1988–1989 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW

LABOR RELATIONS LAW

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I. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. **Misuse of Official National Labor Relations Board Documents in Certification Elections:* C.J. Krehbiel Co. v. NLRB[1]

Section 9(c) of the National Labor Relations Act (the "Act") provides that upon the stipulation of a union and an employer, or upon the National Labor Relations Board's (the "NLRB" or "Board") determination that there is a dispute regarding union representation, a representation election shall be held.[2] A representative union elected by a majority of the appropriate employee group becomes that group's exclusive collective bargaining agent.[3] Under section 9 of the Act, the NLRB has extensive responsibility for providing election procedures and has broad discretion in determining when an employer's or union's actions have jeopardized employees' freedom of choice.[4]

In exercising its supervisory power over certification elections, the Board has held that where a party has altered or embellished a NLRB document so as to suggest that the NLRB favors one party, the NLRB will overturn the election.[5] In 1954, the NLRB in *Allied Electric Products, Inc.* stated that in the future, it would set aside the results of any election where it found that the successful party had distributed altered copies of the NLRB's official election ballot.[6] In

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[1] 844 F.2d 880, 128 L.R.R.M. 2203 (D.C. Cir. 1988).

[2] National Labor Relations Act §§ 9(c)(1), (4), 29 U.S.C. §§ 159(c)(1), (4) (1959). This note will use the terms "representation election" and "certification election" interchangeably to refer to elections held to determine whether employees desire union representation.

[3] National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1959).

[4] 1 THE DEVELOPING LABOR LAW 309–10 (C. Morris 2d ed. 1983) (citing NLRB v. Sanitary Laundry, Inc., 441 F.2d 1368, 1369, 77 L.R.R.M. 2359, 2360 (10th Cir. 1970)).

[5] THE DEVELOPING LABOR LAW, *supra* note 4, at 322. See *infra* notes 6–11 and accompanying text for a discussion of the NLRB's treatment of a party's misuse of an official Board document during a certification election.

[6] 109 N.L.R.B. 1270, 1272, 34 L.R.R.M. 1538, 1539 (1954). The NLRB decided that:

> in the future [the NLRB] will not permit reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its face, and upon objection validly filed, will set aside the results of any election in which the successful party has violated this rule.

Id.

Allied Electric, a union distributed copies of an election ballot that had a large "YES" printed to the left of the yes box and an "X" in the yes box. The union also added an additional line to the bottom of the ballot that read, "Do not mark it any other way — Mark 'Yes' box only."[7] The NLRB concluded that, at a minimum, any copy of an official NLRB election ballot that is altered for campaign purposes tends to suggest that the NLRB approves of the ballot's contents. Thus, the Board stated that in the future, it would find a successful party's use of an altered NLRB ballot in an election to be *per se* misleading, regardless of its actual effect on the voters, and would set aside the election.[8] The NLRB subsequently expanded the *Allied Electric* rule to include the alteration of other official NLRB documents.[9]

The NLRB generally adhered to the rule that alteration of an official Board document was *per se* misleading until 1982, when it asserted in *Midland National Life Insurance Co.* that employees are able to recognize the truthfulness of campaign propaganda and to discount that which is inaccurate.[10] In 1985, the Board expressly overruled the *Allied Electric per se* approach in *SDC Investments, Inc.* In *SDC*, the NLRB held that it would not invalidate an election when an altered official NLRB ballot clearly identified the party that had prepared the document. The NLRB reasoned that, where it was clear that one of the parties prepared the altered ballot, it was unlikely that employees would mistakenly believe that the NLRB supported that party in the election. If, however, the altered ballot did not clearly identify the responsible party, the NLRB held that it would examine the nature and contents of the campaign material on a case-by-case basis to determine whether the material

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[7] *Id.* at 1271, 34 L.R.R.M. at 1538.

[8] *Id.* at 1272, 34 L.R.R.M. at 1539.

[9] *See, e.g.*, Rebmar, Inc., 173 N.L.R.B. 1434, 1434, 70 L.R.R.M. 1018, 1018 (1968). In *Rebmar*, the NLRB set aside an election where a union passed out a handbill consisting of a portion of the NLRB's election notice and of statements the union made. *Id.* The NLRB stated that its "concern [was] not with the substance of the material added to the Board's official notice of election, but with the possible impact such a partisan message added to an official Board document, or copy thereof, might have on the freedom of choice of the voter." *Id.* Thus the NLRB held that, regardless of whether the additions to the election notice were innocuous, it would set aside the election results and direct that a new election be held. *Id.* at 1434, 70 L.R.R.M. at 1019; *see also* GAF Corp., 234 N.L.R.B 1209, 1209–10, 97 L.R.R.M. 1417, 1418 (1978) (NLRB set aside election where union used NLRB letterhead, even though union's name appeared at bottom of page).

[10] 263 N.L.R.B. 127, 132, 110 L.R.R.M. 1489, 1493 (1978).

was likely to mislead voters into believing that the NLRB supported one party's position.[11]

During the *Survey* year, the United States Court of Appeals for the District of Columbia in *C.J. Krehbiel Co. v. NLRB* upheld the NLRB's determination that a union's distribution of an administrative law judge's decision, embellished with cartoons and campaign slogans, did not mislead "reasonable employees" into believing that the NLRB supported the union.[12] The court expressed concern, however, over the NLRB's use of the phrase "reasonable employee," because the phrase indicated that, even in a close election, the Board would not consider the tendency of an altered NLRB document to mislead less astute employees. Although the court did not reverse the NLRB on this issue, the court noted that the Board should explain its use of the "reasonable employee" standard, if that was the Board's chosen standard.[13] Consequently, after *Krehbiel*, the NLRB will probably examine the closeness of an election in determining whether the altered Board document has the tendency to make employees believe that the NLRB favored one party over another.

In *C.J. Krehbiel Co. v. NLRB*, the parties held the certification election to determine whether the Graphic Communications International Union (the "union") would represent C.J. Krehbiel's ("Krehbiel") employees. Krehbiel objected to the union's distribution of flyers prior to a certification election.[14] The union also represented employees of a nearby firm, Neilsen Lithographic Company ("Neilsen"), and its status at Neilsen, as well as its ability to represent the Neilsen employees, became a crucial aspect of both parties' campaigns in the Krehbiel election.[15]

Two days before the election at Krehbiel, the union distributed a flyer containing the remedies section of an administrative law judge's favorable decision regarding the union's charge that Neilsen had engaged in unfair labor practices. The union embellished the margins of the decision with cartoons and campaign slogans. Although the union distributed the flyer in an envelope bearing its name, the document itself was not identified as coming from, or

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[11] 274 N.L.R.B. 556, 557, 118 L.R.R.M. 1410, 1412 (1985).
[12] 844 F.2d 881, 881, 885, 128 L.R.R.M. 2203, 2204 (D.C. Cir. 1988).
[13] *Id.* at 885, 128 L.R.R.M. at 2207.
[14] *Id.* at 882, 128 L.R.R.M. at 2204.
[15] *Id.* at 881, 128 L.R.R.M. at 2204.

having been embellished by, the union. The following day, the union distributed a second campaign flyer, on union letterhead, identifying the first flyer as "an actual copy of a recommended notice issued by an N.L.R.B. Administrative Law Judge." The second flyer was also covered with cartoons and partisan slogans. The certification election was held the next day, and the union prevailed by two votes.

Krehbiel subsequently filed objections with the NLRB's Regional Director, alleging that the union's distribution of the first campaign flyer misled Krehbiel employees into believing that the NLRB favored the union. The Regional Director recommended that the NLRB overrule Krehbiel's objections.[16] Applying the standard set forth in *SDC*, a three-member panel of the NLRB first determined that the flyer did not on its face clearly identify its source. The Board next evaluated whether the flyer tended to give employees the mistaken impression that the NLRB supported the union in the election. The Board found that a "reasonable employee" would not believe that the margins of a decision written by an administrative law judge would be filled with partisan slogans, a five-inch crowing rooster, and other cartoons.[17] Moreover, the NLRB reasoned that employees would recognize that the administrative law judge's decision applied to Neilsen, which was not a party to the upcoming certification election. Finally, the NLRB noted that the placement and sheer size of the cartoons and campaign slogans lent weight to the conclusion that they were not a part of the administrative law judge's decision, but instead were additions made by some third party. The Board also concluded, over the objections of a dissenting Board member, that the second flyer, distributed one day before the election, clearly identified the first flyer as the union's campaign propaganda.[18] Consequently, the NLRB adopted the recommendations and findings of the Regional Director by a vote of two to one, and certified the union as the employees' exclusive collective bargaining representative.[19]

In opposition to the Board's decision, Krehbiel declined to recognize and bargain with the union, prompting the union to file an unfair labor practice charge with the NLRB. In response to the union's charge, the NLRB issued a complaint against Krehbiel,

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[16] *Id.* at 882, 128 L.R.R.M. at 2204.
[17] *Id.* at 884, 128 L.R.R.M. at 2206.
[18] *Id.* at 885, 128 L.R.R.M. at 2207.
[19] *Id.* at 882, 128 L.R.R.M. at 2204.

alleging that the company violated sections 8(a)(1) and (5) of the Act. Krehbiel in turn argued that the union was not properly certified. Krehbiel's arguments did not convince the Board, which granted the union's motion for summary judgment, stating that Krehbiel had not raised any special circumstances or previously unavailable evidence that would require the Board to reconsider its prior ruling. Thus, the NLRB ordered Krehbiel to recognize the union as the employees' exclusive bargaining representative.[20] Krehbiel subsequently asked the United States Court of Appeals for the District of Columbia to review and overturn the NLRB's order on the grounds that the NLRB departed from established Board precedent and that the NLRB's decision was not supported by substantial evidence.[21]

The court of appeals upheld the NLRB's decision that the union flyers did not falsely lead employees to believe that the NLRB supported the union's position in the certification election.[22] The court first noted that because the NLRB has a great degree of discretion in its decisions regarding representation elections, the court could only overturn a Board decision when the party attempting to have the election set aside could show that the other party's conduct interfered with the employees' freedom of choice "to such an extent that it materially effected the election." Thus, the court stated that if it found that the NLRB had followed established precedent and that the Board's decision was backed by substantial evidence, it would defer to the NLRB.[23]

The court next addressed the issue of whether the NLRB's decision conformed with Board precedent.[24] The court traced the development of NLRB doctrine surrounding the use of official NLRB documents in certification elections, and determined that the NLRB had set forth the current legal standard in *SDC Investment, Inc.*[25] In *SDC*, the NLRB rejected the *Allied Electric* rule that an altered NLRB ballot is *per se* misleading. Instead, the Board in *SDC* stated that it would examine the contents and nature of an altered

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[20] *Id.* at 882, 128 L.R.R.M. at 2205.

[21] *Id.* at 882–83, 128 L.R.R.M. at 2205. Under sections 10(e) and (f) of the National Labor Relations Act, the federal courts have limited review of NLRB decisions regarding parties' conduct during certification elections. *See* Amalgamated Clothing Workers of Am. v. NLRB, 424 F.2d 818, 827, 73 L.R.R.M. 2323, 2330 (D.C. Cir. 1984).

[22] C.J. Krehbiel Co. v. NLRB, 844 F.2d 880, 881, 128 L.R.R.M. 2203, 2204 (D.C. Cir. 1988).

[23] *Id.* at 882, 128 L.R.R.M. at 2205.

[24] *Id.* at 883–84, 128 L.R.R.M. at 2205–06.

[25] *Id.* at 883, 128 L.R.R.M. at 2205–06.

official NLRB document to determine whether it tended to mislead employees only when the document did not clearly identify the source of the propaganda. The court stated that Krehbiel did not dispute *SDC's* application to its case, but instead argued that the Board had not followed *SDC* correctly. According to the court, Krehbiel asserted that the NLRB's error was evident when the facts and the NLRB's ruling in the present case were compared with the facts and rulings of pre-*SDC* cases that *SDC* did not overrule.[26] The court noted, however, that the earlier decisions of which the NLRB expressly approved in *SDC* deviated from the NLRB's *per se* approach in *Allied Electric*. Consequently, the court reasoned that the NLRB clearly had followed the analytical framework of *SDC*.[27]

The court next examined Krehbiel's claim that the NLRB's decision was not supported by substantial evidence.[28] The court initially noted that if one more employee had voted against the union, the union would have failed to obtain the majority it needed to become the employees' exclusive bargaining representative. Thus, the court reasoned, the case merited the NLRB's careful consideration because the flyers needed to mislead only one voter to alter the election results.

In determining whether the Board's decision was supported by substantial evidence, the court focused upon the Board's three conclusions with respect to the effect of the union's flyer. First, the court examined the Board's conclusion that no "reasonable em-

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[26] *Id.* at 883, 128 L.R.R.M. at 2206.

[27] *Id.* at 884, 128 L.R.R.M. at 2206. The court stated that:

> [w]hile Krehbiel [was] correct in its assertion that the Board in *SDC* did not intend to disapprove all pre-*SDC* decisions, it fail[ed] to recognize that in the older decisions specifically approved of in *SDC*, *Associated Lerner Shops of America*, 207 N.L.R.B. 348 (1973), and *Stedman Wholesale Distributors*, 203 N.L.R.B. 302 (1973), the Board panels had in practice disregarded the *per se* rule.

Id.

In *Associated Lerner Shops*, the union argued that the employer distributed a sample ballot prior to the election that interfered with the election in violation of the *Allied Electric* rule. 207 N.L.R.B. 348, 349, 84 L.R.R.M. 1463, 1464 (1973). The Board held that the sample ballot was unlikely to lead employees to believe that the NLRB endorsed the employer's position. *Id.* Similarly, in *Stedman*, an employer distributed a sample ballot urging employees to vote against the union. 203 N.L.R.B. 302, 302, 304, 83 L.R.R.M. 1055, 1056 (1973). The Board found that the sample ballot distributed by the employer did not constitute a copy of the official NLRB ballot. *Id.* The Board noted that the sample ballot made no reference to the NLRB and was smaller in size than an official ballot. *Id.* Thus, the Board held that "the ballot did not give the appearance of an official ballot nor would it have misled employees into believing that [the] Agency or the Government endorsed a particular choice." *Id.*

[28] C.J. Krehbiel Co. v. NLRB, 844 F.2d 881, 884–86, 128 L.R.R.M. 2203, 2206–07 (D.C. Cir. 1988).

ployee" would believe that an administrative law judge would include partisan slogans, pictures of crowing roosters and other cartoons in an opinion. Krehbiel argued that the Board could not assume that the employees knew what a normal NLRB opinion looked like, and asked the court to decide the question *de novo*.[29]

The court noted that, because the NLRB's decision was based solely on a written record, Krehbiel's argument had superficial appeal.[30] Nevertheless, the *Krehbiel* court refrained from reaching an independent conclusion, reasoning that it must give the Board's factual conclusions greater deference than the clearly erroneous standard that a court of appeals affords a trial court.[31] The court emphasized that Congress had charged the NLRB with the responsibility of determining whether flaws in the election process had interfered with the employees' free choice. Thus, the court reasoned that its duty to defer to the NLRB was especially great.

The court expressed its concern, however, over the NLRB's use of the phrase "reasonable employee" to determine whether the flyers had a tendency to mislead employees. The court reasoned that inherent in the adoption of the *SDC* case-by-case approach to misleading tendencies was a need to consider the flyer within the entire context of the election. According to the court, that context included the possibility that the flyer would mislead less astute employees, and thus affect the results of a close election. As a result, the court expressed "puzzlement" over the NLRB's failure to examine whether, in a close election, the union's distribution of an altered Board document might have led some of the less capable employees to believe that the NLRB supported one party.

Noting that the NLRB used the term "reasonable employee" only once, and that Krehbiel had failed to address directly this issue, the court held that it would not reverse the NLRB's decision merely because the Board used the phrase "reasonable employee." The court suggested, however, that the "Board w[ould] doubtless wish to explicate its decision to apply a 'reasonable employee' test in close elections, if that indeed is the test to which the Board adheres."

The second of the Board's conclusions that the *Krehbiel* court examined was that Krehbiel's employees would realize that the ad-

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[29] *Id.* at 884, 128 L.R.R.M. at 2206.

[30] *Id.* at 884, 128 L.R.R.M. at 2207.

[31] *Id.* at 885, 128 L.R.R.M. at 2207. The court noted that "Congress has charged the Board, a special and expert body, with the duty of judging the tendency of electoral flaws to distort 'the employees' ability to make a free choice.'" *Id.* (quoting Amalgamated Clothing & Textile Workers v. NLRB, 736 F.2d 1559, 1556–64 (D.C. Cir. 1984)).

ministrative law judge's opinion concerned the Neilsen dispute, would know that Neilsen was not a party in the certification election, and thus would recognize that the cartoons and slogans were not part of the NLRB's opinion. The court, assuming *arguendo* that Krehbiel's employees knew that the opinion was not related to the upcoming election, was not convinced that all of the employees would conclude that the union had added the cartoons to the opinion. The court, however, could not say that the Board's conclusion was unreasonable.

The third of the Board's findings that the *Krehbiel* court considered was that the physical size of the cartoons, and their placement on the flyer, would be a further indication to Krehbiel's employees that the union added the cartoons and slogans. The court agreed that, although it was possible that an administrative law judge would embellish an opinion with a five-inch crowing rooster, it was unlikely that an employee would conclude that the cartoons were part of the decision itself.[32] Consequently, the *Krehbiel* court deferred to the Board and upheld the Board's decision that the flyers did not tend to mislead Krehbiel's employees into believing that the NLRB favored the union's position in the upcoming certification election.[33]

The *Krehbiel* court properly deferred to Board as Congress' chosen means of safeguarding employees' rights in certification elections. Its concern, however, that the Board's future use of a "reasonable employee" standard could, in close elections, result in diminished protection of employees' free choice is valid. Although in *SDC* the NLRB moved away from the rigid, "*per se* misleading" approach of *Allied Electric*, the Board did not intend to relax its attempts to provide a fair, unbiased environment in which employees could freely accept or reject union representation. Instead of resulting in a less stringent review of the parties' use of altered official Board documents prior to a certification election, the *SDC* rule served as an effective way to distinguish harmless uses of official NLRB documents from uses that infringed on employees' ability to exercise their right to make a free and unfettered choice. Thus, in the future, the NLRB should address the *Krehbiel* court's concerns by avoiding total reliance on a "reasonable employee" standard and, instead, examining allegedly misleading campaign flyers in the context of the entire election.

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[32] *Krehbiel*, 844 F.2d at 885, 128 L.R.R.M. at 2207.
[33] *Id.* at 885–86, 128 L.R.R.M. at 2207.

In *C.J. Krehbiel Co. v. NLRB*, if one more employee had voted against union representation, the union would have lost the election. Consequently, if the union's flyers improperly swayed one employee, their distribution resulted in an impermissible outcome.[34] Although the NLRB applied the *SDC* test to the facts of *Krehbiel*, it failed to acknowledge that the closeness of the Krehbiel certification merited closer and more careful scrutiny. Instead, the NLRB used a "reasonable employee" standard to determine whether a voter would believe that an administrative law judge would include cartoons and campaign slogans in a decision.

The *Krehbiel* court, however, recognized that, under the *SDC* test, the NLRB must examine the altered Board document within the context of the entire election. Most employers have employees with varying intellectual capabilities. Less astute employees are certainly less likely to realize that a party to the election is responsible for an altered board document, or that the document does not reflect the NLRB's position or opinion in the election. In a close election, the potential misconceptions of less astute employees become much more significant. When, as in the Krehbiel election, the outcome could have been altered by only one vote, it is critical that the altered Board document not mislead even one employee.

The *Krehbiel* court recognized the possible objection that an approximation of the pre-*SDC* rule might result if the Board considered the impressions of less astute employees when an election was close.[35] This, however, is an inadequate objection to the use of such a standard. The Board has remained dedicated to ensuring that the election atmosphere encourages employees to make an independent, well-informed decision about union representation. The *SDC* rule, which did away with *Allied Electric's per se* misleading approach, distinguishes between altered official Board documents that are misleading and those that voters can clearly and easily identify as propaganda.

In a close election, if an altered Board document misleads one employee, the results of the election may be skewed. Thus, it may be necessary for the Board to rule that an altered board document is *per se* misleading if, in a close election, the responsible party is not clearly identified on the document's face. Such a rule would allow the Board to continue, in the majority of cases, to distinguish between harmful and harmless uses of official Board documents.

[34] *Id.* at 884, 128 L.R.R.M. at 2206.
[35] *Id.* at 885, 128 L.R.R.M. at 2207.

In cases where it is difficult to determine whether the altered document improperly effected the election results, the rule would err on the side of ensuring the employees' right to a fair election process. If, in the future, the NLRB does not carefully consider the perceptions of *all* employees in determining whether an altered Board document could have skewed the results of a close election, the Board will be unable to ensure that employees have an opportunity to make an informed choice about union representation.

In summary, the court in *C.J. Krehbiel v. NLRB* upheld the NLRB's ruling that flyers distributed by the union did not have the tendency to mislead reasonable employees into believing that the Board favored the union.[36] The court did, however, express "puzzlement" that the NLRB failed to consider the closeness of the election under the case-by-case analysis mandated by the NLRB in *SDC Investments, Inc.* The court's concern over the NLRB's reliance on a "reasonable employee" test in such a close race reflects the court's recognition of the continuing need to protect employees' right to decide freely whether to elect a union as their exclusive bargaining representative. Because the NLRB is Congress's chosen means of protecting employees' rights in a certification election, the *Krehbiel* court properly deferred to the Board.[37] In future cases, however, the NLRB should ensure a fair and unbiased election process by carefully examining all of the circumstances surrounding a party's distribution of altered Board documents during a certification election campaign.

B.**Changed Interpretation of Section 8(f) of the National Labor Relations Act*: Mesa Verde Construction Co. v. Northern California District Council of Laborers[1]

Section 8(f) of the National Labor Relations Act ("NLRA" or "the Act") authorizes prehire contracts between employees and unions in the building and construction industries.[2] Under section

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[36] *Id.* at 885–86, 128 L.R.R.M. at 2207.

[37] *Id.* at 885, 128 L.R.R.M. at 2207.

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[1] 861 F.2d 1124, 129 L.R.R.M. 3073 (9th Cir. 1988) (en banc).

[2] 29 U.S.C. § 158(f) (1982). Section 8(f) provides:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of

8(f), an employer may enter into a prehire agreement with a union before a majority of employees has approved the union as its bargaining representative.[3] Section 8(f)'s sanction of prehire contracts is an exception to provisions of the NLRA that guarantee employees the right to select their own bargaining representative.[4] For many years, the National Labor Relations Board ("the Board") construed section 8(f) narrowly, holding that a prehire agreement was merely a preliminary step to the creation of a full collective bargaining agreement and, as such, was voidable-at-will once a workforce was hired.[5] In 1978, the United States Supreme Court endorsed this interpretation of section 8(f).[6] In 1987, the Board changed its interpretation, holding that a prehire agreement is binding for its term.[7] During the *Survey* year, in *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, the United States Court of Appeals for the Ninth Circuit in an *en banc* decision adopted the Board's new interpretation of section 8(f).[8]

> such labor organization has not been established . . . prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization . . . or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualification for employment . . . *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Id. (emphasis in original).

[3] 29 U.S.C. § 158(f)(1) (1982).

[4] NLRB v. Iron Workers, Local 103, 434 U.S. 335, 344–45, 97 L.R.R.M. 2333, 2337 (1978) [hereinafter *Higdon*]; 29 U.S.C. § 157 (1982) (providing that "[e]mployees shall have the right . . . to bargain collectively through representatives of their own choosing"); *see International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737, 48 L.R.R.M. 2251, 2253 (1961) (§ 157 "assur[es] employees the right 'to bargain collectively through representatives of their own choosing.'"); NLRB v. Haberman Constr. Co., 618 F.2d 288, 312, 105 L.R.R.M. 2059, 2075 (5th Cir. 1980), *modified*, 641 F.2d 351, 106 L.R.R.M. 2998 (1981) (right of employees to select their own representatives is the "most sacrosanct" right guaranteed under the NLRA).

[5] Ruttmann Constr. Co., 191 N.L.R.B. 701, 702, 77 L.R.R.M. 1497, 1498 (1971); *see* R.J. Smith Constr. Co., 191 N.L.R.B. 693, 695, 77 L.R.R.M. 1493, 1495–96 (1971), *enforcement denied sub nom.*, Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 1191, 83 L.R.R.M. 2706, 2710 (D.C. Cir. 1973).

[6] *Higdon*, 434 U.S. at 341, 97 L.R.R.M. at 2336; *see* Jim McNeff, Inc. v. Todd, 461 U.S. 260, 266–67, 113 L.R.R.M. 2113, 2115 (1983).

[7] John Deklewa & Sons, 282 N.L.R.B. 1375, 1377, 124 L.R.R.M. 1185, 1187 (1987), *enforced sub nom.*, Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 779–80, 128 L.R.R.M. 2020, 2028 (3d Cir. 1988).

[8] 861 F.2d 1124, 1134, 129 L.R.R.M. 3073, 3080 (9th Cir. 1988) (en banc).

Congress enacted section 8(f) in response to problems encountered in applying the NLRA to the construction industry.[9] Prior to the enactment of section 8(f), the Act prohibited companies from bargaining with an uncertified union and, under the Act, a union could not be certified as a bargaining representative until employees were hired.[10] Despite the technical illegality of prehire agreements, the construction industry continued to engage in the practice.[11] The congressional committees that reported on section 8(f) as a proposed amendment to the NLRA recognized that the construction industry, because it often hired on a project-by-project basis, required a supply of skilled workers for quick referral.[12] The committees also noted that the nature of the industry's bidding process made it necessary for employers to know their labor costs before a project began.[13] Based on these unique characteristics of the construction industry, the committees concluded that Congress should validate the industry practice of engaging in prehire contracts.[14]

Section 8(f) does not grant prehire contracts the same statutory protection that collective bargaining agreements enjoy under the Act. Under a section 9(a) collective bargaining agreement a labor union is protected by "contract bar" rules that guarantee that a union's majority status as collective bargaining representative is free from challenge for up to three years following a certification election.[15] Section 8(f), by contrast, contains a final proviso that permits

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[9] S. REP. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2344 [hereinafter SENATE REPORT]; H.R. REP. No. 741, 86th Cong., 1st Sess. 19, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2424, 2442 [hereinafter HOUSE REPORT].

[10] SENATE REPORT, *supra* note 9, at 2344; HOUSE REPORT, *supra* note 9, at 2442; *see* Chicago Freight Car & Parts Co., 83 N.L.R.B. 1163, 1164–65, 24 L.R.R.M. 1190, 1192 (1949).

[11] Note, *Pre-hire Agreements and Section 8(f) of the NLRA: Striking a Proper Balance Between Employee Freedom of Choice and Construction Industry Stability*, 50 FORDHAM L. REV. 1014, 1017 (1982). Before the enactment of section 8(f), the Board's General Counsel recognized the need for prehire agreements in the construction industry and instituted a policy of not issuing complaints against construction employers and unions. *Id.* When private parties brought complaints, however, the Board continued to enforce the law by declaring prehire agreements illegal. *Id.* at 1017 n.22.

[12] SENATE REPORT, *supra* note 9, at 2345; HOUSE REPORT, *supra* note 9, at 2442.

[13] SENATE REPORT, *supra* note 9, at 2344–45; HOUSE REPORT, *supra* note 9, at 2442.

[14] HOUSE REPORT, *supra* note 9, at 2442; *see* SENATE REPORT, *supra* note 9, at 2344–45.

[15] *See, e.g.*, Westwood Import Co., 251 N.L.R.B. 1213, 1216, app. A at 1222, 105 L.R.R.M. 1515, 1518 (1980) (decision of Board citing with approval decision of administrative law judge reproduced in appendix A). The Board's "contract bar" rules protect challenges to a union's continuing majority status for the first three years of an existing collective bargaining agreement unless the challenge is made during an "open period" of sixty to ninety days prior to the expiration of the agreement. *Id.*

employer, union, or employees to challenge a prehire agreement at any time by petitioning the Board to decertify the union.[16]

For many years, the NLRB has interpreted the final proviso of section 8(f) broadly, holding that a prehire agreement was no more than a preliminary step to developing a full collective bargaining relationship.[17] Accordingly, the Board held that Congress intended that section 8(f) agreements should be voidable-at-will by either party, without need for a certification election to determine if a union possessed majority support.[18] In order for a union to challenge the repudiation of an agreement, the Board required a demonstration that it had achieved majority status during the life of the agreement, thereby converting the agreement to a full collective bargaining contract.[19] Under this "conversion doctrine," the Board could convert an 8(f) prehire agreement into a 9(a) collective bargaining agreement based on circumstantial evidence and without holding an employee election.[20] In 1978, in *NLRB v. Iron Workers,*

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[16] 29 U.S.C. § 158(f) (1982); *see Higdon*, 434 U.S. 335, 345, 97 L.R.R.M. 2333, 2337 (1978).

[17] Ruttmann Constr. Co., 191 N.L.R.B. 701, 702, 77 L.R.R.M. 1497, 1498 (1971); *see* R.J. Smith Constr. Co., 191 N.L.R.B. 693, 695, 77 L.R.R.M. 1493, 1495–96 (1971), *enforcement denied sub nom.*, Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 1191, 83 L.R.R.M. 2706, 2710 (D.C. Cir. 1973). In *R.J. Smith*, the Board found that the final proviso of section 8(f) showed that Congress intended to exempt only contractual steps preliminary to an employer's acquisition of a workforce. *Id.* at 694, 77 L.R.R.M. at 1495. The Board held that the signatory union had no presumption of majority status; an employer could challenge the union by repudiating the agreement at any time after employees had been hired. *Id.* at 695, 77 L.R.R.M. at 1495–96.

[18] John Deklewa & Sons, 282 N.L.R.B. 1375, 1378, 124 L.R.R.M. 1185, 1188 (1987), *enforced sub nom.*, Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 779–80, 128 L.R.R.M. 2020, 2028 (3d Cir. 1988); Dee Cee Floor Covering, Inc., 232 N.L.R.B. 421, 422, 97 L.R.R.M. 1072, 1073 (1977); *see also* D'Angelo & Kahn, Inc., 248 N.L.R.B. 396, 397, 103 L.R.R.M. 1470, 1471–72 (1980); G.M. Masonry Co., 245 N.L.R.B. 267, 267, 272, 102 L.R.R.M. 1542, 1542 (1979) (adopting decision of administrative law judge, appended to the opinion); *R.J. Smith*, 191 N.L.R.B. at 695, 77 L.R.R.M. at 1496.

[19] *Deklewa*, 282 N.L.R.B. at 1378, 124 L.R.R.M. at 1188. Under the Board's "conversion doctrine" an 8(f) agreement can "convert" into a 9(a) collective bargaining agreement by a showing that a signatory union had majority support among employees at some time during the effective term of the agreement. *Id.* For employers with a stable workforce, majority support must be demonstrated in the workforce as a whole. *Id.* at 1379, 124 L.R.R.M. at 1188–89. If an employer hires on a project-by-project basis, majority support must be demonstrated on each job site. *Id.* at 1379, 124 L.R.R.M. at 1189. *See Higdon*, 434 U.S. 335, 345, 97 L.R.R.M. 2333, 2337 (1978).

[20] *Deklewa*, 282 N.L.R.B. at 1378, 124 L.R.R.M. at 1188. Evidence that has been considered relevant in demonstrating a union's majority support includes: the presence of an enforced union security clause, union membership by a majority of employees, the use of referrals from an exclusive hiring hall and employee statements and actions indicating union support. *Id.*

Local 103 (commonly cited as *Higdon*)[21] and later in *Jim McNeff, Inc. v. Todd*,[22] the Supreme Court endorsed the Board's interpretation of section 8(f). The Court stated that "the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language."[23] Thus, until recently, section 8(f) prehire agreements were subject to an employer's right to repudiate the agreement unless the contracting union could demonstrate its majority status.

In 1987, the Board reversed its long standing policy of allowing the repudiation of section 8(f) prehire contracts. In *John Deklewa and Sons*, the Board held that a prehire agreement was binding upon both parties and was enforceable under the refusal-to-bargain provisions of the NLRA.[24] The Board further held that upon expiration of the agreement's term, either party may repudiate it; the signatory union would enjoy no presumption of majority status.[25] The Third Circuit has since upheld the Board's ruling in *Deklewa*.[26]

During the *Survey* year, in *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, the United States Court of Appeals for the Ninth Circuit adopted the *Deklewa* interpretation of section 8(f), holding that an employer could not unilaterally repudiate a prehire contract.[27] The court, over a strong dissent, found that the Supreme Court had not definitively construed section 8(f) when it endorsed the Board's pre-*Deklewa* interpretation.[28] The court, therefore, held itself not bound by *stare decisis* to uphold the pre-*Deklewa* interpretation.[29] Consequently, after *Mesa Verde*, the

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[21] *Higdon* at 335, 341, 97 L.R.R.M. at 2335–36.

[22] 461 U.S. 260, 266–67, 113 L.R.R.M. 2113, 2115 (1983).

[23] *Higdon*, 434 U.S. at 341, 97 L.R.R.M. at 2115.

[24] *Deklewa*, 282 N.L.R.B. at 1377–78, 124 L.R.R.M. at 1187.

[25] *Id.* Although under this holding section 8(f) permits either party to terminate its relationship upon expiration of the prehire agreement, the parties may still be bound to renew the agreement by contractual obligation. Sheet Metal Workers, Local 20 v. Baylor Heating and Air Conditioning, 688 F. Supp. 462, 473, 129 L.R.R.M. 2108, 2116 (S.D. Ind. 1988) (holding that an interest arbitration clause in the prehire contract bound the parties to either negotiate a new contract or submit to arbitration); *see McNeff*, 461 U.S. at 267, 113 L.R.R.M. at 2115 ("[t]here is a critical distinction between an employer's obligation under the [NLRA] to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters a prehire contract.")

[26] Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 779, 128 L.R.R.M. 2020, 2028 (3d Cir. 1988). In upholding *Deklewa*, the Third Circuit found that the Supreme Court's endorsement of the Board's earlier interpretation of section 8(f) was neither definitive nor binding. *Id.* at 776, 128 L.R.R.M. at 2025.

[27] 861 F.2d 1124, 1134, 129 L.R.R.M. 3073, 3080 (9th Cir. 1988) (en banc).

[28] *Id.* at 1130, 129 L.R.R.M. at 3077.

[29] *Id.*

Board's pre-*Deklewa* interpretation of section 8(f) is of questionable precedential value despite its endorsement by the Supreme Court. Additionally, *Mesa Verde* raises the larger issue of when courts should defer to agencies in statutory interpretation.[30]

Mesa Verde Construction Company ("the Company") signed a prehire agreement with the Northern California District Council of Laborers ("the Union") on June 26, 1980.[31] The contract established wages, hours, and working conditions for company laborers and provided for arbitration of disputes concerning interpretation and application of the contract's terms.[32] By its terms the contract was in effect until June 15, 1986. On May 15, 1984, the Company sent a letter notifying the Union of its repudiation of the contract. At that time, the Company was employing union members on a project in Hercules, California. In late May or early June, following notification, the Company began a non-union project in Orland, California. If the prehire contract was still in effect, this project violated its provisions.[33]

The Company brought suit in the United States District Court for the Northern District of California, seeking a declaratory judgment validating the Company's repudiation of the prehire agreement.[34] The district court found in favor of the Company[35] and a panel of the Ninth Circuit affirmed.[36] This panel noted that Ninth Circuit precedent permitted employers who hire on a project-by-project basis to repudiate prehire agreements as they pertain to future projects.[37] The panel acknowledged the shift in NLRB policy under the *Deklewa* decision but asserted that an *en banc* hearing was necessary to change circuit precedent.[38]

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[30] This chapter will address the narrow issue of whether in *Higdon* the Supreme Court held that the Board has statutory authority to interpret section 8(f). The broader policy issue of whether courts or administrative agencies should be the primary interpretive authority for regulatory statutes is beyond the scope of this chapter.

[31] *Mesa Verde*, 861 F.2d at 1126, 129 L.R.R.M. at 3074. Also at issue in *Mesa Verde* was the validity of the company's repudiation of a prehire agreement with a carpenter's union. *Id.* Because both agreements were identical regarding the issues before the court, a description of the second agreement is omitted here for clarity.

[32] *Id.*

[33] *Id.*

[34] *See* Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 598 F. Supp. 1092, 1094, 121 L.R.R.M. 3490, 3491 (N.D. Cal. 1984).

[35] *Mesa Verde*, 598 F. Supp. at 1101, 121 L.R.R.M. at 3497.

[36] Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 820 F.2d 1006, 1013, 125 L.R.R.M. 2849, 2855 (9th Cir. 1987).

[37] *Mesa Verde*, 820 F.2d at 1012, 125 L.R.R.M. at 2854.

[38] *Id.* at 1013, 125 L.R.R.M. at 2855.

The Ninth Circuit subsequently granted an *en banc* hearing in which it adopted the *Deklewa* interpretation of section 8(f).[39] The issues before the court were, first, whether the court had the power to adopt the *Deklewa* ruling in light of existing Supreme Court precedent and second, assuming the court had the necessary power, whether it should adopt the ruling.[40] The court reviewed the Supreme Court decisions in *Higdon* and *McNeff* and concluded that language in those decisions showed that the Supreme Court had not definitively construed section 8(f), but rather had deferred to the Board's interpretation of the statute.[41] Consequently, the Ninth Circuit court held that in accord with precedent it would defer to the Board's *Deklewa* interpretation if that interpretation was a reasonable construction of section 8(f).[42]

In deciding whether the *Deklewa* interpretation was a reasonable construction of the statute, the court first considered the purpose of section 8(f). The court noted that section 8(f) validated construction contracts with unions having minority status.[43] This purpose, the court reasoned, was inconsistent with an interpretation that permits the unilateral abrogation of contracts if a union does not have majority status.[44] The court concluded that the purpose of section 8(f) was better fulfilled by *Deklewa*'s non-repudiation rule.[45]

The court next considered the *Deklewa* interpretation in light of the purposes of the NLRA as a whole. The court noted that Congress enacted the NLRA as a balance between two competing interests, the guarantee of employee choice in union representation and the promotion of industry stability.[46] Certain provisions of the NLRA, the court noted, guarantee employees the right to select their bargaining representatives while other provisions such as the "contract bar" provisions guarantee labor relations stability.[47] The court noted that a likely interpretation of the final proviso of section

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[39] Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1126, 129 L.R.R.M. 3073, 3074 (9th Cir. 1988) (en banc).

[40] *Id.* at 1129, 129 L.R.R.M. at 3076.

[41] *Id.*

[42] *Id.* at 1129–31, 129 L.R.R.M. at 3076–78.

[43] *Id.* at 1131, 129 L.R.R.M. at 3078 (quoting Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 1190, 83 L.R.R.M. 2706, 2709 (D.C. Cir. 1973)).

[44] *Id.* (quoting Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 1190, 83 L.R.R.M. 2706, 2709 (D.C. Cir. 1973)).

[45] *Id.*

[46] *Id.* at 1131–32, 129 L.R.R.M. at 3078.

[47] *Id.*

8(f) was that Congress intended to promote employee choice by allowing the company or the employees to petition for a certification election to verify a section 8(f) union's majority status.[48] The court noted, however, that under the pre-*Deklewa* interpretation, the final proviso was interpreted to allow an employer to unilaterally repudiate a contract.[49] Unilateral repudiation, the court reasoned, hinders employee choice because an employer's decision to repudiate is likely to be based on economic considerations rather than on a concern for employee free choice rights.[50] Furthermore, the court noted, under the pre-*Deklewa* "conversion doctrine" the Board can certify a union as bargaining representative without an employee election ever taking place.[51] The court reasoned that the "conversion doctrine," instead of promoting the employees' right to choose a union, may prevent them from ever voting for or against a union.[52] The court concluded that because the Board's *Deklewa* interpretation eliminates the repudiation rule and the "conversion doctrine," it is consistent with the NLRA's principle of employee free choice.[53]

The court also concluded that the pre-*Deklewa* interpretation did not further the NLRA's purpose of promoting industry stability.[54] The complex nature of the "conversion doctrine," the court noted, fosters litigation. As a result, the court observed, until the litigation is settled, the parties to a prehire agreement are unsure of their contractual rights and obligations. The *Deklewa* interpretation, the court asserted, avoids litigation and uncertainty by ensuring that agreements will be binding. In summary, the court concluded that the *Deklewa* ruling was consistent with the purpose of section 8(f) and with the principles of employee choice and labor relations stability. Accordingly, the court adopted the ruling as law in the Ninth Circuit.[55]

Judge Hug, writing in dissent, argued that the Supreme Court had definitively construed section 8(f) and that under the doctrine of *stare decisis* the Ninth Circuit was precluded from adopting a different construction of the statute.[56] Judge Hug asserted that

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[48] *See id.* at 1132–33, 129 L.R.R.M. at 3079.

