

1981-1982 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW

LABOR RELATIONS LAW

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LABOR RELATIONS LAW

I. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. Bargaining Unit Determination

1.* *Religious/Lay Employee Units: Mercy Hospital of Buffalo v. NLRB*¹

Determining the proper composition of an employee bargaining unit is a highly discretionary task and is left largely to the National Labor Relations Board (the Board).² Section 9(a)³ of the National Labor Relations Act (the Act) requires only that a bargaining unit be "appropriate."⁴ In reviewing the Board's determination of what constitutes an appropriate unit,⁵ courts will interfere only if the decision is arbitrary or capricious.⁶ Thus, it is only in situations where the record is inadequate to support the decision made that courts may overturn the Board's judgment.⁷ In exercising its discretionary authority, the Board's primary test for determining the appropriateness of a bargaining unit is whether the proposed members share a sufficient "community of interest."⁸ Relevant to this inquiry are factors such as the wages, hours, interaction, duties, skills and supervision of the bargaining unit's membership.⁹ The rationale for the community of interest requirement is that by assuring greater similarity of working conditions of bargaining unit members, a greater likelihood of effective collective action will be fostered.¹⁰ Thus, significant incongruities in the composition of a proposed bargaining unit will undermine

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¹ 668 F.2d 661, 109 L.R.R.M. (BNA) 2388 (2d Cir. 1982).

² 18C T. KHEEL, BUSINESS ORGANIZATIONS, LABOR LAW § 14.01[1] (1981).

³ 29 U.S.C. § 159(a) (1976).

⁴ Section 159(a) provides in pertinent part: "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining. . . ." 29 U.S.C. § 159(a) (1976) (emphasis added).

⁵ Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(5) (1976). For the provisions of section 159(a), see *supra* note 4. Thus, the Act mandates that an employer collectively bargain with his employee's representative when the bargaining unit so represented is "appropriate." See 29 U.S.C. §§ 158(a)(5), 9(a) (1976).

⁶ *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1974). In *Packard* the Court held that the National Labor Relations Act mandates that an employer must bargain with a board-certified representative, *id.* at 490, observing:

the issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed.

Id. at 491. See also *May Department Stores Co. v. NLRB*, 326 U.S. 376, 380 (1945) (concluding that the judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to "guarantee against arbitrary action by the Board.")

⁷ *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491-92 (1947).

⁸ See 18C T. KHEEL, BUSINESS ORGANIZATIONS, LABOR LAW § 14.02 [2] (1981).

⁹ *Id.*

¹⁰ *Id.* Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 WEST. RES. L. REV. 479, 487-88 (1967).

the unit's "appropriateness," and will release the employer from the statutory duty to bargain.¹¹

In recent years, the community of interest doctrine has been used to challenge the exclusion of religious order employees from bargaining units containing lay personnel. During the *Survey* year, the United States Court of Appeals for the Second Circuit in *Mercy Hospital of Buffalo v. NLRB*¹² again considered the application of this standard to religious order personnel, and continued a trend toward limiting the exclusion of such persons from bargaining units for the absence of a community of interests with lay employees. Challenges to the inclusion of religious order personnel in lay employee bargaining units have arisen in instances where institutions have been founded, administered or controlled by a religious order to which religious employees seeking admission to the unit belonged. In its first effort to treat the appropriateness of a mixed lay/religious employee bargaining unit, the Board in *Fordham University*¹³ ordered the inclusion of religious faculty in the unit.¹⁴ In its next major treatment of the issue, the Board in *Seton Hill College*¹⁵ rejected a challenge to the exclusion of religious faculty,¹⁶ and reversed *Fordham University* with respect to any inconsistencies.¹⁷ In excluding the religious faculty, the Board in *Seton Hill* based its decision on two grounds. First, the Board reasoned that the religious faculty "would be subject to conflicting loyalties" if included in the unit.¹⁸ Second, the Board determined that the religious faculty did not share the same "economic interests" as the lay faculty.¹⁹

¹¹ 18C T. KHEEL, BUSINESS ORGANIZATIONS, LABOR LAW § 14.02 [2] (1981). See also *supra* note 5.

¹² 668 F.2d 661, 109 L.R.R.M. (BNA) 2388 (2d Cir. 1982).

¹³ 193 N.L.R.B. 134, 78 L.R.R.M. (BNA) 1177 (1971).

¹⁴ *Id.* at 140, 78 L.R.R.M. (BNA) at 1184. In *Fordham*, seventy of the university's 500 full-time faculty members were members of the Society of Jesus. *Id.*, 78 L.R.R.M. (BNA) at 1184. Most of the Jesuit faculty members lived in a separate building and had their salaries paid to the order. *Id.*, at 139, 78 L.R.R.M. (BNA) at 1183. This arrangement, however, was not mandatory for the order members. *Id.* The Jesuit faculty were hired and employed under the same terms and conditions as the lay faculty, and received comparable salaries. *Id.* The union requested the inclusion of the Jesuits in the faculty bargaining unit, and the employer did not object. *Id.* The Board concluded that as there was "no evidence that membership in the Order is in any way inconsistent with collective bargaining with respect to a Jesuit's salary or other terms and conditions of employment," the religious faculty should be included. *Id.*, 78 L.R.R.M. (BNA) at 1183-84.

¹⁵ 201 N.L.R.B. 1026, 82 L.R.R.M. (BNA) 1434 (1973).

¹⁶ 3a *Id.* at 1027, 82 L.R.R.M. (BNA) at 1435-36.

¹⁷ *Id.* at 1027 n.4, 82 L.R.R.M. (BNA) at 1435 n.4. Seton Hill College was owned and operated by the Sisters of Charity of Seton Hill College. *Id.* Over half of the college's faculty were order members, and members of the order constituted 50% of the institution's board of trustees. *Id.* The pay for the religious faculty was sent directly to the order, and there was a contractual obligation whereby the order returned a substantial portion of the members' salaries to the college. *Id.*, 82 L.R.R.M. (BNA) at 1435. The union sought to exclude the religious faculty from the bargaining unit while the employer requested their inclusion. *Id.*, 82 L.R.R.M. (BNA) at 1434.

¹⁸ *Id.* at 1027, 82 L.R.R.M. (BNA) at 1435. The Board reasoned that because the order was in fact the employer, and because the religious employees owed a duty of allegiance to the order, they were "in a sense part of the employer." *Id.* Thus, the Board concluded that if they were included in the bargaining unit, the religious faculty would be torn between their loyalty to their fellow employees and their duty to the order/employer. *Id.*

¹⁹ *Id.* The Board reasoned that because the religious faculty had taken vows of poverty

In the years since *Seton Hill College*, courts considering the appropriateness of bargaining units commingling lay and religious personnel of sectarian institutions have limited that decision's potentially broad application.²⁰ In 1977, the Second Circuit Court of Appeals in *Niagara University v. NLRB*²¹ rendered a significant decision on the pertinence of religious vows to these bargaining unit determinations.²² The *Niagara* court considered whether a vow of obedience could constitute a sufficiently conflicting loyalty and whether a vow of poverty could constitute a sufficiently divergent economic interest to justify exclusion of the religious faculty from the faculty bargaining unit of an allegedly sectarian university.²³ The circuit court, distinguishing *Seton Hill College*, held that under the facts presented, the religious faculty could not be excluded from the unit.²⁴ Treating the first theory for excluding the religious faculty, conflicting loyalties,²⁵ the *Niagara* court declared that before the possibility of such a conflict could be demonstrated, the religious order's control of the institution must be established.²⁶ Reviewing *Seton Hill College*, the *Niagara* court noted that there the religious order had owned and operated the institution in question.²⁷ In *Niagara*, however, the order neither held title to the campus nor constituted a majority of the board of trustees.²⁸ The court thus concluded that as the threshold requirement of control was not satisfied, the argument that the religious faculty would be subject to conflicting loyalties was not viable.²⁹ The *Niagara* court therefore did not need to consider the effect of the religious faculty

and were under a contractual obligation to return a portion of their salaries, they were not interested in economic rewards, and thus did not share the lay employees' interests. *Id.* Moreover, the separate treatment of the two groups' fringe benefits was seen by the Board as the employer's recognition of the groups' diverse economic interests. *Id.*

²⁰ See, e.g., *NLRB v. Saint Francis College*, 562 F.2d 246, 250-51, 96 L.R.R.M. (BNA) 2134, 2136-38 (3d Cir. 1977); *Niagara University v. NLRB*, 558 F.2d 1116, 1118, 95 L.R.R.M. (BNA) 3354, 3355 (2d Cir. 1977). See generally Note, *Religious/Lay Faculty Units: Niagara University: St. Francis College*, 20 B.C.L. REV. 83 (1978).

²¹ 558 F.2d 1116, 95 L.R.R.M. (BNA) 3354 (2d Cir. 1977).

²² In *Seton Hill*, both grounds advanced by the Board for its holding were based in part on the religious vows taken by the members of the order employed by the college. See *supra* notes 18-19 and accompanying text. The Board's reasoning, therefore, raised questions whether religious vows alone would suffice to establish "conflicting loyalties" for religious personnel of sectarian institutions, or to demonstrate the absence of common "economic interests" between the religious and lay personnel. In *Niagara*, the Second Circuit addressed these issues. 558 F.2d at 1117-18, 95 L.R.R.M. (BNA) at 3354-55. *Niagara* was factually similar to *Seton Hill*. *Niagara* was a Roman Catholic university founded by the Congregation of the Mission, commonly known as the Vincentian Order. *Id.* at 1117, 95 L.R.R.M. (BNA) at 3354. Twenty-one of the university's 155 full-time faculty were members of religious orders. *Id.* The university, which was chartered by the state of New York, held title to all of the buildings and property on campus. *Id.* at 1117-18, 95 L.R.R.M. (BNA) at 3354-55. A seventeen-member board of trustees, five of whom were members of the Vincentian Order, governed the university. *Id.* at 1118, 95 L.R.R.M. (BNA) at 3355.

²³ *Id.* at 1120 & n.3, 95 L.R.R.M. (BNA) at 3356 & n.3.

²⁴ *Id.* at 1121, 95 L.R.R.M. (BNA) at 3357-58.

²⁵ *Id.* at 1119, 95 L.R.R.M. (BNA) at 3355-56. The *Niagara* court expressed this concept in terms of an "identity of interest" between the religious employee and the religious order/employer. *Id.*, 95 L.R.R.M. (BNA) at 3356.

²⁶ *Id.* (citing D'Youville College, 225 N.L.R.B. 792, 92 L.R.R.M. (BNA) 1578 (1976)).

²⁷ 558 F.2d at 1119, 95 L.R.R.M. (BNA) at 3355-56.

²⁸ *Id.*

²⁹ *Id.* at 1121, 95 L.R.R.M. (BNA) at 3357-58.

members' vows of obedience on their employment situation.³⁰ The court intimated, however, that even if the religious order did control the employer, vows of obedience could not be relied upon alone to establish that the religious faculty were subject to conflicting loyalties.³¹ Considering the second ground advanced for exclusion, divergence of economic interests, the *Niagara* court held that vows of poverty themselves could not establish divergent interests.³²

The Second Circuit's decision in *Niagara* therefore had a two-fold effect on *Seton Hill College* and its progeny. First, *Niagara* expressly established as a threshold requirement the showing of a religious order's "control" over an employer institution before religious order employees may be excluded for possible conflicting loyalties.³³ Second, *Niagara* undercut reliance on religious vows to establish the presence of either conflicting loyalties or diverse economic interests.³⁴ The *Niagara* court's opinion, however, also left several issues unresolved. Specifically, *Niagara* did not address what proof must be adduced to demonstrate that a religious order "controls" an employer. Furthermore, assuming an order's control of an employer were to be shown, *Niagara* did not deal with what evidence would suffice to establish the potential for conflicting loyalties of religious order employees.

The Second Circuit's *Survey*-year decision in *Mercy Hospital*³⁵ readdressed these issues left unresolved by *Niagara*, and traced more fully the parameters for excluding religious order personnel from the bargaining unit of employees of sectarian institutions. First, the *Mercy Hospital* court fleshed out the control requirement it had imposed in *Niagara* for establishing the conflict of interests exclusion theory.³⁶ The court reaffirmed the position it adopted in *Niagara* that no one factor is sufficient to establish that a religious order indeed controls an institution.³⁷ Next, the *Mercy Hospital* court considered what relationship between religious personnel and the order administering the employer must exist to establish that the religious employees' interests were closely aligned with the employer, and thus in conflict with other unit members' interests.³⁸ The *Mercy Hospital* court set out factors which could demonstrate the existence of an identity of interests between religious personnel and their religious order.³⁹ The

³⁰ The court stated: "The Board on this appeal understandably has not raised the issue of the vows of obedience, and we do not consider it an issue." *Id.*, 95 L.R.R.M. (BNA) at 3356.

³¹ *Id.* at 1120 n.3, 95 L.R.R.M. (BNA) at 3356 n.3. The court noted that the Board had retreated in its subsequent clarification opinion from its original position that vows of obedience could suffice to establish an identity of interest between the religious faculty and the order. *Id.* at 1120, 95 L.R.R.M. (BNA) at 3356.

³² *Id.* at 1121, 95 L.R.R.M. (BNA) at 3358. The *Niagara* court noted the Board's own recognition of the irrelevance of vows of poverty to the issue of economic interests. *Id.* at 1120-21, 95 L.R.R.M. (BNA) at 3357.

³³ *Id.* at 1119, 95 L.R.R.M. (BNA) at 3356.

³⁴ *Id.* at 1120 & n.3, 95 L.R.R.M. (BNA) at 3356 & n.3.

³⁵ 668 F.2d 661, 109 L.R.R.M. (BNA) 2388 (2d Cir. 1982).

³⁶ *Id.* at 664-65, 109 L.R.R.M. (BNA) 2391-92.

³⁷ *Id.* at 665, 109 L.R.R.M. (BNA) at 2392.

³⁸ *Id.* at 665-67, 109 L.R.R.M. (BNA) at 2392-94. The *Mercy Hospital* court couched its discussion in terms of whether the religious employee was "in a sense, part of the employer" because of her membership in the Order, which allegedly controlled the employer. *Id.* at 666, 109 L.R.R.M. (BNA) at 2392. See *supra* note 18 and accompanying text.

³⁹ 668 F.2d at 667, 109 L.R.R.M. (BNA) at 2393-94.

Second Circuit's decision in *Mercy Hospital* thus is the logical extension of its holding in *Niagara University v. NLRB* that to exclude religious personnel from a bargaining unit due to a lack of appropriateness, evidence must be brought demonstrating both the order's control of the employer institution, and the religious employee's identity of interest with the order.

In *Mercy Hospital*, the hospital had refused to bargain with the certified representative⁴⁰ of the hospital's full- and part-time business office clerical employees.⁴¹ The hospital contended that the bargaining unit which had elected the union as its representative was not appropriate.⁴² The facts of the case showed that in the close representation election, a ballot cast by a religious order employee was excluded.⁴³ The challenged ballot was cast by a member of the Religious Sisters of Mercy (the Order), a religious order that allegedly controlled the hospital.⁴⁴ In the court's view, however, the evidence demonstrated that the hospital was a New York corporation distinct from the Order.⁴⁵ The Order was the sponsoring organization of the hospital, but the hospital corporation held title to the institution's lands and buildings.⁴⁶ A seventeen-member board of trustees, of whom a majority had to be Sisters of Mercy, governed the hospital.⁴⁷ Space in the hospital for a convent was rented by the Order, and some members of the Order lived there.⁴⁸ Twenty-three of the hospital's 1,500 employees were members of the Order.⁴⁹ The Order did not donate money to the hospital.⁵⁰ The hospital's administrator was a member of the Order, but she apparently was not under the direct control of the Order in her supervisory capacity.⁵¹ Finally, the Order-member employee in question was employed under terms and conditions similar to lay employees.⁵² Despite this evidence of separateness, the Regional Director nevertheless concluded that the religious employee did not share a community of interest with lay employees because her Order "controlled" the hospital, and therefore as a member of the Order she was "related" to the employer.⁵³ The Regional Director thus recommended that the challenge to the religious employee's vote be sustained and the bargaining unit certified.⁵⁴

⁴⁰ The union involved was the Buffalo and Western New York Hospital and Nursing Home Council. *Id.* at 661, 109 L.R.R.M. (BNA) at 2389.

⁴¹ *Id.* at 662, 109 L.R.R.M. (BNA) at 2389.

⁴² *Id.*, 109 L.R.R.M. (BNA) at 2389.

⁴³ *Id.*, 109 L.R.R.M. (BNA) at 2389. The representation election for the contested bargaining unit produced 33 votes for the union and 32 votes against, with one challenged ballot. *Id.*, 109 L.R.R.M. (BNA) at 2389.

⁴⁴ *Id.* at 663, 109 L.R.R.M. (BNA) at 2390.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 663-64, 109 L.R.R.M. (BNA) at 2390-91.

⁵² *Id.*

⁵³ *Id.* at 662, 109 L.R.R.M. (BNA) at 2389.

⁵⁴ *Id.* at 663, 109 L.R.R.M. (BNA) at 2390.

Affirming the Regional Director's findings, the Board distinguished the Second Circuit's holding in *Niagara University*.⁵⁵ With regard to the issue of the Order's control over the hospital, the Board in *Mercy Hospital* read *Niagara* as holding that in the absence of control of the institution's board of trustees or ownership of the institution's facilities, a religious order's control over an institution could not be established.⁵⁶ Thus, the Board reasoned that the converse situation — majority representation by the Order on the board of trustees — would be sufficient to establish the necessary control.⁵⁷ The Board deemed its conclusion buttressed by its perception that the Order controlled the hospital's day-to-day operation,⁵⁸ a perception apparently based on the administrator's membership in the Order. Turning then to the identity of interests between the religious personnel and the Order, the Board distinguished a decision by the Third Circuit Court of Appeals apparently in conflict with the Regional Director's report.⁵⁹ In *NLRB v. Saint Francis College*,⁶⁰ the Third Circuit held that religious faculty members' vows of obedience and their shared commitment could not establish the presence of conflicting loyalties sufficient to warrant exclusion from the faculty bargaining unit.⁶¹ The Board in *Mercy Hospital* concluded that *Saint Francis* was inapplicable, because in the case before it the Regional Director's decision did not rely on the religious employee's vows of obedience or poverty.⁶² Thus, the Board's decision implicitly adopted the reasoning that membership in a religious order in itself establishes the presence of an identity of interests between the order and its members, and therefore puts the loyalty of religious employees to the order in conflict with their loyalty to the bargaining unit. Under this analysis, the Order's control of the employer, which the Board deemed established, automatically severed the religious employee's community of interests with lay personnel.⁶³ Consequently, the Board adopted the Regional Director's recommendation that the challenge to the religious employee's ballot be sustained, and certified the bargaining unit excluding her.⁶⁴

On appeal, the Second Circuit found that the record was insufficient to support either the Regional Director's finding of control, or his determination

⁵⁵ 250 N.L.R.B. 949 (1980).

⁵⁶ *Id.*

⁵⁷ *Id.* at 949-50. The Board noted that its reasoning in this regard was apparently contrary to that of the Third Circuit in *NLRB v. Saint Francis College*, 562 F.2d 246, 96 L.R.R.M. (BNA) 2134 (3d Cir. 1977). *Id.* at 949 n.3. The Board declared, however, that "[t]o the extent the court implicitly may have found that a majority control of a board of trustees by a religious order does not constitute a basis for excluding members of that order from a bargaining unit, we respectfully disagree." *Id.*

⁵⁸ *Id.* at 949.

⁵⁹ *Id.* at 949 n.3.

⁶⁰ 562 F.2d 246, 96 L.R.R.M. (BNA) 2134 (3d Cir. 1977). See also *supra* note 57.

⁶¹ *Id.* at 255, 96 L.R.R.M. (BNA) at 2141.

⁶² 250 N.L.R.B. at 949.

⁶³ See *id.*, at 949-50.

⁶⁴ *Id.* at 950. Subsequently, the hospital refused to bargain with the union in order to seek judicial review of the certification. 668 F.2d at 662, 109 L.R.R.M. (BNA) at 2389. The union filed a charge and the Regional Director issued a complaint alleging that the hospital's refusal was an unfair labor practice. *Id.* The Board thereafter issued, without prior hearing, an

that there was an identity of interests between the religious order employee and the employer.⁶⁵ Turning to the grounds relied upon for finding the absence of a community of interest between the lay and religious employees, the circuit court first rejected the Board's reading of the precedent on a religious order's "control of an institution."⁶⁶ The court cited three opinions by the Board in which members of religious orders were excluded from bargaining units.⁶⁷ In each case, the *Mercy Hospital* court noted, there had been evidence of a marked degree of financial control by a religious order over an institution.⁶⁸ Such financial control was absent in *Mercy Hospital*.⁶⁹ Moreover, the Board's reasoning that control of a board of trustees established control of an institution's day-to-day operation was unsupported by precedent, the *Mercy Hospital* court declared.⁷⁰ The court noted that in both *D'Youville College*⁷¹ and *Niagara*, which were cited by the Board for support, the absence of majority representation on the institutions' boards of trustees was relied upon as evidence of the absence of the orders' control.⁷² This factor, however, was not, in the *Mercy Hospital* court's estimation, the principal ground of the decision in either of the two cases.⁷³ Rather, the *Mercy Hospital* court declared, "[a]s Niagara makes clear, reliance on any single factor to the exclusion of others to show control is unacceptable."⁷⁴ Thus, the Second Circuit found as unsatisfactory to establish control the Order's majority representation on the board of trustees, and the hospital administrator's membership in the Order and on the board.⁷⁵ The circuit court therefore remanded the case to the Board for further findings of fact on the issue of the Order's "control" of *Mercy Hospital*.⁷⁶ The court noted that on remand, the Board should focus its attention on the responsibilities and authority of the board of trustees and the administrator of *Mercy Hospital*.⁷⁷ The court deemed especially important facts demonstrating the board of trustee's actual control of the hospital and whether the Order members serving as

order granting summary judgment to the union, requiring the hospital to bargain with the union. *Id.* The hospital appealed, and the Board filed a cross-application for enforcement of its order. *Id.*

⁶⁵ *Id.* at 664, 109 L.R.R.M. (BNA) at 2391.

⁶⁶ *Id.* at 664-665, 109 L.R.R.M. BNA at 2391-92.

⁶⁷ *Id.* (citing *St. Rose de Lima Hospital*, 223 N.L.R.B. 1511, 92 L.R.R.M. (BNA) 1181 (1976); *Saint Anthony Center*, 220 N.L.R.B. 1009, 90 L.R.R.M. (BNA) 1405 (1975); *Seton Hill College*, 201 N.L.R.B. 1026, 82 L.R.R.M. (BNA) 1434 (1973)).

⁶⁸ 668 F.2d at 664-65, 109 L.R.R.M. (BNA) at 2391-93.

⁶⁹ *Id.* at 666, 109 L.R.R.M. (BNA) at 2394.

⁷⁰ *Id.*, at 109 L.R.R.M. (BNA) at 2391. The *Mercy Hospital* court noted that the Board's conclusion that the Order's majority membership on the board of trustees and the top administrator's membership in the Order was sufficient to establish control had been declared insufficient by the Third Circuit in an analogous context. *Id.* at 666, 109 L.R.R.M. (BNA) at 2392, citing *NLRB v. Saint Francis College*, 562 F.2d 246, 250-51, 96 L.R.R.M. (BNA) 2134, 2136-38 (3d Cir. 1977).

⁷¹ 225 N.L.R.B. 792, 92 L.R.R.M. (BNA) 1578 (1976).

⁷² 668 F.2d at 664-65, 109 L.R.R.M. (BNA) at 2391-92.

⁷³ *Id.* at 665, 109 L.R.R.M. (BNA) at 2392.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

trustees and the administrator were autonomous, or acted on instructions from the Order.⁷⁸

Turning to the central inquiry for the exclusion of the religious employee's vote, the Second Circuit noted that even if the threshold issue of control were resolved against the Order, it would not necessarily follow that an identity of interest had been established between the employee and the employer.⁷⁹ Rather, the court declared that on remand to gather evidence on the Order's control, the Board also must justify its finding that the religious employee's interests were those of the employer.⁸⁰ The court then considered what facts could establish such an identity of interest to justify the religious employee's exclusion from the bargaining unit. First, the Second Circuit rejected the Board's automatic exclusion of the religious employee because of her membership in the Order.⁸¹ The court recognized that the Board rationalized its *per se* exclusion by comparing the *Mercy Hospital* situation to cases involving blood relatives of management.⁸² The circuit court noted, however, that even in those cases, the blood relationship did not alone establish automatic exclusion.⁸³ Instead, the "community of interest" analysis was employed on a case-by-case basis to determine whether the interests of the family employees differed from those of the other members of the bargaining unit.⁸⁴

The next ground considered by the court for justifying the religious employee's exclusion was her religious vows.⁸⁵ The circuit court declared that a natural concomitant of the Board's automatic exclusion in *Mercy Hospital* was its reliance on the religious employee's vows, which the court in *Niagara* had previously deemed inappropriate.⁸⁶ The *Mercy Hospital* court then turned to the third justification for exclusion, and declared that differences in the terms and conditions of employment would suffice to justify the exclusion of religious personnel from employee bargaining units.⁸⁷ The court noted that the wages received by the lay and religious employees were comparable.⁸⁸ The court declared, however, that other differences in employment terms and conditions, such as utilization of the privilege of unpaid vacations or differential access to areas of the hospital could establish grounds for exclusion.⁸⁹ The *Mercy Hospital* court noted that the religious employee's access to the Order's convent and dining room,⁹⁰ or any other proof showing the religious employee's position was unique, could suffice to establish such a variance in employment terms.⁹¹

⁷⁸ *Id.*

⁷⁹ *Id.* at 666, 109 L.R.R.M. (BNA) at 2392-93.

⁸⁰ *Id.*, 109 L.R.R.M. (BNA) at 2393.

⁸¹ *Id.* at 667, 109 L.R.R.M. (BNA) at 2393.

⁸² *Id.* at 666, 109 L.R.R.M. (BNA) at 2393.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 667, 109 L.R.R.M. (BNA) at 2393.

⁸⁶ *Id.*

⁸⁷ *Id.*, 109 L.R.R.M. (BNA) at 2393-94.

⁸⁸ *Id.*, 109 L.R.R.M. (BNA) at 2393.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

The practical impact of the Second Circuit's ruling in *Mercy Hospital* is to make more difficult the exclusion of religious personnel from employee bargaining units of institutions affiliated with religious orders. The court's decision restricts the Board's prior ruling in *Seton Hill College* to the extent that proof of a religious order's control of an institution will require some evidence of financial control. Furthermore, control alone will not suffice to establish grounds for the exclusion of religious personnel from employee bargaining units. Rather, evidence demonstrating that the religious personnel are employed under terms and conditions different from lay personnel must be produced. The circuit court noted that in *Mercy Hospital* sensitive competing interests of collective bargaining rights and first amendment rights were involved.⁹² Thus, the purpose of the circuit court's ruling requiring evidence to establish the religious personnel's identity of interest with the employer was "to strike an appropriate balance between these competing interests without infringing cherished beliefs."⁹³

With regard to the effect of proof that the terms and conditions of the religious and lay personnel's employment differed, however, the *Mercy Hospital* court's treatment was somewhat ambiguous. The terms and conditions focused upon by the court as probative in *Mercy Hospital* were the wages, the unpaid vacation privilege, and the differential access to areas within the hospital.⁹⁴ The court's treatment of these factors did not make clear whether differences in these terms and conditions would themselves suffice to demonstrate an absence of a community of interest between lay and religious personnel, or would only be probative if the Order's control of the hospital was first established.⁹⁵ Generally, wages and hours are alone sufficient to determine a bargaining unit's community of interest.⁹⁶ Conversely, differential access would not appear to be demonstrative of divergent terms and conditions unless the Order were deemed to control the hospital.⁹⁷ The ambiguous treatment of the wage and hour employment terms, however, could be explained in the context of levels of proof. The court might well have meant that once control of an institution by a religious order is established, differences in wages or hours which in themselves would not be sufficient to justify exclusion of an employee from a bargaining unit would be sufficient to establish divergent terms of employment if the employee were a member of the religious order. Thus, a lower threshold for establishing excludable terms and conditions of employment for religious personnel would arise upon proof of their Order's control of the employer.

⁹² *Id.*, 109 L.R.R.M. (BNA) at 2394. The court declared that "[n]ot only are the rights of employees to bargain collectively at stake . . . but protected First Amendment rights are also implicated. . . ." *Id.*

⁹³ *Id.*

⁹⁴ *Id.*, 109 L.R.R.M. (BNA) at 2393.

⁹⁵ *See id.*

⁹⁶ *See* 18C T. KHEEL, BUSINESS ORGANIZATIONS, LABOR LAW § 14.02 [2] (1981).

⁹⁷ If the Order did not control the employer, the Order member's exclusive access to areas leased by the Order would bear no relation to the religious personnel's employment situation. *See supra* text accompanying note 48.

2. * *Application of "Labor-Nexus" Test to Determine Exclusion of "Confidential Employees" from NLRA: NLRB v. Hendricks County Rural Electric Membership Corporation*¹

Under the National Labor Relations Act (NLRA or Act),² it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of employees or to interfere with the right of employees to engage in activities designed for the purpose of mutual aid or protection.³ As originally enacted in 1935,⁴ the Act in section 2(3) defined "employee" broadly to include "any employee."⁵ Section 2(3) also listed specific types of workers who were excluded from the definition.⁶ Employees with access to confidential information of their employers ("confidential employees") were not expressly excluded by the Act. The National Labor Relations Board (NLRB or Board), however, was soon faced with the argument that confidential employees should be excluded from the Act's definition of "employee" as a policy matter because they are entrusted with confidential matters and act in the interest of management.⁷ The Board rejected such an implied exclusion, finding it not

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¹ 102 S. Ct. 216 (1981).

² Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)).

³ Section 158(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1976), reads:

It shall be an unfair labor practice for an employer —

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

Id.

Section 158(a)(1) of the Act, *Id.* § 158(a)(1), reads:

It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Id.

Section 157, *Id.* § 157, incorporated by reference by section 158(a)(1) reads:

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.

Id. § 157.

⁴ Wagner Act, ch. 117, 46 Stat. 1084 (1931) (current version at 29 U.S.C. § 48 (1976)).

⁵ Section 2(3) of the Act 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 having the status of an independent contractor, or any individual employed as a *supervisor*. . . .

29 U.S.C. § 152(3) (1976) (emphasis added).

⁶ See *supra* note 5.

⁷ See, e.g., Bull Dog Elec. Prod. Co., 22 N.L.R.B. 1043, 1046 (1940).

warranted under the Act.⁸ Nevertheless in fulfilling its statutory obligation to determine the composition of bargaining units under section 9 of the Act,⁹ the Board adopted a "labor-nexus" test to determine the propriety of excluding certain employees.¹⁰ Under this test, employees with access to confidential, labor-relations information of the employer were excluded from bargaining units composed of rank and file workers.¹¹ The Board's rationale for excluding confidential employees with a labor nexus from bargaining units was that management should not be required to handle labor relations matters through employees who are represented by the union with which the company is required to deal and who may obtain advance information of the company's position.¹² Through 1946, the Board applied the labor-nexus test frequently to identify those individuals who were to be excluded from bargaining units because of their access to confidential information.¹³ In 1946, the Board narrowed the labor-nexus test because, in its view, the definition was too broad and thus needlessly excluded many employees from bargaining collectively together with other employees having common interests.¹⁴ Under the "new" labor-nexus test, the term "confidential" was limited to embrace only those employees who assist in a confidential capacity persons who exercise managerial functions in the labor-relations field.¹⁵ Under the original version of the NLRA as enforced by the Board, therefore, the "labor-nexus" test was used to determine the propriety of excluding certain confidential employees from bargaining units.

Congress had an opportunity to review the Board's use of the "labor-nexus" test in 1947. In that year, Congress amended the NLRA through the enactment of the Taft-Hartley Act.¹⁶ The text of the Taft-Hartley Act made no explicit reference to confidential employees. Congress addressed the scope of the NLRA's coverage, however, when it discussed the status of confidential employees in its debate over the Taft-Hartley Act.¹⁷ The House and Senate in-

⁸ *Id.*

⁹ 29 U.S.C. § 159 (1976). The NLRB has been vested with broad discretion to determine appropriate bargaining units under section 9. *See Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491-92 (1947); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 152-53 (1941).

¹⁰ *See, e.g., Creamery Package Mfg. Co.*, 34 N.L.R.B. 108, 110 (1941); *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939).

¹¹ *See, e.g., NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 222-23 (1981); *Creamery Package Mfg. Co.*, 34 N.L.R.B. 108, 110 (1941); *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939).

¹² *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944).

¹³ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 222-23 (1981). For a collection of the Board's decisions applying the "labor-nexus" test prior to 1947, *see id.*, n.11.

¹⁴ *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946).

¹⁵ *Id.* The Ford Motor approach was followed in three decisions in 1946: *Brown & Sharpe Mfg. Co.*, 68 N.L.R.B. 487, 489 (1946); *St. Louis Indep. Packing Co.*, 67 N.L.R.B. 543, 547 (1946); *Tenn. Gas & Transmission Co.*, 67 N.L.R.B. 1375, 1379 (1946). In *B.F. Goodrich Co.*, 115 N.L.R.B. 722 (1956), the Board reaffirmed its previous ruling in *Ford Motor* and underscored its intention in future cases "to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *Id.* at 724.

¹⁶ Taft-Hartley Act of 1947, 61 Stat. 136 (codified in scattered sections of 29 U.S.C.).

¹⁷ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 224

initially passed differing bills.¹⁸ Both bills explicitly excluded "supervisors" from the definition of "employee" in section 2(3).¹⁹ The bills, however, differed in defining the term "supervisor."²⁰ The House bill defined "supervisor" to include all confidential employees,²¹ while the Senate bill made no mention of confidential employees.²² The differing bills were submitted to a conference committee,²³ and, in committee, the Senate definition of "supervisor," with no reference to confidential employees, prevailed.²⁴ The Senate version of the Taft-Hartley Act subsequently became law.²⁵ The United States Supreme Court in *NLRB v. Bell Aerospace*,²⁶ however, upon examining the House and Conference Reports, concluded in a footnote that Congress "clearly thought" that the NLRA did not cover "confidential employees," even under a broad definition of that term.²⁷

The United States Courts of Appeals differ over the propriety of the Board's practice of excluding from collective-bargaining units only those con-

(1981).

¹⁸ *Id.*

(1947). ¹⁹ H.R. 3020, 80th Cong., 1st Sess. § 2(3) (1947); S. 1126, 80th Cong., 1st Sess. § 2(3)

(1981). ²⁰ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 224

follows: ²¹ H.R. 3020, 80th Cong., 1st Sess. § 2(12) (1947). Relevant portions of § 2(12) read as

The term supervisor means any individual — (C) who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.

Id.

following terms: ²² S. 1126, 80th Cong., 1st Sess. § 2(11) (1947). Section 2(11) defined supervisor in the

The term supervisor means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id.

(1981). ²³ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 225

²⁴ *Id.*

²⁵ *Id.*

²⁶ 416 U.S. 267 (1974).

²⁷ *Id.* at 284, n.12. The footnote reads as follows:

The report stated in reference to "confidential employees":

"These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. Most of the people who would qualify as 'confidential' employees are executives and are excluded from the Act in any event.

"The Board itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." *Ibid.* (Emphasis added.) In 1946 in *Ford Motor Co.* 66 NLRB [sic] 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "managerial" functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those

fidential employees with a labor nexus while rejecting any claim that all employees with access to confidential information are beyond the reach of section 2(3)'s definition of employee. Some such courts have upheld the Board's use of the "labor-nexus" test to determine whether confidential employees should be excluded from bargaining units;²⁸ at least one court of appeals has held that employees working in a confidential capacity without a labor nexus must be excluded from bargaining units established pursuant to the NLRA.²⁹

During the *Survey* year, the Supreme Court in *National Labor Relations Board v. Hendricks County Rural Electric Membership Corporation (Hendricks)*³⁰ resolved this dispute. The Court upheld the Board's practice of excluding from collective-bargaining units only those confidential employees who assist in a confidential capacity persons exercising managerial functions in labor relations matters.³¹ *Hendricks* involved two companion cases under the same docket number.³² In *Hendricks*, Mary Weatherman, the personal secretary to the general manager of Hendricks County Rural Electric Membership Corporation (*Hendricks*), was discharged for signing a petition that sought reinstatement of a close friend and fellow employee who had lost his arm in the course of employment.³³ She filed an unfair labor practice charge with the Board, alleging that the discharge violated section 8(a)(1) of the Act.³⁴ *Hendricks* argued that Weatherman was not entitled to the Act's protection since, as a "confidential" secretary, she was impliedly excluded from the Act's definition of employee in section 2(3).³⁵ The Administrative Law Judge (ALJ) rejected *Hendricks*' argument, observing that the Board excluded only those confidential employees who assist and act confidentially with managers in formulating and effectuating labor relations policies.³⁶ The ALJ thus sustained the unfair labor practice charge.³⁷ The NLRB affirmed and ordered that Weatherman be reinstated with back pay.³⁸ The United States Court of Appeals for the Seventh Circuit reversed, holding that secretaries such as Weatherman who work in a confidential capacity,

in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

Id.

²⁸ *Union Oil of Cal., Inc. v. NLRB*, 607 F.2d 852, 853-54 (9th Cir. 1979); *NLRB v. Allied Prod. Corp.*, 548 F.2d 644, 648 (6th Cir. 1977); *Westinghouse Elec. Corp. v. NLRB*, 398 F.2d 669, 670 (6th Cir. 1968); *NLRB v. Quaker City Life Ins. Co.*, 319 F.2d 690, 694 (4th Cir. 1963).

²⁹ *Hendricks County Rural Elec. Membership Corp. v. NLRB*, 603 F.2d 25, 30 (7th Cir. 1979).

³⁰ 102 S. Ct. 216 (1981).

³¹ *Id.* at 221-22.

³² *Id.* at 219.

³³ *Id.*

³⁴ *Id.* For the text of section 8(a)(1), 29 U.S.C. § 158(a)(1), see *supra* note 3.

³⁵ 102 S. Ct. at 219-20. For the text of sec. 2(3), 29 U.S.C. § 152(3), see *supra* note 5.

³⁶ 102 S. Ct. at 220.

³⁷ *Id.*

³⁸ *Id.* The Board affirmed "the rulings, findings, and conclusions" of the ALJ. *Id.*

without regard to labor relations, must be excluded from bargaining units established under the Act.³⁹

In the companion case, the Malleable Iron Range Company (Malleable) refused to bargain collectively with the Office and Professional Employees International Union (Union) despite certification of the Union by the Board.⁴⁰ At the certification hearing, Malleable had challenged the inclusion of eighteen employees in the bargaining unit on the ground that they had access to confidential business information.⁴¹ The Board's Regional Director rejected this objection on the ground that none of the challenged employees was a confidential employee under the Board's "labor-nexus" test.⁴² Malleable nevertheless refused to bargain with the union.⁴³ Seeking relief, the Union filed unfair labor practice charges with the Board.⁴⁴ The Board concluded that Malleable's refusal to bargain violated sections 8(a)(5)⁴⁵ and (1)⁴⁶ of the Act and issued an order requiring Malleable to bargain collectively with the Union.⁴⁷ Upon Malleable's petition for review, the Seventh Circuit denied enforcement of the order because the Regional Director had applied the "labor-nexus" test which the court had explicitly rejected in its decision involving *Hendricks*.⁴⁸ The Board petitioned for certiorari to the United States Supreme Court in *Malleable and Hendricks*.⁴⁹

The Supreme Court granted certiorari in both cases to resolve the conflict among the courts of appeals over the propriety of the Board's practice of excluding from collective-bargaining units only those confidential employees with a labor nexus.⁵⁰ The Court upheld the Board's "labor-nexus" test concluding that a reasonable basis in law⁵¹ existed for the Board to exclude only those confidential employees involved in labor-relations.⁵² The Court observed that the statutory definition of "employee" in section 2(3) embraced the workers whose status was being challenged in *Hendricks*.⁵³ The Court recognized, however,

³⁹ 603 F.2d 25, 30 (7th Cir. 1979).

⁴⁰ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 221 (1981).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 29 U.S.C. § 158(a)(5). For text of Section 158(a)(5), see *supra* note 2.

⁴⁶ 29 U.S.C. § 158(a)(1). For text of Section 158(a)(1), see *supra* note 3.

⁴⁷ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 221 (1981).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ As a prerequisite to finding that the Board's action had a reasonable basis in law, the Court has required a finding that the Board applied the proper legal standard and gave the plain language of the standard its ordinary meaning. See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944).

⁵² *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 228 (1981).

⁵³ *Id.* at 221, 222. For a discussion of these employees, see *supra* notes 33, 44 and accompanying text.

that the Board had excluded for over forty years those employees who assist and act in a confidential capacity to managerial persons in the labor-relations field from the collective-bargaining units determined under the Act.⁵⁴ The Court acknowledged that the respondents both challenged the Board's narrow labor nexus test and asserted that all employees who have access to *any* type of confidential business information of the employer are implicitly excluded from the definition of employee in section 2(3).⁵⁵ The Court emphasized, however, that the Board's construction of the Act should be followed unless there were compelling indications that it was wrong.⁵⁶ The Court first determined how the Board treated confidential employees prior to 1947.⁵⁷ The Court then reviewed congressional consideration of this practice which occurred during debates over the Taft-Hartley Act.⁵⁸ Finally, the Court sought to determine whether Congress, in enacting the Taft-Hartley Act in 1947 intended to alter the Board's practice.⁵⁹

The Court reasoned that before 1947 the Board's practice was to exclude from bargaining units only those confidential employees assisting managers in the labor-relations field.⁶⁰ Soon after the enactment of the NLRA in 1935, the Court observed, the Board was faced with the argument that individuals who had access to confidential information should be implicitly excluded from the definition of "employee" in section 2(3).⁶¹ The Court stated that the Board rejected such an argument.⁶² The Court observed that the Board did exclude, however, pursuant to section 9 of the Act,⁶³ employees with access to confidential, labor-relations information from bargaining units composed of specified groups of workers.⁶⁴ The Court explained that the Board's rationale for this ex-

⁵⁴ 102 S. Ct. at 222. The Court observed that under a literal reading of section 2(3) any employee, including Weatherman or the workers in Malleable, would be included in the Act. *Id.* This observation implies that the Board's exclusion of confidential employees is under section 2(3). The Court notes, however, that the Board has *never* accepted the suggestion that confidential employees are excluded under section 2(3). *Id.* The Board has, however, chosen to exercise discretion under section 9 to exclude confidential employees from bargaining units. See *supra* notes 7-12 and accompanying text.

⁵⁵ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 222 (1981).

⁵⁶ *Id.*

⁵⁷ *Id.* at 224. See also discussion of the Board's pre-1947 practice of excluding from bargaining units only confidential employees in the labor relations field *supra* notes 7-15 and accompanying text.

⁵⁸ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 224-25 (1981).

⁵⁹ *Id.* See also discussion of the Court's analysis of the legislative history of the Taft-Hartley Act *infra* notes 69-88 and accompanying text.

⁶⁰ 102 S. Ct. at 222. The Court remarked that the Board "routinely applied the labor-nexus test in numerous decisions to identify those individuals who were to be excluded from bargaining units because of their access to confidential information" following its formulation of the test around 1940. *Id.* at 223. For a collection of cases referred to by the Court, see *id.* at 222 n.11.

⁶¹ *Id.* at 223.

⁶² *Id.*

⁶³ 29 U.S.C. § 159 (1976). See also *supra* note 9.

⁶⁴ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 223 (1981).

clusion was to protect employers who otherwise would be disadvantaged in labor-relations matters by being required to deal with employees who may obtain advance information of the company's position with regard to contract negotiations, the disposition of grievances, and other labor-relations matters.⁶⁵ From 1940 to 1946, the Court concluded, the Board routinely applied only the labor-nexus test to exclude individuals from bargaining units on the basis of access to confidential information.⁶⁶ The Court observed that in 1946 the NLRB limited further the exclusion for access to confidential information by refining the "labor-nexus" test to extend only to individuals who act in a confidential capacity to persons who exercise *managerial* functions in the field of labor-relations.⁶⁷ The Court, thus, reasoned that when Congress considered the Taft-Hartley amendments in 1947, the Board's policy regarding confidential employees was clear: employees having access to confidential information on labor relations were excluded by the Board from the Act's bargaining units.⁶⁸

The Court observed that the Taft-Hartley Act does not refer explicitly to confidential employees.⁶⁹ According to the Court, however, Congress had considered the status of confidential employees when it had addressed the scope of the NLRA's coverage.⁷⁰ The Court observed nothing in the legislative history of the Taft-Hartley Act that showed that Congress intended to alter the Board's pre-1947 practice of excluding from bargaining units only confidential employees in the labor-relations field.⁷¹ To the contrary, the Court remarked, the legislative history indicated that Congress intended to retain the Board's prior practice.⁷²

The Court concluded first that the House conceded to the Senate that not all confidential employees would be excluded from the definition of employee.⁷³ The Court acknowledged that both the House and Senate versions

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 224.

⁶⁸ The Court rejected application of the *Bell Aerospace* footnote, *see supra* note 27, to exclude the workers in *Hendricks* from the definition of "confidential employees." 102 S.Ct. at 227. In footnote 12 of *Bell Aerospace*, Justice Powell upon considering the House bill, *see supra* note 21, and the Conference Report, *see infra* note 79 and accompanying text, stated that it was not necessary that confidential employees be involved in labor relations to be excluded from the Act's protection. *See supra* note 27. The Court in *Hendricks* observed that this discussion was mere dictum in *Bell Aerospace* because it was not necessary to the determination of the issue raised in *Bell Aerospace*, 102 S. Ct. at 227, whether managerial employees are excluded from the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 268 (1974). Thus, the court in *Hendricks* reasoned, Justice Powell's conclusion with regard to exclusion of confidential employees was entitled to diminished deference. 102 S. Ct. at 227. Furthermore, the Court concluded that the dictum was incorrect in light of the Court's discussion of the legislative history of the Taft-Hartley Act. *Id.* See discussion of the Court's analysis of the legislative history *infra* notes 70-82 and accompanying text.

⁶⁹ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 224 (1981).

⁷⁰ *Id.*

⁷¹ *Id.* See also discussion of the Board's pre-1947 practice of excluding from bargaining units only confidential employees in the labor-relations field, *supra* notes 7-15 and accompanying text.

⁷² 102 S. Ct. at 224.

⁷³ *Id.* at 225 & n.16.

of the Taft-Hartley Act specifically excluded "supervisors" from the definition of "employees" in section 2(3).⁷⁴ The Court also observed, however, that the House and Senate bills differed substantially in their definitions.⁷⁵ Only the House bill, the Court emphasized, included confidential employees as within the scope of the definition of "supervisor."⁷⁶ The Court observed that the Conference Committee ultimately adopted the Senate version which did not include confidential employees within the definition of "supervisor."⁷⁷ The Conference Committee, the Court noted, did not feel that it was necessary to make specific provision for persons working in labor-relations, as was done in the House bill,⁷⁸ because such employees were already being treated as "supervisors" by the Board.⁷⁹ According to the Court, both Houses⁸⁰ concluded that the Board would continue to treat confidential secretaries as outside the Act, and adopted the Conference Report.⁸¹ Therefore, the Court reasoned, the court of appeals had erred when it had interpreted the legislative history of Congress' exclusion of "supervisors" from the definition of "employee" in section 2(3) as warranting an implied exclusion from the definition of "employee" for all workers who have access to confidential business information of the employer.⁸² Furthermore, the Court reasoned, the Taft-Hartley Act's express inclusion of professional employees⁸³ under the Act's coverage⁸⁴ negated an implied exclusion of all employees who have access to confidential business information.⁸⁵ Under the Taft-Hartley Act, the Court observed, Con-

⁷⁴ *Id.* at 224.

⁷⁵ *Id.*

⁷⁶ *Id.* For the relevant text of the House version's definition of "supervisor," see *supra* note 21.

⁷⁷ 102 S. Ct. at 225. For the relevant text of the Senate definition of "supervisor," see *supra* note 22.

⁷⁸ 102 S. Ct. at 224. See *infra* note 79 for the relevant text of the conference Committee's Report and accompanying text.

⁷⁹ The Court observed that the following statement by the House Managers was appended to the Conference Report:

The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the Act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect.

102 S. Ct. at 225 (quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947)).

⁸⁰ *Id.* at 225 & n.16.

⁸¹ *Id.* at 225.

⁸² *Id.* at 225.

⁸³ For the definition of "professional employees" included in the Taft-Hartley Act, see section 2(12) of the Act, 29 U.S.C. § 152(12). The Court observed that the definition of "professional employees" was intended to include such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947). 102 S. Ct. at 225.

⁸⁴ See section 9(b) of the Wagner Act, 29 U.S.C. § 159(b) (providing that the Board may not approve a bargain unit "if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such a unit." *Id.*)

⁸⁵ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 225

gress intended to cover professional employees *and* their junior professional assistants.⁸⁶ The Court reasoned that almost all such persons would have access to confidential information and thus would fall within the broad definition of confidential employee under the House bill.⁸⁷ The Court, therefore, declined to read an implied exclusion for confidential employees because such an exclusion would displace almost the entirety of the express professional-employee inclusion.⁸⁸

The Court could find nothing showing that Congress disapproved of the Board's using a "labor-nexus" test to identify confidential employees whom the Board would exclude from bargaining units. The Conference Committee, the Court noted, was aware of the Board's line of decisions excluding from bargaining units confidential employees in the labor-relations field.⁸⁹ The Court examined the statement appended by the House Manager to the Conference Report which implied that Congress viewed any secretaries with access to confidential information as being excluded from the Act's coverage.⁹⁰ The Court concluded that the only plausible interpretation of the Conference Report was that only employees involved in labor-relations, personnel and employment functions, and confidential secretaries to such persons may be denied the full benefits of the Taft-Hartley Act.⁹¹

Concluding that the Board's treatment of confidential employees had a reasonable basis in law,⁹² the Court returned to the disposition of *Hendricks*' and *Malleable*'s claims. In *Hendricks*, the Court observed that the employer conceded that Mary Weatherman had no confidential duties with respect to labor policies.⁹³ The Court, therefore, ordered her reinstatement.⁹⁴ In *Malleable*, the Court stated, the employer made no argument that the employees trying to negotiate as a bargaining unit satisfied the Board's "labor-nexus" test.⁹⁵ The Court concluded that the court of appeals had erred in ordering the Board to apply a broad definition of confidential employees to in-

(1981).

⁸⁶ *Id.* See also *supra* note 82.

⁸⁷ 102 S. Ct. at 225.

⁸⁸ *Id.* The professional-employee inclusion is set out in section 2(12) of the Taft-Hartley Act, 29 U.S.C. § 152(12) (1976).

⁸⁹ 102 S. Ct. at 227 & n.20. The Court noted that the Board's labor-nexus test has been brought to the attention of Congress through the NLRB's annual reports. *Id.* at 227 n.20. See, e.g., N.L.R.B. Ann. Rep. 34 & n.92 (1945). Significantly, the Court found the Board's refinement of the "labor-nexus" test in *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946), had been included in the NLRB's report submitted to Congress five months before the Conference Committee Report was issued. 102 S. Ct. at 227 n.20. See 11 N.L.R.B. Ann. Rep. 32 & nn.18-21 (1947).

⁹⁰ 102 S. Ct. at 227. See the relevant text of the House Manager's statement *supra* note 79 and accompanying text.

⁹¹ 102 S. Ct. at 228.

⁹² *Id.* For a discussion of "reasonable basis in law," see *supra* note 51.

⁹³ 102 S. Ct. at 228. The Court noted that "Weatherman's tasks were 'deliberately restricted so as to preclude her from' gaining access to confidential information concerning labor relations." *Id.* at 229 n.23 (quoting 236 NLRB 1616, 1619 (1978)). See also *Id.* at 220 n.5.

⁹⁴ *Id.* at 229.

⁹⁵ *Id.*

clude all possession of confidential business information.⁹⁶ The Court therefore remanded *Malleable* for further proceedings consistent with the opinion.⁹⁷

In a concurring and dissenting opinion, Justice Powell agreed with the majority that employees with access to confidential business information are not for that reason alone excluded from the NLRA as "confidential employees."⁹⁸ Justice Powell concurred that Congress' inclusion of professional employees indicated that it did not intend to exclude all confidential employees.⁹⁹ Powell observed, however, that Congress intended by enacting the Taft-Hartley Act to establish a sharp line between management and labor.¹⁰⁰ He therefore dissented from the majority's conclusion that Mary Weatherman was not a confidential employee who should be excluded from the Act because he viewed the majority's decision as tending to "obliterate the line between management and labor."¹⁰¹ Moreover, Justice Powell disagreed with the Court's reading of the Conference Report to include confidential secretaries within the NLRA.¹⁰²

Consistent with his perception that a basic purpose of the Taft-Hartley Act was to establish a statutory line separating management and labor,¹⁰³ and that Congress had intended to exclude from the coverage of the Taft-Hartley Act all individuals allied with management,¹⁰⁴ Justice Powell viewed the "confidential employee"¹⁰⁵ exclusion and the "labor-nexus" test as part of the effort to keep the line between management and labor distinct.¹⁰⁶ He remarked that employees who assist and act in a confidential capacity in labor-relations

⁹⁶ *Id.*

⁹⁷ *Id.* The Court remanded the issue whether the Malleable employees should have been excluded from the Act because the court of appeals had not addressed Malleable's contention that some of the eighteen employees should have been excluded from the bargaining unit for reasons entirely unrelated to whether they were confidential employees. *Id.* The Court noted that Malleable seeks to argue that thirteen of the challenged persons should be excluded as "managerial" employees, and that another four should be excluded as "supervisors." *Id.* at 229 n.24.

⁹⁸ *Id.* at 229 (Powell, J., concurring in part and dissenting in part).

⁹⁹ *Id.*

¹⁰⁰ *Id.* Powell drew support for this congressional intent from the Court's decision in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). 102 S. Ct. at 230 (Powell, J., concurring in part and dissenting in part).

¹⁰¹ *Id.* (citing *Packard Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting)).

¹⁰² 102 S. Ct. at 230-31 (Powell, J., concurring in part and dissenting in part).

¹⁰³ See *supra* note 100 and accompanying text.

¹⁰⁴ It was to further this statutory purpose, Justice Powell continued, that the Board originally adopted the "supervisory employee" exclusion from the NLRA. *Id.* Justice Powell observed that the Board developed the "confidential employee" as well as the "managerial" exclusions to insure that employees who by their "duties, knowledge, or sympathy were aligned with management should not be treated as members of labor." *Id.*

¹⁰⁵ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 230 (1981) (Powell, J., concurring in part and dissenting in part). The Taft-Hartley Act had been enacted, Powell observed, because the Board breached the line between management and labor by deeming supervisors to be "employees" within the Act. *Id.*

¹⁰⁶ Justice Powell cited four Board decisions excluding employees who were sympathetic to management from the ranks of labor: *AFL-CIO*, 120 N.L.R.B. 969, 973 (1958) (excluding employees who "formulate, determine and effectuate an employer's policies"); *Dry Goods*, 74

matters clearly fall on the side of management because of their knowledge of sensitive labor-relations information.¹⁰⁷ The "labor-nexus" test, however, in Justice Powell's view, is not exclusive. He criticized the majority and the Board for their rigid insistence on the labor nexus in the case of confidential secretaries.¹⁰⁸ The Justice concluded that confidential secretaries who work closely with management and who have access to "the most sensitive details of management decisionmaking" clearly fall on the side of management.¹⁰⁹ Inclusion of confidential secretaries in the ranks of labor, in his view, conflicts with the basic framework of the labor laws.¹¹⁰

Moreover, Justice Powell disagreed with the majority's reading of the Conference Committee Report to exclude confidential secretaries from the definition of "supervisor."¹¹¹ Powell stated that Congress decided not to include an explicit provision in the Taft-Hartley Act excluding confidential secretaries because it believed that the Board had been treating, and presumably would continue to treat, such employees as allied to management.¹¹² He noted that this understanding was not without support in the case law prior to 1947.¹¹³ Justice Powell concluded, therefore, that Congress intended to exclude all confidential secretaries from the Act.¹¹⁴ In his view, the Board even now may not extend coverage to confidential secretaries because such extension would violate the Act.¹¹⁵

Justice Powell correctly perceived that prior to the enactment of the Taft-Hartley Act the Board did not apply only the "labor-nexus" test to exclude confidential employees from collective-bargaining units. Although the Board frequently did exclude from bargaining units certain confidential employees

N.L.R.B. 1167, 1175 (1947) (exclusion of assistant buyers who had interests more closely identified with those of management); *Burke Brewery, Inc.*, 54 N.L.R.B. 1061, 1062 (1944) (excluding employees who because of their familial relation to management are on an intimate relationship with officers of the company); *Freitz & Sons*, 47 N.L.R.B. 43, 47 (1943) (exclusion of "expeditors" who are closely related to management). 102 S. Ct. at 230 (Powell, J., concurring in part and dissenting in part).

¹⁰⁷ 102 S. Ct. at 231 (Powell, J., concurring in part and dissenting in part).

¹⁰⁸ *Id.* In Powell's view, the "labor-nexus" test is but a "means to the end" of identifying employees who are allied with management. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* See discussion of the Court's interpretation of the Conference Committee Report *supra* notes 73-82 and accompanying text.

¹¹² 102 S. Ct. at 231 (Powell, J., concurring in part and dissenting in part).

¹¹³ *Id.* at 231 n.7 (Powell, J., concurring in part and dissenting in part). Justice Powell noted several NLRB decisions excluding confidential secretaries from the Act irrespective of a labor nexus: *E.P. Dutton & Co.*, 33 N.L.R.B. 761, 766 (1941) (exclusion of secretaries to officers of the company from the bargaining unit of clerical employees without any mention of a labor nexus); *Montgomery Ward & Co.*, 36 N.L.R.B. 69, 73 (1941) (secretaries of store managers excluded without reference to labor nexus); *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939) (private secretaries excluded from bargaining unit where union believes the personal and confidential relationship between the secretaries and the company's officers is such as to create a possible division of loyalties between management and potential bargaining agent). 102 S. Ct. at 231 n.7 (Powell, J., concurring in part and dissenting in part).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

because of their contact with labor-relations,¹¹⁶ it also excluded confidential secretaries from bargaining units without regard to their contact with labor-relations.¹¹⁷ The Board stated that the "nature of a personal secretary's work is such that much of the confidential matter pertaining to the management passes through his or her hands."¹¹⁸ Accordingly, the Board excluded such secretaries from collective-bargaining units because "management should not be required to handle [confidential] material through employees in the union with which it is dealing."¹¹⁹ This exclusion was consistent with the Board's practice of excluding from bargaining units employees who were not privy to confidential information but who by their duties, knowledge and sympathy were aligned with management.¹²⁰ Justice Powell, therefore, was correct in asserting that the Board's practice prior to the enactment of the Taft-Hartley Act was to exclude confidential secretaries from bargaining units without regard to labor-relations.

Justice Powell also correctly observed that when Congress enacted the Taft-Hartley Act in 1947, it intended to exclude confidential secretaries from the Act. The House and Senate bills differed over whether all confidential employees should be excluded from the Act¹²¹ and the differing bills were submitted to a Conference Committee.¹²² The Committee adopted the Senate bill which did not mention confidential employees.¹²³ The Committee acknowledged, however, that the Board's prevailing practice was to exclude confidential secretaries from the Act.¹²⁴ The Committee stated that it did not intend to alter that practice.¹²⁵ Both the House and the Senate were apprised of these statements and adopted the Report.¹²⁶ The majority's holding that Congress did not intend to exclude confidential secretaries from the Taft-Hartley Act, therefore, disregards clear evidence of legislative intent.

The Court's decision in *Hendricks*, however, will apply only to a narrow set of factual circumstances. The Court acknowledged that Weatherman was a unique case inasmuch as her tasks were "deliberately restricted so as to preclude her from" gaining access to confidential information concerning labor relations."¹²⁷ In her case, therefore, the Court remarked that the Board's

¹¹⁶ For a list of the Board's decisions applying the "labor-nexus" test, see *id.* at 223 n.11.

¹¹⁷ See, e.g., *E.P. Dutton & Co.*, 33 N.L.R.B. 761, 766 (1941); *Montgomery Ward & Co.*, 36 N.L.R.B. 69, 73 (1941); *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939).

¹¹⁸ *Id.* (emphasis supplied).

¹¹⁹ *Id.*

¹²⁰ See, e.g., *Burke Brewery Co.*, 54 N.L.R.B. 1061, 1062 (1947); *Denver Dry Goods*, 74 N.L.R.B. 1167, 1175 (1947) (assistant buyers have interests more closely identified with those of management).

¹²¹ See *supra* notes 20-22 and accompanying text.

¹²² *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 225 (1981).

¹²³ H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ The Clerk of the House of Representatives read the Conference Report to the Members of the House on June 4, 1947. 93 CONG. REC. 6371 (1947). Senator Taft included the Conference Report in his statement to the Senate. *Id.* at 6441.

¹²⁷ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 229

labor-nexus test was not met.¹²⁸ It is unlikely, however, that Weatherman's position is the same as that of executive secretaries in general.¹²⁹ In most cases, therefore, confidential secretaries to executive officers of corporations likely will be treated as outside the scope of the Act. After *Hendricks*, the determination whether the secretary assists or acts in a confidential capacity to persons exercising managerial functions in the labor-relations field will depend on the circumstances of the particular case. It is clear, however, that personal secretaries to managerial personnel may in some cases be included in bargaining units on the side of labor.

Furthermore, the majority's holding that the "labor-nexus" test must be satisfied before confidential employees may be excluded from bargaining units under the Act is contrary to the policy and purposes of the NLRA and the Taft-Hartley Act. The stated policy of the NLRA is to mitigate and eliminate obstruction to commerce by encouraging employees to bargain collectively with their employers.¹³⁰ The Act seeks to encourage collective bargaining 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 of their employment or other mutual aid or protection.¹³¹ One purpose of the NLRA, therefore, was to establish a line between management and labor.¹³² When the Board breached this line by deeming supervisors to be employees within the NLRA,¹³³ Congress passed the Taft-Hartley Act with its explicit exclusion of supervisory employees.¹³⁴ Congress determined that supervisors should be excluded from the Act because their interests were adverse to those of labor.¹³⁵ The Court's holding in *Hendricks* breaches this intended separation by permitting secretaries who work closely with management and who are privy to all but labor-related details of management decision-making to be included in bargaining units on the side of labor.¹³⁶ The confidential secretary to a "supervisory" or "managerial" employee occupies a position of trust and loyalty that is inconsistent with labor-management interest conflicts.¹³⁷ By virtue of the policy and purposes of the labor laws, therefore, the personal secretaries of supervisory or managerial employees should be differentiated from rank-and-file employees regardless of their contact with labor-relations information. The decision in *Hendricks*,

n.23 (1981).

¹²⁸ *Id.* at 229.

¹²⁹ *Id.* at 229 n.23.

¹³⁰ 29 U.S.C. § 151 (1976).

¹³¹ *Id.*

¹³² *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275-78 (1974).

¹³³ *See Packard Co. v. NLRB*, 330 U.S. 485, 493 (1947).

¹³⁴ 29 U.S.C. § 152(3) (1976).

¹³⁵ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

¹³⁶ *Id.*

¹³⁷ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 231 (1981) (Powell, J., concurring in part and dissenting in part).

however, permits confidential employees to bargain on the side of labor if they do not have access to labor-relations information.¹³⁸

Hendricks leaves open whether confidential employees *with* access to labor-relations information should be excluded *totally* from the NLRA. The Board's current policy excludes such employees only from collective-bargaining units established under the Act.¹³⁹ The Board argued in *Hendricks*, however, that even if Weatherman was a confidential employee excludable from a bargaining unit, section 8(a)(1) of the Act barred Hendricks from discharging her for engaging in activity protected by the Act.¹⁴⁰ The Court declined to address this issue because Weatherman did not satisfy the "labor-nexus" test and was thus not excluded from the bargaining unit.¹⁴¹ The dissent, however, criticized the Board policy of allowing confidential employees who are excluded from bargaining units by virtue of their connection with labor-relations to assert the other protections of the Act.¹⁴²

It is unclear whether employees who serve in a confidential capacity to persons exercising managerial functions in the labor-relations field are completely excluded from the NLRA. The NLRB permits employees who are excluded from collective-bargaining units, nonetheless to assert the full protection of the Act.¹⁴³ The courts of appeals are divided over whether this policy should be accepted. Some courts reject the Board's practice of granting employees who are excludable from bargaining units the same protection as that afforded employees who may collectively bargain.¹⁴⁴ At least one Court has apparently accepted the Board's practice.¹⁴⁵

Justice Powell rejected the Board's position that confidential employees are not excluded from the NLRA as a whole but only from collective-bargaining units.¹⁴⁶ In his view, the position is inconsistent with the basic philosophy of the Act¹⁴⁷ which is to keep the line between management and labor distinct.¹⁴⁸ The Board developed the "labor-nexus" test, Justice Powell observed, because it recognized that "'management should not be required to handle labor-relations matters through employees who are represented by the union.'" ¹⁴⁹ Under the Board's policy, the Justice reasoned, confidential

¹³⁸ 102 S. Ct. at 228.

¹³⁹ See *supra* notes 7-12 and accompanying text.

¹⁴⁰ 102 S. Ct. at 220 n.2.

¹⁴¹ *Id.* at 226 n.19.

¹⁴² See *infra* notes 146-152 and accompanying text.

¹⁴³ See, e.g. *Bethlehem Steel Co.*, 63 N.L.R.B. 1230, 1232 & n.2 (1945); *Colorado Power Co.*, 13 N.L.R.B. 699, 710 (1939), *enforced*, 111 F.2d 539 (10th Cir. 1940).

¹⁴⁴ *Peerless of Am., Inc. v. NLRB*, 484 F.2d 1108, 1112 (7th Cir. 1973); *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783, 788 (4th Cir. 1971).

¹⁴⁵ *Southern Greyhound Lines*, 426 F.2d 1299 (5th Cir. 1970) (assuming without discussion that confidential employees are not excluded from the Act in its entirety).

¹⁴⁶ *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 102 S. Ct. 216, 232 (1981) (Powell, J., concurring in part and dissenting in part).

¹⁴⁷ *Id.*

¹⁴⁸ See *supra* notes 104-110 and accompanying text.

¹⁴⁹ 102 S. Ct. at 232 (Powell, J., concurring in part and dissenting in part) (quoting *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944)).

employees *with* a daily access to labor-relations information and the management's bargaining position might do anything in furtherance of their allegiance to labor except join the union.¹⁵⁰ In such cases, Justice Powell observed, management would be powerless to demote or dismiss them or otherwise to protect themselves, at least without the risk of an unfair labor practice charge being filed.¹⁵¹ The Justice concluded that management should not be "required to expose its flank to confidential employees who are overtly committed to the union or the cause of labor in all but actual membership."¹⁵² Since the majority, however, refused to address the issue whether confidential employees are not excluded from the whole Act but only from bargaining units, management may for some time find it difficult to maintain confidentiality of its bargaining position.

B.* *Elections, Invalidity of Minority Quotas for Union Elective Offices:*
*Donovan v. Illinois Education Association*¹

The Labor-Management Reporting and Disclosure Act of 1959² (LMRDA) was enacted to insure high standards of ethical conduct in labor activity and protect employees' rights to organize, elect representatives and bargain collectively.³ Section 401(e) of the LMRDA requires that all union elections be held by secret ballot and provides that, "every member [of the union] in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) and shall have the right to vote for . . . the candidate or candidates of his choice. . . ."⁴ The

¹⁵⁰ 102 S. Ct. at 232 (Powell, J., concurring in part and dissenting in part). Powell reasoned that employees with a labor nexus would be excluded from bargaining units. *Id.* They could, however, join picket lines, sign petitions advocating the cause of labor, speak out against management at employee meetings, and engage in all manner of concerted activity without fear of reprisal. *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

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¹ 667 F.2d 638 (7th Cir. 1982).

² 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1976).

³ 29 U.S.C. § 401 (1976).

⁴ 29 U.S.C. § 481(e) (1976) provides in its entirety:

In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated

United States Supreme Court, considering the reference to "reasonable qualifications," has held that this language should be given a narrow interpretation, allowing only minor qualifications for union office candidates.⁵ In line with those decisions, during the *Survey* year the United States Court of Appeals for the Seventh Circuit held in *Donovan v. Illinois Education Association*⁶ that union voting provisions which reserve a certain percentage of elective offices for minorities violate section 401(e).⁷ While the decision may have far-reaching implications for labor organizations which wish to guarantee minorities representation, there are indications that the holding in the case may be limited to its peculiar facts.

The Illinois Education Association (the Association) is a union of 50,000 members⁸ which represents about half of all public school teachers in Illinois.⁹ The Association is governed essentially by two bodies: the Representative Assembly and the Board of Directors.¹⁰ The Representative Assembly has 600 members who are elected by the entire union membership.¹¹ The Board of Directors (which originally consisted of fifty members) now has members, some of whom are elected by the Representative Assembly and some by the union locals.¹² In 1974, the Association's membership, by majority vote, amended its by-laws in two ways.¹³ First, members of Black, Asian, Hispanic, and American Indian minority groups were guaranteed collectively eight percent of the seats in the Representative Assembly.¹⁴ If during an election these minority groups did not collectively attain eight percent of the Assembly seats, the Board of Directors was directed to expand the Assembly with appointments of minority members until an eight percent minority representation in the Representative Assembly was obtained.¹⁵ Second, the Board of Directors was expanded to fifty-four members and the four additional seats were reserved for members from the special minority groups, regardless of how many seats they might win in the customary fashion.¹⁶

In 1977, the Secretary of Labor filed a complaint, unrelated to the by-laws amendments, which alleged that the Association violated Section 401(d) of the

in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter.

⁵ *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 499 (1968) ("Congress plainly did not intend that the authorization in § 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach.") See also *Local 3489, United Steelworkers of Am. v. Usery*, 429 U.S. 305, 309 (1977).

⁶ 667 F.2d 638 (7th Cir. 1982).

⁷ *Id.* at 641.

⁸ *Id.* at 639.

⁹ *Id.* at 642.

¹⁰ *Id.* at 639.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

LMRDA¹⁷ by appointing rather than electing its Secretary-Treasurer.¹⁸ The district court ordered an election for the office.¹⁹ While the ground rules for the election were being adjudicated, however, the government objected to the amended by-laws on the basis of Section 401(e)²⁰ and moved to enjoin their use in the election.²¹ Notwithstanding this motion, the district court ordered that the election be conducted according to the Association's existing by-laws.²²

On appeal, the Seventh Circuit first rejected the Association's contention that it lacked jurisdiction to determine the legality of the challenged by-laws because the by-laws were not challenged in the government's initial pleading.²³ The court concluded that the legality of the by-laws were sufficiently related to the question of the election of the Secretary-Treasurer to make the by-laws issue appealable.²⁴ Since the composition of the Representative Assembly is brought into question by the challenged by-laws and the Representative Assembly elects the Secretary-Treasurer, the court reasoned, the by-laws must be legal under the LMRDA in order to hold a legal election pursuant to the statute.²⁵ Similarly, the court stated, the composition of the Board of Directors is called into question because nominees for the Secretary-Treasurer position will be nominated by a committee composed of members of the Board. The court therefore concluded that the challenged by-laws were a properly appealable issue.²⁶

Moving to the merits of the case, the court observed that the challenged by-laws did not involve questions on the legality of affirmative action under civil rights statutes or the fourteenth amendment.²⁷ The court noted that the LMRDA was enacted before affirmative action became a pressing legal issue;²⁸ that Congress had not in the LMRDA intended to remedy racial discrimination,²⁹ and that the Association had never been accused of racial discrimination for which it was attempting to make amends.³⁰ Rather, the court found that, although the Association was attempting to promote affirmative action, its by-laws should be judged by the same standards developed under the LMRDA as

¹⁷ 29 U.S.C. § 481(d) (1976) provides:

Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

¹⁸ *Donovan*, 667 F.2d at 639.

¹⁹ *Id.*

²⁰ *Id.* at 640.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *See Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* See 105 CONG. REC. 15826 (1959) (Remarks of Sen. Landrum).

³⁰ *Donovan*, 667 F.2d at 640.

any other union election practice.³¹ On the basis of those standards, the court rejected the challenged by-laws.³²

The *Donovan* court then focused on the impact of the challenged by-laws on the freedom of candidacy and voting guaranteed by Section 401(e).³³ The court observed that any union member who did not belong to one of the specified minority groups was precluded from seeking one of the reserved positions, either on the Association's Board of Directors or in its Representative Assembly.³⁴ Although the appeals court acknowledged that no evidence was available concerning the proportion of whites in the Association, it assumed that they constituted the vast majority of the union.³⁵ The court stated that, while section 401(e) allows "reasonable qualifications" to be set as conditions for candidate eligibility,³⁶ the clause had been narrowly construed by the Supreme Court³⁷ and no decision could be located which countenanced the disqualification of a majority of union members from a leadership position — no matter how reasonable the qualifications seemed.³⁸ Moreover, the *Donovan* court noted, the by-laws at issue raised the possibility of self-perpetuating incumbency, one of the specific practices which the LMRDA was intended to prohibit.³⁹ Since the Board of Directors may appoint up to eight percent of the Representative Assembly, and the Assembly elects many members of the Board, the court concluded that the Board conceivably could employ their appointive powers to insure their reelection.⁴⁰ In addition, the court stated, the four reserved positions on the Board guarantee minorities more seats than they might hope to attain in a democratic election.⁴¹

The *Donovan* court cautioned that, while the challenged by-laws do have a great impact on freedom of candidacy and voting, it would not hold that no set of facts could support the restrictions at issue.⁴² Instead, the court merely declared that the burden of justification had not been met by the Association in *Donovan* because neither the purpose nor the choice of the quotas has been adequately explained.⁴³ The court noted that the absence of information on factors

³¹ *Id.*

³² *Id.* at 641-42.

³³ *Id.* at 641.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* 29 U.S.C. § 481(e) (1976); see *supra* note 4.

³⁷ *Donovan*, 667 F.2d at 641. See *Local 3489, United Steelworkers of Am. v. Usery*, 429 U.S. 305, 309 (1977); *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 499 (1968).

³⁸ *Donovan*, 667 F.2d at 641. The court acknowledged that some decisions such as *Brennan v. Local 5724, United Steelworkers of Am.* 489 F.2d 184 (6th Cir. 1973), had upheld candidacy restrictions which disqualified more than half of a union's membership for an elective position, but that the qualification which *Brennan* upheld was identical to the one subsequently struck down in *Local 3489, United Steelworkers of Am. v. Usery*, 429 U.S. 305, 307 n.3 (1977).

³⁹ *Donovan*, 667 F.2d at 641. See *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 499 (1968).

⁴⁰ See *Donovan*, 667 F.2d at 641.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 641-42.

such as the Association's racial and ethnic composition, the composition of the Association's membership among the four specified minority groups, and minority representation on the Association's ruling bodies influenced its decision.⁴⁴ The *Donovan* court also stated that there was no indication why Asians and American Indians, which comprise a very low percentage of Illinois' school children, were favored over other minorities, and indicated that the by-laws would allow the "bizarre possibility" of appointing exclusively Asians to all the reserved positions.⁴⁵ Finally, the court asserted that if the Association's white members wish to favor minorities in elected position, they may do so "in sufficient numbers to make unnecessary the electoral restrictions. . . ."⁴⁶

The decision of the court in *Donovan* is essentially consistent with other cases construing section 401(e) of the LMRDA, including the Supreme Court's holding in *Local 3489, United Steelworkers of America v. Usery*.⁴⁷ In *Usery*, the Court found that the statutory exception for "reasonable qualifications"⁴⁸ for candidacy had to be balanced against the statutory command for democratic union elections.⁴⁹ The *Usery* Court found that a meeting attendance requirement which disqualified more than ninety-five percent of the membership was unreasonable.⁵⁰ Other courts addressing burdensome attendance requirement also have rejected them.⁵¹ Similarly, courts have rejected several other voting procedures; nominating procedures which have the effect of giving some locals a greater voice than others;⁵² continuous membership requirements of five years;⁵³ prior office holding requirements which disqualified 93 percent of the membership;⁵⁴ and a parent local membership requirement which disqualified more than 60 percent of the total membership which belonged to branch locals.⁵⁵

Moreover, the only case besides *Donovan* to deal with racial requirements — *Schultz v. Local 1291, International Longshoremen's Association*⁵⁶ — is in accord

⁴⁴ *Id.* at 642.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 429 U.S. 305 (1977).

⁴⁸ 29 U.S.C. § 481(e) (1976). *See supra* note 4.

⁴⁹ *Usery*, 429 U.S. 312-13. *See Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 499 (1968).

⁵⁰ *Usery*, 429 U.S. at 310.

⁵¹ *See, e.g., Marshall v. Local 1402, Int'l Longshoremen's Ass'n*, 617 F.2d 96, 99 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 205 (1981) (meeting attendance requirement disqualified 93 percent of membership); *Usery v. Local Div. 1205, Amalgam Transit Union*, 545 F.2d 1300, 1303 (1st Cir. 1976) (meeting attendance requirement disqualified 94 percent of membership).

⁵² *See Usery v. Dist. 22 United Mineworkers of Am.*, 543 F.2d 744, 749 (10th Cir. 1976) (nominating procedure which called for the assent of five locals allowed five smallest locals comprising only five percent of total membership to nominate, while four largest locals comprising more than 50 percent of membership could not nominate).

⁵³ *See Wirtz v. Locals 406, 406A, 406B & 406C, Int'l Union of Operating Engineers*, 254 F. Supp. 962, 966 (E.D. La. 1966).

⁵⁴ *See Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 502 (1968).

⁵⁵ *Hodgson v. Local Union 18, Int'l Union of Operating Engineers*, 440 F.2d 485 (6th Cir.), *cert. denied*, 440 U.S. 852 (1971).

⁵⁶ 338 F. Supp. 1204 (E.D. Pa.), *aff'd per curiam sub nom. Hodgson v. Local 1291, Int'l*

with *Donovan* in matters of law, although the facts in *Schultz* differ somewhat from those in *Donovan*. In *Schultz*, the district court invalidated an election held under by-laws which allocated offices between white and "colored" races.⁵⁷ The court found that there was no objective relation between the qualifications for the offices and the offices' duties.⁵⁸ The *Schultz* court further observed that the challenged by-laws excluded individuals who might be seen to belong to neither race.⁵⁹

Although the Seventh Circuit's decision in *Donovan* is firmly in line with established precedent, the decision at least partially turned on the inartfully drafted by-laws and an inadequately developed trial record. The *Donovan* court did not hold that no set of facts could support the challenged by-laws, but instead declared that in the case before it the basis for the minority quotas was unexplained.⁶⁰ The by-laws might have passed muster had they been grounded in the proposition that minority teachers have special knowledge of the learning problems of children from their specific minority groups, and if the minority quotas bore some statistical relationship to the number of individuals from specific minority groups in either the Illinois school population or the Association's membership. Moreover, skillfully drafted by-laws may have allayed the court's objections that the challenged scheme allows for self-perpetuating incumbency on the Board of Directors and the appointment of individuals to the Association's ruling bodies without regard to the special minority group they belonged to. In short, the court's concern that the scheme threatened freedom of candidacy and the scope of the franchise — that the candidacy qualifications were unreasonable within the meaning of section 401(e) — might have been overcome if the restrictions were more thoughtfully and precisely drawn. Given the court's concern about these procedural deficiencies, the decision in *Donovan* may be but a minor obstacle to labor organizations which wish to pursue affirmative action with respect to their ruling structures.

II. UNFAIR LABOR PRACTICES

A. Employer Unfair Labor Practices

1.* *The Selective Disciplining of Labor Union Officials — Two Contrasting Views: Fournelle v. NLRB¹ and NLRB v. Armour-Dial, Inc.²*

When labor unions engage in illegal strikes, employers may desire to discipline participating union officials more severely than participating rank-and-file union members. The legality of this practice by employers has become

Longshoremen's Ass'n, 461 F.2d 1262 (3d Cir. 1972).

⁵⁷ *Schultz*, 338 F. Supp. at 1205, 1208.

⁵⁸ *Id.* at 1206-07.

⁵⁹ *Id.* at 1208.

⁶⁰ *Donovan*, 667 F.2d at 641-42.

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¹ 670 F.2d 331, 109 L.R.R.M. (BNA) 2441 (D.C. Cir. 1982).

² 638 F.2d 51, 106 L.R.R.M. (BNA) 2265 (8th Cir. 1981).

the focal point of recent decisions by the National Labor Relations Board (NLRB) and several federal circuit courts of appeals. The question presented in these cases is whether the imposition by employers of selective disciplining upon union officials and stewards constitutes an unfair labor practice in violation of the National Labor Relations Act (NLRA).³ The provisions of the NLRA declaring certain actions of employers unfair labor practices and prohibiting such actions are intended to protect from employer interference the self-organization of employees as well as the process of collective bargaining.⁴ Therefore, the NLRB and the courts have been asked to determine whether the selective disciplining of union officials constitutes an impermissible interference with protected employee rights.⁵ The NLRB and the courts have considered whether such actions by employers discourage union members from accepting union leadership positions, which, in and of itself may constitute an unfair labor practice.⁶

In its response to this inquiry, the NLRB has been inconsistent over the past decade. The Board initially held that employers could permissibly discipline union officials more harshly than rank and file union members.⁷ Recently, however, the Board changed its position, adopting the approach that the selective disciplining of union officials constitutes a *per se* unfair labor practice.⁸ The four circuit courts of appeals to consider this question have rejected

³ Section 7 of the National Labor Relations Act (N.L.R.A.) reserves for employees the right to engage in concerted activity for their mutual aid or benefit:

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for . . . other mutual aid or protection. . . .

29 U.S.C. § 157 (1976).

Section 8 of the Act makes it an unfair labor practice for employers to interfere with these § 7 rights, or to take any employment action which either encourages or discourages membership in a labor organization:

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in Section 157 of this title . . .
(3) 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. §§ 158(a)(1), (3).

⁴ *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 317, 58 L.R.R.M. (BNA) 2672, 2680 (1965).

⁵ *See, e.g.*, *Fournelle v. NLRB*, 670 F.2d 331, 109 L.R.R.M. (BNA) 2441 (D.C. Cir. 1982); *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478, 108 L.R.R.M. (BNA) 3020, (3d Cir. 1981); *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 108 L.R.R.M. (BNA) 2001 (3d Cir. 1981); *C.H. Heist Corp. v. NLRB*, 657 F.2d 178, 108 L.R.R.M. (BNA) 2159 (7th Cir. 1981); *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 106 L.R.R.M. (BNA) 2265 (8th Cir. 1981); *Gould Inc. v. NLRB*, 612 F.2d 728, 103 L.R.R.M. (BNA) 2207 (3d Cir. 1980); *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227, 101 L.R.R.M. (BNA) 2475 (7th Cir. 1979); *Precision Castings Co.*, 233 N.L.R.B. 183, 96 L.R.R.M. (BNA) 1540 (1977).

⁶ *Fournelle v. NLRB*, 670 F.2d 331, 338, 109 L.R.R.M. (BNA) 2441, 2446 (D.C. Cir. 1982); *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 54-55, 106 L.R.R.M. (BNA) 2265, 2267 (8th Cir. 1981).

⁷ For a complete discussion of these early Board decisions, see *infra* notes 26-30 and accompanying text.

⁸ For a discussion of the Board's *per se* rule, see *infra* notes 31-41 and accompanying text.

the *per se* rule adopted by the NLRB.⁹ The bases upon which these four circuit courts have rejected the *per se* rule, however, are not uniform; two distinct views concerning *when* an employer may permissibly act in selectively disciplining union officials for their actions in an illegal strike have emerged among the circuits.

The differences among the circuits and the NLRB on the question of selective discipline have arisen from varying interpretations given the discrimination guidelines established by the United States Supreme Court.¹⁰ In *NLRB v. Great Dane Trailers, Inc.*,¹¹ the Court found an unfair labor practice when the employer refused to pay accrued vacation wages to striking employees, but did extend such benefits to employees who had not struck, as well as to returning strikers and to strikers' replacements.¹² The Court based its decision upon section 8(a)(3) of the Act, ruling that the Board could rightfully find discrimination and a consequent discouragement of union membership.¹³ The Court ruled that where the employer's discriminatory conduct is "inherently destructive" of employee rights, anti-union motivation need not be proven to establish a section 8(a)(3) violation.¹⁴ Conversely, the Court noted, if the adverse effect of the employer's discrimination upon employee rights is "comparatively slight," an anti-union motivation must be demonstrated.¹⁵

Interpreting *Great Dane*, the circuit courts have agreed that a union official may be selectively disciplined if he has violated an established higher duty attendant to his holding of union office.¹⁶ The courts disagree, however, upon when the status of holding a union office carries with it a higher duty during illegal strikes. The United States Courts of Appeals for the Seventh and Eighth Circuits have suggested that such a higher duty may exist at all times due to the nature of holding union office itself.¹⁷ The United States Court of Appeals for the District of Columbia has limited the imposition of a higher duty to instances where the collective bargaining agreement has specifically established the existence of such a duty.¹⁸ Where this higher duty has been held to exist, the courts unanimously have held that the facially discriminatory act of the em-

⁹ For a discussion of the positions adopted in the circuit court cases, see *infra* notes 42-141 and accompanying text.

¹⁰ See Note, *Harsher Discipline for Union Stewards than Rank-and-File for Participation in Illegal Strike Activity*, 56 CHI.-KENT L. REV. 1175, 1176 (1980).

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

¹² *Id.* at 32-33, 65 L.R.R.M. (BNA) at 2468-69.

¹³ *Id.* at 32, 65 L.R.R.M. (BNA) at 2468.

¹⁴ *Id.* at 33, 65 L.R.R.M. (BNA) at 2468.

¹⁵ *Id.* at 34, 65 L.R.R.M. (BNA) at 2468-69.

¹⁶ The concept of a "higher duty" suggests that union officials may, either by contract or operation of law, be under a higher obligation than rank-and-file union members to uphold the terms of the collective bargaining agreement. For a discussion of how courts have handled this issue, and where union officials have been held to bear a higher duty, see *infra* notes 43-44, 53-55, 60-61, 66-67, 76-78 and accompanying text.

¹⁷ See, e.g., *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 106 L.R.R.M. (BNA) 2265 (8th Cir. 1981); *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227, 101 L.R.R.M. (BNA) 2475 (7th Cir. 1979).

¹⁸ See, e.g., *Fournelle v. NLRB*, 670 F.2d 331, 109 L.R.R.M. (BNA) 2441 (D.C. Cir. 1982); *Gould Inc. v. NLRB*, 612 F.2d 728, 103 L.R.R.M. (BNA) 2207 (3d Cir. 1979).

ployer in selectively disciplining union officials has not interfered with any protected employee right.¹⁹ The courts have reasoned that since the union official possesses no right to breach his higher duty, whether imposed by contract or by law, he suffers no loss of any protected right by being subjected to punishment for his illegal acts.²⁰

This chapter first examines the recent change in position of the NLRB on this subject. In section 2, the reaction of federal circuit courts generally to the recently adopted position of the NLRB is discussed. Finally, in section 3, this chapter focuses on the difference in approaches present in the latest two circuit court opinions to consider the issue of selective discipline. In 1981, the Eighth Circuit in *NLRB v. Armour-Dial, Inc.*,²¹ ruled that the very nature of union office itself may carry with it a higher duty during an illegal strike.²² During the *Survey Year*, the D.C. Circuit in *Fournelle v. NLRB*²³ joined the Third Circuit in holding that such a higher duty is established only by express contractual provisions to that effect.²⁴ This chapter concludes with an analysis of the two approaches, submitting that the position adopted by the *Fournelle* court represents the best approach to this problem.

a. The Position of the NLRB

In determining whether employers may permissibly discipline union officials more harshly than rank-and-file employees for conduct attendant to an illegal strike, the NLRB has been notably inconsistent. Moreover, this inconsistency exists as well in the position of the NLRB regarding whether an employer and a union, through collective bargaining, may create higher duties for union officials during strikes, thereby waiving the rights of union officials to escape selective discipline.²⁵ Before 1977, the NLRB had held that because union officials have a higher duty to uphold their obligations to employers, union officials may be subjected to harsher discipline than the rank-and-file for violations of the bargaining agreement.²⁶ In *Super Valu Xenia*,²⁷ the NLRB upheld the discharge of two union stewards who had participated in a strike which violated a no-strike clause contained in the union's bargaining agree-

¹⁹ See, e.g., *Fournelle v. NLRB*, 670 F.2d 331, 340, 109 L.R.R.M. (BNA) 2441, 2448 (D.C. Cir. 1982); *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 55, 106 L.R.R.M. (BNA) 2265, 2267 (8th Cir. 1981); *Gould Inc. v. NLRB*, 612 F.2d 728, 733, 103 L.R.R.M. (BNA) 2207, 2210-11 (3d Cir. 1980); *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227, 230, 101 L.R.R.M. (BNA) 2475, 2478 (7th Cir. 1979).

²⁰ See, e.g., *Gould Inc. v. NLRB*, 612 F.2d 728, 733, 103 L.R.R.M. (BNA) 2207, 2211 (3d Cir. 1980); *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227, 230, 101 L.R.R.M. (BNA) 2475, 2478 (7th Cir. 1979).

²¹ 638 F.2d 51, 106 L.R.R.M. (BNA) 2265 (8th Cir. 1981).

²² *Id.* at 55, 106 L.R.R.M. (BNA) at 2267. For a discussion of *Armour-Dial*, see *infra* notes 122-41 and accompanying text.

