

LABOR RELATIONS LAW

I. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. *A Second Decade Of Health Care Bargaining Unit Litigation: St. Francis II¹

Section 9(b) of the National Labor Relations Act (the Act)² requires that the National Labor Relations Board (NLRB or Board) determine which groups of jobs within the work place will serve as the constituency for purposes of elections and collective bargaining.³ The selected group of jobs is termed the appropriate bargaining unit.⁴ In the traditional industrial context the Board seeks an employee group that is united by a "community of interests."⁵ Under the community of interests test the Board considers such factors as wages, working conditions, job qualifications, skills and duties, and employees' interaction and supervision.⁶ In 1974 Congress amended the Act to include nonprofit health care institutions within the Board's jurisdiction, thereby requiring the Board to determine appropriate health care bargaining units.⁷ While Congress intended to give health care employees the rights and protections of the Act,⁸ Congress also

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¹ St. Francis Hospital, 271 N.L.R.B. 948, 116 L.R.R.M. 1465 (1984) (*St. Francis II*).

² 29 U.S.C. §§ 151-69 (1982).

³ Section 9(b) of the Act, 29 U.S.C. § 159(b) (1982), provides in relevant part: "The Board shall decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this subchapter [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." See generally R. GORMAN, BASIC TEXT ON LABOR LAW 66-92 (1976).

⁴ R. GORMAN, *supra* note 3, at 66.

⁵ R. GORMAN, *supra* note 3, at 69. In the traditional industrial context the Act has been interpreted to oblige the Board to delineate an appropriate bargaining unit, not necessarily the most appropriate unit. As the Board stated in *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418, 26 L.R.R.M. 1501, 1506 (1950), *enf'd*, 190 F.2d 576, 28 L.R.R.M. 2364 (7th Cir. 1951):

There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be "appropriate." It must be appropriate to ensure employees, in each case, "the fullest freedom in exercising the rights guaranteed by this Act."

Id. (quoting § 9(b) of the Act, 29 U.S.C. 159(b) (1982)).

⁶ R. GORMAN, *supra* note 3, at 69. The Board in *St. Francis II* identified several community of interest factors:

[E]mployees' wages, hours, and working conditions; qualifications, training, and skills; frequency of contact and degree of interchange with other employees; frequency of transfer to and from the petitioned-for unit; commonality of supervision; degree of integration with the work functions of other employees; area practice and patterns of collective bargaining; and collective bargaining history.

271 N.L.R.B. at 953 n.35, 116 L.R.R.M. at 1470 n.35.

⁷ 29 U.S.C. § 152(14) (1982). The 1974 amendments, which became effective August 25, 1974, eliminated the nonprofit hospital exemption from § 2 of the NLRA and added subsection 14 to § 2 of the NLRA as follows: "The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility or other institution devoted to the care of sick, infirmed or aged persons."

The 1974 Amendments also changed § 8(d)(4)(A), (B), (C), (G) of the Act, 29 U.S.C. § 158(d)(4)(A), (B), (C), (G) (1982) (notice provisions), and § 19 of the Act, 29 U.S.C. § 169 (1982) (adding religious belief exemption).

⁸ This is self-evident from the passage of the 1974 health care amendments. See S. REP. NO. 93-766, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3948.

recognized the special needs of the health care industry. The legislative history of the Act indicates that Congress intended that the Board prevent the "proliferation" of bargaining units in the health care field.⁹ A proliferation of bargaining units, Congress believed, would increase the likelihood of strikes and hence disrupt patient care.¹⁰ Whether the determination of appropriate health care bargaining units under the traditional "community of interests" test is consistent with Congress' nonproliferation directive has been the subject of vigorous litigation¹¹ and heated disagreement between the courts and the Board.¹²

In recent years health care employers have challenged the Board's use of the community of interests test for bargaining unit determinations in the health care field.¹³ In addition, the courts of appeals have vigorously rejected the Board's use of the community of interests test in the health care industry, arguing that the Board had not complied with the nonproliferation directive.¹⁴ The circuit courts of appeals have divided, however, on what should be the appropriate approach. The Ninth¹⁵ and Tenth¹⁶ Circuits have ruled that the Act requires the Board to adopt a "disparity of interests" test. This test requires that the Board start with the largest possible unit in health care facilities, and then exclude only those employees whose interests are so disparate from the rest of the employees that their presence in the bargaining unit would impair effective collective bargaining representation.¹⁷ The Second,¹⁸ Third,¹⁹ Seventh,²⁰ and Eighth²¹ Circuits have interpreted the Act and the nonproliferation directive as requiring the Board — when making health care bargaining unit determinations — to balance community of interests factors against the public's interest in nonproliferation of bargaining units.²²

Responding to the criticism from the circuit courts of appeals, the Board adopted a new analysis for health care bargaining unit determinations in its 1982 decision, *St.*

⁹ *Id.* at 3950.

¹⁰ *Id.* at 3948, 3950.

¹¹ See *infra* notes 13–22 and accompanying text.

¹² *Id.*

¹³ See, e.g., *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 967, 968, 102 L.R.R.M. 2784, 2786, 2787 (3d Cir. 1979); *NLRB v. West Suburban Hosp.*, 570 F.2d 213, 215, 216, 97 L.R.R.M. 2929, 2931 (7th Cir. 1978).

¹⁴ See *infra* notes 15–22 and accompanying text. One commentator reported that from 1974 to 1983, circuit courts of appeals had reviewed twenty Board health care unit determinations, and denied enforcement in sixteen instances. Comment, *The Nonproliferation Mandate and the Appropriate Legal Standard in Health Care Bargaining Unit Determinations*, 11 FORDHAM URB. L. J. 663, 683 (1983).

¹⁵ *NLRB v. HMO Int'l*, 678 F.2d 806, 810, 110 L.R.R.M. 2745, 2747 (9th Cir. 1982); *NLRB v. St. Francis Hosp.*, 601 F.2d 404, 416, 101 L.R.R.M. 2943, 2951 (9th Cir. 1979).

¹⁶ *Presbyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 450, 457 n.6, 107 L.R.R.M. 2953, 2958 n.6, modified on different grounds, 688 F.2d 697 (10th Cir. 1981).

¹⁷ See, e.g., *id.*

¹⁸ *Trustees of the Masonic Hall v. NLRB*, 699 F.2d 626, 638, 112 L.R.R.M. 2908, 2918 (2d Cir. 1983); *NLRB v. Mercy Hosp. Ass'n*, 606 F.2d 22, 27, 102 L.R.R.M. 2259, 2262 (2d Cir. 1979), cert. denied, 445 U.S. 971, 103 L.R.R.M. 3082 (1980).

¹⁹ *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 968–71, 102 L.R.R.M. 2784, 2787–89 (3d Cir. 1979).

²⁰ *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858, 862 (7th Cir. 1980).

²¹ *Watsonwan Memorial Hosp., Inc. v. NLRB*, 711 F.2d 848, 850, 113 L.R.R.M. 3481, 3482 (8th Cir. 1983).

²² See, e.g., *id.*

Francis Hospital (St. Francis I).²³ In that decision the Board designated seven bargaining units which would be presumptively appropriate in the health care context.²⁴ Any proposed unit that did not fall into one of those seven categories would be rejected.²⁵ If, however, the proposed unit fell within one of the categories, the Board would apply its traditional community of interests test.²⁶

During the *Survey* year, in *St. Francis Hospital (St. Francis II)*,²⁷ the Board vacated its position in *St. Francis I* and adopted a disparity of interests test for determining appropriate bargaining units in health care facilities.²⁸ The Board held that the seven-category analysis adopted in *St. Francis I* was contrary to the congressional nonproliferation directive,²⁹ and was in reality no different than the community of interests approach previously used by the Board and discredited by the courts.³⁰ The Board's new test requires greater disparities in the usual community of interests test elements before the Board will grant groups of health care employees representation separate from the other professional and nonprofessional employees.³¹ The new disparity of interests test looks at why the petitioned-for bargaining unit should not be larger. Consequently this test will result in fewer separate units in health care facilities than the Board had previously granted.³² Because the Board declined to state what factors will be deemed most significant, determinations of appropriate bargaining units in the health care industry will turn upon the facts in each case.³³ This lack of guidelines will result in increased health care bargaining unit litigation before the Board.

The controversy in *St. Francis II* arose from a representation drive at St. Francis Hospital (Hospital) by the International Brotherhood of Electrical Workers, Local No. 474 (Union).³⁴ In a petition filed with the Board for a representation election, the Union proposed a collective bargaining unit composed of all the Hospital's thirty-nine maintenance employees.³⁵ The Regional Director of the NLRB found that the petitioned-for unit, with the addition of two less skilled job classifications, shared a community of

²³ *St. Francis Hosp.*, 265 N.L.R.B. 1025, 112 L.R.R.M. 1153 (1982) (*St. Francis I*).

²⁴ *Id.* at 1029, 112 L.R.R.M. at 1157. The seven units were physicians, registered nurses, other professional employees, technical employees, business office clerical employees, service and maintenance employees, and skilled maintenance employees. *Id.*

²⁵ *Id.* at 1029, 112 L.R.R.M. at 1158.

²⁶ *Id.* at 1031, 112 L.R.R.M. at 1160.

²⁷ *St. Francis II*, 271 N.L.R.B. at 948, 116 L.R.R.M. at 1465.

²⁸ *Id.* at 953, 116 L.R.R.M. at 1468.

²⁹ *Id.* at 952, 116 L.R.R.M. at 1468.

³⁰ *Id.*

³¹ *Id.* at 953, 116 L.R.R.M. at 1470.

³² *Id.*

³³ *Id.* at 954, 116 L.R.R.M. at 1471.

³⁴ *Id.* at 948, 116 L.R.R.M. at 1465.

³⁵ *Id.* at 954, 116 L.R.R.M. at 1471. The unit found appropriate consisted of:

All maintenance employees, including communications technicians, painters, carpenters, maintenance helpers, x-ray processor mechanic, refuse and linen collectors, utility operators, cabinet makers, painter/vinyl hanger, HVAC trainee, HVAC mechanic, boiler operators, electronics technicians, electricians, general maintenance mechanics, pneumatic tube mechanic, groundskeeper, utility mechanic, refrigeration mechanic, and plumber employed by the Employer at its hospital, excluding office clerical employees, Bio-Medical Engineering Department employees, service employees, guards and supervisors as defined in the Act.

Id. at 948 n.5, 116 L.R.R.M. at 1466 n.5.

interest sufficient for separate representation.³⁶ Granting the Hospital's request for review of the Regional Director's findings,³⁷ the Board issued its decision — *St. Francis I* — in which it designated seven potentially appropriate units for bargaining unit determinations in the health care industry.³⁸ Applying this test, the Board concluded that the proposed maintenance unit was appropriate,³⁹ and therefore ordered a representation election. In the election the tally was, of forty-three eligible voters, twenty-three for the Union, and twenty against.⁴⁰ On January 5, 1983 the Union was certified.⁴¹

Claiming that the bargaining unit was not an appropriate one,⁴² the Hospital refused to bargain with the newly certified unit.⁴³ At a hearing held to resolve the dispute,⁴⁴ the Board vacated *St. Francis I*⁴⁵ and adopted a disparity of interests test.⁴⁶ In order to give the parties opportunity to present additional facts relevant under the new test, the Board remanded the case to the Regional Director.⁴⁷

In explaining its holding, the Board first examined the legislative history of the 1974 amendments. The Board noted that in extending the Act to the health care industry Congress sought to avoid jeopardizing patient care by work disruptions caused by unit fragmentation, union jurisdiction disputes, and work stoppages.⁴⁸ To this end, both the House and the Senate Committee Reports stated that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry."⁴⁹ Moreover, the Board stated, this concern was reiterated by virtually every senator and representative speaking on the passage of the amendments.⁵⁰ The Board concluded that Congress clearly intended that the NLRB, when determining appropriate bargaining units in health care facilities, apply a stricter test than the community of interests analysis traditionally used in the industrial and commercial sphere.⁵¹ The seven category test of *St. Francis I* was contrary to congressional intent, the Board reasoned, because seven potential units in a health care facility was simply too large a number.⁵² Moreover, the Board continued, the *St. Francis I* test was in reality no different than the community of interests test disapproved of by the courts of appeals.⁵³

The Board then examined the standards for health care bargaining unit determinations advocated by the various circuits. The Ninth Circuit's disparity of interests test⁵⁴

³⁶ *Id.* at 948-49, 116 L.R.R.M. at 1466.

³⁷ *Id.* This review by the Board was the decision in *St. Francis I*, 265 N.L.R.B. 1025, 112 L.R.R.M. 1160 (1982).

³⁸ *St. Francis II*, 271 N.L.R.B. at 950, 116 L.R.R.M. at 1467.

³⁹ *Id.*

⁴⁰ *Id.* at 949, 116 L.R.R.M. at 1466.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 948, 116 L.R.R.M. at 1465.

⁴⁵ *Id.* at 948, 116 L.R.R.M. at 1466.

⁴⁶ *Id.* at 953, 116 L.R.R.M. at 1468.

⁴⁷ *Id.* at 954, 116 L.R.R.M. at 1471.

⁴⁸ *Id.* at 951-52, 116 L.R.R.M. at 1468.

⁴⁹ *Id.* (quoting S. REP. NO. 93-766, *supra* note 8; H.R. REP. NO. 93-150; 93d Cong., 2d sess. 6-7 (1974)).

⁵⁰ *Id.* at 951, 116 L.R.R.M. at 1468.

⁵¹ *Id.* at 953, 116 L.R.R.M. at 1469.

⁵² *Id.* at 952, 116 L.R.R.M. at 1469.

⁵³ *See id.*

⁵⁴ *See, e.g., St. Luke's*, 653 F.2d at 457 n.6, 107 L.R.R.M. at 2958 n.6.

was too rigid, the Board criticized, because it apparently would require the NLRB to select the largest possible bargaining unit in health care facilities.⁵⁵ Such a test, the Board stated, would have the unwarranted result of allowing no more than two units — professional and nonprofessional — in a health care facility.⁵⁶ The Board then presented the balancing approach adopted by the other courts of appeals, but made no analysis of it.⁵⁷

Rather than adopt the balancing approach, the Board adopted a modified Ninth Circuit approach. The Board explained that although the Ninth Circuit's disparity of interests analysis was too rigid, the phrase "disparity of interests" properly emphasized that sharper differences in community of interests criteria (such as wages, working conditions, skills, etc.)⁵⁸ between employees would be required in the health care field to justify a separate unit.⁵⁹ The Board explained that applying the test to a number of cases would result in recurring factual patterns, and these patterns would illustrate what units would be typically deemed appropriate.⁶⁰

Applying its new test for bargaining unit determinations to the case before it,⁶¹ the Board found that the maintenance workers requesting a separate bargaining unit had significant and frequent work contact with nearly all categories of the Hospital's employees, especially service employees.⁶² The Board also pointed out that the service and maintenance employees were subject to the same hourly pay plans,⁶³ and eligible to receive the same fringe benefits.⁶⁴ Finally, the Board noted that seven transfers between the service and maintenance departments had occurred in recent years.⁶⁵ Because the maintenance employees worked closely with and shared the same basic terms and conditions of employment as the larger group of service employees,⁶⁶ the Board explained, there was not an adequate disparity of interests between the maintenance employees and other nonprofessionals to justify separate representation.⁶⁷ The Board remanded the case to permit the parties to introduce further evidence relevant under the new standard.⁶⁸

Member Dennis, concurring, stated that she would have preferred the Board to clearly define a limited number of appropriate health care units in order to provide immediate stability and obviate continued litigation of the appropriate unit issue.⁶⁹ She suggested that the disparity of interests test would readily reveal that there would be four separate appropriate units in a large, diversified health care industry (professionals,

⁵⁵ *St. Francis II*, 271 N.L.R.B. at 953, 116 L.R.R.M. at 1470. Commenting on the Tenth Circuit's test, the Board stated, "We emphasize again that we are *not* establishing a rigid disparity-of-interests test that would always result in two broad units." *Id.* at 953 n.39, 116 L.R.R.M. at 1471 n.39.

⁵⁶ *Id.* at 953, 116 L.R.R.M. at 1470.

⁵⁷ *Id.*

⁵⁸ See *supra* note 6 for a listing of the Board's community of interest criteria.

⁵⁹ *St. Francis II*, 271 N.L.R.B. at 953, 116 L.R.R.M. at 1470.

⁶⁰ *Id.* at 953 n.39, 116 L.R.R.M. at 1471 n.39.

⁶¹ *Id.* at 953, 116 L.R.R.M. at 1471.

⁶² *Id.*

⁶³ *Id.* at 954, 116 L.R.R.M. at 1471.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 954-55, 116 L.R.R.M. at 1472 (Dennis, Member, concurring).

service and maintenance employees, technicals, and business office clericals) and two separate units in a small, functionally integrated facility (professionals and nonprofessionals).⁷⁰

In a lengthy dissent, Member Zimmerman argued that the Board's new standard was unnecessary, uncertain, and perhaps signalled a rigid approach that collided with the Board's role in national labor relations.⁷¹ The reconsideration of *St. Francis I* was unnecessary, Member Zimmerman reasoned, because that decision had fully addressed the criticisms by the courts of appeals.⁷² The *St. Francis I* standard was a clear, straightforward approach, Member Zimmerman stated, because it established seven potentially appropriate units.⁷³ This clarity promised to end the legal debate that had raged for ten years,⁷⁴ paralyzing the processing of health care representation cases,⁷⁵ and thereby denying thousands of employees their statutory right to choose or reject collective bargaining representation, Member Zimmerman protested.⁷⁶ Unlike the clarity promised by the *St. Francis I* standard, Member Zimmerman concluded, the Board's disparity of interests test injects uncertainty into health care bargaining unit determinations.⁷⁷

Because the new test is the consequence of change in the Board membership and in views regarding the purposes of the Act,⁷⁸ Member Zimmerman argued, the new disparity of interests test is evidently designed to grant fewer separate bargaining units in the health care industry.⁷⁹ Although the Board purported to reject the disparity of interests test, Member Zimmerman continued, it had failed to demonstrate how its test would be any different than the one employed by the Ninth Circuit.⁸⁰ This indicates, Member Zimmerman stated, the Board's predilection for finding only two basic units (professional and nonprofessional) appropriate in the health care field.⁸¹ Member Zimmerman concluded that the new disparity of interests test is a gross overreaction to criticism from the courts of appeals,⁸² and is based on a distortion of legislative history.⁸³

St. Francis II clearly rejects the Board's precedent in health care unit determinations since the time of Congress' 1974 health care amendments. Responding to directives from the courts of appeals, the Board in *St. Francis II* ruled that compliance with the congressional directive to prevent a proliferation of bargaining units required a stricter test than has previously been used.⁸⁴ By adopting a test which so closely resembles the Ninth and Tenth Circuits' test, however, the Board overreacted to the criticism by the courts of appeals. Only two circuits (the Ninth and Tenth)⁸⁵ had imposed a disparity of interests

⁷⁰ *Id.* at 955, 116 L.R.R.M. at 1472 (Dennis, Member, concurring).

⁷¹ *Id.* at 955-59, 116 L.R.R.M. at 1472-75 (Zimmerman, Member, dissenting).

⁷² *Id.* at 955, 116 L.R.R.M. at 1472 (Zimmerman, Member, dissenting).

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 955 & n.4, 116 L.R.R.M. at 1473 & n.4 (Zimmerman, Member, dissenting).

⁷⁹ *See id.* at 956, 116 L.R.R.M. at 1473 (Zimmerman, Member, dissenting).

⁸⁰ *Id.* at 957, 116 L.R.R.M. at 1474 (Zimmerman, Member, dissenting).

⁸¹ *Id.*

⁸² *Id.* at 958, 116 L.R.R.M. at 1475 (Zimmerman, Member, dissenting).

⁸³ *Id.*

⁸⁴ *Id.* at 953, 116 L.R.R.M. at 1471.

⁸⁵ *See supra* text accompanying notes 15-16.

test on the Board, whereas five circuits (the Second, Third, Sixth, Seventh, and Eighth)⁸⁶ have held that a disparity of interests test was not required.

Instead of adopting a disparity of interests test resembling the Ninth Circuit's proposed test, the Board could have adopted a test closer to the balancing approach of the other circuits. Under such a test the Board could satisfy Congress's nonproliferation directive by explicitly weighing concern for nonproliferation of units against the community of interest factors when making health care bargaining unit determinations. Moreover, the balancing approach would be consistent with section 9(b) of the Act, which vests broad discretion in the Board for making bargaining unit determinations. The disparity of interests test of the Ninth and Tenth Circuits, on the other hand, is inconsistent with section 9(b) because it requires the Board to select the largest possible bargaining unit.⁸⁷

The Board claims that the disparity of interests test will look to the facts in each particular case, but a comparison of the Board's treatment of the same facts in *St. Francis I* and *St. Francis II* shows that the facts matter less than the mold into which the Board chooses to insert them. The Board's characterization of the facts in *St. Francis II* is markedly different than the characterization of the same facts in *St. Francis I*. For example, the *St. Francis I* Board noted that the maintenance employees were at the high end of a pay scale covering maintenance and service employees.⁸⁸ The *St. Francis II* Board, however, stressed only that the service and maintenance employees were subject to the same pay plan.⁸⁹ The *St. Francis I* Board found the greater experience requirements for maintenance jobs than for service jobs to be significant,⁹⁰ while the *St. Francis II* Board stated that maintenance employees did not perform functions requiring a high degree of skills.⁹¹ In *St. Francis I* the Board found that there was a complete separation of supervision between maintenance and service employees,⁹² but in *St. Francis II* the Board noted that maintenance and service employees were subject to departmental supervision,⁹³ failing to note that they were different departments. Finally, the *St. Francis I* Board characterized the frequent work contact between maintenance and service employees as not indicative of functional integration because maintenance workers performed their duties separately.⁹⁴ In *St. Francis II*, however, the Board stated that there

⁸⁶ See *supra* text accompanying notes 17-21.

⁸⁷ The Board in *St. Francis II* noted this characterization of the Ninth and Tenth Circuits' disparity of interests test by the Second and Eighth Circuits. *St. Francis II*, 271 N.L.R.B. at 952-53, 116 L.R.R.M. at 1469-70. The effect of the disparity of interests test of the Ninth and Tenth Circuits, apparently, is that only two units, professional and nonprofessional, would be considered appropriate in the health care industry. Allowing only two unit configurations unnecessarily infringes the rights of health care employees under the Act on two grounds. First, it is difficult for employees to unionize if the election constituency is too broad. Section 9(b) of the Act directs the Board to use its discretion in determining bargaining units in each case. See 1983-84 *Annual Survey of Labor Relations and Employment Discrimination Law — Determining Bargaining Units in Health Care Settings*: *Watsonwan Memorial Hosp., Inc. v. NLRB*, 26 B.C.L. Rev. 171 (1984). Second, it is more difficult for a union to carry out its duty of fair representation in a large unit. See *id.*

⁸⁸ *St. Francis I*, 265 N.L.R.B. at 1034, 112 L.R.R.M. at 1162.

⁸⁹ *St. Francis II*, 271 N.L.R.B. at 954, 116 L.R.R.M. at 1471.

⁹⁰ *St. Francis I*, 265 N.L.R.B. at 1033, 112 L.R.R.M. at 1161.

⁹¹ *St. Francis II*, 271 N.L.R.B. at 954, 116 L.R.R.M. at 1471.

⁹² *St. Francis I*, 265 N.L.R.B. at 1034, 112 L.R.R.M. at 1162.

⁹³ *St. Francis II*, 271 N.L.R.B. at 954, 116 L.R.R.M. at 1471.

⁹⁴ *St. Francis I*, 265 N.L.R.B. at 1034, 112 L.R.R.M. at 1162.

was significant and frequent work contact between maintenance and service employees.⁹⁵ This reinterpretation of the facts by the *St. Francis II* Board could indicate that the mold the Board has chosen to put the facts into is an unspoken policy that the Board will no longer consider separate maintenance bargaining units appropriate in health care facilities. Moreover, the lack of guidelines by the Board on why it reads the facts so differently in *St. Francis I* and *St. Francis II* only adds to the uncertainty that will spur renewed litigation in this area.

The bargaining unit pattern suggested by Member Dennis — four units in large health care facilities, and two in small facilities — is the most appropriate. The seven unit approach under *St. Francis I* is contrary to the congressional nonproliferation directive; Congress emphasized that the Board must give special attention to the public interest in uninterrupted access to hospitals and patient care.⁹⁶ On the other hand, a two units per se approach runs counter to section 9(b) of the Act,⁹⁷ which requires that the Board make appropriate bargaining unit determinations in each case in order to assure to employees the fullest freedoms in exercising rights guaranteed by the Act. A two unit per se approach thus unnecessarily infringes upon the exercise of organizing rights by health care employees. Member Dennis' approach therefore appears a logical midway position between the contrasting congressional intent of free exercise by health care employees of rights under the Act, and the paramount public interest in undisrupted health care. Moreover, it may well be the pattern that in time emerges from continued health care bargaining unit litigation because it is a compromise position between the rejected seven unit approach in *St. Francis I* and the two units per se approach of the Ninth and Tenth Circuits, from which the *St. Francis II* Board's disparity of interests test is derived.

In summary, *St. Francis II*, decided during the *Survey* year, establishes a disparity of interests test for determining appropriate bargaining units in health care facilities. This test uses the traditional community of interests criteria, but requires sharper disparities be shown between the employees in the petitioned-for bargaining unit and the other employees in order for the Board to grant a separate unit. This new test is intended to prevent the proliferation of bargaining units in the health care industry and thereby meet the public interest in maintaining uninterrupted access to health care facilities and undisrupted patient care. The Board vacated its *St. Francis I* decision because it deemed the potential of seven appropriate units under that case to be contrary to these public interests.

What units will be appropriate under the new disparity of interests test, however, is unclear because the Board provides little guidance as to what disparities of interests will be considered most significant. The pattern that eventually emerges may well be four units for large facilities and two units for small facilities, as Member Dennis suggested. This approach would satisfy the courts of appeals as well as preserve employee free choice in organizing and Board discretion in selecting appropriate bargaining units. In the case before it the Board held that a petitioned-for maintenance unit had not demonstrated sufficient disparity of interests from the other employees, especially service employees, to justify a separate bargaining unit.

⁹⁵ *St. Francis II*, 271 N.L.R.B. at 954, 116 L.R.R.M. at 1471.

⁹⁶ See text accompanying note 49 for the language of Congress's nonproliferation directive.

⁹⁷ Section 9(b) of the Act, 29 U.S.C. § 159(b) (1982). See *supra* note 3 for text of § 9(b).

Considering the holding and the Board's intent to reduce the number of separate units in the health care field, *St. Francis II* indicates that separate maintenance units in health care facilities will no longer be considered appropriate. The Board in *St. Francis II* claims that it has adopted a disparity of interests test different from a rigid test that would compel only two units in the health care field. The nature of this difference, however, is left unexplained. The Board has shut fast and hard the door on proliferation, it seems, but opened the door of a second decade of health care bargaining unit litigation.

B. **Exclusion of Family Members of Management from Bargaining Units: NLRB v. Action Automotive, Inc.*¹

Section 9(b) of the National Labor Relations Act (the Act) provides that the National Labor Relations Board (Board) shall determine the appropriate unit for collective bargaining.² The appropriate unit³ is determined by various factors, focusing on the community of interests shared by employees within the unit.⁴ The breadth of these factors and the flexibility required in making unit determinations have raised the issue of the proper role of judicial review of Board determinations of appropriate bargaining units.⁵

The Board determines the appropriate bargaining unit through case by case adjudication rather than by formulating rules of general application.⁶ The Board generally bases its bargaining unit decision on shared job characteristics.⁷ Although the Board's focus is normally on the job rather than the individual holding the job,⁸ employees related to the employer present the issue of whether they should be excluded from the bargaining unit.⁹ In determining the appropriate bargaining unit under section 9(b), the Board has reasoned that the interests of employees related to the employer lie with

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¹ 105 S. Ct. 984, 118 L.R.R.M. 2577 (1985).

² National Labor Relations Act, § 9(b), 29 U.S.C. § 159(b) (1982). Section 9(b) provides in relevant part: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof"

³ Although commonly called a bargaining unit, this unit is the body which will elect bargaining representatives. See R. GORMAN, *BASIC TEXT ON LABOR LAW* 66 (1976).

⁴ *Id.* at 69. The factors the Board considers in determining bargaining units include:

(1) [S]imilarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

Id.

⁵ *Id.* at 67.

⁶ See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 762-66, 70 L.R.R.M. 3345, 3346-47 (1969).

⁷ See R. GORMAN, *supra* note 3, at 66.

⁸ *Id.*

⁹ See 2 C. MORRIS, *THE DEVELOPING LABOR LAW* 1474-77 (1983).

management, and therefore these employees do not share a community of interests with other employees.¹⁰

For a period, the Board automatically excluded relatives of employers from bargaining units.¹¹ In 1953, however, the Court of Appeals for the Sixth Circuit held that the Board could exclude a related employee only if the Board found that the employee received special job status or working conditions, and could not base its decision solely on the family relationship.¹² For a period thereafter, the Board excluded only those family members of employers who received special job status or working conditions.¹³

In addition to the general terms of section 9(b), the Act also explicitly excludes certain relatives from its coverage. In section 2(3) of the Act, Congress excluded from the definition of "employee" "any individual employed by his parent or spouse."¹⁴ The Board's decisions generated some confusion over whether related employees were to be excluded as not fitting the statutory definition of "employee" under section 2(3), or excluded under section 9(b) and its community of interest standard.¹⁵ In early years under the Act, the Board restricted the application of section 2(3) to sole proprietorships,¹⁶ and automatically excluded relatives of management under section 9(b).¹⁷ After the Sixth Circuit rejected the Board's automatic exclusion of related employees under section 9(b),¹⁸ the Board excluded only those related employees who received special benefits.¹⁹

Beginning in 1967, however, the Board also began to exclude related employees under a more expansive interpretation of section 2(3).²⁰ In addition, the Board began to focus again on the community of interests a family member shared with employees.²¹ The Board's subsequent decisions wavered among a broader interpretation of section 2(3),²² the special status standard,²³ and the community of interests standard²⁴ under

¹⁰ See, e.g., *Foam Rubber City #2 of Fla., Inc.*, 167 N.L.R.B. 623, 66 L.R.R.M. 1096 (1967) (relatives of management may be excluded because interests more closely aligned with management); *Louis Weinberg Associates, Inc.*, 13 N.L.R.B. 66, 4 L.R.R.M. 270 (available in summary form only in L.R.R.M.) (1939) (per se rule of automatic exclusion of employees related to management).

¹¹ See, e.g., *Louis Weinberg Associates, Inc.*, 13 N.L.R.B. 66, 4 L.R.R.M. (available in summary form only in L.R.R.M.) 270 (1939).

¹² *NLRB v. Sexton*, 203 F.2d 940, 940, 32 L.R.R.M. 2105, 2105 (6th Cir. 1953).

¹³ See, e.g., *International Metal Products Co.*, 107 N.L.R.B. 65, 67, 33 L.R.R.M. 1055, 1056 (1953).

¹⁴ National Labor Relations Act, § 2(3), 29 U.S.C. § 152(3) (1982).

¹⁵ See *Linn Gear Co. v. NLRB*, 608 F.2d 791, 794, 103 L.R.R.M. 2021, 2023 (9th Cir. 1979); 2 C. MORRIS, *supra* note 9, at 1474-77.

¹⁶ See *Parkers' Brass Foundry*, 63 N.L.R.B. 1238, 1239-40, 17 L.R.R.M. 57 (available in summary form only in L.R.R.M.) (1945); *O.U. Hoffman & Sons*, 55 N.L.R.B. 683, 684, 14 L.R.R.M. 38 (available in summary form only in L.R.R.M.) (1944), *enforced*, 147 F.2d 679, 681, 15 L.R.R.M. 951 (3d Cir. 1945). The Board expanded this interpretation to exclude the child or spouse of the sole owner of a corporation. See *P.A. Mueller & Sons, Inc.*, 105 N.L.R.B. 552, 553, 32 L.R.R.M. 1299, 1300 (1953).

¹⁷ See *Louis Weinberg Associates, Inc.*, 13 N.L.R.B. 66, 69, 4 L.R.R.M. 270 (available in summary form only in L.R.R.M.) (1939).

¹⁸ *NLRB v. Sexton*, 203 F.2d 940, 32 L.R.R.M. 2105 (6th Cir. 1953).

¹⁹ *International Metal Products Co.*, 107 N.L.R.B. 65, 67, 33 L.R.R.M. 1055, 1056 (1953).

²⁰ *Foam Rubber City #2 of Fla., Inc.*, 167 N.L.R.B. 623, 624, 66 L.R.R.M. 1096, 1098 (1967).

²¹ *Id.* at 624 n.10, 66 L.R.R.M. at 1098 n.10 (overruling *International Metal Products* requirement of special job status).

²² See, e.g., *Foam Rubber City #2 of Fla., Inc.*, 167 N.L.R.B. 623, 66 L.R.R.M. 1096 (1967)

section 9(b) in what one court characterized as a "zig-zag course."²⁵ The expansive interpretation of section 2(3) and inconsistent application resulted in an absence of clear standards and a lack of focus on the underlying reasons for exclusion of related employees.

The Court of Appeals for the Seventh Circuit confronted the problem of the Board's absence of clear standards and focus in *NLRB v. Caravelle Wood Products (Caravelle I)*.²⁶ The Board's expansive interpretation of section 2(3), the court noted, "virtually repeals the statutory language."²⁷ In addition to restricting the Board's interpretation of section 2(3), the court held that the Board could not apply a per se rule of automatic exclusion of related employees.²⁸ Instead, the court focused on those factors which indicated that a related employee would not share a community of interests with fellow employees.²⁹ Although the court focused on special benefits a related employee might receive, the factors it listed did not include special benefits, and instead concentrated on the closeness of the employee's relation to and identification with management.³⁰

(Board excluded son of 50% shareholder of corporation); *Cerni Motor Sales, Inc.*, 201 N.L.R.B. 918, 82 L.R.R.M. 1404 (1973) (section 2(3) applies only to spouses or children of shareholders holding at least 50% of company's stock).

²⁵ See, e.g., *Wilkes-Barre Wholesale Serv., Inc.*, 246 N.L.R.B. 491, 102 L.R.R.M. 1627 (available in summary form only in L.R.R.M.) (1979) (brother of owner received higher pay and not required to punch time clock); *Mid-America Machine Co.*, 238 N.L.R.B. 537, 99 L.R.R.M. 1290 (available in summary form only in L.R.R.M.) (1978) (father of 40% owner not required to punch time clock or work regular hours).

²⁴ See *NLRB v. H.M. Patterson & Son, Inc.*, 636 F.2d 1014, 1017, 106 L.R.R.M. 2543, 2545 (5th Cir. 1981); *Linn Gear Co. v. NLRB*, 608 F.2d 791, 795-96, 103 L.R.R.M. 2021, 2024-25 (9th Cir. 1979); *NLRB v. Caravelle Wood Products, Inc.*, 466 F.2d 675, 679, 80 L.R.R.M. 3411, 3414 (7th Cir. 1972) (*Caravelle I*); *NLRB v. Caravelle Wood Products, Inc.*, 504 F.2d 1181, 1186, 87 L.R.R.M. 2579, 2583 (7th Cir. 1974) (*Caravelle II*).

²⁵ See *Linn Gear Co. v. NLRB*, 608 F.2d 791, 794, 103 L.R.R.M. 2021, 2023 (9th Cir. 1979).

²⁶ 466 F.2d 675, 80 L.R.R.M. 3411 (7th Cir. 1972). Although the text discusses only *Caravelle I*, that case was followed by a further decision under the same name. These cases are therefore distinguished to avoid confusion.

²⁷ *Id.* In *Caravelle I*, the Board asserted that, under section 2(3), it could exclude the spouse or child of a 10% shareholder in a company in which seven family members each owned 10% of the company's stock. *Id.* at 676, 80 L.R.R.M. at 3411-12. The Board relied on its holding in *Foam Rubber City #2* that section 2(3) excluded the spouse or child of a "substantial shareholder" from the Act. See *Foam Rubber City #2 of Fla., Inc.*, 167 N.L.R.B. 623, 624, 66 L.R.R.M. 1096, 1098 (1967). In *Caravelle I*, the Board also contended that section 9(b) of the Act gave the Board unlimited discretion to exclude related employees, even by a per se rule of automatic exclusion. *Caravelle I*, 466 F.2d at 678, 80 L.R.R.M. at 3413.

²⁸ 466 F.2d at 678, 80 L.R.R.M. at 3413.

²⁹ *Id.* at 678-79, 80 L.R.R.M. at 3414. The court enumerated the following factors for the Board to consider:

[H]ow high a percentage of stock the parent or spouse owns, how many of the shareholders are related to one another, whether the shareholder is actively engaged in management or holds a supervisory position, how many relatives are employed as compared with the total number of employees, whether the relative lives in the same household or is partially dependent on the shareholder.

Id. at 679, 118 L.R.R.M. at 3414. The Ninth Circuit added three factors: "(1) [T]he activity, if any, of the employee in the Union, (2) the total number of employees as against the number of blood related employees, and (3) the overall ties and social activities of the family involved." *Linn Gear Co. v. NLRB*, 608 F.2d 791, 796, 103 L.R.R.M. 2021, 2025 (9th Cir. 1979).

³⁰ *Caravelle I*, 466 F.2d at 679, 118 L.R.R.M. at 3414. On remand, the Board again excluded the related employees, noting the high percentage of stock owned by parents and spouses, the

Although every other court of appeals which heard challenges to the Board's authority to apply this broader community of interests standard upheld the Board's authority,³¹ the Court of Appeals for the Sixth Circuit continued to reverse the Board's decisions.³² According to the Sixth Circuit, the Board could only exclude a family member from a bargaining unit upon finding special status.³³

During the *Survey* year, the United States Supreme Court reversed the Court of Appeals for the Sixth Circuit, and upheld the Board's authority to consider a wide range of factors in evaluating a family member's community of interest with other employees in the bargaining unit.³⁴ In *NLRB v. Action Automotive, Inc.*,³⁵ the Supreme Court held that the Board was not restricted to excluding from bargaining units only those employees falling outside the definition of "employee" provided in section 2(3) of the Act or relatives of management who receive special status.³⁶ The Supreme Court's decision grants the Board broad discretion in defining bargaining units, and marks increased deference to the determinations of the Board.

Action Automotive, Inc. is a closely held corporation held equally and operated by brothers Richard, Robert, and James Sabo.³⁷ The Retail Store Employees Union, Local 50, requested a representation election.³⁸ The union and the company agreed to elections in two bargaining units, one composed of the retail employees, the other of clerical workers at the company's headquarters.³⁹ Although the union received a plurality in both units,⁴⁰ management challenged several ballots, throwing the result into doubt. The union, in turn, challenged the ballots of Diane Sabo, wife of company president Richard Sabo, and Mildred Sabo, mother of the three co-owners.⁴¹

The Board's hearing examiner found that neither Diane Sabo nor Mildred Sabo received any special benefits of employment, but nonetheless concluded that they should be excluded because they did not share a community of interests with other employees.⁴²

relationships of the family members, and the managerial and supervisory activities of the family shareholders. The Board's exclusion, based on these factors, was enforced by the Seventh Circuit. *Caravelle II*, 504 F.2d at 1188, 87 L.R.R.M. at 2585.

³¹ See *supra* note 24 and cases cited therein.

³² See *Action Automotive, Inc. v. NLRB*, 717 F.2d 1033, 1035-36, 114 L.R.R.M. 2660, 2662 (6th Cir. 1983), *rev'd*, 105 S. Ct. 984, 118 L.R.R.M. 2577 (1985); *NLRB v. Hubbard Co.*, 702 F.2d 634, 636, 112 L.R.R.M. 3238, 3240 (6th Cir. 1983); *Cherrin Corp. v. NLRB*, 349 F.2d 1001, 1004-05, 59 L.R.R.M. 3016, 3018 (6th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

³³ *NLRB v. Action Automotive, Inc.*, 717 F.2d 1033, 1035-36, 114 L.R.R.M. 2660, 2662 (6th Cir. 1983).

³⁴ *NLRB v. Action Automotive, Inc.*, 105 S. Ct. 984, 118 L.R.R.M. 2577 (1985).

³⁵ *Id.*

³⁶ *Id.* at 989, 118 L.R.R.M. at 2579.

³⁷ *Id.* at 986, 118 L.R.R.M. at 2578.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ The term "plurality" is the Court's. The votes reported were 20-18 for the retail store employee unit, and 4-3 in the clerical unit in favor of the union. Enough ballots were challenged in each unit to throw the results into doubt. *Id.* at 986 n.1, 118 L.R.R.M. at 2578 n.1.

⁴¹ *Id.* Neither Diane Sabo nor Mildred Sabo was excluded by the statutory definition of employee contained in section 2(3). Mildred Sabo was the mother of the owners, not a spouse or child. Diane Sabo was the spouse of a co-owner, but her husband owned only 33% of the stock, each of his two brothers also holding 33%, less than the majority shareholding required under section 2(3). See *Caravelle I*, 466 F.2d at 678, 80 L.R.R.M. at 3413. See *supra* note 27.

⁴² 105 S. Ct. at 986, 118 L.R.R.M. at 2578.

The Board adopted those recommendations, noting that Diane Sabo did enjoy special benefits of employment, and ordered the company to bargain with the union.⁴³

The Court of Appeals for the Sixth Circuit denied enforcement of the Board's order.⁴⁴ An employee's relationship to the employers, according to the court, could only serve to exclude an employee from a bargaining unit where the employee enjoyed special benefits.⁴⁵ Following prior decisions of the Sixth Circuit, the court held that the Board could not use its broad community of interest standard to exclude relatives of management from the bargaining unit.⁴⁶ In this case, the court of appeals held, neither Diane Sabo nor Mildred Sabo enjoyed special privileges which would merit exclusion from the bargaining unit.⁴⁷

The Supreme Court reversed the Court of Appeals for the Sixth Circuit in a six to three decision.⁴⁸ In an opinion written by Chief Justice Burger, the Court held that the Board did not exceed its authority in excluding employees related to management from bargaining units without finding that the employees enjoy special benefits.⁴⁹ The Court began its analysis by noting that section 9(b) of the Act gives the Board broad discretion to determine the appropriate bargaining unit.⁵⁰ In its determinations, the Board focuses on the employees' community of interest, the Court noted.⁵¹ Relatives of management frequently have interests different from those of other employees, the Court continued, prompting the Board to exclude them.⁵² The Board at first applied a per se rule of exclusion, the Court noted, and more recently had considered a number of factors bearing on the employee's relationship to management.⁵³ Although the employee may receive no special benefits, the Court held that the Board may exclude a related employee when other criteria satisfy the Board that the employee's interests are aligned with management.⁵⁴

Judicial review of the Board's determinations, the Court held, is limited to finding a reasonable basis in law,⁵⁵ and the Board's orders are "rarely to be disturbed."⁵⁶ Considering the Board's decision, the Court found that the Board could reasonably conclude that relatives of management would receive closer attention to their employment concerns, would find their self-interest closely aligned with management, and might threaten confidentiality and free expression at union meetings.⁵⁷ The special benefits standard might, as the Court noted, more narrowly achieve the goal of excluding those related

⁴³ *Id.* at 987 n.2, 118 L.R.R.M. at 2578 n.2.

⁴⁴ *NLRB v. Action Automotive, Inc.*, 717 F.2d 1033, 1035-36, 114 L.R.R.M. 2660, 2662 (6th Cir. 1983).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1036, 114 L.R.R.M. at 2662.

⁴⁸ *NLRB v. Action Automotive*, 105 S. Ct. 984, 118 L.R.R.M. 2577 (1985). Chief Justice Burger wrote the majority opinion, joined by Justices Brennan, White, Marshall, Powell, and Blackmun. Justice Stevens dissented in an opinion joined by Justices Rehnquist and O'Connor. *Id.*

⁴⁹ *Id.* at 990, 118 L.R.R.M. at 2581.

⁵⁰ *Id.* at 987, 118 L.R.R.M. at 2579.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 987-88, 118 L.R.R.M. at 2579. *See supra* note 29.

⁵⁴ 105 S.Ct. at 988, 118 L.R.R.M. at 2579.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491, 19 L.R.R.M. 2397, 2400 (1947)).

⁵⁷ *Id.* at 988, 118 L.R.R.M. at 2580.

employees who pose such problems.⁵⁸ The Court held, however, that Congress vested the authority to make labor policy in the Board, and the Court would not second guess the Board's informed judgment.⁵⁹

Congress did not limit the Board's discretion in defining bargaining units, the Court continued, by directing the Board to exclude related employees only where they receive special job benefits.⁶⁰ The Court held that it could not bind the Board in ways not mandated by Congress.⁶¹ Section 2(3) of the Act, the Court held, does not limit the Board's discretion to define bargaining units.⁶² Instead, the Court reasoned, that section placed individuals employed by a parent or spouse wholly outside the statute.⁶³ The Board retains discretion, the Court held, to exclude from bargaining units those who are not excluded by section 2(3).⁶⁴

Finally, the Court held that excluding family members because of a lack of common interests does not violate the requirement that the Board remain wholly neutral as between the contending parties.⁶⁵ Any effect favoring the union, the Court held, is incidental.⁶⁶ In this case, the Court concluded, the Board acted reasonably in excluding Diane Sabo and Mildred Sabo.⁶⁷ Therefore, the Court reversed the judgment of the court of appeals.⁶⁸

Justice Stevens wrote the dissenting opinion, joined by Justices Rehnquist and O'Connor. The majority's decision, the dissent contended, permitted the Board to exclude employees solely because of their probable opposition to the union.⁶⁹ Congress limited the permissible exclusion of family members by enacting section 2(3), the dissent argued.⁷⁰ Permitting exclusion based solely on probable opposition to the union, the dissent reasoned, violated the requirement that the Board equally protect employees' right to resist unionization.⁷¹ Although the majority purported to rely on objective factors for exclusion, the dissent contended that the decision would be based on the family member's opposition to the union rather than characteristics of the job itself.⁷² The dissent concluded that family members could be excluded only where they received special privileges.⁷³

The Supreme Court's decision in *NLRB v. Action Automotive, Inc.*, reversing the Sixth Circuit's split with the other circuits, grants the Board discretion to consider a broad array of factors in determining the appropriate bargaining unit.⁷⁴ Employees related to management pose a special problem because they are likely to identify more closely with

⁵⁸ *Id.* at 988-89, 118 L.R.R.M. at 2580. See *infra* notes 84-86 and accompanying text.

⁵⁹ *Id.* at 989, 118 L.R.R.M. at 2580.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 989-90, 118 L.R.R.M. at 2580-81.

⁶⁸ *Id.* at 990, 118 L.R.R.M. at 2581.

⁶⁹ *Id.* (Stevens, J., dissenting).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 991, 118 L.R.R.M. at 2581-82 (Stevens, J., dissenting).

⁷³ *Id.* at 991, 118 L.R.R.M. at 2582 (Stevens, J., dissenting).

⁷⁴ *Id.* at 987, 118 L.R.R.M. at 2579.

management than with their fellow employees.⁷⁵ Unit determinations, however, are in general based on characteristics of the job, not of the person occupying it.⁷⁶ Most factors considered by the Board in determining the appropriate unit are based on objective characteristics of the job, such as skills, location, and compensation.⁷⁷ Certain employees are excluded from the bargaining unit because they have conflicting interests and loyalties, such as confidential employees and guards.⁷⁸ Those exclusions, however, are based on characteristics of the job, not of the individual.⁷⁹ Exclusion of related employees is, on the other hand, based on characteristics peculiar to the individual.

In *Action Automotive*, the Supreme Court clarified the relationship between section 2(3) and section 9(b) of the Act, and the analysis under which the Board may exclude related employees. Section 2(3) provides a threshold question of whether the family member is covered by the Act at all.⁸⁰ Presumably this inquiry will be more narrowly circumscribed than the expansive interpretation pressed by the Board in *Caravelle I*.⁸¹ This more restrictive application of section 2(3) is offset, however, by the increased flexibility granted the Board in making unit determinations under section 9(b).⁸² Because the Court did not require the Board to find special status as a prerequisite to exclusion under section 9(b), the Board has more flexibility in focusing on the underlying concern of whether a related employee shares a community of interests with fellow employees. This focus on community of interests also avoids the per se rule of automatic exclusion, which deflects consideration of the community of interests shared by a particular related employee.⁸³

The Court's rejection of a finding of special status as a prerequisite to excluding a related employee gives the Board increased flexibility in considering the community of interest. The dissent contended that special status was the only objective basis for exclusion.⁸⁴ The other factors, the dissent argued, amount to a decision based solely on probable opposition to the union.⁸⁵ The dissent's analysis, however, neglects the central

⁷⁵ *Id.* at 988, 118 L.R.R.M. at 2579.

⁷⁶ See R. GORMAN, *supra* note 3, at 66.

⁷⁷ *Id.* at 69.

⁷⁸ In section 9(b)(3) of the Act, Congress specifically prohibits the Board from joining persons employed as "guards" with other classes of employees in a bargaining unit. National Labor Relations Act, § 9(b)(3), 29 U.S.C. § 159(b)(3) (1982). The Board has used its discretion to exclude employees with access to confidential, labor relations information of their employer. See *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 185, 108 L.R.R.M. 3105, 3110 (1981). In addition, Congress amended section 2(3) of the Act to exclude employees in a supervisory capacity from coverage under the Act. National Labor Relations Act, § 2(3), 29 U.S.C. § 152(3) (1982); see also *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 181-85, 108 L.R.R.M. 3105, 3109-10 (1981). Finally, the Supreme Court has enforced Congress's intention to exclude managerial employees from the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283-84, 85 L.R.R.M. 2945, 2951 (1974). See generally R. GORMAN, *supra* note 3, at 75.

⁷⁹ See generally R. GORMAN, *supra* note 3, at 75.

⁸⁰ 105 S. Ct. at 989, 118 L.R.R.M. at 2580.

⁸¹ See *supra* note 27. In light of the great deference the *Action Automotive* Court extends to the Board's decisions, it is not clear whether the Court would place any limits on the Board's application of these standards. See *infra* notes 93-95 and accompanying text.

⁸² 105 S. Ct. at 989, 118 L.R.R.M. at 2580.

⁸³ See *infra* notes 92-94 and accompanying text for a discussion of whether the Court might place any limit on the Board's discretion.

⁸⁴ 105 S. Ct. at 991, 118 L.R.R.M. at 2581 (Stevens, J., dissenting).

⁸⁵ *Id.*

issue of community of interests. A related employee who receives special status on the job would clearly lack a community of interests with other employees. It is because of the absence of community of interests, however, that such an employee is excluded, not solely because of the special status.⁸⁶

The appeal of the special status standard may lie in its objectification of the related employee's affiliation with management into characteristics of the job itself. The special status standard may appear to conform to the goal of decisions based on job characteristics rather than the individual employee,⁸⁷ but it deflects inquiry from the underlying problem that a related employee's interests may be most closely identified with management. The Court's rejection of special status as the only basis for excluding related employees returns the focus to the community of interests shared with employees.

The dissent was concerned that the Court's more flexible factors in analyzing community of interests would, in application, reduce to whether the employee was opposed to the union, and would thus violate the neutrality required of the Board.⁸⁸ The dissent neglects that related employees are excluded because they identify more closely with management, not solely because they oppose the union. The community of interests standard is used to include in a bargaining unit employees in similar positions of employment, with similar concerns, and relations with their employer.⁸⁹ In this regard, this standard polices the line the Act draws between labor and management.⁹⁰ The dissent correctly noted that the Board would probably exclude a related employee who opposed the union. This is true because of the high congruence between being closely allied with management and opposition to a union. High congruence suggests to the dissent that the two may be substituted freely. Not all related employees, however, are aligned with management. Although most related employees who also oppose the union might not share a community of interests with other employees, focusing on the factors in each individual situation would permit a related employee who opposed the union, but who nonetheless shared a community of interests with fellow employees, to be included in the bargaining unit. It is, of course, possible that the Board would exclude even such an employee. The problem to which the dissent alludes lies with the application of the standard rather than the correctness of the standard itself. The Board's more flexible community of interests standard, which the Court upheld, avoids the harshness of automatic exclusion regardless of individual circumstances, and restores the focus on whether a related employee identifies more closely with management than with fellow employees.⁹¹

The Court's decision in *Action Automotive* demonstrates the deference granted to the Board's determinations of bargaining units. The Court allows the Board to exercise its

⁸⁶ 105 S. Ct. at 989, 118 L.R.R.M. at 2580.

⁸⁷ See R. GORMAN, *supra* note 3, at 66.

⁸⁸ 105 S. Ct. at 991, 118 L.R.R.M. at 2581-82 (Stevens, J., dissenting).

⁸⁹ "Eligibility . . . depends on whether an employee is sufficiently concerned with the terms and conditions of employment in a unit to warrant his participation in the selection of a collective bargaining agent." *Shoreline Enterprises of America, Inc. v. NLRB*, 262 F.2d 933, 944, 43 L.R.R.M. 2407, 2414 (5th Cir. 1959).

⁹⁰ See *supra* note 78 for other examples of the line drawn between labor and management under the Act.

⁹¹ The Court did not address whether the flexible, broad factors used in evaluating a related employee's community of interests with fellow employees might be applied to exclude an individual not blood related, but whose interests were most closely identified with management.

discretion based on its experience, and to modify its policies.⁹² The limits to the Court's deference are unclear. If the Board were to impose an expansive interpretation of "employee" under section 2(3) or a per se rule of automatic exclusion, for example, whether the Court would defer to the Board's decision is uncertain.⁹³ In *Caravelle I*, the Seventh Circuit limited the Board's discretion to interpret section 2(3) or to apply a per se rule of automatic exclusion, while granting more flexibility under section 9(b) determinations of bargaining units.⁹⁴ Such guidelines serve an important purpose. If the Court were to defer to an expansive interpretation of section 2(3) or a per se rule of automatic exclusion, the analysis of related employees would again shift from the underlying issue of whether the particular related employee's interests were more closely aligned with management. This would be an unfortunate result obscuring the underlying basis for exclusion.

The Court's decision in *Action Automotive* reversed the Sixth Circuit's limitation of the Board's discretion to exclude related employees, requiring a finding of special status. The Court's decision grants the Board flexibility to consider various factors and returns the focus of the analysis to the community of interests a related employee shares with fellow employees.⁹⁵ The decision accords the Board's determination great deference, and indicates an unwillingness to subject the Board's determinations to scrutiny.⁹⁶ The immediate effect of the Board's increased flexibility is to focus more closely on the underlying issue of whether a related employee is more closely aligned with management. Paradoxically, the Court's unwillingness to scrutinize the Board's determinations could result in a shift away from that focus on community of interests, if the Board chooses to exclude related employees from bargaining units under the section 2(3) definition of "employee" or by applying a per se rule of automatic exclusion.

C. **The Difficulty of Applying the Yeshiva Standard: Loretto Heights College v. NLRB*¹

Section 7 of the National Labor Relations Act (the Act) protects the right of "employees" to bargain collectively.² This protection, however, extends only to certain classes

⁹² 105 S. Ct. at 988 n.4, 118 L.R.R.M. at 2579 n.4.

⁹³ The Court indicated that the Board's decisions must have a "reasonable basis in law." *Id.* at 988, 118 L.R.R.M. at 2579 (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131, 14 L.R.R.M. 614, 622 (1944)). The Court noted that the Board no longer applied a per se rule of automatic exclusion, but did not indicate such a rule would be impermissible. *Id.* at 988 n.6, 118 L.R.R.M. at 2579 n.6.

⁹⁴ *Caravelle I*, 466 F.2d at 678, 80 L.R.R.M. at 3413.

⁹⁵ *Action Automotive*, 105 S. Ct. at 988, 118 L.R.R.M. at 2579.

⁹⁶ *Id.*

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¹ 742 F.2d 1245, 117 L.R.R.M. 2225 (10th Cir. 1984).

² 29 U.S.C. § 157 (1982). See generally 29 U.S.C. §§ 151-169 (1982). Section 7 states:

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 as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1982).

of employees as defined in section 2(3) of the Act.³ The Act's definition of "employee" explicitly excludes any person employed as a supervisor.⁴ The United States Supreme Court has held that the definition excludes managerial employees from the protection of the Act as well.⁵

Prior to 1980, the National Labor Relations Board (Board or NLRB) had stated that college faculty members were not managerial employees and were therefore eligible for protection under the Act.⁶ In 1980, however, the United States Supreme Court, in *NLRB v. Yeshiva University*,⁷ rejected the NLRB's position and held that faculty members may

³ 29 U.S.C. § 152(3) (1982). Section 152(3) states:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this 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, but 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 employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer herein defined.

29 U.S.C. § 152(3) (1982).

⁴ *Id.*; see also R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 33 (1976). There were two rationales for excluding supervisors from coverage under the Act. *Id.* at 34. The first rationale was to assure that supervisors would not ally with or become subordinate to employees within the union and, as a result, renounce the supervisor's duty of undivided loyalty to the employer. *Id.* Second, Congress wanted to assure that rank-and-file employees could unionize without undue influence from supervisors. *Id.*

⁵ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 85 L.R.R.M. 2945, 2948 (1974). Prior to 1970, the National Labor Relations Board (Board or NLRB) excluded all managerial employees from coverage under the Act. *American Locomotive Co.*, 92 N.L.R.B. 115, 118-19, 27 L.R.R.M. 1064, 1064 (1950). See R. GORMAN, *supra* note 4, at 38. In 1971, the Board attempted to alter its position by excluding only those managerial employees whose positions were so closely involved with labor relations that to permit them to bargain would create a severe conflict between the managerial employee and his employer. *Textron, Inc.*, 190 N.L.R.B. 431, 431, 77 L.R.R.M. 1265, 1265 (1971). See R. GORMAN, *supra* note 4, at 38. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 85 L.R.R.M. 2945 (1974), the Supreme Court reversed the Board's position and held that Congress intended to exclude all managerial employees from coverage under the Act. *Id.* at 275, 85 L.R.R.M. at 2948. On remand to the Board, the Board articulated its definition of a managerial employee:

[T]hose who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy

[M]anagerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather it is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.

Bell Aerospace, 219 N.L.R.B. 384, 385, 89 L.R.R.M. 1664, 1665 (1975) (quoting General Dynamics Corporation, Convair Aerospace Division, 213 N.L.R.B. 851, 857, 87 L.R.R.M. 1705, 1715 (1974)).

⁶ See *C.W. Post Center of Long Island Univ.*, 189 N.L.R.B. 904, 905, 77 L.R.R.M. 1001, 1003 (1971); Gray, *Managerial Employees and the Industrial Analogy: NLRB v. Yeshiva University*, 33 LAB. L.J. 390, 393 (1982). See also *NLRB v. Wentworth Institute* 515 F.2d 550, 89 L.R.R.M. 2033 (1st Cir., 1975) (affirming the Board's position that college faculty had the right to organize and bargain collectively).

⁷ 444 U.S. 672, 103 L.R.R.M. 2526 (1980).

exercise such control over academic matters at the university that they are managerial employees and therefore not protected by the Act.⁸

Two criteria emerged from *Yeshiva* for determining whether college faculty members are to be considered managerial.⁹ One was the importance of the subject matter of the faculty's decisions to the functioning of the university.¹⁰ The second was the extent to which the faculty's decisions actually controlled the final outcome of these matters.¹¹ The Court left open the possibility of coverage under the Act for full-time faculty at colleges "unlike *Yeshiva*."¹²

⁸ *Id.* at 679, 103 L.R.R.M. at 2529. The Court stated that the *Yeshiva* faculty exercised authority which "in any other context unquestionably would be managerial." *Id.* at 686, 103 L.R.R.M. at 2532. The Court found that the faculty had absolute authority in academic matters such as determining teaching methods, grading policies, matriculation standards, and standards for retaining and graduating students. *Id.* The Court also noted that the *Yeshiva* faculty occasionally determined the size of the student body, the amount of tuition, and the location of a school. *Id.* The Court found it difficult to imagine more managerial decisions than these within a university. *Id.* See generally Gray, *supra* note 6.

⁹ *Yeshiva*, 444 U.S. at 686-90, 103 L.R.R.M. at 2532-34. See also Gray, *supra* note 6, at 397.

¹⁰ *Id.* at 686, 103 L.R.R.M. at 2532. For example, decisions on academic matters, teaching, student body size, and grading policies are clearly very important to the functioning of the entire university. On the other hand, a teacher's decisions about how to teach an individual course would not have the same importance to the entire university. *Yeshiva*, 444 U.S. at 690 n. 31, 103 L.R.R.M. at 2534 n.31.

¹¹ *Id.* See also Gray, *supra* note 6, at 397.

¹² *Yeshiva*, 444 U.S. at 690 n.31, 103 L.R.R.M. at 2534 n.31. Much litigation has arisen in the wake of the *Yeshiva* decision. See Douglas, *Distinguishing Yeshiva: A Troubling Task for the NLRB*, 34 LAB. L.J. 104, 105 (1983), and cases cited therein. Colleges and universities have challenged attempts by faculty members to organize and bargain collectively. *Id.* These institutions typically justify their refusal to recognize and bargain with the faculty union by alleging that faculty members are managerial employees excluded from protection under the Act in the wake of *Yeshiva*. See *id.*

In the following cases, the court or the Board rejected the managerial status of the faculty and permitted certification of a bargaining unit: *Stephens Institute v. NLRB*, 620 F.2d 720, 727, 104 L.R.R.M. 2524, 2529 (9th Cir. 1980) (*Yeshiva* does not apply where instructors do not engage in policy making nor in management level decision-making; *Yeshiva* is also inapplicable to an Institute unlike the nonprofit, "mature" *Yeshiva* University); *Florida Memorial College*, 263 N.L.R.B. 1248, 1252-53, 111 L.R.R.M. 1547, 1552-53 (1982) (full-time faculty are not managerial employees because, unlike the *Yeshiva* faculty, this faculty's authority is "far from absolute" in the academic sphere and the faculty has no substantial control in other spheres). But see 263 N.L.R.B. 1254-55, 111 L.R.R.M. 1553-54 (1982) (finding extensive faculty involvement rising to the level of management authority that was described in *Yeshiva*) (Van de Water, Chairman, and Hunter, Member, dissenting). As this chapter on *Loretto* demonstrates, it is not surprising that NLRB members, like courts, would reach differing conclusions when applying the fact-intensive *Yeshiva* "standard"; *Wordsworth Academy*, 262 N.L.R.B. 438, 443, 110 L.R.R.M. 1296, 1300-01 (1982) (teachers, psychologists, and therapists are not managerial employees under *Yeshiva*; they are professional employees whose decisions are limited to the routine discharge of their professional duties in projects assigned to them); *Bradford College*, 261 N.L.R.B. 565, 565-67, 110 L.R.R.M. 1055, 1057-58 (1982) (faculty members are not managerial employees because the faculty's recommendations on academic and administrative matters were often ignored or rejected by the administration); *Montefiore Hospital and Medical Center*, 261 N.L.R.B. 569, 572, 110 L.R.R.M. 1048, 1052 (1982) (staff doctors' alleged managerial participation was insufficient to warrant bringing them within the managerial exclusion); *Pratt Institute*, 256 N.L.R.B. 1166, 1167, 107 L.R.R.M. 1404, 1405 (1981) (*Yeshiva* decision did not intend to exclude nonacademic administrative employees who routinely carry out decisions and standards made by higher authority); see also *Milton College*, 260 N.L.R.B. 399, 400, 109 L.R.R.M. 1172, 1173 (1982) ("*Yeshiva* constitutes a substantial change in the state of

During the *Survey* year, in *Loretto Heights College v. NLRB*,¹⁵ the United States Court of Appeals for the Tenth Circuit held that faculty members at Loretto Heights College (Loretto or the College) were not managerial employees within the meaning of *Yeshiva*.¹⁴ As a result, the court found that Loretto had committed an unfair labor practice under sections 8(a)(1) and (5) of the Act¹⁵ by refusing to recognize and bargain with the faculty's union.¹⁶ In reaching its decision, the court of appeals found that the faculty's power was diluted and that the faculty did not control its employer's policies.¹⁷ As will be demonstrated, the facts of *Loretto* and *Yeshiva* are quite similar, yet their respective courts reached opposite conclusions based on those facts. The *Loretto* case illustrates, therefore, the difficulty of predicting the outcome of particular factual situations under the general standard of *Yeshiva*.

The Loretto faculty began organizing in 1971.¹⁸ In 1972, the Loretto Heights College/Faculty Education Association (the Association) was certified as the collective bargaining representative for all regular full and part-time faculty members.¹⁹ The College and the Association subsequently agreed to a series of collective bargaining agreements.²⁰ A few months before the expiration of the last of these agreements,²¹ Loretto notified the Association of its intent to end the agreements.²² The College,

the law regarding the supervisory and/or managerial status of faculty members"; hearing on the appropriateness of the faculty unit at Milton College is therefore warranted).

In the following cases, the Board found that the faculty was managerial under *Yeshiva*: University of New Haven, 267 N.L.R.B. 939, 943, 114 L.R.R.M. 1140-41 (1983) (full-time faculty who play a major and effective role in the formulation and effectuation of broad management policies, policies established by the board of governors of the university, "are managerial employees without organizational rights protected by the Act"); Duquesne University of the Holy Ghost, 261 N.L.R.B. 587, 589, 110 L.R.R.M. 1046, 1048 (1982) (Duquesne Law School faculty exercises managerial authority in critical academic matters and in nonacademic matters in a manner nearly identical to the *Yeshiva* faculty's; Duquesne faculty members are therefore managerial employees); Ithaca College, 261 N.L.R.B. 577, 578, 110 L.R.R.M. 1059, 1060 (1982) (Ithaca faculty exercises authority similar to the authority exercised by the *Yeshiva* faculty, formulating policies for schools in academic matters and having substantial authority in nonacademic spheres; Ithaca faculty members thus classified as managerial employees); Thiel College, 261 N.L.R.B. 580, 586, 110 L.R.R.M. 1041, 1046 (1982) (faculty makes decisions and recommendations in the "overwhelming majority of critical areas relied upon by the Supreme Court in *Yeshiva University*"; therefore, like the *Yeshiva* faculty, the Thiel faculty was found to be managerial).

See generally Foley, *Yeshiva Update: Administration 8, Union 0*, 29 CATH. LAW. 33, 45-49 (1984) (arguing that the impact of *Yeshiva* was largely to sound the death knell for "future union organization at most private, four-year colleges").

¹³ 742 F.2d 1245, 117 L.R.R.M. 2225 (10th Cir. 1984).

¹⁴ *Id.* at 1254, 117 L.R.R.M. at 2232.

¹⁵ Section 8 of the National Labor Relations Act 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 7; . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . ." 29 U.S.C. §§ 158(a)(1), (5) (1982).

¹⁶ *Loretto*, 742 F.2d at 1256, 117 L.R.R.M. at 2233.

¹⁷ *Id.* at 1254, 117 L.R.R.M. at 2232.

¹⁸ *Id.* at 1246, 117 L.R.R.M. at 2225.

¹⁹ *Id.* Part-time faculty members were required to carry at least a one-fourth faculty load. *Id.*

²⁰ *Id.*

²¹ *Id.* at 1246, 117 L.R.R.M. at 2225-26. The last of the agreements expired in May, 1980. *Id.*

²² *Id.*

questioning its duty to bargain with the Association in light of *Yeshiva*, refused to recognize the Association and discontinued further negotiations.²³

The Association responded by filing an unfair labor practice charge with the Board, alleging that the College had violated sections 8(a)(1) and 8(a)(5) by withdrawing its recognition of the Association and refusing to negotiate.²⁴ The case was tried before an administrative law judge (ALJ), who found that the College had violated the Act.²⁵ The ALJ found that the faculty members were not managerial employees who could be excluded from coverage under the Act,²⁶ and ordered the College to recognize and bargain with the Association.²⁷ The Board reviewed the ALJ's decision, affirmed his findings, and adopted his recommended order.²⁸ Loretto petitioned the Tenth Circuit Court of Appeals for review of the Board's order, and the Board cross-applied for enforcement of its order.²⁹

In reaching its decision to enforce the Board's order, the court first reviewed the Supreme Court's *Yeshiva* decision.³⁰ *Yeshiva's* exposition of the rationale of the managerial exclusion, the court stated, relies on a basic assumption that an employer is entitled to the "undivided loyalty" of his employees.³¹ Managerial employees, exercising independent discretion and aligned with management, are excluded from coverage under the Act to guarantee that their loyalty is not divided between their employer and their union.³² According to the Tenth Circuit, the *Yeshiva* faculty was found to be "in effect, substantially and pervasively operating the enterprise."³³ For example, the court noted, in the "overwhelming majority of cases" *Yeshiva's* central administration followed faculty recommendations regarding faculty hiring, tenure, sabbaticals, termination, and promotion.³⁴ Thus in *Yeshiva*, the court concluded, the problem of the faculty's potentially divided loyalty was "particularly acute."³⁵

The court of appeals then reviewed at length the structure of college governance at Loretto.³⁶ The Board of Trustees, according to the court, had ultimate authority for the operation of the college.³⁷ The administration of the college consisted of a President,

²³ *Id.* at 1246, 117 L.R.R.M. at 2226. The College did, however, continue to honor most provisions of the expired contract. *Id.*

²⁴ *Id.* See *supra* note 15 for pertinent text of section 8.

²⁵ *Loretto*, 742 F.2d at 1246, 117 L.R.R.M. at 2226.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* The Board affirmed all but one of the ALJ's findings. *Id.* at 1246 n.2, 117 L.R.R.M. at 2226 n.2. The ALJ had discussed a "divergence of interests" between the faculty and the College. The Board found it unnecessary to discuss the divergence. *Id.* The Board concluded that the other reasons cited by the ALJ were sufficient to justify his finding that the faculty members of Loretto were not managerial employees under *Yeshiva*. *Id.*

²⁹ *Id.* at 1245, 117 L.R.R.M. at 2225.

³⁰ *Id.* at 1246-48, 117 L.R.R.M. at 2226-27.

³¹ *Id.* at 1247, 117 L.R.R.M. at 2226.

³² *Id.* at 1246-47, 117 L.R.R.M. at 2226.

³³ *Id.* at 1246-47, 117 L.R.R.M. at 2226 (quoting *Yeshiva*, 444 U.S. at 679, 103 L.R.R.M. at 2529).

³⁴ *Id.* at 1247, 117 L.R.R.M. at 2227.

³⁵ *Id.* at 1248, 117 L.R.R.M. at 2227 (quoting *Yeshiva*, 444 U.S. at 689, 103 L.R.R.M. at 2533).

³⁶ *Id.* at 1248-52, 117 L.R.R.M. at 2227-30.

³⁷ *Id.* at 1248, 117 L.R.R.M. at 2227.

five division heads, and program directors who administered each of the college's academic programs.³⁸

Faculty participation in governance at the college, according to the court, occurred mainly through committees containing at least some faculty members.³⁹ The most significant of the committees were the Academic Forum, the Faculty Administration Relations Council (FARC), and the Program Review and Recommendation Committee (PRRC).⁴⁰ The court noted that besides such committee work, faculty members participated mainly in decision-making within particular program areas, including decisions regarding curriculum development.⁴¹ Finally, the court stated that faculty members had only very limited impact into the budget process for their program areas.⁴²

The court then analyzed the key question of whether the faculty's involvement at Loretto rose to the level of managerial involvement as defined in *Yeshiva*. While the court found that the faculty played a substantial role in governing Loretto, the court decided that the faculty's authority in most aspects of Loretto's governance was severely circumscribed.⁴³ In areas outside the academic sphere, the court found that the faculty had little or no authority.⁴⁴ Turning to the faculty's role in academic affairs, the court contrasted the Loretto faculty's participation in decision-making from the Yeshiva faculty's decision-making.⁴⁵ While at Yeshiva the faculty at each school met and decided academic matters as a collective body, the court noted that the Loretto faculty's participation was through its representation on committees.⁴⁶ Faculty involvement in these

³⁸ *Id.* at 1249, 117 L.R.R.M. at 2227-28.

³⁹ *Id.* at 1249, 117 L.R.R.M. at 2228. The court reviewed, at great length, each committee with faculty participation. These committees included: the Academic Forum, a self-governing committee including all full and part-time faculty members; the Faculty Administration Relations Council (FARC), which advised the college president and consisted of the President, four administrators and four faculty members, and which was involved in developing the College's academic policies; the Rank Committee, consisting of five full-time faculty members, which made recommendations to the President concerning faculty rank; the Tenure Committee, which consisted of five full-time tenured faculty members and two program directors, and which recommended faculty for tenure to the President; the Faculty Review Committee, which consisted of five full-time faculty members, and which made recommendations to the President concerning the disposition of grievances; the Affirmative Action Committee, which consisted of faculty, staff and students appointed by the President; the Faculty Evaluation Committee, which consisted of three full-time faculty members and two students; the Academic Review Committee, composed of administrators, which dealt with matters of student retention; the Sabbatical Committee, chaired by the Academic Dean, included one program director and two full-time faculty members, and which reviewed sabbatical applications and made recommendations to the President; the Program Review and Recommendation Committee (PRRC), consisting of five appointed faculty members, which reviewed programs for consistency with college goals and for overlap among college courses; and finally the Research Committee, the membership of which varied between faculty members and program directors, and which reviewed applications for research money and made recommendations regarding disposition of \$1000 of research funds. *Id.* at 1249-51, 117 L.R.R.M. at 2228-29.

⁴⁰ *Id.* at 1253, 117 L.R.R.M. at 2231.

⁴¹ *Id.* at 1251-52, 117 L.R.R.M. at 2229-30. These decisions included decisions regarding such areas as the hiring of new faculty and salary level for faculty. *See id.* at 1251, 117 L.R.R.M. at 2229-30. The Academic Dean followed faculty hiring recommendations in every case. *Id.* at 1251, 117 L.R.R.M. at 2230.

⁴² *Id.* at 1252, 117 L.R.R.M. at 2230.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1252, 117 L.R.R.M. at 2231.

⁴⁶ *Id.*

committees, stated the court, was only incidental to the faculty's primary teaching responsibilities.⁴⁷ The court found, therefore, that the faculty's participation in the committees was not truly managerial.⁴⁸ Moreover, the court found that several of the lesser committees were either relatively ineffective or insignificant in their impact on governing Loretto College.⁴⁹ Even in the seemingly more powerful organizations — the Academic Forum, the FARC, and the PRRC — the court found that the faculty's power was more theoretical than actual.⁵⁰

Thus, the court concluded that the Loretto faculty did not "effectively control or implement employer policy,"⁵¹ and therefore the faculty's behavior was not truly managerial. In summarizing, the court listed the factors which led to its conclusion. These factors included the infrequent or insignificant nature of some of the committees' work, the mixed membership (faculty and administrative members) on many committees, the limited decision-making authority held by the faculty, and the administrative approval required to finalize decisions.⁵²

The court also reasoned that the issue of potentially divided loyalty that was present in *Yeshiva* was absent in *Loretto*.⁵³ The court noted that in *Yeshiva* there was potential for divided loyalty because the school depended on the faculty to such a great extent to formulate and implement academic policy.⁵⁴ Further, the court noted that because of the relatively small size of *Yeshiva*'s administrative staff, there was no buffer between management and the faculty.⁵⁵ In contrast, at *Loretto*, the court stated, the administrative staff was relatively large.⁵⁶ The court found it significant that the *Loretto* program directors formed a very effective buffer between the management of *Loretto* and its faculty.⁵⁷ The program directors, according to the court, were considered part of the administration while also functioning as faculty.⁵⁸ *Loretto* relied on the expertise of these program directors within the administration, noted the court, and thus did not need to rely as much on its faculty to determine academic policy.⁵⁹ Thus the court concluded

⁴⁷ *Id.* at 1253, 117 L.R.R.M. at 2231.

⁴⁸ *Id.* The court found that the faculty's involvement on the Sabbatical, Faculty Review, Tenure, and Rank Committees, among others, was incidental. *Id.* These committees met only infrequently and only for short periods of time. *Id.*

⁴⁹ *Id.* The court referred specifically to the Affirmative Action Committee, the Faculty Evaluation Committee, and the Research Committee. *Id.*

⁵⁰ *Id.* For a description of the various committees, see *supra* note 39. With regard to the Academic Forum, the court found that decisions on college philosophy, curriculum, admissions, retention and graduation policy were made largely by the various committees, even though the Forum's bylaws stated that the Forum would share in these decisions. *Loretto*, 742 F.2d at 1253, 117 L.R.R.M. at 2231. Regarding the FARC, the court reasoned that its policies were not controlled by the faculty because faculty members constituted only a minority of FARC's membership. *Id.* The PRRC, while composed solely of faculty members, the court stated, lacked final decision-making authority. *Id.* at 1253-54, 117 L.R.R.M. at 2231-32.

⁵¹ *Id.* at 1254, 117 L.R.R.M. at 2232, quoting *Yeshiva*, 444 U.S. at 683, 103 L.R.R.M. at 2531.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

that the facts of *Loretto* did not present a problem of potentially divided loyalty such as that found in *Yeshiva*.⁶⁰

Finally, the court determined that the administration, not the faculty, made management decisions and exercised control over *Loretto*.⁶¹ Thus the court found that faculty members at *Loretto* were not managerial employees as defined in *Yeshiva*.⁶² Accordingly, the court agreed with the Board that faculty members at *Loretto* were entitled to the Act's protection of their right to organize and bargain collectively.⁶³

The *Loretto* case illustrates how difficult it is to predict the results when a court embarks on a *Yeshiva*-type analysis. *Yeshiva* formulated a general standard, that faculty "substantially and pervasively operating the enterprise," or exercising "authority which in any other context unquestionably would be managerial" are to be considered managerial employees. In practice, however, this standard is so vague that essentially similar facts can lead to opposite results.

