

1980-1981 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,
*Management and Supervisory Trainees: United States Steel Corp. v. NLRB**

Sections 8(a)(1)¹ and 8(a)(5)² of the National Labor Relations Act (Act) guarantee the right of employees to bargain collectively with employers.³ Those sections make it an unfair labor practice for employers to refuse to bargain collectively,⁴ or to interfere with employee organization efforts.⁵ The Act, however, requires the employee bargaining unit to be an "appropriate" one.⁶ The highly discretionary⁷ task of determining whether a particular bargaining unit is "appropriate" falls upon the National Labor Relations Board (Board).⁸

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¹ 29 U.S.C. § 158(a)(1) (1976). The relevant portion of the section states, "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.*

The relevant portion of § 157 states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . ." 29 U.S.C. § 157 (1976).

² 29 U.S.C. § 158(a)(5) (1976). The section provides, "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 159(a) provides, in relevant part:

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

29 U.S.C. § 159(a) (1976).

³ See notes 1 and 2 *supra*.

⁴ Section 158(a)(5), 29 U.S.C. § 158(a)(5) (1976), expressly prohibits employers from refusing to bargain collectively. See note 2 *supra* for the text of § 158(a)(5).

⁵ Section 158(a)(1) protects employee organization efforts by its reference to § 157. 29 U.S.C., § 158(a)(1) (1976).

Section 157 reads, in pertinent part, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . ." 29 U.S.C. § 157 (1976).

⁶ 29 U.S.C. § 159(a) (1976). Section 159(a) reads in pertinent part:

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Id.

⁷ See 18C T. KHEEL, BUSINESS ORGANIZATIONS, LABOR LAW § 14.01[1] (1981). Kheel writes, "The Board has not formulated rigid or constrictive regulations for dealing with such cases. Instead, it exercises a wide ranging discretion, weighing and balancing the numerous, often conflicting considerations." *Id.* (footnotes omitted).

⁸ 29 U.S.C. § 159(b) (1976). Section 159(b) states, in pertinent part: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the

The primary test which the Board has employed in determining whether a bargaining unit is appropriate is whether the members of the bargaining unit share a sufficient "community of interest."⁹ If a consideration of various factors, such as the wages, hours, duties, and skills of the members of the bargaining unit indicates that those members do not have significant common interests, then the Board will not find the unit to be appropriate and the employer's refusal to bargain with that unit will not have violated the Act.¹⁰ The underlying policy of the community of interest test is to prevent internal conflicts which might impair the unit's ability to bargain.¹¹ Prior to the Supreme Court's decision in *NLRB v. Bell Aerospace Co.*,¹² Board decisions often relied on a lack of common interests to keep management employees from being part of rank-and-file bargaining units.¹³

Bell created an alternative to the community of interest test in those cases where management employees claimed to be part of a bargaining unit, by holding that managers were not even within the protection of the Act.¹⁴ After *Bell*, an employer who allegedly has failed to bargain with a unit can still argue that the unit is inappropriate because its members have no community of interest. *Bell*, however, gives the employer the option of arguing that some or all of the unit's members are "management", and therefore cannot claim that the Act protects their right to bargain. A similar option to argue that certain members were not protected by the Act, rather than just inappropriate to the unit, existed even before *Bell*, if unit members could be characterized as "supervisors." The Act expressly does not extend its protection to that group,¹⁵ by excluding supervisors from its definition of employee.¹⁶ Logically,

rights guaranteed by this supchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . ." 29 U.S.C. § 159(b) (1976).

⁹ 18C T. KHEEL, BUSINESS ORGANIZATIONS, LABOR LAW § 14.02 & n.3.

¹⁰ *Id.* See *Franklin Mint Corp.*, 254 N.L.R.B. No. 84, 11, 106 L.R.R.M. 1156, 1158 (1981); *Mock Road Super Duper, Inc.*, 156 N.L.R.B., 983, 985, 61 L.R.R.M. 1173, 1175 (1966).

¹¹ See *Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 173 (1971).

¹² 416 U.S. 267 (1973).

¹³ See *Banco Credito y Ahorro Ponceno*, 160 N.L.R.B. 1504, 1509, 63 L.R.R.M. 1196, 1198 (1966) (field auditors excluded from bank employee bargaining unit because interests closely related to management); *Diana Shop of Spokane, Inc.*, 118 N.L.R.B. 743, 745, 40 L.R.R.M. 1256, 1256 (1957) (management trainees and credit managers not included in rank-and-file bargaining unit).

¹⁴ *Id.* at 289.

¹⁵ 29 U.S.C. § 152(11) (1976). Section 152(11) defines "supervisor" as follows: 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 responsibly to direct them, 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.

¹⁶ 29 U.S.C. § 152(3) (1976). Section 152(3) specifically provides, "[t]he term 'employee' . . . shall not include . . . any individual employed as a supervisor, . . ." 29 U.S.C. §

the question of whether members of a bargaining unit are within the protection of the Act should be a threshold issue, preceding any determination of whether there is a sufficient community of interest for the unit to be appropriate. From a practical point of view, however, this threshold question of employment status may be more difficult to resolve than the matter of community of interest. Namely, there may be cases where the management/supervisory status of certain employees is unclear, but the existence of significant common interests between those employees and other members of the bargaining unit is easily determined. Therefore, the theory advanced by a party, or relied upon by a court in making its decision, may well depend on which of these two arguments is easier to make. A significant body of cases has been decided by the Board in which this practical problem has arisen in the context of a union claim that supervisory/management *trainees* are part of its bargaining unit.¹⁷ In some trainee cases the Board has applied the common interest test,¹⁸ while in others it has focused on whether the trainee already fits the definition of supervisor¹⁹ or manager,²⁰ and was thus excluded from the protection of the Act.²¹

During the *Survey* year, a federal court of appeals considered for the first time the problem of determining whether management/supervisory trainees could be part of a rank-and-file bargaining unit.²² In that case, *United States Steel Corporation v. NLRB*,²³ the Third Circuit did not discuss as a separate issue

152(3) (1976) (emphasis added).

Section 141(b) goes on to provide, "[i]t is the purpose and policy of this chapter, . . . to prescribe the legitimate rights of both *employees* and employers in their relations. . . ." (emphasis added). 29 U.S.C. § 141(b) (1976).

¹⁷ See generally *Curtis Noll Indus., Div. of Curtis Noll Corp.*, 218 N.L.R.B. 1447, 89 L.R.R.M. 1417 (1975); *Banco Credito y Ahorro Ponceno*, 160 N.L.R.B. 1504, 63 L.R.R.M. 1196 (1966); *Montgomery Ward & Co., Inc.*, 131 N.L.R.B. 1436, 48 L.R.R.M. 1276 (1961).

¹⁸ See *Banco Credito y Ahorro Ponceno*, 160 N.L.R.B. at 1510, 11 & n.16, 63 L.R.R.M. at 1198; *Montgomery Ward & Co., Inc.*, 131 N.L.R.B. at 1440, 48 L.R.R.M. at 1277-78; *United States Steel Corp.*, 248 N.L.R.B. 820, 820, 104 L.R.R.M. 1015, 1016 (1980).

¹⁹ "Supervisor" is defined in 29 U.S.C. § 152(11) (1976), set out at note 16 *supra*. In *Dooley Equip. Corp.*, 252 N.L.R.B. No. 20, 1, 3-5, 105 L.R.R.M. 1527, 1528 (1980), the Board affirmed the rulings, findings, and conclusions of the administrative law judge (ALJ) who had focused on the definition of supervisor to determine whether the trainee was protected by the Act. *Id.* at 1, 4. The ALJ found that "Knorr [the employee in question] had not assumed the full duties and responsibilities of the position, but remained a trainee working under close supervision . . . and bound by pricing policy guidelines, with little discretion to determine prices . . . or . . . departmental policy." *Id.* at 4.

²⁰ See *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. at 290 n.19 (Supreme Court left task of defining "managerial" to Board). The following cases determined whether a job was "managerial," rather than, or in addition to, using a community of interest analysis: *Dooley Equip. Corp.*, 252 N.L.R.B. No. 20 at 1, 4; *Barnes and Noble Bookstores, Inc.*, 233 N.L.R.B. 1326, 1341 (1977).

²¹ See *Dooley Equip. Corp.*, 252 N.L.R.B. No. 20 at 1, 3-5; *Barnes and Noble Bookstores, Inc.*, 233 N.L.R.B. at 1326, 1341-42.

²² The only other circuit court to mention the issue whether a trainee can be part of a bargaining unit was the Fifth Circuit in *NLRB v. Kent Corp.*, 564 F.2d 186, 188, 96 L.R.R.M. 3373, 3374 (5th Cir. 1977). That court, however, was rejecting a party's attempt to raise the issue for the first time on appeal. *Id.*

²³ 644 F.2d 286, 106 L.R.R.M. 3045 (3d Cir. 1981).

whether the trainees were within the protection of the Act.²⁴ Instead, the court seemed to assume that if the trainees had no community of interest with other unit members, then they were outside the protection of the Act.²⁵ This important aspect of the decision is analyzed below, following a discussion of the case itself.

In *United States Steel* the court stated that management/supervisory trainees can have no community of interest with rank-and-file employees if a reasoned analysis,²⁶ based on four factors,²⁷ shows a disparity of interests.²⁸ Under this analysis, the four factors to be considered are: (1) whether hiring of the trainees was selective, based on education or experience; (2) whether the employment opportunities of the trainees were limited to accepting a management position or leaving the employer; (3) whether there was a planned training program; and (4) whether the wages and working conditions of the trainees were distinguishable from those of other employees.²⁹ The court held that the trainees before it did not, under the test, have a community of interest with members of a rank-and-file bargaining unit.³⁰

The community of interest issue in *United States Steel* arose in the context of a training program for unlicensed seamen.³¹ Certain steel companies employed both licensed and unlicensed seamen on ore carriers in the Great Lakes.³² A local of the United States Steel Workers of America represented unlicensed personnel on the ships,³³ while the licensed personnel were either represented by a separate organization, or were unrepresented.³⁴ In the summer of 1978, the steel companies and the licensed personnel's representative jointly established a program to prepare selected unlicensed personnel to take the Coast Guard licensing examination.³⁵ The employers selected candidates for the school on the basis of recommendations by supervisors.³⁶ The employers subsidized the travel and living expenses of the trainees, who also received sixty percent of their regular pay while enrolled in the training program.³⁷ Under the terms of the program, the trainees would receive the balance of their pay if they returned to work for their employer for at least thirty days.³⁸ The trainees were not, however, otherwise obligated to return to work for their employers.³⁹ In

²⁴ See *id.* at 288-89, 106 L.R.R.M. at 3047-48.

²⁵ See *id.* at 289 & n.6, 106 L.R.R.M. at 3048 & n.6

²⁶ *Id.* at 290, 106 L.R.R.M. at 3049.

²⁷ *Id.* at 289-90, 106 L.R.R.M. at 3048.

²⁸ *Id.* at 290, 106 L.R.R.M. at 3048.

²⁹ *Id.* at 289-90, 106 L.R.R.M. at 3048.

³⁰ *Id.* at 290, 106 L.R.R.M. at 3049.

³¹ *Id.* at 287, 106 L.R.R.M. at 3046.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 287-88, 106 L.R.R.M. at 3046-47.

³⁶ *Id.* at 288, 106 L.R.R.M. at 3047.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

addition to receiving a partial salary with an option to recover full pay and expenses, the trainees also accrued vacation and bonus benefits as required by the collective bargaining agreement between the unlicensed seamen's union and the steel companies.⁴⁰ The employers did not, however, continue their usual practice of either deducting union dues from the trainee's salary, or issuing a separate check for the dues.⁴¹ Under the terms of the program, if a trainee was unsuccessful in obtaining a licensed position, he or she could return to his or her old, unlicensed job.⁴²

Because the unlicensed seamen's collective bargaining contract made no specific provision for the summer training program,⁴³ the union representing the unlicensed seaman filed unfair labor practice charges in July, 1978, alleging that the steel companies had refused to bargain concerning the employment conditions of the summer program.⁴⁴ An administrative law judge (ALJ) considered the union's complaint.⁴⁵ He made preliminary conclusions that the trainees had no community of interest with the unlicensed personnel,⁴⁶ and that they were training for positions which would be supervisory and/or managerial.⁴⁷ The ALJ did not find it necessary to determine whether the trainees were "employees" entitled to the protection of the Act, in view of his other findings.⁴⁸ Without further explanation, the judge concluded that the employers' "refusal" to bargain on the conditions of the summer program was not a violation of sections 8(a)(1) and 8(a)(5)⁴⁹ of the Act.⁵⁰

After the ALJ's unfavorable decision, the union brought the case to the Board,⁵¹ which disagreed with the judge's conclusion that the trainees had no community of interest with the other members of the bargaining unit.⁵² That conclusion, the Board stated, was based on cases which could be distinguished from the case at hand.⁵³ The Board noted that in two cases cited by the ALJ, *Curtis Noll Industries*⁵⁴ and *WTOP, Inc.*,⁵⁵ the trainees had no ability to remain with the employer if they were not put into the position for which they were being trained.⁵⁶ After distinguishing *Curtis Noll* and *WTOP* in this fashion, the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 290, 106 L.R.R.M. at 3049.

⁴³ *Id.* at 288, 106 L.R.R.M. at 3047.

⁴⁴ *Id.*

⁴⁵ United States Steel Corp., 248 N.L.R.B. 820, 823 (1980) (decision of administrative law judge).

⁴⁶ *Id.* at 827.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See text and notes at notes 1-8 *supra* for a discussion of the Act's protection of employees' right to bargain collectively.

⁵⁰ 248 N.L.R.B. at 827 (decision of administrative law judge).

⁵¹ *Id.* at 820, 104 L.R.R.M. 1015, 1016 (decision of Board).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 218 N.L.R.B. 1447, 89 L.R.R.M. 1417 (1975).

⁵⁵ 115 N.L.R.B. 758, 37 L.R.R.M. 1388 (1956).

⁵⁶ 248 N.L.R.B. at 820 n.4, 104 L.R.R.M. at 1016 n.4.

Board then listed other aspects of the training program in *United States Steel*, such as continued fringe benefits and the accrual of vacation time,⁵⁷ which led it to find that the trainees were appropriate members of the unlicensed seamen's bargaining unit.⁵⁸ Based on this finding, the Board concluded that the terms and conditions of the summer training program were a mandatory subject for collective bargaining⁵⁹ and that the employers had violated sections 8(a)(1) and 8(a)(5) by taking unilateral action on the subject.⁶⁰ The Board ordered the employers to bargain over the summer training program.⁶¹

Rather than bargain, the employers petitioned the Third Circuit to set aside the Board's order.⁶² The court set aside the order, holding that the trainees had no community of interest with the bargaining unit.⁶³ There was no evidence, the court asserted, to support the Board's opposite conclusion.⁶⁴ The court stated that it would use a "community of interest" analysis based on a long series of Board decisions regarding the bargaining unit status of management trainees.⁶⁵ It found that the *Curtis Noll*⁶⁶ case had synthesized this analysis into a four-factor test.⁶⁷ Under this test, the court continued, the training must be examined with regard to its selectivity, whether it limited the employment prospects of trainees, how the program was planned, and what distinctions in wages and hours existed between the trainees and other employees.⁶⁸ The court applied the test and concluded that the trainees had no community of interest with the unlicensed seamen.⁶⁹ According to the court, the training program fulfilled three of the four factors.⁷⁰ It was selective because the employers operating the program controlled admissions and considered the employee's experience, past record and recommendations in selecting trainees.⁷¹ It was strictly planned because the program was a formal ten- to thirteen-week course.⁷² Finally, there were many distinctions between trainees and other employees. The trainees were physically separated from the other employees, received lower pay, did different work, and were on a different payroll.⁷³ When considering this last factor, the court found it "most" significant that the

⁵⁷ *Id.* at 821, 104 L.R.R.M. at 1016.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*, 104 L.R.R.M. at 1016-17.

⁶¹ *Id.* at 822.

⁶² *United States Steel Corp. v. NLRB*, 644 F.2d at 287, 106 L.R.R.M. at 3046 (1981).

⁶³ *Id.* at 291, 106 L.R.R.M. at 3049.

⁶⁴ *Id.* at 289, 106 L.R.R.M. at 3047.

⁶⁵ *Id.*, 106 L.R.R.M. at 3047-48.

⁶⁶ 218 N.L.R.B. 1447, 89 L.R.R.M. 1417 (1975). See text and notes at notes 54-58 *supra*, for a description of the Board's reading of *Curtis Noll*.

⁶⁷ See text and notes at note 29 *supra*.

⁶⁸ 644 F.2d at 289-90, 106 L.R.R.M. at 3048.

⁶⁹ *Id.* at 290, 106 L.R.R.M. at 3048.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

trainees were studying for positions which would place them outside the bargaining unit.⁷⁴ The court subsequently referred to this body of facts as a "disparity between the interests of the students attending the summer school and the unlicensed seamen."⁷⁵

The court then addressed the Board's conclusion that the summer training program's lack of an "up or out" requirement indicated that the trainees still had a community of interest with the bargaining unit employees.⁷⁶ The court explicitly rejected making this one factor of the analysis determinative, as it claimed the Board had done.⁷⁷ Instead, the court read *Curtis Noll* as requiring the consideration of all four factors.⁷⁸ This reading of *Curtis Noll* was justified, according to the court, because *Curtis Noll* did not purport to create a new text for determining trainee status,⁷⁹ but rather synthesized the factors which had been developed in previous Board cases.⁸⁰ Thus, because three of the four *Curtis Noll* factors were fulfilled, the court concluded that the trainees had interests apart from the unlicensed seamen.⁸¹ On that basis, the summer licensing program run by the employers was in full compliance with sections 8(a)(1) and 8(a)(5) of the Act.⁸²

A concurring opinion agreed completely with the majority's conclusion that the trainees had no community of interest with their old bargaining unit.⁸³ The concurring judges, however, would have focused on the preliminary issue of whether language in the union contracts, or language in the NLRB certifications which defined the bargaining unit, could be read to include the trainees in the bargaining unit.⁸⁴ The terms of the parties' agreements and of the NLRB certifications emphasized that the members of the bargaining unit were to be unlicensed employees on the ships.⁸⁵ The opinion concluded, therefore, that the trainees were never intended by the union or steel companies to be part of the bargaining unit.⁸⁶ Thus, a community of interest analysis was of quite secondary importance to the concurring judges.⁸⁷

The Third Circuit's decision, in *United States Steel*, to adopt the *Curtis Noll* community of interest test and to hold that the trainees had no community of

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* The court's restatement of the Board's conclusion as turning solely on a lack of "up or out" requirement is oversimplified, since the Board listed a number of other factors after using the lack of "up or out" to distinguish certain cases. See text and notes at notes 51-61 for a description of the Board's reasoning.

⁷⁷ 644 F.2d at 290, 106 L.R.R.M. at 3049.

⁷⁸ *Id.*

⁷⁹ *Id.* at 11, 106 L.R.R.M. at 3049 n.11.

⁸⁰ *Id.*

⁸¹ *Id.*, at 290, 106 L.R.R.M. at 3049.

⁸² *Id.* at 290-91, 106 L.R.R.M. at 3049.

⁸³ *Id.* at 291, 106 L.R.R.M. at 3049 (Garth, J., concurring).

⁸⁴ *Id.*, 106 L.R.R.M. at 3049.

⁸⁵ *Id.*, 106 L.R.R.M. at 3049-50.

⁸⁶ *Id.*, 106 L.R.R.M. at 3049.

⁸⁷ *Id.* at 292, 106 L.R.R.M. at 3050.

interest with the rank-and-file employees even when not all four factors of the *Curtis Noll* test were met, was correct. The correctness of these aspects of the *United States Steel* decision, and some of the deficiencies in the court's reasoning, can best be understood by analyzing the court's main authority, *Curtis Noll*.

Curtis Noll concerned the allegedly illegal discharge of management trainees for union organizational activities.⁸⁸ The Board in *Curtis Noll* upheld the discharge,⁸⁹ adopting the ALJ's conclusion that the trainees were part of management and therefore were unprotected by the Act.⁹⁰ To support this conclusion, the ALJ first developed a four-factor community of interest test from cases⁹¹ which had considered the issue of whether management/supervisory trainees were appropriate members of the bargaining units of rank-and-file employees.⁹² The ALJ then applied this test to the facts of the case and determined that there was no community of interest between the trainees and the bargaining unit workers.⁹³ Without further discussion, the ALJ added that this result meant that the trainees' interests were so aligned with the interests of management that the trainees were outside the protection of the Act.⁹⁴

A key aspect of the *Curtis Noll* analysis is that the cases used to synthesize the four factors were not concerned with whether the trainees were actually managers or supervisors,⁹⁵ but rather focused on whether the trainees' interest in such positions prevented them from having a sufficient community of interest with other employees to be appropriate members of the bargaining unit.⁹⁶ The four factors — selective hiring,⁹⁷ no future alternative other than management,⁹⁸ a planned training program,⁹⁹ and different working conditions¹⁰⁰ — reflect this emphasis. These factors identify underlying interests which are likely to be more important to a management/supervisory trainee than his or her current working conditions. Thus, the *Curtis Noll* Board found that the management trainees in its case were working side by side with other

⁸⁸ 218 N.L.R.B. at 1450 (decision of administrative law judge).

⁸⁹ *Id.* at 1447, 89 L.R.R.M. at 1417 (decision of Board).

⁹⁰ *Id.* at 1453 (decision of administrative law judge).

⁹¹ See *id.* at 1452 (citing Big N Dept. Store No. 333, 199 N.L.R.B. 174, 81 L.R.R.M. 1190 (1972); Henrikson, Inc., d/b/a Gibson Discount Center, 191 N.L.R.B. 622, 77 L.R.R.M. 1835 (1971); Banco Credito y Ahorro Ponceno, 160 N.L.R.B. 1504, 63 L.R.R.M. 1196 (1966); Rish Equip. Co., 150 N.L.R.B. 1185, 58 L.R.R.M. 1274 (1965); Montgomery Ward & Co., 131 N.L.R.B. 1436, 48 L.R.R.M. 1276 (1961); Diana Shop of Spokane, Inc., 118 N.L.R.B. 743, 40 L.R.R.M. 1256 (1957); WTOP, Inc., 115 N.L.R.B. 758, 37 L.R.R.M. 1388 (1956)).

⁹² 218 N.L.R.B. at 1452 (decision of administrative law judge).

⁹³ *Id.* at 1453.

⁹⁴ *Id.*

⁹⁵ See, e.g., WTOP, Inc., 115 N.L.R.B. at 759, 37 L.R.R.M. at 1388 (floor directors without supervisory authority still have interest of supervisors).

⁹⁶ See *id.*; Rish Equip. Co., 150 N.L.R.B. at 1202 (The Board found that a managerial trainee had interests aligned with managers, not with employees in the appropriate unit. *Id.* (decision of trial examiner).

⁹⁷ See 218 N.L.R.B. at 1452 (decision of administrative law judge).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

employees, and were doing the same tasks as other employees,¹⁰¹ but upon application of the factors the Board found no community of interest.¹⁰²

Although the four *Curtis Noll* factors serve to determine the relevant interests of management trainees, they do little or nothing to indicate whether a trainee is acting as a supervisor or manager. The statutory definition of supervisor focuses on factors such as whether the individual has the power to hire or discharge, and whether he or she uses independence in exercising that authority.¹⁰³ Board decisions determining whether an employee is a manager have focused on that employee's day-to-day work,¹⁰⁴ which is not even a factor in the *Curtis Noll* test.¹⁰⁵ Yet the Board in *Curtis Noll* went beyond its finding that there was no community of interest between the management trainees and other employees,¹⁰⁶ to rule that the trainees were part of management.¹⁰⁷ Therefore, under *Bell Aerospace*,¹⁰⁸ those trainees were not protected by the Labor Management Relations Act.¹⁰⁹ The Board did not recognize the difference between identifying the trainees' interests and determining whether they fit the definitions of supervisor and/or manager. Instead, after determining that the trainees, on the basis of the four factors, had interests aligned with management,¹¹⁰ the Board simply added the finding that the trainees were part of management.¹¹¹ As the dissenting opinion in *Curtis Noll* noted,¹¹² exclusion of trainees from a unit of rank-and-file employees on the basis of qualifications and working conditions is not dispositive of whether those persons have a protected right to organize for self benefit.¹¹³

In contrast to *Curtis Noll*, the issue before the circuit court in *United States Steel* was whether the trainees in question were appropriate members of a certain bargaining unit.¹¹⁴ Since this was also the main issue in the cases used to develop the *Curtis Noll* four-factor test,¹¹⁵ the use of that test was more appropriate in *United States Steel* than in *Curtis Noll*. Like the *Curtis Noll* Board, however, the *United States Steel* court does not appear to have distinguished between identifying the interests of trainees and determining their status as

¹⁰¹ *Id.* at 1451.

¹⁰² *Id.* at 1453.

¹⁰³ 29 U.S.C. § 152(11) (1976).

¹⁰⁴ See *Dooley Equip. Corp.* 252 N.L.R.B. No. 20 at 1, 4; *Barnes and Noble Bookstores, Inc.*, 233 N.L.R.B. at 1326, 1341; *Curtis Noll Indus., Div. of Curtis Noll Corp.*, 218 N.L.R.B. at 1448, 89 L.R.R.M. at 1418 (The dissenting opinion argued that determination of whether an employee is a manager depends on day-to-day work.).

¹⁰⁵ See 218 N.L.R.B. at 1452 (decision of administrative law judge).

¹⁰⁶ *Id.* at 1453.

¹⁰⁷ *Id.*

¹⁰⁸ 416 U.S. at 289.

¹⁰⁹ 218 N.L.R.B. at 1453 (decision of administrative law judge).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 1448, 89 L.R.R.M. at 1418 (dissenting opinion).

¹¹³ *Id.*, 89 L.R.R.M. at 1418.

¹¹⁴ See 644 F.2d at 290, 106 L.R.R.M. at 3049.

¹¹⁵ See text and notes at notes 91-92 *supra*, for a description of the Board's use of earlier cases in *Curtis Noll*.

managers or supervisors. This confusion is apparent from a passage in the court's opinion which discussed a number of cases which had decided whether trainees were appropriate members of a bargaining unit.¹¹⁶ After reviewing those cases, the court then introduced *Curtis Noll* as a case which "once again" found management trainees to be excluded from the protection of the Act.¹¹⁷ The court also noted that the jobs for which the training program prepared the seamen had been held by the Board to be supervisory.¹¹⁸ It later labelled as "most" significant the students' purpose of becoming licensed officers.¹¹⁹ These aspects of the opinion at least suggest that the Third Circuit would hold that trainees fulfilling the *Curtis Noll* analysis are already managers or supervisors, and thus outside the protection of the Act.¹²⁰

United States Steel is significant because of the Third Circuit's decision therein to adopt the *Curtis Noll* four-factor test to determine whether management/supervisory trainees are appropriate members of a rank-and-file bargaining unit. Yet the precedential value of *United States Steel* is questionable because employing the community of interest test may have been unnecessary under the facts of the case. The concurring opinion questioned whether a four-factor community of interest analysis was necessary at all.¹²¹ It observed that the bargaining unit stipulated in the unlicensed seamen's contract and certified by the Board did not appear to contemplate the summer training program,¹²² and therefore could not be an appropriate unit for the trainees.¹²³ Thus, another court wishing to discount the apparent endorsement of *Curtis Noll* by the Third Circuit could point to the concurrence in *United States Steel* and hold that *United States Steel* was not the proper case in which to adopt the *Curtis Noll* test.

In addition to the Third Circuit's decision to adopt the *Curtis Noll* test, *United States Steel* is significant because of the court's assertion that not all four factors of that test have to be met to show that trainees are inappropriate members of a bargaining unit. In *Curtis Noll*, the training program at issue was found to exhibit, to at least some extent, all four factors developed in that case.¹²⁴ In contrast, the *United States Steel* court found that there was no community of interest between the trainees and the other employees,¹²⁵ even though the "up or out" factor was missing.¹²⁶ This finding was reasonable, however, in view of the subjective nature of community of interest analysis.¹²⁷

¹¹⁶ 644 F.2d at 289, 106 L.R.R.M. at 3048.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 289 n.5, 106 L.R.R.M. at 3047 n.5.

¹¹⁹ *Id.* at 290, 106 L.R.R.M. at 3048.

¹²⁰ See 218 N.L.R.B. at 1453 (decision of administrative law judge).

¹²¹ See 644 F.2d at 291, 106 L.R.R.M. at 3049 (Garth, J., concurring).

¹²² *Id.*

¹²³ *Id.*, 106 L.R.R.M. at 3049.

¹²⁴ 218 N.L.R.B. at 1452-53 (decision of administrative law judge).

¹²⁵ 644 F.2d at 290, 106 L.R.R.M. at 3048.

¹²⁶ *Id.* at 290, 106 L.R.R.M. at 3048.

¹²⁷ See text and notes at notes 7-8 *supra*.

Furthermore, the other *Curtis Noll* factors all were quite obviously met in *United States Steel*,¹²⁸ especially apparent being the utterly different working conditions of the students.¹²⁹ When the issue is not one of deciding on an appropriate bargaining unit, but rather one of classifying trainees as supervisors or managers, meeting all four factors may become more important. The "up or out" requirement, for example, would be particularly relevant in determining whether trainees have interests so closely aligned with managers and/or supervisors that they should be considered managers or supervisors.¹³⁰

For the practitioner, *United States Steel*'s importance seems to lie in its agreement with *Curtis Noll*'s holding that when management/supervisory trainees have no community of interest with the rank-and-file, they are so identified with management and/or supervision that they are no longer protected by the Act.¹³¹ This result might be significant, for example, where a union attempted to organize a separate bargaining unit for trainees, or in a case like *Curtis Noll*, where the issue of the appropriateness of unit was secondary to the issue of protection under the Act. The practitioner should be aware, however, that acceptance of the four-factor community of interest test by the *United States Steel* court does not make the *Curtis Noll* conclusions regarding the Act's protection of trainees flow automatically. *United States Steel*'s central concern was really only whether there was an appropriate bargaining unit. Its determinations with respect to the use of the community of interest test to decide whether a trainee is a manager or supervisor and therefore outside the Act's protection are mere dicta.

B. *Enforceability of Prehire Agreements:*

*Contractors Health and Welfare Plan v. Associated Wrecking Co.**

As a general rule, an employer outside the construction industry does not commit an unfair labor practice in violation of section 8(a)(5) of the National Labor Relations Act (NLRA)¹ by refusing to bargain with a union which has not proven that it represents the majority of the employer's workers.² In fact, an employer commits an unfair labor practice by signing a collective bargaining agreement with a union which does not have established majority status.³

¹²⁸ See 644 F.2d at 290, 106 L.R.R.M. at 3048.

¹²⁹ See *id.*, 106 L.R.R.M. at 3048.

¹³⁰ See generally 218 N.L.R.B. at 1453 (decision of administrative law judge).

¹³¹ See 218 N.L.R.B. at 1453.

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¹ 29 U.S.C. § 158(a)(5) (1976). Section 8(a)(5) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

² *R. J. Smith Constr. Co., Inc.*, 191 N.L.R.B. 693, 694, 77 L.R.R.M. 1494, 1494-95 (1971), *enforcement denied sub nom.*, *Engineers Local 150 v. NLRB*, 480 F.2d 1186, 83 L.R.R.M. 2706 (D.C. Cir. 1973). See *NLRB v. Local 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 345, 97 L.R.R.M. 2333, 2337 (1978).

³ *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 736-37, 48 L.R.R.M. 2251, 2253 (1961).

Congress has recognized, however, that prohibiting agreements in the construction industry between employers and unions not having majority status is inappropriate due to the transitory and occasional nature of the employer-employee relationship in that industry.⁴ Accordingly, in 1959 Congress enacted section 8(f) of the NLRA.⁵ Under section 8(f), employers in the construction industry are permitted to make voluntary agreements with unions which do not have majority status.⁶ The employer may execute such agreements before it has actually hired any construction workers.⁷

The degree to which section 8(f) prehire agreements are enforceable against signatory employers is somewhat unclear. In fact, it is possible that such agreements may not be enforceable at all. The only Supreme Court decision to discuss the enforceability of prehire agreements at length is *NLRB v. Local 103, International Association of Bridge, Structural & Ornamental Iron Workers*.⁸ The Supreme Court held in *Local 103* that a union which had failed to establish majority status committed an unfair labor practice when it attempted to enforce a prehire agreement by picketing a signatory employer.⁹ Immediately after the employer and the union in *Local 103* had signed a prehire agreement, the employer formed a new company, created for the express purpose of using

⁴ See S. REP. NO. 187, 86th Cong., 1st Sess. 27-28 (1959); H.R. REP. NO. 741, 86th Cong., 1st Sess. 19-20 (1959), reprinted in I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 [hereinafter cited as LEGISLATIVE HISTORY], at 423-24 & 777-78 (1959).

⁵ 29 U.S.C. § 158(f). Section 8(f) provides, in part:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement. . . .

⁶ The history of § 8(f) is well described in *NLRB v. Irvin*, 475 F.2d 1265, 82 L.R.R.M. 3015 (3d Cir. 1973):

Section 8(f) was enacted as Section 705 of the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519. . . . Section 8(f) was adopted to meet specific problems which had arisen in the construction industry under prior law because of the transitory nature of the employer-employee relationship in that industry. During the Wagner Act period the Board had declined to exercise jurisdiction over the industry. In 1947, after passage of the Taft-Hartley amendments, the Board applied the provisions of the Act to the industry with consequent difficulties.

Id. at 1267, 82 L.R.R.M. at 3016. Because construction workers generally work for a specific employer for only a short time, it was difficult for the Board's election procedures to be applied effectively in the construction industry. See *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 304, 105 L.R.R.M. 2059, 2069 (5th Cir. 1980). It was therefore often impossible for construction workers to exercise their right to select a bargaining representative. *Id.*, 105 L.R.R.M. at 2069-70. This result necessitated the enactment of § 8(f).

⁷ See the text of § 8(f) at note 5 *supra*.

⁸ 434 U.S. 335, 97 L.R.R.M. 2333 (1978).

⁹ *Id.* at 341, 97 L.R.R.M. at 2335-36.

nonunion labor.¹⁰ The union picketed a construction project where work was being performed by the new company.¹¹ This picketing persisted for more than thirty days, during which the union did not file a petition for a representation election.¹² The employer filed an unfair labor practice charge with the NLRB, alleging that the union's picketing violated section 8(b)(7)(C) of the NLRA.¹³ Section 8(b)(7)(C) makes it an unfair labor practice for a union to picket an employer for recognitional purposes for more than 30 days without filing for a representation election.¹⁴ The NLRB found that any picketing to enforce a prehire agreement was recognitional in nature, and therefore violated section 8(b)(7)(C).¹⁵ The Supreme Court affirmed the Board's position.¹⁶ Dicta in the Court's opinion suggested that a prehire agreement or any provisions within it would be completely unenforceable in a contract action unless, after the agreement is signed, the union attains the support of a majority of the employees to be represented.¹⁷ As a result of this dicta in the *Local 103* decision, the lower courts have divided on the issue of whether a prehire contract can ever be enforced by a union which has not achieved majority status.¹⁸

¹⁰ *Id.* at 339, 97 L.R.R.M. at 2334.

¹¹ *Id.*

¹² *Id.*, 97 L.R.R.M. at 2335.

¹³ *Id.*

¹⁴ Section 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C) (1976) provides in part:

It shall be an unfair labor practice for a labor organization . . . (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith . . . direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization . . .

¹⁵ *Local 103, Ironworkers (Higdon Contracting Co.)*, 216 N.L.R.B. 45, 46, 88 L.R.R.M. 1067, 1069 (1975).

¹⁶ 434 U.S. at 341, 97 L.R.R.M. at 2335-36.

¹⁷ The Court observed:

It would not be inconsistent with *Lion Dry Goods* [Retail Clerks Int'l Ass'n. v. Lion Dry Goods, Inc., 369 U.S. 17, 49 L.R.R.M. 2670 (1962)] for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract, just as it is in a § 8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable.

434 U.S. at 351-52, 97 L.R.R.M. at 2340. Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. & § 185 (1976), gives federal district courts jurisdiction to hear suits to enforce labor contracts.

¹⁸ See note 36 *infra*.

During the Survey year, in *Contractors Health and Welfare Plan v. Associated Wrecking Co.*,¹⁹ the Court of Appeals for the Eighth Circuit held that a union may enforce fringe benefit provisions contained in a prehire agreement by bringing a breach of contract suit pursuant to section 301 of the Labor-Management Relations Act (LMRA),²⁰ regardless of whether the union has achieved majority status among the employer's workers.²¹ In so holding, the *Associated Wrecking* court disregarded the dicta in *Local 103* which suggested that prehire agreements would never be enforceable by a union representing a minority of the employer's workers.

Associated Wrecking concerned a prehire agreement signed by Omaha-Council Bluffs Local No. 1140 (the union) and Associated Wrecking & Salvage Company (the employer) which, by its terms, incorporated the fringe benefit provisions in collective bargaining agreements signed by the union and several employers' associations.²² The agreement required the employer to make contributions to various employee benefit trusts.²³ After a period of time the employee trust funds (collectively, the trusts) brought suit against the employer in federal court pursuant to section 301 of the LMRA, alleging that the employer owed contributions to the trusts.²⁴ The employer moved for summary judgment, contending that since the trusts had failed to establish that the union represented a majority of the employer's workers, the prehire agreement could not be enforced.²⁵ The district court granted the motion, finding that the Supreme Court's decision in *Local 103* precluded the minority union from attempting to enforce the prehire agreement.²⁶

The court of appeals reversed the district court, finding that *Local 103* was not controlling for three reasons. First, the court found the holding of *Local 103* to be limited to the enforceability of section 8(f) agreements where the union

¹⁹ 638 F.2d 1128, 106 L.R.R.M. 2257 (8th Cir. 1981).

²⁰ Section 301(a), 29 U.S.C. § 185(a) (1976), provides in relevant part: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

²¹ *Id.* at 1134, 106 L.R.R.M. at 2260-61.

²² *Id.* at 1129, 106 L.R.R.M. at 2257.

²³ *Id.* The funds involved were the Contractors, Laborers, Teamsters and Engineers Health & Welfare Plan, the Omaha-Council Bluffs Laborers Local No. 1140 Holiday Trust, the Contractors, Laborers, Teamsters and Engineers Pension Plan, and the Laborers Training Fund. *Id.*

²⁴ *Id.* at 1130, 106 L.R.R.M. at 2257.

²⁵ *Id.*

²⁶ 484 F. Supp. 582, 585-87, 104 L.R.R.M. 2128, 2131-32 (D. Neb. 1980). The court in *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 488 F. Supp. 816, 104 L.R.R.M. 2653 (D.D.C. 1980), interpreted *Local 103* similarly, and found that an obligation to pay fringe benefits in a prehire agreement is unenforceable when the union fails to demonstrate that it represents a majority of the employer's workers. *Id.* at 819, 104 L.R.R.M. at 2655. That court relied on the district court's opinion in *Associated Wrecking* for support, however. *Id.* at 818, 104 L.R.R.M. at 2654-55.

had engaged in picketing which violated section 8(b)(7)(C).²⁷ *Local 103* was therefore inapplicable to a case which did not implicate section 8(b)(7).²⁸ Second, the court found that the litigation in *Local 103* concerned an unfair labor practice charge filed by the employer, while, in contrast, the litigation in *Associated Wrecking* concerned a breach of contract action filed by the union.²⁹ The court noted that while the Supreme Court had held in *Local 103* that a union which has not established majority status may not file an unfair labor practice charge against the employer for breach of a duty to bargain,³⁰ the Court had not considered whether and to what extent prehire agreements might be enforceable in breach of contract actions.³¹ Finally, the *Associated Wrecking* court found that the underlying policy reason for the holding in *Local 103* — that of protecting the complete freedom of employees to choose their bargaining representative — was not present in *Associated Wrecking*.³² The action taken by the union in *Local 103* was essentially an attempt to gain recognition by an employer without first obtaining the consent of his employees.³³ In *Associated Wrecking*, however, since the union could not gain recognition merely by requiring the employer to pay into employee trust funds, no congressional policy would be furthered by denying the trusts the opportunity to enforce the fringe benefit provisions in the prehire agreement.³⁴ As the court noted, the fringe benefit provisions were not recognition because the payments sought by the trusts would inure to the benefit of the individual employees at the time of employment, regardless of whether the union had majority status.³⁵ Having

²⁷ 638 F.2d at 1132-33, 106 L.R.R.M. at 2259-60.

²⁸ *Id.* at 1133, 106 L.R.R.M. at 2259-60.

²⁹ *Id.*, 106 L.R.R.M. at 2260.

³⁰ 434 U.S. at 341, 97 L.R.R.M. at 2335-36.

³¹ 638 F.2d at 1133, 106 L.R.R.M. at 2260. In *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 49 L.R.R.M. 2670 (1962), the Supreme Court held that a union need not represent a majority of an employer's workers before it can bring an action under § 301(a) of the LMRA to enforce a labor agreement. *Id.* at 25-27, 49 L.R.R.M. at 2673-74. The validity or enforceability of prehire agreements, the Court noted, was intended by Congress to be litigated in § 301 suits. *Id.* at 27, 49 L.R.R.M. at 2674. The *Local 103* decision made clear, however, that the holding of *Lion Dry Goods* was limited to addressing the question of whether federal courts had jurisdiction to hear § 301 suits concerning prehire agreements, and did not address questions concerning the enforceability of prehire agreements. 434 U.S. at 351, 97 L.R.R.M. at 2340.

³² 638 F.2d at 1133, 106 L.R.R.M. at 2260.

³³ *NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. at 346-48, 97 L.R.R.M. at 2338.

³⁴ 638 F.2d at 1133, 106 L.R.R.M. at 2260.

³⁵ *Id.* Neither the opinions of the district court nor the circuit court in *Associated Wrecking* specifically state whether the nonunion workers were entitled to payments from the trusts. If a fringe benefit provision was to provide that only union workers were entitled to benefits from the contributions made by the employer, then the provision would arguably be recognition in nature. Although such a provision would not cause an employer to recognize the union, it could cause nonunion workers to become union members in order to receive benefits. It is doubtful, however, that many prehire agreements contain or incorporate fringe benefit provisions of this type. Typically, an employer who has agreed to make contributions to union trust funds must pay into the trusts a specified amount for each hour worked by each of his employees. After a specified employee has worked a specified number of hours, the trusts are required to pay his benefits, regardless of whether he has become a union member. See *Florida Marble Polishers*

distinguished *Local 103* on these grounds, the *Associated Wrecking* court held that the fringe benefit provisions of the prehire agreement would be binding in spite of the union's failure to establish majority status.³⁶

The *Associated Wrecking* court's holding that fringe benefit provisions contained in prehire agreements may be enforced in a section 301 contract action effectuates the purpose of section 8(f). If the broad interpretation of the *Local 103* decision advanced by the district court in *Associated Wrecking* were accepted, unions could be prevented from enforcing prehire agreements in most, if not all, circumstances. The statutory authorization of prehire agreements found in section 8(f) would become meaningless if prehire agreements are found by the courts to be completely unenforceable.³⁷ The statutory authorization of prehire agreements was intended to benefit construction industry employers in two ways: (1) by allowing employers bidding for construction jobs to know their

Health and Welfare Trust Fund v. Megahee, 102 L.R.R.M. 2740, 2741 (M.D. Fla. 1979); Eastern Dist. Council v. Blake Constr. Co., 457 F. Supp. 825, 826 n.1, 99 L.R.R.M. 3257, 3258 n.1 (E.D. Va. 1978); Western Wash. Cement Masons Health & Security Trust Funds v. Hillis Homes, Inc., 612 P.2d 436, 441, 107 L.R.R.M. 2897, 2898 (1980). In fact, the trusts may be required to pay benefits for an employee even though his employer never made contributions in his behalf. See International Union of Operating Engineers, Local 150, 255 N.L.R.B. No. 83, 106 L.R.R.M. 1399, 1401-02 (1981).

³⁶ 638 F.2d at 1134, 106 L.R.R.M. at 2260-61. Several courts considered the question of the enforceability of fringe benefit provisions in prehire contracts prior to the release of the *Associated Wrecking* decision. The decisions of these courts are inconsistent with one another. See, e.g., Florida Marble Polishers Health and Welfare Trust Fund v. Megahee, 102 L.R.R.M. 2740 (M.D. Fla. 1979) (oral opinion finding fringe benefit provisions enforceable in § 301 suit); Eastern Dist. Council v. Blake Constr. Co., 457 F. Supp. 825, 99 L.R.R.M. 3257 (E.D. Va. 1978) (fringe benefit provisions in international agreement which is "in the nature of a prehire agreement," *id.* at 829, 99 L.R.R.M. at 3259, are enforceable); Western Wash. Cement Masons Health & Security Trust Funds v. Hillis Homes, Inc., 612 P.2d 436, 107 L.R.R.M. 2897 (1980) (trustees of trust funds may, as third party beneficiaries, bring suit to enforce fringe benefit provisions). But see Vermeer v. Aloha Contractors, Inc., 107 L.R.R.M. 2895 (D. Or. 1980) (fringe benefit provisions in prehire contracts are unenforceable until the union establishes majority status); Paddock v. Clark, 107 L.R.R.M. 2325 (D. Or. 1980) (majority status is condition precedent to enforcement of fringe benefit provisions); Baton Rouge Bldg. and Constr. Trades Council v. E.C. Schafer Constr. Co., Inc., 492 F. Supp. 534, 106 L.R.R.M. 2040 (M.D. La. 1980) (absent proof of majority status, prehire agreements are unenforceable); Western Wash. Laborers-Employers Health & Security Trust Fund v. McDowell, 103 L.R.R.M. 2219 (W.D. Wash. 1979). In the months following the *Associated Wrecking* decision, the Tenth Circuit has found, in accord with *Associated Wrecking*, that fringe benefit provisions in prehire agreements may be enforced in a contract action regardless of whether the union can prove majority status. See Trustees of the Teamsters Constr. Workers Health and Welfare Trust Fund v. Hawg n Action, Inc., 107 L.R.R.M. 2865 (10th Cir. 1981); N. M. Dist. Council of Carpenters v. The Mayhew Co., 107 L.R.R.M. 2931 (10th Cir. 1981). See also International Union of Operating Engineers, Local 150, 255 N.L.R.B. No. 83, 106 L.R.R.M. 1399 (1981) (union may picket to enforce fringe benefit provision in prehire contract without violating § 8(b)(7)(C)). See note 35 *supra* for further discussion of the Board's decision in *International Union of Operating Eng'rs, Local 150*.

³⁷ In Western Wash Cement Masons Health & Security Trust Funds v. Hillis Homes, Inc., 612 P.2d 436, 107 L.R.R.M. 2897 (1980), the court commented: "[W]e feel that refusal to allow enforcement of a prehire agreement by a lawsuit would effectively render § 8(f) meaningless, and would, therefore, run counter to the rule that statutes are to be construed so as to give effect to every word." *Id.* at 441, 107 L.R.R.M. at 2900 (citations omitted).

labor costs in advance,³⁸ and (2) by enabling employers to have a known quantity of skilled crafts workers available for construction work.³⁹ If Congress intended prehire agreements to serve these purposes effectively, then prehire agreements must have been intended to be enforceable to some extent against unions. Furthermore, Congress must have intended prehire agreements to be enforceable at least to some extent against employers as well, since no union truly serving the interests of its members would be eager to enter into an agreement with an employer if it knew the employer could always disregard the terms of the agreement with impunity.

The holding of *Associated Wrecking* furthers general congressional aims in enacting labor legislation because it helps to preserve stable and peaceful labor relations on the employer's worksite.⁴⁰ Once a union establishes majority status on a worksite, a prehire agreement has the binding effect of a collective bargaining agreement.⁴¹ If the union does not represent a majority of the employer's workers, however, the employer, as a result of the *Local 103* decision, presumably may disregard the terms of a prehire agreement without committing an unfair labor practice.⁴² Yet severe inequities would result if the

³⁸ S. REP. NO. 187 at 186 H.R. REP. NO. 741 at 19, 86th Cong., 1st Sess. (1959); I LEGISLATIVE HISTORY at 424 & 776.

³⁹ *Id.*

⁴⁰ The Supreme Court has commented that "[t]he goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Local 24, International Bd. of Teamsters v. Oliver*, 358 U.S. 283, 295, 43 L.R.R.M. 2374, 2379 (1959) (citations omitted).

⁴¹ *NLRB v. Local 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. at 349-50, 97 L.R.R.M. at 2339; *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 294-95, 105 L.R.R.M. 2059, 2062 (5th Cir. 1980). When the employees which the union seeks to represent do not work at a single location on a permanent or stable basis, the union must prove majority status on each individual jobsite covered by the agreement. *Corrugated Structures, Inc.*, 252 N.L.R.B. No. 79, 105 L.R.R.M. 1391 (1980). It is not entirely clear whether the union, once it has established majority status, is entitled to an irrebuttable presumption of majority status for the duration of the prehire agreement. The Board's original position was that the union was not entitled to an irrebuttable presumption of majority status. *R.J. Smith Constr. Co.*, 191 N.L.R.B. 691, 77 L.R.R.M. 1493 (1971), *enforcement denied*, 480 F.2d 1186, 83 L.R.R.M. 2706 (D.C. Cir. 1973), *remand accepted*, 208 N.L.R.B. 615, 85 L.R.R.M. 1187 (1974). However, the Board has recently held that a union which has established majority status in a permanent and stable workforce is entitled to an irrebuttable presumption of majority status for the duration of the agreement. *See, e.g., Hageman Underground Constr.*, 253 N.L.R.B. No. 7, 105 L.R.R.M. 1385 (1980); *Precision Striping, Inc.*, 245 N.L.R.B. No. 34, 102 L.R.R.M. 1264 (1979), *enforcement denied*, *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144, 107 L.R.R.M. 2009 (9th Cir. 1981). The Ninth Circuit found that the Board's current position is "inconsistent with the Act, inconsistent with prior decisional law, and irrational." *Id.* at 1147, 107 L.R.R.M. at 2010. Hence, the Ninth Circuit has held that a union is only entitled to a rebuttable presumption of majority status, at least in cases where it is apparent that the union obtained majority status through operation of a union security clause contained in a prehire agreement. *Id.* at 1148, 107 L.R.R.M. at 2011.

⁴² *See, e.g., Corrugated Structures, Inc.*, 252 N.L.R.B. No. 79, 105 L.R.R.M. at 1392 (1980) (finding that an employer does not violate § 8(a)(1) and (5) of the Act when it repudiates a prehire agreement by unilaterally reducing the wages of certain employees and by withdrawing

union is precluded from bringing a section 301 contract action against the employer, and the employer, accordingly, is allowed to escape his contractual obligations. An employer could promise to pay his workers at a certain rate and to provide set benefits in a prehire agreement. Subsequently, after the workers had relied on the employer's promise and at least partially fulfilled their obligations under the prehire agreement, the employer could renege on his promise. Without a section 301 contract action, the employees would have no legal remedy against the employer. Frustrated workers left without a legal remedy against an employer who disregards a prehire agreement would perhaps resort to violent illegal action against the employer. Such action would engender industrial strife in the construction industry, a result which seems contrary to Congress' intent in authorizing section 8(f) prehire agreements.⁴³

recognition of the union which has not established majority status). After the Supreme Court's decision in *Local 103*, it seemed apparent that unions would be completely foreclosed from attempting to enforce prehire agreements through the use of picketing. Yet, in *International Union of Operating Eng'rs, Local 150 (Tri-City Excavating)*, 255 N.L.R.B. No. 58, 106 L.R.R.M. 1399 (1981), in an opinion released by the Board several months after *Associated Wrecking* had been decided, the Board held that a union did not commit an unfair labor practice by picketing to enforce a fringe benefit provision in a prehire contract. 106 L.R.R.M. at 1403. The Board distinguished *Local 103* by finding that picketing to enforce fringe benefit provisions was nonrecognition in nature. Since § 8(b)(7)(C) prohibits only recognition picketing, see note 14 *supra*, the Board concluded that § 8(b)(7)(C) had not been violated. *Id.*

The decision of the Board in *Tri-City Excavating* that fringe benefit provisions are nonrecognition in nature was proper. Furthermore, the Board was correct in finding that those provisions in prehire agreements which are nonrecognition in nature are enforceable. See text and notes at notes 44-45 *infra*. There is a possibility, however, that the courts may refuse to adopt the Board's position that the unions may use economic action, such as picketing, to enforce prehire agreements in cases where the picketing is nonrecognition in nature. Language in various decisions indicates that the courts would prefer to enforce prehire contracts in the context of a § 301 contract action rather than in the context of an unfair labor practice suit. See, e.g., *Precision Striping, Inc. v. NLRB*, 642 F.2d 1145, 1147 n.3, 107 L.R.R.M. 2009, 2010 n.3 (9th Cir. 1981); *Western Wash. Cement Masons Health & Security Trust Funds v. Hillis Homes, Inc.*, 612 P.2d 436, 440, 107 L.R.R.M. 2897, 2900 (1980). Moreover, the Supreme Court has indicated that economic coercion may be completely unavailable as a method of enforcing prehire agreements. In *Local 103*, the Supreme Court regarded § 8(f) to be similar to § 8(e) of the NLRA, 29 U.S.C. § 158(e) (1976), and noted that unions in the construction industry may not use economic coercion to enforce hot cargo clauses which are authorized by the construction industry proviso to § 8(e). 434 U.S. at 349 n.11, 97 L.R.R.M. at 2339 n.11. It should be noted, however, that the hot cargo clauses authorized by § 8(e) generally require a construction industry employer to subcontract work only to subcontractors who agree that their employees will become members of the union after working for a certain period of time on the construction site. Such clauses, unlike fringe benefit provisions, are obviously recognition in nature.

⁴³ See King & LaVaute, *Current Trends in Construction Industry Labor Relations — The Double-Breasted Contractor and the Prehire Contract*, 29 SYRACUSE L. REV. 901, 940 (1978):

The concept of an employer waiting with open arms to have his employees represented by a union runs contrary to practical labor relations experience and contrary in fact to the premises upon which our national labor laws were established. Surely, it should not be solely the employer's option to determine whether he will be subject to collective bargaining or whether he will remain bound to his collective bargaining agreement. . . . If the current trend is permitted to continue it will have a substantial adverse impact on the interests of construction industry labor unions and the employees they represent and, it is submitted, on the in-

The *Associated Wrecking* decision suggests that the following general principle should be applied by the courts in section 301 suits for enforcement of prehire agreements. When the provisions in a prehire agreement which the union is seeking to enforce in a section 301 contract action are not recognitional in nature, the provisions should be enforced regardless of whether the union can show that it represents a majority of the employer's workers.⁴⁴ For example, wage and benefit provisions are generally not recognitional, so long as both union and nonunion workers received the same wages and benefits.⁴⁵ No useful purpose is served when a court refuses to enforce such provisions merely because the union has not obtained majority status. When the provisions in question are recognitional, however, the union should be required to show that it represents a majority of workers before it can prevail in a section 301 suit to enforce them. Union signatory clauses, which require nonunion workers to become members of the union after a specified period of time, are an example of provisions which are clearly recognitional in nature. A useful purpose is served when a court refuses to enforce such provisions prior to a showing by the union that it represents a majority of the employer's workers. If such a provision were enforced before the union represents a majority of workers, the union could gain majority status even though a majority of the workers had been unable to choose freely whether to become union members.

One question not directly confronted by the *Associated Wrecking* court is whether an employer may affirmatively repudiate its obligations under a prehire agreement without risking liability in a section 301 suit brought by the union.⁴⁶ Assuming that the courts draw a distinction between recognitional and nonrecognitional provisions in prehire contracts, recognitional provisions — unenforceable so long as the union does not have majority status — could obviously be repudiated by employers if the union is unable to prove that it has achieved majority status. An argument can be made that the employer's repudiation should also relieve the employer from his obligation to honor nonrecognitional provisions in prehire contracts.⁴⁷ However, the congressional

terests of the vast majority of employers in the construction industry who still regard a labor contract as a contract.

Id. In *New Mexico Dist. Council of Carpenters v. the Mayhew Co.*, 107 L.R.R.M. 2930 (10th Cir. 1981), the court commented that "the employer who subjects himself to a § 8(f) agreement reaps the benefits of industrial peace at his worksite and should not complain when he is asked to honor the agreement that made such benefits possible." *Id.* at 2933-34.

⁴⁴ A union which does not represent a majority of the employer's workers may be foreclosed from enforcing a prehire agreement through unfair labor practice proceedings. See text and note at note 42 *supra*.

⁴⁵ See note 35 *supra*.

⁴⁶ In order to repudiate a prehire agreement, an employer should give the union notice that he does not intend to honor the agreement. In *Trustees of the Teamsters Constr. Workers v. Hawg n Action, Inc.*, 107 L.R.R.M. 2865 (10th Cir. 1981), the court found that an employer could not repudiate fringe benefit provisions in a prehire contract merely by failing to make payments as required by the provisions. *Id.* at 2867.

⁴⁷ In *Precision Striping, Inc. v NLRB*, 642 F.2d 1144, 107 L.R.R.M. 2009 (9th Cir. 1981), the Ninth Circuit indicated that an employer may repudiate a fringe benefit provision in a prehire contract whenever the union does not have majority status. See *id.* at 1147, 107

labor policy of protecting an employee's freedom to choose a bargaining representative is not furthered by allowing an employer to renege on his promise to pay set wages or fringe benefits.⁴⁸ Moreover, both nonunion and union employees would lose their entitlement to set wages and fringe benefits, even though their employer had voluntarily agreed to pay them. Therefore, the courts should be willing to enforce nonrecognition provisions in prehire agreements until the date of the prehire agreement's termination.⁴⁹

It is now possible that a union which has not achieved majority status may not enforce a prehire agreement by bringing an unfair labor practice charge against a recalcitrant employer, or by resorting to economic coercion.⁵⁰ Prior to *Associated Wrecking*, no federal court of appeals had considered whether provisions in prehire agreements should be enforced in contract actions brought pursuant to section 301.⁵¹ The *Associated Wrecking* decision can be interpreted as setting positive guidelines for future application of the law in this area. The enforceability of provisions in prehire agreements other than fringe benefit provisions must, of course, be decided on a case-by-case basis. Nevertheless, in all cases where the enforceability of provisions in prehire agreements is in question, the practitioner should recognize that courts may, in section 301 contract actions, enforce provisions in prehire agreements even though the union is unable to prove that it has majority status.

II. UNFAIR LABOR PRACTICES

A. Employer Unfair Labor Practices

1. Representation at Investigatory Interviews:

Lennox Industries v. NLRB
Appalachian Power Co.*

In 1975, in *NLRB v. J. Weingarten, Inc.*,¹ the United States Supreme Court ruled that if an employee is refused union representation during an investigatory interview which he reasonably fears may result in discipline, the

L.R.R.M. at 2010.

⁴⁸ In fact, Congress has recognized a national public interest in the protection of employee benefit rights. See 29 U.S.C. § 1001 (1976).

⁴⁹ The enforcement of nonrecognition provisions in prehire agreements should not impose an unfair burden on employers. Most prehire agreements are effective on a year-to-year basis. If the employer gives proper notice, usually three months prior to the termination date of the agreement, he may terminate the agreement. See *International Union of Operating Eng'rs*, 255 N.L.R.B. No. 83, 106 L.R.R.M. 1399, 1400 n.3 (1981). Thus, employers generally would be required to pay fringe benefits for, at the maximum, one year before they would no longer be bound by their prehire agreement.

⁵⁰ See note 42 *supra*.

⁵¹ The Tenth Circuit has since heard several cases on substantially the same issue as *Associated Wrecking*, and has followed the position adopted by the *Associated Wrecking* court. See note 36 *supra*.

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¹ 420 U.S. 251 (1975).

employee has a statutory right to decline to participate in the interview.² The Court upheld the decision of the National Labor Relations Board (Board) that an employer's denial of a request for union representation at an investigatory interview constitutes an unfair labor practice in violation of section 8(a)(1) of the National Labor Relations Act (NLRA)³ because it interferes with the employee's right, protected by section 7 of the NLRA,⁴ "to engage in other concerted activities for . . . mutual aid or protection. . . ."⁵

The *Weingarten* Court also approved four limitations of the right to representation which the Board, in other decisions,⁶ had delineated.⁷ First, the Court ruled, the right to representation arises only at the employee's request.⁸ Consequently, the employee may choose to participate in the interview without representation.⁹ Second, this right to request representation exists only where the employee reasonably believes that the investigation will result in disciplinary action.¹⁰ According to the Court, this reasonable belief is measured "by objective standards under all the circumstances of the case."¹¹ Third, the employer has no obligation to explain his refusal to allow union representation and may continue the investigation without interviewing the employee.¹² It is thus the employee's decision whether to forego any benefit which might be afforded by the interview.¹³ Finally, the employer has no duty to bargain with the union representative at an investigatory interview, and may insist on hearing only the employee's version of the situation.¹⁴

² *Id.* at 266-67.

³ Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;" 29 U.S.C. § 158(a)(1) (1976).

⁴ 29 U.S.C. § 157 (1976) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id.

⁵ 420 U.S. at 252-53 (citing *J. Weingarten, Inc.*, 202 N.L.R.B. 446, 82 L.R.R.M. 1559 (1973)). The *Weingarten* Court deferred to the Board's expertise and found the Board's construction of § 7 to be permissible. 420 U.S. at 266-67. The Court noted that it is the Board's responsibility to determine whether the need for union assistance exists in light of changing industrial practices and its experience in dealing with labor-management relations. *Id.* at 266.

⁶ *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 80 L.R.R.M. 1188 (1972), *enf't denied*, 482 F.2d 842, 83 L.R.R.M. 2823 (7th Cir. 1973); *Quality Mfg. Co.*, 195 N.L.R.B. 197, 79 L.R.R.M. 1269 (1972), *enf't denied*, 481 F.2d 1018, 83 L.R.R.M. 2817 (4th Cir. 1973), *rev'd sub nom. Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

⁷ 420 U.S. at 256.

⁸ *Id.* at 257.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 257 n.5 (quoting *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198 n.3, 79 L.R.R.M. 1269, 1271 n.3 (1972)).

¹² 420 U.S. at 258.

¹³ *Id.*

¹⁴ *Id.* at 260.

The criteria *Weingarten* imposed on the right to representation were highlighted by two cases which arose during the *Survey* year. In *Lennox Industries v. NLRB*,¹⁵ the Court of Appeals for the Fifth Circuit considered what constitutes an investigatory interview in order to determine whether the requirement for union representation is triggered even when no discipline is intended by the employer.¹⁶ The Fifth Circuit held that when an interview is designed to elicit information which might reasonably result in immediate or future discipline, the right to a union representative exists.¹⁷ According to the *Lennox* court, when an interview focuses on poor work or an employee-supervisor altercation, the risk of discipline is inherent and the right to representation attaches, even though no discipline is contemplated by the employer.¹⁸

In *Lennox*, the complaining employee, Paul Nestle, was an assembly line worker supervised by Leo Ary. Fred Boenker was manager of final assembly and Ary's superior.¹⁹ Nestle had recently been transferred from a different assembly line and was having difficulty increasing his production speed in the new line.²⁰ He was assigned to different tasks on the line and was told by Ary that if he did not increase his speed, Ary would have to take some action against him.²¹ On February 16, 1978, Ary informed Nestle that he wanted to speak with him.²² On the way to Ary's desk, Nestle said that he would like a union representative present but Ary indicated it would be unnecessary.²³ As they walked, Nestle said something which Ary interpreted as a threat. Ary then took Nestle directly to Boenker's office.²⁴ In Boenker's office, Ary complained that Nestle had threatened him but Nestle denied this.²⁵ After it was determined that there had been no witnesses to the conversation between Ary and Nestle, Boenker suggested that they discuss the production problem.²⁶ While Boenker answered a telephone call, Ary and Nestle expressed their animosity toward one another.²⁷ When Boenker completed his call, he suggested to Nestle and Ary that they get along in spite of their personal differences since he was interested in improved production.²⁸ Boenker pointed out that he had observed Nestle and believed that he and a co-employee were causing a slowdown in production.²⁹ At this point, Nestle requested union representation. Boenker responded that he would get a representative if it were necessary.³⁰ Boenker

¹⁵ 637 F.2d 340, 106 L.R.R.M. 2607 (5th Cir. 1981).

¹⁶ *Id.* at 342, 106 L.R.R.M. at 2608.

¹⁷ *Id.* at 344, 106 L.R.R.M. at 2610.

¹⁸ *Id.*

¹⁹ *Id.* at 342, 106 L.R.R.M. at 2608.

²⁰ *Lennox Indus., Inc.*, 244 N.L.R.B. 607, 608, 102 L.R.R.M. 1298, 1300 (1979).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ 637 F.2d at 342, 106 L.R.R.M. at 2608.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 244 N.L.R.B. at 608, 102 L.R.R.M. at 1300.

³⁰ 637 F.2d at 342, 106 L.R.R.M. at 2608.

then stated that Nestle would continue to work under Ary's supervision and that he did not want continued disharmony.³¹ Finally, Boenker instructed Nestle that his production would have to improve, but indicated that this was not meant as a threat.³²

The union filed charges alleging a violation of section 8(a)(1) of the NLRA. The National Labor Relations Board found that, under *Weingarten*, the denial of union representation was an unfair labor practice.³³ The Fifth Circuit upheld the Board's decision. In so doing, the court acknowledged that when the purpose of a meeting is supervisory rather than investigatory, no right to union representation inheres.³⁴ Nevertheless, the court maintained that the questioning of Nestle about both his poor work performance and the confrontation with his supervisor was designed to elicit responses which could be used in a future disciplinary action.³⁵ The *Lennox* court concluded that such an interview is by nature "an investigatory interview in which the risk of discipline reasonably inheres."³⁶ The court then rejected the test applied by other circuits that the right to representation arises only when a significant objective of the interview is to elicit facts to support disciplinary action which is probable or is being seriously considered.³⁷ The *Lennox* court noted that often management does not determine whether to consider disciplinary action seriously until after the employee has been questioned.³⁸ Consequently, according to the court, the risk of discipline inheres at such an interview.³⁹ A rule which requires discipline to be probable or at least seriously considered in order for the employee's right to union representation to vest would thus unduly limit the protection afforded by *Weingarten*.⁴⁰

At first glance, *Lennox* may appear to be simply an application of the *Weingarten* rule to a particular set of facts. Under *Weingarten*, the reasonableness of the employee's belief that discipline may result is measured objectively, based on all of the circumstances of the case. In view of the critical statements made by Ary in the weeks prior to the interview and the animosity that existed between Ary and Nestle, a belief that disciplinary action would result was a

³¹ *Id.*

³² *Id.*

³³ 244 N.L.R.B. at 608, 102 L.R.R.M. at 1300.

³⁴ 637 F.2d at 343-44, 106 L.R.R.M. at 2609.

³⁵ *Id.* at 344, 106 L.R.R.M. at 2609-10.

³⁶ *Id.*, 106 L.R.R.M. at 2610 (quoting *Weingarten*, 420 U.S. at 262). The *Lennox* court also held that Nestle's request for union representation while on the plant floor was sufficient to require a representative at both meetings. 637 F.2d at 345, 106 L.R.R.M. at 2610-11. Since Ary, a company official, was aware of the request and present at both meetings and since the two meetings were part of a "single interrelated episode," one request was sufficient. *Id.*

³⁷ 637 F.2d at 344, 106 L.R.R.M. at 2610. See *AAA Equip. Serv. Co. v. NLRB*, 598 F.2d 1142, 1146, 101 L.R.R.M. 2381, 2383 (8th Cir. 1979); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 410, 99 L.R.R.M. 2841, 2845 (9th Cir. 1978).

³⁸ 637 F.2d at 344, 106 L.R.R.M. at 2610.

³⁹ *Id.*

⁴⁰ *Id.*

reasonable one. "Substantial evidence on the record as a whole,"⁴¹ then, exists to support the Board's finding that Nestle reasonably feared discipline.⁴²

While the result in *Lennox* appears to be consistent with the *Weingarten* holding, the language used by the court indicates a willingness to expand the right to union representation to situations not necessarily envisioned by the *Weingarten* Court. In *Weingarten*, the Court pointed out that since the right to union representation is limited to situations where the employee reasonably believes that discipline will result, the rule does not apply to everyday shop-floor conversations which include training and correction.⁴³ A key fact noted by the Court in *Weingarten* was that the interview at issue related to an allegation of dishonesty for which the employee could have been discharged without further notice.⁴⁴ There was no question that the employee might reasonably believe that discipline would result.⁴⁵ In holding that representation is required if the interview is "designed to elicit information which might reasonably result in discipline — either immediately or at some time in the future . . .,"⁴⁶ the *Lennox* court appears to have broadened the category of interviews where it will recognize a right to representation. The court viewed the risk of discipline as inherent in an interview focusing on poor work or on an employee-employer confrontation even if disciplinary action does not appear to be imminent.⁴⁷ The *Weingarten* rule, the court suggested, was designed to protect employees from inadvertent answers given during such interviews.⁴⁸

Based on the language of *Lennox*, it is difficult to imagine a supervisory counseling conference in which the right to representation would not exist. It is questionable, however, whether in finding a right to union representation at the counseling stage of supervisor-employee relations the *Lennox* court properly applied the *Weingarten* "reasonable belief" test. By adding the words "or at some time in the future" to the *Weingarten* standard, the court changed the nature of that standard. Moreover, a right to representation during a supervisory counseling conference does not further the purposes enunciated in *Weingarten*. There, the Court noted that the absence of a union representative at an investigatory interview would perpetuate the inequality of bargaining power which the National Labor Relations Act was designed to eliminate.⁴⁹ In addition, union representation in an investigatory interview, according to the *Weingarten* Court, is helpful to both the employee and the employer.⁵⁰ Such rep-

⁴¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

⁴² 637 F.2d at 344-45 n.8, 106 L.R.R.M. at 2610 n.8.

⁴³ 420 U.S. at 257-58.

⁴⁴ *Id.* at 258 n.5.

⁴⁵ *Id.*

⁴⁶ 637 F.2d at 344, 106 L.R.R.M. at 2610 (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 420 U.S. at 262.

⁵⁰ *Id.* at 262 & n.7.

resentation may help resolve the issues in an underlying incident and avoid needless disciplinary actions and grievances that might otherwise occur.⁵¹

The *Weingarten* decision, then, appears to have been directed at interviews investigating particular incidents or repeated failures to improve work rather than at conferences designed for early counseling on poor work performance. There is serious question whether employee-employer relations would be served by recognizing the right to union representation during the initial stages of such counseling, as suggested by *Lennox*. Normally, such a conference would be geared to working out the problems which stand in the way of improved performance. The introduction of a third party, present for the purpose of representing the employee, in a situation where the employer is not contemplating discipline, would be likely to encourage a more adversarial atmosphere and thus would not be conducive to greater harmony between supervisor and employee.

Apart from the sound labor policy considerations which support a cautious approach to the expansion of the right to union representation, it is important also to note that it is the National Labor Relations Board, not the courts, that is entrusted with the task of determining whether a need for union representation exists "in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations."⁵² There is no evidence that the Board is interested in broadening the scope of the *Weingarten* protection to the extent suggested by the language in *Lennox*. The Board's decision that *Lennox* committed an unfair labor practice was based on Nestle's reasonable fear of discipline in view of Ary's prior statement that action would be taken against Nestle if his performance did not improve.⁵³ The Board applied the *Weingarten* standard and used none of the expansive language suggested by the Fifth Circuit. The court should defer to the Board's expertise in this area and refrain from modifying the standard the Board has adopted.

In contrast to the Fifth Circuit approach, the Ninth Circuit, in an earlier case, used much more limiting language in upholding a Board determination.

⁵¹ *Id.* at 262-63.

⁵² *Id.* at 266. The Board has the function of applying the general provisions of the NLRA to the complexities of industrial life. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). The Board's decisions are given deference because of its expertise in the labor-management field, *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965), and the balance it strikes in reconciling the conflicting interests is subject to limited judicial review. *NLRB v. Truck Drivers Union*, 353 U.S. 87, 96 (1957).

The *Weingarten* Court also noted that the recognition of a statutory right to representation at investigatory interviews went along with provisions in many collective bargaining agreements. 420 U.S. at 267. The Court quoted language from the Bethlehem Steel Corp. and United Steelworkers Agreement of 1971, Art. XI, § 4(d), which provided: "Any Employee who is summoned to meet in an enclosed office with a supervisor for the purposes of discussing possible disciplinary action shall be entitled to be accompanied by the Assistant Grievance Committeeman. . . ." *Id.* at 267 n.11. This right of representation in a conference held for the purposes of discussing possible disciplinary action is far more limited than that suggested by the Fifth Circuit as a statutory right.

⁵³ 244 N.L.R.B. at 608, 102 L.R.R.M. at 1300.

In *Alfred M. Lewis, Inc. v. NLRB*,⁵⁴ the Board held that the employer violated section 8(a)(1) by denying union representation at counseling sessions which were an integral part of and a preliminary stage in the disciplinary procedure.⁵⁵ The *Lewis* court distinguished interviews in which the right to representation inheres from those in which it does not, in the following manner:

It should be acknowledged that a supervisory interview in which the employee is questioned or instructed about work performance inevitably carries with it the threat that if the employee cannot or will not comply with a directive, discharge or discipline may follow; but that latent threat, without more, does not invoke the right to the assistance of a union representative. The right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered.⁵⁶

The *Lewis* court recognized that inherent in any supervisory counseling session is the risk of future discipline. This threat, however, does not rise to the level of demanding a *Weingarten* right to representation until disciplinary action is probable or seriously considered. In spite of this more restricted standard, the *Lewis* court found substantial evidence for the Board's conclusion that the employees had a right to union representation in view of the atmosphere of intimidation and the part the counseling sessions played in the disciplinary process. The language of the *Lewis* decision and the application of its standard to the facts of the case demonstrate a close adherence to the Board's and *Weingarten*'s "reasonable belief" standard.

The question of where the line is to be drawn between supervisory and investigatory interviews remains open. The issue is whether the latent threat of discipline, present in any supervisory interview designed to improve work performance, is sufficient to invoke the right to union representation. By stating that the right inheres when discipline might reasonably result at some time in the future even when no discipline is contemplated by the employer, the Fifth Circuit appears ready to take an expansive view of the *Weingarten* right. Until the Board and/or the Supreme Court defines more clearly the limits of the *Weingarten* right, employers and unions will continue to be uncertain of when the right to representation exists.

Another of the elements of the *Weingarten* right to union representation was highlighted during the *Survey* year in a decision of the National Labor Relations Board. In *Appalachian Power Co.*,⁵⁷ the Board held that a shop steward could not invoke an employee's right to union representation in an investigatory interview when no confirmation of the request was made by the employee and the

⁵⁴ 587 F.2d 403, 99 L.R.R.M. 2841 (9th Cir. 1978).

⁵⁵ *Id.* at 410, 99 L.R.R.M. at 2845-46.

⁵⁶ *Id.* The Eighth Circuit adopted this language in *AAA Equip. Serv. Co. v. NLRB*, 598 F.2d 1142, 101 L.R.R.M. 2381 (8th Cir. 1979).

⁵⁷ 253 N.L.R.B. No. 135, 106 L.R.R.M. 1041 (Dec. 22, 1980).

supervisory person involved was not informed of the request.⁵⁸ The Board thus declined to extend the *Weingarten* right to representation which arises only at the employee's request.⁵⁹

Appalachian Power Co. involved a shift supervisor, Charles Harrison, who asked employees Parsons and Noffsinger to repair a high pressure water heater.⁶⁰ Parsons, afraid that the heater was unsafe, objected. His refusal was reported to Hill, the maintenance superintendent.⁶¹ Hill requested that the employees report to his office.⁶² Parsons paged Goff, the shop steward, asking him to meet them at Hill's office.⁶³ While on their way to his office, Parsons and Noffsinger met Hill in the corridor.⁶⁴ Hill began to question them about their refusal to repair the heater.⁶⁵ While this conversation ensued, Goff, the shop steward, entered the corridor and spoke to Harrison, the shift supervisor, who was standing approximately 15 feet away from where Hill, Parsons, and Noffsinger were speaking.⁶⁶ Goff told Harrison that he had come for the meeting. He was then ordered to leave by Harrison. Employees Parsons and Noffsinger made no comment and Goff left.⁶⁷ No evidence was presented indicating that Hill was aware of Goff's presence. The discussion between Hill and Parsons and Noffsinger continued in the hall for several minutes and culminated in the employees' suspension for refusing to work on the heater.⁶⁸

The union filed a charge alleging that the Appalachian Power Company had denied Parson's and Noffsinger's request for union representation in violation of section 8(a)(1) of the Labor Management Relations Act. The Administrative Law Judge (ALJ), whose rulings, findings, and conclusions were affirmed by the Board, concluded that the employer had not committed an unfair labor practice by conducting the meeting even though the steward was told to leave.⁶⁹ The ALJ determined, as a factual matter, that the employees had made no specific request to Hill for union representation.⁷⁰ Furthermore, the ALJ maintained that a request for representation must be initiated by the employees involved and must be directed to the management official who is conducting the interview.⁷¹ The ALJ pointed out that *Weingarten* had

⁵⁸ *Id.*, 106 L.R.R.M. at 1041-42.

⁵⁹ 420 U.S. at 257.

⁶⁰ 253 N.L.R.B. No. 135, 106 L.R.R.M. at 1041.

⁶¹ *Id.* On the previous day, Parsons had also refused to repair the heater, claiming that it was unsafe. *Id.* After a meeting between Parsons, his union steward, and the production supervisor, Parsons was assigned to work on a different heater. *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*, 106 L.R.R.M. at 1042.

⁷⁰ *Id.*

⁷¹ *Id.*

underscored the Board's view that the employee could forego his right to representation.⁷² The ALJ reasoned that to allow the union steward to invoke the employees' *Weingarten* rights would deprive those employees of the opportunity to evaluate whether the steward's presence would be to their benefit.⁷³ It is the employee who has the vested interest in the outcome of the interview and, according to the ALJ, it should be his right to determine if he would like union assistance.⁷⁴ The union's interest in attending the interview is not identical to that of the employee. In addition to protecting this employee's interests, the union must also assure other employees that they will be represented in similar circumstances.⁷⁵ The ALJ concluded that if the union could assert the employee's right to be represented, the employee would be unable to determine if this representation benefited his interests and one of the fundamental purposes of the rule would be undermined.⁷⁶

Prior Board decisions consistently have held that the employee must initiate the request for representation.⁷⁷ The ALJ acknowledged that the union did not initiate the request for representation on its own.⁷⁸ Nevertheless, the ALJ concluded that the employees showed no continuing interest in representation, pointing out that Parsons did not renew his request for representation or communicate it directly to Hill, who was unaware of Parsons' call to Goff.⁷⁹ In addition, the employee must direct the request for representation to the management official with whom the interview is to take place since this official alone knows the reason for the interview and can assess whether or not to grant the request.⁸⁰ Hill, whose back was turned toward Goff and Harrison, was unaware of Goff's presence as well as of the interchange between the two. Therefore, according to the ALJ, Parsons' and Noffsinger's silence during the interchange could not be considered a ratification of Goff's statement that he was there to represent them.⁸¹ Since Parsons did not communicate to Hill a

⁷² *Id.*, 106 L.R.R.M. at 1041.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*, 106 L.R.R.M. at 1042. See, e.g., *Kohl's Food Co.*, 249 N.L.R.B. 75, 104 L.R.R.M. 1063 (1980); *First Nat'l Supermarkets, Inc.*, 247 N.L.R.B. No. 162, 103 L.R.R.M. 1317 (Feb. 19, 1980).

⁷⁸ 253 N.L.R.B. No. 135, 106 L.R.R.M. at 1041.

⁷⁹ *Id.*

⁸⁰ *Id.*, 106 L.R.R.M. at 1042. In *Lennox Indus., Inc.*, 244 N.L.R.B. 607, 102 L.R.R.M. 1298 (1979), the Board held that no *Weingarten* violation was committed when the employer interviewed an employee in the absence of union representation. (This portion of the Board's *Lennox* decision was not addressed in the appeal discussed in text and notes at notes 15-53 *supra*, which related to a different employee.) In this part of the case, the employee indicated to the employer's industrial relations manager that he wanted representation but then spoke with the manager without renewing his request for representation. The Board emphasized that the person asking to meet with the employee must be informed of the demand, since only that individual knows the subject of the meeting and is in a position to determine how to proceed. *Id.* at 609, 102 L.R.R.M. at 1301.

⁸¹ 253 N.L.R.B. No. 135, 106 L.R.R.M. at 1042.

desire for representation, the employer did not unlawfully deny union representation during a disciplinary meeting.⁸²

Appalachian Power is premised on the reasonable notion that the right to representation belongs to the employee. According to this view, it is not the union's bargaining rights but the individual employee's rights which are violated by a denial of representation. This approach has had an uncertain history in NLRB and court decisions. In 1967, in *Texaco, Inc.*,⁸³ the Board found that the denial of union representation in an investigatory interview was an unlawful refusal to bargain with a union. The Fifth Circuit Court of Appeals disagreed, explaining that the purpose of the interview was to question the employee, not to bargain with him.⁸⁴ The court recognized the right to union representation at a disciplinary interview as a function of the right to bargain collectively regarding terms and conditions of employment.⁸⁵ Since an investigatory interview deals with eliciting facts rather than the consequences of those facts, the court found no bargaining rights and consequently no right to representation in such an interview.⁸⁶ The Board later adopted the Fifth Circuit's position. For example, in 1975, in *Quality Manufacturing Co.*,⁸⁷ the Board stated that in the case of a purely investigatory interview, denial of representation did not violate the bargaining rights of the union but did violate the employee's individual right to be represented by his union.⁸⁸ Investigatory interviews, however, continued to be distinguished from disciplinary interviews. The *Weingarten* Court, for example, indicated that the employer only had a duty to bargain with the union representative at a disciplinary interview, not at an investigative interview.⁸⁹

In 1979, in *Baton Rouge Water Works Co.*,⁹⁰ however, in the course of holding that no right to union representation exists when the employer simply meets with the employee to inform him of previously determined discipline, the Board abandoned the distinction between investigatory and disciplinary inter-

⁸² *Id.* The type of disciplinary interview involved here is to be distinguished from the type of disciplinary meeting involved in *Baton Rouge Water Works Co.*, 246 N.L.R.B. No. 161, 103 L.R.R.M. 1056 (Dec. 14, 1979). The Board in *Appalachian Power* took care to note that *Baton Rouge* had not held that there was no right to representation at a disciplinary interview. 253 N.L.R.B. No. 135 n.1, 106 L.R.R.M. at 1042. Rather, *Baton Rouge* had held that a meeting held for the sole purpose of informing the employee of a previously made disciplinary decision did not demand union representation. 246 N.L.R.B. No. 161, 103 L.R.R.M. at 1058. In an interview of the type involved here, *Weingarten* rights would apply since the interview included the employer's attempt to question the employees about their acts. Nevertheless, the Board in this case found ample justification for the result based on its facts.

⁸³ 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967).

⁸⁴ *Texaco, Inc. v. NLRB*, 408 F.2d 142, 70 L.R.R.M. 3045 (5th Cir. 1969).

⁸⁵ *Id.* at 144-45, 70 L.R.R.M. at 3046.

⁸⁶ *Id.* at 145, 70 L.R.R.M. at 3046-47.

⁸⁷ 195 N.L.R.B. 197, 79 L.R.R.M. 1269 (1972), *aff'd sub nom. Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

⁸⁸ *Id.* at 198-99, 79 L.R.R.M. at 1270-71.

⁸⁹ 420 U.S. at 259-60.

⁹⁰ 246 N.L.R.B. No. 161, 103 L.R.R.M. 1056 (Dec. 14, 1979).

views.⁹¹ The Board determined that the same *Weingarten* right is to be accorded to an employee whether the interview is investigatory or disciplinary in nature as long as the interview is not held solely for the purpose of informing an employee of a previously made disciplinary decision.⁹² It appears that, by abandoning the disciplinary-investigatory distinction, the Board abandoned the theory that the union has a right which must be protected. The Board, in fact, noted that in a situation where discipline is being effected, the interests of the other employees are best served through the use of the grievance procedure.⁹³ Currently, the Board seems to view the right to representation at the disciplinary or investigatory interview as solely the employee's individual right. If the right to representation does indeed belong to the employee rather than the union, it is reasonable to require the employee to notify the employer that he wishes representation. Moreover, the union should not be allowed to assert the employee's right to representation in the absence of an indication that the employee wishes to exercise the right.

It is arguable that the only way to insure representation for an inarticulate, intimidated employee is to allow the union to assert the employee's right. Such an employee could easily incriminate himself, even if innocent, if pressured in a situation which he finds uncomfortable. The employee may not know of his right to representation or he may be too intimidated to invoke the right. Yet, to permit the union to assert the employee's right to representation allows the union to have too much control over the average employee. The employee involved in the interview is in the best position to evaluate how the interview is progressing and what the potential impact of interposing a union representative might be. The employee must decide what will best serve his interests in any particular situation based on the circumstances and the individuals involved. The union's interests, which are those of its entire membership, are not necessarily identical to the employee's in all instances. Consequently, a rule which allows the union to make the representation decision runs counter to the rights of the individual employee. An option apparently not considered by the Board would be to require the employer to notify the employee whenever the union attempts to assert the employee's right to representation. Such an approach gives the employee the opportunity to make the ultimate decision. This would remedy the problem of the ill-informed or intimidated employee without permitting the union to control the employee's right. Though some employees might feel pressured by their fellow employees to be represented by the union, this risk seems minimal when compared to the problems inherent in requiring that the initial request come from the employee.

Apart from the possible improvement of requiring that the employee be informed of a union attempt to assert the employee's right to representation,

⁹¹ *Id.*, 103 L.R.R.M. at 1058.

