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LABOR RELATIONS LAW

I. PROCEDURAL DEVELOPMENTS

A. * *Borrowing a Statute of Limitation for Section 101(a)(2) Claims:* Reed v. United Transportation Union[1]

When Congress fails to provide a statute of limitation for a federal cause of action, a well-established general rule requires courts to "borrow" the most closely analogous statute of limitation under applicable state law.[2] Because state statutes and timeliness rules are drafted with state rather than federal interests in mind, however, application of the analogous state rule may on occasion frustrate rather than promote the national policies furthered by the federal substantive law.[3] In these instances when the state-law limitation is an unsatisfactory vehicle for enforcing the underlying federal right, a narrow exception to the general rule requires courts to reject the state-law analog and instead borrow a time limitation from elsewhere in federal law.[4] Under this exception, courts adopt a federal limitation rule when the federal rule clearly provides a closer analogy than state-law alternatives and when the federal policies and practicalities of litigation render the federal rule a significantly more appropriate means to enforce the federal substantive right.[5]

In the 1983 case of *DelCostello v. International Brotherhood of Teamsters*, the United States Supreme Court held that an employee's suit against both his employer and his union fell within the narrow exception demanding adoption of a federal limitation rule.[6] The

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* By Carolyn E. Bassani, Editor, BOSTON COLLEGE LAW REVIEW.

1 488 U.S. 319, 130 L.R.R.M. 2137 (1989).

2 *See id.* at 323, 130 L.R.R.M. at 2138; DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158–59, 113 L.R.R.M. 2737, 2739–40 (1983); Runyon v. McCrary, 427 U.S. 160, 180 (1976); Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704, 61 L.R.R.M. 2545, 2548 (1966).

3 *DelCostello*, 462 U.S. at 161, 113 L.R.R.M. at 2740.

4 *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 156 (1987) (adopting federal statute of limitation for civil RICO claims); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 368, 14 F.E.P. Cases 1718, 1724 (1977) (applying federal limitation period to EEOC enforcement actions brought under Title VII of the 1964 Civil Rights Act); McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 224 (1958) (applying federal limitation period to unseaworthiness action under general admiralty law); Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (refusing to apply a state statute of limitation to enforce federally-created equitable rights).

5 *DelCostello*, 462 U.S. at 172, 113 L.R.R.M. at 2744.

6 462 U.S. 151, 113 L.R.R.M. 2737 (1983).

suit at issue in *DelCostello* was a "hybrid" suit formally comprised of two separate yet interrelated causes of action.[7] The first cause of action, brought pursuant to section 301 of the Labor Management Relations Act ("LMRA"), alleged that the employer had discharged DelCostello in violation of the company's collective bargaining agreement.[8] The second cause of action, brought pursuant to the doctrine of fair representation implicit in the scheme of the National Labor Relations Act ("NLRA"), alleged that the union breached its duty of fair representation by mishandling DelCostello's ensuing grievance-and-arbitration proceeding.[9] Neither component of the hybrid suit contained an expressly applicable statute of limitation.[10] In accordance with the general borrowing rule, the Court was, therefore, forced to borrow a limitation rule from the statute most closely analogous to the hybrid claim.

The *DelCostello* Court considered the applicability of analogous state-law limitation periods but rejected each as incompatible with the substantive policies and practical application of the hybrid section 301/fair representation claim.[11] Instead, the Court recognized a stronger "family resemblance" between the breaches of duty alleged in the hybrid suit and federal claims of unfair labor practice governed by section 10(b) of the NLRA.[12] The Court contended that because a breach of duty and an unfair labor practice are substantively related, section 10(b) necessarily provided a closer analogy to the hybrid claim than did any of the state-law alternatives.[13] Additionally, the Court explained that unlike the possible

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[7] *Id.* at 164–65, 113 L.R.R.M. at 2741–42.

[8] *Id.* at 164, 113 L.R.R.M. at 2741. *See* Labor Management Relations Act § 301, 29 U.S.C. § 185 (1988).

[9] *Id.*

[10] *Id.* at 158, 113 L.R.R.M. at 2739.

[11] *Id.* at 165–69, 113 L.R.R.M. at 2742–43. The Court considered the applicability of the state's 30-day limitation period for vacating arbitration awards but found the period too short to ensure the aggrieved employee an adequate opportunity to vindicate his or her rights under the hybrid claim. *Id.* at 166, 113 L.R.R.M. at 2742. The Court then addressed the possibility of adopting the state limitation period for legal malpractice, analogizing the case to a lawyer's mishandling of a commercial arbitration award. *Id.* at 167–69, 113 L.R.R.M. at 2743. Although the Court agreed with Justice Stevens, who proposed this analogy in his dissenting opinion, that legal malpractice provided the closest state-law analog, the Court declined to borrow the much longer malpractice limitation because it would preclude the rapid resolution of labor disputes encouraged by federal law. *Id.*

[12] *Id.* at 169–70, 113 L.R.R.M. at 2743–44. Section 10(b) states in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the [National Labor Relations] Board . . . ." National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1988).

[13] *DelCostello*, 462 U.S. at 169, 113 L.R.R.M. at 2743–44.

state-law analogs, section 10(b)'s six-month time limit reflected the proper procedural balance between the competing federal interest in promoting stable bargaining relationships and the prompt resolution of labor disputes on the one hand, and the employee's interest in vindicating his or her rights and avoiding unjust results under the collective-bargaining system on the other.[14] For these reasons, the *DelCostello* Court concluded that section 10(b) of the NLRA was the most appropriate borrowed limitation rule for the hybrid section 301/fair representation claim.[15]

In announcing its decision, the Court took pains to narrow the scope of its holding and create only a closely circumscribed exception to the general state-law borrowing rule. The Court warned that the *DelCostello* decision was "not mean[t] to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy."[16] Rather, the Court stressed that courts should limit their look to federal law for a borrowed limitation rule to instances when a federal law clearly provides a closer analogy than available state-law rules and when the substantive federal policies and practicalities of litigation render the federal rule a significantly more appropriate means to enforce the federal right.[17] The Court emphasized that if these two conditions were not satisfied, the state-law analog must traditionally prevail.[18] Thus, the Court insisted that although the relevant factors in *DelCostello* dictated adoption of a federal statute of limitation, resort in the first instance to potential state-law analogs remained the norm.

Despite the Court's admonition that its holding did not displace the general state-law borrowing rule, the *DelCostello* decision precipitated a split among the federal circuits as to whether section 10(b)'s six-month provision, though borrowed from federal law, should similarly be applied to other labor law contexts. One area in which this split occurred involved union members' claims arising under Title I, section 101(a)(2), of the Labor-Management Reporting and Disclosure Act ("LMRDA").[19] Section 101(a)(2) prohibits a union

[14] *Id.* at 171, 113 L.R.R.M. at 2744 (citing United Parcel Serv. v. Mitchell, 451 U.S. 56, 70–71 (1981) (Stewart, J., concurring)).

[15] *Id.* at 169, 113 L.R.R.M. at 2743–44.

[16] *Id.* at 171, 113 L.R.R.M. at 2744.

[17] *Id.* at 172, 113 L.R.R.M. at 2744.

[18] *See id.* at 171–72, 113 L.R.R.M. at 2744.

[19] *See* Labor-Management Reporting and Disclosure Act § 101(a)(2), 29 U.S.C. § 411(a)(2) (1988). *Compare* Davis v. UAW, 765 F.2d 1510, 1514–15, 119 L.R.R.M. 3572, 3575 (11th Cir. 1985) (applying federal § 10(b) statute of limitation), *cert. denied*, 475 U.S. 1057, 121 L.R.R.M. 2791 *and* Local Union 1397 v. United Steelworkers of Am., 748 F.2d 180, 183, 117 L.R.R.M.

from interfering with its members' rights of freedom of speech and assembly concerning union matters and safeguards members from improper disciplinary censure for exercising those rights.[20] Because Congress did not expressly enact a statute of limitation for section 101(a)(2) actions, courts must borrow the most suitable timeliness rule from some other source.[21]

A majority of circuit courts that considered this issue held that like the hybrid claim in *DelCostello*, section 101(a)(2) claims were similarly governed by the six-month limitation period prescribed by section 10(b) of the NLRA.[22] Applying *DelCostello*'s "family resemblance" analysis, these courts analogized the union's inhibition of its members' rights of free speech and assembly to an unfair labor practice.[23] These courts observed that because of this family resemblance, the provisions of section 101(a)(2) of the LMRDA and those of section 10(b) of the NLRA addressed the similar policy concern of protecting individual workers from arbitrary union action. Accordingly, these courts concluded that this identity of underlying interests necessarily rendered section 10(b) of the NLRA the most analogous statute and compelled the court to borrow its six-month time limitation.[24]

3115, 3117 (3d Cir. 1984) (applying federal § 10(b) statute of limitation) *and* Vallone v. Local Union 705, Int'l Bhd. of Teamsters, 755 F.2d 520, 522, 118 L.R.R.M. 2546, 2547 (7th Cir. 1984) (applying federal § 10(b) statute of limitation) *with* Rodonich v. House Wreckers Union Local 95, 817 F.2d 967, 977, 125 L.R.R.M. 2578, 2586 (2d Cir. 1987) (applying state personal injury statute of limitation) *and* Doty v. Sewall, 784 F.2d 1, 11, 121 L.R.R.M. 2649, 2657 (1st Cir. 1986) (applying state civil rights act statute of limitation).

[20] Section 101(a)(2) of the LMRDA provides:

> *Freedom of speech and assembly* Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Labor-Management Reporting and Disclosure Act § 101(a)(2), 29 U.S.C. § 411(a)(2) (1988).

[21] Reed v. United Transp. Union, 488 U.S. 319, 321, 130 L.R.R.M. 2137, 2138 (1989).

[22] *See Davis*, 765 F.2d at 1514–15, 119 L.R.R.M. at 3575 (11th Circuit); *Local Union 1397*, 748 F.2d at 183, 119 L.R.R.M. at 3117 (3d Circuit); *Vallone*, 755 F.2d at 522, 118 L.R.R.M. at 2547 (7th Circuit).

[23] *See Davis*, 765 F.2d at 1514, 119 L.R.R.M. at 3575; *Local Union 1397*, 748 F.2d at 183, 117 L.R.R.M. at 3117; *Vallone*, 755 F.2d at 521–22, 118 L.R.R.M. at 2547.

[24] *See Davis*, 765 F.2d at 1514, 119 L.R.R.M. at 3575; *Local Union 1397*, 748 F.2d at 183, 117 L.R.R.M. at 3118; *Vallone*, 755 F.2d at 521–22, 118 L.R.R.M. at 2547.

Conversely, a minority of circuits refused to extend *DelCostello* beyond the hybrid section 301/fair representation claim.[25] Applying the underlying policy analysis of *DelCostello*, these courts reasoned that denial of free speech was more closely analogous to a civil rights or state law personal injury claim. As a result, these courts endorsed the use of statutes of limitation drawn from state law civil rights or personal injury statutes to govern the union member's section 101(a)(2) claim.[26]

During the *Survey* year, the United States Supreme Court in *Reed v. United Transportation Union* resolved the circuit courts' conflicting interpretation of *DelCostello*'s mandate and determined the appropriate source for a borrowed limitation period in a section 101(a)(2) claim.[27] In *Reed*, the Court held that claims arising under section 101(a)(2) of the LMRDA are governed by state-law general or residual personal injury statutes of limitation.[28] In so doing, the Court reaffirmed *DelCostello*'s admonition that when the operative federal statute is silent with respect to a statute of limitation, departure from the closest state-law analog is the exception rather than the rule.[29]

In August 1982, the plaintiff Reed, a member of the United Transportation Union (the "union") and Secretary/Treasurer of the union's Local 1715 (the "local"), petitioned the union to reinstate reimbursements that the local had paid to him but which the union had subsequently disallowed.[30] Reed alleged in his petition that the union's selective application of a "prior approval" policy to deny his

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[25] *See* Rodonich v. House Wreckers Union Local 95, 817 F.2d 967, 977, 125 L.R.R.M. 2578, 2586 (2d Cir. 1987); Doty v. Sewall, 784 F.2d 1, 9, 121 L.R.R.M. 2649, 2655 (1st Cir. 1986).

[26] *See Rodonich*, 817 F.2d at 977, 125 L.R.R.M. at 2586 (2d Cir.; applying state personal injury statute of limitation); *Doty*, 784 F.2d at 11, 121 L.R.R.M. at 2657 (1st Cir.; applying state civil rights act statute of limitation).

[27] 488 U.S. 319, 130 L.R.R.M. 2137 (1989).

[28] *Id.* at 334, 130 L.R.R.M. at 2143.

[29] *Id.* at 324–25, 130 L.R.R.M. at 2139.

[30] *Id.* at 321–22, 130 L.R.R.M. at 2138. The dispute concerning Reed's reimbursements first arose when an audit of Local 1715's books and records revealed that Reed had received $1,200 worth of reimbursement payments from the local for "time lost" carrying out his union duties. Reed v. United Transp. Union, 828 F.2d 1066, 1067, 126 L.R.R.M. 2478, 2479 (4th Cir. 1987). The auditor disallowed these payments because Reed had failed to obtain approval for the reimbursements prior to performing the tasks for which the "time lost" was incurred. The union president upheld the auditor's denial of Reed's reimbursements. The union president explained that notwithstanding the prior approval requirement, Reed was not entitled to reimbursement for "time lost" because his salary as an officer of the local was intended to cover his full performance of the ordinary duties and responsibilities of his office. *Reed*, 488 U.S. at 322, 130 L.R.R.M. at 2138.

reimbursements was intended to punish him for criticizing the local's officers, thereby violating his right to freely express his views on union matters explicitly protected by section 101(a)(2) of the LMRDA.[31] When the union refused to reinstate Reed's reimbursements, Reed filed suit in the United States District Court for the Western District of North Carolina against the union and three of its officers. Reed filed the complaint exactly two years after his attorney's last letter to the union president reasserting Reed's entitlement to the denied reimbursements.[32] The complaint raised claims under section 101(a)(2) of the LMRDA, as well as pendent state implied contract and quantum meruit claims.[33]

The union moved for summary judgment on statute of limitation grounds, arguing that in accordance with the Supreme Court's reasoning in *DelCostello*, Reed's section 101(a)(2) claims were barred by the six-month limitation period prescribed by section 10(b) of the NLRA.[34] The district court denied summary judgment, holding that Reed's section 101(a)(2) claims were not barred because they were governed by North Carolina's three-year limitation period for personal injury actions.[35] The United States Court of Appeals for the Fourth Circuit reversed, holding that section 10(b)'s six-month provision was the appropriate borrowed statute of limitation

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[31] *Reed*, 488 U.S. at 322, 130 L.R.R.M. at 2138. Reed maintained that no such prior approval policy had existed or been enforced prior to being applied to him. Reed v. United Transp. Union, 633 F. Supp. 1516, 1518 (W.D.N.C. 1986). As evidence of the union's selective application of the prior approval policy, Reed contended that when he subsequently sought to enforce the prior approval policy by denying the unapproved reimbursement claims of the local president and another local officer, the union president overruled the denials and ordered Reed to pay the reimbursement claims. *Reed*, 488 U.S. at 322, 130 L.R.R.M. at 2138.

[32] *Reed*, 633 F. Supp. at 1518.

[33] *Id.* In addition, Reed further alleged that the individual defendants had violated their fiduciary duties as officers of the union pursuant to Title V of the LMRDA, 29 U.S.C. § 501 (1988). *Id.* at 1519.

[34] *Reed*, 488 U.S. at 322, 130 L.R.R.M. at 2138.

[35] *Reed*, 633 F. Supp. at 1525. The court noted that the hybrid § 301/fair representation claim at issue in *DelCostello* was fundamentally precipitated by a break-down in the labor-management relationship. In contrast, the court noted that Reed's § 101(a)(2) claim arose solely out of his relationship with the union and had only a tangential impact, if any, on the union's relationship with the employer. As a result, the court reasoned that the hybrid claim and the § 101(a)(2) claim implicated different policy considerations: the purpose of the hybrid claim was to preserve the labor-management relationship; the purpose of § 101(a)(2) was to preserve the individual's personal interest in internal union democracy. In this respect, the court reasoned, a § 101(a)(2) claim more closely resembled a civil rights action than an unfair labor practice, thereby rendering the statute of limitation applicable to civil rights actions the most appropriate timeliness rule for an action arising under § 101(a)(2). *Id.*

and thus foreclosed Reed from bringing suit under section 101(a)(2) two years after the alleged injury occurred.[36]

The United States Supreme Court reversed, holding that claims arising under section 101(a)(2) of the LMRDA are properly governed by the state's general or residual personal injury statute of limitation, and, therefore, Reed was not barred from prosecuting the section 101(a)(2) claims.[37] In an opinion by Justice Brennan, the Court observed that when Title I of the LMRDA was enacted, it was introduced under the heading of "Bill of Rights of Members of Labor Organizations."[38] The Court reasoned that such a denomination indicated that Congress intended Title I's provisions to serve in the labor context as the union member's statutory counterpart to the Bill of Rights of the United States Constitution.[39] The Court noted that the freedom of speech and assembly provisions embodied in section 101(a)(2) of Title I reiterated a fundamental first amendment value—the right to freely express one's opinions without fear of reprisal.[40] Given this coincidental interest between section 101(a)(2) and constitutionally-protected free speech, the Court concluded that section 101(a)(2) was readily analogized to a state personal injury action.[41]

The Court bolstered this analogy by recognizing the "evident similarities" between the protections afforded by section 101(a)(2) and those guaranteed by 42 U.S.C. § 1983.[42] Section 1983 prohibits

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[36] Reed v. United Transp. Union, 828 F.2d. 1066, 1070–71, 126 L.R.R.M. 2478, 2482 (4th Cir. 1987). Although the court of appeals agreed with the district court that Reed's claims were similar to a civil rights action, it maintained that it was impossible to divorce the § 101(a)(2) claim from the labor-management context within which it arose. *Id.* at 1070, 126 L.R.R.M. at 2482. The court reasoned that if left unresolved, internal union disputes might create dissention among the union's members and diminish their confidence in the ability of the union leaders to manage the union's affairs. The court maintained that such disaffection would weaken the union and erode its ability to adequately bargain on behalf of its members. More importantly, the court stated, this instability would distract the union leaders from performing their sole purpose, that of representing the union members in their relations with their employer. The court, therefore, concluded that a lengthy limitation period would frustrate federal policy favoring rapid resolution of labor-related disputes and necessitated application of the shorter, § 10(b) statute of limitation. *Id.*

[37] Reed v. United Transp. Union, 488 U.S. 319, 323, 130 L.R.R.M. 2137, 2138 (1989).

[38] *Id.* at 325, 130 L.R.R.M. at 2139.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 326, 130 L.R.R.M. at 2140. The Court gave no explanation for its analogy between § 101(a)(2) and personal injury actions, summarily stating, "[w]e find it unnecessary to detail here the elements of this analogy." *Id.*

[42] *Id.* at 327, 130 L.R.R.M. at 2140.

a person acting under color of state law from impinging upon a citizen's constitutional rights such as those secured by the first amendment.[43] The Court has traditionally held that the timeliness of actions brought under section 1983, which lacks an expressly-articulated statute of limitation, is governed by the state's residual personal injury statute.[44] Consequently, the Court concluded that the state's personal injury statute must be similarly borrowed as the most analogous statute of limitation to govern a union member's claims arising under section 101(a)(2).[45]

The *Reed* Court reasoned that the underlying federal policies involved in a section 101(a)(2) claim further compelled the adoption of the most analogous state-law statute of limitation rather than the six-month provision prescribed by section 10(b) of the NLRA.[46] The Court explained that in enacting Title I of the LMRDA, Congress implied that in the union context, the unfettered freedom to speak one's mind and criticize the union's policies or leadership is a fundamental requisite of union democracy.[47] In this manner, the Court

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[43] Section 1983 provides in pertinent part:

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

42 U.S.C. § 1983 (1988).

[44] *Reed*, 488 U.S. at 326, 130 L.R.R.M. at 2140. In the 1985 case of *Wilson v. Garcia*, the Supreme Court held that § 1983 claims are most analogous to, and thereby controlled by, the statute of limitation for state-law personal injury claims. 471 U.S. 261, 280 (1985). In *Wilson*, the Court considered the most appropriate limitation rule to apply to a plaintiff's claim that he was injured when a state police officer used excessive force in unlawfully arresting him. *Id.* at 263. The Court noted that cases arising under § 1983 present a potentially broad and diverse spectrum of constitutional claims sounding in tort. *Id.* at 273. The Court noted that this strong tort emphasis was consistent with the legislative history surrounding the enactment of the Civil Rights Act of 1871, codified in § 1983. *Id.* at 276–77. The Court observed that Congress enacted the Act to protect Southern blacks from the personal atrocities and discrimination visited on them following the Civil War. As a result, the Court concluded that personal injury tort statutes furnished the closest analogy to § 1983, which similarly was intended to protect the personal civil and political rights of the individual. *Id.* at 277.

The Supreme Court reiterated this analogy between § 1983 and personal injury claims during the *Survey* year in *Owens v. Okure*, 488 U.S. 235, 236 (1989). In *Owens*, a unanimous Court held that when a state maintains one or more statutes of limitation for certain enumerated intentional torts and a residual statute for all other personal injury actions, the residual statute of limitation is the most appropriate borrowed limitation rule to govern claims brought under § 1983. *Id.*

[45] *Reed*, 488 U.S. at 334, 130 L.R.R.M. at 2143.

[46] *Id.* at 330, 130 L.R.R.M. at 2141.

[47] *Id.* at 325, 130 L.R.R.M. at 2139.

noted, the rights protected by section 101(a)(2) of the LMRDA vindicate not only the individual union member's personal right to speak freely but also serve the public interest in preserving and promoting union democracy and the union's responsiveness to the needs of its members.[48] The Court observed that this core purpose of section 101(a)(2)—enhancing union democracy by enforcing the union member's rights of free speech and assembly—was not an integral consideration when Congress drafted the NLRA's six-month limitation on filing charges of unfair labor practice.[49] The Court maintained that Congress in fact enacted Title I of the LMRDA to remedy what it perceived as the NLRA's failure to adequately protect the free speech and assembly rights central to a union's democratic operation.[50] The Court concluded that given these incompatible underlying policies, section 10(b) of the NLRA was not a significantly more appropriate vehicle to enforce the federal policies in a section 101(a)(2) claim and thus did not compel the Court to depart from the more analogous state-law limitation rule.[51]

The *Reed* Court further asserted that unlike section 10(b)'s six-month provision, the longer limitation periods furnished by state personal injury statutes were better attuned to the balance of competing interests and practical considerations implicated in a section 101(a)(2) action.[52] The Court conceded that section 10(b)'s six-month statute of limitation would facilitate the rapid resolution of internal union disputes. The Court maintained, however, that confining the filing of complaints to such a short prescriptive period ignored the practical difficulties faced by a section 101(a)(2) plaintiff in identifying his or her injury, securing an attorney, and deciding whether or not to litigate and risk antagonizing the union's leaders.[53] Additionally, the Court contended that although the federal interest in stable collective bargaining relationships and private dispute resolution furthered by section 10(b) may be implicated in a section 101(a)(2) action, these interests are not an integral part of the section 101(a)(2) balance.[54] The Court, therefore, concluded that section 10(b)'s six-month time bar failed to adequately balance the

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[48] *Id.* at 325–26, 130 L.R.R.M. at 2139.

[49] *Id.* at 332, 130 L.R.R.M. at 2142.

[50] *Id.*

[51] *Id.* at 333, 130 L.R.R.M. at 2142.

[52] *Id.* at 327, 130 L.R.R.M. at 2140.

[53] *Id.*

[54] *Id.* at 330, 130 L.R.R.M. at 2141.

private and public interests involved in a section 101(a)(2) action, serving federal policies that were merely tangential to the more fundamental rights sought to be promoted by section 101(a)(2).[55]

In the sole dissenting opinion, Justice White agreed that section 101(a)(2) of the LMRDA implicated first amendment concerns but disagreed that these underlying policy considerations were the primary thrust of the federal statute.[56] Instead, Justice White contended that Congress' primary purpose in enacting section 101(a)(2) was to protect the integrity of the collective bargaining process by ensuring that a union effectively and responsively represents its members.[57] He argued that these interests are identical to those protected by section 10(b) of the NLRA and its insistence on encouraging the prompt airing and resolution of labor-related grievances.[58] As a result, Justice White concluded that section 10(b) of the NLRA, and not section 1983, furnished the better analog and thus rendered section 10(b)'s six-month statute of limitation the most appropriate borrowed limitation rule for a section 101(a)(2) claim.[59]

The implications of the *Reed* Court's holding that state personal injury statutes furnish the appropriate borrowed limitation rule for a union member's claim that the union violated his or her section 101(a)(2) rights of free speech and assembly are three-fold. First, the decision reveals the Supreme Court's interpretation of the core federal policy underlying Title I of the LMRDA, in which section 101(a)(2) is incorporated. In *Reed*, eight of the nine Supreme Court justices agreed that the fundamental purpose of Title I is to enhance union democracy by guaranteeing the union member's rights of free speech and assembly concerning union matters. Under this interpretation, implementation of the federal labor policy depends upon the enforcement of the individual union member's personal rights. The importance of these individual rights in the labor context compelled the Court to adopt a statute of limitation sufficient in length to accommodate the practical difficulties faced by a section 101(a)(2) plaintiff in a suit against his or her union. The Court

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[55] *See id.* Justice Scalia filed a brief concurring opinion. In his opinion, Justice Scalia reiterated the general rule that where a federal statute lacks an expressly-articulated limitation period, courts must borrow the most analogous state-law statute of limitation. *Id.* at 334, 130 L.R.R.M. at 2143 (Scalia, J., concurring).

[56] *Id.* at 335, 130 L.R.R.M. at 2143 (White, J., dissenting).

[57] *Id.*

[58] *Id.*

[59] *Id.*

maintained that because state personal injury statutes of limitation are invariably longer than section 10(b) of the NLRA's six-month provision, they afford a plaintiff greater opportunity to vindicate his or her personal rights and render the state time bar better attuned to the substantive policies and practicalities of a section 101(a)(2) action. The *Reed* Court's adoption of the longer limitation period to protect the plaintiff in a section 101(a)(2) claim suggests that the Court may adopt a similar pro-plaintiff orientation in determining the applicable statute of limitation in subsequent Title I claims.

Second, the *Reed* Court's holding reaffirms the general rule that when a federal cause of action lacks an express statute of limitation, resort in the first instance must be to the most analogous state-law timeliness rule.[60] In so doing, the Court in *Reed* reiterated its earlier admonition in *DelCostello* that departure from the state-law analog is exceptional and limited to instances when a much closer federal analog exists and when the federal policies at stake and the practicalities of litigation render the federal rule a significantly more appropriate vehicle to enforce the federal substantive right.[61] Following *Reed*, courts are more likely to show greater deference to state-law statutes of limitation and be more reluctant to deviate from the general state-law borrowing rule.[62] As a result, courts are likely to recognize that an exception to the general rule—thereby requiring application of a federal statute of limitation—is triggered only when the case falls within the narrowly-prescribed parameters set forth in *DelCostello*. Consequently, departure from

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[60] *See id.* at 334, 130 L.R.R.M. at 2143.

[61] *See* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 172, 113 L.R.R.M. 2737, 2744 (1983).

[62] *See, e.g.*, Posadas de Puerto Rico Assocs. v. Asociacion de Empleados de Casino de Puerto Rico, 873 F.2d 479, 483, 131 L.R.R.M. 2223, 2226 (1st Cir. 1989) (applying Puerto Rico's judicially created 30-day limitation for vacating labor arbitration awards to claims arising under LMRA § 301); Clift v. UAW, 881 F.2d 408, 411, 132 L.R.R.M. 2123, 2126 (7th Cir. 1989) (applying state's limitation period for personal injury actions to employee's equal protection claim arising under LMRA § 301 and LMRDA § 101(a)(2)), *reversing on remand* 818 F.2d 623, 125 L.R.R.M. 2384 (7th Cir. 1987); Hester v. International Union of Operating Eng'rs, 878 F.2d 1309, 1310, 132 L.R.R.M. 2011, 2011 (11th Cir. 1989) (applying state's one-year residual personal injury statute of limitation to union member's breach of duty of fair representation claim against union arising under LMRDA § 411(a)(5) which safeguards employees from improper disciplinary actions). *But see* Guidry v. International Union of Operating Eng'rs Local 406, 882 F.2d 929, 942, 132 L.R.R.M. 2563, 2573 (5th Cir. 1989) (applying state's one-year personal injury statute of limitation to union member's claims arising under LMRDA's § 101(a)(2) but applying NLRA § 10(b)'s six-month limitation period to LMRA § 301 claim).

the state-law analog in favor of a federal statute of limitation will be increasingly more exceptional in light of the *Reed* decision.

Finally, the Court's mandate of the presumptive primacy of the state-law analog reaffirms a protocol for statutory construction to guide courts in selecting the most appropriate borrowed limitation rule. In both *Reed* and *DelCostello*, the Supreme Court relied upon the same selection criteria to isolate the source of the most analogous timeliness rule. In each case, the Court first determined the nature of the action by examining the federal policies at issue in the substantive allegations. After analyzing the potential applicability of surrogate state-law limitation rules, the Court selected the most closely analogous state-law statute of limitation. The Court then examined the extent to which the state-law rule accommodated the underlying policies of federal labor law and the realities of the adversary process. In analyzing potential analogs, the Court's primary directive was to distinguish the statute of limitation that best promoted union harmony and the integrity of the labor-management relationship. Only when the Court found, as it did in *DelCostello*, that application of the state limitation rule would unduly frustrate this federal policy did its focus shift from state-law to federal-law timeliness rules. These controlling principles will guide courts similarly confronted with selecting the most closely analogous statute of limitation for a federal cause of action that is silent with respect to a timeliness rule. In the majority of cases, in accordance with the *Reed* and *DelCostello* directives, the state-law analog will ultimately prevail.

II. Representational and Organizational Activity

A. * *The Duty of Fair Representation and Union Abuse of the Hiring Hall System:* Breininger v. Sheet Metal Workers International Association Local Union No. 6[1]

The United States Supreme Court has established that a labor union has an implied duty of fair representation to its members, due to its role as their exclusive bargaining agent.[2] The Supreme Court has defined a union's duty of fair representation as a duty to treat members without hostility or discrimination, to exercise its

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[1] 110 S. Ct. 424, 132 L.R.R.M. 3001 (1989).

[2] Vaca v. Sipes, 386 U.S. 171, 177, 64 L.R.R.M. 2369, 2371 (1967); *see also* Steele v. Louisville & N.R.R., 323 U.S. 192, 198–99, 15 L.R.R.M. 708, 710–11 (1944).

discretion honestly and in good faith, and to avoid arbitrary conduct.[3] In addition to this common law duty of fair representation, a breach of this duty is also an unfair labor practice under sections 7 and 8(b) of the National Labor Relations Act ("NLRA").[4]

A conflict has existed concerning who has jurisdiction over activity that is both a common-law breach and an unfair labor practice. The United States Supreme Court held in the 1959 case of *San Diego Building Trades Council v. Garmon* that neither state nor federal courts have jurisdiction over activity that is arguably subject to sections 7 or 8 of the NLRA.[5] The Court reasoned that Congress created the NLRA to centralize the administration of labor procedures in order to obtain uniform application of national labor policies.[6]

The Court, however, subsequently held in the 1967 case of *Vaca v. Sipes* that Congress, in enacting the NLRA in 1947, had not intended to oust the federal courts from enforcing the duty of fair representation.[7] The *Vaca* Court held that courts have jurisdiction over suits to enforce collective bargaining agreements even when the employer's alleged breach of contract is also arguably an unfair labor practice within the National Labor Relations Board's ("NLRB") jurisdiction.[8] The *Vaca* Court reasoned that courts continue to recognize the common-law duty of fair representation that had developed prior to Congress' granting unfair labor practice jurisdiction to the NLRB in 1947.[9] The *Vaca* Court concluded, therefore, that courts share jurisdiction with the NLRB over duty of fair representation violations.[10]

In addition to giving rise to both a common-law claim and an unfair labor practice charge pursuant to the NLRA, a breach of the duty of fair representation may also violate provisions of the Labor-Management Reporting and Disclosure Act ("LMRDA").[11] Congress

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[3] *Vaca*, 386 U.S. at 177, 64 L.R.R.M. at 2371.

[4] NLRB v. Miranda Fuel Co., 140 N.L.R.B. 181, 185, 51 L.R.R.M. 1584, 1587 (1962), *enforcement denied*, 326 F.2d 172, 180, 54 L.R.R.M. 2715, 2721 (2d Cir. 1963); *see* National Labor Relations Act, §§ 7, 8(b), 29 U.S.C. §§ 157, 158(b) (1982).