²³ 670 F.2d 331, 109 L.R.R.M. (BNA) 2441 (D.C. Cir. 1982).

²⁴ *Id.* at 341, 109 L.R.R.M. at 2448-49.

²⁵ *Id.* at 339, 109 L.R.R.M. at 2446.

²⁶ See, e.g., *Russell Packing Co.*, 133 N.L.R.B. 194, 195-97, 48 L.R.R.M. (BNA) 1608, 1608-09 (1961).

²⁷ 288 N.L.R.B. 1254, 95 L.R.R.M. (BNA) 1444 (1977).

ment.²⁸ The Board observed that the collective bargaining agreement imposed upon union officials the duty to "undertake every reasonable means to induce [striking] employees to return to their job."²⁹ Consequently, the Board reasoned that the employer had the contractual right to discharge union officials failing to fulfill this obligation.³⁰ Board precedent, including the 1977 decision in *Super Valu Xenia*, therefore apparently supported the view that parties to a collective bargaining agreement may impose higher contractual duties upon union officials, and that employers may discharge union leaders disregarding those duties.

Despite this apparently clear precedent, later in 1977, the NLRB changed its position on the question of selective discipline for union officials.³¹ In *Precision Castings Co.*,³² the employer selectively disciplined union stewards who participated in a walkout in breach of contract.³³ The Board found that the employer had violated section 8(a)(3) of the NLRA despite the fact that the parties had included in their contract a provision requiring the union to "take all reasonable steps to restore normal operations" in the event of such an illegal strike.³⁴ The Board rather broadly held that such discrimination against employees holding union offices violated section 8(a)(3) because it was contrary to the policies of the NLRA.³⁵ Specifically, the Board ruled that such selective discipline violated the right of employees to participate in union activity.³⁶

One year later, in *Gould Corp.*,³⁷ the Board reiterated the position adopted in *Precision Castings*. In *Gould*, the Board held illegal the selective disciplining of a union steward who had joined a work stoppage in violation of the union's collective bargaining agreement.³⁸ The Board noted that the selective disciplining in this case was "not validated by a contract clause that specified the responsibilities of union officers."³⁹ Rather, the Board ruled that the provision in the agreement setting forth higher obligations for union officials was "binding between the Employer and the union, but [did] not grant the employer the power

²⁸ *Fournelle v. NLRB*, 670 F.2d 331, 339, 109 L.R.R.M. (BNA) 2441, 2446 (D.C. Cir. 1982).

²⁹ *Super Valu Xenia*, 288 N.L.R.B. 1254, 1259, 95 L.R.R.M. (BNA) 1444 (1977).

³⁰ *Id.* The Board found that the stewards "were discharged because they joined and participated in the unauthorized work stoppage and consequently failed to fulfill their obligations as stewards . . . not in response to or in retaliation for legal or protected activities engaged in by them as a consequence of their union stewardships." *Id.*

³¹ It has been noted by the Supreme Court, however, that the NLRB need not be bound by its own precedent, and may adopt a different ruling in a subsequent case. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 265-66, 88 L.R.R.M. (BNA) 2689, 2696 (1975).

³² 233 N.L.R.B. 183, 96 L.R.R.M. (BNA) 1540 (1977).

³³ *Id.* at 183, 96 L.R.R.M. (BNA) at 1541-42.

³⁴ *Id.*, 96 L.R.R.M. (BNA) at 1542.

³⁵ *Id.* at 184, 96 L.R.R.M. (BNA) at 1542. The Board ruled that: "discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand." *Id.*

³⁶ *Id.*

³⁷ 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728, 103 L.R.R.M. (BNA) 2207 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980).

³⁸ *Id.* at 881.

³⁹ *Id.*

to enforce it by discharging officials."⁴⁰ In the wake of *Precision Castings* and *Gould*, it appeared that the Board had adopted a *per se* rule forbidding the selective disciplining of union officials where an entire bargaining unit acted in violation of a collective bargaining agreement. The Board appeared willing to find an unfair labor practice under such conditions even where the parties had imposed higher duties upon union officials during collective bargaining.⁴¹

b. The Views of the Third and Seventh Circuits

In general, the *per se* rule of the NLRB has been unanimously rejected by the courts of appeals that have considered whether selective disciplining of union officials constitutes an unfair labor practice.⁴² In rejecting the approach of the Board, however, the circuits have not promulgated a uniform rule of their own. The Third Circuit has limited the right of employers to selectively discipline union officials to those cases where the collective bargaining agreement expressly imposes a higher duty upon those officials during illegal strikes.⁴³ The Seventh Circuit likewise held that union officials may be selectively disciplined where such a higher duty exists.⁴⁴ The Seventh Circuit, however, has suggested that the higher duty owed employers by union officials may arise solely from the holding of a union office itself, resulting in a higher obligation to uphold the terms of the collective bargaining agreement during an illegal strike whether or not the agreement expressly so provides.⁴⁵ Each of these views deserves separate consideration.

In vacating the order of the NLRB in *Gould*, the Court of Appeals for the Third Circuit ruled that a union official may be discharged for a breach of his contractual duty.⁴⁶ The court reasoned that since a higher duty was imposed upon union officials in the contract, it must overrule the finding of the Board that the union steward in this case was "singled out for discipline solely because he was a steward."⁴⁷ If the disciplining had occurred solely because of the steward's status as a union official, the court noted, it could be argued that the act of the employer constituted an interference with the right of employees to seek and hold union office.⁴⁸ The court observed, however, that the steward

⁴⁰ *Id.* This proposition was explicitly rejected by the Circuit Court of Appeals for the District of Columbia when it stated: "This argument simply ignores the principle that a valid waiver of an employee's rights to engage in concerted activity renders such activity unprotected by the N.L.R.A. Rank-and-file employees may be discharged for disobeying a contractual no-strike clause; there is no reason why a valid provision waiving the rights of union officials should have any different effect." *Fournelle v. NLRB*, 670 F.2d 331, 339 n.16, 109 L.R.R.M. (BNA) 2441, 2447 n.16 (D.C. Cir. 1982).

⁴¹ *Id.* at 339, 109 L.R.R.M. (BNA) at 2447.

⁴² *Id.*

⁴³ *See, e.g., Gould Inc. v. NLRB*, 612 F.2d 728, 733, 103 L.R.R.M. (BNA) 2207, 2210-11 (3d Cir. 1979).

⁴⁴ *See, e.g., Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227, 231-32, 101 L.R.R.M. (BNA) 2475, 2478 (7th Cir. 1979).

⁴⁵ *Id.*, 101 L.R.R.M. (BNA) at 2477.

⁴⁶ *Gould Inc. v. NLRB*, 612 F.2d 728, 733, 103 L.R.R.M. (BNA) 2207, 2211 (3d Cir. 1979).

⁴⁷ *Id.*, 103 L.R.R.M. (BNA) at 2210.

⁴⁸ *Id.*

was disciplined because he had failed to fulfill his contractual duties to take positive steps to put an end to the work stoppage.⁴⁹ The court further rejected the contention of the union that the selective discipline imposed in this case interfered with employee rights. The court maintained that since the steward was merely being deterred from engaging in an illegal strike and from breaching a contractual obligation, there existed no employee rights with which the company could be said to have interfered.⁵⁰ The Third Circuit, therefore, concluded in *Gould* that a union official could be selectively disciplined if the punishment was for his breach of a contractually imposed higher duty, and not his holding of union office *per se*.⁵¹

The Third Circuit strengthened its position in two similar cases decided in 1981. In *Hammermill Paper Co. v. NLRB*,⁵² the court reiterated its position in *Gould*, suggesting that "where a collective bargaining agreement explicitly requires union officers and representatives to terminate an unauthorized 'work stoppage,' an employer may single out for disciplinary discharge a union steward who fails to take affirmative steps to terminate that work stoppage."⁵³ The court in *Hammermill* found that the contract in that case was not sufficiently specific to impose upon union officers a higher duty,⁵⁴ and ruled that the union officials in that case could not be disciplined more harshly than the rank-and-file.⁵⁵ The court made it clear that the mere 'status' of union stewardship, without more, is an insufficient basis upon which to base discipline by the employer.⁵⁶ The court ruled that in determining whether added responsibility accompanies the status of union stewardship, the basis for such responsibility must be found in the contract, and not imposed as a matter of law.⁵⁷

Later in 1981, the Third Circuit reaffirmed this approach in *Metropolitan Edison Co. v. NLRB*.⁵⁸ The court noted the policy consideration that the holding

⁴⁹ *Id.* The pertinent part of the collective bargaining agreement in *Gould* provided: In the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following: Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line. The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action. The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

Id. at 730-31 n.3, 103 L.R.R.M. (BNA) at 2208-09 n.3.

⁵⁰ *Id.* at 733, 103 L.R.R.M. (BNA) at 2211.

⁵¹ *Id.*

⁵² 658 F.2d 155, 108 L.R.R.M. (BNA) 2001 (3d Cir. 1981).

⁵³ *Id.* at 163, 108 L.R.R.M. (BNA) at 2007.

⁵⁴ *Id.* at 164, 108 L.R.R.M. (BNA) at 2008. In *Hammermill*, the court noted the collective bargaining agreement stated only that "[t]he Union agrees that there will be no strikes, slowdowns, or work stoppages." *Id.*

⁵⁵ *Id.* at 165-66, 108 L.R.R.M. (BNA) 2008-09.

⁵⁶ *Id.* at 164, 108 L.R.R.M. (BNA) at 2008.

⁵⁷ *Id.*

⁵⁸ 663 F.2d 478, 108 L.R.R.M. (BNA) 3020 (3d Cir. 1981).

of union office is the essence of protected union activity and that discriminatory punishment based merely upon the holding of such office constitutes an unfair labor practice under section 8(a)(3) of the NLRA.⁵⁹ As a result, union officials may be disciplined more severely than rank-and-file workers only when the collective bargaining agreement, in clear language, imposes additional responsibilities upon union officials.⁶⁰ The court reasoned that in the case of clear, contractual obligations, selective discipline may be permissible to deter "prospective union officials from seeking union office because they intend after assuming office to participate in illegal work stoppages and to repudiate voluntarily assumed contractual obligations."⁶¹ In the absence of such contractual provisions, however, an employer may not, through the imposition of selective discipline, impose upon union officials responsibilities the union had not agreed to in the collective bargaining process.⁶² The court, in a footnote, however, did mention with approval the position of the NLRB that an employer may selectively discipline a union official if it is demonstrated that the official assumed a leadership role in an illegal work stoppage.⁶³

In these three recent opinions, therefore, the Third Circuit has limited the right of employers to selectively discipline union officials to instances where union officials are contractually burdened with higher responsibilities to uphold the terms of the collective bargaining agreement, specifically, a no-strike clause. It is apparent that the position of the Third Circuit carries with it two important consequences. First, it rejects the *per se* rule of the NLRB by suggesting that any higher duty imposed upon the holding of union office, which would justify selective discipline, must be derived from express language in a collective bargaining agreement, and may not be imposed as a matter of law.⁶⁴ Second, it requires employers desiring the right to selectively discipline union officials during an illegal strike to bargain with the union for that right. By allowing selective discipline in such instances, however, the Third Circuit adopts the position that unions, through the collective bargaining process, may waive the right of union officials not to be subjected to facially discriminatory selective discipline. The Third Circuit, therefore, emphasizes the importance and integrity of the collective bargaining agreement in labor relations by granting employers the right to enforce the express provisions of the contract by holding union officials to their contractually higher duty to uphold the provisions of the agreement.

The Seventh Circuit has likewise rejected the *per se* rule of the NLRB, but in doing so has suggested that the higher duty of a union official during an illegal strike need not be contractually imposed. In *Indiana & Michigan Electric*

⁵⁹ *Id.* at 482, 108 L.R.R.M. (BNA) at 3023.

⁶⁰ *Id.* at 483, 108 L.R.R.M. (BNA) at 3023.

⁶¹ *Id.* at 482, 108 L.R.R.M. (BNA) at 3023.

⁶² *Id.* at 483, 108 L.R.R.M. (BNA) at 3023.

⁶³ *Id.* at 482 n.2, 108 L.R.R.M. (BNA) at 3023 n.2 (citing *J.P. Wetherby Constr. Co.*, 182 N.L.R.B. 690, 76 L.R.R.M. (BNA) 1879 (1970)). See also *Chrysler Corp.*, 232 N.L.R.B. 466, 96 L.R.R.M. (BNA) 1382 (1977).

⁶⁴ See, e.g., *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 164, 108 L.R.R.M. (BNA) 2001, 2008 (3d Cir. 1981).

Company v. NLRB,⁶⁵ the court held that disciplining union stewards and a union official more severely than rank-and-file employees for participation in an illegal strike was not a violation of the NLRA.⁶⁶ This case apparently represented an even broader rejection of the *per se* rule of the NLRB than evidenced in the opinions of the Third Circuit in that there was no specific contractual language in the collective bargaining agreement before the court which imposed a higher duty upon union officials.⁶⁷ The Seventh Circuit reasoned that since union officials, like rank-and-file employees, had no right to participate in an illegal strike, selective discipline practices did not deter or penalize the exercise of any employee right.⁶⁸ The court cited earlier Board decisions which had recognized that the status of union officials was a proper factor upon which to base more severe disciplinary action.⁶⁹ The court then noted with apparent approval that in these cases the Board had maintained that union officials were generally subject to "an even greater duty than rank-and-file employees to uphold [the contract] provisions."⁷⁰ The court concluded that the more recent Board decisions which departed from this reasoning, including *Precision Castings*,⁷¹ were erroneous.⁷² The Seventh Circuit's position in *Indiana & Michigan Electric*, therefore, appears to go beyond the Third Circuit's in *Gould* by suggesting that union officials may be more harshly disciplined for duties arising from their status and not merely for those duties delineated in the collective bargaining agreement.⁷³

⁶⁵ 599 F.2d 227, 101 L.R.R.M. (BNA) 2475 (7th Cir. 1979).

⁶⁶ *Id.* at 232, 101 L.R.R.M. (BNA) at 2478.

⁶⁷ The relevant provision of the collective bargaining agreement in effect in *Indiana & Michigan Elec.* provided:

It is expressly understood and agreed that the services to be performed by the employees covered by this Agreement pertain to and are essential to the operation of a public utility and to the welfare of a public dependent thereon, and in consideration thereof and of the covenants and conditions herein by the Company to be kept and performed (a) the International Brotherhood of Electrical Workers and the Local Union agree that the employees covered by this Agreement, or any of them will not be called upon or permitted to cease or abstain from the continuous performance of the duties pertaining to the positions held by them with the Company in accord with the terms of this agreement. . . .

Id. at 228, 101 L.R.R.M. (BNA) at 2476.

⁶⁸ *Id.* at 233, 101 L.R.R.M. (BNA) at 2478.

⁶⁹ *Id.* at 231, 101 L.R.R.M. (BNA) at 2478 (citing *University Overland Express, Inc.*, 129 N.L.R.B. 82, 46 L.R.R.M. (BNA) 1511 (1960); *Stockham Pipe Fittings Co.*, 84 N.L.R.B. 629, 24 L.R.R.M. (BNA) 1333 (1949)).

⁷⁰ *Id.* See also *Riviera Mfg. Co.*, 167 N.L.R.B. 772, 775, 66 L.R.R.M. (BNA) 1175, 1176 (1967).

⁷¹ For a discussion of the position of the Board in *Precision Castings*, see *supra* notes 32-36 and accompanying text.

⁷² *Indiana & Michigan Elec. Co. v. NLRB*, 299 F.2d 227, 231, 101 L.R.R.M. (BNA) 2475, 2477 (7th Cir. 1979).

⁷³ See, e.g., *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 167, 108 L.R.R.M. (BNA) 2001, 2010 (3d Cir. 1981) (Higginbotham, J., concurring).

Two years later, in *C.H. Heist Corp. v. NLRB*, 657 F.2d 178, 108 L.R.R.M. (BNA) 2159 (7th Cir. 1981), the Court of Appeals for the Seventh Circuit appeared to limit slightly its broad holding in *Indiana & Michigan Elec.* In *Heist*, the court upheld the decision of the Board sustaining a union charge of an unfair labor practice where a union steward was selectively disciplined for failing to cross a picket line during an illegal strike. *Id.* at 183, 108 L.R.R.M. (BNA)

c. The Latest Cases: The Approaches of the Eighth and D.C. Circuits.

During the *Survey Year*, the D.C. Circuit in *Fournelle v. NLRB*⁷⁴ examined the question of employers' selective disciplining of union officials for the participation in illegal strikes. The court followed the reasoning of the Third Circuit⁷⁵ by holding that union officials may be selectively disciplined where the collective bargaining process has imposed upon them higher duties.⁷⁶ In 1981, the Eighth Circuit considered the same question in *NLRB v. Armour-Dial, Inc.*,⁷⁷ but followed the reasoning of the Seventh Circuit; the Armour-Dial court left open the possibility of selective discipline even in circumstances where the collective bargaining agreement does not specifically impose higher duties upon union officials.⁷⁸

In *Fournelle*, a wildcat strike took place at the shipyard of Bethlehem Steel Corporation, at Sparrows Point, Maryland.⁷⁹ The strike, in protest of the suspension of a union steward, was in violation of the collective bargaining agreement then in effect between Bethlehem and the Industrial Union of Marine and Shipbuilding Workers, AFL-CIO, and its affiliated Local 33.⁸⁰ At a meeting of the strikers on the first night of the strike, Fournelle, an elected

at 2163. The court noted that in this case, any contractual basis for imposing a higher responsibility upon the union steward was "even more tenuous than in *Indiana & Michigan Elec. Co.*" *Id.* at 182, 108 L.R.R.M. (BNA) at 2162-63. The court observed that such a contractual duty may not be necessary under the standard of *Indiana & Michigan Elec.* where "a union steward's mere presence among illegal strikers may provide 'active approval and encouragement.'" *Id.* at 183, 108 L.R.R.M. (BNA) 2163 (quoting *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227, 231 n.9, 101 L.R.R.M. (BNA) 2475, 2478 n.9 (7th Cir. 1979)). The court in *Heist* concluded, however, that the actions of the union steward disciplined in this case did not violate any higher duty that might have arisen due to non-contractual considerations. *C.H. Heist Corp. v. NLRB*, 657 F.2d 178, 183, 108 L.R.R.M. (BNA) 2159, 2163 (7th Cir. 1981). The company had suspended the union steward in *Heist* for failing to cross a picket line despite the fact he had actively "attempted to dissuade the employees from striking before and throughout the strike, and [had acted as a] mediator between the employer . . . and the union." *Id.* at 182, 108 L.R.R.M. (BNA) at 2162. The court contended that the actions of the steward in this case were sufficient to fulfill any added responsibility imposed under the *Indiana & Michigan Elec.* standard, and that to force the steward to cross the picket line in this case would "[c]ause the steward to lose both credibility and the ability and opportunity to mediate a resolution of the strike." *Id.*

The court noted that under the standard of the Third Circuit in *Gould*, if the contract had contained a provision requiring the steward to cross the picket line during an illegal strike, the action of the employer in *Heist* may have been deemed to be permissible. *Id.* In this case, however, the court concluded that to require such an action on the part of the steward would be "inherently destructive of employee rights," and therefore would not pass muster even under the relaxed standard of *Indiana & Michigan Elec. Id.*, 108 L.R.R.M. (BNA) at 2162-63.

⁷⁴ 670 F.2d 331, 109 L.R.R.M. (BNA) 2441 (D.C. Cir. 1982).

⁷⁵ For a discussion of the decisions of the Third Circuit, see *supra* notes 46-64 and accompanying text.

⁷⁶ *Fournelle v. NLRB*, 670 F.2d 331, 341, 109 L.R.R.M. (BNA) 2441, 2448-49 (D.C. Cir. 1982).

⁷⁷ 638 F.2d 51, 106 L.R.R.M. (BNA) 2265 (8th Cir. 1981).

⁷⁸ *Id.* at 55, 106 L.R.R.M. (BNA) at 2267.

⁷⁹ *Fournelle v. NLRB*, 670 F.2d 331, 333, 109 L.R.R.M. (BNA) 2441, 2442 (D.C. Cir. 1982).

⁸⁰ *Id.* The relevant provision, Article XVIII, of the Bethlehem-I.U.M.S.W. agreement provided:

During the term of this Agreement neither the Union nor any Employee shall instigate, encourage, sanction or take part in any strike, sit-down, slowdown or

union committeeman, spoke to an interviewer from a local television news program.⁸¹ In the interview, Fournelle expressed the opinion that the suspension of the union steward by Bethlehem was unjustified,⁸² and also complained about the working conditions at Bethlehem.⁸³ Upon returning to work the next day, Fournelle refused to cooperate with management officials wishing to question him concerning his conduct at the meeting the previous night.⁸⁴ Three days later, Fournelle was suspended for ten days for, according to the disciplinary report, "participating as an elected union official in a work stoppage . . . in violation of Article XVIII of the Agreement."⁸⁵ Bethlehem subsequently disciplined the rank-and-file strike participants less severely, suspending them for five days each.⁸⁶

The Court of Appeals upheld the finding of the Board that Fournelle's conduct at the union hall was unprotected by the NLRA, and therefore under the contract Fournelle could be punished for sanctioning and encouraging the strike.⁸⁷ By this holding, the appeals court determined that the company was justified in imposing on Fournelle the same five-day suspension given rank-and-file workers.⁸⁸ The court next considered whether the company could permissibly discipline Fournelle, as a union official, more harshly than the rank-and-file strike participants.⁸⁹ The court pointed out that it was not called upon to decide whether an employer could selectively discipline a union official when the contract contained only a general no-strike clause and there was no arbitration decision construing the contract.⁹⁰ The court noted that in such cases, if the union official was not a leader of the illegal strike, selective discipline by the employer may be held violative of sections 8(a)(1) and (3) of the NLRA.⁹¹ In this case, the court stated that it had only to decide "whether the parties may, through the collective bargaining process, create higher duties for union officials during strikes and whether the parties may thus waive the rights of union officials to escape selectively greater discipline for their violation of those higher duties."⁹²

other stoppage, limitation or curtailment of work or production, or take part in any picketing, boycotting or other interference or demonstration against any Yard or its business or operations, either in such Yard or elsewhere. . . . The Company may terminate the employment of or otherwise discipline any Employee who willfully violates any of the provisions of this Agreement in any material respect.

Id. at 333-34, 109 L.R.R.M. (BNA) at 2442.

⁸¹ *Id.* at 334, 109 L.R.R.M. (BNA) at 2443.

⁸² *Id.*, 109 L.R.R.M. (BNA) at 2443.

⁸³ *Id.*, 109 L.R.R.M. (BNA) at 2443. The court record quoted Fournelle as saying: "They are increasing the amount of work we have to put out. We've been called to the office for low production. They want us to be their slaves, and they're offering us no other choice but to stand up for ourselves." *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 338, 109 L.R.R.M. (BNA) at 2446.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

The *Fournelle* court discussed the development of the *per se* rule by the NLRB, noting that in *Precision Castings*⁹³ and *Gould*,⁹⁴ the Board had apparently forbidden the selective discipline of union officials, regardless of provisions to the contrary in the collective bargaining agreements.⁹⁵ In light of the unanimous rejection of the *per se* rule by courts of appeals considering the question,⁹⁶ the *Fournelle* court observed that the Board may have backed away from this approach in *Armour-Dial, Inc.*⁹⁷ The appeals court noted that the Board in *Armour-Dial* had stated that it did not "reach the issue of whether a union could, by contract, waive an employee's right to engage in protected concerted activity through the holding of union office by providing for the discipline of union officials."⁹⁸ The court therefore concluded that the current position of the Board concerning the *per se* rule of *Precision Castings* was unclear.⁹⁹ The court went on to note that despite the apparent inconsistency of the Board with regard to the *per se* rule, the courts of appeals considering the question had unanimously rejected the doctrine.¹⁰⁰ The court then discussed the holdings of the Third and Seventh Circuits in *Gould*,¹⁰¹ *Hammermill*,¹⁰² and *Indiana & Michigan Electric*.¹⁰³

In joining the Third and Seventh Circuits in their rejection of the *per se* rule and allowing for selective discipline where the contract provides for a higher duty for union officials, the D.C. Circuit in *Fournelle* reasoned that general principles allowing a valid waiver of employees' rights to engage in concerted activity supported its position.¹⁰⁴ The court ruled that parties to a collective bargaining agreement may permissibly seek to increase the effec-

⁹³ For a discussion of the position of the NLRB in *Precision Castings*, see *supra* notes 31-37 and accompanying text.

⁹⁴ For a discussion of the position of the Board in *Gould Corp.*, see *supra* notes 37-40 and accompanying text.

⁹⁵ *Fournelle v. NLRB*, 670 F.2d 331, 339, 109 L.R.R.M. (BNA) 2441, 2447 (D.C. Cir. 1982).

⁹⁶ See *supra* notes 42-45 and accompanying text.

⁹⁷ *Fournelle v. NLRB*, 670 F.2d 331, 339, 109 L.R.R.M. (BNA) 2441, 2447 (D.C. Cir. 1982).

⁹⁸ *Id.* (citing *Armour-Dial, Inc.*, 245 N.L.R.B. 959, 960 n.8 (1979), *enforcement denied*, 638 F.2d 51, 106 L.R.R.M. (BNA) 2267 (8th Cir. 1981)).

⁹⁹ *Fournelle v. NLRB*, 670 F.2d 331, 340, 109 L.R.R.M. (BNA) 2441, 2447 (D.C. Cir. 1982).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* For the position of the Third Circuit in *Gould*, see *supra* notes 46-51 and accompanying text.

¹⁰² *Fournelle v. NLRB*, 670 F.2d 331, 340, 109 L.R.R.M. (BNA) 2441, 2447 (D.C. Cir. 1982). For a discussion of the position of the Third Circuit in *Hammermill*, see *supra* notes 52-57 and accompanying text.

¹⁰³ *Fournelle v. NLRB*, 670 F.2d 331, 340, 109 L.R.R.M. (BNA) 2441, 2447 (D.C. Cir. 1982). For a discussion of the position of the Seventh Circuit in *Indiana & Michigan Elec.*, see *supra* notes 65-73 and accompanying text.

¹⁰⁴ *Fournelle v. NLRB*, 670 F.2d 331, 340, 109 L.R.R.M. (BNA) 2441, 2448 (D.C. Cir. 1982). In making this argument, the court stated: "a valid waiver of an employee's right to engage in concerted activity renders such activity unprotected by the NLRA. Rank-and-file employees may be discharged for disobeying a contractual no-strike clause; there is no reason why a valid provision waiving the rights of union officials should have any different effect." *Id.* at 339 n.16, 109 L.R.R.M. (BNA) at 2447 n.16.

tiveness of the no-strike clause by requiring higher duties on the part of union officials to help avoid or reduce the "disruptive effects" of illegal strikes.¹⁰⁵ By providing for harsher discipline for union officials during strikes, the court reasoned that union officials may be induced to honor their contractual duties.¹⁰⁶ The court suggested that giving effect to such contractual provisions not only furthers the strong policy favoring freedom of contract, but in addition promotes the national labor policy of substituting peaceful resolution for industrial strife and economic warfare.¹⁰⁷ The court concluded, therefore, that the Board should not interfere with the "legitimate products of the collective bargaining process."¹⁰⁸

The *Fournelle* court concluded its analysis by citing authority for two propositions supporting its position. First, the court observed that treating one group of employees differently from another group under the terms of a contract has been held permissible.¹⁰⁹ The court acknowledged the position of the United States Supreme Court in *Ford Motor Co. v. Huffman*,¹¹⁰ which allowed statutory bargaining representatives a wide range of reasonableness in reaching terms on a contract.¹¹¹ The *Fournelle* court reasoned, therefore, that the only apparent limitation on a bargaining representative's discretion in reaching contract terms which treat groups of employees differently is the consideration of "good faith and honesty of purpose."¹¹² Second, the *Fournelle* court noted that contractual limitations upon the exercise of section 7 rights by union officials have not been held to be objectionable.¹¹³ The court cited cases where employers were allowed to discharge union officials for failure to abide by a contractual provision specifying channels and procedures for the filing of grievances and complaints.¹¹⁴ The *Fournelle* court further referred to a D.C. Circuit decision which upheld contract terms providing for limited superseniority for union officials.¹¹⁵ The court acknowledged that provisions such as these

¹⁰⁵ *Id.* at 340, 109 L.R.R.M. (BNA) at 2448.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 340-41, 109 L.R.R.M. (BNA) at 2448.

¹⁰⁸ *Id.* at 341, 109 L.R.R.M. (BNA) at 2448.

¹⁰⁹ *Id.*

¹¹⁰ 345 U.S. 330, 31 L.R.R.M. (BNA) 2548 (1953) (upholding a contract term providing seniority for employees with military service).

¹¹¹ *Fournelle v. NLRB*, 670 F.2d 331, 341, 109 L.R.R.M. (BNA) 2441, 2448 (D.C. Cir. 1982). The Supreme Court in *Ford Motor Co.* stated:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Id. (quoting *Ford Motor Company v. Huffman*, 345 U.S. 330, 338 (1953)).

¹¹² *Fournelle v. NLRB*, 670 F.2d 331, 341, 109 L.R.R.M. (BNA) 2441, 2448 (D.C. Cir. 1982).

¹¹³ *Id.*

¹¹⁴ *Id.* (citing *NLRB v. Wilson Freight Co.*, 604 F.2d 712, 102 L.R.R.M. (BNA) 2269 (1st Cir. 1979), *cert. denied*, 445 U.S. 962, 103 L.R.R.M. (BNA) 3082 (1980)).

¹¹⁵ *Fournelle v. NLRB*, 670 F.2d 331, 341, 109 L.R.R.M. (BNA) 2441, 2448 (D.C. Cir. 1982), citing *Teamsters Local 20 v. NLRB*, 610 F.2d 991, 993, 102 L.R.R.M. (BNA) 3080,

may have the effect of encouraging or discouraging union members from seeking union office,¹¹⁶ but noted that each case allowed the provisions because they furthered the policy of lessening the dangers of illegal strikes and promoting the smooth and effective administration of the collective bargaining process.¹¹⁷

Given these policy considerations and legal precedent, therefore the *Fournelle* court concluded that "where the collective bargaining process has imposed higher duties upon union officials than the rank-and-file, the officials may be more harshly punished than the rank and file for their conduct in violation of the no-strike clause and an employer's selective discipline of the offending union official will not constitute an unfair labor practice."¹¹⁸ In holding that Bethlehem could selectively discipline union committeeman Fournelle in this case, the court gave full effect to a previous arbitration decision construing the contract in question.¹¹⁹ That arbitration decision, which had concerned the same no-strike clause at issue in *Fournelle* but a different grievance, held that union officials under the contract did have higher duties during strikes than rank-and-file workers, and that a breach of those higher duties would enable the employer to subject the offending union officials to more severe discipline.¹²⁰ The court concluded, therefore, that Fournelle was properly subject to selective discipline for his conduct in violation of the no-strike clause in the agreement.¹²¹

In 1981, the Eighth Circuit considered the question of the selective disciplining of union officials in *NLRB v. Armour-Dial, Inc.*¹²² The dispute in *Armour-Dial* arose when the union representing the employees of Armour-Dial threatened to stop handling materials from Iowa Beef Products¹²³ in support of a dispute between an affiliated union and Iowa Beef.¹²⁴ The threatened work stoppage by Armour-Dial employees constituted an illegal secondary boycott under section 8(b)(4) of the NLRA.¹²⁵ The union president and vice-president supported the refusal of Armour-Dial workers to handle Iowa Beef Products deliveries, and after meetings between the company and the union it became clear that the union officials would not act in preventing the work stoppage.¹²⁶ After the Armour-Dial employees refused to unload an Iowa Beef truck and the union officials failed to prevent the work stoppage, the company suspended the union officials, each for varying lengths of time.¹²⁷

3081 (D.C. Cir. 1979)).

¹¹⁶ *Fournelle v. NLRB*, 670 F.2d 331, 341, 109 L.R.R.M. (BNA) 2441, 2448 (D.C. Cir. 1982).

¹¹⁷ *Id.*

¹¹⁸ *Id.*, 109 L.R.R.M. (BNA) at 2448-49.

¹¹⁹ *Id.* at 345, 109 L.R.R.M. (BNA) at 2451.

¹²⁰ *Id.* at 342, 109 L.R.R.M. (BNA) at 2449.

¹²¹ *Id.* at 345-46, 109 L.R.R.M. (BNA) at 2452.

¹²² 638 F.2d 51, 106 L.R.R.M. (BNA) 2265 (8th Cir. 1981).

¹²³ *Id.* at 53, 106 L.R.R.M. (BNA) at 2265.

¹²⁴ *Id.*

¹²⁵ *Id.* at 55, 106 L.R.R.M. (BNA) at 2267.

¹²⁶ *Id.* at 54, 106 L.R.R.M. (BNA) at 2266.

¹²⁷ *Id.*

In response, the union charged before the NLRB that the suspensions discriminated against the union officials solely on the basis of their status in the union,¹²⁸ and that such discrimination constituted an unfair labor practice under sections 8(a)(1) and (3) of the NLRA.¹²⁹ The Board agreed and held the suspensions to be prohibited by the Act.¹³⁰

On appeal, however, the Eighth Circuit denied enforcement of the Board's order.¹³¹ In deciding that the union officials in this case could be subjected to selective discipline, the *Armour-Dial* court recognized that an employer may not discipline an employee merely because that employee holds a union office.¹³² Yet, the court ruled that an employee may be disciplined due to acts and omissions while holding union office.¹³³ The *Armour-Dial* court, however, did not engage in a detailed discussion concerning specifically what acts and omissions were sufficient to subject union officials to harsher discipline. Further, the court did not discuss union officials' contractually imposed higher duties to avoid or minimize the effects of an illegal work stoppage, but instead quoted extensively from the decision of the Seventh Circuit in *Indiana & Michigan Electric*.¹³⁴ The *Armour-Dial* court adopted the broad language of the Seventh Circuit that "... union officials are subject to 'an even greater duty than the rank-and-file employees to uphold [contract] provisions.'"¹³⁵ The court observed that in *Armour-Dial* the union officials had participated in and induced the illegal work stoppage.¹³⁶ The court concluded its opinion with the rather cryptic statement that "[t]ogether [the union officials] fomented the illegal work stoppage and together they should bear the consequences."¹³⁷

The Eighth Circuit in *Armour-Dial* left several important questions unanswered. First, it did not consider the situation where union officials are contractually held to a higher duty to uphold the terms of a no-strike clause during an illegal strike. Second, by quoting extensively and uncritically from the opinion of the Seventh Circuit in *Indiana & Michigan Electric*, it apparently adopted the view of that court that a higher duty may be imposed upon union officials due to their status in the union despite the lack of contractual provi-

¹²⁸ *Id.*

¹²⁹ *Id.*, 106 L.R.R.M. (BNA) at 2266-67. For the relevant text of sections 8(a)(1) and (3) of the NLRA, see *supra* note 3.

¹³⁰ NLRB v. *Armour-Dial, Inc.*, 638 F.2d 51, 54, 106 L.R.R.M. (BNA) 2265, 2267 (8th Cir. 1981). The company was therefore ordered to cease its unfair labor practices, to provide back pay for those officials who were suspended, to erase all reprimands issued to union officials in connection with the affair, and to post an appropriate notice. *Id.* at 53, 106 L.R.R.M. (BNA) at 2265.

¹³¹ *Id.* at 56, 106 L.R.R.M. (BNA) at 2268.

¹³² *Id.* at 54-55, 106 L.R.R.M. (BNA) at 2267 (citing Pontiac Motors Division, General Motors Corp., 132 N.L.R.B. 413, 415, 48 L.R.R.M. (BNA) 1368 (1961)).

¹³³ NLRB v. *Armour-Dial, Inc.*, 638 F.2d 51, 55, 106 L.R.R.M. (BNA) 2265, 2267 (8th Cir. 1981).

¹³⁴ *Id.*

¹³⁵ *Id.* (quoting *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227, 231, 101 L.R.R.M. (BNA) 2475, 2476 (7th Cir. 1979)).

¹³⁶ NLRB v. *Armour-Dial, Inc.*, 638 F.2d 51, 56, 106 L.R.R.M. (BNA) 2265, 2267-68 (8th Cir. 1981).

¹³⁷ *Id.*, 106 L.R.R.M. (BNA) at 2268.

sions to that effect.¹³⁸ If the *Armour-Dial* court did indeed adopt this approach, it failed to define the parameters of such a higher duty. Moreover, the court failed to explain how or justify why such a higher duty should automatically be imposed upon an employee exercising his protected right to seek union office. Finally, the court did not expressly state that the union officials in this case were liable due to their apparent leadership role in the illegal work stoppage. This conclusion seems imminent given the language of the court to the extent that it determined the union officials in this case did, indeed, *induce* the illegal secondary boycott and eventual strike.¹³⁹ If this were the reason the Eighth Circuit held the union officials liable in *Armour-Dial*, its conclusion would be justified by accepted authority.¹⁴⁰ In light of its opinion in *Armour-Dial*, however, it appears that the Eighth Circuit may allow the selective disciplining of union officials in instances where no clear language exists in the collective bargaining agreement imposing higher duties upon union officials during illegal work stoppages.¹⁴¹

Conclusion

In sum, it appears that there have emerged two distinct views regarding when an employer may selectively discipline union officials for participation in an illegal work stoppage. Both approaches allow selective disciplining where union officials act to lead or instigate illegal activity.¹⁴² Apart from this, however, the two approaches adopt different standards. First, the approach of the Third Circuit¹⁴³ and the D.C. Circuit in *Fournelle*¹⁴⁴ suggests that union officials may be disciplined more severely than rank-and-file employees only when higher duties are imposed upon them in the collective bargaining agreement.¹⁴⁵ The Seventh¹⁴⁶ and Eighth Circuit in *Armour-Dial*, adopted what appears to be a broader approach. These courts suggest that selective discipline may be imposed upon union officials due to the very nature of union office. This view submits that a higher duty to uphold the terms of a collective bargaining agreement naturally attends the status of union office, and as a result union officials may be more severely disciplined for acts and omissions with regard to illegal strike activity.¹⁴⁷

¹³⁸ For a discussion of the position of the Seventh Circuit in *Indiana & Michigan Elec.* with regard to the issue of higher duties for union officials, see *supra* notes 69-73 and accompanying text.

¹³⁹ *NLRB v. Armour Dial, Inc.*, 638 F.2d 51, 56, 106 L.R.R.M. (BNA) 2265, 2267-68 (8th Cir. 1981).

¹⁴⁰ See *supra* note 63 and accompanying text.

¹⁴¹ See generally Comment, *Selective Discipline of Union Officials: NLRB v. Armour-Dial, Inc.*, 23 B.C. L. REV. 155, 158 (1981).

¹⁴² See *supra* notes 63, 91, 136-37 and accompanying text.

¹⁴³ See *supra* notes 46-63 and accompanying text.

¹⁴⁴ See *supra* notes 79-121 and accompanying text.

¹⁴⁵ See, e.g., *Fournelle v. NLRB*, 670 F.2d 331, 341, 109 L.R.R.M. (BNA) 2441, 2448-49 (D.C. Cir. 1982); *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478, 483, 108 L.R.R.M. (BNA) 3020, 3022 (3d Cir. 1981).

¹⁴⁶ See *supra* notes 65-73 and accompanying text.

¹⁴⁷ See, e.g., *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 55, 106 L.R.R.M. (BNA) 2265,

The Third and D.C. Circuits have adopted the preferable approach. Holding otherwise suggests that employers and unions can no longer agree upon the responsibilities of union officials under the contract.¹⁴⁸ This would result in an inflexible approach in every case, regardless of the circumstances of the case.¹⁴⁹ The parties to a collective bargaining agreement should be allowed to bargain with regard to the specific duties of union officials during illegal strikes.¹⁵⁰ Further, by allowing employers to selectively discipline union officials in the absence of contractual obligations, it would appear that the effect of such a burden would be to "discourage members from holding union office," which would have an inherently adverse effect on employee rights with regard to seeking and holding union office.¹⁵¹ Finally, as the Third Circuit noted in *Hammermill*, where an employer offers no contractual basis for selectively disciplining union officials, "it has failed to establish, as required by *Great Dane*, that it was motivated by a legitimate objective."¹⁵²

Unions, therefore, should be allowed to waive the rights of union officials during collective bargaining with regard to selective discipline. Through contractual provisions, the parties should be permitted to specify higher duties for union officials to uphold the no-strike provisions of a contract. Conversely, employers should not be permitted to impose these duties in the absence of contractual language to that effect. Further, it should be concluded that to do so inherently destroys the protected employee right to seek and hold union office. To this extent, the approaches adopted by the Third and D.C. Circuits represent the best resolution to the question of the selective disciplining of union officials.

2.* *Partial Closing Decisions: First National Maintenance Corp. v. National Labor Relations Board*¹

The National Labor Relations Act (the Act) provides in section 8(a)(5) that an employer's refusal to bargain collectively with employees is an unfair labor practice.² The Act further provides in section 8(d), however, that good

2267 (8th Cir. 1981); *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227, 231, 101 L.R.R.M. (BNA) 2475, 2477 (7th Cir. 1979).

¹⁴⁸ See, e.g., *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 164, 108 L.R.R.M. (BNA) 2001, 2007-08 (3d Cir. 1981).

¹⁴⁹ See, e.g., *id.*

¹⁵⁰ Such bargaining would likely result in a contract specifically delineating the duties of union officials during illegal strikes, as was evidenced in *Gould*. For the text of the agreement in *Gould*, see *supra* note 49.

¹⁵¹ See, e.g., *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 163, 108 L.R.R.M. (BNA) 2001, 2007 (3d Cir. 1981) (citing *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 227, 230, 101 L.R.R.M. 2475, 2477 (7th Cir. 1979)).

¹⁵² *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 163, 108 L.R.R.M. (BNA) 2001, 2007 (3d Cir. 1981).

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¹ 101 S. Ct. 2573 (1981).

² 29 U.S.C. § 158(a) (1976) provides in part: "It shall be an unfair labor practice for

faith bargaining is required only "with respect to wages, hours, and other terms and conditions of employment. . . ."³ These provisions, therefore, require an employer to bargain with employees only over certain subjects.⁴ Yet it is not clear from legislative history which subjects, aside from wages and hours, are mandatory topics for collective bargaining.⁵ Accordingly, the National Labor Relations Board (the Board) and the federal courts have been required to interpret the statute's uncertain bargaining requirements.

One subject of litigation has been whether an employer's decision to close part of its business is a mandatory topic for collective bargaining under the Act. Several Supreme Court precedents, dealing with closure decisions, are relevant in resolving this issue. First, in *The Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*⁶ the Court held that a railroad's decision to close several stations was subject to the mandatory bargaining requirement of the Railway Labor Act.⁷ According to the Court, bargaining over this issue was mandatory because such closings would result in the loss of jobs and because a strike to force bargaining could not be enjoined under the Norris-LaGuardia Act.⁸ In reaching its conclusion, the Court stated that job security is a condition of employment under section 13(c) of the Norris-LaGuardia Act,⁹ a section akin to section 8(d) of the Act. Subsequently, in *Fibreboard Paper Products Corp. v. National Labor Relations Board*,¹⁰ the Court held that the failure of an employer to negotiate with a union over its decision to replace union employees with an independent contractor's employees violated sections 8(a)(5) and 8(d)

an employer . . . (5) to refuse to bargain collectively with the representatives of his employees. . . ."

³ 29 U.S.C. § 158(d) (1976) provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

⁴ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 409 (1952).

⁵ Note, *Labor Law — National Labor Relations Act — In a Partial Closing, the Interests of the Parties Must be Balanced to Determine Whether the Closing is a Mandatory Subject of Bargaining — Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720 (3d Cir. 1978), 47 GEO. W. L. REV. 679, 681-82 (1979) [hereinafter cited as Note, *Labor Law*]; Case Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks v. NLRB*, 92 HARV. L. REV. 768, 771 (1979) [hereinafter Case Comment].

⁶ 362 U.S. 330 (1960).

⁷ *Id.* at 339. 45 U.S.C. § 152 (1976) provides in part: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes. . . ."

⁸ 362 U.S. at 335, 340. The Norris-LaGuardia Act provides, in part that, a "labor dispute" is "any controversy concerning terms or conditions of employment. . . ." 29 U.S.C. § 113(c) (1976). If there is a labor dispute, the district courts lack jurisdiction 29 U.S.C. § 104 (1976), to issue injunctions.

⁹ 362 U.S. at 335.

¹⁰ 379 U.S. 203 (1964).

of the Act.¹¹ The Court relied on its interpretation of the phrase "terms and conditions of employment" in *Order of Railroad Telegraphers* to find that termination of employment is a "condition of employment" under 8(d).¹² The Court found that such an interpretation of 8(d) would further the goal of the Act to promote industrial peace.¹³ The Court also noted that because the employer's basic business operations were not significantly affected by the replacement of employees, requiring bargaining would not significantly affect the employer's managerial freedom.¹⁴ Finally, in *Textile Workers Union of America v. Darlington Manufacturing Co.*¹⁵ the Court held that a decision to close an entire business is not an unfair labor practice under section 8(a)(3) of the Act,¹⁶ even if motivated by antiunion animus, but that a partial closing motivated by antiunion animus would violate this provision of the Act.¹⁷ The Court found that legislative history of the Act did not support requiring mandatory bargaining in a total closure case.¹⁸ Furthermore, the Court stated that appellate court decisions correctly reasoned that where a business is terminated entirely, there ceases to be an employer subject to the Act.¹⁹

Thus, before the *Survey* year, the Supreme Court had not directly decided whether partial plant closing decisions fall under section 8(d) of the Act, thereby making them mandatory topics of collective bargaining. The Board²⁰ and the federal courts of appeals²¹ were divided on the issue. In 1981, however, the Court held in *First National Maintenance Corp. v. National Labor Relations*

¹¹ *Id.* at 213.

¹² *Id.* at 210.

¹³ *Id.* at 211.

¹⁴ *Id.* at 213.

¹⁵ 380 U.S. 263 (1965).

¹⁶ 29 U.S.C. § 158(a) (1976) provides in part: "It shall be an unfair labor practice for an employer . . . (3) 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. . . ."

¹⁷ 380 U.S. at 275.

¹⁸ *Id.* at 270-74.

¹⁹ *Id.*

²⁰ The National Labor Relations Board held in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 63 L.R.R.M. (BNA) 1264 (1966), that a partial shutdown was a mandatory bargaining subject "directly affecting terms and conditions of employment." *Id.* at 567, 63 L.R.R.M. (BNA) at 1268. In *National Car Rental Sys.*, 252 N.L.R.B. 159, 105 L.R.R.M. (BNA) 1263 (1980), however, a partial closing was not ruled a mandatory subject because it was a significant business motivated decision. *Id.* at 162-63, 105 L.R.R.M. (BNA) at 1267-68.

²¹ The Second Circuit created a presumption in favor of mandatory bargaining which could be rebutted by showing that the purposes of the Act would not be furthered by bargaining. *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 601-02 (2d Cir. 1980). The Third Circuit created a similar presumption which could be rebutted by showing, that the employer's interests outweighed the employee's interests in mandatory bargaining in the particular case. *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 735-38 (3d Cir. 1978). The Eighth Circuit required bargaining only where a violation of section 8(a)(3) could be proved. *Morrison Cafeterias Consol., Inc. v. NLRB*, 431 F.2d 254, 257 (8th Cir. 1970). The Ninth and Tenth Circuits required a bargaining only if the decision was not a significant one. *NLRB v. International Harvester Co.*, 618 F.2d 85, 87 (9th Cir. 1980); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 939 (10th Cir. 1967). Finally, the Fifth Circuit has imposed a duty to bargain over a partial closing decision. *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512, 517 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966).

Board,²² that a partial closing decision is not part of section 8(d)'s "terms and conditions" of employment requiring good faith mandatory bargaining under section 8(a)(5).²³

In *First National Maintenance*, the petitioner-employer (FNM) was engaged in the business of rendering housekeeping, cleaning, maintenance, and similar services to commercial customers.²⁴ The corporation hired separate employees for each location.²⁵ During the spring of 1977, approximately thirty-five FNM employees were performing maintenance work at the Greenpark Care Center, a nursing home.²⁶ Greenpark provided the workers' equipment.²⁷ On March 31, a majority of FNM's employees selected the District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO as their bargaining agent.²⁸ On July 6, FNM informed Greenpark that unless an increase in the management fee were paid, FNM would cease operations at Greenpark on August 1.²⁹ On July 12, the union notified FNM of the union's certification and right to bargain, requesting a meeting with management.³⁰ FNM did not respond to the union's request.³¹ Subsequently, on July 25, FNM gave final notice to Greenpark that FNM was terminating its service contract.³² On July 28, FNM notified its employees at Greenpark that they would be discharged three days later.³³ FNM refused the Union's request for a delay of its Greenpark closing for the purposes of bargaining.³⁴

The Union filed an unfair labor practice complaint alleging that FNM's refusal to bargain violated sections 8(a)(1) and 8(a)(5) of the Act.³⁵ An administrative law judge ruled for the Union, requiring FNM to bargain in good faith over both its decision to terminate the Greenpark contract and the effects of that termination.³⁶ The administrative law judge also noted that, as in *Fibreboard Paper Products Corp.*, the decision of FNM involved no redeployment of capital, did not alter the nature of the business, and did not substantially af-

²² 101 S. Ct. 2573 (1981).

²³ *Id.* at 2584.

²⁴ *Id.* at 2575.

²⁵ *Id.* The Court found that the record did not fully disclose the dimensions of FNM's business. *Id.* n.1.

²⁶ *Id.* at 2575.

²⁷ *Id.*

²⁸ *Id.* at 2575-76.

²⁹ *Id.* at 2575.

³⁰ *Id.* at 2576.

³¹ *Id.*

³² *Id.* at 2575.

³³ *Id.* at 2576.

³⁴ *Id.*

³⁵ 29 U.S.C. § 158(a) (1976) provides in part: "It shall be an unfair labor practice for an employer . . . (1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 157 of this title. . . . (5) to refuse to bargain collectively with the representatives of his employees. . . ."

³⁶ *First Nat'l Maintenance Corp.*, 242 N.L.R.B. 462, 466 101 L.R.R.M. (BNA) 1117, 1178 (1979).

fect its overall size.³⁷ The Board concurred with the administrative law judges ruling that FNM had violated sections 8(a)(5) and 8(a)(1) of the Act.³⁸

On appeal, the United States Court of Appeals for the Second Circuit enforced the Board's order.³⁹ Unlike the Board, however, it did not find a violation of the Act because of any "per se" violation.⁴⁰ Instead, the court used a balancing test, stating that even where a partial closing decision is an economic one, section 8(d) created a presumption in favor of mandatory bargaining.⁴¹ Yet, the court noted that this presumption could be rebutted under the appeals court's analysis "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain."⁴² Such a showing could be made, for example, by proving that "bargaining over the decision would be futile;" that the decision was due to "emergency financial circumstances;" or that "the custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions."⁴³ The Second Circuit found that because termination of employment is part of the terms and conditions of employment and because FNM did not produce evidence to rebut the presumption favoring mandatory bargaining over partial closing decisions, the statute was violated.⁴⁴ The Supreme Court granted certiorari because of the conflict between the Board and circuit courts.⁴⁵

In *First National Maintenance*, the Supreme Court held that the decision to shut down part of a business solely for economic reasons is not part of section 8(d)'s "terms and conditions" and therefore is not a mandatory topic for collective bargaining.⁴⁶ The majority reached this conclusion by applying a balancing test which provides: "in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."⁴⁷ Applying this balancing test to economically motivated partial closing decisions, the Court found labor had little to gain from collective bargaining while management had much to lose.

With regard to the interests of labor, the Court conceded that a union has an interest in participating in the decision to partially close operations because of "its legitimate concern over job security."⁴⁸ In spite of this interest the

³⁷ *Id.* at 462, 101 L.R.R.M. (BNA) at 1178.

³⁸ *Id.* at 446, 101 L.R.R.M. (BNA) at 1178.

³⁹ *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 603 (2d Cir. 1980).

⁴⁰ *Id.* at 601.

⁴¹ *Id.* at 601-02.

⁴² *Id.* at 601.

⁴³ *Id.* at 601-02.

⁴⁴ *Id.* at 602.

⁴⁵ 101 S. Ct. 854 (1981).

⁴⁶ 101 S. Ct. at 2584.

⁴⁷ *Id.* at 2581.

⁴⁸ *Id.*

Court found that workers already are protected⁴⁹ by section 8(a)(5), which requires bargaining over the effects⁵⁰ of such a decision,⁵¹ and by section 8(a)(3), which prohibits partial closings motivated by antiunion animus.⁵² Turning to an evaluation of management's interests in collective bargaining over a partial closing decision, the Court found that the bargaining process is disruptive of management's decision making process.⁵³ Management's interest in discussing a partial closing, according to the Court, depends upon the circumstances.⁵⁴ When wages are at issue, the majority stated, a voluntary conference probably would occur.⁵⁵ Yet in some partial closing cases, the Court observed, management needs to act quickly, unfettered by the public, time-consuming nature of bargaining.⁵⁶ Moreover, the Court found that because in many cases the closing is inevitable, bargaining will only cause needless additional loss to the employer.⁵⁷ In addition, the Court feared that unions would use mandatory bargaining in this situation to delay unavoidable closings.⁵⁸ Finally, because collective bargaining agreements rarely contain provisions requiring bargaining over a partial closing decision, the Court reasoned, current labor practice does not warrant such bargaining.⁵⁹

After finding that collective bargaining over the decision to close part of a business generally would be fruitless, the Court stated that the rebuttable presumption analysis of the Second Circuit would not promote better labor-management relations.⁶⁰ Because an employer would be uncertain of the need for bargaining under this analysis, the Court found that the penalties for erroneously deciding not to bargain, such as court ordered payment of back pay, would be too harsh.⁶¹ The Court further noted that an employer would have difficulty determining when bargaining should begin and what kind of bargaining would be needed for the employer to act in "good faith."⁶² Likewise, the majority believed that under a presumption analysis a union would be unsure of whether its prerogatives could be used to influence a given decision.⁶³ As a result of the Court's evaluation of the interests at stake and the merits of a presumption analysis, the Court adopted a per se rule under which "the harm

⁴⁹ *Id.* at 2582.

⁵⁰ Such effects include "possibility of transfer, reassignment to other duties, disposition of pensions, and payment of severance pay and vacation pay." T. Kheel, 18 BUSINESS ORGANIZATIONS, LABOR LAW 20-29 (1981).

⁵¹ See *supra* note 35 for text of section 8(a)(5).

⁵² See *supra* text of section 8(a)(3) at note 16.

⁵³ 101 S. Ct. at 2582-83.

⁵⁴ *Id.* at 2582.

⁵⁵ *Id.*

⁵⁶ *Id.* The Court stated that management "may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure." *Id.* at 2582-83.

⁵⁷ *Id.* at 2583.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 2584.

⁶³ *Id.* The Court stated that union delay, due to fear of sanctions from the Board, could constitute a waiver of the right to bargain. *Id.*

likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision ⁶⁴ The Court decided, therefore, that an economically motivated partial closing decision is not a mandatory subject of collective bargaining under 8(d).⁶⁵

After adopting this per se rule, the Court emphasized the limits of its holding by focusing on the specific facts of *First National Maintenance*. These facts, the Court observed, differed from those in *Fibreboard Paper Products Corp.* where the Court required bargaining.⁶⁶ In *First National Maintenance*, no substitution of employees occurred, which indicated the economic nature of the closing.⁶⁷ Moreover, because the economic dispute that led to the partial closing was over the management fee, the Court considered the union at Greenpark too far removed from the dispute to affect the fee negotiation.⁶⁸ The Court also noted there were no ongoing or prior negotiations between the union and FNM.⁶⁹ Although the Court stated that the amount of capital involved was not crucial to its decision, the significance of the change to FNM's operations was considered great enough to warrant noninterference with the employer's decision.⁷⁰ Thus, the Supreme Court's decision is confined to economically based discharges where a significant part of a business's operations are curtailed.

Justice Brennan, joined by Justice Marshall, dissented because he found the majority's test of mandatory bargaining was not neutral.⁷¹ He claimed that the majority's test considered the interests of the employer only.⁷² Moreover, Justice Brennan found that, even under application of the majority's test, a partial closing falls within 8(a).⁷³ Union concessions, he noted, often can keep a company going.⁷⁴ He questioned the majority's belief that employers must make quick, unpublicized decisions. In his opinion, the decision of whether to partially close can be made quickly in many cases.⁷⁵ He noted that since bargaining over the effects of such a decision is mandatory, the extra time needed to bargain over the decision itself should not defeat corporate needs.⁷⁶ Finally he stated that the Board's interpretation of the statute should be accorded deference and that the Second Circuit's analysis was proper.⁷⁷ With respect

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 2585.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 2586.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 2586-87.

⁷⁶ *Id.* at 2587.

⁷⁷ *Id.* at 2587 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-97 (1979); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

to this case, however, he would have vacated the Second Circuit's decision and remanded the case to the Board for further examination of the evidence.⁷⁸

The dissent's disagreement with the majority stems from the view taken of the function of the Act in partial closing situations. Although the majority stated that the Act was designed to maintain industrial peace through "the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management,"⁷⁹ its decision does not further that goal. Rather, the majority skews its analysis to evaluate only the employer's benefit from collectively bargaining over this issue. The majority's analysis may be consistent with another goal of the Act, namely, to provide for the free flow of capital.⁸⁰ Yet, economic efficiency may not always result from unilateral decision. First, the external costs of a partial closing, such as unemployment, affect the community at large and are not likely to enter into management's decision making process.⁸¹ More importantly, an employer lacks complete information when he acts without union consultation.⁸² Unions often are able to offer wage and hour concessions to help keep a business running,⁸³ as in the case of Chrysler Corporation.⁸⁴ Moreover, unions have provided employers secondary economic assistance by helping employers obtain substantial loans and alleviating problems such as crime at the worksite.⁸⁵ The *First National Maintenance* Court, however, presumes that unions are not helpful on indirect economic issues, such as reducing Greenpark's management fee.⁸⁶ More importantly, FNM could not have suffered a substantial loss of capital if termination of its Greenpark operation were delayed because FNM provided only employees.⁸⁷ Although the Court stated that the degree of change to the employer's business was the critical factor in this case,⁸⁸ not the change in capital, the administrative law judge had found that "[t]he closing of this one spot in no sense altered the nature of its [Greenpark's] business, nor did it substantially affect its total size."⁸⁹ Commentators arguing in favor of a per se nonmandatory bargaining rule at least make a distinction between working capital, such as wages, and fixed capital, such as invested resources.⁹⁰ At the heart of the distinction these commentators make is a recognition that the proper rule should account for different factual settings.

⁷⁸ *Id.* (relying on *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)).

⁷⁹ 101 S. Ct. at 2578.

⁸⁰ See Comment, "Partial Terminations" — *A Choice Between Bargaining Equality and Economic Efficiency*, 14 U.C.L.A. L. REV. 1089, 1091 (1967) [hereinafter Comment].

⁸¹ Case Comment, *supra* note 5, at 775.

⁸² Case Comment, *supra* note 5, at 775-76.

⁸³ Case Comment, *supra* note 5, at 777-78; R. Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards In Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803, 824 (1971) [hereinafter Rabin].

⁸⁴ 101 S. Ct. at 2586 (Brennan, J., dissenting).

⁸⁵ Rabin, *supra* note 83, at 825-26.

⁸⁶ 101 S. Ct. at 2585.

⁸⁷ *Id.* at 2575.

⁸⁸ See *supra* note 70 and accompanying text.

⁸⁹ *First Nat'l Maintenance Corp.*, 242 NLRB 462, 466 (1979). See also *supra* note 38 and accompanying text.

⁹⁰ Comment, *supra* note 80, at 1095.

Providing for a rebuttable presumption of mandatory bargaining provides the flexibility needed. The Second Circuit's test, however, arguably is too vague to guide employer's decisions on whether to bargain collectively or not. A more appropriate test is that used by the Third Circuit. Specifically, the presumption that bargaining is required could be rebutted if the circumstances indicate that the interests of the employer in a unilateral decision are greater than those of the workers in a collective decision.⁹¹ In applying this rule, the Third Circuit has upheld a unilateral decision where condemnation proceedings were imminent,⁹² but not where the employer was taking losses over several months.⁹³ Such a test would further the goals of distributing the wealth of the corporation and economic efficiency.⁹⁴ Moreover, the feeling of participation among workers that would result from such an approach would promote industrial peace.⁹⁵ Case law would develop clear guidelines for employers to follow.

The language of the Court, however, makes it unlikely the Court will alter its analysis in future cases. Indeed, the Board already has felt constrained by the *First National Maintenance* decision to uphold an employer's decision to cancel a contract and discharge some sixty employees without mandatory bargaining over the decision.⁹⁶ Moreover, the broad language of the decision may result in pro-employer judgments when plant relocation⁹⁷ or other "economically motivated" decisions are at issue. To be sure, unions still have the power to bargain over the effects of a partial closing decision.⁹⁸ Unions can also bring actions under section 8(a)(3) if the burden of proving antiunion animus is met.⁹⁹ Moreover, the decision making process for partial closings can be provided for in the collective bargaining agreement. Yet because partial closing decisions are now only a permissive subject of bargaining under the Court's analysis in *First National Maintenance*, the union cannot insist upon a resolution of this issue at the bargaining table.¹⁰⁰ Thus, in one stroke the Court has substantially damaged the bargaining process and arguably impaired the Act's effectiveness in promoting industrial peace.

⁹¹ See *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 735-38 (3d Cir. 1978).

⁹² *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191, 196-97 (3d Cir. 1965).

⁹³ *Electrical Prods. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 982-83 (3d Cir. 1980).

⁹⁴ See Case Comment, *supra* note 5, at 775.

⁹⁵ See Case Comment, *supra* note 5, at 779-80.

⁹⁶ *United States Contractors, Inc.*, 257 N.L.R.B. 152, 108 L.R.R.M. (BNA) 1048 (1981).

⁹⁷ See T. Kheel, 18 BUSINESS ORGANIZATIONS, LABOR LAW 20-33 (1981).

⁹⁸ 101 S. Ct. at 2582.

⁹⁹ *Id.*

¹⁰⁰ See generally T. Kheel, 18 BUSINESS ORGANIZATIONS, LABOR LAW 20-30 (1981).

3.* *Successor Employer's Duty to Bargain With a Union:*
NLRB v. Winco Petroleum Co.¹

Section 10(c)² of the National Labor Relations Act³ (the "Act") empowers the National Labor Relations Board (the "Board") to take action against employers found to have engaged in unfair labor practices. The Act authorizes the Board to remedy the deleterious effects of such unfair practices by ordering the reinstatement of an employee or issuing any other appropriate remedy required to effectuate the policies of the Act.⁴ An important issue raised by section 10(c) is whether an order by the Board against the predecessor in interest of a company (the predecessor employer) resulting from the predecessor's unfair labor practice should be valid against the bona fide purchaser of the company (successor employer).⁵

Following a series of inconsistent decisions by the Board and lower courts dealing with such successor liability,⁶ the Supreme Court in 1973 in *Golden State Bottling Co. v. NLRB*⁷ held that a bona fide purchaser, as successor employer, had to obey an outstanding Board order remedying the unfair labor practices of a predecessor employer by reinstating a previously fired employee.⁸ In its deci-

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¹ 668 F.2d 973 (8th Cir. 1982).

² 29 U.S.C. § 160(c) (1976) states in pertinent part:

(I)f upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such a person an order requiring such a person to cease and desist from such unfair labor practice, and take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [29 U.S.C. §§ 151-158, 159-168 (1976)]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.

³ 29 U.S.C. §§ 141-197 (1976).

⁴ See *supra* note 2.

⁵ See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978); *Thomas Engine Corp.*, 73 L.R.R.M. (BNA) 1289 (NLRB 1969), *enforced sub. nom.* *Auto Workers v. NLRB*, 442 F.2d 1180 (9th Cir. 1971); *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967), *enforced sub. nom.* *United States Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968); *Syms Grocer Co.*, 109 N.L.R.B. 346 (1954); *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284 (1st Cir. 1954); *NLRB v. Birdsall Stockdale Motor Co.*, 208 F.2d 234 (10th Cir. 1953); *Alexander Milburn Co.*, 78 N.L.R.B. 747 (1947); *South Carolina Granite Co.*, 58 N.L.R.B. 1448 (1944), *enforced sub. nom.* *NLRB v. Blair Quarries, Inc.*, 152 F.2d 25 (4th Cir. 1945).

⁶ After holding initially that a successor employer could not be held responsible for the unfair labor practices of its predecessor, see *South Carolina Granite Co.*, 58 N.L.R.B. 1448 (1944), *enforced sub. nom.* *NLRB v. Blair Quarries, Inc.*, 152 F.2d 25 (4th Cir. 1945), the Board reached a series of inconsistent conclusions on the issue, see *Alexander Milburn Co.*, 78 N.L.R.B. 747 (1947); *NLRB v. Birdsall Stockdale Motor Co.*, 208 F.2d 234 (10th Cir. 1953); *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284 (1st Cir. 1954); *Syms Grocer Co.*, 109 N.L.R.B. 346 (1954), and the Board finally determined in 1968 that a successor employer could be held responsible for the unfair labor practices of the predecessor employer. *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967), *enforced sub. nom.* *United States Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

⁷ 414 U.S. 168 (1973).

⁸ *Id.* at 172. In *Golden State*, All Am. Beverages, Inc. (All American) had purchased

sion, the Court included guidelines for use in successor liability cases.⁹ The Court stressed the importance of two facts of the case that led to the liability of the successor employer: (1) that the successor employer knew of the unfair labor practice litigation previous to the purchase of the company;¹⁰ and (2) that the successor employer had continued the business without interruption or substantial change.¹¹ Given these facts, the Court concluded that the successor had merely stepped into the shoes of the old employer and therefore had to assume the duties of the old employer.¹² In addition to these two facts, the Court articulated three other prerequisites necessary for liability to attach to a successor employer. First, a remedy has to be within the discretionary powers of the Board under section 10(c).¹³ Second, procedural safeguards, consisting of notice and a hearing, must protect the rights of the successor employer.¹⁴ Third, the order by the Board must reach the appropriate balance among the interests of the bona fide successor employer, the public, and the affected employees.¹⁵ Applying these requirements in *Golden State*, the Court concluded that the order to the successor employer to reinstate the employee was valid and upheld its imposition.¹⁶

Despite the completeness of the *Golden State* decision, one issue left unresolved involved the scope of a successor employer's duty to bargain with a union. This issue arises when an employer who has engaged in unfair labor practices, and as a result has been ordered by the Board to bargain with a union, sells the company. In this situation, the *Golden State* result requiring a successor employer to fulfill an outstanding Board order may conflict with the

Golden State Bottling Co. (Golden State). *Id.* at 170. Prior to the purchase, *Golden State* had been ordered by the Board pursuant to § 10(c) to reinstate a particular employee because his discharge constituted an unfair labor practice. *Id.* at 171. Following the sale of *Golden State*, the Board ordered *All American*, as successor employer, to comply with this reinstatement order. *Id.* at 170-71. The Supreme Court affirmed the appeals court enforcement of the order. *Id.* at 172.

⁹ *Id.* at 172-89.

¹⁰ *Id.* at 172-74.

¹¹ *Id.* at 184.

¹² *Id.* at 172-74, 184.

¹³ *Id.* at 176. The Court stated, "We agree that the Board's remedial powers under § 10(c) include broad discretion to fashion and issue the order before us as relief adequate to achieve the ends, and effectuate the policies of the Act." *Id.* The Court relied on the language of § 10(c) that allows the Board to take affirmative action that will effectuate the policies of the Act. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942).

¹⁴ 414 U.S. at 180-81. The Court relied on the procedural safeguards that were established in *Perma Vinyl*. *Id.* The Court stated, "There will be no adjudication of liability against a bona fide successor 'without affording (it) a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices.'" *Id.* at 180.

¹⁵ 414 U.S. at 181. The Court, in response to an argument made by the successor employer, also stated that Rule 65(d) of the Federal Rules of Civil Procedure, did not bar successor liability even when the successor is not responsible for the unfair labor practices. Rule 65(d) provides that injunctions and restraining orders shall be "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." FED. R. CIV. P. 65(d).

¹⁶ 414 U.S. at 172.

strong public policy favoring union selection through the electoral process.¹⁷ In *Golden State*, the Supreme Court addressed in dicta this issue of a successor employer's duty to bargain with a union.¹⁸ The Court stated that if a majority of employees of the predecessor employer were not hired by the successor employer, the successor employer would not have to satisfy an outstanding order to bargain with a union.¹⁹

In 1978 the United States Court of Appeals for the First Circuit, faced with a factual pattern very similar to the hypothetical posed by the Court in *Golden State*, refused to enforce a bargaining order against a successor employer and overruled the Board. In *NLRB v. Cott Corp.*,²⁰ the predecessor employer, prior to selling the company, had been ordered to bargain with a union.²¹ The successor employer employed only one employee of the predecessor at the time it received a show cause notice concerning why the successor should be allowed to ignore the bargaining order that had been issued to its predecessor.²² Relying on dicta in *Golden State* limiting the duty of a successor employer to bargain if a majority of employees of the predecessor were not employed by the successor, the First Circuit ruled the successor had no duty to bargain.²³ Instead, the appeals court determined that the policy of the Act would be furthered by the holding of a secret election among the new employees to determine if they wanted the union to represent them.²⁴

During the *Survey* year the United States Court of Appeals for the Eighth Circuit, in *NLRB v. Winco Petroleum Co.*,²⁵ held that a successor employer *could*

¹⁷ Two provisions of the Act give the right to employees to be represented by a union of their choice. 29 U.S.C. §§ 9157, 159(a) (1976). Although the provisions do not explicitly provide for it, a secret election process has been accepted as the most favorable method by which employees should select a union. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-15 (1969); *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 149-50 (3d Cir. 1979); *NLRB v. Chatfield-Anderson Co., Inc.*, 606 F.2d 266, 268 (9th Cir. 1979); *NLRB v. Cott Corp.*, 578 F.2d 892, 894-95 (1st Cir. 1978); *NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1152 (9th Cir. 1977); *Peerless of Am., Inc. v. NLRB*, 484 F.2d 1108, 1118 (7th Cir. 1973). The Supreme Court in *Gissel* stated that only "If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair re-run) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." *NLRB v. Gissel Packing Co.*, 395 U.S. at 614, 15.

¹⁸ *Golden State*, 414 U.S. at 184 n.6. Prior to *Golden State*, the Supreme Court had determined that a new employer could be ordered by the Board to bargain with the certified bargaining representative for the old company if the bargaining unit remained essentially unchanged. *NLRB v. Burns Int'l Sec. Servs. Inc.*, 406 U.S. 272 (1972). The situation in *Burns* must be distinguished from that of *Golden State*. *Golden State* involved orders that originally were made against the predecessor company and were subsequently imposed on the successor company. *Burns* focused on the duty of the successor company to follow orders of the Board originally directed at the predecessor company.

¹⁹ *Golden State*, 414 U.S. at 184 n.6. The Court's statements were expressed in a hypothetical situation meant to demonstrate the limits of a successor employer's duty to correct its predecessor's unfair labor practices. *Id.*

²⁰ 578 F.2d 892 (1st Cir. 1978).

²¹ *Id.* at 893.

²² *Id.*

²³ *Id.* at 895.

²⁴ *Id.* at 894-95. The appeals court relied on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). See *supra* note 16 and accompanying text.

²⁵ 668 F.2d 973 (8th Cir. 1982).

have a duty to bargain with a union solely because its predecessor had been ordered by the Board to bargain with that union.²⁶ This decision represents the first time that a court of appeals has upheld the Board's imposition of a bargaining order against a successor employer when the successor itself has not been found to have engaged in unfair labor practices.

In *Winco*, Winco Petroleum Company voluntarily recognized a union which had received union authorization cards²⁷ from a majority of Winco's employees.²⁸ Shortly thereafter, however, Winco withdrew its recognition of the union and discouraged union activity among its employees.²⁹ As a result, the union filed unfair labor practices charges against Winco.³⁰ Following an administrative hearing, a decision against Winco was rendered by the administrative law judge.³¹ Subsequently, Winco Petroleum Company was sold to Cooper Oil Company.³² The controlling parties in the two companies had known each other for at least ten years prior to the sale.³³ The buyer, Cooper Oil, had examined the financial reports of Winco before purchasing, and these reports indicated a sizeable expenditure for legal fees for unfair labor practice litigation.³⁴ The majority of Winco employees were kept in the work force by Cooper, and the former business of Winco continued without substantial change or interruption.³⁵

After the acquisition by Cooper of Winco, the Board affirmed the findings of the administrative hearing, and ordered Winco to bargain with the union that it had previously recognized.³⁶ This bargaining order was subsequently issued against Cooper, as successor employer, and Cooper appealed this decision by the Board to the Eighth Circuit Court of Appeals.³⁷

Relying heavily on *Golden State*, the Eighth Circuit in *Winco* affirmed the Board's decision against Cooper and thereby ordered Cooper to bargain with

²⁶ *Id.* at 975.

²⁷ Union authorization cards provide another method by which a union can be chosen to represent employees. It has been recognized that through the interaction of § 8(a)(5), 29 U.S.C. §§ 9, 158(a)(5), 159(a) (1976) a union may be certified through the collection of union cards. See *NLRB v. Gissel Packing Corp.*, 395 U.S. 575, 596-97 (1968); *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 n.8 (1956); *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318, 339-40 (1940).

²⁸ 668 F.2d 975. Twelve of the nineteen Winco employees had signed the cards. *Id.*

²⁹ *Id.*

³⁰ *Id.* The union charged that Winco had violated § 8(a)(1), (3) and (5) of the National Labor Relations Act 29 U.S.C. §§ 141-197 (1976). *Id.* The basis of the claim was that Winco had refused to negotiate with the union, Winco had discouraged union support, that Winco had discriminatorily discharged one employee and reduced the hours of other employees. 668 F.2d at 975.

³¹ *Id.*

³² *Id.* at 976. Two years prior to the actual sale the same parties had discussed the possibility of a sale but had rejected it. *Id.*

³³ *Id.* at 975. In addition, the court pointed out that both men were members of the Mid-America Gasoline Marketers Association. *Id.*

³⁴ *Id.* at 976.

³⁵ *Id.* One month following the sale Cooper employed three former Winco employees as managers and twelve of the sixteen non-supervisory employees. *Id.*

³⁶ *Id.*

³⁷ *Id.* A notice of hearing was given to both Winco and Cooper, and a hearing was held to determine if Cooper should be held to the order rendered against Winco. *Id.* The Board af-

the union in its capacity as successor employer.³⁸ The court accepted the Board's factual findings that Cooper had purchased with the knowledge of the unfair labor practices of the selling company³⁹ and that the former business of Winco proceeded with little change under Cooper.⁴⁰ The Eighth Circuit emphasized that these two identical facts existed in the *Golden State* case and concluded that *Golden State* controlled in *Winco*.⁴¹ Thus, the court proceeded to apply the three standards of *Golden State*: the power of the Board,⁴² the existence of procedural safeguards,⁴³ and the balance of equities among the employer, the public and the employees.⁴⁴ Since the court viewed the cases as identical, it reached the same conclusion as was reached in *Golden State* — that the bargaining order against Cooper was valid under these three standards.⁴⁵

In addition, the *Winco* court relied on the dicta of the *Golden State* decision, which limited the duty of a successor employer to follow a bargaining order against a predecessor employer.⁴⁶ Since the Supreme Court had stated that a successor employer would not have a duty to bargain if he did not hire a majority of the predecessor's employees, the *Winco* court reasoned that the successor employer would have to bargain if he *did* hire a majority of the predecessor's employees.⁴⁷ The *Winco* court also distinguished *Cott* on the grounds that in *Cott* unlike *Winco* there had been a dramatic shift in the composition of the work force after the sale of the company⁴⁸ and the predecessor employer had never recognized the union.⁴⁹

An analysis of the *Winco* decision reveals that some reliance on *Golden State* by the *Winco* court is justified, but that the strong policy favoring an election of a union to represent a group of workers also should have been considered. Whereas *Golden State* concerned the remedial power of the Board to order a successor employer to reinstate an employee, *Winco* involved an order to a successor employer to recognize and bargain with a union. Since an election by the employees is the favored method by which a union should be selected,⁵⁰ it is

firmed the findings of the hearing that determined Cooper was liable as successor employer. *Id.*

³⁸ *Id.* at 975.

³⁹ *Id.* at 978. In finding that Cooper had actual knowledge of the unfair labor practices, the *Winco* court stated that the Board could reach this conclusion from inferences and credibility determinations. *Id.* The following facts provided the basis for the Board's decision on this matter: the owner of Winco had referred to "union problems" as one of the reasons for Winco included a large amount for legal fees; testimony directly indicated Cooper was aware of the problem; and the two companies operated in the same geographical area. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 980-81. The fact that Cooper kept the majority of Winco employees and did not change the business substantially were crucial to the *Winco* Court's decision. *Id.*

⁴² *Id.* at 979.

⁴³ *Id.* at 979 n.3.

⁴⁴ *Id.* at 977-78.

⁴⁵ The court stated, "We hold that the Board properly applied the principles of *Golden State Bottling Co.* in issuing the bargaining order against Cooper Oil in the present case." *Id.* at 980.

⁴⁶ *Id.* See *supra* note 18 and accompanying text.

⁴⁷ *Id.*

⁴⁸ *Id.* at 981.

⁴⁹ *Id.* See *supra* notes 27-28 and accompanying text.

⁵⁰ See *supra* note 17 and accompanying text.

questionable whether the standards of successor liability announced in *Golden State* should automatically control the result in *Winco*.

Combining the policy favoring union representative elections with the principles on successor liability set out in *Golden State* calls into question the correctness of the *Winco* holding. First, while the *Winco* court recognized that the Board has the discretionary powers under section 10(c) to fashion remedies to effectuate the policies of the Act,⁵¹ it did not consider whether that authority is circumscribed by the policy favoring union elections.⁵² The election policy embodied in the Act establishes that when bargaining with a union is involved, elections should be held to choose a union instead of using a bargaining order.⁵³ Thus, it is doubtful whether the imposition of the bargaining order on the new employer solely because of the practices of the former employer "will effectuate the policies of [the Act],"⁵⁴ to be within the scope of the Board's authority.⁵⁵

Secondly, although the *Winco* court implicitly adopted the balancing test of *Golden State*,⁵⁶ involving the interests of the employer, the public, and the employees, it apparently did not consider the impact of the election policy on that weighing.⁵⁷ Incorporating the strong election policies into the balancing test creates serious doubts as to whether the bargaining order should be upheld against the successor employer.⁵⁸

Thirdly, as stressed by the *Winco* court, the Supreme Court in *Golden State* did address the impact of an outstanding bargaining order on the successor

⁵¹ 109 L.R.R.M. (BNA) at 979.

⁵² This issue was not addressed in *Golden State* because the policies of the Act involved there mandated that the successor employer be held liable for unfair labor practices of its predecessor. 414 U.S. at 175-77.

⁵³ See *supra* note 17 and accompanying text.

⁵⁴ See *supra* notes 2-5 and accompanying text.

⁵⁵ In *Winco*, the successor employer may have established a new working relationship with the employees of the company, and the employees possibly would no longer wish a union to represent them. There was no showing in the *Winco* case that the previous unfair labor practices of the former employer still made a fair election on the union issue impossible. If, due to the change in ownership, a fair union election could be held, the policies supporting the importance of elections would demand that an election be held.

⁵⁶ The *Winco* court did not expressly apply the *Golden State* balancing test, but it was a general basis for the decision. 668 F.2d at 977-78.

⁵⁷ The importance of the balancing test was cited, but the only section of the test specifically referred to was the interest of the employee. *Id.*

⁵⁸ The successor employer in *Winco* would have his interests best served by an election which would determine whether he should have to bargain with a union. If an election was held, the employer would not be ordered to bargain with a union purely because of the predecessor's unfair labor practices. Although the exact standards of the second part of the following test, the interests of the public have not been defined, it appears that the courts are concerned that the public benefit from an equitable rational labor policy. In *Golden State*, 414 U.S. at 181; *NLRB v. Teamsters Local 449*, 353 U.S. 87 (1957). The importance of elections in the process of selecting a union has long been recognized as a beneficial aspect of this rational labor policy. See *supra* note 17 and accompanying text. The balancing test protects an employee by insuring that there will be a remedy for any previous unfair labor practices. A change in ownership of the business should not leave the employee who was injured by the unfair labor practices of the predecessor without a remedy. *Golden State*, 414 U.S. at 181-83. When bargaining with a union is the primary issue, the provisions of the Act and the decisions of the courts have developed the election "remedy," which completely protects the rights of the employees.

employer.⁵⁹ The Court's treatment, however, was in a hypothetical case posed in dicta concerning when an employer would not be duty-bound to bargain,⁶⁰ and thus was not meant to govern converse situations — where a successor employer would be bound by an outstanding bargain order. Moreover, the *Winco* court's dismissal of *Cott* as distinguishable may have been hasty, since *Cott*, unlike *Golden State*, did treat the issue of the election policies.⁶¹ Likewise, the *Winco* court's reliance on the predecessor employer's voluntary recognition of the union⁶² seems misplaced, since the recognition was short-lived, and the employer proceeded to withdraw his recognition of the union.⁶³

In sum, while the *Winco* court correctly recognized that the standards of *Golden State* should be applied to successor employer liability cases, it failed to recognize a key factual difference — the presence of a bargaining order instead of a mere reinstatement order — may have caused the court to reach a mistaken conclusion. The strong election policy present in the Act dictates that the choice of a union through the democratic process is much favored over bargaining orders. The *Winco* court should have used the general standards of *Golden State*, but also should have included in its analysis a consideration of the election policies involved. The court then should have determined if a secret election was possible with the successor employer in place and the successor should be allowed to present evidence on this matter. The election, if determined to be possible, would protect all the parties under the *Golden State* standards and would also meet the election standards of *Gissel*. If such an election is not possible, as may be the case if the successor employer has completely adopted the practices of the predecessor, then the bargaining order against the successor would be appropriate under both *Golden State* and *Gissel*.

⁵⁹ 668 F.2d at 980-81.

⁶⁰ See *supra* note 17 and accompanying text.

⁶¹ There are factual differences between *Cott* and *Winco*, but these do not negate the importance of the election policy that the First Circuit recognized in *Cott*. In *Cott*, unlike *Winco*, the successor employer did not hire a majority of the predecessor's employees but this does not mean that the election policies would apply in *Cott* and would not in *Winco*. If, as in *Cott*, there has been a large turnover in the work force, the need for an election would perhaps be stronger than if the work force remained constant. The turnover would constitute a very significant change in circumstance which would make a fair election more possible, and the election would protect the rights of the new workers. In addition, this large turnover in the work force would remove the case from the predecessor rules of *Golden State*, for one of the criteria of *Golden State*, that the work force remained the same, is missing. The election policies would, however, still apply in the *Winco* case. The *Cott* case stressed that if any change in circumstances would make a fair election possible, the election alternative must be pursued. A complete change in ownership and removal of the employer guilty of the unfair labor practices would seem to be such a change in circumstances.

⁶² Voluntary recognition of a union is, as was stressed in *Winco*, a favored element of national labor policy. 668 F.2d at 981.

⁶³ The short-term voluntary recognition of the union by the predecessor employer does not negate the fact that the successor employer is being ordered to bargain with the union only because of the past unfair labor practices of the predecessor. There would still need to be a showing that the new employer continued to make an unfair election impossible for the bargaining order to transfer to the successor.

4.* *Corporate Relocation and Existing Collective Bargaining Agreements:*
*NLRB v. Marine Optical, Inc.*¹

Section 8(a) of the National Labor Relations Act² provides, in part, that "[i]t shall be an unfair labor practice for an employer . . . (1) to interfere with, restrain, or coerce employees in the exercise of [their organizational rights] . . . ; (5) to refuse to bargain collectively with the representatives of his employees. . . ." In the past decade and a half, the National Labor Relations Board has several times ruled on whether a company's refusal to comply with the terms of an existing collective bargaining agreement upon relocation of operations from one facility to another constitutes a violation of this section.⁴ The general rule developed in these cases is that an "existing and effective collective-bargaining agreement remains in effect following a relocation, provided operations and equipment remain substantially the same at the new location, and a substantial percentage of the employees at the old plant transfer to the new location."⁵ During this *Survey* year, the First Circuit, in *NLRB v. Marine Optical, Inc.*,⁶ became the first circuit to adopt the rule developed by the NLRB.⁷

Marine Optical, Inc. ("the Company"), an eyeglass manufacturer, took over the operations of a Roslindale, Massachusetts facility in 1975.⁸ Since that year it had recognized Optical Workers Union Local 408 ("the Union") as the exclusive bargaining representative of its production employees.⁹ The most recent collective bargaining agreement between the parties had been negotiated in January 1977.¹⁰ During the negotiations, the Company representative informed the Union bargaining agent that the Company might have to move.¹¹ Stating that if the majority of workers at the new location were new hires, the Company's ability to recognize the Union would be jeopardized, he suggested a one-year only contract be negotiated.¹² The Union representative rejected this suggestion, explaining that in his previous experience with relocation, the existing agreement was simply transferred with the workers.¹³ After consulting with counsel, the Company agreed to bargain for and subsequently signed a three-year collective bargaining agreement.¹⁴

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¹ 671 F.2d 11 (1st Cir. 1982).

² 29 U.S.C. § 151-87 (1976 & Supp. 1982).

³ 29 U.S.C. § 158(a)(1), (5) (1976 & Supp. 1982).

⁴ See, e.g., *Westwood Import Co., Inc.*, 251 N.L.R.B. 1213 (1980); *Tricor Prod., Inc. and/or C 7 J Pattern Co.*, 239 N.L.R.B. 65 (1978); *Lutheran Homes and Hospitals, Inc., d/b/a Fairlawn Care Center*, 233 N.L.R.B. 1025 (1977); *W. T. Grant Co.*, 197 N.L.R.B. 955 (1972).

⁵ *Westwood Import Co., Inc.*, 251 N.L.R.B. 1213, 1214 (1980).

⁶ 671 F.2d 11 (1st Cir. 1982).

⁷ *Id.* at 17.

⁸ *Id.* at 14.

⁹ *Id.* The Union had been the exclusive bargaining representative at the facility since 1954. *Id.* at 14 n.2.

¹⁰ *Id.* at 15.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

In August of 1979, while this agreement was still in effect, the Company notified the Union of a probable move to a Brockton facility due to a nonrenewal of the Roslindale lease.¹⁵ Soon after, it began, with the Union's permission, to interview Roslindale employees interested in transferring to Brockton.¹⁶ During the interviews, the employees were told that the Company did not intend to recognize the Union at the new plant unless the majority of workers there desired to be represented.¹⁷ Furthermore, the existing collective bargaining agreement would not be applicable after relocation.¹⁸ In September, the Union demanded negotiation for a contract to replace the one that would run out in February of the following year.¹⁹ The Company refused on the grounds that they could not recognize the Union at the new Brockton plant unless the majority of employees there indicated their desire to be represented.²⁰

In early October, the Company began the gradual transfer of operations to Brockton, continuing operations at Roslindale while moving one department at a time to the new facility.²¹ Its refusal to recognize the Union dated from the beginning of this process.²² By December the transfer was complete, with twenty-six of the sixty-four Roslindale employees now working in Brockton.²³ During the move, the same officials managed both plants, and the Brockton facility was run in a fashion almost identical to the Roslindale plant.²⁴

An Administrative Law Judge found that the Company's refusal to recognize the Union at the Brockton plant, refusal to apply the existing collective bargaining agreement at the new location, and unilateral change in working conditions at the relocated plant violated sections 8(a)(1) and (5) of the National Labor Relations Act.²⁵ The National Labor Relations Board ("the Board") affirmed his rulings, findings, and conclusions, and adopted his order with certain modifications.²⁶ The Board sought enforcement of its order by the United States Court of Appeals for the First Circuit in December, 1981.²⁷

The Company presented three basic arguments in support of its actions. First, the Company asserted that the language of the recognition clause contained in the collective bargaining agreement limited the representational capacity of the Union to workers employed at the Roslindale facility alone.²⁸

¹⁵ *Id.* at 14.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 14, 15.

²¹ *Id.* at 14.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 15.

²⁵ *Id.* at 13-14.

²⁶ *Id.* at 14.

²⁷ *Id.* at 11.

²⁸ *Id.* at 16. The clause read: "The Union shall be the sole collective bargaining agency for such production employees . . . as are employed at the plants at 28 Mahler Road and 28 Lochdale Road, Roslindale, Massachusetts." *Id.* at 15.

The Company also contended that the Union's conduct during the 1977 negotiations constituted a waiver of its claim to continued representation following the move to Brockton.²⁹ Finally, the Company relied on a prior decision of the First Circuit to maintain that the "contract-bar" doctrine³⁰ was inapplicable to situations involving relocation.³¹

The First Circuit summarily dismissed the Company's first two arguments, relying on the absence of evidence in the record indicating party intent either to impose a geographical limit on the bargaining unit or to waive representational claims.³² The court then turned to a discussion of the contract-bar doctrine. Relying on established case law, the court reasoned that prohibiting an employer from petitioning the Board³³ for decertification of an incumbent union necessarily entails forbidding him from withdrawing recognition of or refusing to bargain with the union during that same time period.³⁴ It noted that to do otherwise would allow the employer to accomplish unilaterally what the Board would have refused to do had it been petitioned. Therefore, the court reasoned, a union enjoys a conclusive presumption of majority status for the life of an existing collective bargaining agreement.³⁵

The discussion of the reasoning behind the contract-bar doctrine laid the groundwork for the court's consideration of the major issue in the case — whether the doctrine is applicable in a situation of operations relocation. The court first noted that the Board has held on several occasions that the principles of continued recognition and adherence to the existing contract survive Company relocation providing certain circumstances exist in the situation.³⁶ As presented in *Westwood Import Company, Inc.*,³⁷ the contract-bar doctrine will apply in cases where 1) operations and equipment remain substantially the same at the new location and 2) a substantial percentage of the workers from the old plant transfer to the new one.³⁸ The First Circuit reasoned that under the standard established by the Board, a reasonable inference could be drawn that conditions have not significantly changed since the agreement was reached.³⁹ This being the case, the court observed, the union may rightfully enjoy the benefits of the majority status presumption that exists during the uninterrupted course of any collective bargaining agreement.⁴⁰ Having thus accepted the

²⁹ *Id.*

³⁰ *NLRB v. Massachusetts Machine and Stamping, Inc.*, 578 F.2d 15 (1st Cir. 1978).