⁹² *Id.*

⁹³ *Id.*, 103 L.R.R.M. at 1058 n.6.

the remainder of the Board's decision in *Appalachian Power* is sound. It is reasonable to require that the demand for representation be made directly to the management official involved in the interview.⁹⁴ Only that individual is in a position to evaluate whether the interview will be of a type that necessitates representation. Therefore, he is the only person in a position to make an informed decision regarding the request. In addition, the management official involved in the interview is the only person in a position to evaluate the various options available — whether to grant the request for representation, cancel the interview, or offer a choice to the employee. To allow a request to another management official to suffice would limit these options guaranteed by *Weingarten* and would place unrealistic and unnecessary burdens on management.

disciplinary and investigatory interviews alike, recognizing the right to representation as an individual employee right rather than a union bargaining right. The Board has declined to allow a union to assert an employee's *Weingarten* right and continues to require that an employee notify the management personnel involved in the interview of his request for union representation. The opportunity remains, however, for the Board to require notification to the employee when the union attempts to invoke the employee's right to representation.

2. *Representation During Hiatus Period: Anchortank, Inc. v. NLRB**

In order to promote some degree of equality of bargaining power between employers and employees,¹ section 7 of the National Labor Relations Act (the Act) provides, *inter alia*, that employees have the right to engage in concerted activity for the purpose of mutual aid or protection.² Furthermore, under sec-

⁹⁴ See text and notes at notes 79-82 *supra*.

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¹ See 29 U.S.C. § 151 (1976) which provides:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

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

See also *NLRB v. J. Weingarten*, 420 U.S. 251, 262 (1975).

² Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976) provides: Employees shall have the right to self-organization, to form, join or assist

tion 8(a)(1) of the Act, employers may not interfere with, restrain, or coerce employees in the exercise of concerted activities.³ The courts and the National Labor Relations Board (the Board) agree that the actions of a single employee may be concerted activities.⁴ The federal courts of appeals are split, however, over the question of whether the individual employee's acts must have both a concerted purpose and effect to fall within the Act's protection or whether merely a concerted effect is sufficient.⁵ Without resolving this question, the Supreme Court, in *NLRB v. J. Weingarten*,⁶ held that a single employee's request to have a representative from the certified bargaining unit present at an investigatory interview was a concerted activity.⁷ In that case, the Court agreed with the Board that an employee had the right to request union representation when the employee reasonably believed the interview could result in discipline.⁸ During the *Survey* year, in *Anchortank v. NLRB*,⁹ the Fifth Circuit held that an employee's request for similar representation prior to a union's certification as the bargaining representative but after the union had won a challenged election was concerted activity protected by section 7.¹⁰

In *Anchortank* a representation election was held at a facility of the employer, Anchortank, Inc.¹¹ Although the union appeared to have won the election, five of the votes cast were challenged.¹² Because these votes could affect the outcome of the election, the union could not be certified until the Board settled the challenge. After a period of almost ten months, the Board ruled that although two of the challenged votes were invalid, the outcome of the election

labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

³ Section 8 of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights granted in section 157 of this title."

⁴ See *Weingarten* *supra* note 1.

⁵ See text at notes 20-27 *infra*.

⁶ 420 U.S. 251 (1975).

⁷ *Id.* at 260-61.

⁸ *Id.* at 260. The Board defined the parameters of the right to union representation at an interview as follows: (1) the right is based on § 7 of the Act; (2) the right only arises upon the employee's request for representation; (3) the right is limited to interviews that the employee reasonably believes will result in discipline; (4) the right does not preclude the employer from forcing the employee to choose between attending the interview without representation or having no interview; and (5) the right does not compel the employer to bargain with the union representative. *Id.* at 256-60. See *Quality Mfg. Co.*, 195 N.L.R.B. 197, 79 L.R.R.M. 1303 (1972), *considered in* *Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975); *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 80 L.R.R.M. 1188 (1972). See generally Brodie, *Union Representation and the Disciplinary Interview*, 15 B.C. IND. & COM. L. REV. 1 (1973); Comment, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329 (1974).

⁹ 618 F.2d 1153, 104 L.R.R.M. 2689 (5th Cir. 1980).

¹⁰ *Id.* at 1162, 104 L.R.R.M. at 2695.

¹¹ *Id.* at 1156, 104 L.R.R.M. at 2690.

¹² *Id.*

remained the same.¹³ During this interim period Anchortank had made unilateral changes in the working conditions at its facility.¹⁴ In addition, the company refused the requests of two employees to have a union representative (presumably a non-employee of Anchortank¹⁵) present at interviews concerning their behavior.¹⁶ One of these interviews was for the purpose of investigation and the other was of a disciplinary nature.¹⁷ The *Anchortank* court, with little discussion, affirmed the Board's finding that unilateral changes in working conditions made by the employer during the hiatus period caused by the election challenge constituted an unfair labor practice.¹⁸ The court cited ample precedent from its own decisions for the proposition that an employer who makes unilateral changes during a hiatus does so at his own risk.¹⁹ The court had no such precedent, however, to answer the question of whether Anchortank's denial of the requests for union representation was an unfair labor practice. The Supreme Court's holding five years earlier in *Weingarten* was not dispositive of the issue, since in that case the union already had been certified as the official bargaining unit at the time the employee requested representation. Therefore, in order to determine if the employee's right to union representation extended to interviews conducted during the hiatus period, the court undertook its own examination of the scope of section 7 and concerted activity.

The *Anchortank* court began its inquiry by examining the circumstances in which the actions of an individual employee may be deemed to be concerted. The circuit courts of appeals are divided over this question. Some circuits have taken a strict approach requiring that a two-part test be met. The acts of a single employee must be carried out for the *purpose* of affecting the group and the acts must in fact have an impact upon the group.²⁰ Other circuits have taken a more liberal approach in defining concerted activity, and found that section 7 protects acts that have only a group effect.²¹

¹³ *Id.* See *Anchortank, Inc.*, 233 N.L.R.B. 295, 96 L.R.R.M. 1539, 1540 (1977).

¹⁴ 618 F.2d at 1156, 104 L.R.R.M. at 2690. *Anchortank* changed its method of computing vacation pay, eliminated holiday pay, decreased its work day from 8½ to 8 hours, required employees to punch in and out for lunch breaks, added a swing shift and reclassified employee's job classifications. *Id.*

¹⁵ *Id.* at 1158 n.6, 104 L.R.R.M. at 2692 n.6.

¹⁶ *Id.* at 1156, 104 L.R.R.M. at 2692.

¹⁷ *Id.*, 104 L.R.R.M. at 2690-91.

¹⁸ *Id.* at 1157, 104 L.R.R.M. at 2691.

¹⁹ See, e.g., *NLRB v. W.R. Grace & Co., Construction Products Division*, 571 F.2d 279, 282, 98 L.R.R.M. 2001, 2003 (5th Cir. 1978); *General Electric Co., Battery Products, Capacitor Department v. NLRB*, 400 F.2d 713, 729, 69 L.R.R.M. 2081, 2092-93 (5th Cir. 1968), *cert. denied*, 394 U.S. 904 (1969); *NLRB v. Laney and Duke Storage Warehouse Co.*, 369 F.2d 859, 869, 63 L.R.R.M. 2552, 2558 (5th Cir. 1966).

²⁰ See, e.g., *Aro, Inc. v. NLRB*, 596 F.2d 713, 718, 101 L.R.R.M. 2153, 2156 (6th Cir. 1979); *Keokuk Gas Service Co. v. NLRB*, 580 F.2d 328, 334, 98 L.R.R.M. 3332, 3336 (8th Cir. 1978); *Dreis v. Krump*, 544 F.2d 320, 327, 93 L.R.R.M. 2739, 2743-44 (7th Cir. 1976).

²¹ See *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 67 L.R.R.M. 2083 (2d Cir. 1967). See also Comment, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. PA. L. REV. 152 (1972).

The *Anchortank* court cited *Mushroom Transportation Co. v. NLRB*²² as the leading case for the stringent definition of concerted activity. In *Mushroom* the Court of Appeals for the Third Circuit held that an employee's conversation with other employees informing them of their rights under the existing collective bargaining agreement as well as violations of that agreement was not concerted activity within the meaning of section 7.²³ Reversing the decision of the NLRB, the court, on appeal, adopted a standard of review which provided that the acts of an individual employee are concerted if "at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."²⁴

The *Anchortank* court found a more expansive definition of concerted activity, commonly characterized as constructive concerted activity, in the Second Circuit case of *NLRB v. Interboro Contractors, Inc.*²⁵ In *Interboro*, an employee's attempt to enforce the provisions of a collective bargaining agreement was found to be a concerted activity because of the effect such an act had on other employees.²⁶ It was immaterial to the *Interboro* court whether the employee acted solely for his own benefit²⁷ or whether his fellow employees had demonstrated any interest in the activity.²⁸ The court concluded that even if the claims raised by the employee were not meritorious, the employee's actions still were protected under section 7 since there was evidence that he had a reasonable basis for believing the claims were legitimate ones.²⁹

After exploring these two divergent definitions of concerted activity, the *Anchortank* court concluded that the denial of union representation during the hiatus period would be interference with the employee's right to engage in concerted activity under either standard.³⁰ In so concluding, the court noted that the request for union assistance demonstrated to other employees that they also could call upon the representative in similar situations.³¹ The court further stated that the presence of the union representative would prevent the employer from developing a pattern of disciplining any employee unjustly.³² Thus, according to the court, the request had a concerted effect. This concerted effect, without more, the court concluded, satisfies only the *Interboro* standard, however. In continuing its analysis, the court reasoned that once the union had won an election, even if the election were challenged, the union representative

²² 330 F.2d 683, 56 L.R.R.M. 2034 (3d Cir. 1964).

²³ *Id.* at 685, 56 L.R.R.M. at 2035.

²⁴ *Id.*

²⁵ 388 F.2d 495, 67 L.R.R.M. 2083 (2d Cir. 1967).

²⁶ *Id.* at 499-500, 67 L.R.R.M. at 2087.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 500 n.7, 67 L.R.R.M. at 2087 n.7. *Accord* *NLRB v. John Langenbacher Co.*, 398 F.2d 459, 463, 68 L.R.R.M. 2842, 2845 (2d Cir. 1968).

³⁰ 618 F.2d at 1162, 104 L.R.R.M. at 2694.

³¹ *Id.*

³² *Id.*

"stands in for all the unit employees."³³ Therefore, the single employee's request for union representation was done for the purpose of enlisting the aid of the entire bargaining unit and thus met the *Mushroom* standard as well.

After concluding that the employee's request to have union representation at an interview that could result in discipline satisfied either the *Mushroom* or *Interboro* tests, the court balanced the right of the employee to engage in such a concerted activity against conflicting rights of the employer.³⁴ Specifically, the court balanced the employer's right to exclude non-employees from his property against the employee's right to have a non-employee present at an interview.³⁵ The court concluded that prior to any representation election the employer may lawfully exclude any non-employee from his property.³⁶ The court based this conclusion upon its reading of *Weingarten*, i.e., that an employee has the right to have another employee present at the interview.³⁷ The court reasoned that since an employee who is prevented from bringing a non-employee to an interview is not prevented from being accompanied by a fellow employee, the employee's rights under section 7 can be preserved without disrupting the employer's property rights. Consequently, in the period prior to the representation election any rights that the employee may claim to have a non-employee present at an interview is insufficient to overcome the property rights of the employer.³⁸

Once the union has won a representation election, however, the court ruled that the employee's right to union representation, even when the union representative was a non-employee, outweighed the employer's property rights.³⁹ The court concluded that this was true even if the union had won a *challenged* election.⁴⁰ Thus, the court held that the refusal to allow an employee to bring a representative to an investigation during the hiatus was done at the employer's risk.⁴¹ If the challenge to the election subsequently proved unsuccessful, the employee's right would be preeminent. Yet, the *Anchorbank* court went further in its analysis and stated that an employee's request is protected if he reasonably believes that the interview will result in discipline even if the union loses the election challenge.⁴² Therefore, a denial of that right violated section 8(a)(1) if the employee reasonably believed those interviews would result in discipline.⁴³

³³ *Id.*, 104 L.R.R.M. at 2695.

³⁴ *Id.* at 1164, 104 L.R.R.M. at 2696-97.

³⁵ *Id.*

³⁶ *Id.* at 1163, 104 L.R.R.M. at 2696.

³⁷ *Id.* at 1157, 104 L.R.R.M. at 2691.

³⁸ *Id.* at 1163, 104 L.R.R.M. at 2696.

³⁹ *Id.*

⁴⁰ *Id.* at 1164, 104 L.R.R.M. at 2697.

⁴¹ *Id.*

⁴² *Id.* at 1165 n.22, 104 L.R.R.M. at 2697 n.22.

⁴³ *Id.* at 1165, 104 L.R.R.M. at 2697. The court concluded that any interview, except one conducted solely to inform an employee of a previously-made disciplinary decision, would fall within the ambit of protected interviews. *Id.* at 1166, 104 L.R.R.M. at 2699.

The *Anchortank* court's holding that the employer may not undertake unilateral changes during a hiatus period is a fair one. A contrary holding would allow an employer to raise frivolous challenges in order to gain time in which to effectuate such changes. Clearly this would be contrary to one of the purposes of the Act, *i.e.*, to promote change through collective bargaining.⁴⁴

Since the Supreme Court has recognized the employee's right to have a union representative present at an interview that could result in discipline,⁴⁵ the *Anchortank* decision is correct in holding that the right exists during the hiatus period for employees whose bargaining unit subsequently is certified. If the union wins the challenge, the right will be found to have existed during the hiatus. If the employer interferes with that right, even though the employer cannot know for a fact that the right existed at the time of the interference, he must bear the responsibility. If, however, the union is not certified, the employer should not be held liable for barring another person, who is in reality a spectator, from a disciplinary interview. Indeed the *Anchortank* court acknowledged that should the union lose the election challenge, the employer's denial would outweigh the employee's right to have union representation during the hiatus. Nevertheless, the court concluded that the employee's request was concerted regardless of whether the union wins the election challenge.⁴⁶ Thus, the *Anchortank* court would allow employer interference with the concerted activities if the union loses the challenge.

While the *Anchortank* court arrives at the correct result given the specific facts in the case, the court's analysis raises some difficulties for the legal practitioner. The court's discussion of *Weingarten* indicates that the Fifth Circuit is interpreting the scope of that decision too broadly. The *Anchortank* court has to look to the dissent in *Weingarten* to support its statement that an employee has the right to have another employee present at the interview.⁴⁷ It is suggested that *Weingarten* should not be read so broadly. Although an employee who is a member of a certified bargaining unit engages in concerted activity by requesting union representation at an interview that he reasonably believes could result in discipline, it does not follow that an employee who is not entitled to any such representation has the right to have another employee present during the interview. The presence of an employee who does not have the special status or authority of a union representative cannot be said to be mustering the support of his fellow employees. He is there only to provide support and aid to the employee being interviewed. While the presence of another employee could serve to equalize the bargaining position between the employer and the employee and does not disrupt the property rights of the employer, the request for his presence does not have a concerted purpose and thus, does not satisfy

⁴⁴ See note 1 *supra*.

⁴⁵ 420 U.S. at 260.

⁴⁶ 618 F.2d at 1165 n.22, 104 L.R.R.M. at 2697 n.22.

⁴⁷ *Id.* at 1157, 104 L.R.R.M. at 2691, *quoting* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 269 & n.1 (Powell, J., dissenting).

the two-part *Mushroom* standard for concerted activity. The presence of another employee might meet the *Interboro* test, however, since it would indicate to other employees that they can enlist the help of fellow workers. The Fifth Circuit, reading *Weingarten* as granting to an employee the right to request that another employee be present, necessarily interprets *Weingarten* as supporting the *Interboro* approach. Consequently, although the Fifth Circuit had previously used the *Mushroom* standard for determining concerted activity, it is probable that in the future that circuit will adopt the *Interboro* approach, applying the constructive concerted activity definition. Yet because the *Anchortank* court declined to embrace either standard in this case, it has not helped to resolve the *Mushroom-Interboro* split.

The *Anchortank* court's use of a balancing test adds to the confusion on the issue of when an individual's actions are concerted. Neither the language of the Act nor the decision in *Weingarten* mentions such a device. Prior to *Anchortank*, once the employee's acts were found to be concerted, the employer was expressly forbidden from interfering with those acts.⁴⁸ After *Anchortank*, however, at least in the Fifth Circuit, it appears that employers may be able to show interests sufficient to outweigh the employee's right to act in concert. Thus, the employer may use his right to secure his property from intrusion by non-employees in such a way as to interfere with the protected activities of the employees. Such a possibility negates the very purpose of the Act, namely, to achieve some equality of bargaining strength.

Because of the ambiguity and apparent inconsistencies in the *Anchortank* opinion, the decision ought to be read narrowly by confining its application solely to cases in which the union wins a challenged election.

3. *Presumptive Relevance Requiring Employer Disclosure of Information:*

IUE v. NLRB (Westinghouse) and

IUE v. NLRB (White Farm Equipment)*

Under the National Labor Relations Act (Act), it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.¹ In order to accomplish the Act's goal of promoting industrial

⁴⁸ 420 U.S. at 261.

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¹ 29 U.S.C. § 158(a)(5) (1976). The relevant section provides: "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.* The meaning of the phrase "to bargain collectively" is defined at subsection (d):

(d) 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 obliga-

stability, the bargaining process guaranteed must be an effective one.² Each party to the bargaining process must have sufficient information to permit it to "deal meaningfully with bargainable issues."³ The employer's statutory obligation to bargain collectively therefore includes the obligation to provide employee representatives with the information necessary to participate effectively in the bargaining process.⁴ The scope of such information is defined, with reference to the union, as that necessary to the proper performance of the union's duties.⁵

The union's duties to represent its members extend beyond the contract negotiation period to include the term during which the agreement is in force.⁶ After the collective bargaining agreement has been reached, the union has the duty to ensure that its provisions are carried out.⁷ The union's continuing obligation to enforce the contract imposes an ongoing duty upon the employer to provide the information necessary to the proper performance of the union duties.⁸ An employer's failure to provide data requested by the union between contract negotiation periods may therefore constitute an unfair labor practice.⁹

Certain aspects of employment, such as wages and hours, are deemed fundamental to the employer-employee relationship.¹⁰ Information related to such terms and conditions of employment is therefore presumed to be relevant to the union's duties of negotiating the agreement and monitoring its performance.¹¹ If the information requested by the union is presumed to be relevant, the em-

tion does not compel either party to agree to a proposal or require the making of a concession.

29 U.S.C. § 158(d) (1976).

² *Curtiss-Wright Corp., Wright Aero. Div. v. NLRB*, 347 F.2d 61, 68, 59 L.R.R.M. 2433, 2437 (3d Cir. 1965) [hereinafter cited as *Curtiss-Wright*].

³ *Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB (Oakland Press)*, 598 F.2d 267, 271, 101 L.R.R.M. 2036, 2039 (D.C. Cir. 1979) [hereinafter cited as *Oakland Press*].

⁴ *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). [hereinafter cited as *Acme Indus.*] ("the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties," *id.*); *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1204, 75 L.R.R.M. 2692, 2692-97 (2d Cir. 1970) (duty imposed upon the employer by § 8(a)(5) "includes an obligation to provide the employees' bargaining representative with information that is necessary and relevant to the proper performance of its duties, including effective administration of the collective bargaining agreement in force," *id.* (citations omitted)).

⁵ *See, e.g., Oakland Press*, 598 F.2d at 271 & n.4, 101 L.R.R.M. at 2038 & n.4.

⁶ *Acme Indus.*, 385 U.S. at 436.

⁷ *Id.* ("the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement," *id.* (citations omitted)); *Curtiss-Wright*, 347 F.2d at 68, 59 L.R.R.M. at 2437 ("the well settled obligation of the bargaining agent not only to negotiate new contracts but also to police and administer existing agreements," *id.*).

⁸ *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867 n.5, 94 L.R.R.M. 2923, 2926 n.5 (9th Cir. 1977); *see Acme Indus.*, 385 U.S. at 435-36.

⁹ *See, e.g., Acme Indus.*, 385 U.S. at 435, 439; *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956).

¹⁰ *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315, 102 L.R.R.M. 2128, 2130 (8th Cir. 1979).

¹¹ *Id.*; *Curtiss-Wright*, 347 F.2d at 69, 59 L.R.R.M. at 2437.

ployer bears the burden of proving that the information is not relevant, or of establishing sound reasons for his inability to provide the information.¹² If the requested information is not presumed to be relevant, or if the employer succeeds in rebutting the presumption, then the burden shifts to the union, which must establish why the information is relevant to the performance of its duties as representative of its members.¹³

During the *Survey* year, the United States Court of Appeals for the District of Columbia Circuit decided the question whether information related to race and sex discrimination was presumptively relevant to the union representatives' duties of negotiating or administering collective bargaining agreements, when the contracts the parties were negotiating contained provisions prohibiting such discrimination. In *IUE v. NLRB (Westinghouse)*¹⁴ and *IUE v. NLRB (White Farm Equipment)*¹⁵ the court held that statistical information on the employment of women and minorities was presumed relevant in such circumstances,¹⁶ but that the evaluative portions of an employer's affirmative action plan,¹⁷ and information potentially identifying the plaintiffs in discrimination complaints,¹⁸ were not presumed relevant.

In *International Union of Electrical Radio & Machine Workers (IUE) v. NLRB (Westinghouse)*¹⁹ the court consolidated the appeals of two employers, Westinghouse and General Motors (GM), from the holdings of the National Labor Relations Board (Board) that each had committed an unfair labor practice by refusing to provide requested information to the union.²⁰ The union had instituted its own nationwide program against discrimination in March, 1973.²¹ Its collective bargaining agreements with GM and with Westinghouse each contained specific provisions against discrimination.²² While renegotiating its contract with GM in July of 1973, the union made the first of a series of requests for detailed information on the percentages of women and minorities composing the job categories within the workforce at GM, and on the wages paid to female and minority employees.²³ The union's stated reason for requesting the information was to determine whether discrimination existed within GM's promotional system.²⁴ By the time the dispute with GM came before the Board,

¹² San Diego Newspaper Guild Local 95 v. NLRB, 548 F.2d at 867, 94 L.R.R.M. at 2926.

¹³ *Id.*; *Curtiss-Wright*, 347 F.2d at 69, 59 L.R.R.M. at 2437-38.

¹⁴ 648 F.2d 18, 105 L.R.R.M. 3337 (D.C. Cir. 1980).

¹⁵ 650 F.2d 334, 105 L.R.R.M. 3344 (D.C. Cir. 1980).

¹⁶ *IUE v. NLRB (Westinghouse)*, 648 F.2d at 25, 105 L.R.R.M. at 3341; *see IUE v. NLRB (White Farm Equip. Co.)*, 650 F.2d 334, 335, 105 L.R.R.M. 3344, 3345, *aff'g* *White Farm Equip. Co.*, 242 N.L.R.B. 1373, 1375, 101 L.R.R.M. 1470, 1472 (1979).

¹⁷ *IUE v. NLRB (Westinghouse)*, 648 F.2d at 28, 105 L.R.R.M. at 3344.

¹⁸ *Id.* at 26-27, 105 L.R.R.M. at 3342-43.

¹⁹ *Id.* at 18, 105 L.R.R.M. at 3337.

²⁰ *Id.* at 22-24, 105 L.R.R.M. at 3339-40.

²¹ *Id.* at 21, 105 L.R.R.M. at 3338.

²² *Id.* at 21, 23, 105 L.R.R.M. at 3338, 3339.

²³ *Id.* at 21, 105 L.R.R.M. at 3338-39.

²⁴ *Id.*, 105 L.R.R.M. at 3339.

the union had also asked GM for copies of its affirmative action plan, copies of all discrimination complaints filed against GM by union members, and statistics on recent hirings, seniority, job classifications, and promotions, broken down by race and sex.²⁵ GM complied in part with each of the union's requests, including those made after the renegotiation of the contract was complete, and those made after the union filed an unfair labor practice charge in April, 1975.²⁶ GM, however, refused to provide the union with either the complete text of its affirmative action plan,²⁷ the copies of discrimination complaints filed against it, or the full range of statistical information as requested by the union.²⁸ The Board, in a decision issued in June, 1979, held that GM had committed an unfair labor practice by failing to provide the union with requested information relevant to its duties under the collective bargaining agreement.²⁹ The Board therefore ordered GM to supply the union with copies of all discrimination complaints filed against GM by employees represented by the union, deleting only the names of the charging parties.³⁰ Furthermore, the Board ordered GM to disclose the statistical information for the previous year "regarding hiring, composition, seniority, job classifications, and promotions of employees the [u]nion represent[ed], arranged by sex and certain racial groupings. . . ."³¹ The Board permitted GM to withhold from the union the full text of its affirmative action plan, requiring GM to disclose only the most recent versions of the section entitled "Work Force Analysis."³²

The Union's claim against Westinghouse had arisen from the company's refusal to honor fully a June, 1972, request for information on the present composition of the work force, broken down by sex, race, wage scale, and job category, for similar data on persons hired or promoted during the previous year, and for copies of all discrimination complaints pending against Westinghouse.³³ The union had requested the data between contract negotiation periods,³⁴ stating that it needed the information to monitor the antidiscrimination provisions of the collective bargaining agreement in force between it and Westinghouse.³⁵ Westinghouse initially refused to comply, but later responded to the union's inquiries by offering to provide detailed information on

²⁵ *Id.*

²⁶ *Id.* at 21-22, 105 L.R.R.M. at 3339.

²⁷ *Id.* GM provided the union with only the Work Force Analysis of its affirmative action plans, and only on the condition that the union keep the information confidential. *Id.* at 22, 105 L.R.R.M. at 3339.

²⁸ *Id.* at 21-22, 105 L.R.R.M. at 3339.

²⁹ 243 N.L.R.B. 186, 186-87, 101 L.R.R.M. 1461, 1463 (1979).

³⁰ *Id.* at 187, 101 L.R.R.M. at 1463.

³¹ *Id.* at 186, 101 L.R.R.M. at 1462 (footnote omitted).

³² *Id.* at 187, 101 L.R.R.M. at 1463. The Board described the contents of the work force analyses as "a listing of all job titles in a plant with the corresponding wage rates shown in lines of progression and a listing of the number of incumbents by sex and minority designation." *Id.* at 187, 101 L.R.R.M. at 1463.

³³ *IUE v. NLRB (Westinghouse)*, 648 F.2d at 23, 105 L.R.R.M. at 3339.

³⁴ *See id.* at 23, 105 L.R.R.M. at 3339.

³⁵ *Id.*, 105 L.R.R.M. at 3340.

the condition that the union keep the information confidential.³⁶ When the union refused to guarantee confidentiality, Westinghouse withdrew its offer.³⁷ In a ruling issued October 31, 1978 the Board found that Westinghouse had committed an unfair labor practice by withholding from the union requested information that was "relevant and necessary to its role as collective-bargaining representative."³⁸ The Board therefore ordered Westinghouse to supply the union with (1) statistics showing the composition of the workforce, broken down by race, sex, job classification, basis for wages, and recent promotions; (2) a list of all discrimination complaints filed against Westinghouse regarding plants represented by the union; (3) copies of all discrimination charges relating to employees in those plants, deleting only the names of the charging parties; and (4) copies of the work force analyses that Westinghouse had filed with its most recent affirmative action plans.³⁹

The cases came before the Court of Appeals for the District of Columbia Circuit on petitions by the employers for review, and cross-applications by the unions for enforcement, of the Board's orders.⁴⁰ In a single opinion issued for both cases, Chief Judge Markey, writing for the court, affirmed those parts of the Board's orders requiring the employers to produce the requested statistical information on the distribution and advancement of women and minority employees in units covered by the collective bargaining agreements,⁴¹ and those requiring the production of the work force analysis section of the affirmative action plans.⁴² Judge Markey modified the portions of the Board's orders compelling production of pending discrimination complaints, and permitted the employers to submit instead abstracts revealing only the number and nature of the complaints.⁴³

The court reasoned that, since the union's collective bargaining agreements with both GM and Westinghouse included specific antidiscrimination provisions, the statistical information on the distribution and promotion of women and minorities within the work force of GM and Westinghouse was presumptively relevant to the union's duty to bargain and to ensure that GM and Westinghouse complied with the terms of the contract.⁴⁴ The employers thus had a duty to provide the union with the information because, the court concluded, it was necessary for the union to perform its duties owed to its members.⁴⁵ The court therefore upheld the Board's finding that the employers'

³⁶ *Id.*

³⁷ *Id.*

³⁸ 239 N.L.R.B. 106, 107, 99 L.R.R.M. 1482, 1485.

³⁹ *Id.* at 115, 99 L.R.R.M. at 1493.

⁴⁰ 648 F.2d at 21, 105 L.R.R.M. at 3338.

⁴¹ *Id.* at 26, 105 L.R.R.M. at 3342.

⁴² *Id.* at 28, 105 L.R.R.M. at 3343.

⁴³ *Id.* at 27, 105 L.R.R.M. at 3343.

⁴⁴ *Id.* at 24-25, 105 L.R.R.M. at 3341.

⁴⁵ *Id.* at 25, 105 L.R.R.M. at 3341.

failure to provide the numerical data pertinent to race and sex discrimination constituted an unfair labor practice.⁴⁶ Since the work force analyses of the affirmative action plans consisted of essentially the same statistical information the union had requested, the court concluded that withholding the contents of the work force analyses also constituted a refusal to provide the union with information relevant to its duties.⁴⁷ Consequently, the court required the employers to provide the work force analyses to the union.⁴⁸

Westinghouse and GM attempted to rebut the Board's finding that the statistical information on the distribution of women and minorities within the workforce was presumed relevant to the union's duties.⁴⁹ The employers contended that the union planned to use the data against the employers in the pending litigation over the discrimination complaints, and that this prospective use effected an election of remedies, precluding making any claims to the information under the collective bargaining agreement.⁵⁰ In addition, the employers argued, success in obtaining the statistical data by means of an unfair labor practice charge would provide the union with information for use in the litigation that the union could not have obtained under the discovery rules.⁵¹ The employers claimed, furthermore, that preparing the requested information would impose an excessive burden upon them, both in preparation time and in costs.⁵² The potential use of the information in the discrimination cases, and the difficulties involved in compiling the information, combined to rebut any presumption of relevance, the employers maintained.

The court rejected the employers' proffered rebuttals.⁵³ The court found that the proposition that the availability of remedies under Title VII precluded the pursuit of remedies under the Act could not be maintained given the legislative history of Title VII, and the recent Supreme Court decisions on the subject.⁵⁴ According to the court, the possible use of the statistical data in pending lawsuits was irrelevant to the employers' duty to provide the union with information necessary to proper performance of its functions.⁵⁵ Furthermore, since federal regulations required preparation of most of the information requested by the union, the court concluded that providing the requested data to the union would not present an excessive burden to the employers.⁵⁶ Because GM and Westinghouse had failed to rebut the presumption of relevance, the

⁴⁶ *Id.* at 26, 105 L.R.R.M. at 3342.

⁴⁷ *Id.* at 28, 105 L.R.R.M. at 3343.

⁴⁸ *Id.*

⁴⁹ *Id.* at 25-26, 105 L.R.R.M. at 3341-42.

⁵⁰ *Id.* at 25, 105 L.R.R.M. at 3341.

⁵¹ *Id.* at 26, 105 L.R.R.M. at 3342.

⁵² *Id.*

⁵³ *Id.* at 25-26, 105 L.R.R.M. at 3341-42.

⁵⁴ *Id.* at 25 & nn.8-9, 105 L.R.R.M. at 3341-42 & nn.8-9 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974)).

⁵⁵ 648 F.2d at 26, 105 L.R.R.M. at 3342.

⁵⁶ *Id.*

court affirmed the Board's order requiring them to provide the union with the statistical information it had requested.⁵⁷

Regarding the union's request for copies of all discrimination complaints filed by union members against the employers, however, the court concluded that the employers had given sound reasons for nondisclosure. The court reasoned that deleting the name of the plaintiff from the filed complaint would provide inadequate protection for the privacy interests of those who had charged discrimination.⁵⁸ The threat of such disclosure would interfere, ultimately, with the congressional intent that the filing of such complaints be uninhibited, the court observed.⁵⁹ The court therefore modified the Board's order, permitting the employers to submit abstracts of the complaints filed, rather than actual copies.⁶⁰

The court's discussion of the discrimination complaints emphasized the employees' interest in maintaining confidentiality. Turning to the disclosure of the employers' affirmative action plans, the court found that the employers likewise had valid interests in partially withholding their contents.⁶¹ As government contractors,⁶² the employers prepared affirmative action plans with specific content requirements imposed by federal regulations.⁶³ The court concluded that the affirmative action plans included information on the employers' future goals and commitments that were not pertinent to the union's duties as the representative of its members.⁶⁴ Furthermore, the court reasoned, the employers' anticipation of eventual disclosure of the full contents of the affirmative action plans would inhibit the candid self-assessment desirable in affirmative action plans.⁶⁵ The court found, however, that the Work Force Analysis section, a required component of the employers' affirmative action plans, consisted only of statistical information equivalent to the data whose disclosure was required by the Act.⁶⁶ The court therefore affirmed the Board's order requiring only that the employers provide the union with the Work Force Analysis sections of the affirmative action plans.⁶⁷

In *International Union of Electrical, Radio & Machine Workers v. NLRB (White Farm Equipment)*⁶⁸ the Court of Appeals for the District of Columbia Circuit implicitly applied the reasoning of the *Westinghouse* decision to evaluate the charge

⁵⁷ *Id.*

⁵⁸ *Id.* at 27, 105 L.R.R.M. at 3342-43.

⁵⁹ *Id.*, 105 L.R.R.M. at 3343.

⁶⁰ *Id.*

⁶¹ *Id.* at 28, 105 L.R.R.M. at 3344.

⁶² *Westinghouse Elec. Corp.*, 239 N.L.R.B. at 112, 99 L.R.R.M. at 1489; *see General Motors Corp.*, 243 N.L.R.B. at 187, 101 L.R.R.M. at 1463.

⁶³ *E.g.*, 41 C.F.R. § 60-2.11(a) (1980); 41 C.F.R. § 60-2.23 (1980) (discussed in the Court of Appeals' opinion, 648 F.2d at 26, 105 L.R.R.M. at 3342).

⁶⁴ 648 F.2d at 28, 105 L.R.R.M. at 3344.

⁶⁵ *Id.*

⁶⁶ *Id.*, 105 L.R.R.M. at 3343.

⁶⁷ *Id.*, 105 L.R.R.M. at 3343-44.

⁶⁸ 650 F.2d 334, 335, 105 L.R.R.M. 3344, 3345, *aff'g* *White Farm Equip. Co.*, 242 N.L.R.B. 1373, 1375, 101 L.R.R.M. 1470, 1472.

that an employer had committed an unfair labor practice by withholding information related to possible race and sex discrimination. In a summary opinion issued the same date as *Westinghouse*, the court affirmed the Board's finding that the employer, White Farm Equipment, had committed an unfair labor practice by refusing to provide information that a union attorney had alleged was relevant to determining whether the employer had engaged in race or sex discrimination in its selection and treatment of employees.⁶⁹ This type of discrimination was explicitly prohibited by the collective bargaining agreement.⁷⁰

In *White Farm Equipment*, the collective bargaining agreement between the union and the employer included a provision forbidding discrimination "in any manner whatsoever against any employee" because of race or sex.⁷¹ In June, 1974, a union attorney requested statistics showing the race and sex of job applicants and new employees for the preceeding six months.⁷² The union attorney requested, in addition, copies of the employer's master insurance agreements, and summary booklets describing the insurance plan.⁷³ The attorney's request preceded the scheduled renegotiation of the collective bargaining agreement between the union and White Farm Equipment, negotiations in which he never participated.⁷⁴ Since the employer's application forms did not record race, and no data had been compiled on the race of job applicants, White Farm Equipment explained to the union, the information regarding job applicants was unavailable.⁷⁵ White Farm Equipment complied in part with the union's request, however, by informing the union that three employees had been hired since January 1, 1973, and that the current bargaining unit consisted of eleven white males and one black male.⁷⁶ The employer also supplied the union with summary booklets describing the insurance plans, but withheld copies of the master insurance agreements.⁷⁷

The union nonetheless filed an unfair labor practice charge against White Farm Equipment in October, 1974, alleging that White Farm Equipment had breached its duty to bargain collectively by refusing to provide the union with the requested information.⁷⁸ The Board heard the charge, and found that White Farm Equipment had violated the Act.⁷⁹ In its order of June, 1979, the Board held that the information in the master insurance agreements, and the data on those who applied for jobs at White Farm Equipment as well as those

⁶⁹ *Id.* at 336, 105 L.R.R.M. at 3345.

⁷⁰ The provision reads in full: "Neither the Company nor the Union shall discriminate in any manner whatsoever against any employee because of race, sex, political or religious affiliation, nationality, marital status, or membership or non-membership in any labor or other lawful organization." 650 F.2d at 335 n.5, 105 L.R.R.M. at 3345 n.5 (Markey, J., dissenting).

⁷¹ *Id.* See also note 75 *infra*.

⁷² *Id.* at 336, 105 L.R.R.M. at 3345.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*, 105 L.R.R.M. at 3346.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 337, 105 L.R.R.M. at 3346.

⁷⁹ *Id.* at 337-38, 105 L.R.R.M. at 3347.

who were ultimately hired, were presumptively relevant to the union's duties as the bargaining representative of its members.⁸⁰ The Board therefore ordered the employer to disclose the insurance agreements and hiring statistics to the union.⁸¹

The case came to the Court of Appeals for the District of Columbia Circuit on petitions for review and cross-application for enforcement.⁸² The majority of the court concluded summarily that "the issues presented occasion no need for an opinion. . . ."⁸³ Since substantial evidence supported the Board's order, and no reversible error appeared below, the court granted the Board's application for enforcement.⁸⁴ The majority of the court, by issuing this summary opinion, therefore implicitly agreed with the Board's finding that White Farm Equipment had refused to bargain collectively by failing to supply the union with information necessary to the performance of its duties.

Chief Judge Markey dissented to the *White Farm Equipment* decision, because he concluded that the Board had applied the doctrine of presumptive relevance too broadly, and failed to give sufficient weight to the actual circumstances of the case.⁸⁵ If the information on job applicants was relevant to collective bargaining, the Judge observed, the union was obliged to raise the issue of discrimination during the bargaining process, and to request the information at the bargaining table.⁸⁶ Judge Markey concluded that even if the

⁸⁰ *White Farm Equip. Co.*, 242 N.L.R.B. 1373, 1374-75, 101 L.R.R.M. 1470, 1472. The union's execution of the new collective-bargaining agreement without the requested information was held not to preclude a finding of relevance, but merely to indicate that the union preferred the advantages of securing a contract without waiting for White Farm Equipment to provide the information. *Id.* at 1374, 101 L.R.R.M. at 1471. The Board rejected the union's demand that White Farm Equipment explain its failure to hire more women and minorities. *Id.* at 1375, 101 L.R.R.M. at 1472.

⁸¹ *Id.* at 1375-76, 101 L.R.R.M. at 1472. Board Member Murphy agreed that the contents of the insurance agreements were presumptively relevant, but dissented on the question of the employment statistics, arguing that discrimination was properly a matter for the Equal Employment Opportunity Commission's expertise. *Id.* at 1376-77, 101 L.R.R.M. at 1471.

⁸² 650 F.2d at 335, 105 L.R.R.M. at 3345.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 338, 105 L.R.R.M. at 3347 (Markey, J., dissenting).

⁸⁶ *Id.* at 338-39, 105 L.R.R.M. at 3348. Judge Markey cited *Westinghouse Elec. Supply Co. v. NLRB*, 196 F.2d 1012, 1014, 30 L.R.R.M. 2169, 2170-71 (3d Cir. 1952), for the proposition that the union must make requests for information relevant to the bargaining process at the bargaining table. *IUE v. NLRB (White Farm Equip. Co.)*, 650 F.2d at 339, 105 L.R.R.M. at 3348. Several years after the *Westinghouse Elec. Supply* decision, however, the Third Circuit reversed its position and held that, in order to foster an effective bargaining process, a union could properly request data from management prior to actual negotiations. *Curtiss-Wright*, 347 F.2d 61, 68, 59 L.R.R.M. 2433, 2437 (3d Cir. 1965). This position has support in *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 438 (1967). In *Acme* the Court held that where a collective bargaining agreement forbids discrimination by the employer, the time for the union to request information pertinent to discrimination cannot be limited to the period of renegotiation. *Id.* Rather, the period should extend throughout the term of the contract so that the union can determine whether to initiate action against the employer for discrimination. *Id.* Under the facts of the *White Farm Equipment* case, therefore, Judge Markey should have considered the entire period of the contract in determining when the union would be entitled to the information.

issue had been raised, the contract provision making hiring a management prerogative would prevent the union from asserting that the hiring process was relevant to its duties.⁸⁷ Regarding the master insurance agreements, Judge Markey agreed with the employer that only the fact of providing negotiated insurance benefits, and not the specific manner of providing them, was within the scope of the collective bargaining agreement.⁸⁸ The burden in this case, under Judge Markey's analysis, had shifted to the union⁸⁹ to demonstrate why information on subjects outside the collective bargaining agreement had become relevant.⁹⁰ Judge Markey therefore disagreed with the majority on all points, except its conclusion that the employer was not required to explain its past hiring practices.

Read in conjunction, the *Westinghouse* and *White Farm Equipment* decisions indicate that, where a collective bargaining agreement contains provisions forbidding race or sex discrimination in employment practices, objective information related to race and sex discrimination, such as statistics on the percentages of female and minority employees composing the workforce, will be presumed relevant to the union's duty to represent its members effectively. Since that duty includes the obligation to monitor the performance of the agreement, the union's request for information need not arise during the bargaining process. The effect of the presumption is that, unless the employer provides an effective rebuttal, the failure to disclose the information constitutes a failure to bargain collectively, and thus an unfair labor practice under the Act. The employer may rebut the presumption of relevance by establishing valid reasons for non-disclosure. The confidentiality of employees' discrimination complaints, and of selected sections of an employer's affirmative action plan, effectively rebuts the presumption of relevance.

Certain Supreme Court precedents provide the framework for evaluation of the *White Farm Equipment* and *Westinghouse* decisions. Two decisions illustrate the Court's approach to the range of subjects included in the employer's duty to bargain collectively under the Act. In *Fibreboard Paper Products Corp. v. NLRB*,⁹¹ the Court considered whether an employer had breached its duty under the Act by refusing to bargain with union representatives regarding the

⁸⁷ *IUE v. NLRB (White Farm Equip. Co.)*, 650 F.2d at 339, 105 L.R.R.M. at 3348. Judge Markey argued that the provision making hiring a management prerogative, combined with the absence of a hiring-related provision in the contract for the union to administer, left hiring questions within the sole discretion of management. *Id.* The hiring provision, however, was expressly qualified by a clause subjecting it to the other provisions in the collective bargaining agreement. *Id.* at 335 nn. 4-5, 105 L.R.R.M. at 3345 nn.4-5. To the degree that hiring was a management prerogative, therefore, the antidiscrimination clause required the employer's privilege to be exercised in a nondiscriminatory fashion.

⁸⁸ *Id.* at 339-40, 105 L.R.R.M. at 3348-49.

⁸⁹ The union had argued that its attorney's suggestion that he meet with White would satisfy this burden because it constituted an attempt to engage in mid-term renegotiation of the contract. *Id.* at 341, 105 L.R.R.M. at 3350. Judge Markey rejected this characterization of the union attorney's contacts with the employer. *Id.*

⁹⁰ *Id.* at 340, 105 L.R.R.M. at 3349.

⁹¹ 379 U.S. 203 (1964).

employer's arrangements to contract out certain work performed by union members upon the expiration of the existing collective bargaining agreements.⁹² The Court based its conclusion on three factors. First, the Court reasoned, assigning the work to an outside party would terminate employment for those employees presently performing the tasks; contracting the work out was therefore a "condition" of employment⁹³ even though the subject was not specifically provided for in the existing collective bargaining agreements.⁹⁴ Second, the Court considered the Act's purpose of avoiding industrial conflict by subjecting labor-management disputes to the negotiation process. The Court found that this goal would be promoted by a holding that contracting work to parties outside the collective bargaining agreement was included among the subjects of collective bargaining.⁹⁵ Finally, observing that contracting out work frequently appeared in collective bargaining agreements in industrial practice, the Court concluded that the subject had become part of the collective bargaining framework.⁹⁶ The Court held, therefore, that contracting out the union members' work constituted a term and condition of employment regarding which the employer was obliged to confer with the employees' representative under section 8(d) of the Act.⁹⁷ The holding of the *Fibreboard Products* case indicates that the subjects of collective bargaining are not limited by the specific provisions of an existing collective bargaining agreement. Collective bargaining may also include "conditions of employment" which have significant impact on the employees, or which are settled effectively by negotiation.

Whether the "conditions of employment" included matters affecting those who were not currently employees provided the subject for the Court's decision in *Allied Chemical & Alkali Workers of America Local 1 v. Pittsburgh Plate Glass Co.*⁹⁸ The *Allied Chemical* decision concerned the attempted renegotiation of an employee health insurance plan in which retired employees participated.⁹⁹ The insurance program had been in effect for fifteen years when the Medicare program was enacted in 1965.¹⁰⁰ Instead of negotiating with the union to adjust the insurance plan for retired employees in light of the enactment of the Medicare program, the employer wrote directly to the retired employees, proposing to make supplemental Medicare payments if the retiree

⁹² *Id.* at 204-06.

⁹³ *Id.* at 210.

⁹⁴ The Court's account of the facts of the case does not discuss such a provision in the collective bargaining agreement. *Id.* at 205-08. If such a provision existed, there would not have been an issue for the Court to consider, since the employer's action would merely have been a question arising under the collective bargaining agreement, requiring the parties to bargain collectively under § 8(d) of the Act.

⁹⁵ 379 U.S. at 210-11.

⁹⁶ *Id.* at 211-12 & n.7.

⁹⁷ *Id.* at 215. See also text and note at note 3 *supra*.

⁹⁸ 404 U.S. 157 (1971).

⁹⁹ *Id.* at 160-61.

¹⁰⁰ *Id.* at 161.

withdrew from the negotiated insurance plan.¹⁰¹ The union brought an unfair labor practice charge, alleging that the employer had circumvented the union as the collective bargaining representative, which the Board decided in the union's favor.¹⁰² Holding that the retired employees could not be included either among the employees of the company¹⁰³ or within the bargaining unit,¹⁰⁴ the Court of Appeals for the Sixth Circuit refused to enforce the Board's order.¹⁰⁵

The Supreme Court affirmed the Court of Appeals.¹⁰⁶ Reviewing the legislative history of the Act, the Court concluded that the employer's duty to bargain collectively did not extend to the interests of retired employees.¹⁰⁷ Furthermore, the Court reasoned, the terms of the collective bargaining agreement in force between the employer and the union indicated that the bargaining unit included only active employees.¹⁰⁸ The Court distinguished the cases in which applicants for work had been protected under the Act by characterizing job applicants as "members of the active work force available for hire and [who] at least in that sense could be identified as 'employees' . . ."¹⁰⁹ Contrasting the nature of the benefits at issue in the *Allied Chemical* case with those in the *Fibreboard* opinion, the Court emphasized its earlier finding that the contracting out of work in *Fibreboard* entailed the loss of jobs.¹¹⁰ In *Allied Chemical*, however, the possible reduction in insurance benefits for active employees resulting from the exclusion of retired members from the group insurance program, was too "speculative and insubstantial" an effect to be considered a "term or condition of employment."¹¹¹ The Court's holding in *Allied Chemical* indicated that the collective bargaining process guaranteed by the Act covered only terms and conditions of employment with substantial impact on currently active members of the bargaining unit.

The Supreme Court addressed the role of antidiscrimination policy in labor law in its 1975 decision, *Emporium Capwell Co. v. Western Addition Community Organization*.¹¹² In *Emporium Capwell*, the Court determined whether minority employees discharged for attempting to bargain with the employer separately from the union over alleged race discrimination could be protected under the Act.¹¹³ The Court held that the employees could not claim protection under the Act for activities that undermined the union's role as exclusive

¹⁰¹ *Id.* at 162.

¹⁰² 177 N.L.R.B. 911, 918-19, 71 L.R.R.M. 1433, 1441 (1969).

¹⁰³ 427 F.2d 936, 944, 74 L.R.R.M. 2425, 2431 (6th Cir. 1970).

¹⁰⁴ *Id.* at 946, 74 L.R.R.M. at 2432 (6th Cir. 1970).

¹⁰⁵ *Id.* at 947, 74 L.R.R.M. at 2433

¹⁰⁶ 404 U.S. 157, 160 (1971).

¹⁰⁷ *Id.* at 166.

¹⁰⁸ *Id.* at 172.

¹⁰⁹ *Id.* at 168.

¹¹⁰ *Id.* at 180.

¹¹¹ *Id.*

¹¹² 420 U.S. 50 (1975).

¹¹³ *Id.* at 52.

bargaining agent.¹¹⁴ In reaching its conclusion, however, the Court noted that the Act must be construed in favor of the broad national labor policy against discrimination whenever possible.¹¹⁵

In *Detroit Edison Co. v. NLRB*,¹¹⁶ the Supreme Court considered an employer's effort to rebut the presumption of relevance, where a union had requested information pursuant to the terms of the collective bargaining agreement. The issue in this case concerned promotions on bases other than seniority. The contract in force between the union and the employer at the time the case arose required that promotions within any unit were to be made on the basis of seniority within the unit, whenever the candidates' qualifications were not significantly different otherwise.¹¹⁷ Any management decision to promote on a basis other than seniority within the unit was subject to the collective bargaining agreement's grievance procedures, which provided for arbitration where it was charged that the promotion had been arbitrary or discriminatory.¹¹⁸

The employer used written psychological aptitude tests to evaluate candidates for promotions to a certain job classification.¹¹⁹ When an opening in that category occurred at one of the plants, certain employees within the unit applied for the position.¹²⁰ All were rejected because they had received unacceptable aptitude test scores.¹²¹ The union filed a grievance on behalf of those rejected, alleging that the testing procedure used was unfair, and that the employer had violated the provisions of the collective bargaining agreement requiring that promotion be based on seniority within the unit.¹²² After the employer rejected the grievance, the union took its claims to arbitration.¹²³ Preparing for the arbitration, the union requested copies of the test questions and answer sheets, and the completed answer sheets of the aggrieved employees with the employees' names and test scores attached.¹²⁴ Upon Detroit Edison's refusal to provide this data to the union unless certain conditions were met,¹²⁵ the union filed an unfair labor practice charge, alleging that

¹¹⁴ *Id.* at 70.

¹¹⁵ *Id.* at 66. The Court observed that "national labor policy embodies the principles of nondiscrimination as a matter of highest priority, . . . and it is a commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part." *Id.* at 66 (citations omitted).

¹¹⁶ 440 U.S. 301 (1979).

¹¹⁷ *Id.* at 304-05.

¹¹⁸ *Id.* at 305.

¹¹⁹ *Id.* at 305-06.

¹²⁰ *Id.* at 307.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 307-08.

¹²⁵ While the complaint was under arbitration, Detroit Edison agreed to disclose the scores of identified employees only if the employee waived confidentiality. *Id.* at 308. At the administrative hearing that began the unfair labor practice proceedings, the company offered to submit the test questions and answer sheets to an industrial psychologist of the union's choice. *Id.* at 309. The union rejected these conditions. *Id.* at 308-09.

the company had violated the Act by withholding information that was relevant and necessary to the arbitration of the grievance.¹²⁶ The Board ordered the employer to provide all of the information requested directly to the union because of its potential value to the union in the performance of its duties.¹²⁷ The Court of Appeals for the Sixth Circuit affirmed the Board's holding.¹²⁸

The Supreme Court, however, reversed.¹²⁹ The Court found that section 8(a)(5) of the Act did not obligate the employer to supply the union with copies of the test questions and answers.¹³⁰ The validity of the testing procedure, in which the employer had invested a considerable amount of time and money,¹³¹ depended upon keeping the test questions secret, the Court observed.¹³² In the absence of enforceable sanctions for breach of the union's guarantees of secrecy, the Court concluded, the risk of disclosure was too great to uphold the Board's order that the employer provide the union with the test questions and answer sheets.¹³³ Regarding the disclosure of the completed tests, with the examinee identified, the Court agreed with Detroit Edison that the sensitivity of the individual to the disclosure of information evaluating his competence justified the employer's refusal to supply the tests to the union without the employee's permission.¹³⁴ The Court expressly rejected the argument that establishing a union interest in such information would override any other interests.¹³⁵ The *Detroit Edison* case established that under some circumstances the employer could rebut the presumption of relevance by demonstrating sound reasons for maintaining confidentiality.

In light of these Supreme Court precedents, the *Westinghouse* decision was correct in its treatment of the significance of information related to race and sex discrimination. Construing the Act to find that such information was presumptively relevant to the union's duties in representing its members followed the policy of the Supreme Court as stated in the *Emporium Capwell* decision.¹³⁶ Permitting Westinghouse and GM to withhold copies of the discrimination complaints filed by employees was amply supported by the Supreme Court's

¹²⁶ *Id.* at 308.

¹²⁷ *The Detroit Edison Co.*, 218 N.L.R.B. 1024, 1024, 89 L.R.R.M. 1515, 1519 (1975).

¹²⁸ *NLRB v. Detroit Edison Co.*, 560 F.2d 722, 727, 95 L.R.R.M. 3341, 3344 (6th Cir. 1977).

¹²⁹ 440 U.S. at 320.

¹³⁰ *Id.* at 316-17.

¹³¹ *Id.* at 313.

¹³² *Id.* at 315.

¹³³ *Id.* at 315-16.

¹³⁴ *Id.* at 318-19.

¹³⁵ *Id.* at 318. The Court stated:

The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted. This we believe is one.

Id.

¹³⁶ 420 U.S. 50. See text and notes at notes 112-15 *supra*.

reasoning in the *Detroit Edison* case. The Court had concluded, in *Detroit Edison*, that the employee's interest in restricting information evaluating his competence outweighed the union's interest in determining how those evaluations were made.¹³⁷ An employee who has filed a discrimination complaint against his employer has a similar interest in avoiding the harassment and reprisals from his supervisors and co-workers that could be the consequence of disclosure of his complaint. In addition to the employee's interest in maintaining the confidentiality of the test results, the employer's interest in maintaining a valid testing procedure had been considered among the factors rebutting the presumption of relevance in the *Detroit Edison* case.¹³⁸ The *Westinghouse* court gave much weight to the employers' interest by permitting them to withhold the discrimination complaints and the affirmative action plans. Thus, *Westinghouse* was in keeping with the precedent established by *Detroit Edison*.

While the court of appeals was correct in allowing GM and Westinghouse to retain their affirmative action plans and the text of the discrimination complaints, its requirement that White Farm Equipment provide information on the race and sex of job applicants contravenes the principles established in *Emporium Capwell*. Although the Court stated, in *Emporium Capwell*, that the Act should be construed, where possible, to implement a policy against discrimination in employment, the Court's holding prevented the discharged minority employees from claiming protection under the Act. The Court's objective was to preserve the union's role as exclusive bargaining agent and the collective bargaining structure mandated by the Act.¹³⁹ The *Emporium Capwell* holding indicates that provisions of the Act must not be distorted in order to favor the goal of equal employment.

Under the Act, the principles governing the presumption of relevance in union requests for information provide that, if the employer presents bona fide objections to the union's request, the union must enunciate specific reasons for its request for the information in that form.¹⁴⁰ Even if the information had been demonstrated, rather than presumed, to be relevant to the union's duties, the employer might prevail by providing other justifications for nondisclosure, such as the confidentiality interests established in *Detroit Edison*. The interests of both the employers and the bargaining representatives could be accommodated under this model.

The result in the *White Farm Equipment* case, however, departs from these principles. White Farm Equipment had not kept records on the race of job applicants.¹⁴¹ In disclosing the race and sex of current bargaining unit employees, and the number of persons hired during the period in question, White Farm Equipment complied with the union's request to the best of its abilities. The

¹³⁷ See text and notes at notes 129-34 *supra*.

¹³⁸ See text and notes at notes 131-32 *supra*.

¹³⁹ See text and note at note 114 *supra*.

¹⁴⁰ See, e.g., *Emeryville Research Center, Shell Dev. Co. v. NLRB*, 441 F.2d 880, 885, 77 L.R.R.M. 2043, 2047 (9th Cir. 1971); see also text and notes at notes 12-13 *supra*.

¹⁴¹ See text and note at note 75 *supra*.

court of appeals nonetheless upheld and enforced the Board's order requiring White Farm Equipment to provide data on the race and sex of job applicants.

The court of appeals' holding in *White Farm Equipment* indicates that the court considers the interests implicated in allegations of discriminatory employment practices sufficient to outweigh the principles governing the rebuttal of the presumption of relevance under the Act. The court's requirement that White Farm Equipment provide the union with information on the race and sex of job applicants that the employer had not maintained, strains the principles of construction established under the Act. Although the purpose of the court evidently was to effectuate equal employment policy, the result oversteps the guidelines established by the Supreme Court in *Emporium Capwell*.

The court of appeals' holding that information related to race and sex discrimination is presumptively relevant to the union's duties is not limited to the facts of the *Westinghouse* and *White Farm Equipment* decisions. In each of the cases before the court of appeals, the collective bargaining agreements in force at the time the union requested the information included specific antidiscrimination provisions. The employers' obligation to provide information on race and sex discrimination was premised in part on the union's duty to monitor existing agreements. The precedents to the court of appeals' decision suggest that the presence of an antidiscrimination provision in the collective bargaining agreement is not a prerequisite to a finding that information related to race and sex discrimination is presumptively relevant to the union in representing its members.

Under the Act, the employer and the bargaining representatives are required to bargain collectively over the "terms and conditions of employment" as well as over the terms of existing contracts.¹⁴² The Supreme Court cases interpreting the phrase "term or condition of employment" support the argument that discrimination in hiring and promotional practices constitutes a condition of employment.¹⁴³ If the issue of race and sex discrimination comes within the definition of a condition of employment, the subject is one regarding which the employer and the union must bargain collectively. As a subject of collective bargaining, race and sex discrimination is an issue upon which the employer must provide information at the union's request, even without an existing provision addressing the matter.

The factors considered by the Supreme Court in the *Fibreboard* and *Allied Chemical* decisions on the range of collective bargaining apply to the subject of race and sex discrimination. In *Fibreboard*, the Court reasoned that, since the employer's arrangements to contract work out would terminate employment for union members, such arrangements must be considered a term or condition of employment. Similarly, if the employer's discriminatory practices result in the exclusion of certain individuals from employment and promotions, such discrimination erects barriers to, and therefore creates conditions of, employ-

¹⁴² 29 U.S.C. § 158(d) (1976). See note 1 *supra*.

¹⁴³ See text and notes at notes 91-111 *supra*.

ment. Whether the collective bargaining agreement specifically prohibits race and sex discrimination or not, employer practices creating conditions of employment for minorities and females would require collective bargaining under the *Fibreboard* analysis. In addition, the *Westinghouse* and *White Farm Equipment* decisions demonstrate that the subject of race and sex discrimination generates conflict in labor-management relations. In order to implement the Act's goal of avoiding industrial strife, therefore, the issue of race and sex discrimination must be included within the meaning of the phrase "terms or conditions of employment" in order to be subjected to the negotiation process. Finally, as the union-employer contracts in *Westinghouse* and *White Farm Equipment* illustrate, antidiscrimination provisions are appearing with greater frequency in collective bargaining agreements. The topic of race and sex discrimination has become part of the collective bargaining framework and is therefore among the terms and conditions of employment subject to the requirements of collective bargaining established under the Act.

The issue of race and sex discrimination satisfies the standards for a condition of employment established by the *Allied Chemical* decision. Where discrimination operates as a barrier to employment or to promotions, its effects upon members of the bargaining unit are not tenuous or insubstantial. Rather, such discrimination has significant impact on the working environment for all employees. Even where the employer's discriminatory practices affect only individuals who are not members of the bargaining unit, the union, under the *Allied Chemical* analysis, may assert its right to bargain collectively with the employer over such discrimination because of its impact on union members and on currently active members of the work force.

Under the Supreme Court precedents to the *Westinghouse* and *White Farm Equipment* decisions, therefore, the court of appeals' holdings are not limited in application to instances where the collective bargaining agreement contains an antidiscrimination provision. A union reasonably may argue that race and sex discrimination is a term or condition of employment requiring collective bargaining under section 8(d) of the Act. As a subject of collective bargaining, the issue of race and sex discrimination obligates the employer to disclose relevant information requested by the union even without an antidiscrimination provision in the existing collective bargaining agreement.

The court of appeals' decisions in *Westinghouse* and *White Farm Equipment* may result in hardships for certain employers encountering a union's request for information related to race and sex discrimination. The court of appeals held, in the *Westinghouse* decision, that providing detailed statistical information on the composition of the work force did not impose a burden upon the employers sufficient to rebut the presumption of relevance. *Westinghouse* and GM were required, as government contractors, to compile affirmative action plans that included such data, and therefore already had compiled the requested statistical information. For an employer who is not required to submit such information to the federal government, however, meeting a union's request for statistical information comparable in detail to that required in an af-

firmative action plan may present a substantial burden. The principles governing the presumption of relevance under the Act ordinarily would provide the employer with grounds to rebut the presumption by demonstrating that furnishing the union with such information imposed significant difficulties. The result in *White Farm Equipment*, however, indicates that even employers who are not required by federal regulations to maintain detailed records on the percentages and distributions of female and minority employees within the work force may be required to produce such information at the union's request.

The *Westinghouse* and *White Farm Equipment* decisions establish the union's right to access to information regarding race and sex discrimination as a subject of collective bargaining under the Act. As a result of these decisions, such information is presumed relevant to the union's duties to represent its members in the negotiation and administration of its collective bargaining agreements. The *Westinghouse* and *White Farm Equipment* cases both considered situations where the collective bargaining agreement included specific provisions against discrimination. Precedents decided under the Act indicate, however, that such a provision is not a requirement for the union's right to information regarding race and sex discrimination. The union may be entitled to such information as a consequence of its duty to monitor the terms and conditions of employment. While the *Westinghouse* and *White Farm Equipment* decisions broaden the scope of information that is presumed relevant to the union's duties, the employer retains the opportunity to rebut the presumption of relevance by demonstrating the confidentiality interests of certain information. The holding in *White Farm Equipment*, however, indicates that an employer's assertion that statistical information on the race and sex of job applicants is unavailable fails to satisfy the employer's duty to provide the union with requested information relevant to its duties. As a result of the *White Farm Equipment* and *Westinghouse* decisions, therefore, every employer subject to the Act must be prepared to maintain and disclose a range of statistical information including the distribution by race and sex of employees and job applicants, in order to fulfill its duty under the Act to bargain collectively with the representatives of its employees.

4. *Res Judicata* in Section 10(1) Proceedings:

Walsh v. International Longshoremen's Association (ILA)*

Section 10(1) of the National Labor Relations Act (NLRA) provides for officers or regional directors of the National Labor Relations Board (Board) to petition a district court for a temporary restraining order or a preliminary injunction when a party files an unfair labor practice with the Board under sections 8(b)(4)(A)(B) or (C).¹ The district court in a section 10(1) proceeding

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¹ 29 U.S.C. § 160(l) provides in relevant part:

Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

decides the limited question of whether there is reasonable cause to believe a violation of the NLRA has occurred which warrants injunctive relief.² If there is reasonable cause to believe that an unfair labor practice has occurred, injunctive relief will be ordered and will remain in effect until the Board has reached a final determination on the merits of the claim.³ Until that time the potential for conflicting results from different district courts exists if the activity underlying the allegations affects persons and entities in various regions.⁴ In such situations, one district court may deny an injunction while another district court may issue one. The result of these conflicting determinations is to allow activity in one region that has been enjoined in another. As early as 1959 a few federal courts had noted the relevance of res judicata principles in such cases.⁵ The applicability of res judicata principles to section 10(1) proceedings, however, was not addressed directly in those decisions.⁶

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B) or (C) of section 158(b) of this title, or section 158(c) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law:

² *Walsh v. International Longshoremen's Ass'n, AFL-CIO*, 630 F.2d 864, 868, 105 L.R.R.M. 2809, 2812 (1st Cir. 1980).

³ 29 U.S.C. § 160(l), *supra* note 1.

⁴ 630 F.2d at 869, 105 L.R.R.M. at 2812-13.

⁵ *Madden v. Perry*, 264 F.2d 169 (7th Cir. 1959). In *Madden v. Perry*, the regional director, Madden, requested the Seventh Circuit Court of Appeals to issue a writ of mandamus directing Judge Perry of the United States District Court for the Northern District of Illinois, Eastern Division, to vacate supplemental findings of fact and conclusions of law. *Id.* at 170. Judge Perry had entered the supplemental findings in response to a request by the local union after dismissing regional director Madden's § 10(1) petition because of Madden's refusal to testify and produce subpoenaed records. *Id.* It appears that the local unions requested the findings in order to make clear that Madden was barred from reinstituting the action. *Id.* at 172. Madden requested that the Seventh Circuit Court of Appeals vacate Judge Perry's supplemental findings because they purported to decide the merits of the petition, and thus would act as a bar to instituting a § 10(1) petition. *Id.* at 173. The Seventh Circuit vacated the supplemental findings as being outside the authority of Judge Perry, *Id.* at 174, without deciding whether res judicata would bar a subsequent § 10(1) petition if the supplemental findings had been properly entered. *Id.* In *Consentino v. Local 28*, 268 F.2d 648 (8th Cir. 1959), the respondent had argued both the merits of the case and res judicata at the district court level. *Id.* at 649. The court declined to address the res judicata issue and based its holding on Rule 41(b) of the Federal Rules of Civil Procedure. *Id.* at 652. In *NLRB v. Acker Indus.*, 460 F.2d 649 (10th Cir. 1972), Acker argued that collateral estoppel should be applied to a § 10(j) proceeding because of a prior § 10(b) hearing. *Id.* at 651. The court held collateral estoppel inapplicable because § 10(1) and § 10(j) hearings are not equivalent. *Id.* at 652.

⁶ *Madden v. Perry*, 264 F.2d 169 (7th Cir. 1959); *Cosentino v. Local 28*, 268 F.2d 648 (8th Cir. 1959); *NLRB v. Acker Indus.*, 460 F.2d 649 (10th Cir. 1972).

During the *Survey* year, the First Circuit Court of Appeals, in *Walsh v. International AFL-CIO*,⁷ addressed the role of res judicata principles in section 10(1) proceedings. The *Walsh* court held in a unanimous decision that a determination by a district court on a section 10(1) petition brought by one regional director would bar a subsequent section 10(1) petition made by a different regional director.⁸ Crucial to the court's decision were its findings that the injunction requested in *Walsh* went to the same underlying issue as the injunction requested in the previously decided suit,⁹ and that the International Longshoremen's Association (ILA) was named as a defendant in each action.¹⁰

The issues which formed the basis for the section 10 (1) petition in *Walsh* arose out of a boycott of Russian cargo.¹¹ The boycott was called by the president of the ILA after the Soviet invasion of Afghanistan, in response to demands by union members that they stop loading Soviet cargo.¹² The boycott resulted in three different organizations filing charges with the Board. Each charge alleged that the activity constituted a secondary boycott¹³ and as such was prohibited under section 8(b)(4).¹⁴ Acting on these charges, three regional directors brought section 10(1) petitions in three different federal district courts requesting preliminary injunctions against the ILA and local Unions.¹⁵

The first petition was filed by Regional Director Baldwin in the United States District Court for the District of Texas, and was decided on February 15, 1980;¹⁶ the second petition was filed by Regional Director Mack in the United States District Court for the District of Georgia, and was decided on March 4, 1980;¹⁷ the third petition was brought by Regional Director Walsh in the United States District Court for the District of Massachusetts on March 26, 1980.¹⁸ In an unpublished memorandum opinion, the Texas district court in *Baldwin v. ILA*¹⁹ denied an injunction because the challenged activity was not

⁷ 630 F.2d 864, 105 L.R.R.M. 2809 (1st Cir. 1980).

⁸ *Id.* at 871-72, 105 L.R.R.M. at 2814-15.

⁹ *Id.* at 874-75, 105 L.R.R.M. at 2816-17.

¹⁰ *Id.* at 872-73, 105 L.R.R.M. at 2815-16.

¹¹ *Id.* at 866, 105 L.R.R.M. at 2810.

¹² *Id.* at 866 & n.1, 105 L.R.R.M. at 2810 & n.1.

¹³ A boycott is termed a secondary boycott for the purposes of § 8(b)(4)(ii)(B) when the action taken by the union pressures an employer with whom the union has no dispute. *Baldwin v. ILA*, 626 F.2d 445, 449 (5th Cir. 1980). This activity, "tactically calculated to satisfy union objectives elsewhere," is secondary activity. *Woodwork Mfrs. v. NLRB*, 386 U.S. 612, 644-45 (1967). Secondary boycotts are subject to an "affecting commerce" requirement. *Id.* This requirement is necessary to avoid unenforceable judgments such as those that would be entered if the secondary boycott action were aimed at obtaining concessions that could not be resolved by domestic action (e.g., altering actions of United States workers), or under the National Labor Relations Act. *Id.* at 450.

¹⁴ 630 F.2d at 866 n.1, 105 L.R.R.M. at 2810 n.1.

¹⁵ *Id.*

¹⁶ *Baldwin v. ILA*, Civil No. 80-259 (D.C. Houston).

¹⁷ *Mack v. ILA*, Civil No. 480-051 (D.C. Savannah).

¹⁸ 630 F.2d at 867, 105 L.R.R.M. at 2811. The memorandum opinion is reported at 488 F. Supp. 524, 104 L.R.R.M. 2730.

¹⁹ *Baldwin v. ILA*, Civil No. 80-259 (D.C. Houston).

within the definition of "in commerce" in section 8(b)(4).²⁰ In *Mack v. ILA*,²¹ the Georgia district court issued an injunction prohibiting the boycott in the Savannah and Brunswick, Georgia ports.²² The *Mack* court rejected the ILA assertion that the adjudication in Texas operated as a bar to the *Mack* action under principles of res judicata.²³ The court also rejected the argument that the Board lacked jurisdiction because the matter was not in commerce.²⁴ The regional directors in both *Mack* and *Baldovin* appealed their respective district court decisions.²⁵

The district court in *Walsh* also rejected the union's assertion of res judicata.²⁶ Nevertheless, the court denied the injunction because it failed to find reasonable cause to believe that an unfair labor practice had occurred.²⁷ The Court of Appeals for the First Circuit vacated the district court findings and ordered the court to dismiss the case on the basis of res judicata.²⁸ In reaching its conclusion, the circuit court discussed the principles of res judicata²⁹ and analyzed the validity of the application of those principles to section 10(1) decisions.³⁰ Section 10(1) proceedings, the court noted, are limited in scope to a finding of a reasonable belief that an unfair labor practice has occurred.³¹ Because of this limitation, the court continued, a section 10(1) decision is not final as to the merits of the underlying unfair labor practice charge.³² Thus, the court stated, such decisions do not bar further action on the underlying charge either before the Board or the court of appeals.³³ Yet the limited scope of section 10(1) proceedings, the court continued, does not preclude application of res judicata to district court adjudication of a section 10(1) petition.³⁴ The court noted that in such cases the district court does decide the narrow issue of reasonable cause for the purposes of determining whether to

²⁰ 630 F.2d at 866, 105 L.R.R.M. at 2810.

²¹ *Mack v. ILA*, Civil No. 480-051 (D.C. Savannah).

²² 630 F.2d at 866, 105 L.R.R.M. at 2810-11.

²³ *Id.* at 866, 105 L.R.R.M. at 2810. The court found that subsequent activity removed the case from res judicata principles. See the *Walsh* court's discussion of the *Mack* district court findings where the First Circuit noted that "the subsequent conduct was broader and more far-reaching than the conduct which led to the original complaint." 630 F.2d at 873, 105 L.R.R.M. at 2816.

²⁴ 630 F.2d at 866, 105 L.R.R.M. at 2810.

²⁵ *Id.*, 105 L.R.R.M. at 2811. The decision by the Fifth Circuit, affirming the district court in *Baldovin* and reversing the district court in *Mack*, is reported at 626 F.2d 445, 105 L.R.R.M. 2549 (5th Cir. 1980).

²⁶ 630 F.2d at 867, 105 L.R.R.M. at 2811.

²⁷ *Id.*

²⁸ *Id.*

²⁹ The court of appeals noted that it used the term res judicata as a general term to include both issue and claim preclusion, as well as collateral estoppel. 630 F.2d at 867 n.5, 105 L.R.R.M. at 2811 n.5.

³⁰ 630 F.2d at 867-70, 105 L.R.R.M. at 2811-13.

³¹ *Id.* at 868, 105 L.R.R.M. at 2812.

³² *Id.*

³³ *Id.* and cases cited therein.

³⁴ 630 F.2d at 869, 105 L.R.R.M. at 2812.

allow injunctive relief.³⁵ On this issue, the court pointed out, the parties have an opportunity to be heard³⁶ and to appeal a denial to the court of appeals.³⁷ Since the opportunities to be heard and to appeal are available to section 10(1) litigants, the court noted, there is no reason to allow a party to bring further petitions against the same respondent based on the same underlying charge.³⁸ This approach, according to the court, would result in the type of repetitive litigation which *res judicata* was designed to prevent.³⁹ The court concluded that the potential for such repetitive suits, and for inconsistent decisions, is just as present in section 10(1) proceedings as in other areas of the law, and, therefore, *res judicata* is applicable.⁴⁰

After discussing the applicability of *res judicata* principles, the First Circuit applied those principles to the facts of the *Walsh* case. The court noted that a proper application of *res judicata* principles requires: (1) a prior decision on the merits; (2) identical parties in both actions; and (3) the same cause of action in both suits⁴¹. If the cause of action is not the same, the court continued, the action may still be barred if an issue decided in the earlier case disposed of the later claim.⁴² The *Walsh* court examined each of these factors to determine whether *res judicata* was applicable.⁴³ First, resolving whether the *Baldovin* decision was on the merits, the court pointed out that *Baldovin* was disposed of on a jurisdictional ground.⁴⁴ While a jurisdictional disposition of a case is usually not a disposition on the merits, the court noted, this rule is generally applicable where a presiding court is defining its own jurisdiction.⁴⁵ In *Baldovin*, the court stated the district court was called upon to determine the Board's jurisdiction, and not its own.⁴⁶ Since the finding that the Board lacked jurisdiction necessarily meant that no violation of the Act had occurred, the *Walsh* court concluded that *Baldovin* more closely resembled a decision on the merits than a disposition for lack of federal court jurisdiction.⁴⁷ Under this analysis, the *Baldovin* decision was held by the *Walsh* court to be on the merits for *res judicata* purposes.⁴⁸

The court then turned to the second factor — identity of parties.⁴⁹ The court found that the regional directors should be considered the same party for purposes of *res judicata* because they were all representatives of the United

³⁵ *Id.* at 868-69, 105 L.R.R.M. at 2812.

³⁶ *Id.* at 869, 105 L.R.R.M. at 2812.

³⁷ *Id.*

³⁸ *Id.*, 105 L.R.R.M. at 2813.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 870-74, 105 L.R.R.M. at 2813-16.

⁴² *Id.* at 873-74, 105 L.R.R.M. at 2816.

⁴³ *Id.* at 870, 105 L.R.R.M. at 2813.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 870-72, 105 L.R.R.M. at 2814-15.

States, pursuing the same government interest.⁵⁰ That the claims were brought by different regional directors, the court concluded, did not make them non-identical parties for res judicata purposes.⁵¹ Nor did the court find it persuasive that different parties had filed the unfair labor charges with the Board.⁵² While the charging parties have a substantial interest in the proceedings, the court reasoned, they do not have a private right of action under section 10(1) and therefore cannot be termed the actual petitioners.⁵³ The court also noted that the Board must act in the public interest and not solely in the interest of the party who files the charge with the Board to initiate the bringing of a section 10(1) petition by a regional director.⁵⁴ These factors combined to support the determination that in form and substance the petitioner in both *Baldovin* and *Walsh* was the Board.⁵⁵

After finding the petitioners to be identical in both cases, the court examined whether the respondents were the same in *Walsh* as they were in *Baldovin*.⁵⁶ The regional directors in both *Baldovin* and *Walsh* had named the ILA as respondent.⁵⁷ Under the traditional rules of res judicata, both the plaintiff and the defendant in the two suits had to be identical.⁵⁸ The court found that the requirement of mutuality was not a barrier to the application of res judicata in the case before the court since in both *Baldovin* and *Walsh* the ILA was a named respondent.⁵⁹

The court then focused on the third factor — whether the cause of action was identical in *Baldovin* and *Walsh*. Each case arose out of a challenge by a Board official to the ILA policy of boycotting Soviet cargoes and ships.⁶⁰ The Board had argued that the bringing of three separate actions, each of which was against both local and national ILA union members, constituted actions based on such varying fact patterns that res judicata principles were inappropriate.⁶¹ In response to this argument, the court stated that it was unnecessary to decide whether *Baldovin* and *Walsh* stemmed from the same cause of action for res judicata purposes, finding instead that the principle of collateral estoppel could be applied.⁶² The Board argued that collateral estoppel

⁵⁰ *Id.* at 870, 105 L.R.R.M. at 2814.

⁵¹ *Id.* at 871, 105 L.R.R.M. at 2814.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 872, 105 L.R.R.M. at 2815.

⁵⁶ *Id.* The court noted that mutuality may no longer be required. *Id.* It appears that mutuality is no longer a necessary element in a federal suit where a party is alleging issue preclusion. See *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971) (defensive estoppel); see also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (offensive estoppel).

⁵⁷ 630 F.2d at 872-73, 105 L.R.R.M. at 2815-16.

⁵⁸ *Id.* at 872, 105 L.R.R.M. at 2815.

⁵⁹ *Id.* at 872-73, 105 L.R.R.M. at 2815-16.

⁶⁰ *Id.* at 873, 105 L.R.R.M. at 2816.

⁶¹ *Id.*

⁶² *Id.*

could not be applied because the ship involved in *Walsh* was of United States registry, but the ship involved in *Baldovin* was of foreign registry.⁶³ This difference in registry, the Board concluded, was a "controlling fact" and thus the jurisdictional issue litigated in *Baldovin* was not the same as the issue before the court in *Walsh*.⁶⁴

The court agreed that collateral estoppel could not be used where there exists a difference in controlling facts⁶⁵ but found that the registry of the ships was not a controlling fact.⁶⁶ Since the *Baldovin* court had not expressly limited the scope of its relief to United States ships, the circuit court declined to infer that it had addressed the issue of registry.⁶⁷ The court instead reasoned that the controlling fact in defining the Board's jurisdiction over disputes involving foreign ships is the nature of the underlying dispute.⁶⁸ The court then determined that the underlying issue in both *Baldovin* and *Walsh* was the ILA's policy toward Soviet cargo.⁶⁹ Therefore, since the underlying issues were the same in both *Baldovin* and *Walsh*, the First Circuit found collateral estoppel applicable. Applying collateral estoppel, the court held that the *Baldovin* decision precluded a judicial determination of the *Walsh* suit.⁷⁰ The court then vacated the findings of the district court and ordered the *Walsh* petition dismissed on the ground of res judicata.⁷¹

The application of res judicata principles, including both claim and issue preclusion, to section 10(1) proceedings produces a proper legal result. In order for res judicata to bar a suit, a court must find that there has been a final adjudication on the merits of a prior action brought by the parties or their privies.⁷² These requirements are capable of being met in a section 10(1) proceeding, as was illustrated in *Walsh*. Section 10(1) proceedings are limited in scope to a determination of whether a reasonable basis exists to believe that an unfair labor practice has occurred.⁷³ This determination, although binding only until the Board has reached a decision on the merits of the charge, is made by a district court and is a final judgment from which an appeal can lie.⁷⁴ Thus,

⁶³ *Id.* at 874, 105 L.R.R.M. at 2816.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 874-75, 105 L.R.R.M. at 2816.

⁶⁷ *Id.* at 875, 105 L.R.R.M. at 2817.

⁶⁸ *Id.* at 874, 105 L.R.R.M. at 2817. The court also stated that the location of the underlying dispute was a controlling fact. *Id.* The court did not address the location of the dispute presumably because in both *Baldovin* and *Walsh* the dispute involved American workers in American ports over an issue of Soviet foreign policy. See text and notes at notes 10-11 *supra*.

⁶⁹ *Id.* at 875, 105 L.R.R.M. at 2817. The court also found that there was no equitable bar to applying collateral estoppel to the *Walsh* case. *Id.* at 875, 105 L.R.R.M. at 2816-17.

⁷⁰ 630 F.2d at 875, 105 L.R.R.M. at 2817-18.

⁷¹ *Id.* at 875, 105 L.R.R.M. at 2818.

⁷² *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

⁷³ 630 F.2d 864, 868, 105 L.R.R.M. at 2809, 2812.

⁷⁴ *Id.*

so long as res judicata applies only to the determination of reasonable cause, the application of the doctrine is sound.

Because a judgment under a section 10(1) petition is valid only during the time that the section 8(b)(4) petition is pending before the Board, it is res judicata to another section 10(1) petition only during that limited period. During this time a party challenging a decision by a district court in a section 10(1) proceeding is able to appeal that decision to the circuit court.⁷⁵ This avenue of appeal provides the parties with a remedy for errors made at the district court level, and obviates the need for a *de novo* determination of the same issue by a different district court. The right of appeal, therefore, further counsels that there is no need to carve out an exception to res judicata principles in order to protect the rights of the parties in section 10(1) proceedings.

The Court of Appeals for the First Circuit was correct in holding that the *Walsh* petition was barred by the prior adjudication of the *Baldovin* petition. By explaining its decision in terms of res judicata and collateral estoppel, however, the court did not follow the clearest route to its final determination. Rather, the court framed its decision in a manner which may give rise to ambiguity concerning the definition of claim preclusion and issue preclusion. Claim preclusion can be invoked when a suit is being brought on a cause of action that has already been litigated between the same parties.⁷⁶ The application of claim preclusion prevents the relitigation of any issue that could have been brought under the cause of action of the earlier suit.⁷⁷ Issue preclusion differs from claim preclusion in that, under issue preclusion, the cause of action need not have been the same between the parties in the earlier action.⁷⁸ Any issue actually litigated between the parties in the previous litigation, however, is precluded from relitigation.⁷⁹

The *Walsh* court stated at the outset of its opinion that it was using the term res judicata in the general sense as embodying both claim and issue preclusion.⁸⁰ After discussing the difficulties in determining whether the causes of action were identical, the court stated that it was shifting to a separate analysis, using collateral estoppel.⁸¹ The express mention of this shift indicated that the court was no longer applying the term res judicata in its general sense, yet the court would have been more precise had it used the terms claim preclusion and issue preclusion throughout its opinion. For example, when the court spoke of applying res judicata to the case, it was considering only claim preclu-

⁷⁵ 29 U.S.C. § 160(1) (1976).

⁷⁶ *Purdes v. Carvel Hall, Inc.*, 301 F. Supp. 1256, 1260 (D.C. Iowa 1969). See *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971).

⁷⁷ *Id.*

⁷⁸ *Segal v. American Tel. and Tel. Co., Inc.*, 606 F.2d 842, 845 (9th Cir. 1979).

⁷⁹ *Purdes v. Carvel Hall, Inc.*, 301 F. Supp. at 1260; *Segal v. American Tel. and Tel. Co., Inc.* 606 F.2d at 845. See also *Parklane Hosiery Co. v. Shore*, 439 U.S. 332 (1979).

⁸⁰ 630 F.2d at 867, 105 L.R.R.M. at 2811.

⁸¹ *Id.* at 873-74, 105 L.R.R.M. at 2816.

sion;⁸² where it spoke of applying collateral estoppel, it was considering only issue preclusion.⁸³ Such a shift in analysis warranted explanation by the court. Because the court did not use proper terminology, it is unclear to what extent either of these principles — issue and claim preclusion — will be used to bar repetitious section 10(1) litigation. It is suggested that courts should use these terms in any future application of res judicata principles to section 10(1) proceedings. The following discussion uses the terms claim preclusion and issue preclusion in analyzing the *Walsh* opinion.

The circuit court in *Walsh* expressly declined to decide whether the same cause of action was at issue in *Baldovin* and *Walsh*, thus preventing it from applying claim preclusion.⁸⁴ In lieu of determining whether the requirements of claim preclusion were met, the circuit court applied the principles of issue preclusion.⁸⁵ Thus, the court concluded that since the question of whether the Board had jurisdiction over the action was litigated adversely to the Board in *Baldovin*,⁸⁶ litigation of that issue was barred in *Walsh*.⁸⁷ In this case, however, application of claim preclusion would have led to the same result, since the jurisdictional question was dispositive — e.g., without jurisdiction, the Board could not have brought suit at all.⁸⁸

It is possible, however, that at times issue preclusion will not be dispositive of a case although claim preclusion would be. As noted earlier, issue preclusion applies only to issues actually litigated.⁸⁹ Claim preclusion applies to issues that could have been litigated as well as to those that were actually litigated.⁹⁰ The broader reach of claim preclusion can be demonstrated by examining claim and issue preclusion in the context of a case where judgment is unaccompanied by findings. For example, if the Board's jurisdiction had not been litigated in *Walsh*, and further, if claim preclusion had been applied to the *Walsh* case, a finding that the causes of action were the same would bar the *Walsh* suit even if jurisdiction of the Board had not been raised in *Walsh*. This result would follow from the application of claim preclusion because under that doctrine any issue that could have been raised in the previous litigation may be barred in the later suit.⁹¹ Such a result would not follow from applying issue preclusion where the question of the Board's jurisdiction was not actually litigated in the earlier

⁸² This was evident in the court's discussion of whether the causes of action were identical, *id.* at 873, 105 L.R.R.M. at 2816, which is the analysis needed for a determination of claim preclusion. *Purdes v. Carvel Hall, Inc.*, 301 F. Supp. at 1260.

⁸³ This was evident when the court considered whether the issue decided in *Baldovin* was the same issue as that presented in *Walsh*. 630 F.2d at 845.

⁸⁴ 630 F.2d at 873-74, 105 L.R.R.M. at 2816. See text at notes 61-62 *supra*.

