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LABOR LAW

COLLECTIVE BARGAINING

**Tackling Organized Labor: Brown v. Pro Football, Inc.*¹

The Supreme Court of the United States has recognized a non-statutory exemption from the Sherman Antitrust Act for certain labor practices.² The Court created this nonstatutory exemption because the statutory exemption from federal antitrust laws only protects unions from judicial scrutiny regarding their formation and specific types of union activities such as strikes and boycotts.³ The foundation for this nonstatutory exemption lies in the strong labor policy favoring the association of employees to eliminate competition over working conditions and wages.⁴ In creating the nonstatutory labor exemption for certain union-employer agreements, the Court sought to balance the congressional policy favoring collective bargaining under the National Labor Relations Act ("NLRA") with the congressional policy favoring free competition in business markets.⁵ Without this exemption, anti-trust laws would prohibit certain concerted actions like collective bargaining, which federal labor laws explicitly recognize.⁶ Moreover, un-

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¹ 50 F.3d 1041, 148 L.R.R.M. 2769 (D.C. Cir.), *cert. granted*, 116 S. Ct. 593 (1995).

² *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622-23, 89 L.R.R.M. 2401, 2403-04 (1975). The sources of organized labor's statutory exemption from the federal antitrust laws are: (i) sections 6 and 20 of the Clayton Act (codified at 15 U.S.C. § 17 (1994) and 29 U.S.C. § 52 (1994), respectively); and (ii) sections 4, 5 and 13 of the Norris-La Guardia Act (codified at 29 U.S.C. §§ 104-05, 113 (1994), respectively). These statutes do not consider labor unions to be combinations or conspiracies in the restraint of trade. *Connell*, 421 U.S. at 621-22, 89 L.R.R.M. at 2403. These statutes only exempt specified union activities—such as secondary picketing and boycotts—from the operation of antitrust laws. *Id.*

³ See *Connell*, 421 U.S. at 622, 89 L.R.R.M. at 2403. The statutory exemption does not provide protection for concerted action or agreements like collective bargaining between unions and nonlabor parties. See *id.*; see also *United Mine Workers v. Pennington*, 381 U.S. 657, 662, 59 L.R.R.M. 2369, 2370-71 (1965).

⁴ *Connell*, 421 U.S. at 622, 89 L.R.R.M. at 2403.

⁵ *Brown*, 50 F.3d at 1048, 148 L.R.R.M. at 2772-73 (citing *Connell*, 421 U.S. at 622). The NLRA, 29 U.S.C. §§ 151-99 (1994), and the Labor Management Relations Act, 29 U.S.C. §§ 141-44 (1994), establish a federal policy encouraging the use of collective bargaining. Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1051 (1994). Although Congress encouraged collective bargaining with the passage of these acts, the use of collective bargaining could conflict with the federal antitrust laws because the collective bargaining agreements often have provisions like hour and wage restrictions that would restrain trade. *Id.* at 1050.

⁶ Corcoran, *supra* note 5, at 1050. In particular, collective bargaining not only involves

like the statutory exemption, the nonstatutory exemption is available to both unions and employers.⁷

In 1965, the United States Supreme Court in *Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.* held that a union provision establishing working hours in a collective bargaining agreement with a multiemployer bargaining unit fell within the protection of the federal labor laws and thus was exempt from the Sherman Antitrust Act.⁸ The Court applied the exemption to protect an agreement between a union and a multiemployer bargaining unit to close meat departments in food stores at six p.m.⁹ By closing the meat departments at this time, the union aimed to prevent self-service markets or unskilled laborers from replacing union butchers at night.¹⁰ The Court noted that if the employee-imposed restraints on the hours were subject to attack under the antitrust statutes, it would undermine the NLRA's policy of encouraging collective bargaining.¹¹ The Court further recognized that although the effect of the agreement on competition was "apparent and real," the concern of union members was also immediate and real.¹² In weighing the interests of the union workers against the impact on the product market, the Court concluded that the labor policy expressed in the NLRA places union-employer agreements on working hours beyond the reach of the Sherman Antitrust Act.¹³ The Court further stated that it would also exempt from antitrust scrutiny the union's unilateral demand that other employers in the industry use the same contract.¹⁴ Thus, in *Jewel Tea*, the Court for the first time delineated the nonstatutory exemption by holding a working hour provision in a multiunion and multiemployer collective bargaining agreement exempt from the Sherman Antitrust Act.¹⁵

concerted action between unions and management, but also concerted action among members of the same party. See Kevin Arquit & Richard Wolfram, *Antitrust Law: A Recent Circuit Court Decision May Impair Labor's Ability to Sue Multi-Employer Bargaining Units Pursuant to Sherman Act*, NAT'L L.J., June 5, 1995, at B5. The conflict with federal antitrust laws arises especially where there are multiemployers (e.g., the individual teams of the National Football League) because the employers' concerted action in agreeing to pay a fixed wage may constitute an illegal conspiracy to restrain trade. *Id.*

⁷ *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974).

⁸ 381 U.S. 676, 691, 710, 59 L.R.R.M. 2376, 2381, 2390 (1965).

⁹ *Id.*

¹⁰ *Id.* at 680-82, 59 L.R.R.M. at 2376-78.

¹¹ *Id.* at 691, 59 L.R.R.M. at 2381.

¹² *Id.*

¹³ *Jewel Tea*, 381 U.S. at 691, 59 L.R.R.M. at 2381.

¹⁴ *Id.*; see Corcoran, *supra* note 5, at 1051.

¹⁵ *Jewel Tea*, 381 U.S. at 691, 710, 59 L.R.R.M. at 2381, 2390.

In 1974, the United States Supreme Court in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100* held that the non-statutory exemption did not apply to a union and multiemployer agreement that imposed direct restraints on competition among non-union subcontractors.¹⁶ The union in that case forced a general contractor to sign an agreement requiring the general contractor to subcontract work only to firms that had collective bargaining agreements with the union.¹⁷ The Court reasoned that although the nonstatutory exemption permits unions to impose some restraints on competition by acting unilaterally, it does not offer protection when a union and a nonlabor party (i.e., an employer) agree to restrain competition in the business market.¹⁸ Thus, the Court concluded in *Connell* that the non-statutory exemption did not apply where the terms of a collective bargaining agreement imposed direct restraints on competition among parties that were not involved in the collective bargaining agreement.¹⁹

Although the Supreme Court has not addressed the issue of whether the nonstatutory exemption applies to restraints contained in an expired collective bargaining agreement, two circuit courts have addressed this issue.²⁰ In 1976, in *Mackey v. National Football League*, the United States Court of Appeals for the Eighth Circuit held that a player restraint provision (the "Rozelle Rule") in a collective bargaining agreement was not exempt from antitrust scrutiny.²¹ Under the Rozelle Rule, after the player's contract expired, the player (now a free agent) could sign with another club.²² Nevertheless, if the player did sign with a different club, the commissioner of the National Football League ("NFL") had the discretion to award the free agent's former club one or more players from the free agent's new club to compensate the former club.²³ The Eighth Circuit, reasoning from the Supreme Court's *Connell* and *Jewel Tea* line of cases, devised a three-part test to determine whether the antitrust exemption applies to a collective bargaining agreement: (1) the restraint on trade primarily affects only the parties to the collective bargaining relationship; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement is the

¹⁶ 421 U.S. 616, 623-26, 89 L.R.R.M. 2401, 2403-05 (1975).

¹⁷ *Id.* at 619-21, 89 L.R.R.M. at 2402-03.

¹⁸ *Id.* at 622-23, 89 L.R.R.M. at 2403-04.

¹⁹ *Id.* at 623-26, 89 L.R.R.M. at 2404-05.

²⁰ See *Powell v. National Football League*, 930 F.2d 1293, 1304, 132 L.R.R.M. 2866, 2873 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); *Mackey v. National Football League*, 543 F.2d 606, 609-10 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

²¹ *Mackey*, 543 F.2d at 623.

²² *Id.* at 610-11.

²³ *Id.* at 609, 610-11.

product of bona fide arm's length bargaining.²⁴ The *Mackey* court found that although the Rozelle Rule satisfied the first two elements of the test, it nevertheless was subject to antitrust scrutiny because it failed to satisfy the third element.²⁵ Thus the *Mackey* court held that the nonstatutory labor exemption did not apply to a player restraint provision in a collective bargaining agreement where the provision was not the product of an arm's length negotiation.²⁶

In 1989, in *Powell v. National Football League*, the United States Court of Appeals for the Eighth Circuit held that the nonstatutory labor exemption extended beyond a bargaining impasse and continued as long as the relationship between the parties continued.²⁷ In that case, the players challenged the "right of first refusal/compensation" provision that restricted the players' ability to sign with other teams.²⁸ The players and the NFL had reached an impasse over the provision, which had been contained in the previously expired collective bargaining agreement.²⁹ The Eighth Circuit reasoned that not extending the exemption to the point of impasse would be inconsistent with the federal labor policy set out in the NLRA and would give the players an unfair bargaining position.³⁰ Thus, the Eighth Circuit held that the nonstatutory labor exemption applied as long as there remains a collective bargaining relationship between the parties.³¹

Similarly, in 1995, the United States Court of Appeals for the Second Circuit, in *National Basketball Association v. Williams*, held that the nonstatutory labor exemption for certain employment terms continues until the collective bargaining relationship ends.³² In that case, the National Basketball Association ("NBA"), a multiemployer bargaining unit, sought a declaratory judgment exempting the disputed provisions of an expired collective bargaining agreement from antitrust scrutiny.³³ The Second Circuit reasoned that subjecting the disputed terms to antitrust scrutiny would subvert the collective bargaining process because the NBA could neither maintain the status quo nor

²⁴ *Id.* at 614.

²⁵ *Id.* at 615-16.

²⁶ *Mackey*, 543 F.2d at 615-16.

²⁷ 930 F.2d 1293, 1303-04, 132 L.R.R.M. 2866, 2873 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

²⁸ *Id.* at 1295, 132 L.R.R.M. at 2867.

²⁹ *Id.* at 1296, 132 L.R.R.M. at 2867.

³⁰ *Id.* at 1302-03, 132 L.R.R.M. at 2872-73.

³¹ *Id.* at 1303-04, 132 L.R.R.M. at 2873.

³² *National Basketball Ass'n v. Williams*, 45 F.3d 684, 693, 148 L.R.R.M. 2368, 2375-76 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (Jul. 24, 1995) (No. 95-137).

³³ *Id.* at 686-87, 148 L.R.R.M. at 2370-71.

implement new terms after impasse without fear of antitrust liability.³⁴ Thus, the Second Circuit concluded that the nonstatutory exemption precluded an antitrust challenge to the continued imposition of terms contained in the expired collective bargaining agreement, even after the parties had reached an impasse in negotiations.³⁵

During the *Survey* year, in *Brown v. Pro Football, Inc.*, the United States Court of Appeals for the District of Columbia held that the nonstatutory labor exemption extended beyond a bargaining impasse and remained for as long as the collective bargaining relationship existed between the multiemployer unit and the union.³⁶ Furthermore, the court held that the nonstatutory exemption applied even if the prior collective bargaining agreement between the parties did not contain the challenged term.³⁷ In *Brown*, the court had to determine whether federal labor or antitrust laws controlled where—after bargaining in good faith to a point of impasse—a multiemployer bargaining unit imposed a fixed salary for a category of employees, which was an otherwise lawful step in the collective bargaining process established by the NLRA.³⁸ The court's holding that the nonstatutory exemption extended beyond impasse and remained for as long as the relationship continued, extends the scope of the nonstatutory exemption because a court for the first time has applied the exemption to a term not included in a previous collective bargaining agreement.³⁹

In 1989, the twenty-eight teams that comprised the NFL engaged in collective bargaining with the NFL Players Association ("NFLPA").⁴⁰ The collective bargaining agreement that had covered the terms and conditions of employment for all the players in the league expired in 1987 and the NFL and the NFLPA had immediately begun negotiations for a new agreement.⁴¹ During the course of these negotiations, in early 1989, with the two sides making little progress toward an agreement, the team owners amended the NFL constitution to change the rules governing players on the clubs' injured reserve list and to establish new developmental squads of practice and replacement players.⁴² The

³⁴ *Id.* at 693, 148 L.R.R.M. at 2375-76.

³⁵ *Id.*

³⁶ *Brown*, 50 F.3d 1041, 1045, 148 L.R.R.M. 2769, 2770 (D.C. Cir.), *cert. granted*, 116 S. Ct. 593 (1995).

³⁷ *Id.* at 1045-46, 148 L.R.R.M. at 2770.

³⁸ *Id.* at 1045, 148 L.R.R.M. at 2770.

³⁹ *Id.*

⁴⁰ *Id.* at 1046, 148 L.R.R.M. at 2771.

⁴¹ *Brown*, 50 F.3d at 1046, 148 L.R.R.M. at 2771. The NFL and NFLPA agreed to a new seven-year collective bargaining agreement on January 6, 1993. *Id.* at 1047 n.3, 148 L.R.R.M. at 2772 n.3.

⁴² *Id.* at 1046, 148 L.R.R.M. at 2771. The developmental squad allows each NFL team to sign

amendment, by anticipating a fixed salary for the developmental squad players, departed from the customary NFL practice of setting players' salaries through individual negotiations.⁴³ The NFL proposed a salary of \$1000 per week for the developmental squad players, which the NFLPA subsequently rejected on behalf of the players.⁴⁴ The parties negotiated to an impasse over the issue and then the NFL unilaterally implemented the developmental squad program—with a fixed salary of \$1000 per week—by distributing uniform contracts for developmental squad players to all the teams.⁴⁵

In May of 1990, nine developmental squad players, on behalf of all the developmental squad players, brought a class action suit against all twenty-eight of the NFL clubs and the NFL itself, alleging that the defendants had engaged in price fixing in violation of the Sherman Antitrust Act by setting a fixed salary for the developmental squad players.⁴⁶ In June of 1991, the United States District Court for the District of Columbia, relying on three different rationales, did not exempt the NFL and the NFL clubs from antitrust liability.⁴⁷ First, the district court held that the nonstatutory exemption ended when the parties' collective bargaining agreement expired in 1987.⁴⁸ Second, the district court held that even if the exemption survived the expiration of the collective bargaining agreement, the exemption ended when the parties reached an impasse over the issue of the players' salaries.⁴⁹ Third, the district court held that the exemption nevertheless did not apply because it only protects restraints on competition contained in collective bargaining agreements, and the fixed salary had not previously been included in any agreement between the NFL and the NFLPA.⁵⁰

In reversing the district court's finding that the NFL and NFL clubs did not qualify for the nonstatutory labor exemption, the Court of Appeals for the District of Columbia rejected the players' argument

rookie and first-year free agents to service contracts for the season year. *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 127 (D.D.C. 1991), *rev'd*, 50 F.3d 1041, 1046, 148 L.R.R.M. 2769, 2771 (D.C. Cir.), *cert. granted*, 116 S. Ct. 593 (1995). The developmental players' job requires them to practice with the regular NFL players and to replace the regular players who become injured, but they cannot otherwise play in NFL games. *Brown*, 50 F.3d at 1046, 148 L.R.R.M. at 2771.

⁴³ *Brown*, 50 F.3d at 1046, 148 L.R.R.M. at 2771.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1046–47, 148 L.R.R.M. at 2771–72.

⁴⁶ *Id.* at 1047, 148 L.R.R.M. at 2771–72.

⁴⁷ *See Brown*, 782 F. Supp. at 130–39.

⁴⁸ *Id.* at 130–34.

⁴⁹ *Id.* at 134–37.

⁵⁰ *Id.* at 137–39.

that the United States Supreme Court's decisions in *Jewel Tea* and *Connell* establish that the exemption only applies where a union manifested its consent to a restraint on trade by signing a collective bargaining agreement.⁵¹ The court's reasoning rested on the principle that the nonstatutory exemption must be broad enough in scope to shield the entire collective bargaining process.⁵²

The *Brown* court reasoned that ending the exemption at the point of a bargaining impasse would disrupt the balance of the collective bargaining process.⁵³ Permitting the union to sue at the point of impasse (and thereby invoking the threat of treble damages) would give the unions "a powerful new weapon"—one which federal labor law did not contemplate—and would give the unions an incentive to generate impasses.⁵⁴ The court further reasoned that federal labor policy favors neither party in the collective bargaining process, but rather gives each party roughly equal economic bargaining power.⁵⁵ Consequently, the court reasoned that the national labor policy expressed in the NLRA and the Labor Management Relations Act of 1947 requires that the nonstatutory exemption function as a shield for all lawful actions taken by either unions or employers in the collective bargaining process.⁵⁶ The court concluded that injecting antitrust liability into the system for resolving disputes between unions and employers would both subvert national labor policy and exaggerate federal antitrust concerns.⁵⁷

Finally, the *Brown* court determined that the Sherman Antitrust Act focuses primarily on the product market and not on the labor market.⁵⁸ The court reasoned that the strongest case for applying the nonstatutory exemption involved situations where the restraint on competition operated primarily in the labor market (i.e., the players' services to the teams) and not the product market (i.e., football's consumer entertainment value).⁵⁹ Consequently, the court concluded that the nonstatutory exemption waived antitrust liability for restraints on competition imposed through the collective bargaining process as

⁵¹ *Brown*, 50 F.3d at 1049–50, 148 L.R.R.M. at 2774.

⁵² *Id.* at 1051, 148 L.R.R.M. at 2775. The court also relied on *Wood v. National Basketball Ass'n*, 809 F.2d 954, 959, 124 L.R.R.M. 2446, 2451–52 (2d Cir. 1987) ("No one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal policy as set out in the [NLRA].").

⁵³ *Brown*, 50 F.3d at 1052, 148 L.R.R.M. at 2776.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1056, 148 L.R.R.M. at 2779–80.

⁵⁸ *Brown*, 50 F.3d at 1054–55, 148 L.R.R.M. at 2778.

⁵⁹ *Id.* at 1056–57 & n.8, 148 L.R.R.M. at 2779–80 & n.8.

long as the restraints operated primarily on the labor market, as they did in this case.⁶⁰

The dissent, by Judge Patricia Wald, argued that the nonstatutory exemption should only apply where the previous collective bargaining agreement included the challenged term.⁶¹ It further argued that the exemption should end at the impasse because at that time the employee no longer has an obligation to engage in collective bargaining over the new terms that the employer unilaterally proposed in good faith prior to the impasse.⁶² The dissent acknowledged that the majority's solution provided a bright-line rule that would keep the federal courts out of messy labor-management disputes.⁶³ Nevertheless, the dissent argued that the rule would not serve the best interest of federal labor law by promoting collective bargaining.⁶⁴

Rather, the dissent countered, the majority's rule would disrupt the balance of countervailing power in favor of employers by giving them new rights and incentives, which would harden the parties' bargaining positions.⁶⁵ The dissent further argued that because employers could now unilaterally impose labor market restraints, which had previously exposed them to antitrust liability, the employers now had an incentive to raise the stakes during bargaining in hope of winning new industry-wide labor restraints.⁶⁶ The dissent also contended that the majority's rule would encourage multiemployer bargaining units to stick tough to their demands because at impasse they might have the ability to impose unilaterally any bargaining proposals the employees rejected without the consequence of antitrust sanctions.⁶⁷

The dissent also argued that the majority's rule, instead of encouraging collective bargaining, would force employees either to decertify their unions or avoid forming them in order to receive protection from the antitrust laws.⁶⁸ The dissent asserted that rather than stimulating

⁶⁰ *Id.* at 1056-57, 148 L.R.R.M. at 2779-80.

⁶¹ *Id.* at 1064, 148 L.R.R.M. at 2786 (Wald, J., dissenting).

⁶² *Brown*, 50 F.3d at 1066-67, 148 L.R.R.M. at 2788-89 (Wald, J., dissenting); Arquit & Wolfram, *supra* note 6, at B8; *see also* Taft Broadcasting, 64 L.R.R.M. 1386, 1388 (1967) ("[A]fter bargaining to impasse, that is, after good faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals."), *aff'd sub nom.* American Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622, 67 L.R.R.M. 3032 (D.C. Cir. 1968).

⁶³ *Brown*, 50 F.3d at 1064, 148 L.R.R.M. at 2786 (Wald, J., dissenting).

⁶⁴ *Id.* (Wald, J., dissenting).

⁶⁵ *Id.* (Wald, J., dissenting).

⁶⁶ *Id.* (Wald, J., dissenting).

⁶⁷ *Id.* at 1064, 1065, 148 L.R.R.M. at 2786, 2787 (Wald, J., dissenting).

⁶⁸ *Brown*, 50 F.3d at 1065, 148 L.R.R.M. at 2787 (Wald, J., dissenting). For example, the players responded to the *Powell* decision by decertifying their union and then suing under the antitrust laws. *Id.* (Wald, J., dissenting).

collective bargaining, the majority's decision would have the effect of immunizing unilaterally imposed terms, whether used as a bargaining tactic or to break an impasse.⁶⁹ Finally, the dissent contended that the majority opinion improperly disregarded the anticompetitive effects of restraints on the input market, such as labor, and that the antitrust laws apply to input markets no less than they apply to output markets.⁷⁰

The District of Columbia Circuit's decision in *Brown* restrains organized labor's power because it curtails organized labor's ability to use antitrust laws in the collective bargaining process.⁷¹ Although the majority in *Brown* sought to maintain a level playing field in employer-employee relations, its decision fails to follow the congressional mandate of favoring the collective bargaining process as the primary means of resolving employer-union disputes.⁷² By limiting organized labor's use of antitrust laws in the collective bargaining process, the District of Columbia Circuit's decision dramatically tilts the field in favor of employers.⁷³ Indeed, William B. Gould IV, Chairman of the National Labor Relations Board, observed that the *Brown* decision "eliminated altogether" the role of antitrust laws in the collective bargaining process.⁷⁴

As a result of the *Brown* court's decision, multiemployer bargaining units will have an incentive to raise the stakes in the bargaining process because they can now attempt to unilaterally impose labor market restraints after bargaining to impasse, restraints previously subjected to antitrust scrutiny.⁷⁵ Rather, employees lose an incentive to engage in collective bargaining and may decertify their existing unions in order to take advantage of the antitrust laws. For example, without the benefit of a union, the NFL players could sue the NFL under the antitrust laws. By entering into a collective bargaining agreement with the NFLPA, the NFL received the benefit of antitrust exemption while the NFLPA bargained away its antitrust remedies for the benefits of collective bargaining.⁷⁶ As some commentators recently noted, by extending the nonstatutory exemption beyond impasse to the point

⁶⁹ *Id.* at 1067, 148 L.R.R.M. at 2788-89 (Wald, J., dissenting). Specifically, the dissent found that the uniform salary cap was not designed as a tactical or economic weapon to bring the union back to the bargaining table, but rather was an attempt to save money by the NFL. *Id.* at 1069, 148 L.R.R.M. at 2791 (Wald, J., dissenting).

⁷⁰ *Id.* at 1059-62, 148 L.R.R.M. at 2782-85 (Wald, J., dissenting).

⁷¹ *See id.* at 1065, 148 L.R.R.M. at 2787 (Wald, J., dissenting).

⁷² *Id.* at 1058, 148 L.R.R.M. at 2781 (Wald, J., dissenting).

⁷³ *See Brown*, 50 F.3d at 1059, 148 L.R.R.M. at 2782 (Wald, J., dissenting).

⁷⁴ Arquit & Wolfram, *supra* note 6, at B5 (quoting William B. Gould IV, The Curse of the Bambino: Remarks Delivered at Hofstra University (April 27, 1995)).

⁷⁵ *See Brown*, 50 F.3d at 1064, 148 L.R.R.M. at 2786 (Wald, J., dissenting).

⁷⁶ Arquit & Wolfram, *supra* note 6, at B8; *see Brown*, 50 F.3d at 1057, 1065-66, 148 L.R.R.M. at 2780, 2787-88 (Wald, J., dissenting).

where the NFL can unilaterally change the terms—the very terms for which the NFLPA bargained away their antitrust remedies—the *Brown* court gives management all the advantages of antitrust immunity without giving labor any corresponding benefit.⁷⁷

Nevertheless, subsequent courts may limit the *Brown* decision to its facts. In *Brown*, the parties agreed that the salary cap for the developmental squad players had no anticompetitive impact on the product market (i.e., the entertainment market).⁷⁸ Accordingly, unions in the future can try to avail themselves of the protection from antitrust scrutiny in collective bargaining situations by demonstrating the effect that any unilaterally imposed term would have on the relevant product or output market.⁷⁹

In conclusion, *Brown v. Professional Football, Inc.* establishes that the nonstatutory labor exemption extends beyond impasse in the collective bargaining process and lasts as long as the collective bargaining relationship exists between the union and the multiemployer unit.⁸⁰ Furthermore, the nonstatutory exemption applies even to a challenged term not included in a prior collective bargaining agreement.⁸¹ Contrary to federal labor policy, the District of Columbia Circuit's decision greatly tips the balance in the collective bargaining process in favor of multiemployer bargaining units.⁸² As a result, when bargaining with multiemployer bargaining units, employees will either have to forgo unionization or decertify their union in order to avail themselves of antitrust remedies.⁸³

STRIKER REPLACEMENTS

**Burdens of Proof in Section 8(a)(3) of the National Labor Relations Act: NLRB v. Oregon Steel Mills, Inc.*¹

Section 8(a)(3) of the National Labor Relations Act ("the Act") prohibits employers from discriminating against employees for membership in a labor organization or participation in concerted activities.²

⁷⁷ See Arquit & Wolfram, *supra* note 6, at B8.

⁷⁸ See *Brown*, 50 F.3d at 1056–57 & n.8, 148 L.R.R.M. at 2780 & n.8.

⁷⁹ See *id.* at 1056–57, 148 L.R.R.M. at 2780.

⁸⁰ *Id.* at 1045, 148 L.R.R.M. at 2770.

⁸¹ *Id.* at 1045–46, 148 L.R.R.M. at 2770–71.

⁸² See *id.* at 1059, 148 L.R.R.M. at 2781–82 (Wald, J., dissenting).

⁸³ See *Brown*, 50 F.3d at 1056–57, 148 L.R.R.M. at 2780.

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¹ 47 F.3d 1536, 148 L.R.R.M. 2657 (9th Cir. 1995).

² See 29 U.S.C. § 158(a)(3) (1994). Section 8(a)(3) provides in relevant part: "It shall be an

Section 2(3) of the Act includes in the definition of employee "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."³ The United States Supreme Court has held that employees engaged in an economic strike retain their employee status under the Act.⁴ Determining the precise scope of an employer's duty with respect to economic strikers has been the topic of considerable case law.⁵

In 1938, in *NLRB v. Mackay Radio & Telegraph Co.*, the United States Supreme Court held that although employees who are not working because of a labor dispute continue to be "employees" for purposes of the Act, an employer is entitled to hire permanent employees to replace the strikers for the legitimate business purpose of continuing operations.⁶ In *Mackay*, union members engaged in an economic strike, and the employer hired replacement workers.⁷ When the strikers offered to return to work unconditionally, the employer rehired most of the strikers.⁸ The employer, however, excluded from reinstatement five employees who were active in the union.⁹ The union brought unfair labor practice charges with the National Labor Relations Board ("the Board") alleging that the employer had not reinstated these five employees because they had joined and assisted in the strike.¹⁰ The Court stated that although it was not an unfair labor practice to replace the striking employees, and the employer was not bound to discharge the replacements after the strike, the employer's refusal to reinstate the five employees solely because of their participation in the strike constituted discrimination on the basis of union activity in violation of section 8(a)(3) of the Act.¹¹ The Court reasoned that because economic strikers remain employees under section 2(3), an employer must reinstate an economic striker who offers unconditionally to return to an available position.¹² Thus, the *Mackay* Court

unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

³ 29 U.S.C. § 152(3) (1994).

⁴ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345, 2 L.R.R.M. 610, 614 (1938).

⁵ See, e.g., *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 66 L.R.R.M. 2737 (1967); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 65 L.R.R.M. 2465 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 53 L.R.R.M. 2121 (1963).

⁶ 304 U.S. at 345-46, 2 L.R.R.M. at 614.

⁷ *Id.* at 337, 2 L.R.R.M. at 611.

⁸ *Id.*

⁹ *Id.* at 339, 2 L.R.R.M. at 612.

¹⁰ *Id.*

¹¹ *Mackay*, 304 U.S. at 346, 2 L.R.R.M. at 614.

¹² See *id.* at 345-46, 2 L.R.R.M. at 614.

concluded that the employer had committed an unfair labor practice under section 8(a)(3) by refusing to reinstate the five employees based on their participation in the strike.¹³

In 1963, in *Labor Board v. Erie Resistor Corp.*, the United States Supreme Court held that although section 8(a)(3) analysis normally turns on whether the employer's discriminatory conduct is motivated by an antiunion purpose, where the conduct is "inherently destructive" of employee interests, the Board is not required to demonstrate anti-union motive to establish a violation of the Act.¹⁴ Moreover, the Court held that although an employer can usually defend a section 8(a)(3) charge by showing that it acted for legitimate business purposes, such a showing is not always a defense when the employer's conduct is "inherently destructive" of employees' rights.¹⁵ In *Erie Resistor*, during an economic strike, the employer offered twenty years of additional seniority to all replacements and strikers who returned to work by a certain date.¹⁶ The union charged that the offer of super-seniority to employees during the strike discriminated against employees on the basis of union activity.¹⁷ The employer attempted to justify the offer of super-seniority as a legitimate business practice necessary to continue production during the strike.¹⁸ The Court distinguished the offer of super-seniority from the hiring of permanent replacements in *Mackay* and determined that the employer's conduct here was inherently destructive of employee rights.¹⁹ The Court explained that the devastating consequences that the offer of super-seniority had on the employees' right to engage in concerted activities outweighed the interests of the employer in operating its business.²⁰ The Court inferred an illicit motive behind the employer's conduct, holding the employer to have intended the consequences that foreseeably and inescapably flowed from the destructive conduct.²¹ The *Erie Resistor* Court concluded, therefore, that the employer's granting of super-seniority to replacement employees during a strike was inherently destructive and that the Board was not required to offer specific evidence of the employer's

¹³ See *id.*

¹⁴ 373 U.S. 221, 227-29, 53 L.R.R.M. at 2121, 2124 (1963).

¹⁵ *Id.*

¹⁶ *Id.* at 223, 53 L.R.R.M. at 2122.

¹⁷ *Id.* at 224, 53 L.R.R.M. at 2123.

¹⁸ *Id.* at 225-26, 53 L.R.R.M. at 2123.

¹⁹ *Erie Resistor*, 373 U.S. at 232, 53 L.R.R.M. at 2126.

²⁰ *Id.*

²¹ See *id.* at 228, 53 L.R.R.M. at 2124.

discriminatory motive to prove an unfair labor practice under section 8(a)(3).²²

Consistent with this reasoning, in 1967, in *NLRB v. Great Dane Trailers*, the United States Supreme Court held that once the Board has proven that an employer has engaged in discriminatory conduct that adversely affects employees' rights to some extent, the burden shifts to the employer to establish that the conduct was motivated by legitimate and substantial business reasons.²³ Specifically, the Court stated that in cases where an employer's discriminatory conduct is "inherently destructive" of important employee rights, the Board can establish an unfair labor practice without proof of antiunion motivation.²⁴ Additionally, the Court stated that when the resulting harm to employee rights is not inherently destructive and the employer has demonstrated a legitimate and substantial business reason, the Board cannot establish an unfair labor practice merely by showing antiunion motivation.²⁵ In *Great Dane*, the union engaged in an economic strike even though its collective bargaining agreement expired.²⁶ During the strike, the employer continued operations, using nonstrikers, replacements, and strikers who had returned to work.²⁷ When the strikers asked for their accrued vacation benefits pursuant to the terms of the expired collective bargaining agreement, the employer rejected the strikers' demand and claimed that the strike had terminated all contractual obligations.²⁸ The employer did announce, however, that it would pay such benefits to striker replacements, returning strikers and nonstrikers.²⁹ The Court determined that the refusal to pay vacation benefits to the strikers amounted to discrimination on the basis of concerted activity in violation of section 8(a)(3).³⁰ The Court stated that it was not required to determine the degree to which the challenged conduct affected employee rights because the employer had not met its burden of proving a legitimate and substantial business reason for its discriminatory conduct.³¹ The Court reasoned that the employer bears the burden of demonstrating a legitimate and substantial business reason because proof of motivation is most accessible to

²² *Id.* at 227, 231, 53 L.R.R.M. at 2124, 2125.

²³ See 388 U.S. 26, 33-34, 65 L.R.R.M. 2465, 2468-69 (1967).

²⁴ *Id.* at 34, 65 L.R.R.M. at 2469.

²⁵ *Id.*

²⁶ *Id.* at 29, 65 L.R.R.M. at 2467.

²⁷ *Id.*

²⁸ *Great Dane*, 388 U.S. at 29, 65 L.R.R.M. at 2467.

²⁹ *Id.*

³⁰ *Id.* at 32, 65 L.R.R.M. at 2468.

³¹ *Id.* at 34, 65 L.R.R.M. at 2469.

the employer.³² The *Great Dane* Court concluded, therefore, that without a showing of legitimate and substantial business justification, withholding accrued vacation benefits was an unfair labor practice under section 8(a)(3).³³

Also in 1967, in *NLRB v. Fleetwood Trailer Co.*, the United States Supreme Court held that former strikers' right to reinstatement, does not depend upon job availability when they first apply for reinstatement, but continues until they have obtained other regular and substantially equivalent employment.³⁴ In *Fleetwood*, a union's economic strike caused a sharp cutback in the employer's production, and when the strikers applied for reinstatement after the strike, their positions no longer existed.³⁵ The employer, however, hired six new employees for jobs that the strikers were qualified to perform.³⁶ Subsequently, the union charged that hiring new employees over strikers was discriminatory under section 8(a)(3).³⁷ Following the reasoning in *Great Dane*, the *Fleetwood* Court stated that the Board did not need to show antiunion motivation because the employer had not met its burden of proving a legitimate and substantial business reason for refusing to reinstate the strikers.³⁸ The Court determined that the curtailment of production was not a legitimate and substantial business reason because the undisputed evidence showed that the company's intention was to increase production as soon as possible.³⁹ The *Fleetwood* Court reasoned that the basic right to employment cannot depend upon the mere technicality of job availability at the moment when applications are filed.⁴⁰ On the contrary, the Court explained, the right continues until the former strikers have obtained other regular and substantially equivalent employment.⁴¹ The *Fleetwood* Court concluded, therefore, that the employer was required to reinstate former strikers to available comparable positions.⁴²

In 1987, in *NLRB v. Rockwood & Co.*, the United States Court of Appeals for the Ninth Circuit applied the reasoning of *Fleetwood* and *Great Dane* to hold that a former striker has a right to reinstatement

³² *Id.*

³³ See *Great Dane*, 388 U.S. at 34-35, 65 L.R.R.M. at 2469.

³⁴ 389 U.S. 375, 381, 66 L.R.R.M. 2737, 2739 (1967).

³⁵ *Id.* at 376, 66 L.R.R.M. at 2737.

³⁶ *Id.* at 377, 66 L.R.R.M. at 2738.

³⁷ *Id.*

³⁸ See *id.* at 380, 66 L.R.R.M. at 2738-39.

³⁹ See *Fleetwood*, 389 U.S. at 376, 66 L.R.R.M. at 2737.

⁴⁰ *Id.* at 381, 66 L.R.R.M. at 2739.

⁴¹ *Id.*

⁴² *Id.* at 380-81, 66 L.R.R.M. at 2739.

to any substantially equivalent position for which he or she is qualified unless the employer can demonstrate a legitimate and substantial business reason for not reinstating the striker.⁴³ In *Rockwood*, the union engaged in an economic strike, and the employer took applications for permanent replacement employees.⁴⁴ At the end of the strike, the employees unconditionally offered to return to work, but the employer refused to reinstate them.⁴⁵ The union brought an unfair labor practice charge, alleging that the employer had hired four new, inexperienced workers instead of former strikers and had terminated one striker after offering him a position that was not substantially equivalent to his previous position.⁴⁶ The employer asserted that its refusal to reinstate the strikers was due to the legitimate business reason that the strikers were unqualified for the available positions.⁴⁷ Noting that the strikers were more experienced than the replacements, however, the court determined that the employer had not produced sufficient evidence to demonstrate that the strikers were unqualified.⁴⁸ Citing *Fleetwood*, the Ninth Circuit reasoned that an employee has the right to accept or reject an offer to a non-substantially equivalent poststrike position without affecting his or her right to reinstatement.⁴⁹ Consequently, the Ninth Circuit concluded that the employer had violated section 8(a)(3) by refusing to rehire the former strikers to substantially equivalent positions after the strike.⁵⁰

During the *Survey* year, in *NLRB v. Oregon Steel Mills, Inc.*, the United States Court of Appeals for the Ninth Circuit held that an employer bears the burden of proving that the decision to hire "temporary" workers over former strikers was made for legitimate and substantial business reasons.⁵¹ The court stated that unless an employer can show a legitimate and substantial business reason for refusing to reinstate the strikers, the employer is guilty of an unfair labor practice under section 8(a)(3).⁵² The Ninth Circuit applied this holding to enforce the Board's order, which declared that Oregon Steel had

⁴³ *NLRB v. Rockwood & Co.*, 834 F.2d 837, 840-41, 127 L.R.R.M. 2070, 2072-73 (9th Cir. 1987).

⁴⁴ *Id.* at 839, 127 L.R.R.M. at 2071.

⁴⁵ *Id.*

⁴⁶ *Id.* at 840, 845, 127 L.R.R.M. at 2072, 2073.

⁴⁷ *Id.* at 840, 127 L.R.R.M. at 2072.

⁴⁸ *Rockwood*, 834 F.2d at 840-41, 127 L.R.R.M. at 2072.

⁴⁹ *Id.* at 842, 127 L.R.R.M. at 2073.

⁵⁰ *See id.* at 841, 842, 127 L.R.R.M. at 2072, 2073.

⁵¹ 47 F.3d 1536, 1539, 148 L.R.R.M. 2657, 2659 (9th Cir. 1995).

⁵² *Id.*

violated section 8(a)(3) by failing to reinstate former strikers and by removing former strikers from the preferential reinstatement list.⁵³

The controversy in *Oregon Steel Mills* arose from an economic strike by two locals of the United Steel Workers of America and the 418 employees of Oregon Steel.⁵⁴ After the strike began, Oregon Steel reduced the work force and instituted a hiring freeze.⁵⁵ The union made an unconditional offer to end the strike, and the employer placed the former strikers' names on a preferential reinstatement list for future job openings.⁵⁶ Subsequently, the employer hired approximately 112 strikers from the preferential reinstatement list.⁵⁷ The employer also contracted for services through a temporary employment agency, however, even though former strikers remained on the preferential reinstatement list.⁵⁸ The union filed an unfair labor practice charge with the Board claiming that the employer had violated section 8(a)(3) by hiring temporary employees obtained through independent employment agencies instead of rehiring qualified former strikers.⁵⁹

An Administrative Law Judge ("ALJ") concluded that Oregon Steel had violated section 8(a)(3) by: (1) using temporary service agency employees to perform work when qualified strikers remained on the preferential reinstatement list; (2) disqualifying eight employees for reinstatement because the employer incorrectly determined that they had received comparable employment elsewhere; and (3) striking the names of two employees from the preferential reinstatement list because the employer determined that the strikers refused an offer of substantially equivalent positions at Oregon Steel.⁶⁰ The Board affirmed the decision of the ALJ and subsequently filed an application for enforcement of its order.⁶¹ Oregon Steel appealed to the Ninth Circuit, challenging on three grounds the Board's decision that it had violated section 8(a)(3) of the Act.⁶²

First, the Ninth Circuit rejected Oregon Steel's argument that the employees hired through the temporary employment agency were not considered new employees under the Act.⁶³ The employer argued that

⁵³ *Id.* at 1537, 148 L.R.R.M. at 2657.

⁵⁴ *Id.* at 1541, 148 L.R.R.M. at 2661.

⁵⁵ *Id.*

⁵⁶ *Oregon Steel Mills*, 47 F.3d at 1538, 148 L.R.R.M. at 2658.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1542, 148 L.R.R.M. at 2661. Employees of the temporary service agency represented five to 10 percent of the work force at Oregon Steel. *Id.*

⁵⁹ *Id.*

⁶⁰ *Oregon Steel Mills*, 47 F.3d at 1542, 148 L.R.R.M. at 2661.

⁶¹ *Id.*

⁶² *Id.* at 1537, 148 L.R.R.M. at 2657.

⁶³ *Id.* at 1538, 148 L.R.R.M. at 2658.

the Board had failed to show a prima facie violation of the Act because an employer's obligation to hire former strikers from the preferential reinstatement list applied only when it hired new employees on its payroll.⁶⁴ The court reasoned that the distinction between new employees hired and paid by Oregon Steel and temporary workers hired through an independent employment agency under contract with Oregon Steel was irrelevant under the Act.⁶⁵ In reaching this conclusion, the court applied the reasoning of *Fleetwood*, that "the right [of a former striker] to reinstatement does not depend upon technicalities."⁶⁶ Accordingly, the Ninth Circuit concluded that Oregon Steel's hiring of temporary employees to perform the same jobs held by the former strikers before the employer exhausted the preferential reinstatement list constituted an unfair labor practice under section 8(a)(3).⁶⁷

The Ninth Circuit next addressed Oregon Steel's argument that the Board had misapplied the law by requiring an employer to demonstrate that former strikers were not rehired for legitimate and substantial business reasons.⁶⁸ The court stated that this argument was precluded by both United States Supreme Court and Ninth Circuit precedent.⁶⁹ Specifically, the court cited *Fleetwood*, in which the Supreme Court had explicitly held that the employer bears the burden of proving that it did not rehire strikers for a legitimate and substantial business reason, and *Rockwood*, in which the Ninth Circuit had held that an employer bears the burden of proof for a refusal to reinstate strikers to available positions.⁷⁰ Thus, the *Oregon Steel Mills* court concluded that the employer had the burden of producing a legitimate and substantial business reason for hiring temporary workers over former strikers.⁷¹

Finally, the Ninth Circuit held that the employer did not meet its burden of proving that the decision to hire temporary workers was made for legitimate and substantial business reasons.⁷² The court determined that the assertion that it had hired temporary workers in place of the former strikers because it was an effective cost-saving measure was not enough to meet its burden of proof.⁷³ The court stated

⁶⁴ *Id.*

⁶⁵ *Oregon Steel Mills*, 47 F.3d at 1538, 148 L.R.R.M. at 2658.

⁶⁶ *Id.* (quoting *Fleetwood*, 389 U.S. at 381, 66 L.R.R.M. at 2737).

⁶⁷ See *id.* at 1538-39, 148 L.R.R.M. at 2658-59.

⁶⁸ *Id.* at 1538, 148 L.R.R.M. at 2658.

⁶⁹ *Id.*

⁷⁰ *Oregon Steel Mills*, 47 F.3d at 1538, 148 L.R.R.M. at 2658 (citing *Fleetwood*, 389 U.S. at 381, 66 L.R.R.M. at 2737; *Rockwood*, 834 F.2d at 840-41, 127 L.R.R.M. at 2072).

⁷¹ See *Oregon Steel Mills*, 47 F.3d at 1539, 148 L.R.R.M. at 2659.

⁷² *Id.*

⁷³ *Id.*

that the employer had failed to offer a financial or accounting analysis of its purported cost-saving measures or to show a nexus between its use of contract labor and the company's economic health.⁷⁴ The Ninth Circuit reasoned that the broad question of whether an employer with a preferential reinstatement list can ever contract with outside agencies for labor was not at issue because the employer had failed to demonstrate a legitimate and substantial business reason.⁷⁵ The Ninth Circuit concluded, therefore, that without empirical findings to demonstrate a legitimate and substantial business reason for hiring temporary workers over former strikers, Oregon Steel's assertion of cost saving was insufficient to meet its burden of proof and avoid liability under the Act.⁷⁶

Additionally, the Ninth Circuit addressed Oregon Steel's challenge to the Board's finding that the employer had unlawfully removed five employees from the preferential reinstatement list.⁷⁷ The court stated that an employer may remove a former striker from a preferential reinstatement list only if the striker either has found regular and substantially equivalent employment elsewhere or has refused an employer's offer of substantially equivalent employment.⁷⁸ Accordingly, the court affirmed the Board's finding that the employer had unlawfully removed three former strikers from the reinstatement list because they had not found substantially equivalent employment elsewhere.⁷⁹ The court also affirmed the Board's finding that the employer had unlawfully removed two employees who had rejected new job offers from the preferential reinstatement list because the new job offers were not substantially equivalent to their prestrike positions.⁸⁰ Thus, the Ninth Circuit affirmed the Board's finding that removal of these five employees from the preferential reinstatement list violated section 8(a)(3) of the Act.⁸¹

In a separate opinion, Judge Alacorn dissented from the court's allocation of the burden of proof to the employer.⁸² Judge Alacorn read *Great Dane* and *Fleetwood* to stand collectively for the proposition that in the ordinary situation where an employer's conduct is not inherently destructive of employee rights, the Board must make a prima

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *Oregon Steel Mills*, 47 F.3d at 1539, 148 L.R.R.M. at 2659.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Oregon Steel Mills*, 47 F.3d at 1539-40, 148 L.R.R.M. at 2659-60.