[49] *Id.* at 1132, 129 L.R.R.M. at 3079.

[50] *Id.*

[51] *Id.* at 1133, 129 L.R.R.M. at 3080.

[52] *Id.* at 1133, 1134, 129 L.R.R.M. at 3079, 3080.

[53] *Id.* at 1134, 129 L.R.R.M. at 3080.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 1138, 129 L.R.R.M. at 3083 (Hug, J., dissenting). *Mesa Verde* was a 6–4 *en banc*

precedent establishes two distinct standards for judicial deference to agency decisions.[57] In cases involving questions of pure statutory construction, Judge Hug argued, courts are the final authority and may not delegate this authority to an administrative agency.[58] Judge Hug stated that, although a court may defer to the expertise of agency administrators in interpreting a statute, the court's decision is binding regardless of the degree of deference accorded the agency.[59] In these cases, Judge Hug concluded, the court's decision carries the full force of *stare decisis*.[60]

A second type of deference, Judge Hug stated, is appropriate in cases involving agency decisions within the scope of authority that Congress has explicitly or implicitly delegated to the agency.[61] Explicit delegation, Judge Hug explained, exists when Congress authorizes an agency to promulgate regulations or to design procedures for the implementation of a statute.[62] Implicit delegation, Judge Hug stated, exists when Congress intends that a statutory interpretation should be flexible, as when Congress intends that statutory terms should be defined through the process of administering a statute.[63] When Congress has explicitly or implicitly delegated authority to an agency, Judge Hug argued, courts should defer to agency decisions unless the agency's actions are inconsistent with the statutory scheme.[64] Judicial decisions employing this type of deference, Judge Hug concluded, do not bind later courts by *stare decisis*.[65]

Turning to *Higdon* and *McNeff*, the Supreme Court cases construing section 8(f), Judge Hug argued that these decisions involved an issue of pure statutory construction.[66] As a result, Judge Hug reasoned, the Supreme Court had no choice but to definitively interpret section 8(f).[67] Judge Hug concluded that any deference

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decision. *Id.* at 1125, 129 L.R.R.M. at 3074. Judge Anderson, the eleventh judge, participated in the argument of the case but died before the decision was rendered. *Id.*

[57] *Id.* at 1139, 129 L.R.R.M. at 3084 (Hug, J., dissenting).

[58] *Id.* at 1140, 129 L.R.R.M. at 3085 (Hug, J., dissenting).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1140–41, 129 L.R.R.M. at 3085–86 (Hug, J., dissenting).

[62] *Id.* at 1141, 129 L.R.R.M. at 3086 (Hug, J., dissenting).

[63] *See id.* at 1141–42, 129 L.R.R.M. at 3086 (Hug, J., dissenting).

[64] *Id.* at 1141, 129 L.R.R.M. at 3086 (Hug, J., dissenting).

[65] *See id.* at 1140, 129 L.R.R.M. at 3085 (Hug, J., dissenting).

[66] *Id.* at 1142, 129 L.R.R.M. at 3087 (Hug, J., dissenting).

[67] *Id.* at 1144, 129 L.R.R.M. at 3088 (Hug, J., dissenting).

given to the Board's view in these decisions did not diminish the *stare decisis* effect of the Supreme Court's statutory interpretation.[68]

In a separate dissent, Judge Kozinski asserted that the majority's decision shifted the primary responsibility for statutory construction from the judiciary to executive agencies.[69] This shift is problematic, he argued, because agencies lack the constraints imposed on judicial interpretations of statutes; agencies are free to shift interpretations and to change policies with changes of leadership in the executive branch.[70] By authorizing agencies to definitively interpret statutes, Judge Kozinski argued, courts in effect hold that statutes have no fixed meaning but are intended by Congress to have a variety of interpretations, each as good as the next.[71] In order to illustrate the scope of the problem created by the majority's holding, Judge Kozinski cited a range of similar cases in which courts had adopted agencies' interpretations of statutes.[72] He concluded by expressing hope that the Supreme Court would review the *Mesa Verde* decision.[73]

The *Mesa Verde* decision to adopt the Board's *Deklewa* interpretation of section 8(f) will have two effects. First, the decision will affirm a significant change in the law concerning construction industry prehire contracts. In the short term, a degree of uncertainty will follow this change in the law as parties to existing prehire contracts discover that their legal relationship has been redefined. In the long term, the *Mesa Verde* decision will advance a positive change in the structure of prehire agreements. The second effect of the *Mesa Verde* decision will be to affirm the primary role that the Board plays in the statutory interpretation of section 8(f).

The *Deklewa* interpretation adopted in *Mesa Verde* has had dramatic short term effects on the construction industry. In overturning a settled statutory interpretation, *Deklewa* has generated confusion and uncertainty.[74] One attorney has characterized the decision as a "business agent's nightmare and a lawyer's dream."[75]

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[68] *Id.*

[69] *Id.* at 1146, 129 L.R.R.M. at 3089–90 (Kozinski, J., dissenting).

[70] *Id.* at 1147, 129 L.R.R.M. at 3090 (Kozinski, J., dissenting).

[71] *Id.* at 1147, 129 L.R.R.M. at 3091 (Kozinski, J., dissenting).

[72] *Id.* at 1147–49, 129 L.R.R.M. at 3091–92 (Kozinski, J., dissenting).

[73] *Id.* at 1149, 129 L.R.R.M. at 3092 (Kozinski, J., dissenting).

[74] *Attorney's Debate on the* Deklewa *Ruling*, 128 LAB. REL. REP. (BNA) 147, 148 (May 30, 1988).

[75] *Id.*

In particular, litigation has resulted from disputes over *Deklewa*'s retroactive application to contracts negotiated and entered into before the ruling.[76] The *Deklewa* Board recognized that change in the law would result in a degree of confusion[77] and acknowledged that retroactive application of the ruling would place a burden upon parties who agreed to terms in prehire agreements in reliance upon their ability to repudiate the agreement at will.[78] The *Mesa Verde* decision will help to alleviate some of the short term confusion generated by the *Deklewa* ruling. The *Mesa Verde* court's endorsement of *Deklewa* sets precedent for *Deklewa*'s acceptance in other circuits and helps to settle expectations concerning the enforceability of prehire contracts. Parties entering into or renewing prehire contracts will be aware that the ruling is likely to be enforced in the federal courts and will negotiate their contracts accordingly.

Although the *Deklewa* decision alters the nature of prehire agreements it cannot alter the fundamental marketplace dynamic that exists between labor and management in the construction industry. In the years since the passage of section 8(f), the construction industry labor force has shifted from being highly unionized to being primarily open shop.[79] Because unions no longer hold as strong a bargaining position in the industry, the increased liability that employers incur by entering into prehire agreements is likely to cause their increased use of "take it or leave it" bargaining tactics.[80] For this reason, one commentator has noted that with *Deklewa*, unions have won the battle but lost the war.[81]

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[76] *Compare* National Automatic Sprinkler Indus. Pension Fund v. American Automatic Fire Protection, 680 F. Supp. 731, 734, 127 L.R.R.M. 2419, 2421 (D. Md. 1988) *and* Construction Indus. Welfare Fund v. Jones, 672 F. Supp. 291, 293, 127 L.R.R.M. 2190, 2192 (N.D. Ill. 1987) (each denying the *Deklewa* ruling retroactive effect) *with* National Elevator Indus. Welfare Plan v. Viola Indus., Inc., 684 F. Supp. 1560, 1563 (D. Kan. 1987) *and* R.W. Granger & Sons, Inc. v. Eastern Massachusetts Carpenters and Carpenters Local 275, 686 F. Supp. 22, 30 (D. Mass. 1988) (each giving *Deklewa* retroactive effect). Federal courts are not strictly bound by the *Deklewa* Board's views and have discretion to refuse retroactive application, particularly when "manifest injustice" would result. *R.W. Granger*, 686 F. Supp. at 30; *see* NLRB v. W.L. Miller Co., 871 F.2d 7745, 748 n.2, 130 L.R.R.M. 3102, 3105 n.2 (8th Cir. 1989) (discussing standard of review for retroactive application of Board rulings).

[77] John Deklewa & Sons, 282 N.L.R.B. 1375, 1386 n.46, 124 L.R.R.M. 1185, 1195 n.46 (1987), *enforced sub nom.*, Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 779, 128 L.R.R.M. 2020, 2028 (3d Cir. 1987).

[78] *Id.* at 1389, 124 L.R.R.M. at 1198.

[79] *Attorney's Debate on the* Deklewa *Ruling*, 128 LAB. REL. REP. (BNA) 147, 148 (May 30, 1988).

[80] *Id.*

[81] *Id.*

In the long term, by adopting the *Deklewa* ruling, the *Mesa Verde* decision will help to effect a positive change in the nature of prehire agreements. In *Deklewa*, the Board based its decision to change the law on three rationales. First, the Board asserted that the ruling reflects Congress' intent in enacting section 8(f).[82] Second, the Board maintained that the change in the law enhances industry stability and employee free choice, the two primary purposes behind the NLRA.[83] Third, the Board asserted that *Deklewa* will solve practical problems in the administration of section 8(f).[84]

Over the years, commentators have argued that the pre-*Deklewa* interpretation of section 8(f) did not further the purposes for which the provision was enacted.[85] In *Deklewa*, the Board acknowledged this defect in the law.[86] In particular, the Board noted that no support for the unilateral repudiation of prehire agreements exists in the express language of the statute.[87] Section 8(f)'s final proviso, the Board asserted, was intended as an "escape hatch," allowing employees to challenge unwanted union representatives.[88] The proviso was not intended to allow employers to void prehire agreements. Thus, in *Deklewa*, the Board corrects the broad reading of section 8(f)'s final proviso under which prehire agreements were held to be voidable-at-will.

As both the Board[89] and the *Mesa Verde* court[90] asserted, the *Deklewa* ruling will increase industry stability and employee free choice. *Deklewa* will increase stability by preventing the repudiation of prehire agreements. Employers and unions, as a result, can be sure of their rights and obligations during the term of the agreement. Under pre-*Deklewa* law, when agreements were repudiated the validity of the repudiation depended upon whether the union could effect a "conversion" of the agreement by establishing its *de facto* majority status. During litigation to establish "conversion," nei-

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[82] *Deklewa*, 282 N.L.R.B. at 1386, 124 L.R.R.M. at 1195.

[83] *Id.*

[84] *Id.* at 1388–89, 124 L.R.R.M. at 1197–98.

[85] King & La Vaute, *Current Trends in Construction Industry Labor Relations — The Double-Breasted Contractor and the Prehire Contract*, 29 SYRACUSE L. REV. 901, 940 (1978); Note, *supra* note 11, at 1029–30; Note, *Prehire Agreements in the Construction Industry: Empty Promises or Enforceable Rights*, 81 COLUM. L. REV. 1702, 1716–20 (1981).

[86] *Deklewa*, 282 N.L.R.B. at 1381, 124 L.R.R.M. at 1190–91.

[87] *Id.* at 1381, 124 L.R.R.M. at 1191.

[88] *Id.*

[89] *Id.* at 1386, 124 L.R.R.M. at 1195.

[90] Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1134, 129 L.R.R.M. 3073, 3080 (9th Cir. 1988) (en banc).

ther party could be sure whether the obligations and rights contained in the agreement were in force. As a result, labor relations were destabilized.

Employee choice, as the Board[91] and the *Mesa Verde* court[92] asserted, is enhanced by the elimination of the "conversion doctrine." Under *Deklewa*, section 8(f)'s final proviso gives employees the right to petition for an election to decertify a union if they feel that the union does not represent their interests. After *Deklewa*, representatives may only be certified by direct elections, guaranteeing that employees have an option to choose their bargaining representatives.

By adopting the *Deklewa* ruling, *Mesa Verde* will also have the long term effect of helping to resolve practical problems in the administration of section 8(f). As the *Mesa Verde* court noted, one problem in particular is that the "conversion doctrine" encourages litigation.[93] Administration of the doctrine is difficult, the Board asserted, because administrators must determine from indirect evidence, such as union membership rolls and contract referral provisions, whether a union enjoyed majority status during the term of an agreement.[94] Such evidence, the Board reasoned, is frequently incomplete and inferences are difficult to draw.[95] The Board's conclusions in *Deklewa* concerning the practical difficulty in administering the doctrine are convincing. In addition, it is significant that all of the parties and amici who argued *Deklewa* before the Board were united in calling for changes in existing law.[96]

In summary, the *Mesa Verde* court was correct in deferring to the Board's decision in *Deklewa*. The *Deklewa* interpretation is a more literal reading of congressional intent, conforms with the general purposes of the NLRA, and eases practical problems in the administration of section 8(f). Therefore, *Deklewa* represents a reasonable interpretation of the statute. If, as the *Mesa Verde* court asserted, the Supreme Court in *Higdon* deferred to the Board and did not

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[91] *Deklewa*, 282 N.L.R.B. at 1383, 124 L.R.R.M. at 1192.

[92] *Mesa Verde*, at 1134, 129 L.R.R.M. at 3080.

[93] *Mesa Verde*, at 1134, 129 L.R.R.M. at 3080.

[94] *Deklewa*, 282 N.L.R.B. at 1383, 124 L.R.R.M. at 1193.

[95] *Id.*

[96] *Id.* at 1389, 124 L.R.R.M. at 1198. The employer, John Deklewa & Sons, and the Council on Labor Law Equity and the National Right to Work Legal Defense Foundation argued that the Board should adhere to pre-*Deklewa* law but should adopt rules abandoning the "conversion doctrine." *Id.* at 1377, 124 L.R.R.M. at 1187. The union, the AFL-CIO, and the Teamsters argued that the Board should overrule existing law and abandon the "conversion doctrine." *Id.*

definitively construe section 8(f), then lower courts should follow precedent by deferring in similar fashion to the *Deklewa* interpretation.

In deferring to the Board, the *Mesa Verde* court affirmed the Board's authority to reinterpret section 8(f). Despite the general policy arguments that the *Mesa Verde* dissent raised in favor of a fixed judicial interpretation of section 8(f), it appears that the *Mesa Verde* majority was following Supreme Court precedent. By the best view, the Supreme Court in *Higdon* did not definitively construe section 8(f). The *Higdon* Court asserted that Congress had committed primary responsibility for effecting national labor policy to the Board and that courts should have only limited review of Board decisions.[97] In evaluating the legislative history of section 8(f), the Court sought to determine if the Board's interpretation "represent[ed] a defensible construction of the statute."[98] In endorsing the Board's interpretation, the *Higdon* Court concluded that section 8(f) was an "acceptable" and "reasonable" interpretation of the Act, although perhaps not the only reasonable one.[99] The best conclusion that can be drawn from the opinion in *Higdon* is that the the Court delegated interpretive authority to the Board, subject to judicial review for reasonableness. This conclusion is supported by the fact that the *Higdon* Court never considered or rejected the alternative interpretation of section 8(f) that was set forth in the opinion of the appeals court in that case.[100] If the Supreme Court had intended to definitively construe the statute, it certainly would have considered all of the competing interpretations.

The dissents in *Mesa Verde* raised several arguments against deference to the Board's *Deklewa* interpretation of section 8(f). Judge Hug based his dissent on Supreme Court precedent subsequent to the *Higdon* Court's decision.[101] He argued that because Congress in enacting section 8(f) did not intend to delegate interpretive authority to the Board, interpretation of the statute pre-

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[97] *Higdon*, 434 U.S. 335, 350, 97 L.R.R.M. 2333, 2339 (1978).

[98] *Id.*

[99] *Id.* at 341, 97 L.R.R.M. at 2336.

[100] *See* Ironworkers, Local 103 v. NLRB, 535 F.2d 87, 90, 91 L.R.R.M. 2986, 2989 (D.C. Cir. 1976) (citing Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 83 L.R.R.M. 2706 (D.C. Cir. 1973).

[101] *See* Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1142, 129 L.R.R.M. 3073, 3086 (9th Cir. 1988) (en banc) (Hug, J., dissenting) (citing Chevron U.S.A. Inc. v. National Resources Defense Council, 467 U.S. 837 (1984) and INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)).

sented an issue of pure statutory construction.[102] From this premise, he concluded that the *Higdon* Court necessarily made a definitive interpretation of the statute.[103] Judge Kozinski, in his dissent, made a broader argument based on the adverse policy consequences that he believed would result from granting interpretive authority to the Board.[104] Although these arguments may be valid in an assessment of the wisdom of the Supreme Court's decision in *Higdon*, they cannot overcome the *stare decisis* effect of the *Higdon* Court's deference to the Board. Because of this *stare decisis* effect, the *Mesa Verde* majority was correct in deferring to the Board.

In conclusion, the decision in *Mesa Verde* incorporates the Board's *Deklewa* interpretation of section 8(f) as law in the Ninth Circuit. The *Deklewa* interpretation is a more literal reading of section 8(f) and replaces a flawed interpretation that the Board has had difficulty in administering over the years. For these reasons, *Mesa Verde* represents a positive change in the law of the Ninth Circuit. The *Mesa Verde* decision will also help to settle the new interpretation of section 8(f) by setting precedent for its acceptance in other circuits.[105] The *Mesa Verde* court based its decision upon a reading of Supreme Court precedent under which the Board was given primary authority to interpret section 8(f). Although this delegation of authority raises broad questions concerning the degree of deference that the judiciary should give to administrative agencies, the *Mesa Verde* court ruled correctly based on the narrower rationale of following Supreme Court precedent.

II. Unfair Labor Practices

A. **Management Decision to Close Plant and Relocate Operations Not a Mandatory Subject of Bargaining*: Arrow Automotive Industries v. NLRB.[1]

Section 8(a)(5) of the National Labor Relations Act ("Act") declares that an employer's refusal to bargain collectively with his or

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[102] *Id.* at 1142, 129 L.R.R.M. at 3087 (Hug, J., dissenting).

[103] *Id.* at 1144, 129 L.R.R.M. at 3088 (Hug, J., dissenting).

[104] *See id.* at 1146, 129 L.R.R.M. at 3090 (Kozinski, J., dissenting).

[105] Since *Mesa Verde*, the United States Court of Appeals for the Eighth Circuit has endorsed the new interpretation of section 8f, citing the *Mesa Verde* decision. NLRB v. W.L. Miller Co., 871 F.2d 7745, 748, 130 L.R.R.M. 3102, 3104 (8th Cir. 1989).

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[1] 853 F.2d 223, 128 L.R.R.M. 3137 (4th Cir. 1988).

her employees' representatives constitutes an unfair labor practice.[2] In defining collective bargaining, section 8(d) imposes an obligation on both the employer and the employees' representatives to negotiate in good faith concerning "wages, hours, and other terms and conditions of employment," but does not require that the parties come to an agreement.[3] In 1981, the United States Supreme Court in *First National Maintenance Corp. v. NLRB* considered whether the Act required bargaining over management decisions that affected or terminated employment relations but which primarily concerned the direction and scope of the business, not merely the employment conditions.[4] The Court held that the Act required mandatory bar-

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[2] National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982).

[3] *Id.* § 158(d). The Court divided bargaining proposals into three categories: mandatory bargaining, which regulate wages, hours, and other conditions of the relationship between employer and employees; permissive provisions, which the parties may lawfully incorporate into the contract, but about which neither party must negotiate; and illegal provisions, which the parties may not voluntarily incorporate into the contract. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349, 42 L.R.R.M. 2034, 2036 (1958); R. GORMAN, BASIC TEXT ON LABOR LAW 498 (1976). In discussing mandatory subjects of bargaining, the courts broadly interpret wages to include any compensation for services performed or value accrued from employment. *See* W.W. Cross & Co. v. NLRB, 174 F.2d 875, 878, 24 L.R.R.M. 2068, 2071 (1st Cir. 1949). The courts interpret hours to include the number of hours, the particular hours in a day, and the particular days in a week in which an employer requires its employees to work. *See* Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 690–91, 59 L.R.R.M. 2377, 2381 (1965). The Board and the courts interpret terms and conditions of employment to include safety rules, *see* NLRB v. Gulf Power Co., 384 F.2d 822, 825, 66 L.R.R.M. 2501, 2503 (5th Cir. 1967), workload, *see* Beacon Piece Dyeing and Finishing Co., 121 N.L.R.B. 953, 956–57, 42 L.R.R.M. 1489, 1490 (1958), vacation plans, *see* NLRB v. Sharon Hats, Inc., 289 F.2d 628, 631, 48 L.R.R.M. 2098, 2100 (5th Cir. 1961), sick time, *see* NLRB v. Katz, 369 U.S. 736, 744, 50 L.R.R.M. 2177, 2181 (1962), conditions of initial hiring, *see* NLRB v. Houston Chapter, Associated Gen. Contractors, 349 F.2d 449, 452, 59 L.R.R.M. 3013, 3015 (5th Cir. 1965), and pensions and other conditions of discharges, *see* Inland Steel Co. v. NLRB, 170 F.2d 247, 252, 21 L.R.R.M. 1310, 1312 (7th Cir. 1948), *cert. denied*, 336 U.S. 960, 24 L.R.R.M. 2019 (1949).

According to the Court, management or the union may propose permissive subjects of bargaining, but neither may insist on the subject to the point of impasse. *Borg-Warner Corp.*, 356 U.S. at 349, 42 L.R.R.M. at 2037. Permissive subjects, the courts and the Board have held, include those which involve the relationship of the employer to a third party, and which are therefore the prerogative of the employer, such as advertising, product design, financing, and sales. *See* Detroit Resilient Floor Decorators Local No. 2265, 136 N.L.R.B. 769, 771, 49 L.R.R.M. 1842, 1843 (1962), *enforced*, 317 F.2d 269, 53 L.R.R.M. 2311 (6th Cir. 1963).

[4] First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 677, 107 L.R.R.M. 2705, 2709 (1981). The Court in *First National* considered the refusal of an employer to bargain with the union representing its employees over the discharge of several employees. *Id.* at 670, 107 L.R.R.M. at 2707. The employer was a maintenance company, and had cancelled a service contract with a nursing home due to a dispute over fees; as a result, the employer discharged several employees that worked at the nursing home. *Id.* at 668–70, 107 L.R.R.M. at 2706–07. The *First National* Court held that the Act did not require the employer to negotiate about the cancellation of the service contract and the resultant discharge of the employees. *Id.* at 668, 107 L.R.R.M. at 2713.

gaining over this type of management decision only if collective bargaining could resolve the controversy. Furthermore, the Act required mandatory bargaining, according to the Court, if the benefit of bargaining outweighed the burden placed on the management of the business.[5]

Applying this balancing test between the benefit of bargaining and the burden that bargaining would place on management, the *First National* Court held that an employer's need to decide, without hindrance, to shut down part of its business for economic reasons outweighed any benefit that might accrue by collective bargaining concerning the closing decision itself.[6] The *First National* Court therefore held that the decision to partially close a business did not fall within the scope of section 8 of the Act, and that such decisions were not subject to mandatory bargaining.[7] The *First National* Court, however, limited its holding to partial shutdowns, and stated that the courts would have to consider other types of management decisions, including plant relocations, on their particular facts.[8] The Courts of Appeals and the National Labor Relations Board have varied in their interpretations of the scope of *First National*'s holding concerning which management decisions are subject to mandatory bargaining.[9]

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[5] *Id.* at 678–79, 107 L.R.R.M. at 2709–10. The Court understood mandatory bargaining as an attempt at instituting a process whereby management and labor can resolve subjects amenable to resolution through bargaining in a manner in which each benefitted. *Id.* at 678, 107 L.R.R.M. at 2709–10. The Court also stated, however, that management must be free from bargaining to the extent necessary for a profitable business's operation, and that management must have some degree of certainty whether its decisions might later result in penalties for unfair labor practices. *Id.* at 678–79, 107 L.R.R.M. at 2710.

[6] *Id.* at 686, 107 L.R.R.M. at 2713.

[7] *Id.*

[8] *Id.* at 686 n.22, 107 L.R.R.M. at 2713 n.22. In limiting its holding, the Court noted that First National did not intend to replace its discharged employees or move the terminated part of the business elsewhere, and that the union did not have some control over the causes of the business's economic losses that prompted the shutdown. *Id.* at 687–88, 107 L.R.R.M. at 2713. *See also* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213–14, 57 L.R.R.M. 2609, 2613 (1964) (holding that employer's decision to subcontract out maintenance work previously done by unionized employees required bargaining, because the economic reasons for the subcontracting out — reduction of labor costs — were amenable to resolution through collective bargaining). The Court also observed that section 8(a)(3) of the Act prohibited partial closings arising from antiunion motivations. *First National*, 452 U.S. at 682, 107 L.R.R.M. at 2711.

[9] The National Labor Relations Board in *Otis Elevator Co.* interpreted *First National* as distinguishing between employer's decisions that turned primarily on the reduction of labor costs and decisions that instead rested on an alteration of the scope or nature of the business. 269 N.L.R.B. 891, 891, 115 L.R.R.M. 1281, 1281 (1984) (plurality opinion) [hereinafter *Otis II*]. The Board in *Otis II* reconsidered its earlier decision, in light of the Supreme Court's

During the *Survey* year, the United States Court of Appeals for the Fourth Circuit held in *Arrow Automotive Industries v. NLRB* that

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holding in *First National*, that required Otis to bargain about the transfer of operations. *Id.* at 891, 115 L.R.R.M. at 1281 (discussing Otis Elevator Co., 255 N.L.R.B. 235, 106 L.R.R.M. 1343 (1981)). The Board therefore held that the critical factor which determined if a management decision was subject to mandatory bargaining was whether the employer based its decision on labor costs, not whether the decision affected employees or the union could offer alternatives. *Id.* at 892, 115 L.R.R.M. at 1282–83.

The United States Courts of Appeals have interpreted *First National* with little consistency, even within the circuits, and usually treat *First National* in a perfunctory manner. Some cases have interpreted *First National* to limit severely the circumstances in which a decision to partially close a business will be subject to mandatory bargaining. *See, e.g.*, Railway Labor Executives' Assoc. v. Pittsburgh & Lake Erie R.R., 845 F.2d 420, 429, 128 L.R.R.M. 2030, 2037 (3d Cir. 1988) (interpreted *First National* to hold that management not required to bargain about decision to partially shut down its business even if decision leads to loss of employee jobs), *rev'd*, 109 S. Ct. 2584, 131 L.R.R.M. 2611 (1989) (did not criticize Court of Appeals's interpretation of *First National*); NLRB v. Master Slack and/or Master Trousers Corp., 773 F.2d 77, 84, 120 L.R.R.M. 2514, 2519 (6th Cir. 1985) (management not required to bargain about economically motivated decision to shut down plant); International Union, United Auto., Aerospace & Agric. Implement Workers v. NLRB, 765 F.2d 175, 181 n.23 (D.C. Cir. 1985) (interpreting *First National* to hold that employer had no duty to bargain about decision to partially shut down business for purely economic reasons not involving allegations of antiunion animus); Mason v. Continental Group, 763 F.2d 1219, 1224, 119 L.R.R.M. 3076, 3080 (11th Cir. 1985) (interpreting *First National* to hold that management not required to bargain about decision to shut down plant), *cert. denied*, 474 U.S. 1087, 119 L.R.R.M. 3077 (1986); NLRB v. National Car Rental Sys., 672 F.2d 1182, 1188, 109 L.R.R.M. 2832, 2837 (3d Cir. 1982) (employer had no duty to bargain about decision to close facility); NLRB v. Robin Am. Corp., 667 F.2d 1170, 1170, 109 L.R.R.M. 2844, 2845 (5th Cir. 1982) (interpreting *First National* to not require bargaining over economically-motivated decision to partially shut down business, leaving open question where decision motivated by antiunion animus); NLRB v. Gibraltar Indus., 653 F.2d 1091, 1096, 107 L.R.R.M. 3307, 3311 (6th Cir. 1981) (distinguishes legitimate decision to close business for purely economic reasons from decision motivated by antiunion animus).

The United States Supreme Court's discussion of *First National* in Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives Association, 109 S. Ct. 2584, 131 L.R.R.M. 2611 (1989), suggests that the Court would hold *First National* to not require management to bargain about a decision to shut down part of its business, even if motivated by labor costs. *See id.* at 2595 n.17, 131 L.R.R.M. at __n.17. The Court, however, did not refer to the specific issue of partial closings motivated by costs within the ability of the union to effect, and so the Court has yet to determine whether the Act subjects those partial closings to mandatory bargaining. *See id.*

Other courts have adopted *Otis II*'s interpretation, or have otherwise limited *First National* to its specific facts. *See, e.g.*, NLRB v. 1199, Nat'l Union of Hosp. and Health Care Employees, 824 F.2d 318, 321–22, 126 L.R.R.M. 2204, 2207 (4th Cir. 1987) (management decision to lay off workers reflected more a desire to reduce labor costs than an exercise of managerial control over the scope and direction of the business, and was amenable to resolution through collective bargaining; the decision therefore was mandatory subject of bargaining); Local 2179, United Steelworkers v. NLRB, 822 F.2d 559, 578, 125 L.R.R.M. 3313, 3328 (5th Cir. 1987) (holding that *Otis II*'s labor cost standard was "reasonably defensible interpretation" of Act in light of *First National*); International Union, United Auto., Aerospace & Agric. Implement Workers v. NLRB, 802 F.2d 969, 972, 123 L.R.R.M. 2677, 2679 (7th Cir. 1986) (noting that the Supreme Court in *First National* did not decide when and under what circumstances section 8(d) of the Act did not subject to mandatory bargaining management decisions to partially close a business and hence terminate employees because of labor costs.[10] In *Arrow*, the court ruled that the Act did not require Arrow to bargain with the union representing its employees at a plant which Arrow decided to close, and whose operations were to be moved to another plant.[11] Consequently, courts that adopt *Arrow*'s reasoning as persuasive will not require mandatory bargaining over decisions to partially close a business to reduce labor costs.[12]

Arrow Automotive Industries operated four plants in the United States in 1981.[13] The Hudson, Massachusetts plant, which served the Northeast, was the oldest, and the only plant that was unionized.[14] Because of persistent financial problems at Hudson,

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management must bargain over a decision to relocate operations, and also observing that the Board and lower federal courts had held that management must bargain if the decision is significantly motivated by labor costs); Road Sprinklers Fitters Local Union No. 669 v. NLRB, 789 F.2d 9, 16 n.22, 122 L.R.R.M. 2139, 2144 n.22 (D.C. Cir. 1986) (holding *First National* inapposite by limiting its holding to circumstances involving an employer's decision to terminate a contract for reasons unrelated to the work force); NLRB v. Island Typographers, 705 F.2d 44, 50 n.8, 113 L.R.R.M. 2207, 2211 n.8 (2d Cir. 1983) (interpreting *First National* to apply balancing test to determine if bargaining required for management decisions that involve change in the scope and direction of the business and that have substantial impact on availability of employment (quoting First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679, 107 L.R.R.M. 2705, 2710 (1981))); Jack Thompson Oldsmobile v. NLRB, 684 F.2d 458, 463, 110 L.R.R.M. 3368, 3372 (7th Cir. 1982) (interpreting *First National* to hold that partial shut down of business for economic reasons was not necessarily subject to mandatory bargaining).

For discussions of *First National*, see generally, George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN L. REV. 667, 678–80 (1985); Gorman, *The Negligible Impact of the National Labor Relations Act on Managerial Decisions to Close or Relocate*, 58 TUL. L. REV. 1354, 1361–64 (1984); Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 INDUS. REL. L.J. 402 (1983); *1981–82 Annual Survey of Labor Relations and Employment Discrimination Law*, 24 B.C.L. REV. 95 (1982).

[10] Arrow Auto. Indus. v. NLRB, 853 F.2d 223, 228, 232, 128 L.R.R.M. 3137, 3142, 3145 (4th Cir. 1988) [hereinafter *Arrow II*].

[11] *Id.* at 224–25, 232, 128 L.R.R.M. at 3138–39, 3145.

[12] The union did not contend that antiunion animus motivated Arrow's decision. *See id.* at 223, 225, 128 L.R.R.M. at 3137, 3139. The courts have held that management decisions to partially shutdown or relocate operations because of antiunion animus are unfair labor practices. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 275, 58 L.R.R.M. 2657, 2661 (1965); *see* NLRB v. Preston Feed Corp., 309 F.2d 346, 350, 51 L.R.R.M. 2362, 2365–66 (4th Cir. 1962).

[13] *Id.* at 224, 128 L.R.R.M. at 3138. Each plant produced the same products, and served their respective geographic areas. *Id.*

[14] Arrow Auto. Indus., 284 N.L.R.B. No. 57, at app. 3–4 (June 25, 1987) [hereinafter *Arrow I*]. Note that the *National Labor Relations Board Decisions* slip opinion for *Arrow I* included the administrative law judge's opinion in its appendix, but the Labor Relations Reference Manual did not include the administrative law judge's opinion.

due in part to higher labor costs than at the other plants, Arrow had considered closing the plant beginning in 1978.[15]

The union and Arrow had negotiated a series of collective bargaining agreements, the most recent of which had expired on November 30, 1980.[16] The union and Arrow opened contract renewal negotiations on October 22, 1980, and met nine times before December 1, with the negotiations primarily concerning wage and benefit increases and alterations in the employee health insurance plan.[17] These meetings produced little movement by either side, and the employees struck on December 1, 1980.[18] The strike forced Arrow to temporarily suspend operations at Hudson, with its Spartanburg, South Carolina plant servicing Hudson's customers during the strike.[19]

As the strike continued, Arrow carried out an analysis that indicated that closing Hudson would increase Arrow's profits and that the Spartanburg plant could service Hudson's customers more efficiently.[20] On March 25, 1981, Arrow's Board of Directors decided to close the Hudson plant and relocate its work permanently to the Spartanburg plant.[21] The minutes of the meeting indicated that the Board of Directors made the decision because of losses at the Hudson plant arising from declining sales in the Northeast and increasing production costs, especially labor costs, at the Hudson plant.[22] Arrow informed the union on March 25 of its decision, and requested a meeting to bargain about the closing's effects.[23] The following day the union demanded that Arrow bargain about the decision to close.[24] Arrow refused to bargain about the decision to close Hudson.[25]

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[15] *Arrow II*, 853 F.2d at 224, 128 L.R.R.M. at 3138. The Hudson plant suffered a forty percent drop in sales between 1976 and 1980, and operated at a loss in 1977, 1978, and 1980. *Id.*

[16] *Id.*

[17] *Arrow I*, 284 N.L.R.B. No. 57 at 2, 125 L.R.R.M. at 1189 (June 25, 1987).

[18] *Id.*

[19] *Id.* at 2–3, 125 L.R.R.M. at 1189.

[20] Arrow Auto. Indus. v. NLRB, 853 F.2d 223, 224, 128 L.R.R.M. 3138 (4th Cir. 1988).

[21] Arrow Auto. Indus., 284 N.L.R.B. No. 57, slip op. at 4, 125 L.R.R.M. 1188, 1189 (June 25, 1987).

[22] *Id.* at 4–5, 125 L.R.R.M. at 1189–90.

[23] *Arrow II*, 853 F.2d at 225, 128 L.R.R.M. at 3139.

[24] *Arrow I*, 284 N.L.R.B. No. 57 at app. 7.

[25] *Id.* Bargaining over the effects of a management decision differs from bargaining about the decision itself, in that effects-bargaining concerns the consequences of the decision — for instance, the effects on pensions and the amount of severance pay — but does not concern the decision itself. NLRB v. Royal Plating and Polishing Co., 350 F.2d 191, 196, 60 L.R.R.M. 2033, 2036 (3d Cir. 1965).

On April 6, 1981, the union filed an unfair labor practice complaint with the National Labor Relations Board, charging that Arrow's decision to close Hudson constituted a decision to transfer work from Hudson to Spartanburg, and that Arrow violated the Act by refusing to bargain in good faith about that decision.[26] An administrative law judge held that Arrow's closing of the Hudson plant was subject to mandatory bargaining,[27] but found that sufficient bargaining had occurred, and dismissed the union's complaint.[28] The judge reasoned that the *First National* Court limited its holding to partial shutdowns arising from an employer's abandonment of a portion of its operations.[29] The judge found that Arrow did not abandon the market served by Hudson, but rather serviced that market through expanded operations at Spartanburg.[30] The judge therefore held that Arrow's closing of the Hudson plant did not fall under *First National*'s ruling and was subject to mandatory bargaining.[31]

In 1987, a three-member panel of the National Labor Relations Board upheld the administrative judge's ruling that Arrow's decision to close the Hudson plant was subject to mandatory bargaining, but held that Arrow did not meet that obligation, and thus ruled Arrow had violated the Act.[32] The Board determined that Arrow's decision to close the Hudson plant and transfer its work to Spartanburg arose from frustration with the contract impasse,[33] and that the decision turned upon labor costs and not the direction of Arrow's business.[34] The Board held that the Act required Arrow to bargain *to impasse* over the closing of Hudson,[35] and found that an

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[26] *Arrow I*, 284 N.L.R.B. No. 57 at app. 1. The union also alleged that Arrow refused to furnish the union with requested information that was "necessary and relevant" to the union's position as the representatives of the employees in collective bargaining. *Id.*

[27] *Id.* at app. 14. After a regional director or the General Counsel of the Board investigates and issues an unfair labor practice complaint, an administrative law judge hears the complaint in a trial-type proceeding. GORMAN, *supra* note 3, at 7–8. If a party files exceptions to the administrative law judge's decision, the Board formally reviews. *Id.* at 8.

[28] *Arrow I*, 284 N.L.R.B. No. 57 at app. 19. The administrative law judge held that the Act only required Arrow to give the union an opportunity to be heard, and did not require that Arrow bargain to impasse. *Id.* at app. 17, 19.

[29] *Id.* at app. 11.

[30] *Id.* at app. 14.

[31] *Id.* at app. 13, 14.

[32] *Id.* at 1–2, 10, 125 L.R.R.M. at 1189, 1191.

[33] *Id.* at 7, 125 L.R.R.M. at 1190.

[34] *Id.* at 8, 125 L.R.R.M. at 1190.

[35] *Id.* at 9, 125 L.R.R.M. at 1191. The Board observed no reason to distinguish Arrow's obligation in closing Hudson with "the general obligation to bargain to impasse prior to making unilateral changes." *Id.* at 8, 125 L.R.R.M. at 1191.

impasse had yet to occur when Arrow refused to negotiate about the Hudson closing.[36] Arrow appealed the Board's ruling.[37]

In 1988, the United States Court of Appeals for the Fourth Circuit, in *Arrow Automotive Industries v. NLRB*, denied enforcement of the Board's order, holding that the order contradicted the United States Supreme Court decision in *First National*.[38] The *Arrow* court interpreted *First National* as broadly concluding that decisions to partially close a business were not subject to mandatory bargaining.[39] In discussing *First National*, the *Arrow* court acknowledged that the Supreme Court emphasized the employer's need to make unencumbered decisions.[40] The *Arrow* court also noted that the *First National* Court held that the likely harm to an employer's need to unfettered decisionmaking about partial closings for economic reasons outweighed the likely benefits of the union's participation in those decisions.[41]

The *Arrow* court therefore held that decisions to partially close a business based on economic reasons, even if those reasons in-

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[36] *Id.* at 9, 125 L.R.R.M. at 1191. The Board noted that the possibility of Arrow closing the Hudson plant broke the apparent impasse in the contract negotiations, observed that Arrow only met with the union once to discuss the Hudson closing, and also noted that Arrow apparently did not consider the union's proposals after notifying the union of the possibility of the Hudson closing. *Id.* at 9–10, 125 L.R.R.M. at 1191. The Board ordered Arrow to negotiate with the union about the closing of the Hudson plant (five years after the closing had occurred) and to pay the discharged employees their wages for the period from the Hudson plant closing until Arrow or the union satisfied certain conditions. *Id.* at 11, 125 L.R.R.M. at 1191–92.