⁸⁵ See text at notes 63-64 *supra*.

⁸⁶ *Id.* at 866, 105 L.R.R.M. at 2810.

⁸⁷ *Id.* at 874-75, 105 L.R.R.M. at 2816-17.

⁸⁸ See *Id.* at 870, 105 L.R.R.M. at 2813.

⁸⁹ *Id.* at 864, 105 L.R.R.M. at 2809. See text at notes 78-79 *supra*.

⁹⁰ *Id.* at 867-868, 105 L.R.R.M. at 2811-12. See text at notes 76-77 *supra*.

⁹¹ *Purdes v. Carvel Hall, Inc.*, 301 F. Supp. at 1260.

case. Thus, the application of issue preclusion instead of claim preclusion may sometimes change the outcome of a challenge that a section 10(1) proceeding is barred. Given these potential discrepancies, the broader doctrine of claim preclusion should be applied when its requirements are met in order to effectuate consistently the *Walsh* holding that res judicata principles are applicable to section 10(1) proceedings.

In declining to find that the causes of action in *Baldovin* and *Walsh* were the same, the *Walsh* court created the possibility that claim preclusion — requiring the same cause of action — will not be applied in section 10(1) suits. The court stated that both *Baldovin* and *Walsh* arose out of the general ILA policy of refusing to handle Soviet cargo and goods.⁹² The Board argued that the causes of action were different because each regional director named different local unions as defendants in his pleadings.⁹³ Taken to its logical outcome, the Board's reasoning would result in the following situation: where a national union policy had to be fulfilled by the actions of local union members, thus requiring in turn the actions of various regional directors to challenge the national policy, a court could not find such a national embargo by a national union to give rise to a single cause of action. Rather, each action brought by each regional director concerning the same embargo would have to be treated as separate causes of action. This result would always follow because, as a practical matter, the national union can stop work only through its local unions. While the *Walsh* court questioned whether courts would be prevented from finding an identical cause of action solely because the plaintiff named local unions, the court did not address this issue directly.⁹⁴

Walsh is a strong case for finding that the same cause of action existed and, therefore, that claim preclusion was applicable. Although different regional directors were parties to the suits, each director was challenging the same national policy of the same national union. Whenever a national policy is challenged by a regional director, that challenge is carried out by the actions of local units of the national union. The mere fact that the national policy challenged is effectuated by different members of a union should not preclude a finding that the same cause of action is at issue. A contrary finding would restrict severely the possible application of res judicata principles. Thus, for claim preclusion to have any effect in section 10(1) controversies, as the *Walsh* court ruled it should, the petitions brought by different regional directors concerning a single union policy must be found to spring from the same cause of action.

A finding that the cause of action in *Walsh* was the same as that in *Baldovin* is supported by the facts of both cases. A cause of action is defined as a situation

⁹² 630 F.2d at 873, 105 L.R.R.M. at 2816.

⁹³ *Id.*

⁹⁴ Where activity subsequent to the prior adjudicated activity is challenged, and relief sought only as to that subsequent conduct, the second action may not be barred even though the second action is of the same nature as the first. *See Kiglar v. Colber County Bd. of Ed.*, 578 F2d 1033, 1035 (5th Cir. 1978).

or state of facts which would entitle a party to sustain an action and give him a right to seek a judicial remedy in his behalf.⁹⁵ In both *Baldovin* and *Walsh*, a regional director sought to prevent the ILA from carrying out its policy of boycotting Soviet cargoes. In order for there to have been different causes of action, the activity challenged in each of the section 10(1) proceedings at issue would have to have changed substantively. Although the Board alleged that the same cause of action was not at issue, it offered no proof that the character of the activity challenged had changed from local union to local union. As there was no proof of a change in the challenged activity, the activity was the same for claim preclusion purposes in each case. As a practical matter, the national policy of the ILA could be fulfilled only if each local union boycotted the cargo. In order to end the boycott, the regional director had to enjoin each local union.⁹⁶ Each separate injunction, however, arises from the same cause of action. The Supreme Court has defined a cause of action as "... a single wrongful invasion of a primary right of the plaintiff, namely, ... whether the acts constituting such invasion were one or many, simple or complex."⁹⁷ The challenges by the regional directors fall within this category.

In sum, while the court's determination that res judicata principles apply to section 10(1) proceedings fosters the principles of res judicata without any negative equitable effects on the parties, further clarification of the extent of the standard's application is necessary. While the circuit court correctly found that *Walsh* was barred by *Baldovin*, the court may inadvertently have limited the future application of res judicata principles to the more narrow doctrine of issue preclusion by not applying claim preclusion to the *Walsh* facts.⁹⁸ For the time being, under facts similar to those in *Walsh*, it is clear only that issue preclusion is applicable. The court should clarify the role of claim preclusion in section 10(1) proceedings at the first opportunity.

5. *Burden of Proof in Discriminatory Discharge Cases:* *Wright Line Co. v. NLRB**

Section 8(a)(3) of the National Labor Relations Act (NLRA) prohibits discrimination in hiring, firing, or in other conditions of employment on the basis of union activity.¹ For an employee to prevail in a suit against an

⁹⁵ *Thompson v. Zurich Ins. Co.*, 309 F. Supp. 1178, 1181 (D.C. Minn. 1970). This definition seems similar to the "underlying issue" determination cited by the court as requiring issue preclusion. See text and note at note 64 *supra*.

⁹⁶ See 29 U.S.C. § 160(l) quoted at note 1 *supra*.

⁹⁷ *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 13 (1951) (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)).

⁹⁸ 630 F.2d at 873, 105 L.R.R.M. at 2816. See text at notes 76-78 *supra*.

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¹ 29 U.S.C. § 158(a)(3) (1976), which states in pertinent part: "(a) 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."

employer under section 8(a)(3), he must demonstrate that a causal connection exists between his union activities and his dismissal.² While the National Labor Relations Board (Board) and circuit courts of appeal have agreed that the employee must bear the burden of demonstrating this causal connection,³ a uniform standard to determine whether that burden has been met has not yet been agreed upon. Consequently, considerable difficulty has arisen in ascertaining whether the employee has made a showing of causation sufficient to prove a violation of the NLRA. The major difficulty with determining whether causation has been proved arises when an employer has both an anti-union and a legitimate business reason for the dismissal. It is in these "dual motivation"⁴ cases that the Board and the courts must reconcile the competing interests of protecting an employee under the NLRA with that of allowing management to make business decisions free from unnecessary interference.⁵

In the past, when reconciling these competing interests, the Board has applied the "in-part" test.⁶ In contrast, the courts of appeal have applied, *inter alia*, the "dominant-motive" test.⁷ While both tests require that the employee bear the burden of persuasion that a violation of section 8(a)(3) has occurred, the tests differ significantly on the level of proof necessary to meet that burden. Under the in-part test, the employee must demonstrate that some part of the dismissal decision was generated by his union activities.⁸ Thus, the application of the in-part test could result in a finding for the employee even though the employer would have dismissed the employee absent the protected conduct, so long as anti-union motivation or animus contributed, in part, to the dismissal decision.⁹ In comparison, under the dominant-motive standard, an employee must demonstrate that the protected union activity was the primary cause of the dismissal. The First Circuit, for example, has stated that under the dominant-motive test the employee must give an "affirmative and persuasive reason why the employer rejected the good cause and chose the bad cause."¹⁰

² Wright Line Co. v. NLRB, 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169, 1170 (1980).

³ *Id.* at 7, 105 L.R.R.M. at 1173.

⁴ *Id.* at 4, 105 L.R.R.M. at 1170. An employer's actions are in the dual motivation category if both anti-union animus and a legitimate business reason caused the dismissal. *Id.* When faced with a dual motivation case, the Board and some courts have attempted to determine whether the employer justifications are "pretextual." An employer justification is considered pretextual when the alleged business reason for the dismissal was in reality only a sham. *Id.* If the employer is able to demonstrate that the employer justification for the dismissal was a pretext, no countervailing policy would militate against judgment for the employee. *Id.* The characterization of the employer's justifications for the dismissal as either pretext or dual motivation does not aid in the determination of causation, however, because the characterization could not be made until the parties presented their respective proof on the cause of the dismissal. *Id.*

⁵ 251 N.L.R.B. No. 150 at 5, 105 L.R.R.M. at 1170.

⁶ *Id.* at 5-6 n.5, 105 L.R.R.M. at 1170 n.5.

⁷ *E.g.*, Coletti's Furniture, Inc. v. NLRB, 505 F.2d 1293 (1st Cir. 1977); Midwest Regional Joint Bd., 564 F.2d 434, 440 (D.C. Cir., 1977).

⁸ 251 N.L.R.B. No. 150 at 6, 105 L.R.R.M. at 1170.

⁹ *Id.*

¹⁰ Coletti's Furniture v. NLRB, 505 F.2d 1293 (1st Cir. 1977).

Thus, the dominant motive test requires that the employee prove the dismissal would not have occurred absent the protected activity. To add to the confusion over the appropriate test in section 8(a)(3) cases, several courts have employed a combination of the two standards, while others have chosen one or the other for specific determinations.¹¹

During the *Survey* year, in *Wright Line Co. v. NLRB*,¹² the Board adopted a new standard to be applied in all section 8(a)(3) suits.¹³ In *Wright Line* the Board held that the shifting burden of proof standard adopted by the Supreme Court in the first amendment case of *Mt. Healthy City Board of Education v. Doyle*¹⁴ was to be applied in such suits. Under this test, an employee is required first to make a prima facie case that protected conduct — such as union activity — was a motivating factor in his dismissal.¹⁵ After this showing the burden shifts to the employer who must prove that the employee would have been dismissed for legitimate business reasons even absent the protected conduct.¹⁶

In *Wright Line*, employee Lamoureux was discharged for violating a plant

¹¹ See 251 N.L.R.B. No. 150 at 9-10, 105 L.R.R.M. at 1171-72 and cases cited therein. In *NLRB v. Eastern Smelting and Ref. Corp.*, 598 F.2d 666 (1st Cir. 1970), the First Circuit adopted the *Mt. Healthy* standard, see note 14 *infra*, for use in § 8(a)(3) decisions. In *Wright Line*, 251 N.L.R.B. No. 150 at 9 n.7, 105 L.R.R.M. at 1171 n.7, the Board noted that the First Circuit had adopted the *Mt. Healthy* standard, but did not purport to be following that circuit's view. This passing recognition of the First Circuit activity may be the result of the references to the Board's treatment of § 8(a)(1) and § 8(a)(3) cases when the First Circuit was applying the dominant-motive test, a practice that strained the relations between the two decisionmakers. *E.g.*: "Over the years we have observed that our decisions restricting the Board are rarely cited by it, no matter how pertinent, a seemingly symbolic bookburning, difficult to subscribe to oversight." 598 F.2d at 670 n.7. "The Board's persistent disregard of the principles governing mixed motive cases ultimately led to our announcing that we would no longer 'rescue [it] if it does not both articulate and apply our rule.' " *Id.* at 671. "It is altogether inexplicable that at this late date, . . . an ALJ could say 'The existence of justifiable grounds for the layoff is no defense if the motivation for the layoff was in part because of the employee's participation in union activities.' " *Id.* at 674 n.18. The *Wright Line* decision thus serves to reconcile the differences between the Board and the Court by adopting the same burden of proof standards.

The Seventh Circuit has refused to follow the *Eastern Smelting* decision. *Pelton Casteel, Inc. v. N.L.R.B.*, 627 F.2d 23, 27 (7th Cir. 1980). *Pelton Casteel, Inc.* is a pre-*Wright Line* decision, however, and it is possible that the Seventh Circuit will now follow the Board in the interest of uniformity.

¹² 251 N.L.R.B. No., 150, 105 L.R.R.M. 1169 (1980).

¹³ *Id.* at 3, 105 L.R.R.M. at 1170. The Board announced that the standard used in *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), would be applied to § 8(a)(3) alleged violations. *Id.* The Board then applied the standard to the § 8(a)(3) allegations of the *Wright Line* case. 251 N.L.R.B. No. 150 at 3, 105 L.R.R.M. at 1169.

¹⁴ In *Mt. Healthy*, a school teacher was not rehired following an incident where he turned an intra-school memorandum over to a local radio station which broadcast it as a news item. 429 U.S. at 282. Although the school board presented several non-constitutionally protected incidents that may have been grounds for dismissing Doyle, such as arguing with another teacher and making an obscene gesture at students, *id.* at 281, the district court ordered him reinstated because the constitutionally protected radio incident played a "substantial part" in the school board's decision to dismiss him. *Id.* at 285. The Supreme Court rejected the substantial part test and developed the *Mt. Healthy* standard shifting burden of proof. *Id.* at 287.

¹⁵ 251 N.L.R.B. No. 150 at 13, 105 L.R.R.M. at 1172-73.

¹⁶ *Id.*

rule against knowingly altering time cards.¹⁷ Apparently Lamoureux was not working on jobs at the times listed on his time card.¹⁸ Lamoureux conceded that he may not have been present at the jobs during the times listed, but maintained that the jobs had been performed at different times that same day.¹⁹ The company in turn conceded that Lamoureux was not discharged for failing to perform assigned work.²⁰ Indeed, the record showed that during the more than ten years²¹ that Lamoureux had been employed by Wright Line, he had been producing better than average work.²² The record further showed that his final paycheck had already been prepared when management asked for an explanation of the discrepancies on his time card.²³

The Board applied the *Mt. Healthy* standard of review to these facts and ordered Lamoureux reinstated with back pay.²⁴ Under *Mt. Healthy*, Lamoureux first had to prove that his union activities were a motivating factor in the dismissal.²⁵ In concluding that Lamoureux had sustained that burden, the Board noted that no other employee had been dismissed under the plant rule for knowingly altering time cards even though other employees followed similar practices.²⁶ The Board found that two employees who had deliberately falsified their time cards were only reprimanded.²⁷ In addition, the Board noted, it was undisputed that Wright Line was aware of Lamoureux's union activities²⁸ and that Lamoureux was dismissed only two months after the 1977 union election.²⁹ Furthermore, the Board cited evidence that Wright Line had previously exhibited anti-union animus.³⁰ Consequently, the Board found that Lamoureux had met his burden of proof by making a prima facie case that his union activity was a motivating factor in his dismissal.³¹

The Board next considered whether Wright Line had carried its burden of proof to show that Lamoureux would have been dismissed notwithstanding the union activities.³² The Board ruled that the company had not made such a showing.³³ In support of its findings the Board noted that the superintendent

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 23 & n.17, 105 L.R.R.M. at 1175 & n.17.

²¹ *Id.* at 22, 105 L.R.R.M. at 1175.

²² *Id.*

²³ *Id.* at 23, 105 L.R.R.M. at 1175.

²⁴ *Id.* at 27, 105 L.R.R.M. at 1176.

²⁵ *Id.* at 25, 105 L.R.R.M. at 1176.

²⁶ *Id.* The Board noted that two employees had been dismissed under the rule in the past for embezzlement and for forgery. *Id.* There was no contention that Lamoureux could have financially benefitted from his time-card discrepancies. *Id.* at 25 n.19, 105 L.R.R.M. at 1176 n.19.

²⁷ 251 N.L.R.B. No. 150 at 25, 105 L.R.R.M. at 1176.

²⁸ *Id.* at 24-25, 105 L.R.R.M. at 1175-76.

²⁹ *Id.* at 25-26, 105 L.R.R.M. at 1175.

³⁰ *Id.* at 26, 105 L.R.R.M. at 1175-76.

³¹ *Id.* at 25, 105 L.R.R.M. at 1176.

³² *Id.* at 26, 105 L.R.R.M. at 1176.

³³ *Id.* at 26, 105 L.R.R.M. at 1175-76.

had been ordered to check on Lamoureux without any proof that Lamoureux had done anything to justify that surveillance.³⁴ This fact suggested to the Board that a predetermined plan existed to find a reason to dismiss Lamoureux.³⁵ The Board also found that there was no business reason for the disparate treatment of Lamoureux, since no other employees had been dismissed for the same offense.³⁶ The Board indicated that the company's defense was further weakened because such timekeeping discrepancies were commonplace.³⁷ Accordingly, the Board determined that Wright Line had not shown that it would have dismissed Lamoureux absent his union activity.³⁸

Board member Jenkins concurred specially to highlight the difficulties in separating motives in mixed, as opposed to dual, motive cases.³⁹ Jenkins agreed that the *Wright Line* test would suffice in most cases, but noted that there may be cases where many justifications, only one of which violates the NLRA, culminated in the discharge.⁴⁰ Jenkins termed such instances "mixed" motivation cases.⁴¹ In such cases, the absence of any one of the justifications may have operated to prevent the dismissal.⁴² Nevertheless, Jenkins contended, if a single motive cannot be isolated as the cause of the dismissal and the unlawful motive was found to be part of the discharge, the discharge should be found in violation of section 8(a)(3).⁴³ Jenkins remarked that if the *Mt. Healthy* test, as applied in *Wright Line*, would not require reinstatement of the employee in a mixed motivation case, he would require that the test be modified.⁴⁴

The adoption of the *Mt. Healthy* standard by the Board will considerably clarify the proper application of the burden of proof in section 8(a)(3) dismissal cases. If followed by the circuit courts,⁴⁵ *Wright Line* will bring both uniformity of standards and more consistent findings. One favorable aspect of the standard is its ability to reconcile the competing interests of the employee and the employer in dual motivating dismissals. These competing interests — the right of the employee to partake in activity that is protected under the NLRA, and the right of the employer to dismiss an employee for legitimate business reasons — cannot be reconciled through the use of either the in-part or the dominant-motive test. As noted above,⁴⁶ the in-part test cannot be used to reconcile such

³⁴ *Id.*, 105 L.R.R.M. at 1176.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 27, 105 L.R.R.M. at 1176.

³⁸ *Id.*

³⁹ *Id.* at 28, 105 L.R.R.M. at 1176.

⁴⁰ *Id.* at 28-29, 105 L.R.R.M. at 1176.

⁴¹ *Id.* at 28, 105 L.R.R.M. at 1176.

⁴² *Id.* at 29, 105 L.R.R.M. at 1176.

⁴³ *Id.* at 28, 105 L.R.R.M. at 1176.

⁴⁴ *Id.* at 29, 105 L.R.R.M. at 1176-77.

⁴⁵ See *NLRB v. Burns Motor Freight*, 635 F.2d 312, 106 L.R.R.M. 2018 (4th Cir. 1981) (court declining to decide whether it will adopt *Wright Line* standard).

⁴⁶ See text at note 9 *supra*.

interests. If anti-union animus plays a part in the dismissal decision, the in-part test requires judgment for the employee regardless of any countervailing business reasons that may have existed.⁴⁷ Because legitimate business reasons for the dismissal are not considered under this standard, its application tends to penalize employers unfairly.⁴⁸

In contrast to the in-part test, the dominant-motive test recognizes the need to assess whether a legitimate business concern of the employer was in fact the reason for the dismissal even though protected activity may have played some part in the decision.⁴⁹ Two difficulties with the test, however, render it less desirable than the *Mt. Healthy* standard. First, the employee is required to show that the protected union activity was in fact the employer's "dominant" motive in the dismissal. When many motivating factors exist, including business reasons, this is an exceptionally difficult task. Second, this task is particularly onerous because, by necessity, the determination is a highly subjective one. These difficulties, in addition to the employee's shouldering of the burden of proof, make it questionable whether section 8(a)(3)'s objective of protecting employees from union-based discrimination can be met. The flaw in the dominant-motive test, then, is that it does not adequately preserve the rights of workers.

Reconciliation of the rights of both the employee and the employer, however, is attainable through the application of the *Wright Line* test. Under the first step of the test, the employee must make a prima facie case that protected conduct was a motivating factor in the dismissal.⁵⁰ This first step thus forces the Board to consider whether it is likely that the employee's rights under the Act have been infringed. After the employee has met this burden, the burden of proof shifts to the employer to demonstrate that the employee would have been dismissed for legitimate business reasons absent the protected conduct.⁵¹ This second step allows the Board to consider and weigh the interests of the employer in dismissing the employee.

The two-step process adopted by the Board in *Wright Line* requires that the initial burden of proof be on the employee, as was the case under both the in-part and dominant-motive standards.⁵² Under *Wright Line*, however, the employee need only establish a prima facie case that a dismissal was motivated by anti-union animus for the burden of proof to shift to the employer. This low threshold of proof is, in effect, a shift of the risk of nonpersuasion to the

⁴⁷ See *M.S.P. Indus., Inc. v. NLRB*, 568 F.2d 166, 173-74 (10th Cir. 1977). The application of the in-part test may advantage an employee merely because of the exercise of her rights under the NLRA. See *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. at 285-86 (1977).

⁴⁸ See *Wright Line v. NLRB*, 251 N.L.R.B. No. 150 at 7, 105 L.R.R.M. at 1171 (1980).

⁴⁹ *Id.* at 7-8, 105 L.R.R.M. at 1171.

⁵⁰ *Id.* at 20, 105 L.R.R.M. at 1175.

⁵¹ *Id.* at 19, 105 L.R.R.M. at 1175.

⁵² See, e.g., *NLRB v. Billen Shoe Co., Inc.* 297 F.2d 801 (1st Cir. 1968) (dominant motive standard); *The Youngstown Osteopathic Hosp. Ass'n*, 224 N.L.R.B. 574, 575 (1976) (in-part standard).

employer.⁵³ Although the Board stated that the employee still carries the ultimate burden of proof,⁵⁴ in practice, this ultimate burden may be carried simply by proving a prima facie case in the first instance. The failure of the Board to acknowledge this shift in burdens does not alter the application of the *Wright Line* standard. It does suggest, however, that the Board did not intend its new standard to impose a greater burden of proof on the employee than did the in-part test.

While the adoption of the *Wright Line* test brings with it a much needed clarification of the burden of proof in section 8(a)(3) dismissals, uncertainties exist as to its future application due to the ambiguities concerning the nature of the prima facie case. Without further clarification by the Board, the prima facie standard could be used to detract from the simplicity of the *Mt. Healthy* standard, affecting both the application of the standard and the fairness of its results. While the Board in *Wright Line* intimated that the burden of proof necessary to meet the prima facie standard be that of a motivating factor,⁵⁵ no in-depth discussion of the level of proof was undertaken. Furthermore, the Board noted that the motivating-factor test did not require a showing that the discriminatory motive was the sole cause of the dismissal.⁵⁶

In order to further the purpose of the Act without unduly burdening employers, the Board should retain the in-part standard as the first step of the shifting burdens standard adopted in *Wright Line*.⁵⁷ While the Supreme Court

⁵³ *Pacific Tel. & Tel. Co. v. Wallace*, 158 Or. 210, 213, 75 P.2d 942, 947 (defining prima facie case as one that will prevail until contradicted and overcome by other evidence).

⁵⁴ 251 N.L.R.B. No. 150 at 18 n.11, 105 L.R.R.M. at 1174 n.11.

⁵⁵ 251 N.L.R.B. No. 150 at 14-15, 105 L.R.R.M. at 1173 (discussing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)). In *Village of Arlington Heights*, the Court found that the plaintiffs, who had alleged a denial of zoning changes because of racial discrimination, had failed to establish that racial discrimination was a motivating factor in the refusal. *Id.* at 270.

⁵⁶ 251 N.L.R.B. No. 150 at 19, 105 L.R.R.M. at 1174.

⁵⁷ *But cf.*, *Statler Indus., Inc. v. NLRB*, 244 N.L.R.B. No. 19, 108 L.R.R.M. 2513 (1st Cir. 1981) (employee must satisfy significant-factor test in order to make a prima facie § 8(a)(3) case). The First Circuit Court of Appeals has held that in § 8(a)(3) suits, an employee must prove protected conduct was a significant factor in the employer's decision before the burden shifts to the employer to prove the dismissal would have resulted even absent the protected activity. *Id.* The incorporation of the significant-factor test thus would result in the Board applying the same standard for section 8(a)(3) violations as the First Circuit. Therefore, the incorporation of the significant-factor test would obviate the concern of the First Circuit over the failure of the Board to apply First Circuit standards. See text and note at note 11 *supra*. It is notable, however, that the Board in *Wright Line* did not express any concern over a conflict with the First Circuit. The Board was not attempting to reconcile its position with that of the First Circuit. Instead, the Board was attempting to reconcile employee protection, mandated by the NLRA, with the right of employers to dismiss employees for legitimate business reasons. In order to reconcile employee-employer interests, it is necessary to allow the employer to demonstrate that the employee would have been dismissed absent his protected activity. It should also be noted that the Board may consider the terms "in-part" and "significant" to have the same meaning for purposes of reviewing § 8(a)(3) cases. See *Wright Line v. Lamoureux*, 251 N.L.R.B. No. 150 at 6 (1980).

in *Mt. Healthy* rejected the in-part standard as a one-step test, it did not preclude its use as the standard by which the employee might meet his initial burden of proof. There are several reasons for incorporating the in-part standard. Most importantly, the incorporation of the in-part test would require the employer to come forward with affirmative proof that the employee was not discharged because of his union activities.⁵⁸ Also, the adoption of the in-part standard would address the difficulties implicit in mixed motive dismissals which concerned the concurring Board member Jenkins in *Wright Line*. As noted earlier, Jenkins voiced concern over the equity of the application of the *Mt. Healthy* standard where the employer had several justifications for the dismissal.⁵⁹ If, for example, the union activity was one of the five reasons for the dismissal, and the union activity occurred two years prior to the dismissal, the in-part standard would be met. Since section 8(a)(3) was passed to prevent an employee from being discriminated against because of union activity, the proper test to be applied in section 8(a)(3) dismissals is one which protects the employee from dismissal if any part of the decision to dismiss him was based on his union activity. The incorporation of the in-part standard into the *Mt. Healthy* test would provide the employees with this protection while allowing the employer to prove that the employee's union activity did not affect the dismissal decision.

As noted earlier,⁶⁰ a test which requires a prima facie case that consists only of a showing that anti-union animus played some part in a dismissal, is a test which, as a practical matter, shifts the ultimate burden of proof onto the employer.⁶¹ While this result does run counter to the Board's expressed intent in *Wright Line* to maintain the ultimate burden of proof on the employee,⁶² the ability of the employer to prevail by demonstrating a legitimate business reason for the dismissal obviates any possible inequities.

In sum, the *Mt. Healthy* standard of review in discriminatory discharges will bring both clarity and uniformity of results to section 8(a)(3) suits. Unanswered questions exist, however, as to the standard of proof necessary for an employee to establish a prima facie case of discriminatory discharge. Incorporation of the in-part test as the standard that an employee must meet before the burden of proof shifts to the employer, would clarify the application of this standard and further the purpose of the Act.

⁵⁸ 251 N.L.R.B. No. 150 at 17-18, 105 L.R.R.M. at 1174.

⁵⁹ See text at notes 39-44 *supra*.

⁶⁰ See text and note at note 53 *supra*.

⁶¹ This shift appears to be particularly detrimental to the employer in cases where the employee uses inferences of past anti-union animus to support the prima facie showing. See *J.P. Stevens & Co. v. NLRB*, 106 L.R.R.M. 2145, 2147 (4th Cir. 1980) (discussion of inferences in proving anti-union motivation).

⁶² 251 N.L.R.B. No. 150 at 18, n.11, 105 L.R.R.M. at 1174 n.11.

6. *Selective Discipline of Union Officials:*

NLRB v. Armour-Dial, Inc.*

When labor unions engage in illegal strikes, employers may wish to discipline union officials more severely than the rank-and-file union members. Before 1977, the National Labor Relations Board (NLRB) had held that it was permissible for union officials to be disciplined more severely than the rank-and-file, because the officials had a greater duty than did the rank-and-file to uphold their obligations to the employers.¹ In the 1977 case of *Precision Castings Co.*,² the NLRB adopted a contrary view. In that case, union officials had participated in an illegal strike, although they had an obligation, under their collective bargaining agreement, to take reasonable steps to thwart any work stoppage.³ Upon returning to work, the union officials were singled out and disciplined because of their status as union officials and their resultant obligations.⁴ In spite of the contractual obligations of the union officials, the NLRB held that the employer could not selectively discipline union officials based on their union status.⁵ Such selective discipline was held to be a violation of the employee's right to participate in union activity.⁶ According to the Board, such selective discipline is, therefore, an unfair labor practice, in violation of the National Labor Relations Act (NLRA).⁷

Although the *Precision Castings* case was not itself reviewed by the courts, the NLRB's new position — that union officials cannot be disciplined selectively — has been reviewed by the Third and Seventh Circuits.⁸ Both circuits have refused to accept this position and, thus, have not enforced NLRB orders in ac-

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¹ See, e.g., *Russell Packing Co.*, 133 N.L.R.B. 194, 195-97, 48 L.R.R.M. 1608, 1608-09 (1961).

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

³ *Id.* at 183, 96 L.R.R.M. at 1541-42.

⁴ *Id.* at 183-84, 96 L.R.R.M. at 1542.

⁵ *Id.* at 184, 96 L.R.R.M. at 1542.

⁶ *Id.*

⁷ The pertinent sections of the NLRA provide:

§ 157. Right of employees as to organization, collective bargaining, etc.

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).

§ 158. Unfair labor practices.

(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.

29 U.S.C. § 158 (1976).

⁸ *Gould, Inc. v. NLRB*, 612 F.2d 728, 103 L.R.R.M. 2207 (3d Cir. 1979); *Indiana & Mich. Elec. Co. v. NLRB*, 599 F.2d 227, 101 L.R.R.M. 2475 (7th Cir. 1979).

cord with this position.⁹ These courts have reasoned that, because union officials are under a greater duty to uphold their contracts, the officials may be disciplined more severely when they breach their contracts.¹⁰ Furthermore, since there is no employee right to engage in illegal strikes, the courts have held that no employee right is violated by the discipline of officials who strike illegally.¹¹ Therefore, these courts have rejected the view adopted by the NLRB in *Precision Casting*.

During the *Survey* year, the issue of whether union officials may be selectively disciplined was before the Eighth Circuit in *NLRB v. Armour-Dial, Inc.*¹² The Eighth Circuit joined the Third and Seventh Circuits by holding that selective discipline of union officials was permissible under the Labor-Management Relations Act.¹³ Now that three circuits have held that selective discipline is permissible, it seems unlikely that the NLRB's position to the contrary will become the law.

The *Armour-Dial* case arose when the union which represented Armour-Dial's employees threatened to stop handling materials from Iowa Beef Products.¹⁴ The threatened work stoppage by the Armour employees was in furtherance of a dispute between an affiliated union and Iowa Beef Products.¹⁵ Thus, the threats were illegal under the secondary boycott prohibition of the NLRA.¹⁶

The dispute between Armour and the union climaxed when an Iowa Beef truck arrived at Armour's loading dock.¹⁷ The union president informed company officials that Armour's employees would no longer handle Iowa Beef's products.¹⁸ The company persistently tried to convince the union president and vice-president to prevent the impending work stoppage.¹⁹ When no agreement was reached, a meeting was scheduled between the company and the union's president, vice-president, chief steward, and executive committee.²⁰ This meeting also failed to resolve the dispute, although the company argued that the union officials had an obligation to prevent any work stoppage.²¹ When it became clear that the union officials would not halt the work stoppage, the company suspended the union representatives, each for varying lengths of time.²²

⁹ *Gould*, 612 F.2d at 730, 103 L.R.R.M. at 2208; *Indiana*, 599 F.2d at 228, 101 L.R.R.M. at 2476.

¹⁰ *Gould*, 612 F.2d at 733, 103 L.R.R.M. at 2210; *Indiana*, 599 F.2d at 230, 101 L.R.R.M. at 2477.

¹¹ *Gould*, 612 F.2d at 732-33, 103 L.R.R.M. at 2210; *Indiana*, 599 F.2d at 230, 101 L.R.R.M. at 2477.

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

¹³ *Id.* at 55-56, 106 L.R.R.M. at 2267-68.

¹⁴ *Id.* at 53, 106 L.R.R.M. at 2265.

¹⁵ *Id.*

¹⁶ *Id.* at 55, 106 L.R.R.M. at 2267.

¹⁷ *Id.* at 53, 106 L.R.R.M. at 2266.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 54, 106 L.R.R.M. at 2266.

In response to the suspension of the union officials, a complaint was filed against Armour-Dial.²³ The complaint alleged that the suspensions discriminated against the union officials solely on the basis of their status in the union.²⁴ Such discrimination was allegedly an unfair labor practice under the NLRA.²⁵ The NLRB agreed with this allegation and held that the suspension of the union officials was prohibited by the NLRA.²⁶ Thus, the company was ordered to cease its unfair practices, to provide the suspended officials with back pay, to erase all reprimands issued to the officials, and to post an appropriate notice.²⁷

On appeal to the Eighth Circuit, enforcement of the NLRB's order was denied.²⁸ The court recognized that an employee may not be disciplined merely because he holds a union office.²⁹ The court found, however, a "crucial distinction between discipline which is imposed because of union . . . office and discipline which is imposed for acts, otherwise punishable, which were committed . . . while exercising union . . . office."³⁰ In the *Armour-Dial* case, the court determined that the discipline fell in the latter category. Since the threatened boycotts were illegal under the NLRA, the company had a right to discipline the union officials, regardless of their status within the union.³¹ Because non-official employees could have been disciplined for such activity as well, there was no reason for the court to "shield union officers from disciplinary measures to which they would otherwise be subject."³²

In holding that selective discipline was acceptable under the NLRA, the *Armour* court explicitly adopted the reasoning of the Seventh Circuit in *Indiana & Michigan Electric Company v. NLRB*.³³ In *Indiana*, the court permitted the selective discipline of union officials because such officials are under a greater duty to uphold the union's contractual obligations than are the rank-and-file.³⁴ Furthermore, the officials' actions have a broader effect on other employees, and thus, harsher discipline is justified.³⁵ The Seventh Circuit concluded that stricter treatment of officials does not violate any employee right because no employee, regardless of his union status, has the right to engage in an illegal strike.³⁶

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 54, 106 L.R.R.M. at 2266-67. See the pertinent sections of the NLRA at note 6 *supra*.

²⁶ 638 F.2d at 54, 106 L.R.R.M. at 2267. The Board held that the suspension of the union president, unlike the suspensions of the other union officials, was not a violation of the NLRA. *Id.* The Board did not offer any explanation as to why the president's suspension was acceptable. *Id.*

²⁷ *Id.* at 53, 106 L.R.R.M. at 2265.

²⁸ *Id.*

²⁹ *Id.* at 54-55, 106 L.R.R.M. at 2267.

³⁰ *Id.* at 55, 106 L.R.R.M. at 2267.

³¹ *Id.*

³² *Id.*

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

³⁴ *Id.* at 230, 101 L.R.R.M. at 2477.

³⁵ *Id.*

³⁶ *Id.*

It is unquestionable that no employee has the right to engage in an illegal strike. Participation in illegal strikes, however, was not the issue in either the *Armour-Dial* case or the *Indiana & Michigan Electric* case. The issue in both cases was whether, after union officials supported an illegal strike, employers could discipline those union officials more severely than other employees.³⁷ In other words, the issue was whether stricter sanctions, directly related to status in the union, were *per se* unfair labor practices. Therefore, the courts' reasoning that no employee has the right to engage in an illegal strike sidestepped the real issue in the case.

In order to discipline some, but not all, unlawful strikers, an employer must have some reasonable basis for selecting certain employees to be disciplined.³⁸ That reasonable basis cannot, however, be related to an employee's status in the union.³⁹ In both the *Indiana* and *Armour* cases the circuit courts found the reasonable basis for selectively disciplining union officials to lie in their greater responsibility to uphold union contracts.⁴⁰ According to the rationale of these courts, however, this greater responsibility flows directly from the officials' status as officials. Furthermore, it is only union status that gives rise to the greater responsibility.⁴¹ Therefore, finding that officials have a "greater responsibility" simply obscures the *de facto* result of permitting an employer to punish union status. It can be only union status that is punished when union officials are treated more harshly than non-officials who have committed the same illegal act. Therefore, unless the *Indiana* and *Armour* courts could impute higher responsibility to the union officials from another factor besides their mere status as officials, the *Indiana* and *Armour* courts actually allowed the punishment of union status.

There are certain instances where something other than status may give rise to a heightened responsibility for union officials. For example, in *Gould v. NLRB*,⁴² the selectively disciplined union officials had a specific contractual obligation to take affirmative steps to terminate any work stoppage.⁴³ Although the *Gould* court did not find the contractual provision essential to allow selective discipline, the union officials in the *Gould* case certainly had an obligation which the other employees did not share.⁴⁴ In such instances, it is logical to

³⁷ 638 F.2d at 53, 106 L.R.R.M. at 2265; *Indiana*, 599 F.2d at 228, 101 L.R.R.M. at 2476.

³⁸ *Gould*, 612 F.2d at 732, 103 L.R.R.M. at 2210.

³⁹ *Id.*

⁴⁰ 638 F.2d at 54, 106 L.R.R.M. at 2267; *Indiana*, 599 F.2d 227, 101 L.R.R.M. at 2477.

⁴¹ 638 F.2d at 54, 106 L.R.R.M. at 2267; *Indiana*, 599 F.2d at 231, 101 L.R.R.M. at 2477.

⁴² 612 F.2d 728, 103 L.R.R.M. 2207 (3d Cir. 1979).

⁴³ *Id.* at 730, 103 L.R.R.M. at 2208.

⁴⁴ It is interesting to note that the NLRB takes the more radical position, that even with a specific contract provision requiring union officials to thwart a strike, there cannot be differential discipline of union officials. See *Precision Castings Co.*, 233 N.L.R.B. 183, 184, 96 L.R.R.M. 1540, 1541-42 (1977). This result is illogical, however, as the employer has given consideration for the assurance that union officials would take reasonable steps to thwart any work

single out union officials for discipline, for the union officials had a specific contractual duty to the employer. Breach of the heightened responsibility justifies harsher discipline since the union official has committed a greater wrong by striking than has the rank-and-file employee.⁴⁵

There are other instances where the result in *Armour* may be correct. Where a union official actually behaves differently from the rank-and-file employees during the course of the illegal strike, the employer again may be justified in meting out harsher discipline to the union official. For example, the union officials may induce the strike or they may continue to stay out of work after the rank-and-file has returned. In addition, the union official, as an individual, may behave differently than the other employees during the course of the strike. In cases such as these, where the union officials' behavior is more repugnant than that of the other striking employees, differential treatment also may be justified.

In the *Indiana* case, quoted extensively in the *Armour* decision, there was no allegation that the union officials had behaved differently than had the rank-and-file employees.⁴⁶ There also was no contractual obligation for the union officials to take affirmative steps to thwart a strike.⁴⁷ Rather, the court found the justification for treating the union stewards differently from the other employees in prior NLRB case law.⁴⁸ The old NLRB cases had held that union officials had a higher responsibility to uphold their contracts than did the rank-and-file.⁴⁹ The *Armour* court quoted the portion of the *Indiana* opinion that justified the higher responsibility by relying upon old NLRB cases.⁵⁰ Therefore, the *Armour* court also depended upon previous NLRB holdings to find the heightened responsibility in union officials. The NLRB decisions relied upon by the *Armour* court, however, do not support the imposition of such heightened responsibility since those decisions had been overruled by the NLRB.⁵¹ The Supreme Court has specifically held that the NLRB may overrule its own adjudication, and that the NLRB is not bound by its own previous decisions.⁵² Therefore, if there had been a duty according to prior NLRB case law, the NLRB was free to change its position. The NLRB did change its posi-

stoppage. If the employer cannot discipline the union officials who breach their contract, the contract itself is worth nothing to the employer. See Note, *Harsher Discipline for Union Stewards than Rank-and-File for Participation in Illegal Strike Activity*, 56 CHICAGO-KENT L. REV. 1175, 1191 (1980) [hereinafter cited as Chicago Note].

⁴⁵ 612 F.2d at 730, 103 L.R.R.M. at 2208.

⁴⁶ 599 F.2d at 228-29, 101 L.R.R.M. at 2476.

⁴⁷ *Id.* at 230, 101 L.R.R.M. at 2477.

⁴⁸ *Id.* at 230-31, 101 L.R.R.M. at 2477-78.

⁴⁹ See, e.g., *Stockham Pipe Fittings Co.*, 84 N.L.R.B. 629, 629, 24 L.R.R.M. 1333, 1334 (1949).

⁵⁰ The courts relied on NLRB cases prior to *Precision Castings*, although they acknowledged that *Precision Castings* was a departure from the precedent of previous NLRB cases. See, e.g., *Indiana*, 599 F.2d at 230, 101 L.R.R.M. at 2476.

⁵¹ The courts relied on NLRB cases that predated *Precision Castings*, although they acknowledged that *Precision Castings* was a departure from previous NLRB cases. See, e.g., *Indiana*, 599 F.2d at 230, 101 L.R.R.M. at 2476.

⁵² *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 265-67 (1975).

tion in *Precision Castings*, and it adhered to its new position in its own rulings in the *Armour* and *Indiana* cases. Therefore, a duty requiring union officials to act differently from the rank-and-file cannot be found in current NLRB case law. With no duty to act differently, no differential punishment based on union status can be justified.

Under the facts of the *Armour* case, however, the suspension of the union officials may be justifiable for other reasons. The court found that the union officials *induced*, rather than merely participated in, the illegal strike.⁵³ Since the union officials arguably committed a greater wrong than did the rank-and-file, the harsher discipline imposed upon the officials may have a reasonable basis.

The *Armour* opinion also suggests that under the Eighth Circuit's opinion, mere acquiescence in the strike by the union officials could have justified the harsher discipline.⁵⁴ Such a broad statement may alter the present relationship between labor and management. From a management viewpoint, it will be easier to deter illegal strikes after the *Armour* case because the opinion implies that union officials have an affirmative duty to thwart such threatened strikes.⁵⁵ It is suggested that this duty will have negative consequences for the unions, however, because they will find it more difficult to find members willing to accept such a responsibility.⁵⁶

B. *Union Unfair Labor Practices*

1. *Employee Remedies For Unlawful Discharge:* *Sheet Metal Workers' Union, Local 355**

A union that causes an employer to discriminate against an employee in regard to conditions of employment is guilty of an unfair labor practice under section 8(b)(2) of the National Labor Relations Act (NLRA).¹ Once the National Labor Relations Board (Board) finds that an unfair labor practice has been committed, section 10(c) of the NLRA authorizes the Board to issue a cease and desist order and to take affirmative action, including reinstatement of employees with or without back pay, that will effectuate the policies of the NLRA.² In the 1950 case of *Pen and Pencil Workers Union, Local 19593*,³ the Board fashioned a remedy to be applied where a union alone was found to have unlawfully caused an employer to discharge an employee.⁴ The Board explained that it possessed only limited power to order direct remedial action because

⁵³ 638 F.2d at 56, 106 L.R.R.M. at 2267-68.

⁵⁴ *Id.*

⁵⁵ *Accord*, Chicago Note, *supra* note 40, at 1175.

⁵⁶ *Accord, id.* at 1194-96.

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¹ 29 U.S.C. § 158(b)(2) (1976).

² 29 U.S.C. § 160(c) (1976).

³ 91 N.L.R.B. 883, 26 L.R.R.M. 1583 (1950).

⁴ *Id.* at 889-90, 26 L.R.R.M. at 1586.

the employer had sole control over the employment of its employees.⁵ Since the employer was not a party to the proceeding, the Board could not order the reinstatement of the discharged employee.⁶ Instead, the union was required to remove the barrier it had erected which prevented the employee from retaining his previous position.⁷ To this end, the Board ordered the union to notify both the employer and the employee that the union had no objection to the employee's immediate reinstatement.⁸ The Board also ordered the union to make the employee whole for all losses of pay suffered by reason of the union's unlawful conduct beginning from the date of the employee's discharge to five days after the date the union gave notification that it no longer objected to the employee's reinstatement.⁹ This remedy, limiting the union's back pay liability to five days after notification, has been consistently applied in subsequent cases where the union was found solely liable for the discriminatory discharge of an employee.¹⁰

During the *Survey* year, in *Sheet Metal Workers' Union, Local 355*,¹¹ the Board considered whether the remedy set forth in *Pen and Pencil Workers* adequately compensated an employee for his losses suffered because of unlawful discharge.¹² The Board expressly overruled *Pen and Pencil Workers Union, Local 19593*¹³ and held that henceforth a union would be required to make an employee whole for lost wages and benefits suffered by the employee as a result of the union's discrimination until the employee is reinstated or finds substantially equivalent employment elsewhere.¹⁴ This holding is significant because it abolishes the remedy which had been applied for thirty years: termination of a union's liability five days after notification by the union that it no longer objects to the employee's reinstatement.

The *Sheet Metal Workers' Union* case was originally heard before an administrative law judge who found that acts by the union led to the discharge of Gilson, an employee of Zinsco Electrical Products.¹⁵ The judge also found that these acts constituted a breach of the union's fiduciary duty to deal fairly with Gilson and that the union unlawfully caused Gilson's discharge in violation of sections 8(b)(1)(A) and 8(b)(2) of the NLRA.¹⁶ Since the employer was not a party to the proceedings, the union alone was held responsible for Gilson's

⁵ *Id.* at 888, 26 L.R.R.M. at 1585.

⁶ *Id.*

⁷ *Id.* at 889, 26 L.R.R.M. at 1585.

⁸ *Id.*, 26 L.R.R.M. at 1585-86.

⁹ *Id.* at 889-90, 26 L.R.R.M. at 1586.

¹⁰ *See, e.g.*, *Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70*, 212 N.L.R.B. 714, 87 L.R.R.M. 1757 (1974); *Combustion Eng'r, Inc.*, 130 N.L.R.B. 184, 47 L.R.R.M. 1301 (1961); *Bakery & Confectionery Workers' Int'l Union, Local 12*, 115 N.L.R.B. 1542, 38 L.R.R.M. 1126 (1956).

¹¹ 254 N.L.R.B. No. 92, 106 L.R.R.M. 1137 (1981).

¹² *Id.*

¹³ 91 N.L.R.B. 883, 26 L.R.R.M. 1583 (1950).

¹⁴ 254 N.L.R.B. No. 92 at 5, 106 L.R.R.M. at 1138.

¹⁵ *Id.* at 2, 106 L.R.R.M. at 1137.

¹⁶ *Id.*

discriminatory discharge.¹⁷ The judge applied the remedy established in *Pen and Pencil Workers Union*,¹⁸ ordering the union to remedy this violation by making Gilson whole for any loss of wages and benefits, such liability to end five days after the union notified both Gilson and Zinsco Electrical Products that it no longer objected to Gilson's reinstatement.¹⁹

The sole issue addressed by the Board in its decision was whether the remedy ordered by the administrative law judge was inadequate for failing to make the employee, Gilson, whole for all losses stemming from his unlawful discharge.²⁰ The Board noted that the remedy fashioned in *Pen and Pencil Workers Union, Local 19593*²¹ was first applied in *Pinkerton's National Detective Agency, Inc.*²² In *Pinkerton*, both the employer and the union were found to have violated the NLRA and as a result were held jointly and severally liable for wages the employees lost due to the unlawful discharges.²³ The *Sheet Metal Workers' Union* Board explained that the union's back pay liability was terminated after it gave notification in *Pinkerton* because it would be inequitable to hold the union responsible for further back pay if it ceased its past discrimination and the employer refused promptly to reinstate the employees.²⁴ Therefore, after the union's liability was tolled, the employer would have the responsibility of either reinstating the employees or continuing to pay the employees' lost wages and benefits.²⁵

In *Sheet Metal Workers' Union*, the Board recognized that, unlike *Pinkerton* where the employer remained liable after the union's liability had ended,²⁶ the termination of the union's liability where the union alone was found culpable would result in the employee bearing the burden of any remaining damage.²⁷ In other words, applying the *Pen and Pencil Workers' Union* remedy, the employee would be forced to bear the loss of wages and benefits if the employer refused to reinstate him and he could not obtain substantially equivalent employment within five days after the union withdrew its objection to his reinstatement.²⁸ The Board declared that this result was inconsistent with the statutory policy requiring a wrongdoer to bear the consequences of his illegal acts.²⁹

¹⁷ *Id.*

¹⁸ 91 N.L.R.B. 883, 26 L.R.R.M. 1583 (1950).

¹⁹ 254 N.L.R.B. No. 92 at 2, 106 L.R.R.M. at 1137.

²⁰ *Id.*

²¹ 91 N.L.R.B. 883, 26 L.R.R.M. 1583 (1950).

²² 90 N.L.R.B. 205, 26 L.R.R.M. 1193 (1950).

²³ *Id.* at 213, 26 L.R.R.M. at 1196.

²⁴ 254 N.L.R.B. No. 92 at 3, 106 L.R.R.M. 1137, 1137 (1981). See *Pinkerton's Nat'l Detective Agency, Inc.*, 90 N.L.R.B. 205, 213, 26 L.R.R.M. 1193, 1196 (1950).

²⁵ 254 N.L.R.B. No. 92 at 3-4, 106 L.R.R.M. at 1137.

²⁶ 90 N.L.R.B. 205, 213, 26 L.R.R.M. 1193, 1196 (1950).

²⁷ 254 N.L.R.B. No. 92 at 4, 106 L.R.R.M. at 1138.

²⁸ *Id.*

²⁹ *Id.* at 4-5, 106 L.R.R.M. at 1138.

As a result, the Board refused to adhere to the remedy set forth in *Pen and Pencil Workers' Union*.³⁰ Instead, the Board overruled *Pen and Pencil Workers' Union* and all related cases to the extent that such cases provided a remedy inconsistent with the new remedy established by the Board in *Sheet Metal Workers' Union*.³¹ This new remedy would be applied in cases where a union unlawfully caused an employer to discharge an employee in violation of sections 8(b)(1)(A) and 8(b)(2) of the NLRA³² and the employer was in no way culpable.³³ In such instances, a union must notify the employer and the employee that the union no longer objects to the employee's reinstatement.³⁴ In addition, the union must affirmatively request that the employer reinstate the employee.³⁵ Finally, the union is required to pay lost wages and benefits to the employee until the employee is reinstated by the employer or the employee obtains substantially equivalent employment elsewhere.³⁶

Section 10(c) of the NLRA commands the Board to take such affirmative action in correcting unfair labor practices as will effectuate the policies of the Act.³⁷ The remedy created by the Board in *Sheet Metal Workers' Union* is a superior remedy to the remedy applied in *Pen and Pencil Workers' Union* because it better effectuates the policies of the Act. The declared public policy of the NLRA is to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining.³⁸ This policy is promoted in part by deterring employers and unions from committing unfair labor practices by imposing sanctions upon them for violations of the NLRA.³⁹ Compensating employees for losses suffered on account of unfair labor practices has also been recognized as one of the policy goals of the Act.⁴⁰ In addition, Congress left the effectuation of such policies to the Board, subject to limited judicial review.⁴¹ Thus, the Board, in exercising its discretion, determined that the best way to effectuate the above-stated objectives was to create a new remedy making the union bear the full burden of its wrongful acts. This remedy has the advantage of making

³⁰ *Id.* at 5, 106 L.R.R.M. at 1138.

³¹ *Id.*

³² 29 U.S.C. §§ 158(b)(1)(A), 158(b)(2) (1976).

³³ 254 N.L.R.B. No. 92 at 5, 106 L.R.R.M. at 1138.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 29 U.S.C. § 160(c) (1976).

³⁸ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941); *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940).

³⁹ *NLRB v. J.H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 265 (1969); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175, 60 L.R.R.M. 2578, 2581 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).

⁴⁰ *NLRB v. J.H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 263 (1969); *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175, 60 L.R.R.M. 2578, 2581 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).

⁴¹ *NLRB v. J.H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 262-63 (1969); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198-200 (1941).

the union, rather than the innocent employee, liable for the employee's actual losses, as well as providing for the imposition of stronger sanctions against the discriminating union.

The Board's decision to abolish the severance of a union's liability five days after notification in *Sheet Metal Workers' Union* is a fair one because the new remedy does not necessarily unduly burden the union. Although the union will have to pay lost wages to the unlawfully discharged employee until he is reinstated or finds substantially equivalent employment, the employee will not be entitled to such payments if he unjustifiably remains idle. A discharged employee has a duty to seek new employment.⁴² The policy adopted by the Board and reviewing courts is that an employee has a duty to minimize losses.⁴³ This obligation will be satisfied if the employee makes reasonable efforts to find new employment that is substantially equivalent to the position from which he was discharged and is suitable to a person of his background and experience.⁴⁴ The burden is on the union or employer to show that the employee has failed to make a reasonable search for other employment.⁴⁵ The determination as to which types of employment fit the standard depends upon the circumstances of each case.⁴⁶ The existence of an employee duty to search for alternative employment minimizes the union's back pay obligation without sacrificing the remedial objectives of the back pay order.⁴⁷

Several issues remain unresolved by *Sheet Metal Workers' Union*. First, the decision does not explain the meaning of "substantially equivalent employment."⁴⁸ The duty to minimize losses, which has heretofore only been applied to *interim* employment, will now also apply to *permanent* alternative employment. Yet, the *Sheet Metal Workers' Union* decision does not specify whether the standards for accepting permanent alternative employment will be the same as

⁴² *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198, 199-200 (1941).

⁴³ See *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575, 62 L.R.R.M. 2155, 2158 (5th Cir. 1966); *Southern Silk Mills, Inc.*, 116 N.L.R.B. 769, 773, 38 L.R.R.M. 1317, 1319 (1956), *remanded*, 242 F.2d 697, 39 L.R.R.M. 2647 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957). See also *NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1317-21, 80 L.R.R.M. 3377, 3382-86 (D.C. Cir. 1972).

⁴⁴ See cases cited at note 43 *supra*.

⁴⁵ See *NLRB v. Nickey Chevrolet Sales, Inc.*, 493 F.2d 103, 107, 85 L.R.R.M. 2826, 2829 (7th Cir. 1974); *NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1318, 80 L.R.R.M. 3377, 3383 (D.C. Cir. 1972); *NLRB v. Mooney Aircraft, Inc.*, 366 F.2d 809, 812-13, 63 L.R.R.M. 2208, 2211 (5th Cir. 1966); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-76, 62 L.R.R.M. 2155, 2158-59 (5th Cir. 1966); *NLRB v. Interurban Gas Co.*, 354 F.2d 76, 77, 61 L.R.R.M. 2052, 2053 (6th Cir. 1965); *NLRB v. Ellis & Watts Prods., Inc.*, 344 F.2d 67, 69, 58 L.R.R.M. 2790, 2791 (6th Cir. 1965); *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454, 52 L.R.R.M. 2115, 2120 (8th Cir. 1963); *Southern Silk Mills, Inc.*, 116 N.L.R.B. 769, 770, 38 L.R.R.M. 1317, 1318 (1956), *remanded*, 242 F.2d 697, 39 L.R.R.M. 2647 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957).

⁴⁶ See *NLRB v. Rice Creamery Co.*, 365 F.2d 888, 894, 62 L.R.R.M. 2332, 2336 (D.C. Cir. 1966); *Southern Silk Mills, Inc.*, 116 N.L.R.B. 769, 773, 38 L.R.R.M. 1317, 1319 (1956), *remanded*, 242 F.2d 697, 39 L.R.R.M. 2647 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957).

⁴⁷ *Southern Silk Mills, Inc.*, 116 N.L.R.B. 769, 771, 38 L.R.R.M. 1317, 1318 (1956), *remanded*, 242 F.2d 697, 39 L.R.R.M. 2647 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957).

⁴⁸ See 254 N.L.R.B. No. 92 at 5, 106 L.R.R.M. at 1138.

those already enunciated for seeking and accepting interim employment. The Board has announced several standards concerning the duty to minimize losses by obtaining interim employment. First, the duty only requires the employee to accept employment which is suitable to his background and experience.⁴⁹ Second, an employee may refuse employment which is dangerous, distasteful or essentially different from his previous employment.⁵⁰ Further, an employee does not have to accept a job with more onerous terms and conditions of employment.⁵¹ Finally, an employee is not obliged to accept employment at a distance from his home and it is up to the Board to determine when location is a factor which may reasonably be taken into account.⁵² A dispute exists over whether or not an employee must "lower his sights" by seeking less remunerative employment after unsuccessfully attempting for a reasonable period of time to obtain the kind of employment to which he was accustomed.⁵³ And yet, even the supporters of such a duty emphasize that this duty does not require an employee to accept anything but "suitable" interim employment. Such "suitable" employment must be consonant with the employee's skills, background and experience and must not involve more onerous conditions than the previous employment.⁵⁴

Problems may arise if these same standards are applied to the employee who is seeking permanent alternative employment. If the standards of "interim" employment are applied to permanent employment, a union's back pay liability could drag on interminably while the employee remained out of the work force. The mitigation doctrine is based largely on the public policy of promoting production and employment.⁵⁵ The Board will have to decide whether a discharged employee who has not found substantially equivalent employment after a reasonable period of time should accept lower wages, consider another field of employment or seek employment in another geographical location. In

⁴⁹ See *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575, 62 L.R.R.M. 2155, 2158 (5th Cir. 1966); *Southern Silk Mills, Inc.*, 116 N.L.R.B. 769, 773, 38 L.R.R.M. 1317, 1319 (1956), *remanded*, 242 F.2d 697, 39 L.R.R.M. 2647 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957).

⁵⁰ See *Florence Printing Co. v. NLRB*, 376 F.2d 216, 221, 65 L.R.R.M. 2047, 2050 (4th Cir.), *cert. denied*, 389 U.S. 840 (1967); *Mooresville Cotton Mills v. NLRB*, 110 F.2d 179, 181, 6 L.R.R.M. 780, 782 (4th Cir. 1940).

⁵¹ See *Waukegan-North Chicago Transit Co.*, 235 N.L.R.B. 802, 802 n.4, 98 L.R.R.M. 1074, 1075 n.4 (1978).

⁵² *Florence Printing Co. v. NLRB*, 376 F.2d 216, 221, 65 L.R.R.M. 2047, 2050 (4th Cir.), *cert. denied*, 389 U.S. 840 (1967). See *NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1319, 80 L.R.R.M. 3377, 3384 (D.C. Cir. 1972); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 179, 60 L.R.R.M. 2578, 2584 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *F.M. Broadcasting Corp.*, 233 N.L.R.B. 326, 329, 96 L.R.R.M. 1543 (1977); *Nickey Chevrolet Sales, Inc.*, 160 N.L.R.B. 1279, 1280, 63 L.R.R.M. 1135, 1135 (1966).

⁵³ See *NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1320-21, 80 L.R.R.M. 3377, 3385-86 (D.C. Cir. 1972); *NLRB v. Southern Silk Mills, Inc.*, 242 F.2d 697, 700, 39 L.R.R.M. 2647, 2749 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957); *NLRB v. Moss Planing Mill Co.*, 224 F.2d 702, 705-06, 36 L.R.R.M. 2534, 2537 (4th Cir. 1955).

⁵⁴ *NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1320-21, 80 L.R.R.M. 3377, 3385 (D.C. Cir. 1972).

⁵⁵ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 200 (1941).

making these determinations, it is important that the Board balance the socially desirable goals of making the employee whole for losses sustained because of an unfair labor practice and promoting production and employment.⁵⁶

Another issue which was not explicitly decided by the Board is whether this new remedy will also apply to a union that, prior to a Board finding of an unfair labor practice, voluntarily notifies the employer and the employee that it has no objection to the employee's reinstatement. Under the *Pen and Pencil Workers' Union* remedy, such voluntary notifications were deemed to terminate a union's back pay liability.⁵⁷ Since such a rule is based on the *Pen and Pencil Workers' Union* remedy, it is unlikely that the Board will terminate the union's liability where it voluntarily gives notice. In such situations, there is no guarantee that the employee would actually be reinstated and the employee would personally bear that burden just as he would under forced compliance.⁵⁸ In addition, if voluntary compliance were deemed to terminate a union's liability, unions fearing a Board order would give voluntary notification before an order was issued, escaping liability and leaving the employee to bear the burden. This result would circumvent the policy professed by the Board.

The new remedy created by the Board in *Sheet Metal Workers' Union* furthers the policies of NLRA by requiring a union to bear the full burden of its wrongful acts. The legal practitioner, however, will have to be concerned with the ramifications of this new remedy. The meaning of "substantially equivalent employment" under the union's extended liability and the effect of voluntary notification remain unanswered and will have to be determined by the Board in later cases.

2. Secondary Consumer Picketing

a. New Restrictions:

NLRB v. Retail Store Employees Union, Local 1001*

Consumer picketing at a secondary site occurs when striking employees of one business picket at the site of another, neutral business in an effort to persuade customers of the neutral business to stop buying goods supplied to the neutral by the struck ("primary") employer, or to boycott the neutral business entirely.¹ The immediate aim of secondary site picketing is to force neutral parties to stop doing business with employers with whom the picketing unions are engaged in a dispute. The ultimate purpose of such picketing is to effectively

⁵⁶ *Id.* at 198.

⁵⁷ See *H.C. Macaulay Foundry Co. v. NLRB*, 553 F.2d 1198, 1202, 95 L.R.R.M. 2581, 2583 (9th Cir. 1977); *Westwood Plumbers*, 131 N.L.R.B. 562, 562, 48 L.R.R.M. 1097, 1097-98 (1961).

⁵⁸ See *Sheet Metal Workers' Union, Local 355*, 254 N.L.R.B. No. 92 at 4, 106 L.R.R.M. 1137, 1138 (1981).

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¹ See R. GORMAN, *LABOR LAW* § 1 at 240 (1st ed. 1976).

enlist the economic power of neutral employers in the picketing unions' struggle against primary employers. Secondary site picketing thus tends to expand the scope of labor disputes by embroiling neutral parties in those disputes.

In an effort to prevent such coerced involvement of neutral employers in the labor disputes of others, Congress in 1959 enacted section 8 (b)(4)(ii)(B) of the National Labor Relations Act (the Landrum Amendment).² The Landrum Amendment essentially provides that it is an unfair labor practice for a union to coerce a neutral enterprise into terminating its business relations with any other person, such as a primary employer. Although its legislative history is somewhat inconclusive, the Landrum Amendment was apparently intended to substantially restrict, if not entirely prohibit, consumer picketing at secondary sites.³ The Supreme Court, however, in *NLRB v. Fruit & Vegetable Packers Local*

² 29 U.S.C. § 158 (b)(4)(ii)(B) (1976) The provision reads as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents —
 (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —
 (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . .

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have the effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not perform any services, at the establishment of the employer engaged in such distribution;

³ The legislative history of the Landrum Amendment does not clearly indicate whether Congress intended the Amendment to ban all secondary site picketing or merely to proscribe secondary site picketing explicitly aimed at convincing consumers to boycott the neutral enterprise. Senator John F. Kennedy, chairman of the conference committee which reconciled the differences between the House and Senate bills addressing, among other things, secondary site picketing, explained the compromise embodied in the conference bill as follows:

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

105 CONG. REC. 17898-99 (1959).

While Senator Kennedy's explanation of the conference bill would seem to indicate that it was intended to ban all secondary site picketing, the Supreme Court, in *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*), refused to read the Landrum Amendment so broadly. The *Tree Fruits* Court saw nothing in the legislative history prior to the convening of the conference committee which demonstrated any congressional concern with consumer picketing beyond that with the "isolated evil" of its use to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer. *Id.* at 68. The *Tree Fruits* Court dismissed Senator Kennedy's explanation of the conference bill's impact on secondary site picketing by declaring that:

This explanation does not compel the conclusion that the Conference Agreement contemplated prohibiting any consumer picketing at a second site beyond that

760* (*Tree Fruits*), read the Landrum Amendment's restriction on secondary site consumer picketing more narrowly than its legislative history seemed to warrant. Specifically, the *Tree Fruits* Court ruled that where unions involved in a dispute with Washington state apple wholesalers peacefully picketed stores selling such apples, urging only that consumers not buy the apples, and not requesting patrons to boycott such stores entirely, the Landrum Amendment was not violated.⁵

During the *Survey* year, in *NLRB v. Retail Store Employees Union, Local 1001*⁶ (*Retail Store*), the Supreme Court refined its interpretation of the Landrum Amendment. The *Retail Store* Court held that picketing at a secondary site, even if restricted solely to the product of the struck primary employer and not directed against the neutral enterprise selling the primary product,⁷ is an unfair labor practice under the Landrum Amendment if such picketing can be expected to cause the neutral enterprise substantial economic loss.⁸

The controversy in *Retail Store* arose when the Retail Store Employees Union (the Union), the certified bargaining representative for certain employees of Safeco Title Insurance Company (Safeco), called a strike when contract negotiations between it and Safeco reached an impasse.⁹ The Union did not, however, confine its picketing to the premises of Safeco. Rather, the

which urges the public, in Senator Kennedy's words, to "refrain from trading with a retailer who sells such [primary/ goods]." To read into the Conference Agreement, on the basis of a single statement, an intention to prohibit all consumer picketing at a secondary site would depart from our practice of respecting the congressional policy not to prohibit peaceful picketing except to curb "isolated evils" spelled out by the Congress itself.

NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 70 (1964).

While a majority of the *Tree Fruits* Court thus concluded that Congress did not intend the Landrum Amendment to prohibit all secondary site consumer picketing, Justices Black, Harlan, and Stewart read the legislative history of the Amendment in the opposite fashion and concluded that the Amendment was indeed meant to proscribe all such picketing. *Id.* at 76, 92. Whatever the intention of Congress in passing the Landrum Amendment, the Court has never read that provision as broadly as did Justices Black, Harlan, and Stewart.

⁴ 377 U.S. 58 (1964).

⁵ *Id.* at 60, 71.

⁶ 100 S. Ct. 2372 (1980). The Court in *Retail Store* was split as follows: six Justices held that secondary site picketing of a primary product sold by a neutral enterprise is, under the Landrum Amendment, an unfair labor practice if such picketing can be expected to cause the neutral substantial loss. *Id.* at 2377. The same six Justices (two in separate concurrences) viewed the Landrum Amendment as being constitutional when read in this way. *Id.* at 2378-79. Three Justices dissented, being of the opinion that the Landrum Amendment does not ban any secondary consumer appeal that is restricted to advocacy of a boycott of the product(s) of the struck employer, regardless of the harm that such a boycott will predictably inflict on the neutral enterprise selling that product. *Id.* at 2380-82 (Brennan, White & Marshall, JJ., dissenting). The dissent did not, however, consider the constitutionality of the Landrum Amendment as construed by the *Retail Store* majority.

⁷ The term "primary product" simply means the product of the employer with whom the union is involved in a labor dispute.

⁸ *NLRB v. Retail Store Employees Union, Local 1001*, 100 S. Ct. 2372, 2376-77 (1980).

⁹ *Id.* at 2374-75.

Union also picketed at five local title companies.¹⁰ Each of these title companies depended on sales of Safeco insurance for over 90 percent of their gross income. The remainder of their income was generated by providing services ancillary to the sale of Safeco insurance, such as title searches and escrow services.¹¹ In addition, Safeco owned between 12 and 53 percent of the outstanding stock of each of the five title companies,¹² and officers of Safeco served on the board of directors and in the management of each of the companies.¹³ The Union pickets patrolling on or near the premises of the title companies carried signs and distributed handbills which stated that the Union did not have a contract with Safeco, and which requested that Safeco policyholders cancel their policies.¹⁴ The picketing did not, however, result in any work stoppage or obstruction of deliveries at any of the title companies.¹⁵

In a hearing before the National Labor Relations Board (the Board), Safeco contended that the secondary consumer picketing by the Union, although directed only at the product of the struck employer — Safeco insurance policies — violated the Landrum Amendment because the picketing would, if successful, destroy at least 90 percent of the title companies' business.¹⁶ Indeed, Safeco charged that its insurance policies had become so "incorporated" into the business of the land title companies that a consumer boycott of those policies would lead to a complete boycott of the neutral companies.¹⁷

In response to Safeco's attack on its picketing, the Union advanced three arguments to support the legality of that picketing. The Union contended first that its secondary site activity was actually a kind of *primary* picketing explicitly exempted from the operation of the Landrum Amendment.¹⁸ The Union claimed that its picketing of the land title companies was protected primary activity because the title companies could not reasonably be considered neutrals in light of their extensive corporate and commercial ties to Safeco.¹⁹ Secondly, the Union claimed that even if the land title companies were neutrals entitled to the protection of the Landrum Amendment, its picketing was not an unfair labor practice because it was directed at the product of the struck employer and not at the land title companies selling that product.²⁰ Finally, the Union asserted that its activity, even if proscribed by the Landrum Amendment, was protected by the first amendment to the United States Constitution.²¹

¹⁰ *Id.* at 2375.

¹¹ Retail Store Employees Union 1001, 226 N.L.R.B. 754, 755, 93 L.R.R.M. 1338, 1339 (1976).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 755, 93 L.R.R.M. at 1338.

¹⁵ *Id.*

¹⁶ *Id.*, 93 L.R.R.M. at 1339.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 755-56, 93 L.R.R.M. at 1339.

²¹ *Id.* at 756, 93 L.R.R.M. at 1339.

The Board rejected the Union's first and second arguments and failed to consider the third. Responding to the Union's first argument, the Board ruled that the title companies were "neutral and separate employers with respect to Safeco's dispute with" the Union.²² The Board reasoned that although there were substantial corporate and commercial ties between Safeco and the title companies, the factors tending to create an identity of interests between Safeco and the title companies were outweighed by the lack of any interchange of employees between Safeco and the companies and by the absence of any control exercised by Safeco over the daily operations or labor relations policies of the title companies.²³ By ruling that the title companies were neutral in the Union's dispute with Safeco, the Board necessarily concluded that the companies were entitled to the protection of the Landrum Amendment.²⁴

Having ruled that the title companies were neutral employers, the Board then held that the Union's secondary site picketing of Safeco insurance policies violated the Landrum Amendment's prohibition on the coercion of neutrals.²⁵ Noting the land title companies' dependence on sales of Safeco insurance for 90 to 95 percent of their revenue, the Board concluded that the Union's secondary site picketing, while nominally restricted to the primary product, was in fact reasonably calculated to convince customers to entirely boycott the neutral title companies.²⁶ Such a boycott would likely be so economically devastating to the title companies as to drag them into the Union's dispute with Safeco in the hope of settling the matter and thus ending the boycott. This kind of coerced participation in the labor disputes of others was, according to the Board, inconsistent with the Landrum Amendment.²⁷ The Board therefore ordered the Union to cease its secondary picketing and take certain corrective measures as well.²⁸

²² *Id.*, 93 L.R.R.M. at 1340.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 757, 93 L.R.R.M. at 1341.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* The Board's decision in *Retail Store* was consistent with, and predictable in the light of, its decision in the case of Local 14055, United Steelworkers of America, 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), *enforcement denied, sub nom.*, Local 14055 United Steelworkers v. NLRB, 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975), *vacated and remanded, sub nom.*, Dow Chem. Co. v. Local 14055, United Steelworkers, 429 U.S. 807 (1976), *complaint dismissed on remand, sub nom.*, Local 14055 United Steelworkers of America, 229 N.L.R.B. 302, 96 L.R.R.M. 1090 (1977) (*Dow Chemical*). In *Dow Chemical*, the Board ruled that the Landrum Amendment was violated when a union striking against a gasoline refiner (a division of Dow Chemical Company) picketed neutral gas stations that derived most of their revenue from sales of Dow's gasoline, and urged the public not to buy Dow's fuel. 211 N.L.R.B. 649, 650, 86 L.R.R.M. 1381, 1382 (1974). The Board found that the picketing, while nominally directed against only the primary employer's gasoline, would likely coerce the neutral stations selling that fuel. *Id.* at 651-52, 86 L.R.R.M. at 1383-84. The Board reasoned that some of the neutral gasoline stations, "at least, would predictably be forced out of business if the picketing were successful, and all would predictably be squeezed to a position of duress, escapable only by abandoning Dow. . . ." *Id.* at 651, 86 L.R.R.M. at 1383.

On appeal, the United States Court of Appeals for the District of Columbia set aside the Board's order.²⁹ The court agreed with the Board that the five title companies were indeed neutrals entitled to the protection of the Landrum Amendment. However, the court read the Supreme Court's decision in *Tree Fruits* as leaving neutral enterprises vulnerable to whatever adverse economic consequences might flow from secondary consumer picketing directed solely at the product of the struck employer.³⁰

The Supreme Court reversed the circuit court and remanded the case for enforcement of the Board's order.³¹ The Court read *Tree Fruits* more narrowly than did the court of appeals, concluding that the *Tree Fruits* decision merely stood for the proposition that "§ 8(b)(4)(ii)(B) does not prohibit all peaceful picketing at secondary sites."³² While it was unwilling to overrule *Tree Fruits* and hold that the Landrum Amendment bans all primary product picketing at secondary sites, the *Retail Store* Court did rule that the Amendment proscribes such picketing when it can be "expected to threaten neutral parties with ruin or substantial loss. . . ."³³ The Court determined that where secondary consumer appeals threaten neutral enterprises with economic devastation, such secondary activities violate the Landrum Amendment's prohibition against the use of coercive tactics to force neutral parties to cease "using, selling, handling, transporting, or otherwise dealing in the products of" employers with whom the picketing unions are involved in a dispute.³⁴

Measuring the Union's conduct against this reinterpretation of the Landrum Amendment, the *Retail Store* Court ruled that the Union's secondary site picketing of the Safeco's insurance policies was coercive of the neutral title companies, and thus violative of the Amendment.³⁵ In reaching this conclusion, the *Retail Store* Court emphasized that in the case at bar the neutral employers sold only the product being picketed and services closely related to that product.³⁶ The title insurance companies in *Retail Store* were thus particularly likely to be coerced economically by a successful consumer boycott appeal against the struck primary product — Safeco insurance.

After ruling that the Landrum Amendment prohibits any secondary site picketing of primary products that is likely to cause substantial loss to neutral employers selling such products, the *Retail Store* Court held that the statute, so interpreted and applied, does not violate the first amendment.³⁷ The *Retail Store* Court concluded that the federal government's interest in confining a labor

²⁹ *Retail Store Employees Union, Local 1001 v. NLRB*, 627 F.2d 1133, 1148, 101 L.R.R.M. 3084, 3094 (D.C. Cir. 1979).

³⁰ *Id.* at 1145-46, 101 L.R.R.M. at 3092.

³¹ *NLRB v. Retail Store Employees Union, Local 1001*, 100 S. Ct. 2372, 2378 (1980).

³² *Id.* at 2375.

³³ *Id.* at 2377.

³⁴ *Id.* See note 2 *supra* for the text of the Landrum Amendment.

³⁵ *Id.*

³⁶ *Id.* at 2376.

³⁷ *Id.* at 2378.

dispute to the primary antagonists was sufficient to validate the incidental restriction on expression imposed by the Landrum Amendment.³⁸

Justices Blackmun and Stevens filed separate concurring opinions in which they agreed with the majority that the Landrum Amendment does prohibit the kind of secondary picketing present in the case at bar. Both Justices, however, expressed concern that the compatibility of that provision with the first amendment presented a question that deserved more thoughtful consideration than it received in the opinion of the Court.³⁹ Justice Blackmun found the Landrum Amendment to be constitutional because it strikes a "delicate balance" between "union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."⁴⁰ Justice Stevens, in contrast, found the Landrum Amendment to be a constitutional restraint on union conduct, not expression.⁴¹ After observing that picketing is frequently effective not because of the persuasive force of the picketers' articulated ideas, but rather because of the intimidating nature of the picketers' conduct, Justice Stevens carefully examined the regulatory scope of the Landrum Amendment.⁴² In doing so, Justice Stevens found the Amendment to restrict only certain types of union conduct — picketing. Further, the restriction applied only to narrowly-defined geographical areas — the sites of neutral employers, leaving unions free to employ other methods to publicize their grievances against primary employers.⁴³ Justice Stevens therefore found the Landrum Amendment's restriction on union conduct to be justified by the governmental purpose of

³⁸ *Id.*

³⁹ *Id.* at 2378-79 (Blackmun, Stevens, JJ., concurring).

⁴⁰ *Id.* (Blackmun, J., concurring).

⁴¹ *Id.* at 2379 (Stevens, J., concurring). There is a recognized distinction between "conduct" and "speech" in first amendment jurisprudence. *See, e.g.,* *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court upheld the defendant's conviction for violating a federal statute prohibiting the deliberate destruction or mutilation of one's draft card. *Id.* at 372. In upholding the statute against a claim that it unconstitutionally abridged the defendant's right to express his opposition to the war in Vietnam, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376.

In validating the Landrum Amendment's restriction on peaceful secondary site picketing of primary products, Justice Stevens apparently adopted a kind of analysis similar to that employed by the Court in *O'Brien*. That is, while secondary picketing against primary products obviously involves elements of conduct and speech, the government's interest in preventing the coerced involvement of neutrals in the labor disputes of others is sufficiently important to justify imposition of limitations on such picketing. This is particularly true since the conduct element of such picketing is the focus of the regulation. In addition, a union's right to publicize its grievances against a primary employer (and his product(s)) by means other than picketing is in no way impaired by the Landrum Amendment. *See* note 3 *supra* for Senator Kennedy's explanation of the rights of unions to publicize their grievances with primary employers under the conference bill that became the Landrum Amendment.

⁴² *NLRB v. Retail Store Employees Union, Local 1001*, 100 S. Ct. 2372, 2379 (1980) (Stevens, J., concurring).

⁴³ *Id.*

protecting neutral parties from coerced involvement in the labor disputes of others.⁴⁴ A six-man majority of the Court thus interpreted the Landrum Amendment as constitutionally proscribing secondary consumer picketing of primary products if that picketing is likely to be very harmful to neutral businesses selling such products.

Justices Brennan, White, and Marshall read the Landrum Amendment's ban on coercive activity much more restrictively than did the *Retail Store* majority and consequently dissented.⁴⁵ Justice Brennan, who sixteen years earlier had authored the Court's *Tree Fruits* opinion, read *Tree Fruits* as exempting from the strictures of the Amendment any secondary site picketing which is directed solely at convincing consumers not to purchase the product of the struck employer.⁴⁶ The dissent did agree with the *Retail Store* majority that the Landrum Amendment bans secondary site consumer appeals aimed at coercing a neutral enterprise into joining a union's struggle against the primary employer.⁴⁷ The dissenting Justices took the position, however, that *Tree Fruits* had correctly determined that where secondary site picketing is directed against the product of the struck primary employer rather than against the neutral sellers of that product, there simply can be no coercion of neutral employers in violation of the Landrum Amendment.⁴⁸ Rather, in the dissent's view, if the neutral employer suffers harm as a consequence of a boycott of the primary product it sells, the neutral has merely sustained incidental damage as a result of its decision to entwine its economic fate with that of the primary employer.⁴⁹

Justice Brennan's willingness to find coercion of neutral employers only where secondary picketing is explicitly directed against the neutral itself elevates form over substance. Such an analysis ignores the practical fact that a secondary consumer appeal nominally directed only against products which account for all or substantially all of the sales revenue of the neutral is likely to be just as coercive of the neutral as a boycott openly directed against its entire operation. Justice Brennan's formalistic analysis of secondary site consumer boycott appeals is therefore inconsistent with the Landrum Amendment's proscription of the coercion of neutral employers.

Unlike the dissent, the *Retail Store* majority clearly recognized that a secondary consumer appeal directed against a primary product which accounts for 90 to 95 percent of a neutral employer's sales revenue promises to be every bit as coercive of the neutral as a boycott appeal that explicitly names the neutral as its target. Focusing on the substance and predictable effect of the boycott appeal in question, rather than on its form and nominal target, the *Retail Store* majority determined that the kind of *de facto* coercion of neutrals

⁴⁴ *Id.*

⁴⁵ *Id.* (Brennan, White, and Marshall, JJ., dissenting).

⁴⁶ *Id.* at 2379-82 (Brennan, White, and Marshall, JJ., dissenting).

⁴⁷ *Id.* at 2380 (Brennan, White, and Marshall, JJ., dissenting).

⁴⁸ *Id.* at 2380-82 (Brennan, White, and Marshall, JJ., dissenting).

⁴⁹ *Id.* at 2380 (Brennan, White, and Marshall, JJ., dissenting).

present in the instant case was as repugnant to the language and purpose of the Landrum Amendment as a secondary boycott appeal explicitly directed against the neutral itself.⁵⁰ The *Retail Store* Court thus concluded that where a secondary consumer appeal is nominally restricted to the struck product sold by the neutral(s), the applicability of the Landrum Amendment turns on the predictable effect of that appeal rather than on its putative aim. If such a secondary appeal is likely to cause the neutral seller substantial loss, the Landrum Amendment's proscription of coercion of neutral employers makes the appeal an unfair labor practice.⁵¹

Unlike Justice Brennan's unduly narrow approach to the concept of coercion, the analysis of the *Retail Store* majority fully appreciated and effectuated the Landrum Amendment's purpose of preventing the coerced participation of neutrals in labor disputes. In addition, the *Retail Store* decision implicitly weighed, in the context of a secondary site consumer appeal, the competing interests of neutrals, unions, and the public. In balancing these interests, the *Retail Store* Court apparently concluded that the economic devastation of enterprises not directly involved in a labor dispute was too high a price for society to pay merely to allow striking unions to employ secondary picketing as a device to express their wish that consumers join the union's battle against struck primary employers. The conclusion that the scales tip against such economically destructive activity seems sound for a number of reasons. First, secondary site consumer picketing is but one of many methods unions may adopt in order to appeal to the public for support in their disputes with primary employers. The Landrum Amendment itself expressly exempts from its prohibition "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers . . . , that . . . products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . ."⁵² Given the freedom unions enjoy to publicize their cause by means other than secondary site consumer picketing, denying striking unions the use of such picketing in no way weakens them in their disputes with primary employers. Second, to allow the kind of picketing contested in *Retail Store* would doom many neutral enterprises to economic destruction — with all of the adverse economic and social consequences that business failures entail. Accordingly, the *Retail Store* Court concluded that it was reasonable to read the Landrum Amendment as denying unions one of the many weapons they may legitimately employ in a labor dispute, at least in those situations where a failure to deny unions use of that weapon would mean economic ruin for neutral enterprises. The *Retail Store* decision therefore struck an intelligent and careful balance between the many competing interests present in the case at bar.

⁵⁰ *Id.* at 2376-77.

⁵¹ *Id.* at 2377.

⁵² See note 2 *supra* for the text of the Landrum Amendment.

In reaching its decision, the *Retail Store* Court not only engaged in sophisticated interest balancing, it also struck a compromise between the majority and dissenting positions enunciated in *Tree Fruits*. The *Tree Fruits* majority apparently concluded that secondary consumer appeals directed solely at the products of the struck employer were not unfair labor practices under the Landrum Amendment, regardless of how economically harmful such appeals might be to neutral enterprises selling such struck products.⁵³ The *Tree Fruits* dissent, by contrast, viewed the Amendment as banning all secondary consumer appeals, whether directed at the neutral employer or merely at primary products of the struck employer were not unfair labor practices under the Landrum Amendment, regardless of how economically harmful such appeals shutting off all consumer trade with neutrals, bans secondary picketing of primary products that will predictably cause substantial loss to neutrals selling those products, the *Retail Store* Court thus took a middle path between the differing views expressed in *Tree Fruits*. This middle path represents an improvement on the rigid, formalistic analysis propounded by the *Tree Fruits* majority.

Unfortunately, while improving on the *Tree Fruits* approach to judging the legitimacy of secondary consumer appeals, the *Retail Store* Court did not articulate any guidelines to indicate just what quantum of economic harm a neutral employer must suffer, or reasonably anticipate, from secondary site picketing against primary products it sells before the picketing becomes coercive of the neutral and thus an unfair labor practice. The Court instead chose to leave the Board and the courts free to interpret and apply the *Retail Store* "substantial loss" standard on a case-by-case basis.⁵⁴ While such a flexible approach is in all likelihood the soundest method the Court could have adopted, it places upon the Board and the courts the difficult task of developing and refining practical standards by which to judge the validity of a secondary consumer appeal.

In developing these practical standards, the Board and the courts must recognize that the degree of economic harm that will cause a neutral to be coerced into joining a dispute between a primary employer and unions picketing at the site of the neutral will inevitably vary from case to case. In determining whether the neutral has suffered, or will suffer, a coercive degree of economic harm from a secondary site consumer appeal directed against primary products it sells, numerous factors should be considered. For example, how large a portion of the neutral's sales revenue and total income is derived from sales of the products of the struck employer? Is the neutral so identified with the struck product that a boycott of that product will predictably cause patrons to shun the neutral entirely, even though the neutral sells other products which are not the target of the consumer appeal and which account for

⁵³ *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 70-73 (1964).

⁵⁴ *Id.* at 92 (Harlan, J., dissenting).

⁵⁵ *NLRB v. Retail Store Employees Union, Local 1001*, 100 S. Ct. 2372, 2377-78 n.11 (1980).

the bulk of its sales revenue? How long has the consumer appeal been in progress and how long is it likely to continue? How healthy is the neutral financially, will it be able to draw on a substantial earned surplus in order to offset any short-term losses caused by the boycott? Since the relevant factors to be examined, and the relative importance of each of those factors, will vary ineluctably from case to case, the *Retail Store* Court was probably wise in not attempting to fix an inflexible rule governing the determination whether a secondary boycott appeal directed against the products of the struck employer has inflicted, or will inflict, a coercive degree of economic damage on a neutral.