⁸² *Id.* at 1540, 148 L.R.R.M. at 2660 (Alacorn, J., dissenting).

facie showing that an employer has committed an unfair labor practice and that the conduct was motivated by an antiunion purpose.⁸³ Judge Alacorn stated that there was no evidence in the record that Oregon Steel's conduct was inherently destructive and that the Board had failed to demonstrate that the employer's decision to use temporary service agency employees was motivated by antiunion bias.⁸⁴ Therefore, Judge Alacorn concluded that because the Board had failed to demonstrate antiunion motivation, Oregon Steel had not violated section 8(a)(3) by hiring temporary employees over former strikers.⁸⁵

Moreover, Judge Alacorn stated that the majority opinion did not address the initial dispositive question of whether the employer's conduct was inherently destructive of employees' rights.⁸⁶ Reasoning that Oregon Steel's conduct did not create far-reaching effects that would have hindered future bargaining or discriminated solely upon the basis of participation in union activity, Judge Alacorn determined that Oregon Steel's use of employees from the temporary employment agency to perform duties previously executed by the strikers was not inherently destructive of employee rights.⁸⁷ Judge Alacorn also noted that the employer had reinstated 112 strikers after the strike ended.⁸⁸ Judge Alacorn concluded, therefore, that there was no evidence in the record that the employer's conduct was inherently destructive of employee rights.⁸⁹

Judge Alacorn determined that, in the absence of any evidence of inherently destructive conduct, the employer had met its burden of demonstrating a legitimate and substantial business reason.⁹⁰ Judge Alacorn contended that the majority's reliance on the ALJ's findings was misplaced because the ALJ had failed to consider the testimony of both Oregon Steel's Vice-President of Manufacturing regarding the cost savings of using temporary workers and an industrial psychologist regarding employee confidence.⁹¹ Judge Alacorn reasoned that, unlike in *Fleetwood*, where no evidence was put forth by the employer, in this case the testimony was sufficient to demonstrate that Oregon Steel had

⁸³ *Id.* at 1543, 148 L.R.R.M. at 2662-63 (Alacorn, J., dissenting).

⁸⁴ *Id.* at 1545, 148 L.R.R.M. at 2664 (Alacorn, J., dissenting).

⁸⁵ *Id.* at 1546, 148 L.R.R.M. at 2665 (Alacorn, J., dissenting).

⁸⁶ *Oregon Steel Mills*, 47 F.3d at 1545, 148 L.R.R.M. at 2664 (Alacorn, J., dissenting).

⁸⁷ *Id.* at 1544-45, 148 L.R.R.M. at 2664 (Alacorn, J., dissenting).

⁸⁸ *Id.* at 1545, 148 L.R.R.M. at 2664 (Alacorn, J., dissenting).

⁸⁹ *Id.* (Alacorn, J., dissenting).

⁹⁰ *Id.* (Alacorn, J., dissenting).

⁹¹ *Oregon Steel Mills*, 47 F.3d at 1545, 148 L.R.R.M. at 2664 (Alacorn, J., dissenting).

contracted the temporary employees for a legitimate and substantial business reason.⁹²

The *Oregon Steel Mills* court correctly affirmed that the burden of proof is on the employer to demonstrate a legitimate and substantial business reason for a refusal to reinstate strikers to available positions.⁹³ The United States Supreme Court consistently has held that an employer bears the burden because the employer has better access to proof of motivation.⁹⁴ The Ninth Circuit's placement of the burden of proof on the employer safeguards the right of employees to engage in concerted activities free of employer discrimination, while still providing an appropriate avenue to an employer who can demonstrate a legitimate and substantial business reason for hiring temporary workers.⁹⁵ Furthermore, the Ninth Circuit was correct in not analyzing whether the employer's conduct was inherently destructive of employee rights.⁹⁶ A determination that the employer did not demonstrate a legitimate and substantial business reason precluded an analysis of whether the employer's conduct was inherently destructive of employee rights.⁹⁷ Therefore, the dissent's emphasis on the absence of inherently destructive conduct was misplaced, and requiring the Board to prove inherently discriminatory conduct would have incorrectly raised the hurdle for establishing an unfair labor practice charge under section 8(a)(3).⁹⁸

Moreover, the Ninth Circuit's decision is consistent with an underlying policy of the Act encouraging the economic strike as a legitimate means of resolving a labor dispute.⁹⁹ The Act's declaration of policy states in relevant part that "experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards . . . and promotes the flow of commerce."¹⁰⁰ Additionally, the United States Supreme Court has made clear that there are limits to the weapons that employers may use during a strike, precisely be-

⁹² *Id.* (Alacorn, J., dissenting).

⁹³ *See id.* at 1538, 148 L.R.R.M. at 2658.

⁹⁴ *See, e.g.,* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34, 65 L.R.R.M. 2465, 2469 (1967).

⁹⁵ *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 234-35, 53 L.R.R.M. 2121, 2127 (1963).

⁹⁶ *See* *Great Dane*, 388 U.S. at 34-35, 65 L.R.R.M. at 2469 (establishing that where employer has not come forward with legitimate and substantial business reason for discriminatory conduct it is not necessary to decide degree to which challenged conduct might have affected employee rights).

⁹⁷ *See id.*

⁹⁸ *See* *Oregon Steel Mills*, 47 F.3d at 1544, 148 L.R.R.M. at 2664 (Alacorn, J., dissenting).

⁹⁹ 29 U.S.C. § 151 (1994). "It is declared the policy of the United States . . . [to protect] the exercise by workers of full freedom of association, self-organization . . . for the purpose of negotiating the terms and conditions of employment." *Id.*

¹⁰⁰ *Id.*

cause particular tactics would have a devastating impact on the parties' bargaining relationship at the strike's conclusion.¹⁰¹ Furthermore, in light of the ongoing debate in Congress regarding the right of employers to hire striker replacements, this decision, unlike the dissent's reasoning, sustains the strike as a potent economic weapon that supports the principles of the collective bargaining system.¹⁰² For these reasons the Ninth Circuit's decision correctly supports the public policy underlying the Act and maintains the economic strike as an essential, legitimate feature of our collective bargaining system.¹⁰³

Although the Ninth Circuit's invalidation of Oregon Steel's attempt to replace former strikers with temporary workers represents a step forward for employee rights, the decision may not adequately resolve all issues surrounding the use of poststrike temporary workers.¹⁰⁴ The *Oregon Steel Mills* court declined to address the broader issue of whether an employer with a preferential reinstatement list can ever contract with outside temporary employment agencies.¹⁰⁵ As a result, in the case where the employer has satisfied the burden of proving a legitimate and substantial business reason, *Oregon Steel Mills* does not discuss whether the employer should maintain operations by means less restrictive than hiring temporary workers over former strikers. Similarly, the decision does not address the more difficult issue of what strikers must show to satisfy their burden of proving that an employer's conduct was inherently destructive of employee rights.

In sum, the Ninth Circuit in *Oregon Steel Mills* held conclusively that temporary workers are equivalent to new employees for purposes of the Act.¹⁰⁶ This decision followed naturally from the United States Supreme Court's rulings in *Great Dane* and *Fleetwood*, holding that former strikers are entitled to reinstatement to available positions unless the employer refuses to reinstate them for a legitimate and substantial business reason.¹⁰⁷ *Oregon Steel Mills* does not answer all questions regarding the scope of an employer's right to hire replace-

¹⁰¹ Samuel Estreicher, *Strikers and Replacements*, 3 LAB. LAW. 897, 898 (1987).

¹⁰² David Masci, *Senate Rejects Striker Bill; More Action Unlikely*, CONG. Q., July 16, 1994, at 1936. During the 103d Congress, the House of Representatives passed the Workplace Fairness Act, HR 5, by a vote of 239-190. *Id.* The measure would have overturned the *Mackay* decision by prohibiting employers from permanently replacing workers who go on strike seeking economic benefits. *Id.* The companion bill S.55 was defeated in the Senate by a vote of 53-47 on July 12, 1994. *Id.* The legislation has not yet been considered before the 104th Congress. *See id.*

¹⁰³ *See* 29 U.S.C. § 141(b) (1994).

¹⁰⁴ *See Oregon Steel Mills*, 47 F.3d at 1539, 148 L.R.R.M. at 2659.

¹⁰⁵ *See id.*

¹⁰⁶ *Id.* at 1538, 148 L.R.R.M. at 2658.

¹⁰⁷ *See id.* at 1539, 148 L.R.R.M. at 2659; *see also Fleetwood* 389 U.S. 380-81, 66 L.R.R.M. at 2739; *Great Dane*, 388 U.S. at 35, 65 L.R.R.M. at 2469.

ment workers, however, and practitioners can expect the courts and Congress to continue to grapple with this contentious issue.¹⁰⁸

¹⁰⁸ Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995). President Clinton issued Executive Order 12,954 on March 8, 1995, which authorizes the Secretary of Labor to terminate the contracts of government contractors that permanently replace lawfully striking workers, if doing so will promote economy and efficiency in government procurement. *Id.*

EMPLOYMENT LAW

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

**Sexual Harassment—Clearer Standards for Employers at the Expense of Victims' Rights: Gary v. Long¹*

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful for employers to discriminate against an individual based on his or her gender.² Title VII thus prohibits sexual harassment of an employee.³ Courts have recognized two forms of sexual harassment that violate Title VII's provisions: (1) quid pro quo; and (2) hostile work environment.⁴ Quid pro quo sexual harassment occurs when an employer conditions a tangible job benefit or privilege on the employee's submission to sexual demands and adverse consequences follow from the employee's refusal.⁵ The second theory, hostile work environment sexual harassment, arises when the harassment is sufficiently severe or pervasive to alter the employee's working conditions and create an abusive working environment.⁶ The courts have not yet established a clearly defined standard, however, to determine the extent of an employer's liability for a hostile work environment claim.⁷

In 1986, in *Meritor Savings Bank v. Vinson*, the United States Supreme Court held that hostile environment sexual harassment constitutes a form of sex discrimination actionable under Title VII.⁸ In *Meritor*, a female bank employee claimed that her supervisor made

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¹ 59 F.3d 1391, 1396, 68 Fair Empl. Prac. Cas. (BNA) 581, 583-84 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569, 69 Fair Empl. Prac. Cas. (BNA) 1760 (1995).

² 42 U.S.C. § 2000e-2(a)(1) (1988). Title VII states in relevant part that it is "an unlawful employment practice for an employer . . . 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.*

³ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63, 40 Fair Empl. Prac. Cas. (BNA) 1822, 1825 (1986).

⁴ *See id.* at 65-66, 40 Fair Empl. Prac. Cas. (BNA) at 1826.

⁵ *See Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579, 51 Fair Empl. Prac. Cas. (BNA) 596, 603 (2d Cir. 1989).

⁶ *See Meritor*, 477 U.S. at 66-67, 40 Fair Empl. Prac. Cas. (BNA) at 1827; *Carrero*, 890 F.2d at 577, 51 Fair Empl. Prac. Cas. (BNA) at 602.

⁷ *See Meritor*, 477 U.S. at 72, 40 Fair Empl. Prac. Cas. (BNA) at 1829; *see also Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 110, 65 Fair Empl. Prac. Cas. (BNA) 53, 58 (3d Cir. 1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418, 45 Fair Empl. Prac. Cas. (BNA) 608, 617 (10th Cir. 1987), *aff'd on reh'g*, 928 F.2d 966, 973, 59 Fair Empl. Prac. Cas. (BNA) 1787, 1793 (10th Cir. 1991).

⁸ 477 U.S. at 66, 40 Fair Empl. Prac. Cas. (BNA) at 1827.

repeated demands for sexual favors, fondled her in public and forcibly raped her on several occasions.⁹ The employee sought injunctive relief, compensatory damages and punitive damages against both her supervisor and the bank for violations of Title VII.¹⁰ In addressing the employee's claim, the Supreme Court noted that Title VII's language does not limit its application to "economic" or "tangible" discrimination.¹¹ Additionally, the Court observed that the Equal Employment Opportunity Commission ("EEOC") Guidelines fully supported the view that sexual harassment leading to noneconomic injury can violate Title VII.¹² The Court also reasoned that, although the existence of a grievance procedure does not per se insulate an employer from Title VII liability, a grievance procedure that effectively addresses sexual harassment might shield an employer from liability.¹³ Thus, the *Meritor* Court held that employers do not automatically incur liability for the acts of their supervisors that violate Title VII.¹⁴ Moreover, the Supreme Court held that a Title VII hostile work environment sexual harassment claim is sufficient even absent economic injury.¹⁵

In another 1986 decision, *Highlander v. K.F.C. National Management Co.*, the United States Court of Appeals for the Sixth Circuit held that an employer was not liable for a quid pro quo sexual harassment claim because the evidence was insufficient to demonstrate that the plaintiff suffered a tangible job detriment upon rejecting her supervisor's sexual advances.¹⁶ In *Highlander*, an employee invited her supervisor to go out for a drink to discuss the employee's promotion possibilities.¹⁷ The supervisor responded that if the employee wanted to become a co-manager, "there is a motel across the street."¹⁸ When the employer terminated the employee four months later, she subsequently brought this action.¹⁹ The Sixth Circuit reasoned that the plaintiff's suggestion that she and her supervisor meet in a bar induced the alleged harassment that followed.²⁰ Moreover, the court observed

⁹ *Id.* at 60, 40 Fair Empl. Prac. Cas. (BNA) at 1824.

¹⁰ *Id.*

¹¹ *Id.* at 64, 40 Fair Empl. Prac. Cas. (BNA) at 1826.

¹² *Id.* at 65, 40 Fair Empl. Prac. Cas. (BNA) at 1826.

¹³ *Meritor*, 477 U.S. at 72, 40 Fair Empl. Prac. Cas. (BNA) at 1829. The Court determined that the employer's grievance procedure inadequate because it failed to address sexual harassment in particular, and because it required the employee to complain to her supervisor. *Id.* at 72-73, 40 Fair Empl. Prac. Cas. (BNA) at 1829.

¹⁴ *Id.* at 72, 40 Fair Empl. Prac. Cas. (BNA) at 1829.

¹⁵ *Id.* at 64-65, 40 Fair Empl. Prac. Cas. (BNA) at 1826.

¹⁶ See 805 F.2d 644, 649, 42 Fair Empl. Prac. Cas. (BNA) 654, 657-58 (6th Cir. 1986).

¹⁷ *Id.* at 646, 42 Fair Empl. Prac. Cas. (BNA) at 655.

¹⁸ *Id.*

¹⁹ See *id.* at 647, 42 Fair Empl. Prac. Cas. (BNA) at 656.

²⁰ *Id.* at 649, 42 Fair Empl. Prac. Cas. (BNA) at 657.

that statements made by the plaintiff and her husband subsequent to the alleged sexually offensive comment revealed that the plaintiff did not take her supervisor's conduct seriously.²¹ Most importantly, the court noted that the supervisor did not participate in the decision to terminate the plaintiff and the reasons for her termination were unrelated to the alleged sexual harassment.²² Thus, the Sixth Circuit held that a plaintiff could not recover for quid pro quo sexual harassment because she did not suffer a tangible job detriment as a result of her refusal to submit to sexual blackmail.²³

In 1987, in *Hicks v. Gates Rubber Co.*, the United States Court of Appeals for the Tenth Circuit held that to establish a valid quid pro quo sexual harassment claim, the plaintiff's rejection of her supervisor's sexual advances, rather than another factor such as poor job performance, must be the cause of the plaintiff's job detriment.²⁴ In *Hicks*, a female security guard claimed that two of her supervisors sexually harassed her on several occasions.²⁵ During the incidents, her supervisors allegedly touched her breasts, buttocks and thighs and made harassing comments.²⁶ The Tenth Circuit first considered the plaintiff's claim of quid pro quo sexual harassment.²⁷ The court determined that the record failed to show any suggestion that either of the supervisors conditioned the plaintiff's employment on granting sexual favors.²⁸ Additionally, the Tenth Circuit reasoned that the employer discharged the plaintiff because of her poor work performance and not because she refused to submit to her supervisor's sexual advances.²⁹ Thus, the Tenth Circuit held that an employer had no liability for quid pro quo sexual harassment in the absence of a nexus between the employee's refusal to submit to her supervisor's sexual advances and her subsequent termination.³⁰

²¹ *Highlander*, 805 F.2d at 649, 42 Fair Empl. Prac. Cas. (BNA) at 657.

²² *Id.* The employer terminated the plaintiff for her repeated failures to attend work, advise her supervisor of her absences and provide medical verifications to support her frequent absences. *Id.*

²³ See *id.*

²⁴ 833 F.2d 1406, 1414, 45 Fair Empl. Prac. Cas. (BNA) 608, 614 (10th Cir. 1987), *aff'd on reh'g*, 928 F.2d 966, 973, 59 Fair Empl. Prac. Cas. (BNA) 1787, 1793 (10th Cir. 1991). The court also ruled on the plaintiff's claims of racial harassment in violation of 42 U.S.C. § 1981 (1988) and Title VII of the Civil Rights Act of 1964, holding that the employer did not maintain a racially hostile work environment. See *id.* at 1408, 1412-13, 45 Fair Empl. Prac. Cas. (BNA) at 609, 612-13.

²⁵ *Id.* at 1410, 45 Fair Empl. Prac. Cas. (BNA) at 610-11.

²⁶ *Id.* at 1409-10, 45 Fair Empl. Prac. Cas. (BNA) at 610-11.

²⁷ *Id.* at 1413, 45 Fair Empl. Prac. Cas. (BNA) at 613.

²⁸ *Id.* at 1414, 45 Fair Empl. Prac. Cas. (BNA) at 614.

²⁹ *Hicks*, 833 F.2d at 1414, 45 Fair Empl. Prac. Cas. (BNA) at 614.

³⁰ See *id.* The court also addressed a hostile work environment claim. *Id.* The court relied on agency principles in concluding that, on remand, the employer might be liable under Title VII

In 1989, in *Carrero v. New York City Housing Authority*, the United States Court of Appeals for the Second Circuit held that an employee established quid pro quo sexual harassment where her refusal to submit to her supervisor's sexual advances resulted in a tangible job detriment.³¹ In *Carrero*, the plaintiff's supervisor made sexual advances toward her on several occasions despite her resistance and protests.³² As a result of her repeated refusals and complaints, the plaintiff's supervisor criticized her in public and gave her an unsatisfactory rating on her probationary report.³³ Subsequently, the supervisor reassigned the plaintiff to a lesser position.³⁴ The Second Circuit reasoned that the plaintiff established a quid pro quo claim because the plaintiff suffered adverse consequences as a result of her refusal to submit to her supervisor's sexual advances.³⁵ Additionally, the court reasoned that the harassing employee acted as and for the company when inducing the harassed employee to submit to sexual blackmail in return for a job benefit or privilege.³⁶ Accordingly, the court concluded that an employer became strictly liable in a quid pro quo sexual harassment case for its employee's violation of Title VII.³⁷ Thus, the Second Circuit held that the essence of a quid pro quo sexual harassment claim requires that the employer or supervisor condition a tangible job benefit or privilege on an employee's submission to sexual advances and, as a result of the employee's refusal, the employee suffers a tangible job detriment.³⁸

In 1994, in *Bouton v. BMW of North America, Inc.*, the United States Court of Appeals for the Third Circuit held that an employer was not liable for hostile work environment sexual harassment by a supervisory

for hostile work environment sexual harassment. *Id.* at 1418, 45 Fair Empl. Prac. Cas. (BNA) at 617; see RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957). On appeal of the subsequent lower court decision, however, the court never reached the issue of whether the employer was liable under agency principles because the court held that the plaintiff failed to prove her sexual harassment claim. See *Hicks*, 928 F.2d at 973, 59 Fair Empl. Prac. Cas. (BNA) at 1793.

³¹ 890 F.2d 569, 579, 51 Fair Empl. Prac. Cas. (BNA) 596, 603 (2d Cir. 1989). The court also held that the defendant's conduct created a hostile work environment in violation of Title VII. *Id.* at 578, 51 Fair Empl. Prac. Cas. (BNA) at 602-03. The court declined to address the issue of the employer's liability for a hostile work environment because the district court predicated the employer's liability on the quid pro quo violation. *Id.* at 578, 51 Fair Empl. Prac. Cas. (BNA) at 603.

³² *Id.* at 573, 51 Fair Empl. Prac. Cas. (BNA) at 598.

³³ See *id.* at 573-74, 51 Fair Empl. Prac. Cas. (BNA) at 598-99.

³⁴ See *id.* at 574, 51 Fair Empl. Prac. Cas. (BNA) at 599.

³⁵ *Id.* at 579, 51 Fair Empl. Prac. Cas. (BNA) at 603.

³⁶ *Carrero*, 890 F.2d at 579, 51 Fair Empl. Prac. Cas. (BNA) at 603.

³⁷ *Id.*

³⁸ *Id.*

employee because (i) the supervisor lacked actual authority and (ii) the employer responded promptly and effectively to the plaintiff's report of sexual harassment.³⁹ In *Bouton*, an executive secretary claimed that the Vice President of Service at BMW, for whom she worked, sexually harassed her.⁴⁰ The plaintiff also argued that the court should hold BMW liable for her supervisor's Title VII violation because her supervisor had acted within the scope of his employment.⁴¹ The Third Circuit reasoned that, in light of BMW's grievance procedure for sexual harassment complaints, the plaintiff could not have believed that acts of harassment constituted BMW policy and that BMW authorized her supervisor's acts of sexual harassment.⁴² Moreover, the court determined that the employer's grievance procedure worked effectively because BMW took prompt remedial action upon receiving the plaintiff's complaint.⁴³ The Third Circuit reasoned that, under negligence principles, prompt and effective action by an employer will relieve that employer from liability.⁴⁴ Thus, the Third Circuit held that a supervisor's lack of apparent authority and an employer's swift response to a plaintiff's complaint shielded an employer from Title VII liability for hostile work environment sexual harassment.⁴⁵

During the *Survey* year, in *Gary v. Long*, the United States Court of Appeals for the District of Columbia Circuit held that a supervisor's failure to carry out threats of adverse job consequences, along with the absence of actual or apparent authority to execute those threats, shielded an employer from liability for quid pro quo sexual harassment.⁴⁶ In addition, the *Gary* court held that an employer was not liable for hostile work environment sexual harassment where the employer had adopted policies and implemented measures so that the plaintiff either knew or should have known that the employer did not tolerate sexual harassment.⁴⁷ Considering the plaintiff's claim of quid pro quo sexual harassment, the court reasoned that a supervisor must act as the employer's agent when sexually harassing a plaintiff before it will

³⁹ See 29 F.3d 103, 109-10, 65 Fair Empl. Prac. Cas. (BNA) 53, 57-58 (3d Cir. 1994).

⁴⁰ *Id.* at 105, 65 Fair Empl. Prac. Cas. (BNA) at 53-54.

⁴¹ *Id.* at 106, 65 Fair Empl. Prac. Cas. (BNA) at 55.

⁴² See *id.* at 108-09, 65 Fair Empl. Prac. Cas. (BNA) at 56-57.

⁴³ See *id.* at 109-10, 65 Fair Empl. Prac. Cas. (BNA) at 57-58.

⁴⁴ *Bouton*, 29 F.3d at 107, 65 Fair Empl. Prac. Cas. (BNA) at 55; see *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516, 50 Fair Empl. Prac. Cas. (BNA) 877, 886 (9th Cir. 1989); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 903, 54 Fair Empl. Prac. Cas. (BNA) 230, 247 (1st Cir. 1988).

⁴⁵ *Bouton*, 29 F.3d at 110, 65 Fair Empl. Prac. Cas. (BNA) at 58.

⁴⁶ See 59 F.3d 1391, 1396, 68 Fair Empl. Prac. Cas. (BNA) 581, 583-84 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569, 69 Fair Empl. Prac. Cas. (BNA) 1760 (1995).

⁴⁷ *Id.* at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585.

impose liability on the employer under Title VII.⁴⁸ Because the plaintiff's supervisor did not carry out his alleged employment-related threats, the court concluded that the employee did not suffer the tangible job detriment necessary to establish quid pro quo sexual harassment.⁴⁹ Considering the plaintiff's hostile work environment claim, the court reasoned that an employer had no liability for hostile work environment sexual harassment where the plaintiff could not have believed that a supervisor was acting with the color of authority when the sexual harassment occurred.⁵⁰ Consequently, the court concluded that an employer was not liable for a supervisor's hostile work environment sexual harassment when an employer adopted a policy against it and implemented an effective grievance procedure for harassed employees.⁵¹ Thus, the District of Columbia Circuit held that given the existence of an effective grievance procedure and the absence of a tangible job detriment following a supervisor's sexual advances, an employer faces neither quid pro quo nor hostile work environment liability under Title VII.⁵²

In *Gary*, the plaintiff's supervisor at the Washington Metropolitan Area Transit Authority ("WMATA"), James Edward Long ("Long"), allegedly threatened adverse consequences if the plaintiff did not acquiesce to his demands for sexual relations.⁵³ The plaintiff alleged that Long told her he would make her job easier if she would have sexual relations with him.⁵⁴ The defendant allegedly then threatened to terminate the plaintiff and to impose other adverse job consequences if she did not grant his requests.⁵⁵ Additionally, Long allegedly made inappropriate references to the plaintiff's body and indicated that he would have her discharged if she told anybody of these incidents.⁵⁶ In particular, the plaintiff contended that on one occasion Long drove her to a secluded storage facility under the pretext of conducting a construction site inspection and, while driving, fondled her breasts and rubbed her thighs.⁵⁷ Upon arriving at the storage facility, the plaintiff

⁴⁸ *Id.* at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 584.

⁴⁹ *See id.*

⁵⁰ *Id.* at 1397-98, 68 Fair Empl. Prac. Cas. (BNA) at 585.

⁵¹ *Gary*, 59 F.3d at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585. Specifically, the court held that a policy against sexual harassment will shield the employer from liability if it notifies the victimized employee that reporting the conduct to the employer will not result in adverse consequences and that the employer does not tolerate sexual harassment. *See id.*

⁵² *See id.* at 1396, 1398, 68 Fair Empl. Prac. Cas. (BNA) at 584, 585.

⁵³ *Id.* at 1393-94, 68 Fair Empl. Prac. Cas. (BNA) at 582.

⁵⁴ *Id.* at 1393, 68 Fair Empl. Prac. Cas. (BNA) at 582.

⁵⁵ *Id.* at 1393-94, 68 Fair Empl. Prac. Cas. (BNA) at 582.

⁵⁶ *Gary*, 59 F.3d at 1394, 68 Fair Empl. Prac. Cas. (BNA) at 582.

⁵⁷ *Id.*

alleged that Long raped her and threatened adverse consequences if she reported the incident to anyone.⁵⁸ Throughout all of these incidents, the plaintiff insisted that she repeatedly resisted Long's overtures and indicated that they were unwelcome.⁵⁹

On February 14, 1990, the plaintiff reported the alleged sexual harassment by her supervisor to a WMATA counselor and filed a formal grievance.⁶⁰ Upon receipt of the plaintiff's complaint, WMATA conducted a detailed investigation and found no corroborating evidence to support the plaintiff's charges.⁶¹ WMATA reassigned the plaintiff to another facility so that she would no longer have contact with Long.⁶² The plaintiff filed a sexual harassment charge with the EEOC three months later.⁶³ With permission from the EEOC, the plaintiff filed this action against Long and WMATA in the United States District Court for the District of Columbia.⁶⁴

The district court dismissed the plaintiff's Title VII claim against WMATA.⁶⁵ In reaching its conclusion, the district court reasoned that because WMATA took certain action it had therefore protected itself from hostile work environment liability.⁶⁶ The district court concluded that an employer has no liability for a hostile work environment created by a supervisor when: (1) the employer has done nothing to indicate that it sanctions the harassing conduct committed by the supervisor; (2) the employer has a strong policy against sexual harassment and a grievance procedure for complaints about sexually harassing conduct; and (3) the employer takes prompt remedial measures as soon as it becomes aware of the situation.⁶⁷

On appeal, the District of Columbia Circuit affirmed the district court's dismissal of the plaintiff's Title VII claims.⁶⁸ The District of Columbia Circuit looked to *Meritor* in deciding to use the common law principles of agency to address employer liability under Title VII.⁶⁹ Although the court applied agency principles to both the plaintiff's

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Gary*, 59 F.3d at 1394, 68 Fair Empl. Prac. Cas. (BNA) at 582.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Gary*, 59 F.3d at 1394, 68 Fair Empl. Prac. Cas. (BNA) at 582.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1393, 68 Fair Empl. Prac. Cas. (BNA) at 581.

⁶⁹ *Id.* at 1395, 68 Fair Empl. Prac. Cas. (BNA) at 583; *see also* RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957).

quid pro quo claim and her hostile work environment claim, the court addressed the claims separately in its opinion.⁷⁰

First, the court addressed the plaintiff's claim of quid pro quo sexual harassment.⁷¹ The defendant had argued that the quid pro quo claim was groundless because the plaintiff's supervisor lacked the authority to fire or suspend the plaintiff.⁷² The court did not address this argument, however, because it ultimately held that the supervisor's failure to execute threats of adverse job consequences was dispositive.⁷³ In reaching its holding, the court relied on the *Carrero* position that the essence of a quid pro quo claim involves the conditioning of a tangible job benefit on an employee's submission to sexual blackmail in conjunction with the requirement that the employee suffer adverse consequences for refusing her supervisor's advances.⁷⁴ The court noted that the supervisor must use his authority to subject the plaintiff to a job detriment.⁷⁵ It is fair to hold the employer liable in that situation, the court reasoned, because inflicting a tangible job detriment on the plaintiff serves as evidence that the supervisor acted as the employer's agent.⁷⁶ Thus, the court held that the WMATA was not liable for quid pro quo sexual harassment under Title VII because the plaintiff did not suffer adverse job consequences.⁷⁷

Turning to the plaintiff's claim of hostile work environment sexual harassment, the court determined that the supervisor's alleged conduct created a hostile work environment.⁷⁸ Nevertheless, the District of Columbia Circuit agreed with the district court and held that the employer was not liable for the employee's exposure to that hostile work environment.⁷⁹ In reaching its holding of no employer liability in this case, the court used the requirements established by the district court along with common law principles of agency.⁸⁰ The court cited the general rule that a master has no liability for the torts of its servants acting outside the scope of their employment.⁸¹ The court noted, however, that an exception to this rule provides that a master may incur

⁷⁰ Gary, 59 F.3d at 1395-96, 68 Fair Empl. Prac. Cas. (BNA) at 583-84.

⁷¹ *Id.* at 1395, 68 Fair Empl. Prac. Cas. (BNA) at 583.

⁷² *Id.* at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 583.

⁷³ *Id.* at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 584.

⁷⁴ *Id.* at 1395, 68 Fair Empl. Prac. Cas. (BNA) at 583.

⁷⁵ Gary, 59 F.3d at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 584.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1397, 68 Fair Empl. Prac. Cas. (BNA) at 584.

⁷⁹ *Id.* at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585.

⁸⁰ See Gary, 59 F.3d at 1394, 1397-98, 68 Fair Empl. Prac. Cas. (BNA) at 582, 585-86.

⁸¹ *Id.* at 1397, 68 Fair Empl. Prac. Cas. (BNA) at 584.

liability for such acts if the existence of the agency relationship aided the servant in accomplishing the tort.⁸²

The *Gary* court reasoned that the agency relationship always aids supervisors in accomplishing torts because their responsibilities at work afford them regular contact with the victims.⁸³ For this reason, the court observed that a better interpretation of the common law exception would predicate liability on whether the agent's position facilitates the sexual harassment because the agent appears to be acting in the ordinary course of business.⁸⁴ The court reasoned that the plaintiff in *Gary* could not have believed that Long acted within the scope of his authority when he sexually harassed her.⁸⁵ The plaintiff admitted that she knew WMATA had an active policy against sexual harassment and an adequate grievance procedure for filing complaints.⁸⁶ Accordingly, the court concluded that the plaintiff should have known that her employer did not tolerate sexual harassment by any of its employees.⁸⁷ Based on this reasoning, the court further concluded that agency principles could not serve as a premise for WMATA's liability.⁸⁸ Thus, the *Gary* court held that an employer has no liability for a supervisor's hostile work environment sexual harassment when the employer has adopted a policy against it and implemented effective grievance procedures so that the employee either knew or should have known that the employer did not tolerate sexual harassment.⁸⁹

The court's holdings in *Gary* make two significant contributions to sexual harassment law. First, the *Gary* court further clarifies the standard for employer liability for quid pro quo sexual harassment.⁹⁰ Second, the *Gary* court leans away from protecting victims' rights and instead sides with employers by allowing employers to insulate themselves from hostile work environment liability by instituting an effective sexual harassment policy and grievance procedures.⁹¹

⁸² *Id.* at 1397, 68 Fair Empl. Prac. Cas. (BNA) at 584-85.

⁸³ *Id.* at 1397, 68 Fair Empl. Prac. Cas. (BNA) at 585.

⁸⁴ *See id.*

⁸⁵ *Gary*, 59 F.3d at 1397-98, 68 Fair Empl. Prac. Cas. (BNA) at 585.

⁸⁶ *Id.* at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585. The court noted that WMATA's grievance procedure was thorough, immediate and effective, so that it encouraged sexual harassment victims to come forward. *See id.* at 1398-99, 68 Fair Empl. Prac. Cas. (BNA) at 586; *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73, 40 Fair Empl. Prac. Cas. (BNA) 1822, 1829 (1986).

⁸⁷ *See Gary*, 59 F.3d at 1397-98, 68 Fair Empl. Prac. Cas. (BNA) at 585.

⁸⁸ *See id.*

⁸⁹ *Id.* at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585.

⁹⁰ *See id.* at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 583-84.

⁹¹ *Id.* at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585.

The court's quid pro quo holding intensifies an already existing obstacle for sexual harassment victims.⁹² In many cases, plaintiffs will have difficulty showing that they suffered a tangible job detriment for rebuffing an employer or supervisor's sexual advances absent economic injury.⁹³ Additionally, in some instances employees never suffer a job detriment simply because they feared the supervisors' threats to such an extent that they gave in to their sexual blackmail.

Nevertheless, although *Gary's* quid pro quo holding is displeasing for sexual harassment victims, employers will appreciate the consistent and clear standard *Gary* establishes for quid pro quo sexual harassment.⁹⁴ The District of Columbia Circuit, by adopting the quid pro quo standard found in the Second, Sixth and Tenth Circuits, will increase fairness through greater consistency in sexual harassment verdicts where the plaintiff brings a quid pro quo claim. Furthermore, holding an employer liable only when the employee has suffered a tangible job detriment is inherently fair because, under those circumstances, the harassing employee acted as the employer's agent.⁹⁵

In the realm of the hostile work environment claim, the District of Columbia Circuit took another step toward protecting employers' rights by holding that an employer shielded itself from liability when it instituted an active policy against sexual harassment.⁹⁶ Although the Supreme Court in *Meritor* held that the existence of a grievance procedure does not per se insulate an employer from Title VII liability, the Court's holding remained ambiguous by implying that the existence of a more effective grievance procedure might have such an effect.⁹⁷ The *Gary* decision follows a judicial trend endorsing the notion that effective grievance procedures insulate employers from liability.⁹⁸

Although the *Gary* decision emphasizes the existence of the employer's harassment policy, it minimizes the importance of the employer's specific response to the victim's complaint.⁹⁹ The sparse discus-

⁹² See *Gary*, 59 F.3d at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 583-84.

⁹³ *Id.* at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 584.

⁹⁴ Compare *id.* at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 583-84 (basing finding of quid pro quo sexual harassment on a clear standard) with *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 649, 42 Fair Empl. Prac. Cas. (BNA) 654, 657 (6th Cir. 1986) (basing finding of quid pro quo sexual harassment on specific facts).

⁹⁵ See *Gary*, 59 F.3d at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 584.

⁹⁶ See *id.* at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585.

⁹⁷ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72-73, 40 Fair Empl. Prac. Cas. (BNA) 1822, 1829 (1986).

⁹⁸ See *Gary*, 59 F.3d at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585; *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 3, 7-9, 65 Fair Empl. Prac. Cas. (BNA) 53, 55-56 (3d Cir. 1994).

⁹⁹ See *Gary*, 59 F.3d at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585.

sion of the effectiveness of the grievance procedure in *Gary* diminishes the importance of this feature and suggests that the law is moving away from victims' rights.¹⁰⁰ The *Gary* court's failure to engage in an analysis of the effectiveness of the employer's response to the plaintiff's complaint suggests that the mere institution of a sexual harassment policy and grievance procedures will now insulate an employer from hostile work environment liability.¹⁰¹ For example, the *Gary* court does not consider the timeliness of WMATA's response to the employee's grievance when deciding on the employer's legal liability.¹⁰² As a result, the *Gary* court moves toward leaving sexual harassment victims without an avenue of relief from their employer—either in the workplace or in the courtroom.

In summary, the District of Columbia Circuit in *Gary* held that an employer's liability for quid pro quo sexual harassment depends on the employee suffering a tangible job detriment.¹⁰³ The court also held that an employer shielded itself from liability for hostile work environment sexual harassment if it formally discouraged sexual harassment in the workplace and implemented measures to deal with sexual harassment if it does occur.¹⁰⁴ *Gary* establishes clear standards for employer liability for quid pro quo and hostile work environment sexual harassment in violation of Title VII.¹⁰⁵ These standards, however, are created at victims' expense, making it increasingly difficult for employees to recover from their employers for sexual harassment.¹⁰⁶

**Fourth Circuit Adopts an Objective Standard for Determining
Constructive Discharge in Sexual Harassment Cases: Martin v. Cavalier
Hotel Corp.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 Sexual harassment constitutes discrimination on the basis of sex and is therefore a violation of Title

¹⁰⁰ See *id.* at 1398–99, 68 Fair Empl. Prac. Cas. (BNA) at 585–86. But see *Bouton*, 29 F.3d at 107–09, 65 Fair Empl. Prac. Cas. (BNA) at 54–56.

¹⁰¹ See *Gary*, 59 F.3d at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585.

¹⁰² Cf. *Bouton*, 29 F.3d at 108 (noting that prompt remediation by employer will absolve it from liability).

¹⁰³ *Gary*, 59 F.3d at 1396, 68 Fair Empl. Prac. Cas. (BNA) at 584.

¹⁰⁴ *Id.* at 1398, 68 Fair Empl. Prac. Cas. (BNA) at 585–86.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

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¹ 48 F.3d 1343, 67 Fair Empl. Prac. Cas. (BNA) 300 (4th Cir. 1995).

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

VII.⁵ Plaintiffs may demonstrate an actionable violation of Title VII if their employer has constructively discharged them by requiring them to work in an environment in which they are sexually harassed.⁴ The federal courts of appeals are divided as to what a plaintiff must show in order to establish constructive discharge.⁵ The majority of the circuits rely on an objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign.⁶ The minority view requires that a plaintiff also establish that "the actions complained of were intended by the employer as an effort to force the employee to quit."⁷

In 1972, in *J.P. Stevens & Co. v. NLRB*, the United States Court of Appeals for the Fourth Circuit held that an employer who had deliberately made an employee's working conditions intolerable, thus forcing the employee to resign, had constructively discharged the employee in violation of the National Labor Relations Act ("NLRA").⁸ In *Stevens*, the plaintiff-employee, who was a union supporter, complained that her employer's new system of compensation, based on quantity of goods produced rather than hours worked, made it impossible for her to earn the minimum wage, much less her previous hourly wage.⁹ The Fourth Circuit stated that when an employer deliberately makes an employee's working conditions intolerable and thereby forces the employee to resign, the employer has constructively discharged the employee.¹⁰ The Fourth Circuit noted that although the compensation system enabled other employees to make in excess of the plaintiff's hourly wage, the plaintiff's job was unique.¹¹ Because the system affected only the plaintiff, the court reasoned that the employer was

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 See *Martin*, 48 F.3d at 1348, 67 Fair Empl. Prac. Cas. (BNA) at 301.

⁴ See *id.*

⁵ *Id.* at 1354, 67 Fair Empl. Prac. Cas. (BNA) at 307; Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 561-63 (1986).

⁶ *Martin*, 48 F.3d at 1354, 67 Fair Empl. Prac. Cas. (BNA) at 307.

⁷ *Paroline v. Unisys Corp.*, 879 F.2d 100, 114, 50 Fair Empl. Prac. Cas. (BNA) 306, 318 (4th Cir. 1989) (Wilkinson, J., dissenting) (internal quotations omitted), *vacated and remanded en banc*, 900 F.2d 27, 52 Fair Empl. Prac. Cas. (BNA) 845 (4th Cir. 1990) (adopting dissenting opinion).

⁸ 461 F.2d 490, 494, 80 L.R.R.M. 2609, 2612 (4th Cir. 1972).

⁹ *Id.* at 494, 80 L.R.R.M. at 2611-12.

¹⁰ *Id.* at 494, 80 L.R.R.M. at 2612.

¹¹ See *id.* at 494-95, 80 L.R.R.M. at 2612.

targeting the plaintiff with the intent of forcing her out of her job because of her union support.¹² The Fourth Circuit held, therefore, that because the employee was forced to switch to a much lower compensation schedule the employee had been constructively discharged in violation of the NLRA.¹³

In 1981, in *Johnson v. Bunny Bread Co.*, the United States Court of Appeals for the Eighth Circuit held that because an employer's treatment of an employee did not differ from its treatment of other employees the employer had not constructively discharged the employee in violation of Title VII.¹⁴ In *Johnson*, two employees charged that their employer had discriminated against them on the basis of their color by subjecting them to a strict work environment that caused their constructive discharge.¹⁵ The Eighth Circuit stated that constructive discharge arises when an employer creates an intolerable work environment, thereby forcing the employee out of the job.¹⁶ Furthermore, the court noted that the employee must show that his employer's actions were taken with the intent of forcing the employee to quit.¹⁷ The court observed that an employee may not be unreasonably sensitive to his or her working environment.¹⁸ The Eighth Circuit reasoned that because the defendant company treated all of its employees strictly, the company could not have been handling the plaintiffs with the intention of forcing them to resign; such treatment, the court reasoned, would have resulted in the conclusion that the company had been handling *all* of its employees with the intention of forcing them to resign.¹⁹ The Eighth Circuit thus held that the employer had not constructively discharged the plaintiffs where the plaintiffs were treated no differently than other employees.²⁰

In 1985, in *Bristow v. Daily Press, Inc.*, the United States Court of Appeals for the Fourth Circuit held that an employee whose only reasons for resigning were everyday problems and tensions encountered on the job was not constructively discharged in violation of the Age Discrimination in Employment Act ("ADEA").²¹ In *Bristow*, a su-

¹² *Id.*

¹³ *Stevens*, 461 F.2d at 494, 80 L.R.R.M. at 2612.

¹⁴ 646 F.2d 1250, 1256, 25 Fair Empl. Prac. Cas. (BNA) 1326, 1331 (8th Cir. 1981).

¹⁵ *Id.* at 1252, 1254-56, 25 Fair Empl. Prac. Cas. (BNA) at 1327, 1329-31.

¹⁶ *Id.* at 1256, 25 Fair Empl. Prac. Cas. (BNA) at 1331.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Johnson*, 646 F.2d at 1256, 25 Fair Empl. Prac. Cas. (BNA) at 1331.

²⁰ *Id.*

²¹ 770 F.2d 1251, 1254, 38 Fair Empl. Prac. Cas. (BNA) 1145, 1147 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 40 Fair Empl. Prac. Cas. (BNA) 608 (1986).

pervisor of newspaper carriers resigned after encountering difficulties managing his assigned area.²² The Fourth Circuit, citing the *Stevens* and *Johnson* decisions, stated that in order to prove constructive discharge, an employee must demonstrate two elements: deliberateness of the employer's actions and intolerability of the working conditions.²³ The Fourth Circuit reasoned that deliberateness exists only if the employer intentionally acts to force the employee to quit.²⁴ In order to demonstrate such intent, the Fourth Circuit noted that the plaintiff may point to circumstantial evidence of employer's wrongful intent.²⁵ The Fourth Circuit stated that intolerability is evaluated by the objective standard of whether a "reasonable person" in the employee's position would feel compelled to resign.²⁶ The Fourth Circuit held that because there was no deliberate behavior on the part of the plaintiff's superiors and there was nothing done to the plaintiff that would lead a reasonable person to quit, the plaintiff had not been constructively discharged.²⁷

In 1989, in *Paroline v. Unisys Corp.*, an en banc panel of the United States Court of Appeals for the Fourth Circuit held that because an employer had disciplined a supervisor accused of sexual harassment as the plaintiff requested, asked the plaintiff not to quit, gave the plaintiff time off to recuperate and offered counseling to the plaintiff, the employee had not been constructively discharged.²⁸ In *Paroline*, the plaintiff alleged that her supervisor made unwelcome sexual advances toward her.²⁹ The specific disciplinary action implemented by the employer at the request of the plaintiff had the net result of *increasing* the workplace interaction between the plaintiff and the offending supervisor.³⁰ The plaintiff claimed that this increased interaction caused an intolerable work environment and thus led to her constructive discharge.³¹ Noting that there may be circumstances in which an em-

²² *Id.* at 1253-54, 38 Fair Empl. Prac. Cas. (BNA) at 1145-46.

