, 63 Fair Empl. Prac. Cas. (BNA) at 263.

³⁷ See *id.* at 378, 379, 63 Fair Empl. Prac. Cas. (BNA) at 263, 264.

³⁸ *LaPointe*, 8 F.3d at 379, 63 Fair Empl. Prac. Cas. (BNA) at 264.

³⁹ *Id.* The court cited *Gagne v. Northwestern Nat'l Insurance Co.*, 881 F.2d 309, 313, 50 Fair Empl. Prac. Cas. (BNA) 601, 603 (6th Cir. 1989), for the elements of a prima facie case of age discrimination, including replacement by a person outside the protected class. *Id.* The *Gagne* court, however, had provided no additional analysis on the issue, citing *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265-66, 42 Fair Empl. Prac. Cas. (BNA) 23, 26 (6th Cir. 1987) and *Wilkins v. Eaton Corp.*, 790 F.2d 515, 520, 40 Fair Empl. Prac. Cas. (BNA) 1349, 1352 (6th Cir. 1986) as its authority for the elements of a prima facie case. See 881 F.2d at 313, 50 Fair Empl. Prac. Cas. (BNA) at 603. In both *Chappell* and *Wilkins*, however, the Sixth Circuit indicated that the fourth element of a prima facie case is replacement by a younger person. See *Chappell*, 803 F.2d at 265-66, 42 Fair Empl. Prac. Cas. (BNA) at 26; *Wilkins*, 790 F.2d at 520, 40 Fair Empl. Prac. Cas. (BNA) at 1352. In addition, Sixth Circuit authority exists contrary to *Gagne* which the court in *LaPointe* did not address in its opinion. See *Barnes v. Gencorp, Inc.*, 896 F.2d 1457, 1466, 152 Fair Empl. Prac. Cas. (BNA) 601, 608 (6th Cir. 1990) ("An employer violates the ADEA when preference is given to a younger employee even if the younger employee is within the protected class of persons age 40-and-over.").

⁴⁰ *LaPointe*, 8 F.3d at 379, 63 Fair Empl. Prac. Cas. (BNA) at 264 (citing *Ang v. Procter & Gamble, Co.*, 932 F.2d 540, 548, 55 Fair Empl. Prac. Cas. (BNA) 1666, 1673 (6th Cir. 1991)).

⁴¹ *Id.*

⁴² 116 S. Ct. 1307, 1310, 70 Fair Empl. Prac. Cas. (BNA) 486, 489 (1996).

⁴³ See 56 F.3d at 544, 67 Fair Empl. Prac. Cas. (BNA) at 1861.

⁴⁴ *O'Connor v. Consolidated Coin Caterers*, 829 F. Supp. 155, 158, 160, 62 Fair Empl. Prac.

discrimination on the basis of age and not class membership, the Supreme Court reasoned that the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than the fact that the replacement was from outside the protected class.⁴⁵

In *O'Connor*, plaintiff James O'Connor ("O'Connor") had worked for defendant Consolidated Coin Caterers Corporation ("Consolidated") since 1978.⁴⁶ Consolidated operated cafeterias and vending machines in industrial plants as a division of its parent company, Canteen Corporation ("Canteen").⁴⁷ In 1989, O'Connor became the district manager for a region serving much of southern and western North Carolina.⁴⁸ Canteen and Consolidated also operated two other regions until 1990, when they decided to restructure their operations and created one single territory with only two districts.⁴⁹ The companies combined O'Connor's old district into the newly created Southern District, placing it under the supervision of a forty-year-old employee.⁵⁰ As a result of the reorganization, Consolidated terminated the fifty-six-year-old O'Connor.⁵¹ He asserted that Consolidated had discharged him because of his age and brought suit under the ADEA.⁵²

The district court explained that an ADEA plaintiff can establish the substantive elements of age discrimination either by ordinary principles of proof or through the *McDonnell Douglas* proof scheme.⁵³ The fourth element of a prima facie case under the *McDonnell Douglas* scheme, the court continued, requires the plaintiff to demonstrate that the defendant hired a replacement with comparable or lesser qualifications who was outside the protected class.⁵⁴ Because O'Connor's replacement, age forty at the time of the unfavorable action, was within

Cas. (BNA) 1089, 1092, 1093 (W.D.N.C. 1993), *aff'd*, 56 F.3d 542, 67 Fair Empl. Prac. Cas. (BNA) 1859 (1995), *rev'd*, 116 S. Ct. 1307, 70 Fair Empl. Prac. Cas. (BNA) 486 (1996).

⁴⁵ *O'Connor*, 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489.

⁴⁶ *Id.* at 1309, 70 Fair Empl. Prac. Cas. (BNA) at 488.

⁴⁷ *See O'Connor*, 829 F. Supp. at 156, 62 Fair Empl. Prac. Cas. (BNA) at 1090, 1091.

⁴⁸ *See id.*

⁴⁹ *See O'Connor*, 56 F.3d at 543, 544, 67 Fair Empl. Prac. Cas. (BNA) at 1860.

⁵⁰ *See id.* at 544, 67 Fair Empl. Prac. Cas. (BNA) at 1861. The companies placed the newly formed Northern District under the supervision of a thirty-five-year-old employee. *See id.*

⁵¹ *See id.*

⁵² *See id.* at 545, 67 Fair Empl. Prac. Cas. (BNA) at 1861.

⁵³ *O'Connor*, 829 F. Supp. at 157, 62 Fair Empl. Prac. Cas. (BNA) at 1091.

⁵⁴ *Id.* The court explained that this fourth element of a prima facie case of age discrimination, replacement by a person outside the protected class, is less applicable in reduction-in-force cases where a company has down-sized its operations and, as a result, has fired or laid off employees. *Id.* In such reduction-in-force cases, the adversely affected employee cannot point to a replacement with whom the discharged employee would logically compare himself. *See id.* In these situations, the *McDonnell Douglas* scheme is modified, and the plaintiff must produce some evidence that the employer did not treat age neutrally in taking the adverse employment action.

the protected class, the district court found that O'Connor failed to establish a prima facie case of age discrimination.⁵⁵ On appeal the Fourth Circuit affirmed, holding that a plaintiff is required to demonstrate that his replacement was outside the protected class.⁵⁶

The Supreme Court reversed, holding that replacement by someone outside of the protected class is not a proper element of a prima facie case of age discrimination.⁵⁷ Writing for a unanimous Court, Justice Scalia first stated that a logical connection must exist between each element of the prima facie case and the illegal discrimination for which it establishes a mandatory, rebuttable presumption under the *McDonnell Douglas* scheme.⁵⁸ The Court reasoned that the element of replacement by someone outside the protected class fails this requirement.⁵⁹

The Court noted that the ADEA does not ban discrimination against employees because they are forty or older.⁶⁰ Instead, the Court stated, the ADEA bans discrimination against employees because of their age but limits the protected class to those age forty or older.⁶¹ The Court reasoned, therefore, that the fact that an employer replaced

See id. Here, the two companies' restructuring of operations might ordinarily fall into the category of a reduction-in-force, thereby requiring the modified test that the employer did not treat age neutrally in its decision. *See id.* at 156-57, 62 Fair Empl. Prac. Cas. (BNA) at 1091. The court reasoned, however, that the forty-year-old employee took over what had basically been O'Connor's former district, essentially replacing him. *Id.* at 157-58, 62 Fair Empl. Prac. Cas. (BNA) at 1091-92. Therefore, the court determined that the fourth element was applicable in this case and applied its standard test. *See id.* The Court of Appeals upheld the lower court but also concluded that the plaintiff could not prevail even under the modified version of the *McDonnell Douglas* scheme applicable to reduction-in-force cases. *O'Connor*, 56 F.3d at 546-547, 67 Fair Empl. Prac. Cas. (BNA) at 1862-63. The Supreme Court expressly limited its review of the case to the Fourth Circuit's treatment of it as a non-reduction-in-force case. *O'Connor*, 116 S. Ct. at 1309 n.1, 70 Fair Empl. Prac. Cas. (BNA) at 488 n.1.

⁵⁵ *O'Connor*, 829 F. Supp. at 158, 62 Fair Empl. Prac. Cas. (BNA) at 1092.

⁵⁶ *O'Connor*, 56 F.3d at 546, 67 Fair Empl. Prac. Cas. (BNA) at 1862. Judge Butzner, writing separately, concurred that Fourth Circuit precedent required an ADEA plaintiff to demonstrate that he or she was replaced by someone outside the protected age group. *See id.* at 550, 67 Fair Empl. Prac. Cas. (BNA) at 1866 (Butzner, J., concurring in part and dissenting in part). Judge Butzner stated, however, that "[s]uch an absolute requirement . . . has no justification in law or policy." *Id.* Because the *McDonnell Douglas* scheme was not intended to be "rigid, mechanistic or ritualistic," Judge Butzner reasoned, the age of a replacement employee should be a relevant, but not dispositive, factor in deciding whether the plaintiff has established a prima facie case of age discrimination. *Id.*

⁵⁷ *O'Connor*, 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489. Because neither party contested the application of the *McDonnell Douglas* scheme of Title VII to the ADEA context, the Court assumed that it was appropriate. *Id.* at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 488.

⁵⁸ *Id.*; see also *supra* note 3.

⁵⁹ *O'Connor*, 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489.

⁶⁰ *Id.*

⁶¹ *Id.*

one person in the protected class with another person in the protected class is irrelevant provided the employer replaced him because of his age.⁶² Under this reasoning, the Court concluded, there can be no greater inference of age discrimination, as opposed to "forty or over" discrimination, when an employer replaces a forty-year-old with a thirty-nine-year-old than when he replaces a fifty-six-year-old with a forty-year-old.⁶³

By eliminating the forty and older cut-off, the Court acknowledged, a plaintiff could potentially establish a *prima facie* case on the basis of very thin evidence—for example, the replacement of a sixty-eight-year-old by a sixty-five-year-old.⁶⁴ The Court reasoned, however, that the proper solution to this problem lies not in making an "utterly irrelevant factor" an element of the *prima facie* case.⁶⁵ Rather, the Court concluded that a *prima facie* case requires evidence that would allow an inference that the employment decision was based on an illegal discriminatory criterion.⁶⁶ Such an inference in an age discrimination context, the Court explained, cannot be drawn from the replacement of one worker with another *insignificantly* younger.⁶⁷ Because the ADEA prohibits discrimination on the basis of age and not class membership, the Court reasoned that the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than the fact that the plaintiff was replaced by someone outside the protected class.⁶⁸ The Supreme Court thus held that replacement by someone outside the protected class is not a proper element of a *prima facie* case under the ADEA and instead suggested the alternative requirement that the replacement be substantially younger than the adversely affected employee.⁶⁹

The Supreme Court's decision in *O'Connor* correctly resolves the circuit split on this issue and adopts an approach that comports with the legislative intent of the ADEA.⁷⁰ The statutory language adopted by Congress prohibits discrimination against "any individual . . . because of such individual's age."⁷¹ While limiting its protection to individuals over forty, the act says nothing about the age of the replace-

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *O'Connor*, 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489.

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *Teamsters v. United States*, 431 U.S. 324, 358 (1977)).

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.*

⁶⁹ *O'Connor*, 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489.

⁷⁰ See *infra* notes 71-78 and accompanying text.

⁷¹ 29 U.S.C. § 623(a)(1) (1994).

ment.⁷² Further, Senator Javits, one of the sponsors of the ADEA, explained that "if two individuals ages 52 and 42 apply for the same job and the employer selected the man age 42 . . . because he is younger than the man age 52, then he will have violated the act."⁷³ Lastly, a regulation promulgated by the EEOC, which as the primary agency charged with implementing the ADEA is entitled to great deference, expressly states that it is unlawful in situations where the act applies "for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals forty and over."⁷⁴ The Court's decision in *O'Connor* supports these clarifications of the legislative intent behind the ADEA by recognizing that age discrimination can occur even where the favored employee is over forty.⁷⁵

Prior to the Court's ruling, employers in the Fourth and Sixth Circuits could potentially avoid liability under the ADEA merely by replacing older workers with those that were at least forty years old.⁷⁶ Such actions would essentially subvert the congressional purpose of the act.⁷⁷ By rejecting the requirement of replacement from outside the protected class, the Supreme Court's decision in *O'Connor* prevents this inequitable and unintended result.⁷⁸ Furthermore, by suggesting the alternative requirement of replacement by someone substantially younger, the Court eliminates the possibility of baseless claims, such as a claim based on the replacement of a sixty-eight-year-old by a sixty-five-year-old.⁷⁹

Practitioners should be aware that this alternative requirement, although phrased by the Court as a suggestion rather than a rule, will likely become the required fourth element of a *prima facie* case in all the circuits.⁸⁰ This "substantially younger" standard, while not the

⁷² See *id.* § 631(a); Brief Amici Curiae of the American Association of Retired Persons and the National Employment Lawyers Association in Support of Petitioner at 16, *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996) (No. 95-354) [hereinafter "Brief"].

⁷³ Brief, *supra* note 72, at 16-17 (citing 113 CONG. REC. 31,255 (1967)).

⁷⁴ See *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 155, 64 Fair Empl. Prac. Cas. (BNA) 1645, 1648 (7th Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)).

⁷⁵ See *O'Connor*, 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489.

⁷⁶ See *O'Connor*, 56 F.3d at 546, 67 Fair Empl. Prac. Cas. (BNA) at 1862 (requiring plaintiffs to demonstrate replacement by someone outside protected class); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379, 65 Fair Empl. Prac. Cas. (BNA) 262, 264 (6th Cir. 1993) (same).

⁷⁷ See Brief, *supra* note 72, at 18.

⁷⁸ See *O'Connor*, 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489; Brief, *supra* note 72, at 18.

⁷⁹ See *O'Connor*, 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489.

⁸⁰ See *Denisi v. Dominick's Finer Foods, Inc.*, 99 F.3d 860, 864 (7th Cir. 1996) ("An ADEA

bright line urged by supporters of the Fourth Circuit rule, is nonetheless a workable standard which many circuits have either already employed or at the very least considered.⁸¹ For example, the *Kralman* court addressed the issue when it recognized there might be some circumstances where the age differential between the plaintiff and the favored employee are not sufficient to create a reasonable inference of age discrimination.⁸² Similarly, the *Rinehart* court specifically suggested that district courts might require the plaintiff to show replacement by a person "sufficiently younger to permit an inference of age discrimination."⁸³ Even the court in *Loeb*, on which the First Circuit relied in *Freeman* in establishing its more relaxed standard, noted that the probative value of evidence concerning the plaintiff's replacement would depend on the plaintiff's own age and the age differential between the plaintiff and her replacement.⁸⁴ Thus, the Court's decision should not dramatically affect the kinds of age discrimination claims which now prevail in most circuits.⁸⁵

In sum, the Supreme Court held in *O'Connor* that an age discrimination plaintiff is not required to demonstrate replacement by a person outside the protected class of individuals forty and older to prevail under the ADEA.⁸⁶ Instead, the Court suggested the alternative requirement that the replacement be substantially younger than the plaintiff.⁸⁷ Practitioners should be aware that this alternative standard will likely become the required fourth element of a *prima facie* case of age discrimination.⁸⁸ The Court's decision, however, should not dramatically affect the types of age discrimination claims which prevail in most circuits because many courts have already employed the suggested standard, either expressly or in effect.⁸⁹ It will, however, elimi-

plaintiff can show that he was replaced by someone 'substantially younger,' even if that replacement is not outside the protected class.").

⁸¹ See *infra* notes 82-84 and accompanying text.

⁸² See 23 F.3d at 156, 64 Fair Empl. Prac. Cas. (BNA) at 1648-49; see also *supra* notes 15-23 and accompanying text.

⁸³ See *Rinehart v. City of Independence*, 35 F.3d 1263, 1269, 65 Fair Empl. Prac. Cas. (BNA) 1548, 1553 (8th Cir. 1994) (quoting *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777, 65 Fair Empl. Prac. Cas. (BNA) 828, 835 (3d Cir. 1994)); see also *supra* notes 24-32 and accompanying text.

⁸⁴ *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1335 & n.2, 49 Fair Empl. Prac. Cas. (BNA) 1139, 1142 & n.2 (1st Cir. 1988); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.9, 20 Fair Empl. Prac. Cas. (BNA) 29, 36 n.9 (1st Cir. 1979); see also *supra* notes 8-14 and accompanying text.

⁸⁵ See *supra* notes 82-84 and accompanying text.

⁸⁶ *O'Connor*, 116 S. Ct. at 1310, 70 Fair Empl. Prac. Cas. (BNA) at 489.

⁸⁷ See *id.*

⁸⁸ See *supra* notes 80-84 and accompanying text.

⁸⁹ See *supra* notes 81-85 and accompanying text.

nate baseless claims and re-align the prima facie case requirements in the Fourth and Sixth Circuits with the intended protections of the ADEA.⁹⁰

III. EMPLOYEE RETIREMENT INCOME SECURITY ACT

A. *ERISA Section 502(a)(3) Authorizes a Private Cause of Action: *Varity Corp. v. Howe*¹

The Employee Retirement Income Security Act of 1974 ("ERISA") sets forth the civil remedies available to participants and beneficiaries for ERISA or employee benefit plan violations.² Specifically, section 502 of ERISA identifies nine types of civil actions that may be brought by various parties.³ While the federal courts agree that section 502 allows a participant or a beneficiary to bring a civil action, the courts have differed as to whether a participant or a beneficiary can recover individually or whether recovery inures only to the plan.⁴

In 1985, in *Massachusetts Mutual Life Insurance Co. v. Russell*, the United States Supreme Court held that ERISA section 409(a), which outlines the liability for a breach of fiduciary duty, did not authorize a private cause of action under its remedial provision, section 502(a)(2), for extracontractual damages caused by the improper and untimely processing of a benefits claim.⁵ The plaintiff in *Russell* sought compensatory and punitive damages for injuries sustained when the adminis-

⁹⁰ See *supra* notes 70-79 and accompanying text.

* By Jessica S. Horrocks, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 116 S. Ct. 1065, 19 Employee Benefits Cas. (BNA) 2761 (1996).

² 29 U.S.C. § 1132(a) (1994). ERISA is found at 29 U.S.C. §§ 1001-1461 (1994). This note cites to the 1994 edition of the U.S.C., rather than to the editions cited by the courts that decided the cases discussed, because there have not been any amendments to ERISA that alter the reasoning presented. See 29 U.S.C. §§ 1001-1132.

³ *Id.* § 1132(a).

⁴ See *Varity*, 116 S. Ct. at 1069, 19 Employee Benefits Cas. (BNA) at 2763-64; *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 6 Employee Benefits Cas. (BNA) 1733, 1736 (1985); see also 29 U.S.C. § 1132(a).