The *Retail Store* substantial loss standard will therefore provide the Board and the courts with a salutary degree of flexibility in judging the validity of secondary consumer picketing in any given case. Nevertheless, this flexible standard promises to provoke much litigation because the *Retail Store* decision injects a new element of uncertainty into the law governing secondary consumer appeals. Under the *Retail Store* standard, as Justice Brennan observed:

Labor unions will no longer be able to assure that their secondary site picketing is lawful by restricting advocacy of a boycott to the primary product, as ordained by *Tree Fruits*. Instead, picketers will be compelled to guess whether the primary product makes up a sufficient proportion of the retailer's business to trigger the displeasure of the courts or the Labor Relations Board.⁵⁶

By contrast, the *Tree Fruits* standard for judging the legitimacy of a secondary consumer appeal was quite clear: so long as the secondary consumer pickets restricted advocacy of a boycott to the product(s) of the struck employer and did not call for a boycott of the neutral itself, it was not an unfair labor practice under the Landrum Amendment.⁵⁷ Now, under *Retail Store*, the kind of secondary consumer appeal formerly protected by *Tree Fruits* will be an unfair labor practice if it threatens the neutral with a certain, albeit only vaguely defined, quantum of economic harm.⁵⁸

In summary, the *Retail Store* decision improves on *Tree Fruits* in at least two ways. First, the *Retail Store* Court recognized, as the *Tree Fruits* Court apparently did not, that a neutral employer can be coerced to join a labor dispute *either* because of a secondary boycott openly directed against it, *or* as a consequence of a secondary boycott of primary products whose sales are important or essential to the neutral's economic survival. While *Tree Fruits* protected neutrals against coercion arising from secondary consumer appeals explicitly directed against them,⁵⁹ it arguably offered no protection against coercion from boycotts directed against primary products sold by the neutrals.⁶⁰ *Retail Store* thus stepped into the breach left unguarded by *Tree Fruits* by holding that unions

⁵⁶ *Id.* at 2382 (Brennan, White, and Marshall, JJ., dissenting).

⁵⁷ *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 70-73 (1964).

⁵⁸ *NLRB v. Retail Store Employees Union, Local 1001*, 100 S. Ct. 2372, 2377 (1980).

⁵⁹ *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 63 (1964).

⁶⁰ *Id.* at 63, 70.

may not accomplish indirectly, by primary product boycott appeals at neutrals' sites, what they are prohibited from accomplishing directly, by secondary boycotts directed against neutrals themselves: forcing neutrals to join labor disputes in which they are not primarily involved. *Retail Store* thus more fully effectuates the purpose of the Landrum Amendment — preventing the coercion of neutral employers — by appreciating and effectively responding to the coercive potential of secondary consumer appeals which are directed against primary products whose sale is vital to neutral employers.

Second, *Retail Store* improves upon *Tree Fruits* by striking a better balance between the legitimate interests of neutral employers, which seek to avoid entanglement in the labor disputes of others, and the interests of unions which seek to enlist public support in their battles with primary employers. Unfortunately, the standard by which *Retail Store* better effectuates the purpose of the Landrum Amendment and accomplishes this delicate balancing of interests is necessarily more uncertain in practical application, and thus more prone to provoke litigation, than the clear, if ultimately unsatisfactory, standard of *Tree Fruits*.

b. *Precedent Affirmed:*

Soft Drink Workers Union, Local 812 v. NLRB*

Secondary site consumer picketing occurs when employees involved in a labor dispute with one, "primary" employer, picket at the site of another, "secondary" employer that is neutral in the union's dispute with the primary employer. The immediate object of such picketing is either to cause a consumer boycott of the products of the primary employer sold by the neutral, or to persuade consumers to shut off all trade with the neutral.¹ The ultimate purpose of secondary site consumer picketing is to force the neutral enterprise to reduce or terminate its purchases of the primary employer's products, and thus to pressure indirectly the primary employer into agreeing to the picketing union's demands. In 1959 Congress, in an attempt to prohibit or at least substantially restrict consumer picketing at secondary sites, amended the National Labor Relations Act² by adding section 8(b)(4)(ii)(B) (the Landrum Amendment).³

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¹ R. GORMAN, LABOR LAW § 1 at 240 (1st ed. 1976).

² 29 U.S.C. § 151 *et seq.* (1976).

³ 29 U.S.C. § 158 (b)(4)(ii)(B) (1976). The relevant part of the provision reads as follows:

* * *

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

* * *

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer,

The Landrum Amendment was thus enacted in an effort to prevent the use of secondary site consumer boycott appeals to coerce neutral employers into participating in the labor disputes of others.⁴

In construing the statute in 1964 the Supreme Court, in *NLRB v. Fruit & Vegetable Packers Local 760*⁵ (*Tree Fruits*), held that the Landrum Amendment does not prohibit all peaceful picketing at secondary sites.⁶ Specifically, the *Tree Fruits* Court ruled that peaceful picketing at the site of a neutral employer does not violate the Landrum Amendment if it is directed solely at convincing patrons of the neutral to refrain from purchasing goods supplied to the neutral by an employer with whom the picketing union is engaged in a primary labor dispute.⁷ While the *Tree Fruits* holding was recently modified by the Court,⁸ it continues to protect secondary site consumer boycott appeals that are restricted to the struck primary product and that are not likely to be economically devastating to the neutral enterprise.⁹

Implicit in the proposition that secondary site consumer picketing may be permissible when directed only against struck primary products, is the requirement that the pickets clearly identify for consumers the products to which they are objecting. In fact, a series of decisions subsequent to *Tree Fruits* explicitly required pickets to adequately identify the struck product in order to benefit from the protection offered by *Tree Fruits*.¹⁰ In *Soft Drink Workers Union Local 812*

processor, or manufacturer, or to cease doing business with any other person

* * *

Provided further, That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have the effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not perform any services, at the establishment of the employer engaged in such distribution; . . .

⁴ See *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 63 (1964).

⁵ 377 U.S. 58 (1964).

⁶ *Id.* at 63.

⁷ *Id.* at 71-73.

⁸ The Court, in *NLRB v. Retail Store Employees Union, Local 1001*, 100 S. Ct. 2372 (1980), ruled that even in situations where the secondary site picketing advocates nothing more than a consumer boycott of the struck primary product, such picketing may violate the Landrum Amendment if it "reasonably can be expected to threaten neutral parties with ruin or substantial loss" *Id.* at 2377.

⁹ *Id.* The Court in *Retail Store* did not overrule *Tree Fruits*. Indeed, the *Retail Store* Court explicitly envisioned situations in which *Tree Fruits* will continue to protect secondary site consumer picketing. *Id.* at n.11.

¹⁰ E.g., *NLRB v. San Francisco Typographical Union 21*, 465 F.2d 53, 56, 80 L.R.R.M. 3076, 3077 (9th Cir. 1972); *Bedding, Curtain & Drapery Workers Union, Local 140 v. NLRB*, 390 F.2d 495, 502-03, 67 L.R.R.M. 2392, 2397 (2d Cir.), cert. denied, 392 U.S. 905 (1968); *Meat & Allied Food Workers Union, Local 248*, 230 N.L.R.B. 189, 202-04, 96 L.R.R.M. 1221, 1222 (1977); *Independent Routemen's Ass'n & Urban Distributor, Inc.*, 206 N.L.R.B. 245, 248, 84 L.R.R.M. 1265, 1266 (1973).

v. NLRB,¹¹ decided during the *Survey* year, the United States Court of Appeals for the District of Columbia Circuit affirmed this identification requirement, albeit in an unusual set of circumstances.

The dispute in *Soft Drink* arose when Local 812 of the Soft Drink Workers Union (the Union), representing employees of firms that bottled, canned, and distributed soda in the New York City area,¹² attempted to stem a serious loss of jobs at these firms by mounting a campaign to persuade consumers to buy only "locally" made soda.¹³ As part of this campaign, members of the Union began picketing and distributing handbills on a sidewalk in front of a Long Island retail store selling beer and soda.¹⁴ Their signs and handbills urged customers to buy soft drinks made in the "local" area, but failed to define that term and did not otherwise specify which brands of soda were being picketed.¹⁵

The Union continued this picketing daily, posting six to sixteen pickets at a time.¹⁶ The picketing, however, was peaceful, did not prevent patrons from entering the store, and did not impede deliveries.¹⁷ Nevertheless, approximately two weeks after the picketing began, the owner of the retail store — Monarch Long Beach Corporation (Monarch) — filed an unfair labor practice charge against the Union with the National Labor Relations Board (the Board).¹⁸ In response to this charge, the Board issued a complaint against the Union.¹⁹ The case was thereafter tried before an administrative law judge, who found the Union's picketing to be violative of the Landrum Amendment.²⁰ Finally, the Board adopted the findings of fact and conclusions of law reported by the judge, and ordered the Union's picketing of Monarch's store stopped.²¹

In its appearance before the administrative law judge, the Union presented three major arguments to support the contention that its picketing was not an unfair labor practice. The Union asserted first that it was not urging consumers to boycott nonlocal soda, rather it was asking them to buy soda made locally.²² Thus, the Union maintained that its pickets were not appealing for any boycott whatsoever. Second, the Union contended that, even if its "informational picketing" could be viewed as a boycott appeal, it was not a *second-*

¹¹ No. 79-1888, 105 L.R.R.M. 2658 (D.C. Cir. Oct. 3, 1980).

¹² The Union represented workers at soda bottling, canning, and distributing firms located in the five boroughs of New York City as well as in six nearby counties: Nassau, Suffolk, Westchester, Putnam, Dutchess, and Columbia. *Id.* at 2-3, 105 L.R.R.M. at 2659.

¹³ *Id.* at 3-5, 105 L.R.R.M. at 2659-60.

¹⁴ *Soft Drink Workers Union Local 812*, 243 N.L.R.B. 801, 803, 102 L.R.R.M. 1272 (1979).

¹⁵ *Id.* at 809, 102 L.R.R.M. at 1273.

¹⁶ *Id.* at 803-06, (L.R.R.M. summary of case does not state the number of pickets).

¹⁷ *Id.* at 808-09, 102 L.R.R.M. at 1273.

¹⁸ *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888, slip op. at 5, 105 L.R.R.M. 2658, 2660 (D.C. Cir. Oct. 3, 1980).

¹⁹ *Id.*

²⁰ *Soft Drink Workers Union Local 812*, 243 N.L.R.B. 801, 809-10, 102 L.R.R.M. 1272, 1273 (1979).

²¹ *Id.* at 801, 102 L.R.R.M. at 1273.

²² *Id.* at 806, 102 L.R.R.M. at 1272.

ary boycott appeal, since there was no primary dispute between it and the nonlocal soda companies or between it and Monarch.²³ Third, the Union argued that even if its picketing were a secondary boycott appeal, it fell within the *Tree Fruits* exception to the Landrum Amendment's general proscription of such activity.²⁴ Implicit in this argument would seem to be the contention that the Union had restricted its boycott appeal to the "primary" product — the nonlocal soda.

The administrative law judge dismissed each of the Union's three exculpatory arguments. The judge concluded first that the Union's pickets clearly were urging consumers to shun nonlocal soda.²⁵ In reaching this conclusion, the judge noted that although the pickets' signs and handbills urged only that consumers buy locally manufactured soda, the pickets themselves clearly demonstrated their hostility to soda that they regarded as nonlocal by frequently chanting slogans such as "[r]ead the label before you put it on the table," and do not buy "scab" soda.²⁶ The pickets also booed customers who emerged from Monarch's store carrying soft drinks that the pickets considered to be nonlocal.²⁷ The judge therefore concluded that the real object of the Union's picketing was "to convince Monarch's customers not to buy non-local soft drinks, and thereby to force Monarch not to sell or purchase soft drinks that were non-local."²⁸

Having found that the Union's picketing was indeed a consumer boycott appeal, the administrative law judge next considered whether the picketing could violate the Landrum Amendment in the absence of a conventional, face-to-face primary labor dispute between the Union and Monarch or the nonlocal soda companies.²⁹ The judge found the lack of such a primary labor dispute to be irrelevant to the applicability of the Landrum Amendment.³⁰ The administrative law judge thus accepted the view that a consumer boycott appeal could coerce a neutral employer, and thus violate the Landrum Amendment, even where such an appeal was not ancillary to a traditional primary labor dispute.

Having decided that the Union's picketing constituted a secondary boycott appeal, the judge then considered the Union's claim that *Tree Fruits* protected that picketing from the Landrum Amendment's ban against coercing neutral employers. The judge ruled that the picketing in question could not claim protection under the holding in *Tree Fruits* because the pickets' signs and handbills failed to identify with sufficient clarity the picketed manufacturers

²³ *Id.*, (L.R.R.M. summary of case does not mention this contention of the union).

²⁴ *Id.* at 807, (L.R.R.M. summary of case does not mention this contention of the union).

²⁵ *Id.* at 806, 102 L.R.R.M. at 1272.

²⁶ *Id.*, (L.R.R.M. summary of case does not present these facts).

²⁷ *Id.*, 102 L.R.R.M. at 1273.

²⁸ *Id.*, (L.R.R.M. summary of case does not contain this quotation).

²⁹ *Id.*, (not contained in L.R.R.M. summary of case).

³⁰ *Id.* at 806-07, 102 L.R.R.M. at 1272-73.

and their products.³¹ More specifically, the judge reasoned that while *Tree Fruits* protected secondary consumer boycott appeals directed solely at the struck or disfavored product, the picketing in the instant case was not clearly restricted to any particular product.³² Additionally, the administrative law judge noted that, because visual inspection often cannot disclose where a bottle or can of soda was produced, Monarch's customers were further handicapped in attempting to distinguish the favored from the picketed soda.³³ Thus, had the Union's pickets defined what they meant by the term "local," many of Monarch's customers would still have been unable to determine whether a particular bottle or can of soda was manufactured within or without the "local" area. The judge therefore held that the Union's picketing of Monarch's store did not "meet the *Tree Fruits* exception to the . . . [Landrum Amendment's] prohibition on secondary situs picketing."³⁴

Reviewing the Board's ruling, a divided United States Court of Appeals for the District of Columbia Circuit affirmed the Board's decision and enforced its order directing the Union to cease picketing at Monarch's store.³⁵ The appellate court first considered the Board's ruling that the Landrum Amendment can be applied to consumer boycott appeals even in the absence of a primary labor dispute. The court then scrutinized the Board's conclusion that *Tree Fruits* did not protect the Union's picketing from proscription by the Landrum Amendment. Finally, the court considered whether the Landrum Amendment was unconstitutional as applied to the Union's picketing of Monarch.

The appeals court agreed with the Board that the Landrum Amendment can be violated even in situations which do not involve a discernible primary labor dispute.³⁶ The court noted that "although many passages in the legislative history of the . . . [Landrum Amendment] invoke conventional primary — secondary situations as examples, . . . the very term 'secondary boycott' does not even appear in the statute."³⁷ Concluding that the Union had no legitimate dispute with Monarch, the court ruled that Monarch was a "neutral employer presumptively meriting the protection of Section 8(b)(4)(ii)(B), regardless of whether the union had a conventional labor dispute with any other employer."³⁸

After finding that the Landrum Amendment presumptively protected Monarch, the court then considered the Union's contention that *Tree Fruits* exempted its picketing from the operation of the Amendment. The court embarked upon its analysis of the relevance of *Tree Fruits* to the picketing at issue by observing that there are two separate elements to a violation of the Landrum

³¹ *Id.* at 809-10, 102 L.R.R.M. at 1273.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 810, (L.R.R.M. summary of case does not contain this quotation).

³⁵ *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888, slip op. at 2, 105 L.R.R.M. 2658, 2659 (D.C. Cir. Oct. 3, 1980).

³⁶ *Id.* at 12-14, 105 L.R.R.M. at 2663-64.

³⁷ *Id.* at 12, 105 L.R.R.M. at 2663.

³⁸ *Id.* at 14, 105 L.R.R.M. at 2664.

Amendment.³⁹ First, the union's conduct must be directed, at least in part, at forcing or requiring a neutral employer to cease doing business with another employer.⁴⁰ Second, the union must pursue this goal by "threatening, coercing, or restraining the neutral business."⁴¹

In regard to the first requirement, the court determined that the Union's picketing was directed in part at forcing Monarch to cease selling nonlocal soda, thereby forcing Monarch to cease doing business with the nonlocal soda companies.⁴² The court accorded no more credence than did the Board to the Union's insistence that its picketing had the affirmative goal of stimulating sales of local soda rather than the negative object of reducing sales of nonlocal soda.⁴³ Like the Board, the court observed that the pickets on the sidewalk in front of Monarch's store had clearly expressed their hostility to soda they regarded as nonlocal by chanting slogans and by booing customers carrying containers of nonlocal soda.⁴⁴ The court also reasoned that the Union could not have reasonably expected sympathetic consumers to respond to its picketing by increasing their *total* soda consumption in order to augment their purchases of local soda while not reducing their purchases of nonlocal soda. Rather, the court concluded, the predictable effect of successful picketing by the Union would be that sales of nonlocal soda would decline as sales of local soda increased.⁴⁵ The court further determined that the Union could be held to have intended the predictable consequences of its picketing.⁴⁶ Those predictable consequences were a diminution of customer purchases of nonlocal soda and, ultimately, a reduction or termination of Monarch's business with the nonlocal soda companies.⁴⁷ Thus, the court ruled that the Union's intention to reduce or shut off trade between Monarch and its nonlocal soda suppliers displayed the unlawful object that constitutes one of the two necessary elements of a violation of the Landrum Amendment.⁴⁸

Having found in the Union's picketing of Monarch the first element of a Landrum Amendment violation, the court turned its attention to whether the second component of such a violation — pursuit of an unlawful object by threatening, coercing, or restraining a neutral employer — was present in the instant case. The inquiry concerning this second element of a violation focused "not . . . [on] the motive underlying the boycott [appeal], but . . . [on] the nature and foreseeable consequences of the pressure which the union actually placed on Monarch."⁴⁹ Although the court affirmed the continuing vitality of

³⁹ *Id.* at 16; 105 L.R.R.M. at 2664.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 17-20, 105 L.R.R.M. at 2664-66.

⁴³ *Id.* at 17-18, 105 L.R.R.M. at 2665.

⁴⁴ *Id.* at 17, 105 L.R.R.M. at 2665.

⁴⁵ *Id.* at 17-18, 105 L.R.R.M. at 2665.

⁴⁶ *Id.* at 18, 105 L.R.R.M. at 2665.

⁴⁷ *Id.*

⁴⁸ *Id.* at 20, 105 L.R.R.M. at 2665-66.

⁴⁹ *Id.*, 105 L.R.R.M. at 2666.

Tree Fruits as a safe harbor protecting certain kinds of secondary site consumer picketing from proscription by the Landrum Amendment, it emphasized the identification requirement which necessarily limits that safe harbor. Specifically, the court observed that "the Board and the courts have inferred from *Tree Fruits* the principle that otherwise legal consumer boycotts of struck or disfavored products do 'threaten, coerce, or restrain' neutral employers if they fail to distinguish favored from disfavored products with sufficient clarity."⁵⁰ The court stressed that any union picketing at the site of a neutral, and seeking the protection of *Tree Fruits*, must confine its picketing to the struck or disfavored product.⁵¹ By failing to identify adequately the target of its secondary site boycott appeal the Union had, according to the court, failed to properly confine its picketing to the disfavored product.⁵² Accordingly, *Tree Fruits* did not protect the Union's picketing from the strictures of the Landrum Amendment. The picketing was deemed by the court to be coercive of a neutral employer, Monarch, and thus violative of the Landrum Amendment.⁵³

Finally, the court entertained the Union's claim that applying the Landrum Amendment to the picketing in question violated the first amendment.⁵⁴ The court dismissed this argument, noting that the Supreme Court had recently held, in *NLRB v. Retail Store Employees Union, Local 1001*,⁵⁵ "that a careful reading of the . . . [Landrum Amendment], geared only to prevent the special evils with which Congress was concerned [coercion of neutral employers in the pursuit of an unlawful object], posed no threat to the First Amendment."⁵⁶ The Board, in the opinion of the court, correctly determined that the picketing in the instant case was coercive of Monarch, a neutral employer, and was therefore a "special evil" which Congress constitutionally could, and did, prohibit by enacting the Landrum Amendment.⁵⁷

A vigorous dissent maintained that the picketing in question did not fall within the scope of the Landrum Amendment.⁵⁸ Declaring that the Amendment's restrictions on picketing must be construed narrowly to be consistent with first amendment freedoms of expression, the dissent did not perceive in the Union's picketing any of the "isolated evils" which prompted Congress to enact the statute.⁵⁹ For example, the dissent found the Union's "ultimate" objective in picketing Monarch to be the lawful one of saving its members' jobs rather than the unlawful one of reducing or terminating Monarch's trade with

⁵⁰ *Id.* at 21-22, 105 L.R.R.M. at 2666. For cases enunciating this identification requirement, see note 10 *supra*.

⁵¹ *Id.* at 24-25, 105 L.R.R.M. at 2667.

⁵² *Id.* at 26, 105 L.R.R.M. at 2668.

⁵³ *Id.*

⁵⁴ *Id.* at 33-34, 105 L.R.R.M. at 2670.

⁵⁵ 100 S. Ct. 2372 (1980).

⁵⁶ *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888, slip op. at 33, 105 L.R.R.M. 2658, 2670 (D.C. Cir. Oct. 3, 1980).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1, 105 L.R.R.M. at 2671 (Wald, J., dissenting).

⁵⁹ *Id.* at 1-3, 105 L.R.R.M. at 2671 (Wald, J., dissenting).

nonlocal soda manufacturers and distributors.⁶⁰ Thus, the dissent failed to find the first of the two requisite elements of a Landrum Amendment violation.⁶¹

In addition, the dissent stated that while a primary labor dispute was not essential to a finding of a violation of the Amendment, the absence of such a dispute should cause courts great reluctance to authorize bans on secondary site consumer picketing.⁶² Indeed, the dissent viewed the presence of a primary labor dispute as a kind of "automatic guidepost limiting the scope of regulation of speech to those situations" in which a neutral employer is being coerced into joining the labor disputes of others.⁶³

Finally, according to the dissent's reading of the Supreme Court's opinions in *Tree Fruits*⁶⁴ and *Retail Store Employees*,⁶⁵ a violation of the Landrum Amendment was not demonstrated in the case at bar because the Union's pickets neither exhorted consumers to shut off all trade with Monarch nor did they pose a realistic threat of causing it "ruin or substantial loss."⁶⁶ Absent a showing that the Union's pickets had urged a complete consumer boycott of Monarch or that its picketing of nonlocal soda was likely to cause Monarch severe economic harm, the dissent concluded that Monarch was not being coerced by the secondary site picketing of which it was complaining.⁶⁷ Thus, in the dissent's view, not only was the Union's objective in picketing Monarch lawful, the means by which the Union pursued that goal were not coercive of Monarch, and thus were not violative of the Landrum Amendment.

The importance of the *Soft Drink* case does not lie in its result, since it breaks no new doctrinal ground. Its significance arises instead from its unusual facts, an instance of secondary site picketing not related to any conventional, face-to-face primary labor dispute, to which the *Soft Drink* court applied rules grounded in two quite different lines of precedent. First, the *Soft Drink* court affirmed the proposition that a violation of the Landrum Amendment can occur even in the absence of a primary labor dispute.⁶⁸ Second, the court upheld the principle that secondary site consumer boycott appeals seeking the safe harbor of *Tree Fruits* must clearly distinguish the disfavored products from the other goods sold by the neutral employer.⁶⁹

In ruling that the Landrum Amendment may be violated even in situations in which there is no primary labor dispute, the *Soft Drink* court clearly was

⁶⁰ *Id.* at 3, 105 L.R.R.M. at 2671 (Wald, J., dissenting).

⁶¹ It will be recalled that the first element of a Landrum Amendment violation is an *unlawful object*. That is, "[t]he challenged union conduct must have as an object forcing or requiring a neutral business to cease doing business with another business." *Id.* at 16, 105 L.R.R.M. at 2664.

⁶² *Id.* at 4-5, 105 L.R.R.M. at 2672 (Wald, J., dissenting).

⁶³ *Id.* at 6, 105 L.R.R.M. at 2672-73 (Wald, J., dissenting).

⁶⁴ *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964).

⁶⁵ *NLRB v. Retail Store Employees Union, Local 1001*, 100 S. Ct. 2372 (1980).

⁶⁶ *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888, slip op. at 12-18, 105 L.R.R.M. 2658, 2674-76 (D.C. Cir. Oct. 3, 1980) (Wald, J., dissenting).

⁶⁷ *Id.* at 17-18, 105 L.R.R.M. at 2676 (Wald, J., dissenting).

⁶⁸ *Id.* at 9-14, 105 L.R.R.M. at 2662-64.

⁶⁹ *Id.* at 20-32, 105 L.R.R.M. at 2666-70.

supported by the text of the statute. The Amendment, which makes no reference to "secondary" site picketing, provides simply that it shall be "an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person . . . [with the objective of] forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer. . . ." ⁷⁰ Although the Landrum Amendment's prohibition of the coercion of neutral employers may most often be violated by a boycott appeal that grows out of a primary labor dispute, the operation of the statute is in no way restricted to such situations. If Monarch was a neutral employer, as both the *Soft Drink* majority and dissent readily assumed, ⁷¹ it was entitled by the text of the Landrum Amendment to protection from attempts to coerce it into ceasing its trade with the nonlocal soda companies, regardless of whether those attempts grew out of a conventional primary labor dispute. In taking this position, the *Soft Drink* court was not adopting a novel interpretation of the Amendment. Rather, it was reaffirming a line of decisions rendered by the Board, ⁷² other circuits, ⁷³ and its own circuit. ⁷⁴

Also well grounded in reason as well as precedent was the court's ruling that *Tree Fruits* does not protect secondary site consumer picketing that fails to identify clearly which products sold by the neutral are disfavored. ⁷⁵ Indeed, this identification requirement is implicit in the exemption from the Landrum Amendment carved out by the Court in *Tree Fruits*. The rationale for exempting from the Landrum Amendment secondary site picketing which merely calls for a consumer boycott of a specified struck or disfavored product was well stated by the *Tree Fruits* Court itself. According to the *Tree Fruits* Court, "[w]hen consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. . . . [In such a situation,] if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product." ⁷⁶ In other words,

⁷⁰ For the text of the Landrum Amendment, see note 3 *supra*.

⁷¹ *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888, slip op. at 14, 10, 105 L.R.R.M. 2658, 2664, 2673 (D.C. Cir. Oct. 3, 1980).

⁷² *E.g.*, *Sound Shingle Co.*, 101 N.L.R.B. 1159, 1161-63, 31 L.R.R.M. 1202, 1203-04 (1952), *enforced sub nom.*, *NLRB v. Washington-Oregon Shingle Weavers Dist. Council*, 211 F.2d 149, 152-53, 33 L.R.R.M. 2656, 2658-59 (9th Cir. 1954) (interpreting § 8 (b)(4)(A) of the National Labor Relations Act, which made it an unfair labor practice for a union to engage in a strike or similar action in order to force any employer to cease dealing in the products of any other enterprise).

⁷³ *E.g.*, *National Maritime Union v. NLRB*, 342 F.2d 538, 542-44, 58 L.R.R.M. 2578, 2582-83 (2d Cir. 1965) ("Congress did not intend to confine the effect of § 8 (b) (4) to a strict or precise definition of the term 'secondary boycott' nor did it intend to require the existence of a 'primary employer' as a prerequisite to the applicability of the subsection." *Id.* at 543, 58 L.R.R.M. at 2582).

⁷⁴ *E.g.*, *National Maritime Union v. NLRB*, 346 F.2d 411, 416-19, 58 L.R.R.M. 2827, 2831-34 (D.C. Cir. 1965).

⁷⁵ See text at notes 51 and 52 *supra*.

⁷⁶ *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 72 (1964).

where the secondary picketing is clearly limited to appeals for a consumer boycott of the disfavored goods, the picketing retains a primary-like quality in that it is aimed solely at generating consumer hostility toward the disfavored product, not the neutral seller of that product. Such product-oriented picketing is consequently less likely to coerce the neutral employer than picketing directed at the neutral itself. It was this reasoning that led the *Tree Fruits* Court to rule that the Landrum Amendment does not ban secondary consumer picketing that is exclusively directed against the struck or disfavored product.⁷⁷

When pickets do not clearly identify the disfavored product, however, there is a danger that sympathetic consumers will interpret the picketing more broadly than is intended by the union, and boycott other products sold by the neutral as well. As a result, the neutral employer may suffer economic harm that is much greater than if the consumer boycott were directed only at the products actually disfavored by the pickets. Indeed, vague descriptions of the disfavored product create a danger of the neutral enterprise itself becoming the target of the consumer boycott. Consequently, where secondary site pickets fail to identify precisely which products they are objecting to, they make it difficult or impossible for their picketing to be, as required for protection by *Tree Fruits*, "closely confined to the primary dispute, . . . [and] employed only to persuade customers not to buy the struck product."⁷⁸

In the case at bar, the pickets described the disfavored product as any soda that was not canned, bottled, or distributed by "local" companies.⁷⁹ The term "local" was not, however, defined by the pickets' signs or handbills.⁸⁰ Furthermore, the labelling and design of the soda containers in question were such that consumers often could not ascertain by visual inspection the place where a particular container of soda had been produced.⁸¹ In fact, in the proceedings before the administrative law judge, two veteran business agents of the Union itself were unable to agree on the place where a particular can of "Seven-Up" soda had been manufactured.⁸²

The failure of the Union to identify clearly for customers of Monarch which products it was picketing justified the *Soft Drink* court's ruling that the picketing was not protected by *Tree Fruits*. A secondary site consumer boycott appeal can hardly be employed — as it must for protection under *Tree Fruits* — "only to persuade customers not to buy the struck product,"⁸³ if the pickets are unwilling or unable to inform consumers what the struck product is.

The dissent in *Soft Drink* pursued a course of analysis that was flawed in several respects. For example, the dissent concluded that because the Union's

⁷⁷ *Id.* at 71-73.

⁷⁸ *Id.* at 72.

⁷⁹ See text at note 15 *supra*.

⁸⁰ *Id.*

⁸¹ See text at note 33 *supra*.

⁸² *Soft Drink Workers Union Local 812*, 243 N.L.R.B. 801, 805, 102 L.R.R.M. 1272, 1273 (1979).

⁸³ *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 72 (1964).

"ultimate" goal of preserving its members' jobs was lawful, its secondary picketing could not be deemed violative of the Landrum Amendment.⁸⁴ While the *Soft Drink* majority readily admitted the legitimacy of this ultimate objective, it correctly pointed out that the text of the statute provides that it is an unfair labor practice for a union to "threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is . . . (B) forcing or requiring any person to cease using, selling, . . . or otherwise dealing in the products of any other producer. . . ."⁸⁵ Thus, as the majority recognized, the Landrum Amendment can be violated when only one of several goals motivating the secondary site picketing is the unlawful one of forcing a neutral employer to stop doing business with another enterprise. In other words, "the legality of a union's ultimate goal cannot immunize any otherwise illegal intermediate objective."⁸⁶ By focusing solely on the lawfulness of the Union's ultimate objective in picketing nonlocal soda sold by Monarch, the dissent ignored the text of the Landrum Amendment.

The dissent also failed to recognize that the Union sought to achieve its lawful ultimate objective by resort to an unlawful intermediate objective, shutting off trade between Monarch and the nonlocal soda companies.⁸⁷ The dissent was persuaded by the Union's contention that its pickets were communicating the affirmative request that consumers buy locally manufactured and distributed soda rather than the negative appeal that patrons of Monarch's store reduce or cease their purchases of nonlocal soda.⁸⁸ Such reasoning ignores, however, the practical fact that a family consuming, for example, three quarts of nonlocal soda each week would be most unlikely to respond to the pickets by continuing to consume those three quarts each week while drinking an additional quart or two of local soft drinks. From a practical point of view, therefore, a favorable response to the Union's picketing would likely result in consumers replacing nonlocal soda with local soft drinks. This diminution in sales of nonlocal soda would surely force Monarch to reduce or terminate its purchases from the nonlocal soda companies. Therefore, the Union was in fact attempting to force Monarch to cease dealing in the soft drinks of its nonlocal suppliers, an unlawful objective under the Landrum Amendment.⁸⁹

Although the dissent accepted in principle the identification requirement as a logical emanation of *Tree Fruits*,⁹⁰ it concluded that the requirement had no

⁸⁴ *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888, slip op. at 3, 105 L.R.R.M. 2658, 2671 (D.C. Cir. Oct. 3, 1980) (Wald, J., dissenting).

⁸⁵ See text of Landrum Amendment at note 3 *supra* (emphasis added).

⁸⁶ *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888, slip op. at 17, 105 L.R.R.M. 2658, 2665 (D.C. Cir. Oct. 3, 1980).

⁸⁷ Such an objective is, under the Landrum Amendment, unlawful. See text of the Amendment at note 3 *supra*.

⁸⁸ *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888, slip op. at 16-17, 105 L.R.R.M. 2658, 2676 (D.C. Cir. Oct. 3, 1980) (Wald, J., dissenting).

⁸⁹ See text of Landrum Amendment at note 3 *supra*.

⁹⁰ *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888, slip op. at 16, 105 L.R.R.M. 2658, 2676 (D.C. Cir. Oct. 3, 1980) (Wald, J., dissenting).

relevance to the facts of *Soft Drink* because the signs and handbills of the pickets were affirmative in nature, urging customers to buy, rather than to boycott, certain types of soft drinks sold by Monarch.⁹¹ The dissent's conclusion that the "vague sign" doctrine did not apply to the Union's picketing is sound only if one accepts the premise that the pickets were not urging a boycott of anything. Since this premise is, as explained above, tenuous, the Union's failure to identify clearly the disfavored products created a danger that the neutral employer — Monarch — would become the actual target of a consumer boycott of nonlocal soda. This was a danger that the dissent did not specifically address.

To summarize, *Soft Drink* represents not an enunciation of new law, but rather a consolidation of existing precedent. The decision's significance stems from its affirmation of two discrete lines of authority in the context of an unusual set of facts — a secondary site consumer boycott appeal not related to any conventional primary labor dispute. The District of Columbia Circuit today clearly embraces the view that a conventional, face-to-face primary labor dispute is not a prerequisite to a violation of the Landrum Amendment. In addition, it takes the position that secondary site pickets seeking the haven of *Tree Fruits* must identify for the public precisely which products they are protesting.

3. *Area Standards Picketing on Employer's Property:* *Giant Food Markets, Inc. v. NLRB**

Although section 7 of the National Labor Relations Act¹ (NLRA) grants to unions the right to engage in certain types of union activities without interference, this right must be balanced against an employer's private property rights when a union chooses to engage in the activities on the employer's property.² In such cases, the question presented is whether the employer may request the union members to leave the premises without committing an unfair labor practice under section 8(a)(1) of the Act.³ The Supreme Court first faced

⁹¹ *Id.* at 16-17, 105 L.R.R.M. at 2676 (Wald, J., dissenting).

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¹ This provision reads as follows:

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 such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

29 U.S.C. § 157 (1976).

² *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 38 L.R.R.M. 2001 (1955); see text and notes at notes 4-6, *infra*. The court in *Giant Food Markets* noted that first amendment considerations do not come into play when the picketing takes place in a private shopping center. 633 F.2d at 22, 105 L.R.R.M. at 2918 (6th Cir. 1980); See *Hudgens v. NLRB*, 424 U.S. 507, 520-21, 91 L.R.R.M. 2489, 2494-95 (1976).

³ This statutory provision reads as follows: "It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaran-

the difficulty of balancing non-employee union members' rights against an employer's private property interests in *NLRB v. Babcock & Wilcox*.⁴ In that case, non-employee union organizers entered upon the employer's business property to solicit membership among its non-union employees.⁵ The Court held that when other reasonable attempts to communicate with employees are not available, the employer's private property rights must give way to the union's right to engage in organizational activities.⁶ The Court has since made it clear that this rationale could be extended to balance the employer's private property rights against other types of union activity protected by section 7.⁷

This balancing test was subsequently discussed by the Court in a case involving area standards picketing.⁸ In *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*,⁹ union members engaged in area standards picketing on the property of a department store owner who had hired non-union carpenters.¹⁰ The participants were charged with trespassing and

teed in [Section 7 of the N.L.R.A., 29 U.S.C. § 157].'' 29 U.S.C. § 158(a)(1)(1976); for the relevant text of § 7 see note 1 *supra*.

⁴ 351 U.S. 105, 38 L.R.R.M. 2001 (1955).

⁵ *Id.* at 106, 38 L.R.R.M. at 2002.

⁶ *Id.* at 112, 38 L.R.R.M. at 2004. The court stated:

The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

Id.

⁷ *Hudgens v. NLRB*, 424 U.S. 507, 91 L.R.R.M. 2489 (1976). The Court made it clear that the principles enunciated in *Babcock & Wilcox* could be applied to § 7 rights generally:

The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.

Id. at 522, 91 L.R.R.M. at 2495, quoting from *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112, 38 L.R.R.M. 2001, 2004 (1955).

⁸ See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 98 L.R.R.M. 2282 (1978).

The NLRB has described area standards picketing in the following fashion:

Area standards picketing is engaged in by a union to protect the employment standards it has successfully negotiated in a particular geographic area from the unfair competitive advantage that would be enjoyed by an employer whose labor cost package was less than those of employers subjected to the area contract standards. Failure to protect these standards could result in an undermining of wage and benefit gains in such areas. Therefore, in its attempt to protect the area standards, a union acts not only in its own interest, but in the interest of employees of employers with whom it has negotiated more beneficial employment standards.

Giant Food Markets, Inc., 241 N.L.R.B. No. 105, 100 L.R.R.M. 1598, 1599 (1979), quoted in *Giant Food Markets Inc. v. N.L.R.B.*, 633 F.2d 18, 23 n.11, 105 L.R.R.M. 2916, 2919 n.11 (6th Cir. 1980).

⁹ 436 U.S. 180, 98 L.R.R.M. 2282 (1978).

¹⁰ *Id.* at 182, 98 L.R.R.M. at 2283.

defended on the grounds that they had been engaged in an activity protected by section 7 of the NLRA.¹¹ The Supreme Court held that, even though a union activity is "arguably protected" by section 7, a state court is not deprived of the power to enforce state law against the union.¹² The Court noted that the union has an obligation to respond to the employer's demand to depart by filing an unfair labor practice charge with the National Labor Relations Board (NLRB), thus placing the matter within the jurisdiction of an agency with expertise in balancing the private property rights of employers against a union's section 7 rights.¹³ In dicta, the Court indicated that the rights of non-employee union members to engage in area standards picketing should not be given the same weight as the organizational activities conducted in *Babcock & Wilcox* because the former type of union activity lacked a close nexus to the rights of workers employed on the premises.¹⁴ Still, the Court stopped short of suggesting exactly how the Board should determine when union activities directed at customers justified an intrusion upon the employer's private property.

During the *Survey* year, in *Giant Food Markets, Inc. v. NLRB*,¹⁵ the Sixth Circuit Court of Appeals gave the Board some additional guidance as to how the *Babcock & Wilcox* standard should be applied to determine whether a union is entitled to engage in area standards picketing on an employer's property. In *Giant Food Markets*, the court was called upon to review a decision by the NLRB that an employer had committed an unfair labor practice under section 8(a)(1) when it demanded that non-employee union members engaged in area standards picketing leave its property.¹⁶ The court held: (1) that area standards picketing is as strongly protected by section 7 of the NLRA as other types of union activity;¹⁷ and (2) that there was insufficient evidence in the record to support the Board's determination that the employer's request to leave constituted an unfair labor practice.¹⁸ Accordingly, the court remanded the case to the NLRB for further consideration.¹⁹

The significance of the court's decision in *Giant Food Markets* is two-fold. First, it requires the NLRB to determine the proper balance between the conflicting rights of the union and the employer based upon a consideration of whether substantial evidence indicates that the union had no reasonable alter-

¹¹ *Id.* at 184, 98 L.R.R.M. at 2284.

¹² *Id.* at 207, 98 L.R.R.M. at 2292.

¹³ *Id.*

¹⁴ *Id.* at 206 n.42, 98 L.R.R.M. at 2292 n.42. The Court remarked: "Babcock makes it clear that the interests being protected . . . are not those of the organizers but of the employees located on the employer's property . . . Area-standards picketing, on the other hand, has no such vital link to the employee located on the employer's property." *Id.* The Court also noted that the right to organize, present in *Babcock*, was at the "core" of the purpose of the NLRA, while area-standards picketing was a recently recognized right. *Id.*

¹⁵ 633 F.2d 18, 105 L.R.R.M. 2916 (6th Cir. 1980), *reh. denied*, slip opinion, No. 79-1248 (6th Cir. Feb. 5, 1981).

¹⁶ *Id.* at 19, 105 L.R.R.M. at 2916.

¹⁷ *Id.* at 23, 105 L.R.R.M. at 2919.

¹⁸ *Id.* at 26, 105 L.R.R.M. at 2922.

¹⁹ *Id.*

native means of engaging in its protected activity.²⁰ Second, the court endorsed an approach that would accord more weight to the union's right to engage in area standards picketing on the employer's property than was suggested by the Supreme Court in *Sears*.²¹ In fact, the Sixth Circuit's approach would have private property rights yield more often to area standard picketing than to other types of protected union activities.²²

In *Giant Food Markets*,²³ the defendant leased and operated a supermarket in a building separated from a major thoroughfare by a privately owned parking lot.²⁴ Prior to Giant Food's lease, the premises had been occupied by another food store that had employed union workers.²⁵ When that store failed, Giant Food opened its business and employed non-union workers.²⁶ The Retail Clerks Union, believing that the wages and benefits offered by Giant Food were less than those earned by employees of the previous employer,²⁷ picketed in front of the store.²⁸ The pickets, none of whom were Giant Food employees, urged customers not to patronize the store because it was paying less than the union's area standards wage.²⁹ The picketing was peaceful and did not directly disrupt the store's operations.³⁰

After being requested by Giant Food's management to leave the premises, and served with a temporary restraining order, the pickets relocated.³¹ They chose an area at the entrance to the parking lot just beyond the store's property.³² The union then filed an unfair labor practice charge with the NLRB.³³ Initially, an administrative law judge dismissed the complaint, finding that the request to leave was not an unfair labor practice.³⁴ The NLRB reversed,

²⁰ *Id.* at 24, 105 L.R.R.M. at 2920. This approach is in accord with the Supreme Court's view in prior cases, such as *Babcock & Wilcox* and *Sears*, which leaves to the NLRB initial responsibility for weighing the competing interests in each case. See text and notes at notes 6, 7, 13, 14 *supra* and note 56 *infra*.

²¹ 633 F.2d at 24, 105 L.R.R.M. at 2920; compare with note 14 *supra*.

²² *Id.* at 24, 105 L.R.R.M. at 2920. The court observed:

It may be assumed that, in general, it will be easier to communicate with a specific, discrete number of employees by means other than intrusion on private property than to communication with potential consumers of a large retail store located on a major thoroughfare in a metropolitan area. This assumption, however, leads to a rather anomalous conclusion that private property rights may have to yield more often to the protected right to engage in area standards picketing than to other union activities for which the law has forged a long-standing protected status.

Id.

²³ 633 F.2d 18, 105 L.R.R.M. 2916 (6th Cir. 1980).

²⁴ *Id.* at 19, 105 L.R.R.M. at 2917.

²⁵ *Id.* at 19-20, 105 L.R.R.M. at 2917.

²⁶ *Id.* at 20, 105 L.R.R.M. at 2917.

²⁷ *Id.* at 20 n.4, 105 L.R.R.M. at 2917.

²⁸ *Id.*

²⁹ *Id.* at 20, 105 L.R.R.M. at 2917; see also note 8 *supra*.

³⁰ *Id.*, 105 L.R.R.M. at 2917.

³¹ *Id.*, 105 L.R.R.M. at 2917-18.

³² *Id.* at 21, 105 L.R.R.M. at 2917-18.

³³ *Id.*, 105 L.R.R.M. at 2918.

³⁴ *Id.*

holding that the union activity was protected under section 7 of the NLRA and that the request to leave was unfair labor practice.³⁵

In reviewing the Board's decision, the Sixth Circuit Court of Appeals first addressed the issue of whether area standards picketing is a protected activity under section 7 of the NLRA.³⁶ The court noted that at the time of the *Sears* decision, area standards picketing was regarded as a "recently evolved right."³⁷ The court maintained, however, that this "mere lack of longevity" should not affect the degree to which the National Labor Relations Act protects that right.³⁸ Accordingly, it concluded that area standards picketing falls within the protective ambit of section 7 and is entitled to no less protection than other types of protected union activity.³⁹

The court then addressed the problem of how the conflicting rights of the union and the employer should be balanced.⁴⁰ It emphasized that the balancing test set forth in *Babcock & Wilcox*⁴¹ called for a consideration of the relative strength of the competing interests in view of any alternative methods of communication open to the union.⁴² Unlike the union activity in *Babcock & Wilcox*, however, the communication involved in area standards picketing is not directed at employees on the employer's property, but rather at customers.⁴³ The court reasoned that this difference called for a modification of the test to focus on whether the union had a reasonable alternative means of communicating with its "intended audience."⁴⁴ Where, as in this case, the union's communication is directed toward a single store's potential customers diffused throughout a major metropolitan area, the court ruled that expensive media campaigns should not be considered a reasonable option for the union.⁴⁵ Therefore, the court concluded that the choice open to the union was between

³⁵ *Id.*

³⁶ *Id.* at 22, 105 L.R.R.M. at 2919.

³⁷ *Id.* at 23, 105 L.R.R.M. at 2919; see also note 14 *supra*.

³⁸ *Id.* The court reasoned: "If area standards picketing is protected under section 7 of the NLRA, no matter how long the protection has existed, area standards pickets must be allowed a reasonable means of communicating with the consumers." *Id.*, 105 L.R.R.M. at 2920.

³⁹ *Id.*

⁴⁰ *Id.* at 24, 105 L.R.R.M. at 2920.

⁴¹ 351 U.S. 105, 38 L.R.R.M. 2001 (1955).

⁴² 633 F.2d at 24, 105 L.R.R.M. at 2920; see note 44 *infra*.

⁴³ See note 8 *supra*.

⁴⁴ 633 F.2d at 24, 105 L.R.R.M. at 2920. The court stated: "It is . . . necessary to fit this case into the *Babcock & Wilcox* construct and thereby balance the conflicting rights while exploring the potential alternative means of communication with the *intended audience*." *Id.* (emphasis added).

⁴⁵ *Id.* The court reasoned as follows:

When the consumers potentially come from a large metropolitan area and cannot be categorized as a specific group patronizing a specific type of store, expensive, extensive mass media or mailer campaigns should not be required. If reasonableness is a criterion for determining whether or not an alternative means of communication exists, the union should not be forced to incur exorbitant or even heavy expenses.

Id.

picketing on the employer's property and picketing at the entrance to the store's parking lot.⁴⁶

In the proceedings below, the NLRB had concluded that picketing at the parking lot entrance was not a reasonable option and that therefore the union was entitled to picket on the employer's property.⁴⁷ The court found that the Board's determination on this point rested upon two theories.⁴⁸ First, the Board had believed that if the union was required to picket at the parking lot entrance its message would be diluted by its distance from the store.⁴⁹ Second, the Board had reasoned that picketing at the entrance would enmesh in the dispute a neutral employer located in a store adjacent to Giant Food Market.⁵⁰ The court held that although the Board's theories were based on logical reasoning,⁵¹ they were not supported by substantial evidence in the record.⁵² The court therefore urged the Board to consider testimony from the pickets and store owners, as well as other available evidence, in deciding whether there was a reasonable alternative site available to the union.⁵³ Accordingly, the case was remanded to the Board for further consideration.⁵⁴

The Sixth Circuit Court's decision in *Giant Food Markets*, to some extent, adopts the approach taken by the Supreme Court in prior cases by delegating the delicate balancing of the union's right to engage in its protected activities, and the employer's private property rights, in the first instance, to the NLRB.⁵⁵ In particular, this decision requires the Board to make more detailed factual findings when it applies the balancing test enunciated by the Supreme Court in *Babcock & Wilcox* to cases involving area standards picketing.⁵⁶ The court recognized that the NLRB had logically assumed that picketing at the parking lot entrance would be *less* effective than picketing on the employer's property.⁵⁷ However, it considered this assumption an insufficient basis for concluding that the alternative was so ineffective that the employer's private

⁴⁶ *Id.* at 25, 105 L.R.R.M. at 2920.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* Even the neutral employer, supposedly harmed by the union's picketing, disputed the Board's finding on this matter. *Id.* at n.14.

⁵¹ *Id.* at 26, 105 L.R.R.M. at 2921.

⁵² *Id.* The court remarked: "Both the dilution of message and enmeshing neutral employer theories, which appear to be at the crux of the Board's opinion, are cited by the Board without case authority and, perhaps more importantly, without reference to supporting facts in the record." *Id.*

⁵³ *Id.*, 105 L.R.R.M. at 2921-22.

⁵⁴ *Id.*

⁵⁵ In *Babcock & Wilcox*, the Supreme Court asserted that the balancing of interests is a process best left to the NLRB. As the Court noted: "The determination of the proper adjustments rests with the Board. Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations." 351 U.S. at 112, 38 L.R.R.M. at 2004 (1955); see also text at notes 13-14 *supra*.

⁵⁶ 633 F.2d at 26, 105 L.R.R.M. at 2921-22.

⁵⁷ *Id.* at 25, 105 L.R.R.M. at 2921.

property rights should yield.⁵⁸ Instead, the court listed various types of evidence that should have been considered by the Board, including testimony from the pickets and the neutral store owner supposedly enmeshed by the union's activity.⁵⁹ The court's opinion also indicates that the Board should have considered a wide range of objective factors, such as traffic flow outside the parking lot,⁶⁰ and the potential for interaction between the picketers and car drivers in evaluating whether the site was a reasonable alternative.⁶¹ The court thus defined the critical issue as a factual one: whether the effectiveness of the alternative site was so diluted by distance from the store, or by confusion considering the neutral store adjacent to Giant Food, that it was an unreasonable option.⁶²

More generally, the Sixth Circuit's approach reflects the view that the union's right to engage in protected activity should override the employer's property interest only when it is reasonably necessary for the activity to take place on the employer's property in order to be effective.⁶³ This approach thus attempts to find the locus of the accommodation between the union's right to engage in protected activities, and the employer's private property rights, as suggested in the Supreme Court's prior decisions.⁶⁴ This is also consistent with the Supreme Court's reading of the limits of section 7 protection in *Babcock & Wilcox*, namely, that Congress did not intend section 7 to grant to unions the ability to ignore an employer's private property rights whenever they find it more effective, or otherwise in their interests to do so.⁶⁵ Thus, under the Sixth Circuit's approach the mere fact that an alternative site is less effective is not sufficient to conclude that the employer's property rights must yield to the rights of the union.⁶⁶ Instead, the particular circumstances of each case should be examined fully to determine if the union can communicate its message in a manner which reaches the public in an effective manner, while not imposing on

⁵⁸ *Id.* at 26, 105 L.R.R.M. at 2921-22.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* The court clearly intended the Board's factual inquiry to be wide-ranging. It noted: "Other facts having bearing on the reasonableness of the alternative locations could have been elicited from various sources." *Id.*

⁶² *Id.*

⁶³ *Id.* at 22-23, 105 L.R.R.M. at 2919. This view originated in *Babcock & Wilcox*, where the Court stated that the NLRB must accommodate the employer's property rights and the union's § 7 rights in a manner which assures "as little destruction of one as is consistent with the maintenance of the other." 351 U.S. 105, 112, 38 L.R.R.M. at 2004 (1955). This principle has been observed by the Court in subsequent decisions. See *Hudgens v. NLRB*, 424 U.S. 507, 521, 522, 91 L.R.R.M. 2489, 2494-95 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 529, 544, 80 L.R.R.M. 2769, 2771 (1972).

⁶⁴ *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 204, 98 L.R.R.M. 2282, 2291-92 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 522, 91 L.R.R.M. 2489, 2495, (1976). See text and notes at notes 6, 7, 63 *supra*.

⁶⁵ *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112, 38 L.R.R.M. 2001, 2004 (1955); see notes 6, 7, 56 *supra*.

⁶⁶ See text at note 63 *supra*.

the union undue burdens or expenses.⁶⁷ In effect, the court's approach succeeds in keeping the burden of proof on the union to show that the employer's property rights must give way in order for it to conduct its protected activity effectively. This approach thus seems to balance the competing interests correctly insofar as it requires the union to make use of whatever reasonable alternative locations are available before it can enter upon the employer's property.

Yet, in applying the *Babcock & Wilcox* standard in the context of area standards picketing, the Sixth Circuit Court measured the strength of the union's interest in a way that differs markedly from what was suggested by the Supreme Court in *Sears*. In *Sears* the Court had drawn attention to the nexus between the union's activity and the rights of the employees located on the business premises.⁶⁸ It drew a distinction between the strength of a union's interest in entering the employer's property to attempt to organize its employees and the strength of the union's interest in participating in area standards picketing, placing a lesser value on the latter activity since it was only indirectly related to the rights of those working on the property in question.⁶⁹ Yet, the Sixth Circuit Court's decision in *Giant Food Markets* ignores that possible distinction by focusing on the union's accessibility to its "intended audience" to evaluate the strength of the union's right to engage in area standards picketing.⁷⁰ In rejecting the nexus view suggested in *Sears*, the circuit court reasoned that the rather attenuated relationship between area standards picketing and the rights of the non-union employees on the property was irrelevant since section 7 protected area standards picketing as strongly as other types of protected union activity.⁷¹ The court stated that the central issue in determining whether property rights must yield to the union's desire to locate its activity on that property is the union's accessibility to its "intended audience."⁷² Therefore, when the union can show that no reasonable alternative means of reaching its intended audience exists, it would be entitled to conduct its protected activity on the employer's property.⁷³

The decision in *Giant Food Markets* certainly does not provide a simple formula for applying the *Babcock & Wilcox* balancing test to area standards picketing and, in fact, it raises some new issues that will have to be addressed

⁶⁷ 633 F.2d at 22-23, 105 L.R.R.M. at 2919-20.

⁶⁸ 436 U.S. 180, 206 n.42, 98 L.R.R.M. 2282, 2292 n.42 (1978); see note 14 *supra*.

⁶⁹ *Id.*

⁷⁰ 633 F.2d at 24, 105 L.R.R.M. at 2920; see note 44 *supra*.

⁷¹ *Id.* at 23, 105 L.R.R.M. at 2919; see text at notes 37-39 *supra*. The Sixth Circuit expressly rejected the *Sears* approach by remarking:

Although Justice Stevens did command a majority of the Court [in *Sears*], there was far from unanimity on his dicta relating to area standards activity. It would be stretching this dicta too much to conclude that his statements were necessarily meant as pronouncements for the future rather than descriptions of the past.

Id. at 24 n.13, 105 L.R.R.M. at 2919-20 n.13. Note also that the definition of area standards picketing endorsed by the NLRB and the court makes no mention of the rights of employees on the property in question. See note 8 *supra*.

⁷² *Id.* at 24, 105 L.R.R.M. at 2920; see note 44 *supra*.

⁷³ *Id.*

by the courts in future cases. The chief difficulty with the Sixth Circuit's approach is that it allows the strength of the union's interest in conducting area standards picketing on the employer's property to vary according to how its "intended audience" is defined. As the court noted, when the intended audience consists of potential customers of a single store diffused throughout a large metropolitan area, the only reasonable means of communicating with them may be on-site picketing, either on or near the employer's property.⁷⁴ The court also recognized that this approach may require private property rights to yield more often in cases involving area standards picketing than in cases involving other types of protected union activities.⁷⁵ This outcome would be completely contrary to the result suggested by the Supreme Court in *Sears*,⁷⁶ and, as such, may be subject to both criticism and modification.

Problems of interpretation will also arise in defining the union's "intended audience." It is in the union's best interests to define its audience in a manner that precludes the effective use of forms of communication other than picketing on the employer's property. Thus, the union could lessen its burden of proof by eliminating a number of reasonable alternatives. Since the union has the first opportunity to determine its audience, it may come to have an inordinate influence over the way that the audience is subsequently defined.

Moreover, in cases involving area standards picketing, the possible use of conventional means of contacting consumers, such as radio and other forms of media, should be more fully explored. The court in *Giant Food Markets* rejected the idea that the media may provide a reasonable alternative means of communicating with a single store's potential customers scattered throughout a large metropolitan area because of the expense involved in such a campaign.⁷⁷ Yet, this does not foreclose the possibility that the media might be a reasonable alternative to on-site picketing in a situation where it can be used effectively and inexpensively. Presumably, the fact that a media campaign is physically removed from the employer's business does not automatically render it ineffective as a means of conveying the union's message.⁷⁸ But, since these issues remain unsettled, it is likely that the NLRB will be forced to resolve questions involving the definition of a union's intended audience and the reasonableness of media alternatives to on-site, area standards picketing on a case-by-case basis.

Conflicts involving area standards picketing on an employer's property will probably continue to generate difficulties for the NLRB and the courts. Since there is no simple formula for resolving such conflicts, it is also likely that the courts will continue to insist that the NLRB rely on detailed findings in balancing the competing interests of union and employer. Nevertheless, if the

⁷⁴ *Id.*; see note 45 *supra*.

⁷⁵ *Id.*; see note 22 *supra*.

⁷⁶ See text at notes 69-70 *supra*, and note 14 *supra*.

⁷⁷ 633 F.2d at 24, 105 L.R.R.M. at 2920; see note 45 *supra*.

⁷⁸ *Id.* The court observed that a mass media campaign would "diffuse the effectiveness of the communication." *Id.* Nevertheless, it did not conclude that this prevented the use of such an alternative under all circumstances.

Sixth Circuit's approach is widely adopted, the *Giant Food Market* decision will have helped to provide another piece of the framework within which such conflicts can be resolved. The critical issues left open are how a union's intended audience is to be defined and how the media will be viewed as a possible alternative means of communication open to a union seeking to reach consumers. In addition, the NLRB will need to develop criteria for evaluating the effectiveness and reasonableness of picketing sites outside of the employer's property. The future of the balance between the union's protected activity and the employer's property rights will then depend upon how the courts respond to the NLRB's resolution of these matters.

4. *Secondary Boycott in Protest of Foreign Governments:*

*Baldovin v. ILA and Allied International, Inc. v. ILA**

The secondary boycott provision of the National Labor Relations Act (NLRA) prohibits labor unions from engaging in or encouraging strikes or work-refusals when the purpose of these activities is to further a dispute between a union and a third party.¹ When a union has violated the secondary boycott provision, an aggrieved employer is entitled to a private cause of action under the Labor Management Relations Act (LMRA).² The National Labor Relations Board (NLRB) also may enjoin the union from conducting such strikes or refusals.³ The scope of the secondary boycott provision is limited, however, so that the provision applies only when the employer is "engaged in commerce" or "in an activity affecting commerce."⁴ Although the language of the provision requires that the employer be "in commerce," courts occasionally have expanded the statutory requirement. Thus, in some instances, courts have required that the union's activity be in commerce,⁵ or that the object of the union's dispute be in commerce.⁶ When the requirement of commerce is found to be lacking, the NLRB may not enjoin the union activity,⁷ and the employer may not bring a federal action under the LMRA.⁸ The employer

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¹ The secondary boycott provision provides, in pertinent part:

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

* * *

(4)(1) to engage in . . . a strike . . . where . . . an object thereof is —

* * *

(B) . . . requiring any other employer to recognize or bargain with a labor organization.

29 U.S.C. § 158(b) (1976).

² 29 U.S.C. § 187(b) (1976).

³ 29 U.S.C. § 160(a) (1976).

⁴ 29 U.S.C. § 158(b)(4) (1976).

⁵ *E.g.*, *Windward Shipping, Ltd. v. American Radio Ass'n*, 415 U.S. 104, 112 (1974), and cases cited therein.

⁶ *E.g.*, *Baldovin v. ILA*, 626 F.2d 445, 453, 105 L.R.R.M. 2549, 2554 (5th Cir. 1980).

⁷ 29 U.S.C. § 160(a) (1976).

⁸ 29 U.S.C. § 187(b) (1976).

may have state law remedies available to prevent employee work stoppages, however, even if the "commerce" requirement of the secondary boycott provision is lacking.⁹

The "commerce" requirement of the secondary boycott provision was interpreted by two circuit courts during the *Survey* year.¹⁰ Both cases arose from the International Longshoremen's Association's (ILA) refusal to handle Soviet ships and Soviet cargoes, in protest of the Soviet invasion of Afghanistan.¹¹ At issue in both cases was whether the object of the union's dispute was in commerce, so that the secondary boycott provision could be applied.¹² Although both courts were presented with the same set of facts, they reached different results. The Fifth Circuit held that the dispute was in commerce,¹³ but the First Circuit disregarded the Fifth Circuit's decision and held that the dispute was not in commerce.¹⁴ In reaching opposite results, both courts relied on the same series of Supreme Court cases as precedent. In these cases, the Court had delineated how the requirement of "commerce" should apply to disputes between American labor unions and foreign flagships. This line of cases will be discussed first, in order to determine which of the circuit courts ruled correctly on the issue of whether the ILA's boycott was in commerce.

In the first of these Supreme Court cases, *Benz v. Compania Naveira Hidalgo*,¹⁵ the Court held that a dispute between an American union and a foreign flagship was not in commerce within the meaning of the secondary boycott provision.¹⁶ In *Benz*, American unions had picketed a foreign ship that had been in port in Portland, Oregon.¹⁷ The purpose of the picket had been to offer collateral support for a strike that was being conducted on board the ship by its foreign crew.¹⁸ The Court held that the picketing by the American union was beyond the scope of the secondary boycott provision because the primary dispute was between the foreign ship and its foreign employees.¹⁹ The Court stressed that the NLRA had been enacted "to alleviate the industrial strife between American employers and American workers"²⁰ and not to regulate conflicts between foreign employees and their foreign employers.²¹ The Court also stated that the legislative history "inescapably describes the boundaries of the

⁹ E.g., *Windward Shipping Ltd. v. American Radio Ass'n*, 415 U.S. 104, 105 (1974).

¹⁰ *Allied Int'l, Inc. v. ILA*, 640 F.2d 1368, 106 L.R.R.M. 2659 (1st Cir. 1981); *Baldovin v. ILA*, 626 F.2d 445, 105 L.R.R.M. 2549 (5th Cir. 1980).

¹¹ *Allied Int'l, Inc. v. ILA*, 640 F.2d at 1369, 106 L.R.R.M. at 2660; *Baldovin v. ILA*, 626 F.2d at 447, 105 L.R.R.M. at 2549.

¹² *Allied Int'l, Inc. v. ILA*, 640 F.2d at 1369, 106 L.R.R.M. at 2660; *Baldovin v. ILA*, 626 F.2d at 447, 105 L.R.R.M. at 2549.

¹³ *Baldovin v. ILA*, 626 F.2d at 447, 105 L.R.R.M. at 2549.

¹⁴ *Allied Int'l, Inc. v. ILA*, 640 F.2d at 1369, 106 L.R.R.M. at 2660.

¹⁵ 353 U.S. 138 (1957).

¹⁶ *Id.* at 139.

¹⁷ *Id.* at 139-40.

¹⁸ *Id.*

¹⁹ *Id.* at 143-44.

²⁰ *Id.* at 144.

²¹ *Id.*

Act as including only the workingmen of our own country and its possessions.”²² Since Congress could have included union activity against foreign vessels specifically within the coverage of the Act, the Court concluded that the pickets in *Benz* should be beyond that coverage.²³ Another basis for the Court’s conclusion was the Court’s hesitance to interfere “in such a delicate field of international relations” without a clear direction from Congress to do so.²⁴ Thus, the Court decided that the union’s activity in *Benz* had not been in commerce, in order to avoid judicial interference in international affairs and in the labor disputes of a foreign employer.²⁵

Six years after the *Benz* decision, the Court reaffirmed the *Benz* approach in *Inces Steamship Co., Ltd. v. International Maritime Workers Union*.²⁶ In *Inces*, the Court held again that union activity directed at furthering a dispute between a foreign ship and its foreign crew should not be covered by the NLRA.²⁷ In *Inces*, American unions had picketed a foreign ship that had been in port in the United States.²⁸ The object of the union’s picket had been to unionize the foreign seamen who had formed the crew of the ship.²⁹ In a suit brought by the shipowner to enjoin the picket, the Court determined that the “maritime operations of foreign flagships employing alien seamen are not ‘in commerce’ within the meaning [of the NLRA].”³⁰ Consequently, the Court reasoned, the picket could not be enjoined.³¹ In *Inces*, the Court again stressed that the NLRA had been enacted primarily to govern American disputes, and that, consequently, interference by American courts into the affairs of a foreign employer should be avoided.³²

Although the *Benz* and *Inces* decisions recognized that interference in the affairs of foreign employers should be avoided, the Court also has indicated that union activity is not automatically outside of “commerce” merely because the activity is directed at a foreign employer. In *ILA, Local 1416 v. Ariadne Shipping Co., Ltd.*,³³ the Court held that pickets conducted by American unions to protest the substandard wages paid by the owners of foreign ships to non-union American longshoremen were within the scope of the NLRA.³⁴ The *Ariadne*

²² *Id.*

²³ *Id.* at 146-47.

²⁴ *Id.* at 147.

²⁵ *Id.* at 143.

²⁶ 372 U.S. 24 (1963).

²⁷ *Id.* at 27.

²⁸ *Id.* at 26.

²⁹ *Id.*

³⁰ *Id.* at 27.

³¹ *Id.* at 26-27.

³² *Id.* at 27.

³³ 397 U.S. 195 (1970).

³⁴ *Id.* at 200. Consequently, the Court held that the state courts had no jurisdiction to enjoin the pickets, because this activity was within the exclusive jurisdiction of the NLRB. *Id.* at 200-01. The Court explained:

The jurisdiction of the [NLRB] is exclusive and preemptive as to activities that are “arguably subject” to regulation under [29 U.S.C. §§ 157, 158]. (Cita-

Court distinguished *Benz* and *Inces*, which had held that union activity directed at foreign ships is beyond the scope of the NLRA, by emphasizing that in both *Benz* and *Inces*, the dispute causing the union activity had concerned the rights of foreign workers.³⁵ In *Ariadne*, by contrast, the Court stressed that the dispute focused upon wages paid to American workers.³⁶ The *Ariadne* Court also noted that these workers had not been regular members of the foreign ship's crew. Rather, they had been occasional employees who had worked for the foreign ship on an irregular basis.³⁷ Therefore, the Court reasoned, applying American law to resolve the dispute between the union and the foreign ship would not threaten to interfere with the internal affairs of the foreign ship.³⁸ The Court also found that the concern for the principles of comity and accommodation in matters of international trade, which had been the persuasive factor in *Benz* and in *Inces*, was not implicated under the facts of the *Ariadne* case.³⁹ Because this factor was not implicated, the Court held that the labor dispute in *Ariadne* should be governed by the NLRA.⁴⁰

Whether union activity directed at a foreign ship should be governed by the NLRA was addressed again by the Court in *Windward Shipping, Ltd. v. American Radio Association*.⁴¹ In *Windward*, an American seamen's union had picketed foreign ships. The picketing was conducted to publicize the negative impact that the hiring of foreign seamen by these ships had had on American seamen.⁴² The stevedore unions honored the seamen's picket line and refused to service the foreign ships.⁴³ The owners of these ships brought suit in state court to have the picket enjoined.⁴⁴ In the state court proceeding, the union argued that its activity was within the exclusive jurisdiction of the NLRB and that the state court jurisdiction was therefore preempted.⁴⁵ The Supreme Court later framed the jurisdictional issue as whether the union's activities "were activities 'affecting commerce' " within the meaning of the secondary boycott

tions omitted). The activities [of the union] in this case met that test. The union's peaceful primary picketing to protest wage rates below established area standards arguably constituted protected activity under [29 U.S.C. § 157].

Id.

³⁵ *Id.* at 199.

³⁶ *Id.* at 200.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* Although the Court spoke frequently of the principles of comity and accommodation in the line of cases beginning with *Benz*, the Court never defined these terms. *Black's Law Dictionary* defines comity as a principle whereby "courts of one state or jurisdiction will give effect to laws of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect." *Black's Law Dictionary*, 242 (5th ed. 1979). Accommodation is defined as "an arrangement or engagement made as a favor to another, not upon consideration received."

Id. at 15.

⁴⁰ 397 U.S. at 200.

⁴¹ 415 U.S. 104 (1974).

⁴² *Id.* at 108.

⁴³ *Id.* at 109.

⁴⁴ *Id.* at 106.

⁴⁵ *Id.*

provision of the NLRA.⁴⁶ The Court decided that the activities were not "affecting commerce," based on the precedent of *Benz*, *Inces*, and *Ariadne*.⁴⁷ The Court recognized that, literally speaking, the union activity in the *Windward* case and in each of the precedent cases could be considered to be "in commerce."⁴⁸ The Court noted, however, that those cases which had held the union activity to be beyond the scope of the NLRA had used the jurisdictional requirement of "commerce" to avoid a result that would "erase longstanding principles of comity and accommodation in international trade."⁴⁹ Applying this rationale to the facts of the *Windward* case, the Court observed that, "[a]t the very least, the pickets must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers. . . ."⁵⁰ Exerting such an influence on the foreign ships, the Court reasoned, "would have more than a negligible impact."⁵¹ Thus, the Court concluded that holding the union activity within the scope of the NLRA would run afoul of the principles of comity and accommodation.⁵²

After holding that the union's activity in *Windward* was not covered by the NLRA, the Court was confronted with a similar issue in *American Radio Association v. Mobile Steamship Association*.⁵³ The *Mobile* case arose from the same union activity as the *Windward* case.⁵⁴ In *Mobile*, however, the plaintiffs were the stevedore companies, who sought to enjoin the pickets so that the ships could be unloaded.⁵⁵ The stevedore companies originally had filed suit in state court.⁵⁶ The union again challenged the state court's jurisdiction, arguing that, because its activity arguably was prohibited by the NLRA, the NLRB should have exclusive jurisdiction over any suit arising from the activity.⁵⁷ Again, the Court found that the union's activity was not in commerce, and that the state court's jurisdiction was not precluded by that of the NLRB.⁵⁸ The Court stated that it wanted to avoid the "bifurcated result" that would obtain if, at one picket site, the foreign shipowners could bring suit in the state courts (under *Mobile*), but the American businesses could not do so.⁵⁹ The Court again emphasized that the primary purpose of the picket had been to alter the internal management of a foreign ship.⁶⁰ Consequently, the principles of comity and ac-

⁴⁶ *Id.*

⁴⁷ *Id.* at 112.

⁴⁸ *Id.*

⁴⁹ *Id.* at 112-13.

⁵⁰ *Id.* at 115.

⁵¹ *Id.*

⁵² *Id.* at 115-16.

⁵³ 419 U.S. 215 (1974).

⁵⁴ *Id.* at 219-20.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 220-21.

⁵⁸ *Id.* at 228.

⁵⁹ *Id.* at 221, 225.

⁶⁰ *Id.* at 225.

commodation again militated against the application of the NLRA, even though the suit had been brought by an American business to enjoin a picket by an American union.

In summary, after the *Mobile* case, it appeared that the Court had fashioned a mechanical test to determine whether union activity directed at a foreign flagship was within the scope of the NLRA. The test focused upon the primary purpose of the union activity. If the primary purpose was to alter the internal affairs of a foreign ship, then the activity was not governed by the NLRA. It would not matter, under the *Benz-Mobile* line of cases, whether suit was brought by the foreign ship or by an American plaintiff. Conversely, if the primary purpose of the union activity was to affect only the relationship between the foreign ship and its American workers, the union activity would be within the scope of the NLRA.⁶¹

Although the *Benz-Mobile* test easily could determine whether the NLRA should be applied to union activity directed at a foreign flagship, the test did not specify how the NLRA should be applied to union activity directed at foreign nations.

During the *Survey* year, two circuits applied the *Benz-Mobile* line of Supreme Court cases to determine whether union activity that is conducted to further that union's dispute with a foreign nation should be governed by the NLRA.⁶² Although both circuits applied the same line of cases, they reached opposite results. A discussion of the reasoning each court employed to reach its decision will follow. The merits of each court's reasoning then will be tested against the approach of the Supreme Court in the *Benz-Mobile* line of cases.

Both cases arose from the same basic dispute. To protest the Soviet invasion of Afghanistan, the International Longshoremen's Association (ILA) had ordered a suspension in the handling of all Soviet ships and Soviet cargoes in American ports.⁶³ In the Fifth Circuit case, *Baldovin v. ILA*,⁶⁴ the union activity was held not to be "in commerce" within the meaning of the NLRA.⁶⁵ Consequently, the NLRB was denied an injunction of the union's boycott.⁶⁶ The First Circuit, conversely, held in *Allied International, Inc. v. ILA*⁶⁷ that the union's boycott was in commerce.⁶⁸ Thus, *Allied International*, an American importer whose business had been affected adversely by the longshoremen's strike, could state a claim for damages under the NLRA.⁶⁹ Therefore, by ap-

⁶¹ *Accord*, *Annual Survey of Labor Law*, 16 B.C. L. REV. 966, 972 (1975).

⁶² *Allied Int'l, Inc. v. ILA*, 640 F.2d 1368, 106 L.R.R.M. 2659 (1st Cir. 1981); *Baldovin v. ILA*, 626 F.2d 445, 105 L.R.R.M. 2549 (5th Cir. 1980).

⁶³ *Allied Int'l, Inc. v. ILA*, 640 F.2d at 1369, 106 L.R.R.M. at 2660; *Baldovin v. ILA*, 626 F.2d at 447, 105 L.R.R.M. at 2549.

⁶⁴ 626 F.2d 445, 105 L.R.R.M. 2549.

⁶⁵ *Id.* at 446, 105 L.R.R.M. at 2549.

⁶⁶ *Id.*

⁶⁷ 640 F.2d 1368, 106 L.R.R.M. 2659.

⁶⁸ *Id.* at 1374, 106 L.R.R.M. at 2664.

⁶⁹ *Id.* at 1379, 106 L.R.R.M. at 2668.

plying the same body of precedent to virtually indetical facts, the First and Fifth Circuits reached inconsistent decisions.

In the *Baldovin* case, the Fifth Circuit applied the test implicitly established by *Mobile*. Consequently, the Fifth Circuit held that the ILA's boycott was not in commerce.⁷⁰ The *Baldovin* court reasoned that the teaching of *Mobile* was that the nature of the primary dispute should determine whether the union's activity was in commerce.⁷¹ Under this simplified test, where the primary purpose of the union activity is to effectuate some change in a foreign entity, the NLRA cannot apply to the primary dispute.⁷² When the primary dispute is beyond the scope of the NLRA, so are any secondary effects on disputes the activity may have caused.⁷³ In the *Baldovin* case, the primary dispute was found to be between the union and the Soviets.⁷⁴ The court noted that, compared to the disputes between unions and foreign flagships in the Supreme Court cases, this dispute was "even further removed from the type of domestic relations that the [NLRA] was intended to cover."⁷⁵ Since only a political decision by the Soviet Union could have accommodated the union's demands, the court found that the union's activity was not in commerce.⁷⁶ Because the activity was not in commerce, the court found that the NLRB lacked jurisdiction to enjoin the ILA's allegedly unfair secondary boycott.⁷⁷

Rejecting the Fifth Circuit's application of the mechanical *Mobile* test to disputes involving foreign governments, the First Circuit held in *Allied International, Inc. v. ILA* that the ILA's boycott to protest the invasion of Afghanistan was in commerce.⁷⁸ Therefore, the boycott was held to be within the scope of the NLRA. In analyzing the *Benz-Mobile* line of Supreme Court cases, the First Circuit emphasized that most of those cases had considered whether union activity directed at working conditions aboard a foreign flagship should fall within the ambit of the NLRA.⁷⁹ The court acknowledged that when the union's primary dispute is over conditions aboard the foreign ship, the principles of comity and accommodation militate against the applicability of the NLRA.⁸⁰ The First Circuit concluded, however, that where the primary dispute is with a foreign government, the same analysis should not obtain.⁸¹ The court found that "it would be absurd to contend that application of the secondary boycott provisions would imply NLRB jurisdiction over *this* primary

⁷⁰ 626 F.2d at 449-54, 105 L.R.R.M. at 2554.

⁷¹ *Id.* at 453, 105 L.R.R.M. at 2554.

⁷² *Id.* at 452-54, 105 L.R.R.M. at 2554-55.

⁷³ *Id.*

⁷⁴ *Id.* at 453, 105 L.R.R.M. at 2554.

⁷⁵ *Id.*, 105 L.R.R.M. at 2554.

⁷⁶ *Id.*

⁷⁷ *Id.* at 453-54, 105 L.R.R.M. at 2554-55.

⁷⁸ 640 F.2d at 1374, 106 L.R.R.M. at 2664.

⁷⁹ *Id.* at 1372, 106 L.R.R.M. at 2662.

⁸⁰ *Id.*, 106 L.R.R.M. at 2663.

⁸¹ *Id.* at 1374, 106 L.R.R.M. at 2664.

dispute, *i.e.*, over Soviet military policy.”⁸² The court also noted that “the only labor-related activity in issue ha[d] been played out by an all-American cast.”⁸³ Thus, the First Circuit restricted the *Mobile* case to its facts.⁸⁴ The First Circuit also emphasized that in *Mobile* the Supreme Court had been unwilling to reach a bifurcated result, whereby the foreign shipowners could bring suit in state court, but the American shippers could not.⁸⁵ This type of bifurcated result, the First Circuit noted, is only possible when the primary dispute focuses on foreign labor relations.⁸⁶ Consequently, the First Circuit found that the considerations of comity and accommodation, which had influenced the Supreme Court’s reasoning throughout the *Benz-Mobile* line of cases, were without force under the facts in *Allied*.⁸⁷

Because the fact pattern in *Allied* and in *Baldovin* did not raise issues of comity and accommodation, the First Circuit’s resolution of the jurisdictional issue is the better reasoned one. In *Baldovin*, the Fifth Circuit merely applied the *Mobile* test mechanically, without considering whether the policies behind the test are applicable when the union activity is directed against a foreign government.⁸⁸ Conversely, the First Circuit in *Allied* looked to the policies which led the Supreme Court to develop the *Mobile* test.⁸⁹

In the cases leading up to the *Mobile* test, the Court had been influenced consistently by the policies of comity and accommodation. The Court had been fearful that, by applying the NLRA to union activity directed against a foreign flagship, the Court would imply that the NLRA should apply to the labor relations on board the ship as well. Thus, the Court would be overreaching the limits set upon it by the principles of comity and accommodation.⁹⁰ In the only case in which the Supreme Court had deemed the NLRA applicable to union activity directed against a foreign ship, the primary dispute had been between the ship and American workers.⁹¹ Thus, in that case, applying the NLRA to the union activity could mean only that the foreign ship’s dispute with the other American workers should be governed by the NLRA as well. Because Congress was found to have had the right to regulate American workers, the principles of comity and accommodations did not militate against the application of the NLRA to the union activity.⁹²

The First Circuit correctly applied this approach to determine that the NLRA should govern the dispute in *Allied*. It is beyond question that the NLRA cannot resolve a dispute between American workers and the Soviet

⁸² *Id.* at 1372-73, 106 L.R.R.M. at 2663.

⁸³ *Id.*

⁸⁴ *Id.* at 1374, 106 L.R.R.M. at 2664.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 626 F.2d at 450, 105 L.R.R.M. at 2553.

⁸⁹ 640 F.2d at 1371-74, 106 L.R.R.M. at 2662-64.

⁹⁰ *See, e.g.*, *Benz v. Compania Naveira Hidalgo*, 353 U.S. 138 (1957).

⁹¹ *ILA, Local 141 v. Ariadne Shipping Co., Ltd.*, 397 U.S. 195 (1970).

⁹² *Id.*

Union, especially when that dispute concerns the Soviets' decision to invade another country.⁹³ The First Circuit also noted that the only labor dispute in the case was "played out by an all-American cast." Because the only labor issue was strictly an American one, the decision did not imply that American labor law would govern labor disputes between foreign employers and their foreign employees. Thus, the principles of comity and accommodation are not invoked.

Since the principles of comity and accommodation are not invoked when unions engage in political protests against foreign governments, it is most likely that the First Circuit's approach will be followed when the issue arises before other circuits. Under this approach, American employers will be protected by the secondary boycott prohibition of the NLRA, regardless of whether the union's boycott is directed at other American businesses or at foreign nations. The only instance when a secondary boycott may not be prohibited by the NLRA is when the purpose of the boycott is to influence a foreign employer. When a foreign employer is the victim of the union's wrath, the applicability of the NLRA to the union's activity will be determined by reference to the *Mobile* test. When the primary purpose of the union's activity is to influence a foreign employer, neither the activity, nor the employer is in commerce. Because neither the activity nor the employer is in commerce, the NLRA cannot be applied.

III. EMPLOYER'S DUTY TO BARGAIN

A. *Multi-Employer Bargaining Associations:* *NLRB v. Bonanno Linen Service, Inc.**

The question of whether an employer may withdraw unilaterally from a multi-employer bargaining unit when an impasse occurs in the course of collective bargaining is one which has created a split among the federal courts of appeals. The National Labor Relations Board (Board) has held that a party may withdraw from a multi-employer association once negotiations have been initiated only when mutual consent is given or when an "unusual circumstance" exists.¹ The Board's early cases resulted in uncertainty as to whether a bargaining impasse was an unusual circumstance.² Finally, in 1973 the Board un-

⁹³ See also 640 F.2d at 1372 n.3, 106 L.R.R.M. at 2663 n.3, where the First Circuit explained how it was possible to characterize the primary dispute as one between the Soviet Union and Afghanistan. Therefore, the primary dispute would not involve a labor law issue. *Id.*

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¹ Retail Assocs., Inc., 120 N.L.R.B. 388, 395, 41 L.R.R.M. 1502, 1504 (1958). Prior to the actual commencement of negotiations, the employer or union may withdraw from the unit freely. *NLRB v. Bonanno Linen Serv., Inc.*, 630 F.2d 25, 28, 105 L.R.R.M. 2477, 2479 (1st Cir. 1980).

² Compare *Ice Cream, Frozen Custard Indus. Employees Local 717*, 145 N.L.R.B. 865, 870-71, 55 L.R.R.M. 1059, 1061 (1964) (bargaining impasse would not justify unilateral withdrawal from unit) with *Plumbers & Steamfitters Local 323*, 191 N.L.R.B. 592, 592 n.1, 77 L.R.R.M. 1769 (1971) (impasse could justify withdrawal).

equivocally held that a bargaining impasse was not an unusual circumstance justifying unilateral withdrawal from a multi-employer unit.³ Despite this ruling, several courts of appeals, including the First Circuit (in dicta)⁴ concluded that a genuine impasse in collective bargaining did justify an employer's unilateral withdrawal from a multi-employer bargaining unit.⁵ During this *Survey* year, however, the Court of Appeals for the First Circuit, in *NLRB v. Bonanno Linen Service*,⁶ declined to follow its own dicta and upheld the Board's exclusion of a bargaining impasse from its definition of unusual circumstances.⁷

In *Bonanno*, the employer had joined nine of its competitors in a multi-employer bargaining association which for several years had negotiated the contracts with the Teamsters Local Union 25 (the union).⁸ The union represented the truck drivers and certain other employees of the ten members of the association.⁹ Bonanno continued as a member of the association and negotiations for a new contract had begun when the parties reached an impasse on the issue of compensation.¹⁰ After the parties had been at impasse for approximately one month, the union initiated a selective strike against Bonanno and, in response, most of the association members conducted a lockout.¹¹ Eventually Bonanno replaced all of its striking employees with permanent

³ *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23, 84 L.R.R.M. 1161, 1163 (1973), *enft denied*, 500 F.2d 181, 184, 87 L.R.R.M. 2203, 2206 (5th Cir. 1974). The Board has limited the scope of the term "unusual circumstances" to two situations: where dire financial hardship threatens the employer's existence, *see, e.g.*, *Atlas Electrical Serv. Co.*, 176 N.L.R.B. 827, 830, 71 L.R.R.M. 1625, 1629 (1969); *Spun-Jee Corp.*, 171 N.L.R.B. 557, 558, 68 L.R.R.M. 1121, 1122 (1968); and where the bargaining unit has been fragmented substantially through consensual withdrawals, *see, e.g.*, *NLRB v. Southwestern Colo. Contractors' Ass'n*, 447 F.2d 968, 969, 78 L.R.R.M. 2129, 2130 (10th Cir. 1971); *Typographic Serv. Co.*, 238 N.L.R.B. 1565, 1566, 99 L.R.R.M. 1649 (1978). Certain courts, although not the Board, have interpreted "unusual circumstances" to include situations in which the negotiating committee does not represent fairly the interests of a particular employer. *See NLRB v. Siebler Heating & Air Conditioning, Inc.*, 563 F.2d 366, 371, 96 L.R.R.M. 2613, 2617 (8th Cir. 1977), *cert. denied*, 437 U.S. 911 (1978); *NLRB v. Unelko Corp.*, 478 F.2d 1404 (without published opinion), 83 L.R.R.M. 2447, 2449 (7th Cir. 1973) (dictum).

⁴ *Andino v. NLRB*, 619 F.2d 147, 151, 104 L.R.R.M. 2183, 2186 (1st Cir. 1980).

⁵ *See NLRB v. Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 146, 98 L.R.R.M. 3150, 3157 (2d Cir. 1978), *cert. denied sub nom. Shopmen's Local Union No. 455 v. NLRB*, 439 U.S. 1130 (1979); *NLRB v. Beck Engraving Co., Inc.*, 522 F.2d 475, 483, 90 L.R.R.M. 2089, 2094 (3d Cir. 1975); *NLRB v. Associated Shower Door Co., Inc.*, 512 F.2d 230, 232, 88 L.R.R.M. 3024, 3025 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181, 184, 87 L.R.R.M. 2203, 2205-06 (5th Cir. 1974); *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1172, 82 L.R.R.M. 2017, 2018 (8th Cir. 1972) (alternative holding). *See also Note, Effect of Negotiating Impasse on an Employer's Right to Withdraw from a Multi-Employer Bargaining Association — NLRB v. Beck Engraving Co.*, 17 B.C. IND. & COM. L. REV. 525 (1976).

⁶ 630 F.2d 25, 105 L.R.R.M. 2477 (1st Cir. 1980).

⁷ *Id.* at 27, 105 L.R.R.M. at 2477.