²³ *Id.* at 1255, 38 Fair Empl. Prac. Cas. (BNA) at 1147.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Bristow*, 770 F.2d at 1255, 38 Fair Empl. Prac. Cas. (BNA) at 1147.

²⁷ *Id.* at 1256, 38 Fair Empl. Prac. Cas. (BNA) at 1148.

²⁸ 900 F.2d 27, 52 Fair Empl. Prac. Cas. (BNA) 845 (4th Cir. 1990) (en banc) (adopting dissenting opinion of Judge Wilkinson in *Paroline v. Unisys Corp.*, 879 F.2d 100, 113-15, 50 Fair Empl. Prac. Cas. (BNA) 306, 318-19 (4th Cir. 1989)). The defendant had been granted an en banc panel hearing after which the panel adopted Judge Wilkinson's dissenting opinion as reported in *Paroline*, 879 F.2d at 113-15, 50 Fair Empl. Prac. Cas. (BNA) at 318-19.

²⁹ 879 F.2d at 103, 50 Fair Empl. Prac. Cas. (BNA) at 309.

³⁰ *Id.* at 114, 50 Fair Empl. Prac. Cas. (BNA) at 318-19 (Wilkinson, J., dissenting).

³¹ *Id.* at 114, 50 Fair Empl. Prac. Cas. (BNA) at 319 (Wilkinson, J., dissenting).

ployer's actions create an inference that the employer is attempting to force the employee to resign, the Fourth Circuit stated that this was not such a situation.³² The court reasoned that the company's attempts to ameliorate the situation evinced the company's desire to keep the plaintiff on the job rather than a desire to force her to quit.³³ Citing the *Bristow* requirements of deliberateness and intolerability, the court concluded that because the company's actions were taken at the direct request of the plaintiff, the company had not demonstrated any intent to force the plaintiff to leave.³⁴ Thus, the court held that the company failed to exhibit the deliberateness necessary for a constructive discharge and had not discriminated against the employee.³⁵

In 1993, in *Hukkanen v. International Union of Operating Engineers Local No. 101*, the United States Court of Appeals for the Eighth Circuit held that because an employee's resignation was a reasonably foreseeable consequence of her supervisor's discriminatory actions, her employer was liable for the supervisor's sexual harassment.³⁶ In *Hukkanen*, the plaintiff alleged that she resigned as a result of her supervisor subjecting her to unwelcome and lewd advances as well as a gun-enforced threat of rape.³⁷ The company contended that because the supervisor wanted to keep the plaintiff on the job for his own perverse pleasure, he did not consciously intend to force her to quit as required by *Johnson*.³⁸

The Eighth Circuit rejected the defendant's contention, reasoning that the plaintiff's resignation was a reasonably foreseeable consequence of her supervisor's actions.³⁹ The court reasoned, therefore, that the supervisor's actions were necessarily taken with the intention of forcing the plaintiff to resign.⁴⁰ The Eighth Circuit concluded, therefore, that the employee was constructively discharged because her resignation was a reasonably foreseeable outcome of the supervisor's actions.⁴¹

³² *Id.* at 114, 50 Fair Empl. Prac. Cas. (BNA) at 318 (Wilkinson, J., dissenting). Judge Wilkinson noted that the employer's actions were premised on the request of the plaintiff and that the plaintiff failed to give the remedies the opportunity to work. *Id.* (Wilkinson, J., dissenting).

³³ *Id.* at 114-15, 50 Fair Empl. Prac. Cas. (BNA) at 318-19 (Wilkinson, J., dissenting).

³⁴ *Paroline*, 879 F.2d at 115, 50 Fair Empl. Prac. Cas. (BNA) at 318 (Wilkinson, J., dissenting).

³⁵ *Id.* (Wilkinson, J., dissenting).

³⁶ 3 F.3d 281, 285, 62 Fair Empl. Prac. Cas. (BNA) 1125, 1127 (8th Cir. 1993).

³⁷ *Id.* at 284, 62 Fair Empl. Prac. Cas. (BNA) at 1126.

³⁸ *Id.* at 284, 62 Fair Empl. Prac. Cas. (BNA) at 1127. The Eighth Circuit labeled this contention "bizarre." *Id.*

³⁹ *Id.* at 284-85, 62 Fair Empl. Prac. Cas. (BNA) at 1127.

⁴⁰ *Id.* at 285, 62 Fair Empl. Prac. Cas. (BNA) at 1127.

⁴¹ *Hukkanen*, 3 F.3d at 285, 62 Fair Empl. Prac. Cas. (BNA) at 1127-28.

During the *Survey* year, in *Martin v. Cavalier Hotel Corp.*, the United States Court of Appeals for the Fourth Circuit held that an employer had constructively discharged an employee because the employer had made the employee's working conditions intolerable and the employee's resignation was a reasonably foreseeable consequence of the intolerable conditions created by her employer's conduct.⁴² In *Martin*, an employee alleged that she resigned after repeated sexual harassment by her supervisor.⁴³ The Fourth Circuit reasoned that the plaintiff's resignation was a reasonably foreseeable consequence of the supervisor's actions.⁴⁴ The Fourth Circuit held, therefore, that the employee had been constructively discharged.⁴⁵

The plaintiff in *Martin*, Rosemary Martin, charged her employer and its general manager, Daniel Batchelor, with sexual harassment and constructive discharge in violation of Title VII.⁴⁶ As general manager, Batchelor was Martin's direct supervisor and had the authority to determine employee bonuses and to hire, fire, promote and discipline hotel employees.⁴⁷ Martin testified that Batchelor had sexually harassed her on numerous occasions.⁴⁸ In May 1992, Martin decided that she could no longer continue in her job because of the sexual advances and resigned.⁴⁹

Citing *Bristow* and *Paroline*, the Fourth Circuit observed that in order to sustain a finding of constructive discharge a plaintiff must show that the employer's actions created an intolerable work environment deliberately intended to force the employee to resign.⁵⁰ The Fourth Circuit noted that the defendant did not dispute that working conditions were intolerable.⁵¹ Rather, the court stated that the defen-

⁴² 48 F.3d 1343, 1354-55, 67 Fair Empl. Prac. Cas. (BNA) 300, 306-08 (4th Cir. 1995). In *Martin*, the Fourth Circuit also ruled that under the circumstances, the defendant company was responsible for its general manager's actions. *Id.* at 1353, 67 Fair Empl. Prac. Cas. (BNA) at 306. The Fourth Circuit reasoned that because the supervisor's assaults took place in the workplace, during working hours and on an employee whom he had authority to hire, fire and discipline, the supervisor was acting within the scope of his employment and the company was liable. *Id.* at 1352, 67 Fair Empl. Prac. Cas. (BNA) at 305. The court further reasoned that even if the supervisor were not acting within the scope of his employment, he was using the apparent authority of his position to accomplish the wrongful acts. *Id.* Thus, the Fourth Circuit held that the company was responsible for the supervisor's actions. *Id.* at 1353, 67 Fair Empl. Prac. Cas. (BNA) at 306.

⁴³ *Id.* at 1349, 67 Fair Empl. Prac. Cas. (BNA) at 302-03.

⁴⁴ *Id.* at 1355, 67 Fair Empl. Prac. Cas. (BNA) at 308.

⁴⁵ *Id.* at 1355-56, 67 Fair Empl. Prac. Cas. (BNA) at 307-09.

⁴⁶ *Id.* at 1348, 67 Fair Empl. Prac. Cas. (BNA) at 301.

⁴⁷ *Martin*, 48 F.3d at 1348, 67 Fair Empl. Prac. Cas. (BNA) at 302.

⁴⁸ *Id.* at 1349, 67 Fair Empl. Prac. Cas. (BNA) at 302.

⁴⁹ *Id.* at 1349, 67 Fair Empl. Prac. Cas. (BNA) at 303.

⁵⁰ *Id.* at 1353-54, 67 Fair Empl. Prac. Cas. (BNA) at 306.

⁵¹ *Id.* at 1354, 67 Fair Empl. Prac. Cas. (BNA) at 307.

dant contended that the supervisor did not intend to force the employee to resign and thus the plaintiff failed to meet the deliberateness criterion.⁵² Citing the *Hukkanen* decision, the Fourth Circuit rejected the defendant's contention and reasoned that constructive discharge plaintiffs need not prove their employers consciously intended to force them to quit.⁵³ The Fourth Circuit held that in determining the deliberateness of an employer's actions, an employer is held to have intended to force an employee to quit when such an outcome is the reasonably foreseeable consequence of its actions.⁵⁴ The Fourth Circuit concluded that the plaintiff's resignation was a reasonably foreseeable outcome of her supervisor's continual sexual harassment.⁵⁵ The Fourth Circuit held, therefore, that the employer had constructively discharged the plaintiff.⁵⁶

Prior to *Martin*, a clear distinction could be drawn between the majority definition of constructive discharge requiring an objective finding that a reasonable person would have felt compelled to resign and the minority definition which also required that the employer deliberately intend to force the employee out of his or her job.⁵⁷ The Fourth Circuit's adoption of a "reasonably foreseeable consequence" standard is a move away from an examination of the subjective, conscious intent of the employer and towards an objective standard for determining constructive discharge.⁵⁸ Such a move blurs the distinction between the minority and majority criteria for establishing a constructive discharge and eases the burden on the plaintiff to show constructive discharge.

In its first articulation of the elements of constructive discharge, the Fourth Circuit stated that a plaintiff must show that the employer deliberately made the plaintiff's working conditions intolerable.⁵⁹ This requires an examination of the subjective intent of a particular defendant.⁶⁰ In *Paroline* and *Bristow*, the Fourth Circuit moved toward an objective standard by stating that intent can be inferred through circumstantial evidence.⁶¹ In *Martin*, the Fourth Circuit takes the next

⁵² *Martin*, 48 F.3d at 1354, 67 Fair Empl. Prac. Cas. (BNA) at 307.

⁵³ *Id.* at 1355, 67 Fair Empl. Prac. Cas. (BNA) at 307-08.

⁵⁴ *Id.* at 1355, 67 Fair Empl. Prac. Cas. (BNA) at 307.

⁵⁵ *Id.* at 1355, 67 Fair Empl. Prac. Cas. (BNA) at 308.

⁵⁶ *Id.* at 1355-56, 67 Fair Empl. Prac. Cas. (BNA) at 308-09.

⁵⁷ *Martin*, 48 F.3d at 1354, 67 Fair Empl. Prac. Cas. (BNA) at 307.

⁵⁸ *See id.*

⁵⁹ *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494, 80 L.R.R.M. 2609, 2612 (4th Cir. 1972).

⁶⁰ *See id.*

⁶¹ *See Paroline v. Unisys Corp.*, 879 F.2d 100, 114, 50 Fair Empl. Prac. Cas. (BNA) 306, 318 (4th Cir. 1989) (Wilkinson, J., dissenting), *vacated and remanded en banc*, 900 F.2d 27, 52 Fair Empl. Prac. Cas. (BNA) 845 (4th Cir. 1990) (adopting dissenting opinion); *Bristow v. Daily Press*,

step. Rather than look at the subjective intent of the defendant, the court examines the reasonably foreseeable consequences of the defendant's actions.⁶² The Fourth Circuit reasoned that if the outcome was reasonably foreseeable, it must have been the defendant's intent to create that outcome.⁶³ This standard is purely objective, relying as it does on the outcome being "reasonably foreseeable."⁶⁴

Under the majority interpretation, the plaintiff must demonstrate that a reasonable person would feel compelled to resign.⁶⁵ Before *Martin*, plaintiffs in the Fourth Circuit also had to prove, either directly or through circumstantial evidence, that the defendant had the subjective intent to force the employee to quit.⁶⁶ After *Martin*, the plaintiff has only to show that the outcome of the defendant's actions is one that the defendant should have reasonably foreseen.⁶⁷ Such proof is easier to establish than the subjective intent of a particular defendant and brings the Fourth Circuit in line with the objective standard of the majority of jurisdictions.

In summary, the Fourth Circuit in *Martin* held that where an employee is sexually harassed by an employer, the employee need not demonstrate conscious intent of the employer in order to establish constructive discharge.⁶⁸ Rather, the plaintiff need merely show that the results of the employer's actions were reasonably foreseeable.⁶⁹ This is a lower threshold that moves the Fourth Circuit closer to the majority view and renders constructive discharge easier to prove.

**Rejecting Preferential Treatment for Pregnant Women Under the PDA:
Armstrong v. Flowers Hospital, Inc.¹*

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in employment on the basis of race, color, sex, religion, or national origin.² In 1978, Congress amended Title VII by enacting

Inc., 770 F.2d 1251, 1255, 38 Fair Empl. Prac. Cas. (BNA) 1145, 1147 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 40 Fair Empl. Prac. Cas. (BNA) 608 (1986).

⁶² *Martin*, 48 F.3d at 1356, 67 Fair Empl. Prac. Cas. (BNA) at 309.

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See id.* at 1354, 67 Fair Empl. Prac. Cas. (BNA) at 307.

⁶⁶ *See Bristow*, 770 F.2d at 1255, 38 Fair Empl. Prac. Cas. (BNA) at 1147.

⁶⁷ *See Martin*, 48 F.3d at 1355-56, 67 Fair Empl. Prac. Cas. (BNA) at 308-09.

⁶⁸ *See id.* at 1355-56, 67 Fair Empl. Prac. Cas. (BNA) at 307-09.

⁶⁹ *See id.*

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¹ *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 65 Fair Empl. Prac. Cas. (BNA) 1742 (11th Cir. 1994).

² 42 U.S.C. §§ 2000e-e-17 (1988 & Supp. V 1993). The statute reads, in relevant part:

the Pregnancy Discrimination Act ("PDA"), which brought discrimination based upon an employee's pregnancy or ability to get pregnant within the scope of actionable offenses under Title VII.³ The PDA does not create new substantive law; instead, it simply elevates the potential for being pregnant to a status afforded protection under Title VII's prohibition against sex discrimination.⁴ In applying the PDA, the courts have used the same analysis as that applied in other sex discrimination cases.⁵

In 1987, in *California Federal Savings & Loan Ass'n v. Guerra*, the United States Supreme Court held that Title VII, as amended by the PDA, did not preempt a state statute that required employers to provide unpaid leave and reinstatement to pregnant employees.⁶ In *Guerra*, a trade association of employers and an organization of state businesses sought a declaration that a California statute requiring preferential treatment for pregnant women was inconsistent with and preempted by the PDA.⁷ The Court reasoned that Congress intended the PDA only to remedy discrimination against pregnant women and did not address the issue of preferential treatment in state statutes.⁸ The Court stated that the legislative record of the PDA was almost devoid of discussion of preferential treatment for pregnant women.⁹ Relying on this legislative record, the Court determined that Congress did not intend to preempt state statutes that provided preferential treatment for preg-

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.

42 U.S.C. § 2000e-2(a) (1988).

³ 42 U.S.C. § 2000e(k) (1988). Section 2000e(k) states:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

Id.

⁴ *Armstrong*, 33 F.3d at 1312, 65 Fair Empl. Prac. Cas. (BNA) at 1746.

⁵ See, e.g., *Maddox v. Grandview Care Ctr., Inc.*, 780 F.2d 987, 989, 39 Fair Empl. Prac. Cas. (BNA) 1456, 1457-58 (11th Cir. 1986).

⁶ 479 U.S. 272, 292, 42 Fair Empl. Prac. Cas. (BNA) 1073, 1081 (1987).

⁷ *Id.* at 278 & n.8, 279, 42 Fair Empl. Prac. Cas. (BNA) at 1076 & n.8.

⁸ *Id.* at 285-86, 42 Fair Empl. Prac. Cas. (BNA) at 1079.

⁹ *Id.* at 286, 42 Fair Empl. Prac. Cas. (BNA) at 1079.

nant women unless the statutes were inconsistent with Title VII or required or permitted actions that were unlawful under Title VII.¹⁰ The Court, therefore, concluded that the preferential treatment provided by the California statute, requiring employers to provide unpaid leave and reinstatement to pregnant employees, was not inconsistent with the purpose of the PDA and was not preempted by Title VII.¹¹

In 1987, in *Carney v. Martin Luther Home, Inc.*, the United States Court of Appeals for the Eighth Circuit held that placing an employee on mandatory leave for pregnancy-related conditions that do not interfere with the employee's ability to do the job was actionable as sex discrimination under Title VII and the PDA.¹² The plaintiff in *Carney* was placed on mandatory pregnancy leave because her doctor recommended that she not engage in heavy lifting.¹³ The court reasoned that the inability to engage in heavy lifting was a pregnancy-related condition and, as such, the employer's treatment of the plaintiff regarding this condition was included within the scope of the PDA.¹⁴ The court held, therefore, that an employer could not place a pregnant employee on leave for a condition related to pregnancy unless the employer could show that most women with the same condition would not be able to safely perform the duties of their jobs.¹⁵

In 1991, in *International Union, UAW v. Johnson Controls, Inc.*, the United States Supreme Court held that an employer could not exclude a fertile female employee from certain jobs because of the employer's concern for the health of the fetus the woman might conceive.¹⁶ In *Johnson Controls*, a class of male and female employees challenged as sex discrimination an employer's fetal protection policy.¹⁷ This policy prevented women from working in areas of battery manufacturing that had high lead exposure unless the women could medically document that they were infertile.¹⁸ The Court reasoned that the employer's policy was facially discriminatory and could only be defended as a bona

¹⁰ *Id.* at 287-88, 290 n.29, 42 Fair Empl. Prac. Cas. (BNA) at 1080, 1081 n.29.

¹¹ 479 U.S. 272, 292, 42 Fair Empl. Prac. Cas. (BNA) 1073, 1081 (1987).

¹² 824 F.2d 643, 648, 44 Fair Empl. Prac. Cas. (BNA) 683, 687-88 (8th Cir. 1987).

¹³ *Id.* at 644, 44 Fair Empl. Prac. Cas. (BNA) at 684.

¹⁴ *Id.* at 647, 648, 44 Fair Empl. Prac. Cas. (BNA) at 687, 688. The employer could have defended its action if it had been able to establish a bona fide occupational qualification ("BFOQ") that plaintiff was unable to meet during her pregnancy. *Id.* at 648, 44 Fair Empl. Prac. Cas. (BNA) at 688. Defendant admitted, however, that plaintiff could have performed her job without difficulty after she was placed on leave, so the defendant did not meet its burden in establishing this defense. *Id.*

¹⁵ *See id.* at 649, 44 Fair Empl. Prac. Cas. (BNA) at 688.

¹⁶ 499 U.S. 187, 206, 55 Fair Empl. Prac. Cas. (BNA) 365, 374 (1991).

¹⁷ *Id.* at 191, 55 Fair Empl. Prac. Cas. (BNA) at 368.

¹⁸ *Id.* at 191-92, 55 Fair Empl. Prac. Cas. (BNA) at 368.

fide occupational qualification ("BFOQ").¹⁹ The Court then determined that fetal protection did not affect an employee's ability to perform the job and, therefore, did not fall within the safety to third persons exception to the BFOQ.²⁰ The Court, instead, stated that the decision to work in a position entailing risk to a potential fetus must be left to the woman.²¹ The *Johnson Controls* Court concluded that a company's exclusion of fertile females from jobs that may risk the health of fetuses that the women might conceive deprived women of the right to decide whether to work at jobs that they are capable of performing, and, therefore, violates Title VII and the PDA.²²

In 1994, in *Troupe v. May Department Stores Co.*, the United States Court of Appeals for the Seventh Circuit held that the PDA does not require an employer to allow a pregnant employee with morning sickness to be tardy if the employer does not allow employees with similar health problems to be tardy.²³ The defendant in *Troupe* dismissed the plaintiff one day before her maternity leave was to begin.²⁴ The defendant stated that the reason for dismissal was tardiness.²⁵ The Seventh Circuit affirmed the judgment for the defendant, reasoning that allowing pregnant women to be late because of morning sickness while not extending the same rights to other employees amounted to preferential treatment not required by the PDA.²⁶ The Seventh Circuit, therefore, concluded that an employer is not required to ignore tardiness related to pregnancy if the employer does not ignore tardiness for nonpregnant employees.²⁷

During the *Survey* year, in *Armstrong v. Flowers Hospital, Inc.*, the United States Court of Appeals for the Eleventh Circuit held that the PDA does not require an employer to provide alternative work assignments to pregnant women concerned about the health of their fetuses if the employer does not allow similar exceptions for nonpregnant employees.²⁸ The court determined that the PDA's requirement that a woman be given the right to decide between her job and the health of

¹⁹ *Id.* at 199-200, 55 Fair Empl. Prac. Cas. (BNA) at 371-72. The policy was facially discriminatory because Johnson Controls allowed fertile men to choose whether they would risk the health of possible future children while denying the same choice to women. *See id.* at 199, 55 Fair Empl. Prac. Cas. (BNA) at 371.

²⁰ *Id.* at 203, 204, 55 Fair Empl. Prac. Cas. (BNA) at 373.

²¹ *Johnson Controls*, 499 U.S. at 206, 55 Fair Empl. Prac. Cas. (BNA) at 374.

²² *Id.* at 187, 206-07, 55 Fair Empl. Prac. Cas. (BNA) at 374.

²³ 20 F.3d 734, 738, 64 Fair Empl. Prac. Cas. (BNA) 512, 515 (7th Cir. 1994).

²⁴ *Id.* at 735-36, 64 Fair Empl. Prac. Cas. (BNA) at 513.

²⁵ *See id.* at 737, 64 Fair Empl. Prac. Cas. (BNA) at 515.

²⁶ *Id.* at 738-39, 64 Fair Empl. Prac. Cas. (BNA) at 515-16.

²⁷ *Id.*

²⁸ 33 F.3d 1308, 1317, 65 Fair Empl. Prac. Cas. (BNA) 1742, 1749 (11th Cir. 1995).

her fetus did not require an employer to ease the decision for the woman by providing alternative, less risky, work assignments.²⁹ The court reasoned that such an interpretation of the PDA would provide benefits to pregnant women that were arguably superior to benefits provided to nonpregnant employees who were similarly situated in their ability or inability to work.³⁰ The court concluded, therefore, that although the PDA did not prohibit such preferential treatment for women, the PDA could not be read to require it, and thus the employer had not wrongly discriminated against the plaintiff because of her pregnancy.³¹

The plaintiff, Pamela Armstrong, worked as a nurse for the Home Care Service ("HCS") of Flowers Hospital.³² The hospital and HCS had written policies stating that the refusal of an employee to care for an assigned patient was grounds for immediate termination.³³ On December 12, 1990, the plaintiff was assigned to an HIV positive patient.³⁴ The plaintiff was in the first trimester of pregnancy and was concerned about the health risks to her fetus from virulent diseases that attack the weakened immune systems of HIV positive patients.³⁵ The plaintiff requested that the patient be assigned to a different nurse.³⁶ The request was denied and the plaintiff refused to accept the patient assignment.³⁷ The plaintiff then chose to be terminated rather than resign.³⁸

The plaintiff filed suit against Flowers Hospital in the United States District Court for the Middle District of Alabama alleging a violation of Title VII, as amended by the PDA.³⁹ The plaintiff claimed

²⁹ *Id.* at 1316, 65 Fair Empl. Prac. Cas. (BNA) at 1748-49.

³⁰ *Id.*

³¹ *Id.* at 1316, 1317, 65 Fair Empl. Prac. Cas. (BNA) at 1748-49, 1750; *cf.* California Fed. Savs. & Loan Ass'n v. Guerra, 479 U.S. 272, 294, 42 Fair Empl. Prac. Cas. (BNA) 1073, 1082 (1991) (Stevens, J., concurring) (not all preferential treatment for pregnant women is beyond the scope of the PDA).

³² *Armstrong*, 33 F.3d at 1309, 65 Fair Empl. Prac. Cas. (BNA) at 1743.

³³ *Id.* at 1310, 65 Fair Empl. Prac. Cas. (BNA) at 1744. HCS and Flowers Hospital used the same policy statement, but HCS would modify the policies to meet the particular needs of its operation. *Id.* at 1311, 65 Fair Empl. Prac. Cas. (BNA) at 1745. Flowers Hospital had certain written exceptions to its policy regarding pregnant employees and their care of patients with Hepatitis B or Herpes, and patients receiving radioactive Iodine treatments. *Id.* at 1312, 65 Fair Empl. Prac. Cas. (BNA) at 1745. The hospital also had an unwritten policy of not assigning pregnant women to care for isolation patients. *Id.* HCS had not adopted any of these policies. *See id.*

³⁴ *Id.* at 1310, 65 Fair Empl. Prac. Cas. (BNA) at 1743-44.

³⁵ *Id.* 65 Fair Empl. Prac. Cas. (BNA) at 1744.

³⁶ *Id.* at 1311, 65 Fair Empl. Prac. Cas. (BNA) at 1744-45.

³⁷ *Armstrong*, 33 F.3d at 1311, 65 Fair Empl. Prac. Cas. (BNA) at 1744-45.

³⁸ *Id.* at 1311, 65 Fair Empl. Prac. Cas. (BNA) at 1745.

³⁹ *Id.* at 1309, 65 Fair Empl. Prac. Cas. (BNA) at 1743.

sex discrimination by the hospital under both disparate treatment and disparate impact discrimination theories.⁴⁰ The plaintiff's claim was based upon Flowers Hospital's written policy of terminating nurses who refused to accept a patient assignment.⁴¹ The district court determined that Armstrong did not state a *prima facie* case, and granted Flowers Hospital's motion for partial summary judgment on the Title VII claims.⁴² Armstrong then appealed the District Court's decision to the Eleventh Circuit.⁴³

The Eleventh Circuit first stated that the analysis for a claim under the PDA is the same as the analysis used in any other Title VII sex discrimination claim.⁴⁴ The Eleventh Circuit noted that two types of claims were available to persons alleging a Title VII sex discrimination violation: disparate treatment and disparate impact.⁴⁵ Disparate treatment is intentional discrimination against a protected group, whereas disparate impact discrimination is facially neutral but impacts one group more than others and cannot be justified by business necessity.⁴⁶

The court first dealt with the plaintiff's disparate treatment claim.⁴⁷ The Eleventh Circuit explained that disparate treatment can be either facial discrimination or pretextual discrimination.⁴⁸ The court reasoned that the HCS termination policy was not facially discriminatory and, therefore, Armstrong's disparate treatment claim could only be maintained as a pretext claim.⁴⁹

The Eleventh Circuit noted the four elements necessary to establish a *prima facie* case of discrimination under the disparate treatment analysis: (1) the plaintiff is a member of a group protected by Title VII; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse affect on her employment; and (4) the plaintiff suffered from differential application of work or disciplinary rules.⁵⁰ The court then determined that the plaintiff had not met the fourth element.⁵¹ Armstrong asserted that the accommodation of some pregnant employees in the hospital but not in the HCS amounted to differential

⁴⁰ *Id.* at 1313, 65 Fair Empl. Prac. Cas. (BNA) at 1746.

⁴¹ *Id.*

⁴² *See Armstrong*, 33 F.3d at 1313, 65 Fair Empl. Prac. Cas. (BNA) at 1746.

⁴³ *Id.* at 1312, 65 Fair Empl. Prac. Cas. (BNA) at 1746.

⁴⁴ *Id.* at 1312-13, 65 Fair Empl. Prac. Cas. (BNA) at 1746.

⁴⁵ *Id.* at 1313, 65 Fair Empl. Prac. Cas. (BNA) at 1746.

⁴⁶ *Id.*

⁴⁷ *Armstrong*, 33 F.3d at 1313, 65 Fair Empl. Prac. Cas. (BNA) at 1747.

⁴⁸ *Id.* at 1313, 65 Fair Empl. Prac. Cas. (BNA) at 1746.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1314, 65 Fair Empl. Prac. Cas. (BNA) at 1747.

⁵¹ *Id.*

application of a work rule.⁵² The court rejected the plaintiff's argument, reasoning that the hospital was not applying the same policy differently, but rather, that the hospital had different work rules for hospital and HCS employees because of differences between the two jobs.⁵³ Moreover, the court noted that the plaintiff failed to establish that her medical condition was similar to any of the conditions in the hospital that would lead to reassignment of nurses away from particular patients.⁵⁴ The Eleventh Circuit concluded, therefore, that the plaintiff had failed to meet her *prima facie* burden of establishing differential application of work rules.⁵⁵

Consequently, the Eleventh Circuit went on to hold that the plaintiff failed to establish a *prima facie* case of disparate impact discrimination.⁵⁶ The court stated that to establish a *prima facie* case for disparate impact, a plaintiff must first identify the employment practice that allegedly has the disparate impact.⁵⁷ Then, according to the court, the plaintiff must establish causation by offering statistical evidence sufficient to show that the practice has resulted in prohibited discrimination.⁵⁸ The Eleventh Circuit noted that the plaintiff did not present any statistical evidence, but rather argued that the disparate impact upon her was the "difficult choice" that the hospital's rigid policy forced her to make in choosing between her job and the health of her fetus.⁵⁹ In making the difficult choice argument, the plaintiff relied upon the holding in *Johnson Controls* that an employer may not force an employee to choose between her job and the health of her fetus.⁶⁰ The Eleventh Circuit, rejecting the plaintiff's interpretation, stated that *Johnson Controls* was relevant only in that the decision to become pregnant or to work while pregnant was a decision for each woman to make for herself.⁶¹ The court reasoned that Armstrong's situation was different from that described in *Johnson Controls*.⁶² The Eleventh Cir-

⁵² *Armstrong*, 33 F.3d at 1314, 65 Fair Empl. Prac. Cas. (BNA) at 1747.

⁵³ *Id.* Concurring in the judgment, Judge R. Lanier Anderson III concluded that the hospital does make accommodations for pregnant women in some instances, but this cannot constitute discrimination because the policies benefit pregnant women. *Id.* at 1318, 65 Fair Empl. Prac. Cas. (BNA) at 1750 (Anderson, J., concurring).

⁵⁴ *Id.* at 1314, 65 Fair Empl. Prac. Cas. (BNA) at 1747.

⁵⁵ *Id.* at 1312, 1314, 65 Fair Empl. Prac. Cas. (BNA) at 1745, 1747.

⁵⁶ *Id.* at 1315, 65 Fair Empl. Prac. Cas. (BNA) at 1748.

⁵⁷ *Armstrong*, 33 F.3d at 1314, 65 Fair Empl. Prac. Cas. (BNA) at 1747.

⁵⁸ *Id.* at 1314, 65 Fair Empl. Prac. Cas. (BNA) at 1747.

⁵⁹ *See id.* at 1315, 65 Fair Empl. Prac. Cas. (BNA) at 1748.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Armstrong*, 33 F.3d at 1315, 65 Fair Empl. Prac. Cas. (BNA) at 1748.

cuit reasoned that requiring Flowers Hospital to remove the "difficult choice" for Armstrong would subvert the purpose of the PDA by removing the ultimate decision to work from the woman.⁶³

In rejecting the difficult choice argument, the Eleventh Circuit accepted the reasoning of the defendant that the plaintiff's claim of discrimination was actually an attempt to gain preferential treatment for pregnant women.⁶⁴ According to the court, the PDA provided only that pregnant women be treated the same as other employees, not superior to them.⁶⁵ Examining the legislative history and the prior case law, the court reasoned that the PDA, although not prohibiting preferential treatment, did not *require* employers to provide pregnant women with benefits that are not provided to other employees.⁶⁶ The Eleventh Circuit concluded, therefore, that the "difficult choice" was not an adverse consequence that would be recognized under the PDA and, thus, held that the plaintiff had failed to state a *prima facie* case of disparate impact; summary judgment by the district court, therefore, had been proper.⁶⁷

The Eleventh Circuit's holding in *Armstrong* reinforces the decisions of previous courts that the PDA does not require preferential treatment for pregnant employees.⁶⁸ Based upon the plain language of the PDA and precedential case law, the Eleventh Circuit reached the only reasonable decision given the facts in this case.⁶⁹ If the Eleventh Circuit had ruled in *Armstrong's* favor, the decision would have required employers to provide benefits to pregnant women regardless of whether the employer provided similar benefits to all other similarly situated employees.⁷⁰ Instead, the Eleventh Circuit's decision strikes a balance between the employer's right to limit the benefits it provides to its employees and the employee's right to equal treatment as guaranteed by Title VII.

Armstrong's "difficult choice" argument contravened the very purpose of the PDA. The PDA was enacted to ensure that pregnancy would be included within the scope of discrimination based upon sex.⁷¹ The Act was intended to eliminate employer paternalism that attempted to

⁶³ *See id.*

⁶⁴ *See id.* at 1316, 65 Fair Empl. Prac. Cas. (BNA) at 1749.

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Armstrong*, 33 F.3d at 1316, 1317, 65 Fair Empl. Prac. Cas. (BNA) at 1748-49, 1750.

⁶⁸ *See id.* at 1317, 65 Fair Empl. Prac. Cas. (BNA) at 1749.

⁶⁹ *See supra* note 3 for the text of the PDA and *supra* notes 6-27 for discussion of the prior case history.

⁷⁰ *See Armstrong*, 33 F.3d at 1317, 65 Fair Empl. Prac. Cas. (BNA) at 1749-50.

⁷¹ *Id.* at 1312, 65 Fair Empl. Prac. Cas. (BNA) at 1746.

dictate to pregnant women what was best for them and their potential offspring.⁷² The PDA replaced this paternalism with the right of each individual to decide for herself in what situations she would work, and how and when she would have children.⁷³ These private decisions of the woman could no longer figure into employers' decisions about who they would employ.⁷⁴

Armstrong advocated to have the court interpret the PDA so as to require that employers make it easier for pregnant women to remain in the workplace during pregnancy.⁷⁵ Armstrong argued that true equality in the workplace requires an employer to make accommodations to pregnant women that will eliminate the difficulties of working while pregnant so that it would be as easy for a woman to work during pregnancy as it is for a man to work when his spouse (or significant other) is expecting a child.⁷⁶ This goal is laudable and has been advanced as the purpose of the PDA by many feminist scholars.⁷⁷ Nevertheless, the legislative history of the PDA does not support such an argument, and it is not the place of the courts to make such policy decisions.⁷⁸ This necessary substantive right for pregnant women must come from Congress and not from the courts.⁷⁹

In conclusion, the Eleventh Circuit held that the PDA did not require an employer to provide alternative work assignments for pregnant employees.⁸⁰ Rather, the PDA guarantees to an employee only the

⁷² See *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 647, 44 Fair Empl. Prac. Cas. (BNA) 683, 686-87 (8th Cir. 1987).

⁷³ See *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 205-06, 55 Fair Empl. Prac. Cas. (BNA) 368, 374 (1991).

⁷⁴ *Id.*

⁷⁵ *Armstrong*, 33 F.3d at 1316, 65 Fair Empl. Prac. Cas. (BNA) at 1748-49.

⁷⁶ See *id.* at 1315-16, 1317, 65 Fair Empl. Prac. Cas. (BNA) at 1748-49.

⁷⁷ See generally Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2158 (1994) (arguing that PDA misconstrues difficulties faced by pregnant women and that the statute should be read to guarantee equal opportunity rather than equal treatment for women); Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 936 (1985) (arguing that courts have interpreted the PDA more narrowly than Congress intended and that less than preferential treatment under the statute leads to marginalization of female workers).

⁷⁸ See *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738, 64 Fair Empl. Prac. Cas. (BNA) 512, 515 (7th Cir. 1994).

⁷⁹ The Americans with Disabilities Act of 1990 and the Family and Medical Leave Act of 1993 present possible avenues for women to attempt to gain the accommodations that Armstrong was advocating. See The Family and Medical Leave Act, 29 U.S.C. §§ 2601-11 (1994); The Americans with Disabilities Act, 42 U.S.C. §§ 12101-02, 12111-17 (Supp. IV 1992). Until now, however, only one circuit has recognized a cause of action for pregnancy under the ADA, and that was only in extraordinary circumstances. See *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1397 (N.D. Ill. 1994) (holding that infertility treatment involves a major life activity, pregnancy, and therefore is covered by the ADA).

⁸⁰ *Armstrong*, 33 F.3d at 1316, 65 Fair Empl. Prac. Cas. (BNA) at 1749.

right to decide if she will remain in the work force while she is pregnant or capable of bearing children.⁸¹ It does not provide any affirmative duty on the part of an employer to provide benefits to the pregnant employee that are superior to the benefits provided to other similarly situated nonpregnant employees.⁸²

**Expanding the Public Employer's Duty to Accommodate Employees'
Religious Practices Under Title VII and the First Amendment:
Brown v. Polk County¹*

The number of religious discrimination suits filed nationwide is on the rise.² Religious discrimination charges filed with state and federal agencies increased thirty-one percent between 1990 and 1994, with 2900 filed last year, according to the Equal Employment Opportunity Commission.³ While religious discrimination litigation multiplied, the United States Court of Appeals for the Eighth Circuit may have signaled a new pro-plaintiff attitude in religious employment discrimination cases in its recent decision in *Brown v. Polk County*.⁴ Finding for a government employee under Title VII of the Civil Rights Act of 1964 and the First Amendment's Free Exercise Clause, the court in *Brown* stretched traditional Title VII analysis to protect employees' on-the-job religious activities and announced a new free exercise test for public employees.⁵

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of an individual's religion.⁶ In addition, section 701(j) of Title VII ("section 701(j)") specifies that the

⁸¹ *Id.*

⁸² See *id.* at 1316-17, 65 Fair Empl. Prac. Cas. (BNA) at 1749.

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¹ 61 F.3d 650, 68 Fair Empl. Prac. Cas. (BNA) 648 (8th Cir. 1995) (en banc), *cert. denied*, 64 U.S.L.W. 3439 (U.S. Mar. 4, 1996) (No. 95-964).

² Margaret A. Jacobs, *Courts Wrestle with Religion in Workplace*, WALL ST. J., Oct. 10, 1995, at B1.

³ *Id.*

⁴ Compare *Brown*, 61 F.3d at 657, 68 Fair Empl. Prac. Cas. (BNA) at 654 with *Cook v. Chrysler Corp.*, 981 F.2d 336, 338-39, 60 Fair Empl. Prac. Cas. (BNA) 644, 649 (8th Cir. 1992) (no Title VII violation), *cert. denied*, 113 S. Ct. 2963 and *Johnson v. Angelica Uniform Group*, 762 F.2d 671, 674, 37 Fair Empl. Prac. Cas. (BNA) 1409, 1411 (8th Cir. 1985) (same) and *Wren v. T.I.M.E.—D.C., Inc.*, 595 F.2d 441, 445, 19 Fair Empl. Prac. Cas. (BNA) 582, 587 (8th Cir. 1979) (same). See generally *infra* notes 80-86 and accompanying text.

⁵ See *Brown*, 61 F.3d at 654-60, 68 Fair Empl. Prac. Cas. (BNA) at 651-56; *infra* notes 80-90 and accompanying text.

⁶ 42 U.S.C. § 2000e-2(a)(1)(1988). Title VII provides in part:

It shall be an unlawful employment practice for an employer 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.

employer's obligation under Title VII includes an affirmative duty to "reasonably accommodate" employees' religious beliefs.⁷ In that section, Congress stated that a reasonable accommodation is one that does not impose an "undue hardship" on the employer.⁸ Section 701(j), however, did not provide any practical guidance for determining the degree of accommodation required by an employer or what constitutes an undue hardship.⁹

The First Amendment's Free Exercise Clause also protects public employees from employment practices that burden the free exercise of their religious beliefs.¹⁰ The First Amendment applies to all state and local governments through the Fourteenth Amendment.¹¹ In turn, section 1983 of the Civil Rights Act of 1871 ("section 1983") gives plaintiffs suing under the First Amendment compensatory and equitable remedies.¹²

In 1977, in *Trans World Airlines v. Hardison*, the United States Supreme Court set the standard for employers' duty to reasonably accommodate employees' religious beliefs under Title VII, holding that section 701(j) does not require that employers bear more than a de minimis cost to accommodate an employee's religious observances.¹³ In *Hardison*, the employee, a newly converted member of the Worldwide Church of God, sued his former employer, Trans World Airlines ("TWA"), under Title VII alleging that TWA fired him because his religion forbade him from working on its Sabbath.¹⁴ TWA attempted

⁷ See 42 U.S.C. § 2000e(j) (1988). This section provides: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.*

⁸ See *id.*

⁹ See *id.*; *Trans World Airlines v. Hardison*, 432 U.S. 63, 74, 14 Fair Empl. Prac. Cas. (BNA) 1697, 1701 (1977).

¹⁰ See U.S. CONST. amend. I. The First Amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Id.*

¹¹ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.2, at 332 (4th ed. 1991); see U.S. CONST. amend. XIV. The Fourteenth Amendment provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV.

¹² 42 U.S.C. § 1983 (1988) provides, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

¹³ 432 U.S. 63, 84, 14 Fair Empl. Prac. Cas. (BNA) 1697, 1705-06 (1977).

¹⁴ *Id.* at 67, 14 Fair Empl. Prac. Cas. (BNA) at 1699. The Worldwide Church of God defined the Sabbath as occurring between sunset Friday and sunset Saturday. *Id.*

to accommodate the employee by permitting his union to arrange a shift swap, but the union was unwilling to violate the seniority system, and the employee did not have enough seniority to bid for Saturdays off.¹⁵ In addition, TWA refused to allow the employee to work a four-day week.¹⁶ The Court reasoned that Title VII did not require TWA to implement either alternative because they involved either real economic costs, in the form of lost efficiency or higher labor costs, or significant noneconomic costs, by infringing coworkers' contractual rights as secured by their collective bargaining agreement.¹⁷ The Court held that these costs were more than *de minimis*, and thus TWA demonstrated that it was unable to reasonably accommodate the employee's religious observance without undue hardship.¹⁸

In 1979, in *Brown v. General Motors Corp.*, the United States Court of Appeals for the Eighth Circuit elaborated on the *Hardison* analysis, holding that to show undue hardship, an employer must present evidence that the actual, present cost of a proposed accommodation is more than *de minimis*, and not merely speculative.¹⁹ In *Brown*, the employee, also a new inductee into the Worldwide Church of God, sued his former employer, General Motors ("GM"), under Title VII, alleging GM fired him because he refused to work on the Sabbath.²⁰ The employee requested that he be allowed to leave his job every Friday at sunset, but GM rejected his request, fearing that it would have to make similar accommodations for other workers who claimed to have similar beliefs.²¹ The court reasoned that undue hardship must be actual and present rather than speculative because otherwise, any accommodation would rise to the level of an undue hardship once an employer magnified it through predictions of the future behavior of the employee's coworkers.²² Furthermore, the court noted that the accommodation did not constitute an undue hardship simply because it required giving the employee a privilege his nonreligious coworkers lacked.²³ Thus, the court held that the employer breached its obligation under Title VII to make a reasonable accommodation for the em-

¹⁵ *Id.* at 63, 14 Fair Empl. Prac. Cas. (BNA) at 1697.

¹⁶ *Id.*

¹⁷ *Id.* at 79, 84, 14 Fair Empl. Prac. Cas. (BNA) at 1703, 1705.

¹⁸ *Hardison*, 432 U.S. at 77, 84-85, 14 Fair Empl. Prac. Cas. (BNA) at 1702, 1705-06.

¹⁹ 601 F.2d 956, 958-62, 20 Fair Empl. Prac. Cas. (BNA) 94, 96-98 (8th Cir. 1979).

²⁰ *Id.* at 958, 20 Fair Empl. Prac. Cas. (BNA) at 95.

²¹ *Id.* at 958, 961, 20 Fair Empl. Prac. Cas. (BNA) at 95, 97.

²² *Id.* at 961-62, 20 Fair Empl. Prac. Cas. (BNA) at 98 (quoting *Haring v. Blumenthal*, 471 F. Supp. 1172, 1182 (D.D.C. 1979)).