[5] 359 U.S. 236, 245, 43 L.R.R.M. 2838, 2842 (1959).

[6] *Id.* at 242–43, 43 L.R.R.M. at 2841.

[7] 386 U.S. at 183, 64 L.R.R.M. at 2374. In *Vaca*, a discharged union member brought a class action against local union officers and representatives for failing to arbitrate adequately his grievance with his employer in violation of the collective bargaining agreement.

[8] *Id.* at 183–84, 64 L.R.R.M. at 2374.

[9] *Id.* at 181, 64 L.R.R.M. at 2373.

[10] *Id.* at 186–87, 64 L.R.R.M. at 2375.

[11] LMRDA § 101(a)(2), (5), 29 U.S.C. § 411(a)(2), (5) (1982).

enacted the LMRDA to preserve democratic standards within unions so that members may maintain control over the purposes and policies of their organization.[12] Congress designed both the substantive and procedural aspects of the LMRDA to attain that goal.[13] Sections 101(a)(5) and 609 of the LMRDA make it unlawful for a union to "fine, suspend, expel, or otherwise discipline," any of its members for exercising rights secured under the LMRDA.[14]

Courts have defined inconsistently the term "discipline" in LMRDA provisions 101(a)(5) and 609.[15] Some courts have concluded that discipline includes only those actions that affect a union member's membership status.[16] The majority of courts, however, do not view discipline as necessarily limited to restrictions on membership rights.[17] These courts maintain that a union's breach of the duty of fair representation can constitute discipline.[18]

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[12] *See* Fick, *Political Abuse of Hiring Halls: Comparative Treatment under the NLRA and the LMRDA*, 9 INDUS. REL. L.J. 339, 360 (1987).

[13] *Id.* Section 101(a)(2) of the LMRDA, for example, grants union members the right to express their views, arguments, or opinions, both at their leisure and during union meetings. LMRDA, § 101(a)(2), 29 U.S.C. § 411(a)(2).

[14] Section 101(a)(5) provides:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

LMRDA, § 101(a)(5), 29 U.S.C. § 411(a)(5). Section 609 provides in pertinent part:

> It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter . . . .

LMRDA, § 609, 29 U.S.C. § 529.

[15] *See* Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727, 731 (1969). Courts have experienced some difficulty in determining which union member interests a union must injure for an action to come within the "otherwise disciplined" language of §§ 101 and 609. *Id.*

[16] *Id.*; *see, e.g.*, Finnegan v. Leu, 456 U.S. 431, 438, 110 L.R.R.M. 2321, 2323 (1982) (holding that discipline refers only to retaliatory actions affecting a union member's rights or status *as a member* of the union); Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 849 F.2d 997, 999, 128 L.R.R.M. 2845, 2846 (6th Cir. 1988) (term "discipline" meant to refer only to punitive actions diminishing membership rights).

[17] *See* Etelson & Smith, *supra* note 15, at 731.

[18] *See* Guidry v. International Union of Operating Eng'rs, Local 406, 882 F.2d 929, 940–41, 132 L.R.R.M. 2563, 2569–72 (1989); Murphy v. International Union of Operating Eng'rs, Local 18, 774 F.2d 114, 123, 120 L.R.R.M. 2837, 2844 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017, 121 L.R.R.M. 2736 (1986); Keene v. International Union of Operating Eng'rs, Local 624, 569 F.2d 1375, 1381, 97 L.R.R.M. 3215, 3219 (5th Cir. 1978); Moore v. Local 569 of the Int'l Bd. of Elec. Workers, 653 F. Supp. 767, 771, 125 L.R.R.M. 2402, 2405 (S.D. Cal. 1987).

During the *Survey* year, the United States Supreme Court, in *Breininger v. Sheet Metal Workers International Association Local No. 6*, held that federal courts have jurisdiction over a duty of fair representation claim even if such claim also could give rise to an unfair labor practice charge before the NLRB.[19] The Court also held that alleged discriminatory hiring hall practices [20] are not a basis for a claim under the LMRDA because such conduct does not constitute discipline within the meaning of sections 101(a)(5) and 609.[21] Consequently, after *Breininger*, if union officials discriminate against members through the union hiring hall, federal courts can hear claims and the NLRB can hear charges by union members that the union's action is a violation of its duty of fair representation. Courts will not hold, however, that such discrimination violates the LMRDA.

Lynn Breininger was a member of Local Union No. 6 of the Sheet Metal Workers International Association (the "union").[22] The union, under a multi-employer collective bargaining agreement, managed a hiring hall that referred both union members and non-union members for construction work.[23] The union referred members in one of two ways: either an employer specifically requested a particular member, or the union began at the top of its out-of-work list and continued until it found someone to do the job. The union did not restrict members or employers to the hiring hall as a source of employment.

Breininger alleged that because of his political opposition to the union business manager, the union hiring hall officials both failed to inform him when employers requested him for a job, and skipped over his name on the out-of-work list when referring individuals for jobs.[24] He claimed that the union thereby violated its duty of fair representation.[25] Breininger also alleged that the union,

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[19] 110 S. Ct. 424, 434–35, 132 L.R.R.M. 3001, 3007–08 (1989).

[20] As one commentator explains, a "union-operated hiring hall functions as a central employment clearinghouse. Employers contact the local hiring hall and request the specific number of workers required for the job; employees available for work register at the hall and are dispatched to the jobs as needed." Fick, *supra* note 12, at 342–43; *see* Beaird & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 GA. L. REV. 383, 392 (1975).

[21] *Id.* at 440, 132 L.R.R.M. at 3012.

[22] *Id.* at 428, 132 L.R.R.M. at 3002.

[23] *Id.* The union maintained a list of individuals who were out of work and wanted job referrals.

[24] *Id.* at 428, 132 L.R.R.M. at 3002–03.

[25] *Id.* at 428, 132 L.R.R.M. at 3002. The complaint stated that the union, "in its repre-

in making job referrals, favored certain members who supported the present business manager, and that this favoritism was part of widespread, improper discipline for political opposition in violation of sections 101(a)(5) and 609 of the LMRDA.[26] Breininger therefore alleged that he had been "otherwise disciplined" by the union, acting by and through its officials.[27]

The United States District Court for the Northern District of Ohio granted the union's motion for summary judgment, and the United States Court of Appeals for the Sixth Circuit affirmed in a *per curiam* opinion.[28] In connection with the fair representation claim, the appellate court remarked that circuit courts have uniformly held that such claims fall exclusively under the jurisdiction of the NLRB.[29] With respect to the LMRDA claim, the court held that Congress intended discipline to refer only to punitive actions diminishing membership rights.[30] The court stated that hiring hall practices are not a function of union membership because referrals are available to both members and non-members. Thus, the Court of Appeals for the Sixth Circuit held that discriminatory hiring hall practices do not constitute discipline within the meaning of the LMRDA.[31]

The United States Supreme Court reversed in part, affirmed in part and remanded. The Court set down a two-part holding. First, the Court held that the district court did have jurisdiction over Breininger's fair representation suit arising from union officials' alleged discrimination.[32] Second, the Court held that the union's alleged action did not constitute discipline under LMRDA sections 101(a)(5) and 609.[33]

With respect to the first part of its holding, the Court observed that the circuit court erred in ruling that the district court had no

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sentation of [petitioner,] has acted arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause." *Id.*

[26] *Id.* at 428, 132 L.R.R.M. at 3002–03.

[27] *Id.* at 428, 132 L.R.R.M. at 3003.

[28] Breininger v. Sheet Metal Workers Local Union No. 6, 849 F.2d 997, 998–99, 128 L.R.R.M. 2845, 2845–46 (6th Cir. 1988). The district court decided that the NLRB had exclusive jurisdiction of Breininger's claim. *Id.* at 998, 128 L.R.R.M. at 2845. The court stated that "[i]t is well-settled that union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB." *Id.*

[29] *Id.* at 999, 128 L.R.R.M. at 2845.

[30] *Id.*, 128 L.R.R.M. at 2846.

[31] *Id.*

[32] Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 110 S. Ct. 424, 440, 132 L.R.R.M. 3001, 3012 (1989).

[33] *Id.*

jurisdiction over the duty of fair representation claim.[34] First, the Court noted that the NLRB had held that a violation of the duty of fair representation also could be an unfair labor practice under sections 7 and 8 of the NLRA.[35] Although the Court acknowledged its previous holding, in *San Diego Building Trades Council v. Garmon*, that the NLRB preempted state and federal jurisdiction over claims based on activity arguably subject to section 7 or 8 of the NLRA,[36] the Court also noted its more recent holding in *Vaca* that the preemption rule did not extend to suits alleging a breach of the duty of fair representation. Because this suit involved such a breach, the Court ruled that the district court was not deprived of jurisdiction.[37]

Second, the Court reasoned that there should be no exception for hiring hall cases simply because the NLRB allegedly has more experience with this subject matter.[38] The Court maintained that it had never suggested that it would reconsider its ruling on jurisdiction based on the subject matter of the fair representation claim.[39] The Court was unwilling to adopt a legal principle whereby expertise is equated with exclusive jurisdiction because such a principle would remove an unacceptably large number of fair representation claims from federal courts.[40]

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[34] *Id.* at 435, 132 L.R.R.M. at 3008.

[35] *Breininger*, 110 S. Ct. at 429, 132 L.R.R.M. at 3003. In *NLRB v. Miranda Fuel*, the NLRB held that employees' rights to:

> form, join, or assist labor organizations, or to refrain from such activities, is a statutory limitation on statutory bargaining representatives, and that § 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.

140 NLRB 181, 185, 51 L.R.R.M. 1584, 1587 (1962), *enforcement denied*, 326 F.2d 172, 180, 54 L.R.R.M. 2715, 2721 (2d Cir. 1963).

[36] *Breininger*, 110 S. Ct. at 429, 132 L.R.R.M. at 3003; *see* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245, 43 L.R.R.M. 2838, 2842 (1959).

[37] *Breininger*, 110 S. Ct. at 429, 132 L.R.R.M. at 3003–04; *see* Vaca v. Sipes, 386 U.S. 171, 181, 64 L.R.R.M. 2369, 2373–74 (1967). In *Vaca*, the Court held that courts developed the duty of fair representation before the NLRB even acquired jurisdiction over union activities. *Vaca*, 386 U.S. at 181, 64 L.R.R.M. at 2373. The Court further reasoned that the NLRB has unreviewable discretion to deny hearing unfair labor practice claims if the NLRB considered them insubstantial. *Id.* at 182 & n.8, 64 L.R.R.M. at 2373 & n.8. This discretion might cause a union's breach of duty to go unremedied and thereby frustrate "the basic purposes underlying the duty of fair representation doctrine." *Id.* at 182–83, 64 L.R.R.M. at 2374.

[38] *Breininger*, 110 S. Ct. at 430–31, 132 L.R.R.M. at 3004.

[39] *Id.* at 431, 132 L.R.R.M. at 3004.

[40] *Id.* at 431, 132 L.R.R.M. at 3005. The Court added that the NLRB has already granted themselves exclusive jurisdiction over fair representation cases involving racial and gender discrimination, citing the *Miranda Fuel* decision. *Id.*

Third, the Court refused to define the duty of fair representation in terms of an unfair labor practice under the NLRA because such definition would unreasonably narrow the duty of fair representation.[41] The Court noted that the NLRB had determined that breaches of the duty of fair representation also constituted unfair labor practices in an effort to *broaden*, not *restrict*, the remedies available to union members.[42] The Court reasoned that the common-law duty of fair representation arises from the NLRA's grant under section 9(a) of the union's exclusive authority to represent all the employees in a designated bargaining unit.[43] According to the Court, this duty prevents any arbitrary union conduct against individuals.[44] An unfair labor practice under the NLRA, on the other hand, is limited to instances where a union discriminates solely on the basis of union membership or lack thereof.[45] The Court reasoned, therefore, that narrowing the duty of fair representation to the NLRA's definition of unfair labor practices would make the two redundant despite their different purposes, and would destroy some of the protections of the broader duty of fair representation.[46]

With respect to the second part of its holding, the Court affirmed the Sixth Circuit decision to reject Breininger's LMRDA claim. The Court did not, however, adopt the lower court's reasoning that the term discipline refers only to punitive actions diminishing membership rights.[47] The Court noted that sections 101(a)(5) and 609 of the LMRDA make it unlawful for a union to "fine, suspend, expel or otherwise discipline" any of its members for exercising rights secured under the LMRDA.[48] The Court reasoned that by using the phrase "otherwise discipline," Congress did not

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[41] *Id.* at 436, 132 L.R.R.M. at 3008.

[42] *Id.*

[43] *Id.* at 436, 132 L.R.R.M. at 3009; *see* 29 U.S.C. § 159(a) (1982).

[44] *Breininger*, 110 S. Ct. at 436, 132 L.R.R.M. at 3009 (quoting Vaca v. Sipes, 386 U.S. 171, 182, 64 L.R.R.M. 2369, 2373 (1967)). The *Breininger* Court stated that "[i]t was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court [in *NLRB v. Allis-Chalmers Manufacturing Co.*] found it necessary to fashion the duty of fair representation." *Id.* at 436, 132 L.R.R.M. at 3009 (citing NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181, 65 L.R.R.M. 2449, 2451 (1967)).

[45] *Id.* at 435–36, 132 L.R.R.M. at 3008.

[46] *Id.* at 436, 132 L.R.R.M. at 3008–09.

[47] *Id.* at 438, 132 L.R.R.M. at 3010 (the Court of Appeals reasoned that because "hiring hall referrals . . . are available to non-members as well as to members, and the hiring hall was not an exclusive source of employment for sheet metal workers, petitioner did not suffer discrimination on the basis of rights he held by virtue of his *membership* in the union.").

[48] *Breininger*, 110 S. Ct. at 435, 132 L.R.R.M. at 3008 (citing 29 U.S.C. §§ 411(a)(5), 529).

mean to include all acts deterring the exercise of LMRDA protected rights, but instead intended only to denote punishment that the union authorized as a collective entity to enforce its rules.[49] The Court also reasoned that the structure of the LMRDA implies that discipline involves an established disciplinary process by the union in its official capacity, rather than ad hoc retaliation by individual union officers.[50] The Court held that Breininger did not allege acts by the union amounting to discipline within the meaning of the statute, because individual union officers, not the union as an entity, punished him.[51]

Justice Stevens, joined by Justice Scalia, concurred in the Court's disposition of Breininger's duty of fair representation claim, but dissented from the Court's interpretation of the term discipline in sections 101(a)(5) and 609 of the LMRDA.[52] According to Justice Stevens, union discipline is punishment imposed by the union or its officers to control members' conduct in order to protect the interests of the union or its membership.[53] Justice Stevens argued that this definition clearly includes the use of a hiring hall system to punish members of the union for their political opposition. Furthermore, Justice Stevens reasoned that Congress intended the LMRDA to prevent unions from disciplining members without providing adequate procedural protection.[54] The majority's holding that the LMRDA does not cover informally-imposed punishment as alleged by Breininger, added Justice Stevens, deprives union members of the LMRDA's procedural safeguards when they most need them.[55] Using a hiring hall for retaliatory purposes, Justice Stevens concluded, is a form of discipline even if the hiring hall serves both

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[49] *Id.* at 438–39, 132 L.R.R.M. 3010–11. The Court relied on a fifth circuit case holding that discipline refers only to actions the union undertakes under color of the right to control its members' conduct in order to protect union or union members' interests. *Id.* at 439, 132 L.R.R.M. at 3011 (citing Miller v. Holden, 535 F.2d 912, 915, 95 L.R.R.M. 2152, 2154 (5th Cir. 1976)).

[50] *Id.* at 439, 132 L.R.R.M. at 3011. The Court also looked to the statute's legislative history to support its interpretation of "discipline." It held that "Congress envisioned 'discipline' to entail the imposition of punishment by a union acting in its official capacity." *Id.*

[51] *Id.* at 440, 132 L.R.R.M. at 3012.

[52] *Id.* at 441, 132 L.R.R.M. at 3012 (Stevens, J., dissenting).

[53] *Id.* at 442, 132 L.R.R.M. at 3013 (Stevens, J., dissenting) (citing *Miller*, 535 F.2d at 915, 95 L.R.R.M. at 2154).

[54] *Id.* Justice Stevens argued that, for example, an effective method of disciplining union members would certainly be to injure their employment interests, the interests that are the prime reason for union membership.

[55] *Breininger*, 110 S. Ct. at 443, 132 L.R.R.M. at 3014 (Stevens, J., dissenting).

members and non-members, and even if the decision to punish is ad hoc and unrecorded by the union.[56]

The *Breininger* decision ameliorates a union member's ability to recover against a union for breaching its duty of fair representation with respect to a job referral system. *Breininger* affirmed that a union member can sue a union in federal court as well as bring a charge through the NLRB for such conduct. Federal jurisdiction offers plaintiffs two benefits. First, plaintiffs are more likely to have their claims heard when not restricted to bringing a charge through the NLRB. If plaintiffs' only form of redress is the NLRB, they may have no redress at all because the NLRB has discretion to hear only those claims they decide will advance the public interest in effectuating the policies of the federal labor laws.[57] If employees can sue in federal court, however, they are guaranteed a hearing by constitutional requirements of due process.

Second, a federal court forum might be more profitable for plaintiffs. If plaintiffs bring charges under the NLRB, the available remedies are limited to requiring the union to cease and desist any conduct violating the NLRA and providing back pay to make plaintiffs whole. If plaintiffs sue in federal court they can win damages far exceeding NLRB compensation.

One downside to federal court jurisdiction, however, exists. Allowing union members to sue in federal court severely diminishes the uniformity of national labor policy. Congress enacted the NLRA to centralize administration and obtain uniform application of labor procedures.[58] By giving union members federal jurisdiction over these labor claims, the Court is both diluting the national uniformity established by the NLRB and allowing the government to intervene in this area of the law. Such government intervention may prove harmful to union members in the long run but it is currently outweighed by the benefits of federal jurisdiction.

Breininger also ameliorates a union member's ability to recover against a union for breaching its duty of fair representation with respect to a job referral system because the duty of fair representation is no longer limited to the NLRA's definition of an unfair labor practice. As a result, the union owes a duty of fair representation to a member or non-member in situations other than union-

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[56] *Id.* at 444, 132 L.R.R.M. at 3015 (Stevens, J., dissenting).

[57] *See* Vaca v. Sipes, 386 U.S. 171, 182 & n.8, 64 L.R.R.M. 2369, 2373 & n.8 (1967) (holding that the NLRB can refuse to hear an employee's charge of an insubstantial injury).

[58] *See id.* at 179, 64 L.R.R.M. at 2372.

related administration. A union member has an action for job-referral discrimination pursuant to section 9 of the NLRA, not sections 7 and 8 that define unfair labor practices. Therefore, despite the dilution of a national uniform labor policy, *Breininger* benefits union members by allowing them to sue in federal court and by not restricting the definition of a union's duty of fair representation to the NLRA's definition of an unfair labor practice.

Although the Court allows union members to hold unions liable for their officers' discriminatory management of a hiring hall referral system under a duty of fair representation claim, the Court will not allow unions to be held liable for their officers' improper actions under the LMRDA. The Court concluded in *Breininger* that Congress did not intend the phrase "otherwise discipline" to include all acts that deterred the exercise of rights protected under the LMRDA, but rather to refer only to sanctions authorized by the union as a collective entity undertaken under color of the union's right to control its members' conduct.[59] The Court distinguished such official union discipline from ad hoc retaliation by individual union officers even though it seemed to recognize that one purpose of the LMRDA is to provide safeguards against improper disciplinary action.[60] The Court effectively removes these safeguards when it defines discipline so narrowly as to omit sanctions imposed by union officials against members holding unpopular political views and allowing the union thereby to evade the due process requirements of section 101(a)(5) of the LMRDA.

By barring such LMRDA discipline claims, the Court is not giving unions free rein to discipline its members unlawfully through its officers because members retain duty of fair representation claims. This is no reason, however, for the Court to deny Breininger's LMRDA claim. Section 101(a)(5) of the LMRDA refers to actionable discipline as being imposed by a labor organization or by any officer thereof.[61] Therefore, Congress clearly intended to hold unions liable for their officers union-related actions. Union officials operating a hiring hall in a discriminatory fashion abuse their union authority. Although it might be burdensome for the union to be held liable for every employee's improper action, an absence of liability on the union's part could effectively destroy the purpose of the LMRDA by only allowing unions to unofficially discipline mem-

[59] *Breininger*, 110 S. Ct. at 438–39, 132 L.R.R.M. 3001, 3010–11.
[60] *See id.* at 439, 132 L.R.R.M. at 3011.
[61] 29 U.S.C. § 411(a)(5).

bers through officers, free of LMRDA regulations. Congress enacted the LMRDA with the belief that guaranteeing minimum democratic safeguards within unions would enable members to regulate the unions and prevent corruption and abuse.[62] Despite members' other claims against the union for such action, *Breininger*'s interpretation of the "otherwise discipline" language distinguishing between official union and individual officer actions effectively nullifies the LMRDA's safeguards.

In conclusion, *Breininger* holds that federal courts share jurisdiction with the NLRB over breach of the duty of fair representation claims based on improper discipline imposed unofficially on a union member by a union official. The Court also holds, however, that such conduct is not a violation of sections 101(a)(5) or 609 of the LMRDA. This opinion affirms the expanding federal jurisdiction over labor law issues for the potential benefit of plaintiffs and, at the same time, limits the scope of the LMRDA procedural safeguards, possibly nullifying them altogether.

B.* *Free Speech Protections for Union Officers:* Sheet Metal Workers' International Association v. Lynn[1]

Under section 101(a)(2) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"),[2] members of labor unions are guaranteed the rights of free speech and assembly with respect to union matters.[3] Union members may bring a civil

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[62] S. REP. No. 187, 86th Cong., 1st Sess. 1-5, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2318–21.

* By Jane Guevremont, Editor, BOSTON COLLEGE LAW REVIEW.

[1] 488 U.S. 347, 130 L.R.R.M. 2193 (1989).

[2] 29 U.S.C. §§ 401–531 (1982) [hereinafter cited as LMRDA].

[3] LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2), provides:

> Every member of a labor organization shall have the right to meet and assemble freely with other members and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: [p]rovided, [t]hat nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Id.

In addition to Title I's guarantee of free speech and assembly, Title I also guarantees union members equal rights regarding political participation in the union; stability and access to democratic process in assessing dues, initiation fees and additional assessments; the right to sue and participate in legal proceedings against the union; and safeguards against imaction in federal district court under section 102 of the LMRDA in order to secure these rights.[4] Although Title I traditionally protected the free speech and assembly rights of the rank-and-file union member,[5] circuit courts disagreed as to whether Title I also protected the speech of member-officers.[6] This issue was litigated

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proper disciplinary action. *Id.* at §§ 101(a)(1), 101(a)(3)–(a)(5), 29 U.S.C. §§ 411(a)(1), 411(a)(3)–(a)(5).

[4] LMRDA § 102, 29 U.S.C. § 412, provides:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Id.

[5] *See* Finnegan v. Leu, 456 U.S. 431, 436–37, 110 L.R.R.M. 2321, 2323 (1982); *see also* American Fed'n of Musicians v. Wittstein, 379 U.S. 171, 182–83, 57 L.R.R.M. 2566, 2571 (1964).

The scope of free speech protections under the statute is broader than the scope of the protection guaranteed by the first amendment to the United States Constitution. *See* Reyes v. Laborers' Int'l Union of N. Am., Local Union No. 16, 327 F. Supp. 978, 979, 77 L.R.R.M. 2729, 2729–30 (D.N.M. 1971), *aff'd*, 464 F.2d 595, 597, 80 L.R.R.M. 3215, 3216 (1972), *cert. denied*, 411 U.S. 915, 82 L.R.R.M. 2998 (1973); *see also* Steelworkers v. Sadlowski, 457 U.S. 102, 111, 110 L.R.R.M. 2606, 2609 (1982). Under the statute, protected speech includes speech that is libelous. Salzhindler v. Caputo, 316 F.2d 445, 446, 52 L.R.R.M. 2908, 2908 (2d Cir. 1963). Although the statute allows union members to speak freely without fear of reprisal from union officials, it does not protect union members from common law actions for libel or slander. Stark v. Twin City Carpenters Dist. Council, 219 F. Supp. 528, 537, 53 L.R.R.M. 2640, 2647 (D. Minn. 1963).

[6] *See Finnegan*, 456 U.S. at 433, 110 L.R.R.M. at 2321; *see, e.g.*, Lamb v. Miller, 660 F.2d 792, 794, 107 L.R.R.M. 3064, 3065 (D.C. Cir. 1981) ("[an elected] union official may not be dismissed for exercising [Title I] . . . rights"); Maceira v. Pagan, 649 F.2d 8, 12–13, 107 L.R.R.M. 2408, 2410 (1st Cir. 1981) ("the LMRDA allows an elected official to assert a claim . . . charging that removal from his official position violates the LMRDA bill of rights"); Bradford v. Textile Workers, Local 1093, 563 F.2d 1138, 1142, 96 L.R.R.M. 2690, 2693 (4th Cir. 1977) ("a union member, by accepting an elective office in the union, does not forfeit his rights expressly given him as a union member under the Act"); Grand Lodge of the Int'l Ass'n of Machinists v. King, 335 F.2d 340, 344, 56 L.R.R.M. 2639, 2641 (9th Cir.) ("To exclude officer-members from [guarantees under § 101] would deny protection to those best equipped to keep union government vigorously and effectively democratic."), *cert. denied*, 379 U.S. 920, 57 L.R.R.M. 2512 (1964). *But see, e.g.*, Newman v. Local 1101, Communications Workers, 570 F.2d 439, 445, 97 L.R.R.M. 2606, 2610 (2d Cir. 1978) ("We do not believe Title I of LMRDA to insulate union officials, employees, or agents from removal, or to permit a union representative . . . to freeze himself in office on First Amendment grounds."); Wambles v. International Bhd. of Teamsters, 488 F.2d 888, 889, 85 L.R.R.M. 2328, 2329 (5th Cir. 1974) (extending free speech protections to officers would mean that they had permanent jobs unless they were dismissed for cause); Sheridan v. United Bhd. of Carpenters, Local No. 626, 306 F.2d 152, 157, 50 L.R.R.M. 2637, 2641 (3d Cir. 1962) ("plaintiff's status as a business agent is not protected by the Act").

most frequently when officers were discharged from their positions in retaliation for expressing their beliefs or opinions.[7]

In 1982, in *Finnegan v. Leu*, the United States Supreme Court addressed the issue of officer removals for the first time.[8] In *Finnegan*, the Court held that a newly elected union president did not violate the LMRDA when he discharged appointed business agents who had supported the opposing candidate in an election.[9] The Court noted that the business agents claimed only an indirect interference with membership rights resulting from the fact that they were forced to choose between their positions as business agents and the right to express their views.[10] The Court indicated that, despite this interference, the union president had a justifiable reason for removing the agents from office.[11] The Court reasoned that giving elected officials the right to select their own staff was consistent with the LMRDA's goal of ensuring that officials are responsive to the interests of union members.[12] Thus, under *Finnegan*, appointed officers were not guaranteed the same broad free speech protections under Title I of the LMRDA as were rank-and-file union members. The question of whether a retaliatory removal of an officer could ever give rise to a cause of action under section 102, however, remained open.[13] In the period following *Finnegan*, courts differed in their interpretation of whether the *Finnegan* decision controlled the removal of elected as well as appointed officers.[14]

During the *Survey* year, the United States Supreme Court addressed the issue of whether the retaliatory discharge of an elected business agent violates Title I of the LMRDA. In the 1989 case of

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[7] *See* Note, *Free Speech Rights of Union Officials Under the Labor-Management Reporting and Disclosure Act*, HARV. C.R.-C.L. L. REV. 525, 527 n.8 (citing D. MCLAUGHLIN & A. SCHOOMAKER, THE LANDRUM-GRIFFIN ACT AND UNION DEMOCRACY 115 (1979)).

[8] 456 U.S. 431, 110 L.R.R.M. 2321 (1982).

[9] *Id.* at 432, 442, 110 L.R.R.M. at 2321, 2325.

[10] *Id.* at 440, 110 L.R.R.M. at 2324.

[11] *See id.* at 441, 110 L.R.R.M. at 2324.

[12] *Id.* at 440, 441, 110 L.R.R.M. at 2324. For a discussion of the legislative history of Title I of the LMRDA, see generally, Rothman, *Legislative History of the 'Bill of Rights' for Union Members*, 45 MINN. L. REV. 199 (1960).

[13] *Finnegan*, 456 U.S. at 440–41, 110 L.R.R.M. at 2324.

[14] *See, e.g.*, Runyan v. United Bhd. of Carpenters, 554 F. Supp. 859, 862 n.3 (D. Colo. 1982) (expressing the view that the result in *Finnegan* would not have been different had the plaintiffs been elected rather than appointed); Local 314, National Post Office Mail Handlers v. National Post Office Mail Handlers, 572 F. Supp. 133, 137 (E.D. Mo. 1983) (finding the plaintiff's appointed/elected distinction "meritless"); Brett v. Sohio Constr. Co., 113 L.R.R.M. 2345, 2347 (D. Alaska 1983) ("the exception to broad enforcement of Title I protections for speech and advocacy carved by *Finnegan v. Leu* does not extend so far as to preclude elected job site stewards from remedies under section 102").

Sheet Metal Workers' International Association v. Lynn, the Court held that the removal of an elected official in retaliation for exercising his free speech rights violated Title I of the LMRDA.[15] The Court reasoned that discharging an elected official was significantly different from discharging an appointed official because it had a potentially chilling effect on the free speech rights of union members.[16] Consequently, after the *Sheet Metal Workers* decision, elected officials who are discharged in retaliation for expressing their beliefs may state a cause of action under section 102 of the LMRDA.

In *Sheet Metal Workers*, the members of Local 75 of the Sheet Metal Workers' International Association (the "local") elected Edward Lynn to the position of business representative.[17] In response to the concerns of union members regarding the local's financial difficulties, Lynn organized a group of union members to review the situation. Upon discovering that officers of the local were spending significantly more money than other area sheet metal locals, the group requested that the local's financial problems be addressed by reducing expenditures rather than by raising dues. After the union members defeated three separate proposals to increase dues, Lynn, along with the local's officers, requested assistance from the international union's general president.[18] In response to this request, the international's president appointed a trustee, charging him with the authority to manage the affairs of the local, including the power to suspend union officers pursuant to the Constitution and Ritual of the Sheet Metal Workers' International Association.[19]

After reviewing the union's financial situation, the trustee determined that raising union dues was necessary in order to alleviate the local's financial crisis. The local's executive board accepted the trustee's suggestion and called a meeting of union members to vote on the proposal. Prior to the vote, the trustee informed Lynn that he expected Lynn to support the dues increase. Lynn explained that he would do so only if the trustee also pledged to lower expenditures. Because the trustee refused, Lynn publicly opposed the dues increase at the union meeting, and the union members defeated the proposal. A few days later, the trustee discharged Lynn

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[15] 488 U.S. 347, 349, 130 L.R.R.M. 2193, 2193 (1989)

[16] *Id.* at 355, 130 L.R.R.M. at 2196.

[17] *Id.* at 349, 130 L.R.R.M. at 2193.

[18] *Id.* at 349–50, 130 L.R.R.M. at 2194. The letter requested that the president "immediately take whatever action . . . necessary including, but not limited to, trusteeship to put this local on a sound financial basis." *Id.*

[19] *Id.* at 350.

as business agent stating that he was removed "because of his outspoken opposition to the dues increase."[20]

Lynn filed a claim under section 102 of the LMRDA, stating that the trustee's actions violated section 101(a)(2) of Title I of the LMRDA.[21] The United States Court of Appeals for the Ninth Circuit held that the LMRDA protected the elected official from being discharged in this situation.[22] The United States Supreme Court affirmed the decision, holding that Lynn's discharge from his elected position violated Title I of the LMRDA.[23]

The Court rejected the international's argument that, because Lynn's removal neither prevented him from participating in the union meeting nor interfered with his union membership, Lynn's removal did not violate his Title I rights.[24] Although the Court acknowledged that Lynn's removal did not directly prohibit him from exercising his right to free expression, the Court noted that Lynn's removal was a response to his overt opposition to the trustee's proposal. As such, the Court concluded that Lynn's discharge had an indirect effect on his free speech, as it would most likely discourage him from expressing any views that differed from those of the union leadership in the future.[25]

The Court next addressed whether this indirect interference with free speech was protected under Title I.[26] The Court explained that a basic purpose of the LMRDA is to safeguard democratic governance by ensuring that the interests of union members are protected through fair elections.[27] In contrasting its decision in *Finnegan*, the Court explained that the *Finnegan* decision, which allowed the president-elect to remove the past president's appointed staff, was consistent with the purpose of the LMRDA.[28] The Court reasoned that a disloyal staff could seriously hinder the plans of the president-elect, making his election virtually meaningless.[29] Thus, although the Court in *Finnegan* recognized that sanctioning the removal of appointed business agents who had openly supported

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[20] *Id.*

[21] *Id.*

[22] Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472, 1479, 123 L.R.R.M. 3273, 3278 (9th Cir. 1986), *aff'd*, 488 U.S. 347, 359 (1989).

