

1986-1987 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW

LABOR RELATIONS LAW

I. UNFAIR LABOR PRACTICES	69
A. <i>Nonunion Employee's Right to Representation at Investigatory Interview as Protected Concerted Activity Under the National Labor Relations Act: Slaughter v. NLRB</i>	69
B. <i>Defining Protected Concerted Activity Under the National Labor Relations Act: Meyers Industries, Inc.</i>	74
C. <i>Intent to Evade Union Obligations as a Factor in Alter Ego Analysis: NLRB v. Allcoast Transfer, Inc.</i>	81
D. <i>Permissible Employer Response to Employee Refusal to Cross Stranger Picket Line: Business Services by Manpower, Inc.</i>	89
II. SECONDARY BOYCOTTS	98
A. <i>Excluding Secondary Party Handbilling From the Reach of Section 8(b)(4): Florida Gulf Coast Building & Construction Trades v. NLRB</i>	98
B. <i>Union Picketing on Behalf of Independent Contractors Against Non-Neutral Parties Not Prohibited as Secondary Boycott under the National Labor Relations Act: Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB</i>	105
III. REMEDIES	112
A. <i>Employer Liability for Aggravation of a Preexisting Mental Disability — You Take Your Victim as You Find Him: Wakefield v. NLRB</i>	112
B. <i>Awarding Backpay for Employer Unfair Labor Practices to Undocumented Workers Regardless of Legal Immigration Status: Local 512 Warehouse and Office Workers' Union v. NLRB</i>	118
C. <i>Permissible Remedies for Employer's Refusal to Allow Representation at Investigatory Interviews: Communication Workers of America v. NLRB</i>	125
D. <i>NLRB Acceptance of Settlement Agreements in Unfair Labor Practice Suits: Oil, Chemical & Atomic Workers International Union v. NLRB</i>	132
IV. ARBITRATION	138
A. <i>Judicial Refusal to Enforce Arbitration Awards on Public Policy Grounds: E.I. DuPont de Nemours and Company v. Graselli Employees Independent Association of East Chicago</i>	138
B. <i>Arbitration of Post-Termination Grievances: Teamsters, Local Union 238 v. C.R.S.T., Inc.</i>	146
C. <i>NLRB Standards for Deferral to Arbitration Awards: Garcia v. NLRB</i>	154
V. CONSTITUTIONAL DECISIONS	162
A. <i>Texas Mass Picketing Statute Unconstitutionally Overbroad and Vague: Nash v. Texas</i>	162

VI. PREEMPTION.....	171
A. <i>Federal Court Jurisdiction over LMRA Section 301 Cases Involving the Horseracing Industry: Richards v. Local 134, International Brotherhood of Electrical Workers</i>	171
VII. FAIR LABOR STANDARDS ACT	177
A. <i>The Third Circuit Adopts The Thurston Willfulness Standard For Determination Of Violations Under The Fair Labor Standards Act: Brock v. Richland Shoe Co.</i>	177

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS	185
A. <i>Suing Municipalities Under Title VII and Section 1983: Hamilton v. Rodgers</i>	185
B. <i>Extension of Younger Abstention to Pending State Administrative Proceedings: Ohio Civil Rights Commission v. Dayton Christian Schools</i>	192
II. SCOPE OF TITLE VII.....	198
A. <i>Requisite Employment Relationship for Title VII Claims: Doe v. St. Joseph's Hospital of Fort Wayne</i>	198
B. <i>Application of Title VII to the Armed Forces: Hill v. Berkman</i>	206
III. SEX DISCRIMINATION	215
A. <i>Sexual Harassment in the Workplace: Meritor Savings Bank, FSB v. Vinson</i>	215
IV. AGE DISCRIMINATION.....	224
A. <i>Classification of Professional Corporation Members as Employees Under the ADEA: Hyland v. New Haven Radiology Associates, P.C.</i>	224
B. <i>Waiver of Fact-Based Claims Under the ADEA: Runyan v. National Cash Register Corp.</i>	231
C. <i>Recovery of Attorneys' Fees Under Age Discrimination in Employment Act by Federal Employee Who Prevails at Administrative Level: Palmer v. General Services Administration</i>	241
D. <i>Age Discrimination Under New York Civil Service Law, Section 58(1)(a): Doyle v. Suffolk County</i>	247
V. AFFIRMATIVE ACTION.....	255
A. <i>Public Sector Voluntary Affirmative Action: Wygant v. Jackson Board of Education</i>	255
B. <i>Supreme Court Endorses Court-Ordered Affirmative Action for Non-Victims: Local 28 of the Sheet Metal Workers' International Association v. EEOC</i>	266
VI. SECTION 1983	276
A. <i>Race Under 42 U.S.C. § 1981 Includes Members of Ethnically and Physiognomically Distinct Groups: Al-Khazraji v. Saint Francis College</i>	276
VII. CONSTITUTIONAL DECISIONS	283
A. <i>Constitutionality of Political Patronage Hiring Systems: Avery v. Jennings</i>	283

LABOR RELATIONS LAW

I. UNFAIR LABOR PRACTICES

A. **Nonunion Employee's Right to Representation at Investigatory Interview as Protected Concerted Activity Under the National Labor Relations Act: Slaughter v. National Labor Relations Board*¹

Section 7 of the National Labor Relations Act (Act) guarantees employees the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."² Section 7's safeguards extend to concerted activities of both union members and unorganized employees.³ Protected concerted activities include the employees' attempts to protest employment conditions so long as the activities are not unlawful,⁴ in breach of contract,⁵ or violent.⁶

In defining the parameters of section 7's protection, the United States Supreme Court in its 1979 decision of *N.L.R.B. v. J. Weingarten, Inc.*⁷ affirmed the National Labor Relations Board's (the Board) finding that section 7 of the Act guarantees union employees the right to refuse to submit to an investigatory interview absent a union representative when the employee reasonably believes that the interview may result in disciplinary action.⁸ Three years after *Weingarten*, the Board in *Materials Research Corp.* extended the section 7 right to have a representative present during investigatory interviews to nonunion employees.⁹ The Board, however, subsequently overruled its extension of *Weingarten* to nonunion workers in the 1985 decision of *Sears, Roebuck and Co.*¹⁰ In *Sears*, the Board held that nonunion employees do not possess the right, under section 7, to have a fellow employee present at an investigatory interview.¹¹

During the Survey year, in *Slaughter v. National Labor Relations Board*,¹² the United States Court of Appeals for the Third Circuit reversed the Board's *Sears* decision, holding

* By Richard Gemma, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ *Slaughter v. N.L.R.B.*, 794 F.2d 120, 122, 122 L.R.R.M. 2867, 2869 (3rd Cir. 1986).

² 29 U.S.C. § 157 (1982). Section 7 states in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." *Id.*

³ *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 17, 50 L.R.R.M. 2235, 2238 (1962) (section 7 concerted activities include a walk out by nonunion employees in protest of extremely cold air temperature in shop).

⁴ *Id.* at 17, 50 L.R.R.M. at 2239.

⁵ *Id.* See *Fournelle v. N.L.R.B.*, 670 F.2d 331, 109 L.R.R.M. 2441 (D.C. Cir. 1982) (employers may discipline employees who engage in strikes in breach of contract).

⁶ *Washington Aluminum Co.*, 370 U.S. at 17, 50 L.R.R.M. at 2239. See *N.L.R.B. v. City Disposal Systems, Inc.*, 465 U.S. 822, 115 L.R.R.M. 3193 (1984) (employee may engage in concerted activity in such abusive manner that employee sacrifices section 7 protection).

⁷ 420 U.S. 251, 88 L.R.R.M. 2689 (1979) (union employee requested presence of union representative at disciplinary hearing).

⁸ *Id.* at 260, 88 L.R.R.M. at 2692.

⁹ 262 N.L.R.B. 1010, 1015, 110 L.R.R.M. 1401, 1406 (1982) (nonunion employee attended disciplinary hearing while his request for representation was denied).

¹⁰ 274 N.L.R.B. No. 55 at 2, 118 L.R.R.M. at 1329 (1985) (nonunion employee requested the presence of a fellow employee at the interview).

¹¹ *Id.* at 3 n.5, 118 L.R.R.M. at 1329 n.5.

¹² 794 F.2d 120, 122, 122 L.R.R.M. 2867, 2869 (3rd Cir. 1986).

that an employee's right to demand a union representative's presence at an investigatory interview may be a protected concerted activity under section 7.¹³ In this regard, the court found that there were two permissible interpretations of section 7: first, that the section 7 right to a representative at investigatory interviews only applied to union employees; and, second, that section 7's right to have a representative present at an investigatory interview applied to both union and nonunion employees.¹⁴ Because the *Sears* Board never considered the possibility that nonunion employees possessed a section 7 right to demand the presence of a fellow employee at an investigatory interview, the court remanded the case to the Board to consider which permissible interpretation to adopt.¹⁵

In *Slaughter*, a nonunion employee, Slaughter, filed an unfair labor practice charge against the employer, E.I. DuPont de Nemours and Co. (DuPont), claiming that DuPont improperly discharged him because he refused to submit to an investigatory interview without a fellow employee present.¹⁶ Specifically, DuPont demanded on at least four occasions that Slaughter attend a meeting concerning Slaughter's posting of a notice of employee rights on a bulletin board.¹⁷ Slaughter told DuPont that he would discuss the incident only in the presence of a fellow employee.¹⁸ On two occasions, DuPont ordered the co-worker attending the meeting with Slaughter to return to work and suspended Slaughter because he refused to attend the meeting alone.¹⁹ DuPont continually pressured Slaughter until he attended an investigatory meeting alone and DuPont subsequently discharged Slaughter for his previous failure to attend the meetings alone.²⁰

Following his discharge, Slaughter filed a charge with the Board alleging that DuPont violated his section 7 right to have a fellow employee present at the investigatory interview.²¹ The Board held that section 7 guaranteed Slaughter, a nonunion employee, the right to demand the presence of a fellow employee at an investigatory interview.²² The Board stated that by discharging Slaughter for exercising that right, DuPont committed an unfair labor practice and ordered Slaughter's reinstatement.²³ DuPont appealed the Board's ruling.

In the 1982 decision of *E.I. DuPont de Nemours and Co. (Chestnut Run) v. N.L.R.B.*,²⁴ (*DuPont I*) the Third Circuit affirmed the Board's interpretation that section 7 guaranteed nonunion employees the right to have fellow employees present at investigatory inter-

¹³ *Id.* at 126, 122 L.R.R.M. at 2872.

¹⁴ *Id.* at 128, 122 L.R.R.M. at 2873.

¹⁵ *Id.* In remanding the case back to the Board, the court noted its duty to establish the boundaries for permissible interpretations of section 7 protection. *Id.*

¹⁶ *E.I. DuPont de Nemours & Co. v. N.L.R.B.*, 724 F.2d 1061, 1064, 115 L.R.R.M. 2153, 2155 (3rd Cir. 1983) (the Board affirmed the Administrative Law Judge's finding that Slaughter had a right to insist upon the presence of a fellow employee).

¹⁷ *Id.* at 1063-64, 115 L.R.R.M. at 2154-55.

¹⁸ *Id.*

¹⁹ *Id.* at 1064, 115 L.R.R.M. at 2155.

²⁰ *Id.*

²¹ *E.I. DuPont de Nemours*, 262 N.L.R.B. 1028, 1029, 110 L.R.R.M. 1417, 1418 (1982).

²² *Id.*

²³ *Id.* at 1028, 110 L.R.R.M. at 1418. The Board held that DuPont violated section 8(a)(1) of the Act. *Id.* Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1982), establishes unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title"

²⁴ 724 F.2d 1061, 115 L.R.R.M. 2153.

views.²⁵ While DuPont's petition for rehearing was pending, however, the court vacated its opinion and remanded the case to the Board because the Board wished to reconsider Slaughter's claim in conjunction with the *Sears* case.²⁶

On remand, the Board, reversing its original decision, ruled that Slaughter's refusal to attend an investigatory meeting alone was not protected concerted activity.²⁷ The Board, citing the *Sears* holding that section 7 did not guarantee nonunion employees the right to have a representative present, dismissed the complaint.²⁸ The Board held that because *Sears* established that the Act's language "compelled" the conclusion that nonunion employees must attend investigatory interviews, to give such employees the right to have fellow employees present at such interviews was erroneous.²⁹ Slaughter petitioned for review.³⁰

The Third Circuit began its analysis by noting that the *Slaughter* Board adopted the *Sears* holding that the Act "compels" the conclusion that nonunion employees do not enjoy the right to representation previously granted to union employees in *Weingarten*.³¹ Affirmance of the *Slaughter* Board's decision, the court observed, thus would preclude any other interpretation of the Act.³² The Third Circuit, reasoning that its decision to extend the section 7 right of representation to nonunion employees was a permissible interpretation of the Act, reinstated Slaughter's claim.³³

To justify its view that a permissible interpretation of the Act would allow extension of investigatory interview representation rights to nonunion employees, the Third Circuit first reviewed *Weingarten*.³⁴ In *Weingarten*, the Third Circuit noted, the Supreme Court held that an employee seeking representation at an investigatory interview constitutes "concerted activity" for "mutual aid or protection" under section 7 because the representation ensured fair and uniform disciplinary practices.³⁵ The *Weingarten* Court recognized, the Third Circuit further stated, that such representation effectuates the Act's purpose of protecting the workers' full freedom of association and of equalizing the bargaining power between employees and employers.³⁶

The Third Circuit next examined the *Materials Research* Board's original rationale for extending the investigatory interview right to nonunion employees.³⁷ Specifically, the court noted that although the *Materials Research* Board used the term "union representative" in its decision, it did so merely to depict the particular fact pattern and did not intend to limit the representation right to union employees.³⁸ Thus, the court noted, the

²⁵ *Id.* at 1064, 115 L.R.R.M. at 2155.

²⁶ *E.I. DuPont de Nemours & Co. v. N.L.R.B.*, 733 F.2d 296, 297-98, 116 L.R.R.M. 2343, 2343-44 (3rd Cir. 1984). In vacating its decision, the Third Circuit noted the special deference granted to the Board's expertise in interpreting the Act. *Id.*

²⁷ *E.I. DuPont*, 274 N.L.R.B. No. 176 at 3-4, 118 L.R.R.M. at 1556.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Slaughter*, 794 F.2d at 121, 122 L.R.R.M. at 2869.

³¹ *Id.* at 122, 122 L.R.R.M. at 2869.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 123, 122 L.R.R.M. at 2869.

³⁶ *Id.*

³⁷ *Id.* at 123, 122 L.R.R.M. at 2870.

³⁸ *Id.*

Board's previous decisions contained no particular reason for refusing to extend the representation rights to nonunion employees.³⁹

The Third Circuit also considered whether the employee's right to investigatory interview representation flows from section 7's protection of concerted activity or whether such representation arises from the union's exclusive representation of employees in collective bargaining under section 9 of the Act.⁴⁰ Specifically, the court distinguished the employees' right to representation from the union's right to represent exclusively by observing that the employer is not obligated to bargain with the investigatory interview representative who merely assists in clarifying facts.⁴¹ Moreover, the court found that the union's status as a collective bargaining representative is irrelevant where the employer's act implicates the section 7 rights of nonunion employees.⁴² Indeed, the court noted the *Material Research Board's* original rationale that nonunion employees may, due to the lack of safeguards against an employer's arbitrary conduct in an unorganized plant, require the presence of an investigatory interview representative even more than union employees.⁴³

The court then considered whether the right to representation arose under section 8(a)(5) of the Act, which provides that where a collective bargaining agreement is present an employee must deal with the employer through his or her representative instead of individually.⁴⁴ The court found that section 8(a)(5) did not apply.⁴⁵ The Board, the court stated, erroneously believed that the representation right's extension to nonunion employees was illogical because nonunion employees do not enjoy the right to representation in other employer-employee conflicts.⁴⁶ In particular, the court distinguished disciplinary meetings, which implicate a right to union representation, from investigatory interviews, which involve potential employer action.⁴⁷ Unlike disciplinary meetings, the court noted, the employer is not required to bargain at the interview and may even bypass the interview entirely.⁴⁸ Thus, the court concluded, the right to investigatory interview representation does not stem from section 8(a)(5)'s right to bargain collectively but from section 7's protection of concerted activity.⁴⁹

The Third Circuit found that guaranteeing both union members and nonunion employees the right to representation at an investigatory interview is a permissible interpretation of the Act.⁵⁰ The court overruled, therefore, the *Sears Board's* view that the Act "compelled" the finding that nonunion employees possessed no right to repre-

³⁹ *Id.*

⁴⁰ *Id.* Section 9(a) states in relevant part: "Representatives designed or selected for the purposes of collective bargaining . . . shall be the exclusive representatives of all the employees . . ." 29 U.S.C. § 159(a) (1982).

⁴¹ *Slaughter*, 794 F.2d at 123, 122 L.R.R.M. at 2870.

⁴² *Id.* at 124, 122 L.R.R.M. at 2873.

⁴³ *Id.* at 124, 122 L.R.R.M. at 2870. The co-worker can assist in identifying and in describing the incident, in providing moral support for a fearful employee and in helping to diminish unjust disciplinary action. *Id.*

⁴⁴ *Id.* at 126, 122 L.R.R.M. at 2871. Section 8(a) states in relevant part: "It shall be unlawful for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158 (8)(a)(5).

⁴⁵ *Slaughter*, 794 F.2d at 126, 128 L.R.R.M. at 2872.

⁴⁶ *Id.* at 126, 122 L.R.R.M. at 2871-72.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 126, 122 L.R.R.M. at 2872.

⁵⁰ *Id.* at 128, 122 L.R.R.M. at 2873.

sentation and remanded the case to the Board.⁵¹ The court noted, however, that the Board could limit the right to representation to union employees by altering the *Sears* decision's language, replacing the term "compelling interpretation" with the term "permissible interpretation."⁵² The court justified its reversal on the grounds that the ruling effectuates "the proper execution of the legislative will" and thus establishes the correct path for development of labor law.⁵³

In *Slaughter*, the court correctly found that section 7 protected both union and nonunion employees' rights to have a representative at investigatory interviews.⁵⁴ The court properly relied on the Supreme Court's clear emphasis on section 7's protection of concerted activity as forming the basis of the right to representation.⁵⁵ The court further relied on the Supreme Court's theoretical differentiation between the representative's role at an investigatory interview and his or her role as a collective bargaining representative,⁵⁶ and the need of fair and uniform disciplinary practices for nonunion employees.⁵⁷ Thus, with a sound basis for a permissible interpretation of the Act, the court correctly overruled the Board's interpretation that the Act compelled the finding that nonunion employees do not enjoy the right to representation.

Because of the Board's special expertise in labor matters, the courts owe special deference to the Board's interpretation of the Act.⁵⁸ The appeals court retains, however, the authority to identify the boundaries for permissible interpretations.⁵⁹ In *Slaughter*, the Board failed to consider all permissible interpretations because it believed erroneously that the Act's language compelled a finding that section 7 did not protect the nonunion employees' investigatory interview representation rights. Thus, the court correctly fulfilled its responsibility to establish the parameters of permissible interpretations of the Act.

Although the Board in the future may adopt the "permissible interpretation" that section 7 protects nonunion employees' investigatory interview representation rights and not the "compelling view" that the Act does not extend the *Weingarten* right to nonunion employees,⁶⁰ the Third Circuit guided the legislature's intended path of labor law development by allowing the Board more flexibility in altering the future scope of section 7 rights.⁶¹ The personnel and philosophies of the Board are subject to constant change,⁶²

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See id.* at 123, 122 L.R.R.M. at 2869.

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.* at 123-24, 122 L.R.R.M. at 2870.

⁵⁸ *Id.* at 124, 122 L.R.R.M. at 2871. *See* Pattern Maker's League v. N.L.R.B., 473 U.S. 95, 119 L.R.R.M. 2928 (1985) (Board has primary responsibility in interpreting provisions of the Act).

⁵⁹ *Slaughter*, 794 F.2d at 125, 122 L.R.R.M. at 2870. *See* Prill v. N.L.R.B., 755 F.2d 941, 118 L.R.R.M. 2649 (D.C. Cir. 1985), *cert. denied sub nom.* Meyers Indus. v. Prill, 474 U.S. 946, 120 L.R.R.M. 3392 (1985) (the appropriate role of the judiciary is to establish the parameters for permissible interpretation of the Act). In the 1943 decision of *SEC v. Chenery Corp.*, the Supreme Court established the judicial duty to declare an agency regulation invalid when based on a misinterpretation of congressional intent, or a misconception of the law. 318 U.S. 80, 94-95 (1943).

⁶⁰ *Slaughter*, 794 F.2d at 128, 122 L.R.R.M. at 2873.

⁶¹ *Id.* *See* Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 197 DUKE L.J. 215, 222 (1969) (one should judge the effectiveness of judicial supervision by its effect on the development of law in the long run, and not solely in terms of the case in which the correction was administered).

⁶² N.L.R.B. v. Deaton, Inc., 502 F.2d 1221, 1228, 87 L.R.R.M. 2545, 2550 (5th Cir. 1974).

and the existence of a "permissible interpretation" allows future Boards to alter their views according to the needs of employer-employee relations while ensuring consistent interpretations of the Act. In contrast, a "compelling interpretation" that indicates only one possible interpretation circumscribes the Board's flexibility and forecasts inconsistent interpretations of the Act when change is necessary.⁶⁵ Thus, the Third Circuit's *Slaughter* decision ensures consistent labor law development that permits the Board to adapt section 7 rights to employment needs.⁶⁴

In sum, the Third Circuit in *Slaughter v. N.L.R.B.* held that an employee's right to demand a union representative's presence is protected concerted activity under section 7.⁶⁵ The court further held that a permissible, although not required, interpretation of section 7 would extend the right to have a representative present at an investigatory interview to nonunion employees also.⁶⁶ The Third Circuit's *Slaughter* decision provides the Board with the flexibility to alter the interpretation of section 7 rights, which alterations may result in the determination that section 7 does not guarantee nonunion employees the right to representation at investigatory interviews.⁶⁷ Thus, until the Board considers the question on remand, the rights of nonunion employees to representation in investigatory interviews under section 7 and the corresponding limitations on employers in conducting investigatory interviews is unsettled.

B. **Defining Protected Concerted Activity Under the National Labor Relations Act: Meyers Industries, Inc.*¹

Section 7 of the National Labor Relations Act (the Act), grants employees the right to engage in concerted activity for mutual aid or protection.² To this end, section 8(a)(1) of the Act makes it an unfair labor practice for employers to interfere with, restrain or coerce employees engaging in such protected concerted activity.³ The Act, however, does not specify whether the activity, to be concerted, must involve the joint action of more than one employee.⁴

⁶⁵ See *Sears*, 274 N.L.R.B. No. 55 at 3 n.5, 118 L.R.R.M. at 1329 n.5. The *Sears* majority recognized the distinction between the term "permissible interpretation" and "compelling interpretation." *Id.*

⁶⁴ But see *Deaton*, 502 F.2d at 1228, 87 L.R.R.M. at 2550 (a court should decline to interfere with the consistency of the Board's decisions when interference defeats the essential policy of the Act).

⁶⁵ *Slaughter*, 794 F.2d at 126, 122 L.R.R.M. at 2872.

⁶⁶ *Id.* at 128, 122 L.R.R.M. at 2873.

⁶⁷ *Id.*

* By Mark J. Shaffer, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ *Meyers Industries, Inc.*, 281 N.L.R.B. No. 118, 123 L.R.R.M. 1137 (1986) [*Meyers II*], supplementing 268 NLRB 493, 115 L.R.R.M. 1025 (1984) [*Meyers I*].

² 29 U.S.C. § 157 (1982). Section 7 provides, in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." *Id.*

³ 29 U.S.C. § 158(a)(1) (1982). Section 8(a)(1) states, in relevant part: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of [their section 7] rights . . ." *Id.*

⁴ See generally *Meyers Industries, Inc.*, 268 N.L.R.B. 493, 493-94; 115 L.R.R.M. 1025, 1025-26 (1984) (Member Zimmerman, dissenting) [*Meyers I*].

From 1951 until 1975, the National Labor Relations Board (the Board) defined protected concerted activity as an activity engaged in, or authorized by, more than one employee in pursuit of a common, work-related goal.⁵ In 1975, however, the Board in *Alleluia Cushion Co. (Alleluia)* focused its analysis of concerted activity on the activity's purpose rather than the number of employees participating in it. The *Alleluia* Board held that a single employee engaged in protected concerted activity when the other employees ought to have had a group concern about the interest asserted by the individual employee.⁶ In 1984, the Board in *Meyers Industries, Inc. (Meyers I)* overruled *Alleluia Cushion* and reverted to its former position that a single employee engages in concerted activity only when he or she acts with the express consent of at least one other employee.⁷ Immediately following *Meyers I*, the Supreme Court in *NLRB v. City Disposal Systems* held that a single union employee that seeks to enforce a right rooted in a collective bargaining agreement engages in protected concerted activity, even if the employee does not obtain any other employee's express consent.⁸

During the Survey year, the Board in *Meyers Industries, Inc. (Meyers II)* reconsidered its definition of protected concerted activity in light of *City Disposal*.⁹ The *Meyers II* Board reaffirmed its holding that one, non-union employee does not engage in protected concerted activity if he or she fails to obtain any other employee's authorization, notwithstanding the nature of the employee's concern.¹⁰ The *Meyers II* Board found its *Meyers I* decision to be consistent with *City Disposal*, reasoning that the union employee's assertion of contract rights "is a continuation of an ongoing process of concerted activity."¹¹ In contrast, a non-union employee, the Board stated, engages in concerted activity only when the evidence shows that the employee acted as "a representative of at least one other employee."¹² *Meyers II* thus demonstrates that the definition of a protected concerted activity applies differently to union and non-union employees.

In *Meyers II* the employee, Kenneth Prill, was hired as a skilled driver on April 24, 1979, by Meyers Industries (Meyers), a Michigan company engaged in the manufacture, sale and distribution of aluminum boats and related products.¹³ Meyers assigned Prill a company truck and its trailer to haul boats from Michigan to various dealers throughout

⁵ See, e.g., *Traylor-Pamco, Inc.*, 154 N.L.R.B. 380, 388, 59 L.R.R.M. 1756, 1756 (1965) ("There is no evidence [in this case] that there was any consultation between the two [employees] in the matter . . ."); *Continental Mfg.*, 155 N.L.R.B. 255, 257, 60 L.R.R.M. 1290, 1290 (1965) ("[The acting employee] did not consult with . . . any other employee, or the Union about the grievances . . ."); *Root-Carlin, Inc.*, 92 N.L.R.B. 1313, 1314, 27 L.R.R.M. 1235, 1235 (1951) (" . . . the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization").

⁶ *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000, 91 L.R.R.M. 1131, 1133 (1975). See also *Meyers I*, 268 N.L.R.B. at 495, 115 L.R.R.M. at 1027.

⁷ *Meyers I*, 268 N.L.R.B. at 497, 115 L.R.R.M. at 1029.

⁸ 465 U.S. 822, 115 L.R.R.M. 3193 (1984).

⁹ *Meyers Industries, Inc.*, 281 N.L.R.B. No. 118 at 7, 123 L.R.R.M. 1137, 1140 (1986) [*Meyers II*], supplementing 268 N.L.R.B. 493, 115 L.R.R.M. 1025 (1984).

¹⁰ *Meyers II*, 281 N.L.R.B. No. 118 at 4-7, 123 L.R.R.M. at 1138-39.

¹¹ *Id.* at 19, 123 L.R.R.M. at 1143.

¹² *Id.* at 11, 123 L.R.R.M. at 1141.

¹³ *Prill v. N.L.R.B.*, 755 F.2d 941, 943, 118 L.R.R.M. 2649, 2650 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 313, 120 L.R.R.M. 3392 (1985).

the country.¹⁴ This truck, however, had serious mechanical problems, especially with the braking mechanism.¹⁵ As a result, Prill complained several times to his employer upon return from trips on which the truck's brakes had malfunctioned.¹⁶

During a two week period in 1979, Ben Gove, another employee, drove the truck assigned to Prill.¹⁷ Gove also experienced mechanical problems with the company truck.¹⁸ At the same time Gove reported the truck's deficiencies to his supervisor, Prill was in the office to receive his next assignment.¹⁹ Gove described the truck's problems to his supervisor and stated, in Prill's presence, that he would not drive the truck until Meyers repaired it.²⁰

Shortly after Gove's experiences with Prill's truck, Prill had an accident in Tennessee in which the same truck jack-knifed because the brakes malfunctioned.²¹ Prill then decided to contact the Tennessee Public Service Commission to arrange for an official inspection of the vehicle.²² As a result, the Department of Transportation cited Meyers for operating an unsafe vehicle.²³ After Meyers learned of the accident and the citation, it decided that the truck was not worth repairing and should be sold for scrap.²⁴ Meyers also decided to discharge Prill because it didn't like his "calling the cops like this all the time."²⁵

On the basis of these facts, an Administrative Law Judge (ALJ) determined that Meyers discharged Prill because he made safety complaints and refused to drive an unsafe vehicle in Tennessee.²⁶ The ALJ, relying on *Alleluia Cushion Co.*, held that Prill engaged in concerted activity for mutual aid or protection under section 7 of the Act.²⁷

¹⁴ *Id.*

¹⁵ *Id.* Prill's vehicle was equipped with braking systems on both the truck and the trailer components. These systems, although they can be operated independently, ordinarily would function together when the brake pedal is depressed. On the truck assigned to Prill, however, the brakes on the trailer essentially were inoperative. *Id.* at 943 n.8, 118 L.R.R.M. at 2650 n.8.

¹⁶ *Id.* at 943, 118 L.R.R.M. at 2651.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 944, 118 L.R.R.M. at 2651.

²³ *Id.* See 49 C.F.R. § 396.4 (1978), the regulation that provides in relevant part:
Unsafe operations forbidden

No motor carrier shall permit or require a driver to drive any motor vehicle revealed by inspection or operation to be in such condition that its operation would be hazardous or likely to result in a breakdown of the vehicle If while any motor vehicle is being operated on a highway, it is discovered to be in such unsafe condition, it shall be continued in operation only to the nearest place where repairs can safely be effected, and even such operations shall be conducted only if it be less hazardous to the public than permitting the vehicle to remain on the highway.

²⁴ *Prill*, 755 F.2d at 944, 118 L.R.R.M. at 2652.

²⁵ *Id.* at 944-45, 118 L.R.R.M. at 2652. On an earlier trip to Ohio, Prill stopped at a roadside inspection conducted by the Ohio State Highway Patrol. After the inspection, Ohio issued the truck a citation for a number of defects including the brakes. When Prill returned to his employer in Michigan, he showed the citation to his employer and submitted it together with his paperwork. *Id.* at 943, 118 L.R.R.M. at 2651.

²⁶ *Id.* at 945, 118 L.R.R.M. at 2652.

²⁷ *Id.*

Thus, the ALJ found, Meyers had committed an unfair labor practice by discharging Prill.²⁸

The Board in *Meyers I* disagreed with the ALJ's decision and dismissed the complaint.²⁹ Overruling *Alleluia*, the Board stated that activity could be concerted only if it involved group action.³⁰ The Board also criticized *Alleluia* as inconsistent with the Act because it allowed group support of an action to be presumed rather than proven.³¹ Returning to the pre-*Alleluia* standard, the Board defined a protected concerted activity as an activity engaged in with or on the authority of other employees, and not solely by or on behalf of the acting employee.³² Thus, the Board stated that before it would find an 8(a)(1) violation four elements must be present: the activity was concerted; the employer knew of the concerted nature of the employee's activity; the concerted activity was of a type protected by the Act; and the adverse employment action at issue, such as the discharge, was motivated by the employee's protected concerted activity.³³

Applying this standard, the Board held that Prill had acted alone and on his own behalf when he refused to drive the truck and contacted the Tennessee Public Service Commission.³⁴ The Board determined that Gove did not join in Prill's complaints before the accident, but that Prill merely overheard Gove's complaint while in the office.³⁵ The greatest inference from this incident, the Board found, was that another employee individually was concerned about the truck's condition.³⁶ Taken by itself, the Board stated, individual employee concern, even if openly displayed by several employees on an individual basis, is not sufficient evidence to prove the existence of concerted activity.³⁷ Although the Board disapproved of the employer's attempt to get as much use as possible from old machinery at the expense of Prill's safety, it concluded that section 7, framed to legitimize and protect group action for mutual aid and protection, was not intended to encompass this type of individual activity.³⁸ Therefore, Prill's discharge, according to the Board, did not violate his rights under section 7 of the Act.³⁹

Prill petitioned for review of the Board's decision with the United States Court of Appeals for the District of Columbia Circuit.⁴⁰ The appeals court remanded *Meyers* to the NLRB on the grounds that the Board erroneously assumed that the Act mandated

²⁸ *Id.* The ALJ reasoned that Prill's refusal to drive the vehicle was mandated by Department of Transportation regulations that reflected a concern for the safety of particular drivers as well as for that of the public, and that an employee who complains about the safety of a particular truck speaks for the safety of any employee who may drive that truck. *Id.* at 946, 118 L.R.R.M. at 2653. The ALJ also determined that Prill's complaints before the accident were concerted activity because they were joined by Gove, who had made similar complaints to his employer in Prill's presence. *Id.*

²⁹ *Meyers I*, 268 N.L.R.B. at 498, 115 L.R.R.M. at 1030.

³⁰ *Id.* at 493-94, 496, 115 L.R.R.M. at 1026, 1028-29.

³¹ *Id.* at 495-96, 115 L.R.R.M. at 1027-28.

³² *Id.* at 497, 115 L.R.R.M. at 1029.

³³ *Id.*

³⁴ *Id.* at 498, 115 L.R.R.M. at 1030.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 499, 115 L.R.R.M. at 1031.

³⁹ *Id.* One member of the Board dissented, arguing that the Board's use of the concept of concerted activity to cut off protection for the individual employee who asserts collective rights violates the history and spirit of Federal labor laws. *Id.* (Member Zimmerman, dissenting).

⁴⁰ *Prill v. N.L.R.B.*, 755 F.2d 941, 118 L.R.R.M. 2649 (D.C. Cir.), cert. denied, 106 S. Ct. 313, 120 L.R.R.M. 3392 (1985).

the Board's interpretation of what constituted concerted activities.⁴¹ The court determined that the United States Supreme Court's recent decision in *NLRB v. City Disposal Systems*⁴² established that the Board was not required to give a literal, narrow, interpretation to the term "concerted activity," but had substantial authority to define the scope of section 7.⁴³

In *City Disposal*, the appeals court noted, the Supreme Court addressed whether an individual employee who invoked a collective bargaining right engaged in concerted activity within the meaning of section 7.⁴⁴ The Court, the appeals court found, affirmed the Board's decision that an individual employee's reasonable and honest invocation of a collective bargaining right amounted to concerted activity for two reasons: first, the assertion of a right contained in a collective bargaining agreement is an extension of the concerted action that produced the agreement; and, second, the assertion of such a right affects the rights of all employees covered by the collective bargaining agreement.⁴⁵ Thus, the D.C. Circuit remanded *Meyers I* to the Board to reconsider the issues in light of *City Disposal*.⁴⁶

On reconsideration, the Board in *Meyers II* reaffirmed *Meyers I*, holding that a single employee engages in concerted activity only where he or she acts with the express consent of at least one other employee.⁴⁷ At the outset of its decision in *Meyers II*, the Board recognized that it has a wide latitude in interpreting section 7 of the Act.⁴⁸ The Act, noted the Board, emphasizes collective, rather than purely individual activity.⁴⁹ The Board stated that the Act's purpose is to encourage the practice of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization and the designation of representatives of their own choosing.⁵⁰ The Board thus determined that it is proper to concentrate on joint employee action as the touchstone for an analysis of which activities are within the scope of section 7.⁵¹ The Board found that its definition of concerted activity proceeded logically from such an analysis, because its definition required a linkage to group action for the conduct to be deemed protected concerted activity.⁵²

The Board also determined that its *Meyers I* decision was consistent with the recent Supreme Court *City Disposal* decision.⁵³ The Board noted that the *City Disposal* Court's analysis focused on the precise manner in which the particular actions of an individual

⁴¹ *Id.* at 942, 118 L.R.R.M. at 2650. The court also remanded *Prill* for what it called a lack of rationale for a new definition. *Id.* The court did not, however, express an opinion as to the correct test of concerted activity or whether the Board's standard of concerted activity resulted in a reasonable interpretation of § 7 of the Act. *See id.* at 948 n.46, 118 L.R.R.M. at 2655 n.46.

⁴² 465 U.S. 822, 115 L.R.R.M. 3193 (1984).

⁴³ *Prill*, 755 F.2d at 952, 118 L.R.R.M. at 2658.

⁴⁴ *Id.* at 949, 118 L.R.R.M. at 2656.

⁴⁵ *Id.* at 952, 118 L.R.R.M. at 2658.

⁴⁶ *Id.* at 957, 118 L.R.R.M. at 2661.

⁴⁷ *Meyers II*, 281 N.L.R.B. No. 118 at 11, 123 L.R.R.M. at 1141.

⁴⁸ *Id.* at 4, 123 L.R.R.M. at 1138.

⁴⁹ *Id.* at 4-5, 123 L.R.R.M. at 1139.

⁵⁰ *Id.* at 5, 123 L.R.R.M. at 1139.

⁵¹ *Id.* at 6-7, 123 L.R.R.M. at 1139.

⁵² *Id.* at 7, 123 L.R.R.M. at 1139.

⁵³ *Id.*

employee were linked to the actions of fellow employees.⁵⁴ The Board reasoned that in *City Disposal* the individual employee's assertion of a collective bargaining right was an integral part of the process that gave rise to the agreement and was, therefore, concerted activity.⁵⁵ The Board stated that the *Meyers* claimant, unlike the *City Disposal* claimant, did not invoke a right within any collective bargaining agreement.⁵⁶

The Board found, however, that its definition of concerted activity does not mean that conduct engaged in by a single employee will *never* constitute concerted activity under section 7.⁵⁷ The Board stressed that, to the contrary, the definition attempts to define when an act of any employee is or is not concerted.⁵⁸ The definition recognizes that whether an employee has engaged in concerted activity is a factual question based on the totality of the available evidence.⁵⁹ Accordingly, when the evidence demonstrates group activities, whether specifically authorized by other employees or otherwise, concerted activity will be found.⁶⁰

In addition, the *Meyers II* Board noted that the definition of protected concerted activity encompasses those circumstances where individual employees seek to initiate or induce group action as well as where individual employees bring group complaints to the attention of management.⁶¹ Furthermore, the Board stated, it is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener.⁶² To qualify as concerted activity, however, the Board stated that the conversation must appear at the very least to have occurred with the object of initiating or inducing group action, or that it had some relation to group action in the interest of the employees.⁶³ The Board concluded that the definition formulated is not exhaustive, and any number of situations may arise calling for a careful scrutiny of the record on a case by case basis.⁶⁴

Finally, the Board rejected the argument that an individual employee's safety complaints in accordance with a state statute, or overall public policy considerations, require the Board to protect purely individual activity.⁶⁵ The Board determined that labor's cause is often advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context.⁶⁶ Indeed, the Board stated, employees may resort to administrative and judicial forums, and to legislators to protect their interests as employees.⁶⁷ The Board thus determined that an employee who asserts

⁵⁴ *Id.* at 9, 123 L.R.R.M. at 1140.

⁵⁵ *Id.* (citing *City Disposal*, 465 U.S. at 832, 115 L.R.R.M. at 3198).

⁵⁶ *Id.* at 10 n.30, 123 L.R.R.M. at 1140 n.30. The court reasoned that it is collective activity which lies at the core of § 7 of the Act. *Id.* at 11, 123 L.R.R.M. at 1141.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 13, 123 L.R.R.M. at 1141.

⁶⁰ *Id.*

⁶¹ *Id.* at 15, 123 L.R.R.M. at 1142.

⁶² *Id.* at 16, 123 L.R.R.M. at 1142.

⁶³ *Id.* (quoting *Vought Corp.*, 273 N.L.R.B. 1290, 1294 (1984), *enforced*, 788 F.2d 1378 (8th Cir. 1986)).

⁶⁴ *Id.*

⁶⁵ *Id.* at 17, 123 L.R.R.M. at 1142-43.

⁶⁶ *Id.* at 17, 123 L.R.R.M. at 1143 (quoting *Eastex Inc. v. N.L.R.B.*, 437 U.S. 556, 565-66, 98 L.R.R.M. 2717, 2720 (1978)).

⁶⁷ *Id.* (quoting *Eastex*, 437 U.S. at 565-66, 98 L.R.R.M. at 2720).

contract rights engages in a protected continuation of the ongoing process of employee concerted activity, whereas an individual employee who asserts statutory rights is not similarly protected.⁶⁸

The Board's ruling in *Meyers II* allows employers lawfully to discharge employees for filing safety complaints.⁶⁹ The *Meyers II* Board found that the Act did not protect Prill because no other employee expressly joined him in lodging his complaints.⁷⁰ Despite the apparently inequitable result of the decision, the Board, consistent with section 7 of the Act, correctly defined protected concerted activity and properly excluded from this definition an employee who acted solely on his own behalf.⁷¹ Accordingly, under *Meyers II*, an employee's actions will amount to concerted activity if the action is undertaken with, or on the authority of, other employees, and not solely by or on behalf of the acting employee.⁷² The effect of drawing such a narrow definition will be to reduce instances where a single, non-union, employee complains about workplace conditions and threatens the employer that he or she will report the purported violation to "higher authorities." In addition, the *Meyers II* standard suggests that even if an employee's actions are found to be concerted, the employer's discharge of these employees will be lawful where the employer did not know that the activity was concerted and was not motivated to act in response to the employee's concerted activity.⁷³

Moreover, the *Meyers II* decision creates a dual analysis of concerted activity that depends on whether the acting employee is union or non-union. If the employee is union, the Board presumes the activity is "concerted." If the acting employee is non-union, the activity is concerted only if the employee acted with the express consent of at least one other employee. The *Meyers II* Board correctly balanced the employee's right to engage in collective activity against the employer's right to discipline an individual employee who acts solely on his or her own behalf.

Meyers II also provides employers with greater predictability in dealing with their employees. While employers must ensure that employees' working conditions are reasonably safe, employers also may be free from individual employees' threats. At the same time, employees must learn that their actions to obtain better working conditions will be protected if they act in concert. It is through the strength of employees working together toward a common goal that the inequalities in bargaining power between employers and employees will be overcome.⁷⁴

In sum, during the Survey year, the National Labor Relations Board in *Meyers Industries, Inc.* affirmed its earlier decision overruling *Alleluia Cushion Co.* and developed a more literal definition of concerted activity under the National Labor Relations Act. In *Meyers II*, the Board defined concerted activity by considering whether an individual employee acted with the consent of at least one other employee for mutual aid or protection. Furthermore, according to *Meyers II*, even if the employee engaged in concerted activity, the employer has committed an unfair labor practice only if the employer knew of the concerted nature of the activity, the activity was of a type protected by the

⁶⁸ *Id.* at 19, 123 L.R.R.M. at 1143.

⁶⁹ See *supra* notes 21-25 and accompanying text.

⁷⁰ See *supra* note 39 and accompanying text.

⁷¹ See *supra* notes 34-37 and accompanying text.

⁷² See *supra* note 10 and accompanying text.

⁷³ See *supra* note 33 and accompanying text.

⁷⁴ See generally *supra* note 50 and accompanying text.

Act, and the employer's adverse employment action was motivated by the employee's protected concerted activity.

C. **Intent to Evade Union Obligations as a Factor in Alter Ego Analysis: NLRB v. Allcoast Transfer, Inc.*¹

Under sections 8(a)(1) and (a)(5) of the National Labor Relations Act (Act),² it is an unfair labor practice for an employer to repudiate a collective bargaining agreement entered into with the employee union.³ When an employer changes its corporate form by selling its assets or discontinuing its operations, it is well established that a collective bargaining agreement, entered into by a previous employer, does not bind a successor employer.⁴ Courts, however, agree that if the existing, non-union employer is an "alter ego" of a previous employer with whom the union had a collective bargaining agreement, the "alter ego" employer must comply with the terms of the agreement.⁵ The present employer is the alter ego of the former employer where they are substantially the same entity, and therefore the present employer must honor the collective bargaining agreement of the former.⁶ Accordingly, an "alter ego" employer who repudiates the collective bargaining agreement of its predecessor violates sections 8(a)(1) and (a)(5) of the Act.

To determine whether an existing employer is an alter ego of the previous employer, courts focus on the circumstances surrounding the change of corporate form. Specifically, the courts seek to establish whether the change of corporate form results in a bona fide change of ownership or merely a disguised continuation of the previous employer.⁷ Accordingly, courts examine whether the two corporate entities are "substantially identical" in terms of "management, business purpose, operation, equipment, customers, supervision and ownership."⁸ In addition, courts consider relevant evidence of the employer's intent to avoid compliance with the collective bargaining agreement or anti-union animus.⁹ There is uncertainty, however, concerning whether an existing employer

* By Brian A. Berube, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 780 F.2d 576, 121 L.R.R.M. 2393 (6th Cir. 1986).

² 29 U.S.C. § 158(a)(1), (a)(5) (1982). The statute provides in relevant part that,

(a) [i]t shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

....

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

Id.

³ NLRB v. Allcoast Transfer, Inc., 780 F.2d at 578, 121 L.R.R.M. at 2395.

⁴ 1 THE DEVELOPING LABOR LAW 735 (C. Morris 2d ed. 1983).

⁵ *Id.*

⁶ *Id.*

⁷ Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106, 9 L.R.R.M. 411, 414 (1942).

⁸ E.g., Nelson Elec. v. NLRB, 638 F.2d 965, 968, 106 L.R.R.M. 2393, 2394-95 (6th Cir. 1981) (citing Crawford Door Sales Co., 226 N.L.R.B. 1144, 1144, 94 L.R.R.M. 1393, 1394 (1976)) (new electrical contracting business was bound by the collective bargaining agreement of a prior business where the two businesses were found to be alter egos).

⁹ E.g., Goodman Piping Prods., Inc. v. NLRB, 741 F.2d 10, 12, 117 L.R.R.M. 2143, 2144 (2d Cir. 1984) (employer was found to be an alter ego of an employer which had ceased operations and was therefore bound by the prior employer's collective bargaining agreement).

can be found to be an alter ego of a predecessor employer absent a finding of such intent or anti-union animus.¹⁰

During the *Survey* year, the United States Court of Appeals for the Sixth Circuit in *NLRB v. Allcoast Transfer, Inc.* examined whether an existing employer must exhibit anti-union animus or a specific intent to evade labor obligations before the court may find it to be an alter ego of the predecessor employer.¹¹ The *Allcoast* court held that a finding of such intent is not a prerequisite to a finding of alter ego status, but rather one of many factors to be considered.¹² This finding implies that, in the Sixth Circuit, a change of corporate form motivated by legitimate factors, having no grounds in anti-union animus, may still subject the "new" employer to alter ego status, and therefore, require the new employer to recognize the union and honor the existing collective bargaining agreement.

In *Allcoast*, Robert G. Harris (Harris) was chief operating officer as well as the owner of over ninety percent of a moving and storage company, A. E. Ward (Ward).¹³ Ward transported goods intrastate under a state license, and interstate under its own Interstate Commerce Commission (ICC) license.¹⁴ In addition, Ward transported goods interstate as an agent of Atlas Van Lines, Inc. (Atlas), under an ICC license issued to Atlas.¹⁵ Local 392 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Union) represented all truck drivers employed by A.E. Ward.¹⁶

In February, 1982, Atlas implemented a policy that disallowed its agents, such as Ward, from operating under independent ICC licenses.¹⁷ The Atlas policy, however, permitted its agents to transfer their independent operating authority to a separate corporation as long as that corporation did not associate its business and equipment with Atlas.¹⁸

Responding to Atlas' new policy, Harris formed a new corporation, Ward Moving and Storage Inc. (Ward Moving), and transferred the Atlas agency relationship to the new corporation.¹⁹ Harris was the sole shareholder and officer of Ward Moving.²⁰ A.E. Ward then changed its name to Allcoast Transfer, Inc. (Allcoast),²¹ and retained its independent authority for interstate and intrastate transportation.²² Thus, Harris owned and was CEO of two corporations: Ward Moving, an Atlas agent; and, Allcoast Transfer, an independent trucking company. Allcoast maintained a separate headquarters in a facility close to Ward Moving.²³ The new facility maintained both Allcoast and Ward

¹⁰ *Allcoast*, 780 F.2d at 579, 121 L.R.R.M. at 2396.

¹¹ *Id.* at 579, 121 L.R.R.M. at 2395-96.

¹² *Id.* at 581, 121 L.R.R.M. at 2397.

¹³ *Id.* at 577, 121 L.R.R.M. at 2394.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 577-78, 121 L.R.R.M. at 2394.

¹⁹ *Id.* at 578, 121 L.R.R.M. at 2394. Ward Moving & Storage Inc. was the trade name previously used by A.E. Ward. *Id.*

²⁰ *Id.*

²¹ *Id.* A.E. Ward's corporate name was changed to Allcoast Transfer in compliance with an Atlas policy against the name of the corporation not acting as an agent having a similar name to the Atlas agent. *Id.*

²² *Id.*

²³ *Id.* at 578, 121 L.R.R.M. at 2394-95. Harris indicated at trial that Allcoast had a separate

Moving trucks.²⁴ Also, Allcoast repainted its equipment so as not to be associated with Atlas.²⁵ After ten months, however, Allcoast and Ward Moving operations reconsolidated at the original site.²⁶

Following the reorganization, Harris informed the A.E. Ward employees that they could choose to work for either Ward Moving or Allcoast.²⁷ The Union informed Harris that it considered both companies, Allcoast and Ward Moving, bound by the collective bargaining agreement between A.E. Ward²⁸ and the Union.²⁹ Harris informed the Union that only Allcoast, formerly A.E. Ward, would comply with the bargaining agreement.³⁰ He stated that Ward Moving was a separate corporation from A.E. Ward/Allcoast.³¹

The Union filed an unfair labor practice charge against Ward Moving and Allcoast,³² contending that Ward Moving, as A.E. Ward's alter ego, unlawfully repudiated the collective bargaining agreement. The administrative law judge (ALJ) found that Allcoast and Ward Moving were alter egos, and that, therefore, Ward Moving's repudiation of the collective bargaining agreement violated sections 8(a)(1) and 8(a)(5) of the Act.³³ The National Labor Relations Board (Board) affirmed the ALJ's finding and ordered Ward Moving and Allcoast to cease and desist their unfair labor practices and to compensate Ward Moving employees for losses resulting from the company's failure to recognize the collective bargaining agreement.³⁴ The Board sought enforcement of its order in the United States Sixth Circuit Court of Appeals.³⁵

In *NLRB v Allcoast Transfer, Inc.*, the Sixth Circuit, agreeing with the Board's conclusion that Ward Moving and Allcoast were alter egos, enforced the Board's order.³⁶ The court thus found that both corporations were obligated to honor the collective bargaining agreement.³⁷ The court noted that the alter ego doctrine's purpose is to prevent employers from evading union obligations, such as collective bargaining agreements, by changing their corporate form.³⁸ The court then stated that the alter ego test, as adopted by the Supreme Court in *Southport Petroleum Co. v. NLRB*, focuses on whether the change of form was a bona fide change of employers or merely a continuation of the previous employer.³⁹ Further, the court identified factual criteria used by courts in

location to "prove a point" that Allcoast and Ward Moving were two separate, distinct businesses." *Id.* at 578 n.2, 121 L.R.R.M. at 2395 n.2.

²⁴ *Id.* at 578, 121 L.R.R.M. at 2395.

²⁵ *Id.* at 578, 121 L.R.R.M. at 2394-95.

²⁶ *Id.* at 578, 121 L.R.R.M. at 2395. Harris explained at the administrative hearing that the two businesses were reconsolidated in the same facility because he did not "receive the business he had hoped for," and that it was not worth losing money to make the point that the two businesses, Ward Moving and Allcoast, were separate companies. *Id.* at 578 n.2, 121 L.R.R.M. at 2395 n.2.

²⁷ *Id.* at 578, 121 L.R.R.M. at 2395.

²⁸ Allcoast formerly was known as A.E. Ward.

²⁹ *Allcoast*, 780 F.2d at 578, 121 L.R.R.M. at 2395.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 579, 121 L.R.R.M. at 2395.

³⁶ *Id.* at 583, 121 L.R.R.M. at 2398.

³⁷ *See id.*

³⁸ *Id.* at 579, 121 L.R.R.M. at 2395.

³⁹ *Id.* (quoting *Southport Petroleum*, 315 U.S. at 106, 9 L.R.R.M. at 414, where court upheld the Board's order to cease and desist unfair labor practices, reinstate employees with back pay and post

determining whether corporations are alter egos, such as whether the two businesses are similar in terms of "management, business purpose, operation, equipment, customers, supervision and ownership."⁴⁰ Next, the court addressed whether a finding of anti-union animus or an intent to evade union obligations was a prerequisite to the imposition of alter ego status.⁴¹

The *Allcoast* court first surveyed the decisions of other circuit courts that have addressed the necessity of a finding of intent.⁴² In particular, the court noted that, in the First and Eighth Circuit Courts of Appeal, intent is a "critical inquiry" for determining alter ego status.⁴³ The First Circuit in *Penntech Papers Inc. v. NLRB*,⁴⁴ and the Eighth Circuit in *Iowa Express Distribution, Inc. v. NLRB*,⁴⁵ identified a major conceptual distinction between the single employer doctrine, where two existing business entities are treated as one,⁴⁶ and the alter ego doctrine, which focuses on a successor employer.⁴⁷ Unlike the single employer doctrine, the alter ego determination, the courts noted, focuses on a "disguised continuance" of the former entity, and therefore, intent is a "critical inquiry."⁴⁸ The *Allcoast* court interpreted these cases as requiring the Board to

notices at the plant despite employer's claim that the company's assets had been transferred to another corporation and that the employer had dissolved).

⁴⁰ *Id.* These factors had been enumerated by previous courts such as *Nelson Electric*, 638 F.2d at 968, 106 L.R.R.M. at 2394-95.

⁴¹ *Allcoast*, 780 F.2d at 579, 121 L.R.R.M. at 2396.

⁴² The *Allcoast* court noted that because neither the Supreme Court nor the Sixth Circuit had addressed the intent issue, the court was not bound by precedent. *Id.*

⁴³ *Id.* at 579-80, 121 L.R.R.M. at 2396 (quoting *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311, 116 L.R.R.M. 3224, 3228 (8th Cir.), *cert. denied*, 469 U.S. 1088, 117 L.R.R.M. 3232 (1984); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24, 113 L.R.R.M. 2219, 2223 (1st Cir.), *cert. denied*, 464 U.S. 892, 114 L.R.R.M. 2648 (1983)). Both *Penntech* and *Iowa Express* found support for this proposition in Note, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U. L. Rev. 624, 638-39 (1979). *Iowa Express*, 739 F.2d at 1311, 116 L.R.R.M. at 3228; *Penntech*, 706 F.2d at 24, 113 L.R.R.M. at 2223.

⁴⁴ 706 F.2d 18, 113 L.R.R.M. 2219 (court upheld a Board determination that the parent employer and its subsidiary were a "single employer" for purposes of an unfair labor practice proceeding).

⁴⁵ 739 F.2d 1305, 116 L.R.R.M. 3224 (court upheld the Board's denial of attorney's fees where it found the NLRB General Counsel was justified in bringing an unfair labor practice case against the employer and alleging that the employer was an alter ego of, or single employer with, another company).

⁴⁶ 2 THE DEVELOPING LABOR LAW, *supra* note 4, at 1441. "The 'single employer' concept reflects a judgment that two or more business entities may properly be considered as one for various statutory purposes." *Id.* Four factors are considered in determining single employer status: "(1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control." *Id.* at 1442. Unlike the alter ego analysis which focuses on a former and present employer, the single employer analysis focuses on two existing employers, and whether they should be treated as a "single employer" for statutory purposes. *See id.* at 1441.

⁴⁷ 1 THE DEVELOPING LABOR LAW, *supra* note 4, at 735. The alter ego doctrine examines successor employers to determine if the former and successor employers are substantially the same entity, and thereby bound by the labor contract of the predecessor. *Id.*

⁴⁸ *Iowa Express*, 739 F.2d at 1310-11, 116 L.R.R.M. at 3228; *Penntech*, 706 F.2d at 24, 113 L.R.R.M. at 2223. The *Penntech* and *Iowa Express* courts relied on *NLRB v. Tricor Prods., Inc.*, 636 F.2d 266, 270, 105 L.R.R.M. 3271, 3273 (10th Cir. 1980) and Note, *supra* note 43, at 638-39, for their reasoning. *Iowa Express*, 739 F.2d at 1310-11, 116 L.R.R.M. at 3228; *Penntech*, 706 F.2d at 24, 113 L.R.R.M. at 2223. The *Allcoast* court noted, however, that the Eighth Circuit, in *NLRB v. Campbell-Harris Elec., Inc.*, listed factors to be considered for alter ego purposes without ever

find "intentional employer evasion" of union obligations before imposing alter ego status.⁴⁹

Next, the *Allcoast* court, considering the Third Circuit Court of Appeals' decisions in *NLRB v. Scott Printing Corp.*⁵⁰ and *NLRB v. Al Bryant, Inc.*,⁵¹ expressed doubt as to whether the Third Circuit requires a finding of intent prior to imposing alter ego status.⁵² In *Scott Printing*, the Third Circuit assumed, without deciding whether it must be proven, that the employer evaded its bargaining duties intentionally.⁵³ The dissenting opinion in *Scott Printing* argued that a finding of alter ego status was improper because there was no evidence of anti-union animus.⁵⁴ Four years later, in *NLRB v. Al Bryant*, the Third Circuit enumerated factors to consider in an alter ego analysis and did not include among its list the employer's intent to evade its union obligations.⁵⁵ Thus, based upon *Al Bryant* and the dissenting opinion in *Scott*, the Sixth Circuit expressed doubt that the Third Circuit regarded intent as a necessary element.

In contrast, the *Allcoast* court found that the Second Circuit rejects the argument that a finding of "intent to evade" is a prerequisite for finding alter ego status.⁵⁶ In *Goodman Piping Products, Inc. v. NLRB*, the Second Circuit ruled that intent was not a prerequisite to imposing alter ego status, although it may be "germane" to the issue or

mentioning an intent element. *Allcoast*, 780 F.2d at 580, 121 L.R.R.M. at 2396 (citing *Campbell-Harris*, 719 F.2d 292, 295, 114 L.R.R.M. 2881, 2883 (8th Cir. 1983)). Furthermore, the *Campbell-Harris* court noted that the alter ego test is a "flexible test." *Campbell-Harris*, 719 F.2d at 296, 114 L.R.R.M. at 2883.

In addition, the only language of either *Penntech* or *Iowa Express* which explicitly states that intent must be found is derived from a law review article. Note, *supra* note 43, at 638-42. *Iowa Express* cited to the language in the Note that an alter ego finding requires that "the employer must act from anti-union animus." 739 F.2d at 1311, 116 L.R.R.M. at 3228 (quoting Note, *supra* note 43, at 639). *Penntech* cited to slightly different language: "while a single employer examination is essentially objective, the employer's motivation for the business change is an important element of the alter ego analysis." 706 F.2d at 24, 113 L.R.R.M. at 2223 (quoting Note, *supra* note 43, at 638).

In support of these propositions, the article cites *NLRB v. Herman Bros. Pet Supply, Inc.*, 325 F.2d 68, 70-71, 54 L.R.R.M. 2682, 2684-85 (6th Cir. 1963). In *Herman Brothers*, however, alter ego status was imposed because the court found that the sale of the business in question "was a fictitious transaction to avoid dealing with the union." 325 F.2d at 70, 54 L.R.R.M. at 2684-85. Although the case establishes intent as a factor or reason for imposing alter ego status, no language in *Herman Brothers* indicates that intent is a prerequisite. Accordingly, it is questionable whether this citation is appropriate and should have been relied upon by these courts.

⁴⁹ *Allcoast*, 780 F.2d at 580, 121 L.R.R.M. at 2396.

⁵⁰ 612 F.2d 783, 103 L.R.R.M. 2153 (3d Cir. 1979).

⁵¹ 711 F.2d 543, 113 L.R.R.M. 3690 (3d Cir. 1983).

⁵² *Allcoast*, 780 F.2d at 580, 121 L.R.R.M. at 2396-97.

⁵³ *Id.* (quoting *Scott Printing*, 612 F.2d at 787, 103 L.R.R.M. at 2156).

⁵⁴ *Id.* (citing *Scott Printing*, 612 F.2d at 789, 103 L.R.R.M. at 2158 (Sloviter, J., dissenting)). The *Scott Printing* dissent further noted that intent is a necessary element in determining alter ego status. 612 F.2d at 790, 103 L.R.R.M. at 2158 (Sloviter, J., dissenting).

⁵⁵ *Allcoast*, 780 F.2d at 580, 121 L.R.R.M. at 2396-97 (citing *Al Bryant*, 711 F.2d at 553-54, 113 L.R.R.M. at 3699). In *Al Bryant*, the court determined that the defendant's company was an alter ego of its other company. 711 F.2d at 554, 113 L.R.R.M. at 3699. The factors examined were, "substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership between the old and new corporations." *Id.* at 553-54, 113 L.R.R.M. at 3699. The *Al Bryant* court specifically cited to the criteria set forth in *Scott Printing*. *Id.* at 554, 113 L.R.R.M. at 3699.

⁵⁶ *Allcoast*, 780 F.2d at 580, 121 L.R.R.M. at 2397.

"even a sufficient basis" to prove alter ego status.⁵⁷ The court instead found alter ego status based upon an examination of "management, business purpose, operation, equipment, customers, supervision, and ownership."⁵⁸ Thus, the Second Circuit explicitly has held that a finding of intent is not required to find the new employer an alter ego:

Finally, the *Allcoast* court found that some circuits give "substantial weight" to intent but do not make it a prerequisite to alter ego status.⁵⁹ In *NLRB v. Tricor Products, Inc.*, the Tenth Circuit, finding that there is no hard and fast rule for determining alter ego status,⁶⁰ held that anti-union animus either before or after the corporate change is "germane" to the alter ego inquiry.⁶¹ The *Tricor* court noted that when intent is absent and legitimate business reasons cause the employer to change its corporate form it is less likely that the second employer will be an alter ego.⁶² Similarly, in *Fugazy Continental Corp. v. NLRB*,⁶³ the D.C. Circuit indicated that a finding of intent may be significant but is not dispositive.⁶⁴ The *Fugazy* court listed the traditional factors for determining alter ego status and also noted that substantial weight should be given to evidence indicating an intent to evade labor obligations.⁶⁵ Accordingly, the *Allcoast* court interpreted the Tenth and D.C. Circuit opinions as placing an emphasis on intent, but not requiring a finding of intent as a prerequisite to alter ego status.

Having surveyed the various approaches, the *Allcoast* court concluded that intent is not a prerequisite to a determination of alter ego status.⁶⁶ The *Allcoast* court, drawing upon the language used by the Supreme Court in *Southport Petroleum*, examined whether there was a "disguised continuance of the old employer."⁶⁷ The Sixth Circuit reasoned

⁵⁷ *Id.* (quoting *Goodman Piping*, 741 F.2d at 12, 117 L.R.R.M. at 2144).

⁵⁸ *Goodman Piping*, 741 F.2d at 11-12, 117 L.R.R.M. at 2144.

⁵⁹ *Allcoast*, 780 F.2d at 581, 121 L.R.R.M. at 2397.

⁶⁰ *Id.* (quoting *Tricor*, 636 F.2d at 270, 105 L.R.R.M. at 3273). The court also enumerated the traditional elements of alter ego status that are examined. *Id.* (citing *Tricor*, 636 F.2d at 270, 105 L.R.R.M. at 3273).

⁶¹ *Id.* (quoting *Tricor*, 636 F.2d at 270, 105 L.R.R.M. at 3273, where the court enforced a Board order that a subsequent employer adhere to a collective bargaining agreement of a previous employer, where it was determined that the two were alter egos).

⁶² *Id.* (citing *Tricor*, 636 F.2d at 270, 105 L.R.R.M. at 3273). The *Allcoast* court noted that both *Pennitech* and *Iowa Express* interpreted *Tricor* as requiring an intent finding. *Allcoast*, however, interpreted *Tricor* as holding that intent is important but is not necessary. *Allcoast*, 780 F.2d at 581 n.6, 121 L.R.R.M. at 2397 n.6.

⁶³ 725 F.2d 1416, 115 L.R.R.M. 2571 (D.C. Cir. 1984) (court upheld a Board order that the employer was an alter ego of a previous employer and was therefore obligated to recognize and bargain with the union).

⁶⁴ *Allcoast*, 780 F.2d at 581, 121 L.R.R.M. at 2397.

⁶⁵ *Id.* (citing *Fugazy*, 725 F.2d at 1419, 115 L.R.R.M. at 2573). The *Fugazy* court stated that substantial evidence should be given to "evidence that the motive for the transaction was to evade statutory and contractual duties under the NLRA or to escape the reach of the Board's remedies." *Fugazy*, 725 F.2d at 1419, 115 L.R.R.M. at 2573. The traditional factors enumerated include "substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership between the old entity and its successor." *Id.* In *Fugazy*, alter ego status was established in part due to a finding of anti-union animus. *Id.* at 1420, 115 L.R.R.M. at 2574. The court noted that there was "overwhelming evidence of anti-union animus and . . . extremely suspicious timing and informality" in the transaction. *Id.*

⁶⁶ *Allcoast*, 780 F.2d at 581, 121 L.R.R.M. at 2397.

⁶⁷ *Id.* (quoting *Southport Petroleum*, 315 U.S. at 106, 9 L.R.R.M. at 414). The court phrased the question as "whether there was a bona fide discontinuance and a true change of ownership . . . or merely a disguised continuance of the old employer." *Id.* (quoting *Southport Petroleum*, 315 U.S. at 106, 9 L.R.R.M. at 414).

that the inquiry employed by the Supreme Court required an examination of the totality of the circumstances in each case.⁶⁸ Because the *Allcoast* court decided that a flexible alter ego analysis is appropriate, the court ruled that no particular element is a prerequisite to a finding of alter ego status.⁶⁹ Rather, all factors should be considered together.⁷⁰

The *Allcoast* court noted that a rule that does not require a specific finding of anti-union animus furthers the purpose of the alter ego doctrine.⁷¹ If intent were a prerequisite, the court reasoned, employers attempting to avoid union obligations might mask their avoidance in a changed corporate structure based upon seemingly legitimate business reasons, thereby escaping their obligations while still maintaining essentially the same business.⁷² Such attempts would not be encouraged under the *Allcoast* court's approach, because there would not be a prerequisite finding of intent.⁷³ Thus, the *Allcoast* court reasoned, its approach best advances the purpose of the doctrine.

Applying its holding to the facts, the court found that Ward Moving was the alter ego of Allcoast/A.E. Ward.⁷⁴ The court noted that the two enterprises had substantially identical management, supervision, labor relations policy, business purpose, operations, equipment and employees.⁷⁵ Thus, the court found adequate support for the Board's finding of alter ego status without a finding of anti-union animus.⁷⁶ The court stated, however, that while inquiry into Ward's intent in dividing its operations was not necessary given the surrounding circumstances, such an inquiry may be required in other situations.⁷⁷ Accordingly, the court granted the Board's petition for enforcement.⁷⁸

The *Allcoast* court's holding, that intent is not a prerequisite to alter ego status, is appropriate in light of the case law in other jurisdictions and national labor policy. The Sixth Circuit's holding is persuasive because none of the cited jurisdictions has stated explicitly that intent is a prerequisite to alter ego status. Moreover, although the *Allcoast* court interprets the First and Eighth Circuit decisions as requiring an intent finding prior to establishing alter ego status,⁷⁹ the language of those cases may not necessarily require such a finding. In fact, the strongest language used by the First and Eighth Circuit courts was that "motive or intent are critical inquiries."⁸⁰ Neither circuit court says that motive or intent are essential findings.

Furthermore, the cases from these circuits, *Penntech* and *Iowa Express*, emphasized the intent element in a different context. The courts used intent as a means of distinguishing alter ego analysis from single employer analysis.⁸¹ Because the single employer

⁶⁸ *Id.* at 581, 121 L.R.R.M. at 2397.

⁶⁹ *Id.* at 581-82, 121 L.R.R.M. at 2397.

⁷⁰ *Id.*

⁷¹ *Id.* at 582, 121 L.R.R.M. at 2398.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 582-83, 121 L.R.R.M. at 2398.

⁷⁶ *Id.* at 583, 121 L.R.R.M. at 2398.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 579-80, 121 L.R.R.M. at 2396.

⁸⁰ *Iowa Express*, 739 F.2d at 1311, 116 L.R.R.M. at 3228; *Penntech*, 706 F.2d at 24, 113 L.R.R.M. at 2223.

⁸¹ *Iowa Express*, 739 F.2d at 1310, 116 L.R.R.M. at 3228; *Penntech*, 706 F.2d at 24, 113 L.R.R.M. at 2223.

analysis does not consider intent, while alter ego analysis may, the First and Eighth Circuits necessarily placed great emphasis on the intent factor.

In addition, none of the cases cited by the Sixth Circuit have held that the employer was not an alter ego because intent to avoid union obligations was lacking. Accordingly, the cases cited, while providing helpful insight into the understanding of other jurisdictions, are inapposite on the issue of whether, absent a specific finding of employer's intent, alter ego status becomes impossible.

Indeed, most circuits that have considered the question have determined that an intent finding is not a necessary prerequisite to alter ego status. Under the Sixth Circuit's survey and interpretation of the relevant cases, only the First and Eighth Circuits are interpreted as requiring a finding of intent. Whereas the Second, Third, Tenth and D.C. Circuits are interpreted as finding that intent is an important element, however, it is not a necessary element. Thus the majority of the surveyed circuits have found that intent to avoid union obligations is merely one of several elements in an alter ego analysis.

Public policy lends further support to the Sixth Circuit's holding that intent is only one factor to be considered in an alter ego analysis. Public policy considerations of industrial peace favor private ordering through collective bargaining agreements.⁸² The approach adopted by the Sixth Circuit will uphold this private ordering because it will prevent employers from undercutting collective bargaining agreements by cloaking anti-union animus behind supposedly legitimate business reasons for which the employer would not be required to recognize the collective bargaining agreement. Although the *Allcoast* court's decision risks imposing alter ego status on an employer with legitimate business reasons for the corporate change, public policy in favor of industrial stabilization through collective bargaining agreements outweighs this risk. Thus, the approach adopted by the Sixth Circuit is appropriate and well reasoned.

The *Allcoast* court's holding implies that, in the Sixth Circuit, an employer may be considered an alter ego and be bound by a previous collective bargaining agreement, even if intent to evade collective bargaining or anti-union animus is not established, when other factors indicating alter ego status are present. The *Allcoast* case should not be seen as a radical change in the role of intent as a key factor in determining alter ego status. Rather, *Allcoast* indicates that when all other factors are present, such as similar management, customers, supervision and ownership, an intent inquiry may be unnecessary. When all other factors are not present, however, intent will become a "germane" or "crucial inquiry." Thus, *Allcoast* designs a flexible test to determine alter ego status, which test considers intent as a key factor, but not a determinative element.

In sum, during the *Survey* year, the Sixth Circuit in *NLRB v. Allcoast*, held that a finding of the employer's anti-union animus or intent to evade collective bargaining obligations is not a prerequisite to a finding of alter ego status. Rather, intent to avoid union obligations is one element to be considered along with other factors, such as similarity of management, business purpose, operations, equipment, customers, supervision and ownership. This flexible test is appropriate in light of the Act's goal of fostering collective bargaining as a means of promoting industrial peace. The flexible test discourages employers from using seemingly legitimate business reasons to mask an attempt to evade collective bargaining. Accordingly, in the Sixth Circuit, employers may be bound

⁸² *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 46 L.R.R.M. 2416, 2417-18 (1960).

by a predecessor's collective bargaining agreement with the union, even if the employer's change of form was not motivated by anti-labor animus.

D. **Permissible Employer Response to Employee Refusal to Cross Stranger Picket Line:*
Business Services by Manpower, Inc.¹

Section 7 of the National Labor Relations Act (the Act) guarantees employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."² Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees exercising any of these section 7 rights.³ Thus, an employer who discharges an employee for engaging in conduct protected by section 7 violates section 8(a)(1) of the Act.⁴

An employee's right to honor a legal picket line established on the premises of his or her own employer is protected concerted activity under section 7 of the Act, even if he or she is not a member of the same union as the picketers.⁵ Similarly, the National Labor Relations Board (the Board) and most of the federal appellate courts that have considered the issue agree that workers who honor legal picket lines at employers other than their own, so-called "stranger picket lines," also engage in protected concerted activity.⁶ The Board and the courts disagree, however, on whether an employer may either discharge or permanently replace an employee who refuses to cross a stranger picket line.⁷ Employees that are permanently replaced have full reinstatement rights, while employees that are discharged may not.⁸

* By Constance J. MacDonald, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 784 F.2d 442, 121 L.R.R.M. 2827 (2d Cir. 1986).

² 29 U.S.C. § 157 (1976). Section 7 states in pertinent part: "Employees shall have the right to . . . assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." *Id.*

³ 29 U.S.C. § 158(a)(1) (1976). Section 8 provides: "(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . ." *Id.*

⁴ See R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 349 (1976).

⁵ NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301, 74 L.R.R.M. 2080, 2082 (5th Cir. 1970). See R. GORMAN, *supra* note 4, at 322.

⁶ NLRB v. Browning-Ferris Indus., Chem. Serv., Inc., 700 F.2d 385, 387, 112 L.R.R.M. 2882, 2884 (7th Cir. 1983); NLRB v. Southern Calif. Edison Co., 646 F.2d 1352, 1364, 107 L.R.R.M. 2667, 2673-74 (9th Cir. 1981); NLRB v. Gould, Inc., 638 F.2d 159, 163, 105 L.R.R.M. 2788, 2790 (10th Cir. 1980) (dictum); NLRB v. Alamo Express, Inc., 430 F.2d 1032, 1036, 74 L.R.R.M. 2742, 2744 (5th Cir. 1970), *cert. denied*, 400 U.S. 1021, 76 L.R.R.M. 2272 (1971); Teamsters, Chauffeurs, Warehousemen Helpers and Food Processors, Local Union 657 v. NLRB, 429 F.2d 204, 205, 75 L.R.R.M. 2480, 2480 (D.C. Cir. 1970) (per curiam).

Except for a period during the Eisenhower Administration, the Board has held that the honoring of a stranger picket line is protected activity. *Business Services by Manpower v. NLRB*, 784 F.2d 442, 447, 121 L.R.R.M. 2827, 2831 (2d Cir. 1986).

⁷ See, e.g., NLRB v. William S. Carroll, Inc., 578 F.2d 1, 98 L.R.R.M. 2848 (1st Cir. 1978) (refusing to enforce Board's order reinstating employee, and holding that employer that demonstrated legitimate business reason and showed no antiunion animus legally discharged employee who, without prior notice to employer, refused to cross stranger picket line).

⁸ See *infra* note 9 for a discussion of the difference between discharging and permanently replacing an employee.

The Board adopts the per se rule that employees refusing to cross a stranger picket line may not be discharged because their conduct is protected under section 7.⁹ If the employer evidences no antiunion animus and can show a legitimate and substantial business justification for hiring a new employee to do the refusing employee's job, then the employer may replace permanently the refusing employee.¹⁰ The replaced employee, if he or she makes an unconditional offer to return to work, retains the right to reinstatement when a comparable position becomes available.¹¹ By refusing to cross the stranger picket line, the employee is in effect joining the strike and thus contributing to a stronger labor movement by promoting solidarity.¹²

In contrast, some appellate courts adopt a balancing approach, and hold that where an employer's business justification outweighs the employee's interest in protected concerted activity, the employer may discharge the employee.¹³ Specifically, these courts find that where the employee's interest in the protected concerted activity is so attenuated that the impact of the employer's action on the protected conduct is "comparatively

⁹ See *Torrington Constr. Co.*, 235 N.L.R.B. 1540, 1540-41, 98 L.R.R.M. 1135, 1135-36 (1978) (sympathy strikers, like economic strikers, may not be discharged; operator of a concrete mix manufacturing plant improperly discharged truck driver employees who refused to cross a picket line to deliver concrete at a shopping mall construction site); *Cyril de Cordova & Bro.*, 91 N.L.R.B. 1121, 1137-38, 26 L.R.R.M. 1628 (1950) (analogy to economic striker; brokerage house improperly discharged employee who refused to cross a picket line at the Stock Exchange).

The Board reasons that employees honoring stranger picket lines are treated like "economic strikers." "Economic strikers" are employees engaged in a work stoppage in support of bargaining demands concerning wages or working conditions, or requests that the employer recognize the union. R. GORMAN, *supra* note 4, at 339. Unfair labor practice strikers, in contrast, are employees protesting employer conduct that violates the Act. *Id.* Neither type of striker may be discharged. *Id.* at 341. If an unfair labor practice striker makes an unconditional offer to return to his job, the employer must oust any replacement hired and give the employee his job back. *Id.* An employer, however, has the right to replace an economic striker permanently. *Id.* See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 347, 2 L.R.R.M. 610, 615 (1938). Still, if the replaced employee makes an unconditional offer to return to work, the employer must give him preferential reinstatement status. R. GORMAN, *supra* note 4, at 343. See *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 145, 110 L.R.R.M. 2995, 3006 (2d Cir. 1982).

Because the right to strike is seriously discouraged by the employer's right to replace an economic striker permanently, the Board and the courts have reduced the impact of permanent replacement by expanding an economic striker's reinstatement rights. R. GORMAN, *supra* note 4, at 342-43. Upon unconditional application to return to work, an economic striker now has a right to preferential reinstatement status even if his position is no longer vacant when he applies. *Id.* at 343. As soon as his former position or another one for which he is qualified becomes available, the employer must reinstate the economic striker/employee with full vested employment benefits, including seniority, unless the employee has already secured equivalent employment elsewhere or the employer has a legitimate and substantial reason for not reinstating him, such as a change in business operations or the employee's lack of necessary skills. *Id.* at 344-45; *Koenig Iron Works*, 681 F.2d at 145, 110 L.R.R.M. at 3006. Thus, because of the reinstatement rights of economic strikers, the discharge-replacement distinction makes a difference to the employee. See R. GORMAN, *supra* note 4, at 343-45.

¹⁰ See *Koenig Iron Works*, 681 F.2d at 145, 110 L.R.R.M. at 3006; *Torrington Constr.*, 235 N.L.R.B. at 1541, 98 L.R.R.M. at 1135-36.

¹¹ See *Koenig Iron Works*, 681 F.2d at 145, 110 L.R.R.M. at 3006; *Torrington Constr.*, 235 N.L.R.B. at 1541, 98 L.R.R.M. at 1135-36.

¹² *Southern Calif. Edison*, 646 F.2d at 1363-64, 107 L.R.R.M. at 2673.

¹³ See, e.g., *Manpower*, 784 F.2d at 453, 121 L.R.R.M. at 2835. For a detailed description of the approaches used in stranger picket line cases since 1950 by the Board and the various courts of appeals, see *id.* at 446-53, 121 L.R.R.M. at 2830-35.

slight,"¹⁴ the employer can discharge the employee without violating the Act, if the employer can demonstrate a "legitimate and substantial" business reason for the dismissal¹⁵ and there is no proof of antiunion animus.¹⁶ An employer's business interest is "legitimate and substantial" if it outweighs the harm to the employee's interest in the protected concerted activity of honoring stranger picket lines.¹⁷

During the *Survey* year, the United States Court of Appeals for the Second Circuit applied the balancing approach in *Business Services by Manpower, Inc. v. NLRB*.¹⁸ The court balanced what it found to be the employees' extremely attenuated right to refuse to cross an informational stranger picket line at the location of their temporary work assignment against the strong interest of the employer, a temporary employment agency, in enforcing a neutral rule requiring advance notice of an employee's inability or unwillingness to fulfill a work assignment.¹⁹ The court held that because there was no evidence that the employer acted out of antiunion animus and the employer's business justification outweighed the employees' section 7 interests in honoring this stranger picket line, the discharge of these two employees was not an unfair labor practice in violation of section 8(a)(1).²⁰

In *Manpower*, the employer, Business Services by Manpower, Inc. (Manpower) was an employment agency supplying temporary help to business firms.²¹ On May 20, 1981, Manpower service representative Esther Nui called employee Craig Monroe and offered

¹⁴ Employee interests in the concerted activity may be so attenuated in a particular case that they will not fall within the "mutual aid or protection" clause. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-68, 98 L.R.R.M. 2717, 2721 (1978).

¹⁵ R. GORMAN, *supra* note 4, at 338. See, e.g., *Carroll*, 578 F.2d at 5, 98 L.R.R.M. at 2850-51 (no violation of the Act where the employer had a legitimate business reason for firing the employee who refused to cross the stranger picket line and there was no evidence of antiunion animus); *NLRB v. L.G. Everist*, 334 F.2d 312, 317-18, 56 L.R.R.M. 2866, 2870-71 (8th Cir. 1964) (the court rejected the analogy to economic strikers and held that the employer had a legitimate business reason for discharging and not reinstating four drivers who refused to cross a picket line against a third employer, not even their employer's customer). But see *Browning-Ferris*, 700 F.2d at 389, 112 L.R.R.M. at 2885-86 (although no violation of the Act was found because the employees had failed to make an unconditional offer to return to work, the court followed the *per se* rule that the employees could only be replaced but not discharged).

¹⁶ R. GORMAN, *supra* note 4, at 338. An employer's antiunion animus, however, can tip the balance away from the employer's alleged business necessity in favor of the employees' protected section 7 activity of honoring stranger picket lines. See, e.g., *Teamsters, Local 657*, 429 F.2d at 205, 75 L.R.R.M. at 2480 (employer violated the Act; discharge of an employee who refused to cross a stranger picket line was motivated by a desire to punish the employee and was not in an effort to continue the efficient operation of the business); *Truck Drivers and Helpers Local No. 728 v. NLRB (Overnite Transportation I)*, 364 F.2d 682, 683-84, 62 L.R.R.M. 2502, 2503-04 (D.C. Cir. 1966) (*per curiam*) (employer violated the Act; given the employer's other antiunion actions — interrogating employees about their union sympathies — and the weakness of the alleged business justification, it is likely the employer's decision to discharge the employee was influenced by his showing of sympathy for the union in honoring the stranger picket line).

¹⁷ R. GORMAN, *supra* note 4, at 338. See, e.g., *Alamo Express*, 430 F.2d at 1036, 74 L.R.R.M. at 2744-45 (the employer violated the Act by discharging employees who had refused to cross a stranger picket line, finding that the employer's failure to replace the discharged employees was evidence of a lack of business necessity for their discharge and no antiunion animus).

¹⁸ 784 F.2d at 453-54, 121 L.R.R.M. at 2835-37.

¹⁹ *Id.*

²⁰ See *id.* at 443, 453-54, 121 L.R.R.M. at 2827, 2835-37.

²¹ *Id.* at 443, 121 L.R.R.M. at 2827.

both him and employee Richard Cordes a two-day assignment beginning on May 21, at 9 p.m. at the Spaulding Bakery in Conklin, New York.²² Monroe accepted for both of them.²³ Monroe and Cordes arrived together at Spaulding about 8:30 p.m. and saw five or six picketers with signs there.²⁴ The picketers were members of the Bakery and Confectionary Workers Union employed by Spaulding at its plant in Hazelton, Pennsylvania.²⁵ The union claimed that because they were on strike in Hazelton, Spaulding had moved some of the work previously performed in Hazelton to the Conklin plant.²⁶ Neither the picketers nor their signs requested that others not cross the picket line and the picketers did not attempt to prevent cars from entering the plant.²⁷

After speaking with the picketers, the two Manpower employees decided not to cross the picket line to report to work.²⁸ They immediately left and Cordes called Manpower's answering service, leaving a message at 8:55 p.m.²⁹ Cordes claimed he told the answering service that he and Monroe were not going to work at Spaulding because of a picket line there but that they were not available to work elsewhere.³⁰ Both employees knew that Manpower considered any employee who did not report to work and who did not give Manpower advance notice of his or her inability or unwillingness to work as having resigned.³¹

²² *Id.* at 443, 121 L.R.R.M. at 2828.

²³ *Id.* Cordes and Monroe requested work together because they lived in the same rooming house and could drive to work together. *Id.*

²⁴ *Id.* Before the Administrative Law Judge (ALJ), Manpower produced some circumstantial evidence to show that there was no picket line at Spaulding at 8:30 p.m. on May 21, including testimony from witnesses with no stake in the outcome of this case. *Manpower*, 272 N.L.R.B. at 833, 117 L.R.R.M. 1345. Taylor testified she spent a lot of time at Spaulding and never saw pickets after 3 p.m. *Id.* The ALJ, however, found the testimony not to be in direct conflict with the employees' claim and that Monroe and Cordes were not willfully irresponsible. *Id.* Because the record did not justify a conclusion that they had deliberately lied, the ALJ said, he found that there were pickets there at that time and that that was the reason Monroe and Cordes had refused to report to work. *Id.* Although Manpower excepted to some of the ALJ's credibility findings, the Board found no basis for reversing the findings. *Id.* at 827 n.1, 117 L.R.R.M. at 1345 n.1. The Board will not overrule such findings unless a clear preponderance of the evidence convinces the Board that the findings were incorrect. *Id.* Manpower did not raise that exception before the court of appeals. *Manpower*, 784 F.2d at 443 n.1, 121 L.R.R.M. at 2828 n.1.

²⁵ *Manpower*, 784 F.2d at 443-44, 121 L.R.R.M. at 2828.

²⁶ *Id.*

²⁷ *Id.* at 443, 121 L.R.R.M. at 2828.

²⁸ *Id.* at 443-44, 121 L.R.R.M. at 2828.

²⁹ *Id.* at 444, 121 L.R.R.M. at 2828. Between 8 a.m. and 5 p.m., employees who called the Manpower office would speak with a secretary, a service representative or the person in charge of the office. *Manpower*, 272 N.L.R.B. at 832, 117 L.R.R.M. 1345. Between 5 p.m. and 8 a.m., however, employees could only reach an answering service. *Id.*

³⁰ *Manpower*, 784 F.2d at 444, 121 L.R.R.M. at 2828. Kathy Taylor, a Manpower manager, testified that the message she received from the answering service made no mention of the picket line, merely stating: "'5/20[sic]/81, 8:55 P.M. Rick Cordes with a phone number, available the next few days.'" *Id.*

³¹ *See id.* at 443-44, 121 L.R.R.M. at 2827-28. Taylor testified to the particular importance of employee punctuality and dependability for an employer running a temporary employment agency. *Id.* at 443, 121 L.R.R.M. at 2827. If clients cannot depend on the agency to supply the help needed as requested, they will take their business elsewhere. *Id.* The company's position in this matter is emphasized to new employees during their initial interviews and, once they enlist with the agency,

Accordingly, Manpower removed Monroe and Cordes from its referral list.³²

A complaint that Manpower's discharge of Monroe and Cordes violated section 8(a)(1) of the Act was brought before the Administrative Law Judge (ALJ), who held that Manpower had violated the Act because honoring a picket line "at one's place of employment" is clearly section 7 protected activity for which an employee cannot be discharged.³³ In a split decision, the majority of a three-member panel of the Board, applying the per se rule, agreed with the ALJ that Manpower had violated the Act by removing Monroe and Cordes from its referral list and ordered their reinstatement and back pay from May 22, 1981, their date of termination.³⁴ The majority pointed out that the Board has held consistently that employees have a right, protected by the Act, to honor a union's picket line and that under section 7 there should be no distinction made between stranger picket lines and those at the premises of the employees' own employer.³⁵ Thus, the majority stated, Manpower should not have discharged Monroe and Cordes. Rather, Manpower could have replaced Monroe and Cordes permanently, if Manpower, to protect its business interests, was required to hire two new employees to complete the refusing employees' assignments.³⁶ The majority pointed out that Manpower could have protected its business interests by assigning Monroe and Cordes only to companies not involved in labor disputes.³⁷ The dissenting member of the panel, Chairman Dotson, applied a balancing test and found no violation of the Act because Manpower's need to

employees are given a two-page policy statement including the following instruction and warning (quoted by the court):

CALL IF YOU CAN'T REPORT OR IF YOU WILL BE LATE

If you can't report for work, you *MUST* phone us early. This is very important!!!
As your employer, it is necessary that you keep us informed
IMPORTANT

**IF YOU DO NOT REPORT AS SCHEDULED AND HAVE NOT CALLED OUR
MANPOWER OFFICE, YOU HAVE RESIGNED.**

Id. at 443, 121 L.R.R.M. at 2827-28.

³² *See id.* at 444, 121 L.R.R.M. at 2828. After having phoned Manpower in the evening several times subsequently to confirm their availability and still receiving no assignments, Monroe and Cordes spoke with Esther Nui finally on June 10 and 11, respectively, and she informed them they had been dismissed. *Id.* at 444, 121 L.R.R.M. at 2828-29.

³³ *Manpower*, 272 N.L.R.B. at 832-34, 117 L.R.R.M. at 1345. The ALJ did not consider this case as one where employees had honored a *stranger* picket line. *See id.* at 833, 117 L.R.R.M. 1345. The ALJ ordered Manpower to reinstate Monroe and Cordes and to pay them any back wages they might have lost since their termination on May 22, 1981. *Id.* at 834, 117 L.R.R.M. 1345.

³⁴ *See id.* at 827-28, 117 L.R.R.M. at 1345-46.

³⁵ *Id.* (quoting *Eastex*, 437 U.S. at 564-65, 56 L.R.R.M. at 2719-20; *Browning-Ferris*, 700 F.2d at 387, 112 L.R.R.M. at 2883; *Southern Calif. Edison*, 646 F.2d at 1363-64, 107 L.R.R.M. at 2673-74).

To date, only the Board's decision in *Manpower* has been cited in another case — once, by the Board. In *Gatliff Business Products, Inc. and RBC Corp.*, employees had been discharged for failing to cross a picket line established on their employer's premises by fellow employees allegedly laid off for their union activities. 276 N.L.R.B. No. 60 at 3-4, 22-23, 120 L.R.R.M. 1262 (1985). *Manpower* is cited for the proposition that the Board has held consistently that honoring a picket line is an activity protected by the Act and has even extended those rights to include stranger picket lines not established at the employee's own employer's premises. *Id.* at 46, 120 L.R.R.M. 1262 (citing *Manpower*, 272 N.L.R.B. at 827, 117 L.R.R.M. 1345).

³⁶ *See Manpower*, 272 N.L.R.B. at 828, 117 L.R.R.M. at 1346. *Accord Torrington Constr.*, 235 N.L.R.B. at 1541, 98 L.R.R.M. at 1135-36.

³⁷ *Manpower*, 272 N.L.R.B. at 828, 117 L.R.R.M. at 1346.

enforce its advance notice rule, vital to its business of furnishing temporary help, outweighed the employees' attenuated interest of honoring the stranger picket line at the site of their temporary work assignment.³⁸

On review, the Second Circuit rejected the Board's per se approach and denied enforcement of the Board's order, adopting instead a balancing test similar to the one used by other circuit courts and advocated by Chairman Dotson.³⁹ The court reasoned that as to stranger picket lines a case-by-case balancing of the employer's and employees' interests would be a better approach than rigidly applying the rules regarding strikes on the employer's own premises, because an employee's section 7 interests are not identical in the two situations.⁴⁰

The court first considered the employees' interest in the protected concerted activity. The court pointed out that the employees' section 7 interest in refusing to cross the picket line at Spaulding was particularly weak because it was purely informational picketing by workers not employed at the plant and who were not even requesting that people not enter the plant.⁴¹ The court found it difficult to imagine how the Manpower employees' refusal to cross the picket line really promoted worker solidarity.⁴² Thus, although the court agreed that, ordinarily, refusing to cross a stranger picket line clearly is protected concerted activity under section 7, the court found the rationales of union solidarity and future support of the refusing employees by the picketing employees to be strained in this case.⁴³

The court next turned to what it found to be the employer's compelling business interest in enforcing a rule requiring advance notice of an employee's inability or unwillingness to report for an assignment.⁴⁴ The court reasoned that because Monroe and Cordes had refused to cross the stranger picket line and failed to report for work at Spaulding, Manpower not only lost forever one night's profits on those two assignments but also risked losing its reputation for dependability with its clients.⁴⁵ Thus, the court found that only the discharge of Monroe and Cordes, by removing their names from its referral list, could adequately protect Manpower's business interest because these employees could refuse to report to an assignment any time they unexpectedly encountered a picket line.⁴⁶

Finally, the court found no evidence of antiunion animus.⁴⁷ Manpower was not even aware that Monroe and Cordes had refused to cross the Spaulding picket line, the court stated, until about three weeks after Manpower removed their names from the referral list for failing to report to work.⁴⁸ Also, the court pointed to the uncontradicted testimony of a Manpower manager who said that one employee who objected in advance to working at Spaulding due to the picketing was offered and accepted other assignments.⁴⁹ The

³⁸ *Id.* at 829-31, 117 L.R.R.M. at 1346-49 (Member Dotson, dissenting).

³⁹ *See Manpower*, 784 F.2d at 442-43, 453-54, 121 L.R.R.M. at 2827, 2835-37.

⁴⁰ *Id.* at 451, 121 L.R.R.M. at 2834.

⁴¹ *Id.* at 453, 121 L.R.R.M. at 2835-36.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.* at 453-54, 121 L.R.R.M. at 2836.

⁴⁵ *Id.* at 454, 121 L.R.R.M. at 2836.

⁴⁶ *See id.* at 454, 121 L.R.R.M. at 2836-37.

⁴⁷ *Id.* at 453, 121 L.R.R.M. at 2836.