²³ *Id.*

ployee's religious beliefs, and therefore the employee was discharged illegally.²⁴

In 1981, in *Thomas v. Review Board*, the United States Supreme Court held that a state regulation that is neutral on its face violates the Free Exercise Clause of the First Amendment if it (1) substantially burdens an individual's free exercise of religion and (2) is not the least restrictive means of achieving a compelling state interest.²⁵ In *Thomas*, the plaintiff, a Jehovah's Witness, sought unemployment benefits after he quit his job in a factory that built tank turrets because he objected to the production of armaments.²⁶ The state unemployment review board denied him the benefit because he had not shown that his termination was not based upon "good cause" as required by Indiana's unemployment compensation statute.²⁷ The Court reasoned that the review board essentially forced the plaintiff to choose between following a course of conduct his religion *mandated* and forfeiting the unemployment benefits on the one hand, and abandoning a religious precept to accept work on the other.²⁸ This choice, the Court continued, put substantial pressure on the plaintiff to modify his behavior and violate his beliefs, and thus it substantially burdened the free exercise of his religion.²⁹ The Court further concluded that the state interest was not sufficiently compelling.³⁰ Thus, the Court held that the plaintiff was entitled to receive unemployment benefits when he quit his job due to his religious convictions.³¹

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 on matters of public concern without fear of retribution from his or her employer, so long as the speech does not interfere with the effective functioning of the public employer's enterprise.³² In *Pickering*, the board of education in Will County, Illinois, fired a public school teacher after he wrote a letter to the editor of his local newspaper criticizing the amount of money the board of education allocated to athletics.³³ The Court observed that although the letter undoubtedly addressed a matter of public concern, the State's interest in regulating

²⁴ See *Brown v. General Motors Corp.*, 601 F.2d at 961, 20 Fair Empl. Prac. Cas. (BNA) at 98.

²⁵ See 450 U.S. 707, 717, 718, 25 Fair Empl. Prac. Cas. (BNA) 629, 633 (1981).

²⁶ *Id.* at 710, 25 Fair Empl. Prac. Cas. (BNA) at 630.

²⁷ *Id.* at 712, 25 Fair Empl. Prac. Cas. (BNA) at 631.

²⁸ See *id.* at 717-18, 25 Fair Empl. Prac. Cas. (BNA) at 633.

²⁹ *Id.*

³⁰ *Thomas*, 450 U.S. at 719, 25 Fair Empl. Prac. Cas. (BNA) at 634.

³¹ *Id.* at 720, 25 Fair Empl. Prac. Cas. (BNA) at 634.

³² See 391 U.S. 563, 573-74, 575 (1968).

³³ *Id.* at 566.

the speech of public employees differs significantly from its interest in regulating the speech of private citizens.³⁴ The Court reasoned that it must find a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of public services.³⁵ The Court further noted that the letter criticized the board of education, rather than any of the teacher's direct supervisors or co-workers and would not likely interfere with the general operation of the school.³⁶ Thus, the Court held that the teacher's First Amendment right to speak on matters of public concern outweighed the board of education's interest in promoting efficiency, and therefore his dismissal was unconstitutional.³⁷

During the *Survey* year, in *Brown v. Polk County*, the United States Court of Appeals for the Eighth Circuit sitting en banc held that under Title VII, employers who prevent employees from engaging in religious activities while on the job must show that the banned activities would have imposed real costs on the employer, thus constituting an undue hardship.³⁸ Furthermore, the court held that such policies violate the First Amendment if they are oppressive or vexatious to the employee and are not narrowly tailored to a state interest.³⁹

In *Brown*, the Polk County Administrator fired Brown, a born-again Christian, from his job as director of the county's information services department after the administrator gave Brown two written reprimands.⁴⁰ The county administrator gave Brown his first reprimand in mid-1990 for conducting religious activities on county time after an internal investigation revealed (1) that Brown directed a secretary to type Bible study notes for him, (2) that several subordinates prayed in Brown's office before the beginning of some workdays, (3) that several subordinates prayed in Brown's office during department meetings, and (4) that in addressing one meeting of subordinates, Brown affirmed his Christianity and referred to Bible passages related to slothfulness and work ethics.⁴¹ The county administrator's reprimand directed Brown to stop using county resources for religious activities and to

³⁴ *Id.* at 568.

³⁵ *Id.*

³⁶ *Id.* at 572-73.

³⁷ *Pickering*, 391 U.S. at 574-75.

³⁸ See *Brown v. Polk County*, 61 F.3d 650, 657, 68 Fair Empl. Prac. Cas. (BNA) 648, 654 (8th Cir. 1995) (en banc), *cert. denied*, 64 U.S.L.W. 3439 (U.S. Mar. 4, 1996) (No. 95-964).

³⁹ See *id.* at 658-59, 68 Fair Empl. Prac. Cas. (BNA) at 654-55.

⁴⁰ *Id.* at 652-53, 68 Fair Empl. Prac. Cas. (BNA) at 650.

⁴¹ *Id.* at 652, 68 Fair Empl. Prac. Cas. (BNA) at 650.

cease any activities that "could be considered" religious proselytizing, witnessing or counseling.⁴² Later, the county administrator orally directed Brown to remove all religious items from his office, including a Bible in his desk.⁴³

The county administrator gave Brown his second reprimand in late 1990 for poorly managing the department's budget.⁴⁴ Two weeks later, after an investigation into the personal use of county computers by employees in Brown's department, the county administrator asked Brown to resign.⁴⁵ Brown refused, and the county administrator fired him.⁴⁶ In late 1991, Brown sued the county, its board of supervisors and the county administrator, alleging, under section 1983, that the first reprimand and the order to remove all religious items from his office violated constitutional guarantees of free exercise of religion and free speech.⁴⁷ He also alleged, under Title VII, that the county fired him because of his religion.⁴⁸

After a bench trial, the United States District Court for the Southern District of Iowa found that religious animus played no part in Brown's termination.⁴⁹ The court further held, (1) that the county could not have reasonably accommodated Brown's beliefs under section 701(j) because the county had a duty under the Establishment Clause of the First Amendment to maintain a religiously neutral working atmosphere, and breaching that duty would have thereby inflicted more than a de minimis cost;⁵⁰ and (2) that the First Amendment did not protect Brown's religious activity because the Establishment Clause mandated that the county keep its workplace free of religious speech.⁵¹

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's verdict with respect to the Title VII claim.⁵² The court also agreed with the district court that Polk County did not violate Brown's First Amendment free exercise rights by re-

⁴² *Id.* at 652-53, 68 Fair Empl. Prac. Cas. (BNA) at 650.

⁴³ *Brown*, 61 F.3d at 653, 68 Fair Empl. Prac. Cas. (BNA) at 650.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Brown*, 61 F.3d at 563, 68 Fair Empl. Prac. Cas. (BNA) at 650.

⁴⁹ *Brown v. Polk County*, 832 F. Supp. 1305, 1313, 62 Fair Empl. Prac. Cas. (BNA) 1647, 1652 (S.D. Iowa 1993), *aff'd*, 37 F.3d 404, 411, 66 Fair Empl. Prac. Cas. (BNA) 47, 51 (8th Cir. 1994), *vacated*, 61 F.3d 650, 660, 68 Fair Empl. Prac. Cas. (BNA) 648, 656 (8th Cir. 1995) (en banc).

⁵⁰ *Id.* at 1314, 62 Fair Empl. Prac. Cas. (BNA) at 1653.

⁵¹ *Id.* at 1315-16, 62 Fair Empl. Prac. Cas. (BNA) at 1654-55.

⁵² *Brown v. Polk County*, 37 F.3d 404, 411, 66 Fair Empl. Prac. Cas. (BNA) 47, 51 (8th Cir. 1994), *vacated*, 61 F.3d 650, 660, 68 Fair Empl. Prac. Cas. (BNA) 648, 656 (8th Cir. 1995) (en banc).

stricting his religious conduct on the job.⁵³ In addition, the Eighth Circuit added that removal of religious items from Brown's office did not constitute a substantial burden to Brown's religious beliefs and, therefore, did not violate Brown's free exercise rights either.⁵⁴

When the Eighth Circuit revisited the case sitting en banc, however, the eleven-member panel reversed the court's earlier decision.⁵⁵ First addressing Brown's Title VII claim, the court noted that because the county made no attempt to accommodate the employee's beliefs, it had to show that allowing the plaintiff's religious activities to continue would have imposed an undue hardship, as defined in *Hardison* and *Brown v. General Motors Corp.*⁵⁶ The court then examined each of Brown's religious activities.⁵⁷ First, the court agreed with the district and appellate courts that allowing the plaintiff to have a secretary type his Bible study notes or to have prayer meetings in his office before work imposed undue hardship on the employer because both would have involved more than a de minimis cost.⁵⁸ To type Bible study notes, the court reasoned, the secretary must forego county work, which would create more than a de minimis cost.⁵⁹ Similarly, the court reasoned that requiring the defendant to open its offices for prayer meetings before the work day started imposed significant costs not contemplated by Title VII's reasonable accommodation requirement.⁶⁰

The court reversed the district and appellate courts' rulings, however, with respect to Brown's spontaneous prayer in the office during the work day, his references to Bible passages during a departmental meeting and keeping religious items in his office, holding that such activities did not impose an undue hardship on the county.⁶¹ Relying on *Brown v. General Motors Corp.*, the court reasoned that the county's fears that Brown's conduct might eventually polarize employees because the staff might think that Brown's religious beliefs would cause him to favor fundamentalist Christians were speculative and conjectural and thus imposed de minimis costs rather than real costs.⁶² Thus, the court concluded that the county failed to reasonably accommodate

⁵³ *Id.* at 409, 66 Fair Empl. Prac. Cas. (BNA) at 50.

⁵⁴ *Id.* at 410, 66 Fair Empl. Prac. Cas. (BNA) at 50.

⁵⁵ *Brown v. Polk County*, 61 F.3d 650, 660, 68 Fair Empl. Prac. Cas. (BNA) 648, 656 (8th Cir. 1995) (en banc).

⁵⁶ *Id.* at 655, 68 Fair Empl. Prac. Cas. (BNA) at 652.

⁵⁷ *Id.* at 655, 68 Fair Empl. Prac. Cas. (BNA) at 652-53.

⁵⁸ *Id.* at 665-66, 68 Fair Empl. Prac. Cas. (BNA) at 652-53.

⁵⁹ *Id.* at 656, 68 Fair Empl. Prac. Cas. (BNA) at 653.

⁶⁰ *Brown*, 61 F.3d at 656, 68 Fair Empl. Prac. Cas. (BNA) at 653.

⁶¹ *Id.* at 657, 68 Fair Empl. Prac. Cas. (BNA) at 654.

⁶² *Id.*

Brown's religious beliefs as required under Title VII, and therefore found that the county illegally fired Brown on account of his religious activities.⁶³

The court then addressed Brown's First Amendment claim, holding that the county administrator violated Brown's right to freely exercise his religion when he ordered Brown to cease all activities that could be considered religious.⁶⁴ The court reached this holding by combining Free Exercise Clause analysis from *Thomas* and government employer analysis from *Pickering*.⁶⁵

To reach its holding, the Eighth Circuit first had to find that the county policy substantially burdened Brown's religious beliefs.⁶⁶ The court relied on Brown's own testimony that his spiritual revival was a life-changing experience and that prayer was a part of his being.⁶⁷ The court concluded that Brown showed he was substantially burdened by the county's employment practices because he found the county's antireligious policies "oppressive and vexatious."⁶⁸

The court then applied the balancing test described in *Pickering* to Brown's religious discrimination case, but added an additional requirement.⁶⁹ To pass the modified balancing test, the court said, the county's policy must be narrowly tailored to its interest as an employer.⁷⁰ Applying the test, the court first found that Brown's actions caused "no diminution whatever" in the efficiency of the county's governmental functions.⁷¹ The court then reasoned that even though the county had a legal right to ensure that its workplace was free from

⁶³ *Id.* After making this finding, the court refused to remand the case to the district court for findings on the question of whether the defendants would have fired the plaintiff even if they had not considered his religious activities, as required by the "mixed motives" test enunciated in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-46, 49 Fair Empl. Prac. Cas. (BNA) 954, 960-61 (1989) (plurality opinion). See *Brown*, 61 F.3d at 657, 68 Fair Empl. Prac. Cas. (BNA) at 654. Instead, the court reversed the district and appellate court's judgment on the Title VII religious discrimination claim, holding that no reasonable person could conclude from the evidence presented that the defendants proved that they would have fired the plaintiff anyway. *Id.*

⁶⁴ *Brown*, 61 F.3d at 658-59, 68 Fair Empl. Prac. Cas. (BNA) at 655.

⁶⁵ *Id.*

⁶⁶ *Id.* at 658, 68 Fair Empl. Prac. Cas. (BNA) at 654-55.

⁶⁷ *Id.* at 658, 68 Fair Empl. Prac. Cas. (BNA) at 655. The dissenting opinion lamented this reliance on Brown's testimony, complaining that Brown failed to show any substantial harm to his religious practice resulting from the county's actions. See *id.* at 660, 68 Fair Empl. Prac. Cas. (BNA) at 657 (Fagg, J., dissenting). Thus, the dissent would not have reached the *Pickering* analysis. *Id.* (Fagg, J., dissenting).

⁶⁸ See *id.* at 658, 68 Fair Empl. Prac. Cas. (BNA) at 655.

⁶⁹ *Brown*, 61 F.3d at 658, 68 Fair Empl. Prac. Cas. (BNA) at 655.

⁷⁰ *Id.* at 61 F.3d at 658-59, 68 Fair Empl. Prac. Cas. (BNA) at 655; see also *Pickering*, 391 U.S. at 568.

⁷¹ *Brown*, 61 F.3d at 659, 68 Fair Empl. Prac. Cas. (BNA) at 655.

religious activity that harasses or intimidates, its policies were unconstitutional because the county did not narrowly tailor them to that interest.⁷² In addition, the court found that the county's interest in obeying the Establishment Clause did not allow it to prohibit employees' religious expression.⁷³ Otherwise, the court reasoned, the Establishment Clause would eclipse the Free Exercise Clause for public employees.⁷⁴

Brown may signal that the Eighth Circuit is more willing to decide in favor of employees in religious discrimination suits than it has been the past.⁷⁵ Although *Brown* did not change the legal tests under Title VII, it applied those tests to an employee's *behavior at work* rather than an employee's refusal to work on certain days, which is the typical reasonable accommodation claim under section 701(j).⁷⁶ Thus, employers must tolerate employees' religious activities on the job to the extent the activities do not disrupt the work environment and force employers to sustain real, nonhypothetical costs.⁷⁷ This new application may significantly broaden the reach of section 701(j), which was enacted with the primary purpose of protecting employees whose religious practices forbade them from working on the Sabbath or certain religious holidays.⁷⁸ Thus, without changing any of the legal standards under Title VII, *Brown* applied section 701(j) in a way that embraces considerably more potential plaintiffs.

⁷² *Id.*

⁷³ *Id.* at 659, 68 Fair Empl. Prac. Cas. (BNA) at 655-56.

⁷⁴ *Id.* at 659, 68 Fair Empl. Prac. Cas. (BNA) at 656.

⁷⁵ Compare *id.* at 657, 68 Fair Empl. Prac. Cas. (BNA) at 654 with *Cook v. Chrysler Corp.*, 981 F.2d 336, 338-39, 60 Fair Empl. Prac. Cas. (BNA) 645, 649 (8th Cir. 1992) (no Title VII violation where accommodation would deprive other employees of their contractual rights and would require employer to bear more than a de minimis cost), *cert. denied*, 113 S. Ct. 2963 (1993) and *Johnson v. Angelica Uniform Group*, 762 F.2d 671, 674, 37 Fair Empl. Prac. Cas. (BNA) 1409, 1411 (8th Cir. 1985) (no violation of Title VII because collective bargaining agreement in effect provided reasonable accommodation for plaintiff's needs) and *Wren v. T.I.M.E.—D.C., Inc.*, 595 F.2d 441, 445, 19 Fair Empl. Prac. Cas. (BNA) 584, 587 (8th Cir. 1979) (no Title VII violation where accommodation would deprive other employees of their contractual rights and would require employer to bear more than a de minimis cost).

⁷⁶ Compare *Brown*, 61 F.3d at 655, 68 Fair Empl. Prac. Cas. (BNA) at 652-53 with *Trans World Airlines v. Hardison*, 432 U.S. 63, 85, 14 Fair Empl. Prac. Cas. (BNA) 1697, 1705 (1977) (employee refused to work on Sabbath) and *Brown v. General Motors*, 601 F.2d 956, 959, 20 Fair Empl. Prac. Cas. (BNA) 94, 95 (8th Cir. 1979) (same).

⁷⁷ *Brown*, 61 F.3d at 655, 68 Fair Empl. Prac. Cas. (BNA) at 652.

⁷⁸ See 118 CONG. REC. 706 (1972) (statement of Sen. Jennings Randolph who introduced section 701(j) as an amendment to Title VII, and who was himself a Sabbatarian whose religious beliefs forbade him from working on Saturdays); see also *Hardison*, 432 U.S. at 89, 14 Fair Empl. Prac. Cas. (BNA) at 1708 (Marshall, J., dissenting).

Although *Brown* applied section 701(j) of Title VII to an unusual set of facts, it did little to illuminate the analysis of what constitutes a de minimis cost. Brown's religious activities in the county office ranged from keeping a Bible in his desk to asking a secretary to type Bible notes.⁷⁹ Instead of adding a new gloss to the analysis, however, the court baldly drew a line without explaining its reasons. Essentially, the court said that allowing employees to meet before work in the office to pray imposed more than a de minimis cost, but that allowing "spontaneous" prayers during department meetings did not impose more than a de minimis cost.⁸⁰ Presumably, the court felt that the monetary cost of turning on electricity in the building a half hour early was greater than the loss of productivity while employees prayed, but it did not explain why. In short, although plaintiffs with similar facts should be able to use *Brown* to press successful claims under section 701(j), all litigants will find that *Brown* provides little help in predicting whether conduct imposes more than a de minimis cost.

In addition to expanding the scope of section 701(j) in Title VII cases, *Brown* could be a bonanza for public employees bringing First Amendment claims against government employers. In *Brown*, the Eighth Circuit made it easier for plaintiffs to show that employment policies substantially burdened their religious beliefs.⁸¹ Furthermore, the court required that the employers' antireligious policies be narrowly tailored to the employers' interests.⁸²

The *Brown* court significantly relaxed plaintiffs' substantial burden standard for Free Exercise Clause cases.⁸³ Before *Brown*, free exercise cases defined a substantial burden on a plaintiff's religious freedom as denying the plaintiff a significant benefit because of conduct *mandated* by religious belief.⁸⁴ In *Brown*, however, the Eighth Circuit held that prohibiting the employee from praying at work constituted a substantial burden because the employee found the policy *oppressive and vexatious*.⁸⁵ The court never determined whether Brown's religious beliefs mandated that he pray at work. Thus, under *Brown*, employees need only show they were sufficiently annoyed by an employer's antireligious policies and need not demonstrate that the policy forced them to forgo behavior that their religion mandates.

⁷⁹ See *Brown*, 61 F.3d at 652-53, 68 Fair Empl. Prac. Cas. (BNA) at 650.

⁸⁰ See *id.* at 656, 68 Fair Empl. Prac. Cas. (BNA) at 653-54.

⁸¹ See *id.* at 658, 68 Fair Empl. Prac. Cas. (BNA) at 655.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *Thomas*, 450 U.S. at 717-18, 25 Fair Empl. Prac. Cas. (BNA) at 633.

⁸⁵ See *Brown*, 61 F.3d at 658, 68 Fair Empl. Prac. Cas. (BNA) at 655.

Once the *Brown* court found the county's policy imposed a substantial burden on Brown's religious freedom, the court employed a modified *Pickering* analysis heavily weighted in Brown's favor.⁸⁶ In *Pickering*, the Supreme Court *balanced* the state's interest as an employer in providing efficient services with the employee's First Amendment right to speak on matters of public concern.⁸⁷ In contrast, in *Brown*, the Eighth Circuit asked whether the state's policy was *narrowly tailored* to its interest as an employer in keeping its offices free from harassing or intimidating religious behavior.⁸⁸ Thus, short of religious behavior that actually disrupts governmental efficiency or harasses or intimidates coworkers, it is hard to imagine a religious activity that a government employer could constitutionally ban.⁸⁹

In addition, the court further handicapped government defendants when it rejected the county's contention that it had an interest, for the purposes of the modified *Pickering* analysis, in avoiding a claim that it violated the Establishment Clause of the First Amendment.⁹⁰ As the court noted, such a position would give dominance to the Establishment Clause and allow the state to ban all of its employee's religious activities while at work.⁹¹ With this formidable state "interest" out of the way, government employers will find it extremely difficult to pass the modified *Pickering* test. In sum, in *Brown*, the Eighth Circuit signaled its willingness to interpret section 701(j)'s legal standards more liberally and announced a more permissive standard for public employees' free exercise claims under the First Amendment.

AGE DISCRIMINATION IN EMPLOYMENT ACT

**Tax Status of Damages Received Under the ADEA: Commissioner v. Schleier¹*

Section 61(a) of the Internal Revenue Code ("I.R.C." or "the Code") provides that "gross income means all income from whatever source derived" subject only to the exclusions specifically enumerated elsewhere in the Code.² I.R.C. § 104(a) (2) excludes from gross income

⁸⁶ See *id.* at 658-59, 68 Fair Empl. Prac. Cas. (BNA) at 655.

⁸⁷ *Pickering v. Board of Educ.*, 391 U.S. 356, 368 (1968).

⁸⁸ *Brown*, 61 F.3d at 658-59, 68 Fair Empl. Prac. Cas. (BNA) at 655.

⁸⁹ See *id.*

⁹⁰ See *id.* at 659, 68 Fair Empl. Prac. Cas. (BNA) at 655-56.

⁹¹ See *id.* at 659, 68 Fair Empl. Prac. Cas. (BNA) at 656.

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¹ 115 S. Ct. 2159, 67 Fair Empl. Prac. Cas. (BNA) 1745 (1995).

² 26 U.S.C. § 61(a) (1994).

"the amount of any damages received (whether by suit or agreement . . .) on account of personal injuries or sickness."³ Regulations to the Code interpret the term "damages received" as amounts received through the prosecution or settlement of an action based "on tort or tort type rights."⁴ Accordingly, courts determining the tax status of damages received in actions brought under the Age Discrimination in Employment Act ("ADEA")⁵ consider whether the ADEA creates a "tort-like" cause of action and whether it provides recovery for damages received on account of personal injuries.⁶

In 1986, in *Threlkeld v. Commissioner*, the United States Tax Court held that § 104(a)(2) excluded from gross income the damages received in settlement of a claim for malicious prosecution.⁷ The taxpayer in *Threlkeld* had recovered damages for injury to "professional reputation" in settlement of a claim for malicious prosecution.⁸ The taxpayer did not report the damages as part of his gross income in his federal tax return.⁹ As a result, the Commissioner of Internal Revenue ("Commissioner") issued him a notice of deficiency.¹⁰ The Tax Court reasoned that in determining whether § 104(a)(2) allows for an exclusion, the analysis should focus on whether the damages recovered were pursuant to a claim for "personal injuries."¹¹ The court explained that § 104(a)(2) excluded from gross income all damages received on account of an invasion of a legal right granted to the taxpayer by virtue of being a person.¹² Because the state where the plaintiffs brought the action recognized malicious prosecution as a tort action allowing recovery for injury to reputation, the *Threlkeld* court classified the action for malicious prosecution as an action arising from personal injuries.¹³ Thus, the court held that the taxpayer could exclude from gross in-

³ 26 U.S.C. § 104(a)(2) (1994).

⁴ 26 C.F.R. § 1.104-1(c) (1994).

⁵ 29 U.S.C. §§ 621-34 (1994). The ADEA makes it unlawful for an employer to discharge any individual between the ages of 40 and 70 because of such individual's age. 29 U.S.C. §§ 623(a)(1), 631(a). The remedies available under the ADEA are lost wages and an additional equal amount of liquidated damages in cases of willful violations. 29 U.S.C. § 626(b) (1994).

⁶ See, e.g., *Commissioner v. Schleier*, 115 S. Ct. 2159, 2167, 67 Fair Empl. Prac. Cas. (BNA) 1745, 1751 (1995); *Rickel v. Commissioner*, 900 F.2d 655, 658, 52 Fair Empl. Prac. Cas. (BNA) 1389, 1391 (3d Cir. 1990).

⁷ 87 T.C. 1294, 1308 (1986).

⁸ *Id.* at 1296.

⁹ *Id.* at 1297.

¹⁰ *Id.*

¹¹ *Id.* at 1299.

¹² 87 T.C. at 1308.

¹³ *Id.* at 1307.

come the damages he received in settlement of a claim for malicious prosecution.¹⁴

Prior to 1992, courts following the *Threlkeld* reasoning held that § 104(a)(2) allows the exclusion of damages received under the ADEA.¹⁵ In 1990, in *Rickel v. Commissioner*, for example, the United States Court of Appeals for the Third Circuit held that § 104(a)(2) excluded from gross income damages received in settlement of an ADEA claim.¹⁶ The taxpayer in *Rickel* did not report damages he received for lost wages in settlement of an ADEA action.¹⁷ Focusing on the nature of the ADEA, the court reasoned that an ADEA claim was analogous to a tort-type claim for personal injury because age discrimination caused injury to a person's individual rights.¹⁸ Thus, the court concluded that § 104(a)(2) excluded damages received under the ADEA because they flowed from a tort-like cause of action.¹⁹

In 1992, in *United States v. Burke*, the United States Supreme Court altered the course of § 104(a)(2) analysis and held that back pay awards received in settlement of Title VII claims could not be excluded from gross income as damages received on account of personal injuries.²⁰ As part of the settlement of a sex discrimination claim under Title VII of the Civil Rights Act of 1964, the taxpayer in *Burke* received a back pay award from which her employer withheld federal income taxes.²¹ The taxpayer subsequently filed for a refund of the taxes withheld.²²

The Court reasoned that in determining whether a statute redresses a tort-type personal injury for purposes of § 104(a)(2), the analysis should focus on the nature of the claim underlying the damages award.²³ The Court further explained that because the concept of a tort is inextricably bound up with the nature of remedies, the remedial scheme embodied in the statute is the critical factor for § 104(a)(2) purposes.²⁴ Following this reasoning, the Court concluded that a claim

¹⁴ *Id.* at 1308.

¹⁵ *See, e.g.,* *Redfield v. Insurance Co. of N. Am.*, 940 F.2d 542, 547, 56 Fair Empl. Prac. Cas. (BNA) 977, 979 (9th Cir. 1991); *Pistillo v. Commissioner*, 912 F.2d 145, 148, 53 Fair Empl. Prac. Cas. (BNA) 1219, 1221 (6th Cir. 1990); *Rickel v. Commissioner*, 900 F.2d 655, 664, 52 Fair Empl. Prac. Cas. (BNA) 1389, 1395 (3d Cir. 1990).

¹⁶ *Id.* at 664, 52 Fair Empl. Prac. Cas. (BNA) at 1395.

¹⁷ *Id.* at 657, 52 Fair Empl. Prac. Cas. (BNA) at 1390.

¹⁸ 900 F.2d at 663, 52 Fair Empl. Prac. Cas. (BNA) at 1395.

¹⁹ *See id.* at 663-64, 52 Fair Empl. Prac. Cas. (BNA) at 1395.

²⁰ *See* 504 U.S. 229, 242, 58 Fair Empl. Prac. Cas. (BNA) 1323, 1329 (1992).

²¹ *Id.* at 231, 58 Fair Empl. Prac. Cas. (BNA) at 1325.

²² *Id.* at 232, 58 Fair Empl. Prac. Cas. (BNA) at 1325.

²³ *See id.* at 237, 58 Fair Empl. Prac. Cas. (BNA) at 1327.

²⁴ *Id.* at 237 n.7, 58 Fair Empl. Prac. Cas. (BNA) at 1327 n.7.

under Title VII was not tort-like, because the remedies available under Title VII did not compensate the plaintiff for any of the traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation or other consequential damages.²⁵ The Court noted that even though employment discrimination may cause grave harm and injury, Title VII does not compensate plaintiffs for anything beyond the wages properly owed to them, wages that would have been fully taxable if paid in the ordinary course.²⁶ Thus, the Court held that § 104(a)(2) does not exclude from gross income the back pay awards received in settlement of Title VII claims.²⁷

In 1994, in *Hawkins v. United States*, the United States Court of Appeals for the Ninth Circuit held that § 104(a)(2) does not exclude from gross income punitive damages received for breach of the duty of good faith and fair dealing.²⁸ The taxpayers in *Hawkins* had recovered both compensatory and punitive damages in an action against an insurance company for breach of the duty of good faith and fair dealing.²⁹ The taxpayers initially reported the punitive damage award as part of their gross income, but then filed an amended return claiming that § 104(a)(2) excluded the punitive damages.³⁰

The *Hawkins* court developed a two-part test for determining whether § 104(a)(2) excludes damages received in a lawsuit.³¹ The court stated that the taxpayer must show both that the underlying cause of action was tort-like within the meaning of *Burke* and that the damages received were on account of personal injury.³² In *Hawkins*, the parties agreed that a lawsuit for breach of good faith and fair dealing was tort-like.³³ Thus, the court focused on the second part of the test and held that the damages received by taxpayers were not on account of personal injury.³⁴ The court reasoned that punitive damages were intended to punish the tortfeasor for intentional or malicious action and to deter future wrongful conduct.³⁵ Such punitive damage

²⁵ See *Burke*, 504 U.S. at 239, 240, 58 Fair Empl. Prac. Cas. (BNA) at 1328, 1329.

²⁶ *Id.*

²⁷ *Id.* at 242, 58 Fair Empl. Prac. Cas. (BNA) at 1329.

²⁸ 30 F.3d 1077, 1079, 1084 (9th Cir. 1994).

²⁹ *Id.* at 1079.

³⁰ *Id.* The taxpayer had excluded the compensatory damages from gross income. *Id.* The Commissioner did not argue and the court did not address the excludability of the compensatory damages. *Id.*

³¹ *Id.*

³² *Id.*

³³ 30 F.3d at 1079.

³⁴ See *id.* at 1080.

³⁵ *Id.* at 1083.

awards, the court concluded, bear no relationship to the plaintiff's actual injuries, and therefore § 104(a)(2) does not exclude them from gross income as damages received on account of personal injury.³⁶

In 1994, in *Schmitz v. Commissioner*, the United States Court of Appeals for the Ninth Circuit applied the *Hawkins* test to an ADEA claim and held that § 104(a)(2) excludes from gross income liquidated damages received under the ADEA.³⁷ The taxpayer in *Schmitz* received both back pay and liquidated damages in settlement of a claim under the ADEA.³⁸ The taxpayer claimed § 104(a)(2) excluded from gross income both the back pay and the liquidated damages.³⁹

Applying the two-part test set forth in *Hawkins*, the *Schmitz* court first concluded that the ADEA establishes a tort-like cause of action within the meaning of *Burke* and § 104(a)(2).⁴⁰ The court reasoned that the ADEA's provisions for liquidated damages and jury trials were analogous to those available in tort cases and therefore rendered ADEA claims tort-like.⁴¹ Second, the *Schmitz* court held that the taxpayer received the liquidated damages on account of his personal injuries.⁴² The court reasoned that courts traditionally awarded liquidated damages to compensate victims for damages which were too obscure and difficult to prove.⁴³ Furthermore, the court reasoned that unlike the punitive damages in *Hawkins*, which depended on defendant's conduct and wealth and had no relation to the plaintiff's particular injury, the ADEA liquidated damages at issue here had a compensatory purpose and did bear relation to plaintiff's particular injury.⁴⁴ Thus, the court held that § 104(a)(2) excluded the ADEA liquidated damages.⁴⁵

In contrast, in 1994, in *Downey v. Commissioner*, the United States Court of Appeals for the Seventh Circuit held that § 104(a)(2) did not exclude from gross income settlement payments received under the ADEA.⁴⁶ The taxpayer in *Downey* had received both back pay and

³⁶ *Id.* at 1084.

³⁷ 34 F.3d 790, 792, 796, 65 Fair Empl. Prac. Cas. (BNA) 1195, 1196, 1200 (9th Cir. 1994).

³⁸ *Id.* at 791, 65 Fair Empl. Prac. Cas. (BNA) at 1196.

³⁹ *Id.*

⁴⁰ *Id.* at 794, 65 Fair Empl. Prac. Cas. (BNA) at 1198.

⁴¹ See *id.* (noting that provisions for liquidated damages and jury trials distinguished ADEA from Title VII, which *Burke* held not to be tort-like).

⁴² *Schmitz*, 34 F.3d at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

⁴³ See *id.* at 794, 65 Fair Empl. Prac. Cas. (BNA) at 1198.

⁴⁴ *Id.* at 795, 65 Fair Empl. Prac. Cas. (BNA) at 1199. Under the ADEA liquidated damages must equal lost wages. *Id.* at 798, 65 Fair Empl. Prac. Cas. (BNA) at 1201 (Trott, J., concurring).

⁴⁵ *Id.* at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

⁴⁶ 33 F.3d 836, 837, 840, 65 Fair Empl. Prac. Cas. (BNA) 1192, 1192, 1195 (7th Cir. 1994).

liquidated damages in settlement of a claim under the ADEA.⁴⁷ The taxpayer claimed that § 104(a)(2) excluded both the liquidated damages and the back pay portion of the settlement payment.⁴⁸ The *Downey* court interpreted *Burke* to stand for the proposition that a federal antidiscrimination statute must provide compensatory damages for intangible elements of personal injury (such as pain and suffering, emotional distress or personal humiliation) to constitute a tort-type cause of action and receive tax-exempt treatment under § 104(a)(2).⁴⁹ The court noted the ADEA did not provide the broad range of compensatory damages characteristic of tort-type personal injury statutes.⁵⁰ The court reasoned that the liquidated damages available under the ADEA were either punitive or contractual in nature, but did not compensate the taxpayer for the traditional elements of a personal injury claim.⁵¹ Thus, the court concluded that because an ADEA suit lacked an essential element of a tort-like claim, the back pay and liquidated damages received under the ADEA were taxable.⁵²

During the *Survey* year, in *Commissioner v. Schleier*, the United States Supreme Court resolved the split in the circuits as to whether § 104(a)(2) excludes from gross income damages received in settlement of a claim brought under the ADEA.⁵³ The Court held that § 104(a)(2) excludes neither the back pay nor the liquidated damages portion of an award received pursuant to the ADEA.⁵⁴ Therefore, under *Schleier*, a taxpayer must report such damages as gross income, and such damages are subject to taxation.⁵⁵

The taxpayer in *Schleier* received \$145,629 from United Airlines as settlement of an ADEA claim.⁵⁶ The settlement agreement apportioned half of the payment as back pay and the other half as liquidated damages.⁵⁷ In his federal tax return, the taxpayer included the back pay portion of the settlement as gross income, but excluded the por-

⁴⁷ *Id.* at 837, 65 Fair Empl. Prac. Cas. (BNA) at 1192.

⁴⁸ *Id.*

⁴⁹ *Id.* at 839, 65 Fair Empl. Prac. Cas. (BNA) at 1194.

⁵⁰ *Id.*

⁵¹ *Downey*, 33 F.3d at 840, 65 Fair Empl. Prac. Cas. (BNA) at 1195.

⁵² *Id.*

⁵³ 115 S. Ct. 2159, 2163, 67 Fair Empl. Prac. Cas. (BNA) 1745, 1747 (1995). Compare *Schmitz*, 33 F.3d at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200 (ADEA settlement is not taxable) with *Downey*, 33 F.3d at 840, 65 Fair Empl. Prac. Cas. (BNA) at 1195 (ADEA settlement award is taxable).

⁵⁴ *Schleier*, 115 S. Ct. at 2162, 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1746, 1751.

⁵⁵ See *id.* at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1751.

⁵⁶ *Id.* at 2162, 67 Fair Empl. Prac. Cas. (BNA) at 1746.

⁵⁷ *Id.*

tion attributed to liquidated damages.⁵⁸ The Commissioner issued a deficiency notice, asserting that the taxpayer should have reported the liquidated damages as part of his gross income.⁵⁹ The taxpayer initiated a proceeding in the Tax Court, claiming that he had properly excluded the liquidated damages and that he was entitled to a refund for the tax he had paid on the back pay portion.⁶⁰ The Tax Court found that the entire settlement constituted "damages received . . . on account of personal injuries or sickness" and was therefore excludable from gross income.⁶¹ The Commissioner appealed to the Court of Appeals for the Fifth Circuit, which affirmed the Tax Court's decision.⁶²

The United States Supreme Court granted certiorari to resolve the split among the circuits.⁶³ The Supreme Court reversed the decision reached by the Fifth Circuit and held that ADEA damages are not excludable from gross income.⁶⁴ The Court reached its decision by focusing on the language of § 104(a)(2), the text of the IRS regulation interpreting § 104(a)(2) and the Court's earlier decision in *Burke*.⁶⁵

First, the Court reasoned that § 104(a)(2) does not exclude back wages or liquidated damages recovered under the ADEA because both types of damages lacked the critical requirement of being "on account of personal injury or sickness."⁶⁶ The Court noted that although the unlawful termination may have caused the taxpayer some psychological or personal injury, it was the unlawful termination, not the personal injury, that caused the employee to miss work and lose wages.⁶⁷ The Court distinguished back pay awarded to a victim who lost wages because of age discrimination from back pay awarded to a victim who lost wages because of personal injury caused by an automobile accident.⁶⁸ In the latter, the automobile accident caused the personal injury, and the personal injury caused the loss of wages.⁶⁹ In the former, the Court noted that the discrimination caused both the personal injury and the loss of wages, but neither was linked to the other.⁷⁰ The

⁵⁸ *Id.*

⁵⁹ *Schleier*, 115 S. Ct. at 2162, 67 Fair Empl. Prac. Cas. (BNA) at 1746.

⁶⁰ *Id.* at 2162, 67 Fair Empl. Prac. Cas. (BNA) at 1747.

⁶¹ *Id.*

⁶² *Id.* at 2162-63, 67 Fair Empl. Prac. Cas. (BNA) at 1747.

⁶³ *Id.* at 2163, 67 Fair Empl. Prac. Cas. (BNA) at 1747.

⁶⁴ *Schleier*, 115 S. Ct. at 2163, 67 Fair Empl. Prac. Cas. (BNA) at 1747.

⁶⁵ *Id.* at 2163-67, 67 Fair Empl. Prac. Cas. (BNA) at 1747-51.

⁶⁶ *Id.* at 2164, 67 Fair Empl. Prac. Cas. (BNA) at 1748.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2163-64, 67 Fair Empl. Prac. Cas. (BNA) at 1747-48.

⁶⁹ *Schleier*, 115 S. Ct. at 2164, 67 Fair Empl. Prac. Cas. (BNA) at 1748.

⁷⁰ *Id.*

Court further explained that the personal injury suffered by the employee did not affect the amount of back wages he received.⁷¹ Thus, the Court concluded that the back wages received under the ADEA were taxable because they were not "damages received on account of any personal injury."⁷² Furthermore, the Court held that liquidated damages were punitive in nature, and, like back wages, were not received on account of personal injury or sickness and should therefore be included in gross income.⁷³

Second, the Court rejected the taxpayer's argument that the IRS regulation interpreting § 104(a)(2) authorizes an exclusion of ADEA damages from gross income.⁷⁴ The regulation defines excludable damages as those received through the prosecution or settlement of an action based "on tort or tort type rights."⁷⁵ The taxpayer argued that an action under the ADEA is "based upon tort or tort type rights" as those terms are used in that regulation, and therefore ADEA damages are excludable under the plain language of the regulation.⁷⁶ The Court first explained that the respondent's ADEA recovery is not based upon "tort or tort type rights" as defined in *Burke*.⁷⁷ The Court dismissed the taxpayer's argument that the ADEA's provisions for liquidated damages and a jury trial brought the ADEA within *Burke*'s conception of a tort-type statute.⁷⁸ The Court reasoned that although the availability of these features distinguished the ADEA from the statute at issue in *Burke*, the primary characteristic of an "action based upon . . . tort type rights" is the availability of compensatory damages.⁷⁹ The Court explained that like the pre-1991 version of Title VII, the ADEA provided no compensation for any of the other traditional harms associated with personal injury.⁸⁰ The Court noted that the only monetary remedies available under the ADEA are back wages, which are clearly of economic character, and liquidated damages, which serve no compensatory function.⁸¹ ADEA recoveries therefore did not satisfy "one of the

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *id.* at 2165, 67 Fair Empl. Prac. Cas. (BNA) at 1748-49.

⁷⁴ *Schleier*, 115 S. Ct. at 2166, 67 Fair Empl. Prac. Cas. (BNA) at 1749.

⁷⁵ 26 C.F.R. § 1.104-1(c) (1994).

⁷⁶ *Schleier*, 115 S. Ct. at 2165-66, 67 Fair Empl. Prac. Cas. (BNA) at 1749.

⁷⁷ *Id.* at 2166, 67 Fair Empl. Prac. Cas. (BNA) at 1750.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1750. Before the enactment of the Civil Rights Act of 1991, Title VII limited available remedies to back pay, injunctions and other equitable relief. See *United States v. Burke*, 504 U.S. 229, 237 n.8, 58 Fair Empl. Prac. Cas. (BNA) 1323, 1327 n.8 (1992).

⁸¹ *Schleier*, 115 S. Ct. at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1750.

hallmarks of traditional liability," the Court concluded, because they did not provide for a broad range of damages that compensate the plaintiff for injuries caused by the violation of legal rights.⁸²

Moreover, the Court observed that even if it accepted the taxpayer's contention that his ADEA suit was tort-like, § 104(a)(2) only excludes damages received under a tort-type action when the taxpayer receives the damages on account of personal injury or sickness.⁸³ The Court emphasized that although the *Burke* Court had relied solely on Title VII's failure to qualify as an action based upon tort-type rights, it had not intended to eliminate the basic requirement found in both the statute and the regulation that only amounts received on account of personal injuries or sickness come within § 104(a)(2)'s exclusion.⁸⁴ In this case, the taxpayer did not receive the damages on account of personal injury and therefore was not within § 104(a)(2)'s exclusion.⁸⁵

In sum, the *Schleier* Court held that a taxpayer must meet two independent requirements before a recovery can be excludable under § 104(a)(2).⁸⁶ First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery was tort-like.⁸⁷ Second, the taxpayer must show that the damages he or she received were on account of personal injuries or sickness.⁸⁸ As the taxpayer in *Schleier* failed to satisfy either requirement, the Court held that § 104(a)(2) did not exclude his settlement.⁸⁹

In dissent, Justice O'Connor argued that § 104(a)(2) does exclude ADEA damages from gross income.⁹⁰ Justice O'Connor reasoned that if harms caused by discrimination constituted personal injury, then the damages received for such discrimination are "on account of personal injuries" and should be excludable under § 104(a)(2).⁹¹ Justice O'Connor criticized the majority's argument that acknowledging that discrimination may cause intangible harms does not necessarily lead to the conclusion that damages received for such discrimination are not on account of such injuries.⁹² Justice O'Connor further argued that ADEA claims are tort-type actions under the *Burke* analysis.⁹³ Justice

⁸² See *id.* at 2166-67, 67 Fair Empl. Prac. Cas. (BNA) at 1750.

⁸³ *Id.* at 2165-66, 67 Fair Empl. Prac. Cas. (BNA) at 1749.

⁸⁴ *Id.* at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1750.

⁸⁵ *Id.* at 2164, 67 Fair Empl. Prac. Cas. (BNA) at 1748.

⁸⁶ *Schleier*, 115 S. Ct. at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1751.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1751 (O'Connor, J., dissenting).

⁹¹ *Schleier*, 115 S. Ct. at 2170, 67 Fair Empl. Prac. Cas. (BNA) at 1753 (O'Connor, J., dissenting).

⁹² *Id.* (O'Connor, J., dissenting).

⁹³ *Id.* (O'Connor, J., dissenting).

O'Connor explained that unlike Title VII, the ADEA provides for a jury trial and expressly provides for liquidated damages in addition to back wages.⁹⁴ Justice O'Connor further argued that however the Court characterizes liquidated damages, the ADEA's remedial scheme goes beyond Title VII's limited focus on "legal injuries of an economic character."⁹⁵ These distinctions, according to the dissent, qualify the ADEA as tort-like under *Burke*, and therefore, damages recovered under the ADEA should be exempt from taxation under § 104(a)(2).⁹⁶

The *Schleier* Court correctly held that § 104(a)(2) does not exclude from gross income damages received under the ADEA. The Court's conclusion that ADEA claims are not tort-like follows logically from the Court's decision in *Burke*.⁹⁷ *Burke* made it clear that courts should focus on the nature of the remedies available under a particular statute when determining whether a claim brought under the statute is tort-like.⁹⁸ A statutory claim is tort-like if the remedies available under such statute provide compensation for traditional elements of personal injury, such as emotional distress or pain and suffering.⁹⁹ The remedies under the ADEA are limited to back wages, which are clearly of economic character, and liquidated damages, which serve no compensatory purpose.¹⁰⁰ Because the ADEA does not provide compensation for any of the traditional harms associated with personal injury, such as emotional distress or pain and suffering, the *Schleier* Court was correct in concluding that a claim under the ADEA is not tort-like.¹⁰¹

The *Schleier* Court, however, diverged from its earlier decision in *Burke* by holding that in addition to demonstrating that the underlying cause of action was tort-like, a taxpayer must show that the damages received were on account of personal injury.¹⁰² For most courts, *Burke* stood for the proposition that damages received under a tort-like claim are damages received "on account of personal injuries" and are therefore excludable from gross income.¹⁰³ Relying on its own precedent, the Court should have limited its holding to the fact that § 104(a)(2)

⁹⁴ *Id.* (O'Connor, J., dissenting).