³¹ The contract-bar doctrine prohibits either party from petitioning the National Labor Relations Board for decertification of an incumbent union during the life of an existing collective bargaining agreement. *NLRB v. Marine Optical, Inc.*, 671 F.2d at 16. *See Pioneer Inn Assocs. v. NLRB*, 578 F.2d 835, 838 (9th Cir. 1978).

³² *NLRB v. Marine Optical, Inc.*, 671 F.2d at 17.

³³ *Id.* at 16.

³⁴ *Id.* (citing *NLRB v. Burns Security Serv.*, 406 U.S. 272, 290 n.12 (1972); *Osteopathic Hosp. Founders Assoc. v. NLRB*, 618 F.2d 633, 638 (10th Cir. 1980); *Pioneer Inn Assoc.*, 578 F.2d 835, 838-39 (9th Cir. 1978).

³⁵ *Id.*

³⁶ *Id.* at 17.

³⁷ 251 N.L.R.B. 1213, 1214 (1980).

³⁸ *NLRB v. Marine Optical, Inc.*, 671 F.2d at 17.

³⁹ *Id.*

⁴⁰ *Id.*

Westwood test as the correct standard to apply in relocation cases, the First Circuit went on to find that sufficient continuity existed in the facts of *Marine Optical, Inc.* to justify its application. It therefore affirmed the Board's finding that the contract signed in Roslindale was effective in Brockton.⁴¹

The court rejected the Company's claim that the decision in *NLRB v. Massachusetts Machine and Stamping Co.*⁴² supported the Company's right to question the majority status of the Union at the new Brockton facility.⁴³ Although the prior case did include a relocation, the court distinguished it on two counts. First, the court did not believe that the seventeen mile Roslindale to Brockton move could be equated with the interstate forty mile relocation involved in *Massachusetts Machine*.⁴⁴ More importantly, the collective bargaining agreement negotiated between the parties in the prior case contained a clause specifically providing that it would not be affected by any relocation within a thirty mile radius of the old plant.⁴⁵ Because the move that eventually was made exceeded this geographical limitation, the decision to allow the Company to question the majority status of the union at the new facility "was expressed, therefore, in a context devoid of consideration of an existing collective bargaining agreement."⁴⁶ Having earlier dismissed the Company's other two arguments, and endorsed the application of the *Westwood* modified contract-bar doctrine, the conclusion that the Company's reliance on *Massachusetts Machine*⁴⁷ was misplaced removed the last obstacle to the First Circuit's affirmation of the Board's ruling. The First Circuit therefore upheld the Board's conclusion that *Marine Optical, Inc.* had violated sections 8(a)(1) and (5) by refusing to recognize and bargain with the Union at Brockton, refusing to apply the terms of the existing collective bargaining agreement, and unilaterally changing working conditions.⁴⁸

The decision in *Marine Optical*, was correct for several reasons. First, the facts of the case clearly support the conclusion that the existing agreement should have been and was still in effect following the Company's relocation to Brockton. Second, holding management to agreements made prior to relocation under the circumstances present in this situation promotes the goals of the National Labor Relations Act as a whole. Finally, the decision that relocated companies must abide by existing contracts with the union when the specified conditions are met is a logical extension of the well-established rule that an alter ego of a company is bound by an agreement between the union and the first employer.

The principle outlined in *Westwood Import*, and adopted in *Marine Optical*, states that two conditions must be met before a company will be bound in a new location by the agreement with the union it reached in the old plant. First,

⁴¹ *Id.*

⁴² 578 F.2d 15 (1st Cir. 1978).

⁴³ *NLRB v. Marine Optical, Inc.*, 671 F.2d at 17.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

the equipment and operations at the new facility must be substantially the same as those at the old location. In the present case, the same machinery was used in the same way, operations were continued under the same name, raw materials were purchased from the same supplier, job titles and skills remained the same, and the same supervisory personnel were used at both the old plant in Roslindale and the new one in Brockton.⁴⁹ Furthermore, the same management officials had overall responsibility for operations and labor relations at both plants during the transition period.⁵⁰ These facts led the Administrative Law Judge to make the unchallenged finding that, over the two-month span during which the relocation was completed, both the Roslindale and Brockton operations continued as an integral whole.⁵¹ Under such circumstances, there can be little question that the first prong of the *Westwood* test was satisfied.

The second requirement of the *Westwood* or NLRB test is that a substantial percentage of the workers from the old plant must transfer to the new facility. In *Marine Optical*, forty percent of the Roslindale bargaining unit transferred to Brockton.⁵² This was the same percentage found by the Board in *Westwood Import Company*, to constitute a substantial percentage.⁵³ Therefore, the second and only remaining factor for consideration under the modified contract-bar doctrine was also present in *Marine Optical*. The conclusion, therefore, that the existing agreement was still in effect following the Company's move to Brockton is clearly justified.

The declared purpose of the National Labor Relations Act is to avoid industrial unrest by encouraging the practice and procedure of collective bargaining, and protecting the rights of employees to engage in it.⁵⁴ These goals cannot be achieved in any meaningful way unless workers can rely on continued compliance with the terms of a collective bargaining agreement by all parties. If a company can unilaterally withdraw recognition of a union and stop adhering to an existing contract merely because the physical location of its operations moves seventeen miles, then, the right to collective bargaining will be substantially threatened. On the other hand, if relocation legitimately changed the conditions prevailing at the time the agreement was reached, it is equally violative of the intent of the Act to hold the relocated Company to agreements that may no longer be applicable. Therefore, the requirements of substantial continuity in operations, equipment, and work force following relocation are valid prerequisites to enforced adherence to any existing bargaining contract. The modified contract-bar doctrine, containing within it consideration of the equities involved on both sides, is a fair and just compromise. The First Circuit's adoption of it is therefore fully consistent with the objectives and purposes of the National Labor Relations Act.

It is a well-established rule that an alter ego of a company is bound by the terms of any contract negotiated between the first employer and its

⁴⁹ *Id.* at 15.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 17.

⁵³ *Id.*

⁵⁴ 29 U.S.C. § 151 (1976 & Supp. 1982).

employees.⁵⁵ In light of this principle, it seems appropriate for a company which has merely relocated its operations, as opposed to being replaced by an alter ego, also to be held to existing contracts with a union. To hold otherwise would be to create a distinction unsupportable by facts or reason.

Marine Optical, Inc. is significant in that this decision marks the first time a Circuit court has adopted specifically the modified contract-bar doctrine. The above analysis suggests that the doctrine's application is completely consistent with both the goals of the National Labor Relations Act and previously established rulings. Therefore, it is unlikely that the First Circuit will remain for long the only Circuit to have endorsed it.

B. Union Unfair Labor Practices

1. * *Individual Employee Liability for Wildcat Strikes:*

Complete Auto Transit, Inc. v. Reis¹

Collective-bargaining agreements generally contain a no-strike clause, from which most labor-management litigation arises.² The National Labor Management Relations Act of 1947 (the "Labor Act")³ contains section 301(b)⁴, a limited liability provision, for such litigation. The latter provision renders the union and the employer the appropriate parties for no-strike clause disputes. Accordingly, in *Atkinson v. Sinclair Refining Co.*,⁵ the Supreme Court of the United States held that an employer could not sue individual union members under section 301(a) when those members acted as agents of the union.⁶ The *Atkinson* Court, however, expressly left open the question whether

⁵⁵ See, e.g., *NLRB v. Tricor Products, Inc.*, 636 F.2d 266 (10th Cir. 1980); *NLRB v. Sweet Lumber Co.*, 515 F.2d 785 (10th Cir.), cert. denied, 423 U.S. 986 (1975); *Local 57, Int'l Ladies' Garment Workers Union v. NLRB*, 374 F.2d 245 (D.C. Cir.), cert. denied, 387 U.S. 942 (1967).

* By Eric G. Woodbury, Staff Member, BOSTON COLLEGE LAW REVIEW.

¹ 101 S. Ct. 1836 (1981).

² T. Kheel, 18E BUSINESS ORGANIZATIONS, LABOR LAW 27-2 (1981).

³ 29 U.S.C. § 185(a) (1976) provides:

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

⁴ 29 U.S.C. § 185(b) (1976) provides:

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

⁵ 370 U.S. 238 (1962).

⁶ *Id.* at 247.

employees who, without union consent, violate the no-strike clause can be individually liable.⁷

During the *Survey* year, the Court held in *Complete Auto Transit, Inc. v. Reis*⁸ that section 301(a) does not create an employer's cause of action against individual union members and officers who engage in a "wildcat strike"⁹ contrary to their union's collective-bargaining agreement.¹⁰ The decision resolves the last major uncertainty on the interpretation of who are proper parties under section 301. The Court had established in *Smith v. Evening News Association*¹¹ that an employee could sue an employer for breach of a collective bargaining agreement under section 301.¹² In addition, the *Atkinson* decision established that an employer could not sue an employee who was acting as an agent of the union. Finally, section 301(b) expressly allows employers and unions to sue each other.

The petitioners in *Complete Auto Transit* were three companies that transported newly manufactured motor vehicles by truck.¹³ The respondents were truck drivers and members of Teamsters Local 332,¹⁴ affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The companies and the union were parties to a collective bargaining agreement containing a no-strike clause.¹⁵ Yet, because of disputes regarding union representation, in June of 1976 the respondent employees of Complete Auto Transit stopped working.¹⁶

Objecting to this wildcat strike, the petitioners sought, *inter alia*, damages to recover losses and attorney fees pursuant to section 301(a).¹⁷ The federal District Court for the Eastern District of Michigan denied damage relief,¹⁸

⁷ *Id.* at 249 n.7.

⁸ 101 S. Ct. 1836 (1981).

⁹ A wildcat strike can be defined as "a work stoppage usually conducted by a majority of the union membership, without the authorization by the union leadership in violation of the collective-bargaining agreement." T. Kheel, 18F BUSINESS ORGANIZATIONS, LABOR LAW 30-125 (1981).

¹⁰ *Id.* at 1839.

¹¹ 371 U.S. 195 (1962).

¹² *Id.* at 201.

¹³ 101 S. Ct. 1836, 1838.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Employees of two like companies also ceased working in June. *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110, 1111 (6th Cir. 1980).

¹⁷ 101 S. Ct. at 1838. Injunctive relief to resume business operations also was sought. *Id.*

¹⁸ *Complete Auto Transit, Inc. v. Reis*, Memorandum Opinion and Order No. 76-40057 (E.D. Mich. June 8, 1977), reprinted in 14 PETITIONS AND BRIEFS OF THE SUPREME COURT OF THE UNITED STATES 37 (B.N.A. No. 79-1777). The district court also denied the equitable relief sought because the claim was not arbitrable, it not having arisen from an employer-employee dispute. *Id.* at 36. On rehearing, an injunction was granted because the union dispute was resolved, and a new, arbitrable controversy arose between the union and the companies over amnesty of the union workers. *Id.* at 36. The employees were then granted a motion for dissolution of the injunction and dismissal of the damages claim because of the Supreme Court's decision in *Buffalo Forge Co. v. United Steelworkers*, 438 U.S. 397 (1976), and the congressional purpose behind section 301 *id.* at 37-38. The *Buffalo Forge* Court held, in part, that an injunction could be issued only where the controversy was precipitated by an arbitrable issue. *Buf-*

determining that Congress intended to shield union members and officials from individual monetary liability.¹⁹ Reconsideration of the dismissal was denied.²⁰

On appeal, the Court of Appeals for the Sixth Circuit upheld the dismissal of the damages' claim.²¹ The appeals court based its decision on the Seventh Circuit's analysis of legislative intent in *Sinclair Oil Corp. v. Oil, Chemical & Atomic Workers International Union*,²² where the same issue was decided.²³ The petitioners then appealed the damages aspect of the case.²⁴ Because of a conflict among federal district court decisions on this issue,²⁵ the Supreme Court granted certiorari.²⁶

The Supreme Court held that section 301 does not create a cause of action for damages against individual union members who, acting without union consent, breach a no-strike agreement.²⁷ Justice Brennan, writing for the majority,²⁸ did not find that section 301 on its face resolved the controversy.²⁹ Rather, the Court reached its conclusion by examining the legislative history surrounding section 301.³⁰ The Court first determined that section 301(b) of

falo Forge, 438 U.S. at 410. The district court found no such arbitrable issue existed here. Memorandum Opinion and Order No. 76-40057, *supra* note 16, at 38.

¹⁹ Memorandum Opinion and Order No. 76-40057, *supra* note 18, at 37 (relying on *Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951, 961 n.5 (3d Cir. 1975), *cert. denied*, 424 U.S. 935, *reh'g denied*, 425 U.S. 908 (1976); *Sinclair Oil Corp. v. Oil Chemical & Atomic Workers Int'l Union*, 452 F.2d 49 (7th Cir. 1971).

²⁰ Memorandum Opinion and Order No. 76-40057 (August 30, 1977), *supra* note 18, at 40.

²¹ 614 F.2d 1110, 1116 (6th Cir. 1980). The appeals court also reinstated the injunction. *Id.* at 1114. The appeals court stated that *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976), did not require dissolution of the injunction because the strike was transformed such "that its underlying cause had become an arbitrable dispute." 614 F.2d at 1114.

²² 452 F.2d 49 (7th Cir. 1971).

²³ 614 F.2d at 1115-16.

²⁴ 101 S. Ct. 1839.

²⁵ For cases in accord with *Complete Auto Transit* see, e.g., *Lakeshore Motor Freight v. Steel Haulers Local 800, International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America* 483 F. Supp. 1150, 104 L.R.R.M. (BNA) 2153 (W.D. Pa. 1980); *United Steelworkers of America v. Lorraine, a Division of Koehring Co.*, 616 F.2d 919, 103 L.R.R.M. (BNA) 2627 (6th Cir. 1980); *Putnam Fabricating Co. v. Null*, 631 F.2d 311, 105 L.R.R.M. (BNA) 2645 (4th Cir. 1980); *Westinghouse Electric Corp. v. Electrical Workers*, 470 F. Supp. 1298 (W.D. Pa. 1979); *Benada Aluminum Prod. Co. v. United Steel Workers*, 83 Lab. Cas. (CCH) Par. 10, 612 (D. Utah 1978). *Contra*, *Certain-Tweed v. Local 37A, United Steelworkers of Am.* 484 F. Supp. 726, 103 L.R.R.M. (BNA) 2502 (N.D. Pa. 1980); *Maita v. Killeen*, 465 F. Supp. 471 (E.D. Pa. 1979); *Alloy Cast Steel Corp. v. United Steel Workers of Am.*, 429 F. Supp. 471 (E.D. Pa. 1979); *New York State United Teachers v. Thompson*, 459 F. Supp. 677 (N.D. N.Y. 1978); *Alloy Cast Steel Co. v. United Steelworkers*, 429 F. Supp. 445 (N.D. Ohio 1977); *DuQuoin Packing Co. v. P-156 Amalgamated Meat Cutters and Butcher Workers of N. Am.*, 321 F. Supp. 1230 (E.D. Ill. 1971).

²⁶ 449 U.S. 898 (1980).

²⁷ 101 S. Ct. at 1839.

²⁸ Justice Brennan was joined by Blackmun, Marshall, Stevens, White, and Stewart, JJ.

²⁹ 101 S. Ct. at 1839-40 (relying on *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Howard Johnson Co. v. Hotel & Restaurant Employees and Bartenders International Union*, 417 U.S. 249 (1974); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962)).

³⁰ *Id.*

the Labor Act was adopted as a legislative response to the *Danbury Hatters* case.³¹ In *Danbury Hatters*,³² numerous employees, acting under their union direction, had boycotted an employer's hats. Subsequently, many of these employees were held individually liable for their union-sponsored boycott, and, being unable to satisfy their judgment debts, lost their homes. The Court in *Complete Auto Transit* concluded, therefore, that the Labor Act was designed to make union entities, and not their individual members, liable for union-sponsored activities.³³

The Court then found that Congress also intended to bar individual liability where the union did not sanction such a strike, even if the employer is left without a remedy.³⁴ The Court stated that the precursor of section 301, section 10 of the "Case bill"³⁵ which was successfully vetoed by President Truman, was relevant to ascertaining legislative intent because of its similarity to section 301.³⁶ Section 10(d) of the Case bill, as amended by the Senate, stated that an employer's proper remedy in the event of a wildcat strike is the discharge of union members.³⁷ The Court then considered other congressional activity. According to the Court, when section 301 was debated in Congress, an amendment to section 7 of the National Labor Relations Act was proposed in the House which created individual employee liability for participation in wildcat strikes.³⁸ Yet the Senate, the Court noted, rejected the amendment, desiring only union, not employee, liability under section 301(b) because of the *Danbury Hatters* tragedy.³⁹ The joint House-Senate conference committee, the Court observed, also rejected the imposition of individual damage liability and felt discharge from employment was a more appropriate remedy.⁴⁰ The Court thus found the legislative history of section 301 and related legislation did not support a finding that employee damage liability for wildcat strikes was intended by Congress.

In reaching its conclusion based on pertinent legislative history, the Court noted that other remedies are available to deter such strikes.⁴¹ Specifically, the Court mentioned damages against the union where the union sanctioned such activity, employer power to discipline or discharge, and employer-initiated injunctive relief where the dispute is subject to binding arbitration.⁴² In addition, the Court concluded that the goal of industrial peace, which the Labor Act is

³¹ *Id.* at 1840.

³² See *Loewe v. Lawlor*, 208 U.S. 274 (1908); *Lawlor v. Loewe*, 235 U.S. 522 (1915); *Loewe v. Savings Bank of Danbury*, 236 F. 444 (2d Cir. 1916), *aff'd*, 242 U.S. 357 (1917).

³³ 101 S. Ct. at 1840.

³⁴ *Id.*

³⁵ H.R. 4908, 79th Cong. 2d Sess. (1948).

³⁶ 101 S. Ct. at 1841 (relying on *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962)).

³⁷ Senate Amendment No. 3 to H.R. 4908-92 CONG. REC. 5705 (1948).

³⁸ 101 S. Ct. at 1843.

³⁹ *Id.*

⁴⁰ *Id.* at 1844.

⁴¹ *Id.* at 1845 n.18.

⁴² *Id.*

designed to further, could well be frustrated by employer actions for damages against wildcat strikers.⁴³

Justice Powell concurred in the judgment, but not in the majority's belief that the employer has other remedies that are effective deterrents to wildcat strikes.⁴⁴ Specifically, Justice Powell stated that a suit for damages against a union usually cannot be maintained unless the union is responsible for the strike.⁴⁵ Additionally, such suits may not be brought, he maintained, since they enhance industrial strife, open the corporation to discovery and are ineffectual because the strikes are usually settled upon the condition that the suit be withdrawn.⁴⁶ Justice Powell also observed that discharge is often ineffective because in a large strike wholesale discharges are not practical,⁴⁷ selective discharges are arguably illegal⁴⁸ or ineffectual,⁴⁹ and arbiters often reinstate discharged strikers.⁵⁰ Union discipline of wildcat strikers does not occur, Justice Powell stated, because the dispute in wildcat strikes is usually with union management, not the employer, so any employer attempt to discipline wildcat strikers would be ineffective or counterproductive.⁵¹ Moreover, he pointed out, a union normally has no statutory obligation to halt wildcat strikes.⁵² Finally, with respect to employer-initiated injunctions, Justice Powell feared that the Norris-LaGuardia Act⁵³ renders them unavailable except in the infrequent situation where the dispute is arbitrable.⁵⁴ Moreover, he found that striking workers often disobey injunctions and that, if contempt penalties are imposed, they are difficult to enforce.⁵⁵ Justice Powell regretfully concluded that the failure of the Taft-Hartley amendments of 1947 to provide employers with effective wildcat strike remedies hurts the general public.⁵⁶

Chief Justice Burger, joined by Justice Rehnquist, dissented, stating that individuals must be held accountable for breaches of their contracts.⁵⁷ The Chief Justice first found that section 301(b) was designed to prevent employee liability only where the union is responsible for the strike, as in the *Danbury Hat-*

⁴³ *Id.* (relying on *Boys Market, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 248 (1970); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 381 n.14 (1974)).

⁴⁴ 101 S. Ct. 1845.

⁴⁵ *Id.* at 1848 (relying on *Carbon Fuel Co. v. UMW*, 444 U.S. 212 (1979)).

⁴⁶ *Id.* at 1848 n.9.

⁴⁷ *Id.* at 1847 (citing *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248-49 n.17 (1970)).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1848. Justice Powell stated that selected discharges probably will not force the rank and file back to work and could aggravate industrial strife. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (relying on *Carbon Fuel Co. v. UMW*, 444 U.S. 212 (1979)).

⁵³ 29 U.S.C. § 104 (1976), Section 4 provides, in part: "No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute. . . ."

⁵⁴ 101 S. Ct. at 1847 (citing *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970)).

⁵⁵ 101 S. Ct. at 1847.

⁵⁶ *Id.* at 1849.

⁵⁷ *Id.* at 1849.

ters case.⁵⁸ He believed Congress, in passing the Labor Act, did not wish to alter the common law rule of individual accountability for contract violations, a role that the Chief Justice viewed as "essential to an organized society."⁵⁹ Chief Justice Burger also stated that the Court's decision would enhance industrial strife because employers will be less likely to enter into collective-bargaining agreements if workers can breach such agreements with "impunity."⁶⁰ The Chief Justice further expressed disbelief in the Court's opinion that a damages action against employees would jeopardize management-labor relations.⁶¹ The Chief Justice concluded that fewer strikes would occur if union authority were strengthened by deterring wildcat strikes, which are currently afforded "artificial, excessively paternalistic protection."⁶²

The dissent's analysis departs from that of the majority because of a fundamental difference in the manner in which each viewed the Labor Act. No express language in section 301 excludes imposition of employee liability for wildcat breaches of a no-strike clause. Yet the Court has consistently stated since the landmark *Textile Workers Union v. Lincoln Mills* decision,⁶³ that section 301(a) creates a body of substantive federal law.⁶⁴ The 1947 Act was designed to displace state law that formerly allowed suits against employees. Accordingly, the *Complete Auto Transit* majority found that the "penumbra" of section 301 indicates no congressional intention to impose individual liability upon wildcat strikers.⁶⁵ Conversely, the dissent narrowly construed the Act in finding that common law concepts should remain in the interpretation of section 301.⁶⁶ Given the general purpose of the Act, the majority's analysis is more persuasive.

In enacting section 301, Congress was primarily concerned with preventing the imposition of onerous liabilities on employees. The tragedy of the *Danbury Hatters* case could, therefore, be avoided only by making entities of limited liability, the employer and the union, parties to the collective-bargaining agreement. Employees, in the congressional design, are third-party beneficiaries who can sue but not be sued. By so shielding the employee, Congress believed that labor-management relations would be more stable thereby benefiting the general public. Accordingly, Congress did not alter section 301 after *Sinclair Oil*, where the Seventh Circuit reached the same result.

Aside from the message of the legislative history surrounding section 301, there are policy reasons which favor the majority's result. First, preventing the imposition of damage liability upon wildcat strikers furthers the goal of the

⁵⁸ *Id.* at 1850.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1851.

⁶¹ *Id.*

⁶² *Id.* at 1851-52.

⁶³ 353 U.S. 448 (1957).

⁶⁴ Note, *Labor Law — Section 301 of the Labor-Management Relations Act — Individual Liability of Employees for an Unauthorized Work Stoppage In Breach of the No-Strike Clause of Collective Bargaining Agreement*, 18 WAYNE L. REV. 1657, 1659 (1972).

⁶⁵ 101 S. Ct. at 1844.

⁶⁶ *Id.* at 1850.

Taft-Hartley amendments to cure "a wave of labor unrest."⁶⁷ A suit against individuals usually will not end a work stoppage,⁶⁸ which is the goal of employers.⁶⁹ Moreover, as the Court recognized in *Boys Market, Inc. v. Retail Clerks Union*,⁷⁰ industrial peace is best secured by preventing the aggravating effect of individual damage suits.⁷¹

Chief Justice Burger, however, stated that individual liability would deter industrial strife from occurring.⁷² While the Chief Justice's deterrence theory might be correct, other forms of labor unrest could manifest themselves in response to damage suit, against individual strikers. Moreover, aggrieved employees are not likely to understand and assess the impact of a suit in an emotional dispute.⁷³ Even if these problems did not arise, however, the deterrence provisions Congress has already placed in the Act would be upset by this novel remedy.

If workers would be deterred from striking without union authorization because of individual liability, a chilling effect on legitimate concerted activity may result.⁷⁴ Workers are protected under section 7 of the Management Relations Act when the union does not fairly represent their interests against an unfriendly employer.⁷⁵ Individual damage suits could deter this *express* form of congressionally sanctioned activity. Indeed, in *Complete Auto Transit*, the wildcat strike was in response to alleged unfair representation by the union.⁷⁶

In the wake of *Complete Auto Transit*, employers are not left powerless. Justice Powell's bleak characterization of current remedies, concurred in by some commentators,⁷⁷ may not be broadly applicable.⁷⁸ For example, discharges have been used and sustained by courts in prior cases.⁷⁹ Moreover, employers can protect themselves by negotiating for stringent discipline and discharge provisions in their collective bargaining agreements.⁸⁰ Courts prefer

⁶⁷ *Id.* at 1846 (Powell, J., concurring).

⁶⁸ Casenote, *Labor Law-Strikers-Individual Union Members Not Liable For Breach Of Contractual No-Strike Clause Even When Strike Unauthorized by Union* — *Sinclair Oil Corp. v. Oil Workers Union*, 452 F.2d 49 (7th Cir. 1971), 86 HARV. L. REV. 447, 450 (1972) [hereinafter Casenote].

⁶⁹ Whitman, *Wildcat Strikes: The Unions' Narrow Path to Rectitude?*, 50 IND. L. J. 472, 473-74 (1975).

⁷⁰ 398 U.S. 235 (1970).

⁷¹ *Id.* at 248.

⁷² *Id.* at 1851-52.

⁷³ Casenote, *supra* note 68, at 951.

⁷⁴ *Id.*

⁷⁵ 29 U.S.C. § 157 (1976) provides in part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives for the purpose of collective bargaining or other mutual aid or protection. . . ."

⁷⁶ 101 S. Ct. at 1838.

⁷⁷ See, e.g., Rosenberg, *Individual Employee Liability for Wildcat Strikes*, 7 EMPLOYEE RELATIONS L. J. 288 (1981).

⁷⁸ For example, Justice Powell stated that striking workers "often are disinclined to obey" injunctions. 101 S. Ct. at 1847. Yet the authority relied upon is only in the coal industry and the commentator he cites states that sympathy strikes are especially common in this industry. See Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533, 541 (1978). 101 S. Ct. at 1847 n.6.

⁷⁹ See, e.g., *Emporium Capwell C. v. Western Community Org.*, 420 U.S. 251 (1975); *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944).

⁸⁰ Many collective bargaining agreements delineate the parties' rights and liabilities in

resolving disputes through such provisions.⁸¹ If this procedure proves ineffective, courts are free to expand section 301 remedies consistent with congressional intent.⁸² For example, given the congressional desire to have unions represent their employees as an entity, the judiciary could force unions to take serious efforts to end wildcat strikes under the potential sanction of an employer-union suit.⁸³

In sum, the *Complete Auto Transit* decision is an important case. The Court found that Congress enacted section 301 to avoid the onerous individual liability imposed in the *Danbury Hatters* cases and that section 301 of the Labor Act supplanted common law contract rules. This legislative history compelled the Court to conclude that the imposition of individual damage liability upon wildcat strikers would be contrary to the language of section 301. Moreover, there are important policy reasons, such as promoting industrial peace and ensuring fair union representation, which support the decision. Finally, the decision does not render employers powerless to combat wildcat strikes because effective weapons designed to foster industrial peace remain in the employer's arsenal.

2.* *Federal Criminal Prosecution for Union Violence:*

United States v. Thordarson¹

Under section 8(b)(1) of the National Labor Relations Act (NLRA), coercive violence by unions or employers is an unfair labor practice.² In situations involving union violence the National Labor Relations Board (NLRB) may refuse to reinstate an employee fired for engaging in violent conduct,³ issue broad cease and desist orders, decertify the offending union as the collective bargaining agent, or require the offending union to publicize its prohibited actions.⁴ Furthermore, the NLRB may seek a temporary injunction prohibiting

such cases, which may account for the infrequency of litigation in this area. *Casenote, supra* note 68, at 453.

⁸¹ See, e.g., *Kaiser Steel Corp. v. Fivecoat*, 484 F. Supp. 824, 825 (D. Utah 1980); *Great Scott! Super Market, Inc. v. Goodman*, 764, 50 Mich. App. 635, 213 N.W.2d 762 (1973).

⁸² *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957): "the purpose of section (301) was to provide the necessary legal remedies . . . (it) was more than jurisdictional." *Id.* at 455.

⁸³ *Casenote, supra* note 68, at 457-58.

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¹ 646 F.2d 1323 (9th Cir.), *cert. denied*, 102 S. Ct. 601 (1981).

² 29 U.S.C. § 158(b) (1976). A union's violent conduct used to coerce an employer to select a collective bargaining representative is an unfair labor practice under § 158(b)(1)(B). A separate provision of the NLRA, 29 U.S.C. § 158(b)(1)(A), makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their rights guaranteed under § 7 of the Act, 29 U.S.C. § 157 (1976). Section 7 gives employees the right to organize, bargain collectively and engage in concerted activities, as well as the right not to participate in such concerted activities. Even acts of violence which are directed at the employer outside of bargaining representative selection can be an unfair labor practice when employees are likely to learn of them. See, e.g., *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 6 (1st Cir. 1976); *NLRB v. UMW*, 429 F.2d 141, 147-48 (3d Cir. 1970).

³ 29 U.S.C. § 160(c) (1976).

⁴ *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 11-12 (1st Cir. 1976). If

violent conduct.⁵ Besides these NLRB sanctions, employers may be able to deter union violence through non-administrative means. For example, employers can seek injunctive relief in the federal courts under the Norris-LaGuardia Act⁶ or in the state courts.⁷ Employers also have been allowed tort actions for damages resulting from union violence.⁸ As a third alternative, federal or state prosecutors may intervene in instances in which union violence is threatened or has occurred. State initiated injunctive and criminal prosecutions are available and have been held not to be precluded by the comprehensive remedies of the NLRA.⁹ Moreover, federal criminal prosecutions have been brought against union members for engaging in acts of violence.¹⁰

In 1973, however, the United States Supreme Court in *United States v. Enmons*¹¹ questioned the propriety of using federal criminal laws to proscribe union violence. The *Enmons* Court ruled that a union's use of violence during a lawful strike to achieve legitimate union objectives did not violate the Hobbs Act,¹² a federal criminal statute prohibiting the obstruction of interstate commerce by extortion.¹³ The Court, analyzing the Hobbs Act's statutory language and history,¹⁴ interpreted the statute's proscription of "extortion" to

publicity is ordered, the NLRB can require the union to post notices of the NLRB's rulings at union offices and meeting places, mail notices to each employee of the company involved, and publish copies in newspapers of general circulation. *Id.*

⁵ 29 U.S.C. § 160(j) (1976).

⁶ 29 U.S.C. §§ 101-115 (1976).

⁷ See, e.g., *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 274-75 (1956). For examples of state statutes allowing injunctive relief see MASS. GEN. LAWS ANN. ch. 214, § 6 (West Supp. 1981); N.Y. LAB. LAW § 807 (McKinney 1977).

⁸ See, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *UAW v. Russell*, 356 U.S. 634, 635 (1958); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 657 (1954).

⁹ See *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 275 (1956).

¹⁰ See, e.g., *United States v. Parker*, 586 F.2d 422, 427 (5th Cir. 1978) (strike related bombings and conspiracy); *Langel v. United States*, 451 F.2d 957, 958 (8th Cir. 1971) (strike related bombings, possession of prohibited firearm, possession of unregistered firearm, and conspiracy).

¹¹ 410 U.S. 396 (1973).

¹² 18 U.S.C. § 1951 (1976). Section 1951 provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Id.

¹³ *Enmons*, 410 U.S. at 404. The specific acts of violence charged by the indictment included blowing up a transformer substation owned by the company, firing high powered rifles at company property and sabotaging company equipment. *Id.* at 398.

¹⁴ The Hobbs Act had been enacted to correct a perceived deficiency in its predecessor, § 2 of the Anti-Racketeering Act of 1934, which, while proscribing the use of force, violence, or coercion to obtain valuable consideration, specifically excluded "the payment of wages by a

be limited to "wrongful" uses of force — force used to obtain property to which the alleged extortionist has no lawful claim.¹⁵ Thus, the Court held that workers seeking better wages and benefits from an employer could not be engaged in a wrongful taking of property in violation of the Hobbs Act since the wages sought were in return for services to the employer.¹⁶ To reinforce its determination, the *Enmons* Court stated two strong policy reasons why federal prosecution of union officials for violence arising from labor dispute should not be allowed. First, the Court observed that prosecution would work an "extraordinary change" in the pre-existing federal labor law, in effect, putting "the Federal Government in the business of policing the orderly conduct of strikes."¹⁷ Second, the Court noted that federal criminal prosecutions would be an "unprecedented incursion" into the states' criminal law jurisdiction.¹⁸ Relying essentially on a rule of clear expression, the Court found that the statutory language was not explicit enough to require such far-reaching changes in the federal labor law scheme and federal-state balance.¹⁹ The *Enmons* Court, therefore, refused to expand the federal extortion to include violence during a legitimate labor dispute.²⁰

Building on *Enmons*, the United States Court of Appeals for the Second Circuit in *United States v. DeLaurentis*²¹ struck down a federal criminal conviction based on a federal statute other than the Hobbs Act. In *DeLaurentis*, three union officers had been convicted under section 241 of chapter 18, an 1870 civil rights statute which proscribes conspiracies to injure or threaten the exercise of federal rights.²² The defendants allegedly had sought by threats of violence and actual physical assault to intimidate those union members exercising their right

bona-fide employer to a bona-fide employee; . . ." 48 Stat. 979, 980 (1934) (current version of 18 U.S.C. § 1951 (1976)). By eliminating the wage exception, Congress had sought to reverse a Supreme Court decision, *United States v. Local 807 of Int'l. Bhd. of Teamsters*, 315 U.S. 521 (1942), which had used the exception to prevent an Anti-Racketeering Act prosecution of New York City truck drivers who extorted wages from out-of-town drivers for unwanted, unneeded and, at times, unprovided local drivers. *Enmons*, 410 U.S. at 401-02. Additionally, in passing the Hobbs Act, assurances were made in floor debates that the Act would not interfere with legitimate labor activities or make a striker's picket line assault a federal crime. *Id.* at 404-06.

¹⁵ *Enmons*, 410 U.S. at 400.

¹⁶ *Id.*

¹⁷ *Id.* at 411.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 410-11.

Where the coercive acts are used to obtain personal payoffs, wages for unwanted services, or other non-legitimate labor objectives, *Enmons* has been held not to preclude prosecution under the Hobbs Act. *United States v. Quinn*, 514 F.2d 1250, 1257 (5th Cir. 1975). *See, e.g., United States v. Daley*, 564 F.2d 645, 650-51 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1978) (Hobbs Act held to reach abuse of power by union official who coerced various employers to give materials and employees to pave the driveway of his summer cabin); *United States v. Green*, 350 U.S. 415, 417, 421 (1956) (Hobbs Act charge upheld where union had sought to be paid for unwanted and fictitious services by use of violence).

²¹ 491 F.2d 208 (2d Cir. 1974).

²² 18 U.S.C. § 241 (1976). Section 241 provides in relevant part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by

under section seven of the NLRA²³ not to participate in a concerted labor activity.²⁴ The court, however, found no congressional intent in the history of the NLRA to make what were essentially unfair labor practices in pursuit of valid union objectives punishable by criminal remedies.²⁵ In light of this lack of intent, the broad spectrum of remedies available and the underlying federal labor law exemption and federalism rationales in *Enmons*, the *DeLaurentis* court ruled that enforcement of the rights under the NLRA was entrusted exclusively to the expertise of the NLRB.²⁶ Given this broad language in *DeLaurentis*, the criminal prosecution of union officials under federal statutes other than the NLRA appeared to be precluded as long as the union was seeking legitimate labor objectives.

During the *Survey* year, the United States Court of Appeals for the Ninth Circuit in *United States v. Thordarson*²⁷ rejected the "*Enmons* doctrine" of blanket immunity, and instead limited *Enmons* by interpreting it to hold only that the Hobbs Act could not reach union violence in pursuit of legitimate collective bargaining objectives.²⁸ By denying complete federal criminal law exemption for violent acts accompanying labor disputes, *Thordarson* endorses the continued use of federal criminal statutes to remedy violent means regardless of the legitimacy of the ends sought. As a consequence, the ruling in *Thordarson* significantly expands the federal government's participation in labor disputes.

In *Thordarson*, a Teamsters local had been elected as bargaining agent for the employees of a moving and storage company.²⁹ After the employer's refusal to recognize the Teamsters Union, a strike was called.³⁰ During the strike, several of the employer's trucks were destroyed in California, Arizona, and Connecticut.³¹ The five defendants, officers and employees of the two teamsters locals, were later indicted for their role in the destruction of property.³² The ten-count indictment³³ charged the defendants with violations of several federal statutes: (1) section 844(i) of chapter 18, an untitled federal statute which proscribes the use of explosives affecting interstate commerce;³⁴

the Constitution or laws of the United States, or because of his having so exercised the same. . . .

They shall be fined . . . or imprisoned . . . or both. . . .

Id.

²³ 29 U.S.C. § 157 (1976).

²⁴ *DeLaurentis*, 491 F.2d at 209.

²⁵ *Id.* at 212-13.

²⁶ *Id.* at 212-14.

²⁷ 646 F.2d 1323 (9th Cir.), *cert. denied*, 102 S. Ct. 601 (1981).

²⁸ *Id.* at 1327.

²⁹ *Id.* at 1325.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1325-26.

³⁴ 18 U.S.C. § 844(i) (1976). Section 844(i) provides that:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting inter-

(2) the Travel Act, which proscribes travel in interstate commerce to commit arson;³⁵ and (3) the Racketeer Influenced and Corrupt Organization Act (RICO), which prohibits conspiracies to conduct an enterprise's affairs through a pattern of racketeering activity.³⁶ The district court, relying mainly on *Enmons*, dismissed the explosive, Travel Act, and RICO charges after an analysis of the underlying purposes of each Act.³⁷ The district court reasoned that *Enmons* was not based solely on the statutory interpretation of the Hobbs Act requirement of a wrongful taking but instead rested on the absence of any

state or foreign commerce shall be imprisoned . . . or fined . . . or both. . . .

Id.

³⁵ 18 U.S.C. § 1952 (1976). Section 1952 provides that:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to . . . (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined . . . or imprisoned . . . or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances . . . or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Id.

³⁶ 18 U.S.C. § 1962 (1976). Section 1962(d) provides:

It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

An "enterprise" as defined by 18 U.S.C. § 1961(4) (1976) includes:

any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

A "pattern of racketeering activity" as defined by 18 U.S.C. § 1961(5):

requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

"Racketeering activity" as defined by 18 U.S.C. § 1961(1) (1980) includes:

(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering) . . . (c) any act which is indictable under title 29, United States Code, . . . section 501(c) (relating to embezzlement from union funds). . . .

³⁷ *United States v. Thordarson*, 487 F. Supp. 991, 994-95, 999 (C.D. Cal. 1980), *rev'd*, 646 F.2d 1323 (9th Cir.), *cert. denied*, 102 S. Ct. 601 (1981).

The defendants were also charged with violating the Landrum-Griffith Act, 29 U.S.C. § 501(c) (1976), which prohibits the conversion of union funds. These charges were dismissed by the district court for the indictment's failure to allege essential elements of the offense. 487 F. Supp. at 995-98.

congressional intent to extend the federal criminal jurisdiction to violence for legitimate union objectives.³⁸ Finding no congressional intent to reach legitimate labor disputes with federal acts basically designed to attack organized crime, the district court dismissed the entire indictment.³⁹

On appeal, the Ninth Circuit Court of Appeals, rejected the district court's broad reading of *Enmons* as requiring a search for the congressional intent to include union violence.⁴⁰ Instead, the Court limited *Enmons* to its interpretation of the specific language and legislative history of the Hobbs Act.⁴¹ According to the *Thordarson* court, the question was not whether Congress intended to include a union's violent acts in pursuit of legitimate union objectives but whether Congress intended to *exclude* such acts from coverage by the statute.⁴² In the appeals court's analysis, neither the express language of the criminal statutes nor the policy rationales underlying the *Enmons* decision led to the alleged congressional intent.⁴³ According to the appeals court, all three statutes were written in general terms and did not provide for different treatment based on the status or ultimate objectives of the offender.⁴⁴ Based on this observation alone, the appeals court in *Thordarson* found it unlikely that Congress had intended to make what the court perceived to be a threat sufficient to warrant criminal sanction turn on whether the person causing the proscribed harm did it for himself or the union.⁴⁵

Turning to the federal labor law exemption and federalism policy arguments articulated in *Enmons*, the *Thordarson* court quickly dismissed their applicability. First, the fear that federal criminal statutes might reach minor labor violence — thus putting the federal government in the business of policing the routine conduct of strikes — was not well-founded in this case because, the court noted, destroying vehicles by means of explosives was not minor picket line violence.⁴⁶ Second, the court declared, the feared incursion into a state's criminal jurisdiction by an overextended federal statute was a deliberate, intended incursion.⁴⁷ RICO and the Travel Act by their own terms, the court explained, prohibited arson, an offense also forbidden by state laws.⁴⁸ Moreover, according to the court, the legislative history of section 844(i) indicated that Congress enacted the section because of ineffective state and local laws governing explosives.⁴⁹ Thus, the court concluded, nothing in the plain language of the Travel Act, RICO, or section 844(i) supported a union official's immunization from federal prosecution; nor did *Enmons* compel a general rule exempting all labor violence from federal criminal statutes.⁵⁰

³⁸ 487 F. Supp. at 992-93.

³⁹ *Id.* at 993-95 & n.8, 999.

⁴⁰ 646 F.2d at 1327.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1327-31.

⁴⁴ *Id.* at 1328.

⁴⁵ *Id.* at 1329.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1329-30.

⁴⁸ *Id.* at 1329.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1330.

In addition, to the claimed statutory immunity, the defendants urged that the extensive federal labor laws and regulations which provided special remedies supplanted any federal criminal prosecutions of labor union activities.⁵¹ The court flatly rejected this contention on several grounds. First, the court noted that violent acts were not unfair labor practices and thus subject to redress under the labor laws until found to be so by the NLRB.⁵² Moreover, even if the acts were found to be unfair labor practices, the court admonished, the labor statutes do not provide the exclusive remedy for violence used to achieve collective bargaining objectives.⁵³ Further, the court declared that nothing in the labor legislation indicated an intent to exclude federal criminal statutory sanctions from union violence.⁵⁴ To the *Thordarson* court, even *DeLaurentis*, which held that the rights contained in section seven of the NLRA were to be enforced exclusively by the NLRB, did not require a different result.⁵⁵ Rather, the *Thordarson* court stated that *DeLaurentis* was distinguishable because (1) the existence of applicable state criminal law countered any finding of NLRA exclusivity and (2) the broad language of section 241 of chapter eighteen⁵⁶ contrasted markedly with the plainly applicable language of the statutes allegedly violated.⁵⁷ Finding that neither the pre-existing labor legislation, the *Enmons* decision, nor the language of the statutes required exempting the defendants from criminal prosecution, the appeals court reversed the district court's dismissal of the indictment on the Travel Act, RICO, and explosive charges.⁵⁸

In dissent, Judge Pregerson of the Ninth Circuit agreed with the district court's application of *Enmons*' broad concern that the federal government should not be in the business of policing strikes.⁵⁹ According to his dissent, the majority only saw *Enmons* as attempting to avoid transformation of minor picket line violence into federal crimes by a narrow construction of "extortion."⁶⁰ Yet to Judge Pregerson, a narrow treatment of federal extortion under the Hobbs Act does not avoid the problem of federal government regulation of strikes since extortion is one of the proscribed "unlawful activities" in the Travel Act and a "racketeering activity" in RICO.⁶¹ Further, he noted, in

⁵¹ *Id.*

⁵² *Id.* at 1330-31.

⁵³ *Id.* at 1331.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 18 U.S.C. § 241 (1976). See *supra* note 22.

⁵⁷ 646 F.2d at 1331.

⁵⁸ *Id.* The appeals court then considered the district court's dismissal of the union funds conversion charges for the indictment's failure to allege (1) fraudulent intent and (2) lack of union authorization or good faith belief in benefit to the union. *Id.* at 1331-32. The appeals court rejected a *per se* rule as articulated in *United States v. Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973), which would make union funds used for an illegal purpose automatically within § 501(c)'s proscriptions, and instead required only that fraudulent intent need be alleged. 646 F.2d at 1332-37. The appeals court found that the intent was sufficiently alleged and therefore upheld the conversion charges. *Id.* at 1337.

⁵⁹ *Id.* at 1337-38 (Pregerson, J., concurring and dissenting).

⁶⁰ *Id.* at 1338 (Pregerson, J., concurring and dissenting).

⁶¹ *Id.* See *supra* notes 35 & 36.

both Acts, extortion is defined by state law, not federal law.⁶² Finally, the dissent concluded, the real concern of *Enmons* was that the federal government should not intrude into an area which is historically the province of the states.⁶³ Thus, in the dissent's view, the majority's reinstatement of the federal indictments violated basic principles of federalism.⁶⁴

The Ninth Circuit's holding in *Thordarson* that acts of violence by union officials in pursuit of legitimate union objectives are not immune from federal criminal prosecution significantly limits the holding of *Enmons* to its facts. Although the *Thordarson* court preserves the notion that coercion in a labor context cannot be wrongful under the Hobbs Act if used for legitimate purposes, the *Thordarson* court, nonetheless, limits the underlying federalism and labor law exemption concerns of *Enmons*. By refusing to give any operative effect to the broad policy considerations in its interpretation of the Travel Act, RICO, and section 844(i), *Thordarson* affirms the federal "criminal remedy" for union violence.

On the surface at least, the *Thordarson* analysis appears to be imbued with strong common sense for several reasons. First, to hold that union violence was privileged when its purpose is to achieve better wages, benefits, or working conditions would be to sanction the primitive view that illegitimate means can be justified by legitimate ends.⁶⁵ This result would be contrary to most notions of civilized behavior as well as to the specific federal labor policy of promoting industrial peace through the peaceful settlement of labor disputes.⁶⁶ Second, by not creating a criminal immunity, the court merely maintains the equality of criminal laws. Thus, that which is illegal remains so; the threat or use of physical force against person or property is no more an option for the union member than an unaffiliated criminal. Finally, by limiting *Enmons* to the Hobbs Act, a fairly bright line is drawn by the court: the *Enmons* defense is not available outside of Hobbs Act prosecutions. This line eliminates the element of uncertainty and vagueness which would have been injected into every criminal statute if the requirement of a judicial inquiry into the congressional intent to include labor violence within its operative scope had been imposed.

Nonetheless, this bright line is not completely free from problems. The *Enmons* case addressed two fundamental problems: (1) federalism questions arising any time the scope of federal criminal law overlaps the traditional state criminal law jurisdiction and (2) pre-existing federal legislation overlapping later federal legislation. By deciding that *Enmons* turned more on the legislative history and the special characteristics of extortion,⁶⁷ the *Thordarson* court in effect eliminated or at least derogated the underlying policy rationales set forth by the Supreme Court. Inherent in the *Enmons* decision was the attempt to har-

⁶² *Id.* at 1338 n.1 (Pregerson, J., concurring and dissenting).

⁶³ *Id.* at 1338 (Pregerson, J., concurring and dissenting).

⁶⁴ *Id.* (Pregerson, J., concurring and dissenting).

⁶⁵ *Cf.* H.R. REP. NO. 1396, 96th Cong., 2d Sess. 673 (1980) (supplemental views of Representative S. Hall, Jr., commenting on the proposed recodification of federal criminal law and its retention of the *Enmons* labor limitation on extortion).

⁶⁶ *See* *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-58 (1939).

⁶⁷ *Thordarson*, 646 F.2d at 1327 & n.9.

monize the Hobbs Act with the balance already struck by the existing federal labor legislation with the traditional criminal jurisdiction of the states. Imposed upon these concerns were the unique characteristics of (1) a labor strike, which is itself a form of coercion designed to force an employer to grant certain demands and (2) the crime of extortion, which prohibits obtaining property from another which is induced by the wrongful use or threat of force or violence. The problem, as expressed by *Enmons*, was that a broad definition of extortion ostensibly would include all economic strike behavior which affected commerce as well as the individual picket line transgression.⁶⁸ Taken to the extreme, every strike could be considered, under the Hobbs Act, a criminal conspiracy.⁶⁹ Thus, the pervasive concern of *Enmons* was that the federal courts would be left with the task of policing the routine conduct of strikes.⁷⁰ Even the government had conceded in *Enmons* that "incidental" or "low level" strike violence should not be covered by Hobbs Act extortion.⁷¹

The *Thordarson* court, however, dismissed these concerns by noting that the indicted acts of blowing up trucks, were "hardly the sorts of minor picket line violence that the *Enmons* Court feared would be transformed into federal crimes under the Hobbs Act."⁷² This analysis misses the point entirely; the *Enmons* defendants' extortionate acts also consisted of blowing up an employer's property.⁷³ Thus, it could be argued that the exemption carved out of the Hobbs Act by *Enmons* did not turn on the type or seriousness of the violent activity but on the scope of the Hobbs Act which *potentially* could reach minor acts of extortion. It was this potential which raised the attendant concerns of interference with the states' criminal jurisdiction and massive change in the federal labor law.⁷⁴ By resting on the severity of the criminal acts, *Thordarson*, in effect, validates the low-level exemption urged by the government but rejected by the Supreme Court.

The question, then, is whether the Travel Act, RICO, and section 844(i) also have the potential to reach low-level coercive actions arising during a legitimate labor dispute. The *Thordarson* court did not address the potential reach of these acts and therefore avoided the troublesome problem of identifying what exactly is low-level violence which is or is not reached by the Travel Act, RICO, and section 844(i). Arguably, the heated outburst of isolated individuals in the midst of the tension and frustration generated by a confrontational picket line would not be covered by the Travel Act or RICO for each Act requires more than individual acts of violence as a basis of prosecution.⁷⁵ This

⁶⁸ *Enmons*, 410 U.S. at 410. "The worker who threw a punch on a picket line, or the striker who deflated the tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years' imprisonment and a \$10,000 fine." *Id.*

⁶⁹ H.R. REP. NO. 1396, 96th Cong., 2d Sess. 669 (1980) (separate views of Representatives J. Seiberling, W. Hughes, & J. Conyers on the proposed recodification of federal criminal laws).

⁷⁰ *Enmons*, 410 U.S. at 411.

⁷¹ *Id.* at 412 (Blackmun, J., concurring).

⁷² *Thordarson*, 646 F.2d at 1329.

⁷³ *Enmons*, 410 U.S. at 398.

⁷⁴ *Id.* at 411.

⁷⁵ See, e.g., *Spinelli v. United States*, 382 F.2d 871, 893 (8th Cir. 1967), *rev'd on other*

additional element as well as other statutory predicates contained in the Travel Act and RICO⁷⁶ thus could be seen as curing the defective overreaching found in the Hobbs Act.

Notwithstanding the *Thordarson* court's failure to consider the extent to which the Travel Act, RICO, and section 844(i) reached low-level violence, it did consider briefly the effect of the statutes on the state criminal jurisdiction and pre-existing federal labor law. In this context, the *Enmons* court had relied essentially upon a rule of clear expression which required at least explicit language in the statute and legislative history stating that by enacting the statute, Congress had intended to change the pre-existing federal-state balance and the scope of federal labor law.⁷⁷ The *Thordarson* court, however, separated the two issues and addressed each individually. As to the infringement of state criminal law jurisdiction by section 844(i), the *Thordarson* court found that Congress intended to extend section 844(i) into an area of traditional state concern.⁷⁸ Therefore, the court concluded, this intrusion into state criminal law was permissible.⁷⁹ Intention was somewhat casually found in the Travel Act and RICO merely because each Act prohibits conduct proscribed by state laws.⁸⁰ This analysis is dubious since extortion is also covered by state laws. Further, it is this very overlap which bothered the *Enmons* court and prompted the court to restrain a federal statute's coverage of legitimate labor disputes.

The *Thordarson* court also gave short shrift to the change worked upon the federal labor law by the allowance of federal criminal prosecutions. Here again, the court did not closely follow the *Enmons* rule of clear expression but instead examined the history of the NLRA. Thus, the court argued that even if the NLRA does cover union violence, there was no intent by Congress to make its comprehensive remedies exclusive.⁸¹ In further support of this conclusion, the *Thordarson* court again reasoned that the severity of violence charged supported federal criminal prosecution.⁸² These arguments, however, do not meet the substance of the interrelated policy concerns of *Enmons* which ask whether Congress, by enacting the statute in issue, sought to change the federal-state balance *as well as* the scope of federal labor law.⁸³ Although the *Thordarson* court

grounds, 393 U.S. 410 (1969) (Travel Act prosecution requires (1) interstate travel, (2) intent to promote, direct, or manage illegal business, and (3) overt act); *United States v. Morris*, 532 F.2d 436, 441 (5th Cir. 1976) (RICO prosecution requires (1) association with enterprise and (2) pattern of racketeering activity).

⁷⁶ See *supra* note 75.

⁷⁷ *Enmons*, 410 U.S. at 411.

⁷⁸ *Thordarson*, 646 F.2d at 1329.

⁷⁹ *Id.* at 1330.

⁸⁰ *Id.* at 1329.

⁸¹ *Id.* at 1330-31.

⁸² *Id.* at 1331.

⁸³ The *Enmons* decision and its underlying policy rationales have been the subject of extensive congressional debate and have, so far, been preserved in Congress' proposed recodification of the federal criminal laws. See H.R. 6915, 96th Cong., 2d Sess. (1980).

See generally Cohen & Yellig, *Efforts to Apply the Federal Crime of Extortion to Labor-Related Violence*, 72 J. CRIM. L. & CRIMINOLOGY 499 (1981) (hereinafter Cohen & Yellig). In support of the *Enmons* rule, the Committee on the Judiciary reiterated the *Enmons* policy rationales and noted that to use a federal criminal extortion prosecution to reach union violence would be to use a

did not address the issue, the legislative history of RICO clearly suggests that Congress did intend to reach local activities and to eliminate fraud and corruption in labor relations.⁸⁴ Further, the *Thordarson* court's analysis is in keeping with the better rule of statutory interpretation. By requiring a clear showing of the congressional intent to exclude union violence, the *Thordarson* court is in accord with a recently applied rule of statutory construction which requires that where a statute's language is unambiguous, it is conclusive absent a clearly expressed *contrary* legislative intent.⁸⁵

The *Thordarson* opinion raises but does not deal with the express presence of extortion as one of the "unlawful activities" of the Travel Act⁸⁶ and as one of the enumerated "racketeering activities" in RICO.⁸⁷ As pointed out by the dissent, by limiting *Enmons* to the singular legislative history of the Hobbs Act, the majority creates an inevitable conflict with the Travel Act and RICO extortion provisions.⁸⁸ If an act of extortion was the basis of a Travel Act or RICO violation, the *Thordarson* plain language analysis and its reading of the legislative history would not preclude the federal government from reaching the same type of behavior put out of reach under the Hobbs Act by the *Enmons* court. The Travel Act's required nexus with interstate travel or an interstate facility⁸⁹ seems no more difficult a hurdle for the government than the Hobbs Act requirement that the extortion obstruct, delay, or affect commerce.⁹⁰ Neither does RICO's requirement of a pattern of racketeering activity, which by definition means at a minimum only two acts of extortion, present a formidable barrier to prosecution.⁹¹ The majority recognized this problem and intimated that when extortion is charged, perhaps the *Enmons* analysis should limit the scope of the Travel Act and RICO.⁹² Such recognition, however, begs the question for it tacitly admits the possible validity of the *Enmons* policy rationales which sought to balance state and federal criminal concerns with federal labor law.⁹³

Under *Thordarson*, then, union violence which occurs during the course of a legitimate labor dispute can be prosecuted under the Travel Act, RICO, and Section 844(i). Further, the *Thordarson* court's analysis, by limiting *Enmons* to

rather "blunt instrument" in an area where there already exist sufficient remedies and which is better dealt with by state and local law. H.R. REP. NO. 1396, 96th Cong., 2d Sess. 298-300 (1980). Further, it has been argued that federal criminal prosecution would put a "chill" on the exercise of the federal right to strike. Cohen & Yellig, *supra*, at 522. Again, these policy type arguments seem equally applicable to restrict the reach of other federal criminal statutes into the sphere of legitimate labor disputes.

⁸⁴ See 18 U.S.C. § 1961 note (1976) (Congressional Statement of Findings and Purpose).

⁸⁵ See *United States v. Turkette*, 452 U.S. 576, 580 (1981) (interpreting the scope of RICO).

⁸⁶ 18 U.S.C. § 1952(b)(2) (1976).

⁸⁷ 18 U.S.C. § 1961(1) (1980).

⁸⁸ *Thordarson*, 646 F.2d at 1338 (Pregerson, J., concurring and dissenting).

⁸⁹ 18 U.S.C. § 1952(a) (1976).

⁹⁰ 18 U.S.C. § 1951(a) (1976).

⁹¹ 18 U.S.C. § 1961(5) (1976).

⁹² *Thordarson*, 646 F.2d at 1327 n.9.

⁹³ *Id.* at 1338 n.1 (Pregerson, J., concurring and dissenting).

Hobbs Act violations and downplaying the underlying policy rationales, imposes few barriers for prosecutions under other federal statutes. The *Thordarson* decision leaves undecided, however, whether extortion can serve as a basis for Travel Act and RICO prosecutions when such extortionate conduct seeks to further legitimate union ends. From an employer viewpoint, the *Thordarson* federal criminal remedy is a salutary ruling which provides another weapon against reprehensible conduct during collective bargaining. It affords little relief, however, from damaging pressure when it is most needed: during the strike. For the union, conduct which was prohibited by the states is now doubly proscribed.

III. FEDERAL JURISDICTION

A. * *Exhausting Internal Union Grievance Procedures*

Prior to Filing a Federal Claim:

*Clayton v. Automobile Workers*¹

Section 301(a)² of the Labor-Management Relations Act of 1947 (LMRA)³ provides that an employee may seek a remedy in federal district court for an alleged breach of the collective-bargaining agreement between his union and employer.⁴ The United States Supreme Court in *Republic Steel Corp. v. Maddox*⁵ held that an employee seeking such a remedy must first exhaust any exclusive grievance and arbitration procedures established by that agreement.⁶ The Court established this rule to protect the integrity of the collective-bargaining process and to further that aspect of national labor policy which encourages private rather than judicial resolution of disputes arising over interpretation and application of collective-bargaining agreements.⁷ The Supreme Court's subsequent decision in *NLRB v. Marine Workers*,⁸ however, made it clear that courts have discretion to decide whether to require in addition exhaustion of internal procedures in the union's constitution which control a union member's complaint.⁹ If a court, under the facts and circumstances of the case, finds that the requirement to exhaust internal union remedies prior to court intervention is unreasonable, it may excuse an employee's failure to exhaust them.¹⁰

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¹ 451 U.S. 679 (1981).

² 29 U.S.C. § 185(a) (1976). Section 301(a) provides as follows:

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

³ 29 U.S.C. §§ 141-187 (1976).

⁴ See *supra* note 1.

⁵ 379 U.S. 650 (1965).

⁶ *Id.* at 652-53.

⁷ See *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567, 570-71 (1976).

⁸ 391 U.S. 418 (1968).

⁹ *Id.* at 426.

¹⁰ *Id.* at 428.

Since *Marine Workers*, the courts of appeal have divided over whether an employee alleging that his union breached its duty of fair representation¹¹ in processing his grievance and that his employer breached the collective-bargaining agreement must, in addition to exhausting the agreement's grievance procedure, also attempt to exhaust the internal union appeals procedure established by his union's constitution before he may maintain his suit under section 301.¹² Some courts of appeals have held that the employee's failure to exhaust internal union procedures may not be asserted as a defense by an employer in a court proceeding.¹³ Others have permitted exhaustion to be asserted as a defense by an employer if the internal appeals procedures could result in reactivation of the grievance.¹⁴ Some courts have held that the employee's failure to exhaust in a suit against his union is excused if union officials would be so hostile to the employee that he could not hope to obtain a fair hearing.¹⁵ Others also have excused the employee's failure to exhaust if the substantive relief available through the internal procedures would be less than that available in his section 301 action.¹⁶

During the *Survey* year, the Supreme Court, in *Clayton v. Automobile Workers*,¹⁷ considered these lower court decisions and set forth three factors to be considered in deciding whether to excuse employees from exhausting internal union appeals procedures prior to filing an action under section 301: (1) whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim,¹⁸ (2) whether the internal union appeals pro-

¹¹ Since the collective bargaining system necessarily subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit, the labor laws have been interpreted as imposing upon the bargaining agents a duty of fair representation. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976). As the statutory representative of the employees, the union must always exercise complete good faith and honesty of purpose in the exercise of its discretion. *Id.* Claims of union breach of duty of fair representation typically arise during the life of a contract when employees claim wrongful discharge or other improper treatment at the hands of the employer. *Id.* In such cases, individual employees may claim that the union refused to utilize contractual remedies or utilized them discriminatorily or in bad faith. *Id.*

¹² See *Clayton v. Automobile Workers*, 451 U.S. 679, 684 (1981).

¹³ See, e.g., *Johnson v. General Motors*, 641 F.2d 1075, 1083 (2d Cir. 1981); *Geddes v. Chrysler Corp.*, 608 F.2d 261, 264 (6th Cir. 1979); *Petersen v. Rath Packing Co.*, 461 F.2d 312, 315 (8th Cir. 1972).

¹⁴ See, e.g., *Varra v. Dillon Companies*, 615 F.2d 1315, 1317-18 (10th Cir. 1980); *Baldini v. Local Union No. 1095*, 581 F.2d 145, 150 (7th Cir. 1978); *Harrison v. Chrysler Corp.*, 558 F.2d 1273, 1278 (7th Cir. 1977). Under *Republic Steel*, an aggrieved employee is not entitled to a trial on the merits of his claim unless he has exhausted the grievance procedures established by the collective-bargaining agreement between his union and employer. 379 U.S. at 652-53. Once the time for filing a grievance under the collective-bargaining agreement has expired, the employee may appropriately seek judicial relief because he has no other redress. *Id.* If, however, the internal union appeals procedure allows the employee to "reactivate" the collective-bargaining procedures even though the stipulated period has expired, judicial intervention may be forestalled. For a discussion of when the collective-bargaining agreement grievance procedures in *Clayton* expired, see *infra* notes 24-40 and accompanying text.

¹⁵ See, e.g., *Fizer v. Safeway Stores, Inc.*, 586 F.2d 182, 183-84 (10th Cir. 1978); *Imel v. Zohn Mfg. Co.*, 481 F.2d 181, 184 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

¹⁶ See, e.g., *Finsely v. United Parcel Service, Inc.*, 635 F.2d 1288, 1290 (2d Cir. 1980); *Buzzard v. Local Lodge 1040*, 480 F.2d 35, 41 (9th Cir. 1973).

¹⁷ 451 U.S. 679 (1981).

¹⁸ *Id.* at 689.

cedure would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under section 301,¹⁹ and, (3) whether exhaustion of internal procedures would delay unreasonably the employee's opportunity to obtain a judicial hearing on the merits of his claim.²⁰ The court stated that if any one of these factors are found to exist, a court may excuse the employee's failure to exhaust any such internal procedures.²¹

The dispute in *Clayton* arose when Clayton, a member of the United Automobile, Aerospace and Agricultural Workers of America (UAW or union)²² and a shop steward of its Local 509,²³ was dismissed from his job at ITT Gilfillian (ITT or employer) for violating a plant rule prohibiting certain behavior.²⁴ Clayton, believing his dismissal was not for just cause,²⁵ asked his union representative to file a grievance pursuant to the mandatory grievance and arbitration procedure established by the collective-bargaining agreement between ITT and Local 509.²⁶ The union investigated his charges, pursued his grievance through the third step of the grievance procedure and made a timely request for arbitration.²⁷ The union, however, decided not to proceed with arbitration and withdrew the request.²⁸ Clayton was not notified of the union's decision until after the time for requesting arbitration under the terms of collective-bargaining agreement had expired.²⁹ The UAW Constitution required every aggrieved union member to exhaust established internal union appeals procedures³⁰ before seeking redress from a civil court.³¹ Yet, Clayton did not file a timely appeal from his local's decision not to seek arbitration.³² Instead, he filed suit under section 301 in federal district court,³³ alleging that the union had breached its duty of fair representation by arbitrarily refusing to

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 682.

²³ *Id.*

²⁴ *Id.* The Court did not specify what Clayton's improper behavior was. *See id.* The Ninth Circuit Court of Appeals noted that the alleged misconduct was not material. 623 F.2d 563, 565 (9th Cir. 1980).

²⁵ *Clayton v. Automobile Workers*, 451 U.S. 679, 682 (1981).

²⁶ *Id.* The collective bargaining agreement between Local 509 and ITT established a four-step grievance procedure with binding arbitration as the fourth step. *Id.* at 682 n.1.

²⁷ *Id.* Under the agreement, if the union wishes to request arbitration, it must do so within 15 working days after completion of the third step of the grievance procedure. *Id.*

²⁸ *Id.* at 682.

²⁹ *Id.* Neither the union nor the employer contested Clayton's allegation that he received this notice more than 15 working days after completion of the third step of the grievance procedure. *Id.* at 682 n.2. *See supra* note 26.

³⁰ These procedures first direct the employee to seek relief from the membership of his local. *Id.* at 682-83. If the employee is not satisfied with the result obtained there, he may further appeal to the International Executive Board of the UAW and eventually to either the Constitutional Convention Appeals Committee or to a Public Review Board composed of nonunion, impartial persons of good public repute. *Id.* at 683. Clayton followed this procedure only as far as the first step, seeking relief from his local. *Id.*

³¹ *Id.*

³² *Id.* Clayton had 30 days from the date the union withdrew its request for arbitration to initiate the internal union appeals procedures. *Id.* at 683 n.3.

³³ *Id.* at 683.

pursue his grievance past the third step of the grievance procedure, and that the employer had breached the collective-bargaining agreement by discharging him without just cause.³⁴

Both UAW and ITT pleaded as an affirmative defense Clayton's failure to exhaust the internal union appeals procedure.³⁵ Finding the procedures adequate, the district court sustained the defense.³⁶ The Ninth Circuit Court of Appeals affirmed dismissal of Clayton's claim against the union, holding that the internal appeals procedure would allow Clayton the monetary relief which he sought against the union in his section 301 suit.³⁷ The court of appeals reversed the district court's dismissal of Clayton's claim against his employer, however, holding that the internal appeals procedure would be unable to provide the requested relief.³⁸ ITT appealed, arguing that if Clayton's failure to exhaust internal union appeals procedures bars his suit against the union, it must also bar his suit against the employer.³⁹ The Supreme Court granted certiorari to resolve the conflict among the courts of appeal⁴⁰ regarding whether an employee must exhaust the internal union appeals procedures before seeking redress in federal court.⁴¹

The Court first distinguished the type of exhaustion procedures at bar from those in *Republic Steel*.⁴² In *Republic Steel*, the Court stated that an employee alleging a violation of the collective-bargaining agreement must first exhaust exclusive contractual grievance and arbitration procedures which were established by the agreement.⁴³ The Court in *Clayton* noted that a contrary rule would deprive the employer and union of the ability to establish a uniform method for orderly settlement of employee grievances.⁴⁴ The Court, concluded, however, that the internal union procedures available in *Clayton* differed significantly from the contractual procedures available in *Republic Steel*.⁴⁵ The Court observed that since the procedures in *Clayton* were wholly a creation of the UAW Constitution, and not a result of collective bargaining between the

³⁴ *Id.* To prevail in an action under section 301 against either the employer or the union, an employee must ordinarily establish both that the union breached its duty of fair representation and that the employer breached the collective-bargaining agreement. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976).

³⁵ *Clayton v. Automobile Workers*, 451 U.S. 679, 683 (1981).

³⁶ *Id.* at 683-84.

³⁷ *Id.* at 684. The Supreme Court, in reviewing this finding, noted that the record did not indicate whether this monetary relief included backpay only, or whether it also included prospective monetary relief and incidental or punitive damages. *Id.* at 690 n.17. The Court noted further that Clayton was apparently seeking all such forms in his § 301 action. *Id.*

³⁸ *Id.* at 685. The court of appeals found that the internal appeals procedure could not result in either reinstatement of Clayton to his job or in reactivation of his grievance-relief that Clayton sought from the employer in his § 301 action. *Id.*

³⁹ *Id.*

⁴⁰ See *supra* notes 12-15 and accompanying text.

⁴¹ *Clayton v. Automobile Workers*, 451 U.S. 679, 686 (1981).

⁴² See discussion of *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), *supra* notes 4-6 and accompanying text.

⁴³ *Clayton v. Automobile Workers*, 451 U.S. 679, 685-86 (1981).

⁴⁴ *Id.* at 686.

⁴⁵ *Id.* at 687.

union and employer,⁴⁶ such procedures were separate from the collective-bargaining process.⁴⁷ Consequently, the Court concluded; failure to exhaust them would not deprive the union and employer of the ability to establish settlement procedures.⁴⁸

The Court next reviewed the policy rationale underlying an exhaustion requirement. According to the Court, the union argued that unions would be unable to regulate their internal affairs without undue judicial interference unless employees were first required to exhaust internal appeals procedures,⁴⁹ that an exhaustion requirement would promote the national labor policy goal of encouraging private resolution of disputes arising out of collective bargaining agreements,⁵⁰ and that even if exhaustion were not required with respect to claims brought against employers, it should still be required with respect to the union because the relief Clayton sought from the union was available through such internal union procedures.⁵¹ Clayton conceded that he could have received an impartial hearing on his claim had he exhausted internal appeal procedures of his union.⁵² He argued, however, the Court stated, that he should not be required to exhaust the procedures since they could not provide him with the requested relief.⁵³

The Court rejected the union's argument that because an exhaustion requirement would forestall judicial interference with internal union affairs exhaustion should be required.⁵⁴ The Court explained that a concern with forestalling judicial interference has been "strictly limited to disputes arising over *internal* union matters such as those involving the interpretation and application of a union constitution."⁵⁵ This concern does not extend, the Court stated, to issues in the public domain.⁵⁶ Since Clayton's allegations that the union breached its duty of fair representation raised issues rooted in statutory policies extending far beyond internal union interests, the Court reasoned that improper judicial interference is not a legitimate concern.⁵⁷

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 587-88.

⁴⁹ *Id.* at 688.

⁵⁰ *Id.*

⁵¹ *Id.* at 684.

⁵² *Id.* at 689-90.

⁵³ *Id.* at 590.

⁵⁴ *Id.* The Court noted that this policy has its statutory roots in § 101(a)(4) of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(4) (1976). *Id.* at 688 n.13. Section 101(a)(4) provides:

No labor organization shall limit the right of any member thereof to institute an action in any court, . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal . . . proceedings against such organization or any officer thereof.

29 U.S.C. § 411(a)(4) (1976).

⁵⁵ Clayton v. Automobile Workers, 451 U.S. 679, 688 (1981) (quoting NLRB v. Marine Workers, 391 U.S. 418, 426 n.8 (1968)).

⁵⁶ 451 U.S. at 688 n.14.

⁵⁷ *Id.* at 688. The Court did not discuss the policies to which it referred. *See id.* Instead, it made reference to a number of cases: United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 66-67 n.2 (Stewart, J., concurring); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562 (1976);

The Court also rejected the union's argument that an exhaustion requirement would promote the national labor policy of encouraging private resolution of labor disputes.⁵⁸ The Court acknowledged that some contractual grievances might be resolved privately if employees were required to exhaust internal appeals procedures.⁵⁹ Nonetheless, the Court refused to require employees to exhaust such procedures in all cases.⁶⁰ The Court reasoned that an unbending exhaustion requirement would force employees with meritorious section 301 claims to expend their time and resources needlessly by submitting claims to potentially lengthy internal union procedures that might not be adequate to redress their grievances.⁶¹ Under *Marine Workers*,⁶² the Court recalled, courts have discretion to decide whether to require exhaustion of internal union procedures.⁶³ In deciding whether to exercise that discretion, the Court concluded, three factors are relevant.⁶⁴ The Court stated that if a court should find either that union officials are so hostile to the employer that he could not hope to obtain a fair hearing, that the internal union appeals procedures would be inadequate either to reactivate or to redress fully the employee's grievance, or that exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim, then it could properly excuse the employee's failure to exhaust.⁶⁵ The Court reasoned that the national labor policy of encouraging private resolution of disputes would not be served by requiring Clayton to exhaust internal union remedies which could neither reactivate his grievance nor provide him with an opportunity to obtain the same substantive relief that he sought in his section 301 action.⁶⁶ The Court emphasized that exhaustion would merely delay judicial consideration of Clayton's section 301 action.⁶⁷ Judicial resources would not be saved, the Court reasoned, because regardless of the outcome of the internal appeal, the employee still would be required to prove in his section 301 suit that the union had breached its duty of fair representation and that the employer breached the collective-bargaining agreement.⁶⁸ The Court, thus, concluded that where the internal procedures can neither reactivate the employee's grievance against the employer nor redress it, an exhaustion

Vaca v. Sipes, 386 U.S. 171, 182 (1967); and Humphrey v. Moore, 375 U.S. 335, 355 L.R.R.M. (BNA) 2031 (1964). *Id.* at 689.

⁵⁸ *Id.*

⁵⁹ *Id.* The Court noted, for example, that an employee who exhausts internal union procedures might decide not to pursue his § 301 action in court, either because the union offered him a favorable settlement, or because it demonstrated that his underlying contractual claim was without merit. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² NLRB v. Marine Workers, 391 U.S. 418 (1968).

⁶³ Clayton v. Automobile Workers, 451 U.S. 679, 689 (1981).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 682.

⁶⁷ *Id.*

⁶⁸ *Id.*

requirement would only frustrate the federal policy that underlies section 301 of encouraging relatively rapid disposition of labor disputes.⁶⁹

The Court determined that the internal union appeals procedures in the present case were inadequate either to reactivate Clayton's grievance or provide him with the full relief sought.⁷⁰ The Court noted that Clayton sought reinstatement from his employer⁷¹ and monetary damages from both his employer and his union.⁷² Although the Court recognized that the UAW Constitution does permit some monetary relief against the union,⁷³ it indicated that the amount of financial relief available at that level may not be equal to that sought or available in Clayton's section 301 action.⁷⁴ The Court noted that the union could neither reinstate Clayton in his job nor reactivate his grievance procedure.⁷⁵ In the Court's view, these restrictions on the relief available through the internal UAW procedures rendered them inadequate.⁷⁶

Finally, the Court rejected the union's argument that even if exhaustion is not required with respect to the employer it should be required with respect to the union because the relief sought by Clayton against the union in his section 301 suit is available through internal union procedures.⁷⁷ The union argued that the relief sought by Clayton was available through internal union procedures.⁷⁸ The Court acknowledged that this argument might have force if Clayton were bringing his section 301 action solely against the union.⁷⁹ Since the employer was included in the suit, however, the Court reasoned that an exhaustion requirement against the union but not against the employer would force a trial court to choose between two undesirable alternatives.⁸⁰ On the one hand, the Court observed, if the trial court stayed the action against the employer pending exhaustion of the internal appeals procedure, it would violate national labor policy by effectively requiring exhaustion with respect to the employer.⁸¹ If, on the other hand, the Court explained, the trial court permitted the action against the employer to proceed, two separate section 301 suits based on the same facts could result.⁸² The Court, thus, chose to permit

⁶⁹ *Id.*

⁷⁰ *Id.* at 693.

⁷¹ *Id.* The Court observed that reinstatement is available only from the employer because the union has no power to order reinstatement under the collective-bargaining agreement. *Id.* at 690 n.15.

⁷² *Id.* at 690. The Court explained that monetary damages could be assessed against both the employer and the union. *Id.* at 690 n.15. To determine how such damages would be apportioned between the union and the employer, see *Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967).

⁷³ *Id.* at 690 & n.16.

⁷⁴ *Id.* at 690 & n.17. See also *supra* note 36.

⁷⁵ *Id.* 451 U.S. at 691. The Court acknowledged that the parties had stipulated at trial that once Local 509 withdrew its request for arbitration, no other remedies would remain available under the contract. *Id.* at 691 n.18. In addition, the collective bargaining agreement contained no provision whereby the parties could waive the 15 day time limit for requesting arbitration. *Id.*

⁷⁶ *Id.* at 690.

⁷⁷ *Id.* at 695.

⁷⁸ *Id.* at 694-95.

⁷⁹ *Id.* at 695.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

the section 301 actions against the employer and the union to proceed simultaneously unless the internal union procedures could redress or reactivate the employee's grievance.⁸³ The Court concluded that a reasonable possibility that the employee's claim will be privately resolved exists only where the internal union procedures allow for redress or reactivation of the employee's grievance.⁸⁴

Justice Rehnquist, in his dissent, disagreed with the majority's conclusion that exhaustion would not promote private resolution of the employee's grievance.⁸⁵ He contended that the error in the majority's analysis resulted from its "apparent belief" that internal union remedies must provide a complete substitute for either the contract grievance procedure or the courts in order to be deemed "adequate."⁸⁶ To the contrary, Rehnquist reasoned, internal union remedies are provided only to encourage private resolution of disputes, not to be a complete substitute for the courts.⁸⁷ Justice Rehnquist asserted that private resolution would be promoted in *Clayton* by an exhaustion requirement because either the employee, convinced by the union during the internal procedures that the union's decision not to pursue a grievance was correct, will decide not to pursue his section 301 claim,⁸⁸ or the union and employer, appraised of the strength of the employee's claim, will pursue private resolution to avoid the additional burdens and costs of litigation.⁸⁹ Exhaustion should be required, Rehnquist concluded, because, even if litigation ultimately results, exhausting the internal union procedures may have narrowed the issues in controversy thus saving judicial resources.⁹⁰

The Court's decision in *Clayton* is consistent with previous Supreme Court cases. Under the Court's decision in *Republic Steel*, an employee is required to exhaust the grievance and arbitration procedures established by the collective-bargaining agreement between his union and the employer prior to bringing suit under section 301.⁹¹ Under the facts in *Clayton*, the Court found such procedures to have been exhausted since the union withdrew its request for arbitration and did not notify the employee until after the time for requesting arbitration had expired.⁹² The question in *Clayton* was whether the employee was required to exhaust the internal union appeals procedures established by his union's constitution before maintaining the subsequent breach of duty of fair representation claim in federal court under section 301.⁹³

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 697 (Rehnquist, J., dissenting).

⁸⁶ *Id.* at 700-01 (Rehnquist, J., dissenting).

⁸⁷ *Id.* at 701 (Rehnquist, J., dissenting).

⁸⁸ *Id.* at 700 (Rehnquist, J., dissenting).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Republic Steel Corp v. Maddox*, 379 U.S. 650, 652-53 (1965). See also *supra* notes 4-6 and accompanying text.

⁹² *Clayton v. Automobile Workers*, 451 U.S. 679, 682 (1981). See also *supra* notes 24-28 and accompanying text (discussing the grievance and arbitration procedures established by the collective-bargaining agreement between the union and the employer).

⁹³ 451 U.S. at 682. See also *supra* notes 29-33 and accompanying text (discussing the internal union appeals procedures).

In *Marine Workers*, the Court held that a union could not discipline one of its members for failing to exhaust internal appeals procedures before filing an unfair labor practice charge with the NLRB because the unfair labor practice charge was beyond the internal affairs of the union.⁹⁴ The *Marine Workers* Court observed that a proceeding by the NLRB is not meant to adjudicate private rights but to effectuate a public policy.⁹⁵ Any coercion used to discourage access to such public proceedings, the Court noted, is beyond the legitimate interests of a labor organization.⁹⁶ The *Marine Workers* Court, thus, concluded that there can be no justification to make the public processes wait until the union member exhausts internal union procedures which plainly are inadequate to deal with "all phases of the complex problem concerning employer, union, and employee member."⁹⁷ Similarly, the Court in *Clayton* found that the employee's grievance went beyond the internal affairs of the union.⁹⁸ In addition, the Court observed, the internal union procedures were inadequate to redress or reactivate the grievance.⁹⁹ As in *Marine Workers*, therefore, the Court in *Clayton* excused the employee from the requirement that he first exhaust the inadequate internal union appeals procedure.¹⁰⁰

There is some validity to both views concerning whether internal union procedures should be exhausted even though the views are completely contradictory. The facts of each particular case should be examined to determine whether exhaustion should be required. Such an examination reveals that there are some cases in which exhaustion of internal union appeals is desirable. Where the internal union appeals process is able to provide the aggrieved employee with the relief sought or to reactivate the grievance procedure the national labor policy of encouraging private resolution of labor disputes in order to save judicial resources¹⁰¹ would be furthered by requiring exhaustion. Private rather than judicial resolution of the dispute may occur if the employee could be awarded during the internal procedure the full relief requested.¹⁰² Private rather than judicial resolution of conflicts may also occur if the internal union procedures could result in reactivation of the employee's grievance because dispute-resolution procedures, established through collective-bargaining, would provide the employee with an opportunity to prove that he was wrongfully discharged or otherwise treated improperly by the employer.¹⁰³ Thus, where the internal union process permits redress or reactivation of the

⁹⁴ NLRB v. *Marine Workers*, 391 U.S. 418, 425 (1968).

⁹⁵ *Id.* at 424.

⁹⁶ *Id.*

⁹⁷ *Id.* at 425. The Court remarked that if the union member becomes "exhausted," instead of the remedies, the issues of public policy are never reached and an "airing of the grievance never had." *Id.*

⁹⁸ *Clayton v. Automobile Workers*, 451 U.S. 679, 688 (1981).

⁹⁹ *Id.* at 690. See also *supra* notes 69-75 and accompanying text (discussing the inadequacy of the internal union appeals procedure in *Clayton*).

¹⁰⁰ 451 U.S. at 695.

¹⁰¹ See *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 556 (1976).

¹⁰² *Id.* Where the employee receives satisfaction of his claim via private avenues, his § 301 action would become moot and he would not be entitled to a judicial hearing. *Id.*

¹⁰³ *Id.*

grievance, exhaustion of internal remedies could make unnecessary judicial resolution of the employee's grievance.

Moreover, exhaustion of internal union remedies may promote private resolution of labor disputes even where those remedies cannot provide reinstatement or reactivation of a grievance. For example, during the internal appeals process, the union may satisfy the employee that its decision not to pursue a grievance was correct.¹⁰⁴ The employee's decision to pursue a section 301 action on the ground that the union breached its duty of fair representation, thus, would be pre-empted. Furthermore, if the union determines that it mishandled an employee's grievance, the union and employer may desire to avoid litigation by pursuing private resolution of the grievance with the employee.¹⁰⁵ Finally, even where the collective-bargaining agreement does not provide for grievance reactivation, many employers may voluntarily permit the union to reactivate to avoid the additional burden and costs of litigation.¹⁰⁶ In such cases, a requirement that the employee exhaust internal union appeals would promote private resolution of labor disputes.

While there is validity to the view that exhaustion of internal union appeals in some cases promotes national labor policy goals, the adverse consequences of a general requirement of exhaustion weighs against its adoption. In most cases, a requirement that the employee exhaust internal union appeals procedures will serve only to frustrate the employee in his quest for relief. Where the internal appeals procedure cannot redress or reactivate the employee's grievance, an exhaustion requirement would serve only to frustrate and delay the employee in his quest for relief under section 301. For example, during the internal appeals process, the union may fail to satisfy the employee that its decision not to pursue a grievance was correct.¹⁰⁷ The employee must still maintain a section 301 claim to obtain the relief sought. Even if the union during the internal appeals process determines that it mishandled an employee's grievance, the union, acting alone, might be precluded by the collective-bargaining agreement from providing the employee with the requested relief or from reactivating the contractual grievance procedure.¹⁰⁸ Where the employer refuses voluntarily to reactivate the grievance procedures, the employee must still maintain an action in federal court. In the interim, the employee would have been forced to expend time and resources to obtain relief which from the start could not have been granted by the internal union appeals process. In some cases, therefore, requiring the employee to exhaust internal union appeals procedures which are inadequate to redress or reactivate the employee's grievance would be a worthless gesture and would not render it unnecessary for the employee to seek a judicial hearing.

¹⁰⁴ See *supra* notes 86-89 and accompanying text.

¹⁰⁵ *Id.*

¹⁰⁶ *Clayton v. Automobile Workers*, 451 U.S. 679, 700 (1981) (Rehnquist, J., dissenting).

¹⁰⁷ The UAW, for example, has admitted only once in 20 years that it breached its duty of fair representation. See Klein, *DUTY OF FAIR REPRESENTATION* 103 (1977).

¹⁰⁸ *Clayton v. Automobile Workers*, 451 U.S. 679, 690 n.15, 691 n.18 (1981). The collective bargaining agreement may provide, for example, that only the employer may reinstate

Furthermore, if exhaustion is required, the internal appeals process would not in all cases save judicial resources at trial. In a section 301 action, the employee must still prove that the union breached its duty of fair representation and that the employer breached the collective-bargaining agreement.¹⁰⁹ While a union's admission during the internal union appeals procedure that it breached its duty of fair representation is certainly evidence a court may consider,¹¹⁰ an employer defending a section 301 suit would still be entitled to prove that no such breach had occurred.¹¹¹ Requiring an employee to exhaust internal procedures may, thus, not offer significant savings of judicial resources.

Since an employee may still be required to maintain a section 301 suit even after exhaustion of internal procedures the need to exhaust existing procedures should be obviated where the procedures cannot redress or reactivate the grievance. On one hand, if exhaustion were required and if the employer chose not to voluntarily allow reactivation of the contractual grievance procedures or reinstatement of the employee, the employee's time and resources would have been needlessly expended. The employee in such a case must maintain a second round of arguments to obtain redress for, or reactivation of, his grievance. On the other hand, if exhaustion were not required, and if the employer desires to voluntarily reactivate the grievance procedure,¹¹² the employer, the employee, and the union would still be free to settle their section 301 dispute by agreeing to private avenues such as arbitration. Excusing exhaustion where the internal union appeals process is inadequate to redress or reactivate the employee's grievance thus does not foreclose or discourage private resolution of labor disputes. Excusing exhaustion in such cases, however, does preserve the employee's resources for a meaningful section 301 action.

Under the facts of *Clayton*, the Court correctly excused Clayton's failure to exhaust the internal appeals process. Under the UAW Constitution, the Court observed, the Public Review Board (PRB), with ultimate responsibility to determine whether the union breached its duty of fair representation, was without jurisdiction to consider Clayton's claim.¹¹³ Clayton claimed that the union acted "arbitrarily" and "discriminatorily" in deciding not to pursue arbitration.¹¹⁴ The UAW Constitution does not permit the PRB to entertain such claims.¹¹⁵ Moreover, even if the union decided Clayton was correct, the union did not have authority to reinstate him.¹¹⁶ Since the union appeal boards had

employees or that time limits for processing grievances may be extended by mutual agreement by the parties concerned. *See id.* In *Clayton*, there was no provision in the collective-bargaining agreement whereby the parties could waive the 15-day limit for requesting arbitration. *Id.*

¹⁰⁹ *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976).

¹¹⁰ *See Vaca v. Sipes*, 386 U.S. 171, 186-87 (1967).

¹¹¹ *Id.*; 451 U.S. at 593 n.23.

¹¹² Such a case might occur, for example, where the employer wishes to avoid the burden and costs of litigation.

¹¹³ *Clayton v. Automobile Workers*, 451 U.S. 679, 693 n.24 (1981).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 694 n.24. *See also Klein*, DUTY OF FAIR REPRESENTATION 103 (1977).

¹¹⁶ *Clayton v. Automobile Workers*, 451 U.S. 679, 690 n.15 (1981). The Court stated

no jurisdiction over Clayton's claim, and since the union had no ability to reinstate Clayton, it is unlikely that Clayton's grievance could have been privately resolved through the internal appeals procedure. Under the Court's decision in *Clayton*, Clayton does not have to exhaust the internal appeals procedures because they are inadequate to redress or reactivate Clayton's grievance.¹¹⁷ The union, however, on remand may privately settle Clayton's monetary claim rather than pursue judicial resolution of the issue. Likewise, the employer may reinstate Clayton and settle the monetary claim rather than litigate. The Court's decision to excuse exhaustion thus appropriately preserved Clayton's financial ability to seek redress for his grievance without foreclosing private resolution of the dispute.