⁸ *Id.*, at 105 L.R.R.M. at 2478.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

employees.¹² Bonanno notified both the association and the union that it was withdrawing from the association because of the ongoing bargaining impasse.¹³ About a year after the initiation of negotiations, the union and the association reached an agreement and entered into a new contract which the union claimed was binding upon Bonanno.¹⁴ The Board agreed¹⁵ and sought enforcement of its decision. The Court of Appeals for the First Circuit upheld the Board's decision, reasoning that the employer's ability to withdraw freely from an association would undermine the structure of multi-employer bargaining.¹⁶

In reaching its decision, the court reviewed the policy considerations underlying multi-employer bargaining. Central to the *Bonanno* court's decision is the Supreme Court's conclusion in *NLRB v. Truck Drivers Local 449 (Buffalo Linen)*.¹⁷ In *Buffalo Linen* the Court found that Congress, by rejecting proposals to limit or outlaw multi-employer bargaining units, recognized such bargaining associations as "vital factor[s] in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."¹⁸ One way in which the Court found that multi-employer associations promoted labor peace is by ensuring the uniformity of contract terms.¹⁹ If employers were compelled to bargain with a union on an individual basis, different terms might be negotiated by each employer. With multi-employer bargaining, however, industry-wide benefits can be developed. As a result, there is no disparity of employee benefits to give rise to employee dissatisfaction and strife.²⁰ Second, because all employers are bound by the same terms, one employer cannot use collective bargaining to gain an economic advantage over competitors.²¹ Finally, a multi-employer bargaining unit not only increases the efficiency of the bargaining process²² but also allows smaller employers to band together to obtain a more equal bargaining position vis-a-vis a large labor union.²³

Because of the role multi-employer units play in promoting labor peace, the *Bonanno* court concluded that the stability of such units was of great importance.²⁴ A rule which allowed employers to withdraw freely at any time during the negotiations would create distrust among all the parties. In addition, the court noted that such a rule would allow an employer to manufacture an impasse so that he might be allowed to withdraw from the unit.²⁵ Because the stability of the association would be weakened if an employer were able to

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 27-28, 105 L.R.R.M. at 2478.

¹⁵ See *Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 140 (1979).

¹⁶ 630 F.2d at 35, 105 L.R.R.M. at 2484.

¹⁷ 353 U.S. 87 (1957).

¹⁸ *Id.* at 95.

¹⁹ *Id.* at 96.

²⁰ 630 F.2d at 28, 105 L.R.R.M. at 2478.

²¹ 353 U.S. at 96.

²² 630 F.2d at 28, 105 L.R.R.M. at 2478.

²³ 353 U.S. at 96.

²⁴ 630 F.2d at 28, 105 L.R.R.M. at 2479.

²⁵ *Id.* at 29, 105 L.R.R.M. at 2480.

withdraw whenever a bargaining impasse arose,²⁶ the court rejected such a rule.²⁷ Nonetheless, because other courts have held that an employer may withdraw when a genuine impasse is reached, the *Bonanno* court closely examined those decisions.

The *Bonanno* court first considered the rationale applied by other courts in the so-called "whipsawing" cases, where the existence of interim agreements allowed employers to withdraw from a bargaining unit when an impasse was reached.²⁸ These cases, represented by *NLRB v. Hi-Way Billboards, Inc.*,²⁹ involved interim agreements between the union and some members of the unit at impasse which stated that those employers would be bound by the final agreement reached by the bargaining process.³⁰ The *Hi-Way Billboards* court reasoned that a union could enter into an interim agreement with an employer or employers and then successively strike the remaining members of the association.³¹ Such a strike placed an employer at a severe disadvantage vis-a-vis his economic competitors who avoided a strike by entering into the interim agreement. By this technique, known as whipsawing, the union could force the employers to accept terms more favorable to the union. It is for this reason that when a union has negotiated interim agreements with some members of the association, and a bargaining impasse has been reached, many courts have held that employers may withdraw unilaterally to avoid being whipsawed into accepting the union's offer.³²

After considering the *Hi-Way Billboards* court's rationale, the *Bonanno* court turned to *NLRB v. Beck Engraving Co., Inc.*³³ *Beck* held that the mere right of the union to enter into interim agreements justified an employer's unilateral withdrawal from the unit after an impasse was reached.³⁴ According to the *Beck* court, the mere existence of the right to enter into such agreements, rather than its exercise, gave the union excessive bargaining power.³⁵ The right of the employer to withdraw from the association, therefore, was necessary to balance the power of the union to force the agreement upon the employers.³⁶

After reviewing the underlying principles of the cases which allowed an employer to withdraw unilaterally from a bargaining unit when an impasse was reached, the *Bonanno* court found two reasons why the application of those

²⁶ *Id.* at 28, 105 L.R.R.M. at 2479.

²⁷ *Id.* at 35, 105 L.R.R.M. at 2484.

²⁸ *Id.* at 33, 105 L.R.R.M. at 2483. This group included *NLRB v. Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 98 L.R.R.M. 3150 (2d Cir. 1978), *cert. denied sub nom. Shopmen's Local Union No. 455 v. NLRB*, 439 U.S. 1130 (1979); *NLRB v. Associated Shower Door Co., Inc.*, 512 F.2d 230, 88 L.R.R.M. 3024 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975); and *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181, 87 L.R.R.M. 2203 (5th Cir. 1974).

²⁹ 500 F.2d 181, 87 L.R.R.M. 2203 (5th Cir. 1974).

³⁰ *Id.* at 183, 87 L.R.R.M. at 2204.

³¹ *Id.*, 87 L.R.R.M. at 2205.

³² *Id.* at 184, 87 L.R.R.M. at 2205.

³³ 522 F.2d 475, 90 L.R.R.M. 2089 (3d Cir. 1975).

³⁴ *Id.* at 483, 90 L.R.R.M. at 2094.

³⁵ *Id.*, 90 L.R.R.M. at 2095.

³⁶ *Id.*, 90 L.R.R.M. at 2094.

principles to the case at bar was inappropriate.³⁷ First, the court concluded that a balancing of bargaining strength should not be the key to determining when an employer may leave the unit. The *Bonanno* court found that, under *Buffalo Linen* and its progeny, such a manipulation of bargaining weapons by the court was inappropriate.³⁸ Congress did not intend either the Board or the courts to dispense bargaining weapons. Second, even if bargaining strengths were appropriate considerations, the court rejected the conclusion that the employer could not protect against whipsawing without the right to withdraw from the association.³⁹ The court found that the power of the union to whipsaw was offset by the employer's right to lockout employees.⁴⁰ Therefore it was not necessary to give employers the additional weight of the right to unilaterally withdraw.

In holding that an employer does not have the right to unilaterally withdraw when a bargaining impasse occurs, the First Circuit has reached a decision that is in opposition to those of the Second, Third, Fifth, Eighth, and Ninth Circuits.⁴¹ While the result reached by the *Bonanno* court appears to be the correct one, certain elements of the decision are susceptible to criticism. For example, the court rested the decision at least partly on the belief that an employer might create a bargaining impasse simply to justify his withdrawal from the bargaining unit. This concern is only valid if it is assumed that the authenticity of an impasse cannot be determined. Yet it is exactly this kind of determination that is within the expertise of the Board. Indeed, in *Taft Broadcasting Co.*,⁴² the Board stated that the test of an impasse is whether a continuation of the bargaining sessions will result in a bargaining agreement.⁴³ In applying this standard the Board has recognized that certain factors must be considered. These factors include the bargaining history of the parties, the good faith of the parties, the duration of the negotiations, the relative importance of the issue over which the parties are at impasse, and the contemporaneous understanding of the parties as to the state of the negotiations.⁴⁴ Thus, while an employer could advocate a position which he knew would be unacceptable to the union, such bad-faith conduct would negate the existence of a true impasse. Under *Taft Broadcasting Co.* the question whether a true impasse exists is a question for the fact finder. Appellate courts should limit their scope of review of a Board finding that an impasse exists to whether there is substantial evidence on the record considered as a whole to support such a conclusion.⁴⁵ Therefore it is

³⁷ 630 F.2d at 32, 105 L.R.R.M. at 2481-82.

³⁸ *Id.*, 105 L.R.R.M. at 2481.

³⁹ *Id.*, 105 L.R.R.M. at 2482.

⁴⁰ *Id.* at 33, 105 L.R.R.M. at 2483.

⁴¹ *See, e.g.*, cases cited at note 3 *supra*.

⁴² 163 N.L.R.B. 475, 64 L.R.R.M. 1386 (1967), *enforced sub nom.* American Fed. of Television and Radio Artists v. NLRB, 395 F.2d 622, 67 L.R.R.M. 3032 (D.C. Cir. 1968).

⁴³ 163 N.L.R.B. at 478, 64 L.R.R.M. at 1388.

⁴⁴ *Id.*; *see also* H & D, Inc. v. NLRB, 633 F.2d 139 (withdrawn from publication), 105 L.R.R.M. 3070 (9th Cir. 1980).

⁴⁵ *Universal Camera v. NLRB*, 340 U.S. 474, 491 (1951).

incorrect for the *Bonanno* court to assume that no test for the determination of an impasse exists and that employers may use that device frivolously to justify withdrawal from a bargaining unit. Notwithstanding the *Bonanno* court's mistaken belief that the authenticity of a bargaining impasse cannot be determined, the decision remains a correct one for at least two reasons. To begin, the court properly rejected the *Beck* court's conclusion that judicial equalization of bargaining weapons not only was not prohibited but indeed was necessitated by the union's great strength.⁴⁶ The *Beck* court found that the union had a statutory right to strike⁴⁷ while the employers had a counter-balancing judicially-oriented right to lockout employees.⁴⁸ In addition, the union could enter interim agreements with individual members of the association.⁴⁹ The *Beck* court, however, found no counter-balancing right in the employer. The court therefore concluded that equity required the court to create a corresponding right for the employer.⁵⁰ Thus, the employer's right to withdraw from the bargaining association was upheld.

The Third Circuit's balancing of economic weapons is premised on an erroneous interpretation of *Buffalo Linen* and its progeny. In *NLRB v. Insurance Agents' International Union*⁵¹ the Supreme Court held that the use of economic weapons and the duty to bargain in good faith were not mutually exclusive.⁵² Instead the Court expressed concern that the Board would attempt to manipulate the economic weapons available to each side under the guise of enforcing the duty to bargain in good faith.⁵³ The Court held that any manipulation of weapons was outside the control of the Board⁵⁴ and thus by implication the judiciary. It was exactly this type of equalizing of bargaining power, however, which the *Beck* court sought to accomplish. The *Bonanno* court, then, was correct in rejecting such an approach.

Even if it were proper for the judiciary to undertake a cataloguing of weapons in order to equalize employer and union power, the *Beck* court overlooked important employer-controlled weapons. As the *Bonanno* court correctly indicated, the union's ability to negotiate interim agreements can be negated by the employer's refusal to enter into such agreements. Furthermore, the employer may stockpile goods, readjust contract schedules, or transfer work to deflect the full economic impact of whipsawing.⁵⁵ Moreover, employers may use the lockout in several ways, including locking out

⁴⁶ 522 F.2d at 483, 90 L.R.R.M. at 2094.

⁴⁷ *Id.* at 480, 90 L.R.R.M. at 2092. The Supreme Court in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) found a statutory right to strike based on § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976). *Id.* at 233-34.

⁴⁸ 522 F.2d at 482, 90 L.R.R.M. at 2093.

⁴⁹ *Id.* at 482-83, 90 L.R.R.M. at 2094.

⁵⁰ *Id.* at 483, 90 L.R.R.M. at 2094.

⁵¹ 361 U.S. 477 (1960).

⁵² *Id.* at 494-95.

⁵³ *Id.* at 497-98.

⁵⁴ *Id.* at 490.

⁵⁵ 630 F.2d at 32-33, 105 L.R.R.M. at 2482-83.

employees regardless of whether the union was engaged in selective striking.⁵⁶ Because employers are not as defenseless against whipsawing as *Beck* would indicate, the balance of strength does not fall squarely on the side of the union. Even the *Beck* standard then, if properly applied, does not require recognition of the right of an employer to withdraw from a bargaining unit because an impasse has been reached. It remains to be seen whether courts currently taking a balancing approach which allows employers to withdraw at impasse will follow the *Bonanno* court's lead and desist in their attempts to balance bargaining strengths. Those courts that continue to engage in a balancing test could be guided by *Bonanno* in reevaluating the weapons which comprise the employer's arsenal. Nevertheless, as a result of *Bonanno* there is a significant split in the circuits over whether an employer may withdraw from a multi-employer bargaining association at impasse. The split results from the differing interpretations of *Buffalo Linen* and until it is resolved, confusion will persist concerning the impact of a bargaining impasse on multi-employer bargaining units.

IV. UNION MEMBERS' BILL OF RIGHTS

A. *Right to Sue and Free Speech: Sadlowski v. United Steelworkers of America**

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)¹ contains a Bill of Rights of Union Members section.² The right to sue provision within the Bill of Rights, section 101(a)(4), states that a labor organization shall not limit the right of any member to institute actions in court or before an agency, to appear as a witness in any proceeding, to petition any legislature or to communicate with a legislator.³ Previous decisions concerning section 101(a)(4) have dealt with union discipline of a member for bringing suit against the union or its officers.⁴ All of these cases held that the right to sue provision prohibits labor unions from disciplining their members for bringing such actions.⁵ The Bill of Rights section also contains a provision, section 101(a)(2),

⁵⁶ *Id.* at 32 n.15, 105 L.R.R.M. at 2482 n.15.

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¹ 29 U.S.C. §§ 401-531 (1976).

² 29 U.S.C. § 411 (1976).

³ 29 U.S.C. § 411(a)(4) (1976) in pertinent part provides:

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, . . . or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator. . . .

⁴ See *Phillips v. International Ass'n of Bridge, Structural and Ornamental Workers, Local 118*, 556 F.2d 939, 95 L.R.R.M. 2875 (9th Cir. 1977); *Operating Eng'rs Local Union No. 3 v. Burroughs*, 417 F.2d 370, 72 L.R.R.M. 2577 (9th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970); *Ryan v. IBEW*, 361 F.2d 942, 62 L.R.R.M. 2339 (7th Cir. 1966), *cert. denied, sub nom. IBEW v. Ryan*, 385 U.S. 935 (1966); *Carroll v. Associated Musicians Local 802*, 235 F. Supp. 161, 52 L.R.R.M. 2950 (S.D.N.Y. 1963).

⁵ *Phillips v. International Ass'n of Bridge, Structural and Ornamental Workers, Local 118*, 556 F.2d 939, 942, 95 L.R.R.M. 2875, 2877 (9th Cir. 1977); *Operating Eng'rs Local*

which guarantees a union member's right of freedom of speech and assembly.⁶ Most of the cases construing the meaning of this guarantee of free speech have focused on the protection it offers to the numerous types of communications made by union members.⁷ While decisions regarding sections 101(a)(2) and 101(a)(4) have helped to define union members' rights to pursue litigation and exercise free speech, the full scope of these provisions has yet to be addressed by the courts.

During the *Survey* year, the District of Columbia Circuit Court of Appeals in *Sadlowski v. United Steelworkers*,⁸ was confronted with the legitimacy of a provision in a union constitution, which prohibited candidates for union office from receiving financial or other support from non-members.⁹ The court held that the union provision was invalid because it violated section 101(a)(4), the right to sue provision, and also unreasonably impinged on the right to free speech and association guaranteed by section 101(a)(2).¹⁰ The court explained that the union rule restricted a candidate's right to sue by preventing a can-

Union No. 3 v. Burroughs, 417 F.2d 370, 373, 72 L.R.R.M. 2577, 2579 (9th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970); *Ryan v. IBEW*, 361 F.2d 942, 945-46, 62 L.R.R.M. 2339, 2341-42 (7th Cir. 1966), *cert. denied, sub nom. IBEW v. Ryan*, 385 U.S. 935 (1966); *Carroll v. Associated Musicians Local 802*, 235 F. Supp. 161, 172, 52 L.R.R.M. 2950, 2958 (S.D.N.Y. 1963).

⁶ 29 U.S.C. § 411(a)(2) (1976) in entirety provides:

Freedom of speech and assembly. — Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

⁷ See, e.g., *Sewell v. Grand Lodge of the Int'l Ass'n of Machinists and Aerospace Workers*, 445 F.2d 545, 550-51, 77 L.R.R.M. 2916, 2919-20 (5th Cir. 1971) (members not permitted to engage in activities diametrically opposed to performance of specified duties); *Fulton Lodge No. 2 of the Int'l Ass'n of Machinists and Aerospace Workers v. Nix*, 415 F.2d 212, 218-19, 71 L.R.R.M. 3124, 3219 (5th Cir. 1969) (false statements against union leadership); *Giordani v. Upholsterers Int'l Union*, 403 F.2d 85, 89-90, 69 L.R.R.M. 2548, 2551-52 (2d Cir. 1968) (accusations of union fund misappropriation); *International Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers v. Rafferty*, 348 F.2d 307, 311-12, 59 L.R.R.M. 2821, 2824 (9th Cir. 1965) (circulation outside the union of handbills proposing by-law revisions); *Cole v. Hall*, 339 F.2d 881, 881, 58 L.R.R.M. 2125, 2126 (2d Cir. 1965) (malicious vilification of union officers); *Farolwitz v. Associated Musicians*, 330 F.2d 999, 1000, 56 L.R.R.M. 2082, 2082-83 (2d Cir. 1964) (exhortation to fellow members not to pay dues believed to be illegally excessive); *Salzhandler v. Caputo*, 316 F.2d 445, 446, 52 L.R.R.M. 2908, 2908 (2d Cir. 1963), *cert. denied*, 375 U.S. 946 (1963) (libelous statements).

⁸ 645 F.2d 1114, 106 L.R.R.M. 2942 (D.C. Cir. 1981).

⁹ *Id.* at 1115, 106 L.R.R.M. at 2942. Article V, Section 27 of the Constitution of the United Steelworkers of America in pertinent part provides that, "[n]o candidate (including a prospective candidate) for any position set forth in Article IV, Section 1, and supporter of a candidate may solicit or accept financial support, or any other direct or indirect support of any kind (except an individual's own volunteered personal time) from any non-member." *Id.* at 1126 app.

¹⁰ *Id.* at 1125, 106 L.R.R.M. at 2950.

didate from accepting contributions to finance litigation.¹¹ The court found that the guarantee of free speech was violated because the union provision would inhibit candidates from making effective challenges to union leadership thereby denying union democracy.¹² This case is a landmark decision because not only does it prevent a union from prohibiting all outside contributions to candidates, but it also is the first major decision expanding the scope of both the right to sue provision and the free speech and assembly provision of the LMRDA.

The *Sadlowski* case arose when the union enacted an amendment to its constitution prohibiting outside financial contributions to union candidates.¹³ The enactment followed the 1977 election for International President of the United Steelworkers of America.¹⁴ In that election, Lloyd McBride, who enjoyed the support of the Union's incumbent leadership, was opposed by Edward Sadlowski, Jr., the insurgent candidate.¹⁵ Sadlowski received substantial financial support from sources outside the union, while McBride received most of his campaign contributions from the staff of the union.¹⁶ Sadlowski lost the election.¹⁷ Shortly thereafter, the union amended its constitution by enacting Article V, Section 27.¹⁸ This amendment prohibited candidates from receiving support from persons other than union members, with an exception for volunteered time.¹⁹ Section 27 also empowered the International Executive Board to promulgate implementing regulations and created the Campaign Contribution Administrative Committee (CCAC) to administer and enforce the amendment.²⁰ This constitutional amendment was the first attempt by a labor union to so restrict financial support for union candidates.²¹ The lower court granted summary judgment to the plaintiff, Sadlowski, holding that the amendment violated section 101(a)(4), the right to sue provision.²² Both the union and Sadlowski appealed those parts of the district court's order that were adverse to them.²³

The appellate court held that the union's outsider rule on its face violated the right to sue provision of the LMRDA.²⁴ In support of this decision, the court noted that the outsider rule was all-encompassing and absolute.²⁵ Thus,

¹¹ *Id.* at 1117, 106 L.R.R.M. at 2944.

¹² *Id.* at 1121-22, 106 L.R.R.M. at 2947.

¹³ *Id.* at 1115, 106 L.R.R.M. at 2942.

¹⁴ *Id.*

¹⁵ *Id.* at 1115, 106 L.R.R.M. at 2943.

¹⁶ *Id.* at 1116, 106 L.R.R.M. at 2943.

¹⁷ *Id.*

¹⁸ *Id.* See *id.* at 1126 app.

¹⁹ *Id.* at 1126 app.

²⁰ *Id.* at 1126-27 app.

²¹ *Id.* at 1116, 106 L.R.R.M. at 2943. See Note, *Restrictions on "Outsider" Participation in Union Politics*, 55 CHI-KENT L. REV. 769, 769 (1979).

²² 645 F.2d at 1116, 106 L.R.R.M. at 2943.

²³ *Id.*

²⁴ *Id.* at 1117, 106 L.R.R.M. at 2944.

²⁵ *Id.*

the rule would prevent a candidate from using outside money to pay for a lawyer's services, or from receiving reduced rates from an attorney, or from accepting a lawyer's donated services if a paid employee of the lawyer contributed to the product.²⁶

In finding that the outsider rule violated the right to sue provision of the LMRDA, the court rejected the conclusion reached by the CCAC in an advisory opinion to the union concerning the impact of the outsider rule on the right to sue. The union claimed that the CCAC's construction of the rule demonstrated that the rule did not affect a member's right to sue.²⁷ In response, the court declared that the CCAC's advisory opinion conflicted with the clear language of the outsider rule and its regulations.²⁸ Moreover, the court noted that the opinion left open the question of whether a candidate could be disqualified or disciplined for retaining counsel and bringing a suit which the union later determined was not a *bona fide* attempt to secure an adjudication of legal rights but was, instead, motivated by a desire to promote a candidate's political campaign.²⁹ In this context, the court examined a regulation adopted by the union which in part declared that "[a]ctivities which are designed to extract political gain from legal proceedings are subject to the support limitations of Section 27."³⁰ The meaning of the word "activities" in this regulation was interpreted by the court to include steps in the legal proceedings themselves.³¹ If any step was found by the union to be "designed to extract political gain," it would be subject to the contribution limitations.³² The court declared, however, that the right to sue was an absolute right which could not be diminished by only permitting those suits that a union found to be *bona fide*, or not designed to extract political benefit, to be exempt from the ban on outside contributions.³³

In determining what remedy to apply, the court declared that an injunction prohibiting the outsider rule's application to litigation would not suffice because the rule also violated the free speech guarantee of the LMRDA.³⁴ The court began its analysis of the rule's violation of the free speech provision by asserting that the LMRDA's guarantee of free speech was patterned after the first amendment of the United States Constitution and that this guarantee under the LMRDA was not confined to the exercise of that right among union members.³⁵ Further, the court stated that the right of free association is an inseparable aspect of freedom of speech.³⁶

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1118, 1118 at n.6, 106 L.R.R.M. at 2944, 2944 at n.6.

²⁹ *Id.* at 1118, 106 L.R.R.M. at 2944.

³⁰ *Id.*, 106 L.R.R.M. at 2944-45.

³¹ *Id.* at 1119, 106 L.R.R.M. at 2945.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1120-21, 106 L.R.R.M. at 2946.

³⁶ *Id.* at 1121, 106 L.R.R.M. at 2947.

The court recognized that one of the principal purposes of the LMRDA was to insure union democracy.³⁷ It then declared that union democracy could only occur if effective challenges could be made to the union leadership and that measures that would operate to inhibit insurgents must be carefully scrutinized.³⁸ As a result, the union outsider rule was held to violate the LMRDA's guarantee of free speech and to fly in the face of Congress's intent to insure union democracy.³⁹

In support of its conclusion that the union provision inhibited union democracy, thereby violating rights of free speech, the court analogized to the contribution limits in federal elections.⁴⁰ The court cited *Buckley v. Valeo*⁴¹ in which the Supreme Court recognized the significant connection between financial support and political speech.⁴² In the court's view, the LMRDA's guarantee of free speech limits a union much as the first amendment limits Congress in the restrictions that can be placed on campaign finance, except that the LMRDA does not require state action.⁴³ Relying on *Buckley* and the legislative history of the LMRDA, the court concluded that the union's outsider rule could operate to prevent candidates from obtaining the resources necessary for effective advocacy.⁴⁴

Although the court recognized that a union has a legitimate interest in protecting its internal affairs from nefarious influences, it ruled that this interest could not be used to justify a rule prohibiting a candidate from receiving *any* contributions or loans from non-members.⁴⁵ Hence, the court found that the union provision was not permissible under the section 101(a)(2) proviso which allows "reasonable" rules to protect unions as institutions.⁴⁶ The court reasoned that nothing would inhibit union democracy more than to prohibit insurgent candidates from receiving financial support from outside sources that are not prohibited by statute.⁴⁷

The court asserted that its view that the outsider rule violated section 101(a)(2) was supported by the implicit intent of section 401(g) of the LMRDA⁴⁸ and the legislative history of that section.⁴⁹ It was noted that in section 401(g), Congress dealt with the subject of financial support to union candidates in a comprehensive manner.⁵⁰ That section, however, only prohibits candidates from financing their campaigns with money collected as employer

³⁷ *Id.*

³⁸ *Id.* at 1121-22, 106 L.R.R.M. at 2947.

³⁹ *Id.* at 1122, 106 L.R.R.M. at 2947.

⁴⁰ *Id.*

⁴¹ 424 U.S. 1 (1976).

⁴² 645 F.2d at 1122, 106 L.R.R.M. at 2947.

⁴³ *Id.*, 106 L.R.R.M. at 2947-48.

⁴⁴ *Id.*, 106 L.R.R.M. at 2948.

⁴⁵ *Id.* at 1123, 106 L.R.R.M. at 2948.

⁴⁶ *Id.* at 1123-24, 106 L.R.R.M. at 2948-49.

⁴⁷ *Id.* at 1123, 106 L.R.R.M. at 2948.

⁴⁸ 29 U.S.C. § 481(g) (1976).

⁴⁹ 645 F.2d at 1124, 106 L.R.R.M. at 2949.

⁵⁰ *Id.*

contributions, union dues, assessments or similar levies.⁵¹ Acknowledging the widespread corruption in unions discovered by the Select Senate Committee prior to the LMRDA's enactment, the court concluded that it was likely that when Congress outlawed only union and employer contributions, it intended to permit outside support from legitimate sources to enable a candidate to have a realistic opportunity to challenge union incumbents.⁵² Although admitting that Congress may not have intended to completely preempt the area of campaign support, the court determined that it was highly unreasonable to expect that Congress intended to allow an absolute prohibition of outside support.⁵³ Unable to find any justification for the amendment's restriction on free speech, the court held that the outsider rule was completely invalid.⁵⁴

The *Sadlowski* decision is significant because it expands the scope of the right to sue provision of the LMRDA. All of the previous cases dealt with the provision as a prohibition of union discipline of a member for bringing suit.⁵⁵ The *Sadlowski* court was the first court confronted with the issue of whether a union provision limiting the means which could be used to obtain an attorney's services was a limitation of the right to sue in violation of section 101(a)(4) of the LMRDA. Although the court did not explain its reason(s) for holding that a limitation of the sources of support which could be used in retaining an attorney was a violation of the right to sue provision,⁵⁶ the decision is an appropriate application of that provision. The average person cannot adequately assert his rights in court because he does not know the intricacies of the legal system as an attorney does. Thus, by limiting the means of obtaining representation, the union was, in effect, limiting the union member's right to sue.

The *Sadlowski* court was on more established ground when it expressed its concern over the union's interpretation of the outsider rule as giving the union the power to determine if suits brought by candidates were *bona fide* and not designed to extract political benefit.⁵⁷ Such a determination could result in union discipline of a member for pursuing litigation.⁵⁸ The courts have consistently held that union discipline of a member for bringing suit is a violation of the right to sue provision.⁵⁹

The *Sadlowski* court also found that the union outsider rule violated the LMRDA's guarantee of free speech.⁶⁰ This decision is significant because of the broad interpretation given to the free speech provision by the court. This was the first major court decision interpreting the LMRDA's guarantee of free

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1125, 106 L.R.R.M. at 2949.

⁵⁴ *Id.*, 106 L.R.R.M. at 2950.

⁵⁵ See notes 4-5 *supra*.

⁵⁶ See 645 F.2d at 1117, 106 L.R.R.M. at 2943-44.

⁵⁷ *Id.* at 1119, 106 L.R.R.M. at 2945.

⁵⁸ See *id.* at 1118, 106 L.R.R.M. at 2944.

⁵⁹ See note 5 *supra*.

⁶⁰ 645 F.2d at 1125, 106 L.R.R.M. at 2950.

speech as including the right of free association.⁶¹ Furthermore, the court held that this freedom of association applied to the receipt of monetary contributions.⁶²

The court's assertion that the LMRDA's guarantee of free speech was patterned after the first amendment of the Constitution and should similarly include the freedom of association⁶³ is supported by the legislative history of the LMRDA.⁶⁴ Further support can be found in the Fifth Circuit's observation in *Airline Maintenance Lodge 702 v. Loudermilk*⁶⁵ that the courts have looked upon the free speech provision of the LMRDA as a codification of some of our most basic liberties and that the substantive rights of the LMRDA have been broadly construed.⁶⁶

While the court's application of the freedom of association to a union candidate's right to receive contributions from non-members is not at first glance required by the LMRDA, this interpretation is supported by Congress's intent in enacting the LMRDA. The Supreme Court has declared that in enacting the LMRDA, "Congress emphatically asserted a vital public interest in assuring free and democratic elections that transcends the narrower interest of the complaining union member."⁶⁷ The legislative history demonstrates that one of the principal purposes of the LMRDA was to insure union democracy.⁶⁸ As the *Sadlowski* court acknowledged, the Supreme Court in *Buckley v. Valeo*⁶⁹ has already recognized that the first amendment's guarantee of free speech protects

⁶¹ See *id.* at 1121, 106 L.R.R.M. at 2946-47. The only other court to decide that the freedom of association is a part of the LMRDA's guarantee of free speech is the District Court for the Southern District of New York in *Ostrowski v. Utility Workers Local 1-2*, 104 L.R.R.M. 2343, 2350 (S.D.N.Y. 1980).

⁶² See 645 F.2d at 1122, 106 L.R.R.M. at 2947-48.

⁶³ *Id.* at 1120-21, 106 L.R.R.M. at 2946-47.

⁶⁴ Several comments made during the congressional debates on the LMRDA support the view that the Act was modeled after constitutional provisions. For example, Representative Griffith stated that, "[t]hese basic guarantees are hardly new or novel — they are the essential and fundamental rights which every American citizen is guaranteed in the Bill of Rights of the Federal Constitution." 105 CONG. REC. 15530 (1959). In addition, Senator McClellan declared that Congress should make those inherent constitutional rights apply to union membership as well as to other affairs of life. *Id.* at 6476 (1959).

The legislative history also supports the conclusion that Congress intended the freedom of association to be read into the LMRDA's guarantee of free speech. The clearest example of this intention was made in a statement by Senator McClellan:

Out basic labor policy is grounded in freedom of choice. In it we sought to make effective full freedom of association, with the right assured to associate or not to associate, to participate in collective action, or not to participate, according to the free decision of each individual for himself, without either restraint or coercion from any source. . . .

Id. at 6472 (1959).

⁶⁵ 444 F.2d 719, 77 L.R.R.M. 2721 (5th Cir. 1971).

⁶⁶ *Id.* at 723, 77 L.R.R.M. at 2724.

⁶⁷ *Wirtz v. Local 153, Glass Blowers Ass'n*, 389 U.S. 436, 475 (1968) (cited in *Local 3489, United Steelworkers of Am. v. Usery*, 429 U.S. 305, 309 (1977)).

⁶⁸ See S. REP. NO. 187, 86th Cong., 1st Sess. 2 (1959); H.R. REP. NO. 741, 86th Cong., 1st Sess. 2 (1959).

⁶⁹ 424 U.S. 1 (1976).

political expression and political association.⁷⁰ The first amendment thus imposes limits on the restrictions Congress can impose on campaign contributions.⁷¹ Therefore, the court was correct in extending the freedom of association implicit in the LMRDA's guarantee of free speech to limit the restrictions a union can place on campaign contributions.

Further support for the *Sadlowski* court's finding that the outsider rule is violative of the LMRDA can be found in *Hall v. Cole*.⁷² In *Hall*, the Supreme Court stated that sections 101-105 of the LMRDA were specifically designed to promote the full and active participation of the rank and file in the affairs of the union.⁷³ The Court held that the rights embodied in these sections were deemed vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership.⁷⁴ Were the outsider rule to remain operative, "full and active participation of the rank and file in the affairs of the union," as mandated by the *Hall* Court, would be unduly inhibited. The *Hall* decision also lends support to the *Sadlowski* court's declaration that the union outsider rule does not fall within section 101(a)(2)'s proviso, which allows unions to enact reasonable rules concerning the responsibility of union members toward the organization as an institution,⁷⁵ because the outsider rule in *Sadlowski* would unduly inhibit an area of union democracy — that of elections.

In addition, the *Sadlowski* court asserted that section 401(g) of the LMRDA supported its conclusion that the free speech provision prohibits a complete ban of outside contributions to union candidates.⁷⁶ The court noted that when Congress outlawed only union and employer contributions to campaigns in section 401(g), it intended to permit candidates for union office to obtain outside financial support from legitimate sources.⁷⁷ This interpretation is consistent with the Supreme Court decision of *Trbovich v. United Mine Workers of America*.⁷⁸ In *Trbovich*, the Supreme Court recognized that after Congress had conferred substantial power on labor unions, it became concerned that union leaders would abuse that power.⁷⁹ The Court further observed that Congress realized that the principle of union democracy was one of the most important safeguards against such abuse, and as a result, Congress included a comprehensive scheme for the regulation of union elections in the LMRDA.⁸⁰ This observation supports the view that Congress intended to limit only those areas it covered by statute.

⁷⁰ *Id.* at 15.

⁷¹ *Id.* at 21.

⁷² 412 U.S. 1 (1973).

⁷³ *Id.* at 7-8.

⁷⁴ *Id.*

⁷⁵ 645 F.2d at 1123-24, 106 L.R.R.M. at 2948-49.

⁷⁶ *Id.* at 1124, 106 L.R.R.M. at 2949.

⁷⁷ *Id.*

⁷⁸ 404 U.S. 528 (1972).

⁷⁹ *Id.* at 530.

⁸⁰ *Id.*

Under *Sadlowski*, then, an absolute ban on outside contributions to the campaign of a candidate for union office violates both the right to sue and free speech provisions of the LMRDA. What the *Sadlowski* decision leaves undecided is what restrictions, if any, a union could "reasonably" impose on the sources of a union candidate's campaign contributions. The court emphasized that this particular union rule was an "absolute" prohibition of "all" outsider contributions implying, perhaps, that more narrow restrictions might not violate the LMRDA.⁸¹ It is also uncertain if other courts will adopt the *Sadlowski* court's expansive interpretation of the LMRDA's right to sue and free speech provisions.

V. APPEALS FROM NLRB ORDERS

A. Parties Must be "Aggrieved": *Liquor Salesmen's Union v. NLRB*, and *Amalgamated Transit Union v. NLRB**

The National Labor Relations Act¹ (NLRA) provides that persons aggrieved by decisions of the National Labor Relations Board (NLRB), may obtain judicial review in the United States courts of appeals.² Section 10(f) of the NLRA further restricts the choice of forum to the circuit in which the unfair labor practice was alleged to have taken place, the circuit in which the person aggrieved either resides or transacts business, or the Circuit Court for the District of Columbia.³ When an appeal is filed in more than one circuit, the record will be consolidated for review in the court of first filing.⁴ Although that court may subsequently transfer the case to another circuit "for the conve-

⁸¹ See 645 F.2d at 1117, 1123, 1124, 106 L.R.R.M. at 2944, 2948, 2949.

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¹ 29 U.S.C. § 151-168 (1976).

² Section 10(f) of the Act, 29 U.S.C. § 160(f) (1976).

³ *Id.* Section 10(f) provides:

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

Id.

⁴ 28 U.S.C. § 2112(a) (1976). *Id.* The relevant portion of § 2112(a) provides: If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. *For the convenience of the parties and in the interest of justice* such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals. (emphasis added)

Id.

nience of the parties and in the interest of justice,"⁵ it has become more common for the court simply to keep the case for review.⁶

This practice has placed great emphasis on the first-to-file rule as the determinative factor in selecting a proper forum for review.⁷ Naturally, this approach has resulted in races to the courthouse between parties seeking to control the choice of forum, even when one party has received all the relief it requested from the NLRB and, consequently, is not an "aggrieved person" entitled to seek review.⁸ In response, the courts of appeals have begun to exercise their discretion more often in selecting a proper forum in an effort to discourage this practice known as "forum shopping."⁹ As these cases have shown, factors to be considered in selecting a proper forum are the location of the parties and their counsel, whether the case has an impact largely on one region, whether one circuit is more familiar with the parties and the issues involved in the case, and whether there is only one party that has been "aggrieved" by the outcome of the proceedings below.¹⁰

During the *Survey* year, the definition of a party "aggrieved" was clarified by the Circuit Court of Appeals for the District of Columbia in its review of appeals filed in two cases by parties who had received substantially all the relief that they requested from the NLRB.¹¹ The court, in a single opinion, granted motions to transfer the cases because it found that the parties first to file were not "genuinely aggrieved" by the NLRB's decisions.¹² The court held that in order for a party's appeal to be considered that party must be adversely affected by a significant part of the action taken by the NLRB.¹³ The court's decision curtails the practice of forum shopping in instances where it is apparent from the pleadings that a party's claims for relief from the Board's order are insubstantial.¹⁴

The first of the two cases, *Amalgamated Transit Union, AFL-CIO v. NLRB*,¹⁵ involved an unfair labor practice charge filed by the Amalgamated Transit

⁵ See note 4 *supra*.

⁶ *Liquor Salesmen's Union Local 2 v. NLRB*, 106 L.R.R.M. 2953, 2956 (D.C. Cir. 1981).

⁷ *Id.* As the court noted: "It is a commonly held belief among members of the bar that the courts of appeals have read into § 2112(a) a rebuttable presumption that the court of first filing will also decide the case." *Id.*

⁸ *Id.*

⁹ *Natural Resource Defense Council, Inc. v. EPA*, No. 80-1607, slip op. at 14 (D.C. Cir. Nov. 4, 1980); *United Steelworkers of America v. Marshall*, 592 F.2d 693, 696-98 (3d Cir. 1979); *Industrial Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965, 970 n.9 (D.C. Cir. 1977).

¹⁰ *United Steelworkers of America v. Marshall*, 592 F.2d 693 (3d Cir. 1979); *Industrial Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965 (D.C. Cir. 1977); *American Pub. Gas Ass'n v. FPC*, 555 F.2d 852 (D.C. Cir. 1977).

¹¹ There were four petitions stemming from two separate NLRB orders. The court consolidated three of the petitions into a single proceeding. *Liquor Salesmen's Union Local 2 v. NLRB*, 106 L.R.R.M. at 2954.

¹² *Id.* at 2960.

¹³ *Id.*

¹⁴ *Id.* at 2959; see text at notes 58-60 *infra*.

¹⁵ *Liquor Salesmen's Union Local 2 v. NLRB*, 106 L.R.R.M. 2953 (D.C. Cir. 1981).

Union against Bayshore Transit Management, Inc., alleging Bayshore's failure to bargain with the union's certified representative.¹⁶ In proceedings before the NLRB, the union filed a motion for summary judgment and requested that the NLRB order Bayshore to cease its unfair labor practice and to bargain with the union representatives.¹⁷ The General Counsel for the NLRB filed an identical motion requesting the same relief.¹⁸ The NLRB granted the General Counsel's motion and issued an order granting all the relief that the General Counsel and the union had requested.¹⁹

The union, nevertheless, filed a petition for review in the D.C. Circuit Court of Appeals.²⁰ Bayshore, filing later, sought review in the Ninth Circuit, where the unfair labor practice was alleged to have taken place.²¹ Since the union was first to file, the NLRB sent the record of the proceedings to the D.C. Circuit.²² Bayshore subsequently filed a motion to have the case transferred to the Ninth Circuit, arguing that the union was not in any way aggrieved by the NLRB's order, since it had received all the relief requested.²³ The union countered that the NLRB's failure to address specifically its motion for summary judgment was a denial of due process, which left it aggrieved by the Board's order.²⁴

The D.C. Circuit viewed the union's argument as a poor disguise for the union's desire to control the choice of forum.²⁵ Noting that the union had failed to request any additional relief which the NLRB or the courts could award, the court observed that the union was, at best, technically aggrieved by the NLRB order.²⁶ The court further noted that, lacking a showing of "adverse effect in fact," the union had failed to prove that it was genuinely aggrieved by the Board's order.²⁷ Thus, it concluded that the union's petition for review was entitled to no weight,²⁸ and it transferred the case to the Ninth Circuit.²⁹

The second case, *Liquor Salesmen's Union Local 2 v. NLRB*,³⁰ dealt with an

¹⁶ *Id.* at 2954-55.

¹⁷ *Id.* at 2955.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*; see note 4 *supra*.

²³ *Id.*

²⁴ *Id.* at 2957-58.

²⁵ *Id.* at 2958.

²⁶ *Id.*

²⁷ *Id.* at 2958 n.8. The court remarked:

One has standing to appeal an order of the Board within the meaning of § 10(f) if there is demonstrated an "adverse effect in fact" on the petitioner. The refusal to rule specifically on Local 1309's motion for summary judgment arguably does not even amount to technical aggravement as it is not clear how Local 1309 is adversely affected by such refusal.

Id.

²⁸ *Id.* at 2958.

²⁹ *Id.*

³⁰ *Id.* at 2953.

appeal from an NLRB order requiring several employers to cancel a unilateral change they had effected in the working conditions of their union employees.³¹ The Board's order, while granting all the relief requested by the union,³² had left undisturbed a prior finding made by an administrative law judge, that the union was not entitled to attorney's fees.³³ The union filed an appeal first in the D.C. Circuit. It alleged that the failure to award attorney's fees left it "aggrieved" by the Board's order.³⁴ The employers, in contrast, sought review in the Second Circuit,³⁵ and argued that the union had no right to file because it was not "aggrieved" by the Board's order.³⁶ The matter was consolidated in the D.C. Circuit.

On appeal, the D.C. Circuit noted that each and every part of the NLRB's order was directed against the employers.³⁷ It pointed out that an award of attorney's fees, although routinely requested in matters brought before the NLRB, was only granted in those few cases where the employer's defenses are clearly without merit.³⁸ Moreover, since the claim for attorney's fees was ancillary to the underlying dispute between employer and union, the court concluded that a denial of that claim was not enough to render the union "genuinely aggrieved" by the Board's order.³⁹ Therefore, the union's forum preference was disregarded⁴⁰ and the matter was transferred to the Second Circuit for review.⁴¹

The approach adopted by the D.C. Circuit in these cases reflects its determination to discourage the race to the courthouse between parties seeking review of an NLRB decision in cases where only one of the parties has been "genuinely aggrieved." The court reiterated the view it had taken in prior cases by ruling that section 10(f) of the NLRA,⁴² which allows an aggrieved party to file an appeal in the D.C. Circuit, was intended to provide an option to the losing party that was not open to the NLRB.⁴³ The court contended that

³¹ *Id.* at 2955.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 2959.

³⁸ *Id.* The NLRB will grant attorney's fees only when there is "clearly aggravated and pervasive misconduct" or where the defenses are "palpably without merit." *International Union of Electrical, Radio and Machine Workers v. NLRB*, 426 F.2d 1243, 1250, 73 L.R.R.M. 2870, 2874 (D.C. Cir. 1970).

³⁹ 106 L.R.R.M. at 2959.

⁴⁰ *Id.*

⁴¹ *Id.* at 2960.

⁴² 29 U.S.C. § 160(f) (1976); see note 3 *supra*.

⁴³ The court remarked:

Congress, in enacting § 10(f) of the Act, 29 U.S.C. § 160(f) (1976), "place[d] this court on a par with the courts of appeals for the circuits in which the alleged unfair labor practices occurred." *International Union of Electrical, Radio & Machine Workers v. NLRB*, 610 F.2d 956, 962 (D.C. Cir. 1979). This is in contrast to § 10(e) of the Act, 29 U.S.C. § 160(e) (1976), which authorizes the Board to seek enforcement of its order only in the circuit in which the unfair labor practice allegedly took place,

this congressional intent to aid the losing party would not be served by allowing the choice of forum to be open to a party who had prevailed before the Board.⁴⁴ For this reason, the court's approach restricts the right to appeal available under section 10(f) to a party "genuinely aggrieved";⁴⁵ one that has suffered an "adverse effect in fact" from a significant part of the NLRB's action relating to the underlying dispute between the parties.⁴⁶ Where, as in *Amalgamated Transit*, the claimed aggrievement is harmless error,⁴⁷ the party will not have suffered an adverse effect in fact. Similarly, as the *Liquor Salesmen's* case demonstrates, when the source of aggrievement is only ancillary to the dispute, the party will not be entitled to the status of one genuinely aggrieved by the Board's disposition of the case.⁴⁸ The court's decision thus clarifies factors which will determine when a party is not "genuinely aggrieved" and therefore not entitled to file a petition for review under section 10(f) of the NLRA.

The court also emphasized that it regards section 2112(a),⁴⁹ which provides for consolidation of the case in the court of first filing, as merely an expedient means of choosing which court will determine *venue*, not a means of picking the court that will ultimately hear the case.⁵⁰ This is not the first occasion on which the D.C. Circuit has held that the choice of venue is left to the discretion of the court of first filing.⁵¹ Yet, in its opinion, the court also expressly adopted the view that this discretion is limited by a statutory presumption in favor of the court of first filing.⁵² This view is in accord with the position it has taken in prior cases that, subject to certain exceptions, the filing of the first petition should determine venue.⁵³ The court's opinion, therefore, indicates a continued reluctance to exercise discretion to insure that "the interest of

or in which the respondent resides or transacts business. "By not eliminating, but expressly acknowledging, the District of Columbia as an alternative forum, the apparent aim of Congress is to ease the situation of a losing party desiring review. It affords the losing party a choice denied the Board when it proceeds under section 10(c)." *Ball v. NLRB*, 299 F.2d 683, 688 (4th Cir. 1962), *quoted in International Union of Electrical, Radio & Machine Workers*, 610 F.2d at 962 n.49. This respect due an aggrieved party who chooses to file in this court emanates from the congressional desire to assist *the losing party*. No such respect is due a person who has substantially prevailed before the Board.

106 L.R.R.M. at 2956 (footnote omitted).

⁴⁴ *Id.*; see note 49 *infra*.

⁴⁵ *Id.*

⁴⁶ *Id.* at 2958 n.8, 2960.

⁴⁷ *Id.* at 2958.

⁴⁸ *Id.* at 2959.

⁴⁹ 28 U.S.C. § 2112(a) (1976); see note 4 *supra*.

⁵⁰ The court asserted: "It must be emphasized that § 2112(a) is a mechanical device to determine which court will determine venue, not which court will ultimately hear the case. Transfer is entirely discretionary with the court of first filing." 106 L.R.R.M. at 2956 (emphasis in original).

⁵¹ See, e.g., *International Union of Electrical, Radio & Machine Workers v. NLRB*, 610 F.2d 956, 102 L.R.R.M. 2455 (D.C. Cir. 1979); *Public Service Comm'n v. FPC*, 472 F.2d 1270 (D.C. Cir. 1972); *UAW v. NLRB*, 373 F.2d 671, 64 L.R.R.M. 2225 (D.C. Cir. 1967).

⁵² 106 L.R.R.M. at 2957 n.6.

⁵³ See, e.g., *Public Service Comm'n v. FPC*, 472 F.2d at 1273; *UAW v. NLRB*, 373 F.2d at 674, 64 L.R.R.M. at 2226-27.

justice," and not the race to the courthouse, will be the primary factor governing the selection of the proper forum when both parties are entitled to review.

Another significant feature of the court's decision in these cases is that it applies the standard for determining when a party is not genuinely aggrieved in a manner which carefully restricts its use to cases in which it is obvious that one of the parties is not entitled to petition for review.⁵⁴ Indeed, the court specifically disclaimed any intention to look beyond the pleadings in making this determination.⁵⁵ Thus, only where the deficiencies in the pleadings reveal that the party has not actually suffered from a significant aspect of the Board's action will the court disregard the petition for review.⁵⁶ This approach would seem to be a sufficient safeguard against allowing the right to file an appeal to be determined with regard to the merits of the controversy. On this same point, the court also emphatically rejected any suggestion that the comparative aggrievement of the parties should be considered in determining whether they may apply for review.⁵⁷ Indeed, there is little reason to believe that the interest of justice is better served when the party *less aggrieved* is denied the right to file an appeal. Neither is there any support for such a denial in the language of the venue provision, section 2112(a),⁵⁸ or in section 10(f) of the NLRA.⁵⁹ It is likely, therefore, that the court's observation on this point will be persuasive in leading other circuits to distinguish more carefully between cases in which only one party is genuinely aggrieved, and those in which both parties, although not equally aggrieved, are equally entitled to petition for review.

At the same time, it is, perhaps, regrettable that the court's decision supports the notion that section 2112(a) creates a rebuttable presumption that the case will be heard by the court of first filing. On its face, this decision purports to encourage the use of judicial discretion, rather than a mechanical application of the first-to-file rule, in the selection of a proper forum.⁶⁰ Yet, its support for a presumption in favor of the court of first filing seems to suggest a more limited role for the rather generalized guidelines which have developed on how that discretion is to be exercised.⁶¹ The probable result is that courts will continue to rely on the outcome of a race between the parties, rather than on their discretionary authority in selecting a forum. From a practical viewpoint this is particularly disturbing. As the race to file an appeal becomes increasingly more important, it consequently provides an even greater incentive for parties to file frivolous appeals. In addition, in those cases where it appears likely from the pleadings that both parties are genuinely aggrieved, the first-to-file rule may

⁵⁴ 106 L.R.R.M. at 2959.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 2957.

⁵⁸ See note 4 *supra*.

⁵⁹ See note 3 *supra*.

⁶⁰ 106 L.R.R.M. at 2957.

⁶¹ See text and notes at notes 49-55 *supra*.

continue to play an inordinately important role in determining the choice of forum.

In sum, the court's decisions in these cases sets limits on the meaning of a "party aggrieved" by an NLRB order for purposes of appeal under section 10(f) of the NLRA.⁶² Where a party has not suffered an adverse effect in fact from a significant part of the Board's action,⁶³ or where the harm claimed does not relate to the Board's disposition of the underlying dispute between employer and union, the party is not "genuinely aggrieved."⁶⁴ The court's approach also limits the inquiry to deficiencies in the pleadings⁶⁵ and does not allow for a comparison of the aggrievement of the parties.⁶⁶ In effect, by helping to define who is entitled to seek review, the decision also represents a step toward eliminating the practice of forum-shopping for review of NLRB orders. It remains to be seen whether the courts will more fully develop criteria for selecting a proper forum, or whether they will remain dependent on the first-to-file rule in all but the most egregious cases of forum-shopping.

VI. FAIR LABOR STANDARDS ACT

A. *Contractual Waiver of Federal Action in Favor of Arbitration:* *Barrentine v. Arkansas-Best Freight System, Inc.**

Collective bargaining agreements now frequently provide for the private resolution of disputes over their terms,¹ with the goal of minimizing costly litigation and its related problems.² The National Labor Relations Act (the Act) itself endorses such private resolution, stating that the adjustment of disputes by the parties themselves is "desirable."³ Nevertheless, there may be limits to this desirability. During the *Survey* year, in *Barrentine v. Arkansas-Best Freight System, Inc.*,⁴ the United States Supreme Court for the second time⁵ considered whether an employee subject to a collective bargaining agreement which calls for the private resolution of a claim based on a right protected by

⁶² See text and notes at notes 11-13 *supra*.

⁶³ See text at notes 25-29 *supra*.

⁶⁴ See text at notes 37-41 *supra*.

⁶⁵ See text at notes 54-56 *supra*.

⁶⁶ See text at notes 57-59 *supra*.

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¹ See F. ELKOURI AND E. ELKOURI, *HOW ARBITRATION WORKS*, 7 (3d ed. 1973).

² See *id.* at 8-10.

³ 29 U.S.C. § 173(d) (1976). The statute provides, in pertinent part: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes" *Id.*

⁴ 101 S.Ct. 1437 (1981).

⁵ The Court's first consideration of the issue was in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 38 (1974).

both federal statute and the agreement, loses the right to have that claim heard by a federal court.⁶

In the earlier case, *Alexander v. Gardner-Denver Co.*,⁷ the Court held unanimously that by submitting a claim of racial discrimination for private resolution, pursuant to the terms of a collective bargaining agreement,⁸ an employee was not thereby barred from bringing suit under Title VII.⁹

In *Gardner-Denver*, a black employee filed a grievance under his union's collective bargaining agreement, alleging that his discharge was based on racial discrimination.¹⁰ After failing to prevail under that procedure,¹¹ the employee brought a civil action in federal court, alleging a violation of his rights under the federal statute prohibiting racially discriminatory employment practices.¹² The claim presented the issue of what effect the employee's agreement to use private methods of dispute resolution had on his right to a trial under the federal statute.¹³

The Court approached the problem by considering first the statute's legislative history.¹⁴ It determined that Congress did not intend Title VII to supplant other methods of resisting employment discrimination.¹⁵ This determination led the Court to find a "clear inference" that the statute also did not require an individual to forfeit his private cause of action under it because he had pursued a grievance procedure.¹⁶ The Court emphasized that the two procedures, arbitration and civil suit, were complementary.¹⁷ Whereas arbitration vindicated a contractual right,¹⁸ a lawsuit vindicated independent statutory rights.¹⁹ In addition, the Court found that the employee had not prospectively waived his statutory cause of action, either by agreeing to the terms of the contract,²⁰ or by submitting to the arbitration procedure.²¹ The Court reasoned that there could have been no prospective waiver of the statutory right by agreeing to the collective bargaining contract,²² because the statute concerned individual rights unrelated to collective activity. These individual rights, therefore, could not be subject to collective bargaining.²³ The Court found that

⁶ See 101 S.Ct. at 1439.

⁷ 415 U.S. 36 (1974).

⁸ *Id.* at 37, 48-49.

⁹ *Id.* at 48-49.

¹⁰ *Id.* at 38-39.

¹¹ *Id.*

¹² *Id.* at 43; see 42 U.S.C. § 2000e-2(a)(1) (1976).

¹³ 415 U.S. at 38.

¹⁴ *Id.* at 48 & n.9.

¹⁵ *Id.*

¹⁶ *Id.* at 49.

¹⁷ *Id.* at 50.

¹⁸ *Id.* at 49.

¹⁹ *Id.* at 49-50.

²⁰ *Id.* at 51.

²¹ *Id.* at 52.

²² *Id.* at 51-52.

²³ *Id.* at 51.

the employee's actual submission to the grievance procedure was not a waiver of his statutory rights,²⁴ because that would mean he had been required to concede statutory rights to exercise contractual rights which were supposed to exist without reference to the statutory rights.²⁵ Finally, the Court found that arbitration was an inappropriate forum for the final resolution of the employee's rights under the statute.²⁶ It was unwilling to entrust the statutory issue to an arbitrator for a number of reasons. The Court observed first that the role of the arbitrator was to enforce the terms of the agreement, not the statute,²⁷ and that arbitrators generally were expert in industrial relations, rather than the resolution of statutory issues.²⁸ In addition, the Court stressed that the fact-finding process in arbitration was not up to judicial standards; in arbitration there are no rules of evidence, and basic rights and procedures such as discovery and cross-examination are unavailable.²⁹

Thus, the Court held that an employee's submission to the private grievance procedure to protect his contractual right against discrimination did not bar a suit in federal court to protect a similar statutory right. In so holding, the Court relied on the following three factors: congressional intent to encourage private enforcement of rights under the statute prohibiting discrimination by employers; the individual — rather than contractual — nature of those rights; and the inadequacy of the arbitral forum to decide issues concerning those rights.³⁰

During the *Survey* year, the Supreme Court again addressed the issue whether an employee who uses a procedure under a collective bargaining agreement to vindicate a right protected by both the agreement and a federal statute loses the right to bring a suit based on the statutory right in court. The narrow issue in that case, *Barrentine v. Arkansas-Best Freight System, Inc.*,³¹ was whether employees who had unsuccessfully brought wage claims under a grievance procedure set out in their collectively bargained agreement could also bring an action in court for violations of the minimum wage provisions of the Fair Labor Standards Act (FLSA).³² In *Barrentine*, the Court followed *Gardner-Denver* and held that a claim based on the minimum wage statutes³³ was not barred by the claimant's prior submission of the issue to a contractual dispute resolution procedure.³⁴ This result made it clear that the general

²⁴ *Id.* at 52.

²⁵ *Id.*

²⁶ *Id.* at 56-58.

²⁷ *Id.* at 56-57.

²⁸ *Id.* at 57.

²⁹ *Id.* at 57-58.

³⁰ *Id.* at 48-49.

³¹ 101 S.Ct. 1439 (1981).

³² 29 U.S.C. §§ 206(a), 254 (1976).

³³ *Id.* at 1439.

³⁴ *Id.* at 1447.

reasoning of *Gardner-Denver*³⁵ applied to cases involving statutes on subjects other than racial discrimination.³⁶

The plaintiffs were truck drivers employed by *Arkansas-Best*,³⁷ who alleged that they were entitled to compensation under federal minimum wage laws for certain tasks which their employer required them to perform.³⁸ Before beginning a drive, the drivers were required to conduct a pre-trip safety inspection.³⁹ If the truck failed the inspection, the drivers were required to make a fifteen- to thirty-minute drive to the *Arkansas-Best* repair facility.⁴⁰ Although the drivers were compensated for time spent waiting for their trucks to be repaired, they were not compensated for the drive to the repair facility.⁴¹ Accordingly, one subject of the drivers' claim for compensation was the time spent driving to the repair facility.⁴² As to trucks which passed the inspection, the drivers' claim related to the time taken to inspect, for which they also were unpaid.⁴³ The drivers alleged that according to the terms of their collective bargaining agreement with *Arkansas-Best*,⁴⁴ they should have been compensated for the time in question.⁴⁵ To pursue their claim, the drivers submitted it to a joint grievance committee for a final decision, as provided for in the collective bargaining agreement.⁴⁶ The joint committee, comprised of three union representatives and three representatives of the employer, considered the claim and rejected it without explanation.⁴⁷ The drivers then brought an action in the United States District Court for the Eastern District of Arkansas alleging *inter alia* that the time spent inspecting the truck and/or driving it to the repair facility was compensable under the Fair Labor Standards Act.⁴⁸ The district court did not address the drivers' FLSA claim,⁴⁹ concentrating instead on the drivers' alternative allegation that the grievance process itself was unfair.⁵⁰ Nevertheless,

³⁵ See text and notes at notes 14-30 *supra* for a discussion of the Court's reasoning in *Gardner-Denver*.

³⁶ *But see* 101 S.Ct. at 1449 (Burger, C.J., dissenting) (arguing that *Gardner-Denver* should be limited to statutes prohibiting racial discrimination).

³⁷ *Id.* at 1439.

³⁸ *Id.* at 1440. Section 6(a) of the FLSA, 29 U.S.C. § 206(a) (1976), which was in effect when the employees' complaint arose, 101 S.Ct. at 1440, required employers to pay minimum wages to their employees. Section 16(b) of the FLSA, 29 U.S.C. § 216(b) (1976), states that an employer who violates the minimum wage laws is liable to the employee or employees affected. Thus, any employee who receives a sub-minimum wage may bring a private action to enforce the federal minimum wage laws. *See* 101 S.Ct. at 1444; *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1944).

³⁹ 101 S.Ct. at 1439 n.1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1440.

⁴⁴ *Id.* at 1439-40.

⁴⁵ *Id.* at 1440.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* See also note 38 *supra*.

⁴⁹ *Id.* at 1441.

⁵⁰ *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 615 F.2d 1194, 1199, 103 L.R.R.M. 2732, 2736 (8th Cir. 1980). The district court opinion in *Barrentine* was unreported, but the

the court's references to federal statutes which encourage the settlement of disputes by a method agreed on by the parties⁵¹ implied that the court believed the grievance committee's decision operated as a bar to further wage claims.⁵² The Court of Appeals for the Eighth Circuit, in affirming the district court's decision,⁵³ did address the drivers' FLSA claim.⁵⁴ The circuit court found that FLSA wage disputes could be decided by binding arbitration,⁵⁵ if employees submitted to the procedure voluntarily.⁵⁶ It concluded, therefore, that the Arkansas-Best drivers were barred from asserting their FLSA claim in federal court.⁵⁷

In rejecting the Eighth Circuit's argument, the Supreme Court held that an employee's submission of his or her wage claim to a private grievance procedure did not bar a suit based on wage claims under the FLSA.⁵⁸ The Court first observed a tension between the national labor policy in favor of collective bargaining between employers and unions, and statutes guaranteeing individual employees specific substantive rights.⁵⁹ The Court determined that courts should not disturb results reached through arbitration when the employee's claim is based on rights derived solely from a collectively bargained agreement. It reasoned that Congress had expressly endorsed the desirability of having the parties themselves settle disputes over collectively bargained agreements.⁶⁰ In contrast, the Court also found that courts may disturb such results when considering rights derived from a statute providing substantive guarantees to individual workers.⁶¹ The Court asserted that "different considerations" were involved in such cases.⁶² To delineate these considerations, the Supreme Court described its decision in *Gardner-Denver*.⁶³ That case, it found, had emphasized that the federal statute prohibiting discrimination by employers granted a right separate and distinct from rights granted "through majoritarian processes of collective bargaining."⁶⁴ *Gardner-Denver* had also concluded, according to the *Barrentine* Court, that since Congress had allowed employees asserting discrimination claims access to the courts and since arbitration was an inadequate forum in which to adjudicate those claims, the claims should be considered *de novo*.⁶⁵ Having set out in this fashion the major

Eighth Circuit provided a good summary of the lower court's decision in its own consideration of the case.

⁵¹ See 29 U.S.C. § 173(d) (1976).

⁵² 615 F.2d at 1199, 103 L.R.R.M. at 2736.

⁵³ *Id.* at 1199-1200, 103 L.R.R.M. at 2736-37.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1199, 103 L.R.R.M. at 2736.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1199-1200, 103 L.R.R.M. at 2736-37.

⁵⁸ 101 S.Ct. at 1447.

⁵⁹ *Id.* at 1441.

⁶⁰ *Id.* at 1443.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1443.

points of its decision in *Gardner-Denver*, the Court then rejected an attempt by Arkansas-Best to distinguish *Barrentine* from *Gardner-Denver*.⁶⁶ Arkansas-Best had argued that *Barrentine*, unlike *Gardner-Denver*, was merely a wage and hours dispute, well-suited to arbitration.⁶⁷ In response to Arkansas-Best's contention, the Court observed that the major issues of the drivers' claim involved compensability under the FLSA, a question of statutory interpretation.⁶⁸

After identifying *Gardner-Denver* as controlling precedent, the Court then proceeded with an analysis which echoed that which it had employed in its earlier decision.⁶⁹ The Court began its discussion by emphasizing that the FLSA was designed to protect "individual" workers.⁷⁰ The Court noted that workers' rights under the FLSA had often been held to be non-waivable,⁷¹ and to take precedence over conflicting provisions in collectively bargained agreements.⁷² It also stressed that the statutory scheme of the FLSA gave individuals broad access to the courts.⁷³ Having emphasized the individual and non-waivable nature of FLSA rights, as well as the statutory scheme to enforce these rights through private suits, the Court then considered the appropriate forum issue. The Court stated that the union represented employees at arbitration⁷⁴ and that its interest in benefiting all union members might lead it to sacrifice an individual employee's statutory rights to gain a benefit for the unit as a whole.⁷⁵ It also pointed out that arbitrators may be limited in their ability to understand the complex issues of fact and law presented by most FLSA claims.⁷⁶ Even if they had this ability, the Court remarked, they would have no authority to invoke statutes beyond that authority which might be given them under the collective bargaining agreement.⁷⁷ Finally, the Court concluded that arbitrators would usually be powerless because arbitrators typically would be limited by the wage compensation terms of the agreement, to award the liquidated damages, attorney's fees and costs which the FLSA permits⁷⁸ a court to award.⁷⁹ The Supreme Court's rationale in *Barrentine*, was therefore three-fold. It found first that FLSA rights existed for individual workers, independent of the collective bargaining process.⁸⁰ It then considered two factors: the

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1443-44 n.13.

⁶⁹ See text and notes at notes 63-65 *supra*.

⁷⁰ 101 S.Ct. at 1444.

⁷¹ *Id.* at 1444-45.

⁷² *Id.* at 1445.

⁷³ *Id.* at 1444.

⁷⁴ *Id.* at 1445-46.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1446.

⁷⁷ *Id.*

⁷⁸ 29 U.S.C. § 216(b) (1976). The statute reads, in pertinent part: "[a]ny employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid wages, or their unpaid overtime compensation, as the case may be, and in an additional amount as liquidated damages." *Id.*

⁷⁹ 101 S.Ct. at 1447.

⁸⁰ *Id.*

congressional intent to give employees the right to bring wage claims under the FLSA in federal court,⁸¹ and the forum where those rights would best be protected.⁸² In addition to its basic finding that FLSA rights are for individuals, the Court found that Congress had intended those rights to be protected by private actions in court and that arbitration was an inadequate substitute for those actions.⁸³ Based on these findings, the court held that, in submitting a claim based on collectively bargained rights to a grievance procedure, the drivers were not thereby barred from seeking further relief in federal court.⁸⁴

The dissenting opinion agreed that the FLSA had created a non-waivable employee right to minimum wages,⁸⁵ and that it also had created a right to a private cause of action to enforce that right.⁸⁶ It found, however, that the question of the validity of an agreement under which the right to a federal action would be waived in favor of private arbitration,⁸⁷ was totally different from the question of whether the right to a federal court forum existed.⁸⁸ The dissent argued that the issue of whether a statutory right could be waived depended on the intent of Congress in drafting the statute.⁸⁹ It then pointed out that the employees in *Barrentine* had offered no legislative history to show that the FLSA right to bring an action in federal court was not waivable.⁹⁰ The dissent went on to state a number of policy reasons for encouraging arbitration in resolving labor disputes.⁹¹ It distinguished *Gardner-Denver* as a case involving the fundamental right to have a workplace free from discrimination,⁹² which right should not be subject to any waiver by a collective bargaining agreement.⁹³ To support this point further, the dissent observed that unions themselves had a history of discrimination⁹⁴ and that arbitrators had little experience with policies against discrimination.⁹⁵ The FLSA, in contrast, arose from a very different legal and historical context.⁹⁶ Unions, the dissent asserted, were nearly always allied with individual employees on the issue of wage claims, thus making it a "rare" possibility that the union would fail to protect a member's interests in a wage dispute.⁹⁷ Furthermore, in the dissenting judge's opinion, the FLSA presented factual issues well suited for arbitration.⁹⁸ Listing a number of

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1448 (Burger, C.J., dissenting).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1449.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1450.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

factors relevant to the "compensable time" issue under the minimum wage laws,⁹⁹ the dissent labeled the instant controversy an "elementary wage dispute."¹⁰⁰ The dissent concluded its discussion with a general call for the increased use of extra-judicial means of dispute resolution.¹⁰¹

Despite the dissent's criticism, the *Barrentine* Court's decision to use the principles of *Gardner-Denver* in a case involving the rights arising under the FLSA was correct. The reasons which the *Gardner-Denver* Court used to support its decision were not in any way dependent on the anti-employment discrimination subject matter of the statute in question in that case. The Court in *Gardner-Denver* stressed that the statute created individual rights without reference to the collective bargaining process,¹⁰² that the statute's legislative history showed a congressional intent to allow individual pursuit of the rights which it created,¹⁰³ and that the resolution of statutory issues was primarily within the responsibility and expertise of courts, not arbitrators.¹⁰⁴ The central concerns of the *Gardner-Denver* Court were therefore of a general nature, quite reasonably applicable to cases where a different statute is at issue. The *Barrentine* Court demonstrated this generality by applying the first two prongs of the *Gardner-Denver* analysis without difficulty. It noted that the FLSA created individual rights because it refers to "each" employee, in contrast to the Labor-Management Relations Act, which refers to "workers."¹⁰⁵ The court also found the second prong of the *Gardner-Denver* analysis, congressional intent favorable to private suits, to be satisfied by the express language of the FLSA permitting wage claims in any federal or state court.¹⁰⁶ Indeed, the dissent expressly accepted both of these points.¹⁰⁷ Thus, the strength of the *Barrentine* decision was partly established by its logical application of two of the three basic points in *Gardner-Denver*.

The *Barrentine* Court's discussion and application of the third basic point in *Gardner-Denver*, the appropriate forum¹⁰⁸ analysis, was less straightforward, but in the final analysis also was reasonable. Where the *Gardner-Denver* Court found the arbitral forum inadequate for the statutory construction required to decide Title VII claims,¹⁰⁹ the *Barrentine* Court emphasized that similar limits existed for arbitrators in determining the complex fact-law questions raised by the various terms of the FLSA.¹¹⁰ The dissent criticized this view of the FLSA,¹¹¹ finding that the determination of the "compensable time" issue was

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1451.

¹⁰² 415 U.S. at 51.

¹⁰³ *Id.* at 48.

¹⁰⁴ *Id.* at 57.

¹⁰⁵ 101 S.Ct. at 1444.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1448. (Burger, C.J., dissenting).

¹⁰⁸ 415 U.S. at 56.

¹⁰⁹ *Id.* at 57.

¹¹⁰ 101 S.Ct. at 1446.

¹¹¹ *Id.* at 1450 (Burger, C.J., dissenting).

simply one of fact.¹¹² It went on to list five factors relevant to determining whether the time at issue was compensable under the FLSA,¹¹³ but failed to state where those factors came from or why a fact-finding arbitrator should be expected to make the same list. The dissent also criticized the majority's assertion that unions may not represent adequately the interests of individual employees in a wage dispute.¹¹⁴ Even if the dissent was correct in asserting that a union almost always will support an employee in a wage-hour dispute,¹¹⁵ however, this would not undermine the conclusion in *Barrentine* that the arbitral forum is inadequate to resolve FLSA claims.¹¹⁶ The adequacy of the employee's representation at arbitration was not an essential element of the *Gardner-Denver* analysis on the adequacy of the arbitral forum. Finally, *Barrentine* added a significant factor to the *Gardner-Denver* analysis of the adequacy of an arbitral forum. It observed that arbitrators very often do not have the power, under a collective bargaining agreement, to grant the range of relief which the statute authorizes a court to grant.¹¹⁷ The dissent's assertion that arbitrators have whatever powers the parties grant to them,¹¹⁸ does not really answer the majority's contention that such broad ability to grant relief is rarely given to arbitrators.¹¹⁹ *Barrentine's* convincing application of the *Gardner-Denver* appropriate forum analysis shows it to be a reasonable application of that case. Some questions remain, however, about the *Barrentine* Court's consideration of the kind of relief an arbitrator can grant.

Barrentine added the factor of an arbitrator's ability to grant relief¹²⁰ to the *Gardner-Denver* analysis of the arbitral forum's adequacy. By adding this factor, the Court raises the narrow question of whether a given arbitration procedure would adequately protect an independent statutory right if the relief granted by the statute and that offered by arbitration were sufficiently similar. The short answer would appear to be "no," because the Court in *Barrentine* also considered factors such as an arbitrator's ability to interpret statutes¹²¹ and did not question the concern shown in *Gardner-Denver* for other limitations of arbitration, such as inadequate rules of procedure and evidence.¹²² A more general question, however, concerns the flexibility of the arbitral forum analysis used in both *Barrentine* and *Gardner-Denver*. The *Gardner-Denver* analysis was couched in terms of the specific statute in question,¹²³ but its points were very general. It questioned the competence of arbitrators to decide any statutory issue,¹²⁴ and

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1447.

¹¹⁷ *Id.* See also text and notes at notes 78-79 *supra*.

¹¹⁸ *Id.* at 1450 (Burger, C.J., dissenting).

¹¹⁹ *Id.* at 1445.

¹²⁰ *Id.*

¹²¹ *Id.* at 1446 & n.22.

¹²² *See* 415 U.S. at 57-58.

¹²³ *See id.* at 56-58.

¹²⁴ *Id.* at 57.

observed that arbitration fact finding was not the equivalent of judicial fact finding.¹²⁵ Before *Barrentine*, a reasonable interpretation of *Gardner-Denver* was that if a statute created a separate individual right¹²⁶ and Congress intended that the right be enforced in federal courts,¹²⁷ then no arbitral process would be sufficient to protect the right. *Barrentine*, however, casts some doubt on the apparent absoluteness of the *Gardner-Denver* attitude toward arbitration. In *Barrentine*, the Court stressed that the FLSA granted rights to individuals¹²⁸ and that the FLSA granted those individuals broad access to the courts.¹²⁹ The Court, however, did not conclude summarily that *Gardner-Denver* required the finding that no arbitration procedure could be adequate to determine those rights. Instead it re-examined the issue, looking especially at the ability of arbitrators to decide the relevant statutory issues¹³⁰ and to grant relief commensurate with that offered by the statute.¹³¹ Summarizing its rationale, the Court noted that one reason for its decision was that FLSA rights were better protected in a judicial, rather than an arbitral, forum.¹³² *Barrentine* leaves the impression, then, that in some contexts an arbitral forum may be held adequate to protect an individual right granted by a statute which accords a private cause of action to enforce its terms.

Thus, *Barrentine* refines the implication in *Gardner-Denver* that an arbitral forum could never be adequate for the resolution of a dispute based on a claim under a federal statute. If the application of the statute could be determined by simple factual analysis, and the statute offered no relief superior to that which could be granted pursuant to the agreement, *Barrentine* leaves open the possibility that an attempt to bar further action might prevail. Realistically, however, the application of any statute requires some of the statutory interpretation mentioned in *Gardner-Denver*¹³³ and *Barrentine*.¹³⁴ In addition, the other factors concerning the limits of arbitration procedures, such as the lack of procedural fairness and the inadequacy of the factual record, were considered equally important in *Gardner-Denver*,¹³⁵ a view not questioned in *Barrentine*. It therefore seems unlikely that a court would defer to a result reached by arbitration, even where the statute was not difficult to interpret and the arbitrator had contractual authority to grant relief commensurate with the statute.

¹²⁵ *Id.*

¹²⁶ *See id.* at 49-50.

¹²⁷ *See id.* at 56.

¹²⁸ 101 S.Ct. at 1447.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1446.

¹³¹ *Id.* at 1447.

¹³² *Id.*

¹³³ 415 U.S. at 57.

¹³⁴ 101 S.Ct. at 1446.

¹³⁵ *See* 415 U.S. at 57-58.

EMPLOYMENT DISCRIMINATION LAW

I. EMPLOYMENT DISCRIMINATION SUITS

A. *Timely Filing*1. *Under § 1981 of Title VII in Denial of Tenure:**Delaware State College v. Ricks**

An employer is exposed to liability for a discriminatory employment act only when such an act is the basis of a timely charge of discrimination.¹ Employment discrimination charges may arise under various statutes, including Title VII of the Civil Rights Act of 1964² (Title VII) and 42 U.S.C. § 1981³ (§ 1981). A Title VII action must be filed within 180 days after the alleged unlawful employment practice occurred,⁴ while the statute of limitations under § 1981 is the time period applicable to similar claims arising under state law.⁵ The date of the alleged discriminatory act must be ascertained to determine when the limitations period begins.⁶

In most situations it is easy to ascertain what constitutes the alleged violation and when that act occurred. If the claim alleges discriminatory discharge, the act is the discharge of the employee, and the limitations period commences to run when the employment relationship is terminated.⁷ A charge of discriminatory denial of academic tenure, however, makes precise delineation of the alleged violation and date of its occurrence more difficult. A denial of tenure is normally the result of a series of actions. The initial step is a vote on an individual's tenure bid by a faculty committee on tenure, often followed by a vote of a larger group of faculty representatives.⁸ This determination is then acted upon by the college administration or board of trustees.⁹ If a negative tenure recommendation is endorsed, the individual is officially notified and offered the option of remaining on the faculty for a terminal year.¹⁰ After the endorsement of a negative recommendation, review procedures are often

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¹ *United Air Lines, Inc. v. Evans*, 431 U.S. 556, 558 (1977).

² 42 U.S.C. § 2000e (1976).

³ 42 U.S.C. § 1981 (1976).

⁴ 42 U.S.C. § 2000e-5(e) (1976). The filing period is extended to 300 days where proceedings are "initially instituted" with a local or state agency with authority to grant the complaint relief. 42 U.S.C. § 2000e-5(b) (1976).

⁵ *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

⁶ To present a timely action, some violation must be alleged to have occurred within the appropriate period prior to the filing of the action. *See United Air Lines, Inc. v. Evans*, 431 U.S. at 558.

⁷ *See International Union of Electrical Workers v. Robbins & Myers*, 429 U.S. 229, 234-35 (1976).

⁸ *See, e.g., Delaware State College v. Ricks*, 101 S. Ct. 498, 501, 24 FEP Cas. 827, 828 (1980); *Abramson v. University of Hawaii*, 594 F.2d 202, 204 (9th Cir. 1979). *See also Wagner, Tenure and Promotion in Higher Education in Light of Washington v. Davis*, 24 WAYNE L. REV. 95, 97 (1977).

⁹ *See Wagner, supra* note 8, at 97.

¹⁰ *See id.*

available, and at some colleges reconsideration and an offer of tenure is possible.¹¹ Finally, if reconsideration is denied, the individual terminates employment at the college at the end of the next academic year.¹²

Prior to the *Survey* year, a split existed among the circuits over which action in the denial of tenure process triggered the statute of limitations for filing an action alleging discriminatory denial of tenure. In 1976, the Court of Appeals for the Second Circuit, in *Egelston v. State University College at Geneseo*,¹³ held that a suit filed during the "terminal" year of employment, more than 180 days after initial notification of tenure denial, was timely. The court determined that the point at which the Title VII time limit began to run was the date of discharge, not the date of notification.¹⁴ In a more recent case, however, the Court of Appeals for the Ninth Circuit disagreed with this assessment. In *Abramson v. University of Hawaii*,¹⁵ the court reasoned that the proper focus was upon the time of the discriminatory act, the final denial of tenure, not upon the time at which the consequences of the act become most painful, the date of discharge.¹⁶

During the *Survey* year, the Supreme Court in *Delaware State College v. Ricks*¹⁷ rejected the view that the statute of limitations begins to run on the date of discharge. The Court held that the district court was justified in concluding that the limitations period began to run at the date on which the board of trustees officially notified the plaintiff of its endorsement of a negative recommendation of tenure and its intent not to renew his contract beyond a terminal year.¹⁸

The plaintiff in *Ricks*, a black Liberian, joined the faculty of Delaware State College in 1970.¹⁹ Three years later, a faculty committee on tenure recommended that Ricks not receive tenure.²⁰ The committee agreed, however, to reconsider its tenure recommendation the following year.²¹ In

¹¹ See *Ricks v. Delaware State College*, 605 F.2d 710, 712, 20 FEP Cas. 1373, 1375 (3d Cir. 1979); *Delaware State College v. Ricks*, 101 S. Ct. 498, 508-09 n.3, 24 FEP Cas. 827, 833-34 n.3 (1980) (Stevens, J., dissenting).

¹² See *Ricks v. Delaware State College*, 605 F.2d at 711, 20 FEP Cas. at 1374.

¹³ 535 F.2d 752 (2d Cir. 1976).

¹⁴ *Id.* at 755. The court also noted the possibility that the crucial date could even be when a replacement was hired. *Id.* Several district courts in the Third Circuit similarly determined that the date of discharge was the proper date to trigger the statute of limitations. See, e.g., *Rackin v. University of Pa.*, 386 F. Supp. 992, 1006-07 (E.D. Pa. 1974); *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002, 1007 (W.D. Pa. 1973).

¹⁵ 594 F.2d 202 (9th Cir. 1979).

¹⁶ *Id.* at 209. The *Abramson* court, however, reversed the lower court's holding that the critical date was the time of notification of tenure denial and remanded the case to allow the plaintiff the opportunity to show that the ordinary tenure decision process included a review of reconsideration requests and, therefore, was not final until this review was denied. *Id.* at 210. Such a finding would trigger the limitations period as of the review denial during the terminal year.

¹⁷ 101 S.Ct. 498, 24 FEP Cas. 827 (1980).

¹⁸ *Id.* at 504-05, 24 FEP Cas. at 830-31. The Court reversed in a 5-4 decision.

¹⁹ *Id.* at 501, 24 FEP Cas. at 828.

²⁰ *Id.*

²¹ *Id.*

February 1974, the committee again recommended a denial of tenure.²² In March, the faculty senate voted to support this recommendation and the college board of trustees voted to endorse the senate's decision.²³ Ricks then filed a grievance with the appropriate board of trustees committee.²⁴ This committee held a hearing on the plaintiff's grievance.²⁵ In a letter dated June 26, 1974, the president of the board of trustees officially notified Ricks that the board had endorsed the recommendation to deny him tenure and that he would be offered a "terminal" contract for the 1974-75 academic year.²⁶ On September 12, 1974, the board of trustees notified Ricks that it had denied his grievance.²⁷ During the "terminal" academic year, the president of the college reconfirmed the board's decision and the plaintiff's contract of employment expired on June 30, 1975.²⁸

While still employed under his "terminal" contract, Ricks attempted to file an employment discrimination charge, claiming denial of tenure based on his national origin, with the Equal Employment Opportunity Commission (EEOC).²⁹ Thereafter, he filed a charge of discrimination with the state fair employment practices agency, which under Title VII has primary jurisdiction over employment discrimination complaints.³⁰ The state agency waived its jurisdiction and the EEOC accepted the complaint for filing on April 28, 1975.³¹ Following receipt of an EEOC "right to sue" letter in July of 1977,³² Ricks filed suit in the district court on September 9, 1977,³³ charging that the college³⁴ had violated Title VII and § 1981 by discriminating against him on the basis of his national origin.³⁵

The district court concluded that the only violation alleged in Rick's complaint was the college's decision to deny tenure. Accordingly, the court determined that the statutes of limitations began to run on June 26, 1974, when the plaintiff was officially notified of the tenure denial.³⁶ Since Ricks neither filed

²² 22 FEP Cas. 788, 790 (D. Del. 1978).

²³ 101 S.Ct. at 501-02 n.2, 24 FEP Cas. at 828 n.2. The faculty senate voted on March 11 and the board of trustees voted two days later. *Id.*

²⁴ *Id.* at 501, 24 FEP Cas. at 828.

²⁵ *Id.* The hearing was held in May of 1974. *Id.*

²⁶ *Id.* at 501 & n.2, 24 FEP Cas. at 828 & n.2.

²⁷ *Id.* at 502, 24 FEP Cas. at 828.

²⁸ 22 FEP Cas. at 790.

²⁹ 101 S.Ct. at 502, 24 FEP Cas. at 828-29.

³⁰ 22 FEP Cas. at 789.

³¹ 101 S.Ct. at 502, 24 FEP Cas. at 829.

³² 22 FEP Cas. at 789.

³³ 101 S.Ct. at 502, 24 FEP Cas. at 829.

³⁴ The defendants also included members of the board of trustees, the administration, and the faculty. *Id.* at 502 n.3, 24 FEP Cas. at 829 n.3.

³⁵ *Id.* at 502, 24 FEP Cas. at 829. Since the Supreme Court in *Ricks* determined that both claims failed because they were not timely filed, it expressly did not decide whether a claim of national origin discrimination could be brought under § 1981. *Id.* at 503 n.6, 24 FEP Cas. at 829 n.6.

³⁶ *Id.* at 502, 24 FEP Cas. at 829.

his Title VII charge within 180 days of June 26, 1974, nor commenced his § 1981 suit within the applicable three-year limit from that date, the court granted the defendant's motion to dismiss both claims as untimely.³⁷

The Court of Appeals for the Third Circuit reversed, concluding that the statutes of limitations did not begin to run until June 30, 1975, the date on which the terminal contract expired and Ricks was discharged.³⁸ While agreeing that the only alleged violation was the denial of tenure, the court noted that, at other colleges, denials of tenure that seemed final had been reconsidered and sometimes reversed.³⁹ The court reasoned that it did not want to encourage litigation that might thwart internal processes of reconsideration.⁴⁰ Further, the court remarked that encouraging the initiation of litigation prior to the date of termination would result in reducing an employee's effectiveness during the remainder of his or her employment period.⁴¹ Finally, for ease of application and avoidance of complex litigation to determine when the decision became final, the court adopted the date of termination as the point at which the statutes of limitations begin to run.⁴²

On appeal, the Supreme Court reversed, holding that where, as in *Ricks*, the only challenged employment practice occurs before the termination date, the statutes of limitations begins to run at the time of the alleged discriminatory act.⁴³ *Ricks*' complaint alleged discrimination only in denying him tenure, not in terminating his employment.⁴⁴ Since Ricks neglected to allege any other discriminatory acts, the Court reasoned that his argument, in effect, was that a "continuing violation" of Title VII existed until the end of his "terminal" contract.⁴⁵ The Court noted, however, that the proper focus is upon the discriminatory act itself, not upon its effects.⁴⁶ Following an earlier decision, the *Ricks* majority stated that the mere continuity of employment is insufficient to prolong the life of a cause of action for employment discrimination.⁴⁷ Therefore, the Court concluded that since Ricks failed to allege discriminatory acts that continued or occurred until the end of his employment, he was precluded from claiming that a violation continued until the date of termina-

³⁷ *Id.*

³⁸ *Id.* at 503, 24 FEP Cas. at 829.

³⁹ 605 F.2d at 712, 20 FEP Cas. at 1375.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 712-13, 20 FEP Cas. at 1376.

⁴³ 101 S.Ct. at 504, 24 FEP Cas. at 830.

⁴⁴ 101 S.Ct. at 503-04, 24 FEP Cas. at 830.

⁴⁵ *Id.*

⁴⁶ *Id.* at 504, 24 FEP Cas. at 830.