⁵ 473 U.S. at 140, 148, 6 Employee Benefits Cas. (BNA) at 1736, 1740. ERISA section 409(a) provides:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary

trator of her employee benefits plan breached its fiduciary duty by wrongfully delaying payment of her benefits claim.⁶

The Court reasoned that the text of section 409(a), when read in the context of the statutorily defined duties of a fiduciary and rights of a beneficiary, indicates Congress's intent that recovery from a violation of section 409(a) inure to the benefit of the plan as a whole, not to an individual participant.⁷ Because of the emphasis section 409(a) places on "the plan," the Court concluded that Congress was actually concerned with protecting the entire plan, not with the rights of individual beneficiaries.⁸ Similarly, the Court reasoned that the duties of a fiduciary described in the subsections of the statute stressed obligations with respect to the plan as a whole, such as the management, administration and investment of fund assets.⁹ Finally, although the Court acknowledged that section 502(a)(1)(B) authorizes a beneficiary to bring an action to enforce his or her rights under the terms of a plan, it reasoned that nothing in that section or in section 502(a)(2) supported a private cause of action for extracontractual relief.¹⁰ Thus, the Court held that a fiduciary breach, namely, an improper delay in processing a claim for benefits, does not give rise to a private cause of action for compensatory or punitive relief under section 502(a)(2).¹¹

In 1995, in *McLeod v. Oregon Lithoprint Inc.*, the United States Court of Appeals for the Ninth Circuit applied the rule in *Russell* to another ERISA provision, holding that section 502(a)(3), which states that a participant or beneficiary may obtain equitable relief for ERISA or plan violations, does not permit an individual to recover for a breach of fiduciary duty.¹² The plaintiff in *McLeod* sought compensatory dam-

29 U.S.C. § 1109(a) (emphasis added). ERISA section 502(a)(2) allows a civil suit to be brought by "the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section [409] of this title." *Id.* § 1132(a)(2).

⁶ 473 U.S. at 136-37, 6 Employee Benefits Cas. (BNA) at 1734.

⁷ *Id.* at 140, 6 Employee Benefits Cas. (BNA) at 1736.

⁸ *Id.* at 140, 142, 6 Employee Benefits Cas. (BNA) at 1736-37.

⁹ *Id.* at 142-43, 6 Employee Benefits Cas. (BNA) at 1737.

¹⁰ *Id.* at 144, 6 Employee Benefits Cas. (BNA) at 1738. Section 502(a)(1)(B) states that a civil action may be brought by a participant or a beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

¹¹ See *Russell*, 473 U.S. at 140, 144, 6 Employee Benefits Cas. (BNA) at 1736, 1738.

¹² 46 F.3d 956, 959-60, 18 Employee Benefits Cas. (BNA) 2851, 2854-55 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1346, 19 Employee Benefits Cas. (BNA) 2920 (1996) (judgment vacated and case remanded to Ninth Circuit for further consideration in light of *Vanity*, 116 S. Ct. 1065, 19 Employee Benefits Cas. (BNA) 2761). Section 502(a)(3) states that an action may be brought:

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain

ages, alleging that her ERISA plan administrator breached its fiduciary duty by failing to notify her before she was diagnosed with cancer that she could apply for cancer insurance.¹³ The court reasoned that the Supreme Court in *Russell* implied that recovery from the violation of any of ERISA's provisions relating to fiduciary duties must inure to the plan and not to individual participants.¹⁴ Thus, the court precluded the plaintiff from receiving compensatory relief under section 502(a)(3).¹⁵

The United States Court of Appeals for the Third Circuit took a different approach to ERISA section 502(a)(3) in 1993, holding in *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund* that the "other appropriate equitable relief" clause of section 502(a)(3) allows a private cause of action for a breach of a fiduciary duty.¹⁶ The plaintiff in *Bixler*, whose deceased husband had participated in an employee welfare benefit plan, sought to recover her husband's medical expenses and death benefits.¹⁷ She claimed that her husband's employer and the Teamsters Health & Welfare Fund ("Fund"), which jointly administered the plan, wrongfully denied her husband medical coverage and misled her to believe that continuing coverage under the Consolidated Omnibus Reconciliation Act ("COBRA") was unavailable.¹⁸ The court reasoned that the Supreme Court's holding in *Russell* was narrowly limited to sections 409(a) and 502(a)(2) and therefore did not apply to section 502(a)(3).¹⁹ The court further reasoned that the language of section 502(a)(3) and the fundamental purposes of ERISA—to enforce fiduciary obligations and to promote the best interests of participants—supported a private cause of action.²⁰ Hence, the Third Circuit held that a plaintiff may bring an action for individual recovery against an ERISA plan administrator under section 502(a)(3).²¹

other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3).

¹³ 46 F.3d at 957, 18 Employee Benefits Cas. (BNA) at 2852.

¹⁴ *Id.* at 959, 18 Employee Benefits Cas. (BNA) at 2854.

¹⁵ *Id.* at 960, 18 Employee Benefits Cas. (BNA) at 2855.

¹⁶ See 12 F.3d 1292, 1293-94, 17 Employee Benefits Cas. (BNA) 1934, 1935 (3d Cir. 1993); see also 29 U.S.C. § 1132(a)(3).

¹⁷ 12 F.3d at 1294, 1296, 17 Employee Benefits Cas. (BNA) at 1935, 1937.

¹⁸ See *id.* at 1294, 1296 & n.4, 17 Employee Benefits Cas. (BNA) at 1935, 1937 & n.4; see also

29 U.S.C. §§ 1161-68.

¹⁹ *Bixler*, 12 F.3d at 1298, 17 Employee Benefits Cas. (BNA) at 1940.

²⁰ *Id.* at 1299, 17 Employee Benefits Cas. (BNA) at 1940-41.

²¹ *Id.* at 1299-1300, 17 Employee Benefits Cas. (BNA) at 1941.

During the *Survey* year, in *Varity Corp. v. Howe*, the United States Supreme Court resolved the conflict in the circuit courts regarding section 502(a)(3) by holding that section 502(a)(3) authorizes plan beneficiaries who are harmed by breaches of fiduciary obligations to sue for individual relief.²² In reaching this decision, the Court first decided two preliminary issues.²³ First, the Court held that the Varity Corporation ("Varity") was acting in its capacity as an ERISA fiduciary when it misled its employees.²⁴ Second, the Court held that by misleading the employees, Varity violated the fiduciary obligations that ERISA imposes upon plan administrators.²⁵

The respondents in *Varity* were employees of Massey-Ferguson, Inc., a wholly owned subsidiary of Varity, and they participated in Massey-Ferguson's ERISA-protected employee welfare benefit plan.²⁶ In the mid-1980s, Massey-Ferguson was losing money.²⁷ To remedy Massey-Ferguson's poor financial health, Varity developed a plan that called for the transfer of Massey-Ferguson's ailing divisions to Massey Combines, a newly created Varity subsidiary.²⁸ If Massey Combines failed, as Varity expected, then all of Massey Combines' debts would be eliminated, including its obligation to pay medical and other non-pension benefits to employees of Massey-Ferguson's money-losing divisions.²⁹ Rather than exercise its right to terminate the employees' benefits immediately, Varity tried to convince the failing divisions' employees to transfer their employment to Massey Combines, thereby releasing Massey-Ferguson from its promise to provide benefits.³⁰

Varity held a special meeting to persuade Massey-Ferguson employees to accept the change of employment.³¹ At the meeting, the employees received information about Massey Combines' viability and about the security of their benefits.³² Varity assured the employees that

²² 116 S. Ct. 1065, 1068, 19 Employee Benefits Cas. (BNA) 2761, 2762 (1996).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* The Court did not review the lower courts' findings that Varity did in fact mislead the employees. *See id.*

²⁶ *Id.*

²⁷ *See Varity*, 116 S. Ct. at 1068, 19 Employee Benefits Cas. (BNA) at 2762.

²⁸ *See id.*

²⁹ *See id.* at 1068, 1069, 19 Employee Benefits Cas. (BNA) at 2762, 2763.

³⁰ *See id.* at 1068-69, 19 Employee Benefits Cas. (BNA) at 2762-63.

³¹ *See id.* at 1069, 19 Employee Benefits Cas. (BNA) at 2763.

³² *See Varity*, 116 S. Ct. at 1069, 1071-72, 19 Employee Benefits Cas. (BNA) at 2763, 2765-67. The employees watched a video message from the new president of Massey Combines. *See id.* They also received four documents: a comparison of the benefits offered by the two subsidiaries; a question-and-answer sheet discussing, in part, benefits; a transcript of the video; and a cover letter with an acceptance form. *See id.*

if they transferred to Massey Combines, they would continue to receive benefits.³³

As a result of this meeting, about 1500 Massey-Ferguson employees agreed to transfer employment.³⁴ Two years later, Massey Combines went into receivership and its employees lost their non-pension benefits.³⁵ The employees sued to recover the benefits Massey-Ferguson would have paid them had they not transferred to Massey Combines.³⁶

In analyzing the employees' claim in *Varity*, the Court addressed three issues.³⁷ The first issue was whether Varity was acting as a plan administrator when it induced the employees to switch employers.³⁸ Because the Court held that Varity was acting as an administrator, the Court then addressed the issue of whether Varity violated any of its fiduciary obligations to the employees.³⁹ The final issue was whether section 502(a)(3) of ERISA authorized a private cause of action for a breach of fiduciary duty.⁴⁰

As to the first issue, the Court held that Varity was acting as an administrator when it misled employees at the special meeting.⁴¹ Applying section 3(21)(A) of ERISA, the Court reasoned that Varity's conduct at the meeting constituted an exercise of discretionary authority regarding the plan's management or administration because Varity's intention was to convey the message that the employees' benefits were secure.⁴² The Court further reasoned that Varity's acts were plan-related, and thus Varity acted as a fiduciary, because Varity offered the employees information to help them decide whether to remain with the plan.⁴³ Finally, the Court concluded that Varity acted as a fiduciary because people within the company who had the authority to communicate as plan fiduciaries with beneficiaries offered the information to the employees.⁴⁴

³³ See *id.* at 1072, 19 Employee Benefits Cas. (BNA) at 2767.

³⁴ See *id.* at 1069, 19 Employee Benefits Cas. (BNA) at 2763.

³⁵ See *id.*

³⁶ See *id.*

³⁷ 116 S. Ct. at 1068, 19 Employee Benefits Cas. (BNA) at 2762.

³⁸ See *id.*

³⁹ *Id.*

⁴⁰ See *id.*

⁴¹ *Id.* at 1072, 19 Employee Benefits Cas. (BNA) at 2767.

⁴² *Varity*, 116 S. Ct. at 1071, 1072, 19 Employee Benefits Cas. (BNA) at 2765, 2767. In relevant part, section 3(21)(A) says that a person is a fiduciary with respect to a plan to the extent that he or she exercises any discretionary control respecting management of the plan or has any discretionary authority in the administration of the plan. 29 U.S.C. § 1002(21)(A) (1994).

⁴³ *Varity*, 116 S. Ct. at 1073, 19 Employee Benefits Cas. (BNA) at 2767.

⁴⁴ *Id.*

As to the second issue, the Court held that Varsity had violated its fiduciary obligations.⁴⁵ The Court applied section 404(a), which charges a fiduciary with the duty to act "solely in the interest of the participants and beneficiaries," and reasoned that Varsity did not act in the sole interest of the employees.⁴⁶ Instead, Varsity sought to save money at the employees' expense.⁴⁷

Finally, the Supreme Court turned to the major issue in the case, holding that section 502(a)(3) permits a private cause of action for a breach of a fiduciary duty.⁴⁸ The Court used a four-part analysis in coming to this conclusion.⁴⁹ First, the Court reasoned that *Russell* did not control the outcome of the case because the *Russell* Court limited its holding, which denied a private cause of action, to section 409.⁵⁰ The plaintiff in *Russell* sued under ERISA section 502(a)(2), which is different from the section at issue in *Varsity*.⁵¹ In addition, the Court noted that another remedial provision was available to the plaintiff in *Russell*.⁵² The Court explained that she could have properly sued under section 502(a)(1), which provides for specific relief for the wrongful denial of benefits.⁵³ The individual employees in *Varsity*, however, could not have sued under section 502(a)(1) because, given that they were no longer members of the Massey-Ferguson plan, there were no benefits due to them.⁵⁴ Thus, there was no other remedial provision that would have provided the employees in *Varsity* relief.⁵⁵

In the second part of the Court's analysis, it considered the plain language of section 502(a)(3).⁵⁶ The Court reasoned that the "appropriate equitable relief" clause of section 502(a)(3) was broad enough to include individual relief for the breach of a fiduciary obligation.⁵⁷ In addition, the Court reasoned that section 502(a)(3) seeks to redress "any act or practice which violates any provision of this title," and thus

⁴⁵ *Id.* at 1074, 19 Employee Benefits Cas. (BNA) at 2769.

⁴⁶ *Id.*; see 29 U.S.C. § 1104(a)(1).

⁴⁷ See *Varsity*, 116 S. Ct. at 1074, 19 Employee Benefits Cas. (BNA) at 2769.

⁴⁸ *Id.* at 1075, 1076, 19 Employee Benefits Cas. (BNA) at 2769-70, 2771.

⁴⁹ *Id.* at 1076-78, 19 Employee Benefits Cas. (BNA) at 2771-72.

⁵⁰ *Id.* at 1076, 19 Employee Benefits Cas. (BNA) at 2771 (citing generally to *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 6 Employee Benefits Cas. (BNA) 1733 (1985)).

⁵¹ See *id.*; *supra* notes 5-11 and accompanying text. *Varsity* addresses section 502(a)(3), which, unlike section 502(a)(2), does not reference section 409. See *id.*

⁵² *Varsity*, 116 S. Ct. at 1076, 19 Employee Benefits Cas. (BNA) at 2771.

⁵³ See *id.*

⁵⁴ See *id.* at 1079, 19 Employee Benefits Cas. (BNA) at 2774.

⁵⁵ See *id.*

⁵⁶ *Id.* at 1076, 19 Employee Benefits Cas. (BNA) at 2771.

⁵⁷ *Varsity*, 116 S. Ct. at 1076, 19 Employee Benefits Cas. (BNA) at 2771; see 29 U.S.C. § 1132(a)(3) (1994).

Congress did not intend for sections 409 and 502(a)(2) to be the only subsections that addressed liability for breaches of fiduciary duties.⁵⁸ Last, the Court noted that a 1989 amendment to section 502 uses the amount a court orders a fiduciary to pay "to a plan *or its participants and beneficiaries*" to calculate a certain civil penalty under section 502(a)(5).⁵⁹ Because section 502(a)(5) is nearly identical to section 502(a)(3), the Court decided that Congress must have intended section 502(a)(3) to allow for individual recovery as well.⁶⁰

The third step in the Court's analysis considered the statute's overall structure.⁶¹ The Court reasoned that the remedies in section 409, which are referenced by section 502(a)(2), do not limit the remedies available under section 502(a)(3).⁶² The Court further reasoned that section 409 reflects congressional concern about plan asset management, but was not intended to be the exclusive set of remedies for a fiduciary breach.⁶³ According to the Supreme Court, fiduciaries have more duties under ERISA than just asset management, and therefore Congress included section 502(a)(3) as a "catchall" remedial section to provide remedies for other kinds of fiduciary breaches.⁶⁴

In the fourth part of its inquiry, the *Varity* Court examined ERISA's basic purpose.⁶⁵ ERISA section 2(b) says that the statute seeks "to protect . . . the interests of participants . . . and . . . beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries . . . and . . . providing for appropriate remedies . . . and ready access to the Federal courts."⁶⁶ The Court reasoned that given this stated purpose, Congress did not intend to deny a remedy to individuals when their employers breached their fiduciary duties.⁶⁷

Justice Thomas, in an opinion joined by Justices O'Connor and Scalia, dissented in *Varity*.⁶⁸ They argued that Congress intended to allow suits for breach of fiduciary duty exclusively under sections 409

⁵⁸ *Varity*, 116 S. Ct. at 1076, 19 Employee Benefits Cas. (BNA) at 2771 (emphasis added); see 29 U.S.C. § 1132(a)(3).

⁵⁹ *Varity*, 116 S. Ct. at 1076-77, 19 Employee Benefits Cas. (BNA) at 2771; see 29 U.S.C. § 1132(f)(2)(B).

⁶⁰ *Varity*, 116 S. Ct. at 1076-77, 19 Employee Benefits Cas. (BNA) at 2771; see 29 U.S.C. § 1132(f)(2)(B).

⁶¹ *Varity*, 116 S. Ct. at 1077, 19 Employee Benefits Cas. (BNA) at 2771.

⁶² *Id.* at 1077, 19 Employee Benefits Cas. (BNA) at 2771-72.

⁶³ *Id.* at 1077, 19 Employee Benefits Cas. (BNA) at 2772.

⁶⁴ *Id.* at 1077-78, 19 Employee Benefits Cas. (BNA) at 2772.

⁶⁵ *Id.* at 1078, 19 Employee Benefits Cas. (BNA) at 2772.

⁶⁶ See *Varity*, 116 S. Ct. at 1078, 19 Employee Benefits Cas. (BNA) at 2772 (quoting 29 U.S.C. § 1001(b) (1994)).

⁶⁷ *Id.* at 1078, 19 Employee Benefits Cas. (BNA) at 2773; see 29 U.S.C. § 1001(b).

⁶⁸ 116 S. Ct. at 1079, 19 Employee Benefits Cas. (BNA) at 2774 (Thomas, J., dissenting).

and 502(a)(2), and to authorize relief only on behalf of the plan.⁶⁹ Because section 502(a)(2) specifically deals with breaches of fiduciary duties by referencing section 409, the dissent argued that section 502(a)(3) must not address fiduciary breaches because it does not reference section 409.⁷⁰ According to the dissent, by holding that section 502(a)(3) does address fiduciary breaches, the majority violated the rule of statutory construction that courts should not interpret statutes in such a way as to render language superfluous.⁷¹ In addition, given the completeness of the statute, the dissent noted that if Congress had intended for individual relief they would have made their intention clear in sections 409 and 502(a)(2).⁷²

Finally, the dissent accused the majority of not following *Russell* as precedent.⁷³ The dissent wrote that the *Russell* Court's holding that there was no private cause of action is not limited to sections 409 and 502(a)(2) because it was based on a contextual reading of the entire statute.⁷⁴ The emphasis in section 409 on "the plan," the dissent noted, was important to the *Russell* Court in determining that Congress intended for relief to inure to the plan and not to individual plaintiffs.⁷⁵ The *Varity* dissent argued that the Court should have similarly concluded that Congress did not intend to provide for individual relief under section 502(a)(3) because section 404, under which the *Varity* employees sued, also stresses "the plan."⁷⁶ The dissent pointed out that the *Russell* Court even cited section 404 to support its conclusion that Congress was primarily concerned with plan rights, and not with individual rights, when drafting ERISA.⁷⁷

The dissenters also asserted that *Varity* did not act as a fiduciary and thus did not breach any fiduciary duty.⁷⁸ According to the dissent, *Varity*'s executives did not act as plan administrators, but rather as employers, because all they did at the special meeting was make representations about Massey Combines' financial prospects and the im-

⁶⁹ *Id.* at 1079, 1084, 19 Employee Benefits Cas. (BNA) at 2774, 2779 (Thomas, J., dissenting).

⁷⁰ *Id.* at 1081-82, 19 Employee Benefits Cas. (BNA) at 2776 (Thomas, J., dissenting).

⁷¹ *Id.* at 1082, 19 Employee Benefits Cas. (BNA) at 2777 (Thomas, J., dissenting).

⁷² *Id.* at 1081-82, 19 Employee Benefits Cas. (BNA) at 2776 (Thomas, J., dissenting).

