

LABOR RELATIONS LAW

I. PROCEDURAL DEVELOPMENTS

A. **Judicial Review of Arbitration Awards on Public Policy Grounds:* *United Paperworkers v. Misco, Inc.*¹

The limited nature of judicial review of arbitrators' decisions is a well-established feature of federal labor law.² Generally, courts may not reconsider the merits of an award when asked to review an arbitrator's decision.³ Federal labor law confines the role of reviewing courts to determining whether the arbitrator's decision interprets the collective bargaining agreement in any conceivable way, and whether the arbitrator acted within the scope of his or her authority as defined by the agreement.⁴ As a result, courts reviewing arbitration decisions may not decide claims of factual or legal error.⁵

The United States Supreme Court, however, recognizes a few narrow exceptions to the general rule that courts limit their review of arbitrators' decisions.⁶ For example, courts may overturn arbitrators' awards for fraud or dishonesty.⁷ Additionally, a court may overturn, and in fact may not enforce, collective bargaining agreements or arbitrators' awards that are contrary to some explicit public policy.⁸ Therefore, while judicial review of arbitrators' awards is limited, courts have discretion to overturn arbitrators' awards for fraud, dishonesty, or because they are contrary to public policy.

The United States Supreme Court set out the role of courts in reviewing arbitrators' awards in *United Steelworkers v. Enterprise Wheel & Car Corp.*⁹ The Court limited judicial review to the issue of whether the arbitrator's award "draws its essence" from the collective bargaining agreement.¹⁰ The Court stated that federal policy

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¹ 108 S. Ct. 364, 126 L.R.R.M. 3113 (1987).

² See, e.g., *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 764, 765, 113 L.R.R.M. 2641, 2644 (1983); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

³ *Enterprise Wheel*, 363 U.S. at 596.

⁴ *Misco*, 108 S. Ct. at 371, 126 L.R.R.M. at 3117.

⁵ *Id.* at 370, 126 L.R.R.M. at 3117.

⁶ See *id.* at 371, 126 L.R.R.M. at 3117; *W.R. Grace*, 461 U.S. at 766, 113 L.R.R.M. at 2645.

⁷ *Misco*, 108 S. Ct. at 371, 126 L.R.R.M. at 3117.

⁸ *W.R. Grace*, 461 U.S. at 766, 113 L.R.R.M. at 2645.

⁹ 363 U.S. 593.

¹⁰ *Id.* at 597.

avored private settlement of labor disputes because the settlements require specialized knowledge and because the parties specifically bargained for the arbitrator's interpretation.¹¹ Basing its decision on these policies favoring private settlement of labor disputes, the Court held that judicial review may neither encompass the merits of an arbitration award nor question the validity of the arbitrator's interpretation of the collective bargaining agreement.¹² Thus, the Court limited judicial review of labor arbitration awards to avoid undermining the strong policies behind federal labor statutes favoring private dispute settlement.

Although the United States Supreme Court subsequently reaffirmed the limited nature of judicial review of arbitration awards,¹³ in *W.R. Grace & Co. v. Rubber Workers* it also indicated that courts could, in some cases, overturn awards on public policy grounds.¹⁴ The Court held, however, that the arbitration award at issue did not compromise public policy.¹⁵ While stating that courts must resolve the issue of public policy, the Court held that arbitration awards must violate "some explicit public policy" before courts could overturn awards on public policy grounds.¹⁶ The Court further noted that such a public policy must be "well defined and dominant," and courts must glean it from "laws and legal precedents and not from general considerations of supposed public interests."¹⁷ The Court thereby established courts' authority to overturn arbitration awards if enforcement of such awards would violate explicit public policy.

Following *W.R. Grace*, the courts of appeals divided on when the judiciary could overturn an arbitration award as contrary to public policy.¹⁸ The First, Fifth, and Seventh Circuits broadly viewed the courts' power to overturn awards on public policy grounds and, for this reason, more frequently overturned awards.¹⁹ In contrast,

¹¹ *Id.* at 596, 599.

¹² *Id.* at 596.

¹³ 461 U.S. at 764, 113 L.R.R.M. at 2644.

¹⁴ *Id.* at 766, 113 L.R.R.M. at 2645.

¹⁵ *Id.* at 767, 771, 113 L.R.R.M. at 2645, 2647. The Court identified obedience to judicial orders, *id.* at 766, 113 L.R.R.M. at 2645, and voluntary compliance with Title VII as the public policies that potentially might be compromised. *Id.* at 770, 113 L.R.R.M. at 2647.

¹⁶ *Id.* at 766, 113 L.R.R.M. at 2645.

¹⁷ *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

¹⁸ *Misco*, 108 S. Ct. at 369, 126 L.R.R.M. at 3116.

¹⁹ See *id.* at 369 n.7, 126 L.R.R.M. at 3116 n.7 (discussing First and Seventh Circuits). See, e.g., *S.D. Warren Co. v. United Paperworkers Local 1069*, 815 F.2d 178, 125 L.R.R.M. 2086 (1st Cir.), *cert. granted, judgment vacated*, 108 S. Ct. 497, 126 L.R.R.M. 3360 (1987), *on*

the Ninth and District of Columbia Circuits subscribed to a narrower view of the courts' powers in this area and overturned awards less frequently.²⁰ Thus, although courts were free to overturn arbitration awards as violative of explicit public policy, courts split regarding when they could overturn awards appropriately.

During the *Survey* year, in *United Paperworkers v. Misco, Inc.*, the United States Supreme Court reaffirmed the limited nature of judicial review of labor arbitration awards. The Court ruled unanimously that, before a court may overturn an arbitration award on public policy grounds, it must formulate the public policy with reference to statutes or to judicial precedent.²¹ While the *Misco* Court held that only public policy based on statutes or judicial precedent is sufficient to overturn an arbitration award, the Court did not address what appropriately formulated public policies would justify overturning an award on public policy grounds.²² Consequently, after *Misco*, courts clearly are unable to overturn arbitration awards based on poorly documented public policy.²³ When courts may overturn awards based on properly formulated public policy, however, remains unclear.²⁴

The dispute in *Misco* stemmed from the discharge of a machine operator for violating the employer's rules against the presence or use of drugs on plant property.²⁵ The employer, Misco, operates a paper converting plant in Louisiana.²⁶ Misco's collective bargaining agreement with the United Paperworkers Union, covering production and maintenance employees, provided for final and binding

remand, 845 F.2d 3, 128 L.R.R.M. 2175 (1st Cir. 1988) (award reinstating dangerous equipment operator possessing drugs overturned); *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122, 114 L.R.R.M. 2001, *reh'g denied*, 717 F.2d 1399 (5th Cir. 1983) (award reinstating truck driver dismissed for drinking alcohol overturned); *Amalgamated Meat Cutters v. Jones Dairy Farm*, 680 F.2d 1142, 110 L.R.R.M. 2805 (7th Cir. 1982) (award allowing employer to forbid employees from reporting sanitation violations directly to the government overturned).

²⁰ *Misco*, 108 S. Ct. at 369 n.7, 126 L.R.R.M. at 3116 n.7; *see, e.g.*, *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 808 F.2d 76, 124 L.R.R.M. 2300 (D.C. Cir. 1987) (award directing reinstatement of alcoholic pilot upheld); *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 122 L.R.R.M. 2666 (9th Cir. 1986) (award directing reinstatement of undocumented aliens upheld), *cert. denied*, 108 S. Ct. 500 (1987).

²¹ 108 S. Ct. at 374, 126 L.R.R.M. at 3119.

²² *Id.* at 375, 126 L.R.R.M. at 3120 (Blackmun, J., concurring).

²³ *See id.* at 374, 126 L.R.R.M. at 3119.

²⁴ *See id.* at 375, 126 L.R.R.M. at 3120 (Blackmun, J., concurring).

²⁵ *Id.* at 368, 126 L.R.R.M. at 3115.

²⁶ *Id.* at 367, 126 L.R.R.M. at 3114.

arbitration of any grievance arising from the agreement's interpretation or application.²⁷ The agreement limited the arbitrator's authority to the interpretation and application of the agreement's terms.²⁸

The collective bargaining agreement reserved to Misco the right to establish and to enforce rules for employee discipline or discharge.²⁹ Misco's longstanding rules addressed the presence and use of intoxicants, narcotics and controlled substances on plant property.³⁰ The company rules specified bringing any of these substances onto plant property, consuming them on plant property, or reporting for work under the influence of any of these substances as causes for discharge.³¹

The collective bargaining agreement covered Isiah Cooper, the discharged employee.³² Cooper operated a slitter-rewinder machine which uses blades to cut rolling coils of paper.³³ On January 24, 1983 Cooper informed Misco that he had been arrested, at his house, for possession of marijuana.³⁴ Three days later Misco learned that police had found Cooper, on plant property, in the backseat of another employee's car with a lighted marijuana cigarette in the frontseat ashtray.³⁵ Misco discharged Cooper on February 7, asserting that Cooper's presence in the car with the lighted marijuana cigarette violated its rule against having drugs on plant property.³⁶ When it discharged him, Misco was not aware that police also had

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 367-68, 126 L.R.R.M. at 3114.

³¹ *Id.*

³² *Id.* at 368, 126 L.R.R.M. at 3115.

³³ *Id.* Misco reprimanded Cooper twice for deficient performance within a few months immediately preceeding his discharge. *Id.*

³⁴ *Id.* On January 21, 1983, police searched Cooper's house pursuant to a warrant and found a substantial amount of marijuana. They subsequently arrested Cooper and charged him with marijuana possession. *Id.*

³⁵ *Id.* The police had assigned an officer to keep Cooper's car under observation at Misco's parking lot. The officer observed Cooper and two other men briefly enter Cooper's car and then enter a second car. *Id.* After the two other men had left, the police apprehended Cooper in the backseat of the second car. A lighted marijuana cigarette was in the front-seat ashtray. *Id.*

³⁶ *Id.* The police searched Cooper's own car after finding him in the car with the lighted marijuana cigarette and found marijuana gleanings. *Id.* Misco became aware of the marijuana found in Cooper's car on September 21, five days before the arbitration hearing was scheduled. *Id.*

found marijuana in Cooper's car while it was parked in Misco's lot.³⁷ Cooper filed a grievance on the day of his discharge and the dispute went to arbitration.³⁸

The arbitrator ordered Misco to reinstate Cooper with backpay and full seniority.³⁹ The arbitrator found that there was not just cause for Cooper's dismissal because Misco failed to prove that the employee had possessed or used marijuana on plant property.⁴⁰ The arbitrator found that Cooper's presence in the second car was insufficient to establish a violation of Misco's rules.⁴¹ The arbitrator did not admit into evidence the fact that the police found marijuana in Cooper's car because Misco was unaware of this fact when it discharged him.⁴²

Misco filed suit in the United States District Court for the Western District of Louisiana seeking to vacate the arbitration award on public policy grounds.⁴³ The district court agreed with Misco and set aside the award as violative of the general public policy against operating dangerous machinery while under the influence of drugs and violative of criminal laws against drug possession.⁴⁴ The United States Court of Appeals for the Fifth Circuit affirmed, and held that the arbitration award violated the public policy against operating dangerous machinery while under the influence of drugs.⁴⁵ Additionally, the court of appeals found that the arbitrator erred both by failing to consider that marijuana had been found in Cooper's car and by not reaching the conclusion that the facts established a violation of Misco's rules.⁴⁶ The United States Supreme Court granted the Union's petition for a writ of certiorari because the courts of appeals had split on the issue of when courts may set aside arbitration awards on public policy grounds.⁴⁷

The Court reversed the judgment of the lower courts and upheld the arbitration award.⁴⁸ In doing so, the Court reaffirmed

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 368-69, 126 L.R.R.M. at 3115.

⁴¹ *Id.*

⁴² *Id.* at 369, 126 L.R.R.M. at 3115.

⁴³ *Id.*

⁴⁴ *Id.* The arbitrator found that the machine Cooper operated was hazardous and had caused a number of injuries. *Id.* at 368, 126 L.R.R.M. at 3115.

⁴⁵ *Id.* at 369, 126 L.R.R.M. at 3115.

⁴⁶ *Id.* at 369, 126 L.R.R.M. at 3115-16.

⁴⁷ *Id.* at 369, 126 L.R.R.M. at 3116.

⁴⁸ *Id.* at 375, 126 L.R.R.M. at 3120.

the very limited role of the courts in reviewing arbitration awards.⁴⁹ The Court emphasized that a court may not reject an arbitrator's findings of fact or interpretation of a collective bargaining agreement merely because it disagrees with the arbitrator.⁵⁰ According to the Court, as long as an arbitrator is arguably interpreting or applying the agreement and acting within the scope of his or her authority, a court may not substitute its own judgment for that of the arbitrator even if it is convinced the arbitrator committed a serious error in interpreting or applying the agreement.⁵¹

The Court held that the Fifth Circuit had exceeded its authority by substituting its own factfinding and interpretation of the agreement for that of the arbitrator.⁵² The Supreme Court stated that the court of appeals exceeded its authority when it determined that Cooper's presence in the second car was a violation of Misco's rules, when it considered evidence that the arbitrator deemed inappropriate to consider, and when it set aside the award because it viewed discharge as the correct remedy.⁵³ The Court stated that the court of appeals' action in considering evidence the arbitrator refused to consider was improper because, even assuming the arbitrator erred, his error was not affirmative misconduct or in bad faith.⁵⁴

Even if the court below properly considered evidence the arbitrator excluded, the Court noted, a court's substituting its own remedy for an arbitrator's remedy is clearly substituting judicial judgment for that of the arbitrator.⁵⁵ The Court emphasized that the arbitrator's role is to apply informed judgment to a dispute in order to achieve a fair solution.⁵⁶ The Court stressed that courts should be especially cautious about reformulating the remedies an

⁴⁹ *Id.* at 370, 126 L.R.R.M. at 3116-17.

⁵⁰ *Id.* at 370-71, 126 L.R.R.M. at 3117.

⁵¹ *Id.* at 371, 126 L.R.R.M. at 3117.

⁵² *See id.* at 371-72, 126 L.R.R.M. at 3117-18.

⁵³ *Id.*

⁵⁴ *Id.* at 372, 126 L.R.R.M. at 3118. The Court cited the Arbitration Act (9 U.S.C. § 10(c)) as empowering federal courts to set aside arbitration awards only when "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." *Id.* (quoting 9 U.S.C. § 10(c)). Additionally, the Court indicated that excluding the evidence of marijuana in Cooper's car did not "forever foreclose the Company from using that evidence as the basis for a discharge." *Id.*

⁵⁵ *See id.* The Court noted that the parties themselves appointed the arbitrator as the agent to resolve disputes by determining facts and interpreting the agreement. *See id.* at 371, 374, 126 L.R.R.M. at 3117, 3119.

⁵⁶ *Id.* at 372, 126 L.R.R.M. at 3118.

arbitrator awards.⁵⁷ Thus, the Court reaffirmed the extremely limited role that judicial review plays in labor disputes.

The Court next held that, in addition to exceeding its authority on judicial review, the court of appeals advanced a formulation of the general public policy against operating dangerous machinery while under the influence of drugs which was insufficient to justify overturning the arbitrator's decision.⁵⁸ The Court emphasized that while courts might overturn awards if contrary to explicit, well-defined public policy, this is a narrow exception to the general rule of judicial review.⁵⁹ This narrow exception, the Court stated, does not give broad judicial power to set aside arbitration awards.⁶⁰ The *Misco* Court found that the public policy formulation advanced by the court of appeals made no attempt to review existing statutes and judicial precedents but, instead, relied on common sense and "general considerations of supposed public interests."⁶¹ The Court held that under *W.R. Grace*, such a formulation of public policy did not justify setting aside the arbitration award.⁶²

Even if the source of the Fifth Circuit's public policy had been proper, the Court continued, no violation of that policy was shown.⁶³ The arbitrator's award, the Court noted, did not create an explicit conflict with other laws and legal precedents.⁶⁴ The Court found little, if any, conflict between reinstating Cooper and a public policy against operating dangerous machinery while under the influence of drugs.⁶⁵ Thus, the Court held that setting aside labor arbitration awards as contrary to public policy is only a very narrow exception to the broad, general rule mandating limited judicial review of arbitration awards.⁶⁶ Because the public policy exception is narrow, the Court stated, policies must be explicit and clearly supported by

⁵⁷ *Id.* "This is especially true when it comes to formulating remedies." *Id.* (Court's emphasis in quoting *Enterprise Wheel*, 363 U.S. at 597). The Court indicated that the parties could limit the discretion of the arbitrator by agreement. *Id.*

⁵⁸ *Id.* at 374, 126 L.R.R.M. at 3119.

⁵⁹ *See id.* at 373, 126 L.R.R.M. at 3119.

⁶⁰ *Id.*

⁶¹ *Id.* at 374, 126 L.R.R.M. at 3119 (quoting *Muschany*, 324 U.S. at 66).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 374, 126 L.R.R.M. at 3119.

⁶⁵ *Id.* The Supreme Court stated the court of appeals could not infer that Cooper would ever be under the influence of marijuana when operating dangerous machinery on the job because the police found marijuana in his car. *Id.* Drawing such an inference is impermissible on judicial review, the Court held, because it is an exercise in factfinding properly performed only by the arbitrator. *Id.*

⁶⁶ *See id.* at 373, 126 L.R.R.M. at 3119.

statutes and judicial precedent.⁶⁷ The Court noted that a court's refusal to enforce an award must be based on more than an assumption that enforcement would violate public policy.⁶⁸

Justice Blackmun, joined by Justice Brennan, concurred, stressing the narrowness of the Court's holding.⁶⁹ The concurring opinion stated that the Court did not decide whether the judiciary may set aside an arbitration award on public policy grounds only when "the award itself violates some positive law or requires unlawful conduct by the employer."⁷⁰ Justice Blackmun presented three alternative rationales for the Court's decision.⁷¹ First, the court of appeals exceeded its limited authority on judicial review by setting aside the arbitration award.⁷² Second, the award did not violate the public policy advanced by the court of appeals.⁷³ Third, the court of appeals did not adequately formulate the public policy.⁷⁴ Thus, Justice Blackmun indicated clearly that the Court did not decide the question of what type of violation of an appropriately formulated public policy would justify setting aside an award on public policy grounds.

Misco reaffirms the broad, general principle that judicial review of labor arbitration awards is limited.⁷⁵ Additionally, *Misco* clarifies that setting aside awards on explicit public policy grounds is a narrow exception to this general rule.⁷⁶ Because setting aside arbitration awards on public policy grounds is a narrow exception, *Misco* requires that both parties challenging awards and courts carefully formulate such public policy by reference to statutes and judicial precedent, not merely common sense.⁷⁷ *Misco* indicates, however,

⁶⁷ *Id.* at 374, 126 L.R.R.M. at 3119.

⁶⁸ *Id.*

⁶⁹ *Id.* at 375, 126 L.R.R.M. at 3120 (Blackmun, J., concurring).

⁷⁰ *Id.* The Court itself indicated that it did not decide the question of when a court validly might set aside an arbitration award on policy grounds. *Id.* at 374 n.12, 126 L.R.R.M. at 3120 n.12. Justice Blackmun also stated that the Court did not distinguish how setting aside a labor arbitration award as violative of public policy differs from refusing to enforce a non-labor agreement which violates public policy. *Id.* at 375, 126 L.R.R.M. at 3120 (Blackmun, J., concurring).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* Justice Blackmun indicated that properly formulating public policy is only the initial step in refusing to enforce an award on public policy grounds. *Id.* at 376, 126 L.R.R.M. at 3121 (Blackmun, J., concurring).

⁷⁵ *Id.* at 370, 126 L.R.R.M. at 3116.

⁷⁶ *See id.* at 373, 126 L.R.R.M. at 3119.

⁷⁷ *See id.* at 374, 126 L.R.R.M. at 3119.

that this formulation is only a preliminary step.⁷⁸ After the party or court properly formulates a public policy, it must show or determine that enforcement of the award creates an "explicit conflict" with the public policy.⁷⁹ In other words, enforcement of the award must circumvent public policy.⁸⁰

The *Misco* Court, on the facts presented, properly decided the issue of judicial review of arbitration awards. The court of appeals clearly substituted its judgment as to the facts for that of the arbitrator by considering evidence the arbitrator, in his discretion, refused to consider. The Fifth Circuit determined that Cooper did violate *Misco's* rules, and directed a remedy different from that ordered by the arbitrator.⁸¹ Such substitution of judicial judgment for an arbitrator's judgment is impermissible under *Enterprise Wheel* and *W.R. Grace*.⁸²

The *Misco* Court also correctly evaluated setting aside the arbitration award on public policy grounds.⁸³ In order for a public policy to be explicit and well-established, it must be evidenced in statutes or judicial precedents.⁸⁴ *W.R. Grace* previously established the need to formulate such public policies with care and by reference to laws and legal precedent.⁸⁵ The court of appeals, having made no such effort, improperly set aside the arbitrator's award on a public policy formulated through common sense and "general considerations of supposed public interests."⁸⁶ Such a formulation seemingly ignores the holding of *W.R. Grace*.⁸⁷

While the *Misco* Court indicated that an arbitration award must create an "explicit conflict" with established public policy, the Court did not decide when this requirement would be met.⁸⁸ Because the Court only reiterated the principle that judicial review must be limited and that public policy must be explicit and well-established to justify setting aside a labor arbitration award, what type of violation of an appropriately formulated public policy would justify

⁷⁸ See *id.*

⁷⁹ See *id.* at 373, 126 L.R.R.M. at 3119.

⁸⁰ See *id.* at 374, 126 L.R.R.M. at 3119.

⁸¹ See *id.* at 371-72, 126 L.R.R.M. at 3117-18.

⁸² See *id.*; *W.R. Grace*, 461 U.S. at 764, 113 L.R.R.M. at 2644; *Enterprise Wheel*, 363 U.S. at 599.

⁸³ See *Misco*, 108 S. Ct. at 374, 126 L.R.R.M. at 3119.

⁸⁴ See *id.* at 373-74, 126 L.R.R.M. at 3119.

⁸⁵ See *W.R. Grace*, 461 U.S. at 766, 113 L.R.R.M. at 2645.

⁸⁶ *Misco*, 108 S. Ct. at 374, 126 L.R.R.M. at 3119.

⁸⁷ See *id.*; *W.R. Grace*, 461 U.S. at 766, 113 L.R.R.M. at 2645.

⁸⁸ See *Misco*, 108 S. Ct. at 374 n.12, 126 L.R.R.M. at 3120 n.12.

setting aside an award on public policy grounds remains to be decided.⁸⁹ Thus, the split in the circuits remains despite the fact that the *Misco* Court granted certiorari specifically to resolve this issue.⁹⁰

In summary, *Misco* upholds the supremacy of arbitration as a mechanism for resolving labor disputes. It reaffirms the limited nature of judicial review of labor arbitration awards. *Misco* clarifies the holding of *W.R. Grace* and emphasizes that setting aside awards as violative of public policy is only a narrow exception to the broad general rule. This view is necessary to prevent improper judicial meddling with arbitration awards. *Misco*, while properly decided, did not raise or address the issue of when an award may be set aside on public policy grounds.

II. UNFAIR LABOR PRACTICES

A. Employer Unfair Labor Practices

1. * *A Successor Employer's Obligation to Bargain: Fall River Dyeing & Finishing v. NLRB*¹

Section 8(a)(5) of the National Labor Relations Act provides that an employer's refusal to bargain collectively with the representatives of his employees constitutes an unfair labor practice.² Under the successorship doctrine, a new employer qualifying as a successor employer assumes its predecessor's obligation to bargain with a properly recognized or board-certified union that represented its

⁸⁹ See *id.* at 375, 126 L.R.R.M. at 3120 (Blackmun, J., concurring).

⁹⁰ See, e.g., *Iowa Elec. Light & Power v. I.B.E.W. Local 204*, 834 F.2d 1424, 127 L.R.R.M. 2049 (8th Cir. 1987) (setting aside award reinstating employee who violated nuclear safety rules was against public policy favoring strict observance of federally-mandated nuclear safety regulations).

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¹ 107 S. Ct. 2225, 125 L.R.R.M. 2441 (1987).

² National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982). Section 8(a)(5) provides:

(a) It shall be an unfair labor practice for an employer — . . . (5) to refuse to bargain collectively with the representatives of employees subject to the provisions of section 159(a) of this title. *Id.* Section 159(a) provides:

(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment . . .

29 U.S.C. § 159(a) (1982).

predecessor's employees.³ A new employer must qualify as a successor employer to justify the law's imposition of this duty to bargain.⁴ Successorship and the concomitant obligation to bargain exist where the new employer conducts essentially the same business as the previous employer and a majority of the new employer's workforce are former employees of the predecessor.⁵ The legal presumption underlying the successorship doctrine is that because the union previously represented a majority of the successor's employees under essentially the same working conditions, a majority of the successor's employees continue to support and are adequately represented by that same union.⁶ Accordingly, because a mere change in ownership, without substantial changes in the business or the composition of the workforce, does not defeat this presumption of the union's continued majority status, the successor employer assumes the duty to bargain with the union certified as the representative of its predecessor's employees.⁷

In the 1972 case of *NLRB v. Burns International Security Services, Inc.*, the United States Supreme Court first addressed the issue of whether a successor employer inherits the obligation to bargain with the union certified to represent the employees of its predecessor.⁸

³ *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225, 2235, 125 L.R.R.M. 2441, 2447 (1987); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 278, 281, 80 L.R.R.M. 2225, 2226, 2228 (1972); *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 463, 118 L.R.R.M. 2681, 2684 (9th Cir. 1985); *NLRB v. Hudson River Aggregates*, 639 F.2d 865, 869, 106 L.R.R.M. 2313, 2315 (2d Cir. 1981); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3, 92 L.R.R.M. 2001, 2003 (1st Cir. 1976), *cert. denied*, 429 U.S. 921, 93 L.R.R.M. 2570 (1976); *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1026-27, 73 L.R.R.M. 2020, 2020-21 (7th Cir. 1969); *NLRB v. Auto Ventshade, Inc.*, 276 F.2d 303, 304 (5th Cir. 1960).

⁴ *See, e.g., Fall River*, 107 S. Ct. at 2236, 125 L.R.R.M. at 2447; *Jeffries*, 752 F.2d at 463, 118 L.R.R.M. at 2684; *Kallmann v. NLRB*, 640 F.2d 1094, 1100, 107 L.R.R.M. 2011, 2015 (9th Cir. 1981).

⁵ *Fall River*, 107 S. Ct. at 2236, 2237, 125 L.R.R.M. at 2447, 2448; *Burns*, 406 U.S. at 281, 80 L.R.R.M. at 2228; *Jeffries*, 752 F.2d at 463-64, 118 L.R.R.M. at 2685; *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 627, 113 L.R.R.M. 3261, 3263 (9th Cir. 1983); *Kallmann*, 640 F.2d at 1100, 107 L.R.R.M. at 2015; *Band-Age*, 534 F.2d at 3, 92 L.R.R.M. at 2003; *Tom-A-Hawk*, 419 F.2d at 1026, 73 L.R.R.M. at 2020-21.

⁶ *Fall River*, 107 S. Ct. at 2233-34, 125 L.R.R.M. at 2445-46; *Jeffries*, 752 F.2d at 463, 118 L.R.R.M. at 2684; *Premium*, 709 F.2d at 627, 113 L.R.R.M. at 3263; *Band-Age*, 534 F.2d at 4, 92 L.R.R.M. at 2004.

⁷ *Fall River*, 107 S. Ct. at 2235, 125 L.R.R.M. at 2446-47; *Burns*, 406 U.S. at 279, 80 L.R.R.M. at 2227; *Jeffries*, 752 F.2d at 463, 118 L.R.R.M. at 2684; *Aircraft Magnesium*, 265 N.L.R.B. 1344, 1345 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984); *Premium*, 709 F.2d at 627, 113 L.R.R.M. at 3263; *Tom-A-Hawk*, 419 F.2d at 1027, 73 L.R.R.M. at 2021.

⁸ *Fall River*, 107 S. Ct. at 2232, 125 L.R.R.M. at 2444; *Burns*, 406 U.S. at 274, 80 L.R.R.M. at 2226. The first Supreme Court decision addressing the rights of a union in a successorship situation was *John Wiley & Sons, Inc. v. Livingston*, in which the Court held that under some

Prior to the Supreme Court's 1972 *Burns* decision, the courts of appeals in several circuits consistently held that a successor employer is bound by its predecessor's obligation to bargain with the certified representative of its employees because a mere change in ownership does not constitute such an unusual change as to affect Board certification.⁹ Signifying its approval of the rulings of these circuit courts, the Supreme Court in *Burns* held that a successor employer is obligated to bargain with the incumbent union where the bargaining unit remains unchanged and a recently certified bargaining agent represents a majority of the employees hired by the new employer.¹⁰

Although *Burns* clearly established a successor employer's duty to bargain, several issues remained unresolved after *Burns*.¹¹ First, because the *Burns* Court focused on the recent election and board certification of the union,¹² courts might reasonably have interpreted the *Burns* holding narrowly as limited only to situations where the union was recently certified before the transfer of ownership.¹³ Second, limiting its resolution to the specific facts in *Burns*, the *Burns* Court did not precisely delineate the circumstances which justify the imposition of an obligation to bargain upon a new employer.¹⁴ Guided by the *Burns* Court's focus on continuity of the bargaining unit and continuity of the workforce, however, the National Labor Relations Board (NLRB) developed a successorship analysis, which various courts accepted, to determine whether a new employer qualifies as a successor employer upon which a court may justifiably impose an obligation to bargain.¹⁵ Under this NLRB successorship analysis, a new employer is a successor employer only

circumstances a successor employer may be required to arbitrate under the predecessor's collective-bargaining agreement. 376 U.S. 543, 548, 55 L.R.R.M. 2769, 2772 (1964). The Supreme Court, however, first addressed the issue of a successor's obligation to bargain under § 8(a)(5) of the NLRA in *NLRB v. Burns*, 406 U.S. 272, 274, 80 L.R.R.M. at 2226 (1972).

⁹ *Burns*, 406 U.S. at 279, 80 L.R.R.M. at 2227; *Jeffries*, 752 F.2d at 463, 118 L.R.R.M. at 2684; *Aircraft*, 265 N.L.R.B. at 1345; *Premium*, 709 F.2d at 627, 113 L.R.R.M. at 3263; *Tom-A-Hawk*, 419 F.2d at 1027, 73 L.R.R.M. at 2021.

¹⁰ *Burns*, 406 U.S. at 278-79, 80 L.R.R.M. at 2227.

¹¹ See GORMAN, LABOR LAW 125-31 (1976).

¹² *Burns*, 406 U.S. at 278-79, 80 L.R.R.M. at 2227.

¹³ See *Fall River*, 107 S. Ct. at 2232-33, 125 L.R.R.M. at 2445; *Band-Age*, 534 F.2d at 4, 92 L.R.R.M. at 2004.

¹⁴ See *Burns*, 406 U.S. at 274, 281, 80 L.R.R.M. at 2226, 2227; see also GORMAN, *supra* note 11, at 125.

¹⁵ See, e.g., *Aircraft*, 265 N.L.R.B. at 1345; *Premium Foods, Inc.*, 260 N.L.R.B. 708, 714 (1982), *enforced*, 709 F.2d 623, 113 L.R.R.M. 3261 (9th Cir. 1983).

where "substantial continuity" exists between the new company and the predecessor's operations and a majority of the successor's employees worked for the predecessor employer.¹⁶

Third, the *Burns* Court did not address the issue of when the obligation to bargain matures.¹⁷ The *Burns* Court preserved the successor employer's freedom to set unilaterally the initial terms upon which to hire the predecessor's employees by holding that the successor's obligation to bargain with the union did not mature until it had selected its workforce.¹⁸ As the Court indicated, the obligation to bargain depended upon the composition of the workforce and arose only because a majority of the successor's workforce were former employees of the predecessor.¹⁹ The *Burns* Court indicated that the exact point in time at which a successor employer's obligation to bargain matures depends upon the particular circumstances of each situation. The Court, however, did not offer any guidelines for identifying the date upon which to examine the composition of the workforce to determine if the new employer possesses an obligation to bargain with the incumbent union.²⁰ After *Burns*, the NLRB developed the "substantial and representative complement" rule for identifying the date upon which the Board should examine the composition of the successor's workforce.²¹ Ad-

¹⁶ *Jeffries*, 752 F.2d at 463, 118 L.R.R.M. at 2685 (9th Cir. 1985); *Indianapolis Mack Sales & Serv., Inc.*, 272 N.L.R.B. 690, 693 (1984), *enforcement denied on other grounds*, 802 F.2d 280, 123 L.R.R.M. 2543 (7th Cir. 1986); *Aircraft*, 265 N.L.R.B. at 1345; *Premium*, 260 N.L.R.B. at 714; *NLRB v. Hudson River Aggregates*, 639 F.2d 865, 869, 106 L.R.R.M. 2313, 2315-16 (2d Cir. 1981); *Kallmann v. NLRB*, 640 F.2d 1094, 1100, 107 L.R.R.M. 2011, 2015 (9th Cir. 1981).

¹⁷ *Fall River*, 107 S. Ct. at 2237, 125 L.R.R.M. at 2449; *see GORMAN, supra* note 11, at 129.

¹⁸ *Burns*, 406 U.S. at 294-95, 80 L.R.R.M. at 2233-34.

¹⁹ *Id.* at 278-79, 80 L.R.R.M. at 2227.

²⁰ *Id.* at 294-95, 80 L.R.R.M. at 2233-34.

²¹ *Jeffries*, 752 F.2d at 464, 118 L.R.R.M. at 2685; *Indianapolis*, 272 N.L.R.B. at 694; *Premium*, 709 F.2d at 628, 113 L.R.R.M. at 3264 (9th Cir. 1983). Pursuant to the Board's rule, the appropriate time at which to examine a successor's workforce to determine whether the successor possesses a duty to bargain is when the successor has achieved a substantial and representative complement of workers on the job. *See, e.g., Jeffries*, 752 F.2d at 464, 118 L.R.R.M. at 2685; *Premium*, 709 F.2d at 628, 113 L.R.R.M. at 3264. To determine whether the employer has hired a substantial and representative complement of workers upon any specified date, the Board has articulated several factors for consideration, including whether the employer has substantially filled the job classifications for the operation, whether the operation has begun normal production, the size of the complement, the time expected to elapse before a larger complement of workers begin work, and the relative certainty of the employer's expansion. *Jeffries*, 752 F.2d at 464, 118 L.R.R.M. at 2685; *Premium*, 709 F.2d at 628, 113 L.R.R.M. at 3264. After identifying the date upon which a successor employer has achieved a substantial and representative complement of workers by reference to these

ditionally, in fixing the date upon which to examine a successor's workforce, the Board requires not only the presence of a substantial and representative complement of workers, but also a demand for bargaining by the union.²² Consequently, the Board has adopted a "continuing demand" rule under which a premature bargaining demand, which is a union demand prior to the attainment of a substantial and representative complement, remains in force until the date when the employer attains the substantial and representative complement.²³

During the Survey year, the United States Supreme Court in *Fall River Dyeing and Finishing Corp. v. NLRB* held that a successor's obligation to bargain is not limited to a situation where the union was only recently certified, but applies in all situations.²⁴ The Court reasoned that because a certified union is entitled to a one-year conclusive presumption of majority status following certification and a rebuttable presumption thereafter, a successor's bargaining obligation does not depend upon recent certification.²⁵ The Court ruled that, provided the new employer is in fact a successor employer and the majority of its workforce were employees of its predecessor, the new employer possesses an obligation to bargain with the incumbent union that is presumed to have majority status.²⁶ Additionally, the Court in *Fall River* approved three rules adopted by the NLRB to guide successorship analysis.²⁷ The Court approved the Board's "substantial continuity" approach to determine whether a new employer qualifies as a successor and, applying the analysis to the facts before it, held that *Fall River Dyeing and Finishing Corporation* (*Fall River Corporation*) was a successor employer.²⁸ Furthermore, the Court in *Fall River* held that the Board's "substantial and representative complement" rule, designed to identify the date upon which a successor's obligation to bargain with an incumbent union matures, is reasonable in the successorship con-

factors, the Board thereafter examines the successor's workforce upon that date to decide whether the successor is obligated to bargain with the incumbent union. *Jeffries*, 752 F.2d at 464, 118 L.R.R.M. at 2685.

²² *Indianapolis*, 272 N.L.R.B. at 694.

²³ *Fall River*, 107 S. Ct. at 2241, 125 L.R.R.M. at 2451; *Spruce-Up Corp.*, 209 N.L.R.B. 194, 197 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975).

²⁴ *Fall River*, 107 S. Ct. at 2235, 125 L.R.R.M. at 2446.

²⁵ *Id.* at 2233, 125 L.R.R.M. at 2445.

²⁶ *Id.* at 2235, 125 L.R.R.M. at 2447.

²⁷ *Id.*

²⁸ *Id.* at 2236, 125 L.R.R.M. at 2447.

text.²⁹ Applying this "substantial and representative complement" rule to the facts, the Court identified the date upon which to examine the successor's workforce and held that because a majority of the workforce at that moment were former employees of the predecessor, Fall River Corporation's obligation to bargain arose at that point in time.³⁰ Finally, the *Fall River* Court ruled that the Board's "continuing demand" rule, which establishes that a union's premature bargaining demand continues in force until the moment when the employer attains a substantial and representative complement, is reasonable in the successorship situation.³¹

Fall River Dyeing and Finishing Corp. v. NLRB involved an ownership transfer of a textile dyeing and finishing plant in Fall River, Massachusetts.³² For thirty years prior to 1982, the Sterlingwale company operated the textile dyeing and finishing plant which engaged in both commission dyeing and converting dyeing.³³ Severe adverse economic conditions and foreign competition in the late 1970s forced the Sterlingwale company to reduce its workforce.³⁴ Sterlingwale's economic situation steadily declined until finally, in February 1982, the company laid off all of its production employees, retaining only a skeleton crew to complete its remaining orders and to maintain the building and machinery.³⁵ Sterlingwale finally went out of business in the late summer of 1982 after which Sterlingwale made an assignment for the benefit of its creditors and hired a professional liquidator to dispose of its remaining assets.³⁶

During the months following the February 1982 lay-off, a former employee of Sterlingwale and the president of one of Sterlingwale's major customers formed the Fall River Dyeing and Finishing Corporation.³⁷ The promoters of Fall River Corporation intended to engage exclusively in the commission dyeing business and to benefit from the availability of Sterlingwale's assets and workforce.³⁸ Accordingly, Fall River Corporation acquired Sterlingwale's property and equipment and purchased Sterlingwale's remaining inven-

²⁹ *Id.* at 2240, 125 L.R.R.M. at 2451.

³⁰ *Id.*

³¹ *Id.* at 2241, 125 L.R.R.M. at 2451.

³² *Id.* at 2230, 125 L.R.R.M. at 2443.

³³ *Id.* at 2229, 125 L.R.R.M. at 2442.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 2230, 125 L.R.R.M. at 2443.

³⁷ *Id.*

³⁸ *Id.*

tory at the liquidator's auction.³⁹ Fall River Corporation began operating out of Sterlingwale's former plant in September 1982 and advertised in a local newspaper for workers and supervisors to fill its workforce.⁴⁰ Initially, Fall River Corporation planned to hire one full shift of workers, fifty-five to sixty employees, and to expand to two shifts if business were successful.⁴¹ Fall River Corporation first hired twelve supervisors who assisted in the hiring decisions for the production employees.⁴² Eight of these twelve supervisors were former supervisors of Sterlingwale and three were former Sterlingwale production employees.⁴³ During the hiring process, Fall River Corporation entertained recommendations from these supervisors and considered a prospective employee's former employment with Sterlingwale in its hiring decision.⁴⁴

Fall River Corporation's workforce steadily expanded. By November 1982 the company had filled a complete range of job classifications, had started production operations and was processing customer orders.⁴⁵ In mid-January 1983, the company achieved its initial hiring goal of one shift of workers consisting of fifty-five workers, thirty-six of whom were former employees of Sterlingwale.⁴⁶ Fall River Corporation's workforce reached two full shifts by mid-April at which point, for the first time, former Sterlingwale employees constituted a minority of the workforce, 52 or 53 out of 107 employees.⁴⁷

The United Textile Workers of America, AFL-CIO, Local 292 (Union), represented Sterlingwale's production and maintenance employees for practically thirty years.⁴⁸ In 1978 the Union negotiated the last collective-bargaining agreement before Sterlingwale's decline.⁴⁹ Although this collective-bargaining agreement was due to expire in 1981, appreciating the financial difficulties of Sterlingwale, the Union agreed to amend the 1978 agreement to extend its expiration date until April 1, 1982 without any wage increase and

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 2231, 125 L.R.R.M. at 2443.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 2229, 125 L.R.R.M. at 2442.

⁴⁹ *Id.*

with a commitment to improving productivity.⁵⁰ Nevertheless, the collective-bargaining agreement ultimately expired and Sterlingwale went out of business in the late summer of 1982.⁵¹

After Fall River Corporation began operations, the Union demanded in a letter dated October 19 that Fall River Corporation recognize it as the bargaining representative of its employees and begin bargaining.⁵² At this point in time, eighteen persons out of a twenty-one person workforce were former employees of Sterlingwale.⁵³ Fall River Corporation, however, refused the request.⁵⁴ Consequently, the Union filed an unfair labor practice claim with the National Labor Relations Board on November 1, 1982. The Union alleged that Fall River Corporation violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by its refusal to bargain.⁵⁵ The administrative law judge hearing the case decided that Fall River Corporation was a successor employer possessing a duty to bargain.⁵⁶ The judge further decided that Fall River Corporation's obligation to bargain matured in mid-January when it attained a substantial and representative complement of workers because former Sterlingwale employees then constituted a majority of the successor's workforce and the Union's October bargaining demand remained effective until this date.⁵⁷ The Board affirmed the administrative law judge's ruling,⁵⁸ and the Court of Appeals for the First Circuit enforced the Board's order, finding the Board's determination reasonable.⁵⁹ The United States Supreme Court granted certiorari because of its interest in the successorship rules developed by the Board and the importance of the successorship issue in labor law.⁶⁰

Broadening its ruling in *Burns* that a successor employer is obligated to bargain with the union representing the predecessor's employees, the Supreme Court in *Fall River* held that a successor's

⁵⁰ *Id.* at 2229-30, 125 L.R.R.M. at 2442.

⁵¹ *Id.* at 2230, 125 L.R.R.M. at 2443.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 2231, 125 L.R.R.M. at 2444.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 272 N.L.R.B. 839, 840 (1984).

⁵⁹ *NLRB v. Fall River Dyeing & Finishing Corp.*, 775 F.2d 425, 430-31, 120 L.R.R.M. 2825, 2829 (1st Cir. 1985).

⁶⁰ *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. at 2232, 125 L.R.R.M. at 2444.

obligation to bargain is not limited to situations where the union representing the predecessor's employees received certification only shortly before the transfer.⁶¹ Rather, the Court held that a certified union is entitled to a one-year conclusive presumption of majority status following certification and a rebuttable presumption of majority status thereafter.⁶² Therefore, the Court held, a new employer has an obligation to bargain with that union provided the new employer is in fact a successor and a majority of its workforce were employees of its predecessor.⁶³ The Court reasoned that a mere transfer of ownership does not affect the force of the Board's certification within the normal operative period, nor defeat the legal presumptions of majority status following certification.⁶⁴ Although these presumptions do not rest upon an absolute certainty that a union's majority status continues after certification, the Court stated that the National Labor Relations Act's overriding policy of industrial peace supports these legal presumptions.⁶⁵ As the Court indicated, these presumptions further industrial peace by enabling a union to establish stable bargaining relationships with employers through which to pursue its members' goals.⁶⁶ The presumptions, the Court observed, remove a union's fears that it will lose majority support unless its bargaining efforts produce immediate results and prevent employers from attempting to avoid and delay bargaining to undermine a union's support.⁶⁷

The Court stated that the policy and rationale underlying these presumptions of majority status following certification particularly apply in the successorship situation.⁶⁸ During a transfer of ownership, the Court noted, a union is particularly vulnerable because it does not possess a bargaining relationship with the new employer and is uncertain as to the new employer's plans and the existence of an obligation to bargain.⁶⁹ The Court stated that a presumption of majority status during this transition period is necessary to assist the union in protecting its members' rights and establishing a relationship with the new employer.⁷⁰ Furthermore, without a con-

⁶¹ *Id.* at 2235, 125 L.R.R.M. at 2446.

⁶² *Id.*

⁶³ *Id.* at 2233-35, 125 L.R.R.M. at 2445-47.

⁶⁴ *Id.* at 2232-33, 125 L.R.R.M. at 2445.

⁶⁵ *Id.* at 2233, 125 L.R.R.M. at 2445.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 2233, 125 L.R.R.M. at 2446.

⁶⁹ *Id.* at 2233-34, 125 L.R.R.M. at 2446.

⁷⁰ *Id.* at 2234, 125 L.R.R.M. at 2446.

tinuing presumption of majority status, the Court found that a transition between employers may undermine employee confidence in and support for a union.⁷¹ The Court reasoned that employees may perceive their union choice as controlled by the vagaries of a company's transformation.⁷² During the initial period of employment for the successor, the Court noted, the employees may avoid supporting their former union because they fear losing their new jobs or blame the union for their employment problems caused by the transition.⁷³ As the Court stated, the presumptions prevent an employer from using a successor enterprise either to negate an existing labor contract or to encourage the employees' aversion to the union and to eliminate the union's presence.⁷⁴ Accordingly, the Court ruled that a successor employer's obligation to bargain is not limited to situations involving recent certification before the transition.⁷⁵ Rather, the obligation to bargain with the incumbent union arises where an employer qualifies as a successor and the employees of the predecessor comprise a majority of its workforce.⁷⁶

Although the Court expansively construed its *Burns* ruling and established a successor's obligation to bargain, the *Fall River* Court also preserved some freedom for new employers to rearrange their new businesses independently.⁷⁷ As the Court previously stated in *Burns*, new employers are usually free to establish the employment terms upon which to hire the predecessor's employees and are not obligated to hire these employees provided they do not discriminate.⁷⁸ Additionally, as the Court held in *Burns*, a successor is not bound by the substantive provisions of an existing collective-bargaining agreement.⁷⁹ Accordingly, the *Fall River* Court maintained some freedom for new employers.⁸⁰

After establishing that a successor's obligation to bargain is not limited to situations where the union is only recently certified, the Court examined whether Fall River Corporation qualified as a suc-

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 2235, 125 L.R.R.M. at 2446.

⁷⁶ *Id.*

⁷⁷ *Id.* at 2234, 125 L.R.R.M. at 2446 (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182, 84 L.R.R.M. 2839, 2844 (1973); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549, 55 L.R.R.M. 2769, 2772 (1964)).

⁷⁸ *Id.* (quoting *NLRB v. Burns*, 406 U.S. at 294, 80 L.R.R.M. at 2233).