Clayton is important for the legal practitioner because it clarifies¹¹⁸ when an employee must exhaust internal union appeals procedures prior to bringing an action under section 301. After *Clayton*, internal union appeals procedures probably will be required where the union is the only defendant in a section 301 action.¹¹⁹ Where the employer also is sued, such exhaustion likely will be required if the procedures allow reactivation of the grievance or are adequate to provide the substantive relief requested.¹²⁰ Exhaustion, however, will be excused where the employee sues the union and employer but where the internal union appeals procedures are inadequate to redress the grievance or reactivate the grievance procedures established by the collective-bargaining agreement.¹²¹

B.* *Bringing Union Constitutions Within the Sweep of Section 301:*

United Association of Journeymen v. Local 334¹

The Labor Management Relations Act of 1947 (the Act)² was enacted primarily "to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process."³ Because the enforcement of collective bargaining agreements through the federal court system was a "logical and necessary step" toward industrial peace,⁴ Section 301 was enacted.⁵ Section 301(a) establishes federal court jurisdiction over suits for

that under the collective-bargaining agreement between Local 509 and the employer reinstatement is available only from the employer. *Id.*

¹¹⁷ *Id.* at 695.

¹¹⁸ The decision changes the law in some jurisdictions. See *supra* notes 10-15 and accompanying text.

¹¹⁹ *Clayton v. Automobile Workers*, 451 U.S. 679, 696 (1981).

¹²⁰ *Id.*

¹²¹ *Id.*

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¹ 452 U.S. 615 (1981).

² 29 U.S.C. §§ 141-87 (1976).

³ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962).

⁴ See S. REP. NO. 105, 80th Cong., 1st Sess. 16, 16-17 (1947) N.L.R.B., 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 422-23 (1948) [hereinafter cited as LEGISLATIVE HISTORY].

⁵ 29 U.S.C. § 185 (1976).

violations of contracts between employers and labor organizations or between labor organizations.⁶

The meaning of the clause "contracts between an employer and a labor organization" is well established. The legislative history surrounding Section 301 reveals that Congress specifically intended to include collective bargaining agreements within the clause.⁷ Less well settled, however, is the meaning of the clause in Section 301 extending protection of the Act to "contracts between labor organizations." There is no legislative history relating to this clause, and the language of the statute does not clarify adequately which contracts Congress intended to include under this clause of Section 301.⁸ Thus, the meaning of this clause has been left entirely to judicial interpretation.

Although several lower courts have addressed the issue of whether a union constitution is a contract between labor organizations as contemplated under Section 301(a),⁹ it was not until the *Survey* year that the United States Supreme Court decided the question. In *United Association of Journeymen v. Local 334*,¹⁰ the Court held that a union constitution is a contract between a local union and a parent international union and thus is within the federal courts' jurisdiction as granted by Section 301(a).¹¹

The respondent in *United Association, Local 334* of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 334) was a labor organization affiliated with the petitioner, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (United Association).¹² Local 334 was chartered by the United Association.¹³ In an attempt to consolidate some of its local unions the parent, United Association, issued an Order of Consolidation¹⁴ on August 4, 1977, pursuant to a provision

⁶ Section 301(a), 29 U.S.C. § 185(a), provides:

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

Id.

⁷ LEGISLATIVE HISTORY, *supra* note 4, at 421-24. In 1962, the United States Supreme Court extended the scope of Section 301 to include contracts other than collective bargaining agreements. *Retail Clerks, Int'l Ass'n v. Lion Dry Goods*, 369 U.S. 17, 28 (1962). Specifically, the Court held that it was "enough that [the contract was] clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them," for it to fall within the scope of Section 301(a). *Id.*

⁸ See *Local 334 v. United Ass'n of Journeymen*, 628 F.2d 812, 815 (3d Cir. 1980), *rev'd*, 452 U.S. 615 (1981).

⁹ See, e.g., *Alexander v. International Union of Operating Eng'rs, AFL-CIO*, 624 F.2d 1235, 1238 (5th Cir. 1980); *Local Union No. 657 v. Sidell*, 552 F.2d 1250, 1252-56 (7th Cir.), *cert. denied*, 434 U.S. 862 (1977); *Stelling v. International Bhd. of Elec. Workers*, 587 F.2d 1379, 1382-84 (9th Cir. 1978), *cert. denied*, 442 U.S. 944 (1979).

¹⁰ *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615 (1981).

¹¹ *Id.* at 622.

¹² *Id.* at 616.

¹³ *Id.*

¹⁴ *Id.* at 617. Local 334 had refused to comply with a request by United Association for

in the constitution of the United Association.¹⁵ Local 334, after attempting to obtain a stay of the Order,¹⁶ brought an action in the New Jersey Superior Court to enjoin the order's enforcement.¹⁷ United Association removed the case to the United States District Court for the District of New Jersey, over the objection of Local 334.¹⁸ Upon cross-motions for summary judgment, the court ruled for the United Association and refused to stay the consolidation order.¹⁹

On appeal, the Third Circuit Court of Appeals raised the issue of federal jurisdiction under Section 301(a) *sua sponte* and vacated the judgment of the district court.²⁰ It held that the court had no jurisdiction under Section 301(a) because the suit concerned an intra-union matter that lacked "a significant impact on labor-management relations or industrial peace."²¹

Upon review, a divided Supreme Court reversed the Third Circuit's decision, finding that a violation of a union constitution was a breach of a contract between labor organizations, and was thus subject to federal jurisdiction under Section 301(a).²²

Writing for the Court, Justice Brennan first concluded that a union constitution was essentially a contract between labor organizations.²³ Justice Brennan found support for his holding in a line of Circuit Court decisions holding that a union constitution could be a contract between labor organizations within the meaning of Section 301(a).²⁴ He also noted that at the time of the

voluntary consolidation. The Order called for the consolidation of nine Northern New Jersey locals, including Local 334, into two locals, one representing plumbers and the other representing pipefitters.

¹⁵ *Id.* Section 86 of the Constitution of United Association provides:

Whenever, in the judgment of the General President, it is apparent that there is a superfluous number of Local Unions in any locality, and that a consolidation would be for the best interest of the United Association, locally or at large, he shall have the power to order Local Unions to consolidate and to enforce the consolidation of said Local Unions, or said territory in one or more Local Unions, provided such course received the sanction of the General Executive Board.

Id.

¹⁶ *Id.* at 617-18. Local 334 sent a letter to the United Association and received no response. *Id.*

¹⁷ *Id.* at 618. They also requested an injunction to require the United Association to return the seal and charter of Local 334 and to prevent threats of expulsion and loss of membership against Local 334's officers and members. Local 334's complaint alleged that (1) § 86 of the constitution did not permit division of the chapter's membership into separate work classifications of pipefitters and plumbers, (2) the action was not a consolidation of local unions, (3) the General President had abused his discretion by failing to specify facts to support his finding that Local 334 was a 'superfluous' local. *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 618-19. The court held first that it lacked jurisdiction because Local 334 had failed to exhaust internal union remedies. Alternatively, it ruled that the United Association's actions were justified under § 86 of the Constitution. *Id.*

²⁰ Local 334 v. United Ass'n of Journeymen, 628 F.2d 812, 813 (3d Cir. 1980), *rev'd*, 452 U.S. 615 (1981).

²¹ *Id.*

²² United Ass'n of Journeymen v. Local 334, 452 U.S. 615, 627 (1981).

²³ *Id.* at 621.

²⁴ *Id.* The Circuit Court cases, however, limited their holdings to situations where the union constitution would in some manner have "significant impact" on industrial peace and/or labor-management relations. *See, e.g.,* Stelling v. International Bhd. of Elec. Workers, 587 F.2d

enactment of Section 301(a), the prevailing view of the states' law was that a union constitution was a contract.²⁵ Justice Brennan also referred to the definition of "labor organization" contained within the Act²⁶ as well as to numerous Supreme Court decisions dealing with local and international unions as labor organizations.²⁷ He therefore concluded that both Local 334 and the United Association were labor organizations under Section 301(a).

Justice Brennan then observed that despite the lack of legislative history regarding the clause "contracts between labor organizations,"²⁸ Congress could have concluded that enforcement of the terms of union constitutions would "contribute to the achievement of labor stability."²⁹ The Third Circuit Court had noted that a "significant impact" on labor-management relations was necessary to trigger Section 301(a), and that federal jurisdiction over a union constitution amounted to unjustified intervention in intra-union affairs.³⁰ Justice Brennan dismissed this contention, noting that "there is an obvious and important difference between substantive regulation by the NLRB of internal union governance of its membership,³¹ and enforcement by the federal courts of freely entered into agreements between separate labor organizations."³² The Court therefore concluded that Congress intended that union constitutions be enforced by the federal courts under Section 301(a).³³ The majority, however, specifically declined to determine the source of the federal law to be applied in Section 301(a) cases.³⁴ In addition, the Court declined to hold that all contracts between labor organizations were within Section 301(a).³⁵

In a brief dissent, Chief Justice Burger disagreed with the majority's conclusion that a union constitution was a contract between labor organizations.³⁶

1379 (9th Cir. 1978), *cert. denied*, 442 U.S. 944 (1979); *Local Union No. 657 v. Sidell*, 552 F.2d 1250, 1252-56 (7th Cir.), *cert. denied*, 434 U.S. 862 (1977).

²⁵ *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 623 (1981).

²⁶ 29 U.S.C. § 152(5) (1976) defines "labor organization" as:
any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

²⁷ *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 622 (1981).

²⁸ *Id.* at 624.

²⁹ *Id.*

³⁰ *Id.* at 625.

³¹ In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 184 (1967), a case involving substantive regulation of internal union affairs, the Court observed that "Congress expressly disclaimed . . . any intention to interfere with union self-government or to regulate a union's internal affairs." *Id.*

³² *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 626 (1981).

³³ *Id.* at 627.

³⁴ *Id.* The Court observed that the substantive law to apply "is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957)). The Court specifically declined, however, to state what the source of the federal law in this case should be. The majority also left the question undecided as to whether individual union members may sue a labor organization based on violation of a union constitution. *Id.* at n.16.

³⁵ *Id.* at 627.

³⁶ *Id.*

He agreed that a union and its locals were labor organizations and accepted for the purposes of this case that a constitution could be a contract.³⁷ He, nevertheless, asserted that local unions were not separate organizations apart from the parent union and thus, the constitution was not a contract *between* labor organizations.³⁸ He noted that union constitutions as contracts between labor organizations were not within the plain meaning of the statute nor provided for in the legislative history by Section 301(a).³⁹ Therefore, Section 301(a) did not confer federal jurisdiction over disputes under union constitutions.⁴⁰ He also noted that the Court's decision "invites resort to the federal courts for cases better resolved outside the federal judiciary."⁴¹

A second dissent was written by Justice Stevens and joined by Justice Rehnquist. Justice Stevens based his dissent on the premise that the majority had erred when they interpreted Section 301(a) to include union constitutions because to do so created federal rights.⁴² In its landmark *Textile Workers v. Lincoln Mills decision*,⁴³ the Court had concluded that although the legislative history behind Section 301(a) was unclear, there was sufficient authority under the Commerce Clause for Congress to authorize federal courts to create federal "common" law for the enforcement of collective bargaining agreements.⁴⁴ This conclusion was in part due to the settled principle that collective bargaining agreements have a significant impact on industrial peace.⁴⁵ Justice Stevens, however, observed that such authority to create substantive rules to govern contractual disputes was lacking in the case of union constitutions.⁴⁶ First, he noted that there was no indication in the legislative history that Congress had concluded that contractual disputes between unions always have an effect upon industrial peace.⁴⁷ Second, he stated that no legislative history supported a conclusion that Congress intended for the federal courts to create substantive law to govern such disputes.⁴⁸ Such a policy, he admonished, would create federal rights for unions in a situation where Congress did not intend them.⁴⁹ Because the authorization for the creation of substantive rules to govern contractual disputes between unions was not given to federal courts, Justice Stevens commented that suits on contracts between labor unions are not to be treated as arising automatically under federal law.⁵⁰ He therefore concluded that federal

³⁷ *Id.* at 628.

³⁸ *Id.*

³⁹ *Id.* at 628-29.

⁴⁰ *Id.* at 630.

⁴¹ *Id.*

⁴² *Id.* at 636.

⁴³ 353 U.S. 448 (1957).

⁴⁴ *Id.* at 457.

⁴⁵ *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 632 n.2 (1981).

⁴⁶ *Id.* at 635.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* "There is no justification for the conclusion that Congress perceived contracts between union to involve any federal interest sufficient to warrant the creation of federal rights." *Id.*

⁵⁰ *Id.* at 636.

subject matter jurisdiction was lacking in the instant case of a contract dispute between a parent union and its local chapter.⁵¹

In analyzing the Court's decision in *United Association*, it is arguable that the Court erred in holding union constitutions to be contracts between labor organizations in all instances. Justice Stevens seems correct in his conclusion that Congress did not intend to exercise its power to create federal rights for labor organization contracts unless these contracts affected industrial peace in some manner. A similar conclusion appears to have been reached by several circuit courts of appeals when they held that union constitutions might be contracts under Section 301(a) only in certain circumstances. In 1199 DC, *National Union of Hospital and Health Care Employees v. National Union of Hospital and Health Care Employees*,⁵² the United States Court of Appeals for the District of Columbia Circuit held that absent allegations of "actual threats to industrial peace," there was no federal jurisdiction under Section 301(a).⁵³ The Seventh Circuit in *Local Union No. 657 v. Sidell*⁵⁴ likewise ruled that a dispute must involve more than mere intra-union matters in order to trigger Section 301(a) jurisdiction.⁵⁵ Several other circuits also have adopted this analysis.⁵⁶

Moreover, the limitation on the types of contracts that are to be included under Section 301(a) is not restricted to contracts between labor organizations. In *Fredericks v. Pennsylvania Social Services Union, Local 668*,⁵⁷ the District Court for the Western District of Pennsylvania held that federal jurisdiction under Section 301(a) was not invoked in every situation involving a contract between an employer and a labor organization.⁵⁸ The court denied jurisdiction in a situation where a union was acting as an individual and not as a representative of employees.⁵⁹ Even the Supreme Court recognized the need to limit the scope of Section 301(a) jurisdiction. In *Retail Clerks v. Lion Dry Goods*,⁶⁰ although it concluded that the Section 301(a) clause concerning contracts between employers and labor organizations encompasses contracts other than collective bargaining agreements, the Court did not recognize federal jurisdiction over *all* labor contracts.⁶¹ Thus, a holding that all disputes concerning union constitutions fall under the federal jurisdiction established by the reference in Section 301(a) to contracts between labor organizations would appear to be overbroad. In the absence of any evidence suggesting that Congress concluded industrial

⁵¹ *Id.* at 637.

⁵² 533 F.2d 1205 (D.C. Cir. 1976).

⁵³ *Id.* at 1208.

⁵⁴ 552 F.2d 1250 (7th Cir.), *cert. denied*, 434 U.S. 862 (1977).

⁵⁵ *Id.* at 1255.

⁵⁶ *See, e.g., Stelling v. International Bhd. of Elec. Workers*, 587 F.2d 1379, 1384 (9th Cir. 1978), *cert. denied*, 442 U.S. 944 (1979); *Local Union 1219 v. United Bhd. of Carpenters and Joiners of Am.*, 493 F.2d 93, 96 (1st Cir. 1974).

⁵⁷ 410 F. Supp. 1063 (W.D. Pa. 1976).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 369 U.S. 17 (1962).

⁶¹ *Id.* at 28. *See supra* notes 8-9 and accompanying text.

peace is affected by union constitutions, the Court's broad holding in *United Association* seems inappropriate.⁶²

Furthermore, the Court's distinction between the substantive regulation of internal union governance and the enforcement of freely negotiated agreements between labor organizations is rather imprecise. As several of the Circuits have held, suits involving union constitutions are often intra-union matters without impact on external industrial peace or labor-management relations.⁶³ Thus, by granting federal jurisdiction to all disputes involving union constitutions, the Court apparently frustrated the intent of Congress. As was noted by the Court in *NLRB v. Allis-Chalmers Manufacturing Co.*,⁶⁴ "Congress expressly disclaimed . . . any intention to interfere with union self-government or to regulate a union's internal affairs."⁶⁵ In the instant case, where there was no allegation of any impact on industrial peace or labor-management relations, the Supreme Court has invited the federal courts to regulate a dispute between a parent union and its locals.

For several reasons, therefore, the decision in *United Association* is significant. First, the federal courts now have leave to resolve any dispute between labor organizations involving a union constitution. Second, as pointed out by Justice Stevens in his dissent, "[a]bsent a limitation restricting Section 301 jurisdiction on the basis of the presence of a federal interest or right, it will be difficult for district courts to determine what contracts are not encompassed by Section 301."⁶⁶ Consequently, the Court apparently has taken Section 301 and extended it to include contracts where there may be no impact on industrial peace or labor-management relations. This construction of Section 301, as noted, arguably extends the Act beyond the intent of Congress at the time of its enactment in 1947.

⁶² See *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 636 (1981) (Stevens, J., dissent).

Unless contracts between unions have some form of federal protection, the statute as the Court construes it is the equivalent of a statute authorizing federal jurisdiction over all litigation between people named Smith, Jones or Stevens. Some such cases would present federal questions; some would not.

Id.

⁶³ See, e.g., *Stelling v. International Bhd. of Elec. Workers*, 587 F.2d 1379 (9th Cir. 1978), *cert. denied*, 442 U.S. 944 (1979); *Smith v. United Mine Workers of Am.*, 493 F.2d 1241, 1243-44 (10th Cir. 1974).

⁶⁴ 388 U.S. 175 (1967).

⁶⁵ *Id.* at 184. See also *Smith v. United Mine Workers of Am.*, 493 F.2d 1241 (10th Cir. 1974).

If Congress intended to turn over to the federal courts the control and supervision of internal union affairs which have no external application to industrial peace or to collective bargaining agreements we believe that Congress would have said so explicitly. We agree . . . that it was not the intent of Congress for the courts to use the LMRA to police intra-union problems.

Id. at 1243-44.

⁶⁶ *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 636 n.9 (Stevens, J., dissenting).

IV. EMPLOYEE BENEFITS

A.* *Employee Benefit Funds Under 302(a) of the Labor Management Relations Act: UMW Health and Retirement Funds v. Robinson*¹

Section 302(c)(5) of the Labor Management Relations Act provides that payments by an employer to a trust fund established for "the sole and exclusive benefit of the employees of such employer, and their families and dependents" are not within Section 302's broad prohibition on payments by employers to employee representatives if the fund meets certain requirements.² In order to qualify for an exemption from the Act's ban on employer-employee payments, the fund must be held in trust for the purpose of paying certain types of benefits to the employees.³ Included among the permissible categories of benefits are payments for medical and hospital care, pensions on retirement or death, compensation for illness or injury resulting from occupational activity, unemployment benefits, life insurance or disability, illness, or accident insurance.⁴ The basis upon which payments are to be made must be set out in a written agreement between the employer and the representatives of the employees.⁵ In addition, the statute requires that the fund be administered by an equal number of representatives of the employer and the employees,⁶ and that it be subject to an annual audit.⁷

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¹ 102 S. Ct. 1226 (1982).

² 29 U.S.C. § 186(c)(5) (1976 & Supp. 1979). Section 302(a) of the Labor Management Relations Act prohibits employers from paying or lending money or any other thing of value to employees, representatives of employees, or labor organizations. 29 U.S.C. § 186(a) (1976). Section 302(b) makes unlawful the receipt of such payments by employees or their unions. 29 U.S.C. § 186(b) (1976). In addition, the statute provides for criminal penalties for violations of these sections and gives the district courts of the United States the power to enjoin violations. 29 U.S.C. §§ 186(d) & (e) (1976).

The statute also contains exceptions for payments as compensation for services, 29 U.S.C. § 186(c)(1) (1976 & Supp. III 1979), payments in satisfaction of a court judgment, 29 U.S.C. § 186(c)(2) (1976 & Supp. III 1979), payments for goods, 29 U.S.C. § 186(c)(3) (1976 & Supp. III 1979), and payments for union membership dues deducted from employee wages, 29 U.S.C. § 186(c)(4) (1976 & Supp. III 1979).

³ 29 U.S.C. § 186(c)(5) (1976 & Supp. III 1979).

⁴ *Id.* Section 302(c)(6), 29 U.S.C. § 186(c)(6) (1976 & Supp. III 1979), also allows the establishment of trust funds to provide benefits for employee vacations, holidays, severance pay, and apprenticeship programs. In addition, § 302(c)(7) and § 302(c)(8), 29 U.S.C. §§ 186(c)(7) & (c)(8) (1976 & Supp. III 1979), permit employer payments for the purpose of providing scholarship benefits, child-care centers, and legal services for employees and their dependents. The trust funds established under each of these provisions are required to meet the standards set out in § 302(c)(5), 29 U.S.C. § 186(c)(5) (1976 & Supp. III 1979), for health and retirement benefit funds. 29 U.S.C. §§ 186(c)(6)-186(c)(8) (1976 & Supp. III 1979). Finally, § 302(c)(9), 29 U.S.C. § 186(c)(9) (Supp. III 1979), permits payments by an employer to certain labor-management committees.

⁵ 29 U.S.C. § 186(c)(5) (1976 & Supp. III 1979).

⁶ *Id.* The employer-employee agreement is required to provide for the appointment of an impartial umpire to decide disputes over the administration of the fund in cases where the employer and employee representatives are deadlocked. *Id.* The agreement must also provide that, in the event that the parties fail to agree on the appointment of an impartial umpire within a reasonable time, either group may petition to the district court for the appointment of an impartial person to decide the dispute. *Id.*

⁷ *Id.* The statute establishes an additional requirement for the structure of welfare funds

The United States Supreme Court has, in several cases, been confronted with the issue of the proper construction of section 302(c)(5).⁸ In *NLRB v. Amax Coal*,⁹ the Court held that employer representatives who act as trustees of a welfare fund established under section 302(c)(5) are fiduciaries of the employee beneficiaries and not representatives of the employer.¹⁰ The *Amax* Court's decision, that administrators of a welfare fund established pursuant to section 302(c)(5) act as fiduciaries for the beneficiaries of the fund, was based on its conclusion that Congress intended the common law of trusts to govern the administration of such funds.¹¹ The Court specifically relied on language in section 302(c)(5) which provides that employer contributions are to be "held in trust . . . for the sole and exclusive benefit of the employees . . . and their families and dependents."¹²

During the *Survey* year, the Court addressed whether the statutory requirement that welfare funds be held for the sole benefit of employees, in addition to

whose purpose is to provide pensions or annuities for employees. *Id.* The funds contributed by the employer for these purposes must be held in a separate trust from those created for the purpose of providing other permissible types of benefits. *Id.* In addition, the statute provides that funds contributed to the pension trust may be used only to pay employee pensions or annuities. *Id.*

⁸ For example, the Court has held that employers may be required, by the collective bargaining agreement, to make contributions to the employee welfare fund measured by the hours worked by a subcontractor's employees. *Walsh v. Schlecht*, 429 U.S. 401, 408-11 (1977). The Court held that such an agreement will not violate § 302 as long as the payments are used solely to benefit the employees of the employer-contractor. *Id.* at 407. The Court noted that if the clause in the collective bargaining agreement were construed to require that payments be made for the benefit of the sub-contractor's employees, the payments would be unlawful under the statute. *Id.* The Court observed that § 302(c)(5) exception extends only to trust funds established pursuant to a written agreement between the employer and the employees and the sub-contractor was not a party to the agreement between the contractor and his employees. *Id.*

In addition, the Court has held that, unless clearly stated in the collective bargaining agreement, a breach of the union's contractual obligations to the employer does not excuse the employer from its duty to make contributions to a trust fund established pursuant to § 302(c)(5). *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470-71 (1960).

⁹ 453 U.S. 322 (1982).

¹⁰ *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). The employer in *Amax Coal* argued that § 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B) (1976), which makes it an unfair labor practice to coerce the employer in the selection of his representatives for collective bargaining purposes, applied to a strike by the union to compel the employer to contribute to a multi-employer trust fund because the employer representatives of the fund had already been selected and *Amax* would, therefore, have no voice in the selection of the trustees. 453 U.S. at 327. The Court found that the language and legislative history of the provision in § 302(c)(5), 29 U.S.C. § 186(c)(5) (1976 & Supp. III 1979), that employer contributions to welfare funds be held in trust for the sole benefit of employees and their dependents demonstrated Congress' intent that the law of trusts would apply to welfare funds established under the statute. *Id.* at 329-30. The Court concluded, therefore, that the administrators of the trust, whether appointed by the employer or the employees, have a complete duty of loyalty to the beneficiaries of the trust and no duty to represent the interests of the party that appointed them. *Id.* at 329-30. The trust administrators who were appointed by the employer for purposes of collective bargaining and the union's activities aimed at compelling the employer to contribute to a multi-employer fund when he could not personally participate in the selection of the trustees did not constitute an unfair labor practice under § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1976), 453 U.S. at 335-36.

¹¹ 453 U.S. at 329-30.

¹² *Id.* at 329 (quoting 29 U.S.C. § 186(c)(5) (1976 & Supp. III 1979)).

creating a fiduciary relationship between the administrators and the beneficiaries of the fund, imposed a requirement that collectively bargained agreements, allocating benefits among potential beneficiaries, satisfy a reasonableness standard.¹³ The Court, in *United Mine Workers of America Health and Retirement Funds*, held that the statutory language did not require that benefit eligibility rules established by a collective bargaining agreement meet a reasonableness standard.¹⁴ The Administrators of the fund were, therefore, held not to have violated any fiduciary duties in administering the fund according to the collective bargaining agreement whether or not the standards for participation established therein were reasonable.¹⁵

The dispute in *Robinson* arose when a group of widows of coal miners challenged benefit eligibility rules established by a collective bargaining agreement between the United Mine Workers and the National Coal Operators Association.¹⁶ Under an earlier agreement, the operators had agreed to contribute to a fund which would provide pension and health benefits to miners and their dependents.¹⁷ This prior agreement did not itself establish benefit eligibility conditions.¹⁸ Rather, the authority to determine the amount of benefits and eligibility rules was delegated to the trustees of the fund.¹⁹ Pursuant to this authority, the trustees adopted rules which accorded disparate treatment to two classes of widows of miners.²⁰ Widows of miners who were employed, but eligible for pensions at the time of their death were granted health benefits for five years.²¹ In contrast, widows of miners who were receiving pensions at the time of their death were eligible for health benefits for only two years.²²

Concern about the actuarial soundness of the benefit fund caused the union and the mine operators to agree to restructure the fund. The parties further agreed that the amount of benefits and the eligibility rules would be specified in the collective bargaining agreement rather than being left to the discretion of the fund's trustees.²³ During the negotiations over the benefit eligibility rules, the union demanded initially that all unremarried widows entitled to health benefits under the prior agreement, whether for two or five

¹³ *United Mine Workers of Am. Health and Retirement Funds v. Robinson*, 102 S. Ct. 1226 (1982).

¹⁴ *Id.* at 1233.

¹⁵ *Id.*

¹⁶ *Id.* at 1230.

¹⁷ *Id.* at 1228-29.

¹⁸ *Id.* at 1229.

¹⁹ *Id.*

²⁰ *Id.* The rules adopted by the trustees granted widows of miners who were receiving pensions at the time of their death a death benefit of \$2000 payable over a two-year period and eligibility for hospital and medical care benefits for the same two-year period. *Id.* The widows of miners who were still working at the time of death but who were eligible for pensions were granted a death benefit of \$5000 payable over five years and eligibility for health benefits for an equivalent period. *Id.*

²¹ *Id.* See *supra* note 20.

²² *Id.* See *supra* note 20.

²³ *Id.*

years, be afforded lifetime health coverage.²⁴ The operators objected to this proposal because of uncertainty over its cost.²⁵ Eventually, the mine operators agreed to extend lifetime health benefits to wives of miners widowed after the effective date of the new agreement, regardless of whether their husbands were working or receiving pensions at the time of their death.²⁶ The mine operators also agreed to extend lifetime health benefits to wives of miners widowed prior to the effective date of the new agreement and whose husbands had been receiving pensions at the time of their death.²⁷

While the agreement between the United Mine Workers and the mine operators extended lifetime health benefits to all widows of retired miners, it denied such benefits to widows of miners who died while employed, prior to the effective date of the agreement.²⁸ The benefit terms established by the collective bargaining agreement thus accorded fewer benefits to the group of widows who were eligible for the most benefits under the earlier agreement.²⁹ The widows thus excluded from eligibility for lifetime health benefits under the collective bargaining agreement brought suit against the trustees of the fund.³⁰ The widows alleged that the discrimination between widows of miners receiving pensions at the time of their death and those miners eligible for pensions but still working at the time of death bore no rational relationship to the purpose of the trust fund and, therefore, violated section 302.³¹ The widows asked that the trustees of the fund be ordered to provide them with permanent health care benefits.³²

The District Court for the District of Columbia held that the plaintiffs had made a *prima facie* showing of arbitrariness,³³ but found that proof presented by the trustees, demonstrating that the eligibility requirements were the subject of "explicit, informed and intense bargaining," was sufficient to rebut the contention that the eligibility requirements were arbitrary and capricious.³⁴ The Court of Appeals for the District of Columbia reversed, holding that the provision of section 302(c)(5) which requires that the fund be maintained for the sole and exclusive benefit of the employees establishes a reasonableness standard for benefit eligibility rules.³⁵ The appeals court rejected the district court's find-

²⁴ *Id.*

²⁵ *Id.* at 1230.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *supra* notes 19-32, 26-30 and accompanying text.

³⁰ *Robinson v. United Mine Workers of Am. Health and Retirement Funds*, 449 F. Supp. 941, 943 (D.D.C. 1978).

³¹ *Id.* at 943-44.

³² *Id.* at 942.

³³ *Id.* at 944. The court ordered the defendant trustees to come forward with evidence to rebut the plaintiff's showing of arbitrariness. *Id.* at 945. If they failed to do so, the court stated that summary judgment would be entered for the plaintiffs. *Id.*

³⁴ See *Robinson v. United Mine Workers*, 640 F.2d 416, 425-26 (D.C. Cir. 1981) (Robb, J., dissenting) (quoting from the unreported memorandum and order of the district court, C.A. 77-0698 (D.D.C. June 20, 1978) which directed that judgment be entered for the defendant trustees.).

³⁵ *Robinson v. United Mine Workers*, 640 F.2d at 420-21.

ing that explicit bargaining surrounding the eligibility rules was sufficient to rebut a prima facie showing of arbitrariness.³⁶ The court held that since the trustees were unable to present any reason for the discrimination between classes of widows which was related to the purpose of the fund, widows in the plaintiffs' class could not be excluded from the eligibility for lifetime health benefits.³⁷

The United States Supreme Court, in an unanimous opinion, rejected the court of appeals' reading of section 302(c)(5).³⁸ The Court held that the statutory requirement that funds be used solely for the benefit of employees and their dependents did not embody a reasonableness requirement.³⁹ According to the Court, the purpose of section 302(c)(5) is simply to restrict the beneficiaries of employer contributions to welfare funds to employees and their dependents.⁴⁰ The Court noted that its prior decisions construing section 302(c)(5) were in accord with this interpretation.⁴¹ In particular, the Court referred to its decision in *Amax Coal* which had imposed fiduciary duties on the trustees of welfare benefit funds.⁴² The Court noted that, in *Amax*, it had recognized that the sole purpose of section 302(c)(5) is to ensure that employee benefit funds are used to provide benefits to employees and not diverted to other purposes.⁴³

The *Robinson* Court also stated that its reading of section 302(c)(5) was supported by the legislative history of the statute.⁴⁴ According to the Court, the legislative history demonstrates that Congress enacted section 302(c)(5) to ensure that funds contributed by an employer for the benefit of its employees are not appropriated by the union or its officials for other purposes.⁴⁵ The Court determined that the statutory standards which welfare funds are required to meet in order to qualify for the section 302(c)(5) exception to the prohibition on employer-employee payments are consonant with this purpose.⁴⁶ The Court emphasized that the requirements — that the fund must be established for the sole benefit of the employees, that contributions must be held in trust and be used only to provide specified types of benefits, that the basis for making payments must be set out in a written agreement, and that the fund must be administered jointly by representatives of both the employer and the employees⁴⁷ — were designed to promote the basic requirement that employer contribu-

³⁶ *Id.* at 422-23.

³⁷ *Id.* at 424. The court of appeals, noting that every exclusive eligibility requirement would lessen the cost of benefit plans, also rejected the trustees attempt to justify the discrimination between classes of coal miners' widows on financial grounds. *Id.* at 423-24.

³⁸ 102 S. Ct. at 1233.

³⁹ *Id.* at 1231.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* See *NLRB v. Amax Coal*, 453 U.S. at 331 (quoting 93 CONG. REC. 4678 (1947) (remarks of Sen. Bau), reprinted in 2 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 1305 (1948)).

⁴⁴ 102 S. Ct. at 1232.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

tions be used only to benefit employees.⁴⁸ The Court found no basis in any of the statutory requirements for any substantive restrictions on the allocation of benefits among employees.⁴⁹

In the course of its opinion, the Court recognized that several courts of appeals had held that the reasonableness of decisions made with respect to benefit levels and eligibility rules were subject to judicial scrutiny.⁵⁰ The Court distinguished these cases on the ground that they involved agreements which gave the trustees complete discretion to establish eligibility rules and benefit levels.⁵¹ The Court noted that these decisions rested on a determination that Congress intended trustees of benefit funds under section 302(c)(5), acting as fiduciaries for the beneficiaries of the funds, to have a duty to refrain from acting in an arbitrary or capricious manner toward the beneficiaries of the trust.⁵² While noting that its decision in *Amax Coal* established that Congress did intend to impose fiduciary duties on trustees of benefit funds created pursuant to section 302(c)(5), the Court declined to decide whether the courts of appeals were correct in their determination that federal courts may invalidate trustee decisions on benefit levels or eligibility standards on the ground that the standards are arbitrary and capricious.⁵³ The Court found it unnecessary to decide this issue because it concluded that the rationale of the decisions subjecting eligibility requirements established by trustees to judicial review was not applicable to cases where the conditions for the receipt of benefits were established in a collective bargaining agreement.⁵⁴

After so holding, the Court turned its attention to the facts of *Robinson*.⁵⁵ The Court noted that the trustees were required by the terms of the trust to enforce the conditions established by the collective bargaining agreement.⁵⁶ Asserting that measurement of the trustees' duties by the terms of the trust is consistent with the common law of trusts,⁵⁷ the Court concluded that the trustees did not breach any fiduciary duty by administering the trust in accordance with the rules established in the collective bargaining agreement.⁵⁸

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1233. See *Pete v. United Mine Workers of Am. Welfare and Retirement Fund*, 517 F.2d 1275, 1283 (D.C. Cir. 1975) (*en banc*); *Roark v. Boyle*, 439 F.2d 497, 499 (D.C. Cir. 1970); *Kosty v. Lewis*, 316 F.2d 744, 747 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964). See also, *Toensing v. Brown*, 528 F.2d 69, 72 (9th Cir. 1975) (holding that the trustee decision was not arbitrary).

⁵¹ 102 S. Ct. at 1233.

⁵² *Id.* (citing *Kosty v. Lewis*, 319 F.2d at 747).

⁵³ 102 S. Ct. at 1233 n.12.

⁵⁴ *Id.* at 1233.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1233 & n.13 (quoting from the National Bituminous Coal Wage Agreement of 1974, art. XX, (h)(5), App. to Pet. for Cert. 106a, *United Mine Workers of Am. Health and Retirement Fund v. Robinson*, 102 S. Ct. 1226 (1982)).

⁵⁷ 102 S. Ct. at 1233. The Court cited § 164(a) of the RESTATEMENT (SECOND) OF TRUSTS. 102 S. Ct. at 1233. This section provides that the nature and extent of the trustee's duties is to be determined by the terms of the trust. RESTATEMENT (SECOND) OF TRUSTS § 164(a) (1959).

⁵⁸ 102 S. Ct. at 1233.

Having concluded that section 302(c)(5) does not impose a reasonableness requirement on the terms of a collectively bargained welfare fund, the Court considered whether any other provision of federal law required invalidation of the discriminatory eligibility standards.⁵⁹ In so doing, the Court noted that, generally, federal courts have no authority to modify terms of a collective bargaining agreement unless the bargaining process or the terms of the agreement violate some provision of federal law.⁶⁰ The Court then outlined several principles of existing federal law which may, if applicable, require the invalidation of the terms of a collective bargaining agreement.⁶¹ The Court noted that benefit plans must comply with the provisions of the Employee Retirement Income Security Act and the National Labor Relations Act, and must be consistent with federal laws which prohibit discrimination on the grounds of race, religion, sex or national origin.⁶² The Court found that the *Robinson* agreement violated none of these federal laws.⁶³ In addition, the Court acknowledged that the union, in the collective bargaining process, must fairly represent all of its members.⁶⁴ This duty of fair representation was not violated in *Robinson*, according to the Court, because the duty does not extend to potential beneficiaries who are not members of the bargaining unit.⁶⁵ Concluding that the agreement to extend fewer benefits to coal miners' widows whose husbands died while still working did not violate any of these applicable federal laws, the Court disclaimed the authority to modify the terms of the collective bargaining agreement.⁶⁶

The *Robinson* Court's conclusion that the purpose of section 302(c)(5) was simply to prevent diversion of employer contributions to employee benefit funds to uses other than the benefit of employees is supported by the legislative history of the provision. The enactment of the general prohibition on employer-employee payments contained in Section 302(a) and (b) apparently was motivated in part by congressional concern over a demand by United Mine Workers' president John L. Lewis that coal operators contribute ten cents to a union benefit fund for every ton of coal mined by union workers.⁶⁷ Several senators speaking in support of the prohibition on employer-employee

⁵⁹ *Id.* at 1233-34.

⁶⁰ *Id.* at 1234. This principle has been emphasized repeatedly by the Court. *See, e.g.,* Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212, 218-219 (1979); H.K. Porter Co. v. NLRB, 397 U.S. 99, 105-108 (1970); NLRB v. Insurance Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 488 (1960); Local 24, International Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295-96 (1959); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

⁶¹ 102 S. Ct. at 1234.

⁶² *Id.* The Employee Retirement Income Sec. Act, 29 U.S.C. §§ 1001-1461 (1976 & Supp. III 1979), sets out rules governing employee retirement plan. Its purpose is to protect the interests of participants by requiring disclosure of financial information and establishing standards of conduct for the fiduciaries of retirement plans. 29 U.S.C. § 1001(b) (1976). The National Labor Relations Act, 29 U.S.C. §§ 151-187 (1976 & Supp. III 1979), contains comprehensive rules governing the labor-management negotiating process. *Id.*

⁶³ 102 S. Ct. at 1234.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1233 (quoting *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1981)).

⁶⁶ 102 S. Ct. at 1234.

⁶⁷ *See* 92 CONG. REC. 4892 (1946) (statement of Senator Byrd); 93 CONG. REC. 4678

payments contended that permitting unrestricted employer payments to employee representatives would create a substantial potential for corruption of employee representatives and for diversion of funds solicited for the benefit of employees to the personal use of union officials.⁶⁸ During the debate on the exception for welfare benefit funds, the sponsor of section 302(c)(5) stated that the "sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees . . . and that they shall not degenerate into bribes."⁶⁹ In the Senate report and during the floor debate prior to its adoption, section 302(c)(5) was consistently characterized as a necessary safeguard against appropriation of the assets of welfare funds for uses other than the provision of benefits for employees.⁷⁰ There is no indication in the legislative history that Congress, in enacting section 302(c)(5), intended to confer on the federal courts the power to inquire into the reasonableness of welfare fund benefit levels or eligibility conditions established in a collective bargaining agreement.⁷¹

Moreover, as the Court in *Robinson* recognized,⁷² there already exists a substantial body of federal law which may be used to invalidate eligibility conditions which discriminate among certain classes of potential beneficiaries. The Court held that the terms of a collective bargaining agreement must comply with federal laws prohibiting discrimination on the basis of race, religion, sex, or national origin.⁷³ In addition, the Court held that the union has a duty to represent fairly all members of the bargaining unit.⁷⁴ The existence of this duty imposes restrictions on the extent to which the agreement may discriminate between classes of employees.⁷⁵ Further, although the Court held that the union's

(1947) (statement of Senator Byrd). The legislative history of section 302(c)(5) is somewhat complex. A bill proposing a ban on employer-employee payments was first introduced in the 79th Congress in 1946. See R. Goetz, *Employee Benefit Trusts Under Section 302 of Labor Management Relations Act*, 59 NW. U.L. REV. 719, 721-23 (1965) (review of the legislative history of § 302) [hereinafter cited as Goetz, *Employee Benefit Trusts*]. The legislation was then introduced again in the 80th Congress, passed by both houses, and again vetoed by the President. See 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at vii, x (1948); Goetz, *Employee Benefit Trusts*, at 722. Both houses then voted to override the veto. See 1 N.L.R.B. LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at x (1948); Goetz, *Employee Benefit Trusts*, at 722.

⁶⁸ See, e.g., 92 CONG. REC. 5181 (1946) (statement of Senator Overton); 92 CONG. REC. 5345-46 (1946) (statement of Senator Ball).

⁶⁹ 93 CONG. REC. 4678 (1947) (statement of Senator Ball).

⁷⁰ See S. REP. NO. 105, 80th Cong., 1st Sess. 52 (1947) (reprinted in 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, 458 (1948)); 93 CONG. REC. 4877 (1947) (statement of Senator Ball).

⁷¹ See *supra* notes 66-69 and accompanying text. See also Goetz, *Employee Benefit Trusts*, *supra* note 67, at 721-23.

⁷² 102 S. Ct. at 1234.

⁷³ See, e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188, 208-210 (1974); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1964) (union may not use its position and power as federally recognized bargaining representative to destroy black workers' jobs in order to benefit white workers).

⁷⁴ See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203-04 (1944).

⁷⁵ See cases cited *supra* note 73.

duty of fair representation does not extend to former union members or their families, it recognized that both contract law and section 301 of the Labor Management Relations Act protect these persons against unilateral changes in vested retirement benefits.⁷⁶

As a result of the restrictions on the content of the terms of collective bargaining agreements imposed by these various provisions of federal law, the scope of the immunity from judicial review of welfare fund eligibility and benefit terms conferred by *Robinson* is limited. Essentially, the protection from judicial scrutiny accorded by *Robinson* extends only to benefit eligibility conditions established in a collective bargaining agreement which do not discriminate on the basis of race, sex or some other basis prohibited by federal law, which do not discriminate among classes of beneficiaries covered by the union's duty of fair representation, and which do not attempt to alter unilaterally benefits previously conferred on beneficiaries not currently members of the bargaining unit.⁷⁷ Consequently, only in cases where the collective bargaining agreement discriminates between classes of beneficiaries outside of the collective bargaining unit, with respect to benefits not previously conferred, will the immunity from judicial scrutiny afforded by *Robinson* be completely effective.

As the preceding analysis suggests, the *Robinson* Court's sanction of discriminatory eligibility requirements for employee pension trusts is limited. Such a limited power to discriminate may be beneficial. Permitting discrimination in the eligibility conditions and benefits levels of section 302(c)(5) welfare funds established by collective bargaining agreements in the narrow class of cases where the discrimination does not violate any other provision of federal law provides the union and management with a degree of flexibility to bargain which may be necessary to reach agreement. In *Robinson*, for example, the union's acceptance of the management proposal, which extended fewer benefits to widows of miners who were still working when they died than to widows of miners who were collecting pensions at the time of death, made it possible to conclude a complex collective bargaining agreement and avoid the possibility of lengthy strike.⁷⁸ On balance, the need to promote agreements and prevent strikes justifies the conferral of a limited power to discriminate in the allocation of welfare funds.

After the decision in *Robinson*, the parties to a collective bargaining negotiation will have greater flexibility to negotiate over the terms of employee benefit funds because the reasonableness of eligibility conditions and benefit levels will not be subject to judicial review. As the preceding discussion indicates, the flexibility afforded by the limited ability to discriminate sanctioned by the *Robinson* decision is not extensive. Nevertheless, the ability to make even limited concessions on benefit eligibility conditions may be necessary to enable

⁷⁶ See *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. at 181 n.20. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976), establishes a federal cause of action for violation of contracts between an employer and a labor organization. *Id.*

⁷⁷ See *supra* notes 72-75 and accompanying text.

⁷⁸ 102 S. Ct. at 1230.

the parties to reach agreement. As the *Robinson* Court recognized, however, the terms of employee welfare funds are not always established by the collective bargaining process.⁷⁹ In some cases, the collective bargaining agreement merely provides for the establishment of the fund and the level of employer contributions.⁸⁰ The eligibility conditions and benefit levels are then determined by the trustees of the fund.⁸¹ The *Robinson* Court did not reach the issue of the obligations of trustees who are given authority to determine eligibility rules and benefit levels.⁸² It remains to be seen if the Court will concur in the judgment of those federal courts which have already asserted the power to review and invalidate arbitrary decisions by welfare fund trustees.⁸³

V. ADEA

A. * *Willful Violations of the ADEA:*

Kelly v. American Standard, Inc.¹ and

Syvock v. Milwaukee Boiler Manufacturing Co.²

The Age Discrimination in Employment Act of 1967 (ADEA)³ prohibits employers from discriminating against individuals because of their age.⁴ The ADEA protects individuals between the ages of 40 and 70.⁵ The Act is enforced in accordance with the powers, remedies, and procedures under the Fair Labor Standards Act (FLSA)⁶ rather than through independent ADEA remedies.⁷ Yet, in one important respect, the ADEA modifies the remedies which would be available under the FLSA. The FLSA mandates an automatic doubling of damages for any violations.⁸ Section 7(b) of the ADEA, however, allows the

⁷⁹ *Id.* at 1232-33.

⁸⁰ See *Pete v. United Mine Workers of Am. Welfare and Retirement Fund*, 517 F.2d at 1280; *Kosty v. Lewis*, 319 F.2d at 745-46.

⁸¹ See *Pete v. United Mine Workers*, 517 F.2d at 1280; *Roark v. Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968); *Kosty v. Lewis*, 319 F.2d at 745-46.

⁸² See *supra* notes 50-54 and accompanying text.

⁸³ See cases cited *supra* note 50. A determination that trustee decisions should be subject to judicial scrutiny would be consistent with the common law of trusts, which imposes on trustees a duty to refrain from acting in an arbitrary or capricious manner. See RESTATEMENT (SECOND) OF TRUSTS § 187 & comm. c (1959) (courts may interfere when a trustee, in the exercise of discretion conferred by the trust instrument, acts dishonestly, with improper motives, fails to use judgment, or acts beyond the bounds of reasonable judgment).

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¹ 640 F.2d 974 (9th Cir. 1981).

² 665 F.2d 149 (7th Cir. 1981).

³ 29 U.S.C. §§ 621-634 (1976).

⁴ Section 4(a) of the ADEA provides in pertinent part: "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age" 29 U.S.C. § 623(a)(1) (1976).

⁵ *Id.* § 631 as amended by Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978).

⁶ 29 U.S.C. §§ 201-219 (1976).

⁷ *Id.* § 626(b).

⁸ See *id.* § 216(b).

doubling of damages only in cases of "willful violations" of its standards.⁹ Consequently, an employer who willfully violates the ADEA is liable not only for back wages and benefits, but also for "an additional equal amount as liquidated damages."¹⁰

Despite the importance of "willfulness" for determining the amount of damages which may be awarded, neither the text of the ADEA nor its legislative history has defined the term.¹¹ The courts have reached divergent interpretations of the term. For example, the Court of Appeals for the First Circuit has defined willfulness to require that the employer's discriminatory act be voluntary, intentional, and done with a specific intent to violate the ADEA.¹² In contrast, the Court of Appeals for the Third Circuit upheld a finding of willfulness on a jury instruction that defined "willful" merely as action that was deliberate, intentional, and knowing.¹³ The court added that willfulness also could be found if the employer's discriminatory act was done "in reckless disregard of the consequences."¹⁴

The "willful violation" provision of the ADEA was interpreted by two additional circuit courts during the *Survey* year.¹⁵ At issue in both cases was whether the trial court properly instructed the jury on the standard for determining if the alleged violation of the ADEA was willful.¹⁶ The courts adopted two differing approaches in answering the question. The Ninth Circuit held that a violation is willful if committed knowingly or voluntarily, even if the employer acted without knowledge of the ADEA.¹⁷ The Seventh Circuit held that in order to prove willfulness under the ADEA, a plaintiff must show that the defendant's actions were knowing and voluntary, and that he knew or should have known that those actions violated the ADEA.¹⁸ This chapter discusses the reasoning employed by each court in reaching its decision and assesses the merits of this reasoning.

The first of the two cases was *Kelly v. American Standard, Inc.*,¹⁹ decided by the Ninth Circuit. In *Kelly*, the plaintiff was a sales representative who was discharged by American Standard, Inc. (American), when the company sold one of its plants and decided to reduce its nationwide sales personnel by forty

⁹ 29 U.S.C. § 626(b) (1976).

¹⁰ *Id.* § 216(b).

¹¹ *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981); *Syvocek v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154, 27 Fair Empl. Prac. Cas. (BNA) 610, 614 (7th Cir. 1981).

¹² *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27, 20 Fair Empl. Prac. Cas. (BNA) 29, 41 n.27 (1st Cir. 1979).

¹³ *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283, 22 Fair Empl. Prac. Cas. (BNA) 994, 998 (3d Cir. 1980).

¹⁴ *Id.*

¹⁵ *Kelly v. American Standard, Inc.*, 640 F.2d 974, 25 Fair Empl. Prac. Cas. (BNA) 94 (9th Cir. 1981); *Syvocek v. Milw. Boiler Mfg. Co.*, 665 F.2d 149, 27 Fair Empl. Prac. Cas. (BNA) 610 (7th Cir. 1981).

¹⁶ *Syvocek*, 665 F.2d at 156, 27 Fair Empl. Prac. Cas. (BNA) at 615-16; *Kelly*, 640 F.2d at 979, 25 Fair Empl. Prac. Cas. (BNA) at 96-97.

¹⁷ *Kelly*, 640 F.2d at 980, 25 Fair Empl. Prac. Cas. (BNA) at 98.

¹⁸ *Syvocek*, 665 F.2d at 155-56, 27 Fair Empl. Prac. Cas. (BNA) at 615.

¹⁹ 640 F.2d 974, 25 Fair Empl. Prac. Cas. (BNA) 94 (9th Cir. 1981).

employees.²⁰ At trial, the plaintiff introduced statistical evidence to prove a pattern of age discrimination in American's nationwide discharge plan.²¹ The plaintiff also introduced evidence of American's discriminatory intent.²² Although the jury awarded the plaintiff damages for lost wages and benefits, by agreement of the parties the availability and amount of liquidated damages were determined by the trial court.²³ The trial judge denied the plaintiff's request for liquidated damages because he found no evidence that American's violation was willful.²⁴ The trial court concluded that to establish a willful violation, the plaintiff must prove the defendant intentionally and knowingly discharged the plaintiff, and the defendant knew that its actions had implications under the Age Discrimination in Employment Act.²⁵ The court of appeals reversed the trial court's interpretation of the term "willfulness" under the ADEA and remanded the case to the district court for determination of the availability of liquidated damages under the willfulness standard adopted by the court of appeals.²⁶ The court of appeals held that the plaintiff need not prove that the employer had any knowledge of the ADEA to establish willfulness.²⁷ The court held that the plaintiff need only prove the employer's act was "knowing and voluntary."²⁸

In reaching its holding, the court of appeals relied upon several decisions from other jurisdictions in which courts awarded liquidated damages without requiring proof of the employer's knowledge of the ADEA.²⁹ These courts had looked only to the knowing and voluntary nature of the violation.³⁰ In particular, the appeals court relied on *Wehr v. Burroughs Corp.*,³¹ decided by the Court of Appeals for the Third Circuit. The *Kelly* court found persuasive the *Wehr* court's reasoning that the term "willful" is subject to many interpretations, but that a lower standard, not requiring specific intent to violate the statute, should apply to civil as opposed to criminal statutes.³²

In addition to its reliance on decisions from other jurisdictions, the *Kelly* court resorted to a policy reason for not requiring proof of knowledge of the Act in order to establish a willful violation. The court reasoned that such a require-

²⁰ *Kelly*, 640 F.2d at 977, 25 Fair Empl. Prac. Cas. (BNA) at 95.

²¹ *Id.* at 977, 25 Fair Empl. Prac. Cas. (BNA) at 96.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 979, 25 Fair Empl. Prac. Cas. (BNA) at 97.

²⁶ *Id.* at 981 & 987, 25 Fair Empl. Prac. Cas. (BNA) at 99 & 103.

²⁷ *Id.* at 980, 25 Fair Empl. Prac. Cas. (BNA) at 98.

²⁸ *Id.*

²⁹ *Id.*, citing *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283, 22 Fair Empl. Prac. Cas. (BNA) at 994, 998 (3d Cir. 1980); *Buchholz v. Symons Manufacturing Co.*, 445 F. Supp. 706, 713, 16 Fair Empl. Prac. Cas. (BNA) at 1084, 1089 (E.D. Wis. 1978); *Rogers v. Exxon Research & Engineering Co.*, 404 F. Supp. 324, 334, 11 Fair Empl. Prac. Cas. (BNA) 776, 784 (D.N.J. 1975), *rev'd on other grounds*, 550 F.2d 834, 14 Fair Empl. Prac. Cas. (BNA) 518 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022, 16 Fair Empl. Prac. Cas. (BNA) 501 (1978).

³⁰ *Kelly*, 640 F.2d at 979-80, 25 Fair Empl. Prac. Cas. (BNA) at 98.

³¹ 619 F.2d 276, 22 Fair Empl. Prac. Cas. (BNA) at 994 (3d Cir. 1980).

³² *Kelly*, 640 F.2d at 979-80, 25 Fair Empl. Prac. Cas. (BNA) at 98 (citing *Wehr*, 619 F.2d at 282).

ment "could have the anomalous effect of encouraging employers to know as little as possible about the ADEA so that they would not be liable for liquidated damages."³³

The defendant in *Kelly* had argued that the lower standard of liability adopted by the court would render liquidated damages automatic.³⁴ In effect the defendant argued recovery of liquidated damages would be virtually assured for every violation since an employer's unfavorable treatment of an employee is almost always in some sense knowing and voluntary.³⁵ The court observed, however, that an employer's act may violate the ADEA although not shown to be knowing and voluntary.³⁶ The court noted that a plaintiff need not introduce evidence of the defendant's state of mind to establish a prima facie case of age discrimination.³⁷ A plaintiff could build his case solely on statistical evidence.³⁸ Thus, according to the court, a finding that the employer's act was knowing and voluntary was not a crucial element in every ADEA action.³⁹ For this reason, it could not be said that every successful ADEA action would result automatically in doubling of damages.⁴⁰

The second of the two cases decided during the *Survey* year which assessed the appropriate standard for defining willfulness under the ADEA was *Syvoock v. Milwaukee Boiler Manufacturing Co.*⁴¹ In *Syvoock*, the plaintiff, Syvoock, sued his former employer alleging that by laying him off and failing to rehire him his employer violated the ADEA.⁴² The jury found for Syvoock, determining that the defendant had discriminated against Syvoock and that the discrimination was willful.⁴³ While upholding the jury's finding of discrimination, the trial court granted the defendant a judgment notwithstanding the verdict on the issue of willfulness.⁴⁴ The plaintiff appealed, claiming that the trial judge set too high a standard for a willful violation because the judge's standard required that the defendant's actions be intentional, that is, willful and voluntary as distinguished from accidental or unknowing, to constitute a willful violation.⁴⁵ The Seventh Circuit Court of Appeals nonetheless affirmed the trial court's

³³ *Kelly*, 640 F.2d at 980, 25 Fair Empl. Prac. Cas. (BNA) at 98.

³⁴ *Id.*

³⁵ See Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 OHIO ST. L.J. 349, 369 (1980) [hereinafter cited as Smith & Leggette], cited in *Kelly*, 640 F.2d at 980, 25 Fair Empl. Prac. Cas. (BNA) at 98.

³⁶ *Kelly*, 640 F.2d at 980, 25 Fair Empl. Prac. Cas. (BNA) at 98.

³⁷ *Id.* To establish a prima facie case of age discrimination under the ADEA, a plaintiff must prove 1) his membership in the protected class, 2) his discharge, 3) his qualifications for the position, and 4) his replacement by one outside the protected class. *Id. Accord*, *Haring v. CPC Int'l, Inc.*, 664 F.2d 1234, 1237, 27 Fair Empl. Prac. Cas. (BNA) 575, 578 (5th Cir. 1981); *Geller v. Markham*, 635 F.2d 1027, 1034, 24 Fair Empl. Prac. Cas. (BNA) 920, 925 (2d Cir. 1981); *But see Williams v. General Motors Corp.*, 656 F.2d 120, 128, 26 Fair Empl. Prac. Cas. (BNA) 1381, 1387 (5th Cir. 1981) (proof of fourth element not required in ADEA reduction-in-force cases).

³⁸ *Kelly*, 640 F.2d at 980 n.9, 25 Fair Empl. Prac. Cas. (BNA) at 98 n.9.

³⁹ See *Id.* at 980, 25 Fair Empl. Prac. Cas. (BNA) at 98.

⁴⁰ See *Id.*

⁴¹ 665 F.2d 149, 27 Fair Empl. Prac. Cas. (BNA) 610 (7th Cir. 1981).

⁴² *Syvoock*, 665 F.2d at 151, 27 Fair Empl. Prac. Cas. (BNA) at 611.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 156, 27 Fair Empl. Prac. Cas. (BNA) at 615-16.

judgment with respect to willfulness and, indeed, adopted an even more demanding standard than that applied by the trial court.⁴⁶ The court of appeals held that to prove willfulness, a plaintiff must show not only that the defendant's actions were knowing and voluntary, but also that he knew or reasonably should have known that those actions violated the ADEA.⁴⁷

In reaching its holding, the court of appeals first reviewed the divergent interpretations reached by other courts in defining the term willfulness.⁴⁸ The court then reasoned that by allowing liquidated damages only for willful violations, Congress did not intend the doubling of damages to be automatic.⁴⁹ The court recognized that in *Kelly v. American Standard, Inc.*,⁵⁰ the Ninth Circuit had concluded that defining willfulness as not requiring actual knowledge of the ADEA would not result in the automatic doubling of damages.⁵¹ The *Kelly* court had reasoned that liquidated damages would not be automatic in cases where the plaintiff relied on statistical evidence to establish his prima facie case instead of relying on proof of the defendant's state of mind.⁵² Although the *Syock* court did not directly criticize the Ninth Circuit's decision in *Kelly*, it expressed concern with some of the implications of the reasoning in *Kelly*. The court observed that in one recent case⁵³ the Second Circuit, using reasoning similar to that of the Ninth Circuit in *Kelly*, had implied that liquidated damages will always be available to a plaintiff who establishes liability on a discriminatory treatment rather than a discriminatory impact theory.⁵⁴ Thus, according to the Second Circuit, liquidated damages should always be available to a plaintiff who establishes liability by proving that the defendant took certain unfavorable employment actions towards the plaintiff on the basis of age considerations.⁵⁵ Conversely, double damages might not be available to

⁴⁶ *Id.* at 157-58, 27 Fair Empl. Prac. Cas. (BNA) at 616-17. The court of appeals held that even under the trial court's standard there was no evidence to sustain a verdict of willfulness. *Id.*

⁴⁷ *Id.* at 155-56, 27 Fair Empl. Prac. Cas. (BNA) at 615.

⁴⁸ *Id.* at 154-55, 27 Fair Empl. Prac. Cas. (BNA) at 614.

⁴⁹ *Id.*

⁵⁰ 640 F.2d 974, 25 Fair Empl. Prac. Cas. (BNA) 94 (9th Cir. 1981).

⁵¹ *Syock*, 665 F.2d at 154-55, 27 Fair Empl. Prac. Cas. (BNA) at 614 (citing *Kelly*, 640 F.2d at 980 n.9, 25 Fair Empl. Prac. Cas. (BNA) at 98 n.9).

⁵² *Id.*

⁵³ *Goodman v. Heublein, Inc.*, 645 F.2d 127, 25 Fair Empl. Prac. Cas. (BNA) 645 (2d Cir. 1981).

⁵⁴ *Syock*, 665 F.2d at 155, 27 Fair Empl. Prac. Cas. (BNA) at 614, (citing *Goodman v. Heublein, Inc.*, 645 F.2d at 131 n.6), 25 Fair Empl. Prac. Cas. (BNA) at 647-48 n.6. A case of disparate treatment occurs where the employer "simply treats some people less favorably than others" on the basis of some impermissible factor such as race, religion or age. *Geller v. Markham*, 635 F.2d 1027, 1031-32, 24 Fair Empl. Prac. Cas. (BNA) 920, 923 (2d Cir. 1981) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, 14 Fair Empl. Prac. Cas. (BNA) 1514, 1519 n.15 (1977)). In a disparate treatment case "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.* A case of disparate impact, however, results from the use of "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* Proof of discriminatory motive is not required to sustain a claim of disparate impact. *Id.*

⁵⁵ See *Goodman v. Heublein, Inc.*, 645 F.2d at 131 n.6, 25 Fair Empl. Prac. Cas. (BNA) at 647-48 n.6.

a plaintiff who establishes liability by proving that the defendant instituted employment practices which were facially neutral in their treatment of different age groups but which in fact fell more harshly on the plaintiff's age group.⁵⁶ The *Syvoack* court stated that it found nothing in the ADEA or its legislative history to support the conclusion that liquidated damages will always be available to a plaintiff who establishes liability on a disparate treatment theory.⁵⁷

According to the court, the ADEA requires that a standard of willfulness be developed which distinguishes those cases of disparate treatment in which an employer consciously discriminates against an employee because of age from cases in which discrimination is unconscious.⁵⁸ The *Syvoack* court noted that the available legislative history and commentary suggested Congress thought that cases of non-willful discriminatory treatment, like cases of non-willful discriminatory impact resulting from facially neutral employment practices, were possible.⁵⁹ Such non-willful discriminatory treatment is possible, the court observed, because employers usually tend to discriminate in their treatment of older employees as a result of unconscious stereotyped assumptions about the ability of older employees to perform their work, rather than as a result of a conscious desire to treat older employees adversely.⁶⁰ According to the court, the need to distinguish cases of conscious from unconscious discrimination is just as important in disparate treatment cases as in disparate impact cases.⁶¹ The court concluded, therefore, that a finding of willfulness should lie only where the plaintiff can demonstrate that the defendant had some knowledge of the illegality of his actions.⁶² Consequently, the standard adopted by the court in *Syvoack* requires that the plaintiff prove not only that the defendant's actions were knowing and voluntary, but also that the defendant knew or reasonably should have known that his actions violated the ADEA.⁶³

The *Syvoack* court did not directly criticize or analyze the standard adopted by the Ninth Circuit in *Kelly*. Nevertheless, the Seventh Circuit's adoption of a different standard compels the conclusion that it considered the Ninth Circuit standard flawed with respect to the goal of differentiating cases of willful from unwilling disparate treatment. It is necessary, therefore, to examine more closely each court's reasoning to determine which standard is consistent with the Congressional intent.

A major difficulty in interpreting the court's opinion in *Kelly* is that the court defined a willful violation as a knowing and voluntary violation without specifying the nature of the specific knowledge that the employer must have.⁶⁴

⁵⁶ *Id.*

⁵⁷ *Syvoack*, 665 F.2d at 155, 27 Fair Empl. Prac. Cas. (BNA) at 615.

⁵⁸ *Id.*

⁵⁹ *Id.* See *supra* note 54 for a discussion of the distinction between disparate treatment and disparate impact cases.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 155-56, 27 Fair Empl. Prac. Cas. (BNA) at 615.

⁶⁴ *Kelly*, 640 F.2d at 980, 25 Fair Empl. Prac. Cas. (BNA) at 98.

The *Kelly* court will not require the plaintiff to demonstrate that the employer had knowledge that he was violating the ADEA.⁶⁵ The court, however, did not clarify whether the plaintiff must show merely that the employer was aware he was taking certain actions with unfavorable consequences for an employee rather than the employer was also aware that he was taking these actions *because of the employee's age*. Where this distinction is blurred it becomes possible that, contrary to the intent of Congress, all violations of the statute could lead to the doubling of damages.

Since Congress provided specific remedies in the ADEA for willful violations, it may be presumed not to have intended the availability of liquidated damages to be automatic for all violations.⁶⁶ If the *Kelly* standard is interpreted to require that a plaintiff prove merely that the employer was aware of the actions it was taking toward the plaintiff, then the court's standard would contravene the presumed Congressional intent. Interpreting the *Kelly* standard to require proof merely that the employer was aware of its actions would result in an automatic doubling of damages for virtually all violations since presumably few employers are unaware of their own actions.⁶⁷ The court concluded, however, that an employer's act may still violate the ADEA and not be knowing and voluntary.⁶⁸ The court reasoned that statistical evidence alone could be used to prove discriminatory impact, without any proof of the employer's state of mind.⁶⁹ This reasoning, however, does not fully dispose of the criticism that to require proof merely that the employer was aware of his actions would result in a doubling of damages for virtually all violations of the ADEA. To be sure, a plaintiff seeking to show a willful violation in order to establish that the employer acted knowingly may have to introduce evidence of the employer's state of mind which he would not otherwise have to introduce. Nevertheless, it would seem that plaintiffs would not find it difficult to convince a jury of the tautology that the employer who discharged the plaintiff in fact was aware that he was discharging the plaintiff. Likewise, in actions brought on a discriminatory impact theory, that is, where the employer is shown to have adopted some facially neutral employment practice which has a disproportionate impact on older workers,⁷⁰ recovery of liquidated damages would seem virtually guaranteed. Presumably most such employers can be shown to be aware of their employment practices, although they may not be aware that their practices have a disproportionate impact on older workers. Thus, if the standard adopted by the *Kelly* court required only a showing that the employer had knowledge of the actions he was taking toward an employee, the standard legitimately could be criticized for making virtually every violation of the ADEA willful.

⁶⁵ *Id.*

⁶⁶ See *Syvock*, 665 F.2d at 154-55, 27 Fair Empl. Prac. Cas. (BNA) at 614.

⁶⁷ See *Smith & Leggett*, *supra* note 35, at 369.

⁶⁸ *Kelly*, 640 F.2d at 980, 25 Fair Empl. Prac. Cas. (BNA) at 98.

⁶⁹ *Id.* at 980 n.9, 25 Fair Empl. Prac. Cas. (BNA) at 98 n.9.

⁷⁰ See *supra* note 54 for a discussion of the distinction between disparate treatment and disparate impact cases.

A better interpretation of the standard adopted by the *Kelly* court is that in order for a violation to be willful, an employer must know not only that he is taking certain actions toward the employee, but also that he is doing so because of the employee's age. Since the *Kelly* standard allows liquidated damages for knowing violations,⁷¹ the requisite knowledge should extend to all elements of the violation. An employer's discharge of an employee is not in itself a violation of the Act. The discharge becomes a violation only if it occurs because of an employee's age.⁷² Arguably, therefore, for a violation to be willful, an employer must know not only that he discharged the employee, but also that his actions were taken because of age considerations. Courts allowing liquidated damages on the basis of a standard similar to the *Kelly* standard have in fact cited evidence that the employer was conscious that age was the reason for the unfavorable treatment of the employee.⁷³

Interpreting the *Kelly* standard to require knowledge that age is the reason for unfavorable treatment avoids the criticism that the standard would lead to a doubling of damages for virtually all violations. Under this interpretation of the standard it is possible to point to discriminatory impact cases as one clear example of instances in which an employer may not have knowledge that the actions he is taking are motivated by considerations of age.⁷⁴ The employer may simply have adopted a practice which he considered neutral, but which in fact affects older workers disproportionately. Although it is reasonable to require that an employer have knowledge that age was the reason for a discriminatory employment decision before liquidated damages are awarded, the opinion in *Kelly* does not delineate specifically this or any other standard. Such imprecision is confusing and leaves considerable uncertainty about how the *Kelly* standard should or will be applied.

Unlike the *Kelly* opinion, the *Syvock* opinion contains considerable discussion of the extent of employer awareness necessary to sustain a finding of willfulness. The *Syvock* court emphasized that the standard for determining willfulness must differentiate those cases in which an employer consciously discriminates against an employee because of age from those in which the discrimination is unconscious.⁷⁵ In addition, the court stressed that it was just as necessary to distinguish between conscious and unconscious discrimination in disparate treatment cases as in disparate impact cases.⁷⁶ Although the

⁷¹ *Kelly*, 640 F.2d at 98, 25 Fair Empl. Prac. Cas. (BNA) at 98.

⁷² See *supra* note 4 and accompanying text.

⁷³ See, e.g., *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706, 713, 16 Fair Empl. Prac. Cas. (BNA) 1084, 1089 (E.D. Wis. 1978) (statements by employee's superiors acknowledging that discharge was due to employee's age established intentional, knowing and voluntary violation); *Rogers v. Exxon Research & Engineering Co.*, 404 F. Supp. 324, 335, 11 Fair Empl. Prac. Cas. (BNA) 776, 784 (D.N.J. 1975), *rev'd on other grounds*, 550 F.2d 834, 14 Fair Empl. Prac. Cas. (BNA) 518 (3d Cir. 1977), *cert. den.*, 434 U.S. 1022, 16 Fair Empl. Prac. Cas. (BNA) 501 (1978) (testimony corroborating plaintiff's allegations of a scheme by employer to rid itself of older workers supported award of liquidated damages).

⁷⁴ See *supra* note 54 for a discussion of the distinctions between disparate treatment and disparate impact cases.

⁷⁵ *Syvock*, 665 F.2d at 155, 27 Fair Empl. Prac. Cas. (BNA) at 615.

⁷⁶ *Id.* See *supra* note 54 for a discussion of the distinctions between disparate treatment

court's insistence on distinguishing between conscious and unconscious discrimination even in disparate treatment cases raises incidental problems,⁷⁷ it seems to have some support in the legislative history of the ADEA⁷⁸ and in the commentary on age discrimination.⁷⁹ In disparate treatment cases, however, it is difficult to conceptualize the court's dichotomy between conscious and unconscious discrimination. It is difficult to understand how an employer can violate the act by treating an employee unfavorably "because of age,"⁸⁰ and at the same time to be totally unconscious of the fact that the unfavorable treatment is related to the employee's age. Perhaps, as the court suggests, age discrimination is different from other forms of discrimination.⁸¹ Unlike discrimination based on race or religion, age discrimination does not necessarily result from invidious class-oriented biases which transcend the workplace.⁸² Instead, age discrimination may result from unconscious stereotyped assumptions about older workers' abilities, rather than from a desire to treat older workers unfavorably.⁸³ Yet precisely because age discrimination may be different, it would seem difficult to draw a clear line between those instances of discriminatory treatment which are consciously motivated by age and those which are not. For example, in cases in which an employer discharges or refuses to hire an older worker because of the unconscious stereotyped assumption that older workers are less productive, conceiving of the employer as being totally unconscious of the fact that age at least played a role in his decision is difficult. True, the employer may be unaware that he has made an erroneous assumption about the effect of age on productivity. He may simply apply that assumption to the older worker. Yet in doing so, he may be at least partially aware that his application of the assumption is related to the worker's age.

and disparate impact cases.

⁷⁷ One problem with distinguishing between conscious and unconscious discrimination in disparate treatment cases is that it plays havoc with the requirement of discriminatory intent or motive traditionally deemed crucial in disparate treatment cases. In Title VII cases alleging disparate treatment, the Supreme Court has indicated that an inference of discriminatory motive is crucial. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 14 Fair Empl. Prac. Cas. (BNA) 1514, 1519 n.15 (1977). If an inference of discriminatory motive is required in ADEA disparate treatment cases as well as in Title VII cases, then the *Syvock* court's suggestion that some cases of unlawful disparate treatment arising under the ADEA are unconscious poses a problem. It seems impossible on the one hand to say that an employer possessed a discriminatory motive or intent in treating an employee unfavorably and thus violated the ADEA, and on the other hand to say that the employer did not consciously discriminate and thus is not guilty of a willful violation. The *Syvock* court apparently recognized this problem. *Syvock*, 665 F.2d at 155 n.7, 27 Fair Empl. Prac. Cas. (BNA) at 615 n.7. The court implied, however, that an inference of discriminatory intent is not crucial in an ADEA case. *Id.* Whether this view will produce significant consequences, and if so whether it will survive challenge is open to question.

⁷⁸ See, e.g., 113 CONG. REC. 34, 742 (1967) (remarks of Rep. Burke). See also authorities cited in *Syvock*, 665 F.2d at 155 n.8, 27 Fair Empl. Prac. Cas. (BNA) at 615 n.8.

⁷⁹ See, e.g., Smith & Leggette, *supra* note 35, at 371. See also authorities cited in *Syvock*, 665 F.2d at 155 n.8.

⁸⁰ See *supra* note 4 and accompanying text for pertinent ADEA provisions.

⁸¹ *Syvock*, 665 F.2d at 155, 27 Fair Empl. Prac. Cas. (BNA) at 615.

⁸² *Id.*

⁸³ *Id.*

Thus, while there may be different levels of consciousness in disparate treatment cases, the instances in which an employer discriminates against an employee "because of age" unconsciously likely are rare.

Despite conceptual problems with the court's view that some instances of discriminatory treatment are unconscious, the court's insistence in *Syvock* that only conscious discrimination should be deemed willful may have merit. The merit of the court's position depends on the interpretation given to the term conscious discrimination. If the court intended to limit conscious discrimination to cases in which there was "a deliberate desire to remove older workers from the workplace,"⁸⁴ then the court's view arguably would be too restrictive. Read in the context of the court's opinion, the phrase "deliberate desire to remove older workers . . ." suggests some sort of invidious bias against older workers as a class.⁸⁵ The court itself pointed out that Congress believed few instances of age discrimination stem from such well-defined ill-intentioned feelings toward older people as a group.⁸⁶ Just as Congress could not have intended to make recovery of liquidated damages virtually automatic, so also it must not have intended to virtually rule out recovery of liquidated damages either. Interpreting conscious discrimination to mean a deliberate desire to remove older workers from the workforce, however, suggests a more restrictive standard than the one actually adopted by the *Syvock* court. For a finding of willfulness, the court would require a finding that the employer knew or should have known that he was violating the ADEA.⁸⁷ It seems likely that there can be violations of the ADEA which are not marked by deliberate discriminatory animus but which may result in a finding that the employer knew or should have known that his actions violated the ADEA. For example, an employer may refuse to hire an older worker simply because he believes that the older individual, because of his age, will not perform as well in a particular job. The employer may have no desire to disadvantage older workers as a class. Nonetheless, the employer may know from previous cases that his refusal to hire the older applicant will violate the ADEA. Thus, the standard adopted by the *Syvock* court would seem to allow recovery against the employer even though the employer's actions are not marked by deliberate discriminatory animus toward older people as a group, since the standard adopted by the court for determining willfulness is not consistent with the notion of deliberate discriminatory animus toward older workers as a group, the court probably did not intend to limit recovery for willful violations to cases of deliberate discriminatory animus.

If the court's use of the term conscious discrimination is construed more broadly to include any cases in which an employer is aware that his discriminatory actions are motivated by considerations of age, then the court's position seems to have merit. Liquidated damages would neither be available in all cases, nor be entirely foreclosed. Although the legislative history is silent

⁸⁴ *Id.*

⁸⁵ *See Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 155-56, 27 Fair Empl. Prac. Cas. (BNA) at 615.

about the meaning of the term "willful,"⁸⁸ a standard which makes some but not all violations willful seems consistent with Congress' presumed intent, in providing a special remedy for one category of violations. Furthermore, since the liquidated damages provision can be viewed as a form of punitive damages,⁸⁹ limiting such an award to those violations which are knowing seems proper.

If the *Syock* court interpreted the ADEA to allow recovery for willful violations in cases where the employer was aware that his actions were taken because of age considerations, then the court's interpretation of the ADEA is similar to that of the Ninth Circuit in *Kelly*. Based on the interpretation of the *Kelly* standard previously suggested, it would seem that both courts intended to define as willful violations those cases in which the employer knows that he is treating the employee unfavorably because of age.⁹⁰ It is not clear why the *Syock* court further conditioned an award of liquidated damages on a finding that the employer knew or should have known that his actions violated the ADEA.⁹¹

One reason for the *Syock* court's adoption of a different standard may stem from its view that not all disparate treatment cases involve conscious discrimination.⁹² Although the court did not criticize the *Kelly* opinion directly, it seemed concerned that following the *Kelly* court's standard might result in liquidated damages being available in every case in which the plaintiff establishes liability on a disparate treatment theory as opposed to a disparate impact theory.⁹³ To support its reasoning the court cited one case in which the Second Circuit suggested that whenever liability is established on a disparate treatment theory, the violation is necessarily intentional.⁹⁴ The *Syock* court apparently imputed the Second Circuit's reasoning to the *Kelly* court, and concluded that under the *Kelly* standard whenever liability could be established on a disparate treatment theory, the violation would be knowing and voluntary. Because the *Syock* court believed distinguishing between conscious and unconscious violations even in disparate treatment cases was necessary, it apparently concluded that the *Kelly* standard had to be rejected. Yet, ironically, it seems that the *Syock* court's complaint was with the reasoning of the Second Circuit, not with the standard adopted by the *Kelly* court. Properly interpreted, the *Kelly* standard seems to achieve the result desired by the *Syock* court of allowing an award of liquidated damages only for knowing or conscious acts of discrimination.⁹⁵ Furthermore, the *Kelly* court never stated that it expected liquidated damages to be available in every action in which liability is established on a disparate treatment theory. The *Syock* court could have adopted the

⁸⁸ See *supra*, note 11 and accompanying text.

⁸⁹ *Kelly*, 640 F.2d at 979, 25 Fair Empl. Prac. Cas. (BNA) at 97.

⁹⁰ See *supra* notes 71-73 and 87-89 and accompanying text.

⁹¹ *Syock*, 665 F.2d at 155-56, 27 Fair Empl. Prac. Cas. (BNA) at 615.

⁹² *Id.* at 155, 27 Fair Empl. Prac. Cas. (BNA) at 615.

⁹³ See *Id.* at 155, 27 Fair Empl. Prac. Cas. (BNA) at 614-15.

⁹⁴ *Id.* (citing *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 n.6, 25 Fair Empl. Prac. Cas. (BNA) 645, 647-48 n.6 (2d Cir. 1981)).

⁹⁵ See *supra* notes 71-73 and accompanying text.

Kelly standard while making clear that it did not view as knowing violations all instances of discriminatory treatment.

Despite the *Syvocek* court's limitation of liquidated damages to cases in which the employer knew or should have known that he was violating the ADEA,⁹⁶ in most cases the *Syvocek* standard is likely to produce the same result as the *Kelly* standard. One would expect that in most cases where an employer is shown to have been aware at the time of taking discriminatory actions that such actions were motivated by age considerations (thus satisfying the *Kelly* standard), the plaintiff will argue that the employer also knew or should have known that he was violating the ADEA. Thus, the *Syvocek* court can be criticized for introducing one more standard for determining willfulness without giving clearly articulated and persuasive reasons for rejecting the standards already established by the other circuits.

Both the *Kelly* and *Syvocek* opinions have added to the uncertainty surrounding the meaning of a willful violation of the ADEA. As a result of the *Syvocek* opinion, at least four apparently different standards for determining a willful violation now exist.⁹⁷ The *Kelly* and *Syvocek* standards may differ little, however, in practical effect. It appears that under either standard an employer may be liable for liquidated damages when he takes actions which impact older employees unfavorably and when he is aware that those actions were taken because of age considerations.⁹⁸

VI. CONSTITUTIONAL DECISIONS

A.* Standards for "Reverse Discrimination" Suits Under the Equal Protection Clause and Section 1981:

Valentine v. Smith¹ and Setser v. Novak Investment Co.²

1. *Valentine v. Smith*

Decisions about hiring and admissions made by either faculties or administrations of state universities are subject to scrutiny under the fourteenth amendment of the United States Constitution.³ In *Regents v. Bakke*, a rejected

⁹⁶ *Syvocek*, 665 F.2d at 1555, 27 Fair Empl. Prac. Cas. (BNA) at 615.

⁹⁷ The First and Third Circuits have both interpreted the term willful somewhat differently than the *Kelly* and *Syvocek* courts. See, e.g., *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283, 22 Fair Empl. Prac. Cas. (BNA) 994, 998 (3d Cir. 1980) (proof that discharge was precipitated in reckless disregard of consequences would have been sufficient to support finding of willfulness); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27, 20 Fair Empl. Prac. Cas. (BNA) 29, 41 n.27 (1st Cir. 1979) (finding of willfulness requires that employer's discriminatory act be voluntary, intentional, and done with specific intent to violate the Act).

⁹⁸ See *supra* notes 90 and 96 and accompanying text.

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¹ 654 F.2d 503 (8th Cir. 1981).

² 638 F.2d 1137 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 615 (1982).

³ See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Missouri ex rel. Guines v. Canada*, 305 U.S. 378 (1958).

white applicant to the University of California at Davis Medical School challenged, as violative of the fourteenth amendment's equal protection clause, a special admissions program that set aside sixteen of the one hundred available places in the entering class for members of specifically designated minority groups.⁴ Although there was no majority opinion in *Bakke*, Justice Powell's plurality opinion held that racial or ethnic distinctions of any sort call for strict judicial scrutiny.⁵ Therefore, distinctions draw on the basis of race, albeit in furtherance of an affirmative action plan, are nonetheless subject to something resembling strict scrutiny.⁶

In order for the state to justify the use of a race-conscious classification, it must first show that its purpose or interest, in furtherance of which the classification is adopted, is both constitutionally permissible and substantial.⁷ *Bakke* recognized that a state has such a legitimate and substantial interest in ameliorating or eliminating, where possible, the disabling effects of identified discrimination.⁸ Before such a substantial interest can exist, however, there must be a judicial, legislative or administrative finding of a constitutional or statutory violation.⁹ Only when findings of such a wrong have been made by an appropriate body can the state's interest be characterized as substantial and remedial action be taken.¹⁰ If such remedial action involves a race-conscious classification the state must show the use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest.¹¹ As the Court noted in *Bakke*, when a classification touches upon race, the person affected is entitled to a judicial determination that the burden he is asked to bear on the basis of race is precisely tailored to serve a compelling governmental interest.¹² This standard was similarly phrased in *Fullilove v. Klutznick*, where the court noted that racial criteria could only be used by the government when they were narrowly tailored to achieve their objectives.¹³ Thus, a state has a substantial interest in remedying the effects of past discrimination where the discrimination has been clearly identified by an appropriate governmental body.¹⁴ Any

⁴ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁵ *Id.* at 291. Justice Powell rejected the notion proposed by Justice Brennan that the level of scrutiny to be applied depended upon the group adversely affected by the classification. 438 U.S. at 295-97. Under this system, if the minority group adversely affected by the statute had historically been burdened by the majority strict scrutiny would apply. If, however, the majority was singled out, then the level of scrutiny would be lower. *Id.* at 296-97. Justice Powell rejected this system as unworkable. *Id.* at 298.

⁶ Chief Justice Burger, for instance, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), held that all racial preferences should receive a searching judicial inquiry to insure they do not conflict with constitutional guarantees. *Id.* at 491.

⁷ *Bakke*, 438 U.S. at 305 (citing *In re Griffiths*, 413 U.S. 717, 721-22 (1973)).

⁸ *Id.* at 307.

⁹ *Id.*

¹⁰ *Id.* In *Bakke*, the University was held not to be an appropriate body to make a finding that past discrimination had occurred justifying the use of a race-conscious remedy. *Id.* at 309.

¹¹ *Id.* at 305 (citing *In re Griffiths*, 413 U.S. at 721-22.)

¹² *Id.* at 299.

¹³ *Fullilove v. Klutznick*, 448 U.S. 448, 487. In *Fullilove*, the Court upheld a congressional "set-aside" to minority contractors of 10% of Federal funds for public works projects. *Id.* at 492.

¹⁴ *Bakke* at 308.

remedy adopted, however, must be precisely or narrowly tailored to achieve its objectives if it is to withstand scrutiny under the equal protection clause.

In neither *Bakke* nor *Fullilove*, did a majority of the Court adopt standards defining when a remedy could be considered precisely or narrowly tailored.¹⁵ In his dissent in *Bakke* Justice Brennan set forth the standard he would apply. Use of a race-conscious program, in his view, should be allowed where the purpose of the program is to remove disparate impact of a governmental decision resulting from past discrimination, as long as the program used race reasonably in light of its objectives and did not operate to stigmatize any group or individual.¹⁶ In *Fullilove*, Justice Powell, writing separately in an analysis consistent with his opinion in *Bakke*, would consider, in deciding whether a given remedy was constitutional, the efficacy of alternative remedies,¹⁷ the planned duration of the remedy,¹⁸ the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or workforce,¹⁹ the availability of waiver provisions if the plan could not be met,²⁰ and the effect of the remedy on innocent third parties.²¹ Other than these statements, lower courts have no guidance in determining when a race-conscious remedy adopted by a state is sufficiently precise to withstand scrutiny under the equal protection clause.

During the *Survey* year, the United States Court of Appeals for the Eighth Circuit in *Valentine v. Smith*²² attempted to establish a standard for determining when race-conscious plans are constitutionally permissible. In *Valentine*, the plaintiff, Valentine, sought employment in 1976 at Arkansas State University as a member of the business education faculty.²³ Among the sixteen candidates for the job, Valentine appears to have been the most qualified.²⁴ A list of candidates headed by Valentine's name was presented to the University's vice president for his consideration.²⁵ After discussions with the University's affirmative action officer, however, a new list was drawn up from which Valentine's name was deleted.²⁶ The new list contained only the names of two black candidates, one of whom eventually was hired.²⁷

¹⁵ In *Valentine v. Smith*, 564 F.2d 503 (8th Cir. 1981), the court noted, "The Supreme Court has not yet defined guidelines for permissible affirmative action for employing state university faculty." *Id.* at 508. In *Bakke*, the choice of remedy was not discussed by the majority of the justices. 438 U.S. 265.

¹⁶ *Id.* at 373-74 (Brennan, J., dissenting).

¹⁷ *Fullilove*, 448 U.S. at 510.

¹⁸ *Id.* at 511.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 514.

²² 654 F.2d 503 (8th Cir. 1981).

²³ *Id.* at 506. Valentine taught at the school from 1967 until 1974, when she resigned. In 1976 her replacement, Adena Williams, a black, had resigned, whereupon Valentine reapplied for her former position. *Id.* at 506-07.

²⁴ *Id.* at 507. Several members of the faculty search committee recommended Valentine as the most qualified. *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Valentine asserted that she was discriminated against on the basis of her race in violation of the equal protection clause of the fourteenth amendment.²⁸ In order to prevail, it was necessary for her to show that the University's employment decision had in fact been made on the basis of race.²⁹ Both the district court and the court of appeals concluded that the decision to reject Valentine was based upon race.³⁰ This race-conscious choice, however, was made in deference to the University's affirmative action plan.³¹ Under *Bakke*, before such a plan can be adopted, there must be a finding by an appropriate governmental body of a previous constitutional or statutory violation.³² Federal courts have the competency to make such findings³³ and the District Court for the District of Columbia had made a finding that the Arkansas higher education system was not in compliance with Title VII of the Civil Rights Act of 1964.³⁴ Consequently, the adoption of some type of race-conscious remedy by Arkansas was permissible.

The court then turned to decide whether the particular plan adopted by Arkansas was constitutionally permissible. A race-conscious affirmative action plan was held by the Eighth Circuit to be substantially related to remedying past discrimination.³⁵ Being so related, it would be permissible, according to the court, under the equal protection clause if its implementation results or is designed to result in the hiring of a sufficient number of minority applicants so that the racial balance of the employer's workforce approximates roughly, but does not unreasonably exceed, the balance that would have been achieved absent past discrimination.³⁶ In addition, the court observed, the plan should endure only so long as it is reasonably necessary to achieve its legitimate goals,³⁷ should not result in hiring unqualified applicants,³⁸ and should not completely bar whites or otherwise invidiously trammel their interests.³⁹

The court then applied its test to the University's affirmative action plan. Under the University's plan, twenty-five percent of new faculty hired over a four year period were to be black.⁴⁰ This plan, it was hoped, would serve to raise the number of black faculty members to five percent of the total University faculty.⁴¹ Since the University attracted its students from an area that was

²⁸ *Id.* at 505.

²⁹ *Id.* at 507. "[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." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

³⁰ *Valentine*, 654 F.2d at 507. This finding was made despite the University's assertion that Valentine was rejected because she was overqualified.

³¹ *Id.*

³² *Bakke*, 438 U.S. at 265.

³³ *See, e.g.*, *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 419-20 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).

³⁴ *Adams v. Richardson*, 356 F. Supp. 92, 94 (D.D.C. 1973).

³⁵ *Valentine*, 654 F.2d at 510.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

one quarter black, these goals were held to be substantially related to the legitimate purpose of the plan.⁴² That is, in the court's view, the number of minority applicants hired under the plan would not lead to minority participation beyond that which would have been achieved absent past discrimination. In addition, the four year period contemplated for the plan was held not to exceed the time substantially necessary for the accomplishment of the plan's purpose.⁴³ The court then determined that the plan did not lead to the hiring of unqualified applicants, inasmuch as the person hired instead of Valentine was fully qualified.⁴⁴ Furthermore, according to the court, the plan did not invidiously trammel the interests of white employees since it neither required white employees to be fired to make room for black applicants, nor required white employees to be deprived of employment rights or benefits already earned.⁴⁵ Also, since it was intended under the plan to hire minority applicants for only twenty-five percent of the available positions, it could not be said there was an absolute bar to the hiring of whites for faculty positions.⁴⁶ Thus, the University's plan was narrowly tailored to serve its constitutionally permissible end.⁴⁷

The standard adopted by the court in *Valentine* seems to be drawn largely from Justice Brennan's majority opinion in *United Steelworkers v. Weber*.⁴⁸ *Weber*, however, involved an alleged violation not of the equal protection clause, but of Title VII of the Civil Rights Act of 1964.⁴⁹ It might intuitively seem difficult to appreciate that standards of review under the Constitution would be derived from standards already adopted under a statute. Rather, one might expect a different standard to be applied to decisions of the government if they are to withstand scrutiny under the equal protection clause. In fact, employer's decisions have been scrutinized in the past more carefully under Title VII than under the Constitution.⁵⁰ Thus, by adopting the same or a similar test under both the Constitution and Title VII, the standard of review under the Constitution is perhaps being raised.