⁹⁵ *Id.* (O'Connor, J., dissenting).

⁹⁶ *Schleier*, 115 S. Ct. at 2170, 67 Fair Empl. Prac. Cas. (BNA) at 1753.

⁹⁷ See *United States v. Burke*, 504 U.S. 229, 233-37, 58 Fair Empl. Prac. Cas. (BNA) 1323, 1326-27 (1992).

⁹⁸ See *id.* at 235-37, 58 Fair Empl. Prac. Cas. (BNA) at 1326-27.

⁹⁹ See *id.* at 237, 58 Fair Empl. Prac. Cas. (BNA) at 1327.

¹⁰⁰ *Schleier*, 115 S. Ct. at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1750.

¹⁰¹ *Id.*

¹⁰² See *Schleier*, 115 S. Ct. at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1751; *Burke*, 504 U.S. at 233-34, 58 Fair Empl. Prac. Cas. (BNA) at 1326.

¹⁰³ See, e.g., *Downey v. Commissioner*, 33 F.3d 836, 839, 65 Fair Empl. Prac. Cas. (BNA) at

did not exclude ADEA damages because they did not redress tort-type personal injuries such as pain and suffering.

Although it is now clear that damages received under the ADEA are taxable, the Court's new interpretation of § 104(a)(2) has implications that go beyond the ADEA. The *Schleier* Court has narrowed the possibility of exclusion under § 104(a)(2) by holding that damages received are on account of personal injury only when the injury in and of itself justifies the damages. Given the strict requirements taxpayers must meet to qualify for an exclusion under § 104(a)(2), age discrimination claims under state law will increase in importance because they might provide certain compensatory remedies unavailable under the ADEA. Additionally, in settling cases, taxpayers have a great incentive to maximize the amounts assigned to nontaxable claims such as emotional distress, pain and suffering. Such settlements, however, must be reasonable because otherwise the IRS could challenge their validity.

Schleier has created uncertainty regarding the taxability of damages received under Title VII and other antidiscrimination statutes. Although it is clear that under *Schleier* § 104(a)(2) excludes compensatory damages such as damages for pain and suffering, the tax status of back pay wages is unclear.¹⁰⁴ In assessing the taxability of back wages under Title VII, for example, the IRS could assert that although the discrimination caused both injury and loss of wages, neither was linked to the other, and therefore the back pay awards should be included in taxable income.¹⁰⁵ Under certain circumstances, however, a taxpayer might still have a valid argument that § 104(a)(2) excludes the back wages. In a situation where a taxpayer suffers personal injury due to the employer's discriminatory conduct and as a result stops working, the loss of wages would be the result of the personal injury caused by the discrimination. The taxpayer would therefore be able to argue that the back wages received were on account of personal injury as defined under *Schleier*.¹⁰⁶

Schleier raises another question regarding the taxability of punitive damages. The Court noted that liquidated damages are not received on account of personal injury because they are punitive in nature.¹⁰⁷ Thus, under the *Schleier* reasoning, punitive damages may not be ex-

1192, 1194 (7th Cir. 1994); *Rice v. United States*, 834 F. Supp. 1241, 1244, 63 Fair Empl. Prac. Cas. (BNA) 1189, 1191 (E.D. Cal. 1993).

¹⁰⁴ See *Schleier*, 115 S. Ct. at 2163-64, 67 Fair Empl. Prac. Cas. (BNA) at 1747-48.

¹⁰⁵ See *id.* at 2164, 67 Fair Empl. Prac. Cas. (BNA) at 1748.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.* at 2165, 67 Fair Empl. Prac. Cas. (BNA) at 1749-89.

cludable in any circumstances because their purpose is always to punish the tortfeasor rather than compensate the victim.

In sum, the *Schleier* Court held that § 104(a)(2) does not exclude from gross income damages received under the ADEA.¹⁰⁸ Taxpayers must meet two independent requirements before their recovery qualifies for an exclusion under § 104(a)(2): the underlying cause of action giving rise to the recovery must be "based upon tort or tort type rights," and the damages received must be "on account of personal injuries or sickness."¹⁰⁹ Damages received under the ADEA failed to satisfy either requirement.¹¹⁰ It is unclear, however, what *Schleier* would mean for damages received under other discrimination statutes.

**No ADEA Liability for Employment Decisions Based on Nonpretextual Factors Closely Correlated with Age: EEOC v. Francis W. Parker School¹*

The Age Discrimination in Employment Act of 1967 (the "ADEA" or the "Act") makes it illegal for employers to discriminate against individuals on the basis of age.² Congress relied heavily on Title VII of the Civil Rights Act of 1964 in drafting the ADEA, and therefore, courts have imported the "disparate impact" and "disparate treatment" theories of relief from Title VII jurisprudence to ADEA cases.³ In proving discrimination under disparate treatment theory, a plaintiff must prove the employer's discriminatory intent.⁴ Under disparate impact theory, a plaintiff must show only that an employment practice falls more harshly on the protected group than on other employees.⁵ Although it requires no proof of discriminatory intent, a disparate impact claim will fail if the practice qualifies as a "business necessity."⁶ Under the ADEA, a plaintiff may endeavor to prove age discrimination using disparate treatment theory, but the availability of disparate impact theory under the Act remains unclear.⁷ The question of whether the

¹⁰⁸ *Id.* at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1751.

¹⁰⁹ *Schleier*, 115 S. Ct. at 2167, 67 Fair Empl. Prac. Cas. (BNA) at 1751.

¹¹⁰ *Id.*

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¹ 41 F.3d 1073, 66 Fair Empl. Prac. Cas. (BNA) 85 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995).

² 29 U.S.C. § 623(a)(1) (1994).

³ See *Parker*, 41 F.3d at 1076, 66 Fair Empl. Prac. Cas. (BNA) at 86-87.

⁴ *Id.* at 1076, 66 Fair Empl. Prac. Cas. (BNA) at 87.

⁵ *Id.*

⁶ *Id.*

⁷ *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706, 61 Fair Empl. Prac. Cas. (BNA) 793, 795 (1993). The language of the ADEA makes it clear that the disparate treatment theory is available. *Id.* The ADEA does not explicitly allow for the disparate impact theory, and the Supreme Court has never decided whether it is available. *Id.* The ADEA also provides employers with a defense

disparate impact theory is available is particularly important when a plaintiff challenges an employment decision that is not based on age, but on a factor closely correlated with age.⁸

In 1983, in *Leftwich v. Harris-Stowe State College*, the United States Court of Appeals for the Eighth Circuit held that an employment decision based on tenure status constituted age discrimination under the ADEA.⁹ The defendant in *Leftwich* did not rehire the plaintiff, a forty-seven-year-old tenured professor, after the state college system took over control of the college from the St. Louis Board of Education.¹⁰ The defendant's rehiring practice included reserving certain positions for nontenured faculty.¹¹ The Eighth Circuit found that the close statistical correlation between age and tenure established that an employment decision based on tenure status fell more harshly on older employees and, therefore, violated the ADEA under disparate impact theory.¹² In response to defendant's argument that it implemented the practice pursuant to the business necessity of cutting costs, the Eighth Circuit found that treating cost-cutting as a business necessity would defeat the purposes of the Act.¹³ The Eighth Circuit, therefore, concluded that the ADEA forbids employers from basing employment decisions on tenure status when tenure status closely correlates with age.¹⁴

In 1987, in *Metz v. Transit Mix, Inc.*, the United States Court of Appeals for the Seventh Circuit held that the ADEA prevented employers from replacing older, higher-salaried employees with younger, lower-paid workers in order to save salary costs.¹⁵ The plaintiff in *Metz* had worked for a branch plant of defendant concrete company for twenty-seven years when the defendant replaced him with a younger, lower-salaried employee in order to save money.¹⁶ The Seventh Circuit found

when their employment decisions are based on "reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1994). Some commentators have treated this defense as a codification of the business necessity defense available under the disparate impact theory. *E.g.*, *Parker*, 41 F.3d at 1080, 66 Fair Empl. Prac. Cas. (BNA) at 90 (Cudahy, J., dissenting). Others have found that this defense precludes disparate impact claims. *E.g.*, *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120, 1125-26, 63 Fair Empl. Prac. Cas. (BNA) 1016, 1020-21 (7th Cir. 1994).

⁸ See *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220, 44 Fair Empl. Prac. Cas. (BNA) 1339, 1353-54 (7th Cir. 1987) (Easterbrook, J., dissenting).

⁹ *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 691, 31 Fair Empl. Prac. Cas. (BNA) 376, 380 (8th Cir. 1983).

¹⁰ *Id.* at 689, 31 Fair Empl. Prac. Cas. (BNA) at 377-78.

¹¹ *Id.* at 690, 31 Fair Empl. Prac. Cas. (BNA) at 379.

¹² See *id.*

¹³ *Id.* at 691, 31 Fair Empl. Prac. Cas. (BNA) at 380.

¹⁴ *Leftwich*, 702 F.2d at 691, 31 Fair Empl. Prac. Cas. (BNA) at 380.

¹⁵ *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1211, 44 Fair Empl. Prac. Cas. (BNA) 1339, 1346 (7th Cir. 1987).

¹⁶ *Id.* at 1203, 44 Fair Empl. Prac. Cas. (BNA) at 1340. Plaintiff's replacement was 43 years

that, although the plaintiff had brought a disparate treatment case, the disparate impact reasoning in *Leftwich* proved instructive.¹⁷ Due to the high correlation between age and salary, the Seventh Circuit reasoned that permitting cost-cutting as a nondiscriminatory justification for replacing an older employee with a younger one would undermine the goals of the ADEA.¹⁸ The Seventh Circuit found that the desire to cut costs in this case did not constitute a reasonable factor other than age and, therefore, was not a defense to ADEA requirements.¹⁹ Thus, the Seventh Circuit concluded that replacing an older employee with a younger one, out of a desire to cut costs, constituted age discrimination under the ADEA.²⁰

In 1993, however, the United States Supreme Court, in *Hazen Paper Co. v. Biggins*, held that firing an employee because his pension benefits were close to vesting did not constitute disparate treatment under the ADEA.²¹ The defendant fired the plaintiff just before he completed the ten years of service required for his pension to vest.²² The Court reasoned that the purpose of the ADEA is to prevent employers from making decisions based upon inaccurate and stigmatizing stereotypes about older employees.²³ When the employer bases its decision on factors other than age, the Court observed, the problem of stereotyping disappears, even if the factor correlates with age.²⁴ The Court agreed that pension status typically correlates with age, but determined that age and pension status are analytically distinct.²⁵ Thus, the United States Supreme Court held that an employer does not violate the ADEA by interfering with an employee's pension status when the vesting period is based upon years of service.²⁶

In 1994, in *Anderson v. Baxter Healthcare Corp.*, the United States Court of Appeals for the Seventh Circuit held that the ADEA does not

old, had worked for defendant for 17 years and earned \$8.05/hour compared to plaintiff's \$15.75/hour. *Id.*

¹⁷ *Id.* at 1207, 44 Fair Empl. Prac. Cas. (BNA) at 1343. Judge Easterbrook's dissent argued that the two theories should be kept separate, and stated that by combining the two, the majority allowed plaintiff to get into court on the disparate treatment theory and prove his case using disparate impact analysis. *Id.* at 1215, 44 Fair Empl. Prac. Cas. (BNA) at 1349. (Easterbrook, J., dissenting).

¹⁸ *Id.* at 1207, 44 Fair Empl. Prac. Cas. (BNA) at 1343.

¹⁹ *Id.* at 1208, 44 Fair Empl. Prac. Cas. (BNA) at 1343-44.

²⁰ *Metz*, 828 F.2d at 1211, 44 Fair Empl. Prac. Cas. (BNA) at 1346.

²¹ *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1707-08, 61 Fair Empl. Prac. Cas. (BNA) 793, 796-97 (1993).

²² *Id.* at 1704, 61 Fair Empl. Prac. Cas. (BNA) at 794.

²³ *Id.* at 1706, 61 Fair Empl. Prac. Cas. (BNA) at 795.

²⁴ *Id.* at 1706, 61 Fair Empl. Prac. Cas. (BNA) at 796.

²⁵ *Id.* at 1706-07, 61 Fair Empl. Prac. Cas. (BNA) at 796.

²⁶ *Hazen Paper*, 113 S. Ct. at 1707-08, 61 Fair Empl. Prac. Cas. (BNA) at 796-97.

prevent employers from firing employees to reduce costs.²⁷ The plaintiff served as the highest-paid employee in one of defendant's facilities; defendant fired him after several incidents that allegedly resulted from the plaintiff's inattention.²⁸ Responding to plaintiff's argument that defendant fired him to reduce its salary costs, the Seventh Circuit followed *Hazen Paper*, stating that the problem of inaccurate stereotyping of older employees does not exist when an employer makes a decision based on a desire to cut costs.²⁹ The Seventh Circuit reasoned that though age and salary are typically correlated, they, like age and pension status, are analytically distinct.³⁰ Therefore, the Seventh Circuit concluded an employer does not violate the ADEA when it fires an employee to save the cost of his or her salary.³¹

During the *Survey* year, in *EEOC v. Francis W. Parker School*, the United States Court of Appeals for the Seventh Circuit held that an employer does not violate the ADEA by linking wages to experience, unless a plaintiff shows that the practice results from a forbidden stereotype about older workers.³² Although the plaintiff based its appeal only on disparate impact theory, the Seventh Circuit applied *Hazen Paper's* disparate treatment conclusion that Congress enacted the ADEA to prevent employers from basing decisions on inaccurate and forbidden stereotypes.³³ In light of this purpose, the Seventh Circuit held that an employment practice that disproportionately affects older workers will not result in liability under the ADEA unless a plaintiff proves the practice constituted a pretext for a forbidden stereotype about older workers.³⁴

Francis W. Parker School ("Parker"), a private school in Chicago, calculated teachers' salaries based on a twenty-two step system linking wages to years of experience.³⁵ The school determined new teachers' salaries by crediting them for years of teaching experience acquired elsewhere.³⁶ In 1988, a vacancy opened up in the drama department, and Parker's principal asked Paul Druzinski, head of that department,

²⁷ 13 F.3d 1120, 1126, 63 Fair Empl. Prac. Cas. (BNA) 1016, 1020-21 (7th Cir. 1994).

²⁸ *Id.* at 1121, 63 Fair Empl. Prac. Cas. (BNA) at 1016.

²⁹ *Id.* at 1125, 63 Fair Empl. Prac. Cas. (BNA) at 1020.

³⁰ *Id.* at 1126, 63 Fair Empl. Prac. Cas. (BNA) at 1020.

³¹ *Id.* at 1126, 63 Fair Empl. Prac. Cas. (BNA) at 1020-21.

³² 41 F.3d 1073, 1078, 66 Fair Empl. Prac. Cas. (BNA) 85, 88 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995).

³³ *Id.* at 1075, 1076, 66 Fair Empl. Prac. Cas. (BNA) at 86, 87. *Hazen Paper* strictly involved a disparate treatment claim; the Court never decided whether the disparate impact theory was available under the ADEA. 113 S. Ct. 1701, 1706, 61 Fair Empl. Prac. Cas. (BNA) 793, 795 (1993).

³⁴ *Parker*, 41 F.3d at 1078, 66 Fair Empl. Prac. Cas. (BNA) at 88.

³⁵ *Id.* at 1075, 66 Fair Empl. Prac. Cas. (BNA) at 86.

³⁶ *Id.*

to find a replacement.³⁷ The principal informed Druzinski that, due to budgetary concerns, the new position would pay no more than \$28,000 per year.³⁸

In March 1989, Druzinski narrowed his list of candidates to three finalists.³⁹ After Druzinski had selected the finalists, another teacher asked him if he would consider hiring Harold Johnson, a sixty-three-year-old drama teacher with thirty years of experience.⁴⁰ One week later, Druzinski told Johnson that the school would not hire him, giving as one reason the fact that Johnson qualified for a higher salary than the school could afford to pay.⁴¹ On March 27, 1989, Parker hired Nancy Bishop, a teacher with one year of experience, at a salary of \$22,000 per year.⁴²

The Equal Employment Opportunity Commission (the "EEOC") filed suit on Johnson's behalf, claiming an ADEA violation under both disparate treatment and disparate impact theories.⁴³ The trial court denied Parker's motion for summary judgment on August 27, 1992.⁴⁴ After the United States Supreme Court decided *Hazen Paper*, however, Parker asked the trial court to reconsider its ruling.⁴⁵ The trial court then granted Parker summary judgment on both the disparate impact and disparate treatment claims.⁴⁶ The EEOC appealed only its disparate impact claim.⁴⁷

In response to the EEOC's argument that Parker's employment practice excluded a disproportionate number of teachers over the age of forty from consideration for the position, the Seventh Circuit began with an analysis of the United States Supreme Court's reasoning in *Hazen Paper*.⁴⁸ Although the Seventh Circuit acknowledged that *Hazen Paper* involved a disparate treatment claim, it nonetheless applied the reasoning of *Hazen Paper* to the EEOC's disparate impact claim.⁴⁹ It interpreted *Hazen Paper* to mean that the courts must interpret the ADEA in light of its purpose of eliminating stereotyping of older

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Parker*, 41 F.3d at 1075, 66 Fair Empl. Prac. Cas. (BNA) at 86.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Parker*, 41 F.3d at 1075, 66 Fair Empl. Prac. Cas. (BNA) at 86.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1076, 66 Fair Empl. Prac. Cas. (BNA) at 87.

⁴⁹ *Parker*, 41 F.3d at 1076, 66 Fair Empl. Prac. Cas. (BNA) at 87.

workers.⁵⁰ Following *Hazen Paper's* ruling that age and years of service are analytically distinct, the Seventh Circuit found that Parker did not base its decision to reject Johnson on a forbidden stereotype, and thus Parker did not violate the ADEA.⁵¹

The Seventh Circuit supported its conclusion by interpreting *Anderson* as holding that practices that affect workers over forty more adversely than younger employees are not unlawful as long as the practice does not constitute a pretext for a forbidden stereotype about age.⁵² The Seventh Circuit also found that subsection (f) of the Act, which describes the "reasonable factors other than age" defense, supported this reading.⁵³ This defense, the Seventh Circuit reasoned, suggests that employment decisions made for reasons other than age, but which rely on factors that correlate with age, do not violate the ADEA.⁵⁴ Additionally, the Seventh Circuit noted that the Supreme Court held that a similar provision in the Equal Pay Act precludes disparate impact claims.⁵⁵

In response to the dissent, the Seventh Circuit next determined that the importation of Title VII jurisprudence, which would allow disparate impact claims in the age discrimination context, proved inappropriate on the facts of *Parker*.⁵⁶ Comparing the ADEA and Title VII, the court found significant the fact that subsection (2) of Title VII, which gave rise to disparate impact claims in the Title VII context, included the language "applicants for employment" where the mirror provision in the ADEA omitted this language.⁵⁷ The Seventh Circuit

⁵⁰ *Id.*

⁵¹ *Id.* at 1076-77, 66 Fair Empl. Prac. Cas. (BNA) at 87.

⁵² *Id.* at 1077, 66 Fair Empl. Prac. Cas. (BNA) at 87.

⁵³ *Id.* at 1077, 66 Fair Empl. Prac. Cas. (BNA) at 87-88. Subsection (f) states:

It shall not be unlawful for an employer, employment agency or labor organization—(1) to take any action otherwise prohibited under subsections (a) . . . of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age

29 U.S.C. § 623(f) (1994).

⁵⁴ *Parker*, 41 F.3d at 1077, 66 Fair Empl. Prac. Cas. (BNA) at 87.

⁵⁵ *Id.*; see *County of Wash. v. Gunther*, 452 U.S. 161, 170-71, 25 Fair Empl. Prac. Cas. (BNA) 1521, 1524 (1981).

⁵⁶ *Parker*, 41 F.3d at 1077, 66 Fair Empl. Prac. Cas. (BNA) at 88.

⁵⁷ *Id.* The United States Supreme Court relied on subsection (2) of Title VII in *Griggs v. Duke Power Co.*, in holding that Title VII permitted claims based on disparate impact theory. See 401 U.S. 424, 426, 429-30, 3 Fair Empl. Prac. Cas. (BNA) 175, 176, 177 (1971). The mirror provision in the ADEA reads: "It shall be unlawful for an employer- . . . (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's age" 29 U.S.C. § 623(a) (1994) (emphasis added).

noted that, aside from the omission, the ADEA and Title VII provisions were almost identical.⁵⁸

Finally, the court reasoned that even under a disparate impact analysis, the plaintiff's claim would fail.⁵⁹ The court concluded that the defendant's salary policy constituted a "business necessity" and reasoned that the ADEA's "safe harbor" provision, allowing an employer to "observe the terms of a bona fide seniority system," supported this conclusion.⁶⁰ Thus, the court held that to prevail on an ADEA claim, a plaintiff must show that an employment practice having a disproportionate effect on older workers serves as a pretext for applying a conscious or unconscious stereotype about older employees.⁶¹

In dissent, Judge Cudahy characterized the majority decision as holding that *Hazen Paper* precluded the use of disparate impact theory in the ADEA context.⁶² He argued that the majority's analysis began with a conclusion, i.e., that Parker did not base its decision to reject Johnson on forbidden stereotypes about older workers.⁶³ The dissent stated that courts should use disparate impact theory as an instrument to inquire whether Parker refused to hire Johnson because of these stereotypes.⁶⁴

Judge Cudahy agreed with the majority that after *Hazen Paper* it is no longer enough to show that an employer based a decision on a factor obviously correlated with age.⁶⁵ Rather, Judge Cudahy agreed, *Hazen Paper* requires a showing that an employer based a decision on age *qua* age.⁶⁶ Thus, Judge Cudahy framed the issue presented in *Parker* as whether a plaintiff can attempt to prove that an employer discriminated on the basis of age *qua* age by showing that the employer used a practice disproportionately affecting older workers.⁶⁷ Judge Cudahy argued that implicit in the majority's rejection of disparate impact theory was the belief that an employer need not actually discriminate in order to incur liability under disparate impact analysis.⁶⁸

Judge Cudahy also disagreed with the majority's suggestion that the "reasonable factors other than age" defense precludes the use of disparate impact theory to establish an ADEA violation.⁶⁹ Rather than

⁵⁸ *Parker*, 41 F.3d at 1077-78, 66 Fair Empl. Prac. Cas. (BNA) at 88.

⁵⁹ *Id.*

⁶⁰ *Id.* The "safe harbor" provision of the ADEA is found at 29 U.S.C. § 623(f)(2) (1994).

⁶¹ *Parker*, 41 F.3d at 1077-78, 66 Fair Empl. Prac. Cas. (BNA) at 88.

⁶² *Id.* at 1078, 66 Fair Empl. Prac. Cas. (BNA) at 88-89 (Cudahy, J., dissenting).

⁶³ *Id.* at 1078, 66 Fair Empl. Prac. Cas. (BNA) at 89 (Cudahy, J., dissenting).

⁶⁴ *Id.* (Cudahy, J., dissenting).

⁶⁵ *Id.* at 1078-79, 66 Fair Empl. Prac. Cas. (BNA) at 89 (Cudahy, J., dissenting).

⁶⁶ *Parker*, 41 F.3d at 1078-79, 66 Fair Empl. Prac. Cas. (BNA) at 89 (Cudahy, J., dissenting).

⁶⁷ *Id.* at 1079, 66 Fair Empl. Prac. Cas. (BNA) at 89-90 (Cudahy, J., dissenting).

⁶⁸ *Id.* at 1079, 66 Fair Empl. Prac. Cas. (BNA) at 90 (Cudahy, J., dissenting).

⁶⁹ *Id.* at 1080, 66 Fair Empl. Prac. Cas. (BNA) at 90 (Cudahy, J., dissenting).

precluding the use of disparate impact theory, Judge Cudahy argued, the "reasonable factors other than age" defense to the ADEA merely codifies the "business necessity" defense available under disparate impact theory generally.⁷⁰ He reasoned that an employment practice having a disparate impact on older workers raises a presumption of discrimination; the "business necessity" defense rebuts this presumption and thus provides an already existing defense for "reasonable factors other than age."⁷¹

The Seventh Circuit, in *Parker*, has seriously limited, and perhaps eliminated, the availability of disparate impact theory for establishing age discrimination.⁷² Moreover, even if disparate impact theory survives, the Seventh Circuit has further held that linking wages to years of experience constitutes "an economically defensible and reasonable means of determining salaries."⁷³ This suggests that even if a plaintiff may endeavor to prove age discrimination under disparate impact theory, the court will be sympathetic to a defendant's argument that its desire to cut costs falls within the "business necessity" defense.⁷⁴

The Seventh Circuit has dramatically expanded the holding in *Hazen Paper* by applying that case's disparate treatment reasoning to the plaintiff's disparate impact claim in *Parker*.⁷⁵ *Hazen Paper* requires that the defendant discriminate on the basis of age and not on the basis of some factor closely correlated with age.⁷⁶ As Judge Cudahy frames the issue, the question thus becomes whether a plaintiff may attempt to prove discriminatory intent by proving that an employment practice falls more harshly on older employees.⁷⁷ By granting summary judgment without inquiring whether the disparate impact analysis allowed an inference of discriminatory intent, the *Parker* court foreclosed the plaintiff's opportunity to prove that a forbidden stereotype about older workers lay behind the linking of wages to years of service.⁷⁸

Instead, *Parker* suggests that to survive a summary judgment motion, a plaintiff will have to produce some "smoking gun" evidence of discriminatory intent.⁷⁹ Judge Cudahy correctly argued that this bur-

⁷⁰ *Id.* (Cudahy, J., dissenting).

⁷¹ See *Parker*, 41 F.3d at 1080, 66 Fair Empl. Prac. Cas. (BNA) at 90 (Cudahy, J., dissenting).

⁷² *Id.* at 1077, 66 Fair Empl. Prac. Cas. (BNA) at 87-88.

⁷³ *Id.* at 1078, 66 Fair Empl. Prac. Cas. (BNA) at 88.

⁷⁴ See *id.*

⁷⁵ See *id.* at 1076, 66 Fair Empl. Prac. Cas. (BNA) at 87.

⁷⁶ See *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1707, 61 Fair Empl. Prac. Cas. (BNA) 793, 796 (1993).

⁷⁷ *Parker*, 41 F.3d at 1079, 66 Fair Empl. Prac. Cas. (BNA) at 89-90 (Cudahy, J., dissenting).

⁷⁸ See *id.* at 1075, 66 Fair Empl. Prac. Cas. (BNA) at 86.

⁷⁹ See *id.* at 1080, 66 Fair Empl. Prac. Cas. (BNA) at 90 (Cudahy, J., dissenting).

den is too high.⁸⁰ In essence, the Seventh Circuit will now hold plaintiffs to a burden of proof similar to that required in the equal protection context.⁸¹ *Hazen Paper's* holding that an employer may base a decision on a factor correlated with age does not necessitate elimination of the disparate impact theory of relief.⁸² Even if a plaintiff must show, as *Hazen Paper* holds, that an employer discriminated on the basis of age *qua* age, disparate impact analysis should remain an acceptable method of detecting employment decisions that were really based on age, that is, decisions in which the employer's reliance on a factor correlated with age was merely pretextual.⁸³

In sum, *EEOC v. Francis W. Parker School* establishes that a plaintiff must show that an employer based its employment decision on a stereotype about older workers in order to prevail on an age discrimination claim under the ADEA.⁸⁴ The Seventh Circuit expanded on the holding in *Hazen Paper* by making this the rule regardless of whether the plaintiff brings a disparate treatment claim or a disparate impact claim.⁸⁵ By granting the defendant summary judgment without considering whether the plaintiff's disparate impact analysis could establish discriminatory intent, the Seventh Circuit implied that a plaintiff must produce "smoking gun" evidence of discriminatory intent to make it to trial.⁸⁶ In the future, the Seventh Circuit's *Parker* rule may effectively eliminate the availability of the disparate impact theory in the ADEA context.⁸⁷

EMPLOYEE RETIREMENT INCOME SECURITY ACT

**ERISA Preemption—When Does a State Law "Relate to" an ERISA Plan?: New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*¹

Congress enacted the Employee Retirement Income Security Act ("ERISA") in 1974 in part to protect employee benefit plan participants by controlling the administration of plan benefits.² ERISA cover-

⁸⁰ See *id.* (Cudahy, J., dissenting).

⁸¹ See *id.* (Cudahy, J., dissenting).

⁸² See *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1707-08, 61 Fair Empl. Prac. Cas. (BNA) 793, 796-97 (1993).

⁸³ See *Parker*, 41 F.3d at 1080-81, 66 Fair Empl. Prac. Cas. (BNA) at 91 (Cudahy, J., dissenting).

⁸⁴ *Id.* at 1078, 66 Fair Empl. Prac. Cas. (BNA) at 88.

⁸⁵ See *id.*

⁸⁶ See *id.* at 1080, 66 Fair Empl. Prac. Cas. (BNA) at 90 (Cudahy, J., dissenting).

⁸⁷ See *id.* at 1078, 66 Fair Empl. Prac. Cas. (BNA) at 89 (Cudahy, J., dissenting).

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¹ 115 S. Ct. 1671, 19 Employee Benefits Cas. (BNA) 1137 (1995).

² See *id.* at 1674, 19 Employee Benefits Cas. (BNA) at 1139.

age extends to employee benefit plans that provide medical, surgical or hospital care or benefits.³ ERISA contains participation and vesting requirements, funding standards, reporting and disclosure mandates for covered plans and creates fiduciary responsibility for plan administrators.⁴ ERISA also preempts state laws "insofar as they . . . relate to any employee benefit plan" that ERISA covers.⁵ Congress intended this preemption provision to subject employee benefit plans to a uniform body of law and thus minimize the administrative and financial burdens on plan administrators who would otherwise have to comply with conflicting state, federal and local regulations.⁶ In determining whether ERISA preempts certain state laws, the United States Supreme Court and other federal courts have repeatedly struggled to interpret the term "relate to" as used in ERISA's preemption provision.⁷

In 1983, in *Shaw v. Delta Air Lines, Inc.*, the United States Supreme Court held that a law relates to an employee benefit plan, and thus falls under ERISA's general preemption clause, if it has a connection with, or reference to an ERISA plan.⁸ In *Shaw*, the plaintiffs sought declaratory judgments that ERISA preempted New York's Human Rights Law, which forbade discrimination in employment, and New York's Disability Benefits Law, which required employers to pay sick-leave benefits to employees unable to work because of pregnancy or other nonoccupational disabilities.⁹ The Court reasoned that Congress intended ERISA's preemption provision to be broad in order to eliminate the threat of conflicting state and local regulation by reserving to federal authority the sole power to regulate employee benefit plans.¹⁰ In light of such a broad interpretation of ERISA's preemption provision, the Court concluded that the Human Rights Law and the Disability Benefits Law related to employee benefit plans by regulating their structure and content.¹¹ Thus, the Court held that New York's Human

³ 29 U.S.C. § 1002(1) (1994).

⁴ *Travelers*, 115 S. Ct. at 1674, 19 Employee Benefits Cas. (BNA) at 1139; see 29 U.S.C. § 1001(b) (1994).

⁵ 29 U.S.C. § 1144(a) (1994).

⁶ See *Travelers*, 115 S. Ct. at 1677, 19 Employee Benefits Cas. (BNA) at 1142; *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 5 Indiv. Empl. Rights Cas. (BNA) 1601, 1604 (1990).

⁷ See, e.g., *Travelers*, 115 S. Ct. at 1677, 19 Employee Benefits Cas. (BNA) at 1141; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 32 Fair Empl. Prac. Cas. (BNA) 121, 125-26 (1983); *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1192, 16 Employee Benefits Cas. (BNA) 2182, 2186-87 (3d Cir.), cert. denied, 114 S. Ct. 382 (1993).

⁸ 463 U.S. at 96-97, 32 Fair Empl. Prac. Cas. (BNA) at 125.

⁹ *Id.* at 89, 92, 32 Fair Empl. Prac. Cas. (BNA) at 122-23, 124.

¹⁰ *Id.* at 99, 32 Fair Empl. Prac. Cas. (BNA) at 126.

¹¹ *Id.* at 100, 32 Fair Empl. Prac. Cas. (BNA) at 127.

Rights Law and Disability Benefits Law fell within the general scope of ERISA's preemption provision.¹²

In contrast, in 1984, in *Rebaldo v. Cuomo*, the United States Court of Appeals for the Second Circuit held that to relate to an ERISA plan, a state law must purport to regulate the terms and conditions of the plan.¹³ In *Rebaldo*, a New York statute authorized specific inpatient hospital charges for patients with self-insured plans and prohibited hospitals from establishing other charges for those patients, but did not restrict the discounts that hospitals could give to payers such as Blue Cross.¹⁴ Acknowledging that the United States Supreme Court had interpreted the term "relate to" broadly, the Second Circuit nevertheless reasoned that ERISA preemption does not create "a fully insulated legal world" of ERISA plans where regulations of purely local transactions do not apply.¹⁵ Therefore, the court reasoned, ERISA cannot preempt a state statute that merely has some economic impact on an ERISA plan.¹⁶ Consequently, the Second Circuit held that ERISA did not preempt the New York statute, even though the statute had some economic impact on ERISA plans.¹⁷

The United States Supreme Court again addressed the issue of whether a law related to an ERISA plan in 1990, in *Ingersoll-Rand Co. v. McClendon*, where the Court held that a state law escapes ERISA preemption if it is generally applicable, lacks reference to and functions irrespective of the existence of an ERISA plan.¹⁸ In *Ingersoll-Rand*, the plaintiff filed suit in a Texas state court alleging that Ingersoll-Rand fired him to avoid making contributions to his pension fund.¹⁹ The Texas Supreme Court held that under Texas law a plaintiff could recover in a wrongful discharge action if he or she established that the principal reason for his or her termination was the employer's desire to avoid contributing to or paying benefits under the employee's pen-

¹² *Id.* at 97, 100, 108, 32 Fair Empl. Prac. Cas. (BNA) at 125-26, 127, 130. Although both of New York's laws fell within ERISA's general preemption provision, the Court ultimately held that exemptions to preemption applied and thus ERISA did not fully preempt either statute. *Id.* at 100, 108-09, 32 Fair Empl. Prac. Cas. at 127, 129, 130.

¹³ 749 F.2d 133, 137, 6 Employee Benefits Cas. (BNA) 1001, 1004 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

¹⁴ *Id.* at 134, 6 Employee Benefits Cas. (BNA) at 1001-02.

¹⁵ *Id.* at 138, 6 Employee Benefits Cas. (BNA) at 1004-05. Because containment of hospital costs is part of a state's police power, the Second Circuit reasoned, federal law should not supersede the New York statute, absent clear congressional intent to the contrary. *Id.* at 138, 6 Employee Benefits Cas. (BNA) at 1005.

¹⁶ *See id.* at 139, 6 Employee Benefits Cas. (BNA) at 1005-06.

¹⁷ *Id.*

¹⁸ *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 5 Indiv. Empl. Rights Cas. (BNA) 1601, 1603 (1990).

¹⁹ *Id.* at 135-36, 5 Indiv. Empl. Rights Cas. (BNA) at 1601.

sion fund.²⁰ In reviewing the wrongful discharge cause of action created by the Texas court, the United States Supreme Court focused on the necessity that the plaintiff plead, and that a Texas court find, that an ERISA plan existed and the employer had a pension-defeating motive in terminating the employment.²¹ Because the wrongful discharge cause of action depended on the existence of an ERISA plan, the Court held that it related to an ERISA plan and thus fell within ERISA's preemption provision.²²

The United States Supreme Court further developed ERISA preemption jurisprudence in 1992, in *District of Columbia v. Greater Washington Board of Trade*, where it held that a law that specifically referred to ERISA plans related to ERISA plans.²³ In *Greater Washington*, the Court considered a District of Columbia statute that required employers providing health insurance to provide the same benefit level to injured employees eligible for worker's compensation benefits as they provided to all other employees.²⁴ A corporation that sponsored health insurance for its employees alleged that ERISA preempted the statute and sought to enjoin its enforcement.²⁵ Reasoning that Congress intended a broad reading of ERISA's preemption provision, the Court examined whether the district statute had a connection with or referred to ERISA plans.²⁶ The Court concluded that the statute related to ERISA because the statute specifically referred to ERISA plans.²⁷ Thus, the Court held that ERISA preempted the district statute requiring health insurance for employees eligible for workers' compensation to equal other employee health insurance coverage.²⁸

In 1993, the United States Court of Appeals for the Third Circuit held, in *United Wire, Metal & Machine Health & Welfare Fund v. Morristown Memorial Hospital*, that a state statute relates to an ERISA plan if the statute is specifically intended to affect such plans, singles out such plans for special treatment or creates rights or restrictions predicated on the existence of such a plan.²⁹ In *United Wire* several self-insured employee benefit plans and individual participants sought

²⁰ *Id.* at 136, 5 Indiv. Empl. Rights Cas. (BNA) at 1602.

²¹ *Id.* at 140, 5 Indiv. Empl. Rights Cas. (BNA) at 1603.

²² *Id.*

²³ See 113 S. Ct. 580, 583, 16 Employee Benefits Cas. (BNA) 1001, 1003 (1992).

²⁴ *Id.* at 583-84, 16 Employee Benefits Cas. (BNA) at 1003.

²⁵ *Id.* at 582, 16 Employee Benefits Cas. (BNA) at 1002.

²⁶ See *id.* at 583, 16 Employee Benefits Cas. (BNA) at 1003.

²⁷ *Id.* The Court reasoned that a law's coverage of non-ERISA plans is irrelevant if the law otherwise relates to ERISA plans and thereby falls within ERISA's preemption provision. *Id.* at 584, 16 Employee Benefits Cas. (BNA) at 1004.

²⁸ *Greater Wash.*, 113 S. Ct. at 582, 16 Employee Benefits Cas. (BNA) at 1001.

²⁹ *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Memorial Hosp.*, 995

to prevent application to them of a New Jersey statutory scheme that set different hospital prices for patients covered by differing insurance plans.³⁰ The Third Circuit noted that although ERISA preempts a state law that has a connection with or refers to ERISA plans, the effect on ERISA plans may be too tenuous, remote or peripheral to trigger ERISA's preemption.³¹ Reasoning that New Jersey's regulatory scheme had no effect on the manner in which an ERISA plan conducted business or its ability to function in interstate commerce, the court found that the indirect effect of the regulatory scheme on the cost of ERISA plans was not sufficient to trigger preemption.³² The Third Circuit further reasoned that Congress did not intend to frustrate the efforts of a state to regulate health care costs through the exercise of its police power.³³ Thus, the Third Circuit held that ERISA did not preempt New Jersey's hospital rate regulation scheme.³⁴

During the *Survey* year, the United States Supreme Court again considered the scope of ERISA's preemption provision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, in which it examined ERISA's practical objectives to determine the scope of state law that Congress intended to preempt.³⁵ The Court acknowledged that its prior attempts to construe ERISA's preemption clause did not simplify the determination of which state laws relate to ERISA plans.³⁶ Thus, in *Travelers*, the Court focused on the tension between the broad congressional intent to preempt the field of employee benefits for federal regulation and the traditional presumption that Congress does not intend to supersede the police powers of the states.³⁷

In *Travelers*, a New York statute required that hospitals charge each patient for the average cost of treating the patient's medical problem, as adjusted for each hospital's individual operating costs and other overhead.³⁸ The statute also imposed differing surcharges on patients, depending on the type of insurance held.³⁹ For example, a

F.2d 1179, 1192, 16 Employee Benefits Cas. (BNA) 2182, 2186 (3d Cir.), *cert. denied*, 114 S. Ct. 382 (1993).

³⁰ *Id.* at 1188, 1189, 16 Employee Benefits Cas. (BNA) at 2183, 2183-84.

³¹ *Id.* at 1191, 16 Employee Benefits Cas. (BNA) at 2185 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21, 32 Fair Empl. Prac. Cas. (BNA) 121, 127 n.21 (1983)).

³² *United Wire*, 995 F.2d at 1193, 16 Employee Benefits Cas. (BNA) at 2187-88.

³³ *Id.* at 1196, 16 Employee Benefits Cas. (BNA) at 2190-91.

³⁴ *Id.* at 1195, 16 Employee Benefits Cas. (BNA) at 2190.

³⁵ 115 S. Ct. 1671, 1677, 19 Employee Benefits Cas. (BNA) 1137, 1141 (1995).

³⁶ *Id.*

³⁷ *See id.* at 1676, 1677, 19 Employee Benefits Cas. (BNA) at 1141.

³⁸ *Id.* at 1674, 19 Employee Benefits Cas. (BNA) at 1138.

³⁹ *See id.* at 1674, 19 Employee Benefits Cas. (BNA) at 1138.

patient who belonged to a Blue Cross/Blue Shield plan paid no surcharge, but a patient who belonged to a self-insured plan paid a thirteen percent surcharge.⁴⁰ Some patients with commercial insurance paid as much as a twenty-four percent surcharge under the statute.⁴¹

Several commercial insurers, acting as fiduciaries of ERISA plans they administered, sought to invalidate the statute on the grounds that it related to an ERISA plan and that ERISA therefore preempted the surcharges.⁴² The United States District Court for the Southern District of New York reasoned that the surcharges would lead, at least indirectly, to an increase in plan costs.⁴³ Thus, the district court enjoined enforcement of the surcharges against any commercial insurer or health maintenance organization ("HMO") in connection with its coverage of ERISA plans.⁴⁴

On appeal, the United States Court of Appeals for the Second Circuit abandoned its prior decision in *Rebaldo v. Cuomo* and held that the surcharges related to ERISA because they place a significant economic burden on commercial insurers and HMOs.⁴⁵ The court relied on the United States Supreme Court's assertions that ERISA's preemption clause is broad enough to reach any state law connected with or referring to ERISA plans and thus may preempt laws not specifically designed to affect ERISA plans or laws that have only an indirect effect on ERISA plans.⁴⁶ The court reasoned that New York's intentional interference with ERISA plan administrators' choices, through price setting, constituted a connection with ERISA plans.⁴⁷ Hence, the Second Circuit held that ERISA preempted the New York hospital surcharges statute.⁴⁸

⁴⁰ *Travelers*, 115 S. Ct. at 1674, 19 Employee Benefits Cas. (BNA) at 1138.

⁴¹ *See id.*

⁴² *Id.* at 1675, 19 Employee Benefits Cas. (BNA) at 1139.

⁴³ *Travelers Ins. Co. v. Cuomo*, 813 F. Supp. 996, 1003, 16 Employee Benefits Cas. (BNA) 1551, 1556 (S.D.N.Y. 1993), *aff'd*, 14 F.3d 708, 723, 17 Employee Benefits Cas. (BNA) 1675, 1686 (2d Cir. 1994), *rev'd sub nom.* *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676, 19 Employee Benefits Cas. (BNA) 1137, 1140, 1141 (1995).

⁴⁴ *Id.* at 999, 16 Employee Benefits Cas. (BNA) at 1552.

⁴⁵ *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 719, 17 Employee Benefits Cas. (BNA) 1675, 1682 (2d Cir. 1994), *rev'd sub nom.* *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676, 19 Employee Benefits Cas. (BNA) 1137, 1140, 1141 (1995); *see Rebaldo v. Cuomo*, 749 F.2d 133, 137, 6 Employee Benefits Cas. (BNA) 1001, 1004 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

⁴⁶ *Travelers Ins. Co. v. Cuomo*, 14 F.3d at 718, 17 Employee Benefits Cas. (BNA) at 1681; *see District of Columbia v. Greater Wash. Bd. of Trade*, 113 S. Ct. 580, 583, 16 Employee Benefits Cas. (BNA) 1001, 1003 (1992); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139, 5 Individual Empl. Rights Cas. (BNA) 1601, 1603 (1990).

⁴⁷ *Travelers Ins. Co. v. Cuomo*, 14 F.3d at 719, 17 Employee Benefits Cas. (BNA) at 1682.