⁷⁹ *Id.*; *Burns*, 406 U.S. at 284, 80 L.R.R.M. at 2229.

⁸⁰ *Id.* at 2234, 125 L.R.R.M. at 2446.

cessor.⁸¹ The Supreme Court approved of the Board's "substantial continuity" analysis for determining whether a new employer qualified as a successor employer.⁸² Applying this fact oriented inquiry which considers the totality of the circumstances and focuses upon the existence of substantial continuity between the business enterprises, the Supreme Court ruled that Fall River Corporation qualified as a successor of Sterlingwale.⁸³ The Court indicated that the analysis involves a number of factors, including essential similarity between the two businesses, maintenance of employees in the same job positions under similar working conditions and continuation of the same mode of production, the same products and a similar body of customers.⁸⁴ The analysis emphasizes the employees' perspective, the Court stated, focusing upon whether the employees retained by the successor view their jobs as basically unaltered.⁸⁵ The Court noted that if employees perceive no change in their situation, but do not receive continued representation by their chosen union, employee dissatisfaction may instigate labor unrest and disrupt industrial peace.⁸⁶

Applying this analysis to the facts of *Fall River*, the Court ruled that substantial evidence supported the Board's determination that Fall River Corporation was a successor employer because substantial continuity existed between the business of Sterlingwale and the operations of Fall River Corporation.⁸⁷ The Court found that Fall River Corporation acquired Sterlingwale's property, equipment, and inventory, and that Fall River Corporation continued the same product line and maintained the same production process despite its exclusive involvement in commission dyeing.⁸⁸ From the employees' perspective, the Court noted, the nature of their jobs remained unchanged because they retained the same job classifications, worked on the same machines, and received direction from many of the same supervisors.⁸⁹ Significantly, the Court stated, Fall River Corporation intended to exploit the availability of its prede-

⁸¹ *Id.* at 2236, 125 L.R.R.M. at 2447.

⁸² *Id.*

⁸³ *Id.* at 2236-37, 125 L.R.R.M. at 2447-48.

⁸⁴ *Id.* at 2236, 125 L.R.R.M. at 2447.

⁸⁵ *Id.* (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. at 184, 84 L.R.R.M. at 2845; *Jeffries*, 752 F.2d at 464, 118 L.R.R.M. at 2685).

⁸⁶ *Id.*

⁸⁷ *Id.* at 2236, 125 L.R.R.M. at 2448.

⁸⁸ *Id.*

⁸⁹ *Id.*

cessor's workforce in establishing the new enterprise.⁹⁰ In applying this totality of circumstances analysis, the Court ruled that the seven-month hiatus between the expiration of Sterlingwale and the start-up of Fall River Corporation did not undermine the Board's determination of substantial continuity.⁹¹ Because a hiatus is only one factor in the analysis and because the hiatus in this situation constituted a normal start-up period and its duration was uncertain, the Court determined that the other factors suggesting substantial continuity required a conclusion of successorship because additional indicia of discontinuity did not exist.⁹²

After establishing Fall River Corporation as a successor, the Court addressed the issue of whether Fall River Corporation, as a successor, possessed an obligation to bargain with the incumbent Union and when such an obligation arose.⁹³ The Court held that the Board's "substantial and representative complement" rule for determining the moment at which a successor's obligation to bargain matures is reasonable in the successorship situation.⁹⁴ The Court stated that the composition of the successor's workforce was the dispositive factor triggering the bargaining obligation.⁹⁵ The Court noted that in the present case and similar situations involving a start-up, during which the new employer gradually builds its operations and workforce, the issue of when a successor employer's obligation matures necessarily requires determination.⁹⁶ The Court noted that because the composition of the successor's workforce may depend upon the moment at which examination of the workforce takes place, the Board developed the "substantial and representative complement" rule to identify the appropriate date to conduct the determination.⁹⁷

Pursuant to the "substantial and representative complement" rule, the Court observed, the appropriate moment to conduct a majority representation examination and to impose the bargaining duty is when the new employer attains a substantial and representative complement of workers on the job.⁹⁸ Fulfillment of designated

⁹⁰ *Id.*

⁹¹ *Id.* at 2237, 125 L.R.R.M. at 2448.

⁹² *Id.*

⁹³ *Id.* at 2237-39, 125 L.R.R.M. at 2448-50.

⁹⁴ *Id.* at 2240, 125 L.R.R.M. at 2251.

⁹⁵ *Id.* at 2237, 125 L.R.R.M. at 2448-49.

⁹⁶ *Id.* at 2238, 125 L.R.R.M. at 2449.

⁹⁷ *Id.*

⁹⁸ *Id.* at 2238-39, 125 L.R.R.M. at 2449-50.

job classifications, establishment of normal production, the size of the complement, the length of time expected to pass before the employment of a larger complement and the relative certainty of the employer's expansion plans are among the factors the Board considers in determining whether a substantial and representative complement is on the job.⁹⁹ In upholding the Board's rule, the Court rejected Fall River Corporation's argument that the "substantial and representative complement" rule violates the representation rights of employees who did not work for the predecessor and places an unreasonable burden on the employer.¹⁰⁰ Rather, the Court stated that the rule appropriately balanced the goal of maximum employee participation in the selection of a bargaining representative against the objective of assuring employee representation as quickly as possible.¹⁰¹ The Court also held that the "substantial and representative complement" rule did not unreasonably burden a new employer because the successor occupies the best position to apply the criteria outlined by the Court.¹⁰² According to the Court, the employer is the appropriate person to know when all the job classifications are substantially filled, when normal production begins and when a majority of its expected workforce are employed.¹⁰³

In addition to concluding that the "substantial and representative complement" rule is reasonable in the successorship context, the Court ruled that substantial evidence supported the Board's application of the rule to the facts and its conclusion that mid-January was the period during which the Fall River Corporation achieved a substantial and representative complement.¹⁰⁴ By mid-January Fall River Corporation had attained its initial hiring goal of one full shift, had hired employees in a full range of job classifications and employed a majority of its expected total workforce.¹⁰⁵ Because a majority of this full shift worked for the predecessor, Sterlingwale, the Court agreed with the Board that Fall River Corporation's obligation to bargain with the incumbent Union, AFL-CIO Local 292, arose at this point.¹⁰⁶

⁹⁹ *Id.* at 2239, 125 L.R.R.M. at 2449-50.

¹⁰⁰ *Id.* at 2239, 125 L.R.R.M. at 2450.

¹⁰¹ *Id.* at 2238, 125 L.R.R.M. at 2449.

¹⁰² *Id.* at 2239-40, 125 L.R.R.M. at 2450.

¹⁰³ *Id.* at 2240, 125 L.R.R.M. at 2450.

¹⁰⁴ *Id.* at 2240, 125 L.R.R.M. at 2451.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Addressing the additional requirement that the union must issue a bargaining demand to trigger the employer's obligation, the Court upheld the Board's "continuing demand" rule under which a premature demand retains its force until the successor attains a substantial and representative complement.¹⁰⁷ The Court stated that the rule is reasonable and practical considering the union's position in the successorship situation and the minimal burden which the rule places upon the employer.¹⁰⁸ As the Court noted, because an established relationship does not exist between the union and the employer, the union very likely will issue a premature bargaining demand.¹⁰⁹ The Court reasoned that requiring the union repeatedly to renew its bargaining demand despite its naivete as to the employer's plans and its inability to gauge when a representative complement exists is nonsensical.¹¹⁰ The Court stated, in contrast, that requiring the employer to view a premature demand as a continuing demand is reasonable because once the employer attains a substantial and representative complement, the employer need only determine whether the union has issued a demand.¹¹¹ Therefore, pursuant to the "continuing demand" rule, the Court held that the union's demand of October 19 continued in force until mid-January when Fall River Corporation attained a substantial and representative complement and its obligation to bargain consequently matured.¹¹²

Justice Powell, in a dissenting opinion¹¹³ in *Fall River*, disagreed with the majority's application of the successorship analysis and the Board's "substantial and representative complement" rule.¹¹⁴ The dissent agreed with the majority that a conclusion of successorship requires a finding of substantial continuity between the two enterprises.¹¹⁵ The dissent disagreed, however, with the Court's holding that the Fall River Corporation qualified as a successor employer because in the dissent's view the evidence did not establish substantial continuity between the Fall River Corporation and Sterlingwale.¹¹⁶

¹⁰⁷ *Id.* at 2241, 125 L.R.R.M. at 2451.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ The Chief Justice and Justice O'Connor joined Justice Powell's dissent.

¹¹⁴ *Fall River*, 107 S. Ct. at 2242, 125 L.R.R.M. at 2452 (Powell, J., dissenting).

¹¹⁵ *Id.* at 2243, 125 L.R.R.M. at 2453 (Powell, J., dissenting).

¹¹⁶ *Id.*

According to the dissent, the Court ignored the overwhelming evidence of discontinuity including evidence that the two businesses were completely separate entities, that no contractual or other business relationship existed between the two enterprises, that a seven-month hiatus disrupted business operations, and that Fall River Corporation purchased Sterlingwale's inventory on the open market, and the purchases involved only tangible assets, not Sterlingwale's goodwill or trade name.¹¹⁷ Viewed from the employees' perspective, the dissent added, the evidence also revealed that the employees could not reasonably perceive their new jobs as simply continuations of their Sterlingwale positions.¹¹⁸ These facts persuasively indicated, the dissent stated, that the Board's finding of substantial continuity was incorrect.¹¹⁹ Consequently, the dissent concluded that the majority misapplied the successorship doctrine because of the break in continuity between the enterprises and because neither the employer nor the employees could have anticipated such an application.¹²⁰

The dissent also disagreed with the Court's application of the Board's "substantial and representative complement" rule and its conclusion that mid-January was the appropriate date upon which to measure the composition of the successor's workforce.¹²¹ The dissent noted that the "substantial and representative complement" analysis performs a necessary function when future expansion of the successor's workforce is speculative or hiring is sporadic.¹²² The dissent indicated, however, that the "substantial and representative complement" test merely estimates the percentage of employees from the predecessor who will eventually work for the new employer and involves obvious risks if the complement examined on a particular date contains a disproportionate number of workers.¹²³ As the dissent stated, the full workforce may not receive union representation that a majority favors or may receive representation that a majority does not support.¹²⁴ The dissent stressed that in prior decisions, the "substantial and representative complement" analysis considered the time expected to pass before a larger com-

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2244, 125 L.R.R.M. at 2453 (Powell, J., dissenting).

¹¹⁹ *Id.* at 2243, 125 L.R.R.M. at 2453 (Powell, J., dissenting).

¹²⁰ *Id.* at 2244, 125 L.R.R.M. at 2454 (Powell, J., dissenting).

¹²¹ *Id.* at 2245, 125 L.R.R.M. at 2454 (Powell, J., dissenting).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

plement began work and the definiteness of the expected expansion.¹²⁵ Consequently, the dissent argued that in *Fall River* and similar situations where the expected expansion was imminent and definite, the Board should conduct the determination upon the successor's attainment of a full complement.¹²⁶ The dissent rejected the majority's application of the "substantial and representative complement" rule in *Fall River* as unfair both to the employer who could not reasonably have identified mid-January as the period during which its obligation to bargain arose and to most of Fall River Corporation's employees who did not receive the opportunity to choose their union.¹²⁷ According to the dissent, the Court's application of the "substantial and representative complement" rule in *Fall River* overprotects the goal of early employee representation while sacrificing maximum employee participation in union selection.¹²⁸

Although the Supreme Court's decision in *Fall River* does not dramatically alter existing law, the Court clarified the appropriate analysis to determine whether a new employer possesses an obligation to bargain with the incumbent union and when such a duty arises. Under the *Fall River* decision, application of the successorship doctrine involves a two part analysis. First, the new employer must qualify as a successor under the "substantial continuity" test established by the Board and approved by the *Fall River* Court.¹²⁹ After identifying the employer as a successor, the analysis focuses upon the composition of the successor's workforce to discover whether imposition of a bargaining obligation is justified.¹³⁰ The appropriate date to examine the composition of the workforce is the date upon which the employer attains a substantial and representative complement of workers.¹³¹ The successor's obligation to bargain with the incumbent union arises if upon that identified date, a majority of the successor's workforce are former employees of the predecessor.¹³²

The new employer substantially controls the applicability of the successorship doctrine.¹³³ In *Fall River* the Court protected a new

¹²⁵ *Id.* at 2245, 125 L.R.R.M. at 2454-55 (Powell, J., dissenting).

¹²⁶ *Id.* at 2245, 125 L.R.R.M. at 2454 (Powell, J., dissenting).

¹²⁷ *Id.* at 2246, 125 L.R.R.M. at 2455 (Powell, J., dissenting).

¹²⁸ *Id.*

¹²⁹ *Id.* at 2236, 125 L.R.R.M. at 2447-48.

¹³⁰ *Id.* at 2237, 125 L.R.R.M. at 2448-51.

¹³¹ *Id.* at 2238, 125 L.R.R.M. at 2449.

¹³² *Id.* at 2240, 125 L.R.R.M. at 2451.

¹³³ *Id.* at 2234, 125 L.R.R.M. at 2446.

employer's prerogative to arrange the new enterprise independently.¹³⁴ The new employer may thus resist imposition of the obligation to bargain by avoiding substantial continuity between the new and the old businesses.¹³⁵ Additionally, provided the employer does not discriminate against union employees, the employer may avoid inheriting its predecessor's obligation by filling its workforce with employees not previously employed by the predecessor.¹³⁶ Under the Court's decision, imposition of a duty to bargain requires a conscious decision by the new employer.¹³⁷ If the new employer decides to maintain substantially the same business and to hire a majority of its employees from the predecessor, and thus takes advantage of the predecessor's demise and the availability of a trained workforce, the new employer justifiably inherits the bargaining obligation of its predecessor.¹³⁸ Because of the continuity of the enterprise and the continuity of the workforce, both the employer and the employees can reasonably expect the employer to inherit the predecessor's obligation to bargain. Consequently, the new employer has the option of either avoiding or assuming the bargaining obligation of its predecessor.

Although a new employer can avoid qualification as a successor, where the employer continues substantially the same business and employs a majority of its predecessor's workforce, the employer cannot avoid the bargaining obligation simply because the union did not receive certification shortly before the transfer. The *Fall River* Court held that a successor's obligation to bargain is not limited to situations where the union was only recently certified before the transfer, but arises because the law presumes that a union possesses majority support where the new employer qualifies as a successor and the predecessor formerly employed a majority of the successor's workforce.¹³⁹ Yet, as the dissent indicates, the date of certification is not unimportant in determining the strength of the presumption of majority status.¹⁴⁰ As the dissent states, the more remote the certification, the weaker the presumption that the union retains majority support. Accordingly, because recent Board certification strengthens the legal presumptions underlying the succes-

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 2234-35, 125 L.R.R.M. at 2446.

¹³⁹ *Id.* at 2235, 125 L.R.R.M. at 2446-47.

¹⁴⁰ *See id.* at 2242 n.1, 125 L.R.R.M. at 2452 n.1.

sorship doctrine, the date of certification must factor into any determination of whether a successor is obligated to bargain with an incumbent union.

Furthermore, the Supreme Court's holding in *Fall River* places the burden of determining if and when its obligation to bargain arises upon the new employer.¹⁴¹ Under the Court's decision, a new employer must monitor its own workforce to identify the point at which it attains a substantial and representative complement of workers. The employer therefore is responsible for applying the various factors of the "substantial and representative complement" test.¹⁴² A substantial burden accompanies the responsibility which the employer thus assumes.¹⁴³ The employer risks violating Section 8(a)(5) of the NLRA if it refuses to bargain after it attains a representative complement of workers.¹⁴⁴ Additionally, by recognizing a union prior to the attainment of a substantial and representative complement, the employer may violate Section 8(a)(2) of the NLRA under which employer support for a labor organization constitutes an unfair labor practice.¹⁴⁵

Despite these substantial risks, however, the Court in *Fall River* concluded that the "substantial and representative complement" rule does not unreasonably burden an employer because the employer is in the best position to apply the criteria outlined by the Court.¹⁴⁶ The Court did not appreciate, however, the uncertainty of the factors analysis outlined for determining whether a substantial and representative complement exists. The analysis' uncertainty is illustrated by the dissent's argument that the court's application of the rule ignored two essential factors: the time expected to elapse before the employment of a larger complement of workers and the certainty of the employer's expected expansion plans.¹⁴⁷ Clearly, the "substantial and representative complement" rule is not as straightforward as the Court claimed.¹⁴⁸ If the Court cannot even agree on a proper application of the test, the Court cannot require an employer to apply the analysis without allowing the employer some flexibility in setting the date. Recognizing this problem, the Court

¹⁴¹ *Id.* at 2239, 125 L.R.R.M. at 2450.

¹⁴² *Id.* at 2239-40, 125 L.R.R.M. at 2450.

¹⁴³ *Id.* at 2239, 125 L.R.R.M. at 2450.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2239-40, 125 L.R.R.M. at 2450.

¹⁴⁷ *See id.* at 2245, 125 L.R.R.M. at 2454-55.

¹⁴⁸ *See id.* at 2239-40, 125 L.R.R.M. at 2450.

indicated that an employer is only expected to determine whether a substantial and representative complement is achieved with "tolerable certainty."¹⁴⁹ This language indicates that courts should allow employer's some flexibility in their selection of the date provided they make a good faith effort and the evidence does not indicate that the employer manipulated the date to avoid bargaining.

In conclusion, the Supreme Court decision of *Fall River* introduced some certainty into the law regarding a successor employer's obligation to bargain with the union of its predecessor's employees. First, the *Fall River* Court approved the Board's "substantial continuity" analysis to establish a new employer as a successor. Second, the Court accepted the Board's "substantial and representative complement" rule as reasonable for determining the date upon which a successor's obligation to bargain matures. Third, the court upheld the Board's "continuing demand" rule under which a premature bargaining demand by the incumbent union retains its force until the successor employer attains a substantial and representative complement of workers on the job. The *Fall River* decision also established that the new employer bears the burden of applying the "substantial and representative complement" analysis to determine if and when its obligation to bargain with the incumbent union matures. Because the analysis the Court outlined for discovering whether a representative complement exists involves substantial uncertainty, the burden placed upon the new employer is great. The new employer, however, occupies the best position for engaging in this analysis and therefore should shoulder the burden imposed.

B. *Union Unfair Labor Practices*

1. **Handbilling of Secondary Employers as "Signal Picketing"*: *Catalytic v. Monmouth & Ocean County Building Trades Council*¹

Section 8(b)(4)(ii) of the National Labor Relations Act (the "Act") provides that it is an unfair labor practice for a union to engage in "secondary boycotting."² A secondary boycott occurs

¹⁴⁹ *Id.* at 2240, 125 L.R.R.M. at 2450.

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¹ 829 F.2d 430, 126 L.R.R.M. 2425 (3d Cir. 1987).

² 29 U.S.C. § 158(b)(4)(ii) (1982). Section 8(b)(4)(ii) prohibits threats, coercion, and restraint of persons engaged in commerce to force or require them to cease doing business

where a union, through threats or coercion, persuades an employer with whom it has no dispute, the "secondary employer," to terminate its business relationship with the employer with whom the union has the dispute, the "primary employer."³ To insure that this statutory prohibition on secondary activity would not conflict with first

with any other person. The "publicity proviso" to section 8(b)(4)(ii), however, exempts certain informational activities. *Id.* Section 8(b)(4)(ii) provides in pertinent part:

[i]t shall be 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 . . . an object thereof is —

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . *Provided further*, That . . . 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 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 . . .

Id. (emphasis in original).

In 1959, Congress enacted section 8(b)(4)(ii) (the "Landrum Amendment") as an amendment to the Act to prevent coerced involvement of neutral employers in the labor disputes of others. See *NLRB v. Fruit & Vegetable Packers Local 760 ("Tree Fruits")*, 377 U.S. 58, 63-71, 55 L.R.R.M. 2961, 2964-67 (1964) for an exhaustive discussion of the amendment's legislative history.

³ A "primary employer" is the employer with whom the union has a labor dispute; a "secondary employer" is a neutral person or business who has no labor dispute with the union. *C. Comella, Inc. v. United Farm Workers Organizing Comm.*, 33 Ohio App. 2d 61, 72, 292 N.E.2d 647, 656, 82 L.R.R.M. 2503, 2508 (1972).

Secondary activity refers to union conduct directed against third parties who are not concerned in the union's dispute with the primary employer. *Pickens-Bond Constr. Co. v. United Bhd. of Carpenters & Joiners of Am., Local 690*, 586 F.2d 1234, 1239, 99 L.R.R.M. 3321, 3323 (8th Cir. 1978). The courts routinely interpret section 8(b)(4)(ii) as prohibiting union secondary activity, such as secondary boycotting and picketing. R. GORMAN, *BASIC TEXT OF LABOR LAW* 240 (1976).

A secondary boycott is one in which the union directs its activities toward neutral third parties that deal with the primary employer, such as secondary employers, to bring economic pressure upon the main disputant. See *id.*

Secondary picketing is a form of picketing in which pressure is put on one business establishment with which there is no dispute in order to induce the business to put pressure on the primary employer with which the union has a dispute. *BLACKS LAW DICTIONARY* 1213 (5th ed. 1979).

amendment rights,⁴ Congress included a "publicity proviso" that exempts from the section 8(b)(4)(ii) ban certain union conduct designed to inform the public of the union's dispute with the primary employer.⁵ Under the terms of the proviso, handbilling is protected union activity if it truthfully advises the public that the secondary employer distributes the primary employer's products and does not induce the neutral employees to engage in a sympathetic work stoppage.⁶

Courts agree that handbilling is permissible if it falls within the protection of the publicity proviso.⁷ Handbills satisfying the terms of the proviso, courts have concluded, must contain truthful information⁸ and must describe accurately the nature of the union's dispute with the primary employer and the relationship between the secondary and primary employers.⁹ Most importantly, the hand-

⁴ The legislative history reflects that Congress' concern that § 8(b)(4)(ii) not violate first amendment rights partially motivated the adoption of the publicity proviso. See *Tree Fruits*, 377 U.S. at 69, 55 L.R.R.M. at 2966; *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 798 F.2d 1016, 1021, 123 L.R.R.M. 2139, 2143-44 (7th Cir. 1986); GORMAN, *supra* note 3, at 261. Among other reasons, the legislature drafted the amendment to avoid the first amendment "problems" associated with the House Landrum-Griffin bill. See *Hospital & Serv. Employees Union, Local 399 v. NLRB ("Delta Airlines")*, 743 F.2d 1417, 1423 & n.3, 117 L.R.R.M. 2717, 2722 & n.3 (9th Cir. 1984).

⁵ See *supra* note 2 for the text of the publicity proviso.

⁶ *Id.*

⁷ See MORRIS, 2 THE DEVELOPING LABOR LAW 1111 (2d ed. 1983); Briggs & Mack, *Secondary Handbilling: The Need for a New Response*, 17 AKRON L. REV. 211, 211-12 (1983).

⁸ As per the language of the publicity proviso, the handbills must be truthful. See *Solien v. Carpenters Dist. Council*, 623 F. Supp. 597, 602-03, 122 L.R.R.M. 3088, 3093 (E.D. Mo. 1985); *Local No. P-9, United Food and Commercial Workers Union v. George A. Hormel & Co. ("Hormel")*, 281 N.L.R.B. No. 135, slip op. at 6, 123 L.R.R.M. 1225, 1226 (Sept. 30, 1986). The handbills also must be informational in nature. See *Honolulu Typographical Union No. 37 v. NLRB*, 401 F.2d 952, 957-58, 68 L.R.R.M. 3005, 3008 (D.C. Cir. 1968).

The secondary employer's status as a "producer" or "distributor" of the primary employer's products under section 8(b)(4)(ii) has been frequently litigated. See, e.g., *Boxhorn*, 798 F.2d at 1016, 123 L.R.R.M. at 2139; *Pet, Inc. v. NLRB*, 641 F.2d 545, 106 L.R.R.M. 2477 (8th Cir. 1981); *Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434, 61 L.R.R.M. 2364 (9th Cir.), *cert. denied*, 384 U.S. 1002, 62 L.R.R.M. 2392 (1966); *Hormel*, 281 N.L.R.B. No. 135, 123 L.R.R.M. 1225. The Supreme Court has addressed this issue in the context of secondary consumer picketing and handbilling. See *Tree Fruits*, 377 U.S. at 71-73, 55 L.R.R.M. at 2967; *NLRB v. Servette, Inc.*, 377 U.S. 46, 55-56, 55 L.R.R.M. 2957, 2960 (1964). For a discussion of these cases and consumer secondary handbilling generally, see *Annual Survey of Labor Law*, 23 B.C.L. REV. 166, 166-77 (1981); Briggs & Mack, *supra* note 7, at 211-28.

⁹ See, e.g., *Boxhorn*, 798 F.2d at 1019, 123 L.R.R.M. at 2142 (handbill must tell customers dispute is with an identified primary employer); *Delta Airlines*, 743 F.2d at 1422, 117 L.R.R.M. at 2721 (at the very least the handbills must advise the public of the nature of the primary dispute and the secondary employer's relationship to it); *Solien*, 623 F. Supp. at 604, 122 L.R.R.M. at 3094 ("If the handbill contains information unrelated to the primary dispute, the handbill falls outside the protection of the publicity proviso.").

bills cannot threaten or coerce the secondary employer¹⁰ or induce any of its employees to engage in a work stoppage.¹¹

The National Labor Relations Board and several Circuit Courts of Appeal have disagreed, however, on whether section 8(b)(4)(ii) bans all handbilling except that specifically protected by the publicity proviso.¹² The Supreme Court recently resolved this conflict in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, where the Court ruled that union handbilling directed against a neutral employer may be lawful even if the publicity proviso does not exempt such activity.¹³ The Court affirmed the Eleventh Circuit's interpretation of the publicity proviso as an interpretive, explanatory section, rather than as an exception to an "otherwise-all-encompassing prohibition on publicity."¹⁴ Therefore, the Court ruled, section 8(b)(4)(ii) only applies to situations involving nonpicketing communications directed at the secondary employer's customers and consequently does not ban handbilling ac-

¹⁰ *Boxhorn*, 798 F.2d at 1019, 123 L.R.R.M. at 2142 (handbill coercive where object was to put pressure on club); *Roywood Corp. v. Radio Broadcast Technicians Local Union No. 1264*, 290 F. Supp. 1008, 1021, 68 L.R.R.M. 2881, 2886 (S.D. Ala. 1968) (handbills, signs, pickets coercive where calculated to bring economic pressure on secondary employer); *Hornel*, 281 N.L.R.B. No. 135, slip op. at 5, 123 L.R.R.M. at 1226 (handbills coercive where purpose was to persuade secondary employees to cease doing business).

¹¹ The publicity proviso explicitly provides that protection shall not be afforded publicity that has "an effect of inducing any individual employed by any person other than the primary employer in the 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)(ii) (1982). See *supra* note 2 for the full text of the provision.

¹² *MORRIS*, *supra* note 7, Supp. at 372. Prior to the Supreme Court's resolution of this issue, the NLRB and the Eighth, Ninth, and D.C. Circuits held that section 8(b)(4)(ii) prohibits union handbilling directed against neutral employers unless the handbills fall specifically within the publicity proviso. See, e.g., *Delta Airlines*, 743 F.2d at 1422, 1425, 117 L.R.R.M. at 2721, 2723; *Pet*, 641 F.2d at 549, 106 L.R.R.M. at 2480; *Honolulu Typographical Union*, 401 F.2d at 957-58, 68 L.R.R.M. at 3008; *Great Western Broadcasting*, 356 F.2d at 436, 61 L.R.R.M. at 2366; *International Union of Operating Eng'rs, Local No. 139 v. Oak Constr., Inc.*, 226 N.L.R.B. 759, 760, 93 L.R.R.M. 1385, 1386 (1976). The Eleventh Circuit adopted a contrary view, and interpreted the secondary boycott provision as simply inapplicable to the "peaceful and orderly distribution of handbills." *Florida Gulf Coast Bldg. & Constr. Trades Council v. NLRB*, 796 F.2d 1328, 1346, 123 L.R.R.M. 2001, 2015 (11th Cir. 1986), *cert. granted sub nom. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 107 S. Ct. 3182, No. 86-1461, 126 Lab. Rel. Rep. (BNA) 66 (1987), *aff'd*, 56 U.S.L.W. 4328, 4332 (U.S. April 20, 1988). Under this minority view, union handbilling that targets the secondary employer can constitute protected activity, even if the leaflets do not fall within the publicity proviso exemption. *Id.*

¹³ 56 U.S.L.W. 4328, 4332 (U.S. April 20, 1988) (No. 86-1461).

¹⁴ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Trades Council*, 56 U.S.L.W. 4328, 4332 (U.S. April 20, 1988) (No. 86-1461).

tivity not covered thereunder.¹⁵ The Court thus expressly rejected the view adopted by the NLRB, and Eighth, Ninth, and D.C. Circuits that section 8(b)(4)(ii) prohibits all union handbilling directed against neutral employers unless the handbills fall specifically within the publicity proviso.¹⁶

In contrast to the uncertainty prior to the Supreme Court's ruling in *Edward J. DeBartolo Corp.* concerning the status of handbilling not within the publicity proviso, courts uniformly recognize that the publicity proviso's language expressly excludes picketing from its protection.¹⁷ In determining when handbilling is impermissible, many courts have broadly interpreted this picketing exemption to restrict the distribution of secondary handbills that either occurs simultaneously with unlawful picketing¹⁸ or that effectively constitutes a picket.¹⁹ Thus, although the legislative his-

¹⁵ *Id.* at 4332-33.

¹⁶ *Id.*

¹⁷ 29 U.S.C. § 158(b)(4)(ii) (1982). See *supra* note 2 for the text of the publicity proviso.

¹⁸ See, e.g., *Roywood Corp. v. Radio Broadcast Technicians Local Union No. 1264*, 290 F. Supp. 1008, 1021, 68 L.R.R.M. 2881, 2886-87 (S.D. Ala. 1968) (handbilling, picketing and distribution of unfair lists constituted unlawful picketing); *Cedar Rapids Bldg. & Constr. Trades Council v. Siebke-Hoyt & Co.*, 283 N.L.R.B. No. 175, slip op. at 2, 125 L.R.R.M. 1270, 1271 (1987); *Local 732, Int'l Bhd. of Teamsters v. Servair Maintenance, Inc.*, 229 N.L.R.B. 392, 393, 96 L.R.R.M. 1128, 1129 (1977); *International Union of Operating Eng'rs, Local 139 v. Oak Constr., Inc.*, 226 N.L.R.B. 759, 759, 93 L.R.R.M. 1385, 1385 (1976) (simultaneous picketing and handbilling unlawful; subsequent handbilling, unaccompanied by picketing, lawful because within publicity proviso); *Nashville Bldg. & Constr. Trades Council v. Caster-Knott Dry Goods Store*, 188 N.L.R.B. 470, 473, 76 L.R.R.M. 1293, 1295 (1971) (handbilling "part and parcel" of unlawful picketing); cf. *Local No. P-9, United Food and Commercial Workers Union v. George A. Hormel & Co.*, 281 N.L.R.B. No. 135, slip op. at 8 n.10, 123 L.R.R.M. 1227 n.10, 1226 (Sept. 30, 1986) (where court found handbilling unlawful when examined separately, it declined to consider whether the publicity proviso is inapplicable to handbilling because it occurred simultaneously with picketing).

¹⁹ See, e.g., *NLRB v. National Ass'n of Broadcast Employees and Technicians, Local 31*, 631 F.2d 944, 951, 104 L.R.R.M. 3121, 3126 (D.C. Cir. 1980) (handbill "extension" of unlawful picketing); *Nashville Bldg.*, 188 N.L.R.B. at 471, 76 L.R.R.M. at 1294 (consumer handbills unlawful where "in effect" constituted picketing); *Lawrence Typographical Union No. 570 v. Kansas Color Press, Inc.*, 169 N.L.R.B. 279, 284, 67 L.R.R.M. 1166, 1168, *enforced*, 402 F.2d 452, 69 L.R.R.M. 2591 (10th Cir. 1968) (handbilling unlawful where used as a mere substitute for conventional picketing to enforce union's demands); *Lumber & Sawmill Workers Local 2797 v. Stoltze Land & Lumber Co.*, 156 N.L.R.B. 388, 394, 61 L.R.R.M. 1046, 1048 (1965) (handbills "just as much picketing" as if union members carried a sign); *Service and Maintenance Employees Union, Local 399 v. William J. Burns Int'l Detective Agency, Inc.*, 136 N.L.R.B. 431, 437, 49 L.R.R.M. 1793, 1795 (1962) (marching, patrolling, and handbilling without placards or armbands not protected activity within publicity proviso); *International Bhd. of Teamsters v. Jack M. Lohman, ("Lohman")*, 132 N.L.R.B. 901, 905, 48 L.R.R.M. 1429, 1431 (1961) (handbilling not "tantamount" to unlawful picketing).

How the union members distributing the handbills characterize their activity is not dispositive. See, e.g., *NLRB v. Knitgoods Worker Local 155*, 403 F.2d 388, 390-91, 69

tory reflects Congress' clear intent that courts distinguish protected handbilling from unlawful picketing,²⁰ courts have held that this distinction may disappear in certain circumstances.²¹

Courts have been silent, however, regarding whether handbilling may constitute unlawful "signal picketing." "Signal picketing" refers to activity which, short of a true picket line, signals neutrals that the union desires their sympathetic action, particularly in the form of a work stoppage.²² Traditionally, courts have used this concept only to distinguish between permissible informational picketing and unlawful "signal picketing."²³ Although the courts have not applied the "signal picketing" notion to handbilling, the National Labor Relations Board (the "Board") has considered the issue in a single decision.²⁴ In 1973, the Board held in *Teamsters Local*

L.R.R.M. 2666, 2668 (2d Cir. 1968) ("It is settled, however, that the [NLRB] is not bound to accept such signs and statements at face value, but is entitled to consider the totality of the Union's conduct" to determine if it violates section 8(b)(4)(ii)); *Teamsters, Local Union No. 688 v. Levitz Furniture Co.*, 205 N.L.R.B. 1131, 1133, 84 L.R.R.M. 1103, 1105 (1973) (member's use of the phrase "informational picketing" to describe union activity did not transform "mere handbilling" into picketing).

²⁰ See, e.g., *Lohman*, 132 N.L.R.B. at 905, 48 L.R.R.M. at 1431 ("Apart from the language of the [publicity] proviso itself, the legislative history makes it abundantly clear that mere handbilling is not picketing but is embraced by the term 'publicity' which is protected by the proviso."); *Briggs & Mack*, *supra* note 7, at 213.

Senator John F. Kennedy, who presided over the conference committee that developed the Landrum Amendment, explained the content and purpose of the bill as follows:

We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.

105 CONG. REC. 17,898-99 (1959).

²¹ See *MORRIS*, *supra* note 7, at 1114-15. See also *supra* notes 19 and 20 for cases where courts found the distinction between handbilling and picketing non-existent.

²² *Levitz*, 205 N.L.R.B. at 1133, 84 L.R.R.M. at 1104-05. Courts commonly use the phrase "signal picketing" to refer to activity which, short of a true picket line, signals neutrals that the union desires their sympathetic action, usually a work stoppage. See *NLRB v. Local 825, A, B, C, D, Operating Engineers*, 659 F.2d 379, 387, 108 L.R.R.M. 2480, 2486 (3d Cir. 1981); *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 433 v. NLRB*, 598 F.2d 1154, 1158 n.6, 101 L.R.R.M. 2440, 2443 n.6 (9th Cir. 1979).

²³ See *NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 317 F.2d 193, 199-200, 53 L.R.R.M. 2116, 2120-21 (2d Cir. 1963); *Carpenters Local No. 2133 v. Cascade Employers Ass'n, Inc.*, 151 N.L.R.B. 1378, 1382, 58 L.R.R.M. 1617, 1618 (1965).

Signal picketing is prohibited insofar as it encourages other unions or union members not to perform work of the secondary employer or to put pressure on the secondary employer to influence the primary employer. See *MORRIS*, *supra* note 7, at 1104. Publicity picketing, however, is protected as long as it does not actually interfere with deliveries or communicate more than the limited information permitted under the publicity proviso. See *id.*

²⁴ *Levitz*, 205 N.L.R.B. at 1133, 84 L.R.R.M. at 1103.

Union No. 688 v. Levitz Furniture Co. of Missouri, Inc. that no "signal picketing" occurred where union members distributed leaflets at a primary employer's gates.²⁵ Other than this one Board decision, however, the concept of "signal picketing" has not been applied to restrict union handbilling.²⁶

During the *Survey* year, the United States Court of Appeals for the Third Circuit in *Catalytic, Inc. v. Monmouth & Ocean County Building Trades Council* ruled that union handbilling directed against a secondary employer to protest the primary employer's assignment of work to non-craft union members constituted "signal picketing" in violation of section 8(b)(4)(ii) of the Act.²⁷ The court held that, despite the absence of patrolling and picketing, handbilling does not fall within the protection of the publicity proviso where intentionally designed to signal the neutral secondary employer's employees to engage in a work stoppage.²⁸ Consequently, after *Catalytic*, employers may use the concept of "signal picketing" to restrict unions from conducting secondary handbilling.

The controversy in *Catalytic* concerned the operation of mobile cranes at the Oyster Creek nuclear generating plant that Jersey Central Power and Light Co. (Jersey Central) owned and GPU Nuclear, Inc. (GPU) operated.²⁹ The plaintiff, *Catalytic, Inc.* (*Catalytic*), a general contractor, provided engineering maintenance service to GPU.³⁰ *Catalytic* employed members of various craft unions as needed to fulfill the terms of its contract with GPU.³¹

²⁵ *Id.* at 1133, 84 L.R.R.M. at 1104-05. In *Levitz*, the Board held that no "signal picketing" occurred where union members distributed leaflets at a primary employer's premises, during which they at times walked back and forth across the driveway, flagged down cars, or placed themselves in a position that required cars entering the parking lot to stop. *Id.* at 1132, 84 L.R.R.M. at 1104-05. The Board stated that the union members did not do or say anything that would "signal" others that the union was picketing. *Id.* at 1133, 84 L.R.R.M. at 1104. Thus, the court held that the handbilling was a "subterfuge" for picketing. *Id.* at 1133, 84 L.R.R.M. at 1105.

²⁶ For examples of the court's traditional use of the "signal picketing" concept, see *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 433 v. NLRB*, 598 F.2d 1154, 1159-60, 101 L.R.R.M. 2440, 2444 (9th Cir. 1979) (Ninth Circuit held that unlawful "signal picketing" occurred where union posted officials near reserved gates of secondary employer); *Operating Engineers, Local 825 (R.H. Drukker & Co.)*, 659 F.2d at 387, 108 L.R.R.M. at 2486 (no "signal picketing" where union members patrolled without signs across street from neutral gate of employer; did not identify themselves as union members; did not speak to anyone; and did not prevent anyone from entering the job site).

²⁷ *Catalytic v. Monmouth & Ocean County Bldg. Trades Council*, 829 F.2d 430, 126 L.R.R.M. 2425 (3d Cir. 1987).

²⁸ *Id.* at 435-36, 126 L.R.R.M. at 2429-30.

²⁹ *Id.* at 431, 126 L.R.R.M. at 2426.

³⁰ *Id.*

³¹ *Id.*

Catalytic entered into a collective bargaining agreement with the Building Trades Council which represented various craft unions, including defendant, Local 825 Operating Engineers.³² The "General Presidents' Project Maintenance Agreement by Contract" (Presidents' Agreement) governed the collective bargaining agreement's terms.³³ In recognition of the conditions peculiar to work at a nuclear plant,³⁴ the contract contained no-strike, no-lock-out, and no-work stoppage clauses.³⁵

The agreement acknowledged that GPU could limit the scope of work assignments and that Jersey Central could choose to perform any part of the work necessary on the project.³⁶ The contract further stipulated that the parties would not allow jurisdictional disputes to interfere with the plant's efficient and continuous operations.³⁷ An addendum to the contract provided that the owner's specialty shops, such as crane services, would furnish support services to the craft unions.³⁸ The agreement also contained a grievance procedure establishing arbitration as a forum of last resort.³⁹ The presidents of the craft unions, including defendant, Local 825, signed the contract, and representatives of the various locals approved the addendum.⁴⁰

The dispute in *Catalytic* involved Jersey Central's use of its own employees to man mobile and stationary cranes at the job site.⁴¹ Local 825 insisted that its members be assigned to operate the mobile cranes.⁴² Local 825 picketed the job site over the issue, and, as a result, other craft union members engaged in a two-day work stoppage.⁴³

³² *Id.*

³³ *Id.*

³⁴ *Id.* The Presidents' Agreement recited that the parties "recognized there is an essential difference in the conditions required to perform this type of work." *Id.*

³⁵ *Id.* The Agreement stated that "the Contractor and Unions agree that, due to the particular work covered by the Agreement, there shall be no lock outs or strikes during the life of this Agreement, and provisions must be made to achieve this end." *Id.*

³⁶ *Id.* The contract provided that the "Unions and the Contractor understand that the owner may choose to perform . . . any part or parts of the work necessary on his project with due consideration given to achieving the highest maintenance standards and harmonious working conditions." *Id.*

³⁷ *Id.* According to the court, a "jurisdictional dispute" arises when two or more unions claim the right to a particular work assignment. *See id.* at 433, 126 L.R.R.M. at 2428.

³⁸ *Id.* at 431, 126 L.R.R.M. at 2426.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

Three weeks later, Local 825 distributed at the plant entrances handbills that protested Jersey Central's assignment of mobile crane work to non-craft union employees.⁴⁴ The leaflets charged that the owner, Jersey Central, and the operator, GPU, were being "unfair" to Local 825.⁴⁵ In smaller print, the flyer stated on the bottom of the page that the union's dispute was only with the plant's owner and operator.⁴⁶ The handbill further provided that "[w]e do not seek to enmesh any other employer in this dispute, and we do not seek to induce or encourage an individual employed by any person engaged in commerce to cease doing business with any other employer."⁴⁷ No member of Local 825 actually had worked at the nuclear plant since some time prior to the union's picketing and handbilling activities.⁴⁸

On Catalytic's application, the United States District Court for the District of New Jersey ordered the craft unions to cease a work stoppage which, the court concluded, Local 825's activities at the plant's gate had induced.⁴⁹ The injunction ordered Local 825 and the other unions to refrain from picketing, handbilling, engaging in work stoppages, or otherwise attempting to interfere with Catalytic's employees' ability to perform their duties.⁵⁰ The court directed the parties to arbitrate the dispute according to the grievance procedure set forth in the collective bargaining agreement.⁵¹

Only Local 825 appealed the district court's order.⁵² Local 825 argued that the collective bargaining agreement with Catalytic was not in effect during the period of union activity.⁵³ Even had the contract been valid, the union asserted, the district court abused its discretion in enjoining Local 825's activities because Local 825 itself had not joined in the work stoppage.⁵⁴ Finally, the union claimed that both the "publicity proviso" of the Act and the first amendment to the Constitution protected the handbilling.⁵⁵ In holding that the

⁴⁴ *Id.* at 431-32, 126 L.R.R.M. at 2426.

⁴⁵ *Id.* at 432, 126 L.R.R.M. at 2426.

⁴⁶ *Id.* The handbill stated "[o]ur dispute is only with GPU Nuclear and [Jersey Central]." *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 431, 126 L.R.R.M. at 2426-27.

⁵⁰ *Id.*

⁵¹ *Id.* at 432, 126 L.R.R.M. at 2426.

⁵² *Id.* at 432, 126 L.R.R.M. at 2427.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

union's handbilling violated the Act's secondary boycott provision,⁵⁶ the Third Circuit rejected each of the defendant's arguments and affirmed the district court's injunction.⁵⁷

The Third Circuit upheld the district court's finding that Local 825 and Catalytic were parties to a valid collective bargaining agreement in May and June 1986, during the union's activity.⁵⁸ The court held that although the contract technically expired on February 28, 1986, the agreement was valid in light of the parties' past practices.⁵⁹ Customarily, the court noted, the parties without regard for technical expiration dates considered the agreement to remain in effect while they negotiated a new extension.⁶⁰ The court therefore rejected Local 825's claim that the contract was invalid and held that the collective bargaining agreement was in effect during the period in which Local 825 picketed and handbilled.⁶¹

The court similarly rejected Local 825's claim that the district court abused its discretion in granting the injunction.⁶² The court relied on *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, in which the Supreme Court held that under section 301 of the Labor Management Relations Act, a federal court properly may enforce an agreement to arbitrate unresolved grievances and may enjoin a work stoppage in violation of a no-strike clause if the underlying

⁵⁶ *Id.* at 436, 126 L.R.R.M. at 2428.

⁵⁷ *Id.* at 437, 126 L.R.R.M. at 2430.

⁵⁸ *Id.* at 433, 126 L.R.R.M. at 2427.

⁵⁹ *Id.* at 432-33, 126 L.R.R.M. at 2427. The court relied on testimony provided by Catalytic's director of labor relations that an uninterrupted collective bargaining relationship had existed since March 1983, notwithstanding that several craft unions had failed to sign extensions at various times during the three year period. *Id.* at 432, 126 L.R.R.M. at 2427. The director explained that customarily negotiations often commenced only after the technical expiration of the previous extension. *Id.*

⁶⁰ *Id.* The court stated that Local 825's previous reliance on the collective bargaining agreement was inconsistent with its current position that the collective bargaining agreement was invalid. *Id.* After the technical expiration date of February 28, 1986, Local 825 in March 1986 had protested the assignment of a job to a member of another craft union under the collective bargaining agreement with Catalytic. *Id.* Moreover, the court noted that although the labor agreement required a party to give notice of termination to end the relationship, Local 825 had never done so. *Id.* at 432-33, 126 L.R.R.M. at 2427. The court also stated that all defendant unions except Local 825 had conceded the existence of a valid collective bargaining agreement with Catalytic, even though several locals had not signed extensions. *Id.* at 432, 126 L.R.R.M. at 2427. The Third Circuit quoted the district court's comment that it found "no way to distinguish . . . [Local 825] from the other locals on that point." *Id.*

⁶¹ *Id.* at 433, 126 L.R.R.M. at 2427. The court also noted that the Building Trades Council had stipulated in writing that the pre-existing contract extended to September 1, 1988. *Id.* at 432, 126 L.R.R.M. at 2427.

⁶² *Id.* at 434, 126 L.R.R.M. at 2429.

dispute is subject to arbitration.⁶³ Citing *Boys Market*, the Third Circuit stressed that the purpose of a grievance arbitration is to provide an effective, expeditious means of settling industrial disputes without resort to strikes or other "self-help" measures.⁶⁴ The court found that the work assignment controversy involved in *Catalytic* fell within the scope of the collective bargaining agreement's arbitration provisions.⁶⁵

Although Local 825's dispute was with its primary employer, Jersey Central,⁶⁶ the court classified the controversy as jurisdictional in nature: whether Local 825's operating engineers or the electrician's union, with whom Jersey Central and GPU had a separate collective bargaining agreement, should operate the mobile cranes.⁶⁷

⁶³ *Id.* at 433, 126 L.R.R.M. at 2427 (citing *Boys Markets, Inc. v. Retail Clerks Union*, Local 770, 398 U.S. 235, 253, 74 L.R.R.M. 2257, 2264 (1970)). Section 301(a) of the Labor Management Relations Act provides:

Suits for violation 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.