[37] Arrow Auto. Indus. v. NLRB, 853 F.2d 223, 223, 128 L.R.R.M. 3137, 3138 (4th Cir. 1988).

[38] *Id.*

[39] *Id.* at 226, 128 L.R.R.M. at 3140. The court interpreted this conclusion of *First National* to be a general holding, independent of *First National*'s facts. *Id.* The *Arrow II* court noted that the Courts of Appeals and commentators had agreed that *First National* stated a *per se* rule that decisions to partially close a business were not subject to mandatory bargaining. *Id.* at 227, 128 L.R.R.M. at 3140–41. The *Arrow II* court reasoned that the *First National* Court's apparent attempt to limit its holding did not affect this *per se* rule. *See id.* at 226–27, 128 L.R.R.M. at 3140.

[40] *Id.* at 226, 128 L.R.R.M. at 3140. The *Arrow II* court further noted that the *First National* Court reasoned that mandatory bargaining over decisions to partially close a business was unlikely to increase communications between labor and management, that the Act sufficiently protected employees by requiring bargaining over the effects of the closing, and that the Act protected workers from partial closings caused by antiunion animus. *Id.* The *Arrow* court also observed that the Court reasoned that, if management believed that collective bargaining was likely to be useful in making the closing decision, management would likely bargain voluntarily, but that mandatory bargaining would create the possibility of uncertainty and union delay of the closing. *Id.*

[41] *Id.* (quoting First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686, 107 L.R.R.M. 2705, 2713 (1981)).

cluded labor costs as an important factor, were not subject to mandatory bargaining.[42] The *Arrow* court reasoned that the *First National* Court included labor costs in the category of "economic reasons" for a partial closing that placed those decisions outside the scope of mandatory bargaining.[43] The *Arrow* court interpreted *First National* to distinguish business decisions based on "economic reasons" not from decisions based on labor costs, but rather from decisions made because of anti-union animus.[44]

The *Arrow* court also reasoned that because the United States Supreme Court in *First National* expressly limited its holding to "partial closings" and not "relocations," the decision did not place Arrow's transfer of work from Hudson to Spartanburg outside *First National*'s holding.[45] The *Arrow* court defined relocation to mean when an employer replaced a plant with a new plant that would perform the same work.[46] The *Arrow* court reasoned that the fact that Arrow decided to close one plant and expand operations at another already-existing plant constituted a decision to partially close the business which, under *First National,* was not subject to mandatory bargaining.[47] According to the *Arrow* court, even if Arrow's decision constituted a relocation, the Act nonetheless did not require that Arrow bargain about that decision, for Arrow's need to make such entrepreneurial decisions without the hindrance of collective bargaining outweighed any benefit likely to arise from bargaining.[48]

The *Arrow* court therefore held that the Hudson closing constituted a management decision "at the core of entrepreneurial control."[49] The court consequently did not rely on the *First National* balancing test for management decisions that affected the employment relation but which management made for other reasons independent of that relation.[50] The *Arrow* court, in the alternative,

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[42] *Id.* at 228, 128 L.R.R.M. at 3142.

[43] *See id.*

[44] *Id.* The *Arrow II* court also criticized the *Otis II* Board's labor cost standard for determining whether a management decision affecting employment security is subject to mandatory bargaining, because the standard, according to the *Arrow II* court, provided little guidance to companies faced with such decisions. *Arrow II*, 853 F.2d at 227, 128 L.R.R.M. at 3141. See *supra* note 9 for a discussion of *Otis II*.

[45] *Id.* at 229, 128 L.R.R.M. at 3143. The court reasoned that partial closings often were accompanied by expansions of work at other facilities. *Id.*

[46] *Id.*

[47] *Id.* at 229, 128 L.R.R.M. at 3143.

[48] *Id.* at 230, 128 L.R.R.M. at 3143.

[49] *Id.* at 230, 232, 128 L.R.R.M. at 3143, 3145.

[50] *See id.* at 230, 128 L.R.R.M. 3143.

determined that the Act did not require mandatory bargaining even if the *First National* balancing test applied.[51] The *Arrow* court reasoned that the burdens of mandatory bargaining outweighed any benefit, and that management must be able to act with certainty and without the fetters of mandatory bargaining; for these reasons the court held that the Act did not require Arrow to engage in mandatory bargaining about its decision to close its Hudson plant, even under *First National*'s balancing test.[52]

Judge Winter, dissenting from the *Arrow* holding, argued that the facts of the case, as found by the Board, required that the court apply the *First National* balancing test.[53] Under that test, Judge Winter contended, Arrow's decision was subject to mandatory bargaining.[54] Judge Winter reasoned that the labor dispute in *Arrow* was amenable to resolution through collective bargaining and that the potential burdens of bargaining did not outweigh the potential benefits, thereby concluding that the Act required that Arrow bargain to impasse and allow the union a fair opportunity to present concessions to avoid the closing.[55]

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[51] *See id.*

[52] *See id.* at 230–32, 128 L.R.R.M. at 3143–45. In analysing the potential *benefits* of bargaining over Arrow's decision, the court reasoned, among other things, that Arrow's decision was not amenable to resolution through bargaining, and that the goal of labor peace was achieved by effects-bargaining. *Id.* at 230, 231, 128 L.R.R.M. at 3143, 3144. The court therefore distinguished the situation in *Arrow* from that in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 209, 57 L.R.R.M. 2609, 2611 (1964) (replacement of unionized employees when management subcontracted out maintenance work subject to mandatory bargaining) and NLRB v. Local 1199, Nat'l Union of Hosp. and Health Care Employees, 824 F.2d 318, 321, 126 L.R.R.M. 2204, 2207 (4th Cir. 1987) (layoff of portion of employees subject to mandatory bargaining). *Arrow II*, 853 F.2d at 231, 128 L.R.R.M. at 3144.

[53] *Arrow II*, 853 F.2d at 236–38, 128 L.R.R.M. at 3148–50 (Winter, J., dissenting). Judge Winter observed that the court should accept Board findings on judicial review if supported by substantial evidence, argued that substantial evidence supported the *Arrow* Board's findings that Arrow's decision to partially close turned on labor costs, and therefore accepted those findings for the purpose of reviewing the Board's legal conclusions. *Id.* at 233, 236, 128 L.R.R.M. at 3145, 3148 (Winter, J., dissenting).

[54] *Id.* at 238, 128 L.R.R.M. at 3149–50 (Winter, J., dissenting). Judge Winter, in determining that mandatory bargaining should apply, made the following observations: that Arrow's closing constituted a relocation of business, not a partial closing; that the Union's rejection of the latest Arrow contract proposal motivated the closing; that the escalating costs at Hudson were within an area of Union control; that the Act required Arrow to consider Union concessions; that Arrow terminated ongoing collective bargaining during a strike; and finally that Arrow's relocation was not the same as entering a new business or terminating its operations entirely. *Id.* at 238–39, 128 L.R.R.M. at 3150 (Winter, J., dissenting). Judge Winter noted that these factors distinguished *Arrow* from *First National*'s facts. *Id.* at 238, 128 L.R.R.M. at 3150 (Winter, J., dissenting).

[55] *See id.* at 237–39, 128 L.R.R.M. at 3149–51 (Winter, J., dissenting). Judge Winter disputed whether the courts of appeals cases cited by the majority supported the proposition

The *Arrow* court restricted *First National* by interpreting the Act not to require mandatory bargaining over partial closings not motivated by anti-union animus.[56] In so doing, the *Arrow* court removed virtually all management decisions that resulted in partial closings from the mandatory bargaining requirement, even if labor could alter the conditions which caused management's decision to close. The *Arrow* court placed a premium on the perceived requirement of unfettered managerial decisionmaking over whether to close a plant, while denigrating labor's role in those decisions as little more than an obstruction to managerial prerogative.[57]

The *Arrow* court's holding and reasoning are factually and legally suspect. The Board found that higher labor costs at Hudson were the primary motivation for the Hudson closing, and the Board also determined that Arrow acted out of frustration with the impasse in the contract negotiations.[58] The Fourth Circuit in *Arrow*, however, did not heed these findings of fact, and instead reasoned that labor costs played such a minor role in Arrow's decision that concessions by the union could not affect Arrow's decision.[59] As Judge Winter observed in his dissent, substantial evidence existed for the findings of the Board, and the court was not free to neglect those findings.[60]

More significantly, the *Arrow* court disregarded the *First National* Court's effort to limit its holding to the specific facts of that case. The *First National* Court reached its holding by comparing the benefits and burdens of collective bargaining *in the context of* the absence of union control over factors which motivated the shutdown decision.[61] The *First National* Court excluded from its holding situations where labor had some control over a shutdown's causes.[62]

The *Arrow* court instead interpreted *First National* to hold that no matter what control labor might have over the causes of a shut-

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that all economically motivated partial closing decisions were not subject to mandatory bargaining, and reasoned that almost everything an employer did could be construed as economically motivated. *Id.* at 240, 128 L.R.R.M. at 3151 (Winter, J., dissenting). Judge Winter also argued that the Board's ordered remedies were not unduly burdensome. *Id.* at 241, 128 L.R.R.M. at 3152 (Winter, J., dissenting).

[56] *See id.* at 228, 128 L.R.R.M. at 3142.

[57] *See supra* note 52 and accompanying text.

[58] Arrow Auto. Indus., 284 N.L.R.B. No. 57 at 7–8, 125 L.R.R.M. 1188, 1190 (1987).

[59] *See* Arrow Auto. Indus. v. NLRB, 853 F.2d 223, 230, 128 L.R.R.M. 3137, 3143 (4th Cir. 1988).

[60] *See id.* at 235, 128 L.R.R.M. at 3148 (Winter, J., dissenting).

[61] First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679, 687–88, 107 L.R.R.M. 2705, 2710, 2713 (1981).

[62] *See id.* at 687, 107 L.R.R.M. at 2713.

down, the Act did not require mandatory bargaining.[63] The *Arrow* court dismissed the narrow fact pattern of *First National*, and the explicit limitations on that holding, to remove labor's role from management decisions which potentially may cause severe consequences for employees. In so doing, the *Arrow* court treated collective bargaining as an impediment to managerial discretion. The *Arrow* court also minimized collective bargaining's purpose, to keep the labor peace by institutionalizing negotiations if an issue amenable to resolution might erupt into labor conflict without negotiation.[64] Mandatory bargaining insures that negotiations occur over areas that concern the employment relation and that are amenable to resolution. *Arrow*'s reasoning allows management to make certain decisions that fundamentally affect its employees without any required negotiations with labor, even if labor could influence those decisions to the mutual benefit of management and labor.

The United States Court of Appeals for the Fourth Circuit in *Arrow* held that the Act does not require mandatory bargaining over a management decision to close a plant and relocate its operations to another plant, even though labor costs motivated the decision. By so holding, the *Arrow* court departed from the Supreme Court's holding in *First National*, expanding *First National* beyond the explicit limits set by the Court. *First National* held that a partial closing of a business motivated by reasons unrelated to labor costs or other factors which the union could mitigate was not a mandatory subject of bargaining. The *Arrow* court departs from *First National* by reasoning that the Supreme Court held that *all* management decisions to partially close which were not motivated by antiunion animus were not mandatory subjects of bargaining. The *Arrow* court's holding consequently removes labor's voice from an area of management decisions amenable to resolution through collective bargaining, decisions which substantially affect the employment relation.

B.***Nonpicketing Labor Publicity Not Within the Secondary-Boycott Prohibition of Section 8(b)(4) of the National Labor Relations Act:* Edward J. DeBartolo Corporation v. Florida Gulf Coast Building & Construction Trades Council.[1]

Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the "Act") governs the limits of a labor organization's ability to induce

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[63] *See Arrow II*, 853 F.2d at 228, 128 L.R.R.M. at 3142.
[64] *See First National*, 452 U.S. at 674, 107 L.R.R.M. at 2708.
* By Steven L. Brown, Staff Member, BOSTON COLLEGE LAW REVIEW.
[1] 108 S. Ct. 1392, 128 L.R.R.M. 2001 (1988).

a secondary boycott.[2] A secondary boycott is a boycott that involves the exertion of pressure upon a person with whom the union has no dispute in an attempt to persuade that person to cease doing business with someone with whom the union does have a dispute.[3] Section 8(b)(4) restricts secondary boycotts by prohibiting a union from threatening, coercing, or restraining any person engaged in commerce in order to force that person to cease doing business with any other person.[4]

Although Congress attempted to insulate "neutral" employers from secondary boycotts through section 8(b)(4), Congress also recognized unions' constitutional rights to free speech under the first amendment.[5] A neutral employer is an employer whose employees are not engaged in a labor dispute.[6] In response to first amendment concerns, Congress later added a publicity proviso to the prohibition of secondary boycotts.[7] The Supreme Court in the 1964 case of

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[2] National Labor Relations Act of 1959, 29 U.S.C. § 158(b)(4)(ii)(B) (1982). Congress enacted this provision in 1959 to close a number of loopholes left by the Taft-Hartley Act. For a history of the 1959 amendments, see NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (*Tree Fruits*), 377 U.S. 58, 62–71, 55 L.R.R.M. 2961, 2963–67 (1964); NLRB v. Servette, Inc., 377 U.S. 46, 51–54, 55 L.R.R.M. 2957, 2959–60 (1964).

Section 8(b)(4)(ii)(B) makes it an unfair labor practice for a labor organization or its agents to:

> . . . threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person . . . .

29 U.S.C. § 158(b)(4)(ii)(B) (1982).

[3] R. Gorman, Basic Text on Labor Law Unionization and Collective Bargaining 240 (1976). Section 8(b)(4)(ii)(B), however, does not restrict labor activity aimed directly against a primary employer. *See* 29 U.S.C. § 158(b)(4)(ii)(B) (1982).

[4] 29 U.S.C. § 158(b)(4)(ii)(B) (1982).

[5] *See Tree Fruits*, 377 U.S. at 69–71, 55 L.R.R.M. at 2966. For a general discussion of the first amendment issues related to section 8(b)(4), see Goldman, *The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 Vand. L. Rev. 1469 (1983); Case Comment, "*It Takes More Than Money to Fly Delta. It Takes Nerve.": Union Secondary Boycott Publicity and the First Amendment: Delta Air Lines*, 67 Minn. L. Rev. 1235, 1238–54 (1983).

[6] R. Gorman, *supra* note 3, at 241.

[7] *See Tree Fruits*, 377 U.S. at 69, 55 L.R.R.M. at 2966. The publicity proviso provides in relevant part:

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the

NLRB v. Servette, Inc., interpreted the publicity proviso as to carve out an exception for union communication.[8] As long as the communication is truthful, does not cause a work stoppage, and is for the purpose of informing the public that the primary party to the dispute produces a product that is distributed by the secondary employer, the publicity proviso keeps the union communication outside the ambit of 8(b)(4).[9]

Much of the litigation involving the application and interpretation of the publicity proviso has focused on two of the elements that the union must satisfy in order for the proviso to apply. These two elements concern the relationship between the protesting party and the primary disputant, and the nature of the publicity.[10] Courts have held that a producer-distributer relationship must exist between the labor organization and the secondary employer or party.[11] Also, the union's publicity must relate solely to the primary dispute or to the secondary employer that has a special relationship with the primary employer.[12] Prior to *Edward J. DeBartolo Corporation v.*

> course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . .

29 U.S.C. § 158(b)(4) (1982).

[8] *See* NLRB v. Servette, Inc., 377 U.S. 46, 57, 55 L.R.R.M. 2957, 2961 (1964).

[9] *Id.* Recent NLRB and judicial decisions have interpreted the scope of section 8(b)(4) and the publicity proviso. *See, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392, 1404, 128 L.R.R.M. 2001, 2009 (1988); Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147, 155–56, 113 L.R.R.M. 2955, 2956–57 (1983); NLRB v. Retail Store Employees Union, Local 1001 (*Safeco*), 447 U.S. 607, 614–15, 104 L.R.R.M. 2567, 2570 (1980) (picketing at a secondary site is an unfair labor practice under section 158(b)(4) if such picketing can be expected to cause the secondary employer substantial economic loss); NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (*Tree Fruits*), 377 U.S. 58, 72, 55 L.R.R.M. 2961, 2967 (1964); *Servette*, 377 U.S. at 56–57, 55 L.R.R.M. at 2961 (handbilling in front of secondary employer's supermarket protected by publicity proviso because "producer" under section 158(b)(4) includes processors and manufacturers); United Steelworkers of Am. & Pet, Inc. (*Pet, Inc.*), 244 N.L.R.B. 96, 101, 102 L.R.R.M. 1046, 1050 (1979) (a union's total consumer boycott of a diversified holding company was within the publicity proviso's exemption even when the union's dispute was with one subsidiary who did not sell any of its products to any other subsidiary of the corporation), *rev'd and remanded sub nom.*, Pet, Inc. v. NLRB, 641 F.2d 545, 529–50, 106 L.R.R.M. 2477, 2480 (8th Cir. 1981).

[10] See *supra* note 8 for the relevant text of the publicity proviso.

[11] *See DeBartolo v. NLRB*, 463 U.S. at 152–54, 113 L.R.R.M. at 2955–57; *Servette*, 377 U.S. at 55–56, 55 L.R.R.M. at 2960–61.

[12] *See* Hospital & Serv. Employees Union, Serv. Employees Int'l Union, *and* Delta Air Lines, Inc. (*Delta Air*), 263 N.L.R.B. 996, 998–99, 111 L.R.R.M. 1159, 1162 (1982) (board prohibited handbills and advertisements because they contained information unrelated to the primary dispute that pertained solely to the secondary employer's business), *rev'd and remanded sub nom.*, Hospital & Serv. Employees Union, Local 399, Serv. Employees Int'l

Florida Gulf Coast Building & Construction Trades Council, neither the courts nor the National Labor Relations Board ("NLRB" or "Board") had directly considered how section 8(b)(4) and the publicity proviso apply to a situation involving nonpicketing union publicity.[13]

Before 1988, decisions construing section 8(b)(4) involved picketing, or a combination of picketing and handbilling.[14] In the 1964 decision of *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760* ("*Tree Fruits*"), for instance, the United States Supreme Court held that peaceful picketing and handbilling intended to persuade supermarket customers to cease buying the product of the primary employer was not coercive within the meaning of section 8(b)(4), even though the union's activity caused the secondary employer economic loss.[15] The *Tree Fruits* Court, however, indicated that picketing aimed at preventing customers from dealing with a grocery store's employees was unlawful under section 8(b)(4)(i)(B) which restricts appeals to employees of a secondary employer.[16] Almost two decades later, in the 1980 decision of *NLRB v. Retail Stores Employees Union, Local 1001* ("*Safeco*"), the United States Supreme Court held that section 8(b)(4) prohibits the picketing and handbilling of a secondary employer if a union can reasonably expect such activity to cause substantial economic loss to the secondary employer.[17] Neither *Tree Fruits* nor *Safeco*, however, dealt directly with the issue of whether the secondary boycott prohibition of section 8(b)(4) prohibits pure handbilling and, if so, whether the first amendment protects such handbilling.

During the 1988 *Survey* year, the United States Supreme Court finally addressed the issue of whether section 8(b)(4)(ii)(B) applies to the distribution of handbills.[18] In *Edward J. DeBartolo Corporation v. Florida Gulf Coast Building & Construction Trades Council*, a unanimous Supreme Court held that the union's peaceful handbilling did not violate section 8(b)(4)(ii)(B).[19] In reaching its conclusion that

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Union, AFL-CIO v. NLRB, 743 F.2d 1417, 1428–29, 117 L.R.R.M. 2717, 2726–27 (9th Cir. 1984).

[13] 108 S. Ct. at 1404, 128 L.R.R.M. at 2009; Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 155–56, 113 L.R.R.M. at 2956–57.

[14] *See, e.g.*, *Safeco*, 447 U.S. at 610, 104 L.R.R.M. at 2568 (picketing); *Tree Fruits*, 377 U.S. at 60, 55 L.R.R.M. at 2962 (picketing and handbilling).

[15] 377 U.S. at 72–73, 55 L.R.R.M. at 2967.

[16] *See id.*

[17] 447 U.S. at 614–15, 104 L.R.R.M. at 2569–70.

[18] *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392, 1394, 1395, 128 L.R.R.M. 2001, 2002, 2003 (1988).

[19] *Id.* at 1396, 128 L.R.R.M. at 2003–04.

section 8(b)(4)(ii)(B) did not cover all handbilling, the Court held that proof of a violation of section 8(b)(4) requires an affirmative showing that the union's activity constituted threats, coercion or restraint.[20]

The *DeBartolo* decision involved a labor dispute between High Construction Company ("High"), a construction contractor that was building a store for a mall tenant, and the Florida Gulf Coast Building and Construction Trades Council ("union").[21] The shopping mall owner and operator, the DeBartolo Corporation, had entered into a lease with a retail department store owner, the H.J. Wilson Company ("Wilson").[22] Claiming that High paid substandard wages and fringe benefits, the union distributed handbills at the DeBartolo mall asking customers not to shop at any store on the premises until the mall's owner promised that all its construction would be done by contractors who provided fair wages and benefits to their employees.[23] The handbills clearly stated that the union sought only a consumer boycott against the mall tenants, not a secondary strike by their employees. For three weeks in December of 1979, the union peacefully distributed the handbills at all four entrances of the mall. There was no picketing or patrolling.[24]

The DeBartolo Corporation attempted to convince the union to restrict both the language and the distribution of the handbill.[25] Specifically, DeBartolo requested that the language of the handbills be narrowed to a statement that the dispute involved only Wilson. DeBartolo also asked the union to limit the handbill's distribution to the immediate area surrounding the construction site. After these attempts failed, DeBartolo filed an unfair labor practice charge against the union. The complaint alleged that the union had violated section 8(b)(4)(ii)(B) of the Act by making an illegal secondary appeal.[26] The Board, without deciding whether the union's handbilling constituted the type of "threats, coercion, or restraint" proscribed by section 8(b)(4)(ii)(B), dismissed the complaint, concluding that the handbilling came within the publicity proviso.[27]

Affirming, the United States Court of Appeals for the Fourth Circuit held that the Board's decision was consistent with both the

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[20] *Id.* at 1399, 128 L.R.R.M. at 2005–06.

[21] *Id.* at 1394, 128 L.R.R.M. at 2002.

[22] *Id.*

[23] *Id.* at 1394–95, 128 L.R.R.M. at 2002–03. For the full text of the handbill see *id.* at 1395 n.1, 128 L.R.R.M. at 2002 n.1.

[24] *Id.* at 1395, 128 L.R.R.M. at 2003

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1395–96, 128 L.R.R.M. at 2003.

publicity proviso's legislative history and with prior court decisions.[28] After granting a writ for certiorari, the United States Supreme Court ruled in 1983 that the handbilling in question did not fall within the scope of the publicity proviso.[29] The Court reasoned that DeBartolo and the mall tenants did not "distribute" products of High or Wilson because the "producer-distributer" requirement was not fulfilled.[30] The Supreme Court then remanded the case to the Board for a determination of whether the union's handbilling constituted threats, coercion or restraint, within the prohibition of section 8(b)(4). The Court instructed that if the Board found the handbilling within the scope of section 8(b)(4), the NRLB would then have to decide whether the first amendment protected the activity.

On remand, the Board held that the handbilling, because it urged a complete consumer boycott of the mall, was coercive and therefore violated section 8(b)(4)(ii)(B).[31] The Board sidestepped the issue of whether the first amendment protected handbilling by relying on the presumption of the Act's constitutionality.[32] The Board bolstered its finding by noting that the secondary employers, the tenants of the mall, had suffered economic harm, and that this constituted a form of coercion under 8(b)(4).[33]

Denying enforcement of the Board's order, the United States Court of Appeals for the Eleventh Circuit applied the traditional rule of statutory interpretation that, if possible, a statute should be interpreted so as to avoid conflict with the constitution.[34] The Eleventh Circuit in *DeBartolo* observed that the legislative history and statutory language of section 8(b)(4) revealed no intent to prohibit nonpicketing labor publicity.[35] In addressing the constitutional issues raised by the union, the Eleventh Circuit reasoned that the first amendment generally protects peaceful distribution of handbills.[36] The court noted that the first amendment protects the

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[28] *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264, 272, 108 L.R.R.M. 2729, 2734 (4th Cir. 1981).

[29] *DeBartolo*, 108 S. Ct. at 1396, 128 L.R.R.M. at 2003. *See also 1984–85 Annual Survey of Labor Relations and Employment Discrimination Law*, 26 B.C.L. Rev. 230, 233–36 (1984).

[30] *DeBartolo*, 108 S. Ct. at 1396, 128 L.R.R.M. at 2003.

[31] *Id.*

[32] *See id.* at 1396, 128 L.R.R.M. at 2003.

[33] *Id.*

[34] *See id.* at 1396, 128 L.R.R.M. at 2004. DeBartolo brought suit to enforce the Board's order in the Eleventh Circuit, although the original appeal was brought in the Fourth Circuit.

[35] *Id.*

[36] Florida Gulf Coast Bldg. & Constr. Trades Council v. NLRB, 796 F.2d 1328, 1332, 123 L.R.R.M. 2001, 2004 (11th Cir. 1986).

union's act of distributing handbills even when they are designed to pressure others to act. Therefore, the Eleventh Circuit held that section 8(b)(4) did not prohibit the union's handbilling.[37] In 1987, the United States Supreme Court again granted certiorari in the *DeBartolo* case to resolve the important issue of whether section 8(b)(4) prohibits consumer nonpicketing publicity.[38]

In a unanimous decision, the *DeBartolo* Court held that the union's handbilling was not prohibited by section 8(b)(4)(ii)(B) because the handbilling did not threaten, restrain or coerce within the meaning of the Act.[39] The Court explained that although the words of section 8(b)(4) are vague and non-specific, they should be interpreted with "caution," and not given a "broad sweep." The Court also added that section 8(b)(4) required DeBartolo to make an affirmative showing of threats, coercion, or restraints to establish a violation.[40] Thus, the Court held that the section did not reach the handbilling in the present case because there was no violence, no picketing, and no patrolling.[41] Instead, noted the Court, the union merely attempted to influence customers to shop elsewhere. Moreover, after examining the legislative history of section 8(b)(4), the Court concluded that there was no clear indication that Congress intended to proscribe handbilling, unaccompanied by picketing, that urged a consumer boycott of a neutral employer.[42] The Supreme Court held therefore, that the language and legislative history of section 8(b)(4) allowed a finding that the union's handbilling did not violate the secondary boycott provisions of the Act.

By deciding that section 8(b)(4) did not encompass the union's handbilling, the *DeBartolo* Court avoided subjecting section 8(b)(4) to first amendment scrutiny.[43] The Court noted that the union's handbilling was peaceful, and did not involve any picketing or

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[37] *Id.* at 1346, 123 L.R.R.M. at 2015.

[38] *See DeBartolo*, 108 S. Ct. at 1396, 128 L.R.R.M. at 2004.

[39] *See id.* at 1399, 128 L.R.R.M. at 2005–06.

[40] *Id.* at 1399, 128 L.R.R.M. at 2005.

[41] *Id.* at 1399, 128 L.R.R.M. at 2006. In rejecting the Board's determination that the handbilling coerced mall tenants, despite the union's peaceful distribution, the Supreme Court held that its decision in *Tree Fruits* made the Board's decision untenable. *Id.* In *Tree Fruits*, the Court held that union picketing of a secondary employer, a retailer, that asked the public not to purchase products produced by the primary employer was not coercive within the meaning of section 8(b)(4). 377 U.S. 58, 72–73, 55 L.R.R.M. 2961, 2967 (1964). The Court came to this conclusion despite its acknowledgment of the possibility that the retailer might lose revenue. *Id.* The *DeBartolo* Court reasoned, therefore, that the possibility of economic loss to the mall did not render the union's handbilling coercive. *Id.*

[42] *Id.* at 1402–04, 128 L.R.R.M. at 2008–09.

[43] *Id.* at 1404, 128 L.R.R.M. at 2009.

patrolling.[44] The Court also noted that the handbills revealed the existence of a labor dispute in a truthful manner and urged consumers to take a wholly legal course of action. In other words, stated the Court, by arguing that consumers should oppose substandard wages by not shopping in the mall, the union's handbilling constituted an expressive activity. Had the union simply leafleted the general public about the issue of substandard pay, noted the Court, it is likely that such union publicity would be protected by the first amendment.[45] The Court reasoned that *DeBartolo* presented an analogous factual situation even though the handbills called attention to a specific situation and were not part of a general educational effort.[46] Thus, the Supreme Court implied that the first amendment would protect the union's activities.[47]

The United States Supreme Court's failure in *DeBartolo* to address directly the constitutionality of restrictions on nonpicketing labor publicity leaves the state of the law in doubt except for section 8(b)(4) constitutional questions. Unions, in particular, lack guidance in determining what course of action to take against a secondary employer. The 1988 Supreme Court decision in *DeBartolo* does clarify that the secondary boycott prohibition of section 8(b)(4) does not cover "non-coercive" handbilling, however, it does not clearly define what conduct is coercive.[48] Questions remain, therefore, about what conduct unions can lawfully undertake under section 8(b)(4).

The *DeBartolo* decision suggests that section 8(b)(4) permits alternative forms of nonpicketing publicity, as long as they are peaceful and are not directed at the employees of a secondary employer. Under this interpretation of section 8(b)(4), such union publicity as newspaper, radio, or television appeals urging the public not to patronize a shopping mall would also be permissible and would not be coercive under section 8(b)(4). Thus, the *DeBartolo* decision indicates that modes of communication other than handbilling may be outside the scope of section 8(b)(4), but does not

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[44] *Id.* at 1397, 128 L.R.R.M. at 2004.

[45] *Id.* at 1397, 128 L.R.R.M. at 2004–05.

[46] *Id.* at 1398, 128 L.R.R.M. at 2005.

[47] *See id.* at 1397–98, 128 L.R.R.M. at 2004–05. The *DeBartolo* Court noted that although some communications by labor unions may be "commercial speech" and may therefore be subject to a lesser degree of constitutional protection, the handbilling in this case did not appear to be typical commercial speech. *Id.* at 1398, 128 L.R.R.M. at 2005. See Goldman, *supra* note 5, at 1487–97, for a discussion of commercial speech issues arising from nonpicketing labor publicity.

[48] *DeBartolo*, 108 S. Ct. at 1399, 128 L.R.R.M. at 2005–06.

specify these modes. This leaves uncertainty for both unions and employers.

The Supreme Court in *DeBartolo* distinguished between pure handbilling and picketing by noting that the picketing is qualitatively more intimidating to customers than that of other modes of communication.[49] According to the Court, the truthful presentation of information in handbills does no more than inform consumers of what they would honestly want to do themselves.[50] The Court's distinction between handbilling and picketing fails, however, to address the physical aspects of handbilling — specifically, the physical presence of the union members distributing leaflets.[51] It could be argued that although peaceful, the union's distribution of handbills, which includes union members walking around the entrance of the mall, approaching customers, and at times having brief conversations with them, constitutes picketing.[52] Because the *DeBartolo* Court failed to address the issue of what constitutes picketing under section 8(b)(4) head on, the NLRB, employers, unions and the courts are left with little guidance in this area.

Another issue recognized by the *DeBartolo* Court's interpretation of section 8(b)(4), but not squarely faced, is whether handbilling constitutes commercial speech.[53] In *DeBartolo*, the NLRB argued that the union's conduct should be treated like commercial speech, and therefore accorded less than full first amendment protection.[54] The Supreme Court, in dicta, suggested that the handbilling at the Florida mall did not appear to be commercial speech because it differed greatly from an advertisement of the price or merits of a

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[49] *Id.* at 1400, 128 L.R.R.M. at 2006. The Court noted that picketing, in contrast to handbilling, urges customers not to patronize a business through physical intimidation and persuasion. *Id.*

[50] *See id.*

[51] *Cf.* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315–16, 68 L.R.R.M. 2209, 2212 (1968) ("Handbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person distributing leaflets . . . .").

[52] At the very least, such acts bear the potential of being every bit as physically intrusive and intimidating as picketing. *Cf.* NLRB v. United Furniture Workers of Am., AFL-CIO, 337 F.2d 936, 940, 57 L.R.R.M. 2347, 2351 (2d Cir. 1964) (reasoning that the extent of "confrontation" between the union members and employees, customers or suppliers is critical in determining whether the union's activities constitute "picketing" under section 158(b)); NLRB v. Local 182, Teamsters, 314 F.2d 53, 58, 52 L.R.R.M. 2354, 2356 (2d Cir. 1963) (union signs planted in a snowbank abutting the entrance to the employer's premises while the union members waited in their cars parked on an adjacent roadway was held by the court to be picketing even though the union chose to bisect the activity).

[53] *See DeBartolo*, 108 S. Ct. at 1398, 128 L.R.R.M. at 2005.

[54] Florida Gulf Coast Bldg. & Constr. Trades Council v. NRLB, 796 F.2d 1328, 1335 n.7, 123 L.R.R.M. 2001, 2006 n.7 (11th Cir. 1986).

product.[55] The Court added, however, that even if the handbilling were commercial speech, it would still be protected by the first amendment.[56] The Court did not resolve the commercial speech issues raised by the union's activities, however, the Court found that the union's handbilling was non-coercive under section 8(b)(4)(ii)(B).[57] The issue of whether the definition of "commercial speech" is broad enough to encompass handbilling, as well as other forms of nonpicketing publicity, is a question that needs to be addressed and resolved by the Supreme Court in order to provide guidance to lower courts, NLRB, and unions.

Although ten years of *DeBartolo* litigation that began in 1979 with the distribution of handbills at a Florida shopping mall have come to an end, there are still many questions left unanswered. The Supreme Court's unanimous decision in *DeBartolo* does not provide very much guidance for lower courts or the NLRB faced with challenges to a union's nonpicketing publicity in the future, or for a union in deciding what tactics to employ against a secondary employer. The *DeBartolo* decision does, however, make clear that section 8(b)(4)(ii)(B) does not forbid peaceful handbilling designed to gain public support during a labor dispute.[58] The questions left unanswered after *DeBartolo* concerning the precise definition of picketing and the constitutional protection of nonpicketing labor publicity will, no doubt, be the subject of future litigation when a union's nonpicketing activity is determined by the NLRB or court to be "coercive" under section 8(b)(4)(ii)(B).

III. Arbitration

A. *The Eighth Circuit Moves Toward Establishing That Only Nuclear Regulatory Commission Regulations Constitute Public Policy*: Daniel Construction Co. v. Local 257, International Brotherhood of Electrical Workers[1]

In the National Labor Management Relations Act of 1947 ("Act"), Congress declared formal and binding arbitration to be the

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[55] *DeBartolo*, 108 S. Ct. at 1398, 128 L.R.R.M. at 2005; *see also* Goldman, *supra* note 5, at 1490 (author suggests that nonpicketing labor publicity is not commercial speech because it satisfies the values underlying the first amendment).

[56] *DeBartolo*, 108 S. Ct. at 1398, 128 L.R.R.M. at 2005.

[57] *See id.* at 1404, 128 L.R.R.M. at 2009.

[58] *See id.* at 1399, 128 L.R.R.M. at 2005–06.

* By Mark D. Hoerrner, Staff Member, Boston College Law Review.

[1] 856 F.2d 1174, 129 L.R.R.M. 2429 (8th Cir. 1988).

preferred method for resolving employer-employee disputes.[2] Under the provisions of Section 301(a) of the Act, the victor in an arbitration proceeding may seek enforcement of the arbitrator's decision in a United States district court.[3] The United States district court, however, plays a very limited role in the review of an arbitrator's decision.[4] In the 1987 case of *United Paperworkers International Union v. Misco, Inc.*, the United States Supreme Court held that courts must abide by the arbitrator's view of both the facts and the meaning of the contract, because parties who included an arbitration clause in their collective bargaining agreement have bargained to have their disputes resolved by an arbitrator rather than a judge.[5] Thus, according to the *Misco* Court, a reviewing court should enforce an arbitrator's award, even in the presence of serious error, as long as the arbitrator construed or applied the collective bargaining agreement in reaching the decision.[6]

According to the *Misco* Court, however, a court may refuse to enforce an arbitrator's award if enforcement results in the violation of some explicit public policy.[7] In *Misco*, the employer sought to overturn an arbitrator's award reinstating an employee who possessed marijuana on company property.[8] The *Misco* Court noted that a court must ascertain public policy from laws and legal prec-

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[2] 29 U.S.C. § 173(d) (1982). In the relevant section, the Act provides:

> (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort in exceptional cases.

Id.; *see also* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83, 46 L.R.R.M. 2416, 2417–18 (1960).

[3] 29 U.S.C. § 185(a) (1982). In the relevant section, the Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined by this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy, or without regard to the citizenship of the parties.

Id.; *see* Santos v. District Council of New York and Vicinity of United Brotherhood of Carpenters, 547 F.2d 197, 201, 94 L.R.R.M. 2244, 2247 (2d Cir. 1977) (the court stated that "it is well established that the victor in an arbitration proceeding may seek court enforcement of his award under LMRA § 301(a)").

[4] United Paperworkers Int'l Union v. Misco, 108 S. Ct. 364, 370, 126 L.R.R.M. 3113, 3116 (1987).

[5] *Id.* at 370, 126 L.R.R.M. at 3117.

[6] *Id.* at 371, 126 L.R.R.M. at 3117.

[7] *Id.* at 373, 126 L.R.R.M. at 3119.

[8] *Id.* at 369, 126 L.R.R.M. at 3115.

edents rather than from general considerations of the public interest.[9] Additionally, the Court stated that the party seeking to overturn the award must show a clear violation of the explicit public policy.[10] The *Misco* Court thereby established that implementing an arbitrator's award must clearly violate an explicit public policy in order for a court to vacate the award.[11]

In the 1987 case of *Iowa Electric Light & Power Co. v. Local Union 204, International Brotherhood of Electrical Workers*, the United States Court of Appeals for the Eighth Circuit applied the United States Supreme Court's holding in *Misco* to nuclear safety issues by recognizing strict adherence to nuclear safety rules as a national public policy.[12] The *Iowa Electric* court overturned an arbitrator's decision which reinstated a nuclear power plant employee who had committed a serious violation of the safety rules promulgated by the Iowa Electric Light and Power Company.[13] The *Iowa Electric* court concluded that the passage of the federally mandated nuclear regulatory system demonstrates the public's concern for the safe operation of nuclear power plants.[14] The *Iowa Electric* court observed that the employee violated a power plant safety rule required by the Nuclear Regulatory Commission ("NRC"), which also approved of the employee's dismissal.[15] The *Iowa Electric* court did not specify whether it meant an NRC regulation or a rule promulgated by an individual nuclear power plant when it used the term "safety rule."[16]

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[9] *Id.* at 373, 127 L.R.R.M. at 3119 (quoting W.R. Grace v. Local 759, Int'l Union of Rubber Workers, 461 U.S. 757, 766, 113 L.R.R.M. 2641, 2647 (1983)).

[10] *See id.* at 373–74, 126 L.R.R.M. at 3119. In *Misco*, the Court held that the company demonstrated no clear violation of the public policy against using dangerous machinery while under the influence of drugs because the company could not establish the employee's actual use of drugs while operating dangerous machinery. *Id.* at 374, 126 L.R.R.M. at 3119.

[11] *See generally* United Paperworkers Int'l Union v. Misco, 108 S. Ct. 364, 126 L.R.R.M. 3113 (1987).

[12] Iowa Elec. Light & Power v. Local Union 204, Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1427, 127 L.R.R.M. 2049, 2051 (8th Cir. 1987).

[13] *Id.* at 1429–30, 127 L.R.R.M. at 2052–53. In *Iowa Electric*, the employee worked in the nuclear power plant's secondary containment area, a zone designed to contain any radiation that escapes from the primary containment area at the core of the reactor. *Id.* at 1425, 127 L.R.R.M. at 2049. To prevent leakage, the secondary containment area is pressurized. *Id.* In order to maintain the pressure, an interlock system connects all the doors leading from the secondary containment area that only allows the employees to open one door at a time. *Id.* at 1425–26, 127 L.R.R.M. at 2049. In order to get an early start on lunch, the employee requested that a foreman remove a fuse from the interlock system that allowed the employee to open a second door leading out of the secondary containment area. *Id.* at 1426, 127 L.R.R.M. at 2049–50.

[14] *Id.* at 1428, 127 L.R.R.M. at 2051.