⁴⁸ *See id.*

⁴⁹ *Id.*

court found that "[t]he refusal to cross the picket line thus was simply a but-for cause of the termination, not a motivating one."⁵⁰ The Second Circuit therefore held that Manpower did not violate section 8(a)(1) of the Act when it discharged Monroe and Cordes, because the employer's business interest in this case outweighed the employees' attenuated interest in honoring the stranger picket line and there was no evidence of antiunion animus.⁵¹

The court conceded that the Board's per se approach might not be unacceptable in all cases.⁵² In this case, however, the court criticized the Board's use of the per se rule because the Board, given this case's unusual facts and Manpower's compelling business interest in enforcing its adequate notice rule, should have balanced the employer's and the employees' interests to determine whether Manpower had lawfully discharged Monroe and Cordes.⁵³ Under the balancing approach, the court held, Manpower properly discharged the employees.⁵⁴

The Board's per se rule is better than the case-by-case balancing approach adopted by the *Manpower* court because the per se rule protects the employees' section 7 interest in honoring a stranger picket line to promote union solidarity while also accommodating the employer's interest in continuing his business operations.⁵⁵ The employee's interests are protected because he or she may only be replaced, not discharged, if the employer shows that the replacement is necessary to carry on employer's business.⁵⁶ Moreover, the employer must reinstate the replaced employee as soon as an appropriate position becomes available, if the employee makes an unconditional offer to return to work.⁵⁷ The employer's business interest also is protected because employer is allowed to hire a permanent replacement if necessary for the continued operation of the business.⁵⁸

In contrast, under the court's balancing test the employer may discharge an employee who refuses to cross a stranger picket line because the employee's refusal affects the employer's ability to carry on his business smoothly.⁵⁹ As the *Manpower* Board pointed out, it is difficult to imagine a set of facts that would lead to a favorable result for the employee if the court applies a balancing test.⁶⁰ Therefore, employees are likely to be discouraged from honoring stranger picket lines out of fear of discharge, because that activity no longer appears to be protected.⁶¹

Applying the per se rule to the facts in *Manpower*, the employer was not justified in discharging Monroe and Cordes. Manpower made no claim that it had no other employees who could do Monroe's and Cordes's assigned jobs at Spaulding.⁶² Furthermore, Monroe and Cordes removed themselves from the payroll by not reporting for work at

⁵⁰ *Id.*

⁵¹ See *id.* at 443, 453-54, 121 L.R.R.M. at 2827, 2835-37.

⁵² *Id.* at 454, 121 L.R.R.M. at 2837.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *Manpower*, 272 N.L.R.B. at 828, 117 L.R.R.M. at 1346.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *Manpower*, 784 F.2d at 453-54, 121 L.R.R.M. at 2835-37.

⁶⁰ *Manpower*, 272 N.L.R.B. at 828, 117 L.R.R.M. at 1346.

⁶¹ See Kocol, *Remarks on Recent Developments in NLRB Case Law*, DAILY LAB. REP. (BNA) No. 52, at E-1 (Mar. 18, 1985) (LEXIS, Labor library, BNALAB file).

⁶² See *Manpower*, 784 F.2d at 453-54, 121 L.R.R.M. at 2836-37.

Spaulding, so Manpower could not claim that it was paying the employees while they refused to do the assigned work.⁶⁵ Also, Spaulding was not Manpower's only client, so Manpower could have assigned Monroe and Cordes to jobs with other customers not having labor difficulties.⁶⁴

Furthermore, if the court had applied a true balancing of employer-employee interests in the *Manpower* case, the court, instead of viewing Manpower's advance notice requirement as a compelling, overriding business justification for discharging Monroe and Cordes, would have found that Manpower violated section 8(a)(1).⁶⁵ The court criticized the employees' section 7 interest in refusing to cross the picket line at Spaulding as very weak, because, among other things, the picketing employees were not even employed at the Spaulding plant in Conklin, New York, where the Manpower employees were assigned to work.⁶⁶ The picketers, however, were employed by and on strike against Spaulding at its Hazelton, Pennsylvania plant.⁶⁷ Thus, the concept of mutual aid and protection is not as attenuated as the court implied.⁶⁸

The court spent much time analyzing the particular business necessities of a temporary employment agency⁶⁹ but failed to explore the unusual status that the employees of such an agency have. Although paid by Manpower,⁷⁰ Monroe and Cordes would be working on the Spaulding premises with Spaulding employees and probably would be supervised by other Spaulding employees. The court pointed out that Manpower's compelling interest in this case was that Spaulding was one of its largest customers.⁷¹ To the contrary, the court minimized any stake Monroe and Cordes might have in a labor dispute by pointing out that the employees had only a two-night assignment at Spaulding.⁷² The court failed to recognize that if Spaulding were indeed one of Manpower's largest customers, it is quite possible that Monroe, Cordes and other Manpower employees might spend a considerable amount of time over the course of a year working "for Spaulding." Thus, the employees' interest in working conditions at Spaulding was not as attenuated as the court claimed.⁷³

⁶⁵ See *Manpower*, 272 N.L.R.B. at 830, 117 L.R.R.M. at 1347. Manpower argued that the refusal to cross the stranger picket line was analogous to an intermittent work stoppage and thus cause for discharge. See *Manpower*, 784 F.2d at 454, 121 L.R.R.M. at 2837; R. GORMAN, *supra* note 4, at 318-19. The courts and the Board have held quite consistently that such a work stoppage, when used to extract concessions from the employer, is unprotected activity because employees cannot pick and choose the work they will do while remaining on the payroll. R. GORMAN, *supra* note 4, at 318-19.

⁶⁴ *Manpower*, 272 N.L.R.B. at 828-29, 117 L.R.R.M. at 1346.

⁶⁵ See *Manpower*, 784 F.2d at 443, 453-54, 121 L.R.R.M. at 2827, 2835-37.

⁶⁶ *Id.* at 443, 453, 121 L.R.R.M. at 2828, 2836.

⁶⁷ *Id.* at 443-44, 121 L.R.R.M. at 2835-36.

⁶⁸ See *id.* at 453, 121 L.R.R.M. at 2835-36.

⁶⁹ See *id.* at 443, 453-54, 121 L.R.R.M. at 2827-28, 2835-37.

⁷⁰ See *Manpower*, 784 F.2d at 443, 121 L.R.R.M. at 2828; *Manpower*, 272 N.L.R.B. at 830, 117 L.R.R.M. at 1347.

⁷¹ 784 F.2d at 454, 121 L.R.R.M. at 2836.

⁷² See *id.*

⁷³ See *id.* at 453, 121 L.R.R.M. at 2835-36. In a case involving a temporary employment agency and one of its customers, a court even held them to be joint employers, for matters of union representation. *Manpower, Inc., of Shelby County*, 164 N.L.R.B. 287, 287-88, 65 L.R.R.M. 1059, 1060 (1967). Although the employees were paid by the temporary agency, they also had significant ties to the client company because several had worked there nearly a year. *Id.*

Moreover, Manpower, apart from establishing the rule requiring advance notice of an employee's inability or unwillingness to report for an assignment, did little to protect its assertedly compelling interest in such notice.⁷⁴ From 5 p.m. to 8 a.m., employees were able to reach only an answering service that had no authority to find emergency replacements for employees unable or unwilling to report for their work assignments.⁷⁵ Furthermore, Manpower did not require its clients to notify it of any labor disputes and Manpower did not inform its employees of any such disputes when offering them work assignments. Such a policy would protect the interests of both the employer and the employee. If an employee were to accept an assignment, agreeing to cross a stranger picket line, and then refused to do so at the last minute, the Board could rule that the employee had waived his right to engage in that protected activity.⁷⁶ Thus, his refusal to cross the stranger picket line would be unprotected activity for which he could be discharged.⁷⁷

Finally, the court criticized the Board's decision because it would force Manpower to accept for its referral list two employees who might run into an unexpected picket line at any time and walk off the job again.⁷⁸ The Board considers this concern improper.⁷⁹ The Board holds that employers may not discharge employees merely to obtain a work force that is less likely to engage in protected concerted activities.⁸⁰ The Board reasons that such discharges would have the practical effect of abolishing sympathy actions because employees would be reluctant to engage in such protected activity where an employer could lawfully discharge the employees merely by establishing a need to complete a job within a certain time frame.⁸¹

In sum, the Second Circuit, in *Business Services by Manpower, Inc. v. NLRB*, applying a balancing test, determined that the employer properly discharged, rather than permanently replaced, employees who refused to cross a stranger picket line. The court found that the employer's need to know in advance whether employees would show up at assigned temporary workplaces outweighed the employees' right to engage in protected concerted activity. Whether the Board will shift from its per se approach to the balancing test applied by the *Manpower* court is unclear because Chairman Dotson's

⁷⁴ See *infra* text accompanying notes 75-77.

⁷⁵ *Manpower*, 784 F.2d at 444, 121 L.R.R.M. at 2828; *Manpower*, 272 N.L.R.B. at 832, 117 L.R.R.M. at 1345. Indeed, Manpower was not aware of evening picketing at Spaulding and thus never mentioned picketing to Monroe and Cordes when it offered them work. 272 N.L.R.B. at 833, 117 L.R.R.M. 1345.

⁷⁶ See *Carroll*, 578 F.2d 1, 98 L.R.R.M. 2848. In *Carroll*, a bus driver accepted an assignment, agreeing to cross a stranger picket line. *Id.* at 2, 98 L.R.R.M. at 2848. At the last minute he refused to do so, causing chaos at the site of the picket line and ultimately necessitating the formation of a police cordon to enable the passengers to disembark. *Id.* at 2, 98 L.R.R.M. at 2848-49.

⁷⁷ See R. GORMAN, *supra* note 4, at 324-25.

⁷⁸ See *Manpower*, 784 F.2d at 454, 121 L.R.R.M. at 2836-37.

⁷⁹ In 1976 in *Newbery Energy Corp.*, the Board found that an electrical subcontractor had violated the Act by discharging five employees for refusing to cross a stranger picket line involving a labor dispute with a separate contractor at the mine where they had been sent to work. 227 N.L.R.B. 436, 436, 94 L.R.R.M. 1307, 1307-08 (1976). The employer hired replacements because the timely completion of the project was jeopardized by those employees who were engaging in a sympathy strike. *Id.* at 437, 94 L.R.R.M. at 1308-09. The Board held that the employer's business necessity did not justify the discharge of the five employees who refused to cross the picket line. *Id.* at 437, 94 L.R.R.M. at 1309.

⁸⁰ *Id.* at 437, 94 L.R.R.M. at 1309.

⁸¹ *Id.*

strong dissent advocates the balancing approach and Member Zimmerman, who had favored the *per se* approach, has since left the Board.⁸² The Board and the courts should consider the practical effect of allowing an employer's business justification to override an employee's section 7 "protected" rights, and restrict the court's holding in *Manpower* to the special facts of that case. Otherwise, employees will be reluctant to honor stranger picket lines and engage in sympathy strikes for fear of being discharged, and thus a valuable instrument of labor solidarity and support will be lost.

II. SECONDARY BOYCOTTS

A. **Excluding Secondary Party Handbilling From the Reach of Section 8(b)(4)*: Florida Gulf Coast Building & Construction Trades v. NLRB¹

Section 8(b)(4) of the National Labor Relations Act (the Act) proscribes union activities intended to "threaten, coerce, or restrain" a person with whom the union has no dispute from doing business with an employer with whom the union does have a dispute.² Through Section 8(b)(4), the Act attempts to protect neutral employers, employees and consumers from coercive union tactics that force these neutral parties to become part of the union dispute.³ Protecting neutral parties from coercive union

⁸² See Kocol, *Remarks on Recent Developments in NLRB Case Law*, DAILY LAB. REP. (BNA) No. 52, at E-1 (Mar. 18, 1985) (LEXIS, Labor library, BNALAB file).

* By Chris Dillon, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 796 F.2d 1328, 123 L.R.R.M. 2001 (11th Cir. 1986) (*per curiam*).

² 29 U.S.C. § 158(b)(4)(ii)(B) (1976). This section of the Act states in relevant part:

(b) It shall be unfair labor practice for a labor organization or its agents —

....

(4) ...

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case 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 a representative of his employees unless such labor organization has been certified as the representative of such employees under the provision of § 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.

Id. This is the so-called "secondary boycott" prohibition. It is important to note that § 8(b)(4)(ii)(B) does not proscribe labor activity directed toward the primary employer or a party closely related to the primary employer.

³ NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692, 28 L.R.R.M. 2108, 2115 (1951) (the United States Supreme Court described the underlying intent of § 8(b)(4) as "shielding unoffending employers and others from pressures in controversies not their own").

Neutral parties may be classified as "secondary" parties in the dispute. Secondary parties are uninvolved in the dispute between the union and the "primary" employer. Secondary parties, however, may be the target of union activities designed to force the secondary party to influence the position of the primary party in the dispute. See R. GORMAN, BASIC TEXT ON LABOR LAW 240—

behavior, however, must be delicately balanced with the union's right to free speech.⁴ Restrictive prohibitions against all behavior related to secondary parties, such as handbills or leafletting of consumers, may unnecessarily infringe upon the union's freedom to express its views.⁵ Thus, the Act makes clear in a publicity proviso that the Act's restriction on a union's coercion of neutral parties does not reach non picketing activity.⁶

Defining the parameters of union activities prohibited under the Act necessarily involves both statutory construction and first amendment interpretation.⁷ Contested union activities first must be analyzed to determine whether they are prohibited under the Act.⁸ If the statute encompasses the activity, the court must evaluate whether the statute prohibits behavior that is otherwise protected under the Constitution.⁹ Cases involving picketing of secondary sites clearly have illustrated the tension between the statutory goal of protecting secondary parties and the union's right to express its views.¹⁰

44 (1976). See also Goldman, *The First Amendment and Non Picketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 VAND. L. REV. 1469 (1983). The author distinguishes secondary union activities from primary activities:

A secondary boycott is the application of economic pressure by a union upon a person with whom the union does not have a dispute (the secondary or neutral party), in order to induce that person to apply pressure upon a person with whom the union does have a dispute (the primary or nonneutral party). Economic pressure in the form of appeals to consumers to withhold patronage is a secondary consumer boycott; union appeals directed to the secondary employees seeking a work stoppage is a secondary employee boycott.

Id. at 1470 n.2.

⁴ See *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 617-18, 104 L.R.R.M. 2567, 2571 (1982) (Blackmun, J., concurring in part).

⁵ *Id.* (Blackmun, J., concurring in part).

⁶ See Goldman, *supra* note 3, at 1472.

⁷ Union activities such as secondary picketing create particularly troublesome constitutional issues. The right to express views, even when designed to coerce or embarrass a party, must be considered in light of the nonspeech elements of picketing. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910-12 (1982) (picketing as communication includes elements which make it more than pure speech and, as a result, is entitled to less stringent protection than pure speech); *Safeco*, 447 U.S. at 617-18, 104 L.R.R.M. at 2571 (Blackmun, J., concurring in part) (when union activities include none of the nonspeech elements such as patrolling which result in limited protection of the right to free speech, restrictions of such activity violate the union's first amendment rights); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) (communication intended to influence others, when peaceful, is fully protected under the first amendment). See Goldman, *supra* note 3, at 1482-87 for a discussion of the differences under a first amendment analysis between picketing and nonlabor picketing publicity.

⁸ Cf. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 100 L.R.R.M. 2913, 2917 (1979).

⁹ *Id.*

¹⁰ See, e.g., *Safeco*, 447 U.S. 607, 104 L.R.R.M. 2567 (1982); *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, 377 U.S. 58, 55 L.R.R.M. 2961 (1964).

Picketing, in the labor context, contains two elements. First, there is the element of patrolling, i.e., marching back and forth. Second, there is the element of speech, usually placed on a placard, intended to influence others to favor the union's position. *Id.* at 77, 55 L.R.R.M. at 2969 (Black, J., concurring). Patrolling is the nonspeech element that prevents a union from enjoying the full protection of the first amendment. Patrolling necessarily involves a physical presence that may induce action on the part of another. Handbills, however, does not have the nonspeech element of patrolling. Handbills, when properly conducted, depends solely on the content of the message to influence the reader. See *Safeco*, 447 U.S. at 618-19, 104 L.R.R.M. at 2571 (Stevens, J., concurring in part).

Prior to 1986, however, courts had not yet resolved this tension in the context of labor activities that involved peaceful distribution of a message in the absence of picketing.

During the *Survey* year, in *Florida Gulf Coast Building & Construction Trades v. NLRB* (*Florida Gulf*), the Eleventh Circuit Court of Appeals held that peaceful distribution of handbills by union members at secondary sites is not proscribed by the Act.¹¹ Consequently, the court of appeals did not have to reach the constitutionality of the statute.¹² After *Florida Gulf*, peaceful nonpicketing union activities designed to publicize the union's position may be viewed as free from any prohibition based on the Act.

In *Florida Gulf*, the union's secondary activities were prompted by the union's dispute with the H.J. High Construction Company (High).¹³ High was the general contractor engaged by the Wilson Company (Wilson) to build a department store.¹⁴ Wilson was then a tenant, along with eighty-five co-tenants, in a mall owned and operated by the Edward J. DeBartolo Corporation (DeBartolo).¹⁵ The union, contending that High paid substandard wages to its employees, distributed handbills at four mall entrances urging consumers not to patronize any of the stores in the mall.¹⁶

The union's handbilling occurred over a three week period during the department store's construction.¹⁷ The union distributed handbills peacefully and did not picket or patrol.¹⁸ DeBartolo requested the union to amend its handbills to clarify to readers that the labor dispute did not involve DeBartolo or any of the current tenants of the mall other than Wilson.¹⁹ Additionally, DeBartolo asked the union to restrict its handbilling to the immediate vicinity of Wilson's.²⁰

The union's refusal to comply with DeBartolo's request prompted DeBartolo to file a trespass action in state court and an unfair labor practice charge with the National Labor Relations Board (NLRB).²¹ The NLRB's General Counsel issued a complaint alleging that the union activities violated the Act's secondary boycott provisions because neither DeBartolo nor any tenant of the mall was involved in a labor dispute with the union.²² The NLRB considered the complaint and concluded that the union's activities were exempt from the Act by the publicity proviso of the Act.²³ As a result, the Board

¹¹ *Florida Gulf Coast Bldg. & Constr. Trades v. NLRB* (*Florida Gulf*), 796 F.2d 1328, 1346, 123 L.R.R.M. 2001, 2015 (11th Cir. 1986).

¹² *Id.*

¹³ *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 148, 113 L.R.R.M. 2953 (1983).

¹⁴ *Id.* at 149, 113 L.R.R.M. at 2954.

¹⁵ *Id.*

¹⁶ *Id.* at 150, 113 L.R.R.M. at 2954. The union, through its handbills, asked consumers not to patronize any of the mall's stores until "DeBartolo publicly promised that construction at the Mall would be done by contractors who pay their employees fair wages and fringe benefits." *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 151, 113 L.R.R.M. at 2954.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 152; 113 L.R.R.M. at 2956. The "publicity proviso" is discussed extensively in *Florida Gulf*, 796 F.2d at 1341-46, 123 L.R.R.M. at 2010-14. Congress added the publicity proviso to the 1959 amendment to the Act to clarify the prohibition against union activities. The proviso was intended to make clear that the prohibitory language did not reach primary picketing or nonpicketing publicity. *Id.* at 1343, 123 L.R.R.M. at 2012-13. The publicity proviso states:

dismissed the complaint.²⁴ The Eleventh Circuit Court of Appeals affirmed this broad interpretation of the publicity proviso and held that the union's activities were exempted from the Act.²⁵

On appeal, the United States Supreme Court disagreed with the NLRB and the circuit court and held that the handbilling activities of the union did not fall within the publicity provision of Section 8(b)(4).²⁶ The Court concluded that the expansive reading of the publicity proviso by the NLRB and the court of appeals was unwarranted.²⁷ The Court remanded the case to the NLRB for a determination of whether the Act, apart from the publicity proviso, proscribes the union's handbilling.²⁸

On remand, the NLRB found that the union's distribution of handbills was intended to "coerce the mall tenants with an object of forcing the mall tenants to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High."²⁹ The NLRB therefore concluded that the handbilling violated the Act.³⁰ As a result, the Board ordered the union to stop distribution of the handbills.³¹ The union petitioned the Eleventh Circuit to set aside the Board's order, and the Board cross-petitioned for enforcement of its order.³²

The Eleventh Circuit granted the union's petition and denied enforcement of the order.³³ The Eleventh Circuit began its analysis in *Florida Gulf* by acknowledging the wisdom of the Supreme Court's policy to avoid addressing the constitutionality of a

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

²⁴ *DeBartolo*, 463 U.S. at 152, 113 L.R.R.M. at 2955. For the NLRB decision, see *Florida Gulf Coast Building Trades Council, AFL-CIO (Edward J. DeBartolo Corp.)*, 252 N.L.R.B. 702, 105 L.R.R.M. 1273 (1980).

²⁵ *DeBartolo*, 463 U.S. at 152-53, 113 L.R.R.M. at 2955. For the court of appeals decision, see *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264, 108 L.R.R.M. 2729 (4th Cir. 1981).

²⁶ *DeBartolo*, 463 U.S. 155-57, 113 L.R.R.M. at 2956-57.

²⁷ *Id.* at 155-56, 113 L.R.R.M. at 2956-57. The Court decided that the publicity proviso was intended to exempt publicity targeted to inform the public that the primary employer's product is distributed by the secondary employer. *Id.* at 155-57, 113 L.R.R.M. at 2956-57.

Because no products produced by High were distributed by DeBartolo or any of Wilson's co-tenants, the union's handbilling did not fall within the terms of the proviso. *Id.* at 157, 113 L.R.R.M. at 2956. Further, the Court decided that the publicity proviso did not exempt the handbilling. Therefore, the Court held that the expansive reading of the Act resulted in an improper construction of the statute. *Id.* Nonetheless, the Court refused to address the issue of whether the Act unconstitutionally prohibits the union's right to free speech. *Id.* at 157-58, 113 L.R.R.M. at 2956.

²⁸ *Id.* at 158, 113 L.R.R.M. at 2957.

²⁹ *Florida Gulf*, 796 F.2d at 1331, 123 L.R.R.M. at 2003.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

congressional act if alternative grounds for a decision exist.³⁴ More specifically, the court recognized that this policy encourages courts to construe congressional acts in a manner that does not raise serious doubt as to their constitutionality.³⁵ Therefore, the court of appeals applied a bifurcated approach to the questions presented in *Florida Gulf*. The court first considered whether the NLRB's interpretation of the Act casts doubts as to the constitutionality of the Act.³⁶ If such doubt existed, the court stated, the court then must analyze the statute's legislative history to identify Congress's clear intent to prohibit the handbilling.³⁷ If the analysis revealed no such intention, the court concluded, a narrow construction of the Act would be warranted, and the handbilling, therefore, would not violate the Act.³⁸

The court concluded that the NLRB's interpretation of the Act raises serious questions about the constitutionality of the statute.³⁹ To reach the decision, the court extensively reviewed cases concerning the free speech aspects of picketing. It noted that although picketing contains nonspeech elements, overly restrictive prohibitions of picketing may violate the first amendment.⁴⁰ In considering the facts of the present case, the court emphasized that no picketing was involved. Thus, the nonspeech elements that otherwise would permit limitations on picketing were not present.⁴¹ Additionally, the court noted the protection granted to handbilling and pamphleteering in prior cases.⁴² As a result of these two factors, the court decided that to construe the Act as prohibiting the union's handbilling would implicate serious constitutional issues.⁴³ In light of the potential constitutional issues, the court concluded that an examination of the legislative history was necessary to find a clear expression of congressional intent to prohibit handbilling.⁴⁴

The court first noted that the Taft-Hartley Act, as originally enacted in 1947, included loopholes that prevented it from effectively prohibiting secondary boycotts.⁴⁵ The court then extensively reviewed the legislative history of the 1959 amendments to

³⁴ *Id.* (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 100 L.R.R.M. 2913, 2917 (1979)) (noting that the Court in *Catholic Bishop* held that Congress expects a statute to be narrowly construed when the legislation limits communication in any way).

³⁵ *Florida Gulf*, 796 F.2d at 1331, 123 L.R.R.M. at 2003 (citing *International Ass'n Machinists v. Street*, 367 U.S. 740, 48 L.R.R.M. 2345 (1961)).

³⁶ *Florida Gulf*, 796 F.2d at 1332, 123 L.R.R.M. at 2003.

³⁷ *Id.*

³⁸ *See id.*

³⁹ *Id.* at 1335, 123 L.R.R.M. at 2006.

⁴⁰ *Id.* at 1332-35, 123 L.R.R.M. at 2003-06.

⁴¹ *Id.* at 1335, 123 L.R.R.M. at 2006.

⁴² *Id.* (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

⁴³ *Florida Gulf*, 796 F.2d at 1335, 123 L.R.R.M. at 2006.

⁴⁴ *Id.* at 1335-36, 123 L.R.R.M. at 2006-07.

⁴⁵ *Id.* at 1336-37. See *Tree Fruits*, 377 U.S. at 64-65, 55 L.R.R.M. at 2964-65 for a discussion of the loopholes in the Act. The Court, in *Tree Fruits*, described the loopholes as follows:

Since only inducement of "employees" was proscribed, direct inducement of a supervisor or the secondary employer by threats of labor trouble was not prohibited. Since only a "strike or concerted refusal" was prohibited, pressure upon a single employee was not forbidden. Finally, railroads and municipalities were not "employers" under the Act and therefore an inducement or encouragement of their employees was not unlawful.

Id. at 64-65, 55 L.R.R.M. at 2964-65.

the Act, which were intended to close these loopholes.⁴⁶ The court emphasized that proponents of both the Senate and House versions of the amendments initially considered direct economic actions against secondary parties, such as strikes and nonconsumer picketing, as the evils to be cured.⁴⁷ Consumer picketing or publicity, the court concluded, was not initially the problem to which Congress addressed itself.⁴⁸

The court then reviewed the change in focus that accompanied the 1959 amendment's legislative evolution.⁴⁹ The court noted that a speech by President Eisenhower outlined the problem as solely one of consumer picketing.⁵⁰ As further evidence of the shift in the target of the Bill, the court presented an excerpt from House debates that indicated that the Bill's sponsor proposed the amendments to target consumer picketing.⁵¹ The court noted, however, that there was no evidence⁵² that any of the Bill's proponents advocated restrictions on any form of nonpicketing behavior.⁵³

In sum, after extensive review of the legislative history, the court concluded that the intent of the amendments was to prohibit such coercive behavior by unions as consumer picketing and direct economic actions.⁵⁴ The court noted that the words and actions of the 1959 amendments' sponsors offered no evidence that the amendments were intended to proscribe such nonpicketing labor publicity as handbilling.⁵⁵ Thus, the court examined other aspects of the legislative history.

⁴⁶ *Florida Gulf*, 796 F.2d at 1336-46, 123 L.R.R.M. at 2007-12.

⁴⁷ *Id.* at 1337-38, 123 L.R.R.M. at 2008. The court cited the Secretary of Labor's testimony in support of the Administration's version of the Bill as an example of the proponents' lack of intent to prohibit consumer picketing or publicity directed at consumers. *Id.* at 1337, 123 L.R.R.M. at 2007. The court also pointed to the Senate Report accompanying the Senate's version of the Bill. The Report did not list consumer picketing or publicity as a problem. *Id.* at 1337-38, 123 L.R.R.M. at 2008. Moreover, the court noted that the House version of the Bill and the original statements of its sponsor offered no evidence that consumer picketing or publicity was deemed to be a problem. *Id.* at 1338-39, 123 L.R.R.M. at 2008.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1339-43, 123 L.R.R.M. at 2009-12.

⁵⁰ *Id.* at 1339, 123 L.R.R.M. at 2009. President Eisenhower, speaking in favor of labor reform, presented an example of a furniture store that was picketed because it sold furniture manufactured by an employer with whom the union had a dispute. *Id.* Labelling the store an "innocent bystander," the President called for a "stop" to such tactics. *Id.*

⁵¹ *Id.* at 1339-40, 123 L.R.R.M. at 2009-10.

⁵² The court dismissed the only mention in the legislative history that would indicate that the Bill would apply to nonpicketing labor publicity because the opponents of the amendments advanced it. *Id.* at 1340, 123 L.R.R.M. at 2010 (citing *Tree Fruits*, 377 U.S. at 66, 55 L.R.R.M. at 2964).

⁵³ *Id.* at 1340, 123 L.R.R.M. at 2009-10. Handbilling, of course, is one form of nonpicketing behavior. The coercive nature of picketing, however, was particularly problematic for advocates of the Bill. *Id.* Although recognizing that the Supreme Court in *Tree Fruits* noted that the Act was targeted to prevent coercive conduct such as picketing, 377 U.S. at 68, 55 L.R.R.M. at 2965, the court, in *Florida Gulf*, dismissed the NLRB's argument stating that handbilling was coercive and thus prohibited by the Act. *Florida Gulf*, 796 F.2d at 1340 n.14, 123 L.R.R.M. 2009-10 n.14.

The court, following the rule of statutory construction advanced by the Supreme Court in *NLRB v. Fruit & Veg. Pack. & Whse., Loc. 76*, deemed the opponents' interpretation of the amendments not to be controlling. *Id.* at 1340, 123 L.R.R.M. at 2009. See *Tree Fruits*, 377 U.S. at 66, 123 L.R.R.M. at 2953. The court concluded that the intent of the sponsors of the legislation was the proper source to consider.

⁵⁴ *Florida Gulf*, 796 F.2d at 1337-38, 123 L.R.R.M. at 2008.

⁵⁵ *Id.* at 1340, 123 L.R.R.M. at 2009-10. Moreover, the court concluded that the opponents' interpretation of the amendments, which indicated that nonpicketing labor publicity was prohibited, was of no significance. *Id.* at 1340 n.14, 123 L.R.R.M. at 2009-10 n.14.

The court next addressed the NLRB's argument that Congress intended the publicity proviso to be an exception to the Act's secondary boycott prohibition.⁵⁶ The court reviewed a report that summarized the compromise reached by the House and Senate conference committee.⁵⁷ From the conference committee's summary analysis, the court concluded that the publicity proviso was added to the Bill to clarify that the Bill did not encompass primary picketing or nonpicketing publicity.⁵⁸

The court stated that it could not ascertain any clear intention by Congress to proscribe nonpicketing labor publicity.⁵⁹ Moreover, the court concluded that the legislative history did not indicate that the proponents of the amendments intended to prohibit nonpicketing labor publicity.⁶⁰ Thus, the court held that because there was no evidence that Congress intended to proscribe handbilling, the NLRB order should not be enforced.⁶¹

The *Florida Gulf* opinion represents an example of the judicially developed principle that courts construe congressional acts narrowly when a broader construction raises serious constitutional issues.⁶² In *Florida Gulf*, adherence to this policy was warranted, because handbilling, when peaceful and free of nonspeech elements, clearly deserves first amendment protection.⁶³ To have ruled that the Act proscribes handbilling, the court would have placed itself in the awkward and unnecessary position of being forced to declare the Act unconstitutional. The court wisely, and with sufficient support in the legislative history, avoided this consequence by applying a narrow construction of the statute.

Florida Gulf's importance lies in the guidance it provides in evaluating secondary nonpicketing union activities. Publicity oriented activities that avoid the "physical" specter of patrolling and placarding will escape prohibition from the Act's secondary boycott provisions. Although it is still argued that handbilling does not differ significantly from picketing at secondary sites, courts have distinguished the two, and the *Florida Gulf* decision broadens the distinction by recognizing that handbilling is outside the scope of the Act.⁶⁴ Therefore, after *Florida Gulf*, organizers of union activities at secondary sites can be assured that activities designed to publicize the union's position and that avoid

⁵⁶ *Id.* at 1341, 123 L.R.R.M. at 2010. The NLRB argued that "if Congress had not intended to restrict nonpicketing publicity under the [Act], it would not have drafted the publicity proviso." *Id.* In short, the NLRB argued that the publicity proviso was an exception in favor of nonpicketing publicity, and that therefore the amendments must have proscribed nonpicketing publicity. *Id.*

⁵⁷ *Id.* at 1341-43, 123 L.R.R.M. at 2010-13.

⁵⁸ *Id.* at 1343, 1344 n.19, 123 L.R.R.M. 2012, 2013 n.19.

The court strengthened its conclusion by noting that the publicity proviso was intended not as an exception but rather as an interpretive, explanatory section. *Id.* at 1345, 123 L.R.R.M. at 2014. The court, moreover, noted that a proponent of the Bill, Senator Goldwater, stated that, although the final version of the Bill was pending, the prohibition extended only to picketing. *Id.* at 1346, 123 L.R.R.M. at 2014.

⁵⁹ *Id.* at 1346, 123 L.R.R.M. at 2014-15.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1346, 123 L.R.R.M. at 2015.

⁶³ See *supra* notes 10, 34-43 and accompanying text. See also Goldman, *supra* note 3, at 1482-1508 for the argument that nonpicketing labor publicity deserves the full protection of the first amendment.

⁶⁴ For the NLRB's argument that handbilling is largely equivalent to picketing see *Florida Gulf*, 796 F.2d at 1334 n.6, 123 L.R.R.M. at 2005 n.6.

elements of picketing escape the prohibitions of the Act and fully enjoy the protection of the first amendment.

*B. *Union Picketing on Behalf of Independent Contractors Against Non-Neutral Parties Not Prohibited as Secondary Boycott under the National Labor Relations Act: Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB.¹*

Section 8(b)(4)² of the National Labor Relations Act (Act) makes it an unfair labor practice for any labor organization to engage in a "secondary boycott."³ Essentially, a secondary boycott in a labor dispute involves the application of economic pressure on an employer with whom the union has no dispute in an attempt to induce that employer to cease doing business with another employer with whom the union does have the labor dispute.⁴ The purpose of the secondary boycott provision is to protect neutral third parties from the direct effects of others' labor disputes.

* By Kevin W. Clancy, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 793 F.2d 323, 122 L.R.R.M. 2877 (D.C. Cir. 1986).

² 29 U.S.C. § 158(b)(4)(1982). The relevant portion of the section states:

(b) It shall be an unfair labor practice for a labor organization or its agents — (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is — (B) forcing or requiring any person . . . to cease doing business with any other person . . . *Provided* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Id. (emphasis in original).

³ The classic definition of secondary boycott, often quoted by the Supreme Court in connection with section 8(b)(4), is by Judge Learned Hand:

The gravamen of a secondary boycott, is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.

International Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37, 25 L.R.R.M. 2449, 2451 (2d Cir. 1950); see *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 388, 70 L.R.R.M. 2961, 2968 (1969); *Local 761, Int'l Union of Elec., Radio & Machine Workers v. NLRB*, 366 U.S. 667, 672, 48 L.R.R.M. 2210, 2212 (1961). For a general discussion of the law of secondary boycott, see Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

⁴ GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING, 240 (1976)

The following hypothetical demonstrates the difference between primary and secondary boycotts:

[A] union may seek to organize the employees at Company P, or may seek to extract economic concessions during a collective bargaining negotiation with Company P. An inducement of P's employees to engage in a work stoppage would be treated as "primary" concerted activity, and a request to Company S which buys the product of Company P to refrain from doing so would be a "primary" product boycott; in either situation the object is to cut off P's business and thereby to force capitulation to the union's demands. If the request to Company S, however, is unsuccessful, and the union attempts to coerce in turn that company to cease buying from (or supplying) Company P — and that coercion takes the form of appealing to S's employees to engage in a work stoppage or to S's customers to boycott S's products — the union's pressure becomes "secondary." The attempted withdrawal of services or patronage from S (generically referred to as a "boycott") pressures a person with whom the union has no underlying quarrel and whose employment relations it does not seek to alter.

Although the term "secondary boycott" appears nowhere in the statutory language, since the Act's passage courts have recognized that boycott action⁵ must be "secondary" in character⁶ to fall within the prohibition of section 8(b)(4).⁷ The 1959 Landrum-Griffin amendment to section 8(b)(4) affirms this interpretation making the section inapplicable to any "primary strike or primary picketing."⁸ Thus, the statutory language defines neither the term "secondary boycott" nor the scope of the secondary boycott prohibition.

In *National Woodwork Manufacturers Association v. NLRB*,⁹ the United States Supreme Court defined secondary boycott actions.¹⁰ The Court stated that the central aspect of a secondary boycott is "pressure tactically directed toward a neutral employer in a labor dispute not his own."¹¹ In *NLRB v. Denver Building & Construction Trades Council*,¹² the Supreme Court noted that the quality that makes union pressure secondary is that it is brought against a third party not involved in the underlying labor dispute.¹³ The *Denver Building* Court reasoned that the policy behind section 8(b)(4)'s prohibition against secondary boycotts was to shield unoffending employers and others from pressures in controversies not their own.¹⁴

In 1984 the National Labor Relations Board (Board), in *Production Workers Union of Chicago and Vicinity, Local 707*, sought to expand the scope of section 8(b)(4) by interpreting it to include all picketing by unions on behalf of independent contractors within its definition of secondary boycott, without regard to the neutrality of the third party.¹⁵ The *Production Worker's* Board prohibited union involvement in picketing by independent contractors, not only against neutral employers but also against employers intimately involved in the underlying labor dispute with the independent contractors.¹⁶ This decision marked the first time that the Board included union pressure directed at non-neutral parties within its interpretation of a secondary boycott under section 8(b)(4).¹⁷

The object, just as in the primary boycott, is to fracture the ongoing business relationship between Company P and its suppliers or purchasers in order to make it increasingly costly for that company to resist the union's demands.

Id.

⁵ A boycott is a refusal to have dealings with an offending person. In labor disputes, a boycott consists of economic pressure leveled at the offending person — the employer involved in the dispute. See, Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959).

⁶ The element of "secondary activity" is present when there is a refusal to have dealings with one party because that party has dealings with the offending person. *Id.* at 271.

⁷ See Lesnick, *supra* note 3, at 1364.

⁸ See *supra* note 2 and accompanying text.

⁹ 386 U.S. 612, 64 L.R.R.M. 2801 (1967).

¹⁰ *Id.* at 644-45, 64 L.R.R.M. at 2813.

¹¹ *Id.* at 623, 64 L.R.R.M. at 2805.

¹² 341 U.S. 675, 28 L.R.R.M. 2108 (1951).

¹³ *Id.* at 692, 28 L.R.R.M. at 2115.

¹⁴ *Id.*

¹⁵ *Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB*, 793 F.2d 323, 324-25, 122 L.R.R.M. 2877, 2879 (D.C. Cir. 1986). The Board reasoned that since independent contractors were not statutory employees, their picketing did not advance one of section 8(b)(4)'s primary purposes of promoting the right of labor organizations to bring pressure to bear on offending employers in labor disputes, and thus the Board ruled that section 8(b)(4) prohibited picketing in aid of independent contractors. 793 F.2d at 326, 122 L.R.R.M. at 2880.

¹⁶ *Id.* at 328, 122 L.R.R.M. at 2881.

¹⁷ *Id.*

During the Survey year, in *Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB*,¹⁸ the United States Court of Appeals for the District of Columbia reversed the Board's expanded interpretation of section 8(b)(4), holding that the prohibition against secondary boycotts turns on the neutrality of the targeted third party.¹⁹ Therefore, according to the court, section 8(b)(4) does not prohibit picketing by unions on behalf of independent contractors against non-neutral third parties in a labor dispute.²⁰ In reversing the Board's decision, the D.C. Circuit stated that its ruling was consistent with the congressional intent behind the enactment of section 8(b)(4), and that the Board had no legal authority to support its "novel interpretation" of the provision.²¹ Thus, the *Production Workers Union* court reaffirmed the general rule that a secondary boycott occurs only if the labor organization pressures a neutral employer in a labor dispute not its own.²²

In *Production Workers Union*, the labor dispute arose between two Chicago cab companies, Checker Taxi Company (Checker) and Yellow Taxi Company (Yellow), and a group of drivers who leased cabs from the companies.²³ Before 1975, these companies employed commissioned cab drivers, who were statutory employees under the Act.²⁴ In 1975, however, Checker and Yellow began to replace these commissioned drivers with drivers who leased cabs from the companies.²⁵ Because the Act specifically excludes coverage of independent contractors, these leased cab drivers (LCDs) were not afforded the Act's protection²⁶ and therefore the cab companies were under no legal obligation to bargain with them.²⁷

The LCDs became dissatisfied with the cab lease terms, and because the companies did not have to bargain with them, the LCDs began to organize in the hope that the cab companies would agree voluntarily to deal collectively with them.²⁸ In 1980, the leader of the dissatisfied LCDs sought the Production Workers Union's assistance and together

¹⁸ 793 F.2d 323, 122 L.R.R.M. 2877 (D.C. Cir. 1986).

¹⁹ *Id.* at 327, 122 L.R.R.M. at 2880. See *National Woodwork Mfrs.*, 386 U.S. at 623, 64 L.R.R.M. at 2805.

²⁰ *Production Workers Union*, 793 F.2d at 325, 122 L.R.R.M. at 2879.

²¹ *Id.* at 333, 122 L.R.R.M. at 2886.

²² *Id.* at 327, 122 L.R.R.M. at 2880. See *National Woodwork Mfrs.*, 386 U.S. at 623, 64 L.R.R.M. at 2805.

²³ *Production Workers Union*, 793 F.2d at 325, 122 L.R.R.M. at 2879.

²⁴ *Id.* The Act states that:

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

29 U.S.C. § 152(3) (1982).

²⁵ *Production Workers Union*, 793 F.2d at 325, 122 L.R.R.M. at 2879.

²⁶ The Act states that:

"The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, . . . or any individual having the status of an independent contractor." 29 U.S.C. § 152(3) (1982). Because the LCDs were independent contractors they were, therefore, not statutory employees. See *Local 777, Democratic Union Org. Comm., Seafarers Int'l. Union of N. Am. v. NLRB*, 603 F.2d 862, 881, 99 L.R.R.M. 2903, 2916 (D.C. Cir. 1978).

²⁷ *Production Workers Union*, 793 F.2d at 325, 122 L.R.R.M. at 2879.

²⁸ *Id.*

they created the Leased Taxicab Division of Local 707 of the Production Workers Union.²⁹ The LCDs agreed that if the cab companies refused to negotiate, they would stop working and picket the cab companies.³⁰ The union wrote to Yellow and Checker requesting the companies to recognize and deal with the division, but the companies refused.³¹ As a result, the LCDs and some union officials began to picket the garages of the cab companies in August 1980.³²

In September, 1980, Yellow and Checker responded by filing unfair labor practice charges against the union under the secondary boycott provisions contained in section 8(b)(4).³³ The NLRB Administrative Law Judge (ALJ) heard the case in 1981, and subsequently issued an order dismissing the complaint.³⁴ The ALJ held that the LCDs' picketing fell entirely outside the ambit of the Act because it did not involve an employer-employee relationship. Thus the cab companies' charges failed to present a labor dispute falling within the NLRB's subject-matter jurisdiction.³⁵

In 1984, a three member panel of the NLRB rejected the ALJ's ruling, holding that the unfair labor practice complaint fell within the NLRA's subject-matter jurisdiction because it was brought against a labor organization within the meaning of the Act.³⁶ Moving to the merits of the complaint, the Board noted that section 8(b)(4) generally addresses situations in which the union acts against a neutral employer in order to pressure another employer whose employees the union seeks to represent or benefit, and that the matter at hand was clearly not such a case.³⁷ The Board stated that section 8(b)(4) is intentionally broad and although the term "secondary boycott" generally is used as the shorthand reference for the forbidden conduct, such a broadly drafted provision should not be limited by a term that does not actually appear in the statute.³⁸ Instead, according to the Board, the interpretation should be guided by the provision's primary purpose to promote the labor organization's right to bring pressure on offending employers in labor disputes.³⁹

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Except for one brief incident, the LCDs confined their picketing to the garages that housed only vehicles operated by LCDs.

³³ *Id.*

³⁴ *Id.* at 325-26, 122 L.R.R.M. at 2879-80.

³⁵ *Id.* at 326, 122 L.R.R.M. at 2880. The Act states that:

The term "labor dispute" includes any controversy concerning the terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 152(9) (1982).

³⁶ *Production Workers Union*, 793 F.2d at 326, 122 L.R.R.M. at 2880. The Act states that: The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (1982).

³⁷ *Production Workers Union*, 793 F.2d at 326, 122 L.R.R.M. at 2880.

³⁸ *Id.*

³⁹ *Id.*

The Board found that because the LCDs were independent contractors and not employees within the Act's scope, their picketing did not promote the right of labor organizations, and thus their actions did not advance section 8(b)(4)'s primary purpose.⁴⁰ The Board, therefore, demanded a "strong indication" that section 8(b)(4)'s express permission of primary picketing included picketing in aid of independent contractors.⁴¹ The Board concluded that no such indication existed in either legislative history or case precedent, and ordered the union to cease and desist from picketing the cab companies.⁴² The Board thus held that section 8(b)(4) proscribes labor organization participation in all picketing by independent contractors.⁴³

In *Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB*, the United States Court of Appeals for the District of Columbia rejected the Board's broad interpretation of the Act's secondary boycott provisions.⁴⁴ The court held that section 8(b)(4) does not prohibit picketing by unions on behalf of independent contractors against non-neutral third parties in a labor dispute.⁴⁵ The *Production Workers Union* court began its analysis by noting that the Board did have subject-matter jurisdiction to consider whether the union's picketing violated section 8(b)(4).⁴⁶ The D.C. Circuit found that although no statutory employees were involved in the dispute because of the LCDs' status as independent contractors,⁴⁷ there still existed a labor dispute within the Act's scope.⁴⁸ The presence of a labor dispute, the court found, regardless of the statutory status of the disputants, was sufficient to satisfy the Board's jurisdictional requirement.⁴⁹ The Board's task, according to the court, was not to pause at the threshold to identify a conventional labor dispute, but was instead to measure the union's conduct against section 8(b)(4)'s prohibition on secondary activity.⁵⁰

Moving to the merits of the case, the *Production Workers Union* court noted that since the adoption of section 8(b)(4) in 1947, the Board has decided many cases delineating the labels "neutral" and "secondary boycott" but has never before held that section 8(b)(4) prohibits union participation in picketing against a party regardless of that party's involvement in the underlying labor dispute.⁵¹ The court recognized, however, that the Board may change its interpretation of section 8(b)(4), and that when Congress' intent is unclear the courts must uphold the Board's interpretation if based on a "reasonable accommodation of conflicting policies."⁵² But when the intent of Congress is clear, the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 324-25, 122 L.R.R.M. at 2879.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 326, 122 L.R.R.M. at 2880.

⁴⁷ See *supra* note 26 and accompanying text for the definition of a statutory employee.

⁴⁸ See *supra* note 35 and accompanying text for the definition of a statutory labor dispute.

⁴⁹ *Production Workers Union*, 793 F.2d at 326, 122 L.R.R.M. at 2880. See *Soft Drink Workers Union Local 812, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am. v. NLRB*, 657 F.2d 1252, 1258, 105 L.R.R.M. 2658, 2662 (D.C. Cir. 1980).

⁵⁰ *Production Workers Union*, 793 F.2d at 326, 122 L.R.R.M. at 2880.

⁵¹ *Id.* at 328, 122 L.R.R.M. at 2881.

⁵² *Id.* at 328, 122 L.R.R.M. at 2881-82. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

court stated, it must give effect to that congressional intent regardless of the NLRB's opinion.⁵³

Consistent with these rules, the *Production Workers Union* court assessed the clarity of Congress' intent in enacting section 8(b)(4) to determine the validity of the Board's expanded interpretation.⁵⁴ The court held that Congress' intent, as demonstrated by the provision's legislative history and repeated and unambiguous Supreme Court precedent, was completely clear: Congress designed section 8(b)(4) to prohibit only pressure brought to bear on third persons wholly unconcerned with the labor dispute.⁵⁵ The court found that the legislative history clearly indicated that Congress intended section 8(b)(4) to prohibit only secondary pressure, pressure against neutrals.⁵⁶

In particular, the D.C. Circuit noted that the Conference Report accompanying the provision specified that section 8(b)(4) did not prohibit "the primary strike for recognition," and also listed as examples of prohibited conduct only classic secondary boycotts involving pressure against neutral parties.⁵⁷ Indeed, the court found the remarks of Senator Taft, a sponsor of the bill, controlling. Senator Taft stated that "[a]ll this provision of the bill [section 8(b)(4)] does is to reverse the effect of the law as to secondary boycotts," thereby making them illegal.⁵⁸ According to this unequivocal legislative history, the court stated, the quality that makes behavior secondary is that it fits the common law definition of a secondary boycott.⁵⁹ The central aspect of a secondary boycott, the court noted, was "pressure tactically directed toward a neutral employer in a labor dispute not his own."⁶⁰

The *Production Workers Union* court also examined prior Supreme Court decisions, finding that from its earliest construction of section 8(b)(4), the Court adopted the aforementioned interpretation that secondary boycotts involve pressure against neutrals.⁶¹ The D.C. Circuit noted that in *NLRB v. Denver Building & Construction Trades Council*,⁶² the Supreme Court looked to the purposes of section 8(b)(4), observing that the section was referred to in the Act's legislative history as one of the Act's secondary boycott provisions and that this was made clear by Senator Taft's remark.⁶³ The court stated that the *Denver Building* Court described the policy behind section 8(b)(4)'s prohibition of secondary boycotts as "shielding unoffending employers and others from pressures in controversies not their own."⁶⁴ The D.C. Circuit noted that for the *Denver Building* Court, the quality that made pressure secondary was the same as reflected in the legislative history, namely that it was brought against a third party not involved in the underlying labor dispute.⁶⁵ The *Production Workers Union* court further noted that

⁵³ *Production Workers Union*, 793 F.2d at 328, 122 L.R.R.M. at 2882. See *Securities Indus. Assoc. v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 142-43 (1984).

⁵⁴ *Production Workers Union*, 793 F.2d at 328, 122 L.R.R.M. at 2882.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 329, 122 L.R.R.M. at 2882. See H.R. REP. NO. 510, 80th Cong., 1st Sess. 43 (1947).

⁵⁸ *Production Workers Union*, 793 F.2d at 329, 122 L.R.R.M. at 2882 (quoting 93 CONG. REC. 4198 (1947) (remarks of Senator Taft on section 8(b)(4))).

⁵⁹ *Id.* at 329, 122 L.R.R.M. at 2882.

⁶⁰ *Id.* (quoting *National Woodwork*, 386 U.S. at 623, 64 L.R.R.M. at 2805).

⁶¹ *Id.* at 329, 122 L.R.R.M. at 2882.

⁶² 341 U.S. 675, 28 L.R.R.M. 2108 (1951).

⁶³ *Id.* at 686, 28 L.R.R.M. at 2113.

⁶⁴ *Id.* at 692, 28 L.R.R.M. at 2115.

⁶⁵ *Production Workers Union*, 793 F.2d at 329, 122 L.R.R.M. at 2883.

Congress approved the Supreme Court's interpretation of section 8(b)(4) by inserting a proviso in the present version of section 8(b)(4) that explicitly protects primary union activity.⁶⁶ Thus, according to the court, case law has "universally and unambiguously" held that Congress intended section 8(b)(4) to protect only neutral parties from coercion in disputes not their own.⁶⁷

Based on the legislative history of section 8(b)(4) and the clear Supreme Court precedent, the *Production Workers Union* court found the congressional intent plain and not subject to genuine dispute.⁶⁸ According to the court, secondary activity under section 8(b)(4) refers only to pressure on a neutral third party.⁶⁹ The court noted that neither in its brief nor in its ruling did the Board address a single case or a shred of legislative history to support its interpretation that pressure directed against a non-neutral party is secondary.⁷⁰ Consequently, the court stated, the Board misinterpreted Congress' specific intent in concluding that section 8(b)(4) prohibited union involvement in all picketing by independent contractors.⁷¹ Consistent with the holding, the D.C. Circuit remanded the case to the Board, requiring it to apply the proper standard, that section 8(b)(4) proscribes picketing only against neutral parties to a labor dispute.⁷²

The *Production Workers Union* court's opinion represents the clearest statement of the scope of section 8(b)(4) to date because, as the court noted, the case represents the first instance in which the Board has suggested that section 8(b)(4) prohibits union participation in picketing against a party regardless of that party's involvement in the underlying labor dispute.⁷³ The court's decision is significant because it demonstrates that section 8(b)(4)'s application turns on the neutrality of the targeted party and not, as the Board suggested, on the statutory relationship between that party and the picketing employees.⁷⁴ According to the court, the primary purpose of section 8(b)(4) is not to promote the right of labor organizations to bring pressure on offending employers in labor disputes, as the Board erroneously concluded.⁷⁵ The provision's primary purpose, according to the D.C. Circuit, is to shield unoffending employers and others from pressures in controversies not their own.⁷⁶ Thus, the court's holding indicates that only neutral parties can be the objects of secondary boycotts as proscribed by section 8(b)(4), and that non-neutral parties that are victimized by union pressure cannot prevail in unfair labor practice actions under section 8(b)(4).

The D.C. Circuit, in *Production Workers Union*, correctly decided that picketing by a union on behalf of independent contractors is not a secondary boycott as proscribed by

⁶⁶ *Id.* See *supra* note 2 and accompanying text for the relevant text of section 8(b)(4).

⁶⁷ *Production Workers Union*, 793 F.2d at 329, 122 L.R.R.M. at 2883. See, e.g., *NLRB v. Local 825, Int'l Union of Operating Engineers*, 400 U.S. 297, 302-03, 76 L.R.R.M. 2129 (1971) (congressional concern over involvement of third parties in labor disputes not their own prompted § 8(b)(4)); *National Woodwork*, 386 U.S. at 623-24, 64 L.R.R.M. at 2805 (§ 8(b)(4) designed to make it unlawful to resort to secondary boycott to injure business of third person wholly unconcerned in the disagreement between employer and employees).

⁶⁸ *Production Workers Union*, 793 F.2d at 330, 122 L.R.R.M. at 2883.

⁶⁹ *Id.*

⁷⁰ *Id.* at 331, 122 L.R.R.M. at 2884.

⁷¹ *Id.*

⁷² *Id.* at 332-33, 122 L.R.R.M. at 2885.

⁷³ *Id.* at 328, 122 L.R.R.M. at 2881.

⁷⁴ *Id.* at 326, 122 L.R.R.M. at 2880.

⁷⁵ *Id.*

⁷⁶ *Id.* at 329, 122 L.R.R.M. at 2883.

section 8(b)(4) where the picketed employer is not a neutral party in the dispute. As the court properly found, the legislative history and Supreme Court precedent clearly demonstrate that only neutral parties were to be protected by section 8(b)(4).⁷⁷ Prior to the Taft-Hartley Act, secondary boycotts were legal, but as Senator Taft remarked, section 8(b)(4) of the Act only "reverse[d] the effect of the law as to secondary boycotts," thereby making them illegal.⁷⁸ According to this legislative history, the quality that makes union behavior secondary is that it fits the common law definition of secondary boycott.⁷⁹ As the court noted, the classic definition, often quoted by the Supreme Court in connection with section 8(b)(4), is that a secondary boycott's sanctions bear "not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it."⁸⁰ Clearly, only neutrals were to be protected by section 8(b)(4), as the court found, and thus there was no basis for the Board's erroneous conclusion that the provision banned picketing by a party against an employer regardless of the latter's involvement in the underlying labor dispute. The court therefore correctly found that the Board's broad interpretation of section 8(b)(4)'s scope was without merit.

For the practitioner, *Production Workers Union's* importance lies in its clarification and reassertion of the application of section 8(b)(4). The case demonstrates that the substance of the section 8(b)(4) claim, and not the form, is controlling, and that a claim will be successful only where a neutral party is the object of the union pressure. The practitioner should be aware that the proscription of section 8(b)(4) turns upon the neutrality of the employer in relation to the party applying the pressure, and not upon the latter's status under the Act. As the D.C. Circuit correctly held, section 8(b)(4) does not exclude union involvement in all picketing by independent contractors.⁸¹ Rather, its proscription is limited to picketing against neutral parties.⁸²

III. REMEDIES

A. **Employer Liability for Aggravation of a Preexisting Mental Disability — You Take Your Victim as You Find Him*; Wakefield v. NLRB¹

Section 10(a)² of the National Labor Relations Act ("Act"), empowers the National Labor Relations Board ("Board") to prevent any person from engaging in any unfair labor practice listed in section 8³ of the Act. To this end, the Board may, among other

⁷⁷ *Id.* at 329, 122 L.R.R.M. at 2882-83.

⁷⁸ *Id.* at 328-29, 122 L.R.R.M. at 2882.

⁷⁹ *Id.* at 329, 122 L.R.R.M. at 2882.

⁸⁰ *Id.* (quoting *International Bhd. of Elec. Workers v. NLRB*, 181 F.2d 34, 37, 25 L.R.R.M. 2449 (2d Cir. 1950)).

⁸¹ *Production Workers Union*, 793 F.2d at 332-33, 122 L.R.R.M. at 2885.

⁸² *Id.* at 333, 122 L.R.R.M. at 2885.

* By Kyle M. Robertson, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 779 F.2d 1437, 121 L.R.R.M. 2305 (9th Cir. 1986).

² 29 U.S.C. § 160(a) (1982).

³ Under section 8(a)(1) of the Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section [7][to organize or support a union] . . ." 29 U.S.C. § 158(a)(1) (1982). Section 8(a)(3) makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1982).

remedies, order the offending employer or union to compensate the affected employee for backpay.⁴ The backpay award is intended to remedy the economic consequences of the unfair labor practice, and to deter future unfair labor practices.⁵

Traditionally, backpay awards excluded compensation for any period of disability between the time of the unlawful discharge and reinstatement, regardless of the cause of disability.⁶ In the 1967 case of *American Manufacturing Co.*, the Board reconsidered the general rule which disallowed backpay for periods of disability, and modified it to take into account the cause of an employee's inability to work.⁷ Backpay awards for periods of disability are proper, the Board held, where the causes of the disability are known and are attributable to events or environmental factors that would not have been present but for the unlawful discharge.⁸ The Board in *American Manufacturing* distinguished between incapacity due to illnesses that were not related to the unlawful discrimination, such as heart attacks and influenza, and those illnesses or injuries which are "attributable to the unlawful conduct," such as assaults on an employee, detrimental working conditions, or accidents suffered during the course of an interim job which the employee held after the employer unlawfully discharged him or her.⁹ The Board therefore concluded that equity required that where the disability is caused by the employer's unlawful actions, the wages lost during the period of disability should be included in backpay.¹⁰

⁴ 29 U.S.C. § 160(c) (1982). The Board may also order reinstatement of the affected employee. *Id.*

⁵ *N.L.R.B. v. United Marine Div.*, Local 333, 417 F.2d 865, 868, 72 L.R.R.M. 2620, 2623 (2d Cir. 1969), *cert. denied*, 397 U.S. 1008 (1970). Backpay frequently is awarded in cases where an employer has wrongfully discharged, demoted or refused to reinstate an employee. See GORMAN, BASIC TEXT ON LABOR LAW 138-39, 287, 533-34 (1976). For a discussion of the method of calculating backpay, see *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-49, 31 L.R.R.M. 2237, 2238-39 (1953) (although the Board once calculated backpay over the entire period between discharge and reinstatement, less the amount earned in the interim, the Board now computes backpay on a quarterly basis).

⁶ See *Melrose Processing Co.*, 151 N.L.R.B. 1352, 1354, 58 L.R.R.M. 1638 (1965), *enforced*, 351 F.2d 693, 60 L.R.R.M. 2328 (8th Cir. 1965) ("Broadly speaking, an employee who has been discriminatorily discharged, or denied rehire, is entitled to receive what he would have earned during the period of discrimination less backpay for periods during which he was voluntarily idle or unable to work, and less his interim earnings.") The rule in *Melrose* was overruled in *American Mfg. Co. of Texas*, 167 N.L.R.B. 520, 523, 66 L.R.R.M. 1122, 1126 (1967), which held that backpay awards should include disability periods caused by the employer's unlawful conduct.

In some cases, however, the Board computed backpay without tolling payment for a period of incapacity due to illness resulting from an accident on an interim job. See, e.g., *Moss Planing Mill Co.*, 103 N.L.R.B. 414, 419, 31 L.R.R.M. 1559 (1953), *enforced*, 206 F.2d 557, 32 L.R.R.M. 2530 (4th Cir. 1953) (the Board normally has excluded from computation of backpay any period of physical incapacity to work, except that where employee's incapacity to work for a period following his discharge was due to injury inflicted by employer, the Board would not abate backpay for that period); *Charles T. Reynolds Box Co.*, 155 N.L.R.B. 384, 386 n.1, 60 L.R.R.M. 1343, 1344 n.1 (1965), *enforced*, 399 F.2d 668, 68 L.R.R.M. 2974 (6th Cir. 1968) (allergic reaction to paint at interim job was caused by or resulted from the discrimination against employee and would not have occurred except for that discrimination; thus, backpay would not be abated during 11 month period of illness).

⁷ 167 N.L.R.B. 520, 522, 66 L.R.R.M. 1122, 1125 (1967).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Subsequent Board decisions applied the *American Manufacturing* principle, and examined the causal relationship between the unlawful activity and the disability in determining whether a backpay award for the period of disability was proper.¹¹ In 1979, however, the Seventh Circuit Court of Appeals in *Graves Trucking v. N.L.R.B.* limited the rule of *American Manufacturing*.¹² In *Graves*, the court found that an award of backpay for a disability attributable to employer misconduct was proper, but held that the Board abused its discretion in allowing backpay for as long in the future as the disability continued.¹³ The court based its decision to limit the time period for a backpay award on the Board's self-acknowledged lack of skill in personal injury matters where questions of the continued existence of the disability, its cause, and extent would be outside the Board's expertise.¹⁴ Thus, the *Graves Trucking* court suggested that the Board should

¹¹ For cases where the Board awarded backpay for disability caused by the employer's unlawful activity, see, e.g., *M.F.A. Milling Co.*, 170 N.L.R.B. 1079, 1080, 68 L.R.R.M. 1077, 1079 (1968), *enforced*, 463 F.2d 953, 80 L.R.R.M. 2412 (D.C. Cir. 1972) (employee entitled to backpay for period of disability where employer's unlawful activity placed employee in situation where risk of injury to his back was increased markedly: "[a]s it illegally set these environmental factors in motion, [employer] cannot successfully disclaim liability for their consequences"); *Fabric Mart Draperies*, 182 N.L.R.B. 390, 390, 74 L.R.R.M. 1155, 1158 (1970) (employee entitled to backpay for period of illness attributable to the employer's unlawful conduct in placing employee in a drafty work station that aggravated employee's arthritic condition); *Becton-Dickinson Co.*, 189 N.L.R.B. 787, 789, 77 L.R.R.M. 1627, 1631 (1971) (employee entitled to backpay for period of disability where employer harassment induced, or substantially contributed to, employee's acute anxiety reaction and loss of consciousness: "[t]o withhold a backpay order in these circumstances would permit [employer] to escape all liability for the loss of wages which [employee] may have suffered because of factor [employer] unlawfully set in motion, contrary to the remedial purposes of the Act"); *Graves Trucking, Inc.*, 246 N.L.R.B. 344, 345 & n.9, 102 L.R.R.M. 1504, 1506 & n.9 (1979), *enforced as modified in relevant part*, 692 F.2d 470, 111 L.R.R.M. 2862 (7th Cir. 1982) (employee, while never discharged *per se*, was entitled to backpay where employer's brutal physical assault prevented employee from resuming former position with employer and thus resulted in economic loss: "[t]he relationship between [employer's] unlawful conduct and [employee's] injury is clear and direct [T]o deny [employee] backpay would put him in a worse position than a discriminatee who has suffered an industrial injury during the course of interim employment, an occurrence which the Board has determined does not toll backpay. Yet, [employee's] injury is even more directly related to [employer's] unlawful conduct than such industrial injuries, and we find he is entitled to at least the same remedial relief."). For cases where the Board abated backpay during a period of disability, see, e.g., *Winn-Dixie Stores, Inc.*, 170 N.L.R.B. 1734, 1746 n.35, 69 L.R.R.M. 1219 (1968), *enforced*, 413 F.2d 1008, 71 L.R.R.M. 3003 (5th Cir. 1969) (employee not entitled to backpay for periods of illness during interim period, citing *American Mfg. Co.* for principle that disallowance of backpay for periods of illness is proper where the employee would have been absent from work because of such illnesses even if the employer had not unlawfully discharged the employee).

¹² 692 F.2d 470, 477, 111 L.R.R.M. 2862, 2867 (7th Cir. 1982).

¹³ *Id.* The court selected two years as the outer limit of a backpay award in the case. *Id.* at 477, 111 L.R.R.M. at 2868. The Board had awarded backpay to an employee for "a reasonable period after his injury resulting from said unlawful conduct no longer precludes him from performing his former or a substantially equivalent job" *Id.* at 474, 111 L.R.R.M. at 2865.

¹⁴ *Id.* at 476-77, 111 L.R.R.M. at 2867. The court analogized to the Board's policy of refusing to award employees backpay during periods of disability suffered as a result of assaults by union agents. *Id.* at 475-76, 111 L.R.R.M. at 2866-67. See, e.g., *International Union of Operating Eng'rs, Local 513*, 145 N.L.R.B. 554, 556, 54 L.R.R.M. 1429, 1431 (1963):

[T]o the extent that satisfaction of individual claims which are primarily private in nature may also serve to further the public interest in obtaining the peaceful resolution of labor disputes, such interest is equally well served by the individual's resort to those remedies traditionally used to process claims resulting from another's tortious conduct

refrain from awarding backpay for extended periods of disability suffered as a result of employer misconduct, and should leave the courts to fashion this remedy in a civil tort action.¹⁵

During the Survey year, in *Wakefield v. N.L.R.B.*, the Ninth Circuit Court of Appeals ruled that an employer is liable for backpay during disability periods caused by the employer's unlawful conduct aggravating the employee's nondisabling mental condition into a disabling condition.¹⁶ In adhering to the "time-honored legal principle that a wrongdoer takes his victim as he finds him," the Ninth Circuit refused to enforce the Board's order excluding from the backpay computation the period that the employee remained unable to work because the employer's unlawful conduct aggravated his preexisting psychological disability.¹⁷ The *Wakefield* decision consequently rejects the notion that the Board lacks the expertise to apply principles of tort law in computing the amount of backpay where the evidence reveals a causal relationship between the disability and the unlawful conduct.

Harold Wakefield had been a driver with Greyhound Taxi ("Greyhound") for six years when, in October 1974, he broke his arm while resisting an attempted robbery by a customer.¹⁸ Wakefield was disabled for three months.¹⁹ During this time, Wakefield alleged that he was harassed by Greyhound officials who believed Wakefield was a malingerer.²⁰ In response to the alleged harassment, Wakefield increased his union activities and the General Counsel filed an N.L.R.B. action on Wakefield's behalf in December 1975, charging Greyhound with unfair labor practices.²¹

Wakefield's relationship with Greyhound continued to deteriorate, and in February 1976, while the N.L.R.B. action was pending, Greyhound agents physically assaulted Wakefield.²² Wakefield sustained only minor physical injuries in the attack,²³ but he soon developed a severe post-traumatic anxiety neurosis requiring medical treatment.²⁴ The assault so frightened and intimidated Wakefield that he was forced to quit his job.²⁵

... [T]he numerous and complicated factual questions involved in settling such claims are not such questions as fall within the Board's special expertise, but do fall within the special competence of judge and jury

Id. See also *Union Nacional de Trabajadores*, 219 N.L.R.B. 414, 414, 89 L.R.R.M. 1741, 1742 (1975), *enforced*, 540 F.2d 1, 92 L.R.R.M. 3425 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) ("Use of [traditional] remedies would bring these employees before tribunals which have more expertise and are better equipped than this Board to measure the impact of tortious conduct, including violence, and to make the victims whole for loss of pay and any other injury.").

¹⁵ See *Graves Trucking*, 692 F.2d at 477, 111 L.R.R.M. at 2867-68.

¹⁶ 779 F.2d 1437, 1438, 121 L.R.R.M. 2305, 2306 (9th Cir. 1986).

¹⁷ *Id.*

¹⁸ *Id.* at 1437, 121 L.R.R.M. at 2305-06.

¹⁹ *Id.* at 1437, 121 L.R.R.M. at 2306.

²⁰ *Id.*

²¹ *Id.* The complaint alleged violations of sections 8(a)(1) and 8(a)(3) of the Act. See *Greyhound Taxi Co.*, 234 N.L.R.B. 865, 865, 97 L.R.R.M. 1385, 1385 (1978). See *supra* note 3 for text of the Act.

²² *Wakefield*, 779 F.2d at 1437, 121 L.R.R.M. at 2306.

²³ Wakefield suffered a sore back and sprained ankle. *Id.*

²⁴ *Id.*

²⁵ *Greyhound Taxi Co.*, 234 N.L.R.B. at 865, 97 L.R.R.M. at 1385. The Administrative Law Judge who heard the complaint found that the assault so frightened and intimidated Wakefield that he was forced to quit his job: "[i]f the discriminatory action of the Employer here had created a situation so intolerable to the employee, Wakefield, that he was compelled to quit his job, [employer] is guilty of a constructive discharge." *Id.* at 879, 97 L.R.R.M. at 1385.

Indeed, Wakefield's psychological disability prevented him from working at all for five years.²⁶

In 1978, two years after the assault, the Board issued an order finding that Greyhound had committed unfair labor practices through its harassment, assault, and constructive discharge of Wakefield.²⁷ At a supplemental hearing to determine the amount of backpay due Wakefield, an administrative law judge ("ALJ") found that Wakefield's psychological disability resulted solely from the circumstances surrounding the attack and the unlawful discharge.²⁸ The ALJ recommended a backpay award that compensated Wakefield for his entire disability period.²⁹

The Board accepted the ALJ's finding that Wakefield's physical disabilities resulted from the employer's misconduct, but split over whether Greyhound's unlawful conduct caused Wakefield's mental disability, and hence, whether Greyhound was liable for backpay during that period.³⁰ The evidence, according to the majority, contradicted the conclusion that the attack and unlawful discharge were the sole cause of Wakefield's disability, and failed to show that Wakefield would have been fit for work had the unfair practices not occurred.³¹ The Board majority found that Wakefield's psychological disability was at least partially, if not entirely, the result of a preexisting mental condition.³² In support of its conclusion, the Board cited Wakefield's erratic behavior prior to the discharge, his difficult relations with his own union, his unhappiness with previous employers, and his previous psychiatric treatment.³³ Thus, the Board ruled that Greyhound's backpay liability terminated when Wakefield recovered from his minor physical injuries but remained unable to work because of a preexisting psychological disability.³⁴

In dictum, the Board stated that even where the employee can show that his unavailability for work was due to the employer's unlawful conduct, "the Board [did not know if it] should be in the business of making open-ended awards for disability in the manner of a court in a civil tort action."³⁵ Thus, the Board expressed the same hesitancy that the Seventh Circuit noted in *Graves Trucking* about its expertise in matters involving personal injury and a continuing disability.³⁶ The sole dissenting Board member, in contrast, concluded that Greyhound's unlawful conduct aggravated Wakefield's mental condition.³⁷ Citing the tort law principle that a wrongdoer takes its victim as it finds him,

²⁶ *Wakefield*, 779 F.2d at 1437, 121 L.R.R.M. at 2306. A forensic psychiatrist described Wakefield's condition as a psychological disability which allowed him to go to college but not to work. See *Greyhound Taxi Co.*, 274 N.L.R.B. 459, 459, 118 L.R.R.M. 1568, 1569 (1985).

²⁷ *Greyhound Taxi Co.*, 234 N.L.R.B. at 865, 97 L.R.R.M. at 1385.

²⁸ See *Wakefield*, 779 F.2d at 1438, 121 L.R.R.M. at 2306.

²⁹ See *id.*

³⁰ See *Greyhound Taxi Co.*, 274 N.L.R.B. at 459, 118 L.R.R.M. at 1569. The Board, citing *American Mfg. Co.*, held that the employer was liable for backpay for the two week period of disability attributable to Wakefield's physical injuries. *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* The Board criticized the testimony of the General Counsel's principal psychiatric witness as falling short in proving that the unfair labor practices were the immediate triggering cause of Wakefield's psychological disability. See *id.*

³⁴ *Id.* at 459-60, 118 L.R.R.M. at 1569.

³⁵ *Id.* at 459, 118 L.R.R.M. at 1569 (citing *Graves Trucking, Inc. v. N.L.R.B.*, 692 F.2d 470, 476-77, 111 L.R.R.M. 2862, 2867 (7th Cir. 1982)).

³⁶ See *supra* notes 12-15 and accompanying text for a discussion of the Seventh Circuit's decision.

³⁷ *Greyhound Taxi Co.*, 274 N.L.R.B. at 460, 118 L.R.R.M. at 1570 (Dennis, dissenting).

the dissent concluded that the employer was liable for backpay for the entire period of disability.³⁸

The Ninth Circuit Court of Appeals, in a terse opinion, refused to enforce the Board's supplemental order limiting the employer's liability for backpay.³⁹ The court held that the Board's ruling lacked support in the record.⁴⁰ The Board, stated the court, rejected the ALJ's findings of causation because the evidence did not establish that the assault "standing alone" triggered Wakefield's psychological disability.⁴¹ The court noted, however, that the Board failed to appreciate that the assault was not the only unfair labor practice committed by Greyhound.⁴² Rather, Greyhound's overall pattern of unlawful conduct, including threats, harassment, and intimidation culminating in physical assault, caused Wakefield's psychological disability.⁴³ Thus, the assault did not have to be shown to be the "sole" cause of Wakefield's disability to hold Greyhound liable for Wakefield's backpay accruing since his unlawful discharge.⁴⁴

Having rejected the Board majority's decision, the court of appeals adopted the dissenting Board member's opinion that aggravation of a preexisting condition suffices to prove causation.⁴⁵ The court agreed with the ALJ's finding that Greyhound's unlawful conduct aggravated Wakefield's non-disabling mental condition into a disabling one.⁴⁶ The court then recomputed the period of disability for purposes of awarding backpay and remanded the case to the Board to recalculate Wakefield's backpay award to include the period during which Wakefield was psychologically disabled because of Greyhound's unlawful conduct.⁴⁷

The Ninth Circuit's decision in *Wakefield*, consistent with labor and tort law principles, establishes that a backpay award should include the entire period that an employer's unlawful conduct disables an employee, regardless of the nature of the disability. First,

³⁸ *Id.*

³⁹ *Wakefield*, 779 F.2d at 1438, 121 L.R.R.M. at 2306.

⁴⁰ *Id.* See *supra* note 33 for Board's criticism of the psychiatric testimony.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1439, 121 L.R.R.M. at 2307.

⁴⁴ *Id.* at 1438-39, 121 L.R.R.M. at 2306-07.

⁴⁵ See *id.* at 1438, 121 L.R.R.M. at 2306 (quoting *Greyhound Taxi Co.*, 274 N.L.R.B. at 460, 118 L.R.R.M. at 1570 (Dennis, dissenting)).

The court cited W. Prosser, *Law of Torts* for the principle that a wrongdoer takes its victim as it finds him. *Id.* Prosser describes the principle as follows:

It is as if a magic circle were drawn about the person, and one who breaks it, even by so much as a cut on the finger, becomes liable for all resulting harm to the person, although it may be death. The defendant is held liable when the defendant's negligence operates upon a concealed physical condition, such as pregnancy, or a latent disease, or susceptibility to disease, to produce consequences which the defendant could not reasonably anticipate. The defendant is held liable for unusual results of personal injuries which are regarded as unforeseeable The defendant of course is liable only for the extent to which the defendant's conduct has resulted in an aggravation of the pre-existing condition, and not for the condition as it was; but as to the aggravation, foreseeability is not a factor.

PROSSER AND KEETON, *ON THE LAW OF TORTS* 291-92 (W. Keeton, 5th ed. 1984) (footnotes omitted).

⁴⁶ *Wakefield*, 779 F.2d at 1438, 121 L.R.R.M. at 2306.

⁴⁷ *Id.* at 1439, 121 L.R.R.M. at 2307. See *Greyhound Taxi Co.*, 279 N.L.R.B. No. 144, 123 L.R.R.M. (1986) (Because Greyhound Taxi had not objected to the computation of backpay, but only to the ALJ's finding of Greyhound's liability for that backpay, the Board, on remand, adopted the ALJ's computation of Wakefield's backpay.)

the decision is consistent with the principle established in *American Manufacturing*, which focuses on whether the employer's unlawful conduct caused the disability, rather than on the type of disability that results. Second, the decision is consistent with the tort law principle which makes the wrongdoer liable for aggravation of a victim's preexisting injury. Finally, the decision fulfills the objective of section 10(c) of the Act by compensating an employee who has suffered from an employer's unlawful acts.

The *Wakefield* decision is consistent with the principles developed in *American Manufacturing*,⁴⁸ because it focuses on the causal link between the unlawful conduct and the injury, not on the type of injury suffered.⁴⁹ In cases following *American Manufacturing*, the Board had awarded backpay for disability periods where a preexisting physical condition was aggravated by the employer's unlawful conduct.⁵⁰ As a limiting principle, a distinction between preexisting physical conditions and preexisting psychological conditions cannot withstand scrutiny. The important factor in awarding backpay is not the type of disability aggravated by the employer's unlawful conduct, but the fact that the employer's unlawful conduct set in motion the disabling consequences.⁵¹ Where the causal relationship is clear, a period of disability for any preexisting condition aggravated by the employer's unlawful conduct, physical or psychological, should be included in the computation of backpay. Any limitation on the Board's ability to make open-ended awards for disability should be imposed by statute, and not by imposing limitations on time-honored legal principles.

The Ninth Circuit Court of Appeals in *Wakefield v. N.L.R.B.* extended the longstanding tort law principle that "a wrongdoer takes his victim as he finds him" to the labor law context. A wrongdoing employer whose unlawful conduct aggravated the victim-employee's preexisting psychological condition committed an unfair labor practice and should be responsible, no less than one who acts negligently, for the economic consequences of his or her acts. The award of backpay for a victim of such acts will serve to make the victim whole for his lost pay and deter future employment misconduct. Full compensation for aggravation of an injury therefore serves the purposes of section 10(c) of remedying the economic consequences of an unfair labor practice and deterring such unfair labor practices.

B. *Awarding Backpay for Employer Unfair Labor Practices to Undocumented Workers
Regardless of Legal Immigration Status: Local 512 Warehouse and Office Workers' Union
v. NLRB¹

Congress enacted section 8 of the National Labor Relations Act (the Act) to deter unfair labor practices. Under section 8(a)(5) of the Act, it is an unfair labor practice for

⁴⁸ See *supra* notes 7-10 and accompanying text for a discussion of *American Manufacturing*.

⁴⁹ *American Manufacturing*, 167 N.L.R.B. at 522, 66 L.R.R.M. at 1125.

⁵⁰ See *M.F.A. Milling Co.*, 170 N.L.R.B. at 1079-80, 68 L.R.R.M. at 1079 (preexisting back condition); *Fabric Mart Draperies*, 182 N.L.R.B. at 390, 74 L.R.R.M. at 1158 (arthritis).

⁵¹ See *M.F.A. Milling Co.*, 170 N.L.R.B. at 1079-80, 68 L.R.R.M. at 1079. Furthermore, to toll the computation of backpay during periods of disability where the employer's conduct has aggravated a preexisting condition would be an abuse of the Board's discretion, for it would put the employee who has suffered from the employer's egregious conduct in a worse position than an employee who simply was discharged unfairly and suffered an accident in an interim job. See *Graves Trucking, Inc.*, 246 N.L.R.B. at 345 n.9, 102 L.R.R.M. at 1506 n.9.

* By David L. Ruediger, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 795 F.2d 705, 122 L.R.R.M. 3113 (9th Cir. 1986).

an² employer to refuse to bargain collectively with its employees' representatives.³ If an employer undertakes unilateral action that affects terms and conditions of employment that are the subject of a collective bargaining agreement, without providing its employees' bargaining agent reasonable notice and an opportunity to negotiate, then the employer has violated section 8(a)(5) of the Act.⁴ An employer's decision to layoff an employee may violate section 8(a)(5) if the employer fails to notify its employees' bargaining agent prior to the termination of the worker's employment.⁵ The employer may have committed an unfair labor practice in terminating a worker's employment even if a collective bargaining agreement has not been executed so long as the employer and bargaining agent have entered into contract negotiations.⁶ Traditionally, when the NLRB finds that an employer has laid off employees in violation of section 8(a)(5) it will order that the employer reinstate the laid off workers and award them backpay for the period during which their employment was unlawfully terminated.⁷

When an employer unlawfully terminates an undocumented worker's employment in violation of section 8(a)(5), it is not clear whether the employee's illegal immigration status precludes a backpay award. In 1983, the Supreme Court, in *Sure-Tan, Inc. v. NLRB*, held that undocumented workers employed within the United States were entitled to the Act's protection,⁸ and that affording such protection to workers who had been discharged in violation of section 8 would not undermine the Immigration and Naturalization Act (INA).⁹ The Court in *Sure-Tan* concluded, however, that in awarding backpay to undocumented workers who had fled the country after their employers had wrongfully terminated their employment, the NLRB was required to take into account whether the employees had been legally available for work.¹⁰

In contrast, two years after *Sure-Tan*, the United States Court of Appeals for the Ninth Circuit, in *Bevles Co. v. Teamsters Local 986*, upheld an arbitration award mandating reinstatement and backpay to illegal aliens who had remained in the United States

² Section 8 of the National Labor Relations Act states, in part, that:

[i]t shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [this Act];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;

(3) by discrimination in regard to hire or tenure of employment in any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [this Act].

29 U.S.C. § 158(a) (1982).

³ 29 U.S.C. § 158(a)(5) (1982); see *supra* note 2.

⁴ *NLRB v. Katz*, 369 U.S. 736, 747, 50 L.R.R.M. 2177, 2182 (1962).

⁵ *Local 512*, 795 F.2d at 711, 122 L.R.R.M. at 3117 (citing *NLRB v. Carbonex Coal Co.*, 679 F.2d 200, 204, 110 L.R.R.M. 2566, 2569 (10th Cir. 1982)).

⁶ *Id.* (citing *Carbonex Coal*, 679 F.2d at 205, 110 L.R.R.M. at 2570).

⁷ See *id.* at 710, 122 L.R.R.M. at 3116.

⁸ 467 U.S. 883, 892, 116 L.R.R.M. 2857, 2861 (1984).

⁹ *Id.* at 894, 116 L.R.R.M. at 2861.

¹⁰ *Id.* at 904-05, 116 L.R.R.M. at 2866.

available for work.¹¹ Because *Bevles* involved the decision of a private arbitrator rather than a ruling by the NLRB, however, it remained unresolved whether *Sure-Tan* required the NLRB to condition backpay awards for undocumented workers, whose employment was terminated in violation of section 8 and who remained in the United States, on the employees' ability to prove that they were legally entitled to be present and employed in the United States.

During the *Survey* year, the Ninth Circuit, in *Local 512, Warehouse and Office Workers' Union v. NLRB*, ruled that undocumented workers, whose employment had been terminated in violation of section 8(a)(5) and who remained in the United States, were entitled to receive backpay regardless of their legal status.¹² The *Local 512* court reasoned that awarding backpay to undocumented workers, regardless of their legal status, would not conflict with immigration laws, but might actually promote laws aimed at proscribing legal entry, in addition to compensating for unfair labor practices.¹³ Consequently, in the Ninth Circuit, once the NLRB has determined that an employer has violated section 8(a)(5) by unlawfully laying off undocumented workers, *Local 512* obligates the employer to reinstate all workers who remain in the United States and award them backpay, regardless of whether the workers were legally entitled to be present and employed in the United States.

In *Local 512*, an administrative law judge (ALJ) found that the employer, Felbro Inc., shortly after beginning collective bargaining negotiations with the employees' bargaining agent, laid off three undocumented workers without notifying the bargaining agent.¹⁴ After the bargaining agent filed the complaint, but prior to the hearing before the ALJ, Felbro reinstated the three employees.¹⁵ The ALJ concluded that Felbro's termination of the workers' employment constituted a violation of section 8(a)(5),¹⁶ and recommended both reinstatement, with which the employer had already complied, and compensatory backpay for the period during which the workers had been laid off.¹⁷

The NLRB affirmed the ALJ's finding that Felbro had violated section 8(a)(5),¹⁸ but amended the remedial order. Relying on *Sure-Tan*, the NLRB conditioned the backpay awards on the undocumented workers' ability to demonstrate that they were legally entitled to be present and employed in the United States.¹⁹ Following the NLRB's decision, the bargaining agent petitioned for review of the conditional backpay remedy, the NLRB petitioned for enforcement of its order, and the employer contested the finding of liability as well as the award.²⁰ The principal issue before the United States Court of Appeals for the Ninth Circuit was whether *Sure-Tan* required the NLRB to condition its backpay award on proof that the undocumented workers were legally entitled to be present and employed in the United States.

¹¹ 791 F.2d 1391, 1394, 122 L.R.R.M. 2666, 2668 (9th Cir. 1986).

¹² 795 F.2d at 709, 122 L.R.R.M. at 3115.

¹³ See *id.* at 719-20, 122 L.R.R.M. at 3124.

¹⁴ *Id.* at 709, 122 L.R.R.M. at 3115-16.

¹⁵ *Id.* at 709, 122 L.R.R.M. at 3116.

¹⁶ *Id.* at 709, 122 L.R.R.M. at 3115. The ALJ also found that Felbro had violated sections 8(a)(1) and 8(a)(3) of the Act, 29 U.S.C. §§ 158(a)(1), (a)(3), which prohibit employers from interfering with, coercing, restraining or discriminating against employees in the exercise of their rights guaranteed by the Act. *Id.*

¹⁷ *Local 512*, 795 F.2d at 709-10, 122 L.R.R.M. at 3116.

¹⁸ *Id.* at 710, 122 L.R.R.M. at 3116.

¹⁹ *Id.*

²⁰ See *id.* at 709-10, 122 L.R.R.M. at 3116.

The Ninth Circuit, in concluding that the undocumented workers were entitled to backpay regardless of their legal status, first reviewed the Supreme Court's decision in *Sure-Tan*.²¹ The court in *Local 512* noted that in *Sure-Tan*, the employer, for purposes of retaliation, notified the Immigration and Naturalization Service (INS) that it had reason to believe that several of its employees were undocumented aliens.²² As a result, the *Local 512* court indicated, five employees in *Sure-Tan*, after being arrested by INS officials, voluntarily left the country to avoid deportation.²³ The *Local 512* court noted that the Seventh Circuit, in *Sure-Tan*, had affirmed the NLRB's conclusion that the employer had violated section 8 of the Act by constructively discharging the employees,²⁴ and ordered that the employer extend an offer of reinstatement to the employees. The court also suggested that the employer be required to pay the employees six months of backpay.²⁵ The *Local 512* court indicated that the Supreme Court, in *Sure-Tan*, affirmed the Seventh Circuit's holding that undocumented aliens were entitled to protection under the Act, and that such protection was consistent with both the purposes of fostering collective bargaining and deterring illegal entry.²⁶ Relying on the reasoning of the Supreme Court in *Sure-Tan*, the court in *Local 512* concluded that the undocumented Felbro employees were entitled to protection under the Act.²⁷

The *Local 512* court then addressed the propriety of awarding backpay to illegal aliens. The *Local 512* court noted that the Supreme Court, in *Sure-Tan*, concluded that the backpay award violated the purposes of the Act because it was not conditioned upon the employees' legal availability for work.²⁸ To be consistent with *Sure-Tan*, the *Local 512* court noted, a backpay remedy for violations of the Act must be formulated so that it compensates employees for the actual damages they suffered from an employer's unfair labor practices.²⁹ According to the *Local 512* court, because the *Sure-Tan* workers left the country with no indication of when they might legally re-enter,³⁰ the Supreme Court held that, absent proof of the employees' legal availability for work, the imposition of a six month backpay award was purely speculative and thus, could not accurately compensate the workers for the actual damages they had suffered.³¹

The *Local 512* court interpreted *Sure-Tan* to apply only to workers who left the United States and were unable to return legally. From this, the court extrapolated that because the undocumented Felbro employees remained in the United States available

²¹ See *id.* at 720, 122 L.R.R.M. at 3124. The court in *Local 512* first addressed the issue of its jurisdictional authority to review the case and to amend the NLRB's conditional order. The court concluded that it had both the authority to review the case and the right to amend the order prior to the outcome of the compliance hearing. *Id.* at 710, 713-15, 122 L.R.R.M. at 3116, 3119-20.

²² *Id.* at 715, 122 L.R.R.M. at 3120-21 (citing *Sure-Tan*, 467 U.S. at 887, 116 L.R.R.M. at 2859).

²³ *Id.* (citing *Sure-Tan*, 467 U.S. at 887, 116 L.R.R.M. at 2859).

²⁴ See *id.* at 715-16, 122 L.R.R.M. at 3120-21 (citing *Sure-Tan*, 467 U.S. at 888-89, 116 L.R.R.M. at 2859-60).

²⁵ *Id.* at 716, 122 L.R.R.M. at 3121 (citing *Sure-Tan*, 467 U.S. at 889-890, 116 L.R.R.M. at 2860).

²⁶ *Id.* (citing *Sure-Tan*, 467 U.S. at 892-94, 116 L.R.R.M. at 2861).

²⁷ See *id.*

²⁸ *Id.* (citing *Sure-Tan*, 467 U.S. at 903-05, 116 L.R.R.M. at 2866).

²⁹ *Id.* (citing *Sure-Tan*, 467 U.S. at 900-01, 116 L.R.R.M. at 2864).

³⁰ *Id.* at 717, 122 L.R.R.M. at 3121 (citing *Sure-Tan*, 467 U.S. at 904, 116 L.R.R.M. at 2866).

³¹ *Id.* at 716-17, 122 L.R.R.M. at 3121-22 (citing *Sure-Tan*, 467 U.S. at 901-05, 116 L.R.R.M. at 2864-66).

for work, they were entitled to backpay regardless of their legal status.³² Unlike the employees in *Sure-Tan*, the *Local 512* court noted that all the Felbro employees had returned to work thus making it possible for the NLRB to determine precisely the amount of backpay which would compensate the workers for their lost wages.³³ In addition, the *Local 512* court noted, the *Sure-Tan* Court was concerned that awarding backpay to undocumented workers who were no longer present in the United States would undermine the INA by compensating aliens for work they could not legally perform.³⁴ Conversely, the *Local 512* court concluded, because the Felbro employees remained in the United States, the issue of whether awarding backpay would undermine the INA was not relevant.³⁵

To support its conclusion that *Sure-Tan* did not require employees' legal status to be considered in determining backpay, the *Local 512* court cited *Bevles Co. v. Teamsters Local 986*,³⁶ in which the Ninth Circuit ruled that *Sure-Tan* did not bar undocumented aliens, whose employment was terminated in violation of a collective bargaining agreement and who remained in the United States, from recovering backpay awarded by a private arbitrator.³⁷ In addition to *Bevles*, the *Local 512* court cited a long line of cases in which employees' legal status had been disregarded in determining their eligibility for backpay.³⁸ Nowhere in the *Sure-Tan* decision, noted the *Local 512* court, did the Supreme Court indicate its desire to overrule such cases.³⁹ Rather, the *Local 512* court emphasized, the Supreme Court in *Sure-Tan* was concerned only with the effects of awarding backpay to undocumented aliens who had left the United States and thus could not be considered available for work.⁴⁰

Having concluded that *Sure-Tan* did not prohibit the awarding of backpay to undocumented workers who remained in the United States, the *Local 512* court turned to the more general issue of whether awarding backpay to undocumented workers who had not demonstrated that they were legally entitled to work in the United States conflicted with the purpose of immigration laws. The court indicated that the Supreme Court in *Sure-Tan* identified that the two major goals of the INA were the prevention of the loss of American workers' jobs and the protection of wages and employment conditions for American workers.⁴¹ While the Supreme Court concluded that extending

³² *Id.* at 717, 122 L.R.R.M. at 3122.

³³ *Id.*

³⁴ *Id.* at 719, 122 L.R.R.M. at 3123 (citing *Sure-Tan*, 467 U.S. at 902-05, 116 L.R.R.M. at 2865-66).

³⁵ *Id.*

³⁶ *Id.* at 717, 122 L.R.R.M. at 3122.

³⁷ 491 F.2d at 1393, 122 L.R.R.M. at 2667.

³⁸ *Local 512*, 495 F.2d at 717-18, 122 L.R.R.M. at 3122 (citing NLRB v. Apollo Tire Co., 604 F.2d 1180, 1183, 102 L.R.R.M. 2043, 2045 (9th Cir. 1979) (undocumented workers entitled to full protection under the Act); Amay's Bakery & Noodle Co., 227 N.L.R.B. 214, 214-15, 94 L.R.R.M. 1165, 1166-67 (1976) (reinstatement and backpay awarded to undocumented discriminatees); Justrite Mfg. Co., 238 N.L.R.B. 57, 65-68, 99 L.R.R.M. 1577, 1578 (1978) (underage discriminatee entitled to backpay); New Foodland, Inc., 205 N.L.R.B. 418, 420-21, 84 L.R.R.M. 1253, 1254 (1973) (same); *In re Local 57*, Int'l Union of Operating Eng'rs, 108 N.L.R.B. 1225, 1227-28, 34 L.R.R.M. 1172, 1173-74 (1954) (engineer discriminatee without valid state license awarded backpay); Robinson Freight Lines, 129 N.L.R.B. 1040, 1042, 47 L.R.R.M. 1127, 1128 (1960) (truck driver discriminatee awarded backpay despite no valid driver's license)).

³⁹ *Id.* at 717, 122 L.R.R.M. at 3122.

⁴⁰ See *id.* at 716-17, 122 L.R.R.M. at 3121-22.

⁴¹ *Id.* at 720, 122 L.R.R.M. at 3124 (citing *Sure-Tan*, 467 U.S. at 893, 116 L.R.R.M. at 2861).

the Act's protection to undocumented workers furthered both goals by decreasing the economic advantage of hiring undocumented workers,⁴² the *Local 512* court reasoned that conditioning backpay awards on proof that employees are legally entitled to be present and employed in the United States denies undocumented workers full protection under the Act, thereby making the hiring of undocumented workers more attractive to employers.⁴³ Thus, in addition to encouraging unfair labor practices, the *Local 512* court concluded that conditioning backpay on employees' legal status conflicts with the purposes of the INA.⁴⁴

The *Local 512* court also indicated that the determination of alien status is a matter requiring the expertise of the INS.⁴⁵ In contrast, the *Local 512* court stated, by conditioning the award of backpay on employees' legal status, the determination of legal status winds up in the hands of a NLRB compliance officer untrained in immigration law.⁴⁶ The court therefore concluded that because the complexity of immigration law requires that the determination of the legal status of undocumented employees be left for INS officials,⁴⁷ backpay awards should not be conditioned upon the legal status of workers whose employment has been unlawfully terminated.⁴⁸

Dissenting from the majority opinion, Judge Beezer argued that while undocumented aliens are entitled to the Act's protection, *Sure-Tan* requires that backpay not be awarded absent proof of the employees' legal immigration status.⁴⁹ Judge Beezer reasoned that the majority's interpretation of *Sure-Tan* was too narrow.⁵⁰ To support his argument, Judge Beezer noted that in *Sure-Tan* the Court stated that backpay was to be tolled unless undocumented workers could prove that they were "lawfully entitled to be present and employed in the United States."⁵¹

In addition, Judge Beezer argued that the majority's holding in *Local 512* conflicts with immigration laws.⁵² Judge Beezer stated that aliens who seek employment in the United States without certification from the Secretary of Labor are subject to exclusion from the country under the INA.⁵³ An alien who has obtained employment contrary to INA regulations, asserted Judge Beezer, cannot complain when his employment is terminated.⁵⁴ Judge Beezer argued, however, that to permit backpay to be awarded to aliens lacking documentation would have the effect of sanctioning violations of the INA by the alien's continued illegal presence in the country.⁵⁵ For these reasons, Judge Beezer concluded, the *Local 512* court erred in holding that it was not bound by *Sure-Tan* to require the NLRB to condition its backpay award on proof of the workers' legal status.⁵⁶

⁴² *Id.* (citing *Sure-Tan*, 467 U.S. at 893, 116 L.R.R.M. at 2861).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (citing *Apollo Tire*, 604 F.2d 1180, 1183, 102 L.R.R.M. 2043, 2045 (9th Cir. 1979)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.* at 723, 122 L.R.R.M. at 3126 (Beezer, J., dissenting).