⁴⁸ *Id.* at 723, 17 Employee Benefits Cas. (BNA) at 1686. The Second Circuit acknowledged

The United States Supreme Court reversed the Second Circuit's decision, reasoning in part that unless Congress provides clear evidence to the contrary, it does not intend a federal act to supersede the police powers of a state.⁴⁹ The Court began its analysis with the text of the preemption provision.⁵⁰ Previously, the Court had applied the provision to those laws that had a connection with, or reference to, an ERISA plan.⁵¹ Because the New York statute did not refer to ERISA plans, the Court examined whether the statute had the requisite connection with ERISA plans.⁵² Noting that determining whether a law has a "connection with" an ERISA plan is no easier than determining whether a law relates to an ERISA plan, the Court looked beyond the text of the preemption provision and examined ERISA's objectives to identify which state laws Congress intended to preempt.⁵³

The Court noted that Congress intended ERISA to create a uniform body of benefits law to minimize the administrative and financial burdens of complying with a multiplicity of state and local directives.⁵⁴ The Court contrasted the laws at issue in *Shaw*, which related to ERISA plans by regulating the structure of plans and by requiring payment of specific benefits, with the *Travelers* statute, which only indirectly affected the costs of benefits and did not bind plan administrators to any specific choice.⁵⁵ The Court emphasized that the New York statute did not conflict with the congressional goal of uniformity because the statute did not preclude uniform administrative practices or the provision of a uniform interstate benefit package.⁵⁶ Reasoning that if ERISA were to preempt rate regulation, it would also preempt all other regulation indirectly affecting plan costs, the Court noted that ERISA

that this holding contradicted the United States Court of Appeals for the Third Circuit decision on a similar statute in *United Wire*. *Id.* at 721 n.2, 17 Employee Benefits Cas. (BNA) at 1683 n.2; see *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1196, 16 Employee Benefits Cas. (BNA) 2183, 2191 (3d. Cir.), *cert. denied*, 114 S. Ct. 382 (1993).

⁴⁹ *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676, 19 Employee Benefits Cas. (BNA) 1137, 1140, 1141 (1995).

⁵⁰ *Id.* at 1677, 19 Employee Benefits Cas. (BNA) at 1141.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *Travelers*, 115 S. Ct. at 1677-78, 19 Employee Benefits Cas. (BNA) at 1142.

⁵⁵ *Id.* at 1678, 1679, 19 Employee Benefits Cas. (BNA) at 1142, 1143; see *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 32 Fair Empl. Prac. Cas. (BNA) 121, 125-26 (1983). New York's Human Rights Law prohibited employers from structuring their employee benefit plans in a manner that discriminated on the basis of pregnancy, and New York's Disability Benefits law required employers to pay employees specific benefits. *Shaw*, 463 U.S. at 97, 32 Fair Empl. Prac. Cas. (BNA) at 125-26.

⁵⁶ See *Travelers*, 115 S. Ct. at 1679, 19 Employee Benefits Cas. (BNA) at 1143.

could then effectively preempt all state laws.⁵⁷ The Court asserted that this result would violate basic principles of statutory interpretation by reading the limiting language out of ERISA's preemption provision and would contradict the Court's earlier assertions that ERISA does not preempt state laws that have only a tenuous connection with ERISA plans.⁵⁸ Furthermore, the Court reasoned, barring the New York hospital rate regulations would allow the preemption of any state regulation of hospital costs on the grounds that the regulation has an indirect economic effect on ERISA plans.⁵⁹

The Court found no evidence that Congress intended ERISA to preempt local general health care regulation or to create nationwide cost uniformity and therefore indicated that ERISA does not preempt state laws that indirectly affect the relative costs of health insurance packages within a state.⁶⁰ Additionally, the Court emphasized that states regulated hospital prices when Congress passed ERISA, and yet Congress did not indicate that ERISA should curtail these state efforts.⁶¹ In fact, the Court noted, the same Congress later enacted a statute to encourage and fund state responses to growing health care costs.⁶² Consequently, the Supreme Court reasoned, it would be illogical to read ERISA as preempting such state action.⁶³ After reaching its decision, the Court clarified that its reasoning and holding in *Travelers* were not inconsistent with its reasoning and holdings in past cases.⁶⁴ Hence, the United States Supreme Court held that New York's hospital rate surcharge statute did not relate to ERISA plans and thus fell outside the scope of the preemption provision.⁶⁵

The Court's decision will likely have a profound effect on state regulation of health care. Already, a number of courts have applied the reasoning in the *Travelers* decision to various state laws before them.⁶⁶ Although the Court did not address whether ERISA preempt-

⁵⁷ See *id.* at 1677, 1679, 19 Employee Benefits Cas. (BNA) at 1141, 1144.

⁵⁸ *Id.* at 1679-80, 19 Employee Benefits Cas. (BNA) at 1144; see *District of Columbia v. Greater Wash. Bd. of Trade*, 113 S. Ct. 580, 583 n.1, 16 Employee Benefits Cas. (BNA) 1001, 1003 n.1 (1992).

⁵⁹ *Travelers*, 115 S. Ct. at 1681, 19 Employee Benefits Cas. (BNA) at 1146.

⁶⁰ *Id.* at 1680, 19 Employee Benefits Cas. (BNA) at 1144.

⁶¹ *Id.* at 1681, 19 Employee Benefits Cas. (BNA) at 1146.

⁶² *Id.* at 1681-82, 19 Employee Benefits Cas. (BNA) at 1146.

⁶³ *Id.* at 1682, 19 Employee Benefits Cas. (BNA) at 1147.

⁶⁴ *Travelers*, 115 S. Ct. at 1680-81, 19 Employee Benefits Cas. (BNA) at 1144-46.

⁶⁵ See *id.* at 1680, 19 Employee Benefits Cas. (BNA) at 1144.

⁶⁶ E.g., *New England Health Care Union, Dist. 1199 v. Mount Sinai Hosp.*, 65 F.3d 1024, 1030, 19 Employee Benefits Cas. (BNA) 1809, 1817 (2d Cir. 1995); *Safeco Life Ins. Co. v. Musser*, 65 F.3d 647, 652-53, 19 Employee Benefits Cas. (BNA) 1828, 1834 (7th Cir. 1995); *Travelers Ins. Co. v. Pataki*, 63 F.3d 89, 95, 19 Employee Benefits Cas. (BNA) 1702, 1717 (2d Cir. 1995).

ted application of New York's hospital rate regulations to self-insured plans, on remand the United States Court of Appeals for the Second Circuit found no reason to differentiate between self-insured and other ERISA plans for purposes of preemption and held that the New York statute applied equally to self-insured plans.⁶⁷ Federal courts have also relied on the Court's reasoning to uphold other state laws that imposed surcharges, taxes or assessments on insurers.⁶⁸ This trend of permitting states to indirectly increase the cost of administering ERISA plans is likely to continue and to result in increased charges to beneficiaries of ERISA plans.⁶⁹

On the other hand, the Court's ruling may allow states to be more innovative in regulating health care to further individual state goals. In light of recent federal failure to enact sweeping health care reform, the *Travelers* decision may allow states greater opportunity to attempt their own limited reforms. States might place surcharges on the treatment of patients with insurance in order to subsidize treatment for the un- and under-insured. Taken to its furthest extreme this could lead, in effect, to direct or indirect health care coverage for all. Although this result seems to be socially desirable, it would impose costs on ERISA plans that the plans would then pass on to their subscribers. This might cause more and more people to forgo insurance, thereby further increasing the costs to those who have insurance.

Unfortunately, while the Court's decision takes a pragmatic approach to ERISA preemption, it does not create any bright-line standard by which to judge state regulations.⁷⁰ This lack of a bright-line standard may lead to increased litigation of this issue as more states attempt limited reforms of health care. In the course of this litigation, the courts are likely to develop a standard that will curtail or prevent the perpetual cycle mentioned above.

⁶⁷ See *Travelers*, 115 S. Ct. at 1675 n.4 19 Employee Benefits Cas. (BNA) at 1140 n.4; *Travelers Ins. Co. v. Pataki*, 63 F.3d at 95, 19 Employee Benefits Cas. (BNA) at 1707.

⁶⁸ See, e.g., *New England Health Care Union*, 65 F.3d at 1029-31, 19 Employee Benefits Cas. (BNA) at 1814-17; *Safeco*, 65 F.3d at 651-53, 19 Employee Benefits Cas. (BNA) at 1831-34; *New York State Health Maintenance Org. Conf. v. Curiale*, 64 F.3d 794, 802-04, 19 Employee Benefits Cas. (BNA) 1777, 1785-86, (2d Cir. 1995).

⁶⁹ See *Medical Savings Accounts Face Opposition in Finance Committee*, *Aide Says*, 95 TAX NOTES TODAY, May 12, 1995, Doc. No. 93-7, available in LEXIS, Taxria Library, TNT File (noting that full implications of recent Supreme Court holding in *Travelers* are unclear, but costs certainly will rise for affected plans).

⁷⁰ See *Travelers*, 115 S. Ct. at 1683, 19 Employee Benefits Cas. (BNA) at 1147-48; *Safeco*, 65 F.3d at 652, 19 Employee Benefits Cas. (BNA) at 1833 (noting "the Court's pragmatic view of the surcharges at issue in *Travelers*").

In summary, *Travelers* elucidated the Court's past interpretations of ERISA's preemption provision. The Court clarified that ERISA will not preempt a law that has only an indirect economic effect on ERISA plans as long as the law does not effectively restrict an ERISA plan's choice of insurers or force the plan to adopt specific substantive coverage.⁷¹ The Court did not, however, provide a workable standard for determining which regulations with indirect economic effects fall within ERISA's preemption provision. This void will likely engender more litigation as states attempt to reform health care within their borders and insurers resist the resultant increased costs.

**Amendment Procedure for Employee Welfare Plans Under Section 402(b)(3) of ERISA: Curtiss-Wright Corp. v. Schoonejongen*¹

The Employee Retirement Income Security Act of 1974 ("ERISA") sets forth a number of procedures that an employer must follow when establishing and providing pension and welfare plans.² For the purposes of ERISA, welfare plans are those designed or maintained to provide employee benefits, such as health care, disability benefits, vacation benefits or the like.³ Plans providing severance pay are also considered welfare plans for the purposes of ERISA.⁴ ERISA requires that welfare plans be set out in writing and have certain requisite features.⁵ Section 402(b)(3) of ERISA specifically requires that the plan include a procedure for its amendment and for identifying the persons who have authority to amend the plan.⁶

⁷¹ See *Travelers*, 115 S. Ct. at 1683, 19 Employee Benefits Cas. (BNA) at 1147.

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¹ 115 S. Ct. 1223, 18 Employee Benefits Cas. (BNA) 2841 (1995).

² 29 U.S.C. §§ 1001-1461 (1994).

³ 29 U.S.C. § 1002(1) (1994). The full text of the statutory definition reads:

The terms "employee benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or maintained for the purpose of providing to its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Id.

⁴ See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 105, 10 Employee Benefits Cas. (BNA) 1873, 1874 (1989).

⁵ 29 U.S.C. § 1102(a)(1), (b) (1994).

⁶ 29 U.S.C. § 1102(b)(3).

Two controversies have arisen in courts of appeals surrounding section 402(b)(3).⁷ One area of controversy is the issue of what constitutes a valid amendment procedure under section 402(b)(3).⁸ The second involves the appropriate remedy for a violation of section 402(b)(3).⁹

In 1990, in *Hozier v. Midwest Fasteners, Inc.*, the United States Court of Appeals for the Third Circuit held that ERISA prohibits an employer from modifying its welfare benefits plan without a written instrument.¹⁰ In *Hozier*, the defendant, Midwest Fasteners, Inc. ("Midwest"), implemented a policy that decreased the severance benefits provided in its original plan.¹¹ Midwest then implemented the new policy without reducing it to writing.¹² The plaintiffs in *Hozier* were sales employees of Midwest who were discharged and found themselves subject to the new policy.¹³ They sued for the original plan's higher benefits, claiming that the original plan had been improperly modified under ERISA.¹⁴

Drawing on a line of cases holding that ERISA prohibits employees from binding their employers to oral promises to *increase* benefits in written plans, the *Hozier* court reasoned by analogy that Midwest could not enforce its oral decree to decrease the written plan's benefits.¹⁵ In reaching this conclusion, the court explicitly avoided ruling on whether the amendment would be invalid, even if it were in writing, because the original plan failed to set out an amendment procedure as required by section 402(b)(3) of ERISA.¹⁶ In a footnote, however, the court surmised that a court might remedy such a violation of ERISA section 402(b)(3) by invalidating any subsequent amendment.¹⁷ Nonetheless, the Third Circuit raised the issue only as dictum to its central holding that ERISA prohibits an employer from modifying a welfare benefits plan without a written instrument.¹⁸

⁷ See *Schoonejongen v. Curtiss-Wright*, 18 F.3d 1034, 17 Employee Benefits Cas. (BNA) 2041 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223, 18 Employee Benefits Cas. (BNA) 2841 (1995); *Biggers v. Wittek Indus.*, 4 F.3d 291, 17 Employee Benefits Cas. (BNA) 1556 (4th Cir. 1993); *Murphy v. Keystone Steel & Wire Co.*, 850 F. Supp. 1367 (C.D. Ill. 1994).

⁸ See *Huber v. Casablanca Indus.*, 916 F.2d 85, 12 Employee Benefits Cas. (BNA) 2393 (3d Cir. 1990).

⁹ See *Schoonejongen*, 18 F.3d 1034, 17 Employee Benefits Cas. (BNA) 2041; *Biggers*, 4 F.3d 291, 17 Employee Benefits Cas. (BNA) 1556; *Murphy*, 850 F. Supp. 1367.

¹⁰ 908 F.2d 1155, 1163, 12 Employee Benefits Cas. (BNA) 2449, 2456 (3d Cir. 1990).

¹¹ *Hozier*, 908 F.2d at 1158, 12 Employee Benefits Cas. (BNA) at 2451.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1163, 12 Employee Benefits Cas. (BNA) at 2457.

¹⁶ *Hozier*, 908 F.2d at 1163 n.9, 12 Employee Benefits Cas. (BNA) at 2456 n.9.

¹⁷ See *id.*

¹⁸ *Id.* at 1163, 12 Employee Benefits Cas. (BNA) at 2456.

Also in 1990, in *Frank v. Colt Industries*, the Third Circuit held that the minutes of a meeting of company officers did not meet the minimal standards of formality required for a valid amendment of a welfare benefits plan.¹⁹ The defendant in *Frank*, Colt Industries ("Colt"), had set up a welfare plan that provided for severance pay, but lacked an amendment procedure.²⁰ Subsequently, Colt implemented a system of "continuance bonuses" (a sum payment upon termination of employment rather than a continuation in pay for a prescribed period).²¹ In two internal memoranda, Colt maintained that discharged employees would not be eligible for both severance pay and the continuance bonuses.²² Upon being discharged, some of Colt's former employees brought an action under ERISA's section 402(b)(3) claiming that, in the absence of a more formal instrument of amendment stating otherwise, the continuance bonuses could only supplement, not replace, their severance benefits.²³

The *Frank* court likened Colt's memoranda to attempts at oral amendment of a written plan insofar as they did not sufficiently manifest intent to alter the written plan.²⁴ As in *Hozier*, the Third Circuit again suggested in dicta that, even if the amendment were sufficiently formal, it might still be invalid because the original plan lacked an amendment procedure as required by ERISA section 402(b)(3).²⁵ Again, however, this dicta was only ancillary to the Third Circuit's holding in *Frank* that the minutes of a meeting of company officers did not meet the minimal standards of formality necessary for a valid amendment of a welfare benefits plan under ERISA.²⁶

Also in 1990, in *Huber v. Casablanca Industries*, the Third Circuit held that informal written agreements may be effective amendments to a welfare plan if made pursuant to the plan's amendment procedure.²⁷ In *Huber*, the plaintiff, a subsidiary of Casablanca Industries, challenged an amendment to its multi-employer pension plan.²⁸ The amendment, which involved increased benefits, was made in writing during a meeting of the pension fund's board of trustees, pursuant to a procedure set forth in the plan that allowed modification by "the

¹⁹ 910 F.2d 90, 98, 12 Employee Benefits Cas. (BNA) 2249, 2256 (3rd Cir. 1990).

²⁰ *Id.* at 93, 12 Employee Benefits Cas. (BNA) at 2251.

²¹ *See id.* at 93-94, 12 Employee Benefits Cas. (BNA) at 2251-52.

²² *Id.* at 97, 12 Employee Benefits Cas. (BNA) at 2255.

²³ *Id.* at 95, 12 Employee Benefits Cas. (BNA) at 2253.

²⁴ *See Frank*, 910 F.2d at 97-98, 12 Employee Benefits Cas. (BNA) at 2256-57.

²⁵ *Frank*, 910 F.2d at 98, 12 Employee Benefits Cas. (BNA) at 2256 (citing *Hozier*, 908 F.2d at 1163 n.9, 12 Employee Benefits Cas. (BNA) at 2456 n.9).

²⁶ *Id.*

²⁷ 916 F.2d 85, 88, 12 Employee Benefits Cas. (BNA) 2393, 2395 (3d Cir. 1990).

²⁸ *Id.* at 105, 12 Employee Benefits Cas. (BNA) at 2412.

Trustees.”²⁹ The Third Circuit distinguished the board’s modification of the multi-employer pension plan from the sort of oral modification that it had previously invalidated in *Hozier*.³⁰ The court emphasized that by allowing for modification “by the Trustees” the plan had provided a valid procedure for amendment, one which the board had followed in making its amendment.³¹ Therefore, the *Huber* court concluded that informal written agreements to a welfare plan may be effective if made pursuant to an amendment procedure set forth in the plan.³²

In 1993, in *Biggers v. Wittek Industries*, the United States Court of Appeals for the Fourth Circuit held that in the absence of an amendment procedure, a written amendment is only effective if accompanied by a clear manifestation of an intent to alter the plan.³³ In *Biggers*, the defendant, Wittek Industries, had established a severance policy with no amendment procedure that provided severance benefits commensurate with an employee’s term of service up to a maximum of twenty weeks pay.³⁴ Subsequently, the defendant instituted a new policy that capped a terminated employee’s severance pay at three weeks.³⁵ The new policy was put into effect without ever having been signed by the company president.³⁶ Eighteen terminated employees sued under ERISA for the benefits provided in the original plan.³⁷

Drawing upon principles of trust law, the *Biggers* court likened an employer who desires to amend but whose plan does not set forth procedures for doing so, to a settlor who has reserved the power to amend a trust but has not provided a method for exercising that power.³⁸ Noting that Wittek Industries’ new policy was drafted and revised for its president’s approval and signature, the Fourth Circuit reasoned that the absence of her signature was fatal to any effort of the defendant to show a clear manifestation of intent to alter the policy.³⁹ The *Biggers* court refused to adopt a remedy that would automatically invalidate any amendment made subsequent to a violation of ERISA section 402(b)(3).⁴⁰ Instead, the *Biggers* court concluded that,

²⁹ *Id.* at 105, 106, 12 Employee Benefits Cas. (BNA) at 2412, 2413.

³⁰ *Id.* at 106, 107, 12 Employee Benefits Cas. (BNA) at 2413.

³¹ *Id.*

³² *Huber*, 916 F.2d at 88, 12 Employee Benefits Cas. (BNA) at 2395.

³³ 4 F.3d 291, 296, 17 Employee Benefits Cas. (BNA) 1556, 1560 (4th Cir. 1993).

³⁴ *Id.* at 293, 17 Employee Benefits Cas. (BNA) at 1557.

³⁵ *Id.*

³⁶ *Id.* at 294, 17 Employee Benefits Cas. (BNA) at 1558.

³⁷ *Id.* at 293, 17 Employee Benefits Cas. (BNA) at 1557.

³⁸ *Biggers*, 4 F.3d at 295, 17 Employee Benefits Cas. (BNA) at 1559–60.

³⁹ *Id.* at 296, 17 Employee Benefits Cas. (BNA) at 1560.

⁴⁰ *Id.* at 295, 17 Employee Benefits Cas. (BNA) at 1560.

even in the absence of a valid amendment procedure, a subsequent amendment may itself be valid if accompanied by a clear manifestation of intent to alter the policy.⁴¹

In 1994, in *Murphy v. Keystone Steel & Wire Co.*, the United States District Court for the Central District of Illinois held that an employer's failure to set out a procedure for amending its welfare plan did not automatically invalidate its purported amendment.⁴² In *Murphy*, the defendant, Keystone Steel & Wire Co. ("Keystone"), established a health care benefit plan for retirees that contained no amendment procedure.⁴³ Subsequently, Keystone instituted a new plan with a larger annual deductible and a larger copayment percentage.⁴⁴ Simultaneously, Keystone notified the affected retirees of the original plan's termination and the adoption of the new plan.⁴⁵ Plaintiffs, a group of affected retirees, sued Keystone for their former benefits.⁴⁶

The *Murphy* court declined to award the substantial remedy of invalidating the amendments made subsequent to the violation of ERISA section 402(b)(3).⁴⁷ Instead, the court explicitly agreed with the comparatively lenient remedy to section 402(b)(3) violations set forth by the Fourth Circuit in *Biggers*, allowing for the written amendment of a welfare plan, even without an amendment procedure, as long as the defendant can show a clear manifestation of an intent to alter the policy or plan.⁴⁸ In adopting this approach, the *Murphy* court rejected the Third Circuit's suggestion that the appropriate remedy for a violation of ERISA section 402(b)(3) (i.e., a lack of an amendment procedure) is to render invalid any subsequent amendment.⁴⁹ The *Murphy* court therefore concluded that an employer's failure to set out a procedure for amending its welfare plan does not automatically invalidate its subsequent amendment.⁵⁰

During the *Survey* year, in *Curtiss-Wright Corp. v. Schoonejongen*, the United States Supreme Court unanimously held that a welfare plan provision reserving the company's right to amend the plan at any time satisfies the requirement of ERISA section 402(b)(3) that welfare plans provide a procedure for amendment.⁵¹ The Court's decision in *Curtiss-*

⁴¹ See *id.* at 296, 17 Employee Benefits Cas. (BNA) at 1560.

⁴² See 850 F. Supp. 1367, 1382 (C.D. Ill. 1994).

⁴³ *Id.* at 1370, 1378.

⁴⁴ *Id.* at 1370.

⁴⁵ *Id.* at 1370 n.4.

⁴⁶ *Id.* at 1370.

⁴⁷ *Murphy*, 850 F. Supp. at 1381.

⁴⁸ *Id.* at 1381-82.

⁴⁹ See *id.* at 1379, 1381.

⁵⁰ *Id.* at 1382.

⁵¹ 115 S. Ct. 1223, 1232, 18 Employee Benefits Cas. (BNA) 2841, 2846.

Wright set a de minimis standard for what qualifies as a valid provision for amendment under ERISA section 402(b)(3).⁵² The Court left unresolved, however, the question of the appropriate remedy for a section 402(b)(3) violation.⁵³

In *Curtiss-Wright*, the Curtiss-Wright Corp. ("Curtiss-Wright") maintained a post-retirement health plan with a reservation clause stating: "The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan."⁵⁴ In early 1983, Curtiss-Wright issued a revised provision to the plan that terminated a recipient's health benefits upon the closing or sale of the facility from which the recipient retired.⁵⁵ Later that year, Curtiss-Wright announced that its Woodbridge, New Jersey, facility would close.⁵⁶ In accordance with the revised plan, Curtiss-Wright then terminated the health benefits of the retirees from the Woodbridge facility.⁵⁷

A group of the Woodbridge retirees brought suit in United States District Court for the District of New Jersey to recover their terminated benefits.⁵⁸ The district court agreed with the plaintiffs' contention that Curtiss-Wright amended its original post-retirement health plan without ever having set forth in the plan any procedure for amendment as required by ERISA section 402(b)(3).⁵⁹ On appeal to the United States Court of Appeals for the Third Circuit, Curtiss-Wright argued that the reservation clause constituted a valid procedure for amendment of its post-retirement health plan, likening the clause to the provision upheld in *Huber* that provided for amendment by "the Trustees."⁶⁰ The Third Circuit, however, rejected this argument.⁶¹ The court pointed out that, unlike the Curtiss-Wright plan, the plan in *Huber* clearly identified which persons had the authority to amend the plan (the Trustees).⁶² Consequently, the Third Circuit concluded that mere reservation of Curtiss-Wright's right to amend did not amount to an

⁵² See *id.* at 1229, 18 Employee Benefits Cas. (BNA) at 2844.

⁵³ *Id.* at 1231, 18 Employee Benefits Cas. (BNA) 2847.

⁵⁴ *Id.* at 1227, 18 Employee Benefits Cas. (BNA) at 2842.

⁵⁵ *Id.*

⁵⁶ *Curtiss-Wright*, 115 S. Ct. at 1227, 18 Employee Benefits Cas. (BNA) at 2842.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1039, 17 Employee Benefits Cas. (BNA) 2041, 2045 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223, 18 Employee Benefits Cas. (BNA) 2841 (1995).

⁶¹ *Id.* at 1039, 17 Employee Benefits Cas. (BNA) at 2046.

⁶² *Id.* at 1039, 17 Employee Benefits Cas. (BNA) at 2045.

amendment procedure under section 402(b)(3).⁶³ The Third Circuit also affirmed its dicta in *Hozier* and in *Frank* by holding that the penalty for a violation of ERISA section 402(b)(3) is the invalidation of the purported amendment.⁶⁴

In a footnote, the court described the concurring views of Judge Roth.⁶⁵ Judge Roth suggested that action taken "by the Company" might be interpreted under traditional principles of corporate law to mean action taken by the board of directors.⁶⁶ According to Judge Roth, the subsequent amendment was invalid not because Curtiss-Wright failed to include a valid amendment procedure in its welfare plan, but because Curtiss-Wright's board of directors never ratified the amendment as the procedure required.⁶⁷ Subsequently, Curtiss-Wright petitioned the United States Supreme Court for certiorari to consider two questions: first, whether a plan provision stating that "[t]he company reserves" the right to amend the plan sets forth a valid amendment procedure under section 402(b)(3); and second, if the provision is deemed insufficient, whether the proper remedy is to declare any subsequent amendment invalid.⁶⁸ The United States Supreme Court granted certiorari to address both questions.⁶⁹

In *Curtiss-Wright*, the United States Supreme Court bifurcated its section 402(b)(3) analysis into two distinct inquiries: first, whether there was a procedure in place for amending the plan; and second, whether there was also a procedure for identifying the persons with the authority to amend the plan.⁷⁰ Starting with the second inquiry, the Court looked to the "Definitions" section of ERISA, which defines "person" as including companies and corporate actors.⁷¹ Accordingly, the Court concluded that Curtiss-Wright's reservation clause did, in fact, identify the person ("the company") who possessed the authority to amend its plan with sufficient specificity for the purposes of ERISA section 402(b)(3).⁷²

⁶³ See *id.* at 1039, 17 Employee Benefits Cas. (BNA) at 2046.

⁶⁴ *Id.* at 1039-40, 17 Employee Benefits Cas. (BNA) at 2046-47.

⁶⁵ *Schoonejongen*, 18 F.3d at 1039 n.3, 17 Employee Benefits Cas. (BNA) at 2045-46 n.5.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Curtiss-Wright v. Schoonejongen*, 115 S. Ct. 1223, 1226, 1228, 18 Employee Benefits Cas. (BNA) 2841, 2841, 2843 (1995).

⁶⁹ *Id.* at 1228, 18 Employee Benefits Cas. (BNA) at 2843.

⁷⁰ See *id.*

⁷¹ *Id.* ("The term 'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." (quoting 29 U.S.C. § 1002(9) (1988)).

⁷² *Id.*

The Court next turned to the more difficult question of whether the reservation clause contained a procedure for amending the plan.⁷³ Examining the reservation clause, the Court found more substance in the clause than its terseness might have suggested, insofar as it suggested that only a unilateral decision by the company, as opposed to a decision by a third-party trustee or the approval of the union, could amend the plan.⁷⁴ The Court further reasoned that *Curtiss-Wright's* amendment procedure was as elaborate as it needed to be to provide for the amendment of what amounted to "the simplest of plans."⁷⁵ The Court denied that ERISA may require more detail from more complicated plans; rather, the Court concluded that section 402(b)(3) merely requires that there be a procedure, not that it contain a certain level of detail.⁷⁶

The Court then rejected the Woodbridge retirees' assertion that the purpose of ERISA section 402(b)(3) is to notify employees of their rights and obligations; the Court concluded that section 402(a)(1) of ERISA governs notification.⁷⁷ The Court emphasized that the purpose of ERISA's requirement that each plan provide an amendment procedure is merely "to insure that every plan *has* a workable amendment procedure."⁷⁸ Although the Court suggested that a plan's failure to contain an amendment procedure might render the plan unamendable under principles of trust law, it declined to reach the second portion of the Third Circuit's holding regarding the proper remedy for a section 402(b)(3) violation.⁷⁹ The *Curtiss-Wright* Court therefore restricted its holding to the conclusion that *Curtiss-Wright's* reservation clause established a valid amendment procedure.⁸⁰

By affirming *Curtiss-Wright's* boilerplate reservation clause, the Court in *Curtiss-Wright* instituted a de minimis standard for what qualifies as a valid amendment procedure under section 402(b)(3) of ERISA.⁸¹ As long as a plan mentions, however ambiguously, amendment and an amending authority, it would appear to meet this standard.⁸² Moreover,

⁷³ *Curtiss-Wright*, 115 S. Ct. at 1228, 18 Employee Benefits Cas. (BNA) at 2844.

⁷⁴ *Id.* at 1228-29, 18 Employee Benefits Cas. (BNA) at 2844.

⁷⁵ *Id.* at 1229, 18 Employee Benefits Cas. (BNA) at 2844.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1229-30, 18 Employee Benefits Cas. (BNA) at 2845. Section 402(a)(1) provides, in relevant part: "Every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1) (1994).

⁷⁸ *Curtiss-Wright*, 115 S. Ct. at 1230, 18 Employee Benefits Cas. (BNA) at 2845.

⁷⁹ *Id.* at 1230-31, 18 Employee Benefits Cas. (BNA) at 2845, 2847.

⁸⁰ *Id.* at 1231, 18 Employee Benefits Cas. (BNA) at 2847.

⁸¹ *Id.* at 1229, 18 Employee Benefits Cas. (BNA) at 2844.

⁸² *See id.*

by concluding that the purpose of ERISA's requirement that welfare plans have an amendment procedure is merely "to insure that every plan *has* a workable amendment procedure[.]"⁸³ the Court reduced section 402(b)(3) to a tautology. Both of these developments seem to represent an assertion that section 402(b)(3) is for the benefit of employers, not employees.

By setting this *de minimis* standard for ERISA section 402(b)(3), the Court may also have made the question of the appropriate remedy for a violation of section 402(b)(3) largely academic. The question remains, however, whether the utter absence of an amendment procedure in a welfare plan will render subsequent amendments invalid.⁸⁴ The Court in *Curtiss-Wright* seemed to approve the Fourth Circuit's suggestion in *Biggers* that the answer lies not in ERISA itself, but in principles of trust law.⁸⁵ If so, the Court might also approve the *Biggers* court's holding that, even in the absence of amendment procedure provisions in a plan, an amendment may still be valid when accompanied by a clear manifestation of intent to alter the plan.⁸⁶ Without an explicit holding by the Supreme Court, however, the question of the appropriate remedy for a violation of section 402(b)(3) remains uncertain.

To conclude, the United States Supreme Court in *Curtiss-Wright* held that a welfare plan provision that simply reserves a company's right to amend the plan at any time satisfies the requirement of ERISA section 402(b)(3) that welfare plans provide a procedure for amendment.⁸⁷ The Court's holding set a *de minimis* standard for what qualifies as a valid amendment procedure under ERISA section 402(b)(3), a standard that has the practical effect of protecting employers rather than employees. The *Curtiss-Wright* Court left unresolved, however, the question of whether the utter absence of an amendment procedure in a welfare plan will render subsequent amendments invalid.⁸⁸ The Court implied that the answer would depend on principles of trust law, perhaps hinging on whether the amendment is accompanied by a clear manifestation of an intent to alter the plan.⁸⁹

⁸³ *Curtiss-Wright*, 115 S. Ct. at 1230, 18 Employee Benefits Cas. (BNA) at 2845.

⁸⁴ *See id.* at 1231, 18 Employee Benefits Cas. (BNA) at 2847.

⁸⁵ *See id.* at 1230, 18 Employee Benefits Cas. (BNA) at 2845.

⁸⁶ *Biggers v. Wittek Indus.*, 4 F.3d 291, 296, 17 Employee Benefits Cas. (BNA) 1556, 1560 (4th Cir. 1993).

⁸⁷ *Curtiss-Wright*, 115 S. Ct. at 1231, 18 Employee Benefits Cas. (BNA) at 2846.

⁸⁸ *Id.* at 1231, 18 Employee Benefits Cas. (BNA) at 2847.

⁸⁹ *See id.* at 1230, 18 Employee Benefits Cas. (BNA) at 2845.

AMERICANS WITH DISABILITIES ACT

**Direct Employment Relationship Not Necessary for ADA Liability:*
Carparts Distribution Center, Inc. v. Automotive
*Wholesaler's Ass'n of New England, Inc.*¹

On July 26, 1992, Title I of the 1990 Americans with Disabilities Act ("ADA") went into effect, prohibiting "covered entities" from discriminating on the basis of disability in an employment context.² Section 101(2) of the ADA defines a "covered entity" as "an employer, employment agency, labor organization, or joint labor-management committee."³ The ADA definition of "employer," which is a vital component of the ADA definition of "covered entity," has recently become the subject of litigation.⁴ One issue arising from the ADA definition of "employer" is whether it includes entities that are not the complainant's direct employer.⁵ Courts have also struggled with the interpretation of the identical definition of "employer" under Title VII of the Civil Rights Act of 1964 ("Title VII").⁶ As a result, the reasoning that courts have developed in considering the meaning of "employer" under Title VII has proven to be a source of guidance for courts interpreting the same term under the ADA.⁷

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¹ 37 F.3d 12, 3 A.D. Cases (BNA) 1237 (1st Cir. 1994).

² 42 U.S.C. §§ 12111-17 (Supp. V 1993). Specifically, Section 102(a) of 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." 42 U.S.C. § 12112(a).

³ 42 U.S.C. § 12111(2) (emphasis added).

⁴ See *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 16, 3 A.D. Cases (BNA) 1237, 1240 (1st Cir. 1994). Section 101(5)(A) defines "employer" as, "[a] person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C. § 12111(5)(A).

⁵ See *Carparts*, 37 F.3d at 16, 3 A.D. Cases (BNA) at 1240. A direct employer generally refers to the entity that employs the employee in the conventional sense of the word. See *Peters v. Wayne State Univ.*, 691 F.2d 235, 238, 29 Fair Empl. Prac. Cas. (BNA) 1753, 1754 (6th Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223, 32 Fair Empl. Prac. Cas. (BNA) 359 (1983). For example, a direct employer is often the entity that issues pay checks to the employee. See *Barone v. Hackett*, 602 F. Supp. 481, 483, 40 Fair Empl. Prac. Cas. (BNA) 961, 962 (D.R.I. 1984).

⁶ See *Peters*, 691 F.2d at 238, 29 Fair Empl. Prac. Cas. (BNA) at 1754-55; see also 42 U.S.C. §§ 2000e-2000e-17 (1994). Section 701(b) of Title VII defines "employer" as, "[a] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . ." 42 U.S.C. § 2000e(b).

⁷ See *Carparts*, 37 F.3d at 16, 3 A.D. Cases (BNA) at 1240; *Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616, 619, 3 A.D. Cases (BNA) 590, 592 (S.D. Ohio 1994).

In 1973, in *Sibley Memorial Hospital v. Wilson*, the United States Court of Appeals for the District of Columbia held that employers have a duty under Title VII not to discriminate against individuals whose employment opportunities could be affected by the employer, even if those individuals are not directly employed by the employer.⁸ In *Sibley*, the plaintiff was a private duty nurse who worked at a hospital but was paid directly by the patients in his care.⁹ The plaintiff alleged gender discrimination when hospital supervisors prevented him from working for female patients.¹⁰

The District of Columbia Circuit rejected the hospital's argument that the plaintiff's complaint did not fall under Title VII because there was no direct employment relationship between the hospital and the plaintiff.¹¹ The court reasoned that Congress could not have intended Title VII liability to extend only to direct employment relationships because an objective of Title VII is to provide for equal employment opportunities, and control over employment opportunities often is held by an entity that is not the complainant's direct employer.¹² The court further noted that Title VII's remedial provisions use the term "person aggrieved" rather than "employee."¹³ Construing "person aggrieved" to include people other than direct employees, the court reasoned that Congress would not have granted standing to a category of individuals unless they had rights under Title VII.¹⁴ Consequently, the court concluded that an entity meeting the statutory definition of "employer" could be liable under Title VII for discriminatory conduct against individuals who, while not direct employees, nevertheless might have employment opportunities affected by the employer.¹⁵

In 1982, in *Spirit v. Teachers Insurance & Annuity Ass'n*, the United States Court of Appeals for the Second Circuit held that entities providing employee benefits could be liable under Title VII for discrimi-

⁸ See 488 F.2d 1338, 1341, 6 Fair Empl. Prac. Cas. (BNA) 1029, 1031 (D.C. Cir. 1973). Section 703(a)(1) of the Civil Rights Act of 1964 provides in relevant part, "[i]t shall be an unlawful employment practice for an employer . . . 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 . . . sex." 42 U.S.C. § 2000e-2(a)(1).

⁹ *Sibley*, 488 F.2d at 1339, 6 Fair Empl. Prac. Cas. (BNA) at 1029-30.

¹⁰ *Id.* at 1339-40, 6 Fair Empl. Prac. Cas. (BNA) at 1030.

¹¹ *Id.* at 1340-41, 6 Fair Empl. Prac. Cas. (BNA) at 1030-31.

¹² *Id.* at 1341, 6 Fair Empl. Prac. Cas. (BNA) at 1031. The court cited labor organizations and employment agencies as entities that might not have a direct employment relationship with an employee, yet still possess significant control over the employee's employment opportunities. *Id.*

¹³ *Id.*

¹⁴ *Sibley*, 488 F.2d at 1341, 6 Fair Empl. Prac. Cas. (BNA) at 1031.

¹⁵ See *id.*

natory conduct against benefit recipients.¹⁶ In so holding, the Second Circuit expanded the *Sibley* reasoning regarding entities that have control over employment opportunities to cover entities that control only part of an individual's existing employment.¹⁷ The plaintiff in *Spirit* was a female university professor who alleged that the university's pension plan, offered by defendant Teachers Annuity, violated Title VII because it provided smaller monthly benefits to female annuitants than were provided to "similarly situated" male annuitants.¹⁸

In holding Teachers Annuity liable under Title VII, the court reasoned that for Title VII to be effective, it had to cover entities that functioned as the employer for specific aspects of an employee's employment.¹⁹ The court noted that the defendant's pension plan was mandatory for university employees and that the administrative responsibilities resulting from employee participation were shared by the defendant and the university.²⁰ As a result, the court concluded that the university and the defendant were "closely intertwined" such that the defendant acted as the "employer" with respect to one aspect of every university employee's employment package.²¹ Therefore, to prevent employers from circumventing their Title VII obligations through delegation to third parties, the court concluded that entities "closely intertwined" with the direct employer could be liable for Title VII violations.²²

Conversely, less than a month later in 1982, the United States Court of Appeals for the Sixth Circuit held in *Peters v. Wayne State University* that the defendant Teachers Annuity, also the defendant in *Spirit*, was not liable as an "employer" under Title VII for merely providing retirement benefits to employee recipients.²³ As in *Spirit*, the plaintiffs in *Peters* were employees at a university who challenged the

¹⁶ See 691 F.2d 1054, 1063, 29 Fair Empl. Prac. Cas. (BNA) 1599, 1605-06 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223, 32 Fair Empl. Prac. Cas. (BNA) 359 (1983), *and reinstated and modified on other grounds*, 735 F.2d 23, 34 Fair Empl. Prac. Cas. (BNA) 1469 (2d Cir.), *and cert. denied*, 469 U.S. 881, 35 Fair Empl. Prac. Cas. 1688 (1984).

¹⁷ See *id.* at 1063, 29 Fair Empl. Prac. Cas. (BNA) at 1606.

¹⁸ *Id.* at 1056-57, 29 Fair Empl. Prac. Cas. (BNA) at 1600-01. "'Similarly situated' individuals are those who are the same age, retire on the same date, and have identical amounts of accumulated contributions in their individual retirement accounts on the date of retirement." *Id.* at 1058 n.3, 29 Fair Empl. Prac. Cas. (BNA) at 1602 n.3.

¹⁹ See *id.* at 1063, 29 Fair Empl. Prac. Cas. (BNA) at 1606.

²⁰ *Id.*

²¹ *Spirit*, 691 F.2d at 1063, 29 Fair Empl. Prac. Cas. (BNA) at 1606.

²² See *id.*

²³ *Peters v. Wayne State Univ.*, 691 F.2d 235, 238, 29 Fair Empl. Prac. Cas. (BNA) 1753, 1755 (6th Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223, 32 Fair Empl. Prac. Cas. (BNA) 359 (1983).

Teachers Annuity pension plan as violative of Title VII because female annuitants received smaller periodic benefits under the plan.²⁴ The Sixth Circuit refused to hold Teachers Annuity liable under Title VII as the plaintiffs' employer under either of two theories.²⁵ First, the Sixth Circuit held that Teachers Annuity was not an agent of the university because the university did not exercise control over Teachers Annuity's actions, and such control is a necessary element of an agency relationship.²⁶ Second, the Sixth Circuit concluded that the university had not delegated any of its employer responsibilities to Teachers Annuity because the university retained the power to set contribution levels and make decisions regarding employee eligibility for the pension plan.²⁷ Thus, unlike the Second Circuit in *Spirit*, the Sixth Circuit did not find that Teachers Annuity acted as the "employer" for any aspect of the plaintiffs' employment.²⁸ The Sixth Circuit instead characterized Teachers Annuity as an insurance company that only provided a service to the university.²⁹ In the absence of a direct employment relationship, the court refused to deem an entity an "employer" under Title VII for merely providing benefits to employee recipients and thus held that Teachers Annuity was not an employer for the purposes of Title VII.³⁰

In 1994, in *Pappas v. Bethesda Hospital Ass'n*, the United States District Court for the Southern District of Ohio first considered whether the ADA requires a direct employment relationship and held that an administrator of employee benefits was not a "covered entity" under Title I of the ADA.³¹ The plaintiff in *Pappas* was an employee of a hospital association who was denied family health coverage because her husband and son suffered from severe medical problems.³² The plaintiff thus alleged that the association and its administrator of health insurance benefits were liable for discrimination under the ADA.³³

In interpreting Title I of the ADA, the *Pappas* court looked to cases interpreting Title VII of the Civil Rights Act of 1964 for guidance.³⁴ Consonant with the reasoning of the *Peters* decision from the same

²⁴ *Id.* at 237, 29 Fair Empl. Prac. Cas. (BNA) at 1753-54.

²⁵ *See id.* at 238, 29 Fair Empl. Prac. Cas. (BNA) at 1754-55.

²⁶ *Id.*

²⁷ *Id.* at 238, 29 Fair Empl. Prac. Cas. (BNA) at 1754.

²⁸ *See Peters*, 691 F.2d at 238, 29 Fair Empl. Prac. Cas. (BNA) at 1755.

²⁹ *Id.*

³⁰ *Id.*

³¹ 861 F. Supp. 616, 619, 3 A.D. Cases (BNA) 590, 592 (S.D. Ohio 1994).

³² *Id.* at 617, 3 A.D. Cases (BNA) at 591.

³³ *Id.* at 617, 3 A.D. Cases (BNA) at 590.

³⁴ *Id.* at 619, 3 A.D. Cases (BNA) at 592.

circuit, the court concluded that the health insurance administrator was not liable under the ADA.³⁵ The *Pappas* court reasoned that because the employer had identified the health insurance plan as its own, the employer intended to retain responsibility for providing employee benefits and thus had not delegated to the administrator any duties regarding employee compensation.³⁶ In addition, because the employer lacked control over the health insurance administrator, the court determined that the administrator was not an agent of the employer.³⁷ Consequently, the *Pappas* court concluded that the health insurance administrator was not liable as a "covered entity" under the ADA.³⁸

During the *Survey* year, in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, the United States Court of Appeals for the First Circuit held that a direct employment relationship was not necessary to sustain a claim under the ADA.³⁹ In so holding, the First Circuit became the leading circuit court to apply the reasoning of the Title VII cases *Sibley* and *Spirit* to the definition of "employer" under the ADA.⁴⁰

The plaintiffs in *Carparts*, Ronald J. Senter and Carparts Distribution Center, Inc. ("Carparts"), participated in a medical insurance plan (the "Plan") offered by the defendants, Automotive Wholesalers Association of New England, Inc. ("AWANE") and its administering trust, Automotive Wholesalers Association of New England, Inc. Insurance Plan ("AWANE Trust").⁴¹ Carparts was a member of AWANE, and its employees, including Senter, received medical insurance under the Plan.⁴² In May of 1986, Senter was diagnosed as infected with the human immunodeficiency virus.⁴³ Beginning in 1989, Senter's condition caused him to contract several serious illnesses that required medical treatment.⁴⁴ In October of 1990, AWANE Trust announced that as of January 1, 1991, each eligible member's lifetime benefits

³⁵ *Id.*

³⁶ See *Pappas*, 861 F. Supp. at 619, 3 A.D. Cases (BNA) at 592.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 37 F.3d 12, 16, 3 A.D. Cases (BNA) 1237, 1240 (1st Cir. 1994).