[15] *Id.*

[16] *Id.* at 1428–29, 127 L.R.R.M. at 2051–52.

Therefore, the *Iowa Electric* court's holding left open the question of which specific nuclear safety rules constitute public policy.

During the *Survey* year, in *Daniel Construction Co. v. Local 257, International Brotherhood of Electrical Workers*, the United States Court of Appeals for the Eighth Circuit ruled that enforcing an arbitrator's award of back pay to employees discharged by a nuclear power plant for failing a psychological evaluation did not violate the public policy of nuclear plant safety.[17] The *Daniel* court stated that the employer advanced no valid public policy.[18] Additionally, the *Daniel* court noted that the arbitrator only awarded the employees back pay and therefore returned no potentially dangerous employees to the nuclear power plant.[19] Moreover, although the court did not take this factor into account in its reasoning, the *Daniel* court observed that the arbitrator's award actually advanced the public policy requiring enforcement of nuclear safety rules.[20]

The *Daniel* case involved a situation where the court had to analyze three levels of regulation, including both public and private regulation.[21] The first level consisted of the statutory regulation of the nuclear power plant by the NRC.[22] The second level concerned the contractual agreements between the nuclear power plant and one of its subcontractors, Daniel Construction Company.[23] The third level of regulation was the collective bargaining agreements between the subcontractor and eighteen different unions.[24]

First, the NRC regulated the licensing and operation of Union Electric Company's nuclear power plant in Callaway County, Missouri.[25] Before granting the Union Electric nuclear power plant a license, the NRC required that the plant submit a site security plan.[26] As part of the security plan, the NRC recommended that Union Electric establish a screening program to test the trustworthiness of

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[17] Daniel Constr. Co. v. Local 257, Int'l Bhd. of Elec. Workers, 856 F.2d 1174, 1183, 129 L.R.R.M. 2429, 2436 (8th Cir. 1988). In *Daniel*, the arbitrator only granted back pay and did not order the reinstatement of the employees because by the time of the arbitration, construction on the Callaway nuclear plant was winding down and the Daniel Construction Company had already begun to lay off even those employees who had passed the psychological exam. *Id.* at 1179 n.10, 129 L.R.R.M. at 2433 n.10.

[18] *Id.* at 1182, 129 L.R.R.M. at 2435.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 1176, 129 L.R.R.M. at 2430.

[22] *Id.* at 1176–77, 129 L.R.R.M. at 2430–31.

[23] *Id.* at 1178, 129 L.R.R.M. at 2432.

[24] *Id.*

[25] *Id.* at 1176–77, 129 L.R.R.M. at 2430–31.

[26] *Id.* at 1176, 129 L.R.R.M. at 2430.

both employees and potential employees in order to establish whether Union Electric should grant these people unescorted access to sensitive areas of the plant.[27] Union Electric submitted its security plan to the NRC without detailing a specific screening program, and the plan received NRC approval.[28]

After receiving the approval, Union Electric hired the Institute for Personality and Ability Testing ("IPAT") to develop a screening program.[29] The testing program developed by IPAT included three personality tests. The IPAT testing program also contained an interview with a clinical psychologist as an appeal for employees who failed the written tests. For its own employees, Union Electric adopted the IPAT program which included both the test battery and the appeal process.[30]

The second level of obligations involved the contract between Union Electric and a subcontractor, Daniel Construction Company ("Daniel").[31] Union Electric provided its subcontractors with the option of either developing their own screening test or using a test provided by Union Electric.[32] For testing the employees of contractors, Union Electric only supplied a shorter version of the IPAT written test battery which, in addition to containing fewer questions, had no provisions for an appeal if the subcontractor's employee failed the written portion.[33]

The third and final level of obligations involved Daniel's collective bargaining agreement ("CBA") with eighteen unions. Daniel entered into a CBA with eighteen labor unions regarding the construction of the Callaway plant.[34] The terms of the CBA permitted Daniel to enact appropriate security, safety, and job rules.[35] Additionally, under the CBA, Daniel could only discharge employees for cause.[36]

When Union Electric introduced nuclear fuel into the Callaway plant, it implemented its security plan.[37] As a result, Daniel dis-

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[27] *Id.* at 1176–77, 129 L.R.R.M. at 2431.
[28] *Id.* at 1177, 129 L.R.R.M. at 2431.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1178, 129 L.R.R.M. at 2432.
[32] *Id.*
[33] *Id.* at 1177–78, 129 L.R.R.M. at 2431–32.
[34] *Id.* at 1178, 129 L.R.R.M. at 2432. In this case, the CBA is called the Project Agreement. *Id.* at 1175, 129 L.R.R.M. at 2430.
[35] *Id.* at 1178, 129 L.R.R.M. at 2432.
[36] *Id.*
[37] *Id.*

missed 157 of its employees who had failed the shortened screening test provided to Daniel by Union Electric under the second level of contractual obligations.[38] Responding to the dismissals, six of the eighteen unions party to the CBA filed grievances which resulted in arbitration.[39]

The arbitrator ruled that the provision of the CBA permitting Daniel to establish appropriate safety rules only empowered Daniel to implement screening procedures which were not "arbitrary, capricious, or unreasonable."[40] After hearing extensive expert testimony, the arbitrator held that the shortened version of the psychological test administered to Daniel's employees lacked validity, and, in addition, needed an appeals procedure for those who failed the written test.[41] The arbitrator concluded that because Daniel dismissed the 157 employees as a result of an invalid test, the dismissals lacked cause, as required by the CBA.[42] As a remedy, the arbitrator awarded the dismissed employees back pay without interest.[43] Daniel instituted a suit in the district court requesting that the court overturn the arbitrator's award as a violation of the public policy regarding nuclear safety.[44] The district court rejected Daniel's arguments and Daniel appealed, again advancing the same public policy argument.[45]

In 1988, the United States Court of Appeals for the Eighth Circuit held that implementing the arbitrator's award of back pay to the employees discharged because of the screening test did not violate the public policy of ensuring safety in nuclear power plants.[46] As an initial matter, the *Daniel* court held that it must accept the arbitrator's findings regarding the validity of the screening test.[47] The court reached this decision because it determined that the issue of the screening test was arbitrable.[48] In reaching this conclusion,

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[38] *Id.*

[39] *Id.* at 1178–79, 129 L.R.R.M. at 2432.

[40] *Id.* at 1178, 129 L.R.R.M. at 2432.

[41] *Id.* at 1179, 129 L.R.R.M. at 2432–33. The arbitrator based his decision on statistical evidence which demonstrated that random selection of employees had the same value in locating mentally unstable employees as the shortened version of the screening test. *Id.* at 1179 n.9, 129 L.R.R.M. at 2433 n.9.

[42] *Id.* at 1179, 129 L.R.R.M. at 2433.

[43] *Id.* See *supra* note 17 for a discussion of the arbitrator's rationale for giving this particular award.

[44] *Id.*

[45] *Id.* at 1179–80, 129 L.R.R.M. at 2433–34.

[46] *Id.* at 1183, 129 L.R.R.M. at 2436.

[47] *Id.* at 1181, 129 L.R.R.M. at 2434.

[48] *Id.* at 1181, 129 L.R.R.M. at 2434.

the *Daniel* court stated that whenever an arbitration clause grants an arbitrator broad authority, only the most forceful evidence can demonstrate that an arbitrator had no authority to hear any one particular dispute.[49] Also, the court noted that the CBA between Daniel and the unions granted the arbitrator broad authority.[50] Therefore, the appeals court determined that the arbitrator's findings of fact regarding the screening test's lack of validity controlled their decision.

Despite having to accept the arbitrator's findings of fact in cases such as this, the *Daniel* court stated that a court retains the power to refuse enforcement of an arbitrator's award on public policy grounds.[51] The eighth circuit, however, then rejected the public policy argument advanced by Daniel Construction Company.[52] The Daniel Construction Company asserted that the arbitrator violated public policy when he, rather than the NRC, decided that the security plan failed to conform to NRC standards.[53] In rejecting this argument, the appellate court emphasized that the Daniel Construction Company offered no proof that the NRC actually ever evaluated, approved, or decided in any way that the screening plan complied with NRC regulations regarding screening procedures. Additionally, the *Daniel* court noted that the only evaluation of Union Electric's screening plan occurred in the adversary process before the arbitrator. As a result, the court rejected the Daniel Construction Company's public policy argument.[54]

The eighth circuit also contrasted its holding with its prior decision in *Iowa Electric*, where it had overturned an arbitrator's decision because enforcement of the decision required reinstating an employee at a nuclear power plant and therefore violated the public policy of nuclear safety.[55] The *Daniel* court reasoned that the award of back pay implicated no public safety concerns, unlike the decision in *Iowa Electric* which returned a dangerous employee to the workplace. Therefore, even if Daniel Construction Company stated a valid public policy, the *Daniel* court would enforce the

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[49] *Id.* (quoting AT&T Technologies v. Communications Workers, 106 S. Ct. 1415, 1419, 121 L.R.R.M. 3329, 3332 (1986)).

[50] *Id.* at 1181, 129 L.R.R.M. at 2434.

[51] *Id.* (citing W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 461 U.S. 757, 766, 113 L.R.R.M. 2641, 2645 (1983)).

[52] *Id.* at 1182, 129 L.R.R.M. at 2435.

[53] *Id.*

[54] *Id.*

[55] *Id.*

arbitrator's award because the award of back pay does not clearly violate public policy.

After the *Daniel* court concluded that the arbitrator's award did not violate public policy, it went on to state that public policy actually required enforcement of the arbitrator's award.[56] According to the arbitrator's finding, Daniel Construction Company used an invalid screening test. The *Daniel* court pointed out that the NRC required that each nuclear power plant have a valid screening test, and therefore the test used by the Daniel Construction Company actually violated NRC standards. As a result, the *Daniel* court noted that enforcement of the arbitrator's award not only failed to violate public policy, but enforcement actually promoted public policy by exposing the invalid test.[57]

In *Daniel Construction Co. v. Local 257, International Brotherhood of Electrical Workers*, the United States Court of Appeals for the Eighth Circuit properly upheld the arbitrator's award of back pay to employees dismissed pursuant to an invalid psychological screening test.[58] The *Daniel* court's holding follows the guidelines set out by the United States Supreme Court in *Misco* for evaluating whether a court should overturn an arbitrator's award because enforcement of the award would result in a violation of public policy.[59]

Despite complying with the *Misco* standards, the *Daniel* court's decision failed to establish a general rule regarding which nuclear power safety rules constitute public policy. Like its previous decision in *Iowa Electric*, the eighth circuit in *Daniel* failed to identify whether NRC regulations or individual nuclear plant safety rules constitute public policy. The *Daniel* court's decision implies, however, that a court can only overturn arbitrators' awards on public policy grounds if enforcement of the award results in a violation of an actual NRC rule.

The *Daniel* court's holding closely follows the public policy doctrine as set out by the United States Supreme Court in *Misco*.[60] According to the *Misco* Court, reviewing courts must ascertain public policy through laws and legal precedents.[61] The *Daniel* court held

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[56] *Id.*

[57] *Id.*

[58] *Id.* at 1183, 129 L.R.R.M. at 2436.

[59] See *supra* notes 4–11 and accompanying text for a discussion of a court's power to review an arbitrator's decision.

[60] *Daniel*, 856 F.2d at 1181, 129 L.R.R.M. at 2434.

[61] United Paperworkers Int'l Union v. Misco, 108 S. Ct. 364, 373, 126 L.R.R.M. 3113, 3119 (1987) (quoting W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 461 U.S. 757, 766, 113 L.R.R.M. 2641, 2645 (1983)).

that the NRC regulations established that denying untrustworthy employees unescorted access to sensitive areas of a nuclear power plant constituted a public policy.[62] Therefore, the *Daniel* court followed the *Misco* Court's standard, requiring a specific enunciation of a public policy before a court can use the policy to overturn an arbitrator's award.

The *Misco* Court also held that enforcing the arbitrator's award must result in a clear violation of the explicit public policy in order for a court to overturn the award.[63] The arbitrator's decision at issue in *Daniel* did not result in a clear violation. Because the arbitrator only awarded back pay, his decision returned no potentially unstable employees to work at the power plant.[64] Therefore, the *Daniel* court's decision fully complies with the *Misco* Court's criteria for overturning an arbitrator's decision as a public policy violation.

Despite reaching the proper decision, the *Daniel* court established no standard for evaluating when enforcement of an arbitrator's award results in a violation of the public policy of nuclear power plant safety. The lack of a definition for the public policy constituted by nuclear safety also marked the eighth circuit's previous holding in *Iowa Electric*. The *Daniel* court's opinion only rejected the public policy argument offered by the Daniel Construction Company without stating the instances in which an individual nuclear power plant's safety rules constitute public policy, if at all.[65] Thus, the *Daniel* court established no specific criteria for identifying public policy among nuclear safety rules.

Even though the *Daniel* court established no standard for public policy in the arena of nuclear power plant safety, one can infer from the decision that only actual NRC regulations represent public policy. The *Daniel* court accepted without question the NRC recommendations regarding denying unstable employees access to sensitive areas of a reactor.[66] The *Daniel* court also placed great emphasis on the fact that the NRC never approved of the screening test or decided that the test complied with NRC regulations. Moreover, the *Daniel* court permitted an arbitrator to decide the validity of an individual nuclear power plant's safety test. As a result, it appears that the *Daniel* court intended that only actual NRC regu-

[62] Daniel Constr. Co. v. Local 257, Int'l Bhd. of Elec. Workers, 856 F.2d 1174, 1176, 129 L.R.R.M. 2429, 2430–31 (8th Cir. 1988).

[63] *Misco*, 108 S. Ct. at 373–74, 126 L.R.R.M. at 3119.

[64] *Daniel*, 856 F.2d at 1182, 129 L.R.R.M. at 2435.

[65] *Id.*

[66] *Id.*

lations, rather than the safety rules of an individual nuclear power plant, constitute an explicit public policy.

Therefore, the *Daniel* court's decision offers no specific definition of which nuclear plant safety rules constitute public policy. One can infer from the decision, however, that only actual NRC regulations constitute public policy in the nuclear safety arena. As a result of this inference, a court could overturn an arbitrator's decision which, if enforced, placed a nuclear power plant in violation of an NRC regulation. As long as the plant is clearly in violation of the NRC regulation, then overturning the arbitrator's award complies with the United States Supreme Court's decision in *Misco*.

IV. CONSTITUTIONAL DECISIONS

A. *The Ineligibility of Striking Workers to Participate in the Food Stamp Program* — Lyng v. International Union[1]

The Food Stamp Act was designed to alleviate hunger and malnutrition and to promote the general health and well-being of the Nation's populace by increasing the food purchasing power of all eligible households through the issuance of food stamps.[2] The Act was also intended to promote food distribution and strengthen the agricultural economy.[3] In 1981, as part of its plan to reduce federal spending, Congress included various amendments to the Food Stamp Act in its Omnibus Budget Reconciliation Act of 1981 (OBRA).[4] Among the more than one dozen changes to the Food Stamp Act contained in OBRA '81 was section 109. Section 109 precludes a household containing a worker on strike from either collecting food stamps or increasing its allotment because of the decreased income of the striking worker.[5] Section 109 provides,

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[1] 108 S. Ct. 1184, 127 L.R.R.M. 2977 (1988).

[2] 7 U.S.C. § 2011 (1988).

[3] *Id.*

[4] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 109, 95 Stat. 361 (codified at 7 U.S.C. § 2015(d)(3) (1988)).

[5] *Id.* Section 2015(d)(3) states as follows:

> (d) Refusal to register for or accept employment
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> ....
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> (3) Notwithstanding any other provision of law, a household shall not participate in the food stamp program at any time that any member of such household, not exempt from the work registration requirements of paragraph (1) of this subsection, is on strike as defined in section 142(2) of title 29, because of a labor dispute (other than a lockout) as defined in section 152(9) of title 29:

however, that a household which satisfies eligibility requirements before the strike will not lose its eligibility because of the strike, and a household will not become ineligible if one of its members refuses employment at a plant because of a strike or lockout.[6]

In 1984, two unions and individual union members filed suit against the Secretary of Agriculture, alleging that section 109 unconstitutionally violated their first amendment rights of association and their fifth amendment rights to equal protection.[7] In *International Union v. Lyng*, the individual plaintiffs were various striking workers and members of their households who were denied food stamps because they were on strike.[8] In its undisputed findings of fact, the United States District Court for the District of Columbia found that state agencies informed some workers that their household could avoid disqualification and receive food stamps if the worker left their household.[9] In addition, the court found other workers voted to ratify or accept collective bargaining agreements that were not entirely favorable, while one plaintiff quit his strike and abandoned his union in order to receive food stamps.[10] Thus, to avoid the adverse effect of section 109 upon the household, striking workers were advised or compelled to alter their actions in a manner not necessarily consistent with their needs or desires.

The district court determined that the applicable standard of review was the "rational basis test" — whether section 109 was rationally related to one or more legitimate government interests. Applying the rational basis test, the district court concluded that the Food Stamp Act amendment violated the plaintiffs' first and fifth amendment rights.[11] Specifically, the court held that the amendment interfered or threatened to interfere with the plaintiffs'

> *Provided*, That a household shall not lose its eligibility to participate in the food stamp program as a result of one of its members going on strike if the household was eligible for food stamps immediately prior to such strike, however, such household shall not receive an increased allotment as the result of a decrease in the income of the striking member or members of the household: *Provided further*, That such ineligibility shall not apply to any household that does not contain a member on strike, if any of its members refuses to accept employment at a plant or site because of a strike or lockout.

Id.

[6] 7 U.S.C. § 2015(d)(3) (1988).

[7] International Union v. Lyng, 648 F. Supp. 1234, 1235, 124 L.R.R.M. 2406, 2407 (D.D.C. 1986).

[8] *Id.*

[9] *Id.* at 1237, 124 L.R.R.M. at 2408.

[10] *Id.*

[11] *Id.* at 1238–39, 1241, 124 L.R.R.M. at 2410, 2412.

freedom of association with their families, union, and fellow union members.[12] The court also held that the amendment violated the plaintiffs' freedom of expression and freedom from government coercion.[13] Finally, the court held that the amendment impermissibly attacks the worker through his or her family by denying the entire household food stamps rather than adjusting the allotment to exclude the striking worker.[14] The court also noted the vast differences in the treatment of striking workers and voluntary quitters.[15] Among these differences are the fact that a voluntary quitter's household is disqualified from receiving food stamps for only ninety days, while a striking worker's household is ineligible for the duration of the strike. Moreover, voluntary quitters are not disqualified if they can show "good cause" for leaving work, such as employer discrimination or unreasonable work conditions, while striking workers have no similar opportunity to show "good cause" for the strike.[16]

During the *Survey* year, the United States Supreme Court in *Lyng v. International Union* reversed the district court's decision and held that section 109 does not violate a worker's first amendment rights of association with his or her family, union, or other union members.[17] The Court also held that the statute is not coercive[18] and that the Constitution does not require the government to provide funds to subsidize the exercise of a Constitutional right.[19] Applying the rational basis test, the Court further concluded that the amendment was rationally related to the government objective of maintaining neutrality in labor disputes.[20]

In determining that section 109 did not infringe upon the workers' first amendment rights of freedom of association and expression, the Supreme Court relied upon the rationale used in their earlier decision, *Lyng v. Castillo*.[21] The *Castillo* Court considered

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[12] *Id.* at 1239, 124 L.R.R.M. at 2410.

[13] *Id.*

[14] *Id.* at 1240–41, 124 L.R.R.M. at 2411.

[15] *Id.* at 1240, 124 L.R.R.M. at 2411. Appendix A to the 1985 Memorandum accompanying the opinion discusses the undisputed differences in the treatment accorded striking workers as opposed to voluntary quitters. *See id.* at 1253–55.

[16] *Id.* at 1237, 124 L.R.R.M. at 2409.

[17] 108 S. Ct. 1184, 1188–89, 127 L.R.R.M. 2977, 2979 (1988).

[18] *Id.* at 1191, 127 L.R.R.M. at 2980.

[19] *Id.* at 1190, 127 L.R.R.M. at 2980.

[20] *Id.* at 1192, 127 L.R.R.M. at 2981.

[21] *Id.* at 1189, 127 L.R.R.M. at 2978 (citing Lyng v. Castillo, 477 U.S. 635 (1986)). As noted in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), the right of association includes

whether the definition of a "household" as used in the Food Stamp Act was contrary to plaintiffs' fifth amendment equal protection rights.[22] Under the Food Stamp Act, benefits are determined on a household rather than an individual basis.[23] The definition of "household" used to determine the food stamp allotment classifies parents, children, and siblings who live together as a single household.[24] More distant relatives or groups of unrelated individuals are not presumed to be a single household unless they customarily purchase food and prepare meals together.[25] Thus, the Act's definition may be contrary to an individual family unit's definition of a household and may cause families to alter their living arrangements in order to be eligible for food stamps.[26]

The *Castillo* Court determined the rational basis test was applicable because the definition of "household" did not burden a fundamental right.[27] The Court concluded that the definition did not burden any fundamental rights because it did not interfere with family living arrangements, nor did it prevent any group of individuals from dining or sharing meals together.[28] Finally, the Court concluded the statutory definition had little if any effect upon the households' formation or activities.[29]

Although *Castillo* involved fifth amendment equal protection claims and not the first amendment, the *International Union* Court concluded that the *Castillo* Court's determination of the appropriate standard of review was applicable.[30] Directly applying *Castillo*, the *International Union* Court asserted that although some striking workers might leave their homes to enable their households to obtain food stamps, in the majority of cases the amendment would have no effect.[31] Thus, the Court ruled that the statute did not prevent any group of persons from dining together nor did it "directly and substantially" interfere with family living arrangements and, therefore, their rights of association.[32]

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the right to express one's attitudes or philosophies by membership in a group. Such association, concluded the Court, is a form of expression of opinion and its existence is necessary in making the express guarantees of the first amendment meaningful. *Id.*

[22] *Castillo*, 477 U.S. at 636.

[23] 7 U.S.C. § 2014 (1988).

[24] 7 U.S.C. § 2012(i)(3).

[25] *See* 7 U.S.C. § 2012(i)(2).

[26] *See Castillo*, 477 U.S. at 645 (Marshall, J., dissenting).

[27] 477 U.S. at 638.

[28] *Id.*

[29] *Id.*

[30] 108 S. Ct. 1184, 1189, 127 L.R.R.M. 2977, 2978 (1988).

[31] *Id.* at 1189, 127 L.R.R.M. at 2979.

[32] *Id.*

Applying the *Castillo* rationale to the workers' freedom of association with other workers, the *International Union* Court concluded that the statute did not order or prevent workers from associating together, nor did it burden their ability to associate in any significant manner.[33] Although the Court acknowledged that striking workers have voted to ratify or accept less than favorable collective bargaining agreements as a result of the denial of such benefits, the Court held that the amendment did not "directly and substantially" interfere with the workers' abilities to associate in furtherance of their common goals and interests.[34] The Court noted that any impact on the workers' rights of association was merely a result of the government refusal to extend food stamp benefits to striking workers.[35] The Court, applying reasoning used in previous decisions, stated that a legislative decision not to subsidize the exercise of a right does not constitute an infringement of that right.[36]

In a footnote, the Supreme Court noted previous decisions which held that the right of association is protected from both frontal attacks and more subtle forms of government interference.[37] The Court cited cases such as *NAACP v. Alabama ex rel. Patterson*, which involved disclosure of an organization's membership list,[38] and *NAACP v. Clairborne Hardware Co.*, which involved state imposition of individual liability based on an association with another individual.[39] The Court distinguished *International Union* from these earlier cases, asserting that section 109 did not "significantly" interfere with plaintiffs' rights of association to the extent of exposing members to physical and economic reprisals or civil liability because of membership.[40] Rather, the Court concluded that section 109 was merely a withdrawal of a government benefit for the duration of an activity and not a reprisal based on membership in an association.[41]

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[33] *Id.* at 1189–90, 127 L.R.R.M. at 2979.

[34] *Id.* at 1189 and n.4, 127 L.R.R.M. at 2979 and n.4.

[35] *Id.* at 1190, 127 L.R.R.M. at 2980.

[36] *Id.* (citing Regan v. Taxation with Representation of Washington, 461 U.S. 540, 549 (1983)).

[37] *Id.* at 1190 n.5, 127 L.R.R.M. at 2979 n.5.

[38] 357 U.S. 449, 462 (1958).

[39] 458 U.S. 886, 919–20 (1982).

[40] 108 S. Ct. at 1190 n.5, 127 L.R.R.M. at 2979 n.5.

[41] *Id.* In the body of the opinion, the Supreme Court categorizes section 109 as a legislative decision not to subsidize the exercise of a fundamental right. *See International Union*, 108 S. Ct. at 1190, 1191, 127 L.R.R.M. at 2979, 2980. The Court, however, in its discussion in footnote 5 acknowledges that section 109 is in fact a withdrawal of a government benefit. *Id.* at 1190 n.5, 127 L.R.R.M. at 2979 n.5.

In asserting that section 109 violated the workers' freedom of expression absent government coercion, appellee unions and union members relied upon *Abood v. Detroit Board of Education*.[42] In *Abood* the Supreme Court ruled that the state law requiring teachers to pay a fee to their union, which used the funds for political and ideological purposes, violated the first amendment rights of those members who disagreed and objected to such use of their funds.[43] The Court concluded that an individual's freedom to believe should be shaped by his or her mind and conscience rather than coerced by the state.[44]

Distinguishing *Abood*, the *International Union* Court concluded that section 109 requires no exaction, does not "coerce" a belief, and does not require political participation regardless of an individual's agreement or disagreements.[45] Section 109, the Court noted, merely declines to extend additional assistance to striking workers.[46] The Court also noted that although the Constitution prohibits coercive governmental interference with specific rights, it does not confer any monetary entitlement to aid in the fulfillment of those rights or freedoms.[47]

After determining that the Food Stamp Act amendment had no substantial impact on any fundamental interest and did not affect a protected class, the *International Union* Court applied a rational basis test to determine the outcome of appellees' fifth amendment equal protection claim.[48] In keeping with this standard of review, the Court assumed that legislative classifications or distinctions between groups of individuals or things are valid.[49] As the Court noted, the Secretary of Agriculture offered three justifications for the Food Stamp Act amendment.[50] The first government objective was to cut federal spending. The second objective was to use the available limited resources where the need was greatest. The third objective was concerned with avoiding one-sided support in labor strikes.[51]

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[42] *Id.* at 1191, 127 L.R.R.M. at 2980 (citing 431 U.S. 209, 95 L.R.R.M. 2411 (1977)).
[43] 431 U.S. at 235–36, 95 L.R.R.M. at 2421.
[44] *Id.* at 235, 95 L.R.R.M. at 2421.
[45] 108 S. Ct. at 1191, 127 L.R.R.M. at 2980.
[46] *Id.*
[47] *Id.*
[48] *See id.* at 1191–93, 127 L.R.R.M. at 2980–82.
[49] *Id.* at 1192, 127 L.R.R.M. at 2981.
[50] *Id.*
[51] *Id.*

The *International Union* Court focused on the third governmental objective of avoiding undue favoritism to one side in a private labor dispute.[52] The Court based its decision on a Senate Report which cited public policy reasons for ending food stamp subsidization of striking workers.[53] The report stated that granting benefits to striking workers can be viewed as encouraging workers to "wait out" management rather than compromise.[54] The report also declared that union strike funds, and not the food stamp program, should support striking workers during labor-management disputes.[55]

The Court also noted the Senate's concern with preserving the integrity of the Act and its purposes and goals of alleviating hunger and malnutrition and strengthening the agricultural economy of the country.[56] Although acknowledging that the statute has some discriminatory effect upon striking workers, the Court refused to reject a congressional determination of "what constitutes wise economic or social policy."[57] The Court then considered the two exceptions to section 109: the provision allowing striking workers to continue to receive food stamps if they were eligible before the strike, and the provision not disqualifying a household if a member refuses work at a striking plant or site. The Court viewed these two exceptions as evidence of Congress's effort to avoid favoritism in labor disputes.[58] The Court therefore concluded that the amendment precluding striking workers from collecting food stamps was rationally related to the state objective of maintaining neutrality in private labor disputes.[59]

Having determined a rational basis between government neutrality and section 109, the Court eschewed the issue of whether

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[52] *Id.*

[53] S. REP. No. 139, 97th Cong., 1st Sess. 2, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 452.

[54] *Id.*

[55] *Id.* By concentrating on the Senate report, the Supreme Court ignored the House Agriculture Committee report cited by the district court in its undisputed findings of fact. The House Agriculture Committee report contained a history of previous proposals to preclude striking workers from collecting food stamps. The report cited an earlier House Committee finding which declared that automatic exclusion of striking workers would be unfair and inequitable and would result in non-neutral government pressuring of workers to abandon a strike. H.R. REP. No. 106, 97th Cong., 1st Sess. 142 (1981). *See* International Union v. Lyng, 648 F. Supp. 1234, 1236 (D.D.C. 1986).

[56] 108 S. Ct. 1184, 1192, 127 L.R.R.M. 2977, 2981 (1988).

[57] *Id.* at 1193, 127 L.R.R.M. at 2981.

[58] *Id.* at 1193, 127 L.R.R.M. at 2981–82.

[59] *Id.* at 1193, 127 L.R.R.M. at 2982.

either of the Secretary's remaining two justifications — to cut federal spending and to best allocate resources — would alone justify section 109.[60] The Court commented, however, upon the Secretary's first justification concerning the reduction of federal spending. Although the Court stated that Congress cannot save money by using discriminatory practices, the Court deferred to the congressional determination of how best to allocate resources.[61]

The Court dismissed appellees' argument that the Food Stamp Act amendment impermissibly interfered with the workers' first amendment rights by disqualifying his or her family because of a strike.[62] The Court stated that the amendment's application merely conformed with the general operation of the food stamp program by having an individual's actions affect household eligibility. The Court could find no difference between this argument and the dispute in *Lyng v. Castillo* over the Act's definition of a household.[63] The Court therefore applied its decision in *Castillo*, that the Act's definition of household was valid regardless of the fact that benefits were determined by household and not on an individual basis, and concluded there was no impermissible interference with a constitutional right.[64]

The dissent in *International Union*, written by Justice Marshall and joined by Justices Brennan and Blackmun, criticized the majority for the "brevity" of its fifth amendment analysis and concluded that section 109 failed even under "the most deferential scrutiny."[65] Applying a rational basis test to the Secretary of Agriculture's three arguments supporting the amendment, the dissent stated that it was difficult to discern a rational relation between legitimate government interests and the Food Stamp Act amendment.[66] Justice Marshall noted previous Court rulings that the lack of a rational relationship between a legislative classification and purported goals suggests an illegitimate legislative purpose.[67] The dissent suggested that this case involved an amendment fostered by

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*; see *supra* notes 21–29 and accompanying text for a discussion of the *Castillo* Court's review of the Act's definition of household.

[64] 108 S. Ct. at 1193–94, 127 L.R.R.M. at 2982. *See also* Lyng v. Castillo, 477 U.S. 635, 636 (1986).

[65] 108 S. Ct. at 1194, 127 L.R.R.M. at 2982. (Marshall, J., dissenting).

[66] *Id.* at 1195, 127 L.R.R.M. at 2983 (Marshall, J., dissenting).

[67] *Id.* at 1194–95, 127 L.R.R.M. at 2983 (Marshall, J., dissenting).

such an illegitimate legislative purpose, namely public animus against striking workers.[68]

The dissent concluded that the Secretary of Agriculture's first argument, that the amendment would save money, was unpersuasive because exclusion of any group from a benefit program would result in a decrease in spending and would thus survive rational basis scrutiny.[69] In a footnote, the dissent noted certain statistics indicating that striking workers rarely participate in the food stamp program. One study indicated households containing striking workers accounted for only .2 to .3 percent of non public-assistance households participating in the program.[70] The dissent stated that more than concern for financial resources was necessary to justify the selection of striking workers to bear the burden of cost cutting legislation.[71]

In regard to the Secretary's second argument, that limited resources should be allocated where the need is greatest, the dissent found no logical relation between the purpose of the Act to alleviate hunger and a striking worker's actions.[72] The Secretary had also argued that "need" was related to "willingness to work" and strikers were "unwilling to work."[73] In response, Justice Marshall noted that striking workers often do not have the option to return to work because the business has been shut down or because the worker has been permanently replaced.[74]

Justice Marshall also focused on the different treatment accorded "voluntary quitters" and striking workers. Justice Marshall noted that "voluntary quitters" are given the opportunity to prove "good cause" for leaving, such as employer discrimination or unreasonable work conditions.[75] If good cause is shown, the worker and his or her household are not disqualified from receiving food stamps.[76] Striking workers, however, are not given this opportunity despite the fact that strikes are frequently alleged to be the result

[68] *Id.* at 1198, 127 L.R.R.M. at 2986 (Marshall, J., dissenting).

[69] *Id.* at 1195, 127 L.R.R.M. at 2983 (Marshall, J., dissenting).

[70] *Id.* at 1195 n.2, 127 L.R.R.M. at 2983 n.2 (Marshall, J., dissenting).

[71] *Id.* at 1195, 127 L.R.R.M. at 2985 (Marshall, J., dissenting) (citing Plyer v. Doe, 457 U.S. 202, 227 (1982); Reed v. Reed, 404 U.S. 71, 76 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1968)).

[72] *Id.* at 1196, 127 L.R.R.M. at 2984 (Marshall, J., dissenting).

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1196 n.5, 127 L.R.R.M. at 2984 n.5 (Marshall, J., dissenting) (citing 7 C.F.R. § 273.7(n)(3)(i), (ii) (1988)).

[76] *Id.* at 1196, 127 L.R.R.M. at 2984 (Marshall, J., dissenting).

of unfair labor practices by employers.[77] Voluntary quitters and their households are also disqualified for only 90 days in the absence of "good cause," while the striking worker and his or her household are disqualified for the duration of the strike.[78]

The dissent argued that the Secretary of Agriculture's "neutrality" argument upon which the Court focused was deceptive and deeply flawed.[79] The dissent based its assertion on the fact that businesses can claim a net operating loss as a result of a strike and receive tax subsidies and are also eligible for special tax credits for hiring replacement workers during a strike.[80] In addition, the dissent noted that management employees are not precluded from collecting food stamps, thus decreasing management's burden during a strike.[81] The dissent concluded that in view of the network of governmental support of both labor and management, the withdrawal of even a single support on the side of labor does not constitute a "neutral" act, but rather constitutes a penalty.[82]

The dissent reviewed earlier proposals of the Food Stamp Act amendment, beginning in 1968, which likened striking workers to "hippies" and "commune residents." This group of individuals was considered voluntarily poor. The dissent also reviewed a 1973 Supreme Court opinion that held exclusion of communal households from the food stamp program was irrational and unconstitutional.[83] In particular, the dissent noted that the Government's argument before the Supreme Court, that exclusion of communal households would reduce fraud, differed from the Government's earlier arguments. The Government, at the district court level had initially asserted that the exclusion of communal households was necessary to foster "morality."[84] Thus, by implication, exclusion of striking workers might be viewed as necessary to foster "morality."

Based on legislative history and the failure of the Secretary's purported rationales for the Food Stamp Act amendment, the *International Union* dissent concluded that the amendment may have

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[77] *Id.* at 1197, 127 L.R.R.M. at 2984 (Marshall, J., dissenting).

[78] *Id.* at 1196–97, 127 L.R.R.M. at 2984 (Marshall, J., dissenting) (citing 7 C.F.R. § 273.7(n)(1)(v)).

[79] *Id.* at 1198, 127 L.R.R.M. at 2985 (Marshall, J., dissenting).

[80] *Id.* at 1198, 127 L.R.R.M. at 2985–86 (Marshall, J., dissenting).

[81] *Id.* at 1198, 127 L.R.R.M. at 2985 (Marshall, J., dissenting).

[82] *Id.* at 1198, 127 L.R.R.M. at 2986 (Marshall, J., dissenting).

[83] *Id.* at 1199, 127 L.R.R.M. at 2986 (Marshall, J., dissenting) (citing United States Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973)).

[84] United States Dep't of Agric. v. Moreno, 413 U.S. 528, 535 n.7 (1973).

been enacted based on public animus against striking workers.[85] Although the dissent agreed with the majority that the Food Stamp Act was not established to be used as a weapon in labor disputes, the dissent argued that in fact the Food Stamp Act amendment was such a weapon. The dissent therefore concluded that the amendment was irreconcilable with the Act's goals of aiding the needy.[86]

In sum, the *International Union* Court, applying the Court's decision in *Lyng v. Castillo*, concluded that the Food Stamp Act amendment does not infringe upon a worker's first amendment right of association.[87] Applying a rational basis test, the Court determined the Food Stamp Act amendment was rationally related to the government's interest in remaining neutral in private labor disputes.[88] The *International Union* Court affirmed the congressional determination of what constitutes wise social and economic policy.[89] The dissent, however, attacked the neutrality argument.[90] In light of the treatment accorded voluntary quitters and the various tax subsidies available to businesses experiencing a strike, the dissent concluded that the Food Stamp Act amendment was not neutral and in fact was a weapon against striking workers.[91]

The *International Union* decision is narrowly focused, distinguishing the freedoms to believe, express and associate from the freedom to act. Although the Supreme Court has recognized that some forms of association constitute a form of expression, the Court has historically distinguished between speech and conduct.[92] In holding that section 109 does not "directly and substantially" interfere with a striking worker's first amendment rights, the Court disregarded any indirect effect this amendment might have upon a

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[85] 108 S. Ct. at 1198, 1199, 127 L.R.R.M. at 2986 (Marshall, J., dissenting). In its decision, the District Court for the District of Columbia noted that striking workers have historically been subjected to discrimination and have been considered an unpopular political minority. International Union v. Lyng, 648 F. Supp. 1234, 1240, 124 L.R.R.M. 2406, 2410–11 (D.D.C. 1986).

[86] 108 S. Ct. at 1199–200, 127 L.R.R.M. at 2987 (Marshall, J., dissenting).

[87] See *supra* notes 21–36 and accompanying text for a discussion of *Lyng v. Castillo*.

[88] See *supra* notes 52–55 and accompanying text for a discussion of the government objective of neutrality in private labor disputes.

[89] See *supra* note 57 and accompanying text for a discussion of this point.

[90] See *supra* notes 79–82 and accompanying text for a discussion of the dissent's criticism of the neutrality argument.

[91] See *supra* notes 75–86 and accompanying text for a discussion of the dissenting opinion.

[92] *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965); see *supra* note 21 for a discussion of *Griswold*. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 825–26 (2nd ed. 1988), for a discussion of the historical use of the speech-conduct distinction and its origins in the labor picketing cases.

worker. The Court distinguished between the physical and economic reprisals suffered by individuals due to their membership in an association and an action by the group to which an individual belongs.[93] This distinction clearly indicates that the Court upheld an individual's right to hold his own beliefs and to associate in furtherance of common goals and interests. By precluding striking workers from participating in the Food Stamp program because of the union's act of striking, Congress and the Court are constraining workers to belief without action.

Although withdrawal of a benefit is not necessarily an affirmative impediment, it is a passive impediment with a very clear message. Such removal indicates that if a worker chooses to act on a belief, he or she must do so independent of social aid. Therefore, this policy represents a type of social sanction. Even if, as statistics indicate, only a small percentage of workers will be affected and the coercive powers of the government would therefore be minimal, this does not alleviate the perceived hostility toward labor. This perception is even greater in light of the fact that section 109 will only marginally aid in reducing federal spending.[94] Although it may be less harmful overall to cut such a small program rather than a larger one that would affect a greater number, this amendment has a profound effect upon those households that would have been eligible for food stamps prior to the amendment.

As noted by the dissent, the network of government support of management has not been affected by the withdrawal of aid to striking workers. Although a striking worker may be willing to work but unable to do so because the business is closed, the business can claim a net operating loss.[95] The business, therefore, has more economic resources because of government regulations than does the worker. Moreover, because management employees are not precluded from collecting food stamps, management's burden is less.[96] Management workers, unlike faithful union members, need not worry that their families will go hungry during a strike or shutdown. If Congress truly sought government neutrality in private labor disputes, it would either eliminate all forms of economic as-

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[93] See *supra* notes 37–41 and accompanying text for a discussion of this distinction.

[94] See *supra* note 70 and accompanying text for a discussion of the impact of disbursements to striking workers on the food stamp program.