[23] 488 U.S. 347, 359, 130 L.R.R.M. at 2197.

[24] *Id.* at 353–54, 130 L.R.R.M. at 2195.

[25] *Id.* at 354, 130 L.R.R.M. at 2195.

[26] *Id.* at 354, 130 L.R.R.M. at 2195–96.

[27] *Id.* at 354, 130 L.R.R.M. at 2196.

[28] *Id.*

[29] *Id.* at 354–55, 130 L.R.R.M. at 2196.

the incumbent president would hinder their free speech rights, the Court held that the importance of upholding the union members' democratic choice outweighed this concern.[30]

The Court in *Sheet Metal Workers* stressed that the removal of an elected official differed substantially from the removal of an appointed official.[31] The Court reasoned that when an elected official is fired from a position, the union members who voted for that candidate are also affected in that they are denied the delegate of their choice. In *Sheet Metal Workers,* for example, the Court found that Lynn's discharge during a time of crisis for the local deprived the union members of Lynn's leadership and expertise. Thus, the Court concluded that his removal did not further the LMRDA's purpose of ensuring responsiveness to the interests of union members.[32]

Additionally, the Court asserted that removing an elected official from office would have a more substantial effect on the right to free expression guaranteed under Title I.[33] The Court reasoned that the retaliatory discharge of an elected official affected not only the official's free speech rights, but those of his or her supporters as well.[34] In this regard, the Court suggested that local union members would be hesitant to express their own views after seeing that Lynn's outspokenness resulted in his removal as a business agent. The Court explained that in passing the LMRDA, Congress acknowledged that the existence of a democratic union was dependent upon union members' freedom to express their opinions regarding union matters without fear of reprisal. Because the trustee's actions infringed on the free speech rights of union members that Congress sought to protect by enacting the LMRDA, the Court held that Lynn's retaliatory discharge gave rise to a cause of action under section 102.[35]

Justice White, concurring in the judgment, suggested that the decision did not depend on whether the discharged officer was an

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[30] *Id.* at 355, 130 L.R.R.M. at 2196.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* (citing Hall v. Cole, 412 U.S. 1, 8, 83 L.R.R.M. 2177, 2180 (1973)).

[35] *Id.* The Court also rejected the international's claim that Lynn's discharge was justified because he was removed during a lawfully imposed trusteeship. *Id.* at 356, 130 L.R.R.M. at 2196. Because the legislative history and language of the LMRDA did not indicate Congress' intention that a trusteeship should cancel Title I rights, the Court stated that the power granted to a trustee should be consistent with Title I protections. *Id.* at 356–57, 130 L.R.R.M. at 2196–97.

elected or appointed official, but on whether the officer spoke in his or her capacity as an officer or as a regular union member.[36] Citing *Finnegan*, Justice White stressed that Title I was enacted to protect regular union members, not union officers.[37] Justice White asserted that an officer's status as an elected or appointed official should have no bearing on a decision where the individual spoke in his or her official capacity. According to Justice White, the controlling factor in *Finnegan* was the president's authority under the union's constitution to appoint and remove officers to ensure that he or she would have a supportive staff. Justice White stated that even though the officers in *Finnegan* conducted their campaign activities as union members, and thus were entitled to Title I protection, the union's constitutional grant of authority to the president was sufficient to dispose of the appointed officer's Title I claim.[38]

Justice White explained that unlike *Finnegan*, in which the union's president had the authority to appoint and remove officers, the trustee's authority in *Sheet Metal Workers* was restricted to removing officers for cause.[39] "Cause" in this context included incompetence or other behavior that interfered with the ability to perform the duties of the office. Justice White suggested that, in this case, Lynn's duties as a business agent primarily involved collective bargaining but did not seem to include supporting the dues increase proposed by the trustee. Justice White concluded that, in this instance, there were no "countervailing interest[s] rooted in union democracy" that were sufficient to cancel Title I guarantees and, therefore, he concurred in the judgment.[40]

The Court's decision in *Sheet Metal Workers* represents the first time the United States Supreme Court has recognized that section 101(a)(2) of Title I of the LMRDA protects the free speech of

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[36] *Id.* at 359, 130 L.R.R.M. at 2198 (White, J., concurring in judgment). The distinction between membership speech and officer speech was recognized by the United States Court of Appeals for the Eleventh Circuit in Dolan v. Transportation Workers Union, 746 F.2d 733, 742 (11th Cir. 1984). The *Dolan* court determined that 'membership speech' could be transformed into 'officer speech' "if the officer could reasonably be perceived as speaking for the union, or if her speech affects performance of her specific duties . . . ." *Id.* The United States Court of Appeals for the Ninth Circuit rejected this view in Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472, 1479 n.5, 123 L.R.R.M. 3273, 3277 n.5 (9th Cir. 1986), *aff'd*, 488 U.S. 347, 359.

[37] Sheet Metal Workers' Int'l Ass'n v. Lynn, 488 U.S. at 359, 130 L.R.R.M. at 2197 (White, J., concurring in judgment).

[38] *Id.*

[39] *Id.* at 360, 130 L.R.R.M. at 2198 (White, J., concurring in judgment).

[40] *Id.*

elected union officers. The Court in *Sheet Metal Workers* answered the question left open in *Finnegan* as to whether the retaliatory discharge of a union official could ever give rise to a cause of action under section 102. As a result of *Sheet Metal Workers*, elected union officers discharged in retaliation for expressing their opinion may state a claim under section 102.

The *Sheet Metal Workers* decision expanded several principles set forth in *Finnegan*. In *Finnegan*, the Court noted that the discharged union officers claimed that their retaliatory removal required them to choose between their right to free speech and their positions as union officers, thus, indirectly affecting their membership rights.[41] The *Finnegan* Court did not address whether the direct-indirect distinction had any significance in determining whether a cause of action existed under section 102. In *Sheet Metal Workers*, however, the Court acknowledged that even an indirect interference with an officer's membership rights could give rise to a section 102 claim.[42]

Despite the Court's finding that Lynn's removal indirectly affected his membership rights by making him more hesitant to speak out in the future, the *Sheet Metal Workers* Court did not automatically find an infringement of his Title I rights. Rather, the Court focused on whether the officer's removal would interfere with the purpose of the LMRDA.[43] In both *Finnegan* and *Sheet Metal Workers*, even when it was clear that the officers' removal affected their personal freedom of expression, the Court evaluated the effect of the officers' removal (or retention) on union democracy, an important goal of the LMRDA.

The Court also indicated that the elected/appointed distinction was an important element to consider when evaluating the impact of a retaliatory discharge on union democracy.[44] Where an officer's removal interfered with this goal, the Court held that the officer stated a cause of action under section 102.[45] Where an officer's removal furthered this goal, however, the Court upheld the discharge.[46] Thus, the reasoning of the Court in both *Finnegan* and *Sheet Metal Workers* seems to indicate that the Court will be more likely to recognize a cause of action in officer removal cases where

[41] Finnegan v. Leu, 456 U.S. 431, 440, 110 L.R.R.M. 2321, 2324 (1982).

[42] *See Sheet Metal Workers*, 488 U.S. at 354, 130 L.R.R.M. at 2195.

[43] See *supra* text accompanying notes 26–27 for a discussion of the Court's approach.

[44] *Sheet Metal Workers*, 488 U.S. at 355, 130 L.R.R.M. at 2196.

[45] *Id.*

[46] *Finnegan*, 456 U.S. at 442, 110 L.R.R.M. at 2325.

the removal not only affects the officer's freedom of speech, but also affects the rights of the rank-and-file union member.

III. Permanent Replacements

A. * *The Right to Hire Permanent Replacements: Who is Replaced?* Trans World Airlines, Inc. v. Independent Federation of Flight Attendants[1]

Since the Supreme Court decision in *NLRB v. Mackay Radio & Telegraph Co.*, an employer has been allowed to hire permanent replacements for striking employees in order to maintain its business.[2] The legacy of *Mackay* stems not from the particular holding,[3] but from dicta in Justice Roberts's majority opinion.[4] Under *Mackay* and its progeny, an employer can refuse to reinstate strikers at the conclusion of an economic strike if it has replaced them with permanent employees,[5] or it has another legitimate and substantial business justification.[6]

Although the practice of permanently replacing striking employees is a significant economic weapon in the hands of employers, its use is limited in several respects.[7] First, the employer is limited

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[1] 109 S. Ct. 1225, 130 L.R.R.M. 2657 (1989).

[2] 304 U.S. 333, 345–46, 2 L.R.R.M. 610, 614 (1938).

[3] In *Mackay*, the Supreme Court affirmed an order of the NLRB requiring Mackay Radio & Telegraph Co. to reinstate five employees who had been discriminated against because of their involvement in a union. *Id.* at 341, 351, 2 L.R.R.M. at 612, 616. During a strike of point-to-point operators, Mackay replaced the striking operators with employees from other offices in an effort to maintain its service. When the strike failed, most of the striking operators were automatically reinstated. However, five operators who had been prominent in union activities had still not been reinstated three weeks later. Responding to charges by the union, the NLRB ordered that the five men be reinstated. The Supreme Court ultimately upheld the NLRB's finding that the refusal to reinstate was discrimination against union activity and thus an unfair labor practice. *Id.* at 347, 2 L.R.R.M. at 614.

[4] Justice Roberts stated that it was not "an unfair labor practice to replace the striking employees with others in an effort to carry on the business." *Id.* at 345, 2 L.R.R.M. at 614. He further indicated that it also was not an unfair labor practice "to reinstate only so many of the strikers as there were vacant places to be filled." *Id.* at 346, 2 L.R.R.M. at 614 (citations omitted).

[5] *See* Belknap, Inc. v. Hale, 463 U.S. 491, 504 n.8, 113 L.R.R.M. 3057, 3062 n.8 (1983). For a discussion of the effect of *Belknap* on the Mackay doctrine, see *Federal Labor Law Preemption and Right to Hire Permanent Replacements:* Belknap, Inc. v. Hale, *1983–84 Annual Survey of Labor Relations and Employment Discrimination Law*, 26 B.C.L. Rev. 63, 84–87 (1984).

[6] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379–80, 66 L.R.R.M. 2737, 2738–39 (1967).

[7] *Mackay*, 304 U.S. at 345–346, 2 L.R.R.M. at 614. *See generally* Weinstein, "*Will You Be a Union Man/ Or Will You Be a Scab?*", 7 Cal. Law. 44 (1987).

in its incentives to induce workers to replace its striking employees.[8] Second, even when replaced, strikers who have made an unconditional request for reinstatement remain statutory employees under section 2(3) of the National Labor Relations Act ("NLRA").[9] As a result, an employer must offer its post-strike vacancies to all qualified former strikers before it can hire any new employees.[10] It is settled that an employer has the right to replace strikers permanently under *Mackay* (hereinafter the "*Mackay* doctrine"). Many of the consequences of such actions, however, are still at issue.

During the *Survey* year, in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants* ("*TWA*"), the United States Supreme Court held that the *Mackay* Doctrine applies to crossover employees as well as to permanent replacements.[11] As a result, the *TWA* Court refused to order the reinstatement of full-term strikers to displace the crossover employees.[12]

In March, 1984, TWA began negotiations with the Independent Federation of Flight Attendants ("IFFA" or the "union") on a new collective bargaining agreement.[13] The negotiations, conducted pursuant to the requirements of the Railway Labor Act ("RLA"), covered the issues of wages and working conditions.[14] During two years of negotiations, the parties complied with all of the statutory procedures for dispute resolution, including the requirements of direct negotiation, mediation, and a thirty day "cooling off" period.[15] But in March 1986, having been unable to reach a settlement, the union went on strike.[16]

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[8] *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 225–28, 235–37, 53 L.R.R.M. 2121, 2123, 2127–28 (1963). In *Erie Resistor*, the Supreme Court upheld the NLRB's ruling that an employer could not offer twenty years of seniority as an incentive to replacements, even if such an inducement was needed to hire the replacements and maintain the business. *Id.*

[9] *See* Estreicher, *Strikers and Replacements*, 38 LAB. L.J. 287, 289 (1987). The NLRA states in relevant part: "The term 'employee' shall include any employee . . . whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ." 29 U.S.C § 152(3) (1988).

[10] Estreicher, *supra* note 9, at 289.

[11] 109 S. Ct. 1225, 1235, 130 L.R.R.M. 2657, 2663 (1989). Crossovers are employees who are union members before the strike but who either refuse to strike or return to work before the end of the strike. *See id.* at 1228–29, 130 L.R.R.M. at 2658.

[12] *Id.* at 1228–29, 130 L.R.R.M. at 2658.

[13] *Id.* at 1228, 130 L.R.R.M. at 2658.

[14] *Id.* The Supreme Court affirmed the determination of the Court of Appeals for the Eighth Circuit that the clause survived the strike in Trans World Airlines, Inc. v. Flight Attendants, 108 S. Ct. 1101, 1101, 127 L.R.R.M. 2740, 2741 (1988).

[15] *TWA*, 109 S.Ct. at 1228, 130 L.R.R.M. at 2658.

[16] *Id.*

During the strike, TWA continued operations by hiring and fully training approximately 2,350 permanent replacements.[17] TWA also continued to employ approximately 1,280 flight attendants who either had refused to strike or had abandoned the strike ("crossovers"). TWA informed the striking flight attendants that all strike-created vacancies would be filled in accordance with the existing seniority bidding system and that job and domicile arrangements made according to the system would remain in effect after the end of the strike. TWA's seniority bidding system guaranteed the senior flight attendants the opportunity to obtain the most desirable job assignments, flight schedules, and bases of operation by granting them priority for arising vacancies. In addition, the bidding system, part of the collective bargaining agreement existing before the strike, guaranteed that the junior-most employees would be the first to be laid off if layoffs became necessary.[18]

By utilizing non-striking flight attendants and replacement flight attendants, TWA was able to continue its operations and defeat the strike.[19] In arbitration after the strike, TWA agreed to reinstate full-term strikers as vacancies arose with the same seniority they would have had if there had been no strike.[20] TWA, however, refused union demands to displace crossovers. As a result, TWA initially recalled only the 197 most senior full-term strikers; by May 1988, approximately 1,100 of the 5,000 full-term strikers had been reinstated.[21]

The union sued TWA, seeking the reinstatement of more full-term strikers through displacement of permanent replacements and junior crossover employees.[22] The union contended that both the RLA and the terms of the pre-strike collective bargaining agreement entitled the full-term strikers to reinstatement.[23] On cross-motion

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[17] *Id.*

[18] *Id.*

[19] *See id.*

[20] *Id.* at 1228–29, 130 L.R.R.M. at 2658.

[21] *Id.* at 1229, 130 L.R.R.M. at 2658.

[22] *Id.* at 1229, 130 L.R.R.M. at 2658–59. This was the second legal action taken by the union. The union first brought an action for declaratory judgment, seeking a determination that the full-term strikers were unfair labor practice strikers, and not economic strikers. As unfair labor practice strikers, they would have been entitled to immediate reinstatement. *See id.* The District Court for the Western District of Missouri held that they were not unfair labor practice strikers. Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc., 682 F. Supp. 1003, 1006, 127 L.R.R.M. 3266, 3268 (D. Mo. 1988), *aff'd*, 878 F.2d 254 (1989), *cert. denied*, 110 S. Ct. 840 (1990).

[23] *TWA*, 109 S. Ct. at 1229, 130 L.R.R.M. at 2658–59.

for partial summary judgment, the United States District Court for the Western District of Missouri held that the full-term strikers were not entitled to reinstatement and that TWA was not required to displace either the junior crossovers or the 1,220 new employees hired by TWA immediately after the strike began.[24]

Both TWA and the union appealed the court's decision. The Court of Appeals for the Eighth Circuit affirmed that TWA need not displace the 1,220 new employees.[25] The appellate court, however, reversed the district court with respect to the junior crossover employees. In holding that the junior crossovers should be displaced by more senior full-term strikers, the appellate court relied on both the union security clause of the pre-strike collective bargaining agreement and judicial interpretation of the NLRA.[26] The appellate court concluded that the refusal to displace the junior crossovers "impermissibly discriminates among union members based on the degree of their union activity."[27] The Supreme Court granted a writ of certiorari solely on the issue of displacement of junior crossovers.[28]

The Supreme Court reversed the appellate court,[29] holding TWA did not have to displace junior crossovers in order to reinstate senior full-term strikers.[30] TWA argued that the *Mackay* doctrine applied to crossovers, and that it would be anomalous to allow strikers to displace junior crossovers when they could not displace permanent replacements.[31] The union argued that the *Mackay* doctrine is inapplicable to junior crossovers under the NLRA.[32] The

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[24] Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 643 F. Supp. 470, 480, 123 L.R.R.M. 2337, 2345 (W.D. Mo. 1986). The court also held that 463 new hires who had not been fully trained by the end of the strike could be displaced by full-term strikers. *Id.*

[25] Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc., 819 F.2d 839, 847, 125 L.R.R.M. 2544, 2551 (8th Cir. 1987). The appellate court also affirmed the district court's ruling that the partially trained new-hires could be displaced. *Id.*

[26] *See id.* at 843, 125 L.R.R.M. at 2548.

[27] *Id.* The appellate court reasoned that TWA's crossover policy was at odds with the principles set forth in *Erie Resistor.* The appellate court noted that the *Erie Resistor* Court had disapproved of super-seniority "because the award operated to the detriment of strikers as compared to non-strikers; it in effect offered an inducement to abandon the strike; and it created a long term division in the workforce." *Id.* at 844, 125 L.R.R.M. at 2548.

[28] Flight Attendants v. Trans World Airlines, Inc., 108 S. Ct. 1219 (1988).

[29] *TWA*, 109 S. Ct. 1225, 1235, 130 L.R.R.M. 2657, 2663 (1989). Justice O'Connor wrote the Court's opinion, in which Chief Justice Rehnquist and Justices White, Stevens, Scalia, and Kennedy joined. Justices Brennan, Marshall, and Blackmun dissented.

[30] *Id.* at 1230, 130 L.R.R.M. at 2659.

[31] *Id.* at 1230, 130 L.R.R.M. at 2659–60.

[32] *Id.* at 1230–31, 130 L.R.R.M. at 2660.

union also argued that differences between the NLRA and RLA rendered the *Mackay* doctrine inapplicable to junior crossovers covered by the RLA. In distinguishing junior crossovers from the permanent replacements discussed in *Mackay*, the union relied primarily on the Supreme Court's decision in *NLRB v. Erie Resistor Corp.*[33] In *Erie Resistor*, the Court held that granting super-seniority status to replacements to induce them to work was an unfair labor practice.[34] The *Erie* Court regarded the super-seniority policy as a far greater encroachment on employee rights than permanent replacement alone, and therefore decided that the policy could not be justified by the employer's business interests.[35] The Court also held that, given the discriminatory impact of the policy, the strikers did not have to prove that the employer intended to discriminate against them.[36] Because the discriminatory impact of the policy was not justifiable by business necessity, the Court upheld the Board's decision.[37]

In addressing the applicability of *Erie Resistor* to the crossover issue, the *TWA* Court examined two main issues. First, the Court noted that the grant of super-seniority in *Erie Resistor* affected all strikers—including those that were reinstated—in contrast to permanent replacement, which does not affect those strikers who are reinstated.[38] The Court noted that, in TWA's case, reinstated full-term strikers lost no seniority relative to new-hires and crossovers. By reasoning that, after reinstatement, senior full-term strikers were in exactly the same position to outbid juniors for assignments or to displace juniors, the Court concluded that the union's decision to strike did not affect the seniority of reinstated full-term strikers.[39]

Second, the Court noted that the grant of super-seniority in *Erie Resistor* was a continuing disadvantage to strikers, and thus a source of cleavage in the workforce long after the end of the strike.[40]

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[33] *Id.* at 1231, 130 L.R.R.M. at 2660.

[34] NLRB v. Erie Resistor Corp., 373 U.S. 221, 225–27, 237, 53 L.R.R.M. 2121, 2123, 2128. *Erie Resistor* involved an employer's hiring of permanent replacements during a strike. *Id.* at 223, 53 L.R.R.M. at 2122. In order to guarantee job security to the replacements, in light of previous layoffs, the employer offered them 20 years of seniority. At the end of the strike, many full-term strikers were reinstated, but, because they had less seniority than the replacements, many reinstated strikers were laid off within one year. *Id.* at 224, 53 L.R.R.M. at 2122–23.

[35] *Id.* at 232, 53 L.R.R.M. at 2126.

[36] *See id.* at 231, 53 L.R.R.M. at 2125.

[37] *See id.* at 236–37, 53 L.R.R.M. at 2127–28.

[38] *TWA*, 109 S. Ct. 1225, 1231, 130 L.R.R.M. 2657, 2660 (1989).

[39] *Id.*

[40] *Id.* at 1232, 130 L.R.R.M. at 2660–61.

The *TWA* Court also noted that the anti-union effects of intra-union competition and cleavage in the workforce were secondary effects of economic weapons, fairly within the arsenal available to employers during a period of self-help.[41] Noting that some amount of cleavage was inevitable from the division between strikers and non-strikers, the Court held that the cleavage created by TWA's crossover policy was insufficient to bring it within *Erie Resistor*'s proscription.[42]

Holding that neither of *Erie Resistor*'s rationales for limiting an employer's permanent replacement policies was applicable, the *TWA* Court declined to expand *Erie Resistor* to prohibit TWA's crossover policy.[43] The Court stated that there was no impermissible discrimination in the filling of available positions based upon union activity. The Court reasoned that the positions occupied by junior crossovers and permanent hires were simply not available positions. The Court determined that no discrimination had occurred because the strike-caused vacancies had been filled by application of the pre-existing neutral seniority program.[44]

The Court also rejected IFFA's argument that it should distinguish crossovers from permanent replacements under *Mackay*.[45] The Court reasoned that distinguishing crossovers from new hires would penalize non-strikers, solely to benefit strikers. The Court recognized that the displacement of permanent replacements was often the result of agreements that followed a successful strike, but held that neither the federal common law under the NLRA nor the Act itself required such a result.[46] Lastly, the Court rejected the

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[41] *Id.* at 1232, 130 L.R.R.M. at 2661.

[42] *Id.* at 1231–32, 130 L.R.R.M. at 2660–61. The union argued that the TWA crossover policy would create a cleavage between junior crossovers and reinstated full-term strikers long after the termination of the strike because the desirable work allocations were unlikely to be vacant to be bid upon for a considerable time after the end of the strike. If junior crossovers had filled all the desirable positions during the strike and they could maintain these positions after the strike, then senior full-term strikers would not be able to obtain these positions. The union also argued that resentful rifts would be created because the crossover policy created a competition among strikers to return to work and avoid displacement, undermining collective action protected by the RLA. *Id.* at 1231–32, 130 L.R.R.M. at 2661.

[43] *Id.* at 1232, 130 L.R.R.M. at 2661.

[44] *Id.*

[45] *Id.* at 1233, 130 L.R.R.M. at 2661.

[46] *Id.* at 1233, 130 L.R.R.M. at 2661–62. The Court stated:

> We see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired permanent replacements . . . to be displaced by more senior full-term

union's argument that, even if permissible under the NLRA, self-help available to employers was limited by the RLA.[47] The union had argued that the TWA crossover policy influenced or coerced TWA employees not to strike, or to abandon the strike, and that this represented an attempt to induce the TWA employees not to remain members of the union in contravention of the RLA.[48] The Court first noted that, although helpful in interpreting the RLA, the NLRA should not be imported wholesale because of significant differences between the statutory schemes.[49] The Court then dismissed the union's argument, interpreting the protections of the RLA as directed primarily to the protection of pre-certification rights of unorganized employees.[50] The Court stated that its prior decisions had held that the avenues of self-help available under the RLA were greater than those available under the NLRA.[51]

Moreover, the Court stated that after the statutory procedures of the RLA have been exhausted, it is not the role of the government to intervene on behalf of either bargaining party.[52] The Court noted that the RLA did not provide any guidance as to the permissible scope of self-help. The Court added that this lack of guidance did not amount to congressional approval of all forms of self-help, but did indicate that the Court should only limit self-help where it would strike a fundamental blow to either a union or an employer.[53] Because the statutory scheme of dispute resolution under the RLA

> strikers is precisely to visit the consequences of the lost gamble on those who refused the risk.

Id. at 1233, 130 L.R.R.M. at 2661.

[47] *Id.* at 1233–34, 130 L.R.R.M. at 2662.

[48] *Id.*

[49] *Id.* at 1233, 130 L.R.R.M. at 2662. The Court used as an example the fact that the detailed panoply of law governing secondary picketing under the NLRA was not applicable to disputes governed by the RLA. *Id.* (citing Trainmen v. Jacksonville Terminal, 394 U.S. 369, 383, 70 L.R.R.M. 2961, 2966 (1969)).

[50] *Id.* at 1234, 130 L.R.R.M. at 2662. The Court noted that the purpose of the section was to ensure proper representation of labor in the procedural framework that the RLA provides for dispute resolution and to ensure that the labor representative was not improperly influenced or controlled by the employer. *Id.* at 1234, 130 L.R.R.M. at 2662–63.

[51] *Id.* According to the *TWA* Court, "parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute ... [may] employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." *Id.* (citing *Trainmen*, 394 U.S. at 391–92, 70 L.R.R.M. at 2969).

[52] *Id.* at 1234, 130 L.R.R.M. at 2663.

[53] *Id.* at 1235, 130 L.R.R.M. at 2663. The Court reasoned that judicial intervention is only appropriate where the statutory dispute resolution system would otherwise be put in jeopardy. *Id.*

had been followed in its entirety and the crossover policy was a permissible, peaceful use of economic power, the Court concluded that judicial intervention was inappropriate.[54]

The Supreme Court concluded that the crossover policy was not illegal under either the RLA or the NLRA.[55] The Court decided that the policy was neutral because it applied a pre-existing agreement to all working employees. Further, the Court concluded that the cleavage and competition produced were permissible secondary effects of TWA's use of peaceful economic power.[56]

Justice Brennan, writing in dissent, disagreed with the majority's characterization of the case.[57] Justice Brennan asserted that the issue was not whether crossovers had some right to employment at the end of a strike, but rather, whether an employer could discriminate between crossovers and full-term strikers in the allocation of jobs at the conclusion of a strike. He concluded that such discrimination was inherently destructive of the right to strike.[58]

Justice Brennan characterized the *Mackay* decision as only a narrow exception to the NLRA's proscription of anti-union discrimination—an exception justified solely because of an employer's need to maintain the business.[59] According to Justice Brennan, there was no such justification for the discrimination between crossovers and full-term strikers; TWA's crossover policy did not fall within *Mackay*'s narrow exception and was thus prohibited.[60]

Justice Brennan argued that, under *Mackay*, the treatment of permanent replacements should differ from crossovers.[61] Justice Brennan reasoned that the crossover policy created competition between strikers to abandon the strike and avoid replacement, and thus divided the strikers. By contrast, the use of permanent replacements only produces a group incentive to return to work. Justice Brennan asserted that this divide and conquer technique was inherently destructive of union activity and collective bargaining. Jus-

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 1235, 130 L.R.R.M. at 2663–64 (Brennan, J., dissenting).

[58] *Id.* Unlike the majority, the dissent asserted that the protection of an employee's right to strike was a fundamental role of § 2(4) of the RLA. *Id.* at 1235–36, 130 L.R.R.M. at 2664 (Brennan, J., dissenting). The majority had emphasized that § 2(4) was directed primarily to protection of the pre-certification and organization of labor and not to the right to strike. *See supra* note 50 and accompanying text.

[59] *Id.* at 1236–37, 1238, 130 L.R.R.M. at 2664, 2665 (Brennan, J., dissenting).

[60] *Id.* at 1237–38, 130 L.R.R.M. at 2665–66 (Brennan, J., dissenting).

[61] *Id.* at 1238, 130 L.R.R.M. at 2666 (Brennan, J., dissenting).

tice Brennan concluded, however, that the infringement of employee rights caused by TWA's crossover policy made it a forbidden labor practice.[62]

In a separate dissent, Justice Blackmun argued that the Supreme Court's past RLA decisions had attempted to strike a balance between the business needs of an employer and the long-term stability of labor relations.[63] As an example of this balance, Justice Blackmun looked to the principles espoused in *NLRB v. Fleetwood Trailer Co.*[64]

In *Fleetwood*, the Supreme Court stated that an employer's refusal to reinstate strikers could be considered discriminatory unless the employer could justify its actions because of business necessity. The Court stated that the hiring of permanent replacements was one situation in which an employer had "legitimate and substantial business justifications."[65] Justice Blackmun contended that the *TWA* case ought to be remanded in order to determine whether the crossover policy adopted by TWA also had such business justifications.[66]

The Supreme Court's decision in *TWA* is significant because it increases the power of permanent replacement as an economic weapon against strikes. In *TWA*, the Court held that, under both the RLA and NLRA, crossovers need not be displaced in order to reinstate full-term strikers at the conclusion of a strike.[67] This decision expands the *Mackay* doctrine regarding permanent replacements and limits the protection of striker seniority developed in *Erie Resistor*. The effect of the *TWA* Court's expansive reading of the *Mackay* doctrine is that an employer need not displace crossovers in order to reinstate full-term strikers, even where the crossovers are junior to the full-term strikers.

However facially similar the positions of crossover and newhire may be, the rationale used to protect the positions of crossovers

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[62] *Id.* at 1239, 130 L.R.R.M. at 2666 (Brennan, J., dissenting).

[63] *Id.* at 1240, 130 L.R.R.M. at 2667 (Blackmun, J., dissenting).

[64] *Id.* at 1244, 130 L.R.R.M. at 2670–71 (Blackmun, J., dissenting). *See Fleetwood*, 389 U.S. 375, 66 L.R.R.M. 2737 (1967); *see also* NLRB v. Great Dane Trailers, 388 U.S. 26, 65 L.R.R.M. 2465 (1967).

[65] *Fleetwood*, 389 U.S. at 379, 66 L.R.R.M. at 2738.

[66] *TWA* at 1248, 130 L.R.R.M. at 2673 (Blackmun, J., dissenting). On this point, Justice Blackmun disagreed with Justice Brennan who categorically denied the legality of the crossover policy, finding that it could not be justified by the business necessity of TWA. *Id.* at 1246, 130 L.R.R.M. at 2672 (Blackmun, J., dissenting).

[67] *TWA* at 1235, 130 L.R.R.M. at 2663.

in *TWA* is widely divergent from that which sanctioned the employment of permanent replacements in *Mackay*. Under *Mackay*, it is not an unfair labor practice to hire replacement workers in "an effort to carry on the business" because the employer has "the right to protect and continue his business by supplying places left vacant by strikers."[68] In *TWA*, the Court based its decision on two factors: that the positions occupied by crossovers are not available to be filled; and that the crossovers' right not to strike protects them from the risk of displacement.[69] Neither of these arguments is consistent with the original rationale of *Mackay*.

The majority gives little reason for why crossovers should be guaranteed the same protections as new-hires under *Mackay*. The majority accepts TWA's argument that to require that crossovers be displaced when new hires cannot be displaced would be anomalous.[70] The Court, however, finds nothing anomalous about allowing juniors to displace their seniors by crossing the picket line even though this effectively strips the senior strikers of their rights under the seniority bidding plan. Although the Court did not find any anti-union discrimination on the part of TWA, it is clear that crossovers do not support the union as strongly as full-term strikers.[71] As a result, the crossover policy operates de facto to discriminate against employees because of their degree of union activity. The Court previously noted that direct evidence of discriminatory intent was unnecessary where an employer's actions have obvious discriminatory impact.[72]

The *TWA* Court should have made an independent determination of whether the TWA crossover policy had legitimate and substantial business justifications.[73] The Supreme Court has previously held that an employer could not differentiate between striking and non-striking employees unless the action had legitimate and substantial business justifications.[74] Although the Court has also held that hiring permanent replacements is a legitimate and substantial business justification for refusing to reinstate strikers, the position

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[68] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345, 2 L.R.R.M. 610, 614 (1938).

[69] *See TWA*, 109 S. Ct at 1232, 130 L.R.R.M. at 2661.