29 U.S.C. § 185(a) (1982).

In *Boys Markets*, the Supreme Court stated that congressional policy underlying section 301(a) of the Labor Management Relations Act favored the voluntary establishment of a mechanism for the peaceful resolution of labor disputes. 398 U.S. at 253, 74 L.R.R.M. at 2263. Accordingly, the Supreme Court held that a federal court could use its equitable powers to enjoin a strike where a collective bargaining agreement subjected the grievance to arbitration. *Id.* at 253, 74 L.R.R.M. at 2263-64.

⁶⁴ *Catalytic*, 829 F.2d at 433, 126 L.R.R.M. at 2427-28 (citing *Boys Markets*, 398 U.S. at 248, 74 L.R.R.M. at 2262). The Third Circuit further stated that the purpose of an arbitration grievance procedure is largely subverted "if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate." *Id.* at 433, 126 L.R.R.M. at 2428 (quoting *Boys Markets*, 398 U.S. at 249, 74 L.R.R.M. at 2262).

⁶⁵ *Id.*

⁶⁶ *Id.* Local 825 suggested for the first time on appeal that its handbilling represented primary activity against Catalytic, and that therefore the secondary boycott provisions of section 8(b)(4)(ii) did not apply. *Id.* at 435 n.2, 126 L.R.R.M. at 2429 n.2. Although the court did not consider the issue, it indicated in a footnote that the primary employer's presence during the disputed activity is not dispositive of that activity's character. *Id.* The court then concluded that the union's handbilling constituted secondary activity because "in reality Local 825 sought to coerce GPU Nuclear and Jersey Central through Catalytic." *Id.*

⁶⁷ *Id.* at 433, 126 L.R.R.M. at 2428. The court distinguished *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 92 L.R.R.M. 3032 (1976), where the Supreme Court struck down an injunction against a sympathy strike that violated a no-strike clause. *Id.* The Third Circuit held *Buffalo Forge* inapplicable because in that case neither the cause of the strike nor the underlying dispute was subject to the collective bargaining agreement's grievance procedure. *Id.* The court also indicated that the dispute between Local 825 and Catalytic was not removed from the collective bargaining agreement's purview merely because the

Because the Presidents' Agreement explicitly prohibited work stoppages, particularly those arising from jurisdictional disputes, the court ruled that the agreement governed the issue.⁶⁸ The court found that the union's handbilling at the plant gate constituted "self help" and triggered a work stoppage just as effectively as had the earlier picketing.⁶⁹ Therefore, the Third Circuit held that the union activity came within the ambit of the *Boys Market* rationale, and that the district court had properly enjoined the handbilling and directed the union to arbitrate the dispute.⁷⁰

The court next rejected the defendant's contention that the publicity proviso protected its handbilling.⁷¹ Under the proviso, a union may engage in publicity, other than picketing, to inform the public that a secondary employer distributes a product that the employer with whom the union has a primary dispute produces, as long as the publicity does not induce any employees, other than those of the primary employer, to engage in a work stoppage.⁷² Dismissing the union's argument that the absence of patrolling or an official picket line renders handbilling distinct from unlawful picketing,⁷³ the court concluded that the handbilling constituted unlawful "signal picketing" because it, in fact, caused work stoppages.⁷⁴ The court defined signal picketing as "activity short of a

controversy also implicated a non-party to the contract (i.e., Jersey Central or GPU Nuclear). *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 434, 126 L.R.R.M. at 2428.

⁷⁰ *Id.* The court concluded that "[t]he measure was designed to bring pressure on Catalytic in precisely the same manner as a strike and, consequently, came within the ambit of the *Boys Markets* rationale." *Id.*

The Third Circuit in *Catalytic* upheld the district court's injunction on an alternative ground. *Id.* The union contended that the *Boys Markets* rule permitting courts to enjoin a union from engaging in a work stoppage was inapplicable because no member of Local 825 actually took part in any work stoppage. *Id.* Additionally, the court concluded that even if it accepted this argument, the injunction against the other craft unions was valid because those unions unquestionably engaged in work stoppages. *Id.* The court held that a court properly may enjoin a third party's conduct that effectively violates an injunction previously issued against another party, even if that activity might not come within the *Boys Market* rationale. *Id.* at 434, 126 L.R.R.M. at 2429. Finally, the court stressed that Local 825 expressly covenanted to administer the agreement "in concert" with other unions, and that its handbilling activity instead promoted disharmony. *Id.* at 434, 126 L.R.R.M. at 2428.

⁷¹ *Id.* at 435-36, 126 L.R.R.M. at 2429-30.

⁷² See 29 U.S.C. § 158(b)(4)(ii) (1982). See *supra* note 2 for the full text of the publicity proviso.

⁷³ See *Catalytic*, 829 F.2d at 435, 126 L.R.R.M. at 2429. The union contended that picketing differs from handbilling because of the absence of patrolling and because the presence of a picket line "may induce action irrespective of the nature of the ideas being disseminated." *Id.*

⁷⁴ *Id.* at 435-36, 126 L.R.R.M. at 2429-30.

true picket line which conveys to neutrals that the union solicits their sympathetic action.”⁷⁵ Because the leafletting “signalled” Catalytic’s employees to stop work, the court held, the union handbilling was not entitled to protection under the publicity proviso and thus violated section 8(b)(4)(ii).⁷⁶

The court considered the fact that work stoppages occurred after the union distributed handbills to conclusively reflect the union’s unlawful intent to cause the secondary employees to violate the collective bargaining agreement’s no-strike clause.⁷⁷ In reaching this conclusion, the court stated that the handbill’s actual text is not dispositive of the union’s purpose in distributing the material.⁷⁸ Rather the court found, the district court must determine the union’s purpose on the basis of rational inferences drawn from all the facts.⁷⁹

Despite the court’s finding that the district court should determine the purpose of the handbilling, the Third Circuit supported its holding that the union handbilling unlawfully induced a work stoppage by examining the actual wording of the leaflets.⁸⁰ Without referring to particular language, the court held that if the union truly did not intend to persuade the other craft unions to engage in a work stoppage, the handbills could have specifically requested that the other employees not do so.⁸¹ The court found that “the carefully vague and legalistic statement on the flyer carried no such message and, indeed, its very tone may have been a signal in itself.”⁸²

Finally, the court held that the district court’s injunction of the union’s secondary handbilling did not violate the first amendment.⁸³ Although acknowledging that the first amendment generally protects peaceful picketing and leafletting, the Third Circuit stressed that courts regularly impose reasonable time, place, and manner restrictions on such activities.⁸⁴ The court relied on the Supreme

⁷⁵ *Id.* at 435, 126 L.R.R.M. at 2429.

⁷⁶ *Id.* at 435–36, 126 L.R.R.M. at 2429–30.

⁷⁷ *Id.* at 436, 126 L.R.R.M. at 2430.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.*

⁸¹ *Id.* The court stated that the “simple cause-and-effect of the appearance of leafletters and work stoppages eloquently testified to the purpose of the enterprise” to persuade the other craft unions to violate their contractual no-strike obligation. *Id.* at 435, 126 L.R.R.M. at 2430.

⁸² *Id.* at 436, 126 L.R.R.M. at 2430.

⁸³ *Id.*

⁸⁴ *Id.*

Court's consistent holding that the first amendment does not protect secondary picketing that violates section 8(b)(4)(ii) and, thus, courts properly may enjoin such illegal picketing.⁸⁵ Because the court in *Catalytic* found that the union's distribution of leaflets "in reality" constituted signal picketing in violation of section 8(b)(4)(ii), the court held that the first amendment provided the handbills no protection.⁸⁶

The court noted that the district court's injunction imposed only limited restrictions on the leafletting.⁸⁷ The injunction, the court determined, did not contain time and manner limitations and applied only to the small area of the plant's gates.⁸⁸ Moreover, the court found, the order did not concern the flyer's contents and ample alternative means remained for the union to disseminate its views.⁸⁹ The appellate court thus affirmed the district court's injunction.⁹⁰

The Third Circuit's finding that secondary handbilling constituted unlawful "signal picketing" presages a significant curtailment of permissible handbilling under section 8(b)(4)(ii). *Catalytic* represents the only decision where a court has applied the concept of "signal picketing" to restrict union secondary handbilling. Prior to *Catalytic*, virtually no court had addressed the issue.⁹¹ Moreover, the NLRB had expressly rejected a similar claim that handbilling represented unlawful signal picketing.⁹² Instead, the courts and the

⁸⁵ *Id.* The court cited *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226, 110 L.R.R.M. 2001, 2006 (1982) ("[w]e have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (Court "recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on the rights of free speech and association"; secondary boycotts and picketing could be prohibited); *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 619, 104 L.R.R.M. 2567, 2571 (1980) (Blackmun, J., concurring) ("[t]he statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea"); *Catalytic*, 829 F.2d at 436, 126 L.R.R.M. at 2430.

⁸⁶ 829 F.2d at 436, 126 L.R.R.M. at 2430.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* Surprisingly, the Third Circuit did not address the remaining first amendment issues regarding whether any restrictions on secondary handbilling may be unconstitutional. See *id.* For a discussion of first amendment issues incident to handbilling, see generally, Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982).

⁹¹ See *supra* notes 22-26 for a discussion of the traditional application of the "signal picketing" concept.

⁹² See *Teamsters, Local Union No. 688 v. Levitz Furniture Co.*, 205 N.L.R.B. 1131, 1133, 84 L.R.R.M. 1103, 1104-05 (1973). See *supra* note 25 for a discussion of the *Levitz* decision.

NLRB traditionally have used the concept of "signal picketing" only to distinguish between unlawful and acceptable forms of picketing.⁹³ Courts have prohibited "signal picketing" that encourages other unions or union members not to perform work for the secondary employer or to pressure the secondary employer to influence the primary employer.⁹⁴ In contrast, publicity picketing is permissible to the extent that it does not actually interfere with deliveries or communicate more than the limited information which the publicity proviso permits.⁹⁵ By applying the concept of "signal picketing" to handbilling for the first time, the *Catalytic* court expanded the use of the "signal picketing" theory to condemn union handbilling, thereby adding a novel device to the employers' arsenal of successful challenges to union secondary handbilling.

The Third Circuit's reasoning, however, is inconsistent with Congress' intent to clearly distinguish protected handbilling from unlawful picketing.⁹⁶ The publicity proviso explicitly exempts "publicity, other than picketing" from the section 8(b)(4)(ii) ban on secondary union activity.⁹⁷ This language plainly indicates that only secondary picketing is prohibited; handbilling and other informational activity directed against a secondary employer is allowed.⁹⁸ The legislative history supports the literal interpretation that Congress intended to differentiate permissible informational activity short of picketing, such as handbilling, from unprotected secondary picketing.⁹⁹

Contrary to Congress' intent and the Board's position in *Operating Engineers Local 139*,¹⁰⁰ the Third Circuit did not distinguish Local 825's picketing activity from its later handbilling. The Third Circuit ignored the three week interval between the initial picketing and the subsequent distribution of handbills.¹⁰¹ The court rested its holding that the handbilling amounted to "signal picketing" on the critical fact that the handbills effectively caused work stoppages.¹⁰²

⁹³ See *supra* note 23 and accompanying text.

⁹⁴ See *MORRIS*, *supra* note 7, at 1104.

⁹⁵ See *id.*

⁹⁶ See *supra* note 20 and accompanying text for a discussion of the legislative intent to distinguish handbilling from picketing.

⁹⁷ 29 U.S.C. § 158(b)(4)(ii) (1982).

⁹⁸ *Id.*

⁹⁹ See *supra* note 20 for a discussion of the relevant legislative history.

¹⁰⁰ *International Union of Operating Eng'rs, Local 139 v. Oak Constr., Inc.*, 226 N.L.R.B. 759, 759-60, 93 L.R.R.M. 1385, 1385-86 (1976).

¹⁰¹ See *Catalytic v. Monmouth & Ocean County Bldg. Trades Council*, 829 F.2d 430, 431, 126 L.R.R.M. 2425, 2426 (3d Cir. 1987).

¹⁰² *Id.* at 435, 126 L.R.R.M. at 2430.

The handbilling at issue, however, occurred three weeks after the other craft unions first engaged in a strike in response to the union's picketing.¹⁰³ The court's failure to consider the subsequent handbilling separately from the original picketing runs counter to Congress' intent to distinguish the two types of union activity, and weakens the court's analysis.

In holding that the handbills effectively induced the unlawful work stoppages, the court suggested that the mere fact that handbilling occurred prior to a secondary employees' strike is sufficient to remove the handbilling from the publicity proviso's protection.¹⁰⁴ The court stated that the "simple cause and effect" of the appearance of the handbills and work stoppages reflected the union's intent to "signal" other craft unions to strike.¹⁰⁵ By gleanings union intent to induce a work stoppage from the mere appearance of handbilling, the *Catalytic* court has established a strong precedent for severely restricting union secondary handbilling. *Catalytic* suggests that, to enjoin union secondary handbilling, an employer need only show that the secondary employer's employees stopped work following union handbilling. Permitting such minimal evidence to establish a sufficient causal link between leafletting and a subsequent strike may frustrate Congress' intent to protect informational handbilling.

The Third Circuit's strict construction of the requirements necessary to satisfy the publicity proviso further restricts permissible secondary handbilling. Had the union not intended the handbills to induce a work stoppage, the court concluded, the leaflets could have expressly urged the secondary employees not to do so.¹⁰⁶ Local 825, however, tracking the language of the publicity proviso, explicitly stated in the leaflet that its intent was not "to induce or encourage an individual employed by any person . . . to cease doing business with any other employer."¹⁰⁷ The court dismissed this language as "carefully vague and legalistic," concluding that the "very tone" itself may have been a signal to strike.¹⁰⁸

In condemning the handbill as a "signal" because it failed affirmatively to instruct *Catalytic*'s employees not to strike, the court imposed a substantial and novel burden on the union. Prior to

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 436, 126 L.R.R.M. at 2430.

¹⁰⁷ *Id.* at 432, 126 L.R.R.M. at 2426.

¹⁰⁸ *Id.* at 436, 126 L.R.R.M. at 2430.

Catalytic, courts held that a handbill that clearly identified the primary employer, described the nature of the dispute, and explained the secondary employer's relationship to the primary employer qualified for protection under the publicity proviso.¹⁰⁹ *Catalytic's* facts, although somewhat unclear, suggest that Local 825's handbills satisfied these criteria.¹¹⁰ Thus, *Catalytic* imposed on the union a significant affirmative duty to direct secondary employees not to strike. The decision thereby further restricts permissible union handbilling that targets neutral secondary employers.

Finally, the *Catalytic* court implicitly interpreted the section 8(b)(4)(ii) secondary boycott provision as prohibiting union secondary handbilling unless the handbill specifically falls within the protection of the publicity proviso. The United States Supreme Court has expressly rejected this interpretation, however.¹¹¹ Instead, last term the Court ruled in *Edward J. DeBartolo Corp.* that the publicity proviso does not apply to handbilling activity that is not covered by the publicity proviso, and consequently, union handbilling may be lawful even if it does not satisfy the publicity proviso's requirements.¹¹²

In summary, in *Catalytic v. Monmouth & Ocean County Building Trades Council*, the Third Circuit ruled that union handbilling directed against the secondary employer to protest the primary employer's assignment of work to non-craft union members constituted "signal picketing" in violation of section 8(b)(4)(ii) of the National Labor Relations Act.¹¹³ *Catalytic's* classification of union secondary handbilling as unlawful "signal picketing" represents a new method of limiting permissible union handbilling under section 8(b)(4)(ii) of the Act. Moreover, the court's strict interpretation of the publicity proviso's requirements and suggestion that a union must affirmatively direct the secondary employees not to engage in a work stoppage further restricts the scope of permissible secondary handbilling under section 8(b)(4)(ii). Consequently, after *Catalytic*, employers may apply the concept of "signal picketing" and rely on the

¹⁰⁹ See *supra* notes 7-11 and accompanying text for a discussion of the requirements necessary to satisfy the publicity proviso.

¹¹⁰ See *Catalytic*, 829 F.2d at 431-32, 126 L.R.R.M. at 2426.

¹¹¹ See *supra* notes 13-16 and accompanying text for a discussion of the Supreme Court's holding in *Edward J. DeBartolo Corp.* that handbilling not falling within the publicity proviso nonetheless may be lawful.

¹¹² *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Trades Council*, 56 U.S.L.W. 4332-33 (U.S. April 20, 1988) (No. 86-1461).

¹¹³ 829 F.2d at 435-36, 126 L.R.R.M. at 2329-30.

court's strict interpretation of the proviso's requirements to restrict union secondary handbilling.

III. FOURTH AMENDMENT DECISIONS

*A. *Government Employer Not Required to Possess Search Warrant or Probable Cause for Work-Related Search of Employee's Office: O'Connor v. Ortega¹*

The fourth amendment to the United States Constitution protects an individual against unreasonable governmental searches and seizures and also predicates issuing a warrant on a showing of probable cause.² The fourth amendment, however, applies only to governmental action; private employers are immune.³ Moreover, the governmental actor must undertake a "search" to invoke fourth amendment protections.⁴ The United States Supreme Court has interpreted "search" to mean an infringement of an expectation of privacy that society recognizes as reasonable.⁵ While in the past, the Supreme Court considered searches unreasonable if not supported by a warrant,⁶ the Court has in recent years concentrated on a search's reasonableness when analyzing the fourth amendment issue.⁷ Probable cause and a search warrant are no longer absolute

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¹ 107 S. Ct. 1492, 1 IER Cases (BNA) 1617 (1987).

² See U.S. CONST. amend. IV. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

³ See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)). In *Jacobsen*, the Supreme Court, in holding that the fourth amendment proscribed solely governmental activities, states that "it [the fourth amendment] is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official." *Id.* (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting) (footnote omitted)).

The fourth amendment applies to the states through the fourteenth amendment. See *Elkins v. United States*, 364 U.S. 206, 213 (1960).

⁴ *Jacobsen*, 466 U.S. at 113.

⁵ *Id.*

⁶ See *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

⁷ See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("The fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . .").

requirements;⁸ they are elements that enter into the reasonableness calculus.⁹

Thus reasonableness lies at the center of fourth amendment analysis.¹⁰ The circumstances and context in which a search takes place may determine if a person's privacy expectations are reasonable.¹¹ Thus, courts have considered a governmental employer's announced policies and practices as significant factors in ruling that an employee does not have a reasonable expectation of privacy in his or her office or locker.¹² Furthermore, courts have intimated that work-related searches satisfy the fourth amendment's reasonableness standard, and, hence, do not require warrants.¹³ Where the government impinges an employee's — or an individual's — legitimate expectation of privacy and thus triggers the fourth amendment, the Supreme Court, in considering a search's reasonableness and whether to require probable cause or a warrant, has balanced the individual's expectation of privacy against the government's need to implement the search.¹⁴

⁸ *Id.*

⁹ *See id.* ("both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search") (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring)).

¹⁰ *See T.L.O.*, 469 U.S. at 337.

¹¹ *Id.*

¹² *See, e.g.*, *Gillard v. Schmidt*, 579 F.2d 825, 829 (3d Cir. 1978) ("employer may conduct a search in accordance with a regulation or practice that would dispel in advance any expectations of privacy") (citations omitted); *United States v. Bunkers*, 521 F.2d 1217, 1219-20 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975) (court upheld warrantless search of postal employee's locker in part because postal manual informed workers of employer's right to inspect and search lockers at any time); *Shaffer v. Field*, 339 F. Supp. 997, 1000, 1003 (C.D. Cal. 1972), *aff'd*, 484 F.2d 1196, 1198 (9th Cir. 1973) (warrantless search of deputy sheriff's locker not unconstitutional because commander kept master key and combination to all locks and in past had searched deputies' lockers); *United States v. Donato*, 269 F. Supp. 921, 922-24 (E.D. Pa.), *aff'd*, 379 F.2d 288 (3d Cir. 1967) (warrantless search of U.S. Mint employee's locker valid because governmental regulation provided lockers were not to be considered private, and that lockers were subject to inspections by Mint security guards). *But see United States v. Speights*, 557 F.2d 362, 364 (3d Cir. 1977) (knowledge that police officer's lockers could be opened by master keys "does not make an expectation of privacy unreasonable").

¹³ *See, e.g.*, *United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973) (IRS surveillance of employee not unreasonable search and seizure because of surveillance's relationship to work performed by employee); *United States v. Collins*, 349 F.2d 863, 867-68 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966) (government agent's search of employee's work area was "constitutional exercise of the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a Custom's employee"); *United States v. Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951) (employee's "official superiors might reasonably have searched [her] desk for official property needed for official use").

¹⁴ *See New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). *See, e.g., id.* at 340-41 (school-teachers and administrators' interests in maintaining order versus schoolchildren's privacy interests).

During the *Survey* year, in *O'Connor v. Ortega*,¹⁵ the United States Supreme Court held that a public employer need not possess a search warrant or have probable cause to conduct a lawful search of an employee's office for noninvestigatory work-related reasons¹⁶ or for evidence of work-related misconduct.¹⁷ In reaching this decision, a plurality balanced the public employer's need to control the work environment against the employee's reasonable privacy expectations.¹⁸ Applying this balancing test, the plurality concluded that a warrant requirement would be too burdensome and disruptive and announced that a reasonableness standard should govern such work-related searches.¹⁹ Under the plurality's analysis, both the search's reason and scope must be reasonable.²⁰

O'Connor has broad implications in the area of employer-employee relationships. *O'Connor* expands upon a public employer's right to search an employee's office without a warrant. Accordingly, by not requiring a warrant or probable cause, *O'Connor* seriously diminishes the fourth amendment protections upon which employees may rely. Moreover, *O'Connor's* reach will be extremely expansive because most governmental searches will fall into one of the two broad categories announced by the plurality. Finally, even though the *O'Connor* opinion denied specifically that it was addressing the drug testing issue, *O'Connor's* most far reaching implication is its potential for justifying random drug testing.²¹

In *O'Connor*, Dr. Magno Ortega, Chief of Professional Education at Napa State Hospital, supervised the doctors' training in psychiatric residency programs.²² Hospital officials, concerned about possible improprieties on Ortega's part, launched an investigation in July, 1981.²³ While Ortega was on paid leave, hospital officials entered his office several times and thoroughly searched the area.²⁴ The hospital officials seized several items from Ortega's

¹⁵ 107 S. Ct. 1492, 1 IER Cases (BNA) 1617 (1987).

¹⁶ An example of a noninvestigatory work-related search is where an employer enters an employee's office to retrieve a file or document. See *id.* at 1501, 1 IER Cases at 1622.

¹⁷ *Id.* at 1500-02, 1 IER Cases at 1621-23.

¹⁸ *Id.* at 1499, 1 IER Cases at 1621.

¹⁹ *Id.* at 1500, 1502, 1 IER Cases at 1621, 1623.

²⁰ *Id.* at 1502-03, 1 IER Cases at 1623.

²¹ 1 Lab. Rel. Rep. (BNA) (124 Analysis) 57, 60 (April 13, 1987).

²² *O'Connor*, 107 S. Ct. at 1495, 1 IER Cases at 1617-18.

²³ *Id.* at 1495, 1 IER Cases at 1618. Specifically, the hospital officials thought that Dr. Ortega may have misled them as to the funding of a recently acquired computer and also officials had to contend with charges against Dr. Ortega of sexual harassment. *Id.*

²⁴ *Id.* at 1496, 1 IER Cases at 1618. The record does not clearly indicate the specific

desk and file cabinets and used some of these seized materials at a California State Personnel Board hearing to impeach a witness testifying on behalf of Ortega.²⁵ In September 1981, the hospital terminated Ortega's employment.²⁶

Ortega brought suit in United States District Court for the Northern District of California against Dr. Dennis O'Connor, the Executive Director of the Hospital, and other hospital officials under 42 U.S.C. § 1983, claiming that the search of his office violated his fourth amendment right against unreasonable searches.²⁷ The district court granted the hospital officials' motion for summary judgment, holding the search reasonable because of the need to collect state property in Ortega's office.²⁸

The Court of Appeals for the Ninth Circuit reversed in part and affirmed in part the district court's holding.²⁹ The Ninth Circuit reversed the granting of summary judgment for the hospital officials on the Section 1983 claim and remanded the case to the district court with instructions to grant Ortega's motion for summary judgment and hold a hearing for a determination of damages.³⁰ The court of appeals based this conclusion on two grounds. First, the

reason for entering the office. *Id.* The hospital claimed the search sought to retrieve state property of a terminated employee but at that time, Dr. Ortega had not been fired. *Id.* Moreover, no policy existed as to searching the offices of employees on administrative leave and officials made no effort to separate Dr. Ortega's personal property from state property. *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Ortega v. O'Connor*, 764 F.2d 703, 705, 1 IER Cases (BNA) 831, 832 (9th Cir. 1985), *rev'd*, *O'Connor v. Ortega*, 107 S. Ct. 1492, 1 IER Cases (BNA) 1617 (1987), 42 U.S.C. section 1983 (1982) provides:

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

Id.

Ortega also brought an action under state law for invasion of privacy and breach of good faith. *Ortega*, 764 F.2d at 705, 1 IER Cases at 832.

²⁸ *Ortega*, 764 F.2d at 705, 1 IER Cases at 832. The district court also concluded that Ortega's failure to comply with the California Tort Claims Act precluded his cause of action under state law. *Id.* The Ninth Circuit described Ortega's noncompliance as being his failure to file his claim with the State Board of Control as required by California law. *Id.* at 707, 1 IER Cases at 833.

²⁹ *Id.* at 707, 1 IER Cases at 834. The Ninth Circuit affirmed that part of the district court's ruling that barred Ortega's state-law claims, because of his failure to comply with the state statute. *Id.*, 1 IER Cases at 833-34.

³⁰ *Id.* at 707, 1 IER Cases at 834.

circumstances revealed that Ortega had a reasonable expectation of privacy in his office that society considered reasonable.³¹ Second, the hospital had no regulations on inspections that might have diminished Ortega's expectation of privacy.³² As a result, the Ninth Circuit held the search unreasonable and violative of the fourth amendment, and, therefore, ruled that the hospital officials were liable.³³ The hospital officials petitioned for a writ of certiorari, which the United States Supreme Court granted.³⁴

Although concluding that Ortega had a reasonable expectation of privacy in his desk and file cabinets,³⁵ the plurality held that searches conducted for noninvestigatory work-related reasons, and investigations for work-related misconduct, require neither warrants nor probable cause.³⁶ Instead, stated the plurality, reasonableness standards govern such intrusions.³⁷ The Court offered a two-pronged test for reasonableness, requiring both the search's reason and scope to be reasonable.³⁸ Because neither lower court applied this reasonableness test, the Supreme Court remanded the case for such a determination.³⁹

Justice O'Connor, in writing for the plurality,⁴⁰ first addressed the fourth amendment's scope. The Court relied upon past decisions to reject the hospital officials' argument that public employees have no legitimate expectation of privacy while at work.⁴¹ Recognizing that office policies and practices may diminish an employee's expectation of privacy in his or her office, the plurality ruled that the circumstances of the employment relationship ought to deter-

³¹ *Id.* at 706, 1 IER Cases at 832. The facts that the court of appeals relied upon in this determination included: that Ortega had worked in the office for seventeen years in which no one entered the office without his permission; the office was locked; and Ortega kept confidential information on patients, as well as personal effects in his desk. *Id.* at 705, 1 IER Cases at 832.

³² *Id.* at 706, 1 IER Cases at 833.

³³ *Id.* at 707, 1 IER Cases at 833.

³⁴ 474 U.S. 1018 (1985).

³⁵ *O'Connor v. Ortega*, 107 S. Ct. 1492, 1499, 1 IER Cases (BNA) 1617, 1620 (1987).

³⁶ *Id.* at 1500-02, 1 IER Cases at 1621-23.

³⁷ *Id.* at 1502, 1 IER Cases at 1623.

³⁸ *Id.* at 1502-03, 1 IER Cases at 1623.

³⁹ *Id.* at 1503-04, 1 IER Cases at 1623-24.

⁴⁰ Justice O'Connor announced the judgment of the Court in which Chief Justice Rehnquist, and Justices White and Powell, joined. Justice Scalia concurred in the judgment. Justice Blackmun issued a dissenting opinion in which Justices Brennan, Marshall, and Stevens, joined.

⁴¹ *O'Connor*, 107 S. Ct. at 1498, 1 IER Cases at 1619 (citing *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984); *Mancusi v. DeForte*, 392 U.S. 364, 369, 68 L.R.R.M. 2449, 2450-51 (1968)).

mine such an expectation's reasonableness.⁴² Because Ortega did not share his desk or file cabinets with other hospital employees, kept personal materials unrelated to hospital business in his office, and because the hospital had no stated policy discouraging employees from keeping personal items in their offices, the *O'Connor* plurality declared that Ortega possessed a reasonable expectation of privacy in his desk and file cabinets.⁴³ Having concluded that Ortega possessed a reasonable expectation of privacy, the *O'Connor* plurality next determined the proper standard applicable to the search in question.⁴⁴ Justice O'Connor noted that a balancing test, weighing the quality of the intrusion against the governmental interests warranting the search, was crucial to this analysis.⁴⁵ The plurality stated that in the public employer context, this required balancing the employer's need for control and efficiency against the employee's reasonable expectation of privacy.⁴⁶ While an employee may have a substantial and legitimate expectation of privacy in items brought to work, the Court determined that workplace realities, which included an employer's continual need to enter an office for work-related reasons, demonstrated the impracticality of warrants.⁴⁷ Imposing a warrant requirement in such circumstances, the plurality reasoned, was disruptive to the business' everyday operation and overly burdensome to employers who were unfamiliar with the warrant process.⁴⁸

After determining that public employers may conduct warrantless searches in certain circumstances, the Court next considered whether probable cause should be the appropriate standard governing such intrusions. While acknowledging that probable cause is usually required, the plurality noted that it is not an absolute

⁴² *O'Connor*, 107 S. Ct. at 1498, 1 IER Cases at 1620. The *O'Connor* plurality went on to state that "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable." *Id.* (citations omitted).

⁴³ *Id.* at 1499, 1 IER Cases at 1620.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1499, 1 IER Cases at 1620-21 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

⁴⁶ *O'Connor*, 107 S. Ct. at 1499, 1 IER Cases at 1621.

⁴⁷ *Id.* at 1500, 1 IER Cases at 1621. The Court cited as examples, a supervisor in need of a report located in an employee's office while he or she is out or an employer desiring to secure records in an employee's office to be used in a misconduct investigation. *Id.*

⁴⁸ *Id.* at 1500-01, 1 IER Cases at 1621-22. The Court went on to explain that "the imposition of a warrant requirement would conflict with 'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Id.* at 1501, 1 IER Cases at 1622 (quoting *Connick v. Myers*, 461 U.S. 138, 143, 1 IER Cases 178 (1983)).

mandate for all searches.⁴⁹ The *O'Connor* plurality again resorted to the balancing of interests test.⁵⁰

The plurality rested its holding that public employers' searches did not require probable cause on several grounds.⁵¹ Justice O'Connor first recognized that probable cause meant little when applied to searches in certain work-related noninvestigatory contexts, such as obtaining files or retrieving state property from an employee's office.⁵² Moreover, the plurality stated that requiring probable cause for searches for employee misconduct would result in significant delays in eradicating that misconduct, delays which would negatively affect the workplace.⁵³ The Court also acknowledged that public employers have little familiarity with the complexities of the probable cause standard.⁵⁴ These factors and the employer's interest in an efficient work environment, the plurality concluded, outweigh the employees' privacy interest in their workplace.⁵⁵ Accordingly, the plurality held that the fourth amendment does not require an employer to possess probable cause prior to conducting a noninvestigatory work-related search or a search for evidence of employee misconduct.⁵⁶

Lastly, rather than requiring probable cause or a warrant, the *O'Connor* plurality articulated a reasonableness test to measure the reasonableness of employee misconduct searches as well as noninvestigatory work-related intrusions.⁵⁷ Under this standard, both the

⁴⁹ See *O'Connor*, 107 S. Ct. at 1501, 1 IER Cases at 1622.

⁵⁰ See *id.* at 1501-02, 1 IER Cases at 1622-23.

⁵¹ *Id.* at 1502, 1 IER Cases at 1623.

⁵² *Id.* at 1501, 1 IER Cases at 1622.

⁵³ *Id.* at 1502, 1 IER Cases at 1622-23. The Court stated that because public employers have a direct and overriding interest in insuring that the work of the agency is conducted in a proper and efficient manner . . . a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest.

Id. (citations omitted).

⁵⁴ *Id.* at 1502, 1 IER Cases at 1623. The Court compared the public employer, who is not expected to learn the subtleties of probable cause when the search is not aimed at collecting evidence of a criminal offense, and the law enforcement official who is expected to "school [himself or herself] in the niceties of probable cause" *Id.* (quoting *New Jersey v. T.L.O.* 469 U.S. 325, 343 (1985)).

⁵⁵ See *id.* While the Court admitted that employees' expectations of privacy in the workplace were "not insubstantial, [they were] far less than those found at home or in some other contexts." *Id.*

⁵⁶ *Id.* at 1502, 1 IER Cases at 1623.

⁵⁷ *Id.*

search's inception and scope must be reasonable.⁵⁸ The plurality indicated that a search is reasonable at its inception where the employer had reasonable grounds for believing the intrusion would yield evidence of employee misconduct or where the intrusion was necessary to collect work documents.⁵⁹ Furthermore, a search reasonable in scope, the plurality noted, was one where the employer used measures tied reasonably to the intrusion's goals and not excessive relative to the misconduct.⁶⁰ Accordingly, the Court reversed the Ninth Circuit's judgment and remanded the case to the district court for an evaluation of the search's reasonableness under the two-tiered approach articulated.⁶¹

Justice Scalia concurred in the judgment, but disagreed with both the plurality's reasoning and the reasonableness standard.⁶² First, Justice Scalia criticized the reasonableness standard, claiming that the standard lacked substance and encouraged uncertainty because it provided no guidelines for future applications.⁶³ Justice Scalia then voiced his opposition to the plurality's view that either extensive work-related reasons for entering an employee's office or the search party's identity (law enforcement official versus private employer versus supervisor) could affect the reasonableness of a search, and thus the applicability of the fourth amendment.⁶⁴ In Justice Scalia's view, the fourth amendment protects privacy and not solitude; therefore the fourth amendment protects an employee's office, even if the employer or co-workers were not excluded.⁶⁵ In addition, Justice Scalia stated that the searcher's identity affects only the search's reasonableness and the fourth amendment's applicability.⁶⁶ From this analysis, Justice Scalia concluded that the fourth amendment's protection extends to a governmental employee's office, drawers, and files.⁶⁷

⁵⁸ *Id.* at 1502-03, 1 IER Cases at 1623.

⁵⁹ *Id.* at 1503, 1 IER Cases at 1623.

⁶⁰ *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

⁶¹ *Id.* at 1504, 1 IER Cases at 1624.

⁶² *Id.* at 1505, 1 IER Cases at 1625 (Scalia, J., concurring).

⁶³ *See id.* (Scalia, J., concurring).

⁶⁴ *See id.* (Scalia, J., concurring).

⁶⁵ *Id.* (Scalia, J., concurring).

⁶⁶ *Id.* (Scalia, J., concurring). Justice Scalia stated that "[c]onstitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." *Id.* (Scalia, J., concurring) (emphasis in original).

⁶⁷ *Id.* (Scalia, J., concurring). Justice Scalia cautioned that the fourth amendment covered "a fortiori the drawers and files within those offices, . . ." explaining that "[t]he qualifier is necessary to cover such unusual situations as that in which the office is subject to unrestricted

Having determined that the fourth amendment's provisions applied to Ortega's circumstances, Justice Scalia directed his inquiry to the reasonableness of the employer's intrusion. Despite acknowledging the *per se* unreasonableness of warrantless searches, Justice Scalia declared that governmental employment provided an exception to the general rule.⁶⁸ Thus, according to Justice Scalia, governmental intrusions to gather work-related items or to investigate noncompliance with an employer's rules do not violate the fourth amendment.⁶⁹ Because the evidence did not support either of these justifications, Justice Scalia, like the plurality, reversed and remanded the case.⁷⁰

Justice Blackmun issued a lengthy dissenting opinion, joined by Justices Brennan, Marshall, and Stevens,⁷¹ which ultimately found that the plurality's decision undermined public employees' fourth amendment rights and future constitutional analysis of public employer searches.⁷² Justice Blackmun's conclusion rested first upon his disagreement with the plurality's interpretation of the facts. Contrary to the plurality's assertion that the search's purpose was either to inventory or investigate employee misconduct, Justice Blackmun claimed the intrusion clearly was investigatory.⁷³

The dissent agreed that governmental employees maintain their fourth amendment rights and conceded that workplaces may diminish an employee's expectation of privacy.⁷⁴ Justice Blackmun then expressed, however, his concern over the plurality's intimation that routine visits into an employee's office might entirely eliminate one's expectation of privacy in his or her office.⁷⁵ This suggestion, the dissent stated, did not consider the traditional protection the

public access, so that it is 'expose[d] to the public' and therefore not a subject of Fourth Amendment protection." *Id.* at 1505-06, 1 IER Cases at 1625 (Scalia, J., concurring) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

⁶⁸ *O'Connor*, 107 S. Ct. at 1506, 1 IER Cases at 1626 (Scalia, J., concurring).

⁶⁹ *Id.* (Scalia, J., concurring).

⁷⁰ *Id.* (Scalia, J., concurring).

⁷¹ *Id.* at 1506, 1 IER Cases at 1626 (Blackmun, J., dissenting).

⁷² *Id.* at 1514, 1 IER Cases at 1632 (Blackmun, J., dissenting).

⁷³ *Id.* at 1508, 1 IER Cases at 1627 (Blackmun, J., dissenting). The dissent draws upon the following for its conclusion: that the hospital had no policy of inventorying employees' offices who were on administrative leave; that the leader of the investigation admitted that removal of the computer was irrelevant to the decision to search Ortega's office; and that the character of the search indicated its purpose was not to inventory state property from Ortega's personal property. *Id.* at 1507-08, 1 IER Cases at 1627 (Blackmun, J., dissenting).

⁷⁴ *Id.* at 1508, 1 IER Cases at 1628 (Blackmun, J., dissenting).

⁷⁵ *Id.* (Blackmun, J., dissenting).

fourth amendment affords to offices,⁷⁶ the interrelationship between the employee's expectation of privacy and the nature of the search,⁷⁷ and the reality of the modern workplace.⁷⁸

The remainder of the dissent's analysis criticized the plurality's balancing test. Justice Blackmun contended that courts should only dispense with the warrant and probable cause requirements and turn to a balancing test in exceptional circumstances, such as when obtaining a warrant based on probable cause would sacrifice the goals of the search.⁷⁹ According to the dissent, *O'Connor's* facts did not merit abandoning the warrant and probable cause requirements because the hospital could have taken evidence of Ortega's mismanagement to a magistrate and secured a warrant without abandoning their goal of maintaining an effective health institution.⁸⁰

The dissent also faulted the plurality's balancing of employees' and employers' interests in arriving at its reasonableness standard.⁸¹ Justice Blackmun, in criticizing the plurality's analysis of the warrant requirement, acknowledged that warrants should not be obtained in all searches, but stated that such circumstances did not justify their total abolition.⁸² Justice Blackmun objected to the plurality's alternative to the warrant requirement because the reasonableness standard does not distinguish between types of searches or focus on a balancing of opposing interests.⁸³ Moreover, the dissent proclaimed that the plurality's attempt to limit their judgment to in-

⁷⁶ *Id.* at 1508-09, 1 IER Cases at 1628 (Blackmun, J., dissenting) ("when the office has received traditional Fourth Amendment protection in our cases, it has been with the understanding that such routine visits occur there").

⁷⁷ *Id.* at 1509, 1 IER Cases at 1628 (Blackmun, J., dissenting). Justice Blackmun, in recognizing that an individual's expectation of privacy may change depending on the circumstances stated:

Thus, although an employee might well have no reasonable expectation of privacy with respect to an occasional visit by a fellow employee, he would have such an expectation as to an afterhours search of his locked office by an investigative team seeking materials to be used against him at a termination proceeding.

Id. (Blackmun, J., dissenting).

⁷⁸ *Id.* at 1509-10, 1 IER Cases at 1628-29 (Blackmun, J., dissenting). The reality to which the dissent refers is "the all too true [fact] that the workplace has become another home for most working Americans." *Id.* at 1509, 1 IER Cases at 1628 (Blackmun, J., dissenting).

⁷⁹ *Id.* at 1511, 1 IER Cases at 1629 (Blackmun, J., dissenting).

⁸⁰ *Id.* at 1511, 1 IER Cases at 1630 (Blackmun, J., dissenting).

⁸¹ *Id.* at 1512, 1 IER Cases at 1630 (Blackmun, J., dissenting).

⁸² *Id.* at 1512-13, 1 IER Cases at 1631 (Blackmun, J., dissenting).

⁸³ *Id.* at 1513, 1 IER Cases at 1631 (Blackmun, J., dissenting).

ventory and investigatory intrusions failed because the broad standard the plurality used could apply to all public employer searches.⁸⁴

O'Connor v. Ortega widens a governmental employer's authority to search its employees' offices, desks and files by not requiring a warrant or probable cause in employee misconduct or noninvestigatory work-related intrusions.⁸⁵ Instead, the Court now simply demands that a public employer's search be reasonable both in its inception and scope.⁸⁶ The plurality convincingly proffered reasons for tilting the balance in favor of the employer. The burden on the employer,⁸⁷ the disruption to the workplace,⁸⁸ the employer's unfamiliarity with probable cause complexities,⁸⁹ and the Court's desire to avoid a constitutional question with every employment decision⁹⁰ strongly supported the *O'Connor* judgment.

The implications of *O'Connor* and its rationale are significant. The immediate effect is self-evident: public employees now enjoy less fourth amendment protection because neither a warrant nor probable cause are necessary for the employer to search his or her

⁸⁴ *Id.* The dissent called the plurality attempt at such a limitation "illusory," and stated that "[t]he plurality describe[d] these searches in such a broad fashion that it is difficult to imagine a search that would not fit into one or the other of the categories." *Id.* (Blackmun, J., dissenting) (emphasis in original).

The dissent also expressed its concern over the plurality's handling of the probable cause analysis. According to the dissent, a nexus must exist between the probable cause alternative, the privacy interests involved, and the employer's interest in the intrusion in order to sustain a less than probable cause standard. *Id.* (Blackmun, J., dissenting). The plurality's analysis of investigatory or inventory searches, stated Justice Blackmun, made no attempt to make this connection. *Id.* at 1513, 1513 n.12, 1 IER Cases at 1631, 1631 n.12 (Blackmun, J., dissenting).

Justice Blackmun concluded his dissent by arguing that the plurality offered no justification for choosing a reasonableness standard over probable cause or any other standard beyond simply making some assertions about an employer's interest in eliminating worker malfeasance and an employee's reduced expectation of privacy. *Id.* at 1513-14, 1 IER Cases at 1631-32 (Blackmun, J., dissenting). See *supra* notes 53-54 and accompanying text for those assertions referred to by the dissent in *id.* at 1514 n.13, 1 IER Cases at 1631-32 n.13. The dissent responded to these assertions as follows: "[B]ecause the balancing is simply asserted rather than explicated, the plurality never really justifies why probable cause, . . . would not protect adequately the public employer's interests in the situation presented by this case." *Id.* at 1514, 1 IER Cases at 1631-32 (Blackmun, J., dissenting). Contrary to the plurality's conclusion, the dissent reasoned that *O'Connor's* facts did not merit abandoning the traditional requirements of a warrant and probable cause prior to conducting a search. *Id.* at 1511-12, 1 IER Cases at 1630 (Blackmun, J., dissenting).

⁸⁵ *Id.* at 1500-02, 1 IER Cases at 1621-23.

⁸⁶ *Id.* at 1502-03, 1 IER Cases at 1623.

⁸⁷ *Id.* at 1502, 1 IER Cases at 1622.

⁸⁸ See *id.*

⁸⁹ *Id.* at 1502, 1 IER Cases at 1623.

⁹⁰ *Id.* at 1501, 1 IER Cases at 1622. See *supra* note 48 for the plurality's reaction to a possible constitutional question arising if a warrant were required.

office. In addition, although the *O'Connor* plurality attempted to limit its holding to investigatory or noninvestigatory work-related intrusions,⁹¹ these restrictions, in all likelihood, will result in little consolation for public employees. The classifications are broad, and as the dissent correctly pointed out, any search is likely to fall into one of the two categories.⁹² Furthermore, the reasonableness standard that the Court articulated will work in the employer's favor and result in more employer searches because the burden of proof to justify such a search does not rise to the level of probable cause.⁹³

Commentators have suggested that *O'Connor's* most significant consequence may be its effect on the drug testing of employees.⁹⁴ Currently, the lower courts are in rough agreement that urinalyses are searches within the fourth amendment's scope.⁹⁵ Additionally, the lower courts generally agree that some form of "individualized suspicion" must accompany drug testing of governmental employees in order not to violate the fourth amendment.⁹⁶

Whether *O'Connor* permits warrantless drug testing of public employees or testing without probable cause is open to speculation.

⁹¹ *O'Connor*, 107 S. Ct. at 1501, 1 IER Cases at 1622.

⁹² See *id.* at 1513, 1 IER Cases at 1631 (Blackmun, J., dissenting).

⁹³ See *id.* at 1503, 1 IER Cases at 1623. The Court explains that

[o]rdinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file . . . [and] [t]he search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]."

Id. (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

⁹⁴ See 1 Lab. Rel. Rep. (BNA) (124 Analysis) 57, 60 (April 13, 1987).

⁹⁵ See *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 732, 1 IER Cases 1137, 1141 (S.D. Ga. 1986) (citing *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264 (7th Cir. 1976); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 1 IER Cases (BNA) 945 (E.D. La. 1986), *stay denied*, 808 F.2d 1057, 1060, 1 IER Cases (BNA) 1433, 1435 (5th Cir.), *vacated*, 816 F.2d 170, 182 (5th Cir. 1987); *Penny v. City of Chattanooga*, 648 F. Supp. 815, 1 IER Cases (BNA) 1047 (E.D. Tenn. 1986); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 1 IER Cases (BNA) 1041 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1 IER Cases (BNA) 625 (D. N.J. 1986); *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.C.N.J. 1985), *aff'd*, 795 F.2d 1136, 1 IER Cases 814 (3rd Cir.), *cert. denied*, 479 U.S. 986, 1 IER Cases 1136 (1986); *McDonnell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214 (S.D.N.Y. 1984); *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 120 L.R.R.M. 3294 (D.C. Ct.App. 1985); *Patchogue-Medford Congress of Teachers v. Board of Ed.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (2d Div. 1986); *Caruso v. Ward*, 506 N.Y.S.2d 789 (Sup.Ct. 1986)).