There is a clear advantage to adopting a similar standard for determining the permissibility of affirmative action plans under both the equal protection

⁴² *Id.* at 511.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 443 U.S. 193 (1979). In *Weber*, Justice Brennan did not actually attempt to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." *Id.* at 208. He did, however, note that a plan should not "invidiously trammel" the interests of white employees. *Id.* The plan also should not require the discharge of white workers and their replacement with black hires, or pose an absolute bar to the hiring or advancement of whites. *Id.* Each of these criteria are part of the court's test in *Valentine*.

⁴⁹ *Id.* at 200.

⁵⁰ For instance, in *Washington v. Davis*, 426 U.S. 229 (1976), the Court held a test administered to applicants by the Washington, D.C. police did not violate the equal protection clause merely because it had a disproportionate negative impact upon blacks. *Id.* at 237. Rather, a violation of equal protection required proof of discriminatory intent. *Id.* at 240. Title VII, however, proscribes employment practices that are merely discriminating in operation. *Griggs v. Duke Power*, 401 U.S. 424 (1971).

clause and Title VII. Part of the court's purpose in adopting the test in *Valentine* is to prevent employers from being subject to inconsistent obligations.⁵¹ Where an employer has no affirmative action plan he risks liability to blacks and the cutoff of federal funds. Where, however, the employer adopts such a plan, he risks liability to whites. Thus, if a court adopts a clear standard for determining the permissibility of affirmative action plans, employers can structure their plan accordingly and avoid such inconsistent obligations. Where, however, both Title VII and the Constitution apply (i.e., state action exists), the problem would be much greater if different standards existed under the different bases of liability. This would be especially true if the standard were clear under one prohibitive provision and not under the other. The employer might structure his plan along the lines of the clear standard, and yet still turn out to be liable to a reverse discrimination plaintiff, if the unclear standard turned out to be higher. The court seems to have tried to avoid this situation by equating the standards for permissibility of affirmative action plans under the equal protection clause, where the Supreme Court had offered virtually no guidance, with those under the Title VII, where the Court in *Weber* had offered at least some guidance. Thus, even where an employer is subject to both provisions, he can structure an affirmative action plan that will allow him to avoid inconsistent liability.

After *Valentine*, a state in the Eighth Circuit can, by taking certain precautions, establish an affirmative action plan which will be permissible under the equal protection clause (and since the standard is derived from *Weber*, perhaps under Title VII as well). The stated goal of the hiring plan should be related to the minority population in what might be called the relevant population group. This could be the area population as in *Valentine*,⁵² or perhaps the minority population in the local workforce. Secondly, a plan should avoid the suggestion of permanence, but rather, have a planned existence for a specific limited term. In *Valentine*, for instance, the fact the plan was to exist for only four years led the court to hold it was to exist only as long as reasonably necessary for the accomplishment of its purpose. Thus, rather than establishing plans with longer, perhaps more realistic terms, an employer would be wise to use short term plans which can be extended if unsuccessful. Third, the plan should not lead to the hiring of any obviously unqualified minority applicant. Fourth, the plan should not completely bar whites from vacancies. Finally, the plan should not require that any white employees be fired or deprived of employment benefits already earned. Where these steps are followed, employers in the Eighth Circuit can adopt affirmative action plans which will withstand scrutiny under the equal protection clause.

2. *Setser v. Novak*

In the companion case to *Valentine v. Smith*, *Setser v. Novak Investment Co.*,⁵³ the U.S. Court of Appeals for the Eighth Circuit established standards for deal-

⁵¹ 26 Fair Empl. Prac. Cas. (BNA) 522.

⁵² *Id.*

⁵³ 638 F.2d 1137 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 615 (1982), *reheard en banc*, 657

ing with challenges under section 1981 to affirmative action plans adopted by private employers.⁵⁴ The Supreme Court in *Steelworkers of America v. Weber*⁵⁵ had earlier addressed a similar challenge brought under Title VII of the Civil Rights Act of 1964.⁵⁶ In *Weber*, the employer entered into a collective bargaining agreement with a union which contained, among other provisions, an affirmative action plan designed to eliminate the disparity between the percentage of minority workers in the skilled craft workforce and the percentage of minority workers in the employer's workforce as a whole.⁵⁷ The plan reserved for black workers fifty percent of the openings in an in-plant craft-training program until the percentage of black craft workers equalled the percentage in the workforce as a whole.⁵⁸ During 1974, the first year the program was in operation, of the thirteen workers chosen, seven were black.⁵⁹ The most senior black worker selected for the program had less seniority than several white workers whose bids for admission were rejected.⁶⁰ Thereafter, one of the rejected white applicants brought an action alleging that the program violated sections 703(a) and (d) of Title VII.⁶¹

The *Weber* Court, however, held the employer's plan did not violate the statute.⁶² The Court noted that Title VII, on its face, prohibits discrimination on the basis of race in the allocation of employment benefits,⁶³ and that the statute has been held to prohibit discrimination against whites as well as minorities.⁶⁴ In so holding, however, the Court specifically reserved the question of whether a racial preference that discriminates against whites adopted as part of an affirmative action program was permissible under Title VII.⁶⁵

In deciding whether such plans could be permissible, the *Weber* Court looked to the legislative history of Title VII.⁶⁶ The purpose of the statute according to the Court was not only to remove barriers to participation by blacks in American economic life, but to promote measures that would allow blacks to move out of their traditional role in the economy as unskilled workers and into "jobs with a future."⁶⁷ Inasmuch as voluntary activity by private

F.2d 962 (1981).

⁵⁴ *Id.* at 1143-44.

⁵⁵ 443 U.S. 193 (1979).

⁵⁶ 42 U.S.C. § 2000(e)-2(j) (1976).

⁵⁷ *Weber*, 443 U.S. at 197-98.

⁵⁸ *Id.*

⁵⁹ *Id.* at 199.

⁶⁰ *Id.*

⁶¹ *Id.* at 199-200. 42 U.S.C. § 2000(e)-2(a) (1976) reads in relevant part: 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 . . . because of such individual's race.

⁶² *Weber*, 443 U.S. at 199.

⁶³ *MacDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273, 280 (1976). See also, *Griggs v. Duke Power*, 401 U.S. 424, 433-34 (1971) (where Title VII was held to prohibit a discriminatory preference for any (racial) group minority or majority).

⁶⁴ *MacDonald*, 427 U.S. at 281 n.8.

⁶⁵ *Id.*

⁶⁶ *Weber*, 443 U.S. at 201-04.

⁶⁷ *Id.* at 202-03.

employers was one means to accomplish this end, the Court felt that Title VII could not be interpreted as an absolute prohibition of all forms of private race-conscious affirmative action.⁶⁸ The Court thus held permissible the employer's plan in *Weber*.⁶⁹

In so holding, however, the Court declined to define the line of demarcation between permissible and impermissible plans.⁷⁰ It did, however, imply that a plan would be impermissible if it invidiously trammelled the interests of white employees,⁷¹ required the discharge of white workers and their replacement with new black hires,⁷² or created an absolute bar to the advancement of white employees.⁷³ In addition, the Court seemed to find it important that the plan was a temporary measure, designed only to last until the percentage of black workers in the employer's skilled labor force was equal to the percentage in the labor force as a whole.⁷⁴ Thus, after *Weber*, private voluntary affirmative action is sometimes permissible under Title VII.

Although *Weber* did not attempt to give a complete answer as to when a given plan would be permissible, it did provide some reasonably helpful guidance. *Weber*, however, provided no answer as to the permissibility of affirmative action plans under statutes other than Title VII forbidding racial discrimination in employment. In addition, neither *Weber* nor any other Supreme Court decision has attempted to establish what a plaintiff must show to succeed in a "reverse discrimination" suit, or the extent to which a defendant may rely upon an affirmative action plan as a defense.

In the *Survey* year, the U.S. Circuit Court of Appeals for the Eighth Circuit addressed these questions in *Setser v. Novak Inv. Co.*⁷⁵ In *Setser*, a white male was refused employment and subsequently brought an action under 42 U.S.C. § 1981.⁷⁶ Although section 1981 on its face relates to racial discrimination in the making and enforcement of contracts,⁷⁷ federal courts, including the Supreme Court, have long recognized that the statute provides a remedy for discrimination in private employment.⁷⁸ Section 1981 and Title VII have been recognized as providing independent avenues of relief.⁷⁹ Whether, therefore, affirmative action plans are permissible under a given statute, the question

⁶⁸ *Id.* at 204.

⁶⁹ *Id.* at 208.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 638 F.2d 1137 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 615 (1982).

⁷⁶ *Id.* at 1139.

⁷⁷ 42 U.S.C. § 1981 (1976) reads in relevant part: "All persons within the jurisdiction of the U.S. shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ."

⁷⁸ *Johnson v. Railway Express Agency Inc.*, 421 U.S. 454 (1975); *Waters v. Wisconsin Steel Works of Int. Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970).

⁷⁹ *Johnson v. Railway Express*, 421 U.S. at 460. This independence between the post Civil War statutes and the civil rights statutes of the 1960's was recognized in *Jones v. Alfred Mayer*, 392 U.S. 409, 416-17 n.20 (1968).

resolved in *Weber* under Title VII, needs also to be answered under section 1981.

In *Setser*, the court reasoned that by approving race-conscious affirmative action plans under Title VII in *Weber*, the Supreme Court implicitly approved them under section 1981.⁸⁰ The court noted that, as in *Weber*, the purpose of the statute involved, to improve the social and economic situation of black Americans, meant it should not be used to prevent an effective remedy for past discriminatory employment practices.⁸¹ In addition, the court noted that in fashioning a body of substantive principles under section 1981, courts should look to principles created under Title VII in order to avoid undesirable conflicts.⁸² Thus, the court held standards for permissible affirmative action plans under section 1981 should be identical to those under Title VII.⁸³ Were the standards to be different, an employer might be prevented by section 1981 from adopting a plan to remedy a past discriminatory practice that violated Title VII. Thus, such discrimination might be "locked in" to the system.⁸⁴ Furthermore, the adoption of identical standards for each of the statutes obviates the possibility of an employer incurring inconsistent obligations.⁸⁵ Private employers already face a dilemma when adopting affirmative action plans, since the plan may be impermissibly drawn, thus creating liability to whites. If, however, they adopt no such plan, the possibility exists of liability to blacks. Divergent standards for determining the permissibility of plans under different statutes would, in the court's view, exacerbate this dilemma.⁸⁶ Therefore, the court in *Setser* adopted the same standard for determining the permissibility of affirmative action plans under either statute.⁸⁷

The court then set out what each party must establish in order to prevail in a section 1981 or Title VII reverse discrimination suit. The employer must first come forward with "some evidence" that its affirmative action program was a response to a conspicuous racial imbalance in its workforce.⁸⁸ This can be established by showing that either a governmental body or the employer itself made a finding of the existence of such a conspicuous racial imbalance.⁸⁹ The employer must then produce some evidence that its plan is reasonably related to its remedial purpose.⁹⁰ To do so, the plan should comply with the criteria established in *Weber*. Under these criteria, the plan should be temporary, have a numerical goal for minority hiring related to the minority population in a relevant workforce, should not require the discharge of white workers and their

⁸⁰ *Setser v. Novak Inv. Co.*, 657 F.2d 962, 966-67 (1981). The case when originally heard did not address this question directly. 638 F.2d 1137. It was, however, re-heard *en banc* and reversed in part. 657 F.2d 962 (1981).

⁸¹ 657 F.2d at 967.

⁸² *Id.* at 967 n.5.

⁸³ *Id.* at 967.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *supra* note 80.

⁸⁸ *Setser*, 657 F.2d at 968.

⁸⁹ *Id.*

⁹⁰ *Id.*

replacement with blacks, and should not create an absolute bar to the hiring of whites.⁹¹ Courts are admonished to be flexible in determining if plans are permissible in order that employers will not be subject to inconsistent obligations.⁹² Once a plan is established as legitimate, the employer need only show that the treatment of plaintiff was a consequence of the plan to be entitled to judgment as a matter of law.⁹³ Thus, the race-conscious choices made to implement a legitimate affirmative action plan are themselves legitimate.

The plaintiff, if he or she is to prevail, must show either that some reason other than a remedial reason motivated the plan, or that the plan adopted unreasonably exceeds its remedial purpose.⁹⁴ This could be done, the court points out, by showing that the plan was adopted in the absence of a conspicuous racial imbalance in the employer's workforce.⁹⁵ Plaintiff must also establish to the satisfaction of a jury that the decision not to hire him or her was not the result of some legitimate nondiscriminatory purpose.⁹⁶ Thus, plaintiff can only prevail where he or she can show that the employer's plan is not legitimate, and that his or her treatment was a consequence of the plan and not some legitimate nondiscriminatory reason.

This standard might seem rather harsh on prospective plaintiffs. When *Setser* was first heard by the court of appeals, plaintiff was held to a lower standard in establishing his cause of action.⁹⁷ Under the lower standard, where a white applicant could be told that but for his race he would be employed, the court would find an absolute preclusion of whites.⁹⁸ Such an absolute preclusion is a violation of either Title VII or section 1981.⁹⁹ The existence of an affirmative action plan could be raised by the employer as an affirmative defense.¹⁰⁰ The court recognized this created the possibility of liability on the employer's part if he either did or did not institute a plan.¹⁰¹ Nonetheless, in its view, to allow a plan to serve as an absolute defense to a reverse discrimination suit would be allowing a license to discriminate.¹⁰² In the court's view, a rejected white applicant should be able to challenge the plan as invalid or, if valid, as invalidly applied.¹⁰³

Under this scheme, a plaintiff who is rejected in the implementation of a legitimate plan can still prevail in a section 1981 action. The court wisely rejected this upon rehearing *en banc*. If affirmative action plans are to exist as a remedy for past discrimination, then some race-conscious choices have to be

⁹¹ *Id.* at 969.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 638 F.2d 1137, 1143 (8th Cir. 1981).

⁹⁸ *Id.*

⁹⁹ 443 U.S. at 208.

¹⁰⁰ 638 F.2d at 1145.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1143-44.

¹⁰³ *Id.* at 1145.

made. To allow every white applicant rejected as a result of such a plan, where the plan was permissibly drawn under the criteria previously enunciated, to show the invalidity of the plan by his mere rejection, would put an end to affirmative action. The interests of white applicants are sufficiently protected by the court's later opinion, which allows a successful challenge under section 1981 and Title VII where the plan itself can be shown to be impermissible.

The court's opinion is also to be praised for equating standards for the permissibility of an affirmative action plan under section 1981 with those under Title VII. An employer, therefore, can structure a plan and be confident that it will withstand challenge under both statutes.¹⁰⁴ Were the standards different from each other, it is possible an employer could devise a plan permissible under one statute, which might be fatally framed under the other. This underscores the advantages of the court's adopting a *Weber*-type standard to determine the permissibility of affirmative action plans in *Valentine*. The same standard is to be applied to a plan in determining if it withstands all three likely challenges. After *Valentine* and *Setser*, an employer in the Eighth Circuit can structure a voluntary affirmative action plan along the lines enunciated in *Weber* confident it will withstand all likely challenges.

B.* *Another Limitation on National League of Cities:*

United Transportation Union v. Long Island Rail Road Co.¹

The Railway Labor Act² (RLA) was enacted in 1926, after more than fifty years of federal regulation of the railroads.³ Drafted jointly by representatives of the railroad unions, the RLA establishes a framework for collective bargaining between all interstate railroads and their employees.⁴ In the Act Congress gave all interstate railroad employees the right to organize and bargain collectively.⁵ To assist in the resolution of disputes between the railroads and their employees, Congress also created a series of intricate procedures which included hearings before the National Railroad Adjustment Board,⁶ and the National Mediation Board⁷ as well as detailed guidelines for arbitration.⁸ These

¹⁰⁴ See *supra* notes 66-74 and accompanying text.

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¹ 102 S. Ct. 1349 (1982).

² 45 U.S.C. §§ 151-164 (1981).

³ See 102 S. Ct. at 1355 n.13. Federal authority over the railroads began before the first transcontinental railroad was completed. See Pacific Railroad Act of 1862, 12 Stat. 489. The first comprehensive federal regulation was enacted in 1887. Interstate Commerce Act, 24 Stat. 379 (1887).

⁴ 102 S. Ct. at 1355.

⁵ 45 U.S.C. § 152 (1976).

⁶ 45 U.S.C. § 153 (1976).

⁷ 45 U.S.C. § 154 (1976).

⁸ 45 U.S.C. §§ 157-159 (1976).

complex procedures⁹ were enacted to help achieve one of the primary goals of the RLA — avoidance of disruptions in rail service.¹⁰

The RLA which explicitly covered privately-owned railroads, was first help applicable to state-owned railroads in *California v. Taylor*.¹¹ In *Taylor*, the Supreme Court noted that other federal statutes regulating interstate railroads and their employees had consistently been held to apply to publicly (state)-owned railroads despite a lack of explicit language referring to state-owned carriers.¹² Furthermore, the Court commented that the RLA was a comprehensive statute that may be obstructed by state action as well as by the actions of individuals.¹³ The *Taylor* Court therefore held that a state subjects itself to congressional regulation of its employment relationships through the commerce power when the state engages in interstate commerce by rail.¹⁴ Thus, according to the Court, the state's authority is subordinate to the congressional power to regulate interstate commerce, even when the state acts in its sovereign capacity in operating a railroad.¹⁵

In its landmark 1976, *National League of Cities v. Usery*¹⁶ decision, the Supreme Court again looked at federal regulation of employment relationships

⁹ In 1981, Congress made these procedures even more drawn out for disputes between publicly-owned commuter rail lines and their employees. 45 U.S.C. § 159a (1981). The Supreme Court in *United Transportation Union v. Long Island R. R. Co.* summarized the new process:

The law now provides for a "cooling-off period" of up to 240 days after failure of mediation. Any party to the dispute, or the Governor of any State through which the rail service operates, may request appointment of a Presidential Emergency Board to investigate and report on the dispute. If the dispute is not settled within 60 days after creation of the Emergency Board, the National Mediation Board must hold a public hearing at which each party must appear and explain any refusal to accept the Emergency Board's recommendations. The law then requires appointment of a second Emergency Board at the request of any party or Governor of an affected State. That Emergency Board must examine the final offers submitted by each party and must determine which is the most reasonable. Finally, if a work stoppage occurs, substantial penalties are provided against the party refusing to accept the offer determined by the Emergency Board to be most reasonable.

102 S. Ct. at 1357 n.21.

¹⁰ See *California v. Taylor*, 353 U.S. 553, 566 (1957). The purposes of the RLA also are set forth in 45 U.S.C. § 151a (1976):

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

Id.

¹¹ *California v. Taylor*, 353 U.S. 553, 560 (1957).

¹² *Id.* at 562.

¹³ *Id.* at 566.

¹⁴ *Id.* at 568.

¹⁵ *Id.*

¹⁶ 426 U.S. 833 (1976).

in state-owned service organizations.¹⁷ *National League of Cities* involved the constitutionality of commerce clause-based congressional efforts to regulate the wages and hours of state employees.¹⁸ The Court held that the Constitution limited congressional power to regulate commerce under the commerce clause by prohibiting the exercise of that power in such a way as to take from states the ability to make decisions essential to their existence as states.¹⁹ The Court based its decision in part on the tenth amendment and in part on a more general notion of federalism.²⁰ The Court also established standards for determining when congressional regulation of states was invalid.²¹

During the *Survey* year, in *United Transportation Union v. Long Island Rail Road Co.*,²² the Supreme Court addressed whether a state's operation of commuter rail lines fell within the range of activities immune from federal regulation under the *National League of Cities* doctrine. According to the Court, if the operation of the commuter rail lines was included within the sphere of functions traditionally regulated by the states or was an activity considered essential to a state's separate and independent existence, then federal regulation of employment relations through the RLA might be deemed inappropriate if other criteria set out in *National League of Cities* were met.²³ In *United Transportation Union*, the Court confirmed that the regulation of railroads, including commuter lines, was within the category of traditional federal functions.²⁴ Thus, federal regulation of employment relations between the state-owned railroad and its employees was not precluded by the tenth amendment or the more general federalism concerns discussed in *National League of Cities*; the commuter lines were subject to the provisions of the RLA.²⁵

The respondent in this *Survey* case, Long Island Rail Road Co. (LIRR), was a privately-owned carrier until it was acquired by the State of New York in 1966.²⁶ The railroad provides both freight and passenger service, although the vast majority of its business arises from its commuter services to and from New York City.²⁷ After the acquisition of the LIRR by the State, LIRR continued to operate under the collective bargaining procedures of the RLA.²⁸ In 1978,

¹⁷ *Id.*

¹⁸ *Id.* at 837.

¹⁹ *Id.* at 842-43, 855.

²⁰ *Id.* at 851. The tenth amendment provides:

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.

U.S. CONST. amend. X.

²¹ These standards recently have been clarified and condensed into a three-prong test established in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981). See *infra* notes 50-51 and accompanying text.

²² 102 S. Ct. 1349 (1982).

²³ *Id.* at 1353. The Court had previously reaffirmed *California v. Taylor* in *National League of Cities*. 426 U.S. at 854 n.18. The Court noted that operation of an interstate railroad was not an integral part of a state's governmental activities. *Id.*

²⁴ 102 S. Ct. at 1354.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1351 n.1.

²⁸ *Id.* at 1351.

the petitioner, the United Transportation Union (Union), notified the LIRR that it wished to start negotiations. Collective bargaining began pursuant to the RLA procedures.²⁹ A thirty-day "cooling off" period was triggered when the National Mediation Board released the case from mediation for lack of agreement.³⁰ RLA procedures³¹ permitted the Union to strike at the end of this thirty-day period.

One day before the expiration of the "cooling off" period, in anticipation of a challenge by the RLA, the Union sought a declaratory judgment in federal court.³² The Union asked that the court decide whether the dispute was governed by the RLA or by the Taylor Law, a state statute prohibiting strikes by public employees.³³ The next day, a brief strike ensued. Pursuant to the RLA,³⁴ the President of the United States imposed an additional sixty-day "cooling off" period.³⁵ A few days before this sixty-day period expired, the LIRR filed suit in state court, seeking to enjoin the impending strike under the Taylor Law.³⁶ Before the state court heard the case, the District Court for the Eastern District of New York ruled in the Union's action for a declaratory judgment.³⁷ The District Court held that the LIRR was within the definition of a carrier under the RLA³⁸ and thus subject to its provisions rather than the Taylor Law.³⁹ Declaratory relief was ordered.⁴⁰ The District Court also considered and rejected a *National League of Cities* doctrine argument that operation of state-owned commuter railroads was an integral state function and therefore immune from federal regulation under the RLA.⁴¹

On appeal, the Second Circuit reversed the district court's holding, and found that *National League of Cities* did provide immunity from the RLA.⁴² The court held that transportation of commuters was within the *National League of*

²⁹ *Id.*

³⁰ The case had gone through preliminary negotiations and mediation before the National Mediation Board without success. *Id.*

³¹ Railway Labor Act, 45 U.S.C. § 156 (1976).

³² 102 S. Ct. at 1352.

³³ N.Y. CIV. SERV. LAW § 210(1) (1978). The Taylor Law, N.Y. CIV. SERV. LAW §§ 200-214 (1978), also governs collective bargaining by public employees. This law was enacted to protect the public by assuring "the orderly and uninterrupted operations and functions of government" through the prohibition of strikes by public employees. See *United Transportation Union v. Long Island R.R. Co.*, 634 F.2d at 25.

³⁴ Railway Labor Act, 45 U.S.C. § 160 (1976).

³⁵ 102 S. Ct. at 1352.

³⁶ The LIRR had responded to the declaratory judgment suit by asserting that there was no controversy because it did not believe that the Taylor Law applied to the LIRR. *Id.* at 1352 n.2. After responding to the declaratory judgment suit, however, the LIRR converted to a public benefit corporation. The LIRR believed that this conversion removed the LIRR from the RLA's regulation and put it under the provisions of the Taylor Law. *Id.* at 1352.

³⁷ *United Transportation Union v. Long Island R.R. Co.*, 609 F. Supp. 1300 (E.D.N.Y. 1980).

³⁸ Railway Labor Act, 45 U.S.C. § 151 (1976).

³⁹ 609 F. Supp. at 1305.

⁴⁰ *Id.* The court permanently enjoined the LIRR from proceeding under the Taylor Law in state court and enjoined the Union from striking until the Second Circuit Court of Appeals had reviewed the decision. *Id.* at 1309.

⁴¹ *Id.* at 1306 n.4.

⁴² *United Transportation Union v. Long Island R.R. Co.*, 634 F.2d 19 (1980).

Cities definition of an integral governmental function, particularly since the local government could step in to provide the important public service of commuter transportation when it was unavailable in the private marketplace.⁴³ The court also applied the balancing test of federal versus state interest⁴⁴ proposed by Justice Blackmun in his concurrence in *National League of Cities*.⁴⁵ This test weighs the state's interest in regulating an activity against the federal interest.⁴⁶ If the federal interest is found to be "demonstrably greater" than the state interest, then federal regulation of an integral state function is appropriate.⁴⁷ The Second Circuit determined that the federal interest in preserving the commuter railroad employees' right to strike was not "demonstrably greater" than the state interest, as expressed in the Taylor Law, of preventing strikes in order to ensure continuous commuter service.⁴⁸

Reversing the Second Circuit's decision, the Supreme Court, in a unanimous opinion, held that congressional regulation of labor relations, when applied to a state-owned passenger railroad, does not impair the State's ability to carry out its sovereign function.⁴⁹ The Court reached this holding by applying the three-prong test recently developed in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*⁵⁰ for evaluating claims under the *National League of Cities* doctrine. This three-prong test calls for a showing that the federal regulation regulates the "States as States," that the regulation addresses matters that are "attributes of State sovereignty" and that the regulation impairs the state's ability to "structure integral operations in areas of traditional functions."⁵¹ The third prong of the test, the Court noted, was the key to the resolution of the LIRR's claim of immunity from federal regulation under the *National League of Cities* doctrine.⁵² Based on its examination of precedent, the Court found that the third prong of the test was not satisfied and that "operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation. . . ."⁵³ The status of the

⁴³ *Id.* at 27, 29. See also *infra* note 68.

⁴⁴ *Id.* at 29.

⁴⁵ 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 634 F.2d at 30.

⁴⁹ 102 S. Ct. at 1354.

⁵⁰ 452 U.S. 264 (1981).

⁵¹ In *Hodel*, the Court stated:

[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'

Id. at 287-88. (Citations omitted).

Meeting the three prongs of the test is not always sufficient to find federal regulation invalid, however. In *Hodel* and *United Transportation*, the Court noted an override factor of a federal interest "demonstrably greater" than the state's interest. *Id.* See *infra* notes 72-74 and accompanying text.

⁵² 102 S. Ct. at 1353.

⁵³ *Id.* at 1354.

LIRR as a passenger railroad, the Court observed, did not warrant a result different from previous holdings by the Court involving freight carriers.⁵⁴

The Court also noted that operation of passenger railroads traditionally has been a function of private industry rather than of state or local authorities.⁵⁵ Therefore, it observed, states should not be allowed to circumvent federal regulation of railroads simply by acquiring them.⁵⁶ The Court pointed out that just as the federal government could not seek to regulate traditional state functions, the state may not erode federal authority in areas traditionally subject to federal regulation by assuming functions that were previously performed by private industry.⁵⁷ The Court reasoned that permitting states to circumvent federal regulations would "destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system."⁵⁸

Moreover, the Court maintained, application of the RLA to the state's operation of the LIRR was not likely to impair the state's ability to act as a state or to endanger its separate and independent existence.⁵⁹ The Court noted that the state had acquired the LIRR knowing that it was subject to the RLA and had operated it under federal regulation for thirteen years following its acquisition.⁶⁰ Thus, the state's claims that application of the RLA would endanger its separate and independent existence or its ability to make essential decisions regarding integral governmental functions were unjustified.

The *United Transportation* Court correctly decided the issue of whether federal regulation of labor relations through the RLA was appropriate for state-owned commuter lines. This decision is a logical extension of the Court's holdings in prior railroad cases. The Court has, in several previous cases, held that regulation of the railroads is a federal function.⁶¹ It even specifically has held that regulation of employment relations through the RLA was applicable to state-owned railroads.⁶² These past holdings,⁶³ the long history of federal regulation of the railroads,⁶⁴ and the apparent importance of a uniform regulatory scheme for railroad labor relations⁶⁵ provide ample justification for a determination that the regulation of railway employment relations is not within the range of state activities immune from federal regulation under the *National League of Cities* doctrine.

The Supreme Court's decision, however, summarily rejected the Second Circuit's effort to distinguish past decisions from the instant case on the basis

⁵⁴ *Id.* This was particularly true in light of the recent amendment to the RLA applying to publicly owned commuter rail lines. See *supra* note 9.

⁵⁵ *Id.* at 1354.

⁵⁶ *Id.* at 1356.

⁵⁷ *Id.* at 1355.

⁵⁸ *Id.* at 1356.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936).

⁶² *California v. Taylor*, 353 U.S. 553, 568 (1957).

⁶³ See *supra* note 49.

⁶⁴ See 102 S. Ct. at 1354.

⁶⁵ *Id.*

that they had dealt with freight carriers rather than commuter railroads.⁶⁶ The Court noted only that operation of passenger railroads, like the operation of freight carriers, has traditionally been a function of private industry.⁶⁷ Even if the Court had addressed the issue of whether the transportation of commuters by railroad or other means is an activity immune from federal regulation under the *National League of Cities* doctrine, however, the same conclusion would have been reached in this case. The Second Circuit's determination that the regulation of commuter line labor relations was an integral part of the state's governmental activities was based upon a finding that provision of commuter transportation was an important public service not available in the private marketplace.⁶⁸ Yet, the test as recently articulated by the Court in *Hodel*, is not whether the service provided by the state is important to the public, but rather is the three-prong test derived from *National League of Cities*.⁶⁹ Clearly, the operation of the railroad under federal regulation for thirteen years indicates that federal regulation does not endanger the separate and independent existence of the state — the third prong of the *National League of Cities* test — nor do the facts of this case show that the other two prongs of the test are met. Thus, federal regulation of commuter railroads is justifiable. Whether federal regulation of other forms of commuter transportation is appropriate was not an issue in this case.

United Transportation Union was not the first case to establish the three-prong test for *National League of Cities* claims. In *Hodel*, the Court first clarified the *National League of Cities* decisions by articulating the three-prong test.⁷⁰ The Court also added an over-ride factor⁷¹ derived from Justice Blackmun's "balancing test" as proposed in *National League of Cities*.⁷² This over-ride factor comes into consideration when a state interest has successfully met the requirements of the three-prong test.⁷³ If there is a federal interest that is "demonstrably greater" than the state interest, then the state interest is subordinate to the federal interest and federal regulation is warranted.⁷⁴ Consideration of *Hodel* and *United Transportation Union* indicates the Court's reluctance to expand the range of activities immune from federal regulation under the *National League of Cities* doctrine. By re-affirming that the tightened requirements for a new activity to be included among the immune state functions consist of both the three-prong test and the federal interest over-ride factor,⁷⁵ the Court has suggested that such a classification will not be granted lightly.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Both the nature of the public service and its availability in the marketplace were suggested as parts of the test to determine "integral governmental functions." *United Transportation Union v. Long Island R.R. Co.*, 634 F.2d 19, 29 (2d Cir. 1980).

⁶⁹ See *supra* note 51 and accompanying text.

⁷⁰ 452 U.S. at 287-88. See also *supra* note 51.

⁷¹ *Id.* at 288 n.29.

⁷² 426 U.S. at 856. See also *supra* notes 45-47 and accompanying text.

⁷³ *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 n.29 (1981).

⁷⁴ *Id.*

⁷⁵ 102 S. Ct. at 1353 n.9.

There is further support for this inference in the Court's comment that states may not erode federal authority in areas traditionally subject to federal regulation.⁷⁶ This statement appears to cut off one avenue of expansion of the range of immune interests. At least three ways to expand the category of immune activities may be imagined. Immune activities might include: 1) activities traditionally performed and regulated by the states; 2) activities previously performed by private industry subject to neither federal nor state regulation and now assumed by the state; 3) activities previously performed by private industry subject to federal regulation and now assumed by the state. In *United Transportation Union*, the Court apparently has ruled out expansion of the immune functions by the third method. Whether this "erosion of federal authority" would be prohibited even when a state were forced to assume a previously private function that was federally regulated⁷⁷ presents an interesting question not addressed by the Court. Certainly, in light of the current administration's proposals that states assume certain functions now performed by the federal government,⁷⁸ such a question may become crucial. If this *United Transportation Union* is an indication of the Court's current attitude toward *National League of Cities*, future decisions may very well see a further restriction of that doctrine.

C.* *Employee Free Speech and Agency Shop Agreements: School Committee of Greenfield v. Greenfield Education Association*¹

Section 2(2)² of the National Labor Relations Act leaves regulation of the labor relations in state and local governments to the states.³ In exercising this

⁷⁶ *Id.* at 1355.

⁷⁷ An example of such a situation is the case of a state forced to assume certain public assistance programs. Many of these programs were handled through the private sector in the past. Once the government assumed the function of providing public assistance, however, the programs were subjected to federal regulation. If a state were now forced to assume the function of providing these programs, the question whether the state would then be required to comply with all the federal regulations arises.

⁷⁸ The Reagan administration has proposed that the states assume responsibility for several programs dealing with health, social welfare and education. See, e.g., N.Y. Times, Mar. 3, 1981, at 1, col. 4.

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¹ 385 Mass. 70, 109 L.R.R.M. 2420 (1982).

² 29 U.S.C. § 152(2) (1976).

³ Section 2(2) states in pertinent part:

The term "employer" includes any person . . . but shall not include . . . any State or political subdivision. . . .

29 U.S.C. § 152(2) (1976). By excluding state governments from the statutory definition, the Act exempts them from all restrictions imposed on employers in subsequent sections. *Id.* While there is no uniform national legislation regulating state employees, most states have enacted legislation recognizing public sector collective bargaining and other fundamental labor rights. See ZWERDLING, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. IND. & COMM. L. REV. 993, 993-94 & n.5 (1976) [hereinafter cited as ZWERDLING, *Public Employees*].

regulatory authority, a significant decision made by a state is the selection of the "shop" model it will authorize for its employees.⁴ One alternative, which has been adopted by a number of states,⁵ is to authorize the "agency shop" agreement. Under this arrangement, government employees need not join the union representing their bargaining unit, but nonetheless must contribute toward the financial support of that union.⁶

In *Abood v. Detroit Board of Education*,⁷ the Supreme Court considered the constitutionality of such an agency shop arrangement.⁸ *Abood* dealt with a Michigan statute⁹ whereby every employee represented by a union — even though not a union member — could be required to pay to the union a fee equal to union dues.¹⁰ The statute was challenged first on the ground that by requiring any contribution to unions, it effectively forced dissenting employees to "join" the union in violation of their first amendment rights to freedom of association;¹¹ and second, on the contention that by compelling payments which unions used toward political and ideological activities, the statute impinged upon objecting employees' rights to freedom of speech.¹² The *Abood* Court held that the Michigan statute could constitutionally compel the payment of that portion of the agency fee used to finance unions' exclusive bargaining, contract administration and grievance adjustment activities.¹³ The

⁴ The form of the shop agreements authorized by state statute for its public sector employees will determine to a degree the rights and responsibilities of the individual members of employee bargaining units. ZWERDLING, *Public Employees*, *supra* note 3, at 1004. Thus, once a bargaining unit selects a union as its exclusive bargaining agent, each employee may be required to join or to contribute proportionally to the financial support of the union, depending on the shop model in force. *Id.* The rationale for allowing any such shop agreement is to ensure the fair distribution of costs for collective bargaining among all employees who benefit therefrom. *Id.* at 1004-05. The forms these union security devices have taken include the closed shop, the union shop and the agency shop. *Id.* at 1005. The closed shop, which ensured union financial support by precluding employment of non-union workers, was outlawed by the National Labor Relations Act. 29 U.S.C. § 158(a)(3) (1976). The union shop agreement mandates that all bargaining unit members represented by an exclusive bargaining agent must, within a specified period after commencing work, join the union and pay all dues and initiation fees as a condition of continued employment. ZWERDLING, *Public Employees*, *supra* note 3, at 1006. The agency shop allows employees the choice of gaining or refusing union membership. *Id.* at 1007. Employees who refuse to join the union, however, are still required to pay a fee to the exclusive bargaining agent, while having no voice in the union's affairs. *Id.*

⁵ See, e.g., ALASKA STAT. §§ 23.40.110, 23.40.220 (1979); HAWAII REV. STAT. §§ 89.3, 89.4 (1981); KY. REV. STAT. § 34.050 (1980); MASS. GEN. LAWS ANN. ch. 150E § 12 (West 1982); MICH. COMP. LAWS § 423.210 (1980); MINN. STAT. ANN. § 179.65 (1977); MONT. CODES ANN. § 59-1605 (1981); OR. REV. STAT. §§ 243.650(10), 243.672(1)(c) (1981); R.I. GEN. LAWS §§ 28-9.3-7, 36-11-2 (1977); VT. STAT. ANN. tit. 21 § 1722, 1726 (1966); WIS. STAT. ANN. §§ 111.70, 111.81 (West 1979).

⁶ See *supra* note 4. See also *Ball v. City of Detroit*, 84 Mich. App. 383, 98 L.R.R.M. 3137 (1978), *construing*, MICH. COMP. LAWS § 423.210.

⁷ 431 U.S. 209, 95 L.R.R.M. (BNA) 2411 (1977).

⁸ *Id.* at 211, 95 L.R.R.M. (BNA) at 2413.

⁹ 1973 Mich. Pub. Acts, No. 25, *codified as* MICH. COMP. LAWS § 423.210(1)(c).

¹⁰ 431 U.S. at 211, 95 L.R.R.M. (BNA) at 2413.

¹¹ *Id.* at 222, 95 L.R.R.M. (BNA) at 2416.

¹² *Id.* at 234, 95 L.R.R.M. (BNA) at 2420.

¹³ *Id.* at 225-26, 95 L.R.R.M. (BNA) at 2417, n.10. The Court in *Abood* rejected the claim that compelled support of a union is equal to compelled membership. *Id.* at 217, n.10, 95

Court also held, however, that the statute could not mandate the payment of such fees to finance union political activities.¹⁴ The Court noted that its decision would require difficult line-drawing by courts between permissible and prohibited agency fees.¹⁵ Because *Abood* dealt merely with a motion to dismiss, however, the Court did not have to dwell on what would constitute an adequate remedial scheme if impermissible service fee charges were proved.¹⁶ Nonetheless, the *Abood* Court in passing did note with apparent approval the presence of an internal union rebate procedure to facilitate the refunding of improperly exacted agency fees.¹⁷

During the *Survey* year, the Supreme Judicial Court of Massachusetts in *School Committee of Greenfield v. Greenfield Education Association*¹⁸ considered more fully the adequacy of such a rebate procedure in light of *Abood*'s guiding principles. While noting *Abood*'s apparent approval of the procedure, the Supreme Judicial Court in *Greenfield* refused to read a state statute as mandating that dissenting employees submit to internal union rebate remedies, and declared that if the statute were so construed it would run afoul of the free speech principles announced in *Abood*.¹⁹

The *Abood* Court's determination that only a portion of the service fee could be compelled was a result of the Court's recognition of the strong competing interests at issue.²⁰ The Court reasoned that in fashioning an appropriate remedy once an impermissible service fee was shown, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability

L.R.R.M. (BNA) at 2414. The Supreme Court noted that it had previously upheld statutes requiring employee financial support of union representatives in the union shop context, *id.*, and concluded that those cases were controlling on the issue of agency shop statutes. *Id.* at 226, 95 L.R.R.M. (BNA) at 2417. The Court apparently has not yet addressed the issue of whether a state statute could in fact require employees to join, rather than merely contribute toward the financial support of, their bargaining unit representative. *Id.* at 217, n.10, 95 L.R.R.M. at 2414, n.10.

¹⁴ *Id.* at 235, 95 L.R.R.M. (BNA) at 2421.

¹⁵ *Id.* at 236, 95 L.R.R.M. (BNA) at 2421.

¹⁶ *Id.* at 236-37, 95 L.R.R.M. (BNA) at 2421-22.

¹⁷ *Id.* at 240 and n.41, 95 L.R.R.M. (BNA) at 2423.

¹⁸ 385 Mass. 70, 109 L.R.R.M. (BNA) at 2420 (1982).

¹⁹ *Id.* at 79, 109 L.R.R.M. (BNA) at 2425.

²⁰ 431 U.S. at 222, 95 L.R.R.M. (BNA) at 2416. The *Abood* Court recognized that compelled financial support of labor union representatives involved a balancing between the public interest and individual first amendment rights. *Id.* The Court reasoned that the public's interest in promoting labor peace and stability through effective collective bargaining representation, funded by a fair distribution of costs to all benefiting employees, validated the statutory requirement that all employees contribute toward the union costs for collective bargaining activities. *Id.* at 225-26, 95 L.R.R.M. (BNA) at 2417. Conversely, the Court concluded that an individual's right to his own beliefs invalidated any statutorily compelled contribution toward a union's political or ideological activities. *Id.* at 234-35, 95 L.R.R.M. (BNA) at 2420-21. "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* Thus, the *Abood* Court established a "two-tiered analysis" in which infringements of first amendment free speech guarantees were accorded greater protection than free association rights in the context of compelled financial support of labor unions. *Id.* at 254, 95 L.R.R.M. (BNA) at 2428 (Powell, J., concurring in the judgment).

to require every employee to contribute to the cost of collective-bargaining activities."²¹ The *Abood* Court then implied that an internal rebate procedure, by which an objecting employee could gain refund of the proportional share of his service fee charge used by the union for political activities, satisfied these twin aims.²² While recognizing the competing interests involved in service fee apportionment, the Supreme Judicial Court of Massachusetts in *Greenfield* disagreed with the *Abood* Court's implied conclusion regarding internal union rebate procedures.²³ The *Greenfield* court noted that requiring a dissenting employee to resort to a union's internal rebate mechanism after payment of the service fee would work an interim constitutional deprivation of his freedom of speech.²⁴ On the other hand, the state court pointed out, enjoining the collection of any fee prior to a determination of the appropriate amount would deprive a union only of a right created by statute and contractual agreement.²⁵ The *Greenfield* court's analysis thus contained a subtle alteration in the comparative significance accorded to the principles of free speech and labor peace by *Abood*. By refusing to require prepayment of the agency fee, the Massachusetts Supreme Judicial Court concluded that on balance, the protection of individual constitutional rights to free speech must take precedence over union statutory rights to collective financial support. The adverse impact on union interests stemming from this subtle shift was mitigated to a degree, however, by the *Greenfield* court's conclusion that dissenting employees could constitutionally be required to pay an initial service fee into an escrow account pending final determination of an appropriate apportionment.²⁶

In *Greenfield*, two non-union member teachers refused to pay agency service fees required by the agency shop clause of the collective bargaining agreement between the School Committee of Greenfield (the committee) and the Greenfield Education Association (the association).²⁷ The agency shop arrangement was expressly authorized by state statute.²⁸ The association demanded the teachers' dismissal.²⁹ The committee refused, and the association sought arbitration of the dispute pursuant to a bargaining agreement provision.³⁰ The committee (joined by the teachers) then brought an action against

²¹ *Id.* at 237, 95 L.R.R.M. (BNA) at 2422. The Court then canvassed the procedural requirements that any restitutional remedy scheme would have to satisfy. *Id.* at 238-40, 95 L.R.R.M. (BNA) at 2422-23. The Court declared that a dissenting employee could only be required to pay a fraction of the total union dues equal to the fraction of the total union budget used for permissible purposes. *Id.* at 238 and n.38, 95 L.R.R.M. (BNA) at 2422. Moreover, in lodging a protest to the use of his service fees for political activities, a dissenting employee need only manifest a general opposition to any political expenditure. *Id.* at 240-41, 95 L.R.R.M. (BNA) at 2423. Once such a protest is entered, the burden of proving the validity of the apportionment of the dissenter's agency fee swings to the union. *Id.*

²² *Id.* at 240, n.41, 95 L.R.R.M. (BNA) at 2423, n.41.

²³ 385 Mass. at 81 & n.7, 109 L.R.R.M. (BNA) at 2426.

²⁴ *Id.* at 83, 109 L.R.R.M. (BNA) at 2426.

²⁵ *Id.* at 83-84, 109 L.R.R.M. (BNA) at 2426-27.

²⁶ *Id.* at 84-85 & n.9, 109 L.R.R.M. (BNA) at 2427.

²⁷ *Id.* at 73, 109 L.R.R.M. (BNA) at 2422.

²⁸ *Id.* at 72 & n.1, 109 L.R.R.M. (BNA) at 2422.

²⁹ *Id.* at 73, 109 L.R.R.M. (BNA) at 2422.

³⁰ *Id.*, 109 L.R.R.M. (BNA) at 2422.

the association for declaratory judgment on whether the committee could dismiss the teachers on the association's demand without violating the teachers' statutory or constitutional rights.³¹ All parties agreed that the teachers constitutionally could be compelled to pay their proportional share of the collective bargaining, contract administration and grievance adjustment expenses.³² Furthermore, all agreed that the teachers could not be compelled to support the association's social, political or speech activities.³³ The association admitted that a portion of the agency fee at issue was used for the latter purposes.³⁴ The association contended, however, that Massachusetts law required the teachers to pay the service fee charge set by the union, and then to exhaust the association's internal rebate procedure before challenging that apportionment before another tribunal.³⁵ Conversely, the teachers claimed that the internal rebate procedure for impermissibly obtained service fees violated their first amendment rights to freedom of speech.³⁶ The trial court ordered the teachers to pay the disputed fee into the court and then reported its decision to the appeals court for further proceedings.³⁷

Granting the association's request for direct appellate review, the Supreme Judicial Court affirmed with modifications the order of the Superior Court judge.³⁸ The *Greenfield* court rejected the association's contention that Massachusetts law compels full payment of agency service fees and exhaustion of internal union rebate procedures prior to adjudication of the permissible amount.³⁹ The state court noted that the rebate procedure envisioned by the union would not ensure that the "onus of justification" for the apportionment of the service fee would "remain at all times on the association."⁴⁰ Furthermore, the court declared that mandating resort to rebate procedures would work an interim deprivation of the dissenting employees' opportunity to engage in expressive activities with those funds, while forcing them to subsidize temporarily the ideologically objectionable activities of the union.⁴¹ The court reasoned, therefore, that if the state statute in question did mandate prior recourse to internal union rebate procedures, the statute would be constitutionally suspect.⁴² The *Greenfield* court avoided striking down the state law,

³¹ *Id.* at 71, 109 L.R.R.M. (BNA) at 2421.

³² *Id.* at 78, 109 L.R.R.M. (BNA) at 2424.

³³ *Id.*, 109 L.R.R.M. (BNA) at 2424 (citing, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 95 L.R.R.M. 2411 (1977)).

³⁴ 385 Mass. at 78, 109 L.R.R.M. (BNA) at 2424.

³⁵ *Id.*, 109 L.R.R.M. (BNA) at 2424.

³⁶ *Id.* at 78-79, 109 L.R.R.M. (BNA) at 2424.

³⁷ *Id.* at 71, 109 L.R.R.M. (BNA) at 2421. The trial court also granted summary judgment to the committee on certain other issues, and denied the association's motions for summary judgment. *Id.*, 109 L.R.R.M. (BNA) at 2421. The trial court's action in reporting its decision to the appeals court was done pursuant to a state procedural rule allowing such certifications after verdicts or findings of fact. MASS R. CIV. P. 64, 365 Mass. 831 (1974).

³⁸ 385 Mass. at 71, 109 L.R.R.M. (BNA) at 2421.

³⁹ *Id.* at 79, 109 L.R.R.M. (BNA) at 2425.

⁴⁰ *Id.* at 82, 109 L.R.R.M. (BNA) at 2426. The *Greenfield* court in this regard was apparently referring to the procedural requirements for a valid remedial scheme set out in *Abood*. See *supra* note 19.

⁴¹ 385 Mass. at 84, 190 L.R.R.M. (BNA) at 2426.

⁴² *Id.* at 79, 109 L.R.R.M. (BNA) at 2425.

however, by tailoring its construction of the statute to meet the constitutional constraints announced in *Abood*.⁴³ The *Greenfield* court found that the language of the challenged statute was permissive only, and did not require that an internal rebate procedure, once set up, must be employed by objecting employees in the first instance.⁴⁴ Rather, the court deemed the state statute only to impose a duty on unions to create rebate procedures by which an objecting employee may challenge his service fee charge.⁴⁵ The court then concluded that the statute affords a dissenting employee the option of filing a prohibited practice complaint before the state Labor Relations Commission.⁴⁶ The Court declared that in considering such a complaint the Commission would then determine the appropriate amount of the disputed fee.⁴⁷ Furthermore, the *Greenfield* court decided that the commission could require the objecting employee to pay the challenged service fee into an escrow account.⁴⁸ Finally, the court charged the Commission with the duty of giving prompt attention to service fee complaints, and called upon the agency to adopt procedures for prompt preliminary delivery to the union of that portion of the fee clearly payable.⁴⁹ The court then remanded the case to the Superior Court with orders to enter declaratory judgment consistent with its holding, and to transfer the disputed fee, which was on deposit with the trial court, to the state Labor Relations Commission.⁵⁰

The *Greenfield* court's determination that mandating recourse to internal union rebate procedures would be constitutionally suspect was essentially a policy determination. The *Abood* opinion, while mentioning the rebate mechanism, expressly refused to consider whether that procedure would safeguard dissenting employees' first amendment free speech rights.⁵¹ Hence, the *Greenfield* court's conclusion that the procedure would infringe free speech rights resulted from its consideration of the delicate balance of interests at issue.⁵² The Massachusetts Supreme Judicial Court's analysis focused upon the source of the competing interests it was weighing.⁵³ The high court then concluded that because the employees' free speech right sprang from the Constitution, it took precedence over the union's right to financial support, which was based on statute and contractual agreement.⁵⁴ The *Greenfield* court's reasoning apparently did not take into account the fact that the Supreme Court

⁴³ *Id.* at 79-80, 109 L.R.R.M. (BNA) at 2425.

⁴⁴ *Id.* at 81, 109 L.R.R.M. (BNA) at 2425.

⁴⁵ *Id.* at 85, 109 L.R.R.M. (BNA) at 2427. In conformity with the procedural requirements laid down in *Abood*, see *supra* note 19, the *Greenfield* court declared that once a general objection to the use of service fee proceeds toward any ideological activity by a union is voiced, the burden of proving the accuracy of the service fee's apportionment between collective bargaining and ideological expenses would swing to the union. *Id.*, 109 L.R.R.M. (BNA) at 2427.

⁴⁶ *Id.*, 109 L.R.R.M. (BNA) at 2427.

⁴⁷ *Id.*, 109 L.R.R.M. (BNA) at 2427.

⁴⁸ *Id.*, 109 L.R.R.M. (BNA) at 2427.

⁴⁹ *Id.*, and n.9, 109 L.R.R.M. (BNA) at 2427.

⁵⁰ *Id.* at 85, 109 L.R.R.M. (BNA) at 2427.

⁵¹ 431 U.S. at 242, n.45.

⁵² 385 Mass. at 85, 109 L.R.R.M. (BNA) at 2427.

⁵³ *Id.* at 84, 109 L.R.R.M. (BNA) at 2426-27.

⁵⁴ *Id.*, 109 L.R.R.M. (BNA) at 2426-27.

in *Abood*, weighing unions' statutory rights to financial support against dissenting employees' constitutional rights to freedom of association, concluded that that constitutional guarantee could be overshadowed by the legislatively created right.⁵⁵ The *Greenfield* court's holding nevertheless is consistent with *Abood* because it recognizes the Supreme Court's placement of free speech guarantees on a higher tier of protection than associational rights in the context of service fee disputes.⁵⁶ Thus, the *Abood* ruling that free speech rights prevailed over the state's interest in securing labor peace and stability was construed by the *Greenfield* court to mean that even temporary infringements of the freedom of speech to facilitate union financial support cannot be allowed.⁵⁷

Whether *Abood* demands the *Greenfield* extension of free speech protection in the apportionment of service fees to temporary deprivation, however, is a close question. Other state courts, considering the balance between union financial support rights and employee free speech guarantees have reached the opposite conclusion, holding that dissenting employees must pay the initial service fee to the union pending determination of the permissible amount.⁵⁸ Recognizing *Abood* as controlling on the issue, these courts construe that precedent to allow the temporary deprivation of free speech rights.⁵⁹ A court's decision on the validity of mandating employee recourse to internal union rebate procedures will therefore turn on the relative importance placed on the competing interests of union stability and free speech by a court. In *Greenfield*, the Massachusetts high court deemed the guarantee of the dissenting employees' freedom of speech to be the paramount consideration, and thus construed the state statute to impose no burdens on that right.⁶⁰

The *Greenfield* court, however, did recognize the significance of ensuring continued employee collective-bargaining representation, and tailored its remedial scheme to minimize the decision's adverse impact on unions.⁶¹ By disallowing the collection of service fees from objecting employees prior to determination of the appropriate amount, the state supreme court noted that it was depriving the association of both the amount in dispute and the amount to which the union was clearly entitled.⁶² Moreover, the *Greenfield* court noted that its refusal to allow pre-determination fee collection was in apparent conflict

⁵⁵ 431 U.S. at 225-26, 95 L.R.R.M. (BNA) at 2417.

⁵⁶ See *supra* note 20.

⁵⁷ 385 Mass. at 85, 109 L.R.R.M. (BNA) at 2426-27.

⁵⁸ See, e.g., *White Cloud Educ. Ass'n v. White Cloud Bd. of Educ.*, 101 Mich. App. 309, 319 (1980); *Browne v. Milwaukee Bd. of School Directors*, 83 Wisc.2d 316, 335-40, 98 L.R.R.M. (BNA) 2574, 2581 (1978); *Association of Capitol Powerhouse Engineers v. State*, 89 Wash.2d 177, 188 (1977).

⁵⁹ See, e.g., *White Cloud Educ. Ass'n v. White Cloud Bd. of Educ.*, 101 Mich. App. 309 (1980). Significantly, the Michigan appeals court in *White Cloud*, while agreeing that the *Abood* Court considered free speech guarantees paramount, ordered the initially determined service fee paid, and declared that free speech rights were adequately safeguarded by state statutes affording immediate access to declaratory judgments. *Id.* at 319. Thus, in its balance of the competing interests involved in agency shop fees, the *White Cloud* court implicitly deemed union rights to support to weigh more heavily than free speech rights.

⁶⁰ 385 Mass. at 85, 109 L.R.R.M. (BNA) at 2427.

⁶¹ *Id.*, 109 L.R.R.M. (BNA) at 2427.

⁶² *Id.* and n.9, 109 L.R.R.M. (BNA) at 2427.

with Supreme Court rulings on the use of injunctive remedies in fee collection disputes.⁶³ The *Greenfield* court declared, however, that the injury to the union could be minimized, and the conflict with prior Supreme Court rulings avoided, by requiring the objecting employees to pay the disputed service fee into an escrow account.⁶⁴ The *Greenfield* court declared that the state Labor Relations Commission could constitutionally require such escrowing pending that agency's determination of the permissible fee amount.⁶⁵ By escrowing the challenged service fee, the *Greenfield* court reasoned that delivery to unions of the permissible portion could be more quickly effected once the Commission's determination was made, thus shortening the duration of the union's deprivation.⁶⁶ The Massachusetts high court also called on the state agency to adopt procedures to aid in the prompt determination of fee disputes, including an immediate preliminary procedure to return the undisputed portion of the service fee to the union.⁶⁷ The state court concluded that by escrowing the challenged fees, and establishing procedures for prompt determination and delivery of the permissible amount, the free speech rights of objecting employees would be protected without "allowing an association to be 'crippled by nonaccess to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment.'"⁶⁸

The *Greenfield* court's determination that dissenting employees could constitutionally be required to pay the disputed service fee into an escrow account is somewhat at odds with its conclusion that free speech rights are paramount over union support rights. As noted by the court, mandatory payment of service fees to finance union political or ideological activities is unconstitutional not only because it forces the support of objectionable speech, but also because it hinders dissenting employees' ability to finance the expression of their own views.⁶⁹ The court recognized that internal rebate procedures would force dissenting employees to support objectionable union ideological activities temporarily, and concluded that such procedures would be constitutionally

⁶³ *Id.* at 84, 109 L.R.R.M. (BNA) at 2427, citing, *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 119-20, 53 L.R.R.M. (BNA) 2128, 2134 (1963). The *Greenfield* court noted that the Supreme Court in *Allen* had rejected the use of the injunctive remedy against fee collection because it was too damaging to the union. 385 Mass. at 85, 109 L.R.R.M. (BNA) at 2427. The *Greenfield* court thus implicitly recognized that by denying pre-determination fee collection, it was effectively enjoining that collection in contravention to *Allen*. *Id.*, 109 L.R.R.M. (BNA) at 2427.

⁶⁴ *Id.* at 84-85, 109 L.R.R.M. (BNA) at 2427. While the *Greenfield* court did not detail who would be responsible for the administration of the escrowing process, the court did declare that the account must be "neutral." *Id.*, 109 L.R.R.M. (BNA) at 2427. This requirement of neutrality was apparently meant by the court to reject the result sought by the association in its effort early in the controversy to force the dissenting employees to pay the disputed fee into an escrow account under its control. *Id.* at 73, 109 L.R.R.M. (BNA) at 2422. Thus, the *Greenfield* opinion appears to require that the escrow account be controlled by the state Labor Relations Board pending determination by that agency of the appropriate amount.

⁶⁵ *Id.* at 85, 109 L.R.R.M. (BNA) at 2427.

⁶⁶ *Id.*, 109 L.R.R.M. (BNA) at 2427.

⁶⁷ *Id.* and n.9, 109 L.R.R.M. (BNA) at 2427.

⁶⁸ *Id.* at 85, 109 L.R.R.M. (BNA) at 2427, quoting, *White Cloud Educ. Ass'n v. White Cloud Bd. of Educ.*, 101 Mich. App. 316, 319 (1980).

⁶⁹ 385 Mass. 84, 109 L.R.R.M. (BNA) at 2426.

suspect.⁷⁰ The *Greenfield* court did not note, however, that by requiring dissenting employees to pay the challenged fee into an escrow account, those employees would be deprived in the interim of the ability to finance the expression of their own views. The *Greenfield* opinion initially accorded equal significance to both aspects of infringement of free speech rights by impermissible service fee charges.⁷¹ Sensitive to the competing interests involved, however, the Supreme Judicial Court apparently concluded that only deprivations of free speech by the compelled interim support of objectionable union political activities could be avoided.

For the practitioner, the *Greenfield* opinion is significant as a demonstration of the difficult balancing necessitated by the competing interests present in establishing remedies for the apportionment of service fee charges. The interest in protecting free speech rights from even temporary deprivations swayed the *Greenfield* court to enjoin the collection of any service fees prior to determination of permissible amounts.⁷² Conversely, the interest in ensuring continued financial support of the employee collective bargaining representative swayed the court to conclude that the challenged fee could be escrowed by the state Labor Relations Commission pending consideration of the appropriate fee. That these conflicting interests forced the *Greenfield* court into an inconsistent position with regard to the interim deprivation of employee free speech rights⁷³ is evidence of the fine line drawing required. Other courts, faced with a similar line-drawing dilemma, could well and reasonably exercise equal discretion and reach a contrary result.⁷⁴

VII. PROCEDURAL ISSUES

A.* *Liberal Construction of the National Labor Relations Board's Procedural Regulations*: *Livingston Powdered Metal, Inc. v. NLRB*¹ and *Kessler Institute for Rehabilitation v. NLRB*²

Pursuant to section 156 of the National Labor Relations Act (the Act),³ the National Labor Relations Board (the Board) has the authority to promulgate rules and regulations necessary to carry out the provisions of the Act.⁴

⁷⁰ *Id.* at 79, 109 L.R.R.M. (BNA) at 2425.

⁷¹ *Id.* at 84, 109 L.R.R.M. (BNA) at 2426.

⁷² *Id.* at 83-84, 109 L.R.R.M. (BNA) at 2426-27.

⁷³ *Id.* at 85, 109 L.R.R.M. (BNA) at 2427.

⁷⁴ See *supra* text accompanying notes 70-71.

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¹ 669 F.2d 133, 109 L.R.R.M. (BNA) 2457 (3d Cir. 1982).

² 669 F.2d 138, 109 L.R.R.M. (BNA) 2461 (3d Cir. 1982).

³ 29 U.S.C. § 156 (1976).

⁴ *Id.* Section 156 provides in pertinent part that "the Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter." *Id.*

One regulation, section 102.121 of Title 29 of the Code of Federal Regulations,⁵ directs the Board to construe its regulations liberally to effectuate the purposes and provisions of the Act.⁶ Despite this regulation mandating liberal construction of its rules and regulations, the Board in some circumstances has urged narrow, restrictive interpretations of its regulations.⁷

During the *Survey* year, the Third Circuit Court of Appeals on two occasions reviewed Board determinations in which restrictive interpretations of its regulations were advanced. In *Livingston Powdered Metal, Inc. v. NLRB*,⁸ the Board propounded a narrow construction of its regulations relating to the late filing of an answer to a complaint.⁹ Similarly, in *Kessler Institute for Rehabilitation v. NLRB*,¹⁰ the Board advanced a rigid, restrictive interpretation of its regulation relating to the granting of a three-day time extension for filing responses to notices or other pleadings served by mail.¹¹ Criticizing the Board's narrow and inflexible interpretations of its regulations,¹² the Third Circuit in both cases rejected the Board's construction of its regulations.¹³ The court instead adopted a liberal construction of the Board's procedural regulations.¹⁴

1. *Livingston Powdered Metal, Inc. v. NLRB*¹⁵

Under section 102.20 of Title 29 of the Code of Federal Regulations,¹⁶ an answer to a complaint must be filed within 10 days from the service of the complaint.¹⁷ This regulation, however, authorizes the regional director to exercise discretion to extend the time within which an answer must be filed.¹⁸ This

⁵ 29 C.F.R. § 102.121 (1981).

⁶ *Id.* Section 102.121 states that "the rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the act." *Id.*

⁷ *E.g.*, *Kessler Institute for Rehabilitation v. NLRB*, 669 F.2d 138, 140, 109 L.R.R.M. (BNA) 2461, 2462 (3d Cir. 1982); *Livingston Powdered Metal, Inc.*, 669 F.2d 133, 135, 109 L.R.R.M. (BNA) 2457, 2459 (3d Cir. 1982); *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 568 (9th Cir. 1979).

⁸ 669 F.2d 133, 109 L.R.R.M. (BNA) 2457 (3d Cir. 1982).

⁹ *Id.* at 135, 109 L.R.R.M. (BNA) at 2459.

¹⁰ 669 F.2d 138, 109 L.R.R.M. (BNA) 2461 (3d Cir. 1982).

¹¹ *Id.* at 140, 109 L.R.R.M. (BNA) at 2462.

¹² *See Kessler Institute for Rehabilitation v. NLRB*, 669 F.2d 138, 141, 109 L.R.R.M. (BNA) 2461, 2464 (3d Cir. 1982); *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 137-38, 109 L.R.R.M. (BNA) 2457, 2461 (3d Cir. 1982).

¹³ *Kessler Institute for Rehabilitation v. NLRB*, 669 F.2d 138, 141, 109 L.R.R.M. (BNA) 2461, 2463-64 (3d Cir. 1982); *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 137, 109 L.R.R.M. (BNA) 2457, 2459 (3d Cir. 1982).

¹⁴ *See Kessler Institute for Rehabilitation v. NLRB*, 669 F.2d 138, 141, 109 L.R.R.M. (BNA) 2461, 2463-64 (3d Cir. 1982); *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 136-38, 109 L.R.R.M. (BNA) 2457, 2459, 2461 (3d Cir. 1982).

¹⁵ 669 F.2d 133, 109 L.R.R.M. (BNA) 2457 (3d Cir. 1982).

¹⁶ 29 C.F.R. § 102.20 (1981).

¹⁷ *Id.* That section provides in pertinent part:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto . . . All allegations in the complaint, if no answer is filed . . . shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

Id.

¹⁸ 29 C.F.R. § 102.22 (1981). That section provides: "Upon his own motion or upon proper cause shown by any other party, the regional director issuing the complaint may by writ-

regulation then states that if an answer is not filed on the due date, the allegations stated in the complaint will be deemed admitted as true, absent a showing of "good cause" to the contrary.¹⁹

Despite the "good cause" standard set out in section 102.20, the Board has urged that the Act²⁰ expressly provides for the late filing of answers, and requires a higher standard than mere "good cause."²¹ Section 10(e) of the Act, deemed by the Board to control in late filings of answers, states that a court shall not consider an objection not urged before the Board, unless the failure or neglect to urge such an objection is excusable due to "extraordinary circumstances."²² In 1979, the United States Court of Appeals for the Ninth Circuit rejected the Board's contention that extraordinary circumstances must be shown in order to excuse the late filing of an answer,²³ and determined instead that good cause will excuse the untimely filing of an answer.²⁴

During the *Survey* year, the United States Court of Appeals for the Third Circuit aligned itself with the Ninth Circuit on the appropriate standard governing late filings of answers.²⁵ In *Livingston Powdered Metal, Inc. v. NLRB*,²⁶ the Third Circuit held that the less stringent standard of "good cause," rather than the "extraordinary circumstances" test that applies to failure to file exceptions, governs the late filing of an answer.²⁷ Moreover, the court held that where the answer mailed on the last day of the designated period set out a meritorious defense to very serious charges and where permission to file it would not have delayed the previously scheduled hearing, the circumstances constituted good cause to allow the pleading to be filed.²⁸ In its holding, the *Livingston* court noted that in instances where "wooden and unreasoning insistence upon technical procedural rules" results in injustice, rather than in the proper disposition of the cause, a failure to take remedial measures constitutes an abuse of discretion.²⁹

The dispute in *Livingston* arose when the NLRB General Counsel served a complaint upon Livingston Powdered Metal, Inc. (*Livingston*), alleging that the company had violated sections 8(a)(1), (3), and (5) of the Act.³⁰ *Livingston*

ten order extend the time within which the answer shall be filed." *Id.*

¹⁹ 29 C.F.R. § 102.20 (1981). See *supra* note 17.

²⁰ 29 U.S.C. § 160(e) (1976). This section provides in pertinent part: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances." *Id.*

²¹ See, e.g., *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 135, 109 L.R.R.M. (BNA) 2457, 2459 (3d Cir. 1982); *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 568 (9th Cir. 1979).

²² 29 U.S.C. § 160(e) (1976). See *supra* note 20.

²³ See *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 568-69 (9th Cir. 1979).

²⁴ See *id.* at 569.

²⁵ See *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 136, 109 L.R.R.M. (BNA) 2457, 2459 (3d Cir. 1982).

²⁶ 669 F.2d 133, 109 L.R.R.M. (BNA) 2457 (3d Cir. 1982).

²⁷ *Id.* at 136, 109 L.R.R.M. (BNA) at 2459.

²⁸ *Id.* at 137, 109 L.R.R.M. (BNA) at 2461.

²⁹ *Id.*

³⁰ *Id.* at 134, 109 L.R.R.M. (BNA) at 2458. 29 U.S.C. § 158 (1976) provides in pertinent part:

had operated a production plant in Livingston, Tennessee for several years.³¹ Its parent company, Brockway Pressed Metals Company (Brockway) was located in Brockway, Pennsylvania.³² The NLRB General Counsel's complaint alleged that Livingston had closed its Tennessee plant and moved its operation to Pennsylvania in 1980 because the United Automobile, Aerospace & Agricultural Implement Workers Union (UAAAIWU) had won a representation election at the Tennessee location during the prior month.³³ The complaint further alleged that Livingston had discharged unlawfully its employees and had refused to bargain with the elected union representatives.³⁴

On the company's failure to answer the complaint by the due date, June 26, 1980,³⁵ a field attorney for the NLRB General Counsel telephoned the offices of Livingston's attorney in Pennsylvania on several occasions.³⁶ The agency's attorney, however, was unable to reach the company's attorney, so he sent a letter on July 24, stating that a motion for summary judgment might be filed by the Board if an answer was not forthcoming.³⁷

In a July 31, 1980 letter to the Board, Livingston's attorney requested an extension for filing the answer to Monday, August 11, 1980.³⁸ The Board, in a letter dated August 6, 1980, agreed not to seek summary judgment if the company filed an answer no later than August 11, 1980.³⁹ Livingston then forwarded an answer to the Board on August 11, 1980, which was not received until August 18, 1980.⁴⁰ The company also sent copies of the answer on August 11, 1980 to the union's offices in Nashville, Tennessee⁴¹ which were delivered on August 13, 1980.⁴² On the day the answer was received by the Board, the regional attorney submitted a motion for summary judgment.⁴³ The next day he acknowledged receipt of the answer and requested and received from the company four additional copies.⁴⁴ The Board then issued a show cause notice.⁴⁵ The company replied that it was not responsible for the mail delay

(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 guarantee in Section 157 of this title; . . .

(3) 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: . . .

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

Id.

³¹ 669 F.2d at 134, 109 L.R.R.M. (BNA) at 2458.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

and noted that the union in Tennessee had received the letter and copies of the answer even before the General Counsel's office had begun preparation of the motion for summary judgment.⁴⁶ Moreover, the company stated that the plant's closing was compelled by financial losses, not union representation, and that it had ceased to be an operating manufacturer at all locations.⁴⁷

On December 5, 1980, the Board determined that Livingston had failed to show good cause for its failure to file the answer by August 11, 1980 and, as a result, the allegations of the complaint were considered to be true.⁴⁸ Accordingly, Livingston was ordered to reopen its Tennessee plant, reinstate the employees, and bargain with the union over the plant closure, wages, and conditions of employment.⁴⁹ Livingston hired new counsel and filed a motion for reconsideration.⁵⁰ Livingston contended that the default should be set aside because its former counsel had a small, rural law office and had never handled an administrative appeal such as the instant one.⁵¹ Livingston also asserted that, as a result of the August 6, 1980 telephone conversation with the field attorney, its own attorney was led to believe that time was not of the essence and that August 11, 1980 was not an absolute deadline.⁵² Additionally, an affidavit by Livingston's president stated that the plant was closed because of financial losses and pressures applied by lending institutions, and that if the Board's orders were carried out, Livingston would become bankrupt and Brockway, the parent company, would also suffer dire financial effects.⁵³

The Board denied the motion for reconsideration on March 17, 1981, stating that the motion was "without merit."⁵⁴ Livingston petitioned the Third Circuit for review of the Board's denial, and the Board cross-appealed for enforcement.⁵⁵ The Board contended that it did not abuse its discretion in granting the default judgment and that Section 10(e) of the Act precluded judicial review.⁵⁶ In contrast, Livingston maintained that the Board's action was arbitrary and capricious, depriving Livingston of a fair hearing, and that good cause was shown for the delay in filing the answer.⁵⁷

Holding that the "good cause" standard of section 102.20 governed the late filing of an answer in Board proceedings,⁵⁸ the Third Circuit indicated that

⁴⁶ *Id.* These points substantially mirrored arguments previously made by the company in an April 1980 letter to the Board. *Id.* At the time the 1980 letter was sent, the Board was investigating charges by the union similar to those presented in the instant case. *Id.* at 134 & n.1, 109 L.R.R.M. (BNA) at 2458 & n.1.

⁴⁷ *Id.* at 134, 109 L.R.R.M. (BNA) at 2458.

⁴⁸ *Id.* at 135, 109 L.R.R.M. (BNA) at 2458.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*, 109 L.R.R.M. (BNA) at 2458-59. Livingston also submitted an affidavit averring that its answer was delayed because of the death of the father of its legal counsel. *Id.*, 109 L.R.R.M. (BNA) at 2459.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 136, 109 L.R.R.M. (BNA) at 2459.

it agreed with the Ninth Circuit's decision in *NLRB v. Zeno Table Co.*⁵⁹ on this issue.⁶⁰ The Third Circuit reiterated the *Zeno* court's determination that the purpose of the good cause standard " 'is to ensure that the Board makes decisions on the merits despite technical and inadvertent noncompliance with procedural rules.' " ⁶¹ The *Livingston* court agreed with the Ninth Circuit that the "extraordinary circumstances" test applied to the failure to file exceptions, not to the late filing of an answer.⁶² The *Livingston* court observed that Section 10(e) was intended to prevent matters which had never been presented to the Board for its consideration from being raised by a litigant in the courts.⁶³ The court noted that since *Livingston* had brought the matter to the Board's attention, the Board had had an opportunity to rule on the question.⁶⁴ Recognizing that the statutory purpose had therefore been served, the Third Circuit rejected the Board's contention that Section 10(e) barred review of the case.⁶⁵

Turning to the Board's contention that a pleading mailed on the day for filing is always late because it would not reach the Board by the end of the business day, the *Livingston* court noted that an answer would be accepted if mailed before the filing date, even though it might arrive late.⁶⁶ The court indicated that the equities of the instant case were strongly in favor of acceptance of the answer even though it was not mailed until the due date of the extension period.⁶⁷ The *Livingston* court ascertained that the Board's action, although nominally a summary judgment, was actually a default.⁶⁸ The court observed that the possibility of an injustice occurring was much greater in cases of default, as opposed to summary judgments, because defaults are decided upon a procedural technicality rather than a ruling on the merits.⁶⁹ Accordingly, the court of appeals indicated that more exacting judicial scrutiny was required in a default case.⁷⁰

⁵⁹ 610 F.2d 567 (9th Cir. 1979).

⁶⁰ 669 F.2d at 136, 109 L.R.R.M. (BNA) at 2459.

⁶¹ *Id.* at 135, 109 L.R.R.M. (BNA) at 2459 (quoting *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 569 (9th Cir. 1979)).

⁶² *Id.*

⁶³ *Id.* at 136, 109 L.R.R.M. (BNA) at 2459.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* For example, in *NLRB v. Marshall Maintenance Corp.*, 320 F.2d 641 (3d Cir. 1963), the company's attorney deposited the company's exceptions to a Board Trial Examiner's order in a mailbox which had a scheduled pickup time that would ensure that the exceptions were delivered to the Board on time. *Id.* at 641-42. The exceptions, however, were delivered one day late, because the mail had been picked up earlier than scheduled. *Id.* at 641-42. The Board rejected the exceptions as being untimely filed. *Id.* On appeal the Third Circuit denied the Board's petition for summary entry of a decree enforcing its order, holding that the mail pickup before schedule, thereby causing the company's exceptions to be delivered late, constituted "extraordinary circumstances" under Section 10(e) of the Act. *Id.* at 645.

⁶⁷ 669 F.2d at 136, 109 L.R.R.M. (BNA) at 2459-60. Indeed, the court said that these equities were stronger than those present in *Marshall Maintenance*. *Id.*

⁶⁸ *Id.* at 136, 109 L.R.R.M. (BNA) at 2460. The court noted that in a summary judgment proceeding there is no dispute about the relevant facts. *Id.* The court explained that in a default, however, the *ex parte* allegations of the adversary are accepted as true; the defendant's contentions are not considered. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* The court observed that the interests of a litigant in an administrative proceeding

The *Livingston* court recognized that it was reluctant to permit the final disposition of a substantial controversy by default.⁷¹ It further acknowledged its past caution that, since the interests of justice are best satisfied by a trial on the merits, matters with significant amounts at stake should not be determined by default judgment if it can be reasonably avoided.⁷² Moreover, the court observed that in cases of default judgments, "two questions must be considered: (1) whether there would be prejudice to the plaintiff, and (2) whether a meritorious defense had been asserted by the defendant."⁷³ The court reiterated its prior holding that a standard of liberality, rather than strictness, should be applied in answering those questions, and that the favored policy of deciding cases on their merits dictated that any doubt should be resolved in favor of setting aside the judgment.⁷⁴ Additionally, the court of appeals noted that whether the defendant willfully caused the default was also a relevant factor.⁷⁵

Dealing with the willfulness factor first, the court determined that *Livingston* did not intentionally or willfully cause the default.⁷⁶ The court explained that although *Livingston's* attorney, Ferraro, did not provide representation which was as diligent as is normally expected, there were countervailing points to be considered.⁷⁷ The Third Circuit stated that the Board should have given some weight to both Ferraro's inexperience in Board cases and the disruption of his practice caused by his personal problems.⁷⁸ The court of appeals also observed that there was nothing in the record suggesting that Ferraro was " 'a chronic late filer or a promoter of vexations and dilatory proceedings.' " ⁷⁹

Discussing next the question of prejudice to the plaintiff, the *Livingston* court ascertained that the ultimate resolution of the case on the merits would not have been delayed by the late filing of the answer.⁸⁰ The court indicated that the hearing date recited in the complaint was October 20, 1980.⁸¹ The court of appeals recognized that a continuance of the hearing would not have been required simply because the answer was not filed until August 8, 1980.⁸²

deserve as much protection as the interests of a litigant in a district court proceeding. *Id.* The court further stated that the standard for opening default judgments should not be less demanding in agency cases than in district court cases, especially when an injustice might otherwise result. *Id.*

⁷¹ *Id.* at 136, 109 L.R.R.M. (BNA) at 2460 (quoting *Hutton v. Fisher*, 359 F.2d 913, 916 (3d Cir. 1966)).

⁷² *Id.* at 136-37, 109 L.R.R.M. (BNA) at 2460 (quoting *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951)).

⁷³ *Id.* at 136, 109 L.R.R.M. (BNA) at 2460.

⁷⁴ *Id.* (quoting *Medunic v. Lederer*, 533 F.2d 891, 894 (3d Cir. 1976)).

⁷⁵ *Id.*

⁷⁶ *Id.* at 137, 109 L.R.R.M. (BNA) at 2460.

⁷⁷ *Id.*

⁷⁸ *Id.* The court noted that "lack of expertise is not uncommon among general practitioners who have little opportunity to participate in administrative proceedings." *Id.*

⁷⁹ *Id.* (quoting *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 569 (9th Cir. 1979)).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

Moreover, the court observed that Livingston had not requested any such continuation.⁸³

The court determined, however, that the most compelling factor in the case was that Livingston had been barred from presenting what appeared to be a meritorious defense potentially sufficient to prevent imposition of the broad remedy decreed.⁸⁴ The Third Circuit noted that the Board had not challenged Livingston's assertion that it was forced to close its plant because of business losses and pressures from creditors.⁸⁵ The court emphasized Livingston's contention that the prescribed remedy would have drastic consequences for it and its parent company, threatening the job security of its unionized work force in Brockway.⁸⁶ Moreover, the *Livingston* court stressed the fact that Ferraro's April 1980 letter gave General Counsel notice that Livingston did not close its Tennessee plant for anti-union reasons.⁸⁷ The court noted that the Board was not likely to inspire confidence in its proceedings by ignoring such contentions already in its files and instead entering a default judgment.⁸⁸ Additionally, the court of appeals noted that the United States Supreme Court's recent holding in *First National Maintenance Corp. v. NLRB*,⁸⁹ that an employer is not required to bargain with a union about a partial closing of a business, would have to be considered when the Board reviewed the merits.⁹⁰

The Third Circuit Court of Appeals suggested that the sweeping remedy applied by the Board in *Livingston* may be acceptable when justified by an actual violation, but was questionable when precipitated simply by Livingston's attorney being one business day late in mailing an answer.⁹¹ The court recognized that the Board's heavy caseload burdens required reasonable compliance with time limitation and procedural rules.⁹² Nevertheless, the court indicated that rigid insistence upon adherence to technical procedural rules could result in injustice.⁹³ Accordingly, the *Livingston* court denied the petition for enforcement, granted the petition for review, and remanded the case to the Board for a hearing on the merits.⁹⁴

The *Livingston* court's determination that the good cause standard, rather than the extraordinary circumstances standard, applies to the late filing of answers in Board proceedings, is consistent with the Board's policy of liberally construing its rules and regulations to effectuate the purposes and provisions of the Act.⁹⁵ Indeed, the language of section 120.20, governing the filing of

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* The court recognized that these matters were capable of documentary proof. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 452 U.S. 666 (1981).

⁹⁰ 669 F.2d at 137, 109 L.R.R.M. (BNA) at 2460-61.

⁹¹ *Id.*, 109 L.R.R.M. (BNA) at 2460.

⁹² *Id.*, 109 L.R.R.M. (BNA) at 2461.

⁹³ *Id.*

⁹⁴ *Id.* at 138, 109 L.R.R.M. (BNA) at 2461.

⁹⁵ See 29 C.F.R. § 102.121 (1981). That section provides: "The rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the act." *Id.*

answers, indicates that the good cause standard should apply.⁹⁶ Additionally, the good cause standard appears to be "less stringent" than the extraordinary circumstances test regulating the application of section 10(e) of the Act.⁹⁷ The purpose of section 10(e) is to let the Board hear a labor problem first so that a reviewing court will have the benefit of the Board's expertise in reviewing the Board's decision.⁹⁸ The purpose of the good cause standard, however, is to make certain that the Board decides cases on the merits as opposed to decisions based upon careless or unintentional noncompliance with procedural rules.⁹⁹ Courts, therefore, should favor a trial on the merits over a procedural device which would unfairly or unnecessarily prevent such a determination.¹⁰⁰

2. *Kessler Institute for Rehabilitation v. NLRB*¹⁰¹

National Labor Relations Board (the Board) regulations grant an automatic three-day time extension for filing responses to notices or other pleadings served by mail.¹⁰² This three-day extension provision is somewhat ambiguous because the language of the regulation relating to certain computations is susceptible to two different interpretations.¹⁰³ Thus, when the original period for filing a response ends on a weekend or a holiday, it is unclear whether the three days are to be added to the last day of the initial period, even if the last day falls on a weekend or a holiday, or whether the three days must

⁹⁶ See 29 C.F.R. § 102.20 (1981). That section provides in pertinent part: "... All allegations in the complaint, if no answer is filed ... shall be deemed to be admitted to be true ... unless good cause to the contrary is shown." *Id.*

⁹⁷ *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 569 (9th Cir. 1979).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 375 (D.C. Cir. 1980).

A liberal standard should be applied in considering a motion to set aside a default. *Medunic v. Lederer*, 533 F.2d 891, 894 (3d Cir. 1976). Since the interests of justice are most appropriately satisfied by a trial on the merits, a court should refuse to open default judgments only after a careful examination of all considerations. *Tozer v. Charles A. Krause Milling Co.*, 190 F.2d 242, 245 (3d Cir. 1951). If the reviewing court is uncertain as to whether to set aside the default judgment, any doubt should be resolved in favor of the petitioner. *Id.*

¹⁰¹ 669 F.2d 138, 109 L.R.R.M. (BNA) 2461 (3d Cir. 1982).

¹⁰² 29 C.F.R. § 102.114(a) (1981). This section provides in pertinent part:

In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation ... (A) Saturday on which the Board's offices are not open for business shall be considered as a holiday ... Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period. ...

Id. The National Labor Relations Board's authority to issue such regulations is found in 29 U.S.C. § 156 (1976). See *supra* note 4.

¹⁰³ See *supra* note 102 and accompanying text.

be added to the last day of the "prescribed period," which under the regulations ends on the next day which is neither a weekend nor a holiday.¹⁰⁴ The particular construction adopted could make the difference between the filing of a timely response or the entry of a default judgment.

Despite the potential for controversy created by this ambiguity, no federal court decision prior to the *Survey* year case of *Kessler Institute for Rehabilitation v. NLRB*¹⁰⁵ had interpreted the time extension regulation.¹⁰⁶ In *Kessler*, the Third Circuit considered the proper interpretation of the three-day time extension provided for in section 102.114(a) of Title 29 of the Code of Federal Regulations.¹⁰⁷ The court unanimously held that the correct construction of the Board's regulation required that the expiration date for the "prescribed period" must first be fixed, with due allowance for its holiday and weekend exclusion, and only then should the three-day extension be calculated.¹⁰⁸ The court thereby adopted a construction of the time extension language which gives a party the additional benefit of the weekend and holiday exclusions.¹⁰⁹

Kessler revolved around efforts by the Jersey Nurses Economic Security Organization of the New Jersey State Nurses Association to represent the nurses employed by the Kessler Institute for Rehabilitation.¹¹⁰ On November 8, 1977, a petition for election was filed and on January 27, 1978, balloting took place.¹¹¹ *Kessler*, however, contended that the Association was not a bona fide labor organization because the Board of Directors of its parent entity included statutory supervisors.¹¹² Board proceedings were instituted prior to the election and continued until the time of the *Kessler* decision.¹¹³

On August 21, 1979, the Board referred the case to a hearing officer for a supplemental report.¹¹⁴ The Board's order granted both parties the right to file exceptions to the report with the Board in Washington, D.C. within ten days from the date the report was issued.¹¹⁵ The hearing officer's report, which was mailed on December 26, 1979,¹¹⁶ reiterated the Board's directive that any exceptions to the report should be filed within ten days.¹¹⁷ *Kessler's* counsel received the report on December 28, 1979.¹¹⁸

¹⁰⁴ See *supra* note 102.

¹⁰⁵ 669 F.2d 138, 109 L.R.R.M. (BNA) 2461 (3d Cir. 1982).

¹⁰⁶ Discussion of section 102.114(a) by the federal courts, where it has occurred at all, has not involved the mail extension provision of the regulation. See, e.g., *NLRB v. Preston H. Haskell Co.*, 616 F.2d 136, 141 n.14 (5th Cir. 1980); *NLRB v. Brotherhood of Ry., Airline & Steamship Clerks*, 498 F.2d 1105, 1109 n.4 (5th Cir. 1974).

¹⁰⁷ 29 C.F.R. § 102.114(a) (1981).

¹⁰⁸ 669 F.2d at 141, 109 L.R.R.M. (BNA) at 2463.

¹⁰⁹ See *id.*

¹¹⁰ *Id.* at 139, 109 L.R.R.M. (BNA) at 2462.

¹¹¹ *Id.*

¹¹² *Id.* The litigation involved matters of representation and unfair labor practices. *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* The order specifically provided that: "'within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto . . .'" *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

The tenth day after the report was issued was Saturday, January 5, 1980.¹¹⁹ Kessler mailed its exceptions to the Board in Washington, D.C., and they were received by the Board on Thursday, January 10, 1980.¹²⁰ The Board's Associate Executive Secretary then wrote to Kessler's counsel explaining that the exceptions were considered late and that the Board would not entertain them.¹²¹ Kessler's appeal to permit filing of the exceptions was rejected by the Board on February 4, 1980.¹²² On September 15, 1980, the Board issued a pro forma order adopting the hearing officer's recommendations, noting that timely exceptions to the hearing officer's report had not been filed by either party.¹²³ The Board eventually issued its final decision and order based on the hearing officer's report, granting the NLRB General Counsel's motion for summary judgment in the case.¹²⁴

Kessler subsequently appealed to the Third Circuit Court of Appeals.¹²⁵ In its petition for review, Kessler contended that its exceptions had been timely filed, and that the court should address the substantive issues involved.¹²⁶ The Board cross-petitioned for enforcement, arguing that if the court ruled against it on the procedural issue, the case should be returned to it for a decision on the merits in light of Kessler's exceptions.¹²⁷ The court denied the petition for enforcement because it concluded that under a liberal construction of the regulation, the exceptions had been timely filed.¹²⁸ The court declined to address the merits, however, and instead remanded the case to the Board for further proceedings consistent with its opinion.¹²⁹

The central issue in *Kessler* turned on a determination of the proper construction of the automatic three-day extension of time provision of section 102.114(a).¹³⁰ As the *Kessler* court noted, the Board contended that the extension date should be determined by adding three days to the number of days constituting the initial time period without regard to any weekend days or holidays falling on the last day of the initial period.¹³¹ The court observed that, under this view, three days would be added after the tenth day, which fell on Saturday, January 5, 1980, thereby making Tuesday, January 8, 1980, the final day for filing the exceptions.¹³² The court indicated that, Kessler contended, in contrast, that since the original time period ended on a Saturday, the holiday provision in the regulation must be taken into account in order to

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* Kessler sought a determination of the merits by the Third Circuit Court of Appeals because it believed that the Board would rule unfavorably upon remand. *Id.*

¹²⁷ *Id.* at 139-40, 109 L.R.R.M. (BNA) at 2462.

¹²⁸ *Id.* at 141-42, 109 L.R.R.M. (BNA) at 2463-64.

¹²⁹ *Id.*, 109 L.R.R.M. (BNA) at 2464.

¹³⁰ *Id.* at 140, 109 L.R.R.M. (BNA) at 2462.

¹³¹ *Id.*

¹³² *Id.*

determine properly the "prescribed" ten-day period.¹³³ Under this interpretation, the court explained, the "prescribed period" of ten days did not expire until Monday, January 7, 1980.¹³⁴ Thus, the court noted, Kessler argued that the three days should be added after this date, making the last day for filing the exceptions Thursday, January 10, 1980, which was the date the exceptions were in fact received by the Board.¹³⁵

Indicating that both interpretations were reasonable, the *Kessler* court stated that in most cases it would be inclined to accept the administrative agency's interpretation of its own regulation.¹³⁶ The court of appeals asserted, however, that in this instance it was not justified in subordinating its own judgment to that of the Board for two reasons.¹³⁷ First, the court observed that, because the language of the Board's rule was almost identical to that found in various other federal procedural rules,¹³⁸ the decision in this case would affect the interpretation of procedural rules in cases outside the Board's jurisdiction.¹³⁹ Second, the *Kessler* court determined that the issue presented

¹³³ *Id.*, 109 L.R.R.M. (BNA) at 2462-63.