Despite the *Loretto* court's conclusion that the degree of control exercised by the *Loretto* faculty fell far short of that exercised by the *Yeshiva* faculty,⁶⁴ a close comparison of the facts in *Loretto* with the facts in *Yeshiva* shows that the two institutions did not differ as much as the *Loretto* court found. One of the controlling factors mentioned by the *Yeshiva* Court was that the subject matter of the faculty's decisions, academic affairs, was critical to the functioning of the university.⁶⁵ The *Loretto* court relied on the "insignificant" work in academic affairs of some of *Loretto*'s committees as a basis for its decision.⁶⁶ Yet those committees recommended action on college philosophy and curriculum changes,⁶⁷ faculty tenure,⁶⁸ faculty promotion,⁶⁹ and other academic issues similar to those found to be critical at *Yeshiva*. Somewhat contradictorily, the *Loretto* court argued that the Academic Forum's power was more theoretical than actual precisely because other committees made most of the decisions regarding college philosophy, curriculum, admissions, retention, and graduation policies.⁷⁰ Thus the court actually conceded the importance of the committees in making decisions regarding academic policies. More importantly, these kinds of decisions were very similar to the kinds of decisions made by the *Yeshiva* faculty.⁷¹ It is not clear, therefore, that decisions made by *Loretto*'s faculty were any less significant than those made by *Yeshiva*'s faculty.

Another important aspect of *Yeshiva* was the extent to which the faculty's recommendations actually controlled the outcome of decisions.⁷² In *Yeshiva*, the court found that the faculty had absolute authority in academic matters.⁷³ The *Loretto* court stated

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1255, 117 L.R.R.M. at 2233.

⁶⁴ *Id.* at 1254, 117 L.R.R.M. at 2232.

⁶⁵ *Yeshiva*, 444 U.S. at 686, 103 L.R.R.M. at 2532.

⁶⁶ *Loretto*, 742 F.2d at 1254, 117 L.R.R.M. at 2232.

⁶⁷ *Id.* at 1253, 117 L.R.R.M. at 2231.

⁶⁸ *Id.* at 1250, 117 L.R.R.M. at 2228.

⁶⁹ *Id.* at 1249-50, 117 L.R.R.M. at 2228.

⁷⁰ *Id.* at 1253, 117 L.R.R.M. at 2231.

⁷¹ See *Yeshiva*, 444 U.S. at 676-77, 686, 103 L.R.R.M. at 2528, 2532.

⁷² *Id.* at 686, 103 L.R.R.M. at 2532.

⁷³ *Id.*

that Loretto's faculty had limited decision-making authority.⁷⁴ In the cases of the Tenure, Sabbatical, and Rank Committees at Loretto, however, all of their recommendations had been accepted.⁷⁵ In addition, all faculty hiring recommendations had been followed.⁷⁶ Thus the Loretto faculty had a significant degree of control over these matters.

Further, the *Loretto* court focused on the infrequent meetings and mixed membership of many of the committees as one reason why the faculty's impact fell short of effective control.⁷⁷ The Yeshiva faculty, however, participated in university-wide governance through the faculty representatives on a similarly mixed student-faculty advisory council.⁷⁸ The *Loretto* court also focused on the layers of administrative approval necessary to implement faculty recommendations as evidence of diluted faculty control.⁷⁹ Yet Yeshiva vested ultimate authority in a Board of Trustees and the university had an extensive administration.⁸⁰ Thus, it can be argued that the Loretto faculty had significant decision-making authority of the same type, and with similar structure, as the faculty at Yeshiva. Despite this similarity in facts, however, the *Yeshiva* and *Loretto* courts reached opposite conclusions about whether the faculty at issue was managerial.

As demonstrated, several arguments can be made that the roles of the faculties at Loretto Heights College and at Yeshiva University were not, in fact, as different as stressed by the *Loretto* court. Because such arguably similar facts can lead to such different outcomes, *Loretto* demonstrates the difficulty of predicting the outcome of a case under the vague *Yeshiva* standard. Although *Yeshiva* appeared to spell out a standard, in fact it provided no standard for evaluating specific facts. The *Yeshiva* rule states that when faculty members "in effect, substantially and pervasively operat[e] the enterprise," they are managerial.⁸¹ The *Yeshiva* court, however, provided no meaningful guidance for deciding which facts lead to a conclusion that a faculty "substantially and pervasively" operates a college or university. *Loretto* does little to clarify the standards for assessing faculty "managerialness," reaching as it does the opposite conclusion that the *Yeshiva* Court reached from essentially similar facts. *Loretto* does, however, reveal the ineffectiveness of the *Yeshiva* standard, and it suggests that the issue of the managerial status of a college faculty will continue to be litigated. *Loretto* may also indicate that courts are

⁷⁴ *Loretto*, 742 F.2d at 1254, 117 L.R.R.M. at 2232.

⁷⁵ *Id.* at 1249-50, 117 L.R.R.M. at 2228-29.

⁷⁶ *Id.* at 1251, 117 L.R.R.M. at 2230.

⁷⁷ *Id.* at 1254, 117 L.R.R.M. at 2232. One commentator has criticized the NLRB for not presenting the more convincing argument that faculty members should not be considered managerial because they spend only a small percentage of their time on managerial, as opposed to professional, tasks. See Gray, *supra* note 6, at 405. The *Loretto* court thus seems to be presenting this kind of argument for finding the faculty members to be nonmanagerial.

One other factor mentioned by the *Loretto* court, the infrequency of committee meetings, appeared to play an important part in the court's decision. The court used this infrequency to show that faculty involvement was only incidental to the faculty's other duties. This factor was not considered by the *Yeshiva* court and thus it constitutes a new measure of a faculty's managerial status.

⁷⁸ *Yeshiva*, 444 U.S. at 676, 103 L.R.R.M. at 2528. The *Yeshiva* Court did mention that at four schools the faculty met regularly pursuant to their bylaws. *Id.* at 676, 103 L.R.R.M. at 2528.

⁷⁹ 742 F.2d at 1254, 117 L.R.R.M. at 2232.

⁸⁰ *Yeshiva*, 444 U.S. at 675, 103 L.R.R.M. at 2528.

⁸¹ *Id.* at 695, 103 L.R.R.M. at 2534 (quoting *NLRB v. Yeshiva University*, 582 F.2d 686, 698 (2d Cir. 1978)).

attempting to cut back on the scope of the *Yeshiva* decision by not excluding faculties from the Act's coverage except under the most extreme circumstances.

One promising approach for resolving the vagueness of the *Yeshiva* standard has been suggested by John A. Gray.⁸² He suggests that rather than focus on the *subject matter* of faculty decision-making, the courts (and the NLRB) should focus on the percentage of a faculty's time that is spent on "managerial decision-making."⁸³ Under the present *Yeshiva* standard, two faculties, both of whose recommendations regarding academic or faculty matters were followed by the administration, could be considered equally managerial. Yet the first faculty might spend sixty percent of its time on such matters, while the second faculty might spend only ten percent of its time deciding such issues. Assuming these facts, the first faculty clearly behaves more "managerially" than the second, yet under *Yeshiva* a court might find that both faculties should be excluded from the Act's coverage.⁸⁴

By examining the amount of time a faculty spends on such matters, a court could distinguish between faculties whose behavior is truly managerial (those who spend most of their time making managerial decisions) and those whose managerial behavior is incidental to other professional responsibilities (those who spend only a small fraction of their time deciding managerial issues). Arguably, the only faculties that ought to be excluded from coverage under the Act are those that spend *most* of their time making managerial decisions. These faculties are analogous to managerial employees in industry, who spend most or all of their time on managerial affairs.⁸⁵ Conversely, faculties whose managerial decision-making is only incidental to their other duties could properly be allowed to unionize under the Act.⁸⁶

D. **Union Access to Employer's Plant for Safety Inspection*: Holyoke Water Power Co.¹

Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) makes it an unfair labor practice for an employer to interfere with employees in the exercise of their rights guaranteed in section 7 of the Act.² In addition, under section 8(a)(5) of the Act it is an

⁸² See Gray, *supra* note 6, at 404.

⁸³ *Id.*

⁸⁴ The *Loretto* court, however, applied *Yeshiva* in a way that took into account, to some extent, the amount of time the faculty spent deciding managerial issues. *Loretto*, 742 F.2d at 1253, 117 L.R.R.M. at 2231. The court pointed out that several of the faculty committees met "infrequently and only for short periods of time in performing their functions in past years." *Id.* at 1253 & n.19, 177 L.R.R.M. at 2231 & n.19. See also *supra* note 78.

⁸⁵ See Gray, *supra* note 6, at 405.

⁸⁶ *Id.*

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¹ 273 N.L.R.B. No. 168, 118 L.R.R.M. 1179 (1985).

² 29 U.S.C. §§ 157, 158(a)(1) (1982). Section 8(a)(1) 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 157 of this title." 29 U.S.C. § 158(a)(1) (1982). Section 7 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, 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 as authorized in section 8(a)(3).

29 U.S.C. § 157 (1982).

unfair labor practice for an employer to refuse to bargain over terms and conditions of employment with the elected bargaining representative of its employees.³ To protect employees' rights to proper representation under the Act, the Supreme Court has interpreted sections 8(a)(1) and (5) as obligating employers to furnish to employees' union representatives all information relevant and necessary to the union's performance of its representation duties.⁴

The Supreme Court has also recognized, however, that the Act protects the property rights of employers.⁵ Consequently, conflicts arise between the employees' right to proper representation and the employers' right to control their property.⁶ In most instances, the National Labor Relations Board (NLRB or Board) balances these two conflicting interests.⁷ In prior cases, when access to an employer's plant was requested by a union to investigate health and safety conditions, however, the Board did not balance the employees' and the employers' conflicting interests.⁸ Instead, the Board ruled that such requests were in the nature of requests for information, and thus summarily granted union requests for access to an employer's property.⁹ Accordingly, in these earlier cases, the Board had held that under sections 8(a)(1) and (5) of the Act, union requests to enter an employer's premises to investigate health and safety conditions could not be denied by an employer.¹⁰

During the *Survey* year, the National Labor Relations Board ruled that employers' property rights and employees' right to proper representation must be carefully balanced and accommodated when considering a union's request for access to an employer's property to survey potential health and safety hazards.¹¹ In *Holyoke Water Power Co.*, the Board expressly overruled *Winona Industries*¹² and similar cases which had summarily granted union requests for access to an employer's plant to investigate health and safety conditions and did not consider the employer's property rights.¹³ Under the standards put forth in *Holyoke Water Power*, union requests for access to the employer's property for inspection of potential health and safety hazards may properly be denied by the employer when the union can effectively represent employees through some means other than by entering the employer's premises.¹⁴

³ 29 U.S.C. § 158(a)(5) (1982).

⁴ *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 64 L.R.R.M. 2069 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 38 L.R.R.M. 2042 (1956).

⁵ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112, 38 L.R.R.M. 2001, 2004 (1956).

⁶ *Id.* (accommodation between employers' property rights and workers' organization rights when nonemployee access to employer's property for organizational purposes is involved "must be obtained with as little destruction of one as is consistent with the maintenance of the other"); *Fafnir Bearing Co.*, 146 N.L.R.B. 1582, 1586, 56 L.R.R.M. 1108, 1111 (1964), *enforced*, 362 F.2d 716, 721-22, 62 L.R.R.M. 2415, 2418 (2d Cir. 1966) ("a balance must be struck between these competing interests" of employee statutory rights and employer property rights, although here balance favors employees' rights).

⁷ *Fafnir Bearing Co.*, 146 N.L.R.B. 1582, 1586-87, 56 L.R.R.M. 1108, 1111 (1964), *enforced*, 362 F.2d 716, 721, 62 L.R.R.M. 2415, 2418 (2d Cir. 1966) (access to determine piece rates in plant).

⁸ See *Winona Industries*, 257 N.L.R.B. 695, 696-97, 107 L.R.R.M. 1605, 1605 (1981).

⁹ *Id.*

¹⁰ *Id.* at 698, 107 L.R.R.M. at 1605.

¹¹ *Holyoke Water Power Co.*, 273 N.L.R.B. No. 168, at 4, 118 L.R.R.M. 1179, 1180-81 (1985).

¹² *Id.* at 5, 118 L.R.R.M. at 1180.

¹³ See *Winona Industries, Inc.*, 257 N.L.R.B. 695, 107 L.R.R.M. 1605 (1981).

¹⁴ *Holyoke*, 273 N.L.R.B. No. 168 at 5, 118 L.R.R.M. at 1180.

In *Holyoke Water Power*, the employer's power plant contained a fan room which had a substantial noise problem.¹⁵ The employer posted signs in the fan room warning of high noise levels and provided earmuffs for employees who were required to enter that room.¹⁶ In January of 1983, the union requested that the employer permit the union's industrial hygienist to survey the potential health and safety hazards in the fan room.¹⁷ The employer denied the union's request, and instead gave the union a summary of an overall noise survey conducted five months earlier by a hygienist hired by the employer.¹⁸ The summary, however, did not specifically cover the noise level of the fan room.¹⁹ The employer later instructed its own test coordinator, who was not an industrial hygienist, to take a noise level reading in the fan room and provide the union with the results.²⁰ The employer also granted access to the fan room to the union's business agent, but not to the union's hired industrial hygienist.²¹ The union refused to accept either proposal, and filed a complaint against the employer charging that the employer had violated sections 8(a)(1) and (5) of the Act by failing to provide the union with information relevant and necessary to the union's performance of its representation duties.²²

The administrative law judge (ALJ) found that the employer had violated sections 8(a)(1) and (5) of the Act by denying the union's industrial hygienist access to the fan room.²³ The ALJ first noted the employer's obligation to provide a union with information relevant and necessary to the union's performance of its duties as the employees' representative.²⁴ Recognizing that safety and health conditions are terms and conditions of employment over which the employer is obligated to bargain, the ALJ stated that under the Board's decision in *Winona Industries*, union requests for access to an employer's premises to investigate safety hazards are in the nature of requests for information and, therefore, cannot be denied by an employer.²⁵ The ALJ supported his finding of section 8(a)(1) and (5) violations by noting that the dangers of exposure to high noise levels made this matter relevant to the union's duties of representation,²⁶ and that the test results given to the union by the employer were inadequate for the union to properly perform its duties.²⁷

The Board disagreed with the ALJ's method of analysis, but agreed with the ALJ's conclusion that, under the facts of the case, the employer must grant a union hygienist access to the fan room to test for noise hazards.²⁸ Although the Board recognized that

¹⁵ *Id.* at 1-2, 118 L.R.R.M. at 1179.

¹⁶ *Id.* at 2, 118 L.R.R.M. at 1179.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 2, 118 L.R.R.M. at 1179-80. The test coordinator later testified that he was unaware of whether the conditions in the fan room at the time of the test were representative of its usual conditions. *Id.* at 2, 118 L.R.R.M. at 1180.

²¹ *Id.* at 3-4, 118 L.R.R.M. at 1180.

²² *Id.* at 1, 118 L.R.R.M. at 1179-80.

²³ *Id.* at 2-3, 118 L.R.R.M. at 1180.

²⁴ *Id.* at 3, 118 L.R.R.M. at 1180.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* The test results given to the union were found inadequate because the first test only gauged average noise levels to determine compliance with Occupational Health & Safety Administration (OSHA) standards, and it was undisputed that hearing can be damaged even where average noise levels comply with OSHA's standards. *Id.* Further, the ALJ noted that there was some dispute over the technique and results of that test. *Id.*

²⁸ *Id.* at 4-5, 118 L.R.R.M. at 1180-81.

an employer's right to control its property is a factor that must be considered in deciding whether a nonemployee union representative should have access to the employer's premises, the Board found that in this case the employer's property rights were outweighed by the employees' right to responsible representation.²⁹ Thus, the Board held, union access to the company's fan room was required.³⁰

In reaching its decision, the Board rejected the ALJ's analysis that the union was entitled to access to the employer's premises merely upon a showing that the information sought was relevant to the union's performance of its representation duties.³¹ Instead of applying a simple relevance standard which considers only the union's need for information, the *Holyoke Water Power Board* recognized that the right of the employer to control its property and protect its operations from interference from nonemployees should also be considered.³² Employee representation rights and employer property rights must be *balanced*, according to the Board, to do as little harm to one "as is consistent with the maintenance of the other."³³ In balancing the employer's property rights against the employees' right to proper representation, the Board found that where the union can effectively represent its members through some means other than having access to the employer's premises, the employer's property rights outweigh the employees' interests in proper representation.³⁴ In such a case, the Board stated, an employer may properly deny a union's request for access.³⁵ If responsible representation can be achieved only through union access to the employer's premises, the Board ruled, however, the employees' right to proper representation will predominate³⁶ and the employer will be required to grant access to its premises.³⁷ The Board held, however, that the access granted must be limited to a reasonable amount of time allowing the union to effectively discharge its representation duties without unduly interfering with the employer's operations.³⁸

In applying this analysis to the facts of *Holyoke Water Power*, the Board found that the employees' right to proper representation outweighed the employer's property rights.³⁹ *Holyoke Water Power Company*, the Board concluded, was therefore required to grant the union hygienist reasonable access to the fan room.⁴⁰ In requiring access, the Board first noted that excessive noise in the plant was a proper subject for the union to pursue because health and safety conditions are terms of employment over which an employer is obligated to bargain.⁴¹ Additionally, the employer's safety superintendent admitted that there was a noise problem in the fan room, the Board observed.⁴² Second, the Board stated that under these circumstances, the employees' right to proper representation included the union's ability to obtain accurate noise level readings for the fan

²⁹ *Id.* at 5, 118 L.R.R.M. at 1180-81.

³⁰ *Id.*

³¹ *Id.* at 4, 118 L.R.R.M. at 1180.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 5, 118 L.R.R.M. at 1180.

³⁵ *Id.*

³⁶ *Id.* at 4-5, 118 L.R.R.M. at 1180.

³⁷ *Id.*

³⁸ *Id.* at 5, 118 L.R.R.M. at 1180.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

room.⁴³ The union needed accurate data, the Board noted, to determine the extent of the danger to employees and to propose ways to ensure that employees are properly protected.⁴⁴ The Board agreed with the ALJ's ruling that the test results submitted to the union by the company were insufficient to meet the union's needs.⁴⁵ The company's willingness to grant the union's business agent access to the fan room was also insufficient, the Board ruled, without evidence that the business agent was qualified to conduct and evaluate noise level tests.⁴⁶ Because the union had no other reasonable alternative to properly represent its members, and because access to the fan room by a union hygienist would cause little if any interference with the employer's operations, the Board ordered the employer to grant the union hygienist access to the fan room.⁴⁷ Consistent with its stated method of analysis, the Board limited that access to a reasonable period of time sufficient to enable the union hygienist to observe and test the noise level hazards.⁴⁸

In *Holyoke Water Power Co.*, the Board adopted a balancing test of employee and employer interests to be used when determining whether to grant a union access to the employer's premises in order to survey potential health and safety hazards.⁴⁹ Under the Board's decision, only if the union has no other reasonable means of properly representing its members will the employees' right to proper representation outweigh the employer's property rights.⁵⁰ In overruling *Winona Industries* and its progeny which had summarily granted union access for inspection of potential health and safety hazards, the Board in *Holyoke Water Power* reached a result which is consistent with one of the purposes of the National Labor Relations Act — the accommodation of employer and employee interests.⁵¹ Moreover, because the Board's decision is in accordance with Supreme Court precedent,⁵² *Holyoke Water Power* is likely to be followed in the future.

The Supreme Court has held that employees' rights to proper representation under the NLRA require employers to furnish relevant bargaining information to union representatives during contract negotiations⁵³ and during administration of a collective bargaining agreement.⁵⁴ An employer who refuses to supply relevant information to the union violates its duty to bargain in the same manner as if the employer had declined to meet and negotiate with the union in good faith.⁵⁵ The employees' right to proper representation, however, does not always predominate over employer interests. The

⁴³ *Id.* at 5–6, 118 L.R.R.M. at 1180.

⁴⁴ *Id.*

⁴⁵ *Id.* at 6, 118 L.R.R.M. at 1181.

⁴⁶ *Id.*

⁴⁷ *Id.* at 5–6, 118 L.R.R.M. at 1181.

⁴⁸ *Id.* at 6, 118 L.R.R.M. at 1181.

⁴⁹ *Id.* at 5, 118 L.R.R.M. at 1180–81.

⁵⁰ *Id.* at 4–5, 118 L.R.R.M. at 1180–81.

⁵¹ See C. MORRIS, *THE DEVELOPING LABOR LAW* 71, 616 (1983). The varied interests of employees, employers, and unions must be balanced. *Id.* at 71. The right of a union and its members to access to relevant information is not absolute, but must be balanced with other interests. *Id.* at 616.

⁵² See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 317–21, 100 L.R.R.M. 2728, 2734–35 (1979) (Supreme Court balanced the union's interest against the employer's interest in deciding that union was not entitled to aptitude test data); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113, 38 L.R.R.M. 2001, 2004 (1956) (balancing test used by Court to determine whether the union had the right of access to the employer's property for organizational purposes).

⁵³ *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 38 L.R.R.M. 2042 (1956).

⁵⁴ *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 64 L.R.R.M. 2069 (1967).

⁵⁵ *Curtiss-Wright Corp. (Wright Aerospace Div.) v. NLRB*, 347 F.2d 61, 59 L.R.R.M. 2433 (3d Cir. 1965), *enforcing* 145 N.L.R.B. 152, 54 L.R.R.M. 1320 (1963).

employer's duty to disclose information is not absolute.⁵⁶ According to the Supreme Court, the duty to supply information under sections 8(a)(1) and (5) of the Act turns upon "the circumstances of the particular case."⁵⁷

In considering "the circumstances of the particular case," the Supreme Court usually undertakes a balancing of competing employee and employer interests, much like the Board did in *Holyoke Water Power*.⁵⁸ For example, in *Detroit Edison Co. v. NLRB*,⁵⁹ the Supreme Court upheld an employer's refusal to supply to the union psychological aptitude test questions and answers, and individual employee's scores.⁶⁰ The employer used the aptitude test scores to screen applicants for a particular job classification.⁶¹ The union sought disclosure of the questions, answers, and scores for the purpose of processing a grievance concerning certain denials of promotion to union members and the hiring of nonunion personnel from outside the plant to fill six positions on the basis of those test scores.⁶² In reaching its conclusion that the union was not entitled to the test data, the *Detroit Edison* Court balanced the union's interests in obtaining information relevant to contract administration against the employer's interest in maintaining test security and employee confidence in the testing procedure.⁶³

The Court has also balanced employee/union rights against employers' rights in cases involving the issue of nonemployees' access to an employer's property for organizational purposes.⁶⁴ For example, in *NLRB v. Babcock & Wilcox Co.*,⁶⁵ the Supreme Court held that an employer's property rights outweighed the employees' section 7 rights to have a nonemployee enter the employer's premises for organizational purposes.⁶⁶ The Court recognized that the right of employees to organize depends in some measure on the opportunity to learn about self-organization, but found that in this case, it had not been shown that employees were unable to use alternate means to have access to union communications.⁶⁷ The Board's method of analysis in *Holyoke Water Power*, therefore, is consistent with the Supreme Court's analysis of similar labor disputes.

Not only does the Board's method of analysis in *Holyoke Water Power* find support in Supreme Court precedent, but the Board's balancing test adopted in *Holyoke Water Power* is consistent with the purposes of the NLRA. Congress enacted the NLRA to equalize bargaining power between employees and their employer.⁶⁸ The Act was drafted

⁵⁶ *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 100 L.R.R.M. 2728 (1979). See C. MORRIS, *supra* note 51, at 608, 616.

⁵⁷ *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314-15, 100 L.R.R.M. 2728, 2733 (1979).

⁵⁸ See *supra* note 52.

⁵⁹ 440 U.S. 301, 100 L.R.R.M. 2728 (1979).

⁶⁰ *Id.* at 319-20, 100 L.R.R.M. at 2735.

⁶¹ *Id.* at 307, 100 L.R.R.M. at 2730.

⁶² *Id.*

⁶³ See *Id.* at 318, 100 L.R.R.M. at 2734. The Court stated: "The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such a rule has never been established . . ."

Id.

⁶⁴ See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113, 38 L.R.R.M. 2001, 2004 (1956).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 29 U.S.C. § 151 (1982). Section 1 of the Act provides in pertinent part:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly

not to create absolute rights for employees, but to encourage compromise and accommodation of competing employer and employee interests.⁶⁹ The Board's analysis recognizes the employees' right to proper representation and relevant information by requiring union access to the employer's premises if the union can show that no other means are available to the union to obtain the data needed. The *Holyoke Water Power* analysis, however, also accommodates the employer's property rights. The Board will uphold an employer's denial of union access to its premises if the union has other reasonable means of acquiring information.⁷⁰ If the union must be granted access, that access will be limited to reasonable times and places so as not to unduly interfere with the employer's operations.⁷¹ The Board's analysis in *Holyoke Water Power*, therefore, is consistent with the underlying policies of the Act.

In sum, the NLRB, in *Holyoke Water Power*, ruled that employer's property rights and employees' right to proper representation must be carefully balanced and accommodated when considering a union's request for access to the employer's premises to survey potential health and safety hazards. *Holyoke Water Power* thus overrules *Winona Industries* and its progeny, which had summarily granted union access to employers' property if the union could show a relevant relation to administration of the collective bargaining agreement. The Board's decision is supported by Supreme Court decisions that have also advocated an analysis that involves balancing and accommodating employer rights against employee rights. In addition to the support of Supreme Court precedent, the Board's balancing test will also better effect the underlying purposes of the Act by equalizing bargaining power between employees and their employer, and accommodating the competing interests of both parties. The Board's decision, therefore, is likely to find acceptance in the courts.

II. UNFAIR LABOR PRACTICES

A. Employer Unfair Labor Practices

1. **The Cyclical Nature of an Industry Justifies an Employer's Failure to Reinstate Former Strikers with Full Seniority: NLRB v. Harrison Ready Mix Concrete*¹

Section 8(a)² of the National Labor Relations Act (the Act) protects the rights³ of employees⁴ to organize, bargain and choose whether to engage in strikes and other

adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees . . .

Id. See also C. MORRIS, *supra* note 51, at 71 (the Board's primary objective is to protect employee rights, but in doing so, it must balance those rights with employer and union interests).

⁶⁹ C. MORRIS, *supra* note 51, at 71, 616. The varied interests of employees, employers, and unions must be balanced. *Id.* at 71. The right of a union and its members to have access to relevant information is not absolute, but must be balanced with other interests. *Id.* at 616.

⁷⁰ *Holyoke Water Power Co.*, 273 N.L.R.B. No. 168 at 4-5, 118 L.R.R.M. at 1180. See *supra* notes 31-38 and accompanying text for an explanation of the Board's holding.

⁷¹ *Holyoke*, 273 N.L.R.B. No. 168 at 5, 118 L.R.R.M. at 1180.

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¹ 770 F.2d 78, 120 L.R.R.M. 2077 (6th Cir. 1985).

² 29 U.S.C. § 158(a) (1982).

³ § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1982), guarantees employees "the

concerted activities free from the interference of employers.⁵ Section 8(a)(3) of the Act provides that an employer may not discriminate in the hiring or firing of employees or in setting terms of employment in order to encourage or discourage union membership.⁶ Thus, an employer violates section 8(a)(3) of the Act when he both discriminates in making these employment decisions and that discrimination has the result of encouraging or discouraging union membership.⁷ Courts have broadly interpreted the language of section 8(a)(3) to provide protection for employees' decisions about whether to engage in union activities as well as their choice about membership.⁸ Thus, discriminatory conduct which encourages or discourages union activities such as strikes also violates section 8(a)(3).⁹

The major question arising under section 8(a)(3) today is how to prove a violation of the section. The wording of section 8(a)(3) implies that an employer violates the provision only if she acts with anti-union motivation.¹⁰ The National Labor Relations Board (NLRB or Board) and the courts have adopted a method of analysis, however, which does not always require proof of specific anti-union motivation as an element of a section 8(a)(3) violation.¹¹ In the 1967 case of *NLRB v. Great Dane, Inc.*,¹² for example,

right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities . . ." *Id.*

⁴ Courts have interpreted the term "employees" to include not only employees of the particular employer involved but members of the working force generally. See *Giant Food Mkts., Inc.*, 241 N.L.R.B. 727, 728 n.5, 100 L.R.R.M. 1598, 1599 n.5 (1979).

⁵ Section 7 of the National Labor Relations Act guarantees workers the right not to join or assist labor unions, stating that employees shall have "the right to refrain from any or all of such [union] activities . . ." 29 U.S.C. § 157 (1982).

A concerted activity is any activity engaged in to enforce a collective bargaining agreement so long as the goal is shared by a group of employees. 2 C. MORRIS, *THE DEVELOPING LABOR LAW* 73-74 (2d ed. 1983). Thus, even a single individual's actions may qualify as concerted activity if those actions have a relation to interests shared by a group of employees. *Id.*

⁶ Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1982). Section 8(a)(3) provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." *Id.*

⁷ *Radio Officers Union v. NLRB*, 347 U.S. 17, 43, 33 L.R.R.M. 2417, 2427 (1954).

⁸ *Id.* at 39-40, 33 L.R.R.M. at 2426.

⁹ *Id.*

¹⁰ The use of the phrase "discrimination . . . to encourage or discourage" union membership, 29 U.S.C. 158(a)(3) (emphasis added), implies that the employer's motivation is a necessary element of an 8(a)(3) violation.

¹¹ See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 65 L.R.R.M. 2465, 2469 (1967). The Supreme Court has also adopted an analysis which does not always require a showing of anti-union motivation as a element of a section 8(a)(3) violation. See *id.*; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 53 L.R.R.M. 2121 (1963); *Radio Officers Union v. NLRB*, 347 U.S. 17, 33 L.R.R.M. 2417 (1954).

In the 1954 case of *Radio Officers*, the Supreme Court granted certiorari to three cases in each of which employees had charged either an employer with violating section 8(a)(3) or a union with violating sections 8(b)(1)(A) and 8(b)(2) of the Act. Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) (1982), prohibits unions from coercing or restraining employees in the exercise of their rights to join or assist unions, to bargain collectively, to engage in concerted activities or to refrain from doing such things. Section 8(b)(2), 29 U.S.C. 158(b)(2) (1982), makes it an unfair labor practice for a union to attempt to cause an employer to discriminate with regard to hire, termination or conditions of employment in order to encourage or discourage union membership. The cases raised the issue whether a showing that an employer intended his discriminatory conduct to affect union membership is an essential element of the proof of a section 8(a)(3) violation. *Radio Officers*, 347 U.S. at 23,

the United States Supreme Court noted that the employer must bear the initial burden of showing some legitimate business justification for her discriminatory conduct.¹³ Where an employer fails to put forward any such justification, the Court asserted, the petitioners need not demonstrate actual anti-union motivation to prove a violation of section 8(a)(3).¹⁴ Conversely, the Court stated, in cases where the employer succeeds in meeting its initial burden of justification the reviewing court then must determine whether the employer acted in a manner "inherently destructive" of employee rights, or in a manner having only a lesser effect on those rights.¹⁵ Where the employer's conduct has only slight effects on employee rights, the *Great Dane* Court held that once an employer meets its initial burden of justification, the petitioner must show specific anti-union motivation in order to prove a violation of section 8(a)(3).¹⁶ Where, on the other hand, the employer acts in a manner inherently destructive of employee rights, the Court asserted, the petitioner need not establish anti-union motivation to prove a violation of section 8(a)(3).¹⁷ The *Great Dane* Court relied upon its previous decision in *NLRB v. Erie Resistor Corp.*¹⁸ for the proposition that some conduct is so inherently destructive that it carries its own indicia of intent.¹⁹ Moreover, the *Great Dane* Court stated, when an employer

33 L.R.R.M. at 2419. The Court stated that a violation of section 8(a)(3) must always be based on a finding that the employer intended his conduct to affect union membership. *Id.* at 43-44, 33 L.R.R.M. at 2427. The majority noted, however, that specific evidence of anti-union motivation was not an essential element of the proof of such intent. *Id.* at 44, 33 L.R.R.M. at 2428. According to the Court, "proof of certain types of discrimination satisfies the intent requirement." *Id.* at 45, 33 L.R.R.M. at 2428. Specifically, the Court held, proof of discriminatory conduct which inherently encourages or discourages union membership satisfies the intent requirement. *Id.* The Court cited the common law rule that a man is to be held responsible for the foreseeable consequences of his actions. *Id.* In each of the three cases, the Court enforced the Board's orders, finding that section 8(a)(3) or sections 8(b)(1)(A) and 8(b)(2) had been violated. *Id.* at 55, 33 L.R.R.M. at 2432.

Nine years later, in *Erie Resistor*, the employer attempted to give superseniority to strike replacements and persons who abandoned the strike. 373 U.S. at 223, 53 L.R.R.M. at 2122. The trial examiner found that the employer had no discriminatory motivation and that the superseniority plan was justified by legitimate business considerations. *Id.* at 224-25, 53 L.R.R.M. at 2123. The Board, however, held that the employer's acts constituted an unfair labor practice and that such actions are unlawful even when the employer has advanced a business justification for his conduct. *Id.* at 222, 53 L.R.R.M. at 2122. On a petition for enforcement, the United States Court of Appeals for the Third Circuit rejected the Board's reasoning and held that the granting of superseniority does not automatically violate section 8(a)(3). *Id.* at 226, 53 L.R.R.M. at 2123. Rather, according to the court of appeals, the petitioners must show that the superseniority plan was motivated by a discriminatory purpose. *Id.* The Supreme Court reversed the holding of the court of appeals, holding that under some circumstances, specific intent need not be shown by petitioners claiming a violation of section 8(a)(3). *Id.* at 227-28, 53 L.R.R.M. at 2124. The Court cited *Radio Officers* for the proposition that certain kinds of conduct carry their own indicia of intent, in that the conduct has foreseeable consequences which the actor must have intended. *Id.*

¹² 388 U.S. 26, 65 L.R.R.M. 2465 (1967).

¹³ *Id.* at 34, 65 L.R.R.M. at 2469.

¹⁴ *See id.*

¹⁵ *Id.* at 34, 65 L.R.R.M. at 2469. *Radio Officers* was the first case to hold that employer conduct which inherently encourages or discourages union membership violates section 8(a)(3) of the Act even absent a showing of anti-union motivation. 347 U.S. at 45, 33 L.R.R.M. at 2428.

¹⁶ *Great Dane*, 388 U.S. at 34, 65 L.R.R.M. at 2469.

¹⁷ *Id.*

¹⁸ 373 U.S. 221, 53 L.R.R.M. 2121 (1963).

¹⁹ *Great Dane*, 388 U.S. at 33, 65 L.R.R.M. at 2468 (citing *Erie Resistor*, 373 U.S. at 231, 53 L.R.R.M. at 2125).

acts destructively of employee rights, a court may hold that the employer violates section 8(a)(3) even if the employer shows substantial business justification for its conduct.²⁰

The *Great Dane* Court did not define the types of conduct which it considered inherently destructive. In *Erie Resistor*, however, the Court held that an employer's acts were inherently destructive where the acts discriminated against strikers as a class, dealt a crippling blow to the strike effort, and made future bargaining difficult.²¹ Specifically, the *Erie Resistor* Court held that granting superseniority²² to strikebreakers is inherently destructive of employee rights.²³ In *Portland Willamette Co. v. NLRB*,²⁴ the Court of Appeals for the Ninth Circuit offered a similar definition. The court in *Portland* defined this type of conduct as conduct with "far reaching effects which would hinder future bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity."²⁵ Like the Supreme Court in *Erie Resistor*, the Court of Appeals in *Portland* stated that an employer's granting of superseniority to strikebreakers constitutes one example of inherently destructive conduct.²⁶

Because the *Great Dane/Erie Resistor* analysis requires that an employer justify conduct that has an adverse impact on employee rights, the question arises whether an employer is justified in hiring permanent replacements for striking employees. The use of replacements does have a harmful impact on employee rights.²⁷ In the 1938 case of *NLRB v. Mackay Radio & Telegraph*,²⁸ the Supreme Court set forth the general rule with regard to the replacement of strikers and defined the circumstances under which striking employees must be reinstated.²⁹ The *Mackay* Court held that an employer has a right to

²⁰ *Id.* It appears that the *Great Dane* analysis requires the Board to balance the interests of the employer against the severity of the damage to section 7 rights. See *Erie Resistor*, 373 U.S. at 228-29, 53 L.R.R.M. at 2124. This balance is to be conducted in light of the purpose of the Act to protect employee rights to organize, to bargain, and to engage in concerted activity. *Id.* at 229, 53 L.R.R.M. at 2124. When the conduct of the employer is inherently destructive, the damage to employee rights will always outweigh the employer's business interests and, therefore, such conduct can be prohibited by the Board even without a showing of motive. See *Great Dane*, 388 U.S. at 34, 65 L.R.R.M. at 2469. When, however, the conduct is not inherently destructive but has only a slight effect on employee rights, the employer who advances a business justification can win the initial balancing of interests. *Id.* Only in this situation does the *Great Dane* analysis provide for inquiry into the employer's motivation. *Id.* The additional factor of motive could only tilt the balance away from the employer and thus is only to be considered when the employer's asserted justification outweighs the harm to employee rights. See *id.* Finally, the *Great Dane* Court found that motive need not be considered when the employer advances no justification for his actions. See *id.* See also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380, 66 L.R.R.M. 2737, 2738-39 (1967). If no explanation for the discrimination is given, the violation of section 8(a)(3) is automatic, according to the *Great Dane* Court. 388 U.S. at 34, 65 L.R.R.M. at 2469.

²¹ *Erie Resistor*, 373 U.S. at 230-31, 53 L.R.R.M. at 2125.

²² Superseniority is granted to strikebreakers when the strikebreakers are given seniority status above that of reinstated former strikers, thereby moving the strikers to a relatively lower position on the seniority hierarchy. See, e.g., *id.* at 230, 53 L.R.R.M. at 2125.

²³ See *id.* at 231, 53 L.R.R.M. at 2125.

²⁴ 534 F.2d 1331, 1334, 92 L.R.R.M. 2113, 2115 (9th Cir. 1976).

²⁵ *Id.* at 1334, 92 L.R.R.M. at 2115.

²⁶ *Id.*

²⁷ *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 365, 380, 66 L.R.R.M. 2737, 2739 (1967).

²⁸ *NLRB v. Mackay Radio & Tel.*, 304 U.S. 333, 2 L.R.R.M. 610 (1938).

²⁹ *Id.* at 345, 2 L.R.R.M. at 614.

hire permanent replacements³⁰ and to refuse to discharge them when strikers apply for reinstatement.³¹

Although the *Mackay* Court apparently held that the employer's promise merely to give consideration to the strikers' applications as jobs became available was satisfactory, later cases required the employer to seek out and give preference to strikers who have made unconditional offers to return to work.³² In the 1968 case of *Laidlaw Corp.*³³ the Board held that strikers who make unconditional offers to return to work must be

³⁰ *Id.*

³¹ *Id.* at 346, 2 L.R.R.M. at 614. In *Mackay*, the employees of a radio and telegraph company engaged in a strike, during which the employer hired eleven permanent replacements. *Id.* at 337-38, 2 L.R.R.M. at 611. When the striking employees asked to be reinstated, the employer agreed to reinstate all but eleven of the strikers, stating that due to the eleven permanent replacements, eleven jobs were unavailable. *Id.* at 337-39, 2 L.R.R.M. at 611-12. The employer specified which eleven workers would not be reinstated and said that those men had to file applications for reinstatement to which the employer would give consideration as jobs became available. *Id.* at 338-39, 2 L.R.R.M. at 611-12. The employer reinstated six of the eleven men on the day the rest of the men returned to work because six of the replacements had by that time departed. *Id.* The remaining five men whom the employer did not reinstate had been active in the union and the strike. *Id.* at 339, 2 L.R.R.M. at 612.

After three weeks, the union filed a complaint with the Board which issued a complaint against the employer asserting, *inter alia*, that the employer had violated section 8(a)(3) of the Act by discriminating against the five men because of their union activity in order to discourage union membership. *Id.* The Board held that by refusing to reinstate the five men, the employer had discharged them, thus discriminating in regard to tenure of employment. *Id.* at 340, 2 L.R.R.M. at 612. The Board further held that the discrimination discouraged membership in the union and, therefore, violated section 8(a)(3) of the Act. *Id.* at 340-41, 2 L.R.R.M. at 612.

On appeal, the court of appeals refused to enforce the Board's order; the Supreme Court, however, reversed the court of appeals decision. *Id.* at 351, 2 L.R.R.M. at 616. The Court in *Mackay* held that the employer had discriminated against the five men, constituting a violation of section 8(a)(3). *Id.* at 346-47, 2 L.R.R.M. at 614-15. The Court held that in *Mackay*, the employer had discriminated by deliberately choosing to deny reinstatement to the most active union members, but acknowledged that the employer had a right to hire permanent replacements and to refuse to discharge them when striking employees applied for reinstatement. *Id.* Thus, while finding a violation in the particular case, the *Mackay* decision created a general rule that an employer may hire permanent replacements who he is not obligated to discharge in order to reinstate strikers.

³² In *Great Dane* the Court held that even when employer conduct has only a slight effect on employee rights, it must be justified by some legitimate business purpose, 388 U.S. at 34, 65 L.R.R.M. at 2469, and in *Fleetwood Trailer* the Court found that refusing to reinstate former strikers did have an adverse effect on employee rights. 389 U.S. at 380, 66 L.R.R.M. at 2739. Thus, the *Fleetwood Trailer* Court decided that an employer could only refuse to reinstate a former striker if the employer had a legitimate business justification. *Id.* at 381, 66 L.R.R.M. at 2739. Later cases have made clear that when permanent replacements have been hired, there exists a legitimate business justification for not reinstating former strikers. See, e.g., *NLRB v. Mars Sales & Equip. Co.*, 626 F.2d 567, 572, 105 L.R.R.M. 2138, 2142 (7th Cir. 1980) (employer was justified in not discharging permanent replacements when former strikers applied for reinstatement because the employer's valid interest in continuing his business during the strike was served by using the inducement of permanent work to attract replacements). However, once a permanent replacement has departed, and a job is available, the courts have found that the employer no longer has a justification for not reinstating the striker. See *NLRB v. Cutting Inc.*, 701 F.2d 659, 662, 112 L.R.R.M. 3056, 3058 (7th Cir. 1983) (employer could not legally refuse to reinstate a striker whose position was not filled by a permanent replacement); *NLRB v. Murray Prods., Inc.*, 584 F.2d 934, 939, 99 L.R.R.M. 3269, 3272 (9th Cir. 1978) (strikers not permanently replaced are entitled to reinstatement upon their unconditional offer to return to work).

³³ 171 N.L.R.B. 1366, 68 L.R.R.M. 1252 (1968).

reinstated unless the employer can show a legitimate business justification for not doing so.³⁴ The reinstatement required by *Laidlaw* included full seniority status.³⁵

During the Survey year, in *NLRB v. Harrison Ready Mix Concrete*,³⁶ the United States Court of Appeals for the Sixth Circuit considered whether the failure of an employer engaged in a cyclical business to reinstate strikers with full seniority constitutes a violation of section 8(a)(3) of the Act.³⁷ In *Harrison*, the court held that such conduct is not inherently destructive³⁸ and is, in fact, justified by the cyclical nature of the industry.³⁹

In *Harrison*, the employer produced, sold, and distributed concrete.⁴⁰ The employer had a contract with the Truck Drivers, Chauffeurs and Helpers Union which expired on February 28, 1983.⁴¹ The parties failed to reach a new agreement by that date, and the employees commenced a strike on March 1, 1983.⁴²

During the following week, nine of the strikers returned to work, and the employer hired fifteen permanent replacements.⁴³ The nine employees who had returned to work were assigned slots one through nine of the seniority list⁴⁴ while the permanent replacements were given slots ten through twenty-four.⁴⁵ Due to the cyclical nature of its business, the employer based the amount of work given to each employee on that employee's position on the seniority list, and wide discrepancies existed in hours worked between employees at the top and bottom of the seniority list.⁴⁶

Two weeks after the strike began, while the strike was still in progress, the petitioners, Weitz and Ramey, unconditionally offered to return to work but were told by the job supervisor that no jobs were available at that time.⁴⁷ Shortly thereafter, however, two

³⁴ In *Laidlaw*, the Board held that permanently replaced strikers who made unconditional offers to return to work remained employees and were entitled to reinstatement as positions became available. *Id.* at 1369-70, 68 L.R.R.M. at 1258. According to the Board, the only exceptions to this requirement occur when either the former strikers obtained "regular and substantially equivalent employment," or the employer advanced a legitimate business justification for not reinstating the strikers. *Id.* at 1370, 68 L.R.R.M. at 1258. Cases have made clear that the hiring of permanent replacements provides such a justification. *See, e.g., NLRB v. Mars Sales & Equip. Co.*, 626 F.2d 567, 572, 105 L.R.R.M. 2138, 2142 (7th Cir. 1980) (employer justified in not discharging permanent replacements when former strikers applied for reinstatement because the employer's valid interest in continuing his business during the strike was served by using the inducement of permanent work to attract replacements). When the permanent replacements depart, however, and a position becomes available, that justification is lost. *See NLRB v. Cutting, Inc.*, 701 F.2d 659, 662, 112 L.R.R.M. 3056, 3058 (7th Cir. 1983) (employer could not legally refuse to reinstate a striker whose position was not filled by a permanent replacement); *NLRB v. Murray Prods., Inc.*, 584 F.2d 934, 939, 99 L.R.R.M. 3269, 3272 (9th Cir. 1978) (strikers not permanently replaced are entitled to reinstatement upon their unconditional offer to return to work); *Laidlaw*, 171 N.L.R.B. at 1370, 68 L.R.R.M. at 1258.

³⁵ *See NLRB v. Anvil Prods., Inc.*, 496 F.2d 94, 96, 86 L.R.R.M. 2822, 2824 (5th Cir. 1974).

³⁶ 770 F.2d 78, 120 L.R.R.M. 2077 (6th Cir. 1985).

³⁷ *Id.*

³⁸ *Id.* at 80-81, 120 L.R.R.M. at 2079.

³⁹ *Id.* at 80, 81, 120 L.R.R.M. at 2079.

⁴⁰ *Id.* at 79, 120 L.R.R.M. at 2078.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Harrison*, 272 N.L.R.B. 331, 331, 117 L.R.R.M. 1235, 1236 (1984).

⁴⁶ *Harrison*, 770 F.2d at 79, 120 L.R.R.M. at 2078.

⁴⁷ *Id.*

openings developed, and Weitz and Ramey were reemployed and assigned to the seventeenth and eighteenth slots on the seniority list.⁴⁸ An assignment based only on the date of original hire would have placed Weitz and Ramey in the third and fourth slots respectively.⁴⁹ When asked why he had placed the charging parties so low on the list, the supervisor replied that he had an obligation to the employees who had returned to work before Weitz and Ramey and to the permanent replacements who had driving experience.⁵⁰ Weitz and Ramey returned to work with seniority levels below those of all the employees who had returned to work earlier and below all of the experienced drivers.⁵¹

As a result of this action, Weitz and Ramey filed an unfair labor practice complaint against the employer with the NLRB on April 11, 1983.⁵² On behalf of Weitz and Ramey, the General Counsel of the Board asserted before the Board that the employer had violated both 8(a)(1)⁵³ and 8(a)(3) of the National Labor Relations Act by reinstating the petitioners without their full seniority status.⁵⁴ The employer claimed two defenses to the charged violations.⁵⁵ First, the employer asserted that the cyclical nature of its business provided a legitimate business justification for its refusal to reinstate the petitioners with full seniority status.⁵⁶ This justification, according to the respondent, brought its conduct within an exception to *Laidlaw's* general requirement that former strikers be reinstated with full seniority.⁵⁷ Second, the employer asserted that its right under *Mackay* to hire permanent replacements for strikers, and its right not to discharge those replacements, would be violated if it was forced to reinstate the strikers with full seniority.⁵⁸ The employer argued that reinstating the strikers with full seniority would result in reducing the seniority of replacements and that, because seniority determined the availability of work, this reduction amounted to discharge.⁵⁹

The Board dealt with each of the employer's asserted defenses separately.⁶⁰ First, the Board rejected the claim that the cyclical nature of Harrison's business provided it with a legitimate business justification under *Laidlaw*.⁶¹ The cyclical nature of the employer's business, stated the Board, could not justify any deviation from the *Laidlaw* requirement that employers fully reinstate strikers as positions become available.⁶² The

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Harrison*, 272 N.L.R.B. at 332, 117 L.R.R.M. at 1236.

⁵¹ *Harrison*, 770 F.2d at 79, 120 L.R.R.M. at 2078.

⁵² *Id.*

⁵³ The General Counsel asserted that the employer in *Harrison* had violated section 8(a)(1) in addition to section 8(a)(3), because any violation of section 8(a)(3) is a derivative violation of section 8(a)(1). Section 8(a)(1) is more general in its prohibitions, making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1982). The discriminatory conduct which violates section 8(a)(3) also interferes with, restrains, and coerces employees and, therefore, violates section 8(a)(1).

⁵⁴ *Harrison*, 272 N.L.R.B. at 332, 117 L.R.R.M. at 1236.

⁵⁵ *Id.* at 332, 117 L.R.R.M. at 1236-37.

⁵⁶ *Id.* at 332, 117 L.R.R.M. at 1236.

⁵⁷ *See id.*

⁵⁸ *Id.* at 332, 117 L.R.R.M. at 1236-37.

⁵⁹ *See id.* at 332 n.11, 117 L.R.R.M. at 1236-37 n.11.

⁶⁰ *Id.* at 332 nn.10 & 11, 117 L.R.R.M. at 1236-37 nn.10 & 11.

⁶¹ *Id.* at 332 n.10, 117 L.R.R.M. at 1236 n.10.

⁶² *See id.*

Board also rejected the claim that by requiring that full seniority be given to reinstated strikers, the Board had violated the employer's right to hire and maintain permanent replacements.⁶³ The Board agreed with the employer that full reinstatement of the strikers would result in the replacements losing seniority.⁶⁴ The majority denied, however, that requiring full reinstatement of the strikers would force the employer to discharge its permanent replacements.⁶⁵ According to the Board, a change of seniority would at most affect the amount of work done by the replacements in their jobs, and would not demote them to less desirable or different jobs.⁶⁶ Thus, the Board concluded that full reinstatement of the strikers would not violate the employer's right not to discharge permanent replacements.⁶⁷ The majority of the Board further pointed out that a failure to reinstate strikers with full seniority would be equivalent to giving the workers who had abandoned the strike and the replacements superseniority in violation of the Supreme Court's previous holding in *NLRB v. Erie Resistor Corp.*⁶⁸

Having dealt with the employer's arguments, the Board proceeded to cite *Laidlaw's* requirement that strikers be reinstated with full seniority as permanent replacements departed, unless the employer could show justification for not reinstating the strikers.⁶⁹ The Board stated that because the employer had not justified its failure to fully reinstate the strikers, the employer's conduct was inherently destructive of employee rights and violated sections 8(a)(1) and 8(a)(3) of the Act.⁷⁰

In his dissenting opinion, Board Member Hunter agreed with the employer that, in the limited case of cyclical industries, full reinstatement of strikers did interfere with the employer's right under *Mackay* to hire permanent replacements.⁷¹ The dissent noted that when a business is cyclical, and seniority governs work availability, persons at the bottom of the seniority list get significantly less work than persons at the top.⁷² In such circumstances, Board Member Hunter stated, the reduction of the seniority of replacements caused by the reinstatement with full seniority of strikers amounted to a forced discharge of those replacements and violated the rule of *Mackay*.⁷³ Board Member Hunter asserted

⁶³ *Id.* at 332 n.11, 117 L.R.R.M. at 1236 n.11.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* (citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 53 L.R.R.M. 2121 (1963)). For further discussion of *Erie Resistor*, see *supra* note 11.

⁶⁹ *Id.* at 332, 117 L.R.R.M. at 1237. For further discussion of *Laidlaw*, see *supra* notes 33-35 and accompanying text.

⁷⁰ *Harrison*, 272 N.L.R.B. at 332, 117 L.R.R.M. at 1237. The Board ordered that the employer cease and desist from denying full seniority to the petitioners and from interfering in any other way with § 7 rights. *Id.* at 333, 117 L.R.R.M. at —. Additionally, the Board ordered the employer to restore the petitioners to their correct places on the seniority list and to award them back pay equaling the amount they lost due to their lower seniority placement. *Id.* Finally, the Board's order required the employer to keep and make available all records necessary to determine the back pay amount and to post the appendix to the order in a conspicuous place. *Id.*

⁷¹ *Id.* at 334, 117 L.R.R.M. at 1237 (Hunter, Member, dissenting).

⁷² *Id.*

⁷³ *Id.* The dissent attempted to distinguish the Supreme Court's decision in *Erie Resistor*, in which the Court found that an employer had engaged in unfair labor practices when it offered twenty years additional seniority to permanent replacements and persons abandoning a strike. *Harrison*, 272 N.L.R.B. at 334, 117 L.R.R.M. at 1237-38 (Hunter, Member, dissenting). According to the *Harrison* dissent, *Erie Resistor* did not bar the employer from placing the petitioners below

that, for this reason, the *Laidlaw* rule should not have been applied in the instant case.⁷⁴ *Laidlaw*, itself, did not involve a cyclical industry and was, according to the dissent, distinguishable on that ground.⁷⁵

The United States Court of Appeals for the Sixth Circuit denied enforcement of the Board's order in *Harrison*.⁷⁶ The court first rejected the Board's apparent conclusion that the failure to reinstate the strikers with full seniority constituted an inherently destructive act under *Erie Resistor*.⁷⁷ Distinguishing the *Erie Resistor* precedent,⁷⁸ the *Harrison* court asserted that while in *Erie Resistor* the Board had made detailed findings of the damage to employee rights caused by the offer of superseniority, the Board in *Harrison* had made no such findings.⁷⁹ Rather, the court stated, the Board in *Harrison* had applied the inherently destructive label to the employer's acts in a conclusory manner.⁸⁰ Moreover, the Sixth Circuit stated, *Harrison* was factually distinguishable from *Erie Resistor* on the ground that *Harrison* did not involve an offer of superseniority to replacements as *Erie Resistor* did.⁸¹ Thus, according to the court, because the *Erie Resistor* precedent was distinguishable, the Board in *Harrison* erred in holding the employer's acts inherently destructive.⁸²

Under the *Great Dane* analysis of section 8(a)(3) claims, the Sixth Circuit held that a violation may be found even when an employer's acts are not inherently destructive if the employer has failed to advance any valid justification for its acts.⁸³ The court in *Harrison* next found that, in the context of a cyclical industry, the employer's right under *Mackay* to hire and retain permanent replacements justified the employer's failure to reinstate strikers with full seniority.⁸⁴ The court noted that under *Mackay* an employer has the right to hire replacements for striking employees and need not terminate such replacements in order to rehire returning strikers.⁸⁵ The court quoted with approval dissenting Board Member Hunter's conclusion that where the amount of work available depends upon a worker's seniority, and reinstatement of strikers with full seniority reduces the seniority of replacements, such reinstatement may result in a reduction of work for replacements and amount to a forced discharge in violation of the employer's *Mackay* rights.⁸⁶ Thus, the court asserted, the employer's acts in *Harrison*, just as in

the replacements and workers who had abandoned the strike because doing so was not the same as awarding superseniority. *Id.* at 334, 117 L.R.R.M. at 1238 (Hunter, Member, dissenting). The dissent distinguished *Harrison* from *Erie Resistor* on the ground that in *Erie Resistor* superseniority was given while in *Harrison* replacements were only given the jobs previously held by the strikers. *Id.* This distinction appears to be illusory. There is no real difference between giving extra seniority to strikebreakers and reinstating strikers with reduced seniority. Both are banned by the Court's decision in *Erie Resistor*. See *Erie Resistor*, 373 U.S. at 236-37, 53 L.R.R.M. at 2127-28.

⁷⁴ *Harrison*, 272 N.L.R.B. at 334, 117 L.R.R.M. at 1237 (Hunter, Member, dissenting).

⁷⁵ *Id.*

⁷⁶ *Harrison*, 770 F.2d at 81, 120 L.R.R.M. at 2080.

⁷⁷ *Id.* at 80-81, 120 L.R.R.M. at 2079.

⁷⁸ *Id.*

⁷⁹ *Id.* at 80, 120 L.R.R.M. at 2079.

⁸⁰ *Id.*

⁸¹ *Id.* at 80-81, 120 L.R.R.M. at 2079.

⁸² *Id.* at 80, 120 L.R.R.M. at 2079.

⁸³ See *Great Dane*, 388 U.S. at 34, 65 L.R.R.M. at 2469. For further discussion of the *Great Dane* analysis, see *supra* notes 12-20 and accompanying text.

⁸⁴ *Harrison*, 770 F.2d at 80-81, 120 L.R.R.M. at 2079.

⁸⁵ *Id.* at 80, 120 L.R.R.M. at 2079.

⁸⁶ *Id.*

Mackay, were justified by the business interest in attracting permanent replacements.⁸⁷ Having found that the employer's acts were not inherently destructive and were justified, a violation could only be established, according to the court, by a specific showing that the employer intended its acts to discriminate against strikers.⁸⁸ The court found that no such intent existed⁸⁹ and therefore denied enforcement of the Board's order.⁹⁰

The Sixth Circuit's decision in *Harrison* is flawed in a number of respects. The court's decision was incorrect both because the court should have found the employer's acts inherently destructive and because the decision failed to give adequate weight to the policy underlying the Act. The court in *Harrison* should have held that the employer's acts were inherently destructive because such a conclusion is consistent with the Supreme Court's *Erie Resistor* decision. In *Erie*, the Supreme Court held that an employer's offer of twenty years superseniority to permanent replacements and workers who abandoned the strike was inherently destructive of employee rights.⁹¹ The *Harrison* Court attempted to distinguish *Erie Resistor* by asserting that granting twenty years superseniority is different from simply allowing replacements and earlier returning strikers to keep their assigned positions when later returning strikers are reinstated.⁹² The reasons why both *Erie Resistor* and *Portland Williamette*⁹³ held that offers of superseniority were inherently destructive, however, is contrary to the *Harrison* rationale. Both courts emphasized that offers of superseniority are destructive because they inflict harm, in the sense of lower relative seniority, upon all persons who continue to strike, and only upon them.⁹⁴ Such conduct discriminates solely on the basis of whether a person exercises the right to strike. In addition, each court pointed out that superseniority is inherently destructive because it makes future bargaining difficult.⁹⁵ The employer's conduct in *Harrison* had exactly the effects which make superseniority inherently destructive. By refusing to reinstate returning strikers with full seniority, the employer created a situation in which all the strikers who had returned to the job later had seniority lower than all union members who had abandoned the strike earlier.⁹⁶ This conduct, like an offer of superseniority, discriminated solely on the basis of whether a person had continued to exercise the right to strike. Moreover, because the seniority structure is visible and lasting,⁹⁷ the employer's conduct is likely to make future bargaining difficult by chilling the right to strike and creating a permanent rift between those union members who abandoned the strike and those who did not.⁹⁸ The conduct in *Harrison* created the same evils which make super-

⁸⁷ *Id.* at 81, 120 L.R.R.M. at 2079.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 81, 120 L.R.R.M. at 2080.

⁹¹ *Erie Resistor*, 373 U.S. at 230-31, 53 L.R.R.M. at 2125.

⁹² *See Harrison*, 770 F.2d at 80 n.1, 120 L.R.R.M. at 2079 n.1.

⁹³ For a discussion of the holdings of both *Erie Resistor* and *Portland*, see *supra* notes 21-26 and accompanying text.

⁹⁴ *Erie Resistor*, 373 U.S. at 230, 53 L.R.R.M. at 2125; *Portland*, 534 F.2d at 1334, 92 L.R.R.M. at 2115.

⁹⁵ *Erie Resistor*, 373 U.S. at 231, 53 L.R.R.M. at 2125; *Portland*, 534 F.2d at 1334, 92 L.R.R.M. at 2115.

⁹⁶ *Harrison*, 770 F.2d at 79, 120 L.R.R.M. at 2078.

⁹⁷ The seniority hierarchy is visible and lasting in that it is known to employees and is relatively permanent.

⁹⁸ *Erie Resistor*, 373 U.S. at 231, 53 L.R.R.M. at 2125.

seniority inherently destructive, and therefore, the court should have applied the *Erie Resistor* precedent and enforced the Board's order.

Even if the employer's acts in *Harrison* were not inherently destructive, the court should have held that even in a cyclical industry, an employer's *Mackay* right to retain permanent replacements does not provide a valid justification for failing to reinstate strikers with full seniority. Such a decision would have better effectuated the Act's underlying policy to protect the rights of employees to organize and engage in concerted activities including strikes.⁹⁹ *Harrison* posed a situation in which the employee's right to reinstatement with full seniority and the employer's right to retain permanent replacements could not both be protected. Full reinstatement of the later returning strikers in *Harrison* was likely to reduce the amount of work available to some replacements so greatly as to amount to discharge in violation of the employer's rights, while, on the other hand, failure to fully reinstate the strikers violated the employees' rights.

In rejecting the assertion that full reinstatement would force the employer to discharge its replacements, the Board focused on the fact that the formal employer-employee relationship between the employer and the permanent replacements continues to exist even if the seniority of the replacements is reduced.¹⁰⁰ By emphasizing these facts, the Board interpreted *Mackay* narrowly to give employers only the right not to discharge formally the permanent replacements.¹⁰¹ Accordingly, the Board found that an employer's *Mackay* right to hire permanent replacements and maintain them does not constitute a justification for failure to reinstate strikers unless such reinstatement would require formal discharge of replacements.¹⁰² This result was in accord with the policy underlying the Act and section 8(a), to protect the rights of workers to organize and to engage in concerted activities including strikes.¹⁰³

In contrast, the court of appeals adopted the more pragmatic reasoning of the Board's dissenting member.¹⁰⁴ Although it is objectively correct to argue that lack of work amounts to discharge, the court should have adopted the Board's reasoning to resolve the conflict between the rights of the employer and employees in favor of the latter. The Board's narrower interpretation of the employer's *Mackay* rights was consistent with the overall goal of the Act, because such an approach resolved a conflict between the rights of employers and employees in favor of the employees.¹⁰⁵

In conclusion, the Sixth Circuit in *NLRB v. Harrison Ready Mix Concrete* held that the failure of an employer engaged in a cyclical industry to reinstate returning strikers with full seniority does not constitute an unfair labor practice. The court held that such conduct was not inherently destructive of employee rights. Rather, the court asserted that the failure to reinstate strikers with full seniority is justified in a cyclical industry by the employer's right to retain permanent replacements.

The Sixth Circuit's decision in *Harrison* is flawed in two respects. The court's holding that the employer's conduct was not inherently destructive was inconsistent with the rationale underlying the Supreme Court's decision in *Erie Resistor*. Moreover, the Sixth

⁹⁹ See National Labor Relations Act, §§ 1, 8, 29 U.S.C. §§ 151, 158 (1982).

¹⁰⁰ See *Harrison*, 272 N.L.R.B. at 332 n.11, 117 L.R.R.M. at 1236 n.11.

¹⁰¹ See *id.*

¹⁰² *Id.*

¹⁰³ National Labor Relations Act, §§ 1, 8, 29 U.S.C. §§ 151, 158 (1982).

¹⁰⁴ *Harrison*, 770 F.2d at 80, 120 L.R.R.M. at 2079.

¹⁰⁵ National Labor Relations Act, §§ 1, 8, 29 U.S.C. §§ 151, 158 (1982).

Circuit's finding of a valid justification for the employer's failure to fully reinstate the strikers is inconsistent with the policies embodied in the Act and with section 8(a). These policies require a court to interpret narrowly an employer's right to hire permanent replacements when it conflicts with the rights of employees.

2. **Appropriate Remedies for Weingarten Violations Where Employees Have Engaged in Misconduct: Taracorp Industries¹*

Section 10(c) of the National Labor Relations Act (the Act) states in part: "No order of the Board shall require the reinstatement and backpay of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause."² This provision limits the power of the National Labor Relations Board (N.L.R.B. or Board) to order "make-whole" remedies, or remedies which return jobs or pay which employees would have kept or earned but for their suspension or discharge.³

By common practice, employers who suspect employee misconduct deserving discipline or dismissal conduct investigatory interviews to confirm or disprove their suspicions. In 1975 the Supreme Court determined in *NLRB v. J. Weingarten, Inc.*⁴ that an employer violates an employee's rights under section 7 and commits an unfair labor practice under section 8(a)(1) of the Act in refusing a request by an employee to have a union representative present at an investigatory interview which the employee believes could result in disciplinary measures.⁵ The employer in *Weingarten* did not discipline or discharge the employee involved, and the remedy was an order to the employer to cease and desist from further refusals of such employee requests.⁶ On the same day in *Inter-*

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¹ 273 N.L.R.B. No. 54, 117 L.R.R.M. 1497 (1984).

² National Labor Relations Act, § 10(c), 29 U.S.C. § 160(c) (1982).

³ *Taracorp*, 273 N.L.R.B. No. 54 at 4, 117 L.R.R.M. at 1498 (make-whole remedy "restor[es] the status quo ante, thereby placing the employee in the position enjoyed prior to the discriminatory conduct").

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

⁵ *Id.* at 252-53, 88 L.R.R.M. at 2689-90. Section 7 of the Act states in pertinent part: "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157 (1982).

Section 8(a)(1) of the Act, as codified in the United States Code, provides: "It shall be an 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 . . ." 29 U.S.C. § 158 (1982).

⁶ *Weingarten*, 420 U.S. at 253, 88 L.R.R.M. at 2689. At issue in *Weingarten* was an investigatory interview during which an employer interrogated a saleswoman about allegations that she stole chicken from the lunch counter where she worked. *Id.* at 254, 88 L.R.R.M. at 2690. The employee requested that a union representative join the interview both at this stage and later when, after the employer was satisfied that the allegations were unfounded, the employee revealed that she and other employees had been taking free lunches as a matter of habit. *Id.* at 255, 88 L.R.R.M. at 2690. In each instance, the employer denied her requests. *Id.* at 254-55, 88 L.R.R.M. at 2690.

The Supreme Court upheld the Board's construction of section 7 of the Act, acknowledging that employees had a right to request the presence of a union representative at an investigatory interview. *Id.* at 260, 88 L.R.R.M. at 2692. The Court agreed that the presence of a union representative offers employees "aid or protection" against perceived threats to job security, safeguards the interests of the bargaining unit by allowing the monitoring of employers' disciplinary practices,

national Ladies' Garment Workers Union v. Quality Manufacturing Co.,⁷ however, the Supreme Court held that reinstatement and payment of backpay were appropriate remedies where an employee lost her job because she requested that her union representative accompany her to an investigatory interview.⁸

Between 1975 and late 1984, a conflict developed between the Board and the courts of appeal about the circumstances under which reinstatement and backpay would be proper remedies for *Weingarten* violations. At first, the Board ordered make-whole remedies whenever an employee proved that an employer based disciplinary action or discharge upon employee conduct which was the subject of an unlawful investigatory interview.⁹ In *Kraft Foods, Inc.*,¹⁰ in 1980, the Board modified the procedure for determining the appropriateness of a make-whole remedy. First, the employee had to make a prima facie showing that the employer imposed disciplinary action for the conduct which was the subject of the unlawful interview.¹¹ At that point, the burden shifted to the employer to prove that the unlawful interview was not the source of the information

helps to redress the imbalance of economic power between employers and employees, and assists employers in gathering facts expeditiously. *Id.* at 260-63, 88 L.R.R.M. at 2692-94.

The Supreme Court set four limitations on *Weingarten* rights: the employee must request the representation; the employee must reasonably fear that disciplinary action may be an outcome of the interview; once the employee succeeds in obtaining representation, the employer has no duty to bargain with the union representative who attends the interview; and the employee's assertion of the right to representation cannot interfere with legitimate employer prerogatives. *Id.* at 257-60, 88 L.R.R.M. at 2691-92.

⁷ 420 U.S. 276, 88 L.R.R.M. 2698 (1975).

⁸ *Id.* at 280-81, 88 L.R.R.M. at 2699-700. In *Quality Manufacturing Co.*, an employee met with company administrators to complain about her wage rate. *Id.* at 278, 88 L.R.R.M. at 2699. Later the same day, when she and other employees stopped their machines to talk and the production manager ordered her to resume production, she told the production manager to mind her own business. *Id.* The production manager ordered her to report to the company president. *Id.* Over the next several days, the president refused all of the employee's requests to have union representation at an interview, and the employee refused, for that reason, to submit to an interview. *Id.* at 278-79, 88 L.R.R.M. at 2699. The president eventually suspended or discharged the employee, the union chairwoman who attempted to represent her, and the assistant chairwoman who filed grievances related to the incident. *Id.* at 278-80, 88 L.R.R.M. at 2699-700.

The Supreme Court agreed with the Board that the employer unlawfully punished the employees for asserting the right to union representation at an investigatory interview which reasonably could result in disciplinary action. *Id.* at 280-81, 88 L.R.R.M. at 2700. The Court enforced the Board's make-whole remedies for each of the employees. *Id.* at 281, 88 L.R.R.M. at 2700.

⁹ Following *Weingarten*, early Board decisions granted make-whole remedies for employees regardless of whether misconduct preceded the assertion of *Weingarten* rights. See, e.g., *Potter Elec. Signal Co.*, 237 N.L.R.B. 1289, 1291-92, 99 L.R.R.M. 1248, 1249 (1978) (employee was involved in an argument and a fight); *United States Postal Service*, 237 N.L.R.B. 1104, 1105-08, 99 L.R.R.M. 1179, 1179 (1978) (employee failed to justify sick leave and was insubordinate); *Brown & Connolly, Inc.*, 237 N.L.R.B. 271, 286, 98 L.R.R.M. 1572, 1572-73 (1978) (employee requested union representation at an investigatory interview); *Super Value Stores, Inc.*, 236 N.L.R.B. 1581, 1590, 1592, 98 L.R.R.M. 1605, 1605 (1978) (employee missed work); *Columbia Foundries, Inc.*, 229 N.L.R.B. 34, 36-39, 95 L.R.R.M. 1090, 1091 (1977) (union representative insisted on attending employee's investigatory interview). But see *Detroit Edison*, 218 N.L.R.B. 61, 63-64, 89 L.R.R.M. 1336, 1336 (1975) (while it is not clear that employee requested a make-whole remedy, Board granted a cease-and-desist order, but no make-whole remedy, where employer denied request for representation during a conference in which employer investigated employee's alleged lies and misconduct).

¹⁰ 251 N.L.R.B. 598, 105 L.R.R.M. 1233 (1980).

¹¹ *Id.* at 598, 105 L.R.R.M. at 1233.

upon which it based its decision to discipline the employee.¹² If the employer succeeded in meeting its burden, then the Board would issue a cease-and-desist order rather than reinstatement and backpay.¹³ On the same day, in *Illinois Bell Telephone Co.*,¹⁴ the Board explicitly affirmed that the employee need not prove that the request for a representative was the cause for discharge or discipline.¹⁵ The Board consistently applied the procedure and reasoning of *Kraft Foods* and *Illinois Bell* to later cases.¹⁶

Even before the Board's decisions in *Kraft Foods* and *Illinois Bell*, however, one circuit court had found that reinstatement and backpay for *Weingarten* violations were justifiable only where the employee's request for assistance during an investigatory interview was

¹² *Id.*

¹³ *Id.* The Board issued a cease-and-desist order in *Kraft Foods*. The Board found that the information which the employer obtained during the investigatory interview of the complainant employee played no part in the dismissal of the employee. 251 N.L.R.B. at 598-99, 105 L.R.R.M. at 1234. The employee was discharged for initiating a fight, but divulged no information about the fight during his interview. *Id.* The employer received independent reports about the fight from several witnesses. *Id.*

¹⁴ 251 N.L.R.B. 932, 105 L.R.R.M. 1236 (1980), *enforcement denied*, 674 F.2d 618, 109 L.R.R.M. 3244 (7th Cir. 1982).

¹⁵ *Id.* at 934, 105 L.R.R.M. at 1239. The employee in *Illinois Bell* confessed that she had improperly adjusted six long-distance phone calls for prisoners and had made five long-distance calls for free. *Id.* at 932, 105 L.R.R.M. at 1237. The Board found that the fact that the employer obtained a confession of misconduct during the unlawful interview and relied on that confession in deciding to discharge the employee was enough to make reinstatement and backpay appropriate. *Id.* at 934, 105 L.R.R.M. at 1238-39.

¹⁶ *See, e.g.*, Salt River Valley Water Users' Ass'n, 262 N.L.R.B. 970, 971, 110 L.R.R.M. 1396, 1396 (1982); Montgomery Ward & Co., Inc., 254 N.L.R.B. 826, 826, 106 L.R.R.M. 1148, 1149 (1981), *enforcement denied*, 664 F.2d 1095, 109 L.R.R.M. 2005 (8th Cir. 1981); Kahn's & Co., 253 N.L.R.B. 25, 25, 105 L.R.R.M. 1407, 1408-09 (1980), *enforcement denied*, 694 F.2d 1070, 112 L.R.R.M. 2683 (6th Cir. 1982); Roadway Express, Inc., 251 N.L.R.B. 975, 975, 105 L.R.R.M. 1287, 1288 (1980).

In numerous cases, the Board applied the *Kraft Foods* analysis and found that the information upon which discipline or discharge was based did not come from the unlawful interview. *See, e.g.*, Great Western Coca Cola Bottling Co., 265 N.L.R.B. 1488, 1489, 112 L.R.R.M. 1067, 1069 (1982); Pacific Tel. and Tel. Co., 262 N.L.R.B. 1034, 1038, 110 L.R.R.M. 1416, 1417 (1982); Gulf States Mfgs. Inc., 261 N.L.R.B. 852, 853, 110 L.R.R.M. 1132, 1133 (1982); I.T.T. Lighting Fixtures, 261 N.L.R.B. 229, 231, 110 L.R.R.M. 1025, 1026-27 (1982); Coyne Cylinder Co., 251 N.L.R.B. 1503, 1504, 105 L.R.R.M. 1270, 1271 (1980).

The Board extended its *Kraft Foods* analysis in two subsequent cases. In *L.A. Water Treatment, Div. of Chromalloy American Corp.*, 263 N.L.R.B. 244, 110 L.R.R.M. 1506 (1982), a shop superintendent called an employee into his office for insubordination after they argued about a work assignment. *Id.* at 244, 110 L.R.R.M. at 1506. The shop superintendent denied the employee's request for union representation at the ensuing investigatory interview. *Id.* During the interview, the superintendent sought assurances from the employee that he would not be insubordinate again, which the employee refused to provide. *Id.* at 245, 110 L.R.R.M. at 1508. The Board determined that the employee's insubordinate conduct and his refusal to provide the requested assurances were "inextricably intertwined," and therefore that the employee was unlawfully discharged for conduct which was the subject of the interview. *Id.* at 245 n.10, 110 L.R.R.M. at 1508 n.10.

The Board applied this analysis and accordingly ordered make-whole remedies in *Consolidated Casinos Corp.*, 266 N.L.R.B. 988, 113 L.R.R.M. 1081 (1983), where two employees both unsuccessfully requested union representation and refused to sign waiver forms associated with a polygraph examination. *Id.* at 1015, 113 L.R.R.M. at 1081. The Board found that, as in *L.A. Water Treatment*, discharge was unlawful insofar as "the subject of their interview and the 'insubordination' of their refusing to sign the waiver form are 'inextricably intertwined'" *Id.* at 1016, 113 L.R.R.M. at 1081.

the sole reason for discipline or discharge.¹⁷ The courts generally have reversed the Board's orders for make-whole remedies where employees were discharged for dishonesty or misconduct, often noting that section 10(c) forbids the Board to order reinstatement and backpay where discharge or discipline is for cause.¹⁸ Occasionally, courts held that section 10(c) precluded a make-whole remedy where the evidence of employee misconduct upon which discharge or discipline was based did not come exclusively from the improper interview.¹⁹

During the *Survey* year, in *Taracorp Industries*,²⁰ the Board overruled *Kraft Foods*, *Illinois Bell*, and related cases,²¹ and brought its analysis of make-whole remedies for *Weingarten* violations into conformity with the views of the courts of appeals.²² The Board held that where discharge of an employee is for cause, section 10(c) denies the Board authority to order reinstatement or backpay even if an employer unlawfully denied a

¹⁷ See *Newton Sheet Metal, Inc. v. NLRB*, 598 F.2d 478, 480 n.2, 101 L.R.R.M. 2422, 2423 n.2 (8th Cir. 1979); cf. *NLRB v. Potter Elec. Signal Co.*, 600 F.2d 120, 123-24, 101 L.R.R.M. 2378, 2380-81 (8th Cir. 1979) (denying a make-whole remedy because employees were discharged for a fight that closed down the production line, and not for requesting representation).

¹⁸ See, e.g., *Pacific Tel. and Tel. Co. v. NLRB*, 711 F.2d 134, 137-38, 113 L.R.R.M. 3529, 3531-32 (9th Cir. 1983) (confessions during unlawful interview proved that discharge for unauthorized possession of company equipment was for cause, and language of § 10(c) bars *Kraft Foods* construction requiring employer to prove that information upon which discharge was based did not come from unlawful interview); *NLRB v. Kahn's & Co.*, 694 F.2d 1070, 1071-72, 112 L.R.R.M. 2683, 2684 (6th Cir. 1982) (employee was discharged for overstaying his work break, and § 10(c) precludes back pay and reinstatement where there is evidence of misconduct independent of the improper interview); *NLRB v. Illinois Bell Tel. Co.*, 674 F.2d 618, 623, 109 L.R.R.M. 3244, 3248 (7th Cir. 1982) (employee was discharged for dishonesty in billing, and § 10(c) prohibits reinstatement or back pay if an individual was suspended or discharged for cause); *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097, 109 L.R.R.M. 2005, 2007 (8th Cir. 1981) (employees were discharged for stealing merchandise, and § 10(c) prohibits reinstatement and backpay where discharge is for cause); *NLRB v. Potter Elec. Signal Co.*, 600 F.2d 120, 123-24, 101 L.R.R.M. 2378, 2380-81 (8th Cir. 1979) (employee was discharged for fighting, and § 10(c) prohibits Board from ordering reinstatement or backpay for employees discharged for obvious personal misconduct).

¹⁹ See, e.g., *NLRB v. Illinois Bell Tel. Co.*, 674 F.2d 618, 623, 109 L.R.R.M. 3244, 3248 (7th Cir. 1982) (prior to investigatory interviews where employees confessed putting through phone calls free of charge for prison inmates, employer received information of their misconduct from prison officials); *General Motors Corp. v. NLRB*, 674 F.2d 576, 578, 109 L.R.R.M. 3345, 3346 (6th Cir. 1982) (independent of employee's confession during an improper investigatory interview, security officer's report proved that employee was bowling during work hours). Insofar as these courts accepted that the unlawful interviews must not be the source of the information upon which employers base the decision to discharge or discipline employees, they appear to adopt the reasoning of the *Kraft Foods* analysis, at least in part. See *supra* notes 10-13 and accompanying text.