⁹⁶ *Weinberger*, 651 F. Supp. at 616, 1 IER Cases at 1140. See also 1 Lab. Rel. Rep. (BNA) (124 Analysis) 57, 60 (April 13, 1987).

Proponents of random drug testing are likely to argue that the broad authority given to public employers to conduct warrantless intrusions in the work environment supports such testing.⁹⁷ Under this approach, no warrants or probable cause are required; reasonableness is the sole gauge in choosing to conduct a urinalysis.

Despite its broad applications, courts will probably not extend *O'Connor* to cover drug testing. The *O'Connor* plurality went to great lengths to restrict its holding. The Court expressly limited the application of its ruling to two particular circumstances, investigatory and noninvestigatory work-related searches.⁹⁸ The plurality specifically declared that it was not addressing the fourth amendment application to drug and alcohol testing.⁹⁹ Moreover, urinalyses differ qualitatively from office searches — urinalyses are much more intrusive.¹⁰⁰ Hence, a work-related standard is inappropriate for such a serious infringement of an individual's privacy expectations. Therefore, the Court's careful efforts to limit the holding and distance itself from the drug testing issue, as well as the more serious intrusion that urinalyses represent, indicate that *O'Connor* was not meant to affect the existing law concerning drug testing. The issue of drug testing and the fourth amendment is a separate question that the Court will face at a later time.

After *O'Connor*, a public employer need not possess a warrant or have probable cause before searching an employee's office or desk, even if the employee has a reasonable expectation of privacy while at work. As long as the object of the intrusion is to retrieve work-related materials or is to investigate employee misconduct, the employer's sole restraint is that both the inception and the scope of the search must be reasonable. *O'Connor* represents a continuation of the Supreme Court's recent stance that warrants and probable cause are not essential components of the fourth amendment. *O'Connor* grants public employers broad powers to conduct warrantless searches. As extensive as this grant of power is, however,

⁹⁷ See 1 Lab. Rel. Rep. (BNA) (124 Analysis) at 60.

⁹⁸ See *O'Connor v. Ortega*, 107 S. Ct. 1492, 1501, 1 IER Cases 1617, 1622 (1987) ("we undertake to determine the appropriate Fourth Amendment standard of reasonableness *only* for these two types of employer intrusions and leave for another day inquiry into other circumstances.") (emphasis in original).

⁹⁹ *Id.* at 1504 n.**, 1 IER Cases at 1624 n.**.

¹⁰⁰ See *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 732-33, 1 IER Cases 1137, 1141 (S.D. Ga. 1986) (taking urine sample is highly intrusive search; "qualitatively very, very different from intrusion involved in the taking of fingerprints or fingernail and hair clippings").

O'Connor's rationale will probably not be applied successfully to support random drug testing of public employees.

IV. PREEMPTION

A. **Complete Preemption versus Ordinary Preemption: Caterpillar, Inc. v. Williams*¹

A plaintiff is ordinarily the master of his or her complaint.² If the plaintiff wishes to bring an action in state court, the defendant may not remove that action to federal court unless diversity or federal question jurisdiction exists.³ The "well-pleaded complaint rule" holds that federal question jurisdiction exists only when the complaint facially presents a federal question; a defense raising a federal issue does not suffice.⁴ Thus, when a plaintiff's complaint asserts only a state law cause of action on its face, the well-pleaded complaint rule precludes removing the case to federal court.⁵

Exceptions to the well-pleaded complaint rule exist. The United States Supreme Court has held that occasionally a federal statute's pre-emptive force is so great that the statute will "convert" a state common law claim into a federal claim.⁶ Accordingly, this "complete pre-emption" doctrine permits a defendant to remove a case to federal court even though the plaintiff has asserted only state law claims.⁷

This complete pre-emption doctrine applies with particular force to cases in which Section 301 of the Labor Management Relations Act pre-empts state claims.⁸ The Supreme Court has interpreted Section 301 as providing that any suit regarding a collec-

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¹ *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 125 L.R.R.M. 2521 (1987).

² *Id.* at 2429, 125 L.R.R.M. at 2523.

³ *Id.*

⁴ *Id.* at 2429-30, 125 L.R.R.M. at 2523.

⁵ *See id.* at 2429, 125 L.R.R.M. at 2523.

⁶ *Id.* at 2430, 125 L.R.R.M. at 2523 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1547 (1987)).

⁷ *See id.* at 2430, 125 L.R.R.M. at 2523-24.

⁸ *Id.* at 2430, 125 L.R.R.M. at 2524. Section 301 provides:

Suits for violation 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 of the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

tive bargaining agreement dispute "arises under federal law" regardless of whether a state law cause of action exists in Section 301's absence.⁹ Accordingly, Section 301 converts a state law cause of action for a violation of a contract between an employer and a labor organization into a federal claim under the well-pleaded complaint rule.¹⁰ An employer, therefore, may remove a state law claim based on the collective bargaining agreement to federal court.¹¹

The Supreme Court, however, has concluded that Section 301 not only encompasses claims directly based on rights created by the collective bargaining agreement, but includes claims that are "substantially dependent" on the interpretation of employer-union agreements.¹² In *Allis-Chalmers Corp. v. Lueck*, for example, the Court held that Section 301 pre-empted the plaintiff's state law tort action because the tort involved a determination of the rights and obligations created by a disability benefit plan in the collective bargaining agreement.¹³ At the same time, however, the Court noted that involvement of a collective bargaining agreement in a dispute does not automatically entail pre-emption.¹⁴ According to the Court, Section 301 does not pre-empt state law causes of action creating rights "independent of a labor contract" and only "tangentially" involving the terms of a collective bargaining agreement.¹⁵ Leaving the meaning of these terms for future determination, the Court concluded

⁹ *Franchise Tax Board v. Const. Laborers Vac. Trust*, 463 U.S. 1, 23 (1983). The Court stated that:

The necessary ground of decision was that the pre-emptive force of Section 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of 301.

Id.

¹⁰ *Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1547 (1987).

¹¹ See *Avco. Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557, 560 (1968).

¹² *Int'l Brotherhood of Elec. Workers, AFL-CIO v. Hechler*, 107 S. Ct. 2161, 2166-67 n.3, 125 L.R.R.M. 2353, 2356 n.3 (1987).

¹³ See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 118 L.R.R.M. 3345, 3352-53 (1985). The plaintiff employee argued that the defendant employer had failed to provide disability payments in a timely manner. See *id.* at 205, 118 L.R.R.M. at 3347. Ignoring the three part grievance procedure for disputes regarding disability payments created by a "letter of understanding," the plaintiff brought an action in state court alleging that the employer violated the state tort law duty of good faith in the carrying out of contract terms. *Id.* at 206, 118 L.R.R.M. at 3346-47.

¹⁴ *Id.* at 1911-12, 118 L.R.R.M. at 3349.

¹⁵ *Id.*

that courts would determine Section 301's scope on a case by case basis.¹⁶

In *Caterpillar Inc. v. Williams*, decided during the *Survey* year, the Supreme Court held that Section 301 does not pre-empt a state law cause of action for breach of individual employment contracts entered into while the plaintiff employees occupied positions outside the coverage of the collective bargaining agreement.¹⁷ The Court reached this holding despite the defendant's federal defense requiring interpretation of the collective bargaining agreement.¹⁸ Finding that the policies behind the "well-pleaded" complaint rule were "paramount," the Court held that Section 301's pre-emptive force does not justify creating an exception to the master of the complaint doctrine.¹⁹ Thus, by carefully drafting the complaint, a plaintiff, with a claim independent of the collective bargaining agreement, can prevent a defendant with a federal defense based on the collective bargaining agreement from having the defense ruled on by a federal court.²⁰

The plaintiff employees in *Caterpillar* based their cause of action for breach of contract on oral promises that members of the defendant's management allegedly made while the plaintiffs occupied positions outside the scope of the collective bargaining agreement.²¹ The defendant company, Caterpillar Tractor Company, originally hired the plaintiffs to work at the San Leandro plant in positions the collective bargaining agreement covered.²² Subsequently, however, Caterpillar elevated each of the plaintiffs to positions outside the coverage of the collective bargaining agreement.²³ Caterpillar promoted some of the plaintiffs to managerial positions and the rest became weekly salaried employees.²⁴ The time span of the plaintiffs' occupation of these positions ranged from three to fifteen

¹⁶ *Id.* at 1916, 118 L.R.R.M. at 3352.

¹⁷ See 107 S. Ct. 2425, 2427-28, 2433, 125 L.R.R.M. 2521, 2522-23 (1987).

¹⁸ *Id.* at 2433, 125 L.R.R.M. at 2526.

¹⁹ See *id.* In *Tennessee v. Union Planter's Bank*, the Court interpreted the acts of 1887 and 1888 to preclude a defendant from relying on a federal defense to remove a case to federal court. 152 U.S. 454, 461 (1894).

²⁰ See *Caterpillar*, 107 S. Ct. at 2433, 125 L.R.R.M. at 2526.

²¹ See *id.* at 2427-28, 125 L.R.R.M. at 2522. In addition to the breach of contract claim the plaintiffs also asserted causes of action for breach of the covenants of good faith and fair dealing as well as intentional infliction of emotional distress and fraud. *Id.* at 2428 n.3, 125 L.R.R.M. at 2522.

²² *Id.* at 2427, 125 L.R.R.M. at 2522.

²³ *Id.*

²⁴ *Id.*

years with all but two of the plaintiffs serving eight years or more.²⁵ During this period, the plaintiffs contended, Caterpillar guaranteed their jobs by promising that if the San Leandro plant were closed, the company would find jobs for them at other locations.²⁶ The plaintiffs argued that this promise of continued employment regardless of the fate of the San Leandro plant was made on several different occasions.²⁷

Between May of 1980 and January of 1984 the plaintiffs returned to positions the collective bargaining agreement covered.²⁸ The plaintiffs alleged that Caterpillar supervisors orally assured them that the downgrade to unionized positions was only temporary.²⁹ On December 15, 1984, however, Caterpillar notified the plaintiffs that it was shutting down the San Leandro plant and laying off the plaintiffs.³⁰ In response to Caterpillar's firing, the plaintiffs filed a claim in state court contending that Caterpillar's promises amounted to individual employment contracts which Caterpillar had in turn breached.³¹

Although the plaintiffs based their claim solely on state law, Caterpillar removed the case to federal court.³² Caterpillar argued that the collective bargaining agreement superseded the individual contracts which as a result merged into the collective agreement when the plaintiffs returned to positions covered by the agreement.³³ The district court agreed with Caterpillar and upheld the removal.³⁴ Finding the plaintiffs' state law claims independent of the collective bargaining agreement, however, the Court of Appeals for the Ninth Circuit reversed.³⁵ The Supreme Court granted

²⁵ *Id.*

²⁶ *Id.* The plaintiffs alleged that Caterpillar made both oral and written promises that "they could look forward to indefinite and lasting employment with the corporation and that they could count on the corporation to take care of them," and that "while serving Caterpillar as managers or weekly salaried employees, [they] were assured that if the San Leandro facility of Caterpillar ever closed, Caterpillar would provide employment opportunities for [them] at other facilities of Caterpillar, its subsidiaries, divisions, or related companies." *Id.*

²⁷ *Id.* at 2428, 125 L.R.R.M. at 2522. As a result the plaintiffs' claim that they "continued to remain in Caterpillar's employment rather than seeking other employment." *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See *Caterpillar v. Williams*, 786 F.2d 928, 935, 938, 122 L.R.R.M. 2590, 2595, 2597 (9th Cir. 1986), *aff'd* 107 S. Ct. 2425, 2433, 125 L.R.R.M. 2521, 2526 (1987). The court of appeals concluded that the defendant's contention of pre-emption of the individual contracts

certiorari³⁶ and unanimously affirmed the court of appeals' holding that removal to federal court was improper.³⁷

Caterpillar asserted three distinct grounds for Section 301 pre-emption of the plaintiffs' state law claim. First, Caterpillar argued that the plaintiffs' claim was in reality a claim directly based on the collective bargaining agreement.³⁸ Caterpillar contended that under *J.I. Case v. N.L.R.B.*,³⁹ the collective bargaining agreement "subsumed" the individual contracts when the plaintiffs returned to positions covered by the agreement thereby making any claims based on the individual contracts claims under the collective bargaining agreement.⁴⁰ Secondly, Caterpillar contended that even if the plaintiffs' did not base their claim directly on the collective agreement, the state law action on the individual contracts was at least "substantially dependent" on analysis of the collective agreement.⁴¹ Thirdly, Caterpillar argued that Section 301 mandates pre-emption where a court must interpret the collective agreement to determine the validity of a federal defense.⁴²

After initially reviewing the well-pleaded complaint rule,⁴³ the Supreme Court dismissed each of Caterpillar's three arguments for pre-emption.⁴⁴ Rejecting Caterpillar's contention that the collective bargaining agreement automatically subsumed the individual con-

by the collective agreement was not an essential element of the plaintiffs' cause of action. *Id.* at 936, 122 L.R.R.M. at 2596. According to the court, federal law did not create the right that the plaintiffs allege was violated. *Id.* at 937, 122 L.R.R.M. at 2596-97. As a result, the court held that federal jurisdiction was lacking whether or not the state law cause of action is eventually pre-empted. *Id.*

³⁶ 107 S. Ct. 485 (1986).

³⁷ *Caterpillar*, 107 S. Ct. at 2427, 2433, 125 L.R.R.M. at 2523, 2526.

³⁸ *Id.* at 2431, 125 L.R.R.M. at 2524-25.

³⁹ 321 U.S. 332 (1944). *J.I. Case Co.* offered individual contracts to all of its employees and approximately 75% of the employees accepted the terms of the contract. *Id.* at 333, 14 L.R.R.M. at 502. During the term of the individual contracts the CIO petitioned the National Labor Relations Board for certification as the representative of the production and maintenance employees of *J.I. Case*. *Id.* Dismissing the company's argument that representation elections could not be conducted while the individual contracts were in effect, the Board ordered the elections which in turn resulted in certification of the union. *Id.* When called upon by the union to bargain, however, the company refused claiming that it could not talk with the union concerning any rights under the individual contracts. *Id.* at 334, 14 L.R.R.M. at 502. The Supreme Court concluded that the trade agreement superseded the individual contracts and that employees are entitled to all the benefits conferred by the agreement regardless of how they were originally hired. *Id.* at 336, 14 L.R.R.M. at 503.

⁴⁰ *Caterpillar*, 107 S. Ct. at 2431, 125 L.R.R.M. at 2524-25.

⁴¹ *Id.* at 2431, 125 L.R.R.M. at 2524.

⁴² *Id.* at 2433, 125 L.R.R.M. at 2525-26.

⁴³ *Id.* at 2429-30, 125 L.R.R.M. at 2523-24.

⁴⁴ *Id.* at 2430-33, 125 L.R.R.M. at 2524-26.

tracts as a matter of federal law,⁴⁵ the Court noted that Caterpillar had based this argument on a misinterpretation of *J.I. Case*.⁴⁶ A correct reading of *J.I. Case*, the Court stated, allows for the assertion of state law contract rights that are "independent" of the collective agreement provided that the contract relied upon in support of those rights is not the collective agreement.⁴⁷ Concluding that Caterpillar ignored the fact that the plaintiffs' characterization based the claim on "independent rights" created by individual contracts and not by the agreement, the Court dismissed Caterpillar's initial argument.⁴⁸

Unpersuaded by Caterpillar's second argument, the Court concluded that the plaintiffs' claim was not "substantially dependent" on an analysis of the collective bargaining agreement.⁴⁹ The claim, according to the Court, neither relied on the collective agreement nor addressed the relationship between the individual contracts and

⁴⁵ *Id.* at 2431, 125 L.R.R.M. at 2524-25.

⁴⁶ *Id.* at 2431, 125 L.R.R.M. at 2525. The Court found the following language of *Case* to be conclusive on the question of whether all individual contracts are superseded by the collective bargaining agreement:

Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

Id. (citing *J.I. Case v. N.L.R.B.*, 321 U.S. 332, 339, 14 L.R.R.M. 501, 505 (1944)).

This finding, noted the Court, did not preclude Caterpillar from questioning either the "legality or viability" of the individual contracts. *Caterpillar*, 107 S. Ct. at 2432, 125 L.R.R.M. 2525. The Court noted that Caterpillar could argue that the individual contracts conflicted with "the principle of exclusive representation in Section 9(a) of the National Labor Relations Act," *id.* (citing *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 146, 92 L.R.R.M. 2881, 2886 (1976) (quoting *Teamsters v. Morton*, 377 U.S. 252, 260, 56 L.R.R.M. 2225, 2228 (1964))), or "that enforcement of this individual employment contract arguably would constitute an unfair labor practice under the NLRA." *Id.* (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 43 L.R.R.M. 2838 (1959)).

⁴⁷ *Id.* at 2431-32, 125 L.R.R.M. at 2525.

⁴⁸ *Id.* at 2432, 125 L.R.R.M. at 2525. The Court noted that in reality Caterpillar was "attempting to justify removal on facts not alleged in the complaint," by "ignoring the set of facts (*i.e.* the individual employment contracts) presented by respondents, along with their legal characterizations of those facts, and arguing that there are different facts respondents might have alleged that would have constituted a federal claim." *Id.* Noting that recharacterization of the plaintiffs' claim for purposes of removal is only permissible where the plaintiff is attempting to avoid federal jurisdiction by phrasing the claim in terms of a state claim pre-empted by federal law and not where the plaintiff is asserting an "independent" state law claim, the Court found the invoking of the "artful pleading" doctrine inappropriate. *Id.* (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 410 n.6 (1981) (Brennan, J., dissenting)).

⁴⁹ *Id.* at 2431, 125 L.R.R.M. at 2524.

the bargaining agreement.⁵⁰ Moreover, noted the Court, California state law was unclear whether a state court even had to examine the collective bargaining agreement in this case.⁵¹ Thus, finding the plaintiffs' state law claim to be "independent" of the labor agreement, the Court denied pre-emption on the traditional grounds of either "direct basis" or "substantial dependence."⁵²

Caterpillar's third and final argument essentially requested the Court to adopt a new ground for pre-emption in Section 301 cases.⁵³ Arguing that Section 301 should pre-empt state law claims where the defendant raises a federal defense requiring analysis of the collective bargaining agreement, Caterpillar claimed that an exception to the "well-pleaded" complaint rule was desirable in this case.⁵⁴ Caterpillar raised the federal defense that the collective bargaining agreement contained a waiver by unionized employees of any pre-existing individual contract rights.⁵⁵ The Court, however, held that not even Section 301's pre-emptive force could overcome the "paramount" policies the "well-pleaded" complaint rule embodied.⁵⁶ Moreover, noted the Court, Congress long ago declared a federal defense not a sufficient basis for removal.⁵⁷

In *Caterpillar*, the Supreme Court correctly applied the well-pleaded complaint rule to preclude the defendant from removing the case to federal court. A defendant may remove a case to federal court only where the plaintiff's cause of action on its face asserts a federal claim.⁵⁸ Long ago the Supreme Court interpreted the acts of 1887 and 1888 to prohibit removal based on a federal defense and one commentator suggests that only a constitutional amendment could change this rule.⁵⁹ Thus, whatever the merits of the arguments for change,⁶⁰ denial of removal based on a federal defense is firmly entrenched in precedent.

A confusing aspect of this decision is the two ways in which the Court talks about federal pre-emption. The Court initially con-

⁵⁰ *Id.*

⁵¹ *Id.* at 2431 n.9, 125 L.R.R.M. at 2524 n.9.

⁵² See *Caterpillar*, 107 S. Ct. at 2431-32, 125 L.R.R.M. at 2524-25.

⁵³ See *id.* at 2433, 125 L.R.R.M. at 2525-26.

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 2433, 125 L.R.R.M. at 2526.

⁵⁷ *Id.*

⁵⁸ C. WRIGHT, THE LAW OF FEDERAL COURTS 210 (1983).

⁵⁹ See WRIGHT, *supra* note 58, at 210.

⁶⁰ See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION BETWEEN STATE AND FEDERAL COURTS 164-68 (1969).

cludes that Section 301 does not pre-empt the plaintiffs' cause of action.⁶¹ Later in the opinion, however, the Court suggests that the state court is free to conclude that federal labor law pre-empts the plaintiffs' cause of action.⁶² Although these statements are seemingly contradictory, they are easily resolved when considered in light of the two distinct senses in which the Court is using pre-emption.

Complete pre-emption exists where state law causes of action are totally displaced by a federal cause of action.⁶³ This is the case with Section 301 of the Taft Hartley Act which makes any state law cause of action either directly based or substantially dependent on a collective bargaining agreement inherently federal.⁶⁴ Federal law is therefore the basis of all rights asserted under a collective bargaining agreement.⁶⁵ Thus, if the plaintiff tries to assert a state law claim for violation of a collective bargaining agreement, the defendant can remove the case to federal court.⁶⁶ Because, however, the *Caterpillar* Court concluded that the plaintiffs did not base their cause of action in the collective bargaining agreement, Section 301 pre-emption does not apply in this case.⁶⁷

Unlike complete pre-emption, ordinary pre-emption does not supplant state law causes of action but rather exists as a defense to rights claimed under state law.⁶⁸ In arguing ordinary pre-emption the defendant is not claiming that the plaintiff is in reality asserting a federal claim but rather that federal law cuts off the rights alleged under state law.⁶⁹ Because ordinary pre-emption is a defense, it cannot be grounds for removal.⁷⁰ Removal must be based on the plaintiff's complaint without resort to the defendant's answer to the complaint.⁷¹ Thus, as the result of the federal court's lack of jurisdiction, the question of whether federal labor law pre-empts the plaintiffs' claim in this case is for the state to decide.

The Court therefore decided this case on the basis of the rules governing federal jurisdiction. Concluding that the policies behind the well pleaded complaint rule are paramount, the Supreme Court

⁶¹ *Caterpillar*, 107 S. Ct. at 2430-32, 125 L.R.R.M. at 2524-25.

⁶² *Id.* at 2432, 125 L.R.R.M. at 2525.

⁶³ See WRIGHT, *supra* note 58, at 216.

⁶⁴ See *Caterpillar*, 107 S. Ct. at 2430-31, 125 L.R.R.M. at 2524.

⁶⁵ See WRIGHT, *supra* note 58, at 216.

⁶⁶ See *Caterpillar*, 107 S. Ct. at 2430, 125 L.R.R.M. at 2523-24.

⁶⁷ See *id.* at 2430-32, 125 L.R.R.M. at 2524-25.

⁶⁸ See WRIGHT, *supra* note 58, at 216.

⁶⁹ See *id.*

⁷⁰ *Id.*

⁷¹ *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 96, 98 (1936).

refused to change the rules and allow removal based on a federal defense.⁷² As a result the state court in this case must apply federal labor law.⁷³ State courts are often called upon to apply federal law because state and federal courts have concurrent jurisdiction over federal question cases unless Congress has made federal jurisdiction exclusive.⁷⁴ Thus, in denying removal to federal court, the *Caterpillar* Court rejected the defendant's complete pre-emption argument, but at the same time left open the possibility of a state court ruling of ordinary pre-emption.

B. * *Preemption and Removal of State Law Claims: Young v. Anthony's Fish Grottos, Inc.*¹

Section 301 of the Labor Management Relations Act provides federal jurisdiction for suits alleging contract violations between an employer and a labor organization.² Federal substantive law, derived from the policy of national labor laws, controls suits which arise under section 301.³ The Supreme Court has held that section 301 has extraordinary preemptive force which will displace any state cause of action based on a collective bargaining agreement (the contract between labor and employer) and any state tort claim which is either dependent on a right established by a contract or is "inextricably intertwined" with the terms of a contract.⁴

In *Avco Corp. v. Aero Lodge 735*, the Supreme Court held that federal law properly preempted a state contract claim arising under a collective bargaining agreement (CBA) and that such a contract

⁷² See *Caterpillar*, 107 S. Ct. at 2433, 125 L.R.R.M. at 2526.

⁷³ See *id.* at 2432, 125 L.R.R.M. at 2525.

⁷⁴ See WRIGHT, *supra* note 58, at 268.

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¹ 830 F.2d 993, 126 L.R.R.M. 2798 (9th Cir. 1987).

² 29 U.S.C. § 185(a) (1982). Section 301 of the L.M.R.A. states that "[s]uits for violation of contracts between employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . ." *Id.*

³ See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456-57, 40 L.R.R.M. 2113, 2116 (1957) (Court upheld decision requiring arbitration of a labor grievance applying federal law fashioned from national labor law policies).

⁴ See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 118 L.R.R.M. 3345, 3349-50 (1985) (state law tort claim preempted by section 301 of L.M.R.A.; Court set out guidelines to determine when a state law tort claim was preempted); *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983) (Court held the federal Employee Retirement Income Security Act of 1974 did not preempt all state tax laws and thus removal to federal court was unwarranted); see also 28 U.S.C. § 1441(a) (1982) (sets out basic guidelines for removal jurisdiction).

claim may be removed to federal court even though the superseding federal claim offers no remedy to the plaintiff.⁵ Nineteen years later, in *Caterpillar, Inc. v. Williams*, the Supreme Court rejected the Ninth Circuit's view that preemption of a contract claim required a superseding federal cause of action to provide the plaintiff with a remedy.⁶ In *Caterpillar*, the Supreme Court distinguished the issue of remedy from issues concerning jurisdiction and preemption, making clear that if a state claim is preempted by a federal claim, no federal remedy is necessary.⁷

The Ninth Circuit Court of Appeals has, however, continued to look at the issue of remedies when confronted with section 301 preemption of state tort claims.⁸ In *Harper v. San Diego Transit Corp.*, the court found the state tort of implied covenant of good faith and fair dealing preempted because the superseding federal claim, arising from the CBA, did not offer "any less protection" than the state wrongful termination law.⁹ Recently, in *Scott v. New United Motor Manufacturing, Inc.*, the District Court for the Northern District of California held that the lack of an adequate remedy from a CBA under federal law prohibited the court from finding the state tort claim preempted.¹⁰ Both the *Harper* and *Scott* courts noted that the Ninth Circuit had never found a state tort claim preempted where there was not a comparable federal remedy.¹¹

During the *Survey* year, the United States Court of Appeals for the Ninth Circuit in *Young v. Anthony's Fish Grottos, Inc.* ruled that federal law preempted the state tort claim of implied covenant of good faith and fair dealing, although there was no federal remedy

⁵ 390 U.S. 557, 561, 67 L.R.R.M. 2881, 2882 (1968).

⁶ 107 S. Ct. 2425, 2429 n.4, 125 L.R.R.M. 2521, 2523 n.4 (1987).

⁷ *Id.*

⁸ *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1049, 125 L.R.R.M. 3075, 3078 (9th Cir. 1987) (CBA established that employee had guarantee of discipline only for just cause); *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 668, 119 L.R.R.M. 3161, 3164 (9th Cir. 1985) (implied covenant claim preempted because "good cause" provision provided no less protection than state wrongful termination law); *Hunter v. United Van Lines*, 746 F.2d 635, 642-43 (9th Cir. 1984), *cert. denied*, 474 U.S. 863 (1985) (court held that in order for federal law to preempt state law, federal law must provide a remedy); *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1474, 117 L.R.R.M. 2073, 2078 (9th Cir. 1984) (court allowed preemption noting that the CBA provided the same or greater protection of job security as the state tort law provided for nonunionized workers); *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1357, 1367, 115 L.R.R.M. 3089, 3095 (9th Cir. 1984).

⁹ *Harper*, 764 F.2d at 668, 119 L.R.R.M. at 3164.

¹⁰ 632 F. Supp. 891, 894, 121 L.R.R.M. 2501, 2503.

¹¹ *Harper*, 764 F.2d at 668, 119 L.R.R.M. at 3164; *Scott*, 632 F. Supp. at 894, 121 L.R.R.M. at 2503.

under the CBA comparable to the remedies which state law afforded.¹² In *Young*, the court ruled that the CBA between the union and the employer waived the state job security protections arising from an implied covenant of good faith because the agreement stipulated that probationary employees could be fired at will.¹³ The court held that the implied covenant exception to the employment at will doctrine regulated the employment relationship which Congress had intended federal labor legislation to control.¹⁴ Extrapolating from the policies inherent in the national labor laws, the court concluded that the process of collective bargaining should preempt an independent state law relating to the job security of union members.¹⁵ Consequently, after *Young*, courts should only determine if state law interferes with federal labor policy concerning collective bargaining and need not be concerned if federal law provides a comparable remedy.

In *Young*, Ruth Young worked as a waitress for Anthony's Fish Grottos, Inc., (Anthony's) from 1974 until 1983 when she voluntarily left her job.¹⁶ Young returned to work on May 15, 1985 and was discharged the same day.¹⁷ During her employment a CBA was in effect which established a 30 day probationary period for new employees.¹⁸ The agreement stated that a probationary employee may be discharged at the employer's discretion, while all other employees may only be discharged for just cause.¹⁹

Young believed that her discharge was the result of activities she instigated in 1980 when she organized an employee protest over an Internal Revenue Service audit.²⁰ Young argued that dismissing her because of her protest activities violated state public policy.²¹ She also argued that a manager had orally promised to hire her on the same terms as her previous employment.²²

Young sued in state court under state law claims of breach of contract, breach of the implied covenant of good faith and fair

¹² *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 126 L.R.R.M. 2798 (9th Cir. 1987).

¹³ *Id.* at 1001, 126 L.R.R.M. at 2804.

¹⁴ *Id.* at 999, 126 L.R.R.M. at 2802.

¹⁵ *Id.* at 998, 126 L.R.R.M. at 2801.

¹⁶ *Id.* at 996, 126 L.R.R.M. at 2799-800.

¹⁷ *Id.* at 996, 126 L.R.R.M. at 2800.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

dealing, fraud, wrongful discharge, negligent misrepresentation, and negligent and intentional infliction of mental distress.²³ Anthony's removed the case to federal court claiming that Young's state law claims were, in essence, claims for breach of the CBA and therefore preempted by federal law and removable under section 301 of the Labor Management Relations Act.²⁴ Young moved to remand the case back to state court.²⁵ The district court denied Young's motion and permitted removal, holding that section 301 preempted her claims because they arose under and were intertwined with the CBA.²⁶ The district court then granted summary judgment in favor of Anthony's on the grounds that Young failed to exhaust the CBA's grievance procedure or to timely file the section 301 claim.²⁷

The court of appeals affirmed the district court's holding.²⁸ The court first addressed Young's claim for breach of an oral employment contract.²⁹ Although her complaint did not state that the CBA governed her employment, the court looked beyond the face of the pleadings to determine that her contract depended upon the CBA.³⁰ The court reasoned that any independent agreement of employment, in a job position contained in a CBA, could only be effective as part of the CBA.³¹ Therefore, the court read Young's

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1002, 126 L.R.R.M. at 2805.

²⁹ *Id.* at 997, 126 L.R.R.M. at 2801.

³⁰ *Id.* See *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983). The Court stated that the plaintiff's complaint establishes jurisdiction and that a federal law defense does not establish original jurisdiction. *Id.* at 10-11. The Court recognized that an independent corollary to this rule is that a plaintiff may not "defeat removal by omitting to plead necessary federal questions in a complaint." *Id.* at 22; see *Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1547 (1987) (state contract and tort claims completely preempted by the Employee Retirement Income Security Act of 1974). The Court had held that, for the purposes of removing a state claim to federal court, section 301's preemptive strength is powerful enough to convert a state common law complaint into a complaint which states a federal claim. See also *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2430, 125 L.R.R.M. 2521, 2523-24 (1987) (state law complaint not completely preempted and thus claims were not removable).

³¹ *Young*, 830 F.2d at 997, 126 L.R.R.M. at 2801 (citing *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1474, 117 L.R.R.M. 2073, 2078 (9th Cir. 1984); *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1048, 125 L.R.R.M. 3075, 3078 (9th Cir. 1987); *Bale v. General Tel. Co.*, 795 F.2d 775, 779-80, 123 L.R.R.M. 2835, 2837-38 (9th Cir. 1986)). But see *Anderson v. Ford Motor Co.*, 803 F.2d 953, 957-59, 123 L.R.R.M. 2753, 57 (8th Cir.

complaint for breach of contract as a complaint for breach of the CBA.³² The Ninth Circuit concluded that section 301 preempts and supplants the state law claim for breach of contract and therefore found the district court correctly assumed jurisdiction.³³

Young argued that section 301 did not supplant her claim, for federal law afforded her no redress.³⁴ Specifically, Young noted that under the CBA she could be discharged at will because she was a probationary employee while her state law claim for breach of promise protected her from dismissal.³⁵ Young argued that a federal law claim could supplant a state claim only if it provided a superseding remedy.³⁶

The court noted that the Supreme Court had distinguished between the issues of jurisdiction and relief and had rejected the notion that a federal remedy must supersede a state remedy for federal law to preempt a state claim.³⁷ The court held that the grievance procedure set out in the CBA supplanted Young's claim although Young did not participate in the procedure.³⁸ Further, the court held that federal law recognized the right of the union to waive contractual rights in the "give and take of bargaining."³⁹ The court stated that federal law may supplant and preempt state law even if federal law fails to provide remedies which are available under state law.⁴⁰ Thus, the court found that section 301 preempted

1986), *cert. denied*, 107 S. Ct. 3242 (1987). The Eighth Circuit held that a claim for breach of an individual contract did not arise from a CBA even where the individual position was included in bargaining unit. *Young*, 830 F.2d at 997 n.1, 126 L.R.R.M. at 2801 n.1. The issue of whether individual contracts arise out of a CBA has yet to be settled by the Supreme Court. *Id.*

³² *Young*, 830 F.2d at 998, 126 L.R.R.M. at 2801.

³³ *Id.* at 999, 126 L.R.R.M. at 2802.

³⁴ *Id.* at 998, 126 L.R.R.M. at 2801.

³⁵ *See id.*

³⁶ *Id.*

³⁷ *Id.* (citing *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560, 67 L.R.R.M. 2881, 2882 (1968) (Court affirmed removal and preemption of a state law claim for breach of a CBA even though the relief the plaintiff sought could not be obtained in federal court); *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2429 n.4, 125 L.R.R.M. 2521, 2523 n.4 (1987) (Court distinguished between remedy and jurisdiction)); *see also* *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 22-24 (1983).

³⁸ *Young*, 830 F.2d at 998-99, 126 L.R.R.M. at 2802.

³⁹ *Id.* at 998, 126 L.R.R.M. at 2801 (citing *NLRB v. Allis-Chalmers Mfg. Co. v. Lueck*, 388 U.S. 175, 180, 65 L.R.R.M. 2449, 2451 (1967); *Hollins v. Kaiser Found. Hosps.*, 727 F.2d 823, 825, 115 L.R.R.M. 3601, 3602 (9th Cir. 1984)).

⁴⁰ *Id.* at 998, 126 L.R.R.M. at 2801 (citing *Avco*, 390 U.S. at 560-61, 67 L.R.R.M. at 2881-82).

and supplanted Young's claim of breach of contract even though her probationary status would prevent her from being afforded a remedy under the CBA.⁴¹

The court then determined that section 301 preempted Young's tort claim for breach of implied covenant of good faith and fair dealing.⁴² The court observed that the tort claim for violation of the implied covenant protects the job security of employees by providing an exception to the common law rule that an employer can terminate employees at will.⁴³ The court utilized the Supreme Court's analysis in *Allis-Chalmers Corp. v. Lueck* to help determine whether section 301 preempts a state tort claim.⁴⁴ In *Allis-Chalmers*, the Supreme Court stated that while federal law will not preempt a state tort claim if the state "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract," federal law will preempt such a tort claim if the tort claim is "inextricably intertwined with consideration of the terms of the labor contract."⁴⁵ The court found that Young's implied covenant of good faith and fair dealing claim was intertwined with her contract and the terms of the CBA.⁴⁶ The court noted that the implied covenant directly regulates the employment relationship and would afford Young a different set of rights than those negotiated under the CBA.⁴⁷ Consequently, because Young's tort claim was intertwined with the CBA, section 301 preempted the claim.⁴⁸

As with her contract claim, however, Young argued that section 301 could only preempt a state tort claim when an employee had comparable job security under a CBA.⁴⁹ Young noted that under the CBA she could be terminated at will as a probationary employee while the implied covenant might have provided her with more job

⁴¹ *Id.* at 999, 126 L.R.R.M. at 2802.

⁴² *Id.* at 1001, 126 L.R.R.M. at 2804. The court noted that the district court had exercised pendent jurisdiction over the tort claims based on their close relation with the section 301 claim. *Id.* at 999, 126 L.R.R.M. at 2802.

⁴³ *Id.* at 999, 126 L.R.R.M. at 2803 (citing *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (court found that the duty arising from the covenant of good faith is that neither party will do anything which will injure the right of the other to receive benefits from the agreement, that it is unconditional and independent, and that it applies to all contracts)).

⁴⁴ *Young*, 830 F.2d at 999, 126 L.R.R.M. at 2802.

⁴⁵ *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 213, 118 L.R.R.M. at 3349-50.

⁴⁶ *Young*, 830 F.2d at 1000, 126 L.R.R.M. at 2803.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1000-01, 126 L.R.R.M. at 2803-04.

⁴⁹ *Id.* at 1000, 126 L.R.R.M. at 2803.

security.⁵⁰ The court agreed that in all previous cases in which section 301 preempted a claim of implied covenant the CBA afforded the employee comparable job security.⁵¹ The court thus held that a union could not bargain away an employee's state claim which protected job security otherwise unprotected.⁵² Further, the *Young* court noted that in *Scott v. New United Motor Manufacturer, Inc.* a district court held that section 301 could not preempt a probationary employee's tort claims which gave that employee greater job security.⁵³ The *Young* court observed that the court in *Scott* reasoned it would be against federal labor policy to penalize workers in a union by not allowing them access to those minimum state standards available to nonunion workers.⁵⁴

Despite the precedent and *Young's* arguments, the *Young* court held that the union could waive the implied covenant protections.⁵⁵ The court stated that the state tort furthers no state policy independent of *Young's* employment contract and primarily duplicates the protection implicit in the notion of collective bargaining.⁵⁶ The *Young* court acknowledged that in *Garibaldi v. Lucky Food Stores, Inc.* the court had reasoned that federal law will not preempt a state tort claim if the state claim furthers a state public policy and does not threaten the collective bargaining process.⁵⁷ The *Young* court, however, found no public policy which protected *Young's* claim, and stated that allowing states to fashion corollary protections to collective bargaining agreements would not be in keeping with federal labor policy.⁵⁸

⁵⁰ *Id.*

⁵¹ *Id.* at 1000, 126 L.R.R.M. at 2803; see also *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1474, 117 L.R.R.M. 2073, 2078 (9th Cir. 1984) (court allowed preemption noting that the CBA provided the same or greater protection of job security as the state tort law provided for nonunionized workers); *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1049, 125 L.R.R.M. 3075, 3078 (9th Cir. 1987) (CBA established that employee had guarantee of discipline only for just cause); *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 668, 119 L.R.R.M. 3161, 3164 (9th Cir. 1985) (implied covenant claim preempted because "good cause" provision provided no less protection than state wrongful termination law).

⁵² *Young*, 830 F.2d at 1000, 126 L.R.R.M. at 2803.

⁵³ *Id.* at 1000, 126 L.R.R.M. at 2803 (citing *Scott v. New United Motor Mfg., Inc.*, 632 F. Supp. 891, 121 L.R.R.M. 2501 (N.D. Cal. 1986)).

⁵⁴ *Id.* (citing *Scott*, 632 F. Supp. at 894, 121 L.R.R.M. at 2503-04).

⁵⁵ *Id.* at 1001, 126 L.R.R.M. at 2804.

⁵⁶ *Id.* at 1000, 126 L.R.R.M. at 2803-04. See generally *infra* note 58.

⁵⁷ *Young*, 830 F.2d at 1001, 126 L.R.R.M. at 2803 (citing *Garibaldi*, 726 F.2d at 1373-75, 115 L.R.R.M. at 3093-94).

⁵⁸ *Id.* at 1002, 126 L.R.R.M. at 2803-04 (citing *N.L.R.A. Preemption of State Wrongful Discharge Claims*, 34 HASTINGS L.J. 635, 660 (1983)). (state torts of implied covenant and wrongful discharge "accommodate the very interest that the NLRA accommodates through

Citing the Supreme Court's decision in *Allis-Chalmers*, the court noted the importance of ensuring consistent federal interpretations of CBA's.⁵⁹ Allowing parties to recast section 301 contract claims as state law torts, the *Young* court reasoned, would permit plaintiffs to evade the requirements of 301.⁶⁰ Finally, the court stated that failure to recognize the unions' ability to waive probationary employees' job security would lead to incongruous results.⁶¹ The court observed that probationary employees would have access to the wide range of tort remedies and senior employees would be limited to the CBA.⁶² Therefore, the court reasoned, probationary employees might actually enjoy greater job security than their more senior coworkers.⁶³ Accordingly, the court upheld the unions' prerogative to waive probationary employees' rights to the minimum protections offered under state law.⁶⁴

Young's claim for wrongful termination in violation of public policy rested on her belief that her efforts to organize employees in 1980 caused her firing.⁶⁵ Although the court had recognized exceptions to preemption on public policy grounds, it found that preemption violated no public policy here.⁶⁶ The court noted that Young failed to identify a statute or any other source of public policy supporting her claim.⁶⁷ Because it found no policy, the court held this claim preempted.⁶⁸

Young's last claim was for intentional and negligent infliction of mental distress due to her discharge. The court relied on its prior analysis in holding that these claims arose out of Young's contract claim and thus are inextricably intertwined with the interpretation

the collective bargaining process"; the federal labor system causes individual contracts to be superseded by the CBA).

⁵⁹ *Id.* at 1001, 126 L.R.R.M. at 2804.

⁶⁰ *Id.* (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211; 118 L.R.R.M. 3345, 3349 (1985)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* The court also cited *Trumbauer v. Group Health Coop.*, 635 F. Supp. 543, 547, 122 L.R.R.M. 2384, 2387 (W.D. Wash. 1986) (court held that section 301 preempted probationary employee's implied covenant claim, because the claim arose out of the CBA and was subject to waiver); *Hollins v. Kaiser Found. Hosps.*, 727 F.2d 823, 825, 115 L.R.R.M. 3601, 3602 (9th Cir. 1984) (court held that as exclusive bargaining representative, the union could waive right of the employees).

⁶⁵ *Id.* at 996, 126 L.R.R.M. at 2800.

⁶⁶ *Id.* at 1002, 126 L.R.R.M. at 2805.

⁶⁷ *Id.*

⁶⁸ *Id.*

of the CBA.⁶⁹ Thus the court found that federal law preempted these claims and that removal was proper.⁷⁰

The *Young* decision is significant because it permits the union to waive the state created job security of implied covenants for probationary workers.⁷¹ A court no longer must consider if a preempted and supplanted state law claim has a comparable remedy in federal court. Because of this decision, plaintiffs such as *Young* may only look to the CBA from which their contract arose for redress when pleading the state law claim of implied covenant. Whether other courts will follow the *Young* court's holding, and the degree to which courts may extend the holding, depends primarily on the *Young* court's interpretation of the policy of the national labor laws.⁷² Although the court's interpretation is correct, it avoided making the most compelling argument for its decision.⁷³

In essence, the court's holding put much faith on the collective bargaining process as the primary means of protection for union employees.⁷⁴ The *Young* decision manifests the belief that the parties to a CBA must be left free to bargain without government intrusion. This view of the collective bargaining process is in keeping with the Supreme Court's interpretation of the policy behind the national labor laws.⁷⁵ The Supreme Court has held that the government's role in collective bargaining is only to provide the format from which the parties to a CBA can make their own law.⁷⁶ The Court has found that the intent of labor laws is generally to keep the government and the courts from interfering with the process and

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 1001, 126 L.R.R.M. at 2804.

⁷² See *supra* note 3 and accompanying text. The Supreme Court held that federal substantive law applied to section 301 claims is derived from the policy of national labor laws. *Id.*

⁷³ The court focused on the fact that the state claim was intertwined with the CBA, that labor policy benefits from applying consistent rules, and that not permitting the union to waive such rights would lead to incongruous results. See *supra* text accompanying notes 51-68.

⁷⁴ By allowing the union to waive rights protected by the state, the court adopted a stance favoring private ordering through free collective bargaining.

⁷⁵ See *infra* note 76 and accompanying text.

⁷⁶ See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 45 L.R.R.M. 2704 (1960) (Court held that union could apply economic weapons during negotiation process). The Court noted that collective bargaining is a system where the government does not attempt to control the results of negotiations. *Id.* at 490, 45 L.R.R.M. at 2709; see also *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 30 L.R.R.M. 2147 (1952) (Court upheld a clause which parties agreed to during collective bargaining, despite the fact that the clause was favorable to management).

substance of free collective bargaining.⁷⁷ The *Young* decision is in keeping with this policy.

As the *Young* court articulated, if employees could look both to state law and the CBA, parties to a CBA would have to take into account the state law in forming their agreements.⁷⁸ Unions which may wish to bargain away rights for probationary employees in order to ensure greater job security for senior employees could not do so. The state would, in essence, become a party to the CBA. This was clearly not the intention of the legislature in forming the labor laws.

Thus, the *Young* decision was correct because it was in keeping with national labor policy. Unions and employers ought to be free to fashion their own collective bargaining agreements. The *Young* holding can not, however, be extended indefinitely. Unions may not, for example, waive all employee's protections afforded by state law.⁷⁹ Federal law ought not to preempt and supplant those state laws advocating important public policy which do not threaten the bargaining process.⁸⁰ Claims which arise outside of the CBA will definitely not be preempted.⁸¹ As noted in *Young*, some courts disagree as to what sort of activities or contracts lie within the realm of the CBA and thus section 301.⁸²

Thus, the *Young* court properly established that if a claim arises under a CBA, federal law may preempt and supplant the claim whether or not the remedy provided under the CBA is comparable with that offered under state law. The issue of what claims legitimately arise under a CBA, however, remains for the Supreme Court to clarify.

C. **The Preemption of State Tort Claims Based on State OSHA Statutes: Paige v. Henry J. Kaiser Co.*¹

Courts have addressed the issue of when federal jurisdiction preempts state jurisdiction in cases involving labor relations regu-

⁷⁷ See generally *supra* note 76.

⁷⁸ See generally *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d at 1001, 126 L.R.R.M. at 2804 (9th Cir. 1987).

⁷⁹ See, e.g., *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1374, 115 L.R.R.M. 3089, 3094 (9th Cir. 1987) (court held claim that arose under state policy inherent in "whistle blower" statute not preempted where claimant was fired because he reported that he was delivering spoiled milk).