¹³⁴ *Id.*

¹³⁵ *Id.*, 109 L.R.R.M. (BNA) at 2463.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* (citing FED. R. CIV. P. 6(a), (e), FED. R. CRIM. P. 45(a), (e), and FED. R. APP. P. 26(a), (c)).

FED. R. CIV. P. 6(a) provides in relevant part:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation . . .

Id. Section (e) further provides:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Id.

The corresponding language in FED. R. CRIM. P. 45(a), (e) is identical to that noted above in FED. R. CIV. P. 6(a), (e) except for one minor variation. The first sentence of FED. R. CRIM. P. 45(a) states: "In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included." *Id.* FED. R. APP. P. 26(a) provides in relevant part:

In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation . . .

Id. Section (c) further provides: "Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period." *Id.*

¹³⁹ 669 F.2d at 140, 109 L.R.R.M. (BNA) at 2463.

was one of law and that the Board's administrative expertise was not involved in this matter.¹⁴⁰ The court therefore concluded that deference to the agency interpretation was not warranted.¹⁴¹

The Third Circuit indicated that, while the Board's view of the mail extension provision, requiring three days to be added to the last day of the original period, had "the virtue of simplicity"¹⁴² and was supported somewhat by two state court decisions construing similar language in different procedural regulations,¹⁴³ it did not find those cases persuasive.¹⁴⁴ The court instead determined that the purpose of the Board's time extension rule was to give a party more time to respond to a specific matter when the document containing the matter is transmitted by mail.¹⁴⁵ The court suggested that denying such an allowance would be tantamount to penalizing a party by allotting him less time to complete his task when his adversary mails a document to him than he would have if the document had been personally delivered to him.¹⁴⁶

The circuit court also recognized that an important aspect of the time extension rule was its emphasis on working days.¹⁴⁷ The court observed that when a time period normally would end on a weekend or holiday, the regulation would require an extension to the next regular business day.¹⁴⁸ Also, the court added that when the time period is for less than seven days, intermediate Saturdays and Sundays are excluded from the computation.¹⁴⁹ Moreover, the

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* In *Wheat State Tel. Co. v. State Corp. Comm'n.*, 195 Kan. 268, 403 P.2d 1019 (1965), a Kansas district court dismissed the telephone company's application for review of the State Corporate Commission's orders denying the company's application to take over an abandoned telephone service, and allowing another company to do so on grounds that the application was not timely filed. On appeal, the Supreme Court of Kansas affirmed the district court, holding that the Commission's mail extension rule required that the three additional days should be added on to the *original* period for the purpose of computation. *Id.* at 268-72, 403 P.2d at 1020-23. (Emphasis added.)

Similarly, in *In re Ionfrede's Estate*, 241 Minn. 335, 63 N.W.2d 19 (1954), a Minnesota district court dismissed an appeal filed by the creditors of a decedent's estate on the grounds that the appeal was not taken within the time prescribed by law. Under the applicable state statute, the creditors had 30 days to take an appeal. Also, since notice was served on the creditors by mail, the applicable state civil procedures provided for three days to be added to the prescribed period. The creditors argued that they had 34 days to file the appeal because the original period ended on a Sunday and thus the three days should be added to the following Monday. On appeal, the Supreme Court of Minnesota, affirming the district court, held that the creditors had only 33 days to file the appeal. The three days had to be added to the original period, and since the last day of the 33-day period did not end on a weekend or a holiday the creditors filed their appeal one day late. *Id.* at 335-39, 63 N.W.2d at 20-21.

¹⁴⁴ 669 F.2d at 140-41, 109 L.R.R.M. (BNA) at 2463. The court indicated that it believed that the state courts did not adequately consider the purpose of the extension rule or the practical effect of the construction they adopted. *Id.* at 141, 109 L.R.R.M. (BNA) at 2463.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* The court observed that, in the interest of fairness, the number of working days assigned to each litigant should be as closely identical as possible. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Other holidays also are excluded when the period is less than seven days. See *supra* note 102.

court noted the slow pace of the postal service was an additional factor to consider.¹⁵⁰ Indeed, the court took judicial notice of the delays in the postal system which have increased over the years.¹⁵¹ These factors, the court determined, required a liberal construction of the regulation.¹⁵²

In addition, the court observed that the Board's restrictive construction of the three-day extension language did not give Kessler the full benefit of the provision;¹⁵³ the Board's interpretation, the court reasoned, served only to frustrate the purpose of the rule by diminishing the time allowed to respond.¹⁵⁴ Accordingly, the court of appeals concluded that the proper interpretation of the provision was the one advanced by Kessler.¹⁵⁵ The court stated that the final day of the "prescribed period" must be determined by taking the holiday and weekend extension into account.¹⁵⁶ Once this determination is made, the three-day mail extension should be added.¹⁵⁷ Having failed to follow this procedure, the Board erred in refusing to accept the exceptions.¹⁵⁸

Finally, after resolving this procedural issue, the *Kessler* court refused to reach the merits of the case.¹⁵⁹ The court emphasized that a court of appeals should not engage in the original resolution of issues entrusted to an administrative agency.¹⁶⁰ Accordingly, the court concluded that the Board should render a decision on the merits after a full consideration of Kessler's exceptions.¹⁶¹

The Third Circuit Court of Appeal's decision in *Kessler* is significant in several respects. Read narrowly, the court's decision stands for the proposition that the three-day mail extension provided in section 102.114(a) must be added to the prescribed time period only after such period has first been determined by taking weekends and holidays into account.¹⁶² This interpretation of the regulation is significant because it provides a party with more time to respond when the final day of the initial period is a weekend or a holiday. In a broader context, this decision indicates the disposition of the Third Circuit Court of Appeals to closely scrutinize the Board's decisions when they rest upon purely

¹⁵⁰ 669 F.2d at 141, 109 L.R.R.M. (BNA) at 2463.

¹⁵¹ *Id.* The court noted that, whereas a mailing from Newark to Westfield, New Jersey previously took only one day, today such dispatch was so rare that the Postal Service charged premium rates for the overnight service called "Express Mail". *Id.* The court also noted that postal delays hindered the work of the judges so badly that an electronic mail system had been installed. *Id.* at n.4, 109 L.R.R.M. (BNA) at 2463 n.4.

¹⁵² *See id.* at 141, 109 L.R.R.M. (BNA) at 2463.

¹⁵³ *Id.*

¹⁵⁴ *Id.* Under the Board's interpretation of the mail extension provision, as a result of the weekend, Kessler would effectively have only one working day beyond the original ten-day deadline, rather than three. *See id.* While the actual time available for Kessler to respond was shortened by two days as a result of the Board's use of the mail, as compensation Kessler was given only one extra day. *See id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*, 109 L.R.R.M. (BNA) at 2464.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 142, 109 L.R.R.M. (BNA) at 2464.

¹⁶¹ *Id.*

¹⁶² *See id.* at 141, 109 L.R.R.M. (BNA) at 2463.

procedural considerations. In such cases, the court is likely to give the Board's regulations a liberal construction.¹⁶³ In this case, the court favored a construction of the mail extension language which would give parties responding to notices or other pleadings the full benefit of the provision.¹⁶⁴ Additionally, the court was wary especially of the effect that its interpretation of the Board's mail extension provision would have on the construction of the nearly identical language found in rules and regulations¹⁶⁵ outside the Board's jurisdiction.¹⁶⁶ The court apparently sought to set a liberal standard for the interpretation of language similar to that contained in section 102.114(a) in other contexts. The *Kessler* decision may indeed provide both precedent and persuasive authority in this area.

Conclusion

The *Livingston* and *Kessler* decisions evidence the Third Circuit's policy in favor of liberal construction of the Board's rules and regulations.¹⁶⁷ Moreover, the Third Circuit's decision to adopt a liberal construction of the Board's regulations is consistent with the Board's policy of construing its regulations liberally.¹⁶⁸ Essentially, the Board should try to interpret procedural rules flexibly to enable it to reach the merits of a case;¹⁶⁹ it should not use a rigid interpretation of procedural rules to decide a controversy.¹⁷⁰ The Board has much discretion in the resolution of unfair labor practice disputes, but it may not apply this authority in a way which deprives a party of a fair and adequate hearing.¹⁷¹ Rigid, inflexible insistence upon procedural rules can sometimes result in injustice, especially where such procedures preclude a review of a party's case on the merits.¹⁷² Moreover, where the injustice occurs because of a narrow

¹⁶³ See *id.*, 109 L.R.R.M. (BNA) at 2463. The court reiterated its dissatisfaction with the Board's "wooden and inflexible attitude on procedural matters" which the court found to be "unfortunate" in *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 109 L.R.R.M. (BNA) 2457 (3d Cir. 1982). *Id.*, 109 L.R.R.M. (BNA) at 2464.

¹⁶⁴ *Id.*, 109 L.R.R.M. (BNA) at 2463.

¹⁶⁵ See *supra* note 138.

¹⁶⁶ 669 F.2d at 140, 109 L.R.R.M. (BNA) at 2463.

¹⁶⁷ See *Kessler Institute for Rehabilitation v. NLRB*, 669 F.2d 138, 141, 109 L.R.R.M. (BNA) 2461, 2463-64 (3d Cir. 1982); *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 136-38, 109 L.R.R.M. (BNA) 2457, 2461 (3d Cir. 1982). See also *NLRB v. Marshall Maintenance Corp.*, 320 F.2d 641, 645 (3d Cir. 1963).

The Third Circuit reaffirmed its position in *National Book Consolidators Inc. v. NLRB*, 672 F.2d 323, 326-27, 109 L.R.R.M. (BNA) 3035, 3037-39 (3d Cir. 1982). In *National Book*, the court of appeals again held that the good cause standard applied to the Board's determination of whether it should accept an answer filed after the due date. *Id.* at 326, 109 L.R.R.M. (BNA) at 3037. Moreover, the court held that where the company was "lulled into the belief that a settlement would be acceptable in lieu of an answer," good cause was demonstrated to justify the late filing. *Id.* at 327, 109 L.R.R.M. (BNA) at 3038.

¹⁶⁸ See 29 C.F.R. § 102.121 (1981). See *supra* note 6.

¹⁶⁹ See *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 569 (9th Cir. 1979).

¹⁷⁰ See *id.*

¹⁷¹ *Id.*

¹⁷² See *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 137-38, 109 L.R.R.M. (BNA) 2457, 2461 (3d Cir. 1982).

interpretation of procedural rules, failure by the Board to take appropriate remedial measures may constitute an abuse of discretion.¹⁷³

Furthermore, the Board's insistence upon strict compliance with its procedural rules unnecessarily creates additional cases for already overburdened courts.¹⁷⁴ As the Third Circuit noted in *NLRB v. Marshall Maintenance Corp.*:¹⁷⁵ "the zeal of the Board in demanding inflexible adherence to the strict letter of the law . . . might well have been expended in a worthier cause."¹⁷⁶ In light of the clear policy expressed in section 120.121 mandating a liberal construction of the Board's rules,¹⁷⁷ it seems somewhat contradictory that the Board has frequently urged restrictive interpretations of its own regulations.¹⁷⁸ For better or worse, it appears that the courts have acquired the task of ensuring that the Board's rules actually receive such a liberal construction.¹⁷⁹ The courts ensure that the Board does not abuse its discretion on such matters.¹⁸⁰ Perhaps if the Board would relax its rigid insistence on technical compliance with its rules, the burden on the courts would be reduced and overall efficiency in the determination of disputes would be achieved.

The *Livingston* and *Kessler* decisions may induce other federal courts of appeals to construe the Board's regulations liberally so as to give parties the full benefit of each regulation's provisions.¹⁸¹ Such a policy is desirable because it ensures that the Board addresses cases on their merits, rather than disposing of them summarily because of noncompliance with rigid or narrowly construed regulations.¹⁸² Such a judicial outlook will likely lead to continued scrutiny when the Board's decisions rest on procedural grounds. So long as the Board chooses to overlook its responsibility to forego procedural resolutions of cases before it in favor of decisions on the merits, the courts undoubtedly will continue to review such cases for abuse of discretion by the Board. Perhaps this continued judicial scrutiny will cause the Board to reassess its inflexible position and to overlook minor procedural infractions where a meritorious position is advanced by the delinquent party.

¹⁷³ See *id.* at 137; 109 L.R.R.M. (BNA) at 2461.

¹⁷⁴ *NLRB v. Marshall Maintenance Corp.*, 320 F.2d 641, 645 (3d Cir. 1963).

¹⁷⁵ 320 F.2d 641 (3d Cir. 1963).

¹⁷⁶ *Id.* at 645.

¹⁷⁷ See *supra* note 6.

¹⁷⁸ See, e.g., *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 135, 109 L.R.R.M. (BNA) 2457, 2459 (3d Cir. 1982); *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 568 (9th Cir. 1979).

¹⁷⁹ See, e.g., *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 137-38, 109 L.R.R.M. (BNA) 2457, 2461 (3d Cir. 1982); *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 569 (9th Cir. 1979).

¹⁸⁰ See *supra* note 179.

¹⁸¹ Along with the Third Circuit, the Ninth Circuit has also recently recognized the need for a liberal construction of the Board's regulations. See *NLRB v. Zeno Table Co., Inc.*, 610 F.2d 567, 569 (9th Cir. 1979).

¹⁸² See *id.*

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS

A. * *Equitable Modification of Title VII Filing Requirements:*
*Zipes v. Trans World Airlines*¹

An individual seeking relief from employment discrimination must file a claim under Title VII of the Civil Rights Act of 1964² with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act.³ The time limitation for filing the claim insures that the individual will file his claim promptly and that the employer will be protected from liability for actions which occurred in the distant past.⁴ Although Title VII has this time limitation for filing a claim, Title VII fails to indicate what the consequences will be if an individual does not file within the prescribed time period.⁵

Prior to the *Survey* year, the circuit courts of appeals disagreed about whether an individual's failure to file within the time limit barred his cause of

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¹ 102 S. Ct. 1127 (1982).

² 42 U.S.C. §§ 2000e to 2000e-17 (1976). 42 U.S.C. § 2000e-2(a) (1976) reads as follows:

It shall be unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

³ *Id.* § 2000e-5(e). The statute reads in part:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter. . .

The remainder of the statute provides that if the claim is filed with a state or local agency the employee has 300 days from the date of the alleged unlawful employment practice to file the claim with the EEOC.

Title VII originally provided that a claimant had 90 days from the time of the alleged unlawful act to file his claim with the EEOC. *Id.* § 2000e-5(d) (1970). The period was extended to 180 days in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

⁴ *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980).

⁵ The provision of Title VII which grants jurisdiction of Title VII claims to federal district courts makes no reference to the 180 day filing requirement. 42 U.S.C. § 2000e-5(f)(3) (1976). The jurisdictional provision reads in pertinent part:

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in

action in all cases.⁶ A majority of the circuits held that the Title VII filing period was similar to a statute of limitations and therefore was subject to equitable modification in appropriate cases.⁷ One circuit, the Court of Appeals for the Seventh Circuit, held that filing within the time period was a jurisdictional prerequisite and that failure to file in a timely manner barred the claim regardless of the reason for the delay in filing.⁸ The remainder of the circuits had not yet decided the issue.⁹

During the *Survey* year, the United States Supreme Court in *Zipes v. Trans World Airlines*¹⁰ rejected the view that failure to file a Title VII claim within the prescribed time period will bar the claim in all cases. The *Zipes* Court held that the filing period is not a jurisdictional prerequisite and is subject to equitable waiver, estoppel and tolling.¹¹ The *Zipes* decision, therefore, resolves the split in the circuits and indicates that, under the proper circumstances, failure to file a Title VII claim within the statutory time limits will not bar the claim.

In *Zipes*, the plaintiffs were class representatives in a Title VII class action suit which was brought against Trans World Airlines (TWA) to challenge TWA's alleged policy of discriminating against women employees.¹² The suit was initiated in 1970 by a union which represented all flight attendants employed by TWA.¹³ The union alleged that TWA's policy of grounding female flight attendants who became mothers while allowing male flight attendants who became fathers to continue to fly violated Title VII.¹⁴ The union

which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

Id.

In addition, the provision designating a 180 day filing period for Title VII claims is an entirely separate provision and does not refer to the jurisdiction of the courts. *Id.* § 2000e-5(e). See *supra* note 3 for the text of the filing provision.

⁶ See *infra* notes 7-9 and accompanying text.

⁷ *Cooper v. Bell*, 628 F.2d 1208, 1213, 24 Fair Empl. Prac. Cas. (BNA) 855, 858 (9th Cir. 1980); *Hart v. J.T. Baker Chemical Co.*, 598 F.2d 829, 833, 19 Fair Empl. Prac. Cas. (BNA) 1347, 1350 (3d Cir. 1979); *Leake v. University of Cincinnati*, 605 F.2d 255, 259, 20 Fair Empl. Prac. Cas. (BNA) 964, 966 (6th Cir. 1979); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475, 13 Fair Empl. Prac. Cas. (BNA) 1068, 1101 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928, 11 Fair Empl. Prac. Cas. (BNA) 235, 238 (5th Cir. 1975); *Sanchez v. Trans World Airlines, Inc.*, 499 F.2d 1107, 1108, 8 Fair Empl. Prac. Cas. (BNA) 627, 628 (10th Cir. 1974).

⁸ Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1151, 17 Fair Empl. Prac. Cas. (BNA) 1513, 1520 (7th Cir. 1978).

⁹ The First and Second Circuits expressly have reserved deciding the issue. *Daughtry v. King's Dept. Stores, Inc.*, 608 F.2d 906, 909, 21 Fair Empl. Prac. Cas. (BNA) 333, 335 (1st Cir. 1979); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109, 16 Fair Empl. Prac. Cas. (BNA) 712, 717 (2d Cir. 1978). The Fourth and Eighth Circuits have not yet addressed the issue.

¹⁰ 102 S. Ct. 1127 (1982).

¹¹ *Id.* at 1132. The *Zipes* opinion was written by Justice White and was joined by Justices Brennan, Marshall, Blackmun, O'Connor, Burger, Powell and Rehnquist on the issue of timely filing of a Title VII claim. *Id.* at 1136. Justice Stevens took no part in the consideration or decision of the case. *Id.*

¹² *Id.* at 1129-30.

¹³ *Id.* at 1129.

¹⁴ *Id.* at 1129-30.

therefore brought the suit on behalf of all female flight attendants who had been terminated from their positions as flight attendants on or after July 1965.¹⁵

As a result of the suit, TWA changed its policy and made a tentative settlement with the union which was approved by the district court.¹⁶ The Court of Appeals for the Seventh Circuit, however, found that the union could not represent adequately both the present and past employees of TWA.¹⁷ In 1974, the district court therefore appointed several women who had been discharged from TWA upon becoming mothers as class representatives.¹⁸ Once the petitioners had been appointed as class representatives, and five years after commencement of the suit, TWA moved to exclude the petitioners as well as other class members from the class.¹⁹ TWA asserted that the petitioners and many others in the class should be excluded from the class because they had not filed Title VII claims within ninety days of the termination of their employment by TWA.²⁰

The district court denied TWA's motion to exclude from the class all individuals who had not filed charges within ninety days of termination from TWA.²¹ In denying the motion, the district court first stated that the Title VII filing requirements were indeed jurisdictional and therefore were not waived by TWA's delay in pleading the lack of timely filing as a defense.²² The district court maintained, however, that the Title VII violation was a continuing violation against all the class members which ended only when the airline changed its employment practice.²³ So characterizing TWA's employment practice as a continuing violation,²⁴ the district court held that the filing of the Title VII claim was timely for all the class members.²⁵

¹⁵ *Id.* at 1130 n.1.

The class was composed of female flight attendants terminated after July 1965 since Title VII's prohibition on sex discrimination became effective on July 2, 1965, one year after the date of its enactment. 42 U.S.C. 2000e (1976).

¹⁶ *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1130 (1982).

¹⁷ *Air Line Stewards and Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, 490 F.2d 636, 643, 6 Fair Empl. Prac. Cas. (BNA) 1197, 1202-03 (7th Cir. 1973).

The appeal was brought by several members of the class who contended that the union which represented them and negotiated the settlement had interests antagonistic to their own. *Id.* at 637, 6 Fair Empl. Prac. Cas. (BNA) at 1197-98.

¹⁸ *Airline Stewards and Stewardesses Ass'n, Local 550 v. Trans World Airlines, Inc.*, No. 70 C 2071, slip op. (D.D.C. Sept. 16, 1974) (mem.).

¹⁹ *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1130 (1982).

²⁰ *Id.* At the time the suit was filed in 1970, the filing period for a Title VII claim was within 90 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(d) (1970). In 1972 the provision was amended to extend the time limit to 180 days. See *supra* note 3.

²¹ *Airline Stewards and Stewardesses Ass'n, Local 550 v. Trans World Airlines, Inc.*, Nos. 70 C 2069 & 70 C 2071, slip op. (D.D.C. Oct. 15, 1976) (mem.).

The district court also granted summary judgment for the plaintiffs and held that TWA's employment practice violated Title VII. *Id.*

²² *Id.*

²³ *Id.*

²⁴ For a complete discussion of Title VII and the continuing violation theory see *Title VII and Continuing Violations*, 24 B.C. L. Rev. _____ (1983).

²⁵ *Airline Stewards and Stewardesses Ass'n v. Trans World Airlines, Inc.*, Nos. 70 C 2069 & 70 C 2071, slip op. (D.D.C. Oct. 15, 1976) (mem.).

The Court of Appeals for the Seventh Circuit vacated the decision of the district court and held that members of the class who failed to file a Title VII claim with the EEOC within ninety days of their termination by TWA were barred from the class action.²⁶ After finding that TWA's policy violated Title VII,²⁷ the Court of Appeals rejected the argument that a continuing violation of Title VII against all members of the class existed until the airline changed its employment practice.²⁸ Moreover the Court of Appeals held that filing within the time period was a jurisdictional prerequisite.²⁹ The filing requirement therefore, was not subject to waiver or estoppel because of TWA's failure to plead untimely filing as a defense in the initial stages of the proceedings. Consequently, class members who had not filed charges within ninety days of being discharged from TWA, ninety-two percent of the plaintiffs,³⁰ were barred from the class and were denied a Title VII claim against TWA.³¹

On appeal, the Supreme Court reversed the Court of Appeals, holding that the timely filing of a Title VII claim is not a jurisdictional prerequisite but, instead, is like a statute of limitations which is subject to waiver, estoppel and equitable tolling.³² After noting that the express language of Title VII does not limit Title VII claims only to cases in which there has been a timely filing,³³ the Court examined the legislative history of Title VII.³⁴ Recognizing that the legislative history of the original enactment was sparse,³⁵ the Court found in the history of the 1972 amendment to Title VII³⁶ evidence indicating that Congress intended the filing period to operate as a statute of limitations.³⁷ The Court referred to the Senate Conference Committee Report on the 1972 amendment which states:

²⁶ Consolidated Pretrial Proceedings in the Airlines Cases, 582 F.2d 1142, 1150-52, 17 Fair Empl. Prac. Cas. (BNA) 1513, 1520-21 (7th Cir. 1978).

²⁷ *Id.* at 1147, 17 Fair Empl. Prac. Cas. (BNA) at 1517.

²⁸ *Id.* at 1149, 17 Fair Empl. Prac. Cas. (BNA) at 1518-1519. The court did hold, however, that the employees who were terminated from their positions as flight attendants and were reinstated to ground duty positions after their maternity leaves were subject to a continuing violation and, therefore, were properly included within the class. *Id.* at 1149-50, 17 Fair Empl. Prac. Cas. (BNA) at 1519. The court reasoned that females who were reinstated to ground positions were in a continuing employment relationship and were therefore directly subject to TWA's discriminatory actions. *Id.* at 1150, 17 Fair Empl. Prac. Cas. (BNA) at 1519.

²⁹ *Id.* at 1151, 17 Fair Empl. Prac. Cas. (BNA) at 1520.

³⁰ *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1130 (1982).

³¹ Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1150-52, 17 Fair Empl. Prac. Cas. (BNA) 1513, 1520-21 (7th Cir. 1978).

³² *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1132 (1982). In addition to considering the issue of whether the Title VII filing period was subject to equitable modification, the Court considered whether an award of retroactive seniority was appropriate for all members. The Supreme Court noted that retroactive seniority was generally an appropriate remedy in Title VII cases and that the district court had found that TWA discriminated against all members of the class. *Id.* at 1135. Consequently, the Court affirmed the district court's granting of retroactive seniority to all the class members. *Id.* at 1136.

³³ *Id.* at 1132-33. See *supra* note 5.

³⁴ *Id.* at 1133.

³⁵ *Id.*

³⁶ See *supra* note 3.

³⁷ *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1133 (1982).

This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection.³⁸

After examining the legislative history of Title VII, the Court noted that prior Supreme Court cases also have suggested that the filing requirement is not jurisdictional.³⁹ Although several Supreme Court cases had referred to the filing period as jurisdictional,⁴⁰ the Court acknowledged that such language was dicta and that in subsequent cases the Court had referred to the filing period as a limitations period.⁴¹ The *Zipes* Court then reviewed several Supreme Court decisions which indicated that the filing period was not jurisdictional.⁴² First, in *Franks v. Bowman Transportation Co., Inc.*,⁴³ the Court had held that awarding seniority to unnamed members of a class who had failed to file a claim with the EEOC was an appropriate remedy in a Title VII suit.⁴⁴ The *Zipes* Court noted that if the Title VII filing requirement were indeed jurisdictional, the *Franks* Court would not have had the power to award seniority to the plaintiffs who had not filed with the EEOC.⁴⁵ Subsequently, in *Electrical Workers v. Robbins & Myers*,⁴⁶ the Court had held that the Title VII filing period was not tolled when the plaintiff was participating in a grievance procedure.⁴⁷ The *Zipes* Court emphasized that in *Robbins & Myers* it had considered the merits of the argument that the grievance procedure should toll the filing period.⁴⁸ According to the *Zipes* Court, such consideration of the merits would have been unnecessary if the filing requirement were indeed a jurisdictional prerequisite.⁴⁹

³⁸ 118 CONG. REC. 7167 (1972).

³⁹ *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1133-35 (1982).

⁴⁰ See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

⁴¹ *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1133 (1982). For cases in which the Supreme Court referred to the filing periods as a limitations period, see *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355, 371-72 (1977); *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 241, 242 (1976).

⁴² *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1134-35 (1982).

⁴³ 424 U.S. 747 (1976).

⁴⁴ *Id.* at 762.

⁴⁵ *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1134 (1982).

⁴⁶ 429 U.S. 229 (1976).

⁴⁷ *Id.* at 236-40.

⁴⁸ *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1134-35 (1982).

⁴⁹ *Id.* at 1135. The Court also cited its opinions in *Love v. Pullman Co.*, 404 U.S. 522 (1972) and in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) as supporting the view that the Title VII filing period is not a jurisdiction prerequisite. In *Love*, the Court indicated that the filing provision of Title VII should not be interpreted literally. *Love v. Pullman*, 404 U.S. 522, 526-27. Subsequently, in *Mohasco Corp.*, the Court dismissed a Title VII claim when the respondent had failed to file his claim with the EEOC or a state agency within the prescribed period. *Mohasco Corp. v. Silver*, 825-26. The Court noted, however, that the respondent "did not exercise the diligence required by [Title VII]." *Id.* at 815.

The Supreme Court opinions have served as signals to several lower courts that the filing period was subject to equitable modifications. See, e.g., *Coke v. General Adjustment Bureau*,

Finally, the Court reasoned that equitable modification of the 180 day filing requirement would be consistent with the purpose of Title VII.⁵⁰ The Court noted that equitable modification would further the remedial purposes of Title VII.⁵¹ In addition, the Court emphasized that equitable modification would not interfere with the purpose of the 180 day filing requirement since it would continue to insure prompt filing of Title VII claims.⁵²

The decision of the Supreme Court in *Zipes* strikes an appropriate balance between the remedial purposes of Title VII and the desire for a filing requirement which will protect employers from discriminatory conduct which occurred in the distant past. Equitable modification of the 180 day filing requirement is consistent with the remedial purposes of Title VII. By its very terms, Title VII was enacted to provide a broad remedy for employment discrimination.⁵³ Title VII claims, however, often are filed by individuals who were unaware of the discriminatory acts of an employer when they first occurred.⁵⁴ Therefore, in order to effectuate the broad remedial purposes of Title VII in redressing employment discrimination and to avoid penalizing an aggrieved individual, the 180 day filing period should be flexible. As the Supreme Court has noted, "technicalities are particularly inappropriate in [Title VII, where] laymen, unassisted by trained lawyers, initiate the process."⁵⁵

Although Title VII was enacted to provide maximum protection against employment discrimination, Congress imposed timely filing requirements in order to encourage individuals to file their claims promptly and to protect employers from liability for acts which occurred in the distant past.⁵⁶ Permitting equitable modification of the time period does not undermine these purposes. First, equitable modification will continue to require individuals to file a Title VII claim as soon as possible. When an individual fails to file a timely claim as a result of his own lack of diligence, equitable modification will not preserve his claim.⁵⁷ Second, equitable modification of the filing period will not

Inc., 640 F.2d 584, 587-89, 25 Fair Empl. Prac. Cas. (BNA) 433, 434-36 (5th Cir. 1981); *Hart v. J.T. Baker Chemical Co.*, 598 F.2d 829, 833, 19 Fair Empl. Prac. Cas. (BNA) 1347, 1349-50 (3d Cir. 1979).

⁵⁰ *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1135 (1982).

⁵¹ *Id.*

⁵² *Id.*

⁵³ The Conference Report for the 1972 amendments to Title VII provides:

The provisions of [Title VII] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . . [T]he Act is intended to make the victims of unlawful employment discrimination whole, . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 CONG. REC. 7168 (1972).

⁵⁴ *E.g.*, *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 926, 11 Fair Empl. Prac. Cas. (BNA) 235, 236 (5th Cir. 1975).

⁵⁵ *Love v. Pullman*, 404 U.S. 522, 526 (1972).

⁵⁶ See *supra* note 4.

⁵⁷ Lower courts consistently have held that lack of diligence in filing a Title VII claim will not toll the 180 day period. *E.g.*, *Hart v. J.T. Baker Chemical Co.*, 598 F.2d 829, 834-35, 19

force an employer to defend an act for which he should no longer be held responsible. In considering whether to extend the filing period, courts may take into account the potential prejudice that an employer would suffer in defending a claim which was not filed within the statutory period.⁵⁸ If, however, the employer had misled the plaintiff as to the reasons for the employer's actions,⁵⁹ or if the employer had failed to object to an untimely filing at commencement of the suit, it is unlikely that a court would find an employer unduly burdened by defending an untimely claim.⁶⁰ A proper application of equitable modification to the Title VII filing period therefore will insure that an individual who files his claim in an untimely manner through no fault of his own will have a Title VII cause of action for employment discrimination while guaranteeing that an employer will not have to defend a stale claim which is unjustifiably burdensome.

Although the *Zipes* Court resolved a split in the circuits by holding that the Title VII filing period is subject to equitable modification when the employer fails to raise the defense of untimely filing in the initial stages of the proceedings, it is unclear what other situations may give rise to an equitable modification of the filing period. As the Supreme Court has held in *Robbins v. Myers*, pursuing an alternative remedy for employment discrimination will not toll the 180 day period.⁶¹ In addition, lower courts consistently have held that when an employer misleads the plaintiff concerning the reasons for the discriminatory act⁶² or the necessity of filing a timely claim,⁶³ the filing period is subject to equitable tolling. It remains uncertain, however, to what extent ill-

Fair Empl. Prac. Cas. (BNA) 1347, 1350 (5th Cir. 1979).

⁵⁸ See *Love v. Pullman*, 404 U.S. 522, 526 (1972); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930, 11 Fair Empl. Prac. Cas. (BNA) 235, 239 (5th Cir. 1975).

⁵⁹ In *Reeb v. Economic Opportunity Atlanta, Inc.*, the Fifth Circuit Court of Appeals stated:

Secret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against. Indeed, employers that discriminate undoubtedly often attempt to cloak their policies with a semblance of rationality, and may seek to convey to the victim of their policies an air of neutrality or even sympathy. These tendencies may even extend to the giving of misleading or false information to the victim . . .

516 F.2d 924, 931, 11 Fair Empl. Prac. Cas. (BNA) 235, 240-41 (5th Cir. 1975).

⁶⁰ As Justice Black stated, "[N]o man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959).

⁶¹ 429 U.S. 229, 236-40 (1976); see also *Bronze Shields v. New Jersey Dept. of Civil Serv.*, 667 F.2d 1074, 1084, 27 Fair Empl. Prac. Cas. (BNA) 749, 759 (3d Cir. 1981).

⁶² See, e.g., *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930-31, 11 Fair Empl. Prac. Cas. (BNA) 235, 240-41 (5th Cir. 1975) (employer sought to mislead plaintiff by informing her that funds were no longer available for her position).

⁶³ See, e.g., *Leake v. University of Cincinnati*, 605 F.2d 255, 258, 20 Fair Empl. Prac. Cas. (BNA) 964, 966 (6th Cir. 1979) (Express statements by employer that if plaintiff gave employer time to investigate her complaint employer would not raise a statute of limitations defense).

ness,⁶⁴ or reliance on incorrect advice from counsel⁶⁵ or from a state official⁶⁶ will justify an extension of the filing period.

In the aftermath of *Zipes*, an individual who believes he has been discriminated against in employment should continue to file a Title VII claim as soon as he becomes aware that an employer may have discriminated against him or else the claim may be barred as untimely. If circumstances existed, however, which prevented the plaintiff from filing in a timely manner or if the employer fails to assert the defense of untimely filing in the initial stages of the proceedings, counsel should argue that an equitable modification of the filing period is appropriate. Likewise, employers should be on notice that engaging in conduct which misleads the individual as to the reason for the discriminatory act or the necessity of filing promptly will not prevent the court from hearing a Title VII claim which was filed beyond the time period. Finally, after *Zipes* an employer must be careful to assert promptly the defense of an untimely filing otherwise he may be estopped from doing so later in the proceeding.

B.* *Title VII And Continuing Violations:*

*Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*¹

In order to bring an employment discrimination claim under Title VII of the Civil Rights Act of 1964,² an individual believing he or she has been discriminated against must file a claim with the Equal Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act.³ If the claim is not filed with the EEOC within the 180 day period, the claim will be dismissed

⁶⁴ See, e.g., *Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1312, 12 Fair Empl. Prac. Cas. (BNA) 1654, 1657 (5th Cir. 1976) (illness insufficient to toll filing period under the Age Discrimination in Employment Act).

⁶⁵ See, e.g., *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261, 13 Fair Empl. Prac. Cas. (BNA) 12, 16 (10th Cir. 1976) (complaint allowed after plaintiff relied on incorrect advice from counsel in failing to file a claim under the Age Discrimination in Employment Act); *McQueen v. E.M.C. Plastic Co.*, 302 F. Supp. 881, 884-85, 1 Fair Empl. Prac. Cas. (BNA) 796, 798-99 (E.D. Tex. 1969) (plaintiff's court appointed counsel failed to file a Title VII claim within the filing period and the application for counsel was found to be sufficient compliance with the filing period).

⁶⁶ *Chappell v. Emco Mach. Works Co.*, 601 F.2d 1295, 1303, 20 Fair Empl. Prac. Cas. (BNA) 1059, 1065 (5th Cir. 1979) (the promise of a state official that he would file plaintiff's Title VII claim was not sufficient to toll the statutory period).

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¹ 667 F.2d 1074, 27 Fair Empl. Prac. Cas. (BNA) 749 (3rd Cir. 1981).

² 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

³ 42 U.S.C. § 2000e-5(e) (1976). The statute reads in part:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter. . . .

Id.

The remainder of the statute provides that if the claim is filed with a state or local agency the employee has 300 days from the date of the alleged unlawful employment practice to file the claim with the EEOC. *Id.*

as untimely.⁴ The purposes of the 180 day filing requirement are not only to guarantee the Title VII rights of individuals who file their claims promptly but also to protect employers from liability for actions which occurred in the distant past.⁵

For several reasons courts have not rigidly applied the 180 day time limitation of Title VII.⁶ First, courts have recognized that a liberal application of the filing limitation is consistent with the remedial purposes of Title VII and with the liberal interpretation to be given to all Title VII provisions.⁷ Second, courts have construed the 180 day limitation liberally to avoid penalizing employees who are unfamiliar with Title VII filing requirements.⁸ The courts' propensity to interpret the 180 day limitation broadly has led to the development of the "continuing violation" theory.⁹ This theory is based on the notion that a Title VII violation can occur over a period of time. Courts have found that a continuing violation exists and that the 180 day provision is satisfied if a discriminatory act which occurred prior to 180 days before the filing of a claim with the EEOC was part of a continuing discriminatory act, pattern, or policy which extended to within 180 days of filing.¹⁰ Thus, if a court finds that a violation continued into the filing period, the employer's liability under Title VII will be extended to the first instance of the continuing violation even if it occurred prior to the 180 day filing period.¹¹

The Supreme Court has considered the applicability of the continuing violation theory in two cases. In *United Air Lines v. Evans*,¹² the Court held that a seniority system which merely continued the effects of a prior discriminatory

⁴ See, e.g., *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 & n.4 (1977).

⁵ *Del. State College v. Ricks*, 449 U.S. 250, 256-57 (1980).

⁶ See generally Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L.J. 811, 819-841 (1979).

⁷ E.g., *Hart v. J.T. Baker Chem. Co.*, 598 F.2d 829, 831-32, 19 Fair Empl. Prac. Cas. (BNA) 1347, 1348-49 (3d Cir. 1979). In addition, 29 C.F.R. § 1601.34 (1981) provides that the "rules and regulations shall be liberally construed to effectuate the purpose and provisions of Title VII."

⁸ See Jackson & Matheson, *supra* note 6, at 812 & n.4.

⁹ The continuing violation theory was first articulated in *King v. Georgia Power Co.*, 295 F. Supp. 943, 946, 1 Fair Empl. Prac. Cas. (BNA) 357, 359 (N.D. Ga. 1968).

¹⁰ *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312, 24 Fair Empl. Prac. Cas. (BNA) 990, 992 (4th Cir. 1980); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 760-61, 22 Fair Empl. Prac. Cas. (BNA) 1049, 1051 (9th Cir. 1980); *Acha v. Beame*, 570 F.2d 57, 65, 16 Fair Empl. Prac. Cas. (BNA) 526, 532 (2d Cir. 1978); *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1175, 16 Fair Empl. Prac. Cas. (BNA) 978, 982 (3d Cir. 1978); *Cedeck v. Hamilton Fed. Sav. & Loan Ass'n*, 551 F.2d 1136, 1137, 14 Fair Empl. Prac. Cas. (BNA) 1571, 1572 (8th Cir. 1977); *Clark v. Olincraft Inc.*, 556 F.2d 1219, 1222, 15 Fair Empl. Prac. Cas. (BNA) 374, 376 (5th Cir. 1977); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 348, 11 Fair Empl. Prac. Cas. (BNA) 211, 223 (10th Cir. 1975); *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979, 987, 5 Fair Empl. Prac. Cas. (BNA) 994, 999 (D.C. Cir. 1973); *Cox v. United States Gypsum Co.*, 409 F.2d 289, 290-91, 1 Fair Empl. Prac. Cas. (BNA) 714, 715-16 (7th Cir. 1969).

¹¹ See, e.g., *Acha v. Beame*, 570 F.2d 57, 65, 16 Fair Empl. Prac. Cas. (BNA) 526, 532 (2d Cir. 1978); *Egleston v. State Univ. College at Geneseo*, 535 F.2d 752, 755, 12 Fair Empl. Prac. Cas. (BNA) 1484, 1486 (2d Cir. 1976); *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979, 987, 5 Fair Empl. Prac. Cas. (BNA) 994, 999 (D.C. Cir. 1973).

¹² 431 U.S. 553 (1977).

act did not constitute a continuing violation of Title VII.¹³ The *Evans* Court established that for a Title VII claim to be timely, a present violation of Title VII, rather than merely the continuing effects of a past violation, must exist within the filing period.¹⁴ More recently, in *Delaware State College v. Ricks*,¹⁵ the Supreme Court again considered the application of the continuing violation theory. In *Ricks*, the respondent contended that his Title VII claim was filed timely because the claim was based on a continuing violation of Title VII.¹⁶ The respondent, a Liberian faculty member at Delaware State College,¹⁷ was officially notified that the College had denied him tenure.¹⁸ Pursuant to its customary practice, the College then offered him a one year non-renewable contract which he accepted.¹⁹ Two months before the expiration of his contract, the respondent filed a Title VII claim with the EEOC alleging that the College had discriminated against him by denying him tenure and by terminating his employment at the expiration of the one year contract.²⁰ In considering whether the claim was timely, the Court reasoned that since the college terminated the respondent's contract in the same manner in which it terminated similar contracts,²¹ the termination of employment upon expiration of the contract was not a discriminatory act.²² The Court maintained that termination of the contract was merely an inevitable consequence of the denial of tenure.²³ Referring to *Evans*, the Court again emphasized that the continuing effects of a past discriminatory act do not constitute a continuing violation of Title VII for purposes of extending the 180 day filing requirement.²⁴ To determine the timeliness of a Title VII claim, the *Ricks* Court stated that a court must "identify precisely 'the unlawful employment practice' of which [the plaintiff] complains."²⁵ Concluding that the only alleged discrimination occurred at the time of the tenure decision,²⁶ the Court held that the termination of employment upon expiration of the one year contract was not part of a continuing violation²⁷ and dismissed respondent's claim as untimely.²⁸

¹³ *Id.* at 557-58.

¹⁴ *Id.* at 558. Prior to the Supreme Court's decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), lower courts also had found that a continuing violation of Title VII existed as long as the effects of a discriminatory act which occurred in the past continued to within 180 days of filing with the EEOC. *E.g.*, *Williams v. Norfolk & W.Ry. Co.*, 530 F.2d 539, 542, 11 Fair Empl. Prac. Cas. (BNA) 836, 839 (4th Cir. 1975).

¹⁵ 449 U.S. 250 (1980). For a complete discussion of *Ricks*, see *Timely Filing under § 1981 of Title VII in Denial of Tenure: Delaware State College v. Ricks*, 23 B.C. L. REV. 82, 235-45.

¹⁶ *Del. State College v. Ricks*, 449 U.S. 250, 257 (1980).

¹⁷ *Id.* at 252.

¹⁸ *Id.* at 253 & n.2.

¹⁹ *Id.*

²⁰ *Id.* at 257.

²¹ *Id.* at 257-58.

²² *Id.* at 257.

²³ *Id.* at 257-58.

²⁴ *Id.* at 258.

²⁵ *Id.* at 257.

²⁶ *Id.* at 258.

²⁷ *Id.* at 259.

²⁸ *Id.* at 262. In denying plaintiff's Title VII claim the Court did not decide the exact

Thus, in *Evans* and in *Ricks*, the only two cases in which the Supreme Court has considered the continuing violation theory, the Court did not find a continuing violation of Title VII. In neither case, however, did the Court explicitly reject the continuing violation theory. Rather, the Court merely held that based on the facts of these cases no continuing violation existed.

During the *Survey* year, in *Bronze Shields, Inc. v. New Jersey Department of Civil Service*,²⁹ the Court of Appeals for the Third Circuit relied on the Supreme Court's decisions in *Ricks* and *Evans* to find that the existence of a hiring list compiled from the results of a discriminatory test given to job applicants did not constitute a continuing violation of Title VII.³⁰ The *Bronze Shields* court recognized that the creation of the hiring list may have been a discriminatory act³¹ but noted that the Title VII claim had not been filed with the EEOC within 180 days of the creation of the list.³² The *Bronze Shields* court applied the *Ricks* standard stating that it needed to identify the unlawful employment practice and separate it from the "inevitable, but neutral, consequences" of the discriminatory practice.³³ Viewing the continuing existence of the hiring list merely as an effect of the discriminatory creation of the list, the court dismissed the plaintiffs' Title VII claim.³⁴ *Bronze Shields* is significant because it indicates that the Third Circuit is reluctant to find that a continuing violation of Title VII exists after the Supreme Court's decisions in *Evans* and *Ricks*. In addition, the reasoning utilized by the Court of Appeals in *Bronze Shields* indicates that a split in the circuits may develop on the issue of whether hiring from a discriminatory eligibility list is a continuing violation of Title VII.

The plaintiffs in *Bronze Shields*³⁵ were two black women who applied for positions on the Newark, New Jersey Police Force.³⁶ Pursuant to the hiring policy of the City of Newark, the plaintiffs were required to pass a series of written, physical, and medical exams administered by the New Jersey State

date on which the denial of tenure occurred for purposes of commencing the 180 day filing period. Since the plaintiff had failed to file within 180 days of being notified of the decision by the College Board of Trustees to deny him tenure or within 180 days of being informed that he would be offered a one year employment contract for the following year, the Court found it unnecessary to decide which of the two dates started the running of the 180 day filing period. *Id.* at 262 n.17.

²⁹ 667 F.2d 1074, 27 Fair Empl. Prac. Cas. (BNA) 749 (3d Cir. 1981).

³⁰ *Id.* at 1084, 27 Fair Empl. Prac. Cas. (BNA) at 757.

³¹ *Id.* at 1083, 27 Fair Empl. Prac. Cas. (BNA) at 755.

³² *Id.*, 27 Fair Empl. Prac. Cas. (BNA) at 757.

³³ *Id.*, 27 Fair Empl. Prac. Cas. (BNA) at 756.

³⁴ *Id.* at 1085-86, 27 Fair Empl. Prac. Cas. (BNA) at 759.

³⁵ The plaintiffs in *Bronze Shields* initially filed a complaint alleging that by creating the discriminatory hiring list the defendants had violated 42 U.S.C. §§ 1981 and 1983 and the thirteenth and fourteenth amendments of the Constitution. *Id.* at 1078, 27 Fair Empl. Prac. Cas. (BNA) at 752. Four years later, the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976) held that a showing of discriminatory intent is necessary for all constitutionally based claims of discrimination. 426 U.S. at 244-45. The plaintiffs in *Bronze Shields* therefore amended the complaint and added a claim based on Title VII. *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1079, 27 Fair Empl. Prac. Cas. (BNA) 749, 753 (3d Cir. 1981). On appeal, plaintiffs raised only the § 1981 and Title VII claims. *Id.* at 1076-77, 27 Fair Empl. Prac. Cas. (BNA) at 750-51.

³⁶ *Id.* at 1080, 1089, 27 Fair Empl. Prac. Cas. (BNA) at 754, 761.

Department of Civil Service.³⁷ The Department used the results of these exams to create an eligibility list from which the City of Newark hired its policemen.³⁸

Because the plaintiffs failed the written exam, their names were not placed on the hiring list created in May 1975.³⁹ Since the eligibility list was to be in effect for three years, the plaintiffs would have had to wait three years before they could have been included on a new eligibility list.⁴⁰ In July 1976, more than 180 days after the creation of the hiring list, but before the City of Newark had actually hired from the list,⁴¹ the plaintiffs filed a Title VII claim with the EEOC.⁴² The plaintiffs alleged that the creation of the hiring list violated Title VII since the list was based on test results which excluded a disproportionate number of minorities.⁴³ The plaintiffs asserted that the filing of their claim was timely because a continuing violation of Title VII existed as long as the hiring list was in effect.⁴⁴ In an unpublished opinion, the district court dismissed the Title VII complaint as untimely.⁴⁵

The Court of Appeals for the Third Circuit affirmed the district court's decision to dismiss the Title VII claim.⁴⁶ The court first acknowledged that it had previously recognized the validity of the continuing violation theory in Title VII cases⁴⁷ and that Congress had approved a liberal interpretation of the

³⁷ *Id.* at 1077, 27 Fair Empl. Prac. Cas. (BNA) at 751.

³⁸ *Id.*

³⁹ *Id.* at 1080, 27 Fair Empl. Prac. Cas. (BNA) at 754.

⁴⁰ *Id.*

⁴¹ *Id.* Newark used the list only once in November 1977 when it hired 27 recruits for police training. *Id.*

⁴² *Id.*

⁴³ *Id.* at 1083, 27 Fair Empl. Prac. Cas. (BNA) at 756.

Based on the results of the written exams which were administered 11 times between May 1972 and June 1975, the following percentages of applicants passed the exams: White males — 57.8%, Black males — 26.7%, and Hispanic males — 26.4%. *Id.* at 1088 n.1, 27 Fair Empl. Prac. Cas. (BNA) at 761 n.1.

⁴⁴ *Id.* at 1081, 27 Fair Empl. Prac. Cas. (BNA) at 754.

In addition to the continuing violation theory, plaintiffs maintained that the Title VII claim was timely due to an equitable tolling of the 180 day filing limit. *Id.* at 1084, 27 Fair Empl. Prac. Cas. (BNA) at 757. The plaintiffs argued that since they had relied to their detriment on the continuing violation theory and that the parties had been litigating the same issues since 1972, four years prior to the filing of the Title VII claim, the limitation period should be tolled. *Id.* at 1085, 27 Fair Empl. Prac. Cas. (BNA) at 758. Although the Third Circuit had held previously that the filing limits under Title VII are subject to equitable tolling, *Hart v. J.T. Baker Chem. Co.*, 598 F.2d 829, 833, 19 Fair Empl. Prac. Cas. (BNA) 1347, 1349 (3d Cir. 1979), the Third Circuit in *Bronze Shields* held that the reasons given by the plaintiffs were not sufficient for an equitable tolling of the 180 day filing limitation. *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1085, 27 Fair Empl. Prac. Cas. (BNA) 749, 758-59 (3d Cir. 1981).

Although the circuits were split concerning whether Title VII filing limitations are subject to equitable tolling, the Supreme Court recently resolved the issue in *Zipes v. Trans World Airlines*, 102 S. Ct. 1127, 1132 (1982) and held that the filing period is subject to equitable tolling. *Id.*

⁴⁵ *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1076 & n.3, 27 Fair Empl. Prac. Cas. (BNA) 749, 750-51 & n.3. (3d Cir. 1981).

⁴⁶ *Id.* at 1087, 27 Fair Empl. Prac. Cas. (BNA) at 760.

⁴⁷ *Id.* at 1081, 27 Fair Empl. Prac. Cas. (BNA) at 755. *See Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174, 16 Fair Empl. Prac. Cas. (BNA) 978, 982-83 (3d Cir. 1978).

180 day filing period.⁴⁸ The court maintained, however, that use of the continuing violation theory to extend the Title VII filing period is limited by the need to protect employers from liability for discriminatory acts committed in the distant past.⁴⁹ Moreover, the court noted that even though many lower courts have applied the continuing violation theory liberally, the Supreme Court refused to apply this theory to extend the filing period in both *Evans* and *Ricks*.⁵⁰ Finally, the court reviewed the Supreme Court's decision in *Ricks* and applied the reasoning of *Ricks* to the facts of *Bronze Shields*.⁵¹

Applying the *Ricks* standard, the court first identified the exact employment practice which the plaintiffs alleged was discriminatory.⁵² The court determined that the final act of which the plaintiffs complained was the creation of the hiring list in May 1975.⁵³ Conceding that this may have been a discriminatory act since the list was based on allegedly discriminatory exam results,⁵⁴ the court noted that the plaintiffs had received final notice that their names were not on the list on May 3, 1975.⁵⁵ Plaintiffs did not file their claim within 180 days of that date.⁵⁶ The court then determined whether existence of the eligibility list constituted a continuing discriminatory act or whether, like the dismissal which inevitably followed the denial of tenure in *Ricks*, the eligibility list was merely a discriminatory effect of a previous discriminatory act. In refusing to apply the continuing violation theory, the court first noted that the City of Newark had not used the list prior to plaintiffs' filing of charges with the EEOC.⁵⁷ The court then observed that even if Newark had used the list 180 days prior to the filing date, the plaintiffs had not alleged that Newark would have used the list in a discriminatory manner.⁵⁸ The court reasoned that because applicants would be hired from the list in the order in which their names appeared, the use of the hiring list would be a nondiscriminatory act.⁵⁹ Finally, quoting *Ricks*, the court stated that the failure to hire the plaintiffs was simply "a delayed, but inevitable consequence" of the creation of the hiring list.⁶⁰ Thus the court viewed the continued existence of the hiring list over three years as a discriminatory effect rather than a discriminatory act. Following the approach taken in *Ricks*, the court therefore held that the existence of the hiring list was not a continuing violation and denied plaintiffs' Title VII claim as untimely.⁶¹

⁴⁸ 667 F.2d at 1081, 27 Fair Empl. Prac. Cas. (BNA) at 755.

⁴⁹ *Id.* at 1082, 27 Fair Empl. Prac. Cas. (BNA) at 756-57.

⁵⁰ *Id.*

⁵¹ *Id.* at 1082-84, 27 Fair Empl. Prac. Cas. (BNA) at 756-57.

⁵² *Id.* at 1083, 27 Fair Empl. Prac. Cas. (BNA) at 756.

⁵³ *Id.* at 1084, 27 Fair Empl. Prac. Cas. (BNA) at 757.

⁵⁴ *Id.* at 1083, 27 Fair Empl. Prac. Cas. (BNA) at 756.

⁵⁵ *Id.*

⁵⁶ *Id.*, 27 Fair Empl. Prac. Cas. (BNA) at 756-57.

⁵⁷ *Id.*, 27 Fair Empl. Prac. Cas. (BNA) at 757.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1084, 27 Fair Empl. Prac. Cas. (BNA) at 757 (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980)).

⁶¹ *Id.* at 1085-86, 27 Fair Empl. Prac. Cas. (BNA) at 759.

Circuit Judge Higginbotham dissented from the majority's holding that the Title VII claim was untimely.⁶² In his dissent, Judge Higginbotham maintained that the majority had misconstrued the plaintiffs' complaint.⁶³ According to Judge Higginbotham, the plaintiffs had complained not only that the creation of the hiring list was discriminatory but also that the life of the hiring list prevented Newark from hiring policemen in a nondiscriminatory manner for three years.⁶⁴ Judge Higginbotham emphasized that the facts of *Bronze Shields* were different from those in *Ricks* and *Evans*.⁶⁵ Neither *Ricks* nor *Evans*, he observed, involved a situation in which plaintiffs were discriminatorily denied employment and then prevented from reapplying for the position for several years because of the existence of a "frozen" eligibility list.⁶⁶ Due to this factual difference, Judge Higginbotham concluded that *Ricks* and *Evans* were not controlling.⁶⁷ In considering the facts of *Bronze Shields*, Judge Higginbotham reasoned that the existence of the hiring list was part of an ongoing discriminatory policy which violated Title VII.⁶⁸ Judge Higginbotham therefore maintained that a hiring list based on discriminatory test results constitutes a continuing violation of Title VII for the life of the list regardless of whether the list is used for hiring purposes.⁶⁹

The *Bronze Shields* decision is significant because it demonstrates that the Court of Appeals for the Third Circuit is adopting a narrow view of the continuing violation theory in light of *Evans* and *Ricks*. Under the *Bronze Shields* approach, the mere existence of a discriminatorily promulgated eligibility list will not be considered a continuing violation of Title VII. Therefore, the existence of such a list will not extend the Title VII filing period. In addition, the *Bronze Shields* court suggested that the use of the eligibility list within 180 days of filing will not constitute a continuing violation of Title VII.⁷⁰ Thus, the language of

After dismissing the plaintiff's Title VII claim, the court of appeals turned to whether the plaintiffs alleged a cause of action under 42 U.S.C. § 1981. Since the Third Circuit had held previously that intentional discrimination is a necessary element in a § 1981 claim, *Croker v. Boeing Co.*, 662 F.2d 975, 989, 26 Fair Empl. Prac. Cas. (BNA) 1569, 1577-78 (3d Cir. 1981), the court of appeals in *Bronze Shields* dismissed the § 1981 claim against the New Jersey Department of Civil Service and remanded the § 1981 claim against the City of Newark to allow plaintiffs the opportunity to prove intentional discrimination. *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1086-87, 27 Fair Empl. Prac. Cas. (BNA) 749, 759-60 (3d Cir. 1981).

The issue of whether a plaintiff must prove discriminatory intent as an element of a § 1981 cause of action is currently pending appeal with the United States Supreme Court: *Guardians Ass'n of the N.Y. City Police Dep't v. Civil Serv. Comm'n*, 633 F.2d 232, 23 Fair Empl. Prac. Cas. (BNA) 677 (2d Cir. 1980), cert. granted, 102 S. Ct. 997 (1982).

⁶² *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1087, 27 Fair Empl. Prac. Cas. (BNA) 749, 760 (3d Cir. 1981) (Higginbotham, J., dissenting and concurring). Judge Higginbotham concurred in the majority's judgment on the § 1981 claim. *Id.* See *supra* note 61.

⁶³ *Id.* at 1090, 27 Fair Empl. Prac. Cas. (BNA) at 762.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*, 27 Fair Empl. Prac. Cas. (BNA) at 764.

⁶⁸ *Id.* at 1092, 27 Fair Empl. Prac. Cas. (BNA) at 764.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1083-84, 27 Fair Empl. Prac. Cas. (BNA) at 757.

Bronze Shields indicates that unless the plaintiff files a claim within 180 days of the creation of the list, the existence and use of a discriminatory list for hiring, as well as for possible use in promoting or terminating employees over a period of years will not support a Title VII claim.

Although the applicability of the continuing violation theory undoubtedly was narrowed by the Supreme Court decisions in *Evans* and *Ricks*, the result in *Bronze Shields* was not mandated by those recent decisions. The *Bronze Shields* majority incorrectly treated the existence and use of the hiring list as merely a neutral effect of the discriminatory promulgation of the list. The majority recognized the validity of the continuing violation theory, yet, it seemed to suggest that a discriminatory act can be only a discrete event which occurs at a specific point in time rather than a continuous event which occurs over an extended period. Judge Higginbotham, in his dissent, correctly analyzed the existence and use of the hiring list as part of a discriminatory hiring policy which violated Title VII. The approach adopted by Judge Higginbotham represents a reasonable balance between insuring that the remedial purposes of Title VII are given effect and that employers are protected from stale claims.

The Supreme Court in *Evans* and *Ricks* did not reject totally the continuing violation theory. In both cases the Court rejected the Title VII claims because the plaintiffs had failed to identify discriminatory acts which continued or occurred within 180 days of the filing of their claims.⁷¹ The Supreme Court noted in *Evans* and in *Ricks* that the plaintiffs had shown only that the original discriminatory acts had a continuing effect on their lives.⁷² Therefore, although the Supreme Court has rejected the view that the present effects of a past act constitute a continuing violation of Title VII, the decisions in *Evans* and *Ricks* do not preclude a lower court from finding that a continuing violation exists when a plaintiff can point to specific discriminatory acts or policies by an employer which continued to within 180 days of filing.⁷³

The majority in *Bronze Shields* was incorrect in holding that *Evans* and *Ricks* were controlling in the case before the court. As Judge Higginbotham correctly noted, there are factual differences between the Supreme Court cases and *Bronze Shields*. In both *Evans* and *Ricks* the employment practices which allegedly constituted continuing violations of Title VII were independent of the original discriminatory act. For example, in *Evans*, the discriminatory termination of respondent's employment was an employment practice totally separate from the maintenance of the seniority system. The respondent in *Evans* was a female flight attendant who was forced to resign from her job pursuant to a company policy which prohibited stewardesses from marrying.⁷⁴ This policy was subsequently changed and the respondent was rehired four years later.⁷⁵

⁷¹ *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Del. State College v. Ricks*, 449 U.S. 250, 257-58 (1980).

⁷² 431 U.S. at 558; 449 U.S. at 258.

⁷³ See Jackson & Matheson, *supra* note 6, at 829; Note, *The Continuing Violation Theory of Title VII After United Air Lines, Inc. v. Evans*, 31 HASTINGS L.J. 929, 947 (1980).

⁷⁴ *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 554 (1977).

⁷⁵ *Id.* at 554-55.

Under the company's seniority system, however, the respondent was provided with no credit for her prior employment with the company.⁷⁶ In denying respondent's Title VII claim, the *Evans* Court maintained that the seniority system was a neutral employment practice which continued the effects of the respondent's forced resignation by denying credit for their previous years of employment to all employees who had left the company and then returned.⁷⁷ Likewise, in *Ricks*, the denial of tenure and the termination of the one year contract involved two separate employment practices.⁷⁸ In *Ricks*, once the denial of tenure was official, the respondent was given the option of entering into the one year employment contract.⁷⁹ The respondent voluntarily entered into the contract⁸⁰ and in doing so created a new employment relationship between himself and the College. Although the respondent would have had no occasion to enter into the contract if he had not been denied tenure, employment under the contract constituted an independent employment practice. In *Bronze Shields*, however, the discriminatory creation of the hiring list and the continued existence of the list for hiring purposes were not independent employment practices. The list was created for the express purpose of hiring from that list. Since the creation of the list would be meaningless unless it were used to hire applicants, the creation of the list should not be considered separately from its subsequent use. Rather, the creation, existence, and use of the list for hiring purposes should be viewed as parts of a general hiring policy by the City of Newark. Under this approach, if the initial promulgation of the list is discriminatory, then the existence and use of the list constitute a discriminatory policy or act which occurs over an extended period. Therefore, while *Evans* and *Ricks* involved independent employment practices which merely continued the effects of a prior discriminatory act, the existence of the hiring list in *Bronze Shields* was a part of the city's general hiring policy and, as such, constituted a continuing violation of Title VII.⁸¹

Viewing the existence and use of an eligibility list as a continuing violation of Title VII is consistent with the purpose of the 180 day filing requirement.⁸²

⁷⁶ *Id.* at 555.

⁷⁷ *Id.* at 557-58. Before considering whether the seniority system constituted a continuing violation of Title VII, the Court first determined that the seniority system by itself did not discriminate against women since both men and women who were re-employed by the company received no seniority credit for their prior employment. *Id.* at 557.

⁷⁸ *Del. State College v. Ricks*, 449 U.S. 250, 253 (1977).

⁷⁹ *Id.*

⁸⁰ *Id.* at 253-54.

⁸¹ The Second Circuit Court of Appeals in *Guardians Ass'n* stated: The failing of the department's hiring system is therefore not that it perpetuates the effects of past discrimination, but rather that it perpetuates discrimination. It is one thing to utilize a system that locks in the effects of past discriminatory hiring decisions; it is a very different thing to lock in a discriminatory method of making hiring decisions.

Guardians Ass'n of the N.Y. City Police Dep't v. Civil Serv. Comm., 633 F.2d 232, 253, 23 Fair Empl. Prac. Cas. (BNA) 677, 692 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 997 (1982) (emphasis in original).

⁸² In 1972, when Congress extended the filing period under Title VII from 90 days to 180 days, the Senate Conference Report stated:

Although the filing requirement serves to protect employers from liability for past discriminatory actions,⁸³ Congress has acknowledged that the filing requirement may be liberally construed to effectuate the elimination of employment discrimination under Title VII.⁸⁴ Moreover, Title VII expressly prohibits the use of discriminatory test results in the context of seniority and merit systems.⁸⁵ Prohibiting the use of discriminatory test results in the hiring of employees, therefore, would be consistent with other provisions of Title VII. Thus, in light of the liberal construction to be given to the filing requirement and the express disapproval of the use of discriminatory test results in other contexts, finding that the continued existence or use of a discriminatory hiring list is a continuing violation would not be inconsistent with the purpose of Title VII.

The practical effect of the majority's holding is that an employer can create an eligibility list which discriminates against minorities. As long as applicants fail to file a Title VII claim within 180 days of the creation of the list, the employer can engage in discriminatory hiring for an indefinite period.⁸⁶ In effect, long term employment practices which are based on discriminatory testing and which could have a severe impact on the number of minorities hired would be immune from suit under Title VII. As Judge Higginbotham stated in his dissent, it is doubtful that Congress intended the 180 day filing requirement to be applied rigidly to such a situation.⁸⁷ Viewing the continued existence of a hiring list as part of a discriminatory hiring policy rather than merely as an ef-

Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extensions of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected.

S. REP. NO. 681, 92d Cong., 2d Sess., 118 CONG. REC. 7167 (1972).

⁸³ See *supra* note 4.

⁸⁴ See *supra* notes 6 & 81.

⁸⁵ 42 U.S.C. § 2000e-2(h) (1976). This provision reads in pertinent part: [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . .

Id.

In both *Guardians Ass'n of the New York City Police Dep't, Inc.*, 633 F.2d 232, 251-54, 23 Fair Empl. Prac. Cas. (BNA) 677, 691-93 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 997 (1982) and *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 272-73, 25 Fair Empl. Prac. Cas. (BNA) 1013, 1025-26 (2d Cir. 1981), the Second Circuit considered whether the language of 42 U.S.C. § 2000e-2(h) (1976) applied to the use of discriminatory testing for hiring purposes. After noting that § 2000e-2(h) is typically applied only to seniority and merit systems, the Second Circuit found it unnecessary to decide the issue. 647 F.2d at 273, 25 Fair Empl. Prac. Cas. (BNA) at 273; 633 F.2d at 252, 23 Fair Empl. Prac. Cas. (BNA) at 691.

⁸⁶ *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1093, 27 Fair Empl. Prac. Cas. (BNA) 749, 765 (3d Cir. 1981) (Higginbotham, J., dissenting and concurring).

⁸⁷ *Id.*

fect of the discriminatory promulgation of the list would prevent an employer from insulating himself from liability for ongoing discriminatory hiring.⁸⁸ At the same time, such an approach would continue to protect employers from claims such as those presented in *Evans* and *Ricks* in which neutral employment practices merely continued the effects of a prior discriminatory act.

Since the Supreme Court's decision in *Ricks*, two other circuits have considered cases involving either the creation or use of allegedly discriminatory hiring lists.⁸⁹ In *Yates v. Mobile County Personnel Board*,⁹⁰ the Fifth Circuit Court of Appeals held that an applicant who fails an employment test must file his claim within 180 days of receiving notice that his name will be excluded from a hiring list.⁹¹ The Fifth Circuit reasoned that the act of discrimination against the applicant is complete when he receives notice that his name will not be on the list.⁹² Thus, the Fifth Circuit appears to be in agreement with the Third Circuit that the mere existence of a hiring list is not a continuing violation. Moreover, the language in the *Yates* opinion that the discrimination against the applicant is complete once he receives notification that his name was not placed on the list suggests that the Fifth Circuit may follow the reasoning of the *Bronze Shields* court and find that the use of a discriminatory list for hiring purposes is not a continuing violation of Title VII.

Although the Second Circuit Court of Appeals has not considered whether the mere existence of a discriminatory hiring list constitutes a continuing violation of Title VII, it has ruled that the use of such a list constitutes a violation of Title VII. In *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*,⁹³ the city had hired firefighters from a discriminatory eligibility list, but, not within the filing period.⁹⁴ After concluding that hiring from the list violated Title VII,⁹⁵ the court relied on other discriminatory acts against the applicants within the filing period⁹⁶ to find that a continuing violation existed.⁹⁷ Thus, the court in *Association* held that the city was liable for hiring

⁸⁸ Whether or not the list was used to hire employees may relate to the amount of damages recoverable by the plaintiff. See *id.* at 1093 n.4, 27 Fair Empl. Prac. Cas. (BNA) at 765 n.4 (Higginbotham, J., dissenting and concurring).

⁸⁹ See *infra* notes 90-98 and accompanying text.

⁹⁰ 658 F.2d 298, 27 Fair Empl. Prac. Cas. (BNA) 112 (5th Cir. 1981).

⁹¹ *Id.* at 299, 27 Fair Empl. Prac. Cas. (BNA) at 113.

⁹² *Id.*

⁹³ 647 F.2d 256, 25 Fair Empl. Prac. Cas. (BNA) 1013 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1611 (1982).

⁹⁴ *Id.* at 274, 25 Fair Empl. Prac. Cas. (BNA) at 1027.

⁹⁵ *Id.*, 25 Fair Empl. Prac. Cas. (BNA) at 1026.

⁹⁶ *Id.* at 275, 25 Fair Empl. Prac. Cas. (BNA) at 1026. The district court found that the city gave another exam that was not job related and engaged in individual acts of discrimination against several candidates within the filing period. *Id.* In addition, the district court found that the history of the city's hiring of firefighters demonstrated a continuing policy of discrimination against minorities. *Id.*

⁹⁷ *Id.* at 274-75, 25 Fair Empl. Prac. Cas. (BNA) at 1026-27.

Prior to the Supreme Court's decision in *Ricks*, the Second Circuit had held that hiring from a discriminatory eligibility list within the filing period constituted a continuing violation of Title VII. *Guardians Ass'n of the N.Y. City Police Dep't, Inc. v. Civil Serv. Comm'n*, 633 F.2d 232, 23 Fair Empl. Prac. Cas. (BNA) 677 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) (whether exam with a disproportionate failure rate for whites and minorities violates Title VII),

from an eligibility list based on discriminatory exam results.⁹⁸ The *Bronze Shields* court, on the other hand, stated in dicta that it rejected the approach of the Second Circuit.⁹⁹

The language and reasoning in *Bronze Shields*, therefore, indicates that a split in the circuits is developing on the issue of whether the use of a discriminatory hiring list within 180 days of the filing of the claim is a continuing violation of Title VII.¹⁰⁰ Although in *Bronze Shields* the Third Circuit was not confronted with a situation involving the use of a hiring list, the majority suggested that as long as the city hired from the eligibility list in a neutral manner, the use of the list would not violate Title VII.¹⁰¹ According to the majority, hiring from the list would be simply a continuing effect of the discriminatory promulgation of the list.¹⁰² Thus, the language of the *Bronze Shields* and *Yates* courts indicate that if the Third and Fifth Circuits were confronted with a case involving the use of a discriminatory hiring list, they would reach a result opposite from that reached by the Second Circuit.

Both the potential split in the Circuits concerning the use of an allegedly discriminatory hiring list and the failure of the *Bronze Shields* court to find that the existence of a discriminatory hiring list constitutes a continuing violation of Title VII demonstrate that the Third Circuit is narrowly applying the continuing violation theory to Title VII cases after *Ricks* and *Evans*. Although the holdings of *Ricks* and *Evans* were that an employment practice which merely perpetuates the effects of a prior discriminatory act is not a continuing violation of Title VII, the *Bronze Shields* court misapplied the standard set forth in these cases. The *Bronze Shields* court failed to recognize that the existence and use of an eligibility list cannot be viewed separately from the discriminatory creation of the list. As a result, the court treated the existence of the list as an independent practice which merely continued the effect of the discriminatory creation of the list rather than as part of a continuing policy of discrimination in hiring. In the aftermath of *Bronze Shields*, it seems that the only remaining basis for a continuing violation of Title VII in the Third Circuit is when the employee can

cert. granted, 102 S. Ct. 997 (1982) (whether intent is a necessary element of a claim under 42 U.S.C. § 1981), *petition for cert. filed*, 50 U.S.L.W. 3157 (U.S. Aug. 31, 1981) (No. 81-432) (whether use of a discriminatory hiring list is a continuing violation of Title VII).

Although the *Bronze Shields* court referred to the decision in *Guardians*, the *Bronze Shields* court suggested that the Supreme Court's opinion in *Ricks* invalidated *Guardians*. *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1082 & n.21, 27 Fair Empl. Prac. Cas. (BNA) 749, 755-56 & n.21 (3d Cir. 1981). The decision of the Second Circuit in *Association*, however, demonstrates that the Second Circuit does not read *Ricks* as precluding a finding that a discriminatory hiring list violates Title VII.

⁹⁸ *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 275, 25 Fair Empl. Prac. Cas. (BNA) 1013 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1611 (1982).

⁹⁹ *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1082 & n.21, 27 Fair Empl. Prac. Cas. (BNA) 749, 755-56 & n.21 (3d Cir. 1981).

¹⁰⁰ The issue of whether the use of a discriminatorily promulgated hiring list constitutes a continuing violation of Title VII has been filed for certiorari. See *supra* note 97.

¹⁰¹ *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1083, 27 Fair Empl. Prac. Cas. (BNA) 749, 757 (3d Cir. 1981).

¹⁰² *Id.* at 1084, 27 Fair Empl. Prac. Cas. (BNA) at 757.

point to specific acts of discrimination, other than the existence or use of an eligibility list, which occurred within 180 days of filing the claim. Unless such acts have occurred, the practitioner should file the Title VII claim within 180 days of the day the employee received notice that his name would not be on the list or the Title VII claim will be dismissed as untimely.

II. SENIORITY SYSTEMS

A.* *Broadening the Substantive Scope of Title VII's Seniority System Exemption:* *American Tobacco Company v. Patterson*¹

Title VII of the Civil Rights Act of 1964 (the Act)² prohibits employment practices that discriminate on the basis of an individual's race, color, religion, sex, or national origin.³ In *Griggs v. Duke Power Co.*,⁴ the Supreme Court held that the Act prohibits employment practices which operate to perpetuate or freeze prior discriminatory practices,⁵ and therefore, that a prima facie violation of the Act may be established by employment practices which are facially and intentionally neutral, yet discriminatory in effect.⁶ Seniority systems present special problems in dealing with this standard. In particular, section 703(h) of the Act allows employers to make certain employment distinctions pursuant to a bona fide seniority or merit system.⁷ Seniority rights, typically based on either length of service with a particular employer or within a particular department, provide an objective means for determining promotions and transfers and establishing a hierarchy for layoffs and recalls.⁸ Yet, the use of these objective criteria may perpetuate economic hardships on minorities

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¹ 102 S. Ct. 1534 (1982).

² The Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-1 to 1000e-17 (1976).

³ 42 U.S.C. § 2000e-2(a)(1) (1976).

⁴ 401 U.S. 224 (1971).

⁵ *Id.* at 430.

⁶ *Id.* See also *General Electric Co. v. Gilbert*, 429 U.S. 125, 137 (1976); *Washington v. Davis*, 426 U.S. 229, 246-47 (1976).

⁷ § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1976) provides in its entirety:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. 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 provisions of section 206(d) of Title 29.

⁸ See generally Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962).

when prior discriminatory employment practices leave minorities with less accrued seniority than they would have otherwise earned.⁹ Despite the *Griggs* rationale and the propensity for seniority systems to perpetuate the effects of previous discriminatory practices, in *International Brotherhood of Teamsters v. United States*,¹⁰ the Supreme Court held that under section 703(h) of the Act actual intent to discriminate must be proved, and discriminatory impact alone is insufficient, to invalidate an otherwise neutral bona fide seniority system.¹¹

In this *Survey* year, the Supreme Court again addressed the substantive scope of the seniority system exemption under section 703(h). In *American Tobacco Company v. Patterson*,¹² the Court held, in a five to four decision, that the defense available under section 703(h) was not intended merely as a retrospective, "grandfather" provision to defend those seniority systems adopted prior to the effective date of the Act and to the routine post-Act application of such systems. Instead, the Court held that this defense is also available to seniority systems adopted after the effective date of the Act.¹³ This decision thus extends the *Teamsters* holding to immunize all bona fide seniority systems from invalidation on the basis of disparate impact without a simultaneous showing of discriminatory intent. The Court's broad reading of section 703(h) has far reaching implications for minority employees who may find it increasingly difficult to contest negotiated seniority agreements which have the effect of preserving advantages for whites and males in job security, promotions, and wages.

The facts in *American Tobacco* underscore the impact of the decision. The American Tobacco Company operated two manufacturing plants, each divided into prefabrication and fabrication departments.¹⁴ Prior to 1963, both the union and the company practiced overt racial discrimination.¹⁵ The union maintained dual segregated locals.¹⁶ The company assigned Blacks to lower paying prefabrication departments, reserving the more lucrative fabrication positions for white employees.¹⁷ An employee could transfer from one department to the other only by forfeiting his seniority.¹⁸ Under government pressure in 1963, the union merged the two locals and the company eliminated the departmental seniority system and instituted a plant-wide system.¹⁹ From 1963

⁹ See *Discrimination in Employment Benefits: Seniority Systems*, 20 B.C. L. REV. 169, 170 (1978). See generally Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177 (1975); Comment, *Last Hired, First Fired, Seniority Layoffs, and Title VII: Questions of Liability and Remedy*, 11 COLUM. J. LAW & SOC. PROB. 343, 343-46 (1975); Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969); Cooper & Sobel, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

¹⁰ 431 U.S. 324 (1977).

¹¹ *Id.* at 349, 353-54.

¹² 102 S. Ct. 1534 (1982).

¹³ *Id.* at 1542. Title VII went into effect on July 2, 1975. *Id.* at 1535.

¹⁴ *Id.* at 1535-36.

¹⁵ *Id.* at 1536.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

to 1968, however, nearly all the vacancies in the higher paying fabrication departments were filled by white employees owing to supervisors' discretion to determine which individuals were qualified for the positions.²⁰ In 1968, the company proposed, and the union accepted and ratified, the establishment of nine lines of progression, each of which consisted of two related jobs;²¹ an employee could not fill a top position without first holding a bottom position.²² Four of the lines of progression consisted of virtually all-white top positions in the more lucrative fabrication department, linked with virtually all-white bottom jobs in the same department.²³ Similarly, two of the lines of progression consisted of all-Black top positions in the prefabrication department, linked with all-Black bottom positions in the same department.²⁴

In 1969, Patterson and two other Black employees complained to the Equal Employment Opportunity Commission (EEOC) that, through this system of promotions, the company and union had discriminated against them on the basis of race.²⁵ Ultimately, both the EEOC and the employees brought actions.²⁶ The district court consolidated the suits and held that the defendants' seniority, promotion, and job classifications violated the Act because the six lines of progression perpetuated prior race and sex discrimination and were not justified by business necessity.²⁷ The court also enjoined the company and union from further use of that promotion system.²⁸ The United States Court of Appeals for the Fourth Circuit affirmed and remanded for proceedings on the remedy question,²⁹ and the Supreme Court denied certiorari.³⁰

On remand, the company and union moved to vacate the district court's enjoining orders and also sought a dismissal on the basis of the Supreme Court's holding in *Teamsters* that section 703(h) insulates bona fide seniority systems from invalidation absent a showing of discriminatory intent.³¹ The district court held that the seniority system at issue was not a bona fide system under *Teamsters* because the system operated to the day of trial in a discriminatory manner.³² A divided panel of the Fourth Circuit affirmed, holding that the lines of progression were not a seniority system within the meaning of section 703(h).³³ The Fourth Circuit reheard the case *en banc*, but did not decide whether the lines of progression constituted a seniority system. Rather, the court held that, assuming the lines of progression constituted part

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Patterson v. American Tobacco Co.*, 535 F.2d 257 (1976).

³⁰ *American Tobacco Co. v. Patterson*, 429 U.S. 920 (1976).

³¹ *American Tobacco*, 102 S. Ct. at 1536. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 349, 353-54 (1977); *supra* text accompanying notes 10-11.

³² *American Tobacco*, 102 S. Ct. at 1536-37. The district court's decision was unreported.

³³ *Patterson v. American Tobacco Co.*, 586 F.2d 300, 303 (1978).

of a seniority system, section 703(h)'s exemption for seniority systems applied only to those systems adopted before the effective date of the Act and to post-Act applications of those systems.³⁴

A divided Supreme Court reversed.³⁵ Justice White delivered the opinion for the majority,³⁶ which adopted the company's and union's position that section 703(h)'s exemption for seniority systems does not distinguish between pre- and post-Act seniority systems.³⁷ In a dissent joined by Justices Marshall and Blackmun,³⁸ Justice Brennan concurred with the EEOC's position,³⁹ and that of the *en banc* Fourth Circuit, that section 703(h) applies to the pre-Act adoption and post-Act application of a seniority system, but not to a post-Act adoption of such a system.⁴⁰ In a separate dissent, Justice Stevens urged that the seniority system at issue was adopted in violation of the Act and therefore was not "bona fide" within the meaning of section 703(h).⁴¹

The majority opinion followed three main lines of reasoning. First, the Court found that the plain language of section 703(h) makes no distinction between the pre- and post-Act adoption of a seniority system.⁴² The Court observed that Congress had gone to great lengths in drafting the section to insure that its language was precise.⁴³ Given Congress' meticulousness, the Court reasoned, if Congress had intended to distinguish between pre- and post-Act seniority systems, it would have employed an unambiguous savings or grandfather clause as it had in other sections of the Act.⁴⁴ The Court similarly found that the position urged by the EEOC and Justice Brennan's dissent, which distinguished between pre- and post-Act adoption and application of a seniority system, was equally unsupportable because, although section 703(h) allows an employer to "apply" different conditions of employment under a seniority system,⁴⁵ the section makes no distinction about a system's adoption date.⁴⁶ Moreover, the Court stated, the EEOC's and dissent's proposed distinction would create unusual results.⁴⁷ The adoption of a seniority system which has yet to be applied would not supply a cause of action, the Court reasoned,

³⁴ *Patterson v. American Tobacco Co.*, 634 F.2d 744, 749 (1980).

³⁵ *American Tobacco*, 102 S. Ct. at 1537, 1542.

³⁶ Justice White's majority opinion was joined by Chief Justice Burger, and Justices Powell, Rehnquist, and O'Connor. *Id.* at 1534.

³⁷ *Id.* at 1537, 1542.

³⁸ *Id.* at 1542 (Brennan, J., dissenting).

³⁹ *See Id.*; *Id.* at 1537 (opinion of the Court).

⁴⁰ *See Id.* at 1542 (Brennan, J., dissenting); *supra* note 34 and accompanying text.

⁴¹ *See American Tobacco*, 102 S. Ct. at 1548-49 (Stevens, J., dissenting).

⁴² *Id.* at 4366 (opinion of the Court). *See supra* note 7.

⁴³ *American Tobacco*, 102 S. Ct. at 1537. The Court quoted Senator Dirksen's statements that the draft represented "not merely weeks, but months of labor," and that "I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and the shading of every phrase." 110 CONG. REC. 11935 (1964) (remarks of Sen. Dirksen).

⁴⁴ *American Tobacco*, 102 S. Ct. at 1537. *See, e.g.*, § 701(h), 42 U.S.C. § 2000e-(b) (1976).

⁴⁵ *See supra* note 7.

⁴⁶ *American Tobacco*, 102 S. Ct. 1537-38.

⁴⁷ *Id.* at 1538.

because the requisite discriminatory effect under *Griggs*⁴⁸ would only arise when the system is applied, and its subsequent application would be insulated by section 703(h) in the absence of a discriminatory purpose.⁴⁹ The Court stated that another possible result of the EEOC's theory would be to discourage employers from modifying pre-Act seniority systems, even if the modification benefited minorities, because the subsequent system would lose the protection of section 703(h) and become subject to the more liberal *Griggs* standard.⁵⁰

Second, the Court found that, although its analysis of the statutory language was dispositive of the issue,⁵¹ the legislative history of section 703(h)⁵² similarly reveals no indication that Congress intended to distinguish between pre- and post-Act seniority systems, or between adoption and application of a seniority system.⁵³ The Court focussed on congressional statements which categorically indicated that the Act would not, in any respect, affect seniority rights.⁵⁴ Congressional statements couched in terms of "vested," "existing," or "established" seniority rights,⁵⁵ the Court stressed, were made in response to specific charges that the bill would destroy existing seniority rights.⁵⁶ Accordingly, it found that such statements did not represent a congressional intent to distinguish between pre- and post-Act seniority systems.⁵⁷

Third, the Court found that a distinction between pre- and post-Act seniority systems would be inconsistent with its previous decisions.⁵⁸ In *Teamsters*, the Court noted, it had held that section 703(h) exempts from the Act the disparate impact of pre-Act discriminatory practices.⁵⁹ Similarly, the Court observed, in *United Airlines, Inc. v. Evans* it had held that a discriminatory act which is not complained of in a timely manner⁶⁰ is the equivalent of a discriminatory act committed before the effective date of the Act.⁶¹ The Court

⁴⁸ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (a prima facie violation of the Act may be established by employment practices which are facially and intentionally neutral but nonetheless discriminatory in effect).

⁴⁹ *American Tobacco*, 102 S. Ct. at 1538. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977) (§ 703(h) of the Act insulates bona fide seniority systems in the absence of discriminatory intent).

⁵⁰ *American Tobacco*, 50 U.S.L.W. at 4366. See *supra* note 48.

⁵¹ *American Tobacco*, 102 S. Ct. at 1538-39.

⁵² See generally Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

⁵³ *American Tobacco*, 102 S. Ct. at 1539.

⁵⁴ *Id.* See 110 CONG. REC. 7207 (1964) (remarks of Sen. Clark); *Id.* at 7217 (letter from Sen. Clark to Sen. Dirksen); *Id.* at 5423 (remarks of Sen. Humphrey); *Id.* at 6564 (remarks of Sen. Kuchel); *Id.* at 6665-66 (memorandum by House Republican sponsors); *Id.* 11768 (remarks of Sen. McGovern); *Id.* at 14329 (letter from Sen. Dirksen to Sen. Williams); *Id.* at 14371 (remarks of Sen. Williams).

⁵⁵ 110 CONG. REC. 7207 (1964) (Justice Department memorandum); *Id.* at 7213 (memorandum by Sen.s Clark & Case).

⁵⁶ *American Tobacco*, 102 S. Ct. at 1540.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1541.

⁵⁹ *Id.* See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977).

⁶⁰ See 42 U.S.C. § 2000e-5(e) (1976).

⁶¹ *American Tobacco*, 102 S. Ct. at 1541. See *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

added that this latter holding interpreted section 703(h) to protect seniority systems that perpetuate post-Act discrimination.⁶² The Court reasoned that these two precedents taken together stand for the principle that section 703(h) immunizes all bona fide seniority systems and does not distinguish between their perpetuation of pre- and post-Act discriminatory effects.⁶³ Finally, the Court emphasized that section 703(h) represents the balance Congress struck between the Act's underlying policy of eliminating discrimination in employment and the policy of minimizing governmental supervision over the terms of collective bargaining agreements.⁶⁴ Given these considerations, the Court held that if, on remand, the six lines of progression are found to be part of a seniority system, they must be sustained in the absence of proof of a discriminatory purpose in formulating them.⁶⁵

In a dissent with which Justices Marshall and Blackmun joined, Justice Brennan took the position that section 703(h) exempts only the application of a seniority system adopted prior to the Act.⁶⁶ He noted that the provision allows "an employer to *apply* different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system. . . ."⁶⁷ He asserted that this language limits the ambit of section 703(h) solely to the *application* of an existing seniority system.⁶⁸ Moreover, he reasoned, even if the statutory term "apply" were interpreted to include "adopt," it could not be explained how a decision to adopt a seniority system could be made "pursuant to" the same system.⁶⁹ Justice Brennan differed with the Court's interpretation of the provision's legislative history, finding instead that Congress intended only to protect employees' legitimate expectations of the continued operation of an existing seniority system, and that a timely complaint to a system's adoption would forestall discrimination before any legitimate expectations arose.⁷⁰

Justice Brennan also found that limiting section 703(h) to the application of pre-Act seniority systems would not lead to unusual results.⁷¹ For instance, the mere adoption of a discriminatory seniority system would supply a cause of action, he noted, because the cause of action arises upon the discriminatory act, not when the consequences of the act is felt.⁷² Finally, Justice Brennan found that limiting the exemption under section 703(h) to the application of

⁶² *American Tobacco*, 102 S. Ct. at 1541.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1542 & n.18. The *en banc* Fourth Circuit assumed but did not hold that the lines of progression constituted part of a seniority system under § 703(h). See *American Tobacco Co. v. Patterson*, 634 F.2d 744, 749 & n.3 (1980).

⁶⁶ *American Tobacco*, 102 S. Ct. at 1542 (Brennan, J., dissenting).

⁶⁷ 47 U.S.C. § 2000e-2(h) (1976) (emphasis supplied). See *supra* note 7.

⁶⁸ *American Tobacco*, 102 S. Ct. at 1543 (Brennan, J., dissenting).

⁶⁹ *Id.*

⁷⁰ *Id.* at 1544. Justice Brennan focussed on congressional statements which indicated that existing job holders would not lose their jobs nor accrued seniority rights to minorities, see 110 CONG. REC. 11471 (1964) (statement of Sen. Javits), and that the effect of the Act in regard to seniority rights "is prospective and not retrospective." *Id.* at 7213 (memorandum by Sen.s Clark & Case). See also *American Tobacco*, 102 S. Ct. at 1544 n.6 (Brennan, J., dissenting).

⁷¹ *American Tobacco*, 102 S. Ct. at 1545-46 (Brennan, J., dissenting).

⁷² *Id.* (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)). See also

pre-Act seniority systems would not discourage employers from modifying such systems in favor of minorities because only the modified provision would be subject to the more liberal *Griggs* standard, thus requiring only a showing of discriminatory impact to invalidate an otherwise neutral policy.⁷³ Moreover, he noted, under the decision in *United Steel Workers of America v. Weber*⁷⁴ efforts to assist disadvantaged minorities do not violate any provision of the Act.⁷⁵ Modifications not protected by *Weber* and violative of *Griggs*, he urged, should not be encouraged but discouraged.⁷⁶ For these reasons, Justice Brennan would invalidate the six lines of progression under the *Griggs* standard subject to a determination, on remand, that the employees complained in a timely manner.⁷⁷

Justice Stevens dissented separately on the grounds that, in the absence of specific discriminatory intent, section 703(h) insulates only *bona fide* seniority systems.⁷⁸ He asserted that the Court ignored the legislative and historical context out of which the Act arose by treating the intent proviso as defining the appropriate standard by which to measure any challenge to a seniority system.⁷⁹ Instead, he found that Congress intended only to protect pre-Act seniority systems which were not the product of purposeful racial discrimination.⁸⁰ Under *Griggs*, he reasoned, a seniority system is not invalidated simply because it has a discriminatory impact;⁸¹ rather, he asserted, a seniority system is illegal only if it has a disparate effect *and* is not related to a valid business purpose.⁸² This application of *Griggs*, he observed, would not disrupt most seniority systems. But, in this case, Stevens would hold that the six lines of progression, even if part of a seniority system, were not justified by a legitimate business purpose and, therefore, were not "bona-fide" within the meaning of section 703(h).⁸³

By holding that section 703(h) insulates all seniority systems from invalidation in the absence of specific discriminatory intent,⁸⁴ the Court in *American Tobacco* extends the *Teamsters* decision⁸⁵ by further limiting the ambit of the *Griggs* standard⁸⁶ as it applies to seniority systems. Preceding *Teamsters*, in *Franks v. Bowman Transportation Co.*,⁸⁷ the Court interpreted the section

Bartness v. Brewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir. 1971) (current employees may challenge discriminatory retirement plan).