⁴⁷ *Id.* In an earlier decision, *United Air Lines, Inc. v. Evans*, 431 U.S. 556 (1977), the Court determined that the continuing impact of a prior discriminatory act did not constitute a "continuing violation" that would allow the filing of a timely claim of discrimination. *Id.* at 558.

tion.⁴⁸ If Ricks intended to complain of a violation at the time of discharge, the Court remarked that he would have to identify discriminatory acts that continued until, or occurred at, the date of discharge.⁴⁹

The Court concluded that the statutes of limitations began to run when the alleged discriminatory act, the decision to deny tenure, occurred and Ricks was notified.⁵⁰ Having identified this point, the Court next examined three dates advanced by the parties as alternative dates of accrual of the cause of action: June 26, 1974, the date of official notification; September 12, 1974, the date of the grievance denial; and June 30, 1975, the date of termination.⁵¹ The plaintiff contended that the date of termination, when the "terminal" contract expired, should be the crucial date.⁵² This contention failed due to the Court's rejection of the continuing violation claim, in the absence of any allegations to support it.⁵³ In addition, the Court rejected the argument advanced by the court of appeals that the termination date should be accepted because of its ease of application.⁵⁴

Next, the Court considered and rejected September 12, the date on which the board of trustees notified Ricks of its denial of his grievance.⁵⁵ In its *amicus* brief, the EEOC advanced two arguments supporting September 12 as the crucial date.⁵⁶ First, it contended that the decision to deny Ricks tenure did not become final until the denial of his grievance.⁵⁷ Second, it contended that even

⁴⁸ See 101 S.Ct. at 504, 24 FEP Cas. at 830.

⁴⁹ *Id.* On the facts of *Ricks*, it would seem difficult to find continuing discriminatory acts. The Court noted that Ricks would have had to allege and prove that the manner in which he was terminated differed discriminatorily from treatment accorded other unsuccessful tenure applicants. *Id.* Instead, in accordance with college practice, Ricks was offered a terminal contract with express notice that his employment would end upon its expiration. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 504-06, 24 FEP Cas. at 830-32.

⁵² *Id.* at 504, 24 FEP Cas. at 830-31.

⁵³ *Id.*, 24 FEP Cas. at 831.

⁵⁴ *Id.* at 505, 24 FEP Cas. at 831.

⁵⁵ *Id.* at 505-06, 24 FEP Cas. at 831.

⁵⁶ *Id.* at 505, 24 FEP Cas. at 831.

⁵⁷ *Id.* The EEOC argued that the June 26 letter held out to Ricks the possibility that he would receive tenure if the board of trustees sustained his grievance. *Id.* The letter indicated that Ricks was being notified at that time primarily to ensure compliance with college and AAUP requirements for advance notification of non-reappointment for non-tenured faculty. The text of the June 26 letter stated:

Dear Dr. Ricks:

On March 13, 1974, the Board of Trustees of Delaware State College officially endorsed the recommendations of the Faculty Senate at its March 11, 1974 meeting, at which time the Faculty Senate recommended that the Board not grant you tenure.

As we are both aware, the Educational Policy Committee of the Board of Trustees has heard your grievance and it is now in the process of coming to a decision. The Chairman of the Educational Policy Committee has indicated to me that a decision may not be forthcoming until sometime in July. In order to comply with

if the board decided to deny tenure earlier, the pendency of the grievance should toll the running of the limitations period.⁵⁸ The Court dismissed the former argument, reasoning that the board had made it clear well before September 12 that it had rejected Ricks' tenure bid.⁵⁹ The Court concluded that its decision in *International Union of Electrical Workers, v. Robbins & Myers*⁶⁰ precluded the latter argument. In *Robbins & Myers* the Court held that the exercise of a contractual right to initiate a grievance procedure after discharge, the alleged discriminatory act, did not toll the running of the limitations period.⁶¹

Finally, the Court held that the district court was not erroneous in concluding that the statutes of limitations began to run no later than the last date argued, June 26, 1974, when the letter from the president of the board of trustees officially notified Ricks of the board's intent not to renew his contract beyond the terminal year.⁶² The majority reasoned that by June 26 the faculty committee on tenure had twice recommended against tenure, the faculty senate had voted to support the negative recommendation, and the board of trustees formally had voted to deny Ricks tenure.⁶³ Therefore, in light of this series of "negative decisions," the majority concluded that the district court was justified in finding that the college had established its official position — and made that apparent to Ricks — by June 26, 1974.⁶⁴

Justice Stewart, joined by Justices Brennan and Marshall, dissented. He concluded that the case should be remanded to allow Ricks to prove that tenure was not effectively denied until he was notified of the grievance denial on September 12, 1974.⁶⁵ Stewart agreed that a discriminatory discharge had not been alleged and, therefore, that the judgment of the court of appeals focusing on the date of termination was erroneous.⁶⁶ He emphasized, however, that the

the 1971 Trustee Policy Manual and AAUP requirements with regard to the amount of time needed in proper notification of non-reappointment for non-tenured faculty members the Board has no choice but to follow actions according to its official position prior to the grievance process, and thus, notify you of its intent not to renew your contract at the end of the 1974-75 school year.

Please understand that we have no way of knowing what the outcome of the grievance process may be, and that this action is being taken at this time in order to be consistent with the present formal position of the Board and AAUP time requirements in matters of this kind. Should the Educational Policy Committee decide to recommend that you be granted tenure, and should the Board of Trustees concur with their recommendation, then of course, it will supersede any previous action taken by the Board.

Sincerely,
/s/Walton H. Simpson, President
Board of Trustees of Delaware State College

⁵⁸ *Id.*

⁵⁹ *Id.* The Court also noted that a grievance procedure constituted a remedy for a prior decision, not an opportunity to influence a future decision. *Id.* at 506, 24 FEP Cas. at 831.

⁶⁰ 429 U.S. 229 (1976).

⁶¹ *Id.* at 236.

⁶² 101 S. Ct. at 506, 24 FEP Cas. at 832.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 507, 24 FEP Cas. at 832.

⁶⁶ See *id.* at 506, 24 FEP Cas. at 832.

district court had dismissed Ricks' claims on the pleadings, so it never made any factual determinations.⁶⁷ Stewart reasoned that the complaint included a plausible allegation that the college actually denied Ricks tenure on September 12, 1974.⁶⁸ He noted that the June 26 letter raised the possibility of a subsequent board decision superseding any previous action, if a favorable recommendation ensued from the grievance committee.⁶⁹ Therefore, Justice Stewart would have allowed Ricks a hearing to determine whether the board's vote to deny him tenure was not a final decision, but rather only a step in the process of which the grievance committee constituted the next conventional stage.⁷⁰

Justice Stevens also dissented, arguing that a discriminatory denial of tenure claim should be treated the same as a discriminatory discharge claim.⁷¹ Therefore, Justice Stevens concluded that June 30, 1975, the date of termination, was the proper time to begin the limitations period.⁷² He reasoned that the "terminal" contract offered to an individual denied tenure is analogous to the two-weeks advance notice of discharge accorded to an employee by an employer in other contexts.⁷³ He noted that, prior to the date of discharge, the allegedly wrongful act is subject to change.⁷⁴ Stevens also reasoned that, more importantly, the discharge date was the date identified with the least difficulty or dispute.⁷⁵ Stevens added that this date would further the interest of harmonious working relationships in the remaining period of employment, and would avoid the involvement of the EEOC until the college's decision to deny tenure is final.⁷⁶ Thus, Stevens would have affirmed the judgment of the court of appeals.⁷⁷

The *Ricks* decision clarifies the allegations which must be contained in an employment discrimination complaint involving a denial of tenure, but leaves unanswered the factual determination of when the statute of limitations begins to run. After *Ricks*, it is clear that a charge of discrimination in the denial of tenure is to be treated as a violation separate and distinct from a charge of discriminatory discharge. Absent a claim of discriminatory discharge or other violations, the limitations period will begin when the decision to deny tenure is made and the faculty member is notified accordingly.⁷⁸ If a terminal contract is

⁶⁷ *Id.* at 507 & n.1, 24 FEP Cas. at 832 n.1, 833.

⁶⁸ *Id.* at 506, 24 FEP Cas. at 832.

⁶⁹ *Id.* at 507, 24 FEP Cas. at 832. The letter provided a basis for this allegation when it suggested that the board notified Ricks at that time only to ensure technical compliance with advance notification requirements in case it should later decide to abide by its earlier acceptance of the negative recommendation. *Id.*

⁷⁰ *Id.* at 507-08, 24 FEP Cas. at 833.

⁷¹ *Id.* at 508, 24 FEP Cas. at 833. Stevens did not consider this treatment to be based on any "continuing violation" theory. Rather, he regarded a case in which a college denies tenure and offers a terminal one-year contract, in conjunction with the denial as part of the adverse tenure decision, to be a discharge case. *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 509, 24 FEP Cas. at 834.

⁷⁸ *See id.* at 504, 24 FEP Cas. at 830.

offered to individuals denied tenure, the limitations period will run concurrently with the terminal employment offer. In the aftermath of *Ricks*, a faculty member who believes he or she has been denied tenure discriminatorily is well advised to file an EEOC complaint within 180 days after learning of the authorized administrative body's negative vote on his or her tenure bid, simultaneously with any pursuit of internal grievance procedure.

While *Ricks* clarified the applicable law, the majority's analysis was not completely correct. The majority appropriately rejected the "final date of employment rule" adopted by the court of appeals.⁷⁹ It also properly treated a discriminatory denial of tenure case differently from a discriminatory discharge case. In dissent, however, Justice Stewart accurately analyzed the procedural posture of the case and correctly concluded that under certain plausible facts the date which the majority applied to commence the limitations period would be improper.

Policy considerations support the majority's focus upon the time of the alleged discriminatory act, the denial of tenure, rather than upon the time of the effects of an employment decision, the date of termination. The acceptance of the termination date as the point in time when the limitations period begins to run would allow the complainant to prolong the life of a cause of action. Congress set definite limits on the life of a Title VII cause of action, just as state legislatures set limits on the life of a state employment discrimination claim. The limits reflect value judgments made by legislative representatives concerning the point at which the interests favoring protection of valid claims are outweighed by the interests in prohibiting the prosecution of stale claims.⁸⁰ Tenure is denied regardless of whether the individual voluntarily chooses to accept the terminal contract and remain on the faculty an additional year. If the date of termination is the crucial date, the statute of limitations for filing a discriminatory denial of tenure claim begins to run immediately upon the end of the current contract for the individual who chooses not to accept the terminal contract offer. The individual who chooses to accept the terminal contract offer, however, has postponed the running of the statute of limitations for the length of the terminal contract — in *Ricks*, a period of one year. The discriminatory act, denial of tenure based on impermissible criteria, occurred at the same time in each of these situations; yet one individual is allowed to alter the legislative value judgment concerning when a claim should become stale. Because an individual should not be able to alter the life of a cause of action set by the legislature, the *Ricks* majority correctly rejected the termination date as the time to begin the limitations period.

In addition, the majority correctly rejected the view, expressed in the Stevens dissent, that a denial of tenure case should be treated as a discharge case.⁸¹ Stevens analogized the custom of offering a terminal contract im-

⁷⁹ *Id.* at 505, 24 FEP Cas. at 831.

⁸⁰ *Id.*

⁸¹ Stewart, in his dissent, also refused to treat the case as a discriminatory discharge case. *Id.* at 506, 24 FEP Cas. at 832.

mediately after a tenure denial to the custom of giving two weeks advance notice of discharge.⁸² The denial of academic tenure followed by a terminal contract, however, is not analogous to a two-week advance notification of discharge. In the former situation, the denial of tenure is the act alleged to be discriminatory. The terminal contract is offered when tenure is denied and is a consequence of the alleged discriminatory act.⁸³ In the latter situation, the discharge itself is the alleged discriminatory act. When tenure is denied discriminatorily, the tenure denial results immediately in the faculty member being denied rights and status that would have been granted absent the discrimination.⁸⁴ But for the discriminatory denial, the faculty member would have enjoyed the benefits of being tenured immediately. By contrast, the employee alleging discriminatory discharge from employment is not denied the benefits of being employed discriminatorily until the act has occurred and he or she is terminated. Although the employee on two-week notice knows the benefits of employment soon will be different, the actual discrimination against him or her has not yet occurred.⁸⁵ Thus, basic differences exist between a denial of tenure and a discharge case, and the majority correctly treated them accordingly.

While the majority correctly treated the case differently from a discharge case and rejected the termination date as the appropriate date on which to begin the limitations period, it was incorrect in not remanding the case for further factual findings. Justice Stewart's approach was a better analysis both of the role a factual determination must play in ascertaining the date on which the final decision to deny tenure occurred and of the procedural posture of the case. The crucial date to commence the running of the limitations period is the date on which Ricks was notified that the board had completed the tenure process. Ricks should have been allowed the opportunity to show that the grievance procedure was an ordinary and generally accepted step in the process.⁸⁶ If the grievance committee has in fact recommended reconsideration in the past and the board has concurred with these recommendations, the date of denial of the grievance, September 12, 1974, should be considered the final denial of tenure. If, however, the board's original response to a tenure bid is final in all but the most extreme cases, then a date at or before June 26, 1974, should be considered the final denial. This approach has been used by lower courts. For ex-

⁸² *Id.* at 508, 24 FEP Cas. at 833.

⁸³ *See id.* at 504, 24 FEP Cas. at 830.

⁸⁴ For example, compared to tenured faculty, the non-tenured faculty member enjoys greatly limited procedural rights protecting his or her employment. Note, *Non-Tenure Teachers' Procedural Rights Upon Dismissal*, 3 LOY.-CHI. L.J. 114 (1972). *See also* Note, *Constitutional Law: Procedural Due Process, The Rights of a Non-Tenured Teacher Upon Non-Renewal of His Contract at a State School*, 22 DE PAUL L. REV. 702, 706 (1973).

⁸⁵ As the *Ricks* majority noted, to become a discriminatory discharge case, the plaintiff would have had to allege and prove that the manner in which the college terminated his employment differed discriminatorily from the manner in which it terminated other individuals who also had been denied tenure. 101 S. Ct. at 504, 24 FEP Cas. at 830.

⁸⁶ *Id.* at 507, 24 FEP Cas. at 833 (Stewart, J., dissenting); *Abramson v. University of Hawaii*, 594 F.2d at 210.

ample, although the *Ricks* majority cited *Abramson* favorably, the court in *Abramson* in fact followed the approach proposed in Stewart's dissent and remanded a similar tenure denial case for a factual finding on this issue.⁸⁷

The district court dismissed Ricks's claim on the pleadings. Justice Stewart recognized the procedural posture of the case and noted that no factual findings were made on the actual practice of the college in denying tenure.⁸⁸ The language of the June 26 letter provided a reasonable basis for alleging that the board effectively did not deny tenure until September 12 by suggesting that the June 26 notification was sent solely to comply with advance notification requirements should the board later decide to finalize its acceptance of the negative tenure recommendation.⁸⁹ Thus, Ricks should have been afforded a hearing and determination of this factual issue.

The *Ricks* majority expressly declined to decide whether the district court correctly focused on June 26, 1974, rather than on an earlier date to establish final denial.⁹⁰ Accordingly, *Ricks* does not provide a clear standard for determining the correct point to commence the limitations period.⁹¹ The termination date appears to be precluded totally from consideration after *Ricks*, absent separate allegations of discriminatory discharge. It remains to be seen whether different allegations, or a sufficient showing of the actual practice of a college in denying tenure, would allow the limitations period to commence to run on the date of a refusal to reconsider a denial of tenure. This too seems less likely after *Ricks*, absent allegations of a separate discriminatory act: a discriminatory refusal to reconsider.

The *Ricks* Court stated the principle that the limitations period commences to run when the tenure decision is made and the affected faculty member is notified.⁹² In classifying the grievance procedure as a "remedy for a prior decision,"⁹³ absent factual determination of the college's actual tenure practice, the Court narrowed the available dates to be considered in the future as the appropriate time at which to commence the limitations period.⁹⁴ Three dates remain to be considered: (1) the date when the administrative body

⁸⁷ 594 F.2d at 210. The *Abramson* court expressed willingness to allow the statute of limitations to commence running upon the refusal to reconsider a denial of tenure, if this were found to be the final denial in the procedure the school uses to make tenure decisions. *Id.* at 209.

⁸⁸ 101 S. Ct. at 502, 24 FEP Cas. at 829.

⁸⁹ See note 57 *supra*.

⁹⁰ 101 S. Ct. at 506 n.17, 24 FEP Cas. at 832 n.17. The Court held that even under a limitation period commencing to run on June 26, 1974, the plaintiff's complaints were not timely. Therefore, the issue of whether the period should have commenced earlier was not required to be addressed.

⁹¹ The majority noted that "[t]he application of the general principles discussed herein necessarily must be made on a case-by-case basis." *Id.* at 504 n.9, 24 FEP Cas. at 830 n.9.

⁹² *Id.* at 504, 24 FEP Cas. at 830.

⁹³ *Id.* at 506, 24 FEP Cas. at 831.

⁹⁴ This is the case where the allegations are similar to *Ricks*, and no additional discriminatory acts are alleged. See *id.* at 504, 24 FEP Cas. at 830. Other dates may be considered where additional discriminatory acts such as discriminatory denial to reconsider the decision, or discriminatory discharge, are alleged.

authorized to grant tenure initially votes to accept a negative recommendation on tenure, (2) the date when this vote is communicated to the faculty member, and (3) the date when the administrative body officially notifies the faculty member of its denial and intent not to renew his or her contract beyond the terminal year.⁹⁵ Faced with these three dates, the second date is the correct choice under *Ricks*. By this date, the decision has been made and the faculty member is aware of the denial. The first date, when the board votes, does not satisfy the notification requirement of *Ricks*.⁹⁶ The third date signifies no relevant change in the elements of the tenure denial.

In the aftermath of *Ricks*, three factors have become relevant to faculty members claiming discriminatory denial of tenure. First, courts are not foreclosed from concluding that the limitations period begins to run prior to official notification and offer of a terminal year contract. Under the *Ricks* guidelines, it seems likely that the limitations period will be held to commence to run upon communication of the denial to the faculty member. Second, since it is not clear how early the limitations period will be held to commence, allegations of discriminatory discharge or refusal to reconsider should be included in the complaint in situations where a grievance is denied or employment is terminated. To avoid dismissal on the grounds of untimeliness, a complaint should establish the basis for claiming a discriminatory act at a date later than the initial denial of tenure. Finally, the filing of an EEOC complaint should be considered upon notification of the denial of tenure, regardless of the existence or pursuit of an internal review.

B. Class Actions

1. *Interlocutory Appeals of Orders Denying*

*Consent Decrees: Carson v. American Brands, Inc.**

Under section 1291 of the United States Code, appeals can be taken only from "final decisions" of the district courts.¹ The purpose of the finality rule is to prevent "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single

⁹⁵ See *id.* at 506 nn.16 & 17, 24 FEP Cas. at 833 nn.16 & 17.

⁹⁶ The first date, that of the board's vote, would only satisfy the notification requirement if the faculty member was aware of the negative recommendation to the board and the affirmance of that recommendation by the board was entirely predictable. This may have been the case in *Ricks*. See *id.* at n.16, 24 FEP Cas. at 833 n.16.

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¹ 28 U.S.C. § 1291 (1976) provides:

The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Id.

controversy."² The principle has been considered so fundamental to the United States judicial system that the statutes regulating federal procedure consistently have maintained a finality rule, beginning with the First Judiciary Act of 1789.³

Exceptions to the finality rule, however, have developed in the common law, and within the statutory framework. One such exception is the "collateral order" exception. This common-law exception to the finality rule permits interlocutory appeals of final rulings which are separable from the main cause of action.⁴ The purpose of the collateral order exception is to provide for the immediate, separate appeal of those issues which are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."⁵ The collateral order exception thereby facilitates the efficient administration of justice.

Toward the end of the nineteenth century, Congress began to enact a series of limited exceptions to the finality rule, emphasizing the effects, upon the requesting parties, of the interlocutory order.⁶ The present statutory provision for the appeal of interlocutory decisions, section 1292(a)(1), permits the appeal of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court."⁷ The purpose of excepting orders affecting injunctions from the finality rule was not specified in the legislative history of section 1292(a)(1).⁸ The Supreme Court, however,

² *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

³ *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 178-79 (1955).

⁴ *E.g.*, *Williams v. Mumford*, 511 F.2d 363, 366-67, 10 FEP Cas. 487, 489-90 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 828 (1975).

In addition to the requirement of severability, some decisions specify additional requirements for immediate appeal. For example, in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), the Supreme Court held that before the collateral order doctrine could be applied, the rights affected must be substantial enough to merit review. The Third Circuit set forth another criterion for applying the doctrine. In *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 10 FEP Cas. 80 (3d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975), the court required a showing that an irreparable injury to the affected rights would result from delaying review.

⁵ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

⁶ *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 180 (1955).

When the circuit courts of appeals were established in 1891, Congress included among the actions within their jurisdiction appeals from interlocutory orders in equity granting or continuing injunctions. *Id.* In 1895, the class of appealable interlocutory orders expanded to include orders refusing or dissolving injunctions, and orders refusing to dissolve an injunction. *Id.* at 180 n.6.

⁷ 28 U.S.C. § 1292(a)(1) (1976) provides as follows:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . .

Id.

⁸ *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955).

subsequently determined that, in enacting section 1292(a)(1) Congress intended to provide a balance between "the inconvenience and costs of piecemeal review" and "the danger of denying justice by delay."⁹

Prior to the *Survey* year, in a manner entirely consistent with the statutory language, section 1292(a)(1) had been construed by the Supreme Court to provide a right of immediate appeal for litigants who had been denied an injunction.¹⁰ Section 1292(a)(1) had also been construed, in a manner consistent with the spirit if not the language of the statute, to provide a right of immediate appeal for litigants who would suffer some "serious, perhaps irreparable consequence" from the approval or denial of some other requested relief.¹¹ Such "serious, perhaps irreparable consequences" had been held to exist where the lower court's ruling had passed on the merits of the case.¹² Such consequences had been held to be absent, however, where the lower court's ruling had been characterized as "strictly a pretrial order."¹³

These two formulations of the "irreparable consequence" standard were developed in two Supreme Court cases decided prior to the *Survey* year. The first case, *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, propounded the principle that "irreparable consequences," justifying an immediate appeal under section 1292(a)(1), could not be found where the trial court's ruling did not pass on the merits of the case.¹⁴ In *Switzerland Cheese*, the petitioners, plaintiffs in a trademark infringement case, had moved for summary judgment, praying for permanent injunctive relief and awarding damages.¹⁵ The motion had been denied by the federal district court because of unresolved issues of material fact.¹⁶ The Supreme Court, agreeing with the Court of Appeals for the First Circuit,¹⁷ rejected petitioner's argument that the motion for summary judgment had in effect requested a preliminary injunction and therefore qualified for immediate appeal under section 1292(a)(1).¹⁸ The Court observed that the denial of a motion for summary judgment "does not settle or even tentatively decide anything about the merits of the claim."¹⁹ In

⁹ *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (footnote omitted).

¹⁰ *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966) [hereinafter cited as *Switzerland Cheese*].

¹¹ *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955) (footnote omitted).

¹² See text and notes at notes 14-20 *infra*.

¹³ *Switzerland Cheese*, 385 U.S. at 25; see text and notes at notes 21-31 *infra*.

¹⁴ 385 U.S. at 23.

¹⁵ *Id.*

¹⁶ *Id.* at 23-24.

¹⁷ *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 351 F.2d 552, 553 (1st Cir. 1965).

¹⁸ *Switzerland Cheese*, 385 U.S. at 24.

¹⁹ *Id.* at 25.

the absence of any indication that a final decision on the merits of the case had been rendered the Court concluded that appeal under the statute was impermissible.²⁰

Although the "failure to pass on the merits of the claim" standard was relied upon in *Switzerland Cheese*, an alternative standard for determining whether "irreparable consequences" resulted from a lower court's ruling also evolved from that decision. This standard was derived from the Court's statement that the trial court's denial of a motion for summary judgment was "strictly a pretrial order that decide[d] only one thing — that the case should go to trial."²¹ Thus, prior to the *Survey* year, where the result of the interlocutory order was to continue rather than to terminate the litigation in question, and no other irreparable injury was established, an effort to appeal under section 1292(a)(1) was unlikely to succeed.

The Supreme Court's decision in *Gardner v. Westinghouse Broadcasting Co.*²² illustrated the operation of the standard applicable where a court's order could be characterized as "strictly pretrial." In the *Gardner* case, the trial court had denied class certification to the putative litigants in a Title VII action.²³ The plaintiffs had not requested a preliminary injunction in their complaint,²⁴ but had requested injunctive relief for all members of the class.²⁵ The plaintiffs' effort to appeal, under section 1292(a)(1), the order denying certification was dismissed by the Court of Appeals for the Third Circuit.²⁶ The Supreme Court agreed with the court of appeals that section 1292(a)(1) did not provide the right to immediate appeal in this case.²⁷ The exceptions to the finality rule permitted under the statute, the Court repeated, were limited to orders with "direct or irreparable impact on the merits of the controversy."²⁸ The Court noted that the excluded class members retained the opportunity to have an adjudication of the merits of their claims, despite the denial of class certification.²⁹ In the absence of any holding regarding the legal sufficiency of any plaintiff's claim, the Court concluded, an interlocutory appeal under section 1292(a)(1) could not lie.³⁰ The appeal was therefore dismissed.³¹

During the *Survey* year, the principles which had been established in *Gardner* and *Switzerland Cheese* with respect to the appealability of interlocutory orders were modified by the Supreme Court in *Carson v. American Brands, Inc.*³²

²⁰ *Id.*

²¹ *Id.*

²² 437 U.S. 478 (1978).

²³ *Id.* at 479-80.

²⁴ *Id.* at 479 n.3.

²⁵ *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209, 210, 16 FEP Cas. 88, 89 (3d Cir. 1977).

²⁶ *Id.* at 214, 16 FEP Cas. at 92.

²⁷ 437 U.S. at 479.

²⁸ *Id.* at 482.

²⁹ *Id.* at 480-81 & 480 n.6.

³⁰ *Id.* at 482.

³¹ *Id.*

³² *Carson v. American Brands, Inc.*, 101 S.Ct. 993 (1981).

The Court held that plaintiffs in a class action who request a preliminary injunction, and subsequently are denied a motion for the court's consent to a negotiated settlement which incorporates the relief prayed for in the preliminary injunction, may appeal immediately under section 1292(a)(1) without awaiting a final judgment in the case.³³ By recognizing the denial of a consent decree as a "serious, perhaps irreparable consequence" to the plaintiffs in an employment discrimination action, the *Carson* opinion elevates the preference for negotiated settlements expressed in Title VII³⁴ to the status of positive law.

The plaintiffs in *Carson* represented a class of black, present and former seasonal employees and job applicants at a tobacco processing plant.³⁵ They sued the operator of a branch plant, and the union serving its employees, under 42 U.S.C. section 1981 and Title VII of the Civil Rights Act of 1964.³⁶ The plaintiffs sought a declaratory judgment, preliminary and permanent injunctions, and damages for the defendants' alleged discrimination in its hiring and employment policies.³⁷ The plaintiffs' complaint asserted that "they would suffer irreparable injury unless they obtained that injunctive relief at the earliest opportunity."³⁸ Shortly before trial, the parties negotiated a settlement.³⁹

The proposed settlement provided in detail for remedial measures to be taken by the employer. The terms of the agreement required the employer to give the seasonal employees, all of whom were black,⁴⁰ preference over outside applicants in filling job vacancies in regular positions.⁴¹ The settlement established a goal of filling one-third of the supervisory positions with qualified blacks by December 31, 1980.⁴² Although the defendants agreed to the terms of the settlement, they "expressly denied any violation of . . . any . . . equal employment law, regulation, or order."⁴³ As required by the Federal Rules of Civil Procedure when class actions have been dismissed or compromised,⁴⁴ the

³³ *Id.* at 999.

³⁴ 42 U.S.C. § 2000e (1976).

³⁵ 101 S.Ct. at 994.

³⁶ 42 U.S.C. § 2000e (1976).

³⁷ 101 S.Ct. at 995.

³⁸ *Id.* at 999 n.15.

³⁹ *Carson v. American Brands, Inc.*, 446 F. Supp. 780, 781-82, 16 FEP Cas. 1064, 1065 (E.D. Va. 1977).

⁴⁰ *Id.* at 782, 16 FEP Cas. at 1066.

⁴¹ *Id.* at 783, 16 FEP Cas. at 1067. When the seasonal employees became regular employees, the employer was to credit the time worked as seasonal employees in determining seniority and eligibility for fringe benefits. *Id.*

⁴² *Id.*

⁴³ *Id.*, 16 FEP Cas. at 1066.

⁴⁴ FED. R. CIV. P. 23(e).

Under the Federal Rules of Civil Procedure, the plaintiffs in a class action are subject to special provisions governing the conduct of their suit. FED. R. CIV. P. 23. In contrast to individual plaintiffs, who may terminate an action without a court order, FED. R. CIV. P. 41(a)(1), the parties to a class action must, if they achieve a compromise prior to trial, secure the formal approval of the court before the class action can be dismissed. FED. R. CIV. P. 23(e). The purpose of this requirement is to protect the interests of the class members who are not directly involved in the settlement negotiations. *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970), *cert.*

parties moved the district court to approve and enter the proposed settlement.⁴⁵

The district court refused to approve the settlement.⁴⁶ In doing so, the court rejected the plaintiff's argument that the merits of the case justified entry of the proposed settlement.⁴⁷ Thus, the decision did not turn on whether, based on the merits of the case, there was a discrepancy between the terms of the settlement and the relief the plaintiffs would probably have won at trial.⁴⁸ Rather, the court considered its conclusion that the agreement itself discriminated impermissibly on the basis of race to be sufficient for refusing to enter the decree.⁴⁹

The established pattern of employment practices at the tobacco plant provided the factual context determining the district court's interpretation of the agreement. Four of the settlement's provisions conferred hiring preferences upon "seasonal employees," and a fifth established a goal of promoting

denied, 401 U.S. 912 (1971). Once the class action has been filed, therefore, it is mandatory that the parties obtain the court's approval to a negotiated settlement before the case can be dismissed. *Sagers v. Yellow Freight Sys., Inc.*, 68 F.R.D. 686, 688, 11 FEP Cas. 439, 439 (D.C. Ga. 1975). The court's approval of the settlement is entered by means of a "consent decree," a judgment whose terms are negotiated by the parties to the action, but whose entry requires the consent and sanction of the court. *Gurwitz v. Singer*, 218 F. Supp. 686, 687 (S.D. Cal. 1963) (quoting 49 C.J.S. *Judgments* § 173, at 308) (1947).

⁴⁵ 101 S.Ct. at 995.

⁴⁶ *Carson v. American Brands, Inc.*, 446 F. Supp. 780, 791, 16 FEP Cas. 1064, 1072 (E.D. Va. 1977).

⁴⁷ *Id.* at 790, 16 FEP Cas. at 1072. The Court's discussion of the merits of the case was limited to the following paragraph: "The parties suggest that the decree is intended to overcome the last vestiges of racial discrimination. But the Court perceives no such vestiges. Indeed, the facts admitted by the parties show that with great rapidity and without any decree the artificial racial barriers have completely dissolved at the plant." *Id.*

⁴⁸ The approval of a proposed settlement is a matter for the sound discretion of the trial court. *Girsh v. Jenson*, 521 F.2d 153, 156 (3d Cir. 1975). In reviewing a proposed settlement, the trial court's function is to ensure that it is lawful, reasonable, and just. *United States v. City of Alexandria*, 614 F.2d 1358, 1361, 22 FEP Cas. 874, 874 (5th Cir. 1980). The trial court must include in its considerations the likelihood of the plaintiffs' success, if the case were tried, and whether the benefits available under the consent decree approximate those which could be obtained at trial. *See, e.g., Flinn v. FMC Corp.*, 528 F.2d 1169, 1173, 12 FEP Cas. 1069, 1070-71 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974). This evaluation, which necessarily incorporates some assessment of the merits of the plaintiffs' claims, has been described as one of the most important factors in the court's decision whether to enter a consent decree. *Grunin v. International House of Pancakes*, 513 F.2d at 124 (quoting *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971)). Permitting or denying entry of a consent decree, however, signifies no final disposition of the merits of the case. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 456.

⁴⁹ 446 F. Supp. at 791, 16 FEP Cas. at 1072.

The district court closed its opinion with the statement:

When the parties have settled their differences without a violation of the law and without violating the right of any class members, the Court will enter an appropriate order without prejudice to the right of any person to seek redress for racial discrimination. But this Court will not, by entering the proposed Consent provide the parties with a judicial license to practice racial discrimination.

Id.

"qualified blacks."⁵⁰ Since the seasonal employees at the plant traditionally had been and continued to be all black,⁵¹ the court concluded that the benefits promised to seasonal employees under the settlement were actually to be provided on the basis of race.⁵² According to the court's reading of Title VII,⁵³ preferential treatment on the basis of race could be permitted as a remedy only where racial discrimination had been proven,⁵⁴ and only where the benefits were limited to the victims of the discrimination.⁵⁵ Therefore, the court determined that, even if the facts submitted in support of the proposed settlement had established past or present discrimination,⁵⁶ the sections of the agreement which provided preferential treatment to seasonal employees violated Title VII because they applied to all present and future seasonal employees, not just to those who had been injured by the employers' racial discrimination.⁵⁷ The proposed settlement's fifth provision, which established a goal of promoting qualified blacks to supervisory positions, was rejected by the district court because it established an illegal racial quota.⁵⁸ The court concluded, that the agreement before it violated the law in its remedial use of racial preference, and therefore refused to approve the settlement.⁵⁹ The court invited the parties to revise their agreement, and to arrive at a settlement that would violate neither the law nor the rights of any class members.⁶⁰

The plaintiffs appealed the district court's decision, under section 1292(a)(1), to the United States Court of Appeals for the Fourth Circuit.⁶¹ A closely divided court of appeals concluded that the trial court's interlocutory decision could not be appealed prior to final judgment.⁶² The court stated that although the proposed settlement did provide for injunctive relief, the district court's refusal to approve the settlement merely delayed, rather than denied, the opportunity to attain the relief.⁶³ The court of appeals observed that the

⁵⁰ *Id.* at 783, 16 FEP Cas. at 1067.

⁵¹ *Id.* at 788, 16 FEP Cas. at 1070.

⁵² *Id.* at 788-89, 16 FEP Cas. at 1070-71.

⁵³ *Id.* at 785-87, 16 FEP Cas. at 1068-70.

⁵⁴ *Id.* at 787, 16 FEP Cas. at 1069 (discussing *Patterson v. American Tobacco Co.*, 535 F.2d 257, 12 FEP Cas. at 314 (4th Cir. 1976)).

Although the court refrained from passing formally on the merits of the plaintiffs' case, it responded to the parties' suggestion that the decree was "intended to overcome the last vestiges of racial discrimination," 446 F. Supp. at 790, 16 FEP Cas. at 1072, by remarking that "the facts admitted by the parties show that with great rapidity and without any decree the artificial racial barriers have completely dissolved at the plant." *Id.*

⁵⁵ *Id.* at 786, 16 FEP Cas. at 1071.

⁵⁶ *Id.* at 789, 16 FEP Cas. at 1071.

⁵⁷ *Id.*

⁵⁸ *Id.* at 789-90, 16 FEP Cas. at 1072.

⁵⁹ *Id.* at 791, 16 FEP Cas. at 1072.

⁶⁰ *Id.* See also note 49 *supra*.

⁶¹ *Carson v. American Brands, Inc.*, 606 F.2d 420, 421, 20 FEP Cas. 1186, 1187 (4th Cir. 1979).

⁶² 606 F.2d at 421, 20 FEP Cas. at 1187. Three judges joined in the majority opinion, authored by Judge Hall, while two judges joined in Judge Winter's dissenting opinion.

⁶³ *Id.* at 423, 20 FEP Cas. at 1188; see also *id.* at 429 n.1 (Winter, J., dissenting).

plaintiffs retained the opportunity to win final injunctive relief at trial, to circumvent trial by revising the settlement until it met with judicial approval, or to appeal the trial court's order after final judgment.⁶⁴ Furthermore, postponing appellate review until after the conclusion of trial would serve the policy behind Federal Rule 23(e), by permitting the district court to retain supervisory control of the litigation pending before it.⁶⁵ A single appellate review would also serve the policies of the finality rule by providing the appellate court with a fully developed factual record against which to determine whether the trial court's refusal of any proposed settlement had constituted an abuse of discretion.⁶⁶ Therefore, the circuit court reasoned that delaying review of the trial court's denial of the consent decree until after final judgment in the case would entail no irreparable injury to the plaintiffs, and would serve the interests of judicial policy. The court therefore concluded that the district court's order was not appealable under section 1292(a)(1), and dismissed the appeal.⁶⁷ Three justices dissented on the jurisdictional issue, reasoning that the loss of the opportunity to settle the case was itself an irreparable consequence creating jurisdiction for an immediate appeal.⁶⁸

The petitioners appealed the ruling of the court of appeals to the Supreme Court.⁶⁹ The Court, noting a conflict in the circuits on the issue of whether denial of a consent decree was appealable under section 1291 or section 1292(a)(1),⁷⁰ granted certiorari.⁷¹ In a unanimous opinion, authored by Justice Brennan, the Court held that the district court's refusal to enter the consent decree was appealable under section 1292(a)(1) as an order refusing an injunction.⁷²

In keeping with the precedents decided under the statute, the Court's analysis focused on whether the denial of the consent decree would have a "serious, perhaps irreparable, consequence,"⁷³ which to be challenged effec-

⁶⁴ *Id.* at 423, 425, 20 FEP Cas. at 1188, 1190.

⁶⁵ *Id.* at 424, 20 FEP Cas. at 1189.

⁶⁶ *Id.*

⁶⁷ *Id.* at 425, 20 FEP Cas. at 1190.

⁶⁸ *Id.* at 429, 20 FEP Cas. at 1190 (Winter, J., dissenting). The dissenting justices, having determined that the appeals court did have jurisdiction to hear the appeal, considered the merits of that appeal. *Id.* at 430, 20 FEP Cas. at 1193. The dissenting justices concluded that the trial court had abused its discretion in refusing to enter a consent decree. *Id.*, 20 FEP Cas. at 1194. They found that the terms of the settlement submitted to the trial court had satisfied the standards for consent decrees established in the Fourth Circuit. *Id.* The dissenting justices noted that the Supreme Court's opinion in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), had established that voluntary agreements such as those in the proposed consent decree did not violate Title VII. *Carson*, 606 F.2d at 431, 20 FEP Cas. at 1194-95. The *Weber* decision, according to the dissent, vitiated the trial court's holding that the voluntary use of racial preference in the proposed settlement had violated Title VII. *Id.* Therefore, the dissent concluded that the trial court's refusal to enter the consent decree had constituted a reversible abuse of discretion. *Id.* at 432, 20 FEP Cas. at 1195.

⁶⁹ *Carson v. American Brands, Inc.*, 101 S.Ct. at 995.

⁷⁰ *Id.* at 995.

⁷¹ *Carson v. American Brands, Inc.*, 447 U.S. 920 (1980).

⁷² 101 S.Ct. at 999.

⁷³ *Id.* at 996 (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. at 181).

tively would require an immediate appeal.⁷⁴ The Court concluded that there were two such consequences of the lower court's order. The first "serious, perhaps irreparable consequence" identified by the Court was the loss by the plaintiffs of the opportunity to settle their case.⁷⁵ The second such consequence found to justify an immediate appeal under section 1292(a)(1) was the temporary loss of the injunctive remedies guaranteed by the settlement.⁷⁶ Turning to the first such consequence, the Court observed that the trial court's refusal to approve the settlement had jeopardized the plaintiffs' opportunity to settle their case on terms agreeable to both parties.⁷⁷ By agreeing to a settlement, the Court remarked, the parties had waived the "right to litigate the issues involved in the case"⁷⁸ in exchange for the freedom from the expense and uncertainty of trial.⁷⁹ This waiver, according to the Court, constituted "an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation."⁸⁰ The district court's refusal to approve the settlement altered that condition, the Court observed, by "effectively order[ing] the parties to proceed to trial."⁸¹ In a footnote to the opinion, the Court assessed the possibility of securing the approval of a revised settlement as "effectively foreclosed" by the district court's criteria.⁸² The Court found that denial of a proposed consent decree could irreparably deprive the parties of "their right to compromise their dispute on mutually agreeable terms"⁸³ because either party might legally be able to withdraw its consent to a pending settlement.⁸⁴ The Court concluded that losing the opportunity to effectuate a settlement was in itself a "serious, perhaps irreparable, consequence," justifying immediate appeal under section 1292(a)(1).⁸⁵

The Court addressed, in a footnote, the policy considerations pertinent to denials of consent decrees. The legislative history of Title VII indicated a "strong preference" for the voluntary settlement of Title VII claims, the Court noted.⁸⁶ Rejecting the reasoning of the court of appeals, the Supreme Court concluded that postponing review of the refusal of a consent decree until after final judgment would hinder appellate review.⁸⁷ The Court reasoned that such a delay could oblige the appellate court to choose between the remedies agreed upon by the parties, and those ordered by the trial court after judicial deter-

⁷⁴ 101 S.Ct. at 996.

⁷⁵ *Id.* at 998.

⁷⁶ *Id.* at 999.

⁷⁷ *Id.* at 998.

⁷⁸ *Id.* at 998 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)).

⁷⁹ *Carson*, 101 S.Ct. at 998.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 998 n.12.

⁸³ *Id.* at 998 (footnote omitted).

⁸⁴ *Id.* The defendants in *Carson* had tried to withdraw their consent to the agreement during the course of the litigation. *Id.* at 998 n.13.

⁸⁵ *Id.* at 998.

⁸⁶ *Id.* at 998 n.14.

⁸⁷ *Id.*

mination of the facts of the case and the liabilities of the parties.⁸⁸ This potential result was unacceptable to the Court.⁸⁹ Furthermore, since an estimate of the plaintiffs' likely chances for success at trial determines whether approval of the settlement will be granted, post hoc review would be less equitable than a review preceding the conclusive establishment of the parties' rights and liabilities.⁹⁰ The Court concluded that, in the circumstances presented by the denial of a decree approving the settlement of a Title VII action, the policy against "piecemeal appeals" did not apply.⁹¹

The Court identified as an additional injury justifying immediate appeal under section 1292(a)(1) the temporary loss of the injunctive remedies guaranteed by the settlement.⁹² In their original complaint, the petitioners had requested preliminary and permanent injunctions which would have restructured the employers' employment practices.⁹³ The Court determined that the provisions of the proposed settlement were equivalent to those requested as injunctive relief.⁹⁴ The Court therefore concluded that the trial court's refusal to approve the settlement had denied the petitioners the immediate injunctive remedies available under the agreement.⁹⁵

Under *Carson*, the loss of the opportunity to settle a case, and the loss of the injunctive benefits of settlement agreement, constitute "serious, perhaps irreparable consequences" justifying an immediate appeal under section 1292(a)(1).⁹⁶ The decision alters the law regarding interlocutory appeals under section 1292(a)(1)⁹⁷ in several respects. One consequence of the *Carson* decision is that interlocutory orders now may be appealed under section 1292(a)(1) even if the lower court's ruling does not pass on the merits of the case. Cases decided prior to *Carson* had maintained that a court order which did not on its face grant or deny a request for an injunction could be appealed before final judgment only if it resulted in a "serious, perhaps irreparable consequence."⁹⁸ Under these earlier cases, such an effect would be found only if the lower court's ruling passed upon the merits of the case.⁹⁹ If the only result of the ruling was to oblige the parties to pursue the litigation,¹⁰⁰ or to have the parties' claims decided in some later suit,¹⁰¹ no appeal could be taken under section

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 998-99 n.14.

⁹¹ See text and notes at notes 1-3, 6-9 *supra*.

⁹² 101 S.Ct. at 999.

⁹³ *Id.* at 999 n.15.

⁹⁴ *Id.* The Court, after quoting the plaintiffs' prayer for injunctive relief, stated, "[t]his is essentially the relief that petitioners would have obtained under the proposed consent decree." *Id.*

⁹⁵ *Id.* at 999.

⁹⁶ *Id.*

⁹⁷ 28 U.S.C. § 1292(a)(1) (1976). See text and notes at notes 6-13 *supra*.

⁹⁸ See, e.g., *Gardner*, 437 U.S. at 482; *Switzerland Cheese*, 385 U.S. at 25; *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. at 178-79.

⁹⁹ See, e.g., *Gardner*, 437 U.S. at 480-81; *Switzerland Cheese*, 385 U.S. at 25.

¹⁰⁰ *Switzerland Cheese*, 385 U.S. at 25. See also text at note 21 *supra*.

¹⁰¹ *Gardner*, 437 U.S. at 480-81. See also text at note 29 *supra*.

1292(a)(1).¹⁰² These principles were followed in order to preserve the policy against "piecemeal appeals" expressed by Congress in its statutory regulations of the federal courts.¹⁰³

Carson departed from the principles that the Court had established in prior cases. In *Carson*, the trial court's decision to disapprove the proposed consent decree did not pass on the merits of the case.¹⁰⁴ The order was nevertheless held to be appealable under section 1292(a)(1). *Carson* therefore creates an exception to the requirement that the interlocutory orders of a district court may not be appealed unless the order passes on the merits of the case. In carving out this exception to the finality rule, the Court employed two novel rationales. First, the Court reasoned that the loss of the opportunity to settle a case on "mutually agreeable terms" visited "serious, perhaps irreparable consequences" on the plaintiffs. The Court also reasoned that because the provisions in the proposed consent decree were equivalent to the preliminary injunctive relief requested in the complaint, denying approval to the consent decree was tantamount to denying preliminary injunctive relief. In the next section, these two threads of the Court's reasoning will be tested for their merit and will be evaluated against the background of the Court's prior decisions construing section 1292(a)(1).

The Court's reasoning concerning the loss of the opportunity to settle the case implicitly overrules its earlier decisions regarding appeals under section 1292(a)(1). In the *Switzerland Cheese* decision, the Court held that the denial of a motion for summary judgment meant only that the parties were obliged to proceed to trial.¹⁰⁵ The Court expressly rejected the notion that an order whose only result was to require trial could present the kind of consequence permitting immediate appeal under section 1292(a)(1).¹⁰⁶ In the *Carson* case, the parties' loss of the opportunity to settle on "mutually agreeable terms" meant that their respective liabilities and remedies would be established at trial, rather than compromised out of court.¹⁰⁷

It is difficult to distinguish between the effects of the interlocutory orders at issue in *Carson* and *Switzerland Cheese*. The denial of the motion for summary judgment was held not appealable in the *Switzerland Cheese* decision, because it "decide[d] only one thing — that the case should go to trial."¹⁰⁸ Refusing to approve the proposed settlement in *Carson*, however, did not even require trial; the parties retained the opportunity to avoid trial by revising the agreement until it satisfied the standards articulated by the trial court.¹⁰⁹ *Carson* and

¹⁰² *Gardner*, 437 U.S. at 482; *Switzerland Cheese*, 385 U.S. at 25.

¹⁰³ *Gardner*, 437 U.S. at 482.

¹⁰⁴ Approval or denial of a proposed settlement implicitly considers the merits of the case, but only to determine whether the settlement fairly represents the relief which the plaintiff was likely to have won at trial. See note 48 *supra*.

¹⁰⁵ *Switzerland Cheese*, 385 U.S. at 25.

¹⁰⁶ *Id.*

¹⁰⁷ *Carson*, 101 S.Ct. at 998.

¹⁰⁸ *Switzerland Cheese*, 385 U.S. at 25.

¹⁰⁹ See text and notes at notes 60 & 64 *supra*.

Switzerland Cheese are therefore inconsistent in their conclusions regarding the appealability of a judicial order which determines, on its face, only that the parties proceed to trial. To the extent that *Switzerland Cheese* forbids the immediate appeal of such rulings, *Carson* modifies the *Switzerland Cheese* rule. Cases following *Carson* also must consider the impact of the ruling upon the parties during the interim between its issuance and the final resolution of the case.

The *Carson* Court's holding that the loss of the opportunity to settle a case constituted a result of serious consequence was based in part on its analysis of a settlement agreement as a contractual arrangement. The Court found that a negotiated settlement incorporates an express or implied condition that both parties are waiving the right to litigate the issues.¹¹⁰ The district court's interference with this agreement was viewed as inflicting a "serious, perhaps irreparable" consequence upon the parties.¹¹¹ The Court has held that entry of a consent decree, is to be treated as a judicial act, rather than as a contract.¹¹² In circumstances such as those in *Carson*, where a consent decree is sought for the settlement of a class action, the court's approval is required to dismiss the suit.¹¹³ To view the trial court's performance of its duty as interfering with a contract right is inappropriate in the context of Title VII litigation.

The Court's emphasis on the parties' right to settle a Title VII suit on mutually agreeable terms also conflicts with the policies expressed in the requirements of the Federal Rules of Civil Procedure.¹¹⁴ Rule 23(e) requires final approval by the court before a class action can be dismissed.¹¹⁵ Therefore, parties to a class action do not have the right to come to a mutually agreeable arrangement without the trial court's intervention. The purpose of the requirement of court approval is to safeguard the interests of those class members who are not involved directly in the settlement negotiations.¹¹⁶ The *Carson* decision, however, violates the intent of Rule 23(e) by elevating the negotiating parties' interest in settling the case above the non-negotiating class members' interest in obtaining a fair redress to the alleged discrimination practiced against them, hitherto protected by the disinterested judgment of the trial court.

The *Carson* Court's finding that the denial of the consent decree effectively denied the plaintiffs preliminary injunctive relief was the second "serious consequence" justifying immediate appeal under section 1292(a)(1).¹¹⁷ The Court distinguished the facts of the earlier cases of *Switzerland Cheese* and *Gardner* from the *Carson* case on the basis of the nature of the injunctive relief requested.¹¹⁸ In

¹¹⁰ *Carson*, 101 S.Ct. at 998. See also text at notes 96-99 *supra*.

¹¹¹ 101 S.Ct. at 998.

¹¹² *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).

¹¹³ FED. R. CIV. P. 23(e). See note 44 *supra*.

¹¹⁴ FED. R. CIV. P. 23.

¹¹⁵ FED. R. CIV. P. 23(e).

¹¹⁶ *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

¹¹⁷ 101 S.Ct. at 998-99.

¹¹⁸ *Id.* at 997.

Switzerland Cheese, the Court expressly rejected the plaintiffs' argument that, because granting the permanent injunction requested in the motion for summary judgment would have effected immediate injunctive relief, denial of the motion for summary judgment could be appealed immediately under section 1292(a)(1).¹¹⁹ In contrast, the *Carson* Court concluded that there was an "irreparable consequence" in the denial of a proposed settlement whose provisions would have instituted prompt injunctive relief.¹²⁰ The *Carson* opinion fails to identify any distinction between the decisions in terms of the effects of the respective denials upon the parties. Instead, the opinion distinguished *Switzerland Cheese* from *Carson* on the basis of the preliminary relief prayed for in the initial complaint in *Carson*.¹²¹ The plaintiffs in *Switzerland Cheese*, however, had also requested a preliminary injunction in their complaint and had requested a permanent injunction in their motion for summary judgment.¹²² The Court's effort in *Carson* to distinguish *Switzerland Cheese* on the basis of requests for preliminary injunctions therefore seems untenable.

The Court repeated its effort to draw a distinction on the basis of a request for preliminary injunctive relief in its discussion of the *Gardner* decision. The *Carson* case defined as an "irreparable consequence" the loss of the job opportunities guaranteed by the proposed settlement.¹²³ It is difficult to distinguish this situation from that in *Gardner*, where the individuals who were denied class certification also lost opportunities they might have secured had they been permitted to participate in the named plaintiff's action.¹²⁴ Instead of being able to participate, however, they were required to suffer the loss until after final judgment had been entered.¹²⁵ While those denied class certification in *Gardner* could still litigate their claims, therefore, they suffered the same loss of injunctive remedies as in *Carson*. To distinguish the cases only on the basis of the pleadings is an overly technical approach.

Aside from being overly technical in its attempt to distinguish its decision from previous cases decided under section 1292(a)(1), the *Carson* opinion appears to have ignored the statutory language. *Carson* found determinative the distinction between requests for preliminary injunctive relief and requests for permanent injunctive relief. The language of section 1292(a)(1), however, draws no such distinction between rulings pertaining to preliminary injunctions and rulings pertaining to permanent injunctions. The statute refers only to orders "granting . . . or refusing injunctions."¹²⁶ Neither the policy against piecemeal appeals, nor the effort to prevent irreparable injury, is promoted by distinguishing between requests for preliminary and those for permanent in-

¹¹⁹ *Switzerland Cheese*, 385 U.S. at 24; see text at notes 22-25 *supra*.

¹²⁰ 101 S.Ct. at 999, 999 n.15.

¹²¹ *Id.*

¹²² *Switzerland Cheese*, 385 U.S. at 23.

¹²³ *Carson*, 101 S.Ct. at 999 & 999 n.15.

¹²⁴ *Gardner*, 437 U.S. at 480-81.

¹²⁵ *Id.*

¹²⁶ 28 U.S.C. § 1292(a)(1). See also note 7 *supra*.

junctions. The interlocutory appeal of an order granting or denying a preliminary injunction disrupts litigation as much as the interlocutory appeal of an order granting or denying a permanent injunction.¹²⁷ Irreparable injury can result from the order whether the requested injunction was for preliminary or requested relief.¹²⁸ Thus, the *Carson* Court's reliance on the plaintiffs' request for a preliminary injunction is inconsistent with the language and the goals of section 1292(a)(1).¹²⁹

The Court's opinion in *Carson* enforces the preference for speedy and voluntary settlements expressed in the legislative history of Title VII.¹³⁰ The opportunity to compromise a class action is, as a result of the *Carson* opinion, recognized as a right.¹³¹ The district court trying a class action is viewed as having the power to abrogate that right by denying the consent required to terminate the suit.¹³² Prior to *Carson*, the litigants had no assured recourse against such an order until after final judgment in the class action.¹³³ The strictures of the finality rule prevented the interlocutory appeal of orders denying consent decrees because they failed to pass upon the merits of the case.¹³⁴ The Court's decision in *Carson*, however, may now provide Title VII litigants with the guarantee of prompt judicial review of district court decisions preventing the voluntary settlement of class actions brought under Title VII.

2. Requirement of Numerosity Under Rule 23(b)(2): *Gurmankin v. Costanza**

In order to maintain a class action under Rule 23 of the Federal Rules of Civil Procedure, four prerequisites must be satisfied.¹ The first of these requirements, embodied in Rule 23(a)(1), provides that the class must be "so numerous that joinder of all members is impracticable."² The numerosity re-

¹²⁷ *EEOC v. International Longshoremen's Ass'n*, 511 F.2d 273, 276, 10 FEP Cas. 545, 548 (5th Cir.), cert. denied, 423 U.S. 994 (1975).

¹²⁸ *Id.* at 277, 10 FEP Cas. at 548.

¹²⁹ 28 U.S.C. § 1292(a)(1).

¹³⁰ *Carson*, 101 S.Ct. at 998 n.14.

¹³¹ *Id.* at 998.

¹³² *Id.*

¹³³ *See, e.g., Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978).

¹³⁴ *Carson v. American Brands, Inc.*, 606 F.2d 420, 421, 20 FEP Cas. 1186, 1187 (4th Cir. 1979).

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¹ Rule 23 (a) of the Federal Rules of Civil Procedure establishes four prerequisites for bringing a class action:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 28.

² *See, e.g., Piel v. National Semiconductor Corp.*, 86 F.R.D. 357, 365 (E.D. Pa. 1980)

quirement prevents members of a small class from being deprived of their opportunity to a day in court by the opposing party or by only a few individuals seeking class certification.³ It also allows a full and fair exposition of the merits of all parties' claims, where it is impracticable to join the total number of litigants because of class size.⁴ Whether a proposed class will be deemed large enough to satisfy the numerosity requirement is generally determined by the facts of a particular case, and courts have exercised broad discretion in formulating the acceptable parameters of class size.⁵ Thus, although the number of class members will typically be an important consideration in assessing practicality of joinder, other factors, such as the type of action and the nature of relief sought may also be taken into account.⁶

Many courts now overlook the numerosity requirement in employment discrimination class actions, reasoning that such suits inherently warrant class certification.⁷ Rather than seeking pecuniary damages, these suits are frequently brought under Rule 23(b)(2), and seek only injunctive or declaratory relief to prevent future harm.⁸ Courts which have rejected the importance of the numerosity requirement in Rule 23(b)(2) employment discrimination ac-

("What is considered 'impracticable' is of course a subjective determination although the indicia of the number of parties involved, the expectancy of joinder and the inconvenience of trying individual suits provide guidance.").

³ 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1762, at 593 (1972).

⁴ *Scott v. University of Del.*, 601 F.2d 76, 88, 19 FEP Cas. 1730, 1739 (3d. Cir. 1979).

⁵ *General Tel. Co. of the N.W., Inc. v. EEOC*, 446 U.S. 318, 22 FEP Cas. 1196 (1980); *Stoner v. Ford*, 390 F. Supp. 327, 328 (N.D. Okla. 1974); *Fifth Moorings Condominium, Inc. v. Shere*, 81 F.R.D. 712, 715 (S.D. Fla. 1979) ("The judgment as to whether a given number is sufficient is not susceptible to hard and fast standards. . . ."). Courts have been inconsistent in granting certification. *See, e.g.*, C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1762 (1972); 3B MOORE'S FEDERAL PRACTICE ¶ 23.05 (2d ed. 1978).

⁶ *Davy v. Sullivan*, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973) (Nature of the cause of action and location of class members bear on propriety of class action.); *Harris v. Pan Am. World Airways, Inc.* F.R.D. 24, 45 (N.D. Cal. 1977) (Numbers alone do not determine impracticability; all circumstances must be viewed, including magnitude of claim and degree of dispersion of prospective plaintiffs.); *Sturdevant v. Deer*, 73 F.R.D. 375, 378 (E.D. Wis. 1976) (Numerosity requirement lowered where injunctive relief sought.).

⁷ *See, e.g.*, *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330, 1333 (9th Cir. 1977) (Employment discrimination is by definition a class action.); *Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975) (numerosity not at bar in civil rights action seeking injunctive relief for future class). *See also*, C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1771 at 663 (1972) (suggesting that due to the nature of claims and type of relief sought in Rule 23(b)(2) suits, a less stringent application of Rule 23(a) requirements is appropriate). See text and notes at notes 54-59 *infra*, discussing the rationales of courts which have overlooked the numerosity requirement.

⁸ Rule 23(b) of the Federal Rules of Civil Procedure divides class actions into three types. Besides satisfying the Rule 23(a) prerequisites, parties wishing to obtain certification must demonstrate that their action falls into one of the three categories. Rule 23(b)(2) requires a showing that: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole," FED. R. CIV. P. 23(b)(2). For a discussion of the Rule 23(b)(2) action see generally Note, *Antidiscrimination Class Actions under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L. J. 868 (1969); Comment, *Rule 23: Categories of Subsection (b)*, 10 B.C. IND. & COM. L. REV. 539, 542 (1969).

tions have used three basic rationales in support of their position. The reasons cited are that: (1) employment discrimination is a class-wide action by its very nature;⁹ (2) numerosity requirements may be lowered where the relief sought is injunctive or declaratory rather than pecuniary in nature;¹⁰ and (3) Congress intended the numerosity requirement to be relaxed in employment discrimination suits brought under Rule 23(b)(2) or title VII¹¹ of the Civil Rights Act of 1964.¹² Although the growing trend is toward greatly reducing the vitality of the numerosity requirement in Rule 23(b)(2) employment discrimination class suits, the issue is not free from doubt.¹³

During the *Survey* year the Court of Appeals for the Third Circuit addressed the issue of whether the numerosity requirement of Rule 23 should be retained in employment discrimination suits where the plaintiff requesting certification seeks only prospective remedial relief rather than pecuniary damages.¹⁴ In *Gurmankin v. Costanza*,¹⁵ the court held that the numerosity requirement must be observed in employment discrimination actions regardless of the relief being sought.¹⁶ Despite its refusal to grant certification, however, the court did remand the case to the district court for a determination of further action necessary to correct past, and to prevent future, employment discrimination.¹⁷ Thus, although the court refused to follow the current trend of circumventing the numerosity requirement in actions of this sort, it did indicate a willingness to provide prospective remedial relief through a means other than class certification.¹⁸

Ms. Gurmankin, a blind school teacher, first attempted to obtain employment with the Philadelphia School District in 1969.¹⁹ Because of a medical and personnel policy which excluded blind teachers from teaching sighted pupils in the Philadelphia public schools, Ms. Gurmankin was not permitted to take the examination.²⁰ In 1974, pursuant to a change in policy, Ms. Gurmankin was allowed to take the test and she passed.²¹ Ms. Gurmankin was then offered several positions by the school district.²² She rejected these offers, however, because they did not include retroactive seniority to which she claimed to be

⁹ See, e.g., *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330, 1333 (9th Cir. 1977).

¹⁰ See, e.g., *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275-76, 14 FEP Cas. 1460, 1465 (10th Cir. 1977).

¹¹ 42 U.S.C. § 2000e-2000e-17 (1976).

¹² See, e.g., *Rasmatakala v. United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976).

¹³ See text and notes at notes 51-77 *infra*.

¹⁴ See note 26 *infra*.

¹⁵ 626 F.2d 1132, 23 FEP Cas. 344 (3d Cir. 1980).

¹⁶ *Id.* at 1135, 23 FEP Cas. at 346.

¹⁷ *Id.* at 1136-37, 23 FEP Cas. at 349.

¹⁸ *Id.*

¹⁹ 411 F. Supp. 982, 985, 12 FEP Cas. 1057, 1058 (E.D. Pa. 1976).

²⁰ *Id.* at 985, 12 FEP Cas. at 1059.

²¹ *Id.*

²² *Id.* at 988, 12 FEP Cas. at 1061.

entitled due to past discrimination.²³ Unable to secure a position with retroactive seniority, Ms. Gurmankin filed suit in district court under section 1983 of the Civil Rights Act of 1871,²⁴ alleging that the school district's hiring policies were unconstitutional and asking for an order directing the school district to offer her a teaching position with retroactive seniority.²⁵ She also requested prospective remedial relief designed to prevent future discrimination, on behalf of herself and the class of all visually handicapped teachers who had been denied the opportunity to teach sighted children in the Philadelphia public schools.²⁶ Although Ms. Gurmankin produced only two other individuals who qualified as class members, she urged that to determine numerosity, the court should include all other blind individuals who might seek employment with the Philadelphia school district in the future.²⁷

The district court found that the hiring policies of the school district, which until 1974 had prevented blind individuals from taking the teachers' examination, had violated Ms. Gurmankin's right to due process.²⁸ Pursuant to its findings, the district court issued an injunction ordering the school district to offer Ms. Gurmankin a teaching position with seniority rights.²⁹ The district court, however, declined the plaintiff's request to include future class members in her class.³⁰ The court rejected as too speculative the plaintiff's argument that because some blind teachers would seek jobs in Philadelphia, a sufficient number of unidentified class members existed to satisfy the numerosity requirement of Rule 23.³¹ After excluding these future class members, the court found that the class of three individuals was not so numerous that joinder of all members was impracticable.³² Although certification was denied, the court believed the principle of *stare decisis* would prevent future discrimination by the

²³ *Id.*

²⁴ 42 U.S.C. § 1983 (1976). Ms. Gurmankin also alleged violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976). *Id.* at 983, 12 FEP Cas. at 1057.

²⁵ 626 F.2d 1115, 1118, 23 FEP Cas. 301, 302 (3d Cir. 1980). Ms. Gurmankin also asked for back pay awards. *Id.*

²⁶ 626 F.2d 1132, 1133-34, 23 FEP Cas. 344, 345 (3d Cir. 1980). It is unclear from the record whether Ms. Gurmankin's class action was brought under Rule 23(b)(2) solely for injunctive relief to prevent future harm. From Ms. Gurmankin's arguments as well as the Third Circuit's discussion, see 626 F.2d at 1135, 23 FEP Cas. at 346, this would appear to be the case.

²⁷ *Id.* at 1134, 23 FEP Cas. at 345.

²⁸ *Gurmankin v. Constanzo*, 411 F. Supp. at 982, 991-92, 12 FEP Cas. 1057, 1064 (E.D. Pa. 1976). The district court noted that many of Ms. Gurmankin's claims were based upon actions that occurred prior to her taking the exam. *Id.* at 989, 12 FEP Cas. at 1062. The court found that these policies violated the plaintiff's due process rights. *Id.* at 991-92, 12 FEP Cas. at 1064. The court also found that the school district's evaluation of Ms. Gurmankin at the 1974 interview was conducted in a discriminatory manner. *Id.* at 992, 12 FEP Cas. at 1064.

²⁹ *Id.* at 993; 12 FEP Cas. at 1065, 1066.

³⁰ 626 F.2d at 1134, 23 FEP Cas. at 345.

³¹ This discussion of numerosity was not alluded to in the district court's opinion at 411 F. Supp. 982, 12 FEP Cas. 1057 (E.D. Pa. 1976).

³² 626 F.2d at 1134, 23 FEP Cas. at 345. Although Ms. Gurmankin produced six other individuals, the court found that only two qualified as class members. *Id.*

school district.³³ In addition, the district court noted that the school district's offer to announce its willingness to accept blind applicants would help rectify the negative effects of past discrimination.³⁴

On appeal, the Third Circuit Court of Appeals affirmed the district court's order refusing to grant certification.³⁵ Ms. Gurmankin had urged that certification was proper on two alternative grounds. She argued first that the numerosity requirement is unnecessary where class-wide discrimination has been proven.³⁶ She also contended that even if the numerosity requirement were applied, it would be satisfied by including within her class all other blind individuals who might seek employment with the Philadelphia school district in the future.³⁷ The court conceded that several factors tended to support Ms. Gurmankin's initial argument that fulfillment of the numerosity requirement was unnecessary. The court first took note of the liberal position adopted by the Advisory Committee favoring certification in Rule 23(b)(2) actions.³⁸ The court also acknowledged that in *Wetzel v. Liberty Mutual Insurance Co.*³⁹ it had indicated that employment discrimination actions were particularly well suited for class action treatment.⁴⁰ Finally, the court observed that a number of other courts and authorities had adopted a more liberal attitude toward applying the numerosity requirement in employment discrimination class actions.⁴¹

Despite acknowledging a trend away from strict enforcement of the numerosity requirement in cases like the one at bar, the *Gurmankin* court declined to read the numerosity requirement out of the class action rule altogether.⁴² The court noted that the Rule 23(a) prerequisites make no mention of particular cases where the requirements for maintaining a class action may be relaxed.⁴³ The court also observed that in *East Motor Freight System v.*

³³ *Id.* at 1134; 23 FEP Cas. at 345. Exactly what the district court meant by this statement is unclear because this part of the court's opinion is unreported and is only alluded to in the circuit court's decision.

³⁴ *Id.* See note 33 *supra*.

³⁵ *Id.* at 1134, 23 FEP Cas. at 346. Two other appeals preceded this action. On the first appeal the Third Circuit Court of Appeals upheld the district court's finding that Ms. Gurmankin's due process rights had been violated by the school district's discriminatory hiring policy. *Gurmankin v. Costanzo*, 556 F.2d 184, 14 FEP Cas. 1359 (3d Cir. 1977). On the second appeal Ms. Gurmankin was awarded back pay from the date she would have been employed absent the school district's discrimination policy. *Gurmankin v. Costanzo*, 626 F.2d 1115, 23 FEP Cas. 301 (3d Cir. 1980).

³⁶ 626 F.2d at 1134, 23 FEP Cas. at 346.

³⁷ *Id.*

³⁸ *Id.* See also note 58 *infra*.

³⁹ 508 F.2d 239, 259, 9 FEP Cas. 211, 226 (3d Cir.), *cert. denied*, 421 U.S. 1011, 10 FEP Cas. 1056 (1975).

⁴⁰ 626 F.2d at 1135, 23 FEP Cas. at 346.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

*Rodriguez*⁴⁴ the Supreme Court of the United States indicated that even in cases involving racial or ethnic discrimination, which by their very nature are class actions, the requirements of Rule 23 must still be carefully observed.⁴⁵

The court next turned to Ms. Gurmankin's second and "most compelling argument" which asserted that in order to provide effective class-wide remedial relief, the potential number of future class members must be taken into account.⁴⁶ The court did not deal directly with the merits of this argument, apparently acceding to the district court's determination that this contention was too speculative.⁴⁷ The court did find it significant, however, that the district court had intended to grant broad remedial relief to all blind individuals who might be deterred from seeking positions in the Philadelphia public schools.⁴⁸ As of the time of this appeal, however, the school district had failed to initiate steps to inform blind teachers of its change in policy.⁴⁹ Noting that the need for such effective remedial relief was adequately supported by the record, the court remanded the case to the district court for further consideration of the remedial relief necessary to eliminate unlawful discrimination and publicize the school district's new policy encouraging blind applicants.⁵⁰

The *Gurmankin* decision is important because it highlights the uncertainty concerning the application of the numerosity requirement in employment discrimination class actions. As the court in *Gurmankin* noted, it may be appropriate to lower the numerosity requirement in actions of this sort.⁵¹ Nevertheless, pending further legislative clarification, it would seem preferable to allow the class action prerequisites of Rule 23(a) to retain their vitality, even in employment discrimination class actions. This conclusion recognizes the tremendous degree of factual variation in such suits, as well as the feasibility of providing alternative means of prospective remedial relief. Thus, for example,

⁴⁴ 431 U.S. 395, 405, 14 FEP Cas. 1505, 1509 (1975).

⁴⁵ 626 F.2d at 1135, 23 FEP Cas. at 346. (construing *East Motor Freight System v. Rodriguez*, 431 U.S. at 405, 14 FEP Cas. at 1509). *Rodriguez* was not given precedential effect in *Gurmankin*, because in *Rodriguez* the Court addressed the adequacy of representation under Rule 23(a)(4), rather than numerosity under Rule 23(a)(1). *Id.*

⁴⁶ 626 F.2d at 1135, 23 FEP Cas. at 346. In *Scott v. University of Del.* 601 F.2d 76, 19 FEP Cas. 1730 (3d Cir. 1979), the Third Circuit Court of Appeals rejected an attempt to satisfy numerosity by alleging the existence of future class members. *Id.* at 89, 19 FEP Cas. at 1739. Although the *Scott* opinion indicates that this claim was insufficient on the facts of this case, *id.* at 89, 19 FEP Cas. at 1739-40, footnote 25 of the *Scott* opinion cites *Wetzal* for the proposition that future class members are not to be used at all to determine numerosity. *Id.* at 88 n. 25, 19 FEP Cas. at 1739 n. 25. Hence, it is unclear whether the Third Circuit's position is that future class members are not to be counted at all in determining numerosity, or may be counted, but are not by themselves determinative of numerosity.

⁴⁷ See text and note at note 31 *supra*.

⁴⁸ 626 F.2d at 1136, 23 FEP Cas. at 347.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1137, 23 FEP Cas. at 347.

⁵¹ *Id.* at 1135, 23 FEP Cas. at 346.

although unwilling to certify Ms. Gurmankin's class, the *Gurmankin* court did appear anxious to prevent future discrimination by the school district.⁵² As this was apparently the primary aim of Ms. Gurmankin's class action, the court's result in remanding the case to the district court does not differ significantly from class treatment.⁵³

In retaining the vitality of the numerosity requirement in employment discrimination actions and in upholding the trial court's broad discretion in determining the practicality of joinder, the *Gurmankin* court reached the correct result. Nevertheless, by failing to grant certification, the Third Circuit stands counter to the current weight of authority which has in effect eradicated the numerosity requirement in employment discrimination class actions brought under Rule 23(b)(2).⁵⁴ Courts which have abandoned the numerosity requirement in cases similar to *Gurmankin* have advanced several arguments in support of their position. One argument commonly asserted is that employment discrimination by its very nature is a class-wide action.⁵⁵ Here it is assumed that a discriminatory policy which affects one employee will necessarily affect all other employees similarly situated.⁵⁶ A second justification often expressed is that where the nature of the relief sought is injunctive only, the requirements of Rule 23(a) should be relaxed.⁵⁷ No express reasoning appears to support this conclusion, although courts using this argument probably reason that injunctive relief subjects defendants to potentially less severe consequences than pecuniary damages. Many courts also note that Congress intended class certification to be easily obtainable in suits to enforce statutes governing employ-

⁵² *Id.* at 1137, 23 FEP Cas. at 347. The court ruled that under the district court's direction, the school district must actively inform blind applicants of its willingness to accept blind teachers. *Id.*

⁵³ With respect to providing prospective remedial relief alone, the method of remanding to the district court for class certification should achieve the same result. Under either procedure, the school district must cease its hiring discrimination against the handicapped and announce to this group its willingness to accept applications. There are, however, important differences between the two procedures. Under the method chosen by the court, for example, any individual claiming monetary damages such as back pay will have to litigate this claim in a separate action against the school district. Under class certification, however, it is possible that a class member claiming injury and seeking back pay awards could use the *Gurmankin* decision as *res judicata* for his individual claim. See text and notes at notes 75-76 *infra*.

⁵⁴ See note 6 *supra* and text and notes at notes 55-59 *infra*.

⁵⁵ See, e.g., *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330, 1333 (9th Cir. 1977) (employment discrimination based on race, sex, or national origin is by definition class-wide discrimination); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340, 11 FEP Cas. 211, 216 (10th Cir. 1975) (class actions are generally appropriate in Title VII employment discrimination actions).

⁵⁶ See, e.g., *Afro Am. Patrolmen's League v. Duck*, 503 F.2d 294, 298, 8 FEP Cas. 22, 24 (6th Cir. 1974) (suit by one employee is similar to class action for fellow employees similarly situated).

⁵⁷ See, e.g., *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) (smaller classes are less objectionable where injunctive relief is sought on behalf of future class members); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275-76, 14 FEP Cas. 1460, 1464-65 (10th Cir. 1977) (citing cases in support and concluding that where injunctive relief is sought, numerosity standards may be lowered).

ment discrimination, such as title VII and Rule 23(b)(2).⁵⁸ Finally, some courts, rather than expressing a specific justification, merely state that because of the inherent impossibility of joining future unknown employees, numerosity must necessarily be satisfied.⁵⁹

While these justifications are valid reasons for relaxing the numerosity requirement, they do not compel its total eradication. Thus the claim that employment discrimination inherently warrants class certification overlooks the argument that in many situations, the status and interests of a class of employees will differ significantly.⁶⁰ The statement that the relief sought is injunctive only does not erase the possibility that monetary damages may later be requested and granted.⁶¹ Finally, although Congress has evinced an intent to lower the numerosity requirement in certain types of actions, no express legislation authorizes abolishing the requirement that the class be "so numerous that joinder of all members is impracticable."⁶²

The arguments advanced by courts in favor of eradicating the numerosity requirement contain several flaws and do not adequately justify such a result. Several additional factors mitigate against abolishing the numerosity requirement entirely. First, no legislative directive expressly allows for eradication of any of the Rule 23(a) prerequisites. Second, the scope of the numerosity requirement is not clearly defined. Third, there are inherent ambiguities within the Rule 23(b)(2) class action. Finally, prospective remedial relief may be granted to a group without class certification.

Although the *Gurmankin* court conceded that numerosity requirements may be relaxed in class actions brought for injunctive or declaratory relief, it nevertheless refused to usurp the trial court's broad discretion in determining the practicality of joinder.⁶³ In refusing to overlook the numerosity requirement, the *Gurmankin* court focused on the lack of specific statutory language authorizing its elimination.⁶⁴ The court also apparently felt that effective remedial relief could be granted without resorting to class certification.⁶⁵

⁵⁸ See, e.g., *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330, 1333 (9th Cir. 1977) (legislative history of Title VII shows that Congress itself recognized the importance of class actions by private litigants in accomplishing the statutory purpose of eliminating discrimination in employment); *Rasmatamala v. United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976) (Class actions are particularly appropriate under Civil Rights Act of 1964.); *accord*, *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975).

⁵⁹ See *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124, 8 FEP Cas. 658, 659 (5th Cir. 1974) (Joinder of future unknown individuals is impracticable.).

⁶⁰ See Note, *Due Process Rights of the Absentee in Title VII Class Action — The Myth of Homogeneity of Interests*, 59 B.U.L. REV. 661, 673 (1979) (discussing divergent interests of class litigants).

⁶¹ See text and notes at note 75 *infra*. Injunctive relief, in the form of an affirmative action plan, may also be quite expensive.

⁶² FED. R. CIV. P. 23(a)(1). See text and notes at note 43 *supra*.

⁶³ 626 F.2d at 1135, 23 FEP Cas. at 346.

⁶⁴ *Id.*

⁶⁵ In *Gurmankin*, the court remanded the case to the district court to insure eradication of past and prevention of future discrimination by the school district. *Id.* at 1137, 23 FEP Cas. at

Although refusal to grant certification based solely on the availability of an alternative method of providing relief would not be proper, it should nonetheless be considered as a factor in determining the practicality of joinder.⁶⁶ This approach is particularly appropriate in light of the open-ended nature of the numerosity requirement.⁶⁷

The lack of express legislative authorization and the possibility of alternative means of affording prospective remedial relief in situations where joinder may not be impracticable, present strong arguments against abolishing the numerosity prerequisite. Two additional reasons not relied upon by the *Gurmankin* court, provide further support for the Third Circuit's position against automatic certification of employment discrimination actions where the only relief sought is injunctive or declaratory. First, the scope of the numerosity requirement of Rule 23 is not clearly defined.⁶⁸ Congress instead created an open-ended rule in order to allow courts flexibility in defining the parameters of numerosity on a case-by-case basis.⁶⁹ The varied treatment of acceptable class number attests to the difficulty courts have in framing set standards.⁷⁰ To adopt a rigid rule compelling certification for certain types of substantive claims would be over-simplistic and might conflict with the intent of Congress.⁷¹ This approach would automatically assume the satisfaction of the numerosity requirement regardless of the facts in a particular case. In many instances, however, even in employment discrimination actions brought under Rule 23(b)(2), joinder of all parties may be feasible.⁷² Acknowledging that the scope of the numerosity requirement is still being developed, trial courts should be afforded broad discretion in determining whether numerosity has been satisfied based on all the relevant facts.

Another problem with abolishing the numerosity requirement emanates from the nature of the Rule 23(b)(2) class action itself. Like Rule 23(a)(1),⁷³ the

347. The court did not specify what action the district court should take if the school district failed to cooperate. The court only noted that "the district court may enter the appropriate remedial decree which will insure not only the elimination of the unlawful discrimination but the adequate publication of the new policy." *Id.*

⁶⁶ See *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403, 2 FEP Cas. 842, 843 (C.D. Cal. 1970) (equitable relief may be granted without class action).

⁶⁷ See text and notes at notes 68-72 *infra*.

⁶⁸ The *Gurmankin* court recognized that the function of the numerosity requirement in class actions seeking only prospective equitable relief is "far from clear." *Id.* at 1134, 23 FEP Cas. at 345. See also *Esler v. Northrop Corp.*, 86 F.R.D. 20, 34 (C.D. Mo. 1979) (discussing the difficulties with numerosity); C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* (1972) § 1762 (precedents are uneven at best).

⁶⁹ See 3B, *MOORE'S FEDERAL PRACTICE* ¶ 23.05 at 23-149 (2d ed. 1978).

⁷⁰ See C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* (1972) § 1762; 3B *MOORE'S FEDERAL PRACTICE* ¶ 23.05 (2d ed. 1978).

⁷¹ See text at note 43 *supra*.

⁷² See, e.g., *Smith v. Board of Educ. of Morritlen School Dist.*, 365 F.2d 770, 9 FEP Cas. 1081 (8th Cir. 1966); *Lee v. Macon County Bd.*, 498 F.2d 1090, 8 FEP Cas. 936 (5th Cir. 1974).

⁷³ See text and notes at notes 68-72 *supra*.

application of Rule 23(b)(2) is fraught with considerable uncertainty.⁷⁴ Thus, for example, although Rule 23(b)(2) actions are designed primarily to provide declaratory or injunctive relief, Rule 23(b)(2) suits may also embrace monetary damages.⁷⁵ In addition, because Rule 23(b)(2) actions provide *res judicata* effect despite lack of notice to class members, individuals not wishing to be a party to such a suit may be unfairly bound by a poorly litigated claim without receiving an opportunity to institute an action on their own behalf.⁷⁶ Courts must therefore be cautious when certifying a class and binding such individuals to possible adverse consequences. The overall ambiguity which surrounds the Rule 23(b)(2) class action necessitates that courts carefully scrutinize Rule 23(a) prerequisites so as to insure that the results desired in a decision are achieved.⁷⁷

The *Gurmankin* decision accentuates the diversity of opinion among courts concerning the proper scope of the numerosity requirement in employment discrimination class actions. Depending upon the court, the practitioner may encounter varying degrees of receptivity toward the granting of certification. While most courts now discount the importance of demonstrating the impracticability of joinder in employment discrimination suits, the Third Circuit favors the retention of the numerosity prerequisite. It is therefore important, when instituting an employment discrimination class action in the Third Circuit, to stipulate carefully why joinder of all parties is impracticable. Where the arguments for impracticability of joinder appear weak, the practitioner may consider it preferable to bring suit in a more liberal jurisdiction.

⁷⁴ See generally Note, *Due Process Rights of Absentee in Title VII Class Action — The Myth of Homogeneity of Interests*, 59 B.U.L. REV. 661 (1979); Note, *Anti-Discrimination Class Actions under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868 (1979).

⁷⁵ See, e.g., *Pettway v. American Cast Iron Pipe*, 494 F.2d 211, 257 (5th Cir. 1974) (back pay allowed); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802-804, 3 FEP Cas. 653, 661-62 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) (back pay award is equitable in nature, hence allowable in Rule 23 (b)(2) action).

⁷⁶ See Note, *Anti-Discrimination Class Actions under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868 (1979). In *Scott v. University of Del.*, 601 F.2d 76, 19 FEP Cas. 1730 (3d. Cir. 1979), the third circuit decertified a class action brought by a black university professor. *Id.* at 89, 19 FEP Cas. at 1739. The court cautioned that overbroad classification in anti-discrimination class actions, based upon the "facile" conclusion that because there exist unidentified future class members numerosity must be satisfied, may cause the loss of claims, by unidentified class members. *Id.* See also *Johnson v. Georgia Highway Express Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (dangers of over broad classification to absent class members).

⁷⁷ See *Harris v. Pan Am. World Airways*, 74 F.R.D. 24, 38 (N.D. Cal. 1977): see also *Hill v. Western Elec. Co.*, 596 F.2d 99, 19 FEP Cas. 490 (4th Cir. 1979).

C. *Standard for Rebutting a Prima Facie Title VII Violation:*
*Texas Department of Community Affairs v. Burdine**

Title VII of the Civil Rights Act of 1964¹ prohibits employers from discriminating against an individual in employment because of such individual's race, color, religion, sex, or national origin.² In 1973 the Supreme Court articulated both a Title VII prima facie case model and a standard for rebutting a prima facie case in *McDonnell Douglas Corp. v. Green*.³ Following that case, circuit courts adopted conflicting interpretations of the burden necessary to rebut a Title VII prima facie case. To resolve this dispute, in two 1978 cases⁴ the Court reiterated its *McDonnell Douglas* standard for rebuttal which requires the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."⁵

In this *Survey* year, the Supreme Court again clarified the standard required to rebut a Title VII prima facie case in *Texas Department of Community Affairs v. Burdine*.⁶ The Court, in a unanimous decision, held that the United States Court of Appeals for the Fifth Circuit erred in requiring the defendant to prove by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.⁷ Furthermore, the Court stated that the court of appeals erred in requiring that the defendant prove the superior qualifications of the individual hired for the position.⁸ The effect of this holding is to reemphasize two of the Court's previous assertions: first, that the burden of persuasion in Title VII cases remains with the plaintiff rather than shifting at any point to the defendant; and second, that Title VII does not demand that an employer give preferential treatment to minorities or women.⁹

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¹ 42 U.S.C. § 2000e-1 to 2000e-17 (1976).

² Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1976) provides in pertinent 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 with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Id.

³ 411 U.S. 792 (1973). The plaintiff, a black, male, civil rights activist who had previously worked for McDonnell Douglas Corp., participated in several illegal activities against the company. *Id.* at 794. Subsequently he applied for re-employment and was turned down because of his illegal activities. *Id.* at 796. The plaintiff brought suit under Title VII. *Id.* at 797. The Supreme Court held that the plaintiff's prima facie case of discrimination was successfully rebutted because the employer had articulated a "legitimate, nondiscriminatory reason for the employee's rejection," *id.* at 802, by evidence of his illegal activities. *Id.* at 803.

⁴ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978); *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978).

⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802.

⁶ 101 S.Ct. 1089, 25 FEP Cas. 113 (1981).

⁷ *Id.* at 1097, 25 FEP Cas. at 118.

⁸ *Id.*

⁹ *Id.* at 1093, 1097, 25 FEP Cas. at 115, 118.

The plaintiff in *Burdine*, a woman, was hired as an accounting clerk in the Public Service Careers Division (PSC) of the Texas Department of Community Affairs (TDCA).¹⁰ She received a promotion six months later, and, following the subsequent resignation of her supervisor, was given additional duties.¹¹ The following year PSC, funded completely by the United States Department of Labor, was reorganized to remedy inefficiencies as a condition of continued funding of the program.¹² In reducing the PSC staff, the defendant discharged the plaintiff along with two other employees while retaining only one professional employee, a male.¹³ The plaintiff brought suit, alleging that the decision to terminate her had been predicated upon sex discrimination in violation of Title VII.¹⁴

The United States District Court for the Western District of Texas entered judgment for the defendant.¹⁵ The district court found that, although the plaintiff had presented a prima facie Title VII case, the defendant's employment decisions were based on a good faith, rational evaluation of the relative qualifications of the parties in question.¹⁶ Upon appeal, the Court of Appeals for the Fifth Circuit agreed with the district court that a prima facie case had been established.¹⁷ It disagreed with the district court, however, regarding the nature of the evidentiary burden such a prima facie case places on the defendant.¹⁸ Referring to two prior Fifth Circuit cases,¹⁹ the court of appeals set forth two rules it had developed for a defendant to successfully rebut a prima facie Title VII case.²⁰ One rule required the defendant to prove nondiscriminatory reasons by a preponderance of the evidence.²¹ The other rule required the defendant to prove that those individuals he hired or promoted were better qualified for the position than the plaintiff.²² The court of appeals held that the defendant's case fell short of these evidentiary standards²³ and reversed the district court's finding regarding the plaintiff's termination.²⁴

The Supreme Court, on appeal,²⁵ vacated the Fifth Circuit's decision and

¹⁰ *Id.* at 1092, 25 FEP Cas. at 114.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* The plaintiff was soon rehired by TDCA and assigned to another division. *Id.*

¹⁴ *Id.* In her original suit, the plaintiff also alleged discrimination in the failure to promote her to the position of director. *Id.* The district court and the court of appeals agreed that the plaintiff had not been discriminated against in this matter. *Id.* at 1092-93, 25 FEP Cas. at 115. The failure to promote the plaintiff was not an issue raised before the Supreme Court.