⁵⁰ *Id.* at 723, 122 L.R.R.M. at 3126-27 (Beezer, J., dissenting).

⁵¹ *Id.* at 723, 122 L.R.R.M. at 3126 (Beezer, J., dissenting) (quoting *Sure-Tan*, 467 U.S. at 903, 116 L.R.R.M. at 2865).

⁵² *Id.* at 726, 122 L.R.R.M. at 3129 (Beezer, J., dissenting).

⁵³ *Id.* (Beezer, J., dissenting).

⁵⁴ *Id.* (Beezer, J., dissenting).

⁵⁵ *Id.* (Beezer, J., dissenting).

⁵⁶ *Id.* at 727, 122 L.R.R.M. at 3129-30 (Beezer, J., dissenting).

The Ninth Circuit's decision in *Local 512* is significant in that it expands the remedies afforded to undocumented aliens under the Act. After *Local 512*, in the Ninth Circuit, undocumented aliens whose employment was terminated by an employer in violation of section 8 of the Act are entitled to backpay regardless of their legal status so long as they remain in the United States. Nevertheless, as suggested by Judge Beezer in dissent, despite the majority's attempt to justify its decision, the *Local 512* holding is at odds with the Supreme Court's decision in *Sure-Tan*.

The contradiction between the two decisions stems from the *Local 512* court's failure to appreciate the importance of the term "legal availability" for work. Through clever reasoning, the *Local 512* court attempts to distinguish the two cases by emphasizing that the workers in *Sure-Tan* were not legally available for work because they had left the country and could not legally return, but the Felbro workers, who remained in the United States, were available for work as evidenced by their reinstatement by Felbro prior to the hearing before the ALJ. The *Local 512* court dodged the issue of whether the workers were lawfully entitled to work in the United States by reasoning that legal status was not relevant. Yet, in defining when employees are to be considered unavailable for work, the Supreme Court in *Sure-Tan* stated in plain language that "employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."⁵⁷ Thus, according to *Sure-Tan*, for the Felbro employees to receive backpay, they must have been legally available for work which by definition requires that they were legally entitled to be present and employed in the United States. As such, the *Local 512* court's holding entitling undocumented workers to backpay regardless of legal status directly conflicts with the Supreme Court's ruling in *Sure-Tan* and, hence, it is unlikely that the decision will be followed by other circuits.

Notwithstanding its failure to abide by the Supreme Court's holding in *Sure-Tan*, the court's decision in *Local 512* is meritorious in several respects. First, in ruling that undocumented workers are entitled to backpay regardless of their legal status, the *Local 512* decision lends support to the Supreme Court's initial ruling in *Sure-Tan* that undocumented workers are entitled to the Act's protection. Prior to *Local 512*, the requirement that undocumented workers demonstrate that they were legally entitled to be present and employed in the United States to recover backpay effectively denied such workers protection under the Act. Second, by ruling that undocumented workers are entitled to receive backpay when employers violate section 8 of the Act regardless of the worker's legal status, *Local 512* deters unfair labor practices and promotes collective bargaining by reducing the economic advantage that employers obtain by hiring undocumented workers. Third, the *Local 512* decision provides an indication of the proper role of the NLRB in deciding immigration issues. According to *Local 512*, decisions regarding legal immigration status are to be deferred to the INS. Thus, while the *Local 512* decision conflicts with that of the Supreme Court in *Sure-Tan*, it provides several strong reasons why the Supreme Court might wish to re-evaluate its decision so as to allow undocumented workers to recover backpay for section 8 violations regardless of the workers' legal status.

In sum, *Local 512 Warehouse and Office Workers' Union v. NLRB* dramatically expands the protection afforded undocumented employees under section 8(a)(5) of the Act, by

⁵⁷ *Sure-Tan*, 467 U.S. at 903, 116 L.R.R.M. at 2865.

not requiring that backpay awards be conditioned upon proof of the employees' legal status. In so doing, *Local 512* is at odds with the Supreme Court's earlier decision in *Sure-Tan* in which the Court clearly stated that backpay awards were to be conditioned upon employees' legal availability for work. Nevertheless, absent reversal of *Local 512* by the Supreme Court, in the Ninth Circuit undocumented workers, whose employment was unfairly terminated by an employer in violation of section 8 of the Act, need only prove that they remained in the United States available for work to be entitled to receive backpay for the period during which the employer had unlawfully terminated their employment.

C. **Permissible Remedies for Employer's Refusal to Allow Representation at Investigatory Interviews: Communication Workers of America v. NLRB*¹

In 1975, the United States Supreme Court held in *NLRB v. Weingarten*² that it is an unfair labor practice under the National Labor Relations Act (the Act) for an employer to refuse an employee's request for union representation at an investigatory interview that the employee reasonably believes could result in disciplinary action.³ In the years immediately following *Weingarten*, the National Labor Relations Board (the Board) typically ordered reinstatement with back pay, in addition to cease and desist orders, as the appropriate remedy when an employer discharged an employee following a meeting that violated the *Weingarten* principle.⁴ Courts proved reluctant, however, to enforce such "make-whole" remedies when the employer discharged the employee for cause and not merely because the employee requested representation.⁵ These courts reasoned that the Board's remedy conflicted with section 10(c) of the Act, which grants the Board

* By Carole A. Casey, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 784 F.2d 847, 121 L.R.R.M. 3078 (7th Cir. 1986).

² 420 U.S. 251, 88 L.R.R.M. 2689 (1975).

³ National Labor Relations Act, § 7, 29 U.S.C. § 157 (1982), provides in pertinent part: Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment

....
Id.; *Weingarten*, 420 U.S. 251, 88 L.R.R.M. 2689 (1975).

⁴ *Kraft Foods, Inc.*, 251 N.L.R.B. 598, 105 L.R.R.M. 1233 (1980); *Certified Grocers of Calif.*, 227 N.L.R.B. 1211, 94 L.R.R.M. 1279 (1977), *enforcement denied on other grounds*, 587 F.2d 449 (9th Cir. 1979). The Board's standard for determining the appropriate remedy for *Weingarten* cases was articulated in *Kraft Foods*. Under *Kraft Foods*, an employee who was fired following an interview violating his or her *Weingarten* rights, states a prima facie case that reinstatement with back pay is the appropriate remedy by showing that the employer "conducted an investigatory interview in violation of *Weingarten* and that [he or she] was subsequently disciplined for the conduct which was the subject of the unlawful interview." 251 N.L.R.B. at 598, 105 L.R.R.M. at 1233. The employer avoids the make-whole remedy only if it can prove "that its decision to discipline the employee in question was not based on information obtained at the unlawful interview." *Id.*

⁵ *Communication Workers of America v. NLRB*, 784 F.2d 847, 848, 121 L.R.R.M. 3078, 3079 (7th Cir. 1986). See, e.g., *Pacific Telephone and Telegraph Co. v. NLRB*, 711 F.2d 134, 113 L.R.R.M. 3529 (9th Cir. 1983); *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 109 L.R.R.M. 2005 (8th Cir. 1981).

broad discretion in fashioning remedies, but precludes reinstatement with back pay as a remedy if the employer discharged the employee for cause.⁶

In 1984, in *Taracorp Industries*, the Board reconsidered its policy and ruled that it would no longer order reinstatement with back pay for *Weingarten* violations if the employer ultimately discharged the employee for cause.⁷ The Board reasoned that section 10(c) of the Act precluded a make-whole remedy where the employer disciplined the employee because of misconduct unrelated to the request for union representation.⁸ The Board stated further that permitting the prospect of reinstatement in *Weingarten* cases was bad policy because it transformed investigatory interviews into formal adversarial proceedings, thereby discouraging employers from holding investigatory interviews before disciplining employees suspected of misconduct.⁹ Thus, in *Taracorp*, the Board expressly overruled a long line of its decisions that upheld the make-whole remedy for *Weingarten* violations.¹⁰

During the Survey year, in *Communication Workers of America v. NLRB*, the United States Court of Appeals for the Seventh Circuit considered whether the Board's new policy of refusing to order make-whole remedies in *Weingarten* cases was permissible under section 10(c) of the Act.¹¹ The court held that the Board's construction was not only a permissible interpretation of the Act, but a well reasoned one.¹² In addition, because of the procedural complexities of this case, the court examined whether the Board could apply its new policy on remand, and revoke its original decision reinstating the employee.¹³ The court stated that because the court had never held in its earlier

⁶ *Communication Workers*, 784 F.2d at 848, 121 L.R.R.M. at 3079. Section 10(c) of the Act, 29 U.S.C. § 160(c) (1982), provides in pertinent part:

If upon the preponderance of the evidence taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter No order of the Board shall require the reinstatement and back pay of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Id.

⁷ *Taracorp Indus.*, 273 N.L.R.B. 221, 117 L.R.R.M. 1497 (1984). The Board stated that a make-whole remedy is still appropriate, however, if the employee was discharged or disciplined because he or she asserted the right to representation. *Id.* at 223 n.12, 117 L.R.R.M. at 1499 n.12. For an analysis of the *Taracorp* decision, see 1984-85 *Annual Survey of Labor Relations and Employment Discrimination Law*, 27 B.C. L. REV. 95 (1985).

⁸ *Taracorp*, 273 N.L.R.B. at 222-23, 117 L.R.R.M. at 1498-99.

⁹ *Id.* at 223, 117 L.R.R.M. at 1499.

¹⁰ *Id.* at 222, 117 L.R.R.M. at 1498. For examples of cases overruled by *Taracorp*, see, e.g., *Kraft Foods, Inc.*, 251 N.L.R.B. 598, 105 L.R.R.M. 1233 (1980); *Illinois Bell Telephone Co.*, 251 N.L.R.B. 932, 105 L.R.R.M. 1236 (1980); *Ohio Masonic Home*, 251 N.L.R.B. 606, 105 L.R.R.M. 1281 (1980).

¹¹ 784 F.2d 847, 121 L.R.R.M. 3078 (7th Cir. 1986).

¹² *Id.* at 852, 121 L.R.R.M. at 3082-83.

¹³ The decisions overruled by *Taracorp* included *Illinois Bell Telephone*, 251 N.L.R.B. 937, 105 L.R.R.M. 1236 (1980), the Board's earlier decision involving the same employer and employee as in *Communication Workers*. When the Board sought enforcement of its order to reinstate Hatfield with back pay, the Court of Appeals for the Seventh Circuit affirmed the Board's cease and desist

decision that the Board's old policy was the only permissible one under the Act, the Board, on remand, could apply its new policy.¹⁴ Thus, after *Communication Workers* the Board may refuse to order reinstatement with back pay in *Weingarten* cases, and further, the Board may apply new policies to cases on remand where the new policy is a permissible interpretation of the Act.

In *Communication Workers*,¹⁵ a co-worker told Cary Hatfield, a long distance operator employed by Illinois Bell Telephone Company, that a security agent was coming to the company to investigate operators who were adjusting toll calls and that Hatfield might lose her job.¹⁶ When the security agent told Hatfield he would question her as part of his investigation, Hatfield requested union representation.¹⁷ Because the union steward was unavailable to attend the meeting, Hatfield requested that the former assistant union steward accompany her.¹⁸ The security agent refused to allow the representative to attend on the grounds that the woman was not the current union steward.¹⁹ The agent then continued the interview, without informing Hatfield that she could terminate the interview until a union steward was available.²⁰ During the interview, Hatfield signed a written statement admitting that she had reduced the toll on several long distance calls and had placed several calls for herself free of charge.²¹ One week later, Illinois Bell fired Hatfield.²²

The Board found that the Illinois Bell Telephone Company had committed an unfair labor practice under section 8(a)(1) of the Act by refusing to allow union representation at a disciplinary interview despite a request by the employee.²³ The Board ordered the company to cease and desist from further violations and to reinstate Hatfield with back pay and expunge all references to the disciplinary action from her personnel file.²⁴ When the Board sought enforcement of its order, the United States Court of

order but remanded for further proceedings on the issue of whether reinstatement with back pay was an appropriate remedy. 674 F.2d 618, 623, 109 L.R.R.M. 3244, 3248 (7th Cir. 1982). The court instructed the Board to determine whether Illinois Bell could show it would have fired Hatfield based on evidence available to the company *independent* from that obtained at the unlawful interview, in which case reinstatement with back pay would be denied. *Id.* Before further determinations were made, however, the Board changed its policy on make-whole remedies in *Taracorp*. See *supra* notes 7-9 and accompanying text.

¹⁴ *Communication Workers*, 784 F.2d at 849, 121 L.R.R.M. at 3080.

¹⁵ 784 F.2d 847, 121 L.R.R.M. 3078 (7th Cir. 1986). The facts of *Communication Workers* are set forth in more detail in the court's original decision, *NLRB v. Illinois Bell Tel. Co.*, 674 F.2d 618, 109 L.R.R.M. 3244 (7th Cir. 1982).

¹⁶ *Illinois Bell*, 674 F.2d at 620, 109 L.R.R.M. at 3246.

¹⁷ *Id.*

¹⁸ *Id.* The union steward was unavailable because she worked a different shift. *Id.*

¹⁹ *Id.* The court rejected the company's contention that the former assistant union steward, Cheryl Simonton, was not an appropriate representative. The court pointed out that Simonton, as a former union officer, had the knowledge and expertise needed to protect an employee at an investigatory interview. *Id.* at 622, 109 L.R.R.M. at 3247.

²⁰ *Id.* at 621, 109 L.R.R.M. at 3246.

²¹ *Id.* at 620, 109 L.R.R.M. at 3246.

²² *Id.* at 621, 109 L.R.R.M. at 3246.

²³ *Id.* National Labor Relations Act, § 8(a)(1), 29 U.S.C. § 158 (1982), provides in pertinent part: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title" *Id.* For the text of § 7 of the Act, 29 U.S.C. § 157, see *supra* note 3.

²⁴ 674 F.2d at 621, 109 L.R.R.M. at 3246.

Appeals for the Seventh Circuit affirmed the cease and desist order, but refused to enforce the make-whole remedy.²⁵

The court disagreed with the Board's make-whole remedy because Illinois Bell discharged Hatfield for cause, not because she sought union representation.²⁶ The court indicated that a make-whole remedy in the situation where an employee was discharged for cause conflicted with section 10(c) of the Act, citing several instances where other courts had refused to enforce make-whole remedies.²⁷ The court stated that it needed to balance the company's need for an honest work force against the duty to ensure that the Act's policies were carried out.²⁸ The court concluded, therefore, that reinstatement was an appropriate remedy only if the decision to fire Hatfield resulted solely from evidence gathered at the investigatory interview.²⁹

The court elaborated, however, that if the company could show that it had sufficient evidence to fire Hatfield wholly independent from that obtained at the interview, then the Board was precluded from ordering a make-whole remedy.³⁰ Consequently, the court remanded the case to the Board to determine whether or not reinstatement with back pay was the appropriate remedy.³¹ In so doing, the court ordered the Board to follow the Board's earlier decision in *Kraft Foods* which held that once an employee shows that disciplinary action was taken "for the conduct which was the subject of the unlawful interview," the burden shifts to the employer to prove that it would have fired the employee based on evidence independent from that gathered at the interview.³²

Before the *Illinois Bell* Board made further determinations upon remand, the Board, in *Taracorp*, changed its policy, holding that make-whole remedies were inappropriate when an employee was discharged for cause.³³ Citing *Taracorp*, the *Illinois Bell* Board withdrew its order to reinstate Hatfield, leaving intact only the cease and desist order.³⁴ In response, the union asked the Seventh Circuit to enforce the Board's original *Illinois Bell* decision.³⁵ The union stated two reasons for its request: first, the 1982 remand required reinstatement; and second, the Board had misconstrued section 10(c) of the Act in *Taracorp*.³⁶

On appeal, the Seventh Circuit, in *Communication Workers*, refused to revive its previous order that the Board follow *Kraft Foods*, holding that the Board was not bound

²⁵ *Id.*

²⁶ *Id.* at 623, 109 L.R.R.M. at 3248.

²⁷ *Id.* For the language of § 10(c) of the Act, 29 U.S.C. 160(c), see *supra* note 6. The court cited *NLRB v. Potter Elec. Co.*, 600 F.2d 120, 101 L.R.R.M. 2378 (8th Cir. 1979) and *Montgomery Ward & Co., Inc. v. NLRB*, 664 F.2d 1095, 109 L.R.R.M. 2005 (8th Cir. 1981). *Id.*

²⁸ *Illinois Bell*, 674 F.2d at 623, 109 L.R.R.M. at 3248.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Communication Workers*, 784 F.2d at 848, 121 L.R.R.M. at 3079. For a discussion of *Kraft Foods*, see *supra* note 4.

³³ *Communication Workers*, 784 F.2d at 848, 121 L.R.R.M. at 3079. In *Taracorp*, the Board expressly overruled *Illinois Bell*, 273 N.L.R.B. No. 54, 117 L.R.R.M. 1497 (1984).

³⁴ *Communication Workers*, 784 F.2d at 848, 121 L.R.R.M. at 3079-80. The case was heard before Board members Dotson, Hunter and Dennis. Board member Dennis dissented, stating that the court of appeals' 1982 remand "required the Board to apply the *Kraft Foods* doctrine notwithstanding the Board's abrogation of that doctrine in 1984." *Id.* at 849, 121 L.R.R.M. at 3080.

³⁵ *Id.*

³⁶ *Id.*

by a remand order if it had changed its policy in the interim.³⁷ Furthermore, the court held that the Board's new policy under *Taracorp* was a reasonable construction of section 10(c) of the Act.³⁸ Addressing first whether the Board was bound by the court's 1982 remand, the court pointed out that the Board was free to change its policy and rules as long as the change was within the Board's power.³⁹ The court stated that the Board was not required to ask the court's permission before it implemented a new policy merely because a case was pending on remand from the court.⁴⁰ The court stated further that at the time it remanded *Illinois Bell*, it was not ordering that the "only permissible test" be applied; rather, it was ordering that the Board's *current* policy be applied.⁴¹ Nothing in the remand order, the court pointed out, stated that the Board was required to apply the *Kraft Foods* doctrine as the only permissible course of action under the Act.⁴²

The court next addressed whether the Board's new policy of not ordering make-whole remedies for *Weingarten* violations was a permissible construction of section 10(c) of the Act.⁴³ The court held that the Board's new policy did comport with section 10(c) of the Act, but the court cautioned that section 10(c) did not always preclude make-whole remedies when the employer discharges the employee for cause.⁴⁴ The court emphasized that the phrase "discharged for cause," from section 10(c) of the Act, should be viewed as a two-prong test.⁴⁵ First, the requirement that there be a "cause" for the discharge requires employee misconduct, not just a "good reason."⁴⁶ Next, the court stated, there must be a causal link between the misconduct and the discharge.⁴⁷ The court explained that if *Illinois Bell* had fired Hatfield for joining the union and then subsequently discovered her misconduct, the Board would not be precluded from ordering a make-whole remedy, because the real reason for her discharge was the protected activity.⁴⁸ Similarly, in a dual motive situation, the court elaborated, the Board could order reinstatement with back pay, unless the employer could prove that she would have been fired for the misconduct alone.⁴⁹

The court then suggested certain presumptions and burdens of proof that the Board might use in establishing causal links.⁵⁰ For example, the court stated, if the Board found that an employee was fired following a meeting where his or her *Weingarten* rights were violated, the Board should presume that the employee was fired because of the request for representation.⁵¹ The employer would then bear the burden of proving by a preponderance of the evidence that the employee would have been fired for the misconduct

³⁷ *Id.*

³⁸ *Id.* at 852, 121 L.R.R.M. at 3082.

³⁹ *Id.* at 849, 121 L.R.R.M. at 3080.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 850, 121 L.R.R.M. at 3081. For the text of § 10(c) of the Act, see *supra* note 6.

⁴⁴ *Communication Workers*, 784 F.2d at 850, 121 L.R.R.M. at 3081.

⁴⁵ *Id.* For the text of § 10(c) of the Act, see *supra* note 6.

⁴⁶ *Id.* (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215-17, 57 L.R.R.M. 2609, 2614 (1964)).

⁴⁷ *Communication Workers*, 784 F.2d at 850, 121 L.R.R.M. at 3081.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 850-51, 121 L.R.R.M. at 3081-82.

⁵¹ *Id.* at 850, 121 L.R.R.M. at 3081-82.

alone.⁵² The court stated that the Board could require the employer to meet its burden of proof from evidence other than that gathered at the unlawful interview.⁵³ The court explained, however, that the Board was free to choose the course it would take as long as it was a reasonable one within the limits of the Act.⁵⁴

In upholding the Board's new policy, the court placed particular emphasis on the wording of section 10(c) that the Board shall "take such affirmative action . . . as will effectuate the policies of this Act."⁵⁵ The court pointed out that this language did not require make-whole remedies, but rather gave the Board the power to execute whatever remedies it decides will best carry out the Act's policies.⁵⁶ The court concluded that it had very little power to review the Board's actions where Congress had given the Board such broad discretionary power.⁵⁷

The court also stated its approval of the Board's reasoning in *Taracorp*. The court pointed out that the *Taracorp* Board sought to reduce the adversarial nature of investigatory interviews.⁵⁸ The Board expressed a valid concern, the court stated, because make-whole remedies for every *Weingarten* violation would encourage employers to forego investigatory interviews and act on suspicion without giving the employee the chance to explain.⁵⁹ The Board's new approach to *Weingarten* violations would still be an effective deterrent, the court stated, because repeated violations would be dealt with more severely.⁶⁰ Furthermore, the court pointed out, dual motive cases, that is situations where the employee was fired in part because he or she requested union representation, would not fall under *Taracorp*, and therefore reinstatement with back pay would still be a permissible remedy.⁶¹ Thus, the court stated, the Board's reasoning in reaching its new policy in *Taracorp* involved permissible considerations under section 10(c) of the Act.

The Seventh Circuit, in *Communication Workers*, expressly approved the Board's new policy, set forth in *Taracorp*, of refusing to order make-whole remedies in *Weingarten* cases. The court's opinion is not surprising because the Board in *Taracorp* had brought its own policy toward remedies for *Weingarten* violations in line with that of the appellate courts, thereby ending ten years of conflict between the Board and the courts.⁶² The

⁵² *Id.* (citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 113 L.R.R.M. 2857 (1983)).

⁵³ 784 F.2d at 851, 121 L.R.R.M. at 3081.

⁵⁴ *Id.*

⁵⁵ *Id.* at 852, 121 L.R.R.M. at 3082.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 852, 121 L.R.R.M. at 3083.

⁵⁹ *Id.* at 853, 121 L.R.R.M. at 3083.

⁶⁰ *Id.* at 852, 121 L.R.R.M. at 3082. The court pointed out that for the first *Weingarten* violation, the Board would issue a cease and desist order. If that order were violated, the company would be in contempt of court, a penalty companies do not take lightly. *Id.*

⁶¹ *Id.* The Board's counsel stated at oral argument that *Taracorp* would not apply in a dual motive situation. *Id.* The court noted that this resulted in a continued application of the *Kraft Foods* doctrine to dual motive cases. *Id.* Under the *Kraft Foods* doctrine, an employee whose *Weingarten* rights are violated must establish that he or she was subjected to disciplinary action "for the conduct which was the subject of the unlawful interview." *Kraft Foods*, 251 N.L.R.B. 598, 105 L.R.R.M. 1233 (1980). The burden then shifts to the employer to show that it would have fired the employee anyway based on evidence wholly apart from that gathered at the interview. *Id.* If the employer is successful, the court will not order a make-whole remedy. *Id.*

⁶² The appellate courts consistently have refused to enforce make-whole remedies for *Weingarten*

court's opinion in *Communication Workers* thus reinforces the Board's new policy that section 10(c) of the Act precludes make-whole remedies for *Weingarten* violations, if the employer discharged the employee for cause.⁶³

While the court stated that the Board is free to change its mind under section 10(c) of the Act, and choose among various remedies, this statement in no way weakens the *Taracorp* doctrine's future applicability. The court's statement instead affirmed the new doctrine's retroactive application to *Illinois Bell*, which was pending further proceedings on remand. The court stated that once the court remands a case, the Board is in control of the proceedings.⁶⁴ Thus, the court was able to find that a remand does not bar the Board from applying its newly developed policy, a policy already favored by the courts.⁶⁵

In addition, the *Communication Workers* court reinforced the new doctrine's foundation by re-emphasizing the Board's reasoning and by adding more detail to the *Taracorp* doctrine. The court suggested a two-prong test as a guideline for determining when an employee is "discharged for cause" under section 10(c) of the Act and suggested presumptions and burdens of proof in determining causal links.⁶⁶ With both the Board and the courts in full agreement as to the appropriate remedy for *Weingarten* violations, the *Taracorp* doctrine has become a solid rule.

The *Taracorp* doctrine is a fair approach to remedying *Weingarten* violations, protecting both the employee and employers. Companies retain their freedom to terminate unsuitable employees, yet employees' rights to union representation are not impaired. With the threat of make-whole remedies removed, employers will be more willing to hold investigatory interviews, giving employees the opportunity to explain their side of the story with union protection. Employers who do violate an employee's *Weingarten* rights will be ordered to cease and desist from further violations or face stiffer penalties, and should the company fire an employee for engaging in protected activity, make-whole remedies are still available.⁶⁷

In sum, the Seventh Circuit's *Communication Workers* decision reinforces the Board's *Taracorp* decision that it need not automatically impose make-whole remedies on employers that violate the *Weingarten* doctrine. The Board's new policy, therefore, is closer in line with that of the courts and section 10(c) of the Act. The court's approval and development of the Board's new policy gives the doctrine a solid foundation for future application by both the Board and the courts. The Board's policy protects the employee's *Weingarten* rights during investigatory interviews by treating repeat or egregious violations more severely, while at the same time achieving the employer's interest in maintaining an honest and efficient workforce.

violations when the employer fired the employee for cause. See, e.g., *Pacific Telephone & Telegraph Co. v. NLRB*, 711 F.2d 134, 137-38, 113 L.R.R.M. 3529, 3531-32 (9th Cir. 1983); *NLRB v. Kahn's & Co.*, 694 F.2d 1070, 1071-72, 112 L.R.R.M. 2683, 2684 (6th Cir. 1982); *General Motors Corp. v. NLRB*, 674 F.2d 576, 577-78, 109 L.R.R.M. 3345, 3346 (6th Cir. 1982); *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097, 109 L.R.R.M. 2005, 2007 (8th Cir. 1981); *NLRB v. Potter Elec. Signal Co.*, 600 F.2d 120, 123-24, 101 L.R.R.M. 2378, 2380-81 (8th Cir. 1979).

⁶³ *Communication Workers*, 784 F.2d at 850, 121 L.R.R.M. at 3081.

⁶⁴ *Id.* at 849, 121 L.R.R.M. at 3080.

⁶⁵ *Id.* at 848, 121 L.R.R.M. at 3079.

⁶⁶ *Id.* at 850-51, 121 L.R.R.M. at 3081-82.

⁶⁷ *Id.* at 852, 121 L.R.R.M. at 3082.

D. **NLRB Acceptance of Settlement Agreements in Unfair Labor Practice Suits: Oil, Chemical & Atomic Workers International Union v. NLRB*¹

Congress enacted the National Labor Relations Act² (the Act) to encourage peaceful resolution of work-related disputes, equalize bargaining power between employees and employers and reduce industrial strife and unrest. Section 10(c) of the Act empowers the National Labor Relations Board (the Board) to adjudicate disputes arising from unfair labor practices.³ Where an unfair labor practice has been committed, the Act grants the Board the remedial authority to "take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]."⁴

In the 1978 decision of *Community Medical Services of Clearfield, Inc.* (hereinafter *Clear Haven*),⁵ the Board recognized that once an unfair labor practice complaint reaches the Board, the Board must proceed in the public's interest rather than focusing on the rights of the private parties.⁶ In *Clear Haven*, prior to the Board hearing, the Administrative Law Judge approved a private settlement between the parties.⁷ The settlement provided for reinstatement, without back pay, of the replaced workers and execution of a collective bargaining agreement in exchange for withdrawal of the unfair labor practice charge.⁸ The Board rejected the settlement and held that a pending unfair labor practice charge may be withdrawn only if the settlement agreement is in the public interest.⁹ The Board found that withdrawal of the charge in this case was not in the public interest because the settlement did not substantially remedy the unfair labor practice and thus a settlement would not effectuate the policies of the Act.¹⁰

* By Deborah A. Kolodziej, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 806 F.2d 269, 123 L.R.R.M. 3129 (D.C. Cir. 1986).

² See 29 U.S.C. § 151 *et. seq.* (1982).

³ 29 U.S.C. § 160(c). Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, defines employer unfair labor practices in subsection (a) and defines union unfair labor practices in subsection (b). See note 16 *infra* for a discussion of certain employer unfair labor practices.

⁴ 29 U.S.C. § 160(c).

⁵ 236 N.L.R.B. 853, 98 L.R.R.M. 1314 (1978).

⁶ *Id.* at 853, 98 L.R.R.M. at 1315 (citing Jack C. Robinson, 117 N.L.R.B. 1483, 1485, 40 L.R.R.M. 1035, 1035-36 (1957); Ingalls Steel Constr. Co., 126 N.L.R.B. 584, 584 n.1, 45 L.R.R.M. 1353, 1353 n.1 (1960)).

⁷ *Clear Haven*, 236 N.L.R.B. at 853, 98 L.R.R.M. at 1315.

⁸ *Id.*

⁹ *Id.* at 853-54, 98 L.R.R.M. at 1315. *Clear Haven's* alleged unfair labor practices included unilateral termination of an existing employee health plan, insistence on a non-mandatory topic of bargaining and failure to furnish relevant information to the bargaining agent in violation of sections 8(a)(1) and 8(a)(5) of the Act. *Id.* at 853, 98 L.R.R.M. at 1314-15. Furthermore, the Board charged *Clear Haven* with refusing to reinstate employees engaged in an unfair labor practice strike after the employees unconditionally offered to return to work, a violation of sections 8(a)(1) and 8(a)(3) of the Act. *Id.* at 853, 98 L.R.R.M. at 1315.

¹⁰ *Id.* at 854, 98 L.R.R.M. at 1315, 1316. The Board found it largely irrelevant that the employees voted overwhelmingly in favor of the settlement stating "there is an overriding public interest in the effectuation of statutory rights which cannot be cut off or circumvented at the whim of individual discriminatees." *Id.* at 855, 98 L.R.R.M. at 1316. The court stated that by approving settlement agreements that fail to provide the usual Board remedies it would "encourage wrongdoers to subvert the collective-bargaining process by flouting their obligation to bargain in good faith . . ." *Id.* at 855, 98 L.R.R.M. at 1317.

During the Survey year, the District of Columbia Court of Appeals in *Oil, Chemical and Atomic Workers International Union v. NLRB*,¹¹ reversed the Board's approval of a settlement agreement that included the withdrawal of an alleged unfair labor practice. Such an agreement, the court reasoned, cannot be approved unless the underlying unfair labor practice is substantially remedied.¹² Thus, the court reaffirmed the Board's duty to review settlement agreements in light of the public interest.¹³

The Oil, Chemical and Atomic Workers International Union, AFL-CIO ("union") filed an unfair labor practice charge after the company ("TNS") permanently replaced employees engaging in a work stoppage over unsafe working conditions.¹⁴ The union alleged that the employer's permanent replacement of employees, arguably engaged in an unfair labor practice strike,¹⁵ improperly coerced employees in their right to engage in protected concerted activity and wrongfully discriminated against the employees because of their union membership.¹⁶ Thus, the union charged, the employer's action violated the National Labor Relations Act,¹⁷ and the employees were entitled to reinstatement.¹⁸

Although a Board attorney prosecuted the unfair labor practice at a hearing before an NLRB Administrative Law Judge (ALJ), the ALJ granted seventy strikers the right

¹¹ 806 F.2d at 269, 123 L.R.R.M. 3129 (D.C. Cir. 1986).

¹² *Id.* at 273, 123 L.R.R.M. at 3132.

¹³ See *Clear Haven*, 236 N.L.R.B. at 153, 98 L.R.R.M. at 1315.

¹⁴ *Oil, Chemical & Atomic Workers*, 806 F.2d at 270, 123 L.R.R.M. at 3130.

¹⁵ *Id.* Section 8(a) defines employer unfair labor practices. An employee striking over employer unfair labor practices is an unfair labor practice striker. 29 U.S.C. § 158(a). All other strikes, most commonly those to extract bargaining concessions from the employer, are economic strikes.

The TNS employees arguably were unfair labor practice strikers because they allegedly were engaged in an activity proscribed by section 502 of the Labor Management Relations Act, 29 U.S.C. §§ 141-197 (1982). That section provides that "the quitting of labor by . . . employees in good faith because of abnormally dangerous conditions for work at the place of employment of such . . . employees [shall not] be deemed a strike under this Act." 29 U.S.C. § 143. The union claims, and NLRB General Counsel agrees, that employees engaged in a section 502 work stoppage are the equivalent of unfair labor practice strikers. *Oil, Chemical & Atomic Workers*, 806 F.2d at 270, 123 L.R.R.M. at 3130.

¹⁶ *Oil, Chemical & Atomic Workers*, 806 F.2d at 270, 123 L.R.R.M. at 3130. Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), provides that it is an unfair labor practice when employers "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 of the Act establishes the rights of employees to "engage in . . . concerted activity for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(3) of the Act, states that it is an unfair labor practice for employers "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

¹⁷ See *supra* note 16.

¹⁸ Unfair labor practice strikers engaged in "protected concerted activity" are entitled to reinstatement even if it is necessary to discharge replacements hired during the strike. See generally A. COX, D. BOK, R. GORMAN, *LABOR LAW* 572-75 (10th ed. 1986). It is less clear that unfair labor practice strikers engaging in unprotected concerted activity may also be reinstated. See *Local 833, UAW v. NLRB (Kohler Co.)*, 300 F.2d 699, 702-03, 49 L.R.R.M. 2485, 2487-88 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962); *NLRB v. Thayer Co.*, 213 F.2d 748, 753, 34 L.R.R.M. 2250, 2253 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954). Economic strikers, by contrast, are entitled to reinstatement only upon departure of their replacements. *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1368, 68 L.R.R.M. 1252, 1254 (1968).

to intervene in the proceedings in their individual capacities.¹⁹ William Shaw, the attorney representing the intervening strikers, began negotiating a settlement with TNS, the employer.²⁰ After the hearings concluded, Shaw and TNS counsel presented fifty-six individual settlement agreements for approval by the ALJ.²¹ In exchange for lump sum payments to the employees of between \$2,000 and \$12,000, the employees agreed to withdraw their unfair labor practice charge and waive their rights to reinstatement.²² The ALJ rejected the settlement agreements, finding that neither Shaw nor the employees had "standing" in the case as intervenors independent of their union, the employees' exclusive representative.²³

The Board, in a series of three orders, reversed the ALJ's decision to reject the settlement. In its first order, the Board approved the settlements "in principle" and remanded the case for a determination of whether the employees' agreement to the settlement was informed and voluntary.²⁴ After the company, the union and the employees stipulated that they had executed the agreements voluntarily, the Board, over the General Counsel's objection, approved the settlement.²⁵ In its third order, the Board amended its first two orders, and elaborated on its reasons for approving the settlements.²⁶

The Board noted its "longstanding policy of encouraging resolution of disputes without resort to Board process," as a reason for approving the settlements.²⁷ It then offered several reasons why approving the agreements would further the policies of the Act.²⁸ Specifically, the Board noted that because not all of the employees had agreed to the settlement, the legal issue present in the dispute remained open.²⁹ Also, the Board emphasized that the employees executed the agreements voluntarily and with informed

¹⁹ *Oil, Chemical & Atomic Workers*, 806 F.2d at 270, 123 L.R.R.M. at 3130.

²⁰ *Id.*

²¹ Eventually 56 employees signed the agreement. *Id.* at 270 n.6, 123 L.R.R.M. at 3130 n.6.

²² *Id.* at 270, 123 L.R.R.M. at 3130. The monetary payments by agreement were to be in consideration of employees' release of personal injury claims arising from the unsafe working conditions. They were not to be considered back pay. *Id.*

The agreement also provided that TNS would pay Shaw \$450 for each employee who signed the agreement. *Id.* at 270-71, 123 L.R.R.M. at 3130.

²³ *Id.* at 271, 123 L.R.R.M. at 3130. Specifically, the ALJ found that Shaw did not have standing to settle claims for the employees who did not have power to bargain for settlement apart from their union. The judge also was concerned about the appropriateness of the company's paying Shaw and the quality of Shaw's legal representation. *Id.*

²⁴ *Id.* The Board dismissed the ALJ's concern over Shaw, stating that the Board should not "pass upon the ethical propriety of an attorney's conduct." *Id.*

²⁵ *Id.* at 271, 123 L.R.R.M. at 3131. The General Counsel is a branch of the National Labor Relations Board. The General Counsel investigates unfair labor practice charges and directs the prosecution of unfair labor practice complaints. See 29 U.S.C. § 153(d).

²⁶ *Oil, Chemical & Atomic Workers*, 806 F.2d at 271, 123 L.R.R.M. at 3131.

²⁷ *Id.* The Board cited two cases for this proposition. In *Combustion Engineering, Inc.*, and *Coca Cola Bottling Company*, the Board upheld settlement agreements reached between unions and employers during the course of grievance procedures established by the collective bargaining agreement. *Combustion Engineering, Inc.*, 272 N.L.R.B. 215, 117 L.R.R.M. 1242 (1984); *Coca Cola Bottling Co.*, 243 N.L.R.B. 501, 101 L.R.R.M. 1456 (1979).

²⁸ *Oil, Chemical & Atomic Workers*, 806 F.2d at 271-72, 123 L.R.R.M. at 3131. Presumably the Board was referring to its duty under section 10(c) of the Act to take affirmative action which "will effectuate the policies of the Act." 29 U.S.C. § 160(c).

²⁹ *Oil, Chemical & Atomic Workers*, 806 F.2d at 272, 123 L.R.R.M. at 3131.

consent.³⁰ Finally, it noted that the issues in dispute were novel and that the employees may not have prevailed if the case had proceeded to litigation.³¹ For these reasons, the Board accepted the fifty-six individual settlement agreements and dismissed the unfair labor practice charges relating to those employees.³² The union petitioned for review of the Board's decision.

The District of Columbia Circuit Court of Appeals reversed the Board's orders and noted that the Board should not allow settlement agreements with individual employees that include withdrawal of unfair labor practice charges unless the agreement substantially remedies the unfair labor practice, or at least is "reasonable."³³ The court began its analysis by noting that the Board in *Clear Haven* established the "well-settled" test for determining whether to approve settlement agreements that call for withdrawal of unfair labor practice charges.³⁴ The court interpreted *Clear Haven* as establishing a two part approach to the issue. First, the Board assumes that the case has merit and the General Counsel can meet its burden of proof.³⁵ Next, the Board should approve the agreements only if they substantially remedy the unfair labor practice.³⁶ Generally, only agreements that include traditional Board remedies such as back pay, reinstatement and the posting of notices are considered to substantially remedy the unfair labor practice.³⁷

The court then reviewed the policy underlying the Board's refusal in *Clear Haven* to defer to private settlement agreements.³⁸ According to the court, once an unfair labor practice is charged, the Board acts in the public interest, as the agent empowered to enforce the Act: the Board's primary function is not to vindicate individual employee rights.³⁹ A settlement agreement is not in the public interest unless it discourages unfair labor practices by seeing that they are substantially remedied.⁴⁰ The court cautioned that the public's interest should not be sacrificed simply because the parties to the dispute agree to settle.⁴¹

The *Oil, Chemical & Atomic Workers* court noted that the Board did not apply the *Clear Haven* test, nor any other standard that recognized the policies underlying the

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 274-75, 123 L.R.R.M. at 3133.

³⁴ *Id.* at 272, 123 L.R.R.M. at 3131.

³⁵ *Id.* (citing *Clear Haven*, 236 N.L.R.B. at 855-56, 98 L.R.R.M. at 1317).

³⁶ *Id.* (citing *Clear Haven*, 236 N.L.R.B. at 853, 98 L.R.R.M. at 1315).

³⁷ *Id.* See also *Clear Haven*, 236 N.L.R.B. at 854-56, 98 L.R.R.M. at 1315-17 (settlement agreement questioned because it surrendered employees' back pay rights and failed to provide employees notice of the rights of unfair labor practice strikers or of their rights to engage in section 7 activities in return for withdrawal of unfair labor practice charges); ADP Transport Corp., 253 N.L.R.B. 468, 469-70, 105 L.R.R.M. 1675, 1677 (1980) (settlement agreement which fails to provide for reinstatement and backpay falls short of substantial remedy).

³⁸ *Oil, Chemical & Atomic Workers*, 806 F.2d at 272-73, 123 L.R.R.M. at 3131-32. The court rejected the Board's concern that the employees may not prevail on the merits, noting that under *Clear Haven*, when considering approval of a settlement agreement, the Board must assume that the case is meritorious.

³⁹ *Id.* at 272, 123 L.R.R.M. at 3131.

⁴⁰ *Id.* at 272, 123 L.R.R.M. at 3131-32. See also *Clear Haven*, 236 N.L.R.B. at 853, 98 L.R.R.M. at 1315 (quoting Jack C. Robinson, 117 N.L.R.B. at 1485, 40 L.R.R.M. at 1035-36); ADP Transport, 253 N.L.R.B. at 469, 105 L.R.R.M. at 1676).

⁴¹ *Oil, Chemical & Atomic Workers*, 806 F.2d at 272, 123 L.R.R.M. at 3132 (citing *Clear Haven*, 236 N.L.R.B. at 855, 98 L.R.R.M. at 1316).

Board's role.⁴² The Board's decision rested largely on whether the employees executed the agreements with voluntary and informed consent, a factor not included in the *Clear Haven* analysis.⁴³ The Board did not investigate whether approval of the agreement would be in the public interest by substantially remedying the underlying unfair labor practice.⁴⁴ Indeed, because the private settlement contained none of the remedies typically ordered by the Board, the court stated, the settlement probably did not remedy the unfair labor practice.⁴⁵ Because the Board did not address *Clear Haven's* public interest concerns, the court noted that the Board failed to fulfill its duty to substantially remedy the unfair labor practice.⁴⁶

The court noted that promoting the bargaining relationship between the union and the employer, and the use of procedures established under a collective bargaining agreement, are fundamental policies of the Act.⁴⁷ It stated that resolution of disputes without resort to Board processes should therefore be encouraged,⁴⁸ but only if the settlement agreement is reached between the union and the employers during the course of an established grievance-arbitration procedure.⁴⁹ Because the employer settled the dispute with the individual employees, the court stated, negotiations were not conducted under any procedure established in the collective bargaining agreement.⁵⁰ Indeed, the settlement at issue actually circumvented the bargaining relationship between the union and the company because the union neither participated in nor approved of the settlement agreement.⁵¹

The court admonished the Board for departing from the "well-settled" *Clear Haven* standards without justifying its reasons for doing so and rejected the Board's approval of settlement agreements based upon a simple showing that the employees voluntarily approved the settlements.⁵² It noted that if the Board was not going to insist on substantial remedy of the unfair labor practice, it must at least insist that the settlement terms be reasonable.⁵³ The court, however, found it unlikely that an agreement which provided no remedy for the unfair labor practices would be deemed reasonable in light of the policies of the Act.⁵⁴ The court remanded the case for an examination of whether the approval of the settlement agreement would effectuate the policies of the Act.⁵⁵

⁴² *Id.* at 273, 123 L.R.R.M. at 3132.

⁴³ *See id.* at 271, 123 L.R.R.M. at 3130-31.

⁴⁴ *Id.* at 273, 123 L.R.R.M. at 3132.

⁴⁵ *Id.* at 273, 275, 123 L.R.R.M. at 3132, 3134.

⁴⁶ *Id.* at 273, 123 L.R.R.M. at 3132.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 274, 123 L.R.R.M. at 3133.

⁵³ *Id.* The court did not specifically state that it was establishing a new standard of review of settlement agreements based upon reasonableness. It seems odd that after emphasizing the Board's duty to act in the public's interest to substantially remedy the unfair labor practice, the court suggests a less strenuous "reasonableness" standard. It remains to be seen whether future Board decisions will seize on the court's reasonableness language.

⁵⁴ *Id.* at 275, 123 L.R.R.M. at 3133. The Board also was ordered to address the ethical issues involved when an employer pays an attorney to represent unionized employees normally represented by their collective bargaining agent. *Id.*

⁵⁵ *Id.* at 273-74, 123 L.R.R.M. at 3132-33.

In *Oil, Chemical & Atomic Workers* the D.C. Circuit reaffirms the principle that the National Labor Relations Board performs a broader function than resolving individual labor disputes. As first noted in *Clear Haven*, the purposes and policies of the Act are geared toward the public interest. *Clear Haven* established, therefore, that once an unfair labor practice dispute reaches the Board, any disposition of that case must also be in the public interest.⁵⁶

In addition, *Oil, Chemical & Atomic Workers* recognized that the public's interest in effectuating the purposes of the Act is achieved by substantially remedying the underlying unfair labor practice.⁵⁷ The court noted that where an agreement fails to provide any of the traditional Board remedies for unfair labor practices, it is unlikely that such an agreement would advance the policies of the Act.⁵⁸ The earlier *Clear Haven* decision had noted that approval of such settlement agreements would encourage employers to avoid their obligations under the Act, such as the duty to bargain in good faith, thereby discouraging collective bargaining, a fundamental goal of the Act.⁵⁹

Although emphasizing the Board's duty to operate in the public interest, the *Oil, Chemical & Atomic Workers* court suggested that courts may give greater deference to settlement agreements negotiated by the union as compared to those negotiated by individual employees.⁶⁰ The court also noted that agreements reached during an established grievance and arbitration procedure should be accorded more deference than agreements reached outside the collective bargaining contract.⁶¹ The court pointed out that deferring to privately negotiated agreements "in derogation of" the union/employer bargaining relationship fails to effectuate the Act's policy of promoting the use of collective bargaining.⁶² Perhaps implicit in the court's decision is the notion that because the Act accords the union exclusive representation status, the policy must be considered along with the public interest in the context of unfair labor practice claims.

In sum, the *Oil, Chemical and Atomic Workers* court's indication that the Board should not allow settlement agreements with individual employees that include withdrawal of unfair labor practice charges unless the agreement substantially remedies the unfair

⁵⁶ See *supra* notes 5-10 and accompanying text.

⁵⁷ *Oil, Chemical & Atomic Workers*, 806 F.2d at 273, 123 L.R.R.M. at 3132.

⁵⁸ *Id.*

⁵⁹ *Id.* See also *Clear Haven*, 236 N.L.R.B. at 855, 98 L.R.R.M. at 1316-17. The court stated, we wonder how our approval of settlements of this nature could be thought to serve as a deterrent to the commission of unlawful conduct . . . [T]o the contrary . . . we would encourage wrongdoers to subvert the collective-bargaining process by flouting their obligation to bargain in good faith . . . Such settlements . . . would encourage further unlawful misconduct . . . to the detriment of the stability of bargaining . . .

Id.

⁶⁰ See *Oil, Chemical & Atomic Workers*, 806 F.2d at 273, 123 L.R.R.M. at 3132.

⁶¹ *Id.*

⁶² *Id.* The court quoted *Roadway Express, Inc. v. NLRB*, 647 F.2d 417, 426, 107 L.R.R.M. 2155, 2163 (4th Cir. 1981) which stated

[D]eferring to [a grievance settlement], . . . effected by the union's representative . . . would not be repugnant to the national labor policy of respecting agreements freely made between an employee and employer where such agreement had been effected under the protection of the employee's bargaining agent . . . That certainly is promoting the use of the collective bargaining agent in resolving peaceably and amicably grievances and this is one of the primary purposes of the National Labor Relations Act.

Id. (cited in, *Oil, Chemical & Atomic Workers*, 806 F.2d at 273 n.33, 123 L.R.R.M. at 3132 n.33).

labor practices or is at least reasonable establishes several important points. First, it is unlikely that the Board will sanction settlement agreements in which the union did not participate, unless that agreement calls for traditional Board remedies that substantially remedy the unfair labor practice. Also, the Board will probably accord more deference to agreements negotiated with union involvement. The Board also may be more likely to defer to agreements negotiated in the context of procedures established by the collective bargaining agreement. Because public interest remains the primary consideration for the Board, a simple agreement by the parties to a specific disposition of an unfair labor practice will not suffice once the claim has been filed.

IV. ARBITRATION

A. **Judicial Refusal to Enforce Arbitration Awards on Public Policy Grounds: E.I. DuPont de Nemours and Company v. Graselli Employees Independent Association of East Chicago.*¹

Historically, judicial review of arbitration awards has been extremely limited.² In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*,³ the Supreme Court recognized that courts would undermine the well established policy of settling labor disputes by arbitration if they had broad powers to review arbitral awards.⁴ To encourage the collective bargaining process, courts defer to arbitrators who are more knowledgeable about industry custom and practice.⁵ The arbitrator, however, is confined to interpreting the collective bargaining agreement and cannot go beyond the scope of the arbitral role to dispense "his own brand of industrial justice."⁶ Courts enforce the award, therefore, only "so long as it draws its essence from the collective bargaining agreement."⁷

Courts' deference to arbitral awards prevents potential judicialization of the arbitration process⁸ and underscores courts' commitment to this alternative method of dispute resolution.⁹ The *Enterprise Wheel* Court recognized that the arbitrator's authority would

* John A. Gordon, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 790 F.2d 611, 122 L.R.R.M. 2217 (7th Cir.), cert. denied, 107 S. Ct. 186, 123 L.R.R.M. 2592 (1986).

² *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1855). The *Burchell* Court wrote:

Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.

Id.

³ 363 U.S. 593, 46 L.R.R.M. 2423 (1960).

⁴ *Id.* at 596, 46 L.R.R.M. 2425.

⁵ *Id.*

⁶ *Id.* at 597, 46 L.R.R.M. 2425.

⁷ *Id.*

⁸ *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 183-84, 119 L.R.R.M. 3566, 3568 (7th Cir. 1985), cert. denied, 106 S. Ct. 1184, 121 L.R.R.M. 2736 (1986).

⁹ See *id.*

be severely impaired if the judiciary were given broad powers of plenary review in arbitration cases.¹⁰ Because the parties agree to abide by an arbitrator's interpretation of the collective bargaining contract, it is the arbitrator's decision that the court should enforce — not a court's later reinterpretation.¹¹

Arbitrators are not, however, given unlimited decision-making power.¹² Courts will not enforce an arbitral award when they find evidence of misconduct, fraud, or absence of jurisdiction.¹³ Furthermore, just as courts will not enforce contracts between parties requiring illegal acts or conduct contrary to public policy, they will similarly dismiss arbitration awards calling for such conduct.¹⁴ In *W.R. Grace and Company v. Local Union 759*, the Supreme Court held that courts may determine when an arbitration award violates public policy,¹⁵ and that courts should not enforce collective bargaining agreements that do so.¹⁶

The *W.R. Grace* Court established, however, that courts should not vacate arbitral awards based on vague or nebulous policy considerations.¹⁷ The Supreme Court stressed that: "[A] public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"¹⁸ Consequently, courts may invalidate an arbitration award on public policy grounds only when the award contravenes either explicit public policy, or when the policy in question is "well defined."¹⁹

Although in *W.R. Grace* the Supreme Court announced the "well defined and dominant" standard of review for public policy considerations in arbitration cases, courts have approached the standard differently.²⁰ Some courts view the public policy exception

¹⁰ *Enterprise Wheel*, 363 U.S. at 599, 46 L.R.R.M. at 2426.

¹¹ *Id.* Courts may defer even when an arbitrator's award seems incorrect or unreasonable. See generally R. GORMAN, BASIC TEXT ON LABOR 585 (1976). For example, in *Safeway Stores v. American Bakery and Confection Workers*, 390 F.2d 79, 67 L.R.R.M. 2646 (5th Cir. 1968), when Safeway changed its pay day from Wednesday to Friday and issued paychecks to cover those interim two days until the new schedule would begin, *id.* at 80-81, 67 L.R.R.M. at 2647, the union filed a grievance objecting to the company's violation of a contract provision insuring forty hour work weeks. *Id.* at 81, 67 L.R.R.M. at 2647. The arbitrator found for the union and ordered an additional three days pay for work never performed. *Id.* Because the arbitrator based his decision on the contract's terms, the court sustained the award. *Id.* at 83-84, 67 L.R.R.M. at 2649.

¹² *International Ass'n of Mechanics v. Hayes Corp.*, 296 F.2d 238, 242-43, 49 L.R.R.M. 2210, 2213 (5th Cir. 1961) ("To compel arbitration in the first instance is not to approve *carte blanche* in advance any decision which might be reached.").

¹³ R. GORMAN, *supra* note 11, at 586.

¹⁴ *Id.* at 593.

¹⁵ 461 U.S. 757, 766, 113 L.R.R.M. 2641, 2645 (1983).

¹⁶ *Id.* at 766, 113 L.R.R.M. at 2645. See also *Hurd v. Hodge* 334 U.S. 24, 34-35 (1948) (restrictive covenant precluding sale of property to blacks unenforceable as against public policy).

¹⁷ *W.R. Grace*, 461 U.S. at 766, 113 L.R.R.M. at 2645.

¹⁸ *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

¹⁹ Although policy concerns are within the province of judicial review, judges should not invoke policy considerations as a mere excuse to evaluate the arbitrator's decision. Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 446 (1969). To do so would defeat the purposes of the judiciary's traditional deference in cases of binding arbitration. *Id.* "It is an arbitrator's judgment for which the parties have contracted, and it is essential to the success of their plan that his judgment, be it good or bad, possess finality." *Id.* at 447.

²⁰ See *infra* notes 88-101 and accompanying text for examples of courts' varied application of the *W.R. Grace* standard.

as extremely narrow,²¹ applying only upon clear violation of statutory or case law.²² Other courts, however, take a less restrictive view, holding the exception applicable when a policy is embodied in general law — and when violation obviously would harm the public.²³

During the *Survey* year, in *E.I. DuPont de Nemours and Company v. Grasselli Employees Independent Association of East Chicago*,²⁴ the Seventh Circuit Court of Appeals considered a district court decision that overturned an arbitration award on public policy grounds.²⁵ The court held that the arbitrator's determination to reinstate an employee with a history of violent behavior did not violate public policy.²⁶ The court split, however, as to how narrowly courts should construe the public policy exception.²⁷ The majority adopted a broad view of the public policy exception, and reasoned that an arbitration award inconsistent with a significant public policy was subject to judicial invalidation.²⁸ In contrast, the concurrence argued that courts could not overturn an arbitral decision on policy grounds unless the award violated a rule of positive law.²⁹

In *DuPont*, the employer discharged Willie McClendon, a member of the defendant union, who worked the night shift at plaintiff's corporation.³⁰ McClendon had not slept prior to starting his 11:30 P.M. to 7:30 A.M. shift.³¹ After McClendon's shift ended, a supervisor found him sitting naked in a changing house.³² An hour later, without provocation, the naked McClendon flew into a rage,³³ attacked the supervisor, and damaged company property.³⁴ Still naked, he then ran to another building where he assaulted a second employee and attempted to create a potentially dangerous chemical reaction.³⁵

²¹ See *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 8, 9, 122 L.R.R.M. 2094, 2100 (D.C. Cir. 1986) (holding an ill-defined public policy exception would run the risk of "swallowing the rule" in favor of judicial deference to arbitration). The court stated, "[o]bviously, the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy.'" *Id.* at 8, 122 L.R.R.M. at 2100.

²² See *id.* at 8, 122 L.R.R.M. at 2100.

²³ See, e.g., *Amalgamated Meat Cutters and Butcher Workmen of N. Am. v. Great Western Food Co.*, 712 F.2d 122, 124, 114 L.R.R.M. 2001, 2003 (5th Cir. 1983). In *Great Western*, for instance, the Fifth Circuit refused to enforce an order compelling reinstatement of a truck driver who admittedly drank while on duty although there was no positive law which forbade rehiring an employee known to drink on the job: "In a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over-the-road truck driver caught drinking liquor on duty violates public policy." *Id.* at 125, 114 L.R.R.M. at 2002. The court stated further, "the public policy of preventing people from drinking and driving is embodied in the case law, the applicable regulations, statutory law, and pure common sense. The policy is 'well defined and definite.'" *Id.* at 125, 114 L.R.R.M. at 2003 (incorrectly quoting *W.R. Grace*, 461 U.S. at 766, 113 L.R.R.M. at 2645).

²⁴ 790 F.2d 611, 122 L.R.R.M. 2217 (7th Cir.), *cert. denied*, 107 S.Ct. 186, 123 L.R.R.M. 2592 (1986).

²⁵ *Id.* at 613-14, 122 L.R.R.M. at 2217.

²⁶ *Id.* at 617, 122 L.R.R.M. at 2221.

²⁷ *Id.* at 616, 122 L.R.R.M. at 2220.

²⁸ *Id.*

²⁹ *Id.* at 620, 122 L.R.R.M. at 2224 (Easterbrook, J., concurring).

³⁰ *Id.* at 613, 122 L.R.R.M. at 2217.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 613, 122 L.R.R.M. at 2217-18.

Police subdued McClendon and placed him in a psychiatric facility for thirty days.³⁶ Although McClendon initially tested positively for both barbituates and amphetamines, upon retesting three days later, his results were negative.³⁷ The different test results thus presented the possibility that the initial tests could have been falsely positive.³⁸ The hospital released McClendon and he was not treated subsequently.³⁹

Officially, DuPont discharged McClendon for assaulting fellow employees and destroying company property.⁴⁰ Under the terms of a collective bargaining agreement, McClendon's union (The Grasselli Employment Association) filed a grievance protesting the dismissal as lacking "just cause."⁴¹ The parties submitted the dispute to an arbitrator who evaluated the evidence and concluded that a mental breakdown, rather than misuse of drugs, precipitated the incident.⁴² Furthermore, the arbitrator determined that the likelihood of recurrence was remote.⁴³ Because a nonvolitional mental breakdown caused the outburst, the arbitrator reasoned that McClendon was not at fault⁴⁴ and found, therefore, no just cause for dismissal.⁴⁵ The arbitrator explicitly considered the need for safety in the workplace and the damage to DuPont's property, but he concluded that those concerns were not significant in light of McClendon's favorable prognosis.⁴⁶ As a result, the arbitrator ordered McClendon reinstated.⁴⁷

DuPont brought an action in the District Court for the Northern District of Illinois resisting enforcement of the arbitrator's reinstatement order. The district court vacated the arbitrator's award, reasoning that the arbitrator exceeded his authority by deciding the case based on personal notions of equity rather than on the terms laid out in the collective bargaining agreement.⁴⁸ Furthermore, the court stated that the arbitrator gave too little regard to the public policy consideration of an employer's duty to provide a safe workplace,⁴⁹ and denied enforcement of the arbitrator's decision to reinstate McClendon.⁵⁰

The Grasselli union appealed to the United States Court of Appeals for the Seventh Circuit claiming that the district court should not have denied enforcement of the arbitrator's award seeking McClendon's reinstatement. The Seventh Circuit agreed, reversed the district court, and ordered enforcement of the arbitration award.⁵¹ Stressing

³⁶ *Id.* at 613, 122 L.R.R.M. at 2218.

³⁷ *Id.*

³⁸ *Id.* Because drugs of this type remain in the system longer than three days, a physician testified that the initial tests could have been falsely positive. *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* The arbitrator gave additional consideration to DuPont's failure to follow its own policy of conducting full investigations prior to dismissals. *Id.* At that investigation, McClendon would have been able to present the facts from his perspective. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* ("[L]ack of fault must be considered in determining just cause for discharge.").

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* See *supra* notes 6-7 and accompanying text for a discussion of an arbitrator going beyond the terms of the contract.

⁴⁹ *Grasselli*, 790 F.2d at 613, 122 L.R.R.M. at 2218.

⁵⁰ *Id.* at 614, 122 L.R.R.M. at 2218.

⁵¹ *Id.* at 617, 122 L.R.R.M. at 2221.

the limited scope of judicial review in collective bargaining cases,⁵² the court noted that the judiciary has no power to reach the merits of an arbitration award even if it strongly disagrees with an arbitrator's interpretation of the contract.⁵³ Consequently, the appeals court found no basis for the district court's conclusion that the arbitrator employed personal notions of equity in construing the phrase "just cause."⁵⁴ The court stated that mere disagreement — even strong disagreement⁵⁵ — with an arbitrator's construction did not constitute sufficient grounds to deny enforcement.⁵⁶

Because courts may not review the arbitrator's factual findings the Seventh Circuit dismissed DuPont's contention that the arbitrator failed to consider sufficiently workplace safety.⁵⁷ The court noted, in fact, that workplace safety received the arbitrator's explicit consideration and that he made the informed judgment that it was unlikely McClendon would have future breakdowns.⁵⁸ Because the arbitrator acted within his legitimate role as contract interpreter, the court declined to review the factual determination.⁵⁹

The court then turned to the issue of enforcing arbitration awards violative of public policy.⁶⁰ It recognized the public policy exception to the strong deference generally accorded to an arbitrator.⁶¹ The court noted that use of the public policy exception could undermine the deference accorded arbitration awards and thus the court specified that the judiciary should use the public policy doctrine cautiously when refusing to enforce an arbitrator's award.⁶² The *Grasselli* court noted, however, that it was free to decide *de*

⁵² *Id.* at 614, 122 L.R.R.M. at 2218. See *supra* notes 2–11 and accompanying text for a discussion of the necessity for limited judicial review in collective bargaining cases.

⁵³ *Grasselli*, 790 F.2d at 614, 122 L.R.R.M. at 2218. See also *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 184, 187, 119 L.R.R.M. 3566, 3568, 3570 (7th Cir. 1985).

⁵⁴ *Grasselli*, 790 F.2d at 614, 122 L.R.R.M. at 2219. See *supra* note 48 and accompanying text for a discussion of the district court's treatment of the arbitrator's construction of "just cause." Because the arbitrator's requirement of a fault element for a just cause dismissal was not personal whim, *Grasselli*, 790 F.2d at 614, 122 L.R.R.M. at 2219, it could not be said that he administered "his own brand of industrial justice." *Id.* at 615, 122 L.R.R.M. at 2219 (quoting *Enterprise Wheel*, 363 U.S. at 597, 46 L.R.R.M. at 2425).

⁵⁵ *Grasselli*, 790 F.2d at 614, 122 L.R.R.M. at 2218.

⁵⁶ *Id.* at 615, 122 L.R.R.M. at 2219.

⁵⁷ *Id.*

⁵⁸ *Id.* See *supra* notes 43–46 and accompanying text for a discussion of the arbitrator's treatment of workplace safety vis a vis McClendon's potential for relapse.

⁵⁹ *Grasselli*, 790 F.2d at 615, 122 L.R.R.M. at 2219.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 615, 122 L.R.R.M. at 2219–20. The majority reiterated that even when a court overturns an arbitration award on policy grounds, it still accepts the factual findings of the arbitrator. *Id.* at 615, 122 L.R.R.M. at 2220. Therefore, even if the court disagreed with the arbitrator's conceptualization of the public policy in question, the court should continue to defer to the arbitrator's findings of fact. *Id.* at 616, 122 L.R.R.M. at 2220. For example, in *United States Postal Service v. American Postal Workers Union*, a postal worker who confessed to embezzling postal funds was discharged by the postal service. 736 F.2d 822, 823, 116 L.R.R.M. 2870, 2870 (1st Cir. 1984). An arbitrator ordered reinstatement, reasoning the dismissal lacked "just cause" because the worker had not intended to keep the money. *Id.* The postal service sued successfully to vacate the arbitrator's award as contrary to the public policy of discouraging embezzlement of government money. *Id.* at 824, 116 L.R.R.M. at 2871. The union appealed to the First Circuit which affirmed the district court's finding. *Id.* at 826, 116 L.R.R.M. at 2872. Although not disputing the arbitrator's *factual* basis for making his decision, the First Circuit took exception to the arbitrator's judgment that no public policy was contravened. *Id.* at 825–26, 116 L.R.R.M. at 2872. The First Circuit commented that "it violates public policy to force the Postal Service to reinstate an employee who was recently

novo whether the arbitral judgment endangered public welfare.⁶⁵ In light of both the narrow application of the public policy exception and the unwillingness of courts to question an arbitrator's factual findings, however, the court rejected DuPont's contention that the arbitration award reinstating McClendon violated public policy.⁶⁴

Just as the various circuits have split on construction of the public policy exception announced in the *W.R. Grace* case, the *Grasselli* court itself split on how narrowly the exception should be construed. Although the majority held that the *W.R. Grace* standard was not meant to be narrowly interpreted,⁶⁵ the concurrence claimed that courts had too much discretion to set aside arbitral awards on nebulous policy grounds.⁶⁶ The concurrence argued for nonenforcement of arbitration decisions only upon a violation of existing laws.⁶⁷

The majority found persuasive authority for its broad interpretation of the *W.R. Grace* standard in other circuits.⁶⁸ Specifically, the *Grasselli* court reviewed the First Circuit's decision of *United States Postal Service v. American Postal Workers Union*,⁶⁹ which rejected the argument that there had to be a violation of a "direct legal prohibition" before a court could overturn an arbitrator's decision on public policy grounds.⁷⁰ The First Circuit reasoned that as long as a policy met the *W.R. Grace* "well defined and dominant" standard, courts could permissibly overturn arbitral awards — even if no positive law were violated.⁷¹

Similarly, the *Grasselli* majority also cited the Seventh Circuit case of *Local No. P-1236, Amalgamated Meat Cutters and Butcher Workmen of North America v. Jones Dairy Farm*,⁷²

convicted of directly violating his fiduciary duties through the embezzlement of a large sum of money from it." *Id.* at 826, 116 L.R.R.M. at 2872.

⁶⁵ *Grasselli*, 790 F.2d at 617, 122 L.R.R.M. at 2221.

⁶⁴ *Id.* at 616, 122 L.R.R.M. at 2221. The court separated its analysis into an assessment of the arbitrator's factual findings and an assessment of the arbitrator's judgment based on those findings. *Id.* at 616-17, 122 L.R.R.M. at 2221. The arbitrator made an explicit determination that the potential for future violent episodes was remote. *Id.* at 617, 122 L.R.R.M. at 2221. In his judgment, therefore, workplace safety was not an issue and no policy would be contravened by McClendon's reinstatement. *Id.* Based on the facts presented — which the court was bound to accept as valid — the Seventh Circuit ruled that the arbitrator's judgment was permissible. *Id.* In dicta, the court noted that the appropriate standard for reviewing facts pertaining to the public policy exception had not yet been judicially established. *Id.* It was mindful, however, that a plaintiff appealing an adverse judgment might invoke a public policy argument in order to "end run" the deferential standard of review currently accorded arbitrators' factual findings. *Id.* Under these circumstances a narrow standard of review properly serves to discourage plaintiffs from bringing unwarranted suits. *Id.*

Alternatively, where a plaintiff legitimately petitions for judicial review of an arbitration decision contrary to public policy, courts should not be impaired in their ability to overturn the arbitrator's award merely because courts are compelled to accept arbitral facts as true. *Id.* In these legitimate petitions, a less deferential standard of review is more appropriate. *Id.* The *Grasselli* court suggested the "clearly erroneous" standard embodied in rule 52(a) of the Federal Rules of Civil Procedure. *Id.*

⁶⁵ *Id.* at 616, 122 L.R.R.M. at 2220.

⁶⁶ *Id.* at 618, 122 L.R.R.M. at 2222 (Easterbrook, J., concurring).

⁶⁷ *Id.* (Easterbrook, J., concurring).

⁶⁸ *Id.* at 615-616, 122 L.R.R.M. at 2220.

⁶⁹ 736 F.2d 822, 116 L.R.R.M. 2870 (1st Cir. 1984). See *supra* note 62 for a discussion of the *Postal Workers* case.

⁷⁰ *Postal Workers*, 736 F.2d at 824, 116 L.R.R.M. at 2871.

⁷¹ See *id.* See *supra* notes 15-23 and accompanying text for a discussion of the standard announced in *W.R. Grace*.

⁷² 680 F.2d 1142, 110 L.R.R.M. 2805 (7th Cir. 1982).

as a decision "in complete harmony with" its broader construction of the public policy exception.⁷³ The *Jones Dairy* court held that a rule prohibiting the workers from reporting unsanitary conditions directly to federal inspectors was unenforceable as against public policy even though the rule itself violated no law.⁷⁴ The Seventh Circuit balanced the company's right to control plant management against the public's right to sanitary meat packing plants and held that the public's welfare outweighed the company's interests.⁷⁵ The *Grasselli* court, therefore, relying on *United Postal Workers* and *Jones Dairy*, held that courts could refuse to enforce arbitration awards even when the award violated no law.⁷⁶

The concurrence argued that courts should defer to arbitral judgments unless the order violated positive law.⁷⁷ It distinguished *Jones Dairy*, claiming that the case did not turn only on public policy considerations but that it involved an actual law which would have been violated had the arbitrator's construction of the collective bargaining agreement been enforced.⁷⁸ According to the concurrence, the *Jones Dairy* court reached a correct conclusion precisely because the company rule interfered with enforcement of federal safety laws.⁷⁹ In *Grasselli*, however, the arbitrator's construction of the collective bargaining agreement violated no law.⁸⁰ The concurrence argued *Jones Dairy*, therefore, could not be read to support the "broader proposition that a court may set aside an award even when the arbitrator accurately construes the contract and the contract, so construed, is lawful."⁸¹

In further support of its reasoning, the concurrence argued that the power to set aside arbitral awards on policy grounds (rather than on express rules of law) conflicted with section 9 of the Arbitration Act.⁸² That statute,⁸³ according to the concurrence,

⁷³ *Grasselli*, 790 F.2d at 616, 122 L.R.R.M. at 2220-21. In *Jones Dairy*, the union submitted a worker's reprimand to arbitration. 680 F.2d at 1143, 110 L.R.R.M. at 2806. The arbitrator found in favor of the company, reasoning that the rule came under the collective bargaining contract which gave the company "exclusive management control of . . . the employees." *Id.* The union filed a complaint in district court alleging that enforcement of the company rule pursuant to the arbitrator's decision contravened public policy. *Id.* The district court agreed, reversed the arbitrator's award, and permanently enjoined the company from enforcing its rule. *Id.* at 1143, 110 L.R.R.M. at 2806-07. On appeal to the Seventh Circuit the *Jones Dairy* judgment was affirmed. *Id.* at 1142, 110 L.R.R.M. at 2805.

⁷⁴ See *id.* at 1143, 110 L.R.R.M. at 2806.

⁷⁵ *Id.* at 1145, 110 L.R.R.M. at 2808. The court held that the rule was overly broad in that it forbade the workers from ever dealing with the U.S.D.A. *Id.* The court noted, however, that as part of balancing the interests a company could require its employees to first report sanitation violations to management before reporting uncorrected conditions to the U.S.D.A. within a specified period. *Id.*

⁷⁶ See *Grasselli*, 790 F.2d at 616, 122 L.R.R.M. at 2220-21.

⁷⁷ *Id.* at 620, 122 L.R.R.M. at 2224 (Easterbrook, J., concurring).

⁷⁸ *Id.* at 619, 122 L.R.R.M. at 2222 (Easterbrook, J., concurring).

⁷⁹ *Id.* (Easterbrook, J., concurring). Although the *Grasselli* concurrence does not specify which federal safety laws are at issue, *Jones Dairy* cites the Meat Inspection Act, 21 U.S.C. § 601 *et seq.* *Jones Dairy*, 680 F.2d at 1144, 110 L.R.R.M. at 2807.

⁸⁰ See *Grasselli*, 790 F.2d at 618-19, 122 L.R.R.M. at 2222 (Easterbrook, J., concurring). "If the firm, honestly implementing its contract with the employees, reinstates the berserker, . . . no public policy would stand in the way." *Id.* at 619, 122 L.R.R.M. at 2222 (Easterbrook, J., concurring). Nor did DuPont argue that reinstating McClendon violated any rule of law. *Id.* at 620, 122 L.R.R.M. at 2224 (Easterbrook, J., concurring).

⁸¹ *Id.* at 619, 122 L.R.R.M. at 2222-23 (Easterbrook, J., concurring).

⁸² *Id.* at 618, 122 L.R.R.M. at 2222 (Easterbrook, J., concurring).

⁸³ 9 U.S.C. § 9 (1982).

limits courts to confirming awards unless the arbitrator exceeded his or her power.⁸⁴ Therefore, the Arbitration Act abrogated "any equitable power courts formerly enjoyed to decide which awards to enforce."⁸⁵ The concurring judge concluded that enforcement of arbitral awards necessarily focuses on the meaning of the contract rather than notions about public policy.⁸⁶ He stated, "[i]f the contract violates a rule of law, then the contract itself may be set aside But if the contract is lawful, and the arbitrator follows or interprets the contract within his authority, the court 'must grant . . . an order' enforcing the award."⁸⁷

The *W.R. Grace* decision should have clarified the standard courts use for vacating arbitration awards on public policy grounds. As the *Grasselli* case illustrates, however, no clear principle dominates judicial reasoning in this area of the law. Both the majority and concurring opinions cite *W.R. Grace* to support their position.⁸⁸

The actual language of the *W.R. Grace* opinion is ambiguous and subject to two plausible interpretations.⁸⁹ In *W.R. Grace*, the Supreme Court stated that courts should determine public policy "by reference to the laws and legal precedents and not from general considerations of supposed public interests."⁹⁰ While this language proclaims a generalized command to use objective criteria when ascertaining public policy, the term "by reference to the laws" falls short of mandating the strict construction advocated by the *Grasselli* concurrence. Alternatively, an admonition not to determine public policy in "general considerations of supposed public interests" is contrary to the looser construction followed by the *Grasselli* majority.

Prior to *W.R. Grace* there was considerable conflict among the circuits regarding the public policy grounds on which courts could vacate arbitration awards. For example, the Seventh Circuit took a broad approach in *Jones Dairy*⁹¹ and held an arbitration award need only violate general public policy for the exception to apply.⁹² The Third Circuit, however, took a narrow approach in *Kane Gas Light and Heating v. Local 112*,⁹³ holding that the public policy exception only pertained when the arbitrator's decision "conflicts directly with federal or state law."⁹⁴

Although in *W.R. Grace* the Supreme Court may have intended to clarify the standard for vacating arbitral awards, no such clarification resulted and the circuits have

⁸⁴ *Grasselli*, 790 F.2d at 618, 122 L.R.R.M. at 2222 (Easterbrook, J., concurring).

⁸⁵ *Id.* (Easterbrook, J., concurring).

⁸⁶ *Id.* (Easterbrook, J., concurring).

⁸⁷ *Id.* (Easterbrook, J., concurring) (quoting 9 U.S.C. § 9 (1982)).

⁸⁸ See *id.* at 615, 122 L.R.R.M. at 2219, and *id.* at 620, 122 L.R.R.M. at 2224 (Easterbrook, J., concurring). Obviously the majority reasoned that the "well defined and dominant" standard afforded courts leeway to address the public policy exception even when no positive law was violated. The concurrence, however, argued that the *W.R. Grace* standard was meant to be more narrowly construed and stated: "the Court has never held that an arbitration award that complies with the contract and positive law may be set aside on the basis of vague beliefs about public policy." *Id.* at 620, 122 L.R.R.M. at 2223-24 (Easterbrook, J., concurring).

⁸⁹ See *W.R. Grace*, 461 U.S. at 766, 113 L.R.R.M. at 2645.

⁹⁰ *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

⁹¹ See *supra* notes 72-76 and accompanying text for a discussion of the case.

⁹² *Jones Dairy*, 680 F.2d at 1143-45, 110 L.R.R.M. at 2807-08.

⁹³ 687 F.2d 673, 681, 111 L.R.R.M. 2094, 2099 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011, 112 L.R.R.M. 2808 (1983) (holding arbitrator's decision should be reversed on public policy grounds only when the award conflicts directly with positive law).

⁹⁴ *Id.* at 681, 111 L.R.R.M. at 2099.

continued to apply varying standards.⁹⁵ For instance, in *Local 540 v. Great Western Food Company*,⁹⁶ the Fifth Circuit, relying on *W.R. Grace*, adopted a broad approach and held that an amorphous public policy against drunk driving served as a proper basis for application of the public policy exception.⁹⁷ At the same time, in *American Postal Workers Union v. United States Postal Service*,⁹⁸ the United States Court of Appeals for the District of Columbia held that *W.R. Grace* proposed a narrow standard, applicable only when the arbitral award conflicted with "clear statutory or case law."⁹⁹

Practitioners should note this apparent conflict among the circuits. Under the current state of the law, outcome of a case in which parties are requesting that the court vacate an arbitral award may well depend upon which circuit the case is brought in rather than on the factual issue the case presents.¹⁰⁰ The Supreme Court, however, denied certiorari in *Grasselli*,¹⁰¹ so clarification seems unlikely in the near future.

There is a delicate balance between the federal policy of encouraging peaceful resolution of labor disputes by means of collective bargaining, and the societal interests protected by the public policy exception. As the *Grasselli* case illustrates, no clear direction is currently provided to the courts as to how these competing interests should be brought into alignment. Until the Supreme Court clarifies its position, the controversy is likely to continue.

B. **Arbitration of Post-Termination Grievances: Teamsters, Local Union 238 v. C.R.S.T., Inc.*¹

Most collective bargaining agreements contain grievance procedures to resolve disputes over contract interpretation.² These grievance procedures generally provide that

⁹⁵ See, e.g., *National Rural Letter Carriers' Ass'n v. United States Postal Serv.*, 625 F. Supp. 1527, 1530, 121 L.R.R.M. 2384, 2386 (D.D.C. 1986) ("[C]ourts in this Circuit have effectively rejected the liberal reading of the public policy exception adopted by the First Circuit and the Fifth Circuit.").

⁹⁶ 712 F.2d 122, 114 L.R.R.M. 2001 (5th Cir. 1983). See *supra* note 23 for a discussion of the *Great Western* case.

⁹⁷ See *Great Western*, 712 F.2d at 124, 114 L.R.R.M. at 2002.

⁹⁸ 789 F.2d 1, 122 L.R.R.M. 2094 (D.C. Cir. 1986). See *supra* note 21 for a discussion of the case.

⁹⁹ *American Postal Workers*, 789 F.2d at 8, 122 L.R.R.M. at 2100.

¹⁰⁰ In fact, two circuits have arrived at opposite conclusions based on virtually identical factual situations. Compare *American Postal Workers*, 789 F.2d at 8-9, 122 L.R.R.M. at 2100-01 (holding public policy exception not applicable when there was no specific legal prohibition against rehiring a confessedly dishonest employee) with *United States Postal Service*, 736 F.2d at 826, 116 L.R.R.M. at 2872 (holding public policy exception was applicable despite absence of law prohibiting reinstating a convicted embezzler).

¹⁰¹ 107 S. Ct. 186, 123 L.R.R.M. 2592 (1986).

* By Loretta Rhodes Richard, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 795 F.2d 1400, 122 L.R.R.M. 2993 (8th Cir.) (*en banc*), *cert. denied*, 107 S. Ct. 647, 123 L.R.R.M. 3192 (1986), *rev'g*, 780 F.2d 379, 121 L.R.R.M. 2223 (8th Cir. 1985).

² A. COX, D. BOK & R. GORMAN, *CASES & MATERIALS ON LABOR LAW* 704-707 (10th ed. 1986) [hereinafter GORMAN]. Over 25 years ago the United States Supreme Court delineated the principles governing judicial enforcement of labor arbitration clauses in the *Steelworkers Trilogy*. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 L.R.R.M. 2414 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 L.R.R.M. 2416 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 L.R.R.M. 2423 (1960). In 1986, the Supreme

the parties will submit unresolved disputes over the meaning of the agreement to a neutral third party whose interpretation of the contract is final.³ Federal labor policy strongly favors arbitration as a means of preventing industrial strife.⁴

The strength of federal labor policies favoring arbitration manifests itself in a variety of ways. For example, the federal court's jurisdiction over disputes is limited to determining whether the dispute is arguably within the ambit of the arbitration clause.⁵ The court, in such a case, does not have jurisdiction to resolve the dispute itself, but must submit the dispute to arbitration.⁶ Further, where a grievant presents a colorable claim under the contract, the federal courts will presume the grievance is arbitrable.⁷ Thus, most grievances are subject to arbitration unless the union and the employer make an explicit provision in the contract to exclude that subject from arbitration.⁸ If doubt exists as to the arbitrability of a particular grievance, the court will compel arbitration.⁹

Courts may compel the union and employer to arbitrate even where a dispute arises after the expiration or termination of a collective bargaining agreement.¹⁰ In 1977, the United States Supreme Court held in *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers* that the duty to arbitrate survives the termination of the contract, even if the dispute arises after the collective bargaining agreement expires, so long as it arises under that contract.¹¹ The Court, however, did not define when a grievance "arises under" a contract.

Court reaffirmed the principles set forth in the *Steeworkers Trilogy* in *AT & T Technologies, Inc. v. Communications Workers of Am.*, 106 S. Ct. 1415, 1418, 121 L.R.R.M. 3329, 3331 (1986).

³ See GORMAN, *supra* note 2, at 704-707.

⁴ *Warrior & Gulf Navigation Co.*, 363 U.S. at 578, 46 L.R.R.M. at 2416.

⁵ See *AT & T Technologies*, 106 S. Ct. at 1418, 1420, 121 L.R.R.M. at 3331, 3332. The courts may compel specific performance of the obligation to arbitrate. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582, 46 L.R.R.M. at 2415-16. The issue of a grievance's arbitrability under the contract is a question of law. *AT & T Technologies*, 106 S. Ct. at 1418, 121 L.R.R.M. at 3331. In determining a grievance's arbitrability under the contract, the court may not consider the merits of the substantive claim. *Id.* at 1419, 121 L.R.R.M. at 3332. As the Court stated in *AT & T Technologies*:

[w]hether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order the arbitration, but as the parties have agreed by the arbitrator. 'The courts ... have no business ... determining whether there is particular language in the written instrument which will support the claim.'

Id. (citations omitted).

⁶ *AT & T Technologies*, 106 S. Ct. at 1419, 121 L.R.R.M. at 3332.

⁷ See *Emery Air Freight Corp. v. Local Union 295*, 786 F.2d 93, 99, 121 L.R.R.M. 3240, 3244-45 (2d Cir. 1986); *Outley v. Sheepshead Nursing Home*, 688 F.2d 883, 886, 111 L.R.R.M. 2153, 2155 (2d Cir. 1982).

⁸ See *Warrior & Gulf Navigation Co.*, 363 U.S. at 583-85, 46 L.R.R.M. at 2419-20.

⁹ *Id.* at 582-83, 46 L.R.R.M. at 2420.

¹⁰ *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers*, 430 U.S. 243, 251, 94 L.R.R.M. 2753, 2756 (1977). The position of the National Labor Relations Board (NLRB) on the issue of post-termination arbitrability seems to be that any grievance presented to an employer after the expiration of a collective bargaining agreement is arbitrable as long as the grievance would have been arbitrable under the expired contract and no contractual language states that the duty to arbitrate expires along with the collective bargaining agreement. Leonard, *Post-Contractual Arbitrability after Nolde Brothers: A Problem of Conceptual Clarity*, 28 N.Y.L. SCH. L. REV. 257, 268-69 (1983).

¹¹ *Nolde Bros.*, 430 U.S. at 249, 94 L.R.R.M. at 2755. For thorough discussions of *Nolde* see

This ambiguity in the *Nolde* Court's opinion has resulted in a myriad of judicial opinions attempting to delineate when a grievance arises under a contract.¹² Indeed, in the decade since the Supreme Court decided *Nolde*, the federal courts of appeals have issued inconsistent decisions reflecting the continuing confusion over the arbitrability of post-termination grievances.¹³ Some courts have interpreted the case to compel arbitration where the union presents a "colorable claim" under the expired agreement.¹⁴ Other courts, in contrast, have interpreted *Nolde* narrowly to deny arbitration unless the grievant can show that the facts giving rise to the grievance occurred, or that the benefits claimed "accrued or vested," before the labor agreement expired or terminated.¹⁵

Following the latter approach, during the *Survey* year, the Eighth Circuit held in *Teamsters, Local 238 v. C.R.S.T., Inc.*, that a grievance arising after a contract's expiration or termination is not arbitrable unless the dispute involves a benefit that "vested or accrued" under the expired contract, or unless the facts giving rise to the dispute occur before the contract's expiration.¹⁶ While recognizing the broad language in the Supreme Court's *Nolde* opinion, the Eighth Circuit specifically construed *Nolde* to apply only to a limited class of post-termination grievances, such as severance pay, retirement benefits, and vacation pay.¹⁷ *Local 238* represents a narrow approach, in contrast to a broader one which other courts have used, to determine the arbitrability of post-termination grievances.

Local 238 (the Union) represented truck driver employees of C.R.S.T. (the Company).¹⁸ Local 238 and the Company operated under a collective bargaining agreement for the period July 1, 1979 through June 30, 1982.¹⁹ Before the expiration of the

Geotz, *Arbitration After Termination of a Collective Bargaining Agreement*, 63 VA. L. REV. 693 (1977); Leonard, *supra* note 10.

¹² See, e.g., *Emery Air Freight*, 786 F.2d at 93, 121 L.R.R.M. at 3240; *Graphic Communications Union v. Chicago Tribune Co.*, 794 F.2d 1222, 123 L.R.R.M. 2488 (7th Cir. 1986); *Teamsters v. Kennicott Bros.*, 771 F.2d 300, 120 L.R.R.M. 2306 (7th Cir. 1985); *Ottley*, 688 F.2d at 883, 111 L.R.R.M. at 2153; *Federated Metals Corp. v. United Steelworkers of Am.*, 648 F.2d 856, 107 L.R.R.M. 2271 (3d Cir. 1981), *cert. denied sub nom.*, 454 U.S. 1031, 108 L.R.R.M. 2924 (1981); *Rochdale Village, Inc. v. Public Serv. Employees Union, Local No. 80*, 605 F.2d 1290, 102 L.R.R.M. 2476 (2d Cir. 1979). See Leonard, *supra* note 10, at 273-91 for a discussion of the NLRB and federal circuit court decisions interpreting *Nolde* from 1977-1983.

¹³ See, e.g., *Emery Air Freight*, 786 F.2d at 96-99, 121 L.R.R.M. at 3243-44 (Second Circuit held that to meet the requirement that the grievance arise under a contract the party raising it need only point to a provision in the contract that arguably covers the dispute); *Graphic Communications Union*, 794 F.2d at 1227, 123 L.R.R.M. at 2941 (Seventh Circuit held that grievances arising under an expired agreement arbitrable only where they involved accrued rights or obligations); *Federated Metals Corp.*, 648 F.2d at 861, 107 L.R.R.M. at 2275 (Third Circuit held that it is not necessary that a disputed right have vested or accrued under the expired agreement to be arbitrable so long as the dispute turns on differing interpretations of the agreement).

¹⁴ See, e.g., *Emery Air Freight*, 786 F.2d at 99, 121 L.R.R.M. at 3244-45; *Ottley*, 688 F.2d at 886, 111 L.R.R.M. at 2155.

¹⁵ See, e.g., *Graphic Communications Union*, 794 F.2d at 1227, 123 L.R.R.M. 249; *County of Ottawa v. Jaklinski*, 423 Mich. 1, 377 N.W.2d 668, 120 L.R.R.M. 3260 (1985).

¹⁶ 795 F.2d 1400, 122 L.R.R.M. 2993 (8th Cir.) (*en banc*), *cert. denied*, 107 S. Ct. 647, 123 L.R.R.M. 3192 (1986). The Eighth Circuit's *en banc* decision reversed a prior three judge panel that held the post-termination discharge arbitrable. See 780 F.2d 379, 384, 121 L.R.R.M. 2223, 2227.

¹⁷ *Local 238*, 795 F.2d at 1404, 122 L.R.R.M. at 2995.

¹⁸ *Id.* at 1402, 122 L.R.R.M. at 2994.

¹⁹ *Id.*

contract, the parties began negotiations for a new contract, but failed to reach an agreement before the old agreement expired.²⁰ Among the proposals discussed in the negotiations were changes in the then existing grievance procedure.²¹

In December 1982, the Company determined that negotiations had reached an impasse and notified the employees that effective December 27, 1982, the Company was going to impose unilaterally a schedule of wages, hours and other terms and conditions of employment consistent with its final offer to the Union.²² The Company's final offer included a grievance procedure.²³ The new "schedule" of terms and conditions instituted, however, contained no express arbitration provision, although it did provide that disputes over seniority were to be subject to the grievance procedure.²⁴

In January 1983, C.R.S.T. discharged a truck driver employee represented by Local 238 after the Company determined that the employee had caused an automobile accident.²⁵ The Union, following the grievance procedure in the expired agreement, sought to arbitrate.²⁶ The Company refused, asserting that the grievance procedure in the expired contract no longer applied because more than one year had elapsed since the contract expired and also that no grievance procedure existed under its unilaterally imposed schedule, except as to disputes over seniority.²⁷

The Union filed a state court action to compel arbitration.²⁸ The Company removed the action to the United States District Court for the Northern District of Iowa.²⁹ The district court granted the Company's motion for summary judgment, holding that the only grievable matters under the unilaterally imposed schedule were seniority dates.³⁰ The Union appealed the case to the United States Court of Appeals for the Eighth Circuit.³¹

On appeal, the Union presented three arguments to demonstrate the existence of the grievance procedure. First, the Union argued, the court should infer a grievance procedure from C.R.S.T.'s unilateral schedule, which retained a grievance procedure to resolve seniority disputes.³² Alternatively, the Union contended, the grievance procedure in the expired agreement remained in effect.³³ Finally, the Union asserted that because the Company's last offer contained a grievance procedure, and the Company adopted a schedule consistent with the final offer, a grievance procedure existed.³⁴ In its original three judge panel decision, the Eighth Circuit accepted the Union's argument that the grievance procedure retained in the seniority provision of the schedule rendered the

²⁰ *Id.*

²¹ *Id.* at 1408, 122 L.R.R.M. at 2999 (Heaney, J., dissenting).

²² *Id.* at 1402, 122 L.R.R.M. at 2994.

²³ *Id.* at 1408, 122 L.R.R.M. at 2999 (Heaney, J., dissenting).

²⁴ *Local 238*, 780 F.2d at 380, 121 L.R.R.M. at 2444.

²⁵ *Local 238*, 795 F.2d at 1402, 122 L.R.R.M. at 2994.

²⁶ *Id.*

²⁷ *Id.* at 1401-02, 122 L.R.R.M. at 2993.

²⁸ *Id.* at 1401, 122 L.R.R.M. at 2993.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1402, 122 L.R.R.M. at 2994.

³³ *Id.*

³⁴ *Id.*

agreement ambiguous and thus the discharge was subject to the grievance procedure and arbitration thereunder.³⁵ In a rehearing *en banc*, the Eighth Circuit reversed.³⁶

The majority summarily dismissed the Union's argument that the grievance procedure contained in the Company's last offer applied because, the court found, the agreement had not been raised before the district court.³⁷ Moreover, the court rejected the panel's holding that the Company's reference to "the grievance procedure" in the schedule's seniority clause created the inference that an arbitration provision existed.³⁸ The court found that the unilateral schedule did not provide a broad arbitration clause, but rather contained a limited procedure which applied to disputes over seniority only.³⁹ Thus, the court concluded, a dispute over a wrongful discharge was not arbitrable based on the grievance procedure in the unilateral schedule.⁴⁰

The majority also considered whether the grievance procedure contained in the expired agreement applied to the employee's discharge.⁴¹ The court found that the old grievance procedure did not apply.⁴² The court began its analysis by briefly reciting the conflict between the federal labor policy favoring arbitration and the principle that a party who did not explicitly agree to arbitration in the contract may not be required to arbitrate.⁴³ The court also noted that arbitration provisions are presumed to survive the expiration or termination of a contract unless clearly negated.⁴⁴ The court stated, however, that the presumption does not operate unless the grievance arose under the expired contract.⁴⁵ Thus, the court's analysis focused on whether the disputed discharge arose under the expired agreement.⁴⁶

The Eighth Circuit held that the discharge did not arise under the expired agreement.⁴⁷ The court construed *Nolde's* holding narrowly.⁴⁸ The court stated that all courts which have considered this question have required, to some degree, that post-termination grievances must be based on rights which vested or accrued under the expired agreement, or relate to events which occurred before the agreement expired or terminated.⁴⁹ The court found that because the truck driver employee was discharged after the agreement expired, and the discharge was based on an accident which occurred after the agreement expired, the employee's discharge did not "arise under" the agreement and thus was not arbitrable.⁵⁰

³⁵ *Local 238*, 780 F.2d at 3384, 121 L.R.R.M. at 2227.

³⁶ *Local 238*, 795 F.2d at 1400, 122 L.R.R.M. at 2994.

³⁷ *Id.* at 1402, 122 L.R.R.M. at 2994.

³⁸ *Id.* at 1404, 122 L.R.R.M. at 2996.

³⁹ *Id.*

⁴⁰ *Id.* at 1405, 122 L.R.R.M. at 2996.

⁴¹ *Id.* at 1403, 122 L.R.R.M. at 2994.

⁴² *Id.* at 1404, 122 L.R.R.M. at 2995-96.

⁴³ *Id.* at 1403, 122 L.R.R.M. at 2994-95.

⁴⁴ *Id.*

⁴⁵ *Id.* The court relied on the Michigan Supreme Court decision in *Jaklinski*, 423 Mich. at 17, 377 N.W.2d at 674, 120 L.R.R.M. at 3264, which characterized the presumption set forth in *Nolde* as mere dicta. See *Local 238*, 795 F.2d at 1403, 1404, 122 L.R.R.M. at 2995.