[70] *Id.* at 1230, 130 L.R.R.M. at 2660.

[71] *Id.* at 1232, 130 L.R.R.M. at 2661.

[72] See *supra* notes 33–37 and accompanying text for a discussion of *Erie Resistor*.

[73] Justice Blackmun, in his dissent, urged the application of this test. See *supra* notes 63–66 and accompanying text.

[74] NLRB v. Great Dane Trailers, 388 U.S. 26, 27–35, 65 L.R.R.M. 2465, 2466–69 (1967).

of crossovers is not identical to the position of permanent replacements.[75] Although it mentioned the business justification standard, the majority in *TWA* did not apply it to the crossover policy adopted by TWA.[76] In assuming that crossovers were analogous to new-hires, the Court decided that a de novo determination regarding crossovers was unnecessary because hiring of permanent replacements has legitimate and substantial business justifications.[77]

Only Justice Blackmun in his dissent both stated and applied the business justification analysis. Justice Blackmun concluded that there was insufficient evidence by which to judge the employer's business justifications for the crossover policy.[78] The majority completely ignored the substantial and legitimate business justification analysis because the right not to strike and the tenurial rights of crossovers do not fit such an analysis.

Although decided under the RLA, the holding of *TWA* will apply to future cases brought under the NLRA. The *TWA* decision permits employers to continue to employ junior crossovers at the end of a strike and refuse to reinstate senior full-term strikers. The Court implied that this is a natural progression of the *Mackay* decision; it is not. The basis of the Court's decision was the importance of the employee's right not to strike, which is far removed from the business necessity rationale of *Mackay*. In effect, the Court created a new doctrine that protects crossovers from displacement because of their right not to strike.

The *TWA* Court declined to apply *Erie Resistor*, which limited the ways in which an employer could give incentives to employees who worked during a strike. Erie Resistor's grant of super-seniority was so inherently destructive of employee rights that proof of the employer's discriminatory intent was unnecessary. The Court made it clear that discriminatory motivation could be inferred from discriminatory impact.

In *TWA*, the Court held that the employer, acting under a neutral plan, can remove all of the accrued benefits[79] of seniority

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[75] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380–81, 66 L.R.R.M. 2737, 2739 (1967).

[76] The Court cited *Fleetwood* merely as an affirmation of the *Mackay* rule. *See TWA*, 109 S. Ct. 1225, 1230, 130 L.R.R.M. 2657, 2660 (1989).

[77] *See id.* at 1235, 130 L.R.R.M. at 2663.

[78] *See id.* at 1246, 130 L.R.R.M. at 2672 (Blackmun, J., dissenting). Justice Brennan, who joined in parts of Justice Blackmun's dissent, did not concur with Justice Blackmun with regard to application of the substantial business justification test. *See id.*

[79] The benefits I refer to here are not the ability to outbid others for positions, but the

and distribute them to the non-striking employees.[80] The Court allowed the form of the employer's actions to triumph over their function, and turns a blind eye to the realities of the situation. In effect, the *TWA* Court ignored the teachings of *Erie Resistor* particularly with respect to the discriminatory impact of TWA's crossover policy.

The Court also ignored the legitimate and substantial business justification standard. This omission arose, in part, because the rationale behind the Court's decision is the right not to strike, rather than business necessity. This rationale reveals that factors other than business necessity may be determinative with respect to who is replaced at the termination of a strike. The Court's emphasis of the right not to strike as a factor in this analysis demonstrates that the Court is willing to expand that right to the detriment of its inverse—the right to strike.

IV. SECTION 1983

A. * *Emergence of a Section 1983 Cause of Action under the NLRA:* Golden State Transit Corp. v. City of Los Angeles[1]

The United States Supreme Court has stated that parties to collective bargaining are guaranteed not only those rights which are specifically enumerated in the National Labor Relations Act ("NLRA" or the "Act"), but also those rights which are implicit in the Act.[2] The Supreme Court has also held that individual states are preempted from interfering with the rights secured by the NLRA.[3] If a state does interfere with a right secured by the NLRA, a party to collective bargaining has two potential remedies. First, a party may petition a federal district court for declaratory or in-

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ultimate consequences of seniority, such as the actual occupancy of a desirable domicile and job security.

[80] *See TWA*, 109 S. Ct. at 1235, 130 L.R.R.M. at 2663.

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[1] 110 S. Ct. 444, 132 L.R.R.M. 3015 (1989).

[2] *See*, R. GORMAN, BASIC TEXT ON LABOR LAW, ch. XXXII § 1 (1976) (describing preemption based upon state violations of the explicit provisions of § 7 and § 8 of the NLRA, which outline specific labor practices that are deemed permissible); Golden State Transit Corp. v. City of Los Angeles (*Golden State I*), 475 U.S. 608, 614, 121 L.R.R.M. 3233, 3236 (1986) (describing preemption based upon state and municipal violations of congressional intent which is implicit in the NLRA).

[3] *Golden State I*, 475 U.S. at 613, 121 L.R.R.M. at 3235–36.

junctive relief.[4] Second, a party may have a claim for compensatory damages under 42 U.S.C. section 1983 ("section 1983") if a state violates any rights secured by the Constitution or by federal laws.[5] The Supreme Court, however, has concluded that not every violation of federal statutory law will give rise to a damage claim under section 1983.[6] In 1989, the Court, for the first time, combined section 1983 jurisprudence with the labor law preemption doctrine, creating a claim for compensatory damages under section 1983.[7]

In the labor context, the Supreme Court has held that the rights guaranteed by the NLRA prohibit states from interfering with collective bargaining disputes.[8] In the 1976 decision of *Machinists v. Wisconsin Employment Relations Commission*, the United States Supreme Court established a preemption doctrine that prevents state interference with labor disputes that Congress intended to be left unregulated.[9] In *Machinists*, the union sought to apply economic pressure on the employer during collective bargaining by refusing to allow union members to work overtime.[10] The employer petitioned both the National Labor Relations Board ("NLRB") and the state's employment relations commission to enjoin the union's activity.[11] Although the NLRB dismissed the complaint, the state commission granted an injunction under a state statute that prohibited concerted union activities, apart from strikes, that were designed to disrupt productive activity.[12] In overturning the state employment

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[4] Golden State Transit Corp. v. City of Los Angeles (*Golden State II*), 110 S. Ct. 444, 452, 132 L.R.R.M. 3015, 3022 (1989) (Kennedy, J., dissenting).

[5] Section 1983 provides:

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

42 U.S.C. § 1983 (1988).

[6] *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981) (claims for damages due to violation of federal law under § 1983 are subject to recognized exceptions); see also *infra* notes 16–19 and accompanying text for a discussion of the analysis applied to determine whether a § 1983 cause of action is available.

[7] *Golden State II*, 110 S. Ct. at 453, 132 L.R.R.M. at 3020 (Kennedy, J., dissenting).

[8] *Golden State I*, 475 U.S. 608, 619, 121 L.R.R.M. 3233, 3238 (1986).

[9] *Id.* at 614, 121 L.R.R.M. at 3236 (in *Golden State I*, the Court discussed the practical consequences of the *Machinists* preemption doctrine).

[10] Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 134, 92 L.R.R.M. 2881, 2881–82 (1976).

[11] *Id.* at 135, 92 L.R.R.M. at 2882.

[12] *Id.* at 135–36, 92 L.R.R.M. at 2882.

commission, the Supreme Court reasoned that the use of economic weapons by either party to a labor dispute is "part and parcel" of the process of collective bargaining.[13] Although the Court held that states are preempted from regulating rights secured by the NLRA, it did not address whether such illegal state regulation also gave rise to damages under section 1983.[14]

Outside of the labor context, the Supreme Court has concluded that claims for deprivations of federal statutory rights are available under section 1983.[15] In the 1981 case of *Middlesex County Sewerage Authority v. National Sea Clammers Association*, the United States Supreme Court established a two-step analysis to determine whether a plaintiff may assert a claim under section 1983.[16] In *National Sea Clammers*, the damages claim was based on an alleged violation of federal clean water statutes due to the pollution of plaintiffs' clamming grounds.[17] The Court stated that a plaintiff must first show a violation of some federal right in order to maintain a section 1983 cause of action.[18] Once the plaintiff establishes such a violation, the defendant may demonstrate that Congress intended to foreclose a section 1983 remedy by providing a comprehensive enforcement mechanism in the legislation.[19] Applying this analysis, the Court denied a section 1983 claim, concluding that the comprehensive enforcement mechanisms in the clean water statutes at issue were evidence of Congress's intent to foreclose other remedies.[20]

During the *Survey* year, the United States Supreme Court, in *Golden State Transit Corp. v. City of Los Angeles* (*Golden State II*), examined the preemption doctrine in conjunction with section 1983 jurisprudence.[21] The Court held that when a state interferes with a collective bargaining right secured by the Act, a party to the bargaining may seek compensatory damages against the state under section 1983.[22]

Golden State II involved a dispute between the Teamsters Union and Golden State Transit Corporation ("GST"), in which the City

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[13] *Id.* at 149, 155, 92 L.R.R.M. at 2885, 2889.

[14] *Golden State II*, 110 S. Ct. 444, 453–54, 455, 132 L.R.R.M. 3015, 3020, 3022 (1989) (Kennedy, J., dissenting).

[15] *See* Maine v. Thiboutot, 448 U.S. 1, 4 (1980); 42 U.S.C. § 1983 (1988).

[16] 453 U.S. 1, 19–21 (1981).

[17] *Id.* at 4–5.

[18] *Id.* at 19.

[19] *Id.* at 19–20.

[20] *Id.* at 20–21.

[21] 110 S. Ct. at 447–48, 132 L.R.R.M. at 3016.

[22] *Id.* at 450, 132 L.R.R.M. at 3018.

of Los Angeles intervened.[23] In 1980, GST applied for a renewal of its cab franchise from the city. While the franchise renewal was still being considered by the city, the Teamsters struck GST. The Teamsters argued against renewal of the franchise at the city council's public hearing on the franchise issue. The council voted to temporarily extend the franchise, but conditioned the renewal on a settlement of the labor dispute within a specified period. The period expired without a settlement and the council held a second public hearing. The Teamsters again publicly opposed the franchise renewal, and the council voted against GST's motion to extend the franchise.[24] GST then initiated a suit against the City of Los Angeles in federal district court.[25]

The district court found that the labor dispute had motivated the city's denial of the franchise renewal.[26] The court stated that by considering the labor dispute, the city had denied GST a permissible economic weapon, thereby violating the preemption doctrine established in *Machinists*. Because the NLRA preempted the city's denial of the franchise renewal, the district court entered a preliminary injunction against the city.[27] In addressing the city's appeal, the United States Court of Appeals for the Ninth Circuit overturned the district court, holding that the record indicated that the city's decision was motivated solely by permissible concerns of municipal transportation.[28]

On appeal by the union, the Supreme Court, in *Golden State Transit Corp. v. City of Los Angeles* (*Golden State I*), disagreed, reasoning that the preemption doctrine of *Machinists* applied to the labor dispute between the Teamsters and GST.[29] The Court held that the economic weapons the union employed during the dispute were permissible, and that the city's intervention destroyed the balance of power intended by Congress under the Act.[30] On remand, the district court enjoined the city to reinstate the franchise, but denied the claim for compensatory damages under section 1983 which GST

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[23] *See Golden State I*, 475 U.S. 608, 609 -11, 121 L.R.R.M. 3233, 3234–35 (1986) (the predecessor case to *Golden State II*, in which the Supreme Court described the factual basis of the labor dispute).

[24] *Id.* at 610–11, 121 L.R.R.M. at 3234–35.

[25] *Id.*

[26] *Id.* at 611, 121 L.R.R.M. at 3235.

[27] *Id.* at 611–12, 121 L.R.R.M. at 3235.

[28] *Id.* at 620, 121 L.R.R.M. at 3238 (Rehnquist, J., dissenting).

[29] *Id.* at 614, 121 L.R.R.M. at 3236.

[30] *Id.* at 619, 121 L.R.R.M. at 3238.

had asserted.[31] The circuit court affirmed the district court's decision, and the city again appealed the decision to the Supreme Court.[32]

In *Golden State II*, the Supreme Court established a private cause of action for compensatory damages under section 1983 when a state violates a right secured by the NLRA.[33] The Court applied its two-prong analysis set forth in *National Sea Clammers* in deciding that an enforceable remedy exists under section 1983, arising out of violations of the Act.[34] The Court stated that the plaintiff must first establish the violation of a federal right that Congress intended the NLRA to protect.[35] The Court noted that, in order to establish a protectable right, the plaintiff must demonstrate a definitive right binding upon the governmental unit, rather than a mere expression of congressional preference.[36] Similarly, the Court stated that the right asserted must not be vague, and must be judicially enforceable. The Court then affirmed that where a right is demonstrated, the defendant is free to show that Congress foreclosed the section 1983 remedy by creating a comprehensive enforcement scheme for the claimed right.[37]

Applying the first prong of the test, the *Golden State II* Court concluded that the city's interference with the collective bargaining process constituted a violation of federally protected rights under the NLRA.[38] The Court reasoned that, in enacting the NLRA, Congress had done more than merely occupy the field of labor relations. Rather, the Court stated, Congress had established substantive rights benefiting the parties subject to collective bargaining against both each other and the state. The Court determined that the rights protected by the Act are not solely those enumerated in the Act, but are all of those rights that Congress intended to protect from governmental interference. Specifically, the Court stated that the *Machinists* doctrine prohibits state interference with rights Congress intended to confer through the NLRA.[39] Thus, the Court

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[31] *Golden State II*, 110 S. Ct. 444, 446–48, 132 L.R.R.M. 3015, 3016 (1989).

[32] *Id.*

[33] *Id.* at 452, 132 L.R.R.M. at 3019.

[34] *Id.* at 448, 132 L.R.R.M. at 3016–17.

[35] *Id.* at 448, 132 L.R.R.M. at 3016.

[36] *Id.* at 448, 132 L.R.R.M. at 3016–17.

[37] *Id.* at 448, 132 L.R.R.M. at 3017.

[38] *Id.* at 450, 132 L.R.R.M. at 3018.

[39] *Id.* at 451, 132 L.R.R.M. at 3018–19; *see also* Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 149–151, 92 L.R.R.M. 2881, 2886–2887 (1976) (explaining

reasoned, Congress meant to create a zone free from governmental regulation, even though more peaceful measures may be available to the parties.[40] Similarly, the Court rejected the state's argument that Congress's failure to prohibit explicitly certain state activities implied that state intervention was permissible. The Court held instead that rights implicit in the legislation were to receive protection equivalent to the protection given to those rights specifically enumerated in the NLRA.[41]

Addressing the second prong of the analysis, the Court stated that the City of Los Angeles had failed to show a comprehensive scheme of federal enforcement that would preclude a private remedy under section 1983.[42] The Court recognized that the NLRA grants the NLRB exclusive jurisdiction to restrict unfair labor practices by both unions and employers. The NLRB, however, has no power to prohibit governmental interference with activities that are protected by the NLRA. According to the Court, remedies for such interference originate from private claims under the preemption doctrine, which may give rise to injunctive or declaratory relief.[43] The Court concluded that the broad remedial scope of section 1983 was not precluded by other enforcement mechanisms in the NLRA, and therefore recognized a private right of action under section 1983 for violation of the implicit and explicit provisions of the NLRA.[44]

Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, dissented from the majority's holding. The dissent observed that the Supremacy Clause prohibited the city from interfering in collective bargaining.[45] The dissent, however, concluded that the city's mere misapprehension of the bounds of federal and state power should not give rise to a private cause of action under section 1983.[46]

In addressing the preemption doctrine, the dissent reasoned that the interest protected under the doctrine is immunity from

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that the sources of congressional intent may be found in the decisions of the NLRB, the rules of statutory interpretation, and court decisions interpreting the NLRA).

[40] *Golden State II*, 110 S. Ct. at 451, 132 L.R.R.M. at 3019.

[41] *Id.*

[42] *Id.* at 449–50, 132 L.R.R.M. at 3017.

[43] *Id.* at 455, 132 L.R.R.M. at 3022 (Kennedy, J., dissenting) (recognizing that plaintiffs may vindicate *Machinists* preemption claims by seeking declaratory and injunctive relief in district court).

[44] *Id.* at 450, 132 L.R.R.M. at 3018.

[45] *Id.* at 453, 132 L.R.R.M. at 3020 (Kennedy, J., dissenting).

[46] *Id.*

state action, not a substantive right. The dissent stated that, although GST was properly relieved from the state's interference during collective bargaining, compensatory damages were inappropriate. The dissent relied upon the legislative history of section 1983, as originally enacted, to argue that the framers contemplated "rights" to mean only those rights secured by the Constitution.[47] The dissent recognized that recent Court decisions had expanded "rights" to include statutorily created entitlements as well, but concluded that the NLRA secured no such entitlement. The dissent reasoned that the Supremacy Clause, as applied to the NLRA, was designed to draw the bounds of federal and local jurisdiction, not to establish damages for parties involved in labor disputes when those boundaries are crossed. Thus, the dissent would have limited GST's remedies to declaratory or equitable relief through powers granted to the district courts under various federal jurisdictional statutes.[48]

In *Golden State II*, the Court combined the preemptive rule of *Machinists* with section 1983 jurisprudence to create a new private cause of action under the NLRA.[49] The right created in *Golden State II* is consistent with other economic rights that the Court has deemed worthy of protection under section 1983.[50] Furthermore, protection of collective bargaining through a private cause of action is a necessary measure to encourage the furtherance of Congress' intent in enacting the NLRA. The extension of the *Machinists* rule to section 1983 creates a right designed to benefit the economic interests of both parties to collective bargaining.

The Court, in *Golden State II*, recognized the important role that the use of economic weapons has in the collective bargaining process.[51] Regulation of these economic weapons through state ac-

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[47] *Id.* at 454, 132 L.R.R.M. at 3021 (Kennedy, J., dissenting).

[48] *Id.* at 455–56, 132 L.R.R.M. at 3022 (Kennedy, J., dissenting).

[49] *See id.* at 450, 132 L.R.R.M. at 3018.

[50] *See, e.g.*, Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 419, 432 (1987) (holding that federal housing benefits are sufficiently specific and definite to qualify as enforceable rights under § 1983); Maine v. Thiboutot, 448 U.S. 1, 3–4 (1980) (holding that state recission of Social Security benefits violated federal statutory rights protected by § 1983).

[51] *Golden State II*, 110 S. Ct. at 452, 132 L.R.R.M. at 3019 ("the interests in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another,' is a right specifically conferred on employers and employees by the NLRA"). Outside of the labor context, the Court has held that § 1983 protects rights beyond those encompassed in equal protection or civil rights legislation alone. *See Thiboutot*, 448 U.S. at 5 (under § 1983, states may be made to respond to damages not only for violations of civil rights, but for violations of federal constitutional and statutory rights as well). The Court has recognized that certain economic rights guaranteed by federal statutes, were intended to remain free

tion constitutes more than mere jurisdictional infringement. Such regulation threatens to upset the balance of rights which assures an equitable economic outcome through collective bargaining.[52] The right to bargain collectively is inextricably bound to the relative economic positions of the parties to the dispute. Thus, the right to use relative strength during collective bargaining can be seen as an implicit entitlement of economic rights granted through the NLRA.

The circumstances of *Golden State II* provide an excellent example of the economic entitlement implicitly granted in the NLRA. In *Golden State II*, the city's actions caused a total cessation of the plaintiff's business, while allowing the union to negotiate with carriers who could have succeeded GST's franchise.[53] Given the potential economic ramifications to either a union or an employer that may result from the regulation of otherwise permissible economic weapons, it is difficult to distinguish the rights secured by the NLRA from more direct economic rights, such as welfare or housing assistance, which are protected under section 1983. The dissent recognized, but disagreed with, the judicial expansion of section 1983 to protect federal statutory entitlements from state interference.[54] The dissent's narrow interpretation of both the legislative history of section 1983, and the rights secured by the NLRA, however, ignores the logical conclusion that collective bargaining rights are equivalent to a federal statutory entitlement of economic position during a labor dispute.

Furthermore, in the absence of a section 1983 cause of action, local or state agencies have little incentive to refrain from interfering in divisive collective bargaining situations. Although the NLRA has sole jurisdiction to curtail unfair labor practices between labor and management, it has no jurisdiction over cases where local agencies have prohibited otherwise permissible collective bargaining devices.[55] Prior to *Golden State II*, the sole remedy was injunctive relief based on the preemption doctrine. Such relief, however, fails to account for the economic damage that may be incurred by either labor or management while the preemption action is pending.

In cases such as *Golden State II*, local elected bodies may have an obvious political bias to favor the party with the greatest relative

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from state or local regulation. *See Wright*, 479 U.S. at 421–22, 432 (federal housing benefits); *Thiboutot*, 448 U.S. at 3, 4 (welfare payments under the Social Security Act).

[52] *Golden State II*, 110 S. Ct. at 450, 132 L.R.R.M. at 3018.

[53] *Golden State I*, 475 U.S. 608, 610, 121 L.R.R.M. 3233, 3234 (1986).

[54] *Golden State II*, 110 S. Ct. at 454, 132 L.R.R.M. at 3021.

[55] *Id.* at 450, 132 L.R.R.M. at 3017–18.

political power. Prior to *Golden State II*, this inclination was not offset by a concomitant penalty should the local action be deemed to violate the NLRA. *Golden State II* provides just such a disincentive against capricious local action, thereby encouraging more prudent consideration on the part of local bodies before they intervene in legal collective bargaining disputes.

The extension of a private right of action under section 1983 to cover violations of the *Machinists* preemption doctrine also creates a nonpartisan rule of law favoring neither management nor labor but benefiting both. The incorporation of the *Machinists* rule assures that the right of an employer to maintain an action for damages (where a state body interfered with the employer's permissible economic weapons) extends to labor as well.[56] *Golden State II* thus protects both parties to collective bargaining from interference with the rights intended to be conveyed through the NLRA without imposing an obvious bias in favor of either labor or management.

In *Golden State II*, the Supreme Court held that a party to collective bargaining may maintain a private cause of action under section 1983 should a state violate a right secured by the NLRA. The Court recognized the economic rights that Congress sought to secure through the NLRA by maintaining the availability of certain economic weapons for use by either party during collective bargaining. The decision thus provides a necessary disincentive to capricious local activity that may be spurred by political motivations or by the mere disregard of the jurisdictional limitations which the NLRA seeks to impose.

V. Railway Labor Act

A. * *The Supreme Court's New Standard of Review for Resolving Disputes Under the RLA*: Consolidated Rail Corporation v. Railway Labor Executives' Association[1]

The Railway Labor Act of 1926 ("RLA") seeks to prevent strikes and to promote stability in the railroad and airline industries by

[56] *Machinists* held that economic weapons employed by either labor or management were intended to be free from local interference. Consequently, the rule of *Golden State II* would have allowed the union in *Machinists* to maintain a private cause of action for damages suffered as a result of the state's denial of employees' right to refuse overtime. Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 154–55, 92 L.R.R.M. 2881, 2889 (1976).

* By Mark W. Mancinelli, Editor, Boston College Law Review.

[1] 109 S. Ct. 2477, 131 L.R.R.M. 2601 (1989).

imposing a duty upon management and labor to make every reasonable effort to settle disputes that relate to their collective bargaining agreements.[2] The procedure for resolving disputes arising under the RLA hinges upon whether the disagreement between management and labor gives rise to a "major" or a "minor" dispute.[3] The characterization of a dispute as "major" or "minor" also determines whether a contested employment change can be made before the dispute is resolved through the procedures established by the RLA.[4]

A "major" dispute under the RLA occurs when one party attempts to implement policy changes that are outside the scope of the rights contained within the parties' existing collective bargaining agreement.[5] When a dispute is "major," the RLA requires the parties to complete an exhaustive process of negotiation, mediation, and arbitration in order to encourage voluntary resolution of the dispute.[6] During this conciliation period, either party may obtain an injunction to prevent the other party from unilaterally implementing employment practices that are not within the terms of the parties' existing collective bargaining agreement.[7]

In contrast, "minor" disputes involve disagreements over the meaning or proper application of terms already contained in the

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[2] 45 U.S.C. §§ 151–188 (1981). Section 152 of the RLA provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Id. § 152.

[3] Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U.S. 711, 722–23, 16 L.R.R.M. 749, 754–55 (1945). The language of the RLA does not explicitly distinguish between "major" and "minor" disputes. *See* Railway Labor Executives' Ass'n. v. Norfolk & Western Ry., 833 F.2d 700, 704, 126 L.R.R.M. 3121, 3123–24 (7th Cir. 1987). The Supreme Court created the distinction between "major" and "minor" disputes in *Elgin*, 325 U.S. at 722–23, 16 L.R.R.M. at 754–55.

[4] Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N.R.R. Co., 802 F.2d 1016, 1021, 123 L.R.R.M. 2593, 2597 (8th Cir. 1986).

[5] *Elgin*, 325 U.S. at 723, 16 L.R.R.M. at 754–55. According to the *Elgin* Court, "major" disputes look to the "acquisition of rights for the future, not to rights claimed to have vested in the past." *Id.*

[6] *Burlington*, 802 F.2d at 1021, 123 L.R.R.M. at 2597. For details of the procedure for resolving "major" disputes, see Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378, 70 L.R.R.M. 2961, 2964 (1968).

[7] *Burlington*, 802 F.2d at 1021, 123 L.R.R.M. at 2597. The parties' duty to maintain the status quo during the resolution of "major" disputes arises under the RLA, 45 U.S.C. §§ 156, 160 (1981); *see* Detroit & Toledo Shore Line R.R. Co. v. United States Transp. Union, 396 U.S. 142, 150–53, 72 L.R.R.M. 2838, 2841–42 (1969).

existing collective bargaining agreement.[8] Under the RLA, parties must settle "minor" disputes through compulsory arbitration conducted by the National Railway Adjustment Board (the "NRAB").[9] During the arbitration period, an injunction is not available to the disputing parties, and thus, either party may implement a contested employment policy change at any time.[10]

The distinction between "major" and "minor" disputes is a recurring issue in a wide variety of lawsuits between management and labor in the railroad and airline industries.[11] Although this distinction is fundamental in determining the procedure for resolving management-labor disputes, the federal circuit courts have applied various standards for determining whether a dispute is "major" or "minor" under the RLA.[12] Prior to 1989, the United States Supreme Court had not ruled on the proper standard for distinguishing between "major" and "minor" disputes.

During the *Survey* year, in *Consolidated Rail Corporation v. Railway Labor Executives' Association*, the United States Supreme Court adopted a standard for distinguishing between "major" and "minor" disputes under the RLA.[13] In *Consolidated Rail*, the Supreme Court

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[8] *Elgin*, 325 U.S. at 723, 16 L.R.R.M. at 754–55. As the Court articulated in *Elgin*, "minor" disputes involve claims to "rights accrued, not merely to have rights created for the future." *Id.*, 16 L.R.R.M. at 755.

[9] *Burlington*, 802 F.2d at 1021, 123 L.R.R.M. at 2597.

[10] Railway Labor Executives' Ass'n. v. Pittsburgh & Lake Erie R.R. Co., 845 F.2d 420, 424, 128 L.R.R.M. 2030, 2033 (3d Cir. 1988).

[11] *See, e.g., id.* at 428, 128 L.R.R.M. at 2036 (railroad's decision to sell assets with resultant elimination of jobs is a "major" dispute); Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp., 788 F.2d 794, 798–99, 122 L.R.R.M. 2020, 2023 (1st Cir. 1986) (railroad's operational changes resulting in lower wages constituted "major" dispute); Radin v. United States, 699 F.2d 681, 683, 112 L.R.R.M. 2560, 2562 (4th Cir. 1983) (employee discharge grievance gives rise to a "minor" dispute).

[12] For example, in the 1972 case of *International Brotherhood of Electrical Workers v. Washington Terminal Co.*, the United States Court of Appeals for the District of Columbia Circuit held that a "minor" dispute arises if it is "reasonable" to believe that the terms of an existing collective bargaining agreement cover a new policy change. 473 F.2d 1156, 1173–75, 82 L.R.R.M. 2030, 2042, 2044 (D.C. Cir. 1972). By comparison, in the 1988 case of *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, the United States Court of Appeals for the Ninth Circuit held that a contested change in employment practices gives rise to a "minor" dispute whenever the change is "arguably" within the terms of the parties' existing agreement. 838 F.2d 1087, 1091, 127 L.R.R.M. 2812, 2815 (9th Cir. 1988). Similarly, in the 1987 case of *National Railway Labor Conference v. International Association of Machinist and Aerospace Workers*, the United States Court of Appeals for the Seventh Circuit created its version of the test, holding that a "minor" dispute arose when one party sought to implement new employment practices unless it was "frivolous" or "obviously insubstantial" to believe that the change in employment practices was within the terms of the existing collective bargaining agreement. 830 F.2d 741, 746, 126 L.R.R.M. 2615, 2618 (7th Cir. 1987).

[13] 109 S. Ct. 2477, 2479, 2482, 131 L.R.R.M. 2601, 2601, 2604 (1989).

held that whenever a contested change in employment practices is "arguably" within the parties' existing collective bargaining agreement, the change gives rise to a "minor" dispute, and therefore, the change can be implemented before an arbitrator determines whether it is actually permitted under the terms of the parties' existing agreement.[14]

In 1976, Consolidated Rail Corporation ("Conrail") implemented a medical procedure requiring its employees to undergo physical examinations that included a urinalysis for blood sugar and albumin.[15] In general, the urinalysis that Conrail's physical examination procedures required did not extend to testing urine for the presence of drugs.[16] Employees who failed to meet Conrail's medical standards following a physical examination could be suspended without pay until they were able to pass Conrail's physical examination.[17]

On February 20, 1987, Conrail unilaterally altered its medical testing procedures by adding a drug testing component to its preexisting urinalysis test.[18] As part of the new drug screening program, Conrail could suspend employees who tested positively for the presence of drugs unless they provided a drug-free urine sample within forty-five days after receiving the results of their initial drug test.[19] Conrail could discharge employees who did not provide a drug-free urine specimen within the proscribed time limit.[20]

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[14] *Id.* at 2484, 131 L.R.R.M. at 2605.

[15] *Id.* at 2485, 131 L.R.R.M. at 2606. Under Conrail's medical policy, employees submitted to physical examinations periodically, upon return to duty, and as a follow-up procedure when an employee's medical condition justified an examination. *Id.*, 131 L.R.R.M. at 2606–07.

[16] *Id.* at 2486, 131 L.R.R.M. at 2607. Conrail's policy permitted a drug screening of the urinalysis only when, in the judgment of the examining physician, the employee may have been using drugs. *Id.* Drug screens were, however, a regular part of an employee's "return to duty" examination if the employee had faced prior suspension from work due to a drug-related problem. *Id.*

[17] *Id.* The suspension period was apparently unlimited, and thus, Conrail's policy did not require the discharge of employees who failed to provide a satisfactory urine specimen within a specified period of time. *See id.* at 2487, 131 L.R.R.M. at 2608.

[18] *Id.* at 2486, 131 L.R.R.M. at 2607. Conrail's new policy required drug testing in both periodic and return to duty examinations. *Id.* In addition, Conrail's new policy required drug tests in follow-up examinations for all employees returning to duty after a drug related suspension. *Id.*

[19] *Id.* An employee who tested positively for drugs could also seek counselling at Conrail's Employee Counselling Center. *Id.* If the counselling service revealed that the employee had an addiction problem, the employee could enter an approved treatment program. *Id.* An employee who entered a treatment program was then given 125 days to provide a drug-free urine sample. *Id.*

[20] *Id.* at 2487, 131 L.R.R.M. at 2608.

Following the implementation of Conrail's new drug testing program, the Railway Labor Executives' Association (the "union") filed suit against Conrail in the United States District Court for the Eastern District of Pennsylvania, seeking an injunction to prevent Conrail from administering the disputed tests.[21] The union contended that Conrail's new drug testing policy created a "major" dispute under the RLA.[22] Consequently, the union argued that the court should issue an injunction pending the results of the conciliation process required to resolve "major" disputes.[23] The district court rejected the union's claims, however, and held that the new drug testing policy gave rise to a "minor" dispute because the policy was "arguably" justified under the implied terms of the parties' existing collective bargaining agreement.[24]

The union appealed the district court's decision to the United States Court of Appeals for the Third Circuit.[25] The circuit court concluded that Conrail's drug testing program gave rise to a "major" dispute because there was no evidence that the parties had "arguably" agreed on several important changes resulting from the introduction of the new drug testing policy.[26] Thus, the circuit court

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[21] Railway Labor Executives' Ass'n. v. Consolidated Rail, No. 86–2968 slip op. (E.D. Pa. April 28, 1987). The Railway Labor Executives' Association is an unincorporated association which consists of the chief executive officers of 19 labor associations that represent Conrail's employees. Consolidated Rail v. Railway Labor Executives' Ass'n., 109 S. Ct. 2477, 2479, 131 L.R.R.M. 2601, 2601–02 (1989).