⁸⁰ *Young*, 830 F.2d at 1001, 126 L.R.R.M. at 2804.

⁸¹ See *supra* notes 2-4 and accompanying text.

⁸² *Young*, 830 F.2d at 997 n.1, 126 L.R.R.M. at 2801 n.1.

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¹ 826 F.2d 857, 126 L.R.R.M. 2145 (9th Cir. 1987).

lated by the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA).² Generally, federal preemption issues arise in three contexts.³ First, if the activity of the employer or union is arguably subject to sections 7 or 8 of the NLRA, state and federal courts must defer to the National Labor Relations Board (NLRB).⁴ Second, if a state act interferes with the NLRA's policy of keeping certain labor or management conduct unregulated, federal law will preempt the state act.⁵ Finally, section 301(a) of the LMRA grants jurisdiction to federal courts in actions involving collective bargaining agreements without requiring the usual diversity of citizenship or the minimal dollar amount in controversy.⁶

Although section 301(a) does not explicitly clarify which law courts should apply, federal substantive or state contractual, courts have construed section 301(a) as a Congressional mandate to federal courts to form a body of federal common law⁷ in order to provide uniformity in disputes over collective bargaining agreements.⁸ A

² See generally C. MORRIS, *THE DEVELOPING LABOR LAW* 1504-98 (2d ed. 1983). Congress passed the National Labor Relations Act (Wagner Act), 29 U.S.C. §§ 151-69 (1982), in 1935 in order to regulate more effectively the growth of organized labor. MORRIS, *supra*, at 27-35. In 1947, Congress amended the Wagner Act with the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 141-97 (1982). MORRIS, *supra*, at 35-38.

³ MORRIS, *supra* note 2, at 1504-05.

⁴ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 43 L.R.R.M. 2838 (1959) (Court held that a California state court was precluded by the NLRA from awarding damages resulting from peaceful picketing, because the activity was "arguably subject to" section 7 or section 8 of the NLRA and therefore exclusively under the NLRB jurisdiction); see also MORRIS, *supra* note 2, at 1517-19.

⁵ *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140, 92 L.R.R.M. 2881, 2883-84 (1976). The Court held that a union's refusal to work overtime was "peaceful conduct which must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated." *Id.* at 155, 92 L.R.R.M. at 2889; see also MORRIS, *supra* note 2, at 1522-24.

⁶ Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a). Section 301(a) provides in part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction over the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." *Id.*

⁷ *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456, 40 L.R.R.M. 2113, 2116 (1957) ("the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws"); see also *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 118 L.R.R.M. 3345, 3348 (1985).

⁸ *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103, 49 L.R.R.M. 2717, 2721 (1962) ("[T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law'. . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both negotiation and administration of collective agreements.") (citation omitted); see also *International Bhd. of Elec.*

state claim is preempted when the claim is either directly founded on rights created by a collective bargaining agreement or when resolution of the claim is "substantially dependent" on interpreting the collective bargaining agreement.⁹ Thus, section 301(a) creates a federal cause of action that completely preempts state law claims which necessitate interpreting collective bargaining agreements, even where the plaintiff has attempted to tailor his complaint to avoid federal jurisdiction by omitting allegations of federal law.¹⁰

In the 1985 decision of *Allis-Chalmers Corp. v. Lueck*,¹¹ the United States Supreme Court broadened its reading of the preemptive effect of section 301(a) to cover suits alleging liability under state tort laws.¹² The Supreme Court stated that plaintiffs may no longer avoid federal jurisdiction by merely re-labeling their contract claims as state claims for tortious breach of contract.¹³ The *Allis-Chalmers* Court established a test to distinguish when state tort claims are preempted. The test determines whether the state law proscribes conduct or creates rights and duties independent of the collective bargaining agreement, in which case state law will apply. In contrast, where the state tort claim is substantially related or "inextricably

Workers v. Hechler, 107 S. Ct. 2161, 2168, 125 L.R.R.M. 2353, 2357 (1987); *Allis-Chalmers*, 471 U.S. at 209-10, 118 L.R.R.M. at 3348.

⁹ *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2430-31, 125 L.R.R.M. 2521, 2524 (1987) (citing *Hechler*, 107 S. Ct. at 2166-67 n.3, 125 L.R.R.M. at 2356 n.3); see also *Allis-Chalmers*, 471 U.S. at 220, 118 L.R.R.M. at 3352-53.

¹⁰ *Caterpillar*, 107 S. Ct. at 2429-30, 125 L.R.R.M. at 2523-24. The Court explored the mechanics of how a defendant may remove a case involving a federal question from state to federal court. *Id.* The "well-pleaded complaint rule" makes the plaintiff the master of the claim and provides federal jurisdiction "only when a federal question is presented on the face of plaintiff's properly pleaded complaint." *Id.* at 2429, 125 L.R.R.M. at 2523 (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936)). Moreover, a case may not be removed to federal court solely on the basis of a defense of preemption. *Caterpillar*, 107 S. Ct. at 2430, 125 L.R.R.M. at 2524 (citing *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983)). The preemptive force of a federal statute, however, is so great that it can "completely preempt" an area of state law and thus make any claim purportedly based on that law a federal claim. *Caterpillar*, 107 S. Ct. at 2430, 125 L.R.R.M. at 2523-24 (citing *Franchise Tax Board*, 463 U.S. at 24). Therefore, a statute like section 301(a) prohibits a plaintiff from "artfully pleading" his complaint to avoid federal jurisdiction. *Caterpillar*, 107 S. Ct. at 2432, 125 L.R.R.M. at 2524.

¹¹ 471 U.S. 202, 118 L.R.R.M. 3345 (1985).

¹² *Id.* at 210-11, 118 L.R.R.M. at 3349.

¹³ *Id.* at 211, 118 L.R.R.M. at 3349. The Court posited:

[Q]uestions relating to what the parties to a labor agreement agreed, and what the legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Id.

intertwined" with interpretation of the labor contract, section 301(a) applies and the state tort claim is preempted.¹⁴

Subsequent Supreme Court cases have interpreted *Allis-Chalmers* narrowly. In two cases decided in 1987, *Caterpillar Inc. v. Williams*¹⁵ and *International Brotherhood of Electrical Workers v. Hechler*,¹⁶ the Supreme Court rejected the view that preempts any state claim that is slightly related to the collective bargaining agreement.¹⁷ Rather, the cases recognize independent state claims "tangentially" related to the labor agreement.¹⁸

During the *Survey* year, in *Paige v. Henry J. Kaiser Co.*, the Court of Appeals for the Ninth Circuit interpreted narrowly the *Allis-Chalmers* standard and ruled that section 301(a) did not preempt a state tort claim for wrongful discharge based upon a state public policy expressed in California's Organized Safety and Health Act (Cal/OSHA).¹⁹ In *Paige*, the Ninth Circuit applied the preemption standard presented in *Allis-Chalmers*, and determined that although one cause of action based on a state tort claim of breach of covenant of good faith and fair dealing was preempted as a product of the collective bargaining agreement, a second state tort claim of wrongful discharge based on Cal/OSHA was not "inextricably intertwined" with interpreting the terms of the labor agreement and therefore was not preempted.²⁰ The court in *Paige* then applied a second preemption doctrine and held that minimum state standards for health and safety do not violate the LMRA's policies of promoting the collective bargaining process.²¹ Thus, following the standards set forth in *Paige*, courts could find that section 301(a) does not preempt claims based on state health regulations.²²

In *Paige*, the plaintiffs were two employees who worked as welding-machine tenders pursuant to a collective bargaining agree-

¹⁴ *Id.* at 212-13, 118 L.R.R.M. at 3349-50. The Court held that the plaintiff's claim alleging bad faith in the company's handling of an insurance claim was rooted in the labor agreement because it necessitated looking to the contract to determine if the contract created any implied rights. *Id.* at 215-20, 118 L.R.R.M. at 3350-53.

¹⁵ *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 125 L.R.R.M. 2521 (1987).

¹⁶ *International Bhd. of Elec. Workers v. Hechler*, 107 S. Ct. 2161, 125 L.R.R.M. 2353 (1987).

¹⁷ See *infra* notes 64-68 and accompanying text.

¹⁸ See *infra* notes 64-68 and accompanying text.

¹⁹ *Paige v. Henry J. Kaiser Co.*, 820 F.2d 857, 863, 126 L.R.R.M. 2145, 2149-50 (9th Cir. 1987).

²⁰ *Id.* at 861-63, 126 L.R.R.M. at 2148-50.

²¹ *Id.* at 863-65, 126 L.R.R.M. at 2150-52.

²² *Id.* at 866, 126 L.R.R.M. at 2152.

ment between defendant Kaiser Co. and Operating Engineers Local 3.²³ The plaintiffs were required to fuel twelve gasoline generators under conditions they believed were unnecessarily and illegally hazardous.²⁴ After they unsuccessfully complained to their supervisors, Kaiser Co. fired the plaintiffs when they refused to re-fuel a generator.²⁵ The employer's superintendent discussed the firings with representatives from Local 3, who told the plaintiffs that nothing could be done.²⁶

The plaintiffs then filed a state court action containing seven tort claims under California law.²⁷ Two of the state claims included actions in tort for wrongful discharge.²⁸ The plaintiffs claimed that their employer breached an implied covenant of good faith and fair dealing as well as violated Cal/OSHA which prohibits the discharge of employees who complain of unsafe working conditions.²⁹

The defendant company successfully removed the action to the federal district court, alleging that section 301 preempted the wrongful discharge claims because the plaintiffs' claims were merely artfully-pleaded federal claims based on the collective bargaining agreement.³⁰ The federal district court agreed and dismissed the wrongful discharge claims because the federal statute of limitations had run.³¹ The district court remanded the remaining five tort claims to the state court.³²

The Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the wrongful discharge claim based on breach of a covenant of good faith and fair dealing, but reversed the district

²³ *Id.* at 859, 126 L.R.R.M. at 2146.

²⁴ *Id.* The court found that the fueling was performed before the engines had cooled, that leakage and spillage occurred during the fueling due to cracked funnels and poorly-conditioned containers, and that "much of the re-fueling was required to be done beneath falling sparks given off by the welders." *Id.*

²⁵ *Id.*

²⁶ *Id.* at 859-60, 126 L.R.R.M. at 2146-47.

²⁷ *Id.* The claims included: (1) wrongful discharge in violation of Cal. Lab. Code §§ 6310, 6311, 6400, 6401, 6403, 6404 providing for regulation of occupational health and safety; (2) wrongful discharge in violation of an implied covenant of good faith and fair dealing; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) assault, (6) wilful refusal to take precautions by Chevron who employed Kaiser Co.; and (7) willful, malicious requirements to perform ultra-hazardous tasks. *Id.* at 860, 126 L.R.R.M. at 2147.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

court's treatment of the claim based on violation of Cal/OSHA.³³ In so holding, the Ninth Circuit first noted that section 301 prevented the plaintiffs from "artfully pleading" their complaint to avoid federal jurisdiction.³⁴ The Ninth Circuit reasoned that courts will re-characterize artfully-pleaded complaints as federal claims subject to federal jurisdiction.³⁵

In assessing whether the two wrongful discharge claims were "artfully-pleaded" to avoid section 301 preemption, the court stated that the inquiry must focus on the express or implied intent of Congress in enacting section 301.³⁶ The court cited the policy presented in *Allis-Chalmers* that courts should neither preempt state laws that do not conflict with nor frustrate federal laws, policies, or congressional intent.³⁷ The court also cited the Supreme Court standard that section 301 only preempts claims directly based on rights of collective bargaining agreements and claims "substantially dependent" on interpretation of the agreements.³⁸ The court recognized that this doctrine applies to tort claims that are "inextricably intertwined" with analysis of the contractual terms.³⁹

Applying this standard to the claims at hand, the court first focused on the plaintiffs' first cause of action. The plaintiffs alleged that the employer breached an implied covenant of good faith and fair dealing.⁴⁰ The court found that this claim would require examination of the rights and liabilities presented in the collective bargaining agreement.⁴¹ The court, therefore, held that section 310 completely preempted this first cause of action and properly dismissed the action as time-barred.⁴²

The *Paige* court then focused on the claim for wrongful discharge in violation of California's public policy as expressed in Cal/

³³ *Id.* at 866, 126 L.R.R.M. at 2152.

³⁴ *Id.* at 860, 126 L.R.R.M. at 2147; *see supra* note 10.

³⁵ *Id.* at 860, 126 L.R.R.M. at 2147.

³⁶ *Paige*, 826 F.2d at 861, 126 L.R.R.M. at 2148 (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 738, 119 L.R.R.M. 2569, 2575 (1985)).

³⁷ *Paige*, 826 F.2d at 861, 126 L.R.R.M. at 2148 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 118 L.R.R.M. 3345, 3348 (1985)).

³⁸ *Id.* (citing *Caterpillar, Inc. v. Williams*, 107 S. Ct. at 2431, 125 L.R.R.M. at 2524).

³⁹ *Id.* (citing *Allis-Chalmers*, 471 U.S. at 216-18, 118 L.R.R.M. at 3351-52).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 861-62, 126 L.R.R.M. at 2148. The *Paige* court cited *Allis-Chalmers*, where the Supreme Court held that because an implied duty to act in good faith "ultimately depends upon the terms of the agreement between the parties, both are tightly bound with questions of contract interpretation that must be left to federal law." *Id.* (citing *Allis-Chalmers*, 471 U.S. at 216, 118 L.R.R.M. at 3351).

OSHA.⁴³ Cal/OSHA, the court observed, requires employers to provide a safe work atmosphere and prohibits the firing of employees who complain of unsafe working conditions.⁴⁴ To determine whether this claim was preempted, the court outlined three existing theories of federal preemption.⁴⁵ First, the court noted that the preemption doctrine reserving claims arising under sections 7 and 8 of the NLRA to the NLRB did not apply in this case because the alleged violations were claims arising under a state statute.⁴⁶

Second, the court noted that preemption could also obviously exist under the federal jurisdiction granted by section 301(a) of the LMRA.⁴⁷ The court reasoned, however, that an employee under a collective bargaining agreement retains a private right of action under Cal/OSHA because the state regulations protect all workers "irrespective of any labor agreements."⁴⁸ The court recognized the rights of all employees as individuals to benefit from the state health and safety regulations.⁴⁹ Moreover, the court noted that allowing plaintiffs to refuse to expose themselves and others to a possibly serious explosion would further California's public policy to protect its citizens.⁵⁰ Therefore, even though article 19 of the collective bargaining agreement incorporated the state safety laws, the court held that section 301 did not preempt the claim because it was not

⁴³ *Paige*, 826 F.2d at 862, 126 L.R.R.M. at 2148. The court noted that California restricts any termination that is disallowed by statute or violates public policy. *Id.* (citing *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980)).

⁴⁴ *Paige*, 826 F.2d at 862, 126 L.R.R.M. at 2148.

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 43 L.R.R.M. 2838 (1959)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 863, 126 L.R.R.M. at 2149.

⁴⁹ *Id.*

⁵⁰ *Id.* The court analogized its finding to its 1984 decision in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1376, 115 L.R.R.M. 3089, 3095 (9th Cir. 1984), in which it upheld a state tort claim for wrongful termination in violation of public policy where an employer fired an employee for reporting a shipment of spoiled milk to local health officials. *Paige*, 826 F.2d at 863, 126 L.R.R.M. at 2149. The *Paige* court, moreover, distinguished this case from *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1475, 117 L.R.R.M. 2073, 2078 (9th Cir. 1984), where the Ninth Circuit held that an employee's state claim of wrongful termination was preempted because his employer fired him when the employee complained of mine safety conditions under a federal safety regulation. *Paige*, at 863 n. 10, 126 L.R.R.M. at 2149 n. 10. The *Paige* court also distinguished *DeSoto v. Yellow Freight Sys., Inc.* 811 F. 2d 1333, 125 L.R.R.M. 3107 (9th Cir. 1987), because there the employer discharged an employee not for health and safety violations, but rather for refusing to drive a truck he mistakenly believed was unregistered. *Paige*, 826 F.2d at 863 n. 11, 126 L.R.R.M. at 2149 n. 11.

"inextricably intertwined" with an interpretation of contract terms, but rather required interpretation of state law.⁵¹

In addition to these two theories of preemption, the *Paige* court explored the implications of a third theory. The court considered the third preemption doctrine which precludes state claims that interfere with the goals of the NLRA.⁵² The court quoted the 1985 Supreme Court decision of *Metropolitan Life Insurance Co. v. Massachusetts*, which stated that the Congress' goal in enacting the NLRA was to establish a framework for an equitable bargaining process without disturbing existing state laws that set minimum labor standards unrelated to the collective bargaining process.⁵³ The *Paige* court posited that Congress intended California to retain this police power because the federal OSHA statute, 29 U.S.C. §§ 651-678 explicitly allows individual states to adopt regulations at least as vigorous as those required by the federal act.⁵⁴ The court went on to note that other Supreme Court decisions have upheld various state statutes that provide unemployment compensation to strikers,⁵⁵ require certain minimum mental health care benefits even for residents insured on an employee health plan,⁵⁶ and require a specific severance payment to all employees in event of plant closing.⁵⁷

Finally, in regard to the remaining five tort claims — intentional and negligent infliction of emotional distress, assault, peculiar risk, and ultra-hazardous activities — the court found the district court's order to remand was not reviewable on appeal because it did not involve a matter of substantive law.⁵⁸ In addition, the Ninth Circuit

⁵¹ *Id.* at 863, 126 L.R.R.M. at 2149 ("Article 19 of the collective bargaining agreement states that the employer will comply with all state and federal health and safety laws including OSHA").

⁵² *Id.*

⁵³ *Id.* (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755, 119 L.R.R.M. 2569, 2581-82 (1985)).

⁵⁴ *Paige*, 826 F.2d at 864, 126 L.R.R.M. at 2150.

⁵⁵ See *New York Tel. Co. v. New York Labor Dep't*, 440 U.S. 519, 544-46, 100 L.R.R.M. 2896, 2904-05 (1979) (Court upheld a state court finding no preemption on the ground that the unemployment insurance statute in question was a law of general application).

⁵⁶ See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 755, 758, 119 L.R.R.M. at 2582-83 (Court held that the NLRA did not preempt state statute providing "minimum standards independent of the collective bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization").

⁵⁷ See *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2222-23, 125 L.R.R.M. 2455, 2463-64 (1987) (Court relied on *Metropolitan Life* and held that such a regulation protected individual union and non-union workers alike, and was a valid exercise of the state's police power).

⁵⁸ *Paige*, 826 F.2d at 865-66, 126 L.R.R.M. at 2151-52 (citing *Clorox Co. v. United States*

denied the plaintiffs' request for mandamus because it found that the district court was legally correct in finding that section 301 did not preempt the claims.⁵⁹ Consequently, the Ninth Circuit remanded the five tort claims to the California state court, along with the plaintiffs' claim for wrongful termination in violation of Cal/OSHA in order to determine if the alleged violations existed.⁶⁰

By recognizing that an individual employee can bring a state tort action of wrongful discharge in violation of a public policy independent of any contractual right, the court in *Paige* adhered to and clarified the narrow focus of the *Allis-Chalmers* decision. While other courts have broadly interpreted *Allis-Chalmers* as preempting any wrongful discharge claim brought by an employee who is subject to a collective bargaining agreement and arbitration procedure,⁶¹ *Paige* illustrates a more refined reading of the Supreme Court's "narrow focus" in *Allis-Chalmers*. In *Allis-Chalmers*, the Supreme Court stated that its decision did not hold "that every state law suit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted by § 301."⁶²

The *Paige* decision comports with two recent Supreme Court interpretations of *Allis-Chalmers*. In *International Brotherhood of Electrical Workers v. Hechler*,⁶³ the Court noted that courts should read *Allis-Chalmers* in the context of its "precise limits," and find preemption of only those state claims "substantially dependent" on analyses of collective bargaining agreements.⁶⁴ In *Caterpillar, Inc. v. Wil-*

Dist. Ct. for N.D. of Cal., 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-78 (9th Cir. 1984)).

⁵⁹ *Paige*, 826 F.2d at 865-66, 126 L.R.R.M. at 2151-52 (citing *Survival Sys. v. United States Dist. Ct.*, 825 F.2d 1416, 1418 (9th Cir. 1987)).

⁶⁰ *Paige*, 826 F.2d at 866, 126 L.R.R.M. at 2152.

⁶¹ See *Lingle v. Norge Div. of Magic Chef*, 823 F.2d 1031, 1046, 125 L.R.R.M. 2855, 2867 (7th Cir. 1987). The court in *Lingle* faced an employee's allegation that her employer fired her in retaliation for exercising her rights under Illinois' worker's compensation law. *Id.* at 1033-34, 125 L.R.R.M. at 2857. The court held that section 301 preempted the employee's claim because "where a plaintiff makes a claim for wrongful discharge, this claim necessarily implicates a just cause provision" [of the collective bargaining agreement]. *Id.* at 1049, 125 L.R.R.M. at 2870. The court cited other Seventh Circuit decisions which similarly held that section 301 preempts the tort of retaliatory discharge. *Id.* at 1044-45, 125 L.R.R.M. at 2866.

⁶² *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 118 L.R.R.M. 3345, 3352-53 (1985).

⁶³ 107 S. Ct. 2161, 125 L.R.R.M. 2353 (1987).

⁶⁴ *Id.* at 2166 n.3, 125 L.R.R.M. at 2356 n.3 ("the Court took care in *Allis-Chalmers* to define the precise limits of its holding"). Nevertheless, the *Hechler* Court held that section 301 preempted an employee's suit against her union for breach of duty to furnish a safe workplace, because the Court reasoned that it would have to look to the terms of the collective

liams,⁶⁵ the Court held that plaintiffs employed under a collective bargaining agreement could still enforce state contract rights to contracts independent of the collective bargaining agreement.⁶⁶ The *Caterpillar* Court also noted that *Allis-Chalmers* allows state claims "tangentially" involving provisions of collective bargaining agreements.⁶⁷ Thus, in light of these precedents, the *Paige* court correctly narrowly interpreted *Allis-Chalmers*.

The *Paige* decision impacts labor relations law on two levels: the practical and the theoretical. In regard to practical, direct implications, *Paige* is consistent with earlier Ninth Circuit opinions that recognize a public policy exception to cases addressing state health and safety regulations.⁶⁸ However, *Paige* represents the first time a court has included state OSHA claims in the list⁶⁹ of state tort claims that are outside of section 301 preemption even when the collective bargaining agreement generally incorporates the state regulations.⁷⁰

The practical impact of *Paige*, however, may extend to other areas where courts have split over whether section 301 should preempt a state regulation. For example, the circuits have conflicting views regarding tort claims of wrongful discharge based on

bargaining agreement to determine if and when the union assumed this duty of care from the employer. *Id.* at 2168-70, 125 L.R.R.M. at 2357-58.

⁶⁵ 107 S. Ct. 2425, 125 L.R.R.M. 2521 (1987).

⁶⁶ *Id.* at 2431-32, 125 L.R.R.M. at 2525-26.

⁶⁷ *Id.* at 2432 n.10, 125 L.R.R.M. at 2525 n.10.

⁶⁸ See *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1375-76, 115 L.R.R.M. 3089, 3095 (9th Cir. 1984). The Ninth Circuit held that an employee who was fired because he reported to local health officials that his shipment of milk was spoiled could bring a valid state action for wrongful discharge. *Id.* The court avoided an "inflexible application" of the preemption doctrine when claims presented no danger to the collective bargaining nor to the economic relationship between the employer and employees. *Id.* But see *DeSoto v. Yellow Freight Sys.*, 820 F.2d 1434, 1438, 125 L.R.R.M. 3107, 3110 (9th Cir. 1987) (court held that preemption occurred when the employee "was not acting in defense of a public policy of the state of California, but [rather] incorrectly asserting his own interpretation of the law" when he refused to drive a truck he mistakenly believed was not registered); *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1475, 117 L.R.R.M. 2073, 2078 (9th Cir. 1984) (court held employee did not have an independent state claim when the violation of public policy occurred under federal mine safety act).

⁶⁹ See *supra* notes 56-58 and accompanying text.

⁷⁰ Compare *Paige* with *Brevik v. Kite Painting, Inc.*, 404 N.W.2d 367, 125 L.R.R.M. 2645 (Minn. Ct. App. 1987) (court held that an employee has a private right of action for retaliatory termination where an employer retaliates against the employee by firing the employee for filing a complaint with Minnesota OSHA, and relied heavily on the fact that the collective bargaining agreement in question contained absolutely no mention of Minnesota OSHA rights and no right to grievance for "just cause" claims) and *Oglesby v. RCA Corp.*, 752 F.2d 272, 278, 118 L.R.R.M. 2203, 2206 (7th Cir. 1985) (court found no private right of action under state law for wrongful dismissal when employee claimed employer violated federal OSHA).

firings in retaliation against employees who filed claims under state workers' compensation statutes.⁷¹ If courts analogize to the public policy exception of *Paige*, they may determine that state workers' compensation statutes, like state OSHA regulations, are sufficiently independent of the collective bargaining process to avoid preemption.⁷²

The *Paige* decision also presents two important theoretical concepts that courts have developed regarding the nature of collective bargaining. Within the framework of the federal regulations, courts have balanced the need for uniformity with the rights of individuals and states. *Paige* is an example of a balancing of these concepts. First, the *Paige* court illustrates the important concept that even if an individual is employed under a collective bargaining agreement, he or she may still assert rights independent of that agreement. Consequently, an employee, by entering a union, is not penalized for claiming rights guaranteed to all non-union employees. The Supreme Court has recently recognized this concept in *Metropolitan Life Insurance Co. v. Massachusetts*.⁷³ In *Metropolitan Life*, the Court upheld a state statute giving minimum mental health care benefits to citizens insured under a general policy as well as to those citizens insured under employee health care plans.⁷⁴ Similarly, in upholding a Maine statute requiring employers who close their plants to provide severance pay to employees, the Court in *Fort Halifax Packing Co. v. Coyne*⁷⁵ noted that the statute provided rights to union as well as non-union employees.⁷⁶ The court in *Paige*, therefore, recognized

⁷¹ See *Prestress Eng'g Corp. v. Gonzalez*, 107 S. Ct. 3248, 125 L.R.R.M. 2846 (1987). In his dissent, Justice White disagreed with the Court's denial of certiorari and presented conflicting circuit views on the subject of retaliatory discharge in response to filing of workmen's compensation claims. *Id.* (White, J., dissenting)

⁷² See *Lingle v. Norge Div. of Magic Chef*, 823 F.2d 1031, 125 L.R.R.M. 2855 (7th Cir. 1987) (court held that two employees' claims of retaliatory discharge were preempted by section 301). *But see* *Baldracchi v. Pratt & Whitney Aircraft*, 814 F.2d 102, 125 L.R.R.M. 3363 (2d Cir. 1987) (court held that employees' retaliatory discharge claim was not preempted because state workmen's compensation statute provided rights independent of the collective bargaining agreement).

⁷³ 471 U.S. 724, 119 L.R.R.M. 2569 (1985).

⁷⁴ *Id.* at 756, 119 L.R.R.M. 2582 ("It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on non union employers.").

⁷⁵ 107 S. Ct. 2211, 125 L.R.R.M. 2455 (1987).

⁷⁶ *Id.* at 2222, 125 L.R.R.M. at 2463. ("such regulations provide protection to individual union and non-union workers alike and thus 'neither encourage[s] nor discourage[s] the collective bargaining processes that are the subject of the NLRA'").

this view of employee individuality when it noted that Cal/OSHA benefits all employees as "individual workers."⁷⁷

Second, the holding in *Paige* demonstrates that state interests in health and safety are still viable in labor relations.⁷⁸ While recognizing the need for uniformity in rulings on collective bargaining agreements, the court stated that the goal of the NLRA was "the establishment of an equitable bargaining process."⁷⁹ Therefore, as long as a state's police power over health and safety does not interfere with the NLRA's concern for equitable bargaining, its statutes survive preemption.⁸⁰

This theory of the interstitiality of federal and state law in labor relations is consistent with several Supreme Court decisions.⁸¹ In *Allis-Chalmers Corp. v. Lueck*, the Court proposed that courts should sustain local regulations unless they conflict, frustrate, or interfere with federal law or congressional intent.⁸² In *Metropolitan Life* the Court noted that the legislative history of the NLRA demonstrates that Congress did not intend to destroy the "myriad of state laws" that regulated minimum labor standards and remained relatively unrelated to the collective bargaining process.⁸³ In fact, the Court proposed that the NLRA merely creates a framework within existing state laws.⁸⁴ Similarly, in *Fort Halifax*, the Court continued to recognize the role of state standards as a "backdrop" to the framework of the equitable bargaining process.⁸⁵ The Ninth Circuit in *Paige*, re-affirmed this view of the role of state police power in regard to health and safety provisions.

⁷⁷ *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863, 126 L.R.R.M. 2145, 2149 (9th Cir. 1987).

⁷⁸ *Id.* at 865, 126 L.R.R.M. at 2151 ("it is uniquely within the state's police power to legislate for the health and safety of their citizens").

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 119 L.R.R.M. 2569, 2582 (1985) ("federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act").

⁸² *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208-09, 118 L.R.R.M. 3345, 3348 (1985).

⁸³ *Metropolitan Life*, 471 U.S. at 756, 119 L.R.R.M. at 2582.

⁸⁴ *Id.* ("we believe that Congress developed the framework of self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety").

⁸⁵ *Fort Halifax Packing Co., v. Coyne*, 107 S. Ct. 2211, 2222-23, 125 L.R.R.M. 2455, 2463 (1987) ("preemption should not lightly be inferred in this area, since the establishment of labor standards falls within the traditional police power of the State"); see also *De Canas v. Bica*, 424 U.S. 351, 356, 91 L.R.R.M. 2433, 2434 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State . . . [including] laws affecting occupational health and safety").

In sum, the Court of Appeals for the Ninth Circuit, in *Paige v. Henry J. Kaiser Co.*, recognized an independent state tort claim for wrongful discharge based on a state's public policy as expressed in its OSHA health and safety regulations. The court's decision comports with the Supreme Court's decisions addressing federal preemption of state claims under section 301. As well as creating a new area of tort liability sheltered from the preemptive effects of section 301(a), the court in *Paige* reaffirmed the coexistence of individual workers' rights and state police powers within the federal labor law framework.

V. UNION LIABILITY

A. **Union Liability Under Title VII and Section 1981 for the Non-Assertion of Racial Discrimination Claims: Goodman v. Lukens Steel Co.*¹

Title VII of the Civil Rights Act of 1964 (Title VII) explicitly prohibits a union from discriminating, or causing an employer to discriminate, against any person on the basis of race.² The Supreme Court has interpreted the more general antidiscriminatory provisions of 42 U.S.C. § 1981 (section 1981) to similarly prohibit discrimination by a union.³ Although the courts have consistently held

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¹ 107 S. Ct. 2617, 44 FEP Cases 1 (1987).

² § 703(c)(1)-(3), 42 U.S.C. § 2000e-2(c)(1)-(3) (1982). The relevant portion of Title VII reads in full:

703(c) Labor Organization Practices

It shall be unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or to otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Id.

³ See SCHLEI & GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 669 (1982); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60, 10 FEP Cases 817, 819 (1975) (Section 1981 provides a remedy against discrimination in private employment on the basis of race). Section 1981 states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties,

unions liable for active discrimination against their members,⁴ until recently the courts have failed to definitively hold whether a union is liable for its passive failure or refusal to challenge an employer's racially discriminatory practices.⁵ Subsidiary issues include whether a plaintiff must prove that a union or its officials exhibited racial animus towards the plaintiff,⁶ and whether a union can avoid liability by asserting a nondiscriminatory motive for its discriminatory conduct.⁷

Courts have also failed to agree on the appropriate statute of limitations to be applied to section 1981 claims,⁸ because section 1981, like sections 1982 and 1983, does not contain its own statute of limitations.⁹ Courts must thus "borrow" the most appropriate state statute of limitations from the law of the state in which the claim arises.¹⁰ Previously, courts selected the appropriate statute of limitations to apply on a case-by-case basis, focusing on the nature of the plaintiff's injury and the relief sought.¹¹ In most cases, courts have applied either the statute of limitations applicable to personal injuries or the one applicable to contractual relations.¹² In 1985, in *Wilson v. Garcia*, the United States Supreme Court rejected the use of a case-by-case analysis for section 1983 claims, holding that courts

give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no others.

42 U.S.C. § 1981 (1982).

The coverage of section 1981 is not, however, exactly coextensive with that of Title VII. *Johnson*, 421 U.S. at 460, 10 FEP Cases at 819 (§ 1981 not applicable to certain employers covered by Title VII; Title VII offers various procedural advantages). The differences are not, however, relevant to the present discussion.

⁴ The text of § 703(c) of Title VII explicitly prohibits active discrimination, including, for example, the exclusion of a person from union membership because of his or her race. § 703(c)(1), 42 U.S.C. § 2000e-2(c)(1) (1982).

⁵ See SCHLEI & GROSSMAN, *supra* note 3, at 635-37.

⁶ *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2625, 44 FEP Cases 1, 6 (1987).

⁷ *Id.* at 2624-25, 44 FEP Cases at 4.

⁸ See *infra* notes 10-13 and accompanying text.

⁹ 42 U.S.C. §§ 1981, 1983 (1982). See *Wilson v. Garcia*, 471 U.S. 261, 266 (1985); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 10 FEP Cases 817, 820.

¹⁰ See *Wilson*, 471 U.S. at 266-67; *Johnson* 421 U.S. at 462, 10 FEP Cases at 820.

¹¹ See *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 118, 39 FEP Cases 658, 661 (3d Cir. 1985); *Davis v. United States Steel Supply*, 581 F.2d 335, 338 (3d Cir. 1978); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 900 (3d Cir. 1977).

¹² See *Goodman*, 777 F.2d 118, 39 FEP Cases 661; *Polite v. Diehl*, 507 F.2d 119, 122, (3d Cir. 1984); *Davis*, 581 F.2d at 337, 339 (applying a "contractual rights" statute of limitations to an employment discrimination claim); *Meyers*, 559 F.2d at 900 (applying a "contractual rights" statute of limitations in a housing discrimination case).

must apply the same statute of limitations to all actions arising under section 1983.¹³ Using an historical analysis, the *Garcia* Court concluded that the applicable state's "personal injury" statute of limitations should be applied in section 1983 actions.¹⁴ The *Garcia* Court did not address, however, whether courts must apply the same statute of limitations to all section 1981 claims, and, if so, whether the "contractual rights" or "personal injury" state statute of limitations is appropriate.¹⁵

During the *Survey* year, in *Goodman v. Lukens Steel Co.* the Supreme Court held that when a union deliberately decides not to prosecute grievances alleging racial discrimination against an employer, it has violated both Title VII and section 1981.¹⁶ Further, the *Goodman* Court held that when a union is aware of an employer's discriminatory practices, but refuses to take corrective action, the discriminatory intent necessary to maintain an action under both section 1981 and Title VII's disparate treatment theory has been established,¹⁷ regardless of whether the plaintiff union members have demonstrated that union officials exhibited racial animus towards them.¹⁸ Moreover, the Court held that unions may not escape liability merely by asserting a racially neutral purpose for otherwise discriminatory conduct, particularly where contrary evidence suggests that the purpose is pretextual.¹⁹ Although the *Goodman* decision does not impose an affirmative duty on unions to actively seek out and combat employer discrimination, the decision does indicate that unions risk liability when they fail to take remedial action in the face of discriminatory employer practices.

Regarding the relevant statute of limitations applicable to section 1981 actions, the *Goodman* Court held that the personal injury limitations period applicable to all section 1983 claims is also applicable to all section 1981 claims.²⁰ Although recognizing that section 1981 has particular significance with respect to the protection of economic rights, the *Goodman* Court stated that section 1981's ultimate role as part of a larger statutory scheme prohibiting racial discrimination, a personal injury, indicates that the tort limitations

¹³ 471 U.S. at 275.

¹⁴ *Id.* at 276-79.

¹⁵ *See id.* at 266-79.

¹⁶ 107 S. Ct. at 2625, 44 FEP Cases at 6.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2625, 44 FEP Cases at 6.

²⁰ *Id.* at 2621, 44 FEP Cases at 3.

period is more appropriate.²¹ The application of a single statute of limitations to all section 1981 claims will promote predictability and reduce the litigation costs associated with collateral matters for both plaintiffs and defendants.²² The *Goodman* Court's choice of the personal injury statute of limitations is unlikely, however, to have a neutral effect, as the limitations period applicable to personal injury claims is usually shorter than the one applicable to contract claims.

In *Goodman*, individual employees of Lukens Steel Company (Lukens) filed a class action suit against Lukens and the employee's collective-bargaining agents, the United Steel Workers of America and two of its local affiliates (collectively, the Unions), alleging racial discrimination under Title VII and section 1981.²³ With regard to the Unions, the employees made several distinct allegations.²⁴ First, they charged that the Unions had pursued the grievances of black employees less vigorously than those of white employees.²⁵ Second, the employees charged that the Unions had repeatedly failed to include charges of racial discrimination in grievances filed against Lukens and failed entirely to file grievances and other complaints that were based solely on racial discrimination.²⁶ In addition to a generalized claim that the Unions had tolerated and tacitly encouraged racial harassment, the employees specifically asserted that the Unions had failed to take any action despite their awareness that Lukens had discharged black probationary employees at a significantly higher rate than white probationary employees, and that tests Lukens used in hiring and promotion had a racially disparate impact.²⁷

Although rejecting some of the employee's allegations regarding the Unions, the District Court for the Eastern District of Pennsylvania found sufficient grounds for holding that the Unions had discriminated on the basis of race in violation of both Title VII and section 1981.²⁸ Rejecting the Unions' assertion of a nondiscrimina-

²¹ *Id.*

²² See *infra* notes 290-300 and accompanying text.

²³ 107 S. Ct. at 2619, 44 FEP Cases at 2. The District Court for the Eastern District of Pennsylvania held Lukens liable under a number of theories. *Goodman v. Lukens Steel Co.*, 580 F. Supp. 1114, 1163-64, 39 FEP Cases 617, 657 (E.D. Pa. 1984). The judgment against Lukens was not before the Supreme Court. 107 S. Ct. at 2620 n.6, 44 FEP Cases at 2 n.6.

²⁴ *Goodman*, 580 F. Supp. at 1157-60, 39 FEP Cases at 651-55.

²⁵ *Id.* at 1158-59, 39 FEP Cases at 652-53.

²⁶ *Id.* at 1159-60, 39 FEP Cases at 653-54.

²⁷ *Id.*

²⁸ *Id.* at 1164, 39 FEP Cases at 657. The district court found the evidence regarding the employees' first allegation that grievances initiated by blacks were less vigorously prosecuted

tory purpose for their conduct as pretextual,²⁹ the district court concluded that the Unions' failure to act constituted tacit approval of Lukens' discriminatory practices.³⁰ The district court thus held that the Unions' conduct violated both Title VII and section 1981.³¹ The district court also held that the statute of limitations applicable to section 1981 claims was Pennsylvania's six year "contractual rights" limitations period rather than the two year "personal injury" limitations period.³² The United States Court of Appeals for the Third Circuit affirmed the district court's judgment regarding the Unions' liability,³³ but reversed the district court's application of the longer, contractual rights limitations period to section 1981.³⁴

The United States Supreme Court affirmed the Third Circuit's decision regarding both the Unions' liability and the statute of limitations period applicable to section 1981 claims.³⁵ Although refusing to reach the question of whether Title VII and section 1981 impose a positive duty on Unions to combat racial discrimination in the workplace,³⁶ the Court held that the Unions' intentional non-assertion of claims of racial discrimination in grievances and other complaints rendered the Unions liable under both Title VII and section 1981.³⁷ With regard to the statute of limitations, the Court reasoned that the civil rights violations to which section 1981 applies represent injuries to individual rights more akin, on the whole, to

than those by whites inconclusive, and thus insufficient to support liability. *Id.* at 1158-59, 39 FEP Cases at 652-53. With regard to the employees' second allegation that the unions had failed to assert grievances and other complaints that included claims of racial discrimination, however, the district court found the evidence presented more compelling. *Id.* at 1159, 39 FEP Cases at 653-54. The district court also found that Lukens had discharged a statistically disproportionate number of black probationary employees, and that the Unions were aware of the disproportionality, but intentionally chose not to take any corrective action. *Id.* Similarly, the district court found that the Unions were aware that tests that the steel company used in making decisions with regard to hiring and promotions had a racially disparate impact, but that the Unions took no action. *Id.* Finally, the district court found that the Unions' reluctance to assert racial discrimination as a basis for grievances could not be justified as a practice necessary to the effective and equitable resolution of grievances generally. *Id.* at 1159-60, 39 FEP Cases 654.

²⁹ *Id.* at 1159-60, 39 FEP Cases at 654.

³⁰ *Id.* at 1164, 39 FEP Cases at 657.

³¹ *Id.*

³² *Id.* at 1121-22, 39 FEP Cases at 622-23.

³³ *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 127, 39 FEP Cases 658, 668-69 (3d Cir. 1985).

³⁴ *Id.* at 120, 39 FEP Cases at 663.

³⁵ *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2622, 2625, 44 FEP Cases 1, 4, 6 (1987).

³⁶ *Id.* at 2623, 44 FEP Cases at 5.

³⁷ *Id.* at 2625, 44 FEP Cases at 6.

claims of personal, rather than economic, injury.³⁸ Thus, the Court held that the state's two year "personal injury" limitations period, rather than the six year "contractual rights" limitations period, was the appropriate state limitations period to be borrowed for section 1981 claims.³⁹

In its analysis, the *Goodman* Court first set forth the relevant standards for finding liability under Title VII and section 1981.⁴⁰ In both cases arising under Title VII, the Court noted, two distinct theories of liability exist.⁴¹ Under a disparate impact theory, the Court stated, a plaintiff must demonstrate that a racially neutral policy in fact operates in a manner which discriminates on the basis of race.⁴² Under a disparate treatment theory, the Court held, a plaintiff must prove not only that he or she was treated in a discriminatory way, but also that the discrimination was intentional.⁴³ Similarly, according to the Court, a plaintiff seeking relief under section 1981 must demonstrate that the alleged discrimination was intentional: a showing that a facially neutral policy burdens one race more than another is insufficient.⁴⁴

The *Goodman* Court turned next to the Unions' contention that the district court's judgment rested on the erroneous legal ground that mere passivity in the face of discrimination by an employer can trigger liability under Title VII and section 1981.⁴⁵ The Court noted that both the district court and the Third Circuit had apparently held that such passivity was actionable.⁴⁶ Because both lower courts ultimately found that the Unions had in fact done "far more" than passively ignore discriminatory employer practices,⁴⁷ however, the Supreme Court treated the lower courts' statements that mere passivity triggers liability as dicta, and declined to rule on the matter.⁴⁸

In deciding what activity by the Unions extended beyond mere passivity, the *Goodman* Court adopted the district court's findings virtually verbatim.⁴⁹ The Court found that although the Unions

³⁸ *Id.* at 2621, 44 FEP Cases at 3.

³⁹ *Id.*

⁴⁰ *Id.* at 2622, 44 FEP Cases at 4.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 2623-24, 44 FEP Cases at 5.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 2622-24, 44 FEP Cases at 4-5.

were aware that Lukens had discharged black probationary employees at a disproportionately greater rate, the Unions had failed to take any corrective action; that the Unions failed to file grievances that were solely based on claims of racial harassment; and that the Unions refused to include claims of racial discrimination in grievances that also contained other claims.⁵⁰

The *Goodman* Court next examined the language of Title VII to determine whether the district court's findings supported Title VII liability.⁵¹ The Unions contended that where an employer's discriminatory practices, rather than a union's, are at issue, the only provision of Title VII under which a court may hold a union liable is section 703(c)(3), which prohibits Unions from "caus[ing] or attempt[ing] to cause an employer to discriminate."⁵² The *Goodman* Court rejected this contention, holding that section 703(c)(1), which prohibits Unions from "otherwise discriminating against" any individual on the basis of race, provides a sufficient basis for holding a union liable where it is aware of discriminatory employer practices but fails to take corrective action.⁵³ Specifically, the Court held that an intentional decision by the Unions not to file grievances based on claims of racial discrimination violates the plain meaning of the language of section 703(c)(3).⁵⁴

Moreover, the *Goodman* Court refused to accept the reason offered by the Unions for their failure to assert claims of racial discrimination in the grievances they had filed.⁵⁵ The Unions contended that Lukens was highly sensitive to claims of racial discrimination and that the assertion of such claims would cause Lukens to "get its back up," ultimately making the settlement of grievances more difficult.⁵⁶ The Unions further contended that excluding claims of racial discrimination had not harmed black employees because other, non-racial, allegations usually supported the grievances.⁵⁷ The Supreme Court, as well as the district court and the court of appeals, held that, regardless of the truth of the Unions' contention it failed to explain why the Unions had refused to assert claims of racial discrimination even where no other independent

⁵⁰ *Id.*

⁵¹ *Id.* at 2624, 44 FEP Cases at 5.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 2624-25, 44 FEP Cases at 6.

⁵⁶ *Id.*

⁵⁷ *Id.*

grounds for complaint existed, and thus failed to negate the Unions' liability.⁵⁸ Moreover, the Court noted, the Unions' contention was irrelevant to their failure to protest the discharge of a disproportionate number of black probationary employees.⁵⁹

Finally, the *Goodman* Court held that union liability under Title VII and section 1981 did not require a finding that union officials had exhibited racial animus.⁶⁰ Rather, the *Goodman* Court stressed, a union is liable whenever it intentionally avoids asserting claims of racial discrimination, regardless of whether the reason for doing so is to avoid antagonizing the employer or to satisfy the demands of its white membership.⁶¹

Turning to the issue of the appropriate statute of limitations, the Court noted that section 1981, like sections 1982 and 1983, does not contain its own statute of limitations, and thus courts must borrow the most appropriate or analogous state statute.⁶² The *Goodman* Court stated that in *Wilson v. Garcia* it had held, first, that the same state statute of limitations should apply to all section 1983 claims, and, second, that because the civil rights that section 1983 was intended to protect are in essence personal rights, the state "personal injury" statute of limitations was the appropriate one to apply.⁶³

The plaintiff employees in *Goodman* contended that section 1981, unlike section 1983, focused primarily on the deprivation of economic rights and that the applicable state "contractual rights" statute of limitations should thus apply.⁶⁴ The *Goodman* Court rejected this contention, stating that section 1981 has a much broader focus than economic rights.⁶⁵ The Court noted that in addition to the right to make and enforce contracts, section 1981 protects the personal right to equal rights under the law for the security of persons and property, and to sue and to testify.⁶⁶ The *Goodman* Court concluded that, viewed more abstractly, section 1981 was part

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2625, 44 FEP Cases at 6.

⁶¹ *Id.*

⁶² *Id.* at 2620, 44 FEP Cases at 3. See *Wilson v. Garcia*, 471 U.S. 261, 266-68 (1985).