⁴⁶ *Local 238*, 795 F.2d at 1403-04, 122 L.R.R.M. at 2994-96.

⁴⁷ *Id.* at 1404, 122 L.R.R.M. at 2996.

⁴⁸ *Id.* at 1403, 122 L.R.R.M. at 2995.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1404, 122 L.R.R.M. at 2996.

Three judges dissented from the majority opinion.⁵¹ The dissenters took a position similar to courts which have adopted a broad view of the type of post-termination disputes arbitrable under *Nolde*.⁵² Chief Judge Lay stated in his separately written dissent that he would have found the grievance arbitrable for two reasons. First, the Company's unilaterally imposed schedule constituted, in his opinion, a contract between the Company and the Union that contained an arbitration clause that arguably covered the employee's grievance.⁵³ Second, the Chief Judge continued, the employee's continuing right to employment was as much a vested right as the severance pay considered under *Nolde*.⁵⁴ Thus, Chief Judge Lay concluded, the grievance should be arbitrated.⁵⁵

Chief Judge Lay asserted that even if the terms of the schedule failed to include the last grievance procedure which the Company had proposed, the reference to the grievance procedure in the unilaterally implemented seniority provisions rendered the grievance procedure ambiguous.⁵⁶ Chief Judge Lay argued that the majority improperly failed to apply the traditional principle of judicial construction which requires that an ambiguously drafted provision be construed against the drafter.⁵⁷ Moreover, given that doubts regarding arbitrability should be resolved in favor of coverage, the grievance should have been sent to arbitration.⁵⁸

Chief Judge Lay recognized the unique nature of collective bargaining agreements.⁵⁹ Labor agreements are not ordinary contracts, the Chief Judge stated, but a private code under which the parties order their continuing employment relationship.⁶⁰ This relationship, Chief Judge Lay explained, does not cease when a contract expires.⁶¹ Thus, the Chief Judge argued, the right to continued employment existed.⁶² To hold otherwise, Chief Judge Lay asserted, would result in relegating all Union employees to employees at will upon the expiration of the contract.⁶³

In the second dissenting opinion, Judge Heaney challenged the majority's findings on two grounds. First, Judge Heaney noted, the final proposal which the company offered to the Union, and which the company subsequently unilaterally imposed, contained a grievance procedure.⁶⁴ According to Judge Heaney, because the Company stated that its last offer would be implemented and the last offer contained a grievance procedure, the Company led the Union employees to rely on the existence of an arbitration

⁵¹ *Id.* at 1405-1410, 122 L.R.R.M. at 2996-3000 (Lay, C.J., Heaney, J., Wollman, J., dissenting). Chief Judge Lay and Judge Heaney each wrote dissenting opinions. *Id.* (Lay, C.J., and Heaney, J., dissenting). Judge Wollman joined in a part of Chief Judge Lay's opinion. *Id.* at 1410, 122 L.R.R.M. at 3000 (Wollman, J., dissenting).

⁵² *Id.* (Lay, C.J., Heaney, J., Wollman, J., dissenting). See, e.g., *Emery Air Freight*, 786 F.2d at 93, 121 L.R.R.M. at 3240.

⁵³ *Id.* at 1406, 122 L.R.R.M. at 2998 (Lay, C.J., dissenting).

⁵⁴ *Id.* at 1405, 122 L.R.R.M. at 2997 (Lay, C.J., dissenting).

⁵⁵ *Id.* at 1406, 122 L.R.R.M. at 2998 (Lay, C.J., dissenting).

⁵⁶ *Id.* at 1408, 122 L.R.R.M. at 2998 (Lay, C.J., dissenting).

⁵⁷ *Id.* at 1408, 122 L.R.R.M. at 2998-99 (Lay, C.J., dissenting).

⁵⁸ *Id.* at 1406-07, 122 L.R.R.M. at 2997 (Lay, C.J., dissenting).

⁵⁹ *Id.* at 1405, 122 L.R.R.M. at 2997 (Lay, C.J., dissenting).

⁶⁰ *Id.* (Lay, C.J., dissenting).

⁶¹ *Id.* at 1405, 122 L.R.R.M. at 2996 (Lay, C.J., dissenting).

⁶² *Id.* at 1405, 122 L.R.R.M. at 2997 (Lay, C.J., dissenting).

⁶³ *Id.* (Lay, C.J., dissenting).

⁶⁴ *Id.* at 1408, 122 L.R.R.M. at 2999 (Heaney, J., dissenting).

procedure in preference to striking.⁶⁵ Thus, Judge Heaney argued, the Company should remain obligated to arbitrate post-termination grievances.⁶⁶

Second, Judge Heaney asserted, the grievance would be arbitrable under the seniority provision of the contract, because the schedule containing the seniority provision could be interpreted only with reference to the expired agreement.⁶⁷ Inasmuch as the seniority provision contained the term "discharge," Judge Heaney stated, and the only way to determine the meaning of "discharge" was to look at the wrongful discharge provisions in the expired agreement, the employee's discharge arguably arose under the expired agreement.⁶⁸ Thus, pursuant to *Nolde*, Judge Heaney argued, the grievance was presumed arbitrable because the parties did not negate this presumption explicitly.⁶⁹

The majority opinion in *Local 238* is inconsistent with the fundamental principles of arbitration set forth in the *Steelworkers Trilogy*. The *Steelworkers Trilogy* is the foundation for the modern labor policy favoring labor arbitration to resolve conflicts between workers and employers.⁷⁰ In the *Trilogy*, the Supreme Court recognized that arbitration is not merely an alternative dispute resolution mechanism stated in a commercial contract, but is an integral part of the ongoing labor relations process.⁷¹ The grievance procedure, the Supreme Court has stated, stands at the core of the system of industrial self-government.⁷² To remove a subject from the grievance procedure requires the strongest evidence that the parties did not intend that the subject be arbitrable.⁷³ Thus, as Chief Judge Lay correctly stated in his dissent, any doubts as to whether a particular grievance should be arbitrated should be resolved in favor of coverage.⁷⁴

Moreover, the *Nolde* Court expanded the presumption of arbitrability to include post-termination disputes. Under *Nolde*, the Supreme Court held that, absent strong reasons to the contrary, a court considering post-termination arbitrability should presume that the parties did not intend that their arbitration duties would terminate automatically with the contract.⁷⁵ Further, under the traditional arbitrability analysis to determine a grievance's arbitrability, a court should review the scope of the arbitration clause to see if it is broad, governing all disputes, or narrow, excluding particular subjects from arbitration.⁷⁶ Where the arbitration clause is broad, a court should order arbitration if the claim is "on its face governed by the contract."⁷⁷ Where the arbitration clause is narrow, a court also should order arbitration if the dispute is within the purview of the arbitration clause.⁷⁸ Given the broad presumption of arbitrability, therefore, as long as the party raising the grievance can point to a provision in the contract that covers the dispute, the grievance — even if it appears patently baseless or frivolous — is arbitrable.⁷⁹

⁶⁵ *Id.* (Heaney, J., dissenting).

⁶⁶ *Id.* (Heaney, J., dissenting).

⁶⁷ *Id.* at 1409-10, 122 L.R.R.M. at 3000 (Heaney, J., dissenting).

⁶⁸ *Id.* (Heaney, J., dissenting).

⁶⁹ *Id.* at 1410, 122 L.R.R.M. at 3000 (Heaney, J., dissenting).

⁷⁰ See *supra* notes 2-4 and accompanying text for a discussion of the *Steelworkers Trilogy*.

⁷¹ *Warrior & Gulf Navigation Co.*, 363 U.S. at 578, 46 L.R.R.M. at 2418.

⁷² *Id.* at 581, 46 L.R.R.M. at 2419.

⁷³ *Id.* at 585, 46 L.R.R.M. at 2420.

⁷⁴ *Id.* at 583, 46 L.R.R.M. at 2420.

⁷⁵ *Nolde Bros.*, 430 U.S. at 253, 254-55, 94 L.R.R.M. at 2756, 2757.

⁷⁶ *Emery Air Freight*, 786 F.2d at 97, 121 L.R.R.M. at 3243.

⁷⁷ *Id.*

⁷⁸ *Rochdale Village, Inc.*, 605 F.2d at 1295, 102 L.R.R.M. at 2480.

⁷⁹ *Emery Air Freight*, 786 F.2d at 98-99, 121 L.R.R.M. at 3244.

The Eighth Circuit seems to have discarded this presumption of arbitrability that the *Nolde* Court so strongly emphasized.⁸⁰ Further, the court ignored the *Nolde* Court's specific refusal to require that an event giving rise to the claim must have occurred during the life of the contract in order for a post-termination grievance to be arbitrable.⁸¹ Indeed, in *Local 238*, the court's approach to the issue of arbitrability under the expired agreement is contrary to the principles set forth in *Nolde* and the *Steelworkers Trilogy*.

The *Local 238* court never examined whether the parties clearly intended the arbitration clause to terminate with the expired agreement. Moreover, the court itself noted that arbitration clauses are presumed to survive the collective bargaining agreement's expiration.⁸² The court erroneously failed to reach the question of the scope of the expired contract's arbitration clause, or whether the employee's discharge arguably fell within it. Rather, the court stated that unless the benefits accrued or the events giving rise to the grievance occurred under the old agreement, the presumption of arbitrability did not apply.⁸³ Nowhere in *Nolde*, however, did the Supreme Court require that the events arise before the old agreement expired, but instead, the Court emphasized the parties' intent to continue to arbitrate. Thus, the Eighth Circuit's reasoning does not follow the Supreme Court's approach properly.

As Judge Heaney noted in his dissent, even assuming the court was correct in not applying the expired contract's arbitration clause, a dispute over the meaning and applicability of the unilaterally imposed schedule existed.⁸⁴ Because a dispute existed, the court should have considered whether the dispute arguably fell within the ambit of the provision. When the collective bargaining negotiations reached an impasse, as Judge Heaney's dissent pointed out, the Company stated that it was adopting a contract consistent with its last offer.⁸⁵ The last offer included a grievance procedure.⁸⁶ As Judge Heaney stated, the majority failed to examine the scope of the grievance procedure or whether the employee had a colorable claim under the new contract.⁸⁷ Indeed, the court merely noted that the general grievance procedure in the new contract covered seniority, but ignored the specific language of the seniority provision, which stated that disputes would be resolved under "the grievance procedure."⁸⁸ Because there was no grievance procedure contained in the unilaterally imposed schedule, the clear inference is that the statement referred to the grievance procedure contained in the expired contract.

The Eighth Circuit failed to take into account the unique nature of the collective bargaining relationship explicitly recognized in the *Steelworkers Trilogy*. Specifically, the court ignored the parties' continuing bargaining relationship and expectation that the new contract would contain a grievance procedure and arbitration. Federal labor policy favors arbitration of disputes to promote industrial peace.⁸⁹ To the contrary, the *Local 238* decision does not promote industrial peace because unions can no longer be certain

⁸⁰ *Nolde Bros.*, 430 U.S. at 243, 94 L.R.R.M. at 2753.

⁸¹ *Id.* at 252-53, 94 L.R.R.M. at 2756.

⁸² *Local 238*, 795 F.2d at 1403, 122 L.R.R.M. at 2995-96.

⁸³ *Id.*

⁸⁴ *Id.* at 1406, 122 L.R.R.M. at 2997-98 (Heaney, J., dissenting).

⁸⁵ *Id.* at 1402, 122 L.R.R.M. at 2994.

⁸⁶ *Id.* at 1408, 122 L.R.R.M. at 2999 (Heaney, J., dissenting).

⁸⁷ *Id.* (Heaney, J., dissenting).

⁸⁸ *Id.* at 1404-05, 122 L.R.R.M. at 2996.

⁸⁹ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 46 L.R.R.M. 2416, 2416 (1960).

that the employer will be required to arbitrate post-termination disputes. Because of this uncertainty, unions may choose to strike over post-termination disputes.

In sum, arbitration is the favored method of resolving labor disputes. The Eighth Circuit in *Local 238 v. C.R.S.T., Inc.*, however, held that a post-termination grievance is not arbitrable under an expired agreement unless the claim is based on benefits that accrued or events that occurred during the life of the agreement. The court construed the 1977 Supreme Court decision in *Nolde* to encompass only a limited group of grievances. This interpretation is inconsistent with the underlying rationale of the *Steelworkers Trilogy* and *Nolde* because the *Local 238* court viewed the arbitration clause as a mere creature of contract and not as an integral part of the industrial relations process.

C. *NLRB Standards for Deferral to Arbitration Awards: *Garcia v. NLRB*¹

The National Labor Relations Act (the Act) makes it an unfair labor practice for an employer to interfere with an employee's right to engage in protected concerted activities, including self-organization and collective bargaining.² When a labor dispute involves both an unfair labor practice charge under the Act and a grievance subject to arbitration under a collective bargaining agreement, the Act authorizes the National Labor Relations Board (the Board) to adjudicate the unfair labor practice charge despite prior arbitration of the grievance.³ Because the Act also provides that arbitration is the "desirable method" of settling grievances arising under collective bargaining agreements,⁴ however, the Board may decline to adjudicate an unfair labor practice and defer to an arbitration award when doing so "will serve the fundamental purposes of the Act."⁵ Thus, when a labor dispute results in both a grievance subject to arbitration and an unfair labor practice charge, the Board, in deciding whether to defer to an arbitration award, balances the Act's competing concerns: to encourage private dispute resolution through collective bargaining and the arbitration process, on the one hand, and to protect the Board's statutory responsibility to adjudicate unfair labor practices, on the other hand.⁶

* By Kate H. Lind, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 785 F.2d 807, 121 L.R.R.M. 3349 (9th Cir. 1986), *denying enforcement of*, United Parcel Serv., 274 N.L.R.B. 667, 118 L.R.R.M. 1414 (1985).

² Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1982); Section 7, 29 U.S.C. § 157 (1982). Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title" 29 U.S.C. § 158(a)(1) (1982).

Section 7 of the Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. § 157 (1982).

³ See Section 10(a), 29 U.S.C. § 160(a) (1982). Section 10(a) of the Act provides:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section [8] of this title) affecting commerce.

This power shall not be affected by any means of adjustment or prevention that has been or may be established by agreement, law, or otherwise

Id. See also *International Harvester Co.*, 138 N.L.R.B. 923, 925-26, 51 L.R.R.M. 1155, 1156 (1962).

⁴ 29 U.S.C. § 173(d) (1982).

⁵ *International Harvester*, 138 N.L.R.B. at 925-26, 51 L.R.R.M. at 1156.

⁶ *Servair, Inc. v. NLRB*, 726 F.2d 1435, 1438, 115 L.R.R.M. 3067, 3069 (9th Cir. 1984). See also *Taylor v. NLRB*, 786 F.2d 1516, 1518, 122 L.R.R.M. 2084, 2086 (11th Cir. 1986).

Although the Board's standards for deferral have fluctuated considerably,⁷ the Board recently announced deferral standards in its 1984 decision in *Olin Corp.*⁸ In *Olin*, the Board held that it would defer to an arbitration award when: (1) the arbitration proceedings appeared "fair and regular"; (2) the parties had contracted to be bound by the arbitration; (3) the arbitration award was not "clearly repugnant to the purposes and policies of the Act"; (4) the contractual and unfair labor practice issues were "factually parallel"; and (5) the arbitrator was "presented generally" with the facts relevant to the unfair labor practice charge.⁹ Although the first three criteria had been part of the Board's prior standard of deferral prior to *Olin*,¹⁰ the *Olin* Board added the last two criteria to ensure that the Board would defer to arbitration only when the arbitrator had "adequately considered the unfair labor practice."¹¹ More importantly, however, while the *Olin* Board set out these five criteria for deferral, the Board relied on a strong national labor policy favoring arbitration, and infrequent, inconsistent Board deferrals to hold that the burden of persuasion would now be on the party arguing *against* deferral to show that the arbitration proceeding did not meet one of the *Olin* deferral criteria.¹² Regarding the third criterion for deferral, the *Olin* Board clarified that an arbitration award was not repugnant to the Act unless it was "palpably wrong" and thus "not susceptible to an interpretation consistent with the Act."¹³ In the past, courts have found arbitration awards to be repugnant to the Act where, for example, the award allowed an employer to cause employees to violate the law.¹⁴

During the *Survey* year, in *Garcia v. NLRB*, the United States Court of Appeals for the Ninth Circuit refused to enforce the Board's deferral to an arbitration award because the Board, contrary to its own standards announced in *Olin*, deferred to an arbitration award that the court found to be repugnant to the Act.¹⁵ In *Garcia*, the court found that an employee who refused to obey an order to tap his horn in violation of California law had engaged in protected concerted activity, and thus an arbitration award punishing the employee for such conduct violated the Act.¹⁶ The court also found that, in punishing

⁷ See, e.g., *Stephenson v. NLRB*, 550 F.2d 535, 94 L.R.R.M. 3224 (9th Cir. 1977); *Suburban Motor Freight*, 247 N.L.R.B. 146, 103 L.R.R.M. 1113 (1980); *Electronic Reproduction Serv. Corp.*, 213 N.L.R.B. 758, 87 L.R.R.M. 1211 (1974).

⁸ *Olin Corp.*, 268 N.L.R.B. 573, 573-74, 115 L.R.R.M. 1056, 1057-58 (1984). See generally Ray, *Individual Rights and NLRB Deferral to the Arbitration Process: A Proposal*, 28 B.C.L. REV. 1, 2 (1986); Henkel & Kelly, *Deferral to Arbitration after Olin and United Technologies: Has the NLRB Gone Too Far?*, 43 WASH. & LEE L. REV. 37, 38 (1986).

⁹ *Olin*, 268 N.L.R.B. at 573-74, 115 L.R.R.M. at 1057-58.

¹⁰ *Spielberg Mfg. Co.* 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955).

¹¹ *Olin*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058.

¹² *Id.* at 574, 115 L.R.R.M. at 1058. *Olin's* shifting of the burden of proof means that the Board will presume that the arbitrator adequately considered the unfair labor practice charge. See *id.* at 579, 115 L.R.R.M. at 1062 (Zimmerman, dissenting). *Olin* has been criticized as going too far in expanding the Board's authority to defer to arbitration awards at the expense of the statutory rights of individual employees and the Board's statutory obligation to adjudicate unfair labor practice claims. *Id.* at 579, 115 L.R.R.M. at 1063 (Zimmerman, dissenting). See Ray, *supra* note 8, at 3.

¹³ *Olin*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058.

¹⁴ See, e.g., *Banyard v. NLRB*, 505 F.2d 342, 347, 87 L.R.R.M. 2001, 2004 (D.C. Cir. 1974). For a discussion of *Banyard*, see *infra* note 54.

¹⁵ *Garcia v. NLRB*, 785 F.2d 807, 810, 121 L.R.R.M. 3349, 3352 (9th Cir. 1986), *denying enforcement of* *United Parcel Serv.*, 274 N.L.R.B. 667, 118 L.R.R.M. 1414 (1985).

¹⁶ *Id.* at 810, 121 L.R.R.M. at 3351-52.

the employee for refusing to break the law, the arbitration award violated public policy.¹⁷ The court thus held that the arbitration award was repugnant to the Act and that the Board had violated the *Olin* standards in deferring to the award.¹⁸ Because the court found that the Board's decision to defer was inconsistent with the standards the Board set out in *Olin*, however, the court never addressed the validity of the standards themselves.¹⁹ The decision in *Garcia* therefore leaves open the question of whether the Ninth Circuit would uphold the *Olin* deferral standards if squarely faced with the issue of their validity.

Garcia was a package delivery driver for United Parcel Service (UPS).²⁰ During a "ride-check" designed to improve Garcia's productivity, a supervisor told Garcia to tap his horn when making a delivery as part of UPS's "Four-Way Attract Attention Method."²¹ Garcia refused to tap his horn, expressing his belief that it was against the law to do so.²² In fact, the California Motor Vehicle Code prohibits drivers from using their horns except when necessary for safety or to prevent theft.²³ The Division Manager later told Garcia that, instead of refusing to tap his horn, Garcia should have complied with the order and then filed a grievance through his Union, and that UPS would pay any fines incurred.²⁴ When Garcia said he still would not tap his horn, UPS discharged him for gross insubordination.²⁵

The Teamsters Union filed a grievance on Garcia's behalf which a Joint Arbitration Committee heard pursuant to the collective bargaining agreement between UPS and the Union.²⁶ This committee reduced Garcia's discharge to a 10-day suspension.²⁷ Garcia filed an unfair labor practice charge with the Board claiming that UPS had violated section 8(a)(1) of the Act in discharging him for engaging in protected concerted activity.²⁸ The Administrative Law Judge found that Garcia's refusal to tap his horn did not constitute protected concerted activity and dismissed the complaint.²⁹ The Board affirmed the Administrative Law Judge's decision, but did so because it decided that deferral to the arbitration award was appropriate.³⁰

The Board found that Garcia's actions constituted concerted activity under the Board's rule announced in *Interboro Contractors*, and recently upheld by the Supreme Court in *NLRB v. City Disposal Systems, Inc.*³¹ Under the *Interboro* doctrine, the Board

¹⁷ *Id.* at 810, 121 L.R.R.M. at 3352.

¹⁸ *Id.*

¹⁹ *See id.* at 809, 121 L.R.R.M. at 3351.

²⁰ *Id.* at 808, 121 L.R.R.M. at 3350.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 808 n.1, 121 L.R.R.M. at 3350 n.1 (citing CAL. VEH. CODE § 27001 (West 1985)).

²⁴ *Id.* at 808, 121 L.R.R.M. at 3350.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 808-09, 121 L.R.R.M. at 3350. The Union later filed a grievance relating to the horn-tapping policy claiming that it violated the collective bargaining agreement that provided that employees could not be required to violate traffic laws. *Id.* at 809, 121 L.R.R.M. at 3350. The company subsequently denied the Union's grievance when UPS agreed to assume responsibility for any fines its employees received. *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ United Parcel Serv., 274 N.L.R.B. 667, 669, 118 L.R.R.M. 1414, 1417 (1985).

³¹ *Id.* at 668, 118 L.R.R.M. at 1416 (citing *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822,

held, when an employee asserts a right derived from the collective bargaining agreement, the employee engages in concerted activity.³² The Board noted that the collective bargaining agreement between the Teamsters and UPS provided that employees would not be required to violate any statute or traffic law.³³ Even though the Board therefore found that Garcia's refusal to tap his horn was concerted activity, the Board dismissed Garcia's unfair labor practice charge because it decided that deferral to the arbitration award was appropriate.³⁴ Specifically, the Board found that Garcia failed to show, as required under *Olin*, that the arbitration award was "clearly repugnant" to the Act.³⁵

In reaching its decision, the Board reasoned that the arbitration award disciplining Garcia for engaging in concerted activity would not be inconsistent with the Act if Garcia's refusal to tap his horn was not *protected* concerted activity.³⁶ The Board read the Supreme Court's *City Disposal Systems* decision as suggesting that concerted activity might not be protected when an employee has a more reasonable means available for securing his rights than to engage in the activity.³⁷ The Board stated that the arbitration committee might reasonably have found that Garcia should have resorted to the grievance procedure provided for in the collective bargaining agreement rather than refusing to tap his horn as ordered, and that, therefore, the committee's award disciplining Garcia was not "palpably wrong."³⁸ Thus, the Board held, deferral was proper because Garcia had not met the *Olin* burden of showing that the arbitration award was repugnant to the Act.³⁹

On appeal, the Ninth Circuit refused to enforce the Board's decision to defer to the arbitration award because it found that the award was repugnant to the Act.⁴⁰ The court held that the employee's refusal to tap his horn was *protected* concerted activity and thus disciplining him for engaging in such activity both violated the Act and was against public policy.⁴¹ For these reasons, the court found, the arbitration award was repugnant to the Act and the Board acted improperly in failing to follow its own *Olin* standards when it deferred to that award.⁴² Thus, the court remanded the claim to the Board to consider the merits of Garcia's unfair labor practice charge.⁴³

The central issue before the Ninth Circuit in *Garcia* was whether the Board properly deferred to the arbitration committee's award. The court initially observed that it should

115 L.R.R.M. 3193 (1984) and *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 61 L.R.R.M. 1537, *enf'd*, 388 F.2d 495, 67 L.R.R.M. 2083 (2d Cir. 1967)).

³² *Id.*

³³ *Id.* at 667-68, 118 L.R.R.M. at 1415-16. The court quoted from the collective bargaining agreement which provided at Art. 11, § 2: "Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to person or property or in violation of a government regulation relating to safety of person or equipment." *Id.* at 668 n.7, 118 L.R.R.M. at 1416 n.7. Moreover, Art. 11, § 3, also quoted by the court, provided that "[n]o driver shall be required to violate traffic laws or overloading regulations." *Id.*

³⁴ *Id.* at 668, 118 L.R.R.M. at 1416.

³⁵ *Id.*

³⁶ *Id.* at 669, 118 L.R.R.M. at 1417.

³⁷ *Id.* (citing *City Disposal Systems*, 465 U.S. at 837, 115 L.R.R.M. at 3200). For a discussion of the decision in *City Disposal Systems*, see 1984-85 *Annual Survey of Labor Relations and Employment Discrimination Law*, 26 B.C.L. Rev. 237 (1984).

³⁸ *United Parcel Serv.*, 274 N.L.R.B. at 669, 118 L.R.R.M. at 1417.

³⁹ See *id.*

⁴⁰ *Garcia v. NLRB*, 785 F.2d 807, 810, 121 L.R.R.M. 3349, 3352 (9th Cir. 1986).

⁴¹ *Id.* at 810, 121 L.R.R.M. at 3351-52.

⁴² *Id.* at 810, 121 L.R.R.M. at 3352.

⁴³ *Id.* at 812, 121 L.R.R.M. at 3353.

enforce the Board's decision unless "the Board clearly depart[ed] from its own standards or the standards themselves are invalid."⁴⁴ The court thus considered whether the Board, in this case, had clearly departed from its own standards as set forth in *Olin*.⁴⁵

The Ninth Circuit stated that deferral to arbitration was appropriate under *Olin* when: (1) the proceedings were fair and regular; (2) the parties had agreed to be bound by the arbitration; (3) the decision was not "clearly repugnant to the purposes and policies of the Act"; (4) the contractual and unfair labor practice issues were factually parallel; and (5) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue.⁴⁶ The court specifically noted that, under *Olin*, an award would not be repugnant to the Act unless the party arguing against deferral demonstrated that the award was "palpably wrong" or "not susceptible to an interpretation consistent with the Act."⁴⁷

Garcia, the court observed, argued that deferral was inappropriate because the arbitration award was "clearly repugnant" to the Act.⁴⁸ The Board, the court noted, had rejected Garcia's argument, finding that Garcia's refusal to tap his horn was not protected concerted activity.⁴⁹ The Ninth Circuit, however, disagreed with the Board, holding that Garcia's concerted activity was protected and that the arbitration award disciplining Garcia was therefore "palpably wrong" and repugnant to the Act.⁵⁰

The court cited several Board decisions that held that an employee's refusal to violate state law constituted protected concerted activity.⁵¹ Specifically, the court stated that the Board had upheld as protected concerted activity an employee's refusal to drive a truck which exceeded the legal length,⁵² and employee refusals to drive defective or overweight trucks.⁵³ Moreover, the court noted the decision of the District of Columbia Court of Appeals in *Banyard v. NLRB*, which reversed a Board decision that deferred to an arbitration award permitting the employer to require its employees to violate state law.⁵⁴ The court in *Garcia* emphasized the *Banyard* court's finding that such an award was against public policy and repugnant to the purposes of the Act.⁵⁵ Thus, the *Garcia*

⁴⁴ *Id.* at 809, 121 L.R.R.M. at 3351 (citing *Servair, Inc. v. NLRB*, 726 F.2d 1435, 1439, 115 L.R.R.M. 3067, 3069 (9th Cir. 1984)).

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *Olin Corp.*, 268 N.L.R.B. 573, 573, 574, 115 L.R.R.M. 1056, 1057, 1058 (1984) and *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955)).

⁴⁷ *Id.* (citing *Olin*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058). The court also noted the *Olin* Board's shifting of the burden of showing a failure to meet one of the criteria on the party arguing against deferral. *Id.*

⁴⁸ *See id.* at 810, 121 L.R.R.M. at 3351. Garcia conceded that the other four deferral criteria had been met. *Id.*

⁴⁹ *Id.*

⁵⁰ *See id.* at 810, 121 L.R.R.M. at 3151-52.

⁵¹ *Id.* at 810, 121 L.R.R.M. at 3352.

⁵² *Id.* (citing *Varied Enterprises, Inc.*, 240 N.L.R.B. 126, 132, 100 L.R.R.M. 1305, 1305 (1979)).

⁵³ *Id.* (citing *Ogden & Moffet Co.*, 254 N.L.R.B. 1349, 1352, 106 L.R.R.M. 1283 (1984) and *Transport Serv. Co.*, 263 N.L.R.B. 910, 911, 111 L.R.R.M. 1107, 1108 (1982)).

⁵⁴ *Id.* (citing *Banyard v. NLRB*, 505 F.2d 342, 347, 87 L.R.R.M. 2001, 2004 (D.C. Cir. 1974)). In *Banyard*, an employee had been discharged for refusing to drive a truck that was overloaded in violation of Ohio state law. 505 F.2d at 343, 87 L.R.R.M. at 2002. The court asserted that: "[r]egardless of the purpose of the Ohio statute, it remains axiomatic that it was still the law; for this or any other company to require its employees to act in violation thereof can never be upheld by the Board or this court." *Id.* at 347, 87 L.R.R.M. at 2004.

⁵⁵ *Garcia*, 785 F.2d at 810, 121 L.R.R.M. at 3352 (citing *Banyard*, 505 F.2d at 347, 87 L.R.R.M. at 2004).

court concluded that the Board had a "longstanding policy" of upholding employee refusals to violate the law as protected activity.⁵⁶

The court rejected the Board's argument that the Supreme Court's recent decision in *City Disposal Systems* required a new policy providing that an employee's activity is not protected when the employee has a reasonable alternative to refusing to follow an order.⁵⁷ In fact, the court noted, the Supreme Court in *City Disposal Systems* specifically did not decide whether the employee's actions in that case were protected.⁵⁸ Rather, the Ninth Circuit observed, *City Disposal Systems* did suggest in dicta that an employee's activity might not be protected when he engages in concerted activity in an "abusive manner."⁵⁹ The Ninth Circuit found, however, that Garcia did not act in an abusive manner in refusing to violate the law.⁶⁰

Rather, the court held that the Board distorted the holding of *City Disposal Systems* in finding that the existence of a reasonable alternative to Garcia's refusal to obey the order to tap his horn made his failure to follow the order abusive.⁶¹ The Ninth Circuit stated that Garcia's refusal was a "natural prelude to" the filing of a grievance.⁶² Thus, the court found, Garcia's refusal to follow the order to tap his horn was protected concerted activity,⁶³ and the arbitration award which punished him for engaging in this activity violated section 8(a)(1) of the Act.⁶⁴ The court therefore held that the arbitration award was repugnant to the Act and that the Board's deferral to the award was inappropriate.⁶⁵

In addition to finding that the arbitration award was repugnant to the Act because it punished Garcia for engaging in protected concerted activity, the court also held that the award was repugnant to the Act because it was against public policy to punish Garcia

⁵⁶ *Id.* at 811, 121 L.R.R.M. at 3352.

⁵⁷ *Id.*

⁵⁸ *Id.* (citing *City Disposal Systems, Inc.*, 465 U.S. 822, 837, 115 L.R.R.M. 3193, 3200 (1984)).

⁵⁹ *Id.* (citing *City Disposal Systems*, 465 U.S. at 837, 115 L.R.R.M. at 3200). The Supreme Court in *City Disposal Systems* cited two cases in support of its suggestion that conduct by an employee might be so abusive that the employee would lose the protection of § 7. 465 U.S. at 837, 115 L.R.R.M. at 3200 (citing *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729, 731, 74 L.R.R.M. 2855, 2859, 2860 (5th Cir. 1970) (stating that "[a]n employee may not act with impunity even though he is engaged in protected activity," but finding that the employees' use of epithets and accusations at a grievance meeting did not cause them to lose the protection of § 7); *Yellow Freight Sys., Inc.*, 247 N.L.R.B. 177, 181, 103 L.R.R.M. 1154, 1154 (1980) (employee's delay in completing a freight haul constituted a work slow-down or stoppage expressly prohibited by the contract)).

⁶⁰ *Garcia*, 785 F.2d at 811, 121 L.R.R.M. at 3353.

⁶¹ *Id.* at 811, 121 L.R.R.M. at 3352.

⁶² *Id.* (quoting *City Disposal Systems*, 465 U.S. at 837, 115 L.R.R.M. at 3200). The court in *Garcia* noted the finding in *City Disposal Systems* that, although filing a grievance is the "principal tool" for employee enforcement of rights under their collective bargaining agreement:

there is unlikely to be a bright-line distinction between an incipient grievance, a complaint to an employer, and perhaps even an employee's initial refusal to perform a certain job that he believes he has no duty to perform. It is reasonable to expect that an employee's first response to a situation that he believes violates his collective-bargaining agreement will be a protest to his employer.

Id. (quoting *City Disposal Systems*, 465 U.S. at 836, 115 L.R.R.M. at 3199-200).

⁶³ *Id.*

⁶⁴ *Id.* at 810, 121 L.R.R.M. at 3351-52.

⁶⁵ *Id.* at 810, 121 L.R.R.M. at 3352.

for refusing to break the law.⁶⁶ The court dismissed the Board's assertion that it was not the purpose of the Act to ensure compliance with traffic laws.⁶⁷ The court emphasized that the Board should not be allowed to condone violations of the law by deferring to an arbitration award that disciplined an employee for asserting his contractually-guaranteed right not to violate the law.⁶⁸ The court held that to require an employee first to obey an order to break the law and then to file a grievance was not a "responsible course of action," and thus was repugnant to public policy and to the Act.⁶⁹

The Ninth Circuit in *Garcia* addressed the issue of when the Board properly can defer to a prior arbitration award. As an initial matter, the court determined that it would uphold the Board's decision to defer unless the deferral did not comply with the Board's own announced standards or "the standards themselves are invalid."⁷⁰ The court then set out the Board's criteria for deferral as announced in *Olin*.⁷¹ Although appearing to endorse the Board's standards of deferral to arbitration as announced in *Olin*, the Ninth Circuit in fact based its decision in *Garcia* on finding that the Board did not follow the standards of *Olin* when it deferred to an arbitration award which was repugnant to the Act.⁷² The Ninth Circuit thus did not have to decide whether the *Olin* standards themselves were invalid and, specifically, whether the *Olin* Board's shifting of the burden of showing noncompliance with any of the criteria for deferral to the party arguing against deferral was proper.⁷³ Because the court did not need to examine the validity of *Olin*'s extension of the Board's ability to defer to arbitration awards, the question remains after *Garcia* whether the Ninth Circuit would approve the *Olin* standards if squarely faced with the issue.

Several commentators have criticized *Olin* as going too far in the direction of supporting private settlement of labor disputes at the expense of individual employee rights guaranteed by the Act.⁷⁴ These commentators, relying on recent Supreme Court decisions in other areas of the law, assert that prior arbitration does not preclude an indi-

⁶⁶ *Id.* at 811, 121 L.R.R.M. at 3353.

⁶⁷ *Id.*

⁶⁸ *Id.* The court expressly disapproved the subsequent agreement between the Teamsters Union and UPS that UPS would pay any fines incurred by employees who tapped their horns in compliance with UPS's attract attention method, finding that this agreement:

serves only to breed or reinforce a cynical view of the operation of the law in this society — that those with enough sophistication, money, and influence are exempt from its requirements and may be specially licensed or privileged to ignore and disobey the law and that obedience to the law is reserved for the unsophisticated, the poor, and the powerless.

Id. at 812, 121 L.R.R.M. at 3353. See *supra* note 27 for a discussion of the resolution of *Garcia*'s unfair labor practice claim.

⁶⁹ *Garcia*, 785 F.2d at 812, 121 L.R.R.M. at 3353.

⁷⁰ *Id.* at 809, 121 L.R.R.M. at 3351 (citing *Servair, Inc. v. NLRB*, 726 F.2d 1435, 1439, 115 L.R.R.M. 3067, 3069 (9th Cir. 1984)).

⁷¹ *Id.* (citing *Olin Corp.*, 268 N.L.R.B. 573, 573-74, 115 L.R.R.M. 1056, 1057-58 (1984)).

⁷² *Id.* at 810, 121 L.R.R.M. at 3352.

⁷³ See *Olin*, 268 N.L.R.B. at 574, 115 L.R.R.M. at 1058.

⁷⁴ See, e.g., Ray, *supra* note 8, at 23. Henkel & Kelly, *supra* note 8, at 62. See also Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355, 381 (1985). But see Briggs, Jr., *The National Labor Relations Board's Policy of Deferring to Arbitration*, 13 FLA. ST. U.L. REV. 1141, 1169 (1986) (supporting the newly-stabilized NLRB deferral standards as a policy decision favoring mutually agreed-upon arbitration procedures to protect employee rights under the Act).

vidual from bringing his or her statutory claim before a court.⁷⁵ The commentators reason that the Board's presumption that the unfair labor practice was resolved in arbitration results in the Board's abdicating its responsibility to protect individual statutory rights.⁷⁶ Furthermore, at least one federal appellate court has adopted this position.⁷⁷ Thus, it is possible that, if squarely faced with the issue of the *Olin* standards' validity, the Ninth Circuit would not endorse *Olin*'s extension of the Board's ability to defer to arbitration.

In *Garcia v. NLRB*, the Ninth Circuit addressed the issues of when an individual employee's actions are protected concerted activities within the meaning of the Act, and when the Board's deferral to an arbitration award is inappropriate as repugnant to the Act. In *Garcia*, the court held that an employee who had disobeyed an order to tap his horn in violation of state law rather than obeying the order and filing a grievance had engaged in concerted activity and had not done so in an abusive manner. The court thus found that the Board had abused its discretion by deferring to an arbitration award that punished the employee for engaging in the protected concerted activity. Because the award violated section 8(a)(1) of the Act and public policy, it was repugnant to the Act and the Board improperly departed from its own standards, previously set forth in *Olin*, by deferring to the award. Although the court found that the Board's deferral in this case was an abuse of discretion because the Board had not followed its own standards, the court did not address whether the *Olin* standards themselves were appropriate. Because commentators have criticized the *Olin* standards, and because at least one other court has found that *Olin*'s standards improperly favor deferral to arbitration, the Ninth Circuit, when squarely faced with the issue of the standards' validity, may decide that *Olin*'s deferral standards unfairly deprive individuals of their statutory rights under the Act.

⁷⁵ See, e.g., Henkel & Kelly, *supra* note 8, at 54-60 (describing *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (§ 1983 of the Reconstruction Civil Rights Act); *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII)).

⁷⁶ See Henkel & Kelly, *supra* note 8, at 61-62.

⁷⁷ *Taylor v. NLRB*, 786 F.2d 1516, 1520, 122 L.R.R.M. 2084, 2087 (11th Cir. 1986), *denying enforcement of* *Ryder Truck Lines*, 273 N.L.R.B. 713, 118 L.R.R.M. 1092 (1985). In *Taylor*, the Eleventh Circuit rejected the *Olin* standards, finding that, by presuming the employee's unfair labor practice claims were resolved by the arbitration proceedings, the *Olin* standards do not go far enough in protecting employee rights under the Act. *Id.* at 1521, 122 L.R.R.M. at 2088-89. The employee in *Taylor* was terminated after refusing to drive a tractor assigned to him. *Id.* at 1517, 122 L.R.R.M. at 2085. The arbitration committee denied Taylor's grievance without discussion, and Taylor filed charges with the Board. *Id.* The Board deferred to the arbitration proceeding because it found that Taylor had failed to meet the *Olin* burden of showing that the unfair labor practice was not adequately considered in the arbitration proceeding. *Id.* at 1518, 122 L.R.R.M. at 2085. The Eleventh Circuit found invalid the *Olin* Board's deferral policy because, in presuming that the unfair labor practice claim was resolved in arbitration, the Board in effect abdicates its responsibility to protect individual statutory rights under the Act. *Id.* at 1522, 122 L.R.R.M. at 2089.

The Eleventh Circuit noted four factors which demonstrate the need for employees to be able to assert their statutory rights despite prior arbitration proceedings: (1) the arbitrator may not be competent to resolve complex statutory questions; (2) the arbitrator is authorized only to enforce the contract, not to enforce the statute; (3) the union processing the employee's grievance may have interests which differ from those of the employee; and (4) the factfinding in arbitration proceedings is not the same as that in judicial proceedings. *Id.* at 1521, 122 L.R.R.M. at 2088 (citing *McNair v. United States Postal Serv.*, 768 F.2d 730, 736 n.7, 120 L.R.R.M. 2147, 2151 n.7 (5th Cir. 1985)). For an analysis of the *Taylor* decision, see Ray, *supra* note 8, at 2-3.

V. CONSTITUTIONAL DECISIONS

A. **Texas Mass Picketing Statute Unconstitutionally Overbroad and Vague*: *Nash v. Texas*¹

Under the first amendment to the United States Constitution, Congress can "make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble"² The first amendment applies to the states through the due process clause of the fourteenth amendment.³ The United States Supreme Court, however, has never interpreted the first amendment to prohibit absolutely governmental bodies from enacting laws that interfere with a person's expression.⁴ Thus, states have enacted statutes that regulate expression on the basis of its content,⁵ as well as statutes that focus on time, place and manner restrictions of expression, regardless of their content.⁶ Statutes that affect free expression rights are frequently challenged as being unconstitutionally overbroad or vague, even where they are not content based.⁷ A statute is overbroad when it is capable of being used to penalize persons who have engaged in constitutionally protected expression.⁸ A statute is vague when it fails to provide adequate notice of what speech is prohibited, or when it fails to provide specific guidelines for its application, thereby allowing arbitrary enforcement.⁹ The concern with overbroad and vague statutes stems from the possibility that their application might deter individuals from engaging in constitutionally protected speech.¹⁰

The right of freedom of expression is often related to the right to assemble and demonstrate¹¹ — a right of extreme importance to labor unions.¹² Consequently, labor unions frequently challenge the constitutionality of governmental regulation of picketing.¹³ In 1940, in *Thornhill v. Alabama*, the United States Supreme Court held that

* Royal C. Gardner III, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 632 F. Supp. 951, 121 L.R.R.M. 3140 (1986).

² U.S. CONST. amend. I.

³ *Gitlow v. New York*, 268 U.S. 652, 666 (1925). See U.S. CONST. amend. XIV.

⁴ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (stating that "certain well-defined and narrowly limited classes of speech" — such as obscenity, profanity, libels and fighting words — may be proscribed without violating the first amendment).

⁵ See, e.g., *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding F.C.C.'s authority to prohibit offensive speech on the radio waves); *Roth v. United States*, 354 U.S. 476, 481 (1957) (obscenity not protected expression).

⁶ See, e.g., *Cox v. Louisiana*, 379 U.S. 559, 564, 566 (1965) (upholding constitutionality of statute prohibiting picketing near a courthouse); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding constitutionality of ordinance that prohibited sound trucks); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (stating that municipality may control parades using public streets through reasonable time, place and manner restrictions).

⁷ See *Grayned v. Rockford*, 408 U.S. 104 (1972). In *Grayned*, the Court upheld an anti-noise ordinance against overbreadth and vagueness challenges. *Id.* at 114-15.

⁸ *Id.* at 114.

⁹ *Id.* at 108-09.

¹⁰ *Id.* at 114.

¹¹ See generally *Adderly v. Florida*, 385 U.S. 39, 49-51 (1966) (Douglas, J., dissenting) (discussion of rights of peaceful assembly and petition).

¹² *Thornhill v. Alabama*, 310 U.S. 88, 104-05, 6 L.R.R.M. 697, 704 (1940) (discussing employees' need to enlighten public on nature of labor dispute).

¹³ See, e.g., *Int'l Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212, 218, 110 L.R.R.M. 2001, 2003 (1982) (longshoremen boycott of Russian goods found to be an illegal secondary boycott); *Teamster, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 40 L.R.R.M. 2208 (1957) (state

peaceful picketing during a labor dispute fell under the protection of the first amendment.¹⁴ The Court soon retreated, however, from its broad pronouncement in *Thornhill*, later holding that the government could regulate peaceful labor picketing.¹⁵ Because labor picketing involved more coercion and little communication, the Court reasoned, the first amendment did not fully protect the union's activity.¹⁶ Consequently, the Supreme Court has upheld state regulations that prohibit secondary labor boycotts,¹⁷ recognition picketing,¹⁸ and picketing that seeks to coerce a self-employed individual to join a union.¹⁹ At the same time that the Court withdrew full first amendment protection from labor picketing, Congress, through the National Labor Relations Act, prohibited secondary boycotts, work-assignment strikes and some recognition picketing as unfair labor practices.²⁰ The Supreme Court has upheld these provisions of the Act in the face of constitutional challenges.²¹ Thus, both the Court and the Congress implicitly have relegated peaceful labor picketing "to the status of an economic activity subject to extensive regulation"²² with diminished first amendment protections.

may restrain labor picketing that seeks to induce employees to join union); *Building Serv. Employees Int'l Union, Local 262 v. Gazzam* 339 U.S. 532, 540-41, 26 L.R.R.M. 2068, 2071 (1950) (state may enjoin labor union from peaceful picketing intended to compel an employer to sign a contract which would coerce his employees to choose a particular bargaining representative); *Teamsters v. Hanke*, 339 U.S. 470, 471, 481, 26 L.R.R.M. 2076, 2076, 2080 (1950) (state may enjoin labor union from peaceful picketing intended to compel self-employer to join the union); *Thornhill v. Alabama*, 310 U.S. 88, 102, 6 L.R.R.M. 697, 703 (1940) (labor picketing protected by the first amendment).

¹⁴ 310 U.S. 88, 102, 6 L.R.R.M. 697, 703 (1940). The statute in *Thornhill* prohibited any person, without legal excuse, to picket a place of business for the purpose of interfering with that business. *Id.* at 91-92, 6 L.R.R.M. at 698. Reasoning that the picketer was communicating the facts involved in a matter of public interest, *id.* at 101-03, 6 L.R.R.M. at 703, the Court held that the statute was unconstitutionally overbroad. *Id.* at 105, 6 L.R.R.M. at 704. The companion case to *Thornhill*, *Carlson v. California*, also stated that labor picketing was entitled to first amendment protection. *Carlson*, 310 U.S. 106, 113, 6 L.R.R.M. 705, 707 (1940).

¹⁵ See *Vogt*, 354 U.S. at 289, 40 L.R.R.M. at 2210; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501, 23 L.R.R.M. 2505, 2509 (1949). See also R. GORMAN, *BASIC TEXT ON LABOR LAW* 211-13 (1976) (discussing labor unions' right to picket).

¹⁶ See, e.g., *International Longshoremen*, 456 U.S. at 226, 110 L.R.R.M. at 2006; *Vogt*, 354 U.S. at 289, 40 L.R.R.M. at 2210; *Bakery and Pastry Drivers Local v. Wohl*, 315 U.S. 769, 776, 10 L.R.R.M. 507, 511 (1942) (Douglas, J., concurring).

¹⁷ See *International Longshoremen*, 456 U.S. at 226, 110 L.R.R.M. at 2006.

¹⁸ *Gazzam*, 339 U.S. at 533, 541, 26 L.R.R.M. at 2068, 2071.

¹⁹ *Hanke*, 339 U.S. at 471, 481, 26 L.R.R.M. at 2076, 2080.

²⁰ R. GORMAN, *supra* note 15, at 213. See National Labor Relations Act, 29 U.S.C. § 158(b) (1982).

²¹ See *International Longshoremen*, 456 U.S. at 226, 110 L.R.R.M. at 2006 (stating that the Supreme Court has consistently rejected the claim that section 8(b)(4) prohibition on secondary picketing by labor unions violates the first amendment).

²² Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 938 (1982) [hereinafter Note, *Labor Picketing*].

In *N.A.A.C.P. v. Claiborne Hardware Co.*, however, the Supreme Court distinguished between labor and non-labor picketing. 458 U.S. 886, 912-13 (1982). In *Claiborne*, a civil rights group picketed in support of a boycott of white merchants' businesses. *Id.* at 909. The boycott's purpose was to encourage civil and business leaders to take measures to eradicate racial injustices. *Id.* at 889. The Supreme Court afforded the non-labor picketing full first amendment protection and held that it was subject only to reasonable content-neutral regulations. See *id.* at 912-13. The *Claiborne* Court noted, however, that this case did not involve labor picketing, which could be prohibited. *Id.*

The Court distinguished *Hughes v. Superior Court*, 339 U.S. 460, 26 L.R.R.M. 2072 (1950), which upheld an injunction against picketing to coerce an employer to hire employees, illegally, on

During the *Survey* year, in *Nash v. Texas*, a federal district court in the Eastern District of Texas declared that the Texas mass picketing statute²⁵ was unconstitutionally overbroad and vague.²⁴ Specifically, the court struck down a time, place and manner restriction that regulated how many labor picketers could congregate near the entrance of the place being picketed, and how far apart the picketers were required to remain from each other ("section one").²⁵ The court also struck down a content based regulation that proscribed the use of intimidating, threatening or obscene words intended to interfere with any employee's lawful right to work ("section two").²⁶

In holding sections one and two of the Texas mass picketing statute unconstitutional, the *Nash* court produced a lengthy opinion which, at first glance, vindicates the free speech rights of labor unions. The *Nash* decision is less significant than it first may appear, however.²⁷ For the court, applying the principle that federal courts lack the jurisdiction to interpret authoritatively state statutes,²⁸ found the Texas statute unconstitutional as *written*.²⁹ Had a Texas state court previously interpreted and narrowed the statute, that statute might have been held constitutional.³⁰ Consequently, the validity of a similar mass picketing statute might be upheld if a state court definitively interprets and narrows its provisions to give it constitutionally acceptable effect.

In *Nash*, Buddy Schoellkopf Products, Inc., a company based in Tyler, Texas, began bargaining in September 1978 with the plant's recently certified union, Local 746 of the United Rubber Workers.³¹ On February 8, 1979, as a result of the failed negotiations, the union organized a strike which included establishing picket lines at the plant's entrance.³² Company security guards made violent threats and crude remarks to female picketers.³³ In response, a large number of union members from the Kelly-Springfield Tire Company's plant in Tyler joined the picketing at the Schoellkopf plant on March

the basis of race, by stating that "we [are not] presented with a boycott designed to secure aims that are themselves prohibited by a valid state law." *Claiborne*, 458 U.S. at 915 n.49.

²⁵ TEX. REV. CIV. STAT. ANN. art. 5154d (Vernon 1971). For the text of the statute, see *infra* notes 25-26.

²⁴ 632 F. Supp. 951, 981, 121 L.R.R.M. 3140, 3160 (1986).

²⁵ *Id.* at 968-72, 121 L.R.R.M. at 3150-54. Section one proscribes "more than two (2) pickets at any time within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets." TEX. REV. CIV. STAT. ANN. art. 5154d § 1 (1) (Vernon 1971).

²⁶ *Nash*, 632 F. Supp. at 972-79, 121 L.R.R.M. at 3154-59. Section two prohibits any person, singly or in concert with others, by use of insulting, threatening or obscene language, to interfere with, hinder, obstruct, or intimidate, or seek to interfere with, hinder, obstruct, or intimidate, another in the exercise of his lawful right to work, or to enter upon the performance of any lawful vocation, or from freely entering or leaving any premises.

TEX. REV. CIV. STAT. ANN. art. 5154d § 2 (Vernon 1971).

²⁷ See *infra* text accompanying notes 104-20.

²⁸ *Nash*, 632 F. Supp. at 964, 121 L.R.R.M. at 3147 (citing *Gooding v. Wilson*, 405 U.S. 518, 520 (1972)). "A federal court can only construe a federal statute so as to save it from constitutional infirmity." *Id.* at 964 n.18, 121 L.R.R.M. at 3147 n.18 (citing *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982)) (emphasis by the court).

²⁹ *Id.* at 980-81, 121 L.R.R.M. at 3160.

³⁰ See *infra* text accompanying notes 104-20 for an analysis of the opinion.

³¹ *Nash*, 632 F. Supp. at 957, 121 L.R.R.M. at 3141.

³² *Id.* at 957, 121 L.R.R.M. at 3141-42.

³³ *Id.* at 957, 121 L.R.R.M. at 3142.

12.³⁴ The picketers taunted and threatened the non-striking employees who returned the jeers and threats.³⁵ A few picketers broke off antennas from cars owned by non-striking employees.³⁶ In addition, the president of Local 746, John Nash, appeared in the picket line with a shotgun, for which he was arrested.³⁷ These incidents, however, were the only significant threats of violence throughout the entire strike.³⁸

On March 14, company officials sought and obtained a temporary restraining order enjoining the union's picketing activities.³⁹ In accordance with the Texas mass picketing statute,⁴⁰ the Tyler police department marked off an area fifty feet from each of the plant's entrances, allowing two picketers to stay within the boundaries.⁴¹ The police required other picketers and their sympathizers to remain behind the markers.⁴² Within two weeks thereafter, the police made ninety arrests for alleged violations of the Texas mass picketing statute.⁴³

The police arrested picketers for violating three provisions of the statute.⁴⁴ First, under section one's time, place, and manner regulation, police arrested anyone who approached the two picketers within the fifty foot markers, even if that person only intended to relieve the picket on duty.⁴⁵ Second, police arrested any picketer who caused a vehicle driven on the plant's access road to stop, even momentarily, for violation of section one.⁴⁶ Finally, under section two's content regulation, police arrested any striker who shouted profanities or who called non-striking employees "scabs."⁴⁷ The Tyler police made no arrests, however, for violent threats or actions.⁴⁸

On March 21, 1979, the union amended a pending complaint to aver that the company, its officers and officials of the City of Tyler impinged upon the strikers' first amendment rights through enforcement of the Texas mass picketing statute.⁴⁹ A federal district court granted the union's request for a preliminary injunction enjoining Tyler officials and police from arresting picketers who approached the picket line to relieve picketers on duty, picketers who momentarily halted traffic on the plant roads, and picketers who shouted "scab" at non-strikers.⁵⁰ The City of Tyler appealed the prelimi-

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 957-58, 121 L.R.R.M. at 3142.

³⁸ *Id.* at 958, 121 L.R.R.M. at 3142.

³⁹ *Id.*

⁴⁰ The company held a meeting with city officials and the Chief of Police to ensure that the police would enforce the Texas mass picketing statute at the plant. *Id.* at 958, 121 L.R.R.M. at 3143. At the meeting, company representatives made copies of the statute available to city officials. *Id.*

⁴¹ *Id.* at 959, 121 L.R.R.M. at 3143.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* The court noted that when the union's attorneys crossed the boundary to speak with the sole picket on duty, the police arrested the two attorneys. *Id.* at 959, 121 L.R.R.M. at 3143-44. Out of the ninety arrests, only the union's attorneys were placed in handcuffs. *Id.* at 959, 121 L.R.R.M. at 3144.

⁴⁶ *Id.* at 959, 121 L.R.R.M. at 3143. The constitutionality of paragraph two of section one was not challenged. *Id.* at 961, 121 L.R.R.M. at 3144-45.

⁴⁷ *Id.* at 959, 121 L.R.R.M. at 3143.

⁴⁸ *Id.*

⁴⁹ *Id.* at 960, 121 L.R.R.M. at 3144.

⁵⁰ *Id.*

nary injunction to the Fifth Circuit Court of Appeals.⁵¹ On May 30, 1980, the Fifth Circuit dismissed the appeal of the preliminary injunction as moot because the strike had ended and because the union had been decertified as the Schoellkopf employees' collective bargaining agent.⁵² By subsequent order, however, the union's complaint attacking the constitutionality of sections one and two of the Texas mass picketing statute survived.⁵³

At trial on the merits, the federal district court for the Eastern District of Texas concluded that the issue was not moot.⁵⁴ The court then examined Texas state courts' construction of the mass picketing statute, particularly sections one and two.⁵⁵ The court noted the principle that federal courts lack the jurisdiction to construe state legislation authoritatively.⁵⁶ Accordingly, the court stated, if state courts have not definitively interpreted a state statute, a federal court may consider only its literal terms in evaluating the statute's constitutionality.⁵⁷ The *Nash* court found that state court decisions did not provide conclusive constructions of sections one and two.⁵⁸ Therefore, in analyzing the constitutionality of the statute, the court stated, it would consider only the literal terms of the statute.⁵⁹

The court began its analysis by stating that a statute is unconstitutionally broad if it substantially interferes with expression protected by the first amendment.⁶⁰ A statute need not be unconstitutional in every application, the court pointed out; rather, it could be impermissibly overbroad merely because of its potential to infringe unconstitutionally upon protected expression.⁶¹ Accordingly, the court examined the manner in which the Texas mass picketing statute might be applied.⁶² The court concluded that the mass picketing statute applied not only to labor disputes, but to all forms of picketing.⁶³

⁵¹ *Id.* at 960, 121 L.R.R.M. at 3144.

⁵² *Id.* at 960-61, 121 L.R.R.M. at 3144.

⁵³ *Id.* at 961, 121 L.R.R.M. at 3144-45. The court stated that .

(1) leave was granted to the striking employees to intervene individually; (2) . . . the Attorney General of Texas was notified that the constitutionality of Article 5154d had been challenged; (3) leave was granted to the State of Texas to intervene; (4) plaintiffs' claim for injunctive relief was dismissed; (5) plaintiffs' claim for declaratory judgment concerning the constitutionality of § 1, paragraph 2, of Article 5154d was dismissed; (6) the claims against all private parties-defendants were dismissed; (7) the claims for damages of two named plaintiffs were severed in conformity with Fed. R. Civ. P. 21 [the action was later dismissed]; and (8) all other damage claims were dismissed.

Id.

⁵⁴ *Id.* at 964, 121 L.R.R.M. at 3147. The court stated that mootness "becomes an issue when the actions which provoked the suit have ended or been settled." *Id.* at 961, 121 L.R.R.M. at 3145. An exception to the mootness doctrine, the court noted, exists when "the conduct is capable of repetition, yet evades review." *Id.* Additionally, the court stated that the United States Supreme Court had "explicitly recognized that when declaratory relief is sought, mootness should not preclude review of a statute that will be enforced in the future against the complainants." *Id.* at 963-64, 121 L.R.R.M. at 3147 (citing *Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974); *Steffel v. Thompson*, 415 U.S. 452, 460-73 (1974)).

⁵⁵ *Id.* at 964-67, 121 L.R.R.M. at 3147-49.

⁵⁶ *Id.* at 964 & n.18, 121 L.R.R.M. at 3147 & n.18.

⁵⁷ *Id.* at 966, 967, 121 L.R.R.M. at 3148-49.

⁵⁸ *Id.* at 964-67, 121 L.R.R.M. at 3147-49.

⁵⁹ *Id.* at 966, 967, 121 L.R.R.M. at 3148-49.

⁶⁰ *Id.* at 967, 121 L.R.R.M. at 3149.

⁶¹ *Id.*

⁶² *Id.* at 967-68, 121 L.R.R.M. at 3149-50.

⁶³ *Id.* at 967, 121 L.R.R.M. at 3150. See *supra* note 22 for a brief discussion of the Supreme Court's treatment of non-labor picketing.

The court interpreted section one of the statute, which made it illegal for "more than two (2) pickets at any time" to be "within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets,"⁶⁴ as a time, place and manner regulation of speech.⁶⁵ A time, place and manner restriction, said the court, must not be so sweeping as to interfere with protected speech.⁶⁶ The court stated that the provision, as written, broadly prohibits "more than two persons from standing, fifty feet apart, near a building entrance."⁶⁷ Because there was no requirement that the picketers physically block the entrance and because there was no threshold number of picketers that was required to trigger the provision, the court found that the numbers-distance provision "denie[d] demonstrators many meaningful methods of expression" and thus interfered with protected speech.⁶⁸ Accordingly, the court invalidated section one as unconstitutionally overbroad.⁶⁹

The court determined that section two, which proscribed the use of insulting, threatening or obscene language to interfere with another's right to work, was a content based regulation of speech.⁷⁰ Accordingly, the court stated, section two would be constitutional only if it was narrowly drawn to proscribe only unprotected speech,⁷¹ such as "fighting words," which by their mere utterance tend to provoke violent behavior.⁷² Thus, in analyzing the constitutionality of section two, the court examined whether the action prohibited only fighting words.⁷³

Section two was overbroad, the *Nash* court concluded, because it was capable of being applied to protected speech.⁷⁴ Rejecting the state's assertion that section two only punished "words coupled with conduct,"⁷⁵ the court stated that the section could be violated "based on pure speech."⁷⁶ The court found that section two was aimed not only at unprotected words that caused imminent violence, but also targeted protected words that merely interfered with or intimidated others.⁷⁷

To buttress its conclusion that section two was not sufficiently narrow, the *Nash* court further explored the potential applications of the intimidating language provision.⁷⁸ Using dictionary definitions,⁷⁹ the court determined the meaning of "insulting, threatening or obscene language."⁸⁰ The court noted that some insults, words which belittle

⁶⁴ *Id.* at 968, 121 L.R.R.M. at 3150 (quoting TEX. REV. CIV. STAT. ANN. art. 5154d § 1, paragraph 1 (Vernon 1971)).

⁶⁵ *Id.*

⁶⁶ *Id.* at 971, 121 L.R.R.M. at 3152.

⁶⁷ *Id.*

⁶⁸ *Id.* (quoting *Davis v. Francois*, 395 F.2d 730, 735 (5th Cir. 1968)).

⁶⁹ *Id.* at 971, 121 L.R.R.M. at 3153.

⁷⁰ *Id.* at 973, 121 L.R.R.M. at 3154.

⁷¹ *Id.* (quoting *Gooding v. Wilson*, 405 U.S. 518, 522 (1970)).

⁷² *Id.*

⁷³ *Id.* at 973-76, 121 L.R.R.M. at 3154-57.

⁷⁴ *See id.* at 974, 121 L.R.R.M. at 3155.

⁷⁵ *Id.* at 973, 121 L.R.R.M. at 3154.

⁷⁶ *Id.* "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

⁷⁷ *Nash*, 632 F.Supp. at 974, 121 L.R.R.M. at 3154.

⁷⁸ *Id.* at 976-79, 121 L.R.R.M. at 3157-59.

⁷⁹ The court used *Webster's Seventh New Collegiate Dictionary* (17th ed. 1969). *See Nash*, 632 F.Supp. at 977 n.42, 121 L.R.R.M. at 3157 n.42.

⁸⁰ *Nash*, 632 F. Supp. at 976-79, 121 L.R.R.M. at 3157-59.

others,⁸¹ like "scab" or "fink", could be fighting words in some situations.⁸² The court observed, however, that many other demeaning words that might be used at a picket line, such as "clown," "goon" or "turncoat," are not ordinarily fighting words because they do not tend to incite acts of violence.⁸³ The court concluded that section two's proscription of "insulting" words would make punishable constitutionally protected speech, thus rendering that provision overbroad and therefore invalid.⁸⁴

Similarly, the court found that "threatening" words cover a broad range of expression that is likely to be used at a picket line.⁸⁵ As an example, the court stated that a picketer's shout of "You'll live to regret going to work for that company" to a non-striking employee could either be a warning of dire consequences or a mere prediction of future remorse.⁸⁶ The key element as to whether "threatening" words are fighting words, the court reasoned, is the intent of the speaker.⁸⁷ Because the statute lacks a requirement of the picketer's willfulness to carry out the proposed threat, the court concluded, section two's punishment of "threatening" words was overbroad.⁸⁸

The court noted that section two's restriction on obscene words probably referred to profanity.⁸⁹ The court also found that "obscene" words covered a broad range of strong language that is likely to be used at a picket line.⁹⁰ Reasoning that the lack of guidelines as to what constitutes "obscene" speech allows too much discretion in the enforcement of the statute, the court concluded that this provision was overbroad as well.⁹¹

Finally, the court also questioned whether the state could prohibit as fighting words language intended to "interfere with," "hinder," "obstruct" or "intimidate."⁹² Noting that state courts had not definitively interpreted this section two provision to mean language coupled with conduct, the court found that section two's plain meaning applied only to language that obstructs.⁹³ The court found it difficult to conceive of a situation where words alone could block a person from entering a work site.⁹⁴ Noting the similarity between section two's prohibition of language that obstructs and an Ohio statute that prohibited annoying conduct, previously held unconstitutional by the United States Supreme Court,⁹⁵ the court held that this provision was overbroad.⁹⁶ Consequently, the

⁸¹ *Id.* at 977, 121 L.R.R.M. at 3157.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 977 n.46, 121 L.R.R.M. at 3157 n.46.

⁸⁷ *Id.* at 977-78, 121 L.R.R.M. at 3157-58. The *Nash* court noted that the Fifth Circuit Court of Appeals, in *CISPES v. F.B.I.*, 770 F.2d 468 (5th Cir. 1985), upheld the constitutionality of a federal statute that punished any person who "willfully . . . intimidates, coerces, threatens, or harasses a foreign official." *Nash*, 632 F. Supp. at 975, 121 L.R.R.M. at 3156 (quoting *CISPES*, 770 F.2d at 470-71). The *Nash* court distinguished the federal statute from the Texas statute on the basis of the former's specific intent requirement. *Id.* at 976, 121 L.R.R.M. at 3156-57.

⁸⁸ *Id.*

⁸⁹ *Id.* at 978 & n.48, 121 L.R.R.M. at 3158 & n.48.

⁹⁰ *Id.* at 978, 121 L.R.R.M. at 3158.

⁹¹ *Id.* at 978, 979, 121 L.R.R.M. at 3158, 3159.

⁹² *Id.* at 978-79, 121 L.R.R.M. at 3158-59.

⁹³ *Id.* at 978-79, 121 L.R.R.M. at 3158.

⁹⁴ *Id.* at 979, 121 L.R.R.M. at 3158.

⁹⁵ *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

⁹⁶ *Nash*, 632 F. Supp. at 979, 121 L.R.R.M. at 3158-59. Quoting the recent United States

court held that section two was unconstitutionally overbroad because it prohibited more than unprotected fighting words.⁹⁷ Indeed, the court noted that police arrested picketers at the Schoellkopf plant for merely attempting to persuade non-striking employees not to cross the picket line.⁹⁸

In addition to holding section two overbroad, the *Nash* court also found section two to be fatally vague.⁹⁹ The court stated that a vague statute is one that does not provide persons fair notice of what conduct is illegal or that lacks explicit standards that limit law enforcement officials' discretion.¹⁰⁰ The court concluded that under the Texas statute "persons of common intelligence" could not determine with sufficient clarity what speech is "insulting," "threatening" or "obscene."¹⁰¹ Moreover, the court noted that in its present form, section two gave police discretion to arrest union members who merely shouted "fink" or "strikebreaker" to non-striking employees.¹⁰² Accordingly, the court invalidated section two as too vague to withstand constitutional scrutiny.¹⁰³

In striking down sections one and two of the Texas mass picketing statute, the *Nash* court produced a lengthy opinion which, at first glance, vindicates the free speech rights of labor unions. Although the United States Supreme Court has diminished the first amendment protection of labor picketers over the past few decades,¹⁰⁴ the specific holding of *Thornhill* that states may not enact blanket prohibitions against picketing remains good law.¹⁰⁵ *Nash* reaffirms *Thornhill* by holding that blanket prohibitions against picketing violate the first amendment's free expression guarantees. Yet *Nash* probably will have only a minimal impact on first amendment challenges to picketing regulations because in its analysis, the *Nash* court, without conclusive interpretations of sections one and two by Texas state courts, could consider only the literal terms of these provisions.¹⁰⁶ Indeed, the State of Texas conceded that without a narrowing state court construction of section one, the statute was overbroad and thus unconstitutional.¹⁰⁷ Consequently, a similar mass picketing statute may be held valid if a state court definitively interprets and sufficiently narrows its provisions before a federal court considers the statute's constitutionality.

Section one was overbroad, in part, because it applied to *all forms* of picketing,¹⁰⁸ thereby enabling the court to use traditional first amendment analysis.¹⁰⁹ The court may

Supreme Court decision of *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 910 (1982), the court stated that "[s]peech does not lose its protected character, simply because it may embarrass others or coerce them into action." *Nash*, 632 F. Supp. at 974, 121 L.R.R.M. at 3155.

⁹⁷ *Nash*, 632 F. Supp. at 974, 981, 121 L.R.R.M. at 3155, 3160.

⁹⁸ *Id.* at 974, 121 L.R.R.M. at 3155.

⁹⁹ *Id.* at 981, 121 L.R.R.M. at 3160.

¹⁰⁰ *Id.* at 979 & n.57, 121 L.R.R.M. at 3159 & n.57 (citing *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972)).

¹⁰¹ *Id.* at 980, 121 L.R.R.M. at 3160.

¹⁰² *Id.* at 980, 121 L.R.R.M. at 3159-60.

¹⁰³ *Id.* at 981, 121 L.R.R.M. at 3160.

¹⁰⁴ See *supra* notes 14-22 and accompanying text for a brief discussion of the Supreme Court's treatment of first amendment challenges to labor regulations.

¹⁰⁵ *Teamster, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 294-95, 40 L.R.R.M. 2208, 2212 (1957).

¹⁰⁶ See *supra* notes 55-59 and accompanying text for a brief explanation of why the district court felt bound to interpret the statute literally.

¹⁰⁷ *Nash*, 632 F. Supp. at 966 n.22, 121 L.R.R.M. at 3149 n.22.

¹⁰⁸ *Id.* at 967, 121 L.R.R.M. at 3150.

¹⁰⁹ See *supra* note 22 for a brief description of *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (non-labor picketing afforded full first amendment protection).

have reached a different result if the Texas courts had interpreted the Texas mass picketing statute as applying only to labor disputes. The *Nash* court erroneously suggested, however, that the statute, if applied only to labor related grievances, would be "patently unconstitutional" because it would discriminate among pickets based on the content of their speech.¹¹⁰ A statute which regulates *only* labor related pickets, while exempting non-labor related pickets, is not necessarily unconstitutional.¹¹¹ Because the Supreme Court has recognized that labor picketing involves more than the mere communication of ideas,¹¹² labor picketing has less first amendment protection than other forms of picketing.¹¹³ Accordingly, under the Supreme Court's reasoning, a statute may permissibly regulate only labor pickets.

The *Nash* court found section two overbroad, in part, because it prohibited speech that, although embarrassing or coercive, did not necessarily provoke violence.¹¹⁴ To support this conclusion, the court adopted the United States Supreme Court's position that speech does not lose its protected character simply because it coerces others into action.¹¹⁵ The Supreme Court has explicitly distinguished, however, between labor and non-labor, political picketing¹¹⁶ and has recognized "the strong governmental interest in certain forms of economic regulation, even though such regulations may have an incidental effect on rights of speech and association."¹¹⁷ Specifically, labor picketing may be prohibited, the Supreme Court has stated, as part of a state's "'striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'"¹¹⁸ Thus, the Supreme Court has held that labor picketing is not afforded full first amendment protection *because* of its coercive nature.¹¹⁹

Perhaps the *Nash* court ignored the Supreme Court's statements because the Texas statute applied to all forms of picketing, not just labor picketing. Consequently, if the intimidating language provision of section two applied only to labor unions, the provision would not necessarily be unconstitutional.¹²⁰ Thus, if a state court had interpreted the Texas statute as applying only to labor unions, the *Nash* court could have upheld section two as constitutional.

In sum, in *Nash v. Texas*, a federal district court examined the constitutionality of the Texas mass picketing statute. Because no Texas state court had definitively inter-

¹¹⁰ *Nash*, 632 F. Supp. at 968, 121 L.R.R.M. at 3150. The court misread *Police Dept. v. Mosley*, which invalidated a regulation that prohibited all non-labor related pickets. 408 U.S. 92, 94 (1972). The Supreme Court has declared that non-labor pickets are entitled to greater first amendment protection than are labor pickets. *Claiborne*, 458 U.S. at 912-13.

¹¹¹ See National Labor Relations Act, 29 U.S.C. § 8(b)(4) (1982).

¹¹² See *supra* text accompanying notes 14-22.

¹¹³ See *supra* text accompanying notes 14-22.

¹¹⁴ *Nash*, 632 F. Supp. at 973-74, 121 L.R.R.M. at 3155.

¹¹⁵ *Id.* at 974, 121 L.R.R.M. at 3155 (quoting *Claiborne*, 458 U.S. at 910).

¹¹⁶ *Claiborne* involved a secondary boycott organized by a civil rights group and, therefore, dealt with political, not labor, picketing. *Id.* at 913. For a discussion which criticizes this distinction, see generally Note, *Labor Picketing*, *supra* note 22.

¹¹⁷ *Claiborne*, 458 U.S. at 910.

¹¹⁸ *Id.* at 912 (quoting *NLRB v. Retail Store Employees*, 447 U.S. 607, 617-18 (1980) (Blackmun, J., concurring)).

¹¹⁹ See *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226, 110 L.R.R.M. 2001, 2006 (1982).

¹²⁰ See National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii).

preted the statute, the *Nash* court could examine only the statute's literal terms. As written, the Texas mass picketing statute applied to all forms of picketing, both labor and non-labor, and the *Nash* court therefore held that both sections one and two were overbroad and section two was also vague. The decision in *Nash*, however, will have only a minimal impact on first amendment challenges to picketing regulations. Had a Texas state court previously interpreted and narrowed the statute so that it applied only to labor picketing, the statute may have been constitutional. Consequently, the validity of a similar mass picketing statute might be upheld if a state court definitively interprets and sufficiently narrows its provisions.

VI. PREEMPTION

A. *Federal Court Jurisdiction over LMRA Section 301 Cases Involving the Horseracing Industry: *Richards v. Local 134, International Brotherhood of Electrical Workers*¹

Section 301(a) of the Labor Management Relations Act (LMRA) gives federal district courts jurisdiction to hear private suits for violation of collective bargaining agreements that involve employees in an industry affecting interstate commerce, notwithstanding the amount in controversy or diversity of citizenship.² The National Labor Relations Act (NLRA), in contrast, empowers the National Labor Relations Board (NLRB) to prevent unfair labor practices listed in section 8 of the NLRA that affect interstate commerce.³ Because a labor dispute may give rise to both an unfair labor practice and a violation of contract, the NLRB and the federal courts may each have jurisdiction over different causes of action arising from a single labor dispute.⁴

* By James P. Hawkins, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 790 F.2d 633, 122 L.R.R.M. 2380 (7th Cir. 1986).

² 29 U.S.C. § 185(a) (1982). Section 301(a) states:

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 over the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

³ NLRA § 10(a), 29 U.S.C. § 160(a) (1982). Section 10(a) reads, in relevant part: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce." *Id.* NLRA § 8, 29 U.S.C. § 158 (1982), proscribes certain employer and union activities as unfair labor practices.

⁴ See *Pari Mutuel Clerks Union v. Fair Grounds Corp.*, 703 F.2d 913, 918, 113 L.R.R.M. 2201, 2204-05 (5th Cir.), *cert. denied*, 464 U.S. 846, 114 L.R.R.M. 2568 (1983). If the trade involved is essentially local, however, the state's labor law controls. See 29 U.S.C. § 164(c)(2) (1982). For example, the Board historically has refrained from exercising jurisdiction over industries such as horse and dog racing, *see, e.g.*, *American Totalisator Co.*, 243 N.L.R.B. 314, 101 L.R.R.M. 1403 (1979) (horseracing operator, manufacturer of pari-mutuel betting equipment for the horseracing and dog racing industries); *Walter A. Kelley*, 139 N.L.R.B. 744, 51 L.R.R.M. 1375 (1962) (horseowners/breeders); *Los Angeles Turf Club, Inc.*, 90 N.L.R.B. 20, 26 L.R.R.M. 1154 (1950) (horseracing track), non-profit institutions for emotionally disturbed children, *see, e.g.*, *NLRB v. Children's Baptist Home*, 576 F.2d 256, 258 n.1, 98 L.R.R.M. 3003, 3004 n.1 (9th Cir. 1978); and hotels and motels, *see, e.g.*, *NLRB v. Marinor Inns, Inc.*, 445 F.2d 538, 541, 77 L.R.R.M. 2866, 2867-68 (5th Cir. 1971), because of extensive state regulation and local concern of such businesses.

To conserve the Board's limited resources, section 14(c)(1) of the NLRA, however, allows the Board the discretion to decline jurisdiction over certain labor disputes.⁵ Specifically, the Board may decline jurisdiction where, in its opinion, the dispute's effect on interstate commerce is not substantial enough to warrant the exercise of jurisdiction.⁶ Where the Board declines jurisdiction, the aggrieved party may seek relief for unfair labor practices under the state's applicable labor law.⁷

Federal courts disagree over how the Board's decision to decline jurisdiction over unfair labor practice claims affects federal jurisdiction over labor disputes under the LMRA. Some courts refuse to exercise jurisdiction in LMRA section 301 claims arising out of a labor dispute in an industry over which the Board has refused to exercise jurisdiction.⁸ Courts denying jurisdiction reason that given the lack of substantial effect on interstate commerce, the labor dispute would be resolved best in state courts.⁹ Other courts, in contrast, hold that as long as the federal court determines that the labor dispute affects interstate commerce, the Board's refusal to exercise discretionary jurisdiction does not affect the independent jurisdiction of the federal courts.¹⁰ Courts retaining jurisdiction reason that the Board enjoys the discretion to refuse cases not significantly affecting interstate commerce, which discretion is not given to the federal courts under section 301.¹¹ Thus, a conflict exists over whether federal courts may refuse to entertain LMRA section 301 claims where the NLRB has declined jurisdiction in an unfair labor practice claim arising from the same labor dispute.¹²

⁵ 29 U.S.C. § 164(c)(1) (1982). Section 14(c)(1) reads, in pertinent part: "The Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction"

⁶ *Id.*

⁷ See 29 U.S.C. § 164(c)(2) (1982). Section 14(c)(2) reads, in pertinent part: "Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." See *supra* note 5 for the relevant text of § 14(c)(1).

⁸ See *San Juan Racing Ass'n Inc. v. Labor Relations Bd. of Puerto Rico*, 532 F. Supp. 51, 55, 96 Lab. Cas. (CCH) ¶ 14,155, 24,016 (D.P.R. 1982) (reasoning that the Board is the best judge of "whether the asserting of jurisdiction over the racing industry would further the objectives of the Act"); *Independent Ass'n of Pari-Mutuel Employees v. Gulfstream Racing Ass'n*, 407 F. Supp. 855, 856-67, 92 L.R.R.M. 2680, 2680-81 (S.D. Fla. 1976) (deferring to Board's general expertise, agreeing that horseracing industry is essentially a local concern, and declining to reconsider the same factors prompting the Board's decision).

⁹ *San Juan*, 532 F. Supp. at 54, 96 Lab. Cas. (CCH) at 24,016; *Gulfstream*, 407 F. Supp. at 857, 92 L.R.R.M. at 2681.

¹⁰ *Pari Mutuel Clerks Union v. Fair Grounds Corp.*, 703 F.2d 913, 918, 113 L.R.R.M. 2201, 2205 (5th Cir. 1983) (citing *International Bhd. of Elec. Workers, Local 1501 v. American Totalisator*, 529 F. Supp. 419, 421, 109 L.R.R.M. 2585, 2587 (D. Md. 1982)), *cert. denied*, 464 U.S. 846, 114 L.R.R.M. 2568 (1983). The Fifth Circuit adopted the *American Totalisator* court's reasoning that the two mechanisms which the LMRA has established to promote industrial stability and peaceful resolution of labor disputes — private enforcement of labor contracts under § 301 and the Board's sanction of unfair labor practices — are neither mutually exclusive nor subject to the same jurisdictional limitations in their respective forum). *Id.*

¹¹ *Fair Grounds*, 703 F.2d at 918, 113 L.R.R.M. at 2205; *American Totalisator*, 529 F. Supp. at 421-22, 109 L.R.R.M. at 2587.

¹² In some of these hybrid § 301/unfair labor practice cases, the Board previously had denied

During the Survey year, in *Richards v. Local 134, International Brotherhood of Electrical Workers*,¹³ the United States Seventh Circuit Court of Appeals held that the district court improperly declined jurisdiction over a section 301(a) suit alleging that the employer violated the labor contract and the union breached its duty of fair representation, notwithstanding the Board's refusal to exercise jurisdiction over the unfair labor practice claims arising from the dispute.¹⁴ The *Richards* court specifically agreed with courts that hold that federal court jurisdiction to hear LMRA section 301 claims is independent of the NLRB's discretionary jurisdiction to hear unfair labor practice claims.¹⁵ Thus, the *Richards* court made clear that where the statutory requirements of section 301(a) are met, the district courts must hear contract disputes involving an industry that, in the court's opinion, affects interstate commerce, even if the Board has declined to assert jurisdiction over the industry.¹⁶

In *Richards*, Arlington Park Race Track dismissed from employment Nicholas Richards, a pari-mutuel clerk and a member of Local 134 of the International Brotherhood of Electrical Workers (IBEW), for insubordination.¹⁷ Richards filed a grievance under the grievance procedures contained in the collective bargaining agreement between Arlington Park and Local 134, alleging that he had been improperly discharged.¹⁸ The grievance mechanism did not produce a final settlement of Richards' claim.¹⁹ Richards elected not to pursue the internal appeal procedures provided in the union constitution.²⁰

Approximately six months after Richards filed his grievance, he brought an action in the United States District Court for the Northern District of Illinois alleging that Local 134 and Arlington Park violated section 301(a) of the NLRA.²¹ Richards claimed that Arlington Park violated the collective bargaining agreement by firing him without just cause, and that Local 134 breached its duty to represent him by conspiring with the employer "to make a sham of the grievance procedure in allowing his dismissal to stand."²²

The defendants sought dismissal of Richards' section 301(a) action for failure to state a claim.²³ The employer and union contended that the court lacked subject matter jurisdiction under section 301(a).²⁴ Because horseracing is not an industry affecting

jurisdiction to the party seeking judicial resolution of the dispute on the unfair labor practice charge, while in others the plaintiff brought the initial action in federal district court.

¹³ 790 F.2d 633, 122 L.R.R.M. 2380 (7th Cir. 1986).

¹⁴ *Id.* at 634-35, 122 L.R.R.M. at 2381.

¹⁵ *Id.* at 636, 122 L.R.R.M. at 2382-83.

¹⁶ *Id.* at 636, 122 L.R.R.M. at 2383.

¹⁷ *Id.* at 634, 122 L.R.R.M. at 2381.

¹⁸ *Richards v. Local 134, Int'l Bhd. of Elec. Workers*, No. 85-C711, slip op. at 2 (N.D. Ill. Sept. 30, 1985).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 29 U.S.C. § 185(a) (1982). The decisions make no reference to Richards having applied to the Board for unfair labor practice relief prior to filing his section 301 claim.

²² *Richards*, No. 85-C711, slip op. at 8.

²³ *Id.* at 3.

²⁴ *Id.* The defendants also sought dismissal for failure to state a claim on two other grounds. The first ground was that the six-month statute of limitations provided under NLRA § 10(b), 29 U.S.C. § 160(b) (1982), barred Richards' suit. *Richards*, No. 85-C711, slip op. at 6. Secondly, the defendants asserted that the plaintiff's failure to plead that he had exhausted the available intra-union remedies before instituting the § 301 suit barred the claim. *Id.* at 8.

commerce, the defendants claimed, the Board consistently has refused to assert jurisdiction over that industry.²⁵ Thus, the defendants asserted, the court should defer to the NLRB's expertise and decline subject matter jurisdiction.²⁶

The district court, agreeing with the defendants, held that it lacked subject matter jurisdiction to hear the employee's section 301 claims.²⁷ The district court reasoned that horseracing is a matter of particularly local concern and did not "affect commerce."²⁸ Deferring to the Board's expertise, the district court granted the defendant's motion to dismiss for lack of subject matter jurisdiction.²⁹

The Seventh Circuit Court of Appeals reversed the district court, holding that the district courts must hear labor contract suits that satisfy the section 301 statutory requirements, notwithstanding the NLRB's refusal to entertain jurisdiction.³⁰ While intense

²⁵ *Richards*, No. 85-C711, slip op. at 3-4. See cases cited *supra* note 4.

²⁶ *Richards*, No. 85-C711, slip op. at 3.

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ In deferring to the Board's determination that the horseracing industry's effect on interstate commerce is insufficient to warrant exercise of the Board's jurisdiction, the court noted two justifications for the Board's position. *Id.* at 4. First, the Board has characterized horseracing operations as local in character, and therefore unlikely to disrupt interstate commerce in the event of a labor dispute. *Id.* See *Los Angeles Turf Club, Inc.*, 90 N.L.R.B. 20, 26 L.R.R.M. 1154 (1950). Second, section 14(c)(2) of the NLRA allows the state to assume jurisdiction in the event that the Board declines to do so. *Id.* See *supra* note 7. See also *NLRB v. National Survey Serv., Inc.*, 361 F.2d 199, 61 L.R.R.M. 2712 (7th Cir. 1966) (small company deriving most of its revenues from intrastate business unsuccessfully challenged Board's jurisdiction to certify results of representation election). Therefore, the court held that the Board's position does not leave the horseracing industry unregulated. *Richards*, No. 85-C711, slip op. at 4.

At trial below, the district court in *Richards* did not distinguish the *Fair Grounds* holding, but characterized it as an anomaly "directly contradicting the wide body of law which defers to the NLRB's discretion and expertise to determine the industries over which it exercises or declines jurisdiction." *Richards*, No. 85-C711, slip op. at 6. Stating that no other court had followed or adopted the Fifth Circuit approach, the *Richards* court dismissed the § 301 action for lack of subject matter jurisdiction. *Id.*

Moreover, the court also sustained the six-month statute of limitations and *Richards*' failure to exhaust intraunion remedies as grounds for dismissal. *Id.* at 6-8. The Supreme Court has developed a policy that an employee must exhaust his remedies under the collective bargaining agreement before he can pursue judicial action. See, e.g., *Republic Steel v. Maddox*, 379 U.S. 650 (1965) (discharged employee filed breach of contract suit against employer instead of pursuing collective bargaining agreement's grievance and arbitration mechanism). The court cited the well-settled, court-developed rule that the employee must exhaust all unquestionably adequate and mandatory internal remedies. *Richards*, No. 85-C711, slip op. at 8 (citing *Baldani v. Local 1095*, 581 F.2d 145, 99 L.R.R.M. 2535 (7th Cir. 1978); *Harrison v. Chrysler Corp.*, 558 F.2d 1273, 95 L.R.R.M. 2953 (7th Cir. 1977); *Newgent v. Modine Mfg. Co.*, 495 F.2d 919, 86 L.R.R.M. 2468 (7th Cir. 1974); *Orphan v. Furnco Instruction Corp.*, 466 F.2d 795, 81 L.R.R.M. 2058 (7th Cir. 1972)). The court determined that *Richards*' failure to plead any facts which suggested an attempt to utilize the union constitution's mandatory internal appeal procedures, or which supported his assertion that the grievance process was merely a sham, was fatal to his claim. *Id.*

³⁰ *Richards*, 790 F.2d at 634-36, 122 L.R.R.M. at 2381-82. The circuit court reversed the lower court on the jurisdiction and statute of limitations issues, and remanded the case for further findings on the internal remedy question. *Id.* at 635, 122 L.R.R.M. at 2381. On the statute of limitations question, the circuit court agreed with the district court that six months was the applicable period, but found that the lower court had erred in determining when a combination § 301/fair representation cause of action accrues. *Id.* at 636-37, 122 L.R.R.M. at 2383. Both courts looked to *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 113 L.R.R.M. 2737 (1983), as the controlling law

state regulation, a concern for allocation of resources, and a critical backlog of cases may

on the question. In *DelCostello*, the Court addressed the accrual of a combination § 301/fair representation claim arising out of an employee's discharge and grievance hearing. *Id.* See *infra* this note for a discussion of the *DelCostello* facts. The appellate court determined that the claim accrues from the time the grievance mechanism renders a final decision on the employee's grievance, *Richards*, 790 F.2d at 636-37, 122 L.R.R.M. at 2383 (citing *DelCostello*, 462 U.S. at 172, 113 L.R.R.M. at 2745), or when a reasonably diligent employee should realize that no further action would be forthcoming on his grievance, whichever is earlier. *Id.* (citing *Metz v. Tootsie Roll Indus., Inc.*, 715 F.2d 299, 304, 114 L.R.R.M. 2340, 2344 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070, 115 L.R.R.M. 2360 (1984)). In this case, *Richards* filed his grievance on August 5, 1984, the day he received written notice of his termination. *Id.* at 637, 122 L.R.R.M. at 2383. He filed the § 301 claim on January 29, 1985. *Id.* Accordingly, the court found, the earliest time that *Richards*' claim could have accrued was the grievance filing date, thus bringing the complaint filing within the six-month limitation period. *Id.*

The Seventh Circuit made clear that where a § 301 claim alleges collusion by the employer and union during the grievance procedure, the claim cannot accrue until the allegedly violative conduct has taken place. See *id.* at 636-37, 122 L.R.R.M. at 2383. Even where the alleged wrongful discharge is the basis for a § 301 breach of contract suit, the employee is not aware that he or she requires judicial remedies until the contract grievance procedure has proven unsatisfactory. To start the clock before the employee/grievant could recognize the necessity of judicial recourse would not be logical. See *id.* at 637, 122 L.R.R.M. at 2383. The circuit court's reversal on the accrual of a cause of action question resulted from an obvious misconstruction by the trial court of the Supreme Court's decision in *DelCostello*. The operative dates in *DelCostello* were: discharge on June 27, 1977; grievance committee decision relayed to employee on August 19, 1977; grievance committee minutes approved by committee on September 20, 1977; suit filed on March 16, 1978. 462 U.S. at 155, 113 L.R.R.M. at 2738. The Court remanded the case because the trial court had not addressed the plaintiff's contentions that certain events tolled the statute of limitations. *Id.* at 172, 113 L.R.R.M. at 2745. The Court, however, referred to the date of the committee's decision as the determinative date of accrual. *Id.*

Finally, the circuit court discussed the trial court's holding that *Richards*' failure to exhaust the internal grievance mechanism barred his § 301 claim. *Richards*, 790 F.2d at 637, 122 L.R.R.M. at 2383. The court identified three circumstances under which such a failure would be excused: (1) no prospect of obtaining a fair hearing because of union officials' hostility towards the grievant; or (2) inadequacy of relief as compared to section 301 or inability to reactivate the grievance; or (3) unreasonable delay of the employee's opportunity for court adjudication on the merits. *Id.* (citing *Clayton v. International Union, UAW*, 451 U.S. 679, 689, 107 L.R.R.M. 2385, 2389 (1981)). The appellate court remanded *Richards*' case to the district court for findings on the enumerated exceptions to the exhaustion requirement. *Id.* at 637, 122 L.R.R.M. at 2383-84. The court analogized *Richards*' situation to the plaintiff in *Clayton*, where the employee also sought reinstatement at his job as well as monetary damages from the employer and union. *Id.* at 637, 122 L.R.R.M. at 2383 (citing *Clayton*, 451 U.S. at 690, 107 L.R.R.M. at 2389). In *Clayton*, the Court characterized the agreement as similar to most other collective bargaining agreements which impose strict time limits on grievance decision appeals, thereby precluding the union from seeking arbitration or other remedy for the grievant that might adequately compensate him. 451 U.S. at 691 & n.18, 107 L.R.R.M. at 2389 & n.18.

The Seventh Circuit's remand on the exhaustion of intraunion remedies requirement provides appropriate recognition that, under modern pleading rules, the lack of specificity in the pleadings should not be grounds for dismissal when the complaint at least raises the operative issues under the *Clayton* exceptions to the exhaustion rule. See *supra* this note. Even under the limited facts that *Richards* pleaded, the court could discern possible excuses for failing to exhaust internal remedies on any of the three grounds: futility, inadequacy of remedy, or unreasonable delay. See *Richards*, 790 F.2d at 637, 122 L.R.R.M. at 2383.

The Seventh Circuit also reprimanded the district court for failing to follow circuit court rules before rejecting the direct authority of the Fifth Circuit. *Id.* Circuit Rule 16(e) requires that "a proposed opinion that would create a conflict between circuits must be circulated among the active

be appropriate bases for the Board to decline jurisdiction over an industry,³¹ the court stated, the federal courts do not enjoy such discretionary jurisdiction.³² The threshold inquiry in determining if federal courts must exercise jurisdiction in section 301 cases is whether the purported dispute is in an industry affecting commerce.³³ If the court answers the question in the affirmative, then federal courts have subject matter jurisdiction over the claim, notwithstanding the NLRB's decision to decline jurisdiction.³⁴ The Seventh Circuit found in *Richards* that the horseracing industry clearly affects interstate commerce.³⁵ Thus, the court concluded, the district court was bound to assert jurisdiction over the section 301 claim.³⁶

The Seventh Circuit in *Richards* correctly interpreted federal court jurisdiction over LMRA section 301 claims. Section 501 of the LMRA defines the phrase "industry affecting commerce," as used in the section 301(a) jurisdictional grant, as an industry "in commerce or in which a labor dispute would burden or obstruct . . . the free flow of commerce."³⁷ The corresponding NLRA section 2(7) definition addressing the Board's jurisdiction is, for all practical purposes, identical.³⁸

Without more, therefore, the jurisdictional scope of the Board and the federal courts would be identical. The Board, however, retains statutory discretion under section 301 to decline jurisdiction over disputes that are not likely to have a sufficiently substantial impact on commerce, but which may nonetheless satisfy the definition of an industry affecting commerce.³⁹ The Board bases its long-standing refusal to exercise jurisdiction in horseracing cases on its belief that the detailed state regulation of horseracing operations and the importance of horseracing revenues to the state minimize the risk of a labor dispute persisting long enough to interfere significantly with interstate commerce.⁴⁰ Consequently, although horseracing involves extensive dependence on customers, horse owners, employees and supplies from other states, and thus technically satisfies the definition of an industry in interstate commerce, its labor disputes may not sufficiently burden or obstruct interstate commerce so as to require Board review. Rather, the Board relies on the assumed ability and desire of the states to intervene quickly and resolve the disputes.

The federal courts, unlike the Board, are in the unenviable position of being literally bound to exercise jurisdiction over labor contract disputes that affect interstate commerce, even when the disputes might best be resolved in state courts. It is arguable that

members of this court to determine whether a rehearing en banc is necessary." *Id.* Apparently, the district court did not circulate its opinion which flatly rejected the Fifth Circuit's *Fair Grounds* holding. *Id.*

³¹ See *San Juan Racing Ass'n Inc. v. Labor Relations Bd. of Puerto Rico*, 532 F. Supp. 51, 54-55, 96 Lab. Cas. (CCH) ¶ 14,155, 24,016 (D.P.R. 1982).