⁷³ *American Tobacco*, 102 S. Ct. at 1546 (Brennan, J., dissenting). See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

⁷⁴ 433 U.S. 193 (1979).

⁷⁵ *Id.* at 200.

⁷⁶ *American Tobacco*, 102 S. Ct. at 1546 (Brennan, J., dissenting).

⁷⁷ *Id.* 1546-47 & n.12.

⁷⁸ *Id.* at 1547 (Stevens, J., dissenting).

⁷⁹ *Id.* at 1548.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("The touchstone is business necessity"). Cf. *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979).

⁸³ *American Tobacco*, 102 S. Ct. at 1548-49 (Stevens, J., dissenting).

⁸⁴ *Id.* at 1542 (opinion of the Court).

⁸⁵ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977).

⁸⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

⁸⁷ 424 U.S. 747 (1976). For a thorough discussion of *Franks*, see 17 B.C. IND. & COM.

703(h) exemption narrowly to allow an award of retroactive seniority dating back to the original discrimination once post-Act discrimination has been proved.⁸⁸ In that case, the Court found that section 703(h) is only "directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act."⁸⁹ Given the broad remedial nature of the Act, the Court concluded that an award of retroactive seniority is necessary to place victims of post-Act discrimination in their deserved positions.⁹⁰ Thus, in *Franks*, the Court reached only the questions related to the remedial aspects of the Act, and did not address the substantive reach of section 703(h).⁹¹

In *Teamsters*, the Court reached this substantive issue but in so doing it departed from the approach taken in *Franks* by deemphasizing the underlying remedial policy of the Act. Specifically, the Court held that section 703(h) does not provide seniority relief to victims of pre-Act discrimination who had less accrued seniority owing to that discrimination.⁹² Through this holding, the Court overturned an important precedent upon which numerous courts and litigants had relied to remedy the lingering effects of past discriminatory policies.⁹³ Thus, the decision in *American Tobacco* extends the *Teamsters* rationale and its attendant consequences by making the effects of racial discrimination irrelevant in evaluating a seniority system which perpetuates them, regardless of when that system was adopted.

The Court's reasoning in *American Tobacco* relies heavily upon section 703(h)'s rather ambiguous language and legislative history. Greater attention to the underlying policies of both the Act generally and section 703(h) specifically may have provided clearer authority and a less harsh decision. As the decision stands, disadvantaged minorities will find it increasingly difficult to challenge negotiated seniority systems which cut against them. The decision in *American Tobacco* leaves victims of seniority systems which are discriminatory in effect in the position of proving that the system in question was not "bona fide" within the meaning of section 703(h).

As in *Teamsters*, the Court in *American Tobacco* did not ascribe a great deal of importance to the underlying remedial policy of the Act. Instead, it drew support from ambiguous statutory language and legislative history. The

L. REV. 1041, 1140 (1976).

⁸⁸ *Franks*, 424 U.S. at 762-63.

⁸⁹ *Id.* at 762.

⁹⁰ *Id.* at 767-68.

⁹¹ See *Discrimination in Employment Benefits: Seniority Systems*, 20 B.C. L. REV. 169, 170-71 (1978).

⁹² *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977).

⁹³ See Edwards, *The Coming Age of the Burger Court: Labor Law Decisions of the Supreme Court During the 1976 Term*, 19 B.C. L. REV. 1, 7 (1977). Prior to the *Teamsters* decision, eight circuits had held that § 703(h) does not immunize those seniority systems which perpetuate the effects of prior discriminatory policies. See cases cited at *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 378 n.2, 379 n.3 (1977) (Marshall, J., dissenting). These cases relied primarily upon the reasoning of the district court in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968), that a seniority system which has its genesis in racial discrimination could not be considered a bona fide system under the Act. *Id.* at 517. See Edwards, *supra*, at 7.

statutory language of section 703(h), for instance, does not explicitly establish a distinction between the pre- and post-Act adoption of a seniority system.⁹⁴ Though, as Justice Brennan indicated, the provision does define its scope solely in terms of the "application" of a seniority system,⁹⁵ this observation provides a tenuous basis for making a distinction between the post-Act application of pre-Act seniority systems and the adoption or application of post-Act systems. The legislative history is similarly unenlightening. Section 703(h) was adopted during cloture and consequently scant legislative history exists.⁹⁶ Both the Court and Justice Brennan's dissent acknowledge that the limited legislative history does not explicitly support either of their positions;⁹⁷ both instead rely upon fragmentary congressional statements and the absence of specific statements that expressly contradict their respective positions.⁹⁸

Given the ambiguity of the statutory language and legislative history of section 703(h), reference to the underlying policy of the Act perhaps would have provided a more justifiable basis on which to decide the case. Congress' purpose in enacting the Act was to prohibit broadly and remedy racial discrimination in employment.⁹⁹ Since remedial statutes should be interpreted broadly and exceptions to their rules constituted narrowly,¹⁰⁰ as Justice Brennan urged, the seniority system exemption under section 703(h) should be construed no more broadly than Congress intended.¹⁰¹ If the exemption were intended to protect employees' expectations of the continued operation of a seniority system in which they had worked to accrue seniority rights,¹⁰² then the exemption reasonably could be limited to seniority systems adopted prior to the Act and their post-Act applications. Under this construction, post-Act adoptions and applications of seniority systems which have a disparate impact on minorities could be halted upon a timely challenge — within 180 days¹⁰³ — before legitimate expectations and stakes in those systems arose.¹⁰⁴ In this manner, the policy of protecting employee expectations could have been balanced against the Act's broader policy of prohibiting and remedying discrimination in employment.

As a practical consequence, the Court's decision in *American Tobacco* will make it increasingly difficult for minority employees to contest negotiated

⁹⁴ See *supra* note 7.

⁹⁵ *American Tobacco*, 102 S. Ct. at 1543 (Brennan, J., dissenting).

⁹⁶ See Vaas, *supra* note 52, at 449.

⁹⁷ See *American Tobacco*, 102 S. Ct. at 1539 ("The most that can be said for the legislative history of § 703(h) is that it is inconclusive with respect to the issue presented in this case."); *Id.* at 1545 (Brennan, J., dissenting) (the "legislative history does not contain any explicit reference to the distinction between adoption and application. . . .").

⁹⁸ See *Id.* at 1539-40 (opinion of the Court); *Id.* at 1544-45 (Brennan, J., dissenting).

⁹⁹ See *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Accord *American Tobacco*, 102 S. Ct. at 1543-44 (Brennan, J., dissenting).

¹⁰⁰ Cf. *Piedmont & Northern R.R. Co. v. ICC*, 286 U.S. 229, 311-12 (1932); *Spokane & Inland R.R. Co. v. United States*, 241 U.S. 344, 350 (1916); *United States v. Dickson*, 15 Pet. 141, 165 (1841). Accord *American Tobacco*, 102 S. Ct. at 1544 (Brennan, J., dissenting).

¹⁰¹ See *American Tobacco*, 102 S. Ct. at 1544 (Brennan, J., dissenting).

¹⁰² *Id.*

¹⁰³ See 42 U.S.C. § 2000e-5(e) (1976).

¹⁰⁴ *American Tobacco*, 102 S. Ct. at 1544 (Brennan, J., dissenting);

seniority agreements which have the effect of favoring whites and males in job security, promotions, and compensation. By removing even post-Act seniority systems from the scope of the *Griggs* rationale, which requires only a showing of disparate impact to establish a prima facie violation of the Act, the *American Tobacco* decision places upon aggrieved employees the onerous burden of proving that a seniority system is either discriminatory on its face, purposefully discriminatory, or not "bona fide" within the meaning of section 703(h). Owing to the improbability of the first two alternatives, future complainants are now most likely to challenge seniority systems on the basis that they are neither bona fide, nor "substantially related to a valid business purpose."¹⁰⁵ Indeed, the victims of the six lines of progression at issue in the *American Tobacco* may yet prevail on remand if it is determined that the lines of progression were either not part of a seniority system or not bona fide within the meaning of section 703(h).¹⁰⁶

III. SEX DISCRIMINATION

A. * *Wage Discrimination Under Title VII — Does the 'Equal Work' Standard Apply?* County of Washington v. Gunther¹

In both the Equal Pay Act of 1963² and Title VII of the Civil Rights Act of 1964,³ Congress acted to prohibit discrimination in compensation on the basis of sex. The Equal Pay Act explicitly prohibits employers from paying unequal wages to men and women who perform equal work,⁴ but does not explicitly prohibit unequal compensation in any other context. In addition, the statute provides several affirmative defenses to a cause of action based on its prohibition of unequal pay for equal work.⁵ Specifically, an employer may pay unequal wages to employees performing equal work if the payments are made pursuant to a seniority system, a merit system, or a system which measures earnings by the quantity or quality of work performed.⁶ Moreover, the statute

¹⁰⁵ See *Id.* at 1548 (Stevens, J., dissenting). See also *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353, 355-56 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁰⁶ *American Tobacco*, 102 S.Ct. at 1542 n.18.

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¹ 452 U.S. 161 (1981).

² 29 U.S.C. § 206(d)(1) (1976).

³ 42 U.S.C. § 2000e-2(a)(1) (1976).

⁴ 29 U.S.C. § 206(d)(1) (1976). The statute provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex . . .

Id.

⁵ *Id.* See *supra* text of statute at note 4.

⁶ *Id.*

contains a broad exception for wage differentials based on any factor other than sex.⁷ Title VII, in contrast to the Equal Pay Act, does not expressly limit claims of discrimination in compensation to situations where an employer pays unequal wages for equal work.⁸ An amendment to Title VII, however, known as the Bennett Amendment,⁹ provides that any wage differentials authorized by the Equal Pay Act shall not constitute an unlawful employment practice under Title VII.¹⁰ Therefore, while the Title VII prohibition on unequal compensation appears to be more inclusive than that of the Equal Pay Act, the Bennett Amendment suggests that the wage discrimination prohibitions of Title VII and the Equal Pay Act may be co-extensive. Consequently, the proper reconciliation of the two statutes has been the subject of controversy in the federal courts.

Attempts to harmonize the specific prohibition on unequal pay for equal work contained in the Equal Pay Act and the broader prohibition on sex-based wage discrimination of Title VII led to the development of two conflicting interpretations of the Bennett Amendment. Some federal courts held that the Amendment incorporates into Title VII not only the four specific exceptions to the Equal Pay Act's equal pay for equal work standard but also the standard itself.¹¹ In these courts, a plaintiff was required to allege that she received unequal compensation for work equal to that performed by male employees in order to state a claim under either the Equal Pay Act or Title VII.¹² By contrast, in other courts, the Bennett Amendment was read to incorporate into Title VII only the defenses to the Equal Pay Act's prohibition on unequal pay for equal work.¹³ Under this interpretation, a plaintiff could assert a Title VII claim of discrimination in compensation without first satisfying the equal work

⁷ *Id.*

⁸ Compare 29 U.S.C. § 206(d)(1) (1976) (mandating equal pay only for "equal work on jobs the performance of which requires equal skill, effort, and responsibility . . .") with 42 U.S.C. § 2000e-2(a)(1) (1976) (making it an unlawful employment practice to "discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex . . ."). In general, the 'equal work' standard of the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976), has been interpreted as requiring that the work performed require skill, effort and responsibility of a substantially equal nature. See *Ridgway v. United Hospitals-Miller Div.*, 563 F.2d 923, 926, 16 Fair Empl. Prac. Cas. (BNA) 345, 347 (8th Cir. 1977); *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 9 Fair Empl. Prac. Cas. (BNA) 979, 980 (4th Cir. 1974).

⁹ The amendment is named after its sponsor, Senator Wallace Foster Bennett, Republican Senator from Utah. See 110 Cong. Rec. 13647 (1964).

¹⁰ 42 U.S.C. § 2000e-2(h) (1976). The amendment provides: "[I]t 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 wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29." *Id.*

¹¹ See, e.g., *Lemons v. City and County of Denver*, 620 F.2d 228, 229-30, 22 Fair Empl. Prac. Cas. (BNA) 959, 960 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 244 (1981); *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 400-01, 17 Fair Empl. Prac. Cas. (BNA) 232, 235 (W.D. Pa. 1978).

¹² See cases cited *supra* at note 11.

¹³ See, e.g., *International Union of Elec., Radio and Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1099, 23 Fair Empl. Prac. Cas. (BNA) 588, 592 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 3121-22 (1981); *Gunther v. County of Washington*, 602 F.2d 882, 889, 20 Fair Empl. Prac. Cas. (BNA) 792, 797 (9th Cir. 1979), supplemental opinion on denial of rehearing, 623 F.2d 1303, 1311 (1980), *cert. granted*, 101 S. Ct. 352 (1980).

requirement of the Equal Pay Act.¹⁴ For example, in these jurisdictions, a woman could state a claim under Title VII by alleging that her employer intentionally paid lower wages for those types of work performed predominantly by women than for those predominantly performed by men.¹⁵

During the *Survey* year, the conflict in the federal courts caused by the varying interpretations of the Bennett Amendment was resolved by the Supreme Court. In *County of Washington v. Gunther*,¹⁶ the Court determined that the Bennett Amendment does not limit wage discrimination claims cognizable under Title VII to cases where the plaintiff alleges a violation of the equal pay for equal work standard of the Equal Pay Act.¹⁷ The Court held, therefore, that the plaintiffs' wage discrimination claims were not barred by the Bennett Amendment solely because they did not perform work equal to that of male employees.¹⁸

The plaintiffs in *Gunther* were female guards who worked in the female section of the county jail.¹⁹ They filed suit under Title VII,²⁰ alleging that their employer, the County of Washington, discriminated against female guards by paying them wages which were significantly lower than those of male guards.²¹ The female guards argued, first, that the County discriminated against them by paying them lower wages for work substantially the same as that of male guards.²² In the alternative, the female guards contended that, even if their work was not equal to that of male guards, the differential in wages paid by the County to male and female guards was not justified by the differences in the work they performed.²³ The female guards asserted that a portion of the wage differential resulted from intentional discrimination by the County.²⁴ The County, according to the female guards, intentionally discriminated against them by setting the pay scale for female guards, but not male guards, at a level lower than its own evaluation of the worth of the jobs would warrant.²⁵

After trial, the United States District Court for the district of Oregon found that the female guards did not perform substantially the same work as the male guards.²⁶ The district court concluded, therefore, that the plaintiffs failed to prove their claim of discrimination based on unequal pay for equal

¹⁴ See *id.*

¹⁵ See *International Union of Elec., Radio and Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1096, 23 Fair Empl. Prac. Cas. (BNA) 588, 589-90 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 3121-22 (1981).

¹⁶ 452 U.S. 161 (1981).

¹⁷ *Id.* at 181.

¹⁸ *Id.*

¹⁹ *Id.* at 165.

²⁰ *Id.* The plaintiffs could not sue under the Equal Pay Act because it did not apply to municipal employers until 1974. See *id.* at 164 n.3.

²¹ *Id.* at 164-65.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Gunther v. County of Washington*, 20 Fair Empl. Prac. Cas. (BNA) 788, 791 (D. Or. 1976). The district court noted that the male guards supervised more than ten times as many prisoners as the female guards and that the female guards, therefore, devoted more time to less valuable clerical duties. *Id.*

work.²⁷ In addition, the district court rejected the plaintiffs' alternative claim that, although their work was not equal to that of male guards, the differential in wages paid to male and female guards was in part the product of intentional sex discrimination.²⁸ The district court held that, as a matter of law, a sex-based wage discrimination claim could not be brought under Title VII unless it satisfied the equal work standard of the Equal Pay Act.²⁹

The Court of Appeals for the Ninth Circuit, while leaving undisturbed the district court's finding that male and female guards did not perform equal work,³⁰ held that the female guards could nonetheless state a claim of wage discrimination under Title VII.³¹ In reaching this conclusion, the court reviewed the legislative history of the Bennett Amendment and determined that the purpose of the amendment was merely to incorporate into Title VII the affirmative defenses to claims of wage discrimination contained in the Equal Pay Act.³² In addition, the court relied on the broad remedial policy behind Title VII as support for its conclusion that Title VII wage discrimination claims are not limited to cases satisfying the equal work requirement of the Equal Pay Act.³³ The court of appeals therefore remanded the case to the district court with instructions to allow the plaintiffs to present evidence to substantiate their claim that the County intentionally discriminated against female guards in establishing its pay scales.³⁴

The Supreme Court, in a 5-4 decision, affirmed the holding of the court of appeals.³⁵ At the outset, the majority emphasized the narrowness of the issue before the Court. The Court noted that the female guards' claim was not based on a theory of comparable worth. Such a claim, if established, would require equal compensation for jobs which, although different, had the same intrinsic value or difficulty.³⁶ Instead, the Court stated, the plaintiffs sought to show by direct evidence that their employer discriminated against them by setting the wage rates for female employees, but not for male employees, at a level lower than its own evaluation of the worth of the jobs would warrant.³⁷ The Court declared that "the narrow question in this case is whether such a claim is precluded by the . . . Bennett Amendment."³⁸

Having isolated the central issue in the case, the Court turned to consideration of the language of the Bennett Amendment.³⁹ According to the ma-

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Gunther v. County of Washington*, 602 F.2d 882, 887, 20 Fair Empl. Prac. Cas. (BNA) 792, 795 (9th Cir. 1979).

³¹ *Id.* at 891, 20 Fair Empl. Prac. Cas. (BNA) at 798.

³² *Id.* at 889-90, 20 Fair Empl. Prac. Cas. (BNA) at 797.

³³ *Id.* at 890, 20 Fair Empl. Prac. (BNA) Cas. at 797-98.

³⁴ *Id.* at 891, 20 Fair Empl. Prac. (BNA) Cas. at 798. For a comprehensive discussion and analysis of the court of appeals decision in *Gunther*, see 22 B.C.L. REV. 184 (1980).

³⁵ *County of Washington v. Gunther*, 452 U.S. 161, 181 (1981).

³⁶ *Id.* at 166.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 168-69.

jority, the language of the amendment suggests that Congress intended only to incorporate the affirmative defenses of the Equal Pay Act into Title VII.⁴⁰ The Court noted that the amendment bars sex-based wage discrimination claims under Title VII where differences in compensation are "authorized" by the Equal Pay Act.⁴¹ According to the Court, the Equal Pay Act authorized wage differentials only in those cases which fall within the Act's four affirmative defenses.⁴² The Court rejected the County's argument that this construction of the Bennett Amendment would render it superfluous since all of the affirmative defenses set out in the Equal Pay Act already appear in Title VII.⁴³ The Court noted that despite the duplication of defenses in the two statutes, the Bennett Amendment would still have meaning if it is viewed as a technical amendment, designed to guarantee a consistent interpretation of the exceptions to the prohibition on sex-based wage differentials regardless of whether the discrimination claim was brought under the Equal Pay Act or Title VII.⁴⁴ Further, the Court noted, incorporation of the Equal Pay Act's fourth affirmative defense, which permits wage differentials based on any factor other than sex, could have a significant impact on Title VII litigation.⁴⁵ In this regard, the Court emphasized that Title VII's prohibition of discriminatory practices is broadly inclusive, prohibiting not only overt discrimination but also practices which, while fair on their face, operate in a discriminatory manner.⁴⁶ In contrast, the purpose of the fourth affirmative defense to the Equal Pay Act was, according to the Court, to limit claims cognizable under the Act to those alleging that differences in compensation are the result of overt sex discrimination.⁴⁷ Once the fourth defense was incorporated in Title VII, therefore, claims based on employment practices which require certain physical qualifications, which although facially neutral, operate to exclude women, would not be actionable under Title VII. The Court suggested that some of the procedural rules developed for Title VII litigation may have to be altered in order to accommodate the incorporation of the Equal Pay Act's narrower prohibition on wage differentials.⁴⁸ The Court did not decide precisely what effect the incorporation of the Equal Pay Act's defenses would have on wage discrimination litigation under Title VII. Nevertheless, the Court found the possibility that incorporation of the Equal Pay Act's affirmative defenses into Title VII would necessitate changes in the structure of Title VII litigation gave the Bennett Amendment significance beyond merely making the defenses available in Title VII suits.⁴⁹ Consequently, the Court determined that its interpretation of the Bennett Amendment did not render the amendment meaningless even though

⁴⁰ *Id.* at 168.

⁴¹ *Id.* at 168-69.

⁴² *Id.*

⁴³ *Id.* at 169-70.

⁴⁴ *Id.* at 171.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 170-71.

⁴⁹ *Id.* at 171.

Title VII already contained provisions creating defenses similar to those provided in the Equal Pay Act.⁵⁰

After concluding that the language of the Bennett Amendment supported the interpretation that it was intended to incorporate only the Equal Pay Act's affirmative defenses into Title VII, the Court reviewed the legislative history of the amendment.⁵¹ The Court noted that the sponsor of the amendment characterized it as a "technical" amendment, designed to ensure that the provisions of the Equal Pay Act were not nullified in the event of a conflict with Title VII.⁵² According to the Court, these statements may be read as referring to the Equal Pay Act's four affirmative defenses.⁵³ The Court concluded that this interpretation was more consistent with Senator Bennett's characterization of the amendment as a technical provision than an interpretation making all of the restrictions of the Equal Pay Act applicable to claims brought under Title VII.⁵⁴

Although the Court found support for its interpretation of the Bennett Amendment in the legislative history of the provision, it acknowledged that there were also statements in the legislative history which would support an interpretation of the Bennett Amendment as incorporating into Title VII both the affirmative defenses and the substantive restrictions on wage discrimination claims contained in the Equal Pay Act.⁵⁵ In addition, the majority recognized that administrative interpretations of the Bennett Amendment by the Equal Employment Opportunity Commission have not been consistent.⁵⁶ The Court noted that the Commission's guidelines initially provided that the Equal Pay Act's equal work standard was applicable to Title VII wage discrimination claims.⁵⁷ The Court noted, however, that this provision was later deleted from the Commission guidelines⁵⁸ and that, in any event, the original

⁵⁰ *Id.*

⁵¹ *Id.* at 171-76.

⁵² *Id.* at 173 (quoting 110 CONG. REC. 13647 (1964)).

⁵³ *Id.* at 174.

⁵⁴ *Id.* at 174-75.

⁵⁵ *Id.* at 176. The Court specifically referred to a statement made by Representative Celler when Title VII was under consideration by the House of Representatives. *Id.* Representative Celler explained each of the Senate's amendments to the House before the vote on the bill. See 110 CONG. REC. 15896 (1964). He described the Bennett Amendment as providing that "compliance with the Fair Labor Standards Act as amended Equal Pay Act satisfies the requirements of the title barring discrimination because of sex." 110 CONG. REC. 15896 (1964). According to the *Gunther* Court, this statement cannot be read literally because it would not only restrict wage discrimination claims to those actionable under the Equal Pay Act, but would also block all other sex discrimination claims as well. *County of Washington v. Gunther*, 452 U.S. 161, 176 (1981). The Court concluded, therefore, that Representative Celler's explanation was not intended to be precise, and should be disregarded. *Id.*

⁵⁶ *Id.* at 177-78.

⁵⁷ *Id.* at 177 (quoting 29 C.F.R. § 1604.7(a) (1966)). The guideline provided that "the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." 29 C.F.R. § 1604.7(a) (1966).

⁵⁸ *County of Washington v. Gunther*, 452 U.S. 161, 177 (1981). See 37 Fed. Reg. 6837 (1972). The current guideline provides only that the Equal Pay Act's defenses may be raised in a Title VII action. 29 C.F.R. § 1604.8 (1972).

guideline was not followed consistently by the Commission.⁵⁹ The Court recognized that neither the legislative history nor the administrative interpretations of the Bennett Amendment were unambiguously consistent with its interpretation of the amendment.⁶⁰ Nevertheless, the Court concluded that substantial support existed for a reading of the amendment as incorporating only the affirmative defenses of the Equal Pay Act into Title VII.⁶¹ The majority therefore determined that the lack of an explicit confirmation of its interpretation in the legislative history or of a consistently supportive administrative interpretation should not prevent the adoption of what the Court found was the most persuasive construction of the amendment.⁶²

The Court then stated that an interpretation of the Bennett Amendment which does not restrict wage discrimination claims under Title VII to claims of unequal pay for equal work is required in order to implement the broad remedial purposes of Title VII.⁶³ The Court noted that if Title VII wage discrimination claims were restricted by the equal work standard of the Equal Pay Act, certain forms of wage discrimination would be rendered immune from attack under Title VII.⁶⁴ In addition, the Court pointed out that the Equal Pay Act applies to a narrower range of employers than does Title VII.⁶⁵ Consequently, the Court noted, if all of the restrictions of the Equal Pay Act were made applicable to wage discrimination claims under Title VII, the coverage of Title VII would be limited to those employers covered by the Equal Pay Act.⁶⁶ The Court concluded that such a restriction on Title VII's protection against sex-based wage discrimination was impossible to reconcile with the Court's past interpretations of Title VII as embodying Congressional intent to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."⁶⁷ The Court, therefore, rejected an interpretation of the Bennett Amendment which would incorporate all of the restrictions of the Equal Pay Act into Title VII.⁶⁸

Having concluded on the basis of the language and legislative history of the Bennett Amendment, and the policy behind Title VII, that the amendment

⁵⁹ *County of Washington v. Gunther*, 452 U.S. 161, 177 (1981). The Court noted that, while the original guideline was in effect, the Commission frequently adopted the opposite position in its opinions and decisions. *Id.* See, e.g., General Counsel Opinion, Oct. 12, 1965, reprinted in *Equal Employment Opportunity Commission, 1ST ANNUAL DIGEST OF LEGAL INTERPRETATIONS*, July 1965-66; E.E.O.C. Dec. No. 71-2629, June 25, 1971, 4 Fed. Empl. Prac. Cas. (BNA) 250 (1971).

⁶⁰ *County of Washington v. Gunther*, 452 U.S. 161, 176, 178 (1981).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 178.

⁶⁴ *Id.* at 178-79. The Court noted that if the Bennett Amendment were interpreted as restricting wage discrimination claims under Title VII to cases which satisfy the 'equal work' standard, a woman who was discriminatorily underpaid would have no remedy unless her employer also employed a man in an equal job in the same establishment at a higher rate of pay. *Id.*

⁶⁵ *Id.* at 179.

⁶⁶ *Id.*

⁶⁷ *Id.* at 180 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

⁶⁸ 452 U.S. at 180.

should not be read to restrict sex-based wage discrimination claims under Title VII to cases cognizable under the equal work standard of the Equal Pay Act, the Court held that the female guards' claim of intentional sex discrimination was not barred merely because they failed to establish that they performed work equal to that of male guards.⁶⁹ The Court therefore affirmed the holding of the court of appeals that the plaintiffs must be given an opportunity to demonstrate that the County intentionally discriminated on the basis of sex in establishing its wage schedules.⁷⁰

In a dissenting opinion joined by three other Justices, Justice Rehnquist rejected the majority's interpretation of the Bennett Amendment.⁷¹ The dissenters contended that the amendment was intended to incorporate into Title VII the equal work standard of the Equal Pay Act.⁷² Under this interpretation, a plaintiff cannot state a sex-based wage discrimination claim under Title VII unless she can establish that she was paid less than male employees who were performing the same work.⁷³

As did the majority, the dissenting Justices reviewed the legislative history of the Equal Pay Act, Title VII, and the Bennett Amendment.⁷⁴ The dissenters concluded that this history clearly established that Congress intended to recognize wage discrimination claims only to the extent that they were premised on an allegation of unequal pay for equal work.⁷⁵ The dissenting Justices gave great weight to statements made during the debate on the Equal Pay Act which emphasized that the provision prohibited sex-based wage differentials only where male and female employees performed equal work.⁷⁶ The dissenters asserted that it "defied common sense to believe that the same Congress . . . intended . . . to abandon the limitations of the equal work approach just one year later, when it enacted Title VII."⁷⁷ Moreover, according to the dissenters, nothing in the legislative history of Title VII or the Bennett Amendment indicated that Congress intended to confine the application of the equal work standard to Equal Pay Act actions.⁷⁸ In fact, the dissenters argued, the legislative history of the Bennett Amendment demonstrated that Congress intended to make the equal work standard applicable to sex-based wage discrimination claims under Title VII.⁷⁹ Specifically, the dissenting Justices pointed to a statement by Senator Clark, floor manager of Title VII in the Senate, which indicated that the equal work standard of the Equal Pay Act would apply to

⁶⁹ *Id.* at 181.

⁷⁰ *Id.*

⁷¹ *Id.* (Rehnquist, J., dissenting).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 184-85.

⁷⁵ *Id.* at 198-99.

⁷⁶ *Id.* at 184-87. The dissenters emphasized that the Equal Pay Act was initially drafted to prohibit disparities in pay for men and women performing comparable work but that this formulation was rejected in favor of the equal work standard. *Id.* at 186-87 (citing 109 CONG. REC. 9196-97 (1963)).

⁷⁷ 452 U.S. at 188.

⁷⁸ *Id.* at 190, 193.

⁷⁹ *Id.* at 193.

wage discrimination claims under Title VII.⁸⁰ In addition, the dissenters disputed the majority's interpretation of Senator Bennett's statement that the purpose of his amendment was to prevent the nullification of the provisions of the Equal Pay Act in the event of a conflict with Title VII.⁸¹ Under the dissenters' interpretation, Senator Bennett's reference was to all of the provisions of the Equal Pay Act, including the equal work standard, and not just to the Act's affirmative defenses.⁸²

The dissenters also noted that their interpretation of the Bennett Amendment was consistent with the interpretation initially adopted by the Equal Employment Opportunity Commission.⁸³ According to the dissenters, great weight should be accorded the guidelines originally promulgated by the Commission, which stated that the standards of the Equal Pay Act were applicable to Title VII wage discrimination claims.⁸⁴ In contrast, the dissenters asserted, the Commission's subsequent deletion of this statement from its guidelines was not significant in the absence of new legislative history which would support the change.⁸⁵ Thus, on the basis of their reading of the legislative history and administrative interpretation of the relevant statutory provisions, the dissenters concluded that the Bennett Amendment incorporates the equal work standard into Title VII.⁸⁶

In addition to disputing the majority's reading of the legislative history, the dissenters asserted that the majority's interpretation of the Bennett Amendment would render both the amendment and the Equal Pay Act meaningless.⁸⁷ The dissenters noted that the four affirmative defenses set out in the Equal Pay Act which, under the majority's interpretation, are incorporated into Title VII by the Bennett Amendment, already appear in Title VII.⁸⁸ In addition, the dissenters asserted that since, under the majority's view, plaintiffs can state a wage discrimination claim under Title VII regardless of whether they perform work equal to that of male employees, the Equal Pay Act's limitation of sex-based wage discrimination claims to allegations of unequal pay for equal work is no longer of any consequence.⁸⁹ The dissenters argued that an interpretation of the Bennett Amendment which has the effect of rendering either the Equal Pay Act or the amendment itself superfluous violates longstanding principles of statutory construction and should, therefore, be rejected.⁹⁰

Finally, the dissenters considered the policy justifications offered by the majority to support its reading of the Bennett Amendment.⁹¹ The dissenters re-

⁸⁰ *Id.* at 191 (quoting 110 CONG. REC. 7217 (1964)). The *Gunther* majority gave no weight to this statement, noting that it was made prior to the adoption of the Bennett Amendment and thus could have no bearing on the meaning of the amendment. 452 U.S. at 172 n.12.

⁸¹ *Id.* at 193.

⁸² *Id.*

⁸³ *Id.* at 195-97.

⁸⁴ *Id.* at 195-96.

⁸⁵ *Id.* at 197 n.9.

⁸⁶ *Id.* at 198.

⁸⁷ *Id.* at 193, 199.

⁸⁸ *Id.* at 199-200.

⁸⁹ *Id.* at 193.

⁹⁰ *Id.* at 190-91, 200.

⁹¹ *Id.* at 201-03.

jected the majority's conclusion that limiting Title VII wage discrimination claims to cases which satisfy the equal work standard would contravene the broad remedial purposes of the statute.⁹² The dissenters noted that under their interpretation of the Bennett Amendment, the substantive provisions of the Equal Pay Act, in particular the equal work standard, are incorporated into Title VII but the provisions regarding the kinds of employers to whom the Act applies are not.⁹³ The dissenters asserted, therefore, that the majority's fears that the coverage of Title VII would be restricted by the adoption of the dissenters' interpretation of the Bennett Amendment, were groundless.⁹⁴ According to the dissenters, the only wage discrimination claims which would be barred under their interpretation of the Bennett Amendment are those where the plaintiff argues that she has been discriminated against because she was paid less than a male employee for a job which was, although dissimilar, of comparable intrinsic worth.⁹⁵ The dissenters asserted that the absence of a remedy for claims based on the theory of comparable worth is the result of an explicit Congressional decision, embodied in the Equal Pay Act, not to recognize such claims.⁹⁶ The dissenters argued that the subsequent enactment of Title VII was not intended to override this earlier Congressional determination.⁹⁷

The dissenting Justices recognized that the majority opinion did not approve the theory of comparable worth as the basis for a claim of wage discrimination under Title VII.⁹⁸ In fact, according to the dissenters, the narrowness of the majority's holding may be its "saving feature."⁹⁹ The dissenters emphasized, however, that under their reading of the Bennett Amendment, no cause of action for sex-based wage discrimination should be permitted under Title VII in the absence of proof of unequal pay for equal work.¹⁰⁰

The *Gunther* majority relied on the language of the Bennett Amendment, its legislative history and that of Title VII as a whole, and the policy against sex discrimination expressed by Congress in Title VII, to support its conclusion that the Bennett Amendment should not be construed to restrict sex-based discrimination claims under Title VII to claims involving unequal pay for equal work. The dissenters, in contrast, considered the same evidence but reached the opposite conclusion. Analysis of the statutes and their legislative history, and consideration of the expressed Congressional purpose in enacting Title VII compels the conclusion that the majority's position is the correct one.

First, the language of the Bennett Amendment provides that wage differentials will not be unlawful under Title VII if they are "authorized" by the

⁹² *Id.* at 201.

⁹³ *Id.* at 203.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 202-03.

⁹⁷ *Id.* at 203.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 204.

Equal Pay Act.¹⁰¹ Under the *Gunther* majority's interpretation of this language, the only differentials authorized by the Equal Pay Act are those which fall within the Act's four affirmative defenses — those which result from the operation of seniority systems, merit systems, systems which measure compensation by the quantity and quality of work performed, and systems based on any factor other than sex.¹⁰² In contrast, the dissent's interpretation of the language of the Bennett Amendment would require that the Equal Pay Act be read to "authorize" wage differentials not only in the four situations specifically exempted from the statute's coverage, but also in any case where the plaintiff was unable to establish that she performed work equal to that of more highly compensated male employees. The *Gunther* majority would, therefore, define "authorized" as requiring some affirmative sanction or exemption whereas, under the dissenter's interpretation, any practice not specifically prohibited is "authorized." The majority's view is more consonant with the ordinary meaning of "authorized," which implies some kind of official sanction or approval.¹⁰³ In the absence of any indication that Congress intended otherwise, the ordinary meaning of words used in a statute should govern its interpretation.¹⁰⁴ Thus, the most natural reading of the Bennett Amendment would be that it protects from challenge under Title VII only those wage differentials which Congress affirmatively sanctioned in the Equal Pay Act. Under this reading of the amendment, the *Gunther* majority was correct in its conclusion that the Equal Pay Act does not authorize wage differentials in all cases which fail to satisfy the equal work standard. Rather, the Equal Pay Act is simply inapplicable to cases where the equal pay for equal work requirement is not at issue.

Further, contrary to the *Gunther* dissenters' assertion, an interpretation of the Bennett Amendment as incorporating only the affirmative defenses of the Equal Pay Act into Title VII does not render the Bennett Amendment superfluous. Although Title VII does contain provisions which duplicate the Equal Pay Act's defenses based on seniority, merit systems, or systems which measure earnings by the quantity or quality of production,¹⁰⁵ there is no specific provision in Title VII which corresponds to the fourth affirmative defense of the Equal Pay Act. This defense exempts from the Act's prohibition on wage differentials any wage system based on a factor other than sex.¹⁰⁶ The Bennett Amendment was, therefore, necessary to ensure that all defenses against claims of unequal pay for equal work under the Equal Pay Act would be available in similar cases brought under Title VII. Moreover, since the range of employers covered by the Equal Pay Act and Title VII are not iden-

¹⁰¹ 42 U.S.C. § 2000e-2(h) (1976). See text of amendment *supra* at note 10.

¹⁰² See 29 U.S.C. § 206(d)(1) (1976).

¹⁰³ See BLACK'S LAW DICTIONARY 122 (rev. 5th ed. 1979); WEBSTER'S NEW COLLEGIATE DICTIONARY 75 (1979).

¹⁰⁴ See *Burns v. Alcala*, 420 U.S. 575, 580 (1975) ("[W]ords used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary. . . .").

¹⁰⁵ See 42 U.S.C. § 2000e-2(h) (1976).

¹⁰⁶ 29 U.S.C. § 206(d)(1)(iv) (1976).

tical,¹⁰⁷ the Bennett Amendment's provisions incorporating the Equal Pay Act's affirmative defenses into Title VII was necessary to ensure that these defenses would be available to employers not subject to an action under the Equal Pay Act but falling within the broader coverage of Title VII. The Bennett Amendment is thus not rendered superfluous by a construction which interprets it as only incorporating into Title VII the Equal Pay Act's affirmative defenses and not its substantive standards.

In addition, a construction of the Bennett Amendment as incorporating into Title VII only the affirmative defenses to the Equal Pay Act and not its equal work standard finds significant support in the legislative history of both the Bennett Amendment and Title VII. Title VII of the Civil Rights Act of 1964 was intended as a sweeping prohibition on discrimination in employment. The broad language of the statute indicates that Congress intended to eliminate all forms of employment discrimination.¹⁰⁸ Initially, Title VII did not include any references to sex in its provisions prohibiting discrimination in employment.¹⁰⁹ Shortly before the bill was passed by the House of Representatives, however, an amendment was proposed to add sex to the list of prohibited bases of discrimination in Title VII.¹¹⁰ Statements made during the brief debate on this amendment indicate that its purpose was to ensure that women were given protection against discrimination equivalent to that afforded to other disadvantaged groups by the statute.¹¹¹

Further, the sparse legislative history of the Bennett Amendment does not support the conclusion that it was intended to impose any substantial restrictions on the protection afforded to women by Title VII. The Bennett Amendment was proposed as a "technical" provision, for the purpose of clarifying the relationship between Title VII and the Equal Pay Act.¹¹² The sponsor's characterization of the amendment as only a technical correction of Title VII is more consistent with a construction of the Bennett Amendment as incorporating only the Equal Pay Act's affirmative defenses. If the purpose of the amendment was to incorporate into Title VII not only the affirmative defenses of the Equal Pay Act, but also all of its substantive provisions, the amendment could not fairly be characterized as merely a technical correction of Title VII.

¹⁰⁷ The Equal Pay Act is part of the Fair Labor Standards Act, 29 U.S.C. (1976 and Supp. III). The Act does not apply to employers operating certain retail sales, agriculture, fishing, and newspaper publishing businesses. See 29 U.S.C. §§ 203(s), 213(a) (1976 and Supp. III). In contrast, Title VII, 42 U.S.C. §§ 2000e-1 to 17 (1976), applies to employers with 15 or more employees. 42 U.S.C. § 2000e-1(b) (1976).

¹⁰⁸ *Id.* § 2000e-2(a)(1) (1976). See text of statute *supra* at note 10. The Supreme Court has repeatedly recognized that Congress intended, in enacting Title VII, to strike broadly at all forms of employment discrimination. See, e.g., *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁰⁹ See H.R. REP. NO. 914, 88th Cong., 1st Sess. 10 (1963).

¹¹⁰ See 110 CONG. REC. 2577 (1964).

¹¹¹ See *id.* (statement of Senator Smith); *Id.* at 2578 (statement of Senator Griffiths); *Id.* at 2579 (statement of Senator Griffiths); *Id.* at 2582 (statement of Senator May); *Id.* at 2583 (statement of Senator Kelly); *Id.* at 2584 (statement of Senator Gathings).

¹¹² See *id.* at 13647 (1964) (statement of Senator Bennett).

In addition, the only speaker in support of the Bennett Amendment in the Senate who addressed the content of the amendment stated that "all that the pending amendment does is recognize those exceptions, that are carried in the [Equal Pay Act]."¹¹³ Significantly, Senator Bennett did not dispute this characterization of his amendment.¹¹⁴ The limited legislative history of the Bennett Amendment, therefore, supports the *Gunther* majority's interpretation of the amendment as incorporating into Title VII only the affirmative defenses of the Equal Pay Act.¹¹⁵

As the *Gunther* dissenters point out, there exists some subsequent legislative history which would support a finding of Congressional intent to make both the affirmative defenses and the substantive standards of the Equal Pay Act applicable to Title VII litigation. A year after the adoption of the amendment, Senator Bennett inserted in the Congressional Record a statement which explained that his amendment "means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act."¹¹⁶ The *Gunther* majority did not give great weight to this statement, noting that the Court has traditionally been reluctant to ascribe much significance to statements made after the passage of legislation.¹¹⁷ The *Gunther* majority's position on the weight to be given to subsequent legislative history is indeed consistent with past Court practice.¹¹⁸ Further, even if the statements of Senator Bennett as to his intent in proposing the amendment were considered significant, they would not necessarily resolve the issue of the intent of Congress as a whole when it passed the amendment. In this regard, it should be noted that after Senator Bennett inserted his interpretation of the amendment in the Congressional Record, Senator Clark, floor manager of Title VII in the Senate, inserted in the Record a statement characterizing Senator Bennett's remarks as "a drastic reinterpretation of the amendment."¹¹⁹ Furthermore, he expressed doubt that Congress would have enacted the amendment if Senator Bennett had offered this interpretation while the amendment was under consideration in the Senate.¹²⁰ In view of the lack of consensus in this subsequent legislative history as to what the Congress believed it was enacting, the *Gunther* majority was justified in giving it no weight.¹²¹ Thus, although the legislative

¹¹³ 110 CONG. REC. 13647 (1964) (statement of Senator Dirksen).

¹¹⁴ See 110 CONG. REC. 13647 (1964).

¹¹⁵ The *Gunther* majority noted that, when Title VII, as amended by the Senate, was returned to the House of Representatives, Representative Celler offered an explanation of the Bennett Amendment which described it as providing that compliance with the Equal Pay Act would also constitute compliance with Title VII. See *supra* note 56. As the *Gunther* majority correctly recognized, however, this statement cannot be taken at face value, since it would immunize from attack under Title VII not only wage discrimination claims which failed to qualify under the 'equal work' standard but also discriminatory employment practices involving hiring or promotion policies because the Equal Pay Act applies only to discrimination in compensation. See 29 U.S.C. § 206(d)(1) (1976).

¹¹⁶ 111 CONG. REC. 13359 (1965).

¹¹⁷ *County of Washington v. Gunther*, 452 U.S. 161, 176 n.16 (1981).

¹¹⁸ See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977).

¹¹⁹ 111 CONG. REC. 18263 (1965).

¹²⁰ *Id.*

¹²¹ Similarly, the *Gunther* majority was justified in ascribing little force to the inconsistent

history of the Bennett Amendment is not entirely unambiguous, it does contain significant support for the *Gunther* majority's interpretation of the Bennett Amendment.

The *Gunther* majority's interpretation of the Bennett Amendment, moreover, is consistent with the broad remedial objectives Congress espoused in enacting Title VII.¹²² Under the *Gunther* Court's interpretation, a Title VII action will be available to women who, although unable to demonstrate that they performed work equal to that of male employees, can present evidence that their employer intentionally discriminated on the basis of sex in setting wage rates. In contrast, an interpretation limiting sex-based compensation claims cognizable under Title VII to cases where the plaintiff could satisfy the equal work standard of the Equal Pay Act would effectively insulate from attack several forms of intentional sex discrimination in compensation. In order to state a claim under the Equal Pay Act, a plaintiff must show that she received compensation lower than that paid to a male employee in the same establishment who performed the same work.¹²³ Thus, if a woman were hired for a position which had never been occupied by a male and was told by her employer that she would receive higher compensation if she were male, she would be unable to state a claim under the Equal Pay Act since she could not demonstrate that a male employee had ever been compensated at a higher level for performing the same work.¹²⁴ If the equal work standard were incorporated into Title VII, a plaintiff in this situation would have no cause of action under either statute and would, therefore, have no recourse against this arguably blatant discriminatory practice. Similarly, in cases where the employer intentionally discriminated against women in setting wage levels, and there were no women holding positions equal to those held by men, there would be no cause of action under the Equal Pay Act and, if the equal work standard were held to apply to Title VII actions no claim under Title VII.¹²⁵ The insulation of these practices from attack under Title VII cannot be reconciled with the expressed intent of Congress to eliminate all forms of discrimination in employment.

interpretations of the Bennett Amendment by the Equal Employment Opportunity Commission. See *supra* notes 56-59 and accompanying text. In general, interpretations of legislation by the administrative agency charged with its implementation are entitled to deference. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). In view of the EEOC's failure to consistently implement its 1965 guideline requiring Title VII plaintiffs to satisfy the 'equal work' standard, however, and the Commission's later deletion of this provision from its guidelines, see *supra* notes 58-59 and accompanying text. The *Gunther* Court was warranted in giving the earlier interpretation less weight. See *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944).

¹²² See *supra* note 108 and accompanying text.

¹²³ See *supra* note 4 and accompanying text.

¹²⁴ See *Rinkel v. Associated Pipeline Contractors*, 17 Fair Empl. Prac. Cas. (BNA) 224 (D. Alaska 1978), where the court held that "[w]hile the practice of paying a uniquely situated employee less than would be paid a member of the opposite sex in the same position may be a violation of certain laws and reprehensible, it does not violate this Equal Pay Act. . . ." *Id.* at 226.

¹²⁵ See *Gunther v. County of Washington*, 20 Fair Empl. Prac. Cas. (BNA) 788 (D. Or. 1976), where the district court, which interpreted the Bennett Amendment as making the 'equal work' standard applicable to Title VII, stated that "if the jobs are substantially dissimilar, that is the end of the inquiry." *Id.* at 791.

Further, an interpretation of the Bennett Amendment which limited the availability of a remedy for sex-based wage discrimination to cases of unequal pay for equal work would contravene the Congressional purpose in including sex as a prohibited basis for discrimination in Title VII. As previously noted, the legislative history of Title VII demonstrates that Congress intended to afford women the same degree of protection against discrimination as the other disadvantaged groups covered by the act.¹²⁶ The adoption of an interpretation of the Bennett Amendment which would deny a Title VII action to women who could not meet the equal work standard would be inconsistent with this intention since there is no similar restriction on the availability of Title VII actions to redress intentional discrimination on the basis of race, religion, or national origin.¹²⁷ Thus, if the employer in *Gunther* had established a wage schedule which intentionally discriminated against black employees by paying them less than the employer's independent evaluation of their worth would warrant, while paying white employees 100% of their evaluated worth, the minority employees would have a cause of action under Title VII regardless of whether they performed work equal to that of white employees. If, however, the equal work standard of the Equal Pay Act were incorporated into Title VII, female employees, on the same facts, would be barred from recovery under Title VII if they could not show that they performed work equal to that of male employees. This result cannot be reconciled with the express Congressional intent to afford women protection equivalent to that provided for other traditionally disadvantaged groups by Title VII. The *Gunther* majority's interpretation of the Bennett Amendment as incorporating into Title VII only the Equal Pay Act's affirmative defenses, and not the equal work standard, avoids this inconsistency. The *Gunther* majority's interpretation is, therefore, consonant with the broad policy objectives of Title VII.

As the preceding analysis demonstrates, the *Gunther* majority's interpretation of the Bennett Amendment is consistent with the language and legislative history of both the Bennett Amendment and Title VII. In addition, the *Gunther* Court's refusal to read the amendment as imposing a substantial restriction on the availability of Title VII actions to redress discrimination in compensation on the basis of sex is consistent with the broad policy objectives of Title VII. It should be emphasized, however, that in holding that a plaintiff may state a claim under Title VII without first satisfying the equal work standard of the Equal Pay Act, the *Gunther* Court did not sanction claims based on the theory of comparable worth.¹²⁸ Rather, the Court held only that Title VII claims of sex-based discrimination in compensation are not barred solely because the plain-

¹²⁶ See *supra* note 111 and accompanying text.

¹²⁷ See 42 U.S.C. § 2000e-2(a) (1976).

¹²⁸ See *supra* notes 36-38 and accompanying text. The theory of 'comparable worth' as a basis for claims of wage discrimination has occasioned much commentary. For a comprehensive presentation of the argument in favor of recognizing the 'comparable worth' theory, see R. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 J. L. REF. 399 (1979). A rebuttal to the Blumrosen article, presenting arguments against the adoption of the "comparable worth" theory, appears in B. Nelson, E. Opton, Jr., T. Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 J. L. REF. 233 (1980).

tiffs cannot prove that they performed work equal to that of male employees.¹²⁹ As the *Gunther* Court acknowledged, the precise contours of lawsuits permitted under Title VII as a result of its decision remain to be determined.¹³⁰

B. * *Customer Preference and the Bona Fide Occupational Qualification:*

*Fernandez v. Wynn Oil Co.*¹

Under section 703 of Title VII of the Civil Rights Act of 1964 (the Act) discrimination by an employer against an employee with respect to "compensation, terms, conditions, or privileges of employment" on the basis of sex is unlawful.² This broad prohibition against sex discrimination, however, is qualified by section 703(e)(1) of the Act which permits an employer to discriminate "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation" of a business.³ In delineating the situations in which the bona fide occupational qualification (BFOQ) exception entitles an employer to engage in sex discrimination, the Equal Employment Opportunity Commission (the Commission) and the courts have confronted the issue of whether customer preference can convert the sex of an employee into a bona fide occupational qualification.⁴

¹²⁹ *County of Washington v. Gunther*, 452 U.S. 161, 181 (1981).

¹³⁰ *Id.*

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¹ 653 F.2d 1273, 26 Fair Empl. Prac. Cas. (BNA) 815 (9th Cir. 1981).

² 42 U.S.C. § 2000e-2(a) (1976). Section 703 provides:

(a) It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin. . . .

For a detailed review of sex discrimination in the employment context, see Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980).

³ 42 U.S.C. § 2000e-2(a) (1976). For a thorough discussion of the legislative history and judicial interpretations of the bona fide occupational qualification exception to Title VII, see Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1027-33, 1042-51 (1977).

⁴ Among the Commission decisions addressing the impact of customer preference on the determination of whether a bona fide occupational qualification existed to justify an otherwise discriminatory employment practice are EEOC Decision No. 71-2338, 3 Fair Empl. Prac. Cas. (BNA) 1249 (June 2, 1971) (belief that customers would not go on hunting trips with females did not qualify male gender as a bona fide occupational qualification for a managerial position that involved taking customers to football games, to dinner, and on hunting trips), and EEOC Decision No. 70-11, 2 Fair Empl. Prac. Cas. (BNA) 118, 119 (July 8, 1969) (belief allegedly held by customers of a firm providing courier services that females could not provide adequate security as guards was insufficient to qualify sex as a bona fide occupational qualification for the position). See EEOC Decision No. 72-0697, 4 Fair Empl. Prac. Cas. (BNA) 444, 445 (December 27, 1971) (need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid BFOQ exception).

The leading court decision holding that stereotyped customer preference does not justify a sexually discriminatory employment practice is *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389, 3 Fair Empl. Prac. Cas. (BNA) 337, 340 (5th Cir.), cert. denied, 404 U.S. 950 (1971). The Seventh Circuit is the only other circuit court that has addressed whether customer

The Commission has consistently maintained that effective implementation of Title VII's general ban on sex discrimination requires a narrow construction of the bona fide occupational qualification exception.⁵ Accordingly, the only circumstances in which Commission guidelines permit customer preference to create a bona fide occupational qualification is where one is "necessary for the purpose of authenticity or genuineness . . . e.g., an actor or actress."⁶ Similarly, federal courts considering whether customer preference can qualify sex as a bona fide occupational qualification have refused to adopt a broad construction of the BFOQ exception.⁷ In the leading decision, *Diaz v.*

preference can qualify sex as a bona fide occupational qualification. *Sprogis v. United Air Lines*, 444 F.2d 1194, 1199, 3 Fair Empl. Prac. Cas. (BNA) 621, 625 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

⁵ EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (1981). The legislative history of Title VII supports the Commission's narrow construction of the BFOQ exception. In an Interpretative Memorandum submitted to the Senate during debate on Title VII, the floor managers indicated that "[T]his exception is a *limited* right to discriminate on the basis of . . . sex . . . where the reason is a bona fide occupational qualification." (emphasis added). 110 CONG. REC. 7212, 7213 (1964).

The federal courts generally have agreed with the Commission's narrow construction of the BFOQ exception. *See Dothard v. Rawlinson*, 433 U.S. 321, 333-34, 15 Fair Empl. Prac. Cas. (BNA) 10, 16 (1977). The Supreme Court has declared that the Commission's Guidelines, while not binding on courts, should be shown great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 3 Fair Empl. Prac. Cas. (BNA) 175, 179 (1971). In *Dothard*, the Court approved the portion of the guidelines (29 C.F.R. § 1604.2(A)) relating to the bona fide occupational qualification. *Dothard v. Rawlinson*, 433 U.S. at 334 n.19, 15 Fair Empl. Prac. Cas. (BNA) at 16 n.19. The Court there stated: "The EEOC issued guidelines on sex discrimination in 1965 reflecting its position that 'the bona fide occupational qualification as to sex shall be interpreted narrowly' . . . It has adhered to that principle consistently, and its construction of the statute can accordingly be given weight." *Id.*, 15 Fair Empl. Prac. Cas. (BNA) at 16 n.19.

The circuit courts, as well, have given substantial weight to the Commission's narrow construction of the statute. The uniform view of the federal courts which have construed § 703(e)(1) is that it was meant to be an extremely narrow exception to Title VII's general rule requiring equality of employment opportunities. *See, e.g., In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1145-46, 17 Fair Empl. Prac. Cas. (BNA) 1513, 1516 (7th Cir. 1978) (adopting the *Rosenfeld* construction of the BFOQ exception); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387, 3 Fair Empl. Prac. Cas. (BNA) 337, 338 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) ("[W]e adopt the EEOC guidelines which state that 'the Commission believes that the bona fide occupational qualification as to sex should be interpreted narrowly.'"); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1224-25, 3 Fair Empl. Prac. Cas. (BNA) 604, 608 (9th Cir. 1971) (court adopted the Commission's determination that the BFOQ establishes a narrow exception); *Weeks v. Southern Bell Tel. and Tel. Co.*, 408 F.2d 228, 235, 1 Fair Empl. Prac. Cas. (BNA) 656, 660-61 (5th Cir. 1969) (Commission's guidelines relating to the bona fide occupational qualification are "entitled to considerable weight.").

⁶ 29 C.F.R. § 1604.2(a)(iii) (1981). The Commission guidelines provide in relevant part:

- (1) The Commission will find the following situations do not warrant the application of the bona fide occupational qualification exception. . . .
- (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in subparagraph (a)(2) of this section.
- (2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

Id.

⁷ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389, 3 Fair Empl. Prac. Cas.

Pan American World Airways, Inc.,⁸ the Court of Appeals for the Fifth Circuit rejected an argument that female sex was a bona fide occupational qualification for a flight cabin attendant.⁹ In determining whether the preferences of customers for female flight cabin attendants could justify the airline's discriminatory hiring policy, the court adopted an "essence of the business" test.¹⁰ Under the *Diaz* "essence" test, focus is placed on whether the abilities upon which the employer justifies a discriminatory practice are necessary or merely "tangential" to the essence of the business involved.¹¹ A bona fide occupational qualification exists only when an employer demonstrates that "the essence of the business operation would be undermined" by hiring members of the excluded sex.¹² The Fifth Circuit concluded that unless a customer preference is actually based on a company's inability to perform the primary function or service it offers, that preference is irrelevant to the determination of whether a discriminatory employment practice is valid.¹³ Despite this well defined test for determining whether customer preference converts the sex of an employee into

(BNA) 337, 340 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); *Sprogis v. United Air Lines*, 444 F.2d 1194, 1199, 3 Fair Empl. Prac. Cas. (BNA) 621, 625 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

In *Diaz*, the Fifth Circuit ruled that customer preference for female flight cabin attendants and the assumed superior abilities of females to perform the non-mechanical aspects of the job did not qualify female gender as a bona fide occupational qualification. 442 F.2d at 388-89, 3 Fair Empl. Prac. Cas. (BNA) at 339-40. Similarly in *Sprogis*, the Seventh Circuit found no bona fide occupational qualification in a rule requiring stewardesses (but not stewards) to be unmarried. 444 F.2d at 1199, 3 Fair Empl. Prac. Cas. (BNA) at 625. "The marital status of a stewardess cannot be said to affect the individual woman's ability to create the proper psychological climate of comfort, safety, and security for passengers. Nor does any passenger preference for single stewardesses provide a valid reason for invoking the rule." *Id.*

⁸ 444 F.2d 385, 3 Fair Empl. Prac. Cas. (BNA) 337 (5th Cir. 1971).

⁹ *Id.* at 388, 3 Fair Empl. Prac. Cas. (BNA) at 339. The defendant airline argued that being female was a bona fide occupational qualification for the position of flight cabin attendant because females performed the non-mechanical functions associated with the job in a more effective manner than males. *Id.*

¹⁰ *Id.* at 388-89, 3 Fair Empl. Prac. Cas. (BNA) at 339-40. In *Diaz*, the Ninth Circuit refined an earlier test it had adopted for determining whether a discriminatory employment practice was valid under the BFOQ exception. In *Weeks v. Southern Bell Tel. and Tel. Co.*, 408 F.2d 228, 1 Fair Empl. Prac. Cas. (BNA) 656 (5th Cir. 1969), the court held that the test of whether a bona fide occupational qualification exists is whether there is a "reasonable basis to believe, that is, a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Id.* at 235, 1 Fair Empl. Prac. Cas. (BNA) at 661. To avail itself of the BFOQ exception, an employer had to establish a basis in fact for its belief that no members of the excluded sex could perform the job in question. *Id.* at 235, 1 Fair Empl. Prac. Cas. (BNA) at 660-61. The court reasoned that were it to permit stereotyped characterizations to support the exclusion of all members of one sex from consideration for a position, the exception would "swallow the rule" against discrimination. *Id.*

¹¹ 442 F.2d at 388-89, 3 Fair Empl. Prac. Cas. (BNA) at 339-40. The court defined "essence" as the primary function of the business engaged in by an employer. *Id.* at 388, 3 Fair Empl. Prac. Cas. (BNA) at 339.

¹² *Id.* at 388, 3 Fair Empl. Prac. Cas. (BNA) at 339.

¹³ *Id.* at 389, 3 Fair Empl. Prac. Cas. (BNA) at 340. While acknowledging that the public's expectation of finding one sex in a particular role might cause some initial difficulty for an employer, customer preference had no impact on the court's conclusion that female gender was not a bona fide occupational qualification for a flight cabin attendant. *Id.* See *infra* note 67.

a bona fide occupational qualification,¹⁴ the impact of customer preference on this determination continues to trouble the courts.

During the *Survey* year, the Court of Appeals for the Ninth Circuit addressed whether a customer preference which prevents customers from dealing with an employer can constitute the basis of a valid bona fide occupational qualification.¹⁵ In *Fernandez v. Wynn Oil Co.*,¹⁶ the court held that preferences of foreign customers based on sexual stereotype cannot qualify as a bona fide occupational qualification even if those preferences would prevent customers from dealing with an employer.¹⁷ The *Fernandez* decision is significant in two respects. First, the decision clarifies the kind of evidence an employer must offer to satisfy the *Diaz* "essence" test. To justify a discriminatory employment practice under the BFOQ exception, an employer must offer proof both that gender is a necessary factor in successful job performance and that hiring members of the excluded sex for the position at issue would therefore undermine the essence of its business. Second, *Fernandez* clarifies the law concerning customer preference and the bona fide occupational qualification. Although *Diaz* had previously held that customer preference based on sexual stereotype cannot qualify gender as a bona fide occupational qualification, the Ninth Circuit's ruling is novel in holding that such preferences are irrelevant to the determination of whether a valid BFOQ exception exists even where customers would refuse to deal with an employer if employees were not of a certain sex.

The plaintiff in *Fernandez*, a female, was employed at Wynn Oil Company, an international petro-chemical manufacturer, for nine years.¹⁸ During this time the plaintiff held various positions, including that of administrative assistant to Louis Dashwood, the vice-president of the International Operations Division.¹⁹ Although *Fernandez* performed many functions of Dashwood's job, he chose not to promote her.²⁰ His decision was based upon her value to him as an assistant and upon his belief that defendant's customers and distributors, many of whom were in Latin America and South America, would react negatively to dealing with a woman in a high level management position.²¹ In

¹⁴ The Supreme Court employed the *Diaz* "essence" test in *Dothard v. Rawlinson*, 433 U.S. 321, 15 Fair Empl. Prac. Cas. (BNA) 10 (1977), where the Court held that being male was a bona fide occupational qualification for the position of correctional counselor in an all male, maximum security prison.

Numerous federal courts have relied upon the *Diaz* test in determining whether gender constitutes a bona fide occupational qualification. See, e.g., *Blake v. City of Los Angeles*, 595 F.2d 1367, 19 Fair Empl. Prac. Cas. (BNA) 1441 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1087, 21 Fair Empl. Prac. Cas. (BNA) 1031, 1036 (8th Cir. 1980); *Smith v. Olin Chem. Co.*, 555 F.2d 1283, 1286, 15 Fair Empl. Prac. Cas. (BNA) 290, 293 (5th Cir. 1977); *Manhart v. City of Los Angeles Dep't of Water*, 553 F.2d 581, 587, 13 Fair Empl. Prac. Cas. (BNA) 1625, 1629 (9th Cir. 1976); *Sprogis v. United Airlines*, 444 F.2d 1194, 1199, 3 Fair Empl. Prac. Cas. (BNA) 621, 625 (7th Cir. 1971).

¹⁵ *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 26 Fair Empl. Prac. Cas. (BNA) at 818.

¹⁶ *Id.*

¹⁷ *Id.* at 1277, 26 Fair Empl. Prac. Cas. (BNA) at 818.

¹⁸ *Id.* at 1274, 26 Fair Empl. Prac. Cas. (BNA) at 816.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* Based on Dashwood's testimony, the trial court found that "many of Wynn's

October, 1975, Dashwood's employment terminated and Joseph Borello, formerly the Director of International Operations (DIO) became vice-president of Worldwide Marketing.²² Within three days, Borello informed Fernandez of plans to terminate her administrative assistant position.²³ In March, 1976, Borello hired Arturo Matthews to fill the position of DIO, although Fernandez had requested consideration for the job.²⁴ In April, she accepted an assignment as manager of a different division and remained employed by Wynn until her discharge in February, 1977.²⁵

After her discharge, Fernandez filed an action with the federal district court alleging that the refusal of her employer, the Wynn Oil Company, to promote her to the position of DIO was an act of sex discrimination in violation of Title VII.²⁶ The district court held for Wynn on two alternative grounds. First, the court determined that Wynn's decision not to promote Fernandez was based on her lack of qualifications rather than her sex, and, consequently, was justified by a valid business purpose.²⁷ Second, the district court held that Wynn was legally entitled to discriminate on the basis of sex in hiring a DIO because sex was a bona fide occupational qualification for the position.²⁸ Wynn employees had testified that prevailing cultural customs and mores in Latin America and South America would prevent customers there from doing business with a female DIO.²⁹ The court acknowledged that customer preferences should not be "bootstrapped to the level of business necessity."³⁰ Nevertheless, the court held that customer preferences rise to the dignity of a bona fide occupational qualification if "no customer will do business with a member of one sex either because it would destroy the essence of the business or would create serious safety and efficacy problems."³¹ On this basis, the district court found the preferences of Wynn's customers a bona fide occupational qualification.³²

South American distributors and customers, for instance, would be offended by a woman conducting business in her hotel room. The offensive nature of this apparently innocuous conduct stems from prevailing cultural customs and mores in Latin America." *Fernandez v. Wynn Oil Co.*, 20 Fair Empl. Prac. Cas. (BNA) 1162, 1164 (C.D.C. 1979).

The district court opinion frequently confuses South America with Latin America.

²² 653 F.2d at 1274, 26 Fair Empl. Prac. Cas. (BNA) at 816.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1275, 26 Fair Empl. Prac. Cas. (BNA) at 816. Fernandez sought injunctive and declaratory relief, damages, and back pay against Wynn. 20 Fair Empl. Prac. Cas. (BNA) at 1162.

²⁷ 653 F.2d at 1274, 26 Fair Empl. Prac. Cas. (BNA) at 816. The district court found that Fernandez failed to establish a prima facie case of discrimination because she did not demonstrate that she was qualified for the DIO position. *Id.* at 1275, 26 Fair Empl. Prac. Cas. (BNA) at 817. Furthermore, even if she had been able to make out a prima facie case, the court found that Wynn had a legitimate non-discriminatory purpose in preferring to hire Matthews: his qualifications were far superior to those of Fernandez for the position of DIO. *Id.* at 1276, 26 Fair Empl. Prac. Cas. (BNA) at 817.

²⁸ 653 F.2d at 1274, 26 Fair Empl. Prac. Cas. (BNA) at 816.

²⁹ *Id.* at 1276, 26 Fair Empl. Prac. Cas. (BNA) at 817.

³⁰ *Id.* at 1276, 26 Fair Empl. Prac. Cas. (BNA) at 818.

³¹ *Id.*

³² *Id.*

The Court of Appeals for the Ninth Circuit affirmed the district court's decision that no Title VII violation existed because sex was not a factor in Wynn's refusal to promote Fernandez.³³ The court, however, rejected the lower court's analysis of the bona fide occupational qualification issue.³⁴ The court noted that in finding male gender a bona fide occupational qualification for the position of DIO, the district court erred in both its factual findings and its interpretation of Title VII.³⁵

The Ninth Circuit determined that the district court's finding that male gender was a bona fide occupational qualification was factually erroneous because no evidence had been presented establishing a factual basis for linking sex with job performance.³⁶ While acknowledging the testimony by Wynn employees that a female DIO would have difficulty in conducting business in South America from a hotel room, the court observed that no proof had been offered that the position even required work of this nature.³⁷ Furthermore, the record provided no basis for the district court's findings that promoting Fernandez to the position of DIO would "destroy the essence" of Wynn's business or "create serious safety and efficacy problems."³⁸

Finding incorrect the district court's factual determination that gender is a bona fide occupational qualification for the DIO position, the circuit court turned to the legal conclusions of the district court regarding the applicability of the bona fide occupational qualification to the position of DIO. The court concluded that the district court had erroneously interpreted Title VII.³⁹ The court found that the district court's interpretation allowed customer preference to qualify as a bona fide occupational qualification when those preferences prevent customers from dealing with an employer.⁴⁰ In rejecting this interpretation of the BFOQ exception, the circuit court advanced three arguments. First, the court considered several cases construing the statutory exception to Title VII's ban on sex discrimination.⁴¹ Based on its reading of those decisions, the

³³ *Fernandez v. Wynn Oil Co.*, 653 F.2d at 1275, 1276, 26 Fair Empl. Prac. Cas. (BNA) at 817, 818. Wynn argued that the district court decision was correct, but requested that the Ninth Circuit abandon the district court discussion of the bona fide occupational qualification defense because sex was not a factor in the refusal to promote Fernandez. *Id.*, 26 Fair Empl. Prac. Cas. (BNA) at 816.

The American Jewish Congress, the Mexican American Legal Defense and Educational Fund, Inc., the Equal Employment Opportunity Commission and the Women's Equal Right Legal Defense and Education Fund presented amicus briefs in opposition to the district court's bona fide occupational qualification determination. *Id.*

³⁴ 653 F.2d at 1276, 1277, 26 Fair Empl. Prac. Cas. (BNA) at 817, 818.

³⁵ *Id.* at 1276, 26 Fair Empl. Prac. Cas. (BNA) at 817.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* The circuit court apparently adopted this language from the *Weeks* and *Diaz* decisions which established these limits to when gender qualifies as a bona fide occupational qualification. See *supra* notes 10-13 and accompanying text.

³⁹ 653 F.2d at 1276, 26 Fair Empl. Prac. Cas. (BNA) at 817, where the court states: "Even if the record supported the district court's factual conclusion, we would be compelled to reject the BFOQ finding in this case because it is based on an erroneous interpretation of Title VII."

⁴⁰ *Id.*, 26 Fair Empl. Prac. Cas. (BNA) at 818.

⁴¹ *Id.* (citing *City of Los Angeles Dep't of Water v. Manhart*, 435 U.S. 702, 707, 17

court concluded that "stereotypic impressions of male and female roles" did not bring gender within the scope of the bona fide occupational qualification.⁴² Second, the court considered the impact of customer preference on the determination of whether sex was a bona fide occupational qualification for a position.⁴³ Adopting the Fifth Circuit's treatment of this issue in *Diaz v. Pan American World Airways, Inc.*,⁴⁴ the court reasoned that stereotyped customer preferences could not justify a sexually discriminatory employment practice.⁴⁵ Third, the court considered the position of the Commission regarding customer preference and the bona fide occupational qualification.⁴⁶ Two Commission pronouncements supported the Ninth Circuit's conclusion that male gender was not a bona fide occupational qualification for a position which required dealings with foreign clients who might refuse to transact business with women. The Commission, the court noted, had held that the racially discriminatory practices of other countries could not be the basis of a bona fide occupational qualification.⁴⁷ In rejecting the defendant's contention that a separate rule for customer preference should apply in international contexts, the court apparently relied on this Commission decision.⁴⁸ The court also observed that the Commission guidelines expressly provide that the only customer preference allowed as a bona fide occupational qualification is one necessary for the purpose of genuineness or authenticity.⁴⁹ Based upon its consideration of cases and Commission decisions construing the BFOQ exception, the Ninth Circuit rejected the district court's analysis of the bona fide occupational qualification issue and held that customer preference based on sexual stereotype cannot bring a position within the scope of the statutory exception, even if that preference prevents customers from dealing with an employer.⁵⁰

The Ninth Circuit was correct in concluding that Wynn had failed to demonstrate that the position of DIO fell within the BFOQ exception. In requiring proof that hiring a female for a particular position would undermine the essence of Wynn's business, the court's opinion indicates that the federal courts continue to regard *Diaz* as a valid test for determining when

Fair Empl. Prac. Cas. (BNA) 395 (1978); *Blake v. City of Los Angeles*, 595 F.2d 1367, 19 Fair Empl. Prac. Cas. (BNA) 1441 (9th Cir. 1979), *cert. denied*, 446 U.S. 928, 22 Fair Empl. Prac. Cas. (BNA) 973 (1980)).

⁴² 653 F.2d at 1276, 26 Fair Empl. Prac. Cas. (BNA) at 818.

⁴³ *Id.* at 1276-77, 26 Fair Empl. Prac. Cas. (BNA) at 818.

⁴⁴ 442 F.2d 385, 3 Fair Empl. Prac. Cas. (BNA) 337 (5th Cir. 1971).

⁴⁵ 653 F.2d at 1276-77, 26 Fair Empl. Prac. Cas. (BNA) at 818.

⁴⁶ *Id.* at 1277, 26 Fair Empl. Prac. Cas. (BNA) at 818.

⁴⁷ *Id.* (citing EEOC Decision No. 72-0697, 4 Fair Empl. Prac. Cas. (BNA) 444 (December 27, 1971)).

⁴⁸ 653 F.2d at 1277, 26 Fair Empl. Prac. Cas. (BNA) at 818. In rejecting Wynn's argument that the *Diaz* rule should not apply in an international context, the Ninth Circuit stated: "Though the United States cannot impose standards of nondiscriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here." *Id.* (footnote omitted).

⁴⁹ 653 F.2d at 1277, 26 Fair Empl. Prac. Cas. (BNA) at 818.

⁵⁰ *Id.*

gender constitutes a bona fide occupational qualification.⁵¹ The Ninth Circuit's criticism of the factual findings on which the district court based its bona fide occupational qualification determination highlights the quality of the evidence which an employer must produce to satisfy the *Diaz* test. More particularly, the court's review of the district court's factual findings indicates that evidence of customer preference is insufficient to establish a link between gender and job performance where there has been no showing that the essence of a business would actually be undermined by hiring members of the excluded sex.⁵²

Under the *Diaz* "essence" test, gender constitutes a bona fide occupational qualification for a position "only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."⁵³ As applied in *Diaz*, under the "essence" test the court focuses on the essence of the employer's total business operation, examining both the primary function of the business and whether the abilities upon which the employer justifies its discriminatory practice are necessary or merely "tangential" to the essence of the business.⁵⁴

Fernandez clarifies the proof which an employer must offer under the "essence" test to substantiate a claim that sex constitutes a bona fide occupational qualification for a position. The Ninth Circuit noted that there must be a factual basis for linking sex with successful job performance.⁵⁵ For the court to assess adequately the relevance of gender to performance in the position at issue, an employer must provide evidence of the primary function of its business and of the duties associated with the position.⁵⁶ Furthermore, the court required proof that the abilities upon which an employer justifies a discriminatory employment practice are actually necessary to the business involved.⁵⁷ An employer must therefore demonstrate that hiring members of the

⁵¹ See *supra* note 14.

⁵² See *supra* notes 36-38 and accompanying text.

⁵³ 442 F.2d at 388, 3 Fair Empl. Prac. Cas. (BNA) at 339. See *supra* notes 8-13 and accompanying text.

⁵⁴ 444 F.2d at 388, 3 Fair Empl. Prac. Cas. (BNA) at 339. In commenting upon the lack of a relationship between the primary function of the defendant airline and the apparent superior ability of females to perform the job of flight cabin attendant, the Fifth Circuit stated:

The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as, . . . their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.

Id.

⁵⁵ *Fernandez v. Wynn Oil Co.*, 653 F.2d at 1276, 26 Fair Empl. Prac. Cas. (BNA) at 817.

⁵⁶ As the Ninth Circuit noted, although the district court in *Fernandez* purported to apply the *Diaz* test, there was no factual basis presented for linking sex with successful performance as a DIO. *Id.* The district court failed to consider the primary function of Wynn's business, the duties of the DIO, and whether gender was a relevant factor in the successful performance of those duties. *Id.*

⁵⁷ *Id.*

excluded sex for the position would undermine its entire business operation by interfering with performance of the primary function of the business or by creating serious safety and efficacy problems.⁵⁸ By placing this heavy burden of proof on an employer, the Ninth Circuit limited the availability of the BFOQ exception to those employers for whom sex discrimination is a real business necessity, and not simply a matter of convenience for itself and its customers. In addition to ensuring strict compliance with Title VII, the circuit court's application of the *Diaz* test effectuates one purpose of the Act, eliminating sexual stereotyping from the employment setting.⁵⁹ By contrast, the district court's approach to the BFOQ exception would have defeated that aim by permitting the stereotyped impressions of customers to determine the validity of a discriminatory employment practice.⁶⁰

The position adopted by the Ninth Circuit, that customer preference based on sexual stereotype cannot justify discriminatory conduct, is supported by both Commission and judicial decisions construing the BFOQ exception to Title VII. Consistent with its position that the BFOQ exception should be narrowly construed to effectuate Title VII's general prohibition of sex discrimination, the Commission guidelines recognize customer preference as a bona fide occupational qualification only "where it is necessary for the purpose of authenticity or genuineness."⁶¹ Under this construction of the exception a bona fide occupational qualification attaches only to those jobs which require specific physical characteristics possessed by only one sex.⁶² For example, the Commission rejected an employer's claim that being male was a bona fide occupational qualification for the position of courier guard.⁶³ The Commission found no merit in the employer's argument that loss of customer confidence in the company's ability to provide security services established a bona fide occupational qualification.⁶⁴ Finally, the Commission has been unwilling to apply a separate rule regarding customer preference in international contexts.⁶⁵

The Ninth Circuit's response to the issue of customer preference present in *Fernandez* is consistent with and supported by the *Diaz* rationale. In *Diaz*, the

⁵⁸ *Id.* Commenting on the inadequacy of the district court's factual findings, the Ninth Circuit stated: "Nor does the record provide any basis for the district court's findings that hiring Fernandez would 'destroy the essence' of Wynn's business or 'create serious safety and efficacy problems.'" *Id.*

⁵⁹ *See, e.g.,* In re Consolidated Pretrial Proceedings in the Airlines Cases, 582 F.2d 1142, 1146, 17 Fair Empl. Prac. Cas. (BNA) 1513, 1516 (7th Cir. 1978) where the court notes Title VII seeks to eliminate sex stereotyping from the employment setting; *Sprogis v. United Airlines*, 444 F.2d 1194, 1198, 3 Fair Empl. Prac. Cas. (BNA) 621, 624 (7th Cir. 1971) ("§ 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.").

⁶⁰ 20 Fair Empl. Prac. Cas. (BNA) 1162, 1165 (C.D.C. 1979).

⁶¹ 29 C.F.R. § 1604.2(a)(1)(iii) (1981).

⁶² For Commission decisions construing the BFOQ exception, *see supra* note 4.

⁶³ EEOC Decision No. 71-2338, 3 Fair Empl. Prac. Cas. (BNA) 1249 (June 2, 1971).

⁶⁴ *Id.* at 119, where the Commission states: "[T]his argument is, in law, without merit, since it presumes that customers' desires may be accommodated even at the price of rendering nugatory the will of Congress."

⁶⁵ *See supra* note 47 and accompanying text.

Fifth Circuit concluded that customer preference for female flight cabin attendants was not a justification for an airline's discriminatory employment practice.⁶⁶ In reaching this conclusion, the court reasoned that it would be "anomalous" to allow customer preferences and prejudices to determine the validity of a BFOQ claim, when it was to a large extent these very prejudices Title VII was meant to overcome.⁶⁷ In adopting the *Diaz* court's conclusion that stereotyped customer preference cannot justify a sexually discriminatory employment practice,⁶⁸ the Ninth Circuit implicitly recognized the validity of the *Diaz* rationale.

Both the *Fernandez* and *Diaz* courts' treatment of the issue of customer preference recognized a distinction between a rational customer preference and customer preference based on sexual stereotype. In rejecting the district court's interpretation of Title VII, the Ninth Circuit implicitly acknowledged that the customer preference in *Fernandez* did not satisfy the *Diaz* test:⁶⁹ there was no showing that the preference of Wynn's foreign customers was rationally based on the company's inability to perform its primary functions. Rather, as the district court's findings suggest, Wynn's foreign customers refused to accept a female in the position of DIO because of prevailing mores relating to the proper role of women in their countries.⁷⁰ The Ninth Circuit noted that while customer preference based on sexual stereotype may prevent customers from dealing with an employer, that fact does not qualify those preferences as a bona fide occupational qualification.⁷¹ The Ninth Circuit correctly concluded that rather than constituting an actual business necessity, Wynn's BFOQ claim was

⁶⁶ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d at 389, 3 Fair Empl. Prac. Cas. (BNA) at 340 (5th Cir. 1971).

⁶⁷ *Id.*, where the court states: "[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was to a large extent, these very prejudices the Act was meant to overcome."

⁶⁸ *Fernandez v. Wynn Oil Co.*, 653 F.2d at 1276-77, 26 Fair Empl. Prac. Cas. (BNA) at 818 (9th Cir. 1981).

⁶⁹ See *supra* notes 10-13 and accompanying text.

⁷⁰ 653 F.2d at 1276, 26 Fair Empl. Prac. Cas. (BNA) at 817.

⁷¹ *Id.* at 1277, 26 Fair Empl. Prac. Cas. (BNA) at 818.

Beyond the realm of customer preference, many decisions construing the BFOQ exception have rejected the contention that stereotypic impressions of male and female gender qualify as a bona fide occupational qualification. The Ninth Circuit adopted this position itself in a 1971 decision, *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 3 Fair Empl. Prac. Cas. (BNA) 606, where it rejected an employer's claim that the strenuous physical demands of a position rendered sex a bona fide occupational qualification. In *Rosenfeld*, the court stated that the basis for the application of the bona fide occupational qualification is "sexual characteristics rather than characteristics that might, to one degree or another, correlate with a particular sex." *Id.* at 1225, 3 Fair Empl. Prac. Cas. (BNA) at 608. Applying this test, the court observed that instead of demonstrating a link between the sexual characteristics of an employee and successful job performance, the company attempted to raise a "commonly accepted characterization of women as the 'weaker sex' to the level of a bona fide occupational qualification." *Id.* at 1224, 3 Fair Empl. Prac. Cas. (BNA) at 608. The court concluded that the bona fide occupational qualification is inapplicable where employment opportunities are denied on the basis of a general assumption regarding the physical capabilities of female employees. *Id.* at 1224-25, 3 Fair Empl. Prac. Cas. (BNA) at 608.

See, e.g., *City of Los Angeles Dep't of Water v. Manhart*, 435 U.S. 702, 17 Fair Empl. Prac. Cas. (BNA) 395, 398 (1978) ("[i]t is now well recognized that employment decisions can-

for the convenience of itself and its customers and should therefore have been rejected by the district court.⁷²

In sum, the Ninth Circuit's interpretation of the BFOQ exception highlights that there are only limited circumstances in which an employer will be permitted to rely upon customer preference as support for a BFOQ defense. *Fernandez* clarifies the proof which an employer must offer under the *Diaz* "essence" test to substantiate a claim that gender constitutes a bona fide occupational qualification for a position. An employer must demonstrate both that gender is a necessary factor in successful job performance and that its business would therefore be undermined if a member of the excluded sex were to occupy the position at issue. Accordingly, *Fernandez* indicates that customer preference that members of one sex serve in a particular position should be considered by a court only when the possession of unique sexual characteristics is shown to be essential to the performance of the primary function of a business. By placing this heavy burden of proof on an employer, the courts have limited the availability of the BFOQ defense to those employers for whom sex discrimination is a real business necessity, and not simply a matter of preference for itself and its customers.

C.* *Transsexuals and Title VII:*

*Sommers v. Budget Marketing, Inc.*¹

Section 2000e-2(a)(1) of Title VII² prohibits an employer from discriminating against any employee on the basis of sex.³ The scope of the class protected by this prohibition is a question that has commanded the attention of the federal courts.⁴ Several transsexuals⁵ have argued that the meaning of the

not be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's ability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals.'"); In re Consolidated Pretrial Proceedings in the Airlines Cases, 582 F.2d 1142, 1146, 17 Fair Empl. Prac. Cas. (BNA) 1513, 1516 (7th Cir. 1978) ("attributes that are culturally more common to one sex than the other are an insufficient basis for a bona fide occupational qualification. Cultural stereotypes should not be employed to justify sex discrimination."); see also *Dothard v. Rawlinson*, 433 U.S. 321, 15 Fair Empl. Prac. Cas. (BNA) 10 (1977); *Blake v. City of Los Angeles*, 595 F.2d 1367, 19 Fair Empl. Prac. Cas. (BNA) 1441 (9th Cir. 1979); *Long v. Sapp*, 8 Fair Empl. Prac. Cas. (BNA) 1079 (5th Cir. 1974); *Sprogis v. United Airlines, Inc.*, 442 F.2d 1194, 3 Fair Empl. Prac. Cas. (BNA) 621 (7th Cir.), cert. denied, 404 U.S. 991, 4 Fair Empl. Prac. Cas. (BNA) 37 (1971).

⁷² 653 F.2d at 1276-77, 26 Fair Empl. Prac. Cas. (BNA) at 817-18.

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¹ 667 F.2d 748 (8th Cir. 1982).

² 42 U.S.C. §§ 2000e-2000e-17 (1976).

³ 42 U.S.C. §§ 2000e-2(a)(1) (1976).

⁴ See, e.g., *DeSantis v. Pacific Tel. and Tel. Co.*, 608 F.2d 327, 331-32 (9th Cir. 1979) (lesbians and homosexuals claiming protection); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (effeminate behavior claimed as protected); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (transsexual claiming protection).

⁵ A currently acceptable definition of transsexualism is that it is a dis-

word "sex" under Title VII should be expanded beyond its traditional connotation of male or female gender alone to include transsexual individuals.⁶ Courts uniformly have rejected this argument.⁷ The courts have indicated that, absent evidence of congressional intent to the contrary, they are unwilling to include within the meaning of the term "sex" anything beyond the traditional sexual categories male and female.⁸

During the *Survey* year, the Eighth Circuit Court of Appeals joined the growing number of courts that have rejected claims by transsexuals for protection under Title VII.⁹ In *Sommers v. Budget, Inc.*,¹⁰ the court held that Title VII's ban on sex discrimination in employment practices does not encompass discrimination against transsexuals.¹¹ Without engaging in a detailed analysis, the court based its result on two factors. First, the court observed, the legislative history of Title VII failed to indicate specific congressional intent to include transsexuals within Title VII's protective sweep.¹² Second, the court understood the major purpose of the reference to "sex" in Title VII to be the assurance of equal opportunity for women.¹³ Therefore, the court concluded, that claims by transsexuals for protection under Title VII are contrary to the legislative history and policy of the Act and, therefore, a transsexual cannot claim such protection from discriminatory practices.¹⁴

The appellant in *Sommers* claimed to be a "female with the anatomical body of a male."¹⁵ *Sommers* was hired by Budget Marketing, Inc., on April 22, 1980 to perform clerical duties.¹⁶ Two days later, she¹⁷ was discharged.¹⁸ Budget maintained that *Sommer's* employment was terminated because she had misrepresented herself as an anatomical female when she applied for the

turbance of gender identity in which the person manifests, with constant and persistent conviction, the desire to live as a member of the opposite sex, and progressively takes steps to live in the opposite sex role on a full-time basis.

Money & Gaskin, *Sex Reassignment*, 9 Int'l J. Psychiatry 249, 266 (1970), cited in Wein & Remmers, *Employment Protection and Gender Dysphoria; Legal Definitions of Unequal Treatment on the Basis of Sex and Disability*, 30 HASTINGS L.J. 1075, 1076 n.5 (1979).

⁶ See, e.g., *Powell v. Read's Inc.*, 436 F. Supp. 369, 370 (D.Md. 1977); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd* 570 F.2d 354 (9th Cir. 1978); *Grossman v. Bernard Township Bd. of Educ.*, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1197 (D.N.J. 1975), *aff'd* 538 F.2d 319 (3d Cir. 1976), *cert. denied* 429 U.S. 897 (1976).

⁷ See, e.g., *Powell v. Read's Inc.*, 436 F. Supp. 369 at 371; *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 at 457; *Grossman v. Bernard Township Bd. of Educ.*, 11 Fair Empl. Prac. Cas. (BNA) 1196 at 1199.

⁸ See *supra* cases cited in note 7.

⁹ See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. at 371; *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. at 457; *Grossman v. Bernards Township Bd. of Educ.*, 11 Fair Empl. Prac. Cas. (BNA) at 1199.

¹⁰ 667 F.2d 748 (8th Cir. 1982).

¹¹ *Id.* at 750.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 748.

¹⁶ *Id.*

¹⁷ Because *Sommers* referred to herself in the feminine gender, the court did likewise. *Id.* at 748. Therefore, so shall this note.

¹⁸ *Id.*

job, and that this misrepresentation led to a disruption of the company work routine when the female employees indicated they would quit if Sommers were allowed the use of their restroom.¹⁹ Sommers filed suit in the U.S. District Court of the Southern District of Iowa, alleging that she had been discharged on the basis of sex in violation of Title VII.²⁰

Budget moved to dismiss the action for failure to state a claim and lack of subject-matter jurisdiction, arguing that Title VII provided no relief for transsexuals.²¹ In the alternative, it requested a more definitive statement of the basis for the plaintiff's claim of discriminatory treatment.²² In response to a court order, Sommers submitted an amended complaint alleging that she had been discriminated against because of her "status as a female."²³ In this amended complaint Sommers admitted that sexual conversion surgery had not been performed.²⁴

The district court treated Budget's motion to dismiss as one for summary judgment.²⁵ Previous decisions in other jurisdictions, the court noted, had ruled that Title VII did not protect against discrimination on the basis of transsexuality.²⁶ Following these decisions, the district court determined that, for the purposes of Title VII, Sommers was male because she was anatomically male.²⁷ Because this anatomical fact was not disputed, the court concluded that there existed no genuine issue of material fact,²⁸ and entered summary judgment in favor of Budget.²⁹

On appeal to the Eighth Circuit Court of Appeals Sommers argued that the court below had erred in concluding that Title VII did not prohibit discrimination against transsexuals.³⁰ In rejecting this contention, the court focused primarily on the lack of legislative history evidencing a congressional intent to include transsexuals in Title VII.³¹ The term "sex," the court noted, was added to Title VII by an amendment adopted just one day prior to passage by the House of the full Act.³² The Eighth Circuit found no indication in the legislative history that Congress intended to extend Title VII coverage to transsexuals.³³ Relying on precedent decision in the area, the court declared

¹⁹ *Id.*

²⁰ *Id.* at 749.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ The Federal Rules of Civil Procedure provide for summary judgment when the court finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

²⁹ *Sommers v. Budget Mktg., Inc.*, 667 F.2d at 749.