⁴⁰ See *id.* at 17-18, 3 A.D. Cases (BNA) at 1241; *Spirit v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063, 29 Fair Empl. Prac. Cas. (BNA) 1599, 1605-06 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223, 32 Fair Empl. Prac. Cas. (BNA) 359 (1983), *and reinstated and modified on other grounds*, 735 F.2d 23, 34 Fair Empl. Prac. Cas. (BNA) 1469 (2d Cir.), *and cert. denied*, 469 U.S. 881, 35 Fair Empl. Prac. Cas. 1688 (1984); *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341, 6 Fair Empl. Prac. Cas. (BNA) 1029, 1031 (D.C. Cir. 1973).

⁴¹ *Carparts*, 37 F.3d at 14, 3 A.D. Cases (BNA) at 1238.

⁴² *Id.* Senter had been enrolled in the Plan since 1977. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

under the Plan for expenses resulting from acquired immune deficiency syndrome ("AIDS") related illnesses would be capped at \$25,000.⁴⁵ For all other non-AIDS-related medical expenses, the Plan covered each eligible member up to \$1 million.⁴⁶ In March of 1991, Senter was diagnosed with AIDS.⁴⁷ Shortly thereafter, Carparts began submitting claims on behalf of Senter because his medical costs had reached the \$25,000 limit and Carparts had assumed the responsibility for paying Senter's medical expenses.⁴⁸ Ten days before the ADA became effective, Senter and Carparts filed suit against AWANE and AWANE Trust, alleging claims under the New Hampshire antidiscrimination law.⁴⁹ On January 17, 1993, Senter died.⁵⁰ The coexecutors of Senter's estate were substituted for Senter as plaintiffs in the suit on April 1, 1993.⁵¹ Shortly thereafter, the plaintiffs were granted the opportunity to amend their complaint to include claims under Title I and Title III of the ADA.⁵² In their amended complaint, the plaintiffs alleged that AWANE Trust knew of Senter's illness when it capped AIDS-related medical coverage and that the cap consequently violated the antidiscrimination provisions of the ADA.⁵³

The defendants objected to the plaintiffs' amendment, and the United States District Court for the District of New Hampshire treated the objection as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).⁵⁴ The District Court dismissed the plaintiff's complaint, holding that neither AWANE nor AWANE Trust qualified as "covered entities" under the ADA because neither entity was Senter's "employer."⁵⁵ The plaintiffs appealed to the United States Court of Appeals for the First Circuit, claiming that the District Court's interpretation of "covered entity" under Title I of the ADA was in error.⁵⁶

⁴⁵ *Id.*

⁴⁶ *Carparts*, 37 F.3d at 14, 3 A.D. Cases (BNA) at 1238.

⁴⁷ *Id.*

⁴⁸ *See id.* at 14-15, 3 A.D. Cases (BNA) at 1238-39.

⁴⁹ *Id.* at 15, 3 A.D. Cases (BNA) at 1239. The New Hampshire Law Against Discrimination provides in relevant part, "It shall be an unlawful discriminatory practice . . . for an employer, because of the . . . physical . . . disability . . . of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification." N.H. REV. STAT. ANN. § 354-A:7 (1995).

⁵⁰ *Carparts*, 37 F.3d at 14, 3 A.D. Cases (BNA) at 1238.

⁵¹ *Id.* at 14 n.1, 3 A.D. Cases (BNA) at 1238 n.1.

⁵² *Id.* at 15, 3 A.D. Cases (BNA) at 1239.

⁵³ *Id.* at 14-15, 3 A.D. Cases (BNA) at 1238-39.

⁵⁴ *Id.* at 15, 3 A.D. Cases (BNA) at 1239.

⁵⁵ *Carparts*, 37 F.3d at 15, 3 A.D. Cases (BNA) at 1239.

⁵⁶ *Id.*

In accordance with the Interpretative Guidance on Title I of the ADA, published by the Equal Employment Opportunity Commission, and Title I itself, the First Circuit looked to Title VII of the Civil Rights Act of 1964 for guidance in interpreting the term "employer" under Title I.⁵⁷ Thus, the First Circuit confronted conflicting interpretations of the Title VII term "employer" by other circuits.⁵⁸ Citing several Title VII cases, the court enunciated three theories under which AWANE and AWANE Trust could be liable as "employers" under the ADA.⁵⁹ One theory would impute liability if AWANE or AWANE Trust functioned as Senter's employer with respect to Senter's health insurance benefits.⁶⁰ A second theory would impute liability if AWANE or AWANE Trust acted as Carpart's agent.⁶¹ The last theory would impute liability if AWANE or AWANE Trust met the statutory definition of "employer" and Senter met the statutory definition of a "qualified individual with a disability."⁶²

The court first determined that if AWANE or AWANE Trust functioned as Senter's employer with respect to his health insurance benefits, they should be treated as "employers" under Title I.⁶³ The court thus recognized, as did the Second Circuit in *Spirit*, that parties other than the direct employer may control important aspects of employment, and consequently, the statutory definition of "employer" must be broad enough to include parties other than the direct employer.⁶⁴ The court cited certain factors for the lower court to consider on remand in determining whether AWANE or AWANE Trust functioned as Senter's employer with respect to health insurance benefits.⁶⁵ The court stated that the amount of control AWANE and AWANE Trust had over Sen-

⁵⁷ *Id.* at 16, 3 A.D. Cases (BNA) at 1240. Section 107(a) of the ADA states that where applicable, the "powers, remedies and procedures" of Title VII of the Civil Rights Act of 1964 shall apply to discrimination claims brought under Title I of the ADA. 42 U.S.C. § 12117(a) (Supp. V 1993).

⁵⁸ See *Carparts*, 37 F.3d at 16, 3 A.D. Cases (BNA) at 1240; *Peters v. Wayne State Univ.*, 691 F.2d 235, 238, 29 Fair Empl. Prac. Cas. (BNA) 1753, 1755 (6th Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223, 32 Fair Empl. Prac. Cas. (BNA) 359 (1983); *Spirit v. Teachers Ins. and Annuity Ass'n*, 691 F.2d 1054, 1063, 29 Fair Empl. Prac. Cas. (BNA) 1599, 1605-06 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223, 32 Fair Empl. Prac. Cas. (BNA) 359 (1983), *and reinstated and modified on other grounds*, 735 F.2d 23, 34 Fair Empl. Prac. Cas. (BNA) 1469 (2d Cir.), *and cert. denied*, 469 U.S. 881, 35 Fair Empl. Prac. Cas. (BNA) 1688 (1984).

⁵⁹ *Carparts*, 37 F.3d at 17-18, 3 A.D. Cases (BNA) at 1240-42.

⁶⁰ *Id.* at 17, 3 A.D. Cases (BNA) at 1240-41.

⁶¹ *Id.* at 17-18, 3 A.D. Cases (BNA) at 1241.

⁶² See *id.* at 18, 3 A.D. Cases (BNA) at 1241-42.

⁶³ *Id.* at 17, 3 A.D. Cases (BNA) at 1240.

⁶⁴ *Carparts*, 37 F.3d at 17, 3 A.D. Cases (BNA) at 1240.

⁶⁵ *Id.* at 17, 3 A.D. Cases (BNA) at 1241.

ter's health insurance benefits was one factor to be considered in determining whether they functioned as Senter's employer with respect to health insurance benefits.

The court reasoned that for ADA purposes, an "employer" is any entity that can exercise significant control over an important aspect of an employment situation.⁶⁶ Relevant to the determination of whether AWANE or AWANE Trust exercised significant control over an aspect of Senter's employment, the court stated, was whether AWANE or AWANE Trust set the level of benefits each employee received and whether alternative insurance plans were available to employees.⁶⁷ The court concluded that if there were no alternative insurance options, employees would be forced to accept the terms of the Plan.⁶⁸ Consequently, if those terms were set by AWANE or AWANE Trust, then those entities did exercise significant control over an aspect of the plaintiffs' employment.⁶⁹

The court also stated that the extent to which Carparts shared the administrative duties arising from its employees' participation in the Plan was another factor for the lower court to consider in determining whether AWANE or AWANE Trust functioned as Senter's employer.⁷⁰ The court reasoned that when the administrative obligations of a plan are shared by the direct employer and the provider of benefits, the two entities are "closely intertwined."⁷¹ Consequently, for at least one aspect of the employment, the direct employer and the provider of benefits operate jointly as the "employer."⁷²

Under the court's second theory, even if AWANE or AWANE Trust did not exercise significant control over an aspect of Senter's employment, they could still be liable under Title I if they were the "agents" of a "covered entity."⁷³ The court noted that the language of Section 101(5) of the ADA imputes liability to any entity that serves as an agent of an entity that meets the statutory definition of "employer."⁷⁴ The court implicitly recognized that imputing liability to agents of covered entities was consonant with the ADA's purpose.⁷⁵ Citing *Spirit*, the court further noted that the force of the statute would be lost if employers

⁶⁶ *Id.* at 17, 3 A.D. Cases (BNA) at 1240-41.

⁶⁷ *Id.* at 17, 3 A.D. Cases (BNA) at 1241.

⁶⁸ *See id.*

⁶⁹ *See Carparts*, 37 F.3d at 17, 3 A.D. Cases (BNA) at 1241.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Carparts*, 37 F.3d at 17 n.7, 3 A.D. Cases (BNA) at 1241 n.7.

⁷⁵ *See id.* at 17-18, 3 A.D. Cases (BNA) at 1241.

were able to avoid ADA liability by delegating responsibility to an agent.⁷⁶

The First Circuit based its third theory by which AWANE and AWANE Trust could be liable under the ADA on Section 102(a) of the ADA, which states, "No covered entity shall discriminate against a *qualified individual* with a disability."⁷⁷ The court held, with some reservation, that if an entity met the ADA's definition of "employer," it might be liable for discriminatory conduct against any qualified individual with a disability, regardless of whether the disabled individual was a direct employee.⁷⁸ The court qualified its conclusion by stating that such liability would not be automatic and would greatly depend on the circumstances of each case.⁷⁹ Nevertheless, the court stated its willingness to uphold a claim akin to the action in *Sibley*, where the claimant had no direct employment relationship with the employer being sued.⁸⁰

Under any one of three theories, the First Circuit held that AWANE and AWANE Trust could be liable as Senter's "employer" under Title I of the ADA.⁸¹ Neither AWANE nor AWANE Trust was Senter's direct employer.⁸² Thus, in *Carparts*, the First Circuit held that a direct employment relationship is not necessary to sustain a claim under the ADA.⁸³

The First Circuit's three theories for indirect liability under the ADA make it difficult for a third party to escape liability if the employment benefits it provides to a direct employer's employees discriminate based on a disability. If a third party exercises too much control over the employees' employment benefits, a court may find that the third party is "closely intertwined" with the direct employer and hold it liable under the First Circuit's first theory.⁸⁴ If a third party does not exercise sufficient control, a court may deem it an agent of the direct employer and thus incur liability under the First Circuit's second theory.⁸⁵ Should a third-party provider of employment benefits manage to escape liability under the first two theories, it is not at all clear whether it can escape liability under the First Circuit's third theory. The uncertainty sur-

⁷⁶ *Id.* at 18, 3 A.D. Cases (BNA) at 1241.

⁷⁷ 42 U.S.C. § 12112(a) (Supp. V 1993) (emphasis added); *see also Carparts*, 37 F.3d at 18, 3 A.D. Cases (BNA) at 1241.

⁷⁸ *See Carparts*, 37 F.3d at 18, 3 A.D. Cases (BNA) at 1241.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 17-18, 3 A.D. Cases (BNA) at 1240-42.

⁸² *Id.* at 14, 3 A.D. Cases (BNA) at 1238.

⁸³ *Carparts*, 37 F.3d at 16, 3 A.D. Cases (BNA) at 1240.

⁸⁴ *See id.* at 17, 3 A.D. Cases (BNA) at 1241.

⁸⁵ *See id.*

rounding the court's third theory follows from the broad and vague terms the court employed that may provide future courts a great deal of freedom to apply the *Carparts* ADA analysis to many factual circumstances.⁸⁶ Clearly, third parties who are risk-averse now must consider the ADA implications when providing employment benefits to the employees of their customers.

By forcing parties who provide employment benefits to consider ADA compliance, the First Circuit endeavored to fulfill the ADA objective of equal employment opportunities for the country's forty-three million handicapped citizens.⁸⁷ Focusing on the allegedly discriminatory conduct, and not on the employment relationship between the complainant and the allegedly discriminating party, the court cast a wide ADA liability net.⁸⁸ Consequently, after *Carparts*, because third parties cannot limit the benefits they provide to their customers' employees without risking ADA liability, it is likely that disabled persons will not receive disparate employment benefits on account of their disabilities.⁸⁹

In the long run, however, the *Carparts* decision may hurt the very people it seeks to protect by limiting the number of jobs and reducing wages for all employable people, whether handicapped or not. Under the First Circuit's analysis, risk-averse third parties who provide employment benefits will face one of two options. Both options promise to encumber third-party providers with additional costs to ensure that the benefits they provide comply with the ADA.

A third-party provider of employment benefits may decide that it is economically efficient to offer generic services that will comply with the ADA under any factual circumstances. Generic benefit packages will be necessarily comprehensive and therefore, more expensive. For many small employers, the additional costs will be unwarranted because, given their employee demographics, exhaustive benefit packages are unnecessary for ADA compliance.

To avoid costs incurred by offering generic services, a third party may offer benefit packages tailored to the customer's specific needs. After *Carparts*, however, a third-party provider of employment benefits is now likely to incur additional costs to ensure that the services are tailored to comply with the ADA.⁹⁰ Because these costs will raise the

⁸⁶ See *id.* at 18, 3 A.D. Cases (BNA) at 1241.

⁸⁷ 42 U.S.C. § 12101(a)(1) (Supp. V 1993).

⁸⁸ See *Carparts*, 37 F.3d at 18, 3 A.D. Cases (BNA) at 1241.

⁸⁹ *Selected Recent Court Decisions*, 20 AM. J.L. & MED. 341, 341, 342 (1994).

⁹⁰ For instance, a third-party provider of employment benefits may have to examine the

overall price of employment benefits, customers will likewise incur additional costs in purchasing the benefits packages. Employers will eventually pass these costs to existing and potential employees by lowering wages and decreasing the number of jobs.

In summary, in *Carparts*, the First Circuit held that third parties may be liable for providing discriminatory employment benefits to their customers' employees because the court concluded that a direct employment relationship is not necessary to sustain an ADA claim.⁹¹ The court drew on the reasoning of Title VII cases to provide three theories by which third parties can be liable as "employers" under the ADA.⁹² First, if the entity exercises significant control over an aspect of the employees' employment, the entity may be deemed an "employer" for ADA purposes.⁹³ Second, even if the entity does not exercise significant control over an aspect of the employees' employment, it may still be liable as an "agent" of the direct employer.⁹⁴ Third, if an entity meets the statutory definition of "employer" and the complainant meets the statutory definition of "qualified individual," the entity may incur liability for its discriminatory conduct regardless of the entity's employment relationship with the complainant.⁹⁵ Although these three theories are designed to ensure that disabled persons do not receive disparate employment benefits because of their handicap, they may fail the court's objectives by raising the cost of employment benefits, which, in the long run, may reduce wages and eliminate jobs.

REHABILITATION ACT

**Employee Misconduct Grounds for Discharge Despite Disability:*

Maddox v. University of Tennessee¹

Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act") makes it unlawful for an employer that receives federal funds to terminate handicapped employees based solely on their disability.² The

employee medical records of each customer to ensure that any limits on benefits do not conflict with a specific employee's needs.

⁹¹ *Carparts*, 37 F.3d at 16, 3 A.D. Cases (BNA) at 1240.

⁹² *Id.* at 17-18, 3 A.D. Cases (BNA) at 1240-42.

⁹³ *Id.* at 17, 3 A.D. Cases (BNA) at 1240.

⁹⁴ *Id.* at 17, 3 A.D. Cases (BNA) at 1241.

⁹⁵ *Id.* at 18, 3 A.D. Cases (BNA) at 1241.

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¹ 62 F.2d 843, 4 AD Cases (BNA) 1253, (6th Cir. 1995).

² 29 U.S.C. §§ 701-797 (1994). The Rehabilitation Act provides: "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 . . ." 29 U.S.C. § 794. The

drafters of the Rehabilitation Act intended to provide for the integration of handicapped employees into the workplace and for the development of these employees' economic independence.³ The law must delicately balance the rights of all individuals to equal opportunity with the legitimate concerns of employers who receive federal aid to preserve the effectiveness of their programs.⁴ Courts have recently struggled to maintain this balance when employers have discharged employees for misconduct related to their disability.⁵

In 1991, in *Teahan v. Metro-North Commuter Railroad*, the United States Court of Appeals for the Second Circuit held that the Rehabilitation Act prohibits an employer's termination of an employee due to an outward manifestation of a protected handicap.⁶ In *Teahan*, an employee discharged for excessive absenteeism challenged his termination under the Rehabilitation Act by alleging that the absences constituted a symptom of his alcoholism.⁷ The Second Circuit determined that, due to the causal connection between the alcoholism and the excessive absenteeism, the employer did in fact rely on the handicap in discharging the employee.⁸ Deciding otherwise, the court reasoned, would permit employers to circumvent the provisions of the Rehabilitation Act by simply drawing a distinction between a handicap and its causal manifestations.⁹ Thus, the Second Circuit held that an employer terminates an employee "solely by reason of" a handicap

Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101-13 (Supp. IV 1992), extends this protection to employees in the private sector in the same fashion.

³ See 29 U.S.C. § 701(b).

⁴ *Teahan v. Metro-North Commuter R.R.*, 951 F.2d 511, 513, 57 Fair Empl. Prac. Cas. (BNA) 1138, 1140 (2d Cir. 1991).

⁵ See *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832, 4 AD Cases (BNA) 1278, 1280 (9th Cir. 1995) (ADA permits employer to terminate drug-addicted employees for drug-related misconduct); *Despears v. Milwaukee County*, 63 F.3d 635, 637, 4 AD Cases (BNA) 1313, 1315 (7th Cir. 1995) (Rehabilitation Act permits employer to demote alcoholic employee to nondriving position following arrest for driving under the influence); *Maddox v. University of Tenn.*, 62 F.3d 843, 847, 4 AD Cases (BNA) 1253, 1257 (6th Cir. 1995) (employer may terminate alcoholic employee for driving while intoxicated); *Little v. FBI*, 1 F.3d 255, 257-58, 2 AD Cases (BNA) 1109, 1112 (4th Cir. 1993) (FBI may terminate alcoholic agent for drunkenness while on duty); *Taub v. Frank*, 957 F.2d 8, 10-11, 58 Fair Empl. Prac. Cas. (BNA) 159, 162 (1st Cir. 1992) (permitted discharge of postal employee following arrest for possession of heroin); *Butler v. Thornburgh*, 900 F.2d 871, 876, 57 Fair Empl. Prac. Cas. (BNA) 1526, 1529 (5th Cir. 1990) (Rehabilitation Act does not prohibit termination of alcoholic FBI agent for on- and off-duty alcohol-related incidents). *But see Teahan*, 951 F.2d at 518, 57 Fair Empl. Prac. Cas. (BNA) at 1144 (termination of alcoholic employee for excessive absenteeism may violate Rehabilitation Act). It is notable that four of these cases were decided during the *Survey* year, all with the same ruling.

⁶ *Teahan*, 951 F.2d at 517, 57 Fair Empl. Prac. Cas. (BNA) at 1143.

⁷ See *id.* at 513-14, 57 Fair Empl. Prac. Cas. (BNA) at 1140.

⁸ See *id.* at 517, 57 Fair Empl. Prac. Cas. (BNA) at 1143.

⁹ *Id.*

when the reason for the termination is causally connected to the handicap.¹⁰

In 1992, in *Taub v. Frank*, the United States Court of Appeals for the First Circuit held that an employer could permissibly discharge an employee for some types of misconduct causally related to a protected disability.¹¹ In *Taub*, the employer discharged an employee shortly after his arrest for possession of heroin with intent to distribute.¹² The employee, claiming that he suffered from a heroin addiction, brought suit alleging discriminatory discharge, contending that his addiction entitled him to the protection of the Rehabilitation Act.¹³ The court, in rejecting the employee's argument, found the connection between the protected handicap and the criminal conduct simply too attenuated for such protection to be proper.¹⁴ Consequently, the First Circuit reasoned that the employee's discharge occurred because of his possession of heroin rather than "solely by reason of his handicap."¹⁵ Thus, the First Circuit held that an employer, when discharging an employee, can permissibly draw a distinction between a protected handicap and the conduct it causes.¹⁶

In 1993, in *Little v. Federal Bureau of Investigation*, the United States Court of Appeals for the Fourth Circuit held that an employer may discharge an employee for egregious conduct in the workplace irrespective of the employee's handicap.¹⁷ In *Little*, an alcoholic FBI agent, terminated for drunkenness on duty, brought suit against the agency under the Rehabilitation Act.¹⁸ Little alleged that the FBI terminated him due to his status as an alcoholic, thus constituting a violation of the Rehabilitation Act.¹⁹ The court rejected Little's argument, noting that regulations promulgated by the Secretary of Health, Education and Welfare, related judicial opinions, and common sense all properly permit an employer to terminate an employee for wrongful conduct without regard for the underlying cause of the misconduct.²⁰ Thus, the Fourth Circuit concluded that employers may prop-

¹⁰ *Id.*

¹¹ *Taub v. Frank*, 957 F.2d 8, 10, 11, 58 Fair Empl. Prac. Cas. (BNA) 159, 160, 161 (1st Cir. 1992).

¹² *Id.* at 9, 58 Fair Empl. Prac. Cas. (BNA) at 160.

¹³ *Id.*

¹⁴ *Id.* at 11, 58 Fair Empl. Prac. Cas. (BNA) at 161.

¹⁵ *Id.*

¹⁶ See *Taub*, 957 F.2d at 11, 58 Fair Empl. Prac. Cas. (BNA) at 161.

¹⁷ *Little v. FBI*, 1 F.3d 255, 259, 2 AD Cases (BNA) 1109, 1113 (4th Cir. 1993).

¹⁸ *Id.* at 255, 256-57, 2 AD Cases (BNA) at 1110-11.

¹⁹ *Id.* at 257, 2 AD Cases (BNA) at 1111.

²⁰ *Id.* at 258-59, 2 AD Cases (BNA) at 1112-13.

erly distinguish a handicap from related misconduct when deciding to terminate an employee.²¹

During the *Survey* year, in *Maddox v. University of Tennessee*, the United States Court of Appeals for the Sixth Circuit held that an employer may discharge an employee for egregious conduct even if the protected disability caused the misconduct.²² In so holding, the Sixth Circuit embraced the *Little* approach by permitting employers to terminate employees for misconduct without regard for those employees' handicapped status.²³ As a result, in the Sixth Circuit, terminations for misconduct caused by a protected handicap are not prohibited by the Rehabilitation Act.²⁴

The plaintiff in *Maddox*, Robert Maddox, served in a terminable-at-will position as an assistant football coach at the University of Tennessee.²⁵ The University did not know, however, that Maddox was an alcoholic with three arrests, two of which involved alcohol, prior to his employment by the University.²⁶ On May 26, 1992, Maddox, while intoxicated, backed his car across a major public highway at a high rate of speed.²⁷ When stopped by a police officer, he was highly combative and refused a Breathalyzer test.²⁸ The officer subsequently arrested Maddox and charged him with driving under the influence and public intoxication.²⁹ This incident received considerable attention from the regional press.³⁰

Following this incident, the University investigated the charges and placed Maddox on paid administrative leave.³¹ Shortly after substantiating the allegations, the University's head football coach and the athletic director informed Maddox in writing of his termination.³² This notice of termination provided three reasons for the University's decision—Maddox's criminal acts, the bad publicity and the University's determination that Maddox no longer possessed the qualifications necessary to serve as an assistant football coach.³³

²¹ *Id.* at 259, 2 AD Cases (BNA) at 1113.

²² See *Maddox v. University of Tenn.*, 62 F.3d 843, 847, 4 AD Cases (BNA) 1253, 1256 (6th Cir. 1995).

²³ See *id.*

²⁴ See *id.* at 848, 4 AD Cases (BNA) at 1257.

²⁵ *Id.* at 844, 4 AD Cases (BNA) at 1254.

²⁶ *Id.* at 844-45, 4 AD Cases (BNA) at 1254-55.

²⁷ *Maddox*, 62 F.3d at 845, 4 AD Cases (BNA) at 1255.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Maddox*, 62 F.3d at 845, 4 AD Cases (BNA) at 1255.

³³ *Id.*

After receiving this letter, Maddox brought an action against the University alleging that his termination was discriminatory because of his alcoholism and thus violated his rights under both the Rehabilitation Act and the Americans with Disabilities Act ("ADA").³⁴ In support of this action, Maddox alleged that the drunk driving incident constituted a causally connected manifestation of his alcoholism.³⁵ In response, the University filed a motion for summary judgment, alleging that it had terminated Maddox for his misconduct rather than his disability.³⁶ The United States District Court for the Eastern District of Tennessee granted the University's motion, determining that Maddox could not demonstrate a genuine issue of material fact with respect to whether the termination was due to his status as an alcoholic rather than his criminal conduct.³⁷

On appeal, the Sixth Circuit upheld the ruling of the district court and held that an employer may discharge an employee for egregious conduct even if a protected disability caused the misconduct.³⁸ In so doing, the Sixth Circuit began its analysis by noting the substantial similarities between the relevant provisions of the ADA and the Rehabilitation Act.³⁹ Accordingly, the court determined that it would review the claims under the two Acts in the same fashion.⁴⁰ Therefore, to establish that his termination was discriminatory, the Sixth Circuit required Maddox to show: (1) that he qualified as a "handicapped person" under the Rehabilitation Act; (2) that he was "otherwise qualified" for employment as an assistant coach; (3) that the University terminated him "solely by reason of his handicap"; and (4) that the University received federal financial assistance.⁴¹

After setting out these requirements, the court examined Maddox's claim.⁴² First, the court noted that neither party disputed that the University constituted a program that receives federal financial assistance.⁴³ Next, the Sixth Circuit assumed, without deciding, that alcoholics are "handicapped persons" as set out in the Rehabilitation Act.⁴⁴

³⁴ *Id.*

³⁵ *See id.* at 846, 4 AD Cases (BNA) at 1256.

³⁶ *Id.*

³⁷ *Maddox*, 62 F.3d at 844, 4 AD Cases (BNA) at 1254.

³⁸ *Id.*

³⁹ *Id.* at 846 n.2, 4 AD Cases (BNA) at 1255 n.2.

⁴⁰ *Id.*

⁴¹ *Id.* at 846, 4 AD Cases (BNA) at 1255-56.

⁴² *Maddox*, 62 F.3d at 846, 4 AD Cases (BNA) at 1256.

⁴³ *Id.*

⁴⁴ *Id.*

Therefore, for the purposes of its decision, the court determined that Maddox satisfied the first and fourth requirements.⁴⁵

The Sixth Circuit then reviewed the district court's finding that the University did not terminate Maddox "solely by reason of his handicap."⁴⁶ Relying heavily on *Teahan*, Maddox alleged that the district court incorrectly distinguished between discharge for misconduct and discharge solely by reason of his disability of alcoholism.⁴⁷ Without such a distinction, Maddox argued that termination for conduct caused by a protected handicap would violate both Acts.⁴⁸

The Sixth Circuit, however, rejected this argument and held that the district court properly distinguished between misconduct and its underlying causal disability.⁴⁹ The court, in permitting this distinction, first noted that the holding in *Teahan* would require employers to tolerate all types of behavior by an alcoholic employee, no matter how improper, if they in any way related to the employee's use of alcoholic beverages.⁵⁰ This broad category of protected behavior would even include behavior that the employer would not tolerate if done by a sober employee or even an intoxicated, but nonalcoholic employee.⁵¹ The Sixth Circuit relied on *Taub* and *Little* to support its determination that imposing such a burden on an employer would run contrary to common sense.⁵² The Sixth Circuit agreed with the reasoning employed by both the First and Fourth Circuits that neither logic nor the Rehabilitation Act prohibits an employer from discharging an employee for misconduct solely because alcoholism caused such conduct.⁵³

For additional support, the Sixth Circuit examined the language of the Rehabilitation Act and the ADA.⁵⁴ The court determined that the Rehabilitation Act and the ADA permitted employers to distinguish between the misconduct and its root cause.⁵⁵ Finally, using an example

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Maddox*, 62 F.3d at 846-47, 4 AD Cases (BNA) at 1256.

⁴⁸ *Id.*

⁴⁹ *Id.* at 848, 4 AD Cases (BNA) at 1257.

⁵⁰ *See id.*

⁵¹ *Id.* at 847, 4 AD Cases (BNA) at 1256.

⁵² *See Maddox*, 62 F.3d at 847, 4 AD Cases (BNA) at 1256-57.

⁵³ *See id.*

⁵⁴ *Id.* at 847, 4 AD Cases (BNA) at 1257.

⁵⁵ *Id.* at 847-48, 4 AD Cases (BNA) at 1257. The Rehabilitation Act states:

"Individuals with a disability" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(8)(C)(v) (1994).

of sexual assault, the court opined that an employer must have the ability to discharge an employee for egregious conduct without regard for whether a protected disability caused that conduct.⁵⁶

The Sixth Circuit did not determine whether Maddox was "otherwise qualified."⁵⁷ The court, however, did note that, under the Rehabilitation Act, a plaintiff may demonstrate that the employer's stated reasons for discharge served merely as a pretext for discrimination.⁵⁸ On this point, the Sixth Circuit upheld the district court's determination that the reasons for dismissal articulated by the University did not constitute merely a pretext for discrimination.⁵⁹ The court made the determination, after examining the record compiled at trial, that Maddox could not substantiate his claim that the reasons stated by the University served as a pretext for terminating him due to his alcoholism.⁶⁰

The court in *Maddox*, although ultimately displaying proper judgment, travels a curious, and perhaps unnecessary, route in reaching its decision.⁶¹ The court's reasoning begins, and seems rooted in, an examination of the possible impact on employers if Maddox's arguments were to prevail.⁶² After rejecting such implications as unacceptable, the court bolstered this determination by noting that other circuits have employed analogous reasoning.⁶³ The court, finally and briefly, mentioned the relevant language of the ADA and the Rehabilitation Act.⁶⁴ By examining this text last, the court violates the traditional approach to statutory interpretation and improperly relegates congressional legislation to a supporting role.

Despite this improper approach, the Sixth Circuit in *Maddox* becomes the third circuit within the past year to properly determine that

Section 104(c)(4) of the ADA provides:

A covered entity may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee

42 U.S.C. § 12114(c)(4) (Supp. IV 1992).

⁵⁶ *Maddox*, 62 F.3d at 848, 4 AD Cases (BNA) at 1257. The court concluded that, under the Rehabilitation Act, an employer could permissibly terminate an employee who, while intoxicated, sexually assaulted a coworker. *Id.* Therefore, by analogy, the court reasoned that the University could discharge Maddox. *See id.*

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *See id.* at 848, 4 AD Cases (BNA) at 1257-58.

⁶⁰ *Id.*

⁶¹ *See Maddox*, 62 F.3d at 846-848, 4 AD Cases (BNA) at 1256-1258.

⁶² *See id.* at 847, 4 AD Cases (BNA) at 1256.

⁶³ *See id.*

⁶⁴ *Id.* at 847, 4 AD Cases (BNA) at 1257.

the Rehabilitation Act and the ADA protect handicapped individuals from discrimination but do not discriminate in their favor with regard to termination decisions.⁶⁵ As provided for by the clear language of the Rehabilitation Act, individuals shall not become the object of discrimination based solely on their handicapped conditions.⁶⁶ Thus, an employer must not assume that a handicapped person could not function in a given context, but rather must make employment decisions based on the individual's actual attributes.⁶⁷ This language of the Act should not be read to exempt protected individuals from work requirements that the employer applies fairly to all.⁶⁸ Doing otherwise would go beyond bringing disabled individuals to the level playing field of equal protection and would elevate them to a status well beyond that of their coworkers.⁶⁹

Providing such extra protection to handicapped employees is not only contrary to the purpose of the Act but would also, in practice, harm those individuals Congress attempted to protect.⁷⁰ As one of its stated purposes, the Rehabilitation Act intends to maximize the inclusion and integration of disabled individuals into the work force.⁷¹ Going beyond this worthwhile goal would not serve this end because this added protection may serve to deter employers from hiring handicapped applicants. In addition, forcing employers to accept egregious misconduct by handicapped employees ultimately would hinder the development of these individuals' independence, also contrary to the Act's goals.⁷²

Although the court's reasoning is not sufficiently grounded in the statute, the Sixth Circuit did properly distinguish between termination for misconduct and termination solely by reason of a protected disability.⁷³ The University terminated Maddox for his unwise decision to drive while intoxicated rather than for his status as an alcoholic.⁷⁴ If

⁶⁵ See *Collings v. Longview Fibre Co.*, 63 F.3d 828, 835, 4 AD Cases (BNA) at 1278, 1282 (9th Cir. 1995); *Despears v. Milwaukee County*, 63 F.3d 635, 637, 4 AD Cases (BNA) 1313, 1315 (7th Cir. 1995); *Maddox*, 62 F.3d at 848, 4 AD Cases (BNA) at 1257.

⁶⁶ See 29 U.S.C. § 794(a).

⁶⁷ See *Teahan v. Metro-North Commuter R.R.*, 951 F.2d 511, 513, 57 Fair Empl. Prac. Cas. (BNA) 1138, 1140 (2d Cir. 1991).

⁶⁸ See *Rollison v. Gwinnett County*, 865 F. Supp. 1564, 1572, 10 A.D.D. 478 (N.D. Ga. 1994).

⁶⁹ See *id.*

⁷⁰ See *Despears*, 63 F.3d at 637, 4 AD Cases (BNA) at 1315.

⁷¹ 29 U.S.C. § 701(b)(1) (1994).

⁷² See *Despears*, 63 F.3d at 637, 4 AD Cases (BNA) at 1315.

⁷³ See *Maddox*, 62 F.3d at 847, 4 AD Cases (BNA) at 1256.

⁷⁴ See *id.* at 848, 4 AD Cases (BNA) at 1257; see also *Despears*, 63 F.3d at 636, 4 AD Cases (BNA) at 1314.

drunk driving inevitably resulted from Maddox's protected handicap, then the termination would have been improper.⁷⁵ Presumably, however, Maddox, like most other alcoholics, did not drive each time he drank; therefore his action was voluntary.⁷⁶ Thus, although the University may have terminated Maddox in part due to his alcoholism, at least one additional reason for the termination was Maddox's faulty judgment.⁷⁷ Because of these multiple reasons, Maddox did not satisfy the Act's requirement that the wrongful termination be "solely by reason of . . . his handicap."⁷⁸ Although his alcoholism may have affected his judgment that evening, such conduct does not inevitably follow, as seen by the numerous alcoholics who refuse to drive while drunk.⁷⁹ In addition, criminal law also recognizes that drunk driving is not wholly involuntary and thus refuses to accept alcoholism as a defense to the charge of driving while intoxicated.⁸⁰

Because driving while intoxicated amounts to a voluntary decision, *Teahan*, even if properly reasoned, can be distinguished from this case.⁸¹ The *Teahan* court, in ruling that the discharge of an alcoholic employee for excessive absenteeism violated the Rehabilitation Act, employed an example of the "thumping limper."⁸² The court concluded that the Act would prevent an employer from discharging a handicapped employee for the "thump" sound that results from a limp.⁸³ By analogy to the facts of *Teahan*, the court determined that an employer could not terminate an alcoholic employee who averaged approximately fifty-three unexcused absences if the absences resulted from his drinking.⁸⁴ This reasoning does not apply to Maddox because driving while intoxicated, unlike the "thump" sound that inevitably results from a limp, results from a voluntary, albeit unwise, decision.⁸⁵ Furthermore, because some unexcused absences inevitably result from alcoholism, labeling them "voluntary" would be inappropriate.⁸⁶ In sum, due to the physical effects of excessive drinking caused by alcoholism, missed work-related obligations are an inevitable result of the

⁷⁵ See *Despears*, 63 F.3d at 636-37, 4 AD Cases (BNA) at 1314.

⁷⁶ See *id.* at 636, 4 AD Cases (BNA) at 1314.

⁷⁷ See *id.*

⁷⁸ 29 U.S.C. § 794(a) (1994).

⁷⁹ See *Despears*, 63 F.3d at 636, 4 AD Cases (BNA) at 1314.

⁸⁰ *Id.*

⁸¹ See *Teahan*, 951 F.2d at 513-14, 516, 57 Fair Empl. Prac. Cas. (BNA) at 1140, 1143.

⁸² *Id.* at 516, 57 Fair Empl. Prac. Cas. (BNA) at 1143.

⁸³ *Id.* at 516-17, 57 Fair Empl. Prac. Cas. (BNA) at 1143.

⁸⁴ *Id.* at 517, 57 Fair Empl. Prac. Cas. (BNA) at 1143.

⁸⁵ See *Despears*, 63 F.3d at 636, 4 AD Cases (BNA) at 1314.

⁸⁶ See *id.* at 637, 4 AD Cases (BNA) at 1314.

protected handicap whereas driving while intoxicated constitutes a voluntary decision.⁸⁷ Therefore, *Teahan*, even if decided properly, is factually distinct from *Maddox*.⁸⁸

In conclusion, the United States Court of Appeals for the Sixth Circuit in *Maddox v. University of Tennessee* held that an employer can permissibly distinguish between a discharge for misconduct and a discharge solely by reason of disability.⁸⁹ By embracing the *Little* approach, the Sixth Circuit now permits employers to terminate employees for misconduct regardless of the employee's handicapped status.⁹⁰ Such an approach either rejects or sharply curtails *Teahan*'s causal connection analysis.⁹¹ Therefore, in the Sixth Circuit, the Rehabilitation Act provides little protection for handicapped employees who engage in egregious misconduct.⁹² It remains undecided by the Sixth Circuit whether employees who demonstrate that this misconduct inevitably results from their protected disability will receive the protection of the Rehabilitation Act in the Sixth Circuit.⁹³ There is no language in *Maddox*, however, to suggest that the Sixth Circuit is currently prepared to extend the protection of the Rehabilitation Act to such employees.⁹⁴

FIRST AMENDMENT

**Balancing the Efficiency Needs of the Government as Employer Against an Employee's First Amendment Rights: Jeffries v. Harleston¹*

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

⁸⁷ See *id.*

⁸⁸ See *Maddox*, 62 F.3d at 844-45, 4 AD Cases (BNA) at 1254-55; *Teahan*, 951 F.2d at 513-14, 57 Fair Empl. Prac. Cas. (BNA) at 1140.

⁸⁹ See *Maddox*, 62 F.3d at 847, 4 AD Cases (BNA) at 1256.

⁹⁰ See *id.* at 848, 4 AD Cases (BNA) at 1257.

⁹¹ See *Teahan*, 951 F.2d at 517, 57 Fair Empl. Prac. Cas. (BNA) at 1143.

⁹² See *Maddox*, 62 F.3d at 848, 4 AD Cases (BNA) at 1256.

⁹³ See *id.*

⁹⁴ See *id.* at 848, 4 AD Cases (BNA) at 1257.

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¹ 52 F.3d 9, 10 Indiv. Empl. Rights Cas. (BNA) 806 (2d Cir.), *cert. denied*, 116 S. Cl. 173 (1995).

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.*

of state law, is deprived of any right, privilege or immunity secured by the United States Constitution.³ Under § 1983, an employee terminated by a government-employer is entitled to challenge the termination on grounds that it violated free speech rights protected by the First Amendment.⁴ In light of the government-employer's competing mission to provide public services effectively and efficiently, however, the government as employer has a greater interest in regulating employees' speech than the government as sovereign has in regulating the speech of the general population.⁵ Balancing the government employee's right to free speech with the government-employer's right to regulate that speech has raised problems in the context of § 1983 wrongful termination suits.⁶

In 1983, in *Connick v. Myers*, the United States Supreme Court held that a government-employer's termination of an employee did not violate her right to free speech because the employer's belief that the employee's actions would disrupt the efficient functioning of the office was reasonable and outweighed the employee's limited First Amendment interest.⁷ In *Connick*, an assistant district attorney sued her employer under § 1983, claiming that he had fired her for distributing in the workplace a questionnaire concerning office policies.⁸ The Supreme Court noted that the threshold condition for a wrongful termination suit on First Amendment grounds is that the speech at issue be on a matter of public concern.⁹ Whether speech touches matters of public concern must be determined on a case by case basis, considering the content, form and context of the speech.¹⁰ The Court

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., *Connick v. Myers*, 461 U.S. 138, 141, 1 Indiv. Empl. Rights Cas. (BNA) 178, 180 (1983).

⁵ *Id.* at 140, 150-51, 1 Indiv. Empl. Rights Cas. (BNA) at 179, 183-84.

⁶ See, e.g., *id.* at 149-50, 152, 1 Indiv. Empl. Rights Cas. (BNA) at 183-84.

⁷ *Id.* at 154, 1 Indiv. Empl. Rights Cas. (BNA) at 185.

⁸ *Id.* at 141, 1 Indiv. Empl. Rights Cas. (BNA) at 180.

⁹ See *Connick*, 461 U.S. at 145, 146, 1 Indiv. Empl. Rights Cas. (BNA) at 181, 182. The Court reaffirmed its position that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values." *Id.* at 145, 1 Indiv. Empl. Rights Cas. (BNA) at 181 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). The Court also stated that when the speech cannot be fairly characterized as touching on a matter of public concern, the government-employer should have broad discretion in managing its offices, "without intrusive oversight by the judiciary." See *id.* at 146, 1 Indiv. Empl. Rights Cas. (BNA) at 182.

¹⁰ *Id.* at 147-48, 1 Indiv. Empl. Rights Cas. (BNA) at 182.

observed that although most of the questionnaire involved an employee grievance relating to internal office policies, one question about pressure to work in political campaigns did touch on a matter of public concern.¹¹ The Court next balanced the employee's right to distribute that question against the employer's right to regulate employees' speech and concluded that the employer's belief that the completion of questionnaires would disrupt the workplace, interfere with close working relationships and undermine the authority of the supervisors outweighed the employee's limited First Amendment interest.¹² Thus, the *Connick* Court called for a fact-specific balancing inquiry to determine whether a government-employer's decision to terminate an employee violates the employee's right to speak on matters of public concern.¹³

In 1987, in *Rankin v. McPherson*, the United States Supreme Court held that a county constable's discharge of a clerical employee was improper where the constable's interest in the dismissal did not outweigh the employee's First Amendment freedom of speech.¹⁴ In *Rankin*, the plaintiff alleged that the constable violated her First Amendment rights by firing her for a remark she made to a coworker.¹⁵ After hearing of an attempt to assassinate the President of the United States, the plaintiff had said to a coworker, "If they go for him again, I hope they get him."¹⁶ The Court first determined that the statements at issue constituted speech on a matter of public concern because they were comments on presidential policies following an assassination attempt.¹⁷ In order to determine whether the public employer acted properly in discharging the employee for speech, the Court next balanced the interests of the employee in commenting upon matters of public concern against the interests of the government, as an employer, in performing its public services effectively.¹⁸ The Court held that the employer failed to demonstrate a state interest that outweighed the employee's First Amendment rights, where there was no evidence that the employee's statements interfered with the function of the constable's office, discredited the office or indicated that the employee was unfit to perform her duties.¹⁹

¹¹ *Id.* at 149, 154, 1 Indiv. Empl. Rights Cas. (BNA) at 183, 185.

¹² *See id.* at 151-53, 154, 1 Indiv. Empl. Rights Cas. (BNA) at 184, 185.

¹³ *See id.* at 154, 1 Indiv. Empl. Rights Cas. (BNA) at 185.

¹⁴ 483 U.S. 378, 392, 2 Indiv. Empl. Rights Cas. (BNA) 257, 262 (1987).

¹⁵ *See id.* at 382, 2 Indiv. Empl. Rights Cas. (BNA) at 258.

¹⁶ *Id.* at 381, 2 Indiv. Empl. Rights Cas. (BNA) at 258.

¹⁷ *Id.* at 386, 2 Indiv. Empl. Rights Cas. (BNA) at 260.

¹⁸ *Id.* at 384, 2 Indiv. Empl. Rights Cas. (BNA) at 259 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). The Court noted that the state bears the burden of proving the legitimacy of the discharge. *Id.* at 388, 2 Indiv. Empl. Rights Cas. (BNA) at 260.

¹⁹ *Rankin*, 483 U.S. at 388-89, 2 Indiv. Empl. Rights Cas. (BNA) at 261.