³² *Richards*, 790 F.2d at 636, 122 L.R.R.M. at 2382.

³³ *Id.* at 636, 122 L.R.R.M. at 2382-83.

³⁴ *Id.* at 636, 122 L.R.R.M. at 2382.

³⁵ *Id.*

³⁶ *Id.* at 636, 122 L.R.R.M. at 2383.

³⁷ 29 U.S.C. § 142(1) (1982).

³⁸ 29 U.S.C. § 152(7) (1982). Section 2(7) reads, in pertinent part: "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

³⁹ See LMRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1982).

⁴⁰ See *Walter A. Kelley*, 139 N.L.R.B. 744, 51 L.R.R.M. 1375 (1962).

because, as a general matter, courts should construe statutes in the manner which best promotes the laws' underlying purposes, federal courts should not adjudicate collective bargaining agreement disputes in which the state has a much greater interest and which the state courts are empowered to resolve.⁴¹ Congress, however, in defining the authority of the Board and the courts to enforce federal labor policy, expressly granted the Board a discretionary power, but granted no such discretion to the courts. Whether Congress made this distinction because of a greater concern for the demands on the Board's limited resources or because it felt that the Board was more qualified to exercise such discretion, Congress clearly implied that it intended to open the federal courts to all claims of labor contract violations in industries which affect interstate commerce, notwithstanding the Board's refusal to exercise jurisdiction. Unless and until Congress amends the jurisdictional language of sections 301 and 501 of the LMRA, litigants should not expect the courts to be constrained by the Board's discretionary jurisdiction determinations.

In sum, section 14(c) of the NLRA allows the Board the discretion to refuse jurisdiction in labor disputes not significantly affecting interstate commerce. The Seventh Circuit, in *Richards*, held that even if the NLRB declines to exercise jurisdiction over unfair labor practices in the industry in question, the district courts must exercise jurisdiction over LMRA section 301 collective bargaining agreement disputes involving industries which affect interstate commerce. Thus, the *Richards* court concluded, the district courts must make an independent determination of the industry's effect on interstate commerce. If the industry falls within the definition of interstate commerce, the federal courts retain jurisdiction over the section 301 claim. Although perhaps unfortunate, the federal courts do not enjoy the discretion that Congress has granted to the Board to evaluate the relative necessity of federal government intervention into the labor disputes of a given industry.

VII. FAIR LABOR STANDARDS ACT

A. **The Third Circuit Adopts The Thurston Willfulness Standard For Determination Of Violations Under The Fair Labor Standards Act: Brock v. Richland Shoe Co.*¹

Section 255(a) of Title 29 of the United States Code establishes a two year statute of limitations for any action under the Fair Labor Standards Act (FLSA)² for unpaid, minimum wages, unpaid overtime, or liquidated damages.³ If the violation of the FLSA is willful, however, a three year statute of limitations applies.⁴ Thus, the effect of this provision is to add one year to the statute of limitations in cases involving willful violations of the FLSA, thereby subjecting the employer to the risk of a damage figure based on three years back pay, rather than two.⁵

⁴¹ See WRIGHT, THE LAW OF FEDERAL COURTS § 52, 308-11 (4th ed. 1983).

* By Joseph A. DiBrigida, Jr., Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 799 F.2d 80 (3d Cir. 1986).

² Fair Labor Standards Act of 1938 §§ 1-19, 29 U.S.C. §§ 201-19 (1983).

³ Portal-to-Portal Act of 1947 § 6(a), 29 U.S.C. § 255(a) (1983).

⁴ *Id.*

⁵ See *Brock v. Richland Shoe Co.*, 799 F.2d 80, 84 n.6 (3d Cir. 1986). Although the effect of this provision is also to allow the complainant an additional year in which to bring an action under the FLSA, *Richland Shoe* was not concerned with the timing aspect. The only issue considered was

The first appellate court to set the standard for measuring whether a violation of the FLSA was willful was the Fifth Circuit in *Coleman v. Jiffy June Farms*.⁶ Under the *Jiffy June* standard, an employer's violation is willful when the "employer knew or suspected that his actions might violate the FLSA."⁷ The court stated the test simply as: "Did the employer know the FLSA was in the picture?"⁸ This standard has been followed by the Courts of Appeals in the First, Fourth and Tenth Circuits.⁹

The United States Supreme Court, considering whether an employer's conduct was a willful violation of the Age Discrimination in Employment Act (ADEA),¹⁰ set a different standard in *Trans World Airlines v. Thurston*.¹¹ This new standard states that the employer's violation was willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."¹² The Seventh Circuit, in *Walton v. United Consumers Club*,¹³ held that the *Thurston* standard was the correct one to apply in both ADEA cases and in cases brought under section 255(a) for violations of the FLSA.¹⁴ Thus, when determining willfulness under section 255(a), the First, Fourth, Fifth and Tenth Circuits apply the *Jiffy June* standard, while the Seventh Circuit applies the *Thurston* standard. In determining willfulness under the ADEA, the proper standard to apply is the *Thurston* standard set forth by the Supreme Court.

During the *Survey* year, the Third Circuit, in *Brock v. Richland Shoe Co.*, adopted the *Thurston* standard as the willfulness standard to be used for section 255(a) cases in its jurisdiction.¹⁵ Thus, in the Third Circuit, a violation of the FLSA will be willful under section 255(a), and the three year statute of limitations will apply, if the employer "[k]new or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA."¹⁶ Consequently, after *Richland Shoe*, a knowing violation of the FLSA or deliberate ignorance of the FLSA in the Third Circuit will subject an employer to damages based on three years of back pay, rather than two.¹⁷

Richland Shoe involved an action by the Secretary of Labor, William E. Brock, to enjoin Richland, a manufacturer of footwear and other leather products, from violating

the "willfulness" of the violation for purposes of determining back wages. *Id.* at 81. The effect of a two or three year limitation is to establish a cut-off point for measuring damages in FLSA cases involving ongoing violations. *Id.* at 84 n.6.

⁶ 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

⁷ *Id.* at 1142.

⁸ *Id.*

⁹ See *Secretary of Labor v. Daylight Dairy Products*, 779 F.2d 784, 789 (1st Cir. 1985); *Donovan v. Bel-Loc Diner*, 780 F.2d 1113, 1117 (4th Cir. 1985); *Donovan v. Simmons Petroleum*, 725 F.2d 83, 85 (10th Cir. 1983).

¹⁰ Age Discrimination in Employment Act of 1967 §§ 2-17, 7(b), 29 U.S.C. §§ 621-34, 626(b) (1983).

¹¹ 469 U.S. 111, 126, 36 FEP Cases 977, 984 (1985). This new standard was established under the ADEA by the Second Circuit's decision in *Airline Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 956, 114 L.R.R.M. 2241, 2252 (2d Cir. 1983). The *Thurston* Court adopted this standard as set out by the Second Circuit. 469 U.S. at 126, 36 FEP Cases at 984.

¹² 469 U.S. at 126, 36 FEP Cases at 984.

¹³ 786 F.2d 303 (7th Cir. 1986).

¹⁴ *Id.* at 311.

¹⁵ 799 F.2d at 81, 83.

¹⁶ *Id.* at 81.

¹⁷ *Id.*

the FLSA's overtime¹⁸ and recordkeeping¹⁹ provisions and from withholding compensation owed to seven plant mechanics for overtime work.²⁰ In his deposition, the vice president and general manager of Richland stated that he knew the FLSA applied to overtime pay arrangements such as those between Richland and its mechanics.²¹ The Secretary moved for summary judgment.²²

The United States District Court for the Eastern District of Pennsylvania granted the Secretary's summary judgment motion and enjoined Richland from violating the FLSA's overtime and recordkeeping provisions.²³ Furthermore, the district court applied the *Jiffy June* standard²⁴ of willfulness under section 255(a) in calculating the amount of back overtime pay to award.²⁵ Because of the vice president-general manager's admission, the district court found that the employer knew or suspected that his actions might violate the FLSA.²⁶ Willfulness established, the court awarded the mechanics \$11,084.26 plus interest,²⁷ the amount of back overtime pay due based on the three year statute of limitations period.²⁸ Richland appealed to the Third Circuit, contending that the district court calculated the wrong back overtime pay award under section 255(a) because it applied an improper standard of willfulness.²⁹ The Third Circuit thus faced a question of first impression in its jurisdiction: what constitutes willfulness under section 255(a)?³⁰

The Third Circuit rejected the *Jiffy June* standard, adopting a more rigorous one.³¹ Under this new standard, an employer would willfully violate section 255(a) if "the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA."³² The court therefore affirmed the district court's decision in favor of the Secretary, but vacated the court's order concerning the statute of limitations and remanded the case for recalculation of the amount of back overtime pay due under the new standard.³³ On remand, the trial court was to make a "willfulness" evaluation

¹⁸ 29 U.S.C. §§ 207, 215(a)(2) (1983). Section 215(a)(2) states that it is unlawful to violate section 207. 29 U.S.C. § 215(a)(2) (1983). Section 207 states that employees who work for longer than forty hours in one workweek should receive compensation for their employment in excess of forty hours at one and one-half times their regular rate. 29 U.S.C. § 207 (1983). Richland paid its mechanics time and one-half only for time worked in excess of forty-eight hours per week. 799 F.2d at 81 n.1. The Secretary brought this action to recover overtime pay for all hours worked in excess of forty per week. *Id.*

¹⁹ 29 U.S.C. §§ 211(c), 215(a)(5) (1983). Section 215(a)(5) states that it is unlawful to violate section 211(c). 29 U.S.C. § 215(a)(5) (1983). Section 211(c) states that employers shall keep records of the wages, hours and other conditions and practices of employment maintained, and shall report them to the Administrator when so directed. 29 U.S.C. § 211(c) (1983). The *Richland Shoe* opinion does not specify how Richland violated these provisions.

²⁰ 799 F.2d at 81.

²¹ *Id.* at 82.

²² *Id.* at 81.

²³ *Id.*

²⁴ *Id.* at 82.

²⁵ *Id.* at 81.

²⁶ *Id.* at 82.

²⁷ *Id.* at 81.

²⁸ *Id.* at 82.

²⁹ *Id.* at 81.

³⁰ *Id.* at 82.

³¹ *Id.* at 81.

³² *Id.*

³³ *Id.*

under the new standard, thus deciding the number of years on which to calculate back pay.³⁴

The Third Circuit expressly rejected the *Jiffy June* standard for three reasons.³⁵ First, the court found that willfulness requires more than mere negligence; it requires deliberate effort.³⁶ The court cited to *Webster's New Collegiate Dictionary*, which defines "willful" as "done deliberately: intentional."³⁷ The court stated that a willful act requires "reckless disregard of the consequences" at the very least.³⁸ The *Jiffy June* "in the picture" standard is a mere negligence standard and allows for no consideration of whether the employer violated the FLSA deliberately or recklessly.³⁹ Finding the *Jiffy June* standard contrary to the plain meaning of the statute, the Third Circuit therefore rejected such "in the picture" analysis.⁴⁰

Second, the court rejected the *Jiffy June* standard because it frustrated legislative intent.⁴¹ The court here relied on *Walton v. United Consumers Club*, in which the Seventh Circuit found that section 255(a) was designed to establish a two-tier statute of limitations with two years as the rule and three years as the exception.⁴² The *Richland Shoe* court agreed with the *Walton* court that the *Jiffy June* standard is too lax because under it almost any employer could be found to have acted willfully.⁴³ Thus, use of the "in the picture" standard would turn a two-tier statute into a one-tier statute and thus frustrate congressional intent.⁴⁴ Furthermore, the Third Circuit stated that although a statute's plain meaning may be overcome by clear evidence that Congress intended a different construction,⁴⁵ the court found no evidence of such legislative intent in the present case, *Jiffy June* or any of the cases that have followed *Jiffy June*.⁴⁶ Thus, the Third Circuit rejected the *Jiffy June* standard as frustrating legislative intent.⁴⁷

Third, the court was swayed by the Supreme Court's rejection of the *Jiffy June* standard in *Thurston*.⁴⁸ In *Thurston*, the Supreme Court was faced with defining willfulness under the double damages provision of the ADEA.⁴⁹ The Supreme Court rejected the contention of the plaintiffs who argued, under the *Jiffy June* standard, that the employer was liable for double damages because he knew that the ADEA was "in the picture."⁵⁰ In support of its holding, the *Thurston* Court stated that it would be almost

³⁴ *Id.* at 84 n.6.

³⁵ *Id.* at 82-83.

³⁶ *Id.* at 82.

³⁷ *Id.* (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 1331 (1979)).

³⁸ *Id.* at 82 & n.5.

³⁹ *Id.* at 83.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (citing *Walton*, 786 F.2d at 310).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (citing *Paskel v. Heckler*, 768 F.2d 540, 543-44 (3d Cir. 1985)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (citing *Thurston*, 469 U.S. 111, 36 FEP Cases 977 (1985)).

⁴⁹ 469 U.S. at 125-30, 36 FEP Cases at 984-86. Under the ADEA, the prevailing plaintiff is entitled to double damages only when the employer willfully has violated the provisions of the ADEA. 29 U.S.C. § 626(b) (1983).

⁵⁰ 469 U.S. at 127-28, 36 FEP Cases at 985.

impossible for an employer to prove that it was unaware of the ADEA, or that the ADEA was not in the picture.⁵¹ The Court further found that Congress intended a two-tier liability system under the ADEA and refused to apply a willfulness standard that would frustrate this intent.⁵² The *Thurston* Court established that a willful violation is one in which "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."⁵³ The Court found this standard consistent with its interpretation of the term in other criminal and civil statutes.⁵⁴ Because *Thurston* involved the interpretation of the ADEA, not the FLSA and section 255(a), it did not control *Richland Shoe*. The Third Circuit, in *Richland Shoe*, however, relied on *Thurston* as persuasive precedent in its interpretation of willfulness under section 255(a).⁵⁵

The Third Circuit also relied on the Seventh Circuit's decision in *Walton* which held that the *Thurston* standard was the proper standard to apply both in ADEA cases and in cases brought under section 255(a) for violations of the FLSA.⁵⁶ In *Walton*, the Seventh Circuit, like the Supreme Court in *Thurston*, found that the *Jiffy June* standard would frustrate congressional intent by turning a two-tier system into a one-tier system.⁵⁷ Like the *Thurston* Court, the *Walton* court found that it would be virtually impossible to find an employer unaware that the FLSA was "in the picture."⁵⁸ The Seventh Circuit, therefore, rejected the *Jiffy June* standard and held that the correct standard of willfulness under both the ADEA and section 255(a) is the *Thurston* standard.⁵⁹ Thus, relying on *Thurston* and *Walton*, the Third Circuit in *Richland Shoe* held that an employer violated the FLSA willfully if it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA."⁶⁰

The *Richland Shoe* court also addressed two objections to its disposition.⁶¹ The first objection relied upon the First Circuit's refusal in *Secretary of Labor v. Daylight Dairy*⁶² to extend the *Thurston* standard to section 255(a).⁶³ In *Daylight Dairy*, the First Circuit characterized *Thurston* as involving the question of whether the employer should pay double damages under the ADEA, a punitive statute.⁶⁴ The First Circuit distinguished *Thurston* from *Daylight Dairy* by finding that the statute of limitations provision of section

⁵¹ *Id.* at 128, 36 FEP Cases at 985.

⁵² *Id.*

⁵³ *Id.* at 126, 36 FEP Cases at 984 (quoting *Air Line Pilots*, 713 F.2d at 956, 114 L.R.R.M. at 2252).

⁵⁴ *Id.* See, e.g., *United States v. Illinois Cent. Ry. Co.*, 303 U.S. 239, 242-43 (1938) (defendant's failure to unload a cattle car was willful because it showed a disregard for the governing statute and its requirements); *United States v. Murdock*, 290 U.S. 389, 395 (1933) (defendant's action was willful because it was "marked by reckless disregard [for] whether or not one has the right so to act").

⁵⁵ 799 F.2d at 83.

⁵⁶ *Id.*

⁵⁷ 786 F.2d at 310.

⁵⁸ *Id.* at 311.

⁵⁹ *Id.*

⁶⁰ 799 F.2d at 83.

⁶¹ *Id.* at 83-84. The second objection was brought by the Secretary. *Id.* at 84. The first was presumably brought by the Secretary as well, although the opinion does not so state. *Id.*

⁶² 779 F.2d 784 (1985).

⁶³ 799 F.2d at 83-84.

⁶⁴ 779 F.2d at 789.

255(a) is not punitive.⁶⁵ Thus, the First Circuit did not feel bound to extend *Thurston* to section 255(a).⁶⁶

The Third Circuit in *Richland Shoe* disagreed with the First Circuit, stating that section 255(a) increased the employer's liability based on willfulness and thus was punitive.⁶⁷ Stating that the increased risk of liability could not be explained as anything but punitive, the court reasoned that the harm caused to the workers by willful violations is no more difficult to detect and no more severe than the harm caused by unwillful violations.⁶⁸ The court thus found that the congressional extension of liability for an additional year where the violation was willful clearly is based on its perception that "willful violations are more culpable than negligent ones."⁶⁹ Therefore, the court reasoned, the extension of an additional year is a punitive measure and no different than the double damages provision in *Thurston*.⁷⁰ For this reason, the court refused to follow *Daylight Dairy*.⁷¹

The second objection the *Richland Shoe* court addressed was one raised by the Secretary.⁷² The Secretary argued that the *Jiffy June* standard was preferable because it furthered the remedial ends of the FLSA by making it easier for an employee to recover wrongfully withheld wages.⁷³ The Third Circuit dismissed this objection as overly broad, stating that it could be used to object to any statute of limitations.⁷⁴ The court further stated that any statute of limitations in a damage action seeks a balance between proof and timeliness on one side and the recovery of damages on the other.⁷⁵ Finally, the *Richland Shoe* court found no evidence offered by the Secretary that the congressional intent was to strike the balance in a way that contradicted the plain meaning of section 255(a).⁷⁶ Thus, it dismissed this second objection.⁷⁷

Richland Shoe is a sound and stable decision. To begin with, it relied heavily on the plain meaning rule of statutory construction in interpreting the term "willful" under section 255(a). Furthermore, *Richland Shoe* also adhered to congressional intent in construing the statute. Still further, *Richland Shoe* relied persuasively and effectively on the United States Supreme Court's decision in *Thurston*, which also involved the interpretation of the term "willful" in a punitive statute.

First, *Richland Shoe* was an extremely well reasoned decision which is likely to stand in the Third Circuit and quite possibly could influence other circuits to abandon the *Jiffy June* standard and adopt the *Thurston* standard. *Richland Shoe* gains a portion of its strength from its strict adherence to the plain meaning of "willful." Asserting that the dictionary's plain meaning of "willful" requires deliberate action with intent, the court referred to several instances where courts and commentators have stated that willfulness

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 799 F.2d at 84.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

"requires an intent to bring about certain ends or a reckless disregard to those ends."⁷⁸ The *Richland Shoe* court thus correctly rejected the *Jiffy June* standard as too far removed from this plain meaning.

Second, the *Richland Shoe* opinion also is a proper interpretation of the congressional intent of section 255(a). By establishing a two year statute of limitations for ordinary violations of the FLSA and a three year statute of limitations for willful violations, Congress established a two-tier system. The negligence standard of *Jiffy June* frustrates this two-tier system by finding a willful violation whenever the employer knew the FLSA was "in the picture." *Thurston*, *Walton* and *Richland Shoe* therefore correctly rejected this standard as too lax.

Third, the *Richland Shoe* court's opinion is extremely sound because it follows the United States Supreme Court's *Thurston* decision, which construed "willful" in a situation quite similar to the situation in *Richland Shoe*. Both cases involved punitive statutes which increased the liability of the employer where its violation was willful. Because the statutes were so similar and because the *Thurston* standard is consistent with the way in which the Supreme Court has interpreted "willful" in other civil and criminal statutes, the Third Circuit was correct in following *Thurston*.

Moreover, the *Richland Shoe* court, in rejecting the first objection to its disposition, was correct in determining the punitiveness of the statute by focusing on its impact on the employer.⁷⁹ As the Seventh Circuit stated in *Walton*: "'punitive-ness' is in the eye of the beholder; both [the ADEA and section 255(a)] increase the plaintiff's recovery"⁸⁰ Thus, the increased risk of liability to the employer under section 255(a) cannot be considered anything but a punitive measure.⁸¹

The *Richland Shoe* court also was correct in rejecting the Secretary's objection that the *Jiffy June* standard is preferable because it furthers the ends of the FLSA by making it easier for employees to recover wrongfully withheld wages. This argument is far too broad because it destroys the balance sought by any statute of limitations. As the *Walton* court stated: "It is true . . . that the 'entire legislative history of the 1966 amendments of the FLSA indicates a liberalizing intention on the part of Congress.' But the *direction* of the change (in favor of employees) does not tell us *how far* the change was to go."⁸² The Secretary offered no evidence that the balance was to be tipped so far as to contradict the plain meaning of the statute in establishing a two-tiered standard. The *Richland Shoe* court therefore correctly rejected the Secretary's objection.

The Third Circuit's decision in *Brock v. Richland Shoe Co.* contains several caveats for the practitioner. Under *Richland Shoe*, employers in the Third Circuit will not be held to the "in the picture" standard of *Jiffy June* but to the more rigorous "reckless

⁷⁸ *Id.* at 82 & n.5.

⁷⁹ Furthermore, the impact of the *Daylight Dairy* court's contention that because section 255(a) is not a punitive statute the *Thurston* standard should not apply to it is diminished by the fact that *Daylight Dairy* and *Jiffy June* were authored by the same judge. Compare 779 F.2d at 786 with 458 F.2d at 1140. Although the author, Senior Circuit Judge Wisdom, was of the Fifth Circuit, at the time of *Daylight Dairy* he was sitting in the First Circuit by designation. 779 F.2d at 786. Thus, the *Daylight Dairy* court that so adamantly rejected *Thurston* and adopted *Jiffy June* was not a court of first impression, but a court presided over by a Senior Circuit Judge who had previously formulated *Jiffy June*.

⁸⁰ 786 F.2d at 309.

⁸¹ 799 F.2d at 84.

⁸² 786 F.2d at 310-11 (emphasis in original).

disregard" standard of *Thurston*. Counsel for employees seeking to recover back wages under section 255(a) should advise their clients that they may not take advantage of the three year statute of limitations for bringing an action and may not collect a damage figure based on three years back wages where the employer's violation was merely negligent. Conversely, counsel for employers should advise their clients to take pains not to ignore the knowledge of any of the company's officers, managers, supervisors or administrators concerning the FLSA. If the employer, or any of its administrative personnel, possess knowledge as to the FLSA, a later violation in reckless disregard of the FLSA by the employer may, as in *Richland Shoe*, be deemed willful. Lastly, counsel in circuits which still use the *Jiffy June* standard should be wary of the possibility of the abandonment of that standard and the adoption of the *Thurston* standard because of the strength of the *Thurston*, *Walton* and *Richland Shoe* opinions.

In conclusion, the circuits are split on the proper construction of "willful" under section 255(a). The First, Fourth, Fifth and Tenth Circuits apply the *Jiffy June* "in the picture" negligence standard. Until *Richland Shoe*, only the Seventh Circuit applied the more rigorous *Thurston* "reckless disregard" standard. In *Richland Shoe*, the Third Circuit adopted the *Thurston* standard and seriously challenged the validity of the *Jiffy June* standard. Thus, in the Third Circuit, a violation of the FLSA will be willful under section 255(a) if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA. Because it was so strongly reasoned, *Brock v. Richland Shoe Co.* could influence other circuits to reject the *Jiffy June* standard and adopt the *Thurston* standard.

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS

A. **Suing Municipalities Under Title VII and Section 1983*: Hamilton v. Rodgers¹

Congress enacted Title VII² in 1964 to provide relief to individuals from discrimination in employment.³ Title VII prohibits employers from discriminating against a person based on his or her race, color, religion, sex or national origin.⁴ Under Title VII, a successful plaintiff may obtain equitable relief and back pay,⁵ but may not recover such compensatory damages as awards for emotional distress or pain and suffering.⁶ When a plaintiff brings an action under Title VII, he or she may also bring a parallel claim under 42 U.S.C. section 1983, which permits recovery of such damages.⁷

Section 1983 provides a private right of action for violation of individual rights protected by the United States Constitution and federal law by any "person" acting under color of state law.⁸ Possible defendants under section 1983 include state and municipal employees, municipal governments, and private individuals whose behavior may be classified as state action.⁹ In cases where a plaintiff brings both section 1983 and Title VII claims, the proof shown for Title VII liability will generally support liability under section 1983 as well.¹⁰

Although the elements of Title VII and section 1983 claims are similar, there are some major differences. The applicability of the doctrine of respondeat superior to

* By Mary V. Deck, Staff Writer, BOSTON COLLEGE LAW REVIEW.

¹ Hamilton v. Rodgers, 791 F.2d 439, 40 FEP Cases 1814 (5th Cir. 1984).

² 42 U.S.C. §§ 2000e *et seq.* (1976). 2000e-2(a)(2) provides:

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.

³ Case Note, Chemical Construction Corporation: *Eviscerating Title VII*, 17 SUFFOLK U.L. REV. 987 (1983).

⁴ 42 U.S.C. § 2000e(2)(a). See *supra* note 2.

⁵ 42 U.S.C. § 2000e-5(g).

⁶ B. SCHLEI, EMPLOYMENT DISCRIMINATION LAW 1258-59 & 1259 n.127 (1976).

⁷ See *id.* at 1259; see also Whiting v. Jackson State Univ., 616 F.2d 116, 121, 22 FEP Cases 1296, 1298 (5th Cir. 1980), *reh'g denied*, 622 F.2d 1043 (5th Cir. 1980).

⁸ 42 U.S.C. § 1983 (1982). Section 1983 provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons 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.

⁹ Baumann, *Civil Rights Litigation: Section 1983*, 1975 ANN. SURV. OF AM. L. 203, 203 (1986).

¹⁰ See, e.g., Hamilton v. Rodgers, 791 F.2d 439, 442, 40 FEP Cases 1814, 1816 (5th Cir. 1986); Whiting, 616 F.2d at 121, 22 FEP Cases at 1298.

establish liability of the municipal employer constitutes one major distinction. The doctrine of respondeat superior applies under Title VII to establish the vicarious liability¹¹ of municipal and other employers who are not directly responsible for the violation.¹² Although courts have interpreted the term "persons" in section 1983 to include corporate and municipal agencies,¹³ such entities are liable under section 1983 only when "official policy or custom"¹⁴ is the direct cause of the discrimination charged. Therefore, courts do not hold municipal agencies indirectly liable under the theory of respondeat superior for acts of their employees that violate the individual rights of others.¹⁵

Courts have not yet adopted a clear standard for determining when official policy or custom exists for the purpose of establishing municipal liability under section 1983.¹⁶ Generally, a municipality may be held liable where discriminatory action is taken by an official vested with authority to make decisions representative of official policy.¹⁷ Alternatively, a pattern of unlawful behavior by those lacking policy-making authority may also constitute official policy.¹⁸ Under this view, such a pattern would constitute the constructive knowledge and acquiescence of the policy-making authority and justify imposition of liability.¹⁹

During the *Survey* year, the Fifth Circuit Court of Appeals reaffirmed the distinction between municipal liability under section 1983 and under Title VII.²⁰ The court determined that the doctrine of respondeat superior applies under Title VII²¹ and therefore held the plaintiff's immediate supervisors and the fire department for whom they worked jointly and severally liable under Title VII.²² The court, however, stated that respondeat superior does not apply under section 1983; instead, the court noted, a municipality is liable under section 1983 only where official policy or custom is the cause of the discrimination.²³ The court applied this test and found that twelve racial incidents cited by the plaintiff within a two-and-a-half year period did not constitute a pattern sufficient to establish a custom or official policy under section 1983. Finally, the court found the individual employees of the department liable under section 1983²⁴ and allowed com-

¹¹ Vicarious liability is defined as the liability of one without personal fault or involvement in the violation imposed due to his or her relationship (i.e., employer, employee) with the person directly responsible for the violation. Annotation, *Vicarious Liability of Superiors Under 42 USCS § 1983 for Subordinate's Acts in Deprivation of Civil Rights*, 51 A.L.R. FED. 285, 286 (1981).

¹² See, e.g., *Gay v. Bd. of Trustees of San Jacinto College*, 608 F.2d 127, 128, 23 FEP Cases 1569, 1570 (5th Cir. 1979); *Kirkland v. Buffalo Bd. of Educ.*, 487 F. Supp. 760, 773, 23 FEP Cases 1537, 1546 (W.D.N.Y. 1979), *aff'd*, 622 F.2d 1066, 23 FEP Cases 1547 (2d Cir. 1980); *Helbling v. Unclaimed Salvage and Freight Co., Inc.*, 489 F. Supp. 956, 961, 22 FEP Cases 1620, 1624-25 (E.D. Pa. 1980).

¹³ *Monell v. Department of Social Servs.*, 436 U.S. 658, 688-89, 17 FEP Cases 873, 884 (1961).

¹⁴ *Monell*, 436 U.S. at 694, 17 FEP Cases at 1886; Annotation, *What Constitutes Policy or Custom for Purposes of Determining Liability of Local Government Unit Under 42 U.S.C. § 1983 — Modern Cases*, 81 A.L.R. FED. 549, 558 (1987).

¹⁵ *Monell*, 436 U.S. at 691-92, 17 FEP Cases at 885.

¹⁶ See, Annotation, *supra* note 14, at 558-59.

¹⁷ *Id.*

¹⁸ See *id.* See also *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984).

¹⁹ See *Hamilton*, 791 F.2d at 443, 40 FEP Cases at 1817.

²⁰ *Id.* at 443-44, 40 FEP Cases at 1817-18.

²¹ *Id.* at 444, 40 FEP Cases at 1818.

²² *Id.* at 445, 40 FEP Cases at 1817-19.

²³ *Id.* at 443, 40 FEP Cases at 1817.

²⁴ *Id.* at 442, 40 FEP Cases at 1816.

pensation for emotional injuries sustained. Due to the plaintiff's insufficient showing of proximate cause, however, the court denied compensatory damages under section 1983 for physical injuries suffered.²⁵

In *Hamilton v. Rodgers*, the plaintiff, James Hamilton, was employed by the Houston Fire Department as a radio technician.²⁶ Soon after he was hired in January of 1979, his co-workers began subjecting him to racial slurs and pranks because he was black.²⁷ Hamilton began to receive critical evaluations from his supervisors late in 1980.²⁸ Before November of that year he filed an EEOC charge, claiming discrimination.²⁹ In January 1982, he filed suit in the district court under 42 U.S.C. sections 1981, 1983 and Title VII alleging retaliation and racial harassment on the part of the fire department and other individuals.³⁰ That summer, Hamilton was suspended, and later reinstated with lower pay.³¹ In October 1979, Hamilton found that he had abnormally high blood pressure, and by 1980 he required hospitalization.³² In November 1982, he suffered a stroke, and he died in February 1983.³³

The district court held the Houston Fire Department and Hamilton's supervisors jointly and severally liable under both Title VII and section 1983, finding evidence of a racist work environment and retaliatory efforts to punish Hamilton for seeking equal treatment.³⁴ Accordingly, the district court ordered that Hamilton receive back pay, as well as compensatory damages for mental anguish and the physical problems attributed to the stress he suffered during his employment.³⁵

On appeal, the Fifth Circuit upheld the liability of the individuals responsible for the discriminatory activity, but absolved the fire department from all liability on the theory that it could not be held vicariously liable for the acts of its employees.³⁶ After a subsequent petition for rehearing, however, the *Hamilton* court withdrew its earlier opinion, and substituted an opinion finding the fire department liable under Title VII, but not under section 1983.³⁷

In making its finding on the rehearing, the *Hamilton* court determined that when claims under 42 U.S.C. sections 1981 and 1983 are brought as parallel causes of action with claims under Title VII, the proof required under Title VII will also demonstrate section 1981 and section 1983 liability.³⁸ Therefore, a plaintiff seeking relief for unlawful retaliatory termination under these statutes must establish, by a preponderance of the evidence (1) that the activity engaged in is protected under Title VII; (2) that an adverse employment action occurred; and (3) that the adverse employment action was caused

²⁵ *Id.* at 444, 40 FEP Cases at 1818.

²⁶ *Id.* at 441, 40 FEP Cases at 1815.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 441, 40 FEP Cases at 1815-16.

³⁰ *Id.*

³¹ *Id.* at 441, 40 FEP Cases at 1816.

³² *Id.*

³³ *Id.* A federal district court later substituted Hamilton's wife as plaintiff in this action. *Id.* See *Hamilton v. Rodgers*, 573 F.Supp. 452, 454, 33 FEP Cases 302, 303 (S.D. Tex. 1983).

³⁴ *Hamilton*, 791 F.2d at 441, 40 FEP Cases at 1816.

³⁵ *Id.*

³⁶ *Hamilton v. Rodgers*, 783 F.2d 1306, 40 FEP Cases 453, 456 (5th Cir. 1986).

³⁷ *Hamilton*, 791 F.2d at 441, 40 FEP Cases at 1815.

³⁸ *Id.* at 442, 40 FEP Cases at 1816.

by plaintiff's engaging in the activity.³⁹ Alternatively, the court stated that a plaintiff may establish a Title VII violation and a parallel section 1983 claim by proving that discrimination is so pervasive in the work environment in question that it could seriously undermine the stability of minority employees.⁴⁰

After determining the elements of a Title VII and parallel section 1983 claim, the *Hamilton* court analyzed separately the liability of the plaintiff's supervisors, who were directly responsible for the discrimination against Hamilton, and the liability of the fire department.⁴¹ First, the court approved the district court's finding that Hamilton's supervisors had intentionally discriminated against him.⁴² The court cited testimony that the supervisors intentionally hindered his gaining proficiency in radio management, which ultimately led to an excuse for his suspension.⁴³ The *Hamilton* court then examined whether the supervisors could be considered "employers" under Title VII, a prerequisite to statutory liability.⁴⁴ The court noted that the term "employer" as defined in 2000e(b) includes "agents," which courts have interpreted to include participants in the decisions that result in discrimination.⁴⁵ Because it determined that the supervisors had authority over staffing shifts, assignments, and filing reports, the *Hamilton* court held them liable under Title VII and accordingly under the parallel section 1983 action.⁴⁶

The *Hamilton* court next turned to the issue of liability for the Houston Fire Department.⁴⁷ The court refused to hold the department liable under section 1983 for its employees' action because respondeat superior does not apply in section 1983 actions.⁴⁸ Instead, the court found that section 1983 liability is contingent upon a deprivation of a right secured by the Constitution or federal law that is the result of official policy.⁴⁹ The court stated that official policy may be defined either as an official regulation, ordinance or decision, or alternatively as a "persistent widespread practice" of city

³⁹ *Id.* at 441, 40 FEP Cases at 1816. See also *Dickerson v. Metropolitan Dade County*, 659 F.2d 574, 580, 27 FEP Cases 41, 46 (5th Cir. 1981). Title VII liability is established upon a showing of these factors unless a legitimate, non-discriminatory reason exists for the defendant's action, and the plaintiff is unable to show that this reason is a mere pretext for discriminatory behavior. *Hamilton*, 791 F.2d at 442, 40 FEP Cases at 1816.

⁴⁰ *Hamilton*, 791 F.2d at 442, 40 FEP Cases at 1816.

⁴¹ *Id.* at 442-43, 40 FEP Cases at 1816-17.

⁴² *Id.* at 442, 40 FEP Cases at 1816. A finding of intentional discrimination is considered to be a finding of fact, and, pursuant to FED. R. CIV. P. 52(a) must not be set aside unless it is "clearly erroneous." *Id.* See *Anderson v. Bessemer City*, 470 U.S. 564, 573, 37 FEP Cases 396, 400 (4th Cir. 1985). Therefore, the *Hamilton* court approved the district court's holding, finding that there was plausible support for the district court's conclusions. *Hamilton*, 791 F.2d at 442, 40 FEP Cases at 1816.

⁴³ *Hamilton*, 791 F.2d at 442, 40 FEP Cases at 1816.

⁴⁴ *Id.*

⁴⁵ 42 U.S.C. 2000e(b); *Hamilton*, 791 F.2d at 443, 40 FEP Cases at 1817. The court cited two reasons for this interpretation. First, Title VII is often accorded liberal interpretation in order to best carry out the congressional purpose of ameliorating discrimination and unfairness. *Rogers v. EEOC*, 454 F.2d 234, 238, 4 FEP Cases 92, 94 (5th Cir. 1971). Second, the *Hamilton* court observed that to hold otherwise would facilitate violations of Title VII by leading supervisory personnel to believe they are shielded from liability under the statute. *Hamilton*, 791 F.2d at 443, 40 FEP Cases at 1817.

⁴⁶ See *Hamilton*, 791 F.2d at 442-43, 40 FEP Cases at 1817.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*; *Webster*, 735 F.2d at 841.

officials and employees that, although not officially adopted, is a custom that may be fairly characterized as municipal policy.⁵⁰

The *Hamilton* court agreed with the district court's finding that there existed no formal fire department policy encouraging discrimination, but reversed the district court's determination that the discriminatory conditions of the fire department were tantamount to official policy.⁵¹ Although the Fifth Circuit acknowledged that Hamilton's co-workers and supervisors "tainted" the work environment with their bigotry, the court was unwilling to concede that the twelve instances of bigotry that Hamilton cited constituted a "custom."⁵² The court reasoned that twelve incidents over a two-and-a-half year period could not be considered a "continual pattern" of bigotry such that knowledge could be imputed to officers of the fire department.⁵³ Therefore, the court stated that, even though the officers may have been aware of some of the incidents cited, there was not sufficient evidence that they should have known of a "nagging problem of racism."⁵⁴

Furthermore, the *Hamilton* court disagreed with the district court's finding of implied official policy. The *Hamilton* court noted that the district court based its finding on the policy-making officials' inability to correct the situation.⁵⁵ The *Hamilton* court instead found contrary evidence indicating that fire department officers speedily discouraged and took action against racial incidents that had been brought to their attention.⁵⁶ The court reasoned that requiring greater action of the fire department officials would interfere unreasonably with the department's policy-making.⁵⁷ The court held that an employer is not able and accordingly not required to guarantee a complete absence of bigotry within the ranks of its employees.⁵⁸ In addition, the court reasoned that regulation of employees' bigoted behavior is not within the scope of federal judicial power, because judicially imposed enforcement would be ineffective to change the employees' "belief."⁵⁹ Therefore, the *Hamilton* court absolved the fire department of liability under section 1983.⁶⁰

The *Hamilton* court, however, held the fire department liable under Title VII.⁶¹ The court concluded that no showing of official policy or custom is necessary in order to hold an employer liable under Title VII.⁶² Instead, the court reasoned that an employer may incur liability for the acts of its supervisory personnel, because it chose to put them in positions of responsibility.⁶³ Accordingly, the court found the fire department liable for the discriminatory acts of the supervisors against the plaintiff.⁶⁴

⁵⁰ *Webster*, 735 F.2d at 841.

⁵¹ *Hamilton*, 791 F.2d at 443, 40 FEP Cases at 1817.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 444, 40 FEP Cases at 1817.

⁵⁸ *Id.* at 444, 40 FEP Cases at 1817-18.

⁵⁹ *Id.* at 444, 40 FEP Cases at 1818.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* (citing *Gay v. Board of Trustees of San Jacinto College*, 608 F.2d 127, 23 FEP Cases 1569 (5th Cir. 1979)).

⁶⁴ *Id.*

Finally, the court turned to the issue of compensatory damages.⁶⁵ Because the plaintiff established a section 1983 claim against his supervisors, the court found him entitled to compensatory damages.⁶⁶ The *Hamilton* court, however, disagreed with the district court's finding of compensation for the plaintiff's physical damages, as distinct from his emotional damages.⁶⁷ Although the court recognized the degree of stress which the plaintiff's work environment may have caused him, the *Hamilton* court found that the plaintiff's smoking habit (one and one-half to two packs per day), his coffee consumption (six to twelve cups per day) and the liberal amount of salt in his diet may have contributed to his high blood pressure.⁶⁸ Because the court found the connection between racial harassment and the plaintiff's physical decline tenuous, it held the connection was an overly speculative basis for a damage award.⁶⁹ The court, however, still permitted compensatory damages for emotional and mental distress caused by the racial harassment.⁷⁰ Consequently, the court ordered a remand for recalculation of compensatory damages to be based only on the plaintiff's emotional injuries.⁷¹

The Fifth Circuit in *Hamilton v. Rodgers* was justified in finding that vicarious liability, although available under Title VII, is not available under section 1983. The Fifth Circuit was also justified in reinforcing its general opposition to imposing vicarious liability under section 1983.⁷² Courts routinely apply vicarious liability in Title VII actions.⁷³ The rationale for this is that Title VII's definition of "employee" expressly includes any agent of the employer.⁷⁴ Therefore, under Title VII, courts should attribute the unlawful behavior of an employer's supervisory personnel, acting within the course of their duty, to the employer.⁷⁵ In contrast, section 1983 does not make reference to any principal and agent relationship. It merely permits a private right of action against any person who, under color of state law, deprives another of a right secured by federal law.⁷⁶ Thus, as a matter of statutory interpretation, the *Hamilton* court correctly distinguished between section 1983 and Title VII in determining the application of vicarious liability.

⁶⁵ *Id.*

⁶⁶ *Id.* Although Congress did not explicitly address the issue of compensatory damages under § 1983, it has been implied through apparent incorporation in other sections of the Civil Rights Act of 1871. See *Carey v. Phipps*, 435 U.S. 247, 256 (1978).

⁶⁷ *Hamilton*, 791 F.2d at 444-45, 40 FEP Cases at 1818.

⁶⁸ *Id.* at 444, 40 FEP Cases at 1818.

⁶⁹ *Id.*

⁷⁰ *Id.* at 444-45, 40 FEP Cases at 1818.

⁷¹ *Id.* at 445, 40 FEP Cases at 1818.

⁷² See, Annotation, *supra* note 11, at 299. See also *Baskin v. Parker*, 602 F.2d 1205, 1208 (5th Cir. 1979) (rejects application of vicarious liability under § 1983 as to sheriffs and other officials although state law provides for such liability). Prior to *Baskin*, the Fifth Circuit had consistently held in section 1983 actions that courts should apply state law imposing vicarious liability on officials for violations caused by subordinates. See Annotation, *supra* note 11, at 304 & n.20.

⁷³ See *supra* note 12 and accompanying text.

⁷⁴ 42 U.S.C. § 2000e(b). See, *Gay v. Board of Trustees*, 608 F.2d 127, 128, 23 FEP Cases 1569, 1570 (5th Cir. 1979).

⁷⁵ See *Calcutte v. Texas Educ. Found., Inc.*, 578 F.2d 95, 98, 20 FEP Cases 1685, 1688 (5th Cir. 1978).

⁷⁶ 42 U.S.C. § 1983. While municipalities and governmental entities are "persons" within the scope of § 1983, the Supreme Court has held in *Monell v. Department of Social Services* that such bodies are not vicariously liable under § 1983. 436 U.S. at 694, 17 FEP Cases at 886. See Annotation, *supra* note 11, at 286 n.2.

Not only is the *Hamilton* decision justified from the standpoint of statutory interpretation, but it is also correct from a policy standpoint. *Hamilton* limits liability for municipalities and other officials who have not sanctioned acts violative of section 1983.⁷⁷ This is appropriate because unlike Title VII, which limits relief to employees, the scope of section 1983 is broad and potentially provides relief to *any* individual harmed by another person acting under color of state law. As a result, some limitations of liability are critical to prevent the depletion of state funds in paying section 1983 damage claims to every variety of plaintiff. Limiting section 1983 liability to actors directly responsible for the violation or to those who appear to have sanctioned it is therefore appropriate.

The *Hamilton* court was also justified in holding that twelve incidents of racial discrimination over two and a half years does not constitute a custom or official policy under section 1983.⁷⁸ In evaluating whether the incidents indicated custom or policy, the *Hamilton* court noted that when officials actually learned of the incidents, they acted quickly to discourage them, "reprimanding those responsible and noting incidents in the offenders' files."⁷⁹ Prompt remedial action by officials should dispel charges that an official policy or custom violates section 1983. The high number of alleged violations in *Hamilton*,⁸⁰ however, indicates that officials may not have taken effective action against the alleged violators. Thus, the *Hamilton* court's conclusion that twelve incidents over two and a half years is not sufficient to prove official policy under section 1983 may signal a strengthening reluctance to impose municipal liability under section 1983.⁸¹

The decision in *Hamilton* clearly sets out the distinction between section 1983 and Title VII in the area of municipal liability for employment discrimination. Because the elements of a Title VII and a section 1983 claim are substantially similar,⁸² and because a plaintiff may receive compensatory damages only under section 1983, a plaintiff has an incentive to join Title VII and section 1983 claims wherever possible. Under *Hamilton*, however, vicarious liability for discriminatory practices is not available under section 1983. Therefore, where no official policy or custom exists, a section 1983 employment discrimination claim will fail. A plaintiff who loses a section 1983 claim, and wins a parallel Title VII claim will be limited to equitable relief and back pay.⁸³ Thus, in assessing the merits of any proposed litigation, the practitioner should note the practical distinctions between Title VII and section 1983 highlighted by *Hamilton*, keeping in mind that

⁷⁷ *Monell*, 436 U.S. at 658, 691-93 & 692 n.57, 17 FEP Cases at 885 & 885 n.57.

⁷⁸ *Hamilton*, 791 F.2d at 443, 40 FEP Cases at 1817.

⁷⁹ *Id.* at 443-44, 40 FEP Cases at 1817. *Cf. Gant v. Alguippa Borough*, 612 F. Supp. 1139, 1143 (W.D. Pa. 1985) (complaint withstood summary judgment where governing body knew of incidents, investigated them, yet failed to take corrective action).

⁸⁰ *Cf. Mariani v. City of Pittsburgh*, 624 F. Supp. 506, 512 (W.D. Pa. 1986) (two previous complaints of excessive force do not establish custom or policy); *Law v. Cullen*, 613 F. Supp. 259, 263 (S.D.N.Y. 1985) (one substantiated and four unsubstantiated complaints do not constitute custom or policy).

⁸¹ Other recent Fifth Circuit decisions in this area include: *Carbalan v. Vaughn*, 760 F.2d 662, 665 (5th Cir.) (city not liable under section 1983 for actions of municipal judge), *cert. denied*, 474 U.S. 1007 (1985); *Bennett v. Slidell*, 728 F.2d 762, 770 (5th Cir. 1984) (actions of city attorney and building inspector do not constitute city policy); *Thomas v. Sams*, 734 F.2d 185, 193 (5th Cir. 1984) (actions of mayor empowered by city council held official policy of city).

⁸² *Hamilton*, 791 F.2d at 442, 40 FEP Cases at 1816; *Whiting*, 616 F.2d at 121, 22 FEP Cases at 1298.

⁸³ 42 U.S.C. § 2000e(2)(a)-5(g).

vicarious liability for employment discrimination is available only under Title VII, where relief is limited.

B. **Extension of Younger Abstention to Pending State Administrative Proceedings: Ohio Civil Rights Commission v. Dayton Christian Schools*¹

Article III of the United States Constitution provides that federal courts shall exercise jurisdiction over limited categories of disputes.² Additionally, federal courts have developed a doctrine of abstention, under which a federal tribunal, although vested with jurisdiction, declines to adjudicate a matter which is pending in a state court.³ One special application of the abstention doctrine requires federal courts to abstain from hearing constitutional challenges to state action where federal action would be an improper intrusion into a state's right to enforce its laws in its own courts.⁴

The Supreme Court first applied this special type of abstention, coined "Our Federalism," in the 1971 case of *Younger v. Harris*.⁵ In *Younger*, the Court held that, due to notions of comity⁶ and federalism, federal courts should abstain from granting injunctions against state criminal proceedings unless there is an immediate threat of irreparable harm or the plaintiff shows bad faith or harassment on the part of the state government.⁷ The Court left open, however, the issue of whether "Our Federalism" applies to civil proceedings.⁸ Subsequent cases first applied the doctrine only to civil proceedings of a criminal nature.⁹ Later cases extended the application of *Younger* abstention to matters pending in state court whenever important state interests are involved.¹⁰ In 1984, how-

* By Valerie L. Passman, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 106 S. Ct. 2718, 41 FEP Cases 78 (1986).

² U.S. CONST. art. III, § 2, cl. 1. The jurisdiction clause states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

³ C. WRIGHT, LAW OF FEDERAL COURTS §§ 52-52A (4th ed. 1983).

⁴ C. WRIGHT, *supra* note 3, § 52A at 320.

⁵ 401 U.S. 37 (1971).

⁶ "[The] principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." Black's Law Dictionary 242 (5TH ED. 1979).

⁷ *Younger*, 401 U.S. at 44-46, 54. In *Younger*, the plaintiff, Harris, sought a federal injunction against a California prosecution for violating the California Criminal Syndicalism Act. *Id.* at 38-39. A three-judge court granted the injunction, holding the Act void for vagueness, and overbroad, in violation of the first amendment right to free speech. *Id.* at 40. The Supreme Court reversed, holding that abstention was appropriate. *Id.* at 54.

⁸ C. WRIGHT, *supra* note 3, § 52A at 328.

⁹ See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-05 (1975) (*Younger* abstention applies to request for an injunction against state civil proceedings against a public nuisance).

¹⁰ See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)

ever, the Court refused to extend Younger abstention to state administrative proceedings which were not judicial.¹¹

During the *Survey* year, the Supreme Court decided, in *Ohio Civil Rights Commission v. Dayton Christian Schools*, that Younger abstention applies to a constitutional challenge to certain pending state administrative proceedings.¹² In *Dayton Christian*, the Court ruled that Younger abstention principles applied to an employer's first amendment challenge to the Ohio Civil Rights Commission's actions concerning sex discrimination claims against the employer.¹³ The Court held that federal courts should abstain from enjoining state administrative proceedings where the challenged action will not cause great and immediate irreparable injury, an important state interest is involved, and any constitutional claims may be raised in subsequent state court review of the administrative proceedings.¹⁴ Thus, employers whose employment practices may be constitutionally protected cannot expect federal court intervention into administrative proceedings concerning those employment practices unless the proceeding falls within the limited exceptions to Younger abstention established in *Dayton Christian*.

The dispute in *Dayton Christian* arose when Dayton Christian Schools, Inc. (the school), a corporation which provides education as an extension of two Dayton, Ohio Christian churches, decided not to renew a pregnant schoolteacher's contract.¹⁵ The school informed the teacher that it would not renew her contract because it ascribed to the religious doctrine that mothers should stay home with pre-school age children.¹⁶ Upon receiving this information, the teacher, through her attorney, threatened the school with litigation based on state and federal sex discrimination laws.¹⁷ The school then revoked its initial decision related to the teacher's pregnancy and fired her immediately for violating its contractually mandated internal grievance procedures, which specified a "biblical chain of command."¹⁸

Upon her termination, the teacher filed a complaint with the Ohio Civil Rights Commission (Commission).¹⁹ After conducting an investigation and finding probable cause to believe the school acted discriminatorily, the Commission proposed a conciliation agreement.²⁰ Failing to obtain any cooperation from the school, the Commission initiated

(disciplinary hearing against an attorney); *Moore v. Sims*, 442 U.S. 415, 423 (1979) (child custody proceeding).

¹¹ *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 238 (1984). In *Midkiff*, the state law authorizing the challenged administrative proceedings specified that the proceedings were not judicial proceedings. *Id.*

¹² 106 S. Ct. 2718, 2720, 41 FEP Cases 78, 80 (1986).

¹³ *Id.*

¹⁴ *Id.* at 2723-24, 41 FEP Cases at 82-83.

¹⁵ *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718, 2721, 41 FEP Cases 78, 80 (1986).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 2721, 41 FEP Cases at 80-81. The "biblical chain of command," is "rooted in passages from the New Testament...that one Christian should not take another Christian into Courts of the State." *Id.* at 2721, 41 FEP Cases at 80. The school's "biblical chain of command" proceeds first through the teacher's immediate supervisor, and then to the corporation's Board of Directors, which has final authority over any grievances. *Id.*

¹⁹ *Id.* at 2721, 41 FEP Cases at 81.

²⁰ *Id.* The proposed conciliation agreement required the school to reinstate the teacher and

administrative proceedings against the school.²¹ Dayton Christian Schools responded by stating that the Commission's action violated the school's first amendment rights because the school's action against the teacher was taken pursuant to sincere religious beliefs.²²

The school filed a separate action under 42 U.S.C. § 1983²³ in the United States District Court for the District of Ohio while the administrative proceedings were pending, seeking an injunction against the proceedings on the ground that the Commission's action against the school was unconstitutional.²⁴ The District Court refused to issue the requested injunction, holding that, because the Commission had not yet taken any action against the school and the proposed proceedings did not violate the Constitution, the controversy between the state and the school was not ripe.²⁵ The United States Court of Appeals for the Sixth Circuit reversed, holding that it was unconstitutional for the Commission to exercise jurisdiction over the matter or enforce Ohio's anti-discrimination statute against the school, because of the burden on the school's religious liberties under the first amendment.²⁶

The Supreme Court reversed, holding that the Younger line of cases applied.²⁷ Accordingly, the Court concluded that the district court should have abstained from exercising its jurisdiction over the dispute between the Commission and the school.²⁸ In

prohibited the school from taking retaliatory action against employees who cooperated with the Commission's preliminary investigation. *Id.*

²¹ *Id.* Although warned that failure to accept the agreement would result in the filing of formal administrative proceedings against it, the school did not respond. *Id.*

²² *Id.*

²³ 42 U.S.C. § 1983 (1982) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

²⁴ *Dayton Christian*, 106 S. Ct. at 2721-22, 41 FEP Cases at 81. The first amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. CONST. amend. I. The Supreme Court has held that both the religion clauses are applicable to the states through the fourteenth amendment. *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947) (establishment clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (free exercise clause). The school claimed that the Commission's proposed actions violated the school's rights under the religion clauses, and, thus the school was able to bring suit under the Civil Rights Act, 42 U.S.C. § 1983 (1982). *Dayton Christian*, 106 S. Ct. at 2722, 41 FEP Cases at 81.

²⁵ *Dayton Christian*, 106 S. Ct. at 2720, 41 FEP Cases at 80. See generally *Dayton Christian Schools v. OCR*, 766 F.2d 932, 934, 955, 38 FEP Cases 1548, 1575 (S.D. Ohio 1984) ("The infringement on Plaintiff's freedom of religion rights, however, must be more than a mere possibility or speculation.").

²⁶ *Dayton Christian*, 106 S. Ct. at 2720, 41 FEP Cases at 80. See *Dayton Christian Schools v. OCR*, 766 F.2d 932, 934, 955, 38 FEP Cases 155, 157, 172 (6th Cir. 1985).

²⁷ *Dayton Christian*, 106 S. Ct. at 2720, 2722, 41 FEP Cases at 80, 81. Justice Rehnquist authored the opinion, in which Chief Justice Burger, and Justices White, Powell, and O'Connor joined. Justice Stevens filed an opinion concurring in the judgment, in which Justices Brennan, Marshall, and Blackmun joined.

²⁸ *Id.* Before addressing the abstention issue, however, the Court rejected several arguments that other dispositive issues precluded it from reaching the abstention issue. First, the Court concluded that its review of the matter was appropriate under 28 U.S.C. § 1254(2), which granted

applying Younger abstention, the Court rejected the argument that the Commission's concession of federal jurisdiction in the district court barred it from raising the abstention issue, stating that this argument demonstrated a misunderstanding of the nature of abstention.²⁹ Conceding federal jurisdiction is unlike conceding the abstention issue, the Court explained, because abstention is appropriate when the federal court has jurisdiction over a matter, but strong policies advise against exercising it.³⁰ Accordingly, although the Commission yielded to federal jurisdiction, the Court found that the Commission was not precluded from arguing that the district court should have abstained from ruling in this case.³¹

In addressing the matter of federal court abstention, the Supreme Court reviewed the purposes and evolution of the Younger principle since 1971.³² Courts normally do not interfere with state proceedings due to the importance of comity and federalism, stated the Court.³³ Accordingly, the Court explained, federal courts justify interference only in the unusual situation in which great and irreparable harm otherwise will result.³⁴ The Court noted that the Supreme Court applied Younger abstention to a variety of state court proceedings which shared the common characteristic of affecting important state interests.³⁵

The Court next considered whether the abstention doctrine applies to state administrative proceedings as well as court proceedings.³⁶ The *Dayton Christian* Court first focused on language in *Gibson v. Berryhill*,³⁷ in which the Supreme Court in dictum stated that injunctions requested against state administrative proceedings might be subject to the abstention doctrine if the proceedings commanded the respect due state court actions.³⁸ The Court observed that a later case, *Middlesex County Ethics Committee v. Garden State Bar Association*,³⁹ demonstrated that the abstention doctrine applies to proceedings

appellate jurisdiction to the Supreme Court under these circumstances. *Id.* at 2722, 41 FEP Cases at 81 (citing *Dutton v. Evans*, 400 U.S. 74, 76 n.6 (1970) (jurisdiction includes cases holding a state statute unconstitutional as applied to the facts of the case)). Next, the Court summarily dismissed the district court's finding that an injunction would be premature because the issue was unripe for adjudication and stated that precedents required only a "reasonable threat of prosecution." *Id.* at 2722 n.1, 41 FEP Cases at 81 n.1 (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Steffel v. Thompson*, 415 U.S. 452 (1974)).

²⁹ *Dayton Christian*, 106 S. Ct. at 2722, 41 FEP Cases at 81-82.

³⁰ *Id.* The Court clarified that a state may voluntarily submit to federal jurisdiction even though it has a tenable claim for abstention, but that the Commission did not urge the federal court to proceed to the merits in this case. *Id.* (citing *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 500 n.9, 116 L.R.R.M. 2921, 2924 n.9 (1984); *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 (1977); *Sosna v. Iowa*, 419 U.S. 393, 396 n.3 (1975)).

³¹ *Id.* at 2722-23, 41 FEP Cases at 82.

³² *Id.* at 2723, 41 FEP Cases at 82.

³³ *Id.* (quoting *Younger v. Harris*, 401 U.S. 37, 45 (1971)).

³⁴ *Id.* (citing *Younger*, 401 U.S. at 45).

³⁵ *Id.* (citing *Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975)).

³⁶ *Id.*

³⁷ 411 U.S. 564 (1973). In *Berryhill*, the Supreme Court did not abstain from enjoining actions of the Alabama Optometric Association because the Board's bias rendered it incompetent to adjudicate the issues. *Id.* at 577.

³⁸ *Dayton Christian*, 106 S. Ct. at 2723, 41 FEP Cases at 82 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 576-77 (1973)).

³⁹ 457 U.S. 423 (1982).

which are "judicial in nature," whether taken by administrative bodies or courts, if the proceedings are within the appellate jurisdiction of a higher state court.⁴⁰ Thus, the Court concluded that Younger abstention is appropriate for constitutional challenges to administrative proceedings where there is no immediate threat of great and irreparable harm, there is an important state interest at stake, and the challenged proceedings are judicial in nature and subject to a state court's appellate review.

After determining that federal courts may apply the abstention doctrine to state administrative proceedings, the Court decided that the circumstances presented in *Dayton Christian* were appropriate for abstention.⁴¹ First, the Court reasoned that Ohio's interest in preventing sex discrimination was sufficiently important to merit applying the abstention doctrine.⁴² Second, the Court stated, the school would have an opportunity to raise its constitutional challenge within the state-provided process.⁴³ The Court countered the school's argument that the administrative proceedings themselves provided no opportunity to challenge the constitutionality of the anti-discrimination statute by noting that the Commission has in the past considered religious justifications for discriminatory behavior.⁴⁴ Additionally, the Court stated, the Commission should construe the anti-discrimination statute in light of constitutional principles.⁴⁵ The Court pointed out that, in any event, Ohio provides for judicial review of the Commission's actions, which provides ample opportunity for constitutional challenges.⁴⁶

The Court also rejected the school's contention that the Commission's exercise of jurisdiction over the sex discrimination claim violated first amendment principles.⁴⁷ Noting that even religious schools are subject to some state regulation,⁴⁸ the Court stated that the Commission's investigation and planned hearing to ascertain whether the religious-based reason was the actual reason for dismissing the teacher was constitutionally permitted.⁴⁹ Accordingly, the Court reversed the Court of Appeals for the Sixth Circuit, holding that the district court should have abstained from enjoining the Commission's actions against the school.⁵⁰

Justice Stevens, joined by Justices Brennan, Marshall and Blackmun concurred in the judgment, but disagreed with the majority's application of Younger abstention to *Dayton Christian*.⁵¹ Justice Stevens agreed with the district court's ruling that the issue before the court was not ripe for adjudication.⁵² Justice Stevens distinguished between (1) a constitutional challenge to the Commission's investigation and hearing, and (2) a

⁴⁰ *Dayton Christian*, 106 S. Ct. at 2723, 41 FEP Cases at 82 (citing *Middlesex County*, 457 U.S. at 433-34). This principle was verified in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 238 (1984), the Court noted, in which the challenged proceedings were not judicial proceedings and the Supreme Court did not apply the abstention doctrine. *Dayton Christian*, 106 S. Ct. at 2723 n.2, 41 FEP Cases at 82 n.2.

⁴¹ *Dayton Christian*, 106 S. Ct. at 2723, 41 FEP Cases at 82.

⁴² *Id.*

⁴³ *Id.* at 2723-24, 41 FEP Cases at 82.

⁴⁴ *Id.* at 2724, 41 FEP Cases at 83.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 2724, 41 FEP Cases at 82-83.

⁴⁸ *Id.* at 2724, 41 FEP Cases at 82 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1982)).

⁴⁹ *Id.* at 2724, 41 FEP Cases at 82-83.

⁵⁰ *Id.* at 2720, 41 FEP Cases at 80.

⁵¹ *Id.* at 2724-26, 41 FEP Cases at 83-85 (Stevens, J., concurring in the judgment).

⁵² *Id.* at 2726 & n.4, 41 FEP Cases at 84 & n.4 (Stevens, J., concurring in the judgment).

constitutional challenge to the possible future remedies resulting from the Commission's hearing.⁵³ The former was a ripe controversy, but did not call for an injunction because the Commission's investigation was constitutional, Justice Stevens stated.⁵⁴ A challenge to the possible remedies was not ripe because the Commission had not yet conducted the hearing, Justice Stevens concluded, and thus the district court properly did not enjoin the Commission's hearing.⁵⁵

Dayton Christian is a significant case in the evolution of the Younger abstention doctrine. Although grounded in language of comity and federalism, the *Dayton Christian* Court's application of Younger abstention to pending state administrative proceedings is far removed from the Younger Court's abstention from enjoining state criminal proceedings. The effect of Younger abstention is to deny the plaintiff a federal forum for a constitutional claim. The ruling in *Dayton Christian* increases significantly the number of plaintiffs who are now relegated to state courts for vindication of their rights under the federal Constitution.

The employment discrimination bar likewise will be affected by the *Dayton Christian* ruling's limitation on the accessibility of a federal forum for constitutional claims. Although employment practices may fall within the range of constitutionally protected actions, federal courts will not enjoin state administrative proceedings concerning the challenged practice so long as the requirements of the *Dayton Christian* ruling are satisfied. Thus, employers who claim special constitutional privileges are now required to assert them through the state-provided procedure, and may not rely on an additional federal forum for intervention.

Finally, although the Court's expansion of Younger abstention limits the availability of federal courts to employers, the Court's reasoning nonetheless provides proper protection for employees harmed by employers' allegedly constitutional activity. The Court's preliminary ruling that the Commission's investigation and planned hearing were not unconstitutional is sound. An opposite ruling, that the Commission's exercise of jurisdiction infringed on the school's first amendment rights, would have allowed some employers to shield constitutionally forbidden actions behind claims of religious freedom. It would unduly hamper the work of state civil rights commissions to forbid them to investigate whether a claimed constitutionally protected religious justification was actually the reason for an employer's discriminatory action.

In *Dayton Christian*, the Supreme Court extended Younger abstention to state administrative proceedings in which there is no immediate threat of great and irreparable harm, an important state interest is at stake, and the constitutional claim may be raised in later state court review. The effect of this ruling is to decrease significantly the number of litigants who may seek vindication of their constitutional rights in a federal forum, including employers whose employment practices may be constitutionally protected. In furtherance of employment discrimination goals, however, the Court correctly ruled that

⁵³ *Id.* at 2726 n.4, 41 FEP Cases at 84 n.4 (Stevens, J., concurring in the judgment).

⁵⁴ *See id.* (Stevens, J., concurring in the judgment).

⁵⁵ *Id.* (Stevens, J., concurring in the judgment). Justice Stevens noted that he disagreed with the majority's application of Younger abstention to *Dayton Christian*. *Id.* at 2726 n.5, 41 FEP Cases at 85 n.5 (Stevens, J., concurring in the judgment). Justice Stevens asserted that the result of *Dayton Christian* would "subject a federal court plaintiff to an allegedly unconstitutional state administrative order when the constitutional challenge to that order can be asserted, if at all, only in state court judicial review of the administrative proceeding." *Id.* (Stevens, J., concurring in the judgment).

mere investigation into whether an asserted constitutionally protected reason was the real reason for an employer's action does not violate the federal Constitution.

II. SCOPE OF TITLE VII

A. **Requisite Employment Relationship for Title VII Claims: Doe v. St. Joseph's Hospital of Fort Wayne*¹

Section 2000e-2 of Title VII prohibits employers from discriminating against any individual with respect to the terms of his or her employment on the basis of race, color, religion, sex, or national origin.² Therefore, for Title VII provisions to apply to an employer's act, the act must adversely affect an individual in an employment setting.³ Title VII defines "employer" as "a person engaged in an industry affecting commerce"⁴ and "employee" as "an individual employed by an employer."⁵ The provisions, thus, do not explicitly require that the claimant be an employee of an employer.⁶ In short, Title

* By Eric I. Lee, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 788 F.2d 411, 40 FEP Cases 820 (7th Cir. 1986).

² 42 U.S.C. § 2000e-2(a)(1) (1982). The statute provides in relevant part:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

Id.

³ B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 997 (2d ed. 1983).

⁴ 42 U.S.C. § 2000e(b). The statute provides:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Id.

⁵ 42 U.S.C. § 2000e(f). The statute provides:

The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

Id.

⁶ Webster's defines "employee" as: (1) "one employed by another usu[ally] in a position below the executive level and usu[ally] for wages;" (2) "any worker who is under wages or salary to an employer and who is not excluded by agreement from consideration as such a worker." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 743 (1981). Webster's defines "employer" as: "one that employs something or somebody as . . . the owner of an enterprise (as a business or manufacturing firm) that employs personnel for wages or salaries." *Id.*

VII gives courts little express guidance as to what types of economic relationships it protects.

It is presumed that a salaried worker is an "employee" and may bring a Title VII claim for employment discrimination. On the other hand, courts agree that an independent contractor is not within the requisite relationship and is not entitled to Title VII protections.⁷ Between these extremes, however, courts disagree as to what types of employment relationships Title VII protects. Although a relationship must have some connection with a traditional common law employment relationship for Title VII protections to apply, the connection with employment need not necessarily be direct.⁸

For example, the United States Court of Appeals for the District of Columbia Circuit in *Sibley Memorial Hospital v. Wilson* held valid a Title VII claim even in the absence of a traditional employer-employee relationship where the defendant's actions allegedly interfered with an individual's employment opportunities with another party.⁹ The *Sibley* court reasoned that the congressional objective in Title VII is to achieve equality of employment opportunities, and that the language of the legislation does not require the aggrieved individual to be the employee of an employer.¹⁰ The *Sibley* court thus held that where supervising nurses at a hospital allegedly discriminated against a male private duty nurse on the basis of sex, the latter could enter a Title VII employment discrimination claim by showing that the former interfered with his access to employment opportunities.¹¹

Courts have adopted the *Sibley* test to allow Title VII employment discrimination claims despite the lack of a direct employment relationship.¹² In *Puntolillo v. New Hampshire Racing Commission*, for example, the court allowed a Title VII claim by a driver-trainer of harness horses against the state racing commission and a trade association for discriminatorily denying him a racing license and stall space at a race park.¹³ Although the driver-trainer was not an employee of either defendant, the *Puntolillo* court held valid the Title VII action because the alleged discriminatory acts could have effectively denied the claimant's access to employment opportunities.¹⁴ Other courts, however, have applied the *Sibley* analysis and reached different results.¹⁵ For instance, the court in *Beverley v. Douglas* rejected a physician's Title VII claim alleging that a hospital discriminatorily denied her staff privileges.¹⁶ The *Beverley* court reasoned that because the physician-patient relationship is not one of "employment," the defendant could not have interfered with the physician's "employment opportunities."¹⁷

During the *Survey* year, the United States Court of Appeals for the Seventh Circuit addressed this issue of who has rights under Title VII, and held in *Doe v. St. Joseph's*

⁷ See, e.g., *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 517, 13 FEP Cases 979, 981 (N.D. Cal. 1976).

⁸ *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883, 24 FEP Cases 859, 861-62 (9th Cir. 1980).

⁹ 488 F.2d 1338, 1341, 6 FEP Cases 1029, 1031 (D.C. Cir. 1973).

¹⁰ *Id.*

¹¹ *Id.*

¹² See, e.g., *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089, 10 FEP Cases 292 (D.N.H. 1974).

¹³ *Id.* at 1090, 10 FEP Cases at 293.

¹⁴ *Id.* at 1092, 10 FEP Cases at 295.

¹⁵ See, e.g., *Beverley v. Douglas*, 591 F. Supp. 1321, 35 FEP Cases 1860 (S.D.N.Y. 1984).

¹⁶ *Id.* at 1328, 35 FEP Cases at 1865.

¹⁷ *Id.*

*Hospital of Fort Wayne*¹⁸ that a private physician denied staff privileges by a hospital may bring a Title VII employment discrimination claim. The Seventh Circuit reasoned that a hospital whose allegedly discriminatory acts interfere with a physician's employment opportunities with his or her patients may be subject to a Title VII employment discrimination action.¹⁹ Holding the trial court's dismissal at the pleading stage premature, the appeals court reversed and ordered that the *St. Joseph's* plaintiff be allowed to make a showing that the hospital discriminatorily interfered with her employment opportunities.²⁰

In *St. Joseph's*, the plaintiff, Dr. Doe, was a female Korean-born physician engaged in private practice in Fort Wayne, Indiana.²¹ Five months after Dr. Doe received staff privileges at St. Joseph's Hospital, the hospital administration summarily suspended these privileges based on alleged incidents of unprofessional conduct.²² Dr. Doe sought review of the suspension by the hospital executive committee.²³ The committee unanimously upheld the suspension and advised Dr. Doe that she would have to complete physical, psychological and psychiatric examinations and successfully complete a "certified Physician's Re-Training Program" before being eligible for staff privileges in the future.²⁴ Testing and recertification were not required by the hospital by-laws nor were they routinely required of physicians seeking staff privileges at the hospital.²⁵ Dr. Doe then sought review of her suspension by the hospital board of directors, which refused to revoke the suspension.²⁶ The plaintiff then sued St. Joseph's Hospital, alleging employment discrimination in violation of Title VII.²⁷ Finding no direct employment relationship between Dr. Doe and St. Joseph's Hospital, the district court dismissed the action *sua sponte*.²⁸

On appeal, the United States Court of Appeals for the Seventh Circuit rejected the position of the district court that one must be an "employee" in order to enter a Title VII claim, and thus held that the trial court improperly dismissed Dr. Doe's Title VII claim.²⁹ The court noted that section 2000e-2(a) of Title VII provides for the protection

¹⁸ 788 F.2d 411, 425, 40 FEP Cases 820, 830.

¹⁹ *Id.* at 423, 40 FEP Cases at 829.

²⁰ *Id.* at 425, 40 FEP Cases at 830.

²¹ *Id.* at 413, 40 FEP Cases at 821. The opinion makes no mention of whether Dr. Doe claimed discrimination based on race, sex or both.

²² *Id.* The suspension followed a formal complaint filed by another physician at the hospital. *Id.* The complaint dealt with an incident where Dr. Doe allegedly entered the room of another doctor's patient and in a "loud, abusive manner" castigated the other physician in a "most demeaning, unethical manner." *Id.* The patient was scheduled for major surgery the next day. *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 413-14, 40 FEP Cases at 821. The plaintiff also entered claims under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d (1982)), 42 U.S.C. § 1981 (1982), the Sherman Act (15 U.S.C. § 1 (1982)), the Hill-Burton Act (42 U.S.C. § 300s-6 (1982)), and Indiana state law. *Id.* at 413-14, 40 FEP Cases at 821. On appeal, the Seventh Circuit affirmed the trial court's dismissal of the plaintiff's Title VII and Sherman Act claims and reversed and remanded the dismissal of the § 1981 claim. *Id.* at 426, 40 FEP Cases at 831. The plaintiff did not appeal the dismissal of the Hill-Burton Act claim. *Id.* at 414 n.1, 40 FEP Cases at 821 n.1.

²⁸ *St. Joseph's*, 788 F.2d at 414, 422, 40 FEP Cases at 822, 828.

²⁹ *Id.* at 422, 40 FEP Cases at 827-28. Dr. Doe did not argue that she was an employee of the hospital. *Id.* at 422, 40 FEP Cases at 828.

of "any individual" and does not specify that the aggrieved person necessarily be an "employee" of an "employer."³⁰ Hence, the court stated, the mere fact that Dr. Doe was not a salaried employee of the hospital did not necessarily mean that she was not entitled to bring a Title VII action.³¹ According to the court, this application of the statute was consistent with the judicial position that Title VII be liberally construed to further its goal of eliminating discrimination in employment.³²

In concluding that the district judge prematurely dismissed Dr. Doe's claim because of the absence of a traditional employment relationship, the Seventh Circuit relied on *Sibley Memorial Hospital v. Wilson*³³ in which, the *St. Joseph's* court noted, the District of Columbia Circuit held that Title VII prohibits parties from foreclosing any individual's access to employment opportunities.³⁴ The *St. Joseph's* court noted that, in *Sibley*, the plaintiff was a male private duty nurse who worked in a hospital for patients who required a private nurse.³⁵ When a patient needed such a nurse, the hospital's nursing office communicated the request to a central registry.³⁶ The registry matched the patient with an available nurse, and the nurse reported to the patient.³⁷ The *Sibley* plaintiff alleged that supervising nurses at the defendant hospital had rejected him and prevented him from reporting to a patient if the patient was female.³⁸ The *St. Joseph's* court emphasized the *Sibley* holding that the sex discrimination claim was valid under the statute despite the lack of a direct employment relationship between the private duty nurse and the hospital.³⁹

The Seventh Circuit in *St. Joseph's* also relied on *Puntolillo v. New Hampshire Racing Commission*,⁴⁰ which adopted the *Sibley* analysis that courts may afford Title VII protections in the absence of a direct employment relationship.⁴¹ The court noted that in *Puntolillo*, the plaintiff, a driver-trainer of harness horses, alleged that the defendants denied him a necessary racing license and stall space at the race park.⁴² The plaintiff claimed that these actions effectively curtailed his opportunity to take part in his occupation.⁴³ The *St. Joseph's* court observed that, although the driver-trainer was not hired or employed by either defendant,⁴⁴ the *Puntolillo* court found the defendants' actions may have denied the plaintiff's access to employment opportunities⁴⁵ and held the claim to be within Title VII coverage.⁴⁶

³⁰ *Id.* at 422, 40 FEP Cases at 828.

³¹ *Id.*

³² *Id.*

³³ 488 F.2d 1338, 6 FEP Cases 1029 (D.C. Cir. 1973).

³⁴ *St. Joseph's*, 788 F.2d at 423, 40 FEP Cases at 828 (quoting *Sibley*, 488 F.2d at 1341, 6 FEP Cases at 1031).

³⁵ *Id.* at 422, 40 FEP Cases at 828.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 375 F. Supp. 1089, 10 FEP Cases 292 (D.N.H. 1974).

⁴¹ *St. Joseph's*, 788 F.2d at 423, 40 FEP Cases at 828-29.

⁴² *Id.* at 423, 40 FEP Cases at 828. The defendants were the New Hampshire Racing Commission and the New Hampshire Trotting and Breeding Association. *Id.*

⁴³ *Puntolillo*, 375 F. Supp. at 1091, 10 FEP Cases at 294.

⁴⁴ *St. Joseph's*, 788 F.2d at 423, 40 FEP Cases at 828. The plaintiff was employed by the horse owners. *Id.*

⁴⁵ See *Puntolillo*, 375 F. Supp. at 1092, 10 FEP Cases at 295.

⁴⁶ *Id.*

Furthermore, the *St. Joseph's* court emphasized the result in *Pao v. Holy Redeemer Hospital*,⁴⁷ the only cited case that considered valid a Title VII claim for denial of a physician's staff privileges at the pleading stage.⁴⁸ The court discussed the *Pao* outcome with approval, noting that the plaintiff, an ophthalmologist of Chinese ancestry, alleged that the defendant hospital had impaired his ability to practice by repeatedly denying him staff privileges.⁴⁹

The *St. Joseph's* court took note of the analogy between the positions of the *Pao* plaintiff and that of the nurse in *Sibley*, stating that the hospital in each case had the same capacity to control the plaintiff's access to his prospective patients.⁵⁰ Emphasizing the language in *Pao* that such prospective patients are "ultimate 'employers,'" the Seventh Circuit indicated that a physician may have a sufficient employment relationship with his or her patients to bring a Title VII claim.⁵¹

Applying the *Sibley* analysis to the facts in *St. Joseph's*, the Seventh Circuit held that Dr. Doe need not necessarily be within a traditional employment relationship with the hospital to enter a Title VII discrimination claim.⁵² Instead, the *St. Joseph's* court held a Title VII action may be valid where a defendant hospital discriminatorily interferes with a physician's employment opportunities.⁵³ The court, therefore, stated that Dr. Doe should be allowed to make a showing that *St. Joseph's Hospital* had discriminatorily interfered with her employment opportunities in such a way as would fit under the *Sibley* analysis.⁵⁴

In reaching this result, the *St. Joseph's* court rejected the defendant's argument that *Sibley* and *Puntolillo* were distinguishable.⁵⁵ *St. Joseph's* argued that, in *Sibley*, the defendant hospital could entirely foreclose the nurse's access to patients, while in the present case *St. Joseph's* had no control over Dr. Doe's access to her patients elsewhere.⁵⁶ The Seventh Circuit rejected this reading of the facts in *Sibley*, noting that the private duty nurse in *Sibley* had employment opportunities outside of the hospital that remained unimpaired by that hospital's actions.⁵⁷ The court also rejected the defendant's argument that *Puntolillo* was distinguishable in that the plaintiff in that case could not race at all without a license,⁵⁸ whereas Dr. Doe still could see patients outside of the defendant hospital. The court disagreed with this argument because it determined that a defendant need not foreclose all employment opportunities in order to incur Title VII liability.⁵⁹

In its discussion of *Sibley*, *Puntolillo*, and *Pao*, the *St. Joseph's* court elaborated on the type of employment opportunities that Title VII protects, noting the language in *Pao* which implies that a physician's relationship with his patients constitutes such an em-

⁴⁷ 547 F. Supp. 484, 31 FEP Cases 589 (E.D. Pa. 1982).

⁴⁸ *St. Joseph's*, 788 F.2d at 424-25, 40 FEP Cases at 830.

⁴⁹ *St. Joseph's*, 788 F.2d at 424, 40 FEP Cases at 830. The plaintiff had staff privileges at other hospitals in the area, but the *Pao* court stated that this was not relevant to the question of whether there was a violation under Title VII. *Id.* at 424 & n.27, 40 FEP Cases at 830 & n.27.

⁵⁰ *Id.* at 425, 40 FEP Cases at 830.

⁵¹ *Id.*

⁵² *Id.* at 422, 40 FEP Cases at 828.

⁵³ *Id.* at 423, 40 FEP Cases at 829.

⁵⁴ *Id.* at 425, 40 FEP Cases at 830.

⁵⁵ *Id.* at 423-24, 40 FEP Cases at 829.

⁵⁶ *Id.* at 423, 40 FEP Cases at 829.

⁵⁷ *Id.* at 423-24, 40 FEP Cases at 829.

⁵⁸ *Id.* at 424, 40 FEP Cases at 829.

⁵⁹ *Id.*

ployment opportunity.⁶⁰ The Seventh Circuit stated, however, that there was "substantial uncertainty" as to whether the physician-patient relationship is the type of employment opportunity that is protected under the *Sibley* analysis.⁶¹ The court declared that, because of this uncertainty, the district court's dismissal at the pleading stage was premature.⁶²

Judge Ripple, in a dissenting opinion, stated that Dr. Doe did not establish the necessary connection between herself and the hospital to state a claim under Title VII. He argued that *Sibley* and *Puntolillo* did not provide support for Dr. Doe's claim.⁶³ The focus of Judge Ripple's dissent was the degree of control exercised by the defendant over the plaintiff's access to employment opportunities.⁶⁴ Judge Ripple contended that in both *Sibley* and *Puntolillo* the defendant had total effective control over the plaintiffs' abilities to practice their profession.⁶⁵ In *Sibley*, Judge Ripple argued, the hospital's actions prevented the plaintiff private duty nurse from contacting the patients.⁶⁶ Likewise in *Puntolillo*, Judge Ripple noted, the action of the racing commission prevented the driver-trainer from performing his occupational duties for the horse owners.⁶⁷ Judge Ripple argued that St. Joseph's had no such control over Dr. Doe's ability to contact her patients, because the hospital could not prevent or preclude her from maintaining or establishing any relationship with her patients.⁶⁸ The dissent also noted that although Dr. Doe no longer had staff privileges at the hospital, she was still free to see patients at her office or any other health facility.⁶⁹ Because St. Joseph's Hospital did not control Dr. Doe's access to patients, Judge Ripple argued, its actions could not be characterized as interference with employment opportunities.⁷⁰

In the fact-specific setting of a hospital's denial of staff privileges to physicians, the dissent declared that the result in *Pao* was an incorrect resolution of the issue. Preferring the outcome in *Beverley v. Douglas*,⁷¹ Judge Ripple reiterated the principle in *Beverley* that in order to enter a claim under Title VII, the plaintiff must allege and prove some link between the defendant's actions and an employment relationship.⁷² Judge Ripple argued that, in the present case, Dr. Doe was an independent contractor for Title VII purposes, with no employment relationship with the hospital.⁷³ Furthermore, he stated that a physician's relationship with his patients is not one of employment and does not represent an employment opportunity the interference with which Title VII prohibits.⁷⁴ Judge Ripple characterized the physician-patient relationship as that of client-professional, one

⁶⁰ *Id.* at 425, 40 FEP Cases at 830.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 427, 40 FEP Cases at 832 (Ripple, J., dissenting). Judge Ripple concurred with the majority's disposition on all other claims appealed. *Id.* at 426, 40 FEP Cases at 831 (Ripple, J., dissenting).

⁶⁴ *Id.* (Ripple, J., dissenting).

⁶⁵ *Id.* at 427, 40 FEP Cases at 832 (Ripple, J., dissenting).

⁶⁶ *Id.* (Ripple, J., dissenting).

⁶⁷ *Id.* (Ripple, J., dissenting).

⁶⁸ *Id.* (Ripple, J., dissenting).

⁶⁹ *Id.* (Ripple, J., dissenting).

⁷⁰ *Id.* (Ripple, J., dissenting).

⁷¹ *Id.* at 428, 40 FEP Cases at 832 (Ripple, J., dissenting).

⁷² *Id.* (Ripple, J., dissenting) (quoting *Beverley*, 591 F. Supp. at 1328, 35 FEP Cases at 1865).

⁷³ *Id.* at 428, 40 FEP Cases at 833 (Ripple, J., dissenting).

⁷⁴ *Id.* (Ripple, J., dissenting).

beyond the scope of Title VII coverage.⁷⁵ Thus, the dissent argued that under the facts presented Dr. Doe did not state a Title VII claim.

The Seventh Circuit in *St. Joseph's* indicated that a Title VII plaintiff need not establish a direct employment relationship but only need show that the defendant's actions interfered with his or her employment opportunities. The court thus allowed a Title VII discrimination claim by a party who is in a position of economic interdependence with another if the actions of the latter foreclosed the former's access to employment opportunities.⁷⁶ The *St. Joseph's* court justifiably suggested that Title VII may protect a private physician with staff privileges at a hospital from adverse decisions by the hospital.

The *St. Joseph's* court's adoption of "interference with employment opportunities" as a test for determining whether an individual may enter a Title VII claim, though not statutorily mandated, is consistent with the provisions' legislative objectives. The court's requirement that the defendant discriminatorily interfere with the plaintiff's employment opportunities notably widens the scope of Title VII protections beyond that of the traditional employee-employer setting. The actual text of Title VII does not impose such a requirement to establish standing; yet examining whether the defendant interfered with the claimant's employment opportunities as a determinative test for Title VII rights seems proper in light of the congressional objective to eliminate discrimination in employment and to achieve equality of employment opportunities.⁷⁷ The language of the statute as enacted is broad, extending protection to "any individual" from discriminatory acts by "an employer"⁷⁸ with respect to one's compensation, terms, conditions or privileges of employment.⁷⁹ Moreover, courts have consistently held that Title VII be liberally construed to achieve its purpose to bring about basic social changes.⁸⁰ Hence, the *St. Joseph's* court's examination of the defendant's interference with the claimant's employment opportunities as a test for the validity of a Title VII claim is supported by established legislative objectives.

The *St. Joseph's* court's "interference with employment opportunities" test, which tends to expand Title VII coverage beyond the traditional employee-employer relationship, is especially justified upon consideration of the often complicated nature of discriminatory practices that occur in the current employment scene. As one court noted, employment discrimination can no longer be viewed as "a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting."⁸¹ Employment discrimination today is a far more complex and pervasive phenomenon;⁸² an employer may practice discriminatory acts with great subtlety and craftiness. If *St. Joseph's* is illustrative of such a practice, then Title VII protec-

⁷⁵ *Id.* (Ripple, J., dissenting). Judge Ripple analogized the physician-patient relationship to that between an attorney and client. *Id.* (Ripple, J., dissenting).

⁷⁶ *Id.* at 425, 40 FEP Cases at 830 (Ripple, J., dissenting).

⁷⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 3 FEP Cases 175, 177 (1971).

⁷⁸ See *supra* note 4 for the statutory definition of "employer."

⁷⁹ 42 U.S.C. § 2000e-2(a)(1) (1982). See *supra* note 2 for the text of this provision.

⁸⁰ See, e.g., *Armbruster v. Quinn*, 711 F.2d 1332, 1336, 32 FEP Cases 369, 372 (6th Cir. 1983); *Unger v. Consolidated Foods Corp.*, 657 F.2d 909, 915 n.8, 26 FEP Cases 1025, 1030 n.8 (7th Cir. 1981); *Quijano v. University Fed. Credit Union*, 617 F.2d 129, 131, 22 FEP Cases 1307, 1308-09 (5th Cir. 1980); *Spirides v. Reinhardt*, 613 F.2d 826, 831, 20 FEP Cases 141, 145 (D.C. Cir. 1979); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391, 15 FEP Cases 394, 395 (8th Cir. 1977).

⁸¹ *Rogers v. EEOC*, 454 F.2d 234, 238, 4 FEP Cases 92, 94 (5th Cir. 1971).

⁸² *Id.*

tions ought to be available to Dr. Doe, especially because staff privileges are a significant part of a physician's practice. A physician in private practice, and not directly employed as a salaried staff member of a hospital or clinic, may rely greatly on hospital staff privileges to develop his or her professional practice. These privileges enable a physician to admit patients at the hospital, to take advantage of the sophisticated equipment available at a modern medical facility, and to be present for patient referrals from other physicians. Such benefits would substantially enhance a physician's ability to broaden his or her practice and establish his or her reputation in the community.⁸³ Thus, a Title VII claim seems proper in circumstances where a hospital interferes with a significant portion of a physician's practice by discriminatorily revoking the latter's staff privileges.

The *St. Joseph's* opinion, however, is lacking in that it does not enunciate definable dimensions of a valid Title VII discrimination claim. A Title VII claim must have some identifiable connection with an employment setting.⁸⁴ Otherwise, virtually any claim, with only a marginal relationship to one's vocation, could prevail under the statute. A party who meets the statutory definition of "employer"⁸⁵ should not be subjected to unlimited Title VII liability over matters only tangentially related to a claimant's employment concerns. Every Title VII action must arise from an employment scenario. As the *St. Joseph's* court noted, Title VII was intended to "achieve equality of employment opportunities" and to provide individual's "equal access to the job market."⁸⁶ Although the *St. Joseph's* court justifiably adopted the *Sibley* approach that an individual may enter a Title VII claim when the defendant has allegedly interfered with his or her access to employment opportunities, it did not elaborate sufficiently on what constitutes such employment opportunities.

Applying the *Sibley* analysis, the *St. Joseph's* court indicated that an additional employment relationship between a claimant and a third party may constitute a protectable employment opportunity.⁸⁷ The court, however, left open the question of whether the presence of such a relationship is only one of several indicia of an employment opportunity or whether it is the only means by which such a protected interest is established. Furthermore, mention of the additional employment relationship with a third party evokes questions of whether this relationship is a traditional employee-employer⁸⁸ relationship, or merely one of economic interdependence.⁸⁹ Perhaps the court could have addressed some of these concerns better by requiring that a protectable employment opportunity be one that constitutes a *substantial* part of an individual's economic activity. Absent even this general limitation, *St. Joseph's* does little to elaborate upon the basic requirements for Title VII standing as set forth in *Sibley*.

In summary, the Seventh Circuit in *Doe v. St. Joseph's Hospital of Fort Wayne* reversed the district court's dismissal of a physician's Title VII claim against a hospital for alleged

⁸³ The hospital granting staff privileges also benefits in that it increases its capacity for billable services.

⁸⁴ See *supra* note 5 and accompanying text for the statutory definition of "employee."

⁸⁵ See *supra* note 4.

⁸⁶ *St. Joseph's*, 788 F.2d at 423, 40 FEP Cases at 828 (quoting *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1339-40, 6 FEP Cases 1029, 1031 (D.C. Cir. 1973)) (emphasis added).

⁸⁷ *Id.* at 425, 40 FEP Cases at 830.

⁸⁸ Judge Ripple's dissenting opinion subscribes to this view. See *id.* at 428, 40 FEP Cases at 832-33 (Ripple, J., dissenting).

⁸⁹ The *St. Joseph's* court stated: "There is substantial uncertainty about the type of employment relationship that is protected . . ." *Id.* at 425, 40 FEP Cases at 830.

discriminatory suspension of staff privileges.⁹⁰ In reaching its decision, the *St. Joseph's* court indicated that it would adopt the analysis the District of Columbia Circuit enunciated in *Sibley Memorial Hospital v. Wilson* and held that a plaintiff who alleges a defendant interfered with his or her employment opportunities may bring a Title VII claim.⁹¹ The court stated that a plaintiff need not allege the existence of a traditional common law employment relationship to sue under Title VII.⁹² Hence, the court suggests Title VII coverage extends to a party in economic interdependence with another, namely, a private physician with staff privileges at a hospital. Because the Seventh Circuit did not elaborate on what constitutes an employment opportunity and did not specify how much interference with such an opportunity violates Title VII, the *St. Joseph's* opinion may lead to more confusion in future attempts to define the scope of Title VII coverage.

B. **Application of Title VII to the Armed Forces: Hill v. Berkman*¹

Section 2000e-16(a) of Title VII prohibits employment discrimination in military departments based on race, color, religion, sex, or national origin.² Section 2000e-16(a) defines "military departments" by referring to section 102 of Title 5.³ Under section 102 of Title 5, "military departments" include the Department of the Army, Navy, and Air Force.⁴

Federal courts have consistently held that section 2000e-16(a) applies to employment decisions regarding only civilian military personnel.⁵ These courts have reasoned either that uniformed military personnel are not federal employees for the purposes of section 2000e-16(a),⁶ or that "military departments" include only civilian military personnel.⁷ Consequently, uniformed military personnel have been unable to bring claims of discrimination in military decisionmaking under Title VII.⁸

⁹⁰ *Id.* at 426, 40 FEP Cases at 831.

⁹¹ *Id.* at 425, 40 FEP Cases at 830.

⁹² *Id.* at 422, 40 FEP Cases at 828.

* By Ieuan Mahony, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ *Hill v. Berkman*, 635 F. Supp. 1228, 40 FEP Cases 1444 (E.D.N.Y. 1986).

² 42 U.S.C. § 2000e-16(a) (1982). Section 2000e-16, "Employment by Federal Government," provides in subsection (a): "All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Congress extended Title VII's protection to cover federal employees in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111 (current version at 42 U.S.C. § 2000e-16(a)).

³ 42 U.S.C. § 2000e-16(a). For the relevant text of 42 U.S.C. § 2000e-16(a), see *supra* note 2.

⁴ 5 U.S.C. § 102 (1982) provides in full: "The military departments are: The Department of the Army. The Department of the Navy. The Department of the Air Force."

⁵ *Gonzalez v. Department of the Army*, 718 F.2d 926, 928-29, 34 FEP Cases 1850, 1852 (9th Cir. 1983); *Taylor v. Jones*, 653 F.2d 1193, 1200, 28 FEP Cases 1024, 1028 (8th Cir. 1981); *Johnson v. Alexander*, 572 F.2d 1219, 1224, 16 FEP Cases 894, 898 (8th Cir.), *cert. denied*, 439 U.S. 986, 18 FEP Cases 965 (1978); *Cobb v. United States Merchant Marine Academy*, 592 F. Supp. 640, 642, 38 FEP Cases 1257, 1258 (E.D.N.Y. 1984); *Hunter v. Stetson*, 444 F. Supp. 238, 239, 16 FEP Cases 358, 369 (E.D.N.Y. 1977) (*dicta*).

⁶ See *Johnson*, 572 F.2d at 1223-24, 16 FEP Cases at 898; see also *Taylor*, 653 F.2d at 1200, 28 FEP Cases at 1028.

⁷ *Gonzalez*, 718 F.2d at 927-28, 34 FEP Cases at 1851-52; see *Cobb*, 592 F. Supp. at 642, 38 FEP Cases at 1258.