[95] See *supra* note 80 and accompanying text for a discussion of the tax benefits available to businesses.

[96] See *supra* note 78 and accompanying text for a discussion of management employees eligibility for food stamps during a strike.

sistance available to labor and management or seek to balance government assistance. Section 109, however, has removed economic assistance only from workers, and the legislative history is devoid of any reference to labor being unfairly advantaged. The legislative history does, however, contain suggestions of public animus towards striking workers.[97]

The Supreme Court's decision in *Lyng v. International Union* sanctions congressional withdrawal of food stamps from striking workers. The Court, however, only uses the term "withdrawal" once in a footnote, and focuses primarily on the fact that the Constitution does not require the government to extend entitlements or subsidies to individuals in fulfillment of a constitutional right. The dissent focuses primarily on the impact of the amendment upon striking workers and their households. The dissent also recognizes the disparate treatment between voluntary quitters and striking workers. As noted by the dissent, striking workers are unable to prove a strike is for "good cause" even though some strikes may be in response to situations which, for a voluntary quitter, constitute "good cause." Despite the Food Stamp Act amendment's acknowledged discriminatory effect on striking workers, the Court in *International Union* concluded that the government objective of maintaining neutrality in private labor disputes is rationally related to this amendment and therefore does not violate a worker's fifth amendment rights. The Court further concluded that the Food Stamp Act amendment does not directly and substantially interfere with a worker's right or ability to believe or express an idea or to associate with family, other workers or the union.

V. Preemption

A. **Section 301 Preemption and State Court Actions for Retaliatory Discharge*: Lingle v. Norge Division of Magic Chef, Inc.[1]

Section 301 of the National Labor Relations Act confers subject matter jurisdiction to federal courts in suits alleging a contract

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[97] See *supra* note 83 and accompanying text for a discussion of early hostility toward striking workers.

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[1] 108 S. Ct. 1877, 46 FEP Cases 1553 (1988).

violation between an employer and a labor organization.[2] In 1957, the United States Supreme Court in *Textile Workers v. Lincoln Mills* construed section 301 as authorizing federal courts to develop a uniform body of substantive federal labor law to apply to labor contract disputes that involve a collective bargaining agreement.[3] In 1962, in *Teamsters v. Lucas Flour*, the Supreme Court first addressed the preemptive scope of section 301, holding that federal labor law preempts the application of state law to enforce collective bargaining agreements.[4] Gradually, the Court broadened the preemptive scope of section 301 to include a state tort whose resolution depends upon an interpretation of the labor contract agreement.[5]

In 1985, the United States Supreme Court in *Allis-Chalmers v. Lueck* held that an employee's tort claim alleging a bad faith handling of an insurance claim[6] was "inextricably intertwined" with the

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[2] *See* Labor Management Relations Act of 1947 (the "Act"), § 301, 29 U.S.C. § 185(a) (1982). Section 301 of the Act states in pertinent part:

> (a) suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

[3] *See* Textile Workers v. Lincoln Mills, 353 U.S. 448, 450–51, 40 L.R.R.M. 2113, 2116 (1957). In a grievance dispute between an employer and a labor organization, the union sued in federal court to compel arbitration of the grievance. *Id.* at 449, 40 L.R.R.M. at 2113. The district court ordered the employer to comply with arbitration. *Id.* The appeals court reversed, holding that the court did not have the authority, based either in state or federal law, to grant relief. *Id.* The United States Supreme Court, reversing the appeals court, held that federal labor law is the appropriate substantive law to apply in section 301 disputes. *Id.* at 456, 40 L.R.R.M. at 2116.

[4] *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102–03, 49 L.R.R.M. 2717, 2720–21 (1962). An employer who had entered into a collective bargaining agreement with a union sued the union in state court for damages arising after the union called an eight day strike. *Id.* at 97, 49 L.R.R.M. at 2718. The state court applied state contract law and held that the strike violated the collective bargaining agreement. *Id.* at 97–98, 49 L.R.R.M. at 2718. The Supreme Court, although affirming the judgment, held that the state court should have applied federal labor law, not state contract law, in section 301 disputes involving collective bargaining agreements. *See id.* at 102–03, 49 L.R.R.M. at 2720–21. The Court emphasized the importance of a single body of federal labor law in order to achieve the policy of uniformity underlying the federal labor legislation. *See id.* at 103–04, 49 L.R.R.M. at 2721.

[5] *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220, 118 L.R.R.M. 3345, 3352–53 (1985).

[6] Wisconsin courts have recognized the bad faith handling of an insurance claim as a tort under state law. *Id.* at 203, 118 L.R.R.M. at 3345. Wisconsin courts distinguish the tort of bad faith from a bad faith breach of contract claim, although the tort duty is also created by the creation of the contract. *Id.* at 207, 118 L.R.R.M. at 3347.

terms of the collective bargaining agreement, and therefore section 301 preempted the state tort claim.[7] The *Lueck* Court analyzed whether the state tort conferred non-negotiable state law rights to an employee or employer *independent* of the rights established by the labor union contract.[8] Although recognizing that some state-conferred rights and obligations may exist independently of the labor union contract, the Court held that the tort of bad faith derived from the contractual duties and rights stipulated by the collective bargaining agreement and thus fell within the preemptive scope of section 301.[9]

Furthermore, the Court noted that in order to achieve the policies underlying section 301, the preemptive scope of section 301 must extend to include any disputes that involve collective bargaining agreements, regardless of whether the claim is labeled as a breach of contract, or as a tort claim.[10] If section 301 precluded preemption of tort claims, the Court reasoned, a party could evade the procedures stipulated by the collective bargaining agreement by artfully pleading a contract claim under the guise of a tort.[11] Thus, the Court stated, to hold that section 301 did not preempt this tort claim would undermine the primary importance and effectiveness of the arbitration procedure and would frustrate the federal labor goal of national uniformity.[12]

Since the Supreme Court's decision in *Lueck*, circuit courts have disagreed as to whether section 301 preemption applies to the state tort claim of retaliatory discharge.[13] A number of circuit decisions have held that section 301 does not preempt the tort of retaliatory discharge and thus union employees may pursue such a claim in

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[7] *Lueck*, 471 U.S. at 213, 219, 118 L.R.R.M. at 3349–50, 3352. *See generally* 1986–87 Annual Survey of Labor Relations and Employment Discrimination Law, 28 B.C.L. REV. 101 (1987) for a discussion of *Lueck* and its impact upon section 301 preemption of state law.

[8] 471 U.S. at 213, 118 L.R.R.M. at 3349–50.

[9] *Id.* at 212, 217, 118 L.R.R.M. at 3349, 3351.

[10] *Id.* at 210–11, 118 L.R.R.M. at 3349.

[11] *Id.* at 211, 118 L.R.R.M. at 3349.

[12] *See id.* at 219–20, 118 L.R.R.M. at 3352.

[13] *Compare* Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp., 814 F.2d 102, 107, 125 L.R.R.M. 3363, 3367 (2d Cir. 1987) (section 301 does not preempt retaliatory discharge tort) *and* Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120, 124 n.2, 123 L.R.R.M. 2165, 2167 n.2 (3d Cir. 1986) (same); *with* Johnson v. Hussman Corp., 805 F.2d 795, 797, 123 L.R.R.M. 3074, 3076 (8th Cir. 1986) (section 301 preempts retaliatory discharge tort) *and* Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511, 517, 119 L.R.R.M. 2465, 2469 (7th Cir. 1985) (tort of retaliatory discharge is breach of collective bargaining agreement to which section 301, and not Indiana Worker's Compensation statute, applies).

state court.[14] Applying the "independent tort" analysis of *Lueck*, these courts have concluded that a claim of retaliatory discharge is independent of the terms of the collective bargaining agreement because resolution of the claim does not depend upon interpretation of the labor union contract.[15]

In contrast, other circuits have upheld section 301 preemption of a retaliatory discharge tort.[16] For example, the Eighth Circuit, in *Johnson v. Hussman Corp.*, applying the *Lueck* standard, held that an employee's claim of retaliatory discharge was substantially dependent upon the provisions of the collective bargaining agreement.[17] The *Johnson* court reasoned that, although the employee brought his complaint in tort, the employee was in fact suing for wrongful discharge in violation of the collective bargaining agreement, and thus the claim fell within section 301 preemption.[18]

During the *Survey* year, the United States Supreme Court, in *Lingle v. Norge Division of Magic Chef, Inc.*, resolved this conflict.[19] In *Lingle*, the Supreme Court, reversing a decision by the Seventh Circuit, held that section 301 preemption does not apply to the tort of retaliatory discharge.[20] The Court affirmed the *Lueck* principle that section 301 preempts a state law claim if the claim depends upon an interpretation of the terms of the collective bargaining agreement.[21] The *Lingle* Court ruled, however, that the tort of retaliatory discharge is independent of the collective bargaining agreement because resolution of the claim does not require a state court to interpret the labor union contract.[22] Thus, after *Lingle*, a union employee covered by a collective bargaining agreement may maintain a separate action in state court for retaliatory discharge.[23]

In *Lingle*, petitioner Lingle, a union employee covered by a collective bargaining agreement, was injured while working in the Norge Division of Magic Chef's manufacturing plant in Illinois.[24]

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[14] *See, e.g.*, *Baldracchi*, 814 F.2d at 107, 125 L.R.R.M. at 3367; *Herring*, 799 F.2d at 124 n.2, 123 L.R.R.M. at 2167 n.2.

[15] *See, e.g.*, *Baldracchi*, 814 F.2d at 105, 125 L.R.R.M. at 3365.

[16] *See, e.g.*, *Johnson*, 805 F.2d at 797, 123 L.R.R.M. at 3076; *Vantine*, 762 F.2d at 517, 119 L.R.R.M. at 2469.

[17] *Johnson*, 805 F.2d at 797, 123 L.R.R.M. at 3076.

[18] *Id.*

[19] 108 S. Ct. 1877, 1879–80, 46 FEP Cases 1553, 1554 (1988).

[20] *Id.* at 1879, 46 FEP Cases at 1553.

[21] *See id.* at 1885, 46 FEP Cases at 1558.

[22] *Id.* at 1882, 46 FEP Cases at 1556.

[23] *See id.* at 1879, 46 FEP Cases at 1553.

[24] *Lingle*, 108 S. Ct. at 1879, 46 FEP Cases at 1553.

Shortly after Lingle filed for worker's compensation under the Illinois Worker's Compensation Act, Norge discharged Lingle for allegedly falsifying her compensation claims.[25] Upon Lingle's discharge, the union representing Lingle filed a grievance on her behalf.[26] The collective bargaining agreement protected Lingle from discharge except for "just" or "proper" cause, and provided for a grievance arbitration procedure.[27] An arbitrator ruled in Lingle's favor and ordered her reinstated with back pay.[28]

During this period, Lingle filed a retaliatory discharge complaint in state court, alleging that Norge fired her in retaliation for exercising her rights under the state's compensation laws.[29] Norge then removed the case to federal district court on the basis of diversity.[30] The district court dismissed the case, holding that the tort claim was "inextricably intertwined" with the terms of the labor union contract, and to allow the state action to proceed would undermine the arbitration procedure set forth in the parties' contract.[31]

The Court of Appeals for the Seventh Circuit affirmed the lower court's holding that section 301 preempts the state law claim for retaliatory discharge.[32] The appeals court, relying on the *Lueck* holding, reasoned that the retaliatory discharge tort necessarily implicated the "just cause" provision of the labor union contract and therefore the tort claim was substantially dependent upon the collective bargaining agreement.[33] Furthermore, the court of appeals in *Lingle* concluded that the retaliatory discharge tort was inextricably intertwined with the collective bargaining agreement because both the state action and the arbitration procedure implicated the same analysis of the facts.[34] Finally, the court noted that if common law protected workers from unjust discharges, workers would depend less upon the union's established arbitration procedures, thereby undermining one of the union's most effective organizing

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 1879, 46 FEP Cases at 1554.

[29] *Id.* The Illinois Supreme Court labeled the retaliatory discharge claim as a tort. *See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 185, 384 N.E.2d 353, 358 (1978).

[30] *Lingle*, 108 S. Ct. at 1879, 46 FEP Cases at 1554.

[31] *Id.*

[32] *Id.*

[33] Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031, 1041, 1046, 125 L.R.R.M. 2855, 2863, 2867 (7th Cir. 1987).

[34] *Id.* at 1046, 125 L.R.R.M. at 2867.

points — the protection of union workers from arbitrary discharge.[35]

The United States Supreme Court reversed the court of appeals in *Lingle* and held that section 301 does not preempt a state tort of retaliatory discharge.[36] The Court first noted that the Illinois Supreme Court, the state's highest court, recognized the tort of retaliatory discharge and had extended the availability of the tort to union employees.[37] The United States Supreme Court then stated that the plaintiff must prove two elements in order to prove a charge of retaliatory discharge.[38] First, the plaintiff must demonstrate that he or she was either discharged or threatened with discharge.[39] Second, the plaintiff must prove that the employer's motive was to deter the plaintiff from exercising, or to interfere with the plaintiff's exercising his or her rights under the Illinois Worker's Compensation Act.[40] The Court stated that these two elements of proof presented purely factual questions and neither required an interpretation of the collective bargaining agreement's terms.[41] Thus, the Court held that the tort of retaliatory discharge existed independently of the labor union contract for section 301 preemption purposes.[42]

The Supreme Court rejected the appeals court's reasoning that because both the arbitration procedure and the state action implicated the same factual analysis, the state claim necessarily depended upon the collective bargaining agreement.[43] Although the Supreme Court agreed that resolution of the state law claim might require the same factual considerations as an arbitrator's inquiry into the "just cause" provision of the collective bargaining agreement, the Court observed that section 301 preempted only those areas involving an interpretation of the collective bargaining agreement itself.[44]

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[35] *Id.* at 1047, 125 L.R.R.M. at 2868.

[36] *Lingle*, 108 S. Ct. at 1879, 46 FEP Cases at 1553.

[37] *Id.* at 1881–82, 46 FEP Cases at 1555–56, *citing* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 117 L.R.R.M. 2807 (1984), *cert. denied*, 474 U.S. 909 (1985). *See generally* Comment, *Retaliatory Discharge–Illinois' Extension of Retaliatory Discharge Tort Actions to Employment Relationships Governed by Collective Bargaining Agreements: New Obstacles Imposed by Federal Labor Law Preemption*, 1985 S. ILL. L. REV. 707 (1985).

[38] *Lingle*, 108 S. Ct. at 1882, 46 FEP Cases at 1556.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1883, 46 FEP Cases at 1556–57.

[44] *See id.* at 1882–83, 46 FEP Cases at 1556–57.

The Court further stated that section 301 does not infringe upon a state's ability to provide substantive rights to employees when adjudication of those rights does not depend upon an analysis of the collective bargaining agreement.[45] The Court held, therefore, that section 301 preemption does not apply.[46]

The *Lingle* Court's decision is consistent with the reasoning underlying the Court's earlier decision in *Allis-Chalmers v. Lueck*. The *Lueck* Court held that the tort alleging breach of good faith required an analysis of the duties established by the collective bargaining agreement in order to determine whether a deviation from the contractual obligations occurred.[47] Therefore, the *Lueck* Court concluded that section 301 necessarily preempted the state claim for bad faith.[48] The *Lueck* Court implied, however, that an independent, non-negotiable state law right, whose existence did not depend upon a collective bargaining agreement, might fall outside the preemptive scope of section 301.[49]

The *Lingle* Court, applying the *Lueck* analysis, determined that the tort of retaliatory discharge conferred substantive state law rights independent of the collective bargaining agreement.[50] The *Lingle* Court reasoned that substantive state rights in the labor area can exist without implicating collective bargaining agreements.[51] Because adjudication of these rights did not substantially depend upon the terms of the collective bargaining agreement, the Court held that section 301 does not preempt the tort.[52]

At the same time, the *Lingle* Court failed to address whether a union may waive its members' individual non-preempted state law rights within the collective bargaining agreement.[53] The Court noted that under Illinois law, neither party to a labor union contract may waive the tort of retaliatory discharge or curtail an employee's rights under the state worker's compensation scheme.[54] The *Lingle* Court did not resolve, however, whether a state prohibition against the waiver, such as the Illinois law, falls within the scope of section

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[45] *Id.* at 1883, 46 FEP Cases at 1556–57.

[46] *Id.* at 1879, 46 FEP Cases at 1553.

[47] *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 217–18, 118 L.R.R.M. 3345, 3351 (1985).

[48] *Id.* at 219, 118 L.R.R.M. at 3352.

[49] *Id.* at 217 n.11, 118 L.R.R.M. at 3351 n.11.

[50] *Lingle*, 108 S. Ct. at 1883, 1884, 46 FEP Cases at 1556–57, 1557.

[51] *Id.* at 1884, 46 FEP Cases at 1557.

[52] *See id.* at 1883, 46 FEP Cases at 1556.

[53] *Id.* at 1883 n.9, 46 FEP Cases at 1557 n.9.

[54] *Id.*

301 requiring preemption by federal labor law.[55] The Court merely stated that before deciding whether a state prohibition against a waiver could be preempted under federal law by the parties to the agreement, the court would require "clear and unmistakable evidence" that the parties intended such a waiver.[56]

The *Lingle* decision allows union employees to pursue an action for retaliatory discharge in state court before resolution of the grievance arbitration procedure. The *Lingle* Court explained, however, that its decision should not be construed as an attempt to undermine federal labor law policy encouraging arbitration.[57] Disputes involving interpretations of collective bargaining agreements still remain within the arbitrator's discretion,[58] and parties therefore must submit to the arbitration procedure stipulated by the labor union contract. The *Lingle* Court merely affirmed a state's ability to provide substantive rights to workers without necessarily implicating the broad preemptive scope of section 301 governing collective bargaining agreements.[59] Simply because the goals of the Worker's Compensation Act are also protected under a "just cause" provision of a collective bargaining agreement, a claim of retaliatory discharge is not rendered substantially dependent on the collective bargaining agreement.

Given that many jurisdictions award punitive damages for a violation of public policy, whereas arbitration remedies include only reinstatement and back pay for wrongful discharge,[60] the *Lingle* decision undoubtedly will encourage union employees to pursue state actions for retaliatory discharge. Separate state actions for retaliatory discharge, however, should not present a serious threat to a union's organizing strength; a union still serves as protection against arbitrary and wrongful discharge. Rather, increased resort to state claims of retaliatory discharge will serve to strengthen the goal underlying punitive damages — that of deterring employers from retaliatory firings when workers exercise their rights under a state worker's compensation scheme. Furthermore, *Lingle* emphasizes that interpretations of collective bargaining agreements remain within the realm of arbitration.[61]

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[55] *See id.*

[56] *Id.* (citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983)).

[57] *See Lingle*, 108 S. Ct. at 1884, 46 FEP Cases at 1557.

[58] *Lingle*, 108 S. Ct. at 1884, 46 FEP Cases at 1557.

[59] See *supra* notes 45–49 and accompanying text for a discussion of a state's ability to provide substantive labor rights without preemption by section 301.

[60] *See* Comment, *supra* note 37, at 712–13, 731.

[61] *Lingle*, 108 S. Ct. at 1884, 46 FEP Cases at 1557.

The *Lingle* decision may also give rise to an increased number of contract claims involving collective bargaining agreements disguised as state tort claims, a fear that the Court in *Lueck* expressed.[62] Because of the availability of punitive damages under the tort claim, employees may seek to file breach of contract claims in state court as a tortious breach of contract. The "independent tort" analysis, however, developed in *Lueck* and now affirmed in *Lingle*, is an effective tool to distinguish between contract claims and tort claims. Courts must examine on a case-by-case basis whether the tort claim derives its rights from the collective bargaining agreement, and whether resolution of the state law claim substantially depends upon an interpretation of the collective bargaining agreement.

The Supreme Court's decision in *Lingle* resolved the conflict among circuit courts over the scope of section 301 preemption regarding the tort of retaliatory discharge. As such, the Court's holding that section 301 does not preempt a state tort claim of retaliatory discharge is not a departure from prior existing law. The *Lingle* decision merely affirmed the section 301 preemption principle developed in *Lueck*: section 301 only preempts a state law claim that is inextricably intertwined with the collective bargaining agreement.

B* *NLRB Preemption of an Action Under ERISA To Recover Delinquent Contributions*: Laborers Health & Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co.[1]

An employer who has a contractual duty to contribute to a pension fund has, in addition, a statutory duty to contribute during the period beginning after contract expiration and ending when negotiations for a new contract have come to an impasse, pursuant to section 8(a)(5) of the National Labor Relations Act (NLRA).[2] In 1980, Congress amended the Employee Retirement Income Security Act (ERISA) sections 515 and 502(g)(2) to provide trustees of multi-employer benefit plans a remedy in federal court to collect

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[62] See *supra* notes 10–12 and accompanying text for a discussion of the reasons why the preemptive scope of section 301 should include tort claims whose resolution depends upon an interpretation of the collective bargaining agreement.

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[1] 108 S. Ct. 830, 127 L.R.R.M. 22657 (1988).

[2] Laborers Health & Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., Inc., 108 S. Ct. 830, 832, 127 L.R.R.M. 2657, 2657 (1988).

delinquent contributions.[3] These amendments provide an exception to the well-established rule that federal courts must defer to the National Labor Relations Board (NLRB) on matters which arise under section 7 or 8 of the NLRA.[4]

The 1980 amendments to ERISA apply to "[e]very employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a *collectively bargained agreement* . . . ."[5] The amendments have been found by the First Circuit to provide a federal remedy for contributions delinquent under a *contractual* obligation.[6] The statute raises the issue of whether they also provide a federal judicial remedy for delinquent contributions which are due for the period beginning *after* contract expiration and ending *prior to* impasse pursuant to the statutory duty which arises under the NLRA, or whether the NLRB retains sole jurisdiction.[7]

Four circuit courts, the First, Third, Fifth and Ninth, have ruled on whether the NLRB's jurisdiction preempts a federal court action under ERISA to recover delinquent contributions pursuant to the statutory duty to contribute even *after* contract expiration.[8] All four circuits have agreed that the NLRB had exclusive jurisdiction over such claims and that the 1980 ERISA amendments provided a federal remedy only to collect unpaid contributions which accrued *before* contract expiration.[9] Thus, according to the circuit courts, the NLRB has exclusive jurisdiction to decide this unfair bargaining issue which arises under section 8 of the NLRA, and the

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[3] ERISA § 505(g)(2) *as amended* 29 U.S.C. § 1132(g)(2) (1982).

[4] San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 43 L.R.R.M. 2838, 2842 (1959). The Court stated "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with the national policy is to be averted." *Id.*

[5] *Advanced Lightweight*, 108 S. Ct. at 834, 127 L.R.R.M. at 2659.

[6] New Bedford Fisherman's Welfare Fund v. Baltic Enter., Inc., 813 F.2d 503, 504, 125 L.R.R.M. 2319, 2320 (1st Cir. 1987).

[7] *Id.*

[8] *Id.*; Moldovan v. Great Atlantic & Pacific Tea Co., 790 F.2d 894, 900–01, 122 L.R.R.M. 2762, 2768 (3rd Cir. 1986); U.S. 198 Health & Welfare v. Rester Refrig. Serv., Inc., 790 F.2d 423, 424, 122 L.R.R.M. 2457, 2458 (5th Cir. 1986); Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc., 779 F.2d 497, 505, 121 L.R.R.M. 2276, 2282 (9th Cir. 1985).

[9] *See New Bedford Fishermen's Welfare Fund*, 813 F.2d at 504, 125 L.R.R.M. at 2320; *Moldovan*, 790 F.2d at 900–01, 122 L.R.R.M. at 2768; *Rester Refrig. Serv., Inc.*, 790 F.2d at 424, 122 L.R.R.M. at 2458; *Advanced Lightweight*, 779 F.2d at 505, 121 L.R.R.M. at 2282.

1980 ERISA amendments only apply to actions arising while the contract is still in effect.[10]

During the *Survey* year, The Supreme Court affirmed the rule set forth by the circuit courts, holding, in *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, that the remedy provided by ERISA for collection of delinquent contributions is limited to contributions owed pursuant to an agreement, and does not give jurisdiction to federal courts to determine whether an employer's decision to discontinue contributions post-contract expiration was an unfair labor practice in violation of section 8 of the NLRA.[11] The Court ruled that federal courts must defer to the expertise of the NLRB to determine whether an employer's unilateral decision to discontinue contributing after the contract has expired is unfair bargaining under the NLRA.[12] Thus, the Supreme Court's holding was consistent with the decisions of all the circuits that had ruled on the issue.[13] After *Advanced Lightweight*, it is clear that the NLRB will be the only forum open to pension plan trustees who wish to complain that an employer has breached its statutory duty to contribute post-contract expiration and prior to impasse, in violation of section 8(a)(5) of the NLRA.

In *Advanced Lightweight*, the defendant was a member of the Associated General Contractors of California and was involved in two multi-employer collective bargaining agreements negotiated on its behalf by the association.[14] The agreements required Advanced Lightweight to make contributions to eight employee benefit plans on a monthly basis.[15] The agreements were set to expire on June 15, 1983. On April 1, 1983, Advanced Lightweight notified the unions that the association no longer had authority to bargain for them and that it would not contribute past June 15, 1983 and thereafter would negotiate with the unions independently. In December of 1983, the plaintiffs, the trustees of the eight employee benefit plans, sued Advanced Lightweight in the Federal District

[10] *New Bedford Fishermen's Welfare Fund*, 813 F.2d at 504, 125 L.R.R.M. at 2320; *Moldovan*, 790 F.2d at 900–01, 122 L.R.R.M. at 2768 U.S. Health & Welfare v. Rester Refrig. Serv., Inc., 790 F.2d at 424, 122 L.R.R.M. at 2458; *Advanced Lightweight*, 779 F.2d at 505, 121 L.R.R.M. at 2282.

[11] Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc., 108 S. Ct. 830, 836, 127 L.R.R.M. 2657, 2660 (1985).

[12] *Id.* at 833–34, 127 L.R.R.M. at 2658–59.

[13] *Id.*

[14] *Id.* at 832, 127 L.R.R.M. at 2658.

[15] *Id.*

Court for the Northern District of California in order to collect contributions to the funds after the June 15, 1983 expiration date. The trustees alleged that the federal court had proper jurisdiction based on the federal remedy provided in section 502(g)(2) and section 515 of ERISA.[16]

The Federal District Court for the Northern District of California granted Advanced Lightweight's motion for summary judgment, reasoning that section 515 of ERISA did not apply to an employer's obligations under the NLRA, and the NLRB had exclusive jurisdiction over the claim.[17] The Court of Appeals for the Ninth Circuit affirmed, reasoning that in examining the text and the legislative history of section 515 of ERISA, there was no persuasive evidence that Congress intended that section to apply to the category of suits claiming recovery of delinquent contributions accruing between contract expiration and impasse.[18] The Supreme Court granted certiorari, and affirmed the decision and reasoning of the court of appeals.[19]

In affirming the Ninth Circuit's decision, the Supreme Court examined both the plain text and the legislative history surrounding the 1980 ERISA amendments and reasoned that Congress enacted these amendments to force employers to fulfill their contractual duties to contribute to pension plans and to provide a speedy and efficient remedy against delinquent contributors.[20] Accordingly, the Court held that the amendments did not provide a judicial remedy for delinquent contributions owed under the statutory duty to contribute *after* expiration and prior to impasse.[21] According to the Court, Congress responded to two concerns with its 1980 amendments to ERISA.[22] First and foremost, the Court noted, Congress was concerned about the burden on remaining contributors to a multi-employer fund when other contributors withdrew.[23] The

[16] *Id.*

[17] *Id.* at 833, 127 L.R.R.M. at 2658.

[18] *Id.*, at 833–34, 127 L.R.R.M. at 2658–59. The Court of Appeals for the Ninth Circuit concluded: "[w]e find no persuasive evidence in either the plain words or legislative history of ERISA or the MPPAA [Multi-employer Pension Plan Amendments Act of 1980] that Congress intended section 515 to be an exception to the general rule of NLRB pre-emption for that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse." *Id.*(quoting Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc., 779 F.2d 497, 505 (9th Cir. 1985).

[19] *Advanced Lightweight*, 108 S. Ct. at 834, 127 L.R.R.M. at 2659.

[20] *Id.* at 835–36, 127 L.R.R.M. at 2660.

[21] *Id.*

[22] *Id.* at 834, 127 L.R.R.M. at 2659.

[23] *Id.*

Court stated that Congress, in response to this problem, enacted the "withdrawal liability" provision, which arises when an employer no longer is obligated to contribute to the plan. In this provision, "obligation" is defined as including both contractual obligations as well as the statutory obligation imposed by the NLRA. The Court reasoned that this demonstrated that Congress was well aware of the two distinct sources under which an employer may be obligated to contribute: contractual and statutory. Secondly, in making the amendments, the Court noted that Congress was also concerned about the problem of employers failing to make "promised contributions" on a regular and timely basis.[24] Thus, the Court reasoned that the plain language of section 515 and section 502(g)(2) of ERISA indicated that Congress enacted those provisions in response to this concern and did not even mention an employer's noncontractual obligation imposed by the NLRA.[25]

The Court maintained that, in addition to the plain text of the ERISA provisions the legislative history also supported the proposition that Congress added the remedies contained in the 1980 amendments to further ensure that employers honor their *contractual* duties and to provide quick and efficient collection of any delinquent payment.[26] The Court noted that the legislative history did not mention an employer's statutory duty to make post-contract contributions to the funds while negotiating for a new contract.[27] Given this legislative history, and the plain language of the text of sections 515 and 502(g)(2), the Court concluded that the remedy under these sections is restricted to the collection of "promised contributions" and district courts do not have jurisdiction to determine whether an employer's refusal to make the required post-contract contribution violates the NLRA.[28]

In reaching its decision, the Court rejected two policy arguments which the petitioners set forth as reasons to interpret section 515 broadly enough to encompass post-contract contribution delinquencies.[29] First, the trustees argued that the refusal to recognize

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[24] *Id.*

[25] *Id.* at 834–35, 127 L.R.R.M. at 2659. ERISA section 515 provides that "[e]very employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a *collectively bargained agreement* shall, to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement." [Emphasis added]. 29 U.S.C. § 1145 (1982).

[26] *Advanced Lightweight,* 108 S. Ct. at 835, 127 L.R.R.M. at 2660.

[27] *Id.*

[28] *Id.* at 836, 127 L.R.R.M. at 2660.

[29] *Id.* at 837, 127 L.R.R.M. at 2661.

jurisdiction for post-contract contributions would cause a "gap" in the enforcement scheme.[30] Second, the plaintiffs argued that the NLRB remedies were inadequate.[31]

The Supreme Court rejected both of these policy arguments mainly because the congressional intent was so plain that policy arguments should have been addressed to Congress, which has the authority to amend the legislation, rather than to the Court, which could only interpret such legislation.[32] In addition to this main principle, the Court went on to set out countervailing arguments which it concluded made it more likely that Congress had limited the statute by choice rather than inadvertently as petitioners had alleged. As to the asserted gap in the enforcement scheme, the Court made three observations. First, because post-contractual delinquency appears not even to have been mentioned to Congress, the Court reasoned that it probably is not a serious problem. Second, the Court noted that the issues presented in a dispute over post-contract delinquency are far more complex than the issues involved in a "simple collection action," because the question of whether an impasse has occurred requires a judgment based on such factors as the parties' bargaining history. Third, with regard to the increased complexity, the Court observed that the NLRB has expertise in deciding whether an employer's unilateral decision to cease contributing to a pension plan is a violation of the NLRA. The Court also noted that in cases such as the one before it that involve an "arguable" violation of section 8 of the NLRA, federal courts usually defer to the NLRB.[33]

In response to petitioner's second policy argument that the remedies available under the NLRB are less effective than those available judicially, the Court simply noted that any defects in the NLRB remedies are not unique to this claim and are shared by all unfair labor practice proceedings brought before the NLRB.[34] The Court pointed out that if the labor legislation were repealed, petitioners would have no basis to claim that the employer had a duty to contribute to the fund after the contractual duty had expired, and the duty that does exist was created solely to protect the collective bargaining process and carry out the purposes of the NLRA.[35]

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 838, 127 L.R.R.M. at 2662.

[35] *Id.*

In summing up, the Court pointed out that the the duties imposed on employers by the 1980 amendments provided a substantial benefit to ERISA plan trustees by providing a federal remedy for delinquency to contribute while under a contractual duty, but did not give such trustees a federal remedy for an employer's violation of its duty to bargain in good faith under the NLRA.[36]

The Supreme Court's opinion in *Advanced Lightweight* does not depart from previous law and simply reinforces the viewpoint of past lower court cases.[37] After *Advanced Lightweight*, there can be no question that the NLRA preempts an ERISA action in federal court for the collection of delinquent contributions owed after contract expiration and prior to negotiating impasse pursuant to section 8(a)(5) of the NLRA. The Supreme Court's decision was correct because it was consistent with the plain meaning of the text of the ERISA amendments and the legislative history behind it, and also consistent with the policies and intent of both ERISA and the NLRA.

The Court held that no cause of action existed under ERISA sections 515 and 502(g)(2) to collect contributions owed after contract expiration,[38] a finding which was correct given the plain language and legislative history of these sections. As the Court noted, the plain language of section 515 itself shows that it was meant to apply to contributions owed pursuant to an "agreement" and it does not even mention contributions owed under NLRA section 8(1)(5).[39] The text of section 515 states that: "[e]very employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of *a collectively bargained agreement* shall . . . ."[40] Given the plain meaning of the words, this section can only be interpreted to mean that only contributions delinquent under an agreement, in other words a contract, give rise to a federal remedy. The legislative history of the section also bolsters the Supreme Court's decision.[41]

In addition, the Court's holding is consistent with the general policies of ERISA and the NLRA. Given the general rule that the NLRB has exclusive jurisdiction over unfair labor practices,[42] the

[36] *Id.*
[37] *Id.* at 836, 127 L.R.R.M. at 2660.
[38] *Id.*
[39] *Id.* at 834, 127 L.R.R.M. at 2659.
[40] *Id.*
[41] *Id.* at 835, 127 L.R.R.M. at 2660.
[42] San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 43 L.R.R.M. 2838, 2842 (1959).

Court was correct in determining that the federal court did not have jurisdiction to determine whether impasse had been reached and thus contributions no longer due. Courts should defer to the NLRB, as that body has the expertise to determine when an unfair labor practice has occurred.[43] As the Ninth Circuit stated, impasse is "an imprecise term of art."[44] It requires judgment based on such factors as the parties' bargaining history.[45] The NLRB deals with this issue on a frequent basis, and is quicker and more efficient in determining when impasse has occurred.[46] The Court's decision is consistent with the major policy of the NLRA, which is to promote good faith bargaining[47] and allow the NLRB, which is comprised of experts on the subject, to decide good faith bargaining disputes.[48] Employers have a statutory duty to contribute to the pension funds while negotiating a new contract[49] in order to prevent employers from holding out and forcing unions to grant a contract on unfavorable terms simply out of necessity to get the contributions started again, i.e., to prevent unfair bargaining. The statutory duty that does exist was created to protect the collective bargaining process and carry out the purposes of the NLRA.[50]

ERISA, on the other hand, protects contract actions.[51] Section 515 provides an exception to the general policy of the NLRA and gives a privilege to the pension plan trustees in that they are given a federal judicial remedy for the two reasons stated in the Supreme Court's opinion: first, to relieve the burden placed on other contributors when one withdraws, and second, to prevent employers from failing to make their "promised contributions" on time.[52] Congress enacted the ERISA sections to meet these two concerns and intended to limit them to contract actions.[53] Had Congress meant for the district court to be able to give a remedy as to unfair labor practices, they surely would have stated this explicitly.[54]

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[43] U.S. 198 Health & Welfare, Educ. & Pension Funds v. Rester Refrig. Serv., Inc., 790 F.2d 423, 426, 122 L.R.R.M. 2457, 2460 (5th Cir. 1986).

[44] Laborers Health & Welfare Fund v. Advanced Lightweight, 108 S. Ct. 830, 833 n.5, 127 L.R.R.M. 2657, 2658 n.5 (1988).

[45] *Id.* at 837, 127 L.R.R.M. at 2661.

[46] *Id.*

[47] *Id.* at 831, 127 L.R.R.M. at 2658.

[48] *Rester Refrig. Serv., Inc.*, 790 F.2d at 426, 122 L.R.R.M. at 2460.

[49] *Advanced Lightweight*, 108 S. Ct. at 838, 127 L.R.R.M. at 2662.

[50] *Id.*

[51] *Id.* at 836, 127 L.R.R.M. at 2660.

[52] *Id.* at 834, 127 L.R.R.M. at 2659.

[53] *Id.* at 834–35, 127 L.R.R.M. at 2659.

[54] *Id.* at 836 n.16, 127 L.R.R.M. at 2660 n.16.

In *Advanced Lightweight*, the Supreme Court held that the 1980 ERISA amendments, sections 515 and 502(g)(2), do not provide a federal judicial remedy for delinquent pension fund contributions owed for the period beginning *after* contract expiration and ending prior to impasse under the statutory duty imposed by section 8 of the NLRA. The decision accorded with all circuit court decisions on the issue. Thus, after *Advanced Lightweight*, it is clear that the NLRB has exclusive jurisdiction over complaints that an employer has breached the statutory duty to continue to contribute to employee pension funds after contract expiration and prior to impasse, in violation of section 8 of the NLRA. The decision was consistent with past decisions, and in accordance with the plain meaning and legislative history of the statute involved. In addition, the decision was consistent with the policies of the NLRA and ERISA: to protect against unfair labor practices and to protect contract actions respectively.

VI. Fair Labor Standards Act

A.* *The Supreme Court Rejects the* Jiffy June *Willfulness Standard in Favor of the* Thurston *Standard for Determining FLSA Violations:* McGlaughlin v. Richland Shoe Co.[1]

The federal Fair Labor Standards Act (FLSA) regulates minimum wages, maximum hours and other aspects of employment for most workers in the United States.[2] Actions for violations of the FLSA must be brought within two years of the violation unless the violation is "willful," in which case the limitation period is extended to three years.[3] This extension has particular importance in FLSA cases because many violations of the Act are continuing ones, with backpay damages limited only by the length of the statute of limitations.[4] The FLSA itself provides no guidance as to what is meant

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1 108 S. Ct. 1677 (1988).

2 *See* 29 U.S.C. §§ 201-262 (1982).

3 29 U.S.C. §§ 255(a) (1982). That provision, which provides the statute of limitations for both the Age Discrimination in Employment Act (ADEA)(codified at 29 U.S.C. §§ 621-634 (1982)), and the FLSA states that an action under the FLSA "may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." *Id.*

4 *See, e.g.*, Brock v. Richland Shoe Co., 799 F.2d 80, 84 n.6 (3rd Cir. 1986).

by the word "willful,"[5] and consequently there was a dispute regarding the proper interpretation of the term.[6]

Before the United States Supreme Court addressed the issue in 1988, two conflicting definitions of "willful" prevailed in the federal circuit courts of appeals.[7] In the 1972 decision of *Coleman v. Jiffy June Farms Inc.*, the United States Court of Appeals for the Fifth Circuit held that a willful violation was one in which the employer "knew or suspected that his actions might violate the FLSA."[8] The *Jiffy June* standard, widely followed by other circuit courts,[9] did not require that the employer knew that its actions violated the provisions of the FLSA, but only that the employer realized that the Act could have been "in the picture."[10] The alternative definition of a "willful" violation of the FLSA is based on a United States Supreme Court decision that interpreted the same term in the Age Discrimination in Employment Act (ADEA).[11] In the 1985 case of *Trans World Airlines v. Thurston*, the Supreme Court held that an employer willfully violates the ADEA only if "the employer knew or showed reckless disregard as to whether its conduct was prohibited."[12] Many circuit courts borrowed the reasoning and result of *Thurston* for use in cases involving FLSA violations.[13]

During the 1988 *Survey* year, the United States Supreme Court, in *McGlaughlin v. Richland Shoe Co.* resolved this conflict by holding that a violation of the FLSA is willful if the employer knew or

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[5] *See* 29 U.S.C. §§ 255(a) (1982).

[6] McGlaughlin v. Richland Shoe Co., 108 S. Ct. at 1679-80.