[22] *Consolidated Rail*, No. 86–2968 slip op. at 1.

[23] *Id.* at 2–3.

[24] *Id.* at 3. The district court based its conclusion on several findings. First, the court found that Conrail and the union had a long standing medical policy that included procedures to ensure that employees were medically fit to perform their jobs. Second, the court found that the union had always recognized Conrail's right to discharge employees who were unable to perform their duties safely. In view of these findings, the district court concluded that Conrail's drug testing program was merely a further refinement of its prior practices that was consistent with its right to promote the safety of its operations. Thus, the district court found that the terms of the parties' collective bargaining agreement "arguably" permitted the disputed policy change. *Id.*

[25] Railway Labor Executives' Ass'n. v. Consolidated Rail Corp., 845 F.2d 1187, 128 L.R.R.M. 2168 (3d Cir. 1988).

[26] *Id.* at 1193–94, 128 L.R.R.M. at 2173–74. In particular, the Sixth Circuit court noted that Conrail's new drug testing program permitted drug testing without individual suspicion. *Id.* at 1193, 128 L.R.R.M. at 2173. Moreover, the court noted that the parties' past practices did not indicate an agreement on the type of drug test to be used, the methods for confirming positive results, and confidentiality protections. *Id.* at 1194, 128 L.R.R.M. at 2174. According to the circuit court, Conrail's new drug testing program would only give rise to a "minor" dispute if the implied terms of the existing collective bargaining agreement "arguably" justified the program. *Id.* at 1190–91, 128 L.R.R.M. at 2171. The circuit court then explained that finding a policy change to be "arguably" within the implied terms of a collective bar-

reversed the district court's denial of injunctive relief, and remanded the case to the district court for further proceedings.[27] Conrail appealed the circuit court's decision to the United States Supreme Court.[28]

In *Consolidated Rail*, the Supreme Court reversed the appellate court's decision and held that when management claims that a term of an existing collective bargaining agreement gives it discretion to change employee working conditions without prior negotiations, management's change creates a "minor" dispute if the terms of the agreement "arguably" justify the contested change.[29] The Supreme Court reasoned that a prior course of dealings between the parties to a collective bargaining agreement may indicate that management has a range of discretion in determining the extent to which it can modify its employment practices without prior negotiations.[30] Consequently, the *Consolidated Rail* Court held that when a collective bargaining agreement "arguably" gives management a range of discretion to implement a change in its employment practices, the contested policy change gives rise to a "minor" dispute.[31] The Court concluded that under such circumstances, management is free to implement a disputed policy change before the NRAB concludes that the policy change is actually within the terms of the parties' existing agreement.[32]

The Court in *Consolidated Rail* began its analysis by examining the characteristics that distinguish "major" disputes from "minor" ones.[33] The Court explained that "minor" disputes differed from "major" disputes because "minor" disputes can be conclusively resolved by interpreting the terms of the parties' existing collective bargaining agreement.[34] Examining decisions from several circuits, the Court concluded that "a relatively light burden" existed for the party attempting to show that the terms of the existing agreement justified the contested change.[35]

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gaining agreement is equivalent to concluding that the parties reached a "meeting of the minds" on the general issue of the policy change. *Id.* at 1193, 128 L.R.R.M. at 2173.

[27] *Id.* at 1195, 128 L.R.R.M. at 2174.

[28] Consolidated Rail Corp. v. Railway Labor Executives' Ass'n., 109 S. Ct. 2477, 131 L.R.R.M. 2601 (1989).

[29] *Id.* at 2484, 131 L.R.R.M. at 2605.

[30] *Id.* at 2483–84, 131 L.R.R.M. at 2605.

[31] *Id.* at 2483–85, 131 L.R.R.M. at 2605–2606.

[32] *Id.* at 2484, 131 L.R.R.M. at 2605–06.

[33] See *supra* notes 5–12 and accompanying text for a discussion of the distinction between "major" and "minor" disputes under the RLA.

[34] Consolidated Rail, 109 S. Ct. at 2479–81, 131 L.R.R.M. at 2602–04.

[35] *Id.* at 2482, 131 L.R.R.M. at 2604.

The Court then examined the varied circuit court standards used to determine whether the terms of a collective bargaining agreement justified a contested change in employment policies. Synthesizing the circuit court standards, the *Consolidated Rail* Court concluded that when an employer asserts a claim that the existing collective bargaining agreement gives it discretion to make a particular change in working conditions without prior negotiations, the contested change gives rise to a "minor" dispute if the implied terms of the parties' agreement "arguably" justify the claim.[36] Alternatively, the Court held that a "major" dispute arises when a claim that the implied terms of the agreement cover the policy change is "frivolous" or "obviously insubstantial."[37]

The Court acknowledged that the new "arguably" standard would delay the collective bargaining process until the parties exhausted the arbitration process for "minor" disputes.[38] The Court reasoned, however, that such a delay was consistent with the policies of the RLA because it would force the parties to make full use of the NRAB's arbitration procedures.[39] The Court concluded that such use would diminish the risk of interruptions in commerce by preventing the parties from resorting to self help, something the parties cannot attempt until they complete the collective bargaining procedure required for resolving "major" disputes.[40] In addition, the Court noted that referring arbitrable matters to the NRAB would promote the maintenance of collective bargaining agreements by assuring that expert arbitrators in the common law of the particular industry interpret and enforce the parties' agreement.[41] The *Consolidated Rail* Court concluded, therefore, that the "arguably" standard was consistent with the RLA's purposes of preventing strikes and promoting industry stability.[42]

Before it examined the terms of the parties' collective bargaining agreement, the Court distinguished the method of interpreting collective bargaining agreements from traditional contract interpretation, observing that a collective bargaining agreement is a generalized code of terms covering a wide range of situations that the

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[36] *See id.* at 2482, 131 L.R.R.M. at 2604.
[37] *Id.*
[38] *Id.* at 2484, 131 L.R.R.M. at 2605.
[39] *Id.*, 131 L.R.R.M. at 2606.
[40] *Id.*
[41] *Id.*
[42] *Id.*

drafters of the agreement cannot foresee.[43] The Court explained that because a collective bargaining agreement covers the whole employment relationship, its interpretation requires resort to the common law of the particular industry.[44] In addition, the Court noted that the practice, custom, and usage of a particular industry was significant in interpreting the collective bargaining agreement.[45] Finally, the Court observed that the unique nature of a collective bargaining agreement did not require that the parties reach a "meeting of the minds" on all of the terms of the agreement.[46]

Turning to the parties' arguments, the *Consolidated Rail* Court noted Conrail's contention that the new drug testing component to the urinalysis test was "arguably" within the terms of the parties' collective bargaining agreement.[47] The Court then noted the union's challenges that Conrail's new drug testing program was a material departure from the parties' past practices, and therefore was not part of the existing collective bargaining agreement.[48] After exam-

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[43] *Id.* at 2485, 131 L.R.R.M. at 2606.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 2488, 131 L.R.R.M. at 2608. The Court also addressed the significance of discretionary terms in interpreting collective bargaining agreements. *Id.* at 2483, 131 L.R.R.M. at 2605. The Court explained that collective bargaining agreements frequently contained express or implied terms designed to give one party a measure of discretion within a specific area of activity. *Id.* Noting that the principles of labor law did not prohibit bargaining for flexible terms, the Court concluded that discretionary terms were not subject to a higher degree of interpretive scrutiny than other terms in a collective bargaining agreement. *Id.* at 2483, 131 L.R.R.M. at 2605. In reaching this conclusion, the Court reasoned that to subject discretionary terms to a higher degree of interpretive scrutiny would be unlawful because it would not result in equal treatment of discretionary and non-discretionary terms. *Id.* The Court concluded, therefore, that when a party to a collective bargaining agreement bargains for a term that gives it a range of discretion to change employment conditions without prior negotiations, such a term cannot be subject to a degree of interpretative scrutiny higher than the scrutiny applied to a non-discretionary term. *Id.*

[47] *Id.* at 2487, 131 L.R.R.M. at 2607–08. According to Conrail, the parties had a long-established practice that permitted Conrail unilaterally to establish and change its "fitness for duty" standards, alter its medical testing procedures, and change its policies requiring removal of employees that Conrail considered unfit for duty. *Id.* Conrail contended that its past practices indicated that drug use was relevant to job fitness. *Id.* In addition, Conrail claimed that the prior course of dealings between the parties indicated that Conrail's physicians had discretion to implement the new drug testing program as a component of their medical examinations for job fitness. *Id.*

[48] *Id.* Specifically, the union contended that Conrail's new drug testing program introduced drug tests without cause, created the potential for employee terminations, and constituted a new regime for regulating the off-duty conduct of Conrail's employees. *Id.* at 2487, 131 L.R.R.M. 2607–08. Consequently, the union argued that Conrail's new program was such a significant departure from the party's past practices that it was not "arguably" within the terms of the parties' existing agreement. *Id.* at 2487, 131 L.R.R.M. at 2608.

ining the parties' arguments, the Court addressed the union's contention that the drug testing program materially changed the workplace in light of the parties' prior conduct.[49] First, the Court rejected the union's contention that Conrail's new drug testing program changed the work environment by introducing a new regulation affecting the off-duty behavior of employees.[50] The Court explained that prior to enacting the new drug testing program, Conrail had a well-established policy that recognized the relevance of drug use in testing employees for medical fitness.[51] The Court reasoned that this policy greatly weakened the union's contention that Conrail's new drug testing program regulated the employees' off-duty conduct for the first time. In addition, the Court explained that because Conrail's pre-existing medical policy also detected physical problems linked to off-duty behavior, the off-duty effects of Conrail's new drug testing program were not clearly distinguishable from Conrail's pre-existing medical policy.[52] Thus the Court rejected the union's contention that Conrail's new drug testing program was not "arguably" within the terms of the parties' existing collective bargaining agreement.

The Court then dismissed the union's claim that Conrail's new policy was not "arguably" within the terms of the parties' existing agreement because the new policy would result in drug testing without cause.[53] The Court distinguished between "cause" in the medical context and the legal concept of "cause" or "individualized suspicion."[54] According to the Court, the "cause" a physician would rely on to determine whether to perform the contested drug tests would depend on factors such as the expected incidence of the medical condition detected by the test, the likely benefits of detection, and the cost, accuracy, and medical risk of the test. The Court explained that, considering the parties' prior course of conduct, it was within Conrail's discretion to alter the nature of its medical policy based on changes in the variables that make up a determination of medical "cause." The Court concluded, therefore, that the "cause" aspect of Conrail's new drug testing program, in light

[49] *Id.*
[50] *Id.*, 131 L.R.R.M. at 2609.
[51] *Id.* at 2488, 131 L.R.R.M. at 2609.
[52] *Id.*
[53] *Id.* at 2488–89, 131 L.R.R.M. at 2609.
[54] *Id.* at 2489, 131 L.R.R.M. at 2608–09.

of the parties' past practices, was "arguably" within the terms of the parties' existing agreement.[55]

Finally, the *Consolidated Rail* Court rejected the union's argument that Conrail's new drug testing program was not "arguably" within the terms of the parties' existing agreement because it created the potential for employee termination. The Court explained that Conrail did not claim a right of discharge after an employee failed one drug test under the new policy.[56] Instead, the Court noted that Conrail's new policy permitted employees who tested positively for drugs to choose to enter into rehabilitative treatment.[57] According to the Court, this indicated that Conrail's new drug testing program had a medical rather than disciplinary goal. In addition, the Court explained that although only employees who tested positively for drugs would face the possibility of dismissal, Conrail's need to ensure that its employees were drug free created a medical reason sufficient to permit Conrail to treat employees who tested positively for drugs differently from employees who tested positively for other medical problems.[58] In light of the parties' past practices, the Court thus held that it was "arguably" within the terms of the parties' collective bargaining agreement for Conrail to change the terms of its medical policy to create the possibility for employee terminations.[59] Consequently, the Court concluded that Conrail's new drug testing program gave rise to a "minor" dispute under the RLA, and therefore, that Conrail could implement the policy change prior to a NRAB determination that the contested change was permitted under the parties' collective bargaining agreement.

In dissent, Justice Brennan rejected the majority's opinion, and concluded that Conrail's drug testing program gave rise to a "major" dispute under the RLA.[60] Justice Brennan reasoned that Conrail's drug testing program introduced significant changes into the working environment, most notably the testing of employees for drug use without cause, and the possibility that employees who tested positively for the presence of drugs would face discharge.[61] Justice Brennan contended that the Court should not rely on the union's acquiescence in Conrail's prior medical policy to infer that the union

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[55] *Id.*

[56] *Id.*

[57] *Id.* at 2489, 131 L.R.R.M. at 2609.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 2489, 131 L.R.R.M. at 2610 (Brennan, J., dissenting).

[61] *Id.* at 2490, 131 L.R.R.M. at 2610 (Brennan, J., dissenting).

also agreed to submit to suspicionless drug testing which included the potential for employee terminations, and which was implemented solely on management's terms.[62] Accordingly, Justice Brennan explained that it was "frivolous" to believe that Conrail's new drug testing program was within the terms of the parties' existing collective bargaining agreement.[63] As a result, Justice Brennan concluded that the *Consolidated Rail* Court should have issued an injunction to prevent Conrail's unilateral imposition of the contested drug tests until the conclusion of the mediation process required for "major" disputes.[64]

The Supreme Court's decision in *Consolidated Rail* affects dispute resolution under the RLA in two respects. First, where an employer has an existing medical policy requiring urinalysis, the federal courts are unlikely to find that the addition of a drug screening test gives rise to a "major" dispute unless the new test constitutes a significant departure from the employers pre-existing medical policy. Second, by concluding that a prior course of dealings may give management discretionary authority to implement policy changes under the implied terms of the collective bargaining agreement, the Court's decision in *Consolidated Rail* suggests that it will be increasingly difficult for parties to establish that a disagreement between management and labor constitutes a "major" dispute under the RLA. As a result, both management and labor are more likely to implement unilateral policy changes before they resolve their disputes through the RLA's compulsory arbitration procedures.[65]

It will be increasingly difficult for parties to establish that a disagreement between management and labor gives rise to a "major" dispute under the RLA because, by adopting the "arguably" standard, the *Consolidated Rail* Court embraced the least restrictive standard contemplated in the previous decisions of the federal circuit courts.[66] In holding that a contested policy change gives rise to a "minor" dispute if the new policy is "arguably" within the parties' agreement, the *Consolidated Rail* decision subjects the contested policy change to a minimal level of interpretative scrutiny under the

[62] *Id.*

[63] *Id.* at 2490, 131 L.R.R.M. at 2610–11 (Brennan, J., dissenting).

[64] *Id.*

[65] See *supra* note 48 for a discussion of the changes introduced into the work-place as a result of the implementation of Conrail's new drug testing program.

[66] See *supra* note 12 for a discussion of the standards that the federal courts have used to distinguish between "major" and "minor" disputes.

parties' existing agreement.[67] The Court further illustrated the minimal interpretive analysis that will justify a contested policy change by concluding that a "relatively light burden" exists for the party seeking to justify the disputed policy change under the terms of the existing agreement.[68]

Moreover, the *Consolidated Rail* Court's expansive view of the rights contained within a collective bargaining agreement compounds the difficulty faced by a party attempting to establish the existence of a "major" dispute under the RLA. As noted by the *Consolidated Rail* Court, other courts had held that a prior course of dealings between parties was relevant in interpreting the terms of the parties' existing collective bargaining agreement.[69] By concluding that a prior course of dealings may indicate that one party has a range of discretion to implement new employment policies unilaterally, the Court's opinion in *Consolidated Rail* broadens the scope of rights contained within a collective bargaining agreement, and places increased importance on the parties' prior conduct in determining the breadth of the agreement.[70] The *Consolidated Rail* Court illustrated its more expansive notion of the rights contained within the implied terms of a collective bargaining agreement by concluding that implementation of a new employment policy does not require that parties to the agreement reach a "meeting of the minds" on the resulting change in employment conditions.[71]

The Court's opinion in *Consolidated Rail* is problematic because it fails to provide courts with a framework for determining when a prior course of dealings gives rise to either an implied term or a discretionary right under the parties' existing collective bargaining agreement. Under the Court's analysis, the union's failure to contest Conrail's past medical policy changes indicates that Conrail had a discretionary right to implement additional changes in its medical policy without negotiating the changes with the union.[72] Justice

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[67] See *supra* text accompanying notes 33–37 for the Supreme Court's adoption of the "arguably" standard in *Consolidated Rail.*

[68] See *supra* text accompanying note 37 for a discussion of the burden on the party seeking to justify a policy change with reference to the terms of an existing collective bargaining agreement.

[69] See *supra* text accompanying note 45 for a discussion of the use of the parties' past dealings in interpreting collective bargaining agreements.

[70] Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2477, 2483, 2487–89, 131 L.R.R.M. at 2601, 2605, 2607–09 (1989).

[71] See *supra* text accompanying note 46 for the Supreme Court's rejection of a "meeting of the minds" requirement in interpreting a collective bargaining agreement.

[72] *Consolidated Rail,* 109 S. Ct. at 2483, 2487–88, 131 L.R.R.M. at 2605, 2607–09.

Brennan's dissenting opinion illustrated the weakness in this analysis. According to Justice Brennan, the mere fact that the union did not contest previous non-drug related changes in Conrail's medical policy did not justify the conclusion that the union agreed to the numerous changes Conrail introduced into the employees' working conditions through its new drug testing program.[73] The majority answered this contention by concluding that, despite the many changes resulting from Conrail's new drug testing program, these changes were not so significant, in view of the parties' past practices, that they were not at least "arguably" within the terms of the parties' existing agreement.[74] As Justice Brennan implied, this rather conclusory analysis rests on a value judgment that discounts significant differences in the nature and consequences of instituting a program of drug testing without cause.[75]

Moreover, although the majority claimed that its decision in *Consolidated Rail* advances the RLA's policies by channeling disagreements between management and labor into the compulsory arbitration process required for "minor" disputes,[76] the Court's holding may lead to more numerous disputes between management and labor. According to the majority's reasoning, Conrail "arguably" had a discretionary right to enact its new drug testing program because the union failed to contest prior changes Conrail had made in its medical policy.[77] Following this rationale, the union has an incentive to contest every policy change that management implements in order to forestall the possibility that management will gain a discretionary right to implement policy changes without prior negotiations. Consequently, instead of furthering the RLA's purpose of promoting stability in the railroad and airline industries, the Court's decision in *Consolidated Rail* may result in an increased number of disputes between management and labor.

In summary, the Court's opinion in *Consolidated Rail* significantly diminishes the likelihood that a disagreement between management and labor will give rise to a "major" dispute under the RLA. By adopting the "arguably" standard, the *Consolidated Rail* Court has instructed courts to use minimal scrutiny when they assess whether a contested policy change is within the terms of the parties'

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[73] *Id.* at 2490, 131 L.R.R.M. at 2610 (Brennan, J., dissenting).

[74] *Id.* at 2489, 131 L.R.R.M. at 2609.

[75] *Id.* at 2490, 131 L.R.R.M. at 2610 (Brennan, J., dissenting).

[76] *Id.* at 2484, 131 L.R.R.M. at 2605–06.

[77] *Id.* at 2488, 131 L.R.R.M. 2608–09.

existing collective bargaining agreement. In addition, the opinion endorses an expansive view of interpreting collective bargaining agreements that includes adding implied and discretionary terms to the agreement based on the parties' prior course of dealings. The Court's decision will therefore make it increasingly difficult for parties to show that disputes between management and labor are "major" within the meaning of the RLA. Consequently, the Court's decision in *Consolidated Rail* will allow both management and labor to implement policy changes unilaterally before the NRAB determines whether the terms of the parties' collective bargaining agreement permit the contested changes.

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS

A. * *Timeliness of Filing Title VII Discrimination Charges in Seniority Systems*: Lorance v. AT & T Technologies, Inc.

Title VII of the Civil Rights Act of 1964 (the "Act" or "Title VII") prohibits intentional discrimination by employers on the basis of race, color, religion, sex, or national origin.[1] In the 1971 case of *Griggs v. Duke Power Co.*, the United States Supreme Court broadly defined the scope of Title VII actions by recognizing discrimination in the consequences of employment practices, rather than relying strictly on whether there was discriminatory motivation behind the employment practices.[2] In *Griggs*, black employees challenged a power company's requirement of a high school diploma or passing of intelligence tests as a condition of employment or transfer for certain jobs—a requirement which rendered a disproportionately large group of blacks ineligible for certain jobs.[3] The Court noted that even though the company did not adopt the requirements with the intent to discriminate against blacks, practices which appear "fair in form, but discriminatory in operation," unless justified by a business necessity, are proscribed by the Act.[4]

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* By Jennifer Locke, Editor, BOSTON COLLEGE LAW REVIEW.

[1] 42 U.S.C. § 2000e-2(a) (1982). Section 703(a) provides in pertinent part:

> (a) It shall be unlawful employment practice for an employer —
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> (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.

[2] 401 U.S. 424, 432, 3 FEP Cases 175, 178 (1971). In *Griggs*, the Court held that Title VII requires the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431, 3 FEP Cases at 177; *see also* Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C.L. REV. 943, 956 (1984).

[3] *Griggs*, 401 U.S. at 425-26, 429, 3 FEP Cases at 175-76, 177.

[4] *Id.* at 431, 432, 3 FEP Cases at 178. This "discriminatory effects unjustified by business necessity" theory was subsequently followed in Washington v. Davis, 426 U.S. 229, 247, 12 FEP Cases 1415, 1422 (1976), and Albemarle Paper Co. v. Moody, 422 U.S. 405, 422, 425, 10 FEP Cases 1181, 1189, 1190 (1975).

Since 1971, the Court has moved away from its original *Griggs* holding in a series of cases, especially with respect to its treatment of seniority systems in employment. Through its interpretations of section 703(h),[5] which addresses the legality of certain seniority systems, and Title VII generally, the Court has afforded seniority systems special treatment under Title VII and narrowly defined the instances in which an employee may successfully challenge an allegedly discriminatory seniority system.[6] First, the Court interpreted section 703(h) to immunize "bona fide" seniority systems, those without a discriminatory purpose, from challenge even though these systems may have discriminatory impact or perpetuate pre-Act discrimination.[7] Second, the Court refused to allow a Title VII

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[5] 42 U.S.C. § 2000e–2(h) (1982). Section 703(h) states in pertinent part:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Id. This section was first interpreted in 1968, when a federal district court held that a seniority system which perpetuated the effects of pre-Act discrimination was not "bona fide" and therefore entitled to § 703(h) protection. *See* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 517, 1 FEP Cases 260, 270 (E.D. Va. 1968). In *Quarles*, the court stated that the differences in the terms and conditions of employment for whites and blacks were a result of intentional discrimination in hiring policies prior to the 1966 enactment of Title VII. *Id.* "Congress did not intend," wrote Judge Butzner, "to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Id.* at 516, 1 FEP Cases at 269.

[6] *See* Pullman-Standard v. Swint, 456 U.S. 273, 289, 28 FEP Cases 1073, 1079–80 (1982); American Tobacco Co. v. Patterson, 456 U.S. 63, 69, 28 FEP Cases 713, 715–16 (1982); United Air Lines v. Evans, 431 U.S. 553, 560, 14 FEP Cases 1510, 1513 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 356, 14 FEP Cases 1514, 1527 (1977).

[7] *Teamsters*, 431 U.S. at 356, 14 FEP Cases at 1527. In the 1977 case of *Teamsters*, the Supreme Court held that a claim of a seniority system having a discriminatory impact must be accompanied by proof of a discriminatory purpose. *Id.* The Court reasoned that even though the seniority system in question, as a result of pre-Act hiring discrimination, did currently confer the choicest jobs and greatest job security to white employees, section 703(h) of Title VII conferred a measure of immunity on bona fide seniority systems. *Id.* at 349–50, 14 FEP Cases at 1525. The Court then defined a bona fide seniority system as one: 1) which applies equally to all races and ethnic groups; 2) whose division into separate bargaining units is rational, in accord with industry practice, and consistent with National Labor Relation Board precedents; 3) which does not have its genesis in racial discrimination; and 4) which was negotiated and maintained free from any illegal purpose. *Id.* at 355–56, 14 FEP Cases at 1527.

Justice Marshall vigorously dissented to the Court's reading of section 703(h). *Id.* at 390, 14 FEP Cases at 1542 (Marshall, J., dissenting). Justice Marshall argued that Teamsters' seniority system should be excluded from section 703(h), because it involves intentional discrimination, which, even though it occurred pre-Act, is specifically excluded from section 703(h) immunity. *Id.* at 381–82, 14 FEP Cases at 1538 (Marshall, J., dissenting). The majority opinion, the dissent warned, allows employees who were victims of pre-Act discrimination to action predicated on a past illegal policy, which is no longer in existence, if such a policy was not challenged within the prescribed statutory period.[8] Third, the Supreme Court held that a court may not infer a discriminatory purpose in a seniority system merely from statistics showing a discriminatory impact upon a particular group.[9] Rather, the Court held that there must be a finding of actual intent to discriminate on the part of those who negotiated or maintained the seniority system, and that such a finding is a pure question of fact.[10] Finally, the Court extended section 703(h) protections to cover not only pre-Act seniority systems but also seniority systems adopted after the Act, even if they perpetuate past discrimination but do not have a discriminatory intent.[11]

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advance into more desirable positions only at the expense of their seniority. This would result, according to the dissent, in employees remaining locked into their old jobs because they are unwilling to pay this price, or cause employees who transfer to fall to the bottom of the ladder in their new positions, behind white employees with less overall seniority. *Id.* at 387–88, 14 FEP at 1540–41 (Marshall, J., dissenting).

[8] United Air Lines v. Evans, 431 U.S. 553, 560, 14 FEP Cases 1510, 1513 (1977). In *Evans*, the Supreme Court held that a facially-neutral seniority system may not be currently challenged based on an illegal discriminatory policy which is no longer in existence. *Id.* The Court first noted that United Air Lines seniority system was "neutral," in that it treated all similarly situated employees alike. *Id.* at 558, 14 FEP Cases at 1512. The Court further noted that a discriminatory event which currently impairs the application of such a neutral seniority system cannot be the basis of a "continuing violation" of Title VII. *Id.* If the employee does not challenge the discriminatory event within the statutory time period, the Court concluded, an employer is entitled to treat it as if it were lawful. *Id.*

[9] *Swint*, 456 U.S. at 289, 28 FEP Cases at 1079–80.

[10] *Id.* The *Teamsters* discriminatory purpose requirement was expanded in the 1982 case of *Swint*, wherein the Supreme Court held that absent a discriminatory purpose, the operation of a seniority system is not an unlawful employment practice even if it has discriminatory consequences or perpetuates pre-Act discrimination. *Id.* at 277, 28 FEP Cases at 1074. Discriminatory intent, the Court held, cannot be presumed merely by a showing of a disparate impact upon a particular group. *Id.* at 289, 28 FEP Cases at 1079. The Court concluded that there must be a factual finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system. *Id.*, 28 FEP Cases at 1079–80.

As in *Teamsters*, Justice Marshall again dissented, claiming that section 703(h) should not immunize seniority systems that perpetuate past discrimination "simply because the plaintiffs are unable to demonstrate to this Court's satisfaction that the system was adopted or maintained for an invidious purpose." *Id.* at 294–95, 28 FEP Cases at 1082 (Marshall, J., dissenting). Placing this burden on the plaintiff, the dissent noted, frustrates the intent of Congress and acts to freeze an entire generation of minority group members into discriminatory patterns that existed before the Act. *Id.* (citing Quarles v. Phillip Morris, 279 F. Supp. 505, 516 (E.D. Va. 1968)).

[11] American Tobacco Co. v. Patterson, 456 U.S. 63, 69, 28 FEP Cases 713, 715–16 (1982). In *Patterson*, the Supreme Court further extended section 703(h) protection to seniority systems adopted *after* Title VII was enacted as well as to pre-Act systems. *Id.* The Court held that the language of section 703(h) did not distinguish between pre- and post-Act seniority systems, and therefore it was not intended to be merely a grandfather clause designed to protect existing practices from the operation of the Act. *Id.*

During the *Survey* year, in *Lorance v. AT & T Technologies, Inc.*, the United States Supreme Court further restricted challenges to seniority systems by holding that the limitations period governing a discrimination claim based on a facially neutral seniority system begins to run at the time the system is adopted, rather than when its application is felt by employees.[12] The petitioners in *Lorance* brought their claim of discrimination in 1983 when they were demoted pursuant to a seniority system that had been changed in 1979 as part of a collective bargaining agreement.[13] The Court held that because the alleged intentional discriminatory policy that subsequently resulted in their demotion was instituted in 1979, the statute of limitations barred their claim.[14] In so doing, the Court refused to consider the application of the allegedly discriminatory seniority system as a continuing violation of Title VII, and instead sought to strike a balance between the interests of those who are protected by Title VII and the interests of those who rely, perhaps for years, upon the validity of the facially lawful seniority system.[15]

In *Lorance*, the three female employees ("petitioners"), members of Local 1942, International Brotherhood of Electrical Workers (the "union"), had worked at AT&T's electronic manufacturing plant as hourly wage employees since the early 1970s.[16] The seniority system in place until 1979 gave competitive seniority to all workers based on the number of years they had spent in the plant, regardless of the particular job that they performed. Workers who were promoted to the more highly skilled and better paying "tester" positions retained their plantwide seniority. Between 1978 and 1980, the petitioners were promoted to tester positions. In July of 1979, however, a collective bargaining agreement between AT&T and the union altered the seniority calculations for testers, so that the testers' seniority would be determined by the length of time spent in a particular job, rather than the number of years spent in the plant. The agreement also specified that after working for five years as a tester and completing a prescribed training program,

[12] 109 S. Ct. 2261, 2268–69, 49 FEP Cases 1656, 1661 (1989). Under Title VII, an employee claiming an unlawful employment practice must file a charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged unfair employment practice unless the complainant has first instituted proceedings with a state or local agency, in which case the period is extended to a maximum of 300 days. 42 U.S.C. § 2000e–5(e) (1981).

[13] *Lorance*, 109 S. Ct. at 2264, 49 FEP Cases at 1657.

[14] *Id.* at 2265, 49 FEP Cases at 1658.

[15] *Id.* at 2269, 49 FEP Cases at 1661.

[16] *Id.* at 2263, 49 FEP Cases at 1656–57.

employees could regain their full plantwide seniority. In 1982, due to economic conditions, AT&T demoted the three petitioners on the basis of their low seniority in the tester positions.[17] The company could not have demoted the petitioners if the former seniority system had still been in effect.

In April of 1983, the petitioners filed complaints with the Equal Employment Opportunity Commission ("EEOC"), alleging that the present system was the product of an intent to discriminate on the basis of sex.[18] The EEOC issued right-to-sue letters and the petitioners filed suit in the District Court for the Northern District of Illinois, seeking certification as class representatives for female employees in the AT&T plant who had lost plantwide seniority or who had been deterred from seeking promotions to tester positions because of the new seniority system.[19] The district court granted AT&T's motion for summary judgment on the ground that the petitioners had not filed their complaints with the EEOC within the statute of limitations.[20] The United States Court of Appeals for the Seventh Circuit affirmed, holding that the limitations period began to run at the time the employees became subject to a facially neutral, but discriminatory, seniority system that the employee knows or reasonably should know is discriminatory.[21]

The United States Supreme Court, granting certiorari in order to resolve the circuit conflict as to when the limitations period begins to run, held that it is the adoption, not the application, of a discriminatory but facially neutral seniority system which triggers the statute of limitations.[22] Justice Scalia, writing for the majority, began

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[17] *Id.* at 2264, 49 FEP Cases at 1657.

[18] *Id.*

[19] *Id.* The petitioners alleged in their complaint that men had traditionally held almost exclusively the choice tester positions, whereas women principally held the lower-paying non-tester jobs. Petitioners further alleged that in the 1970's, female employees had increasingly been qualifying for the tester positions and exercising their seniority rights to become testers. The petitioners claimed that the 1979 change in the seniority system was the result of a conspiracy to protect the incumbent male testers from the effects of the female testers' greater plantwide seniority, and to discourage women from entering the traditionally-male tester jobs. *Id.*

[20] *Id.* The district court, as well as the circuit court, declined to rule on whether the applicable limitations period was 180 or 300 days because both courts concluded that the petitioners' claims were time-barred in either case. *Id.* at 2264 n.2, 49 FEP Cases at 1657 n.2.