⁸ See cases cited *supra* note 5. Courts have allowed uniformed military plaintiffs to bring claims under 42 U.S.C. § 1981 (1982). *Taylor*, 653 F.2d at 1200, 28 FEP Cases at 1028; see *Johnson*, 572

During the *Survey* year, the United States District Court for the Eastern District of New York rejected the reasoning of other federal courts and ruled that section 2000e-16(a) protects both civilian and uniformed military personnel.⁹ In *Hill v. Berkman*, the court held that military service was a form of employment covered by section 2000e-16(a),¹⁰ and that "military departments" under section 2000e-16(a) included uniformed military personnel.¹¹ The *Hill* court therefore concluded that the plaintiff could bring a claim of sex discrimination under Title VII.¹² The court, however, applied a standard of review which was deferential to military decisionmaking and held that the Army did not violate Title VII when it reclassified the plaintiff's position as a combat position,¹³ from which, the court determined, women are lawfully prohibited.¹⁴

Consequently, under the *Hill* court's interpretation of section 2000e-16(a), uniformed members of the military may bring claims of discrimination under Title VII.¹⁵ Title VII will provide military personnel with broad protection against discrimination, and in particular will allow military plaintiffs to utilize a disparate impact theory of discrimination.¹⁶ Under the *Hill* court's deferential standard of review, however, military plaintiffs will not enjoy the same protection as civilian plaintiffs under Title VII. Title VII, moreover, will provide the exclusive remedy for victims of discrimination in the military.¹⁷ Therefore, plaintiffs must follow the administrative procedures and strict limitations period of Title VII.¹⁸

F.2d at 1223, 16 FEP Cases at 897. Courts have also suggested that 10 U.S.C. § 1552 (1982), and 42 U.S.C. § 1985(3) (1982) may provide a statutory remedy for discrimination. See *Gonzalez*, 781 F.2d at 929 n.2, 34 FEP Cases at 1852 n.2 (citing *Chappell v. Wallace*, 462 U.S. 296, 303, 305 n.3, 34 FEP Cases 1846, 1849, 1850 n.3 (1983)). A plaintiff, however, may not bring a claim of sex discrimination under § 1981. *Manzanarez v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

⁹ *Hill v. Berkman*, 635 F. Supp. 1228, 1238, 40 FEP Cases 1444, 1451 (E.D.N.Y. 1986).

¹⁰ *Id.* at 1236-38, 40 FEP Cases at 1450-51.

¹¹ *Id.* at 1238, 40 FEP Cases at 1451.

¹² *Id.*

¹³ *Id.* at 1241, 1243, 40 FEP Cases at 1453-54, 1455.

¹⁴ *Id.* at 1240, 40 FEP Cases at 1452.

¹⁵ *Id.* at 1238, 40 FEP Cases at 1451.

¹⁶ Under a disparate impact theory of discrimination, a plaintiff does not need to prove that the employer intended to discriminate against him or her. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 3 FEP Cases 175, 178 (1971). Instead, the plaintiff need only show that an employment selection device adversely impacts on a class protected under Title VII. See *id.* at 429-31, 3 FEP Cases at 177. Unless the employer can show that the selection device is a business necessity, the plaintiff will succeed. See *id.* at 431, 3 FEP Cases at 178. Disparate impact theory is only available to plaintiffs under Title VII. See *Washington v. Davis*, 426 U.S. 229, 238-39, 12 FEP Cases 1415, 1418 (1976). Consequently, where a plaintiff brings a non-Title VII claim of discrimination, he or she must prove the employer's discriminatory intent. E.g., *id.* at 248, 12 FEP Cases at 1422 (claim of discrimination under fifth amendment's equal protection component); *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391, 29 FEP Cases 139, 146 (1982) (claim of discrimination under 42 U.S.C. § 1981).

Because disparate impact theory is only available to challenge certain employment decisions, see *infra* note 94, plaintiffs may also bring Title VII claims based on disparate treatment theory, which requires proof of discriminatory intent. *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, 14 FEP Cases 1514, 1519 n.15 (1977). See generally B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 13-15, 82-83 (2d ed. 1983).

¹⁷ *Hill*, 635 F. Supp. at 1238, 40 FEP Cases at 1451 (citing *Brown v. General Servs. Admin.*, 425 U.S. 820, 829, 12 FEP Cases 1361, 1364 (1976); see *infra* note 62 and accompanying text).

¹⁸ 42 U.S.C. § 2000e-16(c) (1982) requires that a federal employee file a civil action under Title VII either within 30 days of final action taken by his or her department, or the Equal Employment

In *Hill*, the Army Reserve accepted the plaintiff for the position of Nuclear Biological and Chemical Specialist (NBC Specialist) in May, 1982.¹⁹ From May to November, 1982, the plaintiff attended required weekend drills,²⁰ and was assured that she would begin receiving full time training.²¹ In December, 1982, however, the Army informed the plaintiff that it had reclassified the position of NBC Specialist as a "combat support role" and consequently had closed it to women.²² The Army had closed the position to women three months earlier, but failed to notify the plaintiff.²³

The Army closed the NBC Specialist position based on a study²⁴ which indicated that people in the position would be likely to engage in direct combat.²⁵ The study divided Army positions into seven categories based on the probability that a soldier in a particular position would engage in direct combat.²⁶ Because combat replacements were drawn from the NBC Specialist position, the Army determined that too many women in this position would jeopardize combat readiness.²⁷ The Army therefore closed the position as a whole to women.²⁸

Opportunity Commission with regard to his or her charge of discrimination, or within 180 days of the filing of the initial charge of discrimination. In contrast, under 42 U.S.C. § 1981, for example, the statute of limitations on a claim is the time period applicable to similar claims arising under state law. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

¹⁹ *Hill*, 635 F. Supp. at 1231, 40 FEP Cases at 1445. The plaintiff qualified for the position on the basis of her education, a written examination, and a medical examination. *Id.* Upon enlistment, the plaintiff agreed first to participate in weekend drills prior to basic training, then to undergo two months of basic training, two months of specialized training, and finally to work approximately one weekend per month and two weeks per summer for the next six years. *Id.*

²⁰ *Id.* During these drills, men in the plaintiff's unit, and her supervisor, told her that women should not be NBC Specialists. *Id.*

²¹ *Id.* The plaintiff was due to begin basic training on November 12, 1982. *Id.* When the plaintiff reported for a transfer to basic training on November 12, Army personnel informed her that she needed to gain weight. *Id.* at 1231, 40 FEP Cases at 1446. Army personnel subsequently refused to see the plaintiff when she returned at the correct weight on about November 22. *Id.* On approximately December 3, 1982, the Army notified the plaintiff that, although she was now medically qualified, there was no transportation available to bring her to basic training. *Id.*

²² *Id.* The Army also informed the plaintiff that she would receive an honorable discharge immediately. *Id.* The plaintiff, however, did not receive her honorable discharge papers until March 29, 1984. *Id.* Without these papers, the plaintiff had difficulty finding a job, and was without income from November 12, 1982 to February, 1983 when she obtained a job with her former employer. *Id.* at 1231-32, 40 FEP Cases at 1446.

²³ *Id.* at 1231, 40 FEP Cases at 1445-46.

²⁴ *Id.* at 1232, 40 FEP Cases at 1446. The study was compiled by General Hines, a Ph.D in social psychology. *Id.*

²⁵ *Id.* at 1232, 40 FEP Cases at 1446. The Women in the Army Policy Group, an organization within the Pentagon which studies issues relating to women in the Army, made the recommendation to the Army that it close the position. *Id.* According to the plaintiff, women had little input in this particular recommendation. *Id.* at 1242, 40 FEP Cases at 1454.

²⁶ *Id.* at 1241-42, 40 FEP Cases at 1454. General Hines determined the probability of combat for each position by referring to organizational descriptions and questionnaires. *Id.* at 1232, 40 FEP Cases at 1446. The Army closed to women positions which fell within the category with the highest risk of combat. *Id.* at 1242, 40 FEP Cases at 1454.

²⁷ *Id.* at 1232, 40 FEP Cases at 1446. The Army authorized 1,429 entry level NBC Specialist positions; 1,385 of the positions were classified in the highest risk of combat category. *Id.* at 1242, 40 FEP Cases at 1454. Of the 44 places remaining open to women, the Army determined that men had to fill 43 in order to ensure combat replacements. *Id.* Because only one position remained open to women, General Hines recommended that the NBC Specialist position as a whole be closed to women. *Id.*

²⁸ *Id.* at 1232, 40 FEP Cases at 1446. Because of newly created personnel categories, the Army

The plaintiff claimed that the Army had discriminated against her by its reclassification of the NBC Specialist position, and brought a claim under Title VII.²⁹ The defendants argued that Title VII did not apply to the military, and that, even if Title VII applied, the Army was justified in excluding the plaintiff from the NBC Specialist position.³⁰ The defendants therefore moved to dismiss the complaint for failure to state a claim, and, in the alternative, for summary judgment.³¹ The court granted summary judgment, first determining that Title VII's protection extended to the plaintiff, but then concluding that the Army's reclassification of the plaintiff's position had not violated Title VII.³²

In determining that Title VII applied to uniformed personnel, the *Hill* court began with an analysis of the meaning of the term "military departments" in section 2000e-16(a).³³ The court stated that section 2000e-16(a) on its face appears to include both civilian and uniformed military personnel in its provisions.³⁴ The court observed that section 2000e-16(a) defines "military departments" by reference to Title 5, which specifies that military departments include the Department of the Army, Navy, and Air Force without further explanation.³⁵

Turning from the language of section 2000e-16(a), the court considered both the legislative history of the term "military departments" and the executive orders which led up to the amendment extending Title VII's coverage to federal employees, and determined that these sources did not indicate that section 2000e-16(a) distinguished between uniformed and civilian military personnel.³⁶ The court noted that Congress, in its original reference to the Army, Navy, and Air Force as "military departments" in the National Security Act Amendments of 1949, expressly included both civilian and combat personnel.³⁷ The court, however, also noted that the executive orders which were the precursors to section 2000e-16(a)'s protection of federal employees from job discrimination applied

reconsidered the classification of the NBC Specialist position in April 1983. *Id.* With the use of General Hines' methodology, the Army determined that the position could accommodate more women without adversely affecting combat readiness. *Id.* The Army therefore reclassified the position as non-combat in October 1983, and allowed women to serve as NBC Specialists once again. *Id.*

²⁹ *Id.* The plaintiff sued the Secretary of Defense, the Secretary of the Army, the Chief of the Army Reserve, and other officers. *Id.* at 1230-31, 40 FEP Cases at 1445. The plaintiff also brought a claim for damages under the fifth amendment, which the court dismissed. *Id.* at 1232, 40 FEP Cases at 1446.

³⁰ *See id.* at 1231, 40 FEP Cases at 1445.

³¹ *Id.* The defendants also sought Rule 11 sanctions, which the court denied. *Id.*

³² *Id.* at 1243, 40 FEP Cases at 1455.

³³ *Id.* at 1235-38, 40 FEP Cases at 1448-51. For the relevant text of 42 U.S.C. § 2000e-16(a) (1982), see *supra* note 2.

³⁴ *Hill*, 635 F. Supp. at 1233, 40 FEP Cases at 1447. The court noted that § 2000e-16(a) was the only jurisdictional basis under Title VII for asserting a claim against a federal organization. *Id.* at 1234, 40 FEP Cases at 1447. Because section 2000e-16(a) is the only section which expressly prohibits employment discrimination by the federal government, the court concluded that a member of the armed forces could bring a claim only under this section of Title VII. *Id.* The court reasoned that, if the United States was an "employer" for all Title VII purposes, Congress would have included the United States in its definition of "employer" under 42 U.S.C. § 2000e(b). *Id.* at 1233, 40 FEP Cases at 1447.

³⁵ *Id.* at 1232-33, 40 FEP Cases at 1446-47. For the text of 5 U.S.C. § 102 (1982), to which 42 U.S.C. § 2000e-16(a) refers, see *supra* note 4.

³⁶ *Hill*, 635 F. Supp. at 1235-36, 40 FEP Cases at 1448-49.

³⁷ *Id.* at 1235, 40 FEP Cases at 1448 (citing National Security Act Amendments of 1949, Pub. L. No. 81-216, § 2, 63 Stat. 578, 579 § 2).

only to civilian employees.³⁸ The court therefore concluded that the legislative history did not indicate whether "military departments" excluded uniformed military personnel.³⁹

The *Hill* court also considered prior case law which held that "military departments" did not include uniformed personnel, and determined that this case law was unpersuasive.⁴⁰ The *Hill* court specifically rejected the approach of the Ninth Circuit in its 1983 decision of *Gonzalez v. Department of the Army*,⁴¹ which held that Title VII did not apply to uniformed military personnel.⁴² In *Gonzalez*, the Ninth Circuit relied on a distinction between "armed forces" in Title 10, and "military departments" in Title 5 to conclude that Congress intended the former term to designate uniformed personnel, and the latter term to designate civilian personnel.⁴³ The *Hill* court rejected the Ninth Circuit's approach because section 2000e-16(a) expressly refers only to Title 5 for the purpose of defining the federal employees protected by Title VII.⁴⁴ Thus, because case law holding that Title VII did not cover uniformed personnel was unpersuasive, and because the legislative history did not clearly exclude uniformed personnel from "military departments," the *Hill* court concluded that uniformed personnel were members of "military departments" for the purposes of section 2000e-16(a).⁴⁵

The court in *Hill* then analyzed the meaning of "employees," the other ambiguous term in section 2000e-16(a), and determined that uniformed military personnel were federal employees covered by the section.⁴⁶ In so holding, the *Hill* court rejected the approach of the Eighth Circuit in its 1978 decision of *Johnson v. Alexander*.⁴⁷ In *Johnson*, the Eighth Circuit held that military service differs materially from civilian employment,⁴⁸

³⁸ *Id.* at 1235, 40 FEP Cases at 1448-49 (citing Executive Order No. 11246, 30 Fed. Reg. 12319 (1965); Executive Order No. 11375, 32 Fed. Reg. 14303 (1967); Executive Order No. 11478, 34 Fed. Reg. 12985 (1969)).

³⁹ *Id.* at 1236, 40 FEP Cases at 1449.

⁴⁰ *Id.* at 1236, 40 FEP Cases at 1449-50.

⁴¹ *Gonzalez v. Department of the Army*, 718 F.2d 926, 34 FEP Cases 1850 (9th Cir. 1983).

⁴² *Id.*

⁴³ *Id.* at 927-28, 34 FEP Cases at 1851-52. In *Gonzalez*, the Ninth Circuit noted that section 102 of Title 5, the provisions of which section 2000e-16(a) uses to define the term "military departments," contains a Reviser's Note which refers to section 101(7) of Title 10. *Id.* (citing 5 U.S.C. § 102 Reviser's Note (1982)). Section 101(7) of Title 10 provides that: "'Military departments' means the Department of the Army, the Department of the Navy, and the Department of the Air Force." 10 U.S.C. § 101(7) (1982). The *Gonzalez* court reasoned that because section 101(7) is near section 101(4), which contains a separate definition of "armed forces," Congress intended a distinction between "military departments," which include only civilian personnel, and "armed forces," which contain only uniformed personnel. *Gonzalez*, 718 F.2d at 928, 34 FEP Cases at 1851-52 (citing 10 U.S.C. § 101(4) (1982)). In rebuttal, the *Hill* court pointed out that section 101(5) of Title 10 is also close to section 101(7), and that its definition of the term "department" seems to include both civilian and uniformed personnel. *Hill*, 635 F. Supp. at 1236, 40 FEP Cases at 1449-50 (citing 10 U.S.C. § 101(5) (1982)).

⁴⁴ *Hill*, 635 F. Supp. at 1236, 40 FEP Cases at 1449. The court also noted that the Ninth Circuit had held that "military departments" includes members of the armed forces in other contexts. *Id.* at 1236, 40 FEP Cases at 1449-50.

⁴⁵ *Id.* at 1238, 40 FEP Cases at 1451.

⁴⁶ *Id.* at 1235-38, 40 FEP Cases at 1448-51.

⁴⁷ *Id.* at 1236, 40 FEP Cases at 1450 (citing *Johnson v. Alexander*, 572 F.2d 1219, 1224, 16 FEP Cases 894, 898 (8th Cir. 1978)).

⁴⁸ *Johnson*, 572 F.2d at 1223-24, 16 FEP Cases at 898. The *Johnson* court noted that, unlike civilian employment, enlisted people cannot quit their jobs, and the Army cannot fire them freely.

and that therefore courts should not protect uniformed military personnel under Title VII absent an express inclusion in the statute.⁴⁹ The *Hill* court rejected the Eighth Circuit's approach because it determined first that military service was similar to civilian employment, and second that Title VII should apply absent evidence of a contrary legislative intent.⁵⁰

In determining that service in the armed forces is a form of employment under Title VII, the court reasoned that the government's role resembles that of an employer.⁵¹ The court noted that the draft had been eliminated,⁵² that military benefits nearly equaled civilian benefits,⁵³ and that the military offered invaluable training opportunities.⁵⁴

The court then reasoned that because the equal protection clause applies to uniformed military personnel,⁵⁵ Title VII, which embodies equal protection policies, should apply to uniformed personnel absent a clear congressional indication otherwise.⁵⁶ Because of Congress's inconsistent treatment of the term "employees" in other statutes, the *Hill* court determined that it was unclear whether Congress intended to exclude members of the uniformed services from the term "employees" under section 2000e-16(a).⁵⁷ Although in some statutes Congress expressly excluded uniformed military personnel from the definition of "employees,"⁵⁸ the court noted that in other statutes Congress specifically included uniformed personnel in the term.⁵⁹ Therefore, relying on the similarity between military and civilian employment, Title VII's policy of equal protection, and Congress's failure to define clearly "employee," the court found that uniformed military personnel were "employees" under section 2000e-16(a) and allowed the plaintiff to pursue her claim of sex discrimination under Title VII.⁶⁰

Applying Title VII to all military personnel, the *Hill* court stated, would be to the Army's advantage.⁶¹ The court noted that Title VII would become the exclusive remedy for service people claiming discrimination.⁶² Furthermore, the court reasoned, the wealth

Id. at 1223 n.4, 16 FEP Cases at 898 n.4. Furthermore, the court observed, soldiers are subject to both military discipline and military law. *Id.*

⁴⁹ *Id.* at 1224, 16 FEP Cases at 898. In *Johnson*, the court reasoned that: "if Congress had intended for the statute to apply to the uniformed personnel of the various armed services it would have said so in unmistakable terms." *Id.*

⁵⁰ *Hill*, 635 F. Supp. at 1236-38, 40 FEP Cases at 1450-51.

⁵¹ *Id.* at 1236-37, 40 FEP Cases at 1450.

⁵² *Id.*

⁵³ *Id.* at 1237, 40 FEP Cases at 1450. The court noted that in some instances, women obtain better benefits in the military than in civilian employment. *Id.*

⁵⁴ *Id.* For example, the court pointed out that over 80 percent of the commercial pilots in America were trained in the Navy and Air Force. *Id.*

⁵⁵ *Id.* (citing *Schlesinger v. Ballard*, 419 U.S. 498, 9 FEP Cases 33 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 9 FEP Cases 1253 (1973)).

⁵⁶ *Id.* at 1237, 40 FEP Cases at 1450-51.

⁵⁷ See *id.* at 1235, 40 FEP Cases at 1448.

⁵⁸ *Id.* (citing 5 U.S.C. § 7103(a)(2) (1982) ("employee" means an individual employed in an agency . . . but does not include . . . a member of the uniformed services)).

⁵⁹ *Id.* (citing 42 U.S.C. § 659(a) ("moneys . . . due from . . . the United States . . . to any individual, including members of the armed services . . .")).

⁶⁰ *Id.* at 1238, 40 FEP Cases at 1451.

⁶¹ *Id.*

⁶² *Id.* (citing *Brown v. General Servs. Admin.*, 425 U.S. 820, 829, 12 FEP Cases 1361, 1364 (1976) (all non-Title VII avenues, such as 42 U.S.C. § 1981, are foreclosed to federal employees with rights under Title VII)).

of case law interpreting Title VII would give the military clear guidelines on what conduct is prohibited, and might increase military effectiveness.⁶⁵ Therefore, the court concluded that the Army might benefit from its holding in *Hill*.⁶⁴

In addition, the court stated that military employment decisions would be entitled to greater deference than civilian employment decisions under Title VII.⁶⁵ Although holding that service in the armed forces is a form of employment, the court nonetheless recognized that, because of its need for discipline, the military of necessity cannot be as sensitive to individual rights as civilian employers.⁶⁶ The court therefore reasoned that it would be inappropriate to apply the same standard of review to military employment decisions as that applied to civilian employment decisions.⁶⁷ The court noted that in other contexts the Supreme Court had recognized the military's need for discipline and applied a deferential standard of review to military decisions.⁶⁸ Although the cases establishing a deferential standard of review were based on the United States Constitution, the *Hill* court reasoned that it was necessary to give great deference to the military regardless of the jurisdictional basis of the claim.⁶⁹ Recognizing, therefore, that applying a more rigid standard of review would potentially undermine discipline in the armed forces,⁷⁰ the *Hill* court held that the judiciary should not intervene in a military policy decision⁷¹ unless the decision was clearly erroneous, with adverse effects present at the time of trial.⁷²

Applying this deferential standard of review, the *Hill* court found that the defendants did not violate Title VII.⁷³ The court noted that an employer⁷⁴ does not violate Title VII where it makes decisions on the basis of gender if gender is a bona fide occupational qualification (BFOQ) for the position.⁷⁵ The court reasoned that federal

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1241, 40 FEP Cases at 1453-54.

⁶⁶ *Id.* at 1240-41, 40 FEP Cases at 1452-53.

⁶⁷ See *Hill*, 635 F. Supp. at 1240-41, 40 FEP Cases at 1452-53.

⁶⁸ *Id.* at 1240-41, 40 FEP Cases at 1453 (citing *Goldman v. Weinberger*, 106 S. Ct. 1310, 40 FEP Cases 543 (1986) (military regulation did not violate first amendment's free exercise clause); *Chappell v. Wallace*, 462 U.S. 296, 34 FEP Cases 1846 (1983) (uniformed military personnel have no implied right of action under Constitution against superiors for injuries due to race discrimination); *Parker v. Levy*, 417 U.S. 733 (1974) (serviceman convicted for speeches against Vietnam war)).

⁶⁹ *Id.* at 1241, 40 FEP Cases at 1453.

⁷⁰ *Id.* The court emphasized the importance of discipline in the armed forces: "[discipline] becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns." *Id.* (quoting *Chappell v. Wallace*, 462 U.S. 296, 300, 34 FEP Cases 1846, 1848 (1983)).

⁷¹ *Id.* at 1241, 40 FEP Cases at 1453-54. The court noted that day-to-day decisions in the military, which the court considered to be more crucial to military discipline than policy decisions, would be entitled to greater deference. *Id.* at 1241, 40 FEP Cases at 1453.

⁷² *Id.* at 1241, 40 FEP Cases at 1453-54.

⁷³ *Id.* at 1242, 40 FEP Cases at 1454.

⁷⁴ Although the *Hill* court did not consider the United States an employer for the purposes of liability under Title VII, see *supra* note 34, the court apparently determined that the United States was an employer for the purposes of exceptions to Title VII. See 42 U.S.C. § 2000e-2(e)(1) (1982).

⁷⁵ *Hill*, 534 F. Supp. at 1238, 40 FEP Cases at 1451 (citing 42 U.S.C. § 2000e-2(e)(1)). Section 2000e-2(e)(1) provides in part: "[An employer may employ an individual] on the basis of his religion,

statutes which prohibited women from serving in combat positions in the Navy and Air Force established a BFOQ exception to Title VII.⁷⁶ Although no federal statute codified the Army's policy of prohibiting women from combat positions, the court nonetheless concluded that the policy should be given the same weight as a statute.⁷⁷ The court therefore held that being male was a BFOQ for a combat position, and that the Army therefore could lawfully prohibit women from those positions.⁷⁸

The court then examined the Army's reclassification of the NBC Specialist position as a combat position, and determined that this decision was not clearly erroneous.⁷⁹ The court reasoned that, although there may have been flaws in the study upon which the reclassification was based,⁸⁰ these flaws were not sufficient to violate Title VII.⁸¹ The court stated, furthermore, that the defendants' subsequent reopening of the position to women indicated that the Army was acting in good faith.⁸² According to the court, a clearly erroneous standard allows the military the flexibility to change its policy and to make mistakes.⁸³ Thus, the *Hill* court determined that the defendants did not violate Title VII by closing the NBC Specialist position to women.⁸⁴

The *Hill* court's application of Title VII to uniformed military personnel is a significant departure from prior case law.⁸⁵ By reviewing the Army's employment decision with extreme deference under Title VII, however, the *Hill* court followed the general rule that the judiciary should refrain from intervening in military decisions.⁸⁶ The *Hill* court was justified both in holding that the plaintiff had rights under Title VII, and in reviewing the reclassification of the position with deference.

Section 2000e-16(a) of Title VII on its face does not distinguish between civilian and uniformed military personnel.⁸⁷ The *Hill* court's detailed analysis of the terms "employee" and "military departments" demonstrates convincingly that there are no indications Congress intended to exclude uniformed military personnel from Title VII.⁸⁸ In the absence of any clear congressional guidance to the contrary, the plain language of section 2000e-16(a) indicates that Title VII protects both civilian and uniformed military personnel.⁸⁹

sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" 42 U.S.C. § 2000e-(c)(1).

⁷⁶ *Hill*, 635 F. Supp. at 1239-40, 40 FEP Cases at 1452 (citing 10 U.S.C. § 6015 (1982) (Navy); 10 U.S.C. § 8549 (1982) (Air Force)).

⁷⁷ *Id.* at 1240, 40 FEP Cases at 1452.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1242, 40 FEP Cases at 1454.

⁸⁰ *Id.* The plaintiff pointed out that the study's use of statistics was questionable, that women had little input in the study, and that male commanders may have requested the study because of a bias against women. *Id.*

⁸¹ *Id.*

⁸² *Id.* For a discussion of the time sequence of the Army's closing and subsequent reopening of the NBC Specialist position, see *supra* notes 22-28 and accompanying text.

⁸³ *Hill*, 635 F. Supp. at 1241, 1242, 40 FEP Cases at 1454.

⁸⁴ *Id.* at 1243, 40 FEP Cases at 1455.

⁸⁵ For a list of cases holding that Title VII covers only civilian military personnel, see *supra* note 5.

⁸⁶ See cases cited *supra* note 68.

⁸⁷ For the text of 42 U.S.C. § 2000e-16(a) (1982), see *supra* note 2.

⁸⁸ See *supra* notes 33-60 and accompanying text.

⁸⁹ See *Hill*, 635 F. Supp. at 1238, 40 FEP Cases at 1451.

Having rights under Title VII will affect uniformed military personnel in a number of ways. Plaintiffs will benefit from Title VII's broad protection against employment discrimination. In challenging employment decisions under a statute other than Title VII,⁹⁰ or the Constitution,⁹¹ a plaintiff may utilize only a disparate treatment theory of discrimination, and consequently must prove the employer's discriminatory motivation.⁹² Under Title VII, however, a plaintiff may also challenge an employment selection device with a disparate impact theory of discrimination, which does not require that the plaintiff prove discriminatory motivation.⁹³ Consequently, when challenging certain military decisions,⁹⁴ uniformed personnel will be relieved of the burden of proving the decision-maker's discriminatory intent.⁹⁵

Military plaintiffs, however, will be bound by Title VII's procedural requirements.⁹⁶ Federal employees with rights under Title VII are required to bring their claims of employment discrimination under Title VII exclusively.⁹⁷ To preserve their claims, plaintiffs therefore must follow the administrative procedures and adhere to the statute of limitations set out by Title VII.⁹⁸ Furthermore, Title VII will limit the remedies available to plaintiffs.⁹⁹ Thus, although plaintiffs will gain a significant advantage through the use of disparate impact theory, they must adhere to Title VII's strict procedural requirements.

Furthermore, under *Hill* military plaintiffs will not enjoy the same protection from Title VII as civilian plaintiffs because of the court's deferential review of military employment decisions. The *Hill* court's deferential review, however, is appropriate. Courts have traditionally exercised restraint in reviewing or intervening in military matters.¹⁰⁰ This judicial restraint is based in part on a recognition of the need for discipline in the armed services.¹⁰¹ Courts have recognized that military organizations are unique in that

⁹⁰ See, e.g., *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391, 29 FEP Cases 139, 146 (1982) (42 U.S.C. § 1981).

⁹¹ See, e.g., *Washington v. Davis*, 426 U.S. 229, 238-39, 12 FEP Cases 1415, 1418 (1976) (fifth amendment's equal protection component).

⁹² See *supra* notes 90-91. For a discussion of disparate treatment theory, see *supra* note 16.

⁹³ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-432, 3 FEP Cases 175, 177-78 (1971).

⁹⁴ A disparate impact theory is usually available to challenge only an objective selection device, such as a scored test, which has a disproportionate impact on a protected class. See *B. SCHLEI & P. GROSSMAN, supra* note 16, at 82-83.

⁹⁵ In *Johnson v. Alexander*, for example, because the plaintiff was denied rights under Title VII, he was unable to utilize disparate impact theory to challenge an Army regulation which limited the enlistment of people who had "frequent encounters with the law." 572 F.2d 1219, 1220, 1224, 16 FEP Cases 894, 895, 898 (8th Cir. 1978). In contrast, civilian plaintiffs have successfully challenged similar employment policies prohibiting the hiring of people with arrest or conviction records under disparate impact theory. E.g., *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975).

⁹⁶ See *supra* note 62 and accompanying text.

⁹⁷ *Brown v. General Servs. Admin.*, 425 U.S. 820, 829, 12 FEP Cases 1361, 1364 (1976).

⁹⁸ 42 U.S.C. § 2000e-16(c) (1982). For a discussion of these requirements, see *supra* note 18.

⁹⁹ 42 U.S.C. § 2000e-5(g) (1982) limits a plaintiff's relief under Title VII to reinstatement, backpay, or other equitable relief. Under 42 U.S.C. § 1981, for example, a plaintiff alleging discrimination may obtain compensatory or punitive damages, *Johnson v. Railroad Express Agency*, 421 U.S. 454, 460 (1975), although sovereign immunity may bar damages in cases against the federal government. *Brown*, 425 U.S. at 827 n.8, 12 FEP Cases at 1363 n.8.

¹⁰⁰ See *Harris, Protections Against Discrimination Afforded to Uniformed Military Personnel: Sources and Directions*, 46 Mo. L. REV. 265, 309 (1981).

¹⁰¹ See *supra* note 68 and accompanying text. Judicial restraint in military matters is also based

they must enforce a standard of discipline which would be unacceptable in a civilian context.¹⁰² Although noting that military service is a form of employment,¹⁰³ the court recognized that it is different from civilian employment.¹⁰⁴ Thus, in applying Title VII to military employment decisions, the court in *Hill* correctly accounted for the unique relationship between military personnel and the government by applying a "clearly erroneous" standard of review to the reclassification decision.

In contrast to other jurisdictions, the court in *Hill* held that uniformed military personnel are protected from employment discrimination under Title VII.¹⁰⁵ Because they have rights under Title VII, military plaintiffs will be able to utilize a disparate impact theory of discrimination to challenge certain military decisions.¹⁰⁶ The *Hill* court, however, applied a deferential, "clearly erroneous" standard of review to military employment decisions.¹⁰⁷ Therefore, under *Hill*, military plaintiffs will not receive the same protection under Title VII as civilian plaintiffs. Moreover, Title VII will provide military plaintiffs with their exclusive remedy for employment discrimination.¹⁰⁸ Consequently, to preserve their claims, victims of employment discrimination in the military must adhere to Title VII's administrative procedures and statute of limitations.¹⁰⁹

III. SEX DISCRIMINATION

A. **Sexual Harassment in the Workplace*: Meritor Savings Bank, FSB v. Vinson¹

Title VII of the 1964 Civil Rights Act prohibits an employer from discriminating against an employee on the basis of sex.² Following the Guidelines of the Equal Employment Opportunity Commission (EEOC),³ the lower federal courts recognize two causes of action for workplace sexual harassment as illegal sex discrimination under

on separation of powers concerns. See Note, *Federal Judicial Review of Military Administrative Decisions*, 51 GEO. WASH. L. REV. 612, 614 (1983). Because the Constitution grants the President and Congress power over the military, courts have been reluctant to exercise jurisdiction over the military without authority from Congress or the Executive Branch. See *id.*

¹⁰² Chappell v. Wallace, 462 U.S. 296, 300, 34 FEP Cases 1846, 1848 (1983).

¹⁰³ See *supra* notes 46-50 and accompanying text.

¹⁰⁴ See *supra* notes 66-67 and accompanying text.

¹⁰⁵ See *supra* notes 35-60 and accompanying text.

¹⁰⁶ See *supra* note 16 and accompanying text.

¹⁰⁷ See *supra* notes 70-73 and accompanying text.

¹⁰⁸ See *supra* note 62 and accompanying text.

¹⁰⁹ See *supra* note 18 and accompanying text.

* By Alan J. Applebaum, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399, 40 FEP Cases 1822 (1986).

² Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982) [hereinafter Title VII].

Title VII provides:

[It is] an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

....

42 U.S.C. § 2000e-2(a)(1).

³ The Equal Employment Opportunity Commission (EEOC) characterizes sexual harassment in the workplace as a form of employment discrimination. 29 C.F.R. § 1604.11(a) (1985). According to the EEOC, sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," *id.*, even if it does not involve an exchange of sexual favors for job benefits. 29 C.F.R. § 1604.11(a)(3) (1985).

Title VII. First, courts have recognized a cause of action if a female employee's continued employment, promotion, evaluation, or other job-related interest is conditioned on her accepting the sexual advance of a male superior ("*quid pro quo*" sexual harassment).⁴ Second, courts have held that harassment which is severe or pervasive enough to create an offensive or hostile work environment is also actionable even where no tangible job detriment results.⁵ Courts agree that petty slights or insults will not trigger a Title VII claim; the harassment must be so severe and offensive that it rises to the level of a "term or condition" of the plaintiff's employment.⁶

Although lower federal courts have unanimously recognized that sexual harassment is a form of sex discrimination which violates Title VII, the question of when an employer is vicariously liable when one employee sexually harasses another has depended on which type of harassment the plaintiff alleges. The EEOC Guidelines suggest that courts hold an employer strictly liable for the discriminatory actions of its employees.⁷ Courts generally have held employers strictly liable for *quid pro quo* sexual harassment by supervisors having authority over the plaintiff.⁸ Courts have tended not to find an employer strictly liable, however, for "hostile environment" type harassment committed by its employees.⁹ In general, courts find an employer liable for "hostile environment" sexual harassment only when the employer has actual knowledge of the harassment, or if the harassment is so severe and pervasive that "constructive knowledge" can be imputed to the employer.¹⁰ Only where the offending employee was the plaintiff's supervisor has a court held the employer strictly liable, without actual or constructive knowledge of the harassment.¹¹

⁴ Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044, 1048-49, 16 FEP Cases 22, 25 (3rd Cir. 1977); Barnes v. Costle, 561 F.2d 983, 990, 15 FEP Cases 345, 351 (D.C. Cir. 1977).

⁵ Henson v. City of Dundee, 682 F.2d 897, 901, 29 FEP Cases 787, 790-91 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 945, 24 FEP Cases 1155, 1161 (D.C. Cir. 1981).

⁶ See, e.g., Scott v. Sears Roebuck, 605 F. Supp. 1047, 1050-51, 1055, 37 FEP Cases 878, 880, 884 (N.D. Ill. 1985) (no "hostile environment" harassment created by mere flirting, winking, and implied "propositions" by plaintiff's fellow auto mechanics).

⁷ 29 C.F.R. § 1604.11(c) (1985).

⁸ E.g., Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 81, 33 FEP Cases 187, 190 (3rd Cir. 1983); Miller v. Bank of America, 600 F.2d 211, 213, 20 FEP Cases 462, 464 (9th Cir. 1979).

⁹ See, e.g., Katz v. Dole, 709 F.2d 251, 255, 31 FEP Cases 1521, 1524 (4th Cir. 1983); Henson, 682 F.2d at 910, 29 FEP Cases at 799 (actual or constructive knowledge required for employer liability for "hostile environment" even where the wrongdoer is a supervisor).

¹⁰ See *supra* note 9.

¹¹ Vinson v. Taylor, 753 F.2d 141, 149-50, 36 FEP Cases 1423, 1430 (D.C. Cir. 1985). In *Vinson*, the appeals court found that:

[a]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of the occurrence.

Id. (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(c)). For a similar rationale, see *Henson*, 682 F.2d at 913, 29 FEP Cases at 801 (Clark, J., concurring in part and dissenting in part) (employer should be strictly liable even for "hostile environment" harassment if the offender is plaintiff's supervisor, but actual or constructive knowledge should be required if offender is plaintiff's co-worker). The D.C. Circuit Court of Appeals had previously expressed its approval of strict employer liability for hostile environment harassment in *Bundy*, but did not reach the strict liability question because it held that the plaintiff's employer had constructive knowledge of the harassment and thus was liable under either rule. *Bundy*, 641 F.2d at 943, 24 FEP Cases at 1159.

During the *Survey* year, the United States Supreme Court considered a Title VII sexual harassment claim for the first time in *Meritor Savings Bank, FSB v. Vinson*,¹² and unanimously recognized both the sex-for-job benefits ("*quid pro quo*") form of harassment and the "hostile work environment" type of harassment as valid causes of action under Title VII.¹³ The Court declined to decide whether an employer is strictly liable for "hostile environment" sexual harassment by one of its supervisors.¹⁴ The Court reasoned that because workplace sexual harassment is a form of sex discrimination, recognition of a cause of action for sexual harassment would further Congress's intent in enacting Title VII.¹⁵

In *Meritor*, Mechelle Vinson, the plaintiff, brought a Title VII action against her former employer Meritor Savings Bank ("the bank"), claiming that Sidney Taylor, one of the bank's vice-presidents and the branch manager of Vinson's place of work, had sexually harassed her during most of her term of employment there.¹⁶ At trial, the parties presented conflicting testimony concerning whether Taylor had sexually harassed Vinson.¹⁷ Vinson claimed that Taylor had pressured her into having sex with him on forty or fifty occasions, had raped her on several occasions, and fondled her in front of other employees during working hours.¹⁸ Vinson alleged that she had tolerated Taylor's behavior because she feared she would lose her job if she did not comply.¹⁹ Taylor denied these charges and asserted that Vinson had fabricated them because of an unrelated business dispute.²⁰

Without resolving these factual questions, the United States District Court for the District of Columbia entered judgment in favor of the bank, concluding that the evidence did not show that Vinson had suffered sexual harassment which violated Title VII.²¹ The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the creation of a "hostile environment" violates Title VII, and remanded for a determination of whether Taylor's behavior created such an environment.²² The court also held that an employer is strictly liable for "hostile environment" harassment committed by the plaintiff's supervisor or any other employee with apparent or actual authority over the plaintiff.²³

The United States Supreme Court affirmed the appeals court in part, holding that a valid Title VII claim exists not merely when an employee must submit to sexual

¹² *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399, 40 FEP Cases 1822 (1986).

¹³ *Id.* at 2405-06, 40 FEP Cases at 1827.

¹⁴ *Id.* at 2408, 40 FEP Cases at 1829.

¹⁵ *Id.* at 2406, 40 FEP Cases at 1827.

¹⁶ *Id.* at 2402, 40 FEP Cases at 1824.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 2403, 40 FEP Cases at 1824.

²¹ *Vinson v. Taylor*, 23 FEP Cases 37, 43 (D.D.C. 1980). The court did not explicitly state the ground on which it made this finding. See *Meritor*, 106 S. Ct. at 2406, 40 FEP Cases at 1827. It is probable that the court did not recognize a cause of action under a "hostile environment" theory, because the trial occurred before the *Bundy* case, announcing the theory, had been decided. See *Bundy*, 641 F.2d at 945, 24 FEP Cases at 1161. In the absence of such a theory, the court could have found that because Vinson's job benefits were not conditioned on her granting sexual favors to Taylor, she did not suffer actionable sexual harassment.

²² *Vinson*, 753 F.2d at 152, 36 FEP Cases at 1431.

²³ *Id.* at 149-50, 36 FEP Cases at 1430.

advances to gain or retain job benefits, but also when a sexually hostile or abusive environment exists at the worksite.²⁴ The Court began by rejecting the bank's argument that Congress intended Title VII to apply only to *quid pro quo* sexual harassment and not to sexual harassment affecting only the psychological aspects of the work environment.²⁵ The Court reasoned that the language of Title VII did not prevent the phrase "terms, conditions, or privileges of employment" from being read to include psychological harassment in the workplace.²⁶ Instead, the Court gave substantial deference to the 1980 EEOC Guidelines, which explicitly stated that a sexual harassment claim is not limited to an economic *quid pro quo*.²⁷ The majority recognized that both the EEOC and lower federal courts have determined that Title VII provides a right to work in an environment free from discriminatory intimidation, ridicule, and insult.²⁸ Therefore, the Court concluded, the district court erred if it dismissed Vinson's claim because it refused to recognize the "hostile environment" theory on which her claim was based.²⁹

Having affirmed the validity of a Title VII "hostile environment" sexual harassment claim, the Court then considered the question of whether Vinson had stated a cause of action under this theory.³⁰ While noting that not all workplace harassment rises to the level of a "term, condition, or privilege" of employment, the Court asserted that the facts alleged by Vinson easily met this standard.³¹ The Court speculated that the district court, although it may have recognized the validity of a Title VII "hostile environment" claim, may have rejected Vinson's claim because it determined that she had engaged in voluntary sexual relations with Taylor.³² A "hostile environment" plaintiff's voluntary compliance with sexual advances does not defeat her claim, the Court stated.³³ Rather, the Court determined that the correct test is whether the advances were "unwelcome."³⁴

Although it approved Vinson's cause of action under Title VII for sexual harassment due to a "hostile environment," the Court declined to resolve the question of whether the bank should be held strictly liable for sexual harassment by their employee Taylor.³⁵ The Court noted that the EEOC Guidelines hold an employer strictly liable for the acts

²⁴ *Meritor*, 106 S. Ct. at 2405-06, 40 FEP Cases at 1827.

²⁵ *Id.* at 2404, 40 FEP Cases at 1826.

²⁶ *Id.*

²⁷ *Id.* at 2405, 40 FEP Cases at 1826 (citing 29 C.F.R. § 1604.11(a)(3) (1985)). According to the Court, the EEOC Guidelines gave persuasive, although not binding, guidance to the interpretation of Title VII. *Id.*

²⁸ *Id.* (citing *Rogers v. EEOC*, 454 F.2d 234, 4 FEP Cases 92 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 4 FEP Cases 771 (1972); 45 Fed. Reg. 74676 (1972)).

²⁹ *Id.* at 2406, 40 FEP Cases at 1827.

³⁰ *Id.*

³¹ *Id.* ("Respondent's allegations in this case — which include not only pervasive harassment but also criminal conduct . . . are plainly sufficient to state a claim for 'hostile environment' sexual harassment.").

³² *Id.*

³³ *Id.*

³⁴ *Id.* The Court commented that the court of appeals had incorrectly instructed the district court in its remand that evidence concerning Vinson's dress and personal fantasies were inadmissible on the question of whether she found Taylor's advances "unwelcome." *Id.* at 2407, 40 FEP Cases at 1827-28. The Court stated that this evidence was "obviously relevant," and that it was within the district court's discretion to admit it in any case. The Court reiterated that appellate courts must defer to a trial court's determination of the prejudicial and probative value of evidence. *Id.* at 2407, 40 FEP Cases at 1828.

³⁵ *Id.* at 2408, 40 FEP Cases at 1829.

of its agents.³⁶ The Court continued, however, by acknowledging that the EEOC had argued against strict liability in "hostile environment" sex discrimination claims in its amicus brief.³⁷ This argument, the Court noted, was in "tension" with the EEOC Guidelines, which appeared to hold employers strictly liable for *all* forms of Title VII discrimination.³⁸ In view of the unresolved facts of the current case and the ambiguity of the EEOC's position, the Court declined to establish a rule regarding employer liability.³⁹ The Court merely denied the court of appeals' assertion that employers, even absent actual or constructive knowledge, are always strictly liable for sexual harassment committed by their supervisors.⁴⁰

In deciding against the automatic imposition of strict liability, the Court inferred that Congress intended to place some limit on employer liability for actions of employees because Title VII's definition of "employer" includes any "agent" of an employer.⁴¹ The Court noted that both Congress and the EEOC intended that courts use agency principles in interpreting Title VII.⁴² Because these principles often hold employers strictly liable for actions of their employees, and courts have consistently held employers strictly liable for Title VII violations other than "hostile environment" sex discrimination,⁴³ the Court commented that employer ignorance, while not insulating the employer from liability, would not necessarily prevent employer liability either.⁴⁴

Although declining to announce a bright-line rule regarding employer liability, the Court noted that the existence and nature of an employee grievance procedure was relevant to, although not dispositive of, the question of employer liability.⁴⁵ The Court rejected the bank's claim that merely because it had an employee grievance procedure which the plaintiff had failed to invoke it was insulated from liability for sexual harassment committed by Taylor.⁴⁶ In the instant case, the Court noted that the bank's procedures and policies were not specifically directed at sexual harassment, and therefore

³⁶ *Id.* The Court also stated that when considering Title VII racial harassment claims, the federal courts have consistently held employers strictly liable for discriminatory actions of supervisors. *Id.* at 2408, 40 FEP Cases at 1828 (citing *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 724, 4 FEP Cases 987, 988 (6th Cir. 1972)).

³⁷ *Id.* at 2407-08, 40 FEP Cases at 1828-29 (citing Brief for United States and Equal Employment Opportunity Commission as Amici Curiae at 26, *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399, 40 FEP Cases 1823 (1986)). The EEOC argued that because the plaintiff's work status was not affected by "hostile environment" harassment, the offender was not exercising power granted by the employer; therefore the common-law agency principles which led to the general rule imputing supervisor discrimination to the employer should not apply to "hostile environment" cases. *Id.* at 2407-08, 40 FEP Cases at 1828-29. According to the EEOC brief, the Court noted, if an employer has a grievance procedure by which an employee could file a sexual harassment complaint, but fails to do so, the employer should not be liable. *Id.* at 2408, 40 FEP Cases at 1828. The Court also commented, however, that an employer could be held to have "constructive knowledge" of discriminatory activity if the prohibited activity was pervasive or sufficiently long-lasting. *Id.* at 2408, 40 FEP Cases at 1829.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 2407-08, 40 FEP Cases at 1828.

⁴⁴ *Id.* at 2408, 40 FEP Cases at 1829.

⁴⁵ *Id.* at 2408-09, 40 FEP Cases at 1829.

⁴⁶ *See id.*

did not alert bank employees to the bank's concern about that form of discrimination.⁴⁷ Moreover, the Court continued, the bank's procedure required Vinson to complain to her supervisor, Taylor, the very individual who had allegedly harassed her.⁴⁸ The Court commented that Vinson's failure to complain would have strengthened the bank's case only if its grievance procedure had been designed so as to encourage her to report the harassment.⁴⁹

Justice Marshall wrote a concurring opinion, joined by Justices Brennan, Blackmun, and Stevens,⁵⁰ in which he argued that an employer is strictly liable under Title VII for sexual harassment by supervisors.⁵¹ Asserting that the question of employer liability was properly before the Court,⁵² Justice Marshall then urged the application of the EEOC Guidelines to the question of employer liability in Title VII "hostile environment" sexual harassment claims.⁵³ The Court had previously held that these Guidelines were to be accorded great deference, Justice Marshall noted.⁵⁴ The Guidelines, according to the concurrence, hold employers strictly liable for sexual harassment by supervisors.⁵⁵ Arguing that strict liability for "hostile environment" sexual harassment would be a logical extension of Title VII precedent, Justice Marshall stated that federal courts were unanimous in holding employers strictly liable not only for race-related Title VII violations, but also for *quid pro quo* sexual harassment by supervisors.⁵⁶

In addition to his arguments that EEOC Guidelines and Title VII precedent supported a rule of strict employer liability for "hostile environment" sexual harassment, Justice Marshall also argued for a strict liability rule on policy grounds.⁵⁷ Justice Marshall reasoned that the rule of strict employer liability under Title VII for discrimination by

⁴⁷ *Id.* at 2409, 40 FEP Cases at 1829.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 2409, 40 FEP Cases at 1830 (Marshall, J., concurring in the judgment). Justice Stevens wrote a short concurrence in which he simply stated that he agreed with both the other opinions and saw no inconsistency between them. *Id.* at 2411, 40 FEP Cases at 1829 (Stevens, J., concurring).

⁵¹ *Id.* at 2411, 40 FEP Cases at 1831 (Marshall, J., concurring in the judgment).

⁵² *Id.* at 2409, 40 FEP Cases at 1830 (Marshall, J., concurring in the judgment). The majority did not defer to the EEOC's position because the EEOC's amicus brief argued against strict liability, contrary to the Guidelines. See *supra* notes 36-39 and accompanying text.

⁵³ *Meritor*, 106 S. Ct. at 2409-10, 40 FEP Cases at 1830 (Marshall, J., concurring in the judgment).

⁵⁴ *Id.* at 2409, 40 FEP Cases at 1830 (Marshall, J., concurring in the judgment) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 3 FEP Cases 175, 179 (1971)).

⁵⁵ *Id.* (Marshall, J., concurring in the judgment) (citing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.11(c),(d) (1985)). The Guidelines do not distinguish between *quid pro quo* and "hostile environment" sexual harassment on the question of employer liability. See generally EEOC Guidelines, 29 C.F.R. §§ 1604.11(c),(d) (1985). They do distinguish between supervisor and co-worker harassment, however. Compare 29 C.F.R. § 1604.11(c) (1985) (employers strictly liable for sexual harassment committed by the plaintiff's supervisor) with 29 C.F.R. § 1604.11(d) (1985) (no strict liability for sexual harassment committed by the plaintiff's co-worker; employers liable for harassment by co-workers only when the employer has actual or constructive knowledge of the harassment).

⁵⁶ *Meritor*, 106 S. Ct. at 2410, 40 FEP Cases at 1830 (Marshall, J., concurring in the judgment).

⁵⁷ See *id.* at 2411, 40 FEP Cases at 1831 (Marshall, J., concurring in the judgment). The concurring Justice stated that the Solicitor General, in his brief arguing against strict liability for "hostile environment" sexual harassment, had incorrectly distinguished the "hostile environment" situation from other discriminatory treatment for which the Guidelines hold employers strictly liable. *Id.* at 2410-11, 40 FEP Cases at 1831.

supervisors is based on the notion that the employer who granted the offender economic power over the victim should be responsible for its abuse.⁵⁸ It is this grant of power which makes both "*quid pro quo*" and "hostile environment" sexual harassment possible, Justice Marshall noted, because in both situations the threat of economic retribution may deter the victim from resisting harassment.⁵⁹

Not only is "hostile environment" sexual harassment an abuse of the employer's grant of power, Justice Marshall continued, but it is also a dereliction of the supervisor's duty.⁶⁰ A supervisor's duties include not merely making economic decisions about an employee, but also providing a safe, productive workplace, Justice Marshall noted.⁶¹ Therefore, the concurring opinion suggested, both types of sexual harassment involve an abuse of the offender's authority over the victim as well as an abuse of the responsibility delegated by the employer.⁶² Because the policy considerations underlying the EEOC Guidelines' strict liability rule for other types of Title VII discrimination thus apply to "hostile environment" discrimination as well, Justice Marshall argued, the rule should be extended to include "hostile environment" discrimination.⁶³

Justice Marshall concluded by noting that a rule imposing strict liability would not necessarily be unfair to employers.⁶⁴ In a typical "hostile environment" case, the plaintiff seeks not money damages, but an injunction, Justice Marshall stated.⁶⁵ According to Justice Marshall, Title VII requires the EEOC to notify an employer when an employee files a discrimination complaint, and, if it finds the complaint to be based on reasonable cause, to attempt to remedy the offending practice through persuasion.⁶⁶ Therefore, Justice Marshall implied, an employer is not harmed by a rule of "strict liability" when only an injunction is involved, because the injunction merely notifies the employer of the complaint and requires future efforts to remedy the situation.⁶⁷ If an employer actually had effective internal procedures in place to address sexual harassment, so that it would be unfair to hold it liable without notice, the employer could set these procedures in motion upon receiving notice of plaintiff's complaint and thereby stave off an injunction, Justice Marshall reasoned.⁶⁸ In contrast, when a "hostile environment" plaintiff seeks money damages in the form of back pay on a theory of constructive termination, Justice Marshall continued, a court, even if it holds the employer liable, need not award damages when the plaintiff purposely bypassed existing, effective grievance procedures.⁶⁹ Therefore, Justice Marshall suggested, a strict liability rule puts an employer at

⁵⁸ *Id.* at 2410, 40 FEP Cases at 1831 (Marshall, J., concurring in the judgment). The offender in a "hostile environment" claim, even though not exercising work-related authority over the victim or acting in the scope of employment, is still abusing the employer's grant of power, Justice Marshall explained. *Id.* (Marshall, J., concurring in the judgment).

⁵⁹ *Id.* at 2411, 40 FEP Cases at 1831 (Marshall, J., concurring in the judgment) ("it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates").

⁶⁰ *Id.* at 2410, 40 FEP Cases at 1831 (Marshall, J., concurring in the judgment).

⁶¹ *Id.* (Marshall, J., concurring in the judgment).

⁶² *Id.* at 2410-11, 40 FEP Cases at 1831 (Marshall, J., concurring in the judgment).

⁶³ *Id.* at 2411, 40 FEP Cases at 1831 (Marshall, J., concurring in the judgment).

⁶⁴ *Id.* (Marshall, J., concurring in the judgment).

⁶⁵ *Id.* (Marshall, J., concurring in the judgment).

⁶⁶ *Id.* (Marshall, J., concurring in the judgment).

⁶⁷ See generally *id.* (Marshall, J., concurring in the judgment).

⁶⁸ *Id.* (Marshall, J., concurring in the judgment).

⁶⁹ *Id.* (Marshall, J., concurring in the judgment).

greater risk only if the employer has no effective grievance procedure available to the plaintiff.⁷⁰

Meritor is an important landmark in the development of employment discrimination law because for the first time the Supreme Court recognized that workplace sexual harassment is a form of illegal employment discrimination. The Court applied prior caselaw and the EEOC Guidelines in holding that abusive, sexually-related behavior at the workplace can be a substantial impediment to equal employment opportunity, even when the defendant has not conditioned job benefits on sexual favors but has merely created an abusive or offensive environment at the workplace.⁷¹ In its decision, the Court correctly noted that sexual harassment in the workplace is "every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."⁷²

The Supreme Court in *Meritor* also announced an important principle for evaluating "hostile environment" discrimination claims by refusing to dismiss Vinson's complaint because she had voluntarily engaged in sexual relations with Taylor. The Court correctly recognized that Vinson's acquiescence in Taylor's advances did not go to the relevant question of whether the advances themselves constituted sexual harassment under the EEOC Guidelines.⁷³ As the appeals court noted, a victim of sexual harassment should not be forced to choose between acquiescence in harassment, overtly resisting it on a regular basis, resigning from her job, or submitting to the sexual advances and thus losing her chance for redress.⁷⁴ The correct inquiry, as the Court stated, is whether Taylor's advances were not only unwelcome but also severe and pervasive enough to constitute a "term or condition" of her employment.⁷⁵

Unfortunately, the Court did not provide as clear a guidepost on the question of employer liability as it did on the existence of the two types of Title VII sexual harassment

⁷⁰ See generally *id.* (Marshall, J., concurring in the judgment).

⁷¹ *Id.* at 2405-06, 40 FEP Cases at 1827.

⁷² *Id.* at 2406, 40 FEP Cases at 1827.

⁷³ *Id.*

⁷⁴ *Vinson*, 753 F.2d at 146, 36 FEP Cases at 1427.

⁷⁵ *Meritor*, 106 S. Ct. at 2406, 40 FEP Cases at 1827. The Court easily characterized Taylor's alleged behavior as severe and pervasive enough to constitute a term or condition of Vinson's employment. *Id.* See also *supra* note 28. The standard normally used by federal courts to determine whether such behavior is a "term or condition" of employment is an objective one. See, e.g., *Scott v. Sears Roebuck*, 605 F. Supp. 1047, 1050-51, 1055, 37 FEP Cases 878, 880, 884 (N.D. Ill. 1985). The *Scott* court noted that "[t]he focus should be on defendant's conduct, not on plaintiff's perception or reaction." *Id.* at 1056, 37 FEP Cases at 884 (quoting *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549, 551, 34 FEP Cases 1423, 1425 (N.D. Ill. 1984)).

The Court's ruling that evidence concerning Vinson's dress and sexual fantasies was not *per se* inadmissible on the question of whether she found Taylor's sexual advances unwelcome, *Meritor*, 106 S. Ct. at 2407, 40 FEP Cases at 1828, comports with the deference usually accorded trial judges. The court of appeals, however, formulated the better approach when it said that "[a] woman does not waive her Title VII rights by her sartorial or whimsical proclivities . . ." *Vinson v. Taylor*, 753 F.2d at 146 n.36, 36 FEP Cases at 1427 n.36 (citing *Bundy*, 641 F.2d at 944, 945-46, 24 FEP Cases at 1155, 1161-62). The relevant question is whether Vinson communicated to Taylor her dislike for his advances, not what her fantasies were. The Court, in stating that Vinson's dress and fantasies were "obviously relevant" to the question of whether the advances were unwelcome, *Meritor*, 106 S. Ct. at 2407, 40 FEP Cases at 1828, seems to assume that a woman's dress and fantasies are to be taken as an actual expression of desire. The "rape shield law," Fed. Evid. 412(a), acknowledges that a woman's past sexual history is not relevant to the question of whether she consented to intercourse on a particular occasion. A similar rule might be appropriate in the sexual harassment area as well.

claims. The Court rejected the easily-applied rules that the employer is always or never strictly liable,⁷⁶ thereby assuring that the employer liability issue will continue to be a source of fact-bound litigation in future "hostile environment" claims. Nevertheless, the Court did provide some guidance in resolving the question of employer liability, commenting that a defendant employer would be aided by a showing that the plaintiff had bypassed a realistic existing grievance procedure,⁷⁷ and that common-law agency principles should apply in determining whether the offender was an "agent" of the employer.⁷⁸

A rule of strict liability as proposed in Justice Marshall's concurrence, however, would have better served the goal of voluntary employer cooperation with Title VII. If employers are held strictly liable for sexual harassment in the workplace, the threat of employee lawsuits will give employers an incentive to take preventive measures against it, lacking any other way of avoiding liability. This incentive to employers should provide an effective tool to rid the workplace of sexual harassment. As Justice Marshall argues, a rule of strict liability will motivate employers to institute effective grievance procedures for use by victims of sexual harassment.⁷⁹ The need to implement grievance procedures will increase employer awareness that sexual harassment at the workplace is a problem employers must address. Employers, who have economic power over their supervisors, are in a good position to dissuade these supervisors from unacceptable behavior once the employers are aware of it. Safe, effective means of communicating the problem to management will ensure that victims of sexual harassment report it to their employers.⁸⁰

Although the Court did not set out a specific test for employer liability, it correctly rejected the argument that an employer must always have actual or constructive knowledge of sexual harassment to be held liable. A rule requiring actual or constructive notice would send employers the wrong message. Those employers who prefer, either for economic or cultural reasons, to allow workplace sexual harassment, could infer from such a rule that as long as they remain officially ignorant of the harassment, and the harassment is not pervasive enough to constitute "constructive notice," they need not take steps to remedy the problem. These employers would thus have an incentive to avoid creating grievance procedures through which an employee could effectively complain of sexual harassment, because such a procedure would increase the chance that the employer would become officially aware of the harassment, and thus be required to remedy it. A rule requiring notice for employer liability thus discourages rather than encourages the creation of effective grievance procedures. This defeats the intent of Title VII, which is to foster private solutions to employment discrimination problems.⁸¹

⁷⁶ *Meritor*, 106 S. Ct. at 2408, 40 FEP Cases at 1829.

⁷⁷ See *id.* at 2409, 40 FEP Cases at 1829. The Court did take a realistic step to promote employer cooperation, however, by indicating that the mere existence of a "paper" grievance procedure would not be enough to shield the employer from liability. *Id.* at 2408-09, 40 FEP Cases at 1829. In making this statement, the Court implicitly acknowledged that Title VII requires an employer not only to actively discourage sexual harassment in the workplace, but also to provide victims of harassment with a viable private form of relief.

⁷⁸ *Id.* at 2408, 40 FEP Cases at 1829.

⁷⁹ *Id.* at 2411, 40 FEP Cases at 1831 (Marshall, J., concurring in the judgment). See also *supra* notes 60-63 and accompanying text.

⁸⁰ As the majority noted, an effective grievance procedure is one which encourages the offended employee to step forward. *Id.* at 2409, 40 FEP Cases at 1829.

⁸¹ The intent of Title VII is to induce employers to take preventive measures, not to encourage

In summary, the Supreme Court in *Meritor* provides an important first step toward a settled judicial interpretation of those Title VII sex discrimination claims based on workplace sexual harassment. The decision in *Meritor* does not extend Title VII caselaw; it affirms the unanimous approval in the lower courts of both the *quid pro quo* and "hostile environment" theories of sexual harassment, but does not resolve a split in the circuits concerning employer liability. Nonetheless, by recognizing at the highest judicial level the reality that workplace sexual harassment is a form of prohibited sex discrimination under Title VII, the decision gives a boost to sexual equality in the workplace.

IV. AGE DISCRIMINATION

A. *Classification of Professional Corporation Members as Employees Under the ADEA: *Hyland v. New Haven Radiology Associates, P.C.*¹

The Age Discrimination in Employment Act (ADEA or Act) makes it unlawful for an employer to discharge or to refuse to hire any individual solely on account of that individual's age.² Although the statute expressly applies to "any individual," judicial decisions hold that an "individual" must be an employee in order to receive the Act's protection.³ The Act defines employee as an individual employed by any employer.⁴ In turn, "employer" is defined as a "person"⁵ employing twenty or more employees and engaged in an industry which affects commerce.⁶ Because of the Act's circular definition of employee, the issue of whether the ADEA's protection extends to a particular claimant often arises.

Although the statutory language defining "employee" is vague, a line of cases has developed which provides some guidance in determining whether a particular individual

them to look the other way. See *Vinson*, 753 F.2d at 151, 36 FEP Cases at 1431. As the appeals court noted,

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

Id. at 151 n. 80, 36 FEP Cases at 1431 n. 80 (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(f) (1984)).

* By Stephen W. Bernstein, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 41 FEP Cases 183 (2d Cir. 1986).

² 29 U.S.C. § 623(a) (1982). § 623(a)(1) provides:

It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . .

³ *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 980, 33 FEP Cases 487, 488 (4th Cir. 1983) (citing *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 31 FEP Cases 238 (5th Cir. 1983)).

⁴ 29 U.S.C. § 630(f) (1982).

⁵ Person is defined as:

One or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons. 29 U.S.C. § 630(a) (1982).

⁶ U.S.C. § 630(b) (1982).

is protected under the ADEA.⁷ These cases make clear that officers, directors and high level executives are employees for purposes of the ADEA and are therefore protected.⁸ In contrast, courts do not consider partners employees under anti-discrimination statutes by reason of their ability to control and operate the business.⁹ In determining whether an individual is a partner or an employee, the prevailing standard focuses on the individual's co-ownership, ability to control the business and determine compensation, and his or her responsibility for administering profits and losses.¹⁰ Where an individual possesses such proprietary interests, control and responsibilities, courts and the EEOC will treat him or her as a partner, and thus deny coverage under the Act.¹¹

In the few cases that address the issue, courts have not uniformly resolved whether member-shareholders of a professional corporation¹² are employees or partners.¹³ In *EEOC v. Dowd & Dowd, Ltd.*, for example, the Court of Appeals for the Seventh Circuit

⁷ See *Goldberg v. Whitaker House Coop. Inc.*, 366 U.S. 28 (1961); *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 31 FEP Cases 634 (7th Cir. 1983); *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 30 FEP Cases 819 (6th Cir. 1982), cert. denied, 464 U.S. 819, 32 FEP Cases 1672 (1983); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 25 FEP Cases 355 (2d Cir. 1981); *Hoy v. Progress Pattern Co.*, 217 F.2d 701, 27 Lab. Cas. (CCH) ¶ 68,868 (1954).

⁸ See *supra* note 7 for precedent protecting officers, directors and high level executives under the ADEA.

⁹ *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930, 38 FEP Cases 1846, 1847 (8th Cir. 1985), cert. denied, 106 S.Ct. 1263 (1986). Courts likewise hold that partners are not employees for purposes of Title VII. See, e.g., *Hishon v. King & Spaulding*, 467 U.S. 69, 77, 34 FEP Cases 1406, 1410 (1984); *Burke v. Friedman*, 556 F.2d 867, 869, 15 FEP Cases 34, 35 (7th Cir. 1977); EEOC decision No. 85-4, EMP. PRAC. GUIDE (CCH) ¶ 6845 at 7040 (Mar. 18, 1985).

¹⁰ EEOC decision No. 85-4 at 7041 n.4.

¹¹ *Id.*

¹² Professional corporations are statutory creations of the 1960s. J. CRANE & A. BROMBERG, *LAW OF PARTNERSHIP* 184 (1968). They developed as a means of providing favorable tax benefits as well as affording professionals the ability to create defined benefit pension plans for themselves while still maintaining a professional association with others. See R. HAMILTON, *CASES AND MATERIALS ON CORPORATIONS*, 31-36 (3d ed. 1986). Member-shareholders of these corporations must be licensed to practice by a professional regulatory body and the members' interest cannot be transferred except to another licensed professional. J. CRANE & A. BROMBERG, *LAW OF PARTNERSHIP* at 184-85. According to one court,

A professional corporation has numerous legitimate business purposes. By conducting a . . . practice through the structure of a professional corporation, its shareholders realize the advantages of more orderly business operations, greater ease in acquiring, holding and transferring property, and more continuity of existence. Additionally, a professional corporation affords to its shareholders insulation against liability for obligations which do not arise as a result of a breach of a [professional's] obligation to his client or an act of professional malpractice. The shareholders of a professional corporation have the same insulation from liability as shareholders of other corporations with respect to obligations of a purely business and nonprofessional nature.

First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 846, 302 S.E.2d 674, 675 (1983) (emphasis added).

Nevertheless, in regard to liability arising out of the professional's own misdeeds, a corporate veil does not exist and hence, there is no distinction between partnerships and professional corporations. *Id.* at 847, 302 S.E.2d at 676. That is, a member of a professional corporation is not only responsible for his own malpractice but also for those acts by other members of the firm. *Id.*

¹³ Compare *EEOC v. Dowd & Dowd, Ltd.*, 763 F.2d 1177, 34 FEP Cases 1815 (7th Cir. 1984) (shareholder in professional corporation similar to partner and is not an employee under Title VII) with *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 41 FEP Cases 183 (2d Cir. 1986) (shareholder of professional corporation designated an employee and held not a partner under the ADEA).

held that under Title VII a shareholder in a professional corporation is not an employee.¹⁴ The court reasoned that the role of a shareholder in a professional corporation is more like a partner in a partnership, and therefore, professional corporation members are not employees for purposes of Title VII.¹⁵

During the *Survey* year, in *Hyland v. New Haven Radiology Associates, P.C.*, the United States Court of Appeals for the Second Circuit departed from the *Dowd* court's reasoning under Title VII and held that shareholder-members of a professional corporation who are designated as employees of the corporation, are employees and not partners under the ADEA.¹⁶ In *Hyland*, the appeals court ruled that because New Haven Radiology Associates (NHRA) had elected favorable tax treatment by its decision to incorporate as a professional corporation, it could not escape the remedial sanctions of the Act by claiming that it was a partnership and its members partners.¹⁷ The court reasoned that because the roles of corporate employee and partner are mutually exclusive, use of the corporate form precludes any examination designed to determine whether the entity is a partnership.¹⁸ Thus, according to the court, individuals employed by a corporation are employees and are protected under the Act.¹⁹ Consequently, after *Hyland*, there is a split between the Second and Seventh Circuits regarding the classification of member-shareholders of professional corporations as employees for the purposes of anti-discrimination statutes.

In 1977, the plaintiff, Hyland, and four other radiologists organized NHRA as a professional corporation.²⁰ As part of the member-shareholder agreement, each member contributed equal amounts of capital, and received in return equal shares of stock and equal compensation.²¹ Furthermore, all member-shareholders were officers and directors of the group, had an equal voice in management and shared equally in all profits and losses.²²

As part of the incorporation process, each shareholder signed a separate two-year renewable employment agreement.²³ The agreement provided that each member would be compensated \$60,000 annually and that each was required to be "a full time employee of the company during the term of [the] agreement."²⁴ The agreement also provided

¹⁴ *Dowd & Dowd, Ltd.*, 763 F.2d at 1178, 34 FEP Cases at 1816.

¹⁵ *Id.*

¹⁶ *Hyland*, 794 F.2d at 798, 41 FEP Cases at 186.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *supra* note 12 for discussion of professional corporations.

²¹ *Hyland*, 794 F.2d at 794, 41 FEP Cases at 183.

²² *Hyland v. New Haven Radiology Assocs., P.C.*, 606 F. Supp. 617, 618, 37 FEP Cases 979, 979 (D. Conn. 1985), *rev'd*, 794 F.2d 793, 41 FEP Cases 183 (2d Cir. 1986). Additionally, the members agreed that stock could only be held by licensed physicians and that upon death, withdrawal, or termination of any member, that member or his or her successor in interest was required to sell his or her stock to NHRA and NHRA was required to purchase that stock in accordance with the valuation terms of the agreement. *Hyland*, 794 F.2d at 794, 41 FEP Cases at 183.

²³ *Hyland*, 794 F.2d at 795, 41 FEP Cases at 184. It should be noted that Hyland's employment agreement differed from the other co-founders and required him to provide six-months written notice of his intention to leave. *Id.* It is unclear from the facts why Hyland was singled out for such notice. Yet, it does not appear to affect the reasoning of the case.

²⁴ *Id.* The employment agreement also required each member to comply with all company

for disability payments, paid vacations, reimbursement for continuing professional education and certain other payments upon termination of employment.²⁵

In 1980, complaints of Hyland's unavailability, lack of cooperation, and abusive conduct prompted the members of NHRA to ask Hyland to resign as a member and employee.²⁶ Hyland, who was 51 years old at the time of his dismissal, brought an action claiming that the group had discriminated against him on the basis of his age.²⁷ In considering whether Hyland met the jurisdictional requirements of the ADEA, the district court found that Hyland was not an employee as defined by the Act and granted summary judgment for the corporation.²⁸

The Court of Appeals for the Second Circuit reversed the district court's ruling, reasoning that although the distinction between partnerships and corporations, and thus partners and corporate employees, is at times difficult to draw, this difficulty does not provide a sufficient reason to ignore legal form.²⁹ Therefore, because NHRA had chosen to incorporate, the court held that the group could not now protect itself by asserting that it was, in substance, a partnership.³⁰ As a result, the court determined that Hyland was an employee as defined by the Act and permitted him to press forward with his age discrimination claim.³¹

The *Hyland* court began its analysis by acknowledging that the Act is remedial in nature and that its provisions must be broadly interpreted to carry out its purposes.³² According to the court, the Act's goal is to prohibit age discrimination against employ-

regulations and policies and to contribute to the group all compensation earned from their professional services and invoked a duty on all members to devote his or her best efforts to assisting NHRA's patients. *Id.*

²⁵ *Id.* In addition, the agreement provided that termination without cause could only result by a vote of three-fourths of all member stockholders. *Id.* Seven physicians, including the plaintiff-appellant, were member-shareholders at the time of this action. *See id.* at 793, 41 FEP Cases at 183. Since the group's formation, it had offered membership to other radiologists it had employed for a number of years. *Hyland*, 606 F.Supp. at 618, 37 FEP Cases at 979. If admitted, the new member would purchase stock in order to equalize his or her share with that of existing members. *Id.* Once admitted, the new member would receive the same salary as the original members and would possess the same profit sharing rights and incur the same responsibility for losses. *Id.*

²⁶ *Hyland*, 794 F.2d at 795, 41 FEP Cases at 184.

²⁷ *Id.* Hyland also asserted other claims in the district court, which were eventually dismissed. *See Hyland*, 606 F.Supp. at 618, 37 FEP Cases at 980.

²⁸ *Hyland*, 606 F.Supp. at 621, 37 FEP Cases at 982. The district court reasoned that although NHRA was organized as a professional corporation to gain advantageous tax treatment, in reality NHRA was operated and managed as a partnership. *Id.* In its analysis, the court followed two general rules of interpretation. First, according to the court, an entity's legal status should be ignored when necessary to avoid "exalting form over substance." *Id.* at 619, 37 FEP Cases at 981 (citing *Gregory v. Helvering*, 293 U.S. 465 (1935)). Second, the court utilized an "economic realities test," viewing the plaintiff's ownership and management interest in the group as reflecting the role of a partner rather than an employee. *Id.* at 620, 37 FEP Cases at 981. The court cited *Dowd* and subsequently held that because plaintiff could not separate himself from his management and ownership role in NHRA, he therefore could not be considered an employee entitled to the protections of the Act. *Id.* at 621, 37 FEP Cases at 982.

²⁹ *See Hyland*, 794 F.2d at 798, 41 FEP Cases at 186.

³⁰ *Id.*

³¹ *Id.* at 798, 41 FEP Cases at 187.

³² *Id.* at 796, 41 FEP Cases at 184-85 (citing *Zimmerman*, 704 F.2d at 353, 31 FEP Cases at 638; *First Catholic Slovak Ladies Ass'n*, 694 F.2d at 1070, 30 FEP Cases at 820-21).

ees.³³ With this goal in mind, the court looked to interpretations of "employee" under similar anti-discrimination statutes.³⁴

The court first reviewed an established line of precedent and acknowledged that an officer, director or major shareholder may be an employee for purposes of the ADEA.³⁵ Relying on additional precedent, the court further concluded that a proprietary interest is not inherently inconsistent with an employment interest.³⁶ Therefore, the court concluded that officers, directors and major shareholders can be employees and thus, protected under the Act.

The court next examined contrasting precedent that concluded that members of a partnership are not employees for purposes of the ADEA.³⁷ Specifically, the court cited *Hishon v. King & Spaulding*, a Title VII sex discrimination case, to hold that the anti-discrimination statutes do not protect members of a partnership.³⁸ The *Hyland* court noted that the Supreme Court in *Hishon* held that a member of a partnership is not an employee for the purposes of Title VII.³⁹ In *Hishon*, the United States Supreme Court recognized that once a court determines that an entity is a partnership and that the claimant is a partner within that partnership, he or she is not an employee and not entitled to benefits under Title VII.⁴⁰ Because it found that Title VII and the ADEA are similarly worded, the *Hyland* court relied on *Hishon* to find that members of a partnership are not employees for the purposes of the ADEA.⁴¹

Finally, the court found unpersuasive the Seventh Circuit's holding in *Dowd* that members of professional corporations are not employees for the purposes of Title VII.⁴² The *Hyland* court noted that the *Dowd* court held that a professional corporation is more similar to a partnership than to a corporation because, aside from tax treatment, a professional corporation retains management control, conducts itself as a partnership and is subject to similar liabilities.⁴³ The *Hyland* court dismissed this analysis because it held that "the use of the corporate form precludes any examination designed to determine whether the entity is in fact a partnership."⁴⁴ The court reasoned that once an entity decides to avail itself of the favorable tax treatment of a professional corporation,

³³ *Hyland*, 794 F.2d at 796, 41 FEP Cases at 185.

³⁴ *Id.* The court cited the Fair Labor Standard Act of 1938, 29 U.S.C. § 203(a) (1982) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(a) (1982), as statutes providing similar definitions of employee as under the ADEA.

³⁵ *Hyland*, 794 F.2d at 796, 41 FEP Cases at 185. See *Goldberg*, 366 U.S. at 28-29 (shareholders in knitting cooperative considered employees); *Zimmerman*, 704 F.2d at 351, 31 FEP Cases at 636 (active vice president implicitly considered employee); *First Catholic Slovak Ladies Ass'n*, 694 F.2d at 1070, 30 FEP Cases at 820 (officers receiving salary considered employees); *Stanojev*, 643 F.2d at 916, 920, 25 FEP Cases at 355, 359 (high level executive considered employee).

³⁶ *Hyland*, 794 F.2d at 796, 41 FEP Cases at 185 (citing *Goldberg*, 366 U.S. at 32).

³⁷ *Hyland*, 794 F.2d at 797, 41 FEP Cases at 185-86.

³⁸ *Hyland*, 794 F.2d at 797, 41 FEP Cases at 185 (citing *Hishon*, 467 U.S. 79, 80, 34 FEP Cases 1411, 1412 (1984) (Powell, J., concurring)). See also *Peat, Marwick, Mitchell and Co.*, 775 F.2d at 930, 38 FEP Cases at 1847; EEOC decision No. 85-4 EMP. PRAC. GUIDE (CCH) at 7040.

³⁹ See *Hyland*, 794 F.2d at 797, 41 FEP Cases at 185 (citing *Hishon*, 467 U.S. at 79-80, 34 FEP Cases at 1411-12 (Powell, J., concurring)).

⁴⁰ See *Hishon* at 80, 34 FEP Cases at 1411 (Powell, J., concurring).

⁴¹ *Hyland*, 794 F.2d at 797, 41 FEP Cases at 185.

⁴² *Id.* at 798, 41 FEP Cases at 186.

⁴³ *Id.*

⁴⁴ *Id.*

it must also bear the responsibility of adhering to appropriate discrimination laws.⁴⁵ The court therefore concluded that although modern partnerships and corporations are difficult to differentiate on the bases of structure and operation, this difficulty is not an appropriate reason to disregard the entity's legal form.⁴⁶

The court also refused to apply the "economic realities test," which requires inquiry into the actual responsibilities of the claimant in question.⁴⁷ Although the court conceded that an economic realities test may be applicable when distinguishing between an employee and a partner in an already formed and legally existing partnership,⁴⁸ the court stated that the test has no place as a means of identifying a partner within a corporate enterprise.⁴⁹ For the *Hyland* court, the terms corporate shareholder and partner are mutually exclusive.⁵⁰

Given this position, the *Hyland* court had little difficulty characterizing the plaintiff as an employee rather than a partner.⁵¹ According to the court, the plaintiff was not only an officer and a shareholder, but the explicit terms of his original agreement also designated him an employee of the corporation.⁵² Furthermore, the court added that there was nothing inconsistent between a proprietary interest and a term of employment, and thus the plaintiff should be protected from discrimination under the Act.⁵³ Having determined that the plaintiff was an employee within the meaning of the Act, the court remanded the case to the district court for a determination of whether the plaintiff had indeed suffered discrimination on the basis of his age.⁵⁴

Judge Cardamone dissented urging affirmance of the district court's ruling.⁵⁵ Judge Cardamone emphasized the need to focus on the manner in which the corporation functioned and insisted that labels did not provide appropriate guidance for purposes of the discrimination laws.⁵⁶ Admonishing the majority for choosing form over substance, the dissent asserted that NHRA would be most appropriately characterized as a partnership because each founding member had contributed equally, was required to practice in the same specialty, had agreed to share profits, losses and management responsibilities, and was subject to the same exposure to liability.⁵⁷ The dissent further supported its emphasis of substance over form by looking at the Act. According to Judge Cardamone's interpretation, Congress left the definition of "employee" deliberately vague in order to encourage courts to assess the individual's status on a case-by-case basis regardless of the form chosen by the business.⁵⁸

⁴⁵ *Id.* The court stated that NHRA's decision to incorporate, should prevent them from now saying that their corporation is "essentially a medical partnership among co-equal radiologists." *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.* at 797-98, 41 FEP Cases at 186.

⁴⁸ *Id.* at 798, 41 FEP Cases at 186.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 798, 41 FEP Cases at 187.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (Cardamone, J., dissenting).

⁵⁶ *Id.* at 799, 41 FEP Cases at 187 (Cardamone, J., dissenting).

⁵⁷ *Id.* at 800, 41 FEP Cases at 188 (Cardamone, J., dissenting).

⁵⁸ *Id.* at 799, 41 FEP Cases at 187 (Cardamone, J., dissenting). In addition to its reliance on *EEOC v. Dowd & Dowd*, the dissent cited *Armbruster v. Quinn*, 711 F.2d 1332, 32 FEP Cases 369 (6th Cir. 1983), which provides for examination of the entity's function and not its form. *See Hyland*,

After establishing the NHRA's status as a partnership in fact, the dissent's inquiry proceeded to examine the plaintiff's role within the "partnership." Again, the dissent reasoned that although it is tempting to label individuals based on legal categorizations, no *per se* rule exists that appropriately characterizes all individuals working for a corporation as employees under the Act.⁵⁹ The dissent concluded that because the plaintiff had the ability to determine compensation as well as control the direction of the entity, he could only be characterized as a partner, and would not be protected by the terms of the Act.⁶⁰

The majority's holding that members of professional corporations are employees, and thus entitled to protection under the ADEA creates a direct split between the law of the Second and Seventh Circuits. By definition, the Second Circuit refuses to classify members of a professional corporation as partners. Although the Second Circuit's analysis admittedly chooses form over substance, its emphasis on plain meaning, its concern for consistency in corporate title and meaning, and its emphasis on the policy purposes of the ADEA make it a more persuasive analysis than that of the Seventh Circuit.

The Second Circuit's decision can be analyzed from at least two perspectives. On one level, the court took a simple, straightforward, plain meaning approach. By examining the plain words and meaning of the statute,⁶¹ the terms of the plaintiff's employment contract⁶² and the corporate form of the employer,⁶³ the court easily reached the conclusion that the plaintiff was an employee. Therefore, he was appropriately entitled to protection under the ADEA.

On another level, the court's analysis centered on the policy implications of its decision. By examining the purposes of the Act and by focusing on its remedial nature, the court adopted a broad interpretation of "individuals" under the Act.⁶⁴ By including members of professional corporations within the ADEA's definition of "employee," the court extended the Act's coverage.

In *Hyland*, the Second Circuit found that the Act's goal of protecting individuals against discrimination outweighed the negative aspects of continuing to label as a corporation an entity acting like a partnership. The court's approach may result in over-inclusive protection because under the *Hyland* approach courts will tend to label more individuals as employees. Nevertheless, this broad protection is consistent with the Act's remedial nature and justifiably will advance civil rights in the area of age discrimination.

794 F.2d at 799, 41 FEP Cases at 187 (Cardamone, J., dissenting) (citing *Dowd*, 763 F.2d at 1177, 34 FEP Cases at 376). Justice Cardamone extended the reasoning of the *Armbruster* case to the situation presented by NHRA and concluded that the entity was best characterized as a partnership. *Id.* at 799, 41 FEP Cases at 187-88 (Cardamone, J., dissenting).

⁵⁹ See *Hyland*, 794 F.2d at 799, 41 FEP Cases at 187-88 (Cardamone, J., dissenting). Interestingly, the dissent ultimately relied on the relevant precedent which the majority acknowledged conclusively held that partners are not employees. See *id.* (Cardamone, J., dissenting) (citing *Hishon*, 467 U.S. at 77, 34 FEP Cases at 1410; *Peat, Marwick, Mitchell and Co.*, 775 F.2d at 930, 38 FEP Cases at 1847; EEOC decision No. 85-4 EMP. PRAC. GUIDE at 7040).

⁶⁰ *Hyland*, 794 F.2d at 802, 41 FEP Cases at 190 (Cardamone, J., dissenting).

⁶¹ See *Garrett*, 721 F.2d at 980-81, 33 FEP Cases at 488-89 (a plain reading of the statute provides that only those individuals directly employed by the employer are protected).

⁶² The plaintiff's contract terms stated that each physician was required to be a full time employee. See *Hyland*, 794 F.2d at 795, 41 FEP Cases at 184.

⁶³ The entity was titled a corporation for tax and employee benefit purposes. See *id.* at 798, 41 FEP Cases at 186.

⁶⁴ See *id.* at 796, 41 FEP Cases at 185.

The court additionally emphasized the need to maintain consistency in the business entity's behavior. In emphasizing that NHRA was organized specifically as a corporation in order to gain tax benefits, the court stressed that the corporation also should be required to comply with the laws applicable to traditional corporations.⁶⁵ The court's desire to hold businesses to a relatively consistent categorization seems appropriate. To allow corporations to classify themselves as partnerships for one purpose yet maintain their corporate status for another would encourage evasion of the entity's responsibilities.

The traditional notion is that choosing form over substance fails to account for the reality of the operation and thus creates a veil over the business' true identity.⁶⁶ The dissenting opinion in *Hyland* hinges on this idea, and builds its case by focusing on a wide range of precedent which disfavors rigidly holding entities to their legally declared forms.⁶⁷ Although it may be true that the continuing use of labels promotes a legal fiction, where fictions are created and acknowledged as legitimate business forms, applicable laws must be administered consistently in order best to fulfill their intended policies and meet the entity's need for predictability concerning its responsibilities. Thus, continuing to label and treat NHRA as a professional corporation under the ADEA gives both the corporation and its employees notice concerning their obligations accompanying NHRA's corporate status.

In *Hyland v. New Haven Radiology Associates, P.C.*, the United States Court of Appeals for the Second Circuit held that members of a professional corporation are employees for purposes of the Age Discrimination in Employment Act. The court's treatment of employees under the ADEA is significant because it provides a counterweight to the Seventh Circuit's ruling in *Dowd* under Title VII. Although both courts' approaches are persuasive, the Second Circuit's two level analysis, particularly its emphasis on protecting individuals from discrimination and its emphasis on the inconsistency of classifying corporate shareholders as partners for only some purposes makes it a more persuasive opinion.

B. **Waiver of Fact-Based Claims Under the ADEA: Runyan v. National Cash Register Corp.*¹

The Age Discrimination in Employment Act (ADEA) protects workers over the age of 40 from arbitrary age discrimination in employment.² When Congress enacted the

⁶⁵ See *id.* at 798, 41 FEP Cases at 186.

⁶⁶ See *id.* at 799, 41 FEP Cases at 187 (Cardamone, J., dissenting) (citing *Gregory v. Helvering*, 293 U.S. 465, 470 (1935)).

⁶⁷ See *id.* at 800, 41 FEP Cases at 188 (citing *First Catholic Slovak Ladies Ass'n*, 694 F.2d at 1070, 30 FEP Cases at 820-21).

* By David Y. Bannard, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ *Runyan v. National Cash Register (NCR) Corp.*, 787 F.2d 1039, 40 FEP Cases 807 (6th Cir.) (*en banc*), *cert. denied*, 107 S. Ct. 178, 41 FEP Cases 1712 (1986).

² Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1982) [hereinafter ADEA]. Section 623(a) of the ADEA provides in relevant part: "It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age" *Id.* § 623(a)(1). The 1986 amendments to the ADEA removed any upper age limit for those to be protected by the Act. 29 U.S.C. § 631(a) (amended 1986). Section

ADEA, there was considerable debate concerning the most effective means of enforcing the Act's provisions.⁵ Congress considered three separate approaches: seeking to protect workers as a group, as in the National Labor Relations Act (NLRA),⁴ equating age discrimination with racial discrimination, as in Title VII,⁵ and incorporating the enforcement provisions of the Fair Labor Standards Act (FLSA).⁶ Congress ultimately adopted a hybrid of these approaches based primarily on the FLSA's enforcement provisions.⁷ This approach, however, has caused confusion regarding an employee's ability to waive his or her rights under the ADEA.⁸

The Supreme Court has held that courts should interpret the enforcement provisions of the FLSA and the ADEA alike, unless the ADEA specifically provides to the contrary.⁹ The Court has also found, however, that parts of the ADEA and Title VII are virtually identical,¹⁰ and, furthermore, has stated that Congress enacted these two statutes for the common purpose of eliminating workplace discrimination.¹¹ Thus, it is not altogether clear to what extent interpretations of the enforcement provisions of the FLSA and Title VII apply to the ADEA.¹²

The Supreme Court has held that, in most cases, an employee may not waive an FLSA claim.¹³ The Court has not addressed, however, whether an employee may waive a fact-based FLSA claim,¹⁴ but has cited with approval a lower court decision authorizing

631(a) now provides that: "The prohibitions in this chapter . . . shall be limited to individuals who are at least 40 years of age." *Id.*

Section 621(b) states that the purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).

⁵ See *Lorillard v. Pons*, 434 U.S. 575, 577-79, 16 FEP Cases 885, 886 (1978).

⁴ 29 U.S.C. § 160 *et seq.* (1982).

⁵ 42 U.S.C. § 2000e-2 *et seq.* (1982).

⁶ See *Lorillard*, 434 U.S. at 578, 16 FEP Cases at 886 (citing 29 U.S.C. § 216 *et seq.* (1970)).

⁷ *Id.* Section 626(b) provides that: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section 211(b), 216 (except for subsection (a) thereof), and 217 of this title (referring to the FLSA's enforcement provisions), and subsection (c) of this section." 29 U.S.C. § 626(b) (1982).

⁸ See *Runyan*, 787 F.2d at 1039, 40 FEP Cases at 807.

⁹ *Lorillard*, 434 U.S. at 582, 16 FEP Cases at 887-88.

¹⁰ See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755, 19 FEP Cases 1167, 1169 (1979). The Court referred specifically to § 14(b) of the ADEA, comparing it with § 706(c) of Title VII. *Id.*

¹¹ *Id.* at 756, 19 FEP Cases at 1169.

¹² See *Runyan*, 787 F.2d at 1039, 40 FEP Cases at 807. Compare *Runyan v. NCR Corp.*, No. 83-3862, 37 FEP Cases 1086, 1090 (6th Cir. 1985) (opinion withdrawn June 17, 1985) [hereinafter *Runyan II*] (FLSA analysis precludes all waivers of claims arising under the ADEA) *rev'd*, 787 F.2d 1039, 40 FEP Cases 807 (1986) (*en banc*) with *Runyan v. NCR Corp.*, 573 F. Supp. 1454, 1462, 33 FEP Cases 322, 328 (S.D. Ohio 1983) [hereinafter *Runyan I*] (Title VII analysis allows valid waiver when bona fide dispute concerning employer's liability exists and employee's release is knowing and voluntary).

¹³ See, e.g., *Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

¹⁴ A fact-based claim is a dispute whose resolution turns on an issue of fact, such as the number of hours worked, or whether an employee was dismissed because of advanced age. See, e.g., *Runyan III*, 787 F.2d at 1044, 40 FEP Cases at 811 (whether employee discharged because of age at issue in ADEA dispute); *Strand v. Garden Valley Telephone Co.*, 51 F. Supp. 898, 904-05 (D. Minn. 1943) (number of hours worked at issue in FLSA dispute). A law-based claim, in contrast, is a

just such a waiver.¹⁵ Thus a waiver of an employee's fact-based claim may also be allowed under the ADEA.

If a court allows waiver of a fact-based claim under the ADEA, the issue remains as to what standard the court should apply to determine whether the waiver was validly executed. Because the Supreme Court has not yet allowed waivers of ADEA claims,¹⁶ the Court has not yet articulated a standard for determining when such a waiver would be valid. The Court, however, has allowed and encouraged employee waivers of fact-based Title VII claims.¹⁷ Such waivers are valid, the Court has held, when the employee executes them knowingly and voluntarily.¹⁸ Thus, two major issues are presented by waivers of fact-based ADEA claims: whether courts may allow such waivers, and, if they are allowed, what standard courts should apply to determine whether a waiver was validly executed.¹⁹

During the *Survey* year, in *Runyan v. National Cash Register (NCR) Corp.*, the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, found that the release of an employee's fact-based ADEA claim unsupervised by the EEOC was valid.²⁰ At issue in *Runyan* was whether an employee's release of all claims arising from his employment and termination would bar his later suit under the ADEA.²¹ The Sixth Circuit held that an employee, under the circumstances of *Runyan*, may validly waive his or her claims arising under the ADEA when the dispute concerns an issue of fact — in this case whether or not the employee's termination was due to age.²²

In *Runyan*, National Cash Register Corporation (NCR) hired Richard Runyan, an experienced 53 year-old labor lawyer, as Assistant General Counsel.²³ Approximately six years later, James E. Rambo, NCR's General Counsel, informed Runyan that his employment at NCR would be terminated within three months.²⁴ Runyan told Rambo that he felt his termination was related to age discrimination.²⁵ Runyan and representatives

dispute whose resolution turns on an issue of law, such as the scope of the Act's coverage. See, e.g., *Gangi*, 328 U.S. at 114 (scope of Act's coverage at issue in FLSA dispute).

¹⁵ *Gangi*, 328 U.S. at 115 n.10 (citing *Strand*, 51 F. Supp. at 904-05).

¹⁶ *Lorillard*, 434 U.S. at 582, 16 FEP Cases at 887-88.

¹⁷ See, e.g., *Pilon v. University of Minn.*, 710 F.2d 466, 468, 32 FEP Cases 508, 509 (8th Cir. 1983) (concluding that clear and unambiguous waiver of Title VII claim signed with advice of counsel is valid); *Strozier v. General Motors Corp.*, 635 F.2d 424, 426, 24 FEP Cases 1370, 1372 (5th Cir. Unit B 1981) (per curiam) (holding that voluntary settlement of Title VII claim negotiated with aid of counsel is valid). See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 & n.15, 7 FEP Cases 81, 87 & n.15 (1974) ("presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement").

¹⁸ See *Alexander*, 415 U.S. at 52 n.15, 7 FEP Cases at 87 n.15 ("In determining the effectiveness of any [Title VII] waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing."). See also *Pilon*, 710 F.2d at 467, 32 FEP Cases at 509; *Strozier*, 635 F.2d at 426, 24 FEP Cases at 1372.

¹⁹ The Equal Employment Opportunity Commission (EEOC) issued a proposal that would allow private settlements of ADEA claims if the waiver is executed knowingly and voluntarily. See Draft Notice of Proposed Rulemaking, 141 Daily Lab. Rep. (BNA) A-6, A-7 (July 23, 1985) for EEOC proposed amendment to 29 C.F.R. § 1627.16 authorizing private settlements of ADEA claims, using the Title VII "knowing and voluntary" standard.

²⁰ See *Runyan III*, 787 F.2d at 1044, 40 FEP Cases at 811.

²¹ See *id.* at 1040, 40 FEP Cases at 808.

²² *Id.* at 1044, 40 FEP Cases at 811.

²³ *Id.* at 1040, 40 FEP Cases at 808.