⁶³ *Goodman*, 107 S.Ct. at 2620-21, 44 FEP Cases at 3. Section 1983 provides a cause of action against any person who, acting under color of state law, deprives another individual of any of the rights or privileges guaranteed by the United States Constitution. 42 U.S.C. § 1983 (1982).

⁶⁴ *Goodman*, 107 S.Ct. at 2621, 44 FEP Cases at 3.

⁶⁵ *Id.*

⁶⁶ *Id.*

of a larger federal law intended to prohibit racial discrimination,⁶⁷ an injury that the *Garcia* Court found to be distinctly personal in nature.⁶⁸

The *Goodman* Court went on to hold that the two year period should apply retroactively to the employees in *Goodman*.⁶⁹ The *Goodman* Court found that although the applicable rule of law in existence at the time of the district court's decision had required application of the six year period, the precedent establishing this rule of law had not existed at the time the present suit was filed.⁷⁰ The *Goodman* Court found that no definitive statement of the law concerning the applicable state statute of limitations existed at the time the suit was filed, and thus rejected the employees' claims of detrimental reliance.⁷¹

Justice Brennan, joined by Justices Marshall and Blackmun, agreed with the majority's ruling that the Unions' conduct violated Title VII and section 1981, but dissented from the Court's holding that the relevant statute of limitations for actions arising under section 1981 is the applicable state's personal injury statute of limitations.⁷² Justice Brennan asserted that section 1981 protects primarily economic rights, and that the appropriate limitations period is thus the one applicable to contractual relations.⁷³ Justice Brennan reached his conclusion through an analysis of section 1981's legislative and case law history.⁷⁴

Looking first to the legislative history of the Civil Rights Act of 1866, Justice Brennan argued that Congress' purposes in passing the Civil Rights Act of 1866 was to prevent the continued economic subjugation of blacks.⁷⁵ To buttress his historical analysis, Justice Brennan pointed out that section 1982 also has a singularly economic purpose.⁷⁶ Section 1982's economic focus, Justice Brennan asserted, weakened the majority's view that, together, sections 1981, 1982, and 1983 demonstrate a concern with racial discrimination

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 2621-22, 44 FEP Cases at 3-4.

⁷¹ *Id.*

⁷² *Id.* at 2625, 44 FEP Cases at 6 (Brennan, J., dissenting).

⁷³ *Id.* at 2625-26, 44 FEP Cases at 6-7 (Brennan, J., dissenting).

⁷⁴ *Id.* at 2626-31, 44 FEP Cases at 7-10 (Brennan, J., dissenting).

⁷⁵ *Id.* at 2628, 44 FEP Cases at 8 (Brennan, J., dissenting). Justice Brennan sets forth evidence in the form of, for example, congressional debates which he asserts supports his thesis. *Id.*

⁷⁶ *Id.* at 2628-29, 44 FEP Cases at 9 (Brennan, J., dissenting).

generally, rather than with the individual manifestations of such discrimination.⁷⁷

Justice Brennan stated that as a practical matter, actions arising under section 1981 are better characterized as contract, rather than tort, actions.⁷⁸ An overwhelming number of section 1981 claims actually concern the enforcement of economic rights, Justice Brennan noted.⁷⁹ Further, while the evidence surrounding personal injuries is likely to become ephemeral quickly, so that a short limitations period is appropriate,⁸⁰ actions concerning economic relations tend to involve evidence of a more permanent nature, permitting a more extended limitations period.⁸¹

Justice Powell, joined by Justices Scalia and O'Connor,⁸² concurred in the Court's holding that the applicable state personal injury statute of limitations should apply to all section 1981 claims, but dissented from the Court's holding that the Unions' conduct, as set forth in the district court's findings of fact, established a violation of either section 1981 or Title VII.⁸³ Justice Powell asserted that the district court's findings are ambiguous and insufficient to support the conclusion that the Unions had intentionally discriminated.⁸⁴ A finding that the Unions were motivated by racial animus is necessary, Justice Powell stated, to establish a violation of section 1981 and Title VII's disparate treatment theory.⁸⁵

Discriminatory intent, Justice Powell asserted, cannot be established absent a showing that the Unions were motivated by racial animus.⁸⁶ Justice Powell reasoned that "intent" requires more than

⁷⁷ *Id.* Section 1982 provides that all citizens shall enjoy the same right to inherit, purchase, lease, and sell real and personal property. 42 U.S.C. § 1982 (1982).

⁷⁸ *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2630, 44 FEP Cases 1, 9-10 (1987) (Brennan, J. dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Justice O'Connor wrote separately to concur in the application of the applicable state personal injury statute of limitations to section 1981, but expressed doubt whether the Court should give its holding general retroactive effect. *Goodman*, 107 S.Ct. at 2636, 44 FEP Cases at 14 (O'Connor, J., dissenting).

⁸³ *Id.* at 2631, 44 FEP Cases at 10-11 (Powell, J., concurring in part and dissenting in part). Rather than reversing the Third Circuit, however, Justice Powell, would have remanded to allow the district court to clarify or supplement its findings. *Id.* at 2630, 44 FEP Cases at 10-11 (Powell, J., concurring in part and dissenting in part).

⁸⁴ *Id.* at 2631, 44 FEP Cases at 10-11 (Powell, J., concurring in part and dissenting in part).

⁸⁵ *Id.* at 2633, 44 FEP Cases at 12 (Powell, J., concurring in part and dissenting in part).

⁸⁶ *Id.* at 2633-34, 44 FEP Cases at 12-13 (Powell, J., concurring in part and dissenting in part).

mere violation or awareness by the defendant of the consequences of his or her actions.⁸⁷ Intent, Justice Powell observed, implies that the defendant engaged in the discriminatory conduct, at least in part, "because of" its discriminatory effect.⁸⁸ Noting that the district court had found that racial animus had not motivated the Unions, and that the Unions had advanced nondiscriminatory purposes both for failing to challenge Lukens' firing of disproportionately more black probationary employees and for refusing to include claims of racial discrimination in grievances, Justice Powell concluded that the district court's finding failed to establish the necessary intent.⁸⁹

Justice Powell also disagreed with the Court's conclusion that the Unions' conduct consisted of more than mere passivity.⁹⁰ He concluded that Title VII does not impose an affirmative duty on unions, and that the Unions' conduct had not violated the statutes.⁹¹ Based on an analysis of the statutory language of Title VII, Justice Powell argued that section 703(c) prohibits only direct discrimination by a union.⁹² Turning to policy considerations, Justice Powell contended that the imposition of an affirmative duty on Unions to combat employer discrimination would interfere with the discretion unions must exercise to provide the most effective representation.⁹³

In *Goodman*, the Supreme Court held that a union's deliberate refusal to assert claims of racial discrimination against an employer violates both Title VII and section 1981.⁹⁴ Although falling short of imposing an affirmative duty on Unions to seek out and combat discrimination, the Court's opinion indicates that a union's awareness of an employer's discriminatory practices creates a duty to take remedial action.⁹⁵ Significantly, plaintiff union members need not show that union officials exhibited racial animus in establishing

⁸⁷ *Id.* at 2633, 44 FEP Cases at 12 (Powell, J., concurring in part and dissenting in part) (citing *Massachusetts v. Feeney*, 422 U.S. 256, 279, 19 FEP Cases 1377, 1386 (1979)).

⁸⁸ *Id.*

⁸⁹ *Id.* at 2633-34, 44 FEP Cases at 12-13 (Powell, J., concurring in part and dissenting in part). Justice Powell also stated that the district court did not hold, and its findings were inadequate to support, a Title VII disparate impact claim. *Id.* at 2634, 44 FEP Cases at 13 (Powell, J., concurring in part and dissenting in part.)

⁹⁰ *Id.* at 2634-35, 44 FEP Cases at 13-14 (Powell, J., concurring in part and dissenting in part).

⁹¹ *Id.* at 2635, 44 FEP Cases at 13-14 (Powell, J., concurring in part and dissenting in part).

⁹² *Id.* at 2635, 44 FEP Cases at 14 (Powell, J., concurring in part and dissenting in part).

⁹³ *Id.*

⁹⁴ *Id.* at 2625, 44 FEP Cases at 6.

⁹⁵ *See id.* at 2623-25, 44 FEP Cases at 5-6.

union liability under section 1981 or under the Title VII disparate treatment theory.⁹⁶

Although the *Goodman* Court expressly declined to decide whether mere union passivity in the face of employer discrimination renders a union liable, the Court's holding indicates that a union that does nothing to challenge such discriminatory practices risks liability under Title VII and section 1981. The different ways in which the *Goodman* Court found the Unions to have discriminated represent varying degrees of "active" or "passive" discriminatory conduct. The first aspect of the Union's conduct that the *Goodman* Court held violated Title VII and section 1981, the Union's deliberate refusal to file grievances based wholly or in part on charges of racial discrimination, includes an identifiable element of active discrimination.⁹⁷ The Union's positive act of refusing to file such grievances constitutes active, rather than mere passive, discriminatory conduct.⁹⁸ On the other hand, the Court's imposition of liability for the Unions' failure to take positive action despite their knowledge that Lukens was discharging black probationary employees at a disproportionate rate is more problematic, because the Unions' conduct lacks an identifiable element of active discrimination.⁹⁹ Nothing in the district court's opinion indicates, for example, that the Unions received a request from union members to challenge the practice, or that the Unions affirmatively refused to do so.¹⁰⁰ The lack of any affirmative act by the Unions in *Goodman* indicates that courts may hold a union liable for its passive failure to challenge a discriminatory employer practice.¹⁰¹

The *Goodman* opinion also indicates that a union's assertion of a nondiscriminatory motive for otherwise discriminatory conduct will not negate its liability under the statutes.¹⁰² Attempting to justify its failure to include racial discrimination as a basis for grievances filed on behalf of black union members, the Unions claimed that

⁹⁶ *Id.* at 2625, 44 FEP Cases at 6.

⁹⁷ *See id.* at 2623-24, 44 FEP Cases at 5.

⁹⁸ *See id.*

⁹⁹ *See id.* at 2634, 44 FEP Cases at 13 (Powell, J., concurring in part and dissenting in part)(Unions' conduct merely passive). *But see id.* at 2623-24, 44 FEP Cases at 5 (Union's conduct included more than mere passivity).

¹⁰⁰ *See Goodman v. Lukens Steel Co.*, 580 F. Supp. at 1159, 39 FEP Cases at 653-54 (1984). The district court's opinion contains no indication that the unions acted affirmatively in failing to challenge the discharge of black probationary employees. *Id.*

¹⁰¹ *See Goodman v. Lukens Steel Co.*, 777 F.2d 126-27, 39 FEP Cases at 668; *Goodman*, 580 F. Supp. at 1160, 39 FEP Cases at 653.

¹⁰² *See Goodman*, 107 S.Ct. at 2624-25, 44 FEP Cases at 6.

Lukens' sensitivity to charges of racial discrimination and the availability of other, nonracial grounds for obtaining relief rendered the inclusion of allegations of racial discrimination unnecessary and counterproductive.¹⁰³ The *Goodman* Court rejected the Union's argument, holding that where a union has intentionally engaged in discriminatory conduct, the assertion of a nondiscriminatory motive will not shield the union from liability, even where the motive was not pretextual.¹⁰⁴ The *Goodman* Court held further that a plaintiff union member need not establish that union officials were motivated by racial animus to demonstrate the intent required under section 1981 and Title VII disparate treatment actions.¹⁰⁵ Instead, the Court held that the requisite intent exists if a union that possesses knowledge of an employer's discriminatory conduct intentionally refrains from challenging the conduct.¹⁰⁶

The *Goodman* Court, in determining the appropriate statute of limitations for courts to apply to section 1981 claims, held, first, that the same statute of limitations applies to all section 1981 claims, and second, that the applicable limitations statute is the applicable state's "personal injury" statute of limitations.¹⁰⁷ Application by the courts of a single statute of limitations to all section 1981 actions promotes uniformity and predictability, and eliminates unnecessary litigation on collateral matters.¹⁰⁸ The unpredictability faced by potential plaintiffs and the waste of resources involved in relitigating the issue on a case-by-case basis would frustrate the purpose of section 1981: providing an effective remedy for the enforcement of federal civil rights.¹⁰⁹

In contrast to the desirability of applying a single statute of limitations to all section 1981 claims, a compelling justification for adopting one or the other of the statutes of limitations is difficult to identify. In attempting to select the most appropriate statute of limitations, both the *Goodman* Court and Justice Brennan focused on identifying the "true nature" of section 1981. The *Goodman* Court reasoned that, taken together, sections 1981, 1982 and 1983 are primarily concerned with racial discrimination: "a fundamental

¹⁰³ *Id.* at 2624-25, 44 FEP Cases at 5.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 2625, 44 FEP Cases at 6.

¹⁰⁶ *See id.*

¹⁰⁷ *Id.* at 2621, 44 FEP Cases at 3.

¹⁰⁸ *Wilson v. Garcia*, 471 U.S. 261, 275 (1985).

¹⁰⁹ *See id.*; *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 119, 39 FEP Cases 658, 662 (3d Cir. 1985).

injury to [a person's] individual rights."¹¹⁰ Justice Brennan, in contrast, argued that the primary purpose for which section 1981 had been enacted, as well as the function it had performed, was the protection of economic rights.¹¹¹ Identification of the "nature" of section 1981 misconceives, however, the appropriate inquiry. Instead, one must ask whether choosing one or the other of the statutes would advance section 1981's purpose, combating racial discrimination in an employment context.

Practical benefits, including judicial economy and predictability, would be served if courts applied the same statute of limitations to both section 1981 and section 1983 claims.¹¹² A plaintiff's claim may be cognizable under both section 1981 and section 1983.¹¹³ In such a situation, application of different limitations periods under the two statutes might result in the claim being time barred under one, but not the other, of the statutes.¹¹⁴ The Court's decision to apply the personal injury statute of limitations to all section 1981 claims is thus correct.

¹¹⁰ *Goodman*, 107 S.Ct. at 2621, 44 FEP Cases at 3.

¹¹¹ *Id.* at 2625, 44 FEP Cases at 6-7 (Brennan, J., dissenting).

¹¹² *Goodman*, 777 F.2d at 120, 39 FEP Cases at 663.

¹¹³ *Id.*

¹¹⁴ *Id.* (substantial overlap exists in the types of claims brought under sections 1981 and 1983; application of different statutes of limitations where the same claim is brought under both sections 1981 and 1983 would lead to a bizarre result).

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS

A. **Victims of Ethnic or Ancestral Discrimination May Sue Under 42 U.S.C. § 1981: Saint Francis College v. Al-Khazraji*¹ and *Shaare Tefila Congregation v. Cobb*²

Section 1 of the 1866 Civil Rights Act, now codified as 42 U.S.C. § 1981,³ forbids all racial discrimination⁴ in the making of private and public contracts,⁵ including employment contracts.⁶ The United States Supreme Court had not clearly delineated the parameters of the statute, as the Court had never defined the term "race."⁷ Blacks may clearly bring suit under the statute.⁸ The Supreme Court also has held that whites who are the victims of reverse discrimination may sue under the statute.⁹ The Supreme Court, however, had reserved judgment as to whether victims of discrimination based on ethnicity, ancestry, or place of origin possess a cause of action under

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¹ 107 S. Ct. 2022, 43 FEP Cases 1305 (1987).

² 107 S. Ct. 2019, 43 FEP Cases 1309 (1987).

³ 42 U.S.C. § 1981 (1982) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

⁴ Although the term "race" does not appear in the language of the statute, the Supreme Court has interpreted the statute as applying to racial discrimination. *See McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 285, 12 FEP Cases 1577, 1582 (1976); *Runyon v. McCrary*, 427 U.S. 160, 168-69 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60, 10 FEP Cases 817, 819 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

⁵ *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2026, 43 FEP Cases 1305, 1307 (1987). *See also Johnson*, 421 U.S. at 459-60, 10 FEP Cases at 819; *Jones*, 392 U.S. at 436-37.

⁶ *Johnson*, 421 U.S. at 459-60, 10 FEP Cases at 819.

⁷ *See, e.g., McDonald*, 427 U.S. at 287, 12 FEP Cases at 1582; *Georgia v. Rachel*, 384 U.S. 780, 791 (1966); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 556, 29 FEP Cases 1494, 1498 (E.D. Cal. 1982). *See also Kaufman, A Race By Any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981*, 28 ARIZ. L. REV. 259, 259 (1986) [hereinafter Kaufman].

⁸ *See McDonald*, 427 U.S. at 285, 12 FEP Cases at 1582.

⁹ *Id.* at 286-87, 12 FEP Cases at 1582.

section 1981.¹⁰ In the absence of Supreme Court guidance, lower courts have adopted two disparate approaches to this question.¹¹

One line of cases holds that section 1981 recognizes only claims of racial discrimination against non-whites or reverse discrimination against whites.¹² This line of cases holds that claims based on ethnicity or place of origin discrimination are not cognizable under section 1981.¹³ Other courts view section 1981 expansively, and interpret the statute as providing protection for persons who suffer discrimination because they are perceived to be distinct from whites.¹⁴

During the *Survey Year*, the United States Supreme Court defined the parameters of section 1981 in the companion cases of *Saint Francis College v. Al-Khazraji*¹⁵ and *Shaare Tefila Congregation v. Cobb*,¹⁶ unanimously holding that the statute protects persons who

¹⁰ See *Ortiz*, 547 F. Supp. at 556, 29 FEP Cases at 1498-99; Kaufman, *supra* note 6, at 277.

¹¹ See Kaufman, *supra* note 7, at 277-80.

¹² Compare *McDonald*, 427 U.S. at 286-87, 12 FEP Cases at 1582 (Section 1981 protected two white employees who were discharged following a theft, when a black employee who was also charged with the theft was not discharged) with, e.g., *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48, 49-50, 34 FEP Cases 1529, 1530-31 (7th Cir. 1984) (Section 1981 did not protect an Iraqi whose claim of place of origin discrimination did not allege racial animus); *Patel v. Holley House Motels*, 483 F. Supp. 374, 382-84 (S.D. Ala. 1979) (Section 1981 did not protect a dark-skinned Indian because discrimination was motivated by plaintiff's nationality rather than his color); *Kurylas v. United States Dep't of Agric.*, 373 F. Supp. 1072, 1075-76, 7 FEP Cases 207, 210 (D.C. Cir. 1975) (Section 1981 did not protect a Ukranian-born, naturalized, American citizen because Ukrainians were not considered a separate race). See also Kaufman, *supra* note 7, at 277-78.

¹³ Kaufman, *supra* note 7, at 277.

¹⁴ See, e.g., *Manzanares v. Safeway Stores Inc.*, 593 F.2d 968, 19 FEP Cases 191 (10th Cir. 1979) (Section 1981 protected a Mexican-American employee who alleged discriminatory employment practices when his employer fired him following a theft while white employees were merely suspended); *Ortiz*, 547 F. Supp. 550, 29 FEP Cases 1494 (Section 1981 held to protect an employee who was denied promotions and eventually fired because of her Puerto Rican descent and accent). See also Kaufman, *supra* note 7, at 278-80.

¹⁵ 107 S. Ct. 2022, 43 FEP Cases 1305 (1987).

¹⁶ 107 S. Ct. 2019, 43 FEP Cases 1309 (1987). Although *Shaare Tefila Congregation* is a section 1982 action which pertains to racial discrimination in regard to property rights, 107 S. Ct. at 2021, 43 FEP Cases at 1310, the case affects section 1981, and thereby affects employment discrimination law. In short, the Supreme Court views sections 1981 and 1982 as companions and has interpreted them as protecting the same classes of persons. See *Jones*, 392 U.S. at 436-37. See also *Ortiz*, 547 F. Supp. at 550 n.8, 29 FEP Cases at 1498 n.8. In *Goodman v. Lukens Steel Co.*, Justice Brennan, in dissent, wrote: "Both §§ 1981 and 1982 were derived from § 1 of the Civil Rights Act of 1866; their wording and their identical legislative history have led the Court to construe them similarly." 55 U.S.L.W. 4881, 4886, 46 FEP Cases 1, 9 (1987) (Brennan, J., concurring in part, dissenting in part) (citations omitted). Thus a finding by the Court that Jews may bring suit under section 1982 is equivalent to the Court's finding that Jews may bring suit under section 1981.

are subjected to intentional discrimination based on their ancestry or ethnicity.¹⁷ Curiously, however, the Court refused to hold that section 1981 proscribes national origin discrimination. Thus, while the Court clearly expanded the scope of section 1981 protection, the Court also created a nebulous distinction between ethnic/ancestral discrimination and national origin discrimination.¹⁸

In *Saint Francis College*, Majid Ghaidan Al-Khazraji, an assistant professor at Saint Francis College, claimed the college denied him tenure because of his Arabian ancestry.¹⁹ On October 30, 1980, Al-Khazraji filed a *pro se* complaint in the United States District Court for the Western District of Pennsylvania, claiming violations of Title VII of the Civil Rights Act of 1964 and discrimination based upon national origin, religion, and/or race.²⁰ After obtaining counsel, Al-Khazraji added amended complaints which included claims under 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, as well as state law.²¹ After the District Court dismissed Al-Khazraji's section 1986, section 1985(3), and Title VII claims as untimely,²² the Court granted the defendant college's motion for summary judgment on the remaining section 1981 and 1983 claims as well as the state law claims.²³ The Court reasoned that section 1981 does not reach discrimination claims based upon Arabian ancestry.²⁴

The Third Circuit Court of Appeals held that Al-Khazraji's section 1981 claim was not time-barred²⁵ and concluded that Congress intended section 1981 to "at a minimum" reach "discrimination directed against an individual because he or she is genetically a part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*."²⁶ The Third Circuit thereby held that discrimination against ethnic Arabs was cognizable under section 1981,²⁷ and Saint Francis College petitioned for *certiorari* to the United States Supreme Court.²⁸

¹⁷ *Saint Francis College*, 107 S. Ct. at 2028, 43 FEP Cases at 1308.

¹⁸ *Id.*

¹⁹ *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 506, 40 FEP Cases 397, 397 (3d Cir. 1986).

²⁰ *Id.* at 508, 40 FEP Cases at 398-99.

²¹ *Id.* at 508, 40 FEP Cases at 399.

²² *Id.*

²³ *Id.* at 508-09, 40 FEP Cases at 399.

²⁴ *Id.* at 509, 40 FEP Cases at 399.

²⁵ *Id.* at 514, 40 FEP Cases at 403-04.

²⁶ *Id.* at 517, 40 FEP Cases at 406.

²⁷ *Id.* See *Race Under 42 U.S.C. § 1981 Includes Members of Ethnically and Physiognomically Distinct Groups: Al-Khazraji v. Saint Francis College*, 29 B.C.L. REV. 276 (1987).

²⁸ *Saint Francis College*, 107 S. Ct. at 2025, 43 FEP Cases at 1306.

The United States Supreme Court granted *certiorari* in part,²⁹ to consider the question of whether a person of Arabian ancestry was protected from racial discrimination under section 1981.³⁰ The college contended that because section 1981 does not encompass claims of discrimination by one caucasian against another, Al-Khazraji had no cause of action under section 1981 because he is a caucasian.³¹ Justice White, however, writing for a unanimous Court, rejected petitioner's argument by ruling that for the purpose of interpreting section 1981, contemporary conceptions and definitions of race are not dispositive.³² Rather, the Court concluded that the definition of race under section 1981 must be determined by examining what the prevalent conceptions and definitions of race were circa 1866, when Congress contemplated and passed the statute.³³

The Court undertook an exhaustive examination of nineteenth century dictionaries and encyclopedias and discovered that these sources described "race" in terms of "stock," "ancestor," and "ethnic groups."³⁴ The Court noted that not until the twentieth century did dictionaries begin referring to the taxonomical definitions of race — the division of mankind based on physical differences.³⁵ The Court also found that the legislative history of the statute was replete with references to groups which Congress intended to be protected by the statute. These groups included Scandinavians, Chinese, Spanish, Jews, Mexicans, Blacks, Germans, and Gypsies.³⁶

The Court concluded from this evidence that Congress intended section 1981 to protect classes of persons who were subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.³⁷ The Court held that such discrimination is racial discrimination for the purpose of section 1981 regardless of whether such discrimination would be classified as racial in modern terminology.³⁸ Thus, the Court affirmed the Third Circuit, holding

²⁹ 107 S. Ct. 62 (1986). The Supreme Court also granted *certiorari* to consider the statute of limitations question presented by the case. *Saint Francis College*, 107 S. Ct. at 2025, 43 FEP Cases at 1306.

³⁰ *Saint Francis College*, 107 S. Ct. at 2025, 43 FEP Cases at 1306.

³¹ *Id.* at 2026, 43 FEP Cases at 1307.

³² *Id.* Currently three main races are recognized: Causasoid, Mongoloid, and Negroid. See *id.* at 2026 n.4, 43 FEP Cases at 1307 n.4.

³³ *Id.* at 2026-27, 43 FEP Cases at 1307-08.

³⁴ *Id.*

³⁵ *Id.* at 2027, 43 FEP Cases at 1307.

³⁶ *Id.* at 2027, 43 FEP Cases at 1308.

³⁷ *Id.* at 2028, 43 FEP Cases at 1308.

³⁸ *Id.*

that section 1981 prohibits discrimination against a person because he or she is ethnically or physiognomically distinctive.³⁹ The Court, however, further expanded the Third Circuit's holding by ruling that a person need not have a distinctive physiognomy to qualify for section 1981 protection.⁴⁰ The Court refused, however, to interpret section 1981 as prohibiting discrimination based upon one's place or nation of origin.⁴¹ The Court, therefore, concluded that if Al-Khazraji could prove, on remand, that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, then he will have stated a section 1981 cause of action.⁴²

The Court's final distinction between discrimination based upon ethnicity or ancestry and discrimination based upon place or nation of origin prompted Justice Brennan to file a separate concurrence.⁴³ Justice Brennan emphasized that the line between discrimination based on ethnicity or ancestry and discrimination based on place or nation of origin is not clearly delineated.⁴⁴ Justice Brennan, therefore, interpreted the Court's opinion as reading that only discrimination based on birthplace alone is insufficient to state a claim under section 1981.⁴⁵

In *Shaare Tefila Congregation v. Cobb*, a Jewish congregation and some individual members brought suit in the Federal District Court for Maryland, claiming that defendant's desecration of their synagogue constituted a violation of sections 1981, 1982,⁴⁶ 1985(3), and the Maryland common law of trespass, nuisance, and intentional infliction of emotional distress.⁴⁷ The District Court dismissed all

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2028, 43 FEP Cases at 1308-09.

⁴³ *Id.* at 2028-29, 43 FEP Cases at 1309 (Brennan, J., concurring).

⁴⁴ *Id.* at 2028, 43 FEP Cases at 1309 (Brennan, J., concurring). Justice Brennan wrote:

It is true that one's ancestry — the ethnic group from which an individual and his or her ancestors are descended — is not necessarily the same as one's national origin — the country 'where a person was *born*, or, more broadly, the country from which his or her ancestors *came*.' Often, however, the two are identical as a factual matter: one was born in the nation whose primary stock is one's own ethnic group.

Id. (citation omitted) (Brennan, J., concurring).

⁴⁵ *Id.* at 2029, 43 FEP Cases at 1309 (Brennan, J., concurring).

⁴⁶ 42 U.S.C. § 1982 (1982) states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by White citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." See *supra* footnote 14.

⁴⁷ 107 S. Ct. 2019, 2021, 43 FEP Cases 1309, 1310 (1987).

the claims, stating that Jews were not a racially distinct group and thus did not warrant section 1982 protection.⁴⁸ On appeal, the Fourth Circuit Court of Appeals affirmed the dismissal.⁴⁹ Both courts rejected the argument that although Jews were not a racially distinct group, the defendant's actions violated section 1982 because the defendants perceived Jews as being racially distinct.⁵⁰ The Fourth Circuit held that because discrimination against Jews was not racial discrimination, section 1982 was not applicable.⁵¹ The congregation petitioned for *certiorari* to the United States Supreme Court,⁵² and the Supreme Court granted *certiorari*.⁵³

Writing for a unanimous Court, Justice White agreed with the Fourth Circuit that a plaintiff cannot successfully state a charge of racial discrimination under section 1982 solely by proving that racial animus motivated the defendants.⁵⁴ Rather, the plaintiff must also assert that defendants' actions were directed towards a group of people that Congress intended the statute to protect.⁵⁵ The Court, however, reversed the Fourth Circuit, holding that Jews may bring suit under section 1982.⁵⁶ Relying upon its holding in *Saint Francis College v. Al-Khazraji*, the Court concluded that although Jews are not currently thought of as members of a separate race, when Congress passed the Act, Jews were considered to constitute a distinct race and thus are within the protection of the Act.⁵⁷

The Supreme Court has thus held that Section 1981 of the 1866 Civil Rights Act prohibits discrimination based upon a person's ethnicity or ancestry.⁵⁸ The Court arrived at its decision by reasoning that although section 1981 only prohibits racial discrimination, when Congress passed the statute, the term "race" was defined and conceived of more expansively than it is currently.⁵⁹ The Court concluded that in 1866, the phrase and concept of "racial discrimination" included discrimination based upon ethnicity and ancestry,

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ 107 S. Ct. 62 (1986).

⁵⁴ *Shaare Tefila Congregation*, 107 S. Ct. at 2021, 43 FEP Cases at 1310.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2022, 43 FEP Cases at 1310.

⁵⁷ *Id.* at 2021-22, 43 FEP Cases at 1310.

⁵⁸ *Saint Francis College*, 107 S. Ct. at 2028, 43 FEP Cases at 1308; *Shaare Tefila Congregation*, 107 S. Ct. at 2021, 43 FEP Cases at 1310.

⁵⁹ *Saint Francis College*, 107 S. Ct. at 2026-28, 43 FEP Cases at 1307-08.

and thus the eradication of such discrimination was within Congress' intent, and is therefore within the scope of section 1981.⁶⁰

The impact of the Court's decision is more than symbolic. The Court effectively has opened section 1981 protection to all victims of intentional ethnic or ancestral discrimination. This is significant, for although Title VII already proscribes ethnic or ancestral discrimination, section 1981 affords coverage and remedies beyond those of Title VII.⁶¹ Unlike Title VII, section 1981 provides for the recovery of compensatory and punitive damages, as well as direct access to federal courts.⁶² In addition, section 1981's statute of limitations periods are longer than Title VII's.⁶³

The Court's distinction between discrimination based upon a person's ethnicity or ancestry, and discrimination based upon a person's place or nation of origin, however, appears potentially troubling. This distinction makes little sense in terms of judicial efficiency and congressional intent. In effect, the Court has created a nebulous distinction that could spawn multitudinous litigation. The Court's distinction also appears to contravene congressional intent, as the legislative history of section 1981, which the Court quoted in *Saint Francis College*, specifically referred to discrimination

⁶⁰ *Id.* at 2028, 43 FEP Cases at 1308.

⁶¹ Section 703 of Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer: "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (1982). Although Title VII prohibits employment discrimination based on national origin, in several respects it is more limited than section 1981.

A Title VII claimant is generally limited to equitable relief and back pay for a period not in excess of two years, 42 U.S.C. § 2000e-5(g) (1982); a section 1981 claimant may seek equitable or legal remedies, including compensatory and punitive damages. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 460, 10 FEP Cases 817, 819 (1975). Furthermore, unlike a Title VII claimant, a section 1981 claimant is entitled to a jury trial. *See Lincoln v. Board of Regents of Univ. Sys. of Georgia*, 697 F.2d 928, 934, 31 FEP Cases 23, 26 (11th Cir.), *cert. denied*, 464 U.S. 826, 31 FEP Cases 22 (1983). In addition, section 1981 provides direct access to federal district courts, whereas a Title VII claimant must first exhaust administrative remedies before filing suit in the District Court. *See Johnson*, 421 U.S. at 460, 10 FEP Cases at 819. Title VII only applies to employers with fifteen or more employees, 42 U.S.C. § 2000e(b) (1982); section 1981 applies to all contractual transactions, *Runyon v. McCrary*, 427 U.S. 160, 168-69 (1976); *Johnson*, 421 U.S. at 459-60, 10 FEP Cases at 819. Also, the statute of limitations period for filing a Title VII lawsuit is shorter than the period for a section 1981 action. A Title VII action must be filed within ninety days after the receipt of a right to sue letter from the EEOC, 42 U.S.C. § 2000e-5(f)(1), whereas state personal injury limitations periods apply to section 1981 claims. *Goodman v. Lukens Steel Co.* 55 U.S.L.W. 4881, 4882, 46 FEP Cases 1, 2-3 (1987).

⁶² *See supra* note 57.

⁶³ *Id.*

based upon "nationality."⁶⁴ Furthermore, in terms of equal protection analysis, the Court has deemed both racial and national origin discrimination as suspect classifications.⁶⁵ This is significant because the same Congress which enacted the Civil Rights Act of 1866 also proposed and enacted the fourteenth amendment.⁶⁶

The question of why the Court made this seemingly unfortunate distinction appears to have a simple answer — *stare decisis*. Until 1968, prior restrictive judicial interpretations had relegated section 1981 to "a century of desuetude."⁶⁷ In 1968, however, the Court effectively resurrected the Act in *Jones v. Alfred H. Mayer*, in which the Court held that the Act prohibited private racial discrimination, and thus no state action was necessary.⁶⁸ Within this seminal case, the Court stated: "the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or *national origin*."⁶⁹ Thus, the Court's failure to include national origin discrimination within the parameters of section 1981 most likely stems from the Court's unwillingness to deviate from its interpretation of the statute in *Jones*.⁷⁰

In theory, by holding that national origin discrimination is not violative of section 1981, the Court has not only created an imprecise distinction which seems instigative of litigation, but also has

⁶⁴ *Saint Francis College*, 107 S. Ct. at 2027, 43 FEP Cases at 1308.

⁶⁵ See *City of Cleburne, Texas v. Cleburne Living Center*, 105 S. Ct. 3249, 3255 (1985); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 374 (1886).

⁶⁶ See Kaufman, *supra* note 7, at 287.

⁶⁷ See *Jones v. Alfred H. Mayer Co.* 392 U.S. 409, 437 (1968). See also Comment, *Developments in the Law — Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 33 (1980) [hereinafter Comment]. See also Kaufman, *supra* note 7, at 259.

⁶⁸ *Jones v. Alfred H. Mayer*, 392 U.S. 409, 436 (1968). See Comment, *supra* note 67, at 67.

⁶⁹ *Jones*, 392 U.S. at 413 (emphasis added).

⁷⁰ In regard to the role of *stare decisis* in statutory interpretation, Justice Black, in his dissent in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, wrote:

When this Court is interpreting a statute, however, an additional factor must be weighed in the balance. It is the deference that this court owes to the primary responsibility of the legislature in the making of laws When the law has been settled by an earlier case then any subsequent 'reinterpretation' of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute.

398 U.S. 235, 257-58 (1970) (Black, J., dissenting). See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 33 (1949). Conversely, it has been argued that *Jones'* language which excludes national origin discrimination from section 1981 protection is not the Court's holding, and thus is merely dictum and should not be deemed worthy of *stare decisis*. See Kaufman, *supra* note 7, at 287-88; Greenfield & Kates, *Mexican Americans, Racial Discrimination and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662, 667 n.20. (1975).

created a loophole which could conceivably threaten to swallow the Court's intention to eradicate ethnic and ancestral discrimination. The loophole allows those charged with discriminatory practices to argue that their actions were based on national origin discrimination and not on ethnic or ancestral discrimination. In practice, however, the Court's distinction will not likely instigate a flood of litigation and uncertainty, for it does not seem probable that the Court's distinction will clearly absolve a great deal of discriminatory practices. In short, it does not seem probable that a jury which finds national origin discrimination will not also find ethnic or ancestral discrimination. Accordingly, the Court's adherence to *stare decisis* will not significantly undermine section 1981's effectiveness in combatting ethnic and ancestral discrimination.

In summary, in *Saint Francis College v. Al-Khazraji* and *Shaare Tefila Congregation v. Cobb*, the Supreme Court has held that section 1981 of the 1866 Civil Rights Act prohibits discrimination based upon a person's ethnicity or ancestry. The Court arrived at its decision by reasoning that although section 1981 only prohibits racial discrimination, when Congress passed the statute, the term "race" was defined and conceived of more expansively than it is currently. The Court concluded that in 1866, the phrase and concept of "racial discrimination" included discrimination based upon ethnicity and ancestry, and thus the eradication of such discrimination was within Congress' intent, and is therefore within the scope of section 1981. Furthermore, although the Court drew a nebulous distinction between ethnic/ancestral discrimination and national origin discrimination, it is unlikely that this distinction will create a loophole which will undermine section 1981's effectiveness in eradicating ethnic and ancestral discrimination.

B. **Plaintiff's Ultimate Burden in Title VII Actions: Benzie v. Illinois Department of Mental Health and Developmental Disabilities.*¹

Title VII of the Civil Rights Act of 1964² prohibits disparate treatment in employment practices where an employer intentionally and unlawfully discriminates against an employee and where the

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¹ 810 F.2d 146, 42 FEP Cases 1537 (7th Cir. 1987), *cert. denied*, 107 S. Ct. 3231, 43 FEP Cases 1999 (1987).

² Civil Rights Act of 1964, §§ 701-17, as amended, 42 U.S.C. § 2000e *et seq.*

adverse decision would not have occurred absent the unlawful discrimination.³ Unlawful discrimination under Title VII includes discrimination on account of gender, race, national origin, or age.⁴ To determine whether specific employment decisions violate the provisions of Title VII, the United States Supreme Court established an elaborate process of shifting burdens and presumptions between plaintiff and defendant.⁵

Title VII actions alleging unlawful discrimination in an employment setting are subject to a three-step analysis enumerated by the Supreme Court in *McDonnell Douglas Corporation v. Green*.⁶ In *McDonnell Douglas*, the Supreme Court noted that a plaintiff first bears the burden of establishing a prima facie case of unlawful employment discrimination.⁷ Once the plaintiff establishes a prima facie case, a rebuttable presumption that the defendant unlawfully discriminated against the plaintiff arises.⁸ The defendant then bears the burden of presenting lawful, non-discriminatory reasons for its employment decision.⁹ Where the defendant successfully rebuts the presumption that it acted in violation of Title VII, the burden shifts back to the plaintiff to demonstrate that the defendant's recited reasons for the employment decision were pretextual or "unworthy of credence" or that a discriminatory reason more likely accounted for the employer's actions.¹⁰

In 1981, the Supreme Court elaborated further on the third stage of this analysis in *Texas Department of Community Affairs v. Burdine*.¹¹ The *Burdine* Court explained first that the defendant's second-stage burden serves to clarify the issue at hand, thereby enabling the plaintiff to show that the defendant's proffered reasons for the employment decision were in fact pretext.¹² Thereafter, the Court explained, the plaintiff can satisfy his or her final burden of proof in either of two ways.¹³ First, a plaintiff may demonstrate

³ See *Germane v. Heckler*, 804 F.2d 366, 368, 42 FEP Cases 1053, 1055 (7th Cir. 1986).

⁴ 42 U.S.C. §§ 2000e-2(a), (b), (c), § 1982.

⁵ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 5 FEP Cases 965, 969-70 (1972).

⁶ *Id.*

⁷ *Id.* at 802, 5 FEP Cases at 969.

⁸ *Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116.

⁹ *McDonnell Douglas*, 411 U.S. at 802, 5 FEP Cases at 969.

¹⁰ *Burdine*, 450 U.S. at 256, 25 FEP Cases at 116.

¹¹ 450 U.S. 248, 25 FEP Cases 113 (1981).

¹² *Id.* at 255-56, 25 FEP Cases at 116.

¹³ *Id.* at 256, 25 FEP Cases at 116.

sufficiently the probability that the decision was discriminatorily motivated.¹⁴ Second, a plaintiff may meet the final burden by exposing defendant's recited reasons as "unworthy of credence."¹⁵

In 1983, the Supreme Court again addressed the shifting burden concept in Title VII cases in *United States Postal Service Board of Governors v. Aikens* which involved a black postal worker's allegation of racial discrimination on the part of his employer.¹⁶ Justice Blackmun, in his concurrence, emphasized once again that the plaintiff satisfies his or her ultimate burden by demonstrating either sufficient probability of discriminatory intent or that the defendant's recited reasons were "not the true reasons for the employment decision."¹⁷

During the Survey year, the United States Court of Appeals for the Seventh Circuit held, in *Benzies v. Illinois Department of Mental Health and Developmental Disabilities*,¹⁸ that a plaintiff's showing that the defendant's recited reasons for failure to promote a female psychologist were pretextual would not, in and of itself, suffice to establish definitively the defendant's discriminatory intent.¹⁹ The court of appeals pointed out that such a showing would not be equivalent to the second-step presumption's remaining un rebutted by the defendant.²⁰ By emphasizing that a mere showing of pretext by the plaintiff is not dispositive of a Title VII violation, the court established that the ultimate "question . . . is whether the plaintiff established that the employer's use of a criterion forbidden by statute caused an adverse decision."²¹

In *Benzies*, the plaintiff, Bonnie Benzies, brought a Title VII action alleging that the Illinois Department of Mental Health and Developmental Disabilities failed to promote her to the position of Supervising Psychologist I on account of her sex.²² A promotion to such a position could occur by either of two processes: competitive and non-competitive promotions.²³ Although the court of appeals did not specify the requirements of competitive promotions, it did

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 460 U.S. 711, 31 FEP Cases 609 (1983).

¹⁷ *Id.* at 717-18, 31 FEP Cases at 612 (Blackmun, J., concurring).

¹⁸ 810 F.2d 146, 42 FEP Cases 1537 (7th Cir. 1987), *cert. denied*, 107 S. Ct. 3231, 43 FEP Cases 1999 (1987).

¹⁹ *Id.* at 148, 42 FEP Cases at 1538.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 147, 42 FEP Cases at 1537.

²³ *Id.*

note that the department twice denied plaintiff such a promotion telling her that she needed a doctorate degree to qualify for the job.²⁴

The plaintiff acquired her Ph.D. and sought a non-competitive promotion.²⁵ The non-competitive promotion process involved a "job audit" to determine whether a psychologist's duties included the supervision of other psychologists.²⁶ Because the plaintiff's job did not include supervisory responsibilities, civil service personnel deemed her ineligible for a non-competitive promotion.²⁷ During this time the department continued to promote other psychologists with supervisory duties approving for non-competitive promotions four psychologists, only two of whom had doctorate degrees.²⁸ All four were male.²⁹

The district court in *Benzies* rejected plaintiff's contentions that defendant had intentionally discriminated against her.³⁰ Although the district court was skeptical of the department's stated promotion policy, the court of appeals continued, the plaintiff failed to meet her burden of proving to the district court the likelihood that the department's recited reasons behind denying the promotion were a pretext for unlawful discrimination.³¹ Plaintiff appealed the district court's decision arguing that the court had applied an incorrect standard of law as to the plaintiff's burden of proof in the final stage of the *McDonnell Douglas* analysis.³²

The plaintiff contended that the district court required the plaintiff to show that the defendant's recited reasons were pretextual, that the defendant's actions were discriminatory and that absent such discrimination the plaintiff would have been promoted.³³ The plaintiff argued to the contrary, however, that a showing of either pretext or actual discrimination would establish a Title VII violation.³⁴

Prior to analyzing the proper standard of law applicable in the case, the court of appeals first dismissed the plaintiff's contention

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 148, 42 FEP Cases at 1537.

³³ *Id.*

³⁴ *Id.*

on practical grounds.³⁵ The court noted that even a standard requiring only pretext or actual discrimination would not have aided the plaintiff because the district court found neither pretext nor discriminatory intent in the defendant's explanation of why it failed to promote the plaintiff.³⁶ Accordingly, the court pointed out, to have applied either standard would have resulted in the same outcome — that there was no Title VII violation.³⁷

Notwithstanding that no Title VII violation had occurred, the court of appeals next addressed the proper burden of proof imposed on a plaintiff in a Title VII case once the defendant has proposed nondiscriminatory explanations for the employment decision.³⁸ The court rejected the plaintiff's contention that a mere showing that the defendant's explanations for failure to promote were pretextual would be sufficient to establish a Title VII violation.³⁹ Although the court suggested that such a showing of pretext would weigh strongly in a court's assessment of the defendant's discriminatory intent, the court also stressed that pretext alone would not be dispositive of a Title VII violation.⁴⁰ Accordingly, the court of appeals emphasized that a plaintiff must show that the defendant's adverse decision was motivated by intentional discrimination.⁴¹

The court then explained why a mere showing of pretext on the part of the defendant would not establish a Title VII violation as a matter of law.⁴² Title VII, the court asserted, does not prohibit all objectionable employment decisions.⁴³ For example, a finding that an employer discriminated against an employee because of a personal grudge, and nothing more, would not establish a Title VII

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See id.* Regarding the standard of law, the court stated that "Benzies insists that *and* should have been *or*." *Id.* The court then added that "[t]his does not make any difference. The district court concluded both that the reasons the Department gave were not pretexts and that the Department did not act with discriminatory intent. Conjunctive versus disjunctive became immaterial." *Id.*

³⁸ *Id.* at 148, 42 FEP Cases at 1538.

³⁹ *Id.* The court of appeals pointed out that "Benzies argued that if the plaintiff . . . shows that the [employer's] explanation is a 'pretext' — then the district court must infer that the employer acted with discriminatory intent. Not so." *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.*

⁴³ *Id.* The court noted that "Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute." *Id.*

violation.⁴⁴ The court explained that an employer may offer legitimate reasons to disguise his or her true intentions behind an employment decision; but unless those actual motivations represent forbidden actions under Title VII, a showing of pretext could not establish a Title VII violation.⁴⁵ Although not dispositive, where a defendant's explanation of an employment decision fails to establish nondiscriminatory intent, the court noted, it "supports an inference that a bad reason accounts for the decision."⁴⁶

The plaintiff further argued, the court of appeals pointed out, that subsequent to her establishing a *prima facie* case of unlawful discrimination under Title VII, should the defendant's explanations for the employment decision fail, the presumption of a violation stemming from the *prima facie* case would not have been rebutted.⁴⁷ Accordingly, the plaintiff believed that the mere showing of pretext would suffice to establish a Title VII violation.⁴⁸ Here, however, the court cited *United States Postal Service Board of Governors v. Aikens*,⁴⁹ noting that "after the case has been tried the apparatus of the *prima facie* case and response is no longer determinative."⁵⁰ Therefore, in this case, the court concluded, the ultimate burden to establish unlawful discrimination on the part of the defendant resulting in the plaintiff's being denied a promotion rests with the plaintiff.⁵¹ As a result, the court of appeals affirmed the district court's holdings.⁵²

Finally, the court of appeals expressed some concern as to the criteria for promoting psychologists to the Supervisory Psychologist I level.⁵³ Specifically, the court was concerned that the department was assigning duties only to men that later qualified them for non-competitive promotions.⁵⁴ The court stressed that a neutral standard which required previous supervisory duties for promotion is unacceptable where gender discrimination accounts for only males receiving such duties.⁵⁵ The court of appeals pointed out, however,

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 460 U.S. 711, 31 FEP Cases 609 (1983).