[21] Lorance v. AT&T Technologies, 827 F.2d 163, 167, 44 FEP Cases 998, 1001 (7th Cir. 1987).

[22] *Lorance*, 109 S. Ct. at 2264, 49 FEP Cases at 1657. The conflict in the circuits revealed contrasting views of when the statute of limitations is triggered. The United States Court of Appeals for the Seventh Circuit in *Lorance v. AT&T Technologies* held that the limitations period is triggered when an employee is first subjected to a facially-neutral seniority system

his discussion by noting that because section 706(e) of Title VII requires a charge of an unlawful employment practice be filed within the applicable time period of its occurrence, the Court must first identify the exact unlawful employment practice.[23] The Court further noted that although the petitioners' claim would ordinarily suffice under section 703(a) of Title VII, which makes it an unlawful employment practice to discriminate in any employment context because of an individual's sex, or to classify employees in any way that would deprive them of opportunities or otherwise adversely affect their status because of their sex, Title VII affords seniority systems special treatment.[24] Under section 703(h), the Court stated, it is not an unlawful employment practice for an employer to provide different terms, conditions, or privileges pursuant to a bona fide seniority system, as long as these differences are not the result of an intent to discriminate on the basis of sex.[25] According to the majority, the Court has in earlier decisions construed this to mean that operation of a seniority system cannot be an unlawful practice, even if it has discriminatory consequences, unless it has a discriminatory purpose[26] and a finding of an actual *intent* to discriminate on the part of those who negotiated the seniority system.[27]

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that he or she knows, or reasonably should know, is discriminatory; subsequent applications of the seniority system will not trigger the limitations period anew. 827 F.2d at 166–67, 44 FEP Cases at 1000–01 (7th Cir. 1987).

In contrast, other circuit courts have held that the maintenance of discriminatory policies constitutes continuing violations, triggering the limitations period anew each time the employer commits an act in furtherance of these policies. *See, e.g.*, Gray v. Phillips Petroleum Co., 858 F.2d 610, 614, 49 FEP Cases 67, 70 (10th Cir. 1988) (employees may challenge discriminatory policies which result in continuing violations even though the policy may have adversely affected the employee at a much earlier date and the limitations period had run); Cook v. Pan American World Airways, 771 F.2d 635, 646, 38 FEP Cases 1344, 1353 (2d Cir. 1985) (limitations period commences when last discriminatory act in furtherance of continuous practice or policy of discrimination takes place), *cert. denied*, 474 U.S. 1109 (1986); Morelock v. NCR Corp., 586 F.2d 1096, 1103, 18 FEP Cases 225, 229 (6th Cir. 1978) (maintenance of a seniority system which discriminates on the basis of age constitutes continuing violation of Age Discrimination in Employment Act), *cert. denied*, 441 U.S. 906 (1979); Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n, 551 F.2d 1136, 1137, 14 FEP Cases 1571, 1572 (8th Cir. 1977) (limitations period triggered at date of last act committed pursuant to unlawful employment practice); Clark v. Olinkraft, Inc., 556 F.2d 1219, 1222, 15 FEP Cases 374, 376 (5th Cir. 1977) (discrimination in promotion and pay constitutes a continuing violation of Title VII), *cert. denied*, 434 U.S. 1069 (1978).

[23] *Lorance*, 109 S. Ct. at 2264, 49 FEP Cases at 1657.

[24] *Id.* at 2264–65, 49 FEP Cases at 1657–58.

[25] *Id.* at 2265, 49 FEP Cases at 1658.

[26] *Id.* (citing Trans World Airlines v. Hardison, 432 U.S. 63, 82, 14 FEP Cases 1697, 1704 (1977)).

[27] *Id.* (citing Pullman-Standard v. Swint, 456 U.S. 273, 289, 28 FEP Cases 1073, 1080 (1982)).

The petitioners' claim, the Court stated, is not that the seniority system treated similarly situated employees differently or operated in an intentionally discriminatory manner, but rather that the system's differential impact on the sexes had its *genesis* in unlawful sex discrimination.[28] Justice Scalia stated that the petitioners' claim was essentially that the change in the seniority rules was an intentionally discriminatory *alteration* in their contract rights, resulting from a conspiracy to protect incumbent male testers.[29] After delineating the petitioners' claim, the Court held that because the diminution in employment status occurred in 1979, and the petitioners did not file their claim until 1983, section 706(e)'s period of limitations barred the petitioners' claim.[30]

The Court reasoned that although it might be possible to view this situation as a continuing violation, which occurred not only when the collective bargaining agreement altered the seniority system, but also when each of its effects impacted the employees, the Court has rejected this theory in previous decisions.[31] The Court cited to *Delaware State College v. Ricks*, where it held that communication of an allegedly discriminatory denial of tenure to the petitioner was the act which triggered the section 706(e) limitations period, not the subsequent termination of employment one year later.[32] The *Ricks* Court held that courts must focus on the time of the original tenure decision, which was the actual *discriminatory act*, instead of the termination of employment, which was only a *consequence* of the tenure decision.[33]

The *Lorance* Court further noted that in *United Air Lines v. Evans* the Court also refused to allow a claim which was based on a present effect of a past discriminatory act.[34] The Court explained that in *Evans*, the airline company had discriminatorily forced the petitioner to resign, and upon rehiring denied her seniority credit for her years of prior service. The *Lorance* Court noted that the petitioner's claim in *Evans*, like the petitioners' claim in the instant

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[28] *Id.* (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 356, 14 FEP Cases 1514, 1527 (1977)) (emphasis added).

[29] *Id.* (emphasis in original).

[30] *Id.*

[31] *Id.* at 2265–66, 49 FEP at 1658.

[32] *Id.* at 2266, 49 FEP Cases at 1658–59 (citing Delaware State College v. Ricks, 449 U.S. 250, 258, 24 FEP Cases 827, 830 (1980)).

[33] *Id.*, 49 FEP Cases at 1659 (citing *Ricks*, 449 U.S. at 258, 24 FEP Cases at 830) (emphasis in original).

[34] *Id.* at 2266–67, 49 FEP Cases at 1659 (citing United Airlines v. Evans, 431 U.S. 553, 560, 14 FEP Cases 1510, 1513 (1977)).

case, was based wholly on a discriminatory act occurring well outside the period of limitations, and that there was no continuing violation.[35]

The *Lorance* Court explained that rather than interpreting section 703(h) as requiring proof of discriminatory intent when challenging a bona fide seniority system, it might also be possible to interpret section 703(h) as an affirmative defense to a Title VII challenge for bona fide seniority systems.[36] The Court stated that even if read in this manner, which is perhaps its "most natural" interpretation, the statute of limitations would still begin to run from the time the *impact* is felt. According to the Court, previous cases that require proof of discriminatory intent in Title VII challenges to seniority systems have foreclosed this interpretation.[37]

Turning to these precedents, Justice Scalia noted that the Court has interpreted section 703(h) as a provision describing illegal employment practices in seniority systems, not as an affirmative defense to an unlawful employment practice.[38] Justice Scalia further noted that the Court has held discriminatory impact in seniority systems not to be sufficient to invalidate the system, without proof of actual intent to discriminate.[39] Accordingly, the *Lorance* Court concluded that the petitioners' claim depended on proof of discriminatory intent at the time the seniority system was adopted, and in order to be valid it must have been brought within the limitations period.[40]

The Court then cited to a case decided under the National Labor Relations Act ("NLRA"), considered a model for Title VII's remedial provisions, in which the Court held that the limitations period runs from the date the system is adopted.[41] The Court noted that both the NLRA and Title VII require that an employee must file an administrative complaint before lodging a civil action against a private party and both have a statute of limitations within which

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[35] *Id.* at 2267, 49 FEP Cases at 1659.

[36] *Id.*

[37] *Id.*

[38] *Id.* (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 758, 12 FEP Cases 549, 553 (1976).

[39] *Id.* (citing American Tobacco Co. v. Patterson, 456 U.S. 63, 65, 28 FEP Cases 713, 714 (1982); Pullman-Standard v. Swint, 456 U.S. 273, 277, 28 FEP Cases 1073, 1074 (1982); Trans World Airlines v. Hardison, 432 U.S. 63, 82, 14 FEP Cases 1697, 1705 (1977); California Brewers Ass'n. v. Bryant, 444 U.S. 598, 610–11, 22 FEP Cases 1, 61 (1980)).

[40] *Id.*, 109 S. Ct. at 2267, 49 FEP Cases at 1660.

[41] *Id.* (citing Local Lodge 1424, Int'l Ass'n of Machinists v. NLRB, 362 U.S. 411 (1960)).

the employee must file this administrative complaint.[42] The Court, relying on this NLRA case, stressed that because the petitioners' claim was dependent on the alleged illegality of the signing of the union contract, the statute of limitations began to run at the date that contract was signed.[43]

The Court stated that its interpretation of the trigger date of the limitations period was harmonious with section 706(e)'s general purpose in preventing the prosecution of stale claims, and with the "special treatment" accorded seniority systems under section 703(h).[44] According to the Court, this interpretation would operate to balance the interests of those employees who work for many years in reliance upon the validity of a facially lawful seniority system, and those whom Title VII seeks to protect against discrimination.

A facially discriminatory seniority system which treats similarly situated employees differently can be challenged at any time, the Court noted, but a facially neutral system which was adopted with an unlawful discriminatory motive can only be challenged within the prescribed limitations period after its adoption.[45] To allow challenges to a facially neutral seniority system past the limitations period, wrote Justice Scalia, might alter entitlements for years after the system's adoption, and disrupt the reliance interests that section 703(h) was designed to protect.[46] The implications of such an interpretation, the Court noted, would allow a plaintiff to sue for any nondiscriminatory effect that could be attributed to the 1979 change in the seniority plan—such as being demoted, not being promoted, not being awarded a sufficiently favorable pension, or being laid off—far into the future.[47] The Court declined to follow this approach because it was inconsistent with prior decisions and had very disruptive implications.[48]

Justice Marshall, in a dissenting opinion, argued that the majority opinion, which requires employees to sue in anticipation that they may be actually harmed by an intentionally discriminating

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[42] *Id.* at 2267–68, 49 FEP Cases at 1660.
[43] *Id.* at 2268, 49 FEP Cases at 1660.
[44] *Id.* at 2268–69, 49 FEP Cases at 1661.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* Justice Stevens wrote a separate concurring opinion to assert his belief that the Court had misconstrued Title VII in *Patterson* and *Ricks*, but that the Court correctly applied those decisions in the current case. *Id.* at 2269, 49 FEP Cases at 1661 (Stevens, J., concurring).

seniority system or "forever hold their peace," is both glaringly at odds with the purposes of Title VII and not supported by the text of the statute or by precedent.[49] Justice Marshall stated that the majority decision, which continues the process of immunizing seniority systems from Title VII requirements, requires employees to anticipate future adverse effects of a seniority system regardless of how likely or unlikely they may be, and to bring lawsuits to prevent these effects.[50] Justice Marshall further stated that the goals of Congress in enacting Title VII never included conferring absolute immunity on discriminatorily adopted seniority systems that survive the limitations period.[51]

Justice Marshall agreed with the majority's concession that a plausible reading of section 703(a)(1) of Title VII, which deals with disparate treatment, would consider violations to have occurred both at the time the discriminatory system was adopted as well as when each concrete effect of that discriminatory system is felt.[52] Justice Marshall disagreed, however, with the majority's position that a facially neutral seniority system should be treated differently.[53] The dissent argued that each time a discriminatory seniority system is applied, an independent unlawful employment practice takes place, and the limitations period is triggered anew.[54] This "continuing violation" theory, the dissent maintained, ensures that victims of discrimination will be able to seek redress, thus furthering the equal opportunity goals of Title VII.[55]

Justice Marshall further rejected the decision in that it required that challenges to an intentionally discriminatory but *facially neutral*

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[49] *Id.* at 2270, 49 FEP Cases at 1661–62 (Marshall, J., dissenting). Justices Brennan and Blackmun joined Justice Marshall in his dissent.

[50] *Id.* at 2273, 49 FEP Cases at 1664 (Marshall, J., dissenting).

[51] *Id.*, 49 FEP Cases at 1662 (Marshall, J., dissenting).

[52] *Id.* See *supra* note 1 for the text of § 703(a)(1).

[53] *Lorance*, 109 S. Ct. at 2271, 49 FEP Cases at 1663 (Marshall, J., dissenting).

[54] *Id.* at 2270, 49 FEP Cases at 1662 (Marshall, J., dissenting).

[55] *Id.* at 2270–71, 49 FEP Cases at 1662 (Marshall, J., dissenting). The dissent noted that the majority opinion is one in a series of decisions wherein the Court has diminished the application of Title VII to seniority systems. The dissent stated that in *Hardison* and *Swint*, the Court conferred special treatment for bona fide seniority systems pursuant to section 703(h), holding that their operation cannot be an unlawful employment practice even if they have discriminatory consequences, unless they also have a discriminatory purpose. Later, continued the dissent, the Court in *Patterson* held that § 703(h) also protects seniority systems put into place *after* the enactment of Title VII. *Id.* at 2271, 49 FEP Cases at 1662 (Marshall, J., dissenting) (emphasis in original). These decisions as well as the decision in the instant case have flouted the intent of Congress, declared the dissent. *Id.* at 2270–71, 49 FEP Cases at 1662 (Marshall, J., dissenting).

system be brought at the moment of its adoption, whereas a *facially discriminatory* seniority plan can be challenged at any time.[56] Justice Marshall contended that this distinction ultimately rewards employers who disguise their discriminatory intent in a facially neutral plan even though it may have identical effects to a facially discriminatory plan.[57]

Justice Marshall wrote that the precedents relied upon by the majority, *Evans* and *Ricks*, do not compel the majority's decision. In *Evans*, the dissent noted, the plaintiff alleged that the discriminatory impact of her prior discharge was enhanced when she returned to work and the neutral seniority system would not give her credit for the time she lost between her discharge and subsequent reinstatement. According to the dissent, the *Evans* Court's holding, that the plaintiff could not challenge a neutral seniority system based upon a past event which has no present legal significance, should not be controlling in this case where the petitioners' claim is that AT&T's discriminatorily adopted seniority system is *not* neutral.[58]

In distinguishing *Ricks*, Justice Marshall noted that the *Ricks* Court held that the statute of limitations began to run at the time the plaintiff was *notified* of his alleged discriminatory denial of tenure, rather than when he was terminated a year later.[59] Again, according to the dissent, this was in direct contrast to the facts of this case where the petitioners were given no advance warning. Both *Evans* and *Ricks*, the dissent stated, stand for the proposition that neutral employment practices, which are not a result of discriminatory intent, even though they may passively perpetuate the consequences of prior time-barred discrimination, are not actionable wrongs under Title VII. These precedent cases, according to the dissent, do not address seniority systems set up *in order* to discriminate, such as the one in the present case.[60]

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[56] *Id.* at 2271, 49 FEP Cases at 1663 (Marshall, J., dissenting) (emphasis added).

[57] *Id.*

[58] *Id.* at 2272, 49 FEP Cases at 1663 (Marshall, J., dissenting) (emphasis in original).

[59] *Id.* (emphasis added).

[60] *Id.* (emphasis in original). Justice Marshall also wrote that because the final case relied upon by the majority, *Machinists*, arose under a different statute, the NLRA, and involved a union security clause rather than a seniority system, it should not be considered controlling precedent. In *Machinists*, the dissent noted, the enforcement of the clause affected all non-union employees alike and it was obvious who it would effect and what impact it would have. In contrast, the dissent argued, AT&T's seniority system at the time of its adoption only theoretically hurt particular female employees, but was designed to have a long-range discriminatory impact on women employees as a group. *Id.*, 49 FEP Cases at 1664 (Marshall, J., dissenting).

The Supreme Court's decision in *Lorance* presents three distinct problems. First, it requires employees to anticipate a potential adverse impact each time a seniority system, or a modification of an existing system, is adopted and, at that point, to initiate a lawsuit, regardless of whether it has actually affected them or not.[61] This change will certainly breed premature lawsuits and needless litigation.[62] Second, it is unclear whether employees who have not been adversely affected, and who may not at the time of the system's adoption even be in a position to be affected in the future, will have standing to challenge the system.[63] Third, the *Lorance* decision ultimately confers absolute immunity upon facially neutral seniority systems, regardless of discriminatory intent, if they survive the first 300 days after their adoption.[64]

Once a facially neutral system survives the 300 day limitations period, it can create a chilling effect on the groups that are vulnerable to its discriminatory impact. Employees who are hired more than 300 days after the adoption of such a facially neutral system will never be able to challenge it. For example, female employees in the AT&T plant may decide not to seek the higher-paying tester positions for fear of losing the plantwide seniority, and its attendant privileges and benefits, which they have accumulated. This appears contrary to the intent of Congress in enacting Title VII, which the Court in an earlier decision interpreted "to prohibit all practices in

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[61] *Id.*, 49 FEP Cases at 1663 (Marshall, J., dissenting). As Justice Marshall wrote, "employees must now anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be." *Id.* In the lower court, the Court of Appeals for the Seventh Circuit, in rejecting the system's adoption as the trigger date for the limitations period, wrote, "[w]e can see no reason why they [the two petitioners who were not testers at the time the new system went into effect] should have been required to contest a seniority system that did not apply to them." Lorance v. AT&T Technologies, 827 F.2d 163, 166, 44 FEP Cases 998, 1000–01, (7th Cir. 1987).

[62] *Lorance*, 827 F.2d at 167, 168, 44 FEP Cases at 1001 (majority opinion and Cudahy, J., dissenting).

[63] *See Lorance*, 109 S. Ct. 2261, 2270, 49 FEP Cases 1656, 1662 (1989) (Marshall, J., dissenting). As noted by Justice Marshall, two of the petitioners were not testers at the time the change in the seniority system was adopted, and did not advance into that position until several months later.

In *American Tobacco Co. v. Patterson* the Court stated,

> [F]or the purpose of construing § 703(h), the proposed distinction between application and adoption on its face makes little sense. The *adoption of a seniority system which has not been applied* would not give rise to a cause of action. A discriminatory effect would arise only when the system is put into operation and the employer 'applies' the system.

456 U.S. 63, 69–70, 28 FEP Cases 713, 716 (1982) (emphasis added).

[64] *Lorance*, 109 S. Ct. at 2270, 49 FEP Cases at 1662 (Marshall, J., dissenting).

whatever form which create inequality in employment opportunity due to discrimination on the basis of . . . sex. . . ."[65]

The Court has previously recognized how important the provisions of seniority systems are to individual employees, and is clearly concerned about disrupting the interests of those who have relied upon a system believed to be valid.[66] By interpreting section 703(h) as protecting a facially neutral system unless discriminatory intent can be proven within the statutory limitations period, however, the Court's decision "operate[s] to 'freeze' the status quo of prior discriminatory employment practices," an approach which the dissenters have found unpalatable.[67]

Furthermore, the Court has created a distinction between facially neutral and facially discriminatory systems, even though they may have been adopted with the same discriminatory intent and may have identical discriminatory effects.[68] Allowing challenges to facially discriminatory systems at any time, but requiring challenges to facially neutral systems only within a statutory period, in effect, rewards employers or unions clever enough to hide their intent in a facially neutral guise.[69]

The Court should have adopted the "continuing violation" theory argued by the petitioners, wherein each time a discriminatory seniority system is applied, an unlawful employment practice under section 703(a)(1) takes place and the statutory limitations period is triggered anew.[70] This approach may soon become law, as Congress has reacted to the *Lorance* decision by including provisions in the Civil Rights Act of 1990, which would, among other things, expand

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65 *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763, 12 FEP Cases 549, 555 (1976) (citations omitted). The Court further stated that Congress has "ordained that its policy of outlawing such discrimination should have the 'highest priority.'" *Id.* (citations omitted).

The Court in *Franks* stated, "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation," and, "[m]ore than any other provision of the collective [-bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms." 424 U.S. at 766, 12 FEP Cases at 556 (quoting Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1535 (1962)).

66 *See Lorance*, 109 S. Ct. at 2269, 49 FEP Cases at 1661; *Franks*, 424 U.S. at 766, 12 FEP Cases at 556.

67 *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 349, 14 FEP Cases 1514, 1524–25 (1977) (citing Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)); Pullman-Standard v. Swint, 456 U.S. 273, 295, 28 FEP Cases 1073, 1082 (1982) (Marshall, J., dissenting).

68 *Lorance*, 109 S. Ct. at 2271, 49 FEP Cases at 1663 (Marshall, J., dissenting).

69 *Id.*

70 *See id.* at 2270, 49 FEP Cases at 1662 (Marshall, J., dissenting).

the rights of employees to challenge seniority systems created for discriminatory reasons.[71] Until such time, however, practitioners should be aware that they must file challenges to facially neutral seniority systems within the specified statutory period after their adoption, regardless of whether any actual harm is likely to occur or has occurred.

II. SEX DISCRIMINATION

A. * *BFOQ Defense Extended to Fetal Protection Policies:* International Union, UAW v. Johnson Controls, Inc.[1]

Under Title VII of the Civil Rights Act of 1964, an employer may not discharge or refuse to hire any person because of that person's sex.[2] In 1978, Congress amended Title VII by adding the Pregnancy Discrimination Act, which provides that the term "sex"

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[71] H.R. 4000, 101st Cong., 2nd Sess. § 7(a), S. 2104 101st Cong., 2nd Sess. § 7(a) (1990). The Civil Rights Act of 1990, which passed both the House and the Senate, has been vetoed by President Bush. N.Y. Times, Oct. 23, 1990, at A1, col.4. If this veto is overridden by Congress, the Act would amend section 706(e) as follows:

> (1) by striking out "one hundred and eighty days" and inserting in lieu thereof "2 years";
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> (2) by inserting after "occurred" the first time it appears "or has been applied to affect adversely the person aggrieved, whichever is later,";
>
> (3) by striking out ",except that in" and inserting in lieu thereof ". In"; and
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> (4) by striking out "such charge shall be filed" and all that follows through "whichever is earlier, and".

Id.

The Civil Rights Act would amend section 703(h) as follows:

> Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.

Id. § 7(b), S. 2104, 101st Cong., 2nd Sess. § 7(h).

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[1] 886 F.2d 871, 50 FEP Cases 1627 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990).

[2] Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1988). Title VII provides in relevant 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.

includes pregnancy, childbirth, and related medical expenses.[3] An employer charged with violating the provisions of Title VII regarding sex discrimination may raise two defenses. First, Congress created a statutory defense that entitles an employer to discriminate on the basis of sex if an employer proves that such discrimination is based on a bona fide occupational qualification ("BFOQ").[4] This qualification must be reasonably necessary to the normal operation of the employer's business. Courts have traditionally required employers to show a BFOQ in disparate treatment claims where the challenged employment practice is discriminatory on its face.[5] In addition to the BFOQ defense, the judiciary has created a less stringent "business necessity" defense that is applicable in instances of disparate impact where the employer's practice applies to all employees equally, but which, in fact, impacts only one class of employees.[6]

Employees have invoked Title VII to challenge the validity of employers' fetal protection policies.[7] A fetal protection policy involves an employer's classification of pregnant and fertile women who are prohibited from working in jobs that the employer determines pose a risk to the health of a fetus.[8] The policy necessarily applies only to women, and under traditional Title VII analysis,

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[3] *Id.* § 2000e(k). The Pregnancy Discrimination Act provides:

> 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 . . . as other persons not so affected but similar in their ability or inability to work . . . .

Id.

[4] *Id.* § 2000e–2(e)(1). This section provides:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id.

[5] *See, e.g.*, Levin v. Delta Airlines, 730 F.2d 994, 997, 34 FEP Cases 1192, 1194 (5th Cir. 1984).

[6] *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 798, 3 FEP Cases 653, 657–58 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); *see also* Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 668–69, 671 (1981).

[7] *See, e.g.*, Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1546–47, 34 FEP Cases 445, 446–48 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1176, 30 FEP Cases 889, 892–93 (4th Cir. 1982).

[8] *See, e.g.*, *Wright*, 697 F.2d at 1182, 30 FEP Cases at 897–98.

courts would subject the policy to scrutiny under the BFOQ standard.[9] Recognizing that the ability to bear a child rarely impinges upon a woman's ability to perform a particular job, the United States Courts of Appeals for the Fourth and the Eleventh Circuits have held that such policies are unlikely to meet the BFOQ standard.[10] Rather than decide that the policies were necessarily discriminatory, however, both circuit courts extended the availability of the "business necessity" defense to employers defending fetal protection policies.[11]

In addition, the Equal Employment Opportunity Commission ("EEOC") has endorsed the Fourth and Eleventh Circuit decisions.[12]

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[9] *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 908–09, 50 FEP Cases 1627, 1655–56 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990) (Easterbrook, J., dissenting).

[10] *Hayes*, 726 F.2d at 1549 & n.9, 34 FEP Cases at 449 & n.9; *Wright*, 697 F.2d at 1185–86 n.21, 30 FEP Cases at 900–01 n.21.

[11] *See Hayes*, 726 F.2d at 1552–54, 34 FEP Cases at 451–53; *Wright*, 697 F.2d at 1185–87, 30 FEP Cases at 900–02.

In *Wright*, the United States Court of Appeals for the Fourth Circuit justified extension of the business necessity defense by stating that a challenge to a fetal protection policy was more like a disparate impact case than a disparate treatment case, thus allowing the employer to raise that defense. *Id.* at 1185, 30 FEP Cases at 900. The *Wright* court noted that "business necessity" includes employment practices that are implemented to provide for safe job performance. *Id.* at 1188, 30 FEP Cases at 900. The business necessity defense in the fetal protection context, as outlined by the *Wright* court, places the burden of proof upon an employer to show that the exposure of female workers to toxic hazards creates a significant risk of harm to the unborn children of such workers. Additionally, the employer must prove that exposure of male workers to toxic substances does not present similar risks to the offspring of those males. In order to meet the burden, the employer must present independent, objective evidence of the risk of harm. The evidence, however, need only demonstrate that there is a "considerable body of opinion" that the risk exists and is primarily limited to female employees. *Id.* at 1191, 30 FEP Cases at 905. Finally, the employer must show that the protection policy is effective. By proving these elements, the defendant presents a prima facie business necessity defense that can only be rebutted if the plaintiff can show that there are alternative practices that would be as effective in protecting unborn children of employees from health risks and that would create a lesser disparate impact on women.

In *Hayes*, the Eleventh Circuit Court of Appeals used the framework of the business necessity defense presented in *Wright* to establish that a fetal protection policy is neutral if it is proved that only female, not male, employees who are exposed to toxic hazards pose a substantial risk to unborn offspring. *Hayes*, 726 F.2d at 1548 & n.8, 34 FEP Cases at 448. The *Hayes* court reasoned that, if scientific evidence showed that the risk applied only to women carrying a fetus and not to men who may have offspring, then the policy was facially neutral, having a disproportionate impact on women. The policy, which clearly affects only women, can be considered neutral because "it effectively and equally protects the offspring of all employees." *Id.* at 1548, 34 FEP Cases at 448. Although the court determined that the BFOQ defense is the only one available where the employer fails to establish that the employment practice is neutral, the court embraced the business necessity defense for all other fetal protection policy cases. *Id.* at 1547–48, 34 FEP Cases at 447–48.

[12] Equal Employment Opportunity Commission, Policy Statement on Reproductive and Fetal Hazards Under Title VII (approved Oct. 3, 1988).

The EEOC recognized that fetal protection policies that exclude only women from "hazardous" jobs violate Title VII.[13] The Commission noted that the BFOQ defense would normally be the only one available to an employer because of the overt discrimination in fetal protection policies affecting only women.[14] In endorsing the circuit courts, however, the EEOC affirmed that in the interest of protecting unborn children, an employer may find it necessary to restrict women from certain categories of employment. The EEOC advocated that the framework established by the Fourth and Eleventh Circuits be followed by courts addressing Title VII challenges to fetal protection policies.[15]

During the *Survey* year, in *International Union, UAW v. Johnson Controls, Inc.*, the United States Court of Appeals for the Seventh Circuit affirmed that the employer could utilize the business necessity defense in fetal protection cases.[16] The court went further, however, and held that fetal protection policies also could be upheld based on the BFOQ defense.[17] Although recognizing that Congress intended the BFOQ defense to be narrow, the *Johnson* court nonetheless determined that industrial safety was part of the normal operation of Johnson Control's business and that Johnson's fetal protection policy was reasonably necessary to achieving that safety.[18]

In *Johnson*, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), a number of local unions, and individual employees brought a Title VII action against Johnson Controls Company ("Johnson").[19] The action alleged that Johnson's mandatory fetal protection policy discriminated against employees on the basis of sex because it prohibited fertile women from working in Johnson's battery division.[20] The policy stated that medical evidence establishes that a woman's exposure to lead can harm her unborn child because lead in the mother's blood can be passed to the child through the placenta in

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[13] International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 885–86, 50 FEP Cases 1627, 1637 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990).

[14] *Id.* at 886, 50 FEP Cases at 1637.

[15] *See id.*

[16] *Id.* at 887, 50 FEP Cases at 1638. The United States Supreme Court heard oral argument in the *Johnson* case in October, 1990. *See* Boston Globe, Oct. 11, 1990, § 1, at 8.

[17] *See id.* at 893, 50 FEP Cases at 1643.

[18] *Id.* at 893, 898, 50 FEP Cases at 1643, 1647.

[19] *Id.* at 874, 50 FEP Cases at 1629.

[20] *See id.* Johnson and its predecessor corporation had established a voluntary fetal protection policy in 1977, and Johnson adopted the challenged mandatory policy in 1982. *Id.* at 875–76, 50 FEP Cases at 1630.

the earliest stages of pregnancy.[21] Based on this medical evidence, Johnson designed its fetal protection policy to exclude all pregnant and fertile women not only from jobs that involve exposure to lead, but from any job that, through job bidding or transfer and promotion rights, could lead to another job that could expose them to lead.[22]

The district court granted summary judgment in favor of Johnson.[23] On appeal, the case was argued before a panel of Seventh Circuit judges, but prior to publication of the panel's opinion, the majority of the circuit judges voted to hear the case *en banc*.[24] Upon rehearing, the United States Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment.[25]

The *Johnson* court began its analysis by examining the central issue of whether lead poses a risk to the offspring of Johnson's female employees.[26] Both UAW and Johnson acknowledged that lead presents a substantial health risk to an unborn child.[27] The court noted that the record before it indeed established that lead does present such substantial risk.[28] Further, the court observed that restricting the fetal protection policy to pregnant women would not adequately serve the policy's protective purpose.[29] In support of this observation, the court pointed to uncontroverted medical evidence that suggested that lead continues to have an effect upon the mother and the fetus long after the mother is removed from lead exposure.[30] Therefore, the court concluded that a fertile wom-

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[21] *Id.* at 877, 50 FEP Cases at 1631.

[22] *Id.* Johnson's fetal protection policy is as follows:

> [I]t is the [battery] Division's policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights. This policy is intended to reduce or eliminate the possible unhealthy effects of lead on the unborn children of pregnant employees and applicants. It does not apply to those women who have medical confirmation that they cannot bear children . . . .

Id. at 877–78, 50 FEP Cases at 1631.

[23] *Id.* at 874, 50 FEP Cases at 1629.

[24] *Id.* at 874–75, 50 FEP Cases at 1629.

[25] *Id.* at 875, 50 FEP Cases at 1629.

[26] *Id.* at 879–83, 50 FEP Cases at 1632–35.

[27] *Id.* at 879, 50 FEP Cases at 1632.

[28] *Id.* Specifically, the court noted that the record established that lead in a mother's blood crosses the placenta and affects the fetus. The court recognized that because lead attacks the fetus's central nervous system and can slow cognitive development, exposure to lead is a critical concern. In addition, the court noted that lead exposure can reduce birth weight, cause premature or still birth, and affect vital organs. *Id.*

[29] *Id.* at 881–82, 50 FEP Cases at 1634.

[30] *Id.* at 882, 50 FEP Cases at 1634.

an's exposure to lead prior to pregnancy poses significant health risks to unborn children.[31]

In clarifying the burden of proof standard applicable in fetal policy challenges, the *Johnson* court departed from the standard set forth by the Fourth and Eleventh Circuits. Under that standard, the employer had the burden of proof to establish the elements of the business necessity defense.[32] The *Johnson* court, however, relied on a recent Supreme Court decision requiring that a plaintiff prove discrimination as a result of an employment practice.[33] The court required that, although the employer has the burden of producing evidence that a valid business reason exists for the challenged practice, the plaintiff must always meet the burden of persuasion regarding the discriminatory nature of the practice.[34]

The court next analyzed the proper legal standard to be applied in a Title VII action challenging a fetal protection policy.[35] Relying heavily on the Fourth and Eleventh Circuit cases, the *Johnson* court held that the business necessity defense could be utilized by Johnson defending its fetal protection policy.[36] The court noted that the defense allowed the interests of the employer, the employee, and the unborn child to be properly considered and weighed.[37]

Applying the business necessity defense, the *Johnson* court held that exposing fertile women to lead creates a substantial risk to the health of a fetus.[38] The court further determined that the medical evidence sufficiently demonstrated that risk to the fetus from lead exposure is substantially confined to risk created by female employees who are capable of bearing children.[39] According to the court, UAW failed to meet its burden of proof in demonstrating that males exposed to lead, as well as females, create a risk to the health of unborn offspring.[40] The court further noted that Title VII allows

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[31] *Id.* at 883, 50 FEP Cases at 1635.