⁷³ *Varity*, 116 S. Ct. at 1082, 19 Employee Benefits Cas. (BNA) at 2777 (Thomas, J., dissenting).

⁷⁴ *Id.* at 1083, 19 Employee Benefits Cas. (BNA) at 2777-78 (Thomas, J., dissenting); see *Russell*, 473 U.S. at 140, 148, 6 Employee Benefits Cas. (BNA) at 1736, 1740.

⁷⁵ See *Varity*, 116 S. Ct. at 1083, 19 Employee Benefits Cas. (BNA) at 2778 (Thomas, J., dissenting).

⁷⁶ *Id.* (Thomas, J., dissenting).

⁷⁷ *Id.* (Thomas, J., dissenting) (citing *Russell*, 473 U.S. at 142-43 & n.10, 6 Employee Benefits Cas. (BNA) at 1737-38 & n.10).

⁷⁸ *Id.* at 1084, 1088, 19 Employee Benefits Cas. (BNA) at 2779, 2783 (Thomas, J., dissenting).

pact of an ordinary business transaction on the security of the employees' benefits.⁷⁹ In fact, the dissent argued that these are the types of representations employers regularly make in the course of running a business.⁸⁰ Just because the performance of the company did not live up to the predictions made, the dissent argued, non-fiduciary representations should not be transformed into fiduciary representations.⁸¹

The Court's decision in *Varity*, though perhaps well-reasoned, may have the practical effect of raising the cost of employee welfare benefit plans, thus discouraging employers from offering them.⁸² Before *Varity*, a plan participant could sue individually for a wrongful denial of benefits, but courts allowed a plan administrator some discretion in his or her determination that a plan participant was ineligible for certain benefits.⁸³ After *Varity*, a plan participant may sue individually for a breach of fiduciary duty, allowing him or her to hold the plan administrator to a more rigid level of conduct.⁸⁴ Because the participant might convert his or her "denial of benefits" claim into a claim for "breach of fiduciary duty," the plan administrator will tend to pay these benefits instead of preserving plan assets.⁸⁵ Thus, the administrator will lose his or her discretion to deny questionable and expensive benefits and, as a result, the cost of the plan will increase.⁸⁶

The *Varity* Court sought to appease this concern by stressing that a fiduciary obligation does not favor granting a requested benefit over denying it.⁸⁷ In addition, a participant's characterization of a "denial of benefits" claim as a "breach of fiduciary duty" claim does not mean that the courts must apply the more rigid standard.⁸⁸ Finally, because section 502(a)(3) authorizes appropriate equitable relief, the courts can exercise their discretion in determining what relief, if any, is appropriate.⁸⁹

The Court did not, however, articulate a standard to be applied by the lower courts in determining when a claim for a breach of fiduciary duty should really be evaluated as a claim for denial of

⁷⁹ *Id.* at 1088, 19 Employee Benefits Cas. (BNA) at 2783 (Thomas, J., dissenting).

⁸⁰ *Varity*, 116 S. Ct. at 1088, 19 Employee Benefits Cas. (BNA) at 2783 (Thomas, J., dissenting).

⁸¹ *Id.* (Thomas, J., dissenting).

⁸² *See id.* at 1078, 19 Employee Benefits Cas. (BNA) at 2773; *id.* at 1090-91, 19 Employee Benefits Cas. (BNA) at 2786 (Thomas, J., dissenting).

⁸³ *See id.* at 1078, 19 Employee Benefits Cas. (BNA) at 2773.

⁸⁴ *See id.*

⁸⁵ *See Varity*, 116 S. Ct. at 1078, 19 Employee Benefits Cas. (BNA) at 2773.

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.* at 1079, 19 Employee Benefits Cas. (BNA) at 2773.

⁸⁹ *See id.* at 1079, 19 Employee Benefits Cas. (BNA) at 2773-74.

benefits.⁹⁰ It also did not provide the courts with any guidelines as to what constitutes appropriate equitable relief.⁹¹ The resolution of these issues is likely to at least heighten litigation costs borne by employers and may therefore reduce the amount of plan benefits available to employees.⁹²

In summary, *Varity* resolved the conflict among the circuit courts as to whether ERISA section 502(a)(3) authorizes a private cause of action.⁹³ The Supreme Court held that section 502(a)(3) allows plan beneficiaries who are harmed by breaches of fiduciary obligations to sue for individual relief.⁹⁴ The Court, however, provided little guidance as to how the lower courts should balance the need to protect participants' benefits with the need for sensible plan administration.⁹⁵

B. **No ERISA Violation for Payment of Increased Retirement Benefits in Exchange for Early Retirement and Waiver of Employment Claims: Lockheed Corp. v. Spink*¹

Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA") in part to protect employee benefits from employer mishandling.² Congress enacted section 406 of ERISA to bar a fiduciary of a pension plan from engaging in any transaction that is likely to injure the plan.³ Specifically, section 406 prohibits fiduciaries from using any assets of the plan for the benefit of a party in interest.⁴ In 1986, Congress provided further protections to employees by amending ERISA to bar age-based discrimination against employees in terms of benefit plans.⁵

In 1993, in *Commissioner v. Keystone Consolidated Industries, Inc.*, the United States Supreme Court held that an employer's contribution of unencumbered real estate to its pension plan was a prohibited sale

⁹⁰ See *Varity*, 116 S. Ct. at 1079, 19 Employee Benefits Cas. (BNA) at 2773-74.

⁹¹ See *id.*

⁹² See *id.* at 1090-91, 19 Employee Benefits Cas. (BNA) at 2786 (Thomas, J., dissenting).

⁹³ *Id.* at 1069, 19 Employee Benefits Cas. (BNA) at 2763.

⁹⁴ *Id.* at 1068, 19 Employee Benefits Cas. (BNA) at 2762.

⁹⁵ See *Varity*, 116 S. Ct. at 1078-79, 1090-91, 19 Employee Benefits Cas. (BNA) at 2773-74, 2786 (Thomas, J., dissenting).

* By Elizabeth C. Franzosa, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 116 S. Ct. 1783, 20 Employee Benefits Cas. (BNA) 1257 (1996).

² 29 U.S.C. §§ 1001-1461 (1985 & Supp. 1996); see *Lockheed*, 116 S. Ct. at 1788, 20 Employee Benefits Cas. (BNA) at 1259.

³ 29 U.S.C. § 1106; see *Lockheed*, 116 S. Ct. at 1788, 20 Employee Benefits Cas. (BNA) at 1259.

⁴ See *Lockheed*, 116 S. Ct. at 1790, 20 Employee Benefits Cas. (BNA) at 1261.

⁵ 29 U.S.C. § 1052(a)(2); see *Lockheed*, 116 S. Ct. at 1787, 20 Employee Benefits Cas. (BNA) at 1258.

or exchange under ERISA and the Internal Revenue Code ("Code") where the employer used the property to satisfy its minimum contribution obligations.⁶ In *Keystone*, the employer contributed unencumbered real estate valued at almost \$15 million to its pension trust.⁷ The employer credited the value of the real estate toward its minimum funding obligation to the trust.⁸ The employer also claimed deductions on its federal income tax returns for the fair market value of the property and capital gains on the property, thus treating the contribution of the property to the pension trust as a "sale or exchange" for income tax purposes.⁹ The petitioner, the Commissioner of the Internal Revenue Service, claimed the transfers of the property to the pension trust were sales or exchanges prohibited by section 4975 of the Code ("section 4975"), creating tax liability for the respondent.¹⁰

In deciding that the transfers were sales or exchanges, the Supreme Court reasoned that Congress intended section 4975 to bar transactions likely to injure pension plans.¹¹ This intent, the Court reasoned, is evident in the fact that section 4975 was among those provisions Congress enacted in response to pension plan abuses that threatened the security of the plans.¹² The Court reasoned that Congress intended section 4975, like section 406 of ERISA, to protect the security of pension plans.¹³ Because the transfer of property to a pension plan had the potential to burden that plan, even when the property is unencumbered, the Court reasoned that Congress intended to prohibit such a transaction.¹⁴ Thus, the Court held that the employer's contribution of unencumbered real estate to its pension plan was a prohibited transaction under ERISA and the Code.¹⁵

In 1994, in *Johnson v. Georgia-Pacific Corp.*, the United States Court of Appeals for the Seventh Circuit held that an employer did not violate its fiduciary duties to retirees under ERISA by amending its retirement plan to increase benefits to current employees.¹⁶ In *Johnson*, the Great Northern Nekoosa Corporation ("GNN") unsuccessfully tried to

⁶ 508 U.S. 152, 161-62, 16 Employee Benefits Cas. (BNA) 2121, 2125 (1993).

⁷ *Id.* at 154-55, 16 Employee Benefits Cas. (BNA) at 2122.

⁸ *See id.* at 155, 16 Employee Benefits Cas. (BNA) at 2122.

⁹ *See id.*

¹⁰ *See id.* at 156, 16 Employee Benefits Cas. (BNA) at 2122; *see also* 26 U.S.C. § 4975(c) (1986).

¹¹ *Keystone*, 508 U.S. at 160, 16 Employee Benefits Cas. (BNA) at 2124.

¹² *Id.* One example of a pension plan abuse was a sponsor's sale of property to a plan at an inflated price. *See id.*

¹³ *Id.*

¹⁴ *Id.* at 162, 16 Employee Benefits Cas. (BNA) at 2125.

¹⁵ *Id.* at 161-62, 16 Employee Benefits Cas. (BNA) at 2125.

¹⁶ 19 F.3d 1184, 1190, 18 Employee Benefits Cas. (BNA) 1218, 1224 (7th Cir. 1994).

resist a takeover bid by the Georgia-Pacific Corporation ("Georgia-Pacific") by altering its pension plan to make the takeover less attractive.¹⁷ GNN amended the plan by increasing benefits to current employees in order to exhaust the plan's substantial surplus, thus forcing Georgia-Pacific to contribute to the plan should it take over GNN.¹⁸ The plaintiffs in *Johnson* were retired GNN employees who claimed they were also entitled to increased benefits because their plan contributions created the surplus.¹⁹ The plaintiffs sued Georgia-Pacific, GNN's successor, claiming that GNN violated its fiduciary duties under ERISA by amending the plan.²⁰

The *Johnson* court implicitly reasoned that because GNN was not acting as a fiduciary when it amended and implemented the plan, it did not violate its fiduciary duties to the retired employees.²¹ The Seventh Circuit looked at the plain language of ERISA and stated that ERISA's definition of "fiduciary duties" did not include the establishment or amendment of a pension plan.²² The court also rejected the plaintiffs' argument that using the surplus to pay increased benefits amounted to "disposing" of the plan's assets within the meaning of section 1002(21)(A)(i) of ERISA.²³ The word "disposition," the court stated, referred to selling, exchanging or transferring assets of the plan and not to paying out benefits.²⁴ Thus, the Seventh Circuit held that GNN did not violate its fiduciary duties under ERISA by amending its pension plan to increase benefits to future retirees.²⁵

In 1995, in *Curtiss-Wright Corp. v. Schoonejongen*, the United States Supreme Court held that an employer's reservation of the right to amend its pension plan satisfied section 402(b)(3) of ERISA.²⁶ Section

¹⁷ *Id.* at 1185, 18 Employee Benefits Cas. (BNA) at 1218.

¹⁸ *See id.* at 1185, 18 Employee Benefits Cas. (BNA) at 1219.

¹⁹ *Id.* at 1186, 18 Employee Benefits Cas. (BNA) at 1219.

²⁰ *See id.*

²¹ *See Johnson*, 19 F.3d at 1188, 18 Employee Benefits Cas. (BNA) at 1222.

²² *Id.* ERISA states, in pertinent part:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management to such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (1996).

²³ *Johnson*, 19 F.3d at 1188-89, 18 Employee Benefits Cas. (BNA) at 1222.

²⁴ *Id.* at 1189, 18 Employee Benefits Cas. (BNA) at 1222.

²⁵ *Id.* at 1190, 18 Employee Benefits Cas. (BNA) at 1224.

²⁶ 115 S. Ct. 1223, 1226, 18 Employee Benefits Cas. (BNA) 2841, 2841 (1995).

402(b)(3) requires that every employee benefit plan provide both an amendment procedure and a procedure for identifying those persons who may amend the plan.²⁷ The employer in *Curtiss-Wright* maintained a post-retirement health care benefits plan for employees.²⁸ The plan included a provision allowing the employer to amend the plan at any time.²⁹ The employer amended its health benefits plan by adding a clause providing for the cancellation of health care benefits for retirees "upon the termination of the facility from which they retired."³⁰ The plaintiffs in *Curtiss-Wright* were those retirees whose health care benefits were terminated as a result of a subsequent plant closure.³¹ The plaintiffs claimed that the new provision constituted an amendment to the benefits plan, that the defendant did not have a proper amendment procedure in place as required by ERISA section 402(b)(3) and thus, that the cancellation provision should be declared void.³²

The Supreme Court in *Curtiss-Wright* reasoned that employers are generally free to modify welfare benefits plans at any time and for any reason, thus, the plaintiffs would only have a cognizable claim if the defendant amended the plan in a manner barred by ERISA.³³ The Court then looked to the plain language of section 402(b)(3) and determined that ERISA merely requires procedures for amending a plan and for identifying those people with authority to amend the plan.³⁴ The Court reasoned that the employer's reservation clause actually outlined substantial procedures for amendment and for identifying those with authority to amend.³⁵ Because section 402(b)(3) does not require any specificity in these procedural provisions, the Court held that the employer's provision did not violate ERISA.³⁶

In 1996, in *Varity Corp. v. Howe*, the United States Supreme Court held that an employer breached its fiduciary duty under ERISA by intentionally misrepresenting to its employees the future of plan benefits in connection with plans to restructure the corporation.³⁷ In *Varity*, the appellant corporation ("Varity") induced employees of its financially unstable division, Massey-Ferguson, to switch to a newly created

²⁷ *Id.*

²⁸ *Id.* at 1227, 18 Employee Benefits Cas. (BNA) at 2841.

²⁹ *See id.* at 1226, 18 Employee Benefits Cas. (BNA) at 2841.

³⁰ *See id.* at 1227, 18 Employee Benefits Cas. (BNA) at 2842.

³¹ 115 S. Ct. at 1227, 18 Employee Benefits Cas. (BNA) at 2842.

³² *See id.*

³³ *Id.* at 1228, 18 Employee Benefits Cas. (BNA) at 2843.

³⁴ *Id.*

³⁵ *Id.* at 1228-29, 18 Employee Benefits Cas. (BNA) at 2844.

³⁶ *Curtiss-Wright*, 115 S. Ct. at 1226, 1229, 18 Employee Benefits Cas. (BNA) at 2841, 2844-45.

³⁷ 116 S. Ct. 1065, 1074, 19 Employee Benefits Cas. (BNA) 2761, 2769 (1996).

division, Massey Combines, which would release Massey-Ferguson from its obligation to provide benefits.³⁸ Varsity told Massey-Ferguson employees their benefits would remain secure if they voluntarily transferred to Massey Combines.³⁹ Varsity also told employees that the financial outlook for Massey Combines was bright.⁴⁰ This assurance, however, was false, as Massey Combines was insolvent from the day of its creation.⁴¹ In *Varsity*, the plaintiffs were employees who voluntarily switched to Massey Combines and lost their non-pension benefits when the division ended its second year in receivership.⁴²

The plaintiffs sued the plan's administrator, seeking the benefits they would have been owed under their old plan had they not transferred.⁴³ The Supreme Court in *Varsity* held that the appellant corporation was acting as a plan administrator when it intentionally misled employees about the security of their benefits.⁴⁴ The Court concluded that the employer was acting as a fiduciary because plan administration falls within ERISA's definition of a fiduciary's duties.⁴⁵ The *Varsity* Court distinguished an employer making statements to employees about its financial future, which would not invoke ERISA's fiduciary duties, from an employer deliberately tying such statements to the future security of benefits in order to create a misleading impression.⁴⁶ The Court held that the latter is not beyond the scope of plan administration.⁴⁷ The Court reasoned that misrepresenting the security of benefits to employees "is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."⁴⁸ Thus, the *Varsity* Court held that the employer violated its fiduciary duties under ERISA when it amended its pension plan and induced employees to switch employers.⁴⁹

During the *Survey* year, in *Lockheed Corp. v. Spink*, the United States Supreme Court held that the payment of benefits pursuant to

³⁸ *Id.* at 1068-69, 19 Employee Benefits Cas. (BNA) at 2762-63.

³⁹ *See id.* at 1069, 19 Employee Benefits Cas. (BNA) at 2763.

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² 116 S. Ct. at 1069, 19 Employee Benefits Cas. (BNA) at 2763.

⁴³ *See id.*

⁴⁴ *Id.* at 1074, 19 Employee Benefits Cas. (BNA) at 2769.

⁴⁵ *Id.* at 1073, 19 Employee Benefits Cas. (BNA) at 2768.

⁴⁶ *Id.* at 1074, 19 Employee Benefits Cas. (BNA) at 2768-69.

⁴⁷ *Varsity*, 116 S. Ct. at 1074, 19 Employee Benefits Cas. (BNA) at 2769.

⁴⁸ *Id.* at 1074-75, 19 Employee Benefits Cas. (BNA) at 2769 (citing *Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326, 3 Employee Benefits Cas. (BNA) 2590 (7th Cir. 1983)).

⁴⁹ *Id.* at 1074, 19 Employee Benefits Cas. (BNA) at 2769.

an early retirement program was not a prohibited transaction under section 406(a)(1)(D) of ERISA where the employer conditioned payment on the participants' release of employment claims against the employer.⁵⁰ The Supreme Court also held that an employer's amendment of its benefits plan did not violate section 406(a) of ERISA.⁵¹ Finally, the Court held that sections 9201 and 9202 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA"), which amended ERISA to prohibit age-based discrimination in pension plans, applies prospectively rather than retroactively.⁵²

In *Lockheed*, the petitioner Lockheed Corporation ("Lockheed") employed the respondent, Paul Spink ("Spink"), in 1979.⁵³ At that time, the terms of the Lockheed Retirement Plan for Certain Salaried Individuals ("the plan") barred employees over the age of sixty from participation.⁵⁴ ERISA expressly permitted such terms in 1979.⁵⁵ Spink was sixty-one years old when Lockheed hired him and, thus, was ineligible to participate in the plan.⁵⁶

In 1986, Congress enacted sections 9201 to 9203 of OBRA, amending ERISA and barring employers from ceasing benefit accruals, reducing benefit accrual rates or excluding employees from pension plans based on age.⁵⁷ Lockheed complied with the new laws by allowing all employees to participate in the plan regardless of age beginning December 25, 1988.⁵⁸ Lockheed did not, however, credit employees like Spink for their years of service prior to December 25, 1988.⁵⁹

In an attempt to streamline operations, Lockheed later amended the plan by developing two programs to induce certain employees to retire early.⁶⁰ Both programs offered increased pension benefits, payable out of the plan's surplus assets, to those employees who chose to retire early.⁶¹ Under both plans, Lockheed required the retirees to waive any possible employment-related claims against Lockheed.⁶² Spink was qualified to participate in one of the early retirement plans

⁵⁰ 116 S. Ct. 1783, 1788, 20 Employee Benefits Cas. (BNA) 1252, 1259 (1996).