²⁰ 273 N.L.R.B. No. 54, 117 L.R.R.M. 1497 (1984).

²¹ *Id.* No. 54 at 4, 9, 117 L.R.R.M. at 1498, 1500. In addition to *Kraft Foods* and *Illinois Bell*, the Board listed *L.A. Water Treatment, Division of Chromalloy American Corp.*, 263 N.L.R.B. 244, 110 L.R.R.M. 1506 (1982), and *Ohio Masonic Home*, 251 N.L.R.B. 606, 105 L.R.R.M. 1281 (1980). *Taracorp*, 273 N.L.R.B. No. 54 at 4 n.6, 117 L.R.R.M. at 1498 n.6.

²² 273 N.L.R.B. No. 54 at 6, 117 L.R.R.M. at 1499. The Board voluntarily chose to reconsider its own earlier decision in *Taracorp*, in which it had decided against the respondent company, combining a cease-and-desist order with an order for reinstatement and backpay. See *Taracorp Industries*, 257 N.L.R.B. 463, 467, 107 L.R.R.M. 1541, 1541 (1981). When the respondent filed a petition for review with the Eleventh Circuit, the Board successfully moved to withdraw the record so that it could reconsider its own decision. *Taracorp*, 273 N.L.R.B. No. 54 at 1-2, 117 L.R.R.M. at 1497.

request for union representation at an investigatory interview.²³ In a footnote, the Board noted that reinstatement and backpay could be appropriate remedies in these situations if, but only if, an employee receives discipline or discharge for asserting the right to have a union representative present at an investigatory interview.²⁴ As a consequence of the Board's decision in *Taracorp*, employers may discipline or discharge employees on the basis of information they obtain during unlawful interviews. Absent proof by an employee that the assertion of the right to representation at an investigatory interview was the sole cause for discipline or discharge, the maximum remedy for *Weingarten* violations is a cease-and-desist order against future *Weingarten* violations.

In *Taracorp*, the employer argued that it discharged an employee, Fred Elmore, for insubordination, and thus for cause.²⁵ Elmore's work consisted of "feeding" used storage batteries to a moving conveyor belt, which frequently jammed.²⁶ In the incident which eventually led to his discharge, the belt jammed and Elmore refused to follow a foreman's order to help pull the belt to start it moving again, replying that it was not his job.²⁷ The foreman suspended Elmore and told him to report to the plant manager's office.²⁸ At the office, the plant manager refused Elmore's request that a union representative accompany him to the interview.²⁹ Elmore admitted that he had not obeyed the foreman's order, but argued again that pulling on the belt was not his job, and added that the activity was unsafe.³⁰ After the foreman arrived and repeated the story, the plant manager terminated Elmore.³¹ On the basis of these facts, the Board found that the plant manager illegally conducted the investigatory interview because he denied Elmore's request for a union representative.³² It also found that he terminated Elmore for cause.³³

To evaluate the appropriateness of a make-whole remedy for employees whose *Weingarten* rights are violated but whose discharge was for cause, the Board outlined three categories of cases.³⁴ The first category consisted of cases in which employers disciplined or discharged employees for engaging in union or other protected activities.³⁵ Cases in the second category involved discipline or discharge for misconduct or some nondiscriminatory reason, even though the employer may have violated the employees' rights under Section 7 of the Act in ways unrelated to the discharge or discipline.³⁶ In the third category were cases in which the employer's reason for discharge or discipline, though at first appearing legitimate, proved upon further consideration to be an unfair labor practice.³⁷

²³ *Id.* No. 54 at 1, 117 L.R.R.M. at 1497.

²⁴ *Id.* No. 54 at 7 n.12, 117 L.R.R.M. at 1499 n.12 (citing *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 88 L.R.R.M. 2698 (1975)).

²⁵ *Id.* No. 54 at 3, 117 L.R.R.M. at 1498.

²⁶ *Id.* No. 54 at 2, 117 L.R.R.M. at 1497.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* No. 54 at 3, 117 L.R.R.M. at 1497.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* No. 54 at 2, 117 L.R.R.M. at 1497.

³³ *Id.* No. 54 at 10, 117 L.R.R.M. at 1500.

³⁴ *Id.* No. 54 at 4-6, 117 L.R.R.M. at 1498-99.

³⁵ *Id.* No. 54 at 4-5, 117 L.R.R.M. at 1498.

³⁶ *Id.* No. 54 at 5, 117 L.R.R.M. at 1498.

³⁷ *Id.* No. 54 at 5-6, 117 L.R.R.M. at 1499.

The Board noted that, historically, it had deemed reinstatement and backpay proper remedies in cases in the first and third categories.³⁸ With respect to the first category, the Board observed that, since the time of the Board's first published decision in 1935,³⁹ reinstatement and backpay have been the traditional remedy where employers have disciplined employees who engaged in protected concerted activity.⁴⁰ As an example of the third category, the Board cited *Fibreboard Paper Products Corp. v. NLRB*,⁴¹ in which the employer decided to subcontract work and therefore discharged several employees. The Supreme Court found in *Fibreboard* that the employer's refusal to bargain about the subcontracting violated section 8(a)(5) of the Act,⁴² such that the discharge of the employees stemmed directly from an unfair labor practice.⁴³

As for the second category of cases, the *Taracorp* Board found that, by the terms of section 10(c) of the Act, reinstatement and backpay are not appropriate remedies where employees who have engaged in misconduct have been subject to discipline.⁴⁴ The Board noted that section 10(c) embodied the principle that employers could discipline employees for misconduct or "cause,"⁴⁵ and that "cause" in section 10(c) "effectively means the absence of a prohibited reason."⁴⁶ Thus, when an employee is discharged for misconduct, the Board concluded, section 10(c) precludes a make-whole remedy even when the employer has committed an unrelated unfair labor practice.⁴⁷

Having discussed the categories in this manner, the Board determined that typical *Weingarten* cases fit into the second category, for which make-whole remedies are inappropriate.⁴⁸ The Board found that *Weingarten* cases for the most part fell outside the first category of cases in that they involved discharge or discipline of employees for misconduct rather than for participation in protected activity.⁴⁹ The Board reviewed the *Kraft Foods* rule requiring an employee to prove that discharge or discipline was "for the conduct which was the subject of the unlawful interview."⁵⁰ This rule, the Board reasoned, implicitly acknowledges that misconduct, and not the protected activity of requesting that a representative attend the interview, is the cause of the discharge or discipline.⁵¹

Further, the Board found, although an employer commits an unfair labor practice by denying an employee's request for representation at an investigatory interview, usual

³⁸ *Id.* No. 54 at 4-6, 117 L.R.R.M. at 1498-99.

³⁹ *Pennsylvania Greyhound Lines*, 1 N.L.R.B. 1, 1 L.R.R.M. 303 (1935).

⁴⁰ *Taracorp*, 273 N.L.R.B. No. 54 at 4-5, 117 L.R.R.M. at 1498.

⁴¹ 379 U.S. 203, 57 L.R.R.M. 2609 (1964).

⁴² Section 8(a)(5) states that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" National Labor Relations Act, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982).

⁴³ *Fibreboard*, 379 U.S. at 217, 57 L.R.R.M. at 2614. As additional examples of cases in the third category in which the Board ordered make-whole remedies, the Board listed *Boland Marine Mfg. Co.*, 225 N.L.R.B. 824, 93 L.R.R.M. 1346 (1976), and *Alfred M. Lewis, Inc.*, 229 N.L.R.B. 757, 95 L.R.R.M. 1216 (1977).

⁴⁴ *Taracorp*, 273 N.L.R.B. No. 54 at 5, 117 L.R.R.M. at 1498.

⁴⁵ *Id.*

⁴⁶ *Id.* No. 54 at 5 n.8, 117 L.R.R.M. at 1498 n.8.

⁴⁷ *Id.* No. 54 at 5, 117 L.R.R.M. at 1498.

⁴⁸ *Id.* No. 54 at 8, 117 L.R.R.M. at 1499.

⁴⁹ *Id.* No. 54 at 7, 117 L.R.R.M. at 1499.

⁵⁰ *Id.*

⁵¹ *Id.*

Weingarten cases differ from the *Fibreboard* category of cases in which the reason for the discharge or discipline is an unfair labor practice.⁵² In the typical *Weingarten* case, the Board observed, the employee misconduct upon which discharge or discipline is based is not so closely related to the employer's unfair labor practice as to warrant a make-whole remedy.⁵³ According to the Board, only in those *Weingarten* cases where the employee misconduct is a response to the employer's denial of representation would the Board grant make-whole remedies in the future.⁵⁴ Otherwise, despite the employer's unfair labor practice, the Board concluded, usual *Weingarten* cases are in the category in which discharge or discipline is for misconduct, and thus "for cause," such that section 10(c) precludes a make-whole remedy.⁵⁵

Preclusion of a make-whole remedy in most *Weingarten* cases had support not only in section 10(c), the Board continued, but also in other remedial limitations in the Act.⁵⁶ The Board argued that previous Board decisions which allowed reinstatement and backpay in *Weingarten* cases resulted in punitive remedies against employers and windfalls to employees.⁵⁷ The Board stressed that these are remedies which the Act does not give the Board authority to order.⁵⁸

The Board further reasoned that its decision in *Taracorp* conformed to the limitations on *Weingarten* rights that the Supreme Court originally established.⁵⁹ It urged that past Board decisions unjustifiably exceeded those limitations, such that the rules regarding investigatory interviews had come to resemble the labyrinthine rules of criminal procedure and the interviews themselves had begun to resemble formalized adversary proceedings.⁶⁰ To curb this expansionist approach, and to reduce the possibility that employers would forego investigatory interviews due to their increasing complexity and adversarial nature, the Board found that, as a matter of policy, its denial of a make-

⁵² *Id.* No. 54 at 7-8, 117 L.R.R.M. at 1499.

⁵³ *Id.*

⁵⁴ *Id.* No. 54 at 7 n.12, 117 L.R.R.M. at 1499 n.12.

⁵⁵ *Id.* No. 54 at 8, 117 L.R.R.M. at 1499.

⁵⁶ *Id.*

⁵⁷ *Id.* If, independent of an unfair labor practice, employers discharged or disciplined employees and then had to obey orders to return the employees to the status quo ante, the Board reasoned, then employers would pay penalties despite the fact that discharge for misconduct was not improper, and employees would win benefits although there was justification for their discharge or suspension. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* No. 54 at 8-9, 117 L.R.R.M. at 1499.

⁶⁰ *Id.* The Supreme Court in *Weingarten* explicitly indicated that it did not intend that the union representative at an investigatory interview would turn the interview into a confrontation in which both parties had equal power: "A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest." *Weingarten*, 420 U.S. at 263, 88 L.R.R.M. at 2693. This statement qualifies the Court's earlier acknowledgment that an employee's right to a union representative at an investigatory interview is consistent with the Act's goal of realigning the imbalance of economic power between labor and management. *See id.* at 262, 88 L.R.R.M. at 2693. The Court apparently did not believe that the realignment of the balance should go so far as to transform an investigatory interview into an adversary proceeding in which the employer's power to adjudicate was limited. The Board's recognition of this point in *Taracorp* emphasizes that the employer, as judge, should not be sanctioned for failing to follow proper procedures during an interview. *Taracorp*, 273 N.L.R.B. No. 54 at 9, 117 L.R.R.M. at 1499.

whole remedy would serve the interests of both employees and management.⁶¹ Therefore, the Board overruled *Kraft Foods* and its progeny, finding that it had no authority to order reinstatement or backpay in most cases involving *Weingarten* violations, including Elmore's case.⁶²

Board member Zimmerman, who had previously voted in favor of the *Kraft Foods* approach,⁶³ concurred, agreeing that *Kraft Foods* should be overruled and the view of the courts of appeal regarding make-whole remedies for *Weingarten* violations should be adopted.⁶⁴ The concurrence did not accept, however, that past Board decisions generally exceeded the limitations set forth in the *Weingarten* opinion⁶⁵ or that make-whole remedies for *Weingarten* violations would constitute bad policy.⁶⁶

In light of the ten-year history in which the courts of appeal generally refused to enforce make-whole remedies based on *Kraft Foods*, the *Taracorp* decision essentially represents a surrender by the Board to the courts of appeal's position. As a result of the decision, parties to cases involving *Weingarten* violations have the benefit of knowing that, should their cases proceed from the Board to a court of appeals, the outcome will be uniform. In the majority of cases, the only consequence of a denial of *Weingarten* rights that an employer need fear in either forum is the expense of defending itself against an unfair labor practice charge and the possibility of being obliged to obey a cease-and-desist order. An employee cannot win reinstatement or backpay from an employer unless there is proof that the sole reason for the employee's suspension or dismissal was the assertion of the right to have a representative.

⁶¹ *Id.* No. 54 at 9, 117 L.R.R.M. at 1499.

⁶² *Id.* No. 54 at 9, 117 L.R.R.M. at 1500.

⁶³ Board member Zimmerman approved of the application of the *Kraft Foods* analysis in *L.A. Water Treatment, Div. of Chromalloy American Corp.*, 263 N.L.R.B. 244, 110 L.R.R.M. 1506 (1982). See *Taracorp*, 273 N.L.R.B. No. 54 at 12 n.1, 117 L.R.R.M. at 1500 n.1 (Zimmerman, Member, concurring). Member Hunter likewise reconsidered and reversed his decision about the remedy that the Board ordered in *L.A. Water Treatment*. *Id.* No. 54 at 6 n.6, 117 L.R.R.M. at 1498 n.6.

⁶⁴ *Taracorp*, 273 N.L.R.B. No. 54 at 12-13, 117 L.R.R.M. at 1500 (Zimmerman, Member, concurring). Member Zimmerman specifically cited *NLRB v. Potter Elec. Signal Co.*, 600 F.2d 120, 101 L.R.R.M. 2378 (8th Cir. 1979), which the Eighth Circuit decided prior to *Kraft Foods*. *Taracorp*, 273 N.L.R.B. No. 54 at 12, 117 L.R.R.M. at 1500 (Zimmerman, Member, concurring). In *Potter Elec. Signal Co.*, the court found that the Supreme Court's interpretation of § 10(c) in *Fibreboard Paper Prods. Corp.*, 379 U.S. 203, 57 L.R.R.M. 2609 (1964), would not support a make-whole remedy except in those *Weingarten* cases where discharge or discipline was solely for the assertion of the right to representation, or was a product of an unfair labor practice. 600 F.2d at 123-24, 101 L.R.R.M. at 2380-81. Member Zimmerman agreed with the Eighth Circuit's finding in *Potter Elec. Signal Co.* that § 10(c) precludes an order for a make-whole remedy where discharge or discipline is for misconduct. *Taracorp*, 273 N.L.R.B. No. 54 at 12, 117 L.R.R.M. at 1500 (Zimmerman, Member, concurring).

⁶⁵ *Taracorp*, 273 N.L.R.B. No. 54 at 13 n.3, 117 L.R.R.M. at 1500 n.3 (Zimmerman, Member, concurring). Member Zimmerman mentioned *Materials Research Corp.*, 262 N.L.R.B. 1010, 110 L.R.R.M. 1401 (1982), as an example of a decision in which the Board had not exceeded the Supreme Court's intended limitations on *Weingarten* rights. *Taracorp*, 273 N.L.R.B. No. 54 at 13 n.3, 117 L.R.R.M. at 1500 n.3 (Zimmerman, Member, concurring). In *Materials Research*, the Board determined that *Weingarten* rights applied equally to union and nonunion employees because the § 7 right to act in concert for mutual aid and protection does not protect only unionized workers. 262 N.L.R.B. at 1012-16, 110 L.R.R.M. at 1403-06.

⁶⁶ *Taracorp*, 273 N.L.R.B. No. 54 at 13 n.3, 117 L.R.R.M. at 1500 n.3 (Zimmerman, Member, concurring).

The *Taracorp* decision is significant in two respects. First, insofar as it eliminates the possibility of a compensatory remedy, the case demonstrates the Board's unwillingness to retain a strong deterrent against *Weingarten* violations if the price is impairing free decision-making by employers.⁶⁷ In this regard, the Board's comparison of the availability of a make-whole remedy to the rules of criminal procedure is an apt one.⁶⁸ The Supreme Court has noted that the exclusionary rule, which forbids the introduction of evidence obtained during illegal searches or seizures, helps to deter such unconstitutional searches and seizures.⁶⁹ The rule has been subject to criticism in that it has allowed criminals to go free because constables blundered in authorizing searches or gathering evidence.⁷⁰ The *Kraft Foods* approach established a rule subject to similar criticism: it permitted employees to escape justifiable discharge or discipline only because the employer blundered or even willingly proceeded unlawfully with an investigatory interview.

In overruling *Kraft Foods*, the *Taracorp* Board decided that the employees' interest in receiving fair evaluations of their alleged misconduct does not extend so far that unfairness in an evaluation procedure mandates reversal of the evaluation's outcome. The Board's decision reinforces one limitation that the Supreme Court originally set on the scope of *Weingarten* rights: an employee's assertion of those rights cannot interfere with legitimate employer prerogatives.⁷¹ Thus, the *Taracorp* decision reaffirms that employer prerogatives have priority over employee protections where an employer merely

⁶⁷ The *Kraft Foods* rule could operate as a deterrent in the sense that if an employer's refusal of a request for union assistance predictably would result in the employer's inability to discharge or discipline an employee, employers would be likely to refrain from such refusals, such that employee rights would be better protected. Alternatively, as the Board noted, employers might be likely to refrain from holding investigatory interviews, such that employees would suffer discharge or suspension without having an opportunity to answer the employer's charges. *Id.* No. 54 at 9, 117 L.R.R.M. at 1499. To the extent that the *Taracorp* decision preserves incentive for employers to hold interviews, and thus preserves the limited protection of an employee's right to offer a defense to the employer's allegations during an interview, it does not reject the goal of employee protection by rejecting a make-whole remedy. *Cf. id.*

⁶⁸ *See id.*

⁶⁹ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (noting that "the purpose of the exclusionary rule 'is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.'" (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))). *See also* *Stone v. Powell*, 428 U.S. 465, 486 (1976).

⁷⁰ In *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926), Justice Benjamin Cardozo wrote the much-quoted line, "The criminal is to go free because the constable has blundered." *Id.* at 21, 150 N.E. at 587. The court in that case considered whether, because authorities committed trespass in the course of obtaining evidence of the defendant's criminality, the evidence should not be admissible. *Id.* at 19, 150 N.E. at 587.

⁷¹ In *Weingarten*, the Supreme Court emphasized that the existence of the employee's right to have representation at an investigatory interview does not limit the employer's right to refuse to accept a representative's presence and investigate the employee's misconduct without holding an interview. 420 U.S. at 258, 88 L.R.R.M. at 2691. The Court noted that this leaves the employee with a choice of having an interview without a representative, or forgoing the interview and any benefits which might be obtainable from it. *Id.* at 258, 88 L.R.R.M. at 2691-92. The Court cited two Board cases with approval in reaching its conclusion that investigatory interviews ultimately are optional for employers and voluntary for employees. *Id.* at 258-59, 88 L.R.R.M. at 2692 (citing *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 1052, 80 L.R.R.M. 1188, 1191 (1972), and *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198-99, 79 L.R.R.M. 1269, 1271 (1972)). The Board's *Taracorp* decision, therefore, returns to the view which the Board espoused prior to *Weingarten* and which the Supreme Court adopted from the Board in deciding *Weingarten*.

disregards proper procedures in imposing discipline or discharge for employee misconduct.

The *Taracorp* opinion is significant in a second respect in that it explicitly signals the reversal of the Board's past tendency to accept broad interpretations of the Supreme Court's *Weingarten* decision. In determining the inappropriateness of reinstatement and backpay for *Weingarten* violations, the *Taracorp* Board made it clear that its objections to past Board decisions applied not only to the treatment of the narrow issue before it, but also more broadly to the "expansionist approach to *Weingarten*, including make-whole remedies."⁷² In past conflicts between the Board and the courts of appeal, the Board attempted to extend *Weingarten* in several ways: to cover disciplinary interviews⁷³ and pre-interview consultations⁷⁴ as well as investigatory interviews; to include nonunionized as well as unionized employees;⁷⁵ to presume a request by an employee where an

⁷² *Taracorp*, 273 N.L.R.B. No. 54 at 9, 117 L.R.R.M. at 1499.

⁷³ A disciplinary interview differs from an investigatory interview in that, in the former, the employer merely executes a predetermined decision to impose discipline or discharge. In *Certified Grocers of California*, 227 N.L.R.B. 1211, 74 L.R.R.M. 1279 (1977), *enforcement denied*, 587 F.2d 449, 100 L.R.R.M. 3029 (9th Cir. 1978), the Board accepted that *Weingarten* rights would arise in disciplinary as well as investigatory interviews insofar as the Supreme Court mentioned both "investigatory interviews" and "interviews" in *Weingarten*. *Id.* at 1214, 74 L.R.R.M. at 1282. The Board also noted that the Supreme Court cited language from *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 80 L.R.R.M. 1188, ensuring protection where an employee must "appear unassisted at an interview which may put his job security in jeopardy." *Certified Grocers*, 227 N.L.R.B. at 1214, 74 L.R.R.M. at 1282 (citing *Weingarten*, 420 U.S. at 257, 88 L.R.R.M. at 2692). The Ninth Circuit denied enforcement in *NLRB v. Certified Grocers of California*, 587 F.2d 449, 100 L.R.R.M. 3029 (9th Cir. 1978), holding that the right to representation does not arise where the interview is not an occasion for the employee to offer a defense to an employer's allegations. *Id.* at 451, 100 L.R.R.M. at 3030. *See also* *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 411-12, 99 L.R.R.M. 2841, 2846 (9th Cir. 1978); *Brodie, Union Representation and the Disciplinary Interview*, 15 B.C. INDUS. & COM. L. REV. 1, 28 (1973).

The Board reversed its stance in *Baton Rouge Water Works*, 246 N.L.R.B. 995, 103 L.R.R.M. 1058 (1979). A decision authorizing representation at disciplinary interviews, the Board reasoned, would encourage employers to forgo interviews of all types to avoid unfair labor practice charges, and to return to the practice of deciding on discipline and issuing "pink slips" without giving employees opportunities to offer defenses. *Id.* at 998, 103 L.R.R.M. at 1058. *See also* *Tokheim Corp.*, 265 N.L.R.B. 1658, 1658-59, 112 L.R.R.M. 1057, 1059 (1982).

⁷⁴ In *Climax Molybdenum Co.*, 227 N.L.R.B. 1189, 94 L.R.R.M. 1177 (1977), the Board found that employees are entitled to a pre-interview consultation under *Weingarten*, but the Tenth Circuit reversed the Board's opinion. 584 F.2d 360 (10th Cir. 1978). The courts of appeal are split on this point. In *Pacific Tel. and Tel. Co. v. NLRB*, 711 F.2d 134, 113 L.R.R.M. 3529 (9th Cir. 1983), the Ninth Circuit accepted the Board's view that an employer commits an unfair labor practice in refusing to allow a pre-interview conference.

⁷⁵ The Board determined that nonunion workers have the same right to representation by a co-worker during investigatory interviews as union workers for the following reasons: the Supreme Court did not exclude them from protection in *Weingarten*; section 7 protects their right to act in concert for mutual aid and protection; nonunionized workers may need such protection more than unionized workers because they have no collective bargaining agreement to discourage employers from acting unjustly; and a co-worker could serve the purposes and perform the limited activities of a *Weingarten* representative despite a lack of formal union experience. *Materials Research Corp.*, 262 N.L.R.B. 1010, 1012-15, 110 L.R.R.M. 1401, 1403-06 (1982). *See also* *Glomac Plastics*, 234 N.L.R.B. 1309, 1311, 97 L.R.R.M. 1441, 1443-44 (1978).

Two cases that the Board decided on the same day as *Materials Research* reflected the same reasoning. *See* *E.I. duPont de Nemours & Co., Inc. and Walter J. Slaughter*, 262 N.L.R.B. 1028,

employee leaves an interview to find a representative;⁷⁶ and to authorize active participation by representatives during interviews.⁷⁷ The criticism in *Taracorp* of the Board's expansive interpretation of *Weingarten* indicates that employees can no longer expect the Board to arrive at generous readings of the Supreme Court's limitations on *Weingarten* rights.

With *Taracorp*, the Board ends nearly a decade in which decisions about make-whole remedies for *Weingarten* violations depended on the forum in which the question was considered. In an area that has seen considerable disagreement between the Board and the courts, the decision may presage a period of lesser activism by the Board and greater conformity between the Board and the judiciary. If the opinion provides a reliable compass, future Board decisions will reassert the value of *Weingarten* rights in promoting the employer's ability to learn the truth of allegations against employees and the union's ability to monitor the fairness of employees' disciplinary practices.⁷⁸ The Board will be likely to emphasize, however, that in accordance with the right of employers to run their

110 L.R.R.M. 1417 (1982); *E.I. duPont de Nemours & Co., Inc. and Henry M. Burke*, 262 N.L.R.B. 1040, 110 L.R.R.M. 1419 (1982).

The Ninth Circuit rejected the Board's holding in *E.I. duPont de Nemours & Co., Inc. and Henry M. Burke*, finding that the request for representation of an individual acting out of self-protection does not constitute concerted activity, and that the evidence did not reveal any history of concerted activity between the requesting employee and others. *E.I. duPont de Nemours & Co. v. NLRB*, 707 F.2d 1076, 1078-79, 113 L.R.R.M. 2931, 2932-33 (9th Cir. 1982). The court did not exclude the possibility, however, that *Weingarten* protections could apply in other cases where a nonunion employee acted as part of a group. *Id.* at 1079, 113 L.R.R.M. at 2933.

In *E.I. duPont de Nemours & Co., Inc. and Walter J. Slaughter*, the Third Circuit rejected the Ninth Circuit's limited reading of the meaning of concerted activity in section 7 and accepted the Board's general extension of *Weingarten* rights to nonunion employees. *E.I. duPont de Nemours & Co. v. NLRB*, 724 F.2d 1061, 1065-67, 115 L.R.R.M. 2153, 2156, *vacated*, 733 F.2d 296, 116 L.R.R.M. 2343 (3d Cir. 1984) (*per curiam*). Upon the Board's request to reconsider the case along with another case presenting similar questions, however, the court agreed to vacate its decision and remand for panel rehearing. 733 F.2d at 297, 116 L.R.R.M. at 2343-44. Insofar as the Board's request followed a federal court of appeals decision favorable to its past opinions, it may suggest that the *Weingarten* rights of nonunion employees also may be an area in which the Board will retreat from its "expansionist approach."

⁷⁶ See *Spartan Stores*, 235 N.L.R.B. 522, 100 L.R.R.M. 1181 (1978), *enforcement denied*, 628 F.2d 953, 105 L.R.R.M. 2293 (6th Cir. 1980). The Board found that an employee who left an investigatory interview to find a union representative and ignored two requests by supervisors to return was legally asserting his right to *Weingarten* protection. *Id.* at 522-23, 100 L.R.R.M. at 1181-82. The Sixth Circuit held, however, that the assertion of *Weingarten* rights requires an express request for representation. 628 F.2d at 958, 105 L.R.R.M. at 2297.

⁷⁷ The courts of appeal have disagreed about the Board's finding that an employer commits an unfair labor practice by ordering a union representative to remain silent during the course of an investigatory interview. In *NLRB v. Texaco*, 659 F.2d 124, 108 L.R.R.M. 2850 (9th Cir. 1981), the Ninth Circuit noted the Supreme Court's intention that *Weingarten* representatives, though they should not transform investigatory interviews into adversary proceedings, should help to elicit facts favorable to the employee. *Id.* at 126, 108 L.R.R.M. at 2851. Therefore, the court held that employers may not relegate *Weingarten* representatives to the role of passive observer. *Id.* at 126, 108 L.R.R.M. at 2852. The Fifth Circuit held to the contrary in *Southwestern Bell Tel. Co. v. NLRB*, 667 F.2d 470, 109 L.R.R.M. 2602 (5th Cir. 1982). Its finding that the employer's demand for silence during the interview fell "within the perimeters [sic] set forth by the Supreme Court" may have depended on the fact that, at the end of the interview, the employer asked the union representative if he wished to ask any questions or add any clarifications. *Id.* at 473-74 & n.3, 109 L.R.R.M. at 2604 & n.3.

⁷⁸ See *Weingarten*, 420 U.S. at 260-64, 88 L.R.R.M. at 2692-93.

businesses as they see fit, *Weingarten* rights properly do not guarantee employees any relief from discipline or discharge for misconduct.

B. Union Unfair Labor Practices

1. **Union Restrictions on Members' Right to Resign*: International Association of Machinists and Aerospace Workers, Local Lodge 1414 and Neufeld Porsche-Audi, Inc.¹

Section 7 of the National Labor Relations Act (NLRA or Act) guarantees employees the right to organize or join labor organizations, to engage in other concerted activities for their mutual benefit, and to *refrain* from any or all such activities.² Under section 8(b)(1)(A) of the Act, it is an unfair labor practice for a union to restrain or coerce employees in the exercise of their section 7 rights.³ A proviso to section 8(b)(1)(A), however, prescribes that the section 8(b)(1)(A) restriction on unions shall not impair a union's right to adopt its own rules concerning the acquisition or retention of membership in the union.⁴ Tension arises, therefore, between an employee's right to refrain from union activity and a union's right to control acquisition and retention of membership. This tension becomes particularly acute immediately prior to and during a strike, when some employees may wish to leave the union to retain their jobs.

Section 8(b)(1)(A) had been interpreted by the National Labor Relations Board (NLRB or Board) to recognize a union's need, particularly at the time of a strike, to protect against erosion of its status as the exclusive representative of employee interests.⁵ Accordingly, the Board permitted "reasonable" union rules which limited a union member's right to resign from the union provided those rules were applicable during both strike and nonstrike periods.⁶ In *Machinists, Local 1327 (Dalmo Victor II)*,⁷ a union rule prohibiting resignations during the entire course of a strike or within fourteen days preceding the strike's commencement was held to violate section 8(b)(1)(A) of the Act.⁸

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¹ 270 N.L.R.B. 1330, 116 L.R.R.M. 1257 (1984).

² 29 U.S.C. § 157 (1982). Section 7 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, 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 as authorized in section 8(a)(3).

Id.

³ 29 U.S.C. § 158(b)(1)(A) (1982). Section 8(b)(1)(A) provides in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7" *Id.*

⁴ *Id.* Section 8(b)(1)(A) further states: "Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein" *Id.* (emphasis added).

⁵ *Machinists, Local 1327 (Dalmo Victor II)*, 263 N.L.R.B. 984, 986-87, 111 L.R.R.M. 1115, 1117-18 (1982) (union has vital interest in assessing its strength throughout the course of a strike).

⁶ *Id.* at 986-87, 111 L.R.R.M. at 1118.

⁷ *Id.*

⁸ *Id.* at 987, 111 L.R.R.M. at 1119.

The rule violated section 8(b)(1)(A), according to the Board, because it unreasonably restricted an employee's section 7 right to refrain from participating in concerted activity.⁹ Two of the four members of the Board who found the rule unreasonable set forth a general standard to determine whether a union rule limiting resignation was reasonable.¹⁰ Members Zimmerman and Fanning proposed a standard that would find reasonable a union rule which restricted a union member's right to resign for a period of not more than thirty days after the tender of the member's resignation.¹¹ In subsequent cases, this thirty-day standard became the working rule of thumb for union rules restricting members' resignations.¹²

During the *Survey* year, the Board ruled that a union may not lawfully restrict the right of its members to resign from membership.¹³ In *International Association of Machinists and Aerospace Workers, Local Lodge 1414 and Neufeld Porsche-Audi, Inc. (Neufeld Porsche-Audi)*,¹⁴ the Board expressly rejected the *Dalmo Victor II* thirty-day standard regarding union resignation and stated that any union restriction on the rights of its members to resign constituted a violation of section 8(b)(1)(A) of the Act.¹⁵ Consequently, after *Neufeld Porsche-Audi*, a union no longer may impose any restriction on its members' right to resign, even in the event of a strike.¹⁶

Neufeld Porsche-Audi involved the constitution of the International Association of Machinists and Aerospace Workers (the Union). The Union's constitution restricted the effectiveness of a member's resignation during a strike or primary picketing, and also during a fourteen-day period immediately preceding any strike or primary picketing.¹⁷

⁹ *Id.* at 986, 111 L.R.R.M. at 1117.

¹⁰ *Id.* at 987, 111 L.R.R.M. at 1118.

¹¹ *Id.* Although Member Jenkins did not expressly endorse the thirty-day rule, the rule presumably would be valid under Member Jenkins' view that restrictions on resignation are specifically excluded from the scope of section 8(b)(1)(A) of the Act by the proviso to that provision. 263 N.L.R.B., at 995, 111 L.R.R.M. at 1126 (Jenkins, Member, dissenting).

Chairman Van de Water and Member Hunter, who concurred with the plurality opinion in finding that the rule at issue violated section 8(b)(1)(A) of the Act, expressly refused to adopt the thirty-day standard proposed by Members Zimmerman and Fanning. Chairman Van de Water and Member Hunter argued that any union restriction on a union member's right to resign was unreasonable, and any attempt to enforce that rule violated section 8(b)(1)(A) of the Act. *Id.* at 992-93, 111 L.R.R.M. at 1123-24.

¹² See, e.g., *International Ass'n of Machinists and Aerospace Workers, Local Lodge 1414 and Neufeld Porsche-Audi, Inc. (Neufeld Porsche-Audi)*, 270 N.L.R.B. 1330, 1331, 116 L.R.R.M. 1257, 1258 (1984).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1330, 116 L.R.R.M. at 1257. The union's constitutional provision concerning resignation in effect at the time of the member's tender of resignation provided:

Improper Conduct of a Member: . . .

Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket

Under that constitution, a member could not accept employment with the struck employer during the strike if his resignation was tendered within the fourteen-day period or during the strike.¹⁸ Moreover, if a primary picket line was involved, the member's resignation was not effective and the member's obligation to observe the picket line was not extinguished.¹⁹

On September 8, 1980, employees in a unit represented by the Union commenced an economic strike against their employer which continued until March 1, 1981.²⁰ During the strike, a union member delivered a letter of resignation to the Union's offices and returned to work three days later.²¹ One week after the employee tendered his resignation, the Union filed charges against the employee, alleging that he had violated their constitution's provisions on resignation,²² and two months later imposed a \$2,250 fine against the employee.²³ The worker's employer, Neufeld Porsche-Audi, filed an unfair labor practice charge against the Union,²⁴ and the General Counsel for the NLRB responded by issuing a complaint upon that charge against the Union alleging that the union had violated section 8(b)(1)(A) of the NLRA.²⁵

In a three-to-one decision, the NLRB ruled that the Union's efforts to restrict its members' resignations were unlawful.²⁶ Significantly, the Board also, in dicta, specifically rejected the decision of Members Zimmerman and Fanning in *Dalmo Victor II*, which established the thirty-day standard for union restrictions on resignations. The *Neufeld Porsche-Audi* Board declared that any restriction imposed by a union on its members' right to resign was invalid.²⁷

The Board in *Neufeld Porsche-Audi* began its decision by reviewing relevant United States Supreme Court decisions which examined a union's authority to enforce its rules. The NLRB first considered the basic standard for the lawfulness of union rules established by the Supreme Court in *NLRB v. Allis-Chalmers Mfg. Co.*²⁸ and *Scofield v. NLRB*.²⁹ The test established by *Allis-Chalmers* is applied to determine whether a union rule is an "internal" action.³⁰ The Court defined "internal" action as those union actions taken against full union members pursuant to a nonarbitrary rule aimed at achieving a legitimate union objective.³¹ If that test is met, the test for lawfulness of the union rule under *Scofield* becomes whether the union rule first, "reflects a legitimate union interest," second, "impairs no policy Congress has imbedded in the labor laws," and third, "is

line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

Id.

¹⁸ See *supra* note 17.

¹⁹ See *supra* note 17 and accompanying text.

²⁰ *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1331, 116 L.R.R.M. at 1258.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 1330, 116 L.R.R.M. at 1258.

²⁵ *Id.*

²⁶ *Id.* at 1331, 116 L.R.R.M. at 1258. Chairman Hunter and Members Dennis and Dotson found that any union restriction on resignation was unlawful. Member Zimmerman dissented in part.

²⁷ *Id.*

²⁸ 388 U.S. 175, 65 L.R.R.M. 2449 (1967).

²⁹ 394 U.S. 423, 70 L.R.R.M. 3105 (1969).

³⁰ *Allis-Chalmers*, 388 U.S. at 195, 65 L.R.R.M. at 2457.

³¹ *Id.* at 194-95, 65 L.R.R.M. at 2456-57.

reasonably enforced against union members who are free to leave the union and escape the rule."³²

In the instant case, the Board suggested that a union rule restricting resignation might violate the *Allis-Chalmers* "internal action" test, but the Board did not base its decision on that finding.³³ Instead, the Board found that a union rule restricting resignations violated the second and third portions of the *Scofield* test.³⁴ The Board acknowledged that the union rule advanced the legitimate union interests of maintaining strike solidarity and protecting employees who wished to continue a strike.³⁵ A union rule restricting resignations conflicted, however, with the second portion of the *Scofield* test, the Board stated, because it impaired fundamental policies underlying the labor laws.³⁶ Such a rule also violated the third portion of the *Scofield* test, the Board continued, because employees were not "free to leave the union and escape the rule."³⁷

In considering the second portion of the *Scofield* test, the Board explained that any restriction on resignation impaired the underlying policies of section 7 of the NLRA.³⁸ The basis of section 7, the Board noted, is its guarantee of employee rights to organize and participate in concerted activities, or, conversely, to refrain from such activities.³⁹ The Board reasoned that any union restriction which delays or impedes a member's resignation necessarily interferes with the employee's right to refrain from concerted activities provided for in section 7 of the Act.⁴⁰ In so holding, the NLRB refused to balance the interests of the union with the section 7 rights of employees. The Board stated that any effort to equate the "institutional interests" of a union with the "statutory rights" of employees was improper.⁴¹ Regardless of the legitimacy of union interests, the Board reasoned, those interests cannot outweigh fundamental section 7 rights.⁴²

In addition, any union rule restricting resignation, the Board held, also violates the third portion of the *Scofield* test requiring that union rules be "reasonably enforced against union members who are free to leave the union and escape the rule."⁴³ In the Board's view, a rule restricting resignation violates the principle embodied in the *Scofield*

³² *Scofield*, 394 U.S. at 430, 70 L.R.R.M. at 3108.

³³ *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1333-34, 116 L.R.R.M. at 1260-61.

³⁴ *Id.* at 1334, 116 L.R.R.M. at 1261.

³⁵ *Id.* at 1333, 116 L.R.R.M. at 1260.

³⁶ *Id.*

³⁷ *Id.* at 1333-34, 116 L.R.R.M. at 1260-61. A union rule restricting resignation, according to the NLRB, may violate the initial requirement established by *Allis-Chalmers* that the union rule be "internal" action. *Id.* at 1333, 116 L.R.R.M. at 1260. "Internal" action had been interpreted by the Supreme Court to include the imposition and collection of fines on full union members who refused to honor an authorized strike. *Allis-Chalmers*, 388 U.S. at 195, 65 L.R.R.M. at 2457. A union rule restricting resignation, however, may not be "internal" action, according to the Board, because it unilaterally extends the scope of "internal" action by extending membership obligations. *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1333, 116 L.R.R.M. at 1260. Thus, the NLRB explained, a union could continue to regulate its members' conduct when it otherwise would have had no control. *Id.* The Board, however, did not base its decision on the internal/external activity distinction, but instead based its decision on finding violations of the *Scofield* test. *Id.* at 1334-36, 116 L.R.R.M. at 1261-62.

³⁸ 270 N.L.R.B. at 1333, 116 L.R.R.M. at 1260.

³⁹ *Id.* See *supra* note 2 and accompanying text for the text of section 7 of the Act.

⁴⁰ *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1333, 116 L.R.R.M. at 1260.

⁴¹ *Id.* at 1334, 116 L.R.R.M. at 1261.

⁴² *Id.*

⁴³ *Id.* at 1333-34, 116 L.R.R.M. at 1261 (quoting *Scofield*, 394 U.S. at 430, 70 L.R.R.M. at 3108).

test that a union's reach does not extend to employees who decide not to remain as part of the union.⁴⁴ The Board found support for its analysis in a Seventh Circuit decision which held that the principle that employees must be free to leave the union was at the core of an individual's section 7 rights.⁴⁵

Member Zimmerman dissented in part from the Board's decision.⁴⁶ He concurred with the majority's finding that the union rule at issue violated section 8(b)(1)(A) of the Act, but relied on the fact that the union rule violated the thirty-day rule established in *Dalmo Victor II*.⁴⁷ Member Zimmerman based his dissent from the majority opinion and his support for the thirty-day rule on two premises. The first basis for Member Zimmerman's dissent was that section 7 rights are not absolute, as the majority contended.⁴⁸ The better view, according to Member Zimmerman, is that the NLRA is built on compromise and conflict, and the Board should accommodate conflicting interests by balancing the interests involved.⁴⁹ In balancing individual employee interests with the interests of the group, Member Zimmerman argued that a limited degree of intrusion on section 7

⁴⁴ *Id.* at 1334, 116 L.R.R.M. at 1261.

⁴⁵ See *Pattern Makers League of North America v. NLRB*, 724 F.2d 57, 60, 115 L.R.R.M. 2264, 2267 (7th Cir. 1983) (an employee's section 7 rights are not outweighed by union's institutional needs).

The Board in *Neufeld Porsche-Audi* defended its ruling against the Ninth Circuit's contrary holding that a union can lawfully restrict its members' right to resign. First, the Board submitted that the Ninth Circuit's "subscription theory" was in error. *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1335, 116 L.R.R.M. at 1261. The "subscription theory" proposed that employees who resign their membership and then refrain from strike activity violate their duty to their fellow workers and breach an implied promise to those workers who desire to continue the strike. *Dalmo Victor II*, 725 F.2d at 1218, 115 L.R.R.M. at 2976. Resigning employees may not, according to the Ninth Circuit, "betray their colleagues and expect to get away without paying the price for weakening the collective bargaining environment." *Id.* The Board, however, rejected the Ninth Circuit's theory because, according to the Board, the Supreme Court had rejected a similar theory in *NLRB v. Textile Workers Local 1029 (Granite State)*. *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1335, 116 L.R.R.M. at 1261. In *Granite State*, the Supreme Court rejected a union's argument that its rule restricting employees' section 7 right to refrain from concerted activities by limiting resignation was valid because the members had voted to strike and *unanimously* voted to sanction anyone who sought to return to work during the strike. *NLRB v. Textile Workers Local 1029 (Granite State)*, 409 U.S. 213, 217-18, 81 L.R.R.M. 2853, 2854-55 (1972).

Second, the Board recognized the concept of majority rule, but only so far as the union established relations between the individual employee and management. *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1335, 116 L.R.R.M. at 1261-62. The union may not, however, order an employee's membership relations with the union. *Id.* at 1335, 116 L.R.R.M. at 1262.

Third, the Board stated that union interests embodied in the proviso to section 8(b)(1)(A) do not coexist with employees' section 7 rights. *Id.* at 1335-36, 116 L.R.R.M. at 1262. While acknowledging that such union interests are legitimate, the Board held those institutional interests of the union always to be subordinate to individual employee statutory rights. *Id.* at 1336, 116 L.R.R.M. at 1262.

Finally, the Board asserted that the Ninth Circuit, in *Dalmo Victor II*, overlooked the third portion of the *Scofield* test, which provides that a union rule must be "reasonably enforced against union members who are free to leave the union and escape the rule." *Id.*, see *Scofield*, 394 U.S. at 430, 70 L.R.R.M. at 3108. Any union restriction on resignation, according to the Board, violates this principle. *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1336, 116 L.R.R.M. at 1262.

⁴⁶ 270 N.L.R.B. at 1337, 116 L.R.R.M. at 1263 (Zimmerman, Member, dissenting).

⁴⁷ *Id.* at 1340, 116 L.R.R.M. at 1265 (Zimmerman, Member, dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1337, 116 L.R.R.M. at 1263 (Zimmerman, Member, dissenting).

rights should be permitted.⁵⁰ The Supreme Court had balanced competing interests between employees and unions before, argued Member Zimmerman, and section 7 rights had not been held absolute rights in those cases.⁵¹

In addition to advocating a balancing of principles which underlie the Act, Member Zimmerman also based his dissent upon his interpretation of the Supreme Court's decisions in *Allis-Chalmers*, *Scofield*, and *NLRB v. Textile Workers Local 1029 (Granite State)*.⁵² Member Zimmerman noted that the *Allis-Chalmers* Court, in formulating the "internal" action test, established the principle that the right to refrain from union activity contained in section 7 is not an absolute right,⁵³ and that *Scofield* also supported that view.⁵⁴ Nothing in either the *Scofield* or *Allis-Chalmers* decisions, according to Member Zimmerman, suggests that a reasonable rule restricting resignation would not be upheld by the Supreme Court.⁵⁵ In *Granite State*, Member Zimmerman observed, the Court had prefaced its finding that an employee must be free to refrain from concerted activities by noting that in that case, there were no restraints on the resignation of members, and that the Court was not deciding the extent to which a union could restrict resignation.⁵⁶ Member Zimmerman, therefore, dissented from the part of the opinion which overruled *Dalmo Victor II* and the thirty-day rule which *Dalmo Victor II* established.⁵⁷

⁵⁰ *Id.* at 1337-38, 116 L.R.R.M. at 1263 (Zimmerman, Member, dissenting).

⁵¹ *Id.* at 1340, 116 L.R.R.M. at 1265 (citing *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 88 L.R.R.M. 2660 (1975)) (Zimmerman, Member, dissenting). In *Emporium Capwell*, employees picketed their employer in order to force their employer to bargain with them over conditions of employment as they affected race, after the employees refused to pursue their grievances through the established grievance procedure. 420 U.S. at 55-56, 88 L.R.R.M. at 2662-63. The employer discharged the employees. *Id.* at 56, 88 L.R.R.M. at 2663. In a suit against the employer for violating section 8(a)(1) of the Act by interfering with employees' section 7 rights, the Supreme Court upheld the discharge. *Id.* at 70-73, 88 L.R.R.M. at 2668-69. Although a no-strike provision was in effect, the Court based its decision on the principle that the majority rules through the exclusive representative of employees in the unit. *Id.* at 62, 88 L.R.R.M. at 2665. The Court found that the interests of the union in presenting a united front to the employer on bargainable issues outweighed the employees' interests here, although it recognized the employees' legitimate purpose of battling discrimination. *Id.* See also *Pattern Makers League of North America v. NLRB*, 724 F.2d 57, 115 L.R.R.M. 2264 (7th Cir. 1983). According to Member Zimmerman, the Seventh Circuit decision, which the majority of the Board in *Neufeld Porsche-Audi* cited to support their conclusion that section 7 rights were absolute relative to union rights, acknowledged the existence of both union and employee interests, but in that case properly found that the interests of employees outweighed those of the union. *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1339, 116 L.R.R.M. at 1264 (Zimmerman, Member, dissenting).

⁵² 409 U.S. 213, 81 L.R.R.M. 2853 (1972).

⁵³ *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1338, 116 L.R.R.M. at 1263 (Zimmerman, Member, dissenting).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* In *Granite State*, the Court stated: "[w]e do not now decide to what extent the contractual relationship between the union and member may curtail the freedom to resign. But where, as here, there are no restraints on the resignation of members, we conclude . . ." that the employee's section 7 rights outweigh the union's interest in solidarity. 409 U.S. at 217-18, 81 L.R.R.M. at 2855.

Member Zimmerman disagreed with the *Neufeld Porsche-Audi* majority's interpretation of the Supreme Court's decision in *Granite State*. *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1338-39, 116 L.R.R.M. at 1263-64 (Zimmerman, Member, dissenting). Unless the language of the *Granite State* decision is interpreted to imply that the Court would sanction a reasonable union rule restricting resignation by its members, Member Zimmerman argued, the Court's language becomes superfluous. *Id.* at 1338-39, 116 L.R.R.M. at 1264 (Zimmerman, Member, dissenting).

⁵⁷ 270 N.L.R.B. at 1340, 116 L.R.R.M. at 1265 (Zimmerman, Member, dissenting).

The NLRB, in *Neufeld Porsche-Audi*, held that any union restriction on resignation was invalid, and that attempted enforcement of such a restriction violated section 8(b)(1)(A) of the Act.⁵⁸ The Board's decision, however, may not be consistent with the NLRA's stated goal of encouraging collective bargaining in order to promote industrial peace,⁵⁹ because it upsets the balance among employee, employer, and union interests that national labor policy seeks to achieve. The NLRB's position that any union restriction on resignation is unlawful, therefore, may not be supported by the courts.

In the Ninth Circuit, for example, the NLRB's decision to prohibit any union restrictions on resignation will not likely be accepted. The Ninth Circuit in *Machinists Local 1327 v. NLRB*⁶⁰ held that even the *Dalmo Victor II* thirty-day standard, which the Board overruled in *Neufeld Porsche-Audi*, unreasonably restricted unions from enforcing valid membership rules and thus frustrated federal labor policy.⁶¹ The Ninth Circuit noted that the national labor policy is based upon employees acting collectively through an exclusive bargaining representative, and that section 8(b)(1)(A) reserves to unions the power to make reasonable rules regarding retention and acquisition of membership.⁶²

The *Machinists* court recognized that *Scofield* established the proper test for determining when an "internal" union rule is reasonable.⁶³ *Scofield* requires that a union rule pertain to a legitimate union concern, violate no policy underlying the labor laws enacted by Congress, and be reasonably enforced against union members who "may leave the union and escape the effects of the rule."⁶⁴ The Ninth Circuit, unlike the NLRB, however, found that a union rule, which restricted resignations for fourteen days prior to a strike and during the entire strike period by fining members who resigned and returned to work with the struck employer, met all three portions of the *Scofield* test.⁶⁵

In applying the *Scofield* test, the Ninth Circuit first found that the union in *Machinists Local 1327 v. NLRB* had a legitimate interest in controlling resignations because post-resignation strike breaking threatens the union's existence and breaches an implied

⁵⁸ *Id.* at 1336, 116 L.R.R.M. at 1262.

⁵⁹ 29 U.S.C. § 151 (1982). Section 1 of the Act provides in pertinent part:

The inequality of bargaining power between employees who do not possess full freedom of association . . . and employers . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions . . .

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by . . . restoring equality of bargaining power between employers and employees . . .

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

⁶⁰ 725 F.2d 1212, 115 L.R.R.M. 2972 (9th Cir. 1984).

⁶¹ *Id.* at 1215, 115 L.R.R.M. at 2974.

⁶² *Id.* at 1215-16, 115 L.R.R.M. at 2975.

⁶³ *Id.* at 1216, 115 L.R.R.M. at 2975.

⁶⁴ *Scofield*, 394 U.S. at 430, 70 L.R.R.M. at 3110.

⁶⁵ *Machinists*, 725 F.2d at 1217, 115 L.R.R.M. at 2975.

promise of loyalty to those fellow workers who desire to strike.⁶⁶ Second, continued the court, both the employees' right to resign and the union's interest in making rules regarding acquisition and retention of membership are provided for in the NLRA.⁶⁷ Because both interests have been "imbedded" in the labor laws for many years, the Ninth Circuit stated, neither the employees' right nor the union's interest can "override" the other — both must be accommodated.⁶⁸ Third, the Ninth Circuit found union restrictions on resignation not only reasonable, but also vital to the interests of the union in presenting a united front to the employer and in giving meaning to the terms of the contract between the union and its members.⁶⁹ Union members were still free to resign; the union could only reasonably restrict the time when resignations became effective.⁷⁰

The Ninth Circuit, therefore, is unlikely to follow the Board's decision in *Neufeld Porsche-Audi* to prohibit union restrictions on resignation. The NLRB's determination in *Neufeld Porsche-Audi* that employee statutory section 7 rights necessarily outweigh any union interests⁷¹ is inconsistent with the Ninth Circuit's decision that while an employee has a section 7 right to resign, it is also reasonable for the union to adopt rules which reasonably restrict resignations and penalize a member for breaching a duty to refrain from strike-breaking.⁷² Accordingly, the Ninth Circuit probably will continue to permit such restrictions, provided that they are reasonable.

Not only is the Ninth Circuit unlikely to follow the Board's ruling in *Neufeld Porsche-Audi* that any union restriction on resignation is invalid, but the Board's decision may also conflict with the Supreme Court's analysis of federal labor policy. The Supreme Court has held that employees' rights to engage in section 7 activity are not absolute under the NLRA, as the Board seemed to imply, but are sometimes subordinate to the interests of the union in presenting a united front in bargaining and in maintaining its bargaining power as a group.⁷³ Indeed, the Court has stated that sections 7 and 8(b)(1)(A) of the Act should be interpreted in view of the fact that they are but two of many interwoven sections in a complex Act, and mindful of the manifest purpose of Congress to fashion a coherent national labor policy.⁷⁴

In applying the *Scofield* test, however, the Board determined that regardless of their legitimacy, union interests in reasonably restricting resignations are always subordinate to the statutory rights of employees.⁷⁵ Such a determination is at odds with the Supreme Court's method of interpreting the Act with a view toward the underlying purposes of the NLRA. Accordingly, employee interests should not always prevail but should be balanced with union interests.

⁶⁶ *Id.* at 1217, 115 L.R.R.M. at 2976.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1218, 115 L.R.R.M. at 2976-77.

⁷⁰ *Id.*

⁷¹ *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1334, 116 L.R.R.M. at 1261.

⁷² *Machinists*, 725 F.2d at 1217-18, 115 L.R.R.M. at 2976-77.

⁷³ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 70, 88 L.R.R.M. 2660, 2665 (1975). For a discussion of this case and its balancing of union and employee interests, see *supra* note 51 and accompanying text. See also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338, 14 L.R.R.M. 501, 504-05 (1944) (Supreme Court recognized concept of majority rule, and that in practice, the concept might result in some individuals losing rights).

⁷⁴ *Allis-Chalmers*, 388 U.S. at 179-80, 65 L.R.R.M. at 2450.

⁷⁵ *Neufeld Porsche-Audi*, 270 N.L.R.B. at 1334, 116 L.R.R.M. at 1261.

Furthermore, the Board's application of the *Scofield* test in finding that any union restriction on resignation is unlawful ignores the Supreme Court's decision in *Allis-Chalmers*, upon which the *Scofield* test is based.⁷⁶ In *Allis-Chalmers*, the Court recognized as central to the federal labor policy the chosen union's power to "protect against erosion of its status . . . through reasonable discipline of members who violate rules and regulations governing membership."⁷⁷ In granting employees the right to refrain from union activity in section 7 and prohibiting unions from interfering with the exercise of that right, Congress, according to the Supreme Court, did not intend to "strip unions of the power to fine members for strike breaking."⁷⁸ By summarily finding that union interests are always to be subordinated to those of individual employees, and thus prohibiting any restrictions on resignation by union members, the Board in *Neufeld Porsche-Audi* has in effect contradicted the Supreme Court's decision in *Allis-Chalmers* to balance employee and union interests which conflict.⁷⁹ Because the Board's decision in *Neufeld Porsche-Audi* upsets the intended balance of employee, employer, and union interests, and contradicts the Supreme Court's policy statement in *Allis-Chalmers*, the Board's decision should not be followed by the courts.

In sum, the NLRB ruled in *Neufeld Porsche-Audi*, that a union may no longer impose any restriction on its members' right to resign, and expressly overruled the thirty-day standard for union restrictions on resignations established in *Dalmo Victor II*. The *Neufeld Porsche-Audi* decision, however, is not likely to be accepted by the courts. The Ninth Circuit has expressly refused to adopt even the thirty-day rule, holding that if a union rule meets the *Scofield* test, the rule will be upheld. The second portion of the *Scofield* test requires that the union rule not impair fundamental policies underlying the labor laws. The Ninth Circuit, unlike the Board, interpreted that requirement as compelling a balancing test between employee rights and union rights, and found that a union's interest in rules restricting resignation outweighs employees' section 7 rights to refrain from union activity when the rule is reasonable. The Board in *Neufeld Porsche-Audi*, in contrast, stated that employees' section 7 rights to refrain from concerted activities are absolute. The Ninth Circuit interpreted the third element of the *Scofield* test, which states that union rules be "reasonably enforced against union members who are free to leave the union and escape the rule,"⁸⁰ as not prohibiting union rules which reasonably restricted resignations.⁸¹ The Ninth Circuit's finding that reasonable union restrictions on resignation are not only permissible but vital to the existence of the union is more consistent with national labor policy. A reasonable restriction on resignation does not prevent a member from resigning, as the Board's decision in *Neufeld Porsche-Audi* implies, but merely delays the effectiveness of the resignation, giving the union time to adjust its bargaining strategy, especially during a strike. Finally, section 8(b)(1)(A) provides that while unions are prohibited from interfering with an employee's exercise of section 7 rights, such a prohibition "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein"⁸²

⁷⁶ *Scofield*, 394 U.S. at 428-32, 70 L.R.R.M. 3107-08.

⁷⁷ *Allis-Chalmers* 388 U.S. at 181, 65 L.R.R.M. at 2451.

⁷⁸ *Id.* at 183, 65 L.R.R.M. at 2452.

⁷⁹ *Id.*

⁸⁰ *Scofield*, 394 U.S. at 430, 70 L.R.R.M. at 3108.

⁸¹ *Machinists*, 725 F.2d at 1217-18, 115 L.R.R.M. at 2976-77.

⁸² 29 U.S.C. § 158(b)(1)(A) (1982).

Because the Ninth Circuit's analysis is more consistent with both the provisions of the NLRA and the Supreme Court's method of balancing conflicting interests, it is that analysis which is likely to be followed by other courts. If the Supreme Court does resolve this issue in the future, the Court will probably find *Neufeld Porsche-Audi* inconsistent with the principle established in *Allis-Chalmers* and its progeny allowing unions to discipline their members. Without some reasonable means to regulate both acquisition and retention of membership, the union's right to discipline its members is essentially a nullity. Accordingly, if the issue reaches the Supreme Court, it will likely overrule *Neufeld Porsche-Audi*.

III. CONCERTED ACTIVITY

A. **Maintaining the Jurisdictional Restrictions of the Norris-LaGuardia Act*: Briggs Transportation Company v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America¹

The Norris-LaGuardia Act² removes the federal courts' jurisdiction in labor cases in which a party seeks an injunction enjoining any union activity which disputes terms and conditions of employment.³ Congress enacted this provision primarily to prevent federal courts from restricting the legitimate exercise of rights of American workers that were created and are protected by the National Labor Relations Act (NLRA).⁴ The Norris-LaGuardia Act expressly applies to all courts of the United States,⁵ but after the Supreme Court's recent decision in *NLRB v. Bildisco and Bildisco*,⁶ there is some question whether the Norris-LaGuardia Act applies in labor disputes arising out of bankruptcy proceedings. In *Bildisco*, the Supreme Court allowed a bankruptcy trustee to reject collective bargaining agreements that had been entered into by the debtor filing for bankruptcy.⁷ In the first part of the two part *Bildisco* decision, the Court held that a bankruptcy trustee's power to reject executory contracts under section 365(a) of the Bankruptcy Code⁸ included the power to reject collective bargaining agreements.⁹ In addition, reasoning that the NLRA's provisions are subordinated to the "exigencies of bankruptcy,"¹⁰ the *Bildisco* Court held that parties seeking the bankruptcy court's permission to reject union contracts need not comply with the NLRA's procedures for mid-term contract modification.¹¹

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¹ 739 F.2d 341, 116 L.R.R.M. 3169 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 295 (1984).

² 29 U.S.C. §§ 101-115 (1982).

³ 29 U.S.C. §§ 101, 113 (1982).

⁴ *Briggs Transp. Co. v. International Bhd. of Teamsters*, 739 F.2d 341, 344, 116 L.R.R.M. 3169, 3171 (8th Cir. 1984). The NLRA is set out in 29 U.S.C. §§ 151-169 (1982).

⁵ 29 U.S.C. § 101 (1982).

⁶ 104 S. Ct. 1188, 115 L.R.R.M. 2805 (1984).

⁷ *Id.* at 1196-97, 115 L.R.R.M. at 2812-13.

⁸ 11 U.S.C. § 365(a) (1982). Section 365(a) provides: "Except as provided in section 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."

⁹ 104 S. Ct. at 1196-97, 115 L.R.R.M. at 2812-13.

¹⁰ *Id.* at 1200, 115 L.R.R.M. at 2815.

¹¹ *Id.* at 1196-97, 115 L.R.R.M. at 2813. The NLRA's contract modification procedures are set out in 29 U.S.C. § 158(d) (1982).

The *Bildisco* decision, however, left several questions regarding contract modification in bankruptcy unanswered. For example, the Court in *Bildisco* did not address the question of what actions unions may lawfully take to protest legally proper contract modifications that are accomplished through bankruptcy. Similarly, the *Bildisco* Court did not address the issue of what powers courts have in reviewing union actions protesting bankruptcy modifications of collective bargaining agreements. Finally, the *Bildisco* decision left questions open with respect to courts' jurisdiction to issue injunctions where a union contract has been modified in a bankruptcy proceeding. It is unclear from the *Bildisco* decision whether the Norris-LaGuardia Act's jurisdictional restrictions still apply in situations where a union is protesting bankruptcy abrogations of collective bargaining agreements.

During the *Survey* year, the United States Court of Appeals for the Eighth Circuit, in *Briggs Transportation Company v. International Brotherhood of Teamsters*,¹² held that it had no jurisdiction to enjoin employees from protesting a modification of their collective bargaining agreement.¹³ The *Briggs* court did not question the legality of the Briggs Company's contract abrogation because the company's actions were proper under *Bildisco*.¹⁴ The court found, however, that the Norris-LaGuardia Act removed the court's jurisdiction to enjoin any union protests disputing terms and conditions of employment.¹⁵ Thus, according to the *Briggs* court, the Norris-LaGuardia Act's jurisdictional restrictions are not subordinated to the Bankruptcy Code and unions are free to protest any contract abrogations which are lawful under *Bildisco*.¹⁶

In *Briggs*, the Briggs Transportation Company, a motor transportation company with a history of financial problems, laid off 900 of its employees and filed a petition for reorganization under Chapter 11 of the Bankruptcy Code.¹⁷ After filing the bankruptcy petition, Briggs closed 35 of its 57 terminals and laid off approximately 800 more employees.¹⁸ Of Briggs' remaining 400 employees, about 300 were represented by the unions who were the defendants in *Briggs*.¹⁹

On several occasions between January and August, 1983, Briggs Company representatives met with union officials to attempt to reduce its obligations under various collective bargaining agreements with the unions.²⁰ After these negotiations failed, the Briggs Company filed a motion in the bankruptcy court for authority to abrogate its collective bargaining contracts under section 365(a) of the Bankruptcy Code.²¹ Upon the bankruptcy court's granting of this motion, the Briggs Company immediately announced a unilateral reduction in its employees' wages, benefits and terms of employment.²² The next week, the employee members of the International Brotherhood of Teamsters began a strike and stationed pickets at many Briggs terminals.²³ Briggs then agreed to postpone

¹² 739 F.2d 341, 116 L.R.R.M. 3169 (8th Cir.), cert. denied, 105 S. Ct. 295 (1984).

¹³ *Id.* at 344, 116 L.R.R.M. at 3171.

¹⁴ *Id.*

¹⁵ *Id.* at 343-44, 116 L.R.R.M. at 3170-71.

¹⁶ *Id.* at 344, 116 L.R.R.M. at 3171.

¹⁷ *Id.* at 342, 116 L.R.R.M. at 3169.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 342, 116 L.R.R.M. at 3169-70.

²¹ *Id.* at 342, 116 L.R.R.M. at 3170.

²² *Id.*

²³ *Id.*

the effective date of the changes, in exchange for the Teamsters ending the strike.²⁴ When the strike was suspended, Briggs and the union again began to negotiate. These subsequent negotiations also broke off, and the union resumed picketing.²⁵

On April 20, 1984, Briggs filed suit in the United States District Court for the District of Minnesota, seeking, *inter alia*, to enjoin the union from picketing and displaying signs within 2000 feet of Briggs' terminals.²⁶ Briggs claimed the activities interfered with the contract abrogation that had been approved by the bankruptcy court.²⁷ The district court found for the defendant, thereby denying Briggs the relief it had requested.²⁸ In refusing to issue the requested injunction, the district court found that the Norris-LaGuardia Act²⁹ limited the courts' power to issue injunctions in labor disputes over terms and conditions of employment.³⁰ The district court also held that *Bildisco*, while requiring a subordination of NLRA protections to the Bankruptcy Code, did not require a similar subordination of the Norris-LaGuardia Act to the bankruptcy laws.³¹ The court stated that although *Bildisco* allowed Briggs to cut its employees' wages, *Bildisco* did not prohibit the employees from complaining.³²

On appeal, the Eighth Circuit affirmed the district court's order refusing to grant plaintiff Briggs an injunction against the union. In affirming the district court's decision, the Eighth Circuit determined that neither Congress nor the Supreme Court had subordinated Norris-LaGuardia's jurisdictional restrictions to the Bankruptcy Code.³³ The court concluded that neither the Bankruptcy Code nor *Bildisco* removed the jurisdictional restrictions that the Norris-LaGuardia Act placed on federal courts in labor disputes.³⁴ The court noted that the parties cited no provision of the Bankruptcy Code nor anything in its legislative history to indicate that Congress intended the Bankruptcy Code to lift the Norris-LaGuardia restrictions.³⁵ In addition, the court approvingly cited decisions from the Second and Sixth Circuits which had found that certain provisions of the bankruptcy laws did not lift the jurisdictional restrictions of Norris-LaGuardia.³⁶ In both *Crowe & Associates, Inc. v. Bricklayers & Masons Union Local No. 2*³⁷ and *Petrusch v. Teamsters Local 317*,³⁸ the courts found no congressional intent to subordinate the Norris-La-

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 342-43, 116 L.R.R.M. at 3170. Briggs also sought to enjoin the defendants from interfering with the company's normal business operations, the local and over-the-road movement of the company's freight and equipment, the company's real and personal property, and the company's employees, agents, customers, suppliers, and vendors and their families. *Id.* Two days after filing the motion in the district court seeking an injunction, the Briggs Company unilaterally implemented the postponed changes in terms of employment. *Id.* at 343, 116 L.R.R.M. at 3170.

²⁷ *Id.* at 342, 116 L.R.R.M. at 3170.

²⁸ Briggs Transp. Co. v. International Bhd. of Teamsters, 40 Bankr. 972, 975, 116 L.R.R.M. 2241, 2244 (D. Minn. 1984).

²⁹ *Id.* at 973, 116 L.R.R.M. at 2244 (citing 29 U.S.C. §§ 101, 113(c) (1982)).

³⁰ *Id.*

³¹ *Id.* at 974, 116 L.R.R.M. at 2244.

³² *Id.* at 975, 116 L.R.R.M. at 2244.

³³ 739 F.2d at 343-44, 116 L.R.R.M. at 3170-71.

³⁴ *Id.*

³⁵ *Id.* at 343, 116 L.R.R.M. at 3170-71.

³⁶ *Id.* at 343-44, 116 L.R.R.M. at 3171.

³⁷ 713 F.2d 211, 114 L.R.R.M. 2024 (6th Cir. 1984) (per curiam).

³⁸ 667 F.2d 297, 109 L.R.R.M. 2197 (2d Cir.) (per curiam), *cert. denied*, 456 U.S. 974 (1984).

Guardia Act to the Bankruptcy Code.³⁹ Both the *Crowe* and *Petrusch* courts noted that the legislative history of the Bankruptcy Reform Act of 1978⁴⁰ did not even mention the Norris-LaGuardia Act.⁴¹ In addition, the *Petrusch* court pointed out that the Commission on the Bankruptcy Laws of the United States⁴² also did not discuss any possible effect on Norris-LaGuardia.⁴³ Both the decisions in *Crowe* and *Petrusch*, after examining the Bankruptcy Code and its legislative history, concluded that Congress did not intend to implicitly and silently repeal Norris-LaGuardia through enactment of section 362 of the Bankruptcy Code.⁴⁴ Although the bankruptcy provision at issue in *Briggs* differed from the provision considered by the Second and Sixth Circuits, the *Briggs* court agreed that Congress would not have silently repealed the Norris-LaGuardia Act through the Bankruptcy Code.⁴⁵

In addition to concluding that Congress did not intend to subordinate the Norris-LaGuardia Act to the Bankruptcy Code, the Eighth Circuit also held that the Supreme Court's *Bildisco* decision did not require a subordination of the Norris-LaGuardia Act to bankruptcy provisions.⁴⁶ The *Bildisco* decision, according to the Eighth Circuit, does not remove the jurisdictional restrictions imposed by Norris-LaGuardia.⁴⁷ According to the *Briggs* court, the *Bildisco* holding simply allows the bankruptcy court to reject collective bargaining agreements as part of a Chapter 11 reorganization.⁴⁸ The second part of *Bildisco*, as interpreted by *Briggs*, also holds that employers do not commit an unfair labor practice under section 8(a) of the NLRA by modifying collective bargaining agreements after filing for bankruptcy but prior to court approval of a contract abrogation.⁴⁹ In reaching this interpretation of *Bildisco*, the *Briggs* court stated that the Supreme Court did not mention Norris-LaGuardia nor imply that the Norris-LaGuardia Act should be repealed in bankruptcy reorganization cases such as *Briggs* where union contracts are modified.⁵⁰ The court reasoned that it would unnecessarily limit American workers' ability to legitimately exercise their rights if it were to interpret *Bildisco* as repealing the Norris-LaGuardia jurisdictional restrictions.⁵¹

³⁹ *Crowe*, 713 F.2d at 214-15, 114 L.R.R.M. at 2027; *Petrusch*, 667 F.2d at 299-300, 109 L.R.R.M. at 2198.

⁴⁰ REPORT OF THE COMM. ON THE JUDICIARY, H.R. REP. NO. 95-595, 95th Cong., 1st Sess. (1977); NOTES OF THE COMM. ON THE JUDICIARY, S. REP. NO. 95-989, 95th Cong., 2d Sess. 54, reprinted in 5 U.S. CODE CONG. & AD. NEWS 5788, 5840-41 (1978).

⁴¹ *Crowe*, 713 F.2d at 214-15, 114 L.R.R.M. at 2027; *Petrusch*, 667 F.2d at 299-300, 109 L.R.R.M. at 2198.

⁴² REPORT OF THE COMM. ON BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess. (1973).

⁴³ 667 F.2d at 300, 109 L.R.R.M. at 2198.

⁴⁴ *Crowe*, 713 F.2d at 214-15, 114 L.R.R.M. at 2027; *Petrusch*, 667 F.2d at 299-300, 109 L.R.R.M. at 2198.

⁴⁵ 739 F.2d at 344, 116 L.R.R.M. at 3171. The decisions cited by the Eighth Circuit both involved the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, and both decisions found that section 362 did not alter the jurisdictional limitations imposed by Norris-LaGuardia. See *Crowe*, 713 F.2d at 214-15, 114 L.R.R.M. at 2027; *Petrusch* 667 F.2d at 299-300, 109 L.R.R.M. at 2198.

⁴⁶ 739 F.2d at 344, 116 L.R.R.M. at 3171.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

After reaching its decision that neither Congress nor the Supreme Court intended to subordinate the Norris-LaGuardia Act to the Bankruptcy Code, the *Briggs* court indicated that two additional factors supported its affirming the district court's decision. First, the court stated that if any union conduct violated provisions of state or federal law, the Briggs Company would have the same remedies that other employers have under existing statutory and case law.⁵² Second, the court found that since any Briggs Company employees who strike out of dissatisfaction with wages, benefits, or terms of employment are economic strikers, the Briggs' Company could respond in any legal manner to continue its operations.⁵³

The *Briggs* decision refusing to ease the jurisdictional restrictions of the Norris-LaGuardia Act is consistent with the current positions of both Congress and the Supreme Court. The *Briggs* court correctly observed that nothing in the Bankruptcy Code or its legislative history indicates that Congress intended to use bankruptcy provisions to repeal Norris-LaGuardia.⁵⁴ *Briggs'* reliance on two cases from other circuits, *Crowe* and *Petrusch*, is well placed because both cases found no congressional intent to subordinate the Norris-LaGuardia Act to the Bankruptcy Code.⁵⁵ If Congress did not intend to repeal Norris-LaGuardia through the bankruptcy provisions considered by *Crowe* and *Petrusch*,⁵⁶ it was reasonable for the *Briggs* court to conclude that Congress would similarly not have intended to repeal Norris-LaGuardia through section 365(a) of the Bankruptcy Code.

The *Briggs* court also held that the Supreme Court's decision in *Bildisco* does not require an easing of the Norris-LaGuardia Act's jurisdictional restrictions.⁵⁷ Although the *Briggs* discussion of *Bildisco* is somewhat limited, the *Briggs* court's holding is consistent with *Bildisco*. As the *Briggs* court recognized, it is unlikely that the *Bildisco* Court intended to subordinate the Norris-LaGuardia Act to the Bankruptcy Code because *Bildisco* neither discussed Norris-LaGuardia nor implied that Norris-LaGuardia should not apply in bankruptcy reorganizations.⁵⁸ Because the *Bildisco* Court did not indicate that its decision would affect the application of the Norris-LaGuardia Act, courts should continue to enforce the Act. Thus, the *Briggs* court, concluding that it had no jurisdiction to issue an injunction, remained consistent with the mandates of Norris-LaGuardia.⁵⁹

As a consequence of the *Briggs* decision, union workers may continue activities which protest terms and conditions of employment without having those activities enjoined by

⁵² *Id.*

⁵³ *Id.* There are generally two kinds of strikes which are permitted under the National Labor Relations Act — economic strikes and unfair labor practice strikes. 2 C. MORRIS, *THE DEVELOPING LABOR LAW*, 1007-11 (2d ed. 1983). An unfair labor practice strike is a strike initiated in whole or in part in response to an unfair labor practice of the employer, while an economic strike is one that attempts to enforce economic demands on the employer. *Id.* The distinction is important because only unfair labor practice strikers have an absolute right to reinstatement. *Id.* Employers facing economic strikes may hire permanent replacements for the strikers to continue operations and will only have to reinstate economic strikers if vacancies exist. *Id.*

⁵⁴ 739 F.2d at 344, 116 L.R.R.M. at 3170-71.

⁵⁵ *Crowe*, 713 F.2d at 214-15, 114 L.R.R.M. at 2027; *Petrusch*, 667 F.2d at 299-300, 109 L.R.R.M. at 2198.

⁵⁶ *Crowe*, 713 F.2d at 214-15, 114 L.R.R.M. at 2026; *Petrusch*, 667 F.2d at 299-300, 109 L.R.R.M. at 2198.

⁵⁷ 739 F.2d at 344, 116 L.R.R.M. at 3171.

⁵⁸ *Id.*

⁵⁹ *See id.*

judicial injunctions.⁶⁰ After *Briggs*, the power to protest changes in employment conditions remains intact even in situations where the changes in employment conditions have been accomplished through legal methods approved of by the Supreme Court.⁶¹ Such a decision is consistent with the Norris-LaGuardia Act, the purpose of which is to remove the power courts had to prevent American workers from legitimately exercising their rights.⁶² The *Briggs* result is not anomalous simply because employers may be subjected to employee protests for actions which are unquestionably legal. Indeed, present state and federal laws currently allow workers to strike to protest employer actions which are legal.⁶³ The *Briggs* decision does not change the legal status of any actions taken by an employer in reliance on bankruptcy provisions, but instead merely attempts to maintain the equality of bargaining power between labor and management by maintaining the jurisdictional restrictions of the Norris-LaGuardia Act.

IV. FIRST AMENDMENT DECISIONS

A. **Constructive Persuader Agreements Require Disclosure Under the LMRDA: Master Printers of America v. Donovan*¹

Under section 203(b) of the Labor-Management Reporting and Disclosure Act (LMRDA or Act), any person who enters into an agreement with an employer to engage in union or open shop "persuader activity" must disclose that arrangement by filing with the Secretary of Labor.² The Act describes the object of "persuader activity" as being to directly or indirectly "persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing."³ A person meeting the LMRDA's criteria must file a detailed statement of the terms and conditions of such an arrangement within thirty days of entering the agreement.⁴ In addition, a person who agrees with an em-

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Upon expiration of a collective bargaining agreement, for example, an employer may attempt to establish new wage levels or new terms and conditions of employment. Even though such an attempt to change economic terms of employment is perfectly legal, employees may still legally protest the employer's action through a strike. See C. MORRIS, *supra* note 53, at 1011-14.

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¹ 751 F.2d 700, 118 L.R.R.M. 2049 (4th Cir. 1984).

² 29 U.S.C. § 433(b) (1982). Section 203(b) of the Act (codified at § 433(b)) provides:

Every person who pursuant to any agreement with an employer undertakes activities where an object thereof is, directly or indirectly —

(1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; . . . shall file within thirty days after entering into such agreement . . . a report . . . containing . . . a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement a report . . . containing a statement . . . of its receipts . . . on account of labor relations advice or services, designating the sources thereof, and . . . its disbursements.

³ *Id.*

⁴ *Id.*

ployer to perform persuader activity must file an annual report accounting for receipts from employers for labor relations advice or services and connected disbursements.⁵ The Act provides an exemption for persons agreeing to perform only an advisory function to employers regarding methods of discouraging establishment of a union shop, as long as no attempt is made to persuade employees.⁶

The LMRDA has been interpreted broadly, as remedial legislation.⁷ The Fourth, Fifth and Seventh Circuits have construed section 203(b) of the Act as regulating a suspect group, "persuaders," rather than merely a suspect activity, "persuading."⁸ These courts have reasoned that the legislative history of the Act supports the view that Congress connected corruption in the labor field with activities of management persuaders, and determined to regulate them as a group, rather than to address isolated instances of persuader activity.⁹ The congressional purpose for enacting the Act was found to be not only deterrence of actual corruption or the appearance of corruption, but the enablement of investigative methods in an area where there has been a demonstrated propensity for wrongdoing.¹⁰

⁵ 29 U.S.C. § 433(b) (1982).