[32] Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552–53, 34 FEP Cases 445, 451–52 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1190, 30 FEP Cases 889, 904 (4th Cir. 1982).

[33] *Johnson*, 886 F.2d at 887, 50 FEP Cases at 1638–39 (quoting Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125–26, 49 FEP Cases 1519, 1527 (1989)).

[34] *Wards Cove*, 109 S. Ct. at 2126, 49 FEP Cases at 1527 (noting that this allocation of burden of proof is the same as the allocation made in disparate treatment cases).

[35] *Johnson*, 886 F.2d at 883, 50 FEP Cases at 1635.

[36] *Id.* at 883–87, 50 FEP Cases at 1635–38.

[37] *Id.* at 886, 50 FEP Cases at 1638.

[38] *Id.* at 888, 50 FEP Cases at 1639.

[39] *Id.* at 889, 50 FEP Cases at 1640.

[40] *Id.* at 890, 50 FEP Cases at 1641.

employers to make distinctions based on sex so long as those distinctions are real and not stereotypical. Finally, the court observed that UAW failed to meet its burden of proof in establishing that there are acceptable policy alternatives that Johnson could have adopted that would effectively accomplish the safety purpose of the policy while, at the same time, having a less disparate effect on women.[41] The *Johnson* court noted that if UAW had proven that less discriminatory means were available to achieve the same goals, Johnson's existing fetal protection policy may not have been upheld.[42]

The court affirmed the Fourth and Eleventh Circuits' judgment that the business necessity defense can be asserted in meeting a Title VII challenge to fetal protection policies. The Seventh Circuit also expanded judicial sanction of these policies, however, by holding that Johnson's fetal protection policy also could have survived scrutiny under the BFOQ defense.[43] Prior to *Johnson*, the Fourth and Eleventh Circuit courts had stated that such policies would likely fail the BFOQ standard.[44]

The *Johnson* court began its BFOQ discussion by stating that the relevant analysis is very similar to that made under the business necessity defense.[45] Focusing on one of its own prior decisions,[46]

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[41] *Id.* at 891, 50 FEP Cases at 1642.

[42] *Id.* at 890–91, 50 FEP Cases at 1641. The court added, however, that factors such as cost to the employer would be relevant in determining the effectiveness of any alternative. In addition, the court placed great emphasis on the theory that "[c]ourts are generally less competent than employers to restructure business practices," thereby affirming that the court would hesitate to substitute any alternative plan presented by a plaintiff. *Id.* at 892, 50 FEP Cases at 1642.

Regarding the standards to be applied in deciding whether an adequate alternative policy exists, the *Johnson* court relied on the Supreme Court's *Wards Cove* decision. The court stated:

> (1) that the UAW bears the burden of presenting specific economically and technologically feasible alternatives to Johnson Controls' fetal protection policy; (2) that if the UAW presents such alternatives, the UAW also bears the burden of demonstrating that its proposed alternative policy is "*equally* effective [in achieving] legitimate employment goals;" and (3) that this inquiry is to be undertaken with the recognition that "factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practices . . . ."

Id.

[43] *Id.* at 893, 50 FEP Cases at 1643.

[44] Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1549 & n.9, 34 FEP Cases 445, 449 & n.9 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1185–86 n.21, 30 FEP Cases 889, 900–01 n.21 (4th Cir. 1982).

[45] *Johnson*, 886 F.2d at 894, 50 FEP Cases at 1644.

[46] Torres v. Wisconsin Dept. of Health and Social Servs., 859 F.2d 1523, 1527, 48 FEP

which outlined the requirements of a valid BFOQ defense, the court stated that discrimination based on sex is legitimate only if the essence of the business would be harmed in the absence of such discrimination.[47] In addition, the court stated that the defense required a showing that "all or substantially all women would be unable to perform safely and efficiently the job involved."[48] Observing that Congress intended the BFOQ defense to be a means of dealing with genuine differences between men and women, the court noted that the validity of a BFOQ should be assessed in relation to the actual business of the employer.[49] Due to the necessary and inherent hazards associated with Johnson's business requiring the use of lead, the court held that safety is central to its operation.[50]

Having determined that safety is part of the essence of Johnson's business, the court next addressed whether a direct relationship existed between the fetal protection policy and industrial safety.[51] The court had no hesitation in holding that it did. In determining whether the policy was "reasonably necessary" to achieve the safety goal, the *Johnson* court stated that reasonable necessity requires evidence that the employer had a factual basis for believing that all or substantially all women capable of pregnancy would be unable to perform the job.[52]

Although Title VII generally requires employers to allow an individual woman to decide whether a job is too dangerous for her to perform, the court noted that the Supreme Court has held that, in unique cases where more is at stake than an individual's freedom to choose a job, employers are justified in excluding from employ-

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Cases 270, 273 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1133, 48 FEP Cases 1896 and 109 S. Ct. 1537, 49 FEP Cases 464 (1989). In *Torres*, the issue raised was whether a state Department of Health and Human Services could further its goal of rehabilitation by excluding men from specified guard positions in the housing units of a women's prison. *Id.* at 1530, 48 FEP Cases at 276. The court held that under special circumstances, such as those presented in *Torres*, Title VII would not necessarily prohibit legitimate discrimination based on sex. *Id.* at 1532–33, 48 FEP Cases at 277–78.

[47] *Johnson*, 886 F.2d at 894, 50 FEP Cases at 1644 (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977)).

[48] *Id.* The court stated that "an employer [can] rely on the BFOQ exception only by proving 'that he had reason to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'" *Id.* (quoting *Dothard*, 433 U.S. at 333).

[49] *Id.* at 894–95, 50 FEP Cases at 1644–45.

[50] *Id.* at 896, 50 FEP Cases at 1645.

[51] *Id.*

[52] *Id.* at 897, 50 FEP Cases at 1646.

ment an entire class of persons, such as all women or all men.[53] The Seventh Circuit Court of Appeals stated that more is at stake in fetal protection cases than a woman's decision regarding the risks of employment, notably the risk to unborn offspring. Given the unique hazards created by the exposure of a fetus to lead, the court concluded that Johnson's fetal protection policy constituted a valid BFOQ.[54]

In sum, the Seventh Circuit stated that a business necessity defense should be utilized in meeting a challenge to a fetal protection policy under Title VII.[55] The employer raising the defense need only produce evidence supporting that business necessity; the plaintiff must bear the burden of proof regarding the absence of the claimed business necessity. If the employer raises the BFOQ defense instead, the employer must demonstrate that the policy is reasonably necessary to safety. In *Johnson*, the court held that Johnson met its burden under either defense, and because UAW failed to raise any genuine issue of material fact, the court affirmed the summary judgment ruling against UAW.[56]

Three dissents were written to the majority opinion in *Johnson*. Judge Cudahy and Judge Posner each wrote separate dissents.[57] Judge Easterbrook also dissented, joined by Judge Flaum.[58]

In Judge Posner's dissent, he reiterated that Title VII prohibits discrimination based on sex unless a BFOQ is reasonably necessary to the normal operation of the business.[59] According to Judge Posner, Congress intended the BFOQ defense to be very narrow and courts have interpreted it narrowly in Title VII jurisprudence. Judge Posner argued that if the BFOQ defense is given broad application, the defense will swallow up the reach of Title VII.[60]

According to Judge Posner, the determination of whether any particular policy could be upheld under Title VII scrutiny should

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[53] *Id.* (citing Dothard v. Rawlinson, 433 U.S. 321, 335–37 (1977)).

[54] *See id.* at 898–901, 50 FEP Cases at 1647, 1649.

[55] *Id.* at 901, 50 FEP Cases at 1649.

[56] *Id.*

[57] *Id.* at 901–08, 50 FEP Cases at 1650–55. In a short opinion, Judge Cudahy asserted that the BFOQ defense is the only available defense to a fetal protection action under Title VII. Judge Cudahy based this assertion on the fact that the policy advocated by Johnson involved disparate treatment, rather than disparate impact. Although he recognized that it would be difficult for an employer to establish fetal protection as a BFOQ, Judge Cudahy stated that there should be a full trial on that issue. *Id.* at 901–02, 50 FEP Cases at 1650 (Cudahy, J., dissenting).

[58] *Id.* at 909–20, 50 FEP Cases at 1655–65.

[59] *Id.* at 902, 50 FEP Cases at 1650 (Posner, J., dissenting).

[60] *Id.* at 903, 50 FEP Cases at 1651 (Posner, J., dissenting).

be based on the facts of the particular case, and should rarely be made on summary judgment.[61] In examining Johnson's policy, Judge Posner asserted that the policy is far too broad in two respects. First, the policy designates all women under the age of seventy as fertile, thereby excluding them from employment in the battery division. Second, the policy precludes any fertile woman not only from employment in the battery division, but also from employment in any position that might, through promotion, lead to a job in the battery factory. Judge Posner noted, however, that these two provisions could be severed from the remainder of the policy, allowing the policy to stand.[62] Reiterating that each policy should be evaluated on a case-by-case basis, Judge Posner recommended that the district court decision in *Johnson* be vacated and that the case be remanded for further proceedings.[63]

In a lengthy dissent, Judge Easterbrook advocated for a decision based on statutory law, stating that any expansion of Title VII defenses should be implemented by Congress, not by the Seventh Circuit.[64] Judge Easterbrook pointed out that, under Title VII, the only defense available for a policy that uses sex as the only criterion is the BFOQ defense. In discussing the Pregnancy Discrimination Act, Judge Easterbrook stated that the Act mandated that only if pregnant employees differ from other employees "in their ability or inability to work," can they be treated differently with respect to employment.[65]

Criticizing the majority's reliance on the Fourth Circuit decision in *Wright v. Olin Corp.*, Judge Easterbrook accused the Fourth Cir-

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[61] *Id.*, 50 FEP Cases at 1654. Although requiring the BFOQ defense to be raised, Judge Posner did not discount the possibility that some fetal protection policies could meet the burden of that defense. Judge Posner outlined a situation in which such a policy would not violate the mandates of Title VII. *Id.* at 906, 50 FEP Cases at 1653. Judge Posner wrote:

> If the hazard to the fetus from airborne lead in the mother's workplace is sufficiently great, if the amount of lead in the environment cannot be reduced without discontinuing the production of batteries, and if experience demonstrates that some women will become pregnant even after being clearly warned of the hazards to which the fetus would be exposed . . . I can find nothing in the text of the statute, or in its history or purpose, to prevent an employer from defending his refusal to allow fertile women to work in jobs in which they are exposed to dangerous concentrations of airborne lead on the ground that the refusal is reasonably necessary to the normal (civilized, humane, prudent, ethical) operation of his particular business.

Id.

[62] *Id.* at 907, 50 FEP Cases at 1655 (Posner, J., dissenting).

[63] *Id.* at 908, 50 FEP Cases at 1655 (Posner, J., dissenting).

[64] *Id.* at 908, 910, 50 FEP Cases at 1655–56 (Easterbrook, J., dissenting).

[65] *Id.* at 909, 50 FEP Cases at 1656 (Easterbrook, J., dissenting).

cuit of deciding adequacy of the fetal protection policy on faulty grounds.[66] According to Judge Easterbrook, in treating the policy as sex-neutral in order to accommodate the business necessity defense, the *Wright* court was concerned only with whether the employer used sex to further an important societal interest, not with whether the employer impermissibly used sex as a basis for discrimination. He added that, under Title VII, the focus of any analysis should be on whether an employer is treating a group differently based on sex.[67]

Judge Easterbrook argued that Johnson's policy did not meet the requirements of a BFOQ defense. Stating that, as a matter of law, Johnson's policy did not satisfy the BFOQ standards, Judge Easterbrook noted that the policy had inadequate objectives that, in any event, did not apply to all women. Because the purpose of Johnson's fetal policy is to protect unborn offspring, the policy cannot be justified under a defense that requires the policy to be a necessary qualification for the production of batteries. Under BFOQ analysis, the policy must relate to a woman's ability or inability to do the work, and not to whether an employer wishes to protect future generations.[68]

Further, Judge Easterbrook argued that, although some women working in the battery division may become pregnant, and some of those women may pass lead to their fetuses, Johnson's policy of excluding all fertile women from working in that division is overbroad.[69] As noted by Judge Easterbrook, the fear that some children would be harmed cannot meet the BFOQ standard that requires that "all or substantially all women" be unable to perform the job safely.[70] Judge Easterbrook would hold that risk to a fetus does not fall within the requirements of the BFOQ defense.

Finally, Judge Easterbrook questioned the majority's conclusion that the risk to the fetus is transmitted only through the female. The judge cited evidence that demonstrated that males with high lead concentrations in the bloodstream also posed a risk to their offspring.[71] Given the conflicting evidence regarding whether males present similar risks to their offspring, Judge Easterbrook stated

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[66] *Id.*
[67] *Id.* at 910, 50 FEP Cases at 1657 (Easterbrook, J., dissenting).
[68] *Id.* at 912, 50 FEP Cases at 1658 (Easterbrook, J., dissenting).
[69] *Id.* at 913, 50 FEP Cases at 1659 (Easterbrook, J., dissenting).
[70] *Id.*
[71] *Id.* at 918, 50 FEP Cases at 1663 (Easterbrook, J:, dissenting).

that the court should at least have held a trial to properly weigh the evidence.[72]

Calling the *Johnson* case the most important sex-discrimination case since Title VII was enacted in 1964, Judge Easterbrook feared that the majority decision would enable employers to ignore the mandates of the statute and allow them to exclude women from a vast array of industrial jobs.[73] Title VII as interpreted by the majority would create, rather than eliminate, sexual stereotyping in employment. The flexible reading of Title VII, argued Judge Easterbrook, was, in fact, a renunciation of the statute.[74]

The *Johnson* court undermined one of the primary purposes of Title VII in failing to ensure equal employment opportunities to all persons, irrespective of gender. The Pregnancy Discrimination Act definitively determined that Title VII's prohibition against sex discrimination applies to pregnancy and pregnancy-related situations.[75] Given the mandates of these two statutes, any policy that excludes all fertile women from employment in a significant category of industrial jobs violates Title VII. To accommodate the unique situation in which gender distinctions make a genuine difference for a specific job, Title VII provides the BFOQ defense to such a prima facie case of discrimination.[76]

The Seventh Circuit, following the lead of the Fourth and Eleventh Circuits, broadened the defenses that will be entertained in Title VII cases challenging facial discrimination. Faced with a fetal protection policy that excluded all fertile women from working in the battery division of Johnson Controls, the court interpreted the facially discriminatory policy as a neutral one, thereby allowing the less stringent business necessity defense to be used. Under this defense, an employer can more easily justify the exclusion of women from a significant number of jobs, thereby circumventing the intended narrow scope of the BFOQ defense. Fetal protection policies, however, affect only women, and are therefore facially discriminatory, rather than neutral. The court is mistaken in characterizing these cases as disparate impact cases when, clearly, the policies mandate disparate treatment based on sex.

Even if the Seventh Circuit had required the BFOQ defense, however, it would have upheld Johnson's policy. The court held

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[72] *Id.* at 919, 50 FEP Cases at 1664 (Easterbrook, J., dissenting).
[73] *Id.* at 920, 50 FEP Cases at 1665 (Easterbrook, J., dissenting).
[74] *Id.*
[75] 42 U.S.C. § 2000e(k) (1988).
[76] *Id.* § 2000e-2(e)(1).

that such policies can constitute bona fide occupational qualifications.[77] One of the ramifications of the *Johnson* court's decision regarding the BFOQ defense is that employees will no longer be able to argue effectively that the business necessity defense should not be applied in fetal protection cases. It no longer matters in the Seventh Circuit whether the less stringent defense is allowed if the policies can withstand scrutiny under the BFOQ analysis. In holding that the BFOQ requirements could be met, the *Johnson* court eliminated the need to distort the traditional definition of "disparate treatment" as opposed to "disparate impact." Application of the business necessity defense, a defense reserved for disparate impact cases, to fetal protection policies left the validity of those policies in question. By establishing that it is unnecessary to resort to any defense other than the one explicitly provided in Title VII, the Seventh Circuit strengthens the credibility of fetal protection policies and increases the likelihood that employers will implement such policies.

In order for a policy to be upheld under the BFOQ defense, the Seventh Circuit held that an employer must produce evidence that the challenged policy is central to the essence of the business, that at least substantially all members of the excluded group are unable to perform the job from which they are excluded, and that the policy is reasonably necessary to the normal operation of the business.[78] The court noted that safety, the stated object of the policy, was part of the essence of Johnson's battery-making business. Based on medical evidence in the record, fertile women could not safely perform the job because of the proven risks to potential fetuses. It followed that the policy, therefore, was reasonably necessary to the normal production of batteries.

Judge Posner, however, noted in his dissent that, even accepting this framework, Johnson's policy is too broad to stand under Title VII. As Judge Posner stated, the policy excludes all women under the age of seventy from employment in the battery division. It is not realistic or reasonable to conclude that women who have reached that age are likely to bear children.

Further, the policy excludes fertile women from any job which, through existing promotion policies, could lead to a job in the battery division. This is unnecessarily restrictive and discriminatory.

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[77] *Johnson*, 886 F.2d at 893, 50 FEP Cases at 1643.

[78] See *supra* notes 45–50 and accompanying text for a discussion of the court's treatment of the BFOQ defense.

If necessary, Johnson could revamp its promotion policy, rather than prohibit women from working in a vast number of jobs that pose no health risk to either the employee or any potential fetus.

Given the *Johnson* court's analysis, it seems that a person charging that a fetal protection policy is discriminatory will have to show that the risk to the fetus is not isolated to females, but that males also present similar risks. Although some evidence of this existed in the record, the court discounted it because it was based primarily on animal, not human, studies. Once it is established that both women and men exposed to high levels of lead can cause harm to unborn children, any employment policy excluding solely women could not withstand Title VII scrutiny. In addition, if a plaintiff presents the court with an alternative plan, which meets the employer's goal of preserving fetal safety without imposing significant burdens on the business, a court may substitute the less discriminatory policy for the one advocated by the employer. The Seventh Circuit made it clear, however, that any court should hesitate to substitute its judgment for that of an employer.[79]

The trend in the circuits clearly is to allow employers to structure employment practices that exclude women from industrial jobs that, due to toxic hazards, may endanger the health of a fetus. Although the well-being of the next generation is of vital importance, the circuits addressing it have wrongly relied on public policy, rather than on statutory law. In attempting to make their decisions fit within the law, they have distorted definitions and issues. The Seventh Circuit adopted those distortions in extending broad protection to policies that will, in all likelihood, signal the return to employment based on stereotype, rather than on individual merit and decision. The *Johnson* court's extension of the narrow BFOQ defense to uphold employment practices that exclude a class of persons based on sex where sex in no way impairs the class's ability to perform the job signals a weakening of historic Title VII protections.

B. * *Standards for Sexual Harassment in a Hostile Environment:* Brooms v. Regal Tube Company[1]

Title VII of the Civil Rights Act of 1964 provides that an employer cannot discriminate against an employee based on gen-

[79] *Johnson*, 886 F.2d at 892, 50 FEP Cases at 1642.

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[1] 881 F.2d 412, 50 FEP Cases 1499 (7th Cir. 1989).

der.[2] In 1986, the United States Supreme Court in *Meritor Savings Bank, FSB v. Vinson* recognized that sexual harassment constitutes illegal sex discrimination in the workplace.[3] The *Meritor* Court affirmed several lower federal court decisions allowing plaintiffs to establish Title VII violations based on sexual harassment that created a hostile or abusive working environment.[4]

Beyond establishing a cause of action for sexual harassment that creates a hostile or abusive working environment, *Meritor* did little to guide lower courts in determining the proper standard to

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[2] Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e–2(a)(1) (1982 & 1989 Supp.). Title VII states in relevant part:

> [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 an individual's race, color, religion, sex, or national origin . . . .

Id.

[3] 477 U.S. 57, 66, 40 FEP Cases 1822, 1827 (1986). *See generally Sexual Harassment in the Workplace*: Meritor Savings Bank, FSB v. Vinson, *1986–1987 Annual Survey of Labor Relations and Employment Discrimination Law*, 29 B.C.L. REV. 215 (1987) [hereinafter *1986–1987 Annual Survey*]. The Equal Employment Opportunity Commission's ("EEOC") 1980 Guidelines also recognize a cause of action under Title VII for sexual harassment. 29 C.F.R. § 1604.11(a)–(g) (1990). The EEOC guidelines provide in part:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) *such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.*
>
> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. § 1604.11(a)–(b) (1990) (emphasis added).

[4] *Meritor*, 477 U.S. at 66, 40 FEP Cases at 1827. In *Meritor*, a female bank employee claimed that her supervisor required sexual favors, which she agreed to perform because she feared losing her job, and forcibly raped her several times. *Id.* at 60, 40 FEP Cases at 1824. *Meritor* acknowledged the validity of hostile environment claims previously recognized in Henson v. Dundee, 682 F.2d 897, 902, 29 FEP Cases 787, 791 (1982) (female police department employee accused police chief of making sexual advances and inquiries), and Bundy v. Jackson, 641 F.2d 934, 934–45, 24 FEP Cases 1155, 1155–61 (1981) (vocational rehabilitation therapist contended that supervisor made sexual advances). *Id.* at 66–67, 40 FEP Cases at 1827 (other citations omitted). The Court also recognized sexual harassment claims based on the economic *quid pro quo* type of harassment, in which employment or other job-related interests are conditioned upon an acceptance of a sexual advance. *See Meritor*, 477 U.S. at 64–65, 40 FEP Cases at 1826; *see also 1986–1987 Annual Survey*, *supra* note 3, at 216.

be used in assessing whether the work environment created was actually "hostile."[5] Commentators disagree as to whether the vague discussion in *Meritor* led courts to apply a subjective or an objective test in ascertaining the existence of a hostile environment.[6] Currently, many courts have not explicitly adopted either standard, but rather, have rendered decisions based upon the specific facts of each case.[7] The Sixth Circuit Court of Appeals, however, in the 1986 case of *Rabidue v. Osceola Refining Company*, clearly articulated a two-part standard, which included both objective and subjective components.[8] The *Rabidue* court stated that the plaintiff must show

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[5] *See Meritor*, 477 U.S. at 67, 40 FEP Cases at 1827. *Meritor* held that for a plaintiff to establish a sexual harassment cause of action, the conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.*, quoting *Henson*, 682 F.2d at 904, 29 FEP Cases at 793–94. The Supreme Court held that the pervasive harassment and criminal conduct (forcible rape) in this case was sufficient. *Id.* In light of the egregious fact situation, the Court did not discuss whether it used an objective or subjective standard in determining whether this conduct created a hostile environment. *See id.*

[6] For articles contending that *Meritor* did not require courts to view conduct from the perspective of a reasonable person, see RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS A–78–A–79 (1989) (requirement that conduct interfere with a hypothetical individual's work performance significantly departs from *Meritor*); Quick & Quick, *Of Rights and Remedies—Sexual Harassment in the Workplace:* Meritor Savings Bank *and the Sixth Circuit*, 19 TOLEDO L. REV. 331, 343–44 (1988) (requiring proof that a reasonable person must be affected by a hostile environment is not in keeping with *Meritor* and other courts); Case Note, Meritor Savings Bank v. Vinson: *What Makes a Work Environment "Hostile"?*, 40 ARK. L. REV. 857, 867 (1987) (the Supreme Court majority seemed to favor a subjective approach to assessing employer's conduct).

For articles suggesting that *Meritor* did not find the use of a reasonable person standard to be inappropriate, see Note, Meritor Savings Bank v. Vinson: *The Supreme Court's Recognition of the Hostile Environment in Sexual Harassment Claims*, 20 AKRON L. REV. 575, 582 (1987) (although the Supreme Court did not elaborate, other courts have used the viewpoint of a reasonable victim); *1986–87 Annual Survey*, *supra* note 3, at 222 n.75 (the standard generally used by federal courts to determine whether conduct is a term or condition of employment is objective).

[7] *See* Note, *Employer: Beware of "Hostile Environment" Sexual Harassment*, 26 DUQ. L. REV. 461, 464 (1987) (citing Scott v. Sears Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986); Barrett v. Omaha Nat'l Bank, 584 F. Supp. 22, 29 (D. Neb. 1983); Ferguson v. E.I. DuPont de Nemours & Co., 560 F. Supp. 1172, 1198 (D. Del. 1983); Robson v. Eva's Supermarket, Inc., 538 F. Supp. 857, 861 (N.D. Ohio 1982)). It is also interesting to note that many circuit courts do not feel required to announce a standard because they defer to the lower court if the findings of fact have not clearly been found to be erroneous. *See, e.g.*, Stanton v. Maries County, 868 F.2d 996, 49 FEP Cases 309, 310–311 (8th Cir. 1989) (female ambulance dispatcher alleged that she was subject to sexual advances and was eventually raped by the county sheriff); Jordan v. Clark, 847 F.2d 1368, 1375, 46 FEP Cases 1558, 1563 (9th Cir. 1988) (female administrative assistant accused supervisor of soliciting sex in exchange for keeping her job and getting promotion), *cert. denied*, 488 U.S. 1006, 48 FEP Cases 1088 (1989).

[8] 805 F.2d 611, 620, 42 FEP Cases 631, 638 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, 43 FEP Cases 1056 (1987).

that the defendant's actions would have interfered with a reasonable individual's work performance and would have affected the psychological well-being of a reasonable person.[9] Assuming that the plaintiff meets this burden, the reviewing court must then ascertain whether the defendant's conduct offended the particular plaintiff, thereby causing some injury.[10]

In the dissent to *Rabidue*, Judge Keith asserted that courts should view the hostile environment from the perspective of the reasonable woman.[11] According to the dissent, adoption of this standard would permit a court to consider the sociological differences between men and women and still protect employers from overly sensitive plaintiffs.[12] This standard, according to Judge Keith, would also prevent defendants from perpetuating attitudes that may be considered acceptable within the male population, but are unacceptable and offensive to reasonable women.[13] Some courts have adopted Judge Keith's standard, holding that the hostile environment must be found offensive to a person of the same sex as the victim, thereby treating equally both male and female parties.

The circuit courts have adopted various approaches to the hostile environment standard. The Fourth Circuit Court of Appeals explicitly adopted the *Rabidue* standard,[14] whereas other circuits have implicitly adopted its two-prong test.[15] Some courts, including

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 627, 42 FEP Cases at 643 (Keith, J., concurring in part and dissenting in part).

[12] *Id.* at 626, 42 FEP Cases at 642 (Keith, J., concurring in part and dissenting in part) (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451, 1459 (1984)).

[13] *Id.* Judge Keith would also prohibit the court from relying on subjective factors because, as he contends, not only does reliance on such factors make for an unworkable standard, but in addition, the factors are irrelevant because no woman should be subjected to an abusive working environment due to a male prerogative which condones such an atmosphere. *See id.* at 626–27, 42 FEP Cases at 643 (Keith, J., concurring in part and dissenting in part).

[14] Paroline v. Unisys Corp., 879 F.2d 100, 105, 50 FEP Cases 306, 311 (4th Cir. 1989). Several lower courts have recently signaled their agreement with the *Rabidue* standard. *See, e.g.*, Morgan v. Massachusetts Gen. Hosp., 712 F. Supp. 242, 257 (D. Mass. 1989); Perkins v. General Motors Corp., 709 F. Supp. 1487, 1501, 51 FEP Cases 1684, 1695 (W.D. Mo. 1989); Blesedell v. Mobil Oil Co., 708 F. Supp. 1408, 1418–19 (S.D.N.Y. 1989); Ross v. Double Diamond, Inc., 672 F. Supp. 261, 270, 45 FEP Cases 313, 320 (N.D. Tex. 1987).

[15] The fifth circuit applied a reasonable person standard in Waltman v. International Paper Co., 875 F.2d 468, 477 n.3, 50 FEP Cases 179, 187 n.3 (5th Cir. 1989), but did not explicitly overrule its earlier holding in *Jones v. Flagship International*, which directed the court to look at whether the conduct was offensive to the employee. 793 F.2d 714, 719, 41 FEP Cases 358, 362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065, 43 FEP Cases 80 (1987). The eighth circuit also appears to adopt a combined objective and subjective standard based on

the Sixth Circuit Court of Appeals, have adopted the standard proposed by the *Rabidue* dissent, examining the conduct from the perspective of a reasonable female employee.[16]

During the *Survey* year, the United States Court of Appeals for the Seventh Circuit, in *Brooms v. Regal Tube Company,* considered whether the existence of a hostile work environment should be determined by a subjective or an objective standard.[17] The court held that a trial court must apply the *Rabidue* "dual standard" when examining Title VII sexual harassment claims, taking into account the likely effect of the defendant's conduct on both the reasonable person and the particular plaintiff.[18] In adopting this standard, the *Brooms* court stated that it was merely affirming its agreement with both the court's articulation in the sixth circuit of the proper test for establishing a hostile environment and its own earlier "intimations" in this area.[19]

In *Brooms,* Helen Brooms, the plaintiff, brought a Title VII sexual harassment claim against her employer, the Regal Tube Company, its parent company, the Copperweld Corporation, and her supervisor, Charles Gustafson.[20] Gustafson allegedly made offensive racial and sexual remarks to Brooms, all of which she protested or ignored. After Brooms informed Regal's Vice President of Gustafson's conduct, Gustafson refrained from unnecessary contact with Brooms for a period of several weeks but then resumed his former conduct.[21] In one instance, he showed the plaintiff a photograph displaying an interracial act of sodomy, telling her it represented

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Rabidue. See Hall v. Gus Constr. Co., 842 F.2d 1010, 1015, 46 FEP Cases 573, 576 (8th Cir. 1988).

[16] Courts that have adopted the standard outlined in the *Rabidue* dissent include: Yates v. Avco Corp., 819 F.2d 630, 637, 43 FEP Cases 1595, 1600 (6th Cir. 1987) (secretaries accused supervisor of making improper sexual comments and advances); Spencer v. General Elec. Co., 697 F. Supp. 204, 218, 51 FEP Cases 1696, 1708 (E.D. Va. 1988) (plaintiff was victim of sexual advances and environment was pervaded by sexual innuendo, sexually oriented games, and intimate touching); Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 609, 262 Cal. Rptr. 842, 852 n.7 (Cal. App. 2 Dist. 1989) (plaintiff could not establish cause of action for sexual harassment where no action directed against her personally). The First Circuit Court of Appeals held, in *Lipsett v. University of Puerto Rico,* that the fact finder must keep in mind the perspective of both men and women. 864 F.2d 881, 898 (1st Cir. 1988).

[17] 881 F.2d 412, 419, 50 FEP Cases 1499, 1503 (7th Cir. 1989).

[18] *Id.*

[19] *Id.* For the sixth circuit standard, see *supra* text accompanying notes 8–10 and *infra* notes 32–34 and accompanying text. For the prior seventh circuit standard in this area, see *infra* notes 30–31.

[20] *Brooms,* 881 F.2d at 416, 50 FEP Cases at 1500.

[21] *Id.* at 417, 50 FEP Cases at 1501.

the talent of a black woman and that she had been hired for the purpose of performing such acts. After this incident, Brooms filed a complaint with both the Illinois Department of Human Rights and the Equal Employment Opportunity Commission.[22] Several months later, Gustafson showed Brooms a photocopy of a picture involving bestiality, asserting that the picture represented the way she "was going to end up."[23] As Brooms attempted to snatch one of the photographs, Gustafson grabbed her arm and threatened to kill her. She threw coffee on him and, in the course of running away, fell down a flight of stairs. Brooms did not return to work at Regal and, after leaving work, suffered a debilitating depression allegedly caused by Gustafson's repeated abuse.