⁵¹ *Id.* at 1790, 20 Employee Benefits Cas. (BNA) at 1261.

⁵² *Id.* at 1792, 20 Employee Benefits Cas. (BNA) at 1264.

⁵³ *Id.* at 1787, 20 Employee Benefits Cas. (BNA) at 1258.

⁵⁴ *See id.*

⁵⁵ *See Lockheed*, 116 S. Ct. at 1787, 20 Employee Benefits Cas. (BNA) at 1258.

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See Lockheed*, 116 S. Ct. at 1787, 20 Employee Benefits Cas. (BNA) at 1258.

⁶¹ *See id.*

⁶² *See id.*

but refused to waive his claims and, thus, was ineligible for the increased benefits.⁶³ Spink then retired and sued both Lockheed and members of its Retirement Committee, alleging violations of section 406(a)(1)(D) of ERISA and claiming that the OBRA amendments to ERISA required Lockheed to count his years of service prior to 1988 toward his accrued pension benefits.⁶⁴

In holding that Lockheed did not violate section 406(a)(1)(D) by amending the plan, the Court followed the reasoning of *Johnson* and looked at ERISA's definitions of "fiduciary duties."⁶⁵ The Court reasoned that the plain language of the statute makes clear that only a fiduciary can violate section 406(a).⁶⁶ Thus, the Court explained, unless Lockheed was acting as a fiduciary when it amended the retirement plan to create the early retirement incentives, Lockheed could not have violated section 406(a)(1)(D) of ERISA.⁶⁷ In determining whether Lockheed acted as a fiduciary, the Court reasoned that because ERISA's definition of fiduciary duties does not include the design of a pension plan, Lockheed was not acting as a fiduciary when it amended its plan.⁶⁸ Instead, the Court reasoned, Lockheed's actions were analogous to those of a settlor of a trust.⁶⁹ The Court followed the reasoning of *Johnson*, which noted that while settlors do have fiduciary duties, those are not the same duties contemplated by the pertinent sections of ERISA.⁷⁰ Drawing on the reasoning of both *Varity* and *Curtiss-Wright*, the Court noted that the mere act of amending a pension plan does not trigger ERISA's fiduciary provisions.⁷¹ Thus, Lockheed could not have violated section 406(a) solely by amending the pension plan.⁷²

The Court further held that Lockheed's Retirement Committee did not violate section 406(a)(1)(D) by paying out the increased retirement benefits.⁷³ The Court did not reach the issue of whether or not the Committee was acting as a fiduciary, but held that the act of payment itself was not a prohibited transaction within the meaning of

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ *Lockheed*, 116 S. Ct. at 1789, 20 Employee Benefits Cas. (BNA) at 1260.

⁶⁶ *Id.* at 1788-89, 20 Employee Benefits Cas. (BNA) at 1260.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1789, 20 Employee Benefits Cas. (BNA) at 1260-61.

⁶⁹ *Id.* at 1789, 20 Employee Benefits Cas. (BNA) at 1260.

⁷⁰ *Lockheed*, 116 S. Ct. at 1789, 20 Employee Benefits Cas. (BNA) at 1260.

⁷¹ See *id.* at 1789, 20 Employee Benefits Cas. (BNA) at 1260-61.

⁷² See *id.* at 1790, 20 Employee Benefits Cas. (BNA) at 1261.

⁷³ *Id.* at 1792, 20 Employee Benefits Cas. (BNA) at 1263.

the pertinent section of ERISA.⁷⁴ The Court set forth a two-pronged analysis and examined both the nature of the prohibited transactions contemplated by section 406(a)(1)(D) and the nature of the benefit Lockheed received in the bargain.⁷⁵ The Court again looked at the plain language of ERISA and noted that section 406(a) does not include the payment of benefits as a prohibited transaction.⁷⁶ Instead, the Court noted, the statute names transactions which have the potential to threaten the security of a pension plan, such as sales, exchanges or leases of property.⁷⁷ The Court reasoned that the payment of benefits to retirees, unlike the prohibited transactions listed in section 406(a)(1)(D), was not likely to jeopardize the security of the plan and therefore ERISA did not reach such a transaction.⁷⁸ In applying the facts of *Lockheed* to the second prong of the Court's analysis, the Court stated that the benefit Lockheed received by obtaining claim waivers from retirees was indistinguishable from benefits that plan sponsors may legally receive in exchange for operating a pension plan.⁷⁹ Thus, the Court held that the payment of increased benefits to retirees in exchange for waivers of claims was not a prohibited transaction within the meaning of section 406(a)(1)(D).⁸⁰

While concurring in most of the Court's judgment, Justice Breyer dissented on the issue of whether Lockheed's action was prohibited by section 406(a)(1)(D).⁸¹ In particular, Justice Breyer disagreed with the majority's broad holding that a transaction is not prohibited by ERISA "regardless of what the plan requires of the employee in return for . . . benefits."⁸² Justice Breyer argued that the Court should not have even addressed this issue because of its complex legal nature.⁸³ Instead, Justice Breyer stated, the Court should have followed the recommendation of the Solicitor General and allowed the issue to be further

⁷⁴ *Id.*

⁷⁵ *Lockheed*, 116 S. Ct. at 1790-91, 20 Employee Benefits Cas. (BNA) at 1261-62.

⁷⁶ *Id.* at 1790-91, 20 Employee Benefits Cas. (BNA) at 1262.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1791, 20 Employee Benefits Cas. (BNA) at 1262.

⁷⁹ *Id.* Among the legitimate benefits a plan sponsor may receive are retaining employees, paying deferred compensation without increasing wages, increasing employee turnover and reducing the likelihood of lawsuits by inducing employees who would have been laid off to voluntarily retire. *Id.*

⁸⁰ *Lockheed*, 116 S. Ct. at 1792, 20 Employee Benefits Cas. (BNA) at 1263.

⁸¹ *Id.* at 1793, 20 Employee Benefits Cas. (BNA) at 1264 (Breyer, J., concurring in part and dissenting in part).

⁸² *Id.* (Breyer, J., concurring in part and dissenting in part).

⁸³ *Id.* (Breyer, J., concurring in part and dissenting in part).

developed in the lower courts before making such a broad pronouncement.⁸⁴

Finally, although the Court in *Lockheed* did not find an ERISA violation, it went on to address the issue of whether the OBRA amendments should be applied retroactively.⁸⁵ The Court first determined that the OBRA amendments not only barred age discrimination in terms of plan participation, but also in terms of benefit accrual rates.⁸⁶ The Court then rejected the reasoning of the lower court, which held that the OBRA amendments should apply retroactively because excluding an employee from plan participation would effectively reduce that employee's benefit accrual rate.⁸⁷ The Court stated that where Congress has included a provision specifically addressing the temporal effects of a statute, that language "trumps any general inferences that might be drawn from the substantive provisions of the statute."⁸⁸ Thus, the Court reasoned, the mere fact that an employee's pension benefits would accrue at a lesser rate because of the employee's earlier exclusion from a plan was legally irrelevant.⁸⁹ Because the OBRA amendments include a specific temporal provision, the Court held that the amendments must be applied prospectively rather than retroactively.⁹⁰

In holding that *Lockheed* did not violate section 406(a)(1)(D), the Supreme Court seemed to place emphasis on whether the transaction at issue had potential to injure the pension fund.⁹¹ The Court relied on *Keystone*, which noted that Congress intended for ERISA to protect employee benefits plans and thus, employees.⁹² The effect of *Lockheed*, however, may be that employers enjoy greater protection under ERISA than employees.⁹³ Indeed, due to the Court's broad holding, employers may now have free reign to induce employees to give up legal claims and more in exchange for increased retirement benefits.⁹⁴ While the Court termed *Lockheed*'s action a "quid pro quo"

⁸⁴ *Id.* (Breyer, J., concurring in part and dissenting in part).

⁸⁵ *Lockheed*, 116 S. Ct. at 1792, 20 Employee Benefits Cas. (BNA) at 1263.

⁸⁶ *Id.* at 1787, 20 Employee Benefits Cas. (BNA) at 1258.

⁸⁷ *Id.* at 1792-93, 20 Employee Benefits Cas. (BNA) at 1264.

⁸⁸ *Id.* at 1793, 20 Employee Benefits Cas. (BNA) at 1264. Section 9203(a)(1) of OBRA states that employers may not exclude employees from plan participation based on age "only with respect to plan years beginning on or after January 1, 1988." 29 U.S.C. § 1052, note (1996).

⁸⁹ *Lockheed*, 116 S. Ct. at 1793, 20 Employee Benefits Cas. (BNA) at 1264.

⁹⁰ *Id.* at 1792, 20 Employee Benefits Cas. (BNA) at 1264.

⁹¹ *See id.* at 1790-91, 20 Employee Benefits Cas. (BNA) at 1262.

⁹² *See id.* at 1788, 20 Employee Benefits Cas. (BNA) at 1259; *Commissioner v. Keystone Consolidated Indus., Inc.*, 508 U.S. 152, 160, 16 Employee Benefits Cas. (BNA) 2121, 2124 (1993).

⁹³ *See Lockheed*, 116 S. Ct. at 1792, 20 Employee Benefits Cas. (BNA) at 1263.

⁹⁴ *See id.*

that is indistinguishable from legitimate benefits employers may receive in exchange for operating pension plans, such an exchange is fundamentally different because employees are *required* to relinquish a legal right.⁹⁵ Thus, the Court has actually given employers more power to insulate themselves from lawsuits and has taken power from employees in an era of increased downsizing and decreased employment security.⁹⁶ In granting employers this power, the Court may have opened the door to a flood of employer actions involving pension plans that have potential to injure employees, but leave the pension plans intact.⁹⁷ Under *Lockheed*, as long as the pension plan itself is not jeopardized it appears an employer can escape liability under section 406(a)(1)(D) despite putting employees at risk.⁹⁸

Indeed, as Justice Breyer argued in his dissent in *Lockheed*, the Court should never have reached the issue of whether Lockheed's action was a prohibited transaction within the meaning of section 406(a)(1)(D).⁹⁹ The Court probably could have analyzed the Lockheed Retirement Committee's liability by first addressing its fiduciary status, rather than determining whether the transaction itself was prohibited, and reached the same result.¹⁰⁰ Justice Breyer specifically took issue with the majority's broad wording of its holding "that the payment of benefits pursuant to an amended plan, *regardless of what the plan requires of the employee in return for those benefits*, does not constitute a prohibited transaction."¹⁰¹ Thus, a majority of the Court appears to be sending a message to employers that they have a great deal of freedom in amending pension plans and controlling employee choices by using their benefits plans as bargaining chips.¹⁰² While noting that Congress intended the statute to protect employee benefits plans, and thus employees, the Court interpreted Congress's words to protect the employer instead.¹⁰³

On the other hand, the Court strictly interpreted Congress's language when it held that the OBRA amendments applied prospec-

⁹⁵ See *id.* at 1791-92, 20 Employee Benefits Cas. (BNA) at 1262-63.

⁹⁶ See *id.* at 1792, 20 Employee Benefits Cas. (BNA) at 1263; see also *Downsizing—The Toll Keeps Going Up*, U.S. NEWS & WORLD REP., Aug. 30, 1993, at 16.

⁹⁷ See *Lockheed*, 116 S. Ct. at 1792, 20 Employee Benefits Cas. (BNA) at 1263.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1793, 20 Employee Benefits Cas. (BNA) at 1264 (Breyer, J., concurring in part and dissenting in part).

¹⁰⁰ See *id.* at 1792, 20 Employee Benefits Cas. (BNA) at 1263.

¹⁰¹ See *id.* at 1793, 20 Employee Benefits Cas. (BNA) at 1264 (Breyer, J., concurring in part and dissenting in part).

¹⁰² See *Lockheed*, 116 S. Ct. at 1792, 20 Employee Benefits Cas. (BNA) at 1263.

¹⁰³ See *id.* at 1788, 1792, 20 Employee Benefits Cas. (BNA) at 1259, 1263.

tively.¹⁰⁴ Although the Court's holding on this issue advantages the employer rather than the employees, this was clearly what Congress intended.¹⁰⁵ Where Congress has explicitly laid out its intentions, there is no need for further judicial interpretation.¹⁰⁶ Furthermore, the Court's holding is correct because it is likely to discourage litigation not only regarding the OBRA amendments, but also regarding other statutes that include similar explicit temporal provisions.¹⁰⁷ When Congress's intention is so clear, litigation claiming otherwise should be discouraged and terminated at the outset.¹⁰⁸ The Court's holding regarding the OBRA amendments in *Lockheed* may have this desired effect.¹⁰⁹

In conclusion, the United States Supreme Court in *Lockheed* decided three issues.¹¹⁰ First, the Court held that an employer's payment of early retirement benefits in exchange for the recipient's waiver of all legal claims against the employer is not prohibited by section 406(a)(1)(D) of ERISA.¹¹¹ Second, the Court also held that an employer's amending of a benefits plan does not violate section 406(a).¹¹² Third, the Court held that sections 9201 and 9202 of OBRA are to be applied prospectively rather than retroactively.¹¹³ The Court's broad holding on the first issue implies a willingness to allow employers to condition an employee's receipt of retirement benefits on virtually any requirement.¹¹⁴ The dissent, however, took issue with the majority's sweeping pronouncement that regardless of what an employer requires an employee to do in exchange for benefits, the employer will not engage in a transaction prohibited by ERISA.¹¹⁵ Indeed, the majority opinion in *Lockheed* appears to indicate a move toward protection of employers' rights over those of the employee, a shift that may lead to both increased litigation and decreased employee security.¹¹⁶

¹⁰⁴ *Id.* at 1792, 20 Employee Benefits Cas. (BNA) at 1263-64.

¹⁰⁵ *See id.*

¹⁰⁶ *See id.* at 1793, 20 Employee Benefits Cas. (BNA) at 1264.

¹⁰⁷ *See Lockheed*, 116 S. Ct. at 1793, 20 Employee Benefits Cas. (BNA) at 1264.

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 1786, 20 Employee Benefits Cas. (BNA) at 1257-58.

¹¹¹ *Id.* at 1788, 20 Employee Benefits Cas. (BNA) at 1259.

¹¹² *Lockheed*, 116 S. Ct. at 1790, 20 Employee Benefits Cas. (BNA) at 1261.

¹¹³ *Id.* at 1792, 20 Employee Benefits Cas. (BNA) at 1264.

¹¹⁴ *See id.* at 1792, 20 Employee Benefits Cas. (BNA) at 1263.

¹¹⁵ *See id.* at 1793, 20 Employee Benefits Cas. (BNA) at 1264 (Breyer, J., concurring in part and dissenting in part).

¹¹⁶ *See id.* at 1792, 20 Employee Benefits Cas. (BNA) at 1263.

IV. REHABILITATION ACT

A. **Sovereign Immunity Shields Federal Agency Programs from Monetary Damages Claims Under Section 504: Lane v. Pena*¹

Section 504 of The Rehabilitation Act ("the Act") of 1973 prohibits its federal agencies and federally funded programs from discriminating on the basis of disability.² The purpose of the Act is to promote and expand employment opportunities in the public and private sectors for persons with disabilities, as well as to provide for the integration of the disabled into mainstream society.³ In 1978, when Congress amended section 504 to include federal agencies, it added a remedies provision that explicitly equates the remedies available under section 504 with those available under Title VI of the Civil Rights Act of 1964 ("Title VI").⁴ Congress modeled section 504 on Title VI, and in interpreting it, courts have looked to both Title VI and Title IX of the Education Amendments of 1972 ("Title IX"), which is likewise modeled on Title VI.⁵ The question of whether monetary damages are available under section 504 has been the subject of some dispute among the circuits, in part because the precise damages available under Title VI has itself been somewhat unsettled.⁶

* By Nora E. Field, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ *Lane v. Pena*, 116 S. Ct. 2092, 5 A.D. Cases (BNA) 973 (1996).

² 29 U.S.C. § 794(a) (1994). Section 504 states:

No otherwise qualified individual with a disability in the United States . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id.

In 1978, Congress amended this section to provide for executive agency liability. *Id.* Section 501 of the Act prohibits discrimination by the federal government as employer. *Id.* § 791(a); see *Lane*, 116 S. Ct. at 2097, 5 A.D. Cases (BNA) at 976. Prior to the passage of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101-213 (1994), the Rehabilitation Act was the primary means of redress for persons with disabilities in this country, and its relevance persists because the ADA excludes the federal government from its coverage. See 42 U.S.C. § 12101-213 (1994).

³ 29 U.S.C. § 701(a).

⁴ See *id.* § 794a(a)(2). Section 505 of the Act states in part, "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." *Id.*

⁵ See, e.g., *Lane*, 116 S. Ct. at 2101-02, 5 A.D. Cases (BNA) at 978-79 (Stevens, J., dissenting); *Doe v. Attorney General*, 941 F.2d 780, 786-87, 58 Fair Empl. Prac. Cas. (BNA) 627, 631 (9th Cir. 1991).

⁶ See, e.g., *Guardians Assoc. v. Civil Serv. Comm'n*, 463 U.S. 582, 593-602 & n.23, 603, 32 Fair

Further complicating the issue of available remedies under section 504 is the doctrine of sovereign immunity.⁷ Under this doctrine, the federal government is generally shielded from liability unless it explicitly consents to being sued.⁸ While the Administrative Procedure Act ("APA") provides a waiver for non-pecuniary claims against the government brought under federal statutes, it does not provide for monetary relief.⁹ Although the foundation on which sovereign immunity originally rested—the king "can do no wrong"—has long since disappeared, the doctrine has persisted.¹⁰ Furthermore, the United States Supreme Court recently strengthened the government's immunity by holding that the requisite consent to be sued must consist of an unambiguous, explicit waiver found in the language of the statute in question and cannot be supplied by its legislative history.¹¹

In 1991, in *Doe v. Attorney General*, the United States Court of Appeals for the Ninth Circuit held that section 504 of the Rehabilitation Act permits a private right of action for damages against the Justice Department and the Federal Bureau of Investigation ("FBI").¹² In *Doe*, the plaintiff was a physician who performed pre-hiring physical examinations of FBI agents under an annually renewed procurement contract.¹³ When the FBI learned that the physician had AIDS, the FBI stopped referring agents to him.¹⁴ The Ninth Circuit determined that

Empl. Prac. Cas. (BNA) 250, 254–58 & n.23 (1983); *Dorsey v. United States Dep't of Labor*, 41 F.3d 1551, 1554, 3 A.D. Cases (BNA) 1651, 1652–53 (D.C. Cir. 1994). In *Guardians*, the Supreme Court held that damages available for past, unintentional violations of Title VI were limited to declaratory and injunctive relief. 463 U.S. at 607, 32 Fair Empl. Prac. Cas. (BNA) at 260. The majority opinion did not address whether monetary damages are available for intentional violations of the statute. *See id.* at 597, 32 Fair Empl. Prac. Cas. (BNA) at 256. In *Franklin v. Gwinnett County Public Schools*, however, the Court stated in dicta that a majority of the Justices in *Guardians* expressed the view that damages were available in actions for intentional violations of Title VI. 503 U.S. 60, 70, 59 Fair Empl. Prac. Cas. (BNA) 213, 216–17 (1992).

⁷ *See Lane*, 116 S. Ct. at 2096, 5 A.D. Cases (BNA) at 974.