⁶ 29 U.S.C. § 433(c) (1982) provides: "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice"

⁷ See, e.g., *Price v. Wirtz*, 412 F.2d 647, 71 L.R.R.M. 2354 (5th Cir. 1969). In *Price*, the Fifth Circuit construed the advisory exemption so narrowly as to render it vestigial, while the enabling provisions were interpreted liberally. *Id.* at 652, 71 L.R.R.M. at 2356 (Dell, J., dissenting). The issue in *Price* was whether, by engaging in persuader activity with one employer, a labor consultant thereby lost his exemption as to other employers with whom he performed only an advisory function which was otherwise nonreportable. *Id.* at 648, 71 L.R.R.M. 2354-55. The *Price* court found that even one instance of persuader activity with one employer caused a consultant to forfeit his exemption, even as to those agreements with other employers which involved no persuader activity. *Id.* at 650, 71 L.R.R.M. at 2357.

The Fourth Circuit interpreted the section in the same fashion, construing the § 433(c) exemption as a gloss which merely affirmed that a consultant who strictly limited his function to that of advice-giver in all cases did not, by giving that advice, subject himself to disclosure obligations. *Douglas v. Wirtz*, 353 F.2d 30, 34, 60 L.R.R.M. 2264, 2267 (4th Cir. 1965).

The Seventh Circuit also endorsed this view in affirming *Donovan v. Master Printers of America*, where the district court held that a trade association which performed advisory functions for 797 members and persuasion activity for three members was required to account annually for all 800 members. 532 F. Supp. 1140, 1143, 109 L.R.R.M. 3215, 3217 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370, 112 L.R.R.M. 2738 (7th Cir. 1983). The district court acknowledged that, if not for the three instances of persuader activity, the 797 members receiving only advice need not have been reported. *Id.* at 1143, 109 L.R.R.M. at 3218. The district court, however, treated the first instance of persuader activity on the part of a labor consultant as a trigger compelling full disclosure of information otherwise nonreportable under section 433(c). *Id.* The district court rejected the argument that this construction of the Act violated first amendment rights of speech or association, or that it rendered the Act unconstitutionally vague. *Id.* at 1146-49, 109 L.R.R.M. at 3221-25.

⁸ See *supra* note 7 and cases discussed therein. These courts have endorsed the view that one instance of persuader activity between a labor consultant and any employer triggers annual reporting requirements under section 203(b), even as to those employers who have not agreed to persuader activity, but who have received only "advice" which otherwise would be nonreportable.

⁹ See *supra* note 7 and cases discussed therein.

¹⁰ See *supra* note 7 and cases discussed therein. In light of these assumptions and objectives, any consultant who engaged in face-to-face persuader activity on behalf of any employer was viewed by Congress as inherently suspect, and was required to account for all activities, both persuasive and advisory. See *Price v. Wirtz*, 412 F.2d 647, 649-51, 71 L.R.R.M. 2354, 2555-57 (5th Cir. 1969); *Douglas v. Wirtz*, 353 F.2d 30, 34, 60 L.R.R.M. 2264, 2267 (4th Cir. 1965).

During the *Survey* year, the Fourth Circuit in *Master Printers of America v. Donovan* ruled that requiring a trade association consisting of nonunion employers to disclose arrangements whereby employees of the association's members received an anti-union trade magazine directly from the trade association as part of an outstanding employee program, did not violate the trade association's constitutional rights of speech and association.¹¹ The court found that occasional articles with an anti-union focus in a trade magazine constituted "persuader" activity, even where the subject matter of the articles was theoretical or under the guise of news from around the nation, and did not specifically target employees from a particular shop receiving the publication.¹² The court found no need for face-to-face persuasion where employer members of the trade association knew or should have known the anti-union flavor of the publication and agreed to participate in a program whereby the magazine was mailed directly to outstanding employee craftsmen.¹³

The plaintiff in the case was Master Printers of America (MPA), a trade association composed of about 5,000 nonunion printing companies.¹⁴ One program offered by MPA to its members is the Craftsmanship Program, which recognizes employee expertise and promotes good employee-management relations.¹⁵ Winners of the Craftsmanship Award receive a free subscription to an MPA quarterly magazine called *Insight*, which is delivered directly to the employee's home.¹⁶ *Insight* contains articles of general interest to employees in the printing industry as well as articles which feature the employer's viewpoint.¹⁷ MPA disputed whether these articles expressing the employer's viewpoint constituted persuader material within the meaning of section 203(b), thus subjecting MPA to LMRDA reporting requirements.¹⁸

In 1978, MPA brought suit in federal district court challenging the authority of the Secretary of Labor to require MPA to file reports under section 203(b) of the LMRDA.¹⁹ The Secretary responded by seeking an injunction to compel compliance with the Act.²⁰ The suits were consolidated in the form of cross motions for summary judgment, and the district court granted the Secretary's motion and ordered MPA to comply.²¹ On appeal, the Fourth Circuit reversed and remanded for trial on the issue whether MPA's activities fell within the scope of section 203(b).²² Following a trial, the district court ruled on remand that MPA's activities were covered by the Act.²³

¹¹ *Master Printers of America v. Donovan*, 751 F.2d 700, 713-14, 118 L.R.R.M. 2049, 2059 (4th Cir. 1984).

¹² *Id.* at 703, 118 L.R.R.M. at 2051.

¹³ *Id.*

¹⁴ *Master Printers of America v. Marshall*, 101 L.R.R.M. 2483, 2483 (E.D. Va. 1979), *rev'd and remanded*, 620 F.2d 293, 105 L.R.R.M. 2995 (4th Cir. 1980).

¹⁵ *Id.* Candidates for the program are nominated by their employers and are reviewed by a committee of industry experts before receiving the actual Craftsman Award at an awards banquet. *Id.* at 2483-84.

¹⁶ *Id.* at 2484.

¹⁷ *Master Printers*, 751 F.2d at 702, 118 L.R.R.M. at 2050. Articles discuss technological improvements, trends of products or processes, profit facts, open-shop advantages, human interest stories, and awards events. *Id.*

¹⁸ *Id.* at 702-03, 118 L.R.R.M. at 2050-51.

¹⁹ *Id.* at 701, 118 L.R.R.M. at 2050.

²⁰ *Id.*

²¹ *Master Printers of America v. Marshall*, 101 L.R.R.M. 2483, 2486 (E.D. Va. 1979).

²² *Master Printers of America v. Marshall*, 620 F.2d 293, 293, 105 L.R.R.M. 2995, 2995 (4th Cir. 1980).

²³ *Master Printers of America v. Marshall*, 105 L.R.R.M. 2996, 2998 (E.D. Va. 1980). At issue

MPA then appealed to the Fourth Circuit Court of Appeals, arguing that section 203(b) was unconstitutional because it violated MPA's first amendment rights.²⁴ The court of appeals affirmed the district court's factual findings, but remanded for an initial determination of the constitutional questions.²⁵ On remand for the second time, the district court concluded that section 203(b) was constitutional.²⁶ MPA appealed that decision, and the Fourth Circuit affirmed.²⁷

In its decision to affirm, the court of appeals rejected three arguments with which MPA challenged the constitutionality of section 203(b). First, MPA contended that the Act infringed its first amendment rights of speech and association by creating a substantial deterrent effect on continued MPA membership for numerous employers.²⁸ MPA also argued that the statute was void for vagueness.²⁹ Finally, MPA asserted that the thirty-day reporting requirement of section 203(b) constituted a prior restraint on free speech, because it required compliance prior to publication regardless of when the magazine was actually published or of its actual contents.³⁰

In addressing the first amendment challenge, the court expressed skepticism regarding the speculative "deterrent effect" on MPA membership. It concluded, however, that even if the reporting requirements did infringe to some degree on MPA's first amendment rights, the government interests served by the Act far outweighed the harm suffered.³¹ In arriving at this conclusion, the court exercised "exacting" scrutiny,³² focusing on four factors: the degree of infringement on first amendment rights; the importance of the government interest protected by the Act; whether a substantial relationship existed between the government interest and the information required to be disclosed; and the closeness of the "fit" between the Act and the government interest it purported to further.³³

was whether the members participating in the Craftsmanship Program had entered a persuader agreement with the Master Printers organization. *Id.* at 2996. The court weighed the frequency of persuader articles appearing in the *Insight* magazine from 1973 to 1977 which contained unambiguously anti-union material. *Id.* at 2996-97. The court also found evidence that MPA distributed pamphlets to member employers which described *Insight* as covering subjects such as the advantages of the open shop. *Id.* at 2997.

Other pamphlets sent to employers dealt with advice to employees on how to deal with union organizing drives and how to maintain an open shop. *Id.* The court found that although member employers testified as to lack of subjective intent to enter persuader agreements, the court need not accept that testimony as conclusive. *Id.* In light of the abundance of information afforded employers by MPA, the court refused to accept the employers' asserted lack of awareness. *Id.* at 2998. Thus, the court found a persuader agreement present. *Id.*

²⁴ *Master Printers of America v. Marshall*, 679 F.2d 884, 884, 110 L.R.R.M. 2583, 2583 (4th Cir. 1981).

²⁵ *Id.*

²⁶ *Master Printers of America v. Donovan*, 112 L.R.R.M. 2504, 2508 (E.D. Va. 1982).

²⁷ *Master Printers of America v. Donovan*, 751 F.2d 700, 702, 118 L.R.R.M. 2049, 2050 (4th Cir. 1984).

²⁸ *Id.* at 703, 118 L.R.R.M. at 2051.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* The court cited *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976), for the proper standard of review where compelled disclosure of affiliation with groups engaged in advocacy may infringe upon first amendment rights.

³³ *Master Printers*, 751 F.2d at 703, 118 L.R.R.M. at 2051.

First, the court examined the extent of the "chill" on MPA's first amendment rights.³⁴ The court used the standard established in *NAACP v. Alabama*³⁵ and followed in *Buckley v. Valeo*,³⁶ evaluating whether a likelihood existed that first amendment rights were chilled. This standard, the *Master Printers* court explained, required only a showing of reasonable probability that the compelled disclosure would subject the complainant to threats, harassment or reprisals.³⁷ The court found that the evidence submitted by MPA which attempted to show possible annoyance and harassment demonstrated only a speculative "chill" on MPA members' first amendment rights.³⁸

The court then addressed the second factor, the importance of the government interest served by the Act.³⁹ The court concluded that deterrence of actual corruption and the government's power to inform itself through investigations in order to protect its vital interests were compelling government interests.⁴⁰ The court then examined the legislative history of the LMRDA and determined that the Act grew out of congressional findings that "union busting" management middlemen were conspiring with employers to undermine employee efforts to exercise their collective bargaining rights.⁴¹ According to the court, these congressional findings of corruption and disregard for employee rights led to the enactment of section 203(b) to eliminate improper practices which defeated the policies set forth in the Labor Management Relations Act.⁴² Thus, the court held that if, in fact, MPA suffered minimal infringement of its first amendment rights, that infringement was the consequence of government efforts to protect legitimate and important societal interests.⁴³

The court then stated that the disclosure scheme embodied in section 203(b) was substantially related to the compelling government interests which were the objective of the Act.⁴⁴ Referring to the need for disclosure as "sunlight," the court noted that section 203(b) provided "sunlight" in the area of labor/management relations in several ways.⁴⁵ Comparing the need for "sunlight" in labor/management relations to a similar need in political spending, the court recognized that disclosure helps employees, like voters in an election, to understand the source of information that is distributed to them.⁴⁶ The

³⁴ *Id.* at 704, 118 L.R.R.M. at 2052.

³⁵ 357 U.S. 449, 462-63 (1958) (plaintiff sought disclosure of NAACP's membership list).

³⁶ 424 U.S. 1, 74 (1976) (plaintiff sought disclosure of campaign fund sources and amounts).

³⁷ *Master Printers*, 751 F.2d at 703, 118 L.R.R.M. at 2052 (citing *Buckley*, 424 U.S. at 74).

³⁸ *Id.* at 705, 118 L.R.R.M. at 2053. MPA attempted to show that industry competitors could derive useful competitive information from knowing the amount of dues paid by employer/members of MPA, and that members' fear of this disclosure would result in a membership decline in MPA. *Id.* at 705, 118 L.R.R.M. at 2052. The court, however, found that the type of useful information which could be calculated from knowledge of the dues amount was information already easily accessible to those in the industry (e.g., size, number of employees, whether a shop was unionized). *Id.* Thus, the court refused to take seriously MPA's assertion of fear of declining membership. *Id.* at 705, 118 L.R.R.M. at 2053.

³⁹ *Id.* at 706, 118 L.R.R.M. at 2053.

⁴⁰ *Id.* (citing *Buckley*, 424 U.S. at 67).

⁴¹ *Id.*

⁴² *Id.* at 706, 118 L.R.R.M. at 2054 (citing 29 U.S.C. §§ 401(b), 401(c) (1982)).

⁴³ *Id.* at 707, 118 L.R.R.M. at 2054.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* The court in quoting *Buckley* stated that "[p]ublicity is justly recommended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light is the

court maintained that exposure discourages potential abuse and reduces the appearance of impropriety in an area known to be subject to corruption.⁴⁷ Finally, the court noted that section 203(b) ensures the Secretary of Labor the means to gather information and detect violations.⁴⁸ Thus, the court concluded that 203(b)'s scheme was substantially related to the government interests sought to be served.

The fourth factor addressed by the court in the first amendment test was whether the Act was carefully tailored to achieve its purpose.⁴⁹ MPA contended that the Act was overbroad in two ways: in the number of employers covered; and in the amount of detail required to be reported.⁵⁰ While the number of employers potentially affected by section 203(b) exceeded the number enrolled in the Craftsmanship Program, the court attributed no significance to this disparity.⁵¹ The court determined that Congress believed management persuaders *as a group* were inherently suspect, and therefore required disclosure of a wide range of activities, even some activities which were not improper.⁵² In fact, the court acknowledged that the difficulty of distinguishing persuader from nonpersuader activity in the labor field created a critical need for wide-ranging disclosure.⁵³ The court did note that MPA membership, in and of itself, did not call for disclosure. Only if labor relations advice or persuasion was present, the court concluded, were reporting requirements triggered.⁵⁴

The court maintained that the two-fold aspect of section 203(b) — annual reporting of receipts and disbursements for labor relations advice and services, and the thirty-day, detailed reporting of agreements to persuade — showed that the Act was tailored to serve its purpose.⁵⁵ Those employers who have not entered a persuader agreement (that is, nonparticipants in the Craftsmanship Program) appear only on the annual report, which does not specify the content of advice or designate which employers are members of MPA.⁵⁶ Those employers, however, who have entered the suspect area of actual persuasion through the Craftsmanship Program, the court noted, are subject to disclosure in the more detailed and immediate thirty-day report.⁵⁷ Thus, the court found that the stringency of the exposure was narrowly tailored to the degree of suspect activity, and that MPA's claim of overbreadth was unconvincing.⁵⁸

The court next discussed MPA's vagueness argument.⁵⁹ MPA contended that the term "persuade" was so vague that due process was offended, because it was impossible

most efficient policeman." *Buckley*, 424 U.S. at 67 (quoting L. BRANDEIS, *OTHER PEOPLES' MONEY* 72 (1933)).

⁴⁷ 751 F.2d at 708, 118 L.R.R.M. at 2055.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* MPA pointed out that, although over 5,000 employers would be affected by § 433(b), only 900 were actually participating in the Craftsmanship Program at the time of the suit. *Id.* The 4,100 employers who were nonparticipants in the program, but who potentially received "advice" from the trade union would be subject to disclosure by MPA on the annual report of information which had gone unreported under the "advice" exception, § 433(c).

⁵¹ 751 F.2d at 708, 118 L.R.R.M. at 2055.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 708 n.12, 118 L.R.R.M. at 2055 n.12.

⁵⁵ *Id.* at 709, 118 L.R.R.M. at 2055-56.

⁵⁶ *Id.* at 709, 118 L.R.R.M. at 2056.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

to determine what activity triggered reporting requirements.⁶⁰ The court concluded that the term "persuade" conveyed sufficiently definite warning as to conduct regulated by the statute, when measured by common understanding and practices.⁶¹ The court noted that the term "persuade" only took effect in the context of an agreement between an employer and a consultant, and only when persuasion pursuant to that agreement was aimed at an employee on the subject of collective bargaining or the right to organize.⁶² The court stated that it was unimportant whether an article discussed organizing on a theoretical level or reported the specifics of a particular organizing campaign.⁶³ The crux of the matter, according to the court, was the intention of the employer to agree to persuade employees about the merits of union organizing.⁶⁴ The agreement between MPA and member/employers made anti-union articles discussing a different employer or union applicable to the specific MPA employer and employees.⁶⁵ Thus, the court held that an MPA employer/member's knowledge and tacit approval of the anti-union subject matter contained in *Insight*, whether theoretical or specific, coupled with the employer's permission to allow *Insight* to be distributed to his employees, created an agreement to persuade and required disclosure under section 203(b).⁶⁶

Finally, the court found no merit in MPA's prior restraint claim.⁶⁷ The prior restraint argument was based on the district court's holding that the persuader agreement came into being when an MPA member joined the Craftsmanship Program.⁶⁸ Because a report must be filed within thirty days from the date of the agreement, and because this requirement may occur before *Insight* is actually published, MPA argued that in certain instances it may have to comply when that particular issue of *Insight* contains no persuader material.⁶⁹ MPA argued that requiring a determination in advance of a publication date whether to make the disclosure amounted to a prior restraint on protected speech.⁷⁰ The court rejected MPA's argument because prior restraint requires direct restraint on speech and no direct restraint was found in enforcing section 203(b).⁷¹

The *Master Printers* decision clarifies two significant areas in the enforcement of section 203(b). First, the court explained the factors which were required to be present in order to hold that an employer had constructively agreed to persuade with a third party, and was thus subject to section 203(b) disclosure requirements. The first factor was whether an employer knew or should have known of the anti-union content of

⁶⁰ *Id.* at 710, 118 L.R.R.M. at 2057. This asserted ambiguity offended due process in two ways according to MPA. First, MPA offered evidence that the difficulty of ascertaining what constituted persuasion had resulted in "self-censorship" by *Insight* writers who wished to steer far clear of the persuasion zone. *Id.* Second, MPA argued that the subjectivity of the term "persuade" lent itself to arbitrary enforcement because the standards for application of the statute were unclear. *Id.* at 710, 118 L.R.R.M. at 2056.

⁶¹ *Id.* at 711, 118 L.R.R.M. at 2057.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 712 n.13, 118 L.R.R.M. at 2057-58 n.13.

⁶⁶ *Id.* at 712, 118 L.R.R.M. at 2058. The court considered MPA's suggestion that *Insight* be regarded like the *Wall Street Journal* or the *Reader's Digest* to be "preposterous". *Id.*

⁶⁷ *Id.* at 713, 118 L.R.R.M. at 2058.

⁶⁸ *Id.* at 712, 118 L.R.R.M. at 2058.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 713, 118 L.R.R.M. at 2058.

materials which reached his employees.⁷² Second, the material must have reached the employees directly from a third party, not through the employer.⁷³ In other words, an employer may not plead ignorance of the content of materials which reached his employees with the employer's permission.⁷⁴

In addition, the court made clear that materials need not be addressed specifically to a particular employer or a particular union to be classified as persuasive.⁷⁵ Materials which deal with organization or collective bargaining on a theoretical level fall within the section 203(b) definition of persuader activity.⁷⁶ Materials disguised as "newsworthy" comment on the plight of unions across the country, and even articles which describe factual events concerning a specific union or employer fall within the section 203(b) definition of persuasion.⁷⁷ These materials, however, must be given to employees pursuant to an agreement with an employer in order to be subject to report requirements under section 203(b).⁷⁸ Thus, the court has defined persuader activity in the broadest possible sense, while retaining the necessary requirement that employers "conspire" with a third party for those materials to reach employees, in order to fall within the statute.⁷⁹

This approach fulfills the spirit in which the LMRDA was enacted and affirms the courts' intention of implementing the legislative objective to bring "sunlight" to all areas of labor/employer relations. It demonstrates the courts' willingness to scrutinize materials disguised as factual news coverage, and expose their true identity as persuader materials, when, and only when, the material reaches employees subject to an agreement between the employer and a third party. This application of section 203(b) does not impinge on any honest free speech; rather, it permits the hearer to identify the speaker, so that employees may recognize the likelihood of bias inherent in materials they receive.⁸⁰

The *Master Printers* decision makes it imperative for employers to be actually aware of the content of materials which reach their employees from a third party with the employer's blessing, since employers are now made constructively aware of content.⁸¹ Employers should be aware that materials with persuasive content, whether general or specific in nature, subject the third party source to report requirements which reveal the

⁷² *Id.* at 711-12, 118 L.R.R.M. at 2057.

⁷³ *Id.* at 711, 118 L.R.R.M. at 2057.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 711-12, 118 L.R.R.M. at 2057.

⁷⁸ *Id.* at 711, 118 L.R.R.M. at 2057.

⁷⁹ *Id.*

⁸⁰ *Id.* The objective of the legislation at issue in *Buckley* was analogous to the source identification which was sought in *Master Printers*. In *Buckley*, the goal of the legislation was to identify the source of campaign funds in a political election. See *Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, the court's use of the *Buckley* precedent was valid and directly on point. The *Buckley* Court found that the objective of the Federal Election Campaign Act, the constitutionality of which was challenged, was to expose the source of campaign funds in order to protect against improper influence, to safeguard the integrity of the electoral process, and to inform the electorate. *Id.* at 23-28. These objectives are parallel to those sought by the legislators who enacted the LMDRA. See *supra* note 43 and accompanying text. Both cases involved areas of traditional concern regarding corruption. Both cases upheld statutes the purpose of which was to expose the sources of money or information, so that those whose decision-making process was the object of the persuasive activity were able to evaluate the proper weight to be given the persuasive materials.

⁸¹ 751 F.2d at 711 n.13, 118 L.R.R.M. at 2057-58 n.13.

amounts spent by a particular employer for labor relations advice, as well as actual persuader "services."⁸²

In addition, a new reportable category has been created, that of employers who do not agree to allow persuader materials to reach their employees, but who do receive "advice" from a consultant who has persuader agreements with other employers.⁸³ These employers who receive only "advice" from "persuader" consultants must recognize that they are dealing with an inherently suspect party, and that their "advice" activity, although unreportable on its own merits,⁸⁴ becomes reportable by the third party when that party is engaged in persuader activity elsewhere.⁸⁵ Although these "advice" employers are not required to appear on the detailed, thirty-day disclosure to which employers who engage in actual persuasion are subject, they will appear on the less stringent annual report.⁸⁶ The employer who desires confidentiality of amounts spent for labor relations advice or services which fall short of persuader activity must now choose consultants carefully, avoiding those who engage in suspect persuader activity elsewhere.

In *Master Printers*, the Fourth Circuit continued the trend among the circuits to interpret section 203(b) liberally to reach direct and indirect covert activity by employers in the labor relations area.⁸⁷ The *Master Printers* decision demonstrates a determination to expose sources of information which reach employees on the subject of organizing and collective bargaining.⁸⁸ The resulting "sunlight" which is thrust upon employers who

⁸² *Id.* at 709, 118 L.R.R.M. at 2055-56.

⁸³ *Id.*

⁸⁴ See *supra* note 6 for language of 29 U.S.C. § 433(c) (1982), the advice exception.

⁸⁵ 751 F.2d at 709, 118 L.R.R.M. at 2056.

⁸⁶ *Id.*

⁸⁷ See *supra* note 7 and cases cited therein.

⁸⁸ A contrast of the judicial attitudes toward covert versus overt persuader activity is demonstrated by comparing the present opinion with the original district court opinion, *Master Printers of America v. Donovan*, 108 L.R.R.M. 2050 (E.D. Va. 1981) [hereinafter referred to as *Master Printers I*]. That case was decided between the time the present case was initiated and when the present case was finally decided by the Fourth Circuit, and it dealt with the same parties, and with the same publication, *Insight*. *Id.* at 2051. In that case, however, the issue was whether distribution of *Insight* to employees by employers triggered report requirements under § 433(b). *Id.* The court held that no disclosure was required, because no agreement to persuade was present between MPA and the employer, in light of the fact that MPA did not send the publication directly to employees' homes. *Id.*

In an alternative to a finding of no persuader activity, the court ruled that MPA's distribution of *Insight* to employers fell within the "advice" exception in § 433(c). *Id.* This "advice" exception had been narrowly construed to protect only those who performed *exclusively* advice functions and who performed *no* persuader activity on behalf of any employer. See *supra* notes 7-9 and accompanying text. *Master Printers I*, however, unlike the *Wirtz* case, dealt only with advice, because no evidence of persuader activity was produced. *Id.* at 2052. It thus qualified for the narrow § 433(c) exception.

The critical difference between the facts of *Master Printers I* and the present case is the deceptive appearance of impartiality in the present case, where the employee received the material directly from MPA without the realization that it reached him by an agent of his employer. See 751 F.2d at 702, 118 L.R.R.M. at 2050. In contrast, in *Master Printers I*, the employee received the material from the hands of the employer and was therefore aware of the bias inherent in the material. 108 L.R.R.M. at 2051. The contrast in outcome of these two decisions based on the same articles and the same parties, demonstrates that the activity which is the objective of § 433(b) is covert persuader activity, rather than overt activity. In other words, source exposure is the objective of the statute, not suppression of free speech.

would otherwise hide behind purportedly impartial publishers of a trade magazine containing allegedly "newsworthy" articles about failing unions, fulfills the spirit in which the LMRDA was enacted.⁸⁹ In the future, employers must be aware that they assume responsibility for agreeing to the content of persuasive materials which they arrange to reach their employees directly from an "outside" source. The burden of this responsibility involves disclosure of employer information under section 203(b) by the distributor of the persuasive materials, even when the materials are not specifically targeted towards a particular shop, but are of a general nature.

V. PREEMPTION

A. *States' Ability to Limit Employees' Section 7 Right to Select the Officers of their Labor Unions: *Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54*¹

Section 7 of the National Labor Relations Act (Act)² grants employees the right to bargain collectively through representatives of their own choosing.³ Under the provisions of the Act, any interference by management⁴ or labor organizations⁵ with this section 7 right of employees is an unfair labor practice which the National Labor Relations Board (NLRB) has the power to prohibit.⁶ The federal preemption doctrine similarly protects this right of employees to select the bargaining representatives of their own choice from interference by the states.⁷ Under the federal preemption doctrine, if there is a substantive conflict between a state's law and section 7's provisions, the Supremacy Clause of the United States Constitution dictates that the provisions of the federal law must prevail.⁸

In the 1945 case of *Hill v. Florida*,⁹ the United States Supreme Court held that section 7 conferred on employees an absolute right to select the bargaining representatives of their own choice.¹⁰ Thus, according to the Court, a Florida statute, which provided for state licensing of union officials and prohibited the licensing of officials

⁸⁹ See *supra* text accompanying notes 9-10.

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¹ 104 S. Ct. 3179, 116 L.R.R.M. 2921 (1984).

² Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1982), 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, 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 as authorized in section 158(a)(3) of this title.

³ 29 U.S.C. § 158(a)(1) (1982).

⁴ See 29 U.S.C. § 158(a)(1) (1982).

⁵ See 29 U.S.C. § 158(b)(1) (1982).

⁶ See 29 U.S.C. § 160(a) (1982); see generally *Hotel and Restaurant Employees and Bartenders Int'l Union Local 54 v. Danziger*, 709 F.2d 815, 824, 113 L.R.R.M. 2868, 2874 (3d Cir. 1983).

⁷ *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 104 S. Ct. 3179, 3186, 116 L.R.R.M. 2921, 2925 (1984).

⁸ *Id.* at 3187, 116 L.R.R.M. at 2925-26.

⁹ 325 U.S. 538, 16 L.R.R.M. 734 (1945).

¹⁰ *Id.* at 541, 16 L.R.R.M. at 735.

who failed to satisfy the qualifications set forth in the statute, was in conflict with section 7 because the state law placed limits on who employees could select to represent them in bargaining with management.¹¹ The Court similarly found that another section of the Florida statute, under which an injunction had been issued against a union, was in conflict with employees' section 7 rights.¹² This statutorily imposed sanction, the Court noted, prevented the union from performing its collective bargaining functions and, therefore, infringed upon employees' section 7 right to select a particular union as their collective bargaining representative.¹³ In the light of the conflict between the state law and section 7 of the Act, the Court struck down both sections of the Florida statute under the preemption doctrine.¹⁴

Fourteen years later, in *DeVeau v. Braisted*,¹⁵ the Supreme Court upheld the constitutionality of a New York statute which prohibited persons convicted of a felony from holding office in any waterfront labor organization.¹⁶ This New York law had been enacted in furtherance of a bi-state compact between New York and New Jersey.¹⁷ This compact, which was part of an effort by both states to combat crime and corruption on the waterfront, was expressly approved by Congress pursuant to its power under Article I, section 10, of the Constitution.¹⁸ In a plurality opinion, the Court rejected a union's contention that the New York statute was preempted by section 7 of the Act and, thus, upheld the validity of the state law.¹⁹ The Court, however, did not overrule its previous decision in *Hill v. Florida*, but, rather, distinguished it.²⁰ In the view of the Court, Congress's express approval of the bi-state compact and its passage of section 504 of the Labor Management Reporting and Disclosure Act (LMRDA)²¹ manifested congressional intent that the New York law should stand despite the provisions of section 7 of the Act.²²

During the Survey year, in *Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54*,²³ the Supreme Court considered whether New Jersey's regulation of the qualifications of casino industry union officials was in conflict with and,

¹¹ *Id.*

¹² *Id.* at 543, 16 L.R.R.M. at 736. An injunction was issued against the union in *Hill* because the union failed to file a report with the state disclosing its name, the location of its offices, and the names and addresses of its officers, and failed to pay a \$1.00 annual fee to the state as was required by Florida law. *Id.* at 540, 543, 16 L.R.R.M. at 735, 736.

¹³ *Id.*

¹⁴ *Id.* at 543-44, 16 L.R.R.M. at 736.

¹⁵ 363 U.S. 144, 46 L.R.R.M. 2304 (1960).

¹⁶ *Id.* at 145, 46 L.R.R.M. at 2304-05.

¹⁷ *Id.* at 147, 46 L.R.R.M. at 2305.

¹⁸ *Id.* at 149, 46 L.R.R.M. at 2306. Article I, section 10 of the Federal Constitution provides in part that, "No State shall without the Consent of Congress . . . enter into any Agreement or Compact with another state . . ."

¹⁹ *Id.* at 154-55, 46 L.R.R.M. at 2308-09.

²⁰ *Id.* at 155, 46 L.R.R.M. at 2309.

²¹ § 504(a), 29 U.S.C. § 504(a) (1982), provides in pertinent part:

No person . . . who has been convicted of, or served any part of a prison term resulting from his conviction of [a series of enumerated crimes] shall serve . . . as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer . . . of any labor organization . . . for five years after such conviction or after the end of such imprisonment . . .

²² *DeVeau*, 325 U.S. at 155, 46 L.R.R.M. at 2309.

²³ 104 S. Ct. 3179, 116 L.R.R.M. 2921 (1984).

thus, preempted by section 7 of the Act.²⁴ The Court in *Brown* upheld the validity of a section of a New Jersey statute which prohibited persons who had been convicted of any of a series of enumerated crimes or were associates of career offenders from serving as casino industry union officials.²⁵ The Court, however, remanded to the district court the portion of the case concerning whether New Jersey could impose sanctions on unions which allowed disqualified individuals to remain in office.²⁶ The Court stated that on remand the district court should determine whether the imposition of the statutory penalties would prevent the union from performing its collective bargaining functions and, thus, impermissibly interfere with employees' section 7 right to choose which labor union will act as their bargaining agent.²⁷ After the *Brown* decision, at least in instances where states are attempting to combat the problem of organized crime, states may pass legislation preventing certain types of individuals from serving as union officials and impose fines or criminal penalties on persons who continue to hold office after being disqualified.²⁸

Underlying the litigation in *Brown* was a 1976 amendment to the New Jersey Constitution, which permitted the legislature to authorize casino gambling in Atlantic City.²⁹ In an attempt to prevent the infiltration of organized crime into the casino industry, the New Jersey legislature in 1977 passed the Casino Control Act, which provided for comprehensive regulation of casino gambling in Atlantic City, including the regulation of unions representing casino employees.³⁰ Specifically, section 93 of the Casino Control Act³¹ required that casino employees³² and unions representing persons working in casino hotels register annually with the Casino Control Commission (Commission).³³ All

²⁴ *Id.* at 3182, 116 L.R.R.M. at 2922.

²⁵ *Id.*

²⁶ *Id.* at 3190-91, 116 L.R.R.M. at 2928-29.

²⁷ *Id.* at 3191, 116 L.R.R.M. at 2929.

²⁸ *Id.*

²⁹ *Id.* at 3182, 116 L.R.R.M. at 2922.

³⁰ *Id.*

³¹ Section 93, N.J. STAT. ANN. § 5:12-93(a) (West Supp. 1985) provides in part:

Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually, and shall disclose such information to the commission as the commission may require, including the names of all affiliated organizations, pension and welfare systems and all officers and agents of such organizations and systems; provided, however, that no labor organization, union, or affiliate shall be required to furnish such information to the extent such information is included in a report filed by any labor organization, union, or affiliate with the Secretary of Labor pursuant to 29 U.S.C. § 431 et seq. or § 1001 et seq. if a copy of such report, or the portion thereof containing such information, is furnished to the commission pursuant to the aforesaid federal provisions. The commission may in its discretion exempt any labor organization, union, or affiliate from the registration requirements of this subsection where the commission finds that such organization, union, or affiliate is not the certified bargaining representative of any employee licensed or registered under this act, is not involved actively, directly or substantially in the control or direction of the representation of any such employee, and is not seeking to do so.

³² Under the New Jersey statute, casino employees include those performing "service or custodial duties not directly related to operations of the casinos, including, without limitation, bartenders, waiters, waitresses, maintenance personnel, kitchen staff, but whose employment duties do not require or authorize access to the casino." N.J. STAT. ANN. § 5:12-8 (West Supp. 1985).

³³ See N.J. STAT. ANN. § 5:12-93 (West Supp. 1985).

persons required to be registered under section 93 were subject to certain qualification criteria which were set forth in section 86³⁴ of the Casino Control Act.³⁵ Under the qualifications standards set forth in section 86, any person who had been convicted of any of a series of enumerated crimes or was an associate of a "career offender" would be prohibited from serving as a casino industry union official.³⁶ Those labor unions with officials found not to have satisfied the qualification standards set forth in section 86 could be prohibited under section 93(b) from receiving union dues from employees and from administering union pension and welfare funds.³⁷

The Hotel and Restaurant Employees and Bartenders International Union Local 54 (Local 54) was an unincorporated labor organization which had 12,000 members, 8,000 of whom were employees in casino hotels in Atlantic City.³⁸ Pursuant to the terms of the Casino Control Act, Local 54 filed a registration statement with the Commission in 1978.³⁹ Thereafter, the Division of Gaming Enforcement (Division) conducted a lengthy investigation, and in 1981 reported to the Commission that in its view Local 54's president, Frank Gerace, its secretary-treasurer, Robert Lumino, and its grievance manager, Frank Materio, were disqualified from being union officials under the criteria set forth in section 86 of the Casino Control Act.⁴⁰ Subsequent to the release of the Division's report on Local 54, the Commission scheduled a disqualification hearing to determine the validity of the Division's allegations.⁴¹ When Local 54 raised objections to the consti-

³⁴ Section 86, N.J. STAT. ANN. § 5:12-86(c) (West Supp. 1985) provides for disqualification of a person who had been convicted of any of a series of enumerated crimes. Another qualification criteria contained in section 86, N.J. STAT. ANN. § 5:12-86(f) (West Supp. 1985), provides:

The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel or an associate of a career offender or a career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State. A career offender cartel shall be defined as any group of persons who operate together as career offenders . . .

³⁵ See N.J. STAT. ANN. § 5:12-86 (West. Supp. 1985).

³⁶ See N.J. STAT. ANN. § 5:12-86(c), (f) (West Supp. 1985). A "career offender" is defined under the New Jersey statute as "any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this state." N.J. STAT. ANN. § 5:12-86(f) (West Supp. 1984).

³⁷ See N.J. STAT. ANN. § 5:12-93(b) (West Supp. 1984). Section 93(b) provides:

No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criteria consistent with the public policy of this act and upon a finding that the interests of justice so require.

³⁸ *Brown*, 104 S. Ct. at 3184, 116 L.R.R.M. at 2923.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

tutionality of section 86 and section 93 at this hearing, the Commission ruled that it lacked the authority to consider such challenges.⁴²

Local 54 then filed a complaint in federal district court seeking declaratory and injunctive relief on the grounds that the relevant sections of New Jersey's Casino Control Act were preempted by section 7 of the Act, the LMRDA, and the Employment Retirement Income Security Act (ERISA).⁴³ After a hearing, the district court concluded that Local 54 was unlikely to succeed on the merits of its claims and, therefore, denied the union's motion for a preliminary injunction.⁴⁴ Because no preliminary injunction was entered, the Commission went forward and conducted its disqualification hearing concerning Local 54.⁴⁵ On September 28, 1982, the Commission ruled that Local 54's president, Gerace, and grievance manager, Materio, were disqualified under section 86(f) because they were associated with members of organized crime in a manner inimical to the policy of the Casino Control Act and to gaming operations.⁴⁶ The Commission also disqualified Local 54's business agent, Karlos LaSane, because of his 1973 conviction of extortion of persons doing business in Atlantic City while he was a City Commissioner.⁴⁷ Finally, the Commission ordered that these individuals be removed as officers of Local 54 and that, if the union failed to take such action, it would be prohibited from collecting union dues from its members.⁴⁸

Subsequent to the Commission's decision, the United States Court of Appeals for the Third Circuit held that the district court had erred in refusing to grant the union's request for a preliminary injunction.⁴⁹ Relying on the Supreme Court's decision in *Hill v. Florida*, the Third Circuit held that section 93 of the Casino Control Act conflicted with and was preempted by section 7 of the Act insofar as the New Jersey statute allowed the Commission to disqualify elected union officials.⁵⁰ The court of appeals also held invalid as preempted by ERISA⁵¹ a portion of section 93 which empowered the Commission to prohibit any casino worker's union that had officers who had been disqualified under the Casino Control Act from administering union pension and welfare funds.⁵²

⁴² *Id.* at 3184, 116 L.R.R.M. at 2923-24.

⁴³ *Id.*

⁴⁴ *Hotel and Restaurant Employees and Bartenders Int'l Union Local 54 v. Danzinger*, 536 F. Supp. 317, 342-43 (D.N.J. 1982).

⁴⁵ *Brown*, 104 S. Ct. at 3185, 116 L.R.R.M. at 2924.

⁴⁶ *Id.*

⁴⁷ *Id.* The secretary-treasurer of Local 54, Robert Lumino, who the Division had earlier identified as a union official who should also be disqualified, died in June, 1981, prior to the Commission's decision. *Id.* at 3185 n.7, 116 L.R.R.M. at 2924 n.7.

⁴⁸ *Id.* at 3185, 116 L.R.R.M. at 2924.

⁴⁹ *Hotel and Restaurant Employees and Bartenders Int'l Union Local 54 v. Danzinger*, 709 F.2d 815, 830, 113 L.R.R.M. 2868, 2879 (3d Cir. 1983).

⁵⁰ *Id.*

⁵¹ In finding that the New Jersey law was preempted by ERISA, the Court relied on section 514(a) of ERISA, which provides:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144 (1982).

⁵² *Danzinger*, 709 F.2d at 830-31, 113 L.R.R.M. at 2879-80.

The Commission appealed the Third Circuit's decision and the United States Supreme Court granted certiorari to consider the preemption issue.⁵³

In its opinion, the Supreme Court first focused on the federal preemption doctrine.⁵⁴ According to the Court, when the federal preemption doctrine is invoked, a court must first examine the intent of Congress in passing the legislation.⁵⁵ If Congress has explicitly mandated the preemption of state laws or indicated an intent to fully occupy the field of regulation, then the state law, the Court found, must be struck down.⁵⁶ Even if there is no express or implied congressional intent to occupy a particular area of law, the Court asserted that the state law may still be invalidated under the preemption doctrine when an actual conflict between federal and state law exists or when a state law stands as an impediment to the accomplishment of the purposes of Congress.⁵⁷

In determining whether the provisions of New Jersey's Casino Control Act were preempted by section 7 of the Act, the Court first noted that section 7 neither contained explicit preemptive language nor otherwise indicated an intent by Congress to occupy the entire field of labor-management relations.⁵⁸ The Court then turned to its prior decision in *Hill v. Florida* to determine whether there was an actual conflict between the New Jersey law and section 7 of the Act.⁵⁹ The Court acknowledged that the *Hill* decision supported Local 54's contention that section 7 of the Act provided workers with an absolute right to choose the officials of their union.⁶⁰ The Court stated, however, that the *Hill* decision did not control the present case because, subsequent to the Court's ruling in *Hill*, Congress disclaimed any intent to preempt all state laws regulating the qualifications of union officials.⁶¹

By the passage of section 504(a) of the LMRDA,⁶² the Court noted, Congress had prohibited persons who had been convicted of any of a series of enumerated crimes from serving as officers in a union for five years subsequent to the conviction.⁶³ In the view of the Court, by enacting section 504(a), Congress had "unmistakably indicated" that the right of employees to select the officers of their bargaining representative was not absolute.⁶⁴ The Court also asserted that section 603(a) of the LMDRA⁶⁵ expressly disclaimed congressional intent to preempt state laws regulating the responsibilities of union officials, except where preemption was expressly provided for in a section of the

⁵³ *Brown*, 104 S. Ct. at 3185, 116 L.R.R.M. at 2924.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 3185-86, 116 L.R.R.M. at 2924.

⁵⁷ *Id.* at 3186, 116 L.R.R.M. at 2925.

⁵⁸ *Id.*

⁵⁹ *Id.* at 3187, 116 L.R.R.M. at 2926.

⁶⁰ *Id.*

⁶¹ *Id.* at 3188, 116 L.R.R.M. at 2926.

⁶² For text of § 504(a) of the LMRDA, 29 U.S.C. § 504(a) (1982), see *supra* note 21.

⁶³ *Brown*, 104 S. Ct. at 3188, 116 L.R.R.M. at 2926 (quoting 29 U.S.C. § 504(a) (1982)).

⁶⁴ *Id.* at 3188, 116 L.R.R.M. at 2926.

⁶⁵ Section 603(a), 29 U.S.C. § 523(a) (1982), provides:

Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer . . . under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

LMRDA.⁶⁶ The failure of Congress to expressly provide for the preemption of state laws in section 504(a), the Court stated, demonstrated that Congress intended to preserve some room for state action concerning the qualifications of union officials.⁶⁷

Moreover, the Court found that Congress's approval of the bi-state compact at issue in *DeVeau v. Braisted* similarly manifested congressional intent not to preempt all state regulations concerning the qualifications of union officials.⁶⁸ The Court noted that at congressional hearings concerning the bi-state compact, union officials had urged Congress not to approve the New York-New Jersey agreement on the grounds that such action would appear to sanction the New York law prohibiting convicted felons from being officers in waterfront unions and similar legislation enacted by the state.⁶⁹ By approving the compact over such objections, the Court asserted that Congress had concluded that, at least where the states were faced with the problems of "crime, corruption, and racketeering," state regulation of the qualifications of union officials was consistent with national labor policy as embodied in section 7 of the Act.⁷⁰

Thus, noting that New Jersey's Casino Control Act, like the New York legislation enacted in *DeVeau*, was designed to combat organized crime's infiltration of a local industry, the Court held that New Jersey's regulation of the qualifications of casino industry union officials did not actually conflict with section 7 of the Act.⁷¹ The Court further asserted that congressional enactment of section 504(a) of the LMRDA and its awareness of New York's similar restrictions when approving the bi-state compact also demonstrated that New Jersey's imposition of qualification criteria for casino industry union officials did not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.⁷² The Court, therefore, concluded that this portion of New Jersey's Casino Control Act was not preempted by section 7 of the Act.⁷³

Although New Jersey's regulation of the qualifications of casino industry union officials was not preempted by section 7 of the Act, the Court asserted that the state's imposition of a union dues collection ban on Local 54 for failing to remove disqualified persons from their union positions raised a separate preemption issue.⁷⁴ According to the Court, although workers' right to select union officials could now be regulated by the state, section 7 of the Act still gave employees the absolute right to choose which labor organization would act as their bargaining representative.⁷⁵ Thus, the Court emphasized that the issue in the case at bar was whether the imposition of section 93(b)'s dues collection ban would prohibit Local 54 from performing its functions as the employees' chosen collective-bargaining representative.⁷⁶ While Local 54 maintained that 85% of its income came from its collection of dues from its members and that it could not perform its functions as the employees' bargaining agent without these payments,

⁶⁶ *Brown*, 104 S. Ct. at 3188, 116 L.R.R.M. at 2926-27 (quoting *DeVeau*, 363 U.S. at 157, 46 L.R.R.M. at 2309-10).

⁶⁷ *Id.* at 3188, 116 L.R.R.M. at 2927.

⁶⁸ *Id.* at 3189, 116 L.R.R.M. at 2927.

⁶⁹ *Id.*

⁷⁰ *Id.* at 3189-90, 116 L.R.R.M. at 2928.

⁷¹ *Id.* at 3190, 116 L.R.R.M. at 2928.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 3190-91, 116 L.R.R.M. at 2928.

⁷⁵ *Id.* at 3190, 116 L.R.R.M. at 2928.

⁷⁶ *Id.* at 3191, 116 L.R.R.M. at 2929.

the Court found these factual allegations had not been addressed by the district court or the court of appeals.⁷⁷ The Court, therefore, remanded this portion of the case so that the district court could make the requisite findings of fact concerning the effect which the imposition of a dues collection sanction could have on Local 54's ability to perform its functions as employees' chosen bargaining agent.⁷⁸

Finally, the Court declined to reach the issue of whether the imposition of section 93(b)'s second sanction prohibiting a union from administering its welfare and pension funds was preempted by section 514(a) of ERISA.⁷⁹ Because the Commission did not impose this second sanction on Local 54, the Court ruled that this issue was not ripe for review.⁸⁰ Accordingly, the Court vacated the court of appeals' holding that ERISA preempted this sanction.⁸¹

In his dissenting opinion which was joined by Justices Stevens and Powell, Justice White agreed with the majority that federal labor law did not preempt state laws regulating the qualifications of union officials, but stated that this issue was not presented by the case at bar.⁸² According to Justice White, section 93(b) of the Casino Control Act did not seek to penalize union officials who did not meet section 86's qualification standards, but instead sought to impose sanctions on the unions themselves.⁸³ Because section 7 of the Act provided employees with an absolute right to select the particular labor union which would act as their bargaining agent, Justice White asserted that, under the federal preemption doctrine, states were prohibited from imposing sanctions on a union which would prevent a union from carrying out its collective-bargaining functions and, thereby, nullify the employees' exercise of their section 7 rights.⁸⁴ In examining the consequences of section 93, Justice White asserted that dues collection ban sanctions, like the one imposed by New Jersey, render a union unable to sustain itself financially and, thus, effectively prevent a union from engaging in collective-bargaining activities on behalf of its members.⁸⁵ Thus, in the view of Justice White, there was no need to remand this case to district court because the imposition of section 93(b)'s dues collection ban would impair Local 54's ability to function to such an extent that it would infringe upon employees' absolute section 7 right to bargain through the representative of their own choice.⁸⁶ Justice White, therefore, concluded that section 93(b) was preempted by section 7 of the Act and should have been struck down by the Court.⁸⁷

By its decision in *Brown*, the Supreme Court expressly overruled the portion of its prior decision in *Hill v. Florida* which had found that employees had an unqualified right

⁷⁷ *Id.*

⁷⁸ *Id.* Since the Supreme Court issued its decision, the Commission withdrew its decision to impose a dues collection ban on Local 54 and instead ordered the union to remove Gerace, Materio, and LaSane from their union positions. *Hotel and Restaurant Employees and Bartenders Int'l Union Local 54 v. Read*, 597 F. Supp. 1431, 1436 (D. N.J. 1984), *aff'd without opinion*, 772 F.2d 893 (3d. Cir. 1985).

⁷⁹ 104 S. Ct. at 3191, 116 L.R.R.M. at 2929.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 3192, 116 L.R.R.M. at 2930 (White, J., dissenting).

⁸³ *Id.*

⁸⁴ *Id.* at 3193, 116 L.R.R.M. at 2930 (White, J., dissenting).

⁸⁵ *Id.*

⁸⁶ *Id.* at 3193, 116 L.R.R.M. at 2931 (White, J., dissenting).

⁸⁷ *Id.*

under section 7 of the Act to select the officers of their labor union.⁸⁸ After the *Brown* decision, at least in instances where legislation is aimed at combatting the problems of "crime, corruption, and racketeering," states may enact laws preventing certain types of individuals from serving as union officials.⁸⁹ In the future, states will be allowed to enforce their disqualification standards by imposing fines or criminal penalties on union officials who continue to hold office after being disqualified.⁹⁰

The ability of the states to impose sanctions on unions which allow individuals to stay in office after being disqualified remains uncertain after *Brown*. The *Brown* Court did affirm the portion of the *Hill* decision holding that employees had an absolute right under section 7 of the Act to select a particular labor union as their bargaining agent.⁹¹ The failure of the Court in *Brown* to strike down New Jersey's imposition of a dues collection ban under the preemption doctrine, however, makes it unclear which sanctions a state may impose on a union without conflicting with employees' exercise of their section 7 right. If, in the future, the Court invalidates state laws like New Jersey's, employees' absolute section 7 right to bargain collectively through the representative of their choice will be protected.⁹² If, however, in the future, the Court upholds a statute allowing a state to impose a dues collection ban on a union like Local 54 on the grounds that the statute does not prevent the union from performing its collective-bargaining functions, employees' absolute section 7 right to choose their collective-bargaining agent could be severely weakened. A union's ability to sustain itself financially depends to a great extent on its ability to collect dues from its members.⁹³ For example, the imposition of a dues collection ban on Local 54 would deprive the union of 85% of its monthly income.⁹⁴ Thus, as Justice White stated in his dissent, a union against which such a dues collection ban sanction is imposed "obviously cannot effectively engage in collective bargaining activities on behalf of its members" and, thus, workers' right to bargain with management through the representative of their own choice would effectively be nullified.⁹⁵ Therefore, if the imposition of this type of sanction by a state on a labor union is not found by the Court to be preempted by section 7 of the Act, employees' section 7 right to bargain collectively through representatives of their own choosing could be eroded by the states.

In summary, the *Brown* decision establishes the right of states to prohibit certain types of individuals from being labor officials.⁹⁶ States will be allowed to enforce their disqualification standards by imposing fines or criminal penalties on union officials who continue to hold office after being disqualified.⁹⁷ The ability of the states to impose sanctions on unions which allow officials to stay in office after being disqualified remains uncertain after *Brown*. According to the test put forth by the *Brown* Court, if the imposition of the sanction will so incapacitate a union as to prevent it from performing

⁸⁸ *Id.* at 3190, 116 L.R.R.M. at 2928.

⁸⁹ *Id.* at 3189-90, 116 L.R.R.M. at 2928.

⁹⁰ *Id.* at 3191, 116 L.R.R.M. at 2929. *See also id.* at 3192 n.2, 116 L.R.R.M. at 2930 n.2 (White, J., dissenting).

⁹¹ *Id.* at 3190, 116 L.R.R.M. at 2928.

⁹² *See generally id.* at 3192-93, 116 L.R.R.M. at 2930-31 (White, J., dissenting).

⁹³ *Id.* at 3193, 116 L.R.R.M. at 2930 (White, J., dissenting).

⁹⁴ *Id.* at 3191, 116 L.R.R.M. at 2929.

⁹⁵ *Id.* at 3193, 116 L.R.R.M. at 2930-31 (White, J. dissenting).

⁹⁶ *Id.* at 3190, 116 L.R.R.M. at 2928.

⁹⁷ *Id.* at 3191, 116 L.R.R.M. at 2929.

its functions as employees' chosen collective-bargaining agent, the state law will be preempted by section 7 of the Act.⁹⁸

VI. FAIR LABOR STANDARDS ACT

A. **The Supreme Court Overrules National League of Cities v. Usery,¹ Thereby Extending the Fair Labor Standards Act to Virtually All State And Local Government Employees: Garcia v. San Antonio Metropolitan Transit Authority²*

Pursuant to its constitutional authority to regulate interstate commerce,³ Congress enacted the Fair Labor Standards Act (FLSA)⁴ in 1938, and amended it several times thereafter.⁵ Among the nation-wide protections for employees afforded by the FLSA are standards forbidding employers from paying their employees less than certain prescribed minimum and overtime wages.⁶ Originally, the FLSA's minimum and overtime wage provisions applied neither to mass transit employees nor to state and local government employees.⁷ In a series of amendments to the FLSA between 1961 and 1974,⁸ however, Congress extended the FLSA's coverage first to private mass transit workers, and later to state and local government workers, including those employed by publicly owned and operated mass transit systems.⁹

Although Congress's power under the Constitution's commerce clause¹⁰ has consistently been deemed plenary,¹¹ one of the few spheres in which the Supreme Court has limited congressional power to regulate commerce is in the narrow area where that regulation conflicts with the notion of state sovereignty as embodied in the constitutional

⁹⁸ *Id.*

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¹ 426 U.S. 833 (1976), *overruled in* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1007 (1985).

² 105 S. Ct. 1005 (1985).

³ U.S. CONST. art. I, § 8, cl. 3. The interstate commerce clause in the United States Constitution states: "The Congress shall have Power . . . To regulate Commerce . . . among the several states . . ."

⁴ Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (1982).

⁵ The pertinent amendments are as follows: Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 68, 71 (1961) (codified as amended at 29 U.S.C. §§ 203, 213 (1982)) (minimum wage coverage extended to employees of private mass transit carriers whose annual gross revenues were no less than one million dollars); Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(a) & (b), 80 Stat. 831 (1966) (codified as amended at 29 U.S.C. § 203 (1982)) (minimum wage and overtime provisions extended to state and local government employees working for schools, hospitals, and mass transit carriers); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 68 (1974) (codified as amended at 29 U.S.C. § 213 (1982)) (minimum wage and overtime provisions extended to virtually all state and local government employees, including all public mass transit workers).

⁶ 29 U.S.C. §§ 206-207 (1982).

⁷ Garcia, 105 S. Ct. at 1008.

⁸ See *supra* note 5.

⁹ See *supra* note 5.

¹⁰ U.S. CONST. art. I, § 8, cl. 3.

¹¹ E.g., Hodel v. Va. Surface Mining & Recl. Ass'n, 452 U.S. 264, 286 (1981); National League of Cities v. Usery, 426 U.S. 833, 840 (1976), *overruled on other grounds*, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985); United States v. Darby, 312 U.S. 100, 115 (1941).

scheme of federalism.¹² Indeed, the reaction of many state and local governments to Congress's extension of the FLSA to state and local government employees has been to challenge such extension on state sovereignty grounds.¹³ In these suits, the Supreme Court was faced with the difficult task of balancing the competing constitutional interests underlying Congress's regulation of interstate commerce under the commerce clause, and the states' assertion of sovereignty under the tenth amendment.¹⁴

The tension between the federal and state governments over the federal commerce power's intrusion into areas of state sovereignty was manifested in several recent Supreme Court decisions. In deciding *Maryland v. Wirtz*¹⁵ in 1968, for example, the Court rejected the claim that the constitutional conception of federalism precluded Congress from extending the FLSA's minimum wage and overtime provisions to cover employees of state schools and hospitals.¹⁶ Rather, the Court held, because Congress's power to regulate interstate commerce is plenary, a rational basis for congressional action under the commerce clause sufficed, notwithstanding any contention that state sovereignty had been infringed.¹⁷ In 1976, however, a sharply divided Court overturned *Wirtz* in *National League of Cities v. Usery*,¹⁸ ruling that the notion of state sovereignty, as incorporated in the tenth amendment, prohibited Congress from exercising its commerce power in such a way as to interfere with a state government in traditional areas of state functions.¹⁹

The courts subsequently grappled with the *National League of Cities* doctrine of state sovereignty, finding it difficult to distinguish between traditional and nontraditional state functions.²⁰ Consequently, in *Hodel v. Virginia Surface Mining Reclamation Association*,²¹ the Supreme Court attempted to refine its *National League of Cities* doctrine into a four part test to facilitate judicial determination of those limited areas encompassed in the realm of "traditional state functions."²² The Court ruled that under the principles of *National League of Cities* the tenth amendment only limited federal power to regulate interstate commerce insofar as Congress sought to regulate states as states, in matters that were

¹² See, e.g., *National League of Cities*, 426 U.S. at 842; *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975). The area of civil liberties makes up the bulk of the Court's rare decisions that limit Congress's otherwise plenary power under the commerce clause. See *National League of Cities*, 426 U.S. at 858 (Brennan, J., dissenting).

¹³ See, e.g., *Garcia*, 105 S. Ct. at 1005 (city of San Antonio challenged the validity of the Department of Labor's application of the FLSA to its mass transit employees); *National League of Cities*, 426 U.S. at 833 (the National League of Cities, joined by the National Governors' Conference, several states, and several city governments, sought a declaration that the application of the FLSA to state and local government employees was unconstitutional); *Maryland v. Wirtz*, 392 U.S. 183, 187 (1968) (Maryland, joined by 27 other states, challenged as unconstitutional the extension of the FLSA to public school and hospital employees).

¹⁴ See *Garcia*, 105 S. Ct. at 1010-12; see also *infra* note 108 (text of the tenth amendment).

¹⁵ 392 U.S. 183 (1968), overruled in *National League of Cities*, 426 U.S. at 855. *National League of Cities* was overruled, in turn, in *Garcia*, 105 S. Ct. at 1007.

¹⁶ *Id.* at 195.

¹⁷ *Id.* at 190, 195-96.

¹⁸ 426 U.S. 833 (1976). Concurring in the Court's decision, Justice Blackmun supplied the majority's fifth and deciding vote in *National League of Cities*, although he was "not untroubled by certain possible implications of the Court's opinion . . ." *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

¹⁹ *Id.* at 852, 855.

²⁰ *Garcia*, 105 S. Ct. at 1007, 1011-12.

²¹ 452 U.S. 264 (1981).

²² *Id.* at 287-88.

indisputably attributes of state sovereignty, and in such a way that impaired the ability of states to structure integral operations of traditional state functions.²³ In addition, the Court held, the nature and the extent of the federal interest must justify the submission of the state concerns.²⁴ Nevertheless, application of the *Hodel* test proved troublesome as well.²⁵ *United Transportation Union v. Long Island Railroad*²⁶ is exemplary. Though ruling that application of the Railway Labor Act²⁷ to states did not violate any state sovereignty aspect of the tenth amendment, the *Long Island* Court noted that the meaning of traditional state functions remained elusive, even after the *Hodel* refinement of *National League of Cities*.²⁸

During the *Survey* year, the Supreme Court reconsidered and overruled *National League of Cities*.²⁹ In *Garcia v. San Antonio Metropolitan Transit Authority* (*Garcia*), the Court found that the *National League of Cities* doctrine was both practically unworkable and constitutionally unsound.³⁰ Accordingly, the Court ruled that unless expressly exempted by the FLSA's limited exceptions,³¹ all workers, including state employees, are now fully covered by the statute, regardless of whether they work for their states in areas of traditional state functions.³²

The litigation in *Garcia*, which ultimately led to the abrogation of the *National League of Cities* doctrine, began following a 1979 determination by the Wage and Hour Administration of the Department of Labor that the San Antonio Metropolitan Transit Authority (SAMTA) was subject to the FLSA.³³ Desiring to avoid the FLSA's overtime pay scale, SAMTA filed suit against the Secretary of Labor in the United States District Court for the Western District of Texas seeking a declaratory judgment that *National League of Cities* exempted it from the federal labor law.³⁴ The Department of Labor counterclaimed for enforcement of the FLSA's overtime provisions, and *Garcia* and other SAMTA employees were allowed to intervene as claimants against SAMTA.³⁵

²³ *Id.*

²⁴ *Id.* at 287-88 & n.29.

²⁵ See *Garcia*, 105 S. Ct. at 1011-12.

²⁶ 455 U.S. 678, 109 L.R.R.M. 3017 (1982).

²⁷ Railway Labor Act, 45 U.S.C. §§ 151-188 (1982).

²⁸ *Long Island*, 455 U.S. at 684, 109 L.R.R.M. at 3019; see also *Garcia*, 105 S. Ct. at 1011.

²⁹ *Garcia*, 105 S. Ct. at 1007.

³⁰ *Id.*

³¹ The Fair Labor Standards Act, 29 U.S.C. § 203(e) (1982), still exempts a very limited class of state employees from its coverage, such as elected state officials and their political, that is, non-civil service, appointees.

³² See *Garcia*, 105 S. Ct. at 1020.

³³ *Id.* at 1009. Soon after, the Department of Labor amended its FLSA interpretive regulations to provide that publicly owned mass transit systems were not entitled to immunity from the FLSA under *National League of Cities*. 44 Fed. Reg. 75,630 (1979) (codified at 29 C.F.R. § 775.3(b)(3) (1984)).

³⁴ *Garcia*, 105 S. Ct. at 1009. SAMTA did not argue that, because SAMTA's mass transit system consists solely of intrastate rather than interstate commerce, the commerce clause did not apply. *Id.* at 1010. It has long been settled that Congress's authority under the interstate commerce clause extends to intrastate commerce which affects interstate commerce in any way. *Id.* If SAMTA were a private employer, therefore, it would have no claim against Congress's authority to enforce the minimum wage and overtime provisions of the FLSA. *Id.* Hence, SAMTA's sole claim rests in the tenth amendment's reservation of rights to the states. *Id.* Under *National League of Cities*, SAMTA argued, Congress was precluded from exercising its otherwise valid power under the commerce clause, because to do so would necessarily and improperly infringe on state sovereignty. *Id.*

³⁵ *Id.* at 1009.

Like most urban mass transit systems in the United States, San Antonio's public transportation complex began in private hands, but subsequently fell under increasing public control.³⁶ By the 1970s, San Antonio's mass transit system, by then exclusively owned and operated by the city through its transit authority, was heavily dependent on federal monetary contributions, as were most mass transit systems across the country.³⁷ Although San Antonio initially abided by the FLSA,³⁸ after the Supreme Court decided *National League of Cities*, the city terminated its compliance with the overtime provision of the FLSA, believing it was thereafter immune from federal labor laws.³⁹ The focus of the controversy became that part of the *Hodel* test which would exempt San Antonio from the coverage of federal labor laws if it were engaging in a traditional state function.⁴⁰

Relying on *National League of Cities*, the district court granted SAMTA's motion for summary judgment, holding that the mass transit service provided by San Antonio was a traditional state function.⁴¹ Garcia and the Secretary of Labor appealed directly to the Supreme Court.⁴² Pending this appeal, the Court decided *Long Island*, in which it held that the Railway Labor Act constitutionally applies to state-run railroads because mass transit is not a traditional state function under the *Hodel* test.⁴³ The Court therefore vacated the district court's opinion in *Garcia*, and remanded for further proceedings consistent with *Long Island*.⁴⁴ On remand, the district court adhered to its original view,⁴⁵ however, and thus, Garcia and the Secretary of Labor again appealed directly to the Supreme Court.⁴⁶ After initial argument in 1983, the parties were asked to re-argue the case, specifically addressing the question of whether the interpretation of the tenth amendment as set forth in *National League of Cities* should be reconsidered.⁴⁷

In 1985, Justice Blackmun, who had reluctantly supplied the fifth vote in creating the five-to-four majority in *National League of Cities*,⁴⁸ wrote the majority opinion for the Court in *Garcia*, reversing the district court's decision, and overruling *National League of Cities*.⁴⁹ Writing for the Court in *Garcia*, Justice Blackmun concluded that the proposition embraced in *National League of Cities*, that the tenth amendment precludes Congress

³⁶ *Id.* at 1007. Initially, passenger transportation in San Antonio was provided by a private company. *Id.* In 1913, Texas and the city of San Antonio began subjecting city passenger transportation to government regulation. *Id.* In 1959, San Antonio purchased the privately owned San Antonio Transit Company and replaced it with a public authority known as the San Antonio Transit System (SATS). *Id.* In 1978, the city transferred its facilities and equipment to the San Antonio Metropolitan Transit Authority (SAMTA). *Id.*

³⁷ *Id.* at 1008. Between 1970 and 1980, for example, SATS and SAMTA were subsidized by over \$50,000,000 by the federal government. *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1011.

⁴¹ *Id.* at 1009.

⁴² *Id.*

⁴³ See *id.*; see also *supra* text accompanying notes 26-28.

⁴⁴ *Garcia v. San Antonio Metropolitan Transit Auth.*, 457 U.S. 1102 (1982).

⁴⁵ *San Antonio Metropolitan Transit Auth. v. Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983); see also *Garcia*, 105 S. Ct. at 1009.

⁴⁶ *Garcia*, 105 S. Ct. at 1010.

⁴⁷ *Id.*

⁴⁸ See *supra* note 18.

⁴⁹ *Garcia*, 105 S. Ct. at 1021.

from interfering with states engaging in commerce in areas of traditional functions of state governments, had proved both unworkable and constitutionally indefensible.⁵⁰

In beginning its analysis in *Garcia*, the Court noted that the lower federal courts had experienced extreme difficulty in delineating the traditional state functions which were to be protected by the tenth amendment from federal interference under *National League of Cities*.⁵¹ The Court recognized that activities such as regulating ambulance drivers, licensing automobile drivers, operating airports, performing solid waste disposal, and operating highway authorities had been judicially deemed to be traditional state functions, and thus were immune from congressional interference under federal labor laws.⁵² Further, the Court realized that similar activities such as regulating traffic on public roads, regulating air transportation, regulating intrastate natural gas sales, and operating telephone systems had been judicially held not to constitute traditional state functions.⁵³ The *Garcia* Court thus found "it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side."⁵⁴

Returning to its analysis in *Long Island*, the *Garcia* Court observed that it too had failed to demarcate an identifiable principle for distinguishing between traditional and nontraditional state functions.⁵⁵ In *Long Island*, the Court noted, it relied in part on the "historical reality that the operation of railroads is not among the functions traditionally performed by state and local governments," yet, at the same time, it rejected "a static historical view of state functions."⁵⁶ In addition, the Court acknowledged that it had defined traditional state functions in terms of "basic state prerogatives,"⁵⁷ but then failed to explain what makes a function a basic state prerogative.⁵⁸

Finally, observing that the application of the FLSA to states as employers and the requirement that states pay federal taxes similarly implicate state sovereignty concerns, the Court looked to its historical treatment of issues of federalism raised by federal taxation of state entities. The Court noted its failure in tax immunity cases to successfully distinguish between traditional and nontraditional state functions, essential and nonessential state functions, or between governmental and proprietary state functions.⁵⁹ It thus reasoned that attempts to distinguish between traditional and nontraditional state functions in determining which were immune from federal labor laws likewise would prove futile.⁶⁰ As a result, the Court concluded that the principle of state sovereignty set out in *National League of Cities* and refined in *Hodel*, which had led to contradictory results, was, in practical terms, totally unworkable.⁶¹

After thus concluding that *National League of Cities* would lead to inconsistent and conflicting results because it was unworkable, the Court inquired into the possible reasons

⁵⁰ *Id.*

⁵¹ *Id.* at 1011-13.

⁵² *Id.* at 1011.

⁵³ *Id.*

⁵⁴ *Id.* at 1011.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1012 (quoting *Long Island*, 455 U.S. at 686, 109 L.R.R.M. at 3020) (first emphasis added in *Garcia*, second emphasis in original).

⁵⁷ *Garcia*, 105 S. Ct. at 1012 (citing *Long Island*, 455 U.S. at 686-87, 109 L.R.R.M. at 3020).

⁵⁸ *Id.* at 1012.

⁵⁹ *Id.* at 1012-14.

⁶⁰ *Id.*

⁶¹ *Id.* at 1016.

for its impracticability. The Court found that the fundamental reason for the doctrine's practical infeasibility was that it controverted the very state sovereignty concerns that it purported to protect.⁶² That is, the Court reasoned that the problem the courts were having in judging whether a state function was "traditional" could be traced to *National League of Cities*'s mistaken assumption about the essence of a federal system in which the states, not the federal courts, are equipped to make such judgments.⁶³ Any judicial rule of state immunity that looks to the "traditional," "integral" or "necessary" nature of state functions, the Court continued, would necessarily demand that the unelected federal judiciary make decisions about which state services it favors and which it disfavors.⁶⁴ The Court rejected as "unsound in principle" as well as "unworkable in practice," therefore, the rule of state immunity from federal labor regulation that turns on a judicial appraisal of whether a particular state action is a traditional function.⁶⁵ The Court concluded, in other words, that the *National League of Cities* doctrine had proven unworkable *because* it was constitutionally erroneous.⁶⁶

In delineating its finding that *National League of Cities* was constitutionally unsupported, the Court explained that the Framers had intended federalism to be a doctrine of political process rather than substantive result.⁶⁷ Hence, the Court declared that the procedural safeguards inherent in the *structure* of the federal system should govern the limitations, or lack thereof, on state sovereignty under the federal commerce power.⁶⁸ The Court therefore concluded that "[w]hat has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations."⁶⁹

The Court proceeded to elaborate on its reasoning that federalism is a structural concept, rather than a judicially created intrusion into Congress's power to regulate the flow of interstate commerce, by first acknowledging that although the states surrendered a variety of sovereign powers by adopting the federal Constitution, they unquestionably retained a significant measure of sovereign authority.⁷⁰ The Court continued, however, by declaring that the province of state sovereignty lies not in judicially carved out exceptions to the constitutionally enumerated powers of the federal government, but, as the Framers originally intended, state sovereignty is a political concept which "lies in the structure of the Federal Government itself."⁷¹ The Court reasoned that this constitutional structure of federalism was guaranteed by the states' enjoyment of proportionate representation in the House of Representatives under article I, section 2, and equal representation in the Senate under article I, section 3.⁷² Furthermore, the Court noted the prominence of the states' role in selecting the President under the electoral college system prescribed by article II, section 1, and, perhaps most importantly, in the constitutional amendment process ordained by article V.⁷³

⁶² *Id.*

⁶³ *Id.* at 1015.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1016.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1016-18.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1016.

⁷⁰ *Id.* at 1017.

⁷¹ *Id.* at 1017-18.

⁷² *Id.* at 1018.

⁷³ *Id.*

Finally, the Court demonstrated that the Constitution's provision of channels, in which states may fulfill their roles as limited sovereign governments under the American system of federalism, is sufficient, without judicial interference.⁷⁴ For example, the Court pointed out that solely through the political process the states had secured for themselves statutory exceptions to the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Insurance Security Act and the Sherman Act.⁷⁵ That they have not secured an exception to the FLSA, the Court continued, does not obscure the extent to which the political process has preserved the limited sovereignty of the states.⁷⁶

The *Garcia* majority based its decision not on the supposition that state sovereignty, which *National League of Cities* sought to preserve, should not be protected.⁷⁷ Rather, the Court ruled that the political process is both the constitutionally mandated and realistically most practical place for federalism to be preserved.⁷⁸ Accordingly, the Court ruled that Congress's power under the commerce clause is not impliedly limited by the tenth amendment's embodiment of federalism or state sovereignty.⁷⁹ As a result, the Court held that the minimum wage and overtime provisions of the FLSA are applicable to SAMTA employees, as well as to all other state and local government employees.⁸⁰

Justice Powell, writing for all four Justices in dissent, argued first that the Court had no justification for straying from *stare decisis* by overruling *National League of Cities*, a recent precedent on which all members of the Court had previously relied.⁸¹ He went on to argue that the reason the majority found *National League of Cities* unworkable was because it mischaracterized the decision as requiring the Court to define the scope of traditional state functions.⁸² Justice Powell argued, on the other hand, that as Justice Blackmun had noted in his concurrence in *National League of Cities*, the tenth amendment's reservation of rights to the states requires the Court to balance the federal interests with the interests of state sovereignty, a task in which the Court often engages.⁸³ Most importantly, therefore, Justice Powell argued that the Court had eviscerated the American scheme of federalism by relegating it to the political process, thereby stripping it of its constitutional might as enforced by judicial review.⁸⁴

The view of federalism taken by the four dissenters was an historical one.⁸⁵ They first argued that the ratification of the Constitution was the result of a compromise between federalists and anti-federalists which specifically reserved for the states, in the tenth amendment, all powers not explicitly delegated to the federal government.⁸⁶ The dissenters therefore concluded that the Court had emasculated the sovereignty of the

⁷⁴ *Id.* at 1018-19.

⁷⁵ *Id.* at 1019.

⁷⁶ *Id.*

⁷⁷ *See id.* at 1016-17.

⁷⁸ *Id.* at 1020.

⁷⁹ *Id.*

⁸⁰ *See id.*

⁸¹ *Id.* at 1021-22 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor JJ., dissenting).

⁸² *Id.* at 1023-24 (Powell, J., dissenting).

⁸³ *Id.* at 1024-25 (Powell, J., dissenting).

⁸⁴ *Id.* at 1025-26 (Powell, J., dissenting).

⁸⁵ *See id.* at 1027-29 (Powell, J., dissenting); *see also id.* at 1034-38 (O'Connor, J., joined by Powell and Rehnquist JJ., dissenting).

⁸⁶ *Id.* at 1027-29 (Powell, J., dissenting).

states by relegating it to the political whim of Congress, and then shielding that exercise of political power from constitutional judicial review.⁸⁷ Finally, reiterating that the Court's role should have been to balance the federal and state interests involved, as five Justices had done in *National League of Cities*, the dissent concluded that the application of minimum wage and overtime standards to the states obviously endangered the ability of the states to function effectively as sovereigns, while serving no countervailing federal interest.⁸⁸

Garcia is the result of one Justice, Justice Blackmun, changing his mind. With the switch of only one Justice, therefore, the Court was as severely split in *Garcia* as it had been in *National League of Cities*.⁸⁹ Justice Powell's harsh dissent in *Garcia*, joined by the Chief Justice and Justices Rehnquist and O'Connor, accused the Court of altering two hundred years of the constitutional doctrine of federalism.⁹⁰ Justice O'Connor also filed a dissent, joined by Justices Powell and Rehnquist, in which she accused the Court of severely violating the spirit of federalism as embodied in the tenth amendment.⁹¹ Both she and Justice Rehnquist, in his own dissenting statement, took the ominous stance that the Court, perhaps with soon to be appointed new Justices, would surely return to the *National League of Cities* doctrine in the future.⁹²

The harsh dissents notwithstanding,⁹³ the majority in *Garcia* reached the correct result. The Court was persuasive in arguing that *National League of Cities* was neither a practical decision,⁹⁴ nor one faithful to the constitutional interests it sought to advance.⁹⁵ Despite Justice O'Connor's charge that it had sounded a retreat from the important battle over the vitality of federalism,⁹⁶ the Court, in reality, set aside ideological biases and exposed an unworkable and unprincipled decision for what it was.⁹⁷ It surely stretches the imagination to argue that requiring states to pay their employees time-and-a-half for work in excess of forty hours per week, as all other employers must, will destroy state sovereignty.⁹⁸

In first finding the *National League of Cities* doctrine unworkable, the Court accurately pointed out the troublesome nature of its endeavor to distinguish between traditional

⁸⁷ *Id.* at 1032-33 (Powell, J., dissenting).

⁸⁸ *Id.*

⁸⁹ *National League of Cities* was a 5-4 decision in which Justice Blackmun, concurring in the majority opinion with reservations, provided the deciding vote. See *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring). In *Garcia*, Justice Blackmun changed his mind. See *Garcia*, 105 S. Ct. at 1015; see also *id.* at 1024-25 (Powell, J., dissenting).

⁹⁰ *Garcia*, 105 S. Ct. at 1023 (Powell, J., dissenting).

⁹¹ *Id.* at 1036 (O'Connor, J., joined by Powell and Rehnquist, JJ., dissenting); *id.* at 1033 (Rehnquist, J., dissenting).

⁹² *Id.* at 1038 (O'Connor, J., dissenting); *id.* at 1033 (Rehnquist, J., dissenting).

⁹³ See *supra* notes 81-92 and accompanying text.

⁹⁴ See *Garcia*, 105 S. Ct. at 1011-15.

⁹⁵ See *id.* at 1015-16.

⁹⁶ *Id.* at 1033 (O'Connor, J., dissenting).

⁹⁷ *Id.* at 1019-21.

⁹⁸ The Court quoted Justice Frankfurter who had previously proclaimed:

The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court.

Id. (quoting *New York v. United States*, 326 U.S. 572, 583 (1946)).

and nontraditional state governmental functions.⁹⁹ For example, the Court illustrated the hopelessness in trying to devise a rule which would reconcile the placing by courts of state regulation of drivers on the traditional side, and state regulation of traffic on the nontraditional side.¹⁰⁰ The Court did not, however, overrule recent precedent merely because the rule was difficult to apply.¹⁰¹ Rather, the Court looked to the factors which made the rule impractical, and correctly found that the major reason was that the rule lacked proper constitutional foundation from the start.¹⁰²

As the Court elucidated, the Constitution provides ample channels in federal elections and in the constitutional amendment process for a state to champion its status as a limited sovereign government under the American system of federalism.¹⁰³ The Constitution does not, moreover, make the distinction between federal regulatory power over traditional, as opposed to nontraditional, state functions.¹⁰⁴ Nor does the commerce clause so much as imply that Congress's regulatory power is in any way limited by notions of state sovereignty.¹⁰⁵ Moreover, the tenth amendment, by its own terms, reserves for the states only those powers not granted to the federal government, unlike the expressly enumerated power to regulate interstate commerce.¹⁰⁶ The Court's decision in *Garcia*, therefore, is both pragmatically and constitutionally sound. Consequently, state and federal employees should feel secure in their rights under federal labor laws. And federalism still thrives, as enforced by the structure of the American democratic process rather than by the federal courts.