³⁰ *Id.*

³¹ *Id.* at 750.

³² *Id.*

³³ *Id.*

that the primary purpose of the amendment was to ensure the provision of equal opportunity for women.³⁴

The court derived additional support for its conclusion that transsexuals were not included in Title VII's coverage from the consistent defeat of proposals to amend the Civil Rights Act to prohibit discrimination on the basis of sexual preference.³⁵ Although the court acknowledged that Sommers's claim was not one of discrimination on these grounds,³⁶ it nonetheless reasoned that the failure to pass any of the "sexual preference" amendments indicated that Congress intended the term "sex" to be given its traditional connotation of male or female gender alone.³⁷ The court observed that it was aware of the peculiar problem confronting both Sommers and Budget,³⁸ and expressed the hope that "some reasonable accommodation could be worked out between the parties."³⁹ It went on to conclude, however, that "the issue before this court is not whether such an accommodation can be reached. Rather, the issue is whether Congress intended Title VII of the Civil Rights Act to protect transsexuals from discrimination [W]e hold that such discrimination is not within the ambit of the Act."⁴⁰

By restrictively interpreting the term "sex" for the purposes of Title VII, and thereby concluding that transsexuals are not afforded Title VII's protection, the Eighth Circuit followed the trend of other courts considering whether the protective sweep of Title VII extends to transsexual individuals.⁴¹ The court's reasoning, resting primarily on the lack of legislative history revealing congressional intent to include transsexuals within the class of individuals protected by Title VII, is virtually identical to that used in four previous decisions rendered in this area.⁴² Because the legislative history so dominates these cases, a closer inspection of that history is warranted to determine whether Congress indeed intended to exclude from the protective sweep of Title VII employees discriminated against because they are transsexual.

Whereas the amendment adding the term "sex" to Title VII was adopted with no prior legislative hearings,⁴³ evidence of the purpose and intended effect of the amendment must be found in what little debate took place when the

³⁴ *Id.*, (citing *Baker v. California Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *Diaz v. Pan Am.*, 442 F.2d 385, 386 (5th Cir. 1971)).

³⁵ *Id.*

³⁶ *Id.* Sommers submitted a medical affidavit specifically stating "that transsexualism is not voluntarily assumed and is not a matter of sexual preference." *Id.* at 748 n.2.

³⁷ *Id.* at 750.

³⁸ We are not unmindful of the problem Sommers faces. On the other hand, Budget faces a problem in protecting the privacy interests of its female employees. . . . The appropriate remedy is not immediately apparent to this court. Should Budget allow Sommers to use the female restroom, the male restroom, or one for Sommers's own use?

Id.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *supra* cases cited at note 8.

⁴² *Id.*

⁴³ *Sommers v. Budget Mktg., Inc.*, 667 F.2d at 750; see also Note, *Developments in the*

amendment was introduced. In his introductory remarks, the amendment's sponsor emphasized that its purpose was to prevent discrimination against women. He stated:

Mr. Chairman, this amendment is offered to the fair employment practices of this bill to include within our desire to prevent discrimination against another minority group, the women, but a very essential minority group . . . [I]t is an indisputable fact that all throughout industry women are discriminated against in that just generally speaking they do not get as high compensation for their work as do the majority sex. Now, if that is true, I hope the committee chairman will accept this amendment.⁴⁴

The comments of the amendment's sponsor therefore reflect a concern with discrimination against women alone. The ensuing debate underscores this concern.⁴⁵

To the extent, then, that the actual words spoken in congressional debate over the "sex" amendment to Title VII exclusively govern judicial interpretation of the Act, the cases preceding and including *Sommers v. Budget Marketing, Inc.* were correctly decided. There are, however, several arguments against allowing congressional silence regarding protection for transsexuals under Title VII to be the sole consideration in judicial review of the issue.⁴⁶ First, even if discrimination against women alone prompted passage of the "sex" amendment, federal courts have since found that Title VII was intended to cover all individuals discriminated against because of their sex, not just women.⁴⁷ Second, it is unrealistic to demand that legislators contemplate and debate every possible circumstance that may arise under any given statute.⁴⁸ Finally, and perhaps most compellingly, "judicial denial of Title VII relief to transsexuals is tantamount to a denial of access to the private job market simply because of a status created by an accident of birth."⁴⁹

Beyond the concerns outlined above lies another difficulty in exclusive reliance on the conventional meaning of the term "sex" in analyzing transsexuals' claims under Title VII. Such reliance may require courts to draw a tenuous distinction between the validity of claims based on the transsexual's interim status as a transsexual and the transsexual's ultimate status as a member of either gender. The Ninth Circuit drew such a distinction in *Holloway v. Arthur Andersen & Co.*⁵⁰

Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1167 (1971).

⁴⁴ 110 CONG. REC. 2577 (1964) (Statement by Rep. Smith).

⁴⁵ 110 CONG. REC. 2577-2584 (1964).

⁴⁶ See Wein & Remmers, *supra* note 5, at 1075.

⁴⁷ *Id.* at 1105 and n.187 (citing *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971)).

⁴⁸ Wein & Remmers, *supra* note 5, at 1106 and n.190 (citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Montana Power Co. v. Federal Power Comm'n*, 445 F.2d 739 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 1013 (1971); *District of Columbia v. Orleans*, 406 F.2d 957 (D.C. Cir. 1968)).

⁴⁹ Wein & Remmers, *supra* note 5, at 1008.

⁵⁰ 566 F.2d 659 (9th Cir. 1977).

The appellant in *Holloway* was male when first employed by the appellee.⁵¹ The following year she began receiving female hormone treatments, and four years later informed her supervisor that she was in the process of preparing for sex change surgery.⁵² Several months later, she requested that the company's records be changed to reflect her new female first name.⁵³ Shortly thereafter, she was fired.⁵⁴ The *Holloway* majority concluded that she would have had a cause of action under Title VII if she had claimed discrimination on the basis of being female.⁵⁵ Because, however, her claim was based on the fact that she was transsexual and had chosen to change her sex, she was denied relief under Title VII.⁵⁶

In his dissent, Judge Goodwin discussed the logical inconsistency in the majority's opinion, and set forth his reasons for believing that transsexuals have a cause of action under Title VII.⁵⁷ In his view, the issue revolved around the fact that the appellant's condition had not become stationary at the time her employment was terminated.⁵⁸ He suggested that under the majority's reasoning, a transsexual that had already completed sex change surgery could bring a Title VII claim on the grounds that the discharge was based on sex. A transsexual, however, who was about to undergo or was undergoing surgery could not.⁵⁹

It seems to me irrelevant under Title VII whether the plaintiff was born female or was born ambiguous and chose to become female. The relevant fact is that she was, on the day she was fired, a purported female. She says she was fired for having become female under controversial circumstances. The employer says these circumstances are disconcerting for other employees. . . . [T]hose are questions that ought to be answered in court, in a trial. . . .⁶⁰

Inasmuch as no sex change operation had been or, as far as the opinion indicates, was about to be performed on the appellant in *Sommers*⁶¹ it is doubtful whether the *Holloway* decision, if invoked, would have affected the result in that case.

In summary, arguments can be raised in support of allowing transsexuals a cause of action under Title VII. Judge Goodwin's criticism of the distinction made between pre- and post-operative transsexuals in *Holloway v. Arthur Andersen & Co.* appears particularly worthy of further study. Despite the validity of these arguments, the *Sommers* court's refusal to allow transsexuals a cause of action under Title VII makes it clear that — at least for the foreseeable

⁵¹ *Id.* at 661.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 664.

⁵⁶ *Id.*

⁵⁷ *Id.* at 664-65 (Goodwin, J., dissenting).

⁵⁸ *Id.* at 664.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Sommers v. Budget Mktg., Inc.*, 667 F.2d at 749.

future — transsexuals will have to look elsewhere for protection from employment discrimination. Title VII will provide them with no relief.

IV. RELIGIOUS DISCRIMINATION

A. * *Religious Discrimination and Union Accommodation:*

Tooley v. Martin Marietta Corp.¹

Section 703 of Title VII of the Civil Rights Act of 1964² prohibits employment discrimination because of religion by employers³ and labor organizations.⁴ In 1967, the Equal Employment Opportunity Commission (EEOC) amended previously issued guidelines concerning religious discrimination in employment.⁵ The present guidelines establish a new standard of admin-

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¹ 648 F.2d 1239 (9th Cir. 1981).

² Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1976). Section 703 is codified at 42 U.S.C. § 2000e-2 (1976).

³ 42 U.S.C. § 2000e-2(a) (1976), which covers employers, provides:

(a) *Employer practices*

It shall be an unlawful employment practice for an employer —

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

⁴ Labor organizations are covered by 42 U.S.C. § 2000e-2(c) (1976). This section provides:

(c) *Labor organization practices*

It shall be an unlawful employment practice for a labor organization —

- (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
- (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c) (1976). See generally Frantz, *Religious Discrimination in Employment — An Examination of the Employer's Duty to Accommodate*, 1979 C.L. REV. 205 (1979); Comment, *Religious Discrimination in Employment — The Undoing of Title VII's Reasonable Accommodation Standard*, 44 BROOKLYN L. REV. 598 (1978).

⁵ The first set of guidelines, issued in 1966, read as follows:

[T]he Employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs. 29 C.F.R. § 1605.1(b)(3).

istrative and judicial review for employment arising out of religion based discrimination.⁶ This new standard imposes an affirmative action duty on employers to accommodate reasonably the religious beliefs of employees, provided such reasonable accommodation would not cause undue hardship for the employer.⁷ The two principles of "reasonable accommodation" and "undue hardship" were incorporated into the language of Title VII through section 701(j) of the Civil Rights Act of 1964.⁸ Despite congressional incorporation of the principles of "reasonable accommodation" and "undue hardship" into the language of Title VII, however, courts have been unable to reach a consensus on exactly what constitutes religious discrimination in employment.⁹ In 1977, the Supreme Court decided its only major religion based discrimination case since the passage of section 701(j) and, in doing so, construed the principles of "undue hardship" and "reasonable accommodation."¹⁰ In *Trans World Airlines, Inc. v. Hardison*,¹¹ the Court adopted two guidelines for interpreting the terms "reasonable accommodation"¹² and "undue hardship".¹³ First, it established that reasonable accommodation did not mean that a seniority system should be changed to accommodate an employee's religious beliefs.¹⁴ Second, the Court stated that for an employer to bear more than a "de minimis" cost in order to accommodate the employee could constitute undue hardship to the employer.¹⁵ Yet, the Supreme Court's construction of "reasonable accommodation" and "undue hardship" in *Hardison* left a number of issues arising in the context of religion based employment discrimination

The new guidelines are at 29 C.F.R. § 1605 (1981).

⁶ *Id.* The guidelines established by the EEOC are not binding on the courts but the position of the Supreme Court has been that they are entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1979).

⁷ 29 C.F.R. § 1605.2(a)-(c) (1981).

⁸ 42 U.S.C. § 2000-e(j) (1976). Section 701(j), which defines the term "religion" under Title VII, reads as follows:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religion observance or practice without undue hardship on the conduct of the employer's business.

Id.

⁹ See, e.g., *Draper v. United States Pipe and Foundry Co.*, 527 F.2d 515 (6th Cir. 1976); *United States v. Albuquerque*, 545 F.2d 110 (10th Cir. 1976); *Williams v. Southern Union Gas Co.*, 529 F.2d 483 (10th Cir. 1976), *cert. denied*, 429 U.S. 959 (1976); *Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976), *reh. denied*, 433 U.S. 915 (1977); *Johnson v. United States Postal Serv.*, 497 F.2d 128 (5th Cir. 1974); *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972); *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970); *Dixon v. Omaha Pub. Power Dist.*, 385 F. Supp. 1382 (D.C. Neb. 1974); *Claybaugh v. Pacific N.W. Bell Tel. Co.*, 355 F. Supp. 1 (D.C. Ore. 1973); *Roberts v. Heritage Cotton Mills*, 8 Fair Empl. Prac. Cas. (BNA) 315 (D.C.S.C. 1973).

¹⁰ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

¹¹ *Id.* at 63.

¹² *Id.* at 79.

¹³ *Id.* at 84.

¹⁴ *Id.* at 79. The court stated that without a clear and express indication from Congress, it could not agree with *Hardison* and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. *Id.*

¹⁵ *Id.* at 84. "To require TWA to bear more than a *de minimis* cost in order to give *Hardison* Saturdays off is an undue hardship."

unresolved.¹⁶ Two issues in particular were not addressed by the Supreme Court — the duty of a union to accommodate the religious beliefs of an employee¹⁷ and the constitutionality of section 701(j).¹⁸

¹⁶ *Id.* Since *Hardison*, even when presented with factual patterns similar to that presented in *Hardison*, the circuit courts have failed to present a unified answer as to what constitutes religious discrimination. See generally *Howard v. Haverty Furniture Co.*, 615 F.2d 203 (5th Cir. 1980); *Brown v. Gen. Motors Corp.*, 601 F.2d 956 (8th Cir. 1979); *Wren v. T.I.M.E.-D.C., Inc.*, 595 F.2d 441 (8th Cir. 1979); *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir. 1978); *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977); *Huston v. Local No. 93, International Union, United Automobile, Aerospace, and Agricultural Indep. Workers of Am.*, 559 F.2d 477 (8th Cir. 1977); *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72 (4th Cir. 1977).

¹⁷ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 70 n.5 (1977). *Hardison's* original suit was against both the union and TWA. *Id.* at 69. The district court decided in favor of both the union and TWA. *Hardison v. Trans World Airlines, Inc.*, 375 F. Supp. 877, 891 (W.D. Mo. 1974). On appeal to the 8th Circuit, *Hardison* did not attack the ruling in favor of the union, but the court affirmed that judgment without ruling on the merits. *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 42-43 (8th Cir. 1975). At the Supreme Court level, *Hardison* did not file a petition for certiorari seeking to change the ruling in favor of the union. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 70 n.5 (1977). The Supreme Court, however, granted the union's petition for certiorari apparently because the Court felt that union interests were seriously involved. *Id.* The Court decided, "[s]ince we reverse the judgment against TWA, we need not pursue further the union's status in this Court." *Id.* The Court did make one statement with regard to the union which may be indicative of what would constitute undue hardship for the union. In describing the facts, the Court stated, "the union was unwilling to entertain a variance [of the seniority system] over the objections of men senior to *Hardison*; and for TWA to have arranged unilaterally for a swap would have amounted to a breach of the collective-bargaining agreement." *Id.* at 79.

The duty of a union to accommodate an employee's religious belief has become an important issue in cases involving religious discrimination in employment. See, e.g. *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (1981); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *McDaniel v. Essex Int'l Inc.*, 571 F.2d 338 (6th Cir. 1978); *Cooper v. General Dynamics Convair Aerospace Div., Fort Worth Operation*, 533 F.2d 163 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977). When the existence of this union duty is at issue, one frequently debated question is whether a worker must join a union and pay dues to that union. Seventh Day Adventists, for example, prohibit membership in and payment of dues to a union. See *Anderson v. Gen. Dynamics, Convair Aerospace Div.*, 589 F.2d 397, 399 (9th Cir. 1979), *cert. denied*, 442 U.S. 921 (1979).

In some employment situations, however, the collective bargaining agreement between an employer and the union includes a union shop clause which requires that all employees be members of the union as a condition of employment. Union shop clauses are protected by 29 U.S.C. § 158(a)(3), (b)(2) (1976).

While Title VII generally prohibits employment discrimination by a labor organization on the basis of religion, 42 U.S.C. § 2000e-2(c) (1976), there are arguments that indicate unions would not be covered by 701(j). The specific language of section 701(j), which creates the reasonable accommodation and undue hardship test, refers only to employers and not to labor organizations. 42 U.S.C. § 2000e(j) (1976). In addition, under provisions of the Taft-Hartley Act, union shops are permitted. 29 U.S.C. § 158(a)(3) (1976). Despite these arguments, all the circuit courts that have decided the issue of union accommodation have determined that unions generally should be held to the standards of reasonable accommodation and undue hardship in much the same manner as employers. See *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 400-401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405 (9th Cir. 1978).

¹⁸ Both the union and TWA in *Hardison* contended that the applicable section of Title

During the *Survey* year the Ninth Circuit directly considered both the constitutionality of section 701(j), and the proper scope of union accommodation under Title VII. In *Tooley v. Martin Marietta Corporation*¹⁹ the circuit court decided that unions, as well as employers, must reasonably accommodate an employee's religious beliefs, and that allowing an employee to pay an amount equal to union dues to a mutually acceptable charity does not cause undue hardship for the union.²⁰ After so holding, the court went on to determine that section 701(j) is constitutional.²¹

In *Tooley* the three plaintiffs were members of the Seventh Day Adventist Church, a religion which bars followers from paying union dues or belonging to an employment union.²² In 1976 a collective bargaining agreement was entered into by the plaintiffs' employer, Martin-Marietta Corporation, and the union, Steelworkers Local 481.²³ This agreement included a union shop clause which obligated the company to discharge any employee who did not join the union.²⁴ In accordance with their religious beliefs, the plaintiffs refused to comply with the union membership clause of the collective bargaining agreement but instead offered to pay an amount equal to union dues to a mutually acceptable charity.²⁵ The union refused the plaintiffs' proposal, and they were dis-

VII potentially conflicted with the Establishment Clause of the First Amendment and therefore was unconstitutional. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 70 (1977). However, since the Court decided in favor of TWA on statutory grounds, the constitutional claims were not considered. *Id.*

The Establishment Clause of the First Amendment prohibits Congress from enacting legislation respecting an establishment of religion. The Establishment Clause of the First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. Const. amend. I. Given the Constitution's strong prohibition of government-supported religion, section 701(j) may violate the Establishment Clause since the section would seem to support religion. The federal courts that have considered this issue have not reached a complete consensus on whether 701(j) is constitutional. For cases that have decided 701(j) is constitutional, see *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975); *McDaniel v. Essex Int'l, Inc.*, 509 F. Supp. 1055 (W.D. Mich. 1981), *on remand from* 571 F.2d 338 (6th Cir. 1978); *Brown v. General Motors Corp.*, 20 Fair Empl. Prac. Cas. (BNA) 88 (W.D. Mo. 1978), *void on other grounds*, 601 F.2d 956 (8th Cir. 1979); *Jordan v. North Carolina Nat'l Bank*, 399 F. Supp. 172 (W.D. N.C. 1975). For cases that have decided 701(j) is unconstitutional, see *Yott v. North Am. Rockwell Corp.*, 428 F. Supp. 763 (C.D. Cal. 1977), *aff'd on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). One district court determined that 701(j) was unconstitutional but was overturned by the circuit courts: see *Gavin v. Peoples Nat'l Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979), *vacated and remanded*, 613 F.2d 482 (3d Cir. 1980).

¹⁹ 648 F.2d 1239 (9th Cir. 1981). Also during the *Survey* Year the Seventh Circuit decided an identical case, *Nottelson v. A.O. Smith Corp.*, 643 F.2d 445 (7th Cir. 1981). Only the ninth circuit case, *Tooley*, is analyzed in this Chapter. The factual patterns, issues presented and the analysis of the two cases are nearly identical. This similarity obviates the need for an analysis of both cases. The factual situation of *Nottelson* is set forth *infra* in note 47.

²⁰ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242-43 (9th Cir. 1981).

²¹ *Id.* at 1244-46. On the same day that the ninth circuit decided *Tooley*, the court reversed the lower court's ruling in *Anderson v. General Dynamics Convair Aerospace Div.*, 489 F. Supp. 782 (S.D. Cal. 1980), that 701(j) is unconstitutional. *Tooley*, 648 F.2d 1247 (9th Cir. 1981).

²² *Tooley*, 648 F.2d at 1241.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

charged. Consequently, the plaintiffs sought reinstatement through administrative remedies.²⁶ Having unsuccessfully exhausted their administrative remedies, the plaintiffs brought suit against the union and the employer in federal court.²⁷ The plaintiffs complained that religious discrimination had occurred in violation of Title VII²⁸ and that the union and the company had failed to accommodate reasonably their religious beliefs under section 701(j).²⁹ The district court enjoined the union and the company from discharging the plaintiffs as long as each one made contributions equal to union dues to a mutually acceptable charity.³⁰

In affirming the district court's opinion, the Ninth Circuit concentrated on two issues: the duty of a union to accommodate the religious beliefs of an employee and the constitutionality of 701(j).³¹ Relying on an earlier decision in the circuit,³² the court decided that section 701(j) applied to unions.³³ Following the approach of the Supreme Court in *Hardison*, the court used a reasonable accommodation-undue hardship analysis.³⁴ In deciding that the union should have reasonably accommodated the plaintiffs by allowing them to give to charity in lieu of paying union dues, the court rejected the union's contention that the provisions of the Taft-Hartley Act, which allow for union shops, should control.³⁵ Instead, the court held that section 701(j) should govern the degree of reasonable accommodation which should be afforded employees who refuse to pay union dues for religious reasons.³⁶ This holding, the court noted, was in

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Specifically, the plaintiffs claimed violations of 42 U.S.C. § 2000e-2(a) (1976) and 42 U.S.C. § 2000e-2(c) (1976). See *supra* notes 3-4 and accompanying text.

²⁹ *Tooley*, 648 F.2d 1241. The facts of the *Nottelson* case are very similar to those of the *Tooley* case. A union shop clause was adopted by the union and employer. *Nottelson v. A.O. Smith Corp.*, 643 F.2d 445, 448 (7th Cir. 1981). As a result, *Nottelson*, a Seventh Day Adventist, stated he could not pay dues to the union and requested that he be allowed to pay an equivalent amount to a charity. *Id.* The union refused to accommodate *Nottelson*, and he was discharged by the employer. *Id.* *Nottelson* instituted an action against the employer and the union alleging religious discrimination in violation of Title VII. *Id.*

³⁰ *Tooley v. Martin-Marietta Corp.*, 476 F. Supp. 1027, 1031 (D.C. Or. 1979).

³¹ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242-46 (9th Cir. 1981). The plaintiffs sued the employer also, but since it was the union that had refused the plaintiffs' proposal, the court concentrated primarily on the duty of the union to accommodate the plaintiffs' religious beliefs. In *Nottelson*, the court discussed at greater length the position of the employer. *Nottelson v. A.O. Smith Corp.*, 643 F.2d 445, 452-53 (7th Cir. 1981). See *infra* note 79.

³² The court relied on *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1241 (9th Cir. 1981).

³³ *Tooley*, 648 F.2d at 1241.

³⁴ *Id.* at 1242-43. The court relied heavily on four previous opinions of the ninth circuit which also had dealt with religious objectors to mandatory union dues. These decisions were *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Burns v. Southern Pac. Trans. Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Yott v. North Am. Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974).

³⁵ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242 (9th Cir. 1981). The union was arguing under 29 U.S.C. § 158(a)(3) (1976).

³⁶ *Tooley*, 648 F.2d at 1242.

accord with a recent amendment to the National Labor Relations Act³⁷ requiring accommodation identical to that requested by plaintiffs.³⁸ In addition, the court stated that having an employee contribute money to a charity is a reasonable accommodation to the plaintiff's religious beliefs in the sense that all workers would then suffer the same economic loss.³⁹ Finally, the court held that, in view of the facts of this case, the financial loss of the union that would result from the accommodation would be de minimis.⁴⁰ Therefore, under the Supreme Court's construction of undue hardship as a more than de minimis cost, in *Hardison*, the accommodation would not cause undue hardship to the union.⁴¹

Having determined that on a statutory basis the plaintiffs were entitled to relief, the court had to respond to the union's argument that section 701(j) was unconstitutional. Despite recognizing that the Establishment Clause of the First Amendment requires government neutrality in religion,⁴² the court held that section 701(j) was constitutional.⁴³ The primary basis⁴⁴ for this decision was an application of the test enunciated by the Supreme Court in *Committee for Public Education & Religious Liberty v. Nyquist*.⁴⁵ In *Nyquist*, the court applied the following three-prong test to determine whether a piece of legislation can withstand judicial scrutiny under the Establishment Clause of the First Amendment:

First, [the legislation] must reflect a clearly secular legislative purpose . . . , second, [it] must have a primary effect that neither advances nor inhibits religion . . . , and, third, [it] must avoid excessive government entanglement with religion.⁴⁶

In applying the *Nyquist* test, the *Tooley* court determined that section 701(j) met all three standards.⁴⁷ The court stated that the secular purpose of section 701(j)

³⁷ *Id.*

³⁸ *Id.* The amendment to the National Labor Relations Act is Act of December 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452 (1980). It reads in pertinent part:

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund

Id.

³⁹ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981).

⁴⁰ *Id.* at 1243-44.

⁴¹ *Id.*

⁴² See *supra* note 18 and accompanying text.

⁴³ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir. 1981).

⁴⁴ The court also stressed that the Establishment Clause did not require absolute neutrality in the government's attitude towards religion. *Id.* at 1244-45. The court relied on the following cases for support: *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁴⁵ 413 U.S. 756, 772-73 (1973).

⁴⁶ *Id.* at 773 (citations omitted).

⁴⁷ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1245-46 (9th Cir. 1981).

is to prohibit discrimination in employment,⁴⁸ that the primary effect of the section is not to advance the religion of the plaintiffs,⁴⁹ and that the necessary administration by the government under section 701(j) does not constitute excessive government entanglement with religion.⁵⁰

An analysis of the *Tooley* decision reveals that the court was correct in its conclusions that the union was obligated to accommodate reasonably the religious beliefs of the plaintiffs by allowing them to contribute an amount equal to union dues to a charity and that 701(j) is constitutional. This chapter, however, will suggest that the analysis by which the court reached its conclusion regarding the constitutionality of section 701(j) is by no means exhaustive. The *Nyquist* test should be applied in judging the constitutionality of section 701(j), but this test should not be solely determinative of this issue. In its brief application of the *Nyquist* test, the court disregarded complexities that raise doubts about the constitutionality of section 701(j). Other factors in addition to the *Nyquist* three-factor test should be recognized to completely support the constitutionality of section 701(j).

In the logical first step of applying Title VII to the facts of *Tooley*, the court correctly decided that section 701(j) should apply to unions as well as employers.⁵¹ Although the concept that 701(j) should apply to unions has been accepted consistently by the courts, there is surprisingly little discussion of the matter in the cases.⁵² The principal reason that there is a question about whether a union has a duty to accommodate the religious beliefs of an employee is that the language of section 701(j) makes no reference to unions.⁵³ This fact, however, should not dictate that unions are exempt from the application of section 701(j).⁵⁴ There are two reasons why 701(j) should apply to unions. First, the connections between the union and the employers are extremely close in the industrial setting, and it would be inappropriate to subject the employer to the reasonable accommodation and undue hardship standards but allow the union to escape such review.⁵⁵ Second, a close statutory analysis

⁴⁸ *Id.* at 1245. The court relied on *McGowan v. Maryland*, 366 U.S. 420 (1961) and *Stone v. Graham*, 449 U.S. 1104 (1980).

⁴⁹ *Tooley*, 648 F.2d at 1245-46. The court relied on *Gillette v. United States*, 401 U.S. 437 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); and *Gallagher v. Crown Koshier Mkt.*, 366 U.S. 617 (1961).

⁵⁰ *Tooley*, 648 F.2d at 1246. The court relied on *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

⁵¹ *Tooley*, 648 F.2d at 1241.

⁵² See *supra* note 24 for cases that have held that section 701(j) should apply to unions. The *Tooley* court relied on its discussion of this matter in the *Yott* case. However, in *Yott*, the court did little more than state, "Title VII clearly imposes the same duty not to discriminate on a union as it does the employer." *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

⁵³ See *supra* note 17 and accompanying text.

⁵⁴ See *Cooper v. General Dynamics Convair Aerospace Div.*, 533 F.2d 163, 170-71 (5th Cir. 1976) for one of the few opinions in which the language of 701(j) was interpreted narrowly to free the union of any reasonable accommodation duty. The majority of the court ruled that the union had such a duty. *Id.* at 165-69.

⁵⁵ This strong connection between the union and employer was recognized by the majority of the court in *Cooper v. General Dynamics Convair Aerospace Div.* *Id.* at 163. The court

of Title VII, and specifically of the interrelationship of section 701(j) to other provisions of Title VII, indicates that section 701(j) should apply to unions as well as employers. Section 701(j) defines religion and is included in the definitional section of Title VII.⁵⁶ The term "religion" as used throughout Title VII must be applied as defined in section 701(j).⁵⁷ Therefore, in the section of Title VII prohibiting religious discrimination by a union,⁵⁸ the term "religion" is defined by 701(j) a definition which by reference includes the concepts of reasonable accommodation and undue hardship.⁵⁹ Thus, both common sense and statutory analysis dictate that 701(j) should apply to unions.

Having determined that 701(j) applies to unions, the *Tooley* court reached the proper result in applying the statutory standards of reasonable accommodation and undue hardship found in section 701(j) to the union.⁶⁰ The union argued that there were two reasons why the substituted charity request of the plaintiffs would not pass the reasonable accommodation-undue hardship test of section 701(j): first, that the provisions of the Taft-Hartley Act⁶¹ which protect union shops should control,⁶² and, second, that undue hardship to the union could result from allowing the plaintiffs to work in a union shop but not pay dues to the union.⁶³ The court correctly rejected both arguments.

The union's argument that the Taft-Hartley Act's protection of union shops⁶⁴ should negate the effect of the reasonable accommodation requirement of section 701(j) fails when subjected to close analysis. Section 701(j), in spite of the provisions of the Taft-Hartley Act, requires that there be an attempt to make a reasonable accommodation to the religious beliefs of the employees.⁶⁵

stated in reference to this issue that "Congress could not have thought that for two parties under the same stringent substantive prohibition one has an escape hatch of undue hardship denied to the other growing out of the common industrial setting." *Id.* at 172.

⁵⁶ 42 U.S.C. § 2000e(j) (1976).

⁵⁷ The beginning of 42 U.S.C. § 2000e (1976) states, "Definitions — For the purposes of this sub-chapter — . . ."

⁵⁸ 42 U.S.C. § 2000e-2(c) (1976). See *supra* note 4.

⁵⁹ See *Cooper v. Gen. Dynamics, Convair Aerospace Div., Fort Worth Operation*, 533 F.2d 163, 172 n.1 (5th Cir. 1976).

⁶⁰ Even though the plaintiffs in *Tooley* sued both the union and the employer, the real issue when a substituted charity request is made is whether the union has a duty to accommodate. For the employer unilaterally to endorse such a request from an employee would be to put itself in violation of the collective bargaining agreement. The union shop clauses are for the benefit of the union and thus are included in a collective bargaining agreement at the request of the union. The union is the party that must be ordered to accept the request of the employee. The *Tooley* court failed to directly address the situation of the employer in this factual situation. In *Nottelson*, this issue was discussed. *Nottelson v. A.O. Smith Corp.*, 643 F.2d 445, 452-53 (7th Cir. 1981). Despite recognizing that the employer "was caught between a rock and a hard place," the court determined that the employer had violated Title VII. *Id.* at 453. The *Nottelson* court determined that it was the employer's duty to pursue grievance proceedings against the union once the union would not accommodate *Nottelson*. *Id.* This result seems harsh for the basic issue is really between the employee and the union. That issue should be settled, and then the employer should be ordered to act accordingly.

⁶¹ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242 (9th Cir. 1981). See 29 U.S.C. §§ 158(a)(3), (b)(2) (1976).

⁶² *Tooley*, 648 F.2d at 1242.

⁶³ *Id.* at 1243.

⁶⁴ 29 U.S.C. §§ 158(a)(3), (b)(2) (1976).

⁶⁵ See *supra* note 8.

No provision of the Taft-Hartley Act, nor the legislative history of the Act, prohibits union shops from being reasonably altered to allow for religious freedom.⁶⁶ With the exception of the few employees qualifying for the substituted charity treatment, the union still benefits from the union shop clause.⁶⁷ As the court stated, the union's position as sole representative of the workers is not harmed, and the plaintiffs are allowed to maintain their jobs and religious freedom.⁶⁸

An additional argument, noted by the *Tooley* court, which provides strong support for the position that the Taft-Hartley Act provisions which protect union shops should not control, centers on the recent amendment to the National Labor Relations Act (NLRA).⁶⁹ This 1980 amendment requires union accommodation of employees who for religious reasons refuse to pay dues to a union.⁷⁰ It allows for payment of an amount equal to union dues to a non-religious, non-labor charity.⁷¹ Thus, the accommodation requested by the plaintiff in *Tooley* has become federal law as part of the NLRA, effective December 1980.⁷²

⁶⁶ There is support for this argument in other cases. See *Nottelson v. A.O. Smith Corp.*, 643 F.2d 445, 450 (7th Cir. 1981); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978); and *Cooper v. Gen. Dynamics, Convair Aerospace Div., Fort Worth Operation*, 533 F.2d 163, 169 (5th Cir. 1976).

⁶⁷ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242 (9th Cir. 1981).

⁶⁸ *Id.* Another argument that could have been presented by the union, but apparently was not, involves an analogy to the *Hardison* decision. In *Hardison*, the United States Supreme Court decided that because seniority systems were protected by a provision of Title VII (42 U.S.C. § 2000e-2(h) (1976)), the reasonable accommodation of religious beliefs did not extend to changing the terms of seniority provisions in the collective bargaining agreement. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977). Applying this rationale to the factual situation in *Tooley*, it could be argued that the union shop clause of the collective bargaining agreement, which is protected by statute 29 U.S.C. §§ 158(a)(3), (b)(2), should not be altered due to the need to reasonably accommodate religious beliefs of employees. This analogy, however, must fail for two reasons. First, the Supreme Court in *Hardison* based much of its argument in defense of the seniority system on the fact that alteration of seniority rights to favor the plaintiff would hurt other employees. *Hardison*, 432 U.S. at 80. Other employees would have to replace *Hardison* on an undesirable shift, and thus, their seniority rights would be infringed upon. *Id.* This direct harm to other employees would not be present in *Tooley* if the plaintiffs gave to a charity an amount equal to union dues. Second, the protection that Congress provided for seniority systems was purposely included within Title VII so that other provisions of Title VII could not be interpreted to prohibit such systems. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 352 (1977). Comparable protection for union shop agreements was not provided by Title VII. See *Nottelson v. A.O. Smith Corp.*, 643 F.2d 445, 452-53 (7th Cir. 1981).

⁶⁹ Act of December 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452 (1980).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* As the *Tooley* court indicated, 648 F.2d at 1242, the legislative history of the amendment indicates that it was thought to be both a reasonable accommodation under 701(j) and a reasonable balance between the NLRA and Title VII. 126 CONG. REC. H760 (daily ed. Feb. 11, 1980); 126 CONG. REC. H763 (daily ed. Feb. 11, 1980).

Although after December of 1980 the employee who, like the employees in *Tooley*, for religious reasons, gives to a charity in lieu of paying union dues, will be protected by this amendment, the *Tooley* court's application of section 701(j)'s principles of reasonable accommodation and undue hardship has continued relevance for the practitioner. The amendment will not be dispositive of all factual patterns similar to the one in *Tooley*. First, the amendment governs only union action after December of 1980. Thus, demands made by an employee prior to December 1980 to pay an amount equal to union dues to charity, which have resulted in a lawsuit, would

The second argument made by the union in an attempt to prove that the substituted charity request did not meet the reasonable accommodation-undue hardship test of 701(j) was that compliance with that request caused undue financial hardship to the union.⁷³ In rejecting this claim, the *Tooley* court properly applied the de minimis cost test of *Hardison*.⁷⁴ What constitutes de minimis cost to an employer or union will vary, of course, depending on the factual situation.⁷⁵ Accordingly, unions will be quick to assert that the harm likely to be caused by failure to collect dues from all employees in a union shop will be devastating.⁷⁶ If a substantial number of employees in a union shop had legitimate religious claims under Title VII, there is no doubt the harm to the union would not be de minimis. As the *Tooley* court stressed, however, courts should demand that the union demonstrate the likelihood of real harm resulting from the absence of dues income.⁷⁷ If this harm exceeds a de minimis cost, then a declaration of undue hardship to the union would be appropriate. This was not the situation in the *Tooley* case. The factual evidence presented to the district court showed that "[T]he likelihood that the union will ever be burdened by the few members who refuse to pay union dues because of religious beliefs is remote."⁷⁸ The financial figures demonstrated that, despite the plaintiff's failure to pay dues directly to the union, there would continue to be a surplus in the union budget.⁷⁹ Under the de minimis standard of the *Hardison* case, the union clearly could not prove more than a de minimis cost.⁸⁰

still be controlled by the reasonable accommodation-undue hardship principles of section 701(j). Second, the amendment includes specific requirements: (1) the payment of money in lieu of union dues must be to a specific type of charity; and (2) if the employee making such a payment wishes to use the union's grievance-arbitration procedure, he must pay for that service. Therefore, if a situation arises where an employee both refuses to pay union dues for religious reasons and also refuses to comply with these specific requirements of the statute, his request would still be evaluated by the courts under the principles of section 701(j).

⁷³ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981).

⁷⁴ *Id.* at 1243-44.

⁷⁵ There cannot be one definition of "de minimis" cost in connection with undue hardship, for it will depend on the facts of each case. In *Hardison*, the majority stated that having to pay another employee more or having to hire a replacement to replace the plaintiff on Saturday would be above de minimis costs. *Transworld Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977). The dissent in *Hardison* argued that this extra amount spent would have been within the limits of de minimis. *Id.* at 92. But the majority countered with the observation that the district court had found that these solutions would create undue hardship for TWA. *Id.* at 84, n.15. This circular logic does little to clear up the confusion concerning what de minimis really means.

⁷⁶ See *Anderson v. Gen. Dynamics, Convair Aerospace Div.*, 589 F.2d 397, 406-07 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979).

⁷⁷ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981). See also *Anderson v. General Dynamics, Convair Aerospace Div.*, 589 F.2d 397, 406-07 (9th Cir. 1978); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978); *Draper v. United States Pipe and Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975).

⁷⁸ *Tooley v. Martin-Marietta Corp.*, 476 F. Supp. 1027, 1030-31 (D. Or. 1979).

⁷⁹ *Id.* at 1030. Union dues for the three plaintiffs would be less than \$600 per year. *Id.* In 1978 the union income was \$46,000, which created a surplus of \$4,300 above expenses. *Id.*

⁸⁰ Another method the courts use to analyze whether the loss of dues is de minimis or not is to indicate the amount co-workers' dues would increase to compensate for the drop in total dues collected. In *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978), the court decided that, at the most, allowing the plaintiffs not to pay dues directly to the union would increase co-workers' dues by 24 cents per year. *Id.* at 407. In the *Burns* court's view, this was a de

The above analysis suggests that the *Tooley* court reached the proper conclusion in applying the statutory standards of "reasonable accommodation" and "undue hardship" to the request by the plaintiffs to pay an amount equal to union dues to a charity. Having decided the statutory issue, the *Tooley* court decided a second broad issue, the constitutionality of section 701(j).⁸¹ A close analysis of the case demonstrates that the court's decision that section 701(j) is constitutional is correct, but that the court's approach to the issue was too simplistic. Inasmuch as the *Nyquist* test⁸² presents the established guidelines with which to determine the constitutionality of section 701(j),⁸³ the court in *Tooley* cannot be faulted applying *Nyquist* to the case before it. The mere application, however, of the literal terms of the three standards of the test — that the legislation must have a primarily secular purpose, that the primary effect of the legislation must neither advance nor inhibit religion, and that the legislation not involve excessive government entanglement with religion —⁸⁴ to determine whether 701(j) conflicts with the Establishment Clause of the First Amendment fails to present a clear answer in this case. Indeed, there are simple but compelling arguments under the literal terms of the *Nyquist* test which suggest the unconstitutionality of 701(j). A more comprehensive analysis of that section's constitutionality would require a court to engage in an additional step — an examination of 701(j) to determine whether that section is consonant with both the policies underlying Title VII and those underlying the Establishment Clause. The importance of Title VII and the utility of some limited government support for religion both provide crucial support for the constitutionality of section 701(j). Combining these policy considerations with the *Nyquist* test analysis presented by the *Tooley* court leaves little doubt that section 701(j) is constitutional.

Consideration of the meaning of the Establishment Clause necessarily must precede an application of the *Nyquist* test to section 701(j).⁸⁵ The Supreme Court has stated that the purpose of the Establishment Clause was to insure that the Church and the State remained separate entities.⁸⁶ The Court has

minimis cost. *Id.* In *Nottelson*, 643 F.2d 445 (7th Cir. 1981), the figure was 2.4 cents per year, and the court decided this amount to be *de minimis*. *Id.* at 452. In *Tooley*, at least for the present time period, there was no indication that there would be an increase. *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981).

⁸¹ *Tooley*, 648 F.2d at 1244-46. See generally Comment, *Title VII and Religious Discrimination: Is Any Accommodation Reasonable Under the Constitution?*, 9 LOY. U. CHI. L.J. 413 (1978) [hereinafter cited as Comment, *Title VII and Religious Discrimination*]; Case Comment, *Cummins v. Parker Seal Co.: Can the Government Require Accommodation of Religion at the Private Job Site?*, 62 VA. L. REV. 237 (1976) [hereinafter cited as Case Comment, *Can the Government Require Accommodation?*].

⁸² See *supra* notes 45-50 and accompanying text.

⁸³ As the Supreme Court stated in *Nyquist* in reference to the test, "[f]or the now well-defined three-part test that has emerged from our decisions is a product of consideration derived from the full sweep of the Establishment Clause cases." Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 772 (1973).

⁸⁴ *Id.* at 773.

⁸⁵ In *Tooley* the court correctly recognized that the meaning of the Establishment Clause has been determined through repeated judicial interpretation. *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244 (9th Cir. 1981).

⁸⁶ *Emerson v. Board of Educ.*, 330 U.S. 1 (1947). In this case, the Supreme Court

recognized, however, that there cannot, and should not, be a total separation of Church and State.⁸⁷ The Supreme Court has struggled with determining the appropriate degree of contact between Church and State, but, understandably, has not reached a definitive conclusion on the matter.⁸⁸ Accordingly, the *Tooley* court correctly characterized government's relationship to religion as one that is short of absolute neutrality.⁸⁹ Thus, the development of the *Nyquist* test is an attempt to define the degree of neutrality the government should maintain toward religion.

In applying *Nyquist's* first prong under which the statute's purpose must be clearly secular, the *Tooley* court rejected the union's argument that section 701(j) was unconstitutional because its purpose was to favor religion.⁹⁰ Relying on Supreme Court cases,⁹¹ the court felt that the policy of Title VII — to prohibit employment discrimination — outweighed the fact that section 701(j) tended to favor certain employees because of their religion.⁹² In addition, the court reasoned that 701(j) was intended primarily to prohibit religious discrimination, not to favor employment.⁹³

Section 701(j), however, explicitly dictates that a direct benefit is to be granted to certain employees on religious grounds.⁹⁴ In fact, the key sponsor of section 701(j) left no doubt that a primary purpose of the legislation was to assist religious groups.⁹⁵ Thus, if the constitutionality of section 701(j) is to be

stated:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor a Federal Government can set up a church. Neither can pass laws which aid one religion over another In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'

Id. at 15-16 (quoting from *Reynolds v. United States*, 98 U.S. 145 (1878)).

⁸⁷ In *Nyquist*, 413 U.S. 756 (1973), the Supreme Court stated: "this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation. . . ." *Id.* at 760. See also *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

⁸⁸ The following Supreme Court cases have dealt with this issue: *Stone v. Graham*, 449 U.S. 39 (1980); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Gillette v. United States*, 401 U.S. 437 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Sherbert v. Verner*, 374 U.S. 398 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961); and *Zorach v. Clausen*, 343 U.S. 306 (1952).

⁸⁹ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244 (9th Cir. 1981). See also *Gillette v. United States*, 401 U.S. 437, 449 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970); *Sherbert v. Verner*, 374 U.S. 398, 422 (1963); and *Zorach v. Clausen*, 343 U.S. 306, 313 (1952).

⁹⁰ *Tooley*, 648 F.2d at 1245. The court properly decided that a review of the constitutionality of just section 701(j) instead of the whole Act was appropriate because of the unique operation of the reasonable accommodation and undue hardship test. *Id.* n.9. The "legislative purpose" prong of the three-part test first appeared in *Emerson v. Board of Educ.*, 330 U.S. 1, 15-18 (1947).

⁹¹ *Stone v. Graham*, 449 U.S. 39, 43 (1980); *McGowan v. Maryland*, 366 U.S. 420, 445 (1961).

⁹² *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1245 (9th Cir. 1981).

⁹³ *Id.*

⁹⁴ See Comment, *Title VII and Religious Discrimination*, *supra* note 81, at 421-23.

⁹⁵ 118 CONG. REC. 705 (daily ed. Jan. 21, 1972) (remarks of Senator Randolph).

judged on the basis of whether the legislative purpose of the section was to benefit religion, it is questionable whether the section is constitutional.

An application of the second prong of the *Nyquist* test — that the primary effect of the legislation should be secular — also fails to produce a clear answer, as to the constitutionality of 701(j). The *Tooley* court, citing Supreme Court cases,⁹⁶ decided that the primary effect of the legislation was not to favor religious groups.⁹⁷ The court stated that the effect of section 701(j) in the religious groups it aided was neither substantial nor direct and that therefore section 701(j) is constitutional.⁹⁸ A closer examination of section 701(j), however, reveals that its effect in fact may be to favor religion. It cannot be disputed that one major effect of section 701(j), if not the primary effect, is to give preferential treatment to employees who are members of certain religions and to particular religious groups.⁹⁹ While the Supreme Court has stated that one of the effects of a statute may be to aid religion, the Court has not gone so far as to permit the primary purpose of a statute to be to favor religion.¹⁰⁰ Thus, should the primary purpose of section 701(j) be to favor religion, then under the *Nyquist* test, the statute would appear to be unconstitutional.

The third prong of the *Nyquist* test — that the legislation, to be constitutional, must not require that the government become excessively entangled with religion — also fails to provide a decisive conclusion as to the constitutionality of section 701(j). The Supreme Court has developed a general guideline to be used in the application of this part of the *Nyquist* test. Under this guideline, legislation could be constitutional if it does not require "comprehensive, discriminating, and continuing state surveillance" to ensure that First Amendment religious freedoms are respected.¹⁰¹ In addressing this issue, the *Tooley* court summarily stated that the determination of the seriousness of the employee's religious beliefs and the administration of reasonable accommodation standards "requires a minimal amount of supervision and administrative cost"¹⁰² on the government's part. This conclusion, however, is questionable. Religious discrimination is often difficult to detect, and "religion" can be difficult to define.¹⁰³ Both of these factors can contribute to involved investigations

⁹⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Gillette v. United States*, 401 U.S. 437, 452 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Gallagher v. Crown Kasher Mkt.*, 366 U.S. 617 (1961).

⁹⁷ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1246 (9th Cir. 1981).

⁹⁸ *Id.*

⁹⁹ See Comment, *Title VII and Religious Discrimination*, *supra* note 81, at 424-28.

¹⁰⁰ *Gillette v. United States*, 401 U.S. 437 (1971) (conscientious objectors to military inscription are allowed special status); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (special tax status is constitutional for religious, educational and charitable organization); and *Gallagher v. Crown Kasher Mkt.*, 366 U.S. 617 (1961) (Sunday Blue Laws upheld).

¹⁰¹ *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). This test has evolved from the following cases: *Meek v. Pittinger*, 421 U.S. 349, 362-72 (1975); *Tilton v. Richardson*, 403 U.S. 672, 684-89 (1971); and *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

¹⁰² *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1246 (9th Cir. 1981). The court relied on *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

¹⁰³ See, e.g., Comment, *Title VII and Religious Discrimination*, *supra* note 81, at 430-31. Under section 701(j), "religion" is defined very broadly. The section states that the term includes "all aspects of religious observances, practice and belief." 42 U.S.C. § 2000e(j) (1976).

by the EEOC of religious discrimination charges and consequently, may constitute the type of "surveillance" contemplated by the Supreme Court.¹⁰⁴ The many attempts by the judicial system to resolve these same charges of religious discrimination increase the government "entanglement" with religion in this area and result in what could be called comprehensive, discriminating, and continuing involvement.¹⁰⁵

Thus, an application of the literal terms of the *Nyquist* test to section 701(j) fails to produce conclusive answers as to whether the section is constitutional. There are strong arguments under the *Nyquist* test that 701(j) is constitutional, but the above analysis demonstrates that counter arguments do exist. Yet, the court in *Tooley* was content to apply *Nyquist*'s three-pronged test without addressing the complexities inherent in the application of that test. While the *Nyquist* test is uniformly adopted in cases such as *Tooley*, what intuitively seemed to be the deciding factor in *Tooley* are two important but unstated policy considerations — the importance of section 701(j) to the fight against discrimination and the interest of the government in supporting religion.

Title VII attempts to insure that employees and potential employees are judged by employers independently of race, religion, sex, and national origin. The tremendous importance of Title VII and its goals has been repeatedly recognized by the Supreme Court.¹⁰⁶ Although the majority of Title VII cases considered by the Court have concerned racial discrimination,¹⁰⁷ there has been no indication that the other forms of discrimination prohibited by Title VII are not equally important.¹⁰⁸

The second factor that should have been incorporated into the *Nyquist* test by the *Tooley* court in order to reach the conclusion that section 701(j) is constitutional involves the beneficial aspects of connections between Church and State. The court in *Tooley* did recognize that the separation of religion and

This broad definition, when combined with case law definitions, becomes very vague. *Welsh v. United States*, 398 U.S. 333 (1970) (Religion could include moral and ethical beliefs as well); *United States v. Seeger*, 380 U.S. 163 (1965) ("sincere and meaningful feelings which occupy in the life of its possessor a place parallel to that filled by . . . God." *Id.* at 176).

¹⁰⁴ The EEOC has this power under 42 U.S.C. § 2000e(5) (1976).

¹⁰⁵ See *supra* note 101.

¹⁰⁶ *Frank v. Bowman Transp. Co.*, 424 U.S. 747, 757-62 (1976); *Alexander v. Gardner-Dewey Co.*, 415 U.S. 36, 47-49 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-33 (1971).

¹⁰⁷ See cases cited *supra* at note 106.

¹⁰⁸ In *Hardison*, the Supreme Court applied racial discrimination standards under Title VII in a religious discrimination context and, in doing so, the Court potentially provided limits on the scope of valid religious discrimination charges. Specifically, the *Hardison* court noted that religious discrimination charges cannot alter a bona fide facially neutral seniority system. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977). This could be interpreted to mean that religious discrimination is not viewed by the Court as an important aspect of Title VII. The protection given to seniority systems in *Hardison*, however, also has been provided to seniority systems in racial discrimination cases. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Thus, this potentially limiting decision by the Supreme Court in *Hardison* is not an indication by the Court that religious discrimination is not a crucial aspect of Title VII. Indeed, even though the Court ruled that application of the reasonable accommodation-undue hardship test would not help *Hardison*, the Court emphasized the importance of section 701(j). *Hardison*, 432 U.S. at 75.

government cannot be complete but essentially analyzed section 701(j) on the basis that the government can only "accommodate" religion.¹⁰⁹ A review of United States Supreme Court decisions indicates that it is appropriate for government to actually encourage religion.¹¹⁰ Specifically, in *Gillette v. United States*,¹¹¹ the Court recognized the need for conscientious action and the importance of "the principle of supremacy of conscience."¹¹² This rationale, which explicitly encouraged religion, provided crucial support for legislation that permits citizens, due to their religious beliefs, legally to obtain conscientious objector status to participation in the United States armed forces.¹¹³ In *Zorach v. Claus*,¹¹⁴ Justice Douglas captured the essence of this concept that government should support religion when he stated, "We are a religious people whose institutions presuppose a Supreme Being When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions."¹¹⁵ Thus, that section 701(j) provides limited governmental support for religion should be viewed as a positive aspect of the statute.

The above analysis indicates that the *Tooley* court reached the correct conclusions on the two primary issues before the court. First, it determined that section 701(j) applied to unions and that the substituted charity remedy is valid under section 701(j). Secondly, the court decided that section 701(j) is constitutional.

Despite deciding the constitutional question correctly, the court failed to fully address all the pertinent issues on this matter. The *Nyquist* test should be applied in determining whether section 701(j) is constitutional, but included in this analysis should be recognition of the importance of Title VII and the fact that government can act benevolently towards religion.

V. ATTORNEY'S FEES

A.* *Attorney's Fees for Proceedings not Mandated by Title VII:*

*Chrapliwy v. Uniroyal, Inc.*¹

In *New York Gaslight Club, Inc. v. Carey*² the Supreme Court held that section 706(k) of Title VII of the Civil Rights Act of 1964³ authorizes the award of at-

¹⁰⁹ *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981).

¹¹⁰ See *Gillette v. United States*, 401 U.S. 437, 453 (1971); *Zorach v. Clausen*, 343 U.S. 306, 313-14 (1952).

¹¹¹ 401 U.S. 437 (1971).

¹¹² *Id.* at 453.

¹¹³ *Id.* Other cases in which the Supreme Court has applied the *Nyquist* standards indicate religion should be supported by the state. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exemption of Amish children from mandatory state education laws); *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970) (tax benefit allowed for religious organizations).

¹¹⁴ 343 U.S. 306 (1952).

¹¹⁵ *Id.* at 313-14.

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¹ 670 F.2d 760 (7th Cir. 1982).

² 447 U.S. 54 (1980). See the following chapter of this *Survey*.

³ 42 U.S.C. § 2000e-5(k) (1976).

torney's fees to prevailing Title VII plaintiffs for work done in administrative and judicial proceedings at the state and local level.⁴ The purpose behind the enactment of section 706(k), the Court held, was to encourage plaintiffs of limited means to bring meritorious complaints of employment discrimination.⁵ The Court concluded that promotion of this purpose required the award of attorney's fees for work done in state and local proceedings which Title VII plaintiffs must institute as a prerequisite to being heard in a federal forum.⁶

The *Carey* Court did not address, however, the issue of whether section 706(k) permitted the award of attorney's fees for work done in proceedings which, while not required by Title VII, are helpful to the plaintiff's case. During the *Survey* year, this question was answered affirmatively by the Court of Appeals for the Seventh Circuit in *Chrapliwy v. Uniroyal, Inc.*⁷ The *Chrapliwy* court held that the award of reasonable attorney's fees to the prevailing Title VII claimants should include fees for time the plaintiffs' attorney spent persuading the federal government to debar the defendant from its federal contracts.⁸ The court stated that this result was consistent both with section 706(k) and with the *Carey* decision since the debarment proceedings contributed to the ultimate resolution of the Title VII action.⁹

In *Chrapliwy* a Title VII class action suit was filed in 1972 by female employees who alleged that their employer, a federal contractor, had discriminated against them on the basis of sex by using a segregated hiring and seniority system.¹⁰ In 1974, the Federal District Court for the Northern District of Indiana granted the plaintiffs' motion for partial summary judgment on the liability issues because the employer continuously failed to respond to requests for admissions.¹¹ This decision established the employer's general liability for sex discrimination.¹² Three months after the order for partial summary judgment, the federal judge who had been hearing the case died, and the proceedings in the case consequently were delayed.¹³ The employer took advantage of this situation by failing to provide relief for the plaintiffs, even though the employer's liability under Title VII had been determined.¹⁴

To avoid further delay, the plaintiffs' attorney sought to persuade the federal government to take action against Uniroyal.¹⁵ The plaintiffs' attorney argued before the Department of the Interior that the employer's discriminatory practices violated Executive Order 11246.¹⁶ Executive Order 11246 prohibits federal contractors from discriminating against employees on

⁴ 447 US. at 71.

⁵ *Id.* at 63.

⁶ *Id.*

⁷ 670 F.2d 760 (7th Cir. 1982).

⁸ *Id.* at 767.

⁹ *Id.* at 766-67.

¹⁰ *Id.* at 762-63.

¹¹ *Id.* at 763.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

the basis of sex, race, or other impermissible grounds and permits the federal government to debar violators from their federal contracts and declare them ineligible for future contracts.¹⁷ The Department of the Interior initially agreed with Uniroyal's contention that the Department should defer any proceedings while the Title VII suit was pending in federal court.¹⁸

The plaintiffs filed suit in federal court against the Secretaries of Labor, Defense and the Interior to compel the government to enforce Executive Order 11246.¹⁹ With court approval, the government officials agreed to conduct an investigation of Uniroyal and to enforce Executive Order 11246 if any violations were found.²⁰ After a series of judicial and administrative proceedings,²¹ the plaintiffs and Uniroyal ultimately settled the Title VII suit in 1979, less than a week before the government was going to debar the employer from a large federal contract.²² The employer admitted that it would not have settled the suit had it not been for the debarment proceedings.²³

In calculating the award of attorney's fees under section 706(k) the district court held that, as a matter of law, the award could not include fees for time spent seeking the employer's debarment from federal contracts.²⁴ Both the language of section 706(k), which authorizes fees for actions or proceedings "under this subchapter,"²⁵ and the recent *Carey* decision convinced the district court that section 706(k) permitted fees only for proceedings mandated directly or indirectly by Title VII.²⁶ Since the plaintiffs' attorney's efforts to persuade the government to enforce Executive Order 11246 were not required by Title VII, and since the Executive Order itself contains no private right of action or attorney's fees provision, attorney's fees could not be awarded for the debarment efforts.²⁷

¹⁷ 30 Fed. Reg. 12319 (1965).

¹⁸ 670 F.2d 760, 763 (7th Cir. 1982).

¹⁹ *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 446, 25 Fair Empl. Prac. Cas. (BNA) 445, 448 (N.D. Ind. 1981).

²⁰ *Id.*

²¹ *Id.* at 446-48, 25 Fair Empl. Prac. Cas. (BNA) 448-50. These proceedings included: an administrative action in which the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) sought to debar Uniroyal, *see* Department of Labor, OFCCP v. Uniroyal, No. OFCCP-1977-1; Uniroyal's request for a declaratory judgment that the Labor Department Rules for sanction hearings were void, which was dismissed since Uniroyal had not exhausted its administrative remedies, *see* Uniroyal, Inc. v. Marshall, 20 Fair Empl. Prac. Cas. (BNA) 417 (N.D. Ind. 1977); the issuance of a Decision and Administrative Order by Secretary of Labor Marshall, canceling Uniroyal's present government contracts and declaring Uniroyal ineligible for new contracts, *see* Department of Labor, OFCCP v. Uniroyal, 20 Fair Empl. Prac. Cas. (BNA) 419 (1979); a court ruling which upheld Secretary of Labor Marshall's Decision and Administrative Order, *see* Uniroyal, Inc. v. Marshall, 482 F. Supp. 364, 20 Fair Empl. Prac. Cas. (BNA) 137, (D.D.C. 1979).

²² *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 448, 25 Fair Empl. Prac. Cas. (BNA) 445, 450 (N.D. Ind. 1981).

²³ *Id.* at 451, 25 Fair Empl. Prac. Cas. (BNA) at 452.

²⁴ *Id.*

²⁵ 42 U.S.C. § 2000e-5(k) (1976).

²⁶ 509 F. Supp. 442, 451-52, 25 Fair Empl. Prac. Cas. (BNA) 445, 452-53.

²⁷ *Id.* at 452-53, 25 Fair Empl. Prac. Cas. (BNA) at 453.

The Circuit Court for the Seventh Circuit overruled the district court's holding with regard to attorney's fees for the debarment proceedings.²⁸ The circuit court held that *Carey* did not preclude the award of attorney's fees for efforts aimed at achieving the ultimate goal of relief in a Title VII suit.²⁹ The court read *Carey* as indicating that section 706(k) was to be construed liberally rather than restrictively "with respect to fees for services not performed, in the ordinary sense, in proceedings before the Title VII court."³⁰ A liberal construction of section 706(k), the *Chrapliwy* court stated, would further Congress' purpose of encouraging plaintiffs of limited means to bring meritorious discrimination complaints.³¹

The circuit court also held that the district court had interpreted section 706(k) too narrowly as authorizing fees only for efforts mandated directly or indirectly by Title VII.³² Since the plaintiffs' efforts to have the employer debarred contributed to the ultimate termination of the Title VII suit, the circuit court held that these efforts were within the Title VII action.³³ Thus, the court concluded that neither the language of section 706(k) nor the *Carey* decision precluded the award of attorney's fees for the debarment efforts.³⁴

The decision of the district court in *Chrapliwy* represents a more reasonable interpretation of section 706(k) and of *Carey* than does the decision of the circuit court. The language of section 706(k) authorizes fees for "any action or proceeding under this sub-chapter."³⁵ It seems unlikely that Congress intended these words to encompass any proceedings which contributed to the ultimate termination of a Title VII suit. The efforts of the plaintiffs' attorney to have the employer debarred from his federal contracts were clearly separate from the procedures which the plaintiffs followed pursuant to Title VII. Both Title VII and Executive Order 11246 are aimed at eliminating employment discrimination, yet the two provisions have distinct functions.³⁶ Title VII is to be enforced by the Equal Employment Opportunity Commission, while Executive Order 11246 is to be enforced through the administering of the federal contract compliance program by the Department of Labor's Office of Federal Contract Compliance Programs.³⁷ Moreover, Executive Order 11246 was intended to be enforced by the federal government, rather than through private civil actions.³⁸ Thus, while the plaintiffs' efforts to have the Executive Order enforced were helpful to their Title VII suit, these efforts did not constitute proceedings "under" Title VII.

²⁸ *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 766-67 (7th Cir. 1982).

²⁹ *Id.* at 766.

³⁰ *Id.* at 766-67.

³¹ *Id.* at 767.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 766-67.

³⁵ 42 U.S.C. § 2000e-5(k) (1976).

³⁶ *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 452, 25 Fair Empl. Prac. Cas. (BNA) 445, 453 (N.D. Ind. 1981).

³⁷ *Id.*

³⁸ *Id.*

In addition to misconstruing section 706(k), the circuit court in *Chrapliwy* also misread the *Carey* decision. *Carey* does not support the award of attorney's fees for the plaintiffs' debarment efforts. In granting attorney's fees for state administrative and judicial proceedings under Title VII, the *Carey* Court emphasized the mandatory nature of such proceedings.³⁹ The Court stated that Congress had established a system of referral and deferral in which Title VII plaintiffs must resort initially to available state and local avenues of relief for employment discrimination.⁴⁰ The development of such a system indicated to the Court that the state and local proceedings to which Title VII refers claimants constituted actions or proceedings under Title VII.⁴¹

Unlike the state and local proceedings involved in *Carey*, the efforts made by the plaintiffs in *Chrapliwy* to have their employer debarred from its federal contracts were not mandated by Title VII or by related and required procedures. Thus, the debarment procedures played no role in the system of referral and deferral established by Congress in Title VII. The language in *Carey* indicates that since the plaintiffs' debarment efforts were not mandated by either Title VII or by procedures related to and required by Title VII, such efforts are not proceedings "under" Title VII for which attorney's fees can be awarded.⁴²

In addition, withholding attorney's fees for the debarment proceedings in *Chrapliwy* would not cause the interference with the purpose behind section 706(k) that a contrary result in *Carey* would have caused.⁴³ Since Title VII does not require claimants to pursue debarment of employers which have federal contracts, withholding attorney's fees for debarment proceedings will not place a financial obstacle before Title VII plaintiffs of limited means. The plaintiffs in *Chrapliwy* could have obtained complete relief under Title VII even if they had not tried to have their employer debarred from its federal contracts.⁴⁴ Admittedly, the debarment procedures hastened the plaintiffs' success in their

³⁹ 447 U.S. at 62-65.

In *Spancrete Northeast, Inc. v. International Ass'n of Bridge, Structural and Ornamental Ironworkers*, the federal district court interpreted the *Carey* decision as based on the mandatory prior resort to the state and local procedures. 514 F. Supp. 326, 334 (N.D.N.Y. 1981). *Spancrete* involved a request for attorney's fees under § 303 of the Labor Management Relations Act, 29 U.S.C. §§ 141-187, at § 187. Since § 303 does not mandate prior resort to the National Labor Relations Board (NLRB) before a plaintiff can proceed in federal court, the court held that *Carey* did not support the award of attorney's fees for costs incurred in the NLRB proceedings. *Id.* at 334.

See also *Kennedy v. Whitehurst*, 509 F. Supp. 226, 25 Fair Empl. Prac. Cas. (BNA) 362 (D.D.C. 1981), involving a request for attorney's fees under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 (1976). In denying attorney's fees for administrative proceedings, the court distinguished the *Carey* case on the basis that *Carey* involved administrative proceedings required by Title VII, while actions under the ADEA include no such mandatory administrative proceedings. *Id.* at 231, 25 Fair Empl. Prac. Cas. (BNA) at 365.

⁴⁰ 447 U.S. at 62.

⁴¹ *Id.* at 65.

⁴² See *supra* notes 39-40 and accompanying text.

⁴³ The *Carey* Court stated that "a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim." 447 U.S. at 63.

⁴⁴ *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 451, 25 Fair Empl. Prac. Cas. (BNA) 445, 452 (N.D. Ind. 1981).

Title VII suit.⁴⁵ Such procedures, however, were not necessary to the plaintiffs' success.

While awarding attorney's fees for proceedings such as the debarment efforts in *Chrapliwy* undoubtedly benefits Title VII plaintiffs, neither the language of section 706(k) nor the Supreme Court's decision in *Carey* warrants such awards. Moreover, the approach adopted by the circuit court in *Chrapliwy* has no clear limits. The *Chrapliwy* approach broadly sanctions the award of attorney's fees for any efforts which contribute to the termination of the Title VII suit.⁴⁶ This approach exceeds Congress' intent in enacting section 706(k). It remains to be seen whether other courts will adopt this approach and what limits, if any, they will place on it. Practitioners in circuits other than the seventh circuit therefore should not presume that they will be awarded fees under section 706(k) for proceedings which, while helpful to the plaintiff's Title VII suit, are not required by Title VII or by related and required proceedings.

*B. * Attorney's Fee Awards Under Title VII for Mandatory State and Local Proceedings: New York Gaslight Club, Inc. v. Carey¹*

Section 706(k) of Title VII provides that, "in any action or proceeding" under Title VII, the court has discretion to grant reasonable attorney's fees to a prevailing party.² This section, however, does not state whether the words "action or proceeding" were meant to apply exclusively to judicial proceedings in the federal courts or whether they apply to federal administrative and state judicial and administrative proceedings as well. Because section 706(c) of Title VII mandates the pursuit of state and local remedies as a prerequisite to the commencement of the proceedings authorized by the statute,³ the Title VII claimant may incur considerable attorney's costs before his claim is heard by a federal court. In fact, the claimant may prevail in state proceedings before his claim is either commenced or adjudicated in the federal courts.⁴ The federal courts thus have had to decide whether Congress authorized them to award attorney's fees for costs incurred by litigants in federal administrative proceedings and in state judicial and administrative proceedings.⁵

⁴⁵ *Id.*

⁴⁶ 670 F.2d 760, 767 (7th Cir. 1982).

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¹ 447 U.S. 54 (1980).

² 42 U.S.C. § 2000e-5(k) (1976). Section 706(k) provides in full:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

³ See *infra* note 5.

⁴ See *infra* note 5.

⁵ Title VII claimants generally are required to assert their claims before federal administrative and state judicial and administrative bodies before being entitled to bring suit in federal court. 42 U.S.C. §§ 2000e-5(c)-2000e-5(f) (1976). This requirement does not apply to claimants who are federal employees. Federal employees may file suit in federal court within 30 days after a final decision is made on their discrimination complaint either by the federal depart-

During the *Survey* year, the United States Supreme Court, in *New York Gaslight Club, Inc. v. Carey*,⁶ held in a seven to two decision that section 706(k) permitted the prevailing plaintiff to obtain attorney's fees for administrative and judicial proceedings at the state and local level.⁷ The Court, in an opinion by Justice Blackmun, found that Congress intended the words "action or proceeding" in section 706(k) to encompass judicial and administrative proceedings at the federal, state and local levels.⁸ Congress had intended such a result, the Court reasoned, because the congressional policy of encouraging private parties to bring meritorious discrimination complaints would be obstructed if claimants who are required by Title VII to initiate their claims at the state level are denied attorney's fees for the state proceedings.⁹

This Chapter will analyze the Court's holding and rationale in *Carey* in light of the legislative purposes behind section 706(k) and Title VII. Congress enacted 706(k) to encourage the bringing of meritorious Title VII suits by plaintiffs of limited means.¹⁰ Congress also wished to establish through Title VII a scheme of deferral to state and local remedies for employment discrimination.¹¹ This Chapter will conclude that the *Carey* decision furthers both of these congressional purposes.¹² The Court therefore was correct in holding that Section 706(k) permits prevailing plaintiffs to obtain attorney's fees for work done in administrative and judicial proceedings at the state and local level.

ment or agency involved or, upon an appeal from the decision of the department or agency, by the Equal Employment Opportunity Commission (EEOC). One hundred and eighty days after the filing of the initial charge with the department or agency or with the EEOC upon appeal from the decision of the department or agency, the employee may file a civil suit in federal court if he is aggrieved by the final disposition of his complaint or the failure to take action on his complaint. *Id.* at § 2000e-16(c) (Supp. IV 1980).

For non-federal employees, if the state in which the litigants reside has enacted its own employment discrimination laws, Title VII requires claimants to commence proceedings before appropriate state or local judicial or administrative bodies before seeking federal relief. *Id.* at § 2000e-5(c). Sixty days after the commencement of such state or local proceedings, the claimant may file charges with the EEOC. *Id.* The EEOC investigates the claim and dismisses it if the charge is unfounded. *Id.* at § 2000e-5(b). If reasonable cause exists to believe that the charge is valid, however, the EEOC must first try through conciliation to persuade the violator to eliminate the unlawful employment practice. *Id.* When the conciliation process fails, the EEOC may bring suit in federal court. *Id.* at § 2000e-5(f)(1). If the EEOC does not bring a civil action within 180 days of the claimant's filing of charges, however, the EEOC must issue to the claimant a right-to-sue letter. *Id.* Thus, some controversy has developed over which avenues of relief specified in Title VII constitute "actions or proceedings" under Title VII for which attorney's fees can be awarded.

⁶ 447 U.S. 54 (1980).

⁷ *Id.* at 71. Justice Blackmun wrote the opinion of the Court, in which Justices Brennan, Stewart, Marshall and Powell joined. Chief Justice Burger joined also, but wrote separately to state that he did not agree with the statements made in footnote 6 of the opinion of the Court. *Id.* at 71. See *infra* note 57. Justice Stevens filed a concurring opinion, *id.* at 71-73, and Justices White and Rehnquist dissented. *Id.* at 71.

⁸ *Id.* at 60-63.

⁹ *Id.* at 63.

¹⁰ See *infra* notes 77-81 and accompanying text.

¹¹ See *infra* notes 82-83 and accompanying text.

¹² See *infra* notes 77-83 and accompanying text.

Cidni Carey, the plaintiff in *Carey*, had been refused a job as a waitress at the New York Gaslight Club (Club) because she was black.¹³ Carey initially filed a charge with the EEOC.¹⁴ The EEOC forwarded her complaint to the New York State Division of Human Rights (Division),¹⁵ as required by section 706(c) of Title VII.¹⁶ The Division conducted an investigation and found reasonable cause to believe the charge was valid.¹⁷ Efforts at conciliation failed and the Division recommended that a public hearing be held.¹⁸ At this time, Carey's attorney advised the EEOC of the status of the proceedings.¹⁹ He also requested that the EEOC reassume jurisdiction over the complaint so that Carey could later obtain a right-to-sue letter if it became necessary to sue in federal court.²⁰ The EEOC agreed to assign an investigator to the case as soon as possible.²¹

A few months after the state administrative hearing, the hearing examiner decided in Carey's favor.²² While various forms of relief were ordered, Carey was awarded no attorney's fees.²³ While the parties were awaiting the examiner's decision, the EEOC began its investigation and found reasonable cause to believe Carey's charges were valid.²⁴ When the EEOC's efforts at conciliation failed and the EEOC chose not to sue the Club, the EEOC issued Carey a right-to-sue letter.²⁵ This right-to-sue letter gave her ninety days to decide whether to file suit in federal court.²⁶

The Club appealed the examiner's decision to the New York State Human Rights Appeal Board.²⁷ The Appeal Board confirmed the Division's order and the Club appealed this decision to the New York Supreme Court.²⁸ The New York Supreme Court affirmed the decision of the Appeals Board,²⁹ and the Club then filed a motion with the New York Court of Appeals for leave to appeal.³⁰ The motion was denied.³¹

While the Club's appeal was pending before the New York Supreme Court, Carey filed suit in the Federal District Court for the Southern District of New York, seeking relief which included attorney's fees under section 706(k).³²

¹³ 447 U.S. 54, 56 (1980).

¹⁴ *Id.*

¹⁵ *Id.* at 56-57.

¹⁶ 42 U.S.C. § 2000e-5(c) (1976).

¹⁷ 447 U.S. 54, 57 (1980).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 58.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 57.

²⁸ *Id.* at 58.

²⁹ *New York Gaslight Club, Inc. v. New York State Human Rights Appeal Bd.*, 59 A.D.2d 852, 399 N.Y.S.2d 158 (1977).

³⁰ 447 U.S. at 58.

³¹ *Id.* at 59 (citing 43 N.Y.2d 951 (1978)).

³² 447 U.S. at 58.

The Club denied all of Carey's allegations and cited the pendency of the state proceedings as an affirmative defense.³³ In a pretrial conference held by the federal district court, the Club agreed that it would comply with the Division's order if the state court denied its motion for leave to appeal.³⁴ When the state court denied the motion for leave to appeal, the federal action was dismissed except for Carey's request for attorney's fees for work done in the state administrative and judicial proceedings, the EEOC proceedings, and the federal court proceedings.³⁵

The federal district court denied Carey's request for attorney's fees, holding that the mere filing of a suit in federal court did not warrant the allowance of fees for the state proceedings.³⁶ Moreover, the court found that Carey need not have incurred any legal expenses in the state proceedings since a Division attorney could have presented the case to the hearing examiner.³⁷ The Court of Appeals for the Second Circuit reversed the district court, ruling that "[a] complaining party who is successful in state administrative proceedings after having her complaint under Title VII referred to a state agency in accordance with the statutory scheme of that Title is entitled to recover attorney's fees in the same manner as a party who prevails in federal court."³⁸

The Supreme Court affirmed the decision of the court of appeals.³⁹ The Court first examined the language of section 706(k) and interpreted the words "action or proceeding" to include administrative as well as judicial proceedings.⁴⁰ This interpretation, the Court observed, was supported by a comparison of section 706(k) with the attorney's fees provision of Title II of the Civil Rights Act of 1964.⁴¹ The Court noted that the two provisions were enacted contemporaneously, yet the Title II attorney's fees provision, in contrast to 706(k), contained no reference to "proceedings."⁴² This omission indicated to the Court that Congress contemplated both judicial and administrative proceedings under Title VII when it used the phrase "action or proceeding" in 706(k).⁴³ Furthermore, the Court found nothing in Title VII to indicate that Congress intended to allow fee awards only for work done in *federal* administrative and judicial proceedings.⁴⁴ Section 706(k) refers to *any* proceeding

³³ *Id.*

³⁴ *Id.* at 59.

³⁵ *Id.*

³⁶ *Carey v. New York Gaslight Club, Inc.*, 458 F. Supp. 79, 80, 18 Fair Empl. Prac. Cas. (BNA) 721, 723 (S.D. N.Y. 1978).

³⁷ *Id.* at 81, 18 Fair Empl. Prac. Cas. (BNA) at 724.

³⁸ *Carey v. New York Gaslight Club, Inc.*, 598 F.2d 1253, 1260, 19 Fair Empl. Prac. Cas. (BNA) 918, 922 (2d Cir. 1979).

³⁹ 447 U.S. 54, 71 (1980).

⁴⁰ *Id.* at 61.

⁴¹ 42 U.S.C. § 2000a-3(b) (1976).

⁴² 447 U.S. at 61 (citing 42 U.S.C. § 2000a-3(b) (1976)).

⁴³ 447 U.S. at 61.

⁴⁴ *Id.* at 61-62. The Court noted that "[i]n cases involving federal employees, all the Courts of Appeals that have considered the question have upheld fee awards under § 706(k) for work done in federal administrative proceedings that must be exhausted as a condition to filing an action in federal court." *Id.* at 61 n.2. See, e.g., *Brown v. Bathke*, 588 F.2d 634, 638 (8th Cir.

under Title VII, the Court noted, and the statute expressly requires deferral to state and local remedies.⁴⁵ Moreover, the Court observed that the word "proceeding" is used throughout Title VII to refer to all of the different types of administrative and judicial proceedings, both state and federal, through which Title VII is enforced.⁴⁶

An examination of the purpose of section 706(k) also provided support for the Court's conclusion that attorney's fees could be awarded for state and local proceedings. Citing *Christiansburg Garment Co. v. EEOC*,⁴⁷ the Court observed that one of the primary purposes behind the enactment of 706(k) was to facilitate the bringing of meritorious discrimination claims by plaintiffs of limited means.⁴⁸ In *Christiansburg*, the Court had referred to Title VII plaintiffs as private attorneys general vindicating an important policy and deserving of attorney's fees.⁴⁹ The *Carey* Court therefore approved the statement in *Christiansburg* that, absent special circumstances, a prevailing Title VII plaintiff is entitled to attorney's fees.⁵⁰ The Court claimed that "a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim."⁵¹

The Court also regarded the statutory requirement that Title VII claimants initiate their claims in state or local forums as an indication that attorney's fees are permitted for work done in state and local proceedings.⁵² While acknowledging that the federal courts retain the ultimate authority for enforcing Title VII,⁵³ the Court concluded that Congress intended the EEOC and federal court proceedings to supplement available state and local remedies for employment discrimination.⁵⁴ The withholding of attorney's fees for work done in state and local proceedings would hinder the effectuation of Congress' scheme, the Court feared, since plaintiffs would have no incentive to exhaust state remedies prior to filing suit in federal court.⁵⁵ Instead, they probably would abandon the state proceedings and file suit in federal court as soon as the statutory sixty day time limit had elapsed, thus "undermin[ing] Congress' intent to encourage full use of state remedies."⁵⁶ In what arguably was dictum, the Court concluded that a plaintiff who prevailed in state or local proceedings could file suit in federal court solely to recover attorney's fees for the proceedings.⁵⁷

1978); *Fischer v. Adams*, 572 F.2d 406, 410, 18 Fair Empl. Prac. Cas. (BNA) 667, 670 (1st Cir. 1978).

⁴⁵ 447 U.S. at 62.

⁴⁶ *Id.* at 62-63.

⁴⁷ 434 U.S. 412 (1978).

⁴⁸ 447 U.S. at 63 (citing 434 U.S. 412, 420 (1978)).

⁴⁹ 434 U.S. at 416.

⁵⁰ 447 U.S. at 63 (citing 434 U.S. at 417).

⁵¹ 447 U.S. at 63.

⁵² *Id.* at 63-65.

⁵³ *Id.* at 64.

⁵⁴ *Id.* at 65.

⁵⁵ *Id.* at 66 n.6.

⁵⁶ *Id.*

⁵⁷ *Id.* at 66. Chief Justice Burger joined the Court's opinion but wrote separately to ex-

The Court rejected the Club's argument that the award of attorney's fees for the state proceedings violated the tenth amendment because the state did not authorize such an award.⁵⁸ Any interest the state had in withholding these fees, the Court held, was overridden by Congress' power under section 5 of the fourteenth amendment.⁵⁹ Noting that section 706(k) was intended to supplement rather than pre-empt state law, the Court also rejected as inapposite the Club's argument that Congress had not clearly expressed an intention to pre-empt state regulation of state proceedings.⁶⁰ Since Congress had established attorney's fees as a necessary aspect of complete relief under Title VII, plaintiffs in states which do not authorize attorney's fee awards could supplement the relief granted under state law by obtaining attorney's fees under federal law in federal court.⁶¹

Finally, the Court found unpersuasive the Club's contention that it was within the district court's discretion to deny an award of attorney's fees.⁶² The Court noted that *Christiansburg* had established that a court's discretion to deny a fee award to Title VII plaintiffs is limited to those cases in which special circumstances exist.⁶³ According to the Court, the availability of a Division attorney to present a claimant's case did not constitute a special circumstance.⁶⁴ The Division attorney was not available at all levels of the state proceedings, and, even where the attorney was available, there was a possibility that he or she could take a position adverse to that of the claimant.⁶⁵ Thus, since the Division attorney had no obligation to the claimant as a client, the Court asserted that "[w]ithout doubt, the private attorney has an important role to play in preserving and protecting federal rights and interests during the state proceedings."⁶⁶ Since no special circumstances existed in *Carey*, the Court held that Title VII authorized the federal court to grant attorney's fees for work done in state proceedings to which the claimant was required to resort.⁶⁷

Justices White and Rehnquist dissented from the Court's opinion for the reasons expressed by Judge Mulligan in his dissent from the opinion of the Court of Appeals.⁶⁸ Judge Mulligan had contended that state law should

press his belief that it was unnecessary to resolve the issue of whether a claimant could bring a Title VII suit in federal court *solely* to recover attorney's fees for work done in state proceedings in which the claimant had prevailed. *Id.* at 71 (Burger, C.J., concurring). Justice Stevens also wrote separately to state that the facts of the case did not warrant a decision on whether a claimant who prevailed at the state level could file a federal suit merely to recover attorney's fees for the state proceedings. *Id.* (Stevens, J., concurring). The issue did not arise in this case, stated Stevens, because *Carey* had filed suit in federal court for a decision on the merits while the state proceedings were pending. *Id.* at 72. Thus, the federal court had jurisdiction to grant attorney's fees though the state proceedings ultimately had resolved all other questions in the case. *Id.*

⁵⁸ *Id.* at 67.

⁵⁹ *Id.* Section 5 gives Congress the power to enforce the fourteenth amendment.

⁶⁰ 447 U.S. at 67.

⁶¹ *Id.* at 67-68.

⁶² *Id.* at 68.

⁶³ *Id.* (citing 434 U.S. at 416-17).

⁶⁴ 447 U.S. at 68-71.

⁶⁵ *Id.*

⁶⁶ *Id.* at 70.

⁶⁷ *Id.* at 71.

⁶⁸ *Id.* (Rehnquist, J., and White, J., dissenting).

govern the issue of whether to award attorney's fees for state proceedings.⁶⁹ He also emphasized the availability of assistance provided to Carey by a Division attorney,⁷⁰ and observed that no evidence existed which suggested the Division attorney at any time took a position adverse to Carey's interests.⁷¹ Moreover, he argued that granting attorney's fees in federal court for work done in state proceedings would promote litigation in federal courts, a result contrary to Congress' purpose in requiring plaintiffs to resort first to state and local remedies.⁷² Every plaintiff who prevailed in proceedings in a state which did not authorize fee awards would pursue such an award in federal court.⁷³ Judge Mulligan further maintained that denial of attorney's fees for the state proceedings need not cause plaintiffs to abandon state proceedings as soon as they could obtain a federal forum, since the federal courts could discourage such a strategy by staying federal proceeding pending resolution of the state proceedings.⁷⁴ Finally, Judge Mulligan considered unrealistic the argument that denial of fees for state proceedings would induce plaintiffs to present a weak case at the state proceedings so they would lose at that level and thus gain access to a federal forum where a fee award was permissible.⁷⁵ For these reasons, and because he found no evidence in Title VII that Congress intended the federal courts to award attorney's fees to a claimant who prevailed in state proceedings,⁷⁶ Judge Mulligan dissented.

The Supreme Court's decision in *Carey* is correct for two reasons. First, the Court's interpretation of section 706(k) will effectuate the purpose of that section. Second, a contrary decision in *Carey* would have disrupted the congressional scheme in Title VII of promoting deferral to state and local remedies for employment discrimination.

The legislative history of section 706(k), though scant, indicates that one purpose behind the provision was to facilitate the bringing of meritorious suits by plaintiffs of limited means.⁷⁷ The withholding of attorney's fees for work done in state and local proceedings, however, would almost certainly obstruct effectuation of this purpose. Title VII plaintiffs initially must seek relief in available state or local proceedings, and a plaintiff with a meritorious discrimination complaint should succeed at this level. Thus the attorney's fees provision will have done nothing to aid or encourage the claimant to institute these proceedings if a fee award is not available for work done in these proceedings. It would be inconsistent if Congress enacted the fee provision to encourage plaintiffs of limited means to bring meritorious discrimination complaints,

⁶⁹ *Carey v. New York Gaslight Club, Inc.*, 598 F.2d at 1261, 19 Fair Empl. Prac. Cas. (BNA) at 922-23 (2d Cir. 1979) (Mulligan, J., dissenting).

⁷⁰ *Id.* at 1261, 1262-63, 19 Fair Empl. Prac. Cas. (BNA) at 923-24.

⁷¹ *Id.* at 1261, 19 Fair Empl. Prac. Cas. (BNA) at 923.

⁷² *Id.* at 1262, 19 Fair Empl. Prac. Cas. at 923.

⁷³ *Id.* at 1263 n.7, 19 Fair Empl. Prac. Cas. (BNA) at 924 n.7.

⁷⁴ *Id.* at 1263, 19 Fair Empl. Prac. Cas. (BNA) at 925.

⁷⁵ *Id.* at 1263-64, 19 Fair Empl. Prac. Cas. (BNA) at 925.

⁷⁶ *Id.* at 1262, 19 Fair Empl. Prac. Cas. (BNA) at 923.

⁷⁷ See *supra* notes 48-51 and accompanying text.

while requiring these plaintiffs to resort first to proceedings for which fees might not be awarded.

The Court's indication that plaintiffs could file a Title VII suit in federal court solely to recover attorney's fees⁷⁸ also conforms with the purpose of section 706(k). The facts of *Carey* did not necessitate resolution of the issue, as Justice Stevens noted in his concurring opinion,⁷⁹ since Carey already had filed suit in federal court for a decision on the merits of her claim while the state proceedings were pending.⁸⁰ The purpose of section 706(k) would not be served, however, by awarding attorney's fees only to plaintiffs who fortuitously had been able to institute federal proceedings prior to completion of state proceedings. The effect of such a distinction might be to penalize those plaintiffs who had been blatantly discriminated against.⁸¹ The strength of their claims could hasten the conclusion of state proceedings within sixty days and hence could preclude these plaintiffs from filing suit in federal court.

The second reason why the *Carey* decision is correct is that a narrow construction of section 706(k) would interfere with the system of deferral to state and local remedies which Congress intended as part of the enforcement scheme of Title VII.⁸² Even plaintiffs with strong claims would institute federal proceedings as soon as possible under Title VII, while state proceedings were still pending, to insure an award of attorney's fees for work done in the state proceedings. Thus, where state proceedings were lengthy, the federal court ultimately would have to assume jurisdiction of the merits of the case, leading to duplicative litigation.⁸³ Permitting plaintiffs who prevailed in state proceedings to sue in federal court solely to obtain attorney's fees likewise will result in dual proceedings, but the federal court at least need not adjudicate the merits.

In holding that prevailing Title VII plaintiffs can obtain attorney's fees for administrative and judicial proceedings at the state and local level, the *Carey* Court left two issues unanswered. The first involved the determination of when the provision by the state proceedings constitutes a special circumstance such that the federal court may not award attorney's fees for work done during those proceedings by a privately retained attorney. The *Carey* Court stressed the lack

⁷⁸ See *supra* note 57 and accompanying text.

⁷⁹ See *supra* note 57.

⁸⁰ 447 U.S. 54, 58 (1980).

⁸¹ The plaintiffs suffering the most blatant discrimination would be likely to win rapidly in the state proceedings and never find it necessary to file in federal court.

⁸² *Id.* at 62-65.

⁸³ The plaintiff might instead abandon the state proceedings after the federal court assumes jurisdiction, which would thwart Congress' purpose of encouraging deferral to state remedies. Judge Mulligan suggested that the federal courts could defeat this strategy by staying the federal proceedings while the state proceedings were pending. 598 F.2d at 1263, 19 Fair Empl. Prac. Cas. (BNA) at 925 (Mulligan, J., dissenting). See *supra* note 74 and accompanying text. As the Supreme Court observed, however, there is a definite maximum period of time during which the federal court can stay the proceedings, and the state proceedings may still be pending after this period has elapsed. 447 U.S. at 66 n.6. Thus, the plaintiff ultimately would be able to abandon the state proceedings, or to pursue dual proceedings in state and federal forums.

of an obligation owed by the Division attorney to the claimant, and the unavailability of a Division attorney during the part of the state proceedings.⁸⁴ Had the state provided an attorney who was to represent Carey's interests alone and who was available at every stage of the state proceedings, the Court very well might have deemed this a special circumstance calling for denial of attorney's fees for Carey's private attorney. In deciding whether the provision of an attorney is a special circumstance, courts should examine the type and extent of services which the attorney is authorized to provide. It seems logical to award attorney's fees for work which the state attorney was unauthorized to do. Where the state attorney provides adequate assistance, however, and the private attorney provides services which, while helpful, are unnecessary to the presentation of the plaintiff's case, a fee award would seem unwarranted. This issue remains to be resolved in future cases.

The second issue which the Court did not address concerns the recovery of fees for work done in proceedings which, while not mandated by either Title VII or state or local rules, are helpful to the claimant's case. Resolution of this issue will involve a balancing of the important policy of eradicating employment discrimination with the equally important policy of not exceeding Congress' intent in enacting section 706(k).

In sum, the decision in *Carey* represents an important and necessary step in the enforcement of Title VII. Awarding attorney's fees for work done in state proceedings under Title VII will further the purpose behind 706(k) by aiding plaintiffs of limited means bringing discrimination complaints and by encouraging the deferral to state and local remedies intended by Congress.

⁸⁴ See *supra* notes 63-66 and accompanying text.