[7] *Compare* Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1972) (holding that an employer's conduct is "willful" for purposes of the FLSA if the employer knew that the FLSA was "in the picture") *with* Brock v. Richland Shoe Co., 799 F.2d 80, 83-84 (3d Cir. 1986) (holding that an employer's conduct is "willful" for purposes of the FLSA if the employer knows or shows reckless disregard as to whether its conduct is prohibited).

[8] 458 F.2d at 1142.

[9] *See, e.g.*, Secretary of Labor v. Daylight Dairy Prod., Inc., 779 F.2d 784, 789 (1st Cir. 1985); Donovan v. Bel-Loc Diner Inc., 780 F.2d 1113, 1117 (4th Cir. 1985); Marshall v. Union Pacific Motor Freight Co., 650 F.2d 1085, 1092-93 (9th Cir. 1981); Donovan v. M & M Wrecker Serv. Inc., 733 F.2d 83, 85-86 (10th Cir. 1984); Brock v. Georgia Southwestern College, 765 F.2d 1026, 1038-39 (11th Cir. 1985).

[10] 458 F.2d at 1142. ("Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?").

[11] 29 U.S.C. §§ 626(b) (1982). This provision states in relevant part that " . . . liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. 626(b) (1982).

[12] 469 U.S. 111, 119, 36 FEP Cases 977, 985 (1985) (quotations and citations omitted).

[13] *See, e.g.*, Russo v. Trifari, Krussman & Fishel, Inc., 837 F.2d 40, 45, 45 FEP Cases 1145, 1149 (2nd Cir. 1988); Peters v. Shreveport, 818 F.2d 1148, 1167-68, 43 FEP Cases 1822, 1837 (5th Cir. 1987); Walton v. United Consumers Club, Inc., 786 F.2d 303, 311 (7th Cir. 1986).

showed reckless disregard as to whether it was violating the statute.[14] In *Richland Shoe*, the Supreme Court upheld a Third Circuit decision that had applied the *Thurston* standard to determine the willfullness of an employer's conduct.[15] The likely result of this clarification in the law is that, in those circuits that had not already adopted *Thurston*, violators of FLSA provisions could be subject to smaller backpay fines because of the increased difficulty of showing that a particular violation was willful. Thus, those employers who negligently violate or disregard the FLSA will not be subject to the third year of backpay liability.

In 1984, the Secretary of Labor filed an action against Richland Shoe Company ("Richland") for alleged violations of the FLSA.[16] Upon motion for summary judgment, the district court ruled that Richland had violated the Act.[17] The evidence also revealed that the employer had been aware that the FLSA potentially governed its actions.[18] Applying the *Jiffy June* "in the picture" standard to these facts, the district court determined that Richland had willfully violated the Act and therefore was subject to the extended statute of limitations period.[19] In calculating the cumulative backpay damage award, the district court used the three-year period as opposed to the two-year period.[20] The United States Court of Appeals for the Third Circuit reversed the ruling of the district court, rejecting the *Jiffy June* standard and holding that a willful violation must be intentional or reckless.[21] To resolve a growing conflict among the circuits, the Supreme Court granted certiorari.[22]

The United States Supreme Court held that the word "willful" in the FLSA statute of limitations requires more than the employer's awareness that the FLSA governs its actions.[23] The Court faced alternative definitions of the term.[24] The Third Circuit had analogized to *Thurston* and adopted a recklessness standard.[25] In addi-

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[14] 108 S. Ct. 1677, 1681 (1988).

[15] *Id.* at 1680-81.

[16] *Id.* at 1679.

[17] Donovan v. Richland Shoe Co., 213 F.Supp. 667, 671 (E.D. Pa. 1985).

[18] Brock v. Richland Shoe Co., 799 F.2d 80, 82 (3d Cir. 1986) (noting that "Richland's vice-president and general manager stated in his deposition that he knew that the FLSA applied to overtime pay schemes such as that used . . .").

[19] Donovan v. Richland Shoe Co., 623 F. Supp. 667, 670-71 (D.C. Pa. 1985).

[20] *Brock*, 799 F.2d at 84 n.6.

[21] *Id.* at 83-84.

[22] 108 S. Ct. 63 (1987).

[23] McGlaughlin v. Richland Shoe Co., 108 S. Ct. 1677, 1681 (1988).

[24] *See id.* at 1681-82.

[25] *Id.* at 1680.

tion, although neither side urged a strict *Jiffy June* standard on the Court, the Secretary of Labor advocated a modified *Jiffy June* standard that would find a willful violation if the employer both recognized that the FLSA was "in the picture" *and* failed to take steps reasonably calculated to resolve any doubts about the law.[26]

The majority chose to address *Jiffy June* directly.[27] The Court reasoned that defining a willful violator as any employer who knew that its actions were governed by the FLSA would result in nearly every employer being subject to the three-year period. The two-tiered nature of the statute of limitations put forth by Congress, the Court reasoned, indicated that a meaningful distinction should exist between ordinary and willful violations. The Court held that the *Jiffy June* standard failed to make that distinction.[28] The majority also rejected the Secretary of Labor's modified standard that would permit a finding of willfullness based on nothing more than negligence or good faith error.[29] Given the fact that many jurisdictions were already turning away from the *Jiffy June* standard, the Court held that its continued application was not necessary for judicial continuity.[30] The Court also noted that the Secretary of Labor herself had rejected the "in the picture" standard espoused by *Jiffy June*.[31]

After rejecting these possible standards, the Court briefly articulated its reasons for applying the *Thurston* standard. The Court cited "voluntary," "deliberate," and "intentional" as synonyms for "willful," and wrote that the term generally refers to something more than negligent conduct. The Court therefore held that a willful violation of the FLSA for purposes of the statute of limitations provision must entail either actual knowledge of violation or reckless disregard as to whether the statute prohibited its conduct.[32]

Justice Marshall, joined by Justices Brennan and Blackmun, dissented from the majority's holding.[33] Although Justice Marshall agreed that the *Jiffy June* standard swept too broadly,[34] he argued

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[26] *Id.* at 1680-82. The Secretary "would deem an FLSA violation willful 'if the employer, recognizing it might be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute.'" *Id.* at 1682.

[27] *Id.* at 1681-82.

[28] *Id.* at 1681.

[29] *Id.* at 1682.

[30] *Id.* at 1681-82.

[31] *Id.* at 1682.

[32] *Id.* at 1681.

[33] *Id.* at 1682-84 (Marshall, J., dissenting).

[34] *Id.* at 1683 (Marshall, J., dissenting).

for the adoption of the intermediate standard proposed by the Secretary of Labor.[35] Justice Marshall argued that if an employer, knowing that the FLSA might regulate its actions, fails to take reasonable steps to determine the law and consequently violates the Act, the employer should be subject to the longer statute of limitations period.[36]

Justice Marshall noted that in the past the Court had interpreted the term "willful" in more than one way if the context of the words warranted such a distinction.[37] Justice Marshall argued that such a contextual difference exists between the use of the word "willful" in the ADEA and its use in the FLSA.[38] Justice Marshall reasoned that an important distinction exists between the consequences of a finding of a willful violation under the two statutes that militates towards a different definition.[39] He noted that a willful violation of the ADEA results in punitive damages being imposed on the employer, whereas a willful violation of the FLSA entails only an increased period of time during which plaintiffs can recover purely compensatory relief.[40] Noting that concerns of unfair punitive damage awards had led the Court in *Thurston* to restrict the definition of willful for purposes of the ADEA, Justice Marshall reasoned that a broader definition of the term was appropriate under the FLSA, which, he observed, provided only compensatory relief.[41] Therefore, Justice Marshall argued that the Court should have adopted the modified *Jiffy June* standard urged by the Secretary of Labor.[42]

For those circuits that operated under the *Jiffy June* standard, defining willful conduct as occuring when the employer reasonably knew the FLSA was "in the picture," the *Richland Shoe* case represents a significant shift in the way FLSA violators are treated.[43] As a result of this decision, employers who negligently disregard or violate the act will face smaller damage awards due to the increased difficulty of proving a willful violation.

The Court's result in *Richland Shoe* is correct in light of the Court's recent interpretation of the term "willful" in the context of

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[35] *Id.* at 1683-84 (Marshall, J., dissenting).
[36] *See id.*
[37] *Id.* at 1683 (Marshall, J., dissenting).
[38] *Id.* at 1683-84 (Marshall, J., dissenting).
[39] *Id.* at 1684 (Marshall, J., dissenting).
[40] *Id.*
[41] *Id.* at 1684 (Marshall, J., dissenting).
[42] *Id.* at 1683-84 (Marshall, J., dissenting).
[43] *See Thurston*, 469 U.S. 111, 126, 36 FEP Cases 977, 984.

the ADEA.[44] By rejecting the *Jiffy June* standard, the Court gave a more proper interpretation of the two-tiered statute of limitations Congress established.[45] Congress decided that willful violators should be treated differently from inadvertent violators; this purpose is not furthered by making the definition of willful so broad as to encompass all violators. Also, because the Court defined "willful" in *Thurston*, unless there is a compelling reason to distinguish the two situations, the definition should be consistent across statutes. This is especially true where, as here, one statute (FLSA) served as a model for significant portions of the other (ADEA).[46]

Justice Marshall's distinction between the effects of a finding of a willful violation of the ADEA and the effects of such a finding under the FLSA on the basis of the punitive versus remedial nature of the damages incurred is largely illusory. Many cases brought under the FLSA are, as in *Richland Shoe*, continuing violations.[47] The result of the extended statute of limitations period is to increase the amount of monetary damages that the willful FLSA violator will have to pay. Unlike most common law actions, an FLSA violation is often a continuous violation, in many cases extending farther back than the statute of limitations. The backpay awards, therefore, are limited only by the length of the statute of limitations. If a willful violation is found, the employer is liable for three years worth of backpay, whereas an inadvertant violator incurs only two years of liability. Assuming that the violations were consistent over the years, the extra year is, in effect, a fifty percent increase in the damages paid by the employer.

The reason for extending the period cannot be, as Justice Marshall asserts, compensation of the victim, for victims of inadvertent violations are harmed as much as victims of deliberate violations. Rather, the purpose of extending the statute of limitations must be to punish willful violators. Adding time to the limitation period of continuous offenses is roughly analogous to imposing double or treble damages in cases that are essentially one-time

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[44] See *supra* note 3 for the relevant text of the FLSA.

[45] See *supra* note 3.

[46] *See, e.g.*, Brock v. Richland Shoe Co., 799 F.2d 80 (3rd Cir. 1986).

[47] As the Third Circuit noted, "[i]ndeed, the increased risk of liability cannot be explained as anything but a punitive measure. The harm to the workers on account of willful violations is neither more difficult to detect nor more severe than it would be were the violations not willful. Thus, the extension of liability is clearly based on Congress' perception that willful violations are more culpable than negligent ones. The extension is therefore a punitive measure, and no different in this regard from the double damages provision considered in *Thurston*." *Brock*, 799 F.2d at 84.

violations. Although strictly speaking the award is compensatory in that it remedies actual damages incurred by the plaintiff, the purpose of treating willful violators differently from non-willful violators can only be to punish the former.[48] Any distinction between the two types of awards is slight and is not sufficient to justify defining "willful" in a different way for the two statutes. The *Richland Shoe* Court's adoption of the definition of "willful" used under the ADEA is valid. The Court is correct to interpret the same word the same way in what is essentially the same context.

The Supreme Court in *Richland Shoe* resolved a dispute among the circuit courts regarding the definition of "willful" in the statute of limitations provision of the FLSA. The Court held that for the violation to be deemed "willful" and thus trigger the punitive statute of limitations, the employer must either know that its conduct is violative of the Act or show reckless disregard as to whether its conduct is prohibited. Given the congressional decision to punish willful violators, the plain meaning of the word and the precedent set by *Thurston*, this was the proper interpretation for the Court to make.

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[48] *Richland Shoe*, 108 S. Ct. at 1681.

EMPLOYMENT DISCRIMINATION LAW

I. Procedural Developments

A. **Filing Timely Federal Charges of Employment Discrimination*: Equal Employment Opportunity Commission v. Commercial Office Products Co.[1]

Sections 706(c) & (e) of Title VII of the Civil Rights Act of 1964 establish the time limits for filing charges of employment discrimination with the Equal Employment Opportunity Commission (EEOC).[2] Under section 706(e), a complainant must file an employment discrimination charge with the EEOC within 180 days after the occurrence of the alleged unlawful employment practice.[3] If the complainant initially institutes proceedings with an authorized state or local agency, however, the time limit for filing the charge with the EEOC is extended to 300 days after the occurrence of the alleged discrimination.[4] When the complainant initially files such a charge with an authorized state or local agency, the EEOC must grant that agency exclusive jurisdiction over that charge for sixty days, unless the state agency's proceedings have been terminated earlier.[5]

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[1] 108 S. Ct. 1666, 46 FEP Cases 1265 (1988).

[2] 42 U.S.C. § 2000e-5(c), (e) (1964).

[3] 42 U.S.C. § 2000e-5(e) (1964). This section provides that

> [a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . .

Id.

[4] *Id.*

[5] 42 U.S.C. § 2000e-5(c) (1964). This section provides that

> [i]n the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no

Thus, because the EEOC must defer to the state or local agency for sixty days, the complainant must file the charge with the appropriate state or local agency within 240 days of the occurrence of the alleged illegality in order to ensure filing with the EEOC within the 300-day limit.[6] Even if the complainant does not file the charge with the state or local agency within 240 days, however, the charge still may be timely filed with the EEOC if the state or local agency terminates its proceedings before 300 days have elapsed.[7] Consequently, whether a state or local agency terminates its proceedings may determine whether a complainant has 240 or 300 days to file a timely charge with the EEOC.[8]

In 1985 in *Isaac v. Harvard University*, the United States Court of Appeals for the First Circuit considered whether a state agency's temporary waiver of its right to process a charge constituted a termination of that agency's proceedings for the purposes of section 706(c) of Title VII.[9] In *Isaac*, Harvard University denied tenure to appellant Ephraim Isaac, and 251 days later the EEOC referred Isaac's discrimination charge to the authorized state agency.[10] On the 263rd day after the alleged illegality, the state agency temporarily waived its jurisdiction over the charge, but retained the right to consider Isaac's case later.[11] Even though the state agency waived only its right to *initiate* proceedings, and did not completely abandon its interest in the charge, the First Circuit Court of Appeals held

> charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law.

Id.

A complainant need not file his or her charge directly with a state or local agency; he or she may file first with the EEOC, and the EEOC may then refer that charge to the state or local agency. *See, e.g.*, Love v. Pullman Co., 404 U.S. 522, 525, 4 FEP Cases 150, 151 (1972)(state agency's proceedings considered initiated when EEOC referred complaint to state agency). The EEOC's referral properly institutes the agency's proceedings. *Id.* Once that referral is made, the EEOC may hold the charge in "suspended animation" during the state or local agency's 60-day exclusive jurisdiction period. *Id.*

[6] Equal Employment Opportunity Comm'n v. Commercial Office Products Co., 108 S. Ct. 1666, 1669, 46 FEP Cases 1265, 1266 (1988).

[7] *Id.*

[8] *See id.*; *see also* Isaac v. Harvard Univ., 769 F.2d 817, 819, 38 FEP Cases 764, 765 (1st Cir. 1985).

[9] 769 F.2d 817, 827–28, 38 FEP Cases 764, 772 (1st Cir. 1985).

[10] *Id.* at 819, 38 FEP Cases at 765. Isaac filed his charge with the EEOC on the 241st day after the occurrence of the alleged illegality. *Id.*

[11] *See id.* at 819–20, 38 FEP Cases at 765–66.

that such a waiver "terminated" state proceedings under section 706(c) of Title VII.[12] Therefore, because the state agency terminated its proceedings before 300 days elapsed, Isaac's charge was timely filed with the EEOC.[13]

In 1986 in *Equal Employment Opportunity Commission v. Commercial Office Products Co.* (*COPC I*), however, the United States Court of Appeals for the Tenth Circuit disagreed with the First Circuit Court of Appeals' conclusion in *Isaac*.[14] In *COPC I*, a state agency waived its section 706(c) 60-day deferral period, allowing the EEOC to initiate proceedings on a sex discrimination charge.[15] Although the agency waived the deferral period, it retained the right to conduct its own proceedings in the future.[16] The court of appeals held that this temporary waiver was not a "termination" of the agency's proceedings under section 706(c).[17] Until 1988 this conflict between the Courts of Appeals for the First and Tenth Circuits remained: whether these temporary waivers were or were not "terminations" of state agencies' proceedings for the purposes of section 706(c).

During the *Survey* year, the United States Supreme Court granted certiorari on *COPC I* to resolve this conflict.[18] In *Equal Employment Opportunity Commission v. Commercial Office Products Co.* (*COPC II*), the Court followed the First Circuit Court of Appeals' decision in *Issac*, holding that the state agency which waived the 60-day deferral period, but not the right to process the charge in the future, had "terminated" its proceedings.[19] This ruling clarified the definition of "terminates" under section 706(c) of Title VII.[20] In doing so, the holding also confirmed that complainants who file employment discrimination charges with state agencies between 240 and 300 days after the occurrence of the alleged discrimination may file with the EEOC within the limitation period, even though the state agency's waiver of its proceedings is only temporary.

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[12] *Id.* at 827–28, 38 FEP Cases at 772.

[13] *Id.*

[14] 803 F.2d 581, 587, 42 FEP Cases 50, 53 (10th Cir. 1986) (explicitly disagreeing with the *Isaac* court's definition of "terminate").

[15] *Id.* at 584, 42 FEP Cases at 51.

[16] *Id.*

[17] *Id.* at 590, 42 FEP Cases at 56. The dissenting judge, following the reasoning of the *Isaac* court, argued that such a waiver constituted termination of a state agency's proceedings. *Id.* at 591, 42 FEP Cases at 57 (McKay, J., dissenting).

[18] Equal Employment Opportunity Comm'n v. Commercial Office Products Co., 108 S. Ct. 1666, 1671, 46 FEP Cases 1265, 1267 (1988).

[19] *Id.* at 1676, 46 FEP Cases at 1271.

[20] *Id.*

The dispute in *COPC II* arose on March 26, 1984, when Suanne Leersen filed a charge of discrimination with the EEOC.[21] In her complaint, she alleged that 290 days earlier the Commercial Office Products Company (the Company) had discharged her because of her gender, in violation of Title VII.[22] On March 30, the EEOC sent a copy of Leersen's charge and a transmittal form to the Colorado Civil Rights Division (CCRD), the state agency authorized to process employment discrimination charges.[23] The form stated that the EEOC would initially process the charge pursuant to a worksharing agreement that already existed between the EEOC and the CCRD.[24] The CCRD returned the form to the EEOC, indicating that it waived its right to initial processing of the charge.[25] On April 4, the CCRD informed Leersen that it had waived its right initially to process her charge but had retained jurisdiction to act on the charge after the EEOC concluded its proceedings.[26] Thus, if the CCRD's waiver "terminated" its proceedings, then Leersen's charge was filed with the EEOC just under the 300-day limit. If the waiver was not a "termination," the charge was not timely filed with the EEOC.

When the EEOC subpoenaed the Company for information relevant to Leersen's charge, the Company refused to comply, maintaining that the EEOC lacked jurisdiction over the charge because it was not timely filed with the EEOC.[27] The United States District Court for the District of Colorado agreed with the Company, and the Court of Appeals for the Tenth Circuit affirmed. The court of appeals found that the statute required a state agency to surrender completely its jurisdiction over a charge in order for the agency's proceedings to be "terminated." Because the CCRD reserved the right to act after the conclusion of the EEOC's proceedings, the court of appeals reasoned, it did not finally and completely terminate its own proceedings.[28]

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[21] *Id.* at 1670, 46 FEP Cases at 1266.

[22] *Id.*

[23] *Id.*

[24] *Id.* This worksharing agreement allowed the CCRD and the EEOC each to process certain charges. *Id.* at 1669–70, 46 FEP Cases at 1266. When the EEOC processed a charge, the CCRD would waive the 60-day deferral period. *Id.* No matter which party reviewed the charge initially, the other party reserved the right to review the first party's resolution of the case and to investigate the case after the first party had concluded its proceedings. *Id.* at 1670, 46 FEP Cases at 1266.

[25] *Id.* at 1670, 46 FEP Cases at 1267.

[26] *Id.*

[27] *Id.*

[28] *Id.*

In *COPC II*, the Supreme Court reversed the holding of the Tenth Circuit Court of Appeals, concluding that a state agency's temporary waiver of its proceedings constituted a termination of those proceedings.[29] In reaching its decision, the Court noted that the word "terminate" was ambiguous because in common and dictionary usage it may mean "to end finally or to cease temporarily."[30] The Court then stated that the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference.[31] Next, the *COPC II* Court determined that the EEOC's interpretation of "terminate" was reasonable because it was supported by the two basic goals of the deferral provisions: to allow states an opportunity to process discrimination claims, and to encourage efficient processing of those claims.[32] In addition, the Court reasoned that the cooperative spirit of related sections of the statute indicated that the EEOC's interpretation of the ambiguous word "terminate" was reasonable.[33] Therefore, the Court concluded that it must defer to the EEOC's construction of section 706(c).[34]

After finding that "terminate" was ambiguous, the Court examined the deferral provisions' legislative history to determine the reasonableness of the EEOC's interpretation of "terminate."[35] The Court found that the first purpose of these provisions was to give states a reasonable opportunity to address employment discrimination charges without federal intervention.[36] Reviewing the legislative history, the Court noted that the deferral provisions were a result of a conflict between the House and the Senate.[37] The House bill, the Court determined, proposed that the EEOC defer to state enforcement efforts only in certain circumstances and retain the power to monitor those efforts.[38] The *COPC II* Court then found that the Senate objected to this degree of federal intervention and therefore proposed that the EEOC defer to the states for sixty days before starting its own proceedings.[39] The Court further noted that the proponents of the deferral provisions identified deference to

[29] *Id.* at 1676, 46 FEP Cases at 1271.
[30] *Id.* at 1671, 46 FEP Cases at 1267.
[31] *Id.* at 1671, 46 FEP Cases at 1268.
[32] *Id.* at 1671–73, 46 FEP Cases at 1268–69.
[33] *Id.* at 1671, 46 FEP Cases at 1268.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 1672, 46 FEP Cases at 1268.
[37] *Id.* at 1671, 46 FEP Cases at 1268.
[38] *Id.* at 1671–72, 46 FEP Cases at 1268.
[39] *Id.* at 1672, 46 FEP Cases at 1268.

the states as one of the provisions' goals.[40] The Court also found that Congress intended deferral to work as "a carrot, not a stick," allowing the states the option of processing employment discrimination charges first, but not penalizing them for failing to do so.[41] Therefore, the Court concluded that one purpose of the deferral provisions was to give states an opportunity to respond to employment discrimination charges before the EEOC intervened.[42]

Next, the *COPC II* Court determined that the EEOC's position that states may, if they choose, waive the deferral period but retain jurisdiction over a charge supported the statute's goal of state deference.[43] The Court found that the waiver provisions of worksharing agreements in no way denied states the provisions' 60-day protection from federal intervention.[44] The waiver provisions of the worksharing agreement between the CCRD and the EEOC, the Court stated, allowed the states to make a voluntary choice to forego their exclusive period for processing discrimination charges. Because the waiver was voluntary, the Court reasoned, the Federal government was not imposing on the states' opportunity to address employment discrimination claims. Thus, the Court concluded that allowing the states temporarily to waive their proceedings upheld Congress's goal of deferral to the states for processing.

The second goal of the deferral provisions, the *COPC II* Court determined from the legislative history, was to promote efficient handling of discrimination claims.[45] The Court asserted that the EEOC's interpretation of section 706(c) was reasonable because it was consistent with the goal of efficiency.[46] The Court supported this conclusion by outlining several grossly inefficient consequences of the Company's construction of section 706(c).[47] First, the EEOC would be required to wait sixty days before processing a claim even when a state agency chooses not to act during the deferral period.[48]

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[40] *Id.* at 1673, 46 FEP Cases at 1269. The Court also asserted that the Company presented an argument antithetical to the voluntary spirit of state deference. *Id.* at 1672–73, 46 FEP Cases at 1269. The Company argued that Congress intended to show a preference for state as opposed to federal enforcement. *Id.* Therefore, the Company claimed, the states should not be allowed to waive the 60-day deferral period at all. *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1672, 46 FEP Cases at 1268.

[44] *Id.*

[45] *Id.* at 1673, 46 FEP Cases at 1269.

[46] *Id.* at 1671, 1673, 46 FEP Cases at 1268, 1269.

[47] *Id.* at 1673, 46 FEP Cases at 1269.

[48] *Id.*

Second, if states tried to avoid this needless delay by attempting initially to process all charges received, they would create an enormous backlog of cases. Third, the Court noted that states could avoid the delay by rewriting their worksharing agreements so that the waiver provisions required the states to relinquish their jurisdiction completely. The Court concluded that requiring a state to abandon jurisdiction was contrary to both Congressional goals of efficiency and state deference.[49]

Finally, the Court reasoned that the Company's interpretation of the deferral provisions would generally confound the goals of efficiency and deference to states because it would preclude a whole class of discrimination claims: those filed with the EEOC more than 240 days but fewer than 300 days after the alleged illegality occurred.[50] The result would be contrary to the goals of efficiency and state deference because the deferral period would render untimely many claims filed within the 300-day federal limit, despite the state agency's and the EEOC's efforts to process the charges.[51] The Court stated that no such problems of inefficiency existed with the EEOC's construction of section 706(c) and, therefore, that it better effected the legislative goals behind the deferral provisions of Title VII than did the Company's.[52] Consequently, the Court held that the EEOC's interpretation of the ambiguous word "terminate" was reasonable.[53]

Related sections of Title VII also led the *COPC II* Court to its conclusion that the EEOC's construction of "terminated" was reasonable.[54] First the Court explained that section 706(d) permits state and local agencies to waive the 60-day deferral period required when the EEOC, rather than an individual complainant, files a discrimination charge with a state agency.[55] The Court reasoned that the legislature cannot have meant to make the deferral period waivable by states under section 706(d), when the EEOC files a claim, but mandatory under section 706(c) when an individual files one.[56]

The Court also noted that sections 705(g)(1) and 709(b) of Title VII, which give the EEOC the power to enter into worksharing

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[49] *Id.*
[50] *Id.* at 1674, 46 FEP Cases at 1269–70.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 1671, 46 FEP Cases at 1268.
[54] *Id.* at 1674, 46 FEP Cases at 1270.
[55] *Id.*
[56] *Id.*

agreements with authorized state agencies, encourage formal cooperation between the EEOC and those agencies.[57] The Court asserted that these sections support worksharing agreements without precluding the use of waiver provisions that are designed to avoid inefficiency in claim processing.[58] The Court concluded that because the Act envisions cooperation through worksharing agreements, and the temporary waivers supported by the EEOC give effect to those agreements, the EEOC's support of temporary waivers is consistent with the cooperative focus of the Act.[59]

Thus, the *COPC II* Court held that the cooperative spirit of related sections of Title VII and the goals of deference to states and efficiency of processing, revealed in the legislative history, indicated that the EEOC's construction of section 706(c) is reasonable. Consequently, the Court held that the CCRD's waiver "terminated" its proceedings within the 300-day federal limit and that Leersen's claim was timely filed with the EEOC under Title VII.[60] The Court thus reversed the Tenth Circuit's holding that the EEOC lacked jurisdiction because of untimely filing, and remanded the case for further proceedings on the EEOC's administrative subpoena.[61]

Justice O'Connor concurred that, considering the statute's language, structure, and legislative history, enough ambiguity existed to grant deference to the EEOC's interpretation of "termination" in section 706(c).[62] She also agreed with the majority's view that the EEOC's construction was reasonable.[63] She noted, however, that in its discussion of the agency's reasonableness, the majority was wrong

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[57] *Id.* at 1674–75, 46 FEP Cases at 1270.

[58] *Id.* at 1675, 46 FEP Cases at 1270.

[59] *Id.*

[60] *Id.* at 1676, 46 FEP Cases at 1271. The Court also addressed the issue of whether a complainant who files a discrimination charge that is untimely under state law is nonetheless entitled to the 300-day extended federal filing period under section 706(e) of Title VII. *Id.* at 1668, 46 FEP Cases at 1265. The Court joined all of the circuits that have considered the question in holding that state time limits for filing discrimination claims do not determine the federal time limit. *Id.* at 1675, 46 FEP Cases at 1271. The Court noted that Title VII contains no express requirement of, or reference to, timeliness under state law. *Id.* at 1675, 46 FEP Cases at 1271. In addition, the *COPC II* Court reasoned that the importation of state limitations periods into section 706(c) would not only tangle the EEOC in complicated issues of state law with which it is ill-equipped to deal, but also make the remedial scheme unnecessarily confusing for the laypersons who are expected to initiate the process. *Id.* at 1675–76, 46 FEP Cases at 1271. Accordingly, the Court held that public policy and the statute require that the extended 300-day period be available regardless of the timeliness of the state filing. *Id.* at 1676, 46 FEP Cases at 1271.

[61] *Id.*

[62] *Id.* at 1676, 46 FEP Cases at 1272 (O'Connor, J., concurring).

[63] *Id.*

to imply that the EEOC's position was the only acceptable one. Justice O'Connor objected to the Court's implication that it would not uphold an agency's decision to adopt any other approach. Such an implication, O'Connor asserted, would be contrary to the Court's holdings that agency's interpretations must merely be rational, consistent with the statute, and not arbitrary or capricious. Thus, Justice O'Connor concluded that the majority was correct in deferring to the EEOC's interpretation of this statute but not correct in implying that this construction of section 706(c) was the only possible one.[64]

Justice Stevens, joined by Chief Justice Rehnquist and Justice Scalia, dissented from the majority.[65] Justice Stevens asserted that the majority's decision was not faithful to the plain language of the statute, the legislative compromise behind the enactment of the Civil Rights Act of 1964, or to the Court's prior interpretation of Title VII's deferral provisions.[66] First, Justice Stevens reasoned that the plain meaning of "termination" and the context in which it is used in section 706(c) convey nothing other than absolute finality, and negate the possibility that Congress contemplated future proceedings by a state agency.[67] Second, he asserted that the effect of interpreting section 706(c) to require states to waive all jurisdiction in order to terminate their proceedings was merely to prevent concurrent jurisdiction over claims filed more than 240 days after the illegality.[68] This result, he concluded, would not frustrate the legislative intent to protect state enforcement efforts because it would limit federal — not state — intervention.[69] Justice Stevens added that the above construction of section 706(c) was not supported by the legislative history because nothing in that history suggested that this class of complainants should receive special treatment.[70] Finally, he stated that the majority's interpretation of "terminate" was not consistent with the Court's prior determination that "terminated" meant "completed."[71] Thus, Justices Stevens and Scalia and Chief Justice Rehnquist concluded that the Company's construction of section 706(c) was preferable to that of the EEOC.[72]

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64 *Id.* at 1677, 46 FEP Cases at 1272 (O'Connor, J., concurring).
65 *Id.* (Stevens, J., dissenting).
66 *Id.*
67 *Id.* at 1677 n.1, 46 FEP Cases at 1272 n.1 (Stevens,J., dissenting).
68 *Id.*
69 *Id.*
70 *Id.* at 1677 n.2, 46 FEP Cases at 1272 n.2 (Stevens, J., dissenting).
71 *Id.* at 1677 n.3, 46 FEP Cases at 1272 n.3 (Stevens, J., dissenting).
72 *Id.* at 1677, 46 FEP Cases at 1272 (Stevens, J., dissenting).

Despite the dissent's assertion otherwise, the majority's holding is rooted in strong reasoning. The *COPC II* Court is correct in finding that the statute is ambiguous. Dissenting in *COPC I*, Judge McKay stated that the *Isaac* court, the majority itself in *COPC I*, and other courts attest to the inherent ambiguity in the statute by their inability to agree upon the meaning of "terminate."[73] Further, as Justice O'Connor asserted in her concurrence, the determination of ambiguity is by itself enough to support the Court's decision because the Court has commonly recognized that it must defer to an agency's interpretation of ambiguous language in its own statute.[74]

Similarly, no court seriously opposes the Court's conclusion that the EEOC's interpretation of section 706(c) is reasonable, and therefore entitled to deference. First, the statute's goals, based on its legislative history, are widely accepted. In *COPC I*, the majority determined that one goal of the deferral provisions was to encourage local agencies to resolve civil rights disputes and to check federal intervention.[75] This was the same goal that the Supreme Court in *COPC II* found in the legislative history.[76] Neither the concurrence nor the dissent found fault with that determination.[77]

Second, the dissent in *COPC II* and the majority in *COPC I* never asserted that the EEOC's interpretation of section 706(c) did not support this goal and therefore was not reasonable. Instead, they simply relied on the argument that the Company's contrary interpretation of section 706(c) is consistent with this goal of state deferrence. Nowhere did they claim that the EEOC's interpretation is not also reasonable. Thus, even if their arguments are valid, they do not overcome the majority's position in *COPC II* that the EEOC's construction is reasonable — because it promotes efficency, decreased federal intervention in local civil rights claims, and local resolution of those claims — and is therefore entitled to deference. Therefore, the Court's holding is sound.

The majority's well-reasoned decision to defer to the EEOC's construction of section 706(c) has several important practical con-

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[73] Equal Employment Opportunity Comm'n v. Commercial Office Products Co., 803 F.2d 581, 591, 42 FEP Cases 40, 56 (10th Cir. 1986) (McKay, J., dissenting).

[74] Equal Employment Opportunity Comm'n v. Commercial Office Products Co., 108 S. Ct. 1666, 1676, 46 FEP Cases 1265, 1272 (1988) (O'Connor, J., concurring).

[75] *Commercial Office Products*, 803 F.2d at 588, 42 FEP Cases at 54.

[76] *Commercial Office Products*, 108 S. Ct. at 1672, 46 FEP Cases at 1268.

[77] *See id.* at 1676–77, 46 FEP Cases at 1272 (O'Connor, J., concurring; Stevens,J., dissenting).

sequences. First, the holding will allow more complainants a more complete review of their charges. As the Court itself recognized, the ruling may affect an entire class of charges because worksharing agreements, such as that between the CCRD and the EEOC, pervade state and local employment discrimination enforcement.[78] In fact, three quarters of state and local agencies authorized to enforce employment discrimination laws enter into worksharing agreements with the EEOC.[79] The complainants in these jurisdictions who file an employment discrimination charge with a state or local agency between 240 and 300 days after the occurrence of an alleged illegality still have an opportunity to file with the EEOC without sacrificing their right to have the state agency review the charge or the EEOC's resolution of it. Thus, a potentially large group of complainants now have a better opportunity for thorough, fair treatment of their employment discrimination charges.

The ruling is also significant in that the EEOC, when operating under a worksharing agreement, may proceed immediately on charges that state and local agencies refer to them. Under the Company's interpretation of section 706(c), the EEOC would have to wait for up to sixty days to process claims upon which even the state or local agency agreed not to take initial action. After the Court's ruling in *COPC II*, these cases will not be frozen for sixty days.

Thus, in *COPC II* the Supreme Court recognized that state and local agencies and the EEOC may participate in worksharing agreements with provisions that allow the state or local agency to waive initial processing while retaining the right to address those charges later. The Court resolved a conflict between the First and Tenth Circuit Courts of Appeals over whether a state or local agency's waiver under such agreements constitutes a termination of that agency's proceedings under section 706(c) of Title VII, holding that the agency's waiver is a "termination" of the agency's proceedings. This ruling supports state power to enforce employment discrimination charges and allows the EEOC to act on referred charges immediately. Most importantly, however, the ruling gives complainants who file an employment discrimination charge with a state or local agency between 240 and 300 days after the occurrence of the alleged illegality the opportunity to file their charge with the EEOC within the limitation period.

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[78] *Id.* at 1669, 46 FEP Cases at 1266.
[79] *Id.*

II. Scope of Title VII

A. * *Prisoners as Employees under Title VII:* Baker v. McNeil Island Corrections Center[1]

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace, including apprenticeships and training programs, based on race, color, religion, sex or national origin.[2] In order for Title VII protections to apply, however, a plaintiff must show that he or she was involved in an employment relationship.[3] Courts generally determine whether an individual is an employee within the scope of Title VII based on factors, borrowed from the law of agency, used to distinguish between an employee and an independent contractor.[4] Courts agree that although all of the circumstances or "economic realities" of the work relationship must be examined, the most important factor in determining whether an individual is an employee, rather than an independent contractor, is the extent of the employer's right to control the individual's performance.[5]

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1 859 F.2d 124, 48 FEP Cases 143 (9th Cir. 1988).

2 Civil Rights Act of 1964, (Title VII) § 703, 42 U.S.C. § 2000e-2(a)-(d) (1982).

3 Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883, 24 FEP Cases 859, 861-62 (9th Cir. 1980).

4 *See, e.g.*, Mitchell v. Frank R. Howard Memorial Hosp., 853 F.2d 762, 766-67, 47 FEP Cases 954, 957-58 (9th Cir. 1988) (court held that terminated radiologist did not state a cause of action under Title VII against the hospital because he was an independent contractor, not an employee); *Lutcher*, 633 F.2d 880, 883-84, 24 FEP Cases 859, 862 (9th Cir. 1980) (musician whose contract was terminated did not state a cause of action against school district and musicians' union because he was an independent contractor, not an employee); Spirides v. Reinhardt, 613 F.2d 826, 831-33, 20 FEP Cases 141, 145 (D.C. Cir. 1979) (trial court erred when it dismissed plaintiff's Title VII claim; trial court should have reviewed the factors that distinguish an employee from an independent contractor).

See *infra* note 23 and accompanying text for a list of the factors used to distinguish an employee from an independent contractor.

5 *Mitchell*, 853 F.2d at 766, 47 FEP Cases at 957; *Lutcher*, 633 F.2d at 883, 24 FEP Cases at 862; *Spirides*, 613 F.2d at 831, 20 FEP Cases at 145.

Under the right to control test, adopted by the courts from the law of agency,

> [An employee] is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
>
> An independent contractor is a person who contracts to work with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.

RESTATEMENT (SECOND) OF AGENCY § 2 (1957).

The "economic realities" test attempts to expose the real nature of the relationship

A plaintiff may also state a cause of action under Title VII if he or she can demonstrate that the defendant interfered with the plaintiff's employment opportunities with another employer.[6] Under this interference theory, a plaintiff need not establish an employment relationship with the defendant.[7] Rather, it must only be established that the defendant is an employer covered by Title VII and that the defendant discriminated against the plaintiff by interfering with the plaintiff's work relationship with another employer.[8] This interpretation of Title VII gives a plaintiff a cause of action against a Title VII employer who aids and abets discrimination.[9]

Although courts have applied the employee versus independent contractor test in numerous Title VII cases, before 1988 no court had ever considered whether the test was appropriate for determining when, if ever, a prison inmate may be considered an employee for purposes of Title VII and, if so, how the traditional factors that comprise the test should be applied in this context. Similarly, before 1988 no court had ever considered the interference theory in the prison context. In a 1986 decision by the Equal Employment Opportunity Commission ("EEOC" or "Commission"), however, the Commission ruled that an inmate who had been removed from his job assignment within the prison allegedly because of his race, did not state a cause of action against the prison under Title VII because an employment relationship had not existed between the prison and the inmate.[10]

During the *Survey* year, in *Baker v. McNeil Island Corrections Center*, the United States Court of Appeals for the Ninth Circuit ruled, in a case of first impression, that a black prison inmate who

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between the plaintiff and defendant by looking at factors that traditionally characterize one as an employee or as an independent contractor. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 997 (1983).

[6] *See, e.g.*, Zaklama v. Mount Sinai Medical Center, 842 F.2d 291, 294–95, 46 FEP Cases 913, 915–16 (11th Cir. 1988) (a resident who was dismissed from his program at a participating hospital had a cause of action against the hospital under Title VII, even though the hospital did not administer the residency program, because the hospital was in a position to affect the resident's employment); Ellerby v. Illinois, 46 FEP Cases 524, 527 (N.D. Ill. 1988) (attorney who was denied a public defender position had a cause of action against the state under Title VII even though the attorney's real "employer" was the criminal defendant because the only way for the attorney to reach the employer was through the state); Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1342, 6 FEP Cases 1029, 1032 (D.C. Cir. 1973) (although private duty nurse worked directly for patient, nurse had a cause of action against hospital because it controlled initial access to patient).