⁵⁰ *Benzies*, 810 F.2d at 148, 42 FEP Cases at 1538.

⁵¹ *Id.*

⁵² *Id.* at 149, 42 FEP Cases at 1539.

⁵³ *Id.* at 149, 42 FEP Cases at 1538.

⁵⁴ See *id.*

⁵⁵ *Id.*

that the plaintiff did not present the issue to the district court.⁵⁶ The court concluded that it is not the judge's responsibility to decide issues that have not been clearly presented to the court.⁵⁷

Benzies' primary significance rests in the court's determination that after a defendant recites a lawful, nondiscriminatory reason for an employment decision, a plaintiff must show both that such reasons were a pretext and also that the employer's intentional discrimination accounted for the adverse action.⁵⁸ This standard, however, is not readily apparent from earlier cases in this field of law. In *McDonnell Douglas Corporation v. Green*, for example, the United States Supreme Court stated that a plaintiff must be allowed to establish that "the presumptively valid reasons for [the plaintiff's] rejection were in fact a coverup for a . . . racially discriminatory decision."⁵⁹ In another portion of the *McDonnell Douglas* decision, however, the Court asserted that the plaintiff be permitted to demonstrate "that petitioner's stated reason for respondent's rejection was in fact pretext."⁶⁰ The crucial question, then, becomes whether the Court intended to place a burden on the plaintiff of showing merely pretext or pretext for specifically unlawful discrimination.

Seven years after the decision in *McDonnell Douglas*, the Supreme Court, in *Texas Department of Community Affairs v. Burdine*, cited *McDonnell Douglas* as establishing the third stage of Title VII cases as the plaintiff's burden of proving that the defendant's recited reasons for the employment decision were pretextual of unlawful discrimination.⁶¹ The Court found that the final burden of proving unlawful discrimination may be met either by showing that discrimination was a more probable explanation of the employer's decision than the recited reasons or by exposing the employer's explanation as "unworthy of credence."⁶²

The *Benzies* court also relied in its analysis on *United States Postal Service Board of Governors v. Aikens* to establish that subsequent to the plaintiff's prima facie case and the defendant's "legitimate" explanation for the employment decision, the presumption of un-

⁵⁶ *Id.* at 149, 42 FEP Cases at 1538-39.

⁵⁷ *Id.*

⁵⁸ *See id.* at 148, 42 FEP Cases at 1538.

⁵⁹ 711 U.S. 792, 805, 5 FEP Cases 965, 970 (1973).

⁶⁰ *Id.* at 804, 5 FEP Cases at 970.

⁶¹ 450 U.S. 248, 256, 25 FEP Cases 113, 116 (1981).

⁶² *Id.* at 256, 25 FEP Cases at 116. The court explained that the burden of showing pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Id.* The court proceeded then to offer two ways by which this burden could be met. *Id.*

lawful discrimination present after the first stage of analysis is no longer operative.⁶³ The court's decision, however, does not necessarily follow. The court concluded that the burden ultimately rests with the plaintiff to demonstrate that the defendant's adverse employment decision resulted from unlawful discrimination.⁶⁴ As mentioned above, the Supreme Court has stated that such is not the only way to establish a Title VII violation.⁶⁵ The *Benzies* court rejected the plaintiff's contention that a showing of pretext would suffice.⁶⁶ In *Aikens*, Justice Blackmun, in his concurrence, noted that the plaintiff's third-stage burden may be met by a showing of pretext.⁶⁷ Although the majority opinion in *Aikens* does not explicitly set forth the plaintiff's third-stage burden, Justice Blackmun asserted that the majority implied what this ultimate burden entails.⁶⁸

Overall, then, the *Benzies* decision appears ill-premised. Supreme Court rulings regarding Title VII violations could have been more explicit in some instances regarding the plaintiff's final burden of proof, but such rulings were sufficiently clear to have established that a plaintiff may prevail in a Title VII action by demonstrating that an employer's stated reasons for the adverse action were pretextual or "unworthy of credence." It appears, therefore, that the Seventh Circuit courts are operating under a mistaken theory of current law until *Benzies* is overruled or at least clarified.

The court of appeals in *Benzies* cited an example to support its interpretation; but the usefulness of the example may have been misperceived by the court. The court noted that an employer may have taken adverse action against an employee for an illegitimate reason but one which is not specifically forbidden by any Title VII provisions.⁶⁹ As an example, the court cited a personal grudge as a motivating factor which an employer might try to cover up by proposing more legitimate reasons for an employment decision.⁷⁰ The court explained that proving this recited explanation to be pretextual would not logically establish a Title VII violation.

This concern, however, fails to consider one significant factor of Title VII cases. It ignores the purpose of the second stage of

⁶³ 810 F.2d at 148, 42 FEP Cases at 1538 (citing *Aikens*, 460 U.S. at 715, 31 FEP Cases at 611).

⁶⁴ *Id.*

⁶⁵ 450 U.S. at 256, 25 FEP Cases at 116.

⁶⁶ See *Benzies*, 810 F.2d at 148, 42 FEP Cases at 1538.

⁶⁷ 460 U.S. at 718, 31 FEP Cases at 612 (Blackmun, J., concurring).

⁶⁸ *Id.* at 717, 31 FEP Cases at 611 (Blackmun, J., concurring).

⁶⁹ See *Benzies*, 810 F.2d at 148, 42 FEP Cases at 1538.

⁷⁰ *Id.*

analysis as enumerated in *Burdine*.⁷¹ There the court stated that the purpose of the defendant's burden to recite legitimate reasons for the employment decision in order to rebut the prima facie presumption of a Title VII violation is two-fold.⁷² In addition to rebutting the presumption, the Court noted, these proposed legitimate reasons "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."⁷³ Where this purpose is undermined or ignored altogether, an employer conceivably could recite one "legitimate" reason after another. Although the plaintiff could prove each to be pretextual he or she would not necessarily prevail because the recited reasons would fail to serve their practical purpose. Thus, the *Benzies* decision undermines at least one purpose of placing a burden on the defendant to present legitimate reasons for the employment decision.

There is no cause to condone an employer's misrepresenting his or her true reasons for an employment decision. Nor should an employer be surprised by this standard. Any attorney representing an employer in a Title VII action should be certain to alert his or her client to an employer's responsibility to propose a truthful explanation for any employment decision. In this way, an employer who chooses to propose pretextual explanations in order to disguise motives that may or may not be prohibited under Title VII would do so with full knowledge of this tactic's inherent risks.

The *Benzies* court's misinterpretation of the standard of law to be applied in Title VII cases, therefore, will have two serious consequences in the Seventh Circuit. First, district courts in the circuit will follow this erroneous standard until *Benzies* is overturned or at least clarified. Second, as a result of this misperception, employers will be allowed to evade their burden of factually clarifying the issue at hand to allow the plaintiff a legitimate probability of meeting his or her ultimate burden.

In 1987, the Seventh Circuit Court of Appeals in *Benzies v. Illinois Department of Mental Health and Developmental Disabilities* held that an employee in a Title VII action does not prevail, as a matter of law, by a mere showing that an employer's recited reasons for an employment decision adverse to the employee were pretextual.⁷⁴

⁷¹ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255-56, 25 FEP Cases 113, 116 (1981).

⁷² See *id.*

⁷³ *Id.*

⁷⁴ 810 F.2d at 148, 42 FEP Cases at 1538.

This holding, however, conflicts with earlier Supreme Court rulings which stated that a plaintiff may meet his or her ultimate burden by showing either that the employer was more likely acting discriminatorily or that the defendant's recited reasons for the decision were pretextual or "unworthy of credence."⁷⁵ Accordingly, Seventh Circuit courts will be applying a mistaken interpretation of law until *Benzies* is overturned or at least clarified. In addition, not only is the standard proposed by the *Benzies* court ill-premised, it condones improper conduct among employers on the stand and resultingly places an unduly strict burden on plaintiffs in Title VII cases.

C. **Adverse Effects of the Single-filing Rule on Class Actions: Griffin v. Dugger*¹

Under section 2000e-(5)(e) of Title VII of the Civil Rights Act of 1964, a plaintiff must file a complaint with the Equal Employment Opportunity Commission (EEOC) within 180 days of the employer's alleged discriminatory actions.² Because discrimination in the workplace often affects a substantial number of workers, courts in class action suits have liberalized the 180-day filing requirement.³ In *Oatis v. Crown Zellerbach Corp.*, the Fifth Circuit held that if an individual is a party to a class action suit against an employer, he or she need not file a complaint with the EEOC so long as at least one class member has filed a timely complaint with the Commission alleging the charges that the non-filing plaintiff seeks to assert.⁴ This rule, known as the "single-filing rule," bypasses Title VII's procedural requirements for individuals joining as co-plaintiffs in a class action suit.⁵ The Second, Fourth, Fifth, Eighth, Eleventh, and D.C. Circuits have all adopted the single-filing rule allowing non-filing plaintiffs the opportunity to join a class action suit despite their failure to accommodate the EEOC's 180-day requirement.⁶

⁷⁵ See, e.g., *Burdine*, 450 U.S. at 256, 25 FEP Cases at 116.

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¹ 823 F.2d 1476, 44 FEP Cases 938 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1729 (1988).

² 42 U.S.C. § 2000e-(5)(e) (1982).

³ See *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99, 1 FEP Cases 328, 329-30 (5th Cir. 1968) (single-filing rule bypasses Title VII's 180-day requirement).

⁴ *Id.* at 499, 1 FEP Cases at 330.

⁵ See *id.* at 498, 1 FEP Cases at 329.

⁶ See, e.g., *Snell v. Suffolk County*, 782 F.2d 1094, 39 FEP Cases 1590 (2d Cir. 1986); *Lilly v. Harris-Tetter Supermarket*, 720 F.2d 326, 33 FEP Cases 195 (4th Cir. 1983), *cert. denied*, 466 U.S. 951, 34 FEP Cases 1096 (1984), *on remand*, 645 F. Supp. 1381, 42 FEP Cases 17, *aff'd in part, rev'd in part*, 842 F.2d 1496, 46 FEP Cases 610 (4th Cir. 1988); *Foster v. Gueory*, 655 F.2d 1319, 26 FEP Cases 7 (D.C. Cir. 1981); *Allen v. Amalgamated Transit*

In recognizing the applicability of class action suits to Title VII actions, courts have applied a two-tier analysis.⁷ First, the parties seeking to represent the class must meet the requirements of standing and the procedural requirements of Title VII.⁸ Constitutional standing encompasses the plaintiff's ability to assert charges that are common to the class.⁹ If the plaintiff did not suffer the injury that the class seeks to litigate, then the plaintiff lacks standing to represent the class.¹⁰ Courts then turn to Rule 23(a) of the Federal Rules of Civil Procedure to determine the complaining plaintiff's ability to represent the classes' interests.¹¹ Under Rule 23(a), plaintiffs seeking to represent the interests of the class must satisfy four factors before the class can be certified.¹² First, the class must be so numerous that joinder of all the parties would be impracticable.¹³ Secondly, there must be common questions of law and fact between the parties.¹⁴ Thirdly, the representative parties' claims and defenses must typify those of the class.¹⁵ Finally, the representative parties must fairly and adequately protect the classes' interests.¹⁶

The Fifth Circuit has broadly interpreted Rule 23(a), for example, as it applies to employment discrimination claims.¹⁷ In 1968,

Union, 554 F.2d 876, 14 FEP Cases 1494 (8th Cir.), *cert. denied*, 434 U.S. 891, 15 FEP Cases 1184 (1977); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 1 FEP Cases 328 (5th Cir. 1968).

⁷ *E.g.*, *Oatis*, 398 F.2d at 499, 1 FEP Cases at 330.

⁸ *Id.*

⁹ *Id.*

¹⁰ *See Griffin v. Dugger*, 823 F.2d 1476, 1482-83, 44 FEP Cases 938, 942-43 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1729 (1988).

¹¹ *Oatis*, 398 F.2d at 499, 1 FEP Cases at 330.

¹² FED. R. CIV. P. 23(a). Rule 23 states in pertinent part:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members would be impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

¹³ FED. R. CIV. P. 23(a)(1).

¹⁴ FED. R. CIV. P. 23(a)(2).

¹⁵ FED. R. CIV. P. 23(a)(3).

¹⁶ FED. R. CIV. P. 23(a)(4).

¹⁷ *See Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124, 2 FEP Cases 231, 232-33 (5th Cir. 1969) (across-the-board approach to Rule 23 recognizes the similarity in discrimination in the workplace despite the fact that the claims arise from different types of employer discrimination); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99, 1 FEP Cases 328, 329-30 (5th Cir. 1968) (single-filing rule).

Given the split in the Fifth Circuit creating the new Fifth and Eleventh Circuits in October 1981, the Eleventh Circuit has accepted all former Fifth Circuit decisions prior to

the Fifth Circuit, in *Johnson v. Georgia Highway Express, Inc.*, adopted an "across-the-board" rule.¹⁸ Under this approach, injured parties could join as members of a class if all of the parties alleged discrimination in the workplace, despite the fact that the parties may have suffered varying forms of discrimination.¹⁹ The court held that the parties suffered from essentially the same injury because they were all victims of discrimination in the workplace.²⁰

In 1982, however, the United States Supreme Court rejected the across-the-board rule in *General Telephone Co. of the Southwest v. Falcon*.²¹ In *Falcon*, the respondent instituted a class action asserting that the employer's promotion and hiring practices discriminated against Mexican-Americans.²² The Court recognized the similarity of injuries to parties suffering discrimination in the workplace.²³ The Court, however, held that discrimination alone does not sufficiently satisfy the requirements of Rule 23(a) in certifying a class of plaintiffs.²⁴ Thus, the Supreme Court found that the class had been improperly certified by the district court and remanded the case.²⁵

October 1981 as binding. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

¹⁸ See *Johnson*, 417 F.2d at 1124, 2 FEP Cases at 232-33.

In *Johnson*, the Court of Appeals for the Fifth Circuit adopted an across-the-board approach to class action suits under Rule 23 of the Federal Rules of Civil Procedure. *Id.* The court in *Johnson* reasoned that the injuries suffered by the class in that case were of the same general type of racial discrimination, despite the fact that the plaintiffs had been injured by the operation of different policies. *Id.* Rather than limit the class to similar injuries such as all hiring discrimination claims or job promotion claims, the court noted that all of the plaintiffs were victims of racial discrimination in the workplace, which was sufficient to satisfy the requirements of Rule 23 for private class action suits. *Id.*

¹⁹ See *id.*

²⁰ *Id.*

²¹ 457 U.S. 147, 28 FEP Cases 1745 (1982).

²² *Id.* at 150-51, 28 FEP Cases at 1746-47.

²³ *Id.* at 157, 28 FEP Cases at 1749-50.

²⁴ *Id.* at 157-58, 28 FEP Cases at 1750.

²⁵ *Id.* at 160-61, 28 FEP Cases at 1751. In *General Telephone Co. of the Southwest v. Falcon*, the United States Supreme Court specifically overruled the Fifth Circuit across-the-board approach announced in *Johnson v. Georgia Highway Express, Inc.*, by requiring a class action to satisfy the prerequisites of Rule 23(a). *Id.* While recognizing that racial discrimination does constitute discrimination against a class of individuals, the Court nonetheless rejected the across-the-board approach that sustained a class action on the general grounds of racial discrimination. *Id.* at 157-58, 28 FEP Cases at 1750.

In so ruling, the Court noted the reasons for the development of the use of class action suits in the law. *Id.* at 155, 28 FEP Cases at 1749. Of primary significance, the Court recognized the fact that class action suits provide an efficient, economical means of resolving issues common to a substantially large number of individuals. *Id.*

The Court noted that Title VII allows the EEOC to sue on behalf of groups of individuals suffering discrimination in the workplace without having to satisfy the strictures of Rule 23.

During the *Survey* year, the United States Court of Appeals for the Eleventh Circuit ruled, in *Griffin v. Dugger*, that injured plaintiffs who had failed to satisfy the filing requirement under Title VII could not use the single-filing rule to bring or participate in a class action claim unless the named plaintiffs satisfied the requirements of numerosity, commonality, typicality, and adequacy of representation outlined by Rule 23(a) of the Federal Rules of Civil Procedure.²⁶ In addition, the court held that the non-filing plaintiff could not use the single-filing rule to bypass Title VII's procedural requirements unless the plaintiff filing charges with the EEOC had standing to assert the non-filing plaintiff's claims.²⁷ The *Griffin* court found that the lower court improperly joined the non-filing plaintiff, Alvin Smith, to the class action because this plaintiff alleged that the Florida Department of Corrections (FDOC) failed to hire him due to his performance on an examination that adversely affected blacks, while the named plaintiff, Peners Griffin, alleged that the FDOC declined to promote him due to his race.²⁸ Although the Eleventh Circuit recognized the common thread of discrimination in both claims, the court nonetheless followed the Supreme Court's decision in *Falcon* and decertified the class so as to exclude the non-filing plaintiff, Alvin Smith.²⁹ The court reasoned that the claim of the class representative, Griffin, did not properly embrace the claim of the non-filing plaintiff in accordance with Rule 23(a).³⁰ The court further emphasized that Smith, the non-filing plaintiff, could not use the single-filing rule to bypass Rule 23(a) to salvage his own claim and allow him to become a class representative.³¹ The court

Id. at 155-56, 28 FEP Cases at 1749. The Court further noted, however, that Title VII creates no special rules governing the procedures for private parties and, therefore, these private parties must meet the more stringent demands of Rule 23. *Id.* at 156, 28 FEP Cases at 1749. As a result, the Court stated that the class representative(s) must have similar interests and suffer the same injuries as those individuals on whose behalf the representative maintains the action. *Id.*

While noting that racial discrimination is often class discrimination, the Court emphasized that Rule 23 must be complied with prior to the certification of a class. *Id.* at 157-58, 28 FEP Cases at 1750. As a result, the Court held that the class must satisfy the standards of numerosity, commonality, typicality and adequacy of representation provided by Rule 23(a). *Id.* at 156, 28 FEP Cases at 1749.

²⁶ See *Griffin v. Dugger*, 823 F.2d 1476, 1487-91, 44 FEP Cases 939, 946-49 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1729 (1988).

²⁷ *Id.* at 1492-93, 44 FEP Cases at 950-51.

²⁸ *Id.*

²⁹ *Id.* at 1493-94, 44 FEP Cases at 951.

³⁰ *Id.* at 1490-91, 44 FEP Cases at 949.

³¹ *Id.* at 1493, 44 FEP Cases at 951.

found that Griffin, the filing plaintiff, did not have constitutional standing to assert the non-filing plaintiff's claims.³²

In *Griffin v. Dugger*, the Florida Department of Corrections (FDOC) hired the named plaintiff, Peners L. Griffin, in April 1971; he became the first black Road Prison Officer at the Tallahassee Road Prison.³³ In 1973, Griffin began unsuccessfully applying for promotions for higher level positions in the FDOC.³⁴ Claiming disciplinary infractions, Griffin's supervisor fired him in 1974.³⁵ Because the supervisor failed to adhere to proper termination procedures, the Regional Superintendent reinstated Griffin.³⁶ Again, in 1975, the FDOC terminated Griffin's employment for disciplinary reasons.³⁷ On appeal, the State of Florida Career Service Commission overturned the termination for lack of just cause.³⁸

Once reinstated in his former position, Griffin filed a complaint with the Equal Employment Opportunity Commission (EEOC) explaining the events leading up to his allegedly discriminatory dismissals.³⁹ The EEOC sent Griffin a right-to-sue letter in July 1979, and Griffin subsequently filed suit in the District Court for the Northern District of Florida against Louis Wainwright (Secretary of the FDOC), the FDOC, and the State of Florida.⁴⁰ Griffin's complaint alleged discrimination in a number of FDOC practices. Initially, Griffin claimed that the FDOC failed to promote him due to his race.⁴¹ Griffin also alleged that the FDOC relied on race as a factor in both its promotion and hiring decisions.⁴² In addition to the subjective discrimination in the decision-making process, Griffin further alleged that the hiring practices of the FDOC were discriminatory due to an entry-level examination for correctional officers that had an adverse impact upon blacks applying for positions.⁴³

In accordance with Rule 23(b)(2) of the Federal Rules of Civil Procedure, Griffin sued on behalf of all those similarly situated, seeking injunctive relief as well as money damages.⁴⁴ In defining

³² *Id.*

³³ *Id.* at 1479, 44 FEP Cases at 939.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1479, 44 FEP Cases at 940.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

the class to be represented, Griffin asserted that the group was composed of "all past, present and potential black American citizens and residents who have been, are or may be employees of the Defendants or applicants for employment."⁴⁵ Griffin later amended his complaint on June 17, 1980 in order to add Henry L. Dejerinett as a party-plaintiff and class representative.⁴⁶ Dejerinett's discrimination claim focused on the FDOC's failure to hire him for a clerical position.⁴⁷

The defendants filed a "Notice Regarding the Adequacy of the Preliminary Class Certified" in June 1982, in order to decertify the class represented by Griffin and Dejerinett on the grounds that the plaintiffs could no longer rely on the across-the-board rule to raise dissimilar discrimination claims.⁴⁸ In an attempt to block this potential decertification, Griffin and Dejerinett, on July 8, 1982, moved to join Alvin Smith as an additional named plaintiff and class representative.⁴⁹ Initially, the FDOC turned down Alvin Smith for a position as a correctional officer because he had no high-school diploma.⁵⁰ Upon obtaining his GED, Smith again applied for the position, but was turned down when he failed the entry-level examination.⁵¹ Smith, however, never filed a timely complaint with the EEOC.⁵²

The district court rejected the defendants' motion to decertify the class and allowed Smith to intervene in the suit as a named plaintiff and class representative.⁵³ The district court held that, despite Smith's failure to file a complaint with the EEOC within 180 days, Smith's discrimination in hiring claim was allowable under the single-filing rule.⁵⁴ Because Griffin and Dejerinett had both filed timely complaints and alleged discriminatory hiring practices, the court found that Smith's failure to file a timely complaint with the EEOC was not fatal to his motion to intervene as a named plaintiff and class representative in the suit.⁵⁵

⁴⁵ *Id.* at 1479-80, 44 FEP Cases at 940.

⁴⁶ *Id.* at 1480, 44 FEP Cases at 940.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1480, 44 FEP Cases at 940-41. *See* General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 28 FEP Cases 1745 (1982) (Supreme Court rejected across-the-board approach used to liberalize class action requirements in discrimination cases).

⁴⁹ *Griffin*, 823 F.2d at 1480, 44 FEP Cases at 941.

⁵⁰ *Id.*

⁵¹ *Id.* at 1480-81, 44 FEP Cases at 941.

⁵² *Id.* at 1481 n.8, 44 FEP Cases at 941 n.8.

⁵³ *Id.* at 1481, 44 FEP Cases at 941.

⁵⁴ *Id.*

⁵⁵ *Id.*

On July 30, 1982, the district court granted the plaintiffs partial summary judgment on the issue of liability over the written examination because it had a disparate impact on class members.⁵⁶ In the subsequent trial, the court entered judgment for the defendants on all the issues except the testing claim.⁵⁷ The Court of Appeals for the Eleventh Circuit granted an interlocutory appeal.⁵⁸ On appeal, the court vacated the district court's order certifying the class.⁵⁹

The Court of Appeals for the Eleventh Circuit held that the named plaintiffs seeking to represent the classes' interests must satisfy two prerequisites in order to constitute a private class action under a Title VII employment discrimination claim.⁶⁰ The court first held that the named plaintiffs must have standing to assert the claim and they must also have satisfied the procedural requirements outlined by Title VII for bringing a claim against an employer.⁶¹ Secondly, to bring a private class action, the plaintiffs must meet the requirements of numerosity, commonality, typicality, and adequacy of representation provided by Rule 23(a), and their action must be one of the three types delineated in Rule 23(b) of the Federal Rules of Civil Procedure.⁶²

⁵⁶ *Id.* Disparate impact and disparate treatment are fundamentally different concepts. Disparate treatment involves employer practices that are motivated by racially discriminatory or other impermissible grounds while disparate impact involves facially neutral practices that adversely affect one or more particular groups. See Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 319 n.6 (1987).

⁵⁷ *Griffin*, 823 F.2d at 1481, 44 FEP Cases at 941.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1481-82, 44 FEP Cases at 941-42.

⁶⁰ *Id.* at 1482, 44 FEP Cases at 942.

⁶¹ *Id.*

⁶² *Id.* See also FED. R. CIV. P. 23(a), 23(b). Rule 23(b) states in pertinent part:

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,

Prior to addressing the requirements of a class action embodied in F.R.C.P. Rule 23, the court noted that the initial inquiry in *Griffin* revolved around the sufficiency of the plaintiffs' claims and more importantly, the plaintiffs' standing to assert the claims.⁶³ The court stated that in class action suits, the claims presented will be sustained only if at least one named plaintiff has standing to assert the claim.⁶⁴ The court held that it is not sufficient that the plaintiffs demonstrate that the defendant's actions were injurious to someone.⁶⁵ Instead, the plaintiffs must demonstrate that at least one of the named plaintiffs was a victim of the action in question.⁶⁶ In addition, the court held that the fact that a named plaintiff has suffered injury does not automatically convey standing for that plaintiff to assert other injuries of the same general nature if that plaintiff was not a victim of the other injuries.⁶⁷

Applying this analysis to the facts of the case, the court held that *Griffin* lacked standing to assert a testing claim because the injuries complained of by *Griffin* involved discrimination in the promotion process, not discrimination in the hiring process.⁶⁸ *Griffin* already had employment with the FDOC at the time of the alleged injury.⁶⁹ As a result, he lacked standing to assert a discrimination claim based on the adverse impact of the entry-level examination used in the correctional officer hiring process.⁷⁰

After addressing the issue of standing, the court turned to an analysis of Rule 23.⁷¹ Relying on the Supreme Court's decision in *Falcon*, the *Griffin* court rejected the across-the-board approach, and instead looked to the requirements of Rule 23(a) to determine if the district court properly certified the class.⁷² Applying the require-

and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

⁶³ *Griffin*, 823 F.2d at 1482, 44 FEP Cases at 942.

⁶⁴ *Id.* at 1483, 44 FEP Cases at 943.

⁶⁵ *Id.* at 1483, 44 FEP Cases at 943 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1483-84, 44 FEP Cases at 943.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 1484, 44 FEP Cases at 944.

⁷² *Id.* at 1486-87, 44 FEP Cases at 945-46.

ments of Rule 23(a), the court held that the district court improperly certified the class.⁷³ Although the class was numerous, given the broad framing in Griffin's complaint, the other requirements of Rule 23(a), commonality, typicality, and adequacy of representation, were not satisfied.⁷⁴

The court of appeals criticized the district court's commonality analysis as resting on the erroneous assumption that racial discrimination claims involve common questions of law and fact.⁷⁵ Furthermore, as to typicality, the court found that Griffin's claim revolved around discrimination in the decision-making process for promotions, not discrimination as a result of an entry-level examination for the position of correctional officer.⁷⁶ The court of appeals noted that the claims were entirely different and could hardly be lumped together as typical claims of the individuals in the class.⁷⁷ Based on these factors, the court of appeals held that Griffin could not adequately represent the members of the class who raised discrimination claims based on the examination because Griffin raised only a claim of discrimination in promotion.⁷⁸

The court, having rejected Griffin as a class representative for those individuals with testing claims, looked to Dejerinett to determine if he, as a named plaintiff, could represent the individuals with testing claims.⁷⁹ The court dismissed Dejerinett as a class representative for individuals with testing claims because Dejerinett was a victim of alleged discrimination in the hiring process for a

⁷³ *Id.* at 1489-91, 44 FEP Cases at 947-49.

⁷⁴ *Id.* at 1487-88, 1489-90, 44 FEP Cases at 946, 948.

⁷⁵ *Id.* at 1490, 44 FEP Cases at 948.

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *Id.* at 1491, 44 FEP Cases at 949. In applying *Falcon*, the court of appeals recognized an exception to the rejection of the across-the-board approach. *Id.* at 1487, 44 FEP Cases at 946. In footnote fifteen of the *Falcon* decision, the Supreme Court recognized that plaintiffs with different injuries, such as plaintiffs with claims of discrimination in promotion practices and plaintiffs with claims in hiring practices, could be certified as a class if both types of discrimination involved the same or similar practices. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 n.15, 28 FEP Cases 1745, 1750 n.15 (1982). For example, the *Falcon* Court explained that if an objective examination was used for all those seeking employment and promotions, the plaintiffs could be certified as a class. *Id.* Also, the *Falcon* Court continued, if employment and promotions were conditioned on a subjective process such as interviewing, the plaintiffs could again be certified as a class. *Id.* The court of appeals, however, noted the differences in plaintiffs' claims since each plaintiff complained about different practices. *Griffin*, 823 F.2d at 1490-91, 44 FEP Cases at 949. Thus, the court of appeals held that the district court's certification could not be salvaged by footnote fifteen of the *Falcon* decision. *Id.*

⁷⁹ *Griffin*, 823 F.2d at 1491, 44 FEP Cases at 949.

clerical position.⁸⁰ The application process for clerks did not involve the use of the entry-level examination, as was used for those applying for jobs as correctional officers.⁸¹ The court observed that the FDOC engaged in a subjective decision-making process for Dejerinett, unrelated to the process normally administered for those seeking to become correctional officers.⁸² As a result, the court held that Dejerinett, who had never even taken the entry-level examination, lacked constitutional standing to raise the testing claim.⁸³ In addition, even if Dejerinett did have constitutional standing to assert the testing claim, the court further held that he lacked the capacity to represent the testing claims under Rule 23(a) because his claim was based on subjective factors and thus, could not be likened to the objective testing claims.⁸⁴

The court then addressed the claims of intervenor Alvin Smith to determine if Smith could represent the class of individuals with testing claims.⁸⁵ The court held that, although Smith had constitutional standing to assert the testing claim, he could not adequately represent the class of individuals asserting similar claims for a number of reasons. The court stated that Smith failed to follow the appropriate filing procedures for asserting a private claim against an employer in accordance with section 2000e-(5)(e) of Title VII of the Civil Rights Act of 1964.⁸⁶ Although Griffin purported to raise a discrimination claim concerning the testing procedures in his earlier complaint, plaintiff Smith, according to the court, could not rely on Griffin's allegation to justify his failure to abide by the Title VII filing requirements.⁸⁷ The *Griffin* court thus rejected the single-filing rule's applicability⁸⁸ to this case.⁸⁹

The court also held that even under the single-filing rule, Griffin did not represent adequately the class members with testing claims.⁹⁰ Although Griffin and Smith both asserted claims of racial discrimination, the court stated that the similarities between the

⁸⁰ *Id.* at 1492, 44 FEP Cases at 950.

⁸¹ *Id.* at 1491, 44 FEP Cases at 949.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1491-92, 44 FEP Cases at 950.

⁸⁵ *Id.* at 1492, 44 FEP Cases at 950.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1493, 44 FEP Cases at 951.

⁸⁸ See *supra* notes 4-6 and accompanying text for a description of the single-filing rule.

⁸⁹ *Griffin*, 823 F.2d at 1492, 44 FEP Cases at 950.

⁹⁰ *Id.* at 1492-93, 44 FEP Cases at 950-51.

claims were very tenuous.⁹¹ Griffin's claim focused on the subjective decision-making process of the FDOC in granting promotions, while Smith's claim attacked the entry-level examination for correctional officers as discriminatory, and Dejerinett asserted a subjective hiring claim.⁹² As a result, the court held that the single-filing rule could not salvage Smith's objective testing claim and allow him to maintain the class action on behalf of those individuals raising a testing claim against the FDOC.⁹³ Thus, since Griffin, Dejerinett, and Smith failed to represent adequately the claims of individuals asserting discrimination as a result of the entry-level examination, the court reversed the district court's order certifying the class of plaintiffs.⁹⁴

In his dissent, Judge Hatchett criticized the majority's approach in decertifying the class for failure to satisfy the requirements of the single-filing rule.⁹⁵ Judge Hatchett argued that the court incorrectly superimposed standing requirements onto the single-filing rule.⁹⁶ Judge Hatchett noted that the named plaintiff, Griffin, did state a claim of discrimination for those individuals adversely affected by the entry-level examination for the position of correctional officer.⁹⁷ The court, however, refused to recognize this particular claim as far as Griffin was concerned because Griffin lacked constitutional standing to assert the claim.⁹⁸ Judge Hatchett, focusing on the purposes underlying the Title VII filing requirements, stated that the primary purpose was to encourage out of court settlement of disputes through the EEOC.⁹⁹ As a result, Judge Hatchett argued that the stringent standing requirements imposed on a plaintiff in court proceedings need not be applied as vigorously for the purposes of filing a claim with the EEOC.¹⁰⁰ The court, according to Judge Hatchett, ignores the purposes underlying the Title VII filing requirements and instead uses standing to decertify a class when one of the named plaintiffs fails to satisfy the filing requirements.¹⁰¹

In those circuits following the single-filing rule, *Griffin v. Dugger* may have a significant impact on the maintenance of class action

⁹¹ *Id.* at 1493, 44 FEP Cases at 950-51.

⁹² *Id.*

⁹³ *Id.* at 1493, 44 FEP Cases at 951.

⁹⁴ *Id.* at 1493-94, 44 FEP Cases at 951.

⁹⁵ *Id.* at 1494, 44 FEP Cases at 951-52 (Hatchett, J., dissenting).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1494, 44 FEP Cases at 951 (Hatchett, J., dissenting).

⁹⁸ *Id.* at 1493, 44 FEP Cases at 951.

⁹⁹ *Id.* at 1494, 44 FEP Cases at 952 (Hatchett, J., dissenting).

¹⁰⁰ *Id.* at 1494, 44 FEP Cases at 951-52 (Hatchett, J., dissenting).

¹⁰¹ *Id.* at 1494-95, 44 FEP Cases at 952 (Hatchett, J., dissenting).

suits involving parties that have not properly followed the Title VII filing requirements. By requiring that a named filing plaintiff have standing to assert a claim that a non-filing plaintiff seeks to utilize under the single-filing rule, the Eleventh Circuit has in effect tightened the restrictions on maintaining class action suits. As a result, the Eleventh Circuit has completely excluded a class of plaintiffs who have inadvertently failed to abide by Title VII's procedural guidelines and who are now unable to salvage their claims through the single-filing rule and the class action process.

In announcing its ruling, the court of appeals focuses on the validity of the plaintiff's maintaining a particular claim in an employment discrimination lawsuit when analyzing the claims presented in the named plaintiff's complaint.¹⁰² The court's approach revolves around the plaintiff's ability to successfully litigate the claim before allowing the single-filing rule to apply to those plaintiffs asserting the same claim who have failed to adhere to the filing requirements of Title VII.¹⁰³ The court's opinion takes a retrospective approach to the single-filing rule. If a court determines that a plaintiff lacks standing, then that determination invalidates the claim at the moment that it was filed for purposes of the single-filing rule.¹⁰⁴ The court's rejection of the single-filing rule's use in cases where the filing plaintiff lacks standing to assert the non-filing plaintiff's claim indicates that the court seeks to deter plaintiffs from filing frivolous claims or framing their pleadings too broadly. By limiting the single-filing rule, the Eleventh Circuit suggests that perhaps the plaintiff, Griffin, ought not have filed a claim on behalf of those individuals with testing claims and, in fact, because of Griffin's lack of standing, the court treated the testing claim as if it had not been filed for purposes of the single-filing rule.¹⁰⁵

The dissent, in contrast, takes the approach that any claim stated or framed in the pleadings should give effect to the single-filing rule despite the fact that a court may later determine that the filing plaintiff lacks standing to raise the issues.¹⁰⁶ Under this approach, the dissent argues that the policies underlying the Title VII filing requirements seek to further the role that the EEOC plays in resolving employment discrimination disputes.¹⁰⁷ Instead, the court

¹⁰² See *id.* at 1482-83, 44 FEP Cases at 942-43.

¹⁰³ See *id.* at 1493-94, 44 FEP Cases at 950-51.

¹⁰⁴ See *id.* at 1493, 44 FEP Cases at 951.

¹⁰⁵ See *id.* at 1493-94, 44 FEP Cases at 951.

¹⁰⁶ See *id.* at 1494-95, 44 FEP Cases at 951-52 (Hatchett, J., dissenting).

¹⁰⁷ See *id.* at 1494, 44 FEP Cases at 952 (Hatchett, J., dissenting).

has now turned these requirements around to create a statute of limitations that will exclude a number of non-filing plaintiffs attempting to litigate their claims through a class action suit.

Although the court recognized the need to dissuade plaintiffs from bringing frivolous claims, as well as the corresponding need to encourage plaintiffs with employment discrimination claims to follow Title VII's appropriate procedural requirements, the Eleventh Circuit emphasizes the process' efficiency at the expense of its fairness. As noted in the dissent, the filing requirements apply to plaintiffs filing a claim before the EEOC, not a federal court.¹⁰⁸ As a result, the court has not clearly explained why the standing requirement must be applied vigorously to claims filed before the EEOC. For example, the Supreme Court in *General Telephone Co. of the Southwest v. Falcon* noted in dicta that deviations from the prerequisites for a class action suit embodied in Rule 23(a) may be appropriate when the EEOC takes up the claim of a class of individuals, rather than allow those individuals to pursue a private class action.¹⁰⁹ Given the EEOC's primary purpose of settling employment discrimination disputes, the dicta in *Falcon* implies that the more rigid procedures applied to private suits need not apply with equal vigor when the EEOC actively participates in the dispute.

In the *Griffin* case, Griffin actually filed the hiring discrimination charges, hence respondent FDOC received notice of the claims.¹¹⁰ Although a strict reading of section 2000e-(5)(e) of Title VII might lead a court to exclude Smith's claim from the class action because of his failure to follow the proper procedures in conjunction with Griffin's lack of standing, a closer examination of the underlying purposes of that section would command the opposite result.¹¹¹ The purposes of section 2000e-(5)(e) is to encourage the speedy resolution of disputes by requiring parties to file their claims within a six-month time frame. By requiring plaintiffs to file within 180 days, the EEOC can begin to process the complaint and settle

¹⁰⁸ *Id.*

¹⁰⁹ *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155-56, 28 FEP Cases 1745, 1749 (1982).

¹¹⁰ *Griffin*, 823 F.2d at 1479-80, 44 FEP Cases at 940.

¹¹¹ 42 U.S.C. § 2000e-(5)(e) (1982). The statute reads in pertinent part:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter

Id.

the dispute. In addition, the claim is fresh and thus the necessary evidence to support a finding of discrimination or, conversely, uphold the employer's practices, is also fresh and perhaps more accessible. Finally, the 180-day filing provision requires the plaintiff to serve notice on an employer so that the employer can begin to prepare a defense to the employment discrimination charge.¹¹² Allowing Smith to intervene in this case would not compromise any of the above purposes because Griffin had filed the appropriate claim and served notice on the employer that the alleged discrimination complained of included discriminatory hiring practices.

The court of appeals also seems to be rejecting the very logic of the single-filing rule. That rule, announced in *Oatis v. Crown Zellerbach Corp.*, suggests that a minor departure from the procedural requirements of Title VII should not invalidate the valid claim of a non-filing plaintiff in a class action suit.¹¹³ The single-filing rule provides a means around the strict 180-day filing requirements. The court of appeals, however, limits this exception, thus excluding a class of plaintiffs with viable claims for technical reasons.

While the *Oatis* court discussed an individual's standing to raise a claim, the court of appeals in *Griffin* applied the stringent constitutional standing requirements.¹¹⁴ Indeed, the *Griffin* court rejected a looser requirement that could better facilitate the single-filing rule.¹¹⁵ For example, the dissent's view recognizes the important distinction between filing claims before the court and filing them with the EEOC.¹¹⁶ Although plaintiffs must have constitutional standing to litigate claims in court, the dissent suggests that, for

¹¹² *Id.*

¹¹³ See *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99, 1 FEP Cases 328, 329-30 (5th Cir. 1968).

¹¹⁴ *Griffin*, 823 F.2d at 1493 n.37, 44 FEP Cases at 951 n.37 (defines standing as applied by court).

¹¹⁵ In *Oatis*, the charging party was also the class representative and therefore, as class representative, he needed to have standing to maintain the action. See *Oatis*, 398 F.2d at 498-99, 1 FEP Cases at 329-30. In *Griffin*, however, the charging party, Griffin, is not the class representative. Smith is the best representative for class members with testing claims and he could maintain the class action in court. See *Griffin*, 823 F.2d at 1492, 44 FEP Cases at 950. The *Griffin* court seems to ignore this discrepancy and therefore, reads the reference to standing in *Oatis* as a requirement that a filing plaintiff have standing to maintain the non-filing plaintiff's claim in court as a prerequisite to the application of the single-filing rule, rather than recognize the fact that the charging party, Griffin, asserted the claim that Smith seeks to litigate as a class representative. *Id.* at 1493, 44 FEP Cases at 951. Because Griffin asserted the testing claim in the complaint that he filed with the EEOC, Smith should, under the single-filing rule, be able to point to that charge and be certified as a class representative.

¹¹⁶ *Griffin*, 823 F.2d at 1494, 44 FEP Cases at 951-52 (Hatchett, J., dissenting).

purposes of the single-filing rule, the plaintiff need not satisfy the standing requirement when filing claims with the EEOC.¹¹⁷ The limitation imposed totally contradicts the purposes of the rule. Rather than require every plaintiff in a class action suit to file a claim with the EEOC in the relevant time-frame, the *Oatis* court recognized a viable exception by developing the single-filing rule.¹¹⁸ The *Griffin* court, however, injected the standing requirement into the single-filing rule¹¹⁹ which undercuts the utility of that rule.

Because standing is an issue raised after a claim is filed, cautious plaintiffs will not take chances that the named plaintiff and class representative in a class action suit can adequately represent their claims and interests. If the plaintiffs rely on the single-filing rule as a means of joining a class action suit, a subsequent judicial determination of a lack of standing on behalf of the named plaintiff will obliterate their chances to obtain a remedy for the discriminatory actions of the employer. Rather than reduce the number of filing plaintiffs, as the single-filing rule attempted to do for the sake of judicial expediency and efficiency, the *Griffin* decision increases the number of filing plaintiffs by demonstrating the dangers for a non-filing plaintiff relying on the single-filing rule. Thus, the court of appeals' approach in *Griffin* implicitly revokes the logic of the single-filing rule and renders that rule useless as a practical matter for plaintiffs seeking to adjudicate claims through the class action device unless their claims are virtually identical to those of the named plaintiff and class representative.

In summary, *Griffin v. Dugger* has important procedural ramifications for practitioners in the Eleventh Circuit as well as those circuits that adopt the single-filing rule. By injecting the rigorous constitutional requirements of standing into the rule, the court of appeals has in effect undercut the procedural efficiency of the single-filing rule by sending signals to plaintiffs in a class action suit that non-filing parties cannot rely on the class representatives who have properly adhered to the procedural requirements of Title VII in order to adjudicate their claims, unless the filing plaintiffs have standing to assert the claims of the non-filing plaintiffs. As a practical result, plaintiffs should file their claims with the EEOC in accordance with section 2000e-(5)(e) unless they are convinced that the class representative will be determined by the court to have

¹¹⁷ *Id.*

¹¹⁸ See *Oatis*, 398 F.2d at 498, 1 FEP Cases at 329-30.

¹¹⁹ *Griffin*, 823 F.2d at 1493-94, 44 FEP Cases at 951.

standing to assert their claims. Cautious plaintiffs will be reluctant to rely on the rule to adjudicate their claims for fear that a subsequent judicial determination of lack of standing by the class representative will obliterate their claim and preclude their chances for obtaining a remedy. In attempting to limit the applicability of the single-filing rule to class action suits, the Eleventh Circuit has elevated the sanctity of the procedures to a level greater than that of fairness to the individual and has, in fact, deprived a class of plaintiffs of judicial remedies to employment discrimination.

II. HANDICAP DISCRIMINATION*

A. *Safety Risk and the Meaning of "Otherwise Qualified Handicapped Individual" Under Section 504 of the Rehabilitation Act of 1973:*

*School Board of Nassau County v. Arline.*¹

In passing the Rehabilitation Act of 1973 (the Act), Congress primarily sought to encourage the employment of handicapped individuals in the public and private sectors.² To accomplish this purpose, section 504 of the Act³ prohibits any program receiving federal assistance from discriminating against an otherwise qualified handicapped individual solely on the basis of his or her handicap.⁴ The Act's broad definition of "handicapped individual" evinces Congress' desire for extensive protection of the handicapped.⁵ The Act defines "handicapped individual" as any individual who has a physical or mental impairment which substantially affects one or more major life activities or who has a record of such impairment.⁶ The definition further provides that a person will be a handicapped

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¹ 107 S. Ct. 1123, 43 FEP Cases 81 (1987).

² 29 U.S.C. § 701(8) (1976).

³ Section 504 of the Act is codified at 29 U.S.C. § 794 (1982).

⁴ 29 U.S.C. § 794 (1982). Section 794 provides, in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his [or her] handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or any program or activity conducted by an Executive agency of the United States

Id.

⁵ *Id.* § 706(7).

⁶ *Id.* §§ 706(7)(B)(i)-(B)(ii). It should be noted that the regulations promulgated by the Department of Health and Human Services include employment in the definition of a "major life function." 29 C.F.R. § 1613.702(c) (1985).

individual within the meaning of the Rehabilitation Act if he or she is "regarded as having such an impairment."⁷

Although the Act does provide a definition for "handicapped individual," the Act does not provide a definition for "otherwise qualified handicapped individual." The Department of Health and Human Services, however, has promulgated regulations which state that a "qualified handicapped individual" with respect to employment is a handicapped person who can perform the essential functions of a position with or without reasonable accommodation for the handicap, and who can do so without endangering his or her own health and safety or other's health and safety.⁸ The Supreme Court of the United States, interpreting section 504 of the Act in *Southeastern Community College v. Davis*, held that to be an otherwise qualified handicapped individual one must be able to perform the duties of a position in spite of the handicap in question.⁹

The Supreme Court has not spoken on whether a handicap which poses a potential safety risk will preclude a person from being otherwise qualified within the meaning of the Act. Lower courts, however, have discussed the safety risk imposed by a handicapped individual.¹⁰ The Court of Appeals for the Second Circuit, in *Doe v. New York University*, has enunciated a "reasonable probability"

⁷ 29 U.S.C. § 706(B)(iii). Section 706(7)(B) provides in relevant part:

{T}he term "handicapped individual" means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Id.

⁸ 29 C.F.R. § 1613.702(f) (1985). Specifically, section 1613.702(f) provides:

(f) "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual and others . . .

Id.

It is an affirmative duty for any recipient of federal assistance to make reasonable accommodation for a handicapped individual. 45 C.F.R. § 1232.10 (1986).