¹⁵ *Burdine v. Texas Dep't of Community Affairs*, 25 FEP Cas. 118, 120 (1976).

¹⁶ *Id.* at 119.

¹⁷ 608 F.2d 563, 566-67, 21 FEP Cas. 975, 977-78 (5th Cir. 1979).

¹⁸ *Id.* at 567 n.7, 21 FEP Cas. at 978 n.7.

¹⁹ *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 15 FEP Cas. 746 (5th Cir. 1977); and *East v. Romine, Inc.*, 518 F.2d 332, 11 FEP Cas. 300 (5th Cir. 1975).

²⁰ 608 F.2d at 567, 21 FEP Cas. at 978.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 568, 21 FEP Cas. at 979.

²⁴ *Id.* at 570, 21 FEP Cas. at 980. The district court's finding that plaintiff had not been discriminated against concerning a promotion was upheld by the court of appeals. *Id.*

²⁵ 101 S.Ct. 1089, 25 FEP Cas. 113 (1981).

remanded the case for an application of the correct standard of the burden of proof to be borne by the defendant.²⁶ Reviewing the proper evidentiary procedures to be followed in Title VII cases, the Court stated that initially the plaintiff must prove by a preponderance of the evidence that the defendant's acts constitute a prima facie case of discrimination.²⁷ In order to prove a prima facie case under the *McDonnell Douglas* standard, the Court noted, a plaintiff must prove by a preponderance of the evidence that he applied for an available position, that he was qualified for that position, and that he was rejected under circumstances which give rise to an inference of discrimination.²⁸

Once the plaintiff has demonstrated a prima facie violation, according to the *Burdine* Court, the burden of production shifts to the defendant to articulate a nondiscriminatory reason for his actions.²⁹ This burden requires the defendant to introduce admissible evidence that the plaintiff was rejected, or someone else was preferred, for a nondiscriminatory reason.³⁰ The defendant needs only to raise a genuine issue of fact — he need not persuade the court that he was actually motivated by such reasons.³¹ The explanation provided, however, must be legally sufficient to justify a judgment for the defendant.³² The *Burdine* Court articulated a two-pronged test for determining the sufficiency of such evidence.³³ The evidence should (1) present a legitimate reason for the action and (2) frame the factual issue with such clarity that the plaintiff will have a full and fair opportunity to demonstrate any pretext involved.³⁴ Thus, to satisfy the burden, an employer need only produce admissible evidence which would "allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."³⁵

After the defendant articulates the nondiscriminatory reasons for his actions, the burden of production shifts back to the plaintiff, who is given the op-

²⁶ *Id.* at 1093, 25 FEP Cas. at 115. That standard, reaffirmed in *Burdine*, is the Title VII standard the Supreme Court articulated in *McDonnell Douglas*. See text and notes at notes 3-5 *supra*.

²⁷ 101 S.Ct. at 1093, 25 FEP Cas. at 115.

²⁸ *Id.* at 1094, 25 FEP Cas. at 115. In *McDonnell Douglas* the Court articulated a four-part test to show a prima facie case:

- (i) that [the plaintiff] belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802 (footnote omitted). Although *McDonnell Douglas* was a race discrimination case, the same criteria have also been applied to sex discrimination cases. See *East v. Romine, Inc.*, 518 F.2d 332, 337 n.4, 11 FEP Cas. 300, 303 n.4 (5th Cir. 1975). Indeed, in this *Survey* case the Supreme Court applied the *McDonnell Douglas* model to sex discrimination.

²⁹ 101 S.Ct. at 1096, 25 FEP Cas. at 117.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1094, 25 FEP Cas. at 116.

³³ *Id.* at 1095, 25 FEP Cas. at 116.

³⁴ *Id.*

³⁵ *Id.* at 1096, 25 FEP Cas. at 117.

portunity to prove by a preponderance of the evidence that the reasons offered by defendant were a pretext for discrimination.³⁶ The plaintiff retains at all times the ultimate burden of persuading the court that he has been intentionally discriminated against.³⁷ This may be shown either directly, by persuading the court that the employer was motivated by a discriminatory reason, or indirectly, by showing that the employer's explanation was not valid.³⁸

The Court then applied the facts of the *Burdine* case to the standards which it had just enunciated. After ruling that the plaintiff had established a prima facie Title VII case, the Court turned to the question of the burden such a showing places on the employer. The Court found that the Fifth Circuit had misconstrued the nature of the defendant's burden in two respects.³⁹ First, the Court ruled that *Turner v. Texas Instruments, Inc.*,⁴⁰ a case relied upon by the lower court which held that a defendant must prove by a preponderance of the evidence that legitimate, nondiscriminatory reasons for his actions existed, was incorrectly decided.⁴¹ In effect, the Fifth Circuit's preponderance of the evidence standard required a shift of the burden of persuasion to the defendant.⁴² The Supreme Court, however, declared that the burden of persuasion never shifts from the plaintiff,⁴³ and held that the Fifth Circuit's standard required a greater burden than merely the production of admissible evidence which the Court required.⁴⁴ In arriving at this conclusion, the Supreme Court rejected the argument advanced in *Turner* that a lesser burden might allow defendants to create fictitious reasons for their challenged behavior.⁴⁵ The Court found that possibility to be remote for several reasons: first, the defendant, in order to meet the burden of production, would have to offer clear and specific reasons for its acts; second, the defendant, although not bearing the actual burden of persuasion, nevertheless "retains an incentive to persuade the trier of fact;" and third, liberal discovery rules gave the plaintiff access to the Equal Employment Opportunity Commission's investigation file concerning her complaint.⁴⁶ For all three reasons, then, the Court found it unlikely that fictitious justifications for the challenged employment action would be effective.

The second way in which the Fifth Circuit deviated from the standard for rebuttal of a prima facie case set forth by the Supreme Court was in requiring the defendant to prove that the person hired or promoted was *more* qualified

³⁶ *Id.* at 1093, 25 FEP Cas. at 115.

³⁷ *Id.*

³⁸ *Id.* at 1095, 25 FEP Cas. at 116.

³⁹ *Id.* at 1095-96, 25 FEP Cas. at 117-18.

⁴⁰ 555 F.2d 1251, 15 FEP Cas. 746 (5th Cir. 1977).

⁴¹ 101 S.Ct. at 1095-96, 25 FEP Cas. at 116-17.

⁴² *Id.* at 1095, 25 FEP Cas. at 117.

⁴³ *Id.* at 1093, 25 FEP Cas. at 115.

⁴⁴ *Id.* at 1096, 25 FEP Cas. at 117.

⁴⁵ *Id.*

⁴⁶ *Id.*

than the plaintiff.⁴⁷ Referring to *McDonnell Douglas* again, the Court indicated that Title VII requires a plaintiff to demonstrate only that similarly situated employees were not treated equally.⁴⁸ Under the Fifth Circuit's standard, the defendant would be required to show that the plaintiff's qualifications were inferior to those of the person selected.⁴⁹ Title VII, according to the Supreme Court, does not require the employer to reconstruct employment practices to maximize the hiring of a greater number of women or minorities.⁵⁰

The Supreme Court's holding in *Burdine* is consistent with its earlier cases defining a Title VII prima facie case rebuttal standard as well as with its policy of providing a fair allocation of the burden of proof. The Court has consistently drawn circuit courts' attention back to the *McDonnell Douglas* standard,⁵¹ using subsequent cases to clarify that standard. For example, in *Furnco Construction Co. v. Waters*⁵² the Court emphasized the nature of the evidence necessary to rebut a prima facie Title VII case.⁵³ *Furnco* held that a prima facie showing is not a factual finding of discrimination but rather is an inference of discrimination in the absence of any contrary explanation.⁵⁴ The employer, as part of the rebuttal, or second step, must be allowed to introduce evidence which bears on his legitimate motives.⁵⁵ In order to prove that he based his employment decision on a legitimate consideration, an employer need not prove that he used a hiring procedure that maximized the hiring of minority employees.⁵⁶ Rather, the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection."⁵⁷

Six months after the *Furnco* decision, in *Board of Trustees v. Sweeney*,⁵⁸ the

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1097, 25 FEP Cas. at 118. The employer may even misjudge the qualifications of an individual in the protected group without exposing himself to Title VII liability, although such an act may be probative of pretext. *Id.*

⁵¹ *McDonnell Douglas* described essentially three steps in the trial process. 411 U.S. at 802-04. First, the plaintiffs must carry the initial burden of establishing a prima facie case. *Id.* at 802. Second, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. *Id.* Third, plaintiff must be given a fair opportunity to show that the employee's reason was pretext. *Id.* at 804.

⁵² 438 U.S. 567 (1978). In *Furnco*, plaintiffs, three black bricklayers, alleged discrimination on the part of *Furnco* because of that company's policy of not accepting applications at the job site, but hiring only from recommendations. *Id.* at 569-70. The Supreme Court held that the company need not use the method of hiring which maximizes the employment of minority employees but need only articulate some legitimate nondiscriminatory reason for their hiring practice. *Id.* at 576-78.

⁵³ 438 U.S. at 569.

⁵⁴ *Id.* at 579-80.

⁵⁵ *Id.* at 580.

⁵⁶ *Id.* at 577-78.

⁵⁷ *Id.* at 578, quoting 411 U.S. at 802. The *Furnco* Court stated that courts should not attempt to restructure business practices. 438 U.S. at 578.

⁵⁸ 439 U.S. 24 (1978). In its *per curiam* opinion, the Supreme Court repeated its *McDonnell Douglas* standard of articulating some legitimate, nondiscriminatory motive and distinguished the appeals court's test requiring the employer to prove absence of discriminatory motive as being a heavier burden and therefore incorrect. *Id.* at 24-25. The Court remanded in light of the correct standard. *Id.* at 25.

Supreme Court again emphasized the *McDonnell Douglas* standard of articulating some legitimate nondiscriminatory reasons for actions challenged under Title VII.⁵⁹ The *Sweeney* Court held, in a per curiam decision, that the standard articulated by the First Circuit requiring the employer to prove the absence of discriminatory intent was incorrect because it placed too heavy a burden on the employer.⁶⁰ The employer's burden is satisfied, according to the *Sweeney* Court, if he "explains what he has done" or "produc[es] evidence of legitimate nondiscriminatory reasons."⁶¹

The precedent that has been established by *McDonnell Douglas*, *Furnco* and *Sweeney* is based on the distinction between the burden of persuasion and the burden of production. This distinction creates a fair balancing of burdens between the plaintiff and the defendant. Initially, the plaintiff must carry the burden of offering sufficient evidence to create a presumption that the employment decision was based on a discriminatory reason.⁶² Placing this burden on the plaintiff is fair because the plaintiff is in the best position to know the facts necessary to establish a prima facie violation regarding his or her own employment.⁶³ Once the plaintiff's burden has been met, the burden of production, but not of persuasion, shifts to the employer to articulate a legitimate reason for his action.⁶⁴ This shift is also fair to both the plaintiff and the defendant. It is fair to the defendant because he should not be required to persuade the trier of fact that his position is correct, but only to produce evidence as to why the plaintiff's position is wrong. It is fair to the plaintiff for four reasons. First, the defendant-employer should have the burden of production at this point because he is in the best position to know the reasons for his actions. Second, the plaintiff has the opportunity, in the final step, to rebut specific reasons articulated by the employer. Third, the plaintiff also has access to extensive information in the Equal Employment Opportunity Commission's investigation files⁶⁵ with which to construct a rebuttal. Finally, although a satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from plaintiff's initial evidence, the initial evidence supporting the inference of discrimination remains in the record for the trier of fact to consider.⁶⁶

⁵⁹ 439 U.S. at 24-25.

⁶⁰ *Id.* at 25.

⁶¹ *Id.* at 25 n.2.

⁶² 411 U.S. at 802. *McDonnell Douglas* articulated one model of a prima facie case. See text and note at note 28 *supra*. Other models are also possible. In *Teamsters v. United States*, 431 U.S. 324 (1977), for example, the Court noted that an inference of discrimination arises when the action does not result from the two most common legitimate reasons on which an employer might rely: lack of qualifications or absence of vacancy in the job sought. *Id.* at 358 n.44.

⁶³ See text and note at note 29 *supra*.

⁶⁴ 101 S.Ct. at 1093, 25 FEP Cas. at 115.

⁶⁵ *Id.* at 1096, 25 FEP Cas. at 117.

⁶⁶ *Id.* at 1095 n.10, 25 FEP Cas. at 116 n.10. Concern has been advanced that placing only a burden of production on the defendant, rather than a burden of persuasion, might result in possible unfairness to the plaintiff because of the possibility that the defendant might put forth fictitious, invalid or illegitimate reasons for his behavior. *Id.* at 1096, 25 FEP Cas. at 117. This concern is unfounded because of several safeguards cited by the *Burdine* court. One of the safeguards, however, although valid, obfuscates the issue of the shifting of the burden of persuasion.

Although the *Burdine* decision does further clarify the prima facie rebuttal standard for the Title VII cases, some ambiguity remains concerning the nature of the evidence necessary to rebut a Title VII prima facie case. What is certain is that the defendant need not make a showing of any of the following: a preponderance of the evidence,⁶⁷ clear and convincing evidence,⁶⁸ absence of discriminatory motive,⁶⁹ or objective evidence that the person hired or promoted was more qualified than the employee who was rejected.⁷⁰ What is not certain is the definition of evidence legally sufficient to justify a judgment for the defendant. According to the Court, the defendant's evidence must raise a genuine issue of fact.⁷¹ To do so the defendant must introduce admissible evidence explaining the plaintiff's rejection.⁷² This evidence must be legally sufficient to justify a judgment for the defendant.⁷³ The Court implied that the determination of legally sufficient evidence is subject to its twofold guideline.⁷⁴ That guideline states that the defendant's burden of production (1) should meet the prima facie case by presenting a legitimate reason for the action and (2) should frame the factual issue with enough clarity to give plaintiff a full and fair opportunity to demonstrate pretext.⁷⁵ The question remains whether this twofold guideline will be sufficient by itself to justify a judgment for the defendant in future cases.

The Court stated that the defendant has the incentive to persuade the trier of fact. 101 S.Ct. at 1096, 25 FEP Cas. at 117. The underlying theory is valid — the defendant will not recite facts that are untrue if he is faced with the requirement of offering admissible evidence. Yet the practical result of "retain[ing] an incentive to persuade the trier of fact," *id.*, is so close to a shift in the burden of persuasion as to be virtually indistinguishable from such a shift.

⁶⁷ *Id.* at 1095, 25 FEP Cas. at 116-17. The *Burdine* Court rejected the preponderance of the evidence standard applied in *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 15 FEP Cas. 746 (5th Cir. 1977).

⁶⁸ *Ambush v. Montgomery County Gov't*, 620 F.2d 1048, 1054, 22 FEP Cas. 1101, 1105-06 (4th Cir. 1980). *Ambush*, overruling the district court's clear and convincing standard, is cited by the *Burdine* Court as impliedly adopting the correct standard. 101 S.Ct. at 1093 n.4, 25 FEP Cas. at 115 n.4.

⁶⁹ *Board of Trustees v. Sweeney*, 439 U.S. 24, 24.

⁷⁰ 101 S.Ct. at 1096, 25 FEP Cas. at 117. The *Burdine* Court overruled the court in *East v. Romine, Inc.*, 518 F.2d 332, 11 FEP Cas. 300 (5th Cir. 1975), which had applied this standard. In that case the court held that an employer must show that it compared employment history and that those hired were better qualified. *Id.* at 340, 11 FEP Cas. at 305. The Court recognized that Title VII continues to require employers to make fair and neutral employment decisions regarding minorities and women but does not require preferential treatment. 101 S.Ct. at 1096-97, 25 FEP Cas. at 117-18. The *Burdine* Court additionally stated that an employer's misjudgment of the qualifications of applicants is not, in itself, a violation of Title VII. *Id.* at 1097, 25 FEP Cas. at 118. Such misjudgment, however, may be used by plaintiff in proving pretext. *Id.* Employers, then, so long as they have established valid criteria for a job and applied them equally to minority and nonminority alike, may choose the person best suited for the position without being required to prove that the person hired instead of a minority applicant had superior objective qualifications. *Id.*

⁷¹ *Id.* at 1094, 25 FEP Cas. at 116.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1095, 25 FEP Cas. at 116.

⁷⁵ *Id.*

D. *Discriminatory Impact of an Employee Selection Process:*
*Teal v. Connecticut**

The Supreme Court has held that Title VII of the Civil Rights Act of 1964 forbids the use of employment tests with discriminatory effect unless the employer meets the burden of showing that the test bears "a manifest relationship to the employment in question."¹ The burden arises after the plaintiff has made a prima facie case of discrimination.² When one portion of an employment selection process has an allegedly discriminatory effect but the process in its entirety does not, the lower federal courts have been divided over the question of whether a plaintiff may make a prima facie case of discrimination.³ The majority of the few courts that have considered the issue have held that in a Title VII case the selection process as a whole, rather than just one of its components, should be examined for disproportionate impact.⁴

During the *Survey* year, in *Teal v. Connecticut*,⁵ the Second Circuit Court of Appeals held that a plaintiff may establish a prima facie case of disparate impact when he establishes that a component of a selection process produced disparate results and constituted a pass-fail barrier beyond which the candidate was not permitted to pass.⁶ The case is significant in that, at least within the Second Circuit, it expands the possible circumstances under which a plaintiff may make a prima facie showing of employment discrimination and increases the extent to which courts must examine particular segments of a selection process.

The plaintiffs in *Teal* were four black American citizens employed by the Department of Income Maintenance of the State of Connecticut.⁷ In order to attain promotion to permanent status as Welfare Eligibility Supervisors, the plaintiffs had to participate in a selection process, the first step of which was a written examination.⁸ Those employees who passed the written examination entered an eligibility pool from which candidates would be selected to fill per-

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¹ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

² *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

³ For cases holding that the selection process as a whole, rather than any portion, should be examined for disproportionate impact, see *Friend v. Leidinger*, 588 F.2d 61, 66, 18 FEP Cas. 1052, 1056 (4th Cir. 1978); *Rule v. Ironworkers Local 396*, 568 F.2d 558, 565, n.10, 16 FEP Cas. 35, 40 n.10 (8th Cir. 1977); *Smith v. Troyan*, 520 F.2d 492, 497-98, 10 FEP Cas. 1380, 1384-85 (6th Cir. 1975); *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. 1256, 1261-63, 20 FEP Cas. 1377, 1380-81 (D. Conn. 1979) (expressly overruled by *Teal*, see text at notes 35-43 *infra*); *Lee v. City of Richmond*, 456 F. Supp. 756, 771, 19 FEP Cas. 520, 531 (E.D. Va. 1978). *Contra*, *League of United Latin Am. Citizens v. City of Santa Ana*, 410 F. Supp. 873, 894-95, 12 FEP Cas. 651, 666-67 (C.D. Cal. 1976).

⁴ *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. 1256, 1261, 20 FEP Cas. 1377, 1380 (D. Conn. 1979).

⁵ 645 F.2d 133, 25 FEP Cas. 529 (2d Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. October 5, 1981) (No. 80-2147).

⁶ *Id.* at 134-35, 25 FEP Cas. at 529-30.

⁷ *Id.* at 135, 25 FEP Cas. at 530.

⁸ *Id.*

manent positions.⁹ The defendants would then take into consideration the candidates' previous performance on the job, recommendations from supervisors, and to a lesser extent, seniority.¹⁰ The defendants also used an affirmative action program at that point in the process to ensure that many supervisors chosen from the eligibility pool would be minority-group members.¹¹

On the written test, 54.17 percent of the black candidates and 79.53 percent of the white candidates received passing scores.¹² The plaintiffs were among those black candidates who did not receive passing scores.¹³ Analysis of the selection process in its entirety shows that 23 percent of the black candidates who took the written test and 13.5 percent of the white candidates who did so were eventually promoted to permanent positions.¹⁴ The plaintiffs filed a suit in federal district court alleging that the written test had discriminated against them on the basis of race in violation of Title VII.¹⁵

The district court held that the results of the entire selection process should be used to determine whether a prima facie case of racial discrimination had been made.¹⁶ In arriving at its conclusion, the district court decided preliminarily that the claim should be evaluated under the disparate impact analysis¹⁷ established by the Supreme Court in *Griggs v. Duke Power Co.*¹⁸ The court pointed out that the results of the written test did show disparate impact,¹⁹ but concluded that the results of the entire selection process must show such impact for a prima facie case of racial discrimination to be established.²⁰

Appealing to the Second Circuit Court of Appeals, the plaintiffs asserted that the district court had erred in deciding that they had failed to make a prima facie showing of disparate impact.²¹ The court agreed that a prima facie

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 136, 25 FEP Cas. at 530.

¹³ *Id.*

¹⁴ *Id.*, 25 FEP Cas. at 531.

¹⁵ *Id.*, 25 FEP Cas. at 530.

¹⁶ *Id.* at 137, 25 FEP Cas. at 531.

¹⁷ *Id.* at 136, 25 FEP Cas. at 531. Plaintiffs had asserted their Title VII claims under both the disparate treatment formula and the disparate impact analysis. *Id.* Discriminatory motive must be proved in the former type of action, but need not be proved in the latter type. *Id.* at 136 n.5, 25 FEP Cas. at 530 n.5.

¹⁸ 401 U.S. 424 (1971).

¹⁹ 645 F.2d at 137, 25 FEP Cas. at 531. The court's evaluation was made under the four-fifths rule of the Uniform Guidelines of Employee Selection Procedures prepared by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.4(D) (1979). 645 F.2d at 136-37, 25 FEP Cas. at 531. That rule provides that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 C.F.R. § 1607.4(D) (1979). The Supreme Court has declared that EEOC Guidelines, while not binding on courts, should be shown great deference. 645 F.2d at 137 n.6, 25 FEP Cas. at 531 n.6. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

²⁰ 645 F.2d at 137, 25 FEP Cas. at 531.

²¹ *Id.* Alternatively, the plaintiffs argued that the proof of trial established a prima facie case under the disparate treatment formula. *Id.* The circuit court pointed out that the plaintiffs'

case had been made,²² and accordingly reversed the decision of the lower court.²³ The court's reasoning was based on a distinction it drew between two types of sub-tests in an employment process.²⁴ Those types are: (1) one of two or more sub-tests that all applicants take in order to receive a cumulative score based on performance in all the sub-tests, and (2) a pass-fail barrier sub-test that prevents failing applicants from going on to other segments of the selection process.²⁵ The first type of sub-testing had been presented to the Second Circuit Court of Appeals in its 1975 decision in *Kirkland v. New York State Department of Correctional Services*.²⁶ In that case the court had declined to look into disparate impact of sub-tests.²⁷ The *Teal* court distinguished *Kirkland* on the ground that all the candidates for employment in *Kirkland* had been exposed to all portions of the selection process.²⁸ Exposure to all the components of a selection process is important, in the court's opinion, because some portions of the process can offset other portions that are discriminatory.²⁹ In accordance with such reasoning, if the process as a whole does not produce a disparate impact on one group, although one portion of the process does, it can be assumed that such offsetting of one portion against another is taking place.³⁰ When one portion of a process acts as a pass-fail barrier that some cannot proceed beyond, however, those who have been the victims of a discriminatory sub-test have no chance to benefit from any offsetting elements present in later parts of the process.³¹ The court considered judicial scrutiny into the first type of process contrary to common sense.³² However, with respect to the second type, the court stated that judicial scrutiny is required.³³ That requirement is derived, the court reasoned, from congressional intent that Title VII protect individuals rather than "faceless groups."³⁴

qualifications were in dispute and that accordingly it might be proper under the disparate treatment formula to assign plaintiffs the burden of proving that the test was not job-related. *Id.*, 25 FEP Cas. at 531-32. Under such circumstances, the court stated that the disparate impact analysis would better accommodate the case. *Id.* The court then turned to a discussion of the disparate impact claim. *Id.* at 137-40, 25 FEP Cas. at 531-34.

²² *Id.* at 137, 25 FEP Cas. at 532.

²³ *Id.* at 140, 25 FEP Cas. at 534.

²⁴ *Id.* at 137-40, 25 FEP Cas. at 531-34.

²⁵ *Id.*

²⁶ 520 F.2d 420, 11 FEP Cas. 38 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

²⁷ 645 F.2d at 137, 25 FEP Cas. at 532.

²⁸ *Id.* at 137-38, 25 FEP Cas. at 532. In *Kirkland*, in response to the plaintiffs' assertion that a civil service examination had racially disparate consequences, the defendants argued that the results of the five sub-tests comprising the examination did not show a consistent racial disparity, especially when broken down among the different locations at which the examination was given. 520 F.2d at 425, 11 FEP Cas. at 41. The court held that because a passing score was dependent upon the cumulative results of the five sub-tests, the defendants' argument was not relevant to the issue of whether or not the examination as a whole had a discriminatory impact. *Id.*

²⁹ 645 F.2d at 137-38, 25 FEP Cas. at 532.

³⁰ *Id.*

³¹ *See id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

In the course of its discussion, the court overruled a 1979 decision of the federal district court for Connecticut, *Brown v. New Haven Civil Service Board*.³⁵ The factual basis of *Brown*, a case which ruled against the plaintiff even though a portion of the selection process may have had a discriminatory effect, was similar to that of *Teal*.³⁶ The *Teal* court rejected the two principal bases of *Brown*.³⁷ The first was that examination of components of a selection process could lead a court on a limitless course.³⁸ The second was that Title VII should not be interpreted in a way that would inhibit employers from adopting voluntary affirmative action programs.³⁹ With respect to *Brown*'s first basis, the *Teal* court stated that in the case of a pass-fail barrier, "both the discriminatory component and the affected individuals are readily identifiable."⁴⁰ A court would not, therefore, need to look into "subscores."⁴¹ With respect to *Brown*'s second basis, the *Teal* court saw no reason why Title VII could not be interpreted to invalidate a selection process that includes an affirmative action component.⁴² Affirmative action is permitted by Title VII, but is not required by it.⁴³

While the *Teal* decision may have a certain appeal because of its concern for the protection of individuals, rather than "faceless groups," from employment discrimination, the decision can be subjected to some criticism. In its discussion of the *Brown* case, the *Teal* court did not address *Brown*'s statement that "[e]ven in a cumulatively scored application process, a score on any single component might be so low as to preclude the accumulation of a total score meeting a minimum hiring requirement."⁴⁴ In light of that observation, it is evident that the distinction between the two types of selection processes is not so neat. Thus, although the court's decision in *Teal* is based on a distinction that it draws between two types of selection processes, the court fails to address the important statement in *Brown* that casts doubt upon the existence of any such distinction. Furthermore, it is only on the basis of the existence of the distinction that the *Teal* court dismisses the concern that courts will be burdened excessively by examining isolated sub-tests.⁴⁵ The court acknowledged that

³⁵ *Id.* at 138-40, 25 FEP Cas. at 532-34 (overruling *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. 1256, 20 FEP Cas. 1377 (D. Conn. 1979)).

³⁶ 645 F.2d at 138, 25 FEP Cas. at 532. In *Brown*, plaintiffs challenged a testing procedure — for the hiring of police — that consisted of several stages. 474 F. Supp. at 1258, 20 FEP Cas. at 1377. A written examination and physical agility test were scored separately. *Id.* A combination of the scores determined whether an applicant had passed or failed. *Id.* Those passing were eligible for an interview, which was scored separately. *Id.* The applicants with the highest scores in the interview were hired. *Id.*

³⁷ See 645 F.2d at 138-40, 25 FEP Cas. at 532-34.

³⁸ *Id.* at 138, 25 FEP Cas. at 532.

³⁹ *Id.*, 25 FEP Cas. at 533.

⁴⁰ *Id.* at 139, 25 FEP Cas. at 533.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 474 F. Supp. at 1262, 20 FEP Cas. at 1380.

⁴⁵ 645 F.2d at 139, 25 FEP Cas. at 533.

such a concern is justifiable in connection with cumulatively scored selection processes.⁴⁶ The court fails to explain convincingly why the burden of examining sub-tests is lighter in the process with a pass-fail barrier. Moreover, if, as *Brown* suggests, there is no meaningful distinction between the two processes, then the concern may be equally justifiable in the case of a process with a pass-fail barrier.

It remains uncertain what impact *Teal* will have. Since the decision states that Title VII does not require judicial scrutiny into cumulatively scored selection processes, the effect of the decision within the Second Circuit may be to encourage the use of such processes by employers who wish to avoid litigation.

II. THE EMPLOYER'S ACTIONS AND PROGRAMS: DISCRIMINATION V. NON-DISCRIMINATION

A. *Sexual Harassment as a Discriminatory Condition of Employment:* *Bundy v. Jackson**

Section 703¹ of Title VII of the Civil Rights Act of 1964 (Title VII)² prohibits sex discrimination. A cause of action for sex discrimination under section 703 is established where it is shown that an employer has discriminated against an individual with respect to "compensation, terms, conditions, or privileges of employment" on the basis of sex.³ In 1977 the Court of Appeals for the District of Columbia Circuit, in *Barnes v. Costle*,⁴ held that allegations of sexual harassment, when coupled with an adverse employment consequence, make

⁴⁶ *Id.*

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¹ 42 U.S.C. § 2000e-2(a) (1976). Section 703 reads as follows:

(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.

Id.

² 42 U.S.C. § 2000e to e-17 (1976).

³ *Id.* at § 2000e-2(a). See Taub, *Keeping Women In Their Place: Stereotyping Per Se As A Form Of Employment Discrimination*, 21 B.C. L. REV. 345, 363 (1980) [hereinafter cited as Taub]. The Taub article presents an in-depth review of sex discrimination in the employment context, including a section outlining the legal status of sexual harassment claims prior to *Bundy v. Jackson*, 641 F.2d 934, 24 FEP Cas. 1155 (D.C. Cir. 1981), and a proposal to find any stereotyping to be discrimination *per se*. Taub at 361-417.

⁴ 561 F.2d 983 (D.C. Cir. 1977).

out a prima facie case of sex discrimination under Title VII.⁵ The *Barnes* court adopted a "but-for" test in determining whether sex discrimination existed.⁶ After *Barnes*,⁷ which now represents the majority view,⁸ two elements have been required to prove sex discrimination. First, potential discrimination in the form of an adverse employment consequence must exist.⁹ Second, the "but-for" test requires a showing that the gender of an individual is a substantial factor contributing to the discrimination: that if a woman's sex had been different she would have been treated differently.¹⁰ Under this approach, an individual who shows an adverse career consequence directly linked to the rejection of sexual advances from a superior authorized to make employment decisions has established a prima facie Title VII case against the employer.¹¹ Subsequent cases rejected claims that sexual harassment alone, without a showing of directly-related adverse employment ramifications, constituted a valid cause of action.¹²

⁵ *Id.* at 989-90. Later the same year the Third Circuit reached the same conclusion in *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977).

⁶ 561 F.2d at 990. See Taub, *supra* note 3, at 364.

⁷ Prior to 1977, the showing that a male supervisor had addressed unwelcomed sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a female subordinate in an employment context, failed to state a cause of action under section 703 even if there were adverse employment consequences. *E.g.*, *Miller v. Bank of America*, 418 F. Supp. 233, 235-36 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 555-56 (D.N.J. 1976), *rev'd and remanded* 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb*, 390 F. Supp. 161, 162-63 (D. Ariz. 1975), *vacated and remanded without reported decision*, 562 F.2d 55 (9th Cir. 1977); *Barnes v. Train*, 13 FEP Cas. 123, 124 (D.D.C. 1974), *rev'd and remanded sub nom Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). Courts based this outcome on one of two grounds. Either such acts were found to be of a "personal" nature, and therefore attributable to the individual supervisor but not to the employer, *Corne v. Bausch & Lomb*, 390 F. Supp. at 163, or they were found to discriminate on the basis of the refusal to engage in the requested activity rather than on the basis of the sex of the individual. *Barnes v. Train*, 13 FEP Cas. at 124.

⁸ All lower court decisions holding that the rejection of sexual advances, followed by adverse consequences, is not a Title VII violation have been reversed. *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded without reported decision*, 562 F.2d 55 (9th Cir. 1977). No other circuit has adopted a contrary view. See, *e.g.*, *Garber v. Saxon Business Prod., Inc.*, 552 F.2d 1032, 1032 (4th Cir. 1977).

⁹ See, *e.g.*, *Clark v. World Airways*, 24 FEP Cas. 305, 307 (D.D.C. 1980) (no violation of Title VII where sexual advances by corporation president and submission was not related to any employment prospects, and no termination ensued); *Neeley v. American Fidelity Assurance Co.*, 17 FEP Cas. 482, 484-85 (W.D. Okla. 1978) (no violation of Title VII where physical contact and verbal dirty jokes were engaged in by vice-president with female employee but were not related to employment benefits). Neither the *Barnes* nor the *Tomkins* court faced the situation of sexual harassment without resulting adverse employment consequences, and the *Tomkins* court expressly declined to reach this question. See 568 F.2d at 1046 n.1; 561 F.2d at 985. See also Taub, *supra* note 3, at 373.

¹⁰ See 568 F.2d at 1047 n.4; 561 F.2d at 990.

¹¹ See *Miller v. Bank of America*, 600 F.2d at 213.

¹² See, *e.g.*, *Fisher v. Flynn*, 19 FEP Cas. 933 (1st Cir. 1979) (insufficient nexus between romantic overtures by department head and termination); *Cordes v. County of Yavapai*, 17 FEP Cas. 1224 (D. Ariz. 1978) (refusal of prior sexual advances not tied to subsequent termination). See also note 9 *supra*.

During the *Survey* year, the Court of Appeals for the District of Columbia Circuit, in *Bundy v. Jackson*,¹³ significantly extended sex discrimination law, holding that sexual harassment of a female employee by male supervisors in itself constitutes a violation of Title VII. Since the *Bundy* court found that sexual harassment amounted to discrimination with respect to the "terms, conditions, or privileges of employment,"¹⁴ it eliminated any requirement that a plaintiff prove she resisted the harassment and that an adverse employment consequence resulted from this resistance.¹⁵

A co-worker and various superiors subjected the plaintiff in *Bundy*, an employee of the District of Columbia Department of Corrections (the department), to a series of sexual advances.¹⁶ When the plaintiff complained to the supervisors' superior about these advances, he responded that "'any man in his right mind would want to rape you,'" and, thereafter, he proceeded to proposition Bundy.¹⁷

After this latest advance, the plaintiff became eligible for promotion in January of 1975, but upon contacting her first- and second-line supervisors was informed that she could not be recommended for promotion due to a promotion freeze.¹⁸ Learning subsequently that other employees nevertheless had been recommended for promotion, Bundy feared she was being denied a promotion because she rejected her superior's sexual advances.¹⁹ Based on this belief, she pursued several informal procedures with the department to register her complaint.²⁰

When these repeated attempts to complain proved unsuccessful, Bundy proceeded to pursue her claim of sexual harassment formally.²¹ The depart-

¹³ 641 F.2d 934, 24 FEP Cas. 1155 (D.C. Cir. 1981).

¹⁴ *Id.* at 943, 24 FEP Cas. at 1160.

¹⁵ *Id.* at 943-44, 945-46, 24 FEP Cas. at 1160, 1161-62.

¹⁶ *Id.* at 939-40, 24 FEP Cas. at 1156-57. Bundy received and rejected sexual propositions from a fellow employee, who later became the department director and in his role as such was the named defendant, *id.* at 939, 24 FEP Cas. at 1157, as well as from both her first- and second-line supervisors. *Id.* at 940, 24 FEP Cas. at 1157.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 941, 24 FEP Cas. at 1157-58. First she consulted the department's Equal Employment Opportunity (EEO) Officer. *Id.* at 941, 24 FEP Cas. at 1157. Then Bundy met with her third-line supervisor and informed him of the harassment and of her belief, based on the fact that other employees were recommended for promotion, that she was being denied promotion because of her rejection of the sexual advances. *Bundy v. Jackson*, 19 FEP Cas. 828, 831 (D.D.C. 1979) (Finding of Fact No. 38). The supervisor responded that she had not received the promotion because of unsatisfactory work, and that she was free to pursue the matter further. 614 F.2d at 941, 24 FEP Cas. at 1158. At this point, the plaintiff informally complained to the department's Chief EEO Officer, who advised her that such charges would be difficult to prove and cautioned against bringing unwarranted complaints. *Id.* In April of 1975, Bundy presented a draft summarizing her complaints to the department director, who arranged a meeting with her second- and third-line supervisors. *Id.* At this meeting, however, several other people were also present and the discussion focused not on sexual harassment but on the plaintiff's possible promotion and her alleged work deficiencies. *Id.* After the meeting, Bundy's first- and second-line supervisors completed a memorandum offering inadequate work performance as the reason for denying her a promotion. *Id.*

²¹ *Id.*

ment director took no steps to investigate the plaintiff's formal complaint beyond asking Bundy's supervisors if they had made improper advances toward her.²² In February of 1976, Bundy was recommended for a promotion, which she received the following July.²³ The plaintiff became eligible for another promotion in July of 1977, but never received it.²⁴

Bundy filed an action with the federal district court in August of 1977, claiming that the department violated Title VII by imposing different and more onerous terms and conditions of employment on her than upon similarly-situated employees.²⁵ She charged that the department denied her promotions based on her sex and her refusal to submit to sexual advances.²⁶ Finding that improper sexual advances made by male supervisors to female employees were considered "standard operating procedure, . . . a normal condition of employment in the office,"²⁷ the court held that the allegations with regard to the sexual advances were fully proved.²⁸ Nevertheless, the district court failed to find any adverse employment consequences, concluding that the plaintiff was denied promotion because of her work performance, not because of her rejection of sexual advances.²⁹ Therefore, reasoning that sexual advances which do not lead to the loss or denial of tangible employment benefits do not constitute Title VII discrimination with respect to "any term or condition of . . . employment," the district court entered judgment for the defendant.³⁰

The Court of Appeals for the District of Columbia Circuit reversed.³¹ Applying the *Barnes* "but-for" criteria, the court had no difficulty determining that Bundy suffered discrimination on the basis of sex, since her sex was for no legitimate reason a substantial factor contributing to her harassment.³² Based on the district court's finding that the harassment was "standard operating procedure" and that the department director as well as other officials who made promotion decisions had notice of the harassment yet did nothing to stop the practice, the court also had no difficulty in ascribing the harassment to the department.³³

The "novel question" before the court was whether sexual harassment absent adverse employment consequences amounted to sex discrimination with respect to the "terms, conditions, or privileges of employment" under Title VII.³⁴ In concluding that it does, the *Bundy* court reasoned that this result

²² *Id.*

²³ 19 FEP Cas. at 832 (Finding of Fact No. 46).

²⁴ 641 FEP Cas. at 941, 24 FEP Cas. at 1158.

²⁵ *Id.*; 19 FEP Cas. at 829 (Finding of Fact No. 1).

²⁶ 19 FEP Cas. at 829 (Finding of Fact No. 1).

²⁷ *Id.* at 831 (Finding of Fact No. 38).

²⁸ *Id.* at 832 (Conclusion of Law No. 2).

²⁹ *Id.* (Conclusion of Law No. 3). The court found that Bundy was denied the subsequent promotion in July 1977, because she had reached the top of her career ladder. *Id.* (Conclusion of Law No. 4).

³⁰ *Id.* (Conclusions of Law Nos. 5 and 6).

³¹ 641 F.2d at 938, 24 FEP Cas. at 1156.

³² *Id.* at 942-43, 24 FEP Cas. at 1159.

³³ *Id.* at 943, 24 FEP Cas. at 1159.

³⁴ *Id.*, 24 FEP Cas. at 1160.

"follows ineluctably" from cases finding violations of Title VII where an employer created or condoned a substantially discriminatory work environment, regardless of whether any tangible job benefit was lost as a result of the discrimination.³⁵ In this regard, the court cited cases holding that racial,³⁶ religious,³⁷ or ethnic³⁸ slurs, as well as segregated facilities³⁹ are potential violations of Title VII when found to be a pattern in the work environment.⁴⁰

In accepting the plaintiff's argument that "conditions of employment" included both the psychological and emotional work environment, and that sexually stereotyped insults and demeaning propositions illegally poisoned that environment,⁴¹ the court relied primarily on language in another Title VII case, *Rogers v. Equal Employment Opportunity Commission*.⁴² In *Rogers*, a case addressing race and national origin discrimination, the Court of Appeals for the Fifth Circuit determined that a work environment heavily charged with discrimination could destroy the emotional and psychological stability of a protected class of individuals.⁴³ Consequently, the Fifth Circuit concluded that creating or condoning such an environment could be a violation of Title VII with respect to an expansive conception of the phrase "terms, conditions, or privileges of employment."⁴⁴

Examining the reasoning of *Rogers* and related cases, the *Bundy* court noted that although racial slurs are just verbal insults, they are intentional and directed at individuals, and thus form the basis for Title VII liability in "discriminatory environment" cases.⁴⁵ The court reasoned that both racial slurs and sexual harassment could be merely verbal, and yet poison the atmosphere of employment when intentionally directed at employees.⁴⁶ The court remarked that sexual harassment "injects the most demeaning sexual stereotypes" into the work environment and "represents an intentional assault

³⁵ *Id.*

³⁶ *Id.* at 944, 24 FEP Cas. at 1160-61, (citing *Gray v. Greyhound Lines, E.*, 545 F.2d 169, 176 (D.C. Cir. 1976)) (pattern of racial intimidation violates Title VII right to a non-discriminatory work environment); *United States v. City of Buffalo*, 457 F. Supp. 612, 631-35 (W.D. N.Y. 1978) (black employees entitled to work environment free from racial abuse and insult); *Steadman v. Hundley*, 421 F. Supp. 53, 56-57 (N.D. Ill. 1976) (racial slurs may lead to Title VII liability).

³⁷ *Id.*, (citing *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (demeaning religious slurs by supervisor violate Title VII)).

³⁸ *Id.*, (citing *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (though employee could only prove isolated incidents, a pattern of offensive ethnic slurs would violate Title VII)).

³⁹ *Id.*, (citing *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977), *cert. denied*, 434 U.S. 819 (1977) (segregated employee eating clubs condoned, though not organized or regulated by employer, violate Title VII by creating a discriminatory work environment)).

⁴⁰ *Id.*

⁴¹ *Id.* at 944, 24 FEP Cas. at 1160.

⁴² 454 F.2d 234 (5th Cir. 1971).

⁴³ *Id.* at 238.

⁴⁴ *Id.*

⁴⁵ 641 F.2d at 945, 24 FEP Cas. at 1161. See note 36 *supra*.

⁴⁶ 641 F.2d at 945, 24 FEP Cas. at 1161.

on an individual's innermost privacy."⁴⁷ Thus, the court found that sexual harassment, like racial slurs, amounts to discrimination with respect to the "terms, conditions, or privileges of employment" in violation of Title VII.⁴⁸

Having determined that sexual harassment alone will state a valid cause of action within the language of Title VII, the *Bundy* court then gave its justification for concluding that neither a showing of resistance to the advances nor the loss of a tangible job benefit is necessary to establish a violation of section 703. The court again relied on *Rogers* in reaching this conclusion.⁴⁹ The *Rogers* court warned that once patently discriminatory practices become outlawed, those employers bent on pursuing a discriminatory policy will use subtle, more sophisticated methods to perpetuate discrimination among employees.⁵⁰ The *Bundy* court noted that, similarly, although it is illegal to deny job benefits as a result of the rejection of sexual advances, an employee would have no legal recourse if the employer was sophisticated enough to stop short of taking tangible action against her in response to a refusal to cooperate sexually.⁵¹ The court reasoned that an employer implicitly and effectively could make endurance of sexual harassment a "condition" of employment, causing the harassed female to face a "cruel trilemma:"⁵² endure the harassment,⁵³ attempt to oppose it with the likely prospects of making the job even less tolerable,⁵⁴ or leave the job voluntarily with little hope of legal relief and the prospect of facing harassment anew in a different job.⁵⁵

Upon determining that sexual harassment cases should be treated like other "discriminatory environment" cases, without a requirement of showing resistance or subsequent adverse consequences, the court of appeals reversed and remanded the case to the district court for injunctive relief.⁵⁶ The court suggested several steps it would deem to be appropriate relief. First, the department director should "raise affirmatively the subject of sexual harassment with all his employees," and inform the employees that such harassment is a viola-

⁴⁷ *Id.*

⁴⁸ *Id.* at 943, 24 FEP Cas. at 1160.

⁴⁹ *Id.* at 943-44, 24 FEP Cas. at 1160.

⁵⁰ *Rogers v. EEOC*, 454 F.2d at 239.

⁵¹ See 641 FEP Cas. at 945, 24 FEP Cas. at 1161.

⁵² *Id.* at 946, 24 FEP Cas. at 1162.

⁵³ The court acknowledged that resistance could be meaningless where the male supervisor demanded no response to the advances beyond mere tolerance. *Id.*, 24 FEP Cas. at 1161-62.

⁵⁴ In many situations, proof of rejection would require the employee to object in a "visible and dramatic way," at the risk of making her life on the job even more miserable. *Id.*, 24 FEP Cas. at 1162, (citing C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 43-47 (1979)).

⁵⁵ *Id.*

⁵⁶ *Id.* In offering its guidance, *id.* at 946-47, 24 FEP Cas. at 1162-63, including appropriate language for an injunction, *id.* at 948 n. 15, 24 FEP Cas. at 1163 n. 15, the court referred to the final Guidelines on Discrimination Because of Sex: Sexual Harassment (Guidelines) issued by the EEOC on November 10, 1980 and applied by them to the case at bar, *id.* at 946-47, 24 FEP Cas. at 1162-63, (citing EEOC Guidelines on Discrimination Because of Sex: Sexual Harassment, 45 Fed. Reg. 74, 677 (1980) to be codified at 29 CFR § 1604.11 (a)-(g)).

tion of Title VII and the EEOC Guidelines.⁵⁷ Further, the court would require that the department establish and publicize a procedural mechanism allowing employees to complain immediately and confidentially about harassment, and "take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party," as well as generally develop means of preventing harassment.⁵⁸ The court of appeals also suggested that the district court retain jurisdiction to review the defendant's plans for compliance.⁵⁹

The *Bundy* decision reaffirmed the District of Columbia Circuit's leading role in the judicial treatment of sexual harassment. Four years earlier in *Barnes*, the District of Columbia Circuit became the first to recognize sexual harassment coupled with adverse employment consequences as a violation of Title VII. The *Bundy* decision represents the next logical step in the judicial recognition of the impact of sexual harassment on female employees.⁶⁰ In section 703 of Title VII, practices that discriminate because of an individual's sex are prohibited in the same terms as practices that discriminate on the basis of race, religion, or national origin.⁶¹ It has been accepted in the context of racial, religious, and national origin discrimination that verbal insults could violate Title VII.⁶² Therefore, it is both consistent and logical to interpret the same language as prohibiting similar practices in the employment context when they are based on an individual's sex.

In the context of sex discrimination, as in the context of race discrimination, eliminating stereotypes from the employment environment is a prerequisite to achieving treatment based on an individual's qualifications rather than

⁵⁷ *Id.* at 947, 24 FEP Cas. at 1163.

⁵⁸ *Id.*

⁵⁹ *Id.* The final portion of the opinion remanded the claim for back pay and promotion, instructing the district court on a special burden of proof to apply in this type of case. *Id.* at 948-53, 24 FEP Cas. at 1165-68. However, in light of *Texas Dept. of Community Affairs v. Burdine*, 101 S. Ct. 1089, 25 FEP Cas. 113 (1981), reported elsewhere in the *Survey*, the *Bundy* court's reasoning on this issue is suspect. The *Bundy* court would shift the burden of persuasion to the defendant in cases where sex discrimination is proved independent of any loss of tangible job benefits. 641 F.2d at 952-53, 24 FEP Cas. at 1165-67. The *Bundy* court reasoned that the plaintiff should enter the "ritual order of proof" at an advantage, similar to that enjoyed by plaintiffs in cases where race discrimination is proved independent of any loss of tangible benefits. *Id.* at 952, 24 FEP Cas. at 1166-67. To make out a prima facie case, the court would require a showing by the plaintiff "(1) that she was a victim of sexual harassment attributable to her employer, . . . and (2) she applied for and was denied a promotion for which she was technically eligible and of which she had a reasonable expectation." *Id.* at 953, 24 FEP Cas. at 1167. If this prima facie case were presented, the burden would shift to the employer to show, by clear and convincing evidence, legitimate nondiscriminatory reasons for denying the promotion. *Id.* This would entail a showing by the employer that despite the employee's technical eligibility, the qualification criteria were more stringent than the employee could meet. *Id.*

⁶⁰ See Taub, *supra* note 3, at 371-77.

⁶¹ See note 1 *supra*.

⁶² 641 F.2d at 944-45, 24 FEP Cas. at 1160-61. See Taub, *supra* note 3, at 371-73; Comment, *Sexual Harassment and Title VII — Corne v. Bausch & Lomb, Inc.*, 51 N.Y.U. L. Rev. 148, 153-59 (1976) [hereinafter cited as Comment].

her status as a member of a particular class.⁶³ Courts have recognized this, noting that: "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703 (a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past."⁶⁴ Further, Congress acknowledged that "discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."⁶⁵ Perhaps the requirement of adverse employment consequences in section 703 sex discrimination cases effectively addressed the "irrational impediments to job opportunities." Impediments to job enjoyment, however, can be addressed only by recognizing that sexual harassment in itself is also a violation of section 703.⁶⁶ In addition, the fact that sex discrimination is no less serious than other discrimination will be recognized by employers only if sexual harassment alone, like racial slurs, can constitute a violation of section 703. For these reasons, the *Bundy* result is correct, and its application will help ensure that the congressional mandate against sex discrimination can be fully realized.

While *Bundy* goes a long way in advancing the frontier of sex discrimination law in the area of sexual harassment, several questions remain. First, it is doubtful whether *Bundy* will provide a more definite resolution of the question of the employer's vicarious liability for acts of sexual harassment. Second, the amount of conduct necessary to constitute sexual harassment violative of Title VII will have to be clarified. Finally, the immediate impact of the *Bundy* decision outside the District of Columbia Circuit remains to be seen.

The first question not resolved in *Bundy* is whether an employer is always liable for acts of sexual harassment.⁶⁷ Where a supervisor denies a tangible job benefit, such as a promotion, because an employee rejects sexual advances made by the supervisor, imposing employer liability seems logical. The employer hired the supervisor to make this sort of decision and in this capacity

⁶³ Unwelcome conduct in the employment context such as sexual harassment, or the use of racial slurs, is based on historical stereotypes of a particular class of individuals' "proper place" in society. This conduct reinforces a stereotype denoting an inferior status, a position requiring submission to demands from individuals of a favored or "superior" class. See Comment, *supra* note 62, at 158; Taub, *supra* note 3, at 361. Sexual harassment of female employees by male supervisors implies that the female's primary role is to satisfy male sexual desires, just as demeaning treatment of black employees by white supervisors implies that the black's primary role is to satisfy whites' desires. See Comment, *supra* note 65, at 158; Taub, *supra* note 3, at 361.

⁶⁴ *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). See also *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting the passage from *Sprogis* with approval).

⁶⁵ H.R. REP. NO. 238, 92d Cong., 1st Sess. 5 (1971).

⁶⁶ Although data regarding sexual harassment is scanty, recent studies suggest that the overwhelming majority of women do not enjoy sexual advances on the job and are not flattered by such conduct. Taub, *supra* note 3, at 361 n.85.

⁶⁷ The facts in *Bundy* support liability only where the advances are committed by supervisors, both before and after the plaintiff complained, and when upon notice of such acts the employer took no action to stop the advances and reprimand those involved. See text at notes 68-70 *infra*.

the supervisor is an agent acting directly for the employer. Similarly, where the employer has notice of sexual harassment committed by supervisory personnel, regardless of any resulting employment consequences, and implicitly condones the conduct by failing to take corrective action, the employer's liability is also clear. But where sexual harassment does not result in adverse employment consequences and the employer has no reason to know of the conduct, the rationale for imposing liability on the employer is less compelling.

Although the *Bundy* court noted that an employer is liable for acts committed by supervisory personnel,⁶⁸ courts in the future may reject arguments for broad employer liability and may distinguish *Bundy* as limited to its specific facts. Not only *Bundy*'s second- and third-line supervisors, but also the department director and EEOC officers were notified of the harassment, yet they took no corrective action, did not investigate the complaint, and even frustrated her attempts to complain. In addition, the district court found that sexual harassment represented "standard operating procedure,"⁶⁹ within the department. On these facts, it would seem that employer liability may be limited to cases where there is notification, actual or constructive, and corrective action is not undertaken. In dicta, the *Bundy* court indicated a desire to expand liability beyond the situation presented in the case by stating only one situation where an employer might be relieved of liability: where a supervisor acted in contravention of the employer's policy, without the employer's knowledge, and the employer initiated prompt corrective action.⁷⁰ In addition, in providing injunctive guidance, the court noted that the EEOC Guidelines on Discrimination Because of Sex: Sexual Harassment (Guidelines) affirm employer liability for harassment by supervisors regardless of whether the employer knew or should have known of the conduct.⁷¹ The Guidelines make no exception to employer liability for conduct of an agent or supervisor.⁷² The Guidelines would expand employer liability even further, holding the employer liable for acts of sexual harassment between fellow employees⁷³ and for acts by non-employees in the workplace⁷⁴ where the employer or supervisory personnel knows or should have known of the conduct but failed to take immediate and appropriate corrective action.⁷⁵ Whether *Bundy* will be narrowly construed as imposing employer liability only where the employer knew of the conduct of its supervisors yet failed to take corrective action, or whether the much more expansive concept of employer liability expressed in the Guidelines with respect to supervisory personnel will be adopted, remains to be seen.

A second question not resolved in *Bundy* is the extent of harassment neces-

⁶⁸ 641 F.2d at 943, 24 FEP Cas. at 1159.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 947, 24 FEP Cas. at 1162.

⁷² 45 Fed. Reg. 74, 677 (1980) (to be codified at 29 CFR § 1604.11(c)).

⁷³ *Id.* (to be codified at 29 CFR § 1604.11(d)).

⁷⁴ *Id.* (to be codified at 29 CFR § 1604.11(e)).

⁷⁵ *Id.* (to be codified at 29 CFR § 1604.11(d),(e)).

sary to constitute a Title VII cause of action. *Bundy* presented a fairly straightforward situation where sexual harassment continued after the plaintiff complained about the conduct. In other situations, however, the existence of harassment may not be so apparent. One commentator recently addressed this issue and identified two "countervailing considerations" in attempting to delineate the level of harassment necessary to constitute a Title VII case.⁷⁶ While acknowledging that men may genuinely be unaware that their conduct is offensive to women, it also should be recognized that it is often unrealistic to expect women to express their rejection, since this may invite retaliation, thus making the victim's job even less tolerable.⁷⁷ In light of these legitimate considerations, this commentator proposed a standard that seems to be both fair and practical. As a general rule, the standard would require a woman to inform the harasser that she finds his conduct offensive.⁷⁸ In extreme situations, however, the standard would not require such a warning before the harassment would be deemed to constitute a violation of Title VII.⁷⁹ In either situation, after the harasser knew, or should have known, that his conduct was unwelcome, the commentator would find a violation of Title VII.⁸⁰ Regardless of whether this standard is adopted by courts in the future, the application of *Bundy* to claims of sexual harassment will necessitate a clarification of what conduct violates Title VII in cases where the harassment does not occur repeatedly or is discontinued after complaints.

Although *Bundy* leaves unanswered questions concerning vicarious liability and the level of harassment necessary to violate Title VII, the decision nevertheless represents the broadest expansion of the phrase "terms, conditions, or privileges of employment" in the sex discrimination context to date. It remains to be seen, however, whether other courts will adopt this expansion. While Title VII existed for seventeen years,⁸¹ the *Rogers* decision provided a basis for expanding the phrase "terms, conditions, or privileges" for ten years,⁸² and legal commentators argued in favor of such an expansion in the context of sex discrimination for at least five years before *Bundy*,⁸³ the District of Columbia Circuit is the first court to accept this expansion. Prior to *Bundy*, only two other circuits had addressed directly the issue of sexual harassment

⁷⁶ Taub, *supra* note 3, at 375.

⁷⁷ *Id.*

⁷⁸ *Id.* at 375-76.

⁷⁹ *Id.* at 376. These extreme cases include physical conduct such as grabbing the woman's buttocks or putting hands under the woman's clothing, and verbal conduct such as reference to the size of the woman's breasts. *Id.*

⁸⁰ *Id.* at 377.

⁸¹ It should be remembered that the amendment inserting the coverage of sex into Title VII was only offered with the aim of defeating the entire legislation, not with the aim of equalizing the role of women in the workplace or in society. Comment, *supra* note 62, at 156 n.41 (citing L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 103-06 (1969)); Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880-84 & n.34 (1967).

⁸² *Rogers v. EEOC*, 454 F.2d at 238.

⁸³ See, e.g., Comment, *supra* note 62, at 153-59.

even when the action was coupled with adverse employment consequences and found a violation of Title VII.⁸⁴ With this dubious historical background of the treatment of sex discrimination in general, and sexual harassment in particular, the speed with which other courts follow *Bundy* will indicate whether the judiciary is finally ready to treat sex discrimination as no less serious than other unlawful discrimination, a goal affirmed by Congress over a decade ago.⁸⁵

B. *Involuntary Early Retirement*: EEOC v. Baltimore & Ohio Railroad*

The Age Discrimination in Employment Act of 1967 (ADEA) states as one of its purposes the prohibition of arbitrary age discrimination in employment.¹ Individuals between the ages of 40 and 70 are protected by the ADEA.² Subsection 4(a) of the ADEA provides in pertinent part that it shall be unlawful for an employer to discharge any individual because of age.³ Subsection 4(f)(2) provides, however, that it shall not be unlawful for an employer "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual. . . ."⁴ Section 4(f)(2) has been interpreted as an exception to the Act which allowed involuntary retirement under certain seniority systems and employee benefit plans.⁵ In 1978 Congress amended section 4(f)(2) to prohibit its use as a

⁸⁴ See *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d at 1048; *Miller v. Bank of America*, 600 F.2d at 212, 214.

⁸⁵ See text and note at note 65 *supra*.

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¹ 29 U.S.C. §§ 621 *et seq.* (1976). Section (b) of the Act states its purpose as follows: "[T]o promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1976).

² At the time of the alleged discriminatory acts in the *Survey* case, *EEOC v. Baltimore & Ohio R.R.*, 632 F.2d 1107, 23 FEP Cas. 1381 (4th Cir. 1980), which occurred in 1971 and 1972, the protected ages were 40 to 65. 29 U.S.C. § 631 *as amended by* Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978).

³ The ADEA provides in relevant part: "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . ." 29 U.S.C. § 623(a)(1) (1976).

⁴ Section 4(f)(2) of the ADEA provides in relevant part: "It shall not be unlawful for an employer . . . (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual. . . ." 29 U.S.C. § 623(f)(2) (1976).

⁵ *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 195 (1977).

defense to the involuntary retirement of protected individuals.⁶ The amendment was enacted because the courts' interpretation of 4(f)(2) was considered contrary to congressional intent.⁷

In this *Survey* year, the Fourth Circuit in *EEOC v. Baltimore & Ohio Railroad Company*,⁸ examined the broad issue of whether the involuntary retirement of employees because they qualify for pension benefits is a violation of the ADEA. The case posed two questions: first, whether the involuntary retirement of employees based on their age constituted a violation of the ADEA; and second, whether the subsequent change in the company's retirement plan reducing the mandatory retirement age violated the Act. The *B. & O. Railroad* court avoided the question of the retroactivity of the 1978 amendment to the ADEA by holding that the employer's actions violated the pre-1978 Act.⁹

In 1971 a nationwide coal mining strike precipitated a financial crisis at the B. & O. Railroad Company.¹⁰ This financial condition required the company to reduce its work force.¹¹ One hundred and forty-two employees aged 60 to 65 were selected for involuntary retirement because they qualified for pension benefits.¹² The following year the company amended its pension plan to provide for involuntary retirement at age 62.¹³ The plaintiff¹⁴ alleged that B. & O. Railroad violated the ADEA by involuntarily retiring 142 employees based

⁶ Added to § 4(f)(2) is the following amending language: "[a]nd no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this Act because of the age of such individual." 29 U.S.C. § 623(f)(2) (1979 Supp.).

⁷ The Committee on Human Resources, under whose auspices the amendment was made, reported that the retirement decision should be an individual option for capable older workers. H.R. REP. NO. 95, 95th Cong., 2d Sess. 3, reprinted in [1978] U.S. CODE CONG. & AD. NEWS, 504, 506 [hereinafter cited as CONGRESSIONAL AND ADMINISTRATIVE NEWS]. The Committee further contends that the original 1967 section 4(f)(2) has been misinterpreted by the courts. *Id.* at 512. Referring to legislative history of the original section, the purpose of that section was to permit employment of older workers without necessarily including them in employee benefit plans. *Id.* Furthermore, Senator Yarborough, the floor manager of the original 1967 bill, stated that § 4(f)(2) "... will not deny any individual employment or prospective employment but will limit his rights to obtain full consideration in the pension retirement or insurance plan." *Id.* at 513. Despite such language, not only the Third and Fifth Circuits, *Zinger v. Blanchette*, 549 F.2d 901, 14 FEP Cas. 497 (3d Cir. 1977); *Brennan v. Taft Broadcasting*, 500 F.2d 212, 16 FEP Cas. 501 (5th Cir. 1974), but also the Supreme Court, *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), have ruled that pension plans requiring mandatory retirement prior to age 65 do not violate the ADEA under section 4(f)(2). *Id.* at 513. The Committee disagrees with these holdings and states that, in their view, "forced retirement extinguishes an individual's rights to employment and is thus not excused by section 4(f)(2) unless the retirement is based on some reason other than age, such as disability or poor performance." *Id.* at 512.

⁸ 632 F.2d at 1107, 23 FEP Cas. at 1381 (4th Cir. 1980).

⁹ *Id.* at 1112-13, 23 FEP Cas. at 1385.

¹⁰ *Id.* at 1109, 23 FEP Cas. at 1381-82.

¹¹ *Id.*, 23 FEP Cas. at 1382.

¹² *Id.*

¹³ *Id.*

¹⁴ The Equal Employment Opportunity Commission (EEOC) was substituted as appellant-cross appellee after the briefs were filed for the appeal because the enforcement responsibilities for ADEA were shifted to the EEOC. The Secretary of Labor, United States Department of Labor, had originally brought suit. *Id.* at 1108 & n.1, 1108, 23 FEP Cas. at 1381 & n.1.

on their age-related entitlement to a pension, and by amending the pension plans to lower compulsory retirement from age 65 to 62.¹⁵ The district court found *prima facie* violations of the ADEA but held that the company's actions fell within the permissible exception provided by subsection 4(f)(2).¹⁶ On appeal, the Fourth Circuit reversed, finding that the company's actions were not excepted from the Act under section 4(f)(2).¹⁷

Both the district court and the circuit court found that the involuntary retirement of 142 individuals because of their age and pension entitlement constituted a *prima facie* case of age discrimination under the ADEA.¹⁸ The threshold question in determining *prima facie* violations of the ADEA is whether age is a determining factor — although not necessarily the sole factor — in the company's actions.¹⁹ The court stated that, although the company's economic crisis precipitated the layoffs, these particular individuals would not have been selected for retirement "but for" their age.²⁰ Hence, a *prima facie* violation was shown.

Once a *prima facie* case has been established, the burden of production shifts to the company to articulate a reason for its actions which would not be a violation of the Act.²¹ For pre-amendment cases, which include *B. & O. Railroad*, a successful rebuttal of a *prima facie* violation is a section 4(f)(2) defense showing, first, that the action was taken under a bona fide pension plan, and second, that the plan is not a subterfuge to evade the purposes of the ADEA.²² The court in *B. & O. Railroad* set forth a clear and reasonable test for a successful section 4(f)(2) defense: the involuntary termination must be pursuant to the pension plan's design and not be a discretionary act of management.²³

Applying this test to the actions of the B. & O. Railroad, the court first addressed the issue of whether the involuntary early retirement of 142 individuals was a violation of the ADEA.²⁴ In order to prevail under a section 4(f)(2)

¹⁵ *Id.* at 1108, 23 FEP Cas. at 1381.

¹⁶ *Id.* at 1108-09, 23 FEP Cas. at 1381.

¹⁷ *Id.* at 1109, 23 FEP Cas. at 1381.

¹⁸ *Id.* at 1108, 1110, 23 FEP Cas. at 1381-82.

¹⁹ *Id.* at 1110, 23 FEP Cas. at 1382.

²⁰ *Id.*

²¹ *Loeb v. Tectron, Inc.*, 600 F.2d 1003, 1011, 20 FEP Cas. 29, 34 (1st Cir. 1979).

²² 632 F.2d at 1110, 23 FEP Cas. at 1383.

²³ *Id.* at 1111, 23 FEP Cas. at 1383. The court looked to several prior cases which held that involuntary retirement as early as age 60 was not a violation of the ADEA when such action was taken pursuant to a bona fide retirement plan. *Id.* (citing *United Air Lines v. McMann*, 434 U.S. 192 (1977); *Thompson v. Chrysler Corp.*, 569 F.2d 989 (6th Cir. 1978); *Zinger v. Blanche*, 549 F.2d 901, 14 FEP Cas. 497 (3d Cir. 1977)). For example, the Supreme Court in *McMann* rejected any *per se* rule requiring an employer to show an economic or business purpose as evidence of good faith compliance. 434 U.S. at 203. In that case an employee voluntarily subscribed to a retirement plan in which the normal retirement age was 60. *Id.* at 193-94. The employee signed an application form for the plan which stated that the retirement age was 60. *Id.* at 194. The Court held that the retirement plan came within the 4(f)(2) exception and, therefore, no violation occurred. *Id.* at 203. The Court further stated that an employer, in order to have a bona fide retirement plan does not have to show a business or economic purpose to justify involuntary retirement provisions enacted prior to the passage of the ADEA. *Id.*

²⁴ 632 F.2d at 1110, 23 FEP Cas. at 1383.

defense, the company had to show that the involuntary retirements were initiated under a bona fide pension plan.²⁵ A successful section 4(f)(2) defense requires a specific plan and does not include discretionary acts of management.²⁶ The court determined that the company's claim of an informal retirement plan at age 62 was not valid because it was not a bona fide written plan.²⁷ Although the company had been retiring individuals before age 65 on an informal basis, the company's written retirement plan called for involuntary retirement at 65.²⁸ Thus the court concluded that "normal retirement" occurred at age 65 and retirement prior to age 65 was not pursuant to a bona fide retirement plan.²⁹

After ruling that section 4(f)(2) did not provide a defense to the company's involuntary retirements, the court addressed the issue of whether the revised retirement plan reducing the age for involuntary retirement from age 65 to 62 violated the ADEA. The court held that, under section 4(f)(2), the company's action was a subterfuge to evade the purpose of the Act.³⁰ Personnel reductions based on age are specifically prohibited by the Act.³¹ The court reasoned that the company's revised retirement plan, formulated after financial difficulties had necessitated reductions in the work force, was, in essence, a personnel reduction based on age, violative of the express purpose of the Act.³² Furthermore, the court stated that because the company's actions were a violation of the pre-1978 Act, there was no need to decide the issue of the retroactivity of the 1978 amendment.³³

The *B. & O. Railroad* court's decision that the early involuntary retirements violated the ADEA was a proper one. The court based its decision

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1111, 23 FEP Cas. at 1383.

²⁸ *Id.* at 1110-11, 23 FEP Cas. at 1383.

²⁹ *Id.* The company further asserted that its action was not a violation of ADEA because it had relied on published Labor Department opinions in assuming the legality of the involuntary retirements. *Id.* at 1111-12, 23 FEP Cas. at 1384. This reliance was sufficient, it was contended, to protect the company under the Portal-to-Portal Act's exception for good faith reliance. *Id.* at 1111, 23 FEP Cas. at 1383. The Portal-to-Portal Act, incorporated into the ADEA by 29 U.S.C. § 626(e) (1976), states in pertinent part that no employer "shall be subject to any liability or punishment . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the agency of the United States." 29 U.S.C. § 259(a) (1976). On its face this argument appears to be valid. Examination of one of the opinion letters relied on, however, clearly indicates that the involuntary retirement prior to age 65 must be done pursuant to a retirement or pension program in which the employees are participants. 632 F.2d at 1112, 23 FEP Cas. at 1384. The *B. & O. Railroad*'s pension plan did not call for involuntary retirement prior to age 65. *Id.* at 1110, 23 FEP Cas. at 1383. Therefore, no employees could be considered to be participants in a plan calling for involuntary retirement prior to age 65 because no such plan existed in which they could participate. The court, accordingly found that no good faith reliance existed. *Id.* at 1111-12, 23 FEP Cas. at 1384.

³⁰ *Id.* at 1112-13, 23 FEP Cas. at 1385.

³¹ *Id.* at 1113, 23 FEP Cas. at 1385.

³² *Id.*

³³ *Id.* at 1112, 23 FEP Cas. at 1385.

on the ground that the action was not taken pursuant to a bona fide written plan. One possible unarticulated factor for the court's decision is that under the employer's prior practices, management had the luxury of determining when it would pay early retirement benefits without having to provide such benefits as a result of an employee's voluntary decision to retire. Thus when the decision to retire was the employee's, management was under no obligation to provide such benefits. Consequently, only when management unilaterally decided that early retirement was desirable would pension benefits be provided.

Although the court's holding that the involuntary retirement of 142 employees violated the ADEA rests on firm ground, its decision that the revised retirement plan was a subterfuge to evade the purpose of the ADEA is subject to criticism. The court emphasized that this change in the retirement plan was made in 1972, after the company had been advised of its violation in retiring the 142 employees.³⁴ The court concluded that because of this sequence of events, the change could not have been made in good faith.³⁵ There is, however, one other possibility that the court did not address. The B. & O. vice president testified that the company had involuntarily terminated employees prior to age 65 in the past and that such a right was inherent in management.³⁶ Additionally, the company argued at trial that the right to terminate employees involuntarily was an unwritten part of the plan because of past practice.³⁷ By changing the plan, it is possible that the company was attempting to incorporate its established internal practices into its written plan to ensure that such practices could not be challenged as discretionary acts of management. The court did not consider this explanation.

Another disappointing aspect of the Fourth Circuit's analysis is its failure to reach the issue of whether the 1978 amendment to section 4(f)(2) is retroactive. An examination of Supreme Court precedent,³⁸ the district court holding in the principal case addressing itself to the retroactivity issue,³⁹ and the legislative history of the amendment⁴⁰ produces the conclusion that the amendment is most likely prospective in nature. The district court rejected the argument put forth by the plaintiff in *B. & O. Railroad* that, according to *Bradley v. School Board*,⁴¹ a court is to apply the law in effect at the time it renders its decision unless doing so would result in an injustice, or unless statutory direction or legislative history is to the contrary.⁴² *Bradley* can be distinguished from *B. & O. Railroad*, however. The statute addressed in *Bradley* was one authorizing the award of attorneys' fees to the plaintiffs in a school desegregation case.⁴³ That

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1110, 23 FEP Cas. at 1383.

³⁷ *Id.* at 1110-11, 23 FEP Cas. at 1383.

³⁸ *Bradley v. School Board*, 416 U.S. 696 (1974).

³⁹ *EEOC v. B. & O. R.R.*, 461 F. Supp. 362, 18 FEP Cas. at 1101 (D. Md. 1978).

⁴⁰ 123 CONG. REC. S17, 304 (daily ed. Oct. 19, 1977).

⁴¹ 416 U.S. 696 (1974).

⁴² 461 F. Supp. at 382, 18 FEP Cas. at 1102. See 416 U.S. at 711.

⁴³ 416 U.S. at 716. See 20 U.S.C. § 1617 (1976).

statute did not alter any substantive obligation nor would earlier enactment have caused the defendant to change its conduct.⁴⁴ Consequently, applying the statute retroactively did not produce a manifest injustice. In *B. & O. Railroad*, however, retroactive application of a statute regulating retirement plans would not allow private parties to rely on prior settled law in formulating corporate and individual plans.⁴⁵ Furthermore, had the statute been amended earlier, it is likely that employers would have responded with different retirement plans or policies. Thus, while the retroactive application of a statute regulating fee schedules did not result in a manifest injustice in *Bradley*, the retroactive application of a statute regulating retirement plans in *B. & O. Railroad* would have such a result.

The question then remains whether legislative history or statutory direction compels retroactive application. The district court considered the statute's legislative history and concluded that, based on Floor Manager Senator Williams' responses, the bill was not intended to be retroactive.⁴⁶ Statutory direction indicates that the amendment took effect April 6, 1978 except for certain collective bargaining agreements in which case its effect was delayed until January 1, 1980.⁴⁷

An earlier case cited by the plaintiff in support of his position that the amendment should be applied retroactively, *Davis v. Boy Scouts of America*,⁴⁸ actually sidestepped the issue of retroactivity. *Davis* specifically determined that the question was not the retroactivity but rather the application of the existing rule at the time of trial.⁴⁹ The district court avoided applying that construction to *EEOC v. Baltimore & Ohio Railroad*, but did not find *Davis* dispositive because that court did not directly address the timing issue.⁵⁰

Although ambiguity exists as to whether the Fourth Circuit will automatically find any subsequent age change to be a violation of the ADEA, or whether it will adopt a case-by-case analysis of such situations, the issue is moot for cases arising after the effective date of the amendment. The post-amendment section 4(f)(2) no longer serves as a defense to involuntary retirement based on age. Retirement for cause, however, is permitted under section 4(f)(3).⁵¹ Presumably, section 4(f)(2), post-amendment, will now serve that purpose expressed in its original legislative history: to permit the employment of workers without the necessity of including all workers in employee benefit plans.⁵²

⁴⁴ *Id.* at 721.

⁴⁵ 461 F. Supp. at 379, 18 FEP Cas. at 1103.

⁴⁶ *Id.* at 380-81 & n.3, 381, 18 FEP Cas. at 1104-05 & n.3, 1105. Among several comments by Senator Williams was the statement that "the bill is not retroactive. The question of mandatory retirements prior to the effective date of this bill will be determined by the courts' interpretation of existing law." *Id.* at 381, 18 FEP Cas. at 1104 (quoting 123 CONG. REC. S17, 304 (daily ed. Oct. 19, 1977)).

⁴⁷ CONGRESSIONAL AND ADMINISTRATIVE NEWS, *supra* note 7, at 523.

⁴⁸ 457 F. Supp. 665, 17 FEP Cas. 1546 (D.N.J. 1978).

⁴⁹ *Id.* at 673, 17 FEP Cas. at 1551.

⁵⁰ 461 F. Supp. at 380 n.2, 18 FEP Cas. at 1104 n.2.

⁵¹ 29 U.S.C. § 623(f)(3) (1976).

⁵² CONGRESSIONAL AND ADMINISTRATIVE NEWS, *supra* note 7, at 512.

In conclusion, applicability of the section 4(f)(2) defense to rebut a prima facie case of age discrimination under the ADEA has been eliminated under the 1978 amendment.⁵³ The language of the amendment is clear: "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified in section 12(a) of this Act because of the age of such individual."⁵⁴ The purpose of the amendment, as stated in the legislative history, is to clarify section 4(f)(2) to prohibit mandatory retirement pursuant to pension plans or seniority systems of individuals in the protected age category.⁵⁵ Thus, section 4(f)(2) no longer validates mandatory retirement under a bona fide retirement plan based on age after the effective dates for the amendment.⁵⁶ A question remains whether the amendment is retroactive. Following the effective dates for the amendment, mandatory retirement will only be available for cause, such as disability or poor performance.⁵⁷

III. CONCURRENT JURISDICTION OF THE NLRA AND EEOC

A. *Retaliation Charges: Frank Briscoe, Inc. v. NLRB**

The Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) both have jurisdiction in certain instances of retaliation by employers against employees who have exercised their legal rights by group activity. Section 704(a) of Title VII of the Civil Rights Act of 1964 states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge . . . under this title."¹ At the same time, the National Labor Relations Act (NLRA), in section 7, gives employees the right to engage in concerted activities for the purpose of mutual aid or protection² and, in section 8, provides that an

⁵³ *Id.* at 513.

⁵⁴ 29 U.S.C. § 623(f)(2) (1976).

⁵⁵ CONGRESSIONAL AND ADMINISTRATIVE NEWS, *supra* note 7, at 504.

⁵⁶ *Id.* at 510-12. Two exemptions to the prohibition against mandatory retirement were specified: highly compensated individuals and certain employees of educational institutions.

⁵⁷ *Id.* at 512.

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¹ 42 U.S.C. § 2000e-3(a) (1976).

² 29 U.S.C. § 157 (1976). That section provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title [section 8(a)(3) of the NLRA].

29 U.S.C. § 157 (1976).

employer's interference with, restraint or coercion of employees exercising such a right shall constitute an unfair labor practice.³

During the *Survey* year, the United States Court of Appeals for the Third Circuit, in *Frank Briscoe, Inc. v. NLRB*,⁴ held that the filing of a complaint with the Equal Employment Opportunity Commission (EEOC) by a group of employees under Title VII could constitute concerted activity protected by the NLRA.⁵ To qualify as a protected activity, the court ruled, the filing must not violate another important principle of labor law, such as that of a union's right to exclusive representation of employees.⁶ The court further held that retaliation by the employer against those employees who had filed an EEOC complaint could then be an unfair labor practice giving rise to the remedial measures of the NLRA.⁷ Thus, the redressing of violations of Title VII is not necessarily the exclusive province of the EEOC.⁸ The availability of a remedy from the EEOC under Title VII does not preclude a plaintiff from seeking and obtaining relief under the NLRA from the NLRB.⁹ In other words, the jurisdiction of the NLRB and EEOC may overlap in some cases involving retaliation by an employer.

In *Briscoe*, twelve ironworkers were laid off in February, 1979, by Frank Briscoe Inc. (Briscoe), general contractor for the construction of a convention center in Pittsburgh.¹⁰ At that time, the construction project was shut down because of poor weather conditions.¹¹ The union steward instructed the laid-off employees that they would later be called back to work.¹² Of those employees, four black workers filed charges of racial discrimination with the EEOC.¹³ In March, when the company began rehiring, it instructed the union hiring hall that as long as the discrimination charges were filed with the EEOC, none of the laid-off workers would be recalled.¹⁴ Briscoe's job superintendent told a union representative that to rehire those who had not filed charges would be evidence of discrimination.¹⁵ Eight of the workers requested that they be

³ 29 U.S.C. § 158 (1976). That section provides in relevant part: "(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7 of the NLRA]. . . ."

⁴ 637 F.2d 946, 106 L.R.R.M. 2155 (3d Cir. 1981).

⁵ *Id.* at 953, 106 L.R.R.M. at 2160.

⁶ *Id.* at 950, 106 L.R.R.M. at 2158.

⁷ *Id.* at 953, 106 L.R.R.M. at 2160.

⁸ *See id.*

⁹ *Id.*

¹⁰ *Id.* at 947-48, 106 L.R.R.M. at 2156.

¹¹ *Id.* at 947, 106 L.R.R.M. at 2156.

¹² *Id.* at 948, 106 L.R.R.M. at 2156.

¹³ *Id.*, 106 L.R.R.M. at 2156. A fifth worker who had been demoted but not laid off also filed charges. *Id.* Of the four laid-off workers filing charges, one was a trainee laid off because of Briscoe's mistaken belief that the collective bargaining agreement required that all trainees be laid off before any journeymen. *Id.* at 948 n.2, 106 L.R.R.M. at 2156 n.2. That worker was recalled on February 27 when Briscoe realized its error. *Id.*

¹⁴ *Id.*, 106 L.R.R.M. at 2156. The decision of the NLRB states that the employer Briscoe thought that it would be "in some unexplained way 'vulnerable' if it rehired any of that laid-off group, black or white." *Frank Briscoe Inc.*, 247 N.L.R.B. No. 6 (1980).

¹⁵ 637 F.2d at 948, 106 L.R.R.M. at 2156.

rehired, but were refused.¹⁶ Those eight workers, including three of the blacks who had filed discrimination charges with the EEOC, brought an unfair labor practice charge against the company.¹⁷

During the ensuing proceedings before the NLRB,¹⁸ the employer asserted that the lay-off and the refusal to rehire were due to the poor work performance of the employees.¹⁹ The administrative law judge found, however, that the lay-off had been a general one and that the company had refused to rehire any of the workers because they had filed charges with the EEOC.²⁰ The filing of such charges, the judge continued, constituted protected concerted activity under the NLRA, regardless of the merit of those charges.²¹ The judge ordered the employer to cease the violation, and to reinstate the workers with back pay.²² The Board affirmed the findings, conclusions, and rulings of the administrative law judge.²³

Consequently, Briscoe petitioned the Third Circuit Court of Appeals for review, and the NLRB cross-petitioned for enforcement of the Board's order.²⁴ Briscoe raised three issues on appeal.²⁵ The first two concerned the Board's fact-finding.²⁶ Rejecting Briscoe's arguments, the court held that the Board's determinations were supported by substantial evidence.²⁷ Briscoe's third con-

¹⁶ *Id.*, 106 L.R.R.M. at 2156.

¹⁷ *Id.*

¹⁸ Frank Briscoe Inc., 247 N.L.R.B. No. 6 (1980).

¹⁹ *Id.*

²⁰ *Id.* The administrative law judge stated that all the discriminatees, white and black, had been affected by the filing by the blacks of the charges with the EEOC. *Id.* at n.16. The judge rejected Briscoe's contention that the protected concerted activity, if it existed, constituted such activity only with respect to the blacks. 247 N.L.R.B. No. 6

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ 637 F.2d at 947, 106 L.R.R.M. at 2156. The Court of Appeals had jurisdiction under 29 U.S.C. § 160(e) & (f) (1976). 637 F.2d at 947, 106 L.R.R.M. at 2156.

²⁵ 637 F.2d at 948, 950, 951, 106 L.R.R.M. at 2157, 2158-59.

²⁶ First, Briscoe argued that the record did not support the finding that the ironworkers had engaged in protected concerted activity. *Id.* at 948, 106 L.R.R.M. at 2157. Referring to *Edward Blankstein, Inc. v. NLRB*, 623 F.2d 320, 321, 104 L.R.R.M. 3004 (3d Cir. 1980) (cavassing of other employees regarding interest in health plan constituted concerted activity — "concerted activity requirement is basically a factual inquiry"), the court stated that the question was one of fact, and found that the Board's determination had been supported by substantial evidence. 637 F.2d at 949, 106 L.R.R.M. at 2157. In accordance with 29 U.S.C. § 160(e) & (f) (1976) (providing for review of the Board's decision by circuit courts of appeals and stating that findings of fact by the Board are to be conclusive if supported by substantial evidence), the court was thus bound to uphold the Board's determination. 637 F.2d at 949, 106 L.R.R.M. at 2157. In connection with the question of concerted activity, the court also rejected an argument that the Board had relied on a so-called "constructive concerted activity" doctrine enunciated in *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 61 L.R.R.M. 1537 (1966), *enforced* 388 F.2d 495, 67 L.R.R.M. 2083 (2d Cir. 1967), which had been rejected in *NLRB v. Northern Metal Co.*, 440 F.2d 881, 76 L.R.R.M. 2958 (3d Cir. 1971). 637 F.2d at 949, 106 L.R.R.M. at 2157-58.

Second, Briscoe argued that evidence on the record did not support the Board's finding that Briscoe had refused to rehire the workers because of the charges filed with the EEOC. *Id.* at 950, 106 L.R.R.M. at 2158. The court found that the Board's finding was fully supported on the record. *Id.* at 951, 106 L.R.R.M. at 2158.

²⁷ 637 F.2d at 949, 951, 106 L.R.R.M. at 2157, 2158. See note 26 *supra*.

tention was that the only remedy available to the workers for the refusal to rehire them is that derived from section 704(a) of Title VII.²⁸ That section forbids discrimination against an employee who has filed a charge or participated in proceedings under Title VII.²⁹ The court noted that Title VII does not itself address the relation between section 704(a) of Title VII and section 8(a)(1) of the NLRA.³⁰ The court then considered the legislative history³¹ and subsequent judicial interpretation of Title VII.³²

Looking at the legislative history of Title VII, the court found an expression of Congressional intent that the act allow an individual to pursue rights independently under both Title VII and other applicable statutes.³³ The court quoted from an interpretative memorandum introduced by Senator Clark, a sponsor of the bill, stating: "If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction."³⁴ The court pointed out that amendments that would have made Title VII the exclusive federal remedy for most unlawful employment practices had been twice defeated.³⁵

Having found that the legislative history does not support a contention that the remedies provided by Title VII are exclusive, the court turned to a consideration of judicial interpretation of Title VII with respect to that contention. In doing so, the court referred to three Supreme Court decisions that support a conclusion that the remedies provided by Title VII are not exclusive.³⁶ First, the court pointed out that the Supreme Court in *Eastex, Inc. v. NLRB*,³⁷ stated that section 7 of the NLRA "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums."³⁸ The court in *Briscoe* noted that *Eastex* cited with approval an NLRB case that had held that section 704(a) of Title VII does not provide the exclusive remedy for retaliation.³⁹ Second, the *Briscoe* court

²⁸ 42 U.S.C. § 2000e-3(a) (1976). 637 F.2d at 951, 106 L.R.R.M. at 2158-59.