⁸ *See, e.g., Doe*, 941 F.2d at 787–88, 58 Fair Empl. Prac. Cas. (BNA) at 632.

⁹ 5 U.S.C. § 702 (1994). The APA states, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," may bring "an action in a court of the United States seeking relief other than money damages . . ." *Id.*

¹⁰ *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 42–43 (1992) (Stevens, J., dissenting) (citing *Langford v. United States*, 101 U.S. 341, 343 (1880) ("We do not understand that . . . the English maxim has an existence in this country.")).

¹¹ *Nordic Village*, 503 U.S. at 37, 39.

¹² 941 F.2d at 795, 58 Fair Empl. Prac. Cas. (BNA) at 637. *Doe* was decided prior to the Supreme Court's decision in *Nordic Village*; therefore, the court looked not only at the language of section 504 but also at its legislative history to find a waiver of sovereign immunity. *See id.* at 788–93, 58 Fair Empl. Prac. Cas. (BNA) at 632–36.

¹³ *Id.* at 782, 58 Fair Empl. Prac. Cas. (BNA) at 627.

¹⁴ *See id.*

the language and structure of the Act evinced Congressional intent to prohibit discrimination against persons with disabilities by anyone and to create a unitary enforcement mechanism.¹⁵ The court reasoned that by amending the language in section 504 to include "any program or activity conducted by any Executive agency," rather than adding an entirely new statutory section, Congress must have intended to place the federal government on equal footing with the other defendants included in section 504.¹⁶ The Ninth Circuit further reasoned that, because section 505(b) of the Act allows the prevailing party to recover attorney's fees, Congress intended for all defendants under the Act to be treated alike.¹⁷ Additionally, the court reasoned that although never explicitly stated by Congress, Congressional debates on the amendments to the Act unequivocally expressed Congress's intent to subject federal agencies to private actions for money damages.¹⁸ Thus, the Ninth Circuit held that federal agencies that violate section 504 must pay monetary damages in civil actions.¹⁹

In 1992, in *Franklin v. Gwinnett County Public Schools*, the United States Supreme Court held that the implied right of action under Title IX supports a claim for monetary damages.²⁰ In *Franklin*, the plaintiff was a high school student who alleged that a teacher had sexually harassed and abused her.²¹ Franklin sued under Title IX, which prohibits sexual discrimination by federally-funded education programs.²² First, the Court reaffirmed that Title IX is enforceable through an implied right of action.²³ Next, the Court addressed the separate issue of what remedies are available under this implied cause of action.²⁴ The Court examined a long line of its precedents that establish that federal courts have the power to award any appropriate relief in a cause of action brought under a federal statute.²⁵ Additionally, the Court con-

¹⁵ *Id.* at 791, 58 Fair Empl. Prac. Cas. (BNA) at 634.

¹⁶ *Id.* at 790, 58 Fair Empl. Prac. Cas. (BNA) at 633-34.

¹⁷ *Doe*, 941 F.2d at 791, 58 Fair Empl. Prac. Cas. (BNA) at 634.

¹⁸ *Id.* at 791-93, 58 Fair Empl. Prac. Cas. (BNA) at 634-36. The *Doe* court quoted Representatives who stated in debates that the purpose of the 1978 amendments was to make the federal government just as liable for discrimination against the disabled as the other entities already included in section 504. *Id.* at 791-92, 58 Fair Empl. Prac. Cas. (BNA) at 634-35.

¹⁹ *Id.* at 795, 58 Fair Empl. Prac. Cas. (BNA) at 637.

²⁰ 503 U.S. at 76, 59 Fair Empl. Prac. Cas. (BNA) at 219 (1992).

²¹ *Id.* at 63, 59 Fair Empl. Prac. Cas. (BNA) at 214.

²² *See id.* at 62-63 & n.1, 59 Fair Empl. Prac. Cas. (BNA) at 214 & n.1. Title IX states in relevant part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a) (1994).

²³ *Franklin*, 503 U.S. at 65, 59 Fair Empl. Prac. Cas. (BNA) at 215.

²⁴ *Id.* at 65-71, 59 Fair Empl. Prac. Cas. (BNA) at 215-17.

²⁵ *Id.* at 66-71, 59 Fair Empl. Prac. Cas. (BNA) at 215-17.

cluded that Congress had in no way limited the remedies available under Title IX.²⁶ The Court reasoned that the two amendments to Title IX that Congress passed after the Court recognized an implied right of action explicitly authorized remedies and broadened the statute's antidiscrimination coverage, rather than restricting the right of action or its possible remedies.²⁷ Thus, the Court held in *Franklin* that monetary damages are available in actions brought under Title IX.²⁸

In 1995, in *Dorsey v. United States Department of Labor*, the United States Court of Appeals for the District of Columbia Circuit held that the federal government has not waived its sovereign immunity from monetary damages claims for violations of section 504 of the Rehabilitation Act.²⁹ In *Dorsey*, the plaintiff was expelled from the Department of Labor's Job Corps program when a mandatory medical examination revealed that he was HIV-positive.³⁰ Although Dorsey was ultimately readmitted to the program, he alleged that Job Corps members ridiculed and harassed him when they learned of his HIV-positive status.³¹

The District of Columbia Circuit stated that although the federal agency might have violated section 504 by its discriminatory conduct, the statute did not necessarily provide the remedy of monetary relief.³² The court reasoned that although both Title VI and the Rehabilitation Act provide for monetary damages in actions against private parties, sovereign immunity puts the federal government on "different footing."³³ The court concluded that no language in the Act or in Title VI satisfies the Supreme Court's strict requirement of an unequivocal expression of a governmental waiver of sovereign immunity.³⁴ Additionally, the District of Columbia Circuit stated that the Act's ambiguous legislative history did not satisfy the required unequivocal statutory expression of a waiver.³⁵ Thus, the District of Columbia Circuit held that the federal government did not waive its sovereign immunity from monetary damages for violations of section 504.³⁶

During the *Survey* year, in *Lane v. Pena*, the United States Supreme Court held that Congress has not waived the federal government's sovereign immunity against monetary damages awards for violations of

²⁶ *Id.* at 73, 59 Fair Empl. Prac. Cas. (BNA) at 218.

²⁷ *See id.* at 65, 72-73, 59 Fair Empl. Prac. Cas. (BNA) at 215, 217-18.

²⁸ *Franklin*, 503 U.S. at 76, 59 Fair Empl. Prac. Cas. (BNA) at 219.

²⁹ 41 F.3d at 1552-53, 3 A.D. Cases (BNA) at 1651.

³⁰ *Id.* at 1553, 3 A.D. Cases (BNA) at 1651-52.

³¹ *See id.* at 1553, 3 A.D. Cases (BNA) at 1652.

³² *Id.* at 1553-54, 3 A.D. Cases (BNA) at 1652.

³³ *Id.* at 1555, 3 A.D. Cases (BNA) at 1653.

³⁴ *Dorsey*, 41 F.3d at 1555, 3 A.D. Cases (BNA) at 1653.

³⁵ *Id.* at 1555, 3 A.D. Cases (BNA) at 1654.

³⁶ *Id.* at 1552-53, 3 A.D. Cases (BNA) at 1651.

section 504 of the Rehabilitation Act.³⁷ The Court strictly applied its precedents on the doctrine of sovereign immunity, and thus held that the Act's lack of an unequivocal waiver of sovereign immunity with regard to federal agencies disallowed Lane's damages claim.³⁸

In *Lane*, the United States Merchant Marine Academy ("the Academy") dismissed the plaintiff, a student, because he had diabetes.³⁹ The Department of Transportation administers the Academy through the Maritime Administration.⁴⁰ During his first year at the Academy, Lane was diagnosed by a private physician as having diabetes mellitus.⁴¹ After Lane reported the diagnosis to the Academy's Chief Medical Officer, the Academy's Physical Examination Review Board conducted a hearing to determine Lane's "medical suitability" to continue at the Academy.⁴² Three months later, the Academy dismissed Lane on the ground that his diabetes rendered him ineligible to be commissioned for service.⁴³ After unsuccessfully challenging his dismissal before the Maritime Administrator, Lane brought suit in federal district court, alleging that his discharge from the Academy violated section 504.⁴⁴ The government disputed an award of damages on the ground that sovereign immunity protected it from claims for monetary damages.⁴⁵

The Court began its analysis of Lane's damages claim by examining its precedents on waivers of the federal government's sovereign immunity.⁴⁶ The Court cited several precedents holding that it must strictly construe waivers of sovereign immunity in favor of the sovereign.⁴⁷ Additionally, the Court reaffirmed that the text of a statute must

³⁷ 116 S. Ct. 2092, 2096–100, 5 A.D. Cases (BNA) 973, 974–78 (1996).

³⁸ See *id.*

³⁹ *Id.* at 2095, 5 A.D. Cases (BNA) at 974.

⁴⁰ See *id.* at 2095, 5 A.D. Cases (BNA) at 973.

⁴¹ See *id.*

⁴² See *Lane*, 116 S. Ct. at 2095, 5 A.D. Cases (BNA) at 973.

⁴³ See *id.* at 2095, 5 A.D. Cases (BNA) at 974.

⁴⁴ See *id.*

⁴⁵ See *id.* The District Court granted summary judgment in favor of Lane and ordered him reinstated, but deferred resolution of the specific amount of compensatory damages due. See *id.* Shortly thereafter, the Court of Appeals for the District of Columbia ruled in *Dorsey* that the Act did not waive the government's sovereign immunity against monetary damages for violations of section 504. See *id.* at 2096, 5 A.D. Cases at 974 (citing *Dorsey v. United States Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994)). The District Court subsequently vacated its award of damages to Lane, holding that he was not entitled to a compensatory damages award against the federal government. See *id.* On appeal, the Court of Appeals for the District of Columbia rejected Lane's request for en banc review of *Dorsey* and granted the government's motion for summary affirmance. See *id.* The Supreme Court granted certiorari to resolve a split among the circuits. See *id.*

⁴⁶ *Id.* at 2096–97, 5 A.D. Cases (BNA) at 974–75.

⁴⁷ *Lane*, 116 S. Ct. at 2096, 5 A.D. Cases (BNA) at 974–75 (citing *United States v. Williams*,

unequivocally express a waiver of sovereign immunity and that a statute's legislative history is not sufficient to supply such a waiver.⁴⁸

The Court then concluded that the relevant provisions of the Act did not include the required unequivocal waiver of sovereign immunity.⁴⁹ The Court analyzed section 504's remedies provision, section 505(a)(2), which states that the remedies available for violations of Title VI will be available for violations of section 504 "by any recipient of Federal assistance or Federal provider of such assistance"⁵⁰ The Supreme Court reasoned that the absence of the more "far-reaching" language of section 504 in the remedies provision specifically limits the provision's waiver of sovereign immunity to the federal providers mentioned.⁵¹ The Court also rejected Lane's argument that the Department of Transportation is a federal provider under the meaning of the Act.⁵²

Additionally, the Court compared the language of section 505(a)(2) with the language in section 505(a)(1), the section that provides the remedies for violations of section 501.⁵³ The Supreme Court reasoned that the contrast between section 505(a)(1)'s broad language allowing monetary damages for any violation of section 501, and section 505(a)(2)'s narrower language suggests that Congress intended to treat executive agencies differently under section 504 in terms of remedies.⁵⁴ With respect to section 501, the Court saw further evidence of a clear waiver of sovereign immunity in the Civil Rights Act of 1991 and in the Act's attorney's fees provision.⁵⁵ The Court reasoned that this contrasting clarity is further evidence of the absence of such a waiver in sections 504 and 505(a)(2).⁵⁶

The Court stated that the statutory scheme in the Act—which subjects the government to awards of injunctive relief, attorney's fees and monetary damages when it acts as a "federal provider," but does not subject it to monetary damages only when a federal agency violates section 504—is "admittedly somewhat bewildering."⁵⁷ Nevertheless, the Court found support for such a scheme in the APA, which provides for

115 S. Ct. 1611, 1616 (1995); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981)).

⁴⁸ *Id.* at 2096–97, 5 A.D. Cases (BNA) at 975.

⁴⁹ *Id.* at 2097, 5 A.D. Cases (BNA) at 975.

⁵⁰ *Id.* (citing 29 U.S.C. § 794a(a)(2) (1994)).

⁵¹ *Id.*

⁵² See *Lane*, 116 S. Ct. at 2098, 5 A.D. Cases (BNA) at 975–76.

⁵³ *Id.* at 2097, 5 A.D. Cases (BNA) at 975.

⁵⁴ *Id.*

⁵⁵ *Id.* at 2097–98, 5 A.D. Cases (BNA) at 975.

⁵⁶ *Id.*

⁵⁷ *Lane*, 116 S. Ct. at 2098, 5 A.D. Cases (BNA) at 976.

agency liability but not monetary damages.⁵⁸ Thus, the Court reasoned that the Rehabilitation Act's "bewildering" scheme is not entirely irrational.⁵⁹

Additionally, the Court rejected Lane's reliance on *Franklin*.⁶⁰ The Court emphasized that *Franklin*'s holding concerned only the availability of monetary damages under Title IX's implied cause of action against non-federal defendants, and reasoned that it should not apply to federal defendants because of sovereign immunity.⁶¹

The Court also rejected Lane's argument that the "equalization" provision of the 1986 amendments to the Act reveals Congress's intent to make the same remedies available against all defendants for violations of section 504.⁶² Section 1003 of those amendments provides that a state will be subject to all the remedies available for a violation of section 504 in a suit against "any public or private entity other than a State."⁶³ The Court disagreed with Lane's argument that this provision implies that all public and private entities are on equal footing with respect to remedies.⁶⁴ The Court reasoned that there are two other plausible interpretations: first, that "public entities" refers to those non-federal public entities receiving federal funds that are subject to the Act and the other statutes covered by the provision, and; second, that the reference to "public or private entities" suggests a distinction between remedies available against the two types of defendants, or otherwise Congress would have simply stated "every other entity."⁶⁵ Again, although the Court stated that neither reading was "entirely satisfactory," it concluded that section 1003 was too ambiguous to be an unequivocal waiver of sovereign immunity.⁶⁶

In his dissent, Justice Stevens examined the purpose and history of the Act and concluded that Congress clearly intended to authorize a damages award against a federal agency that violates section 504.⁶⁷ He strongly objected to the majority's purely textual approach to waivers of sovereign immunity.⁶⁸ Ignoring relevant legislative history, he

⁵⁸ See *id.* (citing 5 U.S.C. § 702 (1994)); see *supra* note 9 for relevant text of APA.

⁵⁹ *Lane*, 116 S. Ct. at 2098, 5 A.D. Cases (BNA) at 976.

⁶⁰ See *id.*

⁶¹ See *id.* at 2099, 5 A.D. Cases (BNA) at 976.

⁶² See *id.* at 2099–100, 5 A.D. Cases (BNA) at 977–78.

⁶³ 42 U.S.C. § 2000d-7(a) (1994).

⁶⁴ See *Lane*, 116 S. Ct. at 2099–100, 5 A.D. Cases (BNA) at 977.

⁶⁵ *Id.* at 2100, 5 A.D. Cases (BNA) at 977–78.

⁶⁶ *Id.* at 2100, 5 A.D. Cases (BNA) at 978.

⁶⁷ *Id.* at 2100–06, 5 A.D. Cases (BNA) at 978–82 (Stevens, J., dissenting).

⁶⁸ *Id.* at 2106, 5 A.D. Cases (BNA) at 982 (Stevens, J., dissenting).

argued, hinders the Court's ability to carry out the will and intent of Congress.⁶⁹

Justice Stevens began by reviewing the historical interpretation of the first versions of the Act and Title VI.⁷⁰ He cited precedent that interpreted both acts as providing for damages remedies through private actions.⁷¹ He also cited *Franklin* as support for the premise that both Title IX and section 504 contain an implied private cause of action for all traditional forms of relief, including monetary damages.⁷² He criticized the majority's distinguishing *Franklin* on the ground that it involved a non-federal defendant, because the Court in *Franklin* relied on precedents that upheld monetary awards against the United States.⁷³ Justice Stevens concluded that when Congress amended section 504 to include federal agencies in 1978, it understood that the pre-existing provision had already created an implied, private right of action and a damages remedy.⁷⁴

Further, Justice Stevens disagreed with the majority's conclusion that section 505(a)(2), the remedies provision, restricts the remedies available under section 504.⁷⁵ According to Justice Stevens, the legislative history of section 505(a)(2) explains why the statute is limited to "federal providers."⁷⁶ He posited that this 1978 addition to the Act merely codified the application of Title VI's enforcement procedures to section 504.⁷⁷ Justice Stevens concluded that because Title VI does not prohibit discrimination by executive agencies, section 505(a)(2) should have no bearing on enforcement of executive agencies' section 504 violations and Lane's relief thus lies in section 504.⁷⁸

As interpreted by the Court in *Lane*, the Rehabilitation Act makes the federal government liable for monetary awards as an employer and a provider of funds but not when it acts as a director of its own programs, such as a military academy or the Job Corps program.⁷⁹ Such a statutory scheme is illogical and, as the Court states, "somewhat

⁶⁹ *Lane*, 116 S. Ct. at 2106, 5 A.D. Cases (BNA) at 982 (Stevens, J., dissenting).

⁷⁰ *Id.* at 2101-02, 5 A.D. Cases (BNA) at 978-79 (Stevens, J., dissenting).

⁷¹ *Id.* at 2101, 5 A.D. Cases (BNA) at 978-79 (Stevens, J., dissenting).

⁷² *Id.* at 2102, 5 A.D. Cases (BNA) at 979 (Stevens, J., dissenting) (citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65-71 (1992)).

⁷³ *Id.* at 2105 n.13, 5 A.D. Cases (BNA) at 982 n.13 (Stevens, J., dissenting).

⁷⁴ *Lane*, 116 S. Ct. at 2102-03, 5 A.D. Cases (BNA) at 979-80 (Stevens, J., dissenting).

⁷⁵ *Id.* at 2103, 5 A.D. Cases (BNA) at 980 (Stevens, J., dissenting).

⁷⁶ *Id.* at 2104, 5 A.D. Cases (BNA) at 980-81 (Stevens, J., dissenting).

⁷⁷ *Id.* at 2103-04, 5 A.D. Cases (BNA) at 980 (Stevens, J., dissenting).

⁷⁸ *Id.* at 2105, 5 A.D. Cases (BNA) at 981 (Stevens, J., dissenting).