The dissenters in *Garcia*, though no less vehement than the majority, mustered little in the way of specific constitutional support for their propositions. Aside from their own historical vision of state sovereignty, the dissenters relied solely on the ambiguous reservations of rights to the states and to the people in the tenth amendment.¹⁰⁷ They did not, however, explain how the tenth amendment's reservation to the states of those powers "*not delegated by the Constitution [to the federal government]*"¹⁰⁸ shields the states from congressional regulation under the Constitution's clear delegation of power to Congress to regulate interstate commerce.

⁹⁹ *Id.* at 1011-15.

¹⁰⁰ *Id.* at 1011.

¹⁰¹ *Id.* at 1015-16, 1021.

¹⁰² *Id.*

¹⁰³ *Id.* at 1018.

¹⁰⁴ See U.S. CONST. amend. X.

¹⁰⁵ See U.S. CONST. art. I, § 8, cl. 3; see also *Garcia*, 105 S. Ct. at 1016.

¹⁰⁶ U.S. CONST. amend. X.

¹⁰⁷ *Garcia*, 105 S. Ct. at 1021-33 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting); *id.* at 1033-38 (O'Connor, J., joined by Powell and Rehnquist, JJ., dissenting). The dissenters argued that the Court has retreated from its mission of balancing federal commerce power with state sovereignty concerns. *Id.* at 1023-26 (Powell, J., dissenting); *id.* at 1037-38 (O'Connor, J., dissenting). This argument too, however, is founded solely on the dissenters' tenuous reading of the reservation of rights to the states in the tenth amendment as a strict constitutional mandate which somehow limits the federal commerce power. The tenth amendment, however, merely reserves to the states rights not granted to the federal government. See U.S. CONST. amend. X. The constitutional grant of power to Congress to regulate interstate commerce has no limiting counterpart in the Constitution, beyond the dissenters' strained view of the tenth amendment.

¹⁰⁸ U.S. CONST. amend. X (emphasis added). The tenth amendment to the United States Constitution states in full: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

Ironically, Justice O'Connor, in her bitter dissent, joined by her fellow strict constructionists on the Court, Justices Powell and Rehnquist, argued that the Court in *Garcia* violated the "spirit" of the tenth amendment.¹⁰⁹ Justice Powell, no less caustic in his dissent, attacked the Court for its willingness to defy stare decisis by overturning such a recent decision,¹¹⁰ even though *National League of Cities* itself was an identical repudiation of the recent precedent set down in *Wirtz*.¹¹¹ Moreover, it seems impossible to reconcile this uncasiness with straying from stare decisis with the dissenters' desire and prediction that *Garcia* will soon be overturned.¹¹² The dissents, short on persuasive constitutional support, are replete with ideological admonitions that the federal government continues to run rampant over the sovereignty of state governments.¹¹³

If logical reasoning provides for lasting judicial doctrines, state and local employees will undoubtedly remain protected by the FLSA. If, on the other hand, the ideological battle over states' rights and federal regulatory power continues to rage in the Supreme Court, the dissenters' prediction of a future majority returning to the *National League of Cities* doctrine may well serve once again to deny state workers their rights under the FLSA. In any event, for now, state employees need not worry about states, as their employers, seeking to deny them federally mandated labor protections by claiming that the tenth amendment somehow immunizes states from abiding by federal regulation under the commerce clause. Since Congress's power under the commerce clause is plenary, it seems highly unlikely that states will find any way to circumvent the employee protections of the FLSA, short of relying on a shift in the Supreme Court's composition.

In sum, *Garcia* overrules *National League of Cities*, and with it, the notion that some state employees are not protected by the Fair Labor Standards Act. The *National League of Cities* doctrine had immunized states, engaged in commerce in areas of traditional state functions, from federal labor laws passed by Congress pursuant to the commerce clause of the Constitution. The *Garcia* Court found this doctrine both unworkable and

¹⁰⁹ 105 S. Ct. at 1036 (O'Connor, J., dissenting) (emphasis in original).

¹¹⁰ *Id.* at 1021-22 (Powell, J., dissenting).

¹¹¹ *Wirtz*, 392 U.S. at 183 (1968), was overruled in 1976 in *National League of Cities*, 426 U.S. at 855.

¹¹² *Garcia*, 105 S. Ct. at 1033 (Rehnquist, J., dissenting); *id.* at 1038 (O'Connor, J., dissenting).

¹¹³ For example, Justice Powell, writing for all four Justices in dissent, charged that the Court's decision "undermines the constitutionally mandated balance of power between the [s]tates and the federal government, a balance designed to protect our fundamental liberties." *Id.* at 1029 (Powell, J., dissenting). He went on to state that the Court's decision may result in the "emasculat[i]on of the powers of the [s]tates." *Id.* Rather than accept the Court's assertion that it sought to enforce the notion of federalism in the most practical and constitutionally defensible way, albeit in the political process rather than in the courts, Justice Powell accused the Court of merely paying "lip service" to federalism and relegating the states to a "trivial" role in the constitutional scheme. *Id.* at 1030-31 (Powell, J., dissenting). He concluded by stating that the Court's reading of the commerce clause may lead the federal government to "devour the essentials of state sovereignty." *Id.* at 1033 (Powell, J., dissenting).

Justice O'Connor, joined by Justices Powell and Rehnquist echoed these thoughts. *Id.* at 1033-38 (O'Connor, J., dissenting). She stated her disapproval of the "unprecedented growth of federal regulatory activity . . ." over the past twenty years, and then endorsed the notion that "[n]ational action . . . has always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." *Id.* at 1037 (O'Connor, J., dissenting) (emphasis added). She even described federal revenue sharing with the states as "coercive grant programs." *Id.* Justice O'Connor concluded by stating that the Court in *Garcia* "shirk[ed] . . . its constitutional responsibility." *Id.* at 1038 (O'Connor, J., dissenting).

constitutionally unsupportable, though it found that the notion of federalism, purportedly underlying the *National League of Cities* reasoning, alive and well in the structure of the federal government and in the political process, rather than in the tenth amendment. Thus, the states will now have to turn exclusively to the political process, and not to the courts, to fight their battles over federal regulation that they deem injurious to their ability to function as sovereigns. That the states have secured mixed results in convincing Congress to exempt them from some, but not other, federal labor laws displays, as the Court reasoned, that the balancing needed to sustain the American system of federalism is, in fact, successfully occurring in the political process.

A four Justice dissent, however, refused to accept the notion that federalism is a political process, rather than constitutional dogma. Should an opening on the Court present itself, therefore, the desire of the dissenters to return to a tenth amendment limitation on Congress's commerce power may again remove the protections of the Fair Labor Standards Act, in the name of state sovereignty, from many state and local governmental employees.

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS

A. *Allocation of Procedural Burdens and Application of Weber in Title VII Reverse Discrimination Cases: Johnson v. Transportation Agency¹

Title VII of the Civil Rights Act of 1964² prohibits discrimination in employment because of race, color, religion, national origin, or sex.³ In a private, non-class action complaint under Title VII the plaintiff must prove intentional employment discrimination.⁴ Proving intent, however, is difficult because the employer can readily produce some nondiscriminatory reason that was purportedly the basis of its conduct.⁵ Because of this difficulty, the allocation of the order and burdens of proof is important in Title VII cases.⁶ In ordinary Title VII cases, the Supreme Court has held that the plaintiff must first establish a prima facie case that creates a presumption of illegal employment discrimination.⁷ The employer may then rebut the presumption of discrimination by producing evidence of some legitimate, nondiscriminatory reason for the employee's

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¹ Johnson v. Transportation Agency, 748 F.2d 1308, 36 FEP Cases 725 (9th Cir. 1984), *amended and re-reported*, 770 F.2d 752 (9th Cir. 1985). This chapter discusses the original *Johnson* decision, 748 F.2d 1308, 36 FEP Cases 725 (9th Cir. 1984). In the court's amended and re-reported decision, 770 F.2d 752 (9th Cir. 1985), the court refined its opinion by citing additional case law, *id.* at 756 (citing *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979)); *id.* at 758 (citing *Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220, 228 n.11 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 803 (1985)). The court further refined its decision by generally tightening its language, *id.* at 756, 758; by eliminating dicta previously in a footnote, *id.* at 758 n.4; and by adding a footnote countering the dissent's criticism regarding demonstration of an affirmative action plan's remedial purpose, *id.* at 758 n.5.

² Civil Rights Act of 1964, §§ 701-717, *as amended*, 42 U.S.C. § 2000e et seq. (1982).

³ 42 U.S.C. § 2000e-2(a), (b), (c) (1982). The statute reads, in relevant part:

(a) Employer practices

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

⁴ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981).

⁵ See generally B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION* 276-92 (2d ed. 1983).

⁶ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 17 FEP Cases 1062 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). For a recent Supreme Court case briefly recapping this area, see *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 31 FEP Cases 609 (1983).

⁷ *McDonnell Douglas*, 411 U.S. at 802, 5 FEP Cases at 966. This may be done by showing (i) that he belongs to a minority, (ii) that he applied and was qualified for a job for which the employer was seeking applicants, and (iii) that, after his rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. *Id.* A prima facie showing is not, however, the equivalent of a factual finding of discrimination. *Furnco*, 438 U.S. at 579, 17 FEP Cases at 1063. The Court in *Furnco* noted that this initial burden is not onerous. *Id.* Accord, B. SCHLEI & P. GROSSMAN, *supra* note 5, at 1299 (most plaintiffs who proceed under the *McDonnell Douglas* framework have little difficulty making out a prima facie case).

treatment.⁸ If the defendant employer carries its burden, the plaintiff can still prevail by showing that defendant's stated reason for the challenged action in question was in fact pretext or otherwise unworthy of credence.⁹

Although Title VII prohibits employment discrimination on the basis of race or sex, the Supreme Court has ruled that not all voluntary, private, race or gender-conscious affirmative action plans are proscribed by Title VII.¹⁰ In the 1979 case of *United Steelworkers of America v. Weber*,¹¹ the United States Supreme Court, upholding a private, race-conscious affirmative action plan against a Title VII challenge, set out a four-factor test to determine whether an affirmative action plan is permissible under Title VII.¹² First, the plan must aim at breaking down historic patterns of racial segregation.¹³ Second, the interests or employment opportunities of other employees must not be unnecessarily infringed.¹⁴ Third, the plan must not absolutely bar the advancement of other employees.¹⁵ Fourth, the plan must be a temporary measure, aimed at eliminating manifest racial imbalances.¹⁶ Since 1979, lower federal and state courts have extended the *Weber* holding by using the four-factor test to determine the validity of public affirmative action plans¹⁷ and gender-conscious affirmative action plans.¹⁸

⁸ *McDonnell Douglas*, 411 U.S. at 802, 5 FEP Cases at 966. A sufficient rebuttal of the prima facie case would justify a summary judgment for the defendant. *Burdine*, 450 U.S. at 254-55, 25 FEP Cases at 116. The defendant need not persuade the court that it was actually motivated by the proffered reasons. *Id.* at 254, 25 FEP Cases at 116.

⁹ *McDonnell Douglas*, 411 U.S. at 804, 5 FEP Cases at 967. The plaintiff may do this by persuading the court that a discriminatory reason predominated over the legitimate reason offered, or by undermining the credibility of the employer's proffered explanation. *Burdine*, 450 U.S. at 256, 25 FEP Cases at 116. Thus, the Court explained in *Burdine*, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff [T]he *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question" of discrimination *vel non*. *Id.* at 253, 25 FEP Cases at 115. See also *Aikens*, 460 U.S. at 714, 31 FEP Cases at 610.

¹⁰ *United Steelworkers of America v. Weber*, 443 U.S. 193, 204, 20 FEP Cases 1, 6 (1979).

¹¹ 443 U.S. 193, 20 FEP Cases 1 (1979).

¹² *Id.* at 209, 20 FEP Cases at 7-8. The Court noted at the outset of its reasoning in *Weber* that the case did not involve state action, and thus did not involve the equal protection clause of the fourteenth amendment. *Id.* at 200, 20 FEP Cases at 4. In upholding the affirmative action plan, the Court stated that in light of the legislative history of Title VII and the historical context from which the Act arose, a literal construction of § 703(a) and (d) of Title VII (proscribing employment discrimination on the basis of race) was "misplaced." *Id.* at 201, 20 FEP Cases at 5. The Court buttressed its conclusion with its interpretation of § 703(j) of Title VII, 42 U.S.C. § 2000-2(j) (1982), which states that Title VII shall not be interpreted to "require" racially preferential efforts. 443 U.S. at 204-06, 20 FEP Cases at 6-7. The Court stated that this led to the natural inference that Congress chose not to prohibit voluntary affirmative action. *Id.* at 205-06, 20 FEP Cases at 6.

¹³ 443 U.S. at 208, 20 FEP Cases at 7.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See, e.g., *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 688-90, 20 FEP Cases 1728, 1738-40 (6th Cir. 1979), *cert. denied*, 452 U.S. 938, 25 FEP Cases 1683 (1981); *Baker v. City of Detroit*, 483 F. Supp. 930, 983-86 & n.105, 24 FEP Cases 1728, 1730-31 & n.105 (E.D. Mich. 1979), *aff'd sub nom.* *Bratton v. Detroit*, 704 F.2d 878, 31 FEP Cases 465 (6th Cir.), *modified on different grounds*, 712 F.2d 222, 31 FEP Cases 1795 (1983); *Chmill v. City of Pittsburgh*, 488 Pa. 470, 487-90, 412 A.2d 860, 869-71, 22 FEP Cases 742, 742-43 (1980).

¹⁸ See, e.g., *La Riviere v. EEOC*, 682 F.2d 1275, 1278-79, 28 FEP Cases 1481, 1483-84 (9th Cir. 1982).

In these types of reverse discrimination cases involving affirmative action plans, however, the Supreme Court has not yet decided how the burden of proof should be allocated. To date, in these cases, state and lower federal courts have tried to combine the Supreme Court's analysis of the allocation of order and burdens of proof in ordinary Title VII litigation with the Supreme Court's analysis of affirmative action plans in *Weber*.¹⁹ These courts have disagreed on the appropriate formulation for the burden of proof in reverse discrimination cases involving affirmative action plans.²⁰ The differences in the formulations turn on two questions: first, whether the plaintiff or the defendant has the burden of proving that the plan is valid or invalid under *Weber*; second, whether, if the plaintiff carries the burden of showing the plan's invalidity, the defendant may rebut the plaintiff's prima facie case merely by pleading that it acted pursuant to an affirmative action plan.²¹

During the Survey year, the United States Court of Appeals for the Ninth Circuit in *Johnson v. Transportation Agency*²² formulated the order and burden of proof in Title VII reverse discrimination litigation involving affirmative action plans,²³ and upheld a gender-conscious affirmative action plan as valid under *Weber*.²⁴ As to the burdens of proof, the court held that in these cases a defendant employer successfully rebuts a plaintiff's prima facie case by showing that the challenged employment action was pursuant to an affirmative action plan, and by producing "some evidence" that its affirmative action plan is remedial and reasonably related to its remedial purpose.²⁵ As to the application of the four-factor *Weber* test, the *Johnson* court found that the affirmative action plan was temporary,²⁶ even though the plan did not make this explicit.²⁷ In addition, the court held that an employer can demonstrate a plan is remedial by showing a conspicuous statistical imbalance in its work force.²⁸ Consequently, after *Johnson*, reverse discrimination plaintiffs in the Ninth Circuit face a heavy burden of proof and need to demonstrate that the affirmative action program explicitly and significantly departs from the *Weber* criteria.

The controversy in *Johnson* arose when Paul E. Johnson was denied a position with the Santa Clara County Transportation Agency (Agency)²⁹ in favor of a woman who

¹⁹ See, e.g., *Warsocki v. City of Omaha*, 726 F.2d 1358, 1360, 34 FEP Cases 1, 2-3 (8th Cir. 1984); *Setser v. Novack Investment Co.*, 657 F.2d 962, 968-69, 26 FEP Cases 513, 516-17 (8th Cir.) (en banc), cert. denied, 454 U.S. 1064, 27 FEP Cases 223 (1981); *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1016-18, 25 FEP Cases 889, 893-94 (D.C. Cir. 1981); *Janowiak v. Corporate City of Southbend*, 576 F. Supp. 1461, 1466-1467, 33 FEP Cases 958, 961-62 (N.D. Ind. 1983), rev'd, 750 F.2d 557, 36 FEP Cases 737 (7th Cir. 1984).

²⁰ Compare *Janowiak*, 576 F. Supp. at 1466-68, 33 FEP Cases at 961-62 (granting defendant's motion for summary judgment because defendant had presented evidence showing that the challenged affirmative action plan was valid under *Weber*), with *Parker*, 652 F.2d at 1016, 25 FEP Cases at 892-93 ("[s]elf-serving statements for the purposes of litigation do not automatically validate a purported affirmative action program").

²¹ See *supra* note 19 and cases cited therein.

²² 748 F.2d 1308, 36 FEP Cases 725 (9th Cir. 1984).

²³ *Id.* at 1310 n.2, 36 FEP Cases at 728 n.2.

²⁴ *Id.* at 1314, 36 FEP Cases at 731.

²⁵ *Id.* at 1310 n.2, 36 FEP Cases at 728 n.2.

²⁶ *Id.* at 1313, 36 FEP Cases at 729.

²⁷ *Id.* at 1313, 36 FEP Cases at 729-30. The court stated that affirmative action plans "should not be rigidly interpreted so as to make their validity depend on technicalities in drafting." *Id.* at 1312, 36 FEP Cases at 729.

²⁸ *Id.* at 1313, 36 FEP Cases at 730.

²⁹ *Id.* at 1309, 36 FEP Cases at 727.

had scored lower on the eligibility exam.³⁰ Mr. Johnson had worked for eleven years as a road yard clerk with the Agency.³¹ In 1979, he and eight others applied for the opening position of road dispatcher.³² Johnson tied for second on an oral exam, and Diane D. Joyce, the only female applicant, placed fourth.³³ Joyce was also a long-time employee.³⁴ After a second oral examination of the qualifying candidates, the examiners unanimously recommended Johnson for the dispatcher position.³⁵

During the selection process Joyce informed the County Women's Coordinator that she was applying for the dispatcher position but had ranked fourth on the eligibility list.³⁶ The Women's Coordinator relayed this information to the Agency Affirmative Action Coordinator, who in turn recommended to the Agency Director that Joyce be appointed.³⁷ The Agency Director, pursuant to the Agency's voluntary affirmative action plan,³⁸ appointed Joyce to the position.

Johnson brought a Title VII employment discrimination action in the United States District Court for the Northern District of California.³⁹ The district court found that but for his sex Johnson would have been promoted instead of Joyce.⁴⁰ Finding that the Agency had failed to carry its burden of proving that its affirmative action plan was valid under *Weber*,⁴¹ the district court ordered Johnson's retroactive promotion with back pay.⁴²

The United States Court of Appeals for the Ninth Circuit reversed,⁴³ disagreeing with the district court's view of *Weber*,⁴⁴ and its allocation of procedural burdens in this type of case.⁴⁵ The court of appeals began its discussion by noting that the district court may have inappropriately placed on the employer the burden of persuading the court of the plan's validity.⁴⁶ For a defendant employer to rebut a plaintiff's prima facie case of employment discrimination, the *Johnson* court ruled, the employer must first show that it acted pursuant to an affirmative action plan.⁴⁷ Additionally, the court continued, the employer must produce "some evidence" that the plan is a response to conspicuous race or gender imbalance in its work force, and is intended to redress that imbalance.⁴⁸

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* The plan was not adopted pursuant to any collective bargaining agreement. *Id.*

³⁹ *Id.* at 1310, 36 FEP Cases at 727.

⁴⁰ *Id.*

⁴¹ *Id.* at 1310-11, 36 FEP Cases at 727.

⁴² *Id.* at 1310, 36 FEP Cases at 727. The district court specifically held that the Agency failed to show its plan was temporary and remedial. *Id.* at 1310, 36 FEP Cases at 727-28.

⁴³ *Id.* at 1314, 36 FEP Cases at 731.

⁴⁴ *Id.* at 1311, 36 FEP Cases at 728-29.

⁴⁵ *Id.* at 1310 n.2, 36 FEP Cases at 728 n.2.

⁴⁶ *Id.*

⁴⁷ *Id.* In formulating the order and burdens of proof for reverse discrimination cases involving affirmative action plans, the *Johnson* court essentially adopted the Eighth Circuit's formulation in *Setser v. Novak Investment Co.*, 657 F.2d 962, 968-69, 26 FEP Cases 513, 516-17 (8th Cir.) (en banc), cert. denied, 454 U.S. 1064 (1981).

⁴⁸ 748 F.2d at 1310 n.2, 36 FEP Cases at 728 n.2.

Finally, the court stated, the employer must also produce "some evidence" that the affirmative action plan is reasonably related to the plan's remedial purpose.⁴⁹ Once an employer has produced evidence that its refusal to hire the plaintiff was a consequence of its implementation of the plan, the court stated, the employer is entitled to judgment unless the plaintiff proves the plan is invalid.⁵⁰

The Ninth Circuit next addressed the validity of the Agency's affirmative action plan under the four-factor *Weber* test. Finding the district court's view of *Weber* to have been "overly restrictive,"⁵¹ the court of appeals applied each of the four parts of the *Weber* test to the Agency's affirmative action plan. In addressing the *Weber* requirement that the plan be temporary,⁵² the *Johnson* court noted that the Agency plan contained no end date,⁵³ and that the Agency Director testified that affirmative action was a permanent part of the Agency's operating philosophy.⁵⁴ The court insisted, however, that this evidence did not establish that the plan was permanent.⁵⁵ The plan did not state that it was permanent,⁵⁶ the court explained. Moreover, the court continued, the entire focus of the plan was on attaining — not maintaining — a work force balance to approximate the distribution of women, minority, and handicapped persons in the Santa Clara County work force.⁵⁷ Although an affirmative action plan must end when its remedial function has been served, the court noted that *Weber* does not require a plan to terminate on an express date or when fixed percentages for hiring, training, or promotion were achieved.⁵⁸ Thus, the court concluded, the Agency plan in *Johnson* was sufficiently temporary to satisfy the first *Weber* requirement for valid affirmative action plans.⁵⁹

The court then held that the challenged affirmative action plan met *Weber*'s second requirement that the plan have a remedial purpose of breaking down entrenched pat-

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1311, 36 FEP Cases at 729. The Ninth Circuit had previously held that *Weber* applied to public employer gender-conscious affirmative action programs. *La Riviere v. EEOC*, 682 F.2d 1275, 1278-79, 28 FEP Cases 1481, 1483-84 (9th Cir. 1982). In *La Riviere* the court found that the provisions of Title VII respecting gender-based discrimination (42 U.S.C. §§ 2000e-2(a), (e)(1) (1982)) were enacted to protect women against discrimination in the marketplace and to open employment opportunities for women in occupations that had been traditionally closed to them. *Id.* at 1278, 28 FEP Cases at 1483-1484. The court reasoned that these purposes mirror those underlying Title VII's prohibition of racial discrimination, and therefore following the reasoning in *Weber*, Congress did not intend Title VII to prohibit voluntary affirmative action programs designed to correct long-standing sexual imbalances in the work force. *Id.* at 1279, 28 FEP Cases at 1484. *La Riviere* involved a pilot study program ordered by the California legislature, and undertaken by the California Highway Patrol, to determine the feasibility of women as traffic officers. *Id.* at 1276, 28 FEP Cases at 1481. Forty men and forty women were selected. *Id.* Some eligibility requirements were lowered to permit the women to be eligible for positions as traffic officers. *Id.* The court in *La Riviere* proceeded to find the affirmative action program in question valid under *Weber*. *Id.* at 1280, 28 FEP Cases at 1485.

⁵² *Johnson*, 748 F.2d at 1312-13, 36 FEP Cases at 729-30.

⁵³ *Id.* at 1311-12, 36 FEP Cases at 729.

⁵⁴ *Id.* at 1312, 36 FEP Cases at 729.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1313, 36 FEP Cases at 730.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1312, 36 FEP Cases at 729.

⁵⁹ *Id.* at 1312-15, 36 FEP Cases at 729-30.

terms of discrimination. The court ruled that to demonstrate that its plan is remedial it is sufficient for the employer to show a conspicuous statistical imbalance in its work-force.⁶⁰ Contrary to aiming to maintain a male-female numerical balance, the court found, the Agency's plan was directed to eliminate a manifest male-female imbalance: statistics contained in the plan showed that prior to Johnson's promotion to road dispatcher, none of the Agency's 238 skilled craft workers was a woman.⁶¹ A "plethora of proof," the court stated, was not necessary to show that women are under-represented in such positions and that strong social pressures weigh against female participation in skilled craft positions.⁶²

The court then addressed the plan's validity under the third *Weber* requirement that the affirmative action plan not bar the advancement of other employees.⁶³ The plaintiff in *Johnson* argued that because the female candidate Joyce was the only one to be promoted to the dispatcher position, the plan impermissibly barred all other employees.⁶⁴ The court readily dismissed the plaintiff's argument, stating that any single employment opening necessarily excludes all others.⁶⁵

The plan was also valid under the final *Weber* criterion that the plan not unnecessarily infringe upon the interests of other employees, the court ruled.⁶⁶ Although the plan does not create new openings or reserve openings for other employees, the court stated, neither does it indicate that other employees will be barred or their interests unnecessarily infringed.⁶⁷ The challenged plan simply did not show, the court explained, the kind of distinct pattern of exclusion of nonminority candidates that *Weber* indicates would make a plan invalid.⁶⁸ Thus, the court concluded, the Agency plan, like the *Weber* plan, is permissible.⁶⁹

In concurring in part and dissenting in part with the decision,⁷⁰ Judge Wallace criticized the majority's order and allocation of proof.⁷¹ Rather than requiring the employer to merely show "some evidence" that the plan was in response to a conspicuous work force imbalance and that the plan was reasonably related to its remedial purposes, Judge Wallace argued for an alternative approach.⁷² Under his proposal, the burden of proving the validity of an affirmative action program would be shifted to the employer as an affirmative defense.⁷³ This approach, Judge Wallace argued, would be logical, and would provide a better means of analyzing affirmative action programs.⁷⁴

⁶⁰ *Id.* at 1313, 36 FEP Cases at 730.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1314, 36 FEP Cases at 731.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1313-14, 36 FEP Cases at 730.

⁶⁷ *Id.* at 1314, 36 FEP Cases at 730-31. The court stated that the plan contemplated expansion of opportunity for all because shortly before the plan was adopted the county approved 734 new Agency positions. *Id.*

⁶⁸ *Id.* at 1314, 36 FEP Cases at 731.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1314, 36 FEP Cases at 731 (Wallace, J., concurring and dissenting).

⁷¹ *Id.*

⁷² *Id.* at 1317, 36 FEP Cases at 733 (Wallace, J., concurring and dissenting).

⁷³ *Id.* at 1318, 36 FEP Cases at 734 (Wallace, J., concurring and dissenting).

⁷⁴ *Id.* at 1317, 36 FEP Cases at 733-34 (Wallace, J., concurring and dissenting).

Turning to the issue of the affirmative action plan's validity under *Weber*,⁷⁵ Judge Wallace disagreed with the majority's assertion that a statistical imbalance was sufficient to satisfy the *Weber* criterion that the affirmative action plan serve the remedial purpose of breaking down historic patterns of discrimination.⁷⁶ Statistics may function as valuable quantitative clues to past or present discriminatory patterns and practices, Judge Wallace asserted, but an employer cannot rely on statistics alone as a short-cut around showing causal relationship between the discriminatory organizational practices and the response of adopting an affirmative action plan.⁷⁷

Furthermore, Judge Wallace stated, the record was insufficient for the court to be able to determine that the challenged affirmative action plan satisfied the *Weber* requirements that the plan not bar the advancement of other employees or unnecessarily infringe upon their interests. As to the validity of the challenged affirmative action plan under the *Weber* criterion that the plan be temporary,⁷⁸ Judge Wallace argued that the majority interpreted *Weber* too broadly.⁷⁹ The majority erred, Judge Wallace stated, when it ruled that *Weber* endorses all plans which do not admit to being permanent, but which end when their goals are met.⁸⁰ Thus, Judge Wallace concluded, the majority's analysis weakens the Supreme Court's test in *Weber* through doctrinal pronouncements that were unnecessary and premature.⁸¹

By placing the burden of showing that the plan is not valid under *Weber* on the Title VII plaintiff, the *Johnson* decision insulates employers who act pursuant to either a race-conscious or gender-conscious affirmative action program from weakly grounded reverse discrimination actions. While the Supreme Court has not decided how the burden of proof should be allocated in Title VII reverse discrimination actions involving affirmative action plans, the Ninth Circuit's formulation of the burden of proof in *Johnson* is in harmony with the general principles in the Supreme Court's analysis of the order and allocation of burdens of proof in ordinary Title VII litigation.

The Supreme Court has ruled that in ordinary Title VII cases the sufficiency of the defendant's rebuttal of the prima facie case should be evaluated by the extent to which it presents a legitimate reason for the employment action,⁸² and frames the factual issue with sufficient clarity to allow the plaintiff a full and fair opportunity to demonstrate that the proffered justification is pretext.⁸³ Thus the burden on the employer is to show at least that its action was legitimate. Since not all affirmative action programs are valid under *Weber*,⁸⁴ the employer in reverse discrimination actions must do more than merely plead that it acted pursuant to an affirmative action plan.

On the other hand, since some affirmative action plans can be valid under the *Weber* test, an employer does not have to show conclusively that its affirmative action program is valid. By producing some evidence that the challenged affirmative action plan satisfies the *Weber* test, the employer adequately frames the issues for the plaintiff, and allows

⁷⁵ *Id.* at 1318, 36 FEP Cases at 734 (Wallace, J., concurring and dissenting).

⁷⁶ *Id.* at 1319, 36 FEP Cases at 735 (Wallace, J., concurring and dissenting).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1320, 36 FEP Cases at 736 (Wallace, J., concurring and dissenting).

⁷⁹ *Id.*

⁸⁰ *See id.*

⁸¹ *Id.* at 1320-21, 36 FEP Cases at 736 (Wallace, J., concurring and dissenting).

⁸² *Burdine*, 450 U.S. at 253-54, 25 FEP Cases at 115-16.

⁸³ *Id.* at 253, 25 FEP Cases at 115.

⁸⁴ *Weber*, 443 U.S. at 208, 20 FEP Cases at 7.

the plaintiff the opportunity to discredit the employer's defense. The court in *Johnson* strikes this balance between mere pleading of the existence of an affirmative action plan, and conclusively demonstrating its validity under *Weber*.

Although the *Johnson* court held the affirmative action plan valid, the court did so under a watered down *Weber* test.⁸⁵ Comparing the affirmative action plans in *Johnson* and *Weber*, the *Johnson* plan is closer to the line of impermissible affirmative action plans identified by the *Weber* Court. In *Weber* the past discrimination against blacks from craft jobs was so apparent as to warrant judicial notice.⁸⁶ In *Johnson*, however, there was neither the deep historical discrimination so rampant as to permit judicial notice, nor specific proof of past discrimination. Instead, the *Johnson* court noted the manifest statistical imbalance of women and men in skilled craft positions,⁸⁷ and deemed this alone sufficient to satisfy the *Weber* factor that the affirmative action plan have a remedial purpose of breaking down historic patterns of discrimination.⁸⁸

The dissent in *Johnson* criticized this lack of causal evaluation and analysis as inconsistent with *Weber*.⁸⁹ Nevertheless, the court's ruling that the first *Weber* factor was met is sound. Past employment discrimination against women on a society-wide basis is a generally accepted historical fact. Although a causal link should be preferred, it can be difficult to establish,⁹⁰ and that difficulty should not bar voluntary adoption of affirmative action plans. Statistics, therefore, should be, in the absence of contradictory evidence, an adequate basis for employer remedial efforts.

The plan in *Johnson* did not require the dismissal or demotion of nonminority employees, and therefore it satisfied the *Weber* factor of not unnecessarily infringing upon the interests of nonminority employees.⁹¹ The *Johnson* plan does not, however, so readily pass the *Weber* factor of not absolutely barring the advancement of other employees. In *Weber* both minority and nonminority employees benefitted from the institution of the affirmative action plans.⁹² In *Johnson*, however, it is not clear whether women could always be chosen over men until the numerical goal for the affirmative action plan was achieved.⁹³ The dissent in *Johnson* correctly concluded that the record was simply insufficient for adequate scrutiny of the plan.⁹⁴ The majority nevertheless ruled that this *Weber* factor was satisfied since the plan itself did not explicitly indicate that the other employees' opportunity for advancement was barred.⁹⁵

The *Johnson* court's analysis of *Weber*'s prohibition of affirmative action plans that absolutely bar the advancement of other employees is more deferential to the affirmative action plan than the *Weber* Court was. Because the Supreme Court drew the *Weber* test in imprecise terms, however, lower courts have essentially been given discretion to engage in flexible interpretation. Although the *Weber* plan specifically allowed for the advance-

⁸⁵ *Johnson*, 748 F.2d at 1311-12, 36 FEP Cases at 728-29.

⁸⁶ *Weber*, 443 U.S. at 198 n.1, 20 FEP Cases at 3 n.1.

⁸⁷ *Johnson*, 748 F.2d at 1313, 36 FEP Cases at 730.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1319, 36 FEP Cases at 735 (Wallace, J., concurring and dissenting).

⁹⁰ See *supra* notes 5-6 and accompanying text.

⁹¹ *Johnson*, 748 F.2d at 1313-14, 36 FEP Cases at 730-31.

⁹² *Weber*, 443 U.S. at 208, 20 FEP Cases at 7.

⁹³ See *Johnson*, 748 F.2d at 1320, 36 FEP Cases at 736 (Wallace, J., concurring and dissenting).

⁹⁴ *Id.* at 1319, 36 FEP Cases at 735 (Wallace, J., concurring and dissenting).

⁹⁵ *Id.* at 1312, 36 FEP Cases at 729.

ment of nonminority employees,⁹⁶ there was no evidence before the *Johnson* court that the challenged plan absolutely barred males like Paul Johnson from advancement. The holding in *Johnson*, therefore, does not run afoul of *Weber*.

The final criterion set forth by *Weber* is that the plan be temporary.⁹⁷ In *Weber* the plan was designed to achieve a parity of black craft employees with the percentage of blacks in the local labor population.⁹⁸ Even though in *Johnson* the Agency head testified to the permanence of the affirmative action program,⁹⁹ the court looked to the essence of the plan and correctly found it to be generally of the same type as in *Weber*, directed toward attaining a parity balance with the distribution of minorities in the local work force.¹⁰⁰ Thus, the affirmative action plan in *Johnson* satisfied the four-factor *Weber* test, and was correctly upheld by the Ninth Circuit.

The Ninth Circuit in *Johnson* took a significant step toward insulating employers who act pursuant to an affirmative action plan from reverse discrimination suits. The court of appeals did this by only requiring the employer to show that it acted pursuant to an affirmative action plan, and to produce "some evidence" that its plan is remedial and is reasonably related to its remedial purpose. The court also draws the line of permissible affirmative action plans more deferentially in favor of such plans than the Supreme Court did in *Weber*. The rulings in *Johnson* are nevertheless sound. Its allocation of order and burdens of proof is in the mainstream of other judicial formulas and is consistent with the Supreme Court's analysis of the order and burdens in ordinary Title VII cases. Although *Johnson's* analysis departs from the *Weber* analysis of affirmative action programs, it is nevertheless permissible because *Weber's* imprecise standards give lower courts the discretion to engage in flexible interpretation of challenged affirmative action plans.

B. **Burdens of Proof in Title VII Class Discrimination Suits: Segar v. Smith*¹

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees or job applicants on the basis of race, color, religion, sex, or national origin.² Plaintiffs asserting a Title VII violation can establish a prima facie case of discrimination in two ways. First, plaintiffs can demonstrate that they have been intentionally discriminated against by their employers.³ Claims of intentional discrimination against an individual are characterized by the courts as allegations of "disparate treatment."⁴ The second means by which plaintiffs can establish a Title VII case is by showing

⁹⁶ *Weber*, 443 U.S. at 208, 20 FEP Cases at 7.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Johnson*, 748 F.2d at 1312, 36 FEP Cases at 729.

¹⁰⁰ *Id.* at 1312-13, 36 FEP Cases at 729-30.

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¹ 738 F.2d 1249, 35 FEP Cases 31 (D.C. Cir. 1984).

² 42 U.S.C. §§ 2000e to 2000e-17 (1982).

³ See *Teamsters v. United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973).

⁴ See *Teamsters v. United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977). The *Teamsters* Court stated:

Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, al-

that a particular facially neutral employer policy applies equally to all employees, but falls more harshly on those employees who are also members of a protected class, and cannot be justified by business necessity.⁵ Unlike a classic "disparate treatment" case, such a "disparate impact" claim does not require any proof of the employer's intentional discrimination.⁶

Not all employment discrimination claims, however, follow these classic models. Some disparate treatment claims, like most disparate impact claims, are brought as class actions by members of a protected group, such as blacks or women.⁷ These class actions allege a "pattern or practice" of disparate treatment and usually attempt to demonstrate discrimination by combining anecdotal evidence⁸ of discrimination with statistical data showing disparities between the status of the plaintiff class and other employees.⁹ In addition, some disparate impact claims do not challenge a particular employment practice, but rather, allege that "excessively subjective" employer decisions adversely impact upon members of a protected class.¹⁰ Such "excessive subjectivity" claims assert that an employer's generalized bias against a particular class of employees results in discriminatory hiring, promotion and compensation decisions.¹¹

Though the Supreme Court has established different orders and allocations of proof in classic disparate treatment¹² and disparate impact¹³ cases, the applicability of the

though it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

Id. at 335 n.15, 14 FEP Cases at 1519 n.15.

⁵ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971). Protected classes are composed of individuals subject to discrimination prohibited by Title VII, such as blacks or women.

⁶ *Id.* at 432, 3 FEP Cases at 178.

⁷ B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1288 (2d ed. 1983).

⁸ *Id.* Anecdotal evidence of discrimination is direct testimony concerning particular overt discriminatory acts or statements by the employer.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² The Supreme Court first defined the stages of a classic disparate treatment claim in *McDonnell Douglas Corp. v. Green*, which involved a charge that an employer discriminated against a particular job applicant. *McDonnell*, 411 U.S. at 792, 5 FEP Cases at 965. The Court held that the plaintiff must first establish a prima facie case of discrimination by showing that he was treated differently from similarly situated individuals. *Id.* at 802, 5 FEP Cases at 969. A prima facie case, the Court explained, can be established by showing that the plaintiff was qualified for the job, was denied the position, and the employment remained open after he was refused employment. *Id.* If the plaintiff establishes a prima facie case, the Court stated, the trial moves to its second stage in which the employer must rebut the presumption of discrimination. However, the employer may satisfy this rebuttal burden by merely articulating a nondiscriminatory justification for its differential treatment of the plaintiff. *Id.* at 802-03, 5 FEP Cases at 969. If the employer does articulate such a nondiscriminatory explanation for its actions, the plaintiff then has the burden of challenging this explanation and proving that it is merely a pretext for discrimination in the third stage of the case. *Id.* at 804, 5 FEP Cases at 970. Thus, the burden of proof remains at all times with the plaintiff. That is, the plaintiff has the burden of establishing his case and of demonstrating the falsity of any of the defendant's nondiscriminatory explanations for the challenged actions.

¹³ In the classic disparate impact case, the burden shifts from the plaintiff to the defendant in the second stage of the case. *Griggs*, 401 U.S. at 431, 3 FEP Cases at 178. In the first stage, the plaintiff has the burden of showing the disparate impact of a particular employer practice. This

Court's rulings to class disparate treatment and "excessive subjectivity" disparate impact cases is still unclear.¹⁴ Class disparate treatment cases are different than individual disparate treatment cases because, instead of challenging a particular employer action, they challenge the totality of an employer's decision-making process with respect to hiring, promotion and compensation of workers.¹⁵ Excessive subjectivity disparate impact cases also challenge a generalized bias in all employer decisions and are, therefore, very different from classic disparate impact cases, which challenge a specific and defined employer practice.¹⁶ Thus, both class disparate treatment and excessive subjectivity disparate impact cases consist of an attempt by a class of employees to demonstrate statistical disparities between their status and the status of other similarly situated employees.¹⁷ Because "classic" cases differ significantly from class disparate treatment and excessive subjectivity disparate impact claims, the appropriateness of applying the "classic" cases' different burdens of proof to their respective class and "excessive subjectivity" counterparts is unclear. Courts which have examined this issue have reached different results.

During the *Survey* year, in *Segar v. Smith*¹⁸ the United States Court of Appeals for the District of Columbia Circuit ruled that a class disparate treatment claim need not conform to the classic three stage model of burdens of proof first developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*¹⁹ and further refined in later cases.²⁰ In *Segar* the appeals court held that such cases may involve only two stages. The court stated that in the first stage, the plaintiff class would establish a presumption of discrimination by a showing of differential treatment.²¹ In the second stage, the defendant would attempt to rebut this presumption.²² The court held that class disparate treatment defendants, unlike defendants in individual cases, cannot simply articulate a nondiscriminatory explanation for the differential treatment of their plaintiff employees; they must also present evidence challenging the inference of discrimination.²³ In dicta the court also stated that if a defendant successfully rebutted the inference of disparate treatment by showing that a nondiscriminatory practice resulted in that differential

demonstration is usually accompanied by statistical evidence of the disproportionate impact of a particular policy on members of a protected class. If the plaintiff satisfies this burden, the defendant will then have the burden of proving the business necessity of the practice in question. *Id.* If, and only if, the defendant meets this burden, the burden of proof shifts back to the plaintiff who must demonstrate that other, less discriminatory practices would also have accomplished the business goals of the questioned practice. *Id.*

¹⁴ B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1288.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Segar v. Smith*, 738 F.2d 1249, 1268-69, 35 FEP Cases 31, 43-44 (D.C. Cir. 1984).

¹⁹ 411 U.S. 792, 5 FEP Cases 965 (1973).

²⁰ See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981). The *Burdine* decision emphasized "that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253, 25 FEP Cases at 115. The Court emphasized the limited nature of the defendant's intermediate burden to respond to a plaintiff's prima facie case. The Court stated that "[w]hen the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." *Id.* at 260, 25 FEP Cases at 118.

²¹ *Segar*, 738 F.2d at 1269, 35 FEP Cases at 43-44.

²² *Id.*

²³ *Id.* at 1269-70, 35 FEP Cases at 43-44.

treatment, the disparate treatment claim would be transformed into a classic disparate impact claim.²⁴ The defendant would then bear the burden of proving the business necessity of the particular practice which it had raised as a defense to the class disparate impact claim.²⁵

The *Segar* case involved a claim of employment discrimination brought against the federal Drug Enforcement Agency (DEA) by a class composed of black DEA special agents.²⁶ Special agents perform most of the DEA's criminal investigative work.²⁷ The minimum entry level requirements for special agents are established by the Civil Service Commission Handbook.²⁸ Agents enter the DEA at level GS-7 if they have three years of general and one year of specialized experience.²⁹ They enter at GS-9 if they have an additional year of specialized experience.³⁰

Race influences the work assignment of agents.³¹ The DEA generally assigns black agents to areas where significant numbers of suspected drug law violators are black.³² Black agents are also assigned a disproportionate amount of undercover work because the DEA believes they "will be more readily able to infiltrate organizations consisting primarily of blacks."³³ Though some undercover work is desirable, too much undercover work limits the range of an agent's experience and therefore his opportunities for promotion.³⁴

Promotions within the lower GS levels are noncompetitive, while at the higher levels they are competitive agency-wide.³⁵ Competitive promotions are made, in part, on the basis of numerical ratings and rankings, though the boards which determine these rankings have not received any particular guidance by the agency.³⁶

In January 1977, two black special agents of the DEA along with an association representing black special agents sued the DEA alleging that it had engaged in a "pattern or practice" of racial discrimination against black agents in violation of Title VII.³⁷ In their class disparate treatment claim, the agents alleged that the DEA had "discriminated in recruitment, hiring, initial grade assignments, salary, work assignments, evaluations, discipline, and promotions."³⁸ In September 1977, the trial court certified the class of all blacks who were serving or had served as special agents at the DEA, and who had applied for positions or who would in the future apply for such positions.³⁹

²⁴ *Id.* at 1270-71, 35 FEP Cases at 44-45.

²⁵ *Id.* at 1271-72, 35 FEP Cases at 45-46. In addition to its holding with respect to burdens of proof and its dicta regarding the relationship of class disparate treatment and disparate impact claims, *Segar* is also significant for its awarding of a class-wide remedy and its refusal to require individualized damage hearings for each member of the class. *Id.* at 1289-91, 35 FEP Cases at 60-62.

²⁶ *Id.* at 1260, 35 FEP Cases at 36.

²⁷ *Id.* at 1259, 35 FEP Cases at 35.

²⁸ *Id.*

²⁹ *Id.* at 1259, 35 FEP Cases at 36.

³⁰ *Id.*

³¹ *Id.* at 1260, 35 FEP Cases at 36.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* Lower level promotions are conferred to agents upon completion of one year of service in grade and recommendation by their superior. *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* Courts are required by Rule 23 of the Federal Rules of Civil Procedure to determine by

At trial the plaintiffs presented both statistical and anecdotal evidence of discrimination.⁴⁰ Most of the anecdotal evidence, which consisted of testimony regarding discriminatory acts or statements, however, was rejected by the court.⁴¹ The statistical analysis consisted of several multiple regression analyses.⁴² These analyses revealed a significant wage disparity between black and white agents.⁴³ Other analyses revealed significant disparities between comparable black and white agents with respect to initial grade assignments, work assignments, supervisory evaluations, discipline, and promotions from GS-11 to GS-12.⁴⁴

The DEA attacked the value of plaintiffs' statistical evidence as a basis for an inference of discrimination, essentially claiming that it did not compare similarly situated black and white agents.⁴⁵ Specifically, the DEA claimed that the plaintiff's statistical analysis was flawed because it failed "to account for the relevant explanatory variable of prior law enforcement experience."⁴⁶ The DEA also offered an alternative form of statistical analysis that tended to show an absence of discrimination.⁴⁷ Furthermore, the DEA introduced testimonial evidence relating to its efforts to implement equal opportunity goals at the agency.⁴⁸

The district court accepted the bulk of the plaintiffs' statistics and rejected both the DEA's critique of these statistics and the DEA's statistics to the contrary.⁴⁹ The district court concluded that salary differentials between black and white agents resulted from discrimination.⁵⁰ Moreover, the court held that the DEA had discriminated with respect to entry grade assignments, work assignments, supervisory evaluations, and promotions.⁵¹ The court specifically rejected the DEA's claim that the failure of plaintiffs' statistics to account for prior law enforcement experience skewed their analysis.⁵² The DEA appealed the finding of liability to the United States Court of Appeals for the District of Columbia.⁵³

On appeal the DEA raised several specific challenges to the district court's holding.⁵⁴ The bulk of the DEA's case was an attempt to demonstrate that the plaintiffs' statistical

order if claims brought as class actions shall be maintained as such. The court's Rule 23(b)(2) order certifying a class determines which individuals qualify for membership in the plaintiff class.

⁴⁰ *Id.* at 1261, 35 FEP Cases at 37. Prior to trial the parties settled the claims of intentional discrimination with respect to recruitment and hiring. *Id.*

⁴¹ *Id.* at 1264 n.10, 35 FEP Cases at 39 n.10.

⁴² *Id.* at 1261, 35 FEP Cases at 37. Schlei and Grossman have described multiple regression analysis as "a statistical technique designed to estimate the effect of several independent variables, (e.g., education, experience, performance, age, race, sex) in relation to a single dependent variable (e.g., salary). The methodology provides the ability to determine the extent to which the independent variables have influenced the dependent variable." B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1342-43.

⁴³ *Segar*, 738 F.2d at 1261, 35 FEP Cases at 37.

⁴⁴ *Id.* at 1263, 35 FEP Cases at 38.

⁴⁵ *Id.* at 1263, 35 FEP Cases at 39.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1264, 35 FEP Cases at 39.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1265, 35 FEP Cases at 40.

⁵⁴ *Id.*

evidence was an insufficient basis for the lower court's inference of discrimination.⁵⁵ The DEA contended that any statistical disparities between black and white agents were the result of different levels of prior experience.⁵⁶ The appeals court affirmed the district court's rejection of the DEA's challenge to the plaintiffs' statistical showing of status disparities between similarly situated blacks and whites which was based on the lack of evidence that whites possessed greater experience than blacks.⁵⁷ The appeals court also concluded that plaintiffs' statistical showing of status disparities permitted the court to infer discrimination, even absent supporting anecdotal evidence.⁵⁸

The appeals court observed, however, that though the DEA claim that any disparities between blacks and whites were produced by statistically unaccounted for differential prior experience did not invalidate the plaintiffs' prima facie case of discrimination, it could be characterized as evidence rebutting an ultimate inference of discrimination.⁵⁹ In other words, the plaintiffs' failure to fully account for black and white agents' prior experience did not preclude a prima facie showing of disparities between similarly situated black and white agents, but if evidence of such differential experience were presented, such evidence might have precluded the court's ultimate inference that these disparities resulted from discriminatory action by the DEA.⁶⁰ The appeals court, however, ruled that the DEA had also failed to produce any evidence to support this nondiscriminatory explanation and therefore had failed to preclude the ultimate inference of discrimination.⁶¹

⁵⁵ *Id.* at 1287, 35 FEP Cases at 58.

⁵⁶ *Id.* at 1274-76, 35 FEP Cases at 47-49.

⁵⁷ *Id.* at 1276-77, 35 FEP Cases at 49-50. The DEA's claim that the plaintiff's statistics were flawed rested on the claim that they failed to account for agents' prior specialized experience in criminal investigations. *Id.* at 1274, 35 FEP Cases at 44. The DEA alleged that the failure to account for this variable skewed all of plaintiffs' statistical studies, and it was this factor, rather than the race of the employee, which explained the lower salaries and less rapid promotion of black agents. *Id.* The district court rejected this claim because all agents were required to possess one year of specialized criminal investigative experience. *Id.* at 1275, 35 FEP Cases at 48. The plaintiffs' studies only failed to account for a second year of "specialized experience" which was a prerequisite for entry of an agent at level GS-9. *Id.*

⁵⁸ *Id.* at 1277-79, 35 FEP Cases at 50-52. The DEA also claimed that the disparities between blacks and whites, which had been offered by the plaintiffs, were not large enough to justify the trial court's inference of discrimination because they were not linked with anecdotal evidence of discrimination. *Id.* at 1277, 35 FEP Cases at 50. The appeals court ruled that, although anecdotal evidence is always helpful, it is not always necessary for a disparate treatment plaintiff to prevail. *Id.* at 1278, 35 FEP Cases at 51. The court distinguished the Supreme Court's discussion of the relation between statistical and anecdotal evidence of discrimination in *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, 12 FEP Cases 1150, 1158 (1977), from the present case. The *Segar* appeals court noted that in *Hazelwood* the plaintiff relied on statistical comparisons between a workforce and the general population, while the plaintiffs in *Segar* presented more finely tuned statistics comparing blacks and whites who were all DEA special agents. *Segar*, 738 F.2d at 1278-79, 35 FEP Cases at 56.

⁵⁹ 738 F.2d at 1287, 35 FEP Cases at 58.

⁶⁰ *Id.* The manner in which the appeals court raised this issue is somewhat confusing. Though the court distinguished between evidence which directly undermines plaintiff's attempt to demonstrate status disparities between "similarly situated" employees and evidence which provides a nondiscriminatory explanation for status disparities, *id.*, the distinction is not clear in this particular case. If the DEA claim that white agents were more "promotable" because they had greater prior experience had been supported by evidence, this claim would not only have precluded an inference of discrimination, it also would have fatally weakened plaintiff's statistical demonstration of disparities by proving that the black and white agents being compared were not similarly situated.

⁶¹ *Id.*

The court of appeals next addressed the defendant's claim that the district court had applied an improper rebuttal burden.⁶² The DEA challenged the trial court's statement that the burden of persuasion shifts to the defendant once the plaintiff establishes a prima facie case.⁶³ Admitting that the trial court's formulation was a technical misstatement of the law, the appeals court nevertheless concluded that this statement, when read in context with other statements by the trial court, was not a misallocation of burdens of proof.⁶⁴ The appeals court, concluded, therefore, that the trial court had complied with the Supreme Court's requirement, in *Texas Department of Community Affairs v. Burdine*,⁶⁵ that the plaintiff in disparate treatment cases carries the burden of proof at all times.⁶⁶

Although the appeals court indicated that the trial court's statement of the respective burdens of the plaintiff and defendant complied with the Supreme Court's holding in *Burdine*, it also indicated that the *Burdine* analysis might not apply to all class disparate treatment cases.⁶⁷ Because of the significant differences between individual and class action disparate treatment cases,⁶⁸ the appeals court stated that the burdens of proof in the two types of cases may also differ.⁶⁹ The appeals court suggested that because the burden of establishing a prima facie case in an individual's claim of disparate treatment is easily satisfied, the defendant's rebuttal burden is also minimal.⁷⁰ The mere articulation of a nondiscriminatory explanation for allegedly discriminatory action satisfies this burden, the court explained.⁷¹ Plaintiffs then, according to the court, must attempt to prove that the defendant's explanation is a mere pretext for discrimination.⁷²

In contrast, the appeals court noted that prima facie class disparate treatment claims are typically stronger than individual disparate treatment cases because numerous nondiscriminatory explanations for disparate treatment are not credible in the face of plaintiffs' presentation of sound statistical evidence.⁷³ Such statistical evidence, the court explained, not only precludes a greater number of potential employer explanations of disparate treatment than are precluded in the typical individual cases,⁷⁴ it also is relevant to the court's determination of whether employer explanations for differential treatment are merely pretexts for discrimination.⁷⁵ Because plaintiffs' cases in class suits are typically stronger than in individual suits, and because they often compress the first and third stages of the individual claim into one stage,⁷⁶ the appeals court concluded that defendant's rebuttal burden is greater in such class action cases than in individual cases.⁷⁷

⁶² *Id.* at 1284, 35 FEP Cases at 55-56.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981).

⁶⁶ *Segar*, 738 F.2d at 1284, 35 FEP Cases at 56.

⁶⁷ *Id.* at 1268-69, 35 FEP Cases at 42-44.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1269 n.13, 35 FEP Cases at 43 n.13.

⁷³ *Id.* at 1269, 35 FEP Cases at 43-44.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* A statistical showing that a large number of factors do not explain status disparities between blacks and whites may also include evidence relating to whether a particular explanatory factor raised by the defendant to explain such disparities is merely a pretext for discrimination. *Id.*

The *Segar* court attempted to both respect the *Burdine* holding that the burden of proof always remains with the plaintiff as well as to impose on the defendant a more demanding rebuttal burden than mere articulation of a nondiscriminatory explanation for demonstrated disparities between blacks and whites. Trying to harmonize these seemingly contradictory goals, the court stated that class action disparate treatment cases consist of two stages.⁷⁸ According to the court, in the first stage the plaintiff attempts to produce enough evidence to justify an inference of discrimination.⁷⁹ The court added that if the plaintiff succeeds in demonstrating a *prima facie* case, in the second stage the defendant must introduce evidence challenging or rebutting the plaintiff's evidence, so that the court can infer that no discrimination occurred.⁸⁰ Ultimately holding that in both individual and class disparate treatment cases the plaintiff at all times bears the ultimate burden of proof, the court nevertheless concluded that in class actions the defendant must present more substantial evidence to rebut or undercut a plaintiff's *prima facie* case.⁸¹

The *Segar* court determined that the DEA had neither succeeded in directly undermining the plaintiff's case, nor in proposing a nondiscriminatory explanation for the demonstrated disparities between black and white agents.⁸² The court, therefore, affirmed the trial court's finding that DEA was liable to its black agents for intentional racial discrimination.⁸³

In dicta, the court added that even if the DEA had successfully rebutted the charge of intentional discrimination, the DEA might have been guilty of a Title VII violation.⁸⁴ Class disparate treatment claims which are successfully rebutted by a showing that a particular nondiscriminatory employer practice or policy produced the demonstrated disparities should proceed, the court stated, as classic claims of disparate impact.⁸⁵ The court stated that such a transformation from class disparate treatment to classic disparate impact claims is logical because a rebutted class disparate treatment case has all the elements of a classic disparate impact case.⁸⁶ The court explained that these elements constitute a particular employer policy which has resulted in statistically demonstrable status disparities between classes of employees.⁸⁷ The plaintiff's proof of intentional discrimination is not required in disparate impact, as it is in disparate treatment cases.⁸⁸ When such a transformation occurs, the court reasoned, the defendant has the burden of justifying the business necessity of the particular policy which it has raised in its defense.⁸⁹

In such a situation the third stage of the individual disparate treatment case is not necessary. This is because the plaintiff, by showing that numerous nondiscriminatory factors do not explain differential treatment, attempts to show that any nonracial explanation for status disparities is pretextual.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 1287-88, 35 FEP Cases at 59.

⁸³ *Id.* at 1288, 35 FEP Cases at 59.

⁸⁴ *Id.* at 1270-71, 1288, 35 FEP Cases at 44-45, 59.

⁸⁵ *Id.* at 1270-71, 35 FEP Cases at 44-45.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971).

⁸⁹ *Segar*, 738 F.2d at 1270-71, 35 FEP Cases at 44-45.

To illustrate its reasoning, the court observed that the DEA would have had to justify the business necessity of requiring a second year of specialized experience if the court had found this requirement, and not race, to be the cause of lower pay and less promotions of black agents.⁹⁰ Such a disparate impact claim would differ from a traditional case of disparate impact. Under the *Segar* court's approach, the particular practice challenged would not be originally selected by the plaintiff-employees but would be raised by the defendant-employer in its defense of charges of generalized discrimination. In the disparate impact portion of the case, the employer would have had to justify the business necessity of the practice or policy which the employer had successfully raised as a nondiscriminatory explanation for status disparities in the disparate treatment portion of the case. The court justified its requirement that employers articulate which of its practices unfairly affected plaintiffs on the grounds that the employer has superior knowledge "as to precisely how its employment practices affect employees."⁹¹

The *Segar* case is significant because of its holding with respect to the relative burdens of proof on plaintiffs and defendants in Title VII disparate treatment class actions.⁹² The case is also important because it suggests that class disparate treatment claims can be transformed into disparate impact claims, if successfully rebutted by an employer's showing that a nondiscriminatory practice caused the differential treatment.⁹³ The holding of *Segar* with respect to burdens of proof is somewhat confusing because the court purports to hold that their decision is in accord with the Supreme Court decision in *Burdine* that the burden of proof is at all times with the plaintiff.⁹⁴ At the same time the *Segar* court suggests that in class actions there is a greater rebuttal burden on the the defendant than in individual disparate treatment cases,⁹⁵ where the defendant need merely articulate a nondiscriminatory explanation for its action to rebut the plaintiffs' prima facie case. Commentators⁹⁶ and some lower courts⁹⁷ have also stated that the structure and intermediate burdens of proof of individual disparate treatment cases are ill-suited to class disparate treatment claims.⁹⁸

⁹⁰ *Id.* at 1288, 35 FEP Cases at 59.

⁹¹ *Id.* at 1271, 35 FEP Cases at 44-45.

⁹² *Id.* at 1268-69, 35 FEP Cases at 42-44.

⁹³ *Id.* at 1270-71, 35 FEP Cases at 44-45.

⁹⁴ *Id.* at 1284, 35 FEP Cases at 56.

⁹⁵ *Id.* at 1269, 35 FEP Cases at 43-44.

⁹⁶ B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1288. "The disparate treatment rules are designed for probing motivation with respect to an adverse action taken against a specific individual, and are ill-suited to a broad-based statistical attack on an entire employment system." *Id.*

⁹⁷ See *Vuyanich v. Republic Nat'l Bank*, 521 F. Supp. 656, 664-65, 26 FEP Cases 1127, 1134-35 (N.D. Tex. 1981). The *Vuyanich* court stated:

The *Burdine* construct contemplates an initial thrust by a plaintiff, a parry by a defendant, followed by a traditional fight with the burden on the challenger This sequential model works well in the context of a simple, single-plaintiff treatment case by determining the result where a defendant offers no explanation, or where the defendant does explain, but the plaintiff fails to discredit the explanation. The model works poorly, if at all, where a plaintiff class loads overwhelming force into its opening shot In a complex class action, utilizing statistical proof and counterproof, the value of the *Burdine* sequence — to highlight the issues in contest — is about as relevant as a minuet is to a thermonuclear battle.

Id. at 661, 26 FEP Cases at 1132.

⁹⁸ The Supreme Court may accept the reasoning of the appeals court and commentators on this issue. If, however, the Court does not decide to treat class cases differently from individual

Because the *Segar* holding with respect to burdens of proof is subject to challenge, future class disparate treatment plaintiffs should not be satisfied with a general statistical showing of status disparities between the plaintiff class and other employees. Such plaintiffs should also specifically demonstrate that any defendant explanation for differential treatment is merely a pretext for discrimination. In this manner, the plaintiff will satisfy the burden of proof articulated in not only *Segar*, but also in *Burdine*. Conversely,

cases, and instead applies its analysis in *Burdine* uniformly to all disparate treatment cases, it may overturn or remand findings of liability similar to those made in *Segar*. Such a reversal would be a consequence of a defendant articulating a nondiscriminatory explanation for disparate treatment, as the DEA did in *Segar*, and a court refusing to accept that explanation. The nondiscriminatory explanation advanced by the DEA was the differential prior experience of black and white agents. *Segar*, 738 F.2d at 1287, 35 FEP Cases at 58. In *Segar*, the appeals court rejected the DEA's explanation because the agency did not support its assertion with evidence. *Id.* Under a literal interpretation of *Burdine*, however, the burden would have been on the plaintiff to prove that the articulated explanation was merely pretextual, regardless of the credibility or validity of the employer's explanation. The *Segar* appeals court, in contrast, read *Burdine* as holding that, in some cases, the plaintiff's initial evidence will be enough to discredit an employer's explanation. *Id.* at 1269, 35 FEP Cases at 44. The Supreme Court, in contrast, may conclude that such an interpretation of *Burdine* will place too great a burden on employers to justify all racial and sexual disparities which flow from discretionary employer decisions.

The Supreme Court may be even less willing to accept the appeals court's assertions that successfully rebutted class disparate treatment claims can become transformed into disparate impact claims. *See id.* at 1270, 35 FEP Cases at 44. The Court may conclude that such an approach is not justified by Title VII because it permits plaintiffs to prevail who do not prove intentional discrimination and who do not initially challenge a particular policy or practice of the employer. In terms of logic and judicial economy, the appeals court's suggestion that disparate treatment plaintiffs proceed on a disparate impact claim, once a particular practice which disproportionately affects them has been identified, makes sense. The alternative would be to require the plaintiffs to file a new disparate impact claim after their disparate treatment claim had been rebutted. The Supreme Court, however, may be unwilling to sanction the appeals court's approach because it potentially alters the thrust of Title VII. Title VII was intended by Congress to eliminate intentional discrimination and to guarantee equal treatment, but not necessarily equal status, to all employees. *See Power v. Barry*, 539 F. Supp. 721, 726, 29 FEP Cases 559, 563-64 (D. Mich. 1982) (interpreting legislative history of Title VII). The *Segar* doctrine, if adopted, could transform Title VII into a vehicle for suing employers whenever the status of employees of a protected class is inferior to those of nonprotected employees.

The *Segar* approach does offer a solution to the difficult problem of distinguishing class disparate treatment claims from "excessive subjectivity" disparate impact claims. *See B. SCHLEI & P. GROSSMAN, supra* note 7, at 1288. Such disparate impact claims do not challenge a particular practice, but rather allege bias throughout an employment system which adversely impacts on a protected class. Such claims, therefore, are not true disparate impact claims and should be brought as class disparate treatment claims. If the employer demonstrates that any unequal impact of employment policies is not caused by discrimination but by a particular practice, then the elements of a true disparate impact claim would be present and the case could proceed on those grounds.

Treating class disparate treatment claims and excessive subjectivity claims similarly eliminates the logical inconsistency of applying the different standards of proof of the classic disparate impact and disparate treatment cases to these essentially indistinguishable cases. *See Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 800, 28 FEP Cases 121, 125-26 (5th Cir. 1982) (court held that "excessive subjectivity" cases in actuality are disparate treatment cases and not adverse impact cases). The bringing of "excessive subjectivity" disparate impact cases as class disparate treatment cases is not only logical, it also seems advantageous to plaintiffs if, as the *Segar* court suggested, rebutted class disparate treatment claims are transformed into classic disparate impact claims. If the *Segar* dicta is not applied, however, class plaintiffs will face a more difficult task because they will have to produce sufficient evidence to support an inference of intentional discrimination.

future disparate treatment defendants must not be satisfied with the mere articulation of a nondiscriminatory explanation for differential treatment of employees, but must present as much evidence as possible to support that explanation.

Whether other courts will accept the logic of *Segar*'s dicta and permit rebutted class disparate treatment claims to proceed as classic disparate impact cases is also unclear.⁹⁹ Future plaintiffs should, therefore, attempt to bring a classic disparate impact claim in conjunction with their class disparate treatment claim. This approach will guarantee that a disparate impact claim will survive a rebutted disparate treatment claim. The plaintiff, however, may have difficulty bringing a classic disparate impact suit if disparities in status flow from a subtle employer bias, and not from a particular objective employer policy.

The bringing of a concurrent "excessive subjectivity" disparate impact claim would be helpful to the plaintiff if the trial court were to apply the classic disparate impact burdens of proof to such a case. In that situation the defendant would be forced to justify the "business necessity" of its overly subjective decision-making process. Courts will likely recognize, however, that "excessive subjectivity" suits are, in reality, claims of subtle, yet intentional discrimination and will, therefore, require that they be brought as class disparate treatment cases.

The *Segar* court's suggestion that rebutted class disparate treatment cases be transformed into traditional disparate impact cases, if recognized by other courts, would make defending a Title VII employment discrimination case more difficult. Future defendants, therefore, should focus on undermining the plaintiff's initial statistical showing of status disparities between similarly situated classes of employees. The plaintiff's attempt to show statistical disparities in employee status is the crucial battleground because once the plaintiff makes such a showing, the defendant then has the burden of raising a policy which provides a nondiscriminatory explanation for these disparities. Even if the employer succeeds in rebutting the inference of discrimination, the employer will then have the subsequent burden of justifying the "business necessity" of the particular practices which it had shown was the cause of the status disparities in question.

In conclusion, the United States Court of Appeals for the District of Columbia decision in *Segar* held that class disparate treatment claims may consist of only two stages in which the plaintiff presents evidence permitting a court's inference of discrimination and the defendant attempts to undermine that inference. The court stated that the defendant's mere articulation of a nondiscriminatory explanation of discrimination will not suffice, in a class disparate treatment claim, to undercut the inference of discrimination. This holding is a logical modification of the Supreme Court's holdings on burdens of proof with respect to individual disparate treatment cases. The appeals court also suggested that the rebuttal of a class disparate treatment case transforms it into a disparate impact case. Though permitting successfully rebutted class disparate treatment claims to proceed as disparate impact cases is logical in terms of judicial economy, such an approach may also be rejected by the Supreme Court as an unjustified expansion of the scope of Title VII claims.

⁹⁹ See *Pouncy*, 668 F.2d at 800, 28 FEP Cases at 124-25; *Rivera v. City of Wichita Falls*, 665 F.2d 531, 539, 27 FEP Cases 1352, 1356 (5th Cir. 1982), for examples of opinions questioning whether rebutted class disparate treatment cases should be permitted to proceed as disparate impact cases. The *Segar* court rejected the reasoning of these two decisions. *Segar*, 738 F.2d at 1270-71, 35 FEP Cases at 45.

C. **Limiting the Role of Statistical Evidence in Affirmative Action Cases: Janowiak v. City of South Bend*¹

The Supreme Court has interpreted Title VII of the Civil Rights Act of 1964² and the fourteenth amendment³ as allowing employers to implement race-conscious affirmative action plans to remedy past discrimination.⁴ In *Fullilove v. Klutznick*⁵ and *United Steelworkers v. Weber*,⁶ the Supreme Court upheld the disputed validity of race-conscious affirmative action programs, emphasizing that such programs are needed to correct the effects of prior discrimination.⁷ Consequently, in the aftermath of these decisions, the question of what constitutes past discrimination has become a major component in challenges to the validity of affirmative action programs.

A central factor in determining whether past discrimination has occurred is the statistical disparity, if any, between the percentage of minorities employed in the allegedly discriminatory enterprise and the percentage of minorities in the community from which employees are hired.⁸ This approach was suggested by the Supreme Court in the 1976 case of *International Brotherhood of Teamsters v. United States*.⁹ In *Teamsters*, the Court stated that statistics showing racial imbalance are probative because such imbalance is often a telltale sign of purposeful discrimination, and that absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force representative of the racial composition of the community from which employees are hired.¹⁰

Lower federal courts have followed this view and have given strong weight to statistical evidence in affirmative action cases. For example, in *Detroit Police Officer's Association v. Young*,¹¹ in a dispute challenging the legality of an affirmative action program, the Sixth Circuit held that "[e]ven standing alone, the statistical data was evidence of discrimination."¹² Similarly, in *Bratton v. City of Detroit*,¹³ the Sixth Circuit again found that "[t]here is no doubt that the inference of intentional discrimination which arises from severe statistical disparity is an accurate one."¹⁴ Although additional factors indicative of past discrimination were present in *Teamsters*, *Young*, and *Bratton*,¹⁵ these decisions

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¹ 750 F.2d 557, 36 FEP Cases 737 (7th Cir. 1984).

² 42 U.S.C. § 2000e-2(a), (j) (1982).

³ U.S. CONST. amend. XIV, § 2.

⁴ *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193, 20 FEP Cases 1 (1979); *Board of Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 17 FEP Cases 1000 (1978).

⁵ 448 U.S. 448 (1980).

⁶ 443 U.S. 193, 20 FEP Cases 1 (1979).

⁷ *Fullilove*, 448 U.S. at 492; *Weber*, 443 U.S. at 197, 20 FEP Cases at 3; see also *Bakke*, 438 U.S. at 320, 17 FEP Cases at 1022.

⁸ *International Bhd of Teamsters v. United States*, 431 U.S. 324, 339-40 & n.20, 14 FEP Cases 1514, 1520-21 & n.20 (1976).

⁹ 431 U.S. 324, 14 FEP Cases 1514 (1976).

¹⁰ *Id.* at 339-40 & n.20, 14 FEP Cases at 1520-21 & n.20.

¹¹ 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

¹² *Id.* at 687, 20 FEP Cases at 1737.

¹³ 704 F.2d 878, 31 FEP Cases 465 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984).

¹⁴ *Id.* at 889, 31 FEP Cases at 472.

¹⁵ In *Teamsters*, the Court recognized that many acts of overt discrimination had taken place. 431 U.S. at 339, 14 FEP Cases at 1520. In both *Bratton* and *Young*, the Sixth Circuit also found that

suggest in dicta that a court could uphold the implementation of a race-conscious affirmative action plan based solely on a factual finding of sharp statistical disparity between the number of minorities employed in an enterprise and the number of minorities present in the community.¹⁶

During the *Survey* year, however, the United States Court of Appeals for the Seventh Circuit, in *Janowiak v. City of South Bend*,¹⁷ held an affirmative action plan invalid, stating that a finding of statistical disparity between the percentage of minority firefighters and the percentage of minorities in the community was not sufficient to conclude that past discrimination had taken place.¹⁸ The court found that the employer, the City of South Bend, had to proffer something more than a finding of statistical disparity between the percentage of minorities employed and the percentage of minorities in the community to justify the adoption of a race-conscious affirmative action plan.¹⁹ Absent "something more" to show past discrimination, the court concluded that adoption of an affirmative action plan would violate both Title VII of the 1964 Civil Rights Act and the fourteenth amendment of the United States Constitution.²⁰ Although this decision requires an employer to have more than statistical evidence to support a finding of past discrimination,²¹ the decision fails to delineate the factors that must be present in order to find that past discrimination existed.

In *Janowiak*, plaintiff Janowiak, a white male, challenged the South Bend Fire Department's affirmative action program on the grounds that it violated Title VII of the 1964 Civil Rights Act and the fourteenth amendment of the United States Constitution.²² In 1979 the South Bend Board of Public Safety, noting that the city had a minority population of 14.1% and the fire department had a minority population of only 5.3%, appointed a task force to design and implement a plan to improve the recruitment of minorities into the city's fire department.²³ Although the task force did not find that the city's hiring practices were discriminatory, it suggested that the public safety board adopt, for five years, a two minority to one nonminority preferential hiring plan in order for the fire department to eventually reflect the minority composition of the city.²⁴

The minority recruitment review committee of the city's board of public safety approved the task force recommendation and submitted the proposal to the board of public safety for approval.²⁵ The board adopted the task force recommendation, declaring that minority representation on the fire department should be consistent with the minority composition of the community.²⁶ In implementing the newly adopted plan,

there had been many incidents of racial discrimination. *Bratton*, 704 F.2d at 889, 31 FEP Cases at 472; *Young*, 608 F.2d at 687, 20 FEP Cases at 1737.

¹⁶ *Teamsters*, 431 U.S. at 339 n.20, 14 FEP Cases at 1520 n.20; *Bratton*, 704 F.2d at 889, 31 FEP Cases at 472; *Young*, 608 F.2d at 687, 20 FEP Cases at 1737.

¹⁷ 750 F.2d 557, 36 FEP Cases 737 (7th Cir. 1984).

¹⁸ *Id.* at 562, 36 FEP Cases at 741.

¹⁹ *Id.*

²⁰ *Id.* at 562, 564, 36 FEP Cases at 741, 743.

²¹ *Id.*

²² *Id.* at 558, 36 FEP Cases at 738.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 559, 36 FEP Cases at 738.

²⁶ *Id.*

South Bend retained its testing procedures,²⁷ but used two separate lists to rank minority and nonminority applicants who passed the hiring exam.²⁸ In November of 1980, pursuant to this plan, the public safety board hired four minority applicants and one nonminority applicant to the fire department.²⁹

Janowiak had applied to the fire department, passed the exam, and was placed second on the nonminority list.³⁰ On November 7, 1980, the board of public safety notified Janowiak of his position on the list.³¹ At his deposition, Janowiak testified that Robert Potvin, Assistant to the board of public safety, assured him on two separate occasions prior to February, 1981 that the board would hire him as a firefighter.³² In February of 1981, however, Potvin informed Janowiak that he would not be hired and denied having told Janowiak that he would be hired.³³ Janowiak filed a charge of race discrimination with the Equal Employment Opportunity Commission (EEOC) in July of 1981 and the EEOC issued a right to sue in February of 1982.³⁴

Janowiak brought suit in the United States District Court for the Northern District of Indiana.³⁵ In December of 1983 the court granted South Bend's motion for summary judgment.³⁶ The court reasoned that neither Title VII nor the fourteenth amendment prevented South Bend from adopting an affirmative action plan designed to remedy the disparity between the percentage of minorities in the city's population and the percentage of minorities in the fire department.³⁷ On appeal, the Seventh Circuit held that both Title VII and the fourteenth amendment required South Bend to use more than statistical data to make the finding of past discrimination necessary to adopt an affirmative action program.³⁸

The court first considered whether Title VII prohibited South Bend from making a finding of past discrimination based solely on statistical data.³⁹ The Seventh Circuit, citing *United Steelworkers of America v. Weber*,⁴⁰ stated that affirmative action plans withstand Title VII challenges if they are designed to remedy old patterns of racial segregation and do not unnecessarily trammel the interests of white employees.⁴¹ The appeals court then noted that the Supreme Court, in sustaining the plan in *Weber*, relied upon more than the statistical disparity between the percentage of minority craftworkers and the percentage of minorities in the workforce.⁴² According to the Seventh Circuit's

²⁷ *Id.* The task force had found the testing procedures reasonable and nondiscriminatory. *Id.*

²⁸ *Id.* at 559, 36 FEP Cases at 739.

²⁹ *Id.* One minority applicant failed the physical examination and was replaced by the next applicant on the minority list in February of 1981. *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Potvin later denied making any of these statements. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ 576 F. Supp. 1461, 33 FEP Cases 958 (N.D. Ind. 1983).

³⁶ *Id.* at 1468, 33 FEP Cases at 963. The district court found that Janowiak's EEOC charge was not barred despite the 180 day statute of limitations because Potvin's assurances tolled the statute of limitations. *Id.* at 1465, 33 FEP Cases at 961. This portion of the district court decision was affirmed. 750 F.2d at 559-61, 36 FEP Cases at 739-41.

³⁷ 576 F. Supp. at 1466-68, 33 FEP Cases at 961-63.

³⁸ 750 F.2d at 562, 36 FEP Cases at 741.

³⁹ *Id.*

⁴⁰ 443 U.S. 193, 20 FEP Cases 1 (1979).

⁴¹ 750 F.2d at 562, 36 FEP Cases at 741 (citing *Weber*, 443 U.S. at 208, 20 FEP Cases at 7).

⁴² *Id.*

interpretation of *Weber*, the Supreme Court relied upon the craft unions' history of excluding blacks, as well as upon the statistical disparity, in finding the prior discrimination necessary to justify implementation of an affirmative action plan.⁴³ Following its interpretation of *Weber*, the court of appeals concluded that Title VII prohibited the implementation of an affirmative action plan where the finding of past discrimination was based solely on the existence of a statistical disparity between the percentage of minorities working for an employer and the percentage of minorities in the community.⁴⁴

In addition to relying on *Weber*, the *Janowiak* court also cited opinions from the Second and Sixth Circuits which had upheld challenged affirmative action plans.⁴⁵ While noting that the circuits had not agreed on a consistent approach in evaluating the sufficiency of statistical data in affirmative action cases,⁴⁶ the Seventh Circuit held that more than a statistical disparity is necessary to justify the implementation of an affirmative action plan.⁴⁷ The court interpreted both *Detroit Police Officers' Association v. Young*⁴⁸ and *International Brotherhood of Electrical Workers (IBEW) v. City of Hartford*⁴⁹ as requiring more than a statistical disparity to make a finding of past discrimination.⁵⁰ The *Janowiak* court reasoned that in *Young* the Sixth Circuit based its finding of past discrimination in the Detroit Police Department on more than statistical data.⁵¹ In *Young*, the court found that the department had discriminated against blacks in the entrance exam, in duty assignments, in the job's physical requirements, and in background investigatory procedures.⁵² Similarly, in *IBEW*,⁵³ the Second Circuit found that in addition to statistics, there was pervasive overt racial discrimination in the construction trades.⁵⁴ Citing *Weber*, *Young*, and *IBEW* as authority, the Seventh Circuit thus concluded that Title VII required South Bend to proffer more than statistical data to show the past discrimination necessary to justify its adoption of an affirmative action plan.⁵⁵

After finding that South Bend's plan violated Title VII, the court addressed the question of whether South Bend's affirmative action plan, which was based solely on a finding of statistical disparity, violated the fourteenth amendment.⁵⁶ The court stated that it was difficult to find a clear standard of review from *Fullilove v. Klutznick*⁵⁷ and

⁴³ *Id.*

⁴⁴ *Id.* at 563, 36 FEP Cases at 742.