²⁴ *Id.*

²⁵ *Id.*

of NCR subsequently entered into several discussions which resulted in the parties executing a one year consulting agreement.²⁶ Approximately six months later, Runyan asked Rambo to secure an extension of the agreement and an increase in compensation from NCR.²⁷ After discussions with other NCR officials, Rambo informed Runyan that the agreement would not be extended, but that NCR would increase Runyan's compensation if Runyan would execute a release of all claims he had or might have against NCR relating to his employment, his termination, or both.²⁸ Runyan agreed and NCR entered into a written amendment to the consulting agreement which increased Runyan's guaranteed compensation.²⁹ In return, Runyan signed an "Accord & Satisfaction, Release and Discharge" by which he waived all claims he had or might have against NCR "arising [from his] employment and/or the termination of any employment" with NCR.³⁰ The consulting agreement expired six months later and Runyan's employment ended.³¹ Approximately six months after his termination, Runyan filed a charge of age discrimination with the Secretary of Labor, and six months after that, he commenced an ADEA action in district court.³²

The district court ("*Runyan I*") applied a Title VII analysis³³ and held that Runyan had executed the release "knowingly and voluntarily," that the release was not prospective,³⁴ and that it was thus valid to bar Runyan's claim.³⁵ On appeal, a panel of the Sixth

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1040-41, 40 FEP Cases at 808-09.

³⁰ *Id.* at 1041, 40 FEP Cases at 808-09. The full text of Runyan's release reads as follows:

In consideration of the "Amendment to Consulting Agreement" executed by NCR on November 25, 1977, receipt of which is hereby acknowledged and which I acknowledge to be in full accord and satisfaction of any and all claims I may have against NCR arising out of the course of my employment and/or the termination of any employment and in further consideration of the said "Amendment to Consulting Agreement," I, Richard V. Runyan, hereby release and forever discharge NCR, its successors, assigns, transferees, officers, employees, representatives and agents from all manner of action and actions, cause and causes of action, suits, debts, contracts, controversies, agreements, promises, damages, and demands whatsoever in law or in equity, which against NCR, I, Richard V. Runyan, ever had, now have, or which I hereafter can, shall or may, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, save and except the aforementioned "Amendment to Consulting Agreement" of November 25, 1977, and the underlying "Consulting Agreement of June 1, 1977."

I have read this release and understand all of its terms. I execute it voluntarily and with full knowledge of its significance.

Id.

³¹ *Id.* at 1041, 40 FEP Cases at 809.

³² *Id.*

³³ *Runyan I*, 573 F. Supp. at 1462, 33 FEP Cases at 328. Under a Title VII analysis, a valid release must be voluntarily and knowingly executed. See *Alexander*, 415 U.S. at 52 & n.15, 7 FEP Cases at 87 & n.15. See also *infra* note 103 for cases discussing waiver under Title VII.

³⁴ A prospective waiver of rights would lead to the same circumvention of congressional intent as a waiver of legal issues under the FLSA. An employer could condition the receipt of benefits, including employment, on an employee's execution of a release of all prospective Title VII or ADEA claims, thus negating the purposes of the Acts. See *Alexander*, 415 U.S. at 51, 7 FEP Cases at 86.

³⁵ *Runyan I*, 573 F. Supp. at 1458, 1462, 33 FEP Cases at 325, 328. The district court noted that under the FLSA there can be no waiver when there is no dispute as to the employer's liability.

Circuit ("*Runyan II*") applied a narrow FLSA analysis³⁶ and reversed,³⁷ holding that ADEA rights may not be waived without EEOC supervision.³⁸ The panel decision rejected the district court's application of Title VII precedent, finding that FLSA precedent controlled.³⁹ Furthermore, the panel's analysis of Supreme Court FLSA precedent appeared to conclude that *all* waivers of claims arising under the FLSA are invalid, thus mandating reversal of the lower court.⁴⁰ On rehearing, the Court of Appeals for the Sixth Circuit, sitting *en banc* ("*Runyan III*"), reversed the panel's earlier decision, holding that a release of a bona fide factual dispute under the ADEA executed without EEOC supervision was valid as a matter of law.⁴¹

The *Runyan III* court began its analysis by reviewing the history of the ADEA and the FLSA, concluding that the FLSA's judicial construction concerning waiver was applicable to the ADEA.⁴² The court first examined the FLSA, finding no language in the Act's text concerning an employee's ability to release his or her right to wages or damages.⁴³ The court then examined the Supreme Court's decisions in *Brooklyn Savings Bank v. O'Neil*⁴⁴ and *Schulte, Inc. v. Gangi*⁴⁵ concerning the release of FLSA rights.⁴⁶

The *Runyan III* court noted that, in *O'Neil* and *Gangi*, the Supreme Court held that under most circumstances an employee may not waive his or her rights under the FLSA.⁴⁷ In *Brooklyn Savings Bank v. O'Neil*, the first case to raise the issue of the validity of an employee's waiver of FLSA rights, the Court held that, absent a bona fide dispute, a waiver or release of an employer's liability under the FLSA was contrary to the statute's policy and would therefore not bar an employee's subsequent claim.⁴⁸ The *O'Neil* Court left open the question of whether a waiver or release could be valid where there existed a bona fide dispute.⁴⁹ In *Schulte, Inc. v. Gangi*, the Court partially answered this question, concluding that for reasons similar to those posited in *O'Neil*, an employee could not

Id. at 1460, 33 FEP Cases at 326-27 (citing *Gangi*, 328 U.S. at 108; *O'Neil*, 324 U.S. at 697). The court concluded, however, that it had seen no authority holding invalid a release of an employment discrimination or FLSA claim when a bona fide dispute exists as to the employer's liability. *Id.* at 1461, 33 FEP Cases at 327.

³⁶ Under an FLSA analysis, an employee generally may not waive his or her claims. *See, e.g., Gangi*, 328 U.S. at 116; *O'Neil*, 324 U.S. at 704. *See also infra* notes 47-57 and accompanying text for a discussion of waiver under the FLSA.

³⁷ *Runyan II*, No. 83-3862, 37 FEP Cases at 1091.

³⁸ *Id.* at 1090. It appears that the majority of the panel thought that *any* waiver of FLSA claims would be invalid. *Id.* at 1088-89. This opinion did not cite or mention *Strand*.

³⁹ *See id.* at 1087-91.

⁴⁰ *Id.* at 1090-91. The dissenting opinion, however, distinguished settlements of disputes concerning legal issues from settlements of fact-based claims in FLSA cases, citing *Strand* for the proposition that bona fide disputes over factual issues are amenable to settlements under the FLSA. *Id.* at 1091 (Wellford, J., dissenting) (citing *Strand*, 51 F. Supp. at 904-05). Judge Wellford found the *Strand* exception applicable to the ADEA in general and *Runyan* in particular. *Id.* at 1091-92 (Wellford, J., dissenting).

⁴¹ *Runyan III*, 787 F.2d at 1044, 40 FEP Cases at 811.

⁴² *See id.* at 1042-44, 40 FEP Cases at 809-11.

⁴³ *Id.* at 1041, 40 FEP Cases at 809.

⁴⁴ *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).

⁴⁵ *Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

⁴⁶ *Runyan III*, 787 F.2d at 1041-43, 40 FEP Cases at 809-10.

⁴⁷ *Id.* (citing *Gangi*, 328 U.S. at 116; *O'Neil*, 324 U.S. at 704).

⁴⁸ *O'Neil*, 324 U.S. at 707.

⁴⁹ *Id.* at 714.

bargain away his or her rights under the FLSA, even in a settlement resulting from a bona fide dispute over the scope of the FLSA's coverage.⁵⁰ The *Runyan III* court observed that the *Gangi* Court, however, did not specifically address the question of whether an issue of fact under the FLSA, rather than an issue of law such as coverage, could be resolved by agreement.⁵¹ The *Runyan III* court, however, noted that the *Gangi* Court cited with approval *Strand v. Garden Valley Telephone Co.*⁵² According to the *Runyan III* court, *Strand* stands for the proposition that although waivers of FLSA rights in bona fide legal disputes are ineffective, compromises and settlements in bona fide disputes over factual claims may be effective.⁵³

In sum, based on this precedent, the *Runyan III* court concluded that while the Supreme Court had held invalid employee waivers of liquidated damages, or the right to wages or liquidated damages when the dispute concerned the legal question of the scope of the Act's coverage,⁵⁴ the Supreme Court's decisions did not address the validity of an employee's release of an FLSA claim when there is a bona fide dispute over a matter of fact — in this case whether NCR released Runyan because of his age.⁵⁵ The *Runyan III* court noted the *Gangi* Court's approving citation of *Strand*,⁵⁶ and accordingly relied on *Strand* and the *Gangi* Court's approving citation to hold that a waiver of FLSA rights in a fact-based dispute is valid.⁵⁷

The Court of Appeals for the Sixth Circuit then turned to the language of the ADEA, finding that, like the FLSA, the text of the Act contains no mention of whether an employee may waive his or her rights.⁵⁸ Although acknowledging that the ADEA incorporates the FLSA's enforcement standards,⁵⁹ the court stated that the purposes behind Congress's enactment of the ADEA and its enactment of the FLSA were different.⁶⁰ Relying on language from the *Gangi* opinion, the court found that Congress enacted the FLSA to protect the lowest paid segment of society by providing a minimum

⁵⁰ *Gangi*, 328 U.S. at 114.

⁵¹ *Runyan III*, 787 F.2d at 1042-43, 40 FEP Cases at 810 (citing *Gangi*, 328 U.S. at 114-15).

⁵² *Id.* at 1043, 40 FEP Cases at 810 (citing *Gangi*, 328 U.S. at 115 n.10 (citing *Strand v. Garden Valley Tel. Co.*, 51 F. Supp. 898, 904-05 (D. Minn. 1943))).

⁵³ *Id.* (citing *Strand*, 51 F. Supp. at 904-05). Issues of law are to be resolved by a judge, while in FLSA cases, issues of fact may be resolved by a jury. See *Lorillard*, 434 U.S. at 585, 16 FEP Cases at 889. In *Strand*, the court noted that an employee's right to damages under the FLSA is mandatory; the courts may exercise no discretion in awarding damages, and parties may not waive their rights to them. 51 F. Supp. at 904. Otherwise, stated the court, the intent of Congress would be defeated. *Id.* On the other hand, the court found that parties may resolve a factual dispute, such as the number of hours worked. *Id.* at 904-05. Although the *Strand* court did not explicitly so state, the implication is that such a settlement of a factual issue, if executed clearly and with a full understanding of the dispute and the effects of the agreement, would not undermine the purposes of the FLSA. See generally *id.*

⁵⁴ *Runyan III*, 787 F.2d at 1042, 40 FEP Cases at 809-10.

⁵⁵ *Id.* at 1043-44, 40 FEP Cases at 810-11.

⁵⁶ *Id.* at 1043, 40 FEP Cases at 810 (citing *Strand*, 51 F. Supp. at 898).

⁵⁷ *Runyan III*, 787 F.2d at 1043, 40 FEP Cases at 810 (citing *Strand*, 51 F. Supp. at 904-05). See also *Rigopoulos v. Kervan*, 47 F. Supp. 576 (S.D.N.Y. 1942); *Weiss v. Testrite Instrument Co.*, 272 A.D. 696, 74 N.Y.S.2d 673 (1947); *Cassese v. Manufacturers Trust Co.*, 182 Misc. 344, 46 N.Y.S.2d 624 (N.Y. City Ct. 1943) (all allowing waiver of fact-based FLSA claims).

⁵⁸ *Runyan III*, 787 F.2d at 1043, 40 FEP Cases at 810.

⁵⁹ *Id.*

⁶⁰ *Id.*

wage.⁶¹ In contrast, the court found that Congress enacted the ADEA to protect a different segment of society whose members are often affluent and easily able to obtain legal counsel.⁶² The court concluded its comparison of the FLSA and ADEA by stating that an unofficially sanctioned practice of recognizing settlements of ADEA disputes negotiated in good faith had developed.⁶³ Thus, although it noted that the two Acts have different underlying purposes, the *Runyan III* court determined that the ADEA incorporates the FLSA's enforcement provisions and therefore allows waiver of a fact-based claim.

The *Runyan III* court then applied its analysis concerning waiver of FLSA and ADEA claims to the particular facts of Runyan's claim, finding that the dispute between Runyan and NCR was over a matter of fact — whether or not Runyan's discharge was due to his age.⁶⁴ The court found that Runyan's case fell within the *Strand* exception to the Supreme Court's limitation on waivers of FLSA claims which allows waivers of fact-based FLSA claims.⁶⁵ Accordingly, the court held that the release of an ADEA claim in a bona fide factual dispute "of this type under these circumstances," unsupervised by the EEOC, is valid.⁶⁶ Because it found that *Runyan III* turned on a bona fide dispute of fact, the court upheld the validity of the release.⁶⁷

The *Runyan III* court qualified its decision by noting the circumstances surrounding the case. The court found that Runyan was a well-paid, well-educated labor lawyer who, the court suggested, tried to take advantage of NCR.⁶⁸ The court found that the release was "knowingly and deliberately executed" by an attorney thoroughly familiar with this area of the law.⁶⁹ These factors, the court noted, indicated that Runyan did not need the protections that the FLSA and Supreme Court FLSA precedent provide for underpaid, and potentially under-educated people.⁷⁰

The final section of the *Runyan III* court's analysis addressed the issue of waiver in ADEA cases generally. The court stated that the judiciary should not allow employers to take advantage of their superior bargaining position to circumvent policies of the ADEA.⁷¹ The court stressed the importance of good faith in such agreements and stated that courts should encourage amicable settlements of disputes where both parties are dealing at arm's length,⁷² and where overreaching or exploitation are not inherent in the case at hand.⁷³ The court also noted that a recently proposed EEOC rule encourages voluntary settlements of disputes arising under the ADEA because voluntary settlements, the EEOC has determined, are consistent with congressional intent.⁷⁴ Furthermore,

⁶¹ *Id.* (citing *Gangi*, 328 U.S. at 116).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1044, 40 FEP Cases at 811.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 1044-45, 40 FEP Cases at 811.

⁷² *Id.* at 1045, 40 FEP Cases at 811 (citing *Gangi*, 328 U.S. at 121-22 (Frankfurter, J., dissenting)).

⁷³ *Id.* at 1045, 40 FEP Cases at 811-12.

⁷⁴ *Id.* at 1045, 40 FEP Cases at 812 (citing Draft Notice of Proposed Rulemaking, 141 Daily Lab. Rep. (BNA) A-6, A-7 (July 23, 1985)).

refusing to apply a bright-line test that would require a recitation of the ADEA rights waived, the court stated that courts should apply ordinary contract principles to determine whether a plaintiff's waiver of an ADEA claim was knowing and voluntary.⁷⁵

The dissent in *Runyan III* argued that the majority's distinction between persons the ADEA was intended to protect and persons the FLSA was intended to protect avoided the fundamental issue: that of an employee's disadvantageous bargaining position relative to the employer.⁷⁶ The dissent found that Congress intended the ADEA to equalize the parties' bargaining positions by incorporating the FLSA's enforcement procedures.⁷⁷ By allowing employees to waive their ADEA claims when the dispute is one of fact, the dissent argued, the majority was diminishing older employees' statutory protections.⁷⁸ The dissent admitted that *Runyan* presented an unsympathetic plaintiff,⁷⁹ but argued that the precedent could have a negative impact on other workers less sophisticated in legal matters.⁸⁰ The dissent noted that the ADEA was enacted to protect a broad class of persons, not just attorneys.⁸¹ The dissenting opinion concluded by stating that, at a minimum, a valid waiver of rights under the ADEA should expressly mention what rights are to be waived.⁸² Noting that *Runyan's* broadly worded waiver made no mention of age discrimination claims, the dissent contended that the ADEA could not afford any of its intended protection to employees if the court allowed waiver of its provisions through such a broad, nonspecific agreement.⁸³

In summary, the Sixth Circuit found that an employee may "knowingly and deliberately" execute a release of a fact-based claim arising under the ADEA.⁸⁴ The *Runyan III* court, in stressing that the judiciary must not allow employers to take advantage of their employees,⁸⁵ stated that the determination of the validity of an ADEA settlement and release should be governed by contract principles in order to ensure that an employee's waiver of ADEA claims was knowing and voluntary and that the settlement of differences was amicable and honest.⁸⁶ The dissent, however, disputed the majority's holding, stating that it lacked fidelity to Congress's intent.⁸⁷ That intent, argued the dissent, was to protect older workers by equalizing their ability to bargain with employers.⁸⁸ By allowing releases of claims based on factual issues, the dissent contended, the court reduced the congressionally mandated protection of ADEA claimants.⁸⁹

Runyan III presented the Sixth Circuit with two difficult issues to resolve: whether an employee may waive a fact-based ADEA claim, and if so, what standard should the court apply to determine whether such a waiver was validly executed. The *Runyan III* court was justified in determining that employees may waive fact-based ADEA claims.

⁷⁵ *Id.* at 1044 n.10, 40 FEP Cases at 811 n.10.

⁷⁶ *Id.* at 1046, 40 FEP Cases at 812 (Engel, J., dissenting).

⁷⁷ *Id.* (Engel, J., dissenting).

⁷⁸ *Id.* (Engel, J., dissenting).

⁷⁹ *Id.* (Engel, J., dissenting).

⁸⁰ *Id.* at 1046, 40 FEP Cases at 813 (Engel, J., dissenting).

⁸¹ *Id.* (Engel, J., dissenting).

⁸² *Id.* (Engel, J., dissenting).

⁸³ *Id.* (Engel, J., dissenting).

⁸⁴ *Id.* at 1044, 40 FEP Cases at 811.

⁸⁵ *Id.* at 1044-45, 40 FEP Cases at 811.

⁸⁶ *Id.* at 1044 n.10, 1045, 40 FEP Cases at 811 & n.10.

⁸⁷ *Id.* at 1045, 40 FEP Cases at 812 (Engel, J., dissenting).

⁸⁸ *Id.* at 1046, 40 FEP Cases at 812 (Engel, J., dissenting).

⁸⁹ *Id.* at 1046, 40 FEP Cases at 812-13 (Engel, J., dissenting).

The court did not, however, articulate a clear standard for determining when such a waiver is valid.

The *Runyan III* court correctly determined that an employee may waive a fact-based ADEA claim.⁹⁰ The Sixth Circuit correctly distinguished the Supreme Court's FLSA decisions which refuse to allow waivers of claims where coverage — a question of law — was disputed,⁹¹ from *Runyan III*, where a factual issue was in dispute.⁹² Although finding that the ADEA must be construed consistently with the FLSA,⁹³ the *Runyan III* court clearly demonstrated that the Supreme Court has left open the issue of whether fact-based FLSA claims may be waived.⁹⁴ The court then convincingly concluded that waiver of fact-based claims is consistent with the fundamental purposes of the ADEA.⁹⁵

When an employee with a bona fide ADEA complaint waives his or her claims arising under the Act, the purposes of the Act are not undermined, as long as such a waiver is fact-based and not prospective.⁹⁶ The Act's provisions remain in force in that case, because the only dispute is one of fact. Employers could thus evade the Act's mandate only if they conditioned an employee's hiring or other benefits on a prospective waiver of any potential fact-based ADEA claim. In addition, the claimant's choice to forego the judicial options available may save him or her an often lengthy wait for a trial, the expense of litigation, and the difficulty of proving issues of fact. Indeed, settlement may result in an immediate resolution of the dispute which the claimant finds satisfactory. Therefore, allowing private settlements of fact-based ADEA claims may encourage employees to act as private attorneys general, and consequently may reinforce the provisions of the Act. Thus, the *Runyan III* court's upholding the validity of Runyan's waiver is consistent both with prior Supreme Court precedent and with the purposes of the ADEA.

Although the *Runyan III* court amply supported its conclusion that an employee may waive a fact-based ADEA claim, the opinion is deficient in that the court did not mandate a clear test for determining when such waivers have been validly executed. The *Runyan III* court did not explicitly articulate a standard for determining when the execution of a waiver is valid; it found, however, that Runyan had knowingly and deliberately executed the release.⁹⁷ This standard stands at the heart of *Runyan III*. The waiver which Runyan executed was broadly worded and nonspecific.⁹⁸ The dissent objected to upholding the validity of such a waiver, arguing that a minimum requirement of a valid waiver should be a recitation of the rights to be waived.⁹⁹ The majority, however, refused to mandate such a bright-line test.¹⁰⁰ The court's opinion, however,

⁹⁰ *Id.* at 1044, 40 FEP Cases at 811.

⁹¹ *Id.* at 1041-43, 40 FEP Cases at 809-10.

⁹² *Id.* at 1043, 40 FEP Cases at 810.

⁹³ *Id.* at 1042-44, 40 FEP Cases at 809-11.

⁹⁴ *Id.* at 1044-45, 40 FEP Cases at 811-12.

⁹⁵ *Id.* at 1044, 40 FEP Cases at 811.

⁹⁶ See *Alexander*, 415 U.S. at 51, 7 FEP Cases at 86. A prospective waiver of rights would lead to the same circumvention of congressional intent as a waiver of legal issues under the FLSA. An employer could condition the receipt of benefits, including employment, on an employee's execution of a release of all prospective Title VII or ADEA claims, thus negating the purposes of the Acts.

⁹⁷ *Runyan III*, 787 F.2d at 1044, 40 FEP Cases at 811.

⁹⁸ See *supra* note 30 for the text of Runyan's release.

⁹⁹ *Runyan III*, 787 F.2d at 1046, 40 FEP Cases at 813 (Engel, J., dissenting).

¹⁰⁰ *Id.* at 1044 n.10, 40 FEP Cases at 811 n.10.

made clear the importance of good faith and arm's-length bargaining between the parties to such an agreement.¹⁰¹ The release, concluded the court, was knowingly and deliberately executed and therefore valid.¹⁰²

The Sixth Circuit's knowing and deliberately executed standard is similar to the standard courts use under Title VII.¹⁰³ The *Runyan III* court correctly noted that although the ADEA was not incorporated into Title VII,¹⁰⁴ both statutes were enacted to prevent certain types of discrimination.¹⁰⁵ By focusing on the anti-discriminatory aspect of the ADEA, the court implicitly raised the issue of the applicability of the judicial construction of the validity of waivers under Title VII.¹⁰⁶ Courts use a "knowing and voluntary" standard for judging the validity of a waiver under Title VII.¹⁰⁷ Therefore, because the purposes of Title VII and the ADEA are similar, a knowing and voluntary standard for waiver of an ADEA claim is appropriate.

Requiring that releases be knowingly and voluntarily executed strikes the correct balance between the employee's need for the ADEA's protection and the utility of an alternate means of resolving these disputes. At least one court has already relied on this standard to find invalid a release executed under circumstances different from *Runyan's*.¹⁰⁸ Thus, a knowing and voluntary standard is flexible enough to allow courts to effectuate the purposes of the Act in individual cases. Furthermore, the EEOC proposed, in response to *Runyan II*, that knowing and voluntary waivers of ADEA rights executed without EEOC supervision be allowed.¹⁰⁹ This proposed rule relied on the ADEA's goals both of encouraging employers and workers to find solutions to the problems created by age in employment and of encouraging prompt settlement of ADEA claims.¹¹⁰ The EEOC proposed that courts apply the knowing and voluntary standard to ADEA waivers

¹⁰¹ *Id.* at 1044-45 & 1044 n.10, 40 FEP Cases at 811-12 & 811 n.10.

¹⁰² *Id.* at 1044, 40 FEP Cases at 811.

¹⁰³ See, e.g., *Pilon v. University of Minn.*, 710 F.2d 466, 468, 32 FEP Cases 508, 509 (8th Cir. 1983) (concluding that clear and unambiguous waiver of Title VII claim signed with advice of counsel is valid); *Strozier v. General Motors Corp.*, 635 F.2d 424, 426, 24 FEP Cases 1370, 1372 (5th Cir. Unit B 1981) (per curiam) (holding that voluntary settlement of Title VII claim negotiated with aid of counsel is valid). See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 & n.15, 7 FEP Cases 81, 87 & n.15 (1974) ("presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement").

¹⁰⁴ Title VII protects workers only from discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

¹⁰⁵ See *Oscar Mayer*, 441 U.S. at 756, 19 FEP Cases at 1169.

¹⁰⁶ Title VII prohibits discriminatory practices in employment (42 U.S.C. §§ 2000e-2 *et seq.*), while the FLSA establishes minimum wage and hour standards. See *Gangi*, 328 U.S. at 116. See also *Oscar Mayer*, 441 U.S. at 756, 19 FEP Cases at 1169 ("the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace . . .").

¹⁰⁷ See *supra* note 103.

¹⁰⁸ See *Valenti v. International Mill Serv., Inc.*, 634 F. Supp. 57, 60 (E.D. Pa. 1985) (distinguishing plaintiff in *Valenti* from plaintiff in *Runyan II*; jury finding that release of ADEA claim not knowingly or voluntarily executed, thus judge found waiver invalid); *Bernstein v. Consolidated Foods Corp.*, 622 F. Supp. 1096, 1105-06, 36 FEP Cases 1333, 1341 (N.D. Ill. 1984) (distinguishing *Runyan II* on basis of *Runyan's* legal expertise; finding that settlement of ADEA claim must be knowing and voluntary).

¹⁰⁹ See Draft Notice of Proposed Rulemaking, 141 Daily Lab. Rep. (BNA) A-6, A-7 (July 23, 1985) for EEOC proposed amendment to 29 C.F.R. § 1627.16 authorizing private settlements of ADEA claims, using the Title VII "knowing and voluntary" standard.

¹¹⁰ See *id.*

as well as Title VII waivers.¹¹¹ This standard has the added advantage of incorporating the judicially created Title VII standard for a validly executed waiver, making a body of prior caselaw apposite to ADEA actions.¹¹²

In summary, the Sixth Circuit, sitting *en banc*, determined in *Runyan v. NCR Corp.* that employee waivers of fact-based ADEA claims are valid under certain circumstances.¹¹³ Although the *Runyan III* court did not articulate a test for determining when such waivers have been validly executed, the court's language suggests that the "knowing and voluntary" standard applied to Title VII waivers might be apposite.¹¹⁴ Courts should adopt this standard; it effectively balances an employee's need for the ADEA's protection with the fundamental purposes of the Act. Thus, *Runyan III* should not be read broadly for the proposition that any release of an ADEA claim unsupervised by the EEOC is valid. Rather, it should be read to articulate a strict standard requiring that for waiver of a fact-based ADEA claim to be valid, an employee must execute the release knowingly and voluntarily.¹¹⁵

C. **Recovery of Attorneys' Fees Under Age Discrimination in Employment Act by Federal Employee Who Prevails at Administrative Level: Palmer v. General Services Administration*¹

The Age Discrimination in Employment Act (ADEA)² is a hybrid statute. Its substantive provisions are patterned after Title VII of the Civil Rights Act of 1964,³ while its remedial provisions are patterned after the Fair Labor Standards Act (FLSA).⁴ Because the ADEA draws from these two distinct statutes, both courts and practitioners have found the ADEA "a model of imprecision" concerning the exact remedies available to the plaintiff who prevails with an age discrimination claim.⁵

¹¹¹ See *id.* (citing *Alexander*, 415 U.S. at 44, 52 n.15, 7 FEP Cases 84, 88 n.15; *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14, 21 FEP Cases 1, 4 n.14 (1981)).

¹¹² For ADEA cases applying the Title VII standard, see, e.g., *Lancaster v. Buekle Buick Honda Co.*, 809 F.2d 539, 540-41, 42 FEP Cases 1472, 1472-73 (8th Cir. 1987); *Bernstein*, 622 F. Supp. at 1105-06. For Title VII cases applying the knowing and voluntary standard, see *Pilon*, 710 F.2d at 468, 32 FEP Cases at 509; *Strozier*, 635 F.2d at 426, 24 FEP Cases at 1372; *Alexander*, 415 U.S. at 51-52 & 52 n.15, 7 FEP Cases at 86-87 & 87 n.15.

¹¹³ *Runyan III*, 787 F.2d at 1044, 40 FEP Cases at 811.

¹¹⁴ *Id.*

¹¹⁵ Other cases have cited *Runyan III* for the same proposition. See, e.g., *Lancaster*, 809 F.2d at 540-41, 42 FEP Cases at 1472-73 (citing *Runyan III* for proposition that plaintiff's knowing and voluntary waiver of fact-based ADEA claims valid); *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1033, 42 FEP Cases 229, 234 (8th Cir. 1986) (citing *Runyan III* for the proposition that plaintiff's settlement of factual disputes arising under the ADEA is consistent with Act's purposes and policies); *DiMartino v. City of Hartford*, 636 F. Supp. 1241, 1245 n.3, 1248 (D. Conn. 1986) (distinguishing vacated *Runyan II* opinion to find that ADEA claims may be settled by knowing and voluntary waiver). See also *supra* note 108.

* By Gretchen M. Van Ness, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ *Palmer v. General Servs. Admin.*, 787 F.2d 300, 40 FEP Cases 630 (8th Cir. 1986).

² 29 U.S.C. §§ 621-634 (1982).

³ 42 U.S.C. §§ 2000e-2000e-17 (1982).

⁴ 29 U.S.C. §§ 201-219 (1982).

⁵ *Kennedy v. Whitehurst*, 690 F.2d 951, 955, 29 FEP Cases 1373, 1376 (D.C. Cir. 1982). For a general discussion of the problem of remedies under the ADEA, see Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 MD. L. REV. 298 (1986); Nosler & Wing, *Remedies Under the Federal Age Discrimination in Employment Act*, 62 DEN. U.L. REV. 469 (1985).

The fact that the ADEA initially applied only to private sector employees further complicates the question of ADEA remedies.⁶ Congress amended the ADEA to cover federal employees by adding a separate section to the statute in 1974.⁷ Because the wording of the added section's remedial provision differs from that part of the ADEA which applies to private sector employees, many courts have concluded that it establishes a separate remedial scheme for federal employees.⁸ The apparent distinction between court action and administrative proceedings under the FLSA further complicates the issue of ADEA remedies. Under the FLSA, attorneys' fees are recoverable in the former but not in the latter.⁹

As a result of the ADEA's kinship with both the FLSA and Title VII, and the ADEA's separate handling of private sector and federal employees, an inconsistent body of case law has developed concerning the recovery of attorneys' fees under the Act. Most courts have permitted the award of attorneys' fees to private sector employees who have prevailed under the ADEA in court,¹⁰ some courts have permitted private sector employees to recover attorneys' fees at the administrative level,¹¹ and at least one court has permitted a federal employee to recover attorneys' fees after prevailing in federal district court.¹² At the administrative level, however, successful federal complainants have been unable to recover attorneys' fees under the ADEA.¹³

During the Survey year, in *Palmer v. General Services Administration*,¹⁴ the United States Court of Appeals for the Eighth Circuit, in a two-to-one opinion, ruled that a federal employee who has prevailed at the administrative level with an ADEA claim may not recover attorneys' fees.¹⁵ The majority opinion¹⁶ identified two barriers preventing the plaintiff's recovery of attorneys' fees: the doctrine of sovereign immunity,¹⁷ and the "American Rule" of attorneys' fees.¹⁸ First, according to the court, under the doctrine of sovereign immunity the federal government is liable only when it has consented to

⁶ *Palmer v. General Servs. Admin.*, 787 F.2d 300, 301, 40 FEP Cases 630, 631 (8th Cir. 1986).

⁷ *Marion*, *supra* note 5, at 347 n.305.

⁸ *Id.* at 347.

⁹ *Nosler & Wing*, *supra* note 5, at 484.

¹⁰ *Id.*

¹¹ *Marion*, *supra* note 5, at 347-48.

¹² *DeFries v. Haarhues*, 488 F. Supp. 1037, 25 FEP Cases 393 (C.D. Ill. 1980).

¹³ The United States Court of Appeals for the District of Columbia recently ruled that federal employees who prevail under the ADEA at the administrative level cannot recover attorneys' fees. *Kennedy v. Whitehurst*, 690 F.2d 951, 29 FEP Cases 1373 (D.C. Cir. 1982).

¹⁴ 787 F.2d 300, 40 FEP Cases 630 (8th Cir. 1986).

¹⁵ *Id.*

¹⁶ Judge Fagg wrote the majority opinion and was joined by Judge Bowman. Judge Heaney dissented.

¹⁷ 787 F.2d at 301, 40 FEP Cases at 630.

¹⁸ *Id.* at 301, 40 FEP Cases at 630-31. Throughout the history of American law, each party to a law suit traditionally paid the costs associated with his or her representation. 6 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 54.78 (2d ed. 1985). Over the years, courts have recognized three exceptions to what is known as the "American Rule" of not awarding attorneys' fees to the prevailing party: (1) when a valid contractual provision exists between the litigating parties for the award of attorneys' fees, *id.* at ¶ 54.78[2]; (2) when the court may exercise its equitable power to award attorneys' fees in addition to regular statutory costs in order to "vindicate important public rights," or when the plaintiff has acted as a "private attorney general," *id.* at ¶ 54.78[3], at 497; and (3) when a valid statutory provision authorizes the award of attorneys' fees, *id.* at ¶ 54.78[4]. The second two exceptions are at issue in *Palmer*.

suit through a statute which unequivocally waives immunity.¹⁹ Such a statute, the court stated, must be "strictly and narrowly construed" in order to limit the government's liability.²⁰ The second barrier to recovery and a principle underscoring the doctrine of sovereign immunity, in the court's view, is the American Rule concerning attorneys' fees.²¹ Given the established principles of sovereign immunity and the American Rule that each party to a lawsuit pays its own attorneys' fees, the court concluded that even when a federal statute explicitly waives sovereign immunity, this waiver should not be interpreted to include the award of attorneys' fees unless Congress has clearly indicated that it should.²²

In *Palmer v. General Services Administration*, after successfully pursuing an age discrimination claim at the administrative level, Alfred Palmer filed suit in the United States District Court for the Western District of Missouri to recover his attorneys' fees.²³ An internal administrative panel at the General Services Administration (GSA) found merit in Palmer's claim that he had been fired because of his age in violation of the ADEA.²⁴ The GSA panel awarded Palmer a retroactive promotion and back pay but did not award attorneys' fees and costs.²⁵ Consequently, Palmer filed suit in federal district court seeking recovery of his attorneys' fees.²⁶ The district court dismissed Palmer's complaint and, on appeal, the Court of Appeals for the Eighth Circuit affirmed.²⁷

The Eighth Circuit first examined the plain language and the legislative history of the ADEA to discover whether it manifests a clear indication of congressional intent concerning the award of attorneys' fees.²⁸ The court noted that when Congress amended the ADEA to include federal employees, it did not simply add the term "federal employees" to the existing statute.²⁹ Instead, the court observed, Congress enacted an entirely new section which applies only to federal employees.³⁰ Title 29, section 633a of the United States Code contains a brief remedial provision authorizing the court to award to federal employees suing in federal court "such legal and equitable relief as will effectuate the purposes" of the Act.³¹ The *Palmer* court noted that neither the language of this section nor its legislative history contains any reference to attorneys' fees.³² The court concluded, therefore, that this section does not authorize the award of attorneys'

¹⁹ *Palmer*, 747 F.2d at 301, 40 FEP Cases at 630 (quoting *Lehman v. Nakshian*, 435 U.S. 156, 160, 26 FEP Cases 65, 67 (1981) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980))).

²⁰ *Id.* (citing *Premachandra v. Mitts*, 753 F.2d 635, 641 (8th Cir. 1985) (en banc)).

²¹ *Id.* at 301, 40 FEP Cases at 631.

²² *Id.* (quoting *Fitzgerald v. United States Civil Serv. Comm'n*, 554 F.2d 1186, 1189 (D.C. Cir. 1977)).

²³ *Court Says Federal Age Bias Claimant is not Entitled to Recover Legal Costs*, 24 Gov't Empl. Rel. Rep. (BNA) 497 (Apr. 14, 1986).

²⁴ 787 F.2d at 300, 40 FEP Cases at 630.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 302, 40 FEP Cases at 632.

²⁸ *Id.* at 301, 40 FEP Cases at 631.

²⁹ *Id.*

³⁰ *Id.* The section added by Congress to extend ADEA coverage to federal employees is codified at 29 U.S.C. § 633a (1982).

³¹ Age Discrimination in Employment Act § 15, 29 U.S.C. § 633a(c) (1982). The section reads, in its entirety: "Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal and equitable relief as will effectuate the purposes of this chapter." *Id.*

³² 787 F.2d at 301, 40 FEP Cases at 631.

fees to federal employees who have prevailed under the ADEA at the administrative level.³³

The court then examined the manner in which other federal antidiscrimination statutes address attorneys' fees. As originally enacted, the ADEA authorized the award of attorneys' fees to private sector employees in language that is very different than section 633a(c), the court noted.³⁴ Title VII, according to the court, also specifically authorizes attorneys' fees for both private sector and federal employees.³⁵ The court found Title VII instructive because Title VII, like the ADEA, initially applied only to private sector employees.³⁶ When Congress amended Title VII to include federal employees, the court observed, it specifically authorized attorneys' fees in addition to inserting broad remedial language similar to that found in section 633a(c).³⁷ The court found Congress's failure to do the same with the ADEA conclusive evidence that it intended to preclude the recovery of attorneys' fees by federal employees.³⁸

The court concluded its analysis by addressing Palmer's argument that the award of attorneys' fees would effectuate the purposes of the ADEA and should, therefore, be permitted under the Act.³⁹ The court found that this broad reading of the statutory language conflicted with the United States Supreme Court's 1975 ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*.⁴⁰ The *Alyeska Pipeline* ruling, the court stated, prohibits the award of attorneys' fees against the federal government unless expressly authorized by statute.⁴¹ Because only public policy considerations, rather than federal law, would support the award of attorneys' fees to Palmer, the court concluded that *Alyeska Pipeline* prohibits the award.⁴² The court conceded that Palmer's public policy arguments could justify such an award, but concluded that the legislature and not the judiciary should address these arguments.⁴³ Because the court found nothing in the ADEA which specifically provides for the award of attorneys' fees to a federal employee who prevails at the administrative level, it dismissed the plaintiff's suit.⁴⁴

³³ *Id.*

³⁴ 29 U.S.C. § 626(b) (1982). Section 626(b) incorporates by reference 29 U.S.C. § 216(b), that part of the Fair Labor Standards Act which expressly authorizes courts to award attorneys' fees to a prevailing plaintiff. 29 U.S.C. § 216(b) (1982).

³⁵ 42 U.S.C. § 2000e-5(k) (1982) provides for the award of attorneys' fees to private sector employees, while § 2000e-16(d) provides that federal employees shall have the same remedies as private sector employees. 42 U.S.C. § 2000e-16(d) (1982).

³⁶ 787 F.2d at 302, 40 FEP Cases at 631.

³⁷ 42 U.S.C. § 2000e-5(g) provides for the award of any "equitable relief" a court deems appropriate and does not mention attorneys' fees. See *supra* note 31 for the text of section 633a(c).

³⁸ 787 F.2d at 302, 40 FEP Cases at 631.

³⁹ *Id.* at 302, 40 FEP Cases at 631-32.

⁴⁰ 421 U.S. 240 (1975).

⁴¹ 787 F.2d at 302, 40 FEP Cases at 632. The *Palmer* court stated:

[I]t is for Congress, by 'specific and explicit' statutory provisions . . . to determine 'the circumstances under which attorneys' fees are to be awarded and the range of discretion [to be exercised by] the courts in making those awards.' . . . Thus, absent such authorization, this court has no authority to award fees, and each party will be required to pay its own attorneys' fees.

Id. (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. at 263).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

Dissenting from the majority's interpretation of section 633a(c), Judge Heaney argued that the court's holding unfairly limits the remedies available to the federal employee who pursues an age discrimination complaint before an administrative body.⁴⁵ Judge Heaney asserted that Congress intended to give the victims of age discrimination the same remedies it gave victims of race or sex discrimination.⁴⁶ A central policy of statutes prohibiting race and sex discrimination, Judge Heaney emphasized, is to "make whole" the person who has suffered discrimination.⁴⁷ The award of attorneys' fees furthers this policy, in Judge Heaney's view.⁴⁸ Since the ADEA is patterned after Title VII, Judge Heaney reasoned, it should be interpreted similarly to permit the recovery of attorneys' fees at the administrative level.⁴⁹

Judge Heaney also disagreed with the distinction the majority drew between judicial and administrative proceedings.⁵⁰ Judge Heaney found nothing in the language of section 633a(c) to support the award of attorneys' fees when a complainant has prevailed in court and to prohibit such an award when a complainant has prevailed at the administrative level.⁵¹ Judge Heaney warned that this holding will discourage age discrimination claimants from pursuing administrative remedies and thus compromise a meaningful part of the ADEA enforcement scheme.⁵²

In summary, the *Palmer* majority cited the American Rule of attorneys' fees and read the *Alyeska Pipeline* holding as prohibiting the award of any attorneys' fees against the federal government absent an explicit statutory waiver of sovereign immunity. The majority found no such waiver in the ADEA and, as a result, denied *Palmer's* request for attorneys' fees. The dissent viewed the ADEA as more similar to Title VII and, because it found attorneys' fees permissible under that statute's "make whole" philosophy, argued that attorneys' fees are also permissible under the ADEA. The dissent also argued that the majority's opinion will discourage litigants from pursuing administrative remedies under the ADEA and argued, therefore, that *Palmer* was entitled to recover his attorneys' fees and costs.

In *Palmer v. General Services Administration*, the Eighth Circuit invoked a restrictive reading of the ADEA's remedial provisions.⁵³ In holding that a successful ADEA complainant cannot recover attorneys' fees from the federal government when he or she has prevailed at the administrative level, the court has drawn a bright line that will help reduce some of the unpredictability concerning remedies that accompanied age discrimination claims before *Palmer*. The court achieved this predictability, however, at some cost to the age discrimination victim.

One commentator who has explored the analytical difficulties caused by the broad language of the ADEA's section 633a(c) points out that Congress has provided for the

⁴⁵ *Id.* (Heaney, J., dissenting).

⁴⁶ *Id.* (Heaney, J., dissenting).

⁴⁷ *Id.* (Heaney, J., dissenting).

⁴⁸ *Id.* at 303, 40 FEP Cases at 632 (Heaney, J., dissenting) (quoting *Smith v. Califano*, 446 F. Supp. 530, 533 (D.D.C. 1978)).

⁴⁹ *Id.* (Heaney, J., dissenting).

⁵⁰ *Id.* at 303, 40 FEP Cases at 632-33. (Heaney, J., dissenting).

⁵¹ *Id.* (Heaney, J., dissenting).

⁵² *Id.* at 303, 40 FEP Cases at 632 (Heaney, J., dissenting).

⁵³ The Eighth Circuit thus joins the U.S. Court of Appeals for the District of Columbia in holding that attorneys' fees are not recoverable by federal employees who prevail at the administrative level under the ADEA. *Kennedy v. Whitehurst*, 690 F.2d 951, 29 FEP Cases 1373 (D.C. Cir. 1982).

recovery of attorneys' fees under other employment discrimination statutes.⁵⁴ This commentator believes that Congress's failure to expressly provide for the award of attorneys' fees to federal employees under the ADEA is most likely the result of oversight or the belief that the award was included in the statute's broad remedial language.⁵⁵ The suggestion that Congress's failure to provide for attorneys' fees may simply be an oversight finds some support in the legislative history of the 1974 amendment that extended ADEA coverage to federal employees. The amendment was a small part of the massive Fair Labor Standards Act and it received a scant two pages of explanation within a legislative record of over fifty pages.⁵⁶ Nothing in the record indicates that Congress considered age discrimination against federal employees any less serious than age, race or sex discrimination against private sector employees, or that it intended to establish a less complete remedial scheme for the federal age discrimination victim.⁵⁷

In addition to the lack of evidence in the legislative record, it is important to note that Congress amended the ADEA to cover federal employees at a time when the legal system looked more favorably upon the award of attorneys' fees to prevailing plaintiffs. Before *Alyeska Pipeline* was decided in 1975, courts broadly interpreted the "private attorney general" exception to the American Rule on attorneys' fees.⁵⁸ Courts frequently cited the private attorney general exception to support awards which would "vindicate important public rights,"⁵⁹ such as rooting out discrimination in the employment setting. The general practice of awarding attorneys' fees in employment discrimination cases, where the private citizen acts as a private attorney general to enforce federal law, formed the background in which the ADEA was amended to extend to federal employees in 1974. Congressional silence on the issue of attorneys' fees may simply reflect a pre-*Alyeska Pipeline* belief that courts would consider attorneys' fees part of the "legal or equitable relief" necessary to "effectuate the purposes" of the ADEA.⁶⁰ Congress may not have considered it necessary to spell out what was, at that time, the common practice of awarding attorneys' fees to the prevailing plaintiff in employment discrimination cases.⁶¹

Palmer v. General Services Administration makes it clear that the remedy of attorneys' fees is not available to federal employees who prevail under the ADEA at the administrative level. The case provides a bright line interpretation of section 633a(c) that will make ADEA remedies more predictable, but the bright line chosen by the court makes the ADEA a less powerful tool than the other employment discrimination statutes. Although the ADEA, unlike Title VII, does not require that a complainant exhaust all available administrative remedies before filing suit in federal district court,⁶² the *Palmer*

⁵⁴ M. ZIMMER, C. SULLIVAN & R. RICHARDS, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 741 (1982).

⁵⁵ *Id.*

⁵⁶ H.R. REP. NO. 313, 93rd Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 2811, 2849-50.

⁵⁷ *Id.* The report states, "The committee expects that expanded coverage under the Age Discrimination in Employment Law will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment." *Id.*

⁵⁸ 6 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 54-78[3], at 498 n.14.

⁵⁹ *Id.* at ¶ 54.78[3], at 497.

⁶⁰ 29 U.S.C. § 633a(c) (1982).

⁶¹ See *supra* note 58.

⁶² *Kennedy v. Whitehurst*, 690 F.2d 951, 964, 29 FEP Cases 1373, 1383 (D.C. Cir. 1982).

holding may discourage federal employees from pursuing age discrimination complaints because they will be unable to recover attorneys' fees if successful at the administrative level.

More importantly, the *Palmer* holding establishes two anomalous remedial schemes within the ADEA. One scheme permits the recovery of attorneys' fees for the private sector employee who prevails at either the administrative level or in court, and a second permits federal employees to recover attorneys' fees only if they prevail in court. Nothing in the legislative record indicates that Congress intended to provide federal employees with fewer remedies than private sector employees under the ADEA. In his dissent, Judge Heaney correctly argued that the purpose of the various employment discrimination statutes is to "make whole" the discrimination victim. The *Palmer* ruling may defeat this goal for federal ADEA claimants. Federal ADEA claimants who are successful in court will be "made whole" through the award of attorneys' fees, while those who pursue their claims at the administrative level must bear the often prohibitive cost of representation. In view of *Palmer's* restrictive reading of the ADEA, Congress should take this opportunity to amend the Act to provide expressly for the award of attorneys' fees to successful complainants such as Alfred Palmer.

D. *Age Discrimination Under New York Civil Service Law, Section 58(1)(a): *Doyle v. Suffolk County*.¹

The Age Discrimination in Employment Act (ADEA)² prohibits employment discrimination based on age unless age represents a bona fide occupational qualification (BFOQ) which is reasonably necessary to the "normal operation of the particular business" or the age requirement for hiring is "based on reasonable factors other than age."³ The ADEA protects only those employees between the ages of forty and seventy.⁴ The purpose of this law is to ensure that the hiring of older workers is based on their ability to perform their duties rather than on their age.⁵

* By Michael J. Southwick, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 786 F.2d 523, 40 FEP Cases 598 (2d Cir.), cert. denied 107 S. Ct. 98 (1986).

² 29 U.S.C. §§ 623-34 (1982). Actions under the ADEA are restricted to individuals between the ages of forty and seventy. 29 U.S.C. § 631(a).

³ 29 U.S.C. § 623(f)(1). This section of the ADEA provides in pertinent part:

It shall not be unlawful for an employer, employment agency, or labor organization

(1) to take any action . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

Id. The ADEA also does not make unlawful any seniority systems or employee benefit plans such as retirement, pension or insurance plans, provided that such systems or plans are not merely intended to avoid the other requirements of the Act. 29 U.S.C. § 623(f)(2). Additionally, it is not unlawful, under the ADEA, to discharge or discipline an otherwise protected employee for good cause. 29 U.S.C. § 623(f)(3).

⁴ 29 U.S.C. § 631. Additionally, the ADEA only applies to employers with more than twenty employees. 29 U.S.C. § 630(b).

⁵ S. REP. NO. 805, 90th Cong., reprinted in 1967 U.S. CODE CONG. & ADMIN. NEWS, p.2214. The announced purpose of the ADEA is

to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b).

In addition to the ADEA, the equal protection clause of the Constitution also prohibits unreasonable discrimination.⁶ In age discrimination cases, courts have applied the rational relation test in deciding whether a particular provision is constitutional.⁷ Under the rational relation test, a provision is constitutional provided it is rationally related to a legitimate state purpose.⁸

Despite the prohibitions of the ADEA and the equal protection clause, New York has retained a statute which restricts access to its police force strictly on the basis of age. New York Civil Service Law, section 58(1)(a) (section 58) prohibits the hiring of applicants seeking to join the New York police force who are over the age of twenty-nine.⁹ In the 1985 case of *Hahn v. City of Buffalo*,¹⁰ the Second Circuit relied on the ADEA and affirmed the district court's invalidation of section 58 to the extent that it prohibited the hiring of individuals between the ages of forty and seventy.¹¹ In finding that being below the age of forty was not a BFOQ for a police officer, the *Hahn* court upheld the district court's decision against the City of Buffalo.¹² This opinion failed, however, to explain

⁶ U.S. CONST., amend. XIV, § 1. The equal protection clause provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

⁷ See *infra* notes 51-60 and accompanying text.

⁸ *Doyle v. Suffolk County*, 786 F.2d 523, 528, 40 FEP Cases 598, 602 (2d Cir.), *cert. denied* 107 S.Ct. 98 (1986)(quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 12 FEP Cases 1569, 1571 (1976)).

⁹ N.Y. CIV. SERV. LAW § 58(1)(a) (McKinney 1983). This provision states:

... no person shall be eligible for provisional or permanent appointment in the competitive class of the civil service as a police officer . . . unless he shall satisfy the following basic requirements . . .

(a) he is not less than twenty nor more than twenty-nine years of age.

Id. This maximum age restriction on hiring is subject to two exceptions. First, an applicant is entitled to a credit of up to six years for military duty or terminal leave, thus extending eligibility for appointment as far as his or her thirty-fifth birthday. *Id.* Second, upon recommendation by a municipal commission, eligibility may be extended to an applicant's thirty-fifth birthday if the force requires additional recruits because of a "serious shortage of police officers." *Id.* § 58(1)(d)(1-a).

¹⁰ 770 F.2d 12, 38 FEP Cases 1069 (2d Cir. 1985).

¹¹ *Id.* at 14, 16, 38 FEP Cases at 1071, 1072. In determining the issue of BFOQ, the *Hahn* court relied on the test laid out in *Usery v. Tamiami Trail Tours, Inc.* *Id.* at 14, 38 FEP Cases at 1071 (citing *Tamiami*, 531 F.2d 224, 236, 12 FEP Cases 1233, 1241 (5th Cir. 1976)). Under this test, in order to prove that the discriminatory factor of age was a BFOQ, an employer must show:

(1) that the job disqualifications are reasonably necessary to the essential operation of the business and (2) that there is a factual basis for believing that all or substantially all of the persons within the class protected by the ADEA would be unable to perform the job effectively and safely or that it is impossible or impracticable to determine job fitness on an individualized basis.

Hahn, 770 F.2d at 14, 38 FEP Cases at 1071. The *Hahn* court noted that the district court found, in light of all the evidence, that there was no indication that those people over the age of forty could not perform their duties as well as those in the group between twenty and twenty-nine or that hiring police officers from this older group would create an "unacceptable risk to the public." *Id.* at 14, 38 FEP Cases at 1071 (citing *Hahn v. City of Buffalo*, 596 F. Supp. 939, 949, 36 FEP Cases 379, 390 (W.D.N.Y. 1984). Compare *Tamiami*, 531 F.2d 224, 12 FEP Cases 1233 (5th Cir. 1976)(being under forty held to be a BFOQ for position of inner city bus driver) with *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 3 FEP Cases 337 (5th Cir. 1971)(being female held not to be a BFOQ for position of airline cabin attendant) and *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 1 FEP Cases 656 (5th Cir. 1969)(being male held not to be BFOQ for position requiring occasional strenuous activity).

¹² *Hahn*, 770 F.2d at 14, 16, 38 FEP Cases at 1071, 1072.

the status of the surviving portion of section 58, that is, the restriction on hiring applicants between the ages of twenty-nine and forty.¹⁵

During the *Survey* year, in *Doyle v. Suffolk County*, the United States Court of Appeals for the Second Circuit held that the surviving portion of section 58 was severable from the partially invalidated portion,¹⁴ and upheld the validity of section 58 as it applies to applicants to the police force between the ages of twenty-nine and forty on both statutory and constitutional grounds.¹⁵ On the statutory claim, the court maintained that the previous ruling in *Hahn* did not abrogate the legislative intent to set a maximum age limit of twenty-nine for applicants to the force.¹⁶ Furthermore, the Second Circuit found that the surviving portion of section 58(1)(a) did not violate the equal protection clause of the constitution.¹⁷ Thus, in upholding section 58(1)(a), the Second Circuit was able to reach a solution which followed the rule handed down in *Hahn* and also gave effect to the New York legislature's intent to restrict the hiring of police officers over the age of twenty-nine. In addition, notwithstanding this anomalous result which permits the hiring of police officers between the ages of forty and seventy but excludes applicants between twenty-nine and forty, the court upheld section 58 against the equal protection challenge.¹⁸

The *Doyle* case represents a simultaneous hearing of two related but unconsolidated appeals from the United States District Court for the Eastern District of New York.¹⁹ In both cases, plaintiffs challenged section 58 under the equal protection clause of the fourteenth amendment.²⁰ The first case, *Doyle v. Suffolk County*, involved six persons who had passed the civil service exam in Suffolk County but were denied consideration because each had become twenty-nine years of age.²¹ The district court dismissed the action for failure to state a claim upon which relief can be granted,²² holding that section 58(1)(a) did not violate the Constitution because it was rationally related to the state

¹⁵ See *Doyle v. Suffolk County*, 786 F.2d 523, 526, 40 FEP Cases 598, 600 (2d Cir. 1985). The confusing language in *Hahn* reads as follows: "We conclude that the judgment [of the district court] was intended to invalidate section 58(1)(a) throughout New York State." *Hahn*, 770 F.2d at 14, 38 FEP Cases at 1071. In expanding the geographic scope of its holding, however, the *Hahn* court failed to explain that the age group affected by the decision was limited to those in the forty to seventy group. See *id.* The court in *Hahn* did not pass on the validity of section 58(1)(a) as it applies to those applicants between thirty and thirty-nine because in that case, the City of Buffalo agreed not to refuse appointments to those applicants in that age group. *Id.* at 14 n.2, 38 FEP Cases at 1071 n.2. The *Doyle* court concluded that this agreement by the City of Buffalo, although only specifically applying to those between thirty and thirty-nine, was intended to "fill the gap" between those protected by the ADEA and those excluded by the New York law and thus applied to applicants between twenty-nine and forty. *Doyle*, 786 F.2d at 525 n.1, 40 FEP Cases at 599 n.1.

¹⁴ *Doyle*, 786 F.2d at 528, 40 FEP Cases at 602.

¹⁵ See *id.* at 528, 529, 40 FEP Cases at 602, 603.

¹⁶ *Id.* at 528, 40 FEP Cases at 602.

¹⁷ *Id.* at 528-29, 40 FEP Cases at 602-03. Under the rational relation test such a restriction was reasonably related to the legitimate state interest of maintaining a capable police force. *Id.* at 529, 40 FEP Cases at 603.

¹⁸ *Id.*

¹⁹ *Doyle v. Suffolk County*, Docket No. 85-7782 (E.D.N.Y. 1985); *Hettinger v. Nassau County Civil Serv. Comm'r*, Docket No. 85-7820 (E.D.N.Y. 1985).

²⁰ *Doyle*, 786 F.2d at 525-26, 40 FEP Cases at 600.

²¹ *Id.* at 525, 40 FEP Cases at 599-600 (discussing *Doyle v. Suffolk County*, Docket No. 85-7782).

²² FED. R. CIV. P. 12(b)(6).

interest of maintaining a police force which was physically able and capable of being trained.²³

In the second case, *Hettinger v. Nassau County Civil Service Commission*, the district court also rejected the equal protection challenge of two applicants who passed the civil service exam for police officers but were subsequently informed of their ineligibility when they became twenty-nine.²⁴ In this case, however, the court interpreted *Hahn* as invalidating section 58 in its entirety.²⁵ This interpretation was possible because the *Hahn* court stated that section 58 was invalid throughout New York state.²⁶

The question on appeal for the Second Circuit was two-fold. First, the court had to decide the impact of the partial invalidation of section 58 that was handed down in *Hahn*.²⁷ Second, the Second Circuit was required to reconsider the constitutional claim in order to determine whether section 58, insofar as it only applies to applicants between twenty-nine and forty, remained rationally related to the legitimate goal of maintaining a capable police force.²⁸

In deciding the first issue, the Second Circuit rejected the trial court's opinion in *Hettinger* that *Hahn* invalidated section 58 in its entirety.²⁹ The *Hahn* court's expansion of geographic scope, the *Doyle* court explained, was not intended to expand the age-group scope of the *Hahn* judgment which was restricted by the terms of the ADEA.³⁰ Therefore, the *Doyle* court explained, *Hahn* only invalidated section 58 as it applies to those applicants between forty and seventy.³¹

The Second Circuit next examined whether the surviving portion of section 58 was severable from that portion invalidated in *Hahn*.³² The court looked to past partial invalidation cases and reasoned that it had one of two choices.³³ Either it could invalidate the entire provision or it could maintain it insofar as it applies to those between the ages of twenty-nine and forty.³⁴ In holding that the latter course was appropri-

²³ *Doyle*, 786 F.2d at 525, 40 FEP Cases at 600. Having disposed of the federal claim, the district court refused to extend pendent claim jurisdiction over the state law claims also advanced by plaintiffs. *Id.*

²⁴ *Id.* at 526, 40 FEP Cases at 600 (discussing *Hettinger v. Nassau County Civil Serv. Comm'n*, 85-7820).

²⁵ *Id.* at 526, 40 FEP Cases at 600.

²⁶ See *Hahn*, 770 F.2d at 14, 38 FEP Cases at 1071.

²⁷ *Doyle*, 786 F.2d at 526, 40 FEP Cases at 600.

²⁸ See *id.* at 528-29, 40 FEP Cases at 602-03.

²⁹ *Id.* at 528, 40 FEP Cases at 602.

³⁰ *Id.* at 526, 40 FEP Cases at 600.

³¹ See *id.* The district court in *Hettinger* entered an order admitting plaintiffs who had turned twenty-nine to the entering class at the police academy. See *Doyle*, 786 F.2d at 526, 40 FEP Cases at 600. This order was stayed pending this appeal. See *id.*

³² *Id.* at 526-27, 40 FEP Cases at 600-01.

³³ See *id.* at 526-27, 40 FEP Cases at 601.

³⁴ *Id.* The *Doyle* court reasoned that the issue of determining legislative intent when a single provision is partially invalidated can arise in one of two contexts. *Id.* at 527, 40 FEP Cases at 601. First, a court may find a provision underinclusive, in which case the court must decide whether the legislature would have preferred to repeal the statute entirely or extend it to apply to the "impermissibly excluded class." *Id.* at 527, 40 FEP Cases at 601 (citing *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266, 280-81 (2d Cir. 1985) (invalidating New York provision limiting bonus points on civil service exams to New York resident veterans only and extending bonus points to all veterans); *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207, cert. denied, 471 U.S. 1020 (1985) (invalidating exemption for married men and females from state rape and sodomy laws and extending criminal statute to both formerly excluded classes)).

Alternatively, a court may find a statutory provision overinclusive in which case the court must

ate,³⁵ the court considered what result the New York legislature would have preferred if it had foreseen the partial invalidation.³⁶ The court maintained that the legislature's preference with regard to section 58 would be to prohibit the hiring of applicants over the age of twenty-nine.³⁷ Therefore, reasoned the court, the legislature would want this policy to be given effect as far as the federal law allows.³⁸

The Second Circuit reasoned that the decision as to whether section 58 should survive to the extent that it still prohibits the hiring of applicants between twenty-nine and forty³⁹ depended upon the intent of the legislature.⁴⁰ The court began its analysis of the legislative intent by presuming that the New York legislature would prefer any provision surviving partial invalidation to remain in effect.⁴¹ In New York, the court stated, this presumption is supported by the broad severability provision embodied in the Civil Service Laws.⁴² Thus, the court stated, New York apparently evinced a preference for retaining the surviving portion of a provision even following the invalidation of the remainder of that same section.⁴³

The Second Circuit pointed out that the New York legislature, in adopting section 58, made a clear decision that applicants over the age of twenty-nine should not be considered for positions on the police force.⁴⁴ Despite the holding in *Hahn*, the court

determine, again, whether a foresighted legislature would prefer that there be no statute or that the law apply to everyone except for the "impermissibly included class." *Doyle*, 786 F.2d at 527, 40 FEP Cases at 601 (citing *Confederated Bands and Tribes of Yakima Indian Nation v. Washington*, 552 F.2d 1332, 1336 (9th Cir. 1977), *rev'd on other grounds*, 439 U.S. 463 (1979)). The *Doyle* court found section 58 to be overinclusive. *Id.* at 527, 40 FEP Cases at 601.

³⁵ *Id.* at 528, 40 FEP Cases at 602.

³⁶ *Id.* at 527-28, 40 FEP Cases at 601-02.

³⁷ *Id.* at 528-29, 40 FEP Cases at 602.

³⁸ *See id.* at 528, 40 FEP Cases at 602.

³⁹ *Id.* at 527, 40 FEP Cases at 601. If the court had determined that the decision to deny consideration of the applicants was merely the implementation of the counties' own policy then the court could have completely avoided the statutory interpretation issue. The court found that the county decision was indeed statute-based because each county admitted at oral argument that it had indeed relied on the statute in making its decision. *Id.* at 526, 40 FEP Cases at 600.

⁴⁰ *Id.* at 527, 40 FEP Cases at 601. Courts often analyze legislative intent in situations involving partial invalidation. *See People ex. rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (1920). *See also Buckley v. Valeo*, 424 U.S. 1, 108 (1976); *Yakima Indian Nation*, 552 F.2d at 1336; *Liberta*, 64 N.Y.2d at 171, 474 N.E.2d at 578, 485 N.Y.S.2d at 218. The Second Circuit noted, however, that the analysis in *Doyle* would not be the "traditional intent analysis" as to how the legislature intended its statute to be interpreted in a given fact situation. Rather, the court pointed out that it must decide what the legislature would have intended for its statute had it foreseen the partial invalidation. *Doyle*, 786 F.2d at 527, 40 FEP Cases at 601. Thus, if the surviving portion of the statute is relatively minor in light of the overall intent of the original statutory scheme, it is likely that the legislature would prefer total invalidation and an opportunity to readress the entire issue through an alternative statute. *Id.*

⁴¹ *Doyle*, 786 F.2d at 528, 40 FEP Cases at 601.

⁴² *Id.* at 528, 40 FEP Cases at 601-02. N.Y. CIV. SERV. LAW § 186 (McKinney 1983) provides in pertinent part:

If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof . . .

Although section 186 appears to apply only to the invalidation of an entire provision within a larger statutory framework, the principles of severability would seem to apply with equal force to situations, like in *Doyle*, where only a part of one provision is invalidated. *Doyle*, 786 F.2d at 528, 40 FEP Cases at 601-02.

⁴³ *Id.*

⁴⁴ *Id.* at 528, 40 FEP Cases at 602.

explained, it is unlikely that the legislature would elect to remove all age restrictions from the hiring practices of the police departments around the state.⁴⁵ Indeed, the court continued, such an abandonment of policy would enable citizens over the age of seventy to be considered for these positions.⁴⁶ The court thus concluded that because the state retains a strong policy of maximum age requirements in the area of law enforcement, it is likely that the legislature would want to maintain the restriction on hiring applicants between the ages of twenty-nine and forty.⁴⁷ In deferring to the legislature, the court admitted that this outcome was somewhat anomalous because it permitted the hiring of applicants between the ages of forty and seventy but excluded the applications of those between twenty-nine and forty.⁴⁸ Notwithstanding this anomaly, the Second Circuit concluded that this outcome was required because of the legislature's desire to restrict application to the police force to individuals younger than twenty-nine as modified by the 1985 *Hahn* decision.⁴⁹

The Second Circuit next turned its attention to the equal protection issue.⁵⁰ The question before the court was whether New York could constitutionally deny appointment to applicants twenty-nine to forty and those seventy and older while permitting the appointment of those applicants between the ages of forty and seventy.⁵¹ The court applied the rational relation test and determined that the surviving portion of section 58 was rationally related to the legitimate state objective of maintaining a capable police force.⁵²

The state interest behind section 58, according to the court, is the need to hire police officers who are "physically able to discharge their duties."⁵³ The Second Circuit held that such an interest was obviously legitimate and that the twenty-nine year-old cutoff was at least rationally related to advancing that interest.⁵⁴ The court reasoned that

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* Thus the court found that the legislature would have intended section 58(1)(a) to apply "to the greatest extent possible" if it had foreseen the invalidation of the section's application to those between forty and seventy years of age. *Id.* See *supra* text accompanying notes 29-30.

⁴⁸ *Doyle*, 786 F.2d at 529, 40 FEP Cases at 603.

⁴⁹ *Id.* The root of this anomaly is simply that the ADEA, under which *Hahn* was decided, only protects individuals between the ages of forty and seventy. The court concluded that although the resulting age classifications were anomalous the restriction continued to serve a legitimate state interest. Thus, despite the anomaly, section 58, as modified by the partial invalidation, was still constitutional. *Id.*

⁵⁰ *Id.* at 528, 40 FEP Cases at 602.

⁵¹ *Id.*

⁵² See *id.* at 528-29, 40 FEP Cases at 602-03. Plaintiffs in *Doyle* also argued that the military and recruitment emergency exceptions to section 58(1)(a) indicate the irrationality of the exclusion of twenty-nine to forty year old applicants. See *supra* note 7. The court rejected this argument pointing out that such minor adjustments to the rule do not detract from the overall rationality of the statute. *Doyle*, 786 F.2d at 529, 40 FEP Cases at 602.

⁵³ *Doyle*, 786 F.2d at 528, 40 FEP Cases at 602.

⁵⁴ *Id.* at 528-29, 40 FEP Cases at 602. The court found that it was reasonable for the state legislature to conclude that an individual's physical capacity to perform police activities declines after the individual reaches the age of twenty-nine. *Id.* at 528, 40 FEP Cases at 602. There is a discrepancy between this conclusion and that reached in *Hahn* where the court affirmed the district court's finding that being below the age of forty does not represent a BFOQ. See *Hahn*, 770 F.2d at 16, 38 FEP Cases at 1072. The explanation for this inconsistency is that the BFOQ standard is a much stricter test than the rational relation inquiry required under the equal protection analysis. *Doyle*, 786 F.2d at 528, 40 FEP Cases at 602. Thus, while it seems odd that a thirty year old may be

although many people between the ages of twenty-nine and forty could probably perform the duties of a police officer, the conclusion that on average the younger group (20 to 29 year-olds) would yield a higher percentage of viable candidates was not irrational.⁵⁵

Finally, the Second Circuit considered whether the holding in *Hahn* permitting consideration of applicants between forty and seventy made the exclusion of candidates between twenty-nine and forty irrational.⁵⁶ The court rejected this argument on the ground that most applicants over the age of twenty-nine would fall in the twenty-nine to forty group.⁵⁷ Therefore, if the legislature had foreseen this anomalous result, the court concluded that it still would have been rational in maintaining the exclusion of applicants between twenty-nine and forty.⁵⁸ The court noted that the state would conserve its scarce resources if it only had to conduct individualized testing on the relatively small group of forty to seventy year old applicants rather than the much larger twenty-nine to forty group.⁵⁹ Accordingly, the Second Circuit upheld the constitutionality of the surviving portion of section 58 under the rational relation standard.⁶⁰

In analyzing the Second Circuit's opinion in *Doyle*, several issues arise. The first, and perhaps most obvious point to be made concerns the unusual outcome of the case. Whereas the *Hahn* court found that being below the age of forty does not constitute a

denied appointment while a sixty-nine year old is granted a job, the tests employed by the court support this result.

The court reasoned that the rational relation test was the proper standard to apply in cases "prohibiting the commencement of employment because of age." *Id.* at 528, 40 FEP Cases at 602 (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 12 FEP Cases 1569, 1571 (1976)). The rational relation test requires only that the classification made by the state is "rationally related to furthering a legitimate state interest." *Murgia*, 427 U.S. at 312, 12 FEP Cases at 1571. See also *Vance v. Bradley*, 440 U.S. 93, 97, 19 FEP Cases 1, 3 (1979). Although courts have applied this standard in cases involving statutes terminating employment because of age, the *Doyle* court concluded that it is also the correct standard to apply to statutes denying employment because of age. *Doyle*, 786 F.2d at 528, 40 FEP Cases at 602.

⁵⁵ *Doyle*, 786 F.2d at 529, 40 FEP Cases at 602. The court concluded, in light of the limited resources available in the state, that the most cost effective plan was to only conduct physical testing "among the group most likely to yield qualified candidates." *Id.* A state is not acting irrationally if the purpose of its law is to avoid the burdensome costs of conducting individualized testing. See *Tamiami Trail Tours*, 531 F.2d at 227-28, 12 FEP Cases at 1234; *Weeks*, 408 F.2d at 235 n.5, 1 FEP Cases at 660 n.5. The decision that the qualified candidates would be below the age of twenty-nine, the court reasoned, was not irrational. Rather, the provision would serve the legitimate state interest of maintaining a physically capable police force. *Doyle*, 786 F.2d at 529, 40 FEP Cases at 602. The court pointed out that in cases such as this, where line drawing is difficult to begin with, "perfection is by no means required." *Id.* (quoting *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 385 (1960)). The court reasoned that by limiting selection to the younger group, the state was insuring that those applicants selected would be part of the force for a reasonable number of years, thereby increasing the effectiveness and experience of the force as a whole. *Id.* at 529, 40 FEP Cases at 602.

⁵⁶ *Doyle*, 786 F.2d at 529, 40 FEP Cases at 602-03.

⁵⁷ *Id.* at 529, 40 FEP Cases at 603.

⁵⁸ *Id.* at 529, 40 FEP Cases at 602-03 (citing *Lamb v. Scripps College*, 627 F.2d 1015, 24 FEP Cases 1010 (9th Cir. 1980)(upholding mandatory retirement for tenured professors between 65 and 70 but not younger than 65 or older than 70)).

⁵⁹ *Id.* at 529, 40 FEP Cases at 603. It should be noted that by limiting the testing pool to only applicants in the smaller group of forty to seventy year olds, New York is not jeopardizing the strength or ability of its police force. The pool of applicants between twenty and twenty-nine should be able to provide adequate recruits for the force especially in light of the emergency provision enabling the municipality to expand the size of its applicant pool in cases of serious shortages. See N.Y. CIV. SERV. LAW § 58(1)(d)(1-a).

⁶⁰ *Doyle*, 786 F.2d at 529, 40 FEP Cases at 603.

BFOQ, the *Doyle* court found itself in the unenviable position of holding that the state is permitted to discriminate in employment based on age as long as the applicant is between the ages of twenty-nine and forty. This unlikely result was reached simply because the ADEA, under which *Hahn* was decided, protects only those individuals between the ages of forty and seventy.⁶¹ Congress made the conscious choice to restrict the application of the ADEA to those between forty and seventy.⁶² Thus those below the age of forty cannot successfully claim that they have been deprived of the right to have their employers make decisions based on their ability rather than on their age because they never had that right in the first place.

The anomalous result in *Doyle*, which permits New York to discriminate against applicants who are between the ages of twenty-nine and forty but forbids the exclusion of those between forty and seventy, is not a shortcoming in the Second Circuit's opinion. In its careful consideration of the legislative intent behind section 58, the court abided by appropriate separation of powers principles. Rather than striking down the provision in its entirety, an act which would have been tantamount to making law, the court adhered to its role as interpreter of the laws and devised a solution which was, in its reasoned discretion, not only just but also appropriately deferential to the legislature.⁶³

A second noteworthy aspect of the *Doyle* decision concerns the Second Circuit's constitutional analysis of the age discrimination in employment issue. In the past, the courts have consistently upheld employment statutes which tend to discriminate based on age as long as the provision is rationally related to a legitimate state interest. As the *Doyle* court correctly pointed out, the monetary savings to the state, if it restricted its consideration to only those candidates younger than twenty-nine and between forty and seventy, alone support a finding that the law is at least rationally related to the legitimate objective of maintaining a capable police force. Because the number of applicants to the force in the twenty-nine to forty group is greater than that in the forty to seventy group, it was not irrational for the legislature to conclude that limiting testing to those in the older group would better advance the state's interest.

It also seems unlikely that a stricter level of scrutiny will be required in employment discrimination cases based on age. Strict scrutiny is appropriate only where a fundamental right⁶⁴ or discrimination against a "suspect class" is involved.⁶⁵ There is no support for the contention that the right to employment is, or should be considered, *per se* fundamental.⁶⁶ Similarly, the class of applicants in *Doyle* between the ages of twenty-nine and forty is not a suspect class according to the Supreme Court's definition of that term over the past fifty years.⁶⁷ It is difficult to argue that this group suffers from the same

⁶¹ 29 U.S.C. § 631.

⁶² *Id.*

⁶³ See *Yakima Indian Nation*, 552 F.2d at 1336.

⁶⁴ *Murgia*, 427 U.S. at 312, 12 FEP Cases at 1571 (citing *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 (1973)). See also *Roe v. Wade*, 410 U.S. 113 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁶⁵ See *Murgia*, 427 U.S. at 312 n.4, 12 FEP Cases at 1571 n.4 (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

⁶⁶ *Murgia*, 427 U.S. at 313, 12 FEP Cases at 1571. In *Murgia*, the Supreme Court expressly held that "... we have expressly held that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.'" (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

⁶⁷ Historically, a suspect class has been defined as one which is "saddled with such disabilities,

purposeful discrimination and historical inability to protect itself through the political process that those discriminated against on the basis of, for example, race once did. In light of the historical interpretation of suspect classification, the *Doyle* court was correct in applying the rational relationship standard and properly upheld the surviving portion of section 58 against the constitutional challenge.⁶⁸

Finally, an impact that the *Doyle* decision will have on the practice of labor law revolves around the partial invalidation issue. In the future, practitioners in this area should be aware that invalidation of one portion of an employment statute will not require the courts, at least in New York, to subsequently invalidate the entire statute. Rather, in these situations, the court will examine the legislative intent behind the statutory scheme and decide whether or not a foresighted legislature would prefer total or partial invalidation.

In conclusion, the Second Circuit in *Doyle* held that New York is permitted to exclude applicants to its police force who are between the ages of twenty-nine and forty. At the same time, the court upheld its 1985 decision in *Hahn* to the extent that it prohibited age discrimination against applicants to the force who are between forty and seventy. The *Doyle* case represents an attempt by the Second Circuit to give effect to the legislative intent behind section 58 despite partial invalidation of that intent in the prior *Hahn* decision. Notwithstanding the anomalous result reached in *Doyle*, the conclusion of the court seems to be in line with prior case law as well as statutory interpretation through legislative intent analysis. Finally, the court dealt with the equal protection issue and, in finding the state law to be constitutional, reaffirmed that the proper standard of judicial scrutiny in age discrimination cases is the rational relation test.

V. AFFIRMATIVE ACTION

A. *Public Sector Voluntary Affirmative Action: *Wygant v. Jackson Board of Education*¹

The equal protection clause of the Constitution generally prohibits all governmental employers from participating in invidious racial discrimination in the hiring and promotion of employees.² Courts also have interpreted the equal protection clause to mandate that public employers adhere to strict requirements when they seek to implement voluntary affirmative action programs involving racial classifications which benefit members of groups historically the victims of discrimination.³ This type of discrimination which benefits historically victimized groups is typically termed "benign."⁴ Although the

or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28. See also *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938)(suspect classification involves a "discrete and insular minority").

⁶⁸ *Doyle*, 786 F.2d at 528-29, 40 FEP Cases at 602-03.

* By William T. Matlack, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 106 S. Ct. 1842, 40 FEP Cases 1320 (1986).

² See generally J. NOWAK, R. ROTUNDA AND J. YOUNG, CONSTITUTIONAL LAW, §§ 14.8-14.9 (3d ed. 1986) [hereinafter NOWAK, CONSTITUTIONAL LAW].

³ See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 271-72, 17 FEP Cases 1000, 1004 (1978) (Court ordered plaintiff's admission to medical school because state purposes insufficient and racial quota in admissions overbroad to sustain University's affirmative action program).

⁴ See *id.* at 358-61, 17 FEP Cases at 1036-37.

Supreme Court has not agreed upon a consistent standard of review,⁵ it appears that affirmative action plans based on racial preferences must arise from a compelling governmental purpose,⁶ and must be narrowly tailored to the achievement of that purpose.⁷ Courts have found employment affirmative action plans valid under the Constitution when they are both implemented to remedy the effects of the employer's past invidious racial discrimination and do not severely harm the interests of nonminority employees.⁸

Several Supreme Court decisions in the last ten years have attempted to identify the constitutional parameters of affirmative action.⁹ Nonetheless, the Court's opinions have not offered a unified method of analysis.¹⁰ Among the standards articulated by the Court, that of Justice Powell arguably has exerted the strongest influence.¹¹ Justice Powell reasons that there is no difference in the standard of review of invidious racial discrim-

⁵ See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1979) (plurality opinion); *Bakke*, 438 U.S. 265, 17 FEP Cases 1000 (plurality opinion).

⁶ *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). See also *Bakke*, 438 U.S. at 290-91, 17 FEP Cases at 1010-11 (opinion of Powell, J.).

⁷ *Fullilove*, 448 U.S. at 480; see *Bakke*, 438 U.S. at 320, 17 FEP Cases at 1022 (opinion of Powell, J.).

⁸ See, e.g., *Bratton v. City of Detroit*, 704 F.2d 878, 897-98, 31 FEP Cases 465, 479 (6th Cir. 1983), cert. denied, 464 U.S. 1040, 33 FEP Cases 1084 (1984).

⁹ See, e.g., *Fullilove*, 448 U.S. 448, *Bakke*, 438 U.S. 265, 17 FEP Cases 1000.

¹⁰ See *Bakke*, 438 U.S. 265, 17 FEP Cases 1000. The issue has fragmented the Supreme Court, and each of several shifting coalitions have developed related but independent standards of review. These various standards were first articulated in the several opinions of the *Bakke* decision. *Id.* Although all members of the Court apply a two-prong purpose and means test in cases involving racial classifications, disagreement arose over the proper standards within this analysis. Justice Powell would apply strict scrutiny for any racial classification. Thus a valid affirmative action plan must be enacted pursuant to a compelling governmental purpose and be narrowly tailored to achieve that purpose. *Id.* at 305-06, 17 FEP Cases 1017.

Justices Brennan, White, Marshall, and Blackmun would permit states to use race-conscious remedies "where there is reason to believe that the evil addressed is a product of past discrimination." *Id.* at 366, 17 FEP Cases at 1039. In response to Justice Powell's requirement that affirmative action be supported by a compelling state interest, and narrowly tailored to the achievement of that interest, these four Justices would require that benign racial classifications serve important governmental objectives and be substantially related to the achievement of those objectives. *Id.* at 359, 17 FEP Cases at 1036. In addition, these four Justices would require an independent inquiry into whether the preference "stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives." *Id.* at 373-74, 17 FEP Cases at 1042-43.

Moreover, prior to 1986, the Court had not addressed the specific issues of voluntary affirmative action in governmental employment decisions. Consequently, lower court decisions on this issue have been inconsistent, with various courts following one of the several standards offered by the different Supreme Court Justices — or creating their own standard. Compare *Baker v. City of Detroit*, 483 F. Supp. 930, 991, 24 FEP Cases 1728, 1779 (E.D. Mich. 1979), *aff'd sub. nom.* *Bratton v. City of Detroit*, 704 F.2d 878, 31 FEP Cases 465 (6th Cir. 1983), cert. denied, 104 S. Ct. 703, 33 FEP Cases 1084 (1984) (court applied the standard set out in the Title VII case of *Steelworkers v. Weber*, 443 U.S. 193 (1979)) with *Bratton*, 704 F.2d at 886-87, 31 FEP Cases at 470 (applying Justice Brennan's approach as set forth in the *Bakke* dissent but also requiring sufficient findings by a competent body). See also *N.A.A.C.P. v. Beecher*, 679 F.2d 965, 977, 28 FEP Cases 1627, 1667-68 (1st Cir. 1982) (court created its own standard drawing upon reasonableness test and the factors set out in *Weber*).

¹¹ Justice Powell was the "swing" vote in *Bakke*, see 438 U.S. at 271-72, 17 FEP Cases at 1004, he wrote a lengthy concurrence in *Fullilove*, 448 U.S. at 495-517, applying his standard to the case, and his standard is the basis of the Court's plurality in *Wygant*, 106 S. Ct. 1842, 1844-52, 40 FEP Cases 1320, 1322-28 (1986).

ination and the "benign" discrimination contained in affirmative action plans.¹² He therefore applies the two-prong "strict scrutiny" standard traditionally applied to racial classifications.¹³ Under Justice Powell's approach, a governmental body must demonstrate both that a compelling purpose exists for the racial preference, and that the preference is narrowly tailored or is the least restrictive means to achieve that compelling purpose.¹⁴ Pursuant to this standard, a plurality of the Court has held that the goal of classroom diversity justifies affirmative action in academic admissions.¹⁵ Several lower courts have also held that a public employer may use racial preferences to correct the employer's own prior invidious discrimination.¹⁶

During the *Survey* year, in *Wygant v. Jackson Board of Education*, a plurality of the Supreme Court ruled that providing classroom role models in order to remedy societal discrimination is not a sufficiently compelling purpose to justify affirmative action.¹⁷ Four Justices also agreed that a collectively bargained racial layoff preference is an unconstitutional means of achieving even a compelling governmental purpose.¹⁸ In addition, the Court considered a test for determining the constitutionality of voluntary affirmative action plans.¹⁹ Despite disagreement on this test and, in particular, on the requisite specificity of findings of prior discrimination necessary to uphold a remedial affirmative action plan,²⁰ five Justices held that the affirmative action plan in *Wygant* violated the equal protection clause.²¹ Thus, after *Wygant*, public employers may not enact affirmative action plans which include a racial layoff preference to remedy societal discrimination. *Wygant* reaffirms, however, that public employers may use limited racial preferences to correct their own past discrimination.²²

In *Wygant*, the school board of Jackson, Michigan and the teachers' union had negotiated an affirmative action plan as part of their collective bargaining agreement.²³ In order to maintain the percentage of minority faculty members attained by hiring preferences, Article XII of the contract protected minority teachers from layoffs in a

¹² See *Wygant*, 106 S. Ct. at 1846, 40 FEP Cases at 1324 (1986); *Bakke*, 438 U.S. at 291-99, 17 FEP Cases at 1011-14.

¹³ See *Bakke*, 438 U.S. at 299, 17 FEP Cases at 1014; *Fullilove*, 448 U.S. at 496-99. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6 (1978).

¹⁴ See *id.*

¹⁵ See *Bakke*, 438 U.S. at 319-20, 17 FEP Cases at 1022.

¹⁶ See *supra* note 10.

¹⁷ 106 S. Ct. 1842, 1848, 40 FEP Cases 1320, 1325 (1986).

¹⁸ *Id.* at 1852, 40 FEP Cases at 1328. Justice White concurred in this part of the judgment. *Id.* at 1857, 40 FEP Cases at 1332 (White, J., concurring in the judgment).

¹⁹ *Id.* at 1848-49, 40 FEP Cases at 1325; *id.* at 1854-56, 40 FEP Cases 1330-31 (O'Connor, J., concurring in the judgment); *id.* at 1863, 40 FEP Cases at 1336-37 (Marshall, J., dissenting).

²⁰ *Id.*

²¹ Justices Powell, Rehnquist and Chief Justice Burger found that the plan violated both parts of the strict scrutiny test. *Id.* at 1848, 1852, 40 FEP Cases at 1325, 1328. Justice O'Connor found only that the plan was not adopted pursuant to a sufficiently compelling purpose. *Id.* at 1857, 40 FEP Cases at 1332 (O'Connor, J., concurring in the judgment). Justice White found only that the plan was unconstitutionally broad in its operation. *Id.* at 1857-58, 40 FEP Cases at 1332-33 (White, J., concurring in the judgment). Thus only four Justices found the plan unconstitutional on either part of the two part standard, but five Justices ruled the plan unconstitutional.

²² *Wygant*, 106 S. Ct. at 1848, 40 FEP Cases at 1325; see also *id.* at 1863, 40 FEP Cases at 1336-37 (Marshall, J., dissenting).

²³ *Id.* at 1844-45, 40 FEP Cases at 1322.

greater proportion than their percentage in the workplace.²⁴ Article XII specifically provided that teachers would be laid off in reverse seniority "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."²⁵ Pursuant to this provision, when layoffs became necessary some white teachers were laid off before black teachers with less seniority.²⁶

In 1972 the union and the school board negotiated the layoff provision in Article XII after a series of events led to a violent escalation of racial tensions in Jackson schools.²⁷ In 1969 minority representation on the faculty was 3.9%.²⁸ The NAACP filed a complaint with the Michigan Civil Rights Commission claiming, in part, that the board discriminated in the hiring of minority teachers. The Commission investigated and concluded that the NAACP's allegations had merit.²⁹

Rather than contest these claims, and require the Commission to make formal findings of the board's racial discrimination, the school board sought settlement and agreed to numerous remedial measures including an affirmative action program for hiring minority teachers.³⁰ As a result, by 1971 the percentage of minority teachers reached 8.8%.³¹ In that year, however, layoffs became necessary. Since the collective bargaining agreement provided for layoffs in order of reverse seniority, most of the minority teachers hired pursuant to the affirmative action program were laid off, "literally wip[ing] out all the gain made toward achieving racial balance."³² At the same time, racial tensions in the schools rose to violent levels. In early 1972 the school board decided to respond to these tensions by fully integrating the Jackson school system, including its faculty.³³ The board recognized that integration of its faculty would require a modification of the seniority system to prevent economic fluctuations from eviscerating the results of a hiring program.³⁴ Thus, the school board and the teachers' union negotiated for Article XII of the collective bargaining agreement which modified the schools' reverse seniority layoff practice.³⁵

Nonetheless, when layoffs were again necessary in 1974, the school board violated Article XII by laying off minority teachers before tenured white teachers.³⁶ The union and two minority teachers who had been laid off brought suit against the board in federal court claiming that the board's failure to honor the provision violated the equal

²⁴ *Id.*

²⁵ *Id.* at 1845, 40 FEP Cases at 1322.

²⁶ *Id.* at 1845, 40 FEP Cases at 1322-23.

²⁷ *Id.* at 1859, 40 FEP Cases at 1334 (Marshall, J., dissenting).

²⁸ *Id.* at 1859, 40 FEP Cases at 1333 (Marshall, J., dissenting).

²⁹ *Id.* (Marshall, J., dissenting).

³⁰ *Id.* at 1859, 40 FEP Cases at 1334 (Marshall, J., dissenting).

³¹ *Id.* (Marshall, J., dissenting).

³² *Id.* (Marshall, J., dissenting).

³³ *Id.* (Marshall, J., dissenting).

³⁴ *Id.* (Marshall, J., dissenting).

³⁵ *Id.* (Marshall, J., dissenting). The school board and the teachers' union negotiated Article XII of the collective bargaining agreement at some length. The teachers' union initially favored straight seniority and the board a temporary freeze on minority layoffs. Justice Marshall noted in dissent that "one union leader characterized the development of the layoff compromise as the most difficult balancing of the equities that he had ever encountered." *Id.* (Marshall, J., dissenting).

³⁶ *Id.* at 1845, 40 FEP Cases at 1322-23.

protection clause and Title VII of the Civil Rights Act of 1964.³⁷ In response, the board denied any prior discrimination.³⁸ The district court dismissed the case for lack of jurisdiction because of insufficient evidence of prior discrimination by the school board, and because the plaintiffs had failed to fulfill the jurisdictional prerequisites of Title VII.³⁹

The union then brought suit in state court raising similar claims. The state court found for the plaintiffs, ruling that the board breached the contract with the union.⁴⁰ The state court rejected the board's argument that the layoff provision constituted discrimination against white teachers in violation of the Civil Rights Act of 1964.⁴¹ In holding that the layoff provision did not impermissibly discriminate against white teachers, however, the court did not accept the plaintiffs' position that the provision was necessary to remedy the school board's prior hiring discrimination against minorities. The court stated that the plaintiffs had not established that the board discriminated against minorities in its hiring practices. The court found instead that the under representation of minorities on the faculty was the result of societal racial discrimination.⁴² Thus, the state court found no history of overt racial discrimination by the school board but nonetheless held that the layoff provision was a permissible attempt to remedy the effects of societal discrimination.⁴³

After this ruling by the state court, the board followed the layoff provision. Consequently, in the 1976-1977 and 1981-1982 school years, minority teachers were retained while white teachers with greater seniority were laid off.⁴⁴ Several displaced white teachers thereafter brought suit in federal court claiming violations of the equal protection clause, Title VII, and other state and federal statutes. On cross motions for summary judgment, the district court dismissed the plaintiffs' claims.⁴⁵ The court found that the board need not ground the racial preferences embodied in the layoff provision on a prior finding of discrimination.⁴⁶ Rather, the lower court concluded that preferences were permissible under the equal protection clause as an effort to remedy societal discrimination by providing role models for minority students.⁴⁷ The Court of Appeals for the Sixth Circuit affirmed on the same grounds.⁴⁸ The plaintiffs then petitioned for a writ of certiorari, solely on their equal protection claim, which the Supreme Court granted.

The Supreme Court reversed the lower courts, striking down the layoff provision as violative of the equal protection clause.⁴⁹ Justice Powell wrote for a plurality of the Court. He applied the strict scrutiny standard, reiterating his position that "the level of

³⁷ *Id.* at 1845, 40 FEP Cases at 1323. The plaintiffs also sought pendant jurisdiction over state law contract claims.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1845-46, 40 FEP Cases at 1323.

⁴⁵ *Id.* at 1846, 40 FEP Cases at 1323.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."⁵⁰ Justice Powell therefore applied a two-prong standard of review. First, he stated, the racial classification must be justified by a compelling governmental purpose, and second, the means adopted by the state to bring about that purpose must be narrowly tailored to its achievement.⁵¹ Justice Powell found that the layoff provision failed both prongs of the test. Two Justices joined in his opinion. Justice O'Connor, however, agreed only that the stated purpose was insufficient to justify a racial preference, and Justice White agreed only with the second part of the plurality's opinion, that the means were unconstitutionally broad.⁵² Thus a plurality of five Justices held that the plan was unconstitutional.⁵³

Justice Powell stated that societal discrimination alone is not sufficiently compelling to support a racial classification.⁵⁴ For a court to find an affirmative action plan valid, the Justice maintained, the public employer must make some showing of its prior discrimination.⁵⁵ Only an effort to remedy the employer's own past discrimination, he stated, is sufficiently compelling to permit the racial classifications of affirmative action.⁵⁶

Justice Powell rejected the role model theory accepted by the lower courts, reasoning that it "has no logical stopping point."⁵⁷ Because there is no relation between the role model theory and the harm caused by prior hiring discrimination, Justice Powell maintained that an affirmative action plan based on the role model theory might continue to operate long past the point of a legitimate remedial purpose.⁵⁸ Justice Powell therefore concluded that despite the incontrovertible fact that there has been discrimination in America, "societal discrimination is insufficient and over expansive" to justify discriminatory legal remedies which harm innocent people.⁵⁹ Thus, Justice Powell's approach requires the employer to make particularized findings of its own past hiring discrimination before enacting an affirmative action plan.

Although the Court agreed with Justice Powell that the correction of past or present racial discrimination warrants the remedial use of a narrowly constructed affirmative action plan, the Justices did not agree on the evidentiary standard necessary to justify remedial affirmative action. Both the plurality and the dissent rejected the petitioner's argument that an affirmative action plan could only be valid if there was an explicit admission or full judicial finding of actionable racial discrimination by the employer.⁶⁰ Justice Powell rejected the petitioner's argument and reasoned that in order for a court to uphold an affirmative action plan as responsive to a sufficiently compelling governmental purpose, the court must make the factual determination that the employer had a "strong basis in evidence for its conclusion that remedial action was necessary."⁶¹

⁵⁰ *Id.* at 1846, 40 FEP Cases at 1324.

⁵¹ *Id.*

⁵² See *supra* note 21.

⁵³ *Wygant*, 106 S. Ct. at 1846, 40 FEP Cases at 1324.

⁵⁴ *Id.* at 1847, 40 FEP Cases at 1324.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1848, 40 FEP Cases at 1325.

⁵⁷ *Id.* at 1847, 40 FEP Cases at 1324.

⁵⁸ *Id.* at 1847-48, 40 FEP Cases at 1324-25.

⁵⁹ *Id.* at 1848, 40 FEP Cases at 1325.

⁶⁰ *Id.*

⁶¹ See *supra* note 21. The Solicitor General had also argued as amicus that the employer must be fully adjudged guilty of prior discrimination before the Constitution permits affirmative action.

Applying his "strong basis in evidence" standard, Justice Powell found that the board had presented no evidence of its prior discrimination, and that the several cases below had determined that any statistical disparity between the percentage of minority teachers and the relevant labor market was the result of "general societal discrimination," not of discrimination by the school board.⁶² In its pleadings and arguments before the Supreme Court, the board submitted extensive extra-record documentation of its past discriminatory hiring practices and claimed that because of the complex litigation history surrounding the layoff provision it had not previously been in its interest to prove its own prior hiring discrimination.⁶³ Justice Powell rejected as untimely the board's *de novo* attempts to satisfy the Court that there was sufficient evidence to prove the board's past discrimination.⁶⁴

Justice Powell and three other justices further found that the layoff provision was not a constitutional means of achieving even a compelling governmental purpose.⁶⁵ Justice Powell distinguished cases involving hiring goals by stating that the burden borne by innocent individuals in the hiring cases is diffused among society generally, whereas in cases involving layoffs particular individuals lose their jobs.⁶⁶ The Justice concluded, therefore, that denial of a future employment opportunity is not as heavy a burden as the loss of an existing job.⁶⁷ Thus, four Justices consider that laying off nonminority employees to remedy their employer's discrimination imposes too heavy a burden on the employees, and that any affirmative action plan which includes a racial preference in layoffs is unconstitutionally broad.⁶⁸ Rather, employers should use the less intrusive means of hiring goals to remedy employment discrimination.⁶⁹

Justice O'Connor concurred in the judgment and followed Justice Powell's use of the two-prong strict scrutiny standard.⁷⁰ She agreed that the role model theory of remedying societal discrimination was not compelling, but did not agree with Justice Powell that layoff provisions are inherently unconstitutional as overbroad.⁷¹ In her concurrence, Justice O'Connor stressed public employers' need for an opportunity to remedy their prior racial discrimination voluntarily without incurring subsequent liability to nonminorities affected by affirmative action plans.⁷² She agreed that to require employers to make full admissions or be adjudicated guilty of past discrimination before they may constitutionally implement affirmative action would destroy public employers' incentive to fulfill voluntarily their civil rights duties.⁷³ This, the Justice reasoned, would "clearly be at odds with this Court's and Congress' consistent emphasis on the value of

See *Wygant* 106 S. Ct. at 1862, 40 FEP Cases at 1336. Seven members of the Court explicitly rejected the Justice Department's position.