[7] *See* B. SCHLEI & P. GROSSMAN, *supra* note 5, at 998.

[8] *Id.*

[9] *Id.* at 998 & n.109.

[10] No. 86–7, 40 FEP Cases 1892, 1893 (1986).

had been denied a job at the prison library, allegedly because of his race, stated a cause of action against the prison under Title VII.[11] In *Baker*, Leydell Baker, an inmate at the McNeil Island Corrections Center in Washington State, applied for a job as a library aide in the Corrections Center's Library.[12] The job paid thirty dollars a month and involved assisting and being trained by the librarian.[13] Despite the fact that a prison employee in charge of inmate assignments told Baker he was "next in line" for the position, Baker did not get the job.[14] Baker, who is black, claimed he was denied the job because the state librarian did not want to work with a black man.[15]

Baker obtained an EEOC right-to-sue letter[16] and sued the Corrections Center *pro se* under Title VII of the Civil Rights Act of 1964.[17] He alleged that he had been denied the position because the female librarian was afraid of blacks; that he had been denied benefits he would have received as an employee of the Washington State Library; and that the position would have made him a direct employee of the Washington State Library, so that unquestionably, Title VII rights would apply.[18] He stated that he had been denied equal protection and due process rights as guaranteed by the fourteenth amendment to the United States Constitution. Moreover, he stated that the mere lack of legal precedent to support his argument did not imply that there is a right to discriminate against prison inmates.[19] He further alleged that the Department of Corrections was trying to keep him in confinement by denying him the position and that the Corrections Center had changed the referral procedure when he applied for the position.[20] He also asserted that the right-to-sue letter demonstrated that his claim had merit.[21]

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[11] 859 F.2d 124, 126, 129, 48 FEP Cases 143, 145, 147 (9th Cir. 1988).

[12] *Id.* at 125, 48 FEP Cases at 144.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] The first stage in bringing a Title VII action is to file a charge with the EEOC. If the charge is not resolved within 180 days of filing, the plaintiff receives a right-to-sue letter from the EEOC which allows the plaintiff to file a civil action in district court. B. SCHLEI & P. GROSSMAN, *supra* note 5, at 946–47.

[17] *Baker*, 859 F.2d at 125–26, 48 FEP Cases 144–45. *Pro se* refers to a situation in which one does not retain a lawyer but appears for oneself in court. BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

[18] *Baker*, 859 F.2d at 126, 48 FEP Cases at 145.

[19] *Id.*

[20] *Id.*

[21] *Id.*

The magistrate to whom Baker's case was referred, applied the factors used in *Spirides v. Reinhardt* to determine whether Baker stated a claim.[22] In the 1979 case of *Spirides*, the United States Court of Appeals for the District of Columbia set forth a series of factors or the "economic realities" to be examined, in order to distinguish an employee from an independent contractor.[23] The magistrate observed that the employer's right to control the worker's performance was the most important distinguishing factor and that in this case, this factor suggested that the plaintiff was an employee under Title VII because of the prison context, in which the prison inherently controls every facet of its inmates' lives.[24] The magistrate, however, as required by *Spirides*, also looked to the "economic realities" of the situation.[25] Upon examination of the economic realities, the magistrate concluded that no employment relationship existed between the prison and Baker because prison job assignments are more like rehabilitation and employment training than commercial employment.[26] Therefore, the magistrate dismissed Baker's

[22] Baker v. McNeil Island Corrections Center, No. C85–1188T, slip op. at 2–3 (W.D. Wash., June 4, 1986).

[23] 613 F.2d 826, 831–32, 20 FEP Cases 141, 145–46 (D.C. Cir. 1979). These factors include the extent of the "employer's" right to control the individual's work; the type of work with reference to whether the work is normally done under supervision; the skill required; whether the "employer" furnishes the equipment used by the individual; the length of time the individual has worked; the method of payment with reference to whether payment is on an hourly or per job basis; the manner in which the work relationship is terminated; and whether the individual is given annual leave." *Id.* at 832, 20 FEP Cases at 145–46.

[24] *Baker*, No. C85–1188T, slip op. at 4.

[25] *Id.*

[26] *Id.* at 8. The magistrate stated in his report and recommendation that:

> [t]he typical employment relationship is created to facilitate profits. The free enterprise system presupposes that hiring, promotion and business decisions are made so as to maximize productivity. An individual should thus be hired solely for the reason that he or she would do the best job. In this context, Title VII regulation is not an undue burden on an employer's discretion, because the only legitimate reason for hiring or promoting an individual is because he or she is the best one available for the job, and if an employer hires someone other than the individual best suited, an inference of illegitimate purpose, e.g. racial discrimination, is reasonable.
>
> These assumptions underlying Title VII do not hold true in the prison context. As noted above, prison officials have a different set of goals in hiring or promoting inmates. According to RCW 72.09.100, such work assignments as are at issue here are made "to promote basic work training and experience so that the inmate will be able to qualify for better work both within institutional industries and the free community." RCW 72.09.100(3)(a). Thus, a hiring decision can legitimately be made on the ground that Inmate X, while not necessarily the best one for the job, has only six months left on his sentence and no other saleable skill, while the other applicants have more time on their

claim without explicitly stating whether dismissal was for failure to state a claim or whether it was based on the prison's motion for summary judgment.

Responding to the magistrate's decision, Baker filed a motion in the United States District Court for the Western District of Washington for reconsideration of the magistrate's finding.[27] The district court affirmed the magistrate's finding and recommendation dismissing Baker's claim,[28] without issuing an opinion of its own. Baker then appealed to the United States Court of Appeals for the Ninth Circuit.[29]

The Court of Appeals for the Ninth Circuit ("*Baker* court") determined that Baker's action was dismissed for failure to state a claim.[30] Thus, the major issue on appeal was whether Baker's complaint stated a claim under Title VII.[31] The *Baker* court noted that "a complaint should not be dismissed . . . 'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"[32] The appeals court further noted that in civil rights cases when the petitioner presents his or her own case without the benefit of a lawyer, the court must give the petitioner the "benefit of the doubt."[33]

Although the *Baker* court agreed with the magistrate that the test to be applied in determining whether Baker was involved in an employer-employee relationship was the employee versus independent contractor test,[34] the *Baker* court disagreed with the magistrate's holding that Baker had failed to state a cause of action under Title VII.[35] The appeals court stated that the magistrate could not

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> sentences and thus more time for training, or perhaps already have a skill that is saleable in the free community. . . . Inmates may therefore be hired, promoted or shifted in such a way as to maximize exposure to potential career choices rather than solely because a particular inmate is the best for the job.

Id. at 6–8.

[27] *Baker*, 859 F.2d at 126, 48 FEP Cases at 145.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 127, 48 FEP Cases at 146.

[31] *See id.* The appeals court also discussed whether Baker's claim was dismissed pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim or under Rule 56 for summary judgment. This issue is irrelevant for the purposes of this discussion. *Id.* at 126–27, 48 FEP Cases 145–46.

[32] *Id.* at 127, 48 FEP Cases at 146 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

[33] *Id.*

[34] See *supra* note 5 and accompanying text for a discussion of the employee versus independent contractor test.

[35] *Baker*, 859 F.2d at 128, 48 FEP Cases at 146.

have been convinced beyond doubt that Baker could not prove his claim, because the magistrate acknowledged that the right to control factor indicated that Baker was an employee.[36] The *Baker* court further observed that the pleadings stated a fact that tended to establish the existence of an employment relationship.[37] According to the *Baker* court, Baker's statement that the state librarian did not want to work with a black man supports an inference that Baker was an employee of the prison, because it indicated that the librarian had input in the hiring decision.[38]

The *Baker* court also disagreed with the magistrate's finding that because prison work assignments, such as the library aide position, are in the nature of employment training, Baker was not involved in an employment relationship and that therefore, Baker's Title VII claim should be dismissed.[39] The *Baker* court noted that the language of Title VII prohibits discrimination based on race in apprenticeships and "'other training or retraining, including on-the-job training programs . . . .'"[40] The *Baker* court observed that Baker might be a trainee because the magistrate found that the library aide position was a type of job training.[41] The *Baker* court assumed that if Baker was a trainee, he must also be an employee.[42] Therefore, the *Baker* court, focusing on the statutory language, held that Baker's claim should not have been dismissed.[43]

The *Baker* court also noted the existence of a Notice of Policy Statement, published by the Commission, that stated that Title VII applied to prisoners eligible for work release.[44] According to the notice, once a prisoner is recommended for work release and the prisoner seeks a job with an outside employer, the prison becomes a third party. If the prison interferes with the inmate's employment opportunities with this outside employer, it may be liable for damages under Title VII.[45] The *Baker* court, noting that this type of interference with another's employment opportunities is a recognized and legitimate cause of action under Title VII, noted that

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[36] *Id.* The appeals court refers to the "district court" when in fact the district court issued no opinion of its own, but rather, merely adopted the magistrate's report and recommendation.

[37] *Id.*

[38] *Id.* at 128, 48 FEP Cases at 146–47.

[39] *Id.* at 128, 48 FEP Cases at 147.

[40] *Id.* (citing 42 U.S.C. § 2000e–2(d) (1982)).

[41] *See id.*

[42] *See id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

this theory might also provide a possible basis for Baker's Title VII claim.[46]

In fact, in 1973, the United States Court of Appeals for the District of Columbia held in *Sibley Memorial Hospital v. Wilson* that a private-duty male nurse stated a cause of action against a hospital when he alleged that a nursing supervisor employed by the hospital refused to refer him to female patients because he was male.[47] The *Sibley* court stated that even though the plaintiff was employed directly by patients rather than by the hospital, the hospital controlled the work facilities, including the nurse's initial access to the patient.[48] The *Baker* court compared work assignments within the prison, which involve training, to work release programs and suggested that both prepare inmates for the job market.[49] The *Baker* court therefore implied that by controlling the type of training that inmates receive, the prison administration can affect an inmate's access to job opportunities.[50] According to the *Baker* court, not enough information was available about the library aide position to determine whether an employment relationship existed.[51]

In sum, although the *Baker* court agreed with the magistrate's application of the factors used to distinguish between employees and employers, as set out by *Spirides v. Reinhardt*, the *Baker* court disagreed with the results the magistrate reached. According to the *Baker* court, the facts viewed in the light most favorable to Baker indicated that the magistrate could not have been convinced beyond doubt that Baker could not have proved facts which would support his claim. Therefore, the *Baker* court held that the magistrate erred in dismissing Baker's claim and reversed and remanded the case to the district court.

Contrary to the result reached by the *Baker* court, the EEOC in 1986 ruled that an inmate did not state a claim under Title VII because no employment relationship between the inmate and the prison existed.[52] The EEOC examined the prison-inmate relationship in the terms of employee versus independent contractor factors.[53] Although the Commission conceded that the most important factor, the right to control, indicated that an employee-employer

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[46] *Id.*

[47] 488 F.2d 1338, 1342, 6 FEP Cases 1029, 1032 (D.C. Cir. 1973).

[48] *Id.*

[49] *See Baker*, 859 F.2d at 128, 48 FEP Cases at 147.

[50] *See id.*

[51] *Id.*

[52] No. 86-7, 40 FEP Cases 1892, 1893 (1986).

[53] *Id.* at 1894 & n.3.

relationship existed, the Commission focused on the "primary purpose" of the relationship. Under this analysis, the Commission concluded that the primary purpose of the prison-inmate relationship involved was incarceration rather than employment and that therefore, the inmate was not an employee. The Commission reasoned that because the prison administration not only controlled the inmate's work, but the inmate himself, the conditions under which the inmate performed his work were "functions of his confinement . . . ."[54] The Commission further reasoned that because of his prisoner status, his "very job flowed from his incarceration and was dependent on his status as a prison inmate."[55] Therefore, the Commission concluded, the inmate is not an employee under Title VII. Thus, the Commission utilized the same employee versus independent contractor test set forth by the United States Court of Appeals for the District of Columbia in *Spirides*, but emphasized the primary purpose of the work relationship in determining that the prisoner was not an employee within the scope of Title VII.[56]

Baker v. McNeil Island Corrections Center, the first judicial pronouncement on the status of prisoners under Title VII, suggests that a prisoner may be entitled to Title VII protections in future cases based on three different theories.[57] The first theory, which requires a plaintiff to show that he or she was an employee of the defendant based on the employee versus independent contractor test, was purportedly used by both the *Baker* court[58] and the Commission in its 1986 EEOC decision.[59] Each test, however, had a different emphasis which resulted in opposite conclusions. An analysis of the test as used by the *Baker* court and by the Commission shows that each variation of the test has strengths and weaknesses, but that courts should follow *Baker*. Courts should also follow *Baker* and allow an inmate-plaintiff to state a cause of action based on the interference theory[60] or based on the language of Title VII.[61]

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[54] *Id.*

[55] *Id.*

[56] *Id.* See *supra* note 4 and accompanying text for an explanation of the employee versus independent contractor test.

[57] See *supra* notes 4, 6, 40 and accompanying text for a discussion of the respective theories.

[58] See *supra* notes 34–35 and accompanying text for a discussion of the *Baker* court's application of the employee versus independent contractor test.

[59] See *supra* notes 53–56 and accompanying text for a discussion of the EEOC's application of the employee versus independent contractor test.

[60] See *supra* notes 6–9 and accompanying text for a discussion of the interference theory.

[61] See *supra* notes 39–43 and accompanying text for a discussion of the language of Title VII.

The test used by the appeals court in *Baker* emphasized the traditional factors of the employee versus independent contractor test.[62] These factors include the extent to which the "employer" controls the individual's work; whether the work is normally done under supervision; the method of payment; and whether the individual is given annual leave.[63] The *Baker* court placed greatest emphasis on the control factor and concluded that Baker was an employee and that he therefore stated a claim.[64]

Under this variation of the test, which stresses the right to control, all inmates would be employees for Title VII purposes because by virtue of their incarceration, they are necessarily controlled by the prison. This result has merit because no inmate will be denied the opportunity to be heard on the merits of his or her case. The extremeness of this result is balanced by the fact that inmate-plaintiffs must still prove the existence of an employment relationship and a violation of Title VII ultimately to succeed.

On the other hand, the *Baker* court's use of the employee versus independent contractor test is problematic because it does not focus on a central issue. In the prison context, the issue is not necessarily whether the inmate is an employee or an independent contractor, but rather, whether the inmate is an employee or merely one whose work assignment is a "function" of his incarceration.[65] A test that focuses on this distinction might produce a more accurate result.

The test used by the Commission, although purported to be the traditional employee versus independent contractor test, was apparently a variation of the traditional test that emphasized the primary purpose of the work relationship.[66] The Commission conceded that the right to control factor indicated that the inmate was an employee; however, it also intimated that this factor could not overcome the circumstances involved in the prison-inmate context.[67] These circumstances involve the fact that the inmate's "job" is dependent upon his or her incarceration and that the primary purpose of the work relationship is incarceration.[68]

Under this reasoning, inmates will almost never be employees for purposes of Title VII and may never, therefore, state a cause of action under Title VII. The result of this emphasis on the pri-

[62] *See Baker*, 859 F.2d at 128, 48 FEP Cases at 146–47.
[63] *See Spirides*, 613 F.2d at 832, 20 FEP Cases at 145–46.
[64] *See Baker*, 859 F.2d at 128, 48 FEP Cases at 146.
[65] *See* No. 86–7, 40 FEP Cases at 1894.
[66] *See id.*
[67] *See id.*
[68] *See id.*

mary purpose of the work relationship is favorable in the sense that it truly focuses on the issue at hand — whether the inmate is an employee or merely one whose work assignment is a "function" of his incarceration. On the other hand, though, this result is unreasonable because it puts the inmate in a situation in which he or she cannot possibly win. Because an inmate will always be involved in a prison work assignment which necessarily stems from the fact that he or she is in prison, an inmate will never be allowed the opportunity to be heard on the merits of his or her Title VII claim.

Although the analysis used by the *Baker* court and the one used by the Commission in its 1986 decision both have merit, courts probably will and should follow *Baker*. The primary purpose emphasis used by the Commission effectively denies all inmates a Title VII claim, an undeniably unfair result. The traditional employee versus independent contractor test, however, will allow almost all inmates to state a claim under Title VII. This apparently excessive result is tempered by the fact that the inmate must still present sufficient evidence to win on the merits. In addition, because *Baker* is a judicial opinion, courts will probably weigh it more heavily than the EEOC decision. Thus, courts are likely to follow *Baker*.

Another possible Title VII claim for an inmate, according to the *Baker* court, might be the prison's interference with the inmate's employment opportunities.[69] This theory has been used and accepted in other Title VII cases,[70] as well as by the EEOC, which, in a Notice of Policy stated that an inmate involved in a work release program may state a cause of action under Title VII against the prison if the prison interferes with the inmate's employment opportunities with an outside employer.[71] Thus, in order for an inmate to state a claim under Title VII on an interference theory, courts would have to extend this principle to in-prison training. The appeals court in *Baker* seemed willing to do this. It noted that both work release and in-prison training prepare an inmate for the job market and that the prison controls which inmates receive training.[72] The *Baker* court intimated, therefore, that the prison can and does interfere with the inmates' employment opportunities in both

[69] See *supra* notes 6–9, 44–51 and accompanying text for a discussion of the interference theory.

[70] *See supra* notes 7–9 and accompanying text.

[71] *See supra* notes 44–46 and accompanying text for a discussion of this Notice of Policy Statement.

[72] See *supra* notes 44–70 and accompanying text for a discussion of the limitations placed on a prison's control of its prisoners.

the work release and in-prison training situations. This reasoning is sound because it allows a defendant who has interfered with the rights of an inmate to be sued in a Title VII action, despite the fact that the inmate is not on work release. It seems likely that other courts will apply this reasoning and allow inmates to recover under Title VII under the interference theory.

The language of Title VII is the third possible basis for an inmate's claim against the prison, according to the *Baker* court.[73] Title VII prohibits discrimination based on race in apprenticeships and "other training or retraining, including on-the-job training programs . . . ."[74] According to the *Baker* court, because training programs are specifically covered under Title VII, Baker's claim might have merit.[75] Other courts should follow *Baker* and allow inmates to state a claim based on this statutory language.

After *Baker v. McNeil Island Corrections Center*, inmates will most likely be able to bring suit under Title VII, because other courts will probably apply the reasoning used by the *Baker* court to conclude that inmates are employees. Is also seems likely that inmates may also base their Title VII claims on the theory that the prison interfered with the inmate's employment opportunities with an outside employer. Although this theory officially applies only to inmates on work release, the appeals court in *Baker* seemed willing to extend it to in-prison training, and other courts will probably follow suit. The language of the statute is another possible Title VII claim for an inmate because the statute specifically mentions training programs.

III. SEX DISCRIMINATION

A. * *Rehabilitation as the Essence of a BFOQ Defense*: Torres v. Wisconsin Department of Health and Social Services[1]

Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for an employer to refuse to hire or

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[73] See *supra* note 40 and accompanying text for a discussion of this language.

[74] Civil Rights Act of 1964, (Title VII) § 703, 42 U.S.C. § 2000e-2(a)-(d) (1982).

[75] *See id.*

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[1] 859 F.2d 1523, 48 FEP Cases 270 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1133, 48 FEP Cases 1896 (1989) and 109 S. Ct. 1537, 49 FEP Cases 464 (1989).

discharge an individual based solely on the individual's sex.[2] Section 2000e–2(e)(1) of Title VII, however, provides a defense to prosecution.[3] To prevail under this section, a defendant employer must prove that gender "is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise . . . ."[4]

Because the purpose of Title VII is to provide a legal foundation for non-discrimination,[5] the courts narrowly interpret the BFOQ defense and require the defendant to bear the burden of proof.[6] Courts have developed various formulations of the BFOQ defense.[7] First, as a threshold requirement, defendant employers must prove that the normal operation of their business would suffer if gender were not a qualification for a particular position.[8] To prove injury to the business, the defendant must establish the essence of the business.[9] As the second element of the BFOQ defense, the defendant must show that the basis of the gender qualification is not merely a stereotypical characterization of a particular gender's traits.[10] Some federal courts have also considered whether the de-

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[2] Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e–2(a)(1) (1982).
Section 2000e–2(a)(1) provides:

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

Id.

[3] 42 U.S.C. § 2000e–2(e)(1) (1982).
Section 2000e–2(e)(1) provides:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] 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.

[4] *Id.*

[5] Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 386, 3 FEP Cases 337, 338 (5th Cir. 1971).

[6] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 333–34, 15 FEP Cases 10, 14–15 (1977); *Diaz*, 442 F.2d at 387, 2 FEP Cases at 338; Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232, 1 FEP Cases 656, 658 (5th Cir. 1969).

[7] *See, e.g.*, *Dothard*, 433 U.S. at 333–34, 15 FEP Cases at 15–16.

[8] *Cf.* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236, 12 FEP Cases 1233, 1242 (5th Cir. 1976) (assessing a BFOQ defense in the context of age discrimination).

[9] *See Diaz*, 442 F.2d at 388, 3 FEP Cases at 339.

[10] *E.g.*, *Weeks*, 408 F.2d at 235–36, 1 FEP Cases at 660–61. The defendant "has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing,

fendant employer can make reasonable accommodations to minimize the conflict between the employer's essential interests and the non-discrimination requirement of Title VII.[11]

Title VII's non-discrimination principle is tested in the prison context when administrators seek to establish gender as a BFOQ for prison guards.[12] The administrators generally allege that the maintenance of security is the essence of the business of the penal institution.[13] The administrators attempt to prove the impossibility of accommodating inmates' privacy rights without compromising prison security if guards of the opposite gender are employed.[14] The courts, thus, characterize the clash of rights as a clash between the administrator's statutory duty to maintain security and the employee's statutory right to a particular job.[15] Absent compelling evidence that the employer cannot accommodate the clash of rights, the courts have generally held that the employee's rights dominate, and the BFOQ defense is not valid.[16]

During the *Survey* year, in *Torres v. Wisconsin Department of Health & Social Services*, the United States Court of Appeals for the Seventh Circuit held that the administrators of a female prison did not have to introduce empirical evidence to prove that employing only female correctional officers would enhance the rehabilitation of the female inmates.[17] Instead, the court held that a court should consider the totality of circumstances when evaluating the officials' efforts.[18] The

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that all or substantially all [men] would be unable to perform safely and efficiently the duties of the job involved." *Id.* at 235, 1 FEP Cases at 661. Alternatively, the defendant must show that it would be virtually impossible to deal with applicants on an individualized basis. *Cf. Tamiami*, 531 F.2d at 236, 12 FEP Cases at 1242 (adjudicating an age discrimination claim). In *Tamiami*, the court stated that *Weeks* required proof beyond administrative convenience or statistical correlation. 531 F.2d at 236–37, 12 FEP Cases at 1242.

[11] *See, e.g.*, United States v. Gregory, 818 F.2d 1114, 1118, 46 FEP Cases 1743, 1746 (4th Cir. 1987); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086, 21 FEP Cases 1031, 1036 (8th Cir. 1980).

[12] *See, e.g.*, Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769, 771, 27 FEP Cases 1575, 1576–77 (S.D. Ohio 1981), *aff'd without opinion*, 779 F.2d 50, 45 FEP Cases 1895 (6th Cir. 1985); Griffin v. Michigan Dep't of Corrections, 654 F. Supp. 690, 701, 30 FEP Cases 638, 646–47 (E.D. Mich. 1982).

[13] *See Griffin*, 654 F. Supp. at 701, 30 FEP Cases at 646–47.

[14] *See, e.g., Gunther*, 612 F.2d at 1086, 21 FEP Cases at 1036; *Harden*, 520 F. Supp. at 778, 27 FEP Cases at 1583; *Griffin*, 654 F. Supp. at 701, 30 FEP Cases at 646–47.

[15] *See, e.g., Gregory*, 818 F.2d at 1118, 46 FEP Cases at 1746; Edwards v. Department of Corrections, 615 F. Supp. 804, 808–09, 45 FEP Cases 1540, 1544–45 (M.D. Ala. 1985).

[16] *See, e.g., Gregory*, 818 F.2d at 1115, 46 FEP Cases at 1744; *Edwards*, 615 F. Supp. at 810, 45 FEP Cases at 1545.

[17] 859 F.2d 1523, 1532–33, 48 FEP Cases 270, 277–78 (7th Cir. 1988).

[18] *Id.* at 1532, 48 FEP Cases at 277.

court held, however, that on remand the administrators must establish that a female-only gender qualification is "reasonably necessary" to achieve the rehabilitative goal.[19] By formulating the standard in this fashion, the court lowered the threshold requirement for the BFOQ defense, implying that the essence of a business is not necessarily monolithic; rather, the essence may be multi-faceted.[20] Moreover, the court reduced the burden of proof required to establish that the gender qualification is not merely a stereotypical classification from a factual evidence standard[21] to a "totality of the circumstances" determination.[22]

In *Torres*, the designated defendant, Nora J. Switala, was the superintendent of Wisconsin's Taycheedah Correctional Institution (TCI), the only maximum security prison for women in the state.[23] The Department appointed Ms. Switala to this position in 1978.[24] Her qualifications included eleven years of experience in the Wisconsin penal system.[25] Upon assuming the superintendency, Ms. Switala reviewed TCI's staffing needs.[26] She ultimately decided, on the basis of her concerns for inmate rehabilitation and security, that only female correctional officers should staff nineteen of the twenty-seven positions in the prison's living units.[27] The TCI administration, therefore, announced in 1980 that it would implement a BFOQ program over a two-year period.[28] The plan was to replace male officers who held any of the nineteen designated positions in the living units with female officers through a gradual process of attrition.[29] Males who still held any of the designated "female only" positions on September 1, 1982, however, would have to vacate those positions.[30] In 1982, when the program was to be fully imple-

[19] *Id.* at 1532–33, 48 FEP Cases at 277–78.

[20] *See id.* at 1529–30, 48 FEP Cases at 274–75.

[21] *See* Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228, 235, 1 FEP Cases 656, 661 (5th Cir. 1969).

[22] *See* Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1532, 48 FEP Cases 270, 277 (7th Cir. 1988).

[23] *Id.* at 1524, 48 FEP Cases at 270.

[24] *Id.* at 1525, 48 FEP Cases at 271.

[25] *See id.* Ms. Switala served for three years as treatment director at TCI and eight years as a parole and probation agent with the Wisconsin Division of Corrections. *Id.*

[26] *Id.*

[27] *Id.* at 1525, 48 FEP Cases at 271–72.

[28] *Id.* The BFOQ plan affected 19 of 27 positions in the living units, including all CO-3 (the highest ranking correctional officers' position at TCI) positions in the units. The result of the plan was that only 3 CO-3 positions would be available to men. *Id.*

[29] *See* Torres v. Wisconsin Dep't of Health & Social Servs., 639 F. Supp. 271, 276, 40 FEP Cases 1748, 1752 (E.D. Wis. 1986).

[30] *Id.*

mented, the three plaintiffs, Raymond Torres, Franklin Utz, and Gerald Schmidt still occupied "female only" positions.[31] To accommodate the BFOQ program, they were demoted with no loss of pay to "undesignated" positions.[32] The plaintiffs thereupon filed suit challenging the validity of the BFOQ program under Title VII of the Civil Rights Act of 1964.[33]

The district court, after an eleven-day trial and a tour of TCI,[34] held that the defendants failed to establish the validity of their BFOQ program.[35] The court ordered the abolition of the program, and the reinstatement of the plaintiffs.[36] The prison administration asserted security, privacy and rehabilitation concerns as justifications for the female-only BFOQ.[37] Rejecting these justifications, the court reasoned that the defendants had "failed to show that security, privacy or rehabilitation" would diminish at TCI if the BFOQ program was not implemented.[38] Specifically, with regard to the rehabilitation justification, the district court found that the defendant "offered only a *theory* of rehabilitation" and "no objective evidence either from empirical studies or otherwise."[39] The

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[31] *See Torres*, 859 F.2d at 1525, 48 FEP Cases at 272. In 1986, when the district court rendered its opinion in the *Torres* case, Raymond Torres was 48 years old and had been a CO-3 at TCI since 1978. Frank Utz was 56; he had transferred to TCI as a CO-3 in 1979. Gerald Schmidt transferred to TCI as a CO-3 in 1975 and was 41 at the time of the suit. *Torres*, 639 F. Supp. at 272, 40 FEP Cases at 1748–49.

[32] *Torres*, 859 F.2d at 1525, 48 FEP Cases at 272.

[33] *See Torres*, 639 F. Supp. at 272, 40 FEP Cases at 1748.

[34] *Id.*

[35] *Id.* at 281, 40 FEP Cases at 1756.

[36] *Id.*

[37] *Id.* at 278, 40 FEP Cases 1753.

[38] *Id.* at 278–81, 40 FEP Cases at 1753–56.

[39] *Id.* at 280, 40 FEP Cases at 1755. Superintendent Switala's unique theory is based on the premise that before incarceration approximately 60% of all inmates were abused by males. *Id.* at 279–80, 40 FEP Cases at 1755. Female inmates are, therefore, uncomfortable with male guards. This discomfort or fear interferes with rehabilitation of the inmates. *Id.* Thus, reasoned Superintendent Switala, being female is a necessary qualification for a CO-3 position in the living units at TCI. *See id.* TCI introduced expert testimony in support of the rehabilitation theory. *Id.* The plaintiffs, however, introduced expert testimony that male guards "have a beneficial effect on inmate rehabilitation." *Id.* Superintendent Switala admitted that no decrease in the recidivism rate occurred during the 3 years that the program was in effect. *Id.*

Dissenting from the initial circuit court decision in *Torres*, Judge Ripple quoted Ms. Switala's testimony about her theory:

> A good many — about 60 percent of our population comes from abusive backgrounds, either . . . at the hands of their parents or spouse or boyfriend or whatever[.] [T]hey come into the institution and they have told me of their fear of assault, their fear of physical harm from inmates, and I believe that if a woman is afraid, that is going to take over predominantly her energy. The

court found, therefore, that rehabilitation concerns did not justify the program.[40]

On appeal, the United States Court of Appeals for the Seventh Circuit, in an opinion written by Judge Cudahy, affirmed the district court's ruling.[41] The court stated that the defendant must prove that the essence of its business would be undermined absent the gender-based qualification.[42] Moreover, the court stated that the defendant must prove that the gender qualification was based on more than a stereotypical characterization.[43]

The Seventh Circuit rejected the prison administrators' three justifications — security, privacy and rehabilitation — for its BFOQ program.[44] The court dismissed the defendant's security rationale, reasoning that no real risk of physical assault existed and that therefore the security rationale was merely an extension of the privacy rationale.[45] As to the privacy justification, the court, referring to analogous cases, stated that prisons can generally preserve inmate's privacy rights without sacrificing the employment rights of security guards.[46] In particular, the court noted that TCI operated

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> energy she has to invest in herself is going to be diminished by those concerns [and] by [not] being able to assure her that in her living space, men will not be intruding on her private life.
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> . . .
>
> [W]omen, as a rule, when they come in, they have a history of being very influenced, if not dominated by men in their lives and one of our major goals is to teach them . . . self-respect and . . . dignity[,] [and that they] have the capability of making their own decisions and living their lives based on their own perceptions of what they want and what their options are. And [if] we establish atmospheres where men are playing the primary dominant force, which is somewhat natural in a prison anyway, in terms of staffing, or power or authority over inmates, we were to perpetuate that, that's just going to further compound what she's lived with in the past and she will probably defer to the male and that's not something we want her to do.

Torres v. Wisconsin Dep't of Health & Social Servs., 838 F.2d 944, 955, 45 FEP Cases 1652, 1661–62 (7th Cir. 1988) (Ripple, J., dissenting).

[40] Torres v. Wisconsin Dep't of Health & Social Servs., 639 F. Supp. 271, 280, 40 FEP Cases 1748, 1755 (E.D. Wis. 1986).

[41] *Torres*, 838 F.2d at 954–55, 45 FEP Cases at 1661.

[42] *Id.* at 949, 45 FEP Cases at 1656. The Seventh Circuit cited the standards adopted by the United States Supreme Court in Dothard v. Rawlinson, 433 U.S. 321, 333–34, 15 FEP Cases 10, 15–16 (1977). The *Dothard* Court enunciated the standards for reviewing a BFOQ defense in the context of a male maximum security prison. *Id.*

[43] *Torres*, 838 F.2d at 949, 45 FEP Cases at 1656 (quoting *Dothard*, 433 U.S. at 333, 10 FEP Cases at 15–16).

[44] *Torres*, 838 F.2d at 949–54, 45 FEP Cases at 1657–61.

[45] *See id.* at 950, 45 FEP Cases at 1657.

[46] *Id.* at 952, 45 FEP Cases at 1659.

sensitively with regard to inmate privacy.[47] The court, therefore, concluded that the privacy justification did not support the BFOQ defense.[48] The court also dismissed the defendant's rehabilitation rationale,[49] stating that although the defendant is not required to "dispel all reasonable doubts"[50] about its rehabilitation theory, it should have to make a preliminary showing of some likelihood of success.[51] The Seventh Circuit further noted that, given the length of the trial in the district court and the fact that the district court judge toured TCI, deferring to the district court's findings was especially appropriate in this case.[52]

Circuit Judge Ripple dissented from this holding.[53] Although Judge Ripple accepted the majority's straightforward dismissal of the defendant's privacy justification,[54] he objected to the majority's characterization of the case as a clash between inmates' rights and guards' employment rights.[55] Rather, he stated that the case presented a conflict between the duty of the prison administration to innovate and the employment rights of the guards.[56] Judge Ripple reasoned that the unique nature of female penitentiaries necessitates an innovative approach to rehabilitation.[57] He concluded, therefore, that innovation is the essence of the business of TCI.[58] Judge Ripple stated that the majority had placed an unreasonable burden on the defendants by requiring objective proof that their rehabilitation theory was based on more than stereotypical characterizations because the defendants could not gather empirical data or objective proof without experimentation.[59] He stated that because female prisoners were perhaps the most isolated minority in the

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[47] *Id.* at 951, 45 FEP Cases at 1658.

[48] *Id.* at 953, 45 FEP Cases at 1660.

[49] *See id.* at 954, 45 FEP Cases at 1661.

[50] *Id.*

[51] *Id.* at 954–55 n.7, 45 FEP Cases at 1661 n.7. In footnote 7, the Seventh Circuit stated:

> The dissent argues with some force that the state should be allowed to experiment in its efforts to achieve greater rehabilitation. An experiment that infringes on workers' Title VII protections against discrimination based on gender, however, should not be permitted to go forward without some preliminary showing that it is likely to achieve objectives beyond the testing of a theory.

Id.

[52] *Id.* at 946, 45 FEP Cases at 1654.

[53] *Id.* at 955, 45 FEP Cases at 1661 (Ripple, J., dissenting).

[54] *Id.* (Ripple, J., dissenting).

[55] *Id.* (Ripple, J., dissenting).

[56] *Id.* (Ripple, J., dissenting).

[57] *Id.* at 956–57, 45 FEP Cases at 1662–63 (Ripple, J., dissenting).

[58] *Id.* at 957, 45 FEP Cases at 1663 (Ripple, J., dissenting).

[59] *See id.* (Ripple, J., dissenting).

United States, their rehabilitation and eventual reintegration into society is a goal not unlike the goal of Title VII itself.[60] Judge Ripple concluded that the majority's dismissal of the defendant's rehabilitation justification was incorrect.[61]

Upon petition for rehearing, the Seventh Circuit vacated its earlier opinion and granted a rehearing en banc.[62] On October 17, 1988, in an opinion written by Judge Ripple, the United States Circuit Court of Appeals for the Seventh Circuit (*Torres* court), reversed the district court's ruling.[63] The *Torres* court held that the district court should evaluate the administrator's rehabilitation theory by considering the totality of the circumstances.[64] Because the district court's resolution of the rehabilitation issue rested on the lack of objective evidence, the *Torres* court stated that the district court had no occasion to evaluate the record under the proper standard.[65] Therefore, the *Torres* court remanded the case for further consideration in accordance with the newly enunciated "totality of the circumstances" standard.[66]

In its analysis on rehearing, the Seventh Circuit reiterated the long established precedents of the BFOQ defense.[67] The court stated that it is "universally recognized" that the BFOQ defense is an "extremely narrow exception to the general prohibition of discrimination . . . ."[68] The court noted that a BFOQ defense is only valid when the essence of the business would be undermined absent the gender-based qualification.[69] Moreover, the court stated that an employer must show reasonable cause to believe "that all or substantially all [individuals of one gender] would be unable to perform safely and efficiently the duties of the job involved."[70] Although acknowledging that the BFOQ defense should not be based on stereotypical characterizations or preconceptions, the *Torres* court, foreshadowing their ultimate conclusion, noted that gender classi-

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[60] *See id.* (Ripple, J., dissenting).

[61] *See id.* (Ripple, J., dissenting).

[62] Torres v. Wisconsin Dep't of Health & Social Servs., 838 F.2d at 957–58 (*per curiam*).

[63] Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1533, 48 FEP Cases 270, 277–78 (7th Cir. 1988).

[64] *Id.* at 1532, 48 FEP Cases at 277.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1526–28, 48 FEP Cases at 273–74.

[68] *Id.* at 1527, 48 FEP Cases at 273 (quoting Dothard v. Rawlinson, 433 U.S. 321, 334, 15 FEP Cases 10, 16 (1977)).

[69] *Torres*, 859 F.2d at 1527, 48 FEP Cases at 273.

[70] *Id.*

fications exist that realistically reflect differences between men and women.[71]

Analyzing the facts of the instant case, the *Torres* court held that the district court had to hear the case again because the district court had applied an incorrect legal standard.[72] The *Torres* court analyzed the first requirement for a valid BFOQ defense — whether the defendant's rehabilitation justification went to the essence of TCI's business.[73] To assess this threshold issue, the court enunciated the standard for determining the essence of a business.[74] The court stated that generalities are not sufficient to analyze correctly the essence element of a BFOQ defense.[75] Rather, the court noted that it must consider the particularities that distinguish one institution from other institutions involved in the same general enterprise.[76] The *Torres* court reasoned that only by delving into the particular mission of an institution could the court determine whether the absence of gender-based qualifications would truly undermine the institution's primary goals.[77]

The *Torres* court relied on the Supreme Court decision in *Dothard v. Rawlinson*, in which the Court distinguished Alabama's prisons from generic maximum security prisons, and mandated a refined, case-by-case analysis of an institution's essence.[78] Therefore, the *Torres* court outlined several levels of analysis to explore before determining the essence of TCI's business.[79] The *Torres* court noted

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[71] *See id.* at 1527–28, 48 FEP Cases at 273–74.

[72] *Id.* at 1532, 48 FEP Cases at 277. The *Torres* court affirmed the district court's decision that the BFOQ defense could not be justified on privacy or security grounds. *Id.* at 1528, 48 FEP Cases at 274.

[73] *Id.* at 1528–30, 48 FEP Cases at 274–75.

[74] *Id.*

[75] *See id.* at 1528, 48 FEP Cases at 274.

[76] *Id.* at 1528–29, 48 FEP Cases at 274.

[77] *See id.*

[78] *See id.* at 1529, 48 FEP Cases at 275. In *Dothard*, the Supreme Court held that although Congress intended the BFOQ defense to be an "extremely narrow exception," the particularly inhospitable atmosphere of Alabama's prisons established a valid BFOQ defense to gender-based discrimination. 433 U.S. 321, 334–37, 15 FEP Cases 10, 16–17 (1977).