⁴⁵ *Id.* The opinions cited were *Bratton v. City of Detroit*, 704 F.2d 878, 31 FEP Cases 465 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984), *International Bhd of Elec. Workers (IBEW) v. City of Hartford*, 625 F.2d 416, 22 FEP Cases 1786 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

⁴⁶ 750 F.2d at 563, 36 FEP Cases at 742.

⁴⁷ *Id.*

⁴⁸ 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979).

⁴⁹ 625 F.2d 416, 22 FEP Cases 1786 (2d Cir. 1980).

⁵⁰ *Janowiak*, 750 F.2d at 562-63, 36 FEP Cases at 741-42.

⁵¹ *Id.* at 562, 36 FEP Cases at 741-42.

⁵² *Young*, 608 F.2d at 690, 20 FEP Cases at 1740.

⁵³ 625 F.2d 416, 22 FEP Cases 1786 (2d Cir. 1980).

⁵⁴ *Id.* at 421-22, 22 FEP Cases at 1790.

⁵⁵ *Janowiak*, 750 F.2d at 563, 36 FEP Cases at 742.

⁵⁶ *Id.* The court pointed out that although courts should not reach constitutional issues in cases which can be disposed of on other grounds, most courts considering Title VII affirmative action challenges also address the fourteenth amendment equal protection clause issue. *Id.*

⁵⁷ 448 U.S. 448 (1980).

Regents of the University of California v. Bakke,⁵⁸ the two most recent Supreme Court decisions to consider the constitutionality of race-conscious affirmative action programs.⁵⁹ The court determined, however, that generally, under *Fullilove* and *Bakke* an affirmative action program satisfies the fourteenth amendment if the plan both serves an important governmental interest and is directed toward the achievement of that governmental interest.⁶⁰

Applying this two-prong test to the case at bar, the court found that South Bend's affirmative action program failed the initial inquiry because it did not serve an important governmental interest.⁶¹ Although conceding that remedying past discrimination was an important governmental objective that would satisfy the first prong of the test, the court concluded that South Bend had not adequately established that past discrimination existed.⁶² According to the court, evidence of statistical disparity, coupled with the city's admission that its previous hiring practices were reasonable, was insufficient to show that past discrimination had occurred.⁶³ Reasoning that a statistical disparity, when considered with additional evidence, could demonstrate the existence of past discrimination, the court remanded the case to the district court for a determination of whether South Bend could put forth any such additional evidence.⁶⁴

Janowiak represents the first case to question the validity of an affirmative action program in which a court of appeals was presented with a finding of past discrimination solely on the basis of statistical evidence. Although the Supreme Court upheld affirmative action programs in both *Weber* and *Fullilove* based in part on statistical data, there was ample additional evidence of discrimination presented in those cases to support the claim of past discrimination. In *Weber*, the Supreme Court found that the evidence of prior discrimination was so pervasive that the issue was considered to be a proper subject for judicial notice.⁶⁵ In *Fullilove*, the Court, in the lead plurality opinion of Chief Justice Burger, found abundant historical basis to conclude that prior discrimination had taken place.⁶⁶ The Court noted that the presence of barriers to competitive access had their roots in racial and ethnic discrimination.⁶⁷

Decisions of other courts of appeals similarly have relied on evidence in addition to the statistical disparity between the number of minorities employed in the enterprise and the number of minorities in the community in upholding affirmative action plans. In *Young*,⁶⁸ for example, the Sixth Circuit relied on direct testimony of overt racial discrimination as well as on statistics in making a finding of past discrimination.⁶⁹ In *Bratton*,⁷⁰ the court found that blacks in the Detroit Police Department were victims of

⁵⁸ 438 U.S. 256, 17 FEP Cases 1000 (1978).

⁵⁹ *Janowiak*, 750 F.2d at 563, 36 FEP Cases at 742.

⁶⁰ *Id.*

⁶¹ *Id.* at 563-64, 36 FEP Cases at 743.

⁶² *Id.* at 564, 36 FEP Cases at 743.

⁶³ *Id.*

⁶⁴ *Id.* Because the court found no discrimination and therefore no important governmental interest, it did not reach the second prong of its test — whether the affirmative action plan was directed toward achieving that interest.

⁶⁵ *Weber*, 443 U.S. at 208, 20 FEP Cases at 7.

⁶⁶ *Fullilove*, 448 U.S. at 477-78.

⁶⁷ *Id.* at 477.

⁶⁸ 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979).

⁶⁹ *Id.* at 687, 20 FEP Cases at 1737.

⁷⁰ 704 F.2d 878, 31 FEP Cases 465 (6th Cir. 1983).

discriminatory practices in hiring, promotion, and in day-to-day treatment by other members of the police force.⁷¹ In *IBEW*,⁷² as in *Weber*, the existence of racial discrimination was so pervasive that it was recognized as a subject for judicial notice.⁷³ Thus, the *Janowiak* decision is consistent with past affirmative action decisions. Despite the dicta in *Young* and *Bratton* that statistics alone may be sufficient to prove prior discrimination,⁷⁴ courts which have thus far upheld affirmative action plans have done so only when presented with evidence in addition to statistics to show prior discrimination.⁷⁵

By requiring employers to use more than statistical evidence to make a showing of past discrimination, the *Janowiak* decision diminishes the evidentiary role of statistics in affirmative action cases. Employers in the Seventh Circuit must now meet a higher threshold standard to gain judicial approval of race conscious affirmative action plans.⁷⁶ In limiting the role of statistical evidence in affirmative action cases,⁷⁷ however, the *Janowiak* court failed to announce the type of additional evidence that will be sufficient to support a finding of past discrimination. Though the court gave some suggestions regarding the type of evidence it would consider adequate in the future,⁷⁸ *Janowiak* in effect allows lower courts to determine what evidence, in addition to statistics, is sufficient to make a finding of past discrimination.

The *Janowiak* decision does not provide much guidance for district courts faced with challenges to affirmative action programs in the future. Although the *Janowiak* decision clearly requires more than statistical data before an employer's race-conscious program will withstand judicial scrutiny,⁷⁹ the decision does not specify how much more evidence is required. The presence of facts similar to those present in the cases *Janowiak* cites, such as overt or intentional discrimination directed at individuals, discriminatory entrance examinations, or discriminatory hiring or promotion procedures, would all appear to be sufficient to constitute a finding of prior discrimination after *Janowiak*.⁸⁰ Whether any other factors will be sufficient to justify such a finding will, no doubt, be the subject of future litigation challenging the validity of affirmative action programs.

D. **Res Judicata* in Title VII Actions: *Cooper v. Federal Reserve Bank of Richmond*¹

Title VII of the 1964 Civil Rights Act² prohibits discrimination in employment based on an individual's race, color, religion, sex, or national origin.³ Both the Equal Employ-

⁷¹ *Id.* at 889, 31 FEP Cases at 472.

⁷² 625 F.2d 416, 22 FEP Cases 1786 (2d Cir. 1980).

⁷³ *Id.* at 422, 22 FEP Cases at 1790. See also *Weber*, 443 U.S. at 198 n.1, 20 FEP Cases at 3 n.1.

⁷⁴ *Bratton*, 704 F.2d at 889, 31 FEP Cases at 472; *Young*, 608 F.2d at 687, 20 FEP Cases at 1737.

⁷⁵ See, e.g., *Fullilove*, 448 U.S. at 477-78; *Weber*, 443 U.S. at 208, 20 FEP Cases at 7; *Bratton*, 704 F.2d at 889, 31 FEP Cases at 472; *Young*, 608 F.2d at 687, 20 FEP Cases at 1737.

⁷⁶ *Janowiak*, 750 F.2d at 564, 36 FEP Cases at 743.

⁷⁷ *Id.* at 562-64, 36 FEP Cases at 741-43.

⁷⁸ The *Janowiak* court, citing *Bratton*, 704 F.2d at 887, 31 FEP Cases at 472, stated that evidence showing discrimination in hiring, promotion, or in day-to-day treatment of minorities would be sufficient to support a finding of past discrimination. 750 F.2d at 562-64, 36 FEP Cases at 741-43.

⁷⁹ 750 F.2d at 562, 564, 36 FEP Cases at 741, 743.

⁸⁰ *Id.* at 562-64, 36 FEP Cases at 741-43.

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¹ 104 S. Ct. 2794, 35 FEP Cases 1 (1984).

² 42 U.S.C. § 2000e (1982).

³ 42 U.S.C. § 2000e-2(a)(1) (1982). Section 703(a)(1) of Title VII of the 1964 Civil Rights Act provides:

ment Opportunity Commission (EEOC) and private individuals may bring Title VII actions against an employer.⁴ Frequently, the initial suit is brought as a class action under Rule 23 of the Federal Rules of Civil Procedure⁵ and is followed by individual suits.⁶ Because the individual suits often raise issues identical to those in the earlier class actions, courts have applied the doctrines of res judicata and collateral estoppel to those later individual suits.⁷ Res judicata or claim preclusion bars an action when a prior final

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 an 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.

⁴ 42 U.S.C. §§ 2000e-4 to 2000e-5 (1982). But see § 706(f)(1) of Title VII, which authorizes the Attorney General to sue state and local governments. An individual may sue on his own behalf or as a member of a class action. 42 U.S.C. § 2000e-5(f)(1) (1982). The EEOC may also sue on behalf of an individual or on behalf of a class of employees. 42 U.S.C. §§ 2000e-5, 2000e-6 (1982).

⁵ Rule 23(a) of the Federal Rules of Civil Procedure provides:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

Most often courts certify Title VII class actions under Rule 23(b)(2) as suits for injunctive or declaratory relief. Comment, *Res Judicata in Successive Employment Discrimination Suits*, 4 ILL. L. FORUM 1049, 1058 (1980) [hereinafter cited as Comment, *Res Judicata*]. Rule 23(b)(2) provides that:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole

....
FED. R. CIV. P. 23(b)(2).

Parties may also seek monetary relief for back pay in addition to injunctive relief under Rule 23(b)(2). See *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 250 (3d Cir. 1975). A party seeking back pay but not injunctive relief must meet the more rigorous requirements of Rule 23(b)(3). Rule 23(b)(3) provides that a class action may be maintained when: "(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). Under this subsection all class members must receive individual notice of the class action and be provided with the option to withdraw or opt out from the class without prejudice. Comment, *Res Judicata, supra*, at 1058. This option provides an important distinction between Rule 23(b)(2) and Rule 23(b)(3) class actions. In Rule 23(b)(2) actions, absent members receive neither notification of the pending action nor the option to exclude themselves from the suit. *Id.* at 1059-60 n.61.

⁶ See generally Comment, *Res Judicata, supra* note 5. The later individual suit may be brought as a Title VII action alleging that the employer has engaged in an unlawful employment practice. 42 U.S.C. § 2000e-2(a)(1) (1982); see *supra* note 3. An individual may also bring an action under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982). Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

⁷ See generally Comment, *Res Judicata, supra* note 5.

judgment has already been rendered on the same claim between the same parties or those in privity with them.⁸ Collateral estoppel or issue preclusion bars reconsideration of issues actually litigated and determined that were essential to the earlier judgment.⁹

As a general rule, a judgment in a class action is binding on all members of the class.¹⁰ The United States courts of appeals, however, have been divided as to the preclusive effect of a Title VII class action alleging a "pattern or practice" of discrimination on subsequent individual actions.¹¹ A Title VII pattern-or-practice suit involves an allegation that the defendant's actions constitute a pattern of conduct of intentional discrimination against the plaintiff's protected class.¹² The Fourth Circuit, in *EEOC v. Federal Reserve Bank of Richmond*,¹³ held that res judicata barred a class member from bringing an action individually following a judgment in a pattern-or-practice class action against the class.¹⁴ The Fourth Circuit noted that the only exceptions to the rule regarding the preclusive effect of a class suit are based on due process.¹⁵ Finding no evidence of violations of due process, the Fourth Circuit concluded that the class action was binding on all class members and therefore subsequent suits were barred.¹⁶ In contrast, the Third Circuit held, in *Edwards v. Boeing Vertol Co.*,¹⁷ that a class member was not barred by res judicata from bringing an individual action after a judgment in a class action against the class.¹⁸ The Third Circuit reasoned that because the class action determined only that there was no "pattern or practice" of company-wide discrimination,

⁸ C. WRIGHT, LAW OF FEDERAL COURTS § 72 (4th ed. 1983). To determine whether privity exists between parties, the courts consider factors such as commonality of interests of the parties, the extent of cooperation between the parties, the extent to which the party of the later suit controlled the earlier litigation, and the notice and opportunity of the subsequent party to join the earlier litigation. *Id.* § 100A.

⁹ *Id.*

¹⁰ See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (judgment in a class suit may bind members of the class or those represented who were not made parties to it); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363 (1921) (decree in class suit binds all members of the class as if all were before the court); *Kemp v. Birmingham News*, 608 F.2d 1049, 1054 (5th Cir. 1979) (judgment in a class action will bind members of the class); RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) (1982). There are, however, exceptions to this general rule based on principles of due process. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1268-69 (2d ed. 1983). Due process requires proper certification of the class, adequate notice to class members and adequate representation of absent class members. *Id.* Furthermore, Rule 23(b)(3) class actions are not binding on class members who have asked to be excluded or "opted out." C. WRIGHT, *supra* note 8, § 72.

¹¹ See *Edwards v. Boeing Vertol Co.*, 717 F.2d 761, 32 FEP Cases 1696 (3d Cir. 1983); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 30 FEP Cases 1137 (4th Cir. 1983).

¹² See, e.g., *Teamsters v. United States*, 431 U.S. 324, 335, 14 FEP Cases 1514, 1519 (1977) (government suit alleging company-wide pattern and practice of employment discrimination against blacks and Spanish-surnamed persons throughout the company's transportation system). Pattern-or-practice suits necessarily involve claims of class-wide discrimination. B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1322 n.95. The EEOC may bring a pattern-or-practice action under § 707(a) of Title VII, or a private class action may be maintained. The Supreme Court has recognized that the elements of a prima facie pattern-or-practice case are the same in a private class action as they are in an action by the EEOC under § 707(a). See *Cooper v. Federal Reserve Bank of Richmond*, 104 S. Ct. 2794, 2800 n.9, 35 FEP Cases 1, 5 n.9 (1984).

¹³ 698 F.2d 633, 30 FEP Cases 1137 (4th Cir. 1983).

¹⁴ *Id.* at 674-75, 30 FEP Cases at 1169-70.

¹⁵ *Id.* at 674, 30 FEP Cases at 1169.

¹⁶ *Id.*

¹⁷ 717 F.2d 761, 32 FEP Cases 1696 (3d Cir. 1983).

¹⁸ *Id.* at 767, 32 FEP Cases at 1701.

issues of discrimination against individuals could still exist and therefore later suits involving specific instances of discrimination against individuals could be properly maintained.¹⁹ Thus, although a class member is generally precluded by *res judicata* from bringing a subsequent individual suit based on the claims already litigated and determined, the circuit courts have been split as to whether a pattern-or-practice class action is sufficiently similar to a subsequent individual claim of discrimination to warrant the application of *res judicata*.

During the *Survey* year, the Supreme Court, in *Cooper v. Federal Reserve Bank of Richmond*,²⁰ decided to resolve the split in the lower courts. Specifically, the Court inquired whether a judgment against a certified class in a Title VII case bars members of that class from bringing subsequent individual actions against their employer for discrimination.²¹ In an 8-0 decision,²² the *Cooper* Court held that a judgment that an employer did not engage in a pattern or practice of class-wide racial discrimination does not preclude class members from bringing subsequent individual actions alleging discrimination against them by their employer.²³

Cooper began when the EEOC filed a civil action against the Federal Reserve Bank of Richmond (the Bank) in March, 1977 alleging that the Bank was violating section 703(a) of Title VII of the Civil Rights Act of 1964 by engaging in "policies and practices" of racial discrimination against blacks.²⁴ Subsequently, four individuals were permitted to intervene as plaintiffs.²⁵ These intervening plaintiffs alleged that they were being discriminated against by the Bank because of their race and that they represented a class of black employees with similar claims.²⁶ The district court certified that class according to Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure.²⁷ Notice was published in a local newspaper and mailed to individual class members.²⁸ The notice contained a description of the litigation and a statement that members of the class would be bound

¹⁹ *Id.* The Third Circuit stated that the class action "determined no more than that class representatives had failed to prove a company-wide pattern or practice of discrimination. *Edwards* is not, however, attempting to relitigate what was finally determined in the class action The class action judgment is not a former adjudication." *Id.*

²⁰ 104 S. Ct. 2794, 35 FEP Cases 1 (1984).

²¹ *Id.* at 2796, 35 FEP Cases at 2.

²² Justice Powell did not participate in the decision.

²³ *Id.* at 2802, 35 FEP Cases at 6.

²⁴ *Id.* at 2796, 35 FEP Cases at 2.

²⁵ The four intervening plaintiffs were Sylvia Cooper, Constance Russell, Helen Moore and Elmore Hannah, Jr. *Id.* at 2796 n.2, 35 FEP Cases at 2 n.2. Section 706(f)(1) of Title VII permits a party to intervene in an action filed by the EEOC as a matter of right. 42 U.S.C. § 2000e-5(f)(1) (1982). See B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1167.

²⁶ 104 S. Ct. at 2796, 35 FEP Cases at 2. The intervening plaintiffs alleged that the Bank's practices violated section 1981 as well as Title VII. *Id.*

²⁷ *Id.* at 2796-97, 35 FEP Cases at 2. The certified class included:

[a]ll black persons who have been employed by the defendant at its Charlotte Branch Office at any time since January 3, 1974 [6 months prior to the first charge filed by the intervenors with EEOC], who have been discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race.

Id. at 2797, 35 FEP Cases at 2; see also *id.* at 2797 n.3, 35 FEP Cases at 2 n.3. Although the court certified the class under both Rule 23(b)(2) and Rule 23(b)(3), the procedural requirements of Rule 23(b)(3) such as personal pretrial notice to each class member and provision for class members to opt out of the litigation were followed. See *id.* at 2796-97, 35 FEP Cases at 2.

²⁸ *Id.* at 2797, 35 FEP Cases at 2.

by the judgment or other determination unless they excluded themselves by notifying the court clerk in writing.²⁹ Among those who were notified of the class action were Phyllis Baxter and five other bank employees.³⁰ Although all parties agreed that Baxter and the other five employees were members of the certified class, the "Baxter petitioners" failed to exclude themselves from the class after receiving notice.³¹

After testimony was given at trial by both the intervening plaintiffs and the Baxter petitioners, the district court held that the Bank had engaged in a pattern and practice of racial discrimination from 1974 to 1978 by failing to afford black employees opportunities afforded white employees.³² The court found, however, that this class-wide discrimination was present only in pay grades four and five.³³ As for the intervening plaintiffs, the court observed that the Bank had discriminated against Cooper and Russell, but not Moore and Hannah.³⁴ The court made no decision as to the Baxter petitioners.³⁵

Subsequently, the Baxter petitioners moved to intervene in the class action claiming that the Bank had discriminated against each of them by denying them promotions because of their race.³⁶ The district court denied the motion to intervene for two reasons: (1) one of the Baxter petitioners was a member of the class designated by the court as entitled to relief³⁷ and therefore her rights would be protected in Stage II of the class action proceedings dealing with relief;³⁸ and (2) the other five Baxter petitioners held

²⁹ *Id.* at 2797 n.4, 35 FEP Cases at 2 n.4. Paragraph 5 of the notice stated:

If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; the judgment in this case, whether favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action; and if you do not request exclusion, you may appear at the hearings and trial of this action through the attorney of your choice.

Id.

³⁰ Phyllis Baxter and the five other employees, Brenda Gilliam, Glenda Knott, Emma Ruffin, Alfred Harrison and Sherri McCorkle, referred to by the Court as the "Baxter petitioners," all stipulated that they had received the notice. *Id.* at 2797 n.5, 35 FEP Cases at 3 n.5.

³¹ *Id.* at 2797, 35 FEP Cases at 3.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* Instead, as the Supreme Court observed, the district court "somewhat cryptically stated that although it had an opinion about 'the entitlement to relief of some of the class members who testified at trial,' it would defer decision of such matters to a further proceeding." *Id.*

³⁶ *Id.* at 2798, 35 FEP Cases at 3. Apparently, the Baxter petitioners were seeking to intervene to protect their right to appeal pursuant to Rule 24(b) of the Federal Rules of Civil Procedure governing permissive intervention. According to Wright, "it may not be too late to intervene even after final judgment if it is necessary to preserve some right that cannot be otherwise protected." C. WRIGHT, *supra* note 8, § 75.

³⁷ The petitioner, Emma Ruffin, held a position within pay grades four and five. 104 S. Ct. at 2798, 45 FEP Cases at 3.

³⁸ *Id.* Class actions alleging a pattern or practice of discrimination generally are divided into two stages. See B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1323-24. In the first stage — the liability stage — the plaintiff class must establish a prima facie case of a pattern or practice of discrimination. *Id.* at 1323. This burden is usually satisfied through the use of statistical evidence. *Id.* If the defendant cannot produce sufficient evidence to dispel the inference of discrimination, the court will infer that the class members were victims of the alleged discriminatory pattern or practice. *Id.*

positions above pay grade five and were thus outside the designated class entitled to relief.³⁹ In dictum, however, the district court added that it saw no reason why the five Baxter petitioners could not each file actions in their individual capacities.⁴⁰

After the district court denied their motion to intervene, the Baxter petitioners filed individual actions against the Bank alleging racial discrimination in violation of the Civil Rights Act of 1866.⁴¹ The Bank answered by filing a motion to dismiss claiming that the action was barred under the doctrine of *res judicata*.⁴² The Bank argued that because each of the five Baxter petitioners was a member of the original class certified in the *Cooper* litigation and because each held a position other than grade four or five, the Baxter petitioners were consequently bound by the district court's earlier finding that no class-wide discrimination existed above grade five.⁴³ The district court denied the Bank's motion to dismiss based on *res judicata*, but certified an order for interlocutory appeal to the United States Court of Appeals for the Fourth Circuit.⁴⁴ The Bank's interlocutory appeal and its pending appeal from the *Cooper* decision were then consolidated by the appellate court.⁴⁵

The Fourth Circuit began by addressing the *Cooper* litigation and reversed the district court's holding that class-wide discrimination existed in pay grades four and five and that two of the intervening plaintiffs had been discriminated against by the Bank.⁴⁶ According to the Fourth Circuit, there was insufficient evidence either to support the district court finding of a pattern or practice of racial discrimination in grades four and five⁴⁷ or to support the finding that two of the intervening plaintiffs, Russell and Cooper, were victims of racial discrimination.⁴⁸ Turning to the interlocutory appeal, the court held that the Baxter petitioners were precluded by *res judicata* from bringing individual race discrimination claims against the Bank following the adverse judgment in the *Cooper* class action.⁴⁹ The appeals court relied on its prior decisions holding that a final judgment

The court will then move to the second stage — the remedial stage — in which the court determines the matter of relief for individual class members. *Id.* at 1323–24.

³⁹ 104 S. Ct. at 2798, 35 FEP Cases at 3.

⁴⁰ *Id.* The court suggested that the Baxter petitioners file individual actions pursuant to 42 U.S.C. § 1981 (1982). 104 S. Ct. at 2798, 35 FEP Cases at 3.

⁴¹ 42 U.S.C. § 1981 (1982). *See* 104 S. Ct. at 2798, 35 FEP Cases at 3.

⁴² 104 S. Ct. at 2798, 35 FEP Cases at 3. According to Schlei and Grossman, support exists for the principle that a judgment on the merits in an action brought on one legal basis of liability, such as § 703(a)(1) of Title VII, may preclude bringing a subsequent action based on the same facts, but a different legal basis, such as a § 1981 action. B. SCHLEI & P. GROSSMAN, *supra* note 10, at 87. *See, e.g.,* Nilsen v. City of Moss Point, 701 F.2d 556, 561, 31 FEP Cases 612, 613–15 (5th Cir. 1983) (dismissal of Title VII action for untimeliness precludes a later § 1983 claim); Poe v. John Deere Co., 695 F.2d 1103, 1105–08, 30 FEP Cases 827, 828–30 (8th Cir. 1982) (judgment in a Title VII and § 1981 action bars subsequent action raising state law claims).

⁴³ 104 S. Ct. at 2798, 35 FEP Cases at 3.

⁴⁴ *Id.* The district court's order met the requirements of a discretionary interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1982). The order involved a "controlling question of law as to which there is substantial ground for difference of opinion" and the appeals court agreed to hear the appeal. *Id.*

⁴⁵ 104 S. Ct. at 2798, 35 FEP Cases at 3.

⁴⁶ EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 664, 669, 30 FEP Cases 1137, 1161, 1165 (4th Cir. 1983), *rev'd sub nom.* Cooper v. Federal Reserve Bank of Richmond, 104 S. Ct. 2794, 35 FEP Cases 1 (1984).

⁴⁷ *Id.* at 664, 30 FEP Cases at 1161.

⁴⁸ *Id.* at 669, 673, 30 FEP Cases at 1165, 1168.

⁴⁹ *Id.* at 675, 30 FEP Cases at 1170.

in a properly certified class action binds a class member who has not asked to be excluded from, or "opted out" of, the class action after notice from subsequently asserting an individual claim.⁵⁰

After it granted certiorari,⁵¹ the Supreme Court reversed the appellate court's holding that the Baxter petitioners were precluded by *res judicata*.⁵² The Court held that the class action judgment that the Bank did not engage in a pattern or practice of class-wide racial discrimination did not preclude a class member from maintaining an individual action based on racial discrimination.⁵³ The Court began by observing that under the general principles of *res judicata*, a judgment in a properly maintained class action is binding on all class members in subsequent litigation.⁵⁴ Thus, the Court noted that a judgment in favor of the plaintiff class extinguishes the original claim and creates a new claim on the judgment.⁵⁵ Alternatively, according to the Court, a judgment in favor of the defendant extinguishes the claim and bars subsequent actions on that claim.⁵⁶

Having made these general observations regarding the preclusive effect of a class action, the Court discussed some specific differences between individual and class action claims of racial discrimination. According to the Court, the plaintiff who brings an individual racial discrimination action under section 703(a) of Title VII has the initial burden of establishing a *prima facie* case that he has been discriminated against by his employer on account of race.⁵⁷ The plaintiff meets this burden by showing: (1) that he is a member of a racial minority, (2) that he applied and was qualified for a position the employer was trying to fill, (3) that the employer rejected him, and (4) that following his rejection the position remained open and the employer continued to seek applicants

⁵⁰ *Id.* at 674, 30 FEP Cases at 1169. The court relied on *Dalton v. Employment Sec. Comm'n of North Carolina*, 671 F.2d 835, 838, 28 FEP Cases 178, 180 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 138, 29 FEP Cases 1560 (1983) (plaintiff who agreed to consent decree in Title VII class action which expressly stated to be a final resolution of all issues was bound by the decree); *Woodson v. Fulton*, 614 F.2d 940, 942, 22 FEP Cases 59, 61 (4th Cir. 1980) (consent decree awarding damages to class members in a class action for racial discrimination in employment barred later individual § 1983 suit by class member); *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052, 21 FEP Cases 830, 833 (5th Cir. 1979) (consent decree entered in a Title VII class action is binding on class members and precludes a later individual claim of racial discrimination in employment); *Dorsey v. Smith*, 91 F.R.D. 261, 262-63, 30 FEP Cases 1232, 1233 (D. Md. 1981) (black employee who was member of earlier class action is barred by *res judicata* from litigating claim of racial discrimination where court found in earlier class action that employer engaged in discrimination).

The appeals court noted, however, that there were exceptions based on due process to the rule that a final determination in a class action will bar subsequent individual actions. 698 F.2d at 674, 30 FEP Cases at 1169. Due process requires a class to be properly certified, adequate notice to class members and adequate representation of absent class members. *Id.* See also B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1268-69.

⁵¹ 104 S. Ct. 334 (1984).

⁵² 104 S. Ct. 2794, 2802, 35 FEP Cases 1, 6 (1984).

⁵³ *Id.*

⁵⁴ *Id.* at 2799, 35 FEP Cases at 4.

⁵⁵ *Id.* Although the class or a member of the class may not raise the same claim in a later action, once there is a judgment in favor of the plaintiff-class, a new claim is created and the class or an individual member may sue the original defendant to enforce that judgment. See *Kasper Wire Works, Inc. v. Leco Eng'g & Mach.*, 575 F.2d 530, 535 (1978). See also generally C. WRIGHT, *supra* note 8, § 100A.

⁵⁶ 104 S. Ct. at 2799, 35 FEP Cases at 4.

⁵⁷ *Id.*

with the plaintiff's qualifications.⁵⁸ The employer must then come forward with evidence of a legitimate, nondiscriminatory reason for its rejection of the plaintiff.⁵⁹ The plaintiff can then prove that the employer's alleged nondiscriminatory reason is actually a pretext for intentional discrimination.⁶⁰

In contrast to individual actions, the Supreme Court noted that in Title VII pattern-or-practice class actions the plaintiff class must demonstrate by a preponderance of the evidence that a pattern or practice of discriminatory treatment existed and that the pattern or practice was the employer's standard operating procedure.⁶¹ Evidence of isolated or sporadic instances of discrimination, the Court stressed, is insufficient to establish a prima facie case of company-wide discrimination.⁶² Moreover, the Court noted, while a finding of a pattern or practice of discrimination supports prospective relief, such as an order enjoining the employer from continuing its discriminatory practices, additional proceedings are usually necessary after the liability stage of the trial to determine the scope of relief to individual members of the class.⁶³

The Court then summarized its examination of the differences between an individual's discrimination claim and a class action alleging a pattern or practice of discrimination. The focus in an individual action, the Court observed, is on a specific employment decision regarding a specific individual, whereas the focus at the liability stage of a pattern-or-practice class action is not on one specific employment decision, but on a regular practice of discriminatory decision-making.⁶⁴ The Court stressed that this distinction between individual and class actions was critical to its earlier holding in *General Telephone Company of Southwest v. Falcon*.⁶⁵ In *Falcon*, the Court held that an individual employee's claim that he was denied a promotion on racial grounds was insufficient to make him an adequate representative of a class of employees who had allegedly been refused employment for discriminatory reasons.⁶⁶ The Court noted that evidence that the plaintiff was passed over for promotion when less deserving white employees were

⁵⁸ *Id.* See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 5 FEP Cases 965, 969 (1973).

⁵⁹ 104 S. Ct. at 2799, 35 FEP Cases at 4. See also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116 (1981).

⁶⁰ 104 S. Ct. at 2799, 35 FEP Cases at 4. See also B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1286-87.

⁶¹ 104 S. Ct. at 2799-2800, 35 FEP Cases at 4-5. See also *Teamsters v. United States*, 431 U.S. 324, 336, 14 FEP Cases 1514, 1520 (1977) (proof by a preponderance of the evidence that the company's pattern or practice of discrimination was the standard operating procedure was required); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772, 12 FEP Cases 549, 559 (1976) (demonstrating the existence of a discriminatory pattern or practice established a presumption that individual class members were victims of discrimination).

⁶² 104 S. Ct. at 2799-2800, 35 FEP Cases at 4.

⁶³ *Id.* at 2800, 35 FEP Cases at 5. See also *supra* note 38.

⁶⁴ 104 S. Ct. at 2800, 35 FEP Cases at 5.

⁶⁵ 457 U.S. 147, 28 FEP Cases 1745 (1982).

⁶⁶ *Id.* at 156-58, 28 FEP Cases at 1749-50. In *Falcon*, the Court explained:

Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds and his otherwise unsupported allegation that the company has a policy of discrimination and (b) the existence of a class of persons who have suffered the same injury as the individual, such that the individual's claims and the class claim will share common questions of law or fact and the individual's claim will be typical of the class claims.

Id. at 157-58, 28 FEP Cases at 1750.

promoted might have supported the conclusion that the plaintiff was discriminated against individually, but this evidence did not necessarily justify the inference that there was a company-wide pattern or practice of employment discrimination.⁶⁷ Thus, the Court in *Falcon* ruled that the existence of a valid individual claim did not justify the conclusion that the individual plaintiff could maintain a class action.⁶⁸ Extending the reasoning in *Falcon*, the *Cooper* Court concluded that if the existence of an individual discrimination claim does not necessarily mean that a company-wide class action may be maintained, then it follows that the failure to prove that a company-wide practice or policy of discrimination exists does not necessarily mean that discrimination on an individual basis is nonexistent.⁶⁹

After examining the distinction between individual and class actions, the Court proceeded to analyze the *Cooper* facts. First, the Court concluded that based on the different burdens of proof in individual claims and class actions, the district court could properly hold that the intervening plaintiffs, Cooper and Russell, who held positions above grade five, had legitimate individual claims of discrimination, while also ruling that the plaintiff-class had failed to prove class-wide discrimination above grade five.⁷⁰ Next, the Court analyzed the court of appeals' reasoning as to the Baxter petitioners. According to the Supreme Court, the Fourth Circuit correctly concluded that the Baxter petitioners, as members of the original class in the *Cooper* litigation, were bound by the judgment against the class.⁷¹ In the Supreme Court's judgment, however, the appellate court erred in the preclusive effect it gave to that prior decision.⁷² According to the Supreme Court, the prior judgment should be viewed as precluding only two types of subsequent actions.⁷³ First, the Court stated that the prior judgment bars class members from maintaining another class action against the Bank raising the same claim of a pattern or practice of discrimination.⁷⁴ Second, the Court found that the prior judgment bars class members in any other action against the Bank from raising the issue of whether the Bank engaged in a pattern or practice of discrimination.⁷⁵ The Court noted, however, that the judgment did not bar the Baxter petitioners from later raising their individual claims.⁷⁶

In reaching its decision, the Supreme Court specifically rejected the Bank's argument that allowing the Baxter petitioners to maintain separate individual actions would frustrate the purposes of Rule 23 of the Federal Rules of Civil Procedure.⁷⁷ The Court noted that Rule 23 was designed to provide a practical method for determining common questions of law and fact.⁷⁸ The Court reasoned that the Bank's argument that individual

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 104 S. Ct. at 2801, 35 FEP Cases at 5.

⁷⁰ *Id.* at 2801-02, 35 FEP Cases at 5-6.

⁷¹ *Id.* at 2802, 35 FEP Cases at 6.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* The Court found, however, that "the prior adjudication may well prove beneficial to the Bank in the Baxter action; the determination in the *Cooper* action that the Bank had not engaged in a general pattern or practice of discrimination would be relevant on the issue of pretext." *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

claims were precluded would have the result of requiring every class member to intervene to litigate the merits of his or her individual claim. Such intervention, according to the Court, would defeat the purpose of Rule 23.⁷⁹

The Court also rejected the Bank's contention that Rule 23 required the district court to decide the merits of the Baxter petitioners' individual claims because they testified at the trial.⁸⁰ The Bank argued that because the purpose behind Rule 23 was to avoid repetitive litigation, and because the subsequent individual actions would entail a reexamination of the evidence presented at the first proceeding, the district court should have decided the Baxter petitioner claims.⁸¹ The Supreme Court, however, maintained that Rule 23 does not require as a matter of law that district courts rule on every matter on which they received testimony.⁸² The Court reiterated that Rule 23 was designed to provide a device for efficiently determining common questions.⁸³ That purpose, according to the Court, might be thwarted by requiring the lower courts to decide "a host of individual claims."⁸⁴ Thus, the Court held that the subsequent individual claims brought by the Baxter petitioners were not barred by res judicata.⁸⁵

The Supreme Court's decision in *Cooper* represents a more appropriate interpretation of the preclusive effect of a class action on subsequent individual actions than that of the Fourth Circuit. The Supreme Court did not simply rely on the general rule that a prior judgment in a class action is binding on class members in subsequent litigation.⁸⁶ Instead, the Court carefully compared an individual claim of discrimination with a class action claiming a pattern or practice of discrimination.⁸⁷ As a result of this comparison, the Court recognized that these two claims were not identical and therefore held that res judicata should not be applied to bar a subsequent individual claim following a judgment against the class in a pattern-or-practice class action.⁸⁸

To demonstrate the differences between an individual action and a class action, the Court compared the proof required to establish a prima facie case in each type of action.⁸⁹ In an individual action, the elements of a prima facie case focus on specific instances of discrimination against the plaintiff personally. In contrast, in a pattern-or-practice class action, the focus is on whether the employer is engaged in a company-wide policy of racial discrimination.⁹⁰ The trial in this type of class action is divided into two stages: Stage I is the liability stage, and Stage II is the remedial stage.⁹¹ At the liability stage of the trial, the plaintiff-class must show by a preponderance of the evidence that racial discrimination is the company's standard operating procedure.⁹² The plaintiff-

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 2802-03, 35 FEP Cases at 6-7.

⁸² *Id.* at 2802, 35 FEP Cases at 7.

⁸³ *Id.* at 2802-03, 35 FEP Cases at 7.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *supra* text accompanying notes 54-56.

⁸⁷ See 104 S. Ct. at 2799-2800, 35 FEP Cases at 4-5; see also *supra* text accompanying notes 56-68.

⁸⁸ See 104 S. Ct. at 2799-2800, 35 FEP Cases at 4-5.

⁸⁹ See *supra* notes 56-59 and accompanying text.

⁹⁰ See *Teamsters v. United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977); see also *supra* text accompanying notes 60-62.

⁹¹ See B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1323-24.

⁹² See *Teamsters*, 431 U.S. at 336, 14 FEP Cases at 1519.

class meets this initial burden through the use of statistical evidence.⁹³ To establish a prima facie case in a class action alleging racial discrimination in hiring, for example, the class will offer statistics comparing the racial composition of the employer's work force with the general population from which employees are hired.⁹⁴ If the class action claims discrimination in promotion, the class will present evidence comparing the number of whites promoted against the number of blacks promoted with similar work records within the defendant company.⁹⁵ Individual instances of racial discrimination may be offered into evidence, but they are insufficient to prove a pattern or practice of racial discrimination.⁹⁶

At the close of the liability stage, if the trier of fact finds that the employer has engaged in a pattern or practice of discrimination then the trial will proceed to the second stage — the remedial stage.⁹⁷ In the remedial stage class members testify as to specific instances of individual discrimination.⁹⁸ From this testimony, the court determines the appropriate award for each class member.⁹⁹ Following a determination in favor of the class and the subsequent determination of individual relief, a member of the class is barred by res judicata from maintaining an individual action for racial discrimination against the employer. Individuals are barred in this situation because all the requirements for res judicata are fulfilled; the action involves identical parties,¹⁰⁰ with identical claims,¹⁰¹ and there is a prior final judgment on the merits.¹⁰²

On the other hand, if the trier of fact at the close of the liability stage finds that the employer has not engaged in a pattern or practice of discrimination then the trial will not proceed to the remedial stage and class members will not testify regarding individual acts of discrimination.¹⁰³ Consequently, all that is determined is that the class was unable to prove that an employer had a system-wide policy of racial discrimination.¹⁰⁴ The merits of an individual class member's claim of discrimination have not been determined.¹⁰⁵ Therefore, subsequent suits brought by class members alleging individual discrimination are not barred by res judicata because the claims are not identical.

An unsuccessful class action followed by individual suits is precisely the situation addressed in *Cooper*. The Baxter petitioners were members of the original class which attempted to show that the Bank had engaged in a pattern or practice of discrimination.¹⁰⁶ The final judgment in that action, as the Supreme Court recognized, was the failure of the class to prove that a pattern or practice of discrimination existed.¹⁰⁷

⁹³ See B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1322–23.

⁹⁴ See *Teamsters*, 431 U.S. at 337–38, 14 FEP Cases at 1520.

⁹⁵ See *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d at 650–51, 30 FEP Cases at 1150.

⁹⁶ *Teamsters*, 431 U.S. at 337, 14 FEP Cases at 1519; B. SCHLEI & P. GROSSMAN, *supra* note 10 at 1322.

⁹⁷ B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1454; *Teamsters*, 431 U.S. at 361, 14 FEP Cases at 1529.

⁹⁸ B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1454, 1456.

⁹⁹ *Id.* at 1456–57.

¹⁰⁰ See C. WRIGHT, *supra* note 8, § 100A.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1454.

¹⁰⁴ See *supra* text accompanying note 68.

¹⁰⁵ See *Cooper*, 104 S. Ct. at 2802, 35 FEP Cases at 6.

¹⁰⁶ *Id.* at 2797, 35 FEP Cases at 3. See also *supra* note 36 and accompanying text.

¹⁰⁷ See 104 S. Ct. at 2802, 35 FEP Cases at 6.

Although both actions involved identical parties, there was no prior determination that the employer did or did not discriminate against the individual Baxter petitioners on account of race.¹⁰⁸ Accordingly, the Court correctly held that the Baxter petitioners could maintain individual actions alleging racial discrimination.

In sum, the Supreme Court in *Cooper* resolved the division in the circuit courts and settled the question of the applicability of res judicata to Title VII pattern-or-practice class actions. Where the plaintiff-class in a pattern-or-practice class action fails to prove that the employer engaged in a company-wide policy of discrimination, a class member is not barred by res judicata from maintaining a subsequent individual suit alleging employment discrimination.¹⁰⁹ The *Cooper* Court, in contrast to the Fourth Circuit, closely examined the proof required to establish a prima facie case in both of these actions.¹¹⁰ Accordingly, the Court held that the prior final judgment in the first action determined only that the class had failed to prove a company-wide pattern or practice of discrimination existed.¹¹¹ The first judgment did not settle the question as to whether individual instances of discrimination existed.¹¹² Thus, a class member is not bound by the first judgment against the class and may bring a later individual action claiming racial discrimination.

E. * *Court Appointment of Counsel in Title VII Cases: Bradshaw v. United States District Court for the Southern District of California*¹

Section 2000e-5(f)(1)(B) of Title VII of the Civil Rights Act of 1964 authorizes a district court, in its discretion, to assign counsel to the complainant in employment discrimination cases.² This provision allowing appointment of counsel demonstrates congressional recognition that attorney's fees awards³ may provide insufficient incentive to assure representation of those individuals with civil rights grievances.⁴ The purpose of the statutory provision of Title VII authorizing appointment of counsel is thus to

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ 104 S. Ct. at 2800, 35 FEP Cases at 4-5.

¹¹¹ *Id.* at 2802, 35 FEP Cases at 7.

¹¹² *Id.* at 2801, 35 FEP Cases at 5.

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¹ 742 F.2d 515, 35 FEP Cases 1297 (9th Cir. 1984).

² Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1)(B) (1982) provides in part: "Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security."

³ Under the attorney's fees provision of Title VII, a district court, in its discretion, may award attorney's fees and costs to a prevailing party. Civil Rights Act of 1964, Title VII, § 706(k), codified as amended, 42 U.S.C. § 2000e-5(k) (1982). A primary purpose of awarding such fees is to encourage individuals injured by discrimination to seek judicial relief and to guarantee them effective access to the judicial process. See *Hensley v. Eckerhart*, 461 U.S. 424, 429, 31 FEP Cases 1169, 1171 (1983); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Congress articulated the attorney's fees provision, stating: "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." *Zarcone v. Perry*, 581 F.2d 1039, 1041 (2d Cir. 1978) (quoting S. REP. NO. 94-1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5910).

⁴ See *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1319, 27 FEP Cases 841, 857 (9th Cir. 1981) (*Bradshaw II*).

broaden the effective access to the judicial process of those individuals with meritorious civil rights claims.⁵

An employment discrimination plaintiff does not have an unqualified right to appointment of counsel in a civil rights action.⁶ Rather, Title VII provides that a court may appoint an attorney for a complainant "in such circumstances as the court may deem just."⁷ Consequently, courts have established certain criteria for determining when discretion should be exercised in favor of appointing counsel for a pro se plaintiff in a matter brought pursuant to Title VII. Three factors have emerged as particularly relevant to this determination under the broad statutory mandate: first, whether the plaintiff has a meritorious claim, second, whether the plaintiff has made diligent efforts to secure counsel, and third, whether the plaintiff has inadequate resources to retain counsel.⁸ Satisfaction of these three criteria, unless exceptional circumstances dictate otherwise, entitles a complainant under the Civil Rights Act to the appointment of counsel.⁹ Under these standards, normally, a district court's decision will be subject to review only for an abuse of discretion.¹⁰

During the Survey year, in *Bradshaw v. United States District Court for the Southern District of California (Bradshaw III)*,¹¹ a panel of the United States Court of Appeals for the Ninth Circuit ruled that a district court did not abuse its discretion in failing to make coercive appointment of counsel, when counsel could not be located to voluntarily assist a plaintiff proceeding in forma pauperis in a Title VII action.¹² The panel reached this decision even though the plaintiff fulfilled the three relevant criteria for court appointment of counsel under section 2000e-5(f)(1)(B).¹³ In *Bradshaw III* the court of appeals held that while there are three essential factors which must be considered by a district court in

⁵ *Id.* The *Bradshaw II* court noted: "The only plausible reason for enactment of the [court appointment of counsel] provision was Congress' recognition that some civil rights claimants with meritorious cases would be unable to obtain counsel." *Id.*

⁶ See *Arnold v. Speedgrip Chuck, Inc.*, 524 F. Supp. 679, 680, 27 FEP Cases 950, 951 (N.D. Ind. 1981).

⁷ 42 U.S.C. § 2000e-5(f)(1)(B) (1982). "The statute's clear intent is to limit the appointment of counsel in suits brought pursuant to Title VII to only those situations where, in the sound discretion of the court, the circumstances clearly warrant it." *Arnold v. Speedgrip Chuck, Inc.*, 524 F. Supp. 679, 680, 27 FEP Cases 950, 951 (N.D. Ind. 1981). See also *Bradshaw II*, 662 F.2d at 1321, 27 FEP Cases at 859 (Wallace, J., dissenting) ("Congress did not make appointment of counsel a matter of right, but rather left it to the discretion of the district courts.").

⁸ See, e.g., *Bradshaw II*, 662 F.2d at 1318, 27 FEP Cases at 857. See also *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 269, 28 FEP Cases 1577, 1579 (9th Cir. 1982); *Luna v. International Ass'n of Machinists and Aerospace Workers*, 614 F.2d 529, 531, 22 FEP Cases 525, 527 (5th Cir. 1980); *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308-10, 15 FEP Cases 1787, 1790-91 (5th Cir. 1977); *Arnold v. Speedgrip Chuck, Inc.*, 524 F. Supp. 679, 680, 27 FEP Cases 950, 951 (N.D. Ind. 1981). These factors are applicable in all cases, according to the courts, and are usually the only relevant factors. *Bradshaw II*, 662 F.2d at 1318 n.43, 27 FEP Cases at 856 n.43. However, in cases where particular facts so warrant, other similar factors may be taken into account by a district court in deciding whether to assign counsel. *Id.* See also *White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 205, 25 FEP Cases 1541, 1542-43 (5th Cir. 1981).

⁹ *Bradshaw v. United States Dist. Court for the S. Dist. of California*, 742 F.2d 515, 520, 35 FEP Cases 1297, 1301 (9th Cir. 1984) (Reinhardt, J., concurring) (*Bradshaw III*).

¹⁰ *Bradshaw II*, 662 F.2d at 1318, 27 FEP Cases at 856. See also *White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 205, 25 FEP Cases 1541, 1542-43 (5th Cir. 1981).

¹¹ 742 F.2d 515, 35 FEP Cases 1297 (9th Cir. 1984).

¹² *Id.* at 519, 35 FEP Cases at 1300-01.

¹³ 42 U.S.C. § 2000e-5(f)(1)(B) (1982). See 742 F.2d at 516, 35 FEP Cases at 1298.

exercising its discretionary power of appointment under section 2000e-5(f)(1)(B),¹⁴ other factors may properly be taken into account in denying appointment of counsel as exceptional circumstances dictate.¹⁵ Because *Bradshaw III* was emphatically presented by the court as an anomalous case, it illustrates general judicial satisfaction with the three criteria standard normally dispositive for court appointment of counsel under section 2000e-5(f)(1)(B). *Bradshaw III* reveals, however, that the three criteria standard is not absolute.

In early 1975, Nancy Bradshaw, acting in *propria persona*, filed a sex discrimination action against the Zoological Society of San Diego alleging unlawful denial of employment.¹⁶ Prior to the initiation of the suit, Bradshaw had filed a charge with the Equal Employment Opportunity Commission (EEOC) which had found "reasonable cause" to believe that the Zoological Society discriminated against Bradshaw in denying her application for a position at the Zoo.¹⁷ In April of 1975, the district court granted summary judgment to the defendant, finding Bradshaw's claims to be time-barred.¹⁸ Three years later, the Ninth Circuit reversed the district court's determinations and remanded the case for further proceedings.¹⁹

The proceedings resumed in the district court with the filing of an answer by the Zoological Society to the complaint.²⁰ Bradshaw then filed a motion for appointment of counsel under section 2000e-5(f)(1)(B), and for leave to proceed in forma pauperis.²¹ The district court granted the request to proceed in forma pauperis, though it denied the motion for appointment of counsel.²² Bradshaw subsequently filed a motion to reconsider, and sought leave to amend her complaint to plead a class action.²³ Both requests were denied by the district court.²⁴ Pursuant to title 28, section 1291, Bradshaw filed a notice of appeal.²⁵

¹⁴ See *supra* note 7 and accompanying text.

¹⁵ *Bradshaw III*, 742 F.2d at 517, 35 FEP Cases at 1299. According to the *Bradshaw III* court, each case regarding court appointment of counsel is to be judged individually depending on the circumstances. *Id.* at 518, 35 FEP Cases at 1300.

¹⁶ *Bradshaw II*, 662 F.2d at 1303, 27 FEP Cases at 842-43. Specifically, Bradshaw brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (1976) and 42 U.S.C. § 1983 (1976). In addition to her gender claim, Bradshaw claimed discrimination on the basis of marital status and in retaliation for her past complaints of discrimination. 662 F.2d at 1303 n.1, 27 FEP Cases at 843 n.1.

In the initial action in the district court, the court granted the defendants' motion to dismiss. *Bradshaw v. Zoological Soc'y of San Diego*, 10 FEP Cases 1268, 1274 (S.D. Cal. 1975). This decision was subsequently reversed and remanded to the district court for further proceedings. *Bradshaw v. Zoological Soc'y of San Diego*, 569 F.2d 1066, 1069, 116 FEP Cases 828, 830 (9th Cir. 1978) (*Bradshaw I*). The decision on remand was also appealed and was the subject of *Bradshaw II*, 662 F.2d 1301, 27 FEP Cases 841 (9th Cir. 1981).

¹⁷ *Bradshaw II*, 662 F.2d at 1303, 27 FEP Cases at 843.

¹⁸ *Id.* The district court found that both the Title VII and section 1983 claims were barred. *Id.*

¹⁹ *Bradshaw I*, 569 F.2d at 1069, 16 FEP Cases at 830.

²⁰ *Bradshaw II*, 662 F.2d at 1303, 27 FEP Cases at 843.

²¹ *Id.* With this motion, Bradshaw filed affidavits regarding both her impecunious financial situation and her unsuccessful efforts to obtain an attorney. *Id.* Although her successful request to proceed in forma pauperis was based on 28 U.S.C. § 1915, similar relief could have been predicated upon 42 U.S.C. § 2000e-5(f)(1) which seems to require a lesser showing in Title VII cases. 662 F.2d at 1303 n.4, 27 FEP Cases at 843 n.4.

²² 662 F.2d at 1303 n.4, 27 FEP Cases at 843 n.4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* 28 U.S.C. § 1291 (1982) vests in the courts of appeal "jurisdiction of appeals from all final

On appeal, the Ninth Circuit held that orders denying appointment of counsel in Title VII suits are appealable under section 1291.²⁶ Taking jurisdiction over Bradshaw's appeal, the court of appeals noted that the Civil Rights Act of 1964 provides for appointment of counsel in employment discrimination cases at the court's discretion.²⁷ The appellate court further observed that three critical factors have emerged as relevant to the exercise of discretion under this statutory mandate.²⁸ Although the court noted that normally a district court's decision is subject to review only for an abuse of discretion,²⁹ the court held that standard was not applicable in this case.³⁰ Thus, turning to the merits of Bradshaw's appeal, the court stated that because the appeal satisfied the three relevant criteria set forth by the court, Ms. Bradshaw was entitled to appointment of counsel pursuant to section 2000e-5(f)(1)(B).³¹ Consequently, the case was again remanded to the district court for further proceedings.³²

In March of 1983, the district court entered findings of fact detailing its unsuccessful attempts to appoint counsel for Bradshaw.³³ The court findings revealed that the district court strove for thirteen months to find an attorney to represent Ms. Bradshaw.³⁴ Numerous public and private organizations and attorneys were contacted by either the court or Ms. Bradshaw.³⁵ No one, however, would voluntarily assist her in the prosecution of her case.³⁶ Finally, these findings included an order that she either continue pro se or seek further relief from the court of appeals.³⁷ As a result, Bradshaw filed a petition

²⁵ *Id.* 28 U.S.C. § 1291 (1982) vests in the courts of appeal "jurisdiction of appeals from all final decisions of the district courts."

²⁶ *Bradshaw II*, 662 F.2d at 1320, 27 FEP Cases at 858. The court was confronted with two other issues relating to its jurisdiction over the appeal. *Id.* at 1303, 27 FEP Cases at 843. As to the first issue, the court held that the order of the district court denying Bradshaw leave to amend her complaint was not appealable, because the opportunity to amend, if erroneously denied, is effectively protected after final judgment on the merits. *Id.* at 1304, 27 FEP Cases at 844. The second issue was the Zoo's challenge to the appeal on the ground that it was taken from an unappealable order denying reconsideration of the district court's earlier denial of Bradshaw's original motions. The court held the motion for "reconsideration" to be simply a renewal of the motions on the merits and consequently found that the notice of appeal was timely filed. *Id.* at 1305 & n.10, 27 FEP Cases at 844-45 & n.10.

²⁷ *Id.* at 1318, 27 FEP Cases at 856.

²⁸ *Id.* See *supra* note 8 and accompanying text for a discussion of these three factors.

²⁹ *Bradshaw II*, 662 F.2d at 1318, 27 FEP Cases at 856 (citing *White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 205, 25 FEP Cases 1541, 1542-43 (5th Cir. 1981); *Spanos v. Penn Cent. Transp. Co.*, 470 F.2d 806, 808, 5 FEP Cases 527, 529 (3d Cir. 1972) (per curiam)).

³⁰ *Bradshaw II*, 662 F.2d at 1318, 27 FEP Cases at 856. The court stated that "the district court's decision does not represent the reasoned judgment necessary to application of that standard." *Id.* Further, the court noted, "such discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, 10 FEP Cases 1181, 1187 (1975) (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.))). Thus, the court concluded, "we are unable to conclude from the record that the district court exercised a reasoned and well-informed discretion which we may review." *Id.* at 1319, 27 FEP Cases at 857 (quoting *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308, 15 FEP Cases 1787, 1790 (5th Cir. 1977)).

³¹ *Id.* at 1319-20, 27 FEP Cases at 857-58.

³² *Id.* at 1320, 27 FEP Cases at 858.

³³ *Bradshaw III*, 742 F.2d at 516, 35 FEP Cases at 1298.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

for writ of mandamus seeking to compel the district court to assign counsel.³⁸ In this posture, a panel of the Ninth Circuit again considered appointment of counsel for Ms. Bradshaw pursuant to section 2000e-5(f)(1)(B).³⁹

The court began its discussion stating that this case highlights the inherent defects in Title VII of the Civil Rights Act of 1964.⁴⁰ The court observed that while section 2000e-5(f)(1)(B) authorizes court appointment of counsel, it fails to provide compensation to those so appointed.⁴¹ This deficiency, according to the court, exacerbated the district court's difficulty in finding counsel willing to voluntarily represent Bradshaw.⁴² The court noted that chief among the reasons given by attorneys and organizations contacted by the district court was the lack of compensation.⁴³

In *Bradshaw II*⁴⁴ a majority of the appeals court had held that the district court had abused its discretion because it failed to consider one of the three essential factors relevant to the exercise of its discretionary power of appointment of counsel under section 2000e-5(f)(1)(B) and that the district court had been wrong as a matter of law in its evaluation of another of these factors.⁴⁵ According to the *Bradshaw III* panel, however, the *Bradshaw II* opinion was careful to point out that the three factors were not exclusive, and that under certain circumstances other factors may properly be taken into account.⁴⁶ Examining the record supplemented by the additional findings of fact, the panel held the instant case to be appropriate for consideration of factors other than the standard three.⁴⁷

Looking to other factors, the court noted that the majority in *Bradshaw II* never anticipated there would be such a lack of willingness to represent Ms. Bradshaw.⁴⁸ First, recounting the degree of resistance by the members of the San Diego bar, the court concluded that the helpfulness of coercive appointment of counsel was questionable as regards both the indigent and the court.⁴⁹ Second, the court observed, members of the

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* Compensation would be available to a prevailing party, however, under the attorney's fees provision in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(k)(1982). See *supra* note 2 and accompanying text.

⁴² *Bradshaw III*, 742 F.2d at 516, 35 FEP Cases at 1298.

⁴³ The court further found that in addition to the obvious demand on attorney time, the costs of discovery for this complex employment discrimination case were thought to be prohibitive. *Id.* Moreover, the court implied that the attorney's fees provision in Title VII was insufficient to overcome these pecuniary concerns. *Id.*

⁴⁴ *Bradshaw II*, 662 F.2d 1301, 27 FEP Cases 841 (9th Cir. 1981).

⁴⁵ *Id.* at 1319-20, 27 FEP Cases at 857-58. According to the court in *Bradshaw II*, the district court's decision to allow Ms. Bradshaw to proceed in forma pauperis resolved the first issue in her favor, as a lesser showing of indigency is required to satisfy the test for appointment of counsel. *Id.* at 1319, 27 FEP Cases at 857. The court noted that Ms. Bradshaw satisfied the second requirement and had shown more than the requisite degree of diligence in searching for counsel. *Id.* Finally, the court noted, Bradshaw's claim was shown to be meritorious for the purposes of the provision regarding appointment of counsel. *Id.* at 1319-20, 27 FEP Cases at 857-58.

⁴⁶ *Bradshaw III*, 742 F.2d at 517, 35 FEP Cases at 1299.

⁴⁷ *Id.*

⁴⁸ *Id.* The court observed that the district court "fairly exhausted" the possibilities in the community in attempting to locate willing counsel. *Id.*

⁴⁹ *Id.* The court noted that the degree of reluctance was so high that members of the San Diego bar were more willing to confront the court with "tenuous" thirteenth amendment arguments and the issue of involuntary servitude than to provide counsel for Ms. Bradshaw. *Id.*

bar were concerned that Ms. Bradshaw had been particularly litigious and was not reluctant to question the competency of counsel assisting her.⁵⁰ Finally, the court stated, the district court found that members of the bar were afraid of jeopardizing their malpractice insurance coverage and of being subjected to state bar disciplinary proceedings.⁵¹

In determining that no remedy in the form of coercive appointment of counsel was available to Ms. Bradshaw, the panel of the Ninth Circuit held that the exigencies addressed by the district court on remand were properly part of the decision whether to appoint counsel.⁵² Given the circumstances, the court stated, it was not prepared to say the district court derived the wrong conclusion in its consideration of the additional factors.⁵³ In so holding, the court stressed that *Bradshaw III* is an extreme case, and moreover, that it is not to be read as suggesting that coercive appointment of counsel is never proper.⁵⁴

In a concurring opinion, Judge Reinhardt wrote separately to expand on a few points made by the court.⁵⁵ Noting the troublesome nature of both the result reached and the underlying problem, Judge Reinhardt admonished that the basis of the court's decision is that it is an "extreme case."⁵⁶ As such, according to Judge Reinhardt, the peculiar facts of *Bradshaw III* make it apparent that it is not intended as precedent for refusals to appoint counsel in other cases.⁵⁷ Consequently, the concurrence stated, the standards established in *Bradshaw II* remain unaltered.⁵⁸ Moreover, according to Judge Reinhardt, the factors which determined the court's decision were noneconomic.⁵⁹ Instead, Judge Reinhardt stated that they involved Bradshaw's history, her relationships with her previous attorneys, and the attitude of the bar towards her.⁶⁰

Notwithstanding the result of *Bradshaw III*, Judge Reinhardt asserted, unpopular litigants are entitled to the full extent of their legal rights.⁶¹ Thus, while there was no abuse of discretion in the instant case, the concurring judge found that it is nonetheless clear that there exist numerous avenues for a district court judge to explore in attempting

⁵⁰ *Id.* at 517-18, 35 FEP Cases at 1299.

⁵¹ *Id.* at 518, 35 FEP Cases at 1299. These fears presumably stemmed from the bar's assessment of Ms. Bradshaw's claims, coupled with the willingness of litigants to join attorneys as defendants in seeking redress from frivolous claims. *Id.*

⁵² *Id.* at 518, 35 FEP Cases at 1300.

⁵³ *Id.*

⁵⁴ *Id.* This comment by the court seemed directed particularly at the California State Bar Association, which for reasons unknown failed to file an amicus curiae brief at the request of the court. *Id.* at 518-19, 35 FEP Cases at 1300. Excoriating the response of the bar to the requests for assistance, the court observed that "[p]erhaps only the threat of widespread coercive appointments will rekindle" the recognition that the problem of indigent legal representation is in large part a responsibility of the bar. *Id.* at 519, 35 FEP Cases at 1300.

⁵⁵ *Id.* at 519, 35 FEP Cases at 1301 (Reinhardt, J., concurring).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* Judge Reinhardt stated, "[w]e must be particularly careful that civil rights litigants are afforded their full rights and that neither the unpopularity of their cause nor any perceived belligerency on their part, or other unwillingness or inability to conform to the normal mode, underlies or plays any part in a failure to appoint counsel." *Id.*

to locate counsel willing to take a given civil rights case.⁶² Further, Judge Reinhardt noted, in the rare case where willing counsel cannot be located, the district court must nevertheless make an appointment in the absence of exceptional circumstances.⁶³ According to Judge Reinhardt, *Bradshaw III*, however, represents an exceptional situation. The concurrence stated that another reversal of the district court would not be in the interest of Ms. Bradshaw.⁶⁴ Given the inevitability of further procedural delays, Judge Reinhardt noted, proceeding to trial without the aid of an attorney might be the most expedient option.⁶⁵

Bradshaw III reveals the deficiencies inherent in section 2000e-5(f)(1)(B). Though perhaps an anomalous case, *Bradshaw III* also illustrates the conceptual difficulties in allowing exceptions to the three established criteria used to determine whether discretion should be exercised in favor of appointing counsel under the provision. Moreover, the Ninth Circuit in *Bradshaw III* failed to adequately explain why this case is exceptional and how future cases are to be read in light of *Bradshaw III*. As *Bradshaw III* demonstrates, courts are hesitant to make coercive appointments of counsel to fulfill the purpose of the statutory provision. Consequently, although characterized as an "extreme case,"⁶⁶ the rationale of *Bradshaw III* inevitably leads to the result that individuals with meritorious civil rights claims will be denied adequate representation.⁶⁷

According to the panel, *Bradshaw III* "highlights" a defect in Title VII of the Civil Rights Act of 1964.⁶⁸ This defect, the panel notes, is the failure of Congress to create a fund to compensate court-appointed counsel in Title VII cases.⁶⁹ This characterization, however, seems unwarranted and inaccurate, and its use by the *Bradshaw III* court results only in confusing the purpose and significance of section 2000e-5(f)(1)(B). Congress included an attorney's fees provision in Title VII⁷⁰ as a means by which to induce attorneys to represent individuals with civil rights grievances, and to encourage those injured by discrimination to seek judicial relief for their meritorious claims.⁷¹ The provision allowing court appointment of counsel, however, indicates congressional recog-

⁶² *Id.* Judge Reinhardt noted that "the ingenuity of federal judges, when sufficiently motivated, is limitless . . ." *Id.*

⁶³ *Id.* at 520, 35 FEP Cases at 1301 (Reinhardt, J., concurring). The inability of a district judge to find a volunteer does not, by itself, constitute exceptional circumstances. *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* Judge Reinhardt stated that "proceeding to trial without an attorney may under these unique circumstances be the lesser of the evils." *Id.*

⁶⁶ *Id.* at 518, 35 FEP Cases at 1300.

⁶⁷ Given the complexity of civil rights litigation, an individual unschooled in the field stands "little hope of successfully prosecuting his case to a final resolution on the merits." *Bradshaw II*, 662 F.2d at 1306, 27 FEP Cases at 846. Refusal to appoint an attorney to an individual with a meritorious claim, therefore, is almost tantamount to a dismissal.

⁶⁸ *Id.* at 516, 35 FEP Cases at 1298.

⁶⁹ *Id.*

⁷⁰ 42 U.S.C. § 2000e-5(k) (1982). See *supra* notes 2-5 and accompanying text.

⁷¹ See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 429, 31 FEP Cases 1169, 1171 (1983); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). In *Bradshaw II* the court noted, "Congress indeed intended the prospect of an award of fees to the prevailing party as a means to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'" 662 F.2d at 1319, 27 FEP Cases at 857 (quoting 110 CONG. REC. 12,724 (1969) (Remarks of Senator Humphrey)); see also *Copeland v. Marshall*, 641 F.2d 880, 889 (D.C. Cir. 1980) (en banc) (legislative history of the Civil Rights Attorney's Fees Award of 1976 demonstrates congressional intent to assist individuals with civil rights grievances).

dition that the attorney's fees awards provision may at times prove to be an insufficient incentive.⁷² Thus, the provision authorizing court appointment of counsel was enacted to ensure that those civil rights claimants with meritorious cases would be able to obtain counsel.⁷³ As such, given the relationship between the attorney's fees provision and the appointment of counsel provision in Title VII, congressional failure to provide a fund for payment of court-appointed counsel does not constitute a "defect". Rather, section 2000e-5(f)(1)(B) simply manifests a congressional desire that court-appointed counsel be compensated exactly as are voluntary counsel.⁷⁴

To determine whether an individual is entitled to court appointment of counsel under section 2000e-5(f)(1)(B), courts have developed a test of three criteria which must be satisfied by the claimant.⁷⁵ Failure by a district court to consider any one of the three criteria constitutes reversible error.⁷⁶ Indeed, in determining whether a civil rights plaintiff is entitled to court-appointed counsel, these three factors are "usually the only relevant factors."⁷⁷ Given the congressional intent that those individuals with meritorious civil rights cases be adequately represented, the near exclusivity of the three factors seems particularly appropriate.⁷⁸

The *Bradshaw III* decision, however, creates an exception to this almost exclusive reliance on the three criteria that is neither warranted nor consistent with section 2000e-5(f)(1)(B). The panel's decision in *Bradshaw III* is flawed because it rests solely upon the attitude of the local bar and its resistance to assisting Ms. Bradshaw. First, and fatal to the *Bradshaw III* rationale, the panel noted that chief among the reasons given by attorneys and organizations for refusing to assist Bradshaw was the lack of compensation.⁷⁹ Opportunity for recovery for time and expenses, however, could be available to a prevailing party under section 2000e-5(k).⁸⁰ Moreover, the broad statutory mandate authorizing court appointment of counsel was enacted precisely to correct occasions where attorney's fees awards proved insufficient to induce representation.⁸¹ Thus, permitting the district court to deny assignment of counsel to Ms. Bradshaw because attor-

⁷² *Bradshaw II*, 662 F.2d at 1319, 27 FEP Cases at 857.

⁷³ *Id.*

⁷⁴ That is, when the attorney's fees provision is inadequate to induce representation of an indigent claimant, the court appointment provision offers added "incentive." This added "incentive" — essentially court coercion — does not alter the basic compensation scheme contemplated by Congress. See *supra* notes 2-5 and accompanying text. The risks of losing remain the same.

⁷⁵ These criteria are: (1) the plaintiff must have a meritorious claim, (2) the plaintiff must make diligent efforts to obtain an attorney, and (3) the plaintiff must demonstrate an inability to retain counsel. See *supra* note 8 and accompanying text.

⁷⁶ See *Bradshaw II*, 662 F.2d at 1319-20, 27 FEP Cases at 857-58.

⁷⁷ *Id.* at 1318 n.43, 27 FEP Cases at 856 n.43.

⁷⁸ Once a civil rights plaintiff has satisfied the three criteria, it is difficult to imagine a situation where Congress would not intend that representation be provided. This seems especially so because, as with the attorney's fees provision, Congress surely intended deterrence of discrimination to be a secondary purpose of the statutory mandate. See, e.g., *Copeland v. Marshall*, 641 F.2d 880, 889 n.13 (D.C. Cir. 1980) (en banc). Failure to provide counsel to indigent claimants satisfying these criteria would tend to vitiate the deterrence aspects of the provision.

⁷⁹ *Bradshaw III*, 742 F.2d at 516, 35 FEP Cases at 1298.

⁸⁰ See *supra* note 3 and accompanying text.

⁸¹ This was recognized by the Ninth Circuit itself in *Bradshaw II* where the court stated, "the provision allowing appointment of counsel indicates congressional recognition of the fact that an award of fees may prove an insufficient incentive." 662 F.2d at 1319, 27 FEP Cases at 857.

neys do not wish to represent her "chiefly" because of their dissatisfaction with the compensation scheme is contrary to the purpose of section 2000e-5(f)(1)(B).⁸²

Another factor proffered by the *Bradshaw III* court to support its acceptance of the district court's failure to make a coercive appointment is the local bar's concern that Bradshaw was a particularly litigious person and, more importantly, that attorneys who have represented her in the past have themselves been the subject of court hearings, regarding their competency.⁸³ The cogency of this argument, however, is severely undermined by Judge Reinhardt's concurrence which notes that "unpopular and even obstreperous litigants are entitled to the full measure of their legal rights."⁸⁴ Moreover, as the court admits, it has no knowledge regarding the legitimacy of Bradshaw's complaints about her former counsel.⁸⁵ Finally, Bradshaw's present claim had been determined to be meritorious.⁸⁶ Consequently, her reputation for litigiousness should have been irrelevant.

A third set of related factors in the panel's decision concerned the bar members' fear of jeopardizing their malpractice insurance coverage and of being subject to state bar disciplinary proceedings.⁸⁷ These factors are insufficient to justify *Bradshaw III* as an exception to the traditional consideration of the three standard criteria which Ms. Bradshaw had satisfied. As noted, the meritoriousness of her claims had already been determined.⁸⁸ Further, and perhaps ironically, failure to come forward to assist indigent litigants is a violation of the spirit of ethical considerations of the Model Code of Professional Responsibility.⁸⁹

⁸² The court apparently conceded this, noting, "[w]here the lack of compensation the only reason for the bar's recalcitrance, we would be far less inclined to accept the district court's failure to make a coercive appointment." *Bradshaw III*, 742 F.2d at 517, 35 FEP Cases at 1299.

⁸³ *Id.* at 516-18, 35 FEP Cases at 1298-99.

⁸⁴ *Id.* at 519, 35 FEP Cases at 1301 (Reinhardt, J., concurring).

⁸⁵ *Id.* at 517, 35 FEP Cases at 1299.

⁸⁶ *Bradshaw II*, 662 F.2d at 1319-20, 27 FEP Cases at 857-58. As the court observed:

[w]here the administrative agency charged with enforcing the statute has made a determination that there is reasonable cause to believe that the plaintiff was the victim of discrimination, as it [the EEOC] has in Miss Bradshaw's case, the court need ordinarily make no further inquiry for purposes of appointment of counsel.

Id. at 1320, 27 FEP Cases at 857-58. Although the dissent in *Bradshaw II* took issue with the majority's holding that an EEOC determination of reasonable cause will suffice to establish the "merit" requirement, *id.* at 1322, 27 FEP Cases at 860, the *Bradshaw III* court did not alter or qualify its previous holding regarding the satisfaction of the merit requirement by Ms. Bradshaw.

⁸⁷ *Bradshaw III*, 742 F.2d at 518, 35 FEP Cases at 1299.

⁸⁸ See *supra* note 86.

⁸⁹ As the *Bradshaw III* panel noted, "[f]ailure to come forward to assist indigent litigants at the request of the court is an indication of loss of professionalism. It is also a violation of the spirit, if not the letter, of ethical considerations of the Model Code of Professional Responsibility." 742 F.2d at 518, 35 FEP Cases at 1300. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16, EC 2-25-EC 2-31 (1980). EC 2-29, for example, provides:

When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, . . . or the belief of the lawyer regarding the merits of the civil case.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1980).

Thus, the panel decision fails to explain how *Bradshaw III* differs from other cases where voluntary representation cannot be induced by the attorney's fees awards provision of Title VII. The *Bradshaw III* holding that the district court did not abuse its discretion in failing to make a coercive appointment of counsel rests exclusively on the attitude of the members of the bar towards Ms. Bradshaw and their adamancy in refusing to assist her with her claims. Moreover, the primary basis of this refusal centered on monetary concerns.⁹⁰ It is precisely this situation at which the statutory provision authorizing appointment of counsel is directed. Given that Ms. Bradshaw satisfied the criteria necessary to fall within the ambit of section 2000e-5(f)(1)(B), the exception carved out in *Bradshaw III* requires greater articulation than the court gave.

Bradshaw III upholds an exception to the view that usually only three factors are relevant to a district court's determination of whether to exercise its discretion in appointing counsel to a civil rights plaintiff pursuant to section 2000e-5(f)(1)(B). The *Bradshaw III* court failed to explain adequately the need for an exception. Consequently, the decision calls into question the integrity of the three factor test. Moreover, in denying Ms. Bradshaw representation, the court failed to distinguish her case, thus placing the decision in direct contravention of the statutory mandate.⁹¹ Ultimately, *Bradshaw III* leads to the result that individuals with meritorious claims can be left without effective access to the judicial processes.

F. **The Rejection of Comparable Worth Claims: Spaulding v. University of Washington*¹

Sex-based wage discrimination is prohibited by both Title VII of the Civil Rights Act of 1964² and the Equal Pay Act of 1963.³ Plaintiffs asserting a Title VII violation can establish a prima facie case of discrimination in two ways. The first method is termed claims of "disparate treatment."⁴ Under this method, plaintiffs must show by direct or circumstantial proof that their employer intentionally discriminated against them.⁵ Plain-

⁹⁰ See *supra* notes 72-75 and accompanying text.

⁹¹ As Judge Reinhardt noted, "under the Civil Rights Act plaintiffs are, unless exceptional circumstances exist, entitled to the appointment of counsel whenever the three criteria set forth in *Bradshaw II* are met . . . [I]n the rare case in which the services of a volunteer cannot be obtained, the district court must nevertheless make an appointment." *Bradshaw III*, 742 F.2d at 520, 35 FEP Cases at 1301 (Reinhardt, J., concurring). Failure to appoint counsel in such a case is tantamount to a dismissal.

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¹ 740 F.2d 686, 35 FEP Cases 217 (9th Cir. 1984).

² 42 U.S.C. §§ 2000e to 2000e-17 (1982).

³ 29 U.S.C. § 206(d) (1982).

⁴ See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977) (involving government charges that the Teamsters discriminated against blacks and hispanics in the seniority system of the union's collective bargaining agreement); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973) (involving civil rights activist's charge that his layoff by McDonnell and McDonnell's subsequent refusal to rehire him were racially motivated).

⁵ The Court stated in *Teamsters*:

"Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

Teamsters, 431 U.S. at 335 n.15, 14 FEP Cases at 1519 n.15 (citations omitted).

tiffs can also establish a Title VII claim by a second means, known as claims of "disparate impact," without proof of discriminatory motive. In a disparate impact case, plaintiffs make a prima facie case if they can demonstrate that a particular employer policy is facially neutral in its treatment of different groups but in fact falls more harshly on members of a protected class than other groups of employees, and cannot be justified by business necessity.⁶

To be entitled to relief under the Equal Pay Act, plaintiffs must demonstrate that they received unequal compensation for work "substantially equal" to that performed by other employees.⁷ If a plaintiff establishes a prima facie Equal Pay Act claim, the employer can then rebut this claim by showing that the inequality is the result of a seniority system, a merit system, or a system which links earnings to the quality or quantity of production.⁸ These exceptions to the Equal Pay Act's mandate of equal pay for equal work were incorporated into Title VII by the Bennet Amendment.⁹ Prior to 1981 the Bennet Amendment was interpreted as limiting Title VII wage discrimination claims to those which involved claims of unequal pay for "substantially equal" work.¹⁰

In *Washington v. Gunther*, however, the Supreme Court held that jobs do not, in all cases, have to be "substantially equal" for Title VII's prohibitions to apply.¹¹ In *Gunther* the Court stated that differing treatment of employees, whose jobs are not identical, is allowed in a claim of "disparate treatment,"¹² but the Court did not decide whether a comparison of dissimilar jobs could be the basis of a disparate impact claim. The Court explicitly distinguished the facts before it in *Gunther*, which involved intentional discrimination and only required a comparison of jobs in the context of determining disparate treatment, from the type of disparate impact case characterized as a "comparable worth" claim.¹³

"Comparable worth" claims compare different jobs, in the context of showing pay inequities between jobs which are de facto segregated by race or sex.¹⁴ Because neither Title VII nor the Equal Pay Act prohibit differential pay rates for different jobs, these

⁶ See *Dothard v. Rawlinson*, 433 U.S. 321, 328-31, 15 FEP Cases 10, 13-15 (1977) (involving a challenge to Alabama's statutory height and weight requirements for prison guard positions); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-32, 3 FEP Cases 175, 177-78 (1971) (involving black employee's challenge to employer's policy of only hiring high school graduates). The disparate impact theory was first recognized in *Griggs*. Plaintiffs are not, however, required to choose between the disparate impact and disparate treatment theory, but are permitted to proceed concurrently under both theories. See, e.g., *Wright v. National Archives & Records Serv.*, 609 F.2d 702, 710-11, 21 FEP Cases 8, 13-14 (4th Cir. 1979) (en banc).