⁷⁹ See 116 S. Ct. at 2097-98, 5 A.D. Cases (BNA) at 975-76.

bewildering."⁸⁰ The Court's holding is contrary to the legislative intent behind Congress's 1978 amendments to prevent discrimination against persons with disabilities by federal agencies.⁸¹ As the *Doe* court correctly pointed out in its analysis, the language and structure of the Act and its legislative history clearly demonstrate that Congress intended to treat alike all defendants under the Act.⁸² In addition, Justice Stevens convincingly argued that when Congress amended section 504 in 1978 to provide for executive agency liability, Congress sought to strengthen and expand the Act's reach and had no reason to expect that the Court would require a more explicit waiver of sovereign immunity that was not, at that time, required.⁸³

Furthermore, the Court's interpretation of section 1003 of the 1986 amendments to the Act—which stipulates that the same remedies available against any public or private entity be available against a state—is wholly unconvincing.⁸⁴ First, the term "public" is not normally subject to the narrow definition the Court ascribes to it, namely, only those non-federal, non-state public entities such as municipal hospitals and local school districts, and; second, the fact that Congress included the terms "public or private" rather than "every other entity" more likely implies Congressional intent to treat all defendants, both public and private, exactly alike, rather than an intent to distinguish between the two without instructions on how to do so, as the Court suggested.⁸⁵

The Court's holding, however, was the inevitable result of its current, strict approach to the doctrine of sovereign immunity.⁸⁶ Precedent demanded that an explicit waiver of the government's sovereign immunity be found in the language of the statute; the absence of such a waiver in section 504 and its remedies provision dictated the Court's conclusion.⁸⁷ The *Lane* Court has exposed a loophole that Congress created in 1978 when it amended the section to provide for agency liability but neglected to include those agencies in the new remedies provision.⁸⁸ Perhaps Congress will amend the Act in response to *Lane*

⁸⁰ See *id.* at 2098, 5 A.D. Cases (BNA) at 976.

⁸¹ See *Doe v. Attorney General*, 941 F.2d 780, 791–93, 58 Fair Empl. Prac. Cas. (BNA) 627, 634–36 (9th Cir. 1991).

⁸² See *id.*; see *supra* notes 16–18 and accompanying text.

⁸³ See *Lane*, 116 S. Ct. at 2102–03, 5 A.D. Cases (BNA) at 979–80 (Stevens, J., dissenting).

⁸⁴ See *id.* at 2099–100, 5 A.D. Cases (BNA) at 977 (interpreting 42 U.S.C. § 2000d-7(a) (1994)).

⁸⁵ See *id.*

⁸⁶ See *id.* at 2096–97, 5 A.D. Cases (BNA) at 974–75.

⁸⁷ See *id.*

⁸⁸ See 29 U.S.C. § 794(a) (1994); 29 U.S.C. § 794a(a)(2) (1994); see generally *Lane*, 116 S. Ct. 2092, 5 A.D. Cases (BNA) 973.

to close this loophole, just as it did in 1986 when it amended the Act to explicitly provide for state liability in response to a prior Supreme Court holding that the Act lacked an explicit abrogation of state sovereign immunity.⁸⁹ *Lane* solidifies the Court's current, strict approach to waivers of sovereign immunity, in that the Court is willing to reject not only the Act's legislative history, but also a logical interpretation of the Act in favor of a "bewildering" one that protects the government from damages claims.⁹⁰

Although the Court's holding in *Lane* is limited to the comparatively small number of potential cases in which a federal agency discriminates against a disabled person in the administration of its own program, its effect on those cases is severe.⁹¹ It totally eliminates the possibility for recovery of monetary damages, such as lost income, not to mention compensatory damages for emotional suffering. Despite this harmful effect on the rights of persons with disabilities, however, the Court may have strengthened other potential damages claims under section 504. Prior to *Lane*, the Supreme Court had not specifically addressed the issue of whether monetary awards were available under section 504, and this issue was in dispute among the circuits.⁹² In dicta, the Court states explicitly, "Title VI provides for monetary damages awards," and because Title VI's remedies apply to federal providers under section 504, *Lane* should lead to more certainty for most section 504 claimants seeking monetary damages, including employees of entities receiving federal funds.⁹³

In conclusion, the Supreme Court in *Lane* held that the Rehabilitation Act does not waive the government's sovereign immunity with respect to monetary damages awards against federal agencies under section 504.⁹⁴ The Court seized on the puzzling discrepancy between section 504's inclusion of executive agencies and section 505(a)(2)'s omission of those agencies in their remedies provisions, and found the

⁸⁹ See 116 S. Ct. at 2099, 5 A.D. Cases (BNA) at 977. In *Atascadero State Hospital v. Scanlon*, the Supreme Court held that states were not subject to suits by litigants seeking monetary relief under section 504 because the Act did not unequivocally abrogate the states' Eleventh Amendment immunity. 473 U.S. 234, 235, 247, 38 Fair Empl. Prac. Cas. (BNA) 97, 98, 102 (1985). In 1986, Congress responded by passing section 1003 of the Rehabilitation Act Amendments of 1986, which explicitly provided for states' liability under the Act. See *Lane*, 116 S. Ct. at 2099, 5 A.D. Cases (BNA) at 977.

⁹⁰ See *Lane*, 116 S. Ct. at 2098, 5 A.D. Cases (BNA) at 976.

⁹¹ See *id.* at 2105, 5 A.D. Cases (BNA) at 982 (Stevens, J., dissenting).

⁹² See, e.g., *Dorsey*, 41 F.3d at 1554, 3 A.D. Cases (BNA) at 1652-53.

⁹³ See *Lane*, 116 S. Ct. at 2096, 5 A.D. Cases (BNA) at 974 (discussing 29 U.S.C. § 794a(a)(2) (1994)).

⁹⁴ *Id.* at 2096-100, 5 A.D. Cases (BNA) at 974-78.

Act lacking in terms of an explicit statutory waiver of sovereign immunity.⁹⁵ Ironically, although the Court has eliminated the availability of monetary relief for some section 504 claimants, by implication it may have assured the availability of monetary damages for future section 504 plaintiffs who have claims against private entities receiving federal funds and federal agencies acting in a funding capacity.

V. CONSTITUTIONAL DEVELOPMENTS

A. **Applying First Amendment Principles to Shield Independent Government Contractors from Retaliatory Dismissal: Board of County Commissioners v. Umbehr*¹

The First Amendment of the United States Constitution protects the rights of citizens to speak freely on social, political and economic subjects without risking acts of retribution by the government.² A civil remedy exists under 42 U.S.C. § 1983 for any person who, under color of state law, is deprived of any right, privilege or immunity secured by the United States Constitution.³ Under section 1983, an independent contractor whose government contract is terminated may challenge the government's decision on the grounds that it violated his or her free speech rights protected by the First Amendment.⁴ In light of the government's mission as a contractor to provide public services efficiently and effectively, the government as contractor has a greater interest in regulating the independent contractor's speech than the government as sovereign has in regulating the speech of the general population.⁵ Balancing the independent contractor's right to free speech with the government's interest in regulating that speech deter-

⁹⁵ See *id.* at 2097, 5 A.D. Cases (BNA) at 975.

* By Patrick J. Cammarata, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 116 S. Ct. 2342, 11 Indiv. Empl. Rights Cas. (BNA) 1393 (1996).

² U.S. CONST. amend. I. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

³ 42 U.S.C. § 1983 (1988). Section 1983 states, in part:

Every person who, under color of any statute, . . . of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . 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.

Id.

⁴ See, e.g., *Umbehr*, 116 S. Ct. at 2345, 2352, 11 Indiv. Empl. Rights Cas. (BNA) at 1395, 1400.

⁵ See *id.* at 2347-48, 11 Indiv. Empl. Rights Cas. (BNA) at 1396.

mines the extent of the protection provided to independent government contractors under the First Amendment.⁶

In 1968, in *Pickering v. Board of Education*, the United States Supreme Court held that a public employee has a First Amendment right to speak out on issues of public importance without risk of termination of employment, as long as the speech does not substantially affect the efficient functioning of the government employer's enterprise.⁷ In *Pickering*, the Board of Education in Will County, Illinois fired a school-teacher for submitting a letter to the local newspaper that criticized the amount of funding allocated to the community's athletic programs.⁸ The Court noted that, although the teacher's letter unquestionably addressed an issue of public concern, the government's interest in regulating the speech of public employees differs significantly from its interest in regulating the speech of private citizens.⁹ The Court reasoned that in deciding whether the First Amendment's guarantee of freedom of speech protects government employees from retaliatory dismissal, it must strike a balance between the interests of the employee, as a citizen, in commenting on issues of public concern and the interests of the government, as employer, in promoting the efficiency of public services.¹⁰ The Court further reasoned that the letter criticized the Board of Education rather than any of the teacher's direct superiors or co-workers, and that such criticism would not likely interfere with the general operation of the school.¹¹ Thus, the Court held that the teacher's First Amendment right to speak freely on matters of public concern outweighed the Board of Education's interest in promoting efficiency, and therefore, his dismissal was unconstitutional.¹²

In 1972, in *Perry v. Sinderman*, the United States Supreme Court elaborated on the *Pickering* analysis, holding that a lack of contractual or tenure right, taken alone, does not defeat a claim that the non-renewal of a contract violated the First Amendment.¹³ In *Perry*, a non-tenured professor at a state junior college claimed that the Regents of the college refused to renew his contract because the professor had been openly critical of the administration.¹⁴ The Court stated that the

⁶ See *id.* at 2348, 2352, 11 Indiv. Empl. Rights Cas. (BNA) at 1396, 1400.

⁷ See 391 U.S. 563, 574, 1 Indiv. Empl. Rights Cas. (BNA) 8, 13 (1968).

⁸ *Id.* at 566, 1 Indiv. Empl. Rights Cas. (BNA) at 10.

⁹ *Id.* at 568, 571, 1 Indiv. Empl. Rights Cas. (BNA) at 10, 11.

¹⁰ *Id.* at 568, 1 Indiv. Empl. Rights Cas. (BNA) at 10.

¹¹ *Id.* at 569-70, 1 Indiv. Empl. Rights Cas. (BNA) at 11.

¹² *Pickering*, 391 U.S. at 574, 1 Indiv. Empl. Rights Cas. (BNA) at 13.

¹³ 408 U.S. 593, 597-98, 1 Indiv. Empl. Rights Cas. (BNA) 33, 34 (1972).

¹⁴ *Id.* at 595, 1 Indiv. Empl. Rights Cas. (BNA) at 33.

principals set forth in *Pickering* apply regardless of whether the public employee has a contractual claim to a job.¹⁵ The Court reasoned that even though an individual has no right to a valuable governmental benefit and the government may deny an individual the benefit for a number of reasons, there are some reasons upon which the government may not rely.¹⁶ The Court further reasoned that if the government could deny such a benefit based upon the employee's constitutionally protected speech, the employee's exercise of those freedoms would, in effect, be inhibited.¹⁷ Consequently, this would allow the government to produce a result that it could not command directly.¹⁸ Thus, the Court held that a public employee's lack of contractual or tenure right to reemployment is immaterial to his or her free speech claim.¹⁹

In 1977, in *Mt. Healthy City School District Board of Education v. Doyle*, the United States Supreme Court once again modified the *Pickering* balancing test by holding that the government may choose not to rehire a public employee who exercises his or her constitutionally protected speech if the government can show that it would have arrived at the same decision absent the protected conduct.²⁰ In *Mt. Healthy*, the Board of Education (the "School Board") refused to renew a teacher's contract on two separate grounds.²¹ First, the School Board cited the fact that the teacher had made obscene gestures at two female students and, second, that he had called a local radio station criticizing the School Board's dress code for teachers.²² The Court noted that, even though the call to the radio station was protected free speech under the *Pickering* balancing test and was a motivating factor in the School Board's decision not to rehire the teacher, the firing would be deemed legitimate if the School Board could show that they would have arrived at the same decision in the absence of the protected conduct.²³ The Court reasoned that borderline or marginal candidates should not have their employment terminated because of constitutionally protected conduct.²⁴ Nevertheless, those same candidates ought not, by engaging in protected conduct, prevent their employers from

¹⁵ *Id.* at 598, 1 Indiv. Empl. Rights Cas. (BNA) at 34.

¹⁶ *Id.* at 597, 1 Indiv. Empl. Rights Cas. (BNA) at 34.

¹⁷ *Id.*

¹⁸ See *Perry*, 408 U.S. at 597, 1 Indiv. Empl. Rights Cas. (BNA) at 34.

¹⁹ *Id.* at 597-98, 1 Indiv. Empl. Rights Cas. (BNA) at 34.

²⁰ 429 U.S. 273, 287, 1 Indiv. Empl. Rights Cas. (BNA) 76, 80 (1977).

²¹ *Id.* at 282-83, 1 Indiv. Empl. Rights Cas. (BNA) at 78-79.

²² See *id.* at 282-83, 1 Indiv. Empl. Rights Cas. (BNA) at 79.

²³ *Id.* at 287, 1 Indiv. Empl. Rights Cas. (BNA) at 80.

²⁴ *Id.* at 286, 1 Indiv. Empl. Rights Cas. (BNA) at 80.

reaching the same decision that they would have arrived at had the free speech issue not existed.²⁵ Thus, the Court held that, even though constitutionally protected speech may be a motivating factor in the dismissal of a public employee, the government's decision may still pass constitutional muster if it can show that it would have arrived at the same decision absent the protected speech issue.²⁶

In 1982, in *Connick v. Myers*, the United States Supreme Court held that the limited First Amendment protection provided to employees under the *Pickering* balancing test does not require a government employer to tolerate speech that substantially disrupts the working environment and undermines the employer's authority.²⁷ In *Connick*, an assistant district attorney prepared and circulated a questionnaire to the other attorneys in the office concerning the office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors and pressure to work on political campaigns.²⁸ The Court noted that the threshold determination for a wrongful termination suit on First Amendment grounds is that the speech at issue must address a matter of public concern.²⁹ The Court reasoned that whether a public employee's speech addresses a matter of public concern so as to shield the employee from discharge for expressing those views must be determined by the form, content and context of the particular statement.³⁰ Having found that one of the survey questions addressed an issue of public concern, the Court next balanced the employee's interest in distributing the questionnaires against the employer's interest in regulating the speech.³¹ The Court concluded that the employer's belief that the questionnaire would disrupt the workplace, interfere with the office's close working relationships and undermine the authority of supervisors outweighed the employee's limited First Amendment privilege.³² Thus, the Court held that the employee's questionnaire did not constitute free speech protected by the First Amendment because it adversely affected the government's interest as an employer in maintaining the smooth operation of its enterprise while only minorly addressing issues of public concern.³³

²⁵ See *Mt. Healthy*, 429 U.S. at 286, 1 Indiv. Empl. Rights Cas. (BNA) at 80.

²⁶ *Id.* at 287, 1 Indiv. Empl. Rights Cas. (BNA) at 80.

²⁷ 461 U.S. 137, 154, 1 Indiv. Empl. Rights Cas. (BNA) 178, 185 (1983).

²⁸ *Id.* at 141, 1 Indiv. Empl. Rights Cas. (BNA) at 179.

²⁹ *Id.* at 145, 146, 1 Indiv. Empl. Rights Cas. (BNA) at 182.

³⁰ *Id.* at 147-48, 1 Indiv. Empl. Rights Cas. (BNA) at 182.

³¹ *Id.* at 149-50, 1 Indiv. Empl. Rights Cas. (BNA) at 183.

³² *Connick*, 461 U.S. at 154, 1 Indiv. Empl. Rights Cas. (BNA) at 185.

³³ *Id.*

During the *Survey* year, in *Board of County Commissioners v. Umbehr*, the United States Supreme Court held that the First Amendment protects independent contractors from the termination or prevention of automatic renewal of at-will government contracts in retaliation for their exercise of their freedom of speech.³⁴ The Court further held that the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than employer, determines the extent of the independent contractor's protection.³⁵ The majority noted that this holding, while important in that it extends the application of the *Pickering* balancing test to situations involving independent government contractors, is limited and does not radically affect the state of the law.³⁶

In *Umbehr*, the Board of County Commissioners for Wabansee County, Kansas (the "Board") chose to terminate a contract between the county and the respondent, Keen Umbehr.³⁷ The contract gave Umbehr the exclusive right to haul trash for each of the county's six cities.³⁸ The contract also provided that it would be automatically renewed annually unless either party terminated it at least sixty days before the end of the year.³⁹

During the term of the contract, Umbehr was an outspoken critic of the Board, the three-person governing body of the county.⁴⁰ Umbehr spoke at several of the Board's meetings and wrote critical letters to the editor of the local newspaper regarding, among other things: 1) the county's landfill user rates; 2) the cost of obtaining official documents from the county; 3) alleged violations by the Board of the Kansas Open Meetings Act; and 4) the county's alleged mismanagement of taxpayers' money.⁴¹ Umbehr's allegations regarding violations of the Kansas Open Meetings Act were vindicated in a consent decree signed by the Board's members.⁴² During this time, Umbehr also made an unsuccessful bid to win election to the Board.⁴³

The Board's members allegedly took Umbehr's criticism badly, threatening the county paper with censorship for publishing his letters.⁴⁴ Finally, in 1991, after ten years of hauling the county's trash, the

³⁴ 116 S. Ct. 2342, 2352, 11 Indiv. Empl. Rights Cas. (BNA) 1393, 1400 (1996).

³⁵ *Id.* at 2349, 11 Indiv. Empl. Rights Cas. (BNA) at 1397-98.

³⁶ *Id.* at 2352, 11 Indiv. Empl. Rights Cas. (BNA) at 1400.

³⁷ *Id.* at 2345, 11 Indiv. Empl. Rights Cas. (BNA) at 1395.

³⁸ *See id.* at 2345, 11 Indiv. Empl. Rights Cas. (BNA) at 1394.

³⁹ *See Umbehr*, 116 S. Ct. at 2345, 11 Indiv. Empl. Rights Cas. (BNA) at 1394.

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See id.* at 2345, 11 Indiv. Empl. Rights Cas. (BNA) at 1394-95.

⁴³ *See id.* at 2345, 11 Indiv. Empl. Rights Cas. (BNA) at 1395.

⁴⁴ *See Umbehr*, 116 S. Ct. at 2345, 11 Indiv. Empl. Rights Cas. (BNA) at 1394.

Board voted two to one to terminate Umbehr's contract.⁴⁵ Umbehr subsequently negotiated new contracts with five of the six cities he had previously served.⁴⁶

In 1992, Umbehr brought suit against the two members of the Board who had voted against him in both their individual and professional capacities under 42 U.S.C. § 1983.⁴⁷ Umbehr alleged that they had terminated his contract in retaliation for his criticism of the county and the Board.⁴⁸ The Board members moved for summary judgment, and the district court granted the motion, holding that government contractors are not entitled to the same First Amendment protection afforded to public employees.⁴⁹

The Court of Appeals for the Tenth Circuit reversed, holding that the First Amendment protects an independent contractor from retaliatory government action in the same manner as it would a government employee.⁵⁰ Thus, the court held that it would determine the extent of such protection through a *Pickering* analysis, weighing the interests of the contractor in exercising his or her free speech against the interests of the government as contractor in the efficient running of its enterprise.⁵¹ The United States Supreme Court granted certiorari in order to resolve a conflict among the circuits as to whether, and to what extent, independent government contractors are protected under the First Amendment.⁵²

The Court reasoned that the First Amendment should protect independent government contractors from retaliatory dismissal because their situation closely parallels that of government employ-

⁴⁵ See *id.* at 2345, 11 Indiv. Empl. Rights Cas. (BNA) at 1394-95.

⁴⁶ See *id.* at 2345, 11 Indiv. Empl. Rights Cas. (BNA) at 1395.

⁴⁷ 42 U.S.C. § 1983 (1988); see *Umbehr*, 116 S. Ct. at 2345, 11 Indiv. Empl. Rights Cas. (BNA) at 1395.

⁴⁸ See *Umbehr*, 116 S. Ct. at 2345-46, 11 Indiv. Empl. Rights Cas. (BNA) at 1395.