[79] *See Torres*, 859 F.2d at 1529, 48 FEP Cases at 274–75. The *Torres* court further supported its levels of analysis approach by citing to the Supreme Court's 1985 decision in *Trans World Airways, Inc.(TWA) v. Thurston*. *Torres*, 859 F.2d at 1528, 48 FEP Cases at 274 (citing *Thurston*, 469 U.S. 111, 122, 36 FEP Cases 977, 982 (1985)). The *Torres* court implied that *Thurston* stands for the proposition that courts cannot deal in generalities when determining the essence of a business. *See Torres*, 859 F.2d at 1528, 36 FEP Cases at 274. *Thurston* was an age discrimination case. 469 U.S. at 114, 36 FEP Cases at 979. In *Thurston*, the Court suggested that the essence requirement refers to the relationship between the essence of a particular business and the essence of the particular job from which an individual is excluded. *See id.* at 122, 36 FEP Cases at 982. The *Thurston* Court stated that age was not a valid BFOQ

that, at the most general level, TCI is in the business of governance.[80] The court implied, however, that the inquiry could not end there.[81] At a second level, the court noted that TCI's business is penal administration.[82] The *Torres* court indicated that at this level, justification may exist for deferring to the defendants' innovative theory of rehabilitation, because prisons present intractable administrative problems.[83] Yet, the court noted that this level of analysis was still too general.[84] The *Torres* court stated that at the relevant level of analysis the defendants administered "a distinct type of penal institution — a women's maximum security facility."[85]

In discerning the essence of TCI's administrative policy, the *Torres* court distinguished the task of administering TCI from that of administering a male maximum security prison.[86] The *Torres* court noted that little historical precedent for the administration of female prisons is available.[87] The court observed that, at the most basic operational level, the officials charged with the administration of female prisons must innovate, whereas administrators of male prisons may rely on historical precedent and empirical evidence in determining the most effective operational procedures.[88] Noting that the Wisconsin legislature mandates rehabilitation as one of the

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for a flight engineer's job, as distinguished from a pilot's job. 469 U.S. at 122–23, 36 FEP Cases at 983. Thus, the *Thurston* Court used particularity to limit the scope of the BFOQ defense. *See id.*

The *Torres* court, however, used particularity to expand the scope of the BFOQ defense by suggesting that the essence of a business may be multi-faceted. 859 F.2d at 1528–29, 48 FEP Cases at 274–75. Moreover, the *Thurston* Court's relational test would suggest that even if rehabilitation and innovation are accepted as the essence of TCI's business, the defendants in TCI would have to prove that the essence of a correctional officer's job is rehabilitation.

In the 1985 decision of *Harden v. Dayton Human Rehabilitation Center*, the United States District Court for the Southern District of Ohio noted that although the essence of the operation of the medium security center in question was the rehabilitation of criminals convicted of misdemeanors, the essence of the job of a rehabilitation specialist was security. *See Harden*, 520 F. Supp. 769, 778, 27 FEP Cases 1575, 1583 (S.D. Ohio 1981), *aff'd without opinion*, 779 F.2d 50, 45 FEP Cases 1985 (6th Cir. 1985). *Harden* highlights, therefore, in a prison context, the distinction that can be drawn between the essence of a business and the essence of a particular job. *See id.*

[80] Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d at 1523, 1529, 48 FEP Cases at 271, 274 (7th Cir. 1988).

[81] *See id.*

[82] *Id.*

[83] *See id.* at 1529, 48 FEP Cases at 274–75.

[84] *Id.* at 1529, 48 FEP Cases at 275.

[85] *See id.*

[86] *See id.* at 1529–30, 48 FEP Cases at 275.

[87] *Id.* at 1529, 48 FEP Cases at 275.

[88] *See id.* at 1529–30, 48 FEP Cases at 275.

goals of prison administration, the *Torres* court observed that rehabilitation and, therefore, innovation must be part of the essence of the business of the administration of TCI.[89] The court concluded that the female-only BFOQ was directly related to the rehabilitative essence of TCI's business.[90]

The *Torres* court next assessed the second element of TCI's BFOQ defense — whether TCI had reasonable cause to believe that their rehabilitation theory was based on more than stereotypical characterizations of gender differences.[91] The court held that this element should be judged based on a totality of the circumstances standard.[92] The *Torres* court distinguished the instant case from the Second Circuit decision in *Forts v. Ward*.[93] In *Forts*, the Second Circuit held that the employment of male guards on overnight shifts did not violate the privacy rights of the female inmates at the Bedford Hills Correctional Facility.[94] The *Torres* court identified the conflict in *Forts* as a conflict between the female inmates' privacy rights and the guards' employment rights.[95] The *Torres* court characterized the *Forts* case as a "mere matter of 'consumer preference.'"[96] The *Torres* court implied that at TCI, however, the clash of interests was between the guards' employment rights and TCI's responsibility to its inmates and to society in general for the rehabilitation of inmates.[97] Thus characterizing the TCI conflict, the court reasoned that a more deferential standard of review was appropriate on the second element of the BFOQ defense because

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[89] *See id.* at 1529–30, 48 FEP Cases at 275.

[90] *Id.* at 1530, 48 FEP Cases at 275.

[91] *See id.* at 1530–32, 48 FEP Cases at 276–77.

[92] *See id.* at 1532, 48 FEP Cases at 277.

[93] *Torres*, 859 F.2d at 1530, 48 FEP Cases at 275–76 (citing Forts v. Ward, 621 F.2d 1210, 27 FEP Cases 1587 (2d Cir. 1980)).

[94] *Forts*, 621 F.2d at 1217, 27 FEP Cases at 1592–93. In *Forts*, the female prisoners asserted that the prison administrators violated their privacy rights by assigning male guards to their living and sleeping quarters. 621 F.2d at 1212–13, 27 FEP Cases at 1588–89. The court was loathe to prevent the administration from employing male guards on overnight shifts, noting that, ultimately, female guards would suffer from such a decision. 621 F.2d at 1215–16, 27 FEP Cases at 1591. Therefore, noting that the prison administrators could accommodate inmates' privacy rights, the *Forts* court held that the prison administrators could assign male guards to overnight duty. 621 F.2d at 1217, 27 FEP Cases at 1592–93.

[95] *Torres*, 859 F.2d at 1530, 48 FEP Cases at 275–76.

[96] *See id.* at 1530, 48 FEP Cases at 276. At least one court has noted that consumer preference — clients' desire to have one gender serve their needs — does not create a valid BFOQ unless ignoring such a preference would undermine the business. Diaz v. Pan American World Airways, 442 F.2d 385, 389, 3 FEP Cases 337, 340 (5th Cir. 1971).

[97] *See Torres*, 859 F.2d at 1530, 48 FEP Cases at 276.

the administrators had an obligation to the inmates and to society in general to innovate.[98]

The *Torres* court analyzed precedent in BFOQ jurisprudence and found no general requirement that objective evidence support a BFOQ.[99] The court reasoned that empirical evidence may be appropriate in certain circumstances, but noted that situations exist where validation studies are either unnecessary or unavailable.[100] Referring again to the Supreme Court's decision in *Dothard*, the *Torres* court stated that the Supreme Court's appraisal of whether male guards were necessary in Alabama's maximum security prisons was based on a "common-sense understanding of penal conditions."[101] The *Torres* court implicitly reasoned, therefore, that *Dothard* requires judges to defer to some degree to prison administrators.[102]

The *Torres* court cited precedent where role model theories sufficed to establish a BFOQ absent objective proof.[103] The court suggested that role model theories are comparable to TCI's rehabilitation theory.[104] A role model theory, by its very nature, is not

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[98] *See id.* at 1532, 48 FEP Cases at 277.

[99] *Id.* at 1531–32, 48 FEP Cases at 276–77.

[100] *Id.*

[101] *Id.* at 1531, 48 FEP Cases at 276.

[102] *Id.*

[103] *Id.* at 1531, 48 FEP Cases at 276–77. In *Chambers v. Omaha Girls Club*, cited by the *Torres* court, the Eighth Circuit held that a role model theory could support a BFOQ defense. 834 F.2d 697, 705, 45 FEP Cases 698, 698 (8th Cir. 1987). The *Chambers* court upheld the district court's finding that there was a direct relationship between the Club's goal of preventing teenage pregnancy and their refusal to continue to employ an unmarried female staff member when she became pregnant. *Id.* at 701–02, 45 FEP Cases at 701–02. The *Chambers* court observed that role models may not be suited to empirical validation. *Id.* at 702, 45 FEP Cases at 702. Therefore, the court held that the district court's decision was plausible and not clearly erroneous. *Id.* at 702, 45 FEP Cases at 701–02.

In *Pime v. Loyola University of Chicago*, also cited by the *Torres* court, the court held that the evidence supported the general proposition advanced by the university, that having a Jesuit presence at the university was reasonably necessary to the operation of the school. 803 F.2d 351, 354, 42 FEP Cases 1, 3 (7th Cir. 1986). Thus, the court held that being a Jesuit was a valid BFOQ for a teaching position in the philosophy department. *Id.* In a concurring opinion in *Pime*, Judge Posner suggested that the majority's reading of the BFOQ defense might be too broad. *Id.* at 356, 42 FEP Cases at 4–5 (Posner, J., concurring). Judge Posner implied that by allowing tradition to suffice to establish a BFOQ, the court could be condoning the type of traditional discrimination that Title VII is meant to eliminate. *Id.* (Posner, J., concurring). Judge Posner concurred in the court's judgment, however, despite the defendant's failure to establish a BFOQ, because, he argued, the plaintiff had not made out a prima facie case for religious discrimination. *Id.* at 356, 42 FEP Cases at 4–5 (Posner, J., concurring).

[104] *See Torres*, 859 F.2d at 1531–32, 48 FEP Cases at 276–77.

suited to empirical validation.[105] Similarly, the court reasoned that TCI's rehabilitation theory, was not suited to empirical validation because it is an *innovative* theory and therefore, by definition, could not be proven empirically.[106]

The *Torres* court stated that the district court required the defendants to meet an unfair burden and that a court should evaluate the totality of the circumstances in assessing TCI's efforts to rehabilitate its inmates.[107] Moreover, the Seventh Circuit held that the district court, on remand, should give substantial weight to TCI's judgments if the district court found that TCI's program is the "product of a reasoned decision-making process."[108] Concluding, the *Torres* court emphasized the narrowness of its holding and stressed that a claim of innovation alone will not suffice to elude Title VII and establish a BFOQ defense.[109] The court held only that given the special circumstances of the instant case, the district court erred in requiring objective validation to prove the second element of the BFOQ defense.[110]

The *Torres* court's decision after rehearing produced two dissenting opinions. Circuit Judge Cudahy wrote one dissent, joined by Circuit Judges Cummings and Easterbrook.[111] Circuit Judge Easterbrook wrote a separate dissent as well.[112]

Judge Cudahy asserted that TCI must bear the heavy burden of explaining and justifying its rehabilitation theory.[113] Given the absence of evidence of any adverse reactions from the past employment of male guards in TCI's living units, Judge Cudahy concluded that TCI had not established a valid BFOQ defense.[114] Moreover, he objected to the majority's interpretation of *Dothard* as creating a standard of review that would require the plaintiffs to prove that TCI's program was not a "product of reasoned decision-making."[115] Requiring the plaintiffs to prove an inadequate process, Judge Cudahy reasoned, degraded Title VII's basic assumption that gender

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105 *Id.*

106 *See id.* at 1531–32, 48 FEP Cases at 277.

107 *Id.* at 1532, 48 FEP Cases at 277.

108 *Id.*

109 *Id.* at 1532–33, 48 FEP Cases at 277–78.

110 *Id.* at 1533, 48 FEP Cases at 277–78.

111 *Id.* at 1533–35, 48 FEP Cases at 278–80 (Cudahy, J., dissenting).

112 *Id.* at 1535–38, 48 FEP Cases at 280–82 (Easterbrook, J., dissenting).

113 *See id.* at 1533, 48 FEP Cases at 278 (Cudahy, J., dissenting).

114 *See id.* at 1533–35, 48 FEP Cases at 278–80 (Cudahy, J., dissenting).

115 *Id.* at 1534, 48 FEP Cases at 279 (Cudahy, J., dissenting).

is rarely a decisive qualification in employment.[116] Judge Cudahy stated that intractable problems exist at all levels of governance and that, therefore, to distinguish prisons from other governmental activities on that ground is inapt.[117] He argued that, given the district judge's experience as a district attorney and as Attorney General of Wisconsin, the court should be particularly deferential to the district court judge's evaluation of the evidence.[118]

Judge Easterbrook, in his dissent, argued that, with the enactment of Title VII, Congress altered the standard of proof required to establish a valid BFOQ defense.[119] Judge Easterbrook noted that the statute requires that TCI's gender qualification be necessary, not merely reasonably related, to the goals of the institution.[120] He reasoned that the majority's standard conflicted with the statutory mandate by accepting TCI's "bare opinion" that the BFOQ was necessary.[121] He suggested that the majority misinterpreted the district court's standard by focusing on the district court's use of the words "objective evidence."[122] Judge Easterbrook reasoned that the district judge did not require computer data; rather, he suggested that the district judge merely indicated that the expert testimony was not conclusive.[123] As to the majority's use of Wisconsin's legislation to establish the essence of the business of penal institutions in the state, Judge Easterbrook concluded that the state may pursue whatever goals it chooses, but not at the expense of employment discrimination.[124]

Although the *Torres* court cited with approval the generally accepted elements of a BFOQ defense, the *Torres* court's decision is inconsistent with BFOQ jurisprudence in the prison context. Generally, gender-based BFOQs for prison guards are held to be invalid.[125] Although most prison cases involve male prisons, the cases

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[116] *See id.* (Cudahy, J., dissenting).

[117] *See id.* at 1534, 48 FEP Cases at 279 (Cudahy, J., dissenting).

[118] *Id.* at 1535, 48 FEP Cases at 280 (Cudahy, J., dissenting).

[119] *See id.* at 1535, 48 FEP Cases at 280 (Easterbrook, J., dissenting).

[120] *Id.* (Easterbrook, J., dissenting).

[121] *See id.* at 1536, 48 FEP Cases at 280–81 (Easterbrook, J., dissenting).

[122] *See id.* at 1537, 48 FEP Cases at 281 (Easterbrook, J., dissenting).

[123] *See id.* (Easterbrook, J., dissenting).

[124] *Id.* (Easterbrook, J., dissenting).

[125] *See, e.g.*, United States v. Gregory, 818 F.2d 1114, 1115, 46 FEP Cases 1743, 1744 (4th Cir. 1987); Hardin v. Stynchcomb, 691 F.2d 1364, 1372, 30 FEP Cases 624, 630 (11th Cir. 1982); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1087, 21 FEP Cases 1031, 1037 (8th Cir. 1980); Griffin v. Mich. Dep't of Corrections, 654 F. Supp. 690, 704–05, 30 FEP Cases 638, 649 (E.D. Mich. 1982).

involving female prisons have not upheld the validity of female-only BFOQs.[126]

Although a number of federal courts have decided Title VII actions involving gender discrimination in the prison context, the *Torres* court used the reasoning of only two.[127] The *Torres* court based its decision on the 1977 Supreme Court decision in *Dothard v. Rawlinson*.[128] Although the Supreme Court in *Dothard* held that the administrators of Alabama's Department of Safety established a valid male-only BFOQ for Alabama's male maximum security prisons, the Supreme Court suggested that *Dothard* was the exception, not the general rule.[129] In fact, other courts use the narrow holding of *Dothard* to invalidate gender-based BFOQs for prisons.[130]

The only other prison case that the *Torres* court cites is *Forts v. Ward*.[131] In *Forts*, however, the court held that a female-only BFOQ was invalid.[132] The *Torres* court distinguished *Forts* on the grounds that *Forts* was a suit brought by the female inmates of the prison asserting their privacy rights.[133] Although this distinction is valid, the vast majority of prison cases that remain uncited by the *Torres* court are cases where employees have brought actions asserting their employment rights and the courts have held gender-based BFOQs invalid.[134]

Torres affirms that a gender-based qualification is only valid when the absence of such a qualification would undermine the essence of the business.[135] The purpose of the essence threshold requirement for a BFOQ defense is to ensure that without gender

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[126] Forts v. Ward, 621 F.2d 1210, 1217, 27 FEP Cases 1587, 1593 (2d Cir. 1980); Edwards v. Dep't of Corrections, 615 F. Supp. 804, 810, 45 FEP Cases 1540, 1545 (M.D. Ala. 1985); Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769, 774, 27 FEP Cases 1575, 1579 (S.D. Ohio 1981).

[127] The *Torres* court does cite a third prison case, *Hardin v. Stynchcomb*, for the proposition that "Title VII prohibits employment discrimination, which is 'one of the most deplorable forms of discrimination.'" *Torres*, 859 F.2d at 1526–27, 48 FEP Cases at 273 (citing *Hardin*, 691 F.2d at 1369, 30 FEP Cases at 627).

[128] See *supra* notes 78, 101–02 and accompanying text for a discussion of *Dothard*.

[129] *See Dothard v. Rawlinson*, 433 U.S. 321, 334–37, 15 FEP Cases 10, 15–17 (1977).

[130] *See, e.g., Gregory*, 818 F.2d at 1117–18, 46 FEP Cases at 1746; *Hardin*, 691 F.2d at 1372, 30 FEP Cases at 628; *Edwards*, 615 F. Supp. at 808, 45 FEP Cases at 1544.

[131] *See Torres*, 859 F.2d at 1530, 48 FEP Cases at 275–76 (citing Forts v. Ward, 621 F.2d 1210, 27 FEP Cases 1587 (2d Cir. 1980)).

[132] *Forts*, 621 F.2d at 1217, 27 FEP Cases at 1593.

[133] *Torres*, 859 F.2d at 1530, 48 FEP Cases at 275–76.

[134] *See, e.g., Gregory*, 818 F.2d at 1118, 46 FEP Cases at 1746–47; *Edwards*, 615 F. Supp. at 805, 810, 45 FEP Cases at 1541, 1545; *Griffin*, 654 F. Supp. at 693, 705, 30 FEP Cases at 640, 649.

[135] See *supra* note 69 and accompanying text for a discussion of this point.

discrimination, the normal operation of a business will be undermined. Courts use the essence threshold to ensure that the BFOQ defense remains a narrow exception to the general Title VII nondiscrimination principle. Without the essence requirement, the BFOQ defense could conceivably swallow the general rule.[136] Therefore, the essence of a business is that characteristic of a business without which the business would not be viable.

The *Torres* court uses *Dothard*'s analysis of the specific characteristics of Alabama's male maximum security prisons to suggest that courts should consider the goals of a particular institution in order to determine the essence of the institution.[137] *Dothard's* analysis distinguished Alabama's prisons on factual grounds, however, observing that Alabama's maximum security prisons are "characterized by 'rampant violence' and a 'jungle atmosphere.'"[138] The *Torres* court did not distinguish TCI from male maximum security prisons on the basis of a factual analysis of the environment. Rather, the *Torres* court distinguished TCI on the basis of TCI's superintendent's methodological needs.[139] Therefore, although the *Torres* court appears to delve into particulars with its levels of analysis standard to determine the essence of TCI, the *Torres* court's focus is on methodology, not environment.

The *Torres* court's analysis of the standard of proof required to ensure that a BFOQ is not based on stereotypical characterizations falls short of the statutory mandate. As pointed out by Judge Cudahy in his dissent, the majority's totality of circumstances standard suggests that the majority simply did not agree with the district judge's evaluation of the evidence.[140] The *Torres* court cites to several Supreme Court cases to establish that courts should be particularly deferential to the determinations of prison administrators who must cope with "intractable problems" of penal institutions.[141] These

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[136] *E.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235, 1 FEP Cases 656, 660–61 (5th Cir. 1969).

[137] *See Torres*, 859 F.2d at 1529, 48 FEP Cases at 275 (citing *Dothard*, 433 U.S. at 334, 15 FEP Cases at 16).

[138] *See Dothard*, 433 U.S. at 334–36, 15 FEP Cases at 15–16 (citing Pugh v. Locke (also cited as James v. Wallace), 406 F. Supp. 318, 325 (M.D. Ala. 1976)).

[139] See *supra* notes 86–90 and accompanying text for a discussion of the administration of female prisons.

[140] *See Torres*, 859 F.2d at 1534, 48 FEP Cases at 279 (Cudahy, J., dissenting).

[141] *See Torres*, 859 F.2d at 1529, 48 FEP Cases at 274–75 (citing Turner v. Safley, 107 S. Ct. 2254, 2262 (1987); Rhodes v. Chapman, 452 U.S. 337, 352 (1981); Bell v. Wolfish, 441 U.S. 520, 547–48 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 127–29 (1977); Procunier v. Martinez, 416 U.S. 396, 404–05 (1974)).

cases, however, balance the constitutional rights of inmates against the duties of prison administrators.[142] The cited cases deferred to prison administrators when the challenged regulations did not implicate the rights of third parties (non-inmates).[143] In *Torres*, the statutory rights of third parties are the focus and, therefore, the court should follow the Title VII mandate and be less deferential. When other courts have balanced prisoners' rights, intertwined with administrators' concerns about security, against employees' Title VII rights, the employees have prevailed.[144]

One may view *Torres* as a victory for feminism because the decision implicitly recognizes that female prisoners have suffered from abuse at the hands of males in society.[145] Unless other courts interpret *Torres* as the exception and not the rule, however, *Torres* could impede women's employment opportunities. Although the *Torres* grievance is asserted on behalf of men, prison cases are generally about discrimination against women.[146] The *Torres* court's essence analysis, combined with its diminished burden of proof, could ultimately exclude women from positions at male penitentiaries on the basis of theories and stereotypes if empirical data on a particular theory is unavailable. Courts should use a standard that will ensure that gender classifications are not valid unless such

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[142] *E.g.*, *Turner*, 107 S. Ct. at 2257 (first amendment and right to marry); *Rhodes*, 452 U.S. at 339 (eighth amendment cruel and unusual punishment); *Bell*, 441 U.S. at 523 (fourth amendment and due process); *Jones*, 433 U.S. at 121 (first amendment right to associate); *Procunier*, 416 U.S. at 398–400 (first amendment censorship).

[143] *Compare Rhodes*, 452 U.S. at 352 *and Jones*, 433 U.S. at 132 *with Procunier*, 416 U.S. at 409 *and Turner*, 107 S. Ct. at 2266 (citing *Procunier*, 416 U.S. at 409).

The *Procunier* Court upheld the district court's invalidation of mail censorship regulations issued by the Director of the California Department of Corrections. 416 U.S. at 415–16. The Court rejected the Department's argument, based on assumptions about the legal status of prisoners, for an undemanding standard of review. *Id.* at 409. The Court stated, "[t]his line of argument and the undemanding standard of review it is intended to support fail to recognize that the First Amendment liberties of free citizens are implicated in censorship of prisoner mail." *Id.*

The *Turner* Court held that the Missouri Department of Corrections marriage regulation was facially invalid. 107 S. Ct. at 2267. The Court noted that the marriage regulation could implicate the interests of non-prisoners. 107 S. Ct. at 2265–66. The Court implied that an undemanding standard of review would therefore be inappropriate. *Turner*, 107 S. Ct. at 2266 (citing *Procunier*, 416 U.S. at 409).

[144] See *supra* notes 125–26 and accompanying text for a discussion of the invalidation of gender-based BFOQs.

[145] *See* Jacobs, *The Sexual Integration of the Prison's Guard Force: A Few Comments on* Dothard v. Rawlinson, 10 TOLEDO L. REV. 389, 414–17 (1979) for a discussion of the effect of *Dothard* on the privacy rights of female prisoners and employment opportunities for women. See *supra* note 39 for a discussion of the background of female prisoners.

[146] Forts v. Ward, 621 F.2d 1210, 1215, 27 FEP Cases 1587, 1591 (2d Cir. 1980).

discrimination is necessary. Gender discrimination is only necessary when, absent the gender-based qualification, the institution will not be viable.

B.* *Retroactive Application of Pension Plan Rulings*: Florida v. Long[1]

Under Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice "to discriminate against any individual with regard to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[2] If a court finds that an unlawful employment practice exists, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order . . . affirmative action . . . or any other equitable relief as the court deems appropriate."[3] Although the statute states that courts "may" award retroactive relief, the United States Supreme Court has stated that courts should not apply the "presumption in favor of retroactive liability" in Title VII pension plan cases, unless plainly commanded by legislative action.[4]

In the 1978 case of *Los Angeles Department of Water and Power v. Manhart*, the Supreme Court held that the sex discrimination provisions of Title VII prohibited an employer from requiring women to make larger pension plan *contributions* than men, based on the longer lifespan of women as reflected in sex-based actuarial tables.[5] The Court denied retroactive relief, concluding that the presumption in favor of retroactive relief should not be applied in Title VII pension plan cases because it would be financially devastating to the pension fund and would harm innocent third parties.[6] In the 1983 case of *Arizona Governing Committee v. Norris*, the Supreme Court held that Title VII also prohibited an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which paid

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[1] Florida v. Long, 108 S. Ct. 2354, 47 FEP Cases 7 (1988).

[2] 42 U.S.C. § 2000e-2(a)(1) (1982).

[3] 42 U.S.C. § 2000e-5(g) (Supp. V 1982).

[4] Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 721, 17 FEP Cases 395, 404 (1978).

[5] *Id.* at 717, 17 FEP Cases at 402.

[6] *Id.* at 722–23, 17 FEP Cases at 404. The Court noted that if the pension fund reserve was not large enough to fund the retroactive award, it would be necessary to raise additional revenue. If the pension fund raised additional revenue by lowering the benefits of all retired workers or by increasing the burden on current employees, the financial burden would fall on innocent third parties. *Id.*

women lower monthly *benefits* than men, based on sex-based actuarial tables.[7] The *Norris* Court stated that "the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage."[8] The *Norris* Court stated that post-*Manhart* contributions must yield equal benefits for both men and women.[9]

During the *Survey* year, the Supreme Court, in *Florida v. Long*, ruled that employers are not liable for pension plans offering discriminatory payment options during periods prior to the *Norris* decision.[10] The Court stated that *Norris*, not *Manhart*, put employers on notice that optional pension plans offering sex-based *benefits* violated Title VII.[11] The Court reaffirmed its conclusion in *Manhart* that courts should not apply the presumption in favor of retroactive relief in Title VII pension plan cases, stressing that such retroactive relief would impose costs that would threaten the financial security of both the funds and the beneficiaries.[12] As a result, the Court held that under the plan at issue in *Long*, employers need not make adjustments for past or future benefit payments for employees who retired before the effective date of the *Norris* decision.[13] The Court implied that no adjustment need occur because the plan offered defined benefits, and the employer complied with the law at the time the pension funds received the contributions.[14] An employer may be liable, however, for offering pension plan options after the *Norris* decision if those plans entail unequal contributions or unequal benefits based on sex-based actuarial tables.[15] Consequently, after the *Long* case, pension plans are not subject to retroactive adjustment provided that they offered defined benefits and complied with existing law at the time the pension funds received the contributions.[16]

In *Florida v. Long*, a class of male retirees brought a class action suit under Title VII on behalf of male retirees who elected one of the optional pension plans offered by the state of Florida to state

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[7] Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1086, 32 FEP Cases 233, 239 (1983).
[8] *Id.* at 1081, 32 FEP Cases at 237.
[9] *Id.* at 1093, 32 FEP Cases at 242.
[10] *Long*, 108 S. Ct. at 2359, 47 FEP Cases at 10.
[11] *Id.* at 2361, 47 FEP Cases at 11.
[12] *Id.* at 2362–63, 47 FEP Cases at 12–13.
[13] *Id.* at 2365, 47 FEP Cases at 14.
[14] *Id.* at 2364, 47 FEP Cases at 14.
[15] *Id.* at 2361, 47 FEP Cases at 11.
[16] *Id.* at 2364, 47 FEP Cases at 14.

employees.[17] The class consisted of male employees who retired after the effective date of the Equal Employment Opportunity Act of 1972 [18] and before August 1, 1983, when Florida, pursuant to the *Norris* decision, adopted unisex actuarial tables for all employees in the Florida Retirement System.[19] Although the Florida Retirement System calculated an employee's normal retirement benefit without regard to the retiree's sex, if a male retiree chose one of the optional plans instead of the normal plan, the male retiree would receive a lower monthly payment than the female would receive under the same optional plan.[20]

The United States District Court for the Northern District of Florida granted summary judgment in favor of the male retirees, holding that the optional pension plan discriminated against male employees in violation of Title VII.[21] The district court ordered Florida to compensate the men who retired after *Manhart* for the difference between the benefits that the male retirees had received and the benefits they would have received had the pension plan used unisex mortality tables during the period between *Manhart* and the court's judgment.[22] The district court also awarded increased future benefits, calculated in the same manner.[23] The district court reasoned that the awards were appropriate because *Manhart* placed employers on notice that pension benefits as well as contributions must be calculated without reliance on sex-based actuarial tables.[24] The Court of Appeals for the Eleventh Circuit affirmed.[25]

The United States Supreme Court reversed, stating that the *Norris* decision, not the earlier *Manhart* decision, placed employers

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[17] *Id.* at 2358, 47 FEP Cases at 9.

[18] *Id.* at 2358 n.1, 47 FEP Cases at 8 n.1, 9. The Equal Employment Opportunity Act of 1972 defined public employers (such as the state of Florida and its local governments) as "employers" within the meaning of Title VII. *Id.*

[19] *Id.* at 2358, 47 FEP Cases at 9.

[20] *Id.* The Florida system calculated the normal retirement for both men and women without regard to the retiree's sex. The optional plans, however, utilized sex-based actuarial tables in order to determine the present actuarial value of the total amount an employee would receive under the normal plan during the period between retirement and death. This amount represented the amount an employee would receive under one of the optional plans. As a male's life expectancy was shorter than a female's life expectancy, the optional plans paid lower monthly benefits to males than the same optional plans paid to females. *Id.*

[21] *Id.* at 2358, 47 FEP Cases at 10.

[22] *Id.* at 2358–59, 47 FEP Cases at 10.

[23] *Id.* at 2359, 47 FEP Cases at 10.

[24] *Id.*

[25] 805 F.2d 1542, *reh'g denied*, 805 F.2d 1552 (1986) (per curiam).

on notice that employer-operated pension plans could not offer discriminatory *benefits* without violating Title VII.[26] The *Long* Court refused to apply retroactive relief for violations pre-dating its decision in *Norris*.[27] Reiterating its reasoning in *Manhart*, the *Long* Court stated that such retroactive relief was not warranted for periods in which the employer reasonably assumed that the use of sex-based tables was lawful.[28] The *Long* Court held that the award of increased future benefits was retroactive "in nature" and therefore prohibited for the same reason.[29] The *Long* Court also stated that awarding retroactive relief would threaten the financial stability of the pension plan and the financial security of the beneficiaries.[30]

The majority opinion concluded that the first award, requiring prejudgment benefit increases, was retroactive "without doubt" and was therefore impermissible.[31] The majority also concluded that the second award, requiring post-judgment benefit adjustments, although related to future payments, was "fundamentally retroactive" because it increased future benefits based on past contributions and past actuarial assumptions.[32] After concluding that both awards were retroactive, the *Long* Court identified three criteria for determining whether a retroactive award was appropriate in a Title VII case involving the use of sex-based actuarial tables.[33]

The first criterion concerns whether the Court's decision in *Manhart* put Florida on notice that unequal benefit payments violated Title VII.[34] The *Long* Court concluded that *Norris*, not *Manhart*, put Florida on notice because *Manhart* only established that unequal contributions, not benefits, violated Title VII.[35] In addition, the *Long* Court reasoned that the *Manhart* decision left open the possibility that an employer could set aside equal contributions and allow each employee to purchase the largest benefit available on the open market.[36] The *Long* Court also stated that *Manhart* did not

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[26] *Long*, 108 S. Ct. at 2359, 47 FEP Cases at 10.

[27] *Id.*

[28] *Id.* at 2356, 47 FEP Cases at 14.

[29] *Id.* The Court stated that the adjustment of future benefits is retroactive "in nature" because future benefit payments are based on contributions made in the past. *Id.* at 2364, 47 FEP Cases at 14.

[30] *Id.* at 2362, 47 FEP Cases at 12–13.

[31] *Id.* at 2363, 47 FEP Cases at 13.

[32] *Id.* at 2363–64, 47 FEP Cases at 13–14.

[33] *Id.* at 2359, 47 FEP Cases at 10.

[34] *Id.*

[35] *Id.* at 2360–61, 47 FEP Cases at 11.

[36] *Id.* at 2360, 47 FEP Cases at 11.

explicitly prevent the offering of sex-based annuities as options.[37] For these reasons, the *Long* Court held that *Manhart* did not put Florida on notice that unequal *benefits* violated Title VII.[38]

The second criterion the *Long* Court addressed was whether a retroactive award was necessary in this case in order to either deter deliberate violations or to ensure compliance with the *Norris* decision.[39] The Court noted that in *Long*, a retroactive award was not necessary because Florida had modified its optional pension plans to comply with *Norris* immediately following the effective date of that decision.[40] In addition, the *Long* Court stated that there was no evidence that employers in general had not complied with the Title VII requirements announced in *Manhart* and *Norris*.[41]

The third criterion that the *Long* Court discussed was whether an award of retroactive relief would produce inequitable results "for the States, employers, retirees, or pension funds."[42] The Court concluded that retroactive relief would be inequitable because it would cause financial instability in pension and retirement programs, resulting in harm to other retirees and innocent third parties.[43] In addition, the Court stated that a retroactive award that caused a deficiency in the pension fund could cause the pension fund to violate its contractual guarantee to provide defined benefits to other retirees.[44] The *Long* Court, therefore, reaffirmed its conclusion in *Manhart* and *Norris* that retroactive liability was inappropriate in Title VII pension plan cases.[45]

The majority concluded that the district court's award for compensatory payments to employees who retired after *Manhart* and before *Norris* was retroactive in nature and therefore impermissible.[46] In addition, the *Long* Court held that the portion of the district court award requiring that future payments be adjusted for all pre-*Norris* male retirees who were receiving lower benefits was "retroactive in nature and therefore impermissible."[47] The *Long* Court reached this conclusion because the award would adjust benefits

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[37] *Id.* at 2361, 47 FEP Cases at 12.
[38] *Id.* at 2361, 47 FEP Cases at 11.
[39] *Id.* at 2359, 47 FEP Cases at 10.
[40] *Id.* at 2362, 47 FEP Cases at 12.
[41] *Id.*
[42] *Id.* at 2359, 47 FEP Cases at 10.
[43] *Id.* at 2362, 47 FEP Cases at 13.
[44] *Id.* at 2364, 47 FEP Cases at 14.
[45] *Id.* at 2362, 47 FEP Cases at 13.
[46] *Id.* at 2363, 47 FEP Cases at 13.
[47] *Id.* at 2363–64, 47 FEP Cases at 13–14.

that the pension plan had calculated in a manner that was not unlawful at the time the retirements occurred.[48]

Justice Blackmun, concurring in part and dissenting in part, joined by Justice Brennan and Justice Marshall, disagreed with the majority that *Norris* put Florida on notice that failure to use unisex tables in calculating retirement benefits violated Title VII.[49] Justice Blackmun argued that *Manhart*, not *Norris*, supplied the date after which Florida should be liable.[50] Justice Blackmun reasoned that the *Manhart* decision "clearly foreshadowed" the unlawfulness of Florida's pension plan.[51] Justice Blackmun argued that *Norris* did not articulate a new principle of law[52] because *Manhart* laid down a general rule that Title VII prohibited the use of sex-based actuarial tables.[53] In addition, Justice Blackmun argued that *Manhart*'s open market exception was only applicable to third party insurers and not applicable to the employer-operated plan in *Long*.[54]

Justice Blackmun agreed with the majority that both awards were retroactive,[55] but disagreed with the majority that retroactive liability would be inequitable.[56] Although Justice Blackmun agreed with the majority that respondents who retired before *Manhart* were not entitled to equitable relief, he argued that retroactive relief was appropriate for post-*Manhart* retirees because *Manhart*, not *Norris*, placed Florida on notice.[57] Justice Blackmun argued that the presumption in favor of retroactive liability should apply because the law was sufficiently clear at the time of the violation[58] and "no special factors were presented . . . that would make an award of relief inequitable for post-*Manhart* retirees."[59]

Justice Stevens, in a dissenting opinion, agreed with the majority that recovery was not warranted for violations that occured prior

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[48] *Id.* at 2364, 47 FEP Cases at 14.
[49] *Id.* at 2368, 47 FEP Cases at 17 (Blackmun, J., concurring in part and dissenting in part).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 2366, 47 FEP Cases at 16.
[54] *Id.*
[55] *Id.* at 2365 n.2, 47 FEP Cases at 15 n.2.
[56] *Id.* at 2368, 47 FEP Cases at 17.
[57] *Id.* at 2366, 47 FEP Cases at 15, 16.
[58] *Id.* at 2365, 47 FEP Cases at 15.
[59] *Id.* at 2368, 47 FEP Cases at 17.
Justice Stevens, in a dissenting opinion, argued for adjusting the future benefits for all pre-*Manhart* male retirees because he characterized the future payments as "prospective," not "retroactive." *Id.* at 2368–69, 47 FEP Cases at 17–18 (Stevens, J., dissenting).

to the *Manhart* decision.[60] Justice Stevens agreed with the court of appeals that the pre-*Norris* and pre-*Manhart* retirees should have their future benefits increased because such future relief would be prospective, not retroactive, in nature.[61] In addition, Justice Stevens concluded that there were "no special equities in this case militating against an award of this type of prospective relief."[62]

Prior to the *Long* decision, the Supreme Court stated that it was not necessary to apply retroactive relief in Title VII pension plan cases because retroactive relief was not necessary to further the principles of Title VII, and because such relief would impose an adverse financial effect on the pension funds and beneficiaries.[63] The *Long* decision reaffirms this proposition.[64] The majority, however, stretched this proposition by classifying adjusted future payments as retroactive in nature in order to deny an award of adjusted future payments. It appears from the additional arguments offered by the majority that their primary motivation for refusing to grant relief was their concern about the potential adverse consequences to the pension fund's economic stability.[65]

The majority, however, limited its holding in *Long* in two important respects. First, the Court noted that since Florida had modified its pension plan options to comply with the *Norris* decision, retroactive relief was not necessary in order to deter deliberate violations or to ensure compliance in the future.[66] The Court stated that if Florida had not complied with the *Norris* decision prohibiting the use of sex-based actuarial tables to calculate benefits for its pension plan, "the case before us would have been an altogether different one."[67] Although the majority did not explain how the case would have been different, this statement implies that the majority would have been less reluctant to award retroactive relief in such a case in order to deter deliberate violations and ensure future compliance with the *Norris* decision.

Second, the majority admits that a different assessment of retroactivity might result if a pension plan did not provide retirees

[60] *Id.* at 2368, 47 FEP Cases at 17 (Stevens, J., dissenting).

[61] *Id.* at 2369, 47 FEP Cases at 18 (Stevens, J., dissenting).

[62] *Id.*

[63] *See* Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1092, 32 FEP Cases 233, 242 (1983); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 722–23, 17 FEP Cases 395, 404 (1978).

[64] *Long*, 108 S. Ct. 2354, 2362–63, 47 FEP Cases 7, 12–13 (1988).

[65] *See id.* at 2362–65, 47 FEP Cases at 12–14.

[66] *Id.* at 2362–63, 47 FEP Cases at 12–13.

[67] *Id.* at 2363, 47 FEP Cases at 13.

with a contractual right to receive a fixed level of benefits or a fixed rate of return on contributions.[68] If an award of increased future benefits in such a case did not require additional funding by the state or employer and did not violate the contractual rights of other retirees, the award would not disrupt past pension funding assumptions and therefore would not be retroactive in nature.[69] Any award, however, that disrupts past pension funding assumptions by requiring adjustments based on conduct that could not reasonably have been in violation of Title VII at the time the retirements occured, is considered "essentially retroactive."[70] *Long*, therefore, indicates that in the future, courts will not adjust benefits for retirees whose benefits were defined by a pension plan that complied with the laws applicable when the contributions were made.

In essence, these two limitations carve out only a narrow range of exceptions to the decision in *Long* not to apply retroactive relief. Although the *Long* decision implies that the Court will consider awarding retroactive relief in order to deter deliberate violations or in situations where such an award would not be economically detrimental, the *Long* decision does not indicate the extent of the interrelationship between these two exceptions. In the future, it is unclear whether the Court will award retroactive relief in order to deter continuing violations if such an award would be economically detrimental to the pension fund. Although the *Long* decision does not address the issue, the Court implied that the potential economic consequences of a retroactive award will be the controlling factor.

In the 1988 case of *Florida v. Long*, the United States Supreme Court ruled that employers are not liable for operating pension plans that offer discriminatory payment options during periods prior to the *Norris* decision. The Court reaffirmed its conclusion in *Manhart* that courts should not apply the presumption in favor of retroactive relief to Title VII pension plan cases if such relief would impose a financial burden on the pension fund or its beneficiaries. *Long* indicates that in the future, courts will not apply a pension plan ruling retroactively if the pension plan in question contained defined benefits and if the plan complied with existing law at the time the contributors made their contributions.

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[68] *Id.* at 2364, 47 FEP Cases at 14.

[69] *Id.*

[70] *Id.*