⁷ 29 U.S.C. § 206(d)(1) (1982). See generally B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 437-63 (2d ed. 1983).

⁸ 29 U.S.C. § 206(d)(1) (1982).

⁹ § 703(h), 42 U.S.C. § 2000e-2(h) (1982). The amendment reads:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the [Equal Pay Act].

Id.

¹⁰ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 463-64, 474.

¹¹ *Washington v. Gunther*, 452 U.S. 161, 181, 25 FEP Cases 1521, 1529 (1981). *Gunther* was a "disparate treatment" case involving intentional discrimination against female prison guards.

¹² *Id.*

¹³ *Id.* at 180-81, 25 FEP Cases at 1528.

¹⁴ B. SCHLEI & P. GROSSMAN, *supra* note 7, at 477-78.

claims are based on the contention that the different jobs being compared are of "comparable worth" to the employer and therefore should be compensated equally.¹⁵ Comparable worth plaintiffs concede that an employer's reliance on the market in determining differential wage rates for de facto sex-segregated jobs is a facially neutral employer policy. These plaintiffs contend, however, that this policy establishes a prima facie case of disparate impact on women because the market wages for traditionally female occupations are lower than those for traditionally male occupations of comparable worth.¹⁶

During the *Survey* year, in *Spaulding v. University of Washington*,¹⁷ the United States Court of Appeals for the Ninth Circuit held that a prima facie disparate impact claim could not be constructed by a showing of wage disparities between jobs of allegedly comparable worth.¹⁸ The court's decision is in accord with previous cases in which courts have refused to recognize claims of "comparable worth" in disparate impact cases.¹⁹ The court ruled that the employer policy challenged in a disparate impact claim cannot be an employer's market-determined wage structure, but must be a "specific employer practice" over which the employer has discretionary control.²⁰ The court distinguished an employer's general reliance on market wage rates from a narrow discretionary practice on the grounds that the purpose of disparate impact analysis is to challenge neutral policies which are a non-job related pretext for intentional discrimination — not to challenge broader unequal distributions of wealth which are beyond the control of a single employer.²¹ *Spaulding* is significant because it was decided subsequent to *Gunther*, which expanded the scope of Title VII claims by no longer requiring that they be made in the context of equal work.²² The *Spaulding* decision demonstrates that although divergences in pay among employees in comparable jobs is relevant to a "disparate treatment" claim of intentional discrimination, differential compensation for jobs of allegedly comparable worth does not establish a claim of "disparate impact." *Spaulding* thus indicates that courts will continue to avoid a subjective determination of the worth of jobs to employers and will continue to hold that an employer's reliance on market wage rates, even when market wages for predominantly male jobs are higher than market wages for predominantly female jobs of comparable worth, does not constitute illegal sex-based wage discrimination under Title VII.

¹⁵ *Id.*

¹⁶ *Id.* According to Schlei and Grossman, "[a] plaintiff in a 'pure' comparable worth lawsuit, by analogy, seeks to show that an employment practice — the setting of wage rates by job classification — has a disproportionately adverse effect on one sex because a lower wage is given to predominantly female jobs than to predominantly male jobs." *Id.* Schlei and Grossman also apply the term "comparable worth" to cases such as *Gunther* which do not actually require an evaluation of the "worth" of the jobs compared, but which do compare the treatment and compensation of individuals who are not doing substantially equal work. *See id.* This casenote will not apply the term comparable worth to cases unless plaintiffs claim that the jobs compared are of comparable worth to the employer.

¹⁷ 740 F.2d 686, 35 FEP Cases 217 (9th Cir. 1984).

¹⁸ *Id.* at 706, 35 FEP Cases at 231.

¹⁹ *See* *Lemons v. City and County of Denver*, 620 F.2d 228, 22 FEP Cases 959 (10th Cir. 1980) (claim of city nurses that they were underpaid with respect to other city and community jobs of comparable worth); *Christensen v. State of Iowa*, 563 F.2d 353, 13 FEP Cases 161 (8th Cir. 1977) (comparable worth claim of female clerical workers that they were paid less than male physical plant workers).

²⁰ *Spaulding*, 740 F.2d at 707, 35 FEP Cases at 231.

²¹ *See id.* at 707-08, 35 FEP Cases at 231-32.

²² *See Gunther*, 452 U.S. at 181, 25 FEP Cases at 1521.

The plaintiffs in *Spaulding* were past and present members of the predominantly female faculty of the University of Washington School of Nursing.²³ The defendant, the University of Washington (University), was created and funded by the Washington State Legislature.²⁴ The University consists of sixteen separate schools.²⁵ Each school is responsible for the hiring and compensation of faculty members, subject to the approval of the University president.²⁶ The University budget office allocates the funds received from the state legislature to the various schools, after earmarking a percentage of these funds for across the board wage increases.²⁷

In March 1972, members of the nursing faculty filed a petition with the University alleging sex discrimination on the part of the University with respect to compensation.²⁸ The University responded that because each academic discipline was distinctive, a different "academic marketplace" existed for each discipline.²⁹ The University contended, therefore, that a comparison of salaries between schools was not relevant.³⁰ The school did, however, undertake a comparison on a school-by-school basis of its faculty salaries with those of other colleges and universities.³¹ This comparison indicated that the University's salaries were, on the whole, 9% below those of comparable universities.³² The University's School of Nursing salaries were 10.9% below those paid by comparable schools of nursing, though other schools at the University were equally below the level of compensation at similar academic institutions.³³ In 1972 the budget office allocated a 3% across the board salary increase to all schools and an additional 2% increase to the School of Nursing in response to the results of its salary study.³⁴ The nursing faculty remained dissatisfied with the level of compensation after the 1972 adjustment and ultimately brought suit in federal district court alleging that the University engaged in discriminatory compensation practices in violation of the Equal Pay Act and Title VII of the Civil Rights Act.³⁵

In August 1977, the federal district court judge referred the case to a special master.³⁶ After the master had taken evidence, but before he issued his findings, the Supreme Court decided *Gunther*.³⁷ After receiving memoranda from both parties on the affect of the *Gunther* decision on their case, the master concluded that *Gunther* did not affect the outcome of the case and recommended that the district court dismiss the nursing faculty's suit.³⁸ The district court thus granted the University's motion for

²³ *Spaulding*, 740 F.2d at 691, 35 FEP Cases at 218.

²⁴ *Id.* at 692, 35 FEP Cases at 219.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 693, 35 FEP Cases at 220. The plaintiffs also sued under 42 U.S.C. § 1983, which permits individuals to bring actions against state officials for deprivations of civil rights.

³⁶ 740 F.2d at 693, 35 FEP Cases at 220.

³⁷ *Id.*

³⁸ *Id.*

involuntary dismissal.³⁹ Appealing the district court's decision, the nursing faculty contended that it had demonstrated that the University had violated both the Equal Pay Act and the disparate treatment and disparate impact models of Title VII.⁴⁰

Holding that the plaintiffs failed to establish a prima facie claim of Title VII discrimination,⁴¹ the United States Court of Appeals for the Ninth Circuit stated that it reached this conclusion under both a "de novo" and a "clearly erroneous" standard of review.⁴² The court acknowledged, with respect to the nursing faculty's claim of disparate treatment, that after *Gunther* disparate treatment could be demonstrated through an examination of the differential treatment of sex-segregated jobs which were comparable, though not substantially identical.⁴³ The court added, however, that a demonstration of a wage disparity between comparable jobs, alone, did not constitute a prima facie case of disparate treatment.⁴⁴ Wage disparity between different jobs alone is insufficient, according to the court, because it is neither direct evidence of intentional discrimination nor evidence from which an inference of discrimination can be made.⁴⁵

Though the nursing faculty also introduced evidence purporting to show discriminatory acts of University officials, the court held that this evidence demonstrated only sporadic discriminatory acts and was an insufficient basis for a prima facie case.⁴⁶ The nursing faculty attempted to buttress this evidence with statistical data of the differential compensation of female nursing faculty and male faculty members in other departments.⁴⁷ The court stated, however, that the unreliability of the nursing faculty's statistics, combined with the statistical model's failure to distinguish the effect of sex on compen-

³⁹ *Id.*

⁴⁰ *Id.* at 691-92, 35 FEP Cases at 218-19. The nursing faculty also appealed the denial of its section 1983 claim. *Id.*

⁴¹ *Id.* at 699, 35 FEP Cases at 225. The appeals court also affirmed the district court's rejection of the nursing faculty's other claims. The court affirmed the district court's rejection of the section 1983 claim on jurisdictional grounds, though the district court went directly to the claim's merits. The appeals court stated that section 1983 claims against a state or its agency require a waiver by the state of its sovereign immunity. Because the nursing faculty did not assert a waiver of sovereign immunity, the appeals court held that the district court had lacked jurisdiction over the section 1983 claim. *Id.* at 693-94, 35 FEP Cases at 220-21.

The court of appeals also affirmed the district court's rejection of the plaintiff's claim that the University had violated the Equal Pay Act, stating that it would overturn the district court's decision only if it was clearly erroneous. *Id.* at 696-98, 35 FEP Cases at 223-24. The plaintiff's claim that the appeals court should engage in de novo review of the Equal Pay Act claim was denied by the court. *Id.* at 696, 35 FEP Cases at 222. The district court concluded that though some female nursing faculty members were paid less than some male faculty members in other schools, the nursing faculty failed to demonstrate, as is required by the Equal Pay Act, that the work of the faculty members in different disciplines was "substantially equal." *Id.* at 696-97, 35 FEP Cases at 223-24. The appeals court noted that the district court's finding that teaching jobs in different schools are not substantially equal was not clearly erroneous and was supported by the different emphasis placed on research, training and community service skills by the various disciplines. *Id.* at 697-98, 35 FEP Cases at 223-24.

⁴² *Id.* at 699, 35 FEP Cases at 225.

⁴³ *Id.* at 699-700, 35 FEP Cases at 225. See also B. SCHLEI & P. GROSSMAN, *supra* note 7, at 474.

⁴⁴ 740 F.2d at 700, 35 FEP Cases at 226.

⁴⁵ *Id.*

⁴⁶ *Id.* at 702, 35 FEP Cases at 228.

⁴⁷ *Id.* at 703, 35 FEP Cases at 228. If plaintiffs clearly prove wage disparities, the court observed, this demonstration can provide the basis for a court's inference of an employer's discriminatory intent based on the difference in compensation of certain classes of employees. *Id.*

sation from the effect of other variables, precluded the drawing of any conclusions about differential treatment or compensation on the basis of sex, and, therefore, any inference of discriminatory intent.⁴⁸

The court of appeals also affirmed the district court's determination that the nursing faculty had failed to establish a *prima facie* case of Title VII discrimination under a disparate impact claim.⁴⁹ The court did not entirely preclude the use of disparate impact analysis in sex-based wage discrimination cases.⁵⁰ The court stated, however, that such analysis is only appropriate when the particular employer practice at issue is a narrow one, such as a fringe benefit policy, subject to the exercise of employer judgment.⁵¹

The court rejected the plaintiff's claim that the University's reliance on market rates to set differential wages for jobs of "comparable worth" is an employer policy or practice which can be challenged by an assertion of disparate impact.⁵² A "wide-ranging claim of wage disparity between only comparable jobs," the court stated, cannot be constructed by showing the disparate impact of market wage rates.⁵³ The setting of wage rates, the court explained, is not determined solely by the judgment of the employer, and salaries are affected by factors other than the objective "worth" of a job.⁵⁴ Such other factors are precisely those which would be reflected in the market rate of pay for a particular job, the court observed. In support of its decision the court cited a law review note that discussed such factors as the number of available workers in a particular field, the number of employers who require the skills of these particular workers, and the ability of these workers to organize and bargain collectively.⁵⁵ The court held that because such factors

⁴⁸ *Id.* at 703-04, 35 FEP Cases at 228-29. The court noted the superiority of multiple regression statistical analysis to the analysis presented by the nursing faculty, which consisted merely of a simple matching of male and female faculty members assumed, but not shown, to be equal in terms of training and experience. *Id.* at 704, 35 FEP Cases at 229. See generally B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1342-43. Schlei and Grossman state:

Multiple regression analyses are particularly well suited for comparing the wage rates paid to members of a protected group with those paid to whites or males, because a simple direct comparison of those wages would fail to take into account the differences caused by differing occupations and other relevant and nondiscriminatory factors. . . . [Multiple regression analysis] is a statistical technique designed to estimate the effect of several independent variables (e.g. education, experience, performance, age, race, sex) in relation to a single dependent variable (e.g. salary). The methodology provides the ability to determine the extent to which the independent variables have influenced the dependent variable.

Id.

⁴⁹ 740 F.2d at 706-07, 35 FEP Cases at 231.

⁵⁰ *Id.* at 707-08, 35 FEP Cases at 231-32.

⁵¹ *Id.* at 707, 35 FEP Cases at 231.

⁵² *Id.* at 708, 35 FEP Cases at 232-33. If the employer had relied on differential market rates for men and women doing equal work, such a wage disparity would have constituted a violation of the Equal Pay Act. See, e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188, 9 FEP Cases 919 (1974).

⁵³ 740 F.2d at 706, 35 FEP Cases at 231. The court quoted the district court decision in *Power v. Barry*, 539 F. Supp. 721, 29 FEP Cases 559 (C.D. Mich. 1982). In *Power*, the court concluded that the legislative histories of the Equal Pay Act and Title VII indicate that Congress did not intend the courts to make independent and subjective evaluations and comparisons of the worth of various jobs to an employer. *Id.* at 726, 29 FEP Cases at 563-64. Other courts have similarly rejected comparable worth claims. *Lemon v. City and County of Denver*, 620 F.2d 228, 27 FEP Cases 959 (10th Cir. 1980); *Christensen v. State of Iowa*, 563 F.2d 353, 13 FEP Cases 161 (8th Cir. 1977).

⁵⁴ 740 F.2d at 708, 35 FEP Cases at 232-33.

⁵⁵ 740 F.2d at 706, 35 FEP Cases at 231. See Note, *Sex-Based Wage Discrimination Under The Title*

are beyond the employer's control, a reliance on the "market" is not a discretionary business practice or employer decision subject to the sanctions of Title VII merely because it impacts disproportionately on a protected class.⁵⁶

The Ninth Circuit's decision in *Spaulding* does not significantly change recent interpretation of Title VII. The case is important, however, because it delineates the boundaries of Title VII liability in the wake of the Supreme Court's expansion of Title VII in *Gunther*. After *Gunther*, the Equal Pay Act's requirement of "substantially equal" work no longer applies to Title VII claims of intentional sex-based wage discrimination. *Spaulding* indicates the extent to which analysis of comparable, but not equal, jobs can establish disparate impact Title VII claims. Both *Spaulding* and *Gunther* hold that an analysis of comparable jobs is relevant in the context of a disparate treatment claim because the plaintiff is attempting to prove intentional discrimination. The treatment of only "comparable" jobs is relevant because it compares not the worth of the jobs, but, rather, the employer's differential treatment of individuals doing comparable work.⁵⁷

Whether an analysis of comparable jobs or work can ever be the basis of a disparate impact claim is left open by both *Gunther* and *Spaulding*. The *Spaulding* court specifically refused to make "any broad statement as to the general availability of the impact model in other broad based sex-wage cases."⁵⁸ Moreover, even though the *Spaulding* court stated that the Supreme Court's expansion of Title VII liability is limited to "recognition of intentional discrimination,"⁵⁹ the *Spaulding* court also distinguished the nursing faculty's broad based attack on the University's wage structure from successful challenges to more specific employer practices under the disparate impact doctrine.⁶⁰ The court, therefore, rejected any disparate impact claim which requires a judicial determination of the "worth" of different jobs.⁶¹ The Ninth Circuit explicitly left open the possibility that plaintiffs may demonstrate the disparate impact of narrow, discretionary employer practices on classes of workers who are not doing substantially equal work.⁶²

Though the court appears uncertain, there is no theoretical difficulty in permitting disparate impact claims to be demonstrated through an analysis of comparable work if

VII Disparate Impact Doctrine, 34 STAN. L. REV. 1083, 1098 (1982) [hereinafter cited as Note, *Sex-Based Wage Discrimination*].

⁵⁶ 740 F.2d at 708, 35 FEP Cases at 232-33.

⁵⁷ Though the court analyzed and rejected a claim of comparable "worth," Judge Schroeder, in his concurring opinion, stated that the plaintiffs "repeatedly disclaimed having presented any comparable worth theory" and only claimed that nursing and other faculty positions were "comparable work." *Id.* at 710, 35 FEP Cases at 239 (Schroeder, J., concurring). Claims of comparable work and not worth are logical with respect to the nursing faculty's claim of disparate treatment. See *supra* note 16. An allegation of comparable "worth" with respect to plaintiffs' disparate impact claim, however, seems necessary. If the worth of the positions were not comparable there would be no expectation that the positions would be compensated equally, and any demonstrated wage disparity would, therefore, be meaningless with respect to a claim of wage discrimination.

⁵⁸ 740 F.2d at 706, 35 FEP Cases at 231 (citing *Power v. Barry*, 539 F. Supp. 721, 29 FEP 559 (C.D. Mich. 1982)).

⁵⁹ *Id.*

⁶⁰ *Id.* at 707-08, 35 FEP Cases at 231-33.

⁶¹ *Id.* at 706-07, 35 FEP Cases at 231-32. Therefore, the *Spaulding* court is in agreement with pre-*Gunther* appellate decisions which have rejected claims of wage discrimination based on allegations that different sex-segregated jobs receive different rates of pay though they are of "comparable worth" to an employer. See *supra* note 19. See also *Power v. Barry*, 539 F. Supp. 721, 29 FEP Cases 559 (C.D. Mich. 1982).

⁶² 740 F.2d at 706, 35 FEP Cases at 231.

the employer practice challenged is specific and discretionary.⁶³ The disparate impact of some types of fringe benefits for instance could be demonstrated by an analysis of their differential effect on the compensation of somewhat different de facto sex-segregated jobs without involving the court in an analysis of the comparable "worth" of those jobs to an employer. An employer's policy of providing retirement benefits based on sex-segregated annuity tables, for example, has been successfully challenged under a Title VII disparate impact claim; the plan required all employees to make equal contributions, yet provided female employees lower benefits.⁶⁴ If female employees doing the same work as male employees brought such an action, it would be a classic disparate impact claim involving equal work. If the employer's job classification policy, however, had resulted in classes of all-female secretaries and all-male clerks doing similar but not equal work, the secretary's disparate impact claim challenge to the benefit policy would require a court to examine whether the jobs — secretaries and clerks — were comparable, but would not require the court to determine whether the "worth" of the jobs was comparable. Although such a claim might be denied by courts which interpret *Gunther* as only permitting comparable work to be examined when intentional discrimination is alleged,⁶⁵ this type of claim would not contradict the *Spaulding* decision, which only precludes disparate impact claims where proof of the comparable worth of the two jobs is an essential element of the claim.

The Supreme Court declined to review the *Spaulding* court's rejection of comparable worth claims under the disparate impact model.⁶⁶ The Court had already indicated its reluctance to accept such claims by emphasizing that *Gunther* did not involve a "controversial" claim of comparable worth.⁶⁷ Furthermore, acceptance of comparable worth claims would force courts to make subjective evaluations of the worth of various jobs and would then require them to impose those evaluations on employers. Such an imposition would be difficult, complicated, the subject of constant judicial review, and would also interfere with collective bargaining agreements, which often result in pay rates higher or lower than the "worth" of a job to an employer.⁶⁸ Finally, judicial wage setting through a valuation of jobs' worth in relation to other jobs would violate the congressional intent of the Equal Pay Act and of Title VII.⁶⁹

In summary, the *Spaulding* court held that a Title VII disparate impact claim can not be constructed by a showing of wage disparities between jobs of allegedly comparable worth. The *Spaulding* court rejected the nursing faculty's comparable worth claim on two grounds. First, it rejected the proposition that courts have the authority or compe-

⁶³ The court also cites Note, *Sex-Based Wage Discrimination*, *supra* note 55, for the proposition that courts should not recognize disparate impact claims based on comparable worth. 740 F.2d at 706, 35 FEP Cases at 231. This note, however, does endorse the recognition of disparate impact claims based on other than comparable worth. See Note, *Sex-Based Wage Discrimination*, *supra* note 55, at 1092.

⁶⁴ See *Arizona Governing Comm. v. Norris*, 103 S. Ct. 3492, 32 FEP Cases 233 (1983), *aff'g in part, rev'g in part*, 671 F.2d 330, 28 FEP Cases 361 (9th Cir. 1982).

⁶⁵ See *Power v. Barry*, 539 F. Supp. 721, 29 FEP 559 (C.D. Mich. 1982).

⁶⁶ *Spaulding v. University of Washington*, 105 S. Ct. 511, 36 FEP Cases 464 (1984) (denying certiorari).

⁶⁷ *Gunther*, 452 U.S. 161, 166, 25 FEP Cases 1521, 1522-23 (1981).

⁶⁸ Note, *Sex-Based Wage Discrimination*, *supra* note 55, at 1098.

⁶⁹ See *Power v. Barry*, 539 F. Supp. 721, 726, 29 FEP Cases 559, 563-64 (C.D. Mich. 1982), for a discussion of the legislative histories of the Equal Pay Act and Title VII.

tence to determine the comparable "worth" of different jobs.⁷⁰ Second, even if comparable worth were not an issue,⁷¹ the court rejected the claim that an employer's reliance on the market to determine wages was the type of discretionary employer practice which could be challenged under Title VII.⁷² Therefore, the *Spaulding* court is in agreement with pre-*Gunther* appellate decisions which have rejected claims of wage discrimination based on the comparable worth theory.⁷³ In the Ninth Circuit's opinion, the Supreme Court's expansion of Title VII liability in *Gunther* is limited to cases of intentional discrimination and, possibly, challenges to narrow and discretionary employer practices. Thus, in the future, claims of wage discrimination based solely on a showing of wage disparities between different jobs alleged to be of only comparable worth to an employer will still not constitute a prima facie case of Title VII wage discrimination.

II. REMEDIES

A. *Right to Contribution Not Available to Parties Found to be in Violation of Section 1981: *Anderson v. Local Union No. 3*¹

Under the doctrine of contribution, a tortfeasor attempts to shift some of the judgment rendered against him to one or more joint tortfeasors.² By doing so, the tortfeasor can avoid paying more than his proportionate share of the judgment.³ In *Northwest Airlines, Inc. v. Transport Workers*,⁴ however, the United States Supreme Court held that such a right is not available to a defendant found to be in violation of Title VII⁵ of the Civil Rights Act of 1964.⁶ The Supreme Court held that a right to contribution

⁷⁰ 740 F.2d 686, 706, 35 FEP Cases 217, 231.

⁷¹ See *Briggs v. County of Madison*, 536 F. Supp. 435, 442, 28 FEP Cases 739, 748 (C.D. Wis. 1982), where the court concluded that municipal nurses and sanitarians performed jobs which were of "comparable value" to the city. This conclusion rested, in part, on city job classification ratings which were similar for the two positions.

⁷² 740 F.2d at 708, 35 FEP at 232.

⁷³ *Power v. Barry*, 539 F. Supp. 721, 29 FEP 559 (C.D. Mich. 1982); see also *supra* note 19.

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¹ 751 F.2d 546, 36 FEP Cases 1249 (2d Cir. 1984).

² See generally RESTATEMENT (SECOND) OF TORTS § 886A (1979); W. PROSSER & W. KEETON, THE LAW OF TORTS § 50 (1984) [hereinafter cited as PROSSER].

³ See generally RESTATEMENT (SECOND) OF TORTS § 886A (1979); PROSSER, *supra* note 2, § 50.

⁴ 451 U.S. 77, 25 FEP Cases 737 (1981). In a class action brought against Northwest Airlines by a female cabin attendant, Northwest Airlines was held liable to the class of female employees for backpay because wage differentials between male and female cabin attendants were found to violate Title VII (42 U.S.C. § 2000e-2a (1982)) and the Equal Pay Act (29 U.S.C. § 206(d) (1982)). See *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763, 789-90, 6 FEP Cases 902, 923 (D.D.C. 1973). In subsequent litigation, Northwest Airlines brought an action seeking contribution from the unions responsible for collectively bargaining for the wages of male and female cabin attendants. 451 U.S. at 82, 25 FEP Cases at 739.

⁵ 42 U.S.C. § 2000e-2 (1982). The pertinent part of the Act reads as follows:

It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

Id.

⁶ 451 U.S. at 98-99, 25 FEP Cases at 745.

could not be inferred from either the language⁷ or legislative history of Title VII.⁸ Moreover, the Court maintained that it would be improper to add a common law right to contribution to the statutory rights created by Congress in that statute.⁹

During the *Survey* year, in *Anderson v. Local Union No. 3*,¹⁰ the United States Court of Appeals for the Second Circuit extended the holding of *Northwest Airlines* by barring claims for contribution under section 1981¹¹ of the Civil Rights Act of 1866, which guarantees equal rights under the law for all persons within the jurisdiction of the United States.¹² The court in *Anderson* held that Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (Local 3), was not entitled to any award for contribution, since a proper reading of the *Northwest Airlines* decision would preclude such an award under section 1981.¹³ Therefore, after *Anderson*, a party found to be in violation of section 1981 will not be allowed to seek contribution from another party.

In employment discrimination suits antecedent to *Anderson*, classes of black and hispanic individuals alleged that Madison Square Garden Center, Inc. and Madison Square Garden Corp. (the Garden Entities), various individuals, and Local 3, the union which represents laborers employed at Madison Square Garden, had violated the civil rights laws by engaging in a pattern of hiring and employment practices which made it impossible for class members to secure higher paying and generally more desirable positions as laborers at Madison Square Garden.¹⁴ Prior to the trial of these suits,

⁷ *Id.* at 91-95, 25 FEP Cases at 742-44. The Court first stated that the language used in Title VII did not expressly create a right to contribution. *Id.* at 91, 25 FEP Cases at 742. Nor, the Court noted, did the language support implication of a right to contribution under Title VII. *Id.* at 93, 25 FEP Cases at 743. In fact, according to the Court, "[t]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize [a right to contribution]." *Id.* at 93-94, 25 FEP Cases at 743.

⁸ *Id.* at 94, 25 FEP Cases at 743. The Court stated that the legislative history of Title VII provided no support toward the recognition of a right to contribution under the statute. *Id.*

⁹ *Id.* at 98, 25 FEP Cases at 745. The Court explained that it could not, in the face of such a comprehensive legislative scheme as Title VII, fashion new remedies that might upset a carefully planned legislative program. *Id.* at 97, 25 FEP Cases at 745. Based on this, the Court concluded that "[w]hatever may be a federal court's power to fashion remedies in other areas of the law, we are satisfied that it would be improper for us to add a right to contribution to the statutory rights that Congress created in . . . Title VII." *Id.* at 98, 25 FEP Cases at 745 (footnote omitted).

¹⁰ 751 F.2d 546, 36 FEP Cases 1249 (2d Cir. 1984).

¹¹ 42 U.S.C. § 1981 (1982). That section provides in full:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exaction of every kind, and to no other.

Id.

¹² 751 F.2d at 550, 36 FEP Cases at 1252-53. *Anderson* also involved a claim for indemnification. *Id.* at 547, 36 FEP Cases at 1250. Indemnification refers to an order requiring a party to reimburse in full the party who has discharged a common liability. See PROSSER, *supra* note 2, § 51. The court stated that the rationale of its holding, with regard to contribution, extended as well to claims for indemnification. 751 F.2d at 548, 36 FEP Cases at 1251.

¹³ *Id.* at 548-49, 36 FEP Cases at 1251-52.

¹⁴ See *Ingram v. Madison Square Garden Center*, 482 F. Supp. 414, 21 FEP Cases 718 (S.D.N.Y. 1979); 482 F. Supp. 918, 32 FEP Cases 538 (S.D.N.Y. 1979); 535 F. Supp. 1082, 32 FEP Cases 548 (S.D.N.Y. 1982), *modified*, 709 F.2d 807, 32 FEP Cases 641 (2d Cir.), *cert. denied*, 104 S. Ct. 346, 33 FEP Cases 48 (1983).

however, the plaintiff classes entered into a consent decree with all the defendants other than Local 3.¹⁵ As a result, the plaintiff classes withdrew their claims against the settling defendants.¹⁶ Litigation against Local 3, however, proceeded to trial and resulted in a finding that Local 3 had violated both Title VII and section 1981.¹⁷ The court entered judgment against Local 3 for injunctive and monetary relief.¹⁸ In so doing, the court specifically accounted for payments received by the plaintiff classes from the settling defendants and reduced Local 3's liability accordingly.¹⁹ The appeals court upheld the award against Local 3, as modified.²⁰

At this point, Local 3 announced that it would seek contribution for amounts awarded to the plaintiff classes in the antecedent litigation.²¹ Following this announcement, individual plaintiffs and the Garden Entities commenced an action for declaratory relief.²² The United States District Court for the Southern District of New York, finding no factual question to be tried, granted the plaintiffs' motion for summary judgment.²³ The court declared that the plaintiffs were not liable to Local 3 for any monies associated with the prior litigation.²⁴

The Second Circuit affirmed the judgment of the district court granting the plaintiffs' motion for summary judgment and dismissing Local 3's claim of a right to contribution.²⁵ In reaching its decision, the court rejected the two arguments raised by the union in favor of recognizing a right to contribution. First, the court rejected Local 3's argument that *Northwest Airlines* should be read narrowly.²⁶ Local 3 argued that *Northwest Airlines* should be read to bar the assertion of a claim to contribution under Title VII only in those circumstances in which no charge of discrimination was ever filed against the party from whom contribution is sought.²⁷ The court stated, however, that a proper reading of *Northwest Airlines* decision would bar all actions for contribution under Title VII, even those among named respondents.²⁸

The *Anderson* court also rejected Local 3's assertion that *Northwest Airlines* should not be read to bar claims for contribution under section 1981.²⁹ Local 3 maintained that the holding in *Northwest Airlines* hinged on the Supreme Court's concern that a judicially-

¹⁵ 751 F.2d at 547, 36 FEP Cases at 1250. The terms of the decree were approved by the district court. 482 F. Supp. at 429, 32 FEP Cases at 538.

¹⁶ 751 F.2d at 547, 36 FEP Cases at 1250.

¹⁷ 482 F. Supp. at 424, 21 FEP Cases at 724. The court stated that Local 3 referred applicants to the Garden to fill positions in the Garden work force. *Id.* at 420, 21 FEP Cases at 721. The court found that the union had engaged in a pattern of "subjective and standardless" referrals. *Id.* at 420, 21 FEP Cases at 722. Furthermore, according to the court, Local 3 had frustrated the attempts of minorities to gain information about becoming laborers at the Garden. *Id.* at 421, 21 FEP Cases at 722.

¹⁸ 535 F. Supp. at 1095, 32 FEP Cases at 559.

¹⁹ *Id.*

²⁰ 709 F.2d 807, 814, 32 FEP Cases 641, 647-48 (2d Cir.), *cert. denied*, 104 S. Ct. 346, 33 FEP Cases 48 (1983).

²¹ 751 F.2d at 547, 36 FEP Cases at 1250.

²² *Id.*

²³ 582 F. Supp. 627, 633, 34 FEP Cases 517, 522 (S.D.N.Y. 1984).

²⁴ *Id.*

²⁵ 751 F.2d at 547, 36 FEP Cases at 1250.

²⁶ *Id.* at 548, 36 FEP Cases at 1251.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 548, 36 FEP Cases at 1251-52.

fashioned right to contribution under Title VII would upset a comprehensive legislative scheme.³⁰ Unlike the Title VII situation, however, the union contended that there was not the same degree of comprehensiveness legislated with regard to section 1981 actions.³¹ Disagreeing with this reasoning, the court indicated that the comprehensive legislative scheme for Title VII enforcement would nevertheless be disrupted if defendants found liable under both Title VII and section 1981 were permitted to bring actions for contribution.³² The court further stated that the threat of section 1981-derived actions for contribution among persons conceivably liable under Title VII would discourage the voluntary settlement of employment discrimination cases.³³ The court noted that other courts have stressed the importance of voluntary settlements in this area of law,³⁴ and that Congress had expressed a strong preference for voluntary settlement in the enactment of Title VII.³⁵ Therefore, by refusing to read *Northwest Airlines* narrowly, the *Anderson* court held that actions for contribution in a section 1981 litigation, like those in a Title VII litigation, would be barred.³⁶

Underlying both *Anderson* and *Northwest Airlines* is the notion of judicial restraint. Although the Supreme Court noted in *Northwest Airlines* that there were two main policy considerations which favored the recognition of the right to contribution under Title VII,³⁷ the Court stated that it would be an "improper" exercise of judicial authority for it to create such a right under that statute.³⁸ First, the Court maintained that recognition of the right to contribution reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation.³⁹ Second, the Court pointed out that it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.⁴⁰

³⁰ *Id.* at 548, 36 FEP Cases at 1251.

³¹ *Id.*

³² *Id.* at 548, 36 FEP Cases at 1252.

³³ *Id.*

³⁴ *Id.* Such settlements, the court noted, work to speed the placement in the workplace of historically under-represented groups. *Id.* at 549, 36 FEP Cases at 1252. *See, e.g.,* *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14, 25 FEP Cases 1, 4 n.14 (1981) (identifying voluntary settlement as "one of the policies underlying Title VII"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 7 FEP Cases 81, 84 (1974) ("[c]ooperation and voluntary compliance were selected as the preferred means for achieving [the goals of Title VII]"); *Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220, 226, 34 FEP Cases 1065, 1070 (2d Cir. 1984); *Kirkland v. New York State Dep't of Corrections Servs.*, 711 F.2d 1117, 1128, 32 FEP Cases 509, 517 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 997, 33 FEP Cases 1344 (1984) ("[i]t is settled that voluntary compliance is a preferred means of achieving Title VII's goals of eliminating employment discrimination").

³⁵ 751 F.2d at 549, 36 FEP Cases at 1252. *See, e.g.,* *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14, 25 FEP Cases 1, 4 n.14 (1981) ("[c]ooperation and voluntary compliance . . . were selected [by Congress] as the preferred means for achieving [the goals of Title VII]").

³⁶ 751 F.2d at 550, 36 FEP Cases at 1252-53. The court also rejected Local 3's contention that *Northwest Airlines* did not extend to claims for contribution by agents against their principals. *Id.* at 549, 36 FEP Cases at 1251-52. Local 3 argued that it had merely acted at the direction of the Garden Entities in the perpetration of its discriminatory practices. *Id.* at 548, 36 FEP Cases at 1251. The court stated, however, that this contention established, at most, a basis for the Garden Entities' liability in the antecedent litigation. *Id.* at 549, 36 FEP Cases at 1252.

³⁷ 451 U.S. at 88-89, 25 FEP Cases at 741-42.

³⁸ *Id.* at 98, 25 FEP Cases at 745.

³⁹ *Id.* at 88, 25 FEP Cases at 741.

⁴⁰ *Id.*

The *Northwest Airlines* Court concluded, however, that policy considerations alone could not provide a sufficient basis for recognizing the right to contribution under Title VII.⁴¹ Rather, the right to contribution had to be created, according to the Court, either by statute when Congress enacted Title VII or through the exercise of judicial power to fashion appropriate remedies for unlawful conduct.⁴² In *Northwest Airlines*, the Court found no basis for concluding that the right to contribution had been created by Congress when Congress enacted Title VII.⁴³ Furthermore, the Court refused to exercise its power to create a right to contribution under Title VII.⁴⁴ In explaining this refusal, the Court stated that federal courts are courts of limited jurisdiction.⁴⁵ Federal courts, the Court pointed out, have not been vested with open-ended lawmaking powers.⁴⁶ In exercising its judicial power, therefore, the Court noted that it is subject to the paramount authority of Congress.⁴⁷ Since the Court had already found that Congress had not created a right to contribution in enacting Title VII, the Court concluded that it would be an "improper" exercise of judicial authority for it to create such a right under that statute.⁴⁸ By refusing to read *Northwest Airlines* narrowly,⁴⁹ the *Anderson* court acquiesced in this notion of judicial restraint.

Thus, in light of *Anderson* and *Northwest Airlines*, the equitable considerations advanced by those seeking contribution under Title VII or section 1981 are properly addressed to Congress, not to the federal courts. The *Northwest Airlines* Court and, by implication, the *Anderson* court, recognized that these equitable considerations existed, but determined that Congress is more properly suited to evaluate such considerations. The question of the availability of the right to contribution for one found liable under Title VII or section 1981, though closed for now by *Anderson* and *Northwest Airlines*, remains "more appropriately [one] for those who write the laws, rather than for those who interpret them."⁵⁰

Should Congress decide to resolve this issue, as both the *Northwest Airlines* Court and the *Anderson* court have indicated it should, the proper focal point for that resolution would be the two policy considerations raised by the Court in *Northwest Airlines*.⁵¹ The first of those policy considerations is that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation.⁵² The second policy consideration raised by the *Northwest Airlines* Court is that it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.⁵³

⁴¹ *Id.* at 90, 25 FEP Cases at 742.

⁴² *Id.*

⁴³ *Id.* at 91-95, 25 FEP Cases at 742-44. First, the Court explained that a right to contribution could not be inferred from the language of Title VII. See *supra* note 7 and accompanying text. Neither, the Court indicated, could such a right be inferred from the legislative history of the statute. See *supra* note 8 and accompanying text.

⁴⁴ See *supra* note 9 and accompanying text.

⁴⁵ 451 U.S. at 95, 25 FEP Cases at 744.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 98, 25 FEP Cases at 745.

⁴⁹ See *supra* notes 25-35 and accompanying text.

⁵⁰ *Id.* at 98 n.41, 25 FEP Cases at 745 n.41.

⁵¹ See *supra* notes 37-40 and accompanying text.

⁵² See *supra* note 39 and accompanying text.

⁵³ See *supra* note 40 and accompanying text.

These considerations, one of equity and one of deterrence, appear to weigh in favor of congressional recognition of a right to contribution under section 1981.

A party's right to contribution under section 1981 is now, by virtue of *Anderson*, barred by the Supreme Court's decision in *Northwest Airlines*. Although the *Northwest Airlines* Court found that policy considerations supported recognition of the right to contribution, it stated that its actions were constrained by the paramount authority of Congress. Therefore, whether claims for contribution will be allowed under Title VII and, after *Anderson*, under section 1981, is now a question that must be addressed by Congress.

III. EMPLOYMENT BENEFITS

A. *Retroactive Relief for Discriminatory Use of Gender-Based Mortality Tables in Calculating Pension Benefits: *Spirit v. Teachers Insurance and Annuity Association*¹

Under Title VII, it is an unlawful employment practice "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."² Pension benefits have presented controversy because annuities have traditionally been calculated separately for men and women.³ Because of the actuarial finding that women, as a class, outlive men,⁴ employee pension plans have generally paid women lower monthly benefits on the assumption that women's longer lifespans would result in equal total benefits to women and men.⁵

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¹ 735 F.2d 23, 28, 34 FEP Cases 1510, 1514 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 247 (1984).

² Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982).

³ See generally Key, *Sex-Based Pension Plans in Perspective: City of Los Angeles, Department of Water and Power v. Manhart*, 2 HARV. WOMEN'S L.J. 1 (1979); Kimball, *Reverse Sex Discrimination: Manhart*, 1979 AM. B. FOUND. RESEARCH J. 85.

⁴ See, e.g., *Arizona Governing Comm. v. Norris*, 103 S. Ct. 3492, 3496, 32 FEP Cases 233, 237 (1983) ("women as a class live longer than men"); *City of Los Angeles v. Manhart*, 435 U.S. 702, 704-05, 17 FEP Cases 395, 397 (1978) ("[a]s a class, women live longer than men"). The validity of this actuarial finding has been challenged on the basis that factors other than sex are responsible for differences in longevity. See Brilmayer, Hekeler, Laycock, & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980); Brilmayer, Laycock & Sullivan, *The Efficient Use of Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U. CHI. L. REV. 222 (1983); Key, *supra* note 3, at 8-9. Cf. Benston, *Discrimination and Economic Efficiency in Employee Fringe Benefits: A Clarification of Issues and Response to Professors Brilmayer, Laycock, and Sullivan*, 50 U. CHI. L. REV. 250 (1983) [hereinafter cited as Benston, *A Response*]; Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489 (1982) [hereinafter cited as Benston, *Economics*]. The actuarial longevity of women is complicated by the finding that only sixteen percent of women outlive their male counterparts. *Arizona Governing Comm. v. Norris*, 671 F.2d 330, 332 n.1, 28 FEP Cases 369, 370 n.1 (9th Cir. 1982), *aff'd*, 103 S. Ct. 3492, 32 FEP Cases 233 (1983).

⁵ See Key, *supra* note 3, at 14; Benston, *Economics*, *supra* note 4, at 490. The calculation of benefit payments is more complicated than merely dividing total contributions by life expectancy, in part because of investment income earned by undistributed contributions. See Brief of Eight Individual Actuaries as Amici Curiae at 12, *Arizona Governing Comm. v. Norris*, 103 S. Ct. 3492, 32 FEP Cases 233 (1983). These other factors do not affect the differences in treatment because of the use of gender-based mortality tables, and are therefore not considered here.

In 1978, in *City of Los Angeles v. Manhart*,⁶ the Supreme Court held that Title VII prohibited an employer operating a defined-benefit pension system⁷ from requiring women to make higher contributions than men.⁸ The Court in *Manhart* rejected the argument that higher contributions by women were justified because men and women would receive equal monthly retirement benefits under the plan, women had a longer actuarial lifespan, and therefore women, as a class, would receive greater total benefits than men.⁹ Title VII focuses on the individual, the *Manhart* Court held, and prohibits attributing group characteristics to individuals.¹⁰

Having found a violation of Title VII, the Court turned to the issue of relief. While noting that a presumption exists in Title VII cases favoring retroactive as well as prospective relief, the *Manhart* Court granted only prospective relief.¹¹ Retroactive liability, the Court reasoned, was not justified because the fund's administrators could reasonably have assumed that their plan was lawful.¹² Furthermore, the Court reasoned, the impact of retroactive liability could jeopardize the stability of the entire retirement fund.¹³ The solvency of the pension fund, the Court noted, depended on calculation of liability and provision of sufficient funds to meet its obligations.¹⁴ Retroactive liability, the Court found, could threaten a fund's solvency by reducing its assets and making it unable to meet its obligations.¹⁵

In 1983, in *Arizona Governing Committee v. Norris*,¹⁶ the Supreme Court held that Title VII prohibited the operation of a defined-contribution¹⁷ retirement system under which a woman who chose to purchase a lifetime annuity through her employer received lower monthly payments than a similarly situated man.¹⁸ The *Norris* Court also granted only prospective relief.¹⁹ As in *Manhart*, the Court held, plan administrators may reasonably have assumed that the plan was lawful.²⁰ Furthermore, the Court reasoned, retroactive liability could impose staggering costs, threatening the fiscal stability of the plans and the state and local governments operating them.²¹ In both *Manhart* and *Norris*,

⁶ 435 U.S. 702, 17 FEP Cases 395 (1978).

⁷ A defined-benefit pension program is one in which the level of payments to be received is specified and guaranteed by the plan. Contributions to the plan to fund future payments are calculated according to a specified formula. See Ryan & Burkley, *Nondiscrimination in Pension Plans*, 34 LAB. L.J. 201, 203 (1983).

⁸ *Manhart*, 435 U.S. at 711, 17 FEP Cases at 400.

⁹ *Id.* at 708-09, 17 FEP Cases at 399.

¹⁰ *Id.* at 708, 17 FEP Cases at 399.

¹¹ *Id.* at 723, 17 FEP Cases at 404.

¹² *Id.* at 720-21, 17 FEP Cases at 403.

¹³ *Id.* at 721, 17 FEP Cases at 404.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 103 S. Ct. 3492, 32 FEP Cases 233 (1983).

¹⁷ Under a defined-contribution pension system, payments are made into individual accounts for each employee, and no specific level of benefits is guaranteed. The accumulated contributions and investment income are then distributed at retirement in a lump sum, or are, optionally, used to purchase a lifetime annuity with monthly payments. The amount of the monthly benefit depends on the amount of accumulated contributions and the participant's projected lifespan. See Ryan & Burkley, *supra* note 7, at 203.

¹⁸ 103 S. Ct. at 3499, 32 FEP Cases at 239 (opinion of Marshall, J.).

¹⁹ *Id.* at 3510, 32 FEP Cases at 248 (opinion of Powell, J.).

²⁰ *Id.* at 3510, 32 FEP Cases at 247 (opinion of Powell, J.).

²¹ *Id.* at 3510, 32 FEP Cases at 248 (opinion of Powell, J.).

the Court noted that Title VII presumptively granted retroactive relief, yet the Court declined to grant it.

During the *Survey* year, the Court of Appeals for the Second Circuit held that retroactive relief from an employer's use of gender-based mortality tables is appropriate if such relief would not be a monetary burden on the pension plan and would not violate the settled expectations of plan participants.²² In *Spirt v. Teachers Insurance and Annuity Association*,²³ the appeals court clarified the basis of the *Norris* Court's refusal to grant retroactive relief.²⁴ The *Spirt* decision reasserts the presumption of retroactive relief for Title VII violations, and dramatically hastens the implementation of *Norris* by requiring the use of gender-neutral mortality tables in pension benefit calculations for all contributions accrued by future retirees, not just those contributed after the *Norris* decision.²⁵

In *Spirt*, Diana L. Spirt, a tenured professor at Long Island University, was required by her employer to participate in a pension plan administered by Teachers Insurance Annuity Association (TIAA) and the College Retirement Equities Fund (CREF).²⁶ Under this defined-contribution plan,²⁷ contributions were equal for similarly situated male and female employees.²⁸ Upon the employee's retirement, the accumulated contributions were used to purchase an annuity paying fixed amounts for the life of the retiree.²⁹ The amount of the payment under these annuities was calculated using gender-based mortality tables, which assumed a longer average life expectancy for women than for men.³⁰ As a result, a woman would receive lower monthly payments than a man of the same age with equal total contributions.³¹

Diana Spirt filed suit against TIAA-CREF and her employer, alleging that the use of gender-based mortality tables violated Title VII and the equal protection clause of

²² *Spirt v. Teachers Insurance and Annuity Association*, 735 F.2d 23, 28, 34 FEP Cases 1510, 1514 (2d Cir.), *cert. denied*, 105 S. Ct. 247 (1984).

²³ 735 F.2d 23, 34 FEP Cases 1510 (2d Cir. 1984).

²⁴ *Id.* at 27-28, 34 FEP Cases at 1513. See Ryan & Rock, *Post-Norris Ambiguities: Unanswered Questions for Women and the Pension Industry*, 17 AKRON L. REV. 171 (1983), for a good exposition of the uncertainties in the wake of the *Norris* decision.

²⁵ *Norris* required gender neutral mortality tables to be used only for contributions made after that decision; therefore, benefits to men and women would be equalized only for those employees that began contributing to the plan after that decision. Such employees are likely to be young and decades away from retirement and the receipt of completely sex-neutral benefits. See *Norris*, 103 S. Ct. at 3510, 32 FEP Cases at 248 (opinion of Powell, J.).

²⁶ *Spirt v. Teachers Ins. & Annuity Ass'n*, 475 F. Supp. 1298, 1300, 20 FEP Cases 738, 740 (S.D.N.Y. 1979), *aff'd in part, rev'd in part*, 691 F.2d 1054, 29 FEP Cases 1599 (2d Cir. 1982), *vacated and remanded*, 103 S. Ct. 3566, 32 FEP Cases 359 (1983).

²⁷ See *supra* note 17.

²⁸ *Spirt*, 475 F. Supp. at 1300, 20 FEP Cases at 740. The contributions in *Spirt* were made by both the employees and employer Long Island University according to a formula under which the employee contributed 5% of his or her salary, and the employer contributed an amount equal to 5% of the first \$4,800 and 11% of the remaining salary. Participation in the plan was mandatory for tenured professors. *Id.*

²⁹ *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1058, 29 FEP Cases 1599, 1602 (2d Cir. 1982), *vacated and remanded*, 103 S. Ct. 3566, 32 FEP Cases 359 (1983). The employee in this plan could choose to receive a single life annuity, one with a guaranteed period, or a joint-life annuity with a specified beneficiary. The plan did not, however, include an option whereby a retiree could receive a lump sum payment of all contributions at retirement. *Id.*

³⁰ *Id.*

³¹ *Id.*

the fourteenth amendment.³² The district court held that the use of gender-based mortality tables by the CREF plan violated Title VII,³³ and enjoined CREF from using gender-based mortality tables in computing any benefits for plan participants who retired after May 1, 1980.³⁴ The district court found that TIAA was exempted from the provisions of Title VII as an insurance company.³⁵ The court of appeals affirmed the district court's finding of a Title VII violation by CREF, and held that TIAA was also in violation of Title VII.³⁶ The court of appeals held that both TIAA and CREF were bound by the district court's order requiring the use of gender-neutral mortality tables to calculate benefits of all retirees.³⁷ The Supreme Court granted certiorari, vacated the decision of the lower courts, and remanded for reconsideration in light of its decision in *Norris*.³⁸

Because *Norris* had settled that Title VII prohibited an employer from calculating pension benefits using gender-based mortality tables, the *Spirit* court on remand considered only the issue of relief.³⁹ The issue of relief, however, was an important one. Large sums of money were involved in the retirement plans, and the court's framing of relief would have a profound impact on how soon retirees' annuities would be calculated entirely using gender-neutral mortality tables.⁴⁰

The fundamental issue, the court stated, was retroactivity.⁴¹ That term is ambiguous, the court noted, because no claim was made to require the plans to pay additional sums to past retirees.⁴² Instead, the court focused on whether the monthly payment calculations for future retirees should apply gender-neutral mortality tables to all past contributions, or just to contributions made after August 1, 1983, the date of the Supreme Court's decision in *Norris*.⁴³

The *Spirit* court considered the *Norris* Court's denial of retroactive relief.⁴⁴ The *Spirit* court noted that it used the term retroactive liability in a limited sense to apply only to benefits calculated for future retirees, not to unequal payments previously made to all past retirees calculated with gender-based mortality tables.⁴⁵ Even considering only future retirees, the *Spirit* court continued, the issue remained whether application of gender-neutral mortality tables would be required for all accumulated contributions of future retirees, or just those contributions accumulated after the *Norris* decision.⁴⁶

In deciding whether to require application of gender-neutral mortality tables to all accumulated contributions, the *Spirit* court considered the specific concerns which

³² *Spirit*, 475 F. Supp. at 1301, 20 FEP Cases at 740. The district court denied Spirit's equal protection claim. *Id.* at 1313-15, 20 FEP Cases at 750-51.

³³ *Spirit*, 691 F.2d at 1059, 28 FEP Cases at 1602-03.

³⁴ *Spirit*, 475 F. Supp. at 1316, 28 FEP Cases at 752. The Court deferred the requirement of gender-neutral actuarial tables to the end of the academic year to ease the transition. *Id.*

³⁵ *Spirit*, 691 F.2d at 1064, 29 FEP Cases at 1606.

³⁶ *Id.* at 1066, 29 FEP Cases at 1608. The court held that, although TIAA was in the business of insurance, its employment-related pension plan was not exempted from Title VII coverage by the McCarran Act, 15 U.S.C. §§ 1011-1015 (1982). *Spirit*, 691 F.2d at 1065, 29 FEP Cases at 1608.

³⁷ 691 F.2d at 1066, 29 FEP Cases at 1608.

³⁸ *Spirit v. Teachers Ins. & Annuity Ass'n*, 103 S. Ct. 3566, 32 FEP Cases 359 (1983).

³⁹ *Spirit*, 735 F.2d at 25, 34 FEP Cases at 1511-12.

⁴⁰ See *supra* note 25.

⁴¹ *Spirit*, 735 F.2d at 26, 34 FEP Cases at 1512.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 27, 34 FEP Cases at 1512-13.

prompted the *Norris* Court to reject Title VII's presumption of retroactive relief.⁴⁷ Considering the application of retroactive relief, the *Norris* Court had assumed that the Arizona system would be forced to "top up" women's benefits to the higher level received by men, the *Spirt* court noted, rather than adjust the amounts received by both male and female future retirees according to gender-neutral mortality tables.⁴⁸ As a result, the *Spirt* court continued, the *Norris* Court feared that the imposition of the cost of "topping up" the women's benefits on the plans would threaten the economic stability and security of the pension system.⁴⁹

The *Spirt* court distinguished the TIAA-CREF plans from the Arizona plans, noting that the Arizona plans provided some certainty about the level of benefits to be received.⁵⁰ The participants in the TIAA-CREF plans, the court reasoned, had no such expectancy because the plan stressed that the precise level of benefits would be determined by the plan's investment performance.⁵¹ The *Spirt* court concluded that requiring application of gender-neutral mortality tables to all contributions made by future retirees would not necessarily burden either the employer or TIAA-CREF with increased costs.⁵²

Application of gender-neutral mortality tables to all contributions made by future retirees, the court continued, could instead result in recalculation of benefits for all future retirees, both men and women.⁵³ Male retirees, as a class, would receive fewer dollars under gender-neutral mortality tables than under gender-based mortality tables, the court noted. That result would not, however, be inequitable in the absence of settled expectations of male retirees of a certain level of benefits.⁵⁴

Although the majority on this issue in *Norris* did not specify the expectations of male plan participants as a factor in its denial of retroactive application of gender-neutral mortality tables, the *Spirt* court noted, the *Norris* dissenters on this issue would have remanded for consideration of the expectations of male plan participants.⁵⁵ The *Norris* Court must have assumed, the *Spirt* court concluded, that the male participants in the Arizona plan had settled expectations which precluded application of gender-neutral mortality tables to all future retirees, both male and female.⁵⁶ The *Spirt* court rejected TIAA's contention that *Norris* barred retroactivity in all cases because someone would inevitably be burdened; had the *Norris* Court intended such a holding, the *Spirt* court reasoned, one would expect it to appear clearly in the Court's opinion.⁵⁷

The *Spirt* court concluded that it would require retroactive application of gender-neutral mortality tables unless this would violate settled expectations of plan participants.⁵⁸ Turning to the TIAA-CREF plan, the *Spirt* court modified the district court's holding that participants in the TIAA-CREF plans had no settled expectations as to the amount of future benefits.⁵⁹ Plan participants had no expectations, the *Spirt* court found,

⁴⁷ *Id.* at 26-27, 34 FEP Cases at 1512-13.

⁴⁸ *Id.* at 26, 34 FEP Cases at 1512.

⁴⁹ *Id.*

⁵⁰ *Id.* at 26-27, 34 FEP Cases at 1512-13.

⁵¹ *Id.* at 27, 34 FEP Cases at 1513.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 27-28, 34 FEP Cases at 1513.

⁵⁶ *Id.* at 28, 34 FEP Cases at 1514.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

other than TIAA's guarantee of a minimum two and one-half percent return on investment.⁶⁰ Gender-neutral mortality tables must be applied to all accumulated contributions of future retirees, the *Spirt* court held, except to the degree that employing gender-neutral tables would increase TIAA's costs in bringing benefits in a given year up to this minimum guaranteed level.⁶¹

The *Spirt* court was faced with the difficult task of interpreting the holding in *Norris*.⁶² In unraveling the *Norris* Court's holding, the *Spirt* court established an analytical framework for deciding whether gender-neutral mortality tables must be applied to all contributions paid in by future retirees. This framework was missing from the *Norris* decision. The decision in *Spirt* related the issues of relief to Title VII's central thrust of remedying employment-related job discrimination by clarifying the departures of *Manhart* and *Norris* from the presumption of retroactive relief.⁶³

Much of the confusion surrounding the debate over implementing gender-neutral mortality tables stems from a failure to identify the burdens retroactive application might impose. Provision of pension benefits, like insurance, is a zero-sum system: total benefits dispersed should equal contributions paid in plus income from investing those contributions, minus administrative costs.⁶⁴ Gender-neutral mortality tables average the expected life spans of all plan participants rather than treating men and women separately.⁶⁵ The total benefits disbursed, however, would remain unchanged. No burden is thus placed on the pension system itself solely by requiring gender-neutral mortality tables to be used in benefit calculations.⁶⁶

Under gender-neutral mortality tables, men receive slightly lower benefits than under gender-based mortality tables.⁶⁷ The mere fact that men as a class would receive slightly lower benefits using gender-neutral mortality tables cannot defeat their application; *Norris* held that gender-neutral mortality tables must be used for all future contributions.⁶⁸ The difficulty in requiring retroactive application can only arise, as the

⁶⁰ *Id.* at 28-29, 34 FEP Cases at 1514.

⁶¹ *Id.* at 29, 34 FEP Cases at 1514.

⁶² In *Norris*, separate majorities decided the issues of finding a Title VII violation and of relief. Only Justice O'Connor joined with the majority on both issues. On the issue of a Title VII violation, Justice Marshall wrote the opinion, joined by Justices Brennan, White, Stevens, and O'Connor. On the issue of relief, Justice Powell wrote the opinion, joined by Chief Justice Burger and Justices Blackmun, Rehnquist, and O'Connor. Justice O'Connor also wrote a separate opinion. The majority which refused to grant retroactive application of the prohibition against gender-based mortality tables was thus made up of four members who found no Title VII violation present. *Norris*, 103 S. Ct. 3492, 32 FEP Cases 233 (1983).

⁶³ See *supra* notes 6-21 and accompanying text.

⁶⁴ See Benston, *A Response*, *supra* note 4, at 273.

⁶⁵ Brief of Eight Individual Actuaries as Amici Curiae at 7-9, *Arizona Governing Comm. v. Norris*, 103 S. Ct. 3492, 32 FEP Cases 233 (1983).

⁶⁶ *Id.* The effect on males is diminished by the fact that many retirees elect a joint and survivor annuity option which guarantees payments for the lifetime of the participant and the participant's spouse. A man's wife would presumably outlive him, whereas a woman's husband would presumably have a shorter life expectancy, and would thus have only a minimal effect on benefits. See Ryan & Burkley, *supra* note 7, at 204. Some commentators contend that gender-neutral mortality tables will benefit men as a class more than women. *Id.* at 206. Finally, data shows that only 16% of all women outlive their male counterparts. The remaining 84% receive diminished benefits to subsidize the longer-living 16%. See *supra* note 4.

⁶⁷ *Spirt*, 735 F.2d at 27, 34 FEP Cases at 1513.

⁶⁸ *Norris*, 103 S. Ct. at 3510, 32 FEP Cases at 248 (opinion of Powell, J.).

Spirt court correctly noted, where male plan participants have settled expectations of a specific level of future benefits to be paid on their pre-*Norris* contributions.⁶⁹ Building on the *Norris* dissent, the *Spirt* court concluded that these settled expectations were presumed by the *Norris* majority.⁷⁰ TIAA argued that *Norris* precluded retroactive application if any entity, including male plan participants without clearly settled expectations, would be burdened with increased costs or decreased benefits.⁷¹ This contention, if accepted by the courts, would bar retroactive relief issued against any risk-sharing insurance plan, under which a benefit extended to one participant necessarily costs the other participants.⁷²

The *Spirt* court found no settled expectations of specific levels of benefits on the part of male plan participants.⁷³ The court continued, in dicta, to state that if a plan were female dominated to the degree that retroactive adoption of gender-neutral mortality tables would cause a substantial decline in the benefit levels the males received, retroactive application might be inequitable.⁷⁴ This analysis may merely reflect that male plan participants might have some general expectations about their level of benefits which might be violated by a drastic reduction, making retroactive application of gender-neutral tables inequitable. The difficulty in this analysis, however, arises from the limited reach of Title VII to the insurance industry.⁷⁵

Because Title VII reaches only employers and the plans they sponsor, the prohibitions of *Manhart* and *Norris* do not reach annuities purchased on the "open market."⁷⁶ If male participants had an option to receive their accumulated contributions in a lump sum,⁷⁷ they could presumably purchase gender-based annuities on the open market paying them higher monthly benefits. The remaining plan participants, predominantly

⁶⁹ *Spirt*, 735 F.2d at 27, 34 FEP Cases at 1513.

⁷⁰ *Id.* at 26, 34 FEP Cases at 1512.

⁷¹ *Id.* at 25, 34 FEP Cases at 1511-12.

⁷² See Benston, *A Response*, *supra* note 4, at 273.

⁷³ 735 F.2d at 28, 34 FEP Cases at 1514.

⁷⁴ *Id.* This conclusion presumes that tables would be gender-neutral when applied to individual plan participants. The tables would be adjusted, however, to reflect the "mix" of male and female plan participants. See *Manhart*, 435 U.S. at 718 & n.34, 17 FEP Cases at 402 & n.34 (Court's decision does not "call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan"). See also Brief of Eight Individual Actuaries as Amici Curiae at 16-17, *Arizona Governing Comm. v. Norris*, 103 S. Ct. 3492, 32 FEP Cases 233 (1983); Brief of American Academy of Actuaries as Amicus Curiae at 18-19, *Arizona Governing Comm. v. Norris*, 103 S. Ct. 3492, 32 FEP Cases 233 (1983). But see Bernstein & Williams, *Sex Discrimination in Pensions: Manhart's Holding v. Manhart's Dictum*, 78 COLUM. L. REV. 1241 (1978) (arguing Title VII bars consideration of work force's sexual composition).

⁷⁵ See *Norris*, 103 S. Ct. at 3499, 32 FEP Cases at 239 (opinion of Marshall, J.).

⁷⁶ *Manhart*, 435 U.S. at 717-18, 17 FEP Cases at 402.

[W]e do not suggest that the statute was intended to revolutionize the insurance and pension industries. . . . Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

Id.

⁷⁷ The particular plan in *Spirt* did not include an option for a lump sum distribution. *Spirt*, 691 F.2d at 1058 n.2, 29 FEP Cases at 1602 n.2.

women, would have a longer lifespan as a group.⁷⁸ The plan would therefore distribute smaller monthly benefits to reflect the change in the plan's composition, or would jeopardize the plan's stability by disbursing greater total benefits than contributions collected.⁷⁹ This sequence of events, under the *Spirt* court's analysis, could result in barring retroactive application of the gender-neutral mortality table requirement.⁸⁰ This objection to retroactive liability seems open to all plans which permit lump sum distribution under the *Spirt* court's analysis.

Under the *Spirt* court's analysis, only if application of gender-neutral mortality tables would violate settled expectations of male plan participants could retroactive application of gender-neutral mortality tables impose increased costs on the pension plans.⁸¹ This was the concern motivating the denial of retroactive application in *Manhart* and *Norris*.⁸² In *Manhart*, because the very nature of a defined-benefit plan created settled expectations for all plan participants of a certain level of benefits, retroactive liability would have diminished the plan's assets.⁸³ In *Norris*, the *Spirt* court noted, the majority seemed to have assumed that settled expectations on the part of male plan participants meant that female plan participants' benefits would have to be "topped up" at the plan's expense.⁸⁴

The *Spirt* court found no such expectations on the part of male plan participants, and thus no need to consider the costs imposed on the employer or the plan.⁸⁵ Following its framework rigorously, moreover, the *Spirt* court noted the minimal expectation of TIAA's guarantee of at least two and one-half percent return on investment of contributions, and concluded that use of gender-neutral mortality tables would not be required to the extent that the plan disburses funds to meet this minimum guarantee if investment income falls below that minimum.⁸⁶

The *Spirt* court reached the logical conclusion that gender-neutral mortality tables must be applied to all accumulated contributions of future retirees, not only those accumulated after the *Norris* decision. To apply gender-neutral mortality tables only to that portion of a retiree's contributions made after the *Norris* decision would postpone fully remedying the effect of the Title VII violation for decades, until retirees' contributions were entirely made after the *Norris* decision. As well as hastening the remedy of the Title VII violation, the *Spirt* court interpreted the fragmented *Norris* decision, and created an analytical framework to explain the conditions under which retroactive application of that decision would not be imposed.

This framework allows the central purpose of remedying Title VII violations to be achieved by identifying the precise conditions under which retroactive relief would not be extended. The potential danger in this analysis is if male participants are able to receive lump sum distributions and purchase gender-based annuities on the open market. If a significant number of male plan participants withdraw, this could create the very

⁷⁸ See Brief of American Academy of Actuaries as Amicus Curiae at 17, *Arizona Governing Comm. v. Norris*, 103 S. Ct. 3492, 32 FEP Cases 233 (1983).

⁷⁹ *Id.* at 18-19.

⁸⁰ *Spirt*, 735 F.2d at 27, 34 FEP Cases at 1514.

⁸¹ *Id.*

⁸² See *supra* notes 6-21 and accompanying text.

⁸³ *Manhart*, 435 U.S. at 723, 17 FEP Cases at 404.

⁸⁴ 735 F.2d at 28, 34 FEP Cases at 1514.

⁸⁵ *Id.*

⁸⁶ *Id.* at 28-29, 34 FEP Cases at 1514.

kind of female dominated plan in which gender-neutral mortality tables could create a substantial reduction in the benefits of remaining male participants. This problem results, however, not from a weakness in the Court's analysis, but from the limited reach of Title VII to employers only. Insurance companies on the "open market" remain free of the Title VII requirement of gender-neutral mortality tables.⁸⁷ By offering annuities calculated with gender-based mortality tables with higher monthly payments to males, they may disrupt and postpone remedying the effects of the discrimination in the use of gender-based mortality tables.

IV. SENIORITY SYSTEMS

A. **Voluntary Race-Conscious Affirmative Action Versus Seniority Rights: Wygant v. Jackson Board of Education*¹

The equal protection clause in the fourteenth amendment² forbids the state governments from discriminating on the basis of race.³ Pursuant to its power to regulate interstate commerce, Congress statutorily extended this constitutional prohibition against racial discrimination beyond state governmental action to include federally funded programs and most private and public employers, by enacting Title VI and Title VII of the Civil Rights Act of 1964.⁴ The Supreme Court has applied these proscriptions by subjecting race classifications to the strictest judicial scrutiny,⁵ making it virtually impossible for a racial classification to pass constitutional or statutory muster.⁶ Paradoxically, this strict scrutiny of all racial classifications has impeded recent race-conscious endeavors to eradicate those manifestations of past and present racial discrimination which society, through its public and private sectors, has not been successful in redressing without the use of race-based remedies.⁷ It is well settled that race-conscious remedies are necessary to grant relief to judicially proven direct victims of racial discrimination.⁸ Voluntary and

⁸⁷ See *Manhart*, 435 U.S. at 717-18, 17 FEP Cases at 402.

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¹ 746 F.2d 1152, 36 FEP Cases 153 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985) (No. 84-1340).

² U.S. CONST. amend. XIV, § 1.

³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307, 17 FEP Cases 1000, 1017 (1978) (declaring illegal the race-based exclusion of the plaintiff from medical school, the Court relied on statutory grounds under Title VI of the Civil Rights Act of 1964, but held that this statute proscribes exactly what the fourteenth amendment does in the way of racial discrimination); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (Court held that segregation by race in public schools, whether or not the facilities are equal, is a violation of the equal protection clause of the fourteenth amendment).

⁴ Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000e-2 (1982) (Title VI of the Civil Rights Act applies to federally funded programs and Title VII applies to most private and public employers).

⁵ See *Bakke*, 438 U.S. at 291, 17 FEP Cases at 1001.

⁶ *Id.* at 297-98 n.37, 17 FEP Cases at 1013 n.37.

⁷ See *infra* note 9 and accompanying text.

⁸ *Fullilove v. Klutznick*, 448 U.S. 448, 482 (1980). In *Fullilove*, Chief Justice Burger, writing for a six-to-three majority, explained as follows:

As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18-21 (1971), we rejected this argument in considering a court-formulated school desegregation remedy on the basis that examination of the

court-ordered attempts to grant class-wide, race-conscious relief, however, absent an identification of individual victims of discrimination, continue to be challenged under the equal protection clause and the Civil Rights Act as "reverse discrimination."⁹

Nevertheless, in *Regents of the University of California v. Bakke*,¹⁰ a sharply divided Supreme Court held that race is a permissible consideration in the admissions policy of a state school where that policy is designed, and narrowly tailored, to remedy the effects of proven past racial discrimination.¹¹ By a five-to-four vote, the Court ruled that neither

racial composition of student bodies was an unavoidable starting point and that racially based attendance assignments were permissible so long as no absolute racial balance of each school was required. In *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971), citing *Swann*, we observed: "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' Any other approach would freeze the status quo that is the very target of all desegregation processes." And in *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), we . . . held that "just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

. . . [T]he authority of a court to incorporate racial criteria into a remedial decree also extends to statutory violations. Where federal antidiscrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor.

Fullilove, 448 U.S. at 482-83.

⁹ See *Fullilove*, 448 U.S. at 453 (challenge to a congressional set-aside of government contracts for minority businesses); *United Steelworkers of America v. Weber*, 443 U.S. 193, 197, 20 FEP Cases 1, 3 (1979) (challenge to a collectively bargained affirmative action plan which gave preference to minorities for in-house training positions); *Bakke*, 438 U.S. at 278, 17 FEP Cases at 1006 (challenge to a school admissions policy which considered race).

It should be noted that the Supreme Court has held that incidental infringement on the rights of innocent nonminorities does not invalidate an affirmative action plan so long as that plan is pursuing legitimate remedial goals and as long as it is drawn narrowly so that it does not unnecessarily prefer minority group members at the expense of punishing innocent nonminorities. See, e.g., *Fullilove*, 448 U.S. at 484; *Weber*, 443 U.S. at 201-02, 20 FEP Cases at 5.

¹⁰ 438 U.S. 265, 17 FEP Cases 1000 (1978).

¹¹ Justice Powell, joined by Chief Justice Burger and Justices Stewart, Rehnquist and Stevens, held that the affirmative action plan in *Bakke* violated Title VI of the Civil Rights Act. *Id.* at 287, 320, 17 FEP Cases at 1010, 1022; see also *id.* at 421, 17 FEP Cases at 1049 (Stevens, J., joined by Burger, C.J., Stewart and Rehnquist, JJ., concurring in part and dissenting in part). Writing for a different majority, however, Justice Powell, joined by Justices Brennan, White, Marshall and Blackmun, held that under Title VI and the equal protection clause properly tailored race-conscious affirmative action is permissible. *Id.* at 272, 17 FEP Cases at 1004. Justices White, Marshall and Blackmun all filed separate opinions as well, concurring in part and dissenting in part from the Court's opinion.

Justice Marshall's separate opinion stands out as a passionate cry for the Court to reconsider the notion that it seemed to adopt that class-based racial preference is *only* permissible where past discrimination has been *proven*. *Id.* at 387, 17 FEP Cases at 1052 (Marshall, J., concurring in part and dissenting in part). Though applauding the judgment of the Court insofar as it upheld the use of race-conscious relief, Justice Marshall, writing separately, criticized the Court's limiting of permissible relief to situations where individual victims of past discrimination have been identified, and its unwillingness to accept his proposition that "after several hundred years of class-based discrimination against Negroes . . . a class-based remedy for that discrimination [must be] permissible." *Id.* at 400, 17 FEP Cases at 1057 (Marshall, J., concurring in part and dissenting in part). Justice Marshall elaborated further:

In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in twentieth century America to

the equal protection clause nor Title VI of the Civil Rights Act preclude a *state* from voluntarily taking affirmative action to remedy current effects of past discrimination by granting preferential treatment to members of minority racial groups, regardless of whether they have been specified as direct victims of discrimination.¹² In *United Steelworkers of America v. Weber*,¹³ the Court, in rejecting a Title VII challenge to a collectively bargained agreement to set aside 50% of in-house training positions to minorities regardless of their lack of seniority, extended its sanctioning of race-conscious affirmative action to voluntary employment practices of *private* parties.¹⁴ The Court held that even if Title VII prohibits courts from ordering private businesses to remedy the effects of general societal discrimination against minorities, Title VII, read in the light of the evils it was intended to eliminate, must be interpreted to permit private parties to address voluntarily the lingering effects of past and present societal discrimination, even where individual victims of that discrimination have not been, or cannot be, identified.¹⁵

Although voluntary affirmative action employment programs designed to remedy past discrimination against minority racial groups have been sanctioned by the Supreme Court notwithstanding the equal protection clause and the Civil Rights Act,¹⁶ opposition to such programs persists and is especially strong where the affirmative action plan conflicts with other valid employment practices, such as the conferring of benefits on the basis of seniority.¹⁷ In 1984, the Supreme Court ruled, in *Firefighters Local Union No.*

have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive, that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. *And that mark has endured.*

Id. (emphasis added).

¹² *Id.* at 317-18, 17 FEP Cases at 1021 (Powell, J., joined by Brennan, White, Marshall and Blackmun, JJ.). The specific affirmative action plan in this case was struck down, however, because it based admission solely on the plaintiff's race in its racially separated two-track admissions procedure. *Id.* at 320, 17 FEP Cases at 1022 (Powell, J., joined by Burger, C.J., Rehnquist and Stevens, JJ.). A majority of the Court agreed, nonetheless, that race may be considered as *one* of many factors in an otherwise race-neutral admissions process. *Id.* at 318, 17 FEP Cases at 1021 (Powell, J., joined by Brennan, White, Marshall and Blackmun, JJ.).

¹³ 443 U.S. 193, 20 FEP Cases 1 (1979).

¹⁴ See *id.* at 208, 20 FEP Cases at 7.

¹⁵ *Id.* The Court concluded that, contrary to the respondent's challenge, Title VII was not intended to prohibit all race-conscious employment practices, but rather to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." *Id.* at 203, 20 FEP Cases at 5. Read in this light, the Court reasoned, Title VII "cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts." *Id.* at 204, 20 FEP Cases at 6. To the contrary, the Court held that the statute was intended as a "spur" or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate . . . the last vestiges of an unfortunate and ignominious page in this country's history . . ." *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)); cf. *Fullilove*, 448 U.S. at 475. In *Fullilove* the Court stated: "Our cases dealing with application of Title VII . . . express no doubt of the congressional authority to prohibit practices challenged as perpetuating the effects of not unlawful discrimination . . ." *Id.* (emphasis added).

¹⁶ E.g., *Fullilove*, 448 U.S. at 491-92 (upholding a federal statute which reserved 10% of public works projects to minority firms); *Weber*, 443 U.S. at 197, 20 FEP Cases at 3 (upholding a collectively bargained affirmative action plan setting aside 50% of the openings in an in-plant training program for black employees).

¹⁷ See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2581, 34 FEP Cases

1784 *v. Stotts*,¹⁸ that a court-ordered affirmative action plan which conflicted with valid, existing seniority rights violated Title VII of the Civil Rights Act.¹⁹ The district court in *Stotts*, relying on a consent decree in which the city promised to use its best efforts to increase the representation of minorities in its fire department, had enjoined the city from instituting layoffs in accordance with its seniority system insofar as those layoffs would reduce the percentage of minorities in the department.²⁰ The Supreme Court reversed, however, holding that the district court's order was neither a justifiable construction of the consent decree — because the decree did not mention layoffs or the existing seniority system, nor an appropriate modification of the decree — because Title VII protects bona fide seniority rights.²¹ The Court noted that the district court-ordered affirmative action plan was agreed to by neither the city nor the union, and that it was not warranted by the identification of direct victims of discrimination.²² Thus, the Court reasoned, the district court had exceeded its authority by ordering the city to enforce an affirmative action plan that directly contradicted the city's seniority system.²³ Though it employed sweeping language which strongly implied that Title VII only allows race-conscious remedies where discrimination against identified victims has been proven,²⁴ the Court noted that its decision was based on the compulsory nature of the district court's unilateral modification of the consent decree. The Court refused to decide, therefore, whether an identical, but voluntary, affirmative action plan would be permissible in similar circumstances.²⁵

During the *Survey* year, in *Wygant v. Jackson Board of Education*,²⁶ the United States Court of Appeals for the Sixth Circuit ruled that a voluntary affirmative action layoff plan is constitutional even though it interferes with seniority precepts.²⁷ Specifically, the court of appeals in *Wygant* held that the recent Supreme Court decision in *Stotts*²⁸ is not applicable to voluntary affirmative action programs under the equal protection clause.²⁹ Consequently, after *Wygant*, purely voluntary affirmative action that conflicts with seniority principles by providing preference for minority racial balance will be permissible, without requiring the identification of individual victims of discrimination, where the agreement seeks to legitimately remedy the lingering effects of societal discrimination by attempting to end the under-representation of minorities. The Supreme Court subsequently granted certiorari to review this decision, and heard oral arguments in the case in November, 1985.³⁰

1702, 1705 (1984) (challenge to an affirmative action plan in a court-modified consent decree which conflicted with seniority rights in layoff procedures); *Weber*, 443 U.S. at 199–200, 20 FEP Cases at 4 (nonminority plaintiffs alleged that they were victims of illegal racial discrimination where minority balance was given preference over existing seniority rights).

¹⁸ 104 S. Ct. 2576, 34 FEP Cases 1702 (1984).

¹⁹ *Id.* at 2581, 34 FEP Cases at 1705.

²⁰ *Id.* at 2582, 34 FEP Cases at 1706.

²¹ *Id.* at 2590, 34 FEP Cases at 1712.

²² *Id.* at 2587–88, 34 FEP Cases at 1709.

²³ *Id.* at 2585, 34 FEP Cases at 1708.

²⁴ See *infra* note 93 and accompanying text.

²⁵ *Stotts*, 104 S. Ct. at 2590, 34 FEP Cases at 1712.

²⁶ 746 F.2d 1152, 36 FEP Cases 153 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985) (No. 84–1340).

²⁷ *Id.* at 1157, 36 FEP Cases at 157.

²⁸ 104 S. Ct. 2576, 34 FEP Cases 1702 (1984).

²⁹ *Wygant*, 746 F.2d at 1158, 36 FEP Cases at 157.

³⁰ *Wygant*, 105 S. Ct. 2015 (1985) (No. 84–1340).

In *Wygant*, nineteen nonminority school teachers employed, or previously employed, by the Jackson Board of Education (School Board) challenged their layoffs under the federal Constitution, Title VII and various federal and state statutory civil rights provisions.³¹ The district court reviewed the historical racial employment practices of the Jackson School Board in order to determine whether the affirmative action plan challenged by the plaintiffs pursues the legitimate goal of remedying the effects of systemic discrimination against minorities, as manifested in their under-representation in the Jackson school faculties.