⁹ 442 U.S. 397, 406 (1979): In ruling that to be otherwise qualified a handicapped individual must be able to perform the duties of a position *in spite of* a handicap, the Supreme Court rejected the Fourth Circuit's holding that to be otherwise qualified a handicapped individual must be able to perform his or her duties *except for* the handicap. *Id.*

¹⁰ See, e.g., *Bentivegna v. United States*, 694 F.2d 619, 622, 30 FEP Cases 875, 877 (9th Cir. 1982); *Doe v. Region 13 Mental Health-Retardation Comm'n*, 704 F.2d 1402, 1410, 32 FEP Cases 1332, 1338 (5th Cir. 1983); *E.E. Black, Ltd. v. Marshall*, 487 F. Supp. 1088, 1103, 23 FEP Cases 1253, 1264 (D. Haw. 1980); see also Perras & Hunter, *Handicap Discrimination in Employment: The Employer Defense of Future Safety Risk*, 6 J.L. & Com. 377, 389-97 (Winter 1986); 1985-86 *Annual Survey of Labor Relations and Employment Discrimination Law*, 28 B.C.L. Rev. 187 (1986) [hereinafter 1985-86 Survey].

standard, under which predictions about future behavior can justify a handicapped person's exclusion.¹¹ In contrast, the Third Circuit, in *Srathie v. Department of Transportation* did not endorse *Doe's* "reasonable probability" standard, requiring instead an "appreciable risk of harm" before an individual's handicap would render him or her not otherwise qualified.¹² In *Mantolete v. Bolger*, the Court of Appeals for the Ninth Circuit suggested yet another standard, holding that an employer's concern for safety will only justify the determination that a handicapped person is not otherwise qualified if such a handicap poses a "reasonable probability of substantial harm."¹³ Thus, although a uniformly applied standard has emerged regarding the issue of when a safety risk precludes an individual from achieving "otherwise qualified" status, lower courts have recognized that concern for future safety is a valid consideration in determining whether a handicapped individual is otherwise qualified.¹⁴

During the *Survey* year, in *School Board of Nassau County, Florida v. Arline*, the Supreme Court of the United States considered whether an individual who is a carrier of a communicable disease is a handicapped individual within the meaning of the Rehabilitation Act, and whether an employer can discharge such an individual on the grounds that risk of disease transmission poses a safety risk.¹⁵ The Court held that an individual who has a record in his or her medical past of carrying a communicable disease is a handicapped individual under the meaning of the Rehabilitation Act.¹⁶ Stating, however, that an employer, when determining whether an individual is "otherwise qualified," cannot "meaningfully distinguish" the disease's physical effects in terms of ability to perform the job in question and the disease's physical effects in terms of possible transmission to others, the Court held that an employer cannot merely point to the contagious effects of a disease as justification for ter-

¹¹ 666 F.2d 761, 775 (1981); see also *Doe v. Region 13 Mental Health-Retardation Comm'n* 704 F.2d 1402, 1409-10, 31 FEP Cases 1332, 1338 (5th Cir. 1983) (holding that substantial, reasonable basis for prediction about effect of plaintiff's mental health is sufficient justification for the determination that plaintiff is not otherwise qualified).

¹² 716 F.2d 227, 232, 32 FEP Cases 1561, 1565 (2d Cir. 1983).

¹³ 767 F.2d 1416, 1422, 38 FEP Cases 1081, 1086 (9th Cir. 1985).

¹⁴ See 1985-86 *Survey*, *supra* note 10, at 187-89, which suggests that the trend has been toward a stricter standard. It should be noted, however, that no cases have dealt specifically with the issue of when safety risk posed by a contagious disease is a handicap, notwithstanding the question of whether such disease, if a handicap at all, would render an individual not otherwise qualified.

¹⁵ 107 S. Ct. 1123, 43 FEP Cases 81 (1987).

¹⁶ *Id.* at 1127, 43 FEP Cases at 84.

mination.¹⁷ The Court recognized, however, that in deciding whether an individual who is handicapped by virtue of carrying a communicable disease is "otherwise qualified," the courts can give weight to the "legitimate concern" of avoiding serious health or safety risks.¹⁸ According to the Court, however, the ultimate determination of whether such an individual is otherwise qualified must not lie with the employer, but rather with the "reasonable medical judgment" of public health officials.¹⁹ By holding that an employer, on the grounds of possible safety risk, cannot terminate an employee who has a communicable disease without first obtaining reasonable medical judgment, the *Arline* Court thus reinforced the principle that an employer cannot discriminate against an employee on the basis of uninformed prejudice or stereotypes. Because the *Arline* decision deals specifically with communicable diseases as a handicap, it will prove particularly relevant in the very likely event that the communicable disease in question is Acquired Immune Deficiency Syndrome (AIDS).

Arline involved an elementary school teacher, Gene Arline, who worked for the Nassau County, Florida school system since 1966.²⁰ Arline had been hospitalized in 1957 with tuberculosis, but the disease had been in remission since then.²¹ In 1977, a culture revealed that the disease was again active in her system.²² After she suffered a second relapse in the spring of 1978 and a third relapse the following winter, the school board suspended Arline with pay.²³ The board subsequently terminated Arline, however, giving as their justification her continued recurrence of tuberculosis.²⁴

Arline filed suit, and the district court held that Arline was not a handicapped person within the meaning of the Rehabilitation Act and therefore not under its protection.²⁵ The district court further stated that even if Arline were handicapped within the meaning of the Act, she was, because of the safety risk posed by the contagiousness of her disease, not qualified to teach elementary school.²⁶ The Court of Appeals for the Eleventh Circuit reversed, however, find-

¹⁷ *Id.* at 1128, 43 FEP Cases at 84.

¹⁸ *Id.* at 1131, 43 FEP Cases at 86.

¹⁹ *Id.* at 1131, 43 FEP Cases at 87.

²⁰ *Id.* at 1125, 43 FEP Cases at 82.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1125, 43 FEP Cases at 82-83.

²⁶ *Id.*

ing that Arline's hospitalization for tuberculosis in 1957 revealed a record of physical impairment which substantially limits a major life function and, furthermore, that her employer "regarded her" as having such an impairment.²⁷ Turning to the question of whether Arline was "otherwise qualified," however, the Eleventh Circuit found the facts before it insufficient, and remanded the case for further determination.²⁸ The school board petitioned a writ of certiorari, which the Supreme Court granted.²⁹

The United States Supreme Court affirmed the Eleventh Circuit's decision.³⁰ Looking to both the language of the Act and Department of Health and Human Services Regulations, the Court found that Arline fell under the Act's definition of a handicapped individual.³¹ The Court first noted that the Act defines "handicapped individual" as an individual with a physical or mental impairment which substantially limits a major life function.³² The Court pointed to the regulations, which include in their definition of "physical impairment" any "physiological disorder or condition . . . affecting [the] respiratory [system]," and concluded that Arline had a physical impairment because Arline's tuberculosis affected her respiratory system.³³ Such an impairment, the Court continued, required hospitalization, and this fact was "more than sufficient" to indicate that the impairment limited a major life activity.³⁴ Arline, the Court determined, was therefore a handicapped individual.³⁵

The Court then addressed the school board's argument that it had not discriminated against Arline because of any discriminatory perception that her handicap rendered her unable to perform her duties, but rather had dismissed her because her handicap was a threat to the health and safety of others.³⁶ The Court, however,

²⁷ 772 F.2d 759, 764, 39 FEP Cases 9, 13 (1985) (citing 29 U.S.C. 706(7)(B) (1982); 45 C.F.R. § 84.3(j)(2)(i)(A) (1982); 45 C.F.R. § 84.3(j)(2)(iii) (1982); 45 C.F.R. § 84.3(j)(2)(iv) (1982)). The court, in deciding that Arline was regarded as having an impairment which substantially limits a major life function, noted that the disease can severely impair the respiratory system. *Id.*

²⁸ *Id.* at 765, 39 FEP Cases at 14.

²⁹ 106 S. Ct. 1633 (1986).

³⁰ 107 S. Ct. 1123, 1132, 43 FEP Cases 81, 87 (1987).

³¹ *Id.* at 1126-27, 43 FEP Cases at 83-84 (citing 29 U.S.C. § 706(7)(B) (1982); 45 C.F.R. § 84.3(j)(2)(i) (1982)).

³² *Id.* at 1126, 43 FEP Cases at 83 (citing 29 U.S.C. § 706(7)(B) (1982)).

³³ *Id.* at 1127, 43 FEP Cases at 84 (citing 45 C.F.R. § 84.3(j)(2)(i) (1982)).

³⁴ *Id.* at 1127, 43 FEP Cases at 84. The Court, however, did not base its finding on whether Arline was regarded as having a substantially limiting handicap.

³⁵ *Id.* at 1127, 43 FEP Cases at 84.

³⁶ *Id.* at 1128, 43 FEP Cases at 84-85.

stated that when a recipient of federal funds decides whether an individual is otherwise qualified, discrimination based on an employer's perceptions about the contagious effect of a disease cannot be "meaningfully distinguished" from discrimination which relates to an employer's perception regarding the effect of the disease on ability to perform successfully on the job.³⁷ The Court observed that Congress was as concerned with a handicap's effect on others as with the physical effect of the handicap on the individual,³⁸ and that to allow discrimination based on the perceived possibility of a disease's communicability would be inconsistent with the Act's goal of ensuring that handicapped individuals are not denied employment because of misconceptions or unfounded prejudices.³⁹ Some persons with contagious diseases may pose a serious threat to others, the Court said, but that is not grounds for excluding the Act's coverage to all individuals who carry a contagious disease.⁴⁰ The Court therefore concluded that the board terminated Arline because of her handicap, thus bringing her under the protection of the Rehabilitation Act.⁴¹

The Court then turned to the problem of determining when a recipient of federal funds can exclude from employment an individual with a contagious disease because such individual poses a safety risk to others.⁴² The Court first noted that significant health and safety risks are "legitimate concerns" when determining whether a handicapped individual is otherwise qualified.⁴³ Without discussing a standard for the safety risk in general, the Court agreed with the American Medical Association, which filed an amicus brief, that the particular determination of when contagiousness as a safety risk precludes a handicapped individual from being "otherwise qualified" should include a finding of fact based on reasonable medical judgment given the state of medical knowledge.⁴⁴ The relevant considerations, the Court noted, include the nature of the disease's transmission, the duration of the risk of transmission, the severity of the risk, and the probability that the disease will in fact

³⁷ *Id.* at 1128, 43 FEP Cases at 84.

³⁸ *Id.* at 1128, 43 FEP Cases at 85.

³⁹ *Id.* at 1129, 43 FEP Cases at 85.

⁴⁰ *Id.* at 1130, 43 FEP Cases at 86.

⁴¹ *Id.* at 1128, 43 FEP Cases at 84.

⁴² *Id.* at 1130-32, 43 FEP Cases at 86-87.

⁴³ *Id.* at 1131, 43 FEP Cases at 86.

⁴⁴ *Id.* at 1131, 43 FEP Cases at 87 (citing Brief for American Medical Association as *Amicus Curiae* 19).

be transmitted.⁴⁵ The Court also stated that, in making these findings, a court should defer to public health officials' judgment.⁴⁶ The Court then decided that in this case the evidence was not sufficient to make a finding as to whether Arline was otherwise qualified, and remanded for further findings of fact.⁴⁷

In a dissent joined by Justice Scalia, Chief Justice Rehnquist argued that the Court should not read the Rehabilitation Act as broadly as it did.⁴⁸ Chief Justice Rehnquist maintained that legislation which imposes obligations exclusively on recipients of federal funds should be treated as a contract,⁴⁹ and that the receipt of federal funds in this case was therefore a *quid pro quo* for providing the handicapped with employment.⁵⁰ Along these lines, Chief Justice Rehnquist contended that a recipient can only accept and be bound by those terms of a *quid pro quo* which Congress has made unambiguous.⁵¹ Because the regulations, the legislative history, and the language of the Act are silent on the issue of whether a carrier of a contagious disease is a handicapped person, Chief Justice Rehnquist argued that the inclusion of people with contagious diseases in the category of handicapped individuals was not such a clear, unambiguous term in the "contract" for receipt of federal funds.⁵² Chief Justice Rehnquist also observed that Congress had left the states significant leeway to legislate regarding the spread of contagious disease, and the Court in the past, when faced with extensive state regulation, had declined to read the Rehabilitation Act broadly.⁵³

Significantly, the Court, in deciding whether the safety risk posed by contagiousness rendered Arline unqualified, did not refer to the large body of lower court decisions which discussed safety risk.⁵⁴ The Court therefore did not resolve the dispute in the lower

⁴⁵ *Id.* (citing Brief for American Medical Association as *Amicus Curiae* 19).

⁴⁶ *Id.* at 1131, 43 FEP Cases at 87.

⁴⁷ *Id.* at 1131-32, 43 FEP Cases at 87.

⁴⁸ *Id.* at 1132-34, 43 FEP Cases at 87-89.

⁴⁹ *Id.* at 1132, 43 FEP Cases at 87-89 (citing *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981); *Board of Educ. Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176 (1982)).

⁵⁰ *Id.*

⁵¹ *Id.* at 1132, 43 FEP Cases at 87-89.

⁵² *Id.* at 1132-33, 43 FEP Cases at 87-88.

⁵³ *Id.* 43 FEP Cases at 88.

⁵⁴ *E.g.*, *Doe v. New York*, 666 F.2d 761, 775 (2d Cir. 1981); *Mantolite v. Bolger*, 767 F.2d 1416, 1422, 38 FEP Cases 1081, 1086 (9th Cir. 1985); *Bentivegna v. United States*, 694 F.2d 618, 622, 30 FEP Cases 875, 877 (9th Cir. 1982); *Doe v. Region 13 Mental Health-Retardation Comm'n*, 794 F.2d 1402, 1410, 31 FEP Cases 1332, 1338 (5th Cir. 1983); *Strathie*

courts over which standard should be employed generally in determining whether a safety risk renders a handicapped person unqualified.⁵⁵

Furthermore, the Court's ruling that the safety risk inquiry should include the consultation of "reasonable medical judgment" is expressly limited to the safety risk imposed by contagious disease,⁵⁶ and it is therefore unlikely that courts will read the "reasonable medical judgment" standard as the relevant standard in all safety risk cases. Furthermore, one can easily conceive of situations where the "reasonable medical judgment" standard would not be helpful. For example, courts would not necessarily answer the question of whether an individual with vision in only one eye is "otherwise qualified" to be a railroad trackman by consulting reasonable medical judgment.⁵⁷ In such a case, the employer's judgment may be more valuable and more relevant. The Supreme Court's decision in *Arline* therefore does not resolve the conflict in the lower courts concerning the appropriate standard for determining when a safety risk renders a handicapped individual unqualified generally.⁵⁸ Only in the specific instance where the potential safety risk is communication of a disease will employment of the *Arline* "reasonable medical judgment" standard be necessary.

v. Department of Transp., 716 F.2d 227, 232, 32 FEP Cases 1561, 1565 (3d Cir. 1983); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1103, 23 FEP Cases 1253, 1264 (D. Haw. 1980); see also Perras & Hunter, *supra* note 10, at 389-97; 1985-86 Survey, *supra* note 10, at 187.

⁵⁵ See, e.g., Doe v. New York Univ., 666 F.2d 761, 775 (2d Cir. 1981); Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981); Mantoletto v. Bolger, 767 F.2d 1416, 1422, 38 FEP Cases 1081, 1086 (9th Cir. 1985); Bentivegna v. United States, 694 F.2d 618, 622, 30 FEP Cases 875, 877 (9th Cir. 1982); Doe v. Region 13 Mental Health-Retardation Comm'n, 794 F.2d 1402, 1410, 31 FEP Cases 1332, 1338 (5th Cir. 1983); Strathie v. Department of Transp., 716 F.2d 227, 232, 32 FEP Cases 1561, 1565 (3d Cir. 1983); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1103, 23 FEP Cases 1253, 1264 (D. Haw. 1980); see also Perras & Hunter, *supra* note 10, at 389-97; 1985-86 Survey, *supra* note 10, at 187.

⁵⁶ 107 S. Ct. at 1133, 43 FEP Cases at 86-87 (1987) (the Court delivers the "reasonable medical judgment" standard as one which applies "in the context of the employment of a person handicapped with a contagious disease").

⁵⁷ National R.R. Passenger Corp. v. Commonwealth, 452 A.2d 301, 36 FEP Cases 599 (Pa. Commw. Ct. 1982) (refusal to hire railroad trackman with vision in only one eye upheld).

⁵⁸ See, e.g., Doe v. New York Univ., 666 F.2d 761, 775 (2d Cir. 1981); Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981); Mantoletto v. Bolger, 767 F.2d 1416, 1422, 38 FEP Cases 1081, 1086 (9th Cir. 1985); Bentivegna v. United States, 694 F.2d 618, 622, 30 FEP Cases 875, 877 (9th Cir. 1982); Doe v. Region 13 Mental Health-Retardation Comm'n, 794 F.2d 1402, 1410, 31 FEP Cases 1332, 1338 (5th Cir. 1983); Strathie v. Department of Transp., 716 F.2d 227, 232, 32 FEP Cases 1561, 1565 (3d Cir. 1983); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1103, 23 FEP Cases 1253, 1264 (D. Haw. 1980); see also Perras & Hunter, *supra* note 10, at 389-97; 1985-86 Survey, *supra* note 10, at 187.

In the context of contagious diseases, the most obvious and pertinent question after *Arline* is whether the Rehabilitation Act will cover an individual suffering from Acquired Immune Deficiency Syndrome (AIDS). The Court deliberately left this question open.⁵⁹ It seems likely, however, that an individual already suffering from AIDS will be considered a handicapped individual, because the disease often results in severe pneumonia,⁶⁰ which is certainly a "physiological disorder or condition . . . affecting [the] . . . respiratory [system]."⁶¹ A mere carrier of AIDS who has not actually contracted the disease may have more difficulty showing that the Rehabilitation Act protects him or her. Negative public sentiment regarding the disease, however, increases the likelihood that an individual who is only a carrier of AIDS will be "regarded as having . . . an impairment [which substantially limits a major life function]," thus bringing such an individual within the Act's coverage.⁶² Furthermore, because the Act's purpose is to prevent unwarranted and prejudicial discrimination, the negative public reaction to people with AIDS might make such people particularly in need of the Rehabilitation Act's protection.

The more difficult question which *Arline* leaves open is whether an individual who has AIDS or who is a carrier of AIDS will be "otherwise qualified," or whether a safety risk posed by the possible infection of others will allow an employer to conclude that such an individual is not "otherwise qualified." The Court suggests that employers consult "reasonable medical judgment" when considering the safety risk in the contagious disease context. The Court's decision compels the recipient of federal funds to consult outside judgment, thereby reducing the risk that the recipient will discriminate against a carrier of AIDS on the basis of unfounded fear or prejudice. Thus, although the *Arline* Court specifically declined to decide whether an individual with AIDS is protected by the Act, the decision can be read as strong support for the likelihood that the Rehabilitation Act protects AIDS sufferers.

⁵⁹ 107 S. Ct. 1123, 1128 n.7, 43 FEP Cases 81, 84 n.7 (1987). The Court said specifically that it would not comment on whether a carrier of AIDS would come under the protection of the Act. *Id.*

⁶⁰ Titus, *AIDS as a Handicap Under the Federal Rehabilitation Act of 1973*, 43 WASH. & LEE L. REV. 1515, 1515 n.5. Author notes that AIDS often causes pneumocystic cariniis, a respiratory ailment caused by a parasitic infection of the lungs. *Id.*

⁶¹ 45 C.F.R. § 84.3(j)(2)(i) (1985). The Court relied on this regulation in concluding that *Arline* was a handicapped individual. 107 S.Ct. at 1127, 43 FEP Cases at 84 (citing 45 C.F.R. § 84.3(j)(2)(i) (1985)).

⁶² 29 U.S.C. § 706(7)(B) (1982).

In *Arline*, the Court gave a specific standard, the "reasonable medical judgment" standard, for determining whether individuals with a contagious disease would be otherwise qualified with respect to employment within the meaning of the Rehabilitation Act of 1973. In light of the varied and inconsistent lower court decisions regarding the standard for safety risk,⁶³ such a definite standard for safety risk in the context of contagious diseases will provide needed guidance. Although *Arline* does not discuss the question of AIDS as a handicap nor the question of whether an individual suffering from AIDS qualifies as a handicapped individual under the Rehabilitation Act of 1973, the Court did provide that an individual who has suffered from or is presently suffering from a contagious disease would be protected by the Rehabilitation Act, which is strong support for the conclusion that the Act will protect AIDS victims.

III. AFFIRMATIVE ACTION

A. **Statistical Evidence of a Manifest Imbalance in a Traditionally Segregated Job Category Can Protect a Voluntary Affirmative Action Plan from a Title VII Challenge: Johnson v. Transportation Agency, Santa Clara County, California*¹

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin.² Congress intended Title VII to

⁶³ Along with the cases discussed in this article, see *Bentivegna v. United States*, 694 F.2d 618, 622, 30 FEP Cases 875, 877 (9th Cir. 1982); *Doe v. Region 13 Mental Health-Retardation Comm'n*, 794 F.2d 1402, 1410, 31 FEP Cases 1332, 1338 (5th Cir. 1983); *Strathie v. Department of Transp.*, 716 F.2d 227, 232, 32 FEP Cases 1561, 1565 (3d Cir. 1983); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1103, 23 FEP Cases 1253, 1264 (D. Haw. 1980); see also *Perras & Hunter*, *supra* note 10, at 389-97; 1985-86 *Survey*, *supra* note 10, at 187.

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¹ 107 S. Ct. 1442, 43 FEP Cases 411 (1987).

² 42 U.S.C. § 2000e-2(a) (1982). Title VII provides that:

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

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

prevent invidious discrimination based on racial or other impermissible classifications³ and to correct historical patterns of discrimination against women and minorities in the work place.⁴ These two objectives can conflict when an employer adopts a voluntary affirmative action plan that takes race, sex, or other impermissible classifications into account to correct the underrepresentation of women or minorities in certain job areas.⁵

Balancing these competing objectives, the United States Supreme Court first interpreted Title VII to protect equally male and female employees, white and minority employees.⁶ In 1978, however, the Court decided, in *Steelworkers v. Weber*, that Title VII did not prohibit all voluntary, race conscious affirmative action plans.⁷ In *Weber*, the Court did not establish clear rules distinguishing permissible affirmative action plans from impermissible plans,⁸ but instead listed several factors that contributed to the plan's validity in that case.⁹ The Court mentioned such factors as the nonexistence in the plan of any requirement to fire non-minority workers in order to hire or promote minorities, the availability of some advancement opportunities for non-minority workers, and the plan's temporary character.¹⁰ Subsequently, courts have looked to these factors as guidelines in validating other voluntary affirmative action plans.¹¹

During the Survey year, the United States Supreme Court ruled in *Johnson v. Transportation Agency, Santa Clara County, California* that an employer could defend an affirmative action plan against a Title VII challenge by pointing to statistical evidence of a manifest im-

³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 3 FEP Cases 175, 177 (1971); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280, 12 FEP Cases 1577, 1579 (1976).

⁴ *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 200-04, 20 FEP Cases 1, 5-6 (1979).

⁵ SCHLEI & GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 775-76 n.4 (2d ed. 1983); see also *Weber*, 443 U.S. at 201, 20 FEP Cases at 5.

⁶ *Griggs*, 401 U.S. at 431, 3 FEP Cases at 177 ("Discriminatory preference for any group, minority or majority, is precisely . . . what Congress has proscribed."); see also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280, 12 FEP Cases 1577, 1580 (1976) (Title VII prohibits discrimination against white employees with the same standards as would apply to black employees).

⁷ *Weber*, 443 U.S. at 208, 20 FEP Cases at 7.

⁸ *Id.*

⁹ *Id.* at 208-09, 20 FEP Cases at 7.

¹⁰ *Id.*

¹¹ *Setser v. Novack Inv. Co.*, 657 F.2d 962, 969, 26 FEP Cases 513, 517 (8th Cir. 1981), cert. denied, 454 U.S. 1064 (1981) (Court recites guidelines listed in the text after stating: "[t]he specifics of the plan approved in *Weber* indicate some guidelines for private affirmative action plans.").

balance in a traditionally segregated job category.¹² The Court stated that in demonstrating such a conspicuous imbalance an employer need not identify an imbalance great enough to support a prima facie case of discrimination against the employer.¹³ Rather, according to the Court, an employer need only compare the minority or female percentage of the employer's work force with the minority or female percentages of the relevant labor market.¹⁴ To further Title VII's goals of eliminating the effects of past discrimination without unduly trammelling the rights of non-minority or male employees, the Court also affirmed the *Weber* requirement that the conspicuous imbalance must occur in a traditionally segregated job category.¹⁵ In *Johnson*, the Court further ruled that the employee challenging an affirmative action plan under Title VII must bear the burden of proving that the plan is invalid.¹⁶ Additionally, the *Johnson* decision marked the first time that the Court approved a public employer's affirmative action plan under Title VII analysis.¹⁷

Because of *Johnson*, employers will be better able to defend voluntary affirmative action plans from Title VII challenges. Em-

¹² 107 S. Ct. 1442, 1453-57, 43 FEP Cases 411, 419-22 (1987). While *Johnson* involves a gender discrimination claim under Title VII, the Court's opinion applies equally to claims based on other "impermissible" classifications. *Id.* at 1454 n.13, 43 FEP Cases at 419 n.13.

Johnson involved only a Title VII challenge. *Id.* at 1449, 43 FEP Cases at 416. Justice Scalia suggests in his dissent that the affirmative action plan in *Johnson* might be unconstitutional under fourteenth amendment equal protection analysis. *Id.* at 1472, 43 FEP Cases at 434 (Scalia, J., Rehnquist, C.J., dissenting). The majority never addressed the issue of whether or not the fourteenth amendment prohibited the plan in *Johnson*. *Id.* at 1449-50 n.6, 43 FEP Cases at 416-17 n.6. Therefore, practitioners should not conclude that the plan in *Johnson* would necessarily withstand constitutional scrutiny.

¹³ *Id.* at 1452, 43 FEP Cases at 419.

¹⁴ *Id.* at 1452, 43 FEP Cases at 418.

¹⁵ *Id.* at 1452, 43 FEP Cases at 418-419. The *Weber* requirement that the imbalance exist in a traditionally segregated job category does not impose a heavy burden on employers. Once an employer can demonstrate a conspicuous imbalance, courts have been willing to presume that the job category has been traditionally segregated. SCHLEI & GROSSMAN, *supra* note 5, at 860.

¹⁶ *Johnson*, 107 S. Ct. at 1449, 43 FEP Cases at 416. In placing the burden of proof on the plaintiff, the Court extended to Title VII actions the rule it established one year earlier for constitutional challenges to affirmative action plans. *Id.* The Court decided in *Wygant v. Jackson Board of Education* that the ultimate burden of demonstrating the unconstitutionality of an affirmative action plan rests with the plaintiff. 106 S. Ct. 1842, 1848, 40 FEP Cases 1321, 1325 (1986).

¹⁷ *Johnson*, 107 S. Ct. at 1471, 43 FEP Cases at 433 (Scalia, J. and Rehnquist, C.J., dissenting). The dissent in *Johnson* considers the approval of a public employer's voluntary affirmative action plan to be a major step. *Id.* Other authorities, however, have long assumed that the same standards apply to public employers as private employers. SCHLEI & GROSSMAN, *supra* note 5, at 840; see *Detroit Police Officer's Assoc. v. Young*, 608 F.2d 671, 689 n.7, 20 FEP Cases 1728, 1739 n.7 (6th Cir. 1979); see also *Scott v. City of Anniston*, 597 F.2d 897, 900, 20 FEP Cases 62, 64 (5th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

employers will not need to prove a prior history of discrimination to justify an affirmative action plan. Rather, employers may simply point to a manifest statistical imbalance. Moreover, in *Johnson*, the Court placed no explicit limits on how large a manifest imbalance needs to be in order to justify an affirmative action plan.

In December 1978, the District Board of Supervisors of the Santa Clara County Transportation Agency adopted an affirmative action plan designed to comply with the county's general affirmative action plan.¹⁸ The Agency plan provided that, in making promotions, the Agency may consider the gender of the applicants as one factor in its decision provided that the position exists within a traditionally segregated job classification and that women are significantly underrepresented in that job category.¹⁹ To determine whether women were significantly underrepresented, the Agency compared the percentage of women in each of its seven job categories to the percentage of women in the local labor market.²⁰ The Agency found that women were underrepresented in the Agency as a whole and in five of its seven job categories.²¹ Most strikingly, in the Skilled Craft Worker category, all 238 employees were men.²² The Agency attributed these disparities in part to the limited opportunities in the past for women to work in these job classifications.²³

In light of this background, the Agency adopted the long-term goal of attaining, in all of its job categories, a work force that reflected the proportion of women in the local labor force.²⁴ To reach this goal, the Agency sought to achieve a measurable yearly improvement in the hiring and promotion of women in those job categories in which women were underrepresented.²⁵ The Agency recognized several obstacles to achieving measurable yearly improvements, including the low turn-over rate in some jobs, the heavy labor involved in others, the limited number of entry level positions in the Technical and Skilled Craft Worker classifications, and the limited number of qualified female applicants for positions

¹⁸ *Johnson*, 107 S. Ct. at 1446, 43 FEP Cases at 414.

¹⁹ *Id.*

²⁰ *Id.* Women made up 36.4% of the local job market. *Id.*

²¹ *Id.* Women made up only 7.1% of Agency Officials and Administrators, 8.6% of Professionals, 9.7% of Technicians, and 22% of Service and Maintenance Workers. *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 1447, 43 FEP Cases at 414.

²⁵ *Id.*

requiring specialized training and experience.²⁶ Because of these obstacles, the affirmative action plan called for the establishment of realistic short-term goals which the Agency would adjust annually to guide its employment decisions.²⁷ The plan stressed the importance, in establishing these goals, of determining the availability in the local labor market of women who have the necessary training for the more technical or skilled positions.²⁸ The plan did not set aside a specific number of jobs for women.²⁹ Rather, the plan authorized the Agency to consider gender as one factor in evaluating qualified candidates for jobs in which women or minorities were poorly represented.³⁰

In December 1979, the Agency announced a road dispatcher vacancy, a job classified as a Skilled Craft Worker position.³¹ The plaintiff, Paul Johnson, applied for the job along with Diane Joyce and ten other employees.³² Johnson, Joyce and seven other applicants possessed the necessary qualifications for the job.³³ A two-person board interviewed the candidates and assigned them each a score based on the interview.³⁴ To proceed in the hiring process, a candidate needed to score at least a 70 on the interview.³⁵ Seven candidates received scores between 70 and 80 with Johnson tied for second at 75 and Joyce ranked next with 73.³⁶ A panel of three Agency supervisors then interviewed the seven remaining candidates and recommended Johnson for the position.³⁷

Before interviewing with the three person panel, Joyce contacted the County Affirmative Action Office.³⁸ The Affirmative Action Coordinator recommended to the Director of the Transport-

²⁶ *Id.*

²⁷ *Id.* at 1447, 43 FEP Cases at 415.

²⁸ *Id.* at 1447, 43 FEP Cases at 414-15.

²⁹ *Id.* at 1447, 43 FEP Cases at 415.

³⁰ *Id.*

³¹ *Id.* The position required at least four years experience as a dispatcher or road maintenance worker. *Id.*

³² *Id.*

³³ *Id.* at 1448, 43 FEP Cases at 415.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* Joyce had previous unpleasant dealings with two of the supervisors on the panel. *Id.* at 1448 n.5, 43 FEP Cases at 415 n.5. Joyce had earlier filed a grievance against one of the panel members for his mistreatment of her when she worked on his road maintenance crew. *Id.* She also had several prior disagreements with another panel member when she chaired the Agency's Road Operations Safety Committee. *Id.*

tation Agency that Joyce be selected to receive the promotion.³⁹ After considering the recommendations of the panel and the Affirmative Action Coordinator, the Director of the Agency awarded the position to Joyce.⁴⁰

After losing the promotion, Johnson filed a complaint with the Equal Employment Opportunity Commission alleging that the Transportation Agency denied him the promotion on the basis of sex in violation of Title VII.⁴¹ The EEOC issued him a right-to-sue letter on March 10, 1981.⁴² Shortly thereafter, Johnson filed suit in the United States District Court for the Northern District of California.⁴³ The court found that Johnson was better qualified for the position and that sex was the determining factor in the Agency's decision to promote Joyce instead of him.⁴⁴ The Ninth Circuit Court of Appeals reversed the district court's decision and held that the Agency's affirmative action plan was lawful because it addressed itself to a conspicuous imbalance in the work force and did not unnecessarily violate other employees' rights.⁴⁵ The Ninth Circuit also held that the plan's frequently expressed goal of *attaining* rather than *maintaining* an appropriate level of female employment would end the preferential treatment for women as soon as women achieved an appropriate level of employment within the Agency.⁴⁶ In response to the Ninth Circuit's ruling, Johnson petitioned the United States Supreme Court for certiorari.⁴⁷

The United States Supreme Court upheld the Ninth Circuit's ruling in a six to three decision,⁴⁸ upholding for the first time an employer's voluntary affirmative action plan without requiring the

³⁹ *Id.* at 1448, 43 FEP Cases at 415.

⁴⁰ *Id.*

⁴¹ *Id.* at 1449, 43 FEP Cases at 416.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* Johnson had previously worked for seventeen years as a dispatcher in the private sector. *Id.* at 1468, 43 FEP Cases at 431 (Scalia, J. and Rehnquist, C.J., dissenting). He had worked as a Road Yard Clerk for the county for eleven years. *Id.* at 1448, 43 FEP Cases at 416. Johnson also worked two years as a Road Maintenance Worker for the county. *Id.* When the job in this case opened up in September, 1979, the Agency assigned Johnson to temporarily fill the vacancy until the Agency reached the final promotion decision. *Id.*

Diane Joyce had worked for the Agency for nine years. *Id.* at 1447, 43 FEP Cases at 415. For her first five years, she worked as an account clerk. *Id.* For the next four years, she worked as a Road Maintenance Worker. *Id.* Like Johnson, she occasionally worked out of class as a road dispatcher. *Id.* at 1448, 43 FEP Cases at 415.

⁴⁵ *Id.* at 1449, 43 FEP Cases at 416.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1446, 43 FEP Cases at 414.

⁴⁸ *Id.* at 1445, 43 FEP Cases at 412.

employer to establish a prior history of discrimination.⁴⁹ Writing for the Court, Justice Brennan addressed several of the issues involving Title VII claims based on "reverse discrimination." First, the Court held that employees challenging an affirmative action plan bear the burden of proving that it violates Title VII.⁵⁰ Once an employee establishes a prima facie case that an employer considered race or sex in an employment decision, the employer must present a nondiscriminatory rationale for considering race or sex.⁵¹ According to the Court, the affirmative action plan in *Johnson* provided such a rationale.⁵² Once the Agency presented such a rationale, the burden shifted back to the plaintiff to prove that the plan was invalid.⁵³ The Court noted that while employers will probably try, as a litigation tactic, to present evidence that the affirmative action plan is valid when they first present the plan, they do not bear the burden of proof.⁵⁴

Second, the Court relied on Justice Blackmun's concurrence in *Weber* to hold that an employer need not establish its own prior discrimination to justify an affirmative action program.⁵⁵ Rather, an employer need only identify a manifest imbalance in a traditionally segregated job category to justify affirmative action.⁵⁶ When considering jobs that require no special expertise or training programs designed to provide expertise, the Court stated that employers should compare the percentage of women in a given job category with the percentage of women in the local labor pool.⁵⁷ When

⁴⁹ See *id.* at 1469, 43 FEP Cases at 431-32.

⁵⁰ *Id.* at 1449, 43 FEP Cases at 416.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.

Id.

⁵⁵ *Id.* at 1451, 43 FEP Cases at 418.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1452, 43 FEP Cases at 418. The Court relied on its previous decisions in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337 n.17, 14 FEP Cases 1514, 1520 n.17 (comparing the percentages of minorities in certain cities with the percentage of minorities employed by the defendant as truck drivers in these cities) and *United Steelworkers of America, AFL-CIO-CFC v. Weber* 443 U.S. 193, 198-99, 20 FEP

considering jobs that require special training, however, the Court stated that employers should compare their percentage of female employees with the percentage of qualified women in the local labor pool.⁵⁸

Although the Agency had not yet completely established its short-term hiring goals in the Skilled Craft Worker category when Diane Joyce received her promotion,⁵⁹ the Court stated that specific short-term goals were not necessary for the Agency to recognize that having no women at all in that category constituted an obvious imbalance.⁶⁰ The Agency attributed the underrepresentation of women in several of its job categories to the historically limited opportunities for women in these jobs.⁶¹ Thus, the Court held that the promotion did not violate Title VII because the Agency promoted Diane Joyce to redress a manifest imbalance in a traditionally segregated job category.⁶²

The Court also decided that Diane Joyce's promotion did not unnecessarily trammel male employees' rights.⁶³ The Court noted that the Agency did not set aside a specific number of positions for women or minorities.⁶⁴ Rather, the Agency's plan authorized the Director to consider gender as one of many factors in making an employment decision.⁶⁵ Furthermore, the Court noted that Johnson had no entitlement to the position.⁶⁶ Because the Director of the Agency could have promoted any one of the seven candidates who scored 70 or above at the first interview, Johnson had no firmly rooted claim to the promotion.⁶⁷ Finally, the Court held that the

Cases 1, 3-4 (1979) (applying a similar comparison to minority candidates for on the job training programs).

⁵⁸ *Johnson*, 107 S. Ct. at 1452, 43 FEP Cases at 418. The Court relied on its decision in *Hazelwood School District v. United States*, 433 U.S. 299, 308, 15 FEP Cases 1, 6 (1977) (comparing percentage of minority teachers in the school system with the percentage of minorities who were qualified to teach in the public school system).

⁵⁹ Under the affirmative action plan, the Agency considered the percentage of qualified minorities or women in the labor market when it set its short term goals. *See supra* text accompanying notes 27 and 28. Johnson argued that because the short-term goals were not completed when the Agency made the promotion decision, the Agency should not have considered its general policy in favor of affirmative action. *Johnson*, 107 S. Ct. at 1454, 43 FEP Cases at 420.

⁶⁰ *Johnson*, 107 S. Ct. at 1455, 43 FEP Cases at 420.

⁶¹ *Id.* at 1453 n.12, 43 FEP Cases at 419 n.12.

⁶² *Id.* at 1457, 43 FEP Cases at 422.

⁶³ *Id.* at 1455-56, 43 FEP Cases 421-22.

⁶⁴ *Id.* at 1455, 43 FEP Cases at 421.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

lack of a specified termination date for the affirmative action plan did not violate the rights of male employees reasoning that such end dates are more necessary for plans that set aside specific positions for women.⁶⁸ Thus, because the Santa Clara plan set aside no specific positions for women, a specific end date for the plan was unnecessary to protect male employees' rights.⁶⁹

The Court also stated that a manifest imbalance sufficient to support an affirmative action plan need not be so egregious that it could establish a prima facie Title VII claim against the employer.⁷⁰ The Court reasoned that such a standard would discourage employers from adopting affirmative action plans because to justify the plan, the employer would have to accumulate evidence that others could use against the employer in a Title VII suit.⁷¹ The Court noted that this result would run counter to Title VII's policy of encouraging employers to eliminate the vestiges of discrimination.⁷²

Although Justice Stevens joined in the majority opinion, he also filed a concurrence.⁷³ Justice Stevens emphasized that the majority's opinion did not impose any outer limits on an employer's ability to establish voluntary affirmative action programs.⁷⁴ Justice Stevens emphasized the need to leave management sufficient "breathing room" to remedy past discrimination through its own initiatives.⁷⁵ Justice Stevens also noted that he did not believe that courts should interpret the factors listed in *Weber* as limits on an employer's ability to implement a voluntary affirmative action plan.⁷⁶

Justice O'Connor also filed a concurrence.⁷⁷ Justice O'Connor reasoned that the lack of any women in the Skilled Craft Worker job category in *Johnson* would suffice to establish a prima facie Title VII case against the Agency.⁷⁸ Thus, she concurred with the Court in upholding Diane Joyce's promotion.⁷⁹ In her opinion, she argued that to justify an affirmative action plan, an employer should have

⁶⁸ *Id.* at 1456, 43 FEP Cases at 421-22.

⁶⁹ *Id.* at 1456, 43 FEP Cases at 422.

⁷⁰ *Id.* at 1452, 43 FEP Cases at 419.

⁷¹ *Id.* at 1453, 43 FEP Cases at 419.

⁷² *Id.*

⁷³ *Id.* at 1457, 43 FEP Cases at 422 (Stevens, J., concurring).

⁷⁴ *Id.* at 1457, 43 FEP Cases at 423 (Stevens, J., concurring).

⁷⁵ *Id.* at 1459, 43 FEP Cases at 424 (Stevens, J., concurring).

⁷⁶ *Id.* at 1458 n.3, 43 FEP Cases at 423 n.3 (Stevens, J., concurring).

⁷⁷ *Id.* at 1460, 43 FEP Cases at 425 (O'Connor, J., concurring).

⁷⁸ *Id.* at 1465, 43 FEP Cases at 428 (O'Connor, J., concurring).

⁷⁹ *Id.* at 1465, 43 FEP Cases at 429 (O'Connor, J., concurring).

to prove that a firm basis existed for believing that an affirmative action plan was necessary.⁸⁰ In Justice O'Connor's view, an employer must show either previous discrimination against women in that job classification, or a great enough statistical disparity, between the percentage of female employees and the percentage of qualified women in the local labor market, to establish a *prima facie* Title VII claim against the employer.⁸¹

Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist joined and in which Justice White joined in part.⁸² In his dissent, Justice Scalia argued that the Court's decision in *Weber* incorrectly interpreted Title VII.⁸³ The dissenters relied on the plain language of Title VII to prohibit any consideration of gender in employment decisions.⁸⁴ The dissenters would, therefore, have reversed the Ninth Circuit's decision in *Johnson* and overruled *Weber*.⁸⁵

The Supreme Court's decision in *Johnson* removed several of the barriers that employers who wish to implement voluntary affirmative action plans previously have faced. Allowing an employer to justify a voluntary affirmative action plan with statistical evidence

⁸⁰ *Id.* at 1461, 43 FEP Cases at 425 (O'Connor, J., concurring).

⁸¹ *Id.* The *prima facie* standard for supporting a Title VII action that Justice O'Connor advocated is highly complex. The Supreme Court outlined this standard in the *Hazelwood* case. 433 U.S. 299, 309-10, 15 FEP Cases at 5 (1977). The Court uses statistical analysis to establish an inference of discriminatory intent. *Id.* Under this analysis, one should be able to establish an expected number of successful job applicants from the protected class. *Id.* One then compares the actual hires to the expected hires. *Id.* Some differences between these figures are permissible. *Id.* Others are too large to be permissible. *Id.* According to the Court: The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample . . . times the probability of selecting a . . . [member of the protected class] times the probability of selecting a . . . member of the non-protected class]

Castaneda, Sheriff v. Partida, 430 U.S. 482, 496-97 n.17 (1977). When the actual deviation is two or three times the standard deviation, a *prima facie* Title VII violation exists. *Hazelwood*, 433 U.S. at 309-10, 15 FEP Cases at 5.

⁸² *Johnson*, 107 S. Ct. at 1465, 43 FEP Cases at 429 (Scalia, J. and Rehnquist, C.J., dissenting); *id.* (White, J., dissenting). Justice White joined in Parts I and II of Justice Scalia's dissent but not in Part III. *Id.* Justice White would also over-rule *Weber*, though on different grounds. *Id.* Justice White stated that the plan in *Weber* was valid in that it remedied previous discrimination by the employer and the union. *Id.* Justice White objected, however, to the majority's decision to approve the plan in *Johnson*, because, Justice White asserts, that plan does not remedy previous discrimination but, rather, only a manifest statistical disparity. *Id.* For these reasons, Justice White dissented in *Johnson* and believed that *Weber* should be overruled. *Id.*

⁸³ *Id.* at 1472, 43 FEP Cases at 434 (Scalia, J. and Rehnquist, C.J., dissenting).

⁸⁴ *Id.* For the precise language of Title VII, see *supra* note 2.

⁸⁵ *Johnson*, at 1472, 43 FEP Cases at 434 (Scalia, J. and Rehnquist, C.J., dissenting).

of a manifest disparity provides a much easier standard for approving these plans than requiring a showing of previous discrimination. Further, the Court provides no guidance on how large a disparity need be to qualify as "manifest."

Although uncertain standards may often serve as a breeding ground for litigation, the *Johnson* Court's decision to place the burden of proof on the plaintiff may discourage Title VII challenges to these plans. Plaintiffs in these cases may find it difficult to prove these plans invalid under *Johnson* analysis. As Justice Stevens pointed out, without response from either the majority or the dissent, the Court's opinion nowhere defines the outer limits of an employer's discretion to implement a voluntary affirmative action plan.⁸⁶ With no stated outer limit on an employer's discretion once that employer can point to a statistical disparity, a plaintiff will have little authority to support a claim that the employer abused its discretion in implementing an affirmative action plan.

The *Johnson* Court, however, did clarify which labor market an employer should look to in assessing any disparities in the composition of his work force. The Court stated that for technical jobs an employer should look to the pool of qualified workers in the area. The *Johnson* Court did not, however, clarify how an employer should define "local." This definition is crucial when an employer is in or near a major urban center with a high minority population.⁸⁷ For example, in *Hammon v. Barry*, the crucial question in a Title VII challenge to an affirmative action plan was whether, for the purposes of finding a statistical disparity, the public employer should compare its work force to the labor pool in Washington, D.C. or the entire Washington metropolitan area.⁸⁸ Thus, employers can anticipate that future challenges to the validity of their voluntary affirmative action plans will focus on a claim that the employer found a statistical disparity by comparing its work force to the wrong "local" labor pool.

In sum, the Supreme Court in *Johnson v. Transportation Agency, Santa Clara County, California* removed several difficulties that employers faced in justifying voluntary affirmative action plans. The Court stated that an employer could justify its affirmative action plan by introducing statistical evidence of a manifest disparity. Moreover, the Court placed the burden of proof on the challenger

⁸⁶ *Id.* at 1457, 43 FEP Cases at 423 (Stevens, J., concurring).

⁸⁷ See, e.g., *Hammon v. Barry*, 826 F.2d 73, 44 FEP Cases 869 (D.C. Cir. 1987).

⁸⁸ *Id.* at 77, 44 FEP Cases at 874.

to an affirmative action plan. Thus, employers can expect fewer successful challenges that attempt to establish that the employer had no basis for adopting an affirmative action plan. The Court did not, however, give any guidance on the question of what constitutes the "local" labor market for the purposes of deciding if a manifest disparity exists. Employers should, therefore, anticipate more of the Title VII challenges to voluntary affirmative action plans to focus on the question: what exactly is the "local" labor market?