⁶² *Wygant*, 106 S. Ct. at 1849, 40 FEP Cases at 1325-26.

⁶³ *Id.* at 1858, 40 FEP Cases at 1333 (White, J., concurring in the judgment).

⁶⁴ *Id.* at 1849, 40 FEP Cases at 1326.

⁶⁵ *Id.*; *id.* at 1857-58, 40 FEP Cases at 1332-33 (White, J., concurring in the judgment).

⁶⁶ *Id.* at 1851-52, 40 FEP Cases at 1327.

⁶⁷ *Id.* at 1852, 40 FEP Cases at 1327.

⁶⁸ *Id.* at 1852, 40 FEP Cases at 1328; *id.* at 1857-58, 40 FEP Cases at 1332-33 (White, J., concurring in the judgment).

⁶⁹ *Id.* at 1852, 40 FEP Cases at 1328.

⁷⁰ *Id.* at 1853, 40 FEP Cases at 1329 (O'Connor, J., concurring in the judgment).

⁷¹ *Id.* at 1857, 40 FEP Cases 1332 (O'Connor, J., concurring in the judgment).

⁷² *Id.* at 1856, 40 FEP Cases at 1331-32 (O'Connor, J., concurring in the judgment).

⁷³ *Id.* at 1855, 40 FEP Cases at 1330 (O'Connor, J., concurring in the judgment).

voluntary efforts to further the objectives of the law."⁷⁴ For this reason, Justice O'Connor agreed with the plurality that the proper standard for establishing prior discrimination as the basis of affirmative action is a "firm basis" in evidence.⁷⁵

The dissent joined the plurality on the issue of the findings of prior discrimination necessary to justify an affirmative action plan, on much the same reasoning as that given by Justice O'Connor.⁷⁶ The dissent did not agree, however, on the principle issues governing the disposition of the case. Three Justices, led by Justice Marshall, would not have heard the case at all.⁷⁷ Due to the procedural history of the layoff provision, especially the fact that the minority teachers had no opportunity to present facts supporting their discrimination claims against the board because the case was appealed after a victory on summary judgment, the dissent would have remanded the case to the district court for further fact finding on the issue of the board's discrimination.⁷⁸

Although arguing that the facts were insufficient to support an opinion, Justice Marshall nonetheless explained why the dissent would have upheld the affirmative action plan. The dissent argued for the application of the intermediate standard of review for affirmative action first articulated in *Regents of the University of California v. Bakke*.⁷⁹ Specifically, the dissent maintained that the "remedial use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives.'"⁸⁰ These Justices reasoned that strict scrutiny was inappropriate because whites have none of the immutable characteristics of a suspect class and because the remedial racial classification did not impinge upon a fundamental right.⁸¹

Drawing upon the extra-record materials submitted to the Court, the dissent argued that it was unnecessary to rely upon the purpose of remedying societal discrimination pled below.⁸² Rather, the dissent reasoned that the history of efforts to integrate the Jackson schools, with its attendant violence, the finding of the Michigan Civil Rights Commission that the board had discriminated in hiring, and statistical evidence of under representation of minorities on the faculty were sufficient to define the board's purpose as the correction of its own prior discrimination.⁸³ In addition, the dissent continued, the board sought the preservation of the faculty integration achieved in the early 1970s in order to attain stability and educational quality in the schools.⁸⁴ Both these purposes,

⁷⁴ *Id.* at 1855-56, 40 FEP Cases at 1330-31 (O'Connor, J., concurring in the judgment). She argued that it would undermine "the States' constitutional duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Id.* at 1856, 40 FEP Cases at 1331 (O'Connor, J., concurring in the judgment).

⁷⁵ *Id.* (O'Connor, J., concurring in the judgment).

⁷⁶ *Id.* at 1863, 40 FEP Cases at 1337 (Marshall, J., dissenting).

⁷⁷ *Id.* at 1858, 40 FEP Cases at 1333 (Marshall, J., dissenting).

⁷⁸ *Id.* (Marshall, J., dissenting).

⁷⁹ *Id.* at 1861, 40 FEP Cases at 1335 (Marshall, J., dissenting).

⁸⁰ *Id.* (Marshall, J., dissenting) (quoting *Bakke*, 438 U.S. at 359, 17 FEP Cases at 1036).

⁸¹ *Id.* (Marshall, J., dissenting).

⁸² *Id.* at 1863, 40 FEP Cases at 1337 (Marshall, J., dissenting).

⁸³ *See id.* (Marshall, J., dissenting). Justice Marshall does not make this point clearly. Rather, one may infer it from his reasoning. Justice Powell noted this lack of clarity and interpreted Justice Marshall's statement to mean either that Justice Marshall felt the board must offer sufficient evidence of its own prior discrimination, which Justice Powell found lacking, or that Justice Marshall was satisfied with the remedying of societal discrimination as a constitutionally permissible purpose, in which case further evidence of the board's own discrimination was unnecessary. *Id.* at 1849 n.5, 40 FEP Cases at 1326 n.5.

⁸⁴ *Id.* at 1863, 40 FEP Cases at 1337 (Marshall, J., dissenting). Justice Marshall posits the purpose

the dissent argued, were sufficiently important to justify the use of remedial racial classifications.⁸⁵

Coming to the second prong of the intermediate standard of review, the dissent strongly disagreed with the plurality's analysis of the layoff provision as too intrusive and overbroad. Justice Marshall characterized as untenable Justice Powell's finding that preferential layoff protection is not permissible in the face of massive layoffs because, according to Justice Powell, hiring policies serve the same purpose at a lesser cost.⁸⁶ Justice Marshall stated that "[a]s a matter of logic as well as fact, a hiring policy achieves no purpose at all if it is eviscerated by layoffs."⁸⁷ In addition, Justice Marshall drew upon evidence that the lack of some layoff protection would have crippled the board's efforts at recruiting minority teachers to conclude that the plan was sufficiently narrowly tailored to achieve the purpose of integrating the faculty.⁸⁸ Justice Marshall further rebutted Justice Powell's conclusion that race-conscious layoff plans are always unconstitutional by noting that Article XII itself did not require teachers to be laid off. Rather, economic forces caused the school board to lay off teachers. Although those displaced are severely harmed through no fault of their own, Justice Marshall maintained that this is not in itself a constitutional violation.⁸⁹ The Justice pointed out that any *per se* constitutional

somewhat more broadly than that pled by the school board. He stated the board's interest in integrating the faculty as "diversity and stability for the benefit of *all* students." *Id.* (Marshall, J., dissenting). Prior to review by the Supreme Court the board had characterized its purpose as remedying societal discrimination by providing role models for minority students, not as benefiting all students by retaining a racially diverse faculty. Justice O'Connor noted that this would have presented a different question. *Id.* at 1854 n.*, FEP Cases at 1330 n.* (O'Connor, J., concurring in the judgment).

⁸⁵ *Id.* at 1863, 40 FEP Cases at 1337 (Marshall, J., dissenting).

⁸⁶ *Id.* at 1864, 40 FEP Cases at 1337-38 (Marshall, J., dissenting).

⁸⁷ *Id.* at 1864, 40 FEP Cases at 1338 (Marshall, J., dissenting).

⁸⁸ *Id.* at 1864, 40 FEP Cases at 1337 (Marshall, J., dissenting).

⁸⁹ *Id.* at 1864, 40 FEP Cases at 1338 (Marshall, J., dissenting). Justice Marshall distinguished the Title VII case of *Firefighters v. Stotts*, 467 U.S. 561 (1984), on the grounds that the layoff protection afforded minority employees in *Stotts* was the result of a court order, while the layoff provision in *Wygant* was collectively bargained and agreed to by both the school board and the union. Justice Marshall placed considerable weight on the fact that the provision was voluntary. *Id.* at 1860, 40 FEP Cases at 1334-35 (Marshall, J., dissenting). He stated:

the perceived dangers of affirmative action misused, therefore, are naturally averted by the bilateral process of negotiation, agreement, and ratification. The best evidence that Article XII is a narrow means to serve important interests is that representatives of all affected persons, starting from diametrically opposed perspectives, have agreed to it — not once, but six times since 1972.

Id. at 1866, 40 FEP Cases at 1339 (Marshall, J., dissenting). The result was a narrow provision, Justice Marshall argued, because "it allocates the impact of an unavoidable burden proportionately between two racial groups." *Id.* at 1865, 40 FEP Cases at 1338-39 (Marshall, J., dissenting).

Justice Powell responded to this argument. He characterized Justice Marshall's view of the case as "not in terms of individual constitutional rights, but as an allocation of burdens 'between two racial groups.'" *Id.* at 1850 n.8, 40 FEP Cases at 1327 n.8. The petitioners, Justice Powell continued, are not a group but individual teachers who claim that they lost their jobs because of their race. "That claim," he maintained, "cannot be waived by petitioners' more senior colleagues The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights." *Id.*

While Justice Powell's view is likely to prevail in the way the majority articulates the reverse discrimination claims of white individuals affected by affirmative action, Justice Marshall's argument

prohibition against layoff protection is the equivalent of ruling that the practice of basing layoffs on seniority is so fundamental that the constitution prohibits its modification.⁹⁰ Justice Marshall concluded that this proposition is inconsistent with established precedent allowing modification of seniority to achieve other public policies.⁹¹

The most important principle of *Wygant* is in its dicta. Seven members of the Court firmly and specifically rejected the argument that an affirmative action plan is only constitutionally valid if supported by an antecedent or contemporaneous judicial finding of previous discrimination, or a full admission by the employer.⁹² Nonminority employees or applicants will therefore not succeed in claiming that an affirmative action plan which lacks a judicial finding of discrimination violates the equal protection clause. After *Wygant*, a public employer still must make a convincing showing that its past discrimination requires remedial racial preferences, but that showing need not rise to the level of independent liability.⁹³ Although the *Wygant* Court struck down the affirmative action plan in question, the Court's indication that it will not require full judicial findings of discrimination to uphold affirmative action is an important reaffirmance of the Court's general support for remedial affirmative action.

On the specific facts of the case,⁹⁴ the only holding which emerged from the plurality is that racial preferences in layoffs implemented to provide role models for minority students, and thereby remedy societal discrimination, are unconstitutional.⁹⁵ An insufficient number of Justices agreed to strike down explicitly either the purpose or the means involved in the affirmative action plan. Nonetheless, the Court offered a strong

more accurately reflects the reality of affirmative action. Justice Powell's polemics notwithstanding, it is difficult to see how affirmative action is ever anything other than a group "bloc grant" of constitutional proportion. By definition, affirmative action is a benefit granted to various individuals on the basis of their membership in a group. Affirmative action is not make-whole relief to identifiable victims of discrimination. Rather, it is the reapportionment of some benefit from the members of one group, who may never have been guilty of discrimination, to the members of another group, who may never have been harmed, simply because most members of the latter group have been harmed at one time or another. When the Court holds that remedial affirmative action is valid, it is simply because the previous *group* harm perpetrated by a particular institution is perceived to warrant a *group* remedy. See generally, O. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

⁹⁰ *Wygant*, 106 S. Ct. at 1864, 40 FEP Cases at 1338.

⁹¹ *Id.* (citing *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 775 (1976) (court may displace innocent workers by granting retroactive seniority to victims of employment discrimination)).

⁹² See *supra*, note 22.

⁹³ See *Wygant*, 106 S. Ct. 1848, 40 FEP Cases at 1325.

⁹⁴ In large measure *Wygant* itself was decided by what the Justices took from the complex and curiously pled cases below. The plurality restricted itself to the record presented, while the dissent disagreed largely on facts and claims not officially before the Court. Thus, much of the reasoning by Justices Powell and Marshall either fails to intersect in an agreed upon record of operative facts, or is parallel and differs in outcome only because of the evidence adduced. For example, Justice Powell did not accept the board's argument that its purpose was at least in part to remedy its own past hiring discrimination, nor did he accept the extra-record evidence to that effect, while Justice Marshall did both and consequently argued that the board passed the plurality's own standard for articulating a compelling state purpose.

In light of the fact that Justice Powell failed to win a majority for the proposition that layoff protection is *per se* unconstitutional, there is a strong argument that the Court could have avoided the ensuing fragmented plurality by remanding the case for clarification of the board's past hiring discrimination.

⁹⁵ See *supra* notes 17-18.

indication that public employers must link affirmative action closely to their own prior discrimination.⁹⁶ Furthermore, Justice Powell reiterated his position that societal discrimination is too amorphous a concept to support affirmative action.⁹⁷ *Wygant* therefore strongly suggests, but does not hold, that societal discrimination is insufficient to justify racial remedies.

The strange combination of the school board's limited goal of role models for minority students and its broad purpose of correcting "societal" discrimination prevented the Court from addressing the more difficult question of whether goals other than the remedying of an employer's own past discrimination could be compelling justification for racial hiring preferences. For example, *Wygant* does not address the question of whether a school may hire minorities in order to gain a diverse faculty for the educational benefit of all students. Such a purpose, however, seems to parallel the motives approved in *Bakke* where the Court found that affirmative action in school admissions to achieve a diverse student body is a compelling governmental goal.⁹⁸ Although the dissent stated that it would uphold such a purpose,⁹⁹ there is no indication how the *Wygant* plurality would view such a question.

Nor does the *Wygant* plurality specifically hold that layoff protection is an impermissible means of achieving a compelling goal.¹⁰⁰ The logic of the four Justices who so ruled appears to rest on the Court's reluctance to alter seniority expectations in civil rights cases. Justice Powell cites *Firefighters v. Stotts* in support of his belief that affirmative action involving layoffs is simply too onerous under any circumstances.¹⁰¹ The Justice's *per se* rejection of layoff protection would mean that for the foreseeable future affirmative action is only a fair weather option. When jobs are scarce, the correction of past invidious racial discrimination not directly linked to individual victims must simply wait for the economy to improve.

The proposition that layoff protection is not sufficiently narrowly tailored, or is not the least restrictive available means to achieve even the compelling redress of prior discrimination, is also theoretically unsound. As Justice Marshall points out, in the face of layoffs, racial layoff protection is the narrowest means available to achieve the goal of correcting past discrimination.¹⁰² Only if Justice Powell's compelling governmental interest in correcting past discrimination is understood as contingent upon a sustained period of economic stability can the Justice correctly reason that layoff protection is not the least restrictive means available to remedy past discrimination. Justice Powell's reasoning is more appropriately stated, therefore, as finding that the correction of past discrimination, otherwise compelling, is not compelling enough when the cost to achieve that purpose is the modification of a layoff order. If layoffs are inevitable, integration is impossible for any reason without racial layoff protection. Nonetheless, after *Wygant*, public employers would be ill advised to include such a provision in an affirmative action plan.

⁹⁶ See *Wygant*, 106 S. Ct. at 1848, 40 FEP Cases at 1325.

⁹⁷ See *id.*

⁹⁸ *Bakke*, 438 U.S. at 314-15, 17 FEP Cases at 1020.

⁹⁹ *Wygant*, 106 S. Ct. at 1863, 40 FEP Cases at 1337 (Marshall, J., dissenting).

¹⁰⁰ *Id.* at 1857, 40 FEP Cases at 1332 (Justice O'Connor did not concur on this point).

¹⁰¹ *Wygant*, 106 S. Ct. at 1851, 40 FEP Cases at 1327. See *supra* note 89 for a brief discussion of *Stotts*.

¹⁰² *Id.* at 1865, 40 FEP Cases at 1339 (Marshall, J., dissenting).

Wygant contains two implications which are of direct relevance to public employers and unions. First, seven members of the Court explicitly reject the requirement that an employer reduce findings of its prior discrimination to a legal certainty, before the Constitution will permit remedial affirmative action. Second, the plurality finds that a collectively bargained contract between a union and an employer does not supplant or restrict the constitutional claims of individual employees. If the individual can prove a constitutional harm from the enforcement of the collective bargaining agreement, the Court will strike that part of the contract.

In sum, *Wygant* demonstrates the continued factionalization of the Supreme Court in defining the constitutional parameters of affirmative action. The case holds only that a school board may not use racial preferences in layoffs for the purpose of retaining faculty role models for minority students and thereby correcting societal discrimination. *Wygant* strongly suggests, however, that any purpose defined as the correction of societal discrimination will be constitutionally insufficient. Furthermore, *Wygant* strongly suggests that at least four Justices are likely to find racial protection in layoffs an unconstitutionally intrusive means for any purpose. After *Wygant*, public employers must implement affirmative action plans when the economy is stable or expanding, and, if their plans are challenged, they must prepare convincing evidence of their prior discrimination.

B. **Supreme Court Endorses Court-Ordered Affirmative Action for Non-Victims: Local 28 of the Sheet Metal Workers' International Association v. EEOC*¹

Section 706(g) of the Civil Rights Act of 1964 permits courts to order an employer or a labor union found guilty of discrimination to take affirmative action to correct that unlawful practice.² Such affirmative action, the statute provides, may include, but is not limited to, ordering the reinstatement or hiring of employees or the admission of individuals to a union.³ The final sentence of section 706(g) indicates that no court shall order the admission, hiring, reinstatement or promotion of an individual who was refused admission or advancement, suspended or fired, for any reason other than a discriminatory one.⁴

* By Kathleen E. McGrath, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 106 S. Ct. 3019, 41 FEP Cases 107 (1986).

² 42 U.S.C. § 2000e-5(g) (1982). Section 706(g) provides in relevant part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin in violation of . . . this title.

Id.

³ *Id.*

⁴ *Id.*

While the statute expressly permits courts to order affirmative action,⁵ it does not specify under what circumstances a court may order it. The United States Department of Justice, after the Supreme Court's 1984 decision in *Firefighters Local Union No. 1784 v. Stotts*,⁶ began to interpret section 706(g) as allowing courts to order affirmative action only when the plan benefits individuals who are proven victims of specific discriminatory acts.⁷ In *Stotts*, a federal court ordered city officials to ignore the city's established seniority system for determining which workers to lay off.⁸ Thus, city officials laid off white firefighters with greater seniority than some minority firefighters.⁹ The city had hired the minority firefighters as part of an affirmative action plan to achieve approximately the same racial composition in the force as in the county.¹⁰ The city did not admit to any practice of discrimination in agreeing to the consent decree, which was the basis of its affirmative action plan.¹¹ The Supreme Court overturned the court order and held that federal courts could disrupt a bona fide seniority system only to benefit individuals who are proven victims of discrimination.¹²

The Justice Department argued for a broad interpretation of *Stotts*,¹³ and in amicus briefs, asserted that any affirmative action plan that benefits individuals who are not proven victims of discrimination violates Title VII.¹⁴ Seven courts of appeal refused to accept *Stotts* as an absolute bar to court-ordered affirmative action that aids non-victims before the Supreme Court considered the issue.¹⁵

During the Survey year, in *Local 28 of the Sheet Metal Workers International Association v. EEOC*,¹⁶ the Supreme Court of the United States rejected the Justice Department's reading of *Stotts* and section 706(g) of Title VII,¹⁷ and held that courts may, in certain circumstances, order employers or unions to take affirmative action that benefits those who are not proven victims of discrimination.¹⁸ In *Sheet Metal Workers*, the Court determined that a union's egregious and continuous discrimination in defiance of earlier court orders justified the imposition of affirmative action in the form of a short-term membership goal for minority group members.¹⁹ A plurality distinguished the *Stotts* case by

⁵ *Id.*

⁶ 467 U.S. 561, 34 FEP Cases 1702 (1984).

⁷ Beck, *The Supreme Court Decisions of the 1985-86 Term*, 3 THE LAB. LAW. 55, 56 (Winter 1987).

⁸ *Stotts*, 467 U.S. at 566-67, 34 FEP Cases at 1706.

⁹ *Id.* at 567, 34 FEP Cases at 1706.

¹⁰ *Id.* at 565, 34 FEP Cases at 1705.

¹¹ *Id.*

¹² *Id.* at 583, 580, 34 FEP Cases at 1712, 1711.

¹³ See, e.g., *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3049, 41 FEP Cases 107, 127 (1986).

¹⁴ *Id.* See also Beck, *supra* note 7, at 56.

¹⁵ See, e.g., *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152, 36 FEP Cases 153 (6th Cir. 1985), *rev'd on other grounds*, 106 S. Ct. 1842, 40 FEP Cases 1321 (1986); *Deveraux v. Geary*, 596 F. Supp. 1481, 36 FEP Cases 415 (D. Mass. 1984), *aff'd*, 765 F.2d 264, 38 FEP Cases 23 (1st Cir. 1985); *EEOC v. Local 638 & Local 28, Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 36 FEP Cases 1466 (2d Cir. 1985); *Pennsylvania v. International Union of Operating Eng'rs*, 770 F.2d 1068, 38 FEP Cases 673 (3d Cir. 1985); *Diaz v. American Telephone & Telegraph*, 752 F.2d 817, 36 FEP Cases 1742 (9th Cir. 1985); *Turner v. Orr*, 759 F.2d 817, 37 FEP Cases 1186 (11th Cir. 1985); *Grann v. City of Madison*, 738 F.2d 786, 35 FEP Cases 296 (7th Cir. 1984).

¹⁶ 106 S. Ct. 3019, 41 FEP Cases 107 (1986).

¹⁷ *Id.* at 3050, 41 FEP Cases at 128.

¹⁸ *Id.* at 3054, 41 FEP Cases at 131.

¹⁹ *Id.* at 3050-51, 41 FEP Cases at 129.

differentiating between retroactive "make whole" relief and prospective affirmative action relief, concluding that only the former is limited to proven victims of discrimination.²⁰

The *Sheet Metal Workers* case presented two major issues: the correct interpretation of section 706(g) of Title VII of the Civil Rights Act of 1964 and the appropriate standard of constitutional review for remedies sanctioned by section 706(g).²¹ Six members of the Court agreed that under section 706(g) a district court may order race-conscious relief that benefits individuals who are not proven victims of discrimination.²² Five of those six justices held that a membership goal which benefits non-victims is permissible under Title VII; Justice White concluded, however, that a specific membership goal for protected class members represents an impermissible quota.²³ In addition, while they could not agree on the correct standard of constitutional review, five justices concluded that the remedy in *Sheet Metal Workers* passed the strictest standard of constitutional scrutiny because it was narrowly tailored to further a compelling state interest in ending unlawful discrimination.²⁴

In *Sheet Metal Workers*, a federal district court issued contempt citations against a union based on the union's failure to implement court-ordered remedies imposed after a 1975 trial found the union guilty of discriminating against non-whites in recruitment, selection, training and admission.²⁵ The union appealed the contempt finding, as well as the court's order that the union meet a 29.23 percent non-white membership goal by August 31, 1987.²⁶ It also challenged the court's order to set up a fund, financed by a \$150,000 contempt fine, to seek out non-white union members through a variety of measures.²⁷ The United States Court of Appeals for the Second Circuit upheld the

²⁰ *Id.* at 3049, 41 FEP Cases at 128. The plurality consisted of Justices Brennan, Marshall, Blackmun and Stevens.

²¹ *Id.* at 3024, 3052, 41 FEP Cases at 109, 130.

²² *Id.* at 3054, 41 FEP Cases at 131. The six justices were the plurality of Justices Brennan, Marshall, Blackmun and Stevens, Justice Powell, and Justice White.

²³ *Id.* at 3062, 41 FEP Cases at 138 (White, J., dissenting).

²⁴ *See id.* at 3052-53, 3054-55, 41 FEP Cases at 130-31, 132.

²⁵ *See id.* at 3028, 3029, 41 FEP Cases at 112, 113. The Court described the district court's 1975 trial findings: (1) the union required applicants to take an entrance examination and to prove they had a high school diploma, although neither requirement was related to job performance and each had a discriminatory impact on non-whites; (2) the union restricted the size of its membership in order to deny access to non-whites and responded to increased demands for its services by issuing temporary work permits to whites; (3) the union selectively organized non-union sheet metal shops with few, if any, minority employees; and (4) the union discriminated in favor of white applicants seeking transfer from sister locals. *See id.* at 3026-27, 41 FEP Cases at 110-11.

After it made these findings, the district court imposed an affirmative action program requiring the union:

to offer annual, non-discriminatory journeyman and apprentice examinations, select members according to a white-nonwhite ratio to be negotiated by the parties, conduct extensive recruitment and publicity campaigns aimed at minorities, secure the administrator's consent before issuing temporary work permits, and maintain detailed membership records, including separate records for whites and non-whites.

Id. at 3027, 41 FEP Cases at 111.

²⁶ *Id.* at 3031, 41 FEP Cases at 113-14.

²⁷ *Id.* at 3030, 41 FEP Cases at 113. Among the uses of the fund were paying for non-white union members to serve as liaisons to vocational and technical schools with sheet metal programs, creating part-time and summer sheet metal jobs for qualified non-white youths, extending financial

district court's contempt citation and its orders regarding the membership goal and the fund.²⁸ The union then sought review by the United States Supreme Court.

In its petition for certiorari to the Supreme Court, the union, joined by the Solicitor General representing the Justice Department, charged that the membership goal and the fund exceeded the scope of Title VII. The union argued that the district court misread Title VII by granting a race-conscious preference to individuals who are not proven victims of discriminatory action.²⁹ The union further contended that the membership goal and the fund were unconstitutional because they violated the equal protection component of the due process clause of the fifth amendment.³⁰

Six members of the Court held that Title VII does not prohibit courts from ordering race-conscious relief that aids individuals who are not proven victims of discrimination, particularly when the discrimination has been egregious.³¹ Four of these six justices, Justices Brennan, Marshall, Blackmun and Stevens, issued a plurality opinion concluding that the plain meaning of the statute, its broad underlying purpose, and the intent of Congress as demonstrated in the legislative history of Title VII support this interpretation.³²

assistance to needy apprentices, paying for counseling and tutorial services to non-white apprentices and providing financial support to employers for job training. *Id.*

²⁸ *Id.* at 3030, 41 FEP Cases at 113. The Second Circuit upheld the district court's contempt remedies, including the fund order and the affirmative action plan, with two modifications. *Id.* at 3031, 41 FEP Cases at 114. It set aside the requirement that one minority apprentice be named for each white apprentice and clarified the district court's instructions on developing non-discriminatory selection procedures. *Id.*

²⁹ *Id.* at 3031, 41 FEP Cases at 114.

³⁰ *Id.* In addition to its Title VII and constitutional claims regarding the membership goal and the fund, the union charged that the membership goal was based on incorrect statistical evidence, that the civil contempt remedies were criminal in nature and were imposed without due process, and that the appointment of an administrator to supervise membership practices interfered with the union's rights to self-governance. *Id.* The Court rejected each of these arguments. *Id.* at 3054, 41 FEP Cases at 131.

³¹ *Id.* at 3050, 3054, 41 FEP Cases at 128-29, 131.

³² *See id.* at 3034-47, 41 FEP Cases at 109-30. Justice Powell concurred in the judgment and joined the plurality opinion except for its analysis of the legislative history of Title VII and its constitutional reasoning. *Id.* at 3054, 41 FEP Cases at 132 (Powell, J., concurring in part). He indicated that he had some doubts about the opinion's interpretation of the legislative history of Title VII. *Id.* (Powell, J., concurring in part). He concluded, however, that neither the legislative history nor the plain language of the statute clearly supported the Justice Department's view that courts order remedies only for proven victims of discrimination. *Id.* (Powell, J., concurring in part). Justice O'Connor concurred with the plurality that the district court had used statistical evidence properly, that its civil contempt sanctions were not criminal in nature, and that its orders did not usurp the union's right to self-governance. *Id.* at 3057, 41 FEP Cases at 134 (O'Connor, J., concurring and dissenting). She dissented in the judgment, however, because she contended that section 703(j) and section 706(g) must be read together to interpret the statute correctly, and that such a reading prohibits courts from ordering relief of the type in this case. *Id.* at 2058, 41 FEP Cases at 134-35 (O'Connor, J., concurring and dissenting). Justice White agreed with the plurality and Justice Powell that Title VII permits courts to order race-conscious relief that benefits non-victims, but dissented in the judgment because he considered the goal in this case to be a quota. *Id.* at 3062, 41 FEP Cases at 138 (White, J., dissenting). Justice Rehnquist and Chief Justice Burger joined in a dissent, arguing that Title VII does not permit courts to order relief for non-victims. *Id.* at 3063, 41 FEP Cases at 139 (Rehnquist, J., dissenting).

Justices Brennan, Marshall, Blackmun and Stevens, in their plurality opinion, started the analysis of section 706(g) of Title VII by examining the plain language of the statute.³³ The plurality concluded that this section of the statute clearly expresses congressional intent to give district courts broad powers to award equitable relief in employment discrimination cases.³⁴ The plurality further stated that the last sentence of section 706(g), which states that no court order shall require admission or reinstatement of anyone excluded for a reason other than a discriminatory one, meant only that a court could not order a union or an employer to accept an unqualified person.³⁵ The plurality then applied this interpretation of the statute to the facts and concluded that the affirmative action agreement in *Sheet Metal Workers* did not force the union to accept unqualified individuals.³⁶

Next, the plurality found that the broad purposes underlying Title VII support the conclusion that section 706(g) allows individuals who are not proven victims of discrimination to obtain relief.³⁷ The broad purpose behind Title VII, the plurality asserted, was the fostering of equal employment opportunities for whites and non-whites.³⁸ Courts often cannot carry out this purpose effectively, the plurality reasoned, unless they have the power to require an employer or union to take affirmative steps.³⁹ For example, the plurality stated, if an employer or a labor union had practiced discrimination over a long period of time, an injunction reiterating the statute's prohibition against discrimination would probably be pointless.⁴⁰ An injunction in those circumstances, the plurality contended, could result in endless enforcement litigation.⁴¹

In addition, the plurality noted, affirmative steps may be justified to dispel a union's or an employer's reputation for discrimination among qualified potential applicants.⁴² The plurality further reasoned that a court may find that ordering interim hiring or promotional goals is the only workable approach when the development of non-discriminatory hiring procedures or tests is pending.⁴³ Without an interim goal, the plurality stated, a court would be faced with choosing between a temporary freeze on hiring or the continued use of discriminatory practices.⁴⁴

³³ See *id.* at 3035, 41 FEP Cases at 117. For the text of section 706(g), see *supra* note 2.

³⁴ *Sheet Metal Workers*, 106 S. Ct. at 3035, 41 FEP Cases at 117.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* Referring to remarks of Senator Hubert Humphrey, one of the statute's sponsors, the plurality stated that Congress was aware that minority workers suffered from "pervasive and systematic" discrimination when it adopted Title VII of the Civil Rights Act. *Id.* at 3035-36, 41 FEP Cases at 117.

³⁸ *Id.* at 3035-36, 41 FEP Cases at 117.

³⁹ *Id.* at 3036, 41 FEP Cases at 118.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 3037, 41 FEP Cases at 118-19.

⁴⁴ *Id.* The plurality noted that the Supreme Court previously had supported racial preferences to address past discrimination. *Id.* In the 1980 case of *Fullilove v. Klutznick*, the Court upheld a federal statute that allotted ten percent of federal public works construction funds for businesses run by minorities. 448 U.S. 448, 453 (1980). The plurality opinion also noted that the United States Courts of Appeals have unanimously agreed that racial preferences may be appropriate to remedy past discrimination. See *Sheet Metal Workers*, 106 S. Ct. at 3037 and n.28, 41 FEP Cases at 119 and n.28. The plurality's footnote lists twenty-six Title VII cases that support the point, including at least one case from each circuit court. *Id.*

The plurality next considered its interpretation that section 706(g) provides affirmative relief to non-victims in light of its legislative history.⁴⁵ The plurality analyzed the statements of legislators and reasoned that the bill's supporters were concerned with assuring opponents that Title VII would not force employers or labor unions to adopt quotas to avoid unlawful discrimination charges.⁴⁶ As support for their interpretation, the plurality pointed to the bill sponsor's insertion of another section, section 703(j), into the statute.⁴⁷ Section 703(j) indicates that nothing in Title VII should be interpreted to require employers or unions to maintain a work force that reflects the racial, religious, ethnic or gender distribution of the community.⁴⁸ It is clear, the plurality maintained, that the bill's supporters added section 703(j) to emphasize that the existence of a racially imbalanced work force alone would not violate Title VII.⁴⁹

The plurality stressed that while Congress rejected the use of racial quotas merely to correct a racial imbalance in the workforce, the legislators did not consider the imposition of racial quotas or preferences as a remedy for past discrimination.⁵⁰ The interpretative question, the plurality noted, is whether Congress intended to prohibit courts from ordering racial preferences or goals to redress past discrimination.⁵¹ Because Congress expressly gave the courts broad equitable powers to devise remedies and did not expressly prohibit courts from ordering race-conscious remedies, the plurality reasoned that Congress did not intend to limit the federal courts' remedial powers.⁵²

⁴⁵ *Id.* at 3038, 41 FEP Cases at 119.

⁴⁶ *See id.* at 3038-44, 41 FEP Cases at 119-24.

⁴⁷ *Id.* at 3038, 41 FEP Cases at 119.

⁴⁸ 42 U.S.C. § 2000e-2(j) (1982). Section 703(j) provides:

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

Id.

⁴⁹ *Sheet Metal Workers*, 106 S. Ct. at 3038, 41 FEP Cases at 120.

⁵⁰ *See id.* at 3044, 41 FEP Cases at 124.

⁵¹ *Id.*

⁵² *Id.* For additional support for this view of the scope of the district courts' remedial powers, the plurality pointed to the contemporaneous policies of the Justice Department and the Equal Employment Opportunity Commission, the two agencies charged with enforcing Title VII of the Civil Rights Act of 1964. *Id.* at 3044-45, 41 FEP Cases at 124. In a footnote, the plurality observed that the Justice Department had now abandoned its earlier support for court-ordered affirmative action. *See id.* at 3045 n.38, 41 FEP Cases at 124 n.38. The quoted portion of the Solicitor General's brief in the 1979 case of *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979), as set out in the footnote, follows:

To be sure, there was considerable concern that the Act would be construed to require the use of quota systems to establish and maintain racial balance in employers' work forces. [citations omitted]. The sponsor of the bill repeatedly assured its opponents that this was not the intent and would not be the effect of the statute. [citations omitted]. But these assurances did not suggest restrictions on remedies that could be

The plurality, moreover, contended that the legislative history of the Equal Employment Opportunity Act of 1972 (the EEOA) supports its interpretation of the courts' remedial powers under Title VII.⁵³ The EEOA amended Title VII in several ways, the plurality noted, including the addition of language to section 706(g) that stressed the broad equitable powers of the courts to order affirmative action.⁵⁴ According to the plurality, during the debate over the EEOA, the Senate considered and rejected an amendment that would have broadened Title VII's prohibition against quotas.⁵⁵ The amendment would have banned the use of variable percentages, goals and ranges, which courts and federal agencies had used when ordering relief for past discrimination.⁵⁶ The Senate turned down that amendment by a two-to-one vote, the plurality noted, and also rejected a proposed amendment to limit the executive branch's power to impose race-conscious remedies.⁵⁷ Because Congress decided to broaden the equitable powers of the courts, and refused to narrow the definition and use of race-conscious remedies, the plurality concluded that Congress intended courts to have the ability to order such remedies, if they are needed to correct past discrimination.⁵⁸

In its final section construing the meaning of Title VII, the plurality opinion considered whether the Court's language in *Firefighters Local Union No. 1784 v. Stotts*⁵⁹ restricted the power of courts to order race-conscious relief to individuals who are not proven victims of discrimination.⁶⁰ The plurality quoted language from *Stotts* in which the Court stated that the policy behind section 706(g) "is to provide 'make-whole' relief only to those who have been actual victims of illegal discrimination."⁶¹ The plurality, however, distinguished the *Stotts* language by explaining that "make-whole" relief and affirmative action relief serve different purposes.⁶² Make-whole relief, the plurality noted, can include competitive seniority, backpay or promotion to restore those who are

ordered after a finding of discrimination. Instead, they made it clear that the statute would not impose a duty on employers to establish racially balanced work forces and that it would not require or even permit employers to establish racial quotas for employment in the absence of discrimination of the kind prohibited by the Act. [citations omitted].

Brief for the United States and the Equal Employment Opportunity Commission in *United Steelworkers of Am. v. Weber*, O.T. 1978 Nos. 432, 435 and 436, pp. 29-30.

The brief concludes that "the last sentence of Section 706(g) simply state[s] that a court could not order relief under the authority of the Act if employers took action against employees or applicants on grounds other than those prohibited by the Act." *Sheet Metal Workers*, 106 S. Ct. at 3045 n.38, 41 FEP Cases at 124 n.38.

⁵³ 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13-2000e-17. See *Sheet Metal Workers*, 106 S. Ct. at 3045-46, 41 FEP Cases at 125-26.

⁵⁴ *Sheet Metal Workers*, 106 S. Ct. at 3045, 41 FEP Cases at 125.

⁵⁵ *Id.* at 3045, 3046, 41 FEP Cases at 125, 126.

⁵⁶ See *id.* at 3045-47, 41 FEP Cases at 125-26. Opponents of the amendment argued that it would "deprive even the courts of any power to remedy clearly proven cases of discrimination." *Id.* at 3046, 41 FEP Cases at 125 (quoting 118 CONG. REC. 1676 (remarks of Senator Javits)).

⁵⁷ *Id.* at 3046, 41 FEP Cases at 125. A second proposed amendment would have extended the reach of section 703(j)'s prohibition of quotas to executive branch orders. *Id.* It was defeated by a large margin. *Id.*

⁵⁸ *Id.* at 3047, 41 FEP Cases at 126.

⁵⁹ 467 U.S. 561 (1984). For a discussion of *Stotts*, see *supra* text accompanying notes 6-14.

⁶⁰ *Sheet Metal Workers*, 106 S. Ct. at 3048, 41 FEP Cases at 127.

⁶¹ *Id.* at 3049, 41 FEP Cases at 127 (quoting *Stotts*, 467 U.S. 561, 579-80, 34 FEP Cases 1702, 1711 (1984)).

⁶² See *id.* at 3049, 41 FEP Cases at 127-28.

actual victims of discrimination.⁶³ The purpose of affirmative action, the plurality stated, is not to make identified victims whole, but to break a pattern of discrimination affecting an entire class of people.⁶⁴ The *Stotts* limitation on a court's authority to order individual make-whole relief does not, the plurality contended, affect a court's power to order class-wide affirmative action.⁶⁵

While six justices interpreted Title VII as permitting the district court to order the Sheet Metal Workers Union to establish a membership goal and a fund, only five of those justices reached the question of the constitutionality of the district court's action.⁶⁶ These five justices agreed that the court's action was constitutional under the equal protection component of the fifth amendment's due process clause.⁶⁷ Justices Brennan, Marshall, Blackmun and Stevens, the same four justices that interpreted Title VII at length in the plurality opinion, concluded that the remedy in *Sheet Metal Workers* was constitutional. Justice Powell agreed the district court acted constitutionally, but wrote separately to set out his standard for constitutional review.⁶⁸

The plurality noted that the justices in favor of upholding the constitutionality of the remedy could not agree on the proper standard of review under the equal protection clause for evaluating race-conscious remedies.⁶⁹ The source of the disagreement, the plurality explained, was how rigorous the standard of review must be.⁷⁰ Without settling on a standard, the plurality concluded that the remedies ordered in this case would meet the strictest possible scrutiny because they were narrowly tailored to carry out the compelling state interest in eradicating past discrimination.⁷¹

Applying this strict scrutiny standard to the union, the plurality determined that the union's egregious violation of Title VII, coupled with its resistance to correcting those violations, justified the use of race-conscious remedies.⁷² The plurality considered the membership goal and the fund for attracting minority candidates to be narrowly tailored remedies because they have a marginal impact on the interests of white workers.⁷³ The plurality reasoned that the district court's orders did not harm existing workers and that, while the orders may affect future applicants, they did not create an absolute bar to admission by whites.⁷⁴

In his opinion concurring in part, Justice Powell argued that the Court should apply its strictest standard of constitutional review to the use of race-conscious remedies. The remedies, according to Justice Powell, should be narrowly tailored to justify a compelling

⁶³ *Id.* at 3049, 41 FEP Cases at 128.

⁶⁴ *Id.*

⁶⁵ *Id.* Justice Powell, in his opinion concurring in part and concurring in the judgment, distinguished *Stotts* by contending that the Court never reached the question whether Title VII might ever permit a court to order a remedy that benefits those who are not proven victims of discrimination. *Id.* at 3054, 41 FEP Cases at 132 (Powell, J., concurring in part).

⁶⁶ *Id.* at 3054, 41 FEP Cases at 131-32. Justice White did not reach the constitutional issue because he found the district court's remedy to be an impermissible quota. *Id.* at 3062-63, 41 FEP Cases at 138 (White, J., dissenting).

⁶⁷ *Id.* (White, J., dissenting).

⁶⁸ *Id.* at 3054, 41 FEP Cases at 132 (Powell, J., concurring in part).

⁶⁹ *Id.* at 3052-53, 41 FEP Cases at 130-31.

⁷⁰ *Id.*

⁷¹ *Id.* at 3053, 42 FEP Cases at 130-31.

⁷² *See id.* at 3053, 41 FEP Cases at 131.

⁷³ *See id.*

⁷⁴ *Id.*

state interest.⁷⁵ Justice Powell reasoned that the district court, in ordering a fund to attract minority candidates and counter the recalcitrance of the Sheet Metal Workers' Union, furthered two compelling state interests.⁷⁶ The compelling state interests, Justice Powell stated, were the governmental interest in eliminating unlawful discrimination, and the societal interest in seeing court judgments obeyed.⁷⁷ Justice Powell concluded both were served by enforcing the court's fund order.⁷⁸

The 29.23 percent minority membership goal, however, raised a different question, Justice Powell stated.⁷⁹ Racial goals, Justice Powell contended, should be evaluated using five factors he established in his concurrence in the 1980 case of *Fullilove v. Klutznick*.⁸⁰ The five factors are: the efficacy of alternative remedies; the planned duration of the remedy; the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant work force; the availability of waiver provisions if the hiring plan could not be met; and the effect of the remedy on innocent parties.⁸¹

The waiver provision, Justice Powell explained, could be met more generally by the existence of flexibility in a race-conscious goal.⁸² Because the district court based its contempt finding on the union's unwillingness to take steps to end discriminatory practices, and not on the union's failure to meet the membership goal, Justice Powell concluded that the goal fit his flexibility requirement.⁸³ Justice Powell noted that the district court had given the union three time extensions to meet the membership goal, which demonstrated the goal's flexibility.⁸⁴

Justice Powell also applied the remaining four factors to the Sheet Metal Workers' membership goal and found it acceptable.⁸⁵ Justice Powell emphasized that the district court's orders did not appear to harm whites directly.⁸⁶ With Justice Powell's deciding vote, the Court declared the district court's action constitutional.

Justice White, in his dissenting opinion, never reached the question of constitutionality.⁸⁷ He concluded that Title VII could be interpreted to permit courts to order affirmative action remedies that benefitted those who are not actual victims of discrimination.⁸⁸ The membership goal ordered in this case, however, did not fit within permissible affirmative action remedies, Justice White reasoned.⁸⁹ Justice White concluded that the goal was actually an impermissible quota because the district court held the union in contempt for failing to meet it, despite mitigating circumstances.⁹⁰ Because Title VII expressly forbids quotas, Justice White dissented in the judgment.⁹¹

⁷⁵ See *id.* at 3054-55, 41 FEP Cases at 132 (Powell, J., concurring in part).

⁷⁶ See *id.* at 3055, 41 FEP Cases at 132 (Powell, J., concurring in part).

⁷⁷ *Id.* (Powell, J., concurring in part).

⁷⁸ *Id.* at 3055, 41 FEP Cases at 132-33 (Powell, J., concurring in part).

⁷⁹ *Id.* at 3055, 41 FEP Cases at 133 (Powell, J., concurring in part).

⁸⁰ See *id.* (Powell, J., concurring in part). Justice Powell first articulated these factors in his opinion in *Fullilove*, 448 U.S. 448 (1980).

⁸¹ *Sheet Metal Workers*, 106 S. Ct. at 3055, 41 FEP Cases at 133 (Powell, J., concurring in part).

⁸² *Id.* (Powell, J., concurring in part).

⁸³ *Id.* at 3056, 41 FEP Cases at 133 (Powell, J., concurring in part).

⁸⁴ *Id.* (Powell, J., concurring in part).

⁸⁵ *Id.* (Powell, J., concurring in part).

⁸⁶ *Id.* at 3056, 41 FEP Cases at 134 (Powell, J., concurring in part).

⁸⁷ See *id.* at 3062-63, 41 FEP Cases at 138 (White, J., dissenting).

⁸⁸ *Id.* at 3062, 41 FEP Cases at 138 (White, J., dissenting).

⁸⁹ See *id.* at 3062-63, 41 FEP Cases at 138 (White, J., dissenting).

⁹⁰ *Id.* (White, J., dissenting).

⁹¹ *Id.* at 3062, 41 FEP Cases at 138 (White, J., dissenting).

Justice O'Connor, who concurred in part and dissented in part, agreed that the goal was an impermissible quota.⁹² Because the union must meet the goal on pain of sanction, regardless of economic circumstances or the availability of qualified minority candidates, the goal was actually a quota, Justice O'Connor reasoned.⁹³ A permissible goal, Justice O'Connor asserted, should require only that the employer or labor union make a good faith effort to come within a range of the numerical goal.⁹⁴ The goal in *Sheet Metal Workers*, Justice O'Connor contended, was achieving racial balance between the union's membership and the workforce at large, and thus was the sort of racial balancing courts are forbidden to do by section 703(j) of Title VII.⁹⁵

Justice Rehnquist dissented from the judgment in an opinion joined by Chief Justice Warren Burger.⁹⁶ Justice Rehnquist relied on *Stotts* to support his view that section 706(g) of Title VII does not permit a court to order a remedy that helps those who are not proven victims of discrimination.⁹⁷ He did not reach the issue of the constitutionality of the court's action.⁹⁸

The result in *Sheet Metal Workers* repudiates the Justice Department's reading of *Stotts* that courts may never order affirmative relief that benefits those who are not proven, actual victims of discrimination.⁹⁹ The plurality also made clear, however, that district courts should order relief that benefits non-victims only when necessary to enforce Title VII effectively.¹⁰⁰ In a majority of cases, the plurality stated, a court's order to stop a particular discriminatory practice will be adequate to enforce Title VII effectively.¹⁰¹ Affirmative measures such as membership or hiring goals are necessary, the plurality indicated, only when discrimination has been particularly egregious or persistent.¹⁰²

The Court was justified in its interpretation that Title VII may be used to benefit those who are not proven victims of discrimination. Remedies such as those ordered in *Sheet Metal Workers* are essential to break up patterns of discrimination that make it difficult to prove an individual is the victim of specific discriminatory conduct. Furthermore, the Court approved a plan that struck a fair balance between the benefit to protected class members and the burden to non-minority members. The fact that seven circuit courts of appeal were unanimous in endorsing a broader view of Title VII than the Justice Department advocated adds to the credibility of the result.

The Supreme Court's decisions in *Stotts* and *Sheet Metal Workers* reflect a distinction between non-minorities who hold jobs and non-minorities who seek jobs.¹⁰³ Where a proposed remedy would disrupt an established seniority system and cause innocent non-minorities to lose jobs, the Court held in *Stotts* that such a remedy may only benefit a proven victim of discrimination.¹⁰⁴ If the remedy only delays or diminishes, without

⁹² *Id.* at 3057, 41 FEP Cases at 134 (O'Connor, J., concurring and dissenting).

⁹³ *Id.* at 3060, 41 FEP Cases at 136 (O'Connor, J., concurring and dissenting).

⁹⁴ *See id.* at 3060, 41 FEP Cases at 135-36 (O'Connor, J., concurring and dissenting).

⁹⁵ *Id.* (O'Connor, J., concurring and dissenting).

⁹⁶ *Id.* at 3063, 41 FEP Cases at 139 (Rehnquist, J., dissenting).

⁹⁷ *Id.* (Rehnquist, J., dissenting).

⁹⁸ *Id.* (Rehnquist, J., dissenting).

⁹⁹ *Id.* at 3049, 41 FEP Cases at 128.

¹⁰⁰ *Id.* at 3050, 41 FEP Cases at 128-29.

¹⁰¹ *Id.*

¹⁰² *Id.* at 3050, 41 FEP Cases at 129.

¹⁰³ Berke, *The Stotts Dilemma: Will Wygant Resolve It?*, 11 EMPLOYEE REL. L.J. 635, 653 (1986).

¹⁰⁴ *Stotts*, 467 U.S. at 565, 34 FEP Cases at 1705.

destroying, the chances of non-minorities to get a job or become a union member, as in *Sheet Metal Workers*, the Court will approve a remedy that benefits non-victims.¹⁰⁵

Another relevant distinction between *Stotts* and *Sheet Metal Workers* is that in the former, the affirmative action plan was based on a consent decree and there was no finding of discriminatory conduct, while in the latter, the court found the union guilty of discrimination and "foot-dragging" in correcting the problem. Thus in analyzing whether a court is likely to sustain a proposed remedy, one should examine both whether the parties based the affirmative action plan on a consent decree or a finding of specific discrimination, and whether the remedy will impact heavily on non-minorities.¹⁰⁶ Under *Stotts*, if a consent decree is the only basis for an affirmative action plan, the plan cannot result in non-minority employees losing their jobs. Under *Sheet Metal Workers*, a specific finding of discriminatory conduct against a union, coupled with the union's reluctance to undo the effects of its discrimination, will support an affirmative action plan that benefits non-victims but does not cause whites to lose their jobs. The case leaves open the question whether a finding of specific discriminatory conduct is enough or if there must also be "foot-dragging" to justify affirmative action.

Once a court has resolved the threshold issue of whether affirmative action is necessary to enforce Title VII, the plurality indicates the next step is devising a remedy that fits the violation.¹⁰⁷ Courts should balance the past harm of the defendant's discrimination, the plurality states, with the potential impact of the remedy to ensure that the remedy is not overly broad.¹⁰⁸ Just what remedies will fit that balance remains for future decisions to resolve.

Another question left open by *Sheet Metal Workers* is the appropriate standard for determining whether a remedy violates the equal protection clause. The five justices who found the remedy in *Sheet Metal Workers* to be constitutional could not agree on how rigorous the standard of review should be.¹⁰⁹ Until a standard is established, one can be sure only that a remedy which meets the strictest scrutiny will pass muster.

VI. SECTION 1983

A. *Race Under 42 U.S.C. § 1981 Includes Members of Ethnically and Physiognomically Distinct Groups: *Al-Khazraji v. Saint Francis College*¹

Congress enacted section 1981 of the United States Code to eliminate discrimination against any person under the auspices of federal or state law.² Although the statute itself does not mention race,³ the United States Supreme Court has interpreted this statute as

¹⁰⁵ *Sheet Metal Workers*, 106 S. Ct. at 3052, 41 FEP Cases at 131.

¹⁰⁶ *Berke*, *supra* note 103, at 653-54.

¹⁰⁷ *Sheet Metal Workers*, 106 S. Ct. at 3050, 41 FEP Cases at 129.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 3052-53, 41 FEP Cases at 130-31.

* By Lisa K. Snow, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 784 F.2d 505, 40 FEP Cases 397 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2022, 43 FEP Cases 1305 (1987).

² See 42 U.S.C. § 1981 (1982).

³ *Id.* Section 1981 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

applying only to racial discrimination.⁴ While it is clear that a black person, or a white person,⁵ can bring a discrimination action under section 1981, the Supreme Court has not yet defined how far the term "race" reaches in allowing those not clearly black or white to bring a section 1981 suit.⁶

Because only racial discrimination is cognizable under section 1981, definitional problems arise in determining whether a claimed "race" is actually a distinguishable race, or simply a person's national origin.⁷ Some courts and parties to section 1981 actions have attempted to distinguish race from national origin by employing scientific, taxonomical definitions⁸ that seek to classify persons by race according to unique, immutable characteristics.⁹ Many courts, however, have determined that a scientific distinction between race and national origin is futile, and have further concluded that there is considerable, if not complete, overlap between the two terms.¹⁰ As one federal district court explained, taxonomical definitions are subjective classifications that exist only in the human mind, not in the objective universe.¹¹ Thus, one classification scheme may identify 50 distinct races, while another could conclude that there are only thirty races.¹² Because of the arbitrary nature of scientific classification systems, many courts have rejected racial distinctions based on taxonomical definitions.¹³

Courts that reject the scientific classification approach instead use judicially created racial classifications under section 1981 to distinguish between groups that are commonly perceived as "non-white,"¹⁴ that have traditionally experienced discrimination,¹⁵ that are not part of the "favored class,"¹⁶ or that are part of a group distinct from "white

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 . . .

Id. See also *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970, 19 FEP Cases 191, 192 (10th Cir. 1979) ("section 1981 makes no mention of race, national origin, or alienage").

⁴ *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287, 12 FEP Cases 1577, 1582 (1976). Section 1981 is distinguishable from Title VII of the Civil Rights Act of 1964 because Title VII includes actions based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(b) (1982).

⁵ *McDonald*, 427 U.S. at 286-89, 12 FEP Cases at 1582-83. In *McDonald*, the Court found that because section 1981 applies to "all persons," it includes white persons. *Id.* at 287, 12 FEP Cases at 1582 (emphasis in original). The broad language of the bill, the Court explained, after examining the legislative history, was not limited to aiding emancipated Negroes. *Id.* at 289, 12 FEP Cases at 1583. See also *Ortiz v. Bank of America*, 547 F. Supp. 550, 556, 29 FEP Cases 1494, 1498-99 (E.D. Cal. 1982).

⁶ See *Ortiz*, 547 F. Supp. at 556, 29 FEP Cases at 1498.

⁷ *Ortiz*, 547 F. Supp. at 559, 29 FEP Cases at 1500 (quoting *Gonzalez v. Stanford Applied Eng'g. Inc.*, 597 F.2d 1298, 1299 n.1, 19 FEP Cases 1661, 1662 n.1 (9th Cir. 1979)); *Aponte v. National Steel Serv. Ctr.*, 500 F. Supp. 198, 202, 24 FEP Cases 609, 611-12 (N.D. Ill. 1980).

⁸ *Ortiz*, 547 F. Supp. at 565, 29 FEP Cases at 1505-06. Taxonomic classifications seek scientifically to organize plants and animals into orderly classifications according to their presumed natural relationships. WEBSTER'S NEW COLLEGIATE DICTIONARY 1186 (150th anniv. ed. 1981).

⁹ See *Ortiz*, 547 F. Supp. at 565, 29 FEP Cases at 1505.

¹⁰ E.g., *Banker v. Time Chem., Inc.*, 579 F. Supp. 1183, 1185 (N.D. Ill. 1983); *Ortiz*, 547 F. Supp. at 562, 29 FEP Cases at 1503; *Aponte*, 500 F. Supp. at 202, 24 FEP Cases at 612; *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 825, 19 FEP Cases 189, 190 (D. Colo. 1978).

¹¹ *Ortiz*, 547 F. Supp. at 565, 29 FEP Cases at 1505.

¹² See *id.* at 565-66, 29 FEP Cases at 1506 (quoting C.S. COON, S. GARN, J. BIRDSSELL, RACES: A STUDY OF THE PROBLEMS OF RACE FORMATION IN MAN 140 (1950)).

¹³ See, e.g., *Banker*, 579 F. Supp. at 1186; *Ortiz*, 547 F. Supp. at 566, 29 FEP Cases at 1506-07.

¹⁴ *Aponte*, 500 F. Supp. at 202-03, 24 FEP Cases at 612.

¹⁵ *Banker*, 579 F. Supp. at 1185-86.

¹⁶ *LaFore*, 448 F. Supp. at 826, 19 FEP Cases at 191.

citizens."¹⁷ Using these criteria, courts have determined that Mexican-Americans,¹⁸ Puerto Ricans,¹⁹ and Indians,²⁰ for example, belong to distinct races, and consequently have extended section 1981 rights to these groups. Thus, there is disagreement among the courts over what makes a particular group a race, or even if a racial classification, as distinct from classification based on national origin, is appropriate under section 1981.

During the *Survey* year, in *Al-Khazraji v. Saint Francis College*, the Third Circuit Court of Appeals held that race discrimination prohibited under section 1981 included discrimination against a member of an ethnically and physiognomically distinctive group.²¹ Using this definition of race, the Third Circuit concluded that an ethnic Arab may rely on section 1981 to remedy racial discrimination against him or her.²² By defining race under the statute, the Third Circuit has attempted to clarify the boundaries of who may sue under the statute.²³ Subsequent to the *Survey* year, the United States Supreme Court affirmed the Third Circuit's definition of race.²⁴

In *Al-Khazraji*, the plaintiff, an Iraqi-born college professor, alleged that the defendant college denied him tenure because of his Iraqi background and Muslim faith.²⁵ Al-Khazraji applied for tenure at Saint Francis College in January 1978, but the college Tenure Committee recommended to the Board of Trustees in February that tenure not be granted.²⁶ On October 30, 1980, after unsuccessfully seeking a reconsideration of his tenure proposal through college channels and exhausting state civil rights complaint

¹⁷ *Manzanares*, 593 F.2d at 971, 19 FEP Cases at 193.

¹⁸ See, e.g., *Gonzalez v. Stanford Applied Eng'g, Inc.*, 597 F.2d 1298, 1300, 19 FEP Cases 1661, 1662 (9th Cir. 1979) (Mexican-American basing discrimination on brown skin); *Manzanares*, 593 F.2d at 972, 19 FEP Cases at 193 (spanish surnamed persons); *LaFore*, 448 F. Supp. at 825-26, 19 FEP Cases at 190-91 (same).

¹⁹ *Ortiz*, 547 F. Supp. at 568, 29 FEP Cases at 1508.

²⁰ *Banker*, 579 F. Supp. at 1184; *Baruah v. Young*, 536 F. Supp. 356, 363 (D. Md. 1982). But see *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 787, 14 FEP Cases 504, 505 (W.D. Pa. 1977) (Slavic person denied section 1981 protection); *Kurylas v. United States Dept. of Agric.*, 373 F. Supp. 1072, 1073, 1075-76, 7 FEP Cases 207, 208, 210 (D.C. Cir. 1975) (Polish person denied section 1981 protection).

²¹ *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 514, 517, 40 FEP Cases 397, 404, 405-06 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2022, 43 FEP Cases 1305 (1987). The court does not explicitly define what it means by "ethnically or physiognomically distinct." See *id.* at 517, 40 FEP Cases at 406. The dictionary defines "ethnic" as of or relating to races or large groups classed according to common traits and customs. WEBSTER'S NEW COLLEGIATE DICTIONARY 389 (150th anniv. ed. 1981). "Physiognomic" is defined as of or relating to judging character by the features, nature, physique, or appearance. *Id.* at 859. It seems unlikely that the Third Circuit meant to distinguish members of races according to their inner characters. The court must have meant "physiognomic" to refer to classifying by distinctive physical features.

²² *Al-Khazraji*, 784 F.2d at 514, 40 FEP Cases at 404. The court also held that the individual members of a tenure committee may be held personally liable for any intentional infringement of section 1981 rights. *Id.* at 518, 40 FEP Cases at 407.

²³ See *id.* at 517, 40 FEP Cases at 406.

²⁴ *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2028, 43 FEP Cases 1305, 1308-09 (1987). The Court emphasized, however, that a distinctive physiognomy is not essential to qualify for section 1981 protection. *Id.* at 2028, 43 FEP Cases at 1308.

²⁵ *Al-Khazraji*, 784 F.2d at 506, 40 FEP Cases at 397.

²⁶ *Id.* at 507, 40 FEP Cases at 398.

procedures,²⁷ Al-Khazraji filed a civil rights complaint in the United States District Court for the Western District of Pennsylvania.²⁸

Al-Khazraji based his first *pro se* complaint on the college's alleged violations of Title VII of the Civil Rights Act of 1964.²⁹ After obtaining counsel and filing amended complaints, Al-Khazraji additionally alleged violations of Title 42, sections 1981, 1983, 1985(3), and 1986, as well as violations of state laws.³⁰ Al-Khazraji based the federal claims of discrimination on his Arabian race, Iraqi national origin, and Muslim religion.³¹

During 1981, the district court judge dismissed the section 1986, Title VII, and section 1985(3) claims as untimely.³² In 1984, the district court also granted defendant's motion for summary judgment on the remaining sections 1981 and 1983, and state law claims.³³ The district court ruled that Al-Khazraji's claim of discrimination on the basis of being Arab was not cognizable under section 1981.³⁴

On appeal, the Third Circuit determined that only Al-Khazraji's section 1981 and pendant state law claims survived procedurally.³⁵ Reasoning that "race" at least included membership in an ethnically or physiognomically distinct group, the Third Circuit held that Al-Khazraji's claim made out a *prima facie* case under section 1981.³⁶ Thus, the Third Circuit determined that ethnic Arabs could maintain a section 1981 discrimination action.³⁷

²⁷ *Id.* By the following September, Al-Khazraji contacted the Pennsylvania Human Relations Commission (PHRC) to inquire about his civil rights. *Id.* The PHRC could do nothing because Al-Khazraji had signed a one year non-renewable employment contract with the college after the tenure denial the previous spring; the commission could only take action if the termination of employment had already taken place. *Id.* He could not file charges until the employment contract terminated in May, 1979. *Id.*

Despite faculty support for Al-Khazraji's tenure, the tenure committee in February, 1979 again refused to reconsider its decision. *Id.* Within a month after his employment with the college ended in May, 1979, Al-Khazraji filed a complaint with the PHRC which was deemed a simultaneous filing with the Equal Employment Opportunities Commission (EEOC). *Id.* Nearly a year later, the PHRC complaint was dismissed, and a few months later, the EEOC issued Al-Khazraji a right to sue letter. *Id.* at 508, 40 FEP Cases at 398.

²⁸ *Id.* at 508, 40 FEP Cases at 398.

²⁹ *Id.* at 508, 40 FEP Cases at 398-99.

³⁰ *Id.* at 508, 40 FEP Cases at 399. Al-Khazraji alleged under state law that the individual tenure committee members had violated his rights under the Pennsylvania Human Relations Act. *Id.* He also brought state law claims for breach of contract and intentional infliction of emotional distress. *Id.*

³¹ *Id.* at 508 n.4, 40 FEP Cases at 399 n.4.

³² *Id.* at 508, 40 FEP Cases at 399.

³³ *Id.* at 509, 40 FEP Cases at 399.

³⁴ *Id.* The judge dismissed the section 1983 action for lack of state action. *Id.*

³⁵ *Id.* at 509-14, 40 FEP Cases at 399-404. The court found that Al-Khazraji's section 1981 claim was not barred by res judicata, *id.* at 509-10, 40 FEP Cases at 399-400, nor the applicable statute of limitations. *Id.* at 511-14, 40 FEP Cases at 401-04. Al-Khazraji's other federal claims, the court determined, were appropriately dismissed. *See id.* at 510-11, 40 FEP Cases at 400-01. Because the federal section 1981 claim remained, the court found that Al-Khazraji's pendent state law claims survived as well. *Id.* at 518, 40 FEP Cases at 407. On appeal, the Supreme Court granted certiorari on the narrow questions of statute of limitations and an ethnic Arab's ability to sue under section 1981. *Saint Francis College*, 107 S. Ct. at 2025, 43 FEP Cases at 1306. Like the Third Circuit, the Court determined that Al-Khazraji's claim was not time barred. *Id.*

³⁶ *Al-Khazraji*, 784 F.2d at 517, 40 FEP Cases at 405-06.

³⁷ *Id.* at 514, 40 FEP Cases at 404.

The Third Circuit reached its decision on the section 1981 claim by examining the possible definitions of race under the statute.³⁸ The court noted that the United States Supreme Court has never explicitly defined race although the Court frequently has used the term.³⁹ The court rejected the defendant's proposed taxonomical definition of race which, if applied, would have prevented Al-Khazraji from suing under the statute because Arabs are not taxonomically a distinct race from other caucasians.⁴⁰ The court reached this result because the Supreme Court has extended section 1981 protection to taxonomical members of the white/caucasian race.⁴¹

The court next turned to the legislative history of section 1981 for guidance in formulating a definition of race under the statute.⁴² After reviewing the relevant history of section 1981,⁴³ the court concluded that Congress did not intend to limit section 1981 to an anthropologically defined group.⁴⁴ The court noted that there is in fact no precise definition of race.⁴⁵ Instead, the court believed that Congress intended to ensure that all people are treated equally, without regard to color or race.⁴⁶ The conception of race intended by Congress, the court maintained, is broad enough to at least include membership in an ethnically and physiognomically distinctive group.⁴⁷

The court noted that some courts have had difficulty distinguishing the concept of race from national origin because of the arbitrary dividing line of taxonomical definitions of race.⁴⁸ Despite this, the Third Circuit expressly refused to address claims based on national origin discrimination under section 1981,⁴⁹ and maintained that courts must still attempt to differentiate between cognizable racial discrimination claims and non-cognizable national origin-based discrimination claims.⁵⁰ The court concluded that its

³⁸ *Id.* at 514-17, 40 FEP Cases at 404-06.

³⁹ *Id.* at 515 n.12, 40 FEP Cases at 404 n.12. Subsequent to the *Survey* year, the Supreme Court approved this definition of race. *Saint Francis College*, 107 S. Ct. at 2028, 43 FEP Cases at 1308.

⁴⁰ See *Al-Khazraji*, 784 F.2d at 514, 40 FEP Cases at 404. See *supra* note 8 for a definition of "taxonomic."

⁴¹ *Id.* at 514-15, 40 FEP Cases at 404. The Supreme Court, in its decision in *Saint Francis College*, noted that the Third Circuit properly rejected the college's taxonomical argument. 107 S. Ct. at 2026, 43 FEP Cases at 1307.

⁴² *Id.* at 515, 40 FEP Cases at 404.

⁴³ *Id.* at 515-16, 40 FEP Cases at 404-05.

⁴⁴ *Id.* at 516, 40 FEP Cases at 405.

⁴⁵ *Id.* at 516 & n.13, 40 FEP Cases at 405 & n.13.

⁴⁶ *Id.* at 517, 40 FEP Cases at 405.

⁴⁷ *Id.* at 517, 40 FEP Cases at 405-06. On appeal, the Supreme Court also extensively examined the legislative history of section 1981. *Saint Francis College*, 107 S. Ct. at 2026-28, 43 FEP Cases at 1307-08. It concluded that the enacting Congress did not intend to limit section 1981 to scientifically defined groups. *Id.* at 2028, 43 FEP Cases at 1308. The Court noted that at the time section 1981 was enacted, such ethnic groups as Scandinavians, Chinese, Mexicans, and Anglo-Saxons, were considered separate races. *Id.* at 2027, 43 FEP Cases at 1307-08. Based on this history, the Court concluded that Congress intended section 1981 to forbid discrimination against "identifiable classes of persons who are subjected to intentional discrimination because of their ancestry or ethnic characteristics." *Id.* at 2028, 43 FEP Cases at 1308. The Court thus maintained that the Third Circuit was "quite right" in holding that section 1981 at a minimum includes discrimination against a member of an ethnically and physiognomically distinctive group. *Id.*

⁴⁸ *Id.* at 517, 40 FEP Cases at 406.

⁴⁹ *Id.* at 514 n.11, 40 FEP Cases at 404 n.11.

⁵⁰ *Id.* at 517, 40 FEP Cases at 406. In the Supreme Court decision in *Saint Francis College*, Justice Brennan, in his concurrence, emphasized that the line between "ancestry or ethnic characteristics" and "place or nation of origin" is not a bright one. 107 S. Ct. at 2028, 43 FEP Cases at 1309

standard for dividing out cognizable claims — membership in an ethnically or physiognomically distinct group — was consistent with legislative intent.⁵¹ In applying this standard to the present case, the court found that an ethnic Arab fits under its definition of race;⁵² the court was not willing to maintain that Arabs could not be victims of racial prejudice because "prejudice is as irrational as is the selection of groups against whom it is directed."⁵³ Therefore, the court held that Al-Khazraji should be given the opportunity to prove discrimination under section 1981.⁵⁴

Although the concurring judge, Judge Adams, questioned the majority's interpretation of the legislative history, he stated that he felt constrained to join in the holding that an Arab may sue under section 1981.⁵⁵ Judge Adams believed that Congress intended section 1981 to apply only to discrimination against blacks.⁵⁶ He admitted, however, that a few Congressmen may have expressed the broader interpretation of the statute reached by the majority.⁵⁷ Judge Adams agreed that a taxonomical definition of race would be inappropriate because it is too narrow.⁵⁸ Nevertheless, the majority's definition of race, he continued, implicitly extends section 1981 coverage to groups distinguishable by national origin because virtually any nationality can be seen as ethnically and physiognomically distinct.⁵⁹

While recognizing that stopping invidious discrimination in any form is salutary,⁶⁰ Judge Adams contended that making definitional distinctions is the province of the legislature not the courts.⁶¹ He recognized that although the majority is, in his view, misinterpreting the statute's legislative history, the majority's interpretation of section

(Brennan, J., concurring). Justice Brennan's interpretation of the majority opinion was, however, that discrimination based on "*birth place alone*" is not cognizable under section 1981. *Id.* at 2029, 43 FEP Cases at 1309 (Brennan, J., concurring) (emphasis in original).

⁵¹ *Id.* at 516–17, 40 FEP Cases at 405–06.

⁵² *Id.* at 517–18, 40 FEP Cases at 406.

⁵³ *Id.* at 517, 40 FEP Cases at 406.

⁵⁴ *Id.* at 518, 40 FEP Cases at 406. The court also held that the individual members of the Tenure Committee could be liable under section 1981. *Id.* at 518, 40 FEP Cases at 407. The court analogized the federal civil rights remedy of section 1981 to a tort remedy. *Id.* at 518, 40 FEP Cases at 406. Under tort law, the court stated, an injured third party may sue an individual, including a director, officer, or agent of a corporation for the individual's torts whether acting individually or on behalf of the corporation. *Id.* Moreover, the court stated that directors, officers, and employees of a corporation may be personally liable for intentional discrimination under section 1981 regardless of the corporation's liability. *Id.* at 518, 40 FEP Cases at 407. Thus, the court concluded that if the Tenure Committee members were personally involved in intentional infringement of Al-Khazraji's section 1981 rights, then they may be held liable. *Id.*

In addition, the court concluded that the individual defendants could be found liable under the pendent Pennsylvania Human Rights Act claim. *Id.* at 518–19, 40 FEP Cases at 407. The court also found that the individual defendants were not liable on a breach of contract theory for lack of privity between the plaintiff and these defendants. *Id.* Finally, the court found that the individuals could be liable on an intentional infliction of emotional distress theory because privity is not required to bring this claim. *Id.* at 519, 40 FEP Cases at 407.

⁵⁵ *Id.* at 519, 40 FEP Cases at 407 (Adams, J., concurring).

⁵⁶ *Id.* at 519, 40 FEP Cases at 408 (Adams, J., concurring).

⁵⁷ *Id.*

⁵⁸ *Id.* at 520, 40 FEP Cases at 408 (Adams, J., concurring).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 520, 40 FEP Cases at 408–09 (Adams, J., concurring).

1981 was consistent with the Supreme Court's construction of the statute.⁶² Given that some definition of race must be formulated, Judge Adams reservedly concluded that the majority's approach was more sensible than formulating a scientific, though arbitrary, definition of race.⁶³ Thus, he concurred in the holding that Al-Khazraji may sue under section 1981.⁶⁴

The definition of "race" proposed by the majority correctly is not confined to a strict, arbitrary, technical definition of race. In its broadness, the definition recognizes the more realistic possibility that someone may be discriminated against because of ethnic or physiognomical differences.⁶⁵ The language of the definition is unclear, however, because it fails to recognize explicitly that race cannot clearly be distinguished from national origin.⁶⁶

By formulating a definition of race that includes ethnically and physiognomically distinct groups, the *Al-Khazraji* court provides no guidance to aid courts in distinguishing between race and national origin. In its opinion, the court claims that it is not passing on the issue of the cognizability of a claim based on national origin under section 1981.⁶⁷ As the concurring opinion points out, however, the majority's definition includes virtually every nationality because almost any nationality can be viewed as ethnically distinct.⁶⁸ Also, despite explicitly rejecting a taxonomical definition of race, the majority nevertheless seems to adopt a partial taxonomical definition by including physiognomical distinctions in its definition of race.⁶⁹ While it is arguably impossible to formulate a definition of race that does not account for nationality, by explicitly refusing to include national origin within its classification, and then announcing a racial classification system that includes virtually any national origin, the majority has left the imprecise boundary between "race" and "national origin" obscure.

Courts that reject the strict race requirement achieve a more sensible resolution to the question of who may sue under section 1981.⁷⁰ These courts, in their formulations of "race," compare the treatment accorded the complainant with the treatment commonly accorded the favored class in society.⁷¹ If a person is part of a group that has traditionally experienced discrimination, whether because of national origin, or skin color, or what-

⁶² *Id.* at 519, 40 FEP Cases at 407 (Adams, J., concurring).

⁶³ *Id.* at 520, 40 FEP Cases at 408 (Adams, J., concurring).

⁶⁴ *Id.* at 520, 40 FEP Cases at 409 (Adams, J., concurring).

⁶⁵ *Id.* at 517, 40 FEP Cases at 406.

⁶⁶ *See id.* at 514 n.11 & 517, 40 FEP Cases at 404 n.11 & 406.

⁶⁷ *Id.* at 514 n.11, 40 FEP Cases at 404 n.11.

⁶⁸ *Id.* at 520, 40 FEP Cases at 408 (Adams, J., concurring).

⁶⁹ *See id.* at 517, 40 FEP Cases at 406. The Supreme Court majority opinion does little to clarify the Third Circuit's definition because it expressly approves the Third Circuit's language. *Saint Francis College*, 107 S. Ct. at 2028, 43 FEP Cases at 1308. The Court does emphasize, however, that a distinctive physiognomy is not the essential factor for section 1981 protection. *Id.* The Supreme Court stated that, on remand, Al-Khazraji must prove he was the victim of intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion. *Id.* at 2028, 43 FEP Cases at 1308-09. See *supra* notes 8 and 21 for definitions of "taxonomic" and "physiognomic" respectively.

⁷⁰ *See, e.g., Banker*, 579 F. Supp. at 1185; *Ortiz*, 547 F. Supp. at 566, 29 FEP Cases at 1506-07; *Aponte*, 500 F. Supp. at 202, 24 FEP Cases at 612; *LaFore*, 448 F. Supp. at 825-26, 19 FEP Cases at 190-91.

⁷¹ *See supra* notes 14-17 and accompanying text. *See also Manzanares*, 593 F.2d at 970, 19 FEP Cases at 192 ("The measure is group to group . . .").

ever irrational basis, that person has a cognizable claim under section 1981.⁷² A flexible definition of who may sue under section 1981 that is based on past overt discrimination reflects the historical fluctuations in favored, and disfavored, groups.⁷³

Moreover, a flexible, comparative definition of who may sue under section 1981 is not inconsistent with the language of the statute.⁷⁴ Even though the Supreme Court has interpreted the statute to allow only racial discrimination,⁷⁵ the statute itself declares that discrimination against "all persons" is invalid.⁷⁶ A comparative definition reflects the reality that discrimination occurs against all groups of people, whether black, white, or somewhere in between.⁷⁷

In summary, the Third Circuit, in *Al-Khazraji v. Saint Francis College*, held that an ethnic Arab has a cognizable claim of racial discrimination under section 1981 of the United States Code. The Third Circuit attempted to clarify the definition of "race" under section 1981 by concluding that race must at least include a member of an ethnically or physiognomically distinct group. While this broad definition implicitly recognizes that no clear distinction exists between "race" and "national origin," by failing to explicitly recognize this fact, the court only further confuses the definition of who may sue under section 1981.

VII. CONSTITUTIONAL DECISIONS

A. **Constitutionality of Political Patronage Hiring Systems: Avery v. Jennings*¹

The first amendment protects an individual's right to expression free from governmental interference,² particularly expression concerning political affairs.³ Because advocacy of a political viewpoint is more effective when undertaken by a group,⁴ the Supreme Court has extended the first amendment to guarantee freedom of political association.⁵ A state may not abridge an individual's freedom of political association unless the state demonstrates both that a compelling governmental interest exists,⁶ and that the means used to achieve the interest are no more restrictive than necessary.⁷

In the 1976 case of *Elrod v. Burns*, the Supreme Court held that dismissal of various public employees because of their political affiliation violated the first amendment.⁸ In

⁷² See *supra* notes 14-17 and accompanying text.

⁷³ See *Ortiz*, 547 F. Supp. at 567, 29 FEP Cases at 1507.

⁷⁴ *Id.* at 564, 29 FEP Cases at 1505.

⁷⁵ See *McDonald*, 427 U.S. at 287, 12 FEP Cases at 1582.

⁷⁶ See *supra* note 3 for the text of section 1981.

⁷⁷ See *Ortiz*, 547 F. Supp. at 567, 29 FEP Cases at 1507.

* By Mark David Lurie, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 786 F.2d 233 (6th Cir.), *cert. denied*, 106 S. Ct. 3276 (1986).

² U.S. CONST. amend. I.

³ *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

⁴ See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

⁵ *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

⁶ *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975).

⁷ *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973).

⁸ *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Elrod* is discussed in Casenote, *Constitutional Law — Freedom of Speech and Association — Government Employees — Elrod v. Burns*, 18 B.C. INDUS. & COM. L. REV. 782 (1977) [hereinafter Boston College Casenote]; Casenote, *The Unconstitutionality of Patronage Dismissals of Public Employees: Elrod v. Burns*, 427 U.S. 347 (1976), 9 CONN. L. REV. 678 (1977); Casenote, *Elrod v. Burns: Chipping at the Iceberg of Political Patronage*, 34 WASH. & LEE L.

Elrod, a newly elected Democratic sheriff dismissed the chief deputy of the Process Division, as well as a bailiff, a process server, and an office worker solely because they were not members of the Democratic party.⁹ The *Elrod* plurality¹⁰ held that the dismissals violated the employees' first amendment right to freedom of political association because, in order to keep their jobs, the employees were required either to pledge allegiance to the Democratic party or to contribute to the party's strength.¹¹ The Court reasoned that these requirements would force the employees to compromise their true political beliefs.¹² In addition, Justice Brennan, writing for the plurality, noted that by dismissing employees on the basis of political affiliation, the government imposed an unconstitutional restriction on the receipt of a public benefit.¹³ For these reasons, the Court held that dismissal based on political affiliation violates the first amendment rights of public employees.

In addition, the *Elrod* plurality held that the government did not demonstrate a compelling state interest in favor of patronage dismissals.¹⁴ The Court reasoned that the interest involved must be governmental, not partisan.¹⁵ Consequently, it rejected the argument that employees of one political party will subvert the efforts of the administration of another party, stating that mere difference of political persuasion does not necessarily motivate poor conduct.¹⁶ The *Elrod* defendants also argued that patronage increases efficiency and accountability by motivating employees of an incumbent to perform well in order to ensure both that their party is re-elected, and that they retain continued employment.¹⁷ The Court, however, dismissed this argument because it noted that less restrictive means are available to guarantee efficiency and accountability.¹⁸ Thus, the plurality held that patronage dismissals are unconstitutional.¹⁹

Justice Stewart, in his concurrence, refused to join the plurality's "wide-ranging opinion."²⁰ According to the concurrence, the Court did not need to decide whether the entire patronage system was unconstitutional, only whether a government employer constitutionally may dismiss nonpolicymaking, nonconfidential public employees solely

REV. 225 (1977); Comment, *Patronage and the First Amendment After Elrod v. Burns*, 78 COLUM. L. REV. 468 (1978) [hereinafter Columbia Comment]; Comment, *Patronage Dismissals and Compelling State Interests: Can the Policymaking/Nonpolicymaking Distinction Withstand Strict Scrutiny?*, 1978 S. ILL. L.J. 278.

⁹ *Elrod*, 427 U.S. at 350-51.

¹⁰ There was no majority opinion in *Elrod*. Justices White and Marshall joined Justice Brennan's opinion. *Elrod*, 427 U.S. at 349. Justice Blackmun joined Justice Stewart's concurrence. *Id.* at 374. Justices Burger, Rehnquist and Powell dissented. *Id.* at 375, 376. Justice Stevens did not participate in the decision of the case.

¹¹ *Id.* at 355.

¹² *Id.*

¹³ *Id.* at 358-59.

¹⁴ *Id.* at 360-72.

¹⁵ *Id.* at 362.

¹⁶ *Id.* at 365.

¹⁷ *Id.* at 366.

¹⁸ *Id.* In addition, the Court observed, the employees were not dismissed because of concern for efficiency and accountability. On the contrary, they were reinstated after obtaining Democratic sponsorship. *Id.* at 364 n.18.

¹⁹ *Id.* at 373.

²⁰ *Id.* at 374 (Stewart, J., concurring).

because of their political beliefs and associations.²¹ Because the employees in *Elrod* did not decide policy or occupy a confidential position, Justice Stewart concurred with the result.

Because the *Elrod* decision failed to produce a majority opinion,²² at least two questions remained open. First, *Elrod* left unanswered the question, raised by Justice Stewart's concurrence, whether dismissal of a policymaking, confidential employee may be based solely on political affiliation. Second, *Elrod* failed to address whether a refusal to hire an applicant because of political association would violate the Constitution.

The Supreme Court addressed the first question in *Branti v. Finkel*.²³ In *Branti*, a Democratic public defender attempted to discharge two Republican assistant public defenders solely because the assistants were Republicans.²⁴ A majority of the Court held that, although the employees occupied a confidential position, they could not be dismissed solely on grounds of political association.²⁵ Instead, the Court decided, dismissal based on party affiliation is permissible only where party affiliation is an appropriate requirement for effective performance.²⁶ Thus, the *Branti* Court reasoned, because the public defender's office is concerned with needs of individual clients, and not with partisan political interests, party affiliation is not an appropriate requirement for effective performance by an assistant public defender.²⁷ In summary, following *Branti*, a dismissal based on political association is unconstitutional except where party affiliation is an appropriate requirement for job performance.

The *Branti* Court, however, left open the question whether political affiliation is an appropriate criterion in hiring, rather than dismissal, decisions.²⁸ During the *Survey* year, in *Avery v. Jennings*, the Sixth Circuit Court of Appeals held that although the first amendment prohibits official hiring policies where party affiliation is the sole criterion, it nonetheless allows elected officials to weigh party affiliation among other factors.²⁹ In

²¹ *Id.* at 374-75 (Stewart, J., concurring).

²² See *supra* note 10.

²³ 445 U.S. 507 (1980). The *Branti* decision has generated considerable scholarly literature. See, e.g., Meier, *Ode to Patronage: A Critical Analysis of Two Recent Supreme Court Opinions*, 41 PUB. ADMIN. REV. 558 (1981); Note, *Constitutional Law: The Impact of Branti v. Finkel on Political Patronage Employment*, 34 OKLA. L. REV. 93 (1981) [hereinafter Oklahoma Note]; Casenote, *Patronage Dismissals Under a First Amendment Analysis: The Aftermath of Branti v. Finkel*, 25 ST. LOUIS U.L.J. 189 (1981); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181 (1982) [hereinafter Chicago Comment].

²⁴ *Branti*, 445 U.S. at 508-09.

²⁵ *Id.* at 518-19.

²⁶ *Id.* at 518.

²⁷ *Id.* at 519.

²⁸ *Id.* at 513 n.7 ("In light of the limited nature of the question presented, we have no occasion to address petitioner's argument that there is a compelling governmental interest in maintaining a political sponsorship system for filling vacancies in the public defender's office."). At least one court, however, has stated in dicta that no distinction exists between hiring and firing practices. See *Aufiero v. Clarke*, 489 F. Supp. 650, 654 (D. Mass. 1980) ("Clearly, the inducement to suppress one's political philosophy and choice of party affiliation operates equally forcefully on the person who seeks a job or promotion as it does on one who desires to retain one.") (citations omitted).

In addition, several commentators have suggested that *Elrod* and *Branti* extend to hiring decisions. See, e.g., Meier, *supra* note 23 at 560; Oklahoma Note, *supra* note 23, at 106; Boston College Casenote, *supra* note 8, at 800-01; Chicago Comment, *supra* note 23, at 200-02; Columbia Comment, *supra* note 8, at 475-76.

²⁹ *Avery v. Jennings*, 786 F.2d 233, 234 (6th Cir. 1986) [hereinafter *Avery* II].

Avery, a Democratic plaintiff applied unsuccessfully to three Republican officials for a clerical job.³⁰ No job vacancies existed when the plaintiff applied.³¹ Indeed, no vacancies ever occurred in one of the defendant's offices, but additional people were hired when the workload became too heavy.³² Generally, as people were needed, the officials hired friends, relatives, acquaintances, or people connected to political allies.³³ As a result, the overwhelming majority of employees were Republicans.³⁴ Furthermore, although the defendants did not refuse to hire Democrats,³⁵ and did not inquire into an applicant's party affiliations,³⁶ the defendants stated that they preferred to hire Republicans both because they assumed Republicans would work harder to get them re-elected,³⁷ and because "it just works better when people have the same philosophy."³⁸ Consequently, the defendants did not even consider the plaintiff's application because she was not connected with the defendants' network of friends and allies.³⁹

Based on these facts, and the *Elrod* and *Branti* prohibition against employment dismissals based on political affiliation, both the plaintiff and the defendants filed motions for summary judgment.⁴⁰ The district court denied the plaintiff's motion, but granted the defendants' summary judgment motion.⁴¹ In arriving at this decision, the court maintained that *Elrod*⁴² and *Branti*⁴³ do not extend to include cases involving any employment decisions other than dismissals.⁴⁴ The court also held that the plaintiff failed to show that her party affiliation was a substantial factor in her failure to obtain a job, because the defendants did not even inquire into her party affiliation.⁴⁵

The court of appeals affirmed the district court's judgment.⁴⁶ The court distinguished between the infringement on the plaintiff's freedom of association caused by "normal" and "informal" political hirings which rely on personal and political connections, and infringements to freedom of association caused by a patronage system which makes decisions based solely on party affiliation, such as in *Elrod* and *Branti*.⁴⁷ Because the plaintiff in *Avery* was not deprived of a job with the defendants solely because of her party affiliation, the court held that any burden on the plaintiff's freedom of association

³⁰ *Id.*

³¹ *Avery v. Jennings*, 604 F. Supp. 1356, 1358 (S.D. Ohio 1985) [hereinafter *Avery I*].

³² *Id.*

³³ *Avery II*, 786 F.2d at 234 & n.1.

³⁴ *Id.* at 235. In one of the defendant's office, only two of the 210 people hired were Democrats. *Id.* Another defendant hired 62 people, five of whom were Democrats. *Id.* The third defendant hired 160 employees, including only three Democrats. *Id.*

³⁵ *Id.* at 234-35.

³⁶ *Id.* at 235.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 234. One of the defendants, however, was out of state when the plaintiff mailed her application letter, and did not see it until after the plaintiff filed suit. *Avery I*, 604 F. Supp. at 1359.

⁴⁰ *Avery I*, 604 F. Supp. at 1357.

⁴¹ *Id.* at 1365.

⁴² See *supra*, notes 8-22 and accompanying text for a discussion of *Elrod*.

⁴³ See *supra*, notes 23-28 and accompanying text for a discussion of *Branti*.

⁴⁴ *Avery I*, 604 F. Supp. at 1362.

⁴⁵ *Id.* at 1364.

⁴⁶ *Avery II*, 786 F.2d at 237.

⁴⁷ *Id.*

was an incidental consequence of other government interests, and did not amount to a constitutional deprivation.⁴⁸

The *Avery* court then reasoned that the government interests in the system were legitimate. First, the court remarked, unlike dismissals based solely on party affiliation, the hiring system in *Avery* had multiple purposes, including finding good employees, preserving personal and political connections and creating office harmony and cooperation.⁴⁹ In addition to having different purposes, the court also stated that the two systems led to different results; according to the *Avery* court, an informal hiring system enhances the office holder's performance and popularity.⁵⁰ In contrast, a hiring system based solely on party affiliation draws attention to ideological differences and punishes those who disagree with the employer.⁵¹ Balancing the harm to the plaintiff against the officials' interests, the court found that the *Avery* hiring system did not offend the Constitution.⁵²

In addition, the *Avery* court noted the practical difficulties involved in judicial scrutiny of patronage hiring systems. Because employment decisions take numerous factors into account, the court observed, judicial review of these decisions would involve the courts in complex and subjective hiring practices.⁵³ Moreover, the court predicted, invalidation of informal hiring networks would lead to a massive civil service system, overseen by the courts.⁵⁴ Thus, the Sixth Circuit held that patronage hiring systems are constitutional as long as political affiliation is not the sole criterion for judging job applicants.

The *Avery* decision departs from the spirit and reasoning of *Elrod* and *Branti*. First, the *Avery* court seems to limit the meaning of "political association" to party affiliation. In addition, the court fails to distinguish between government and partisan interests. Finally, the *Avery* test is concerned with the procedure for filling a position rather than the nature of the position.

The *Avery* court observed that the plaintiff was denied public employment, not because she was a registered Democrat, but because she was not a personal or political ally of the officials.⁵⁵ The court's distinction between affiliation to a party and association with an elected official is open to criticism. If only political allies may receive public employment, then people who desire public employment will be forced to support actively the candidates they consider most likely to be elected, and not necessarily the ones who are closest to the individual's political ideology. Consequently, a patronage hiring system may force individuals to contribute to a candidate, or obtain a sponsor, in compromise of their true political beliefs.⁵⁶ Thus, requiring an individual to maintain a political association with an employer leads to the same constitutional infringement as

⁴⁸ *Id.* at 236.

⁴⁹ *Id.* at 237.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 236.

⁵⁶ See *Elrod*, 427 U.S. at 355-56 (requirement that individual work for candidate or obtain a sponsor in order to retain job leads to compromise of belief). See also *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 195 (1976).

requiring a specific party affiliation. To be consistent with *Elrod*, the *Avery* court, therefore, should have held that requiring an individual to associate with a political candidate is as burdensome as requiring affiliation with a specific party, and should have balanced this infringement against the alleged governmental interests.⁵⁷

In addition, the *Avery* court held that certain interests were legitimate, even though the *Elrod* and *Branti* Courts dismissed those same interests as invalid. As the *Elrod* Court emphasized, "care must be taken not to confuse the interests of partisan organizations with governmental interests."⁵⁸ The *Avery* court, however, held that the need of elected officials to hire employees who are aware of the political needs of their employers is a legitimate need.⁵⁹ Additionally, the *Avery* court identified the maintenance of political relations,⁶⁰ and the enhancement of the official's political appeal,⁶¹ as legitimate government concerns. These concerns, however, clearly are partisan interests.

Moreover, although the *Avery* court held that one purpose of the patronage system is to find good employees,⁶² the Supreme Court in *Elrod* noted that patronage appointments are often made in exchange for the delivery of votes, and not because the employee is competent.⁶³ Additionally, the Sixth Circuit in *Avery* accepted the defendant's contention that shared philosophy leads to greater efficiency,⁶⁴ even though the Supreme Court noted that political homogeneity does not insure greater efficiency.⁶⁵ In conclusion, the alleged interests in *Avery* are either partisan, or have been rejected specifically by the Supreme Court.

In summary, the employee is coerced into compromising his political beliefs under a patronage system, regardless of whether he or she is applying for a position or seeking to retain one.⁶⁶ Furthermore, the elected official has no greater legitimate interest in hiring a political associate for a position than the official may have in firing an employee who does not share the same political views. Therefore, instead of devising a new test for patronage hiring, in which an informal system drawing on family and allies is distinguished from an official system that regards party affiliation as the sole factor, the *Avery* court should have adopted the *Branti* Court's test of whether political affiliation is necessary for performing the job.⁶⁷ Under such a test, political affiliation is an appropriate requirement in both hiring and firing decisions only where such affiliation is necessary for job performance. The court in *Avery* should have required the defendants to consider all applications for office positions, rather than hire only those who have some political connection.

Due to numerous factors that employers consider when deciding upon applicants, it may be more difficult in cases of hiring, rather than firing, for an individual to prove

⁵⁷ Instead, the court held that the plaintiff did not suffer a constitutional deprivation, and that the only harm caused by the patronage system was institutional — members of a particular party are dominant in different offices. *Avery II*, 786 F.2d at 236, 237.

⁵⁸ *Elrod*, 427 U.S. at 362.

⁵⁹ *Avery II*, 786 F.2d at 237.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Elrod*, 427 U.S. at 364–65.

⁶⁴ See *Avery II*, 786 F.2d at 235, 237.

⁶⁵ *Elrod*, 427 U.S. at 364–65.

⁶⁶ See *supra* note 28.

⁶⁷ See *supra* notes 23–28 and accompanying text for a discussion of the *Branti* test.

that he or she was denied employment because of political affiliation.⁶⁸ As the *Avery* court observed, the judiciary would be forced to oversee a civil service system to guarantee that workers are hired because of ability rather than political connection.⁶⁹ The speculative difficulty of adjudication, however, should not be sufficient reason for allowing infringements of constitutional guarantees.

In conclusion, the Sixth Circuit in *Avery v. Jennings* held that political patronage hirings are permissible as long as party affiliation is not the sole criterion used. The court maintained that inability to receive public employment in the absence of political connections is not an infringement of first amendment associational rights. In addition, the court stated that public officials have legitimate interests in hiring relatives and political allies. Thus, following *Avery*, publicly elected officials remain free to hire only people with political or personal connections, regardless of the nature of the position.

⁶⁸ See Columbia Comment, *supra* note 8, at 479-80.

⁶⁹ *Avery II*, 786 F.2d at 237.