Prior to 1953, no minority teachers were hired by the School Board.³² By 1961, only ten minority teachers were employed out of a total of five hundred and fifteen, creating a minority teacher ratio of 1.8%.³³ The School Board first began to address this problem of the under-representation of minority school teachers in 1969, when the minority student population in its schools constituted 15.2% of the total student population, as compared with a minority teacher representation of only 3.9%.³⁴

In the early 1970s, collective bargaining negotiators began to address the problem of racial imbalance in the school faculties.³⁵ Some teachers took the position that the School Board and the teachers union, when faced with fiscal constraints leading to unavoidable layoffs, should modify the existing seniority preference system to the extent necessary to prevent a deterioration of the racial balance among the school system's faculties.³⁶ Despite initial opposition, and after racial tensions erupted into violence, agreement was reached in 1972 between the teachers union and the School Board, whereby layoffs would not be made in such a way as to reduce minority representation on the faculties of Jackson public schools.³⁷

In 1973, when layoffs were required, the School Board abided by this agreement.³⁸ In 1974, however, when further layoffs became necessary, the School Board gave preference to tenured nonminority employees at the expense of reducing the ratio of minority members on the faculties.³⁹ This action spawned a breach of contract action which ultimately was decided by a state court in favor of the minority employees who

³¹ *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195, 1197, 29 FEP Cases 1359, 1361 (E.D. Mich. 1982), *aff'd*, 746 F.2d 1152, 36 FEP Cases 153 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985) (No. 84-1340). The plaintiffs alleged that the affirmative action plan violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982); federal civil rights statutes 42 U.S.C. §§ 1981, 1983 and 1985 (1982); and several state constitutional and statutory provisions. *Id.* The district court only reached the merits on the federal constitutional challenge under the equal protection clause of the fourteenth amendment.

³² 546 F. Supp. at 1197, 29 FEP Cases at 1360.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1198, 29 FEP Cases at 1360-61.

³⁷ *Id.* The relevant portion of the contract reads as follows:

In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the [School] Board, teachers with the most seniority in the district shall be retained, 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.

Id.

³⁸ *Id.* at 1198, 29 FEP Cases at 1361.

³⁹ *Id.*

were laid off.⁴⁰ The court upheld the constitutionality and validity of the collective bargaining agreement, which mandated that priority be given to sustaining racial balance rather than to fostering seniority principles.⁴¹ Thereafter, the School Board complied with its agreement.⁴² This adherence to the affirmative action program led to the suit in *Wygant* by nineteen nonminority teachers.⁴³

Some of the plaintiffs in *Wygant* alleged that they had been notified of impending layoff, and that as a result of the racial balance provision in the collective bargaining agreement they would be replaced illegally by minority teachers who had less seniority.⁴⁴ The remaining plaintiffs alleged that they had been removed from their positions under similar circumstances several years before.⁴⁵ In addition to several federal⁴⁶ and state⁴⁷ statutory violations, the plaintiffs alleged that their layoffs violate the equal protection clause of the fourteenth amendment to the United States Constitution and Title VII of the Civil Rights Act of 1964.⁴⁸ The defendants moved for summary judgment and dismissal of the plaintiffs' claims, and the plaintiffs countered with their own motion for summary judgment.⁴⁹ Both sides agreed that the facts as stated in the defendants' pleading, as noted above, were not in dispute.⁵⁰ Therefore, the trial court assumed that they were true.⁵¹

Faced with cross motions for summary judgment in *Wygant*, the United States District Court for the Eastern District of Michigan ruled that the affirmative action plan in question does not violate the equal protection clause because the plan both is warranted

⁴⁰ *Id.*; Jackson Educ. Ass'n v. Board of Educ. of Jackson Pub. Schools, No. 77-0011484 CZ (Jackson County Cir. Ct., 1979).

⁴¹ 546 F. Supp. at 1198, 29 FEP Cases at 1361.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1198-99, 29 FEP Cases at 1361.

⁴⁶ The district court ultimately ruled that the affirmative action plan, which voluntarily gave priority to racial balance over seniority, is not a violation of the equal protection clause of the fourteenth amendment. *Id.* at 1202-03, 29 FEP Cases at 1364. Having so ruled, the district court proceeded to dismiss the plaintiffs' § 1981, § 1983 and § 1985 federal statutory claims, reasoning that success on those claims is dependent on success of the plaintiffs' equal protection challenge. *Id.* at 1203, 29 FEP Cases at 1365. The court also dismissed the plaintiffs' federal statutory claim under Title VII of the Civil Rights Act of 1964 because they had failed to file an administrative charge with the Equal Employment Opportunity Commission, a statutorily imposed federal court jurisdictional prerequisite. *Id.* at 1203-04, 29 FEP Cases at 1361.

⁴⁷ Having dismissed all of the federal claims, the court proceeded to dismiss for lack of pendent jurisdiction all of the plaintiffs' state claims. *Id.* at 1203, 29 FEP Cases at 1361.

⁴⁸ *Id.* at 1199, 29 FEP Cases at 1361. Though the district court ruled that the affirmative action plan does not violate the equal protection clause, the court never reached the Title VII claim because the plaintiffs had failed to meet the federal court jurisdictional requirement, under 42 U.S.C. § 2000e-5(f)(1), of first filing an administrative charge with the Equal Employment Opportunity Commission. *Wygant*, 546 F. Supp. at 1203, 29 FEP Cases at 1365. Nevertheless, under the Sixth Circuit's extension of *Weber* to equal protection challenges in *Young*, the court treated Title VII as if it raised the same issues as the equal protection clause. *Id.* at 1199-1202, 29 FEP Cases at 1362-65. Although five Justices apparently held in *Bakke* that the Civil Rights Act and the equal protection clause permit exactly the same types of race-conscious affirmative action, see *supra* note 11, the question still appears unsettled.

⁴⁹ 546 F. Supp. at 1199, 29 FEP Cases at 1362.

⁵⁰ *Id.*

⁵¹ *Id.*

by the under-representation of minority teachers in the school system, and is tailored narrowly to redress that problem.⁵² The plaintiffs appealed to the Sixth Circuit Court of Appeals, which affirmed the decision of the district court, incorporating most of its findings and conclusions.⁵³ The court of appeals also considered the district court's opinion in light of two subsequently decided cases — its own holding in *Oliver v. Kalamazoo Board of Education*⁵⁴ and the Supreme Court's holding in *Stotts* — and ruled that unlike the court-ordered affirmative action plans which were held illegal in those cases, the voluntary affirmative action plan in *Wygant* is not impermissible.⁵⁵ The plaintiffs petitioned for certiorari, which the Supreme Court granted on April 15, 1985.⁵⁶

The plaintiffs in *Wygant* first argued in the district court that an employer and a union may not negotiate an affirmative action plan which gives preference to minorities, where there has been no judicial finding of past employer discrimination.⁵⁷ The district court rejected this contention.⁵⁸ The court noted that the Supreme Court's decision in *United Steelworkers of America v. Weber*⁵⁹ stands for the proposition that Title VII does not require a judicial finding of employer discrimination before a private sector employer may adopt an affirmative action plan to remedy the substantial and chronic under-representation of minorities that has resulted from past and present societal discrimination, yet which may be all but impossible to prove.⁶⁰ The court further noted that *Detroit Police Officers' Association v. Young*,⁶¹ decided by the Sixth Circuit, extends this particular holding of *Weber* to public employers and to alleged constitutional violations under the equal protection clause of the fourteenth amendment.⁶² The existence of conspicuous racial imbalance is sufficient under the *Weber* decision, the court concluded, to warrant an affirmative action program.⁶³ As a result, the district court denied the plaintiffs' motion for summary judgment.⁶⁴

⁵² *Id.* at 1202, 29 FEP Cases at 1364.

⁵³ *Wygant*, 746 F.2d at 1157, 36 FEP Cases at 156.

⁵⁴ 706 F.2d 757, 31 FEP Cases 1108 (6th Cir. 1983).

⁵⁵ *Wygant*, 746 F.2d at 1157-58, 36 FEP Cases at 157.

⁵⁶ *Wygant*, 105 S. Ct. 2015 (1985) (No. 84-1340). The Court heard oral arguments in *Wygant* in November, 1985. In predicting how the Supreme Court may decide the case, two factors should be kept in mind. First, the Court normally avoids deciding a constitutional issue where it can dispose of a case on statutory grounds. In upholding the affirmative action plan under Title VII in *Weber*, however, the Court implied that the plan was not only consistent with the statute, but also consistent with the Constitution. Otherwise, presumably, the Court would not have upheld the plan. Here, on the other hand, the Supreme Court, as a federal court, has no jurisdiction to decide the Title VI claim. See *supra* note 46. This leads to the second factor: where federal court jurisdiction is lacking, the federal courts — the Supreme Court included — have no authority to rule on the merits of a claim. Therefore, the Supreme Court should find itself compelled to rule solely on the equal protection claim in *Wygant*. The Court may, however, suggest in dicta that Title VII does or does not permit the same types of affirmative action as the equal protection clause. See *supra* note 48. Although it is unlikely, the Court may take this opportunity to clear up the continuing confusion in this area.

⁵⁷ *Wygant*, 546 F. Supp. at 1199, 29 FEP Cases at 1362.

⁵⁸ *Id.*

⁵⁹ 443 U.S. 193, 20 FEP Cases 1 (1979).

⁶⁰ *Wygant*, 546 F. Supp. at 1199, 29 FEP Cases at 1362.

⁶¹ 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979), *cert. denied*, 452 U.S. 938, 25 FEP Cases 1683 (1981).

⁶² *Wygant*, 546 F. Supp. at 1199-1200, 29 FEP Cases at 1362.

⁶³ *Id.*

⁶⁴ *Id.* at 1200, 29 FEP Cases at 1362.

The district court then considered whether the Constitution allows an affirmative action plan in the specific circumstances surrounding the suit brought in *Wygant*. The court found that according to previous Supreme Court cases, the Constitution requires some evidence that minority teachers have not enjoyed the same representation as nonminority teachers in the Jackson public school system.⁶⁵ In *Weber*, the court observed, the Supreme Court viewed this requirement in terms of "conspicuous racial imbalance in traditionally segregated job categories."⁶⁶ For an affirmative action plan to be in accordance with the fourteenth amendment's equal protection clause, the court noted, the Sixth Circuit's *Young* decision stated that there must be a "sound basis for concluding that minority under-representation is substantial and chronic, and that the handicap of past discrimination is impeding access . . . of minorities."⁶⁷ The district court found, therefore, that in addressing the constitutional validity of the affirmative action plan, if the purpose of the plan is legitimate, there is no need to show that those receiving preferential treatment have been individually subjected to discrimination, because it is enough that the recipients are within a general class of persons likely to have been the victims of the discrimination.⁶⁸ The requirement of a showing of under-representation, the court continued, must be adapted to the facts of the case.⁶⁹

The district court in *Wygant* found it appropriate to compare the percentage of minority faculty members to the percentage of minority students in the student body, rather than to the percentage of minority teachers in the labor pool.⁷⁰ The use of this standard is vital, the court explained, because of the important position minority teachers hold as role models for their students.⁷¹ Under this standard, the trial court found that minority faculty members clearly were "substantially" and "chronically" under-represented in Jackson public schools.⁷² Therefore, the court concluded, the fourteenth amendment's equal protection clause does not preclude the union and the School Board from voluntarily negotiating a race-conscious affirmative action plan designed to protect minority teachers from necessary layoffs.⁷³

Having found that the circumstances in the Jackson school system warranted the adoption of affirmative action goals for the hiring of teachers, the district court turned to the constitutionality of the means employed by the School Board to achieve those goals. The Sixth Circuit's opinion in *Young*, the court noted, articulated a standard of reasonableness, under which the affirmative action plan must be related substantially to the objectives of remedying the effects of past discrimination and correcting substantial and chronic under-representation.⁷⁴ The district court found that because the affirmative action plan in *Wygant* precludes a reduction in the percentage of minority teachers in the school system in the event of necessary layoffs, it is related sufficiently to the goal of remedying the substantial and chronic under-representation of minorities that has re-

⁶⁵ *Id.* at 1200, 29 FEP Cases at 1362-63.

⁶⁶ *Id.* at 1200, 29 FEP Cases at 1363 (quoting *Weber*, 443 U.S. at 209, 20 FEP Cases at 6).

⁶⁷ *Wygant*, 546 F. Supp. at 1200 (quoting *Young*, 608 F.2d at 694, 20 FEP Cases at 1743).

⁶⁸ *Wygant*, 546 F. Supp. at 1200, 29 FEP Cases at 1363.

⁶⁹ *Id.* at 1200-01, 29 FEP Cases at 1363.

⁷⁰ *Id.* at 1201, 29 FEP Cases at 1363.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1201, 29 FEP Cases at 1364.

⁷⁴ *Id.* at 1201-02, 29 FEP Cases at 1364.

sulted from years of past discriminatory hiring practices.⁷⁵ Furthermore, the court found, the affirmative action plan is sufficiently narrow in scope because it is temporary in nature, and neither requires the retention of unqualified minorities, nor unnecessarily or invidiously trammels the rights of nonminority teachers.⁷⁶ Since the plan was collectively bargained by the teachers union, a majority of whose members were nonminority teachers, the court could find no reason for viewing the agreement as discriminating against the nonminority plaintiffs.⁷⁷ The court therefore concluded that the affirmative action program in *Wygant* does not violate the equal protection clause.⁷⁸

On appeal, a three judge panel of the Sixth Circuit affirmed, incorporating most of the district court's reasoning in full.⁷⁹ Although one concurring judge objected to the district court's comparison of the proportion of minority teachers to the proportion of minority students, rather than to the proportion of minority teachers in the relevant labor pool,⁸⁰ and although the two judge majority deemed it unnecessary to address this issue because it was not contested by the parties,⁸¹ all three judges agreed that regardless of which standard is used, minority teachers were under-represented, and therefore affirmative action is warranted in *Wygant*.⁸² The appeals court then considered whether the district court's holding should be reversed in the wake of the subsequently decided cases of *Oliver* and *Stotts*. The court of appeals rejected this contention, distinguishing the court-ordered, non-voluntary, affirmative action plans in *Oliver* and *Stotts* from the collectively bargained, purely voluntary plan in *Wygant*.⁸³

The appeals court first ruled that *Oliver*, which had invalidated a lower court's order of a 20% minority quota for black teachers in disregard of an existing seniority system, does not control *Wygant*.⁸⁴ Because *Oliver* dealt with a judicially compelled court-ordered affirmative action plan, the court reasoned, it is not applicable to the voluntary collective bargaining agreement at issue in *Wygant*.⁸⁵

The court of appeals also held that the district court's decision in *Wygant* is consistent with the Supreme Court's subsequent decision in *Stotts*.⁸⁶ The court of appeals in *Wygant* pointed out that the *Stotts* Court expressly declined to address the issue raised in *Wygant* of purely voluntary affirmative action programs which conflict with seniority preference principles.⁸⁷ Moreover, the court of appeals observed, the *Stotts* Court did not overrule *Weber*, which still stands for the proposition that voluntary affirmative action is permissible, at least under Title VII.⁸⁸ Accordingly, since the affirmative action program in *Wygant* is voluntary like that in *Weber*, and unlike that in *Stotts*, the court of appeals found that it does not violate the equal protection clause.⁸⁹ Rather, the appeals court held, the

⁷⁵ *Id.* at 1202, 29 FEP Cases at 1364.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Wygant*, 746 F.2d at 1158, 36 FEP Cases at 156.

⁸⁰ *Id.* at 1159-61, 36 FEP Cases at 158-59 (Wellford, J., concurring).

⁸¹ *Id.* at 1156 n.1, 36 FEP Cases at 155 n.1 (opinion of the court).

⁸² *Id.* at 1158, 36 FEP Cases at 157; *id.* at 1161, 36 FEP Cases at 159 (Wellford, J., concurring).

⁸³ *Id.* at 1158, 36 FEP Cases at 157.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

minority preference provision in the collective bargaining agreement between the School Board and the teachers union is a constitutionally legitimate attempt to "remedy past obvious race discrimination and to meet the practical problems posed by racial tensions engendered by that history."⁹⁰

Because the Supreme Court granted certiorari in *Wygant* less than one year after deciding *Stotts*, it presumably has agreed to resolve the issue of purely voluntary affirmative action, which is squarely presented by the Sixth Circuit's distinguishing of *Stotts*.⁹¹ Though the Supreme Court in *Stotts* invalidated the district court's modification of the consent decree by a six-to-three vote, the significance of the case is blurred by its procedural and substantive complexity, as illustrated by the filing by two Justices of conflicting concurrences to the majority opinion, and the filing of one vehement dissent, in which three Justices joined.⁹² Writing for the majority, Justice White utilized sweeping language suggesting that permissible Title VII remedies are limited to make-whole relief of individual victims of discrimination,⁹³ even though he seemed to conclude his analysis with a narrow holding on the issue of whether the district court had exceeded its authority.⁹⁴ Although Justice Stevens concurred in the judgment reached by the majority, he expressly disassociated himself from the majority's Title VII analysis, predicated his vote solely on the district court's abuse of discretion under the rules governing the construction and enforcement of consent decrees.⁹⁵ Justice O'Connor, on the other hand, wrote separately to concur both in the Court's judgment and in the Court's broad language which strongly implied that there are substantial limitations under Title VII for race-conscious relief.⁹⁶ Justice Blackmun, joined by Justices Brennan and Marshall,

⁹⁰ *Id.* at 1159, 36 FEP Cases at 157.

⁹¹ The Court, of course, may decide, or avoid deciding, the issues presented in this chapter on the grounds here discussed, or on other grounds. For example, the Court may view the case solely as an equal protection case, or solely as a Title VII case, and may distinguish between the two as it has not done previously. *Cf. supra* note 48. Another aspect of the case which may lead to an alternative resolution is the use of minority student proportions as opposed to the percentage of minority teachers in the labor pool. *See supra* text accompanying notes 70-72, 80-81. Whether the Court chooses to decide the case on a tangential issue or whether it resolves the case as presented here, the Court should find itself obliged at least to address, if not resolve, the distinction as set out by the Sixth Circuit between *voluntary* and *court ordered* affirmative action.

⁹² Justice White wrote the opinion for the Court, in which Chief Justice Burger and Justices Powell, Rehnquist and O'Connor joined. Justice Stevens concurred only in the judgment. Justice O'Connor concurred separately in the judgment and in the Court's discussion of limits on Title VII remedies. Justice Blackmun wrote a dissenting opinion, in which Justices Brennan and Marshall joined.

⁹³ *Stotts*, 104 S. Ct. at 2589, 34 FEP Cases at 1711. Justice White stated that the policy behind Title VII remedies is "that policy which is to provide make-whole relief *only* to those who have been actual victims of discrimination." *Id.* (emphasis added).

⁹⁴ *Id.* at 2590, 34 FEP Cases at 1712.

⁹⁵ Concurring only in the judgment of the Court, Justice Stevens described the Court's Title VII analysis as "wholly advisory." *Id.* at 2594-95, 34 FEP Cases at 1715 (Stevens, J., concurring). Instead, Justice Stevens relied on his view that the district court abused its discretion in modifying the consent decree absent the "changed circumstances" which are required for such a modification. *Id.* at 2595, 34 FEP Cases at 1716 (Stevens, J., concurring).

⁹⁶ For example, Justice O'Connor stated: "Title VII affirmatively protects bona fide seniority systems, including those with discriminatory effects on minorities." *Id.* at 2592, 34 FEP Cases at 1714 (O'Connor, J., concurring). She went on to state:

A court may not grant preferential treatment to any individual or group simply because the group to which they [sic] belong is adversely affected by a bona fide seniority

impetuously protested the Court's procedural and substantive handling of the case, declaring that the decision "is less troubling for the law that it creates than for the law that it ignores."⁹⁷

Regardless of the Court's failure in *Stotts* to articulate the breadth of its ruling, the Sixth Circuit's opinion in *Wygant* is justified in light of both the *Stotts* Court's explicit

system. Rather, a court may use its remedial powers, including its power to modify a consent decree, *only to prevent future violations and to compensate identified victims of unlawful discrimination.*

Id. at 2593, 34 FEP Cases at 1714 (O'Connor, J., concurring) (emphasis added).

⁹⁷ *Id.* at 2595, 34 FEP Cases at 1716-17 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). Justice Blackmun, writing for Justices Brennan and Marshall, lambasted the Court for its treatment of both the procedural and substantive issues in the case. First, he accused the majority of violating long standing Court practice by not declaring the case moot in light of the fact that the layoffs were no longer in effect, *Id.* at 2596, 34 FEP Cases at 1717 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). He continued by charging that "having improperly asserted jurisdiction, the Court then ignore[d] the proper standard of review." *Id.* Justice Blackmun viewed the district court's action as a preliminary injunction, and therefore, he argued that the correct standard to apply is the deferential abuse of discretion review. *Id.* On the other hand, the Court, according to Justice Blackmun, treated the district court order as a permanent injunction, thereby reaching the merits of the case even though the district court never did so. *Id.* Finally, Justice Blackmun contended, once erroneously reaching the merits, the Court ignored specific facts of the cases on which it relied which made those cases inapplicable. *Id.*

Justice Blackmun proceeded to criticize the majority's reasoning, more specifically, on several grounds. For example, he disputed the Court's characterization of the issue as one which involved a court ordered abrogation of existing seniority rights. Rather, he suggested that the district court order merely enjoined the layoffs of a certain number of minority firefighters, and had nothing to do with ordering the layoffs of nonminorities in alleged violation of their contractual rights. *Id.* at 2602, 34 FEP Cases at 1722 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). Furthermore, Justice Blackmun continued, even if the majority's view that the order was a permanent injunction is correct, the consent decree explicitly reserved for the district court the power to make "further orders as may be necessary or appropriate to effectuate the purposes of the decree." *Id.* at 2603, 34 FEP Cases at 1723 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). He concluded, therefore, that since adherence to strict seniority principles would have destroyed the efficacy of the consent decree, the district court had not exceeded its authority in modifying the decree so that its aims could be realized. *Id.*

Justice Blackmun continued to deride the Court's reasoning by pointing out the absurd unfairness in its procedural treatment of the court order as a permanent injunction. He noted that as a court-modified consent decree, the "court order" did not involve the participation of the litigating parties. *Id.* To the complete incredulity of the dissent, the Court ruled against the minority firefighters on the merits of their claim because they did not substantiate their charges, yet the Court treated the unilateral court modification of the consent decree as a permanent injunction as if the minority firefighters had been given a chance to litigate the merits at the district court level. *Id.* According to the dissent, since the district court had unilaterally modified the decree, the minority firefighters were never given the opportunity to substantiate the merits of the charges which the Supreme Court faulted them for not substantiating. *Id.* Finally, Justice Blackmun, seemingly exasperated by the Court's procedural handling of the case, moved to the underlying merits of the controversy over race-conscious affirmative action under Title VII.

Noting that the nature of systemic discrimination is such that it requires class-based remedies, Justice Blackmun disputed the Court's view of Title VII remedial authority. *Id.* at 2606-10, 34 FEP Cases at 1724-28 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). He also noted that the Court seemingly ignored the unanimous view of the United States Courts of Appeals which have all held that Title VII allows race-conscious affirmative action, as well as ignoring the Court's own majority opinions in *Bakke* and *Weber*, in which the author of the *Stotts* opinion, Justice White, had joined. *Id.* Writing for the three dissenters in *Stotts*, Justice Blackmun therefore "concluded"

refusal to address the applicability of its decision to voluntary affirmative action,⁹⁸ and its conspicuous failure to overturn *Weber*,⁹⁹ which upheld voluntary affirmative action. Moreover, the facts in *Wygant* are distinguishable from those in *Stotts*.

Though employing overly broad language as to the limited range of proper Title VII remedies, the *Stotts* Court emphasized that its holding was based on the district court exceeding its authority by invalidating an existing, nondiscriminatory seniority system under an affirmative action plan in a consent decree, to which the effected parties never agreed, and which did not expressly address the seniority issue.¹⁰⁰ Under Title VII, the *Stotts* Court held, bona fide seniority systems are protected from such court-ordered, non-voluntary invalidation.¹⁰¹ In *Wygant*, on the other hand, all parties involved agreed to the affirmative action plan.¹⁰² In addition, the plan in *Wygant* specifically addressed the issue of seniority and explicitly gave priority to racial balance over strict seniority principles.¹⁰³ Therefore, the affirmative action plan in *Wygant* was not judicially ordered against anyone's will, nor does it conflict with anyone's pre-existing seniority rights.

Notwithstanding the *Stotts* Court's sweeping statements suggesting a limit to appropriate race-conscious remedies under Title VII to identified victims of discrimination, neither the *Stotts* majority nor any other Supreme Court majority ever has held that Title VII or the equal protection clause preclude private parties from voluntarily pursuing valid affirmative action goals which happen to conflict with seniority principles.¹⁰⁴ Consequently, under *Bakke* and *Weber*, in which the Court endorsed, respectively, race-conscious affirmative action by states and by private parties, the *Wygant* court was correct in holding that the equal protection clause is not violated.¹⁰⁵

that the Court could not have meant that the policy behind Title VII *only* allows the make-whole relief of proven victims of discrimination; but rather the Court must have meant, notwithstanding its language to the contrary, that the particular relief granted in *Stotts* was not justified in the circumstances. *Id.* at 2610, 34 FEP Cases at 1728 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

⁹⁸ *Stotts*, 104 S. Ct. at 2590, 34 FEP Cases at 1712.

⁹⁹ See *Wygant*, 746 F.2d at 1158, 36 FEP Cases at 157.

¹⁰⁰ *Stotts*, 104 S. Ct. at 2586, 34 FEP Cases at 1709.

¹⁰¹ *Id.*

¹⁰² *Wygant*, 746 F.2d at 1158, 36 FEP Cases at 157.

¹⁰³ *Id.*

¹⁰⁴ See *id.* at 1158-59, 36 FEP Cases at 157.

¹⁰⁵ Although it is clear that the *Stotts* Court's decision did not expressly prohibit the type of affirmative action plan upheld in *Wygant*, whether it impliedly prohibits voluntary affirmative action plans which interfere with seniority rights is a question that remains for the Court to decide this term in *Wygant*. A literal reading of the holding in *Stotts* does not make this implication, however. The *Stotts* Court noted that the consent decree that it invalidated, which had been entered and then modified by the district court, did not have the approval of either the city or the union that it effected. *Stotts*, 104 S. Ct. at 2586, 34 FEP Cases at 1709. It was, therefore, an improper construction of the decree; and it certainly was not voluntary. *Id.* at 2486-88, 34 FEP Cases at 1709-10. Furthermore, the Court noted that the decree itself did not address the issues of layoffs and seniority. *Id.* at 2586, 34 FEP Cases at 1709. Therefore, the Court concluded, the district court had exceeded its authority in modifying the decree to apply to layoffs and the pre-existing seniority plan. *Id.* Consequently, *Stotts* should be read to preclude under Title VII only those affirmative action plans which are court ordered and which interfere with existing nondiscriminatory seniority rights.

The *Stotts* decision, however, is arguably much broader than the narrow holding suggests. In reaching its decision, the Court noted that the legislative history of Title VII illustrates that at least some of the bill's proponents never meant it to grant relief to minority group members who were

The Supreme Court should affirm *Wygant* because the reasoning of the Sixth Circuit is sound, and because the same compelling policy reasons found by the *Weber* Court are present in *Wygant*. As the Court found in *Weber*, the Civil Rights Act — and, by implication, the equal protection clause — was intended to erase a long history of discrimination against minorities, not as individuals, but as a class.¹⁰⁶ It follows that class-based remedies are essential to effectively redress the effects of class-based discrimination.¹⁰⁷ Therefore, even though the Supreme Court definitively held in *Stotts* that a court, consistent with Title VII, may not order an affirmative action plan which abrogates the existing seniority rights of nonminorities in the absence of proven discrimination against minorities, the *Weber* Court's decision sanctioning voluntary affirmative action not in conflict with existing rights remains in force. Since the *Wygant* decision allows parties to voluntarily bargain for affirmative action agreements which take into account the history of discrimination, without having to prove specific examples of discrimination, it was correctly decided, because controlled by *Weber*, not *Stotts*.

Moreover, as a practical matter, voluntary affirmative action is the ideal means of remedying the effects of past discrimination.¹⁰⁸ Employers, understandably, will always

not individual victims of discrimination. *Id.* at 2589, 34 FEP Cases at 1711-12. For example, the Court quoted Senators Clark and Case, the bipartisan "captains" of Title VII, from the Congressional Record: "No court order can . . . [provide a remedy] for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g) of Title VII]." *Id.* (quoting 110 CONG. REC. 7214 (1964) (remarks of Senators Clark and Case)). Justice O'Connor emphasized this reading of Title VII in her separate concurrence. *See supra* note 96. *But see supra* note 95 (Justice Stevens' separate concurrence).

The dissent, alarmed at the implications of these sweeping generalizations which the majority added to its holding, criticized the Court's opinion both procedurally and substantively. *Stotts*, 104 S. Ct. at 2595-2610, 34 FEP Cases at 1716-28 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). *See also supra* note 97.

¹⁰⁶ *See Weber*, 443 U.S. at 201-02, 20 FEP Cases at 5; *see also Bakke*, 438 U.S. at 327, 17 FEP Cases at 1025 (Brennan, J., joined by White, Marshall and Blackmun, JJ., concurring in part and dissenting in part). Concurring in the portion of the opinion which upheld the use of race-conscious affirmative action, Justice Brennan, speaking for three other Justices, stated:

[W]e cannot — and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds — let color blindness become myopia which makes the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

Id.

¹⁰⁷ *Cf. supra* note 11 (discussing separate opinion of Justice Marshall in *Bakke*); *see also Fullilove*, 448 U.S. at 482. Writing for the majority in *Fullilove* upholding the affirmative action plan, Chief Justice Burger, who had dissented in *Bakke* and *Weber* from the Court's sanctioning of the use of affirmative action, rejected the contention that "Congress must act in a wholly color-blind fashion" when seeking to remedy the effects of discrimination against minorities. *Id.* He declared that "[a]ny other approach would freeze the status quo that is the very target" of efforts to so remedy discrimination against minorities. *Id.*

¹⁰⁸ *See Weber*, 443 U.S. at 209-10, 20 FEP Cases at 8 (Blackmun, J., concurring). Concurring in the Court's opinion in *Weber*, Justice Blackmun sought to expand the Court's reliance on the congressional intent to abolish racial discrimination and thus consider some of the practical considerations behind the use of voluntary affirmative action. For example, he argued that reading Title VII to preclude voluntary race-conscious affirmative action would create a "catch 22" situation for employers. On one hand, Justice Blackmun reasoned, employers would face liability for past discrimination against minorities. On the other hand, he continued, they would risk liability to nonminorities for any voluntary efforts to mitigate the effects of their prior discriminatory practices against minorities. *Id.*

be less than eager to admit prior discrimination, especially when faced with potential civil rights liability. Since it is very unlikely that employers will admit prior discriminatory practices, all claims of discrimination will have to be litigated if the Court requires a judicial finding of individual victims of discrimination; and the employer always will be opposing affirmative action. Voluntary affirmative action, however, avoids the costs in time, money and effort of litigation, and it avoids the risks of litigation where direct discrimination against specific individuals is difficult, if not impossible, to prove. Most importantly, voluntary affirmative action simply is more conducive to easing the racial tensions that have resulted from years of society-wide discrimination against minorities.¹⁰⁹

It makes little sense, therefore, to eschew the route of voluntary compliance with the laws against discrimination by requiring parties to litigate issues on which they otherwise would agree. In addition, if voluntary affirmative action is prohibited, employers will be placed in an untenable situation. On one hand, they risk potential liability for racially discriminatory practices in the past; and on the other hand, they risk liability to nonminorities for any voluntary attempts they take to mitigate the effects of their prior discrimination against minorities.¹¹⁰ Finally, it would be a cruel irony if the Court were to interpret Title VII of the Civil Rights Act or the equal protection clause, both of which were intended to cure the effects of centuries of racial injustice, to preclude efforts to erase the lingering effects of past discrimination, especially voluntary efforts.¹¹¹

In sum, the Supreme Court in *Stotts* invalidated under Title VII a court modified consent decree that implemented an affirmative action program which conflicted with existing seniority rights. In *Wygant*, the Sixth Circuit Court of Appeals held, however, that *Stotts* does not control voluntary affirmative action programs which may interfere with seniority principles. The court of appeals distinguished *Stotts* on the ground that it involved

¹⁰⁹ See *id.* Concurring in *Weber*, Justice Blackmun argued that it is simply very practical to allow voluntary affirmative action where discriminatory impact on minorities is obvious, and therefore discriminatory intent is arguably present, but, most likely, difficult to prove. *Id.* at 211, 20 FEP Cases at 8-9 (Blackmun, J., concurring). He asserted that employers, by adopting voluntary affirmative action plans, could avoid the costs of identifying individual victims of past discrimination, and past victims could avoid the costs and risks of suing for damages. *Id.* Justice Blackmun concluded, therefore, that "[s]trong considerations of equity support an interpretation of Title VII that would permit private affirmative action" even if Title VII does not so require. *Id.* at 214, 20 FEP Cases at 10 (Blackmun, J., concurring).

Similarly, in *Bakke*, Justice Brennan, writing for four Justices concurring in part and dissenting in part, stated:

Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of the law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.

Bakke, 438 U.S. at 364, 17 FEP Cases at 1038-39 (Brennan, J., joined by White, Marshall and Blackmun, JJ., concurring in part and dissenting in part) (emphasis added).

¹¹⁰ See *supra* note 108.

¹¹¹ See *Weber*, 443 U.S. at 204, 20 FEP Cases at 6. After searching the legislative history of the Civil Rights Act and the historical context in which it was passed, the Court declared that interpreting the Act to forbid all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute and must be rejected." *Id.* at 202, 20 FEP Cases at 5 (emphasis added).

an illegitimate court modification of a consent decree — which modification was not approved by the parties effected, and which wrongly interpreted the decree. Despite the broad language wielded in the *Stotts* opinion, which some may read as signalling a retreat from the Court's sanctioning of race-conscious attempts to remedy the results of past discrimination, *Wygant*, relying on the still valid *Weber* decision, stands for the proposition that purely voluntary affirmative action plans which legitimately seek to remedy the lingering effects of past discrimination do not violate the equal protection clause of the Constitution. There is ample, if not compelling, constitutional and statutory precedent, as well as sound policy considerations, upon which the Supreme Court may base a decision to affirm *Wygant* in its present term.

V. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. **Defining Willfulness Under the Age Discrimination in Employment Act: Trans World Airlines v. Thurston*¹

Persons between the ages of forty and seventy are protected from discrimination by employers on the basis of age by the Age Discrimination in Employment Act of 1967 (ADEA or Act).² Section 7(b) of the Act directs that rights created under the ADEA be "enforced in accordance with the powers, remedies and procedures"³ of the Fair Labor Standards Act (FLSA),⁴ rather than by remedies defined by the ADEA.⁵ The remedial provisions of the two statutes, however, are not precisely the same.⁶ The ADEA modifies the remedial procedure of the FLSA. Under the FLSA, liquidated damages are awarded for any and every violation,⁷ automatically doubling the plaintiff's recovery.⁸ The ADEA, however, directs that liquidated damages shall only be awarded under the provisions of that Act in the event that the defendant's violation is adjudged by the finder of fact to be "willful."⁹ Where an employer's violation is determined to be willful, the plaintiff recovers liquidated damages in an amount equal to his pecuniary recovery for lost back wages and benefits.¹⁰

Congress failed to provide a definition of the word "willful" as it appears in the statute, either in the Act or in its legislative history.¹¹ Previously courts have diverged in their efforts to fill this statutory void.¹² During the *Survey* year, the United States Supreme

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¹ 105 S. Ct. 613, 36 FEP Cases 977 (1985).

² 29 U.S.C. §§ 621-634 (1982). The age span covered by the Age Discrimination in Employment Act of 1967 (ADEA) is defined by 29 U.S.C. § 631 (1982).

³ 29 U.S.C. § 626(b) (1982).

⁴ 29 U.S.C. §§ 201-219 (1982). See *Lorillard v. Pons*, 434 U.S. 575, 579, 16 FEP Cases 885, 887 (1978).

⁵ 29 U.S.C. § 626(b) (1982).

⁶ See *Trans World Airlines v. Thurston*, 105 S. Ct. 613, 623-24, 36 FEP Cases 977, 984 (1985).

⁷ See 29 U.S.C. § 216(b) (1982).

⁸ See *Thurston*, 105 S. Ct. at 624, 36 FEP Cases at 984.

⁹ 29 U.S.C. § 626(b) (1982).

¹⁰ 29 U.S.C. § 216(b) (1982).

¹¹ See *Syvocek v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154, 27 FEP Cases 610, 614 (7th Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979, 25 FEP Cases 94, 96 (9th Cir. 1981).

¹² Compare *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1114, 25 FEP Cases 376, 378 (4th Cir.), cert. denied, 454 U.S. 860 (1981) (approving statement that "employer acts willfully . . . if he knows, or has reason to know, that his conduct is governed by [the Act]") (quoting *Brennan v. Heard*,

Court in *Trans World Airlines v. Thurston*,¹³ held that a violation is "willful" if the employer either knew or showed reckless disregard as to whether its conduct violated the ADEA.¹⁴ Conversely, however, the Court held that an employer that knows only of the potential applicability of the Act will not be held liable for a "willful" violation of the Act.¹⁵ In so holding, the Court stressed that reasonable good faith efforts to comply with the ADEA would defeat allegations of a willful violation.¹⁶

In *Thurston*, the original defendant was Trans World Airlines, Inc. (TWA), a commercial airline, and the plaintiffs, Harold Thurston, Christopher J. Clark and Clifton A. Parkhill, were pilots employed by the airline who challenged a policy permitting employee airline captains and first officers disqualified from serving in that capacity for reasons other than age to transfer automatically to the position of flight engineer.¹⁷ There are three cockpit employee positions: captain, first officer and flight engineer.¹⁸ The captain is the pilot of the aircraft and controls it.¹⁹ The first officer is the copilot, assisting the pilot as second in command.²⁰ The flight engineer serves as an instrument monitor at a side-facing panel and assumes control only if both the pilot and the copilot are incapacitated.²¹

TWA entered into a collective bargaining agreement with the Air Line Pilots Association (ALPA) in 1977, under which cockpit employees were required to retire upon reaching the age of 60.²² The scheme was permissible under the ADEA as part of a bona fide system of seniority.²³ A 1978 amendment²⁴ to the Act, however, prohibited mandatory age-based retirement plans affecting individuals falling under the protection of the Act.²⁵ Consequently, on July 19, 1978, TWA officials announced that the amendment outlawed the company's retirement policy as it pertained to flight engineers.²⁶ The

491 F.2d 1, 3 (5th Cir. 1974) (emphasis in original)), with *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27, 20 FEP Cases 29, 41 n.27 (1st Cir. 1979) (willful action must be deliberate, intentional and knowing). Compare *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979-80, 25 FEP Cases 94, 98 (9th Cir. 1981) (violation is willful if committed knowingly and voluntarily, even if employer acted without knowledge of the ADEA), with *Syvocek v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155, 27 FEP Cases 610, 615 (7th Cir. 1981) (to prove willfulness under the ADEA plaintiff must show defendant's actions to be knowing and voluntary, and that defendant knew or should have known that actions violated the ADEA). See also 1981-1982 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW — WILLFUL VIOLATIONS OF THE ADEA: *Kelly v. American Standard, Inc.* and *Syvocek v. Milwaukee Boiler Mfg. Co.*, 24 B.C.L. REV. 161 (1982).

¹³ 105 S. Ct. 613, 36 FEP Cases 977 (1985).

¹⁴ *Id.* at 625, 36 FEP Cases at 985.

¹⁵ *Id.*

¹⁶ *Id.* at 626, 36 FEP Cases at 985.

¹⁷ *Id.* at 619-20, 36 FEP Cases at 980-81.

¹⁸ *Id.* at 618, 36 FEP Cases at 979.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* See *United Airlines v. McMann*, 434 U.S. 192, 195-202, 16 FEP Cases 146, 148-50 (1977).

²⁴ See Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, § 2(a), 92 Stat. 189 (1978) (codified at 29 U.S.C. § 623(f)(2) (1982)).

²⁵ *Id.* See also 105 S. Ct. at 618, 36 FEP Cases at 979.

²⁶ 105 S. Ct. at 618, 36 FEP Cases at 979. Federal Aviation Administration (FAA) regulations prohibit individuals over 60 years of age from serving as a pilot on a commercial carrier. 14 CFR § 121.383(c)(1985). Flight engineers are the only cockpit employees who do not fall under the term

company outlined its new policy, which initially allowed any cockpit employee, upon reaching age sixty, to continue to work as a flight engineer.²⁷ ALPA objected to the plan, however, and it was subsequently modified so that only flight engineers could automatically continue employment after reaching age sixty.²⁸ Pilots²⁹ could continue to work only if they had successfully attained flight engineer status prior to their sixtieth birthday.³⁰

The plaintiffs' charge of illegal, age-based discrimination arose in the context of the procedural intricacies of attaining flight engineer status.³¹ Under the collective bargaining agreement in question, flight engineer status had to be obtained by pilots under a "bidding" system.³² This system required that a pilot submit a "standing bid" requesting flight engineer status prior to his sixtieth birthday.³³ If a flight engineer position opened, it was awarded to the most senior pilot with a standing bid.³⁴ A pilot who reached his sixtieth birthday without being awarded a position was retired.³⁵

The bidding system for pilots seeking flight engineer status due to age-based transfer did not apply to pilots who were transferred for any other reason.³⁶ Pilots transferred for medical reasons³⁷ or incompetence could transfer by "bumping" or displacing a flight engineer with less seniority.³⁸ If pilots transferred for non-age-based reasons were unable to displace a flight engineer prior to their sixtieth birthday due to lack of seniority, they were generally placed on some form of standby status and permitted to accrue further seniority, so that a transfer to flight engineer status could be made.³⁹

Each of the plaintiffs in *Thurston* was denied the opportunity to use their seniority to displace a less senior flight engineer.⁴⁰ Consequently, Thurston was forced to retire on May 26, 1978, prior to TWA's adoption of the new policy.⁴¹ Clark did not enter a bid, because TWA had advised him that to do so would not improve the likelihood that he would be transferred.⁴² Thus, neither Thurston nor Clark was permitted an effective

"pilot." *Id.* Therefore, TWA was not concerned with the permissibility of retiring pilots and copilots. 105 S. Ct. at 618 & n.3, 36 FEP Cases at 979 & n.3.

²⁷ 105 S. Ct. at 618, 36 FEP Cases at 979-80.

²⁸ *Id.* at 618-19, 36 FEP Cases at 979-80.

²⁹ Both pilots (captains) and copilots (first officers) will hereinafter be collectively referred to as "pilots."

³⁰ 105 S. Ct. at 619, 36 FEP Cases at 980.

³¹ *Id.* at 618, 621, 36 FEP Cases at 979, 981-82.

³² *Id.* at 619, 36 FEP Cases at 980.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* This disparity in the treatment of pilots transferring because of age and pilots transferring for other reasons was further exacerbated by a policy instituted by TWA in 1980, requiring pilots to "activate" their bid as soon as a position was awarded, so that they were forced to choose between (Scylla) a premature lessening of pay and responsibility, and (Charybdis) the possibility that they were turning down their only opportunity to avoid mandatory retirement at age 60 (in the event that no further vacancies occurred prior to their sixtieth birthday).

³⁷ Under 14 CFR § 67.13 (1985), a pilot must have a first-class medical certificate in order to maintain his position. If a pilot cannot maintain a first-class medical certificate but can obtain a second-class certificate, he can fill a flight engineer position. *Id.* § 67.15.

³⁸ 105 S. Ct. at 619, 36 FEP Cases at 980.

³⁹ *Id.* at 619 & nn.8-12, 36 FEP Cases at 980 & nn.8-12.

⁴⁰ *Id.* at 619-20, 36 FEP Cases at 980.

⁴¹ *Id.* at 620, 36 FEP Cases at 980.

⁴² *Id.*

opportunity to bid for a transfer to a position as flight engineer.⁴³ Parkhill filed a transfer bid, but was not awarded a flight engineer position.⁴⁴ Each of the plaintiff pilots, therefore, was forced to retire at the age of sixty.⁴⁵

Thurston, Clark and Parkhill filed suit⁴⁶ against TWA and ALPA, arguing that the TWA transfer policy in which ALPA had acquiesced, violated section 4(a)(1) of the ADEA.⁴⁷ They contended that pilots retired due to age should have been extended the same "privilege of employment," of displacing less senior flight engineers, extended to pilots required to leave the occupation of pilot for reasons other than age.⁴⁸ The trial court entered summary judgment for the defendants TWA and ALPA,⁴⁹ stating that the plaintiffs had failed to establish a prima facie case of age discrimination under the *McDonnell Douglas Corp. v. Green*⁵⁰ test.⁵¹ The *McDonnell Douglas* test requires a prima facie showing of discrimination where indirect or inferential proof of discriminatory motive (such as statistical data) is used.⁵² In *Thurston*, the plaintiffs, in order to make out a prima facie case, would have been required to show that at the time of at least one of their transfer requests, there was an opening for the position of flight engineer.⁵³ The trial court also found that TWA's policy was justified by the two affirmative defenses that the policy was based first, on bona fide occupational qualifications and second, on a bona fide seniority system.⁵⁴

The United States Court of Appeals for the Second Circuit reversed the lower court's decision.⁵⁵ Because the proof of age-based discrimination introduced by the plaintiffs was direct rather than inferential evidence, the appeals court concluded that the *McDonnell Douglas* test was an inappropriate standard of review.⁵⁶ The court held that where pilots who were disqualified for non-age-based reasons were allowed to bump less senior flight engineers and thus transfer automatically, the ADEA⁵⁷ required TWA to grant the same "privilege of employment" to pilots facing mandatory retirement.⁵⁸ The appeals court also overruled the lower court in regard to the affirmative defenses,

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ The suit was filed in the United States District Court for the Southern District of New York. *Id.* at 620, 36 FEP Cases at 980-81.

⁴⁷ 29 U.S.C. § 623(a)(1) (1982). The statute provides, in pertinent part: "It shall be unlawful for an employer 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.*

⁴⁸ 105 S. Ct. at 620, 36 FEP Cases at 980-81.

⁴⁹ *Air Line Pilots Ass'n v. Trans World Airlines*, 547 F. Supp. 1221, 1223 (S.D.N.Y. 1982).

⁵⁰ 411 U.S. 792, 5 FEP Cases 965 (1973).

⁵¹ 547 F. Supp. at 1228-29.

⁵² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 5 FEP Cases 965, 969 (1973); *see also Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112-13, 25 FEP Cases 376, 378 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981).

⁵³ 105 S. Ct. at 620, 36 FEP Cases at 981.

⁵⁴ *See* 29 U.S.C. § 623(f)(1) (1982) (bona fide occupational qualifications); *id.* § 623(f)(2) (1982) (bona fide seniority system).

⁵⁵ *Air Line Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 957, 32 FEP Cases 1185, 1198 (2d Cir. 1983).

⁵⁶ *Id.* at 952, 32 FEP Cases at 1194.

⁵⁷ 29 U.S.C. § 623(a)(1) (1982).

⁵⁸ 713 F.2d at 949-50, 32 FEP Cases at 1191-92.

holding that they did not warrant the discriminatory nature of the TWA transfer policy.⁵⁹ Finally, the appeals court held that TWA "was clearly aware of the 1978 ADEA amendments."⁶⁰ Stating that an employer's conduct is willful if it "knows or shows reckless disregard for the matter of whether its conduct is prohibited by the ADEA," the court of appeals held that TWA's conduct was "willful," and therefore that TWA was liable for liquidated damages under the Act.⁶¹ TWA filed for certiorari, challenging the appeals court's holdings that its transfer policy violated the ADEA and that the violation was "willful."⁶²

The United States Supreme Court granted certiorari,⁶³ and affirmed the court of appeals' holding that the TWA policy violated the ADEA.⁶⁴ The Court reversed, however, as to the liquidated damages.⁶⁵ In reaching its decision on the ADEA proscription of the TWA policy, the Court relied on *Hishon v. King & Spalding*,⁶⁶ in which the Court held that a benefit which is integral to the employment relationship "may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all."⁶⁷ This reading of Title VII of the Civil Rights Act of 1964,⁶⁸ the Court stated, applies with equal force in the age discrimination context, because the ADEA provisions were derived from Title VII.⁶⁹ In rejecting the applicability of the *McDonnell Douglas* test in *Thurston*, where the plaintiffs had presented direct rather than inferential evidence of discrimination, the Court affirmed the reasoning of the court of appeals.⁷⁰ Because the TWA policy permitted pilots who were disqualified on any basis other than age to bump more junior flight engineers, thus making the available method of transfer dependant upon the pilot's age, the Court held that the TWA policy was discriminatory on its face.⁷¹

TWA's affirmative defenses of bona fide occupational qualifications and bona fide seniority system were also rejected by the Court. TWA's retirement policy could not be based on bona fide occupational qualifications, the Court concluded, because age is not a bona fide occupational qualification for the position of flight engineer from which the plaintiffs were excluded.⁷² Nor could TWA successfully claim that the transfer policy was part of a bona fide seniority system, the Court held, because any seniority system which incorporates such a discriminatory policy is proscribed by the ADEA.⁷³

⁵⁹ *Id.* at 951, 32 FEP Cases 1193.

⁶⁰ *Id.* at 957, 32 FEP Cases at 1197.

⁶¹ *Id.* at 956-57, 32 FEP Cases 1197-98.

⁶² *Trans World Airlines v. Thurston*, 104 S. Ct. 1412 (1984). ALPA filed a cross-petition, raising only the liability issue. *Air Line Pilots Ass'n v. Thurston*, 104 S. Ct. 1706 (1984). The Court granted certiorari in both cases, consolidating them for argument in *Trans World Airlines v. Thurston*, 105 S. Ct. 613, 36 FEP Cases 977 (1985).

⁶³ 104 S. Ct. 1412 (1984).

⁶⁴ 105 S. Ct. at 621, 36 FEP Cases at 981.

⁶⁵ *Id.*

⁶⁶ 104 S. Ct. 2229, 34 FEP Cases 1406 (1984).

⁶⁷ 105 S. Ct. at 621, 36 FEP Cases at 982 (quoting *Hishon*, 104 S. Ct. at 2234, 34 FEP Cases at 1410).

⁶⁸ 42 U.S.C. §§ 2000e to 2000e-17 (1982).

⁶⁹ 105 S. Ct. at 621, 36 FEP Cases at 982 (citing *Lorillard v. Pons*, 434 U.S. 575, 584, 16 FEP Cases 885, 888 (1978)).

⁷⁰ *Id.* at 622, 36 FEP Cases at 982.

⁷¹ *Id.*

⁷² *Id.* at 622-23, 36 FEP Cases at 982-83.

⁷³ *Id.* at 623, 36 FEP Cases at 983.

Lastly, the Court addressed the court of appeals' finding that TWA's violation was "willful" and thus subject to liquidated damages.⁷⁴ The Court upheld the court of appeals' statement that an employer's violation of the ADEA is "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."⁷⁵ The Court, however, rejected the court of appeals' application of this standard to TWA's conduct.⁷⁶

In rejecting the court of appeals' characterization of TWA's conduct as "willful," the Court emphasized two facets of TWA's position. First, TWA apparently made a good faith effort to bring its policies within the directives of the ADEA.⁷⁷ The Court noted that it was precisely the effort by TWA to achieve consistency with the ADEA which spawned the challenged policy.⁷⁸ In light of these findings, the Court stated that it would be unfair to TWA to characterize its adoption of the pilot transfer policy as being in "reckless disregard" of the ADEA requirements.⁷⁹ Second, the Court held that TWA's actions demonstrated that it "certainly did not 'know' that its conduct violated the Act."⁸⁰ The holding demonstrates a strong measure of deference to the good faith efforts of an employer to comply with the Act, even where the employer's intentional⁸¹ actions violate the Act.⁸²

The principal effect of the Court's definition of the word "willful" as applied in *Thurston* is to resolve the prior conflict among the circuits in favor of requiring that willfulness be determined in relation to the Act itself rather than to the action which is deemed to violate it. Thus, mere knowledge of the potential applicability of the ADEA is an insufficient ground upon which to base liability.⁸³ The premise that an ADEA violation is "willful" if an employer was aware that the employees concerned might be covered by the ADEA derives from a line of cases interpreting section 6 of the Portal-to-Portal Act (PPA).⁸⁴ Section 6 of the PPA extends the statute of limitations for violations of the Act for an extra year if the violation is found to be willful.⁸⁵ In regard to this statute of limitations extension, courts have found violations to be willful where the defendants were aware merely that the Act might apply to their actions.⁸⁶ The result clearly reflects the variance in the degrees of stringency required in assessing whether a

⁷⁴ *Id.* at 623-26, 36 FEP Cases at 983-86.

⁷⁵ *Id.* at 625-26, 36 FEP Cases at 985.

⁷⁶ *Id.* at 626, 36 FEP Cases at 985.

⁷⁷ *Id.*

⁷⁸ *Id.* at 626, 36 FEP Cases at 986.

⁷⁹ *Id.* at 626, 36 FEP Cases at 985.

⁸⁰ *Id.*

⁸¹ The word "intentional" as used here refers to the intent to commit the action itself, rather than to the intent to violate the ADEA.

⁸² 105 S. Ct. at 626, 36 FEP Cases at 986.

⁸³ *Id.* at 625, 36 FEP Cases at 985.

⁸⁴ 29 U.S.C. § 255(a) (1982). The Portal-to-Portal Act (PPA), 29 U.S.C. §§ 216, 251-262 (1982), was passed to curb litigation under the Fair Labor Standards Act (FLSA) because the FLSA as interpreted by the courts had created "wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers," one result of which was to severely impede interstate commerce. 29 U.S.C. § 251(a) (1982). One of the purposes of the PPA was to "define and limit the jurisdiction of the courts." 29 U.S.C. § 251(b)(3) (1982).

⁸⁵ 29 U.S.C. § 255(a) (1982).

⁸⁶ See, e.g., *EEOC v. Central Kansas Med. Center*, 705 F.2d 1270, 1274 (10th Cir. 1983); *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974).

defendant's actions warrant the extension of a statute of limitations, and in assessing whether a defendant's actions warrant a punitive doubling of pecuniary damages.

The division among the circuits on the issue of appropriately defining "willful" included decisions holding that the standard for willfulness under the damages section of the ADEA should be identical to that of the PPA section governing the statute of limitations;⁸⁷ that the standards should be different;⁸⁸ that intentional actions are willful even without knowledge of the Act's proscription;⁸⁹ that willfulness requires at least constructive knowledge of the Act's proscription;⁹⁰ and that the defendant's action must include a specific intent to violate the ADEA.⁹¹ The breadth of this disparity revealed the pressing need for a well-reasoned basis upon which to define the ADEA damages standard of willfulness, which the Court addressed in *Thurston*. The Court construed the legislative history to demonstrate an intent that the doubling of ADEA damages be punitive in nature, applying only when the employer's actions had demonstrated themselves to warrant a stiffer punishment than mere pecuniary damages.⁹² On that basis the Court concluded that it would be inappropriate to permit a low threshold definition of "willfulness" to effectively make the doubling of damages automatic.⁹³ The Court consequently adopted a fairly stringent definition of "willfulness" set forth in prior criminal cases.⁹⁴

Although at first blush the Court's holding appears to unduly burden the plaintiff in an ADEA action because of the stringency of the test which is applied to a charge of "willfulness," the consideration of other less immediately apparent factors demonstrates the propriety of such a stringent standard. In particular, TWA was to date the only major airline to have voluntarily permitted persons over 60 to work as flight engineers.⁹⁵ As the *Thurston* Court recognized, it would be unjust to hold the airline liable for punitive damages for taking such positive action.

B. **Burdens of Proof Under the Age Discrimination in Employment Act: Sharry v. Hanover Insurance Company¹*

In the past decade, federal courts have approved a specific standard of proof which an employee must meet to make out a claim that his or her employer has discriminated

⁸⁷ Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1113, 25 FEP Cases 376, 378 (4th Cir. 1981).

⁸⁸ Kelly v. American Standard, Inc., 640 F.2d 974, 979, 25 FEP Cases 94, 97-98 (9th Cir. 1981).

⁸⁹ See Goodman v. Heublein, Inc., 645 F.2d 127, 131 n.6, 25 FEP Cases 645, 647 n.6 (2d Cir. 1981); Wehr v. Burroughs Corp., 619 F.2d 276, 283, 22 FEP Cases 994, 998 (3d Cir. 1980).

⁹⁰ Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 155-56, 27 FEP Cases 610, 615 (7th Cir. 1981).

⁹¹ Loeb v. Tectron, Inc., 600 F.2d 1003, 1020 n.27, 20 FEP Cases 29, 41 n.27 (1st Cir. 1979).

⁹² 105 S. Ct. at 624, 36 FEP Cases at 984. In support of this reading of the legislative intent, the Court cited Congress's initial intent to incorporate § 16(a) of the FLSA, 29 U.S.C. § 216 (1982), imposing criminal liability for a willful violation. 105 S. Ct. at 624, 36 FEP Cases at 984. See also 113 CONG. REC. 2199 (1967). The bill as passed, S. 788, 90th Cong., 1st Sess. (1967), substituted liquidated damages for the criminal liability in order to avoid "difficult problems of proof" and invocation by defendants of the fifth amendment, while still furnishing an "effective deterrent to willful violations" of the ADEA. 113 CONG. REC. 7076 (1967).

⁹³ 105 S. Ct. at 624, 36 FEP Cases at 984.

⁹⁴ See, e.g., United States v. Murdock, 290 U.S. 389, 395 (1933) (conduct is "willful" if marked by careless disregard for whether one has the right so to act).

⁹⁵ 105 S. Ct. at 626 & n.23, 36 FEP Cases at 986 & n.23.

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¹ 36 FEP Cases 1822 (D. Mass. 1985).

against him or her on the basis of age under the Age Discrimination in Employment Act of 1976 (ADEA).² Employment discrimination claims necessarily involve problems of proof because the employee must demonstrate that the employer was motivated by a discriminatory purpose in discharging, demoting, or failing to hire or to promote the employee.³ Two issues relating to standards of proof arise in the context of employment discrimination litigation. The first concerns whether the plaintiff must, at some time during the trial, present direct evidence of the defendant's motive.⁴ Second, if the plaintiff is not required to present direct evidence, then an issue arises regarding the extent to which inferences drawn from indirect evidence may be considered by the jury to substantiate a finding that the defendant acted with a discriminatory motive.⁵

Recognizing that employment discrimination plaintiffs will rarely be able to establish a discriminatory motive through direct evidence, the United States Supreme Court has determined that the burden of producing evidence in such cases should be shared by the employer and the employee.⁶ To ensure that the burden of producing evidence of discriminatory motive will be shared by the parties, the Court has held that, even where there is no direct proof of discriminatory motive, an employment discrimination complaint may not be dismissed for failure to state a claim if the plaintiff has established a *prima facie* case of discrimination.⁷ The Court's *prima facie* case device is designed to allow the plaintiff to raise a *mandatory inference* of discriminatory motive by showing that the most common reasons for a discharge or failure to hire — lack of qualification or lack of a position — are not present.⁸ Likewise, the Court has allowed that where the defendant asserts a nondiscriminatory reason for its action, the inference raised by the plaintiff's evidence is no longer mandatory.⁹ This is a classic example of a judicially created rebuttable presumption which places the burden of producing evidence on the party more likely to have access to the information.¹⁰

To make out a *prima facie* case of employment discrimination under the ADEA,¹¹ plaintiffs must prove that they are within the age group protected by the statute; that

² See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 20 FEP Cases 29 (1st Cir. 1979); *Wilson v. Sealtest Foods*, 501 F.2d 84 (5th Cir. 1974). See also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1980) (same test for gender discrimination under Title VII); B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 401-02 (2d ed. 1983).

³ See *Burdine* 450 U.S. at 253-54, 25 FEP Cases at 115-16 (gender discrimination); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 5 FEP Cases 965, 969 (1972) (race discrimination); *Loeb*, 600 F.2d at 1015, 20 FEP Cases at 37 (age discrimination).

⁴ *Burdine*, 450 U.S. at 253-55 & n.8, 25 FEP Cases at 115-16 & n.8.

⁵ *Id.*

⁶ See *Burdine*, 450 U.S. at 253-56, 25 FEP Cases at 115-16; *McDonnell Douglas*, 411 U.S. at 802-03, 5 FEP Cases at 969; *Loeb*, 600 F.2d at 1014, 20 FEP Cases at 36-37. Each of these decisions was rendered in the context of reviewing burdens of proof improperly applied at trial. For this reason, the Supreme Court and the Court of Appeals for the First Circuit did not discuss what kind of proof was necessary to get to the jury, but rather what proof was necessary to obtain a favorable decision on the merits. See *Burdine*, 450 U.S. at 251-52, 25 FEP Cases at 114-15; *McDonnell Douglas*, 411 U.S. at 797-99, 5 FEP Cases at 967; *Loeb*, 600 F.2d at 1007, 20 FEP Cases at 31.

⁷ See *infra* notes 11-16 and accompanying text.

⁸ *Burdine*, 450 U.S. at 254, 25 FEP Cases at 115-16.

⁹ *Id.* at 254-55, 25 FEP Cases at 115-16.

¹⁰ See *id.* at 255 n.10, 25 FEP Cases at 116 n.10.

¹¹ The United States Supreme Court developed the burdens of proof for employment discrimination claims in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973), and clarified them in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113

they were discharged from employment; that they were qualified for the job and were performing their responsibilities at an accepted level; and that after their dismissal, the position remained open and the employer continued to seek persons of their qualifications to fill it.¹² Once the plaintiff establishes a prima facie case, a presumption of discriminatory motive arises.¹³ The burden of producing evidence then shifts to the defendant who must come forward and present evidence showing a legitimate, nondiscriminatory reason for its actions.¹⁴ If the defendant asserts a nondiscriminatory reason for dismissing the plaintiff, the presumption of discriminatory motive drops out of the case and the plaintiff is given an opportunity to show that the defendant's reason was "mere pretext" before the case is submitted to the jury.¹⁵ Although the burden of producing evidence shifts to compensate for the plaintiff's lack of direct proof of motive, the plaintiff bears the burden of persuading the jury at trial that the defendant has engaged in discriminatory conduct.¹⁶

During the *Survey* year, in *Sharry v. Hanover Insurance Company*,¹⁷ the United States District Court for the District of Massachusetts considered whether an employment discrimination claim could be dismissed before trial if the employee could not produce

(1980). *McDonnell Douglas* involved claims under Title VII of the Civil Rights Act of employment discrimination on the basis of race, 411 U.S. at 796, 5 FEP Cases at 966-67, and *Burdine* involved a Title VII claim of employment discrimination on the basis of gender, 450 U.S. at 251, 25 FEP Cases at 114-15. Several courts of appeals have applied the *McDonnell Douglas* rationale to claims under the ADEA for employment discrimination on the basis of age. See B. SCHLEI & P. GROSSMAN, *supra* note 2, at 401-02. In the First Circuit, *Loeb v. Textron, Inc.*, 600 F.2d 1003, 20 FEP Cases 29 (1979), is the seminal decision applying the *McDonnell Douglas* doctrine to an ADEA claim. In *Loeb* the First Circuit discussed the applicability of *McDonnell Douglas* to ADEA claims at length and concluded that because ADEA plaintiffs, like Title VII plaintiffs, were required to prove motive and would have difficulty obtaining direct evidence of a discriminatory motive, the *McDonnell Douglas* doctrine was likewise applicable in the context of claims of employment discrimination on the basis of age. *Id.* at 1014-15, 20 FEP Cases at 36-37.

¹² *Loeb*, 600 F.2d at 1013-14, 20 FEP Cases at 36. See *Burdine*, 450 U.S. at 252-54, 25 FEP Cases at 115-16.

¹³ *Loeb*, 600 F.2d at 1014-15, 20 FEP Cases at 36-37. See *Burdine*, 450 U.S. at 254, 25 FEP Cases at 116. There the Court stated:

The word "presumption" properly used refers only to a device for allocating the production burden In a[n ADEA] case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

Id. at 255 n.8, 25 FEP Cases at 116 n.8.

¹⁴ *Loeb*, 600 F.2d at 1013-15, 20 FEP Cases at 36-37.

¹⁵ *Id.* See also *Burdine*, 450 U.S. at 254-55, 25 FEP Cases at 115-16. In *Burdine* the Court explained:

In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Id. at 255 n.10, 25 FEP Cases at 116 n.10.

¹⁶ *Loeb*, 600 F.2d at 1015, 20 FEP Cases at 37.

¹⁷ 36 FEP Cases 1822 (D. Mass. 1985).

direct evidence that the employer's asserted nondiscriminatory reason for discharge was pretext.¹⁸ The court rejected a United States magistrate's finding that an ADEA plaintiff must prove by a preponderance of the evidence that his employer's asserted reason for dismissing him was "mere pretext."¹⁹ An inference of pretext, the court found, was sufficient to establish a genuine issue of material fact which should be decided by a jury.²⁰ Rejecting the employer's motion for summary judgment, the court found that the employee, Sharry, had presented enough evidence to raise an inference that the employer's reason for dismissal was pretext.²¹ The court cautioned, however, that the employee would still carry the burden at trial of persuading the jury that age was the determining factor in the employer's decision to discharge.²²

In *Sharry*, the plaintiff sued his former employer, Hanover Insurance Company, for violation of the ADEA, claiming that he was discharged from his managerial duties because of his age.²³ The plaintiff, Joseph Sharry, had been employed as a manager of one of Hanover's offices.²⁴ Sharry had an excellent performance record: in October, 1981 he received a positive employee evaluation, and in February, 1982, his office was favorably reviewed by the company.²⁵ Nevertheless, in February, 1982, Sharry was discharged²⁶ from his managerial duties at the age of sixty-two.²⁷ Hanover asserted that Sharry had been discharged because he was creating serious morale problems in the office he managed.²⁸

After Sharry filed suit in federal district court, the district court judge assigned the case to a United States magistrate who recommended that Hanover's motion for summary judgment be granted.²⁹ The magistrate found that although Sharry had raised a presumption of discrimination through his *prima facie* case, Hanover had rebutted the presumption by asserting a nondiscriminatory reason for the discharge.³⁰ Moreover, according to the magistrate, Sharry had not presented enough evidence to prove that Hanover's asserted reason was mere pretext.³¹ Thus, the magistrate concluded, Sharry had not met his burden of proof and Hanover was entitled to summary judgment.³² Sharry then filed a motion with the district court objecting to the magistrate's recommendation to grant summary judgment for Hanover.³³

¹⁸ *Id.* at 1823-24.

¹⁹ *Id.* Sharry and his wife also made claims based on state law concerning his discharge from Hanover. *Id.* at 1823.

²⁰ *Id.* at 1824.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1823.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* The court's opinion does not clarify whether Sharry was actually fired or whether he was merely demoted from his position as manager and left the company voluntarily. *Id.* The court clearly states, however, that Sharry was involuntarily removed from his position as manager of one of Hanover's offices. *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1822-23. The magistrate additionally recommended that plaintiff's state law claims be dismissed. Sharry did not object to this portion of the magistrate's recommendation. *Id.* at 1823.

³⁰ *Id.* at 1823.

³¹ *Id.*

³² *Id.*

³³ *Id.*

The district court rejected the magistrate's recommendation and held that Sharry had raised an inference that Hanover's reason for discharge was pretext by demonstrating his excellent performance record and the haste with which he was discharged.³⁴ The district court therefore concluded that Sharry was entitled to a trial on the merits.³⁵ The court found that the material issue of fact at trial would be whether Hanover had discharged Sharry because of his age or for some other, legitimate motive.³⁶ At trial, the court stated, Sharry would bear the burden of proving violation of the ADEA by convincing the jury that age was "the determinative factor" in Hanover's decision to discharge him.³⁷

The court first accepted the magistrate's finding that Sharry had made out a *prima facie* case of age discrimination.³⁸ In this connection, the court noted that Sharry had shown that he was sixty-two years old when he was discharged, that he had an excellent performance record at Hanover, that he was nevertheless discharged involuntarily, and that his replacement was thirty-two years old.³⁹ Thus, the court found that Sharry had raised a presumption that he was discharged for discriminatory reasons.⁴⁰ The court also accepted the magistrate's finding that Hanover had rebutted the presumption of discriminatory motive by asserting that Sharry had been discharged because of a morale problem at his office.⁴¹

The court disagreed, however, both with the magistrate's finding that Sharry had shown no facts to support the contention that Hanover's asserted reason for discharge was pretext, and with the defendant's argument that Sharry must prove pretext in order to avoid summary judgment against him.⁴² With respect to the pretext issue, the court first found that Sharry had presented evidence indicating both an excellent performance record and a subsequent hasty discharge.⁴³ According to the court, the contrast between Sharry's recent positive review and Hanover's claim of morale problems was sufficiently great to support an inference of pretext.⁴⁴ Thus, a genuine issue of material fact as to Hanover's motivation existed and a trial by a jury was required, the court concluded.⁴⁵

After holding that Sharry was entitled to a trial on the merits, the court discussed its reasons for finding that positive proof of pretext was not required to defeat an employer's motion for summary judgment.⁴⁶ The court stated that to require positive proof to defeat a pretrial motion would subvert the very purpose of the judicially endorsed presumption which arises from the *prima facie* case.⁴⁷ According to the court, judges have endorsed a *prima facie* showing in employment discrimination cases because few employees can produce direct proof of their employer's motives.⁴⁸ To require that a plaintiff produce direct evidence on the pretext issue to defeat a motion for summary

³⁴ *Id.*

³⁵ *Id.* at 1823-24.

³⁶ *Id.* at 1823.

³⁷ *Id.* at 1824.

³⁸ *Id.* at 1823.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1823-24.

⁴³ *Id.* at 1823.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1823-24.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1824.

⁴⁸ *Id.* at 1823.

judgment would, in the court's view, nullify the effect of the prima facie case device.⁴⁹ Thus, the court concluded, an employment discrimination plaintiff is entitled to a trial on the merits if he or she establishes a prima facie case and produces sufficient evidence to raise an inference that the defendant's asserted reasons are pretext.⁵⁰

The *Sharry* case raised a serious question as to whether employment discrimination plaintiffs will be allowed to present their claims to juries without first producing direct evidence that their employers' adverse employment actions were grounded in discriminatory motive. In *Sharry* the court considered two related questions regarding proof that an employer's asserted nondiscriminatory reason for adverse employment action was pretext. The first question is whether an employment discrimination defendant, by asserting a nondiscriminatory reason for its action, raises a mandatory inference in its favor which the plaintiff must rebut to obtain a trial on the merits, or whether the plaintiff's proof of a prima facie case and the defendant's rebuttal create a sufficient issue of material fact to require a jury trial.⁵¹ The magistrate's recommendation in *Sharry* presented the additional question of whether a presumption arising from the defendant's assertion of a nondiscriminatory motive could be rebutted with indirect evidence supporting an inference of pretext, or whether the plaintiff would have to show direct evidence of pretext to get to the jury.⁵²

Unlike other courts which have discussed the shifting burden of proof involved in age discrimination claims,⁵³ the *Sharry* court addressed the plaintiff's burden of proof under the ADEA in the context of a motion for summary judgment.⁵⁴ For this reason, the question of whether the plaintiff is required to present evidence of pretext as part of his or her prima facie case was directly presented to the court.⁵⁵ In holding that indirect evidence of pretext was sufficient to require a trial, the court implicitly held that the plaintiff is required to present some evidence of pretext to rebut the defendant's asserted reason for discharge before he or she is entitled to a trial.⁵⁶

This holding is a logical extension of the analysis developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*,⁵⁷ and *Texas Department of Community Affairs v. Burdine*.⁵⁸ In *Burdine*, the court stated that one purpose of the prima facie case device was to reduce the motive issue at trial to a question of whether the defendant's asserted reason for its conduct was or was not a pretext for discrimination.⁵⁹ The Supreme Court structured the shifting burden of proof to this end.⁶⁰ Initially, the plaintiff raises a presumption of discrimination by showing that the defendant did not discharge him for any of the usual reasons; the defendant must then state a nondiscriminatory reason supporting the plaintiff's discharge.⁶¹ After rebuttal, the question remains whether the

⁴⁹ See *id.* at 1824.

⁵⁰ *Id.* at 1824.

⁵¹ See *id.* at 1823-24.

⁵² *Id.* at 1823.

⁵³ See *supra* note 6 and accompanying text.

⁵⁴ *Sharry*, 36 FEP Cases at 1823.

⁵⁵ *Id.* at 1823-24.

⁵⁶ *Id.*

⁵⁷ 411 U.S. 792, 5 FEP Cases at 965 (1973).

⁵⁸ 450 U.S. 248, 25 FEP Cases 113 (1980).

⁵⁹ *Id.* at 255-56 & n.8, 25 FEP Cases at 116 & n.8.

⁶⁰ *Id.* at 253, 255-56, 25 FEP Cases at 114, 116.

⁶¹ *Id.* at 254, 25 FEP Cases at 115.

plaintiff can show that the defendant's asserted reason for discharge was a pretext for unlawful discrimination.⁶² Because the Supreme Court developed this analysis while reviewing burdens of proof that have been applied at trial, the Court did not explicitly recognize that the defendant's assertion of a nondiscriminatory reason creates a presumption in its favor which would entitle it to dismissal if not rebutted by evidence of pretext.⁶³ In the summary judgment context, where the defendant asserts a nondiscriminatory reason for discharge, thereby rebutting the prima facie case, however, the plaintiff must produce evidence of pretext in order to rebut the presumptive validity of the defendant's reason.⁶⁴ If the plaintiff does not dispute the defendant's asserted reason for discharge with evidence of pretext, there is no issue of fact to try and the defendant is entitled to summary judgment under Rule 56 of the Federal Rules of Civil Procedure.⁶⁵ Moreover, since defendant will almost always be able to assert a nondiscriminatory reason,⁶⁶ proof of pretext has become, in most cases, part of the prima facie case which plaintiff must prove to obtain a trial.

As noted above, the *Sharry* court glossed over the question of whether pretext evidence was required to rebut defendant's asserted reason for discharge.⁶⁷ The court held that plaintiff's prima facie evidence supported an inference of pretext and was

⁶² See *supra* notes 8-15 and accompanying text.

⁶³ See *McDonnell Douglas*, 411 U.S. at 794-98, 5 FEP Cases at 965-67. In *McDonnell Douglas* the district court dismissed the plaintiff's claim under section 703(a) of Title VII of the Civil Rights Act of 1964 because the Equal Employment Opportunity Commission (EEOC) had not found "reasonable cause" to support a claim of discrimination. *Id.* at 797, 5 FEP Cases at 967. The Supreme Court affirmed the Eighth Circuit's decision, which had held that the EEOC's findings were not dispositive of the question whether a suit could be brought. *Id.* The Court then went on to describe the burdens of proof applied at trial. *Id.* at 797-98, 5 FEP Cases at 967. See also *Burdine*, 450 U.S. at 250-52, 25 FEP Cases at 114-15. In *Burdine* the Fifth Circuit reversed the decision of the trial judge and held that the defendant had to prove a nondiscriminatory reason by a preponderance of the evidence to rebut the plaintiff's prima facie case. 450 U.S. at 252, 25 FEP Cases at 114. The Supreme Court reversed, holding that the burden of persuasion remains with plaintiff throughout the trial, and then went on to explain the shifting burden of production. *Id.* at 253-56, 25 FEP Cases at 115-16. See also *Loeb*, 600 F.2d at 1012-15, 20 FEP Cases at 35-37. In *Loeb*, the First Circuit, reviewing jury instructions given by the district court, held that the plaintiff was required to prove pretext by a preponderance of the evidence in order to prevail at trial. *Id.* at 1014, 20 FEP Cases at 36-37.

⁶⁴ See *McDonnell Douglas*, 411 U.S. at 805, 5 FEP Cases at 970. There the Court stated: "on the retrial [the employee] must be given a full and fair opportunity to demonstrate by competent evidence that the *presumptively valid* reasons for his rejection were in fact a coverup for a . . . discriminatory decision." *Id.* (emphasis added).

⁶⁵ See FED. R. CIV. P. 56. The relevant text of Rule 56(c) is as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id.

⁶⁶ The burden placed on the defendant to rebut the prima facie case is not difficult to surmount. The defendant must articulate a valid reason for its action which meets the negative proof of the prima facie case. *Loeb*, 600 F.2d at 1011-12 & n.5, 20 FEP Cases at 35 & n.5. Thus, the defendant will either contradict one of the assertions which comprise the prima facie case or state a valid reason which is separate from the plaintiff's case. See *id.* Moreover, the defendant's asserted reason need only be nondiscriminatory — it does not have to be a prudent reason. *Id.* at 1012 n.6, 20 FEP Cases at 35 n.6.

⁶⁷ *Sharry*, 36 FEP Cases at 1823-24.

therefore sufficient to require a trial on the merits,⁶⁸ while also explicitly rejecting the magistrate's finding that direct proof of pretext is necessary to obtain a trial on the merits.⁶⁹ The court's holding that direct proof of pretext is not required is clearly correct because such a requirement would nullify the effectiveness of the prima facie case device. If the plaintiff could adduce direct proof of the defendant's motive in the pretext context, he or she would have no need of the presumption created by that device.⁷⁰ Moreover, the Supreme Court stated in *Burdine* that pretext could be proved by either direct or indirect evidence.⁷¹

In summary, the Court in *Sharry* held that, where an employer asserts a nondiscriminatory reason for discharge, an employment discrimination plaintiff must present enough evidence to support an inference of pretext to obtain a trial on the merits. In so holding, the *Sharry* court clarified that the Supreme Court's structure for a shifting burden of proof in employment discrimination cases creates two presumptions, one in favor of the plaintiff and another in favor of the defendant, both of which can put an end to litigation before trial. Thus, in most cases, where the defendant is able to assert a nondiscriminatory reason for the complained of discharge, the plaintiff should present enough evidence in his or her prima facie case so as to raise an inference of pretext.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1823.

⁷⁰ *Id.* at 1824. See *Burdine*, 450 U.S. at 256, 25 FEP Cases at 116; *Loeb*, 600 F.2d at 1014, 20 FEP Cases at 36-37.

⁷¹ *Burdine*, 450 U.S. at 256, 25 FEP Cases at 116.