⁴⁹ See *id.* at 2346, 11 Indiv. Empl. Rights Cas. (BNA) at 1395; *Umbehr v. McClure*, 840 F. Supp. 837, 839 (D. Kan. 1993).

⁵⁰ See *Umbehr*, 116 S. Ct. at 2346, 11 Indiv. Empl. Rights Cas. (BNA) at 1395; *Umbehr v. McClure*, 44 F.3d 876, 883 (10th Cir. 1995).

⁵¹ See *Umbehr*, 116 S. Ct. at 2346, 11 Indiv. Empl. Rights Cas. (BNA) at 1395.

⁵² See *id.* The Fifth and Eighth circuits agreed with the Tenth circuit, allowing independent contractors to sue for termination based on their speech and political activities. See, e.g., *Blackburn v. Marshall*, 42 F.3d 925, 931-35 (5th Cir. 1995); *Copsey v. Swearigen*, 36 F.3d 1336, 1344 (5th Cir. 1994); *Smith v. Cleburne County Hosp.*, 870 F.2d 1375, 1381 (8th Cir. 1989). The Third and Seventh circuits have held, however, that an independent contractor who does not have a property interest in his or her contract with the government has no right to prevent that contract from being terminated in retaliation for his or her exercise of First Amendment freedoms of political affiliation and participation. See, e.g., *Downtown Auto Parts, Inc. v. Milwaukee*, 938 F.2d 705 (7th Cir. 1991); *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc).

ees.⁵³ The Court noted that both contractors and employees depend heavily on the valuable financial benefits that come with their relationship to the government.⁵⁴ As a result, the threat of losing this benefit in response to the exercise of their free speech right would likely chill the speech of government contractors in much the same way that it would government employees.⁵⁵ Furthermore, the Court observed that through their relationship to the government, contractors, like government employees, are often in the best position to know what ails the agencies with which they work.⁵⁶ Because they are in a better position than the general public to know of the problems within government agencies, the interest of independent government contractors in being able to speak freely on matters of public concern is similar to that of employees.⁵⁷

The Court also reasoned that the government's interest in maintaining the efficiency of its functions is similar when dealing with both employees and contractors.⁵⁸ The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy and responsiveness of service to the public, and to prevent the appearance of corruption.⁵⁹ Furthermore, absent contractual, statutory or constitutional restriction, the government is entitled to terminate employees and contractors for no reason at all.⁶⁰ Because the public's interest in promoting free speech and the government's interest in the effective functioning of its services are substantially similar for both government employees and government contractors, the Court held that independent contractors are protected from retaliatory dismissal for exercising their right to free speech.⁶¹ Following from this reasoning, the Court also held that the *Pickering* test, used to evaluate the extent of public employees' protection, should also be applied to cases involving government contractors.⁶²

In a separate opinion addressing the Court's decisions in both *Umbehr* and its companion case, *O'Hare Truck Service, Inc. v. City of*

⁵³ *Umbehr*, 116 S. Ct. at 2346-47, 11 Indiv. Empl. Rights Cas. (BNA) at 1396.

⁵⁴ *Id.* at 2347, 11 Indiv. Empl. Rights Cas. (BNA) at 1396.

⁵⁵ *See id.*

⁵⁶ *Id.* (citing *Waters v. Churchill*, 511 U.S. 661, 670, 9 Indiv. Empl. Rights Cas. (BNA) 801, 805 (1994) (plurality opinion)).

⁵⁷ *See id.*

⁵⁸ *See Umbehr*, 116 S. Ct. at 2347, 11 Indiv. Empl. Rights Cas. (BNA) at 1396.

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *Id.* at 2347, 2352, 11 Indiv. Empl. Rights Cas. (BNA) at 1396, 1400.

⁶² *Id.* at 2349, 11 Indiv. Empl. Rights Cas. (BNA) at 1397.

Northlake,⁶³ Justice Scalia, joined by Justice Thomas, dissented from the majority's holding that independent contractors and government employees are similar with respect to First Amendment protection.⁶⁴ Justice Scalia reasoned that public employees are almost always individuals whose public jobs represent their sole livelihoods.⁶⁵ Consequently, termination of a public employee's job is typically the termination of his or her livelihood.⁶⁶ Public contractors, on the other hand, are often corporations that also conduct business with private customers.⁶⁷ Termination of a public contract, Justice Scalia noted, rarely results in the public contractor losing his or her entire business, or even an indispensable part of it.⁶⁸ As a result, fear of retaliatory dismissal would not likely affect a contractor's decision to speak out on issues of public concern to the same degree that it would affect a government employee.⁶⁹ Thus, Justice Scalia reasoned that because public contractors depend far less heavily on the benefit they derive from their relationship with the government than do public employees, the First Amendment should not afford contractors the same protection that it affords public employees.⁷⁰

The majority's holding that the First Amendment protects independent contractors from the termination of government contracts in retaliation for their exercise of the freedom of speech proves consistent with the Court's other precedents in this area of the law.⁷¹ The Court noted that *Umbehr* is part of a larger body of case law to which

⁶³ 116 S. Ct. 2353, 11 Indiv. Empl. Rights Cas. (BNA) 1377 (1996).

⁶⁴ *Umbehr*, 116 S. Ct. at 2362, 11 Indiv. Empl. Rights Cas. (BNA) at 1401 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2362, 11 Indiv. Empl. Rights Cas. (BNA) at 1384 (Scalia, J., dissenting).

⁶⁵ *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1404 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1387 (Scalia, J., dissenting).

⁶⁶ See *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1404 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1387 (Scalia, J., dissenting).

⁶⁷ See *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1404-05 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1387 (Scalia, J., dissenting).

⁶⁸ See *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1404-05 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1387 (Scalia, J., dissenting).

⁶⁹ See *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1405 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1387 (Scalia, J., dissenting).

⁷⁰ See *Umbehr*, 116 S. Ct. at 2366-67, 11 Indiv. Empl. Rights Cas. (BNA) at 1404-05 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366-67, 11 Indiv. Empl. Rights Cas. (BNA) at 1387 (Scalia, J., dissenting).

⁷¹ See, e.g., *Umbehr*, 116 S. Ct. at 2350, 11 Indiv. Empl. Rights Cas. (BNA) at 1398; *Pickering v. Board of Education*, 391 U.S. 563, 568, 574, 1 Indiv. Empl. Rights Cas. (BNA) 8, 10, 13 (1968).

the Court refers as its "unconstitutional conditions" precedents.⁷² Throughout this line of cases, the Court has consistently held that where citizens have a relationship with the government which provides them with a valuable benefit, the government may not deny them that benefit if such a denial infringes upon their constitutionally protected interests—especially the freedom of speech.⁷³ The Court correctly reasoned that if the government could deny a benefit to people because of their constitutionally protected speech, their exercise of those freedoms would in effect be penalized and inhibited.⁷⁴ In turn, this denial would allow the government to produce a result that it could not command directly.⁷⁵

Over the past quarter century, the Court has broadly applied this general principal to situations where citizens receive a rather insubstantial government benefit, such as tax exemptions or employment benefits, as well as to situations where citizens derive a substantial benefit, such as public employment or welfare payments.⁷⁶ In each of these cases, the Court determined the scope of the First Amendment protection by weighing the citizen's interest in speaking out on issues of public concern against the government's interest in regulating that speech.⁷⁷ Because the size of the benefit which an independent contractor receives from his or her relationship to the government lies somewhere between tax exemptions and public employment, the Court's holding in *Umbehr* falls squarely within the parameters of the Court's unconstitutional conditions doctrine.⁷⁸

Examining *Umbehr* in light of these other unconstitutional conditions precedents, the Court's decision to employ a modified version of the *Pickering* balancing test in order to determine the extent of an independent contractor's First Amendment protection proves both reasonable and logical.⁷⁹ The majority clearly illustrates that government employees and independent contractors share many of the same characteristics which factor into a *Pickering* analysis.⁸⁰ First, both contractors and employees derive a substantial financial benefit from their

⁷² *Umbehr*, 116 S. Ct. at 2349, 2350, 11 Indiv. Empl. Rights Cas. (BNA) at 1396, 1398.

⁷³ See, e.g., *id.*; *Perry v. Sinderman*, 408 U.S. 593, 597, 1 Indiv. Empl. Rights Cas. (BNA) 33, 34 (1972).

⁷⁴ See *Perry*, 408 U.S. at 597, 1 Indiv. Empl. Rights Cas. (BNA) at 34.

⁷⁵ See *id.*

⁷⁶ See, e.g., *id.*

⁷⁷ See, e.g., *Umbehr*, 116 S. Ct. at 2350, 11 Indiv. Empl. Rights Cas. (BNA) at 1398; *Perry*, 408 U.S. at 597, 1 Indiv. Empl. Rights Cas. (BNA) at 34.

⁷⁸ See *Umbehr*, 116 S. Ct. at 2350, 11 Indiv. Empl. Rights Cas. (BNA) at 1398.

⁷⁹ See *id.* at 2349, 11 Indiv. Empl. Rights Cas. (BNA) at 1397.

⁸⁰ See *id.* at 2346-47, 11 Indiv. Empl. Rights Cas. (BNA) at 1396.

respective relationships to the government.⁸¹ The Court is correct in concluding that, as a result, fear of losing this benefit in retaliation for exercising their right to free speech would likely prevent both parties from speaking out on issues of public concern.⁸² Second, because both contractors and employees deal closely with government, they are often in the best position to know what ails the agencies for which they work.⁸³ Finally, the interest of the government in regulating the speech of both contractors and employees is similar; for in its capacity as either an employer or contractor, the government needs to be free to terminate both contractors and employees for the same reasons.⁸⁴ Because of these similarities, the same *Pickering* balancing test that the Court has successfully used to determine the extent of First Amendment protection in government employment precedents can easily and effectively be applied to cases involving independent contractors.

The dissent's criticism of the majority's holding in *Umbehr* is generally unpersuasive, in part because it ignores the fact that the case's central issue revolves around the freedom of speech.⁸⁵ Instead, the dissent focuses primarily on the issue of political patronage raised by *Umbehr's* companion case, *O'Hare Truck Service, Inc. v. City of Northlake*.⁸⁶ The dissent errs in its reasoning that these two First Amendment rights can be treated interchangeably, and although it articulately raises some questions about the Court's holding in *O'Hare*, these questions do not apply to the free speech issues in *Umbehr*.⁸⁷ Thus, the dissent's miscategorization of the issues raised by the majority in *Umbehr* precludes it from seriously challenging much of the reasoning upon which the Court relies for its decision.

The dissent does, however, directly challenge one aspect of the majority's reasoning in *Umbehr*.⁸⁸ The dissent challenges the majority's assertion that there is no difference of constitutional magnitude be-

⁸¹ See *id.* at 2347, 11 Indiv. Empl. Rights Cas. (BNA) at 1396.

⁸² See *id.*

⁸³ See *Umbehr*, 116 S. Ct. at 2347, 11 Indiv. Empl. Rights Cas. (BNA) at 1396 (citing *Waters*, 511 U.S. at 670, 9 Indiv. Empl. Rights Cas. (BNA) at 805 (1994)).

⁸⁴ See *id.*

⁸⁵ See *id.*, at 2361, 11 Indiv. Empl. Rights Cas. (BNA) at 1401 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2361, 11 Indiv. Empl. Rights Cas. (BNA) at 1383-84 (Scalia, J., dissenting).

⁸⁶ See generally *O'Hare*, 116 S. Ct. 2353, 11 Indiv. Empl. Rights Cas. (BNA) 1377.

⁸⁷ See *Umbehr*, 116 S. Ct. at 2362-66, 11 Indiv. Empl. Rights Cas. (BNA) at 1401-04 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1387 (Scalia, J., dissenting).

⁸⁸ See *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1404-05 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1387 (Scalia, J., dissenting).

tween public employees and independent government contractors.⁸⁹ This challenge proves unpersuasive because it relies upon stereotyped and oversimplified characterizations of both government employees and independent contractors.⁹⁰ Assuming, however, that the dissent is correct in its assertion that government employees are far more dependent on the benefit they derive through their relationship with the government than are independent contractors, it is nevertheless naive to propose that such a difference substantially diminishes the chilling effect that the threat of retaliatory dismissal has on the speech of independent contractors. Furthermore, even in the circumstances where a contractor is so independent from government support that the threat of losing business would have little chilling effect on his or her speech, the dissent's argument does not account for the fact that public employees might also be able to find work elsewhere if they lose their government jobs. Consequently, the dissent's reasoning that the threat of retaliatory dismissal would not have a chilling effect on the speech of independent contractors proves unpersuasive, for it does not seem to address the realities of the situation.

In sum, in *Umbehr*, the United States Supreme Court held that the First Amendment protects independent contractors from the termination or prevention of at-will government contracts in retaliation for their exercise of the freedom of speech.⁹¹ The Court further held that the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of the independent contractors' protection.⁹² This decision proves consistent with the Court's other precedents in this area and provides a workable solution to the complex and fact-sensitive problems surrounding the scope of First Amendment protection.⁹³

⁸⁹ See *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1404 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1387 (Scalia, J., dissenting).

⁹⁰ See *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1404 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. at 1387 (Scalia, J., dissenting). Justice Scalia perpetuates the myth that most government contractors perform services for the government that are merely ancillary to their overall business. *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1404 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. at 1387 (Scalia, J., dissenting). It is important to note that although this characterization does not apply to the plaintiffs in either *Umbehr* or *O'Hare*, Justice Scalia fails to highlight any specific facts supporting his characterization of government contractors to be the norm, rather than the exception. *Umbehr*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. (BNA) at 1404 (Scalia, J., dissenting); *O'Hare*, 116 S. Ct. at 2366, 11 Indiv. Empl. Rights Cas. at 1387 (Scalia, J., dissenting).

⁹¹ *Umbehr*, 116 S. Ct. at 2352, 11 Indiv. Empl. Rights Cas. (BNA) at 1400.

⁹² *Id.*

⁹³ See generally, e.g., *Perry*, 408 U.S. 593, 1 Indiv. Empl. Rights Cas. (BNA) 33; *Pickering*, 391 U.S. at 568, 574, 1 Indiv. Empl. Rights Cas. (BNA) at 13.

B. **Extension of the Right to Privacy to Medical Prescription Information: Doe v. Southeastern Pennsylvania Transportation Authority*¹

The courts have long recognized that the United States Constitution protects individuals' right to privacy.² Justice Brandeis and Samuel D. Warren introduced the concept of a guaranteed right to privacy in 1890.³ The United States Supreme Court first recognized a right to privacy in 1965 in *Griswold v. Connecticut*.⁴ In 1977, in *Whalen v. Roe*, the Court identified two types of interests protected by the constitutional right to privacy: an interest in avoiding disclosure of personal matters and an interest in independence in making certain kinds of important decisions.⁵ Although *Whalen* provided some guidance for the courts, it did not specify the scope of the constitutional right to privacy.⁶ In particular, courts have differed in their determination of whether *Whalen* clearly establishes a constitutional right to privacy that extends to protection against disclosure of medical information.⁷

In 1977, in *Whalen v. Roe*, the United States Supreme Court held that the patient-identification provisions of a New York statute, which required that the names and addresses of people obtaining certain prescription drugs be recorded, did not violate patients' constitution-

* By Kari C. Kwiatkowski, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 72 F.3d 1133, 19 Employee Benefits Cas. (BNA) 2721 (3d Cir. 1995), *cert. denied*, 117 S. Ct. 51 (1996).

² See Edward A. Lyon, *The Right to Die: An Exercise of Informed Consent, Not an Extension of the Right to Privacy*, 58 U. CIN. L. REV. 1367, 1368-69 (1990); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744-45 (1989).

³ See Lyon, *supra* note 2, at 1368 & n.8; Katherine M. Allen, Note, *Dronenburg v. Zech: The Wrong Case for Asserting a Right of Privacy for Homosexuals*, 63 N.C. L. REV. 749, 749 n.2 (1985); see generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-220 (1890).

⁴ 381 U.S. 479, 486 (1965); see also Lyon, *supra* note 2, at 1368 & n.8; Rubenfeld, *supra* note 2, at 744.

⁵ 429 U.S. 589, 599-600 (1977).

⁶ See *Adams v. Drew*, 906 F. Supp. 1050, 1056 (E.D. Va. 1995) (noting that *Whalen* permits states to inquire into individual's medical information but does not indicate how far states must go to protect information once obtained).

⁷ Compare *Doe v. Marsh*, 918 F. Supp. 580, 585-86 (N.D.N.Y. 1996) (holding that individual's right to privacy in medical information is a conditional right) and *Doe v. Town of Plymouth*, 825 F. Supp. 1102, 1107 (D. Mass. 1993) (holding that constitutional right to privacy encompasses nondisclosure of HIV status) with *Adams*, 906 F. Supp. at 1056-57 (holding that there is no clear rule regarding right to prevent disclosure of personal information). The United States Court of Appeals for the Sixth Circuit also initially concluded that *Whalen* did not extend to recognizing a right to privacy against disclosure of personal matters, *Mason v. Regional Medical Center*, 121 F.R.D. 300, 301-02 (W.D. Ky. 1988), but later aligned with the majority and held that an individual had a privacy interest in the nondisclosure of private information regarding AIDS status. *Doe v. City of Cleveland*, 788 F. Supp. 979, 985 (N.D. Ohio 1991).

ally protected right to privacy.⁸ In *Whalen*, a group of patients and physicians sued the State of New York to enjoin enforcement of a statute requiring that physicians submit copies of all prescriptions for Schedule II drugs to the Department of Health for entry into the state's centralized computer system.⁹ The Court acknowledged that patients, fearing misuse of the computerized data and subsequent stigmatization as a drug addict, may refuse to accept prescriptions for Schedule II drugs.¹⁰ Nonetheless, the Court determined that the New York statute's patient-identification program did not violate a patient's right to privacy because the statute did not sufficiently threaten the patient's interests to constitute a constitutional violation.¹¹

The Court reasoned that New York had a vital interest in controlling the distribution of dangerous drugs and determined that the statute was a reasonable exercise of the State's broad police powers.¹² The Court further reasoned that the statute's specific nondisclosure provisions sufficiently safeguarded against improper public disclosure of the medical information.¹³ Furthermore, the Court reasoned that requiring disclosure to state representatives responsible for public health did not constitute an improper invasion of privacy because patients regularly make the same type of disclosure to health care providers.¹⁴ The Court also reasoned that the statute did not deprive the public of access to the drugs because it did not prohibit use of the drugs or condition their use upon the consent of state officials.¹⁵ After balancing these considerations, the Court held that the statute's patient-identification program did not violate the right to privacy of patients receiving prescriptions for Schedule II drugs.¹⁶

In 1980, in *United States v. Westinghouse Electric Corp.*, the United States Court of Appeals for the Third Circuit held that the National Institute for Occupational Safety and Health ("NIOSH") could have access to certain employee medical records from Westinghouse without violating the employees' constitutionally protected right to pri-

⁸ 429 U.S. at 591 & n.4, 603-04 (discussing New York State Controlled Substances Act of 1972, 1970 N.Y. Laws 474, *amended by* 1971 N.Y. Laws 7).