The Court further explained that the potential for disruption would increase with the level of authority and public accountability inherent in the employee's position.²⁰ Because this employee's position was purely clerical the Court concluded that her speech posed only a minimal threat of disruption to the employer's law enforcement function.²¹ Thus, the *Rankin* Court held that a public employer may not discharge an employee for engaging in speech on a matter of public concern where the speech had no disruptive effect on the functioning of the employer's enterprise.²²

In 1991, in *Piesco v. City of New York, Department of Personnel*, the United States Court of Appeals for the Second Circuit held that a public employer's discharge of an appointed city official for engaging in speech violated her First Amendment rights, where the employer failed to demonstrate that the employee's statements on matters of public concern interfered with the efficient functioning of the workplace.²³ In *Piesco*, the plaintiff had held a provisional appointment as Deputy Personnel Director for Examinations in the New York City Department of Personnel ("DOP") and in that capacity oversaw the administration of the Bureau of Examinations and the city's civil service tests.²⁴ Following a disagreement over the setting of a passing grade for a police examination, the plaintiff replied affirmatively at a committee meeting when asked whether a "moron" could pass a police examination with the passing grade set as it was.²⁵ The plaintiff filed suit alleging that the DOP violated her First Amendment rights by retaliating against her for her testimony before the committee.²⁶ Eight days later, DOP fired the plaintiff.²⁷

The Second Circuit first determined that the plaintiff's statements concerning the competency of police officers touched on matters of public concern because law enforcement is a fundamental governmental function.²⁸ The court stated that a primary purpose of the First Amendment is to protect open discussion of political and governmental issues and that criticism of the government is the kind of speech for which the First Amendment protection was designed.²⁹ The court

²⁰ *Id.* at 390-91, 2 Indiv. Empl. Rights Cas. (BNA) at 261-62.

²¹ *Id.*

²² *Id.* at 389, 392, 2 Indiv. Empl. Rights Cas. (BNA) at 261, 262.

²³ 933 F.2d 1149, 1160 (2d Cir.), *cert. denied*, 502 U.S. 921 (1991).

²⁴ *Id.* at 1151.

²⁵ *Id.*

²⁶ *Id.* at 1153.

²⁷ *Id.* Plaintiff subsequently filed an amended complaint that added a count for wrongful discharge under § 1983. *Id.* at 1154.

²⁸ See *Piesco*, 933 F.2d at 1157.

²⁹ *Id.* at 1156-57.

next applied the *Connick* balancing test and concluded that the plaintiff's interest in testifying truthfully before a city legislative committee significantly outweighed the city's interest in efficiently performing its public services.³⁰ The *Piesco* court did acknowledge that the plaintiff had held a relatively senior position and that the speech of such an employee has a greater potential for disruption.³¹ The court explained, however, that the need for honest and candid testimony from those uniquely qualified to speak before a legislative investigative committee, as well as their legal obligation to so testify, mitigates the burden normally borne by high ranking officials to monitor their speech on public matters.³² The court also noted that when the speech at issue *substantially* touches upon matters of public concern, the government must make a stronger showing of disruption of the functioning of the government-employer's enterprise.³³ Because the plaintiff's statements clearly touched on matters of public concern and the government-employer failed to demonstrate any interference with the effective functioning of the workplace, the court determined that the DOP had violated the plaintiff's First Amendment rights.³⁴

In 1994, in *Waters v. Churchill*, the United States Supreme Court added to the *Connick* balancing test an inquiry into the evidentiary bases of the employer's decision by stating that a government-employer could properly terminate an employee for speech that might disrupt the functioning of the employer's workplace, as long as the employer used a reasonably reliable procedure for determining what was actually said by the employee.³⁵ The Supreme Court held that a public hospital's discharge of a nurse did not violate her First Amendment rights because the hospital's belief that her speech had the potential to interfere with its efficient functioning outweighed the nurse's interest in expressing herself on a matter of public concern.³⁶ *Waters* involved an obstetrics nurse at a public hospital who allegedly made remarks critical of her department to another nurse considering transferring to obstetrics.³⁷ When the hospital fired her from her nursing job, she filed suit claiming that her discharge violated her First Amendment rights.³⁸

³⁰ *Id.* at 1157, 1158.

³¹ *Id.* at 1157.

³² *Id.* at 1157, 1158.

³³ See *Piesco*, 933 F.2d at 1159.

³⁴ *Id.* at 1161.

³⁵ See 114 S. Ct. 1878, 1889, 9 Indiv. Empl. Rights Cas. (BNA) 801, 807 (1994).

³⁶ See *id.* at 1891, 9 Indiv. Empl. Rights Cas. (BNA) at 808-09.

³⁷ *Id.* at 1882-83, 9 Indiv. Empl. Rights Cas. (BNA) at 801-02. The substance of the remarks was disputed. *Id.* at 1882, 9 Indiv. Empl. Rights Cas. (BNA) at 801.

³⁸ *Id.* at 1883, 9 Indiv. Empl. Rights Cas. (BNA) at 802.

The Court first noted that the government has a greater ability to regulate speech when acting as employer, than when acting as sovereign.³⁹ The government must be able to restrict employee speech in some situations that would violate an employee's First Amendment rights in a private employment setting, and courts must give greater deference to government-employers' reasonable predictions of disruption when these predictions motivate restrictions on employee speech.⁴⁰ The Court further explained that the extra power the government has in dismissing employees for engaging in speech arises from the nature of the government's mission as employer.⁴¹ The government hires an employee to contribute to the government's mission, and when that employee says things that hinder effective operations, the government-employer must have power to restrain that employee.⁴² Applying this reasoning to the case at hand, the Court determined that the hospital's discharge did not violate the nurse's First Amendment rights.⁴³ The Court reasoned that whether or not the nurse's statements touched on matters of public concern, they had the potential to disrupt operations by discouraging people from coming to work in the obstetrics department, undermining management authority and raising doubts as to the nurse's future effectiveness.⁴⁴

The *Waters* Court also discussed the procedure or evidence upon which a government-employer may reasonably rely in making a termination decision.⁴⁵ The Court stated that it would sustain the termination of an employee if the employer used reasonably reliable procedures to determine what was actually said by the employee, even though a trier of fact might later find that those procedures yielded incorrect information.⁴⁶ Because the hospital interviewed the employee herself, the nurse to whom the employee spoke, the person who overheard the conversation and three managers who confirmed the informants' reliability, the Court concluded that the hospital's investigation was reasonable.⁴⁷ Thus, the *Waters* Court held that the government-employer's interests in maintaining effective operations outweighs an employee's First Amendment rights when the employer bases its belief that the

³⁹ *Id.* at 1886-87, 9 *Indiv. Empl. Rights Cas.* (BNA) at 804.

⁴⁰ *Waters*, 114 S. Ct. at 1886-87, 9 *Indiv. Empl. Rights Cas.* (BNA) at 804-05.

⁴¹ *Id.* at 1887, 9 *Indiv. Empl. Rights Cas.* (BNA) at 806.

⁴² *Id.* at 1887-88, 9 *Indiv. Empl. Rights Cas.* (BNA) at 806.

⁴³ *See id.* at 1890-91, 9 *Indiv. Empl. Rights Cas.* (BNA) at 808.

⁴⁴ *Id.*

⁴⁵ *Waters*, 114 S. Ct. at 1888, 1890-91, 9 *Indiv. Empl. Rights Cas.* (BNA) at 806, 808.

⁴⁶ *Id.* at 1888, 9 *Indiv. Empl. Rights Cas.* (BNA) at 806.

⁴⁷ *Id.* at 1890, 9 *Indiv. Empl. Rights Cas.* (BNA) at 808.

speech at issue is potentially disruptive on reasonably reliable information.⁴⁸

During the *Survey* year, in *Jeffries v. Harleston*, the United States Court of Appeals for the Second Circuit held that a public college could remove a professor from his position as department chairperson where it made a substantial showing that the removal was motivated by a reasonable prediction that the professor's speech would disrupt the efficient functioning of the college.⁴⁹ In *Jeffries*, a public college removed a professor from his department chairmanship after he made several anti-Semitic remarks at an off-campus conference.⁵⁰ The Second Circuit applied the *Connick* balancing test and showed substantial deference to the government-employer's reasonable prediction of disruption.⁵¹ The court held that an adverse employment action will be sustained where the speech at issue is on a matter of public concern, the potential for disruption outweighs the employee's First Amendment rights and the employer's decision to take action is a reaction to this potential disruption and not to the substance of the speech.⁵²

In *Jeffries*, the plaintiff, Leonard Jeffries, was chairman of the Black Studies Department at City College of New York ("City College"), part of the City University of New York ("CUNY") system, and was the featured speaker at a July 1991 conference on black culture in Albany.⁵³ While commenting on what he considered to be racial and ethnic biases in New York's public school curriculum, Jeffries made several remarks disparaging Jews.⁵⁴ Several days later, Bernard Harleston, the President of City College, released a statement condemning Jeffries's Albany speech as contrary to CUNY's policy of ethnic, racial and religious tolerance.⁵⁵

At a meeting of the CUNY Board of Trustees in late October 1991, Harleston recommended that the trustees reappoint Jeffries to only a one-year term as chairman of the Black Studies Department, instead of to the normal three-year term.⁵⁶ Four of the trustees voted against Jeffries's reappointment for any term in response to the content of his

⁴⁸ *Id.* at 1890-91, 9 Indiv. Empl. Rights Cas. (BNA) at 808.

⁴⁹ *Jeffries v. Harleston*, 52 F.3d 9, 10, 10 Indiv. Empl. Rights Cas. (BNA) 806, 807 (2d Cir.), *cert. denied*, 116 S. Ct. 173 (1995) [hereinafter *Jeffries II*].

⁵⁰ See *Jeffries v. Harleston*, 21 F.3d 1238, 1238, 1241-42, 9 Indiv. Empl. Rights Cas. (BNA) 686, 686, 688-89 (2d Cir.) [hereinafter *Jeffries I*], *vacated*, 115 S. Ct. 502, 503 (1994).

⁵¹ *Jeffries II*, 52 F.3d at 13, 10 Indiv. Empl. Rights Cas. (BNA) at 809.

⁵² *Id.*

⁵³ See *Jeffries I*, 21 F.3d at 1241, 9 Indiv. Empl. Rights Cas. (BNA) at 688.

⁵⁴ *Id.* at 1241-42, 9 Indiv. Empl. Rights Cas. (BNA) at 689.

⁵⁵ *Id.* at 1242, 9 Indiv. Empl. Rights Cas. (BNA) at 689.

⁵⁶ *Id.* at 1242, 9 Indiv. Empl. Rights Cas. (BNA) at 689-90.

speech.⁵⁷ Nine other trustees voted for the one-year reappointment, and that term was approved by the Board.⁵⁸ In a letter to Jeffries, Harleston claimed that the Albany speech threatened "recruitment, fund-raising, and CUNY's relationship with the community."⁵⁹ In December 1991, Harleston proposed to replace Jeffries as chairman, and the trustees voted unanimously for his replacement.⁶⁰

Jeffries filed suit in the United States District Court for the Southern District of New York, naming as defendants Harleston, the CUNY Chancellor and the fourteen individual trustees.⁶¹ He claimed that the defendants had removed him as department chair in violation of his First Amendment right to free speech.⁶² The district court served the jury with three sets of interrogatories.⁶³ The first set of jury responses indicated that the defendants had limited Jeffries's term in reaction to the content of the Albany speech.⁶⁴ The jury also indicated that although the speech did not actually disrupt the efficient and effective operation of the Black Studies Department, the fifteen defendants were motivated by a reasonable expectation that it would.⁶⁵ The district court judge determined from these responses that the fifteen defendants had violated Jeffries's First Amendment rights because the Albany speech was substantially on matters of public concern and did not cause actual disruption to CUNY.⁶⁶

In response to a second set of interrogatories designed to determine the individual liability of the fifteen defendants, the jury found that six of the defendants, the four trustees, Harleston and the CUNY Chancellor, voted against Jeffries solely because of the Albany speech, and the other nine, who voted only to limit Jeffries's term, did not base their decision on the speech.⁶⁷ The district court judge enforced the jury's third interrogatory response, awarding punitive damages against

⁵⁷ *Id.* at 1242, 9 Indiv. Empl. Rights Cas. (BNA) at 690.

⁵⁸ *Jeffries I*, 21 F.3d at 1242, 9 Indiv. Empl. Rights Cas. (BNA) at 690. One trustee abstained from voting because she had previously criticized Jeffries's controversial views. *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1243, 9 Indiv. Empl. Rights Cas. (BNA) at 690.

⁶¹ *Id.* at 1241, 1243, 9 Indiv. Empl. Rights Cas. (BNA) at 688, 690. One of the trustees died during the trial and Jeffries discontinued his claim against her. *Jeffries II*, 52 F.3d at 11, 10 Indiv. Empl. Rights Cas. (BNA) at 808.

⁶² *Jeffries I*, 21 F.3d at 1243, 9 Indiv. Empl. Rights Cas. (BNA) at 690.

⁶³ *See id.* at 1243-44, 9 Indiv. Empl. Rights Cas. (BNA) at 690-91.

⁶⁴ *See id.*

⁶⁵ *See Jeffries II*, 52 F.3d at 11, 10 Indiv. Empl. Rights Cas. (BNA) at 808; *Jeffries I*, 21 F.3d at 1243-44, 9 Indiv. Empl. Rights Cas. (BNA) at 690-91.

⁶⁶ *See Jeffries II*, 52 F.3d at 11, 10 Indiv. Empl. Rights Cas. (BNA) at 808.

⁶⁷ *Jeffries I*, 21 F.3d at 1244, 9 Indiv. Empl. Rights Cas. (BNA) at 691.

six of the defendants, and ordered Jeffries's reinstatement as chairman.⁶⁸ The defendants appealed.⁶⁹

In *Jeffries v. Harleston* ("Jeffries I"), the Court of Appeals for the Second Circuit affirmed the reinstatement order, but recognized an inconsistency in the two sets of interrogatories.⁷⁰ The *Jeffries I* court affirmed the district court's findings that Jeffries's speech touched upon matters of public concern, that the decision to terminate Jeffries was motivated by that speech and that the defendants had failed to show "substantial interference" with CUNY's functioning.⁷¹ The court could not reconcile the jury's finding that the fifteen defendants voted to dismiss Jeffries based on a reasonable belief that the Albany speech would disrupt the effective operation of CUNY with the further finding that six of the defendants acted with "malicious intent" to violate Jeffries's First Amendment rights.⁷² The court therefore vacated the punitive damages against the six defendants and remanded for a new trial on the punitive issues.⁷³ After the decision in *Waters v. Churchill*, the Supreme Court granted certiorari, vacated the *Jeffries I* decision and remanded the case to the Second Circuit with instructions to reconsider the case in light of *Waters*.⁷⁴

On remand from the Supreme Court, in *Jeffries v. Harleston* ("Jeffries II"), the Second Circuit reversed the *Jeffries I* decision and held that Jeffries's removal as department chair was justified because the defendants had a reasonable prediction of disruption that was sufficient to overcome Jeffries's First Amendment interests.⁷⁵ Following *Waters*, the Second Circuit stated that in applying the *Connick* balancing test a court should give substantial deference to a government-employer's reasonable prediction of disruption and that the government-employer need not show actual disruption or injury caused by the employee's speech.⁷⁶ The court noted that *Waters* had thus altered a crucial aspect of the earlier *Jeffries* opinion.⁷⁷ The *Jeffries II* court also acknowledged the *Waters* conclusion that where the employee's interest in commenting on public matters is stronger, the government-employer's burden of showing that the speech would likely result in disruption in-

⁶⁸ *Id.*

⁶⁹ *Id.* at 1241, 9 Indiv. Empl. Rights Cas. (BNA) at 688.

⁷⁰ *Jeffries II*, 52 F.3d at 11, 10 Indiv. Empl. Rights Cas. (BNA) at 808.

⁷¹ *Jeffries I*, 21 F.3d at 1245-46, 9 Indiv. Empl. Rights Cas. (BNA) at 692-93.

⁷² *Jeffries II*, 52 F.3d at 11-12, 10 Indiv. Empl. Rights Cas. (BNA) at 808.

⁷³ *Id.* at 12, 10 Indiv. Empl. Rights Cas. (BNA) at 808.

⁷⁴ *Id.*

⁷⁵ See *id.* at 13, 10 Indiv. Empl. Rights Cas. (BNA) at 810.

⁷⁶ *Id.* at 13, 10 Indiv. Empl. Rights Cas. (BNA) at 809.

⁷⁷ *Jeffries II*, 52 F.3d at 13, 10 Indiv. Empl. Rights Cas. (BNA) at 809.

creases.⁷⁸ The *Jeffries II* court restated the *Connick* balancing test in light of the *Waters* holding and concluded that a government-employer may discharge an employee for engaging in speech that touches on a matter of public concern if (1) the employer's determination of potential disruption is reasonable; (2) the potential for disruption outweighs the value of the speech; and (3) the employer took action against the employee because of this potential disruption and not in retaliation for the content of the speech.⁷⁹

The *Jeffries II* court next reviewed the jury's responses to the interrogatories in the district court case and determined that the jury's "central finding" was that the fifteen defendants had voted to limit Jeffries's term based on a reasonable prediction of disruption and not based on a retaliatory motivation.⁸⁰ Relying on that jury finding, the *Jeffries II* court held that as a matter of law the potential for disruption created by the Albany speech outweighed Jeffries's First Amendment rights.⁸¹ The court then disposed of the inconsistency in the jury responses by stating that "elementary principles of causation" demanded the conclusion that the defendants had not violated Jeffries's rights.⁸² The court explained that because a majority of the defendants voted to limit Jeffries's term based on a legitimate motive, their reasonable expectation of disruption, the decision of the Board of Trustees did not violate Jeffries's constitutional rights.⁸³ The court also rejected the argument that Jeffries's speech deserved greater protection because of Jeffries's role as an educator by holding that Jeffries's position as department chair was not academic, but purely "ministerial," in nature.⁸⁴ Thus, the *Jeffries II* court concluded that the government-employer's reasonable prediction of disruption caused by an employee's speech on a matter of public concern outweighed the employee's First Amendment right of free speech.⁸⁵

By accepting the broader "reasonable prediction of disruption" standard and deferring to employers' conclusions that are based on reasonable investigative procedures, the *Jeffries II* court's interpretation of *Waters* signals that courts will show significantly greater deference to government-employers' determinations in wrongful discharge

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 13, 10 Indiv. Empl. Rights Cas. (BNA) at 810.

⁸¹ *Id.*

⁸² *Jeffries II*, 52 F.3d at 14, 10 Indiv. Empl. Rights Cas. (BNA) at 810.

⁸³ *Id.*

⁸⁴ *Id.* at 14, 10 Indiv. Empl. Rights Cas. (BNA) at 810-11.

⁸⁵ *Id.* at 13, 15, 10 Indiv. Empl. Rights Cas. (BNA) at 810, 811.

suits.⁸⁶ In practice, it appears the government-employer will bear a light burden in showing that it considered disruption likely under the circumstances of the case. For example, in *Waters*, the Supreme Court deferred to the hospital's determination that the plaintiff's alleged criticism of the obstetrics department might discourage people from transferring to the department, undermine the authority of the hospital management or hinder the plaintiff's continued effectiveness.⁸⁷ The Court stated that if the hospital "really did believe" the two employees who witnessed the plaintiff's comments, and if the hospital fired the plaintiff because of those comments, then the termination was lawful.⁸⁸ In other words, the requirements for investigation seem minimal. Not only are government-employers able to establish and follow investigative procedures free from the strictures of the evidentiary rules of court, but they also are encouraged to rely on hearsay, personal judgments of credibility and character, and unfounded complaints.⁸⁹ As long as a reasonable manager would approve of the procedure used to determine what was actually said and the government-employer found a potential for disruption, the employer will escape liability.⁹⁰

The *Jeffries II* court's additional requirement that the government-employer prove that it acted in response to the potential disruption and not in response to the substance of the speech itself will probably not restrict the government-employer's broadened freedom under *Jeffries II*.⁹¹ A government-employer could satisfy this requirement so easily in most cases that it affords almost no additional protection to the employee. If the managers disagree with the content of the speech, they might also reasonably believe, or at least claim in a believable manner, that others will find it disagreeable. On that basis they may justify their decision by citing potential harm to working relationships or doubt as to the employee's future effectiveness, when the decision was primarily, though perhaps secretly, a reaction to the substance of the speech.⁹² Once a government-employer is on notice of the *Jeffries II* standard, it may simply pay closer attention to the phrasing of its determinations and word public statements and termination notices accordingly. Although four of the CUNY trustees admitted basing their

⁸⁶ *Id.* at 13, 10 Indiv. Empl. Rights Cas. (BNA) at 809.

⁸⁷ *Waters v. Churchill*, 114 S. Ct. 1878, 1890-91, 9 Indiv. Empl. Rights Cas. (BNA) 801, 808 (1994).

⁸⁸ *Id.* at 1890, 9 Indiv. Empl. Rights Cas. (BNA) at 808.

⁸⁹ *See id.* at 1888-89, 9 Indiv. Empl. Rights Cas. (BNA) at 806.

⁹⁰ *See id.* at 1889, 9 Indiv. Empl. Rights Cas. (BNA) at 807.

⁹¹ *Jeffries II*, 52 F.3d at 13-14, 10 Indiv. Empl. Rights Cas. (BNA) at 809, 810.

⁹² *See Waters*, 114 S. Ct. at 1890-91, 9 Indiv. Empl. Rights Cas. (BNA) at 808.

decision to reject Jeffries's reappointment on the substance of his Albany speech, it is probable that avoiding such public confessions and instead citing concerns about potential effects on the workplace will allow the employer to avoid liability.⁹³

In *Jeffries II*, the Second Circuit did not fully develop its interpretation of the *Waters* requirement that the employer's investigative procedures be reasonably reliable.⁹⁴ In *Waters*, the Supreme Court held that a government-employer can properly terminate an employee for speech only if the employer uses reasonably reliable procedures to determine the nature of the speech at issue.⁹⁵ The *Jeffries II* court correctly interpreted *Waters* as holding that the government can terminate an employee for potentially disruptive speech based on a reasonable belief of what was said, regardless of what was actually said.⁹⁶ The *Jeffries II* interpretation of *Waters* subsumes the inquiry into the reasonableness of the investigative procedures through which the employer's belief is formed.⁹⁷ Yet because the *Jeffries II* court determined that there was no dispute as to what Jeffries actually said, it did not review the reasonableness of the investigative procedures used by CUNY.⁹⁸ The *Jeffries II* decision therefore does not indicate how the Second Circuit will conduct such an inquiry when there is a dispute as to what was actually said by the employee.

In summary, the *Jeffries II* court held that where a government-employer terminates an employee for engaging in speech on a matter of public concern, the employer need only show that it fired the employee because of a reasonable prediction of disruption of the effective functioning of the employer's workplace.⁹⁹ The courts will grant considerable deference to the government-employer's conclusions as to what was actually said and its potential for disruption.¹⁰⁰ While both *Waters* and *Jeffries II* emphasize the special mission of the government as employer and the justifications for the broader powers accorded it in that capacity, the fact-specific balancing test they establish will always be tipped in the State's favor by the courts' consistent grants of deference to the government-employer's investigations and determinations.¹⁰¹

⁹³ See *Jeffries I*, 21 F.3d at 1242, 9 Indiv. Empl. Rights Cas. (BNA) at 690.

⁹⁴ See *Waters*, 114 S. Ct. at 1889, 9 Indiv. Empl. Rights Cas. (BNA) at 807; *Jeffries II*, 52 F.3d at 12, 10 Indiv. Empl. Rights Cas. (BNA) at 809.

⁹⁵ See *Waters*, 114 S. Ct. at 1890, 9 Indiv. Empl. Rights Cas. (BNA) at 807, 808.

⁹⁶ *Jeffries II*, 52 F.3d at 12, 10 Indiv. Empl. Rights Cas. (BNA) at 809.

⁹⁷ *Id.*

⁹⁸ *Id.* The court instead focused its opinion on the issue of disruptiveness. *Id.*

⁹⁹ *Id.* at 13, 10 Indiv. Empl. Rights Cas. (BNA) at 809, 810.

¹⁰⁰ *Id.* at 13, 10 Indiv. Empl. Rights Cas. (BNA) at 809.

¹⁰¹ See *Waters*, 114 S. Ct. at 1887, 9 Indiv. Empl. Rights Cas. (BNA) at 806; *Jeffries II*, 52 F.3d at 13, 10 Indiv. Empl. Rights Cas. (BNA) at 809.

FEDERAL ARBITRATION ACT

**Employees Not Bound by Agreements to Arbitrate Statutory Employment Claims Unless They Knowingly Contract to Forgo Their Statutory Remedies: Prudential Insurance Co. of America v. Lai*¹

In 1925, Congress enacted the Federal Arbitration Act ("FAA") both to reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements on an equal footing with other contracts.² The FAA allows federal district courts to stay proceedings when a claim can be referred to arbitration and to compel arbitration when one party has not complied with an arbitration agreement.³ The United States Supreme Court has interpreted these provisions as manifesting Congress's intent to favor arbitration agreements.⁴

Congress enacted Title VII of the Civil Rights Act of 1964 ("Title VII") to ensure equality of employment opportunities.⁵ Title VII provides for consideration of employment-discrimination claims in several forums, and in general, submission to one forum does not preclude subsequent submission to another.⁶ The Court has interpreted these provisions as manifesting Congress's intent to make the policy against discrimination of the highest priority.⁷ Consequently, courts must determine whether compelling arbitration of a particular Title VII claim is consistent with Congress's policy against employment discrimination.⁸

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¹ 42 F.3d 1299, 66 Fair Empl. Prac. Cas. (BNA) 933 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61, 68 Fair Empl. Prac. Cas. (BNA) 1536 (1995).

² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 55 Fair Empl. Prac. Cas. (BNA) 1116, 1119 (1991). 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).

³ 9 U.S.C. §§ 3-4 (1994).

⁴ *Gilmer*, 500 U.S. at 25, 55 Fair Empl. Prac. Cas. (BNA) at 1119.

⁵ *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).

⁶ *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)).

⁷ *Alexander*, 415 U.S. at 47, 7 Fair Empl. Prac. Cas. (BNA) at 85.

⁸ See, e.g., *Alexander*, 415 U.S. at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90; *Prudential*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 936.

In 1974, in *Alexander v. Gardner-Denver Co.*, the United States Supreme Court held that an arbitrator's resolution of a contractual claim did not dispose of a statutory claim under Title VII.⁹ The employee filed a claim in federal court alleging that the employer fired him because of his race in violation of Title VII.¹⁰ The district court dismissed the case because an arbitrator had previously adjudicated the discrimination claim in the employer's favor, and the United States Court of Appeals for the Tenth Circuit affirmed per curiam.¹¹ On appeal, the Supreme Court interpreted the legislative history and procedures of Title VII as indicative of Congress's intent that the act supplement, not replace, other laws and institutions relating to employment discrimination.¹² The Supreme Court rejected the reasoning of the two lower courts and determined that the doctrine of election of remedies was inapplicable to the case, stating that an employee asserts contractual rights in arbitration and statutory rights in a lawsuit.¹³ The Court also dismissed the argument that the employee waived his cause of action under Title VII, opining that because Title VII concerns individual rights it cannot be waived prospectively.¹⁴ Submission of a grievance to arbitration did not constitute a waiver, according to the Court, because such a submission is an existing contractual right and no additional concession may be exacted as the price for its enforcement.¹⁵ The Court held, accordingly, that the arbitrator's resolution of the employee's employment discrimination claim did not dispose of the employee's statutory right to pursue the claim in court.¹⁶

In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, the United States Supreme Court held that an arbitration agreement could subject claims under the Age Discrimination in Employment Act of 1967 ("ADEA") to compulsory arbitration.¹⁷ The employee filed a claim in federal court alleging that the employer fired him because of his age in violation of the ADEA.¹⁸ In response, the employer filed a motion to compel arbitration of the ADEA claim.¹⁹ The Court interpreted the

⁹ See 415 U.S. at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90.

¹⁰ *Id.* at 43, 7 Fair Empl. Prac. Cas. (BNA) at 83.

¹¹ *Id.*

¹² *Id.* at 48-49, 7 Fair Empl. Prac. Cas. (BNA) at 85-86.

¹³ *Id.* at 49-50, 7 Fair Empl. Prac. Cas. (BNA) at 86.

¹⁴ *Alexander*, 415 U.S. at 51, 7 Fair Empl. Prac. Cas. (BNA) at 86-87.

¹⁵ *Id.* at 52, 7 Fair Empl. Prac. Cas. (BNA) at 87.

¹⁶ See *id.* at 59-60, 7 Fair Empl. Prac. Cas. (BNA) at 90.

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

¹⁸ *Id.* at 23-24, 55 Fair Empl. Prac. Cas. (BNA) at 1119.

¹⁹ *Id.* at 24, 55 Fair Empl. Prac. Cas. (BNA) at 1119.

FAA as allowing compulsory arbitration of statutory claims unless Congress intended to preclude a waiver of judicial remedies for the statutory rights in question.²⁰ The Court reasoned that parties are afforded the same substantive rights by agreeing to arbitrate statutory claims as they are through a judicial remedy.²¹ The Court distinguished *Alexander* on the grounds that the employee in that case had only agreed to arbitrate contractual rights under a collective-bargaining agreement whereas the employee in *Gilmer* agreed to arbitrate statutory rights.²² The Court held, therefore, that because the employee had failed to show that Congress intended to preclude arbitration of ADEA claims, his ADEA claim was subject to compulsory arbitration in accordance with the arbitration agreement he had signed.²³

In 1992, in *Mago v. Shearson Lehman Hutton Inc.*, the United States Court of Appeals for the Ninth Circuit applied the *Gilmer* decision to Title VII claims and held that the employee failed to show that Congress intended to preclude arbitration of Title VII claims.²⁴ The employee claimed sexual harassment and gender discrimination in violation of Title VII.²⁵ The employer moved to stay the proceeding and compel arbitration under the terms of the employee's employment agreement.²⁶ Following *Gilmer*, the Ninth Circuit opined that Title VII and the ADEA had similar aims and provisions.²⁷ The court concluded therefore that Title VII claims may be subject to arbitration pursuant to a prior arbitration agreement.²⁸

During the *Survey* year, in *Prudential Insurance Co. of America v. Lai*, the United States Court of Appeals for the Ninth Circuit held that Title VII plaintiffs may be forced to waive their statutory remedies and arbitrate their claims only if they knowingly agreed to submit those disputes to arbitration.²⁹ In *Prudential*, two employees sued Prudential Insurance Co. ("Prudential") and their supervisor on various state law claims, alleging rape, harassment and sexual abuse.³⁰ Prudential filed an action in federal district court to compel arbitration based on the

²⁰ *Id.* at 26, 55 Fair Empl. Prac. Cas. (BNA) at 1120.

²¹ *Id.*

²² *Gilmer*, 500 U.S. at 35, 55 Fair Empl. Prac. Cas. (BNA) at 1123.

²³ *See id.*

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

²⁵ *Id.* at 934, 58 Fair Empl. Prac. Cas. (BNA) at 179.

²⁶ *Id.*

²⁷ *Id.* at 935, 58 Fair Empl. Prac. Cas. (BNA) at 180.

²⁸ *Id.*

²⁹ 42 F.3d 1299, 1305, 66 Fair Empl. Prac. Cas. (BNA) 933, 937 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61, 68 Fair Empl. Prac. Cas. (BNA) 1536 (1995).

³⁰ *Id.* at 1301, 66 Fair Empl. Prac. Cas. (BNA) at 934. The FAA applies identically to state

Standard Applications for Securities Industry Registration ("the U-4 forms"), which the employees had been required to sign when applying for their positions.³¹ The court determined that the evidence showed the employees could not have known that by signing the U-4 forms they were agreeing to arbitrate sexual discrimination claims.³² The court further concluded that Congress intended to encourage arbitration only where the parties have knowingly and voluntarily agreed to arbitrate certain disputes.³³ The court thus held that the appellants were not bound to arbitrate their sexual discrimination claims because they did not knowingly waive their statutory remedies.³⁴

In *Prudential*, the appellants worked for Prudential as sales representatives.³⁵ When they applied for their positions, Prudential required the employees to sign U-4 forms that contained an agreement to arbitrate any dispute required to be arbitrated by the rules, constitutions or bylaws of the organizations with which appellants subsequently registered.³⁶ The employees subsequently registered with the National Association of Securities Dealers ("NASD") which required arbitration of disputes arising in connection with its members' business.³⁷ The employees alleged that they were directed to sign the U-4 forms without being given an opportunity to read the arbitration clause contained within, arbitration was never mentioned and they were never given a copy of the NASD Manual that contained the terms of the agreement requiring arbitration that the company later sought to enforce.³⁸

The employees sued Prudential and their supervisor in state court on various state law claims, alleging rape, harassment and sexual abuse.³⁹

claims and Title VII claims because state anti-discrimination laws are part of Title VII's enforcement scheme. *Id.* at 1303 n.1, 66 Fair Empl. Prac. Cas. (BNA) at 935 n.1.

³¹ *Id.* at 1301, 66 Fair Empl. Prac. Cas. (BNA) at 933-34.

³² *Id.* at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

³³ *See id.* at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 936.

³⁴ *Prudential*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

³⁵ *Id.* at 1301, 66 Fair Empl. Prac. Cas. (BNA) at 934.

³⁶ *Id.* The U-4 forms provided in pertinent part: "I agree to arbitrate any dispute, claim or controversy that may arise between me or my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register." *Id.* at 1302, 66 Fair Empl. Prac. Cas. (BNA) at 935.

³⁷ *Id.* at 1301, 66 Fair Empl. Prac. Cas. (BNA) at 934. The NASD Manual provided in pertinent part: "Any dispute, claim or controversy eligible for submission under part I of this Code between or among members and/or associated persons . . . arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code." *Id.* at 1302, 66 Fair Empl. Prac. Cas. (BNA) at 935.

³⁸ *Id.* at 1301, 66 Fair Empl. Prac. Cas. (BNA) at 934.

³⁹ *Prudential*, 42 F.3d at 1301, 66 Fair Empl. Prac. Cas. (BNA) at 934.

Prudential filed an action in federal district court to stay the state court proceedings and compel arbitration.⁴⁰ The district court granted Prudential's motions.⁴¹

In overturning the district court's decision, the Ninth Circuit first decided that a court was the proper forum for deciding the issue of arbitrability.⁴² Unlike the district court, the Ninth Circuit found *Prima Paint Corp. v. Flood & Conklin Manufacturing*—in which the United States Supreme Court held that under the FAA an arbitrator, and not a court, must decide whether an entire contract containing an arbitration clause had been induced by fraud—inapplicable to the case.⁴³ The Ninth Circuit framed the issue before it as whether and under what circumstances individuals may waive their Title VII statutory remedies, which differed from the issue in *Prima Paint*.⁴⁴ The court concluded, therefore, that because courts routinely decide whether Congress intended to prevent or limit the arbitrability of statutory claims, the issue of arbitrability was within the court's province.⁴⁵

Next, the court probed congressional intent by examining the legislative histories of the Civil Rights Act of 1964 and the Civil Rights Act of 1991.⁴⁶ It found that prior to 1991, courts interpreted Title VII as prohibiting any waiver of its statutory remedies in favor of arbitration.⁴⁷ The Ninth Circuit also noted that in passing the Civil Rights Act

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1304, 66 Fair Empl. Prac. Cas. (BNA) at 936. In a procedural aspect of the case, the court held that it had jurisdiction over the case pursuant to the FAA. *See id.* at 1302, 66 Fair Empl. Prac. Cas. (BNA) at 935. The FAA provides in pertinent part:

An appeal may be taken from . . . a final decision with respect to an arbitration that is subject to this title. . . . Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title

9 U.S.C. § 16 (1994). Persuaded by every other court that had considered the issue, the Ninth Circuit interpreted 9 U.S.C. § 16(a)(3) as allowing appeals of decisions to compel arbitration in cases in which the motion to compel arbitration is the only claim before the district court. *Prudential*, 42 F.3d at 1302, 66 Fair Empl. Prac. Cas. (BNA) at 934.

⁴³ *See Prudential*, 42 F.3d at 1303–04, 66 Fair Empl. Prac. Cas. (BNA) at 935–36 (citing *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967)). Relying on *Prima Paint*, the district court did not decide whether the arbitration clause was enforceable, concluding that the question was for the arbitrator to decide. *Prudential*, 42 F.3d at 1303, 66 Fair Empl. Prac. Cas. (BNA) at 935.

⁴⁴ *Prudential*, 42 F.3d at 1303–04, 66 Fair Empl. Prac. Cas. (BNA) at 935–36.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1304–05, 66 Fair Empl. Prac. Cas. (BNA) at 936.

⁴⁷ *Id.* at 1304, 66 Fair Empl. Prac. Cas. (BNA) at 936.

of 1964, Congress indicated that the policy supporting anti-discrimination was of the highest priority.⁴⁸ Looking at Congress's intent regarding the Civil Rights Act of 1991, the court reasoned that the purpose of section 118, which allows for the use of arbitration to settle claims, was to increase the remedies available to civil rights plaintiffs and to allow compulsory arbitration of Title VII claims only "where appropriate," that is, only where the parties knowingly choose that method.⁴⁹ One House report explained the purpose of the section as consistent with the *Alexander* Court's interpretation of Title VII.⁵⁰ The Ninth Circuit determined that the public policy of protecting victims of sexual discrimination is at least as strong as the public policy favoring arbitration.⁵¹ The court then noted that the remedies and procedures of an arbitral forum can differ significantly from those contemplated by Congress, thus affecting a plaintiff's substantive rights.⁵² The court held, therefore, that Title VII plaintiffs may be forced to arbitrate claims only after knowingly agreeing to submit such claims to arbitration.⁵³

Applying its test to the case before it, the Ninth Circuit held that the appellants did not knowingly agree to submit sexual discrimination claims to arbitration.⁵⁴ The court stated that the U-4 forms the appellants signed did not describe any of the types of suits subject to arbitration.⁵⁵ The court further determined that the NASD arbitration clause did not put the appellants on notice that arbitration of Title VII claims would be compelled because it did not even refer to employ-

⁴⁸ *Id.*

⁴⁹ See *Prudential*, 42 F.3d at 1304, 1305, 66 Fair Empl. Prac. Cas. (BNA) at 936. Section 118 states in pertinent part: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolutions including, . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (set forth in the notes following 42 U.S.C. § 1981 (Supp. IV 1992)).

Senator Dole, speaking of § 118, said the arbitration provision encourages arbitration only "where the parties knowingly and voluntarily elect to use these methods." 137 CONG. REC. S15,472, S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

⁵⁰ *Prudential*, 42 F.3d at 1304, 66 Fair Empl. Prac. Cas. (BNA) at 936. The House Report stated: "[T]he committee believes that any agreement to submit disputed issues to arbitration . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*" H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 97 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635.

⁵¹ *Prudential*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 936.

⁵² See *id.* at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 936-37.

⁵³ *Id.* at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

⁵⁴ *Id.*

⁵⁵ *Id.*

ment disputes.⁵⁶ The court noted that the Seventh Circuit in *Farrand v. Lutheran Brotherhood* had held as a matter of law that the relevant NASD provision did not cover employment disputes.⁵⁷ The Ninth Circuit concluded that the appellants could not have understood that by signing the U-4 forms they were agreeing to arbitrate sexual discrimination claims.⁵⁸ The court, therefore, held that the appellants were not bound by the arbitration agreements they had signed because they did not knowingly agree to them.⁵⁹

In an opinion concurring in the judgment, Judge Norris agreed that the appellants were not bound by the arbitration agreement they had signed because of the language of the relevant NASD provision, but disagreed with the majority's unnecessary interpretation of Title VII's arbitration provision.⁶⁰ He agreed with the Seventh Circuit's decision in *Farrand* that the relevant NASD provision did not apply to employment disputes.⁶¹ Judge Norris argued that the inapplicability of the provision was dispositive of the issue facing the court.⁶² He argued, therefore, that the majority should not have gone on to hold that Congress intended to allow only knowing waivers of the right to adjudicate employment discrimination claims and that the employees in this case did not knowingly waive that right because there was no need to reach those issues.⁶³

Critics of the *Prudential* decision may agree with Judge Norris, that the Ninth Circuit went too far. On the other hand, the court may not have gone far enough. Because of its resolution of the case, the court found it unnecessary to decide whether the Civil Rights Act of 1991 ("CRA") overruled *Gilmer*.⁶⁴ Instead, the court used the legislative history of the CRA to determine that Congress intended to preclude unknowing waivers of the right to adjudicate employment discrimination claims.⁶⁵

Six months after the United States Supreme Court decided *Gilmer*, Congress enacted the CRA, in part to overrule several Supreme Court decisions restricting the rights of plaintiffs alleging discrimination.⁶⁶ In

⁵⁶ *Prudential*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

⁵⁷ *Id.* (citing *Farrand v. Lutheran Bhd.*, 993 F.2d 1253 (7th Cir. 1993)).

⁵⁸ *Prudential*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1305-06, 66 Fair Empl. Prac. Cas. (BNA) at 937 (Norris, J., concurring).

⁶¹ *Id.* (Norris, J., concurring).

⁶² *Id.* at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937 (Norris, J., concurring).

⁶³ *Prudential*, 42 F.3d at 1306, 66 Fair Empl. Prac. Cas. (BNA) at 937 (Norris, J., concurring).

⁶⁴ *Id.* at 1303 n.2, 66 Fair Empl. Prac. Cas. (BNA) at 935 n.2.

⁶⁵ *Id.* at 1304-05, 66 Fair Empl. Prac. Cas. (BNA) at 936.

⁶⁶ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991) (set forth in the notes following 42 U.S.C. § 1981 (Supp. IV 1992)). Section 3 provides in pertinent

enacting the CRA, Congress may have intended to preclude any waiver of the statutory remedies created by Title VII. Section 118 of the CRA dealt with arbitration of civil rights disputes.⁶⁷ A House report stated that section 118 encouraged alternative dispute resolution;⁶⁸ however, an agreement to arbitrate, in the context of a collective bargaining agreement or in an employment contract, does not preclude relief under the enforcement provisions of Title VII.⁶⁹ The Supreme Court in *Gilmer* had distinguished its prior decision in *Alexander*, in which it held that prior arbitration of a claim did not preclude the later assertion of a Title VII claim in court, on the grounds that *Alexander* dealt with a collective bargaining agreement, whereas *Gilmer* dealt with a private employment agreement.⁷⁰ The reasoning behind section 118 of the CRA, therefore, indicates that Congress intended to overturn the *Gilmer* decision.⁷¹

Although the Ninth Circuit declined to decide whether the CRA overruled *Gilmer*, the court did carve out an exception to *Gilmer*.⁷² It left unresolved the question of how courts will determine whether a waiver was knowing. The Ninth Circuit relied on both the language of the NASD provision and on the fact that the appellants were not given the opportunity to read it.⁷³ Though the court did not provide any explicit standards, it implied that arbitration clauses may need to describe all disputes the parties agreed to arbitrate.⁷⁴ Regardless of the test for a knowing waiver, employers in the Ninth Circuit will find it more difficult, after *Prudential*, to compel employees to arbitrate Title VII claims.⁷⁵

In summary, the Ninth Circuit in *Prudential* held that Title VII plaintiffs may be compelled to arbitrate their claims only if they knowingly waived their statutory remedies by agreeing to submit those disputes to arbitration.⁷⁶ This ruling represents an exception to the

part: "The purposes of this Act are . . . to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.*

⁶⁷ Set forth in the notes following 42 U.S.C. § 1981 (Supp. IV 1992); see *Prudential*, 42 F.3d at 1304, 66 Fair Empl. Prac. Cas. (BNA) at 936.

⁶⁸ H.R. REP. NO. 40(1), *supra* note 50, at 97, reprinted in 1991 U.S.C.C.A.N. at 635.

⁶⁹ *Prudential*, 42 F.3d at 1304, 66 Fair Empl. Prac. Cas. (BNA) at 936.

⁷⁰ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35, 55 Fair Empl. Prac. Cas. (BNA) 1116, 1123 (1991).

⁷¹ See *Prudential*, 42 F.3d at 1304, 66 Fair Empl. Prac. Cas. (BNA) at 936.

⁷² See *id.* at 1303 n.2, 1305, 66 Fair Empl. Prac. Cas. (BNA) at 935 n.2, 937.

⁷³ See *id.* at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *Prudential*, 42 F.3d at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.

holding in *Gilmer* that employment discrimination claims can be subjected to compulsory arbitration.⁷⁷ The decision may prevent many employers from enforcing arbitration clauses against employees claiming employment discrimination.⁷⁸ Nevertheless, employers are not completely foreclosed from compelling arbitration of Title VII claims.⁷⁹ They may compel arbitration where they can prove that the employee made a knowing waiver of statutory remedies.⁸⁰

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.* at 1303, 66 Fair Empl. Prac. Cas. (BNA) at 935.

⁸⁰ See *id.* at 1305, 66 Fair Empl. Prac. Cas. (BNA) at 937.