Brooms filed suit in the Northern District Court of Illinois, charging the defendants with sexual harassment in violation of Title VII, racial discrimination, and the torts of intentional infliction of emotional distress and negligence.[24] On the charge of sexual harassment, the district court concluded that the plaintiff could prove the occurrence of sexual harassment.[25] Although the district court denied her motion for front pay,[26] the court concluded that the plaintiff had been "constructively discharged" and was therefore entitled to back pay.[27] Copperweld and Regal appealed the district court's judgment on Brooms' sexual harassment charge, contending that the court erred in applying a subjective standard in determining whether the defendants had subjected the plaintiff to a hostile work environment.[28]

The appellate court affirmed the district court's holding, agreeing that Gustafson's conduct constituted sexual harassment, and

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[22] *Id.*

[23] *Id.*

[24] *Id.* The court found that the plaintiff could not maintain a cause of action under section 1981 due to the Supreme Court's holding in the 1981 case of *Patterson v. McLean Credit Union*, in which the Court held that conduct by an employer relating to the terms or conditions of employment was not actionable under this statute. *Brooms*, 881 F.2d at 424, 50 FEP Cases at 1507 (*citing* Patterson v. McLean Credit Union, 109 S. Ct. 2363, 49 FEP Cases 1814 (1989)). The plaintiff's claims for intentional infliction of emotional distress and negligence were also dismissed. *Id.* at 426–27, 50 FEP Cases at 1508–09.

[25] *Id.* at 417, 50 FEP Cases at 1501 (7th Cir. 1989). The court, however, held that the plaintiff could not prove that Regal and Gustafson's actions had been in retaliation to her filing discrimination charges with the Illinois Department of Human Rights. *Id.*

[26] Front pay is intended to compensate victims for the promotions which they would have received but for the discrimination which occurred. *See* SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1434–35 (2d ed. 1983).

[27] *Brooms*, 881 F.2d at 417, 50 FEP Cases at 1501–02.

[28] *Id.* at 418, 50 FEP Cases at 1502.

clarified its standard for judging whether particular types of conduct create a hostile work environment.[29] The *Brooms* court relied on its prior holding in *Scott v. Sears, Roebuck & Co.*, stating that, in effect, it had previously adopted a combined subjective and objective standard.[30] The *Brooms* court claimed that by both affirming the district court's opinion in *Scott* and noting the effect of the conduct upon the particular plaintiff, the court had already adopted a two-prong standard for the seventh circuit.[31]

The *Brooms* court also expressed its agreement with the court's adoption in the Sixth Circuit of a combined subjective and objective test.[32] The *Brooms* court reiterated the standard established by the Sixth Circuit in *Rabidue*, holding that a plaintiff must prove that a defendant's conduct would have interfered with the work performance and well-being of a reasonable individual, and that such conduct actually offended and caused some injury to the particular plaintiff.[33] The *Brooms* court also cited with approval the *Rabidue* court's assertion that the EEOC guidelines support this hybrid test by emphasizing both an individual probative inquiry and an evaluation of the totality of the circumstances.[34]

The *Brooms* court noted that the district court had employed a predominantly subjective standard in determining whether Gustafson's conduct interfered with the plaintiff's work performance and

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[29] *Id.* at 419, 50 FEP Cases at 1503.

[30] *Id.* (citing Scott v. Sears, Roebuck & Co., 605 F. Supp. 1047, 1056, 37 FEP Cases 878, 884 (N.D.Ill. 1985), *aff'd*, 798 F.2d 210, 213–14, 41 FEP Cases 805, 808 (7th Cir. 1986)). In *Scott*, the district court held that the question of whether the plaintiff was sexually harassed was an objective determination, and the court should therefore focus on the defendant's conduct, not upon the plaintiff's reaction. 605 F. Supp. at 1056, 37 FEP Cases at 884 (citing Jennings v. D.H.L. Airlines, 101 F.R.D. 549, 551, 34 FEP Cases 1423, 1425 (1984)). On appeal, the court did not comment on the district court's standard, but applied a more subjective rationale, addressing the particular plaintiff's ability to function on the job. *Scott*, 798 F.2d at 214, 41 FEP Cases at 808.

[31] *Brooms*, 881 F.2d at 412, 50 FEP Cases at 1502.

[32] *Id.*, citing *Rabidue*, 805 F.2d 611, 620, 42 FEP Cases 631, 638 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, 43 FEP Cases 1056 (1987).

[33] *Id.* The *Rabidue* court's list of objective and subjective factors to be considered includes:

> the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering the environment.

Rabidue, 805 F.2d at 620, 42 FEP Cases at 638.

[34] *Brooms*, 881 F.2d at 419, 50 FEP Cases at 1503 (citing *Rabidue*, 805 F.2d at 621 n.5, 42 FEP Cases at 638 n.5). For a statement of the referenced EEOC guideline, 29 C.F.R. § 1604.11(b), see *supra* note 3.

whether the plaintiff actually suffered an injury.[35] The *Brooms* court also stated that, although the district court did not explicitly consider the effect of the conduct on a reasonable person, it implicitly applied an objective test in determining whether the plaintiff had a valid sexual harassment claim.[36] The *Brooms* court, however, asserting its own ability to draw legal conclusions from the lower court's findings of fact, also applied the objective prong of the *Rabidue* test to this case.[37] The appellate court held that Gustafson's offensive conduct would have affected both the work performance and the psychological health of a reasonable employee.[38] The conduct, according to the appellate court, constituted sexual harassment based upon the district court's application of the subjective test and its own application of the objective test.[39]

In explicitly adopting the standard prescribed by the *Rabidue* majority, the Seventh Circuit Court of Appeals has contributed to a trend making it more difficult for alleged victims of sexual harassment to bring a cause of action under Title VII. Under the *Brooms* standard, it is not enough for the plaintiff to assert that she was offended by the defendant's conduct and thereby suffered injury as a result of working in a hostile environment. In addition, the plaintiff must prove that the hypothetical, reasonable individual would have been disturbed by the work environment.[40] Although the *Brooms* court did not state its reasons for accepting the *Rabidue* standard rather than selecting a different criteria for determining the existence of a hostile environment,[41] in *Rabidue*, the court did attempt to justify its use of both subjective and objective factors by claiming that, in so doing, it was according protection to both plaintiffs and defendants.[42] The *Rabidue* court also stated that its ap-

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[35] *Brooms*, 881 F.2d at 419, 50 FEP Cases at 1503.

[36] *Id.* According to the appellate court, the district court clearly applied the subjective prong of the standard, examining Gustafson's actions to determine if they interfered with Brooms' ability to perform her work and if she suffered an actual injury. *Id.* at 419, 50 FEP Cases at 1503. The district court did not explicitly discuss the effect of these actions on the reasonable person although the appellate court stated that this part of the test did play an implicit role in the district court's holding. *Id.*

[37] *Id.* at 420, 50 FEP Cases at 1503. The district court's findings of fact established that Brooms was the victim of sexual remarks and pranks, and "that her problems with Gustafson made her phobic about the company and that she found it intolerable." *Id.* at 420 n.2, 50 FEP Cases at 1503 n.2.

[38] *Id.* at 420, 50 FEP Cases at 1503.

[39] *Id.*

[40] *Id.* at 418, 50 FEP Cases at 1502.

[41] *Id.* at 419, 50 FEP Cases at 1503.

[42] Rabidue v. Osceola Refining Co., 805 F.2d 611, 620, 42 FEP Cases 631, 638 (6th Cir.

proach was not inconsistent with the EEOC guidelines, which reference both the individual nature of the inquiry and the totality of the circumstances.[43]

Commentators have voiced much dissatisfaction over the appropriate standard for determining the existence of a hostile environment. Some authors have criticized a pure subjective standard because a hypersensitive plaintiff could penalize a defendant for conduct that was not intentionally offensive and that courts would not hold to be offensive if directed at a more reasonable individual.[44] Others have stated that by adding a more objective component, the balance is shifted toward the defendant, creating a steep hurdle for plaintiffs. A standard such as set out by both the *Rabidue* and *Brooms* courts, which includes both subjective and objective components, has engendered concern that courts will fail to evaluate sexual harassment from the viewpoint of the most likely victims—women.[45] A gender neutral standard would foreclose claims that would meet the subjective test of offending a particular female employee because it would fail to take into account the difference between male and female perceptions of appropriate conduct in the workplace.[46]

The approach of the *Rabidue* dissent attempts to remedy this flaw by suggesting that courts should evaluate hostile environment cases from the perspective of the reasonable female.[47] Although Judge Keith's approach may satisfy critics who are concerned with differences in perception of conduct based on sex, no standard that relies on evaluating conduct in terms of what would be offensive to the reasonable individual in the prevailing work environment can

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1986), *cert. denied*, 481 U.S. 1041, 43 FEP Cases 1056 (1987). The *Rabidue* court acknowledged that under this standard, it was possible that (1) a plaintiff who was personally affected by conduct which would not offend a reasonable person would not be able to state a claim and (2) the same conduct may or may not be found actionable depending on the personality of the plaintiff and the prevailing work environment. *Id.*

[43] *Id.* at 621 n.5, 42 FEP Cases at 638 n.5 (discussing 29 C.F.R. § 1604(b)). See *supra* note 3 for the text of the regulation.

[44] *See, e.g.*, Case Note, *supra* note 6, at 867; Note, *supra* note 7, at 464.

[45] S. OMILIAN, SEXUAL HARASSMENT IN EMPLOYMENT 14 (1987).

[46] *See Rabidue*, 850 F.2d at 626, 42 FEP Cases at 638 (Keith, J., concurring in part and dissenting in part); *see also* S. OMILIAN, *supra* note 45, at 14–15.

Conduct that is viewed as offensive to females may be seen as harmless or innocent by males. Case Note, *supra* note 6, at 867–68; Note, *supra* note 12, at 1451.

[47] *Rabidue*, 850 F.2d at 627, 42 FEP Cases at 643 (Keith, J., concurring in part and dissenting in part). This standard has received much support in the legal community. *See, e.g.*, S. OMILIAN, *supra* note 45, at 14; Holtzman & Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environmental Claims After* Meritor Savings Bank v. Vinson, 31 ST. LOUIS U.L.J. 239, 258 (1987); Note, *supra* note 46, at 1459.

truly fulfill the mandate of Title VII.[48] In addressing the *Rabidue* district court's contention that Title VII was not intended to transform the "social mores of American workers," Judge Keith correctly noted that offensive conduct cannot be condoned simply based upon the finding that it is part of the prevailing work environment.[49] Conduct that may appear reasonable in the context of the work situation because it follows the status quo nevertheless may be discriminatory and, therefore, create a hostile work environment for the plaintiff. Simply adding the gender distinction to the reasonable person standard, however, will not serve to alleviate this problem if a reasonable woman has been conditioned to accept discriminatory behavior as part of her working environment.

Rather than meekly accepting the status quo by stating that Congress did not intend Title VII to change work environments in which sexual jokes, conversations, and pornography are tolerated,[50] the court should have adopted the perspective of the individual working in the environment that Title VII aspires to create; an environment in which there is no discrimination based on gender.[51] The existence of a hostile work environment then would not depend upon whether the conduct involved was offensive in the particular work situation, but, instead, upon a more fundamental vision of rights that the court should protect regardless of what might seem acceptable to a reasonable person. Translating this standard into objective/subjective terminology, the court would evaluate conduct based upon whether it was offensive to a reasonable person functioning in a setting in which discrimination is not acceptable to

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[48] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30, 3 FEP Cases 175, 177 (1970). According to the *Griggs* Court:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute . . . . Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices.

Id.

[49] *Rabidue*, 805 F.2d at 626, 42 FEP Cases at 643 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part) (quoting Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 430, 36 FEP Cases 183, 191 (E.D. Mich. 1984)). According to Justice Keith:

> To condone the majority's notion of the 'prevailing workplace' I would also have to agree that if an employer maintains an anti-semitic workforce and tolerates a workplace in which 'kike' jokes, displays of nazi literature and anti-Jewish conversation 'may abound,' a Jewish employee assumes the risk of working there, and a court must consider such a work environment as 'prevailing.' I cannot.

Id.

[50] *See id.*

[51] See *supra* note 2 for the relevant section of Title VII.

reasonable people. If the conduct fails to be acceptable in this context, then it should not be condoned, and the plaintiff who is subjected to this type of behavior should be allowed to sustain a cause of action.

The *Brooms* court's unreasoned adoption of the *Rabidue* two-part standard perpetuates the acceptance of the status quo in determining what constitutes a hostile work environment. The outlook of a reasonable person in the current work environment simply assesses what conduct is acceptable based on current social mores; it does not evaluate those social mores to ask whether they constitute the environment to which Title VII aspires. The Seventh Circuit Court of Appeals in *Brooms* has merely followed the *Rabidue* court's short-sighted view by defining a hostile environment, based not only on subjective concerns, but also on current perceptions. Courts should envision an environment in which gender discrimination does not exist and evaluate claims based on that view.

III. Age Discrimination

A. * *Age Discrimination in Employee Benefit Plans and the Scope of the Section 4(f)(2) Exemption*: Public Employers Retirement System v. Betts[1]

The Age Discrimination in Employment Act of 1967 ("ADEA" or the "Act") forbids arbitrary discrimination by public and private employers against employees on account of age.[2] Under section 4(a)(1) of the Act, it is unlawful for an employer to discriminate based on an individual's age with respect to the compensation, terms, conditions, or privileges of employment.[3] Section 4(f)(2), however, exempts age-based distinctions made pursuant to the terms of any bona fide employee benefit plan that is not in reality a subterfuge for circumventing the purposes of the Act.[4]

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* By Robert Mirabella, Editor, Boston College Law Review.

[1] 109 S. Ct. 2854, 50 FEP Cases 104 (1989).

[2] Age Discrimination in Employment Act of 1967 §§ 2–16 29 U.S.C. §§ 621–634 (1974).

[3] 29 U.S.C. § 623 (a)(1). Under this section, it is unlawful for an employer: "[to] fail or to refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ."

[4] This section of the ADEA makes it unlawful for an employer:

> [to] observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse

In the 1977 case of *United Air Lines, Inc. v. McMann*, the United States Supreme Court first interpreted the meaning and scope of the section 4(f)(2) exemption.[5] In upholding a mandatory retirement plan for employees reaching the age of sixty, the Court held that a benefit plan established before the effective date of the ADEA could not be a subterfuge because there could be no intent to evade the purpose of the Act.[6] The Court further held that post-Act plans maintaining age-based distinctions did not need to be justified by a business purpose.[7] In 1978, however, Congress specifically amended the ADEA to prohibit age-based mandatory retirement plans, thereby overriding the *McMann* result.[8] Circuit courts have since split on whether the reasoning supporting the *McMann* decision, namely exempting pre-ADEA plans from the purview of the ADEA and denying the need to justify age-based distinctions with a valid business purpose, remains good law.[9]

During the *Survey* year, in *Public Employers Retirement System v. Betts*, the United States Supreme Court held that the *McMann* interpretation with regard to pre-Act plans under section 4(f)(2) remains controlling precedent.[10] In *Betts*, the Court relied on *McMann* to uphold a benefit plan that: (1) denied disability benefits to employees over sixty; and (2) maintained a floor of thirty percent of final average salary for disability recipients without providing a corresponding floor for age and service retirees.[11] The Court followed the *McMann* proposition that employee benefit plans estab-

> the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual . . . .

Id.

[5] *See* 434 U.S. 192, 195–203, 16 FEP Cases 146, 148–151 (1977).

[6] *Id.* at 203, 16 FEP Cases at 151.

[7] *Id.*

[8] Pub. L. No. 92, 81 Stat. 602 (codified at 29 U.S.C. § 623(f)(2) (1986)). Congress amended § 623(f)(2) in 1978 by adding at the end of the section the clause: "and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual . . . ." *Id.*

[9] *Compare* Equal Employment Opportunity Comm'n v. Cargill, Inc., 855 F.2d 682, 685–86 (10th Cir. 1988) (pre-ADEA plan cannot be a subterfuge of the Act) and Equal Employment Opportunity Comm'n v. County of Orange, 837 F.2d 420, 422–423 (9th Cir. 1988) (*McMann* reasoning still good law despite congressional invalidation of result) *with* Betts v. Hamilton County Bd. of Mental Retardation and Developmental Disabilities, 848 F.2d 692, 694 (6th Cir. 1988) *and* Equal Employment Opportunity Comm'n v. Fox Point-Bayside School Dist., 772 F.2d 1294, 1302–03 (7th Cir. 1985) (pre-ADEA plan only "presumptively" not a subterfuge to evade Act).

[10] 109 S. Ct. 2854, 2861, 50 FEP Cases 104, 107–108 (1989).

[11] *Id.* at 2861, 2869, 50 FEP Cases at 108, 113.

lished before the enactment of the ADEA are beyond the purview of the ADEA.[12] The *Betts* Court also relied on *McMann* to hold that age-based distinctions in benefit plans do not need to be justified by a business purpose.[13] Thus, the *Betts* decision establishes that a post-Act plan will be exempt under section 4(f)(2) as long as it does not violate the express provisions of the Act.[14]

The appellant in *Betts* was the Public Employees Retirement System of Ohio ("PERS"), a state program established in 1933 to provide state and local government employees with retirement benefits. PERS provided two types of benefits for government employees. First, PERS provided age-and-service retirement benefits to those employees who had accumulated a certain amount of service time and had reached a certain age.[15] Second, PERS provided disability retirement benefits to employees under sixty years of age with at least five years of service.[16]

Under the original PERS scheme, because age-retirement employees and disability-retirement employees received benefits based on the same formula, it did not matter which form of retirement payments a retiree received.[17] In 1976, however, two years after the ADEA became applicable to the states, Ohio amended the PERS scheme to provide that disability payments would not fall below a minimum of thirty percent of a retiree's final average salary.[18] The State did not adopt a corresponding provision providing a floor percentage for those retirees receiving age and service benefits.[19]

The appellee in *Betts*, June M. Betts, was hired as a speech pathologist by an Ohio government agency in 1978. Due to a deteriorating health condition, Betts retired from this job seven years later at the age of sixty-one.[20] Because she was over sixty when she retired, she was only eligible for age-and-service retirement benefits, and consequently was denied disability benefits despite her medical

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[12] *Id.*

[13] *Id.* at 2861, 50 FEP Cases at 107.

[14] *Id.* at 2865–66, 50 FEP Cases at 111.

[15] *Id.* at 2858, 50 FEP Cases at 105. Employees could receive age-and-service retirement benefits if they had: (a) 5 years service credit and were at least 60 years old; (b) 30 years of service credit; or (c) 25 years of service credit and were at least 55 years old. *Id.*

[16] *Id.* The requirement that disability recipients be under age 60 was first put into effect in 1959. *Id.* at 2854, 50 FEP Cases at 105.

[17] *Id.* at 2859, 50 FEP Cases at 106.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 2859, 50 FEP Cases at 105–06. Ms. Betts had a choice of retiring or taking an unpaid medical leave, and she chose to retire. *Id.*

condition. Betts would have received more than twice her monthly age-and-service payments under the disability payments scheme because of the thirty percent floor. In response to the PERS ruling, Betts filed suit in federal district court in Ohio, claiming that PERS violated the ADEA by refusing to grant her application for disability retirement benefits.[21]

The United States District Court for the Southern District of Ohio granted summary judgment for Betts, holding that PERS could not avail itself of the section 4(f)(2) exemption of the ADEA.[22] The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision, adopting the district court's analysis.[23] The circuit court agreed that if an employee benefit plan contains age-based distinctions, there must be "a substantial business purpose" for those provisions.[24] The circuit court held that *McMann* was not binding precedent, concluding that Congress had expressly repudiated *McMann* in its 1978 amendment to the ADEA.[25]

The United States Supreme Court reversed the Court of Appeals' decision.[26] In reaching its conclusion, the Court confirmed the vitality of the *McMann* proposition that a pre-ADEA employee benefit plan cannot be a subterfuge of the Act. The Court reiterated the position it had taken in *McMann* that the word "subterfuge" must be given its ordinary meaning as a "scheme, plan, stratagem or artifice of evasion."[27] Pre-ADEA plans can never be a subterfuge, the Court concluded, because a plan established before the Act could not have been made with the requisite element of intent to evade the Act.

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[21] *Id.* at 2859, 50 FEP Cases at 105–06.

[22] *Id.* The court relied on an interpretive regulation of the Equal Employment Opportunity Commission (EEOC), the agency that enforces the ADEA, which provided that in order for employee benefit plans to qualify under the § 4(f)(2) exemption, any age-related reductions in benefits must be justified by the enlarged cost of providing these benefits to older employees. Because PERS could show no business/cost justification, the district court held the § 4(f)(2) exemption inapplicable. *Id.* at 2859, 50 FEP Cases at 106.

[23] Betts v. Hamilton County Bd. of Mental Retardation and Developmental Disabilities, 848 F.2d 692, 694–95 (6th Cir. 1988).

[24] *Id.* at 694.

[25] *Id.* Judge Wellford, in a dissenting opinion, opined that the *McMann* decision was controlling and that the court therefore erred in refusing to exempt PERS from the ADEA. Judge Wellford reasoned that because PERS was a pre-Act plan it could not be a subterfuge used to evade the purposes of the Act. He also rejected the majority's reliance on the EEOC interpretive regulation, asserting that nothing in the language of the statute required a cost justification for age-based reductions in benefits. *Id.* at 699–700 (Wellford, J., dissenting).

[26] Public Employees Retirement Sys. v. Betts, 109 S. Ct. 2854, 2860, 50 FEP Cases 104, 105, 106.

[27] *Id.* at 2861, 50 FEP Cases at 107.

The Court rejected Betts' argument that given the 1978 Congressional amendment to section 4(f)(2), which effectively overruled the *McMann* result, the reasoning of *McMann* was no longer good law.[28] The Court justified its reliance on *McMann*'s interpretation of "subterfuge" on the grounds that, although Congress may have changed the result of *McMann*, it did not insert a definition of the term "subterfuge" in the ADEA, nor did it modify section 4(f)(2) other than by adding the clause barring mandatory retirement plans.[29] Thus, although conceding that there were indications that Congress may have intended to overturn *McMann* completely,[30] the Court held that the PERS rule denying disability payments for workers over age sixty could not be challenged as a subterfuge because the rule was established before the ADEA became applicable to the states.[31]

Having reaffirmed *McMann* with respect to pre-ADEA plans, the Court proceeded to hold that the PERS thirty percent floor for disability payments was not similarly protected from ADEA challenges.[32] The Court stated that because PERS was amended to include a 30% floor in 1976, after the ADEA became applicable to the states, no "remarkable prescience" would have been required by PERS to attempt to evade the ADEA. Thus, the Court held that the automatic rule of *McMann* was inapplicable to this portion of the plan.[33]

Having determined that the *McMann* rule regarding pre-ADEA plans did not shelter the PERS plan from attack, the Court next addressed Betts' contention that section 4(f)(2)'s exemption for bona fide benefit plans only protects age-based benefit reductions that are justified by an increased cost of providing benefits for older workers.[34] Betts argued that unless PERS could show a business purpose for not enacting a similar floor for employees over age 60, the plan did not qualify for the section 4(f)(2) exemption.[35]

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[28] *Id.*

[29] *Id.* at 2861, 50 FEP Cases at 107–08.

[30] *Id.* at 2861, 50 FEP Cases at 107; *see* 124 CONG. REC. 7881, 7888, 8219 (1978) (remarks of Senators Hawkins, Javits and Waxman). Senator Hawkins stated, "the conferees specifically disagree with the Supreme Court's holding and reasoning in [*McMann*], particularly its conclusion that an employee benefit plan which discriminates on the basis of age is protected by section 4(f)(2) because it predates the enactment of the ADEA." *Id.*

[31] *Id.* at 2862, 50 FEP Cases at 108.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

Betts put forth two arguments supporting this interpretation of the section 4(f)(2) exemption, both of which were rejected by the Court. First, Betts relied on an interpretive regulation issued by the Department of Labor, and later adopted by the EEOC, that required a cost justification for age-based distinctions in benefits.[36] The Court, however, dismissed this regulation as contrary to the plain language of the ADEA. In dismissing the regulation, the Court relied on the *McMann* interpretation of the term "subterfuge," pointing out that under *McMann*, "subterfuge" requires a subjective element of intent to evade the purposes of the ADEA. Because the regulation in question failed to acknowledge this requirement, the Court reasoned, no deference was due to the regulation, as it was clearly contrary to the plain language of the statute it was interpreting.[37]

Betts also argued that the language of the section 4(f)(2) exemption implies a cost justification requirement for age-based distinctions in employee benefits.[38] Section 4(f)(2) states that an exemption is available to any bona fide plan, "such as a retirement, pension, or insurance plan . . . ."[39] Betts argued that these listed plans are all similar in that the costs of maintaining the benefits rise with the age of the beneficiaries. Thus, Betts argued, Congress intended the exemption to permit employers to decrease benefits to older workers only to the extent necessary to equalize the costs of providing benefits to older and younger workers.[40]

The Court rejected this argument as well, reasoning that the types of benefit plans listed in section 4(f)(2) were only given as examples of qualified plans, as indicated by the prefatory words "such as."[41] The Court also observed that there was no evidence to show that Congress selected these specific plans because they each involve an increased cost of providing benefits as the age of the beneficiaries increases. The Court noted that many potentially ex-

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[36] *Id.* The Department of Labor was the agency initially charged with enforcing the ADEA. *Id.*

[37] *Id.* at 2863, 50 FEP Cases at 109.

[38] *Id.* at 2864, 50 FEP Cases at 110.

[39] *See* 29 U.S.C. § 623(f)(2). *See supra* note 4 and accompanying text for the text of section 4(f)(2).

[40] *Id.* at 2864, 50 FEP Cases at 110.

[41] *Id.*

empted plans, such as defined-contribution plans,[42] do not share this characteristic.[43]

Having rejected Betts' interpretation of the section 4(f)(2) exemption, the Court next endeavored to determine the meaning of the term "subterfuge" as applied to post-Act plans.[44] The Court determined that among the numerous purposes of the Act, the purpose implicated in *Betts* was the elimination of arbitrary age discrimination. Thus, the Court concluded, a benefit plan is not a "subterfuge" unless it discriminates in a manner prohibited by the express provisions of the Act.[45] Simply stated, section 4(f)(2) exempts benefit plans as long as they do not discriminate in nonfringe-benefit aspects of the employment relationship. This interpretation, the Court reasoned, reflects Congress' judgment that age-based restrictions in benefit plans do not constitute "arbitrary age discrimination," because Congress specifically established section 4(f)(2) to exempt them.[46]

Although the Court acknowledged that it was broadening the scope of employer discretion in fashioning benefit plans, the Court contended that it was not emasculating the "subterfuge" limitation.[47] The Court reasoned that any attempt to evade the restrictions of the Act by disguising forbidden discrimination as age-based differentials would disqualify a plan from the section 4(f)(2) exemption. The Court, however, shifted the burden of proving an employer's actual intent to discriminate to the employee. As justification for this result, the Court analogized to the similar burden shifting that occurs under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment, including seniority systems.[48] Noting that Betts did not meet the burden of showing that PERS intentionally discriminated in a non-benefit aspect of employment, the Court held that granting summary judgment against her would be inappropriate. The Court therefore remanded the case to give Betts an opportunity to show a genuine issue of material fact on this matter.[49]

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[42] *See id.* at 2864 n. 5, 50 FEP Cases at 110 n. 5. A defined contribution plan is one in which the employer's contribution is fixed, and the cost of making contributions for any given employee is completely unrelated to that employee's age. *Id.*

[43] *Id.* at 2864, 50 FEP Cases at 110.

[44] *Id.* at 2865, 50 FEP Cases at 110–11.

[45] *Id.* at 2865–66, 50 FEP Cases at 111.

[46] *Id.* at 2866, 50 FEP Cases at 111.

[47] *Id.* at 2867–68, 50 FEP Cases at 112–13.

[48] *Id.* (citing 42 U.S.C. § 2000e–2(h) (1982)).

[49] *Id.* at 2869, 50 FEP Cases at 113.

In a dissenting opinion, Justice Marshall vehemently asserted that the result reached by the majority mistakenly immunizes almost all employee benefit programs from liability under the ADEA.[50] Justice Marshall contended that the majority's construction of section 4(f)(2) leaves older workers unprotected from baseless discrimination in employee benefit plans.[51] Justice Marshall agreed with Betts' assertion that section 4(f)(2) should be read as limiting the exemption to those plans where unequal treatment of older workers is justified by a plausible business purpose.

According to Justice Marshall, the first part of § 4(f)(2) (listing the three examples of qualifying benefit plans that entail rising costs with age) and the second part (the "subterfuge" limitation) should be read as a synthetic whole.[52] Under this reading, Justice Marshall reasoned, it was apparent that Congress intended to include a cost justification requirement wherever employers reduced benefits to older workers. Justice Marshall contended that there was absolutely no support for the majority's interpretation in the legislative history of the statute. Further, he argued that because of section 4(f)(2)'s ambiguity, the Court should defer to the interpretive regulation promulgated by the EEOC.[53] Therefore, Justice Marshall concluded, unless PERS could show a business purpose for its age-based distinctions, it should be denied a section 4(f)(2) exemption.[54]

The *Betts* case promises to have a significant impact on the provision of public and private employee benefit plans. Under *Betts*, any bona fide benefit plan established before the enactment of the ADEA is entirely exempt from the purview of the Act. The impact on post-Act plans, however, will also be substantial. Under the majority's interpretation of section 4(f)(2), employers have broad discretion to make age-based distinctions in benefit plans without any business purpose. As long as the benefit plan does not violate the express provisions of the Act, it will be unassailable by employees under the ADEA.

In addition, plaintiff employees also have a very high burden of proof to meet following the *Betts* decision. The plaintiff must allege and prove the employer's actual intent to engage in "arbitrary age discrimination" in nonfringe-benefit aspects of the employment

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[50] *Id.* (Marshall, J., dissenting).

[51] *Id.* at 2870, 50 FEP Cases at 114 (Marshall, J., dissenting).

[52] *Id.* at 2871, 50 FEP Cases at 115–16 (Marshall, J., dissenting).

[53] *Id.* at 2874, 50 FEP Cases at 117–18 (Marshall, J., dissenting).

[54] *Id.*

relation. Thus, even where an employee has been the victim of age discrimination, proving the requisite element of intent under the *Betts* standard will be problematic.

After *Betts*, pre-Act plans are insulated from being labeled "subterfuges" and thus automatically receive the section 4(f)(2) exemption. The majority's only ground for this conclusion lies in its reading of the term "subterfuge" as requiring a subjective element of intent. But the crucial question here is *when* does an employer need to harbor the requisite intent for a benefit plan to be a "subterfuge?" The majority clearly envisions only post-Act plans as being capable of harboring this intent and precludes the notion that a benefit plan established before the ADEA could be intended by an employer to be a "subterfuge" to the Act. This conclusion appears flawed, because an employer maintaining a pre-Act plan may intend to circumvent the ADEA presently, even if that was not the employer's intent when originally fashioning the benefit plan. Given that Congress established the ADEA to combat age discrimination, it would seem beyond question that the injury suffered by an employee discriminated against pursuant to a pre-Act plan is as egregious as the injury suffered by an employee pursuant to a post-Act plan. The majority's insulation of all pre-Act plans from ADEA scrutiny will preclude workers under such plans from protection against age discrimination.

In the second major prong of the *Betts* decision, the Court established that age-based reductions in employee benefits will no longer be required to be justified by the higher cost of providing benefits to older workers. Once again, the rights of older workers are endangered by the *Betts* result. The employer is given the absolute ability to reduce arbitrarily the fringe benefits provided to older workers without running afoul of the ADEA. After *Betts*, an employer is insulated from ADEA scrutiny as long as it does not discriminate in nonfringe-benefit aspects of the employment relationship. This result seems unfathomable given the purpose of the ADEA to combat age discrimination in the workplace.[55]

As put forth by Congress, the section 4(f)(2) exemption acknowledges that employers should be free to account for the differences between older and younger workers in fashioning employee benefit plans. This exemption, however, undoubtably was not intended to sanction employers' unjustifiable reductions of older

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[55] *Id.* at 2854, 50 FEP Cases at 105.

workers' benefits. Given the ambiguity of section 4(f)(2), Justice Marshall is correct in concluding that the Court should defer to the legislative history of the Act, as well as the EEOC's interpretation of the Act, and adopt the cost justification requirement. In its current form, the *Betts* result provides employers broad discretion to make unfair age-based distinctions in employee benefit plans.[56]

[56] The "Older Workers Protection Act," a comprehensive amendment to the ADEA, has been passed by the United States Senate and is currently in debate before the House of Representatives. *See* 136 CONG. REC. H8614-02 (daily ed. Oct. 2, 1990). The proposed amendment would specifically overturn the *Betts* result, construing the ADEA's prohibition against age discrimination in "compensation, terms, conditions, or privileges of employment" to encompass employee benefits and employee benefit plans. *Id.* The amendment would also shift the burden of proof from the employee, as concluded by the *Betts* court, to the employer, to prove that it has provided equal benefits to, or incurred equal costs in providing benefits to, all workers. *Id.*

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