⁹ *See* 429 U.S. at 591, 595-96. The statute categorizes the most dangerous drugs that also have legitimate uses, including cocaine, methadone and amphetamines, as Schedule II drugs. *See id.* at 592-93.

¹⁰ *Id.* at 595, 599-600.

¹¹ *Id.* at 600.

¹² *Id.* at 598.

¹³ *See id.* at 594-95, 598, 600-02.

¹⁴ *Whalen*, 429 U.S. at 602.

¹⁵ *Id.* at 603.

¹⁶ *Id.* at 600-02, 603-04.

vacy.¹⁷ In *Westinghouse*, Westinghouse refused to provide NIOSH access to the medical records of its employees who worked in an area suspected of being contaminated with chemicals causing allergic reactions.¹⁸ The employer justified its refusal on the grounds that disclosure of the medical records would constitute an invasion of the employees' right to confidentiality.¹⁹

The court reasoned that the constitutional right to privacy extends to employee medical records because they may contain intimate personal facts.²⁰ Nonetheless, the court determined that the right to privacy is limited and that intrusion into privacy concerning medical records is permissible if the public interest in disclosure outweighs the privacy interest at risk.²¹ The court expanded upon the generalized weighing of competing interests which the United States Supreme Court had conducted in *Whalen* by establishing a balancing test involving the consideration of seven specific factors.²² The court balanced these factors and determined that the public interest in employees' occupational safety and health, NIOSH's reasonable need for the requested medical information, and NIOSH's safety procedures providing protection against improper disclosure sufficiently outweighed the employees' privacy interests in their medical records to justify intrusion into the employees' right to privacy.²³ Accordingly, the court held that Westinghouse could not refuse to allow NIOSH access to its employees' medical records, although the court conceded that each employee was entitled to prior notice of the disclosure.²⁴

In 1987, in *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, the United States Court of Appeals for the Third Circuit held that the City of Philadelphia's requirement that applicants to its Special Investigations Unit ("SIU") disclose certain medical information did

¹⁷ 638 F.2d 570, 572, 580, 8 O.S.H. Cas. (BNA) 2131, 2132, 2138 (3d Cir. 1980).

¹⁸ *Id.* at 572-73, 8 O.S.H. Cas. (BNA) at 2132.

¹⁹ *See id.* at 572-73, 8 O.S.H. Cas. (BNA) at 2132-33.

²⁰ *Id.* at 577, 8 O.S.H. Cas. (BNA) at 2136. The individual's interest in not having his or her private affairs made public by the government falls within the first category set forth by the United States Supreme Court in *Whalen v. Roe*. *See id.* at 577, 8 O.S.H. Cas. (BNA) at 2135-36.

²¹ *Id.* at 578, 8 O.S.H. Cas. (BNA) at 2137.

²² *Westinghouse*, 638 F.2d at 578, 8 O.S.H. Cas. (BNA) at 2137; *see Whalen*, 429 U.S. at 598-604. The factors are: the type of record requested, the information contained in the record, the potential for harm in any subsequent nonconsensual disclosure, the potential for injury from disclosure, the existence and adequacy of safeguards against unauthorized disclosure, the degree of the need for the information, and whether there is an express statutory provision or other public interest requiring disclosure. *See Westinghouse*, 638 F.2d at 578, 8 O.S.H. Cas. (BNA) at 2137.

²³ *Westinghouse*, 638 F.2d at 578-80, 8 O.S.H. Cas. (BNA) at 2137-38.

²⁴ *Id.* at 580-81, 8 O.S.H. Cas. (BNA) at 2138-39.

not violate the applicants' constitutionally protected right to privacy.²⁵ In *Fraternal Order of Police*, a union of police officers challenged the constitutionality of a questionnaire, which the department required all SIU applicants to complete.²⁶ The officers claimed that three questions on the questionnaire violated their right to privacy.²⁷ The court acknowledged that people have a reasonable expectation that medical information will remain confidential.²⁸ Nonetheless, the court applied the balancing test articulated in *Westinghouse*, reasoning that disclosure of private information is required if the public interest in disclosure outweighs the individual's privacy interest.²⁹

The court acknowledged that the police department required the medical information to select officers physically and mentally suited for the type of work performed by the SIU.³⁰ The court determined that the City could not have made the overly broad questions more specific without potentially losing valuable and relevant information.³¹ The court further reasoned that officers had a reduced expectation of privacy in the information because the application process customarily requires disclosure of the same type of medical information.³² After balancing these considerations, the court held that the questions seeking medical information did not unconstitutionally violate the officers' right to privacy.³³

In 1990, in *Doe v. Borough of Barrington*, the United States District Court for the District of New Jersey held that a police officer's disclosure of an individual's medical condition to a neighbor violated his, and his family's, constitutional right to privacy.³⁴ In *Borough of Bar-*

²⁵ 812 F.2d 105, 107, 114, 1 Indiv. Empl. Rights Cas. (BNA) 1496, 1497, 1503 (3d Cir. 1987).

²⁶ *Id.* at 107-08, 1 Indiv. Empl. Rights Cas. (BNA) at 1497-98.

²⁷ *See id.* at 108, 112, 1 Indiv. Empl. Rights Cas. (BNA) at 1498, 1501. The three questions were:

18. List any physical defects or disability, also list any extended time spent in the hospital for any reason.

19. Are you presently using any prescription drugs? If yes, state the drug, the need for it and the dosage.

20. Are you now or have you ever been attended, treated or observed by any doctor or psychiatrist or at any Hospital or Mental Institution on an in-patient or out-patient basis for any mental or psychiatric condition? If yes, give the dates and nature of the treatment.

Id. at 112, 1 Indiv. Empl. Rights Cas. (BNA) at 1501.

²⁸ *Id.* at 112-13, 1 Indiv. Empl. Rights Cas. (BNA) at 1501-02.

²⁹ *Id.* at 110-13, 1 Indiv. Empl. Rights Cas. (BNA) at 1499-1502.

³⁰ *Fraternal Order of Police*, 812 F.2d at 114, 1 Indiv. Empl. Rights Cas. (BNA) at 1503.

³¹ *Id.* at 113, 1 Indiv. Empl. Rights Cas. (BNA) at 1502.

³² *Id.* at 113-14, 1 Indiv. Empl. Rights Cas. (BNA) at 1502.

³³ *Id.* at 112-14, 1 Indiv. Empl. Rights Cas. (BNA) at 1500-03.

³⁴ 729 F. Supp. 376, 385 (D.N.J. 1990).

rington, the plaintiffs, Mrs. Doe and her children, alleged that they suffered harassment, discrimination and humiliation because a police officer had informed their neighbor that Mr. Doe had contracted Acquired Immune Deficiency Syndrome ("AIDS").³⁵ The court found that the plaintiffs had a constitutional right to privacy in medical records and medical information that entitled them to protection from governmental disclosure of Mr. Doe's infection with the AIDS virus.³⁶

The court reasoned that the government had a duty to avoid disclosing confidential information.³⁷ The court further reasoned that individuals have an even greater privacy interest regarding AIDS than ordinary medical information, due to the sensitivity of the information concerning the HIV virus and the stigma attached to the disease.³⁸ Accordingly, the court found that the government was required to show that the breach of the Does' privacy interest in their medical information and records furthered a compelling state interest in order to justify the disclosure.³⁹ The government failed to demonstrate a compelling state interest.⁴⁰ Therefore, the court determined that the government's interest in disclosure did not outweigh the substantial privacy interest involved.⁴¹ The court thus held that the officer's disclosure violated the Does' constitutional rights.⁴²

During the *Survey* year, in *Doe v. Southeastern Pennsylvania Transportation Authority*, the United States Court of Appeals for the Third Circuit held that the Southeastern Pennsylvania Transportation Authority's ("SEPTA") inadvertent discovery and minimal disclosure of the plaintiff's medical prescription records did not violate his constitutionally protected right to privacy.⁴³ Although the court recognized that patients have a right to privacy in their medical prescription information, disclosure of the information did not constitute a consti-

³⁵ *Id.* at 378-79. A Barrington police officer arrested plaintiff's husband, who informed the police officer that he was HIV positive to alert the officer to be aware of his lesions while searching him. *See id.* While present at the scene of an accident involving plaintiff's automobile, the police officer subsequently informed a Runnemede police officer of Mr. Doe's condition. *See id.* The Runnemede police officer then informed the Does' neighbor that Mr. Doe had AIDS. *See id.*

³⁶ *Id.* at 382.

³⁷ *Id.* at 383-84.

³⁸ *Id.* at 384.

³⁹ *Borough of Barrington*, 729 F. Supp. at 385.

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See id.*

⁴³ 72 F.3d 1133, 1134, 1138, 1143, 19 Employee Benefits Cas. (BNA) 2721, 2722, 2725, 2730 (1996). SEPTA is a public transportation authority that operates various transportation facilities in Philadelphia, Pennsylvania and receives operating funds from state and federal subsidies. *See id.* at 1134 n.1, 19 Employee Benefits Cas. (BNA) at 2721 n.1. SEPTA operated a self-insured

tutional violation unless the invasion outweighed the need for access to the information.⁴⁴

SEPTA discovered that the plaintiff had AIDS from a pharmacy report which contained the plaintiff's name and medical prescription information.⁴⁵ Doe, the plaintiff, brought suit alleging that this discovery violated his right to privacy.⁴⁶ Although SEPTA did not request the patient-identification information on these reports, SEPTA's pharmacy submitted a report to SEPTA's Chief Administrative Officer identifying the names of employees who had obtained prescriptions costing more than \$100 in the previous month.⁴⁷ The Chief Administrative Officer and the Director of Benefits reviewed the report and were unable to identify one of Doe's prescribed medications.⁴⁸ They contacted a SEPTA staff physician and Doe's doctor to determine the drug's use and, in doing so, discovered that Doe had AIDS.⁴⁹

The court reasoned that a person's limited right to privacy in his or her medical records includes medical prescription records because people using prescription drugs have a right to expect that the information will remain private.⁵⁰ The court applied the balancing test articulated in *Westinghouse* to determine whether the disclosure of Doe's prescription information constituted a violation of his constitutionally protected right to privacy.⁵¹ Applying the balancing test, the court reasoned that the minimal intrusion upon Doe's privacy was insufficient to require SEPTA to prove it had a compelling interest in obtaining the information.⁵²

The first two *Westinghouse* factors are the type of record requested and the information disclosed.⁵³ The court determined that the report

health program and contracted with Rite-Aid Drug Store for the provision of prescription drugs for its employees. See *id.* at 1135, 19 Employee Benefits Cas. (BNA) at 2722.

⁴⁴ See *id.* at 1135-36, 1143, 19 Employee Benefits Cas. (BNA) at 2722-23, 2730.

⁴⁵ See *id.* at 1135-36, 19 Employee Benefits Cas. (BNA) at 2722-23.

⁴⁶ See *id.* at 1134-35, 19 Employee Benefits Cas. (BNA) at 2721.

⁴⁷ See *id.* at 1135, 1138, 19 Employee Benefits Cas. (BNA) at 2722, 2726. Pursuant to its contract with SEPTA, the pharmacy produced certain reports which identified costs associated with the prescription drug program and included statistics regarding the prescriptions being filled by SEPTA employees. See *id.* at 1135, 19 Employee Benefits Cas. (BNA) at 2722.

⁴⁸ See *Southeastern Pa. Transp. Auth.*, 72 F.3d at 1135-36, 19 Employee Benefits Cas. (BNA) at 2722-23. Doe was taking Retrovir, a medication used solely for the treatment of AIDS. See *id.* at 1135, 19 Employee Benefits Cas. (BNA) at 2722. Retrovir is the prescription name for AZT. See *Doe v. Town of Plymouth*, 825 F. Supp. 1102, 1104 n.3 (D. Mass. 1993).

⁴⁹ See *Southeastern Pa. Transp. Auth.*, 72 F.3d at 1135-36, 19 Employee Benefits Cas. (BNA) at 2722-23.

⁵⁰ *Id.* at 1138, 19 Employee Benefits Cas. (BNA) at 2725.

⁵¹ *Id.* at 1139-40, 1142-43, 19 Employee Benefits Cas. (BNA) at 2726-30.

⁵² *Id.* at 1139-40, 19 Employee Benefits Cas. (BNA) at 2726-27.

⁵³ See *id.* at 1140, 19 Employee Benefits Cas. (BNA) at 2727; *supra* note 22 (listing seven factors).

submitted by the pharmacy to SEPTA contained employee identification and medical prescription information.⁵⁴ The court concluded that the Constitution protects the confidentiality of such medical information contained in those types of pharmacy reports.⁵⁵

The third and fourth *Westinghouse* factors are the potential for harm from disclosure and the injury resulting from the disclosure.⁵⁶ The court acknowledged that disclosure of Doe's medical condition could result in great potential harm to Doe because of the increased risk of social stigma, harassment and discrimination due to public perception of AIDS.⁵⁷ Nonetheless, the court determined that the disclosure had not harmed Doe, whose later promotion negated any claim of harm.⁵⁸

The fifth *Westinghouse* factor requires consideration of the adequacy of safeguards for the prevention of unauthorized disclosure.⁵⁹ The court noted that SEPTA did not have any mechanisms for preventing the disclosure of prescription information contained in pharmacy reports provided by Rite-Aid Drug Store pursuant to Rite-Aid Drug Store's contract with SEPTA.⁶⁰ Nonetheless, the court reasoned that SEPTA had not foreseen the need for instituting safeguards against disclosure because it had not requested the confidential information.⁶¹ The court further reasoned that SEPTA compensated for its lack of safeguards by subsequently destroying the report and instructing the pharmacy to omit names from future reports.⁶²

The sixth and seventh *Westinghouse* factors are the need for access and whether there is statutory authority or public interest favoring access to the information.⁶³ The court determined that the public has a strong interest in permitting SEPTA to conduct research regarding its prescription program in order to contain its costs.⁶⁴ The court further found that SEPTA had a legitimate need for the reports—to keep insurance costs down by monitoring the prescription program for

⁵⁴ *Southeastern Pa. Transp. Auth.*, 72 F.3d at 1140, 19 Employee Benefits Cas. (BNA) at 2727.

⁵⁵ *Id.* at 1137, 1140, 19 Employee Benefits Cas. (BNA) at 2724, 2727.

⁵⁶ *See id.* at 1140, 19 Employee Benefits Cas. (BNA) at 2727.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1136–37, 1140–41, 19 Employee Benefits Cas. (BNA) at 2723–24, 2727–28. The court specifically noted that it was undisputed that Doe did not suffer any economic deprivation, any discrimination or any harassment. *Id.* at 1141, 19 Employee Benefits Cas. (BNA) at 2728.

⁵⁹ *See Southeastern Pa. Transp. Auth.*, 72 F.3d at 1140, 1142, 19 Employee Benefits Cas. (BNA) at 2727, 2729–30.

⁶⁰ *Id.* at 1142, 19 Employee Benefits Cas. (BNA) at 2729–30.

⁶¹ *Id.* at 1136, 1142–43, 19 Employee Benefits Cas. (BNA) at 2724, 2729–30.

⁶² *Id.*

⁶³ *See id.* at 1140, 19 Employee Benefits Cas. (BNA) at 2727.

⁶⁴ *Southeastern Pa. Transp. Auth.*, 72 F.3d at 1140, 19 Employee Benefits Cas. (BNA) at 2727.

fraudulent use of drugs and abusive behavior.⁶⁵ The court reasoned that employers also have the right to inspect reports from prescription suppliers to ensure that only authorized patients are obtaining drugs and that the pharmacy is minimizing costs by providing generic drugs whenever possible.⁶⁶

After balancing these factors, the court determined that SEPTA's need for access to its employees' prescription information outweighed the employees' interest in keeping the information private.⁶⁷ Accordingly, it held that SEPTA's minimal intrusion on Doe's privacy did not violate his constitutional rights.⁶⁸

In *Southeastern Pennsylvania Transportation Authority*, the Third Circuit expanded the scope of the privacy protection under *Whalen* to include medical prescription records.⁶⁹ The court noted that the *Westinghouse* court held that medical records fell within the scope of fundamentally private information entitled to constitutional protection.⁷⁰ The court then extended this protection to prescription records, reasoning that the policy for affording constitutional protection to medical records required finding medical prescription information private as well, because private facts about a person's medical condition can be determined from his or her prescription records.⁷¹

The court also emphasized the Third Circuit's reliance upon the factors enunciated in *Westinghouse* in balancing the competing interests of the state and the individual.⁷² In *Borough of Barrington*, the court seemed to move away from the strict balancing test set forth in *Westinghouse*.⁷³ The *Barrington* court acknowledged the *Westinghouse* factors but distinguished its facts from those in *Westinghouse* and suggested that the particularly sensitive nature of medical information about AIDS mandated requiring states to show a compelling interest in disclosure.⁷⁴ *Southeastern Pennsylvania Transportation Authority*, which also concerned disclosure of a patient's HIV status, implicitly rejected a heightened standard of state or public interest.⁷⁵ The Third Circuit

⁶⁵ *Id.* at 1141, 19 Employee Benefits Cas. (BNA) at 2729.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1143, 19 Employee Benefits Cas. (BNA) at 2730.

⁶⁸ *Id.*

⁶⁹ See *Southeastern Pa. Transp. Auth.*, 72 F.3d at 1137-38, 1143, 19 Employee Benefits Cas. (BNA) at 2724-25, 2730.

⁷⁰ *Id.* at 1137, 19 Employee Benefits Cas. (BNA) at 2724.

⁷¹ See *id.* at 1137-38, 19 Employee Benefits Cas. (BNA) at 2724-25.

⁷² See *id.* at 1140, 19 Employee Benefits Cas. (BNA) at 2727.

⁷³ See *Doe v. Borough of Barrington*, 729 F. Supp. 376, 382-85 (D.N.J. 1990).

⁷⁴ *Id.* at 383-84.

⁷⁵ See *Southeastern Pa. Transp. Auth.*, 72 F.3d at 1140-42, 19 Employee Benefits Cas. (BNA) at 2728-29.

considered the degree of need and public interest in disclosure within the framework of the *Westinghouse* balancing test.⁷⁶ Furthermore, the court disregarded the great potential harm to Doe by finding that he suffered no actual harm.⁷⁷ Thus, while *Borough of Barrington* suggested that the potential and actual harms associated with disclosure regarding AIDS require the state to show a compelling interest, *Southeastern Pennsylvania Transportation Authority* established that potential harm and actual harm are only two of the seven factors the court should consider.⁷⁸

In summary, *Southeastern Pennsylvania Transportation Authority* extends limited constitutional protection to the unauthorized disclosure of medical prescription information.⁷⁹ The court will preclude access to private information, or award an individual damages for disclosure of private information, when it determines that the individual's privacy interest in the information outweighs any public or state interest in obtaining the information.⁸⁰

⁷⁶ See *id.* at 1141-42, 19 Employee Benefits Cas. (BNA) at 2728-29. These are factors six and seven of the *Westinghouse* balancing test. See *id.*

⁷⁷ See *id.* at 1140-41, 19 Employee Benefits Cas. (BNA) at 2727-28.

⁷⁸ See *id.*; *Borough of Barrington*, 729 F. Supp. at 383-85.

⁷⁹ See *supra* note 67 and accompanying text.

⁸⁰ See *supra* notes 43-66 and accompanying text.