²⁹ 42 U.S.C. § 2000e-3(a) (1976).

³⁰ 637 F.2d at 951, 106 L.R.R.M. at 2159.

³¹ *Id.* at 951, 106 L.R.R.M. at 2159.

³² *Id.* at 952-53, 106 L.R.R.M. at 2159-60.

³³ *Id.* at 951, 106 L.R.R.M. at 2159.

³⁴ 110 CONG. REC. 7207 (1964), quoted in 637 F.2d at 951, 106 L.R.R.M. at 2159.

³⁵ 637 F.2d at 951, 106 L.R.R.M. at 2159. The court made reference to 110 CONG. REC. 13,650-52 (1964) and H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 66 (1971). 637 F.2d at 951, 106 L.R.R.M. at 2159.

The court's citations to the Congressional Record are the same as those of the United States Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 n.9 (1974) (an employee does not lose his statutory right to trial *de novo* under Title VII by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement).

³⁶ 637 F.2d at 952, 106 L.R.R.M. at 2159-60. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).

³⁷ 437 U.S. 556 (1978) (distribution of a newsletter by employees was protected activity under § 7 of NLRA).

³⁸ 437 U.S. at 566, quoted at 637 F.2d at 952, 106 L.R.R.M. at 2159.

³⁹ 637 F.2d at 952, 106 L.R.R.M. at 2159. See *King Soopers, Inc.*, 222 N.L.R.B. No. 80 (1976).

made reference to *Alexander v. Gardner-Denver Co.*,⁴⁰ a 1974 case which held that submission by an employee to final arbitration under a collective bargaining agreement does not preclude a private right of action under Title VII.⁴¹ Third, the *Briscoe* court found support⁴² in the Supreme Court's decision in *Emporium Capwell Co. v. Western Addition Community Organization*.⁴³ That decision recognized that employees' rights to be free from racial discrimination may arise from both Title VII and the NLRA.⁴⁴ Thus, since the *Briscoe* court found that the remedy provided by Title VII for retaliation is not exclusive, the court granted the NLRB's cross-petition for enforcement of its order.⁴⁵

In a dissenting opinion,⁴⁶ Judge Schwartz asserted that the activity of the ironworkers, though "concerted activity . . . for mutual aid or protection . . .," is not protected by the NLRA.⁴⁷ He stated that the focus of the court should be on whether an unfair employment practice that would not have been illegal before the passage of Title VII is also an unfair labor practice under the NLRA.⁴⁸ Under such an analysis, Judge Schwartz concluded that while *Briscoe's* refusal to rehire might constitute racial discrimination under Title VII, it did not constitute an unfair labor practice under the NLRA.⁴⁹

The result reached by the *Briscoe* court appears to be the correct one. The majority recognized that the question of whether retaliation against employees who have filed charges has occurred is quite distinct from the question of whether racial discrimination has taken place. The question of whether retaliation for filing of charges occurred is independent of the nature or merit of those charges, and may be regarded as within the expertise of the NLRB. The occurrence of retaliation in a given instance may be a much simpler question of fact than the existence of racial discrimination. Consequently, the remedy for a specific instance of retaliation would tend to be simpler than that for a pervasive pattern of racial discrimination. The dissent failed to recognize the distinctness of the two issues. Furthermore, the holding of the majority is firmly supported by the legislative history of the Civil Rights Act.

The issue of overlapping jurisdiction of the EEOC and NLRB is significant because of the differing enforcement mechanisms available to each agency. Under Title VII, an employee files a charge with the EEOC, which then investigates the charge and may attempt conciliation between employer and employee.⁵⁰ If the EEOC does not obtain a satisfactory conciliation agreement, it may institute a suit against the employer in federal district court.⁵¹ If the

⁴⁰ 415 U.S. 36 (1974).

⁴¹ 637 F.2d at 952, 106 L.R.R.M. at 2159.

⁴² *Id.* at 952-53, 106 L.R.R.M. at 2159-60.

⁴³ 420 U.S. 50 (1975) (decision by minority employees to bypass procedures of collective bargaining agreement is not protected by national policy of nondiscrimination).

⁴⁴ 420 U.S. at 69, cited at 637 F.2d at 952-53, 106 L.R.R.M. at 2160.

⁴⁵ 637 F.2d at 953, 106 L.R.R.M. at 2160.

⁴⁶ *Id.* at 953-57, 106 L.R.R.M. at 2160-63 (dissenting opinion).

⁴⁷ *Id.* at 953, 106 L.R.R.M. at 2161.

⁴⁸ *Id.* at 955, 106 L.R.R.M. at 2162.

⁴⁹ *Id.* at 956, 106 L.R.R.M. at 2163.

⁵⁰ 42 U.S.C. § 2000e-5 (1976).

⁵¹ *Id.*

EEOC refrains from filing a suit, the employee may file one.⁵² Thus, the role of the EEOC is primarily conciliatory. It does not issue orders. If there is to be an order, it must come from the federal district court after the usual course of litigation.⁵³ In contrast, under the NLRA, an employee may file a charge with the NLRB, which, after investigation, may issue a complaint against the employer.⁵⁴ The case is tried before an administrative law judge, whose finding is reviewed by the Board.⁵⁵ The Board may issue an order and then petition a federal circuit court of appeals for a court order to enforce it.⁵⁶ The employer may also petition that court for review of the Board's action.⁵⁷

Thus, as a result of *Briscoe*, in situations involving retaliation by an employer against employees who have filed charges with the EEOC, the employees may have a choice of two procedural routes.⁵⁸ The options available to the employees are accordingly broadened.⁵⁹ Practitioners may find that the NLRB process can provide quicker resolution of a given problem.

IV. ATTORNEY'S FEES

A. *Determining Attorney's Fee Awards To Prevailing Title VII Plaintiffs:* Copeland v. Marshall*

Title VII of the Civil Rights Act of 1964¹ governs employment discrimination proceedings. One provision of Title VII gives the court discretionary power to allow the prevailing party to recover from the losing party reasonable attorney's fees as part of the cost of litigation.² If the prevailing party is the Equal Employment Opportunity Commission or the United States, the statute does not give the court authority to award reasonable attorney's fees as part of the costs.³ This recovery is in addition to any other relief granted.⁴

The fundamental purposes of the fee awards provision are to eliminate

⁵² *Id.*

⁵³ *See id.*

⁵⁴ 29 U.S.C. § 160 (1976).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ One commentary states that such overlapping jurisdiction is not necessarily inconsistent with governmental efficiency. Smith & Schmelzer, *Overlapping Jurisdiction of the EEOC and NLRB*, 31 LAB. L.J. 393, 402 (1980).

⁵⁹ It must be borne in mind that not all conduct protected by § 704(a) of Title VII is necessarily protected by § 8(a)(1) of the NLRA. 637 F.2d at 953, 106 L.R.R.M. at 2160. For example, concerted activity violative of the principle of exclusive representation by a union would not be protected by the NLRA. *Id.* at 950, 106 L.R.R.M. at 2158.

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¹ 42 U.S.C. §§ 2000e — 2000e-17 (1976 and Supplement III, 1980).

² 42 U.S.C. §§ 2000e-5(k); 2000e-16(d) (1976).

³ 42 U.S.C. § 2000e-5(k) (1976) provides in pertinent part:

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.

⁴ 42 U.S.C. §§ 2000e — 2000e-17 (1976 and Supplement III, 1980).

discrimination in employment on the basis of race, sex, creed or national origin, and to provide monetary and equitable relief to those who have suffered such discrimination.⁵ The United States Attorney General or the Equal Employment Commission may enforce the substantive provisions of Title VII against private employers. Title VII, however, does not authorize the Attorney General or the Commission to bring suit on behalf of federal employees against government agencies.⁶ Aware that private enforcement would be essential to effect the statute's purpose, Congress enacted a fee awards provision.⁷ Congress' intent in allowing recovery of reasonable attorney's fees was two-fold. First, potential recovery of attorney's fees would make it easier for "a plaintiff of limited means to bring a meritorious suit,"⁸ thereby providing incentive to plaintiffs to seek redress of injuries.⁹ Second, the prospect of liability for attorney's fees might serve as a deterrent to employment discrimination.¹⁰ Thus, one purpose of Title VII's fee award provision is remedial — it is designed to foster redress of injury after employment discrimination has occurred. The other purpose is prophylactic — it is designed to prevent or deter such discrimination before it occurs.

As originally enacted, Title VII did not specifically provide federal employees access to court for review of employment discrimination claims. Complaints of employment discrimination were heard first by the agency in question, with a subsequent review by the Civil Service Commission. Monetary restitution or back pay was not available.¹¹ In 1972, Congress amended the attorney's fees provision of Title VII to provide for an impartial administrative review by the Equal Employment Opportunity Commission and monetary restitution for federal employee discrimination in employment claims. In addition, the 1972 amendment permitted a prevailing federal employee or job applicant to recover attorney's fees from the federal government "the same as a private person."¹² According to the House report, it was essential that the federal government have the same obligation to eradicate discrimination in federal employment that industry and labor organizations have to eradicate

⁵ 42 U.S.C. §§ 2000e-5(k); 2000e-16(d) (1976 and Supplement III, 1980).

⁶ 42 U.S.C. § 2000e-16 (1976); *Parker v. Califano*, 516 F.2d 320, 330 (D.C. Cir. 1977).

⁷ 42 U.S.C. §§ 2000e-5(k); 2000e-16(d) (1976 and Supplement III, 1980); see *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); S. REP. NO. 94-1011, 94th Cong., 2d Sess., 2-4 reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909-14; Berger, *Court Awarded Attorney's Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 306-07 (1977) [hereinafter cited as Berger].

⁸ See 110 CONG. REC. 12722 (1964) (remarks of Sen. Humphrey), 118 CONG. REC. 4940, 4943 (1972); H.R. REP. NO. 238, 92 Cong., 2d Sess. reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2137, 2157-60.

⁹ *Parker v. Califano*, 561 F.2d 320, 332 (D.C. Cir. 1977); cf. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 899 (1975) (discussing the rationale for non-statutory award of attorney's fees to prevailing parties).

¹⁰ See *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980); *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).

¹¹ 42 U.S.C. § 2000e — 2000e-16(d) (1976).

¹² 42 U.S.C. § 2000e-5(k) (1976 and Supplement III, 1980); 118 CONG. REC. 4943 (1972).

discrimination in private employment.¹³ In addition, the House report stated that a federal employee should be able to seek judicial redress in the same manner as a private sector employee.¹⁴ Under the 1972 amendment to Title VII, therefore, a court may grant a discretionary award of reasonable attorney's fees to the prevailing party regardless of whether the losing party is a public or private entity.

In neither the original 1964 Act, nor the 1972 amendment to Title VII, however, did Congress provide guidance for the courts to determine what constitutes a reasonable attorney's fee. The United States Supreme Court also has not stated what standards should be employed in determining a reasonable attorney's fee award. In the absence of such guidance considerable litigation has been spawned over the amount of court-awarded Title VII attorney's fees.¹⁵ When the losing fee-paying party has been a private entity, labor organization, or state or municipal government, the majority of courts have applied a market-value approach in determining the award of a reasonable fee.¹⁶ For most courts using this approach,¹⁷ application of a market-value formula required an analysis of the number of hours the attorney devoted to a variety of legal activities¹⁸ and an assignment of a value to the hours reasonably expended.¹⁹ Ascertaining the value of the hours the attorney has expended generally

¹³ H.R. REP. NO. 238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2158-60.

¹⁴ *Id.* at 2160.

¹⁵ See, e.g., *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974); *Johnson v. Georgia Highway Express, Inc.*, 448 F.2d 714 (5th Cir. 1974); *Ingram v. Madison Square Garden Center, Inc.*, 482 F. Supp. 918 (S.D.N.Y. 1979); *Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd per curiam*, 437 F.2d 959 (5th Cir. 1971); *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978) (panel decision, *Copeland I*); *Copeland v. Marshall*, 20 FEP Cas. 79 (D.C. Cir. 1979) (panel decision denying petition for rehearing, *Copeland II*); *Copeland v. Marshall*, 20 FEP Cas. 88 (D.C. Cir. 1979) (*per curiam*, petition for rehearing *en banc* granted); *Copeland v. Marshall*, 641 F.2d 880, 23 FEP Cas. 967 (D.C. Cir. 1980) (full court, *Copeland III*).

¹⁶ *Clark v. American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970) (private corporation); *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 187-89 (D.C. Cir. 1974) (hotel and union, applies principles from *Johnson* case, see notes 17, 31 *infra*); *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980) (state agencies, Hawaii Dept. of Social Services and Housing).

¹⁷ This is the foundation of the approach outlined in *Johnson v. Georgia Highway Express, Inc.*, 448 F.2d 714 (5th Cir. 1974), cited with approval in S. REP. NO. 1011, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913 (Civil Rights Attorney's Fees Awards Act of 1976). The report also cited with approval *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); 353 F. Supp. 124 (1972), *aff'd*, 550 F.2d 464 (1976), *rev'd on other grounds*, 436 U.S. 547 (1977), *petition for rehearing denied*, 439 U.S. 885 (1978). The *Stanford Daily* case, 64 F.R.D. 680, used the *Johnson* factors modified by the analysis presented in a Third Circuit antitrust case, *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). 64 F.R.D. at 682-83. The *Stanford Daily* case has been cited with approval in cases in both civil rights and Title VII Fee awards in all circuits except the Fourth Circuit.

¹⁸ For example, time spent on pre-trial discovery, depositions, or settlement negotiations should be identified. See *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973). See also *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470-71 (2d Cir. 1974).

¹⁹ 487 F.2d at 168.

starts with determining the attorney's normal hourly billing rate.²⁰ This rate then can be adjusted to reflect the contingent nature of the fees,²¹ the quality of the attorney's performance,²² or other variables.²³ This method of determining the "reasonable" fee that should be awarded consistently has been referred to as the market-value approach.²⁴

Although federal courts generally have applied the market-value approach to fee award determinations when the losing Title VII defendant was a private party, neither Congress nor the United States Supreme Court has stated what standard should be applied when the federal government is the losing party. In 1976, however, with the passage of the Civil Rights Attorneys Fees Award Act,²⁵ Congress appeared to have endorsed the market-value approach to fee award determinations when the federal government is the defendant. The Civil Rights Attorneys Fee Awards Act allows a court, in its discretion, to award attorney's fees to a prevailing party in a civil rights action.²⁶ The Senate report stated that this Act was modeled on the language of Titles II and VII of the 1964 Civil Rights Act.²⁷ The report stated that the purposes of these Titles included encouraging litigants to bring meritorious suits and to deter future civil rights violations.²⁸

The Senate report of the 1976 Civil Rights Attorneys Fee Awards Act²⁹

²⁰ *Id.* at 167 ("The value of an attorney's time generally is reflected in his normal billing rate.").

²¹ *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

²² *Id.* at 718-19; 487 F.2d at 168.

²³ *See Berger, supra* note 7, at 318-26; 488 F.2d at 718-19.

²⁴ *Copeland III*, 641 F.2d 880, 889-94, 23 FEP Cas. 967, 977-82 (D.C. Cir. 1980); *Berger, supra* note 7, at 315-16.

²⁵ Civil Rights Act of 1976, Rev. Stat. § 722, 42 U.S.C. § 1988 (1976).

²⁶ S. REP. NO. 1011, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908.

²⁷ 42 U.S.C. § 2000e-3(b); 42 U.S.C. § 2000e-5(k) (1976). Congress also followed the language of § 402 of the Voting Rights Acts Amendments of 1975, 42 U.S.C. § 19731(e); [1976] U.S. CODE CONG. & AD. NEWS 5909.

²⁸ [1976] U.S. CODE CONG. & AD. NEWS 5909, citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968):

When the Civil Rights Act of 1964 was passed it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . If the plaintiff obtains an injunction he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest. . . . Congress therefore enacted the provision for counsel fees — not simply to penalize litigants who advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

390 U.S. at 401-02.

²⁹ S. REP. NO. 1101, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5910. The Supreme Court had already established, in *Ablemarle Paper Co. v. Moody*, 422 U.S. 403 (1975), that the Title II standards for awarding attorney's fees to successful parties also applied to Title VII cases. 422 U.S. at 415. In the Senate Report to the 1976 Act, Congress stated that the fee-shifting provisions of Title II apply to Title VII as well. S. REP. NO. 1101, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5910.

cited *Johnson v. Georgia Highway Express, Inc.*³⁰ as the major example of the standard to be used in determining attorney's fee awards under the 1976 Act. The *Johnson* case was a Title VII action which adopted a market-value approach to attorney's fee determinations. The *Johnson* market-value approach involved assessing twelve factors of an attorney's performance to establish a reasonable fee award.³¹ The persuasiveness of the Senate report to the 1976 Civil Rights Attorneys Fee Awards Act, however, should not be overestimated as an index of congressional intent in providing for attorney's fee awards in Title VII. Because the report concerned an Act passed twelve years after Title VII was enacted, the observations of the Senate committee cannot be considered a part of Title VII's legislative history.³² Rather, the report constitutes secondary authority — an authoritative, expert opinion concerning Title VII's correct interpretation.³³

Confronted with this scanty legislative history, and the absence of a United States Supreme Court decision on the appropriate measure of attorney's fee awards, the Circuit Court of Appeals for the District of Columbia was the first court of appeals to consider what the appropriate standard should be when the federal government is the losing party in Title VII litigation. A series of decisions rendered by that court from 1978 to 1980 — the *Copeland v. Marshall* litigation — demonstrated the court's attempt to resolve the issue.³⁴ During this *Survey* year this series of decisions culminated in *Copeland v. Marshall*³⁵ (*Copeland III*). In that opinion the majority set forth a more exacting version of the market-value standard than prior decisions by other courts.³⁶ The vigorous two-judge dissent proposed that a "cost-plus" formula rather than a market-value formula be used when the federal government is the losing

³⁰ 488 F.2d 714 (5th Cir. 1974) cited in S. REP. NO. 1011, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5913.

³¹ 488 F.2d at 717-19. These twelve factors are: the time and labor required; the novelty and difficulty of the question; the skill requisite to perform the legal services properly; the preclusion of other employment; the customary fee for similar work in the community; the fixed or contingent nature of the fee; the time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorney; the undesirability of the case; the nature and length of the professional relationship with the client; and the amount of awards in similar cases. *Id.* at 717-19. These factors are based on the ABA's Code of Professional Responsibility Standards governing fees for legal services. See ABA, COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106 at 12C-13C (August, 1976 amendment).

³² *Parker v. Califano*, 561 F.2d at 339 (D.C. Cir. 1971).

³³ *Id.* at 339 n.11 (citing 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTIONS § 949.11 (4th ed. 1973)).

³⁴ *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978) (*Copeland I*); *Copeland v. Marshall*, 20 FEP Cas. 79 (D.C. Cir. 1979) (*Copeland II*); *Copeland v. Marshall*, 20 FEP Cas. 88 (D.C. Cir. 1979 petition for rehearing *en banc* granted, panel order vacated); *Copeland v. Marshall*, 641 F.2d 880, 23 FEP Cas. 967 (D.C. Cir. 1980) (*Copeland III*).

³⁵ 641 F.2d 880, 23 FEP Cas. 967 (D.C. Cir. 1980).

³⁶ 641 F.2d at 888-94, 23 FEP Cas. at 974-82.

litigant.³⁷ Prior to the *Copeland III* decision, a panel of the D.C. Circuit Court had considered this same question. The panel of the full court, composed of the same two judges who dissented in *Copeland III*,³⁸ initially enunciated the "cost-plus" formula in two separate panel opinions.³⁹ The dissenters in *Copeland III* asserted that attorney's fee awards, when the government is the losing litigant, should be lower than comparable awards against private parties.⁴⁰ The court in *Copeland III*, however, rejected the use of a different standard for the federal government as opposed to a private party. The court reasoned that employing different standards could result in lower fee awards, which would violate the goals of the Title VII fee awards provisions. These goals were to enable litigants to bring meritorious suits and to deter the federal government from discriminating in employment.⁴¹ Instead of embracing a cost-plus formula the court's market-value approach attempted to simplify and organize the twelve factors presented in the *Johnson* case into a manageable format for district court judges to apply in making fee determinations.⁴² The D.C. district court, in the interim between the circuit court's panel opinion in *Copeland I*, and the majority opinion of the full court in *Copeland III*, considered the question of the appropriate standards for attorney's fee awards against the federal government.⁴³ In *Bachman v. Pertschuk*,⁴⁴ the district court did not follow the cost-plus formula articulated in *Copeland I*. Instead, the court attempted to implement that portion of the *Copeland I* decision that admonished the district court to apply the *Johnson* factors carefully to avoid windfall fee awards.⁴⁵ Collectively, the majority and dissenting opinions in *Copeland III*, preceded by the panel opinions in *Copeland I*

³⁷ *Id.* at 908-30, 23 FEP Cas. at 987-1005 (Wilkey and Tamm, J.J., dissenting).

³⁸ Judges Wilkey and Tamm.

³⁹ 594 F.2d 244 (D.C. Cir. 1978); 20 FEP Cas. 79 (D.C. Cir. 1979).

⁴⁰ After the *Copeland I* panel opinion, the plaintiffs petitioned the panel for a rehearing on the standards to be applied in determining attorney's fee awards. Although the panel denied the petition, it wrote another opinion explaining the cost-plus standard, and the rationale for, and practical application of the standard in greater detail. *Copeland v. Marshall*, 20 FEP Cas. 79 (D.C. Cir. 1979) (*Copeland II*). In a brief, *per curiam* opinion issued the same day as *Copeland II*, the full court reversed the panel's denial of the petition for rehearing. The full court granted a petition for rehearing, *en banc*, and vacated the *Copeland I* order which had remanded the attorney's fee award question to the district court for reconsideration in light of the *Copeland I* decision. *Copeland v. Marshall*, 20 FEP Cas. 88 (D.C. Cir. 1979).

⁴¹ *Copeland III*, 641 F.2d at 889-95, 23 FEP Cas. at 966-82 (D.C. Cir. 1980).

⁴² *Id.* at 905-08, 23 FEP Cas. 974-82.

⁴³ *Bachman v. Pertschuk*, 23 FEP Cas. 1046 (D.C. Cir. 1979) appeal pending No. 79-1650 (D.C. Cir.).

⁴⁴ *Id.*

⁴⁵ *Id.* at 1049-51. In April of 1980 the Equal Employment Opportunity Commission incorporated the *Johnson* factors into its regulations determining fee awards for prevailing parties in administrative proceedings of Title VII claims. 29 C.F.R. § 1613.271(c) (1980). While this agency apparently adopted a market-value approach, the Justice Department, not surprisingly, endorsed the *Copeland I* and *Copeland II* position that a different fee standard for reasonable attorney's fees should be used when the government is a losing party in a Title VII action. *Justice: Are There Any Public Interest Lawyers?*, LEGAL TIMES OF WASHINGTON, 5 (February 18, 1980).

and *II*, as well as the variations of the market-value standard when used by the federal courts,⁴⁶ demonstrate that the issue of the appropriate standard to apply when awarding Title VII attorney's fees against the federal government remains in doubt.

This chapter will analyze both the market-value and the cost-plus standards that can be used to determine the proper measure of attorney's fees in Title VII cases. In particular, the chapter will examine whether the court in *Copeland III* established a viable market-value standard for courts to use in granting Title VII attorney's fee awards against the federal government. First, the chapter will discuss the evolution of the D.C. Circuit Court's response to the question of the appropriate standard for attorney's fee awards by considering its decision in *Copeland v. Secretary of Labor*,⁴⁷ *Copeland I* and *Copeland II*.⁴⁸ The discussion will consider the policy reasons stated in other cases and congressional reports which led the court to conclude that a market-value standard should be used to award attorney's fees when the federal government was the losing party.⁴⁹ After discussing the market-value standard, this chapter then will explain the cost-plus standard and the policy reasons that caused Judges Wilkey and Tamm to adopt this standard.⁵⁰ Both standards then will be analyzed to determine which better effectuates the policies behind Title VII, and which standard seems easier for a district court to apply. Concluding that the market-value standard best effectuates Congress' intent in allowing fee awards in Title VII cases, and that it is easier for judges to apply than the cost-plus approach, this chapter agrees with the *Copeland III* majority that the market-value test is the best method for determining attorney's fee awards.⁵¹

1. The History of the Copeland Decisions

In *Copeland v. Marshall*⁵² (*Copeland III*), the Court of Appeals for the District of Columbia considered whether it should adopt a market-value test for determining Title VII attorney's fee awards or accept the cost-plus test developed by a panel of the court in *Copeland I* and *Copeland II*.⁵³ The *Copeland* case had a seven-year history before this issue gained the attention of the full circuit

⁴⁶ Two other federal courts have considered the closely-related question of the appropriate measure of attorney's fee awards when the losing party is a state governmental agency. In each of these decisions the court used a version of the market-value formula. *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958, 963-66 (E.D. Pa. 1980) (a claim under the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988); *Dennis v. Chang*, 611 F.2d 1302, 1307-09 (9th Cir. 1980).

⁴⁷ 414 F. Supp. 647 (D. D.C. 1976); see also *Copeland v. Brennan*, 414 F. Supp. 644 (D.D.C. 1975).

⁴⁸ 594 F.2d 244 (D.C. Cir. 1978); 20 FEP Cas. 79 (D.C. Cir. 1979).

⁴⁹ *Copeland v. Marshall*, 641 F.2d 880, 23 FEP Cas. 967 (D.C. Cir. 1980) (*Copeland III*). See text and notes at notes 84-89 *infra*.

⁵⁰ See text and notes at notes 129-148 *infra*.

⁵¹ See text and notes at notes 183-219 *infra*.

⁵² 641 F.2d 880, 23 FEP Cas. 967 (D.C. Cir. 1980).

⁵³ 594 F.2d 244 (1978); 20 FEP Cas. 79 (1979).

court. In *Copeland v. Secretary of Labor*⁵⁴ the district court had found in favor of the plaintiff on her own behalf and on behalf of female employees similarly situated. Plaintiff and other class members were employed in the Data Processing Center of the United States Department of Labor (Department).⁵⁵ One week before trial, after extensive discovery had taken place, the Department stipulated that it had subjected plaintiff-appellee and other class members to sex discrimination in violation of Title VII and agreed to establish an affirmative action plan.⁵⁶ The Department also stipulated that the appellee was the prevailing party for the purpose of entitlement to attorney's fees and costs.⁵⁷ At trial the judge ruled in favor of the appellee's individual claim for relief and ordered that she be promoted to a higher G.S. level and be granted back pay of \$4,169.80. Two district court hearings were required to resolve the negotiations between the appellees and the Department involving the affirmative action plan.⁵⁸ A special master was appointed to determine the retroactive promotion and back pay for other class members.⁵⁹

After substantial additional discovery class members were awarded approximately \$33,000 in back pay.⁶⁰ In addition, class members were awarded either promotion and opportunity to participate in a training program — instead of, in combination with or in addition to back pay.⁶¹ Following this award, the appellee filed a documented request for attorney's fees and costs.⁶² The request stated that four attorneys had spent 3,602 hours on the case.⁶³ Applying their normal billing rates, the legal fee requested was \$206,000.⁶⁴ Plaintiff-appellees supported their request for reimbursement with detailed affidavits.⁶⁵ Although the Department objected to any award approaching \$206,000 it did not request an evidentiary hearing on the attorney's fee award.⁶⁶

⁵⁴ 414 F. Supp. 647 (D.D.C. 1976). See also *Copeland v. Brennan*, 414 F. Supp. 644 (D.D.C. 1975).

⁵⁵ 414 F. Supp. at 648-50.

⁵⁶ *Id.*

⁵⁷ 594 F.2d at 274 n.9.

⁵⁸ 414 F. Supp. at 652-53; 594 F.2d at 214 n.11 (citing Brief for Appellees at 17). *Copeland III* stated that she was awarded \$6,169.80 in back pay. 641 F.2d at 887 n.12, 23 FEP Cas. at 971, n.12. "Some of the plaintiff's proposed changes that the District Court ordered incorporated into the plan concerned 1) reporting, 2) training programs, 3) employee notification, 4) composition of evaluation panels, and 5) retention of jurisdiction by the court to insure compliance." *Id.*

⁵⁹ *Id.*, 23 FEP Cas. at 971 n.12.

⁶⁰ *Id.*; see also 594 F.2d at 247.

⁶¹ 641 F.2d at 887, 23 FEP Cas. at 971.

⁶² *Id.* at 887-88, 23 FEP Cas. at 971-72.

⁶³ 594 F.2d at 247. The hourly rates were \$51.65 for one associate and \$54.32 for the other. The hourly rates for the partners were \$72.46 and \$89.92. *Id.* Eighty percent of the total number of hours charged was logged by the junior associate with little or no courtroom experience or special Title VII expertise. *Id.* at 248.

⁶⁴ *Id.* at 247. The actual requested figure was \$205,916.50, but all the decisions refer to the amount as \$206,000.00.

⁶⁵ *Id.* at 247-48.

⁶⁶ 641 F.2d at 887, 23 FEP Cas. at 972.

On the basis of the record and his personal experience with the proceedings, the trial judge awarded \$160,000 in fees and accompanied his order with a four-page memorandum analyzing the award.⁶⁷ The trial judge stated that the discrepancy between the amount of damages the plaintiff ultimately received and the amount of the attorney's fee award was irrelevant because an employment discrimination suit was an equity action that had achieved benefits such as increased job opportunities whose value could not be measured solely in monetary terms.⁶⁸ Moreover, the trial judge stated that he had taken into account the factors itemized in *Evans v. Sheraton Park Hotel*⁶⁹ in determining the award.⁷⁰ In the *Evans* case, the D.C. Circuit accepted the 12 *Johnson* factors⁷¹ as the proper basis from which to determine attorney's fee awards.⁷² Concluding that the promotion and training program benefits of the affirmative action plan established by the Department were substantial, and that he had balanced correctly all relevant factors to arrive at a reasonable award, the trial judge reduced the requested award from \$206,000 to \$160,000.⁷³

The Department appealed the award as excessive and a two-judge panel of the circuit court heard this appeal in *Copeland I*.⁷⁴ The panel remanded the fee award to the district court, stating that the trial court should determine the fee award on the basis of more detailed data on billing.⁷⁵ In addition, *Copeland I* stated that the traditional method of determining fees by using the hourly rate as the starting point for calculations was incorrect when the federal government was the losing party.⁷⁶ The panel suggested that the trial judge determine the fee award by applying the panel's formula for reimbursement of "costs plus a reasonable and controllable margin for profit."⁷⁷ On plaintiff's petition for rehearing on the award and the cost-plus standard, the panel, in *Copeland II*,⁷⁸ reaffirmed its original ruling that attorney's fee awards in Title VII cases should be determined by using the cost-plus formula.⁷⁹ The panel stated that the trial judge should weigh the quality factors enumerated in *Evans* (the *Johnson* factors) to determine the appropriate profit to be awarded.⁸⁰ On the same day that the panel rendered its *Copeland II* opinion,⁸¹ however, the court,

⁶⁷ *Id.*; 594 F.2d at 238.

⁶⁸ 641 F.2d at 888, 23 FEP Cas. at 972.

⁶⁹ 503 F.2d 177 (D.C. Cir. 1974).

⁷⁰ 414 F. Supp. at 655.

⁷¹ 503 F.2d at 187-88. See note 31 *supra* for a listing of these factors.

⁷² 503 F.2d at 188.

⁷³ 641 F.2d at 887, 23 FEP Cas. at 972.

⁷⁴ 594 F.2d 244 (D.C. Cir. 1978).

⁷⁵ *Id.* at 257.

⁷⁶ *Id.* at 256.

⁷⁷ *Id.* at 251. See text and notes at notes 147-61 *infra* for an explanation of the panel's "cost-plus" test.

⁷⁸ 20 FEP Cas. 79 (D.C. Cir. 1979).

⁷⁹ *Id.* at 80.

⁸⁰ *Id.* (citing *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974)).

⁸¹ 20 FEP Cas. at 82.

sitting *en banc*, granted a petition for rehearing⁸² and vacated the panel's *Copeland I* judgment and remand order.⁸³

2. The Market-Value Standard

In *Copeland III* the full court decided what formula should be used to determine a reasonable attorney's fee in a Title VII suit when the government is the losing party.⁸⁴ The court stated that the language of the Title VII attorney's fee awards provision⁸⁵ and the policies that underlie it do not support the conclusion that the amount of the fee should depend on the losing party's identity.⁸⁶ The court rejected the cost-plus approach articulated in *Copeland I* and *Copeland II*,⁸⁷ stating that:

the theoretical basis for "cost-plus" is fundamentally inconsistent with Congress' purpose in providing for statutory fee-shifting. A fee should be based on the market value of services rendered, not on some notion of "cost" incurred by the law firm. That is the conclusion both of the courts that have spoken on the issue and also Congress itself.⁸⁸

In lieu of the cost-plus formula, the court fashioned a market-value standard which it anticipated would achieve a two-fold purpose. The first purpose, the court stated, was to provide for awards sufficient to ensure that victims of employment discrimination could secure competent lawyers willing to represent them.⁸⁹ The *Copeland III* majority quoted the United States Supreme Court's statement in *Newman v. Piggie Park Enterprises, Inc.*, that the primary purpose of awarding attorney's fees is to "encourage individuals injured by . . . discrimination to seek judicial relief."⁹⁰ In addition, the majority stated that its market value formula could be applied easily by trial courts and would make meaningful appellate review possible.

The court discussed the twelve factors enumerated in *Johnson*⁹¹ and accepted by the D.C. Circuit in *Evans*⁹² as the starting point for calculating a

⁸² *Id.* at 88.

⁸³ *Id.*

⁸⁴ 641 F.2d 880, 23 FEP Cas. 967 (D.C. Cir. 1980).

⁸⁵ 42 U.S.C. § 2000e-5(k) (1976). See note 3 *supra* for the text of the attorney's fee award provision.

⁸⁶ 641 F.2d at 894-86, 23 FEP Cas. at 977-78.

⁸⁷ *Id.* at 896-900, 23 FEP Cas. at 978-82.

⁸⁸ *Id.* at 897, 23 FEP Cas. at 979.

⁸⁹ *Id.* at 890, 23 FEP Cas. at 974.

⁹⁰ *Id.* (quoting *Newman v. Piggie Park Enterprises, Inc.*, 309 U.S. 400, 402 (1968) (Title II case)). See text and notes at notes 5-14 *supra* for a discussion of the purposes of the fee awards provision.

⁹¹ See note 31 *supra*.

⁹² 503 F.2d at 187-88.

reasonable attorney's fee.⁹³ It was the court's view, however, that simply listing these twelve factors did not provide an analytic framework that a judge could apply to his deliberations.⁹⁴ In order to fashion a more meaningful formulation of the *Johnson* factors, the court then turned to the Third Circuit's analysis in *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitation Corp.*⁹⁵ According to the *Copeland III* majority, the *Lindy* court had articulated a formula that considered all relevant factors but eliminated the redundancy that could occur when all twelve *Johnson* factors were applied.⁹⁶ The majority thus based its market-value formula on the considerations embodied in the *Johnson* factors, but applied within the framework provided by *Lindy*.⁹⁷

The *Lindy* court stated that the first inquiry to be made in determining a reasonable attorney's fee award is to ascertain the number of hours spent by the attorneys in each of several categories of professional activity, such as pretrial discovery or settlement negotiations.⁹⁸ After determining the hours spent on the particular categories of legal activities the court stated that the value of the hours spent must be ascertained. According to the *Lindy* court the value of an attorney's time generally is reflected in his normal billing rate.⁹⁹ The court stated that these two figures constitute the "lodestar" — the number of hours spent multiplied by the value of this time.¹⁰⁰ According to the court, the trial judge then should reduce or increase the lodestar figure based on the contingent nature of the lawsuit's success and the quality of the attorney's work.¹⁰¹ The *Lindy* court thus applied the twelve *Johnson* factors in a streamlined manner.

According to the *Copeland III* court, following *Lindy*, the lodestar is to be calculated by multiplying "the number of hours reasonably expended [by the firm] . . . by a reasonable hourly rate."¹⁰² The court described the following method for determining the amount of time reasonably expended by the firm. First, the law firm must document the amount of work performed.¹⁰³ Then the work performed should be segregated by the judge into suitable categories, *e.g.*, pretrial discovery and trial work.¹⁰⁴ In addition, the hours spent by various classes of employees¹⁰⁵ on different categories of work also should be segregated

⁹³ 641 F.2d at 889-90, 23 FEP Cas. at 973-74.

⁹⁴ *Id.*

⁹⁵ *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitation Corp.* (*Lindy*), 487 F.2d 161 (3d Cir. 1973).

⁹⁶ *Lindy*, 487 F.2d at 168-69; 641 F.2d 890, 23 FEP Cas. at 974. See *Copeland II*, 20 FEP Cas. at 80 n.2 for the panel's discussion of the possible redundancy and duplication that occurs if each of the twelve *Johnson* factors is considered individually.

⁹⁷ 641 F.2d at 890, 23 FEP Cas. at 974.

⁹⁸ 487 F.2d at 167.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 168.

¹⁰¹ *Id.*

¹⁰² 641 F.2d at 891, 23 FEP Cas. at 974, citing *Lindy*, 487 F.2d at 167.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 891-92, 23 FEP Cas. at 974-75 (citing *Lindy*, 487 F.2d at 167).

¹⁰⁵ For example, paralegals, junior associates, senior associates, junior partners, senior partners.

and separately calculated.¹⁰⁶ After obtaining the total of raw hours spent, the judge then must determine whether the time was reasonably expended.¹⁰⁷ This determination, the court explained, involves a process similar to the exercise of "billing judgment" in the private sector.¹⁰⁸ For example, no compensation should be provided for non-productive time, such as hours billed for the presence of three attorneys at a hearing when one would have sufficed. The court also indicated that time spent litigating claims on which the party did not prevail, was not time reasonably expended.¹⁰⁹ After determining the number of hours reasonably expended, the second step in calculating the lodestar, the court stated, is to determine a reasonable hourly rate to be assigned the hours reasonably expended. According to the majority this is the hourly rate "prevailing in the community for similar work."¹¹⁰ This rate already reflects such variables as the lawyer's skill, experience, reputation, the undesirability of the case,¹¹¹ and time limits.¹¹² The court noted that there may be more than one reasonable hourly rate for each of the attorneys and for each kind of work involved.¹¹³

Once the lodestar has been calculated, the court continued, this fee should be adjusted by the judge to reflect two other important considerations — the contingent nature of the success of the litigation,¹¹⁴ and the quality of the representation provided.¹¹⁵ The court noted that when either party requests an adjustment in the lodestar fee, that party bears the burden of justifying the requested change.¹¹⁶ The contingency adjustment is not a percentage based on

¹⁰⁶ 641 F.2d at 892, 23 FEP Cas. at 974-75.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 892, 23 FEP Cas. at 975.

¹⁰⁹ *Id.* The court pointed out that sometimes recovery under a variety of legal theories for the same injury will be sought. *Id.* at 892 n.18, 23 FEP Cas. 975 n.18. If some of these legal theories do not prevail but essentially one unitary issue is litigated, the district court judge should not arbitrarily reduce the award. *See Stanford Daily v. Zurcher*, 64 F.R.D. 680 at 684 (N.D. Cal. 1974) (holding that fees based on meritless and "manufactured" claims should be denied, but fees for legal work reasonably calculated to advance the client's interests but later deemed unnecessary should be granted).

¹¹⁰ 641 F.2d at 892, 23 FEP Cas. at 975.

¹¹¹ *See, e.g., Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 66 F.R.D. 483, 485-86 (1975) (attorney's fee awards decision). This decision dealt only with the question of attorney's fees. The *Swann* case, however, had a long history. *See* 311 F. Supp. 265 (1970) (school desegregation award); 431 F.2d 1387 (3d Cir. 1970) (district court decision vacated and remanded); 328 F. Supp. 1346 (1971) (school district desegregation plan denied, court plan ordered); 402 U.S. 1 (1971) (district court *aff'd*, appeals court *aff'd in part, rev'd in part*); 403 U.S. 912 (1971) (rehearing denied); 404 U.S. 811 (1971) (petitioner allowed one-half costs); 67 F.R.D. 648 (1975) (case removed from active docket). In the *Swann* decision which dealt exclusively with the attorney's fee award the court discussed the fact that plaintiff's counsel's offices and building were burned at the height of the litigation and that they had lost and probably would continue to lose business because of their representation of the "pro-desegregation," "pro-busing" claim. 66 F.R.D. 483, 485-86.

¹¹² 641 F.2d at 892, 23 FEP Cas. at 975 (citing *Evans*, 503 F.2d at 187-88).

¹¹³ *Id.*, 23 FEP Cas. at 975.

¹¹⁴ *Id.* at 892-93, 23 FEP Cas. at 976-77.

¹¹⁵ *Id.* at 893-94, 23 FEP Cas. at 976-77.

¹¹⁶ *Id.* at 892, 23 FEP Cas. at 975.

the amount of recovery.¹¹⁷ Rather, it is a percentage adjustment in the lodestar to reflect the risk present at the outset of the litigation that the party would not prevail and the attorney would receive no fee.¹¹⁸ To the extent that the attorney's usual hourly rate already reflects this contingency, the court noted, no adjustment would be necessary. The delay in the receipt of payment for services rendered also may be incorporated into a contingency adjustment.¹¹⁹ The court pointed out that such an adjustment may be especially appropriate if the court uses "historical rates" (those prevailing at the time the services were performed) as opposed to current rates, to calculate the lodestar.¹²⁰ If the litigation has been protracted and the fee award delayed, the court stated that the current value of the payment based on the historical figures may not reflect accurately the services rendered.¹²¹ The court recognized that determining the appropriateness of any contingency adjustment would be a difficult exercise of discretion.¹²² The majority stated, therefore, that the district court judge should state clearly his reasons for adjusting the lodestar for any contingency.¹²³ The majority also reiterated that the standard to be applied by an appellate court when reviewing a fee award determination is that such awards should be upheld in the absence of an abuse of discretion by the trial judge.¹²⁴ In addition to an adjustment for the contingent nature of the litigation, the court stated that the lodestar also may be adjusted to reflect the quality of the representation provided.¹²⁵ This adjustment to the lodestar should be made only if the services rendered by the lawyer deviate significantly, either positively or negatively, from the "level of skill normally expected of an attorney commanding the hourly rate used to compute the 'lodestar'."¹²⁶ The court stated that when exceptional results are obtained, given the time expended and the hourly rates, the fee justifiably may be increased.¹²⁷ The court cautioned, however, that the amount of dollar recovery is not the measure of exceptional results.¹²⁸ Equitable relief, such as an affirmative action plan of national scope, the court observed, can have a more significant, long-lasting result than a large financial recovery.¹²⁹

¹¹⁷ Cf. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits: The Twenty-third Annual Antitrust Review*, 71 COL. L. REV. 1, 9-11 (1971) (vigorous argument against the suitability of percentage fee awards in antitrust case settlements).

¹¹⁸ 641 F.2d at 893, 23 FEP Cas. at 976.

¹¹⁹ *Id.*

¹²⁰ See *Bachman v. Pertschuk*, 23 FEP Cas. at 1052-53 (court used historical rates).

¹²¹ 641 F.2d at 893, 23 FEP Cas. at 976.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 901, 23 FEP Cas. at 982.

¹²⁵ *Id.* at 893-94, 23 FEP Cas. at 976-77.

¹²⁶ *Id.* at 893, 23 FEP Cas. at 976.

¹²⁷ *Id.* at 894, 23 FEP Cas. at 976.

¹²⁸ *Id.* The court stated that, for example, if a substantial monetary judgment was to be expected, that expectation usually is reflected in the hourly rate and therefore in the lodestar fee. *Id.*

¹²⁹ The court discussed promotions, affirmative action training programs, and guaranteed promotions upon training completion as examples of the kind of non-monetary relief that would justify a substantial attorney's fee award in spite of a relatively small monetary recovery. *Id.* at 905-06, 23 FEP Cas. at 986-87.

In sum, the market-value approach, as formulated by the court in *Copeland III*, requires the trial judge to determine the number of hours reasonably expended by each lawyer in each category of legal work. After ascertaining the hours reasonably expended, the lodestar is calculated by multiplying these hours by a reasonable hourly rate for lawyers of similar skill and experience in the community. The trial judge then can increase or reduce the lodestar figure to reflect the contingent nature of the success of the particular litigation, or the quality of the representation provided.

3. The Cost-Plus Standard

In *Copeland I*, *Copeland II*, and the dissent to *Copeland III*, two judges of the D.C. Circuit Court set forth a different test for determining a reasonable attorney's fee. The dissenters in *Copeland III* stated that a new approach was necessary because the market-value standard, even as modified by the court, was resulting and would continue to result in "windfall" or "bonanza" fee awards for the prevailing party's attorney(s).¹³⁰ The dissenting judges set forth five reasons for their opposition to a market-value standard. First, they stated that the market-value standard for fee awards would spur lawyers to extend the pre-litigation phases of a Title VII suit.¹³¹ If a private firm knew that eventual success meant compensation for all relevant work at their customary rate, the dissent reasoned, this would provide a tremendous incentive for the firm to extend and expand the pretrial stages of the litigation so that it would become financially advantageous for the government to settle, rather than to run the risk of liability for enormous attorney's fees.¹³² The panel expressed concern that a proliferation of these cases would induce the government to give in to claims "however unjust" in order to cut off the litigation and thereby limit its liability for attorney's fees.¹³³ In *Copeland II*, the panel reiterated its concern that the market-value formula would yield inflated attorney fee awards. For example, it stated that an attorney's fee award of \$160,000 for a case in which the entire prevailing class of plaintiffs received a monetary recovery of approximately \$34,000 made out "at least a *prima facie* case that something is wrong with the previously constructed standards — when applied to fix a fee award in a Title VII case against the government."¹³⁴ The judges stated that nothing in the statutory history of the Title VII fee awards provision¹³⁵ indicated that Congress intended the standard for calculation of a reasonable fee when the government is the defendant to be identical to that for a private party¹³⁶ or that

¹³⁰ *Id.* at 920-21, 23 FEP Cas. at 997 (dissenting opinion).

¹³¹ *Id.* at 911, 23 FEP Cas. at 989-90.

¹³² *Id.*

¹³³ *Id.* at 911-12, 23 FEP Cas. at 990.

¹³⁴ *Copeland II*, 20 FEP Cas. at 86.

¹³⁵ 42 U.S.C. § 2000e-5(k) (1976).

¹³⁶ 641 F.2d at 915-17, 23 FEP Cas. at 992-94 (dissenting opinion). The panel also read the legislative history of the 1976 Civil Rights Fee Awards Act differently from the majority. See text and notes at notes 25-41 *supra*. According to the panel, the citation of Title VII cases using a market-value approach was not meant as endorsement of that formula but was done only to show that a reasonable, non-windfall fee was awarded in the cited cases. 641 F.2d at 916-17, 23 FEP Cas. at 994 (dissenting opinion).

Congress even considered at all the method of fee calculation.¹³⁷ In addition to disagreeing with the *Copeland III* majority over Congress' recognition and endorsement of the market-value approach, the dissent also did not agree that fee awards served to deter discrimination when the losing party was a government agency.¹³⁸ The dissent reasoned that because the fee came directly out of the United States Treasury and not from the agency or person discriminating, the fee award would have absolutely no deterrent effect.¹³⁹

The panel also determined that a different test than market value was required because the private attorney was functioning like an attorney general, who traditionally has never been compensated at the same level as attorneys in private practice.¹⁴⁰ The plaintiff's private attorney in a Title VII case, the panel noted, functions like an attorney general because normally it is the attorney general who brings an employment discrimination suit against a private or local government employer for the benefit of the injured private party.¹⁴¹ Consequently, the dissenters concluded that an attorney acting like an attorney general should be compensated at the same level. The court stated that "government counsel defending and plaintiff counsel bringing suit should have compensation of roughly the same amplitude."¹⁴² Alternatively, in the *Copeland II* opinion, the panel compared a Title VII suit on behalf of a federal employee with *pro bono publico* service.¹⁴³ The court concluded, therefore, that a cost-plus formula would result in a fee awards of a sufficient amount, equaling or exceeding what the attorneys were compensated for *pro bono* work. Thus the panel concluded that awards based on a cost-plus formula would be sufficient to encourage attorneys to continue to take Title VII suits, even if the fee they received was lower than the attorney's usual fee.¹⁴⁴

The dissent's most fundamental disagreement with the *Copeland III* market-value formula, however, stemmed from the panel's contention that there is simply no "market" for Title VII suits against the federal government.¹⁴⁵ The dissent in *Copeland III* stated that a prospective plaintiff who was a government employee could rarely, if ever, afford to buy the necessary services to bring a Title VII suit.¹⁴⁶ Thus, there are no ready "buyers" bidding for the services of attorneys who litigate Title VII claims against the government. Consequently, there are no agreed fees between a client and a lawyer, as there are in other areas of private litigation, to indicate what limits the normal buying public of clients will set on attorneys' fees in the

¹³⁷ *Id.* at 916, 23 FEP Cas. at 993 (dissenting opinion).

¹³⁸ *Id.* at 912, 23 FEP Cas. at 990 (dissenting opinion).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 912-13, 23 FEP Cas. at 990-91 (dissenting opinion).

¹⁴¹ 20 FEP Cas. at 81.

¹⁴² 641 F.2d at 912, 23 FEP Cas. at 990 (dissenting opinion).

¹⁴³ 20 FEP Cas. at 81.

¹⁴⁴ 641 F.2d at 913, 23 FEP Cas. at 991 (dissenting opinion).

¹⁴⁵ *Id.* The dissent pointed out that no real market value forces set the fees.

¹⁴⁶ *Id.*

market place.¹⁴⁷ In light of these concerns the dissent maintained that a market-value formula was inappropriate for determining attorneys' fees in Title VII suits against the government because no market exists to limit a reasonable fee.¹⁴⁸

In light of these concerns the dissent advocated the cost-plus standard formulated in *Copeland I* and *Copeland II*. Instead of starting calculations with a commercial "going hourly rate," as the court in *Copeland III* did, the panel suggested that a proper formula should attempt to provide attorneys reimbursement for their costs plus a reasonable profit margin.¹⁴⁹ In *Copeland II* the panel judges stated that the intent of a cost-plus formula should be to return to the firm the actual out-of-pocket costs for its attorney's legal services and the attorney's overhead costs, plus a "reasonable and controllable profit."¹⁵⁰ The dissenters stated that three factors should determine a fee award under the cost-plus formula. These factors are salary, overhead and a reasonable profit. Unlike the market-value approach, the dissent's cost-plus formula would not start with a lodestar calculated by determining the number of hours reasonably expended and multiplying that figure by the reasonable value of those hours in the community.

The first step in the panel's cost-plus formula is the calculation of the appropriate salary figures that the firm may charge for Title VII litigation.¹⁵¹ In *Copeland I* the panel referred to the services, salary, costs and overhead of an individual firm member.¹⁵² In *Copeland II*, however, the judges stated that an average salary for a class of firm members, or an average overhead as opposed to an individual-by-individual calculation would be an acceptable figure to use in fee award determinations.¹⁵³ Following the *Copeland II* approach a firm claiming attorney's fees would have to provide the trial judge with the average salary of associates in the firm with the same number of years experience as the associate for whom fees are claimed.¹⁵⁴ As the panel pointed out, the salary of a partner is more difficult to ascertain because "all income earned by a partner above that chargeable to overhead may be considered profit."¹⁵⁵ The panel stated that a partner's salary may be extrapolated upwards from the highest associate's salary.¹⁵⁶

After determining the salary, the next step in the "cost-plus" calculus is to determine the chargeable overhead. According to the panel, overhead includes rent, supplies, services, secretarial and paralegal help.¹⁵⁷ The panel stated that

¹⁴⁷ *Id.* at 913-14, 23 FEP Cas. at 991-92 (dissenting opinion).

¹⁴⁸ *Id.* at 914, 23 FEP Cas. at 991.

¹⁴⁹ 20 FEP Cas. at 81-82.

¹⁵⁰ *Id.* at 81.

¹⁵¹ *Id.* at 82-83; 594 F.2d at 251-52.

¹⁵² 594 F.2d at 251-52.

¹⁵³ 20 FEP Cas. at 83.

¹⁵⁴ *Id.* at 82.

¹⁵⁵ 594 F.2d at 251.

¹⁵⁶ 20 FEP Cas. at 83.

¹⁵⁷ 594 F.2d at 251.

every firm will know its overhead on at least an annual basis and thus could submit to the trial judge an average, per-attorney overhead cost.¹⁵⁸ If the firm found that there were significant differences in overhead costs between an associate and a partner, the firm could provide the court with an average overhead cost for each class of attorney involved in the Title VII proceeding.¹⁵⁹ Once the court knew the applicable salary and overhead costs it would "make an accurate appraisal of the number of hours and type of work performed in a particular case, and then reimburse the firm for that share of each . . . [attorney's] . . . hourly fee equivalent to . . . [his] overhead and salary plus a certain margin for profit."¹⁶⁰

The final step in the panel's cost-plus test is to determine the amount of reasonable profit.¹⁶¹ The panel's decisions do not suggest what a reasonable profit should be. Rather, the decisions state that the amount of profit is determined by considering the relevant quality factors derived from the *Evans-Johnson* factors.¹⁶² These quality factors include such things as the speed with which the attorney completed the Title VII action, the novelty and complexity of the issues, and the extent of the recovery — both monetary and equitable. In *Copeland I*, the panel suggested that the judge's evaluation of the quality of the attorney's services that determines the amount of reasonable profit awarded might be "leavened . . . by a reference back to the firm's earning performance on other legal business."¹⁶³

4. An Analysis of the Cost-Plus and Market-Value Formulas

In *Copeland I* and *Copeland II*, a panel of the Court of Appeals for the District of Columbia devised an innovative cost-plus formula for determining a reasonable attorney's fee award when the government is the losing party in a Title VII action. In order to determine whether the cost-plus or the market-value formula should be used by courts in determining a reasonable attorney's fee award it is necessary to analyze both formulas in light of two variables. First, both formulas should be examined in light of the policies underlying the Title VII fee award provision. The more appropriate standard is the one which best effectuates Congress' intent in giving government employees the right to recover reasonable attorney's fees. The second variable which must be considered when assessing the value of a cost-plus as opposed to a market-value standard, is the practical utility of either standard. If a formula is too cumbersome, difficult or impractical to use it will be of little value to judges who must apply it to grant fee awards. This section will analyze both the cost-plus and market-value formulas to determine the extent to which each effectuates congressional intent in creating the Title VII fee awards provision, and the ease with which each standard can be employed by a district court judge.

¹⁵⁸ 20 FEP Cas. at 83.

¹⁵⁹ *Id.*

¹⁶⁰ 594 F.2d at 251-52.

¹⁶¹ 20 FEP Cas. at 83.

¹⁶² *Id.* See note 31 *supra*.

¹⁶³ 594 F.2d at 253.

a. *The Amount of the Fee Award Under the Market-Value
and the Cost-Plus Formulas*

The panel opinions expressed concern that attorneys in Title VII cases were reaping "windfalls" or "unreasonable" profits when a market-value formula for fee award determinations was used.¹⁶⁴ This assertion was unsupported by any cited authority. The assertion that the market-value standard yields an unreasonable award, however, is contradicted by Title VII and other civil rights cases. In these other cases, the court reduced either the hourly rate, the allowable hours or a requested increase in the lodestar because of the contingency nature of a fee or the quality of the representation.¹⁶⁵ One scholar has noted that:

[w]hile the mean hourly rate awarded by the courts under the fee provisions of the private antitrust statutes was \$181 in the cases surveyed, the mean hourly rate awarded in Title VII suits in the cases surveyed was \$40. A general review of the reported decisions inescapably confirms the conclusion that statutory fee awards under civil rights . . . statutes have been substantially lower than awards under . . . fee statutes involving commercial rights.¹⁶⁶

In almost every Title VII fee award case where the court used a market-value formula, including *Copeland v. Marshall*, the court has reduced the requested fee award.¹⁶⁷

In spite of the contention of the *Copeland II* judges that the use of a market-value standard results in a windfall fee award, nothing inherent in a market-value formula insures that it will automatically produce a higher fee. Both the market-value and the cost-plus tests allow the trial judge considerable discretion in adjusting the fee. Under the market-value test, for example, the court

¹⁶⁴ 20 FEP Cas. at 82.

¹⁶⁵ See, e.g., *Bachman v. Pertschuk*, 23 FEP Cas. 1046 (D.D.C. 1980). *Bachman* was decided after *Copeland I*, but nevertheless applied the *Evans* factors rather than the cost-plus formula in determining the fee award. The judge increased the award for the two principal attorneys in *Bachman* in consideration of the quality of their performance. He also reduced another attorney's hourly rate from \$50 to \$35 an hour, and reduced the number of allowable hours from 853 to 501.25. Fifty-five of these hours were reimbursed at the paralegal hourly rate of \$25 an hour. *Id.* at 1056. A fourth applicant's hourly rate was reduced from \$60 to \$35 per hour and her total number of reimbursable hours was reduced from 59.6 to 50. *Id.* at 1057. See also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (1975). See note 111 *supra* for the history of the *Swann* case. After commending counsel for an outstanding job in this major civil rights case, and noting that defense counsel already had received over \$200,000 in fees, the court reduced the attorney's requested fee from \$204,237.50 to an award of \$175,000.00. *Id.* at 485-86. See also *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958 (E.D. Pa. 1980). *Bolden* was a major case aimed at eradicating racial discrimination in state police employment practices. This case took over three years to resolve, and the dispute over attorney's fees lasted an additional two years. *Id.* at 959-60. Plaintiff's counsel had asked for three times the lodestar award as an adjustment for quality of representation. *Id.* The court agreed to adjust the lodestar by a factor of 50% to reflect quality of representation. *Id.*

¹⁶⁶ See *Berger*, *supra* note 7, at 310 (citing Helfman, Court Awarded Attorney's Fees: A Statistical Survey of One Hundred and Forty Recent District Court Cases Involving Attorney's Fees (Project submitted to the faculty of Antioch School of Law, 1975)).

¹⁶⁷ See note 165 *supra*.

can adjust the lodestar itself by determining whether the hourly rate and the number of work-hours claimed are reasonable.¹⁶⁸ In addition, while clients may be willing to pay extremely high fees for legal "stars," a judge has the discretion under the market-value formula to reduce the lawyer's hourly rate if his performance does not equal his billing. Furthermore, the judge can adjust the lodestar fee up or down to reflect the contingent nature of the case.¹⁶⁹

The cost-plus formula is similar to the market-value formula in that when using the cost-plus formula the judge also can reduce the number of hours claimed by the attorney. It appears, however, that he must accept the salary and overhead figures presented by the attorney.¹⁷⁰ In addition, the judge must determine the amount of "reasonable profit" using the relevant *Evans-Johnson* factors which reflect quality of performance variables.¹⁷¹ The panel opinions in the *Copeland v. Marshall* litigation appear to assume that the basic cost figures arrived at under the cost-plus formula will be less than the lodestar fee under the market-value formula.¹⁷² While the dissenters may have incorrectly asserted that the use of a market-value formula would have resulted in a windfall fee award for attorneys, they were correct in cautioning that judges should not always allow a lawyer to recover the highest fee he could have obtained since such "opportunity rates" may not reflect the market or his performance.¹⁷³ In addition to assuming that the "cost" figure invariably will be lower than the "lodestar" figure, the panel opinions also appear to assume that the reasonable profit adjustment to the cost, plus overhead, will be less than the adjustments to the lodestar fee.¹⁷⁴ Since "reasonable profit" was not defined by the dissenting judges it is not possible to say that adjustments to the cost-plus formula will result necessarily in a lower fee award. Moreover, there is always the potential with either formula for a trial judge to adjust the formula incorrectly to produce a windfall, or a shortfall, as well as a reasonable fee.¹⁷⁵

While the dissent in *Copeland III* was critical of the market-value formula because supposedly it would result in an inflated total at the end of the suit, the dissenting judges had an additional criticism of the standard. This second important criticism was that the use of the market-value standard itself would provide an incentive to prolong all stages of litigation prior to final judgment and

¹⁶⁸ See text and notes at notes 98-113 *supra*.

¹⁶⁹ See text and notes at notes 114-29 *supra*.

¹⁷⁰ See text and notes at notes 151-60 *supra*.

¹⁷¹ See text and notes at notes 161-63 *supra*.

¹⁷² See 594 F.2d at 252-53; 20 FEP Cas. at 81; 641 F.2d at 909, 23 FEP Cas. at 988 (dissenting opinion). Judges Wilkey and Tamm stated that a lawyer should be entitled to recover his costs plus a reasonable profit. They asserted that people who claim that the cost-plus formula will result in lower fee recoveries are saying, in effect, that attorneys should be entitled to, and are reaping "unreasonable" profits. 641 F.2d at 909, 23 FEP Cas. at 988. If lawyers are recovering more from the government in Title VII cases than they are in other contingent fee, complex federal litigation cases, then the panel judges' concerns about the amount of fee awards are clearly justified. It appears, however, that such problems are caused by judges failing to scrutinize fee requests closely, and not by the market-value formula itself.

¹⁷³ 641 F.2d at 920-21, 23 FEP Cas. at 997 (dissenting opinion).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 896-900, 23 FEP Cas. at 979-81.

thus increase the fee award. Because the market-value standard allows firms to be paid an hourly rate for the hours reasonably expended, the dissent contended that the firm would be encouraged to delay litigation, thus forcing the government into settlement of unjust causes to avoid liability for excessively high attorney's fees.¹⁷⁶ This reasoning, however, is faulty for several reasons. First, since the award of attorney's fees is dependent upon the plaintiff prevailing in the suit, the government should defend vigorously against unjust claims on the grounds that clearly unjust claims will not prevail and that therefore, no liability for the plaintiff's attorney's fees will result. Both the plaintiff's attorney and the government should have an equal interest in speedy resolution of cases that clearly could go either way, since the plaintiff's attorney is taking a serious risk that he will not recover anything for the time he has spent on the case if the plaintiff does not prevail. Second, the panel's reasoning ignores the reality that most Title VII settlements involve the creation of an affirmative action plan. Implementing such plans with training programs, reporting systems and promotions will nearly always generate costs in excess of a single fee award.¹⁷⁷ In all but the most flagrant cases of discrimination — *e.g.*, those where the government expects to lose its case — there is a definite financial advantage to litigation, at least through discovery. This advantage is particularly evident when both sides become aware through the discovery process, that the weight of the evidence clearly favors the plaintiff. The government may settle less obvious claims more quickly than a private party because it may be more sensitive to discrimination claims.¹⁷⁸ This policy question, however, has nothing to do with the government's desire to avoid liability for attorney fees.

The dissenting judges in *Copeland III* also claimed that the market-value approach encouraged expanded pre-trial litigation because an attorney knew that if his client was successful, then all his time spent on the suit would be compensable.¹⁷⁹ Under the market-value approach formulated in *Copeland III*, however, an attorney's fee award is limited to the hours he has reasonably expended on the suit.¹⁸⁰ The attorney seeking a fee award also always faces potential lodestar reduction. Furthermore, if all salary and overhead are reimbursable under the cost-plus formula, a law firm could find incentive to extend the time spent in litigation.¹⁸¹ Since the costs submitted by the firm apparently are not reviewable by the trial judge, incentive to extend litigation under the cost-plus formula could be a particular problem if the firm's

¹⁷⁶ *Id.* at 910-11, 23 FEP Cas. at 989-90 (dissenting opinion).

¹⁷⁷ By way of illustration, if each of the 24 *Copeland II* class members were granted a promotion which over the course of their employable life yielded \$10,000 each in additional pay, the cost would be \$240,000. If the Department established a training program on a \$20,000 yearly budget with two trainers, each receiving a \$10,000 a year salary, the cost over a 10 year period would be \$400,000. Presumably, persons trained in the program would receive promotions with higher salaries; there would be increased reporting, management and other costs.

¹⁷⁸ 641 F.2d at 914 n.12, 23 FEP Cas. at 992 n.12 (the dissent's analysis of the government's commitment to resolve Title VII suits).

¹⁷⁹ *Id.* at 911-12, 23 FEP Cas. at 990 (dissenting opinion).

¹⁸⁰ *Id.* at 891, 23 FEP Cas. at 974.

¹⁸¹ *Id.* at 897, 23 FEP Cas. at 979.

legitimate salary and overhead figures grossly exceed the prevailing market rate.¹⁸² In addition, the cost-plus approach in government contracting has been criticized for increasing costs by removing the incentive for efficiency.¹⁸³ Although the dissenting judges argued that the market-value formula produces excessive awards and that the cost-plus formula would produce more reasonable fee awards, nothing inherent in either formula compels this result.

Courts using the market-value formula consistently have reduced either the lodestar, or the requested adjustments to the lodestar, to reflect the quality of representation or the contingent nature of success. Under the cost-plus formula the trial judge is free to adjust the hours expended on the Title VII suit, but apparently must accept the firm's overhead and salary costs. Using the cost-plus formula, therefore, he actually may have less flexibility to reduce a submitted fee request than he would have if he were using the market-value formula. Moreover, the dissenting judges have not defined the reasonable profit adjustment applicable to the cost-plus overhead figures. Therefore, a court using a cost-plus formula might grant windfall fee awards because of an excessively high profit adjustment. While the dissent also criticized the market-value standard for providing an incentive to plaintiff's attorney' to expand pretrial litigation to force settlement, it appears that either formula has the potential for this kind of abuse.

b. *The Market Value Formula and The Advancement of Title VII*

The foregoing analysis has revealed that neither the market-value nor the cost-plus formula automatically yields a lower attorney's fee in Title VII cases. The important inquiry, then, becomes which formula better effectuates the intent of Congress in passing Title VII. It will be suggested in this section that the market-value formula more effectively advances the purposes of Title VII.

In *Copeland III*, the dissent and the majority opinions differed considerably, both in their interpretation of the legislative history of Title VII and in their understanding of the practical effect each formula would have on implementing congressional intent. Both the dissent and the majority agreed that the purpose of the Title VII attorney fee awards provision is to encourage the enforcement of Title VII by making it easier for individuals injured by discrimination to seek judicial relief.¹⁸⁴ Both the dissent and the majority also recognized that a secondary purpose of the fee provision is to deter discrimination.¹⁸⁵

The majority and dissenting judges in *Copeland III* disagreed, however, on whether Congress had endorsed the market-value formula as the correct measure of attorney's fee awards in Title VII cases when the government is the

¹⁸² *Id.* at 897-9 and n.34, 23 FEP Cas. at 979 and n.34.

¹⁸³ *Id.*

¹⁸⁴ 594 F.2d at 249; 641 F.2d at 889-90, 23 FEP Cas. at 972, 974.

¹⁸⁵ 641 F.2d at 912 n.9, 23 FEP Cas. at 990 n.9 (dissenting opinion); 641 F.2d at 888 and n.13, 23 FEP Cas. 972 and n.13 (majority opinion).

defendant. The dissent assumed that when Congress amended the Title VII fee awards provision to entitle prevailing parties to recover attorney's fees and costs from the government it did not consider what the standard for fee determination should be.¹⁸⁶ The majority opinion, however, relying heavily on Congress' statements concerning the 1976 Civil Rights Attorneys Fees Awards Act,¹⁸⁷ stated that Congress had accepted the market-value formula as the correct standard regardless of the losing party's identity.¹⁸⁸

If Congress did endorse the market-value formula, as it appears it did, then the courts should implement its judgment. Even if Congress did not specifically adopt the market-value formula for determining a reasonable fee, it would still be the court's responsibility to fashion a fee award formula that best fulfilled the intent of the Title VII fee award provision. The market-value formula should be adopted by the courts because it better effectuates the dominant purposes of the legislation. Congress' intent in enacting these provisions was to make legal services accessible to prospective clients seeking to vindicate their civil rights. Therefore, anything that detracts from that purpose, either because it results in fee awards lower than those an attorney ordinarily could make in other areas of practice, or because it requires disclosure of private information from participating attorneys, should not be endorsed by the courts. Attorneys will be more likely to litigate Title VII claims if they receive fee awards that are commensurate with what they could earn in other, equally complex litigation. Conversely, lawyers are less likely to litigate Title VII claims if they are required to disclose their overhead, salary and profit margin prior to reimbursement for services rendered, when such information need not be disclosed in other lucrative areas of practice.

Courts and commentators who have examined fee awards in Title VII and other suits against private entities are virtually unanimous in their opinion that the market-value approach most effectively achieves this purpose in a variety of circumstances.¹⁸⁹ Only the D.C. Circuit Court of Appeals has examined directly whether this standard is suitable when the federal government is the defendant. Under the cost-plus formula sole practitioners, public interest attorneys, and legal services attorneys generally would receive lower awards than large private firms because their salaries and overhead are lower than that of private firms.¹⁹⁰ According to the panel this is a fair result.¹⁹¹ The panel opinions state that if public interest and legal services attorneys and firms have developed special expertise in litigating Title VII claims this should be reflected

¹⁸⁶ *Id.* at 916, 23 FEP Cas. at 993 (dissenting opinion).

¹⁸⁷ See text and notes at noteq 25-33 *supra* for a discussion of the 1976 916, 23 FEP Cas. at 993 (dissenting opinion).

¹⁸⁸ See text and notes at notes 25-33 *supra* for a discussion of the 1976 Civil Rights Attorneys Fee Awards Act.

¹⁸⁹ 641 F.2d at 894-95, 23 FEP Cas. at 977-78.

¹⁹⁰ See cases cited at note 15 *supra*, excluding *Copeland I* and *Copeland II*; see Berger, *supra* note 7, at 314.

¹⁹¹ 20 FEP Cas. at 83-85.

¹⁹² *Id.* at 85.

in the amount of "reasonable profit" awarded.¹⁹² Market-value fee awards are essential, however, in order to ensure that public interest firms can continue to develop expertise and to allocate their financial and legal resources to Title VII adjudication.¹⁹³ The dissent forcefully points out that there is no indication that Congress intended to use Title VII fee awards to sponsor or support public interest firms.¹⁹⁴ Yet, if the private or public interest firm can win larger fee awards in other litigation where a market-value formula is used, both private interest firms and legal services organizations with limited resources will direct their energies into these other areas rather than Title VII litigation. This result would decrease the pool of available expert attorneys and would hinder rather than advance the statute's purposes.¹⁹⁵ Given the contingent nature of success in Title VII claims, and the complexity of the legal and factual issues involved, it is essential that fee awards be sufficient to encourage attorneys to develop and maintain expertise in Title VII litigation.

Another argument that has been advanced in support of lower fee awards in Title VII suits than an attorney might receive under the market-value formula is that the private attorney either is acting as an attorney general, or is performing *pro bono publico* service. According to this argument the private attorney, therefore, should not expect to be paid a fee equivalent to what he could make in private practice.¹⁹⁶ This argument does not appear defensible.¹⁹⁷ First, it is the plaintiff who is the private attorney general in a Title VII suit, rather than the lawyer. The analogy to the attorney general's role thus is of limited utility in resolving the question of whether a market-value or cost-plus standard better effectuates Congress' purpose in allowing prevailing parties to recover attorney's fees against the federal government. Moreover, the statutory fee award provision exists to benefit the potential litigant by enabling him to bring suit; it is only incidentally concerned with the plaintiff's attorney. The cost-plus formula would produce lower fees than a market-value formula, thus serving only to reduce the pool of available lawyers by making Title VII cases financially less enticing.¹⁹⁸

¹⁹² *Id.* See generally Cahn and Cahn, *Power to the People or the Profession? — The Public Interest in Public Law*, 79 YALE L.J. 1005, 1033 (1970).

¹⁹³ See *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980); *Torres v. Sachs*, 538 F.2d 10, 10-13 (2d Cir. 1976) (Voting Rights Act); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 484 F.2d 1331 (1st Cir. 1973) (Clean Air Amendment); Note, *Attorney Fees in Civil Rights Actions*, 7 COL. J. OF LAW AND SOCIAL PROBLEMS 381, 408-11 (1971).

¹⁹⁴ 641 F.2d at 926-30, 23 FEP Cas. at 1002-04 (dissenting opinion).

¹⁹⁵ See *Berger*, *supra* note 7, at 312-13.

¹⁹⁶ 594 F.2d at 257-58; 20 FEP Cas. at 84; 641 F.2d at 911-13, 23 FEP Cas. at 990-91 (dissenting opinion).

¹⁹⁷ In *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980) the United States Supreme Court rejected the argument that the prevailing party's representation by a public interest law firm against a private party was a special circumstance that should result in a denial of attorney's fees. *Id.* at 70, 71 n.9.

¹⁹⁸ *Berger*, *supra* note 7, at 312. See also the Attorney General's position stated in his Memorandum of the United States in Response to Court's Request For Its Views on Rehearing *En Banc* at 4-5:

Second, it is not appropriate to characterize the attorney's relationship to the client as a *pro bono publico* representation. In most cases it would be more proper to compare the relationship to a contingent fee arrangement. The Title VII attorney does not recover a portion of the client's monetary recovery under either the market-value or the cost-plus formula, but his right to recovery is dependent on the success of the Title VII action. Given the statutory fee provision in Title VII cases an attorney can intend not to "charge" the client for his services and still fully expect to be paid for his time via a fee award against the government.¹⁹⁹ Furthermore, it is incorrect for courts to determine that representation of a particular Title VII client is *pro bono* representation and therefore entitled to a lesser fee than a similar contingent representation in an antitrust case. Courts then would be assigning "relative priorities to the statutes Congress has itself selected for enforcement incentives."²⁰⁰ In practical terms higher fee awards in antitrust as opposed to Title VII litigation makes specialization in antitrust work more attractive to the legal profession.²⁰¹ Congress has not established that there should be such a difference in priorities.²⁰²

c. *Government and Private Violators of Title VII —
Support For the Single Standard Approach*

Proponents of the cost-plus standard for determining reasonable attorney's fees in Title VII litigation rely on the basic premise that the government should not be held to the same standard of accountability as are private entities. Nothing in the language of the legislative history of Title VII, however, reveals any congressional intent to treat the federal government differently from a private party. The United States Supreme Court, in a Title VII action, has refused to treat the federal government differently from a private party when the United States, as plaintiff, was required to pay attorney's fees to a prevailing private defendant.²⁰³ At least one circuit court has stated that awarding attorney's fees against a state government agency would serve a deterrent effect,²⁰⁴ and consequently, fee awards should be computed in the same manner as fee awards granted against private parties.

[F]ees to these [public interest] law firms should not be less than would be the case had a for-profit law firm brought the suit. Strong considerations of public policy require that such firms and lawyers receive fee awards equal to those made to firms and attorneys at large.

641 F.2d at 900 n.36, 23 FEP Cas. at 981 n.36 (dissenting opinion).

¹⁹⁹ 641 F.2d at 900, 23 FEP Cas. at 981 (citing *Keyes v. School Distr. No. 1*, 439 F. Supp. 393, 406-07 (D. Colo. 1977)).

²⁰⁰ Berger, *supra* note 7, at 311.

²⁰¹ *Id.* at 312.

²⁰² *Id.* at 315. If Congress had believed that the charity of lawyers was sufficient to provide a ready pool of lawyers to Title VII litigants, it probably would not have enacted the attorney fee award provision. If attorneys do not earn in Title VII litigation what they would reasonably expect to earn in other litigation, the courts, in effect, are still forcing these clients to rely on the partial charity of lawyers. See 641 F.2d at 899-900, 23 FEP Cas. at 98-102.

²⁰³ *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 n.20, 422-23 (1977).

²⁰⁴ *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980).

Another reason for not according the government preferential treatment in fee award determinations as compared to private parties, is that it is especially important to eradicate discrimination in government itself. Taxpayers, in a sense by paying taxes, have accrued a fund for legal services to vindicate these legal rights. It is imperative that equal employment opportunity be of "paramount significance" in federal service. As stated in the House report on the 1972 amendments to the Equal Employment Opportunity Act, "Americans . . . traditionally measure the quality of their democracy by the opportunity they have to participate in government processes. It is therefore imperative that equal employment be the touchstone of the Federal system."²⁰⁵

Conversely, proponents of the cost-plus formula argue that a different fee scale for awards paid by the government is appropriate because the statutorially-created right to attorney fee recovery has the effect of making the taxpayer finance both sides of the litigation.²⁰⁶ The taxpayer pays the salaries and costs for the government lawyers defending the federal agency, and if the litigant prevails, he pays the successful plaintiff's attorney fees as well. The dissenting judges in *Copeland III*, therefore, deemed it imperative that the government which created the right to the fee also be allowed to determine its limit.²⁰⁷ In addition, because the right to the fee award is a creature of statute, the dissent argued that normal market forces have no place in establishing a limit to what can be charged.²⁰⁸

There are problems, however, with this line of reasoning. First, there is no indication that Congress intended to limit attorney fee awards against the federal government. The cost-plus formula is a creature of the courts, not the legislature. Second, Title VII created a new legal right to sue the federal government for employment discrimination. Yet, the creation of this right did not change in any way the nature of the services attorneys would provide litigants seeking relief for employment discrimination from the federal government as compared to private parties. While advocates of the cost-plus formula are correct that the "market" did not create the right to sue the federal government, the market does set the price for attorney's fees in cases of comparable complexity. Third, the federal government often pays the prevailing rate or more, when it retains private defense counsel in cases where the plaintiff's right to sue also has been created by statute.²⁰⁹ Presumably, the government would not pay market-value rates if it thought it could obtain the expertise it sought for less. It would be anomalous to assign lesser value to the plaintiff's right to secure competent counsel than to the government's. Such a discrepancy in fee awards would not effectively implement Congress' purpose to vindicate civil rights by granting attorney's fees to prevailing parties.

²⁰⁵ H.R. REP. NO. 328, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2157.

²⁰⁶ 641 F.2d at 911-14, 23 FEP Cas. at 990-92 (dissenting opinion).

²⁰⁷ *Id.* at 914, 23 FEP Cas. at 992 (dissenting opinion).

²⁰⁸ *Id.*

²⁰⁹ *Bachman v. Pertschuk*, 23 FEP Cas. 1046, 1051-52 (D.D.C. 1979).

The market-value formula for determining Title VII attorney's fee awards will yield fees closely approximating what lawyers could earn in similar complex litigation. Therefore, it best effectuates Congress' intent to assure that lawyers are available to enable claimants to obtain judicial redress of federal employment discrimination. The market-value test also is preferable to the cost-plus approach because it provides greater flexibility. Under the market-value test the court can adjust the hours expended, and the hourly rate, as well as the lodestar fee to reflect the quality of representation and the contingent nature of success of the Title VII action.²¹⁰

The market-value approach thus provides a flexible standard that is easily applied.²¹¹ In addition, contrary to the contentions of proponents of the cost-plus formula that the potential of being paid for all hours reasonably expended under the market-value formula may encourage attorneys to prolong pretrial litigation, it seems likely that the attorney's awareness that the trial judge can adjust his lodestar fee down, as well as up, maximizes his incentive to work rapidly and efficiently.²¹² While the "cost-plus" formula also offers a judge flexibility there are two drawbacks in its application that for practical reasons militate against its use as a formula for determining awards against the government. One drawback is that firms may be reluctant to reveal to the court as a public matter such things as average salary for each class of firm member, overhead and profit margin. Such disclosures are necessary for any court using the cost-plus formula. The application of this standard may deter firms from engaging in Title VII litigation. Furthermore, compilation of, and disputes over such data could increase the time spent litigating the fee award since time spent determining the fee is compensable. Thus, the potentially extended discovery and litigation surrounding the fee that the cost-plus formula creates may itself increase the amount of the fee awarded.²¹³

Even if it is assumed that revealing salary, overhead and profit margin information will not require extensive disclosure or documentation,²¹⁴ it is still necessary under the cost-plus formula for the judge to arrive at a basic cost and then balance a range of quality factors to determine a reasonable profit.²¹⁵ An initial problem in calculating such a profit is that "it would be . . . anomalous

²¹⁰ 594 F.2d at 250.

²¹¹ *Id.*

²¹² *Stanford Daily v. Zurcher*, 64 F.R.D. at 683.

²¹³ The District of Columbia District Court determined a Title VII attorney's fee to be paid by the Federal Trade Commission in the interim between the *Copeland I* and *Copeland II* decisions in *Bachman v. Pertschuk*, 23 FEP Cas. 1046 (D.D.C. 1979). The court rejected the cost-plus formula and instead attempted to weigh all twelve *Evans (Johnson)* factors as requested by the circuit court panel in the first portion of the *Copeland I* decision. *Id.* at 1048-50. The court awarded approximately \$5000 in additional attorney's fees for services rendered in determining the fee request. *Id.* at 1055. In a footnote the court explained how using all the *Evans* factors greatly increased the costs: "[i]t should be noted that a substantial part of this cost is attributable to the extensive procedural and evidentiary requirements for court-awarded attorneys' fees imposed by the *Copeland* opinion." *Id.* at 1054 n.5.

²¹⁴ See 20 FEP Cas. at 84-85.

²¹⁵ *Id.* at 83-86.

for [a] court to attempt to fix an appropriate return of profit for the public interest law firm. . . .'²¹⁶ A second problem in implementing the cost-plus formula is posed by the lack of guidance offered by the panel as to what constitutes a reasonable profit, or as to how to weigh and apply each of the *Evans* factors. Using the market-value approach the judge need only consider adjusting the basic rate for two factors — contingency and quality. Using the cost-plus approach, factors such as the amount of recovery, or the nature and length of the professional relationship with the client are to be considered as well.²¹⁷ It is readily apparent that the intent of the Title VII fee awards provision is not to make lawyers rich,²¹⁸ but to make vital services available to prospective litigants. By the same token, if a formula for determining a reasonable fee is not to involve the courts in protracted and complex litigation over the fee itself, but to streamline the fee determination process, then the cost-plus formula seems counterproductive.

CONCLUSION

The market-value approach seems to provide a more appropriate formula for determining reasonable Title VII attorney's fees than does the cost-plus formula. It allows for compensation commensurate with private work, and therefore provides sufficient financial incentive for lawyers to litigate Title VII claims. Furthermore, the lodestar and accompanying adjustments seem less complicated to apply than the cost-plus formula. The market-value approach also requires less disclosure of a firm's financial affairs than the cost-plus formula. Because the market-value standard seems more likely to enable prospective litigants to find competent lawyers to represent them and because it is relatively easy to apply, it is recommended that courts continue to use this standard to determine fee awards. The cost-plus standard does not eliminate any of the discretionary elements of the market-value formula, and, therefore, does not prevent inflated recoveries. In addition, it allows for different fee levels not only when the government and private parties are footing the bill, but also among public interest, legal services, solo practitioners, and large

²¹⁶ *Bachman v. Pertschuk*, 23 FEP Cas. 1046 at 1050 (D.D.C. 1979).

²¹⁷ See *Evans v. Sheraton Park Hotel*, 503 F.2d 117, 187-88 (D.C. Cir. 1974). In a civil rights action, where the equitable relief is often the most important and far-reaching result it is debatable whether the money damages the plaintiff receives should have any bearing on the attorney's fee award. An outstanding legal performance which results in a broad range of equitable relief for a large class of plaintiffs under the market-value approach, may cause the judge to increase the lodestar fee because of the exceptional quality of representation. See, e.g., *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958 (E.D. Pa. 1980). The *Copeland III* dissent asserted, however, that the discrepancy between the plaintiff's monetary and the plaintiff's attorney's fee recovery was an anomaly. See 641 F.2d at 910-11, 23 FEP Cas. at 989 (dissenting opinion). In at least one case against a private entity attorney's fees of \$20,000 were awarded to the plaintiffs' attorneys. These attorneys did not secure any back wages for their client, but had "skillfully and successfully attacked a covert pattern of discrimination in employment . . ." *Clark v. American Marine Corp.*, 320 F. Supp. 709, 710 (E.D. La. 1970).

²¹⁸ *Johnson v. Georgia Highway Express, Inc.*, 482 F.2d 714, 719 (5th Cir. 1974).

private firms. Moreover, the cost-plus approach requires the disclosure of a firm's financial matters and a consideration of all twelve *Evans-Johnson* factors, which makes it a cumbersome and time-consuming formula for courts to apply.

With respect to the application of a fee award standard, neither Congress nor the judiciary has made a clear statement as to whether the same standard is to be applied to government defendants and private defendants in Title VII employment discrimination cases. If Congress does wish a different, lower fee award standard to apply to government defendants, in spite of the market-value standard's apparent advantages, it is suggested that an explicit provision be enacted.²¹⁹ This provision should define a "reasonable" fee, or establish a formula to be used by courts in determining a reasonable fee when the government is the losing party.²²⁰

²¹⁹ See 20 FEP Cas. at 87-88 (Memorandum of the United States). In *Copeland II* the panel invited the Attorney General to submit the views of the United States. The panel quoted the Attorney General who remarked that "[t]he traditional customary approaches, as demonstrated by what has occurred in this case, may not be accurate. More refined analysis and consideration of alternatives are required." *Id.* at 87.

²²⁰ In *Copeland I* the panel stated that "[t]he Government has urged that a maximum \$40 per hour fee be allowed to attorneys for a prevailing party in Title VII litigation . . ." 594 F.2d at 251. This suggestion reveals one of the difficulties with a congressionally-established maximum or minimum fee. This drawback is that such limits are necessarily rigid and arbitrary and do not accommodate extreme cases of lawyer expertise or inefficiency. Moreover, considerable impetus on the federal level would be necessary to change the statutory fee once it was established. A fee that was set too low might be difficult to change quickly and therefore might serve to deter lawyers from readily assuming Title VII cases.

There has been at least one statutory attempt to define a reasonable fee which seems to adopt a market-value approach. It is the Consumer Product Safety Commission Improvement Act of 1976:

[A] reasonable attorneys' fee is a fee (A) which is based upon (i) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action under this subsection, and (ii) such reasonable expenses as may be incurred by the attorney in the provision of such services, and (B) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding the fee.

15 U.S.C. § 2059(e)(4) (Supp. 1977). See also Note, *Attorney Fees in Civil Rights Actions*, 7 COLUM. J. OF LAW & SOCIAL PROBLEMS 381, 410-11 (1971) (discussion of the necessity for and problems with a statutory definition of a reasonable attorney's fee).